

# Can reparations for apartheid profits be won in US courts?

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## Abstract

The campaign for apartheid reparations is in the US courts at present, pitting black South Africans in the Jubilee and Khulumani organisations (as well as individuals) against three dozen multinational corporations and friendly governments in Washington, London, Berlin and Pretoria. The demand for reparations extends the logic of international anti-racism solidarity campaigning, dating to the sanctions era. Plaintiffs' use of the Alien Tort Claims Act extends a precedent set by Holocaust victims' descendants. The US justice system's conservatism is stretched, due to plaintiff appeals in 2008 reaching even the Supreme Court. And the change in SA government leadership may open up space to debate the critical questions: how to achieve justice from pro-apartheid corporations, and also disincentivise future exploitation in similar circumstances?

## Introduction

"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."  
- The Alien Tort Claims Act

Will profits from the crimes of apartheid be examined in a court of law, and reparations paid to its victims? Might the case of apartheid be extended to slavery and colonialism? Is the United States justice system capable of considering such radical notions of historical retribution?

Two hundred twenty years ago, one of the world's most pressing security problems was addressed through a US law that would subsequently haunt corporations sued by victims of repressive states and their corporate allies. In 1789, the US Congress passed the Alien Tort Claims Act (ATCA) in part to get a legal handle on shipping theft, and in the process to persuade colonial powers it was safe to trade with the US. "Torts" (personal injuries such as piracy theft) against foreigners ("aliens") could be served on the perpetrator within the US even if there was no other connection. An obscure statute of just 33 words, only in the last two decades has ATCA become widely known. More than 100 cases have been filed in US courts, beginning with a Paraguayan torture victim. It is one of several ways that the demand for reparations is being made,<sup>1</sup> but may be most powerful if the US courts agree in coming months that black South Africans can use the law to win reparations of \$400 billion against several dozen multinational corporations which profited from apartheid.

In 1997, ATCA Holocaust Litigation cases against Swiss banks were settled out of court for \$1.25 billion. The law was affirmed in 2003, in the case of Presbyterian Church of Sudan, et al.

v. Talisman Energy Inc. in the New York federal district court, which denied a Talisman motion to dismiss the case. Encouraged by the case of Burmese villagers against Unocal, which in 2003 withstood challenge by the Bush Administration, a group of South African activists including Dennis Brutus and Lungisile Ntsebeza, as well as the Khulumani Support Group for apartheid victims and Jubilee South Africa, used the ATCA to sue latterday pirates: dozens of multinational corporations operating in South Africa during apartheid, a UN-determined "crime against humanity". As a result of multiple strategies and players (sometimes in conflict with each other), there were several lawsuits filed during 2002-04 - Khulumani Support Group and 90 others; Digawamaje et al; and Ntsebeza et al - which were subsequently consolidated in a 2007 countersuit, American Isuzu Motors, et al, v Ntsebeza, et al.

Not long after the activists' cases were filed, the South African government was requested by the Bush Administration to oppose Khulumani and other plaintiffs, and as noted below, agreed to do so after a period of relative neutrality. Because of the alliance between Pretoria and Washington (as well as the British and German governments) on behalf of multinational corporate interest, in November 2004, Judge John Sprizzo initially decided the case on behalf of corporate defendants. He reasoned that ATCA conflicted with US foreign policy and South African domestic economic policy.

But three years later, on 12 October 2007, litigants won an appeal on grounds Sprizzo's logic was faulty. In May 2008, the US Supreme Court was expected to finally kill the lawsuit, on behalf of the corporations, but four of the justices discovered conflicts of interest in their own investment portfolios (they owned shares in the sued companies). The Supreme Court had no choice but to pass the case back to Sprizzo, who scheduled the next hearing for July 8. But the Supreme Court stand-down, according to plaintiff lawyer Charles Abrahams, represented "a massive victory for the international human rights movement as a whole."<sup>2</sup>

### **Reparations, social responsibility and public relations**

In contrast to Abrahams, establishment commentators worried that this new lease on the reparation lawsuit's life would blunt the possibility of generating a more nuanced foreign economic policy. Some point to Ronald Reagan's 1980s promotion of the Sullivan Principles to encourage multinational corporations to raise black worker wages. Others seek out of court settlements and corporate investments.

