ARTICLE

WHEN THE STATE FAILS: THE ROLE OF THE KHULUMANI SUPPORT GROUP IN OBTAINING REPARATIONS FOR VICTIMS OF APARTHEID

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ABSTRACT

'Politics begins when one decides not to represent victims … but to be faithful to those events during which victims politically assert themselves.'
Alain Badiou (1985). *Peut on penser la politique?*

It is argued that one should not look at the state as the sole actor capable of delivering justice in transitional and post-transitional contexts. Victim organisations can be equally well equipped as and, in certain contexts, better equipped than the state to represent the interests of victims and to assist in formulating reparation policies.

Keywords: reparations; victims; transitional justice; Khulumani; Truth and Reconciliation Committee; civil society; victim organsiations; Alien Tort Claims Act

INTRODUCTION

In the aftermath of serious human rights violations victim organisations often emerge to help victims raise their voice about gross injustices and mobilise collectively for recognition and reparation.[1] Historical examples, most prominently and forcefully the Holocaust victim organisations,[2] show the important role that such organisations can

1 See, for example, Heidy Rombouts, *Victim Organisations and the Politics of Reparation: A Case Study* (Intersentia 2004).

2 See Michael Bazyler and Roger Alford, *Holocaust Restitution: Perspectives on the Litigation and its Legacy* (NYU Press 2007). The most prominent of these groups is the Conference on Jewish Material

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play in initiating reparation claims, mobilising victims and applying pressure to obtain such reparations. Therefore, victim organisations, like other non-state actors, can be both catalysts of human rights discourse in domestic politics and instigators of domestic and international policy change.[3]

In what Ruti Teitel describes as the 'global phase' of transitional justice,[4] transnational non-governmental organisations (NGOs) and global civil society have become increasingly involved. This phenomenom has generated 'a shift from a focus on state-centric obligations to a focus upon the far broader array of interests in non-state actors associated with globalisation'.[5] For this reason the work of global civil society has frequently been credited with putting victims and human rights on the agenda. The rise of victim organisations and other civil society actors as mobilisers and pressure groups for the payment of reparations for serious human rights violations indicate something important about the role and shortcomings of states in transitional contexts. Victim organisations often substitute the state by fulfilling similar roles to it. Typically, they both represent the interests of victims and support them; they promote victims' rights by advocating changes in the policies and laws that affect them.

This article is particularly concerned with the role of victim organisations in the aftermath of the work of the South African Truth and Reconciliation Commission (TRC). It focuses on the Khulumani Support Group (KSG), because it is the best example of a victim organisation that has mobilised victims and applied pressure on the South African government to fulfil its moral and international law obligations[6] to pay reparations to the victims of apartheid.

Claims Against Germany that was established in 1951.

3 See Sonia Cardenas, *Human Rights in Latin America: A Politics of Terror and Hope* (University of Pennsylvania Press 2011); James Meernik, 'The Impact of Human Rights Organizations on Naming and Shaming Campaigns' (2012) 56(2) Journal of Conflict Resolution 233.

4 Ruti Teitel, *Globalising Transitional Justice* (OUP 2014) 4–5. The author defines the 'global phase' of transitional justice by: '… three significant dimensions: first, the move from exceptional transitional responses to a "steady state" justice, associated with post-conflict related phenomena that emerge from a fairly pervasive state of conflict, including ethnic and civil wars; second, a shift from a focus on state-centric obligations to a focus upon the far broader array of interests in non-state actors associated with globalization; and, third and last, we see an expansion of the law's role in advancing democratization and state-building toward the more complex role of transitional justice in the broader purposes of promoting and maintaining peace and human security.'

5 Teitel (n 4).

6 *Velasquez-Rodriguez v Honduras* 1988 4 Inter-Am Ct HR (Ser C) para 172; see also, for example, International Covenant on Civil and Political Rights (OHCHR) 999 UNTS 171 art 2 entered into force 23 March 1996; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1465 UNTS 85 art 14 entered into force 26 June 1987; International Convention on the Elimination of All Forms of Racial Discrimination 660 UNTS 195 art 6 entered into force 4 January 1969; Convention on the Rights of the Child (CRC) 1577 UNTS 3 art 39 entered into force 2 September 1990.

Truth commissions are created to discover and reveal the truth about past wrongdoing and to investigate past human rights violations.[7] Truth commissions are also expected to help with national reconciliation and even peace-building in volatile societies. Some truth commissions, most famously the South African TRC, assume additional roles such as awarding amnesty as an alternative to criminal prosecutions and making recommendations in respect of reparations.[8] Their mandates can vary widely and are context-dependent. In general, truth commissions lean towards restorative[9] as opposed to retributive[10] justice.

Since truth commissions are mostly created by the state,[11] it is unlikely that the government itself will be vocal or powerful in identifying the shortcomings of a truth commission it helped to create. As a result, the public must be alert to the possibility that such truth commissions could serve the interests of the new governing elite.[12] It is therefore particularly appropriate for victim organisations to be vigilant in pointing out the shortcomings of a truth commission and in insisting that a state-sponsored truth commission should carry out its mandate even after its official closure. In the South African context the government's failure to implement the TRC's recommendations on reparations remains one of the TRC's most serious weaknesses and omissions. As a result, twenty years after the start of the TRC's work in April 1996, it is now an appropriate time to consider the contribution of victim organisations to its work and legacy.

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7 See Priscilla Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* (Routledge 2010).

8 See the Promotion of National Unity and Reconciliation Act 34 of 1995 <http://www.justice.gov.za/legislation/acts/1995-034.pdf> accessed 28 August 2017.

9 See John Braithwaite, 'Restorative Justice and De-professionalization' (2004) 13(1) The Good Society 28 at 28; Restorative justice can be defined as: 'A process where all stakeholders affected by an injustice have an opportunity to discuss how they have been affected by the injustice and to decide what should be done to repair the harm. With crime, restorative justice is about the idea that because crime hurts, justice should heal. It follows that conversations with those who have been hurt and with those who have inflicted the harm must be central to the process.'

10 The *Stanford Encyclopedia of Philosophy* <https://plato.stanford.edu/entries/justice-retributive/>; retributive justice can be defined as 'that form of justice committed to the following three principles: (1) that those who commit certain kinds of wrongful acts, paradigmatically serious crimes, morally deserve to suffer a proportionate punishment; (2) that it is intrinsically morally good – good without reference to any other goods that might arise – if some legitimate punisher gives them the punishment they deserve; and (3) that it is morally impermissible intentionally to punish the innocent or to inflict disproportionately large punishments on wrongdoers.'

11 In the case of South Africa, the South African TRC was created by national legislation; see Promotion of National Unity and Reconciliation Act (n 8).

12 Truth Commissions can, of course, also serve the interests of the old government elite. When TRCs provide blanket amnesty for perpetrators of human rights violations, they are serving the interests of the former regime. The Chilean TRC was one such example; see John Dugard, 'Dealing with the Crimes of a Past Regime. Is Amnesty still an Option?' (1999) 12(4) Leiden Journal of International Law 1001.

This article focuses on the South African Khulumani Support Group (KSG), the victim organisation that drove the Khulumani litigation[13] under the Alien Tort Claims Act[14] in the United States. This organisation is concerned with the unfinished business of the South African TRC and particularly with pressurising the South African government to pay reparations to apartheid victims by advocating a comprehensive and inclusive reparations regime in South Africa.[15] For instance, the group is currently working on 'reparations submissions to assist the Minister of Justice to achieve justice and reparations for victims of apartheid gross human rights violations.'[16] The article considers the main avenue the KSG has pursued in obtaining reparations for victims of apartheid: by litigating in courts in the United States through the so-called '*Khulumani* litigation'. The article asks whether this strategy was ultimately successful. It is argued that this litigation strategy was indeed successful in spite of the fact that the case did not succeed on the merits.

