Postapartheid Justice: Can Cosmopolitanism and Nation-Building Be Reconciled?

Rosemary Nagy

South African plaintiffs are suing numerous multinational corporations under the American Alien Tort Claims Act for aiding and abetting apartheid's crimes against humanity. This article argues that *Re South African Apartheid Litigation* should be understood as a cosmopolitan re-membering of the nation. This interpretation runs counter to theoretical and political presumptions of an inherent antagonism between cosmopolitanism and nationhood. The apparent divide between cosmopolitanism and nation-building is bridged by the concept of victimhood. Insofar as nation-building in South Africa depends upon the restoration of victims, so too is cosmopolitanism victim-centered in its commitment to prevent harm and suffering. The apartheid litigants enact the duality of cosmopolitanism: they press for justice on the basis of cosmopolitan right, yet they do so in part because of their continued marginalization in the "new" South Africa with respect to issues of "truth" and reparation. Following on the "unfinished business" of the South African Truth and Reconciliation Commission, the apartheid litigation illustrates the intersection of cosmopolitanism with national memory and belonging.

In an action that seeks "justice without borders," South African plaintiffs have filed suit in the United States against numerous multinational corporations for aiding and abetting apartheid's crimes against humanity. The plaintiffs rely upon the Alien Tort Claims Act (ATCA), which grants universal jurisdiction over "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" (28 U.S.C. sec. 1350 [1789]). The South African government has steadfastly opposed the litigation on the grounds of national sovereignty and, in particular, that foreign courts "bear no responsibility for the well-being of our country and . . . our constitution[al] . . . promotion of national reconciliation" (Mbeki 2003: n.p.). Although nation-building

I would like to thank Brandon Hamber for our conversation, Diane Sammons and Dumisa Ntsebeza for providing documents, and Ronalda Murphy, Doris Buss, and Christiane Wilke for comments on earlier drafts. I would also like to thank the anonymous reviewers and Herbert Kritzer for their thoughtful comments and suggestions. All shortcomings are mine. Please address correspondence to Rosemary Nagy, Department of Law, Carleton University, 1125 Colonel By Drive, Ottawa ON K1S 5B6, Canada; e-mail: rnagy@connect.carleton.ca.

Law & Society Review, Volume 40, Number 3 (2006)

in postconflict societies arguably might take place only *within* the nation, this also provokes the question, "what is a nation?" in an era of economic globalization, legal and moral cosmopolitanism, and transnational violence and injustice. The politics surrounding *Re South African Apartheid Litigation* (2004) bring this question to the forefront of a long-standing debate between cosmopolitanism and nationhood, which typically presumes an inherent conflict between the two.

Contemporary cosmopolitanisms, theorized under the cluster of phenomena known as globalization, draw upon ancient Stoic ideals of world citizenship and Kantian principles of cosmopolitan or universal right. Cosmopolitanism in general upholds the moral dignity and equality of all human beings as individuals, regardless of their culture, nationality, or citizenship. Cosmopolitanism rejects ethnonationalism or unreflective patriotism and urges engagement with the world. It speaks of moral obligations beyond borders and of enforcing minimal standards of decency within borders.

This runs counter to the statist view of international relations. According to the statist view, nation-states are the ultimate source of legal or moral authority, and their integrity is guaranteed by principles of nonintervention and national self-determination (see Fine 2003:452–3). These two principles must be respected for the sake of international peace and because they protect different ways of life amongst nations.[1] Nationalists argue that the nation provides the best context in which trust, reciprocity, right, obligation, and political self-determination can take place (see Tan 2002:435–9). This is because co-nationals have historic, political, and territorial ties; shared values and loyalties; and a common identity. A citizen of the world, in contrast, is in fact a citizen of nowhere (see Bowden 2003). Solidarity in the name of general humanity is too abstract to be meaningful. And, critics further charge, the promotion of cosmopolitan universality is inevitably the imposition of somebody else's values.

The principles of nonintervention and national self-determination are both evident in the South African government's opposition to the apartheid litigation. First, in accordance with the statist view of international relations, the South African government objects to the intervention of a foreign court in its supposedly sovereign affairs. On this view, international law ought to recognize only states as legal subjects, whereas cosmopolitan law also recognizes individuals and groups in civil society as legal persons (see Fine 2003:452–3). The ATCA decenters the state. It permits extraterritorial legal action for human rights crimes, and it recognizes

[1] *Nation* refers to a people bounded by ethnic or civic identity/culture. In the context of this article, *nation* also denotes territorial boundaries, i.e., country.

https://doi.org/10.1111/j.1540-5893.2006.00275.x Published online by Cambridge University Press

individuals and multinational corporations as legal subjects. Moreover, the South African government sees the ATCA as threatening to override domestic constitutional law. This concern leads to the second principle of objection, which is the focus of this article: the fear that external interference will jeopardize South Africa's chosen path toward national unity and reconciliation. Through democratic and constitutional means, South Africa established the Truth and Reconciliation Commission (TRC) and other policies to deal with its apartheid past. The "new" South Africa, so the argument goes, is based on values of reconciliation, reconstruction, and goodwill—and not on the antagonistic, alienating, and retributive values of litigation.

Thus, the fear is that the use of a cosmopolitan law from outside South Africa will undermine nation-building within the country. This fear can be mapped onto larger theoretical debates, which run something like this: if cosmopolitanism's moral allegiance to all human beings is seen as an antidote to the divisive, marginalizing, and sometimes violent politics of race, ethnicity, or nation, the dark side of cosmopolitanism is false universalism, colonialism, and violent imperialism (see Anderson 1998; Lu 2000). Even a relatively benign cosmopolitanism, critics accuse, casts aside the morally meaningful connections and affiliations that constitute human life. To put it in the context of postconflict transitions to democracy, it may indeed be inappropriate and unfeasible for outsiders to attempt to resolve the unique complexities of local or regional violence. Universal jurisdiction may have little bearing on domestic values of peace, justice, and reconciliation,[2] or it may jeopardize delicate peace arrangements.[3] In the case of the apartheid litigation, the claim is that a foreign court cannot promote national reconciliation, develop civic unity, or effectively reduce the ravages of apartheid because it is abstracted from South Africa's politics of a negotiated transition to democracy.

I argue, in contrast, that if we closely examine South Africa's transitional path toward "national unity and reconciliation,"[4] which is largely exemplified in the TRC, the apartheid litigation instead emerges as a cosmopolitan quest by victims for national belonging. The broader theoretical claim is that the apartheid litigation provides an illustration of cosmopolitanism as a rooted or differentiated concept, or what is sometimes called the "new

[2] This has certainly been the case with Rwanda and the International Criminal Tribunal (see Uvin & Mironko 2003).

[3] For instance, there was some concern when the International Criminal Tribunal for Yugoslavia indicted Slobodan Milosevic prior to the conclusion of peace negotiations.

[4] See the postamble to the 1993 Interim Constitution and the Promotion of National Unity and Reconciliation Act No. 34 of 1995, which is the founding legislation for the TRC.

https://doi.org/10.1111/j.1540-5893.2006.00275.x Published online by Cambridge University Press

cosmopolitanism'' (e.g. Fine 2003; Hollinger 2002). The challenge of the new cosmopolitanism is to reconcile abstract universalism with concrete particulars. In this case, although the plaintiffs' claims are based on universal right, their claims call attention to connections and affiliations rather than stripping them away. What the apartheid litigation shows is that cosmopolitanism and nation-building can be reconciled to at least some degree.

Specifically, I propose to bridge the apparent divide between cosmopolitanism and nation-building with the concept of victimhood. Insofar as nation-building in South Africa is seen to depend upon the restoration of victims, so too is cosmopolitanism victim-centered in its commitment to prevent harm and suffering. This argument develops a particular strand of cosmopolitanism[5] as a moral injunction to protect victims of injustice and cruelty (following Shklar 1989, 1990; Lu 2000). Its legal counterparts are human rights, international harms-based conventions and declarations, and universal jurisdiction (see Linklater 2002). While universal in scope, this cosmopolitanism also necessarily requires contextualized roots and concrete solidarities. For violence operates by denying victims their humanity *and* by stripping them of their place and belonging in the world. The prevention of cruelty—''never again'' —thus depends in part upon recognizing those who had been excluded, marginalized, or silenced under the previous regime, affirming not only their humanity but also their belonging as equal citizens. The apartheid litigation enacts this duality: the South African plaintiffs press for justice on the basis of cosmopolitan right, yet they do so in part because of their continued marginalization within the ''new'' nation with respect to issues of ''truth'' and reparation. It is a cosmopolitan *re-membering* of the nation. The plaintiffs challenge closed-off constructions of historic violence and national reconciliation in an implicit demand for belonging as citizens whose lives matter.

