UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re: South Africa Apartheid Litig.	)	
	)	Case No. 1:02-MD-1499
KHULUMANI, et al.,	)	
	)	
Plaintiffs	)	
	)	
vs.	)	Case No. 1:03-CV-4524 (JES)
	)	
BARCLAYS NAT'L BANK LTD., et al.,	)	
	)	
Defendants.	)	
	)	

BRIEF OF *AMICI CURIAE* INTERNATIONAL HUMAN RIGHTS ORGANIZATIONS, TRC COMMISSIONERS, AND OTHERS IN SUPPORT OF PLAINTIFFS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

RULES

I. INTRODUCTION

In light of the recent decision in *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 72 U.S.L.W. 4660 (June 29, 2004), *amici curiae* submit this brief in support of the Plaintiffs in this action. *Amici* include dozens of international human rights organizations throughout the world, religious organizations, academics – including Nobel prize-winning economist Joseph Stiglitz, current and former members of European parliaments and other leaders of civil society. *Amici* also include individuals who have figured prominently in efforts to ameliorate the lasting damage that the apartheid system inflicted upon its South African victims. Among *amici* are the Chairperson of the Truth and Reconciliation Commission of South Africa ("TRC"), Archbishop Desmond Tutu, and other members of the TRC and the South African Human Rights Commission. A list of *amici* is attached as Exhibit A.

The great promise of *Sosa* is the impetus for *amici*'s appearance. Though cautious in its approach, the Supreme Court made unmistakably clear in *Sosa* that the courthouse door is open to "private causes of action for certain torts in violation of the law of nations." *Sosa*, 124 S. Ct. at 2761. The claims brought before this Court by the *Khulumani* Plaintiffs are cognizable under the *Sosa* standard. Indeed, recognizing the validity of their claims would help define the contours of the *Sosa* holding and distinguish this "narrow class" of actionable "international norms," *id.* at 2764, from the morally reprehensible, but nevertheless nonactionable, class of lesser harms such as the

"single illegal detention of less than a day" presented in *Sosa*. *Id.* at 2769. And although the *Sosa* Court expressed particular concern with respect to the position of the South African government vis-a-vis other "apartheid cases" pending in this Court, *see id.* at 2766 n.21, those concerns would be misplaced if directed to the limited, individualized relief sought by each of the Plaintiffs in this action. This Court would further the principles announced in *Sosa* by examining the concerns of the South African government in a discriminating light, distinguishing between this action and other "apartheid cases" pending before this Court that might in fact invade the political province of the South African government.

The decisions made by this Court in this action will shape the future of human rights litigation. They will reverberate beyond the courthouse walls to the ears of official and private actors across the globe. What happens in *Khulumani* matters not only to the victims of torture and murder who are Plaintiffs in the case, it matters to such victims worldwide whose rights and interests the *amici* have dedicated their existence to vindicating. *Amici* believe that the principles outlined in the *Sosa* decision, carefully applied, will further not only the interests of the Plaintiffs in this case, but those of victims throughout the world whose fundamental human rights have been trampled. Plaintiffs in actions under the Alien Tort Statute ("ATS") often have no other avenue of relief. The vindication of their rights promotes healing, both for them and for their communities, with the official recognition that the deprivations they suffered are

universally condemned. *See Sosa*, 124 S. Ct. 2783 (recognizing "universal jurisdiction over claims of torture, genocide, crimes against humanity, and war crimes") (Breyer, J., concurring). These cases often break down the walls of silence and fear, enabling survivors of unspeakable atrocities to find dignity and composure. These are not mere bromides; they are the realities that have made up the lives of tens of thousands of people across the globe, including those before this very Court. The ATS embodies the United States' most laudable aspirations as a member of the world community. It is with pride that the United States courts should embrace the *Sosa* decision and the hope it offers to the all-too-often hopeless. *Amici* do not seek sympathy for the victims of human rights violations; they seek justice. *Sosa* affords it.

II. *SOSA* KEEPS THE DOOR OPEN TO CLAIMS BASED ON THE VIOLATION OF BINDING INTERNATIONAL NORMS.

Dr. Humberto Alvarez-Machain alleged that his "relatively brief detention," at the hands of U.S. agents amounted to a violation of international norms actionable under the ATS. *Id.* at 2768. The Supreme Court disagreed. *See id.* at 2767-69. In doing so, however, the Court definitively answered the lingering question whether the ATS encompasses a right of private action. *See, e.g.*, *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) (recognizing a right of private action under the ATS for violation of the international norm against torture). Following its discussion of the Act's historical underpinnings, the Court concluded that the federal courts may "recognize private causes

of action for certain torts in violation of the law of nations." *Sosa*, 124 S. Ct. at 2761. Given that "[f]or two centuries we have affirmed that the domestic law of the United States recognizes the law of nations," said the Court, "[i]t would take some explaining to say now that the federal courts must avert their gaze entirely from any international norm intended to protect individuals." *Id.* at 2764-65. The Court left no uncertainty that the door to the United States federal courts is "open to a narrow class of international norms today." *Id.* at 2764. The important question now becomes *what* international norms comprise that class. The Court gives guidance.

III. THE CLAIMS BROUGHT IN THIS ACTION SEEK REDRESS FOR THE VIOLATION OF NORMS COGNIZABLE UNDER *SOSA*.

Although the Court urged "judicial caution" in applying internationally generated norms, *id.* at 2762, it recognized that any number of binding international norms might give rise to a cause of action under the Alien Tort Statute. *See, e.g., id.* at 2766 (endorsing the recognition of "a handful of heinous actions—each of which violates definable, universal and obligatory norms) (quoting *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 781 (D.C. Cir. 1984) (Edwards, J., concurring)). The Second Circuit has accepted this principle for years. *See, e.g.*, *Kadic v. Karadzic*, 70 F.3d 232, 242 (2d Cir. 1995) (recognizing ATS claims arising from a "campaign of murder, rape, forced impregnation, and other forms of torture" as well as "murder, rape, torture, and arbitrary detention of civilians" constituting war crimes); *Filartiga*, 630 F.2d 876, *passim*. *See*

also In re Estate of Ferdinand Marcos, 25 F.3d 1467, 1475 (9th Cir. 1994) (recognizing claims for families of victims of torture, summary execution, and forced disappearances).

