THE MISR REVIEW

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Our Mission

Begun in 2012, the doctoral program in Social Studies at the Makerere Institute of Social Research (MISR) is driven by the conviction that key to research is formulating the problem of research. Given that our objective was to transform MISR from a consultancy into a research unit, we summed up the difference in a sentence: in a consultancy, the client defines the question; in a research unit, the question is the prerogative and responsibility of the researcher. We argued that an adequate formulation of the research problem requires a double endeavor: on the one hand, a firm grasp of key debates in the area of research, and on the other, a contextual and historical understanding of the research question.

The MISR Review signals a long-awaited step in the development of the program at MISR. It combines a commitment to local and indeed regional knowledge production, rooted in relevant linguistic and disciplinary training, with a critical and disciplined reflection on the globalization of modern forms of knowledge and modern instruments of power. Rather than oppose the local to the global, we seek to relate the two, assessing each from the vantage point of the other.

The MISR Review is intended to serve a dual function. First, it will broadcast the intellectual work undertaken at MISR, particularly by advanced doctoral students, to the wider scholarly community. Second, we aim for it to energize and promote debate in the broader scholarly community. By shining a historical and theoretical light on the contemporary, we hope the journal will play a role in the larger process of knowledge production.

We locate this endeavor in a particular conceptual and institutional understanding of the "university." Many have argued that the "university" has multiple origins, in different parts of the world, including Cairo, Fez, and Timbuktu in Africa. At the same time, the genealogy of the modern university, with its gated community, fee-paying students, and disciplinary organization of knowledge

can be traced to a single starting point, the reorganization of the academy in late nineteenth-century Germany following its defeat by France. With the expansion of Western power, this particular institutional form of the university has become global. Conceptually, the production of social sciences and the humanities in the modern academy bears an unmistakable imprint of Western Enlightenment with its self-conscious homage to a Greco-Roman legacy.

Higher education in the postcolonial world has a different genealogy, one rooted in the colonial experience. Knowledge housed in the university and transmitted from it is an unabashedly modernist project. Indeed, it is a top-down secular missionary project with ready-made solutions for a whole range of problems, known or not known. The colonial university is the original home of "one size fits all" remedies. Except for the few who turned the colonial experience into a vaccine rather than a lifelong malady, students emerged from its doors with little capacity for creative thought. The character of Lawino, a peasant woman, lamented the fate of her university graduate husband in *The Song of Lawino*, an epic poem by Okot p'Bitek:

> *Bile burns my inside!*
> *I feel like vomiting!*
> *For all our young men*
> *Were finished in the forest*
> *Their manhood was finished in the classroom*
> *Their testacles*
> *Were smashed*
> *With large books!*

Some critical thinkers like Yusufu Bala Usman have reflected on the epistemological conditions under which colonial and postcolonial university education has been imparted: conceptual categories are crafted from a particular historical experience but are so universalized that they claim to interpret and explain histories in

other parts of the world, the ambition being to shape a common future for all. They proceed to point out the epistemological violence that must inevitably result from any self-conscious effort to universalize historically situated concepts that mine the rest of the world for raw data in order to verify or modify these so-called universal categories.

What should be the response of scholars around the world, including in Africa? Some have responded by turning to the precolonial for authentic knowledge. Others have looked for African or postcolonial modes of thinking in the contemporary world. These initiatives have given rise to a variety of tendencies ranging from the "modernist" to the "nativist."

With the publication of *The MISR Review*, we join this eclectic endeavor, avowing neither a "modernist" nor a "nativist" agenda. Our modest aim is to get the MISR scholarly community to engage with the contemporary and its historical antecedents from the standpoint of situating Africa in the world and understanding the world from an African vantage point. Our not-so-modest aim is to theorize the African experience with a view to underlining its particular as well as more general significance. To do so is to join the innovative work of creating categories, thereby giving meaning to our experience in the world and making possible an emancipatory practice, including theory-making, that can translate and communicate this experience to neighbors near and far.

Mahmood Mamdani · Lyn Ossome · Suren Pillay
May 1, 2016

Contributors to this Issue

The papers in this issue are the work of members of the *Beyond Criminal Justice* research group at Makerere Institute of Social Research.

Akoko Akech is a fourth-year PhD candidate, specializing in Political Studies. His doctoral research is on social movements, popular political action, and political change in Kenya, 1945–2015.

Haydee Bangerezako is a fourth-year PhD student in Historical Studies and Political Studies. Her interest is in the precolonial political and social history of the Great Lakes and its conceptual aspects.

Simon Omaada Esibo is a fourth-year PhD student in Political Studies. Esibo is the author of *Conflict between Right to Asylum and Security Concerns of Uganda: A Study of Asylum Seekers in the Wake of Global Terrorism* (Lambert Academic Publishing, 2011). He has written on questions of war and peace in Karamoja, and on customary land tenure in Teso.

Mahmood Mamdani is professor and executive director, Makerere Institute of Social Research, Makerere University, Kampala, Uganda, and Herbert Lehman Professor of Government at Columbia University. He is the author of *Citizen and Subject*, *When Victims Become Killers*, *Saviors and Survivors* and, most recently, *Define and Rule: Native as Political Identity*. He is the coordinator of the *Beyond Criminal Justice* research group.

Laury L. Ocen is a fifth-year PhD student in Literary and Cultural Studies. Ocen holds an MA in Literature from Makerere University. His research focuses on survivors' justice in the context of mass violence, specifically the agency of war monuments in postwar northern Uganda, and how the politics and poetics of these artifacts are interpreted by governments, NGOs, local institutions, and ordinary survivors of war.

The Politics of Indigeneity: Land Restitution in Burundi

Haydee Bangerezako

ABSTRACT This paper studies the challenges of land restitution in Burundi after phases of violence. The paper traces land relations from the precolonial to the colonial and postindependence periods. With sovereignty shifting from body to territory in the colonial period, bodies that had been marked as indigenous (indicating those who first cleared the land) were newly marked as ethnic. In the postindependence state, politics and ethnicity, as products of continued racialized, centralized despotism, were expressed in law as well as in violence. Violence in 1972 led to the exile of part of the population and the gaining of land for another part, with the state facilitating this process. With the return of the population after this and the subsequent 1993 violence, and the formation of a new government (the product of the Arusha peace talks in 2003), a new land commission, the National Commission of Land and Other Assets, sought to resolve property disputes between *abahungutse* (repatriates) and *abasangwa* (residents). In its first mandate in 2006–11, the land commission advocated for the sharing of property. With the same but more hardline government in 2011, the properties were to be given to the former refugees because, it argued, the residents had enjoyed the "illegally" obtained property for a long period of time. This paper shows how land rights are tied to citizenship and indigeneity. In theory, the land commission seeks reconciliation in which everyone is regarded as a survivor, but in practice it marks out victims and perpetrators.

Activities of the Burundi Commission Nationale Terres et autres Biens—CNTB (National Commission of Land and other Assets) were brought to a halt in March 2015, after communities living in the southern province of Makamba, bordering Tanzania, barricaded roads using stones and tree trunks to prevent the CNTB's agents from implementing their decisions in favor of claimants. President Pierre Nkurunziza's office supported the governor's decision to temporarily suspend activities of the CNTB until after the 2015 elections. For over two weeks, both residents (*abasangwa*) and repatriates (*abahungutse*) stood together to oppose the CNTB, which had been revisiting land restitution cases it had previously settled. The CNTB had previously favored the sharing of property between returnees and the residents. *Abasangwa* and *abahungutse* in Makamba together now accused the CNTB of corruption. Residents of Nyanza-lac, Kibago, Vugizo, and Mabanda communes in the Makamba province viewed the recent move by the CNTB as a form of "spoliation." In their eyes the CNTB had enabled corrupt practices, with people acquiring several plots of land through the bribing of commission officials and overturning resolved land restitution cases.[1]

Land restitution is testimony to state and society relations of the past and present and to the mass violence experienced in postindependence Burundi. In 1972, a rebellion in south and western Burundi targeting Tutsi leaders and population was followed by a massive repression against Hutu elites and peasantry by a republican state.[2] After the violence, which killed an estimated 150,000

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1   Complaints have been made against the CNTB about people passing themselves off as repatriates in order to acquire properties and sell them off. Land restitution, complainants claimed, had become a "business" (Dieudonné Hakizimana and Christian Bigirimana, "Makamba: des conflits fonciers ravivent les tensions," *Iwacu*, April 20, 2014, www.iwacu-burundi.org/makamba-des-conflits-fonciers-ravivent-les-tensions).

2   Jean-Pierre Chrétien and Jean-Francois Dupaquier, *Burundi 1972: Au bord des génocides* (Paris: Editions Karthala, 2007); hereafter cited as Chrétien and Dupaquier. Chrétien and Dupaquier refer to the "bureaucratic aspect" of the organization of killings of Hutu, and describe events of 1972 as genocide led by a Tutsi military dictatorship (ibid., p. 477). René Lemarchand calls it a "selective genocide" due to its particular focus on the elite and the educated Hutu, though peasants were also killed. Hutu government and army leaders were assassinated (René Lemarchand, *Burundi: Ethnic Conflict and Genocide* [Cambridge: Cambridge

people of Hutu ethnicity and prompted the exile of over 300,000, the state distributed the land to new landowners, including state and private companies. Waves of reciprocal killing subsequently broke out in 1988 and 1991, culminating in the 1993 civil war that lasted over a decade, following a coup against the first democratically elected Hutu president, Melchior Ndadaye. In a space where 1972 is not publicly commemorated except for small gatherings, references in the media to *ikiza*, the scourge, evokes a lot of emotions from all ethnic groups (Chrétien and Dupaquier, p. 9). It is painfully discussed as one group, the Tutsi, trying to exterminate the other, the Hutu, and vice versa, while the Batwa are excluded from the debate. Political violence since Burundi's independence has produced a displaced population: refugees, orphans, and internally displaced persons among others.

Tensions were high following the 2011 decision of the CNTB, whose motto is *Gira aho uba wubahwe*,[3] to restore property owned by *abasangwa* to *abahungutse* as a solution to land scarcity and as a means of reconciling communities, thus ending previous land sharing agreements. Those with title deeds argue that they bought the land in good faith and have thus contested the legality of these claims.

The land restitution process has been used as a way of asserting indigeneity, to compensate for past injustices, and impose retribution on those who moved into the properties of the refugees. This process has created new victims and new perpetrators. As land remains a material reminder about the contested memories and experiences of the past, land disputes play into the politics of autochthony: who belongs and does not belong, who is a citizen and who can be heard by the state? Land restitution not only offers a way of acknowledging the past, of healing, but also of rendering some form of justice to one part of the population and reaffirming their citizenship.[4]

University Press, 1996]).

3   "Have a home, be respected" in Kirundi.

4   Ruth Hall, "Reconciling the Past, Present, and Future: The Parameters and Practices of Land Restitution in South Africa" in *Land, Memory, Reconstruction, and Justice: Perspectives on Land Claims in South Africa*, ed. Cherryl Walker, et al. (Athens, OH: Ohio University Press, 2010), pp. 17-40; Derick Fay and Deborah James,

The research presented in this paper assesses the connections between past and present by factoring in the ways in which land disputes are presented, negotiated, and resolved by the CNTB. How does political violence transform the land question? What does the state's approach reveal about the connection between land and citizenship? How did the political settlement affect the CNTB? How is land used to remember the past and assert indigeneity? Though this paper focuses on disputes related to land restitution, it has to be acknowledged that most land disputes in Burundi are intrafamily: disagreements over land are disputes over rights to customary land between family members and neighbors.[5] Furthermore, land disputes are divided into two kinds: disputes over plots mainly in the countryside and over houses mainly in the towns and capital city. Over ninety percent of the population lives off the land and over ninety percent of land disputes go to courts and tribunals.

This paper, divided into three sections, studies the ways in which land tenure has changed through different periods. The first section traces the history and connection between land tenure, indigeneity, ethnicity, violence, and the law. The aim is to show how land and people become central in the genealogy of power relations. The second section looks at the policy on land restitution on paper, while the third section frames the debate on land restitution policy in praxis. The former section on policy posits everyone as a survivor, while the latter section on practice recognizes one set as victims and the other as perpetrators. Political reform in Burundi has sought to resolve the land question using the law, a product of political violence, as a way to render justice to victims of the past. This paper shows how land ownership becomes central to

"Giving Land Back or Righting Wrongs? Comparative Issues in the Study of Land Restitution" in *Land, Memory, Reconstruction, and Justice*, pp. 41-60; Pauline E. Peters, "Inequality and Social Conflict over Land in Africa," *Journal of Agrarian Change* 4 (July 2004): 269-314.

5   Dominik Kohlhagen, "In Quest of Legitimacy: Changes in Land Law and Legal Reform in Burundi," paper presented at European Association of Development Research and Training Institutes General Conference, Rethinking Development in an Age of Scarcity and Uncertainty: New Values, Voices and Alliances for Increased Resilience, University of York, 2011, hereafter cited as Kohlhagen.

belonging in the nation-state and how after violence, indigeneity and ethnicity are reasserted through land.

From Body to Territory: Sovereignty from the Precolonial to the Postcolonial

This section traces the history of the relationship between land, ethnicity, and political violence. To grasp how the ruling party has used the state to handle the question of former refugees and their properties – by asking the beneficiaries of the past who now have legal rights over the properties to vacate them for their "original" owners – one has to understand the history of land relations, political violence, and ethnicity. Land has come to symbolize citizenship and state control, whereas in the precolonial period land represented not only what one could communally enjoy, but also services and tribute to be paid to leaders. Each period shows how relations around power, land, and identity continue to change: sovereignty shifts from body to territory, with the territory empowering the state over people.[6]

In nineteenth-century Burundi, the *mwami* (king) had preeminent right over the land, but this right over property was more in theory than in praxis.[7] The king was the guardian or protector and not owner.[8] This is because the king ruled over the domains he owned, while rule over the rest of his territory was delegated to chiefs and royal princes. Land belonged collectively to families. Family members had usufruct rights over the land, but it was not private property (Gahama, p. 310). Jan Vansina characterizes the location of power as an "alliance of lineages": kings were meant to

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6 Kings of Burundi were buried facing north to mark the border with Rwanda; see Jean-Pierre Chrétien and Émile Mworoha, "Les Tombeaux des bami du Burundi: Un aspect de la monarchie sacrée en Afrique orientale," *Cahier d'Études Africaines* 10, no. 37 (1970): 40–79.

7 Roger Botte, "Burundi: De quoi vivait l'État (Burundi: How the State Made a Living)," *Cahiers d'Études Africaines* 22, no. 87/88 (1982): 277–324, hereafter cited as Botte; Joseph Gahama, *Le Burundi sous administration Belge* (Paris: Karthala, 1983), hereafter cited as Gahama.

8 Jean-Pierre Chrétien comments on this in a footnote in Hans Meyer, *Les Barundi: une étude ethnologique en Afrique orientale*, trans. Françoise Willimann, ed. Jean Pierre Chrétien (Paris: Société française d'Histoire d'Outre-mer, 1984), p. 126.

have emerged from those who first came and cleared the land, and others would join the lineage as clients.[9] Thus land tenure, writes Vansina, was important for the foundation of political structure. Such a phenomenon of political structures dictating land use, he argues, makes Rwanda and Burundi unique.[10]

In the late nineteenth century, the strengthening of political control over land clashed with the population's demographic expansion, with "the clearing of vast lands and vested rights by the one who cleared the land" (Botte, p. 313). With a higher number of chiefs and subchiefs with their own increased demands, those in power sought to halt the "vested rights of ancestry" and end lineage-based form of organization. The aim was to make the size of extended families' enclosures smaller, in favor of greater gains by each *urugo*, or home (ibid.). Land management in the nineteenth century was decentralized, with land use in lineages based on indigeneity claimed by those who first cleared the land.

In Burundi's historiography, ethnicity is debated on the one hand as a colonial mode of categorizing; ethnicity is argued as forming part of a double identity of Hutu and Tutsi; they were not "immutable" identities. Hutu had two definitions: one a culturally or ethnically defined identity and the other defined by social connotations. Yet within this perspective, status rather than ethnic identity "was the principal determinant of rank and privilege" in precolonial Burundi.[11] On the other hand, the population can also be presented as members of socioeconomic categories.[12] In this argument, ethnicity is nonexistent because it is *ubwoko* (a category) that was used to categorize people, trees, and plants, and the same language and religion were shared among the four social and

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9 Jan Vansina, *Antecedents to Modern Rwanda: The Nyiginya Kingdom* (Madison, WI: University of Wisconsin Press, 2004), p. 29.

10 Ibid.

11 Lemarchand, *Burundi*, pp. 10, 15. One could have a double identity of Hutu and Tutsi; they were not "immutable" identities. Hutu had two definitions: one a culturally or ethnically defined identity and one defined by social connotations (ibid., p. 10).

12 Jean-Bosco Manirambona, "Nature du Discours sur la Fondation de la Monarchie Sacrée du Burundi et son Organisation Politique" (PhD thesis, Université Libre de Bruxelles, 2014).

economic categories of people: Ganwa (royalty), Hutu, Tutsi, and Twa.[13] Bahutu, Batutsi, and Batwa were not part of an order of dependency, but rather formed ranks within the same masses of the *banyagihugu* (population) as producers of goods and suppliers of services to the kingdom.[14]

In the twentieth century, Belgian colonial administration expropriated peasants from their land for the profit of mining and agricultural companies or religious institutions, and reduced the domains owned by the king.[15] Expulsions or dispossessions were not as common in the precolonial as in the colonial period, as it was in the chief's interest to have control over the largest number of subjects. Reforms of the 1939 land law increased the power of customary authorities to intervene in land tenure. It gave power to chiefs to distribute vacant land still in its wilderness and receive payment for it. From then onwards, peasants needed the authorization of subchief and chief in order to clear marshland, prompting the authorities to intervene in land disputes, thus reducing the power of the *Bashingantahe*, who used to resolve disputes (Gahama, p. 313). This produced rivalries, as chiefs would receive payment from new landowners yet act as the owners of the land. Colonial rule therefore intensified the power of chiefs and Baganwa over land tenure and changed the relationship between chiefs and subjects.