Thus, the main argument is that cosmopolitan justice can intersect with national memory and belonging. These need not be antithetical to one another, either conceptually or in practice. In the first section, I develop the theoretical connections between cosmopolitanism, victimhood, and nation. The ATCA likely affords an especially strong claim about the intersection of these three concepts because it permits victims to take matters into their own hands by lodging civil claims, rather than being dependent upon foreign governments to indict international criminals. Neverthe-

[5] On cosmopolitan democracy, see Held 1995. On global distributive justice, see Pogge 2002; Beitz 1999. On cosmopolitanism as culture, education, or a way of being in the world, see Nussbaum 1996; Cheah 1998. It is beyond my scope to assess the degree to which these thinkers and others reconcile the universal and the particular, or how these strands of cosmopolitanism interact with the one discussed here.

https://doi.org/10.1111/j.1540-5893.2006.00275.x Published online by Cambridge University Press

less, generalizable questions regarding transitional justice[6] and globalization are raised: How do constructions of violence, victimhood, and responsibility fit into the meaning of the "new" nation? How does the supposed binary between "inside" and "outside" become complicated by international financing and transnational conflict economies in arms, diamonds, and oil? How extensively can we think past this same binary with respect to bringing cosmopolitan values "home" through the exercise of universal jurisdiction in hybrid tribunals, the International Criminal Court, and transnational prosecutions? Although I cannot respond to these questions due to space constraints, I raise them here to more broadly situate the analysis.

In the course of illustrating the theoretical argument through discussion of the apartheid litigation, secondary themes emerge that are more specific to the South African case. In the following sections, I outline how the contours of South Africa's negotiated settlement have shaped the trajectory of nation-building and also bring into question the government's claim of national sovereignty against the apartheid litigation. Although South Africa's transition to democracy and the TRC in particular have been exemplary in many respects, the pursuit of reparation through outside courts presents a cautionary tale to those who embrace the notion of reconciliation too easily, or to those who celebrate South Africa's success without acknowledging its domestic frictions. Furthermore, the reparations debate in South Africa (and the outward movement of this debate) exposes various issues in what has been, until recently, a fairly neglected dimension of transitional justice, despite reparation being the only form of justice directed specifically toward victims. These issues include what, if anything, constitutes adequate reparation, and who should grant reparation and to whom. Although, in the end, civil remedy is not the same as reparation, this is not to dismiss the significance of a cosmopolitan push from outside South Africa's borders. Rather, as I explore in the concluding section, it raises the potential for the building of a more cosmopolitan nation.

Re South African Apartheid Litigation is under appeal after being dismissed on November 29, 2004 for lack of subject matter jurisdiction.[7] For my purposes, the moral and political symbolism of the litigation is just as significant as the unsettled question of legal culpability. Even successful alien tort claims rarely collect damages; they are usually filed with goals of affording victims a measure of

[6] Transitional justice comprises at least five elements: truth, accountability, reparation, reform, and reconciliation.

[7] The appeal was heard on January 24, 2006, but had not yet been decided when this article was submitted.

https://doi.org/10.1111/j.1540-5893.2006.00275.x Published online by Cambridge University Press

recognition and respect, of publicly shaming those responsible for human rights violations, and of perhaps instigating change outside the courtroom. Certainly, a verdict of legal liability might strengthen these goals, but the publicity, political damage, or out-of-court settlements generated by the mere processing of a lawsuit should not be underestimated. Of interest here are the politics surrounding the apartheid litigation and how they have affected constructions of the "new" nation.

Cosmopolitanism, Victimhood, and Nation

The challenge of the new cosmopolitanism has been to differentiate itself from classical universalisms that "presume commonalities by positing a transcendent subject who is no subject in particular" (Mehta 2000:622), or a subject who is in fact Western, Christian, male, or so forth. The aim, then, is to engage the contradictions of diversity and solidarity, to seek universalities without homogenization or empty abstraction, and to recognize the embeddedness of human life. The new cosmopolitanism thus shares insights with universalism and nationalism while also distinguishing itself from each. As Hollinger puts it, "Cosmopolitanism shares with universalism a suspicion of enclosures, but the cosmopolitan [also] understands the necessity of enclosures in their capacity as contingent and provisionally bounded domains in which people can form . . . sustaining relationships, and can indeed create diversity" (2002:231).

Enclosed belonging fulfills important moral, psychological, and political needs that cannot be met by solidarities that are global in scope. But the new cosmopolitanism also insists that the bounds of belonging—traditionally, nation-states—are reflexive constructions. Importantly, as Appiah distinguishes, although "natural" nations may be morally arbitrary, states "matter morally intrinsically . . . because they regulate our lives through forms of coercion that will always require moral justification" (1998:97). Because states are "necessary to so many modern human purposes and because they have such great potential for abuse" (1998:97), cosmopolitanism places moral and legal constraints on the state, while it is also aware of the (democratic) state's political and moral capabilities.[8] The new cosmopolitanism therefore looks to both nation-states and transnational agencies in the protection of human well-being.

This article develops a variant of the new cosmopolitanism that is a moral injunction to militate against cruelty and suffering. This

[8] Tan (2002) argues that liberal nationalism, which is civic and democratic as opposed to ethnoracial, is compatible with and even furthered by cosmopolitanism.

https://doi.org/10.1111/j.1540-5893.2006.00275.x Published online by Cambridge University Press

cosmopolitanism invokes notions of justice, but with an added emphasis on injustice. Drawing on Shklar's "liberalism of fear," Lu argues that cosmopolitanism is grounded in "the universal human capacity to inflict and suffer harm" (2000:254; see Shklar 1989).[9] Cosmopolitanism on this account enjoins us to "put cruelty first," to prevent and redress suffering, whether inflicted in public or in private, and to challenge the distinctions that are arbitrarily drawn between misfortune and injustice.[10] As in most cosmopolitan thinking, the individual, and not the nation, is the primary unit of moral concern. However, especial attention is directed toward victims of violence and suffering.

This cosmopolitanism is not a recipe for human perfectibility; indeed, cosmopolitanism as the prevention of cruelty is largely dystopic and negative, and by itself does not constitute a full expression of liberalism or democracy.[11] In its positive conviction, cosmopolitanism espouses that the lives of all human beings matter morally (see Shklar 1990:35). The universality of this claim is grounded in "a common human condition marked by vulnerability to suffering" (Lu 2000:257). The suffering of one is an affront to the many. Cosmopolitanism speaks of shared moral obligations to bring an end to violence and oppression, to attend to the cries of victims, simply because they are human, one of us, entitled to dignity. But this is not an undifferentiated universalism. Cosmopolitans must be attentive to the subjective, felt experiences of pain and humiliation, to the concrete specificities of victimhood, and to the diversity of injustice. For suffering—and stopping suffering—take place in specific contexts.

Consequently, although cosmopolitanism transcends borders in the aim of putting cruelty first, it must also recognize that there is no place like home, however loosely or plurally home is defined. For people do not live nowhere or everywhere, and states remain primary to the legal and political realization of rights. Thus a foremost concern has to do with embedding the cosmopolitan injunction within diverse contexts. This concern relates in large part to the moral psychology and political ethos of motivating and sustaining the commitment to prevent cruelty and relieve suffering.

To explain, the structure and enabling of violence is two-fold in its victimization. As Lu writes:

[9] See Shklar 1989. Note that Shklar did not consider herself a cosmopolitan.

[10] On the distinction between misfortune and injustice, see Shklar 1990.

[11] Shklar (1989) notes that the liberalism of fear may be an insufficient expression of liberalism. This point is worth emphasizing because Shklar's "bare-bones liberalism" avoids charges of imposing totalizing Western liberal values. See Benhabib 1996 on Shklar's questioning of Kantian presumptions of rationalism and human nature. Moreover, I assert that the protection of bodily integrity and moral dignity—which are core to putting cruelty first—are not particularly liberal or Western.

https://doi.org/10.1111/j.1540-5893.2006.00275.x Published online by Cambridge University Press

> Inhumanity consists not only in denying the fact that one's victims are [universal] human beings, but also in severing the multitude of roots that embed them in a particular but common set of human relationships, producing an unaccommodated humanity deprived of names, nationality, citizenship, religion, ethnicity, ethical convictions, political, economic, or social position (2000:258).

This duality is something Arendt powerfully articulated in her explanation of why the abstract ideal of human rights failed to save denationalized Jews in the interwar period. Because "the world found nothing sacred in the abstract nakedness of a human being," wrote Arendt (1958:295), there was little to motivate or compel intervention on behalf of the nameless, faceless mass of deportees whom the Germans had carefully ensured no one would claim as their own (Arendt 1958:295). Extermination was almost an afterthought to the expulsion of Jews from concrete human community. Thus for Arendt the only guarantee of human dignity was the "right to have rights," understood as the universal right to membership in an enclosed political community. She contended that identification through specific attachments is the ultimate protector of dignity and equality because it grounds public recognition of the significance and worth of each individual's place within the political community.

Due to the geopolitics of her time and her fear of a global leviathan, Arendt insisted that human dignity be "rooted in and controlled by" territorial entities (1958:ix). She predicted neither the post–Cold War development of cosmopolitan law nor the permeability of borders under conditions of globalization. Although I cannot locate Arendt more fully vis-à-vis cosmopolitanism here (see Fine & Cohen 2002), the critical point to draw is that abstract humanity alone is too thin for cosmopolitanism. Arendt's keen diagnosis of events leading up to the Holocaust remains apt in the face of persecution of the "*inyenzi*,"[12] the "terrorist," the "criminal," the "subversive," the "communist." State-sponsored violence reduces its victims to a single category. It strips them of contextual solidarities and affiliations, thereby not only denying their humanity through the fact of brute degradation, but also denying their place and belonging in the world.

