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# Civil Society as a Transitional Justice Litigation Actor in Africa

*Khanyisela Moyo**

## Abstract

This article examines the input into the transitional justice discourse by civil society as a litigation actor in postcolonial Africa. It does not analyse all civil society litigation in transitional contexts in Africa, but rather uses some examples to point to different kinds of contributions. From the examples provided, one can affirm that civil society organisations (CSOs) are significant transitional justice litigation actors. This relates to civil and criminal litigation. With regard to criminal litigation, CSOs participate in formal processes in several ways, including pointing out due process flaws and turning over to the prosecution evidence of violations that they would have gathered during the conflict. Also, in the context of impunity and inadequate government policies, some CSOs have filled the accountability gap by resorting to civil suits and regional, exported and international litigation. These examples may offer useful insights into contexts where transitional justice initiatives are undertaken where there is no transition. In addition, the experiences may question whether compensation to victims of state-orchestrated violations of human rights which is achieved through non-governmental organisations' initiatives constitutes transitional justice.

**Keywords:** Transitional justice, civil society, Africa, litigation, accountability, non-governmental organisations

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## 1. Introduction

As part of the general international legal duty to effectively protect human rights, states have to prevent human rights violations, provide domestic remedies for violations, investigate allegations, prosecute suspects, and punish those found guilty. In the passage from armed conflict or authoritarianism, this right to redress is emphasised as part of a process of democratisation and reconciliation and usually necessitates four distinct transitional justice mechanisms: apologies, investigations, compensation, and prosecutions.

Early transitional justice scholarship and practice focused on the role of the state in redressing past human rights violations. This concentration on the role of the state can be attributed to transitional justice's development from Latin American labours in repairing the atrocities of authoritarian states. The general idea was that powerful states with powerful institutions should assume the responsibility (Cismas 2015). Nowadays, transitional justice is implemented in contexts where there are weak and fragile states with non-state actors featuring as not only victims but also as perpetrators (Hansen 2017). This has led to increased engagement with the role of actors other than the state.

On this note, the 2017 report of the United Nations (UN) Special Rapporteur on the promotion of truth, justice, reparations and guarantees of non-recurrence identifies civil society organisations (CSOs) as transitional justice stakeholders (United Nations 2017). The UN Secretary General has also identified civil society as transitional justice actors (United Nations 2010). Furthermore, the African Union (AU) Transitional Justice policy also states that civil society has a role in transitional justice (African Union 2019). Indeed, CSOs around the world often play significant roles in transitional justice processes, including advocacy, capacity building and facilitating victim participation (Backer 2003; Brahm 2007). Also, in the context of impunity and inadequate government policies, some CSOs have resorted to domestic, international

and exported litigation. Thus, scholarly interest in the role of civil society in transitional justice processes globally has emerged.

Existing scholarship has scrutinised the role of CSOs in the politics of transitional justice and in the international propagation of justice standards and institutions (Finnemore and Sikkink 1998). There are also case studies and theoretical analyses of the relationship between civil society, the state and transitional justice (Hansen and Sriram 2015; Doyle 2017; Kirabira 2021). Furthermore, Teitel and Iavor Rangelov have examined the role of global civil society in transitional justice by contextualising the wide range of actors, discourses and structures which make up the transitional justice discipline (Rangelov and Teitel 2011). By distinction, this contribution has an African regional focus. It highlights the complexities of accounting for the past and seeking redress for human rights violations by providing examples and an analysis of the relevant efforts of CSOs in postcolonial Africa.

Following the introduction, the second part of this article provides a theoretical framework for understanding the role of civil society as transitional justice litigation actors. The third part of the article provides examples of relevant efforts by African CSOs. This part begins by providing an account of domestic litigation initiatives by African CSOs. It then gives examples of relevant regional litigation followed by illustrations of exported jurisdiction and international criminal tribunals. The final part of the article offers concluding observations.