Belgian colonizers were surprised to find that the rule of chiefs and princes was not territorially based, but tied to "personal

relationships."[16] Even when princes went to war it was not over territory but over gaining "productive producers": *igihugu ntikiribwa ivu kiribwa abantu* (a country does not feed on land, but on people) (Botte, p. 278). Colonial administrators set out to install their own ideal of customs by "restoring the custom in its primitive purity: the political connection became once again territorial."[17] Chiefs were from then on bound to defined territories and not people. Colonial administration created a hierarchical feudal power, yet the kingdom allowed for independent-minded *chefs* (chiefs), personal connections that allowed the population to taunt their chiefs, and the confusing of territorial borders due to numerous overlapping enclaves.[18]

Colonial historiography described a "feudal" kingdom, with Hutu as the autochthonous majority and serfs, and Tutsi as the minority, both identities understood in racial terms. The Hamite colonizers from Ethiopia were considered a superior race and natural ruler and the royal Baganwa were assimilated into the Tutsi as an ethnic group.[19] The last group, the Batwa (pygmies), was described as the first inhabitants.[20] Missionaries, explorers, and colonial administrators emphasized the physiognomy of the Barundi, which Lisa Malkki critiqued as "heavily elaborated cultural constructs — ideal types confounded by the reality of physical diversity and variation — [that] did not in the least detract from their

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13 Jean-Pierre Chrétien, *Burundi L'histoire retrouvée: 25ans de métier d'historien en Afrique* (Paris: Editions Karthala, 1993).

14 One overlooked category in the monarchy is the category of the Baganwa (the princes); the *Banyamabanga*, "the men of secrets," coming from mostly Hutu lineages, were the most influential as a "hereditary politico-ritualist aristocracy." This latter group exercised spiritual power at the court of leaders and among the peasantry. They were holders of the secrets of the state, organizing royal ceremonies and cults. The role of *Banyamabanga* was brought to an end during the colonial period. (Émile Mworoha, *Peuples Et rois de l'Afrique des Lacs: Le Burundi et les royaumes voisins au xIxe siècle* [Dakar-Abidjan: Les Nouvelles éditions Africaines, 1977], p. 116).

15 King Mwezi Gisabo (1852–1908), after having resisted the Germans, signed the Treaty of Kiganda, which in 1903 recognized the kingdom as a German protectorate. The Germans proceeded with indirect rule. After the First World War, Germany lost its protectorates and Belgium ruled Ruanda-Urundi under the League of Nations mandate from 1916.

16 Jean-Pierre Chrétien, "Une Révolte au Burundi en 1934: Les racines traditionalistes de l'hostilité à la colonisation," *Annales. Histoire, Sciences Sociales* 25 (November–December 1970): 1702.

17 Government report of 1927, cited in Chrétien, "Une révolte au Burundi en 1934," p. 1702.

18 Chrétien, "Une révolte au Burundi en 1934."

19 Ruanda-Urundi: In Ruanda, the royalty designated themselves as Tutsi, unlike Burundi where they were above Hutu and Tutsi identities as "Baganwa."

20 Vansina and other scholars such as David Lee Schoenbrun have rejected the migration hypothesis of the Great Lakes region. Vansina writes, "there were never successive immigrations of Twa foragers, Hutu farmers, and Tutsi herders since these social categories were only slowly developed as a means of labeling persons who were in the country" (Vansina, *Antecedents to Modern Rwanda*, p. 198). See also David Lee Schoenbrun, *A Green Place, A Good Place: Agrarian Change, Gender, and Social Identity in the Great Lakes Region to the 15th Century* (Kampala: Fountain Publishers, 1998).

power as classificatory tools."[21] For Jean-Pierre Chrétien, the "social manipulation" enacted by colonizers, who were informed by the missionaries, was based on three axes: feudalism, racial policy, and cultural segregation.[22]

The regrouping of chiefs and subchiefs, practiced in Rwanda and Burundi by the resident Belgian governor in both countries in the 1930s, led to a thorough elimination of Bahutu leaders during that period. Tutsi rule was naturalized countrywide. Segregation took place in schools, with the Tutsi trained as the future leaders and administrators.[23] In 1959, three years before independence, chieftaincy was brought to an end. Numbers of chiefs had been substantially reduced during the colonial period, centralizing power in the hands of few (Botte, Kohlhagen). In 1960, land that was not registered became the property of the state, allowing those who were granted plots by chiefs to register the land. Yet very few registered their land. Although in 1961 a title deed could be registered, customary rights to land continued to prevail in regard to land relations. However, rule by "custom" is not explained in any text of statutory law (Kohlhagen, p. 8).

Despite segregation by colonial administration, Hutu and Tutsi were not territorially segregated. Instead, they lived in the same space within racially segregated institutions. This was thus a two-tiered, racialized system, the first tier distinguishing whites from natives, the second Tutsi from Hutu. This was more of a centralized than a decentralized despotism. Instead of a decentralized despotism (or indirect rule), with tribalized identities of Hutu and Tutsi having different ethnic homelands with their own native authorities and customary laws, it was rather a racialized, centralized

21 Liisa H. Malkki, *Purity and Exile: Violence, Memory, and National Cosmology among Hutu Refugees in Tanzania* (Chicago: University of Chicago Press, 1994), p. 79.

22 Jean-Pierre Chrétien, "Hutu et Tutsi au Rwanda et au Burundi," in *Au Cœur de l'ethnie: Ethnies, tribalisme et état en Afrique*, ed. Jean-Loup Amselle and Elikia M'Bokolo 2nd ed. (Paris: Editions La Découverte, 1999), p. 143.

23 Between 1929 and 1954, the rate of Bahutu chiefs went from 10% to 0% and that of Batutsi chiefs from 21% to 26%, with the blood princes taking the lion's share (ibid., p. 145).

despotism within a single political and legal space.[24] This affected the formation of the postcolonial state. In the precolonial period the politics of land was based on personal relationships. Its basis shifts to ethnicity during the colonial period: Hutu is constructed as an autochthon while Tutsi is a migrant. Postindependence politics must be understood as a continuation, not a reforming, of colonial structures and ideologies.

Upon independence in 1962, it was a nationalist movement, UPRONA (Union for National Progress)—led by Prince Louis Rwagasore, who had been murdered after the win in 1961—that came to power. The party had both Hutu and Tutsi leaders, yet it is the fight for Hutu representation in leadership that resulted in the tumultuous year of 1965, when the Hutu prime minister, Pierre Ngendandumwe, was murdered. Following a two-thirds majority legislative win by the Hutu, King Mwambutsa Bangiricenge constituted a new government led by the Ganwa royalty.[25] This was an important turning point in the hardening of ethnic rule and rivalries, one which reinforced colonial, racialized, centralized despotism, with the Baganwa and Tutsi seeking to hold power in government while the Hutu sought representation that equaled their numbers. Violence that has broken out in political contestation among elites was thereafter used by the same elites to mobilize the population: "the initiatives of ethnic violence were led by the ruling stratum. After have confronted each other, the Hutu and Tutsi elites exported ethnic violence to the masses."[26] Violence from the elites was dispersed into the population. Violence has not only political but economic underpinnings, since political power is connected to economic access. After 1972, a strengthened racialized, centralized despotism held power, without Hutu political representation. An armed struggle was the outcome, with the Party for the Liberation of the Hutu

24 Mahmood Mamdani, *When Victims Become Killers: Colonialism, Nativism, and the Genocide in Rwanda* (Princeton, NJ : Princeton University Press, 2001) and *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (Princeton, NJ : Princeton University Press, 1996).

25 René Lemarchand, *Rwanda and Burundi* (London: Pall Mall Press, 1970), p. 296.

26 Barnabé Ndarishikanye, "Burundi: Des identities ethnico-politique forgées dans la violence," *Canadian Journal of African Studies* 33, no. 2/3 (1999): 287.

People (*Palipehutu*) created in 1980 in a refugee camp in Tanzania.[27]

The rebellion in 1972 that set off the violence was led by Congolese Mulelists, who led massacres against Tutsi, as well as Hutu who fit the so-called Tutsi prototype.[28] The rebels calling themselves "Mulele" came from mainly either Zaïre or Tanzania; others were Babembe or Babwari already living in Swahili districts on the Burundi littoral. However, most of the insurgents were Hutu who lived in the southern provinces, viewing the Tutsi as the enemy (Chrétien and Dupaquier, p. 97). A witness described the attack in Nyanza-Lac commune as being led by the people called Mulele from the Imbo region; they viewed themselves as Hutu liberators and sought to exterminate the Tutsi. A Hutu from the mountain was referred to as Tutsi and was the enemy (Chrétien and Dupaquier, p. 102). Any person with a straight nose and tall stature was killed, whether Tutsi or not. The Mulele wanted to liberate the Hutu, "because in Imbo people could not stand the presence amongst themselves of those who came from the interior of the country" (ibid.). The attack against Tutsis by Hutus in 1965 and 1972 was followed by an indiscriminate repression against educated Hutu. This initiated a cycle of mass violence perpetrated by one ethnic group against the other, among persons in similar social conditions.[29] Ethnic consciousness-raising occurred through this politically motivated violence (Chrétien and Dupaquier, p. 21). Events in Rwanda affected politics in Burundi, leading to ethnic rivalries and growing regionalism in a tense first decade after independence. The so-called social revolution of 1959 in Rwanda reinforced politicized colonial identities.[30] A small-educated bourgeoisie started an anti-Tutsi movement that was not instantly taken up among the peasantry.[31] This movement

27 Malkki, *Purity and Exile*.

28 Ndarishikanye, "Burundi: Des identities ethnico-politique forgées dans la violence."

29 Ibid.

30 The Belgians jointly colonized Rwanda and Burundi, and thus both experience the same colonial racializing. Yet, each kingdom had experienced differently the question of "ethnic" categorizing during the precolonial and colonial periods due to their different histories.

31 Claudine Vidal, "Situations Ethniques au Rwanda," in *Au Cœur de l'ethnie*, pp. 167–84.

resulted in the killing of thousands of Tutsi in Rwanda between 1959 and 1963, with over 150,000 Tutsi seeking refuge in Burundi and Uganda. These events have influenced the "construction of a Tutsi dominated political system in Bujumbura."[32]

In order to understand the history of those who came from the countryside versus those living on the Tanganyika coast, one must understand the history of the region. The Imbo region, where the Mulele attack took place, stretches from Lake Tanganyika shore to the dry lowland area. Its economy and social relations differ from those of the highland and grassland. The region engaged in commercial activities with the Muslim trade networks around Lake Tanganyika in ways that were different from the culture of dynastic Burundi.[33] In the twentieth century, the Hutu chiefs in the region were subjects of Baganwa (the princes). King Mwezi Gisabo, in the late nineteenth century, would send Tutsi representatives to the Imbo region, while the Belgians eliminated Hutu chiefs. In the nineteenth century, the region was rich in exchange of services or tribute such as salt or mats made to the court. The sleeping sickness decimated the region from 1905. Only beginning in 1930 did the population increase. Imbo inhabitants viewed themselves as Hutu, with Swahili widely spoken, and inhabitants were in contact and commercial exchange with Congolese fishermen, artisans, and traders (Chrétien and Dupaquier, p. 103).[34] By independence it was Hutu authorities that were elected under UPRONA. Babembe, from what was then Zaïre, moved to the other shore of the Lake Tanganyika in the 1950s and easily integrated themselves. In the 1960s, the Imbo region was seen as a particularly welcoming, cosmopolitan place, with 5,000 inhabitants including Swahili, In-

32 Gérard Prunier, *The Rwanda Crisis 1959-1994: History of Genocide* (Kampala: Fountain Publishers, 1995), p. 198.

33 David Newbury, "Pre-colonial Burundi and Rwanda: Local Loyalties, Regional Royalties," *The International Journal of African Historical Studies* 34, no. 2 (2001): 262.

34 Manirambona, on the other hand, argues that the movement of the people of the mountain into the Imbo plain to work in the colonial cotton plantations is what brought the Hutu identity onto the plain. In the southern western Imbo region, the Babo (people of Imbo) referred to themselves as "Abasase" and not Hutu (Manirambona, "Nature du Discours sur la Fondation de la Monarchie Sacrée du Burundi et son Organisation Politique," p. 209).

dians, Babembe, Arabs, Rwandans, and Barundi from all regions (Kohlhagen, pp. 52–54).

The refugees who returned after 1972 got access to their plots of land, while neighbors and local administrators took over the plots of the thousands who did not return. Encouraged by the administration and attracted to the very fertile land bordering Lake Tanganyika, populations from other provinces and communes moved to Rumonge soon afterwards.[35] In 1974 and 1975, a significant number of senior government officials took over properties and would acquire several hectares or even entire zones.[36] Some who had remained sold part of their property to avoid having to share family land upon return of refugees or exiled family members.[37] Not all Hutu fled, but a large majority did.[38]

In 1976, at the beginning of the second republic (which lasted until 1987 and was led by Colonel Jean-Baptiste Bagaza, who came to power through a coup), the first land commission, the so-called 1976 Mandi commission, was set up with a mission to settle property disputes with the returning population. The commission had a special court with jurisdiction of common law.[39] The state passed a decree to support the commission's work of restoring the property of the repatriates.[40] The agenda of the commission was ambiguous, as it aimed to end illegal land allocations by the Michel Micombero regime,[41] yet also legalized a great number of these allocations,

35 Gervais Gatunange, "La Problématique foncière dans la perspective du rapatriement et de la reinsertion des sinistrés," Observatoire de l'Action Gouvernementale, Bujumbura, November 2005, p. 9.

36 République du Burundi, *Commission Nationale Terres et autres Biens: bilan d'activités période 2006-2011* (Bujumbura: Lake House, n.d.), p. 29.

37 Gatunange, "La Problématique foncière," p. 10.

38 Félicien Sinarinzi and Théodora Nisabwe, "Étude Sur la problématique des terres laissées par les refugiés de 1972 dans les communes Rumonge et Nyanza-Lac," Fourth Commission of Arusha Inter-Burundi Negotiations in Charge of Development and Reconstruction, Bujumbura, October 1999.

39 Gatunange, "La Problématique foncière," p. 10.

40 Law decree n° 1/191 of December 30, 1976 stated that land illegally attributed must return to the state; see Sinarinzi and Nisabwe, "Étude Sur la problématique des terres laissées par les refugiés de 1972 dans les communes Rumonge et Nyanza-Lac."

41 Captain Michel Micombero led a coup against the monarchy and formed the first republic from 1966 until 1977, when he was overthrown by Colonel Jean-Baptiste

with previous owners' rights limited to partial compensation. Thus very few refugees returned.[42] Out of 236 lodged claims, 177 land rights claimants were restored to their properties.[43]

In 1977, as part of the Mandi commission's work, a decree brought an end to *ubugererwa*, which had allowed a family to give land to the landless, implying an engagement in a patron-client relationship.[44] Those who occupied land were granted rights to that land after having lived in it for more than fifteen years, whether or not the first taking up of occupancy was illegal. Yet only a small number of people have registered those plots in the decades since the 1960 decree (Kohlhagen). The 1986 land code, "a compilation of former colonial laws," distinguished between "propriété," land registered by title and protected by law, and "droits privatifs" or recognized customary rights, according to which the state could claim ownership of land left vacant for over two years.[45] From a legal perspective, former occupants were the original owners while new occupants enjoyed the land without necessarily being the owners. The owner is in bad faith when he enjoys as the owner while knowing in reality that he is not one. Hence the thirty-year prescription that transforms an occupant into an owner even if they were an owner in bad faith. But if one occupied property in good faith, one acquires the title for the property in fifteen years.[46] This means that whether one occupied land in good faith or in bad faith after 1972, one would be an owner starting in 2002.

The third republic (1987–88), in which President Pierre Buyoya ascended to power after a coup in 1987, was followed by the democratization of the 1990s. There was pressure from the international community following killings and counterkillings of Ntega-Ma-

Bagaza.

42 Réseau Citoyens-Citizens Network (RCN) Justice and Démocratie, *Etude Sur les pratiques foncières au Burundi: Essai d'harmonisation; Enquêtes menées dans 10 provinces du Burundi en février – mars 2004*, Bujumbura, 2004.

43 Gatunange, "La Problématique foncière," p. 10.

44 David Newbury and Catherine Newbury, "Bringing the Peasants Back In: Agrarian Themes in the Construction and Corrosion of Statist Historiography in Rwanda," *The American Historical Review* 105 (June 2000): 832–77; see also Kohlhagen.

45 Article 231 of the 1986 Land Code (quoted in Kohlhagen, p. 2).

46 Gatunange, "La Problématique foncière," p. 13.

rangara in the north. In 1988, when a Hutu group attacked a Tutsi population, the response was the repression of the Hutu population by the Tutsi majority army. President Buyoya initiated the "national unity" policy, which enacted the sharing of power with ethnic Hutus who had been practically excluded since the 1972 crisis. The share of Hutus in government rose from twenty percent to half.[47] In 1991, a new commission in charge of the return and reinsertion of refugees, the Commission Nationale chargée du retour, de l'accueil et de l'insertion des réfugiés Burundais, was established with a double mission: to help repatriates settle in available properties and to investigate the causes of disputes during relocation of refugees, in order to promote reconciliation and national unity.[48] Repatriates were not to seek to regain their properties if they were occupied by others, as they would be given land elsewhere. The government sought to settle them elsewhere rather than in the region from which they had come.[49] All those who could not return to their properties were given two hectares on vacant land. Villages to provide places for returnees were also constructed.[50]

After almost three decades of military, republican rule, democratic elections took place in June 1993. Melchior Ndadaye, the Hutu leader of the pro-Hutu Front pour la Démocratie au Burundi (FRODEBU), was elected. The victory of FRODEBU resulted in a massive return of refugees, who sought to claim their land.

Created in a political context of agitation, the commission was reactivated after the victory of FRODEBU. Under attack was the clause that prevented the refugees from gaining their old properties. Occupants were thrown out. Ndadaye made a speech in Makamba in which he called for the respect of vested rights unless the occupant owned several properties, in which case the state would allocate land for the returning refugees.[51] Yet after Ndadaye was killed

47 Réseau Citoyens-Citizens Network (RCN) Justice and Démocratie, *Etude Sur les pratiques foncières au Burundi*, p. 12.
48 Ibid.; Arusha Peace and Reconciliation Agreement for Burundi, August 28, 2000, p. 18.
49 Gatunange, "La Problématique foncière," p. 12.
50 Arusha Peace and Reconciliation Agreement for Burundi, p. 19.
51 Réseau Citoyens-Citizens Network (RCN) Justice and Démocratie, *Etude sur les*

in 1993, former refugees fled Burundi once more and many Tutsi were internally displaced.[52] This plunged Burundi into a civil war that brought President Buyoya back to power from 1996 to 2003.