It is argued that one should not look at the state as the sole actor capable of delivering justice in transitional and post-transitional contexts. Victim organisations can be better equipped than the state to represent and serve the interests of victims. This article discusses the role of victim organisations and other civil society organisations (CSOs) in the conceptualisation of the TRC, its work and, specifically, in the drafting of its reparation policy.

DEFINITION AND SIGNIFICANCE OF VICTIM ORGANISATIONS

Victim organisations often arise after gross and systematic human rights violations. Rombouts suggests that there are two main criteria for defining victim organisations.[17] First, 'Victims associations are those originally established by and for the interests of victims.'[18] Second, such groups 'strive within the public arena for the betterment of

13 *Khulumani v Barclays National Bank Ltd* 2007 504 F 3d 254. For the history of the *Khulumani* case see Mia Swart, 'Requiem for a Dream? The Impact of *Kiobel* on Apartheid Reparations in South Africa' (2015) 13(2) Journal of International Criminal Justice 353.

14 The Alien Tort Claims Act 28 of 1789 US Code para 1350 <https://www.law.cornell.edu/uscode/text/28/1350> accessed 28 August 2017. The article stipulates: 'The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.'

15 See Khulumani Support Group (KSG) website <www.khulumani.net>. In the 1990s, the group educated the public about the TRC and the crimes of the past. Today, it also works towards public accountability, justice against multinational corporations that profiteered off aiding and abetting the apartheid regime and rebuilding the future through agricultural and entrepreneurial projects. It offers support to victims of past political violence and assists those who were not qualified as victims by the TRC.

16 KSG (n 15).

17 See Rombouts (n 1) 67.

18 Rombouts (n 1) 67.

victims' circumstances.'[19] The associations aspire to initiate action in a fairly organised way and their main goal is to improve the victims' own circumstances in a material, symbolic and psychological sense.

Victim organisations should be distinguished from self-help groups as self-help groups try to help victims through internal support rather than through government policies. They are also not necessarily politically engaged, whereas victim organisations are typically more political by nature.[20] Moreover, victim organisations should also be distinguished from service providers that strive to help victims mainly by providing specialised services, such as psychological ones.[21]

The terminology in this field competes and overlaps. Victim organisations form part of civil society and are sometimes referred to as CSOs. Civil society can be defined as the arena of voluntary collective actions around shared interests, purposes and values, an 'intermediate associated realm between state and family populated by organisations which ... enjoy autonomy from the state.'[22] CSOs are political movements that respond to specific political and cultural issues; their claims are often stated in the language of universal values such as fundamental human rights.[23]

The work of such groups can be described as a new source of change that reflects the enormous growth in civil society political activism.[24] Local movements have become a powerful force that leverages the global information revolution to spread human rights ideas across the world. For Richard Falk, transnational civil society holds the key to the future of the world order.[25] He writes:

> Firmly committed to the promotion of shared values in terms of peace, ecological awareness, and human rights, and animated by shifting political identities which transcend territorial boundaries, these groups will play an increasingly central role in overall governance structures.[26]

And, indeed, some scholars argue that globalisation has reduced the role of the state by placing the achievement of social change in the hands of civil society and by increasing the influence of non-state actors, including NGOs.[27] As James Paul states: 'Globalization

19 Rombouts (n 1) 67.

20 See Martin Vielajus and Nicolas Haeringer, *Transnational Networks of 'Self-representation': An Alternative Form of Struggler for Global Justice* (Rowman and Littlefield 2016) 88.

21 See Rombouts (n 1) 68.

22 See Gordon White, 'Civil Society, Democratisation and Development: Clearing the Analytical Ground' in Peter Burnell and Peter Calvert (eds), *Civil Society in Democratization* (Psychology Press 2004).

23 See Helen Stacy, *Human Rights for the 21st Century: Sovereignty, Civil Society, Culture* (Stanford University Press 2009).

24 Stacy (n 23) 13.

25 See Richard Falk, *On Humane Governance: Toward a New Global Politics* (Penn State University Press 1995) 212; see also Philip Alston, 'The Not-a-cat Syndrome' in Philip Alston, *Non-state Actors and Human Rights* (OUP 2005) 22.

26 Falk (n 25) 212.

27 See James Paul, 'Global Policy Making' <https://www.globalpolicy.org/empire/31611-ngos-and-

has created both cross-border issues that NGOs address and cross-border communities of interest that NGOs represent.'[28] The state has been displaced with 'multiple de-centralised networks that transcend national borders'.[29] International human rights norms are now spread through persuasion and acculturation rather than through top-down legal coercion.[30] Therefore, civil society is seen as the engine of change and the implementer of social preferences.[31]

Even if their role in social change has increased over the past several years, victims' groups still face some shortcomings. In many transitional contexts, they have been numerous, heterogenous, far flung and under-resourced. In addition, they have often had organisational structures that were not optimal for achieving the results they aimed for.[32] The fact that victim organisations *represent* victims does not mean that all such organisations give victims a voice that is strong enough in their decision-making and policies. Besides, it can sometimes be argued that victim organisations are insufficiently 'democratic' and fail to give the victims a prominent role in the functioning of the organisation, and this can create a lack of legitimacy.

However, it is increasingly argued that victim organisations are far better equipped to represent and to further the interests of victims than international human rights NGOs.[33] Citing Mutua, Madlingozi writes that the work of international NGOs in the sphere of victims' rights resembles the work of missionaries who aimed to civilise the Third World.[34]

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global-policy-making.html> accessed 25 August 2017.

28 See Paul (n 27) last para.

29 See Stacy (n 23) 10.

30 See Stacy (n 23) 11; see Ryan Goodman and Derek Jinks, 'How to Influence States: Socialization and International Human Rights Law' (2004) 54 Duke Law Journal 621.

31 But since this can be described as an emerging trend, it still has to be established that these new dynamics have overtaken or replaced formal legal mechanisms. Civil society cannot (yet) replace legal institutions and legal rules.

32 See, for example, the survey carried out among 118 victim organisations in Peru <http://www.redress.org/downloads/events/OutreachEngagementLM.pdf> accessed 25 August 2017.

33 However, see the work of the South African Coalition of Transitional Justice (SACTJ), that is, 'an umbrella body of organizations working to advance the rights of victims of past conflicts and to hold the South African government accountable to its obligations.' This coalition regroups organisations such as Centre for the Study of Violence and Reconciliation (CSVR), Human Rights Media Centre (HRMC), Institute for Justice and Reconciliation (IJR), KSG, South African History Archive (SAHA) and Trauma Centre for the Survivors of Violence and Torture (TCSVT). The International Centre for Transitional Justice (ICTJ), that is an international NGO, supports the SACTJ and works with it to develop a strategy to persuade the government to provide adequate reparations to all victims of gross human rights violations. Available at <https://www.ictj.org/news/justice-south-africa-anti-apartheid-activist-disappearance>; and <https://www.ictj.org/our-work/regions-and-countries/south-africa>.

34 See Tshepo Madlingozi, 'Transitional Justice Entrepeneurs and the Production of Victims' (2010) 2(2) Journal of Human Rights Practice 208, citing Makau Mutua, *Human Rights: A Political and Cultural Critique* (University of Pennsylvania Press 2005).