## 2. Theoretical consideration of the role of civil society, litigation and transitional justice

### 2.1 Conceptualising transitional justice CSOs

Notions of a 'civil society' can be traced back to Aristotle who identified three aspects: an associational life, the public sphere and the good society (Ehrenberg 2017; Kora 2010). First, the associational life model refers to groups that are independent of the market and the state. These associations can be either anti-government or engage the government as

they intervene between the state and the public (Crocker 1998; Ignatieff 1998). Second, the public sphere model refers to the space outside the political arena for publicly deliberating on issues of common concern. Last, the good society model is associated with 'anti-government' activity by groups and individuals as they advance their own notions of good (Tockeville 2002).

The article uses the term 'civil society' to refer to local and international civic associations and NGOs that work on transitional justice issues. It is cognisant of the fact that CSOs that engage with transitional justice are not just human rights organisations. They also include victim and survivor groups, humanitarian aid organisations, development NGOs, religious groups, medical personnel, and conflict transformation groups. However, to limit the scope of the article, examples are drawn only from the CSOs that are concerned with human rights and justice issues. These include both experts and survivor groups (Haslam 2011).

The associational model is explicitly captured in this definition, but the other ideas are not excluded either. The public sphere model can be gleaned from the kind of activities from which CSOs derive their legitimacy, that is, facilitation of the participation of victims and citizens in the design and implementation of transitional justice mechanisms. This is not to say that the populace usually has greater control over transitional justice and it does not necessarily follow that CSO advocacy always mirrors victims' positions.

Transitional justice CSOs are mostly professional organisations. As Tshepo Madlingozi aptly put it:

> The transitional justice entrepreneur gets to be the speaker or representative on behalf of victims, not because the latter invited and gave her a mandate but because the entrepreneur sought the victim out, categorized her, defined her, theorized her, packaged her, and disseminated her on the world stage (Madlingozi 2010:210–211).

Thus, the third notion of civil society as the good society becomes important as it contextualises the role of transitional justice CSOs. A simplistic view would be to state that CSOs contribute to the pursuit of 'good' goals, as their quest is to move the transitional state from either armed conflict/ authoritarianism to a just and peaceful democracy. Yet, these associations are diverse, and this can be attributed to the 'irreconcilable goals' of transitional justice (Leebaw 2008). CSOs have also sometimes been labelled the "evil" society, which is an agent of the imperialist (Hansen and Sriram 2015).

Nonetheless, the relevant scholarship has ranged from those who state that CSOs are recipients of transnational norms to those who believe that CSOs are not merely passive recipients of international norms. CSOs also transform those norms, to either make them fit their own agendas or to influence domestic governments and the international community (Finnemore and Sikkink 1998). It is also now recognised that the relationship between CSOs and governments is often symbiotic (Hearn 2001; Lewis 2002). In particular, CSOs can increase the legitimacy of state-led transitional justice mechanisms and the transitioning state by mobilising the grassroots. At the same time, CSOs themselves can be strengthened by engaging in transitional justice activities (Duthie 2009:15–18).

### 2.2 Litigation and transitional justice

> In transitional societies shifting from authoritarian rule to democratic governance, litigation can help new constitutional principles to take root, as well as increase public awareness of human rights and embolden those with legal claims to come forward (Hershkoff and McCutcheron 2000:283).

Epistemologically, litigation is the means by which the state is the primary enforcer of citizens' legal rights and duties. Those rights and duties are posited in the law which is enacted by parliament and interpreted by judges. The law's actuality presupposes the prospect of disputes between individuals, non-state actors and individuals, or between the state and

the citizens or non-state actors. The judiciary imposes the state's will on conflicting parties by resolving disputes and dispensing justice using the posited law. Citizens and non-state actors residing in a state usually comply with court orders, which are the product of litigation, for prudential and moral reasons (Wacks 2020:321). According to Raymond Wacks, the moral foundation for obeying the law may come from a number of fronts. Moral reasons include perceptions that the legal and political structure is fair and just, consent to be a member of that state, consequential notions that widespread disobedience to the law may lead to anarchy, and gratitude for the state's benevolence (Wacks 2020:321–323).