The law privileged those who remained behind. It is such an "instrumental use of law" that the government has never questioned and that is at the root of multiple land disputes (Kohlhagen). As Dominik Kohlhagen writes, "the core problem is that most of the spoliations and land grabs were at some point legalised, giving corruption and clientelism an almost normative character. To a large extent, statutory law in Burundi facilitates and even encourages practices that most people perceive as arbitrary, inequitable and unjust" (Kohlhagen, p. 4). Politicized ethnicities and violence by the state produced a land where ethnicity became tied to indigeneity in the colonial and postindependence periods.

The Truth and Reconciliation Commission and Consociational Power-Sharing

Parliament approved the creation of the Truth and Reconciliation Commission (TRC) in April 2014, at the same time that the special court for the CNTB was approved.[53] The TRC was tasked with studying ethnic violence spanning 1962–2008 for a period of four years, in order to identify what crimes were committed and who the perpetrators were. It does not have the right to prosecute. There have been no other avenues to discuss the past or judge those who commit mass violence, be it the state, individuals, political groups, or rebel groups.

The delay in creating a truth and reconciliation commission was due to the form of political settlement that Burundi underwent to end the civil war, namely the Arusha Peace and Reconciliation Agreement brokered by South Africa and Tanzania and signed by the main opposition Hutu and Tutsi parties and the president in 2003. Although the National Council for Defence and Democracy – Forces for Defence and Democracy (CNDD–FDD) did not sign this

pratiques foncières au Burundi, p. 14.
52 Ibid., p. 20.
53 The TRC has struggled to take off and is not perceived as an unbiased body.

agreement, its emergence into power through the parliamentary vote was brokered by the Arusha agreement. The agreement has sculpted the current constitutional and political landscape.[54] This political settlement was based on a "consociational power-sharing arrangement between ethnopolitical groups and an elite bargain between politicomilitary leaders."[55] Burundi's government follows a consociational power-sharing model. The constitution states that the government, for instance the National Assembly, must have a maximum of sixty percent Hutu ministers, a maximum of forty percent Tutsi ministers, and at least thirty percent who are women. The Minister of National Defence and the Minister in charge of the National Police must belong to different ethnic groups.[56] Each political party must have a mixture of Hutu and Tutsi candidates on the electoral lists. Each party has to have ethnic and gender diversity, thus "the dominant party CNDD–FDD, while rooted in a Hutu rebel movement, is no longer perceived as an exclusive Hutu party."[57] Despite defusing ethnic tension, the Arusha agreement was in reality an elite power-sharing pact focused on the sharing of senior political, military, and economic positions. Thus, due to the character of Burundi's transition, namely that the ethnopolitical and politicomilitary groups were not in the least interested in transitional justice, the TRC was delayed: "As many of them have blood-stained hands, their interests converge in having as little truth and accountability as possible." For example, if the CNDD–FDD is in power and handles the TRC process, other parties will be concerned with "one-sided truth telling."[58]

The power-sharing model has also not led to success in other state-building goals of democracy such as the rule of law, account-

ability, effective governance, anticorruption, and avoiding electoral authoritarianism.[59] Consociationalism has not prevented the ruling party from becoming increasingly authoritarian, despite being perceived as providing a stable power-sharing democracy that ended political violence and electoral authoritarianism. It has been argued that the 2010 elections resulted in a more authoritarian state with the reelection of President Pierre Nkurunziza and the boycott by major opposition parties. However, opposition parties, including former foes, formed a coalition to fight the growing hegemony of the ruling party. This has showcased maturity among opposition parties. The 2015 elections have increased the ruling party's stranglehold on power, as President Nkurunziza chose to run for a third mandate on July 21 and won the election, in spite of the constitution, based on the Arusha agreement, recognizing a two-term limit. The constitutional court in the end approved President Nkurunziza's candidacy, though its independence was questioned. This has led to anti-third-mandate protests in neighborhoods of Bujumbura similar to earlier ones in Makamba province prompted by land disputes. The protestors as well as opposition party members and members of civil society have since been the targets of killings allegedly led by the police and youth members of the ruling Imbonerakure party. This violence, alongside accusations of reigniting ethnic antagonism, have tarnished President Nkurunziza's third term and led once more to the movement of the population, with an estimated 175,000 refugees in neighboring countries.[60]

Land Commission: A Reconciliatory Policy

The 2003 Arusha agreement established a commission to assist refugees and displaced persons in recovering their properties.[61] Emphasis was placed on the right of refugees and the "sinistrés"

54 Stef Vandeginste, "Burundi's Truth and Reconciliation Commission: How to Shed Light on the Past while Standing in the Dark Shadow of Politics?" *The International Journal of Transitional Justice* 6 (July 2012): 355–65; Stef Vandeginste, "Power-Sharing, Conflict and Transition in Burundi: Twenty Years of Trial and Error," *Africa Spectrum* 44, no. 3 (2009): 63–86.

55 Vandeginste, "Burundi's Truth and Reconciliation Commission," p. 5.

56 Vandeginste, "Power-Sharing, Conflict and Transition in Burundi," p. 75.

57 Vandeginste, "Burundi's Truth and Reconciliation Commission."

58 Ibid., p. 5.

59 Vandeginste, "Power-Sharing, Conflict and Transition in Burundi."

60 European Commission, "EU Increases Humanitarian Aid for Burundi Refugees," press release, Brussels, July 30, 2015, europa.eu/rapid/press-release_IP-15-5453_en.htm.

61 Article 2(e) of chapter one, on "Rehabilitation and Resettlement of Refugees and Sinistrés," in Protocol IV Reconstruction and Development, Arusha Peace and Reconciliation Agreement for Burundi, p. 77.

("all displaced, regrouped and dispersed persons and returnees") to regain possession of their land in conformity with the laws and regulations of Burundi.[62] When they cannot recover their property, they should be compensated, the Arusha agreement said.

The Commission Nationale de Réhabilitation des Sinistrés (CNRS), created in 2002 as a product of the Arusha agreement, was replaced in 2006 by the CNTB. The government issued a call for the return of refugees in 2002, but it was 2008 that saw a high number of repatriates return following the tripartite action of the Burundi government, the United Nations High Commission for Refugees, and the Tanzanian government.[63]

The CNTB classifies refugees in two categories: longstanding refugees from 1972 and recent refugees who fled the country in 1993 (including a large number of internally displaced persons). These categories encompass both Hutu and Tutsi. The 1993 refugees were able to more or less easily regain their property. The main problem was for the longstanding refugees of over thirty years who returned and wished to obtain their former properties. People without documentation of ownership were placed in "integrated rural villages" that included refugees of 1972. 524,222 refugees of 1972 and 1993 were repatriated from 2002 to 2009 with the majority being 1993 refugees, while 162,156 Burundi refugees received citizenship from Tanzania in 2014.[64]

The CNTB report of its activities from 2006 to 2011 affirms that it set out to resolve conflicts connected to the 1972 crisis through "amicable settlement, restitution of property, sharing of property, demarcation, transfer, retrocession, confirmation of ownership by occupier, [and] compensation."[65] In its report, the CNTB affirmed that it aimed to be neutral and to "reconcile law, equity, peaceful co-

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62 Ibid.

63 République du Burundi, *Commission Nationale Terres et autres Biens: bilan d'activités période 2006-2011*, p. 27.

64 Jean-Baptiste Ndayiragije, "Non-Institutional Mechanisms to Resolve Land Conflicts between Residents and Returnees: Study of Nyanza-Lac Commune in Makamba Province" (master's diss., University of Burundi, April 2011).

65 République du Burundi, *Commission Nationale Terres et autres Biens: bilan d'activités période 2006-2011*, p. 2.

habitation and peace consolidation."[66] The role of the commission was to explain and make the repatriate and the resident understand that "neither of them were at the root cause of the conflict and that they will gain from such cohabitation."[67] The CNTB has a delegation in each province, whose work is to carry out an inventory of land owned by the state, identify land illegally acquired, and handle all cases submitted by the *sinistrés*, who comprise all the displaced, regrouped, and dispersed persons and returnees. The CNTB and its provincial delegations aim to help the *sinistrés* recover their property, providing technical assistance for them to acquire their property rights.[68] The CNTB considered compensating the *sinistrés* who have not recovered their land or goods and resolving pending litigation from the previous commissions, but this has not been done.

The repatriate, upon his return from exile – from the war – finding his plot occupied by another person or the state having built some form of infrastructure on it, is expected to seek the help of the CNTB. The report emphasizes that those who seek the help of the CNTB are limited to those who fled because of "socio-political crises."[69] Often the repatriate has to provide witnesses, as they hold no land title while the occupant has one. Thus it is a battle whether memory and customary right, or the law will win. With customary land, memory can help produce evidence and locate the land as well as neighbors or other persons who can attest to one's ownership. According to law, the occupant must produce a land title. Yet the burden remains on claimants to bring evidence that they were previous owners of the property. Witnesses are required in the event a title cannot be located, which is often the case.

The possibilities faced by refugees and internally displaced persons upon return include: the property was shared among remaining family members, the state took ownership of it and distributed it, or the land was requisitioned by the state for infrastructural

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66 Ibid.

67 République du Burundi, *Commission Nationale Terres et autres Biens: son organisation et ses activités 2006-2010* (Bujumbura: Lake House, n.d.), p. 19.

68 Ibid.

69 Ibid.

projects.[70] The CNTB invites the "plaintiff" and the "accused" living on the plot to bring documents or witnesses (or, in the case of the accused, to explain themselves). The CNTB then tries to make them reach a compromise. If the two parties fail to agree, CNTB settles it. In a case where property was annexed or the owner dispossessed, they restore the property to the repatriate. When the land has been improved by the occupant, the CNTB will give the occupant one-quarter of the land and the repatriate three quarters. If the occupant has documents—proof that they are occupying the land legally—then the property can be cut in half (though not always, depending on its proportions). If a claimant's land was taken over for a public infrastructure project, the state must give the claimant land with the same surface area. Through retrocession, if land was occupied illegally or compensation was given when the occupant returns property, his assets should be evaluated and he should receive compensation. But the CNTB has no funding for this.[71]

In its first mandate from 2006 to 2011, the CNTB, led by the clergyman Astère Kana, primarily sought to inventory land owned by the state and vacant land and privileged the sharing of property or mediated settlements agreed by both parties. By 2011, over 27,000 cases were registered with the CNTB. Close to sixty-six percent were amicably resolved, while twenty percent were settled by CNTB.[72] Prior to the CNTB's existence, land disputes were resolved in the way most disputes were—with the involvement of local leaders such as *Bashingantahe*, wise men and women of the community.[73] They are now excluded from the process. Yet the institution of *Bashingantahe* remains important with respect to customary law: "Negotiation, conciliation and arbitration continue to play an important role, whereas only very few people recognise written state law as an effective means to mitigate conflicts. Not only the *Bashingantahe*

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70 République du Burundi, *Commission Nationale Terres et autres Biens: bilan d'activités période 2006-2011*, p. 2.

71 Ibid., p. 26.

72 Ibid., p. 43.

73 These are trusted "wise men," chosen by the community as their mediators and representatives, from the precolonial era. In land conflicts between returnees and residents, the solution favored by *Bashingantahe* was the sharing of property.

but also state administrators and even judges in state courts refer to customary values and logics to settle disputes" (Kohlhagen, p. 9).

The CNTB explains land disputes among the Nyanza-Lac peasantry in the Makamba province, an area previously very populated and rich in agriculture, as being due to the 1972 crisis, whereby large parts of the population fled.[74] In 1976, the government urged the population to return. Some returned and some did not. Those who returned did not return to farm but rather to reap, and would return to Tanzania and neighboring Democratic Republic of Congo. In view of such "abandonment," the report states, the government decided upon a new use for the land. It cleared forested land and settled new peasantries. In this new agricultural project, the government would dictate what to plant and agronomists would monitor the planting of food crops, principally palm trees and cotton. Upon their return, the repatriates would expect to recover their land but found that the government had settled other people there. Thus began land conflicts among the peasantry.[75]

CNTB policy considers everyone a survivor. It encourages reconciliation and prioritizes land sharing or compromise between parties. Such an approach privileges the present, peaceful living, and the breaking down of victim-perpetrator narratives.

Praxis of Land Restitution

Prudence Bigirimana, a native of Matana in the hinterland of the province and a Tutsi, has been living in Rumonge, a town on the coast of Lake Tanganyika in southern Burundi in Bururi province, for over two decades. In 2014, Bigirimana lost his plot of land to a repatriate, Nyabenda Buyabara, who returned from Tanzania in 2009 and sought to resolve the problem amicably. Failing to reach an understanding, Buyabara went to the CNTB to claim his property. Bigirimana argued, showing proof, that it was the Office d'Huile de Palme (OHP, Palm Oil Office), a state company, that gave out the

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74 République du Burundi, *Commission Nationale Terres et autres Biens: bilan d'activités période 2006-2011*, p. 27.

75 République du Burundi, *Commission Nationale Terres et autres Biens: son organisation et ses activités 2006-2010*, p. 28.

land in 1983 to encourage farmers to plant palm trees.[76] In 2013, the CNTB listened to both parties and visited the property. It thereafter gave right of property to Bigirimana, and then asked the plaintiff to make an appeal at the national level within two months. The appeal did not take place. Nevertheless, in May 2014, Bigirimana attested that the CNTB brought the repatriate onto the property by force and refused to listen to Bigirimana. Bigirimana questioned how the CNTB could give out land to someone who lost before the same commission and did not even appeal. This, Bigirimana said, was a regular occurrence with the CNTB and would eventually lead to conflict, as two conflicting decisions were made in one case. The CNTB defended itself, saying that Buyabara complained to the commission after Bigirimana sold the property to someone else.[77] Bigirimana owns another home where he resides in Rumonge.

In an interview, Bigirimana called the CNTB "fraudulent," describing it as corrupt. The CNTB, in his view, urges repatriates to find people to play the role of witnesses to claim land which is not theirs, and then bribe the commission.[78] There is a lot of hostility in the community, said Bigirimana, adding, "now we are hoping for a change in government: we hope a new body will come to undo the injustice done." For Bigirimana, ethnicity is less of an issue now. Ethnicity only appears when it comes to revisiting cases already settled by the sharing of property between returnees and residents or when houses built post–1972 by the residing property owner are attributed to repatriates.

Pierre Bandyatuyaga, who lost two of his properties in Rumonge in 1972, gained them both back in April 2014. Bandyatuyaga was elated and said justice was served: "better late than never." He won the case after appeal in the special court. Emmanuella Tuyishemeza, a representative of one of occupants of the properties, said that the CNTB granted Bandyatuyaga the home without

76 This was previously the SRD Rumonge (Société Régionale de Développement Rumonge).

77 Prudence Bigirimana, interview by author, Bujumbura, December 2014.

78 Dieudonné Hakizimana, "Bururi, Makamba: La CNTB accusée de partialité," *Iwacu*, May 26, 2014, www.iwacu-burundi.org/bururi-makamba-la-cntb-accusee-de-partialite.

considering that it is her father who built the house in the property and not Bandyatuyaga. Tuyishemeza added that the appeals court had rejected the CNTB provincial delegation's decision to attribute the property to Bandyatuyaga, and ruled that the property be divided into two.[79]

The CNTB came under the president's office following a revision of the CNTB law in 2011 and welcomed newcomer members of the ruling party. The Forces Nationales de Libération (FNL) members who actively took part in the armed rebellion that ended in 2006 were appointed as provincial delegates of the CNTB. In 2011, the new head of the CNTB, Serapion Bambonanire, accused the commission of favoring residents and called for unconditional restitution of land for the 1972 refugees. Residents were now referred to as secondary occupants.[80] After 2011, the CNTB directed those living on property owned by Hutu before 1972 to promptly vacate the property. In the CNTB's records, out of 37,062 cases recorded from 2006 to 2013, 59.9 percent were resolved amicably and 26.12 percent were resolved through the commission's decision, the latter meaning that the current occupant was told to vacate the property. 13.98 percent were not conflict-related cases and 29.88 percent of cases were unresolved.[81] Another change in the CNTB's mission was article four – composition, organization, and functioning of the commission – which provides in the new version, from 2011 onwards, that if parties fail to reach an agreement at the provincial delegation level, the injured party can appeal to the national commission within two months of the decision.[82]

The president's spokesperson, Léonidas Hatungimana, has argued that the state cannot be blamed for its allocation of land to new occupants after 1972. Rather, the blame is on the occupants,

79 Felix Nzorubonanya, "Rumonge: La CNTB restitute deux maisons à un rapatrié sur fond de contestations," *Iwacu*, April 4, 2014, www.iwacu-burundi.org/rumonge-la-cntb-restitue-deux-maisons-a-un-rapatrie-sur-fond-de-contestations.

80 Bambonanire was sacked as the head of the CNTB on April 18, 2015, an event related to the Makamba incident.

81 Statistics received from CNTB, 2013.

82 République du Burundi, *Commission Nationale Terres et autres Biens: bilan d'activités période 2006–2011*, p. 11.

who became "illegal occupants" because "the state had washed off its hands with the laws."[83] This is in reference to presidential decrees in 1974 and 1977. The 1974 decree rescinded the seizure of property in May 1972, while the decree of 1977 allowed the lawful reintegration of people who fled the events of 1972. The CNTB is reconciliatory because, as Hatungimana maintained, "when someone demands the jacket of his murdered father, without demanding their death, this is more than conciliatory?" Thus, according to the president's spokesperson, the illegal occupant should voluntarily return what does not belong to him, with compensation for benefiting from the "illegal occupation." For Hatungimana there are no laws that refer to compensation for illegally enjoyed property, but instead there are laws regarding compensating a claimant who can no longer access their property. Thus he denies the notions of a legal occupant of a property with a land title and a secondary occupant or who bought the land in good faith. This dismissal absolves the state even though the state sold many properties and encouraged people to move onto vacant land.[84]

In an exchange workshop organized in July 2013 by the office of the president to evaluate the work of the CNTB, the creation of a compensation fund was rejected because the commission did not believe anyone bought property in good faith.[85] Pierre Claver Sinzinkayo, head of the CNTB's provincial delegation in the city of Bujumbura, said that they could not recognize the title deeds of such occupants because there are no good faith occupants. The government that issued title deeds was in their view illegitimate because it had condemned the property owners to death before seizing their property. Sinzinkayo emphasized that the CNTB was not put in place to dispossess one population for the benefit of

another, but rather to "rectify errors of the past and rehabilitate victims of injustice committed in the past."[86] He questioned the authenticity of documents proving ownership because the owners had been condemned to death.

