

# **“Experiences of Violence and the Formation of the Political: embodied memory and victimhood in South Africa”**

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## **Introduction**

In this chapter, I argue that South Africa's Truth and Reconciliation process facilitated the cementation of a particular apartheid-era victim subject position. In particular, I show the enduring effects on lived victim subjectivities. I hence look at the TRC as a form of governance and trace its effects on the social, political and legal realm in its aftermath.<sup>2</sup>

Victimhood is chiefly embodied. I argue that the embodiment of experiences of violence is both the basis for and the limit to the articulation of one's victimhood. Whereas shared experiences of victimhood foster sociality among victims, in order to be politically effective, victims need to relate to dominant victim subject position. This requires the emancipation from the bodily dimension of victimhood. To be sure, experiences of violence are, by definition, social – and political. The focus here is on the conditions for the emergence of a political victim subjectivity – as a basis for social i.e. collective action – in the context of a legalized, politicized but also bureaucratic notion of apartheid-era victimhood.

Given that the effects of distinctive forms of governance become evident in the relationship between politics and individuals, they allow for certain kinds of social actions and invalidate others. If individuals attempt to make their subjectivities politically effective, they have to do so in the context of existing forms of governance. People may try to change the empirically given forms or adopt them as their ideals. In such processes, new forms of articulation emerge or given ones stabilize. I thus look at the contingencies of the formation of the political in victims' everyday lives and question whether we have truly understood the reach of “top-down” processes of governance and the possibilities for the emergence of “bottom-up” governance arrangements.

In the part “victim subject positions”, I first rely on literature suggesting how the TRC – as a quasi-judicial institution (Wilson 2000, p. 80) – partly succeeded in cementing a

particular victim subject position which is very much legally oriented. I will then show that this way of governing through differentiation has met contestation which was mainly fought in courts, both domestically and abroad. The TRC was consequential for the standing of apartheid-era victims in its aftermath. Due to its strong emphasis on victimhood which was necessary for successful nation-building, the TRC facilitated the (albeit incomplete) formalization of victimhood in post-apartheid South Africa. Also, the limitations of its work were weighed stronger by victims and advocacy groups than the state's assurance that the past was dealt with. The Commission thus enabled alternative interpretations of victimhood.

The main part of the article relies on my empirical material of the everyday in victims' lives.<sup>3</sup> In order to understand the shift between a lived and an articulated and politically successfully articulated victimhood – in relation to discursively dominant subject positions of victimhood –, I developed a typology of four states of societal experience. I then argue that victimhood is sedimented in the body and is, as an experience, inherently and persistently bound to the body. Any political articulation is thus chiefly informed by – and contingent to – persistent sedimented knowledge of various kinds of injury. Whilst victimhood enables solidarity amongst victims as they have similar experiences, it also creates boundaries between the “irreconcilable” individual and society. There is thus an increasingly articulated division between victims who struggle to overcome their state of being and those who have managed to live in the “new South Africa”. The legal developments are manifestations of this tension. They hold the possibility of a shift in victim subjectivity but they remain ambivalent in their focus on a legal victim subject position.

This trajectory of governance will allow me to do two things. On the one hand, I can relate governance to individually attempted articulations of victim subjectivity. I thereby chiefly argue for experience or *habit memories* (Connerton 1989) as a major driving factor for agency.<sup>4</sup> On the other hand, I reflect on the limits of a politically successful articulation of victimhood and the limits of the political *per se*. I argue that knowledge sedimented in the body is the source of any political articulation. However, based on my empirical material, I also argue that a victim subjectivity – in order to be politically effective and applicable in relation to dominant discourses of victimhood – seems to demand a certain emancipation from the bodily experience of victimhood.

Speaking to the transversal themes of this volume, this will lead me to suggest that the concept of governance needs to be expanded with the embodiment of experiences as one of the bases of, and limits to, (collective) agency.

## Victim Subject Positions

The TRC's strong impact on the idea of transition, nation-building and a new South Africa has been extensively dealt with in the literature.<sup>5</sup> Less prominent has been its role in the production of a particular victim subject position. In various legal disputes following the TRC, the mandate of the TRC, the limitations of its work and its final report were used as an authority justifying the respective positions. I argue that these ongoing legal processes have, despite being partly detrimental to the victims' cause at first, brought legitimization and negotiating power to those who stand in for the recognition of victims of apartheid-era human rights violations in today's South Africa.

In the work of the TRC, a particular victim subject position emerged. Formally, the Promotion of National Unity and Reconciliation Act of 1995 noted the definition of a victim.<sup>6</sup> In order to qualify the *cause* of the injuries, suffering and loss, the Act also defined what a gross violation of human rights constitutes.<sup>7</sup> It is defined in its more narrow form as violations of civil and political rights and singled out four "gross" violations (killing, abduction, torture and severe ill treatment) which had to be verifiable and tied to an individual perpetrator<sup>8</sup> and committed with a political motive. As such, the selection of persecuted violations did cohere with the notion of perpetrator versus victim that informed the Commission's work more generally, a notion that omitted reference to the many beneficiaries of apartheid (Mamdani 2002). Hence, individual and direct perpetration and visible injuries were foregrounded at the cost of the recognition of structural violence in its complexity.<sup>9</sup> Ross (2002) noted that considering apartheid "in terms of excess phrased as violation of certain rights" had the effect of "flattening and homogenizing the complex moral terrain of the everyday" (2002, p. 163). Experience as such was sidelined.<sup>10</sup>

The definitions through which the framework of the TRC's work was outlined became *operational* once the Commission started its work and they became *effective* when it actually defined some 21'000 South Africans as victims and declined the status to others.<sup>11</sup> In its activity, according to Ross, the TRC focused on "the embodied consequences of authored events of violence" (2002, p. 165) and thus applied a narrow focus on violations of bodily integrity. It considered "its subject in terms of injury" (2002, p. 11) and worked with a "body-bound" notion of victimhood. Moreover, the "victim" was not an enduring subject, someone with a complex history, but rather a subject born of violence.<sup>12</sup> Ross calls this a "legal person", a "victim produced through occupation of the signs of injury" (2002, p. 12).<sup>13</sup> Also, the Commission promoted the necessity to verbalise experience through the "equation of speaking subject with

healed subject” (2002, p. 165). This meant, pragmatically, that it was only through speaking that applicants could claim their status as victims.

The TRC thus governed by distinguishing between those falling into its category of injuries sustained and those failing to meet the requirements; it further distinguished between those who testified and those choosing not to<sup>14</sup> or having missed the opportunity to do so; it distinguished between those who were entitled to financial redress and those who were not. But only few victims were able to fully claim ‘victim’ status.

The TRC’s version of victimhood had an important impact on the South African society, but it was not totally accepted. Instead, it fostered a societal discussion that transformed the possibilities that victims had for articulating their claims.

One important organized form of articulation has been the South African apartheid-era victims' support group Khulumani.<sup>15</sup> In its advocacy programs, it claims to represent around 65 000 victims of apartheid-era human rights violations.<sup>16</sup> Over its 12 years of existence, it has come to represent a different notion of violations and human rights than the TRC has propagated. It focuses on the *needs* which have arisen from the effects of human rights violations, broadly defined.<sup>17</sup> It petitions the state to fulfil its duty to ensure equality of chances and conditions for every South African in a country in transition. It is thus less interested in the actual violations or the causes of today’s suffering and inequality than in the aspects that need *repairing* today.<sup>18</sup> Khulumani’s and other civil society organizations’ legal actions have evoked legal and political responses regarding how victimhood should be understood in post-apartheid and post-TRC South Africa.