For example, Scarry analyzes how the use of everyday cultural objects in torture serves to undo civilization itself. Everything safe and familiar—a bathtub, a house, a chair—is converted into a weapon, stripped of context, isolated from all but the fact of pain (Scarry 1985). Similarly, the "disappearance" of victims puts them out of sight and mind, beyond the law, "outside any moral relationship of care or responsibility" (Humphrey 2002:32). In

[12] Hutu extremist propaganda referred to Tutsis as cockroaches.

https://doi.org/10.1111/j.1540-5893.2006.00275.x Published online by Cambridge University Press

Argentina, for example, the Mothers of the Plaza de Mayo resist this tactic by parading silently with pictures of their disappeared children: that this is *somebody*'s child, that *any mother* could identify with their loss. And in South Africa, torture and other abuses became intrinsic to a dehumanizing policy that explicitly denied community or identity between different ethnoracial groups.

The duality of cosmopolitanism, then, is that moral allegiance to all human beings is best secured within specific contexts and relationships. Insofar as violence is enabled and acted out through the denial of connection, the commitment and willingness to uphold minimal standards of decency is empowered through reconnection. Although the connections that sustain the cosmopolitan injunction to prevent cruelty need not coincide with territorial boundaries, it must also be stressed that "those who cannot avoid the legacies of mass violence are those that have to live together after it" (Humphrey 2002:103). Herein lies the conceptual link between cosmopolitanism and nation-building. (Note: *nation-building* is invoked in the context of transitional justice; specifically, nation-building is equated with national unity and reconciliation.)

There is a growing turn toward national reconciliation processes in postconflict societies, and victims are increasingly seen as central to these processes. Victims' testimony compels acknowledgment of the previously denied past. By telling their stories in public, victims are transformed from object to subject (Humphrey 2002:93). Violence is contextualized; it is no longer nameless or faceless or without concrete impact. And in acknowledging that *this* person or *this* group was grievously wronged, officials and complicit bystanders (re)affirm broken bonds of legal, civic, and moral responsibility. To help rebuild these connections, explicit acknowledgment of the failure to stop injustice and reparatory measures are needed. This affirms that "never again" will cries of injustice go unheeded, and past wrongs are righted as best possible. Thus, normatively, the acknowledgment of victims enacts the (cosmopolitan) principle that if democracy means anything morally, it is that the lives of all citizens matter (Shklar 1990:35). It is literally a process of re-membering the nation through "truth": collective condemnation of the violence victims suffered affirms not only their basic humanity but also their equal belonging as rights-bearing citizens.

Yet the centrality accorded to victims can also be disconcerting. While the transitional emphasis on the restoration of victims can encapsulate the duality of cosmopolitanism, it also risks instrumentalizing victims and victimhood. Truth-telling may or may not help individual victims to heal. Notwithstanding, their pain becomes the vehicle of national catharsis—most especially when it is victims, rather than perpetrators and bystanders, who take center

https://doi.org/10.1111/j.1540-5893.2006.00275.x Published online by Cambridge University Press

stage. The act of collectively condemning the violence they suffered serves to unify the nation. Victims become symbolic of national recovery and the reconstitution of social relations (see Humphrey 2002:107). And the instrumental role that victims perform, as we see in the South African case study, may undermine the commitment to attend to victims themselves.

Victimhood comprises the subjective sense of having suffered injustice and the objective violation of socially and legally constructed norms (Lu n.d.). These two elements of victimhood may or may not coincide in particular circumstances. Indeed, who counts as a victim is central to perceptions of historic injustice and postconflict constructions of nationhood. It is the transitional state that determines who is to be officially acknowledged as a victim—and a perpetrator. Entire categories of violence may be left out of public remembrance. When the provision of blanket amnesty is part of a peace settlement, there is simply no acknowledgment of specific crimes or victims. Although South Africa's individualized amnesty is much more legitimate because it is linked to truth and reparation, it too has been a source of discontent, as I expand in the next section. And while truth commissions may offset amnesty's denial of justice through public investigation, they are inevitably limited in their mandate. For example, the Chilean truth commission investigated cases of death and disappearance, but not torture. In South Africa, the TRC emphasized torture, severe assault, and murder over the "everyday" violence of racial discrimination, forced removals, and pass laws.

The focus on certain types of violence and victimhood over others shapes the recognition of the layers and types of responsibility and remedy. Limited acknowledgment of victims and of complicity in their suffering may, in turn, perpetuate impunity, inhibit the reconstruction of solidarities, and continue to leave victims on the outskirts of the nation. The exercise of universal jurisdiction can bypass domestic amnesties and bring recognition to victims of crimes against humanity. The general argument against foreign legal action is that it will upset delicate transitions and undermine national reconciliation.[13] Foreign or international courts contribute little to the penetration of norms or local capacity-building because they are geographically and often culturally removed (see Dickinson 2003). Though these are valid concerns in many cases, they should not lead to assumptions of a rigid binary between "inside" and "outside." For one reason, intrastate violence is almost never wholly domestic—with financing, political support, combatants, and refugees spilling across borders. Furthermore, as

[13] For a rabid defense of blanket amnesty, see Kissenger 2001. Llewellyn's (2001) defense of "just" amnesties, i.e., as in South Africa, is more persuasive.

https://doi.org/10.1111/j.1540-5893.2006.00275.x Published online by Cambridge University Press

Golob convincingly demonstrates with respect to the Spanish indictment and British arrest of Chilean military dictator Augusto Pinochet, cosmopolitan justice *can* be about the "deep and abiding meaning of place and of belonging to that place" (2002:49).

It is worth briefly sketching Golob's analysis because it sparked my own thinking on the potential intersections between cosmopolitanism, victimhood, and nation-building. She shows a duality in the Pinochet case. On the one hand, his arrest was emblematic of cosmopolitan citizenship where universal human rights are not contingent on borders: the victims were rehumanized at the level of global civil society. On the other hand, the cosmopolitan search for justice was simultaneously an effort to reinvent national identity at the level of "affective citizenship" in an atomized society. Pinochet's arrest forced Chileans to reflect on why a so-called consolidated democracy forces victims to seek justice outside the nation. They were compelled to reevaluate 20 years of amnesty and their complicity in silence about the past. As a consequence of the international activity, Pinochet was stripped of senatorial immunity in Chile, domestic legal action was reinvigorated, and the disclosure of new information, roundtable talks, and an "emotionally charged" national mass were sparked.[14] With this, Golob argues, alienated and silenced victims finally began to feel "at home" in their nation.

Themes of victims' exclusion and belonging are similarly present in the South African case, as I discuss below. By turning outside the nation, the South African plaintiffs raise a slew of questions about the treatment of victims and victimhood in the "new" South Africa.

Genesis of the Apartheid Litigation

Re South African Apartheid Litigation (2004) is a consolidation of nine lawsuits by three groups of plaintiffs led by Lungisile Ntsebeza, Hermina Digwamaje, and the Khulumani Support Group (a nongovernmental organization [NGO] that has provided advocacy and support to victims of human rights violations under apartheid for more than 10 years). They are suing 35 multinational corporations for allegedly supplying oil, ammunitions, technology, and loans to the apartheid security state in the face of international sanctions, thereby sustaining the system of brutal racial capitalism, and aiding and abetting the military and police in repressive acts of torture, killing, indiscriminate

[14] Although Chile's amnesty law remains in place, judicial reinterpretation of the law now allows for the prosecution of disappearances. See Golob 2002:33–8, 49–51; Jonas 2004; Franklin 2001.

https://doi.org/10.1111/j.1540-5893.2006.00275.x Published online by Cambridge University Press

shootings, sexual assault, and arbitrary detention.[15] As per ATCA requirements, all defendants have an office in New York State; thus only multinationals are being sued. While it might be possible to launch a similar civil suit (at least against domestic firms) in South Africa, the standards for awards are much higher in the United States.[16] Moreover, such a lawsuit has never been tried in South Africa, whereas the ATCA has yielded numerous successes against individual torturers and a $6 billion out-of-court settlement with Swiss banks and German corporations for collaboration in the Holocaust.

Although there are obvious strategic reasons for going to the American courts, the domestic context that gave rise to the lawsuits is also important. All three groups of plaintiffs follow through on the "unfinished business" of the TRC. (There are also key differences between the plaintiffs. For example, Ntsebeza and Digwamaje are class action suits, whereas Khulumani is not; Khulumani's action has been much more publicized, and early on it had the extensive support of many prominent South African and non–South African individuals and groups.[17]) The apartheid litigation confronts beneficiary denial and the South African government's equivocation on reparation to individual victims. I explain these interrelated factors below in order to develop a broad sense of the political genesis and impact of the litigation.

Beneficiary Complicity

The TRC was mandated to investigate and establish "as complete a picture as possible of the nature, causes and extent of gross violations of human rights" committed between 1960 and 1994, "within or outside the Republic [of South Africa], emanating from the conflicts of the past" (TRC Act 1995: Preamble). Its main tasks were to grant amnesty to those individuals who provided full disclosure about gross violations associated with a political objective; to identify victims and restore their human and civil dignity; and to report findings and make recommendations to prevent future

[15] Aiding and abetting is the common allegation. For additional allegations made by Digwamaje and Ntsebeza plaintiffs, see *Re South African Apartheid Litigation* 2004:23–4. Khulumani is the most specific with respect to individual gross human rights violations.