The above is largely accurate in ordinary times. In the context of armed conflict or authoritarianism, however, the state's authority to generate, develop or restrict incidents in a dispute is not certain. Thus, transitional justice is implemented against the backdrop of a legal and political system largely perceived by the majority as having been unjust, authoritarian, and possessing laws that do not appear to promote the common good and which are thus unworthy of respect. In that context, Ruti Teitel notes that the arduous problem of building and restoring trust in the legal system is contingent on transitional justice (Teitel 2005: 861).

### 2.3 Civil society, litigation and transitional justice

Litigation which can refer to both prosecutions and civil suits is part of the transitional justice package which is aimed at combating impunity, restoring the rule of law and the domestic socialisation of human rights norms. Obviously, CSOs are limited in this regard, as unlike the state they do not have the primary right to prosecute. Private prosecutions are an exception and not the norm.

As is the case with many of the approaches to transitional justice, the type of civil society litigation depends on the nature of the transition,

identity of the perpetrators, and the vibrancy of the CSOs. In this regard, it is helpful to re-state Jeremy Sarkin's view that:

> The type of justice that is pursued is dependent on the type of transition of which there are three types: overthrow, reform and compromise (Sarkin 1999:253).

For example (and as will be explored in detail in the section below), in a situation where the previous regime has been forcefully removed, the prosecution model is likely. In such contexts, CSOs could be involved in providing to the prosecution information that they have been recording and ensuring that the transitional regime protects the due process rights of the alleged perpetrators.

Nonetheless, in a situation of reform where inquiries may predominate, CSOs are often involved in attempts at obtaining compensation for victims of the state's abuses and compelling the state to share information. And, in a situation of compromise, where truth commissions and other restorative justice models may be preferred, civil society may complement inclusive governments' truth-seeking models, or engage in transnational litigation for those issues which cannot be dealt with by domestic truth-seeking measures.

## 3. The practice in Africa

### 3.1 Domestic initiatives

Domestic-level CSO litigation has been varied and, as one might expect, context specific. For example, in Ethiopia following the overthrow of the Mengistu regime and the adoption of the prosecution model in 1992, domestic CSOs were weak and contributed very little in terms of providing information to the State Prosecutor (Sarkin 1999:258). However, international organisations such as Human Rights Watch had documented atrocities committed by the Haile Selassie and Mengistu regimes (Human Rights Watch 1991). Quite significantly, both domestic and international CSOs were useful in highlighting the trials' failure to comply with relevant human rights norms, including due process rights

of the accused. They were also critical of the use of capital punishment (Human Rights Watch 1994; Mayfield 1995).

Arguably, the 'transitional justice' trials strengthened domestic CSOs. As Jeffery Clark aptly put it:

> Indeed, by the time the Derg collapsed in 1991, virtually all civil society entities had been co-opted or barred from meaningful existence by the regime. ... By any measurement, the progress realized since 1991 is impressive. Civil society is increasingly vibrant and relevant to the nation's political and economic revitalization (Clark 2000:1).

On a similar note, Paul Gready has stated that prior to the 1994 genocide in Rwanda, domestic CSOs had no experience in influencing policy (Gready 2010). The post-genocide Gacaca trials created a window of opportunity for CSOs to carry out new tasks and "forge unfamiliar relationships" with the government (Gready 2010). In particular, the Rwandan Human Rights League of the Great Lakes (LDGL) and the Rwandan League for the Promotion and Defense of Human Rights (LIPRODHOR) monitored the Gacaca process and produced reports outlining the failure of the trials to respect the rights of witnesses and the accused (Mwesigye 2006). Their efforts were complemented by international organisations such as Human Rights Watch, Avocats Sans Frontières (ASF), and Penal Reform International (PRI) (Human Rights Watch 2011).

Indeed, there has been a role for CSOs in transitional prosecutions in Africa. An instructive illustration of this is the part played by CSOs in the repudiation of amnesties and the subsequent establishment of the Special Court of Sierra Leone (SCSL) (International Peace Institute 2013; Perriello and Wierda 2006). Sierra Leonese civil society also had an input into the compromises which were made on the indictment of minors who had committed atrocities. The SCSL actively sought

*amicus* briefs from academics and CSOs and in some judgments adopted the position of the amicus (Brimelow et al 2016).

