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Beyond Nuremberg:

Learning from the Post-Apartheid Transition in South Africa

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The contemporary human rights movement holds up Nuremberg as a template with which to define responsibility for mass violence. The lesson of Nuremberg is two-fold: one, responsibility for mass violence is criminal and must be ascribed to individual agents; above all, this responsibility is said to be ethical, not political. Two, criminal justice is the only politically viable and morally acceptable response to mass violence. Turned into the founding moment of the new human rights movement, Nuremberg is today the model for the International Criminal Court (ICC) and is held as the fitting anti-dote to every incident of mass violence.

If Nuremberg has been turned into the founding moment of a new paradigm for justice, the end of apartheid has been exceptionalized as an improbable outcome produced by the exceptional personality of Nelson Mandela. It is thus said that Africa's problems – the violence of civil wars – is a result of a culture of impunity among African leaders, one that calls for punishment rather than political reform.

Nuremberg as Victims' Justice

For a long time, Nuremberg was seen as an example of victors' justice, meted out by victorious Allies to defeated Nazis. Today, however, Nuremberg is also identified with victims' justice; indeed, Nuremberg provides a good example to demonstrate that we should see victims' justice as a complement to victor's justice, and not as an alternative to it.

Victors' justice and victims' justice are not alternatives; they are two sides of the same coin. Victims' justice is not possible without a victor who can set up a rule of law under which victims may obtain justice. Criminal justice, like the military battlefield, is a place where there can only be winners and losers. It produces a new round of winners and losers and sets up the ground for the next war.

Nuremberg functioned as part of a larger political logic shared by the victorious Allied powers. This was that winners and losers, victims and perpetrators, must be physically separated into different political communities. As they redrew boundaries and transferred millions across borders, the result was the most extreme ethnic cleansing in modern history. By 1950, between 12 and 14 million Germans had fled or were expelled from east-central Europe. Historians consider this the largest forcible movement of any population in modern Europe history. It is estimated that more than 20 million were forcibly transferred from Central and Eastern Europe. According to German federal agencies and the German Red Cross, between 2 and 2.5 million civilians died in the course of expulsions. Some writers describe this forced movement as 'population transfer,' others as 'ethnic cleansing,' and yet others as 'genocide.' But all agree that the shared ground between victors' justice and victims' justice is revenge.

As perpetrators huddled in Germany, victims departed for another homeland. The process culminated in the period after Nuremberg with the creation of the State of Israel, seen as a state for victims, now called 'survivors.' Indeed, post-Holocaust language reserved the identity 'survivors' only for yesterday's victims.

The transition from apartheid as Political Justice

Key to the post-apartheid transition was not an exchange of amnesty for truth, but amnesty for the willingness to reform. That reform was the dismantling of juridical and political apartheid, the outcome of the round of negotiations known as the Convention for a Democratic South Africa (CODESA).

The ground for CODESA was prepared by an acknowledgement by both sides to the conflict that their preferred solution to the conflict (victory in war for the government, revolution for the anti-apartheid movement) would not be possible. If South Africa is a model for solving intractable conflicts, it is an argument for moving from the best to the second best alternative. That second best alternative was political reform.

The above was tantamount to each side giving up the quest for victors' justice. The reasons for this shift highlight the conditions that made the outcome in South Africa different from those that led to Nuremberg. They also underline the similarities between the conflict in apartheid South Africa and conflicts in contemporary Africa. First, whereas Nuremberg followed a military victory, the conflict in South Africa had not ended. Second, whereas Nuremberg was informed by an overall logic that drove the post-war settlement, that of ethnic cleansing, calling for a physical separation of yesterday's victims and yesterday's perpetrators into separate political communities, there was no question of creating an Israel for victims of apartheid in South Africa. Instead, it was clear that victims and perpetrators, blacks and whites, would have to live in the same country.

Rather than put justice in the back seat, CODESA presents us with a radically new way of thinking about justice. To begin with, CODESA distinguished between different forms of justice – criminal, political and social. It then prioritized political justice, the reform of the political system, over the other two.

A shift of logic from the criminal to the political led to decriminalizing both sides to the conflict. By turning enemies into political adversaries, CODESA also changed the goal post. The goal was no longer the internment and punishment of individuals charged with so many crimes, but a change of rules that would include them and their constituencies into a reformed political community.