The Truth Commission’s mandate was controversial from the beginning. In addition to the lively public debates on its mission and shape, a core provision of the TRC Bill was challenged in the Constitutional Court (Giannini *et al.* 2009, p. 19). In *Azanian People’s Organization (AZAPO) and Others vs. The President of the Republic of South Africa and Others*, victims alleged that the authority to grant amnesty to perpetrators deprived victims of particular rights as protected in the Interim Constitution of 1995, as it waived both civil and criminal liability.<sup>19</sup> Although the Constitutional Court ruled that the granting of amnesty was indeed constitutional, it also made clear that perpetrators who failed to satisfy the amnesty requirements could face civil and criminal charges. It thus argued that victims were not absolutely deprived of the right to seek legal recourse.<sup>20</sup> Almost a decade later, amendments to the Prosecution Policy were promulgated by the Ministry of Justice.<sup>21</sup> The changes relate to the prosecution of offences “emanating from conflicts of the past” and they guide the prosecutors

in their discretion whether to grant indemnity to perpetrators who committed crimes that were politically motivated before 1994. Civil society organizations filed a challenge to the amendments.<sup>22</sup> In 2008, the High Court in Pretoria found that the policy amendments did in effect amount to a “copy-cat” of the TRC amnesty process and struck down the amendments.<sup>23</sup>

In the same year, Mbeki created a Reference Group to make recommendations to him with regard to which offenders who were convicted of offences committed in pursuit of political objectives before 1994 should receive presidential pardon. The South African Coalition of Transitional Justice<sup>24</sup> launched an urgent application in the North Gauteng Court, arguing that such process would unlawfully exclude victims.<sup>25</sup> The respondents, the President and the Minister of Justice, argued that the victims had no right to be heard when the President exercised his power to grant pardon.<sup>26</sup> The Court ruled that the President must, prior to releasing a prisoner on pardon, consider “the inputs of victims and/or families of the victims”.<sup>27</sup>

Parallel to these domestic developments, the apartheid litigations filed in U.S. Courts in 2002 caused much turbulence and opposition in South Africa. The apartheid litigations *Balintulo et al vs. Daimler AG et al.* (henceforth Khulumani case) and *Ntsebeza et al. vs. Daimler Chrysler Corporation et al.* allege that a number of international corporations aided and abetted the security branches of the apartheid regime in the perpetration of human rights violations.<sup>28</sup> With these civil cases, South African citizens seek to bring corporations to trial in U.S. courts on the basis of common law principles of liability and under the Alien Tort Statute.<sup>29</sup> Seven years after submission of the complaints, Judge Shira Scheindlin of the Southern District Court of New York allowed the class actions to proceed.<sup>30</sup> The South African government had been opposing the apartheid litigations from an early stage.<sup>31</sup> It argued that the litigations would pre-empt the South African government’s ability to handle domestic matters of reconstruction and reconciliation internally and transgress its sovereignty and they would discourage investment in the South African economy.<sup>32</sup> Only in September 2009, the South African government half-heartedly withdrew its opposition.<sup>33</sup>

In sum, in its attempts to build a post-apartheid political order, the state has shown little interest in the victims of apartheid-era human rights violations beyond the TRC process. Victims’ agendas, in spite of this official disregard, have moved towards the centre of the political stage in the aftermath of the TRC and after a considerable time lag. Three domestic cases and one U.S. instance of litigation have led to an official legitimization of victims’ demands.

Through the findings of the TRC as to who constitutes a victim and who does not, a typical interventionist governance measure was enacted. I showed the limits of this interventionist measure by outlining its contestation both politically and in courts. The legal and political developments after the TRC show that the TRC's stance on the definition of victims was not confined to the conditions under which it was created, but developed a logic of its own. Both the interventionist measure and the contestation influenced the formation of political victim subjectivities. I will now turn to this particular aspect of governance.

## **Victimhoods**

Processes of governance have effects on the everyday life of those directly addressed and those left out. In the case at hand, both those who are beneficiaries of officially recognized victim status and those who are unrecognized negotiate their status as victims in larger society. In this reality, a politically successful articulation of one's victim subjectivity is dependent on the fact that victimhood is grounded in bodily experiences. By arguing that any articulation of victimhood has to engage with bodily experiences, I also attempt to show that *precisely because* of the sedimented character of victimhood, the formation of the political has limits for victims themselves. The political reaches its limits and governance may be more consequential than originally conceptualized.

The dominant victim subject positions elaborated above tend not to acknowledge a bodily grounded victimhood and discursively detach experience from status. The four accounts which follow below show that amongst victims, the bodily dimension of victimhood meets understanding, compassion and may be the basis for common political action. In relation to larger society, however, a specific victim subjectivity is not connectable and meets with a lack of understanding and the refusal to solidarize. It makes political communication more difficult than it is often assumed. Political effectiveness demands to comply with certain conventions of articulating one's victimhood. My empirical material suggests that one of the effects seems to be the dissipation of bodily experience as raw source of articulation as victims engage with more standardized forms of victim subject positions.

In order to understand the shift from lived to articulated and to politically articulated victimhood, I developed a typology of four states of societal experience:

(1) I speak of *victimhood* as a state of being of a victim of human rights violations. This state is self-ascribed and genuinely intimate and personal as an experience.<sup>34</sup> It is not necessarily a conscious state. Once a person becomes conscious of his or her victimhood and publicly performs it, the role of victimhood in the person changes. (2) I call the new position *victim*

*subjectivity*. When taking this position, someone's personhood comes into a relation with forms of (3) *victim subject positions*. Victims subject positions are often dominant discourses which give ideas/ideals of what a victim is or is supposed to be. This status is necessarily political, as any articulation of one's subjectivity is taking place in a context of discourses. Although subjectivity is always political, I distinguish between victim subjectivity and (4) *political victim subjectivity*. I only speak of *political* victim subjectivity when a person or a group publicly articulates victimhood in a relation to a specific form of victim subject position (for instance, the TRC, the ANC, the legal complaints, the neighbors; Khulumani). The attribute political thus demands a positioning, consciously or not, vis-à-vis prevailing (and often dominant) ideas of victimhood.

Of course, these different positions are not clear-cut and aspects of victimhood may occupy different positions of this typology. Particularly the shift from victimhood to victim subjectivity has, in varying degrees, already happened in most of my encounters because my research took place in the context of a victims' support group.

### **Embodied victimhood**

In Sebokeng, a township in Southern Gauteng and in the former Transvaal, a group of women meet regularly. They identify themselves as victims of widowhood as a consequence of violence generally associated with the wars between Inkatha Freedom Party (IFP) hostel dwellers and the ANC in the early 1990s. The casualties often were ordinary community members. Almost 100 members are listed in one of the executives' notebook. Together, the widows run small-scale income-generating projects like sowing and beading or projects for their subsistence such as a communal garden. They act under the umbrella of Khulumani.

After one day of workshop, a round of women gathered and wanted to tell me some of their stories.<sup>35</sup> Dikeledi Mabaso [name changed] spoke after several others had spoken. Her husband was killed in a massacre in which 38 people were shot on a Sunday in 1990.<sup>36</sup> On Monday, her husband went to the crime scene, a hostel, to see whether a relative of theirs was wounded or killed. However, he was shot right away, Ms Mabaso said in tears. The arrival of the IFP in the Vaal was a problem, she continued. It caused their husbands to die.<sup>37</sup> There was no breadwinner left in their families as their children still went to school when their husbands were killed. Also the government seemed to have forgotten them, she said, shaking. Even their families made fun of them, the widows, whereas before they had had their respect.<sup>38</sup> In response to my question, she confirmed that the ANC offered a burial to her late husband since he was a member. However, Ms Mabaso would have liked to see the erection of a memorial and witness

the ceremony of unveiling it.” The government forgot the widows, she said, winding down. The politicians were enjoying their luxurious lives with their families and wives but forgot about all those women left alone. She was very sick, Ms Mabaso said in closing, she suffers from high blood pressure and diabetes.

Her friends comforted her and complemented her story. Ms Mabaso looked very old, sorrowful and generally drained with an expression of deep helplessness on her face. With her whole posture and personhood, she underlined her loss and her feeling of being left alone. The others said to me later that she had not talked about herself before; and they were more confident than I was that it had done her good. Her account was raw and she was clearly not used to perform her victimhood in a verbal and public manner.

It was one of many situations which I experienced in the course of my research, where it became evident how much incorporated victimhood is and how crucially victimhood is linked to the body. Arguing famously for the impossibility of expressing pain, Scarry (1985) also suggests that the human body can be the “referent” for “felt-attributes” which are lifted “into the visible world”. It is one way of how the “sentient fact of the person’s suffering” can become “knowable” to a second person (1985, p. 13). For Scarry, the body therefore *refers* to something which is not transmittable in its original form and which necessarily undergoes translation. The body may be a means to communicate one’s sentient victimhood to another.