To illustrate, the conservative Washington representative of South Africa's International Marketing Council, Simon Barber, was dismissive of the litigants' Supreme Court win: "The endeavour remains quixotic, nonetheless. The only redistribution of wealth ever likely to result is from shareholders to lawyers. There has been plenty of that already." Still, he revealed a nervous twitch:

The US government has been as clear as the South African in calling for dismissal of what is, as President Thabo Mbeki has said, judicial imperialism. The Supreme Court will heed the call when the time comes. It has already shown its hand. One nagging

question: what if the next South African administration were to change tack and back the plaintiffs?<sup>3</sup>

Given that the next administration, likely to be headed by Jacob Zuma, has already declared loyalty to the ideals of the Davos World Economic Forum, Citibank and Merrill Lynch, nevertheless, what if the plaintiffs are not only correct in making their demands for torts to be righted, hence winning damages to offset the oppression suffered by black South Africans, but also in disincentivizing such behaviour by multinational corporations in future? According to South Africa's *Times* newspaper:

Millions of South Africans are eligible to join a class-action lawsuit against US-based multinational corporations accused of aiding and abetting the apartheid government... Nicole Fritz, the director of the SA Litigation Centre, said that companies that were not perpetrators of human rights violations but were complicit in such violations through their dealings with oppressive governments were now potentially liable in law for their actions. The Supreme Court ruling could open the way for similar cases, Fritz added.<sup>4</sup>

Similar cases would underscore how important it is to disincentivize profits made through operations within dictatorial regimes such as Burma or Zimbabwe is one objective. In mid-2008, just as Robert Mugabe's Zanu(PF) committed torture and murder to ensure his reelection, AngloPlats announced a US\$400 million investment in lucrative Zimbabwean mines.

In opposition to sanctions and disinvestment from sites like apartheid South Africa, the phenomenon of Corporate Social Responsibility grew in part to allow large firms like Anglo to claim they were undermining oppressive governments from within, and that the tax revenues and other benefits to a repressive regime were offset by the firms' empowerment of trade unions and introduction of market rationality. Such claims were never seriously addressed in the Truth and Reconciliation Commission (TRC), which gave large local corporations which profited from apartheid a two-day wrist-slapping exercise, although the TRC did recommend a wealth tax to redistribute apartheid profits. Hence, according to law professor Danny Bradlow of American University, who opposes the reparations strategy:

Regardless of their outcome, these legal bouts will result in embarrassing publicity about [multinational corporations'] role in apartheid SA. In addition, they know that these types of lawsuits will continue to hound them unless they can prove that they are behaving responsibly in difficult situations. Consequently, even if they win this case, they may still feel compelled to try and prove, both to SA and the world, that they are responsible global citizens, who accept an obligation to use their profit-making and philanthropic operations to help address social problems like poverty, inequality, unemployment and discrimination. Given these unpleasant scenarios and the urgent need to address the difficult legacy apartheid has left us, it behooves both Kulumani and the corporate defendants to think creatively about resolving their differences out of court.<sup>5</sup>

An out of court multi-billion dollar settlement was, indeed, the outcome of a prior ATCA-related victory by Holocaust victims' descendants, in their fight with Swiss and German corporations and banks. Partly because of race, but also because a win against apartheid might also generate renewed reparations interest in three other areas – environmental destruction, colonialism and slavery – it appears crucial for international business to end these lawsuits before they get a toehold in US jurisprudence. Reflecting this concern, Clinton-era US deputy treasury secretary Stuart Eizenstat, once a supporter of reparations claims against pro-Nazi corporations, provided “talking points” to the “USA Engage” lobby of 650 multinational corporations in November, 2002, to help capital fight the ATCA. For if South African reparations activists “can galvanise public opinion and generate political support,” Eizenstat explained, “they may achieve some success despite legal infirmities.”<sup>6</sup>

As Abrahams remarks,

Most notable amongst the three cases is the Khulumani lawsuit that was initiated by Jubilee South Africa and has been supported by the organisation since its filing in November 2002. The substantive basis of the suit is that foreign multinational corporations aided and abetted the Apartheid government by providing arms and ammunition, military technology, transportation and fuel with which the government and its armed forces were able to commit the most heinous crimes against the majority of the people of South Africa. Corporations sued are: the Reinmetall Group, for providing arms and ammunition to the Apartheid government; British Petroleum (BP), Shell, Chevron Texaco, Exxon Mobil, Fluor Corporation and Total Fina-Elf, for providing fuel to the armed forces; Ford Motor Company, Daimler-Chrysler and General Motors, for providing transportation to the armed forces; Fujitsu and IBM for providing the government with much needed military technology. The suit further argues that this support could not have taken place without the role of foreign banks that provided the necessary foreign currency for these goods and services. These banks were, amongst others, Barclays Bank, Citibank, Commerzbank, Credit Suisse, Deutsche Bank, Dresdner Bank, J P Morgan Chase and UBS. Most of these banks were responsible for bankrolling the Apartheid government... A success in these suits will not only be a legal victory for the victims of Apartheid on whose behalf Khulumani has taken up the case, as well as for the human rights community as a whole, but more so, it will also be a significant moral victory for the Jubilee debt campaigns locally and internationally for their steadfastness in maintaining the view that the Apartheid debt is an Odious Debt of multinational corporations and foreign banks that financed the Apartheid government knowing that it would commit the most heinous crimes against the people of South Africa.<sup>7</sup>