How are we to determine which specific norms belong to this class? Any newly recognized norms should be as definite in content and acceptance among civilized nations as the historical paradigms (such as piracy) familiar when the ATS was enacted. *Sosa*, 124 S. Ct. at 2765; *see also id.* at 2759 (discussing the paradigms alluded to above). To determine whether the violation of a given norm is actionable, the resulting claim "must be gauged against the current state of international law." *Id.* at 2766. Critically important is the Court's observation that lower courts must, in the absence of any treaty or "controlling executive or legislative act" look to "the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat." *Id.* at 2766-67 (quoting *The Paquette Habana*, 175 U.S. 677, 700, 20 S. Ct. 290, 44 L. Ed. 320 (1900)). Notably, the *Sosa* Court, in addressing Dr. Alavarez-Machain's specific claim for relief, looked to the Restatement (Third) of Foreign Relations Law of the United States (1987) (hereinafter "Restatement"). Following the Supreme Court's guidance, this Court will find that the claims raised by the *Khulumani* Plaintiffs rest upon binding international norms, the violation of which supports a claim under the ATS.

Torture & Extrajudicial Killing. The *Sosa* Court itself cited "torture and

extrajudicial killing" as exemplary norms, the violation of which provides an "'unambiguous and modern basis for' federal claims . . . ." *Id.* at 2763 (quoting H.R. Rep. No. 102-367, pt. 1 at 3 (1991)); *see also id.* at 2783 (recognizing "universal jurisdiction exists to prosecute . . . . *torture*, genocide, crimes against humanity, and war crimes") (Breyer, J., concurring) (emphasis added); *Filartiga*, 630 F.2d at 890 (holding actionable under the ATS torture perpetrated under color of official authority: "[F]or purposes of civil liability, the torturer has become like the pirate and the slave trader before him *hostis humanis generis*, an enemy of all mankind."); *see generally* Restatement § 702 ("A state violates international law if, as a matter of state policy, it practices, encourages, or condones . . . torture . . . .").

Thus actionable are torture claims by *Khulumani* Plaintiffs like Micheal Mbele who in 1986, because of his political activism, was shocked, beaten, and choked for three days, resulting in the loss of his hearing; and Nomkhango Phumza Slolweni Dyantyi, who in 1983 was tortured for three consecutive weeks by the South African police to the point that she was nearly blinded and from which she carries bullet fragments in her legs today; and Thandiwe Shezi, who in 1988 was abducted, repeatedly raped and electrocuted, and who had acid poured over her head. (Complaint ¶¶ 59, 47, 102.) Likewise actionable are the claims of extrajudicial killing brought by Elsi Guga, the mother of James Guga, 19, who was shot in the back by the South African security police while singing freedom songs and peacefully marching in the streets; and Joyce Ledwaba,

the mother of Samuel Ledwaba, who was lured to a farm house where he was summarily executed by South African security police; and Elizabeth Sefolo, the surviving wife of Harold Sefolo, who was abducted by the South African police in 1986 and was forced to witness the torture-murder of two acquaintances before he too was electrocuted to death. (Complaint ¶¶ 20, 23, 42.)

Prolonged Arbitrary Detention. Although the *Sosa* case involved a claim of arbitrary detention, it was by the Court's own description "a single illegal detention of less than a day, followed by transfer of custody to lawful authorities and a prompt arraignment . . . ." *Sosa*, 124 S. Ct. at 2769. Understandably, the Supreme Court found that this act, though morally condemnable, "violate[d] no norm of customary international law so well defined as to support the creation of a federal remedy." *Id.* However, the Court did not rule out the creation of such a remedy in the event of prolonged arbitrary detention. Indeed, the Court cited the Restatement in observing that "a 'state violates international law if, as a matter of state policy, it practices, encourages, or condones . . . prolonged arbitrary detention.'" *Id.* at 2768 (quoting Restatement § 702). The Court recognized that a "credible invocation of a principle against arbitrary detention" was possible, but that it would require "a factual basis beyond relatively brief detention in excess of positive authority." *Id.* at 2768-69.

"[A]rbitrary detention violates customary law if it is prolonged and practiced as state

policy." Restatement § 702 cmt. h.[1] Arbitrary detention "is cited as a violation of international law in all comprehensive international human rights instruments." *Id.* n.6. The United States government has officially described prolonged arbitrary detention as a violation of fundamental human rights. *See* 22 U.S.C. § 2151n(a) (barring U.S. assistance "to the government of any country which engages in a consistent pattern of gross violations of internationally recognized human rights, including prolonged detention without charges . . . ."); 22 U.S.C. § 2304 ("encourag[ing] increased respect for human rights and fundamental freedoms throughout the world" and barring security assistance to any nation that engages in "gross violations of internationally recognized human rights" including "prolonged detention without charges and trial"); *see also Hilao v. Estate of Marcos*, 103 F.3d 789, 795 n.9 (9th Cir. 1996) ("Customary international human-rights law prohibits prolonged arbitrary detention."); *Rodriguez-Fernandez v. Wilkinson*, 505 F. Supp. 787, 795-96 (D. Kan. 1980), *aff'd*, 654 F.2d 1382 (10th Cir. 1981) ("Our review of the sources from which customary international law is derived clearly demonstrates that arbitrary detention is prohibited by customary international law."). Breach of the international norm prohibiting arbitrary detention has been accepted widely as a basis for legal action under the ATS. *See Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1349 (N.D. Ga. 2002); *Eastman Kodak v. Kavlin*, 978 F. Supp.

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[1] "A violation of rights . . . is committed as a matter of state policy when it is required or encouraged by law, clear custom, or usage, or by some official act or statement of a responsible high official." Restatement § 702 n.2.

1078, 1092-95 (S.D. Fla. 1997); *Xuncax v. Gramajo*, 886 F. Supp. 162, 184-85 (D. Mass 1995); *Paul v. Avril*, 901 F. Supp. 330, 335 (S.D. Fla. 1994); *Fernandez-Roque v. Smith*, 622 F. Supp. 887, 903 (N.D. Ga. 1985).

Properly before this Court, therefore, are the claims of Elias Boneng, Dennis Vincent, Frederick Brutus, Moraloki Kgobe, Reuben Mphela, and Lulamile Ralrala, all of whom were subjected to prolonged arbitrary detention as a matter of state policy. (Complaint ¶¶ 104-08.) Recognition of their claims furthers the principles enunciated in *Sosa* and thus advances the cause of all who have been or might in the future be arbitrarily detained.