Indeed, in some instances during my research, the “sheer material factualness of the human body” (1985, p. 14) played into expressing one’s victim subjectivity. In moments when words seem to let a person down, the factualness of the human body should speak for itself. Sometimes, I was shown scars of injuries sustained. Generally, neither women nor men would uncover more than their shinbone or calf to show scars, though. The verbal reference to bullets in the chest or lack of scalp hair as a result of torture *in its potentiality* would suffice. Such demonstration was not supposed to make *the* difference in people’s sentient victim subjectivity. Rather it served to communicate a *subject position* as stipulated in various discourses as, for instance, the logic of law and evidence (Connerton 1989, pp. 96–100). These gestures seemed to refer to discourses which are believed to require that kind of evidence: *inscribed* according to Connerton, in order to serve as an “objective” sign of injury. Scars may thus be a necessary tool to communicate *incorporated* (Connerton 1989) injury to others in order to meet credibility. The body may serve as a place of evidence or a means of communicating victim subjectivity but to make this a requirement for the recognition of a victim subject position is, for obvious reasons, highly problematic. For if we take the body as the single evidence for



sustained injuries and even psychological damage, we privilege a cognitive view of the body which draws on the idea that the body is “readable” as a text or code (1989, p. 101). Such “reading” attempts to expand the hermeneutic privilege to incorporation by simply perpetuating a textual reading of practice to the “non-textual” and “non-cognitive” realm. This is based on a flawed understanding of bodily mnemonics. It privileges the inscribed and ignores the persistence of “what is being incorporated” (1989, p. 102) and, in effect, the habitual nature of bodily experiences. Like all bodily experiences, incorporated victimhood does not persist independently from one’s being.

The body is not just an argument *for* a victim subjectivity, it is an integral part *of* an argument of victim subjectivity. The body absorbs exhaustion, stress and sorrows, and injuries on the bodies manifest themselves as confusion, fits, depression, uneasiness, incapability to socialize and so forth. However, it is precisely due to the fact that the body is integral part of the argument of victim subjectivity that political articulation may fail. Victimhood poses nonnegotiable boundaries. It may undergo shifts and changes. But the body is injured and scarred forever because experiences have turned into *habit memories* which are sedimented in the body. Habit here should be understood as a “continuously practiced activity”, thus emphasizing a sense of operativeness and the reinforcing effect of repeated acts (Connerton 1989, p. 94).

Amongst the widows of Sebokeng, Ms Mabasa momentarily met solidarity and comfort with an extraordinary effort of emotions and exposure. However, her victimhood has become part of her self as much that she struggles to emancipate from it towards a form of articulation which is discursively connectable to political action around victimhood.<sup>8</sup> Hence, pain creates solidarity amongst those who have experienced it but creates boundaries to those who have not. Victim subjectivity differentiates and causes rifts which are difficult to bridge.

### **The formation of a political community based on individual dissent**

The way society thinks victimhood should be lived has an effect on the individual. It has a potential to outcast or alienate people. Shared experience of victimhood may be the basis for political action precisely because it is based on shared exclusion. For some, Khulumani offers an alternative gaze on their own personhood and an escape from the judgment of society. The following account shows that solidarity amongst victims may trump societal judgment of how victimhood is supposed to be lived. It also shows that society struggles to relate to victims’ experiences and reacts with lack of understanding if people try to make their victimhood effective.

In September 2009, Mr. Phelane [name changed] came to the Khulumani Western Cape office, Salt River, Cape Town, to apply for membership and to ask for assistance in his application for a Special Pension Grant.<sup>41</sup> He was told to come back the next morning and bring along the relevant documents. An executive member informed me that a “direct victim” was coming. On that day, Mr. Phelane was angry and emotional. He was anxious to document what he had to say using the respective papers. He spoke to the office manager, an executive member and myself. Other people who applied for membership were present and the office manager handled a couple of cases simultaneously.

Mr. Phelane was in prison from 1994 to 2005; on which charges he did not elaborate. During that time, he made a preliminary statement to the TRC and received Interim Reparations. Although he also qualified for the individual reparations of R30 000, he never received the money.<sup>42</sup> According to Mr. Phelane, his father gave the extensive statement without authorization from him. The money was subsequently deposited on his father’s account. The statement-taker never approached Mr. Phelane for his consent. At this stage of his account, the office manager interrupted and said that she had indeed heard of this statement-taker. He had spread the information of the running of the TRC very selectively and monopolized it to his friends. It was because of him that she had not heard of the TRC on time and had missed the opportunity to give a statement. She accused him of having teamed up with people giving statements on behalf of others and having claimed his share of the deal.

Mr. Phelane asked his wife and other relatives to come and visit him in prison. They said that they did not have sufficient money for the journey to the prison. His father spent R15 000 on a car and spread R14 000 equally between his three daughters, and assumingly the remaining R1 000 to the statement-taker. On his deathbed, his father was haunted by a guilty conscience. He asked his three daughters to give the money to their brother; but they never did so. They stick together like “The Three Musketeers”, Mr. Phelane complained. He has had many meetings with lawyers to get his money back. It was hopeless, he said, the attorney in the Magistrate Court was bribed by his sister. He was also disappointed by LegalWise, the legal advice agency and insurance. “I gave up on the judiciary.” When he told us about the injuries he sustained, the office manager noted them in the organization’s Needs Assessment Form (which is at the same time the application form for membership). In 1976, he was shot in his chest. He still has the x-ray photograph. He also has 37 rubber bullet shots in his back. “The system made us bad.” He made clear that he wanted to bring the statement-taker and the First National Bank, which transferred the money, to accountability.

Mr. Phelane's account was in parts confusing and incoherent. With its anger, accusations, frustration and disillusionment with bureaucracies and legal institutions, it resembled the accounts of many others who came to the Khulumani office, often to ask for assistance as a last resort after many failed attempts to receive what they thought they were entitled to. His account is also not exceptional in that a real or promised pay-out has caused rifts in families, jealousy, and sometimes threats and violence in family and community.

Mr. Phelane is acknowledged as a victim by the TRC, hence formally, he is a "good victim" to society. But as a person and with his actions, he does not comply with the notion of a "good victim".<sup>43</sup> He was in prison for the first 12 years into democracy. He is not only a victim but possibly also a perpetrator, quarrels with his families over money, and is not useful for a new beginning. This might be so *precisely* because he is a victim and struggles to integrate into a society which he was first estranged from and which he is being alienated from today. This contradiction which society prefers not to see underlines the effects of the past and undermines sociability and solidarity with him.

Khulumani, however, offers solidarity with those who have in common both their victimhood and their difficulties to integrate and to grab the supposed chances. They have not "made it" in the new South Africa. Mr. Phelane's probable delinquency is noticed but it is seen in a broader context of a fight for dignity and acknowledgment. The commonalities are therefore prioritized over the differences. The office manager could relate to his account because she thinks to know the person who collaborated with his family to appropriate his money from her own experiences of exclusion. She identifies with his victimhood caused by allegedly corrupt state officials. The executive member may relate to him as he has also been in jail a couple of times since 1994 on charges of stabbing in attacks of rage. The ambivalence towards the part of society which "made it" remains for all those who declare their victimhood of past experiences as an act of positioning themselves in the present time. It is an urge to belong despite victimhood and possibly perpetration. Khulumani offers a space to belong *due to* victimhood. Based on a common experience of an exclusive notion of victimhood, an alternative sense of community may emerge.

In the South African majority opinion, the question of victimhood is resolved since 1994 or at the latest since the closing of the TRC. There is strong pressure to comply with the ANC's approach to reconciliation and forgiveness for which the TRC as a reference is pivotal (Wilson 2000, Borer 2003, p. 1092, Humphrey 2005). Everyone should try to re-integrate into society and take his or her rightful place, build the future of the new South Africa, and be useful to

society. S/he should reconcile; some may still suffer from long-term effects and be marked, but they should at least be willing to integrate. If victims try to foreground the ongoing consequences of past sufferings and to render them politically effective, such reminders challenge both the break with the past and the hopes for the future. They are resented as ungrateful egotism, and seen as proofs of the speakers' incapability of being integrated. The acknowledgment of a person's victimhood should instead be smooth, sociable and generous – and not threaten to evoke bad memories or to challenge one's own success in the “new South Africa”.

For many, Khulumani is, at first, just another place to turn to with administrative problems. Once the contact made, many learn about the possibility of sociability in their victimhood. A victim subject position may, in some ways, be transformed into *conscious* victim subjectivity. Mr. Phelane had heard that Khulumani would provide help for Special Pension applications. He was surprised to find sympathy and articulation of shared concerns. One executive member said once to me: „Khulumani is a one stop shop“ and another complemented: “We are an advise office”, marvelling at the very many perceptions people have of what Khulumani would be able to help them with. The application for membership is not a quick bureaucratic process and it is not completed by an employee with little relation to his/her work and the life-worlds of the applicants. It is received by someone who can relate to the experience of the applicant and act intersubjectively to his/her story. In most cases, it is a very local story with specific protagonists and incidences which only someone who him/herself has lived in the townships in the years of struggle can understand and give value to.