[16] Thanks to Jonathan Klaaren on this point.

[17] An amici curiae brief (2004) from more than 200 Khulumani supporters was submitted to the court for the initial hearing. Khulumani's amici included several former TRC commissioners including Desmond Tutu, and numerous South African and non–South African organizations, individuals and groups concerned with human rights, social justice, development, third world debt, and/or the antiapartheid movement. For the full list of amici in the initial brief, see Cohen et alia's Web site at http://www.cmht.com/pdfs/AmicusBriefAsFiledSeptember292004.PDF. Since then, joint amici curiae briefs have been prepared for the appeals of all three suits. For a listing of all amici briefs, see http://www.cmht.com/cases_cwapartheid1.php.

abuses. In short, it was expected that "truth" about the past would lead to national unity and reconciliation. "Truth," however, was circumscribed by the mandated focus on individual acts of torture, disappearance, killing, and severe ill-treatment. Although the TRC recognized the system of apartheid to be a crime against humanity, that is, a gross violation of human rights, it narrowly identified victims and perpetrators as those who had suffered and inflicted egregious bodily harm. It did not focus on the everyday publicly sanctioned violence of forced removals, pass laws, the migrant labor system, or general racial discrimination. Consequently, as Mamdani puts it, "We thus have a crime against humanity without either victims or perpetrators" (2002:54).

The system of apartheid generally factored into the TRC's account as the context of gross violations, rather than as the crime itself. Although the TRC conceptually recognized that endemic racism and the dehumanization of blacks facilitated gross abuses, its report has been criticized as a decontextualized chronicle of wrongful acts (see Mamdani 2002; Wilson 2001; Posel 1999). It does not sufficiently depict the ways that illegal acts of torture, killing, and terror were intrinsic to legally sanctioned apartheid, both as a defense of that system and in their very operative structure, which followed apartheid principles of ethnoracial stratification, differential privilege, and dehumanization (see Nagy 2004a). Hence, the TRC did not fully seize the opportunity to rebut claims that state agents who committed gross violations were bad apples or that apartheid was a necessary check on, rather than the producer of, "black-on-black" violence.[18] In effect, indifference to egregious violence was built into the system, which consigned blacks to second-class citizenship. This explicit denial of solidarity and universality produced fear, ignorance, apathy, withdrawal, and blindness to the suffering of others. But because indirect responsibility for gross violations was muted during the TRC, the damaged bonds between beneficiaries and individual victims received insufficient attention.

Moreover, by casting structural violence as the background, the TRC neglected the bigger picture of suffering and benefit.[19] The focus on individualized acts prevailed over the systemic and collective nature of the crime of apartheid. Certainly, and to its credit, the TRC tried to stretch its mandate beyond the spectacular with

[18] Mamdani's quote from a private source captures the crux of the problem: "I could not believe [the TRC's finding] that most perpetrators of apartheid were black" (Mamdani 2002:36).

[19] Logistically speaking, of course a line must be drawn somewhere. But had even forced removals alone been included under "severe ill treatment," the TRC would have brought to the forefront the suffering of at least 3.5 million rather than the 22,000 explicitly identified as victims.

https://doi.org/10.1111/j.1540-5893.2006.00275.x Published online by Cambridge University Press

public hearings on the apartheid roles of the faith community, health sector, prisons, business and labor, the media, and the legal community. But these hearings were considered as providing background information and not as victim hearings (see TRC 1998: Vol. 5, ch. 11, para. 49). Moreover, an "overarching sense of denial" emanated from these hearings (TRC 1998: Vol. 5, ch. 6, para. 15).[20] In the business and trade union hearings, not a single foreign or multinational corporation participated, despite their role in sustaining the apartheid security state, especially banks through the provision of loans. Of those who did participate, some argued that profit, and not morality, is the only job of business.[21] While a few did acknowledge their responsibility in apartheid's injustices, many more argued that apartheid eroded productivity and long-term growth—in effect, that business was a victim of apartheid rather than a benefactor. Others additionally cast themselves a moral role as helping to bring an end to apartheid.

These claims were rather disingenuous. First, white business unquestionably benefited from migratory labor (especially mining); convict labor composed mainly of those in violation of pass laws (especially agriculture); preferential land distribution (agriculture); the denial of trade union rights, which was often enforced by violent state repression; and the dereliction of basic health and safety standards. Second, although (manufacturing) companies may not have made as much profit as they potentially could have in the last two decades of apartheid, they nonetheless profited (Lyons 1999:151). Third, although corporations such as Anglo-American, Nedcor/Old Mutual, and Sanlam did sponsor scenario-planning exercises in order to tackle the "organic" crisis facing the apartheid state, their projections and analyses as late as 1987 declined to propose "one-person, one-vote" as part of the solution (Bond 2000:57). Finally, when whites in general finally ceded political power, it was in exchange for the preservation of the wealth and property status quo. Constitutional agreements on the property clause and market-based land reform, as well as a shift toward free market economic policy, all helped ensure the continuation of beneficiary privilege. Thus the moral ground was nowhere as high as liberal beneficiaries claimed in the business hearings. Yet as I take up below, the political economy of transition has shaped certain narratives of reconciliation that are deployed against the

[20] Notable absences included judges and magistrates; two of the churches widely identified with apartheid, the Nederduitsch Hervormde Kerk and the Gereformeerde Kerk; the Afrikaans press; the Department of Correctional Services; and the White Mineworkers' Union, the South African Agricultural Union, and the National Council of Trade Unions.

[21] For detailed critiques of the business hearings, see Lyons 1999; S. Terreblanche 2000.

https://doi.org/10.1111/j.1540-5893.2006.00275.x Published online by Cambridge University Press

apartheid litigation and in defense of the corporate version of history.

The TRC plainly stated that national reconciliation depended upon the acknowledgment of responsibility by apartheid leaders and beneficiaries. It refuted the business sector's denials of benefit and its role in sustaining apartheid (see TRC 1998: Vol. 5, ch. 6, para. 156; Vol. 4, ch. 2, paras. 161–7). It raised glaring issues that participants had omitted—in particular, that of corporate participation in the government's National Security Management System, which was pivotal to counterinsurgency tactics during the "total onslaught" and states of emergency in the 1980s. (The 1980s were the worst period for gross violations as defined by the TRC's mandate.) The TRC further found that business has a "particularly significant role to play" in the "huge and widening gap between the rich and poor [that] is a disturbing legacy of the past [and] has not been reduced by the democratic process" (TRC 1998: Vol. 5, ch. 8, para. 38). To this end, the TRC recommended that the government provide for restitution and "the empowerment of the poor" through measures such as a wealth tax, once-off corporate levy, retroactive surcharges on corporate profits made under apartheid, or a one-time donation of 1% of the market capitalization of each company listed on the Johannesburg Stock Exchange (TRC 1998: Vol. 5, ch. 8, para. 39).

Despite these findings and recommendations, critics have complained that the TRC, constrained by the mandate and its interpretation of it, did not go far enough. Although the TRC was powerless to implement its recommendations, it might have strengthened its position on beneficiary responsibility by emphasizing that apartheid was *the* overarching crime from which all other violations flowed. But apartheid did not feature as a gross violation, and amnesty did not apply to indirect perpetration. Thus with the public spotlight on sensational perpetrators such as "Prime Evil" Eugene de Kock, beneficiaries were left to engage in very superficial reckoning with the past.

The apartheid litigation breaks past the confines of the TRC's mandate to further confront beneficiary denial. For instance, one of the main NGOs involved in the initiation of Khulumani's lawsuit, the Apartheid Debt and Reparations Campaign of Jubilee South Africa, states in its press release: "Whilst we are fully aware of the fact that the Promotion of National Unity and Reconciliation Act only made provision for individual amnesty as opposed to institutional amnesty, this should not have precluded foreign corporations and banks to come forward and reveal their complicity with the Apartheid regime." Since none did so, they "forfeited their rights to claim any entitlement under the spirit of the Promotion of National Unity and Reconciliation Act and have opened themselves

https://doi.org/10.1111/j.1540-5893.2006.00275.x Published online by Cambridge University Press

to litigation" (Apartheid Debt and Reparations Campaign 2002: n.p.).

Furthermore, as Dumisa Ntsebeza, former TRC commissioner and lead counsel for the lawsuits led by his brother, writes:

> [The TRC] failed to interrogate the role of big business, of the transnational companies, for their part in sustaining and perpetuating the apartheid order. We did not set out to find the evidence that would have supported a recommendation that the transnational companies . . . owe to the victims of South Africa (mostly black people) a duty to give reparations. It should not have been a duty of government alone to provide reparations, even if this is not what the statute provided. . . . It is also essential to uncover the level of complicity of these corporate entities in the crime of apartheid. That also continues to remain the unfinished business of the TRC process (Bell & Ntsebeza 2003:349).

It is worth noting the timing of events. In 1998, the TRC released its "final" five-volume report and wrapped up operations, except for the amnesty hearings, which were extended for several years. The apartheid litigation was launched in 2002. This was after four years of frustration with the minimal acknowledgment of responsibility within the South African and multinational business community, frustration with the government's rejection of the TRC's recommended wealth tax or corporate levy, and failed lobbying of foreign banks to cancel apartheid debt as an act of reparation. The TRC visited these and other outstanding issues in its March 2003 "codicil" report, which was released after the conclusion of the amnesty hearings.