It should be noted that in those societies where there were prosecutions, concerns were raised about the trials' flaws, including the weakness of the judiciary and the failure of those trials to act in accordance with human rights norms. Also of note is that "situations of overthrow" similar to the case of post-Mengistu Ethiopia where there was a clear break with the past, are rare in Africa. In most cases, transitional justice in Africa is implemented in the context of negotiated transitions or ongoing conflicts (Bosire 2006). In particular, as exemplified by the examples of Zimbabwe and Uganda, civil society transitional justice advocacy occurs where there is no transition that constitutes regime change. Also, existing regimes had previously, in various epochs, adopted some form of transitional measures aimed at addressing specific conflicts. Furthermore, some of the issues which transitional justice must address relate to colonial injustices and the artificial nature and arbitrary borders of the postcolonial state.

On this note, Lydiah Bosire has asked the following questions with regard to successive transitions, the mechanisms adopted when implicated regimes are in power, and the perceived character of the African state (Bosire 2006):

> What constitutes a "transition" in Africa? Is the transition marked simply by the political choice to use the rhetoric of justice and reconciliation, even in a context of a minimum breach from the past, perhaps in order to 'create the democratic possibility to re-imagine the specific paths and goals of democratization'? Can a country have a succession of transitions and apply transitional justice measures each time? Are these measures appropriate even in contexts of weakly institutionalized states without a history of Western-style democratic tradition? Or is it possible that new governments adopt the now-

common language of transitional justice to compete for resources on an international stage?

Thus, the type of transitions plus the character of African states have meant that domestic prosecutions are infrequent and flawed. Certainly, prosecutions are a key pillar of justice as their retributive nature helps to rebuild the rule of law and to combat impunity. However, as most scholars have already pointed out, in situations of widespread human rights atrocities, prosecutions may need to be complemented by other measures since an adversarial approach to transitional justice may be expensive and fail to attend to the needs of victims.

Nonetheless, a closer examination of the practice in Africa has shown that even in the absence of state-level prosecutions, civil society has resorted to different forms of civil litigation, thereby contributing to the restoration of the primacy of the rule of law (Brankovic 2018). Proceedings have been initiated by CSOs for several reasons. For example, in Kenya after the 2007 post-election violence and in the wake of the 2013 elections, CSOs such as the Federation of Women Lawyers (FIDA) supported civil suits in cases relating to state responsibility for police shootings, sexual and gender-based violence, and failure to act (Hansen and Sriram 2015).

In Zimbabwe, even though the country is yet to experience a clear break with the past, the Zimbabwe Human Rights NGO Forum (a coalition of 22 Zimbabwean NGOs) has been litigating cases of state-orchestrated systematic violence and torture in both domestic and international courts for more than a decade. Domestic civil lawsuits have been seeking compensation on behalf of the victims. In so doing, the organisation has challenged impunity and ensured that the government accounts for its human rights abuses. In fact, in a record number of cases which have been litigated on in domestic courts, the state has conceded liability in the judge's chambers. This means that additional transitional justice purposes such as acknowledgement, apologies and guarantees of non-repetition have not been met. In addition, there have been problems with

enforcement and in cases where there was compensation, the awards were too insignificant for victims to gain satisfaction.

Zimbabwean CSOs have also filed lawsuits (albeit unsuccessfully) requiring the government to publicise reports of the Dumbutshena and Chihambakwe Commissions which were set up to investigate atrocities committed in the Matebeleland and Midlands regions of the country soon after independence. In particular, in *Zimbabwe Lawyers for Human Rights v President of Zimbabwe and Anor*, the country's Supreme Court dismissed a court application for the release of the two reports which was filed by Zimbabwe Lawyers for Human Rights (ZLHR) in 2004, as the government stated that the reports had been misplaced. Despite the failure of the ZLHR to compel the government to share information, this lawsuit raised public awareness of the issue, putting pressure on the government while underlining the importance of transparency.