Roy Jobson of Khulumani Support Group asks,

Is it legitimate for corporations to exploit and profit from situations created by oppressive regimes? The corporations named in the Khulumani Lawsuit profited from funding the apartheid government by lending it money and selling it resources used

for carrying out assassinations, indiscriminate shootings, torture, sexual assault, and prolonged arbitrary detention. Does this constitute “aiding and abetting”? The court will be asked to decide this. Was it immoral and unethical business behaviour? I believe so.<sup>8</sup>

Adds Khulumani lawyer Michael Hausfeld, “We are contending that those companies were linked in ways to the South African government, such that they were aiders and abettors of crime. They assisted the apartheid government in furthering the commission of crimes against humanity.”<sup>9</sup> Although the present South African government ruled by the African National Congress agreed with this analysis prior to 1994, when they insisted that multinational corporations disinvest, in subsequent years they changed position entirely.

### **South African official hostility**

In 2001, the UN World Conference Against Racism (WCAR) was the site of the most vigorous debate about reparations to date. Then-Nigerian president Olusegun Obasanjo endorsed reparations along with other African official delegates. One suggested clause, for example, was that the “US should take responsibility and pay reparations for the Trans-Atlantic Slave Trade.” But then president Thabo Mbeki and foreign minister Nkosazana Dlamini-Zuma refused to support reparations and called instead merely for more donor aid. “Nigeria has chosen to ditch SA and align itself with other African hardliners over the slavery issue,” lamented a *Business Day* editorial: “The difficulties that SA has encountered in Durban trying to move the rest of the continent to a more moderate position in negotiations between Africa and Europe over an apology and reparations for slavery, highlight the gulf, and sometimes deceit, that underlies relations between this country and the rest of the continent... When will our real friends in Africa stand up and be counted?”<sup>10</sup> Thanks to Mbeki, reparations demands were absent from the final WCAR document, and moreover, also soon led to a rupture between the ANC government and civil society activists.

During 2002, the Burmese villagers who sued oil firm Unocal for damages done while earning profits under a repressive regime began to frighten multinational corporations. As the National Association of Manufacturers argued in a letter to George W. Bush's main lawyer, “If the Department of State fails to intervene when private suits threaten to impose new liabilities on American companies arising from activity abroad by a foreign government, it risks allowing a further erosion of the President’s exclusive prerogatives on foreign policy and his ability to develop relationships with foreign governments in ways that he determines will best advance U.S. national interests.”<sup>11</sup> Bush agreed and his attorney general, John Ashcroft, lobbied the courts in an amicus curiae brief, hoping to weaken the ATCA. Although they failed, the question of whether foreign policy is damaged in such lawsuits was established as a reasonable consideration, one which doomed the first round of apartheid reparations cases.

Frustrated by the failure of the WCAR to advance their agenda, leaders of Jubilee South Africa, Khulumani and other faith-based activists turned to the US and Swiss courts. Mbeki first reacted to the court applications with “neither support nor condemnation.” However, in April 2003, in the wake of Archbishop Desmond Tutu’s final Truth and Reconciliation Commission

(TRC) report which recommended a reparations payment by businesses which benefited from apartheid, Mbeki changed tack. Now, he said, it was “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.” He expressed “the desire to involve all South Africans, including corporate citizens, in a cooperative and voluntary partnership.” But Mbeki failed to reflect upon numerous such attempts by the Reparations Task Force and Cape Town’s Anglican Archbishop Njongonkulu Ndungane for some years prior to the lawsuits.<sup>12</sup>

Then trade minister Alec Erwin heaped on scorn during an April 2003 parliamentary discussion, declaring that Pretoria was “opposed to, and contemptuous of the litigation.” Any findings against companies “would not be honoured” within South Africa, and a wealth tax - as recommended by the TRC - would be “counterproductive.”<sup>13</sup> A few weeks later, the director-general in Mbeki’s office, former liberation theologian Frank Chikane, attacked the morals of those filing the reparations lawsuits: “I have seen [apartheid] victims being organised by interest groups who make them perpetual victims. They will never cease to be victims because they [interest groups] need victims to advance their cause. I think it is a dehumanising act.” Chikane argued that lawsuits against banks and corporations would lead “businesses here to lose money and therefore to lose jobs.” As for the TRC wealth tax, “My view has always been that healing will happen only if the victimiser stands up and says, 'let us make it right'. It will not happen if the government says so.”<sup>14</sup>

In July 2003, Mbeki and justice minister Penuell Maduna went to even greater lengths to defend apartheid-era profits, arguing in a nine-page brief to a US court hearing a reparations case, that by “permitting the litigation”, the New York judge would discourage “much-needed foreign investment and delay the achievement of the government’s 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 unemployment.”<sup>15</sup> As a friend of the court on behalf of the claimants (alongside Tutu), Nobel laureate Joseph Stiglitz replied that the comments by Mbeki and Maduna had “no basis,” because, “those who helped support that system, and who contributed to human rights abuses, should be held accountable... If anything, it would contribute to South Africa’s growth and development.”<sup>16</sup> But by August 2003, even Nelson Mandela decided that the activist pressure on the foundations of global capitalism, namely, corporations’ right to make profits no matter how egregious the regime, was out of control. Hosted by Africa’s richest man, Nicky Oppenheimer, at the Rhodes Building in Cape Town, Mandela gave his name to a new foundation, “Mandela Rhodes,” and used the occasion to attack the apartheid reparations lawsuits as “outside interference”.<sup>17</sup>