Moreover, victim organisations are uniquely positioned to put pressure on a state to respond to the demands of victims. Whereas international legal standards and human rights declarations barely entice governments to change their behaviour,[35] these organisations can resort to a range of formal and informal tactics, such as protest campaigns, symbolic actions or civil resistance, to influence policy responses—tactics that are not available to more formal or official actors.[36] In spite of the fact that they are not democratically elected bodies and are frequently under-resourced, such organisations derive their integrity from their independent 'moral voice'.[37]

REPARATIONS IN INTERNATIONAL LAW AND SOUTH AFRICAN TRANSITIONAL ARRANGEMENTS

International Law

There can be no doubt that the duty of a state to make reparation is part of international law. This duty is firmly entrenched in major international and regional human rights treaties and other instruments, including the International Convention on Civil and Political Rights (ICCPR)[38] and the Universal Declaration of Human Rights.[39] In addition to binding and non-binding international treaties, declarations and resolutions also contain remedial provisions. The United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power as well as the more recent Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (the 'Van Boven' principles)[40] contains broad remedial guarantees for those who suffer pecuniary losses, physical or mental harm and substantial impairment of their fundamental rights.[41]

Reparation can refer to 'the obligation of a wrongdoing party to redress the damage caused to the injured party.'[42] Under international law 'reparation must, as far as possible,

35 See Stacy (n 23).

36 See Martina Fischer, 'Civil Society in Conflict Transformation: Strengths and Limitations' (2011) Advancing Conflict Transformation, 287 <http://www.berghof-foundation.org/fileadmin/redaktion/Publications/Handbook/Articles/fischer_cso_handbookII.pdf>; see also Catherine Barnes, 'Weaving the Web: Civil Society Roles in working with Conflict and Building Peace', in Paul van Tongeren (ed), *People Building Peace II: Successful Stories of Civil Society* (Lynne Riener 2005).

37 Barnes (n 36).

38 The ICCPR contains three separate articles on remedies: see article 2(3) as well as articles 9(5) and 14(6).

39 Article 12 of the Universal Declaration states: 'Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental human rights granted him by the constitution or by the law.'

40 Resolution 60/147 of 16 December 2005.

41 UNGA Res 40/34 of 29 November 1985.

42 See Gabriela Echeverria, *Reparation: A Sourcebook for Victims of Torture and Other Violations of*

wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.'[43] Reparations include redress, restitution, rehabilitation, restoration of dignity and reassurance of non-repetition.[44]

Proponents of reparations have benefitted from the increased international attention paid to victims over the past two decades. This development is most vividly illustrated by the establishment of the International Criminal Court (ICC).[45] The Statute of the ICC and the early activities of the court—including progressive practices such as victim participation[46] as well as the inclusion of a reparations mandate—have contributed to placing the international spotlight on the plight of victims.[47] Significantly, the ICC created a Trust Fund for Victims (TFV) with the aim of making reparations to victims of the crimes within the jurisdiction of the ICC.[48] However, the record of the TFV has been a mixed one so far. For example, even if some aid has been forthcoming to communities, the court-ordered reparations in the *Lubanga* case[49] still have to reach the victims.

Once again, civil society played a large part in directing the attention of the international community to the plight of victims: CSOs played a major role in advocating the inclusion of reparations provisions in the ICC Statute during the preparatory negotiation meetings, the 'PrepComs'. The NGOs that formed part of the working group

Human Rights and International Humanitarian Law (REDRESS Trust 2003) 7.

43 See (Ger V Pol), (1928) PCIJ, Sr A, No 17, at 47 (September 13).

44 Pablo de Greiff, *The Handbook of Reparations* (OUP 2006).

45 Rome Statute of the ICC UNTS 90 entered into force 1 July 2002.

46 The ICC Statute contains provisions that allow victims to participate in almost all stages of the proceedings before the Court. Victims may, for example, file submissions before the Pre-Trial Chamber when the prosecutor requests its authorisation to investigate. Victims are entitled to file submissions on all matters relating to the competence of the court or the admissibility of cases. Victims are also empowered to participate more directly by putting their views directly to the judges. This normally happens through a legal representative. Victims may also ask witnesses or experts questions before the court. See article 68 of the ICC Statute—the core provision on victim issues. See also ICC Rules of Procedure and Evidence (2000) UN Doc PCNICC/2000/1/Add/1. See International Criminal Court, 'Victims before the International Criminal Court: A guide for the participation of victims in the proceedings of the Court'<https://www.icc-cpi.int/NR/rdonlyres/8FF91A2C-5274-4DCB-9CCE-37273C5E9AB4/282477/160910VPRSBookletEnglish.pdf> accessed 28 August 2017.

47 This is illustrated by the role provided for victims in the Rome Statute. The Statute deals with the protection of victims in articles 20 and 22. Article 23 provides for reparations. With regard to reparation, the Trial Chamber may, in addition to imprisonment, order the return of any property acquired by criminal conduct, including by means of duress, to their rightful owners. The court may also order an award for reparations from the Trust Fund for Victims.

48 See Dinah Shelton and Thordis Ingadottir, 'The International Criminal Court Reparations to Victims of Crimes (Article 75 of the Rome Statute) and the Trust Fund (Article 79)' (New York University Centre of International Cooperation 1999) <http://www.pict-pcti.org/publications/PICT_articles/REPARATIONS.PDF> accessed 25 August 2017.

49 *Prosecutor v Thomas Lubanga*, judgment on the appeal against the decision establishing the principles and procedures to be applied to reparations of 7 August 2012 with amended order for reparations (Annex A) and public annexes 1 and 2 2005 ICC-01/04-01/06-3129.

on victims' rights strongly advocated the incorporation of principles of human rights law and restorative justice, including the payment of reparations.[50] They wanted to make sure that the mistakes and weaknesses inherent in the ad hoc tribunals, where there was no particular status for victims, would not be repeated[51]—in the ad hoc tribunals for Rwanda and the former Yugoslavia, victims could participate in the proceedings only as witnesses, they had 'no opportunity to participate in their own right',[52] nor 'were they able to request compensation in proceedings before the tribunals'.[53] This made the tribunals' work more removed from the main constituents of the court (the victims) and less legitimate in the eyes of the local populations.[54] This shortcoming was not repeated by the ICC, thanks to the work of CSOs that argued for victim participation mechanisms to be included in the ICC regime.

Furthermore, the knowledge acquired by the ICC as well as national experience suggests that the involvement of grassroots CSOs in outreach activities has been invaluable because such organisations have local networks that enable them to reach a larger number of victims. Among other things, local civil society:

> documents crimes, is in direct contact with victims, helps them to fill in the application forms for participation and reparation, provides training for local lawyers, helps to the understanding of the scope of the rights before the ICC and ensures a flow of information towards affected communities.[55]

CSOs can also play the role of intermediary between the ICC and the local population. That is why the ICC adopted guidelines governing the relations between the court and intermediaries in 2014,[56] in which it recognised the important need for collaboration with local organisations in the enforcement of international justice.

SOUTH AFRICAN TRANSITIONAL ARRANGEMENTS

In South Africa, the issue of apartheid reparations was dealt with primarily in the context of the TRC that many viewed as the result of political compromises made during the

50 See further details of the *travaux preparatoires* of the International Law Commission in relation to the Statute of the ICC <www.un.org/law/ilc/>.

51 Christine Evans, 'Reparations for Victims in International Criminal Law' <http://rwi.lu.se/app/uploads/2012/04/Reparations-for-Victims-Evans.pdf> accessed 25 April 2017.

52 Maren Burkhardt, 'Victim Participation before the International Criminal Court' (PhD thesis, Humboldt University of Berlin 2010) 12 <https://www.wcl.american.edu/warcrimes/documents/12-2007_Victim_Participation_Before_the_ICC.pdf> accessed 25 August 2015.

53 Burkhardt (n 52) 12.

54 FIDH, 'Enhancing Victims' Rights before the ICC?' (2013) 4 <https://www.fidh.org/IMG/pdf/fidh_victimsrights_621a_nov2013_ld.pdf> accessed 25 August 2017.

