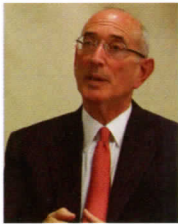


Truth and reconciliation

As South Africa and the world celebrated the recent 20th anniversary of the release of Nelson Mandela from Robben Island prison, **Michael Hausfeld** and **Steig Olson** say the global corporations that supported the apartheid regime still have to be brought to book



Michael Hausfeld (top) is the chairman and Steig Olson a partner at the Washington DC and New York offices respectively of US law firm Hausfeld. The firm is acting in the US litigation on behalf of the Khulumani Support Group and class plaintiff individuals

Black South Africans still wait for a measure of justice from global corporations that knowingly aided apartheid South Africa's military and security agencies. Corporations are citizens of multiple states and must adhere to fundamental principles of international law, the most basic of which is respect for human dignity.

On 21 January 2010, the US Supreme Court held that corporations possess the same fundamental right to freedom of speech as ordinary citizens in overturning a law prohibiting corporations from bankrolling advertisements advocating for a candidate's election or defeat within 30 days of an election.

However, just the week before, multinational corporations – including some based in Europe – argued to a US Court of Appeals in New York that their corporate structure shielded them from any responsibility for providing material assistance to the apartheid government's military and security agencies in their efforts to terrorise South Africa's black population.

Ironic events

The irony of these events – the US's highest court conferring fundamental personal rights on corporations, while corporations argued to another US court that they should be free of responsibility for human rights violations – is not lost on the South African victims of apartheid-era violence who have received neither 'truth' nor 'reconciliation' from corporations complicit in apartheid atrocities.

With the election of Nelson Mandela in 1994, South Africa sought to bring victims and

perpetrators into a truthful dialogue that could lead to amnesty for perpetrators and reconciliation for the nation.

But while the nation pursued truth and reconciliation, corporations largely sat on the sidelines. Although invited by the commission, most corporations did not participate in hearings on their role in the regime's offences, provide a full account of their assistance, or substantially contribute to the cash-strapped government's reparations fund.

To address this injustice, groups of South African lawyers and activists looked to a US law passed by its first Congress in 1789, the Alien Tort Claims Act, which allows foreigners to bring claims for violations of customary international law. The Act was meant to signify that the young republic would honour and uphold international rules. Today the Act reflects a US commitment to ensuring that victims of the most serious international human rights violations have access to justice.

South African victims of apartheid crimes filed a series of lawsuits in 2002 and 2003 in New York against various multinational companies. The cases were dismissed in 2004, resurrected on appeal, and now focus on the alleged worst offenders.

In 2008, these companies again sought dismissal, but this time the court ruled the case could go forward and plaintiffs could gather evidence on their claims. The companies appealed, arguing, among other things, that their corporate existence immunises them because of a supposed lack of consensus in international law on how to address corporate liability.

Corporations have no immunity for violating fundamental human rights norms. Those who knowingly provided assistance to the perpetration of apartheid abuses must be accountable to victims. Reconciliation demands a measure of justice. However, with both sides acting responsibly there are rational means to resolve these claims other than litigation.

Legal hurdles

Given the legal hurdles that narrowed the lawsuit's scope, even its success would not fill the void caused by corporations' failure to embrace the truth and reconciliation process. But it could provide a mechanism to address victims' sense of injustice; the companies in the case could agree, in exchange for the case's dismissal, to contribute seed money to a foundation that would administer corporate contributions to the nation's reconciliation efforts. The foundation could, in turn, facilitate donations by other corporations that choose to acknowledge a moral obligation to assist the nation's progress. Under appropriate circumstances, the South African and US Governments may even be willing to play a role.

A similar foundation was established from cases brought against corporations who used Nazi forced and slave labour during the Second World War.

And such a structure could be created if corporations acknowledged their responsibilities as global citizens. A foundation could address the gap in corporate participation in South Africa's reconciliation efforts. Good corporate citizenship should demand nothing less.