Maduna’s letter to the US court requested that the lawsuits be dismissed, “in deference to the sovereign rights of foreign countries to legislate, adjudicate and otherwise resolve domestic issues without outside interference.” But in August 2003, at the opening plenary of a major Reparations Conference, Jubilee SA’s Berend Schuitema reported that Maduna made an extraordinary confession: “The reason why he had made the objection was that he was asked for an opinion on the lawsuit by Colin Powell. He gave Powell his written response,

whereupon Powell said that he should lodge this submission to the Judge of the New York Court. Howls from the floor. Jubilee SA chairperson M.P. Giyose pointed out the bankruptcy of the sovereignty argument.”<sup>18</sup>

In June 2004, the US Supreme Court handed down a surprising defeat for the Bush regime in the case of *Sosa v Alvarez*, when corporate plaintiffs requested that foreigners not be permitted to file lawsuits for human rights violations committed elsewhere in the world under the Alien Tort Claims Act (cases were then pending against companies for repressive operations in Burma, Nigeria, Indonesia and apartheid South Africa).<sup>19</sup> According to the corporations, US courts might infringe upon the sovereignty of nations and interfere with the business of free trade.

The judgement was mixed, however. On the one hand, although the conservative Supreme Court’s ruling was a “huge blow” to the firms, according to Khulumani and Jubilee South Africa lawyers, on the other hand,

The US Supreme Court cautioned that the right to civil relief must be balanced by the domestic policy interests of the foreign nations in which the conduct occurred and the foreign policy concerns of the United States. Regrettably though, in a footnote in the judgment, the US Supreme Court referred to the declaration submitted by the former South African Minister of Justice and Constitutional Development, Dr Penuell Mpapa Maduna, submitted to a district court where the Khulumani and other Apartheid cases are pending as an instance where the caution should be applied. The declaration expressed the South African government’s concern that the cases before the court would interfere with the policy embodied in the Truth and Reconciliation Commission. The South African government has specifically asked the court to abstain from adjudicating the victims claims in deference to its paramount national interests.<sup>20</sup>

In reality, the Final Report of the Truth and Reconciliation Commission, chaired by Tutu, contained a different sentiment, namely that the New York reparations cases posed no conflict with South Africa law or policy: ‘Business failed in the hearings to take responsibility for its involvement in state security initiatives specifically designed to sustain Apartheid rule.’ The TRC also found, according to Jubilee, that

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. 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. <sup>21</sup>

Taking the most conservative approach possible, judge John Sprizzo of the Southern District of New York dismissed the apartheid-related lawsuits in November 2004 on grounds that aiding and abetting claims could not be brought to bear under the Alien Tort Statute. The judge ruled that Pretoria “had indicated it did not support the lawsuits and that letting them proceed might injure the government’s ability to handle domestic matters and discourage investment in its economy.”<sup>22</sup> Within a few months, the adverse implications of Maduna’s

intervention for international justice became even more ominous, in a case involving women who were victims of Japanese atrocities during World War II. Fifteen “comfort women” from Korea, China, the Philippines and Taiwan sued the Japanese government in the US, using the Alien Tort Claims Act. They had been held as sex slaves, raped and tortured by the Japanese military. In June 2005, the US Court of Appeals in the District of Columbia rejected their suit in part by citing Maduna’s affidavit.

Meanwhile at home, the South African government was unilaterally paying just R30 000 to 19 000 families whose members suffered murder or torture, far less than the TRC had recommended. Complained Khulumani Support Group strategist Roy Jobson,

“Community reparations” is part of the government’s mandate. The Department of Justice has yet to publish its proposed policy on community reparations. Khulumani submitted proposed suggestions and recommendations on October 29 2003 (the fifth anniversary of the handing-over of the TRC report). These suggestions were based on the actual researched needs of the communities in which Khulumani members reside. To date [February 2008], there has been no response to or even acknowledgement of receipt of these proposals.<sup>23</sup>

Jubilee next took the opportunity to tackle Barclays Bank in a mass citizens’ campaign, in the course of the London financier’s 2005 takeover of South Africa’s second-largest bank, Absa (formerly the Amalgamated Banks of South Africa, a collection of mediocre and failing institutions, several with Afrikaner roots, stitched together by the SA Reserve Bank in a controversial 1991 rescue operation). Once again, when an ATCA suit was filed against Barclays, Pretoria’s justice minister Brigitte Mabandla (Maduna’s 2004 replacement) responded with an October 2005 friends of the court brief on behalf of the bank, prompting a demonstration by Jubilee. Jubilee went on to picket eight international banks located in Sandton:

All of these banks either never left South Africa during sanctions or have returned post-1994; they are all doing business - making money hand over fist - as if they have no moral culpability or responsibility, supported by anti-poor economic policy. These banks gave billions of dollars of loans to the Apartheid Government, renegotiated its debts and thus enabling it to spend even more on its military, and, in the case of Barclays, gave money directly to the South African Defense Force in 1976. All of these banks need to fully apologize to the South African people for the support they gave to the Apartheid regime, and pay reparations to those who have suffered from its actions.<sup>24</sup>

The Washington-based Mobilization for Global Justice and a coalition of Swiss activists (Comtec, Declaration de Berne, and Campagne pour l’Annulation des Dettes et pour les Réparations en Afrique Australe) joined Jubilee protesters in solidarity demonstrations. From Sandton to Washington, Citibank was target, for as the UN’s Special Committee against Apartheid had observed in 1979, “Citigroup has loaned nearly 1/5 of the \$5 billion plus which has gone to bolster apartheid” and in subsequent years made yet more loans for

segregated housing and for the rollover of apartheid debt during the 1985 financial crisis. In Berne, Credit Suisse and UBS were the subject of protest because from the early 1980s they replaced US and British banks as the main apartheid financiers.

### **Disunity amongst the plaintiffs**

But during this time, there were also important problems that deserve mention. The South African government's arrogance in dismissing and then sabotaging the reparations campaigning can partly be explained by disunity amongst campaigners. There are three major splits worth recording, as they diverted the reparations drive and made it far more difficult to achieve the mass public support Eizenstat warned might emerge. The most important split involved different plaintiffs who lined up either with or against a high-profile "cowboy lawyer," Edward F. Fagan. Fagan had promoted the Holocaust case, but was accused of being "a destructive opportunist" and "carpetbagger" by South African Dumiso Ntsebeza. According to labour journalist Terry Bell,

Fagan promised funding and the prospect of getting matters moving in double-quick time. He also seemed to have behind him a large and reputable New Jersey law firm. Many of the campaigners felt they had already wasted too much time; that Fagan could act as a catalyst to get cases moving. Others were unsure. But the talk of apartheid claims had also seen another US personal injury lawyer step forward. Michael Hausfeld, who had garnered a solid reputation for himself in the Holocaust cases, offered his services. The South African reparations drive was split...

Fagan decreed that 16 June 2002, the 26th anniversary of the Soweto student uprising, should be the day the apartheid claims would be launched. From a publicity viewpoint, this made sense. But Fagan had neither organised, nor done the necessary legal preparation. His draft claim for the court in New York was a mishmash of inaccuracies which he presented for revision little more than 48 hours before the matter was to go to court. While others were left to handle what amounted to a hurried, and basically inadequate rewrite, Fagan flew to Geneva. With him was Dorothy Molefi, a claimant and the mother of Hector Petersen, one of the first students killed in the Soweto student uprising in 1976 and whose photograph is an icon of the uprising. Fagan made much of the first multibillion-dollar apartheid case, listing prominent companies. But the documents delivered to the court gave scant details of the charges. At least his original draft had been amended to remove wild claims about genocide and slavery that had no historic or legal basis.

But this was the beginning of the end. There was a great deal of television, magazine and newspaper coverage around the world, much of it generated by Fagan, but the legal team was becoming increasingly frustrated. The team was not consulted before Fagan made often extravagant claims to the media and he refused to take instructions from the South African lawyers who had gathered together thousands of individual claimants. Obviously feeling in need of more publicity, Fagan announced that he, on behalf of Dorothy Molefi and other unnamed clients, was launching a new court case - suing former President Nelson Mandela and the present South Africa government for apartheid reparations, because the present government was the "legal

successor to the previous, apartheid government". Members of the government such as President Thabo Mbeki, who had been concerned about the apartheid claims, were outraged. But so too were the South African and US legal teams.

"He has tarnished and complicated cases that have great merit," says Ntsebeza. But while Fagan is now uncharacteristically silent and out of sight, the apartheid claims cases have been damaged and a division, a legacy of Fagan's intervention, remains between two major claims.<sup>25</sup>

Even without Fagan, enough conflict existed between plaintiffs to adversely affect the broader reparations agenda, and it is only in 2008 that the various groups have found it necessary and feasible to come together against their corporate and state opponents. Between the Khulumani Support Group and Jubilee, severe tensions arose over claims to ownership of the case and over direction of strategy. Between Jubilee's former Johannesburg staff on the one hand, and on the other, board members and several provincial chapters, a dispute erupted that destroyed the organisation from early 2006 until its revival in August 2008.