Indiscriminate Shootings. Tragically common during the apartheid era was the indiscriminate infliction of violence upon the citizens of the South Africa. From the notorious Sharpeville massacre to the anonymous, routine drive-by shootings committed by the security police, state-sponsored shootings compose a baleful chapter in South Africa's history. Although "indiscriminate shooting" as such is not identified as a violation of binding international norms, customary international law does prohibit "cruel, inhuman, or degrading treatment . . . ." Restatement § 702. Likewise, a state "violates international law if, as a matter of state policy, it practices, encourages, or condones . . . a consistent pattern of gross violations of internationally recognized human rights." *Id.* Thus, a violation that, "committed singly or sporadically" might not derogate customary law, does so if state policy fosters a consistent pattern of gross violations. *Id.* cmt. m. A violation is "gross" if "it is particularly shocking because of the importance of

the right or the gravity of the violation," such as where the state engages in "systemic harassment . . . grossly disproportionate punishment [or] invidious racial or religious discrimination." *Id.* The United States government has given official expression to these legal principles. *See* 22 U.S.C. § 2151n(a) (describing as a "pattern of gross violations of internationally recognized human rights" the "cruel, inhuman, or degrading treatment or punishment . . . or other flagrant denial of the right to life, liberty, and the security of person . . . ."); 22 U.S.C. § 2304(d)(1) (defining the term "gross violations of internationally recognized human rights" to include "cruel, inhuman, or degrading treatment or punishment . . . and other flagrant denial of the right to life, liberty, or the security of person"). *See also* Restatement § 404 cmt. a ("Universal jurisdiction is increasingly accepted for certain acts of terrorism, such as . . . indiscriminate violent assaults on people at large.").

South Africa's apartheid government, aided and abetted by the Defendants in this action, violated these customary norms when, for example, it inflicted violence upon Plaintiff Elsie Gishi, who was shot six times in the back while passing by a demonstration on her way home from work; when it inflicted violence upon Plaintiff Nosipho Manquba, who was shot randomly by the security police when he was but 8 years old; and when it inflicted violence upon Plaintiff Mzuhlangena Nama, who was shot in the leg and hospitalized for four months when the security police fired indiscriminately into a crowd holding a commemoration march in 1982. (Complaint ¶¶

76, 80, 84.)

Apartheid. At the root of the separately actionable violations discussed above was, of course, the state-sponsored systematically racist policies referred to collectively as apartheid. The Restatement makes clear that "[r]acial discrimination is a violation of customary [international] law when it is practiced systematically as a matter of state policy, e.g., apartheid in the Republic of South Africa." Restatement § 702 cmt. i. Beginning in the 1950s the United Nations General Assembly condemned apartheid. *See* G.A. Res. 820 (IX) (1954); 1016 (XI) (1957); 1178 (XII) (1957); 1249 (XIII) (1958); 1375 (XIV) (1959). In 1962 the General Assembly called for a boycott of South African goods and for member states to break all ties with the South African regime. *See* G.A. Res. 1761 (XVII) (1962). In 1968 the U.N. General Assembly declared apartheid to be a crime against humanity. *See* G.A. Res. 2396 (XXIII) (1968). This trend continued until the apartheid regime was dismantled. No one can seriously dispute that apartheid constituted a notorious and ongoing violation of customary law. Nor can the corporate Defendants in this action plausibly deny their knowledge of the mass human rights violations committed by the South African government during the apartheid era.[2]

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[2] The *Khulumani* Plaintiffs allege that the multinational corporate defendants aided and abetted the apartheid regime and the human rights abuses perpetuated under the apartheid system. The Second Circuit has ruled repeatedly that private parties may be held liable under the ATS. *See Wiwa v. Royal Dutch Pet. Co.*, 226 F.3d 88, 104 (2d Cir. 2000) ("[T]he ATCA reaches the conduct of private parties provided that their conduct is undertaken under the color of state authority or violates a norm of international law that is recognized as extending to the conduct of private parties."); *Kadic*, 70 F.3d 239 ("[W]e hold that certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private

Ultimately, although the *Sosa* Court counseled caution, it made clear that the violation of bona fide norms of customary international law will give rise to claims under the ATS. *Amici* welcome this development in American jurisprudence and join the *Khulumani* Plaintiffs' efforts to vindicate their respective individual rights on the grounds outlined above.

IV. THE *SOSA* COURT URGED CAUTION WHERE FOREIGN SOVEREIGNTY IS JEOPARDIZED, BUT THE CONCERNS OF THE SOUTH AFRICAN GOVERNMENT EXPRESSED IN THE MADUNA DECLARATION ARE NOT IMPLICATED BY THIS ACTION.

The *Sosa* decision goes further than admonishing lower courts to exercise discretion in the recognition of private causes of action under the ATS. The Court also discussed in dicta the "possible limitation" of a "policy of case-specific deference to the political branches." *Sosa*, 124 S. Ct. at 2766 n.21. As this Court undoubtedly is aware, the Supreme Court specifically discussed in footnote 21 a declaration sent to this Court by South African Minister of Justice Penuell Mpapa Maduna:

> [T]here are now pending in federal district court several class actions seeking damages from various corporations alleged to have participated in, or abetted, the regime of apartheid that formerly controlled South Africa. *See In re South African Apartheid Litigation*, 238 F. Supp. 2d 1379 (JPML 2002) (granting a motion to transfer the cases to the Southern District of New York). The Government of South Africa has said that these cases interfere with the policy embodied by its Truth and Reconciliation Commission, which "deliberately avoided a 'victors' justice' approach to the crimes of apartheid and chose instead one based on confession and absolution, informed by the principles of

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individuals.")

> reconciliation, reconstruction, reparation and goodwill." Declaration of Penuell Mpapa Maduna, Minister of Justice and Constitutional Development, Republic of South Africa, reprinted in App. to Brief for Government of Commonwealth of Australia et al. as *Amici* Curiae 7a, ¶ 3.2.1 (emphasis deleted). . . . In such cases, there 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.

Id.[3]

Amici are interested in this issue for two reasons. First is the potential in cases other than those before this Court for interference in an ATS action by actors (or their cohorts) alleged to have committed the violations raised in the case. Because this action involves claims arising under a distinct, minority-controlled predecessor regime no longer in power, that concern need not be addressed in this action. There is, however, a more insidious peril arising from footnote 21—the potential for unquestioning and unwavering deference by a United States court to the expressions of an interested government, such as those in Minister Maduna's declaration. *Sosa* requires that a court give serious weight to such expressions, but nothing in the *Sosa* opinion demands blind obedience to them. *Amici* strongly urge the Court to scrutinize Minister Maduna's claims as they apply to the

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[3] In a similar vein, the interests of the United States government are cited as a concern. As the United States government advised the Supreme Court in briefing the *Sosa* case, however, "The State Department has determined that, *to the extent that the pending apartheid litigation impedes South Africa's domestic efforts to promote both reconciliation and equitable economic growth*, the litigation will undermine the United States foreign policy objectives of promoting both foreign investment in South Africa and redress for the wrongs of apartheid." Brief for the United States as Respondent Supporting Petitioner at 43, *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739 (2004) (Nos. 03-339, 03-485) (emphasis added). As will be seen, regardless of what may be said of the class actions pending in this Court, the *Khulumani* litigation does not to any extent whatsoever impede South Africa's "domestic efforts to promote reconciliation and equitable economic growth."

