

## Perspectives From a Practitioner: Lessons Learned From the *Apartheid* Litigation

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*Critics often contend that human rights litigation is not particularly useful in advancing human rights. Yet such critiques tend to miss the mark both because they demand too much of litigation—which is, of course, but one tool available to the human rights movement—and because they fail to understand the multiple goals, beyond court verdicts, of human rights plaintiffs and litigators.*

*This article excavates those diverse goals, many of which have previously gone unexamined. It draws on insight gained from nearly a decade spent litigating a complex Alien Tort Statute suit that sought to hold corporations accountable for their role supporting and facilitating human rights violations in apartheid South Africa. This article also evaluates both successes and failures in the Apartheid case to explore the extent to which common critiques ring true.*

*It would be foolhardy to claim that lawsuits alone can fundamentally improve respect for and protection of human rights. Still, this article concludes that litigation can be a powerful option for individuals or communities that have survived human rights abuse, particularly when deployed in tandem with other strategies, and that it played an important role for many stakeholders involved in the apartheid suit. In so doing, this article opens up fresh scholarly terrain and shares unique perspectives that may inform the work of other affected communities and human rights practitioners.*

### INTRODUCTION

For nearly a decade, I served as co-counsel on a case that sought to hold corporations accountable for their role in assisting and supporting the apartheid government to commit grievous human rights violations in South Africa. The suit was litigated in U.S. federal courts under the Alien Tort Statute on behalf of South African citizens who were tortured and exiled, whose children were killed, who were stripped of their citizenship, homes, and livelihoods. The case focused on the actions of corporations that provided essential assistance to the apartheid state—the iconic armored military vehicles that both represented and facilitated oppression, intimidation, harassment, and killing of black South Africans, as well as the specialized com-

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puter hardware and software that produced identity documents which deprived black South Africans of their citizenship and associated rights to move freely, obtain work, access education and healthcare, and remain on their land.

This article is my attempt, as a human rights practitioner, to analyze and reflect upon the experience of litigating the *Apartheid* suit.<sup>1</sup> It would be naive to claim that lawsuits alone can fundamentally improve respect for and protection of human rights. Still, this article contends that litigation can be a powerful option for individuals or communities that have survived human rights abuse, and that it played an important role for many stakeholders involved in the *Apartheid* suit. The article draws primarily on my personal reflections and perspective about that case to consider the challenges that we faced over the years, as well as our successes. While acknowledging the ways that we fell short of our ambitions, I also suggest that critiques of human rights litigation often miss the mark because they both demand too much of litigation—which is, of course, but one tool available to the human rights movement—and because they fail to understand the multiple goals of this kind of effort.

Litigation, we are told by its critics, is inadequate and not particularly useful in advancing human rights. Cases rarely result in favorable verdicts for plaintiffs and have little, if any, impact on the structural problems that create and perpetuate social and economic inequality. Plaintiffs' claims must conform with existing legal precedents, leading to suits that focus on the types of abuse that courts are prepared to tackle, but that may not address the depth, variety, or complexity of the harms suffered. In addition, the argument goes, because these cases require a significant investment of time, energy, and money, the demands of litigation may overwhelm both the plaintiffs and their attorneys, diverting attention from alternate paths towards justice. Litigation may therefore substitute for other better forms of engagement like social mobilization and organization, with results that fall far short of what a client or community hoped to achieve. Relatedly, critics assert, these cases place too much power in the hands of attorneys. There is an obvious danger that the lawyer will become the face and voice of a movement, or coopt and control decisions, thus creating a level of community dependency on the attorney. As lawyers shape their clients' stories into documents and arguments for courts, they risk marginalizing or even silencing those clients' voices. Particularly when attorneys are removed from the communities they represent, they may misunderstand those communities' priorities and goals.

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1. The terms *Apartheid* suit, *Apartheid* case, and *Apartheid* litigation are used interchangeably throughout this article to refer to the *Ntsebeza/Botha* case in which I served as co-counsel. Our case was joined for pre-trial purposes with the *Khulumani/Balintulo* case, and collectively the cases have been known as *In re South African Apartheid Litigation*. See *infra* Part I.B. This article is focused on the experience of litigating the *Ntsebeza/Botha* case.

This article excavates the varied and overlapping goals of human rights plaintiffs and litigators, many of which have previously gone unexamined, and then explores the value and impact of the *Apartheid* case. It explains that the suit was never solely about liability for specific corporations, but was just as much about practicing community lawyering, empowering the clients, offering a forum to tell their stories, acknowledging their experiences, calling attention to injustices, shaping the historical record, energizing and building social movements, shaming and deterring bad actors, shifting expectations around corporate behavior, and inspiring other survivors of human rights abuse to pursue justice and accountability through various avenues. These goals may be harder to measure than a court verdict, but they are equally important.

Moreover, we succeeded in accomplishing many of these goals despite the fact that the case was ultimately dismissed prior to trial. For example, through the process of researching and formulating the complaints, we were able to uncover new facts and expose historical truths about apartheid-era human rights abuse, particularly the role of corporate actors. Through the adoption of a community lawyering approach, the plaintiffs and the legal team worked collaboratively so that decision-making around the case—who would be a part of it, which claims and arguments would be advanced, how and whether the case would proceed—could be more collectively owned. Through the joint efforts of both the plaintiffs and the legal team, we succeeded in reshaping public perceptions about the case, making clear that it was not an attempted end-run around South Africa's truth and reconciliation process, but rather a legitimate effort of survivors seeking remedies for past harms. Over time, the case demonstrated how the language of reconciliation and transitional justice should not be used to force closure about the past or to blunt a lingering need for truth and accountability, especially when the past is still present and some wounds remain open. Through bold efforts to hold companies accountable for human rights abuse, this case, in tandem with others, formed the scaffolding upon which a larger corporate social responsibility movement could be built and grown. Along with other corporate Alien Tort Statute cases, this suit inspired similar efforts in multiple jurisdictions outside the United States, led to the proliferation of regulatory initiatives at the international, regional, and industry levels, and influenced multinationals to take greater care to respect human rights, including by introducing or revising their policies and practices in response to the potential threat of liability. Finally, through the clinical teaching model, the case provided an opportunity to train members of the next generation of human rights practitioners, both in South Africa and the United States. These advocates now concretely understand the limitations, risks, and complexities of strategic human rights litigation and will be better prepared to engage with affected communities and weigh the merits of different approaches to seeking justice and accountability.

The article proceeds in three Parts. Part I provides context and background. It begins with a short introduction to apartheid-era human rights violations, including the role of corporations in that abuse, and offers a brief overview of the truth and reconciliation process initiated as part of South Africa's transition to democracy. It also summarizes the complex procedural history of the *Apartheid* case and outlines the plaintiffs' central factual allegations and legal claims. Part II explores several prominent critiques of human rights litigation and then discusses the primary goals of the *Apartheid* suit, grouping those goals into three broad categories: plaintiff-centered goals; normative, systemic, and rule-of-law goals; and defendant-focused goals. With these critiques and articulated goals in mind, Part III evaluates our efforts in the *Apartheid* case, reflecting on our successes and failures to take a deeper look at the extent to which the critiques ring true in the context of this litigation. Grappling with the complexities of this particular case may illuminate and inform the efforts of other communities, activists and campaigners, strategic litigators, and civil society groups. This Part therefore concludes by offering some insights that may improve other efforts to litigate human rights claims.

Finally, narrative snapshots of some of the named plaintiffs are interspersed throughout the article to highlight their stories.<sup>2</sup> The *Apartheid* litigation was always about the people involved—about what they had endured and survived, and about their struggle for justice. As a result, we litigated in service of aims beyond simply a verdict of liability, with storytelling prominent among our goals. When the case was ultimately dismissed prior to reaching trial, I felt immense sadness about the plaintiffs' fairly limited opportunities to tell their stories to a broader audience. We always imagined that through the case, their stories would contribute to the shared memory of the apartheid era and help shape the historical record. I hope this article can move us a step closer to realizing those aspirations and serve as an essential reminder of some of the complex, brave people behind the litigation.

## I. BACKGROUND

### A. *Corporations, Apartheid, and the Truth and Reconciliation Commission*

Apartheid was an institutionalized regime of racial segregation and systematic oppression implemented in South Africa for the purpose of depriving the majority black<sup>3</sup> population of basic rights and securing the white

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2. These portraits of the plaintiffs are based on interviews that I, and other members of the legal team, conducted during the course of the litigation. For some plaintiffs, the narratives also draw on testimony given to the Truth and Reconciliation Commission or on conversations subsequent to the conclusion of the *Apartheid* case.

3. The apartheid regime classified all South Africans into three broad racial categories: white, black ("native"), or "coloured" (including Indian), as determined by one's appearance, social acceptance, and descent. *See* Population Registration Act 30 of 1950. The Act described a white person as one whose

minority's power over the country's government, economy, and resources. The international community universally condemned the apartheid system and the systematic discrimination, brutality, and violence against black South Africans that characterized the apartheid state.<sup>4</sup>

Apartheid, itself a crime against humanity,<sup>5</sup> was enforced by means of other human rights violations, including prolonged arbitrary detention, forced exile, forced relocation, revocation of citizenship, forced and exploited labor, extrajudicial killings, and torture. Physical separation of the races, often by force, was an essential aspect of the apartheid system. The black population was geographically isolated into "homelands" apart from the white population, where they lacked access to fertile land, employment opportunities, and basic services such as education and healthcare. Black workers were denied access to certain classes of jobs, deprived of the right to organize and protest their conditions, and paid lower wages. This elaborate apartheid system would not have been possible without the active and ongoing support of many private corporations, some of which helped to implement and facilitate apartheid policies. For example, private companies, including Ford, General Motors, and Daimler, manufactured specialized military and police vehicles used by the apartheid regime to terrorize and attack the black population.<sup>6</sup> Private companies, including IBM, produced the identity documents that stripped black South Africans of their citizenship and rights.<sup>7</sup>

As the apartheid era came to an end, in 1995 South Africa created a Truth and Reconciliation Commission ("TRC") to attempt to come to terms with its past.<sup>8</sup> The TRC was intended to address the legacy and impact of apartheid through a truth-telling process that could lead to a shared historical understanding of the past, and ultimately to a degree of healing, reconciliation, and national unification. The TRC had the power to grant amnesty to individuals accused of politically-motivated human rights violations if they made a full disclosure before the Commission in compliance with the

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parents were both white, but also based this categorization on habits, speech, education, deportment, and demeanor. A black person was defined as being a member of an African race or tribe, and a coloured person as neither white nor black. *Id.* A person's racial classification dictated nearly every aspect of his or her life. It determined where one could live, work, and own property, whether one could vote, the education one would be entitled to receive, the facilities that one could use and access, and who one could marry. *See, e.g.*, Group Areas Act 41 of 1950; Bantu Authorities Act 68 of 1951; Separate Representation of Voters Act 46 of 1951; Bantu Education Act 47 of 1953; Reservation of Separate Amenities Act 49 of 1953; Prohibition of Mixed Marriages Amendment Act 21 of 1968.

4. *See, e.g.*, G.A. Res. 1761 (Nov. 6, 1962); S.C. Res. 181 (Aug. 7, 1963).

5. International Convention on the Suppression and Punishment of the Crime of Apartheid, G.A. Res. 3068 (XXVIII), 28 U.N. GAOR Supp. (No. 30), U.N. Doc. A/9030 (1974), 1015 U.N.T.S. 243 (July 18, 1976).

6. Ntsebeza and Digwamaje Consolidated and Amended Complaint at 2–4, 12–13, 20–26, 31–32, *In re South African Apartheid Litig.*, 617 F. Supp. 2d 228 (S.D.N.Y. 2009) (No. 02-MDL-1499) (Complaint filed on Oct. 27, 2008) [hereinafter Ntsebeza and Digwamaje Amended Complaint].

7. *Id.* at 2–3, 38–42.

8. Promotion of National Unity and Reconciliation Act 34 of 1995.

terms of the National Unity and Reconciliation Act.<sup>9</sup> Those who did not apply for or were not granted amnesty could be prosecuted for their acts.

The work of the TRC was, in many ways, inherently limited, with a mandate to investigate only “gross human rights violations,” defined as killing, abduction, torture, or severe ill treatment, which were committed by those acting with a political motive and occurred between March 1, 1960 and May 31, 1994.<sup>10</sup> As a result, the TRC did not examine violations such as denial of freedom of movement through pass laws<sup>11</sup> or forced removals of people from their land, denial of the right to vote, the mistreatment of farm workers and other labor practices, or discrimination in areas such as education and employment. Accordingly, the TRC is often criticized for focusing on discrete stories of individual victims while failing to robustly address the structural harms of apartheid.<sup>12</sup>

Nevertheless, the TRC did make some attempts to illuminate the broader social and institutional contexts that gave rise to gross human rights violations during apartheid. It convened various institutional hearings, including one focused on business and labor.<sup>13</sup> As the Commission’s Final Report explained:

At the heart of the business and labour hearings lay the complex power relations of apartheid, the legacy of which continues to afflict the post-apartheid society. These include the consequences of job reservation, influx control, wages, unequal access to resources, migrant labour and the hostel system. Adjacent to these historic developments were industrial unrest, strikes and the struggle for the right to organise trade unions.<sup>14</sup>

Many of the business submissions emphasized that apartheid was not simply a political system but also an economic one, in which minority rule was rooted in the socio-economic privileges accorded to whites at the expense of the black majority. In other words, these submissions explained how South

9. *Id.* § 20(1)(a)–(c).

10. 5 TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA REPORT 15–16 (1998) [hereinafter TRC REPORT VOL. 5].

11. The pass laws controlled the movement of non-white South Africans during apartheid. All black and coloured South Africans over age sixteen were required to carry a passbook, or “dompas,” with them at all times. Similar to a passport, the book contained the holder’s photograph, finger print, name, place of birth, marital status, employment details, permission to reside or work in certain locations, qualifications to work or seek work, and employer reports on worker performance and behavior. Also known as influx controls, the pass law system enforced apartheid by limiting the number of black and coloured South Africans allowed to live and work near urban centers reserved for whites. Persons found without a dompas were subject to immediate arrest and could be exiled back to the Bantustans. *See* Natives (Abolition of Passes and Co-Ordination of Documents) Act 67 of 1952.

12. *See generally, e.g.*, TRUTH AND RECONCILIATION IN SOUTH AFRICA: TEN YEARS ON (Charles Villavicencio & Fanie du Toit, eds. 2006).

13. None of the defendant corporations named in the amended complaint participated in the hearing on business and labor.

14. 4 TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA REPORT 18 (1998) [hereinafter TRC REPORT VOL. 4].

Africa's economy was built and sustained by an exploitative system of cheap labor made possible by systemic racial oppression.

The TRC's Final Report concluded that "[t]o the extent that business played a central role in helping to design and implement apartheid policies, it must be held accountable."<sup>15</sup> The Commission outlined three different "orders"<sup>16</sup> of business involvement in apartheid: first-order involvement, which meant active collaboration in the construction of apartheid; second-order involvement, which meant supplying goods and services used for repressive purposes; and third-order involvement, which meant benefiting from the apartheid economy. The TRC determined that

[d]irect involvement with the state in the formulation of oppressive policies or practices that resulted in low labour costs (or otherwise boosted profits) can be described as first-order involvement. This is clearly of a different moral order to simply benefiting from such policies. Businesses that were involved in this way must be held responsible and accountable for the suffering that resulted.<sup>17</sup>

Businesses that operated in South Africa during apartheid, and therefore benefitted from it, were placed in a category of second-order involvement, although the TRC drew a distinction between businesses that profited "by engaging directly in activities that promoted state repression," such as businesses that provided armored vehicles to the state in the mid-1980s, versus businesses "whose business dealings could not have been reasonably expected to contribute directly or subsequently to repression."<sup>18</sup> The TRC further noted that culpability would depend on businesses knowing that their products or services would be used to commit human rights violations.<sup>19</sup> Finally, the TRC categorized "ordinary business activities that benefited indirectly by virtue of operating within the racially structured context of an apartheid society" as third-order involvement, and noted that condemning such businesses suggests that all who prospered under apartheid must answer for the ways that they benefitted from the apartheid system.<sup>20</sup>

Pursuant to these findings, the South African government and business sector held a consultative forum and determined that business "would honour its responsibility to the victims of apartheid" by making contributions to a Business Trust established for the purpose of reparations.<sup>21</sup> However, in

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15. *Id.* at 24.

16. *Id.* at 24–27.

17. *Id.* at 24.

18. *Id.* at 25.

19. *Id.*

20. *Id.* at 26.

21. 6 TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA REPORT 142 (2003) [hereinafter TRC REPORT VOL. 6]. Separate from the question of contributions from the business sector, in its Final Report, the TRC recommended that victims of apartheid receive reparations of up to 2,000 Rand per month from the government for six years. However, in April 2003 President Mbeki announced that

2003 the TRC's Reconciliation and Reparation Committee condemned the "paltry amount" contributed by business to the trust fund and reiterated a series of earlier proposals, including mandatory regulatory and tax measures, through which businesses that benefitted from apartheid would support reparations.<sup>22</sup> As the Committee emphasized, "business benefitted substantially during the apartheid era either through commission or omission and has, at the very least, a moral obligation to assist in the reconstruction and development of post-apartheid South Africa through active reparative measures."<sup>23</sup> These proposals did not result in tangible outcomes for victims and the demand for reparations, including from the business sector, remains profound more than twenty-five years after the end of apartheid.<sup>24</sup>

### B. Procedural History of the Apartheid Case

It was upon this backdrop that the *Apartheid* suit was initiated under the Alien Tort Statute ("ATS"), a section of the First Judiciary Act of 1789, which allows non-U.S. citizens to sue in U.S. courts for violations of international law.<sup>25</sup> The case's history is long and complex, beginning with complaints filed in 2002 and concluding with the Supreme Court's decision to deny certiorari in 2016.

Multiple similar suits were initially filed in various jurisdictions in 2002 and 2003; these cases were consolidated for pretrial purposes in the Southern District of New York. The original complaints brought claims against more than fifty corporations, including unnamed corporate Does, alleging that the defendants had been aware of the racist policies and human rights violations committed by the apartheid state; that they nevertheless continued to do

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reparations would amount to a once-off payment of 30,000 Rand to individuals declared victims by the TRC, and between 2003 and 2004, 17,408 individuals benefitted from such payments. The President's Fund, established to finance the TRC's recommendations for reparations, had grown to approximately 1.5 billion Rand as of 2018, much of which has yet to be allocated or paid. See, e.g., Adam Yates, *Justice Delayed: The TRC Recommendations 20 Years Later*, DAILY MAVERICK (Sept. 5, 2018), <https://perma.cc/TT2N-8TNK>; Ra'eesa Pather, *Ramaphosa under pressure to support reparations for apartheid victims*, MAIL & GUARDIAN (Dec. 17, 2018), <https://perma.cc/C325-8H78>.

22. TRC REPORT VOL. 6, *supra* note 21, at 142–44.

23. *Id.* at 143–44.