Despite inconsistencies it was clear that Mr. Phelane had told his story before. He was emotional but his account was also structured along institutions which he approached *in his capacity* as a victim and which accepted or rejected him on the basis of his victimhood. His account was thus not raw as Ms Mabaso's but more eloquent in articulating his frustration over the lack of recognition. The bodily experience of victimhood shows through in the form of body-bound evidence (such as the x-ray and the bullet wounds). Albeit having had little success in making his victim subjectivity financially effective, he is not helpless in approaching institutions for support. His claims are, amongst other things, based on the formal recognition of victim status by the Commission.

### **Dominant notion of victimhood versus individual dissent**

The general notion of apartheid-era victimhood in South African today potentially clashes with individual dissent. The political is formed in relation to the dominant notion of

how victimhood should be lived and performed. The following example shows how an individual directly contests the effects of the dominant victim subject position as promoted largely by the African National Congress. Such acts of articulation risk to meet strong opposition and risk to be dismissed as unpatriotic, selfish or weak, as I also showed above when discussing government's reactions to the apartheid litigations. They are risky also because victim subjectivity is chiefly linked to the private and the intimate experiences of the individual.

Amanda Mabilisa ties her victim subjectivity to an active non-membership in the ANC. In 2009 when we spent two weeks together, she had just stood for Congress of the People (COPE) Women's League at the party's first national elections. In her own account, she chronicles the corrupt apartheid state and the biased post-apartheid state. She had abandoned school in Swaziland in 1973 and was, as she emphasizes, the only female member of the South African Students' Organisation who was first hidden and later smuggled out of the country after the 1976 Soweto Uprising. Her life in exile then brought her to Lesotho, Botswana, Nigeria and Germany, from which she returned to South Africa in 1995 only. Her certificate as a nurse trained in Germany in the 1980/90s has never been accredited in South Africa. Her refusal to assume ANC membership has been an expression of her self-image as a non-corruptible cosmopolitan thoroughly rooted in her community. She calls herself a "politician".

One night, Ms Mabilisa took me to her neighbor's house in which he runs a shebeen in the back yard room. Some male friends and she frequently meet there for soccer, debates and beer. She is ambivalent about some of them. They were well positioned ANC cadres and came to the township to show off their cars on weekends and otherwise enjoy a comfortable life in the suburbs, she muttered. The four men present that night were indeed dressed in suit and tie and had a worldly flair about them. At some stage, one of the men, a senior official, argued that a multi-party system does not work in Africa. To prove this, he referred to the post-election violence in Kenya in 2007 and Barack Obama's *Dreams from My Father*. He implied, and obviously this was not the first time they had this discussion, that Amanda Mabilisa excluded herself knowingly and deliberately if she did not partake in ANC politics.

The conversation turned to a discussion of the ANC's integrity and Ms Mabilisa mentioned a document which, she claimed, proved that Chris Hani was killed by Umkhonto we Sizwe comrades.<sup>4</sup> Another man in the round, a former mayor, was deeply upset by this accusation (which made news several years ago). "I think I am with the wrong people!"; he was about to leave the room. The officer mediated: documents, he said, are easily counterfeited. And anyway, he had read the three (sic!) volumes of the TRC's Final Report, and nothing of

such sort was mentioned there. Ms Mabilisa said triumphantly that this was exactly part of the “unfinished business of the TRC” her organization Khulumani had been advocating to clear. The officer replied that he saw no reason for her to engage in such thoughts; it would only harm her and her career. The conversation stopped and everyone reverted to more drinking.

Ms. Mabilisa’s company that evening suggested that she should let sleeping dogs lie. They generally acknowledged that injuries of the past still impact on the lives of South Africans today, but rejected individualized grievances whose expression they see as unreasonably holding on to the past. The TRC has dealt with that. Both quote the TRC as a reference of authority and knowledge. The senior official cited its Final Report as a canonical document with truth value, substantiating the ANC’s role as author of a transformation that, by now, is accomplished. Ms Mabilisa, in turn, referred to the TRC’s limitations and shortcomings. She did not foreground her sentient victimhood but made her political victim subjectivity effective in an routinized political argument in a private setting in which the people present drew on their public influence and importance for their arguments. She made a structural argument and was confronted with an individualistic, liberal response. Although it was at no point threatening to get out of hand, the recognition of individual choices was at stake.

I witnessed in several situations that Ms Mabilisa is readily listened to and easily finds favor in other circles - youth and women groups, COPE members or protest movements for service delivery. Her victim subjectivity proves widely effective. Due to her status as an important struggle veteran, she finds ways of expressing her standpoint and ascertaining her individuality, contrary to Ms Mabaso and Mr. Phelane. Her personal bodily experience of victimhood is in the background and gives way to persuasive argumentation of structural victimhood and biased politics. Victimhood as a personal experience is manifest as emphatic argumentation. It is not communicated in its raw and intimate form which makes it possible to come up against a strong discourse of the finished past.

### **The formation of the political and the emancipation from embodied experiences**

The last situation directly addresses the basis for the formation of the political. I argue that successful politicization requires emancipation from the bodily dimension of victimhood experiences.

In the following account, victims and a representative of law meet. In this situation, it is the law that helps to form political victim subjectivities. Legal ways of thinking about victimhood and personhood as such are not effective on victims’ personhood, though. Only when they enter the political realm do they become tangible elements of victims’ subjectivities.

*What does this mean for my life and my future? and Am I socially and politically recognized in my state as a victim?* are questions that transform law-making into a tangible reality in victims' lives. In this form, law can be a basis for the formation of the political.

Khulumani Western Cape, unlike many other provincial branches, holds regular monthly general meetings since its consolidation into Khulumani's national structure in 1999.<sup>45</sup> At short notice, Charles Abrahams, the South African legal advisor to the Khulumani apartheid litigation filed in the U.S., spoke to the membership at the October 2010 meeting.<sup>46</sup> If rumors circulate that he will be coming to a meeting, the Ashley Kriel Hall at the Community House in Salt River, Cape Town, is typically packed with members. So it was this time; more than 200 people attended. For members, the lawyer's presence reasserts professional and international support for their everyday struggles and suffering. By way of his profession and his faithfulness to Khulumani, Mr. Abrahams constitutes an authority who is trusted. In addition, every announcement that he is going to speak to the membership is accompanied with hopes and rumors that there might be a pay-out from a settlement in the lawsuit. Those members who are better informed are usually glad that he speaks, because his talks give short-term clarification of technical and political matters and tend to momentarily brush away rumors, ill perceptions and accusations of misappropriation. Given that information is communicated predominantly orally among members and between the executive and members, there is room for misunderstandings and misinterpretations. In turn, such orality gives more authority to those who are chosen to speak or appoint themselves to speak. Mr. Abrahams is well versed in speaking from a perspective comprehensible to members without undermining the complexity and contingency of the law. All these aspects give him a certain monopoly of definition, in other words: normative power. The meeting at hand was particular in that specific constellations allowed members' articulation of the most critical stance towards government I had yet heard in Khulumani meetings. I will show that, facilitated by the lawyer, the law allowed members to momentarily and temporarily emancipate from their embodied experiences by taking on a political perspective on their collective victimhood. This, in turn, offered a basis for collective action.

The apartheid litigations were still pending at the U.S. Second Circuit Court of Appeals at the time. Just a month before, September 17, 2010, three judges of the Appeals Court issued an opinion in a related case which was a blow to the international human rights community. In *Kiobel versus Shell*, the Nigerian plaintiffs allege that Shell was complicit for torture and crimes against humanity committed in the Ogoni region of Nigeria by allegedly collaborating with the military regime of Nigeria in the 1990s. The majority ruling of the Appeal Court decision

denied the liability of corporations for the violation of international law.<sup>47</sup> The plaintiffs were expected to file a petition for rehearing the case.<sup>48</sup> In short, and Mr. Abrahams communicated that to me before it was his turn to speak, he had the difficult task of conveying the bad prospects this parallel case indicated for the apartheid litigation without demoralizing members or understating the contingencies of such cases.

After members sang joyously, Charles Abrahams thus opened his address to the membership as follows: “As most of you know, I always talk about the lawsuit. Sometimes I bring good news, and sometimes I bring bad news. Or sometimes I just bring news. Now today I am going to bring just news. I am not sure whether it’s good or bad; you must decide.” He briefed the membership on the hearing of the defendants’ appeal on Judge Shira Scheindlin’s decision to allow the apartheid cases to proceed. Out of three judges, Mr. Abrahams singled out Judge Cabranes: “He is a bit of a terrible judge”. He is the very same judge who strongly argued against the liability of companies under international law in the *Kiobel versus Shell* opinion.