Pauline Ntacunkurikira, whose husband was killed in 1972, was given her five-hectare property in Busoni in the northern province of Kirundi in July 2014 by the CNTB after the commission forced 116 family members off the plot.[87] The residents argued that they had purchased the land in 1980 with money they had received from the state as compensation for being forced to relocate in order to make way for a market. The evicted persons added that they knew nothing about the previous ownership and history of the property. They further said that they did not know that the first property owner was a *menja*, a term with a negative connotation widely used in official literature to refer to a Hutu rebel. Hutus are portrayed as rebels, *bamenja*, and not as the victims of 1972. Thus the Hutu who fled in 1972 were portrayed as rebels who attacked the people and the state. But although some Hutus launched attacks and had some support in the communes where they did so, they were not representative of the whole Hutu population. What is not discussed is the heavy oppression thereafter.

In a November 2013 interview, a CNTB official who works on cases in Bujumbura city estimated that eighty-five percent of plot disputes are Hutu versus Hutu. Thus for him, ethnicity is only one factor in the restitution of houses, not land. Yet between Tutsi and Hutu, housing is disputed. The disputes over property that the official was handling in Bujumbura were about Tutsi residing in houses owned previously by Hutu. Property is returned to 1972 owners and the current owner is not compensated. The latter are told to seek out the person from whom they brought the house, the official added. But according to Abbot Adrien Ntabona, the former

83 Edouard Madirisha, "Karusi: Léonidas Hatungimana la star de la CNTB," *Iwacu*, June 22, 2013, www.iwacu-burundi.org/karusi-leonidas-hatungimana-la-star-de-la-cntb.

84 République du Burundi, *Commission Nationale Terres et autres Biens: bilan d'activités période 2006-2011*, p. 53.

85 Floribert Nisabwe and Philippe Ngendakumana, "CNTB: que veut dire 'acquéreur de bonne foi'?", *Iwacu*, July 3, 2013, www.iwacu-burundi.org/cntb-que-veut-dire-acquereur-de-bonne-foi.

86 Dieudonné Hakizimana, "CNTB: "Pas acquéreur de bonne foi," *Iwacu*, August 7, 2013, www.iwacu-burundi.org/cntb-pas-dacquereur-de-bonne-foi.

87 Philippe Ngendakumana, "Les Déguerpis de la CNTB, à Busoni: une décision légale mais injuste," *Iwacu*, July 28, 2014, www.iwacu-burundi.org/les-deguerpis-de-la-cntb-a-busoni-une-decision-legale-mais-injuste.

head of the *Bashingantahe* council, the CNTB is viewed as a politicized entity, in place to settle political and ethnic scores. For Ntabona, the current ruling party wishes to thereby win over the Hutu electorate. Describing it as an "explosive situation," he said that no *mushingantahe* can get involved because there is a lot of scheming within the CNTB. The CNTB official said those who oppose its work have politicized it. Yet those who oppose CNTB argue that it is the CNTB that has politicized land restitution. For the CNTB official, land disputes are "an opportunity to express the frustrations against the CNDD [-FDD, the ruling party]."[88] Political parties and civil society actors argue that the CNTB has not aimed at reconciliation, but is instead reviving ethnic hatred and helping the ruling party win votes in the 2015 elections.[89]

The state uses the CNTB to depoliticize land disputes. It bureaucratizes the process, making land disputes a procedural matter. Yet increasingly, the CNTB's work is seen as reigniting not only ethnic tensions but also privileging one part of the population over the other in its endeavor to remediate the past. The CNTB, on the other hand, argues that reconciliation can only happen when those who have returned have their property restored. This has limited the CNTB's capacity to listen to both sides, and has aggravated disputes over land. CNTB policy in praxis has privileged the past, rendering justice to the victims of 1972 by ensuring that beneficiaries of the past vacate the properties belonging to the refugees. The beneficiaries are viewed as the perpetrators, illegal occupants who knowingly stayed in properties that did not belong to them, those holding land titles notwithstanding. The state is absolved of any responsibility, in spite of laws that were in conflict in previous commissions.

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88 CNTB official, interview by author, Bujumbura, November 2013.

89 Rénovat Ndabashinze, "Forsc: La loi sur la CNTB souffle sur les braises de la haine ethnique en faisant les yeux doux aux Hutu," *Iwacu*, January 1, 2014, www.iwacu-burundi.org/forsc-loi-cntb-souffle-sur-les-braises-de-la-haine-ethnique-en-faveur-hutu-contre-tutsi.

Ending Remarks

As sovereignty shifted from body to territory during the colonial period, the marking of bodies shifted from an indigeneity that indicated those who first cleared the land, to ethnicity. Politics and ethnicity, as products of continued racialized, centralized despotism in the postindependence state, produced law to suit itself as well as violence. The body was connected to and disconnected from territory in the twentieth century, bringing out a new form of ethnicized indigeneity that marked the "ethnic" body as tied to particular property.

Land restitution in Burundi shows that the new policy emerged as the outcome of the CNTB's actions and inactions. This process is complicated by properties passing through many owners and the state passing laws that allowed occupants to gain ownership of the property with time, legalizing the dispossession of people who fled for their lives. The establishment of the CNTB without a truth and reconciliation commission with which to work hand-in-hand to acknowledge past events and provide compensation has created and continues to create new victims and perpetrators. It has performed inclusionary and exclusionary practices that have strained the nation and peace-building process in postviolence Burundi. The political settlement, based on a consociational power-sharing agreement, has been a top-down initiative and has not led to engagement in dialogue with the population. Rather, it divides the population into either perpetrator or victim. It does not compensate residents and it holds them accountable for past violence by the state against the population. Land restitution in this instance comes to inform and strengthen one view of the past where one part of the population is a victim of another part of the population. This also shows how malleable the law is; it has been used to dispossess a population fleeing violence and to also give them back their land.

Can the state's approach plausibly be considered as restorative justice and as transcending the categories of conflict? Does it serve as a foundation for a new society: a new community, a new political relation, and new men and women in postconflict

Burundi? Unfortunately the responses to these interrelated questions are negative. Despite invoking land as restorative justice, the Burundi experiment has many challenges. The approach is elitist, too institutionalist, and fails to involve communities in addressing land alienation and other legacies of the violence. At the top, the CNTB and the special court pass contradictory orders and decisions that have been challenged by the other local and high courts. Its justice appears more corrective than restorative.

In brief, the Burundi experience reveals the scars and trauma of the violence in the political foundation and essence of its postconflict community. Mahmood Mamdani argues that the solution is the deethnicization and depoliticization of ethnic identities through survivor's justice, in which Hutu, Tutsi, and Twa are all survivors and all belong to the land.[90] Land ownership and reform has become central to political reform and political justice in Burundi, defining people as victims and perpetrators rather than survivors.

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Justice and Peace after War: Conceptual Difficulties in the Discourses of Transition and Reform in Postwar Societies

Laury L. Ocen

ABSTRACT This paper examines how transitional processes in postwar societies are shaped by rhetorics of peace and concepts of state building that are applied homogenously yet are context specific in respective communities. Concepts such as peace, justice, war, terror, return, survivability, and victimhood have been perpetually reproduced and integrated in peace-building discourses without extensive interrogation of how different experiences of war and mass violence in specific locations reorient or shape their meanings differently. This work attempts to interpret mass violence in northern Uganda, where after twenty years of war, displaced people, excombatants, former abductees, and child soldiers have all *returned* home. What does it mean for displaced communities to "return"? What are the conceptual distinctions between victims and survivors of war? To what extent can peace-building practices in northern Uganda and other postwar societies transform victimhood into survivability in a manner that upholds transitional justice? The paper problematizes legal phenomena, particularly the rule of law in rebuilding war ruins and reintegrating communities divided by experiences of mass violence. There is a sense in which "rule of law" can be retranslated in a nonconformist trajectory that allows former rebels, losers, and perpetrators to have a voice in postconflict processes of trial, restitution, and transition.

Introduction

This paper explains conceptual lapses in the discourses of transition and reform in postwar societies. Critical here is the fluidity that characterizes notions of survivor and victim in the context of peace and justice. Transitional interventions continuously create victims of war in their attempt to create survivors of war.Although the major focus is northern Uganda, the paper also draws on examples from other parts of the world to argue that legal inclusiveness, market inclusivity, and resolved antecedents of conflicts create conditions that facilitate implementation processes of integration, settlement, and reconstruction of postwar societies.Creating "survivability" is a collective work of surviving communities as well as national, local, and other exogenous entities.The way reform processes are played out in transitional periods stems from how international agencies, national governments, civil societies, nongovernmental organizations, and local actors deploy human and material resources towards recovery.

In the above context this work highlights significant processes and stages in the structure and span of war, with specific focus on how time functions as an important variable in the broader discourses of transition and reform. It examines how war *begins* and *ends,* and how societies emerging from war interrogate the logic of transition, peace, and justice. By so doing, it explicates how a political reform paradigm galvanizes momentum from the state, humanitarian agencies, international diplomacy, and local actors to articulate survivors' justice. Using examples from northern Uganda, war is understood as a continual process whose axis of time is more complicated than has been assumed. Generally the depiction in different media is that the Lord's Resistance Army (LRA) war with the government of President Yoweri Museveni "began" in 1987 and "ended" in 2005. Conventional markers of the beginning and the end of a war take it for granted that war starts when two or more groups raise conflicts to armed confrontation. War *ends* when guns go silent and belligerents sign a truce. Because the beginning of a war is rather complex, it is easy to bring warring parties to-

gether, but often difficult to handle complexities and altercations emerging out of settlement and restoration. Conventional understandings of concepts related to war and peace posit lapses into armed conflict and therefore suggest that social justice can never be achieved outside of political justice. Although survivors' justice requires liberality, there is a need to check that liberality if postwar societies must recuperate faster. The present argument is based on a major claim that war is not necessarily a one-dimensional experience of tragedy, loss, and pain. War is also an experience of opportunity, gain, and advancement.

The War in Northern Uganda

Occurrences of political violence in postindependent Uganda can be plotted as follows: the 1966 constitutional crisis, Idi Amin's military coup of 1971, the controversial 1980 elections leading to the Luwero Triangle Bush War, the 1985 coup by General Okello Lutwa, and the ousting of Lutwa's Junta government by Yoweri Museveni in 1986. Post-1986 incursions saw the Uganda People's Army (UPA) in eastern Uganda, Allied Democratic Front (ADF) in western Uganda, the West Nile Bank Front (WNBF), the Uganda People's Democratic Army (UPDA), the Holy Spirit Army (HSA), and the LRA in northern Uganda all making attempts to topple the government of President Museveni. In the process, all these groups and others not mentioned unleashed waves of violence on the people, the economy, and the social fabric of the nation. This analysis focuses on post-1986 violence in which the LRA and the National Resistance Army (NRA) were key players. Adam Branch shows "anti-civilian violence" of this period as manifesting in torture, killing, forced displacement, and deprivation of the local population by both the NRA and the LRA.[1] The LRA carried out maiming, mass abduction, mass killings, and destruction of villages as modes of "pacifying" Acholi. They attempted to purge the population "corrupted" by Museveni and create a "new Acholi" (Branch, p. 71). In

1990, the Uganda People's Defense Forces (UPDF) ordered that all civilians move to "internment camps," ostensibly to cut off supplies of food, information, and potential abductees from the rebels. Branch argues that this move constituted top-level violence, in that the humanitarian crisis that followed was even worse than the war itself (Branch, pp. 92–93). A key focus of this paper is how different actors—namely the state, humanitarian bodies, nongovernmental organizations (NGOs), and survivors—engage discourses of reform as a transition to a life *beyond* violence. Emphasis is placed on experiences of survivors in Attiak, Lukodi, Abia, and Barlonyo because these places represent not only the worst of the LRA incursions, but have also attracted interventions in the postwar period, perhaps more than any other place. The paper examines the nature and character of survivors in such places with a view to understanding the types of intervention and reform through which such communities transition to an era of peace.

Transition as Justice

A transition from war to peace, or from poverty to prosperity, is not possible without justice. Required in this debate is an understanding of justice itself. In a 2005 survey by the International Center for Transitional Justice and Human Rights carried out in the four northern and eastern Uganda districts of Gulu, Kitgum, Lira, and Soroti, a majority of respondents defined justice as a process of adjudicating survivors' claims through legal trial of perpetrators. By perpetrators they meant those who committed atrocities of violence, and those who failed in their responsibilities to protect civilians. Such a definition was shaped by experiences of massacres in Barlonyo, Lukodi, Odek, and other places. In the non-Acholi districts of Soroti and Lira, justice was defined as reconciliation, truth, and fairness.[2]

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1   Adam Branch, *Displacing Human Rights: War and Intervention in Northern Uganda* (Oxford: Oxford University Press, 2011); hereafter cited as Branch.

2   Phuong Pham, et al., *Forgotten Voices: A Population-Based Survey on Attitudes about Peace and Justice in Northern Uganda* (New York: International Center for Transitional Justice; Berkeley: Human Rights Center, University of California, Berkeley, July 2005), p. 23, ictj.org/sites/default/files/ICTJ-HRC-Uganda-Voices-2005-English.pdf.

In recent interviews, survivors and victims in these places affirm justice as assistance to victims. In the postreturn period, survivors have identified rebuilding of infrastructure, provision of compensation to war claimants and vigilantes like Amuka and Arrow Boys militia, total elimination of the LRA, improvement of education, and enhancement of community livelihoods as urgent concerns. An association of war veterans in northern Uganda sued the National Resistance Movement (NRM) government for failing to restock the region after the severe cattle raids perpetrated by the Karimojong raiders and the LRA from around 1986 to the mid-2000s. Justice Byamukama Mugenyi of the High Court of Uganda ruled in 2014 that the government should pay the people of Lango region 2.9 trillion (shillings) in compensation for lost livestock.[3]

This understanding of justice as compensation regards transition as the mediation of space, time, and experience among excombatants, former communities of violence, and postwar communities in ways that mitigate the effects of past conflicts. It presupposes a reexamination of how political, legal, and sociological differences between conflicting forces can be harmonized after being adrift for a long time. In the context of excombatants reintegrating into civilian lives, transition means new communities are created out of agglomerations of former nemeses. As Ruti G. Teitel says, legal and political instruments mediate transition. Teitel argues that for just transition in postwar societies to be achieved, legal responses should operate within democratic frameworks.[4] She contends that democratic development is essential for a meaningful transition, but at the same time wonders whether law is capable of building a democratic culture. In a sense, transition requires liberalized space with appropriate modus operandi. In response to the amnesty that was declared by the NRM government in 1999, many LRA combatants, aided by the Acholi Religious Leaders Peace Initiative (ARLPI), came back. NGOs like World Vision, The Invisible Children, and Sponsoring Children Uganda (this last located in Lira

municipality) among others, participated in transition from violence, displacement, and destruction to peace, stability, and recovery. However, respondents in Attiak, Barlonyo, Lukodi, and Abia in northern Uganda contend that the LRA had made this difficult to achieve: the LRA had made it impossible for people to act and move freely by causing the government to padlock most of them in camps. When peace "returned," communities required ample space to speak about the war and to move freely to transact ordinary business without interruption. Human rights protection becomes a fundamental requirement for the restoration of peace after the guns have gone silent, a fact that has made many people of northern Uganda view human rights as "life with peace and security without fear." A transitional process propped up by democratic values that protect human rights enables survivors, victims, and reintegrated excombatants to live without being haunted by fear of past atrocities.

In that context, most postwar organizations like Acholi Religious Leaders Peace Initiative, Kerkwaro pa Acholi, and Tekwaro Lango in northern Uganda preferred restorative forms of justice to a retributive type, on the understanding that transition requires inclusion of everybody's labor including that of former war combatants.[5] Some excombatants bring back innovative skills and experiences acquired from the bush, which can be used to rebuild a community ravaged by their own activities. Some survivors who suffered heavier casualties preferred the retributive type.[6] In a situation where modes of operation between relevant stakeholders conflict, the very output of transition is itself flawed. To effect liberal change and democratic transformation as suggested by Teitel, both retributive and corrective forms of justice would have to be enforced. The retributive type should, however, be enforced with caution. Survivors can play an active role in determining its mech-

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3   News bulletin, Radio Wa, Lira, Uganda, March 18, 2015.

4   Ruti G. Teitel, *Transitional Justice* (Oxford: Oxford University Press, 2000), p. 3; hereafter cited as Teitel.

5   Kerkwaro pa Acholi and Tekwaro Lango are traditional/cultural institutions among the Acholi and Langi.

6   Interviews with Okot Acilam, Bosco Obua, and Ambrose Odongo at Gulgoi, November 2014. All interviews cited herein were conducted by the author with the assistance of Sarah Abua and Boniface Otim Olal.

anisms instead of allowing state courts and legal systems to monopolize administration of punishment. The ARLPI never advocated for retributive justice because of the mixed-up composition of former combatants, which included formerly abducted children, mothers, abducted NGO workers, and women. Many of the abducted children and those born in the bush who enrolled in the LRA ranks were often led to perpetrate destructive raids against their own villages. Such acts were intended to discourage them from escaping to return home. For this category of violence imposed or coerced on victims, most communities in northern Uganda preferred corrective justice. For the kind of violence perpetrated by top LRA commanders like Joseph Kony, Kenneth Banya, and Okot Odiambo, communities preferred "retributive" justice, where survivors would also participate in determining punishments.