24. See generally William Gumede, *Failure to Pursue Economic Reparations Has and Will Continue to Undermine Racial Reconciliation*, in *THE LIMITS OF TRANSITION: THE SOUTH AFRICAN TRUTH AND RECONCILIATION COMMISSION 20 YEARS ON* (Mia Swart & Karen van Marle, eds., 2017).

25. 28 U.S.C. §1350 (1948) ("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 or a treaty of the United States."). For an overview of the history of the ATS, see Beth Stephens, *The Curious History of the Alien Tort Statute*, 89 NOTRE DAME L. REV. 1476 (2014). The statute was rarely used for nearly 200 years before being revived by creative lawyers at the Center for Constitutional Rights. See *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980). Following a period in which ATS cases sought to hold natural persons accountable, the judgment in *Kadic v. Karadzic* recognized that the ATS also provided jurisdiction over private actors who committed international law violations in concert with state officials. 70 F.3d 232 (2d Cir. 1995). As the text of the ATS nowhere specified that the defendant must be a natural person, the *Kadic* decision opened the gates to a second wave of ATS litigation against corporate defendants. However, ATS litigation against corporate defendants has been sharply curtailed by a pair of recent Supreme Court decisions, *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013), and *Jesner v. Arab Bank*, 138 S. Ct. 1386 (2018).



business in South Africa; that they benefitted greatly from such business, including from the provision of cheap labor from the black population; that they provided the government with essential tools and services used to maintain and support the apartheid system; and that had they not done business with the apartheid state, the system would have collapsed much sooner and many people, including the plaintiffs, would not have suffered severe harms.<sup>26</sup> Some of the original complaints also requested broad equitable relief, including the creation of an independent historical commission to report on and provide an accounting of all profits unjustly derived by defendants.<sup>27</sup>

Defendants moved to dismiss in 2003, arguing that merely doing business in apartheid South Africa could not give rise to ATS liability and that the cases should be dismissed under the political question doctrine or other related foreign policy doctrines. South Africa's Minister of Justice submitted a letter to the district court outlining concerns that the proceedings would "interfere with a foreign sovereign's efforts to address matters in which it has the predominant interest" and "intrude upon and disrupt our own efforts to achieve reconciliation and reconstruction."<sup>28</sup> Appearing before the National Houses of Parliament, South African President Thabo Mbeki also criticized the cases as judicial imperialism that interfered with South Africa's sovereignty and its chosen truth and reconciliation process. He stated that it was "completely unacceptable that matters that were central to the future of our country should be adjudicated upon in foreign courts which bore no responsibility for the wellbeing of our country and the observance of the perspective contained in our Constitution on the promotion of national reconciliation."<sup>29</sup> The United States executive branch also submitted a letter, in response to a request from the district court, stating that in light of South Africa's views, the litigation could harm foreign policy as "[s]upport for the South African government's efforts in this area is a cornerstone of U.S. policy towards that country," although the U.S. government did not request dismissal on prudential grounds.<sup>30</sup>

The district court granted defendants' motion to dismiss in 2004, concluding that the ATS did not provide for aiding and abetting liability and that merely doing business in apartheid South Africa was not a violation of international law.<sup>31</sup> Plaintiffs appealed and, in 2007, the Second Circuit reinstated the ATS claims, holding that plaintiffs could plead an aiding and

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26. See, e.g., *Digwamaje v. IBM Corp.* Complaint, *In re South African Apartheid Litigation*, 346 F. Supp. 2d 538 (S.D.N.Y. 2004) (No. 02-CV-6218) (Complaint filed on Aug. 2, 2002). Similar complaints were apparently filed in California, Florida, Michigan, and Texas.

27. *Id.*

28. Declaration by Penuell Mpapa Maduna, South African Minister of Justice and Constitutional Development (July 11, 2003).

29. President Thabo Mbeki, Statement to the National Houses of Parliament and the Nation, on the Occasion of the Tabling of the Report of the Truth and Reconciliation Commission, 9 (Apr. 15, 2003).

30. Letter from William H. Taft IV, the Legal Advisor of the Department of State (Oct. 27, 2003).

31. *In re South African Apartheid Litig.*, 346 F. Supp. 2d 538 (S.D.N.Y. 2004).

abetting theory of liability under the ATS.<sup>32</sup> The Second Circuit also vacated the district court's denial of plaintiffs' motion to amend the original complaints, allowing plaintiffs to address concerns raised by the Supreme Court in its first ATS decision, issued in *Sosa*<sup>33</sup> in 2004, as well as by the U.S. and South African governments.<sup>34</sup> The defendants then petitioned for a writ of certiorari to the Supreme Court.<sup>35</sup> However, the Court was forced to affirm the lower court decision for lack of a quorum when four justices recused themselves due to conflicts of interest.<sup>36</sup> Accordingly, the Second Circuit's decision would stand, and the case was returned to the district court for further proceedings.

Plaintiffs filed amended complaints in 2008 that responded to concerns raised by the United States and South Africa in prior submissions, removing numerous defendants (including all South African corporations and the unnamed corporate Does) and omitting the former requests for broad equitable relief.<sup>37</sup> Defendants again moved to dismiss. After argument on the motion, South Africa *sua sponte* submitted a letter to the district court stating that, given the narrowed scope of the litigation, the South African government was 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."<sup>38</sup> The letter further observed that plaintiffs' remaining claims "are based on aiding and abetting very serious crimes" and that the prior dismissal of corporations that "merely did business with the apartheid government also addressed some of the concerns which the Government of the Republic of South Africa had."<sup>39</sup>

The district court denied in part defendants' motion to dismiss in 2009, allowing plaintiffs' aiding and abetting claims to proceed against defendants IBM, General Motors, Ford, and Daimler.<sup>40</sup> Defendants appealed, arguing that the political question doctrine provided grounds for immediate appeal

32. *Khulumani v. Barclay Nat. Bank Ltd.*, 504 F.3d 254, 260 (2d Cir. 2007).

33. In *Sosa v. Alvarez-Machain*, the Supreme Court affirmed that norms of customary international law are cognizable under the ATS. 542 U.S. 692, 730 (2004). In a footnote referring to *In re South African Apartheid Litigation*, the Supreme Court noted that federal courts, as a matter of "case-specific deference," should give serious weight to executive branch views of the case's impact on foreign policy. *Id.* at 733 n.21.

34. *Khulumani*, 504 F.3d at 264.

35. Petition for Writ of Certiorari, *Am. Isuzu Motors, Inc. v. Ntsebeza*, 553 U.S. 1028 (2008) (No. 07-919).

36. See *Am. Isuzu Motors, Inc. v. Ntsebeza*, 553 U.S. 1028 (2008); Linda Greenhouse, *Justices' Conflicts Halt Apartheid Appeal*, N.Y. TIMES (May 13, 2008), <https://perma.cc/GS99-GFF4>.

37. Ntsebeza and Digwamaje Amended Complaint, *supra* note 6.

38. Letter from Jeffrey Thamsanqa Radebe, South African Minister of Justice and Constitutional Development, to Shira A. Scheindlin, U.S. District Judge (Sept. 1, 2009).

39. *Id.*

40. *In re South African Apartheid Litig.*, 617 F. Supp. 2d 228 (S.D.N.Y. 2009). Defendants then moved for reconsideration of portions of the district court's decision and to certify an interlocutory appeal on case-specific deference, the mens rea for aiding and abetting liability, and the standard for vicarious liability, motions which the district court denied in May 2009. *In re South African Apartheid Litig.*, 624 F. Supp. 2d 336 (S.D.N.Y. 2009).

through a writ of mandamus or the collateral order doctrine; plaintiffs moved to dismiss for lack of appellate jurisdiction.<sup>41</sup> Without addressing the jurisdictional issues, the Second Circuit agreed to address the merits.<sup>42</sup> However, the appeal was stayed for several years while the Supreme Court considered *Kiobel*,<sup>43</sup> in which it ultimately held that a presumption against the extraterritorial application of U.S. law applies to ATS claims, and that to overcome this presumption an ATS plaintiff must show that her claim “touch[es] and concern[s] the territory of the United States.”<sup>44</sup> With *Kiobel* decided, the Second Circuit requested supplemental briefing on the impact of the Supreme Court’s ruling on the *Apartheid* suit. In 2013, the Second Circuit denied defendants’ petition for a writ of mandamus, stating that defendants were entitled to relief before the district court under *Kiobel* because “none of the[ ] paragraphs [in Plaintiffs’ 2008 complaints] ties the relevant human rights violations to actions taken within the United States.”<sup>45</sup>

Defendants then moved the district court to dismiss plaintiffs’ claims, while plaintiffs requested leave to amend to address the requirements established in *Kiobel*—legal hurdles that did not exist in 2008, when the prior complaints were filed. Following briefing on the question of whether corporate liability was permitted under the ATS after *Kiobel*, the district court permitted plaintiffs to move to amend,<sup>46</sup> and plaintiffs submitted a proposed amended complaint in 2014.<sup>47</sup> Although the district court acknowledged that this complaint was “substantially more detailed and specific” than the 2008 version, it nevertheless denied leave to amend, finding the proposed amendments failed to allege sufficient conduct in the United States to sat-

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41. While this appeal was pending, one of the defendants, General Motors, filed for bankruptcy on June 1, 2009. Plaintiffs sought damages in bankruptcy court similar to those sought in the ATS case. The federal bankruptcy judge denied class certification and disallowed plaintiffs’ claims due to prevailing Second Circuit law, but noted that plaintiffs could seek reconsideration of the disallowance should Second Circuit precedent change. *In re Motors Liquidation Co.*, 460 B.R. 603 (Bankr. S.D.N.Y. 2011). Accordingly, in order to be free and clear of the *Apartheid* suit, GM agreed to settle the individual claims as general unsecured claims, resulting in each named plaintiff being entitled to receive approximately U.S. \$10,000.00.

42. *See In re South African Apartheid Litig.*, No. 09-2778-cv (2d Cir. Sept. 10, 2009) (order requesting supplemental merits briefing).

43. *Kiobel* initially presented the question of whether corporations could be held liable under the ATS. After briefing and argument on this question, the Supreme Court requested supplemental briefing and argument on whether the ATS applies to violations committed outside the territory of the United States. In the end, the Court did not rule on the corporate liability question in *Kiobel*. *Kiobel v. Royal Dutch Petroleum Co.*, 568 U.S. 108 (2013).

44. *Id.* at 124–25.

45. *Balintulo v. Daimler AG*, 727 F.3d 174, 192 (2d Cir. 2013).

46. *In re South African Apartheid Litig.*, 15 F. Supp. 3d 454, 465 (S.D.N.Y. 2014) (order on corporate liability) (discussing *Kiobel*, 621 F.3d at 148).

47. *Botha v. Ford Motor Co. Second Consolidated and Amended Complaint*, *In re South African Apartheid Litig.*, 56 F. Supp. 3d 331 (S.D.N.Y. 2014) (No. 02-MDL-1499) (Complaint filed on Aug. 8, 2014) [hereinafter *Botha Second Amended Complaint*].

isfy the Second Circuit's understanding of *Kiobel's* new "touch and concern" standard.<sup>48</sup>

Plaintiffs appealed. The Second Circuit affirmed the district court's order dismissing the complaint.<sup>49</sup> Plaintiffs petitioned the Supreme Court for a writ of certiorari<sup>50</sup> which the Court denied in 2016, putting a final end to more than a decade of litigation.

### *Dan Peters*

*Dan, who was born in 1951, worked at the Ford plant in Port Elizabeth from 1979 until 1985. He started as a material handler and was later promoted to receiving checker, both positions held only by black or colored employees.*

*Of course there was discrimination. Ford had separate canteens, toilets, and smoking areas for "European" and "Non-European" employees. A yellow line ran down the middle of all facilities, making clear where you belonged. Each employee had a Ford badge with his classification clearly labeled. "C" for colored. "B" for Bantu. Whites wore "M" for master.*

*Signs around the shop said Ford was an "equal opportunity employer," but everyone knew the signs were lies. So Dan suggested the signs be taken down. They never were.*

*Dan was frustrated to be assembling the vehicles of apartheid's oppression, but he needed work. He knew when cars or trucks were destined for the police or military because the job cards said as much. Once completed, trucks and military vehicles would be placed in the yard for inspection. High ranking military and police officers, with emblems on their uniforms, would come to scrutinize their new equipment. Dan recalled how some workers dared to complain "because the same {vehicle they had just built} would kill them one of these days as they were in the townships," but nothing changed.*

*Dan was full of energy, a natural leader, and became chairman of NAAWU, the National Automobile and Allied Workers Union, in 1980 and later, in 1983, chairman of the shop stewards.*

*The collaboration between Ford and the Special Branch<sup>51</sup> was obvious to Dan. Ford's managers and directors seemed to want their employees to know that they were members of the Broderbond, the secretive and highly influential Afrikaner organiza-*

48. *In re South African Apartheid Litig.*, 56 F. Supp. 3d 331, 337–39 (S.D.N.Y. 2014) (order denying plaintiffs' motion for leave to amend their complaints). The district court held that *Balintulo v. Daimler AG*, 727 F.3d 174, 192 (2d Cir. 2013), "requires plaintiffs to plead 'relevant conduct within the United States' that itself 'gives rise to a violation of customary international law' – in other words, the position adopted by Justice Alito." *South African Apartheid Litig.*, 56 F. Supp. 3d at 336–37.

49. *Balintulo v. Ford Motor Co.*, 796 F.3d 160, 163 (2d Cir. 2015).

50. Petition for Writ of Certiorari, *Ntsebeza v. Ford Motor Co.*, No. 15-1020 (U.S. 2016), 2016 WL 612549.

51. The Special Branch, or Security Branch, was a notorious division of the South African Police tasked to target and disrupt anti-apartheid groups and activists, including through surveillance, infiltration, detention, abduction, forced disappearances, torture, and assassination.

tion that was a dominant force behind apartheid.<sup>52</sup> Dan explained how “In certain conversations, they would tell you straight that they were part of the Broderbond and ‘We know exactly what is happening. We Broderbond people, we know everything.’” Dan recalled being told by two directors at Ford that “something is going to happen in Cradock, to the so-called activists in Cradock,” before it came out in the press.<sup>53</sup> He understood this information was a threat. “They would say it to remind you that they were part of the Broderbond. . . . I cautioned a lot of my shop stewards. They wanted us to know that the Broderbond was so powerful, that they could just push a button and it would explode.”

The Special Branch would arrest Ford’s shop stewards, interrogate them, and sometimes hold them for months at a time. The Special Branch knew where to find the shop stewards because, as Dan explained, “There was an agreement between NAAWU and the company: whenever we were going to union activities, we should notify the company three days prior to the happenings. A letter would be written to the {company’s} Labour Relations Manager.”

When the union wrote to Ford to say that Dan would be attending a meeting as union representative, Ford then informed the Special Branch, who would either come to his house before he left or pull him over on his way to his destination, searching his bags and harassing him. This first happened in 1982, when Dan was slated to attend a conference of the Congress of South African Trade Unions (COSATU). The Special Branch arrived at his home, then took him to their office in Louis le Grange Square.

Dan often spoke in euphemisms about his own experience, about how he was “really victimized” by the Special Branch. But this particular memory was one to be shared. Dan demonstrated how the officers handcuffed him, left wrist to left ankle, right wrist to right ankle; how they threaded a broom between his arms and the back of his legs; how they spun him around for a “helicopter” ride. “They would take you and handcuff you to a broomstick and spin you. They would say, ‘Now you are riding the SAP {South African Police} helicopter, now will you talk?’” It left blue bruises, as did the beatings and kicking, but there was never any recourse for this abuse.

Dan was subjected to the helicopter again in 1983, when the Special Branch picked him up at home before he could head to a National Executive Committee (NEC) meeting in Durban. The Special Branch also detained and interrogated him in 1984, on his way to a union meeting in Lesotho; again in 1984, at the time of a strike at Ford, when he was asked, “How can you bite the hand that feeds the golden egg?” and told, by the Security Branch, that as union chairman he should speak to

52. See, e.g., Dan O’Meara, *The Afrikaner Broderbond, 1927–48: Class Vanguard of Afrikaner Nationalism*, 3 J. S. AFR. STUD. 156 (1977); IVOR WILKINS AND HANS STRYDOM, *THE SUPER AFRIKANERS* (1978).

53. Mathew Goniwe, Fort Calata, Sparrow Mkonto, and Sicelo Mhlaui were intercepted by the Special Branch and murdered on June 27, 1985, while returning to Cradock from a United Democratic Front meeting in Port Elizabeth. The security forces tortured, stabbed, and shot the men, then burned their bodies. The murder of the “Cradock Four” provoked a national outcry and their funeral became one of the largest political burials in the Eastern Cape, leading to the declaration of a state of emergency. See 2 TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA REPORT 227–28 (1998) [hereinafter TRC REPORT VOL. 2].

*his people and get them back to work; in 1985, returning from an NEC meeting in Johannesburg; and again in 1985, hours after he returned from a trip representing the union in the United Kingdom.*

*After the Ford plant closed down, Dan couldn't land another job. He was told by other auto companies in Port Elizabeth that he was a "dangerous guy. You will only turn this place into chaos like Ford. You have closed Ford, now you will close us." Many of his fellow union members faced a similar problem.*

*Dan passed away in 2010. When I received this news from South Africa, listening on my cell phone from Massachusetts on a snowy January day, the connection was horrible. Initially I thought it was Dan himself calling—the distinctive accent, the quick, clipped speech. I pictured him inside his home, phone to his ear, sitting in his favorite chair. So when it all became clear, I couldn't quite accept that he was gone.*

*When I remember him now, I think first of his unyielding energy. If he had been a child, you might have called him hyper. He always spoke quickly, the stories and recollections tumbling out of him, punctuated by his catchphrase: "and all that jazz." He never stopped moving, hands waving about, eyes widening for emphasis, head bobbing around. He believed unreservedly in the importance of the case, seemed to thrive on being reconnected with former union colleagues, and was motivated by the opportunity to continue their struggle.*

### **James Tamboer**

*James, who was born in 1959, worked at the General Motors plant in Port Elizabeth from 1977 until 1986. As he said, "I started as a laborer and ended as a laborer." He worked the trim line, fitting together truck parts, including chassis for military vehicles.*

*Before joining GM James had been politically active in the student movement,<sup>54</sup> although he had never been arrested. He continued his organizing efforts with the union at GM, first as a shop steward and later as a senior shop steward. James sought not only pay increases but also to break down racial barriers, such as separate toilets and canteens, within the plant.*

*He paid heavily for this involvement. He recalled 1982 being one of the worst years for him, a year in which he was arrested on a regular basis—including being taken from the GM plant—because he was a vocal and visible union leader. Security Branch personnel often came into the plant, and to his mother's home, to question James about plans for strikes or other political activities.*

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54. Students played a critical role in the anti-apartheid struggle. Motivated in part by the Bantu education system and the imposition of Afrikaans as the language of instruction, and inspired by the Black Consciousness Movement and the formation of the South African Students Organization, student activism helped transform and accelerate opposition to apartheid, particularly following the government's lethal response to the Soweto student uprising in 1976. See generally STUDENTS MUST RISE: YOUTH STRUGGLE IN SOUTH AFRICA BEFORE AND BEYOND SOWETO '76 (Anne Heffernan & Noor Nieftagodien, eds., 2016); Nozipho J. Diseko, *The Origins and Development of the South African Student's Movement (SASM): 1968–1976*, 18 J. OF S. AFR. STUD. 40 (1992).