CODESA as a Critique of Nuremberg

To reflect on the lessons of apartheid, we need to begin with two questions: how shall we think of extreme violence, of mass violence – as criminal

or political? And how shall we define responsibility for large-scale violence – as criminal or political?

What distinguishes political from criminal violence? The key distinction is qualitative. Political violence requires more than just criminal agency; it needs a political constituency. More than just perpetrators, it needs supporters. That constituency, in turn, is held together and mobilized by an issue. More than criminal violence, political violence is issue-driven.

The present rush for courtroom solutions advocated by the human rights community is the result of a double failure: analytical and political. Analytically, it confuses political with criminal violence. Politically, the focus on perpetrators is at the expense of a focus on the issues that drive the violence. It is likely to magnify rather than mitigate violence in the public sphere.

CODESA shed the zero-sum logic of criminal justice for the inclusive nature of political justice by including both sides to the conflict in the constitutional process that would forge a post-apartheid political order. Political justice affects groups whereas criminal justice targets individuals. If the object of criminal justice is punishment, that of political justice is political reform.

The Downside of the South African Transition

There are two debates in South Africa today. The first focuses on the perpetrator, and thus on criminal justice. The second focuses on the beneficiary, and thus on social justice. Whereas there is hardly a popular demand in contemporary South Africa calling for perpetrators of apartheid to be tried and punished, it is the debate around social justice that more and more drives the critique of the post-apartheid transition. This debate highlights the downplaying of social justice in the agreements concluded at CODESA.

The demand that the end of apartheid should have delivered social justice ignores the political reality that defined the context in which CODESA was negotiated. The political prerequisite for attaining social justice would have been a social revolution, but there was no revolution in South Africa. If apartheid was not defeated, neither was it victorious. The most one can say is that there was a stalemate.

Yet, the both the process and the outcome that marked the end of apartheid ruled out even a modicum of social justice. The constitution negotiated at CODESA defended the integrity of property accumulated during the apartheid era as part of a constitutionally sanctified Bill of Rights. The justification for this came in the form of the semi-official narrative crafted by the TRC: the semi-official multi-volume report of the TRC described apartheid not as a system in which a racialized power disenfranchised and dispossessed a racialized majority, but as a set of human rights violations of a minority of individual victims carried out by an even smaller minority of individual perpetrators.

Did the beneficiaries of apartheid win at the negotiating table what its authors and perpetrators could not win on the battlefield? If so, what set of political conditions made this possible? The main condition was to play off two wings of the anti-apartheid movement against each other, thereby reinforcing the leadership of the external wing and sidelining the internal wing. The anti-apartheid camp comprised two very different kinds of forces: on the one hand, exiled 'liberation movements,' principally the ANC, whose scanty presence on the ground contrasted with its enormous popular prestige; and, on the other, an internally organized anti-apartheid resistance which knit together dozens of community and shop floor level organisations into a single umbrella-type network, called the United Democratic Front (UDF), which was responsible for the stalemate in which apartheid found itself.

The multi-party negotiations known as CODESA went alongside informal bi-party talks held outside the formal negotiation setup. The 'sufficient consensus' crafted by the ANC and the NP in the course of these informal talks stretched and strained the relation between the exile and the internal wings of the anti-apartheid opposition. In marginalizing the forces identified with the internal opposition, the 'sufficient consensus' also sidelined their agenda for social justice. This constitutional closure was the result of the political alliance between reform forces within the ruling NP and the ANC-based exile wing, the alliance that ushered in the post-apartheid transition.

TRC

This constitutional closure was legitimized in a narrative crafted by the TRC. The TRC set aside the distinctive everyday violence of apartheid, the violence that targeted entire groups and that was central to realizing its political agenda, and thus would have made sense of the lived experience of the vast majority of South Africans. This is because the TRC understood violence as criminal, not as political; as targeting identifiable, individual victims, and not entire groups; as driven by individual perpetrators, but neither the state that empowered them not groups of beneficiaries within society. It focused on violence as excess, not as norm. It thus limited the criminal responsibility of individual operatives to actions that exceeded political orders – actions that would have been defined as crimes under apartheid law. In doing so, the TRC distinguished between the violence of apartheid – pass laws, forced removals, and so on – and the excess violence of its operatives. Because it did so, it was unable to achieve even that which Nuremberg did: to compile a comprehensive record of the atrocities committed by the apartheid regime.