The first comment from the membership was from a man who thanked Mr. Abrahams for not sparing them with the facts. He said, as translated by executive member Zukiswa Puwana: “It is encouraging to see that as lawyers you are not just sitting, you are looking forward and thinking of the appeal. We are behind you, hundred percent, we pray for you.” Another man joined him: “I don’t think we have any questions. You are the lawyer, we are not”, upon which the membership laughed partly amused by the handing over of authority so bluntly but also partly uncomfortable because the lawyer’s presence should be appreciated by asking questions. It was then Sakwe Balintulo’s term to speak. He is the first named plaintiff in the Khulumani lawsuit (*Balintulo et al. vs. Daimler AG et al.*) and is always given a slot to speak.<sup>49</sup> He is old and his voice is so soft that members can hardly hear him: “It is important that we are patient. These things don’t come easily. We have to wait. Mandela waited for 27 years [in prison]”.

It was another female member who caused a small uproar. She started by tuning into the general gratefulness and then went on to ask: “My question is, I am not going to hold back: how much longer are we going to wait [for the money to be paid out]?” The reason for the uproar is not that the question would be irrelevant to members, on the contrary. It was considered rude, or brave at the very least, to ask what may question the lawyer’s efforts. He, in turn, replied in reference to the South African government’s opposition to the cases for many years. “Yes, tata Balintulo is right, we must be patient. But it’s a real question of how long still?” He said that had there been “a government that was a little bit stronger behind us, perhaps



it might have been a different outcome”. He assured the membership that “if I look at all of you and also myself: My wish and desire is that this matter should be resolved as quickly as possible” and elaborated on the two approaches they always had: the legal and the political. “And when there was enough political will not just among Khulumani but among everyone, everyone, there may have been a different outcome.”

A man responded that he had indeed not seen any political will right through the three administrations, from Mandela to Mbeki and Zuma. In the Groote Schuur Minutes of 1990<sup>9</sup>, “Tata Mandela said there isn’t going to be any reparations for victims and also no arrest for perpetrators. And then Thabo Mbeki came into power and he used our money”. The membership was, at that stage, torn between excitement and surprise. Some were visibly angry and tried to hush the speaker. It is rare to hear Nelson Mandela being attacked for not thinking for the victims. The majority of members are loyal ANC members and would evaluate successive presidents for their faithfulness to Mandela’s heritage.

The fact that Charles Abrahams, as a lawyer, uttered the possibility to critically engage with the government gave the impetus for such articulations. It was then a young representative from the rural branch of Khulumani stood up and called for action, in English:

Chief! [...]

Is there any strategy in terms of dealing or strategizing around how do we engage with the current government? [...] Because I believe in a way we need a more militant approach in terms of reparations [...] We need to sit down and strategize how do we engage *militantly* this reluctant government. [...]

A militant approach, chief!

While he spoke, members muttered and mumbled in agreement; when he finished, they applauded. Everyone was curious what the lawyer had to say in response to this youthful and well-spoken person and his quest. Such words were unheard and it clearly represented a new, second, generation of members who advocated new ways of engaging with government on the issue of reparations. This young man used to work for the government and one clearly heard it in the rhetoric he chose. Charles Abrahams responded:

I owe the chief a response. [...] I have got to be very wary about my position because first and foremost I am a lawyer. And you are asking me, and in fact all the other questions prompted, a political response. So accept my response not as a lawyer; so that you accept it was as an individual that’s been involved in these lawsuits. I just want to make that clear. [...] As you know lawyers are very restricted in what they can say and what they can’t say. [understanding murmurs in the public.][...]

Now stepping outside the realm of being a lawyer: I think you are right. We need to up the pace [applause in the public.] [...] It is not militant in the sense of being destructive but we need to

really show that we are very serious about this matter. [...] So that hopefully it is not another nine years before this matter is being resolved. [...]

An elderly man took forth the critical stance on government which had emerged, and he was loudly cheered: “I think it is up to us to put pressure on government. Whenever there are elections coming up, [the ANC] will come to the communities and pick up old people to vote for them. Let’s use that channel, let’s make our voice heard and say that we are not going to vote because they are not considering what we are saying.” He suggested active opposition against being instrumentalized for party politics. Such activity, of course, also means passivity as he proposed to abstain from voting.

The next contribution showed that, at the end of the day, it is details with a huge impact on their everyday life which members are struggling with. A man said: “People are dying without getting anything. My question is to you, Charles: is there a provision for us as plaintiffs when we die that our dependents will get something when this matter is resolved?” Mr. Abrahams was then said good-bye with songs celebrating him and Khulumani, making members dance and cheer.

In sum, upon provocation by a young member and in a move which only persons of law can successfully *perform*, Mr Abrahams proposed a shift of perspective from the legal to the political *through his own personhood*. He drew the line between the legal and the political and momentarily left the one for the other. In effect, of course, he also confirmed the demarcation of the two. He offered solidarity beyond professional advice and reasserted members that legal actions have to be paralleled with political actions.<sup>51</sup> This shift from the legal to the political realm facilitated various articulations which probed what he advocated. For members, the legal realm remained obscure in its technicality but it became possible to engage with it publicly in the meeting and make it tangible for collective political action.<sup>52</sup>

The meeting is the result of years of conscientization. No-one needs to explain to members what the apartheid regime inflicted upon them and what the effects are up to today. But the formulation of one’s own victimhood into a political victim subjectivity, i.e. a critical quest of recognition and attention from the former liberation movements and the current government, is a different thing. It could only come about by an emancipation of one’s own victim subjectivity from the official discourse that clashes with personal Party solidarity, with the search for reliable leadership, with hopes long upheld, and, most importantly, from one’s bodily sedimented victimhood.

I suggest that a legal process offered a crucial possibility for members to momentarily see their elected leaders in a different light. In that meeting, the legal became tangible and personally meaningful *in the shape* of the political and started to form the basis for political collective action. Members' victim subjectivities successfully became politicized in this safe environment of a public realm shaped by familiar solidarity.

The condition for the possibility of articulating one's victimhood politically is the (momentary) emancipation from the bodily dimension of victimhood. Hence, bodily experiences are not only the basis for the formation of the political which Mr. Phelane's account shows to a lower degree and Ms Mabilia's to a bigger degree, it is also the dimension which requires emancipation from in order to be politically effective – the failure of which I showed with the account on Ms Mabasa where her sedimented knowledge of her victimhood emerged in all its rawness.

## **Conclusion**

In May 2011, the Department of Justice (DOJ) gazetted regulations for assistance to victims in respect of basic education and higher education and in relation to medical benefits for apartheid-era victims and their dependents, and invited responses. The regulations indicated that only those some 21'000 victims who were identified by the TRC were eligible. The President's Fund from which the payments should be sourced has accumulated almost R1 billion since its establishment in the mid-1990s.<sup>31</sup> Civil society was appalled by the proposal. For years, they had tried to be part of the decision how the Fund should contribute to the reconstruction of the country, pushing the state to finally release the money, and suggested community reparations and benefits to *all* victims – beyond the TRC's list. They criticized the "closed list policy" and demanded that the current process be stopped until "meaningful consultation are carried out with victims and interested parties".<sup>32</sup> It was a set-back for civil society after years of closed or public meetings with the DOJ, the President and the TRC Unit and what was believed to be small steps towards a more inclusive notion of victimhood. The DOJ had, notwithstanding the increased attention on its handling of post-TRC matters, decided to apply the officially recognized list of the TRC. It thus decided against the database of Khulumani Support Group or a follow-up of the TRC to have more victims testify.

The list proves persistent. Government had, 17 years ago as a result of negotiations and by way of the TRC Act of 1995, decided on a model of dealing with the past. I showed above that it was, in effect, a form of governance which leaves traces and is not easily revised. But what does this form of governance mean beyond a list and inclusion and exclusion for public

benefits? What is at stake here, I suggest, is what post-apartheid South Africa is based on: its myth of having overcome the cruel and unjust past. The list is in essence a list of injustices redressed and abolished. By defining a category of victims and paying out reparations to all that fall into the category, Government does not only provide resources to a select few; it attempts to define and provide the public good of a post-conflict political order. This governing process was at first a typical example of an interventionist measure. As many interventionist measures, it did not fully reach its aim, but remains hotly contested and challenged. What is more, it influenced the formation of political subjectivities. An interventionist measure thus triggered the emergence of other, less interventionist forms of governance. We can only understand the trajectory of governance if we take both into account.