*During intense union negotiations that year, James was detained for three weeks at St. Alban's, a notorious prison facility where hundreds of men were often held without charge and subjected to police abuse. He was tortured. He described being beaten over a bench and waterboarded as the security police attempted to extract information from him about the union's plans.*

*James was held again for several months in 1985–86, swept up following the government's declaration of a state of emergency. The security forces, interrogating James about his role organizing a major strike at GM, stomped on his legs and chest. They bashed his head into the walls so forcefully that he would suffer from memory loss and epilepsy for the rest of his life.*

*But James was so much more than an activist and survivor. He was a husband, a father, and a pastor. He hesitated before joining the apartheid litigation as a plaintiff. He was concerned that if his children knew more about the abuse that he had suffered, they might hate the white people who had mistreated him. And he had spent his life working against hatred, and for equality and reconciliation.*

*Ultimately he joined the case because he wanted stories like his to be heard and because he hoped for some measure of justice and accountability, or at least acknowledgement, by GM and the other corporations. He was clear-eyed about the immense legal hurdles that we would face, but he believed in the importance of the case.*

*James passed away in 2018. When I think of James now, my strongest memories are of him laughing—deep and loud and heartily, with his whole body—and of the way that he would lean in close, look you right in the eye, and wag his finger a bit when making an important point. I remember speaking with him after we had suffered a major setback in the case. I was apologetic and also, I'm sure, quite upset. As was his way, James offered reassurance and perspective: "We always knew this would be hard. And we have suffered so much worse." Of course.*

### C. *The Amended Complaints: Allegations and Key Legal Claims*

My own involvement in the case dates to early 2008, when I was hired as a consultant by the International Human Rights Clinic at Harvard Law School.<sup>55</sup> At the time I came on board, the plaintiffs' legal team was preparing to file an amended complaint following the Second Circuit's 2007 rul-

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55. Although I had previously worked in South Africa, I did not participate in the litigation until I joined the Clinic in February 2008. At the point when I became involved in the case, the International Human Rights Clinic was supporting the work of Paul Hoffman, who had become lead U.S. counsel in the *Ntsebeza* and *Diguamaje* suits prior to the 2007 appeal. The International Human Rights Clinic formally became co-counsel when the amended complaints were filed in October 2008. The core team of attorneys and advocates that I joined included, in South Africa, Advocate Dumisa Ntsebeza, Advocate Michael Osborne, John Ngcebetsha, and Medi Mokuena, and in the United States, Paul Hoffman of Schonbrun, Simone Seplow, Harris & Hoffman LLP, Judith Brown Chomsky of the Law Office of Judith Brown Chomsky, Diane Sammons of Nagel Rice LLP, and myself and Tyler Giannini from the International Human Rights Clinic. Our case was joined, for pretrial purposes, with a companion case known as *Kbulumani*, which brought similar (but not identical) claims and which was litigated by a separate team of attorneys, led by Charles Abrahams in South Africa and Michael Hausfeld in the United States. We sometimes worked in collaboration with the *Kbulumani* legal team to submit joint briefing at various stages throughout the litigation.

ing. The *Apartheid* case was already well known and, for critics of human rights litigation in U.S. courts, it seemed to represent nearly everything that was problematic about this kind of suit. Our Clinic became involved because we believed that ATS litigation, if pursued responsibly and through a community lawyering framework, could be one important tool for individuals seeking accountability and for activists and social movements seeking to change behavior. By community lawyering, I mean using litigation and legal advocacy to build the power of our clients and their communities in order to seek justice, accountability, and other identified goals. In this model, lawyers are not the leaders, saviors, or gatekeepers. Rather, lawyers play a supporting role, are guided by the clients and communities who have the most at stake, and work collaboratively to offer legal advice and support that advances a shared vision of justice and social change.<sup>56</sup>

The *Apartheid* case was poised to become a vehicle through which the appellate courts, and possibly the Supreme Court, could make major decisions impacting the entire landscape of ATS litigation. In *Sosa*, the first ATS suit decided by the Supreme Court in 2004, the Court discussed *In re South African Apartheid Litigation* in an extended footnote about case-specific deference to the political branches, indicating that the Court was already mindful of the cases and that they could shape the Court's thinking about how the ATS should be interpreted.<sup>57</sup> At that time, a critical legal question remained undecided: whether a corporation needed to act with purpose or merely with knowledge to be held liable for aiding and abetting violations of international law. A significant circuit split had begun to emerge on the aiding and abetting standard, and it appeared that the *Apartheid* case might be the first to offer a definitive answer.<sup>58</sup> We hoped that in the right hands, the case could be litigated to advance the interests of our clients while also not damaging legal norms and frameworks that had been developed over more than a decade of corporate ATS litigation.

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56. See, e.g., Charles Elssesser, *Community Lawyering—The Role of Lawyers in the Social Justice Movement*, 14 LOY. J. PUB. INT. L. 375 (2013); Benjamin Hoffman & Marissa Vahlsing, *Collaborative Lawyering in Transnational Human Rights Advocacy*, 21 CLIN. L. REV. 255 (2014).

57. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n.21 (2004) (“[T]here is a strong argument that federal courts should give serious weight to the Executive Branch’s view of the case’s impact on foreign policy.”).

58. A Ninth Circuit panel had ruled that the applicable standard was knowledge, but that decision was later vacated. *Doe v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002), *vacated*, 403 F.3d 708 (9th Cir. 2005). The Second Circuit had weighed in on the aiding and abetting standard in the *Apartheid* litigation before sending the case back to the district court, with one judge suggesting a knowledge standard, a second judge suggesting a purpose standard, and a third judge suggesting that corporations should not be held accountable at all while opining that purpose was the correct standard, but these ruminations were dicta rather than binding precedent. *Khulumani v. Barclay Nat. Bank Ltd.*, 504 F.3d 254, 254 (2d Cir. 2007), *aff’d sub nom.*, *Am. Isuzu Motors Inc. v. Ntsebeza*, No. 07-919, 2008 U.S. LEXIS 3868 (U.S. May 12, 2008).



The amended complaint we filed in 2008 was narrower, in several significant ways, from the complaints filed six years earlier.<sup>59</sup> Although still a class action brought on behalf of a putative class of black South Africans injured as a result of the defendant corporations' actions, the relief sought was simply monetary damages, as opposed to the accounting and appointment of a historic commission requested in the original complaints. In addition, the complaint concerned only five defendants, as opposed to more than 50 that had originally been named.<sup>60</sup> From a practical perspective, it was essential that the case be contained as the litigation moved forward into discovery and eventually to trial. Even with five defendants and these claims the case remained, frankly, extremely large, but it was more manageable than the previous iteration.

Narrowing the case to these defendants—non-South African corporations that had played a significant and active role in apartheid—was also important to remedy misperceptions about the case. We hoped that changing the relief sought and the scope of the case would help interested observers and parties, including the South African government, understand that the case was not an attempt to usurp or second-guess South Africa's truth and reconciliation process, but rather a way to fulfill the promise of the TRC and continue its legacy through other means. Some survivors, including the plaintiffs, felt that the TRC had not delivered the accountability that they sought, but that other legal fora might do so. The TRC Chairperson, Archbishop Desmond Tutu, and other members of the TRC recognized as much in their own submission to the court:

[L]itigation seeking individual compensation against multinational corporations for aiding and abetting the commission of gross human rights abuses during apartheid does not conflict, in any manner, with the policies of the South African government, or the goals of the South African people, as embodied in the TRC.

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59. Ntsebeza and Digwamaje Amended Complaint, *supra* note 6. The discussion in this section focuses primarily on the amended complaints filed in 2008. The amended complaint subsequently filed in 2014, after the Supreme Court's *Kiobel* decision, laid out similar facts about the harms suffered by the plaintiffs, but named only two U.S. corporations—Ford and IBM—and dedicated significantly more attention to how the claims touched and concerned the United States in order to overcome *Kiobel*'s presumption against extraterritoriality. For example, the 2014 complaint detailed how Ford, in the United States, approved the design of specialized vehicles for the South African security forces, directed the production of these vehicles and shipments to South Africa, and closely supervised the handling of major incidents involving South African employees. The 2014 complaint also explained how IBM, in the United States, developed the hardware and software used to produce identity documents and store information necessary to implement apartheid's forcible separation of the races and denationalization of black South Africans. The 2014 complaint further alleged that both defendants were active in the United States to prevent the imposition of U.S. sanctions on exports to South Africa and, when they failed to do so, defendants then acted to undermine U.S. foreign policy and support apartheid by continuing their business activities. See Botha Second Amended Complaint, *supra* note 47.

60. None of the defendants named in the amended complaint had participated in the business and labor hearings before the TRC.

To the contrary, such litigation is entirely consistent with these policies and with the findings of the TRC.<sup>61</sup>

The amended complaint filed in 2008 named three automotive companies as defendants—Daimler AG, Ford Motor Company, and General Motors Corporation—for engaging in private workplace discrimination that mimicked, reinforced, and enhanced the apartheid system; for suppressing union and anti-apartheid organizing; for manufacturing specialized vehicles for the South African security forces; and for working hand-in-hand with the South African security forces to identify, target, and torture anti-apartheid activists who were their employees.<sup>62</sup> The amended complaint also named IBM for providing computer hardware, software, maintenance, and support that effectuated the geographic separation of the races through the homeland system, and denationalized numerous black South Africans.<sup>63</sup> Finally, the complaint brought claims against Barclays Bank for its employment practices, which enhanced the geographic separation of the races and the economic marginalization of black South Africans.<sup>64</sup>

Critics had previously characterized the case as an attempt to hold companies liable for merely doing business in apartheid South Africa. It was important to correct this misconception in the amended complaint and make clear that we were not seeking accountability against corporations that simply engaged in commerce with a pariah state. Rather, the complaint alleged that defendants knowingly and purposefully provided essential assistance to the apartheid government, and this support led directly to human rights violations, making the corporations complicit in the abuse.<sup>65</sup> The defendants produced specialized products that enabled the apartheid government to run and maintain the apartheid system and to oppress, control, intimidate, denationalize, and otherwise violate the rights of black South Africans.<sup>66</sup>

With respect to the automotive companies, the amended complaint brought claims, accepted by the district court,<sup>67</sup> that the defendants aided and abetted apartheid, torture, extrajudicial killing, and cruel, inhuman, or degrading treatment. As we alleged, the management at Daimler, Ford, and GM provided information about employees who were anti-apartheid activists to the South African security forces, facilitated arrests, provided information to be used by interrogators, and even participated in interrogations. We explained how these companies actively retaliated against employees who participated in community organizations and unions that opposed

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61. Brief of Amici Former Commissioners and Committee Members of South Africa's Truth and Reconciliation Commission in Support of Plaintiffs-Appellants Seeking Reversal of District Court Decision at 2, *Khulumani v. Barclay Nat. Bank Ltd.*, 504 F.3d 254 (2d. Cir. 2007) (No. 05-CV-2141).

62. Ntsebeza and Digwamaje Amended Complaint, *supra* note 6, at 2–4.

63. *Id.*

64. *Id.*

65. *Id.* at 2–4, 12–13.

66. *Id.* at 20–23, 25–26, 31–32, 39–41.

67. *In re South African Apartheid Litig.*, 617 F. Supp. 2d 228 (S.D.N.Y. 2009).

apartheid or expressed anti-apartheid views, subjecting employees to dismissal, arrest, intimidation, detention, and torture.<sup>68</sup>

For example, plaintiff Msitheli Wellington Nonyukela was a Daimler employee from 1983–87 and was active in the union. In 1985, Special Branch officers detained Nonyukela and then transported him to the Daimler plant, where Daimler’s head of security accompanied them to Nonyukela’s locker to retrieve documents. Returning to the Special Branch station, officers placed a bag full of water over Nonyukela’s head to suffocate him, then questioned him about the whereabouts of other Daimler shop stewards who had allegedly left the country. The Special Branch said that Nonyukela’s job at Daimler was at risk if he did not comply with their demands. Daimler’s head of security then entered the Special Branch interrogation room and reiterated that Nonyukela’s job would be in jeopardy if he did not provide information to the Special Branch. After Daimler’s head of security left, the Special Branch officers resumed torturing Nonyukela. That evening, they forced him into a car and drove to a dam where they threatened to kill him by dropping him off a cliff over the reservoir. They said no one would know about his murder because there would be no evidence.<sup>69</sup>

We also detailed how these automotive companies produced specialized military vehicles, including armored trucks and the heavy personnel carriers known as “Hippos,” for use by the South African Defense Forces and the Special Branch.<sup>70</sup> Hippo was both a specific mine-protected armored personnel carrier as well as a catch-all term used to describe various models of armored vehicles—including the Hippo, Casspir,<sup>71</sup> Buffel, and Nyala—used by the apartheid state to oppress and control the black population. The vehicles both symbolized apartheid’s repression and made possible numerous extrajudicial killings in the townships.

The compression of a number of vehicle types into the singular term “hippo” created a novel iconic image that could deliver, at a minimum, an intentionally simple and straightforward political message: “the state is occupying its black townships and using excessive force.” The striking image of these outsized police trucks . . . evolved into a simple code, a telegraphic sign for the military-style occupation of South Africa by its own army and police that the government denied.<sup>72</sup>

The automotive companies produced and supplied these vehicles in contravention of UN Security Council and U.S. sanctions designed to cut off the

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68. Ntsebeza and Digwamaje Amended Complaint, *supra* note 6, at 17–20, 23–30, 32–38.

69. *Id.* at 18–19.

70. *Id.* at 20–23.

71. The Casspir was built on a Bedford (GM) chassis and relied heavily on Mercedes-Benz (Daimler) parts, including the engine. See *Casspir*, MILITARY TODAY, <https://perma.cc/7JHW-YK92>.

72. John Pepper, *Mellow Yellow: Image, Violence, and Play in Apartheid South Africa*, in *VIOLENCE AND NON-VIOLENCE IN AFRICA* 141, 149 (Pal Ahluwalia et al., eds., 2007).

supply of such vehicles to the South African security forces. As early as the 1960s, international and U.S. sanctions regimes had made clear that vehicles provided to South African security forces played a central role in apartheid, including the violent oppression of the black South African population.<sup>73</sup> Yet despite sanctions and international condemnation, the defendants made policy, management, investment, sales, and operational decisions to supply vehicles to the security forces and police. These vehicles were essential to suppress, control, and attack civilians and anti-apartheid activists in the townships, allowing the security forces to patrol, target, and kill civilians and activists with less threat to their own safety. Suing the manufacturers of these armored vehicles carried immense symbolic power, essentially putting on trial an object that embodied apartheid-era terror and oppression: “images of the armored truck were potent signifiers, as synecdoche, of the massive presence of the state war machine in the daily lives of South Africans living under apartheid.”<sup>74</sup>

With respect to IBM, the complaint brought claims that IBM facilitated the implementation of apartheid through denationalization. We explained how the apartheid government systematically denationalized millions of black South Africans, and how IBM’s active support and customized technology enabled this abuse.<sup>75</sup>

In order to make real its vision of a white-majority South Africa, the apartheid regime created fictitious “independent” homelands (or Bantustans) for specific ethnic groups, stripped black South Africans of their citizenship, and forced them to take new identity documents that assigned “citizenship” in a designated homeland. Bantustans were impoverished and isolated areas created for the very purpose of isolating and suppressing the black population. The Bantustan system facilitated discrimination on a mas-

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73. For example, in 1963, UN Security Council Resolution 181 called on states to stop the sale and shipment of military vehicles to South Africa. *See* S.C. Res. 181 (Aug. 7, 1963). In 1970, UN Security Council Resolution 282 condemned South Africa’s continuing disregard for international law and reaffirmed a policy of withholding the supply of all vehicles and equipment to South African armed forces and paramilitary organizations. *See* S.C. Res. 282 (July 23, 1970). In 1971, the U.S. Department of Commerce enacted regulations stating: “In conformity with the United Nations Security Council Resolution of 1963, the United States has imposed an embargo on shipments to the Republic of South Africa of arms, munitions, military equipment, and materials for their manufacture and maintenance.” Domestic and Int. Bus. Adm. 15 C.F.R. § 385.4 (1977). In 1977, UN Security Council Resolution 418 mandated that all States should “cease forthwith any provision to South Africa of arms and related matériel of all types, including the sale or transfer of . . . military vehicles and equipment, paramilitary police equipment, and spare parts of the aforementioned, and shall cease as well the provision of all types of equipment and supplies and grants of licensing arrangements for the manufacture or maintenance of the aforementioned.” S.C. Res. 418 ¶ 2 (Nov. 4, 1977). The resolution further called upon States to “review all existing contractual arrangements with and licenses granted to South Africa relating to the manufacture and maintenance of . . . military equipment and vehicles, with a view to terminating them.” *Id.* ¶ 3. In 1986, Congress passed the Comprehensive Anti-Apartheid Act, which also prohibited the export of vehicles for the use of South Africa government entities associated with apartheid. Botha Second Amended Complaint, *supra* note 47, at 34.

74. Peffer, *supra* note 72, at 142.

75. Ntsebeza and Digwamaje Amended Complaint, *supra* note 6, at 2–3, 15, 38–41; *see also* Botha Second Amended Complaint, *supra* note 47, at 6–9, 56–70.

sive scale, depriving black South Africans not only of their citizenship but also of associated rights—the ability to move and travel freely in South Africa, obtain work and participate in the South African economy, access education, health care, and pensions, open bank accounts or acquire loans, and build homes or run businesses. Whole communities were forcibly uprooted and removed to isolated, inhospitable, impoverished rural areas to which they had no prior connection.<sup>76</sup>

As we alleged, IBM produced race-based identity documents for at least one homeland government, Boputhatswana. IBM developed, customized, sold, and maintained critical computer systems, and sorted and stored information in databases, allowing the state to effectively and efficiently institutionalize apartheid by tracking and separating the races. By supporting and implementing this fictitious administrative separation through the creation of the identity card system, IBM purposefully provided an essential tool to institutionalize apartheid.<sup>77</sup>

Denationalization of South African citizens in Boputhatswana had a profound impact on their lives. For example, plaintiff Kgosi Lekose Shole was the chief of Botshoale, a collection of three villages that formed a self-sustaining community. They had sheep and chickens, the area was fertile, and they grew crops for their own consumption. Some families who were particularly successful had tractors, or sold cattle to buy other goods. A river ran through the village so there was plenty of water and no need for boreholes. The soil was good for making the mud bricks used to construct houses, as well as the primary school and high school that the community built for itself. But in the 1970s, the South African government told the community that they were a black spot in a white area and they had to move. Laws had been passed, and to show they were serious the government began to number the houses. Just before Boputhatswana was made independent, Hippos, riot police, and soldiers arrived to forcibly remove the community to Ramatlabama. As Kgosi Shole explained, “It was very hard when we arrived. This was a wild area only meant for animals, not for people.” Officials from the Boputhatswana government told the community that as Tswana-speaking people they had forfeited their South African citizenship and would form part of Boputhatswana. They were forced to apply for the Boputhatswana ID document and abided because they felt they had no choice. The community had seen what happened to those who refused to take the Boputhatswana ID: people were labeled communists and arrested, their houses were bulldozed, their furniture was left outside, and their possessions were burned. In order to access pensions and all social services, to register births, to go to school, to travel—to exist—one had to take the Boputhatswana ID.