With respect to the business sector, the TRC this time used stronger, quasi-legal language to make the case that reparations are owed. Pointing to the UN Apartheid Convention, the TRC advised that foreign banks who gave support to the apartheid regime "were accomplices to a government that consistently violated international law" (TRC 2003: Vol. 6, sec. 2, ch. 5, paras. 25–6). It further suggested that foreign debts incurred by the South African government or parastatals during apartheid be considered "odious" in accordance with international law principles.[22] In a detailed case study of mining corporations, the TRC argued that "unjust enrichment" is a "source of legal obligation" (TRC 2003: Vol. 6, sec. 2, ch. 5, para. 60). Drawing on international law, and analyzing how apartheid violence and benefit extended beyond South Africa's borders, the TRC drew no sharp distinction between inside and outside in its conception of the "new" South Africa. Overall,

[22] TRC 2003: Vol. 6, sec. 2, ch. 5, para. 27; para. 28 regarding the 1976 International Monetary Fund (IMF) loan that helped finance the security state; paras. 29–42 describe a case study of Eskom and other parastatals.

https://doi.org/10.1111/j.1540-5893.2006.00275.x Published online by Cambridge University Press

the codicil report provided tacit support to the apartheid litigation, in contrast to the government's hostility, and it painted a picture of national unity and reconciliation that depended upon foreign and domestic beneficiary acknowledgment as well as reparations to the "very large majority who remain victims of South Africa's past" (TRC 2003: Vol. 6, sec. 2, ch. 5, para. 6.)[23]

Individual Reparations Debate

The general dissatisfaction surrounding beneficiary reparations for apartheid was exacerbated by the government's delay in providing reparation to the 22,000 individuals specifically identified as victims by the TRC. It seemed palpably unfair that victims had to wait nearly six years for reparation while amnestied perpetrators immediately walked away—especially given the Constitutional Court's 1996 *Azapo* ruling that amnesty was justifiable on the basis of the provision of truth and reparation to victims. The lodging of alien tort claims, Khulumani's in particular, functioned to pressure the government to fulfill the constitutional promise of reparation and to drop what is perceived to be an equivocal and at times acrimonious stance toward victims. The sense of marginalization within the "new" South Africa is an important factor driving victims' outside quest for recognition and redress.

Reparation publicly affirms the moral worth of victims and concretely substantiates equal protection of the law; it also brings some measure of financial relief and rehabilitation to individual victims (Teitel 2000: Ch. 4). But apart from urgent interim grants issued in 1998 to the neediest of individual victims,[24] the symbolic and practical functions of reparation were largely unmet, even undermined by a "very destructive debate" (Hamber 2004:17) between the government and various victims' groups. A high expectation of reparation was created among victims by the *Azapo* decision, by the TRC process, and by the TRC's final recommendations of symbolic measures such as exhumation and memorials, community reparation such as skills training and health treatment centers, and individual grants of R17,000 to R24,000 per year over six years. The government claimed it was waiting to announce its reparations policy until the conclusion of the amnesty hearings in order to have a complete count of victims. But President Thabo

[23] While the TRC does not refer to the ATCA for suing corporations, it does (rather enigmatically) suggest that a Business Reconciliation Fund be established through a "claim for reparations lodged against the lenders who profited illegitimately from lending to apartheid institutions during the sanctions period" (TRC 2003: Vol. 6, sec. 2, ch. 5, para. 13).

[24] Approximately 18,000 people were provided R2,000 to R5,000. In 1997, the annual household income was R21,7000 and the poverty line was R15,600 (see TRC 1998: Vol. 5, ch. 5, para. 69). There are six to seven Rand in an American dollar.

https://doi.org/10.1111/j.1540-5893.2006.00275.x Published online by Cambridge University Press

Mbeki and other government officials also repeatedly insinuated that because the antiapartheid struggle was about freedom, victims' claims were money-grubbing (see Sooka 2000; Mbeki 2003).

This position has been deeply alienating. It has fueled resentment and ignores the very real and lasting damage to quality of life suffered as a result of mental or physical injury. The lack of symbolic gestures or support—which reasonably could have been implemented prior to the conclusion of the amnesty hearings—has also effectively reduced the reparations debate into a struggle over sums of money. Money itself has become a symbol of recognition and, as Hamber (2004:17–8) speculates, this may go some way in explaining the billions sought in the apartheid lawsuits: the settlements need to be substantial in order to "register the extent of hurt." Not surprisingly, when the government finally announced in October 2003 that it would provide a once-off payment of R30,000 per person, which was considerably less than the TRC recommended, victims were highly dissatisfied. Khulumani warned that the sum would be wholly insufficient to meet the costs of educational fees, housing replacement, prosthetics, counseling, or exhumation and reburial (Khulumani Support Group 2003:36–45). Overall, the damaging debate and subsequently disappointing amount, combined with general beneficiary denial, have reinforced victims' perceptions that the country has not properly acknowledged them.

This perception is intensified when we consider the pivotal role that individual victims played during the TRC process in building the "new" South Africa. In his opening address at the "victim" hearings, Archbishop Desmond Tutu spoke of all South Africans as a "traumatised and wounded people" whose healing depended upon unearthing the truth about the past and collectively condemning the evils of apartheid. Thus victims' stories became central to national catharsis, which centered on the "truth" of torture and killings. Victims' bodily injuries were conflated with wounds in the body politic, and commissioners lauded the "heroic" sacrifices made by individual victims for the "new" South Africa. Acts of reconciliation between individual victims and perpetrators, to whom the TRC had direct access, sometimes appeared to stand in for national reconciliation as a whole. Many victims felt there was a pressure to forgive (Centre for the Study of Violence and Reconciliation and Khulumani Support Group 1998). And commissioners' praise for victims' generosity of spirit simplified the costs of reconciliation by implying that nothing further needed to be done.

This rather one-sided approach to national reconciliation was amended by the TRC in its codicil report, which directly tackled the government's delay in announcing a reparations package. Pointing at length to the "right to reparation" under international

https://doi.org/10.1111/j.1540-5893.2006.00275.x Published online by Cambridge University Press

law, the TRC stressed that South Africa's international legitimacy depended upon the adequate provision of reparation to victims (TRC 2003: Vol. 6, sec. 2, ch. 2, para. 44). But the argument for reparation also honed inward, directly linking the place and belonging of victims to national reconciliation. The TRC wrote, "If we ignore the implications of the stories of many ordinary South Africans, we become complicit in contributing to an impoverished social fabric—to a society that may not be worth the pain the country has endured" (2003: Vol. 6, sec. 2, ch. 7, para. 21). Moreover,

> To ignore the suffering of those found by the Commission to be victims would be a particular kind of cruelty. After all, it was the testimony of these victims that gave us a window onto how others saw the past and allowed us to construct an image of the future (2003: Vol. 6, sec. 2, ch. 7, para. 2).

These passages evoke notions of cosmopolitan re-membering insofar as the universal injunction to prevent and redress cruelty is brought home within a specific context. If victims' voices represent the national shift from a violent past to a democratic future, the "new" South Africa cannot continue to leave them at the periphery of the nation.

Cosmopolitan Re-membering of the Nation

Reparation has taken on multiple meanings in South Africa, ranging from symbolic and compensatory measures for individual victims of torture and killing to more development-oriented programs for specific communities that were targeted by terror and for the general victims of basic apartheid. Likewise, the apartheid lawsuits encompass different interests and purposes among plaintiffs and supporters, including greater corporate social responsibility, the expansion of global human rights and social justice, a challenge to South African domestic policy, an accounting of beneficiary complicity, the vindication of individual and collective victims, and broad-based or individual relief. Some of these dimensions of the litigation intersect with national memory and belonging. This is not an all-encompassing claim; certainly there are extrinsic considerations at stake. But there are a number of ways in which the litigation can be seen as an effort to bring cosmopolitan values home such that the recognition of victims and injustice is central to constructions of the "new" South Africa.

The litigation is "new cosmopolitan" because it wields international human rights law in order to reassert the language of accountability as a pointed counter to domestic developments. The plaintiffs challenge beneficiary denial of responsibility—both then

https://doi.org/10.1111/j.1540-5893.2006.00275.x Published online by Cambridge University Press

and now—by arguing that profiting from and sustaining a system deemed a crime against humanity was not just moral abdication but also a violation of legal norms and UN sanctions. Even if the argument ultimately fails in the American courts—and at this point, *Re South African Apartheid Litigation* (2004) has failed due to interpretations of ATCA jurisdiction, and not on the substantive allegations—the publicity surrounding the lawsuits and the ATCA more generally contributes to the growing trend to establish human rights obligations for corporations. Increasingly, the global debate is not whether such obligations exist but whether they are enforceable or, as corporations who fight against the ATCA would like to see, voluntary (Shamir 2004). But the South African government appears to have sidestepped this debate with its conciliatory approach toward business's role in nation-building.