### **Linking broad-based reparations issues**

But the story is not only one of division, but of unity, for Jubilee has also done an exceptionally good job of linking issues so that its apartheid debt campaign launched in 1998 soon connected dots across a variety of related issues and constituencies. As M.P. Giyose explains of the organisation's apartheid debt work,

Of necessity, this campaign was a regional Southern African affaire because the political interconnections of the Apartheid Debts could not be confined within the borders of this country. The wider ramifications of the Apartheid Debt question included the problem of Apartheid-caused debt. Further, it was impossible at this formative date already to extricate the question of debt from those of the basic organisation of the South African economy, the issue of reparations and the related problems of human and social rights. The logic of these broad imperatives lying behind the campaign immediately dictated a broad alliance of forces that would be able to develop policy and generate social action...

In addition to the projection on the new debts arena, foreshadowed by the proposed World Bank Health loan of this time and the new debts being incurred in the arms deal, the Reparations Campaign became focused on the prospects for a lawsuit involving any parties our researches might suggest. The road was now wide open to a broad strategy involving large sections of the working classes and the faith movements broken up into several Task Team areas. It was at this time that the Apartheid Debt and Reparations (ADR) Task Team came to take the ascendancy. This also meant the rise of Khulumani Support Group as a leading organ in the work of the ADR campaign. Further sharpening of functions and roles occurred within that campaign inside South Africa and on the International arena. The Khulumani vs Barclays et al Lawsuit has now entered a critical phase at the Southern District court of the USA. In this regard, it is necessary to say that it is obligatory for this lawsuit to arrive at an even closer modus operandi with the sister lawsuits led by the Lungisile Ntsebeza et al

group.

The 'debt cancellation' schemes that have been paraded by the G8 leaders ever since the HIPC and PRSP frauds have been followed by a multilateral debt reductions strategy which has been at large on the continent ever since 2005. These have been followed or become concurrent with the Norwegian Government Project, the Nigerian Government Agreement with the Paris Club and the debt legislation led by Maxine Waters in the USA. These features that intertwine debt with finance and trade have only been put into sharper relief by the sub-prime crisis embroiling the banks and the Real Estate Economy in the USA and the western world.

Nearer home, the older question of ecological debt that originally developed in Latin America has engulfed the political economy of mining finance throughout the economies of Southern Countries. In South Africa, the fury of the mining companies has taken its vengeance in the sector of gold mining and spent renewed vigour in the sector of platinum mining as well as coal mining. However, the question has to be posed. Why has mining finance developed such an exclusively predatory character at the present time?

Finally, in the realm of Debt and Finance, further researches need to be undertaken today designating all the areas of debt in globalised capitalism which integrates National Debt and Social Debt with streams of Private and Personal Debt. The factor of Finance in Debt will build Jubilee South Africa into a Mass Movement uniting larger and larger forces among the dominated classes. Whereas all other social movements existing presently tend to be single-issue and/or sectoral in their struggle against capitalism (resolving themselves into struggles against capital in particular), debt integrates into a position that stridently strikes out against capital in general.<sup>26</sup>

How easy will it be to link the issues given how much resistance there was from Thabo Mbeki's government to the core campaign? Part of the reason for Mbeki's truncated term of office was his perceived pro-corporate orientation, which alienated so many constituents. Regardless of the stance taken by Kgalema Motlanthe, Jubilee strategists believe they can appeal to a much richer strand of African nationalism, than one that relies simply upon an appeal to sovereignty. For as Gerald Lenoir and William Minter recall,

In 1993, the Organization of African Unity (OAU) spelled out Africa's case for reparations. The Abuja Proclamation declares that the injury caused by slavery, colonialism, and neo-colonialism "is not a thing of the past, but is painfully manifest in the damaged lives of contemporary Africans from Harlem to Harare, in the damaged economies of the black world from Guinea to Guyana, from Somalia to Surinam." The proclamation states that a moral debt is owed to African peoples and calls for "full monetary payment through capital transfer and debt cancellation."<sup>27</sup>

Indeed, there is growing pressure for corporations to make monetary payment to their victims in cases of extreme ecological damage. In June 2008, a network called the African Civil Society Organisations coalition addressed the African Ministerial Conference on the Environment in Johannesburg, demanding that northern states and corporations provide resources for affordable renewable energy, prevent biofuel threats to food security in Africa,

and compensate Africa for an estimated \$50 billion required to adapt to climate change damage caused nearly entirely by industrialised countries' historic accumulation of capital.<sup>28</sup>

More generally, public support appears to be growing for Third World environmental reparations. The “ecological debt” that the North owes the South, for example, is invoked by Ecuadoran president Rafael Correa, in part for his initiative to “keep the oil in the soil” so as to help preserve the Yasuni National Park and slow climate change. But \$5 billion in ecological debt repayment by the North to Ecuador would, he argues, be a reasonable offset for Ecuador's revenue losses.