55 FIDH (n 54) 9.

56 See ICC, 'Guidelines Governing the Relations between the Court and Intermediaries: For the Organs and Units of the Court and Counsel working with Intermediaries' (2014) <https://www.icc-cpi.int/iccdocs/lt/GRCI-Eng.pdf>.

negotiations leading up to the first democratic elections.[57] As Van Zyl writes, 'a country's choice of policy has as much to do with power as it does with principle.'[58] In the case of South Africa, the former government retained control over the military and police forces during the transition. It became clear that prosecution of members of the military and police would threaten a peaceful transition and that amnesty would be the price to be paid for peace.[59] The drafters of the Constitution believed, further, that amnesty would be in the interests of national reconciliation.

The amnesty provision in the Interim Constitution recognised the principle that:

> the conflicts of the past had caused immeasurable injury and suffering to the people of South Africa and that, because of the country's legacy of hatred, fear, guilt and revenge: "there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for Ubuntu but not for victimisation."[60]

As a result, the TRC was set up by an Act of Parliament called the Promotion of National Unity and Reconciliation Act (the Act).[61] The Commission was mandated to investigate politically motivated gross human rights violations perpetrated between 1960 and 1994.[62] Its mandate lasted from December 1995 to 2002.

The Commission could grant amnesty to individuals who made 'full disclosure of all the relevant facts relating to acts associated with a political objective and comply with the requirements of this Act'.[63] It was funded by international sources with a budget of approximately US$40 million.[64]

The Rehabilitation and Reparations Committee of the TRC was the body specifically charged with making recommendations on reparations. The TRC Act stated that this Committee had to make recommendations to the president on ways of assisting victims.[65] The Committee recommended that reparations would be given only to those formally declared victims by the Commission and it was in charge of deciding whether

57 Ifi Amadiume and A An-Na'im, *The Politics of Memory: Truth, Healing and Social Justice* (University of Chicago Press 2000).

58 See Paul van Zyl, 'Dilemmas of Transitional Justice: The Case of South Africa's Truth and Reconciliation Commission' (1999) Journal of International Affairs 647.

59 Van Zyl (n 58) 647.

60 Constitution of the Republic of South Africa Act 200 of 1993 para 251 under the section 'National Unity and Reconciliation'. However, the Constitution of 1996 contains no explicit reference to reparations. It can be argued that by stating that the court 'must consider international law', the Constitution in its section 39 indirectly mandates the making of reparations in either financial or symbolic form, or both, since the making of reparations has become a duty in international law.

61 Act 34 of 1995. Available at <http://www.justice.gov.za/legislation/acts/1995-034.pdf> accessed 28 August 2017.

62 Act 34 of 1995 (n 61).

63 Act 34 of 1995 (n 61) section 3(*b*).

64 World Bank, *Gender, Justice and Truth Commissions* (2006) 11 <http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/GJTClayoutrevised.pdf> accessed 25 August 2017.

65 Act of 34 of 1995 (n 61) Ch 2, s 3(3)(*c*).

someone was a victim.[66] It did so by looking at all the information they had on the gross human rights violation suffered by that person. The Act stated that

> gross violation of human rights means the violation of human rights through – (*a*) the killing, abduction, torture or severe ill treatment of any person; or (*b*) any attempt, conspiracy, incitement, instigation, command or procurement to commit an act referred to in paragraph (*a*).[67]

Therefore, it put a heavy emphasis on physical violence and bodily harm. It was also possible in certain circumstances that the relatives and dependants of victims could also qualify for reparations as secondary victims. Secondary victims were defined as 'those individuals articulating a form of their personal suffering as a result of the trauma experienced by the primary victim.'[68] Ultimately, individuals identified as victims by the Commission received an amount of R30 000 each. This approach has been heavily criticised because many victims were absent from this conceptualisation, for instance the victims of structural inequalities.[69] These indirect violations and violence were not covered under the definition of gross violations of human rights.

The Committee also made a range of further recommendations and proposals, such as housing projects or education programmes,[70] that were unfortunately never implemented.

Finally, the Act further required the President and the ministers of Justice and Finance to establish a President's Fund.[71] Victims who qualified for assistance were to be paid from this fund. Nevertheless, the issue of how the money in the President's Fund should be distributed continues to be controversial and partly shrouded in secrecy.[72] There is currently approximately half a billion rand in the President's Fund.[73]

66 Reparation and Rehabilitation Committee, Report vol 6, s 2, ch 1 (1998) <http://www.justice.gov.za/trc/report/finalreport/vol6_s2.pdf> accessed 28 August 2017.

67 South African Truth and Reconciliation Commission (SATRC), vol 4, ch 10 (1998) at 290.

68 SATRC, vol 1, ch 5 (1998) at 367.

69 Kiri Gurd and Rashida Manjoo, 'The Need for a New Narrative: Challenging Hegemonic Meanings of Human Rights Violations in the South African Truth and Reconciliation Commission' in Robin Chandler, Lihau Wang and Linda Fuller (eds), *Women, War, and Violence: Personal Perspectives and Global Activism* (Palgrave 2010) 88.

70 See South Africa, Department of Justice website, 'A summary of reparation and rehabilitation policy, including proposals to be considered by the President' <http://www.justice.gov.za/trc/reparations/summary.htm#President's Fund> accessed 25 August 2017.

71 See 'A summary of reparation and rehabilitation policy' (n 70).

72 See Simon Allison, 'The President's Fund: Where is the Money for Apartheid Victims actually going?' (*Daily Maverick* 2014) <https://www.dailymaverick.co.za/article/2014-10-14-the-presidents-fund-where-is-the-money-for-apartheid-victims-actually-going/#.WQdbkCN96RY> accessed 25 August 2017.

73 Interview with Hugo van der Merwe, April 2017.

VICTIM ORGANISATIONS AND REPARATIONS

Domestic groups have frequently played a significant role in shaping transitional justice policies. For instance, human rights groups often bring legal expertise and recruit courageous and determined lawyers who press the judicial system to act upon past human rights violations. One of the best South African examples is the Black Sash in its original form. Between 1955 and the mid-1990s the Black Sash was a member-driven organisation; this changed after the transition to democracy, when the organisation became a professionally staffed NGO.[74]

Victim organisations can work in the spaces where the state is absent or inadequate. McEvoy writes that transitional justice has become dominated by legalism over the past few decades.[75] This has led to the tendency of transitional justice to become both state-centric and top-down.[76] He believes that there is a dialectic relationship between the legalism of transitional justice and the tendency to view the delivery of justice as the business of the state.[77] According to Madlingozi, the idea of the state 'delivering justice' can reconstitute victims as disempowered and hapless.[78] The delivery of justice need not be the exclusive preserve of the state. Actors such as individuals, victim groups and civil society more broadly can participate in the delivery of justice by actively mobilising and by applying creative advocacy mechanisms to pressurise the government and multinational companies to comply with their obligations under international law and the Constitution.

According to Narnia Bohler Muller, Khulumani's counter-narrative and its ongoing struggle to secure reparations for victims of human rights abuses is

> illustrative of the fact that matters of reconciliation are complex and require nuanced responses that take into account the fact that transformation is an ongoing process and not a linear event that leads to closure and the eventual loss of memory.[79]

NGOS AND THE SOUTH AFRICAN TRUTH AND RECONCILIATION COMMISSION

Kamminga writes that defining the concept of NGO is difficult but NGOs tend to be private citizens' groups established to further the common objectives of their members.[80]

74 See Black Sash <http://www.blacksash.org.za/index.php/our-legacy> accessed 28 August 2017.

75 Kieran McEvoy, 'Beyond Legalism: Towards a Thicker Understanding of Transitional Justice' (2007) Journal of Law and Society 421.

76 McEvoy (n 75) 421.

77 McEvoy (n 75) 424.

78 Madlingozi (n 24).

79 Narnia Bohler Muller, 'Reparations for Apartheid Era Human Rights Abuses: The Ongoing Struggle of Khulumani Support Group' (2013) Speculum Juris.