In situations of negotiated transitions, illustrated here by South Africa's move from apartheid to Black majority rule, CSOs have resorted to litigation to make the government involve victims in closed procedures concerning the transition. To elaborate on this, South Africa's method for dealing with the past was a Truth and Reconciliation Commission (TRC). The TRC acknowledged that there were human rights abuses during the apartheid era. However, it compromised justice for peace by offering conditional amnesty, that is, truth in return for amnesty, with the understanding that those alleged perpetrators who had not participated in the process or were not granted amnesties would be prosecuted. The state failed to comply with the prosecution requirement and subsequently used presidential pardons. It also adopted legislation that had the effect of illicitly granting amnesties thereby breaching the fundamental element of accountability in the TRC. This state policy was successfully challenged by CSOs in *Nkadimeng and Others v National*

*Director of Public Prosecutions and Others* on the basis that it infringed the rule of law *inter alia*.

In comparison with other African experiences, South African CSOs have an established record of engaging in public interest litigation dating back to the apartheid era. There is also a vibrant civil society, enabling legislation with clear 'access to justice' and with an emphasis on strong democratic institutions. These include a judiciary that is undaunted in upholding fundamental rights and the rule of law. In other contexts, as will be discussed below, and in the absence of conditions which make domestic litigation feasible, CSOs have had to either export jurisdiction or litigate in regional and international criminal tribunals. The practice has also been used by several CSOs in Africa (including South Africa) to seek redress for colonial and apartheid atrocities that implicate non-conventional abusers of rights, such as non-state actors and former colonial masters.

### 3.2 Exported jurisdiction

Certainly, there have been instances where CSOs have approached foreign states to deal with atrocities that were committed in countries other than their own. Two types of cases are worth highlighting in this regard as they both offer useful insights into the complexities and prospects for accounting for the past and seeking redress for human rights violations in a transitional setting. First, there are corporate collaborators' cases, namely the South Africa *Apartheid Litigation* and *Kiobel v Royal Dutch Petroleum Co.* Second, there are universal jurisdiction cases.

#### 3.2.2 Corporate collaborators' cases

The *In re South African Apartheid Litigation* refers to consolidated reparations' lawsuits dating from 2002 whereby the Khulumani Support Group (Khulumani) relied on the United States (US) Alien Tort Statute (ATS) to sue Ford Motor company and International Business Machines Corporation (IBM) in the US. Khulumani would fit Haslam's classification of civil society as 'objects', as it is a NGO which was formed

by apartheid victims and survivors who testified at the South African Truth and Reconciliation Commission.

Khulumani alleged that Ford Motor Company and IBM were complicit in the human rights atrocities committed by the apartheid regime against all Black people between 1973 and 1992. Their claims were based on the law of nations. They argued that the Southern District of New York was the appropriate location for hearing this lawsuit as:

> The defendant corporation, their subsidiaries, affiliates, alter egos or agents are doing business in this district (*In re South African Apartheid Litigation* 2009).

Similarly, *Kiobel v. Royal Dutch Petroleum Co.* is a lawsuit that was filed by Nigerian plaintiffs against corporations alleged to have aided and abetted the Nigerian military dictatorship in the torture and killing of Dr Barinem Kiobel and 11 other Nigerian activists from the Survival of the Ogoni People (MOSOP) between 1992 and 1995. International human rights organisations filed an *amicus* brief in support of the petitioners.

The Kiobel case was dismissed on the basis that the presumption is that the ATS does not apply extraterritorially. This presumption can be rebutted by proof that the issue "touches and concerns" the US with "sufficient force". This finding led to further motions by *In re South African Apartheid* litigants on the question of whether corporations can be held liable under ATS. In April 2014, US District Judge Shira A. Sheindlin found in favour of the litigants in holding that corporations can be held under ATS, thereby separating the principle of law from the enforcement of the law. However, the plaintiffs were later unsuccessful in proving the enforcement issue.

These lawsuits above have been very costly and protracted. However, they have been very useful in respect of precedence setting in holding that non-state actors can be held accountable under ATS. This is not to reject the obvious fact that substantial victory for the victims would be the actual reparations and a finding that jurisdiction can be exported, but

the finding on the principle that corporations can be held liable offers opportunities for redress and ascertaining the truth. Investigations, which are an axiomatic part of litigation, are a truth-seeking mechanism.