In Nigeria, demands by the Ogoni people relate not only to the massive destruction of their Delta habitat, but also to the looting of their natural wealth by Big Oil. According to Sam Olukoya,

Reparations is a crucial issue in the struggle for environmental justice in Nigeria. Many of the ethnic groups in the Niger Delta have drawn up various demands. A key document is the Ogoni Bill of Rights which seeks reparations from Shell for environmental pollution, devastation and ecological degradation of the Ogoni area. Shell's abuses in Ogoniland were made infamous by the late playwright and activist Ken Saro-Wiwa, who was executed by the Nigerian government.<sup>29</sup>

By June 2008, women protesters, local NGOs and the Movement for the Survival of the Ogoni People (MOSOP) had won enough power that Nigerian president Umaru Musa Yar'Adua unilaterally announced the end of the company's Ogoniland operations: “There is a total loss of confidence between Shell and the Ogoni people. So, another operator acceptable to the Ogonis will take over.”<sup>30</sup> MOSOP held a victory march in Port Harcourt, and its information officer, Bari-ara Kpalap, thanked Yar'Adua, yet also promised more agitation in the Niger Delta “until the government took more practical and sincere steps to genuinely address the problems of the area”.

From South Africa, the demand for reparations from apartheid's financiers is a crucial precedent for wider campaigns aimed at reversing the outflow of resources from Africa and correcting historic wrongs, as well as addressing contemporary crisis conditions. As Giyose remarks,

The work on ecological debt is persistently raising the need to develop a clear approach to the land question. The international context of rising commodity prices highlights the need to link this question to food security. The debt, finance and broader economic context of poverty and unemployment underpinning the recent wave of xenophobia also demand attention. All of these are burning matters for the people of this country and its neighbours.<sup>31</sup>

How far might the reparations movement travel? Another nervous twitch can be discerned from those fearing that the revival of apartheid reparations claims could boomerang to the United States where slavery-related profits became more visible in recent years. Representative John Conyers, who chairs the House Judiciary Committee, “is reportedly

waiting for Obama to be elected so Conyers can rush a reparations law through Congress”, according to a reliable source.<sup>32</sup>

But rather than depend upon courts and members of congress, the most important ingredient is a well-functioning, militant civil society. A variety of organisations emerged during the 2000s to fight for reparations in the broadest sense, linking back to slavery, colonialism, apartheid and environment destruction, including not just the South Africans and the Jubilee South movement, but the Reparations Movement (for Africa and the African Diaspora); Africa Reparations Movement; All for Reparations and Emancipation; Reparations Central; Caucasians United for Reparations and Emancipation; National Coalition of Blacks for Reparations in America; New World Reparations; and Sons of Afrika. The challenge is to take a diverse civil society and find those intersections in national law and through national states which will permit the issue of reparations to not only be raised with some prospect for success, but to keep the linkages growing so, as Giyose indicates, the struggle becomes a broader and wider critique of economic injustice at its roots.