Khulumani action (as distinguished from the class-action reparations cases pending before this Court). This Court should not set a precedent of undiscerning adherence to an interested government's general expressions of concern. It should instead provide an example to later courts of deliberation and scrutiny, of looking through the nominal into the substantive. Doing so here will reveal that the concerns expressed in Minister Maduna's declaration are not in fact implicated by this action.[4]

Failure to Redress Apartheid Abuses. Minister Maduna's initial concern is that "the litigation appears to suggest that the government of which I am a member, has done little or nothing about redressing the ravages of the apartheid system . . . ." (Exh. B ¶ 3.3.) The *Khulumani* action is premised exclusively on acts committed during the apartheid era. As Minister Maduna points out, the apartheid system was "formally and institutionally terminated by the election of the Mandela government on 27 April 1994." (Exh. B ¶ 3.3.) The Plaintiffs in this action have not impugned the efforts undertaken by the current South African government to redress the lingering effects of apartheid. The Plaintiffs seek no compensation from the current government of South Africa. This action involves corporate complicity in human rights abuses under a predecessor regime

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[4] A copy of Minister Maduna's declaration is attached as Exhibit *B*. It warrants mention that footnote 21 discussed the Maduna declaration only in the context of "several class actions" pending in this Court and it cited the order consolidating three class-action reparations cases: *Frank Brown et al. v. Amdahl Corp.*, *Lungisile Ntzebesa et al. v. Citigroup, Inc. et al.*, and *Nyameka Goniwe, etc. v. IBM Corp. et al.* The Supreme Court placed the Maduna declaration against its proper backdrop—that of the far-reaching class actions which seek broad relief that may well invade the province of the current South African government.

that Minister Maduna himself recognizes as illegitimate. The basis for this action in no way suggests that the current government "has done little or nothing about redressing the ravages of the apartheid system."

Surrogate Government. Minister Maduna stated that the "principal reason" for his declaration was that the litigation seeks "in effect . . . to set up the claimants as a surrogate government." (Exh. B ¶ 7.) The *Khulumani* Plaintiffs are individuals who seek not reparations, but individualized relief tailored to the suffering each experienced.[5] Unlike the other "apartheid cases" pending before this Court, the *Khulumani* action is not now and will not become a class action. Each *Khulumani* Plaintiff seeks only individualized traditional tort damages. The class-action reparations cases, such as the *Ntzebesa* and *Digwamaje* cases, purport to represent a class of virtually all black South Africans born during the period 1948 to 1994. Those suits seek to address every disparity and abuse associated with the apartheid regime, and accordingly seek global relief of the sort that raises genuine concerns about the power of a United States court to intervene in South African domestic policy. The *Khulumani* suit has no such pretensions and seeks no such relief.

Suing Domestic Corporations. Minister Maduna expressed grave concerns over the attempt to "impose liability and damages on corporate South Africa." (Exh. B ¶ 7.) Accordingly, says Minister Maduna, the administration resolved to oppose "attempts to

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[5] The organization Khulumani is a Plaintiff as well, but seeks only recovery of the costs incurred in assisting apartheid victims to recover from their injuries.

undermine South African sovereignty through actions such as the reparations lawsuit filed . . . by a US lawyer, Mr Ed Fagan, against two South African mining firms . . . ." (*Id.*) The *Khulumani* action does not include as a Defendant any South African mining firm. Indeed, this action is not brought against *any* domestic South African company. Nor is attorney Ed Fagan *in any way* associated with the *Khulumani* action. Thus, this case does not implicate Minister Maduna's concerns in this regard.

Affirmative Action Programs. Of legitimate concern to Minister Maduna and the current South African government are the alleged intentions of the *Ntzebesa* and *Digwamaje* parties to "creat[e] a historical commission and [to] institut[e] affirmative action programs" in South Africa. (Exh. B ¶ 10.) The current South African government views these matters as "essentially political in nature." (*Id.* ¶11.) Again, the *Khulumani* Plaintiffs seek no relief beyond individualized damages for specific, individual harms. At no time have the Plaintiffs in this action sought to create a historical commission or to institute affirmative action programs. Nor do the *Khulumani* Plaintiffs seek any form of political redress for the harms they suffered; they seek only the compensation available in traditional tort actions. Though the people of South Africa may deserve the broad-based relief described in Minister Maduna's declaration, that is indeed a matter of domestic policy that could not properly be sought through litigation in a foreign court. Accordingly, although Minister Maduna's distress is legitimate, it simply has no relation to the *Khulumani* action because this action seeks none of the relief that Minister

Maduna describes.

Foreign Investment. Finally, Minister Maduna expresses concern that "reparations" lawsuits "would discourage much needed foreign investment" and undermine the nation's economic stability. (Exh. B ¶ 12.) Whether the broad-based class actions pending in this Court might discourage foreign investment may be subject to dispute. However, it is incredible at the least to suggest that claims by 82 Plaintiffs against a number of private corporations would destroy South Africa's economy. As Nobel laureate and Columbia economics professor Joseph Stiglitz pointed out in his earlier attestation before this Court, this legal action says nothing about the South African government's attitude toward business. *See* Letter of Joseph E. Stiglitz (Aug. 6, 2003). As Professor Stiglitz points out (and as Americans have learned over the past few years), addressing corporate misconduct brings confidence to consumers and markets, creating "a more positive business climate." *Id.* Professor Stiglitz draws a convincing analogy:

> Businesses . . . ask, what are the opportunities for profits today and in the future? If a firm has polluted in the past, making it pay for that *past* pollution may deter it from polluting in the future, but will not deter it from entering into profitable investments. No one would argue that one should not impose fines or penalties for past pollution because doing so would discourage future investment. Such arguments would imply that no firm would ever be held accountable for past misbehavior.

Id. Corporate responsibility and foreign investment are not mutually exclusive. If it is profitable to invest in South Africa, foreign corporations will do so regardless of whether other corporations are held accountable for *past* misconduct under a distinct and illegitimate predecessor regime. If it is not profitable to invest in South Africa, foreign

corporations will not do so, regardless of how this legal action might turn out. Minister Maduna's concerns may be sincere, but they are misplaced.

The TRC Commission. Absent from Minister Maduna's declaration is any reference to the TRC's findings with respect to doing business under the apartheid regime:

➢ "Certain businesses . . . were involved in helping to design and implement apartheid policies." TRC Report, Vol. 4, Ch. 2 ¶ 161.

➢ "Business failed in the hearings to take responsibility for its involvement in state security initiatives specifically designed to sustain apartheid rule . . . ." TRC Report, Vol. 4, Ch. 2 ¶ 161.