It is also noteworthy that the South African TRC had implicated corporations in apartheid era human rights violations but there were no domestic remedies in South Africa. Thus the CSO (Khulumani) filled the gap when the government was both unwilling and unable to deal with apartheid reparations. According to Mia Swart, the *In re South African Apartheid Litigation* complemented the work of the South African TRC (Swart 2011). It is transitional justice. As Narnia Böhler-Muller (2013:13) aptly put it:

> As closure is sought, there is a process of excluding those who do not accept the closure. As such, Khulumani poses a challenge to notions that transformation has taken place and that progress is linear when measured in terms of discourses of "transitional justice". Rather, the ideal to strive for is a continuous state of transition that should neither be hailed as a victory nor the "end of politics" as new communities of sharing are constantly created, destroyed and re-created in the struggle towards equality. As such, by countering the hegemony of nation-building that is initiated by the state and is state-driven, Khulumani, through its legal activism, aims to enhance and bring to the fore the voices of the "unreconciled" or "bad" victims.

Thus, whereas the South African TRC was a state-led transitional justice mechanism whose goal was nation-building and reconciliation, the CSO-led *In re South African Apartheid Litigation* democratised transitional justice. The CSO gave the dissenting victims an opportunity to 'speak out' by demanding reparations for apartheid atrocities.

### 3.2.3 Universal jurisdiction

A recent CSO innovation in Africa has been to initiate proceedings under the principle of universal jurisdiction (O'Keefe 2004). Two types of cases have been initiated. The first cases are those involving the

commencement of universal jurisdiction against alleged persons who are within the territory that have been accused of committing crimes against humanity, war crimes and genocide in another state. The second ones are those that have raised the question of the contentious issue of whether universal jurisdiction can be allowed in absentia.

The role of CSOs regarding the first type of cases is illustrated by actions taken by CSOs in Kenya and South Africa ahead of the visit of Sudanese ex-President Omar Hassan Ahmad Al-Bashir to their countries. This was following his indictment by the International Criminal Court for international crimes committed in Darfur (*The Prosecutor v Omar Hassan Ahmad Al Bashir* 2009). The Kenyan section of the International Commission of Jurists (ICJ) successfully filed an action for his provisional warrant of arrest (*ICJ – Kenya v Attorney General* 2011). It is noteworthy that this ruling was not supported by the Kenyan state and some Kenyan citizens opposed the ruling as it would have consequences for inter-state relations and Kenyans residing in Sudan.

Another similar example is the 1999 unsuccessful attempt by Human Rights Watch/Africa Division to have Mengistu tried in South Africa or in any other country which could guarantee a fair trial. This occurred when Mengistu went for treatment in South Africa (Michigan State University 2000). Ethiopia had failed to get him extradited from Zimbabwe where he had been a refugee since 1991, but Human Rights Watch was not pressing for Mengistu's return to Ethiopia. As stated above, there were concerns about the death penalty and fairness of the Ethiopian domestic trials.

Another example of universal jurisdiction was where there was significant input by CSOs in the trial against Hissène Habré at the Extraordinary African Chambers in Senegal. Hissène Habré was tried and convicted in Senegal for crimes committed in Chad between 1982 and 1990. According to Christoph Sperfeldt, victims' associations and CSOs had lobbied for the trial for more than two decades; Sperfeldt refers to this lobbying as networked justice (Sperfeldt 2017). In addition to investigations

conducted by the Extraordinary African Chambers' judges, the court also relied on the research by Human Rights Watch. Human Rights Watch and other CSOs helped in the dissemination of information about the trial by facilitating the travel of Chadian journalists to Senegal to cover the trial.