It is a popular sentiment in South Africa that the African National Congress (ANC) government has "sold out" to corporate interests, that indeed beneficiaries will "get off free." Corporate pledges to the Business Trust, an initiative of firms that supports social and economic reconstruction, have reportedly been made in explicit exchange for the South African government's support to quash the ATCA claims (C. Terreblanche 2003a). Moreover, contributions are given on condition that they are called *nation-building* rather than *reparation*, thereby avoiding issues of historic injustice and responsibility for it (C. Terreblanche 2003b). In the TRC's view, the amount in the Business Trust is "paltry" (TRC 2003: Vol. 6, sec. 2, ch. 5, para. 9). But former Minister of Justice and Constitutional Development Penuell Maduna, in his affidavit to the U.S. court asking for the apartheid lawsuits to be dismissed, points to the fund as a "meaningful contribution to the broad national goal of rehabilitating the lives of those affected by apartheid" (Maduna 2003: Para. 9). Citing the cabinet's belief that the lawsuits would jeopardize the government's policy of reconciliation, Maduna brandishes the right of the national sovereignty in order to denounce the plaintiffs' actions. Notably, the crux of Maduna's assertion of national sovereignty is economic.[25]

He takes umbrage with the lawsuits' insinuation that the government has done little to address the damages of apartheid. This is not surprising; as a preeminent democratic success story, South

[25] Maduna also argues that South Africa's negotiated settlement was a "conscious agreement" among all parties to provide amnesty and thereby "avoid Nuremberg-style apartheid trials *and any ensuing litigation*" (Maduna 2003: Para. 3.2; emphasis added). This is an inaccurate representation. Amnesty was designed as the "carrot" to the "stick" of prosecution. Those who did not apply, or those for whom amnesty did not apply, remain subject to the stick. Notably, the TRC raises the possibility of alien tort claims against "all former heads of state" for "gross violations committed by their agents" (TRC 2003: Vol. 6, sec. 5, ch. 2, paras. 118–24). I also pointed earlier (footnote 23) to the TRC's reference to reparations claims against lenders.

Africa is not a rogue nation such as those typically implicated in ATCA actions. Furthermore, from the government's perspective, supporting the apartheid litigation is tantamount to acknowledging that their plans for social and economic development are not working (see Hamber 2004:19 and following.). Maduna points to the ANC's numerous advances in "social upliftment" and notes that it has been twice elected on a platform of socioeconomic transformation. An underlying argument, perhaps, is that development should be distinguished as a general right of citizenship whereas reparation is more specifically tied to historic wrongdoing. But this position of course depends upon one's characterization of wrongdoing, and it leaves the matter of community-based reparations hanging. In addition, there is an overwhelming lack of electoral alternatives for the majority of South Africans.[26] Voting for the ANC does not necessarily mean a wholesale endorsement of its policies, nor does it preclude the voicing of dissent in a healthy democracy (and the government certainly does recognize the right of victims to launch suit).

Domestic contention over South Africa's social and economic development policy underlies the debate about beneficiary reparations and the meaning of national reconciliation. Earlier, I noted that corporations had some influence in setting the terms of the transition to democracy including through scenario-planning exercises. While in 1990, Nelson Mandela had assured the nationalization of banks, mining and monopoly industries, progressive taxation, and redistribution, from 1992 onward, the ANC, partly through the influence of its negotiating partners, moved toward the virtues of market forces, foreign investment, and economic growth (see Bond 2000; Marais 2001). This shift is exemplified in the 1996 macroeconomic policy document, *Growth, Employment and Redistribution* (GEAR) (Republic of South Africa 1996), which is generally condemned on the left as an embrace of neoliberalism that has worsened rather than redressed poverty and inequality.

My purpose is not to assess GEAR per se but, rather, to point out that the policy shift occurred within *globalized* considerations. In short, the new South Africa—and subsequent claims of sovereignty—did not develop in a vacuum. The "organic" crisis facing the apartheid state in the late 1980s was in large part a consequence of structural limits on the growth of domestic demand, of severe skilled labor shortage, and of foreign sanctions and disinvestment. There was general recognition of the need to reinsert South Africa into the global economy. Elite consensus on the manner of global reintegration developed within overarching

[26] Few blacks are going to vote for the former "apartheid parties," and the ANC garners vast support including through various alliances.

https://doi.org/10.1111/j.1540-5893.2006.00275.x Published online by Cambridge University Press

international trends, including the collapse of the (ANC's standby) Soviet model and the ascendancy of neoliberal doctrine. The main platforms of GEAR were first outlined in a 1993 letter of intent signed by the Transitional Executive Council, which included the ANC, to secure an $850 million IMF loan to help the country with balance of payment difficulties (Marais 2001:104, 134).

Today, the primacy of this model over other modes of (re)distribution emerges in Maduna's affidavit as *the* path to nation-building. He writes:

> One of the structural features of the South Africa 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 (Maduna 2003: Para. 12).

He cites GEAR as a key strategy in promoting "reconciliation with and business investment by all firms, foreign and South African" And faster economic growth, he argues, offers "*the only way* out of poverty, inequality and unemployment (Maduna 2003: Para. 8.1; emphasis added).

However, this (neoliberal) prescription is not necessarily the only way. Rumblings of dissent run through the Tripartite Alliance (ANC, South African Communist Party, Congress of South African Trade Unions [COSATU]) and from deep within South African civil society.[27] Furthermore, the claim of sovereignty is rather ironic. In Maduna's prescription, we see that the nation, ostensibly impervious to intrusion, is in fact dependent upon porous borders in a globalized economy. In these respects, the apartheid litigation is very much about the meaning of home in an increasingly globalized world. For some South Africans, the ANC appears to be a willing participant in, rather than a victim of, neoliberal globalization. Moreover, in rejecting the litigation, the government is seen to be colluding with the very oppressors whom it once struggled against. Thus, it appears to those who call for beneficiary responsibility, business and nation are neatly nestled together in a "co-operative and voluntary partnership" (Mbeki 2003: n.p.), embarking forward on a path of reconciliation that leaves little room for backward-looking obligations. On this view, beneficiaries need only continue with self-congratulatory acts, such as those articulat-

[27] Note also that COSATU has not taken a position on the apartheid lawsuits (see Hamber 2004:21–2).

https://doi.org/10.1111/j.1540-5893.2006.00275.x Published online by Cambridge University Press

ed during the TRC business hearings, in order to contribute to the democratic evolution of South Africa.[28]

It is difficult to see how bonds of recognition that secure the commitment to prevent injustice can develop when this approach glosses over the very failure of beneficiaries to attend to cries of injustice. This approach is reinforced by the socioeconomic compromises of transition that enable continuities of privilege while allowing beneficiaries to claim a break with the past by merely condemning gross abuses committed by others. It is also reinforced by narratives of "healing the nation" that rely upon the stories of individual victims of torture and killing. The apartheid litigation, in contrast, insists that beneficiaries be held to account for their role in apartheid's violence, both everyday and extraordinary.

This advances a cosmopolitan re-membering of the nation. By cosmopolitan re-membering I mean, first, that the complaints function as an historical indictment, reiterating the findings of responsibility made by the TRC in its codicil report and with greater analytical detail.[29] In so doing, they confront insular views of the past, such as the story that only starts in the 1980s with businesses pressuring for the reform of apartheid. By pointing out the transnational nature of apartheid violence, which violated cosmopolitan rights and international principles, they urge the amendment of national memory.

Second, the litigation calls attention to neglected dimensions of victimhood. It challenges predominant conceptions of injustice by confronting the language of voluntary contributions toward nation-building, which implies that being black and poor is a misfortune rather than tied at least in part to a history of racialized oppression and benefit. The class-action suits represent the millions of persons who suffered damages as a result of apartheid—in particular, its unfair and discriminatory labor practices.[30] Underlying these lawsuits is an insistence that reconciliation requires the involvement of apartheid's general victims (mostly black people) and beneficiaries (mostly white people) (Bell & Ntsebeza 2003:349). Khulumani's Complaint, which narrows on individual victims of gross human rights violations, also spends considerable time outlining the systemic injustices of apartheid. It often implies that plaintiffs were injured in the course of resisting pass laws, forced removals, Bantu education, influx control, and poverty

[28] For analysis of the evolutionary nature of transition and its relation to beneficiary denial, see Bell and Ntsebeza 2003:286–8.

[29] This is especially so for Khulumani's Statement of Complaint (2002), which is available on the Internet and is clearly written with much detail. But all lawsuits have gotten wide media coverage internationally and in South Africa.

[30] See Ntsebeza Second Amended and Consolidated Complaint (n.d.). This complaint is not as specific as Khulumani's in arguing which international laws were violated.

https://doi.org/10.1111/j.1540-5893.2006.00275.x Published online by Cambridge University Press

(Khulumani Statement of Complaint 2002: Paras. 174–223). On this accounting, gross abuses are the consequence of the crime of apartheid (whereas the TRC treats apartheid as merely the context). The crime of apartheid cannot be separated from the criminal means used to sustain it, and both, it is asserted, are violations of international law.

Going outside the nation to make these claims need not be seen as a foreign or alien intervention. It is, rather, a retrieval of an alternative account of national reconciliation that emphasizes reparative obligation based on historic wrongdoing rather than voluntary contributions in the name of a new patriotism. The alternative account secures the commitment to prevent injustice by explicitly acknowledging and repairing broken bonds, whereas the latter risks superficial reconciliation (see Nagy 2004b) because it elides notions of victimhood and responsibility altogether. We can only speculate whether the litigation would have been launched had businesses better responded to the TRC or had the government implemented all the TRC recommendations or embraced socioeconomic policy other than GEAR. What we do know is that the plaintiffs have made their claims as cosmopolitan citizens, with the support of a globalized civil society, from within the context of South African politics of reconciliation. The apartheid litigation is not simply a claim based on abstract right. It is rooted in and militates against a particular denial of injustice and how that denial has shaped the nation.