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76. Botha Second Amended Complaint, *supra* note 47, at 6–7.

77. *Id.* at 67–70.

Plaintiff Solly Bokaba grew up in the village of Dilopye, a farming and livestock community near Hammerskraal. His village was forcibly removed, or “unloaded,” into Boputhatswana in 1976. His parents had to come home from South Africa, where they were working, to take the Boputhatswana ID. By the time he was old enough to get his own ID, Boputhatswana had surrounded Solly, and he had no choice. In high school, he had to carry the Boputhatswana ID to “justify [his] existence there” and access education, even though the border between South Africa and Boputhatswana was “just imaginary.” He could feel how “the [Bopuhatswana] education system was meant to blunt the young people. . . . One of the worst forms of killing people is denying them education. Of the forty people that started school with me, only three finished matric.<sup>78</sup> There was nothing good about self-development in the Bantustans. The system destroyed people.” The end of apartheid meant that his family could finally reclaim their identity. “I remember the excitement of my mother to go back to South African Home Affairs and get her green [South African] ID document. It was a real liberation. People felt their humanity again. It was such a liberation for her to throw away that grey document. They felt like they were taking their South African identity back.”<sup>79</sup>

IBM’s contribution to this oppression was no small thing. The company’s role was not simply that of a corporation doing business with a repressive regime or unwittingly allowing its technology to be used for nefarious purposes. The complaint detailed how IBM developed and tailored hardware and software—both a machine and a program—to produce the Boputhatswana identity documents; trained homeland government employees in an IBM-specific programming language; and helped troubleshoot, maintain, and repair hardware and operating systems. IBM’s specialized technology was essential to the government’s pervasive control over virtually every aspect of black South Africans’ existence.<sup>80</sup> These actions contravened U.S. sanctions that banned exports of computers, software, and technology to the South African and homeland governments to administer apartheid.<sup>81</sup>

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78. In South Africa, “matric” refers to the final year of high school, and to the exams and requirements necessary to qualify to enter university.

79. Kgosi Leoksoe Shole and Solly Bokaba were both named as plaintiffs in the 2014 proposed amended complaint, but not in the 2008 amended complaint. See *Botha Second Amended Complaint*, *supra* note 47, at 13–14, 70–71.

80. *Id.* at 56–73.

81. For example, in 1978 the Carter administration promulgated new, more stringent regulations which established “a complete embargo on knowing export and reexport of all commodities and technical data of U.S. origin to the South African military or police.” Mawell J. Mehlman, Thomas H. Milch & Michael V. Toumanoff, *United States Restrictions of Exports to South Africa*, 73 AM. J. INT’L L. 581, 589 (Oct. 1979). This new export ban applied not only to military-related commodities but to all items, “including technical data and consumer goods.” *Id.* at 589–90; 43 Fed. Reg. 7311 (1978). President Reagan also issued an executive order in September 1985 banning “All exports of computers, computer software, or goods or technology intended to service computers to or for use by any of the following entities of the Government of South Africa: . . . (6) The administering authorities for the black passbook and similar controls; (7) Any apartheid enforcing agency; (8) Any local or regional government or ‘home-

### *The Mothers of Duncan Village*

*Large scale police shootings of demonstrators—in Mdantsane, Langa, and Duncan Village—turned 1985 into a year of particular unrest in the Eastern Cape.*

*Human rights lawyer and activist Victoria Mxenge was buried on August 11, 1985 in her home village, about 60 kilometers from Duncan Village. A Security Branch hit squad assassinated her, just as the Security Branch had tortured and killed her husband Griffiths Mxenge several years earlier.<sup>82</sup> Ten thousand people attended her funeral which, like others of the era, served as both memorial and political rally, punctuated by addresses demanding troops pull out of the townships and Mandela be released from prison. Violence broke out as mourners returned to Duncan Village.<sup>83</sup>*

#### *Nonkululeko Sylvia Ngcaka*

*Nonkululeko Sylvia Ngcaka was in King William's Town, about 60 kilometers west of Duncan Village, caring for her sick mother and her own twin babies. Her other children, including eight-year-old Thembekile, were at home in Duncan Village with her siblings.*

*Nonkululeko's father arrived to deliver the news that Thembekile had been shot. "I thought to myself, 'My father must be lying to me that my son has been shot. I cannot survive if he has been shot.'"*

*Thembekile had been playing with other children behind the family home on Douglas Smith Highway, the main road through Duncan Village. One of the children was shot in the head, one in the knee.*

*Thembekile had been hit in the abdomen. When Nonkululeko and her husband were able to speak with the doctors at Frere Hospital, where Thembekile was being cared for, they were told he had been struck by small bullets that looked like gravel.*

*Nonkululeko traced the incision on her own body as she recalled how, despite an operation "where they cut him open from the top of his chest down to his stomach," the bullets could not be removed. So the doctors discharged him.*

*"When he came home he was not right. He could not eat normally. When the sun was hot he would become too weak."*

*Nonkululeko still carried the guilt of growing angry when Thembekile refused to eat. "One day after I gave him something to eat he vomited it all back up and there was something green." His stomach had grown swollen, so they took him to King William's Town Hospital for a second operation.*

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land' entity which performs any function of any entity described in paragraphs (1) through (7)." Exec. Order No. 12,532, 50 Fed. Reg. 36861 (1985). And in 1986, Congress passed the Comprehensive Anti-Apartheid Act, which prohibited the export of computers, software, and other technology for the use of South Africa government entities associated with apartheid and the extension of new loans or credit to such entities. See generally Comprehensive Anti-Apartheid Act, H.R. 4868, 99th Cong. (1986).

82. See 3 TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA REPORT 183–185 (1998) [hereinafter TRC REPORT VOL. 3]; TRC REPORT VOL. 2, *supra* note 53, at 229–30.

83. TRC REPORT VOL. 3, *supra* note 82, at 87–90, 232–34.

*But he never woke up. Thembekile died in March 1986. Nonkululeko blamed herself for not taking him to the hospital sooner, and for his suffering. "I wish that he had died at the time they shot him. I was really hurt that he still lived and he suffered the way he suffered."*

*When she testified before the Truth and Reconciliation Commission in 1996, her request was straightforward: to know who shot her son. She never got an answer. But she knew that Hippos were often standing outside her home, hovering. That five or more Hippos would patrol the township, and then return again to rest outside her home. She knew, from having seen it herself, that soldiers in Hippos often shot at people in the streets, forced their way into people's homes, and rounded up youths in hiding. She knew, from her brother who saw it happen, that soldiers in Hippos shot her son and the other children that day. And she knew, when the opportunity presented itself, that she wanted to be part of a case seeking to hold accountable the companies that manufactured those vehicles.*

### ***Nothini Betty Dyonashe***

*"I had a son called Vuyani Adonis. Apartheid took my only child."*

*Nothini Betty Dyonashe was direct and to the point when asked how apartheid impacted her life. This seemed to be her way, to convey information as quickly and succinctly as possible. She was a compact woman, with close cut hair and searching eyes, and she lived in Duncan Village's C Section in a single room in that was both tidy and over-filled with her possessions.*

*Vuyani was thirteen years old in 1985 and attended school in Chalumn, a rural area where he stayed with his grandmother. Nothini didn't know that Vuyani was on his way to Duncan Village to fetch his school books. She was at work as a domestic. When she arrived home that afternoon, his body had already been removed.*

*"I collapsed when I heard what had happened." Her neighbor had seen it all, and told her how Vuyani was shot from a Hippo, by troops who shouted at people as they passed by the house.*

*Before the massacre, the security forces always roamed the community. Hippos and Casspirs were part of the landscape, haunting the street corners of Duncan Village. They were bulky, hulking vehicles, with a body that sat high above the ground to deflect mines, making their appearance on a residential street immediately intimidating and upsetting. "All were scared but we didn't know what would happen until that day."*

*Nothini sent her father to the mortuary to identify her child. He counted seven bullet wounds. She never saw the body.*

*Vuyani was buried in a mass funeral with twenty-two others who had been killed. Nothini explained that "The evidence was destroyed as a general matter. The community members took names but there was no investigation. There was no court case." So the Apartheid litigation offered another chance to seek justice for her son's death.*



### *Miriam Mandaba Mzamo*

*When Miriam Mandaba Mzamo came to testify before the Truth and Reconciliation Commission in 1996, the hearing had to continue over to a second day. She fainted the first time she appeared to speak. "Whenever I talk about it, it brings back the trauma," she explained.*

*"My baby was shot by the white guys when he was only fifteen years old." It was March of 1986. Duncan Village was "not quiet, but it was not as it was in 1985." The Hippos "were being driven up and down in the streets and there was still this confrontation between the white people and our children and people. Because whenever the soldiers would come across our people, they would shoot."*

*Miriam was "in black clothes," still mourning the recent death of her husband, but she had gone to work that day. Schools were on holiday, though, so her son Bubele Benjamin Mzamo had stayed home to play ball with a friend.*

*A neighbor witnessed it all:*

*I heard shooting and I was so worried because I had sent my son to another house. I jumped outside and saw them shooting outside the other house. There were young boys there. . . . I was holding my hands together in front of me because I thought it was my son as I had sent him for a phone book. The Hippos reversed and there were people there looking. They had shot the two boys. One of the boys was Bubele Mzamo. I ran straight there. The head was down. I held his hand and a man and a car came to take him to the hospital. I took Bubele. He was bleeding from a hole behind his ear that was pumping out blood. I was wet with blood down my whole front. I took his arms and the man took his legs. He was bleeding everywhere; it was just full with blood. At the hospital they said they were both dead.*

*When Miriam arrived home that day, the windows of her house were opened but "I couldn't see {Bubele} in his usual place. And I asked the neighbors about my son's whereabouts. They simply looked at one another, but this did not send any message to me as to what had happened to my son."*

*So she asked another girl from the neighborhood. "I could see that she wanted to cry, but wouldn't tell me what had happened and I was sitting at the doorstep at that time. But nothing rang a bell to me that my son had died."*

*Miriam was taken into a neighboring house. "That is where I was told the truth about my son."*

*For Miriam, "What hurts the most is that he was an innocent boy, playing with his friends." But he was old enough to know that Hippos meant shooting, so he ran when he saw them. "This is what actually hurts me, because even when my son was running away, the soldiers pursued until they got hold of him. . . . They followed him until they were able to shoot him again and then he died."*

*Miriam joined the Apartheid litigation because she hoped for some measure of accountability against the companies that built the Hippos. But she was under no*

*illusions about what the case could deliver. She knew that no court decision would change the past. "It won't bring back my child."*

## II. CRITIQUES OF HUMAN RIGHTS LITIGATION, AND GOALS OF THE APARTHEID CASE

### A. Reflecting on Critiques of Human Rights Litigation

Before considering the goals of the *Apartheid* suit, this section steps back to summarize and reflect upon some prominent critiques of human rights litigation. Will these critiques ring true in the context of the *Apartheid* litigation? Or does the case demonstrate that these critiques, while powerful and important, are not always fair or accurate?

#### 1. Not So Useful, Especially When Seeking Systemic Change

One prominent critique of human rights litigation in general, and ATS litigation in particular, is that it is not particularly "useful in advancing the cause of global human rights."<sup>84</sup> According to this argument, at best ATS litigation provides an avenue for courts to grant relief to individuals who suffered gross human rights abuse. But the obstacles to accessing U.S. courts are significant, requiring knowledge that such suits are possible, resources to file and litigate a case, and the type of underlying human rights abuse that courts are willing to recognize. Even for individuals able to bring suit against their perpetrators, cases often take years to litigate, and few ATS cases have resulted in favorable verdicts or settlements for the plaintiffs.<sup>85</sup>

In addition to questions about the utility of human rights cases for individual claimants seeking justice, critics see little evidence that such litigation "has put a dent in the world's suffering"<sup>86</sup> or made any broader impact.<sup>87</sup> The legal framework under which ATS suits are litigated means that such cases must focus on a particular, narrow set of abuses like genocide, crimes against humanity, or extrajudicial killings, at the expense of a focus on social and economic inequality. And it may be these background

84. Samuel Moyn, *Why the Court Was Right About the Alien Tort Statute*, FOREIGN AFFAIRS (May 2, 2013).

85. The two most well-known corporate ATS success stories are *Doe v. Unocal*, 248 F.3d 915 (9th Cir. 2001), which resulted in a settlement for an undisclosed amount in 2004, and *Wiwa v. Shell Petroleum Dev. Co. of Nigeria*, 335 F. App'x 81 (2d Cir. 2009), which resulted in a settlement of \$15.5 million in 2009. See Marc Lifsher, *Unocal Settles Human Rights Lawsuit Over Alleged Abuses at Myanmar Pipeline*, L.A. TIMES (March 22, 2005), <https://perma.cc/SYP7-BDDZ>; Jad Mouawad, *Shell to Pay \$15.5 Million to Settle Nigerian Case*, N.Y. TIMES (June 8, 2009), <https://perma.cc/QF2G-G8MP>.

86. Moyn, *supra* note 84.

87. See, e.g., Catherine Albiston, *The Dark Side of Litigation as a Social Movement Strategy*, 96 IOWA LAW REV. BULLETIN 61, 76 (2011) (noting "a longstanding critique of litigation as essentially winning the battle, but losing the war. In this view, litigation strategies may win some short-term advantages for the parties, but by working within the system such strategies help legitimate the larger structure of domination through legal ideology and law. The law, in this view, helps stave off revolution and justify the status quo of unequal social relations by providing nominal individual remedies for unequal treatment.").

norms and economic conditions which do far more damage, or which lay the foundation upon which other abuses flourish.<sup>88</sup> Given existing legal frameworks and the institutional limitations of the legal system, the argument goes, human rights cases do not lead to sustained, structural change—particularly with respect to underlying political and economic challenges.<sup>89</sup>

A variation on this critique would add that because the remedies sought through civil human rights litigation focus on accountability and compensation, the cases are primarily backwards-looking rather than preventative. As a result, even when a case is successful, its impact is inherently limited because it focuses more on seeking justice for a specific harm or event, rather than on deterring future violations, or motivating advocacy campaigns or organizing efforts that could sustain longer-term, structural change.<sup>90</sup>

## 2. *Too Court-Centric, Marginalizes Other Options*

Bringing human rights abusers to court requires framing history in a certain, specific way. The stories that the law can tell, and the suffering that it can address, are limited. Plaintiffs must present their claims in conformity with existing precedents and seek certain proscribed types of relief. As a result, litigation often over-simplifies or atomizes events in order to conform with legal understandings, in a way that can be particularly damaging to struggles for social justice:

The need to fit into the legal world fragments the interconnected struggles of a social movement into discrete issues, each time channeling the movement into a single direction. The inherent links between projects, as well as between various social reform groups, are conceptually obscured because the issues are to be framed as distinct legal claims.<sup>91</sup>

This critique is of particular concern for societies in transition, like post-apartheid South Africa, where there is a significant risk that prominent litigation—with an emphasis on only certain subsets of harms and certain types of victims—will distort memories, shape future conceptions of history and truth, and interfere with the process of creating a comprehensive, shared understanding of the nation's past.

To the extent that an issue cannot be framed in legal terms that courts can tackle, it may be ignored entirely. Problems that are hard to formulate as legal claims on behalf of individuals—collective problems, structural

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88. David Kennedy, *The International Human Rights Movement: Part of the Problem?*, 15 HARV. HUM. RTS. J. 101, 110, 118 (2002).

89. Moyn, *supra* note 84.

90. See, e.g., Beth Van Schaack, *With All Deliberate Speed: Civil Human Rights Litigation as a Tool for Social Change*, 57 VANDERBILT L. REV. 2305, 2331–32 (2004).

91. Orly Lobel, *The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics*, 120 HARV. L. REV. 937, 951 (2007).

problems—risk being overlooked. The result of these pressures is the well-recognized risk that litigation will co-opt social mobilization and organization. In other words, the mere adoption of a litigation strategy can result in a limited approach that marginalizes other options. Through the process of voicing grievances in terms that courts will recognize, plaintiffs and communities risk stunting their own aspirations.

### 3. *Resource-Intensive*

A related reason that human rights litigation might limit other options for seeking justice and change is simply that it is so resource-intensive—financially expensive and time consuming, requiring human capital and expertise, and emotionally exhausting. Because litigation requires such a significant investment of time, energy, and money, critics contend it will “inevitably decrease the ability of a movement to engage in alternative courses of action.”<sup>92</sup> The demands of litigating a case may overwhelm both the plaintiffs and their attorneys, diverting attention from alternate avenues towards justice. Why dedicate precious human and financial resources to the long, unpredictable, and often frustrating process of litigating these cases, especially when the outcome is so uncertain, and when other options may ultimately prove more fruitful?

### 4. *Too Much Power in the Hands of Lawyers*

Another concern, and perhaps the most serious for those who aspire to litigate human rights cases using a community lawyering framework, is that these cases place too much power into the hands of attorneys. It is lawyers—trained elites with degrees that confer authority and the kind of knowledge valued by courts—who can speak the language of the law, and who ultimately shape the stories of violations into documents and arguments for courts. A lawyer’s role is often seen as one of translating clients’ stories into the distinct language of the law. But this very act of translation can marginalize or even silence the voice of the client, stripping out nuance and detail in order to present a clear, compelling narrative to the court. And if an attorney is removed from the collective actions or grassroots efforts of the communities that she represents, she may misunderstand the priorities and goals of those communities, prioritizing her own strategic vision over that of her clients. There is an obvious danger that lawyers, even those driven by altruistic motives to support and assist their clients to achieve their desired outcomes, will become the face and voice of a movement, coopting and controlling decisions, and shaping outcomes in ways that hinder organic client-led action and create a level of dependency.