A case which illustrates the issue of the exercise of universal jurisdiction in absentia is *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre* (Werle and Bornkamm 2013). In this case, a South African High Court ruled in favour of the 2008 lawsuit of the Zimbabwe Exiles Forum and the Southern Africa Litigation Centre (SALC), which required the country's National Prosecuting Authority (NPA) and police service to investigate international crimes committed in Zimbabwe in 2007. This lawsuit was based on South Africa's Implementation of the Rome Statute of the International Criminal Court ("Act"), which empowers South African courts to exercise universal jurisdiction over core international crimes enshrined in the Rome Statute of the International Court. From a South African domestic-law perspective, this case is precedent-setting as it addresses the issue of South Africa's competence regarding the investigation of core crimes of international law. It is also precedent setting in international law generally. This is precedent-setting and exceptional because in the 2000 *Arrest Warrant* case, the International Court of Justice (ICJ) was divided on the issue. From a transitional-justice perspective, this was a progressive ruling as it advanced victims' right to truth and redress in contexts where there is no domestic political will.

### 3.3 Regional bodies

Some African CSOs have filed complaints with the AU's African Commission on Human and Peoples' Rights (ACHPR) against governments said to have violated human rights. The ACHPR proceedings have often been protracted for years and have also confronted the hurdle of the procedural requirement that an applicant has to exhaust domestic remedies. For example, *Open Society Justice Initiative v Cote d' Ivoire* was

filed in 2006 and decided in 2015. Enforcement has also been an issue in those cases where the ACHPR has ruled in favour of the plaintiffs. An example is the case of *Gabriel Shumba v Zimbabwe,* which was filed in 2004, decided in favour of the plaintiff in 2012, but is yet to be enforced. Nonetheless, this procedure's consciousness-raising function cannot be overlooked.

Cases have also been filed with the African Court on Human and Peoples' Rights (African Court). Two conditions have to be satisfied for an application to be received by the African Court (Ssenyonjo 2013). First, the application must be against a state which has ratified the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights. Second, the state accused of violating human rights must have made an optional declaration accepting the competence of the African Court to receive cases from NGOs and individuals. At the time of writing, 33 of 55 AU member states have ratified the Protocol and only nine states have made the optional declaration.

This demonstrates that few African states are willing to grant direct access to the African Court to individuals and NGOs. There is also no guarantee that states which have made the relevant declaration will maintain their position. For example, in 2016, Rwanda withdrew from the declaration which it had made in 2013, agreeing to the power of the African Court to receive cases from NGOs and individuals. At the time of the withdrawal, the African Court was due to deal with the case of *Ingabire Victoire Umuhoza v. The Republic of Rwanda.* In this case, Victoire Ingabire successfully argued that her incarceration for genocide denial violated her human rights.

Victoire Ingabire's case demonstrates the contested nature of transitional justice crimes. It shows that CSOs do not always have a consistent position when it comes to such crimes. For example, while it is stated that Spanish NGOs supported Victoire's case at the African Court (KT Press 2017) in

Rwanda, survivor's groups had in fact successfully campaigned for her sentence to be extended (Musoni 2012).

### 3.4 International criminal law tribunals

CSOs have also contributed to the development and application of international criminal law. In fact, a role for CSOs is provided for in the constituent documents of international criminal law tribunals. Furthermore, NGOs' *amici curiae* are based on Rule 74 of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR) Rules of Procedure and Evidence. Furthermore, the Rome Statute of the International Criminal Court includes unambiguous possibilities for CSO input.

A significant contribution of CSOs to the right to justice in the ICTR was in the *Akayesu* case when the Coalition of Women's Human Rights in Conflict Situations (The Coalition) influenced the Prosecutor to amend the indictment to include crimes of sexual violence (Copelon 2000). However, not all CSOs' interventions in the ICTR have been successful. For example, in the *Cyangugu Group* case (2001), the ICTR rejected the Coalition's argument that the indictment be revised to include rape and sexual violence charges. Also unsuccessful was Africa Concern's application for leave to address the ICTR on its power to prosecute and order restitution in the *Bagosora* case.

According to Emily Haslam, expert groups' *amicus* briefs have a higher success rate compared to those of survivor groups (Haslam 2011:228). This critique raises important questions in relation to local ownership and legitimacy of international criminal law process. It is often thought that the participation of CSOs is encouraged as such groups can mobilise victims and garner the latter's views on the root causes of the conflict (Penna and Gaelle 2013). Yet, in practice, civil society *amicus* submissions have been accepted on the basis that the organisation has factual and legal expertise *inter alia*, and that they do not profess to act for victims. It can be said that this exclusion can be attributed to the fair-

trial concerns of the international criminal courts and the quality of the victim's participation.