➢ "After the Sharpeville massacre in 1960, the chairman of the largest Swiss bank, [Defendant] UBS, was asked: 'Is apartheid necessary or desirable?' His response was: 'Not really necessary, but definitely desirable.'" TRC Final Report, Vol. 6, Sec. 2, Ch. 5 ¶ 18.

➢ "It is also possible to argue that banks that gave financial support to the apartheid state were accomplices to a criminal government that consistently violated international law." TRC Final Report, Vol. 6, Sec. 2, Ch. 5 ¶ 26.

➢ "The recognition and finding by the international community that apartheid was a crime against humanity has important consequences for the victims of apartheid. Their right to reparation is acknowledged and can be enforced in terms of international law." TRC Final Report, Vol. 6, Sec. 5, Ch. 1 ¶ 75.

None of the Defendants in this action sought amnesty before the TRC. It would be bizarre at best to hold that they may now find shelter from civil liability in private litigation because their payment of damages might somehow interfere with a reconciliation process in which they refused to participate. The *Khulumani* action involves the private redress of private harms from private actors. The now-completed work of the TRC is not implicated in any way.

The Letter of June 27, 2003. Also relevant to this issue is a letter dated June 27, 2003, from the Office of the Presidency of South Africa to Khulumani. (Exhibit *C*.) The author of the letter, Frank Chikane, Director-General, addressed public comments he recently had made with respect to claims brought in the United States courts. The letter clarifies that Director-General Chikane's comments were directed toward "reparations claims" by persons who "claim to be representatives of South Africa or all of the victims of apartheid system . . . ." Letter of Frank Chikane (Rev), Director-General, The Presidency: Republic of South Africa (June 27, 2003). This actually is in keeping with the concerns expressed in Minister Maduna's declaration. However, the *Khulumani* Plaintiffs do not seek "reparations;" nor do they claim to represent South Africa or all the victims of apartheid. They bring claims only on behalf of themselves for damages they suffered as individuals, or as representatives of deceased individuals. Director-General Chikane recognizes the legitimacy of such claims, stating that he "accept[s] that any individual South African or groups of South Africans have the right to choose the route

of legal suits and claims against South African companies outside the country . . . ." *Id.* Although this action does not involve any South African companies, the principle of honoring the right to bring individualized claims remains intact. This Court should consider the remarks of Director-General Chikane alongside those of Minister Maduna. Furthermore, resolutions supporting the right of Plaintiffs to bring this legal action have been passed by the South African Council of Churches and the Congress of South African Trade Unions (COSATU) Central Executive Committee. The Resolutions are attached as Exhibit D.

Amici join the Plaintiffs in this action in urging the Court not simply to accept the declaration of Minister Maduna at face value, but instead to inquire into its merits, or at least its application to the facts of this specific case. Doing so reveals that it would be erroneous and unjust to derail the *Khulumani* action based upon Minister Maduna's letter.

V. CONCLUSION

The United States Supreme Court has held open the doors of the American court system to those, such as Plaintiffs here, who have suffered denial of the most fundamental and universally recognized human rights. Though the Court counseled caution in recognizing claims under the ATS, it did not in any way suggest that the lower courts ought to close the door to meritorious claims involving binding international norms. This is such a claim. Despite the current South African government's legitimate

concerns with respect to some claims pending before this Court, the *Khulumani* suit does not implicate those concerns. Careful consideration of these issues will set the standard of legal craftsmanship for future courts to emulate—one of enlightened fairness and basic justice, which is precisely the standard endorsed by *Sosa*.

Dated: September 29, 2004

Respectfully submitted,

By: _____

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Exhibit A

List of Amici

SOUTH AFRICA TRUTH AND RECONCILIATION COMMISSION

Archbishop Emeritus Desmond Tutu
Chair
Cape Town, South Africa

Yasmin Sooka
Commissioner
Pretoria, South Africa

Hugh Lewin
Member, Human Rights Violation Committee
Johannesburg, South Africa

CIVIL SOCIETY:

Religious Organizations and Church Leaders

Africa Desk of the Protestant Federal Church
Frankfurt, Germany

South African Catholic Bishops Conference
Pretoria, South Africa

Commission Tiers Monde de l'Eglise Catholique
Geneva, Switzerland

Geoffrey Davies
Bishop, Church of the Province of South Africa
Kokstad, South Africa

Ecumenical One World Solidarity Group of Parishes
Munster, Germany

Ecumenical Support Services
Munchen, Germany

EMS Protestant Mission Society in South-West Germany
Stuttgart, Germany

European Continental Province of Moravian Church
Bad Boll, Germany

Martin Huhn
Church Network of Industrial Mission*
Manheim, Germany

Kairos Europa/Ecumenical European Network of Grassroots Organizations
Heidelberg, Germany

Father Michael Lapsley
Institute for the Healing of Memories*
Cape Town, South Africa

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Former Moderator of the Presbyterian Church of Southern Africa*
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Norwegian Church Aid
Oslo, Norway

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Johannesburg, South Africa

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Limburg, Germany

Cristoph Reichel
The Moravian Church
Germany

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New York, New York

Swiss Interchurch Aid
Zurich, Switzerland

Swiss Catholic Lenten Fund
Lucerne, Switzerland

Young Christian Students
Weinheim, Germany

Young Christian Workers-Free State
Welkom, South Africa

South African Civil Society Organizations and Individuals

Alternative Information and Development Centre
Cape Town, South Africa

Anti-Privatisation Forum
Johannesburg, South Africa

Boipatong Community Development
Boipatong, South Africa

Boipatong Development Forum
Boipatong, South Africa

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Centre for the Study of Violence and Reconciliation
Johannesburg, South Africa

Daveyton Environmental Youth Council
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RC Dbakwane
Johannesburg, South Africa

Environmental Justice Networking Forum
Johannesburg, South Africa

Evaton West Crisis Committee
Evaton West, South Africa

Free Burma Campaign (South Africa)
Edenglen, South Africa

Freedom of Expression Institute
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Gender & Trade Network in Africa
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Industrial Ministries of South Africa
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KHOCC
Welkom, South Africa

Landless Peoples Movement
Gauteng Province, South Africa

Motheho Mokhansto Innovators
South Africa

Muslim Youth Movement
Johannesburg, South Africa

NBS Project Management
Johannesburg, South Africa

Orange Farm Water Crisis Committee
Orange Farm, South Africa

Palestinian Solidarity Committee
Johannesburg, South Africa

Pan Africanist Women's Organisation
Johannesburg, South Africa

Pan Africanist Youth Congress
Johannesburg, South Africa

Philadelphia National Youth Directorate
South Africa

Quigney Safety Forum
Eastern Cape, South Africa

Ratang Agriculture Usindiso AIDS Project
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Samancor Retrenched Workers Crisis Committee (SAMANCOR)
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Sounds of Edutainment Cultural Artists
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Services and General Workers Union
Welkom, South Africa