This critique about the outsized role of the attorney is linked to the concern that litigation undermines the possibility of other advocacy or organiz-

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92. *Id.* at 949.

ing activities that could lead to sustainable solutions. Social movements may overestimate what kind of change the lawyer, and the law, can deliver, particularly because the law is often perceived as a source of authority and an engine of social reform. If law comes to occupy the field of transformative possibilities, and if clients and communities in turn rely upon lawyers to help them navigate that field, the vision and goals of a social movement may be significantly curtailed. The turn to litigation may “deradicalize both the message and the objectives of a movement.”<sup>93</sup> Those seeking change may succumb to the lure of litigation and the promise that the lawyer can deliver certain outcomes, even when other channels might provide more powerful avenues for meaningful change.<sup>94</sup> Particularly when a movement’s goal is one of radical change, legal action may crowd out other possibilities by presenting “moderately reformist” and “status-quo-ish” paths as the only alternatives.<sup>95</sup> In short, litigation may substitute for other, better forms of social engagement, with results that fall far short of what a client or a community hoped to achieve.<sup>96</sup>

### B. Goals of the Apartheid Litigation

Both the legal team and the plaintiffs had multiple overlapping goals at the time the amended complaint was filed, as well as over the years of litiga-

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93. Albiston, *supra* note 87, at 74.

94. See Lobel, *supra* note 91, at 955.

95. *Id.* at 956.

96. For some responses to these critiques, see Sandra Coliver, Jennie Green, and Paul Hoffman,  *Holding Human Rights Violators Accountable by Using International Law in U.S. Courts: Advocacy Efforts and Complimentary Strategies*, 19 EMORY INT’L L. REV. 169, 174–75 (2005) (asserting that ATS cases “have contributed to the worldwide movement against impunity by (1) helping to ensure that the United States does not remain a safe haven for such perpetrators, (2) holding individual perpetrators accountable for human rights abuses, (3) providing the victims with some sense of official acknowledgment and reparation, (4) contributing to the development of international human rights law, and (5) building a constituency in the United States that supports the application of international law in such cases and an awareness about human rights violations in countries in all regions of the world. It also appears that these cases, when taken together with other anti-impunity efforts around the world, are also helping to (6) create a climate of deterrence and (7) catalyze efforts in several countries to prosecute their own human rights abusers.”); Beth Stephens, *The Curious History of the Alien Tort Statute*, 89 NOTRE DAME L. REV. 1476, 1489–90 (2014) (stating that while the cases are often criticized as merely symbolic, they have provided survivors the opportunity to present their claims in court, create a record of their suffering and the defendant’s conduct, and strengthen the rule of law); *id.* at 1542–43 (noting that although ATS cases “have produced only a small number of enforceable judgments, they have all contributed to the implementation of international human rights norms by strengthening substantive norms, . . . putting corporations and government officials on notice that they may be held accountable for abuses, and increasing global awareness of the potential consequences of human rights violations.”). On models that mitigate the power of lawyers, see generally Charles Elsesser, *Community Lawyering - The Role of Lawyers in the Social Justice Movement*, 14 LOY. J. PUB. INT. L. 375 (2013); Louise G. Trubek, *Critical Lawyering: Toward a New Public Interest Practice*, 1 B.U. PUB. INT. L.J. 49 (1991); William P. Quigley, *Reflections of Community Organizers: Lawyering for Empowerment of Community Organizations*, 21 OHIO N.U. L. REV. 455, 455–56 (1994); Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1 (1990); Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L.J. 2017 (1991); Gerald P. Lopez, *The Work We Know So Little About*, 42 STAN. L. REV. 1 (1989); Gerald P. Lopez, *Lay Lawyering*, 32 UCLA L. REV. 1 (1984).

tion. Some of these goals became clearer to us along the way, or came to take on a greater sense of importance through the process of working on the case together. These goals can be roughly divided into three broad categories.

### 1. *Plaintiff-Centered Goals*

One set of goals focused explicitly on the plaintiffs' interests. To me, these goals were the primary driving force in the case. The legal team attempted, as much as possible in a transnational context, to adopt a community lawyering model in which the interests and ideas of the plaintiffs would take primacy in strategic thinking around the case, and in which the attorneys would play a supportive role. However, this model poses numerous challenges, particularly in a case like this one. Many members of the legal team—and the courts themselves—were located in the United States rather than South Africa. Many of the plaintiffs lived in remote or rural areas or did not have easy access to telephones or email. Many different communities and plaintiffs were involved, each with varied visions and interests related to the case.

Nevertheless, one clear goal shared by the named plaintiffs was to ensure that the case reinforced their own agency. It was important that the case be litigated in a way that allowed the plaintiffs to retain ownership over their stories and lived experiences, as well as over the litigation itself. The plaintiffs should be the decision-makers about how their experiences would be framed for the courts, when to push forward in the face of legal obstacles, how to engage with the defendants, governments, and other key actors, and when—if ever—the case was no longer worth pursuing.

A related goal articulated by many named plaintiffs was to use the case as an opportunity to tell their stories. For some plaintiffs, this was very much a matter of personal catharsis. Some found it gratifying and healing to share their stories with the lawyers who interviewed them as the case was assembled, and also with the courts, the media that covered the case, each other, and their families. Some of the plaintiffs had not previously spoken extensively about their experiences during apartheid, even to members of their own families, and said that they felt a sense of relief in finally having an outlet, and a sense of release and satisfaction at having aired their stories publicly.<sup>97</sup> Others found it difficult and painful to tell their stories, and the

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97. Plaintiffs in other ATS cases have movingly described how telling their stories helped their own healing process and offered a sense of pride. For example, Juan Romagoza Arce, a Salvadoran torture survivor and plaintiff in *Arce v. Garcia*, 434 F.3d 1254 (11th Cir. 2006), explained, "When I testified a strength came over me. I felt like I was in the prow of a boat and that there were many, many people rowing behind. . . . I felt that if I looked back at them, I'd weep because I'd see them again: wounded, tortured, raped, naked, torn and bleeding. So, I didn't look back, but I felt their support, their strength and their energy. Being a part of the case and having the opportunity to confront these generals with these terrible facts provided me with the best possible therapy a torture survivor could have." *No Safe Haven: Accountability for Human Rights Violators in the United States: Hearing Before the Subcomm. On Human*

legal team was certainly attuned to the risk of re-traumatization.<sup>98</sup> But many plaintiffs expressed the sentiment that it was still important to be part of the case because they wanted to tell the truth, and to have their own personal experience included as part of the larger historical narrative of the apartheid era. They were willing to revisit their suffering, even at great personal cost, because the act of surviving and speaking out was itself a victory. They also hoped that their stories could represent similar stories or experiences of others who did not or could not speak out.

In addition to the story-telling goal, the plaintiffs obviously sought some acknowledgment from the defendant corporations. Although many hoped for an apology, they were doubtful that such an explicit statement would ever be issued. However, they still believed that the companies might at least acknowledge their role—both in supporting the apartheid government and in irreparably harming the lives of so many South Africans—and take some responsibility for the mistakes of the past. This type of gesture, even if purely symbolic, would carry real power and was hugely important to many of the plaintiffs. Some focused primarily on the specific company where they had been employed. For others, the case was less about any single company and more about a broader system in which business and the apartheid state mutually supported each other. Even though only a handful of companies were named as defendants, it seemed possible that additional corporations that were actively involved in apartheid—although they had not been sued—would feel compelled by the suit to take affirmative steps to acknowledge and make amend for past harms.

Finally, in civil suits of this nature, there is also a potential goal of compensation. When individuals joined the suit as named plaintiffs, this was something that we always discussed—how a favorable verdict or settlement could potentially result in monetary compensation. But the plaintiffs were not significantly motivated by this goal. They understood that it was a remote possibility. Many of them had been disappointed by past, unfulfilled promises of reparations or compensation and were wary to raise their own expectations, which might never be met. In addition, to some plaintiffs it felt like any compensation would be a somewhat empty gesture. In part this was because it would be offered so many years after the fact, when people

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*Rights and the Law Comm. on the Judiciary*, 110th Cong. 88 (2007) (testimony of Juan Romagoza Arce, Executive Director, La Clinica del Pueblo, Plaintiff, *Arce v. Garcia*).

98. In addition to being trained in trauma-sensitive interviewing techniques, lawyers working on human rights cases may wish to partner with medical professionals who have experience with survivors of human rights abuse. For some individuals, participating in a multi-year litigation effort and retelling their story may be destructive, while for others it may be empowering and remedial. For example, the Director for the Center for Victims of Torture has explained that torture survivors “who are able to take their cases to court create a collective voice for all torture victims, bringing the issue of human rights atrocities into the public eye. This opportunity also presents a means for psychological healing of torture’s wounds by breaking the silence, confronting perpetrators and refuting impunity.” Coliver, *supra* note 96, at 181–82 (quoting Mary Fabri, *Torture and Impunity: Legal Recourse May Lead to Healing*, 16 TRAUMATIC STRESS POINTS (2002)).

had less opportunity to benefit from it. In part this was because any compensation would be given not because the companies had seen the error of their ways and genuinely wanted to make people whole, but rather because they had been compelled into action by a lawsuit. There was also a clear sense that money would never be enough to truly compensate for the damage anyway.

Perhaps most importantly, compensation was not a primary motivator for the named plaintiffs because they understood that the case was about a broader class of individuals, far beyond just themselves. None of them joined the suit hoping that a windfall was coming their way. They joined because it felt like the right thing to do. The case offered them an opportunity to use their own experiences to harness the past so that it would not be forgotten or repeated, to perhaps change corporate behavior, and to give back to their own communities. When many of the plaintiffs spoke about the case, they spoke the language of justice. They spoke about what was right and wrong, the importance of apologies, and making amends. This justice was not necessarily, or even primarily, about guilt or about money—it was about acknowledging the truth and taking concrete steps to repair the harm that had been done.

## 2. *Systemic, Normative, Rule of Law Goals*

The *Apartheid* suit was strategic impact litigation. Although the legal team focused on the specific interests of our clients, one of their stated interests and one of our collective, explicit aims was to have a broader impact beyond those individuals named in the suit. This goal encompassed not only South Africans seeking accountability and truth-telling for the harms of apartheid, but also other survivors of human rights abuse—particularly abuses facilitated by corporations—around the world, who might be motivated by the suit to seek relief for themselves. Our case might inspire similar efforts in other countries or contexts, modeling what this kind of suit could look like and helping creative advocates consider whether similar litigation could be pursued in their own legal system, or whether legislative reform could open space for such litigation. We fully recognized that litigation was only one among many possible tools for social change but believed that the case could work in concert with other strategies, such as advocacy and mass mobilization, as part of a larger effort to reform corporate behavior. We hoped that the case would provide further impetus to a movement, already well underway, to advance corporate social responsibility in general.<sup>99</sup>

We also sought, through the case, to further develop a growing body of law around corporate accountability for human rights abuse, setting precedents that other, similar suits could build upon. As already noted, the standard for aiding and abetting liability was an open legal question when the

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99. See *infra* Part III.B.4.



amended complaint was filed. The case would also allow us to explore novel legal questions around international comity and case-specific deference and, as the case progressed, about the very issue of corporate liability itself. In addition, we sought to persuade a U.S. court that both denationalization and apartheid, as a crime against humanity, constituted well-recognized violations of international law.

A further goal was to use the case to reinforce certain universal principles, including accountability for gross human rights violations such as torture, extrajudicial killing, and crimes against humanity. Linked to this goal was the symbolic importance of the case. It could help demonstrate to the world that U.S. courts respected these legal norms and were willing to hold even U.S. actors accountable for human rights abuse. In other words, the case could reinforce that the United States respected the rule of law. This seemed an especially important proposition at the time the amended complaint was filed in early 2008, as the United States had flouted basic principles of international law in the years following 9/11,<sup>100</sup> and remains equally salient today, as the current U.S. administration exhibits little respect for international law or norms.

Finally, although the history of apartheid and its attendant violations is well known in South Africa and relatively well known in the United States, the role of corporations—and particularly of American corporations—in building and supporting the apartheid state seemed largely absent from that history. We sought to raise awareness around this particular issue. While we intended and expected that the case would have an impact in South Africa, it was also important for Americans to be informed about and better understand what had been done by our own corporate citizens during the apartheid era.

### 3. *Defendant-Focused Goals*

A third and final set of goals focused on the defendant corporations, and these goals can be broken into two categories: backward-looking and forward-looking. The primary backward-looking goal was accountability. We sought to hold the defendants legally liable for their actions by obtaining a judgment or a settlement for the plaintiffs. But even if a verdict could not be achieved, the suit itself was a form of accountability. These corporations would have to repair the harm to their reputations and the shame associated with the devastating facts alleged in the complaints. These companies would have to confront the stories of our plaintiffs, invest the time and resources to

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100. To note but two examples, White House Counsel Alberto Gonzales determined that the Geneva Conventions were quaint and obsolete, and the U.S. Department of Justice prepared legal memoranda that distorted the legal definition of torture and purported to redefine U.S. legal obligations under the Convention against Torture, in order to justify torture and other cruel, inhuman, and degrading treatment against individuals held in Guantanamo Bay, Afghanistan, Iraq, and CIA black sites around the world. See *A Guide to the Memos on Torture*, N.Y. TIMES, <https://perma.cc/KJ5T-QTP3>.

defend themselves against searing allegations, and answer serious questions—from us, but also potentially from the media, from shareholders, and from other interested actors—about their past behavior. Over the course of the litigation, we could expect interim decisions from the courts that could reinforce and recognize our plaintiffs' claims, and undermine the defendants' denials. So even if we never won a favorable verdict, we were optimistic that the case would still accomplish some measure of public accountability.

The primary forward-looking goal was deterrence. We sought to change the future behavior not only of the handful of corporations named as defendants, but also of other major multinationals that might more carefully consider collaborating with or offering support to facilitate abuses of fundamental rights. If corporations understood that they could be sued and held accountable when they facilitated human rights violations, perhaps they would think twice about their actions. This goal connects to the systemic and normative goal already noted above, related to buttressing corporate social responsibility principles and practices more broadly.

### *Dorothy Molefi*

*She has forgiven the architects of apartheid, but she will never forget that day: June 16, 1976. She remembers that it was a Wednesday. She remembers that it dawned cold and brisk. She remembers telling her son to put on his winter clothes, but he wore shorts instead. She didn't know that pupils were organizing a march to protest against Afrikaans becoming the mandatory language of instruction. She didn't know that police would open fire on them. She didn't know that her son, Hector Zolile Pieterse, aged 12 years and 10 months, would be among the first killed.*

*After seeing Hector off to school, Dorothy Molefi had gone to visit her sister. "People started saying there were riots, but no one told me what was going on. When I reached home, I was told to get into the car, but no one told me why, what was going on." The situation was confusing and chaotic. They had no television to watch for news. But Dorothy saw a newspaper later that day, at her brother's house. She thought Hector might have been injured. "The next morning, I went to the police station. The police said that those who were looking for children must come back on Monday. On Monday, I found him dead in the government hospital."*

*When it was published around the world, the photo of her dying child—being carried in the arms of a fellow student, his anguished sister screaming at their side—made Hector an enduring icon of the horrors of apartheid.<sup>101</sup> But to her he is not a symbol. He is a person. He was her only son.*

*And of course she misses him. She misses the way that he would tease her, jolly and always smiling. Because of him, their home was filled with laughter. He enjoyed karate and would put the family into fits of laughter by practicing his moves. He was*

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101. See Aryn Baker, *This Photo Galvanized the World Against Apartheid. Here's the Story Behind It*, TIME MAGAZINE (June 15, 2016), <https://perma.cc/4EAZ-TMYN>.

*clever. He loved school and hoped to continue his studies, perhaps becoming a lawyer one day.*

*After his killing, Dorothy remained in her house in the Meadowlands section of Soweto. She raised her five daughters, worked at Checkers, Woolworths, as a domestic, as a cleaner at Anglo American.*

*She tries not to think too often of how old Hector would be if he were alive, of the family he might have raised, of what his life might have become. She takes comfort that Hector's story is taught in schools across the country as part of South Africa's history, that he is remembered, that his death began to turn the tide towards international condemnation of the apartheid regime.*

### III. EVALUATING OUR EFFORTS

With the critiques and our goals in mind, this section evaluates the successes and shortcomings of the *Apartheid* litigation, and concludes by offering some modest lessons learned. While I hope to be clear-eyed in my examination of the case, I am well aware of my own inherent bias as an attorney who worked on it for so many years.

#### A. Shortcomings

There are undoubtedly ways in which we fell short of our aspirations, and examples where critiques of litigation were borne out in the *Apartheid* suit.

##### 1. *Exclusion of Certain Harms, Survivors, and Stories*

One particular challenge was posed by the need to narrow the claims in the amended complaints to meet the legal standards that the courts would impose. Accordingly, we focused our efforts on situations in which there was a tight nexus between the harm inflicted on a plaintiff and the actions of a defendant corporation, in which it would be possible to demonstrate that a corporation acted purposefully (not merely knowingly, in case the higher legal standard was adopted), and subsequently on claims in which there was a sufficient connection to the United States to overcome the presumption against extraterritoriality imposed by the Supreme Court in *Kiobel*. All of this meant that the plaintiffs and harms that became the foundation of the case presented a very limited subset of the human rights violations committed during apartheid.

In other words, many people who identify as victims and survivors of apartheid-era abuse could not be included in the suit. Obviously, the case was never intended to be a decisive accounting of all apartheid-era violations. But a survivor's feeling of exclusion from the case, particularly where her suffering during apartheid became integrally tied to her own sense of identity, could be extremely painful and risk opening old wounds or sowing divisions among members of a community. We discussed this issue often

with clients and witnesses, in an effort to ensure that people understood what the case was and was not about, why only certain individuals could be included as plaintiffs, and how the case was not intended to remedy all harms or to offer a comprehensive accounting of apartheid's victims and survivors. But, understandably, the explanation was not always satisfying.

Perhaps some sense of exclusion is inevitable in impact litigation, but it is still problematic. We recognized that our case was only one of many efforts to seek justice for apartheid-era harms, and that it could never tell the full story of apartheid or make all survivors whole—nor was it intended to. We deemed the violations suffered by our clients, and the broader classes that they sought to represent, serious and deserving of justice. The effort felt worthwhile, even if the best it could deliver was a partial justice, because the case offered an opportunity to add nuance and texture to the history, to tell additional stories, to potentially hold some of the responsible actors accountable, and to have a real impact for the individuals involved.

It is important to acknowledge that the attention this case received may have diverted focus from other stories. For example, the named plaintiffs who participated in the case did so because their experiences were powerful representations of the kinds of abuses that a U.S. court could find compelling, and that would meet the requisite legal standards. The automotive company plaintiffs had often been active, eloquent, and prominent figures during the apartheid era. This was, in part, why they became targets of the apartheid state. Their stories were representative in some ways but exceptional in others. There was always a risk that selecting certain individuals to represent broader classes would create divisions within communities of people who had suffered similarly. In the same vein, mothers whose sons were killed shared an experience that was far too common during apartheid. But I worried that the case portrayed women primarily as mothers who had suffered, rather than capturing the many ways in which women were active participants in the anti-apartheid struggle, not simply the mothers (or wives) of the main actors.