It is noteworthy that whereas the Nuremberg, Tokyo, former Yugoslavia and Rwanda tribunals did not provide for victim participation, Article 68(3) of the Rome Statute permits victim participation at every stage of the criminal proceedings. This should be read with Article 75(3) of the same statute which allows representations in reparation proceedings. For example, several Article 75 representations were made by civil society in the *Lubanga* and *Katanga* reparations' hearings (*Prosecutor v Thomas Lubanga Dyllo* 2006; *Prosecutor v Germain Katanga* 2007).

Even so, it can be said that there is a disconnect between the needs of the survivor groups and the agenda of international criminal law. For example, Christine Bjork's study in Kenya (Bjork 2011:226) in the wake of the International Criminal Court (ICC)'s indictments found that:

> Locals referred to lack of water, lack of food, lack of housing, corruption in the political class, and lack of political accountability as the type of problems they expected the ICC to solve.

Nonetheless, Kenya is a remarkable case study of a context where there was a failed attempt by the ICC to prosecute incumbents. In 2010, the ICC opened investigations against six Kenyan leading politicians following the 2007 elections which were characterised by serious human rights violations, including endemic killings, displacement, sexual violence and other crimes. Following the indictments, Kenyan civil society interacted with both the ICC's Office of the Prosecutor (OTP) and other organs of the ICC – including the Victims and Witnesses Unit (VWU). CSOs helped the ICC to understand the Kenyan context and to manage victims' expectations.

It must be noted that not all CSOs are pro-accountability. Hansen and Sriram have explained that following the post-2007 election violence in Kenya, CSOs were split into 'justice' and 'peace' groups (Hansen and Sriram 2015). Whereas the justice groups advocated for accountability,

the peace groups concentrated on ending violence and even attempted to remove accountability from the agenda. This is not peculiar to Kenya. For example, following the Government of Uganda's referral of the situation in Uganda to the ICC in 2003, the Acholi Religious Leaders Peace Initiative (ARLPI) called on the ICC to withdraw indictments against members of the Lord Resistance Army (Manirakiza 2017). They unsuccessfully argued that the ICC arrest warrants endangered peacemaking and were at odds with traditional reconciliation-based justice in northern Uganda.

## 4. Conclusion: The procedure is the substance

Generally, as in other CSOs' roles in transitional justice, African litigation attempts have been conducted either as part of a formal process or in instances where CSOs have intervened in the absence of a formal process. Formal domestic prosecutions in Africa have been possible in only those few cases where the previous regimes have been removed. Mostly, CSOs have filled the accountability gap when compromise measures, for example, truth commissions or inquiries, have been adopted and in those countries where there is a contested transition.

The lawsuits discussed above were mostly time-consuming, costly and required the services of specialist lawyers with expertise in international law and comparative methods. The lawyers dealing with these matters would have to appreciate the methodology of intertwined civil and criminal law. Nonetheless, it is this article's view that the procedure is the substance. The jurisprudence has largely contributed to truth recovery and accountability, as it has developed precedents that are useful in terms of seeking redress in contexts where there is no clear break with the past. In contexts where there is no transition, lawsuits seeking compensation on behalf of the victims have raised the issue of whether state acknowledgement of guilt is an element of transitional justice.

Cases of exported jurisdiction offer innovative ways of dealing with abuses, which for social, economic and political reasons cannot be addressed domestically. These are atrocities attributed to non-conventional abusers of human rights, namely corporations and colonialists.

The jurisprudence also presents opportunities for transitional justice to deal with economic crimes and may act as a deterrent to corporations when it comes to doing business with regimes that violate human rights.

Universal jurisdiction jurisprudence has been exceptional and has developed the notion of allowing the exercise of universal jurisdiction in absentia. ACHPR communications have been useful in terms of precedent setting and fostering accountability. Furthermore, CSO interactions with the international criminal justice tribunals have facilitated the realisation of the rights to truth, justice and reparations.

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