Upon the visit of Fatou Bensouda to Barlonyo in 2015, the people of Barlonyo suggested that Dominic Ongwen should be tried in Barlonyo. The ARLPI also argued that a uniform system of justice should apply to all excombatants returning home. In northern Uganda, it was clear that amnesty was a mechanism of peace being imposed from above. Most communities understood amnesty as applicable to combatants who were coerced into joining the rebellion, but not LRA's top commanders.[7] According to Local Council leaders of Attiak and Barlonyo, small conflicts between notorious commanders and survivors' families were not uncommon.[8] Thus, although survivors' justice is a paradigm that calls for alternative noncriminal trials, *mato oput* and *kayo Cuk* in Acholi and Lango have challenges in handling deep-seated transitional grievances against top LRA commanders. Besides, churches preach messages of reconciliation and forgiveness, which do not meet the approval of most victims.[9] Some see traditional trial systems as Satanic, as revealed in an interview with Christian survivor community lead-

ers from Onywal Ipeyda and Okarowok clans, thus raising critical questions about trauma and healing. Mary Akec, a survivor who lost her husband and two children in the Barlonyo massacre remarked that forgiveness or reconciliation can never happen unless trauma is completely healed.[10]

Because of such views held by most survivors, effective transition requires accountability for past wrongs (Teitel, p. 5). There must be "rules of recognition" governing transitions such as authoritarian rule to democracy, poverty to prosperity, lawlessness to the rule of law, and war to peace. Weary of backlashes, transition can also mean moving from a state of war to a state of anarchy, or from war to another form of war. The role of democratic processes in marking transition is thus pivotal. Effective reintegration of excombatants requires postwar actors to move away from a transition that only centers on the democratic principle of free and fair elections (Teitel). Democracy is, then, reconceptualized as inclusion of survivors' voices in a way that decenters it from public dominance. Survivors' liberty to articulate views on postwar processes, such as inclusion and reintegration of excombatants, victims, and perpetrators, compensation and restoration of the ruins of war, is what constitutes democracy. There is a theory which claims that transition ends when all "politically significant groups have embraced the rule of law" (Teitel). This theory does not account for the ways in which factors like reparation, the healing of trauma, and compensation impact the rule of law. Aggrieved persons are likely to embrace the rule of law if they feel that justice has been done to all parties implicated in the war.

It is important to examine the role of legal phenomena in transition along a "transformative continuum." Transitional processes define a period that seeks restoration of what has been impaired by war, to allow an incisive interrogation of the functions of law, particularly the need to protect victims and survivors from different forms of abuse. In northern Uganda, victims are a category that includes those who are (ir)reversibly incapacitated physically, psy-

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7   Interviews with Betty Acan of Attiak Survivors Association and Moses Adupa LC Defense Secretary of Barlonyo, October 2014.

8   Interviews with LC1 Geoffrey Odyek of Barlonyo and John Bosco Ochan LCIII of Attiak, October 2014.

9   "UPC backs ICC trial of Ongwen," *New Vision*, January 29, 2015, p. 7.

10 Interview with Mary Akec, October 2014.

chologically, and economically by the war. It is worthwhile regulating or even censoring their exposure to the media and other public spaces. Different bodies have tended to take undue advantage of victims of violence for economic profiteering. The practice of profiling and displaying pictures of victims of violence for business or "advocacy" reasons is one reason why legal interventions are vital in transition. Interviewing and display of victims, some of them underaged persons, in print and electronic spaces is purportedly done to mobilize resources for transition. How much of these resources reach beneficiaries is often questionable.

The rule of law can also be examined in the context of punishment, reparations, purges, constitution-making, rehabilitation, and projects that characterize transitional periods (Teitel, p. 6). During transition, the rule of law is applicable to excombatants, victims, and survivors, including auxiliary actors such as Red Cross and other humanitarian agencies. In the case of excombatants, the rule of law would facilitate inclusion or absorption into civilian life. First, it is assumed that the rule of law can help war actors adjust to a peaceful life. Second, the rule of law can regulate social behavior of war parties in postconflict communities. There are psychosocial processes that can help them adjust to the rule of law. Most former child soldiers in northern Uganda were first received at reception centers at which they were given such support.[11] Normative shifts governing social behavior and local rules in everyday life for both war returnees and receiving communities, especially those that are likely to refuse reintegration, are a prerequisite in this process. The role of community-based organizations in propagating basic sensitization in new ways of coexistence is essential here. Above all, exploring ways in which laws that govern rebels in the bush can be appropriated in constructing practical possibilities of administering a workable rule of law is an important option. As Teitel has argued, adhering to the rule of law during political upheavals is a difficult undertaking (Teitel, p. 11). Tensions often exist in the rule of law during a transition. As societies emerging from war tran-

sition, the rule of law also has to transition; it has to be flexible in relation to the political and sociological demands of a society seeking its bearings in the transition from violence to nonviolence. In this case the rule of law is never independent since it flourishes in a democratic space. The rule of law, Teitel explains, mediates "normative shifts in values that characterize these extraordinary periods" (ibid.). The rule of law has to appropriate itself to a certain flexibility that makes it possible for former agents of anarchistic communities to adjust to juridical cultures. Teitel elucidates this as the conflict between "predecessor" and "successor" justice systems (Teitel, p. 12). The tension it presupposes is that returnees from the bush will be reintegrated into a political dispensation in which the rule of law is supreme, yet they bring back with them cultures and traditions shaped by a different "rule of law." In the bush, rebels do not operate without laws. Rebel-held territories also adhere to a quasistatist rule of law. In that jurisdiction they administer punishments, reparations, and reprieves based on sham, spurious laws. For children, women, and men abducted in northern Uganda, adherence to such laws shaped them in such a way as to see LRA systems of brutality as fostering a just or even holy way of life.

In the "predecessor" system of law, methods such as indoctrination, threats, bizarre rituals, and forced killings were used to reorient captives and create in them new personalities befitting bush life. The dilemma of transition is to determine how all these may be uprooted or destabilized in a transitional process where a different system of law is in force.[12] Thus, in agreement with Teitel, "the dilemma raised by successor criminal justice leads to broader questions about the theory of the nature and role of law in the transformation to the liberal state" (Teitel, p. 12). Teitel adds that in times of significant political change, conventional understandings of the rule of law are thrown into relief. The biggest concern is then the "transitionality" of victims, most especially those abducted from

11 Phuong Pham, et al., *Forgotten Voices.*

12 For similar arguments about sources of law in transitional contexts, see Valérie Couillard, et al., *Land Rights and the Forest Peoples of Africa: Historical, Legal and Anthropological Perspectives, Overview: Analysis and Contexts* (Moreton-in-Marsh: Forest Peoples Programme, March 2009), pp. 2, 25.

their homes and subjected to weird practices for a long time. Such practices form personality characteristics very difficult to dispense with. The dominant challenge is how postbush transitionality can be managed in a new political and civil dispensation overseen by the state. During the Nazi trials it was argued that rule of law should not mean breaking away completely from the Nazi justice systems. Some thinkers argued that some Nazi laws, no matter how immoral they might have been, should have been allowed to retain some legal force. What was needed in that context was simply a reinterpretation of those laws. However, the question of laws whose normative values are incompatible with rule of law raises the question regarding what forms of justice ought to prevail during reintegration, resettlement, and other transitional processes.

Transitional Justice and Discourses of Return

Reexamining the notion of return in the context of transition is critical in ascertaining how postwar communities recuperate. "Return," as used in postwar discourses of settlement and restoration, excludes much more than it includes. In many cases, after the guns have gone silent, governments facilitate survivors' return to homes from which they had been displaced. In the case of northern Uganda, more than one million people displaced in the Acholi, Lango, and some parts of Teso region in eastern Uganda were finally "returned" in 2005 and 2006.[13] People return from camps, exile, asylum, and other forms of forced migration. Return is also known as resettlement or sometimes repatriation. Major facilitators of "return" and "resettlement" projects are national governments, humanitarian agencies, and NGOs.[14] Return is conceptually intertwined with justice. It is a stage in the process of transition that conjectures a number of interpretations. In its conventional sense, it means that somebody or a group of persons are leaving an abode of displacement, exile, or asylum to get back to a place they used

to know as home. Return should include homecoming, which entails comprehensive processes of indemnification — meaning that as people go back they are secured against loss and deprivation.

Critical is how survivors, refugees, or formerly displaced people should return, taking into account the vital economies of return, in other words the material, physical, and spiritual requirements that survivors need in transitional periods. Return should be conceptualized as part of a transitional process synonymous with justice to "returned" communities. In transitional periods, return means more than going back home. In current discourses, there are a number of omissions and assumptions that obviate its logic. You do not return to life those who died in camps for the displaced or in exile. You can only return their remains. You do not return time wasted, cultures impaired, and opportunities lost in the period of war. You can only repair the wreckage of time and of culture by mitigating poverty, disease, and cultural degeneration. You can revamp things that have been lost but you cannot do it with the exactitude that the concept of "return" presupposes. For instance, what are those things that are transplanted from host communities by returnees yet are alien to the history of communities to which they return? To understand fully the concept of return it is necessary to make a historical tour of prewar times — to take stock of material, immaterial, spiritual, and other vital economies of that community. Furthermore, it is crucial to examine the cultural influences of host-homes, to see what returning communities are tempted to take back with them, to see whether taking back such packages amounts to a just "return." In the case of camps for the displaced in northern Uganda, there are things learned in protected villages (host communities) that returning people should unlearn in order to create a just return.

Nicholas Van Hear has examined cases of refugee diasporas that followed upheavals in Afghanistan, Palestine, and Sri Lanka since the 1970s.[15] Following fighting between the Muhajedin and

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13 Office of the United Nations High Commissioner for Human Rights, *Making Peace Our Own: Victims' Perceptions of Accountability, Reconciliation and Transitional Justice in Northern Uganda* (New York: United Nations, 2007), pp. 4–35.

14 Ibid.

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15 Nicholas Van Hear, "From 'Durable Solutions' to 'Transnational Relations': Home and Exile among Refugee Diasporas" (CDR Working Paper 02.9, Centre for Development Research, Copenhagen, July 2002), p. 2.

the Kabul regime supported by the Soviet Union, there were massive exoduses of refugees to the neighboring countries of Pakistan and Iran. The Soviet-backed regime collapsed in 1992, paving the way for the Taliban regime that sprang from the refugee population in Pakistan from 1996 to 2001. A good number of Afghans returned, but up to 2.5 million remained in Iran and Pakistan until the overthrow of the Taliban. Van Hear has indicated that in displacement, asylum, and exile, there are often transnational relations created. Such relations explain connections between the homeland (place of origin), the neighboring country (country of first asylum), and countries of asylum further afield.[16] In these connections there are bound to be movements of money and information. Van Hear adds that displaced camps have no rigidly tight boundaries. There are small movements of people between the host country, first asylum country, and asylum countries further afield. Van Hear's case explicates the expanded discourses of return, particularly the new cultural influences with which survivors go back. When refugees repatriate money, they do not send the labor and skills they used for making such monies. When they return physically they take with them such skills. Such transfers are, however, constructed and padded by cultural standards of the host country. In this case returnees come back with new mindsets and worldviews that present culture shocks or innovations. Both scenarios impact transition in different ways. Culture shock refers to mannerisms that are socially repugnant to home norms. Similarly, Dolan Chris considers "protected villages" in northern Uganda as humiliation, his critique focusing on the moral consequences of parents sharing dingy rooms with their children in displaced peoples' camps.[17] The assumption is that a proper return paradigm deassimilates unwanted learned practices from host communities, practices that undermine the cherished values of returning communities.

A just and realistic consideration of "return" prioritizes security of the returning communities. The case of northern Uganda is a

tricky affair, considering the fact that LRA rebels planted landmines in trading centers, villages, along the roads, in schools, markets, and so forth. How do you return people to villages riddled with land mines? From as early as 1995, people were being blown up with different types of land mines. Land mines have killed people in Tugu, Paibona, Awach, and several places in Kitgum, Pader, and Gulu.[18] Return would comprehensively integrate the teaching of communities to safeguard themselves against the dangers of land mines. "Return" as part of transition is "just" when returnees are equipped with necessary political, civic, and military education to survive in a returned community that is not yet safe. Return embraces transitional justice if victims of land mines and other forms of violence are helped to overcome disabilities by giving them opportunities for corrective surgery.

On February 22, 2015, the Adina Foundation Uganda, a local NGO working in Lira and Alebtong districts in northern Uganda, organized a "Run to Walk" marathon in which participants – civil society groups, corporate bodies, and business communities – contributed money to enable children disabled by war, accidents, and congenital defects to "walk again." The Adina marathon was not supported by the central government despite wide publicity.

Stories of land mine victims also help us to understand how war *ends*. For many years after cessation of hostilities, landmines kill and disable many people. The Uganda Joint Christian Council (UJCC) advocated against the manufacture and sale of land mines, but they did not mobilize the international community in raising funds for land mine victims. Conventional war may end, but things like landmines silently perpetuate war. According to the International Committee of the Red Cross (ICRC), "land mines are cheap to buy but expensive to remove and remain long after the war has *ended*."[19] Countries that experienced war years ago, such as Cambodia and Afghanistan, are still battling the problem of land mines. A critical dilemma is how to help a person without legs transition

16   Ibid., p. 4.
17   Chris Dolan, *Social Torture: The Case of Northern Uganda, 1986-2006* (New York: Berghahn Books, 2009).

18   "Mine Kills Boy," *The New Vision*, October 3, 1995, p. 13.
19   "Horror of Landmines," *The New Vision*, March 22, 1995, p. 19.

to peace and prosperity, a litany commonly sung by postconflict governments. Such a person, if not compensated or rehabilitated, continues to live with war within him. In the words of Antanasio Ocan, a land mine victim, "I find no words to explain it. I cannot continue with my job since my legs are missing." Rendering justice to such victims in an era of transition is a difficult undertaking. To such a person, the fact that the guns have gone silent would not mean that the war has ended. Their transition includes reforms that rebuild them as survivors of war, unafraid of uncertainty.

Whether return is about going back home or a return to normalcy is a complex phenomenon. Similarly complex is what constitutes "normalcy." There were abducted children forced to batter other abducted people.[20] Children abducted from Lamola and Acholibur on August 22, 1995 testified that they were made to batter thirty captives, those who were accused by rebels of attempting to escape. In most of their raids, rebels burned houses, looted livestock, destroyed granaries, looted foodstuff, and destroyed household property.[21] In Lango and Teso regions (heavily affected by the LRA war) transitional focus has emphasized restocking, which is being advocated as a policy that will replenish the shattered economy of survivors. This policy intervention, however, has challenges. In the first place, the policy assumes that the people of northern Uganda were exclusively cattle keepers. But northern Uganda has been a mixed economy in which a majority of people also practice small-scale commercial agriculture. Return by supplying ox ploughs has not gone far because not every part of northern Uganda used ox ploughs for cultivation. The houses and vehicles burned or destroyed and other priority interests have not been compensated yet. Put differently, lopsided return policies undermine transition from war to peace, and economic recovery. It also undermines justice, if justice is to be understood as giving back to people what was taken away from them.

Brad Evans and Julian Reid highlight the notion of resilience

in the discourses of return, something they call an "ideal" for survivors. "Resilience," they say, is now often articulated by liberal agencies and institutions as "the fundamental property that peoples and individuals worldwide must possess in order to demonstrate their capabilities to live with danger."[22] Because transitional processes produce political subjectivities in different magnitudes, aid agencies, local actors, and state agencies often devote their resources to equipping survivors for a life beyond the horrors of war. Evans and Reid emphasize resilience as the ability to avoid suffering significant "adverse effects" of a hostile or devastating experience. In other words, it is how victims survive in a state of adversity. Resilience is not a political claim that necessitates an affirmative, apolitical "survivability instinct" (Evans and Reid, p. 6). Instead, resilience thrives on liberalism, which unfortunately also produces its own violence. Evans and Reid are not certain how a survivor equipped with tools of resilience survives violence unleashed by its own liberal system. Their discussion of resilience as a transitional requirement for returnees nonetheless helps us to understand who a survivor is and how a survivor is different from a victim.

First, in their claim, "survivability" is presented as a form of potential that enables the experiencer of adversity to live beyond the "contemporary limits of their existence" (Evans and Reid, p. 29). That potential is partially explained to mean the "action" that a survivor puts toward regenerating himself. In other words, a survivor is a person whose mechanics of memory of adversity (through retrospection, memoirs, commemoration, and other forms of remembrance) translate into an innovation aimed at transforming his life circumstances. A survivor is in that context not a dormant recipient of donations, alms, handouts, and the like. It is a survivor's resilience that enhances his ability to mitigate adversities. A survivor is that person with a proven capacity to adapt and thrive in the face of suffering (Evans and Reid, p. 32). They are not just a person who has escaped death in war, violence, or any hazardous

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20 "500 Children Held in Sudan," *The New Vision*, October 18, 1995, p. 28.

21 "Kony Kills Six, Abducts 132," *The New Vision*, October 23, 1995, pp. 1–2.

22 Brad Evans and Julian Reid, *Resilient Life: The Art of Living Dangerously* (Cambridge: Polity, 2014), p. 2; hereafter cited as Evans and Reid.

condition of life. They do not simply survive death in a war situation and then fail to survive trauma, deprivations, and other secondary effects of war. They generate inspiration that enables them to live beyond turbulent experiences during and *after* war. They survive thanks to the spirit, will power, and creative ability to reproduce the life decimated by adversity. They carry into a postwar period learned lessons, skills, dexterity, and virtuosity that enhance personal and community livelihoods. A survivor is a participant in the collective work of "re-membering."[23]

In *Matigari* (1987), Ngũgĩ wa Thiong'o presents the heroic Matigari returning with his gun and sword, which he secretly buries in a bush, before beginning on his journey to look for truth and justice.[24] Survivability, in that context, has a tripartite face: return, retention, and forgetting. There are things that a survivor retains and there are things that they should forget. Matigari buries his gun and sword, yet he still has the will to fight in search of truth and justice. In that beautiful novel, *Matigari* says, "it's good that I have now laid down my arms...I have now girded myself with a belt of peace. I shall go back to my house and rebuild my home." After saying this, "he crossed the river and came out of the forest."[25] A survivor returns home, but with something they have retained to facilitate a process of regeneration or resettlement. They must indeed come out of the forest of violence, hatred, trauma, and all the putridness of war. A victim does not possess those attributes. They are almost irreversibly incapacitated socially, morally, and mentally and could benefit from efforts of survivors and other aid actors. Patients of nodding disease syndrome in northern Uganda are typical examples of victims. As Hillary Onek, the onetime Minister for Relief, Disaster Preparedness and Refugees stated, daycare centers should be set up for children with nodding diseases to

enable their parents to engage in income-generating activities.[26] As Onek affirmed, the syndrome is complex; parents must trail children everywhere they go because many of them, left unguarded, are known to drown in rivers. There are over 3,000 child victims of nodding disease in the northern districts of Pader, Agago, Lamwoo, and Kitgum. Children with nodding disease can, however, be turned into survivors if critical research is done to battle this epidemic. The aid should go beyond the daycare centers and tons of food that the Adventist Development Relief Agency (ADRA) donated for nodding disease victims. Such aid never enables transition. At best it is palliative. The disease that causes multiple symptoms (head nodding and convulsions) also traumatizes families of victims. Onek surprisingly said that Uganda's Ministry of Health had not budgeted any funds towards containing the disease. If these children are to become survivors of war, they must overcome their physical and mental afflictions and be able to at least partially live on their own rather than depend totally on their parents. They must develop resilience worthy of true survivors.