In this chapter, I first traced the emergence of a particular victim subject position in the course of the TRC process and then showed how this interventionist measure was objected and resisted in legal actions, paralleled by increasingly organized forms of contacts and activities among apartheid-era victims. I then analyzed the scope and limits of forms of governance “from below”, based on shared personal experiences rendered politically relevant by an interventionist categorisation. For victims’ agency to make a political victim subjectivity effective in their everyday lives, I emphasized *experience*, or in other words: *habit memories*, as one of the driving factors. Is the persistence of incorporated knowledge a source of resistance against governance? I argued that the sedimentation of *habit memories* is not only the source of agency but also what puts limits to agency and a successful political articulation. Especially so when the body is, in various ways, damaged. The outcome is hence contingent on the bodily dimension of victimhood and precisely because of the bodily dimension of victimhood – or of being human. I hence suggest to expand any analysis of governance and agency with the embodiment of experiences.

To include embodiment of experiences in our analysis of governing processes would also mean to carefully re-think the effects of governance measures in terms of outreach into social space. It would mean to ask for the effects of governing processes on the possibilities of sociability. In which ways do governing processes – through their discursive formation of differentiation – impact on the possibilities of sociability? In the case at hand it is important to differentiate between the effects of norms established through processes of governance and the nonnegotiable boundaries in communicating injuries to others. In the article, I followed the line of argument that the bodily dimension of victimhood dissipates at the advantage of politically more applicable forms of articulating victimhood. Does this formalization of articulation towards dominant forms of victimhood result in a distancing from one’s own experience or is

it simple a learned way which may bear the possibility of shifts in subjectivity away from overwhelmingly sentient victimhood?

Governing processes open up possibilities of political action, but they also impose constraints on social actors to emancipate from the cementation of definitions and subject positions.<sup>35</sup> I tried to show that experience in the shape of sedimented knowledge is the source of any political articulation. However, the developments in courts and the political reactions to legal actions suggest that the political often emancipates, moves beyond and develops a logic of its own. This, in turn, is effective in everyday life in contingent ways and forces the cementation of distanced subject position or fosters the articulation of new forms of political subjectivities. This process is at the heart of a conceptualizing of governance which builds on the relationship between the individual and the political.

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Despite the rapidly growing number of truth commissions (more than 30 since the 1980s) and other so-called transitional instruments, the institutions have so far been promoted on weak evidence for their success. Governments, commissioners (especially of the “successful” South African Truth Commission but also of the earlier models in Chile and Argentina), and the global transitional justice think-tank have long turned into major agents in shaping the transitions from authoritarian to democratic rule by advocating what has grown into a supposedly universally applicable model of transition (Scheuzger 2009). However, scholars and practitioners have also grown more critical as to the positive effects of a truth commission and point out the limitations of its mandate, the underestimated time aspect of reconciliation and the normative approach to truth. As to *how* to “evaluate”, though, there seems to be a striking loss (for an exceptional attempt, see Chapman and Merwe 2008).

I conducted field research in South Africa in 2006 (6 months), and, for my doctoral thesis, in 2009 (10 months) and 2010 (3 months). I worked with the South African apartheid-era victims organization Khulumani Support Group first as a volunteer and later as PhD candidate with occasional volunteering for the organization. Throughout, I shared many members’ everyday lives and witnessed their involvement in the organization, prominently in the Western Cape but also in the former Transkei and the provinces of Gauteng, Mpumalanga and KwaZulu Natal.

Connerton distinguishes three types of memory: personal, cognitive and habitual. The third category is particularly under-researched: habit memory is the “capacity to reproduce a certain performance” (Connerton 1989, p. 22). We cannot necessarily recall the moment when we acquired a particular piece of knowledge. What characterizes this kind of memory is its recognition and demonstration via performance. In other words: we do it the way we have always done it after a phase of (cognitive) learning. Examples are riding a bike or swimming. For the acquisition of a technique such as swimming and the notion of learned habit and habitus, see Mauss 1934 and also Bourdieu 1977; and for a scholarship sensitive to sensory cognition, see Stoller 1997.

See for instance Bozzoli 1998, Norval 2001, Wilson 2001, Posel and Simpson 2003, Doxader and Villavicencio 2004, Cole 2007.

According to the Act, victims are “(a) persons who, individually or together with one or more persons, suffered harm in the form of physical or mental injury, emotional suffering, pecuniary loss or a substantial impairment of human rights (i) as a result of a gross violation of human rights; or (ii) as a result of an act associated with a political objective for which amnesty has been granted; (b) persons who, individually or together with one or more persons, suffered harm in the form of physical or mental injury, emotional suffering, pecuniary loss or a substantial impairment of human rights, as a result of such person intervening to assist persons contemplated in

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paragraph (a) who were in distress or to prevent victimization of such persons; and (c) such relatives or dependants of victims as may be prescribed” (The Promotion of National Unity and Reconciliation Act 34 of 1995, Chapter 1 (1)).

<sup>7</sup> According to the Act, a gross human rights violation is a violation of human rights “through (a) the killing, abduction, torture or severe ill treatment on any person; or (b) any attempt, conspiracy, incitement, instigation, command or procurement to commit an act referred to in paragraph (a), which emanated from conflicts of the past and which was committed during the period 1 March 1960 and 10 May 1994 within or outside the Republic, and the commission of which was advised, planned, directed, commanded or ordered, by any person acting with a political motive” (The Promotion of National Unity and Reconciliation Act of 1995, Chapter 1(1); as amended in Act 104 of 1996, section 21(a)).

<sup>8</sup> In his classic work on violence, Galtung (1969) differentiates between direct and structural violence, of which the latter has no identifiable actor: “Violence is built into the structure and shows up as unequal power and consequently as unequal life chances” (1969, p. 171). It is the physical aspect of direct violence, often a violation of political right such as murder, torture, maiming and wounding, which are more likely to attract our attention (Nordstrom 2004). Economic, social, and cultural rights are widely neglected in transitional justice processes around the world (Schmid 2009).

<sup>9</sup> See Buur (1999) for a detailed account on how the Commission eventually settled on its decision to not recognize a victim without an act of violence and a perpetrator. In the South African case, according to Cronin (1999), the systemic would include “mass forced removals, the Pass Laws, the Bantustans, and the whole apparatus of decades-long territorial ‘ethnic cleansing’, all of which resulted in mass malnutrition, high levels of infant mortality and low life expectancy” (1999, p. 6).

<sup>10</sup> This is in line with what Wilson (1997) argues for human rights discourse more general: subjective meanings are sacrificed for the objective legal facts because of the discourse’s reliance on particular and decontextualized events.

<sup>11</sup> The TRC received statements from 21’290 persons of whom “more than 19’050 persons were found to be victims of a gross violation of human rights”. In addition, 2’975 persons were identified as victims during the amnesty process (Truth and Reconciliation Commission South Africa 2003: vol.7, Foreword, p.1). The application relied on definitions which the commissioners partly adjusted in the course of their work (Buur 1999, Wilson 2001, Ross 2003). For instance, a Special Hearing on Women was set up upon the intervention of women’s groups and activists (Goldblatt and Meintjes 1996). See also Goldblatt and Meintjes (1997) on how the TRC dealt with sexual violence against women and Ross (2003) on the emergence of “women” as a category. Aronson (2011) gives a detailed account on how disappeared and missing persons were defined by the Act and the Commission’s work. Also what constituted a crime committed with a political objective was contested and the Commission, in effect and to the dissatisfaction of many, focused on whether the act was executed upon the order of, or on behalf of, the state or a political organization (Bhargava 2002).

<sup>12</sup> For a critique of the lack of historical perspective in the Commission’s work and Final Report, see also Bonner and Nieftagodien (2003).

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<sup>13</sup> Only few authors touch on the question of how the Commission created of a particular victim subject position and the effects on people's lives in the aftermath of the Commission (Kaminer *et al.* 2001, Humphrey 2003, Posel and Simpson 2003, Colvin 2004a, Madlingozi 2007, Gunn and Krwala 2008, Backer 2010).

<sup>14</sup> See Ross 2003, p. 172 and 2002, p. 163 for a listing of reasons why people decided not to testify.

<sup>15</sup> See also Norval, this volume.

<sup>16</sup> Khulumani's homepage can be accessed here: <http://khulumani.net>. Roughly a fifth of the membership testified before the TRC and is thus officially recognized as apartheid-era victims. Most members are in their 50s or older. The majority is unemployed and lives in the townships across South Africa. Only a fraction of Khulumani's membership has actually sustained injuries from the narrowly defined violations as promoted by the TRC.