Small Farms Community Crisis Forum
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South African History Archives
University of the Witwatersrand
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South African National NGO Coalition
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South African Prisoners Organisation for Human Rights
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Thembisa Concerned Residents Association
Thembisa, South Africa

The Timbila Poetry Project
Polokwane, South Africa

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Association of Democratic Jurists
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ATTAC
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Berne Declaration
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Bread for All
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Maya Graf
Member of Parliament
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Remo Gysin
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Pia Hollenstein
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Franziska Teuscher
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Pierre Vanek
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Daniel Vischer
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* Organization listed for identification purposes only

Exhibit B

DECLARATION BY PENUELL MPAPA MADUNA

1. I am the Minister of Justice and Constitutional Development of the Republic of South Africa and a member of the cabinet of President Thabo Mbeki. I am an admitted attorney of the High Court of South Africa and hold the degrees of B.Juris, LL..B, LL.M as well as a LL.D in constitutional law.

2. I make this declaration to set forth the South African government's (**"the government"**) view of various cases pending in the United States courts against corporations that did business with and in South Africa during the apartheid period, including those cases consolidated under the caption, *In Re South African Apartheid Litigation*, MDL No. 1499 (S.D.N.Y.) and *In Re Khulumani & others,* CV 02 5952 (E.D.N.Y.) It is the government's submission that as these proceedings interfere with a foreign sovereign's efforts to address matters in which it has the predominant interest, such proceedings should be dismissed.

3.

3.1 By way of background, the Republic of South Africa is one sovereign democratic state founded on the values of human dignity, equality, non-racialism, non-sexism, supremacy of the Constitution, and the rule of law, universal adult suffrage and a multi-party system of democratic government to ensure accountability, responsiveness and openness. Under South Africa's 1996 Constitution, the Constitution is the supreme law of the Republic. Under the Constitution, the judicial authority of the Republic is vested in the courts, which are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice. No person or organ of state may interfere with the functioning of the courts, while all other organs of the state, through legislative and other measures, must assist and protect the courts to ensure their independence, impartiality, dignity, accessibility and effectiveness. An order or decision of a court binds all persons to whom and organs of state to which it applies. South Africa has a well developed judicial system, with the Constitutional Court at its apex and the Supreme Court of Appeal as the final court of appeal in non-constitutional matters. Judgments of the Constitutional Court and, indeed, the Supreme Court of Appeal, are widely admired for their independence and incisiveness

and are frequently referred to in judgments of other final courts of appeal internationally.

3.2

3.2.1 The 1993 interim Constitution, which paved the way for South Africa's first democratic government in 1994, made provision for the establishment of a Truth and Reconciliation Commission ("**the TRC**") in order to establish the truth in relation to "**past events**", the circumstances under which gross violations of human rights occurred and to make such findings known. The purpose of the TRC was not simply to provide an account of the apartheid system, but to document gross violations of all human rights abuses, irrespective of their perpetrators, and to make provision for amnesty for those who made full disclosure of such politically-motivated human rights violations and to provide reparations for the victims of such abuses. In 1995, Parliament enacted legislation to establish the TRC formally. In taking these constitutionally-mandated steps, government deliberately avoided a "**victors' justice**" approach to the crimes of apartheid and chose instead one based on confession and absolution, informed by the principles of reconciliation, reconstruction, reparation and goodwill.

3.2.2 The 1993 Constitution and the Promotion of National Unity and Reconciliation Act, 1995, which established the TRC, was based on a conscious agreement by all political parties in South Africa to avoid Nuremberg-style apartheid trials and any ensuing litigation.

3.2.3 The TRC completed its work in March 2003. It granted amnesty to many perpetrators of gross violations of human rights on a cross-party basis. It also recommended financial reparations for some 20 000 victims of such abuses. In his address to Parliament on 15 April, 2003, on the tabling of the TRC Report, President Thabo Mbeki on behalf of the government, observed that:

> "In the recent past, the issue of litigation and civil suits against corporations that benefited from the apartheid system has sharply arisen. In this regard, we wish to reiterate that the

South African Government is not and will not be party to such litigation.

In addition, we consider it completely unacceptable that matters that are central to the future of our country should be adjudicated in foreign courts which bear no responsibility for the well-being of our country and the observance of the perspective contained in our constitution of the promotion of national reconciliation".

3.2.4 It is my respectful submission that the government's views on matters which fall within its sovereign domain should be respected in all forums.

3.3 I believe that it is important for the court to understand the context in which these cases are brought. The litigation appears to suggest that the government of which I am a member, has done little or nothing about redressing the ravages of the apartheid system, which, while formally and institutionally terminated by the election of the Mandela government on 27 April 1994, continue to live with us and will, unfortunately, continue to endure for many years to come. It likewise fails to appreciate the mandate under which South Africa's first democratic government was elected and how it has gone about executing this mandate since 1994. In order to assist the court, I set out briefly the details of this below.

4. In addition to institutionalising enforced racial segregation, and denying the majority the franchise, the apartheid system sought systematically to exclude most South Africans from access to adequate education, health care, housing, water, electricity, land and communications, while likewise excluding it from proper participation in the economy. The African National Congress-led government, under the leadership of former President Mandela, was elected in 1994 by the previously apartheid-excluded majority on a programme specifically to redress the legacy of apartheid. The government's programme, based on the reconstruction and development of the South African economy, accordingly had and continues to have as its central plank the fundamental transformation of South African society. It does so by attempting to rehabilitate the lives of the previously disadvantaged through the promotion of non-racialism, equality and social justice. The implementation of this policy, as will be seen below, has been and continues to be achieved through wide-ranging legislative reforms to transform South African

society. In other words, what the government is attempting to do is to repair the damage caused by the apartheid system through a broad programme of socio-economic reparations which has at its heart, the betterment of the lives of the previously disadvantaged.

5.

5.1 South Africa's 1996 Constitution, which the African National Congress was instrumental in drafting, gives effect to government policy to redress the wrongs of the apartheid system, by not only prohibiting all forms of discrimination, but also by guaranteeing the right of all South Africans to access to housing, education, health care and related social services. Under the Constitution, the government is obliged to meet these socio-economic rights within the limits of its resources. The central importance of these provisions of the Constitution is, however, transformative and redistributive, in order to enable all South Africans to overcome the legacy of apartheid, through the creation of a more just and egalitarian society. Although, the government has obviously not met all of its 1994 goals, its record, faced with the realities of a globalised economy is, I submit, impressive.