This understanding of a survivor contrasts sharply with how Billie O'Kadameri characterizes a survivor. O'Kadameri, who reported on the northern Uganda war in the mid-1990s for *The New Vision*, defined a survivor in the rather limited sense of someone who has escaped death or survived a violent entrapment.[27] Lt. Colonel Otii Lagony reportedly commanded forces that committed the Attiak massacre on April 20, 1995. The final death toll stood at 209, 159 of whom were from Attiak. The rebels paraded their captives—men, women, and children—up to the confluence of River Ayugi and River Awic. Separating pregnant women, children below ten years of age, and breastfeeding women, the rebels sprayed bullets on the others, killing over 200 people. Those spared were ordered to clap their hands in appreciation for what the rebels had done. Terrified and dumbfounded, some of the children who had seen their parents killed clapped their hands to avoid the

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23 Ngũgĩ wa Thiong'o, *Re-membering Africa* (Nairobi: East African Publishing House, 2009); see also Evans and Reid, p. 7.

24 Ngũgĩ wa Thiong'o, *Matigari* (Nairobi: East African Educational Publishers. 1987), p. 4

25 Ibid., p. 5

26 "Onek Wants Daycare for Nodding Patients," *The New Vision*, May 11, 2015, p. 15.

27 "Attiak's Longest Day of the Bullet," *Sunday Vision*, April 30, 1995, p. 3; "2000 Escape Kony Captivity," *The New Vision*, February 4, 1995, p. 10.

rebels' wrath. Ten kilometers away, sixty-five people were killed in a similar manner. Sixteen homeguards, one policeman, forty-one students, and one police administrator were also killed on this same day. The rebels burned 210 grass-thatched houses, twenty-two commercial premises, one office block, a lorry belonging to Middle North Tobacco Cooperative Union and set ablaze a pickup belonging to a produce buyer. O'Kadameri would look at the spared pregnant women, breastfeeding mothers, and those children below ten years of age as survivors in the sense that they were spared death on that fateful day. In other words, an escapee in the heat of the moment fits into O'Kadameri's definition of a survivor. But, as the present essay's discussion of survivors attests, a survivor in a transitional context should not simply be defined as an escapee from a fatal situation. The children who saw their parents killed, and the pregnant and breastfeeding women who witnessed their husbands killed and who knew that henceforth the children they were carrying and those they were yet to bear would be orphans should be understood as having the ability to survive the traumas of the scene only long after the incident.

It is not advisable for scholars and policy makers on postwar transition to analyze survivors as a generalized category. Interventions to improve survivors' life circumstances should be considered differently when handling transitional processes. To expand on this point, I unpack the notion of survivability as used by Evans and Reid. First, "survivability" depends on principles of political liberalism. It thrives on the input that life during wartime dispenses in the memory of the war dead. Such potential equally thrives in a certain political and social landscape. Transitional mechanisms should provide enabling conditions that make it possible for human beings to thrive. These include opening up roads, markets, social infrastructures, and the like. Survivors cannot achieve all of these on their own. In northern Uganda, the majority of people live as victims and not survivors. Their personal and collective narratives are sad stories of neglect, deprivation, pessimism, and a yearning for what government can do to better their living conditions. Sur-

vivability features in situations and places where NGOs have mobilized communities into development and rehabilitation activities.

That notwithstanding, I went to a village near Gulgoi in Abia and found that local boys and girls, without external funding, have started a local brick industry at the clay mines of Gulgoi. Gulgoi had in the past been the capital of pottery and other clay arts in Lango subregion. It was also in Gulgoi that Okot Odiambo, one of the LRA's most notorious commanders indicted by the ICC, camped with his fighters for several months and launched at least three rounds of massacres in 2004.[28] During my two visits in Gulgoi in 2014, I observed that in addition to a flourishing pottery industry, brickwork and sand mining have now sprung up in Gulgoi. Evans and Reid have said that survivability and resilience are closely associated with ecology, arguing that transitional reform should enhance protection of ecosystems that are threatened with decimation due to great inflows of capital in former war zones. Evans and Reid use the term "anthropocene" to refer to "a distinct geological epoch that is defined by the scale of human activity" (Evans and Reid, p. 3). A workable plan for justice and reform is the one that will allow survivors to exploit these resources as a way of recuperating from the horrific and destructive consequences of war. There is a worrying reality in many of the postwar communities I have visited, particularly in Barlonyo, Abia, and Otuke, where local capitalists and entrepreneurs make colossal financial investments to exploit resources like sand and stone quarries, charcoal burning, and gems extraction. These are resources that survivors could utilize toward their much-needed recovery. In a transitional period, bylaws and other regulatory systems that protect the ecological heritage of surviving communities could create swift recovery. It is on account of this that liberalism does not enhance life circumstances for surviving communities. Market liberalism ensures that survivors are outcompeted by capitalists and entrepreneurs that maraud formerly war-ravaged areas to exploit local resources and

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28 Interviews with Okot Acilam, Bosco Obua, Madalina Aguti, and singers of Abwoc Yie Kec, October 2015.

heritage. As Evans and Reid observe, liberalism should rather aim at solving and preventing manifestations of dangers and threats to the security of surviving communities. Legal instruments should offset threats against their economic and cultural revival.

In Abia, I observed that a local *okeme* (thumb piano) musical and dance troupe started in the early 1980s, Abwoc Yie Kec, has been engaged by various NGOs, state agencies, and local governments in the production of song, drama, dance, and other cultural interventions. Abwoc Yie Kec is a Luo saying which means "an impotent man is bitter." Today they perform about issues of violence, suffering, recovery, and hope. Some of the social hazards that their songs depict can be symbolized by the sexual metaphor of impotence. At commemorations, anniversaries, festivals, parties, and other ceremonies Abwoc Yie Kec is always called to perform. There is not much that this group gains from their wonderful performances, even when they sometimes travel hundreds of miles to perform. It is in this area that interventions to protect surviving communities from different forms of exploitation and usurpation are needed. Groups like Abwoc Yie Kec could be equipped with capacities that enable them to command worthy professional fees for their performances. An impotent man is bitter if postwar transitional processes take unfair advantage of his economic, political, and social impotencies by exploiting his talents, taking advantage of his turbulent history, and exploiting his voicelessness. Measures that minimize the injustices of market liberalism, which does not protect survivors in marginal communities, might be a useful transitional requirement.

Amartya Sen, who conceptualizes development as freedom, would disagree with the above argument. The role of markets, according to Sen, is central in the development process.[29] Significant is the amount of market freedom necessary in transitional communities. As Robert Bates argues, intervention in markets by powerful agencies should not harm the interests of small entrepreneurs.[30]

In this context the state would shelter domestic industries from aggressive competition in a way that enables rural people to utilize the available resources to facilitate their recovery. This is one way of appreciating transitional justice in transitional societies.

Although Sen has argued that free market mechanisms enhance economic growth, such freedom could be to the detriment of survivors struggling to revitalize their plundered economies if it is not regulated. Adam Smith was one of the earlier proponents of freedom of exchange as basic to human liberty. But such is not the type of freedom from which survivors of war can benefit. Survivors of war need protectionist measures to safeguard their fragile economies recuperating from the damages of war. Free, unregulated markets that monopolize allocation of resources would only contribute to new wars between survivors and others. How the market is understood in transitional justice is what I would like to emphasize. Karl Marx said that in replicating the history of advanced capitalist Europe, the less developed do so under harsher and retrograde conditions.[31] If a market is an economic space in which people buy and sell goods and services, then it is not only freedom which is a core value of the market, but also fairness. Market liberalism, as Tsenay Serequeberhan says, is the language of the more developed, not the less developed.[32] In other words, freedom is the language of industrial development. In this sense, no capitalist mode of production is fair in survivors' communities. To a large extent, war has its own principles of economics and modes of distribution. War is a multidirectional service industry in which different market actors offer or even sell services that directly or indirectly contribute to war efforts: the media, humanitarian agencies, spiritual bodies, producers, and consumers all have stakes in war. Absolute freedom in the allocation of resources would only benefit capital, not survivors.

29 Amartya Sen, *Development as Freedom* (Oxford: Oxford University Press, 1999), p. 6.

30 Robert H. Bates, *Markets and States in Tropical Africa, The Political Basis of Agricultural Policies* (Berkeley: University of California Press, 1981), p. 81.

31 Tsenay Serequeberhan, *Contested Memory: The Icons of the Occidental Tradition* (Asmara: Africa World Press, 2007), p. 108.

32 Serequeberhan, *Contested Memory*.

Rhetoric of "Numbers" and "Words"

At Barlonyo mass grave in Lira, there is a plaque laminated on the monument with the following inscription: "This memorial stone was laid by H.E President Yoweri Museveni in Memory of the 121 innocent civilians killed by LRA terrorists on 21ˢ February 2004." This memorial plaque is the first point of attraction to visitors who daily throng Barlonyo. Two things that electrify the attention of any visitor are the number 121 and the word "terrorists." The visitor then scans the prominence of the oval-shaped mass grave, a concrete surface that looks like the beginnings of the foundation of a building. They become an arithmetician of a sorts, observing a contradiction between the sprawling mass grave and the figure of 121 interred. The mass grave is so massive that, in looking at it, it seems unlikely that only 121 people are buried there. Names of the dead are not indicated. Guides and custodians of Barlonyo often help visitors solve this riddle by saying that bodies were exhumed and recounted and found to be 301 instead of 121.[33] They also say that in their "private" records, they have all names of the dead. Survivors insist that the UPDF, who "supervised" the burial of victims a day after the massacres, doctored the number of deaths, lowering figures to minimize the degree of the government army's irresponsibility. Yet in many cases where such atrocious killings occurred, the government pointedly named perpetrators of the massacres as "terrorists" and not "rebels." Such nomenclature has rhetorical implications in the politics and poetics of transitional reforms.

Kenneth Burke has observed that rhetoric has "motives" and "actions" that build different identifications in a work.[34] We are interested in how rhetoric and motive—which Burke uses to talk about literary texts—traverse the domain of material arts like monuments. Rhetorical motive, as Burke says, determines whether an object is good or bad. In other words, it establishes how an object

is put to use.[35] Burke has argued that objects can become political, and this is shown by the numerical figure "121" and the word "terrorists" inscribed on the memorial plaque. Survivors have come to realize that the figure 121 grossly misrepresents their memory of the Barlonyo massacre. One survivor says, "one day people will wake up to find that we have demolished this structure. We want this plate removed and replaced with the correct number. We also want the names of the dead written here just like it is in Lukodi and other places." The number 121 and the word "terrorists" are rhetorical referents. First, the figure 121 determined by officers of the UPDF conflicts with what survivors say. Since it was the duty of the UPDF to protect inhabitants of Barlonyo camp, high numbers would sing loud the irresponsibility of the army. For that matter, it was the UPDF that drove people to go into the camp with a promise of protection.[36] As it is the function of rhetoric to persuade audiences, the number 121 is meant to lessen the effect of the tragedy of Barlonyo. A higher number could not only complicate the international credibility of the Ugandan government, but also generate debates about the nomenclatures of the war in northern Uganda—whether to classify it as genocide, disaster, tragedy, and the like (Atkinson, p. 304).[37] Either way, this would have political and diplomatic implications for the Ugandan government. Just as any rhetoric has a speaker, the rhetorician of the memorial plaque of Barlonyo has one, the Ugandan state.

The word "terrorists" on the memorial plaque at Barlonyo justified the Ugandan government's opposition to dialogue and negotiations with the LRA. President Museveni consistently opposed

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33 Interviews with Barlonyo survivors Silbina Auma, Moses Adupa, Pulkeria Atto, and Charles Ogwang, November 2014.

34 Kenneth Burke, *A Rhetoric of Motives* (Cambridge: Cambridge University Press, 1969), p. 36.

35 Ibid., p. 31.

36 Ronald R. Atkinson, *The Roots of Ethnicity: The Origins of the Acholi of Uganda Before 1800* (Kampala: Fountain Publishers, 2010), pp. 295-97, hereafter cited as Atkinson; Branch, pp. 71-79.

37 Atkinson quotes Jan Egeland's description of the northern Uganda war, particularly conditions in the camps, which constituted "the biggest neglected humanitarian emergency in the world" (Atkinson, p. 304). In Acholi region more than ninety percent of the displaced population lived in extremely squalid conditions. In the neighboring areas of Lango and Teso, where the war spread and reached peak conditions in 2004, nearly one million displaced people faced humanitarian disaster.

Acholi religious leaders for their insistence on dialogue with LRA insurgents.[38] If the LRA were referred to as "rebels" it would call for multifaceted approaches in the search for peace in northern Uganda, including roundtable discussions. Referring to the LRA as terrorists justified the use of military force while undermining options of dialogue (Atkinson, pp. 308–21).[39] In the postwar transitional period, this rhetoric has had additional implications. First, it undermined the international credibility that the LRA was bound to create abroad.[40] It is also debatable whether survivors or returnees of terrorist violence should be treated in the same way as survivors of rebel violence. In postwar northern Uganda, the two are being taken as one and the same category. In transitional periods, survivors and returnees of rebel violence demand political redress because rebels are militants that voice political discontent through war. Rebels deploy both military and political modes of resistance. Terrorists may have a political agenda, but they articulate it through crude, antihuman displays of violence and horror. They target unarmed, vulnerable people in what are normally seen as proxy wars intended to discredit, demoralize, or wreck political, economic, and social institutions.

Michael Walzer uses the word terrorism to describe revolutionary violence.[41] There is outright ambiguity here. Either Walzer is assuming that revolutionizing a system is achievable exclusively through violence, or he is portraying the myopic ideology of terrorist violence, which takes it for granted that the instrument of violence is sufficient to cause revolutionary change. Revolutionizing a system requires approaches of war, dialogue, concessions, truce, and so forth. But while explaining the meaning of terrorism, Walzer argues that terrorists aim at destroying the morale of a nation or a class – to undercut its solidarity using the technique of organized killings.[42] Terrorists, Walzer adds, instill fear by killing people identified with a specific class, regime, party, or policy. An interesting dimension he illuminates is that terrorism is a way of avoiding engagement with the enemy army, an approach that seemed to have been used by the LRA. Going by Walzer's argument, winning a war against terrorism is a struggle that is hard to realize. Conversely, it is also very difficult for terrorists to win wars. They simply succeed in "breaking the hearts of subjects."[43] The end of a war fought by rebel movements may take a long time, but it is easy to anticipate or predict when approached politically. Rebels engage in formal wars, while terrorists engage in unpredictable violence in terms of time and location. Rebels have something to table for redress after a truce, while terrorists present demands and ultimatums as an agenda for concessions. Be that as it may, there must be some room for discussing demands and ultimatums. Terrorists' demands are often political, but in these political grievances there are often social and economic issues at play.

In northern Uganda, redress, as a focal point for intervention or dialogue, includes grievances related to marginalization, representation, social imbalances, and infrastructural development (Atkinson, pp. 291, 331). In these areas the government of President Museveni has done relatively well. The Peace, Recovery, and Development Program (PRDP) was launched in October 2007, followed by Northern Uganda Social Action Fund (NUSAF) I & II, National Agricultural Advisory and Development Services (NAADS) managed by the Office of the Prime Minister, and now Operation

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38   "U.K. Acholi Ask President to Abolish Northern Minister," *Daily Monitor*, January 23, 1997, p. 24.

39   Atkinson has elaborated on the tensions that characterized the peace process in Juba between the LRA and Ugandan Government in South Sudan from 2006–08. The Juba Peace talks staggered repeatedly despite being boosted by the signing of the Comprehensive Peace Agreement between the Sudan People's Liberation Movement and the Khartoum Government and the roles played by international statesmen like Joachim Chisano of Mozambique. The Ugandan government appeared uninterested because, to them, this would be a dialogue with terrorists and bandits. Whereas the Ugandan government exuded a lukewarm attitude towards it, the peace process was extoled by Acholi religious and cultural leaders, NGOs, and civil society organizations. The government, looking at the LRA as terrorists, did not consider dialogue worthwhile.

40   "U.K. Acholi Ask President to Abolish Northern Minister," p. 24.

41   Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (New York: Basic Books, 1977).

42   Ibid, p. 197.

43   Ibid, p. 198.

Wealth Creation (owc) being overseen by UPDF officers deployed in subcounties. New roads from Gulu to Nimule and South Sudan via Attiak (the center of LRA massacres) have been paved. There is another road construction project underway, covering the road from Gulu to Acholibur, Mucwini, and South Sudan. War has created new opportunities for trade and partnership with the government of Southern Sudan and Eastern Africa at large. There is, for instance, a mega rail construction project underway, covering Uganda, Kenya, and South Sudan. But in the transitional period, northern Uganda needs more than tangible physical and material infrastructures. The LRA's claim that people of the north were or are marginalized cannot be taken as politically relevant if the state rhetoric is that the group was a bunch of terrorists. Historical errors of judgment must be corrected if transitional justice is to suffice. Ronald Atkinson has indicated that when President Museveni used the word "terrorists" to refer to the LRA, he was not exclusively talking about the innocent civilians killed in the north (Atkinson, p. 28). He was implicitly making reference to the over 800,000 people killed by Milton Obote's Uganda National Liberation Army (UNLA) in the bushes of Luwero Triangle: that hateful history accounts for why Museveni used words like "bandits," "primitive," and "ignorant" to refer to the LRA — as a symbolic remnant of a terrorist army that plundered Luwero. Most governments dismiss terrorists as groups that cannot table a reform agenda in the postwar period. The unanswered question is what modus operandi governments can use to discuss political reform issues with groups deemed to be terrorists. Yet transitional reforms work best if they are approached politically through discussions that lead to legislation.