The TRC shared with Nuremberg a focus on political violence as crime. The TRC hoped to function as a surrogate Nuremberg by displacing the logic of crime and punishment with that of crime and confession. The TRC ended up trying to hold individual state officials criminally responsible – but only for those actions that would have been defined as crimes under apartheid law. By so limiting criminal responsibility, it both upheld apartheid as a rule of law and the law that undergirded apartheid. This is why the TRC should be seen as a special court within the framework of apartheid law.

Lessons for Africa

Like the violence that marked apartheid South Africa, mass violence in most African countries is not the outcome of inter-state conflict; it is the product of civil wars. Does the end of apartheid offer a lesson for the rest of Africa?

The South African transition was not unique. It was preceded by the political settlement in Uganda at the end of the civil war (1980-86), and followed by the settlement in Mozambique. The outcome of the civil war in Uganda made for a political stalemate in a situation in which one side (the National Resistance Army) had 'won' militarily in a war waged in the Luwero Trian-

gle (a small part of the country), but lacked an organized political presence in large sections of the country. Its political resolution was a power-sharing arrangement called the "broad base", which gave positions in the cabinet to those opposition groups that agreed to renounce the use of arms even if not their political objectives.

In Mozambique, six months after the South African elections in 1994, there was another impressive settlement, which followed a 15-year civil war. Like CODESA, this settlement too renounced both the battlefield and the courts as two versions of a winner-take-all approach, unsuited to a conflict in which there was no winner. The peace process in Mozambique decriminalized Renamo, an insurgency aided and advised by the apartheid regime, whose practices included the recruitment of child soldiers and the mutilation of civilians. A retribution process in Mozambique would have meant no settlement at all; instead, Renamo's leadership were brought into the political process and invited to run in national and local elections.

It is not accidental that all the examples cited above – the "broad base" in Uganda, the end of apartheid, and the end of the civil war in Mozambique – happened before the ICC was set up. In all three cases, the accent was on the "survivor," not the "victim."

Nuremberg, Extreme Violence and the Contemporary Human Rights Movement

The logic of Nuremberg flowed from the context of inter-state war, one that ended in victory for one side, which then put the losers on trial. The logic of a court trial is zero sum: you are either innocent or guilty. This kind of logic ill fits the context of a civil war. Victims and perpetrators in civil wars often trade places in ongoing cycles of violence. No one is wholly innocent and none wholly guilty. Each side has a narrative of victimhood. Victims' justice is the flip side of victors' justice: both demonize the other side, and exclude it from participation in the new political order.

A civil war can end up either as a renegotiated union or as a separation between states. The logic of Nuremberg drives parties in the civil war to the latter conclusion: military victory and the separation of yesterday's perpetrators and victims into two separate political communities.

The contemporary human rights movement is permeated with the logic of Nuremberg. Human rights groups focus on atrocities for which they seek individual criminal responsibility. Their method of work has a formalized name: Naming and Shaming. The methodology involves a succession of clearly defined steps: catalogue atrocities, identify victims and perpetrators, name and shame the perpetrators, and demand that they be held criminally accountable. The underside of the focus on perpetrators is to downplay issues. This much is clear from a reading of field reports of Human Rights Watch or International Crisis Group: except for a pro-forma 1-2 page introduction on history and context, the focus is on 'naming and shaming'. Indeed, context is considered a distraction from establishing the universality of human rights.

This is problematic if one recognizes that political violence is often not a standalone incident but part of a *cycle of violence* – a fact obscured by the absence of a historical context. In a civil war, victims and perpetrators tend to trade places. Each side has a narrative of victimhood.

The tendency to portray the perpetrator as the driving force behind the violence leads to freezing the two identities, perpetrator and victim, leading to the assumption that the perpetrator is always the perpetrator and the victim is always the victim. The result is to demonize the agency of the perpetrator – and diminish the agency of the victim. Demonizing goes along with branding, and reinforces the assumption that you can easily and eternally separate the bad from the good.

The more depoliticized our notion of violence, the more the temptation to think of violence as its own explanation. Indeed, the tendency is to seek the explanation for violence in the person of the perpetrator. From being a problem, violence also becomes the solution. But instead of showing a way out of the dilemma, violence introduces us to a quagmire. It feeds the cycle of violence.