Finally, the stories that the case did tell were abridged and edited versions of the past, distilled down from lived experience through our extensive conversations with plaintiffs and witnesses, and then crafted—in large part by the attorneys—specifically for the courts. Although we consulted with the clients, many of whom reviewed portions of the complaints and briefs related to their specific experiences, the reality is that they did not have a robust opportunity to tell their own stories in their own voice.<sup>102</sup>

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102. If the case had proceeded to depositions or to trial, this concern would likely be less pronounced. Depositions and trials are often criticized as hostile or difficult places for survivors to tell their stories. But in my experience the opportunity to testify under oath, and particularly in court, can be an empowering and affirming process for survivors of human rights abuse, particularly individuals who have been waiting many years for that chance. Although testifying is, no doubt, stressful and emotionally draining, clients who I have worked with often say that it made them feel powerful and gave them a huge sense of pride to have a judge and jury listen so intently. In addition, I have been thoroughly impressed with, and

## 2. *Paths not Taken*

In addition to the case narrowing the stories that could be told and the people who could participate, many non-litigation options simply were not pursued. One important reason for this outcome was that, as already mentioned, our Clinic joined as co-counsel only after nearly six years of litigation. The decision about whether to pursue a court case or seek justice and accountability through other avenues had already been made. Our task was to litigate the case in the most responsible way possible, which we did by adopting a community lawyering framework and ensuring that the plaintiffs and the communities were the real drivers of decision-making, to the extent that was possible.

That said, we could have taken more time prior to filing the amended complaint to discuss, both within the legal team and among the plaintiffs and their communities, whether litigation was still the best approach, or whether other approaches could be adopted to compliment the litigation effort. From my perspective this is the real point at which the resource intensive critique comes into play. Although we talked often about the suit working in tandem with other forms of organizing and mobilization, we did not intensively pursue those other options, primarily because of extreme time pressure and a lack of human resources. Both in 2008 and again in 2014, we felt a responsibility to prepare the strongest possible amended complaint to increase the chances of success in court, which meant that time spent considering and pursuing other avenues—whether building a social movement or an advocacy campaign, directly engaging with the South African government, attempting to mediate or negotiate with the defendant corporations, or numerous other possibilities—sometimes felt like a distraction from our, and our clients', first priority.

However, had we spent more time considering and discussing these other options, our collective priorities might have shifted. But it is difficult to identify plaintiffs, craft theories of liability, and draft a complaint while simultaneously assessing whether that effort is the right option. It was also a challenge simply to determine who should be a part of these conversations to establish the best course of action: the plaintiffs from the original complaint, from the anticipated amended complaint, members of broader classes they represented, civil society organizations, activists who had been involved with other efforts to seek accountability for apartheid-era abuses, to name but a few. With the benefit of hindsight, it seems fair to say that more time and energy could have been spent weighing and potentially pursuing non-litigation strategies.

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moved by, the ability of survivors to own and tell their story, even under the daunting constraints of having to respond to an opposing counsel's questions.

### 3. *Limitations to Community Lawyering*

Another related shortcoming is that we were never able to firmly anchor the case within the larger South African struggle for accountability for apartheid-era abuse.<sup>103</sup> Such accountability efforts were and are ongoing, but the case often seemed to be operating on its own distinct path. Truly embedding the case within these other efforts would have been a way for many more people, including those who identify as survivors but could not become plaintiffs in the suit, to become involved in accountability-seeking efforts as active participants. Ideally, a case is only one component of a much broader strategy. However, in practice this kind of multi-pronged strategy would have demanded more time and human resources, and more members of our team to be present in the communities and other organizing structures, than we could muster.

In a transnational context, the hurdles to practicing a thick version of community lawyering are immense. At most, each member of the U.S. legal team was in South Africa for a couple of months in any given calendar year. While this allowed us to build and sustain deep, meaningful relationships with many of the named plaintiffs, the physical distance meant that we simply could not have the kind of ongoing presence in their lives or communities that would have been ideal. Further, although the South African attorneys and advocates were based in South Africa, they were no longer residing inside the communities at the heart of the litigation, nor did they have the time or capacity to spend regular, sustained time in those communities. At various moments throughout the case, we were able to hire young attorneys and researchers who worked in these communities for extended periods. But even then, the communities were disparate and disconnected; the plaintiffs from Port Elizabeth, for example, did not necessarily know or interact with the plaintiffs from the North West.

In short, there was no single person associated with the case who was consistently present in these communities throughout the litigation, and who could support the substantial organizing and advocacy work essential to

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103. *Khulumani*, the companion case to our own, was part of a broader ongoing social movement to ensure the South African government fulfills its commitments to healing, accountability, and reparations that began with the TRC process. However, while the legal teams on the two cases often collaborated on court filings and strategy, there was little parallel collaboration on organizing, advocacy, or government engagement. For an anthropological study of how the Khulumani Support Group engaged with and was shaped by the litigation process, see generally RITA KESSELRING, *BODIES OF TRUTH: LAW, MEMORY, AND EMANCIPATION IN POST-APARTHEID SOUTH AFRICA* (2017). She notes that, “[a]s a civil society group, Khulumani has partially emerged from the interaction with a legal logic, but it has generated political action that is the result of similarly situated people relating to one another, recognizing each other’s experiences of violence, and trying out new forms of sociality among themselves. In many instances, they have managed to successfully articulate their perspectives in the public space and modify dominant victims’ subject positions. Ultimately, new forms of the political have grown out of legal actions. The reason for the emergence of the political can also be disappointment with the law. This confirms that recourse to law is not inescapable; it is one possibility of articulation in the relation between the law and the social.” *Id.* at 199–200.

a multi-pronged strategy.<sup>104</sup> As a result, the reality was that despite our efforts to maintain regular contact with the named plaintiffs and the communities they represented, as well as to listen to and act upon a variety of their ideas surrounding the case and corporate accountability more broadly, we fell short of our ideals. The structures were never in place to implement a robust version of community lawyering, and we were not able to help build those structures from the United States. From my perspective, this was one of our greatest shortcomings as a legal team.

#### 4. *No Finding of Liability, and the Impact on Understandings of the Past*

Another failure was our inability to move the case into discovery or to secure a verdict. There is always a possibility that the law will evolve over the lifespan of a case, or that other cases being litigated simultaneously will set precedents that prove problematic. When a suit extends for many years, and when it implicates highly contested areas of law, that risk only grows. In our case, the law changed under our feet as the case was being litigated. At the start, the biggest legal question we faced seemed to be whether the aiding and abetting standard would be knowledge or purpose; in the end, the Supreme Court created a presumption against the extraterritorial application of the statute—something we did not anticipate in 2008—leading ultimately to the case's dismissal.

This outcome might initially seem to reinforce the critique that human rights litigation is not particularly useful, especially when seeking systemic change. The case lasted for more than a decade, consumed extensive time, resources, and emotional energy to litigate, and did not result in the courtroom victory we desired. However, a compelling argument can be made that this case, and others like it, shifted the corporate accountability landscape in ways that have had a meaningful and sustained impact. Expectations about corporate behavior and the institutions to regulate that behavior have improved significantly over the past twenty years.<sup>105</sup> While we did not achieve the verdict we sought against these defendants for these plaintiffs, the case contributed to building other frameworks which may deter corporations

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104. This example contrasts with another human rights case that our Clinic has litigated in U.S. federal courts for many years, *Mamani v. Sanchez de Lozada and Sanchez Berzain*, No. 07-22459-CIV, 2018 WL 2435173 (S.D. Fla. May 30, 2018). That case was brought by Bolivian citizens against Bolivia's former president and minister of defense for their roles in planning and overseeing a 2003 civilian massacre. In *Mamani*, the plaintiffs were part of a pre-existing victims' association, with its own organizing structure and conception of how a legal case would advance their broader goals. They were active in mobilizing independently of the legal team, were located within relatively close geographic proximity to one another, and the deaths at issue were all part of the same series of events which unfolded over several months, rather than disparate abuses committed over decades. In addition, one member of the legal team was a U.S.-trained, Bolivia-based attorney who worked closely with the plaintiffs throughout the course of the litigation, earning their trust and respect, and providing an essential connection between the community and the U.S.-based legal team. These were among the factors that facilitated a more vigorous community lawyering approach in that case.

105. For a more detailed discussion of this point, see *infra* Part III.B.4.

from future complicity in similar violations, or lead to accountability in other fora. The plaintiffs can take a measure of pride in this achievement. Although they sought justice for themselves and the classes they represented, the case was always about more than these particular harms, and despite our shortcomings the plaintiffs have played an important role in a broader deterrence effort.

Another profound concern relates to the way that the outcome of a case shapes the historical record and impacts people's feelings about their own lived experiences. The fact that a court never declared these defendants liable might create the impression that the harms did not occur or that these communities do not deserve justice. This concern links back to critiques about litigation being too court-centric in a way that not only dictates strategy and priorities but also influences perceptions. If a court judgment is understood as the definitive declaration of liability, then failure to secure that judgment threatens to absolve the defendants of wrongdoing. We worked hard to discourage anyone from drawing this sort of conclusion by making clear throughout the litigation that the outcome was far from certain and that many meritorious claims do not succeed for a variety of reasons. Still, it would be unfair to minimize the impact of the case's dismissal on the clients and their communities. Naturally, there was a deep sense of disappointment, discouragement, and frustration that, due to what felt like legal technicalities, U.S. courts failed to recognize a truth widely considered common knowledge in South Africa: corporations worked in tandem with the apartheid state to aid and abet numerous human rights violations.

## *B. Successes*

### *1. Uncovering Facts, Telling the Truth*

It's often said that bad facts make bad law. Although good facts are no guarantee of a good outcome in court, they are necessary to achieve that outcome. One of our successes was our ability to gather and build out facts to amended the complaint in 2008 and survive the defendants' motion to dismiss, in a time-pressured and challenging context. We knew that we might have limited time between the Second Circuit's decision and the date to file an amended complaint. As a result, in anticipation of a favorable outcome, our legal team began the groundwork necessary to file that amended complaint prior to the appellate court's ruling. This required significant time considering and evaluating which defendants would remain a part of the suit, as well as identifying plaintiffs who were willing and able to participate in the reformulated case. Lawyers, law students, and researchers from South Africa and the United States spent many months in various locations in South Africa—particularly Port Elizabeth, East London, and the North West Province—to consult with the named plaintiffs from the original complaint, to identify new witnesses and gather additional information,



and to locate new potential plaintiffs who might be well-suited to participate in the case as amended.

Much of this work was done the old-fashioned way, by tapping into existing, informal networks in various communities and then working to build trust. We slowly gained access to individuals who would be willing to speak about their own experiences, or who could connect us to others who might be well-placed to provide information. Some of these essential connections came from the South African attorneys and advocates who were from these communities, so they had an initial level of access and understanding that came with being more “insider” than “outsider.” Often it took just one individual who could then open many more doors for the team, for example connecting us with other former employees of an automotive company, other mothers whose children had been killed, or other villagers whose lives had been disrupted by denationalization. We were thorough and methodical in gathering information, conducting extensive interviews with prospective clients, witnesses, and community members. We sought to understand not only what they had experienced but also whether there was any interest in pursuing litigation, and what role the case might play in relation to other, ongoing efforts to seek justice. These conversations informed decision-making around how the case would proceed, who would join the litigation, and also the claims that we would advance.

For example, our initial theory of liability with respect to the automotive companies related to the fact that they had manufactured armored vehicles for the South African security forces; those vehicles were then used to terrorize and attack the black population, resulting in numerous injuries and deaths. It was only after interviewing many employees of these automotive companies that two additional theories of liability began to emerge. First, the extent to which these companies worked symbiotically with the South African government became clear. Just as the government had an interest in cracking down on anti-apartheid political organizing, the companies had an interest in cracking down on union organizing. Anti-apartheid and union activists overlapped to a large extent, so the companies and the government would share information about individuals, making it easier to follow and target them for torture and other abuse. Second, employees of these companies were deeply offended by the fact that they were forced to build the very instruments of their oppression, and that the workplace mimicked and reinforced the indignities of apartheid. Although many of the attorneys never thought that this theory—that the companies were liable for replicating apartheid structures, such as separate facilities, unequal pay, and access to jobs and promotions within the workplace—was particularly strong from a legal standpoint, it was absolutely essential to many of the plaintiffs. “Petty” apartheid was the real story that had often been overlooked and needed to be told, to demonstrate how the system was designed to dehumanize and teach black people that they were less valuable, less worthy, and

less deserving.<sup>106</sup> So this claim for a systemic harm, the internal replication of apartheid within the workplace, was included in the amended complaint, along with claims for more “egregious” violations such as extrajudicial killing, torture, and apartheid as a crime against humanity.<sup>107</sup>

Related to our ability to build the complaint, the truth-telling aspects of the case can be counted as a success, although a somewhat more limited one. The case was never meant to be a definitive history of apartheid-era abuses, and significantly more facts would have come to light if the case had proceeded to discovery and trial. But the specific information that we unearthed through the process of researching and writing the complaint, and through sharing the named plaintiffs’ experiences, adds to the historical record. More is known, and with more precision, about the ways that these companies supported and assisted the apartheid regime, as well as about the very tangible impact of these companies’ actions on so many lives.

## 2. *Denationalization as a Tort in Violation of International Law*

Another success relates to a particular victory achieved early on in the courtroom. A U.S. federal court first recognized denationalization as a tort in violation of international law in the *Apartheid* case.<sup>108</sup> In its 2009 ruling on the motion to dismiss, the district court looked to the Restatement of Foreign Relations Law and a variety of international legal instruments to conclude that the prohibition against denationalization is designed with specificity: a state actor commits arbitrary denationalization if it terminates the nationality of a citizen either arbitrarily or on the basis of race, religion, ethnicity, gender, or political beliefs. The court further determined that this norm is widely accepted by states out of a sense of both legal obligation and mutual concern. At the time of the court’s decision, this felt like an exciting normative achievement. Through the case, we had succeeded in persuading a U.S. court to formally recognize what we all believed to be a correct understanding of the law. This judicial decision carried an important imprimatur of legitimacy, and felt like a lasting contribution that the plaintiffs and legal team could be proud of—laying a foundation for similar claims to be ad-

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106. Petty apartheid was particularly important not only because it reflected the plaintiffs’ lived experiences, but also because of the TRC’s perceived failure to adequately address such harms. See *supra* Part I.A.

107. Our theory of liability against IBM similarly evolved based on numerous conversations and interviews, particularly with individuals who had been forcibly relocated to the homelands. Over time, it became clear how essential IBM’s technology was to the creation and efficient administration of the homeland system, and how the implementation of denationalization on a massive scale relied upon hardware and software systems designed, built, and sold by IBM. We developed an analogy to the Zyklon B gas used at Auschwitz. While the Jews could have been killed with bullets rather than in gas chambers, gas was the tool that made the scale of the genocide possible. Similarly, while South Africa could have denationalized and controlled the black population using non-computerized identity documents, IBM’s technology made possible the massive scale of the denationalization in an efficient manner.

108. *In re South African Apartheid Litig.*, 617 F. Supp. 2d 228, 252–53 (S.D.N.Y. 2009).

vanced in the future, and making clear that denationalization is every bit as egregious and well-recognized as other serious human rights abuses.

### 3. *Reshaping Public Perceptions*

A third success was our ability to reshape public perceptions about the case. As already noted, prior to the filing of the amended complaint, many critics saw the case as imperialistic and misguided. Both the legal team and the plaintiffs worked tirelessly to address misconceptions about the motivations for the case, who it would benefit, why it was brought, and what it aimed to achieve. Through outreach to civil society actors in South Africa, individuals involved with the TRC and the transitional period, and government officials, as well as numerous meetings and discussions in community halls, coffee shops, and homes, the team sought to understand and address a variety of concerns about the litigation.

My sense is that we succeeded in explaining to the South African government that this case was not an attempted end-run around the TRC process, or an effort to second-guess decisions that the country had made about how it would confront its past. Rather, some survivors still felt left behind by, or excluded from, the search for accountability and justice. An avenue was available to them in U.S. courts and they chose to pursue it, not because they wished to undermine the sovereignty of South Africa or the reconciliation process but because they were entitled to seek a remedy for past harms, and U.S. courts provided an appropriate forum. President Mbeki had acknowledged as much in his remarks to the National Assembly, when he noted that the TRC's "approach leaves open the possibility for individual citizens to take up any grievance related to human rights violations with the courts" and affirmed that "[g]overnment recognizes the right of citizens to institute legal action."<sup>109</sup>

When the South African Minister of Justice submitted a letter to the federal district court in September 2009, following the filing of the amended complaint, he stated that the South African government was "now of the view that [the United States District Court for the Southern District of New York] is an appropriate forum to hear the remaining claims of aiding and abetting in violation of international law."<sup>110</sup> The letter also recognized that the amended complaint alleged very serious violations and indicated that the government would be "willing to offer its counsel to the parties in pursuit of a settlement."<sup>111</sup> This letter represented a major reversal

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109. President Thabo Mbeki, Statement to the National Houses of Parliament and the Nation, on the Occasion of the Tabling of the Report of the Truth and Reconciliation Commission, 9–10 (Apr. 15, 2003).

110. Letter from Jeffrey Thamsanqa Radebe, South African Minister of Justice and Constitutional Development, to Shira A. Scheindlin, U.S. District Judge (Sept. 1, 2009).

111. *Id.*

from the South African government's prior skepticism about the case, and a significant breakthrough.

At some level, the case seemed to help clarify that the language of reconciliation and transitional justice should not be used to force closure about the past or to blunt a lingering need for truth and accountability, especially when the past is still very much present and some wounds remain open and unhealed. Similarly, over time, and perhaps in part due to the government's own evolving position, South African civil society organizations came to appreciate that the legal team was acting responsibly in the best interests of the clients and communities, and was well aware of the tension and risks inherent in this kind of litigation. As a result, we gained more allies and support to propel the case forward.

To be sure, significant concerns did remain. There were critics who wondered why American attorneys were involved in the case, who doubted our motives and our understanding of the issues, and who believed the case might undermine other "home grown" accountability efforts. Such perspectives sometimes came from individuals who were unwilling to really engage with and understand the ways that the attorneys and clients were working collaboratively on the case, and how we were conscious to avoid undermining ongoing efforts within South Africa. However, I respect and understand skepticism of outsiders who raise the possibility of some kind of legal remedy, especially in situations where people have been repeatedly disappointed or disrespected by lawyers.

Throughout the litigation, we faced tough questions about who would be a member of the class and who might stand to benefit. These questions were always particularly challenging.<sup>112</sup> We recognized that many individuals who were victims of apartheid-era abuses could not be included in this case, which focused on a narrow set of harms linked to the actions of a handful of corporations. We continually sought to explain why the case had been tailored in the ways that it was—not to exclude any class of victims or to claim that label for a certain subset of people, but rather to maximize the chances of succeeding in court—while also thinking about how the case could be used more effectively as a springboard to advocate for remedies and justice for a broader swath of survivors. Still, misperceptions persisted, and were especially troubling in those moments when the case seemed to sow divisions, leading some of the plaintiffs to grow concerned about their safety as

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112. This challenge was especially profound with respect to the companion case to our own, brought by members of the Khulumani Support Group. Like our case, *Khulumani* was a class action on behalf of a group of individuals who had suffered apartheid-era abuses that could be linked back to specific corporate defendants. However, the Khulumani Support Group itself encompasses and represents a much larger group of survivors of apartheid-era abuse, including many who would not be part of any class represented in the case. There were real concerns about the degree to which these distinctions were ever clear to the Khulumani membership base. Of course, Khulumani members who were not part of the class could still have felt invested and included in the legal process, and in the broader goals that the case sought to achieve.

false rumors spread about how they stood to benefit (or had already benefited) from the case.