<sup>17</sup> Of course, speaking about effects is always a reference to the cause and to perpetration and guilt. Arguments of reparation necessarily oscillate between cause and effect. Depending on the context and the addressee, the public face of Khulumani emphasizes either cause or effect. For instance, in its damage complaint against corporations, the cause and the moments of violation are pivotal for the allegation that the defendant companies aided and abetted the apartheid regime in the perpetration of human rights. For the political advocacy work around the lawsuit, in contrast, the notion of effects on the today is much more prominent.

<sup>18</sup> As such, Khulumani Support Group is part of a wider movement in South Africa which demands the fulfilment of social and economic rights: Treatment Action Campaign (TAC), Abahlali baseMjondolo, a shack dweller movement for public housing in Durban, Pietermaritzburg und Cape Town, Symphony Way in Cape Town (Symphony Way Pavement Dwellers 2011), for instance.

<sup>19</sup> *Azanian People's Organization (AZAPO) and Others v. The President of the Republic of South Africa and Others*; 1996 (4) SA 671, Constitutional Court of South Africa. The amnesty provision of the Interim Constitution and the challenge to it has been topic of various publications (Sarkin-Hughes 2004, Van Marle 2007, Sarkin 2008).

<sup>20</sup> The Commission, in its Final Report, also argued for concessions in a country of transition by acknowledging that perpetrators were the primary source of information. It saw the promise of amnesty as crucial for perpetrators to come forward to unveil and reveal information (Truth and Reconciliation Commission South Africa 1998: vol.1, ch.5).

<sup>21</sup> "Prosecuting Policy and Directives Relating to Prosecution of Offenses Emanating from Conflicts of the Past and Which Were Committed on or Before 11 May 1994", promulgated December 1, 2005, Appendix A. For a detailed outline of the amendments and its first implementation before they were struck down by the High Court in Pretoria, see Mallinder 2009, pp. 115–127.

<sup>22</sup> *Nkadimeng and Others v National Director of Public Prosecutions and Others* (32709/07) (2008) ZAGPHC 422 (<http://www.saflii.org/cgi-bin/disp.pl?file=za/cases/ZAGPHC/2008/422.html&query=nkadimeng>; last visited April 7, 2014). The representative organizations were Khulumani Support Group, the International Center for Transitional Justice (ICTJ) and the Centre for the Study of Violence and Reconciliation (CSVr).

<sup>23</sup> *Thembisile Phumelele Nkadimeng and Others v National Director of Public Prosecutors and Others*; case no.: 32709/07 (2008); date: December 12, 2008; paragraph 15.4.3.1.

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<sup>28</sup> The SACTJ comprises the Khulumani Support Group, CSVr, ICTJ, the South African History Archives (SAHA), the Human Rights Media Centre (HRMC), the Institute for Justice and Reconciliation (IJR), the Freedom of Expression Institute (FRI) and the Trauma Centre for Victims of Torture and Trauma.

<sup>29</sup> *CSVr and Others v President of the Republic of South Africa and Others*; case no.: 15320/09 (2009), date: April 29, 2009; ZAGPPHC (<http://www.saflii.org/cgi-bin/disp.pl?file=za/cases/ZAGPPHC/2009/35.html&query=%20csvr>; last visited April 7, 2014).

<sup>30</sup> Under section 84(2)(j) of the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996).

<sup>31</sup> See paragraph 7.4.3 and 8 in *CSVr and Others v President of the Republic of South Africa and Others*; case no: 15320/09 (2009); date April 28, 2009; North Gauteng Court, Pretoria. One of the pardon applicants, Ryan Albutt, who is a member of the right-wing Afrikaner Weerstandsbeweging, the President and the Minister of Justice asked the Constitutional Court to grant leave to appeal against the order of the High Court. In February 2010, the Constitutional Court at the same time granted leave to appeal and dismissed the appeal.

<sup>32</sup> In the original Khulumani complaint, 23 defendant multinationals and banks span six different countries and involve six different industries. The alleged distinct violations as formulated in the complaints are close to those the TRC recognized as gross violations of human rights: extrajudicial killing, torture, detention and cruel treatment, and, in the Ntsebeza case, forced removals.

<sup>33</sup> The ATS gives jurisdiction to US District Courts for any civil action by an alien for a tort which was committed in violation of the law of nations or a treaty of the United States, whether it arose in the US or abroad. U.S. District Courts are trial courts and part of the federal court system. They have jurisdiction to hear federal cases on both civil and criminal matters. - The Alien Tort Statute dates back to 1789 when George Washington signed legislation for an anti-piracy bill (28 U.S.C. §1350). The Statute lay practically dormant for almost 200 years but it has been the basis of some hundred lawsuits since 1980. In the mid-1990s, many Holocaust-related litigations gave visibility to the rapidly growing and worldwide phenomenon that the ATS was hoped to bring to justice specifically those who commit human rights violations. The Alien Tort Statute has been discussed at length by numerous authors and legal experts and is seen, on the one extreme, as the ultimate expression of US legal imperialism or, on the other side, is heralded as the last option that potentially establishes that private companies can be held accountable for breaches of international law and international human rights standards (Mattei 2003, Shamir 2004, Stephens *et al.* 2008).

<sup>30</sup> The plaintiffs' attorneys filed the Second Amended Complaints according to Judge Scheindlin's order (see also Kesselring (2012a)). The defendants then filed yet another appeal to dismiss. The Appeal Court heard the appeal on January, 15 2010. In the meantime, a case against Royal Dutch Petroleum (*Kiobel and Others v Royal Dutch Petroleum Company and Others*) took the lead in ATS matters. It came as a shock to the international human rights movements when the Second Circuit Court of Appeals ruled on September 17, 2010 that companies could not be held liable for violations of international human rights law. Given that the application of the ATS became the core issue, it halted all the other cases filed under the provisions of the ATS.

<sup>31</sup> See my PhD thesis (2012b) for a detailed account on the opposition and support of the apartheid litigations over the years.

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<sup>32</sup> The Maduna Declaration can be accessed on the website of the South African Government: <http://www.gov.za/speeches/2003/03073010461001.htm> (last visited April 7, 2014).

<sup>33</sup> Minister of Justice Jeff Radebe communicated to the Court that it was «now of the view that this Court is an appropriate forum to hear the remaining claims of aiding and abetting in violation of international law» and also offered Government's assistance to mediate a probable settlement. This shift was not reiterated publicly by his Ministry. However, it did not submit any statement in response to the Appeal Court's quest for advice for the hearing on the defendants' appeal to dismiss in January 2010. The letter is available on the Khulumani website: <http://www.khulumani.net/khulumani/documents/file/12-min.justice-jeff-radebe-letter-to-us-court-2009.html> (last visited April 7, 2014).

<sup>34</sup> I do not call this a political victimhood. However, this should not undermine the fact that victimhood is always formed as a consequence of the political and the social.

<sup>35</sup> In October 2010, I spent two days with the women and mainly wanted to understand their concerns and activities in comparison to other areas than where I have worked extensively and over periods of months and years. At the end of the first day, I was, by surprise and against my intention, expected to interview some of the women who seem to have come forward voluntarily. As this is something I would only do with people I have met several times and after having ensured that I could come back anytime to check on them, I suggested a group interview. I thought it may divert the potential heaviness in such "story-telling" conversations. Simphiwe Shabalala, a volunteer and youth activist for Khulumani, translated from seSotho to English. – For more on my methodology, see Kesselring (2012b).

<sup>36</sup> In 1990, two massacres occurred in Sebokeng, in July and September. In the early 1990, almost uncountable massacres took place in the then Transvaal (today Gauteng) region such as the Boipatong massacre on June 17, 1992 (when over 100 people were massacred while asleep in their homes during a raid by IFP hostel dwellers). Often there were caused by attacks by hostel dwellers on township communities and vice-versa (see Bonner and Nieftagodien (2003))

<sup>37</sup> The Final Report of the TRC (1998: vol.3, ch.6) interpreted the violence in party political terms: The increase in violence coincided with the establishment of Inkatha Freedom Party as a national political party in July 1990. In competition to the ANC and UDF, the IFP attempted to develop a political base in the Transvaal. For an alternative and much more nuanced and historical reading, see Bonner and Nieftagodien (Bonner and Nieftagodien 2003).