Using the rhetoric of terrorism to characterize activities of armed insurgents in northern Uganda would not facilitate the return of peace if acts of the LRA qualified the movement to be labeled a terrorist movement. The ARLPI and other civil society organizations in northern Uganda have insisted that the people killed in Barlonyo, Attiak, Lukodi, and elsewhere should be accounted

for by examining the role played by both the LRA and the UPDF.[44] Criticizing the approach adopted by Luis Moreno Ocampo, the then ICC Prosecutor, leaders argued that both the LRA and the UPDF should be held accountable for the mass killings. Looking at the LRA alone as terrorists exonerates the dark side of the UPDF. Branch observes that the rhetoric of war against terrorism has made it easy for President Museveni to tie war against the LRA to US interests in the region. According to Branch, this enabled Museveni not only to expand his military budget but also obtain international funding and military supplies from the US government because of its strategic interest in Sudan and Somalia (Branch, p. 79). The UPDF military presence has since then multiplied in South Sudan, Central African Republic, and Somalia. The rhetoric of war against terror and the political, diplomatic, and economic advantages it created enabled the state to exploit situations of war in northern Uganda to its advantage. President Museveni used this war to unilaterally expand the defense budget, much to the dismay of donor communities (ibid.).

In analyzing rhetoric to understand the nature of the LRA war in northern Uganda, its modes of classification come into perspective. In Lukodi village, survivors dispute the naming and classification of this war. Some view the war as having been between the LRA rebels and *gamente me aranyi*, an "enemy government."[45] The label "enemy government" explains civilian protestation of forced encampment, which Atkinson says created "structural violence" that likely killed more people than LRA bullets or in greater numbers than those killed in Darfur (Atkinson, pp. 304–05). A cross section of survivors of the Barlonyo and Abia massacres saw the war as an "intra-civil" conflict in which the Acholi were killing one another and extending this violence to their neighbours, the Langi and Iteso.[46] Others refused to believe that the LRA was fighting the govern-

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44 Carlos Rodríguez Soto, *Tall Grass: Stories of Suffering and Peace in Northern Uganda* (Kampala: Fountain Publishers, 2009).

45 Interview with Giftson Okullu LC Chairperson of Lukodi, October 2014.

46 Interviews with Lazarus Ogwang, Erica Ekol (Abia), Moses Adupa, and Charles Okot of Barlonyo, November 2014.

ment of Uganda.[47] Why would Joseph Kony attack and kill them if he was indeed fighting the government of Uganda? What would Museveni lose if the LRA killed all of them? Such voices accused the NRM government of the sin of omission, implying that the LRA was a state-sanctioned rogue army perpetuating an organized vendetta to kill the people of northern Uganda for committing atrocities in Luwero Triangle. Atkinson has, however, observed that the rebels' rationale for killing civilians was to discredit the government internationally for failing to discharge its sovereign functions.

Terrorism as statist reference to insurgents impacts how former child soldiers are regarded in returned communities. Reception centers like Sponsoring Children Uganda, World Vision, and Child's Voice International received thousands of children who returned from the bush. But the manner in which most returned communities received them showed that the state's reference to such children as terrorists shaped the hateful attitude of the local people against former child soldiers. Receiving communities viewed them as terrorists whose inhuman bush war culture could not be tamed in only a couple of months.

Such a return is portrayed in a postwar drama staged in northern Uganda by United Troupers Theatre Group and funded by Sponsoring Children Uganda. Monica Adero, the central character, returns home after three years in LRA captivity and gets an extremely hostile reception from her own community. She is browbeaten, insulted, and ostracized. In fact, people refer to her as a terrorist. It is clear that such opinions are politically shaped by what people read about rebels in newspapers and hear about them in speeches delivered by politicians and state functionaries. In transitional logic, such rhetoric does not dispense justice. It is unjust for state media and public spaces to shape community hostility towards returning children who have not been given a fair hearing in the form of truth telling, public hearing, and other mechanisms of accountability. Adero's case is replicated by Dominic Ongwen's

case before the ICC. Ongwen was allegedly abducted on his way to school when he was fourteen years old. In the newspapers he is referred to as villain and victim. His trial promises controversies on the meaning of justice.[48] According to Ongwen's relatives in the subcounty of Mina-Akulu, located at the border of Oyam and Gulu districts, their kinsman was abducted at fourteen while on his way to school. They claim that his true name is Denis Erem and that this was the name he was using at the time of his abduction. The LRA gave him the bush name of Dominic Ongwen. When we think of Denis Erem we remember innocence, victimhood, and vulnerability. On the other hand when we think of Dominic Ongwen, we remember abductions, rape, and other crimes against humanity. When the ICC puts him on trial at The Hague, will they try him as Denis Erem or Dominic Ongwen? What impacts will such a trial have on transitional processes at home in northern Uganda?

Relating Darfur to Northern Uganda: The Rhetoric and Politics of Numbers

Mahmood Mamdani's account of the conflict in Darfur (2003–07) shows how numbers shape opinion in discourses of intervention. He shows how in the Darfur conflict, international media played about with the rhetoric and politics of numbers. The mortality level in Darfur, which was first put at 50,000, was later revised to 70,000—and even higher—after mobilization by Save Darfur Movement. US Government oversight agencies, asked to compare these estimates with others, concluded that they were the least reliable of all. Death statistics are crucial in both interwar and postwar developments because they have political and diplomatic implications. Mamdani is concerned with who counts the dead, an issue that is also relevant to northern Uganda. Drawing on their research, the International Rescue Committee (IRC) identified numbers of dead in places like Rwanda (800,000), Bosnia (250,000), and Kosovo (12,000), which dictated variations in international response to

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47 Interviews with Lalam Ketty and Giftson Okullu of Lukodi Village and Gertrude Ejang, Okot Acilam, and Ocen Abia of Abia, October 2014.

48 For similar testimonies from formerly abducted children who were forced to become wives to rebel commanders, see *Making Peace Our Own*, pp. 9-11.

those conflicts. Governments in whose territories wars occur have an interest in controlling such information. A contentious area that Mamdani highlights is the discrepancy between the primary and secondary causes of death in war situations. Did the figure of 121 at Barlonyo, not to mention the figure of 65 at Lukodi in northern Uganda, arise from direct acts of violence on the days of massacre or do they also include secondary effects of violence? Mamdani has unequivocally argued that there is a significant relationship between war and other causes of human mortality.[49] In computing figures of death, statisticians should therefore work out modalities of including deaths arising from indirect effects of war. Numbers such as 121 in Barlonyo, 203 in Attiak, and 65 in Lukodi reveal a shocking paucity of knowledge about how war kills. The figures represent only dead bodies found at the scenes of massacre. The figures do not consider those who fled and perished in the bushes or those who died of the effects of war long after the fateful events. These figures also do not consider those that develop fatal complications arising from war trauma, and do not consider cases such as that of an ill-fated child in Attiak, who was found clung to her dead mother, trying to suckle lifeless breasts.[50]

In transitional periods it is important that exact numbers of survivors and victims are established if things like compensation, reparation, and restoration are to be scrupulously implemented. Numbers influence planning and dispensation of recovery aid to help postwar societies. Deliberate reduction of mortality figures is false remembering that buries memories of people who are unrepresented in the memorial statistics. Although Mamdani has cautioned that genocide is determined by "intent" and not principally by numerical figures, statistics are important because they enable us to investigate that "intent." In the case of northern Uganda, the LRA explicitly stated their intention to "wipe out the Acholi population and replace it with a new Acholi constituted by children born in the bush" (Branch, p. 71). Yet genocide was far from declared in

northern Uganda. Mamdani's argument – that "intent" determines genocide – neglects "hidden intent," often obscured in apparent motives. In other words, it assumes that "intent" to commit genocide is straightforward and manifestly discernible. "Hidden intent" can be traced in protected villages in northern Uganda and in concentration camps in South Africa, the latter memorialized by the Vrouemonument.[51] In the case of northern Uganda, Branch contends that the Ugandan government's counterinsurgency policy of forcefully displacing people in camps disastrously complicated humanitarian conditions of the displaced, suggesting dangerous motives masquerading as the state's protective measure (Branch, p. 91). Branch indicates that there were unholy alliances between the government of Uganda and aid agencies, who, moreover, looked at violence against antigovernment elements as humanitarian. Ignoring the factor of hidden intent compromises computation of death numbers. A large number of deaths was a wake up call for the international community and international press with regard to Darfur, Rwanda, and Kosovo. Numbers also cannot be correctly established if secondary causes of death such as deaths from malnutrition, drought, humanitarian hazards, and disease are not taken into consideration. The World Food Programme was able to concentrate on such cases in the context of Darfur.[52] To Mamdani, numbers are not meant to portray mathematical accuracy but to show the scale of mortality. In transitional periods the scale of mortality should correspond to the scale of restorative, compensatory, or resettlement interventions. Planners and interventionists use statistics relating to numbers of survivors as well as numbers of the dead. There is a sense in which numbers of the dead help illuminate numbers and conditions of survivors or victims. In transitional periods numbers should not only concentrate on figures of mortality. Figures for those injured in war are equally important. Adina Foundation has interacted with 4,756 mutilated children, many of

49 Mahmood Mamdani, *Saviors and Survivors: Darfur, Politics, and the War on Terror* (Dakar: Codesria Publication, 2010), p. 65.

50 Interview with Ketty Abalo, November 2014.

51 See Dolan, *Social Torture*; Branch; and Liz Stanley, *Mourning becomes...: Post/memory, Commemoration and the Concentration Camps of the South African War* (Johannesburg: Wits University Press, 2006).

52 Mamdani, *Saviors and Survivors*, p. 27.

whom are victims of the violence of war such as land mines, physical mutilation by the LRA, and disease. Adina Foundation solicits funds for corrective surgery and psychosocial support for such children. More than 450 children have so far undergone corrective surgery. This is the sense in which the rhetoric of numbers helps in convincing humanitarian individuals and organizations about the need for support to societies emerging from the horrors of war.

Findings and Conclusions

First, transitional reforms in postwar societies call for inclusivity of actors, measures that embrace different juridical and nonjuridical systems, and a consideration of multiple temporalities including prewar periods as analytical frames in which the roots of war are sown. It is thus not accurate to say that in northern Uganda, the LRA war started in 1986. The seeds of that war were sown in the conflicts preceding it. A significant conclusion is that because such conflicts were not effectively resolved, they offered fertile grounds on which the LRA war sprouted. By definition, war becomes tension and violence arising from the consequences of poorly resolved conflicts.

Second, national court systems are not better options to handle postwar conflicts in northern Uganda. National court systems use abstract methods that cannot inclusively explore truth-telling, reconciliation, and reparation reflecting the aspirations of everyday survivors. Knowledge of traditional justice systems is extensive in Acholi. In Lango and Teso, people nostalgically remember the historical practices that are no longer in force. Religious influences have also caused many to shun such practices as heathen. For effective application of justice after war, the power of history needed is a depoliticized type in which people do no engage ethnic, political, and religious biases in defining key historical moments. Ordinary people are relevant in defining what is meant by peace, justice, survivor, government, and trial. Views they provide can guide governments and aid actors in applying better transitional options. For example, while doing scientific research on things like

nodding disease, local herbalists have great potential to contribute.

Third, after conventional wars, there are hidden wars manifesting as land wrangles, trauma, disease, and moral decay that become seeds of future wars if left unattended to. Worthwhile interventions focus on health, education, entrepreneurship, and legal sectors in ways that minimize these potential threats to peace.

Fourth, war is not necessarily a one-dimensional experience of tragedy and loss. War is also opportunity and gain for some. To avoid double jeopardy or double gain, it is important that survivors are not taken as a universal category. There is a clear distinction between survivors of war and victims of war. This distinction calls for measures that effectively transform victims of war into survivors during transitional periods. For survivors of war to be the vital beneficiaries of postwar interventions in a manner that rebuilds peace and at the same time restores justice, regulatory mechanisms that protect against capitalistic expropriation of resources in surviving communities are essential. While ensuring freedom of economic activity in surviving communities, such freedom has often tended to benefit local capitalists and not survivors and victims, thus calling for market regulations that boost production and marketing potentials of surviving communities. A free, unregulated market benefits capital only.

Fifth, legal inclusivity and alternative justice practices are useful benchmarks in negotiating relations between different categories of survivors on the one hand, and perpetrators and victims on the other. Such inclusivity encompasses consideration of laws that governed rebels while they were in the bush. Some laws and systems that governed their operations in the bush may be applied, to see whether in engaging those laws, the rebels operated within allowable limits. Lastly, while designing policies in returned communities, the histories and cultures of survivors offer transitory frames that can proactively guide interventions. To distribute seeds or ox-ploughs that survivors will be reluctant to use would be irrelevant to their memories and cultures.

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What is Kenya Becoming? Dealing with Mass Violence in the Rift Valley

Simon Omaada Esibo

ABSTRACT This paper examines the occurrence of mass violence in the Rift Valley of Kenya in the contexts of the emergence of national and socioeconomic questions in the history of Kenya, and the ways in which violence has been employed to define these questions. This paper argues that responses to mass violence have defined Kenyan identity. The question of the nation informs the analysis of what Kenya has become, and the socioeconomic question helps to demarcate issues that either promote or hinder such becoming of Kenya. This paper draws on research conducted in the Rift Valley of Kenya that was guided by the following questions: (1) What characterizes the waves of mass violence in the history of Kenya in general and the Rift Valley in particular? (2) What issues were driving these waves of mass violence? (3) What were Kenya and Kenyans becoming as these waves of violence and the issues driving them were being addressed? This research, and consequently, this paper, was motivated by the absence of a broad view in previous research, of what Kenya is becoming due to the use of violence in, on the one hand, the subordination of natives to settlers in colonial government and the subordination of citizens to the state in postcolonial governments, and on the other, in natives' and citizens' resistance to the excessive use of violence by those governments. The paper concludes that even though violence should never be condoned, something good can emerge from it.

Introduction

The violence that involves the masses in Kenya, referred to in this paper as "mass violence," "collective violence," or "political violence," is as old as Kenya.[1] However, the occurrence of this violence has not been perpetual but intermittent. This paper therefore identifies the occurrence of this violence in the Rift Valley, how it was dealt with, and its implications for the formation of Kenyan identity, referred to in this paper as becoming-Kenya. This paper argues that mass violence has defined Kenyan identity in terms of the ways it has been addressed. In addressing this mass violence, the focus is here oriented towards two categories of questions, the national and the socioeconomic. Some of these questions have been addressed in prior years, but others have not; and some of the ways these questions have been addressed have triggered the reoccurrence of violence. This paper attempts to identify the emergence of these questions in the history of Kenya, what was done about them, and their implications for becoming-Kenya.

The paper further argues that the way the national question was addressed informs the becoming-Kenya aspect, and the way the socioeconomic question was addressed helps to demarcate issues that either promote or hinder such becoming of Kenya. Kenyans have employed ethnicity in either promoting or fighting against these issues. In particular, land, elections, and employment opportunities have emerged as prominent issues that sustain ethnicity. Negative ethnicity has in turn emerged as the stumbling block to becoming-Kenya in terms of sustainable political community.

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1   Other researchers have come up with similar observations. For instance, Thomas Obel Hansen says that "Kenya's political history was marked by violent uprising and repression" (Thomas Obel Hansen, "Political Violence in Kenya: A Study of Causes, Responses, and a Framework for Discussing Preventive Action," ISS Paper 205, Institute for Security Studies, Pretoria, November 2009, p. 2), hereafter cited as Hansen. Daniel Branch and Nicholas Cheeseman cite David Throup and Charles Hornsby who observe that since the inception of Kenya, there has been a desire for order, which has "encapsulated an intolerance of dissent, the maintenance of profound social inequality and a determination to maintain control for its own sake." This order is defined by violence. (Daniel Branch and Nicholas Cheeseman, "The Politics of Control in Kenya: Understanding the Bureaucratic-Executive State, 1952–78," *Review of African Political Economy* 33 [March 2006]: 13, hereafter cited as Branch and Cheeseman.)

For conceptualization purposes, this paper is framed in terms of categories referred to as levels of becoming-Kenya. The first level captures the mass violence in the Rift Valley when Kenya was being sketched as epitomized by more than sixteen years of the Nandi resistance. The conquest of the Nandi and other communities that had resisted the British marked the beginning of the violent definition of Kenyan identity perpetuated by the colonial administration. The second level of becoming-Kenya is characterized by the emergence of the native elites, the products of colonial education. These elites demanded to be recognized in terms of enjoyment of equal rights with the colonialists since they had acquired colonial education and culture. When the colonial government refused to grant this demand, these elites responded by mobilizing ethnic identities as bases for pushing for their demand. The third level of becoming-Kenya is characterized by the emergence of political parties oriented toward independence. However, these parties were formed through ethnic alliances. These alliances resulted in a contest between parties with dominant ethnic groups and parties with minority ethnic groups. The bases of the contest were two: security of ancestral land, and the question of taking power from the colonial government and the fears associated with it. The fourth level of becoming-Kenya is characterized by the violent transition from single-party to multiparty politics. The fifth level of becoming-Kenya is characterized by new developments during the 1990s and 2007–08 violence. During the 1990s violence, internally displaced persons organized themselves and started advocating for their agenda, making the world at large know their plight. During the 2007–08 violence, Kenyans from the grassroots in areas where interethnic violence occurred started peace initiatives that reached out across ethnic lines to other Kenyans.