#### 4. *Advancing Corporate Social Responsibility*

A fourth success was the degree to which this case, in tandem with other corporate ATS cases, accelerated and shaped the global movement for corporate social responsibility and accountability. This accomplishment may be the most powerful response to the critique that human rights litigation fails to make any systemic impacts or to address structural concerns. Of course cases are but one tool—along with non-litigation approaches such as popular protests, consumer boycotts, and advocacy campaigns—to change corporate behavior and enforce human rights standards. But through the corporate ATS cases, plaintiffs and their attorneys sought to shape and consolidate ideas about corporate social responsibility into something more than voluntary practices, and to bind corporations to specific standards of behavior backed by international norms.

There are indications that ATS suits did cause multinational corporations to take greater care to ensure that their operations respect human rights, such as introducing or revising their human rights policies and practices in response to the potential threat of liability. For example, in the extractives sector, Shell, Chevron, and Rio Tinto—all defendants named in other ATS suits—joined “a multi-stakeholder dialogue with various governments and NGOs that resulted in the adoption of the Voluntary Principles on Security and Human Rights,” which “set out best practices for extractive corporations in forming their relationships with public and private security forces.”<sup>113</sup> A recent study of 41 multinational corporations subject to human rights lawsuits in the United States and multiple other jurisdictions found four broad trends with respect to the links between corporate social responsibility and human rights litigation.<sup>114</sup> First, all but four of the corporations had published corporate social responsibility reports, with the vast majority of such publications introduced only after the company was sued for human rights abuse.<sup>115</sup> Moreover, although eight companies published corporate social responsibility reports prior to facing litigation themselves, these reports post-date the filing of the first corporate ATS cases in 1996.<sup>116</sup> Second, more than two-thirds of the companies introduced human rights policies and drafted corporate human rights statements shortly after lawsuits against them were initiated.<sup>117</sup> In addition, nearly two-thirds of the companies began human rights trainings for employees, as well as human rights audits,

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113. Caroline Kaeb, *Emerging Issues of Human Rights Responsibility in the Extractive and Manufacturing Industries: Patterns and Liability Risks*, 6 NW. J. INT'L HUM. RTS. 327, 338 (2008).

114. See generally Judith Schrempf-Stirling & Florian Wettstein, *Beyond Guilty Verdicts: Human Rights Litigation and its Impact on Corporations' Human Rights Policies*, 145 J. BUS. ETHICS 545 (2017).

115. *Id.* at 549.

116. *Id.*

117. *Id.*

assessments, and monitoring, after lawsuits were filed.<sup>118</sup> Third, more than 70 percent of the corporations had joined soft-law or multi-stakeholder initiatives like the UN Global Compact and, again, most joined only after a suit was brought against them.<sup>119</sup> Fourth and finally, almost half of the corporations began to collaborate with human rights NGOs to review and strengthen their human rights policies and practices.<sup>120</sup>

Even with a healthy degree of skepticism about the content of new policies and procedures, the voluntary nature of multi-stakeholder initiatives, or the motivation to take action to burnish a company's reputation and image when faced with litigation, it seems reasonable to conclude that human rights suits have impacted not only corporate policy but also corporate behavior. Even if corporate responses are initially a defensive reaction against litigation, such policies and practices may open up space for meaningful change, increasing receptivity to the voices of communities and advocates, and ultimately shifting corporate behavior in a way that advances accountability and respect for human rights. As the former UN Special Representative for Business and Human Rights John Ruggie has noted, human rights litigation has helped "more broadly reinforce[ ] the necessity for companies everywhere to develop effective systems to manage the actual and potential adverse human rights impacts of their operations and business relationships."<sup>121</sup>

Beyond influencing corporate behavior in specific ways, the corporate ATS cases essentially formed the scaffolding upon which a larger corporate social responsibility movement could be built and grown. The cases helped make visible challenges that had previously been overlooked about the role and accountability of corporations in human rights abuse, thereby identifying new legal issues, setting agendas, and influencing legal and policy changes. There has been a proliferation of regulatory initiatives over the last two decades, from UN norms and principles,<sup>122</sup> to regional<sup>123</sup> and national<sup>124</sup> standards and guidelines, to industry-level codes of conduct,<sup>125</sup> to

118. *Id.* at 554.

119. *Id.* at 554–55.

120. *Id.* at 555.

121. John G. Ruggie, *JUST BUSINESS: MULTINATIONAL CORPORATIONS AND HUMAN RIGHTS* 197–98 (2013).

122. See, e.g., *Resolutions and Decisions*, U.N. OFFICE OF THE HIGH COMM'R FOR HUM. RTS., <https://perma.cc/N4YP-92HN>; *Working Group on the issue of human rights and transnational corporations and other business enterprises*, U.N. OFFICE OF THE HIGH COMM'R FOR HUM. RTS., <https://perma.cc/F98W-2EMK>.

123. See, e.g., Organisation for Economic Co-operation and Development (OECD), *OECD Guidelines for Multinational Enterprises* (2011), <https://perma.cc/LF99-82PM>; Organization of American States (OAS), General Assembly Res. AG/RES. 2753 (XLII-O/12), OAS Doc. AG/doc.5329/12 (June 4, 2012) (entitled "Promotion of Corporate Social Responsibility in the Hemisphere"); Organization of American States (OAS), General Assembly Res. AG/RES. 2840 (XLIV-O/14), OAS Doc. AG/doc.5452/14 (June 4, 2014) (entitled "Promotion and Protection of Human Rights in Business").

124. See *State National Action Plans on Business and Human Rights*, U.N. OFFICE OF THE HIGH COMM'R FOR HUM. RTS., <https://perma.cc/X4TW-6H27>.

125. Several of the most prominent industry-level examples include the Kimberly Process, the Extractive Industries Transparency Initiative (EITI), and the Global Network Initiative (GNI). For company-

ongoing efforts to draft a legally binding instrument to regulate the activities of transnational corporations with respect to human rights.<sup>126</sup> The creation of the UN Guiding Principles on Business and Human Rights in 2011 was a watershed moment in recognizing the international legal obligations of all businesses to respect human rights,<sup>127</sup> creating the first authoritative reference point for corporations' human rights responsibilities. The impetus to create the Guiding Principles can be traced back in part to corporate ATS litigation, and its principle on human rights due diligence draws on lessons learned through these cases.<sup>128</sup>

The Supreme Court's decisions in *Kiobel* and *Jesner* have significantly curtailed plaintiffs ability to hold corporations to account in U.S. courts under the ATS. But the corporate ATS cases shaped and inspired similar litigation efforts in multiple other jurisdictions. For example, the Canadian Supreme Court issued a landmark decision earlier this year holding that customary international law violations may be civilly actionable in Canadian courts, including for human rights abuses committed abroad, and that corporations are subject to liability under international law.<sup>129</sup> In recent years, cases against corporations for complicity in human rights abuse have been brought not only in Canada (against HudBay Minerals,<sup>130</sup> Copper Mesa Mining,<sup>131</sup> and Anvil Mining<sup>132</sup>) but also in the United Kingdom (against African Barrick Gold,<sup>133</sup> British Petroleum,<sup>134</sup> DJ Houghton,<sup>135</sup> Shell,<sup>136</sup>

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specific examples, see *Company Policy Statements on Human Rights*, BUSINESS & HUMAN RIGHTS RESOURCE CENTRE, <https://perma.cc/H7YK-L4VG>.

126. For more information about the working group on transnational corporations and other business enterprises with respect to human rights, see *Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights*, U.N. HUM. RTS. COUNCIL, <https://perma.cc/4DKM-SKPK> (last visited Mar. 12, 2020) and *Binding Treaty*, BUSINESS & HUMAN RIGHTS RESOURCE CENTRE, <https://perma.cc/6GS5-CT7B>.

127. Special Rep. of the Sec'y Gen., *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect, and Remedy" Framework*, U.N. Hum. Rts. Council, U.N. Doc. A/HRC/17/31 (2011).

128. In particular, the document notes that many national jurisdictions allow for criminal or civil liability for businesses when complicit in a crime, and explicitly states that "[t]he weight of international criminal law jurisprudence indicates that the relevant standard for aiding and abetting is knowingly providing practical assistance or encouragement that has a substantial effect on the commission of a crime." *Id.* at 19.

129. *Nevsun Resources Ltd. v. Ayaya*, 2020 SCC 5. For additional background, see *Nevsun Lawsuit (re Bisha Mine, Eritrea)*, BUSINESS & HUMAN RIGHTS RESOURCE CENTRE, <https://perma.cc/L3JB-L85N>.

130. *Choc v. Hudbay Minerals Inc.*, 2013 ONSC 1414 (Can. Ont. Super. Ct.). For additional background, see *Hudbay Minerals Lawsuits (re Guatemala)*, BUSINESS & HUMAN RIGHTS RESOURCE CENTRE, <https://perma.cc/B83E-KQQK>.

131. *Piedra v. Copper Mesa Mining Corporation*, 2011 ONCA 191 (Can. C.A.). For additional background, see *Copper Mesa Mining Lawsuit (re Ecuador)*, BUSINESS & HUMAN RIGHTS RESOURCE CENTRE, <https://perma.cc/M5DA-G2FS>.

132. *Anvil Mining Ltd. v. Association Canadienne Contre L'Impunite*, 2012 QCCA 117 (Can. Que. C.A.). For additional background, see *Anvil Mining Lawsuit (re Dem. Rep. of Congo)*, BUSINESS & HUMAN RIGHTS RESOURCE CENTRE, <https://perma.cc/2T78-MFNH>.

133. See *Barrick Gold lawsuit (re Tanzania)*, BUSINESS & HUMAN RIGHTS RESOURCE CENTRE, <https://perma.cc/HGC7-GLS8>.

and Vedanta<sup>137</sup>), Australia (against BHP Billiton<sup>138</sup>), Switzerland (against IBM<sup>139</sup> and Nestle<sup>140</sup>), France (against DLH<sup>141</sup> and Lafarge<sup>142</sup>), Belgium (against Total<sup>143</sup>), Germany (against Danzer Group<sup>144</sup>), the Netherlands (against Shell<sup>145</sup>), Nigeria (against Pfizer<sup>146</sup>), and Argentina (against Ford and Daimler<sup>147</sup>), among others.

The expansion and diffusion of accountability for corporate human rights abuse to multiple jurisdictions is a positive development, focusing attention and analysis on litigation possibilities around the world, including countries where the underlying violations occurred. This development may allow for more experimentation and new accountability options, for example holding corporations liable for abuses of socio-economic rights. In addition, it may present opportunities for affected communities to collaborate with each other, as well as with local, national, and international organizations, to engage in community-driven national and transnational litigation and advocacy. In short, despite recent setbacks in U.S. courts, corporate ATS cases have helped close the power differential between multinational corporations

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134. Pedro Emiro Florez Arroyo and Others v. Equion Energia Ltd., [2016] EWHC (TCC) 1699 (Eng.). For additional background, see *BP Lawsuit (re Colombia)*, BUSINESS & HUMAN RIGHTS RESOURCE CENTRE, <https://perma.cc/5NBZ-26UR>.

135. Antanas, Galdikas and Others v. DJ Houghton Catching Services Ltd., [2016] EWHC (QB) 1376 (Eng.). For additional background, see *DJ Houghton lawsuit (re trafficked Lithuanian migrants)*, BUSINESS & HUMAN RIGHTS RESOURCE CENTRE, <https://perma.cc/7WX4-CXGW>.

136. For information on the litigation on behalf of the Ogale and Bille communities, see *Shell Lawsuit (re oil spills & Ogale & Bille communities in Nigeria – Okpabi v Shell)*, BUSINESS & HUMAN RIGHTS RESOURCE CENTRE, <https://perma.cc/VX7D-RWHU>. For information on the litigation on behalf of the Bodo community, see *Shell Lawsuit (re oil spills & Bodo community in Nigeria)*, BUSINESS & HUMAN RIGHTS RESOURCE CENTRE, <https://perma.cc/Z82H-X6MZ>.

137. Vedanta Resources PLC and Another v. Lungowe and Others, [2019] UKCS 20 (Eng.). For additional background, see *Vedanta Resources lawsuit (re water contamination, Zambia)*, BUSINESS & HUMAN RIGHTS RESOURCE CENTRE, <https://perma.cc/MT5S-JDDF>.

138. See *BHP Lawsuit*, BUSINESS & HUMAN RIGHTS RESOURCE CENTRE, <https://perma.cc/X9EL-GNZ6>.

139. See *IBM Lawsuit*, BUSINESS & HUMAN RIGHTS RESOURCE CENTRE, <https://perma.cc/3F5W-BTMS>.

140. See *Nestle Lawsuit (re Colombia)*, BUSINESS & HUMAN RIGHTS RESOURCE CENTRE, <https://perma.cc/6A78-8RKL>.

141. See *DHL Lawsuit (re Liberian Civil War)*, BUSINESS & HUMAN RIGHTS RESOURCE CENTRE, <https://perma.cc/8FLW-69WS>.

142. See *Lafarge Lawsuit (re Complicity in Crimes Against Humanity in Syria)*, BUSINESS & HUMAN RIGHTS RESOURCE CENTRE, <https://perma.cc/ZVY8-L4XQ>.

143. See *Total Lawsuit in Belgium (re Myanmar)*, BUSINESS & HUMAN RIGHTS RESOURCE CENTRE, <https://perma.cc/5QYG-ZAQX>.

144. See *Danzer Group & SIFORCO Lawsuits (re Dem. Rep. Congo)*, BUSINESS & HUMAN RIGHTS RESOURCE CENTRE, <https://perma.cc/3R45-YELP>.

145. See *Shell Lawsuit (re Oil Pollution in Niger)*, BUSINESS & HUMAN RIGHTS RESOURCE CENTRE, [perma.cc/2BCV-LM8M](https://perma.cc/2BCV-LM8M); *Milieu Defense Lawsuit Against Shell Nigeria*, BUSINESS & HUMAN RIGHTS RESOURCE CENTRE, <https://perma.cc/R5EZ-23Z3>.

146. See *Pfizer Lawsuit (re Nigeria)*, BUSINESS & HUMAN RIGHTS RESOURCE CENTRE, <https://perma.cc/R3N9-57N2>.

147. See Larry Rohter, *Ford Motor is Linked to Argentina's 'Dirty War,'* N.Y. TIMES (Nov. 27, 2002), <https://perma.cc/AS8P-WLTN>. For additional background, see *Ford Lawsuit (re Argentina)*, BUSINESS & HUMAN RIGHTS RESOURCE CENTRE, <https://perma.cc/J8DR-MQNX>.



and communities of rights-holders, an important development that promises more progress towards protecting and defending human rights.

##### 5. *Building the Next Generation of Human Rights Practitioners*

In human rights work, it is important to celebrate the small victories along the way because big, decisive wins are few and far between. With this axiom in mind, a fifth success is one that some might consider a side-effect of the suit: over the years, dozens of law students, young lawyers, and researchers from both South Africa and the United States worked on the case, receiving extensive training and mentoring in the process. In other words, the case built the expertise of members of the next generation of human rights practitioners. This is, in fact, no minor success. These young lawyers and researchers learned invaluable skills and gained important insights about how to engage with communities, interview about traumatic events, build trust and work collaboratively, and shape legal arguments and public opinion. They now understand the complexities of large scale, strategic human rights litigation in a very concrete way. Many were inspired to pursue human rights careers, and the experience of working on the *Apartheid* case will improve the impact of their work. They will engage with survivors and communities and weigh strategic options more aware of the risks and dangers of litigation, and better able to navigate the challenges.

It is important to emphasize that the individuals who benefitted from this exposure and experience were not exclusively U.S.-trained law students. Our Clinic was intentional about identifying South African students, young attorneys, and researchers to work on the case. We collaborated with many of them over multiple years, and they offered continuity of work and a connection between the plaintiffs and the U.S. legal team when we were not physically present in South Africa. They also provided invaluable insight, cultural and historical context, uncovered new information, located witnesses, helped shape our theories of liability, and discussed the importance and value of the case with constituencies and communities that we might otherwise not have reached.

Beyond these researchers and attorneys, we also worked with interpreters in various locations. These individuals were often not formally trained as interpreters, but rather were young people from the communities with the necessary language skills and an eagerness to learn and be involved. We used a model in which our interpreters were integrated into the team. Ideally, we would spend time together in advance of any interviews to get to know each other and to discuss the litigation, the types of information likely to come out in interviews, the challenges of this kind of work, as well as to solicit their feedback and suggestions both prior to beginning the interviews and throughout the process. Interpreters often told us that they appreciated being involved in the interviews and the litigation effort, and hearing stories from their elders. While they were aware, at a general level, of the suffering

endured by their parents' or grandparents' generation, some had been shielded from specific, detailed stories about apartheid. They were moved by the opportunity to learn from, listen to, and seek justice for the past.

The interpreters often served as our cultural bridge in ways that were hugely beneficial to the litigation. One striking example occurred while conducting fact-finding related to denationalization in the former Boputhatswana. We were asking interviewees whether, at the time the homeland became independent, they would have chosen a South African identity document or a Boputhatswana identity document. We expected interviewees to choose the South African document because of the rights and benefits that attached to it, but people seemed puzzled by the question and unable to offer a clear answer or explanation. It was our interpreters who recognized that the question was problematic because interviewees could not imagine having had the choice. As soon as we began to ask "If you had both the IDs in front of you, which ID would you take, and why?" instead of "Which ID would you choose?", interviewees were able to provide thoughtful and detailed examples of why they would prefer the South African document. Developing and refining a model in which interpreters were more fully integrated into the team, became a part of conducting rigorous fact-finding, and participated not only in interviews but also in debriefing and making sense of interviews in the broader cultural and litigation contexts, was certainly a success.

### C. *Lessons for Other Litigation Efforts*

It would be impossible to distill the experience of litigating the *Apartheid* case into a few simple takeaways or a primer for other similar efforts. Having said that, however, there are several important lessons that bear emphasizing—about team composition, setting expectations, the class action question, the role of storytelling, and perspective on evaluating impact.