<sup>38</sup> Another women in the round mentioned that the community would not believe that their husbands died a political death and accused their wife they had killed or hid their husbands to get their money. The widows also mentioned accusations of witchcraft to me. For what it means to be a "political widow" in today South Africa, see for instance Ramphele (1997).

<sup>39</sup> She probably referred to another massacre in Sebokeng which gained considerably more public attention, the Nangalembe Night Vigil massacre of January 1991, when 47 mourners were killed at the night vigil of the funeral of a comrade. Then President Mandela unveiled the monument on 21 March 1996.

<sup>40</sup> Ms Mabaso's "case" may be taken up by an advocacy group (or by a researcher like myself) and frame the story as political action. She herself, however, can only with utmost difficulties learn how to speak discursively

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more effective; she needs facilitation which may or may not bear the chance for a subjectively positive shift of her victim subjectivity.

<sup>41</sup> For Special Pension, those South Africans qualify who were prevented from providing for a pension because they sacrificed more than five years of their lives for the liberation struggle in their full-time service for a liberation movements before 1990. Alternatively, the person could also have been imprisoned or detained for any offence committed with a political objective. According to the latest Amendment to the Act no. 69 of 1996 (2008) which was enacted to give effect to Section 189 of the Constitution, the applicant must not yet have been 30 years or older on December 1, 1996.

<sup>42</sup> On April 15, 2003, Mbeki announced the once-off payment of R30 000 as individual reparations (Statement by President Mbeki to the National House of Parliament and the Nation, at the Tabling of the Report of the Truth and Reconciliation Commission. Issued by the Office of the Presidency, 15 April 2003). Conversely, the TRC recommended that each victim of a gross human rights violation as defined by the TRC should receive a financial grant of between 17 000 to 23 000 rand per year for six years.

<sup>43</sup> See Madlingozi (2007) for a slightly different use of such victim subject position. “Bad victims”, according to him, are those who claim reparations, campaign for social justice and, as such, “expose the poverty of this elite compromise, which involves maintaining the ill-gotten gains provided that a section of the new elite is placed in positions of economic power and privilege” (2007, p. 12). “Good victims” are those who belong to the new elite, have been well connected as members of liberation movements, profit of the new access to wealth in post-1994 and generally can afford not to demand reparations. Madlingozi thus places the emphasis in his distinction between those “mostly ordinary and often poor township residents” (also those who, according to Madlingozi, and Fullard and Rousseau (2004) made up the bulk of those 21’000 who testified to the TRC) who demand reparations and a new elite which holds high positions in government and corporate positions due to their close ties to the former liberation movements and the today ruling party ANC. For the former, he takes the example of Khulumani Support Group and treats it as a homogenous group.

<sup>44</sup> Chris Hani became involved in anti apartheid protests, joined the military wing of the ANC, Umkhonto we Sizwe, went into exile 1962 and later became the leader of the South African Communist Party and head of Umkhonto we Sizwe. He was assassinated in April 1993.

<sup>45</sup> They are a remnant and a continuum of meetings held at the Trauma Centre which offered counseling to ex-political prisoners and survivors of torture in the post-TRC years. For a detailed analysis of what was Khulumani Western Cape then, see Colvin 2004a, 2004b.

<sup>46</sup> South African attorney Charles Abrahams is partner in a small law firm called Abrahams&Kiewitz Attorneys in Belleville, Western Cape just outside Cape Town, which specializes on public interest and human rights cases. He finished his Master degree in International Law at the University of Cape Town and wrote his thesis on the question of the apartheid debt. Jubilee South Africa then used his research for its campaign on the matter and he became Jubilee’s legal advisor. Later, he was sanctioned by Khulumani Support Group to be the South Africa attorney for the potential apartheid litigation, together with American attorney Mr Michael Hausfeld as their US counterpart with his expertise of the Alien Tort Statute. Abrahams&Kiewitz worked on South African cases against Anglo Platinum (re displacement), AngloGold Ashanti (re silicosis), Gencor (re asbestosis), and bread companies testing the instrument of class actions in South Africa, amongst others.

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<sup>47</sup> More specifically, the majority decision ruled that the Alien Tort Statute cannot be used to sue corporations for violations of international law because customary international law only confers jurisdiction over natural persons. One of the three judges, Pierre N. Leval wrote a strong dissent of the majority opinion – noting that the majority’s (Chief Justice Dennis Jacobs and José A. Cabranes) reasoning would be a “substantial blow to international law and its undertaking to protect fundamental human rights” ([http://www.ca2.uscourts.gov/decisions/isysquery/3b6c7a2e-4d70-4306-973e-d0ed3eff5b40/1/doc/06-4800-cv\\_opn.pdf](http://www.ca2.uscourts.gov/decisions/isysquery/3b6c7a2e-4d70-4306-973e-d0ed3eff5b40/1/doc/06-4800-cv_opn.pdf); last visited April 7, 2014).

<sup>48</sup> The plaintiffs filed a petition for rehearing the case but the Court of Appeals left intact the original ruling with a 5-5 split on February 4, 2011. The plaintiffs then filed their certiorari petition at the Supreme Court on June 6, 2011 which was granted on October 17. The hearing took place on February 28, 2012 and on March 3, the Court ordered that the case should be re-heard and invited briefs about the issue of extraterritorial application of the ATS. On April 17, 2013, the Court’s majority (with three concurring opinions) found that there is a presumption against the extraterritorial application. The presumption can be overcome when the matter “touches and concerns” the US with “sufficient force”. The case was originally consolidated with *Wiwa v. Royal Dutch Petroleum Co.* in which Ken Wiwa, son of Nigerian activist and writer Ken Saro-Wiwa, executed in 1995, and other members of the “Movement for the Survival of the Ogoni People” sued Shell with similar allegations as formulated in the *Kiobel versus Shell* case. The latter was settled out of court in 2009.

<sup>49</sup> Sakwe Balintulo stands as personal representative for his late brother Sabe Balintulo who was shot dead by the South Africa Police on March 15, 1973 along with fifteen others.

<sup>50</sup> The Groote Schuur Minute refers to the conclusion of negotiations between the unbanned ANC and the National Party Government signed in Cape Town on May 4, 1990, three months after the release of Nelson Mandela. The negotiations were about the release of the hundreds of lower ranking political prisoners which were still held in South African prisons and the immunity from prosecution of political exiles returning to South Africa. Together with the conclusion of negotiations in Pretoria in August 1990 (the Pretoria Minute), they led to the passing of the Indemnity Act 1990 which empowered the President to grant indemnity from prosecution “either unconditionally or on the conditions he may deem fit”. The issue of amnesty for security forces of the National Party regime and the release of political prisoners was later a central point of disagreement during the CODESA talks.

<sup>51</sup> It is important to note that he obviously thought it a moment conducive to such actions. There were also times when the cautioned members from going off marching to the parliament. It was when he considered too much visibility of the political and social grounding of the lawsuit as potentially harming legal success.

<sup>52</sup> It was also the first time that the lawyer so openly and unambiguously suggested an out-of-court settlement as the only way forward. The first out of court settlement overture from the defendant companies came from General Motors in March 2011. This offer is widely put in the context of GM’s insolvency and the US Courts urging it to settle pending cases. Although, due to its liquidation status, GM was no longer part of the main legal apartheid action, Khulumani’s leading lawyer Michael Hausfeld managed to negotiate a settlement in February 2012. The settlement, US\$1.5 million worth of shares of the company, was between Motors Liquidation Company (formerly known as General Motors Corporations), General Unsecured Creditors (GUC) Trust and the South African claimants. Although the Court’s order does not require an admission of

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liability by GM and the amount is insignificantly small per victim, the attorney and the plaintiffs judged it nonetheless as a step towards corporate accountability (see also Kesselring 2012a).

<sup>33</sup> The President's Fund was established for the purpose of supporting victims of gross human rights violations during apartheid. It was part of the TRC's recommendations to the President (Truth and Reconciliation Commission South Africa 2003, pp. vol.6, section 2, ch.5). Many states such as the Swiss and the German contributed to the Fund. No clear policy of how the money should be used had been developed up until the gazetting of the regulations.

<sup>34</sup> The statement of the South African Coalition for Transitional Justice can be accessed on: <http://khulumani.net/reparations/government/item/499-no-cohesion-without-reparations-%E2%80%93-the-struggle-for-inclusive-and-comprehensive-reparations-a-view-from-the-south-african-coalition-for-transitional-justice.html> (last visited April 7, 2014).

<sup>35</sup> For a stronger emphasis on the role of the law and the legal process in the formation of victim subjectivities, see my PhD dissertation (2012b).