Violence is not its own explanation. This much becomes clear with a shift of focus from human rights to human wrongs. Human rights may be universal, human wrongs are specific. To focus on human wrongs is, first, to highlight context. It is, second, to underline issues. And it is, third, to produce a narrative that highlights the cycle of violence. To break out of the cycle of violence we need to displace the victim narrative with that of the survivor. A

survivor narrative is less perpetrator-driven, more issue-driven. Atrocities become part of a historical narrative, no longer seen as so many stand-alone acts but as parts of an ongoing cycle of violence. To acknowledge that victim and perpetrator have traded places is to accept that neither can be marked as a permanent identity. The consequence is to de-demonize – and thus to humanize – the perpetrator.

What is an African solution to an African problem?

Both advocates and critics of "an African solution to an African problem" share a common assumption: that an "African solution" must be culturally specific and thus opposed to not only a "one-size-fits-all" universal solution but also to universal values, whether humanitarian or otherwise.

The demand for an African solution arises from the experience of having taken, indeed having been prescribed, a series of universal remedies over time. The 'One Size Fits All' dogma began in the sphere of economic policy and was enforced as a series of Structural Adjustment Programs (SAPs) by the Washington Consensus in the 1980s. Its destructive effects are now both well documented and widely acknowledged. Criminal Justice is the latest home of this dogma, claiming a single 'international standard' – as it were, a gold standard – for all situations of extreme violence in the name of following 'best practices.' This 'one size fits all' solution calls for criminal trials.

"An African solution" has to be a contextual solution. Context is not the opposite of a universal value or standard. Neither is it a reference to a particular – different – culture. Context is an understanding that any concrete situation is an outcome of multiple processes: historical, political, economic, social, moral and so on. The call for a contextual understanding is an argument that we need to understand the precise articulation of multiple processes in the creation of a single event or outcome. Thus the need to differentiate between different forms of violence, in particular criminal and political violence. And thus the need to think of justice in a contextual sense: both as political justice and as Survivors justice.

Survivors Justice

Whereas Nuremberg has become the basis of a notion of *victims' justice* – as a complement to *victors' justice* – *CODESA* provides the basis for an alternative *notion of justice,* which I call survivors' justice. The difference between the two is at least four-fold.

The first is a difference of perspective. That difference is in turn shaped with an eye on the future we wish to build: a renegotiated union and not a separation. This future is crafted through the perspective of a bystander, rather than that of a partisan. It is born of a recognition that political wisdom is the fruit of reflection, in retrospect; in the words of Hegel, 'the owl of Minerva takes flight at dusk.'

The second is a difference in the meaning of 'survivor.' The survivor is not the victim who survived extreme violence, but all who survived the civil war, whether victim, perpetrator or bystander. All are 'survivors.'

The third is a difference in the inclusive nature of the negotiated outcome to the civil war. All survivors of extreme violence must rightfully participate in making the new political order.

The fourth difference lies in the means by which to create this community of survivors: not punishment, but political reform. Political reform targets entire groups, not isolated individuals. Its object is not punishment, but a change of rules; not state creation, but state reform. By turning its back on revenge, it offers the possibility of creating new communities of survivors. By focusing on the link between creating an inclusive political order and an inclusive rule of law, it calls for a deep reflection on the relation between politics and law. The point of it all is not to avenge the dead, but to give the living a second chance.

List of Policy Brief

1. Professor Mahmood Mamdani, *Beyond Nuremberg: Learning from the Post-Apartheid Transition in South Africa,* October 2015

2. Akoko Akech - PhD. Fellow, *Kenya's Constitution and Institutional Reforms after Political Violence 1991-2010,* October 2015

3. Haydee Bangerezako - PhD. Fellow, *Politics of indigeneity: Land restitution in Burundi,* October 2015

4. Laury Lawrence Ocen - PhD. Fellow, *Justice and Peace after war: Conceptual Difficulties in the discourses of Transition and Reform,* October 2015

5. Esibo S. Omaada - PhD. Fellow, *What is Kenya Becoming: Dealing with Mass Violence in the Rift Valley of Kenya,* October 2015

6. Professor Mahmood Mamdani, *The Land Question and Customary Tenure: Some Preliminary Policy Recommendations,* October 2015

7. Dr. Giuliano Martiniello - Research Fellow, *Policy Paper – Large Scale Land Acquisitions,* October 2015

8. Dr. Pamela Khanakwa - Research Associate, *National Policies and Inter-District Territorial Boundary Conflicts: Lessons from the Bugisu-Bugwere Dispute over Namatala Wetland,* October 2015