## Endnotes

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1. For a growing literature on the field, see, e.g. Biondi, M. (2003), "The rise of the reparations movement," *Radical History Review* 87, pp. 5-18; Brooks, R. (Ed)(1999), *When sorry isn't enough: The controversy over apologies and reparations for human injustice*, New York, New York University Press; Coates, R. (2004), "If a tree falls in the wilderness: Reparations, academic silences, and social justice," *Social Forces*, 83, 2, pp.841-864; Lsabu-Kle, D. (2000), "The African reparations cry: Rationale, estimate, prospects, and strategies," *Journal of Black Studies*, 30, 3, pp.331-350; McGary, H. (2003), "Achieving democratic equality: Forgiveness, reconciliation, And reparations," *The Journal of Ethics*, 7, pp.93-113; Thompson, J. (2002), *Taking Responsibility for the Past: Reparation and Historical Injustice*, Cambridge, Polity Press; Torpey, J. (2003), *Politics and the Past: On Repairing Historical Injustices*, Lanham, MD, Rowman and Littlefield Publishers. The main analysis of SA reparations law is Sarkin, J. (2004), "Pursuing private actors for reparations for human rights abuses committed in Africa in the Courts of the United States of America," in E.Doxtader and C.Villa-Vicencio (Eds), *To repair the irreparable : reparation and reconstruction in South Africa*, Claremont, David Philip Publishers.
2. Independent Online (2008), "Groups welcome apartheid lawsuit ruling", 13 May.
3. Barber, S. (2008), "Tilting at reparation windmills in the US courts", *Business Day*, 16 May.
4. Rank, F. (2008), "US firms to pay for apartheid", *The Times*, 14 May.
5. Bradlow, D. (2008), "Better ways to solve this than through US court," *Business Day*, 28 May. Regrettably, Bradlow (a long-time critic of apartheid and strategist for financing post-apartheid development) did not internalise core reasons for naming/shaming the apartheid-linked corporations, nor did he spell Khulumani's name properly on each occasion he offered it the advice to end the lawsuits.
6. Rodoreda, G. (2003), "The battle over apartheid reparations", *New African*, July. Six months later, at a Columbia University seminar, Eizenstat bragged of his work on Holocaust reparations. He noted how, as a result, "Anti-apartheid victims from South Africa have sued scores of U.S. companies in U.S. courts for their alleged - and I underscore alleged - participation in facilitating apartheid." But to prove himself post-racist, he also recalled - self-critically - a 1950s experience in his hometown of Atlanta: "I was unwilling to break with convention and give an elderly black lady my seat on the white section of an Atlanta bus." (<http://www.cceia.org/resources/transcripts/962.html>)
7. Abrahams, C. (2007), "Corporations and foreign banks in the dock", [http://jubileesouthafrica.ca/index.php?pr=Apartheid\\_reparations](http://jubileesouthafrica.ca/index.php?pr=Apartheid_reparations)
8. Jobson, R. (2008), "Business unusual – during apartheid", <http://www.thoughtleader.co.za/royjobson/2008/05/14/business-unusual-during-apartheid/>
9. Rodoreda, G. (2003), "The battle over apartheid reparations", *New African*, July, p.
10. *Business Day*, 7 September 2001.
11. National Association of Manufacturers (2002), "NAM letter to Department of State", 26 September, [http://www.nam.org/s\\_nam/doc1.asp?CID=377&DID=225386](http://www.nam.org/s_nam/doc1.asp?CID=377&DID=225386)
12. For coverage, see, e.g., *Financial Times*, 19 May 2003. According to Jubilee SA secretary George Dor, writing to *Business Day* in the wake of the late August 2003 Reparations Conference, "Attempts to engage the foreign corporations were initiated as long ago as 1999 and this had been met with an obstinate refusal to talk. Business reiterated its non-cooperative stance by failing to take the opportunity to address this conference."
13. *Financial Times*, 19 May 2003.
14. *Sunday Independent*, 15 June 2003.
15. *Sunday Independent*, 25 July 2003. Replying to this logic a month later, prize-winning Indian author Arundhati Roy told BBC radio, "In what ought to have been an international scandal, this same government officially asked the judge in a US court case to rule against forcing companies to pay reparations for the role they played during apartheid. Its reasoning was that reparations - in other words justice - will discourage foreign investment. So South Africa's poorest must pay apartheid's debts so that those who amassed profit by exploiting black people can profit more?" (BBC, 24 August 2003.)
16. *Sunday Independent*, 9 August 2003.
17. *Sowetan*, 26 August 2003.
18. e-debate listserve, 30 August 2003. The organisations represented included JubileeSA, Khulumani, Cosatu, the Anti-Privatisation Forum, Sanco, the Landless Peoples Movement, the South African Council of Churches and the Environmental Justice Networking Forum. Notwithstanding important divisions over loyalty to the ANC/Alliance, there was no dispute that Mbeki had erred in his attempt to sabotage the reparations campaign.

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19. Engelbrecht, L. (2004), "Apartheid victims turn to US court," *Business Report*, 5 July.
  20. Apartheid Debt and Reparations Campaign (2004), "Support for the Khulumani Lawsuit," Johannesburg, 13 July.
  21. Apartheid Debt and Reparations Campaign, "Support for the Khulumani Lawsuit".
  22. Neumeister, L. (2004), "Lawsuits seeking billions from U.S. companies in South Africa dismissed," Associated Press, 29 November.
  23. Jobson, R. (2008), "Dishonourable discharge", \_  
<http://www.thoughtleader.co.za/royjobson/2008/02/17/dishonourable-discharge/>
  24. Jubilee South Africa (2005), "Strike Against Corporate Greed!", Johannesburg, 23 September.
  25. Bell, T. (2004), "Gone with the wind", *New African*, November.
  26. Giyose, MP (2008), "Jubilee South Africa Conference Concept Paper", Unpublished, 27 June, Johannesburg.
  27. Organization of African Unity Reparations Commission (2003), "Abuja Pan-African Conference on Reparations for African Enslavement, Colonization And Neo-Colonization," Abuja, April 27-29, cited in Lenoir, G. and W.Minter (2005), "South Africa, Apartheid Debt, and Reparations", *AfricaFocus Bulletin*,  
<http://www.afsc.org/africa-debt/learn-about-debt/south-africa.htm>
  28. Fabricius, P. (2008), "Call for top polluters to compensate Africa", *The Star*, 12 June.
  29. Olukoya, S. (2001), 'Environmental Justice from the Niger Delta to the World Conference Against Racism', Special to CorpWatch, 30 August, <http://www.corpwatch.org/article.php?id=18>
  30. Agence France Press (2008), "Ogoni people welcome Nigerian move against Shell", 5 June.
  31. Giyose, MP (2008), "Jubilee South Africa Conference Concept Paper", Unpublished, 27 June, Johannesburg.
  32. Report in *The Hill*, 13 March 2007, cited in Martin, A. (2007), "Does Obama support reparations?" *Contrarian Commentary*, 4 April.