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# Let South Africa Decide

## America's courts and lawyers have no business sorting out blame or punishment for apartheid.

BY THURGOOD MARSHALL JR.

Last month, in a federal courtroom in New York City, the South African government issued a strong yet little noticed statement to America's trial lawyers and human rights groups: Stop interfering in our apartheid reconciliation process. Following on the heels of President George W. Bush's recent visit to the African continent, the government of South Africa and the U.S. State Department have joined forces to urge the dismissal of a lawsuit seeking to extract cash from U.S. corporations under the guise that the corporations engaged in, or actively promoted, human rights abuses during the years of South African apartheid.

Points of View

The New York lawsuit, and others like it around the country, is sorely misguided. At best, the litigation interferes with executive branch leadership in matters of American foreign policy and national security, disrupts the sovereignty of foreign governments, threatens much-needed foreign investment, and raises significant legal issues. Worse, the New York case seeks to redirect much-needed rebuilding resources and investments from those who need it most to a group of individuals bent on manipulating the American justice system to further their own self-interests.

### IMMORAL NO MORE

Thankfully, the oppressive and immoral government system of apartheid has been successfully dismantled in South Africa. Throughout the process, countless lawyers joined citizens from every walk of life in nonviolent sidewalk protests at the South African embassy here in Washington in the 1980s. Other efforts pushed successfully for the divestiture of assets in any American company that sought to interact with the apartheid regime. And much of the world watched in awe as Nelson Mandela emerged from decades of unjust imprisonment and claimed the nation's presidency in 1994. As perhaps only he could, President Mandela set a remarkable new course for the country and, in doing so, set an example for the world.

A consistent thread of an unmistakable sense of justice and fairness runs throughout these experiences. Such justice became the hallmark of the new majority leadership in South Africa, first under President Mandela, and now under President Thabo Mbeki. In recent years, those in South Africa have learned the importance and the power of the rule of law.

Even with such progress, however, in South Africa today there remains a pressing need to eradicate the last of apartheid's economic inequalities, a need for adequate resources to rebuild the country.

It is disheartening to witness the people of South Africa working tirelessly to build their way out of decades of apartheid abuse, while an obscure provision of U.S. law is enabling class action plaintiffs in American courts to misappropriate South Africa's long-overdue reform and progress. The rule of law is being perverted by such litigation, and American plaintiffs lawyers are advancing dubious theories in their representation of apartheid victims.

Enacted in 1789, the Alien Tort Claims Act allows foreign plaintiffs to litigate in U.S. courts—even when the alleged abuses took place in other countries. The law was virtually unused for nearly 200 years. Starting with a decision in 1980, lawyers used the law to sue foreign officials. But now, attorneys for victims of human rights violations seek to expand ATCA's reach to multinational corporations, and have targeted those that conducted business in South Africa during the apartheid regime.

Contending that such lawsuits often pose a threat to national security and foreign policy interests, and could undermine the war against terrorism, the Bush administration recently filed a brief seeking to limit ATCA cases in U.S. courts. It acted on sound legal precedent.

If at all, application of ATCA should be limited to situations where a defendant company has been complicit in serious crimes, and where the legal and political systems are incapable of rendering a fair and reasoned outcome.

In the case of South Africa, the lawsuits do not contain specific allegations of human rights violations committed by the more than 30 defendant corporations named, including such blue-chippers as IBM, Ford, Citibank, Shell, and Exxon Mobil.

## SUING THE SELLERS

Instead, the plaintiffs claim any corporation that had any business interaction with South Africa during the period of apartheid rule—from the 1940s until the 1990s—helped to maintain the unjust process and, therefore, should be punished. They assert that these companies sold goods and resources, and that some of those goods and resources were, in turn, used by the regime. The weakness of this argument is apparent—it is akin to suing companies that sell items to a local police department whose officers may have engaged in police brutality.

The suits dubiously charge that corporations must shoulder the blame for the horrific pain inflicted by apartheid, to the tune of billions of dollars. Alleging that American companies are "vicariously liable" for the actions of foreign governments in the countries where they do business, the plaintiffs bar has created its own cottage industry. This industry borders dangerously on colonialism, in that the proceedings assume incompetence by the people of these post-colonial countries.

Consider the South African apartheid context. The government set up a Truth and Reconciliation Commission to examine apartheid abuses. The commission was given the authority to consider grant reparations to apartheid victims and to grant amnesty to those making full disclosure of the facts. It has done so, and continues to do so by all accounts, in a fair, impartial and compassionate manner.

President Mbeki rejects the suggestion that U.S. courts thousands of miles away can do a better job at remedying the wrongs of apartheid than the Truth and Reconciliation Commission. In April, President Mbeki told the South African Parliament that reparations are appropriate for apartheid victims, but should be issued only by the Truth and Reconciliation Commission.

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

South African Justice Minister Penuell Maduna says his government must not support the suits and risk jeopardizing foreign investment in South Africa. In fact, he says, "We are talking to the very same companies named in the lawsuits about investing in post-apartheid South Africa."

## ABUSING ATCA

It is important to note that ATCA is being abused because it is being fundamentally misinterpreted. It does not provide a legal basis for the recent influx of lawsuits. Rather, ACTA merely grants federal court jurisdiction. It does not create a cause of action. U.S. courts must take this limitation seriously and maintain ATCA's narrow scope to stop these unwarranted claims against companies in the United States, claims that could critically damage our foreign policy and the national economy.

The 1993 South African Constitution calls for understanding, not vengeance. It advises that the pursuit of national unity requires the reconstruction of society and reconciliation among the peoples of that country.

Let that blueprint guide South Africans in their determined effort to end, once and forever, the horrors and economic injustices of apartheid. Imprudent outsiders should not be allowed to substitute their judgment of what is right for South Africa.

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