80 Menno T Kamminga, 'The Evolving Status of NGOs under International Law' in P Alston, *Non-state Actors and Human Rights* (Oxford 2005) 96.

An important question is whether NGOs enjoy legal status and, if they do, whether only on a national plane or also on an international plane.[81] Under the current state of the law, however, NGOs are restricted from having the capacity to perform international acts on the international plane. Significantly, NGOs do not have the capacity to enter into treaties.[82]

But NGOs do have the capacity to bring international claims: there are some instances where states have accepted international obligations towards NGOs that are enforceable in this way.[83] In terms of Article 34 of the ECHR, NGOs have a right to lodge petitions to the ECHR claiming to be victims of violations of rights set forth in the Convention.[84] Under some international mechanisms, NGOs enjoy the possibility of third-party intervention in courts:[85] the Constitutive Treaty of the European Court of Human Rights, for example, allows it.[86]

NGOs such as Justice in Transition and the Black Sash formed part of the Coalition on the TRC which was directly credited with the process of selecting commissioners. The nomination of commissioners and the critique of the nominees resulted from effective NGO lobbying;[87] the suitability of the nominees was widely debated among human rights and survivors' groups. In addition, civil society has frequently played a role in the construction of truth commissions: in South Africa, NGOs helped draft the legislation that established the TRC.[88]

The psychological needs of apartheid victims were, however, not considered to be an important political issue in the run-up to the establishment of the TRC. It was noted time and time again that the psychological needs of victims and local community dynamics appeared peripheral to the policy debates and political manoeuvering surrounding the establishment of the TRC.[89] It was one of the issues in respect of which NGOs felt marginalised.

81 Kamminga (n 80) 98.

82 Kamminga (n 80) 98.

83 With the adoption of Protocol No 11 in 1998 the possibility of amicus submission has been included in the ECHR, in Article 36(2). The President of the Court has the discretion to determine whether such amicus intervention is 'in the interest of justice' and should be permitted. See PM Dupuy, 'Article 34' in Andreas Zimmermann, Christian Tomuschat and Karin Oellers-Frahms (eds), *The Statute of the International Court of Justice: A Commentary* (OUP 2006) 548.

84 Dupuy (n 83) 106.

85 Dupuy (n 83).

86 See the European Court of Human Rights's website, the third party intervention section <http://agent.echr.am/en/functions/representation/third-party-intervention.html> accessed 5 August 2017.

87 H van der Merwe, P Dewhirst and B Hamber, 'Non-governmental Organisations and the Truth and Reconciliation Commission: An Impact Assessment' (1999) Politikon 62.

88 Coalition on Civil Society Resource Mobilisation, *Critical Perspectives on* S*ustainabilty of the South African* C*ivil Society Sector* (2012) 10 <https://www.cafsouthernafrica.org/pdf/caf_report%28perspectives_on_sustainability_report_2012%29.pdf.> accessed 25 August 2017.

89 Coalition on Civil Society Resource Mobilisation (n 88) 62.

Van der Merwe, Dewhirst and Hamber conclude that, although NGOs might have played a significant role in the debates on the establishment of the TRC, their involvement in the conceptualisation and drafting process was too limited and could have been more extensive.[90] On the whole, the drafting and conceptualisation of the TRC could not be described as a civil-society project but rather as a state-run project. The long-term implications of this fact include the lingering dissatisfaction with the TRC. The relationship between the TRC and NGOs was never clearly delineated and many NGOs were of the view that the TRC did not have their interests at heart in spite of making public statements to that effect.[91] The Deputy Chairperson of the TRC, Alex Boraine, explained that the TRC failed to develop strong relationships with NGOs because of a shortage of time. He said: 'The process suffered because of the quick transition from the legislation to the establishment of a state body.'[92] But Boraine's explanation is not satisfactory. NGOs have also been attacked as not having been pro-active enough. One commentator commented as follows on their role:

> The TRC has been good at revealing the truth. The reconciliation side of things appears to be almost an afterthought that was tagged on. The NGO community's involvement at various stages of the process could have contributed to build up the reconciliation side of the TRC's work.[93]

Some NGOs took initiatives such as developing and providing counselling and referral services for victims who approached the TRC, developing and supporting victim support groups, providing public education for communities on how the TRC operated, offering victim–offender mediation services and offering legal services for victims.[94]

The criticism of the TRC process by NGOs was mainly that the TRC did not consider many thousands of records and statements compiled by NGOs over many years. There was also a concern on the part of NGOs that some sides to the conflict (such as the militarised youth) were reluctant to engage with the TRC. Many NGOs felt that the TRC approached the conflict in an overly simplistic manner, using broad categories that obscured the complexity of the issues within its mandate.[95] The TRC was also accused of not engaging with the local complexity of particular communities where they held hearings. It was widely believed that the TRC squeezed people into pre-defined categories of victims and offenders.[96] Since the TRC's focus was on political parties as the main stakeholders and focused on divisions that related to political ideology, many NGOs felt that this under-emphasised conflicts around economic injustices and conflicts

90 Coalition on Civil Society Resource Mobilisation (n 88) 10.
91 Coalition on Civil Society Resource Mobilisation (n 88) 64.
92 Interview with Alex Boraine 25 May 1998, cited by Van der Merwe et al (n 87) 64.
93 Interview with Athol Jennings (Vuleka Trust), 16 January 1998, cited by Van der Merwe et al (n 87) 63.
94 Van der Merwe et al (n 87) 66.
95 Van der Merwe et al (n 87) 70.
96 Van der Merwe et al (n 87) 70, 71.

over the distribution of resources.[97] Many also criticised its focus on perpetrators rather than beneficiaries.

From early on, the KSG took a more adversarial line, starting with organising a picket at the Johannesburg TRC offices because they felt the TRC had not adequately informed victims about the work of the TRC or of the implications the amnesty process would have for them.[98] And not enough space had been allowed for victims to criticise the process. This weakness is also evident from the negative reaction the TRC initially showed towards victims' families who opposed the TRC process (such as the victims who were the plaintiffs in the *Azapo* case).[99]

In conclusion, the TRC was an opportunity that was not fully exploited. In spite of limited mobilisation on the part of NGOs, it can be argued that NGOs failed to mobilise effectively within the limited scope and space provided to them and the TRC failed to draw effectively on the resources of the NGOs.[100]

THE KHULUMANI SUPPORT GROUP

The KSG is a CSO that was established in 1995 by the survivors and families of the victims of the political violence that occurred during the apartheid era. Khulumani initially assisted victims in engaging with the TRC and evolved over time to focus on advocacy when it became evident that people in authority seemed to be reneging on their promises to victims and the organisation had to begin lobbying for and advocating reparations.

The work of the KSG continues a long tradition of the use of law and an active civil society to effect social change in South Africa. As Chanock notes, the relationship between law and social and political issues in South Africa has a long and rich history. There is also a long history of the pro-active use of law, and of the use of the law as an instrument of social change.[101] However, in the dying days of apartheid, on the crest of an enormous social mobilisation revitalised by the industrial working class and urban youth, the law was used extensively to defend a new generation of detainees against arbitrary arrest and torture. The law was also used more boldly to challenge some of the fundamental tenets of apartheid law and practice, such as the Pass Laws and the Group Areas Act.[102] One of the most significant developments during this period was

97 Van der Merwe et al (n 87) 71.

98 H van der Merwe, P Dewhirst and B Hamber, 'Non-governmental Organisations and the Truth and Reconciliation Commission: An Impact Assessment' (Research report written for the Centre for the Study of Violence and Reconciliation 1999).

99 *Azanian People's Organisation (Azapo) v President of South Africa* 1996 (4) SA 671 (CC).

100 *Azapo v President of South Africa* (n 99) para 76.