The third way that the apartheid litigation functions as a cosmopolitan re-membering of the nation pertains specifically to Khulumani's action. With avenues of satisfactory reparation seemingly cut off at home, the symbolic message of the lawsuit is that victims of gross abuses have had to turn outward for recognition and redress. The civil suit functions as a sharp rejoinder to a nation that has largely left victims to fend for themselves, despite their having been told otherwise during the TRC hearings. The claim for damages responds to basic needs, which, as noted above, Khulumani says will not be met by the once-off payment. Significantly, the Khulumani Support Group is itself a plaintiff, along with 85 individual victims of gross abuse. Khulumani positions its claim of injury on the basis of the marginalization of victims within the South African nation. It has borne the burden of providing direct medical assistance, psychological counseling, equipment such as wheelchairs, and educational assistance to its 32,700 members, many of whom were not identified by the TRC (Khulumani Statement of Complaint 2002: Para. 682). Khulumani's Complaint tells South Africans that the meaning of nation—and of equal belonging to that nation—rests, at minimum, upon the ability to properly attend to those who were often the most victimized under

https://doi.org/10.1111/j.1540-5893.2006.00275.x Published online by Cambridge University Press

apartheid, those who are symbolic of apartheid's excesses and are the triumph of the "new" South Africa.

Conclusion: Toward a More Cosmopolitan Nation?

To a fair extent, then, cosmopolitanism and nation-building can be reconciled. By going outside the nation, plaintiffs remind South Africans of the spirit of the constitutional promises of truth, reparation, and reconciliation. The commitment to prevent cruelty —"never again"—is enacted through a call to acknowledge the victims of apartheid and to repair broken bonds of legal and moral responsibility. Victims seek to be recognized as human beings and, albeit more implicitly, as citizens whose lives matter. The class-action suits draw attention to the everyday violence of apartheid and invoke a conception of reconciliation that involves general victims and beneficiaries. Khulumani's suit makes clear that egregious abuses cannot be separated from systemic apartheid, and it functions to criticize the instrumental use of individual victims in "healing the nation." Themes of victims' exclusion and belonging arise in the indirect challenges to an economic policy that is seen as favoring beneficiaries and in indirect challenges to a reparations policy that is seen as treating victims of gross abuse like "third-class citizens" ("Apartheid victims 'treated like third-class citizens,'" *Mail & Guardian*, 1 Dec. 2003, n.p.).

The publicity and impact of the apartheid litigation in South Africa, while not necessarily as progressive as plaintiffs might hope, have succeeded in keeping salient the issues of reparation, beneficiary responsibility, and national reconciliation. Some, notably Anglican Archbishop Njongonkulu Ndungane and, to a lesser degree the government, have interpreted the litigation as a formal mechanism for lodging a grievance that ought to impel "national dialogue" ("Govt opposed to Apartheid Lawsuits," *Mail & Guardian*, 27 Aug. 2003; "Settle Reparations Claims with Dialogue, Anglicans say," *Mail & Guardian*, 10 April 2003, n.p.). In addition to solid media coverage, the lawsuits have spurred a large conference on reparation to which civil society, government, and business were invited (Civil Society Conference on Reparation, August 27, 2003, Randburg, South Africa; business representatives did not attend). Ndungane has attempted to organize roundtable talks between victims' groups and corporations, and he has urged South Africans to contribute to a national reparation fund. In the Brief of Amici Curiae that supports the appeal, Tutu and other TRC members state, "[b]y giving voice to those harmed by multinational corporations aiding and abetting apartheid, [the lawsuit] assists the healing and reconciliation process" (2005:15–6).

https://doi.org/10.1111/j.1540-5893.2006.00275.x Published online by Cambridge University Press

The apartheid litigation, in other words, has from "outside" pushed the nation to better attend to victims. Not all extraterritorial legal action brought on behalf of or by victims will necessarily be new cosmopolitan in this sense, not unless they exhibit the rootedness or duality of the apartheid claims. Note also that there are some limits to the argument based on the South African case. Even if the appeals succeed and there is an official finding of beneficiary accountability for human rights violations, civil awards are not exactly the same as reparation. The forcible extraction of funds represents defendants' (continuing) denial. Civil damages may fulfill the compensatory and rehabilitative functions of reparation, but they do not satisfy the symbolic criteria of acknowledgment or apology.[31] Money without acknowledgment rings hollow, as seen in victims' and supporters' reactions to calling voluntary contributions *nation-building* rather than *reparation*. And to date there has been steadfast refusal of corporate beneficiaries to acknowledge responsibility, in part perhaps because this would now be an admission of liability. So in this symbolic regard, the alien tort claims may be counterproductive within South Africa. Then again, the lawsuits could contribute to the growing global culture of corporate accountability such that future collaboration in human rights violations is prohibitive. I suggest that in this respect the apartheid lawsuits offer South Africa an additional manner of bringing home cosmopolitan values.

There is some irony in Judge John E. Sprizzo's dismissal of the apartheid lawsuits. Part of his reasoning is that the International Convention on the Suppression and Punishment of the Crime of Apartheid is not binding international law because the United States, Great Britain, Germany, France, Canada, and Japan did not ratify it (*Re South African Apartheid Litigation* 2004:29). So international complicity in the crime of apartheid in 1973 has a lasting effect some 30 years later. Judge Sprizzo's decision also places considerable weight on Maduna's affidavit. But the South African government, in avoiding the language of responsibility, misses an opportunity both to bring home and to send out a message that human rights violators will be held responsible for their actions. Acquiescing to the term *nation-building* rather than *reparations* not only risks superficial reconciliation. It also does little to arrest corporate complicity in human rights violations elsewhere in the world. Rather than taking a stance against corporate impunity, rather than taking a more cosmopolitan approach within the nation, it shows South Africa to be yet another safe haven.

[31] See United Nations Commission on Human Rights 2003: Resolution 2003/34: Art. 25; TRC 2003: Vol. 6, sec. 2, ch. 1, para. 8.

In conclusion, the duality of cosmopolitanism is that all human beings matter morally, but the injunction to put cruelty first is grounded and realized in specific contexts. By attending to victims' cries of injustice, cosmopolitan re-membering affirms their equal belonging in concrete relationships of responsibility. While the commitment to never again repeat the past generally coincides with national processes, the new cosmopolitanism also claims that the bounds of belonging are reflexive constructions. The insistence that dealing with the past can *only* take place within South Africa's borders evidences a kind of moral arbitrariness that cosmopolitanism rejects. This insistence denies the fact of transnational violence and benefit. It also undermines the "new" South Africa's commitment to human rights—a commitment, I might add, that bears international significance due to South Africa's prominence as a beacon of hope and model of stable transition. All in all, the cosmopolitan message of the apartheid litigation is that nation-building entails a commitment to acknowledging, redressing, and preventing injustice, which, for all its particularities, does not take place in a moral, territorial, or historical vacuum.

References

Anderson, Amanda (1998) "Cosmopolitanism, Universalism, and the Divided Legacies of Modernity," in P. Cheah & B. Robbins, eds., *Cosmopolitics: Thinking and Feeling Beyond the Nation*. Minneapolis: Univ. of Minnesota Press.

Apartheid Debt and Reparations Campaign (2002) "Briefing on the Reparations Lawsuit Facilitated by the Apartheid Debt and Reparations Campaign of Jubilee South Africa," http://www.woek.de/pdf/kasa_klage_abrahams_briefing_nov_2002.pdf (accessed Feb. 2004).

Appiah, Kwame A. (1998) "Cosmopolian Patriots," in P. Cheah & B. Robbins, eds., *Cosmopolitics: Thinking and Feeling Beyond the Nation*. Minneapolis: Univ. of Minnesota Press.

Arendt, Hannah (1958) *The Origins of Totalitarianism*. Cleveland: World Publishing.

Beitz, Charles (1999) *Political Theory and International Relations*, 2d ed. Princeton: Princeton Univ. Press.

Bell, Terry, & Dumisa B. Ntsebeza (2003) *Unfinished Business: South Africa, Apartheid and Truth*. London: Verso.

Benhabib, Seyla (1996) "Judith Shklar's Dystopic Liberalism," in B. Yack, ed., *Liberalism without Illusions: Essays on Liberal Theory and the Political Vision of Judith N. Shklar*. Chicago: Univ. of Chicago Press.

Bond, Patrick (2000) *Elite Transition: From Apartheid to Neoliberalism in South Africa*. London; Sterling, VA; Scottsberg, South Africa: Pluto Press; Univ. of Natal Press.

Bowden, Brett (2003) "The Perils of Global Citizenship," 7 *Citizenship Studies* 349–62.

Brief of Amici Curiae International Human Rights Organizations, TRC Commissioners and Others in Support of the [Khulumani] plaintiffs (2004) http://www.cmht.com/pdfs/AmicusBriefAsFiledSeptember292004.PDF (accessed 25 Sept. 2005).