5.2 In education, the spending disparity on white and black learners (18:1 in 1970 was reduced to 3:1 by 1993) was eliminated by racially integrating schools while at the same time, directing the bulk of state expenditure to the neediest schools. In addition, free primary and secondary level education will be available to the poorest 40% of the population from 2004. Government remains committed to reducing adult illiteracy.

5.3 Skewed land ownership is being addressed through legislation which provides for the restitution of land taken from black South Africans under race-based legislation first introduced in 1913. Further laws provide for the redistribution, with state assistance, of some 30% of commercial farming land to emerging black farmers.

5.4 Social pensions (equalised prior to 1994) have now been extended to many more beneficiaries and supplemented by school feeding schemes, free medical treatment at state hospitals for pregnant women and children under the age of six, and a child support grant. Substantial increases have been made in providing state financial support, especially to children, with more

DMM

than eight million people expected to receive social assistance grants by 2005 compared with 2.7 million in 1997. Government is currently rolling out state financial support for children between the ages of seven and fourteen years, over a seven year period.

5.5 At the same time, government has adopted a range of legislative measures aimed at overcoming racial inequality, including the Employment Equity Act of 1998, and the Preferential Procurement Policy Framework Act of 2000. The vast bulk of the Promotion of Equality and Prevention of Unfair Discrimination Act of 2000, came into effect on 16 June, 2003.

5.6 A good example of achieving majority participation in the economy is the Minerals and Petroleum Resources Development Act of 2002, which is due to come into force in late 2003. This vests all mineral rights in the state and grants new mining licences to applicants in return, among other things, for comprehensive endeavours to promote black economic empowerment. The objectives here include the transfer of ownership to black South Africans of at least 26% of equity or operating assets within ten years under a broad-based mining charter agreed with the South African mining industry. Likewise, a Black Economic Empowerment Bill, intended to promote black economic empowerment in other sectors through measures such as affirmative action, preferential procurement, and equity transfers in favour of black South Africans, is currently before the South African Parliament.

6. While the government's job is to govern in a way which is best for the people as a whole, it cannot ignore the fact that it is the successor government to the apartheid government and, as such, bears primary responsibility for the rehabilitation and improvement of the lives of the people whom the claimants claim to represent.

7. The decision taken by Cabinet not to support the litigation was not taken lightly. The Cabinet only took this decision after an extensive discussion both at Cabinet committee level and in the full Cabinet in which I participated fully. The principal reason for the Cabinet's decision was that as the Mandela government in 1994 and the Mbeki government in 1999 were both elected by an overwhelming majority of the population, on a programme of thorough socio-economic transformation aimed at redressing the legacy of apartheid, it would make little sense for the government to support litigation, which not only sought to impose liability and damages on corporate South Africa but which, in effect, sought to set up the

claimants as a surrogate government. Accordingly, on 16 April 2003, the Cabinet, after extensive discussion of the matter at Cabinet committee level, resolved that:

> **"It remains the right of the government to define and finalise issues of reparations, both nationally and internationally. In this regard, it is imperative for the government to clearly express its views on attempts to undermine South African sovereignty through actions such as the reparations lawsuit filed in the United States of America by a US lawyer, Mr Ed Fagan, against two South African mining firms and the participation of South African lawyers in such procedures."**

8.

8.1 The government's policy is to promote reconciliation with and business investment by all firms, South African and foreign, and we regard these lawsuits as inconsistent with that goal. Government's policies of reconstruction and development have largely depended on forging constructive business partnerships. Its 1996 Growth, Employment and Redistribution ("**Gear**") strategy further acknowledged the importance of the private sector that faster economic growth offers the only way out of poverty, inequality, and unemployment, that such growth is driven by both foreign and local private sector investment, and that government's principal role is to create an enabling environment for such investment. This market-friendly strategy regards business as the engine of economic growth.

8.2 The re-entry of South Africa to global capital and export markets post-1994, together with the government's exemplary fiscal and monetary policy record, have resulted in an increase in economic growth to 2.5% per annum from 1994-2002, compared with the paltry below 1 per cent per annum growth of the previous decade. Importantly, private sector fixed investment has responded to the improved environment, rising some 4.3 per cent per annum since 1993.

8.3 The improved growth performance is still less than what is required to address successfully all the socio-economic legacies of apartheid – especially unemployment. But, together with the government's redirection of existing expenditure, it has enabled important progress to be made in addressing historical inequalities and poverty.

8.4 In addition to the government performance set out in 5, the recently released 2001 census, together with figures from the South African Reserve Bank, provide evidence of further important progress:

- real disposable income per capita of households (at constant 1995 prices) rose from R8 640 in 1994 to R9 271 in 2002, reflecting an increase of 7.3%;
- from April 1994 to February 2003, close on 1.5 million houses had either been built or were under construction with the help of the government's subsidy for low-income first-time buyers. The number of formal dwellings increased from 4.3 million in 1996 to 6.2 million in 2001, an increase of 44%. Further, formal houses constituted 48% of the total number of dwellings in 1996 and this proportion rose to 56% in 2001;
- the number of households using electricity for lighting increased from 5.2 million in 1995 to 7.8 million in 2001, an increase of 50%. While 57% of all households used electricity for lighting in 1996, this proportion had risen to 70% by 2001;
- the number of households with access to clean water increased from 7.2 million in 1996 to 9.5 million in 2001, an increase of 31%. As a result, by 2001 85% of all South African households had access to piped water within 200 metres of their homes;
- in 1996, the number of people aged between 5 and 24 who were studying at an educational institution was 11.8 million while in 2001 the number had risen to 13.7 million: an increase of 16%. The number of people aged 20 or over who have Grade 12 or have completed high school rose from 3.5 million in 1996 to 5.2 million in 2001, an increase of 50%.

9. The government accepts that corporate South Africa is already making a meaningful contribution to the broad national goal of rehabilitating the lives of those affected by apartheid. Over and above its existing corporate social investment programmes, business has been in partnership with the government in the R1-billion (approximately US $ 133-million) Business Trust. Over five years,

this business led initiative has improved the lives of 2.5 million disadvantaged South Africans through focused programmes of human capacity building and employment creation. Further initiatives in partnership between business and government, as well as other social actors, are being prepared with concrete commitments having been made in a number of fields at the government's June 7, 2003 Growth and Development Summit attended by leading representatives of government, business and labour. At the summit, business agreed with government and labour to invest R145 billion (US$19 billion) in the automotive, chemical, mining and oil sectors over the next five years.

10. The remedies demanded in the current litigation in the United States – both the specific requests (such as for the creation of a historical commission and the institution of affirmative action programmes) and the demand for billions of dollars in damages to be distributed by the US courts – are inconsistent with South Africa's approach to achieving its long term goals. In this regard, I refer further to the earlier discussion on the TRC and its establishment in 3.2. As indicated above, the government has its own views on appropriate reparations policies and the appropriate allocation of resources to develop our economy. I would also make the point that matters of domestic policy which are pre-eminently South African should not be pre-empted by litigation in a foreign court.