101 M Chanock, *The Making of South African Legal Culture 1902–1936: Fear, Favour And Prejudice* (CUP 2001).

102 Chanock (n 101).

the beginning of the use of the law pro-actively to challenge injustices and to mobilise public opinion.[103]

Since the KSG has been the main driving force behind the *Apartheid Reparations* case, it is necessary to consider this movement more closely. The KSG ('Khulumani') was formed in 1995 by survivors and families of victims of the political conflict during apartheid. Fittingly, Khulumani is the isiZulu word for 'Speak Out!'[104] Almost all of Khulumani's roughly 100 000 members are survivors of apartheid-era violence. The sheer size of the KSG's membership demands the state's attention.

Most of the members believe that they continue to be affected by the consequences of the violence, that they have been left out of the TRC process and that they have also not been consulted subsequently. Khulumani argues that the work started by the TRC, particularly regarding reparations, has not been completed.[105] Their one core focus is on the amount of R30 000 paid as reparation to each of the 20 000 victims listed in the TRC report, a sum that has repeatedly been criticised as inadequate and too modest, and on the failure of the government to implement the reparations recommendations of the TRC. Khulumani's aim is to restore the dignity of victims and not only to help reintegrate them into society but to help effect societal change. Among other objectives, it aims to create a responsive public that recognises experiences of victimhood.[106] Khulumani aims to understand the changing needs of its constituency and tries to adapt its established programmes and create new projects that are relevant to its members' needs.[107]

As a consequence of Khulumani's work and their stated objective to provide forums beyond the term of the TRC which would give 'public voice to stories that had been [ignored], silenced and even suppressed',[108] it continues to work with victims across the country, recognising the enduring impact of apartheid's brutality and the imperative to 'repair and redress the gaps left by South Africa's transitional justice process'.[109] Khulumani has criticised the South African government for its failure to acknowledge

103 Richard Abel, *Politics by Other Means: Law in the Struggle against Apartheid, 1980–1994* (1995). In a foreword (at ix), Geoffrey Budlender reflects on the important but inherently circumscribed role of law in relation to social change, by acknowledging that 'what breathed life into all successful legal work was a spirit of resistance and rejection of unjust rule.'

104 Oupa Makhalemele, 'Southern Africa Reconciliation Study: Khulumani Case Study' (CSVR Project 2004) <https://www.csvr.org.za/docs/reconciliation/southernafricareconcilliation.pdf> accessed 25 August 2017.

105 Claire Moon, 'Reconciliation as Therapy and Compensation: A Critical Analysis' in Scott Veitch (ed), *Law and the Politics of Reconciliation* (Routledge 2007) 173.

106 Rita Kesselring, *Bodies of Truth: Law, Memory and Emancipation in Post-apartheid South Africa* (Stanford University Press 2016) 33.

107 Makhalemele (n 104).

108 Andrea Durbach, 'An Essential Intervention: Civil Society Responses to Redressing and preventing Violence against Women in Post-apartheid South Africa' in Sarah Williams and Hannah Woolaver (eds), *Civil Society and International Criminal Justice in Africa* (Juta 2016) at 224..

109 Durbach (n 108).

'the perspectives of civil society organisations and victims' member groups which have sustained the struggle to construct measures to build a just and inclusive post-apartheid society.'[110]

Although other victim organisations such as Jubilee South Africa (which assisted in the launching of the *Apartheid Reparations* case and is primarily championing the cancellation of Third World debt) have broadly the same aims as Khulumani, Khulumani is the most prominent lobbying group agitating for reparations from the government.

One of Khulumani's most important contributions to the reparations debate has been its criticism of the government's 'closed-list' victim policy. This policy refers to the government's decision to award reparations only to the 20 000 individuals who were officially awarded the status of 'victim' by the TRC. For example, Khulumani challenged the government's draft regulations which provided for medical and educational benefits to 'TRC-identified victims' (many of whom had previously received nominal compensation payouts).[111] Khulumani argues that the 'closed-list' policy can create tensions within victim communities if some people 'receive reparation that is not accessible to others who have had similar experiences'.[112]

Hoelker writes that issues revolving around local ownership of transitional justice and the growing role of civil society within transitioning contexts is part of a more general global trend by which institutions of global governance are increasingly interacting with 'global civil society'.[113] Organisations such as Khulumani help to assert local ownership of transitional justice. Khulumani also forms part of 'global civil society', which comprises a complex network of movements and individuals who 'negotiate and renegotiate social contracts or political bargains at a global level'.[114]

Khulumani believes that the South African government continues to have an obligation towards victims in the long-term goal of reconciliation.[115] It engages with the government to facilitate a longer-term solution to meet the various needs of the victims, resisting the idea (expressed by the government) that the past has and should have been buried. The movement stresses that the country and its citizens continue to live with the consequences of apartheid; it believes that without structured interventions, victims will not be able to escape poverty.[116] Apart from its involvement in the *Apartheid Litigation*

110 Draft regulations released in 2011. See KSG, 'A Reparations Campaign Update from Khulumani Support Group – 17 November 2011' (2011) <http://www. khulumani.net/reparations/item/559-a-reparations-campaign-update-from-khulumani-supportgroup-17-nov-2011.html>.

111 KSG (n 110)

112 KSG, 'Khulumani expresses Profound Disappointment at Government's Reparation Regulations' (2011) <http://www.khulumani.net/khulumani/statements/ item/459-khulumani-expresses-profound-disappointment-at-governments-reparation-regulations.html> accessed 25 August 2017.

113 Veronika Hoelker, 'The Impact of Human Rights Mobilisation on Colombia's Peace and Justice Law' (2016) <http://www.e-ir.info/2016/03/07/the-impact-of-human-rights-mobilization-on-colombias-justice-and-peace-law/>.

114 M Kaldor, *Global Civil Society: An Answer to War* (2003) 78.

115 See KSG website <http://www.khulumani.net/activities/12-advocacy-and-lobbying.html>.

116 KSG (n 115).

case, Khulumani hosts weekly Post-TRC Advocacy Working Groups and has planned to reconvene TRC-like hearings in parts of South Africa where human rights violations took place—places that were not reached by the TRC.[117]

Starting in December 1995 when the KSG picketed the TRC offices in Cape Town because they felt inadequately informed about the amnesty process,[118] Khulumani has been engaged in a long and ongoing struggle to secure reparations for victims.[119] They subsequently became involved in drafting recommendations to the TRC on the reparations policy. The Khulumani complaint was filed on 11 November 2002 on behalf of the KSG and its 32 700 members (at the time) as well as individual plaintiffs who had suffered from the crimes of the apartheid regime.

The actions of support groups such as the KSG promote solidarity among victims, mobilisation having positive results regardless of the outcome of litigation. The question of effective mobilisation has become an important factor in constitutional litigation in South Africa generally: in constitutional matters especially, the success of one's case could depend on whether one is supported by a well-organised and active movement such as Khulumani. The best example of effective social mobilisation is the efforts of the Treatment Action Campaign (TAC), which initiated groundbreaking litigation on the provision of anti-retroviral medication to HIV-positive mothers.[120]

Ironically, the then Minister of Health, Dr Manto Tshabalala-Msimang, made the following statement in the context of constitutional litigation regarding the pricing of medicine:

> The resolution of this court case only confirms our view that international markets, which play an increasingly important role in all our lives, have no inbuilt conscience. But governments and ordinary people acting collectively have a precious responsibility to make the huge companies that dominate the markets accountable for how they respond to the most critical issues of our times.[121]

The South African Coalition for Transitional Justice (SACTJ) consists of a number of CSOs that are concerned that processes of truth, reconciliation and justice are respected and fully implemented in the post-apartheid context in South Africa: the Centre for the Study of Violence and Reconciliation (CSVR), the Trauma Centre, the Human Rights Media Centre (HRMC), the International Centre for Transitional Justice (ICTJ) and the

117 KSG (n 115).

118 See Brandon Hamber, 'The Dilemmas of Reparations: In Search of a Process-driven Approach' in K de Feyter, S Parmentier, M Bossuyt and P Lemmens (eds), *Out of the Ashes: Reparations for Victims of Gross and Systematic Human Rights Violations* (Intersentia 2005) 142.