Brief of Amici Curiae Commissioners and Committee Members of South Africa's Truth and Reconciliation Commission in Support of Appellants (2005) http://www.cmht.com/pdfs/SAACTRCI083005.pdf. Addendum of signatories at http://www.cmht.com/pdfs/SAACTRCII083005.pdf (accessed 25 Sept. 2005).

https://doi.org/10.1111/j.1540-5893.2006.00275.x Published online by Cambridge University Press

Centre for the Study of Violence and Reconciliation and Khulumani Support Group (1998) "Submission to the Truth and Reconciliation Commission: Survivors' Perceptions of the Truth and Reconciliation Commission and Suggestions for the Final Report," http://www.csvr.org.za/papers/papkhul.htm (accessed 1 Sept. 2004).

Cheah, Peng (1998) "Introduction Part II," in P. Cheah & B. Robbins, eds., *Cosmopolitics: Thinking and Feeling Beyond the Nation*. Minneapolis: Univ. of Minnesota Press.

Dickinson, Laura (2003) "The Promise of Hybrid Courts," 97 *American J. of International Law* 295–310.

Fine, Robert (2003) "Taking the 'Ism' out of Cosmopolitanism: An Essay in Reconstruction," 6 *European J. of Social Theory* 451–70.

Fine, Robert, & Robin Cohen (2002) "Four Cosmopolitan Moments," in S. Vertovec & R. Cohen, eds., *Conceiving Cosmopolitanism: Theory, Context, and Practice*. Oxford, UK: Oxford Univ. Press.

Franklin, Jonathan (2001) "Chilean army admits 120 thrown into the sea," *The Guardian International,* 9 Jan. http://www.guardian.co.uk/international/story/0,3604,419599,00.html (accessed 15 May 2006).

Golob, Stephanie (2002) "The Pinochet Case: 'Forced to be Free' Abroad and at Home," 9 *Democratization* 25–57.

Hamber, Brandon (2004) "Reparations as Symbol: Narratives of Resistance, Reticence and Possibility in South Africa." Paper presented at conference "Reparations: An Interdisciplinary Examination of Some Philosophical Issues," Queen's University, Kingston, Canada (6–8 Feb.).

Held, David (1995) *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance*. Stanford: Stanford Univ. Press.

Hollinger, David A. (2002) "Not Universalists, Not Pluralists: The New Cosmopolitans Find Their Own Way," in S. Vertovec & R. Cohen, eds., *Conceiving Cosmopolitanism: Theory, Context, and Practice*. Oxford, UK: Oxford Univ. Press.

Humphrey, Michael (2002) *The Politics of Atrocity and Reconciliation: From Terror to Trauma*. New York: Routledge.

Jonas, Stacie (2004) "The Ripple Effect of the Pinochet Case," 11 *Human Rights Brief* 36–8.

Khulumani Statement of Complaint (2002) Cohen, Milstein, Hausfeld & Toll P.L.L.C. (CMHT), http://www.cmht.com/pdfs/apartheid-cmpl.PDF (accessed 26 Sept. 2005).

Khulumani Support Group (2003) "Reparations Policy," http://www.khulumani.net/reparations/KSG%20Gov%20Submission.doc (accessed March 2004).

Kissenger, Henry (2001) "The Pitfalls of Universal Jurisdiction: Risking Judicial Tyranny," 80 *Foreign Affairs* 86–96.

Linklater, Andrew (2002) "Cosmopolitan Harm Conventions," in S. Vertovec & R. Cohen, eds., *Conceiving Cosmopolitanism: Theory, Context, and Practice*. Oxford, UK: Oxford Univ. Press.

Llewellyn, Jennifer (2001) "Just Amnesty and Private International Law," in C. Scott, ed., *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation*. Portland, OR: Hart Publishing.

Lu, Catherine (2000) "The One and Many Faces of Cosmopolitanism," 8 *J. of Political Philosophy* 244–67.

——— (n.d.) "Giving Victims Their Due." Unpublished manuscript, on file with author.

Lyons, Beth S. (1999) "Getting to Accountability: Business, Apartheid and Human Rights," 17 *Netherlands Q. of Human Rights* 135–60.

Maduna, Penuell Mpapa (2003) Declaration by Justice Minister Penuell Maduna on the Apartheid Litigation in the United States, 11 July. On file with author.

Mamdani, Mahmood (2002) "Amnesty or Impunity? A Preliminary Critique of the Report of the Truth and Reconciliation Commission of South Africa," 32 *Diacritics* 33–59.

Marais, Hein (2001) *South Africa: Limits to Change: The Political Economy of Transition*. London, New York, and Cape Town: Zed Books and UCT Press.

Mbeki, Thabo (2003) Statement to the National Houses of Parliament and the Nation, at the Tabling of the Report of the Truth and Reconciliation Commission, 15 April. http://www.anc.org.za/ancdocs/history/mbeki/2003/tm0415.html (accessed 1 Sept. 2004).

Mehta, Pratap B. (2000) "Cosmopolitanism and the Circle of Reason," 28 *Political Theory* 619–39.

Nagy, Rosemary (2004a) "Violence, Amnesty and Transitional Law: 'Private' Acts and 'Public' Truth in South Africa," 1 *African J. of Legal Studies* 1–22.

——— (2004b) "The Ambiguities of Reconciliation and Responsibility in South Africa," 52 *Political Studies* 709–27.

Ntsebeza Second Amended and Consolidated Complaint (n.d.) On file with author.

Nussbaum, Martha (1996) "Cosmopolitanism and Patriotism," in J. Cohen, ed., *For Love of Country: Debating the Limits of Patriotism*. Boston: Beacon Press.

Pogge, Thomas (2002) *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms*. Malden, MA: Blackwell.

Posel, Deborah (1999) "The TRC Report: What Kind of History? What Kind of Truth?" Paper presented at conference "The TRC: Commissioning the Past," University of Witswatersrand, Johannesburg, 11–14 July.

Scarry, Elaine (1985) *The Body in Pain: The Making and Unmaking of the World*. New York: Oxford Univ. Press.

Shamir, Ronen (2004) "Between Self-Regulation and the Alien Tort Claims Act: On the Contested Concept of Corporate Social Responsibility," 38 *Law & Society Rev.* 635–64.

Shklar, Judith N. (1989) "The Liberalism of Fear," in N. Rosenblum, ed., *Liberalism and the Moral Life*. Cambridge, MA: Harvard Univ. Press.

——— (1990) *The Faces of Injustice*. New Haven, CT: Yale Univ. Press.

Sooka, Yasmin (2000) "The Unfinished Business of the TRC," in B. Hamber & T. Mofokeng, eds., *From Rhetoric to Responsibility: Making Reparations to the Survivors of Past Political Violence in South Africa*. Johannesburg: Centre for the Study of Violence and Reconciliation.

Tan, Kok-Chor (2002) "Liberal Nationalism and Cosmopolitan Justice," 5 *Ethical Theory and Moral Practice* 431–61.

Teitel, Ruti G. (2000) *Transitional Justice*. New York: Oxford Univ. Press.

Terreblanche, Christelle (2003a) "Business pledges reparations for apartheid," *Sunday Independent,* 29 June. http://www.iol.co.za/index.php?sf=13&click_id=13&art_id=ct20030629121139889P000997&set_id=1 (accessed Feb. 2004).

——— (2003b) "Business says 'no' to apartheid payouts," *Cape Argus,* 14 Nov. (South Africa). http://www.iol.co.za (accessed 28 Nov. 2003).

Terreblanche, Sampie (2000) "Dealing with Systemic Economic Injustice," in C. Villa-Vicencio & W. Verwoerd, eds., *Looking Back, Reaching Forward: Reflections on the Truth and Reconciliation Commission of South Africa*. Cape Town: Univ. of Cape Town Press.

Truth and Reconciliation Commission (1998) *Truth and Reconciliation Commission of South Africa Report*, Vols 1–5. Cape Town: Juta.

——— (2003) *Truth and Reconciliation Commission of South Africa Report*, Vols 6–7. Cape Town: Juta.

Uvin, Peter, & Charles Mironko (2003) "Western and Local Approaches to Justice in Rwanda," 9 *Global Governance* 219–31.

Wilson, Richard A. (2001) *The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post-Apartheid State*. Cambridge, UK: Cambridge Univ. Press.

Cases Cited

Azanian People's Organization v. President of the Republic of South Africa [*Azapo*], (4) SA 671 (CC) (1996).

Re South African Apartheid Litigation, 346 F. Supp. 2d 538; U.S. Dist. LEXIS 23944 (2004).

Statutes and Resolutions Cited

Alien Tort Claims Act, 28 U.S.C. 1350 (1789).

Promotion of National Unity and Reconciliation Act of South Africa [TRC Act], No. 34 (1995).

United Nations Commission on Human Rights, Resolution 2003/34, Draft Principles and Guidelines on the Right to Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law (2003).

Rosemary Nagy *is Assistant Professor in the Department of Law at Carleton University in Ottawa, Canada. Her research in political theory and transitional justice has focused on South Africa and Rwanda. Publications are included in the* Canadian Journal of Political Science, African Journal of Legal Studies, *and* Political Studies.

https://doi.org/10.1111/j.1540-5893.2006.00275.x Published online by Cambridge University Press