#### 1. *Composition of the Team*

The composition of the team working on the case—both the plaintiffs and the attorneys—is absolutely essential. Many factors determine who will become plaintiffs in a case of this nature. Obviously the individuals need to have suffered a qualifying harm. They need to be able to speak about their experience, and be comfortable with the reality of having to do this repeatedly over many years, potentially under hostile questioning, and publicly in court. They must possess the patience, dedication, and determination to persevere with a case over many years, even when faced with unexpected and apparently insurmountable obstacles. Ideally, they will have the support of their family and their community throughout the process. They need to be optimistic but also realistic about what litigation can achieve. They must be clear and honest about their motivation for becoming involved in the litiga-

tion, as well as what they hope to accomplish for themselves and more broadly for the movement or the issues at stake. In a class action, they need to understand the responsibilities that attach to being a class representative, and be prepared for the focus and attention, not always positive, that comes with being the face of the litigation. They must also understand the risks involved, including not simply the risk of a bad outcome in court, but also risks to their reputation and sometimes even their physical safety. They need their own vision of the case, of how it will interact and intersect with broader goals, and a willingness to collaborate with each other and the lawyers to implement that vision, as well as the strength to exercise their power.

With respect to the legal team, ideally many different types of attorneys and advocates collaborate on a case of this nature, working together over many years to sustain the effort. At the outset, investigators and fact-finders must understand the legal framework and be able to search for and uncover the key evidence and witnesses necessary to build a case. They need to be able to develop theories of liability but also have excellent people skills, and an ability to work across differences and earn trust. They will often be the main contact between the broader legal team and the clients and communities throughout the litigation, so they must be able to speak the language and understand the interests of all involved. Ideally, at least one of these people would spend significant time in these communities and with the plaintiffs throughout the case, immersing themselves in the daily discussions and considerations that are taking place in those communities, and then helping to ensure that those conversations are heard and communicated across the team. Later, trial level attorneys must be adept at opposing motions to dismiss and motions for summary judgment, both in briefs and at oral argument. These cases often end up on appeal, so attorneys with appellate experience are also necessary. The legal team should have representatives from both the country where the case is being litigated and the country where the violations occurred, assuming transnational litigation. This is important for a variety of reasons, including that insiders often have a better understanding of the cultural and historical context, can effectively communicate and share information across the team, and can help address urgent issues or crises that might arise. It is also crucial, in cases of this nature, to have attorneys who understand the politics involved and public perceptions around the case, and who can help navigate interactions with governments and the media. Finally, and perhaps most importantly, the attorneys and the clients must develop a shared vision of justice and common goals, and agree on the type of community lawyering approach that will be exercised throughout the litigation.<sup>148</sup>

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148. Hoffman & Vahlsing, *supra* note 56, at 264–65.

## 2. *Setting Expectations from the Outset*

Relatedly, the team—plaintiffs and attorneys together—should ideally determine and set expectations and understandings before any litigation is initiated. The team must help manage expectations around the case from the outset, not only among those who are closely involved in the litigation but also with broader communities who may be interested in the outcome, such as civil society groups, activists, the media, academics, and other attorneys. The team should also consider upfront how they will navigate both losses and wins along the way. How will these various moments in the case be understood and explained, so that their significance is properly weighted? If the defendants are never found liable, how will that news be received and perceived, and is that outcome potentially so damaging or disheartening that the risk is not worth proceeding? If the defendants are found liable, what does that victory actually mean in practice? Who will benefit, and is there a risk that a win in court could actually result in divisions or discord within a community? This work is crucial as a case moves forward, but is also essential in determining whether a case should be initiated in the first place, or whether at some point it is no longer worth proceeding.

## 3. *The Class Action Question*

The team must determine whether a case should be brought as a class action. On the one hand, there is obvious value to a class action when attempting to seek justice for wide-scale abuses that have impacted large groups of people. The class allows for a form of collective action and solidarity, and may be better able to address the systematic or structural nature of harms suffered, as opposed to focusing on discrete individual violations. In this way, a class action may strengthen community and help build social movements, allowing survivors to come together in solidarity to exercise their power and attempt to collectively redress a common injustice. It can also be a powerful statement and acknowledge the many people who have been impacted by a defendant's actions.

However, there are huge obstacles to litigating a class action. Purely from a standpoint of manageability, the case will be much larger, with many more people who will be involved in decision-making and who will have expectations about what the case will deliver. There may be confusion about who is and is not a member of the class and who stands to benefit from the case, in a way that raises hopes unfairly or that divides communities. It can be difficult to determine who will be the class representatives, and why. Moreover, although the purpose of a class action is to demonstrate responsibility for similar violations, often only a handful of stories will stand for and represent the broader narrative. In other words, people may believe that their involvement or role as class members will be more substantial than it actually is, or offer more opportunities for participation than it actually

does. The class action may impact a court's perception of a case as well, and give ammunition to defendants to argue that a case is unwieldy and should be dismissed. Obtaining class certification will be a difficult process and is by no means guaranteed. These challenges are not reasons to abandon a class action outright, but should be seriously considered when weighing whether a class action is the best approach in litigating human rights claims. It might well be that a handful of plaintiffs can effectively represent the broader interests of an affected community, even without a formal class action.

#### 4. *The Role of Storytelling, and Evaluating Impact*

The team must give serious consideration to the extent that the case will become a vehicle for storytelling. One purpose of a case is to secure a victory in the courtroom, but that is often not the only goal. If a major priority for the plaintiffs is to speak out and to tell their stories, court filings and advocacy might be framed differently than if the priorities are purely legal. However, using legal documents for storytelling as much as for argument or having plaintiffs give interviews or speak publicly about their experiences while a case is ongoing can backfire or at least complicate efforts in court. The team must assess these risks to determine the best course of action, to create opportunities so clients do not feel silenced by the legal process, and to ensure that advocacy and litigation can proceed in tandem to achieve the desired goals.

A related lesson is the importance of considering how to evaluate the impact and effectiveness of human rights litigation. This evaluation question relates back to the goals of a case, and also to the critique that the cases often fail to lead either to a favorable verdict or to any kind of structural change. In my mind, these critiques miss the mark because they fail to understand the multiple goals of this kind of litigation. Of course we are not indifferent to victory in court, but those of us who litigate human rights cases know that a win at trial is a very rare outcome. While we always keep that goal in mind, the cases are just as much about empowering the clients, offering a forum to tell their stories, calling attention to injustices, acknowledging their experiences, energizing and building social movements, contributing to the historical record, shaming and deterring bad actors, shifting expectations and behavior, and inspiring others. By seeking to achieve such goals, human rights litigation can do more than deliver specific remedies in a single case. It can carry political, cultural, and symbolic significance, and become part of a public discourse that shapes broader understandings of justice. These goals may be harder to measure than a simple verdict in court, but they are equally important.

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In the end, my experience litigating the *Apartheid* suit reinforces how much easier it is to articulate aspirations about community lawyering than to implement them. Working transnationally, at such a great distance and with major hurdles to maintaining regular communications with all the clients, meant that the lawyers were sometimes the decision-makers. There were moments when we developed strategy and made judgment calls at our own pace, or at the pace required by the courts, rather than in tandem with the clients. It comes as no surprise that community lawyering across borders is incredibly difficult—but it is important to acknowledge this reality and then keep working at it, striving to meaningfully collaborate with the clients at every step.

Although I did not live up to all of my aspirations, the ideals of community lawyering still guided me in important, meaningful ways. My talisman was a simple pair of questions: what is in the best interests of the clients, and what do they want? Whenever possible, I asked them and followed their lead. Each time I was in South Africa, my priority was to spend meaningful time with as many of the plaintiffs as possible, visiting them in their homes and in their communities, listening carefully and actively to how they were feeling about the case, hearing their opinions about the job we were doing as their lawyers and how they felt about their own role and place in the process, and striving to understand what they expected from us and from themselves. I encouraged them to reflect on and question their own goals for the case, and to weigh seriously whether it was worth proceeding—especially in moments when the legal obstacles seemed insurmountable and the personal, emotional toll on them and their families became significant. I worked with them to consider alternate strategies like pressuring the companies directly to acknowledge the past and to make amends, or engaging the South African government to take an active role in attempting to resolve the case, although in retrospect I wish we had spent even more time exploring these options.

Human rights advocates and activists are often thought of as idealists. And being an idealist can mean holding ourselves and our work up to, and measuring it against, the highest standards. But being an idealist does not mean that we should set the bar unreasonably high and then criticize our efforts if we fail to clear that bar. Nor does it mean that small changes or incremental progress are insignificant. I have often found it important to remind myself that no one case alone needs to—and perhaps no one case alone can—change history. Rather, each case is one component of a much longer, larger struggle.

For many of the named plaintiffs, being involved in the case reinvigorated their activist roots, reconnected them to networks of individuals with similar experiences and aspirations, and helped them recognize and deploy their

own power. Over the life of the litigation, both the plaintiffs and the attorneys came to understand that our real strength was not in our recourse to the courts but in our capacity to imagine, reflect, and act collectively. Litigation is not the engine of social change. Rather, creative and committed people working together make the real difference. I was fortunate to collaborate with and learn from so many of them on this case.

### *Mpumelelo Cilibe*

*I knew it was him the moment I walked into the News Café. He was seated at a far table, reading a book. Every time we would meet over the years—at cafes, at shopping malls, at community halls, at taxi ranks—he seemed to be carrying a book. It was only after we got to know each other that he revealed himself to be a poet. “Getting people into a hall and reciting poetry was one way of mobilizing people against apartheid,” he explained.*

*Mpumelelo Cilibe was born in New Brighton, outside Port Elizabeth, in 1954. He put himself through school in Alice and qualified as a teacher. But that kind of work was hard to come by, so he joined Ford’s Cortina Plant in 1974. “It didn’t matter if you were a lawyer, you were expected to be a laborer. Despite the fact that I was a teacher, I was supposed to be a laborer.” He laughed recalling how the pay for black laborers was 56 cents an hour, but Ford offered him 59 cents because he was “qualified.”*

*Mpumelelo started as a line feeder in the unboxing area. Parts from Europe would arrive in crates; his job was to break down the crates and pull trolleys of parts to the assembly line. Someone noticed he was a fast learner, so after a month he was promoted to unboxing checker, comparing the contents of crates with the packing lists and noting if anything was missing.*

*Only whites could be clerks or storemen, jobs that carried more responsibility. But the work of a storeman was difficult. You had to ensure all parts made it to the assembly line: ordering parts that could be procured locally, counting parts when they arrived, calculating the days’ production and the parts needed each week, making sure you never ran out. No one seemed to last very long. So Mpumelelo got the job.*

*He stayed until 1984, trying to earn enough for further education. “That was the purpose of my work. That’s why I spent ten years there. It was impossible to do anything different. You were trapped. I didn’t want to be there that long.”*

*Although Ford was an American company, Mpumelelo recalled that it was “completely South African.” There were four doors to enter the plant—blacks, whites, Indians, colored—and you could only enter through one. “You just knew that to do otherwise was unthinkable.” The company functioned like the apartheid state with separate toilets, changing rooms, and canteens. White employees ate off a different menu, with proper cutlery rather than plastic. When the Sullivan Code<sup>149</sup> came out,*

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149. The Sullivan Principles were a code of conduct created by the Revered Leon Sullivan in 1975 for American companies operating in South Africa. By signing the code, companies agreed to: (1) Non-segregation of the races in all eating, comfort, and work facilities. (2) Equal and fair employment practices for all employees. (3) Equal pay for all employees doing equal or comparable work for the same

white employees “revolted. They just went home at lunch rather than sharing things with us. They wouldn’t mix with us.”

After Mpumelelo was made storeman, every white storeman was promoted to senior storeman. Part of Mpumelelo’s job was to train new senior storemen, who earned double his pay from day one. “Even if he just started, he was a senior storeman and earned twice as much.”

Mpumelelo knew he would rise no further at Ford. “Being a supervisor, impossible! You didn’t dream of it. . . . You couldn’t move above. You just knew it was company policy. We didn’t even think of challenging it. I would have been crazy to think I could get a job as a foreman. . . . You were supposed to die in the position you had.”

Mpumelelo had long been politically active. He was part of the very first structure that formed PEBCO, the Port Elizabeth Black Civic Organization, as a member of the youth wing.<sup>150</sup> And he had experienced run-ins with the law. While working at Ford he was also freelancing for *The Voice*, the newspaper of the South African Council of Churches. He was on his way back from a training in Johannesburg on June 1, 1980, the same night that the MK attacked the Sasol plants in what was, at that time, the largest act of economic sabotage carried out by the ANC. And Mpumelelo was carrying books—some of them banned—from *The Voice*’s office. A friend traveling with him was carrying an ANC magazine, with a picture of O.R. Tambo on the front, “which was automatically trouble.”

They were picked up getting off the train in Port Elizabeth and taken to the Sanlam building. The Eastern Cape Security Branch had its headquarters on the sixth floor. The location was notorious even before Black Consciousness leader Steve Biko was fatally tortured there in 1977. Mpumelelo knew that people were dying there. “If you came back, the first question was, ‘Were you beaten up or electrocuted?’” Mpumelelo was detained for two weeks, beaten up by the security police, interrogated, and told, “You are killing the cow that gives you milk.” After his release, he returned to work at Ford.

Mpumelelo was a leader there, helping to form the Ford Workers Committee and serving as Treasurer of MACWUSA, the Metal Assemblers and Component Workers Union South Africa. This made him a target. It was common knowledge that Ford and the Special Branch collaborated. When Mpumelelo would meet with Ford’s Director of Human Resources, Fred Ferreria, Ferreria knew what had been discussed at the union’s meetings. “Informers would be at the meetings and they would tell the

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period of time. (4) Initiation of and development of training programs that will prepare, in substantial numbers, blacks and other nonwhites for supervisory, administrative, clerical, and technical jobs. (5) Increasing the number of blacks and other nonwhites in management and supervisory positions. (6) Improving the quality of life for blacks and other nonwhites outside the work environment in such areas as housing, transportation, school, recreation, and health facilities. While many American corporations operating in apartheid South Africa adopted the principles, implementation was often inconsistent and incomplete. Sanctions Against South Africa, Sullivan Principles for U.S. Corporations Operating in South Africa, Nov. 8, 1984, 24 I.L.M. 1464, 1496.

150. PEBCO was a prominent anti-apartheid community organization that sought to improve the living conditions of township residents in and around Port Elizabeth.



police, and the police would tell management. In our meetings {Ferreria} would laugh at us for what went on at the {union} meetings the night before." Mpumelelo recalled that, "It was easy for {the security police} to go to Ford and say, 'We want so and so.'"

So it came as no surprise when the security police came to fetch Mpumelelo at the Cortina plant. Mpumelelo's white foreman found him and said, "The police are at the gate—go and attend to it." There were two black guys waiting to take him back to the Sanlam building, then to court. He was questioned again by the security police and threatened. "They were hovering around. One of them would hold the other back {from physically attacking}. It was very scary." Eventually he was released on a technicality. Books could be banned either for publication and distribution, or for possession. The court ruled that although it would have been illegal for Mpumelelo to publish or distribute the banned books, it was not illegal simply to possess them. But Mpumelelo knew the harassment would be ongoing. And more than thirty years later, it still grated on him that, "They took my books. They are still in the Sanlam building, even now!"

When MACWUSA held union meetings in the township the Security Branch was always present, waiting and watching. "Some guys I recognized. I had seen them at the Sanlam building before. It was fortunate that I glanced in that direction. I don't know for how long they had been attending the meetings. They were black guys; white guys would have stood out. One of them had been involved in my earlier arrest {at Ford's gate, for possession of the books}. I told Dumile Makanda, a union leader, and he announced, 'We have some unwelcome visitors.' They scurried out. They realized they were in danger. I didn't see them again, but after that the white security policemen got involved. They would be sitting in cars outside our meetings, not in uniform, in unmarked cars. Some of them I recognized from the Sanlam building. They didn't arrest people as they went in and out of {union} meetings. They went to people's homes."

Mpumelelo recalled the Security Branch keeping close tabs on him in 1979, around the time of a series of massive strikes at Ford,<sup>151</sup> when the police sought to intimidate him and other leaders. "They visited me at home. They would just talk nonsense. They would say, 'Don't you want money? Don't you want a good job? We know you are working at Ford, and we know your qualifications, and you can do better than at labor.' This was not about a better job at Ford. It was dangerous,

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151. The strikes began when another Ford employee who was also PEBCO's chairman (and a named plaintiff in the *Apartheid* suit), Thozamile Botha, was forced to choose between his employment at Ford and his leadership of PEBCO. PEBCO received widespread media attention throughout South Africa at the time of its creation, as a result of which Botha was frequently referred to and quoted in newspapers throughout the country. Shortly after PEBCO was launched, a white Ford supervisor called Botha into his office. The supervisor was holding a newspaper and stated that he, as well as the white management and other white employees at the plant, were unhappy with the media attention that Botha and PEBCO were receiving. Despite having a good work record, the supervisor told Botha that he was too political and could either continue working at Ford or go and serve his community by working with PEBCO, but he could not do both. When Botha refused to cease working with PEBCO, he was dismissed by Ford. The next day hundreds of Ford workers downed tools, a strike which continued for three days until Botha was reinstated and all workers were given three days' pay.

*because people would see them from outside, and assume you were giving them information. That was the intention—to give the impression you were collaborating. Many union guys wouldn't sleep in their own homes after a meeting. There was an imminent threat. But I thought it was better that you were seen to be arrested. Imagine if you were arrested and there was nobody around to see.”*

*As a named plaintiff in the Apartheid suit, Mpumelelo put his old organizing skills to good use. Whenever we visited Port Elizabeth, he was instrumental in connecting the legal team with former Ford employees who might have relevant information for the case, and he ensured that we could use the Zwide Community Hall as a meeting place. The first time he made announcements on the radio asking former Ford and GM employees to attend a meeting with us, we expected perhaps 20 people; when we arrived more than 80 had already assembled. We were slightly overwhelmed, but not surprised, that his efforts to persuade people to come forward with their stories would resonate so powerfully.*

*In another time and place, I imagine Mpumelelo would have spent his life as an academic. He loves to read, write, and think. He is focused, determined, and heart-breakingly eloquent when he speaks. So it's gratifying to know that he's been able to return to academia, earning his master's degree in creative writing with distinction at Rhodes University, and continuing on for his doctorate, all while supervising his own students. They are exceedingly lucky to have him as a teacher. And he's still writing poetry.*

*A friend wept*

by Mpumelelo Cilibe

*mention another man's  
 mother's private parts and start a war  
 but instead, a friend of mine just cried  
 and I was sad too and devoid of power.  
 Visser and all white men in the factory  
 could shout such words to any of us  
 Jou ma se poes could only be mouthed  
 by a white man to any black man,  
 and it would just end there,  
 the power of apartheid: cruel words  
 insults, punches and kicks.  
 Jou fokken kaffir, you think you're white!  
 assertiveness was my friend's only sin;  
 mine was to speak English faultlessly  
 Jy, Engelse man, gaan huis toe!  
 and so, no over time for me, no extra money.  
 insults rip a man's heart:  
 a heart misses a beat or two and sags  
 from their heaviness, their weight  
 too much on the mind and heart.  
 I've since learnt to care little for money  
 and men whose importance depends on it,  
 for some men are nothing without money and power.*