119 See M Lykes, M Tereblanche and B Hamber, 'Narrating Survival and Change in Guatemala and South Africa: The Politics of Representation and a Libertarian Community Psychology' (2003) American Journal of Community Psychology 31(1–2): 79–90.

120 *Minister of Health v Treatment Action Campaign (TAC)* 2002 (5) SA 703 (CC).

121 *Pharmaceutical Manufacturers Association of SA, In re: Ex parte Application of the President of the RSA* 2003 (3) BCLR 241 (CC), 2000 (2) SA 674 (CC).

South African History Archive (SAHA). The KSG belongs to this group. The members of the coalition are concerned about the shortcomings of the TRC.

Khulumani has not been the only group pressurising the state for reparations. Jubilee South Africa is a social movement launched in November 1998 at a conference of more than 60 CSOs.[122] Whereas Jubilee initially focused almost exclusively on debt-cancellation issues, it widened its aims to include campaigns for reparations and the achievement of social and economic justice.[123] Jubilee initially had the status and structure of a coalition and was supported by a network of influential organisations such as the South African Council of Churches (SACC). Jubilee and Khulumani had a collaborative relationship that was especially strong in the early years of Jubilee's existence, and the two have collaborated in pursuing a reparations campaign.[124]

Khulumani has forged partnerships with a number of CSOs to sponsor programmes and projects with and for victims, although there have been sporadic battles of personalities and interests between CSO partners. Khulumani is, however, a dominant player in the sense that it is currently uncontested in providing a voice for victims.[125]

The connection between Jubilee's primary work on debt cancellation and the apartheid reparations case initiated by Khulumani is that reparations have been considered as a form of debt cancellation.[126] The Jubilee movement has campaigned vigorously for the cancellation of debt owed to UK, US, German and Swiss banks that lent money to the apartheid government as well as reparations from companies that invested in apartheid South Africa.[127] Like Khulumani, Jubilee has criticised the government for abandoning victims and for announcing the extent of the relief (reparations) without prior consultation with the KSG. Jubilee also associates itself with the criticism of Khulumani that the TRC process favoured perpetrators over victims. Jubilee links apartheid struggles with struggles for economic and social justice.

THE *KHULUMANI* CASE

The so-called *Khulumani* (also named the *Apartheid Litigation* case) case, named after the KSG, involved protracted litigation which stretched over a period of more than 12 years. This section briefly considers the background of the case and then presents the case in a nutshell.

To understand the genesis of the *Khulumani* litigation, it is important to understand the anger of many apartheid victims. It is understandable that many are angry because

122 See Cyrus Rustomjee, *Jubilee South Africa* (2004) 13 <http://ccs.ukzn.ac.za/files/Rustomjee%20JSA%20ResearchReport.pdf> accessed 25 August 2017.

123 Jubilee is one of several Jubilee movements worldwide such as Jubilee 2000 Coalition and Jubilee South (JS).

124 Cyrus Rustomjee (n 122).

125 Kesselring (n 106).

126 Kesselring (n 106).

127 Kesselring (n 106) 13.

of the failure of the government to pay reparations for serious human rights violations. This anger is intensified by poverty and the poor economic prospects of most of the victims.

Many victims feel that they have not been vindicated in the form of having the perpetrators punished and having their injury recognised through, inter alia, reparations.[128] Mobilisation such as the *Khulumani* court action can give victims a feeling of being given the space to express their feelings of sadness and rage. Hamber writes that a critical public space for the expression of these emotions is civil-society-based activities undertaken by the victim groups themselves.[129] It is important to recognise that it is not just the outcome of the *Apartheid Litigation* case that is important but also the *process*. Conceivably, the lawsuit can be described as having been successful and meaningful if the victims feel that the litigation process allowed them to have a voice and to receive recognition. The process of making reparations should show sensitivity to the feelings of the victims. Particularly during the early years of the litigation, the South African government caused damage not only by not supporting the lawsuit but by criticising the plaintiffs for resorting to courts in the United States.

In 2002 the Khulumani plaintiffs, consisting of a group of apartheid victims, sued multinational corporations alleged to have profited from investments in apartheid South Africa and, in so doing, having aided and abetted violations of human rights committed by the apartheid government and having violated international sanctions and trade embargoes against South Africa.

The plaintiffs in the *Khulumani* case allege that they were victims of torture, sexual assault, indiscriminate shooting and arbitrary detention. Some of the plaintiffs were relatives of victims of alleged extrajudicial killings.

The initial defendants in this case included companies such as IBM, EXXON, Schindler, American Isuzu Motors and Barclays National Bank–38 corporations in total. Three groups of plaintiffs (the 'Ntsebeza plaintiffs',[130] 'Digwamaje plaintiffs'[131] and the 'Khulumani plaintiffs'[132]) filed actions in which they alleged that the defendants had violated international law and were therefore subject to suits in United States federal district courts under the 1789 Alien Torts Claims Act (ATCA).[133]

Essentially, the complaint of the plaintiffs was that, by doing business in and with South Africa, the defendant companies had allegedly 'aided and abetted' apartheid. To

128 Hamber (n 118) 139.

129 Hamber (n 118) 142.

130 The Ntsebeza plaintiffs acted on behalf of a class of individuals who lived in South Africa at any time between 1948 and the present and who suffered damages as a result of the crimes of apartheid: *Khulumani* 11.

131 The Digwamaje plaintiffs brought an action on behalf of all persons who lived in South Africa between 1948 and the present and who suffered damages as a result of apartheid: *Khulumani* 11.

132 The Khulumani action was brought on behalf of the KSG and its 32 700 members as well as individual plaintiffs who suffered from the crimes of apartheid regime: *Khulumani* 12.

133 *In re South African Apartheid Litigation* 617 F Supp 2d 228 (SDNY 2009).

satisfy the element of causation the plaintiffs argued that, but for the aforementioned knowing participation, particular injuries suffered by the plaintiffs would not have been suffered and, more generally, that in the absence of participation the apartheid regime would have collapsed sooner than it did.[134] The plaintiffs sought both compensatory and punitive damages.[135]

DISTRICT COURT DECISION

In the initial district court decision, Sprizzo J decided that the tort of aiding and abetting apartheid did not fall into the 'narrow and limited class' of violations that would be justiciable under ATCA.[136] Furthermore, Sprizzo came to the conclusion that specific norms making accomplice liability punishable have yet to crystallise.[137] This judgment was heavily criticised for its conservative nature and its incorrect application of international law.[138]

Second Circuit Court of Appeals Decision

The Second Circuit Court of Appeals overturned the District Court decision four years later, on 12 October 2007.[139] The majority of the judges in the Second Circuit held that the ATS does provide jurisdiction over aiding and abetting.[140] The judges in this case stated that the District Court had erroneously held that aiding and abetting liability does not exist under international law.[141] The Second Circuit referred the case back to the District Court.

Sprizzo J provided clarity on the political question and international comity doctrines as well as the standard of intent required; insufficient attention had been paid to the issue of aiding and abetting liability. While the case establishes that a plaintiff

134 *The United States of America v the State of Georgia*, *Memorandum of Law in Support of Defendants' Joint Motion to Dismiss* 2009 Civil Action No 1:10-CV-0249-CAP 6 <https://www.clearinghouse.net/chDocs/public/PB-GA-0004-0005.pdf>.