11. It is also the view of the government that the issues raised in these proceedings are essentially political in nature. These should be and are being resolved through South Africa's own democratic processes. Another country's courts should not determine how ongoing political processes in South Africa should be resolved, not least when these issues must be dealt with in South Africa. In addition, the continuation of these proceedings, which inevitably will include massive demands for documents and testimony from South Africans involved in various sides of the negotiated peace that ended apartheid, will intrude upon and disrupt our own efforts to achieve reconciliation and reconstruction.

12. Permitting this litigation to go forward will, in the government's view, discourage much-needed direct foreign investment in South Africa and thus delay the achievement of our central goals. Indeed, the litigation could have a destabilising effect on the South African economy as investment is not only a driver of growth, but also of employment. One of the structural features of the South African economy, and one of the terrible legacies of apartheid, is its high level of

unemployment and its by-product, crime. Foreign direct investment is essential to address both these issues. If this litigation proceeds, far from promoting economic growth and employment and thus advantaging the previously disadvantaged, the litigation, by deterring foreign direct investment and undermining economic stability will do exactly the opposite of what it ostensibly sets out to do.

13. I understand that under United States law, courts may abstain from adjudicating cases in deference to the sovereign rights of foreign countries to legislate, adjudicate and otherwise resolve domestic issues without outside interference, particularly where the relevant government has expressed opposition to the actions proceeding in the United States, and where adjudication in the United States would interfere with the foreign sovereign's efforts to address matters in which it has the predominant interest. The government submits that its interest in addressing its apartheid past presents just such a situation.

I declare, under penalty of perjury, under the laws of the United States, that the foregoing is a true and correct statement.

Signed on 11th July 2003.

PENUELL MPAPA MADUNA

Exhibit C

Tel: 012 300 5354/ 021 464 2111 Fax: 012 300 5755/ 021 464 2200
THE PRESIDENCY: REPUBLIC OF SOUTH AFRICA
Private Bag X1000, Pretoria, 0001

27 June 2003

Mr. Ike Tlholwe
Executive Director
Khulumani Support Group
3rd Floor, Heerengracht Building
De Korte Street
BRAAMFONTEIN
2017

Dear Mr.Tlholwe

"PERCEPTIONS ABOUT KHULUMANI"

Your letter of the 18th June 2003 on the above matter has reference.

I appreciate the trouble you have taken to raise Khulumani's concerns about the June 15 Sunday Independent article which deals with some of my views relating to the complex subject of reparations and the role of civil society.

I was surprised though that you thought my comments were directed at Khulumani as a support group for victims or survivors groups in general. If the newspaper report gave that impression I think it would be unfortunate.

For the record, I would like to state that I have nothing against Khulumani as a support group for victims and survivors of apartheid. In fact, I am convinced that we need more of such groups to service victims and survivors as Khulumani is doing. I met some of your leaders both in Cape Town and in Pretoria to consult them about the TRC and the complex issues related to reparations. And, in all the discussions, especially at the Workshop prior to the President addressing Parliament, I found your contributions very useful. The work of Khulumani outlined in your letter is indeed commendable, and you should be encouraged and supported to continue offering these services.

As you would know, I myself have been part of civil society for many years, and I would be the last one to disparage the good work many civil society groups are doing.

My comments in the newspaper report you refer to were specifically about the contentious issue of reparations claims against South African companies in the USA. Whilst I accept that any individual South African or groups of South Africans have the right to choose the route of legal suits and claims against South African companies outside the country, they should not claim to be representatives of South Africa or of all the victims of the apartheid system. Worse more, no lawyer should ever make such claims, especially when this is for their own benefit more than for the victims themselves. Details of this discourse can best be disposed of in a discussion rather than through the static written words as I am doing now.

I have not experienced Khulumani, especially here in Gauteng, as an organization that tries to present itself as above the elected representatives of the people. I am aware that Khulumani has a cordial relationship with Government and that it has embraced, for itself, Government's programmes to advance the interests of victims and survivors.

I accept your offer for a discussion on some of these matters, and I will ask my Office to arrange such an encounter. I would advise though that our encounter should not be about proving your legitimacy or value, as I am convinced about that. If we do have a discussion, it should be on subjects that you think are pertinent for your work or victims or survivors of apartheid themselves.

I wish you all the luck and God's blessings in your good work.

Sincerely yours

FRANK CHIKANE (REV)
DIRECTOR-GENERAL

Exhibit D

RESOLUTION ON REPARATIONS
BY THE SOUTH AFRICAN COUNCIL OF CHURCHES (SACC)

The National Conference acknowledges the experience and expertise developed by the Khulumani Support Group in the areas of reparations as a means of redress for gross human rights violations, both at a local and an international level.

The National Conference recognises the right of people to seek legal redress for corporate practices that helped to sustain the apartheid government.

The National Conference calls on the NEC to facilitate ongoing dialogue between the SACC, Khulumani Support Group and any other victim groups to:

- Deepen the understanding of the TRCs unfinished business and reparations issues
- To expose cooperation and support for programs that advance the healing of victims in a way which enables responsible rebuilding and development of community

The National Conference notes the existing amicus brief in support of the Khulumani litigation in addressing issues of global inequity and the practices of corporations, both internationally and locally and refers this to the NEC for urgent action

The National Conference also mandates the NEC to meet with government to consider the wisdom of continuing to oppose the Khulumani litigation, as distinct from the class action.

Adopted at the Final Session of the SACC Triennial Conference on July 14, 2004 at Cedar Park Conference Centre, Johannesburg

CONGRESS OF SOUTH AFRICAN TRADE UNIONS (COSATU) DECISIONS OF THE CENTRAL EXECUTIVE COMMITTEE

St. Georges Hotel
Cape Town: 23-26 August 2004

Section 10:

- Business cannot deny its responsibility for the oppression and deprivation of our people under apartheid. It must therefore play an active role in the overcoming the resulting inequalities and poverty, above all by increasing investment in production and expanding employment;
- The critical issue is to ensure greater equity in South African society especially through systematic changes in ownership and employment;
- Individuals however, have a right to pursue cases that seek justice for damages suffered at the hands of specific companies anywhere including in foreign countries;
- The way to achieve these broad objectives is to mobilise our people around demands for greater investment and job creation.

CERTIFICATE OF SERVICE

I, Tanya Harvey hereby certify that on this 29th day of September 2004, I caused to be served the foregoing Brief of AmiciCuria International Human Rights Organizations, TRC Commissioners and Others In Support of Plaintiffs on the following counsel of record by first-class mail, postage pre-paid:

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