135 'The plaintiffs seek equitable relief that includes the production of defendants' documents, the creation of an international historical commission and creation of affirmative action and educational programmes. They also seek injunctive relief which would prevent the defendants from destroying documents that relate to their investment in apartheid South Africa.' *See In re South African Apartheid Litigation* 346 F Supp 2d 538 (SDNY 2004), *rev'd sub nom Khulumani v Barclay Nat'l Bank Ltd* 504 F.3d 254 (2d Cir.2007) (per curiam).

136 *In re South African Apartheid Litigation* 2003 346 F Supp 2d 538, 547 (SDNY 2003).

137 *In re South African Apartheid Litigation* (n 136) at 549, referencing *Sosa v Alvarez Machain* 2004 124 SCt 2739.

138 See Osborne (n 5) 255–267.

139 *Khulumani v Barclays National Bank Ltd* 2007 504 F 3d 254 (2d Cir 2007).

140 *Khulumani v Barclays National Bank Ltd* (n 139) at 289 (Hall J concurring in part) (referencing *Doe I v Unocal Corp* 2002 395 F3d 932, 967 (9th Cir 2002).

141 *In re South African Apartheid Litigation* 2003 346 F Supp 2d 538, 542 (SDNY 2003) 549.

may plead a theory of aiding and abetting liability under the ATS, it also highlights the unresolved issue of what the proper standard for such liability under the ATS would be.

District Court Decision by Scheindlin J

The case returned to the Southern District Court of New York on 8 April 2009**.** In her decision Scheindlin J first stated that the litigation does not interfere with the TRC process and rejected the argument that the actions should be dismissed on the basis of the doctrines of 'comity' and 'political question', then she struck down claims against some of the defendants and allowed claims against five remaining defendant companies.[142] In addition, she stated that the defendant corporations had pointed to no other South African forum that could adjudicate those claims.[143]

Pursuant to this decision, the *Khulumani* plaintiffs amended their complaint and proceeded only against the following companies: Daimler, Ford Motor Company, General Motors,[144] IBM[145] and Barclays Bank.[146] Daimler, Ford and General Motors were charged with aiding and abetting torture, extrajudicial killing and apartheid.

Second Circuit Decision 2013

In August 2013 the plaintiffs claimed before the Second Circuit that the remaining companies, Ford and IBM, had sold cars and computers to the South African government, therefore knowingly facilitating the apartheid regime's race-based depredations and injustices, including rape, torture and extrajudicial killings.[147] IBM was accused of assisting with and facilitating the apartheid government's population registration system. The plaintiffs argued that Ford aided and abetted extrajudicial killing and apartheid by making military vehicles for use by the South African security forces.

In determining whether a defendant can be held liable for aiding and abetting, the court applied the test set forth in *Presbyterian Church of Sudan v Talisman Energy* that to establish aiding and abetting liability under the ATCA, a plaintiff must show 'that a defendant purposefully aided and abetted a violation of international law'.[148]

142 The five companies were General Motors, Daimler Benz, Ford, Barclays Bank and IBM.

143 See *In re South African Apartheid Litigation* (n 141) para 286.

144 ibid 297.

145 ibid. See *Khulumani et al v Barclays et al*, Amended Complaint, United States District Court, 31 October 2008.

146 IBM was charged with aiding and abetting arbitrary denationalisation and apartheid: *In re South African Apartheid Litigation* 2009 624 F Supp 2d 336 at 56–73.

147 *United Sates Court of Appeals for the second circuit* 2013 No 09-2778 <http://hrp.law.harvard.edu/wp-content/uploads/2011/01/130821-Apartheid-09-2778_opn-2d-Cir.pdf> accessed 26 August 2017.

148 *Presbyterian Church of Sudan v Talisman Energy, Inc* 2009 582 F 3d 244, 259 (2d Cir 2009), cited in *Balintulo* (n 115) at 13n11.

Unfortunately, as a direct result of the outcome of the *Kiobel*[149] decision of the US Supreme Court, the *Khulumani* case did not succeed in the Second Circuit.[150] The *Kiobel* case put an end to the use of ATCA by victims to obtain relief for acts committed outside the United States. The Second Circuit Court of Appeal stated that since all the relevant conduct in *Khulumani* had occurred outside the United States, the case had to be disposed of. The Court of Appeal further pronounced that the Alien Tort Statute 'does not permit claims based on illegal conduct that occurred entirely in the territory of another sovereign'.[151]

Future Prospects for the *Khulumani* Case

The prospects for success for the *Khulumani* case were obstructed by the US Supreme Court's decision in *Kiobel v Royal Dutch Petroleum Co.*[152] But in spite of the fact that the *Khulumani* case ultimately did not succeed, the tireless efforts of the KSG must be applauded for electing to take the unusual route of litigating in the United States under the ATCA.

After *Kiobel*, a unanimous panel of the US Court of Appeals for the Second Circuit ruled in *Balintulo v Daimler AG*[153] that US courts have no jurisdiction over the *Khulumani* lawsuit because all of the alleged wrongs had taken place in South Africa and not in the United States. Despite this serious setback, the legal team for Khulumani intends to continue to pursue the litigation against multinational companies that benefitted from doing business with the apartheid government. In the meantime, Khulumani continues to keep a close eye on the reparations policy of the South African government and to pressurise the state to close the gaps in 'post-*apartheid* injustices'.[154]

Although the *Khulumani* case did not ultimately succeed, the KSG deserves praise for making the unconventional and brave decision to make use of the ATCA. The *Khulumani* case triggered great interest in human rights circles in the United States and internationally and inspired other victim groups to take advantage of the extraterritorial jurisdiction ATCA provided until the *Kiobel* decision.

CONCLUSION

The role of victim organisations and CSOs generally in the design of reparations programmes within transitional justice contexts is a topic that is academically under-

149 *Kiobel v Royal Dutch Petroleum Co* 2013 133 S Ct 1659 (No 10 1491).
150 See Swart (n 10).
151 *Balintulo v Daimler AG* 2013 727 F 3d 174, 192 (2d Cir 2013).
152 569 US (2013). See Swart (n 13) 353.
153 *United Sates Court of Appeals for the second circuit* (n 147).
154 See KSG, Memorandum handed over to the Office of the President in Pretoria on Tuesday, 20 March 2012 <http://www.khulumani.net/khulumani/statements/item/637-memorandum-handed-over-to-the-office-of-the- president-in-pretoria-on-tuesday-march-20-2012.html> accessed 25 August 2017.

explored. Whereas the participation of victims and victim groups lends more legitimacy to transitional mechanisms such as reparations programmes, transitional processes that aim to benefit victims are not immune from criticism since such programmes that are inspired from the 'bottom' can replicate the problems associated with top-down processes. Civil-society-based mobilisation such as the actions of the KSG should form a crucial part of the design of a truth commission and should also do so in the follow-up process in the aftermath of the work and mandate of such a commission. Norman Reynaulds writes that the *Khulumani* case provided an opportunity to present South Africa as a morally ambitious country and as courageous, organised and united.[155] To a significant extent the case was driven by the energy and creative initiative of KSG.

In spite of the fact that the *Khulumani* case did not succeed on the merits, the case can still be seen as a victory for the KSG: the case managed to draw much-needed attention in the forms of media, academic and public attention. The settlement made by General Motors can also be considered a qualified victory. Meanwhile, the KSG continues to keep a close eye on the reparations policy of the South African government. The fact that there is still no suitable domestic or international forum to approach to obtain reparations for corporate human rights violations remains a significant obstacle, however.

This article has shown that victim movements and other CSOs are instrumental not only in the formation of typical transitional justice mechanisms such as truth commissions, but that they can also powerfully drive litigation that flows from the failures and inadequacies of truth commission processes.

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155 See Khulumani website <http://www.khulumani.net/ny-lawsuit/197-khulumanis-reparations-case-and-the-future-of-human-rights.html> accessed 25 August 2017.

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