The present paper is the outcome of my attempt to examine the phenomenon of mass violence in Kenya, specifically in the Rift Valley, guided by the following questions:

1. What characterizes the waves of mass violence in the history of Kenya in general, and Rift Valley specifically?

2. What issues were driving these waves of mass violence?

3. What was Kenya and Kenyans becoming as these waves of violence and the issues driving them were being addressed?

Through these questions I sought to locate Kenyan Rift Valley dwellers' experiences of mass violence in their historical contexts, with a view to identifying the drivers of this mass violence, and finding out whether responses to this violence provided the foundation for building sustainable political community in the Rift Valley. In other words, I was seeking to find out whether a new Kenya was born out of the experiences of mass violence, where survivors of violence rather than victims and perpetrators forged a cohesive new community of Kenyans.

The collection of data that has informed this paper involved field visits and review of secondary literature. While in the field, interviews and focus group discussions were conducted, targeting the intellectual class, political class including political activists, and ordinary people. The research was primarily qualitative and employed a case study design.

Some confusion hampered the collection of primary data due to suspicions that it was a parallel investigation into pieces of criminal evidence to support the then ongoing International Criminal Court (ICC) cases against some prominent Kenyans in The Hague. In fact, almost all the targeted respondents were suspicious and some of them refused to give any information because they believed that any inquiry related to the violent Kenyan past was meant to solicit evidence and witnesses to corner Kenyan ICC suspects. The research permit from the National Commission for Science, Technology and Innovation (NACOSTI) and the clearance that the researcher secured from the Office of the President (OP) did not suffice to convince some targeted respondents that the researcher had nothing to do with ICC cases.

While reviewing literature, I noticed that difficulties in soliciting information relating to past violence in Kenya is not new. In an important report is the 2008 report of the Commission of Inquiry

into Post-Election Violence (CIPEV), chaired by The Hon. Mr. Justice Philip N. Waki, I found the observation of Waki pertinent to my experience. Waki observes that the commission had difficulty obtaining concrete evidence during the inquiry. For instance, he says,

> the Commission was unable to acquire any tapes or transcripts by KASS FM vernacular stations from before, during, or immediately after the 2007 election....it [the Commission] heard many allegations of what was said, but it does not have the actual transcripts of who said exactly what during this very critical period.[2]

However, the commission managed to receive from the Ministry of Information and Communication the broadcast of February 18, 2008 on KASS FM. The information contained in this broadcast throws some light on my experience of field data collection. In Waki's view, listeners of KASS FM were exhorted to be cautious in giving information about the election violence to people they did not know because the information might be used for criminal purposes and cause problems for them. During the broadcast, it was stated,

> You may answer [a] question whose answer will in future spell doom for you.
>
> Be very careful and refer the investigators to political leaders, chiefs or church leaders to answer the questions....You may be asked to explain how a neighbor of yours left his farm or property and then you answer in a manner that will later place you in an awkward position. I am not saying you conceal the truth, but tell the truth if you have been appointed to undertake the particular duty because not everybody should talk.
>
> Some of you may be offered money for information and then tomorrow you are in a very difficult situation....the way the country is now, nobody likes you...not everybody who is investigating is doing so in good faith, some

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2 Republic of Kenya, *Report of Commission of Inquiry into Post-Election Violence* (Nairobi: Government Printer: October 2008), p. 303, hereafter cited as Republic of Kenya 2008.

> will be doing so to incriminate some particular people or community in the...violence [Republic of Kenya 2008, pp. 303-4]

The Media Monitoring Unit of the Ministry of Information and Communication interpreted the views of KASS FM as hiding something. This interpretation is captured in the Unit's memo to the commission: "Kass FM should be held to explain why they are barring members of the community from disclosing whatever they know about the post election violence" (Republic of Kenya 2008, p. 304). This unit opined that "the Truth on what happened in the run-up to the December general election and the resultant postelection violence will not receive co-operation of the members of the community at all...so what is the station hiding." Irrespective of the fears of this unit, the commission managed to receive some samples of hate speech. For example, from Bahash FM in Nakuru, the commission received on January 30, 2008 the hate speech recorded at 8:00 a.m. that day. The speech goes like this: "Kikuyu are like mongoose which is ready to eat chickens. All other tribes, i.e. Luo, Kisii, Luhyas are all animals in the forest. They cannot be able to lead this country like Kikuyus." The commission also received a concrete report of hate speech from Nam Lolwe Station in Kisumu. It was an anonymous call to the station: "Our people are dying in Naivasha and Nakuru and some other tribes are living with us. They should be flashed (sic) out those who don't belong to this town" (ibid.).

The commission received testimony from public officials, public records, private records, and in some instances written sworn affidavits from lawyers. However, ordinary people were not willing to give testimony to the commission. It seems this line of thinking had lodged itself deep into ordinary people's bone marrow: "the way the country is now, nobody likes you...not everybody who is investigating is doing so in good faith, some will be doing so to incriminate some particular people or community in the...violence." (Republic of Kenya 2008, p. 304).

Nonetheless, the documents that cleared me for research

managed to convince some targeted respondents that I was con-
ducting the research in good faith. These respondents participated
in the research on condition that no photos of them were to be
taken, no recording instrument was to be used, and their names
were not to be included in the report. These conditions reflect the
fear of being victimized as one involved in incriminating "some
particular people or community in the…violence." Thomas Obel
Hansen seems to have had similar experiences in his research on
"Political Violence in Kenya." As he put it, "the interviews were
carried out confidentially and the identity of those organizations
consulted will remain on file with the author only" (Hansen, p. 15).

Experiences of Mass Violence in Kenya:
Locating Knowledge Gaps

This paper conceptualizes mass violence as "collective violence"[3]
with "the pursuit of political objectives" (Hansen, p. 1).[4] Socioec-
onomic motivations sometimes underlie political violence. Key
to understanding this notion of violence is its conscious or un-
conscious employment to "obtain political influence" or power
(Hansen, p. 1). Some call this violence, "mass violence";[5] others call
it "collective violence";[6] but whether it is referred to as "mass vio-
lence" or "collective violence," it all points to the same phenome-
non, "political violence," which is located in the "collective sphere"
(Hansen, p. 1). Its agents may be nonstate, the state or both.

A number of studies have been carried out in Kenya in an at-
tempt to understand the phenomenon of political violence. Some
of these studies are quite recent. Some have attempted to under-
stand the puzzle of the escalation and deescalation of this violence
in the course of the democratization process. Specifically, the re-
search of Jacqueline M. Klopp and Elke Zuern has been pointing

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3   Dominik J. Schaller and Jurgen Zimmerer, ed., *The Origins of Genocide: Raphael
    Lemkin As a Historian of Mass Violence* (London: Routledge, 2009), p. 2.
4   See also Earl Conteh-Morgan, *Collective Political Violence: An Introduction to the
    Theories and Cases of Violent Conflicts* (London: Routledge, 2004).
5   Scott Straus, "Retreating from the Brink: Theorizing Mass Violence and the
    Dynamics of Restraint," *Perspectives in Politics* 10 (June 2012): 343-62.
6   Conteh-Morgan, *Collective Political Violence*.

in this direction.[7] Other recent studies have sought to understand
the factors that prevented the violence in Kenyan from becoming a
"mass violence case." In particular, Scott Straus interprets the vio-
lence in this perspective.[8]

There are also earlier works on political violence in Kenya.
For instance, Peter Mwangi Kagwanja examines the 1987-2002 in-
itiation of the move toward political pluralism during President
Daniel Toroitich arap Moi's presidency. Kagwanja focuses on the
state's "legitimization of sectarian violence for political ends,"
which transformed Mungiki from "a moral ethnic movement" to
"a political tribal movement."[9] Another take is Godwin Rapando
Murunga's work, which focuses on "urban violence" with specif-
ic attention to the "origins and occurrence of urban violence" be-
tween 1982 and 1992, in what he calls "Kenya's transition to plural-
ist politics." Murunga looks at the causes of this urban violence as
well as at "its impact on the democratization process."[10]

From the perspective of continuities from colonial government
to postcolonial government, Daniel Branch and Nicholas Cheese-
man capture the institutionalized late colonial violence that the
independence government under Jomo Kenyatta embraced in a
"bureaucratic-authoritarianism." This bureaucratic authoritarian-
ism marked a presence of the government in both urban and rural
Kenya that "combined an administrative and executive power" and
ensured an observance of "order." This order encapsulated on the
one hand "an intolerance of dissent," and on the other it perpetu-
ated "profound social inequality" (Branch and Cheeseman, p. 13).
In *Histories of the Hanged*, David Anderson argues that while even
the employment of excessive violence in Kenya could not save the

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7   Jacqueline M. Klopp and Elke Zuern, "The Politics of Violence in Democratization:
     Lessons from Kenya and South Africa," *Comparative Politics* 39 (January 2007):
     127-46.
8   See Straus, "Retreating from the Brink."
9   Peter Mwangi Kagwanja, "Facing Mount Kenya or Facing Mecca? The Mungiki,
     Ethnic Violence and the Politics of the Moi Succession in Kenya, 1987-2002,"
     African Affairs 102 (January 2003): 25-49.
10   Godwin Rapando Murunga, "Urban Violence in Kenya's Transition to Pluralist
     Politics, 1982-1992," *Africa Development* 24, no. 1/2 (1999): 165-98.

collapsing British colonial empire, it however, dealt an almost fatal blow to Kenyans.[11]

In a wider scope, Bruce Berman and John Lonsdale capture the use of violence not only during the creation of white settlements in Kenya but also throughout the tenure of the colonial government in Kenya.[12] A. T. Matson illustrates this violence in the Nandi resistance to the colonial government from 1890 to 1906 in the Rift Valley.[13] These initiatives to understand the phenomenon of mass violence in Kenya while good, do not attempt to give a broad view of what Kenya is becoming due to the use of violence in, on the one hand, the subordination of the natives to the settlers in colonial government and the subordination of citizens to the postcolonial governments, and, on the other, natives' and citizens' resistance to the excessive use of violence by colonial and postcolonial governments respectively.[14] It is this gap that the present paper seeks to address.

Waves of Mass Violence in the Rift Valley

A review of the historical literature attests to four waves of violence in Kenya. The first wave occurred when Kenya was being sketched in the encounter between the colonialists and the natives and the resistance that ensued.[15] Even after the conquest of resisting communities in the emerging Kenya, the existing literature shows that there were still pockets of resistance that emerged mainly due to socioeconomic questions.[16] The second wave is characterized by the

11 David Anderson, *Histories of the Hanged: The Dirty War in Kenya and the End of Empire* (New York: W. W. Norton, 2005); hereafter cited as Anderson.

12 Bruce Berman and John Lonsdale, *Unhappy Valley: Conflict in Kenya & Africa*, 2 vols. (Nairobi: East African Educational Publishers, 1992).

13 A. T. Matson, *Nandi Resistance to British Rule, 1890-1906* (Nairobi: East African Publishing House, 1972).

14 Here I follow Mahmood Mamdani's distinction between the native and the citizen; see Mahmood Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (Kampala: Fountain Publishers, 1996).

15 See Matson, *Nandi Resistance to British Rule, 1890-1906* and Berman and Lonsdale, *Unhappy Valley*.

16 See Robert L. Tignor, *The Colonial Transformation of Kenya: The Kamba, Kikuyu, and Maasai from 1900 to 1939* (Princeton, NJ : Princeton University Press, 1976).

Mau Mau war in the 1950s.[17] Before this war, as Anderson observes, the lack of good grazing in central Kenya enhanced the appeal of the Rift Valley farms in particular, and many Kikuyu families in Kiambu and Nyeri even encouraged younger members to move west in order to gain access to the resources available. But among those to leave for the Rift Valley were also many Kikuyu who had lost land to white settlers in central Kenya (Anderson, p. 24).

Anderson adds that, "by the end of the 1930s the Kikuyu squatter community numbered more than 150,000. They retained higher levels of illiteracy, and contained a lower proportion of Christians, yet were on the whole wealthier than their brethren in the Kikuyu reserves" (ibid.). These squatters enjoyed the use of land in the white settlements of the Rift Valley. However, the situation began disintegrating when the "European farming lobby" managed to secure legislation in 1940 that empowered settler councils in settler districts "to limit by law the number of cattle that could be held by each squatter" (ibid., p. 25). It further disintegrated when, after World War II settlers, reduced the land the squatters used to an acre or two at most, and removed all the cattle of the squatters. The squatters' attempt to redress their situation through a strike did not work. All hell broke loose when the colonial government decided to forcibly repatriate squatters to central Kenya. This marked the beginning of the Mau Mau war. In the view of Branch and Cheeseman, the colonial government had put the squatters in a tight corner, and it seems that war was the only alternative left to the imagination of the opponents of the colonial government (Branch and Cheeseman, p. 13).

The reintroduction of and resistance to multiparty politics characterize the third wave in the 1990s.[18] As Murunga puts it, "proponents of pluralism knew that violence was the only way for them to get back to the mainstream of political activity."[19] This view is

17 See Anderson and Branch and Cheeseman.

18 See Murunga, "Urban Violence in Kenya's Transition to Pluralist Politics, 1982–1992" and Kagwanja, "Facing Mount Kenya or Facing Mecca?"

19 Murunga, "Urban Violence in Kenya's Transition to Pluralist Politics, 1982–1992," p. 191.

later echoed by Branch and Cheeseman's observation about "politics of control in Kenya that has been intolerant to dissent" (Branch and Cheeseman, p. 13). Where dissent is not tolerated, it seems that the only space left for the imagination of the opponents of the system is the use of violence.

The fourth wave is characterized by 2007–08 postelection violence.[20] Thus, it has been observed that

> confusion and delays in announcing the result created unease, then unrest, and eventually violence. The ODM refused to accept the outcome and rejected the Electoral Commission's declaration that President Kibaki had been legitimately elected to the presidency. This triggered a political crisis. Kenya became engulfed in violence that lasted for almost a month. It was evident that the election dispute was a catalyst that had brought simmering tensions to the surface.[21]

There is overwhelming evidence to back up the contention that the 2007 election results dispute triggered the violence.

However, in the field research informing the present paper, many Kenyans identified only three major waves of horrifying violence that have swept through the entire country. The most recent wave, remembered vividly by most Kenyans both young and old, occurred after the 2007–08 elections. Next is the 1990–92 pre- and postelection violence, which is clearly remembered by adult and elderly Kenyans and recollected by the young as an event that occurred in the past. The last wave of violence recounted luridly by some elderly Kenyans and considered by adult and young Kenyans as a narrative of the past was the Mau Mau war, which took place before independence from 1952–57. Hardly anyone mentioned the wave of violence that occurred when Kenya was being sketched.

20 See Jacqueline Klopp and Prisca Kamungi, "Violence and Elections: Will Kenya Collapse?" *World Policy Journal* 24 (Winter 2007/2008): 11–18; Klopp and Zuern, "The Politics of Violence in Democratization: Lessons from Kenya and South Africa"; Straus, "Retreating from the Brink"; and Hansen.

21 Office of the AU Panel of Eminent African Personalities, *Back from the Brink: The 2008 Mediation Process and Reforms in Kenya* (African Union Commission, n.d.), p. 8.

These waves of violence are remembered generally as if they were events that took place within just months or years. The memory of these waves of violence is mostly rekindled on public days, when public figures condemn occurrences of violence and when the spirit of patriotism and nationalism is evoked. Violence is thus treated as comprising events that occurred in the past, but that do not define Kenya's identity. It is generally not a matter of public discussion whether the conditions that occasioned specific episodes of violence have been dealt with or not.

Interestingly, these waves of violence are not remembered in terms of the way they were addressed, but in terms of the conditions that occasioned their occurrence.[22] As such, the occurrence of this violence is easily pushed to what I propose to call the past-past, rather than what I call the present-past.[23] In light of this view, this paper contends that past violence should be viewed in terms of the way it was dealt with. This proposal is significant in that it makes us proactive about our lives in reference to past experiences of violence. We will always be conscious of the remnants of that violence in our lives. We can seek to eradicate these remnants proactively rather than waiting to be reminded during political campaigns, as has been the case in the Rift Valley. This way of thinking seems to be lacking in the literature about political violence in Kenya. Developing it further might be useful for building not only politically sustainable communities but also sustainable peace. The next section deals with these questions, examining the conditions that enabled the first wave of violence and the ways in which the violence was addressed.

22 Hansen proposes the use of the conditions of political violence rather than the causes of political violence on the view that identifying the conditions of violence enables us to explain why "political violence seems to occur persistently in some countries and not – or to a much smaller extent in others" (Hansen, p. 4). In a way, this destabilizes the difficulty of providing a causal explanation of political violence.

23 The difference between the past-past and present-past is that the past-past is in the past alone, while the present-past is lived in the present; that the present-past exhibits continuity of the past in the present.

Becoming Kenya Through Colonial Conquest

In this section, I track the emergence of national and socioeco-
nomic questions in the attempt to show how mass violence in the
Rift Valley in particular and Kenya in general was addressed in
the process of becoming Kenya. The views of Thandika Mkandaw-
ire have influenced the thinking in this and subsequent sections.
Mkandawire argues that the emergence of the nationalist question
was an "excruciatingly slow process."[24] In this paper, I conceptu-
alize the emergence of the national question in terms of gradual
levels of becoming-Kenya. At the first level, there were the nation-
alities that had resisted colonialism, the foreign conquering force
that was designed for purposes of domination.[25] At this level, these
nationalities became subdued; they lost not only their freedom but
also their land to white settlers. The available literature shows that
resistance at this level was emerging from individual nationalities,
which is to say, ethnonationalities.[26] The most prominent example
of such resistance is the case of the Nandi, which resisted the Brit-
ish for more than sixteen years, from 1890 to 1906, in spite of the
difference in weapons technologies.

Kenya was being territorially sketched at this level. The main
tool for defining Kenya was violence, with a few instances of ne-
gotiation. The violence experienced at this level is not even in the
remote consciousness of Kenyans today. Some scholars like Karuti
Kanyinga only indirectly allude to this violence in their attempt
to rebuff the animosity reignited by the Nandi and other Kalenjin
groupings against the so-called foreigners in the Rift Valley (in oth-
er words, the Kikuyu, as it has been shown in the violence of the
1990s and 2007–08).[27] Kanyinga's point is that neither the Nandi nor
the Kikuyu can, historically speaking, claim Eldoret, for instance,
as their ancestral homeland because Eldoret is a Maasai word. The

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24 Thandika Mkandawire, "From the National Question to the Social Question,"
    Transformation: Critical Perspectives on Southern Africa, no. 69 (2009), p. 135.

25 See Matson, *Nandi Resistance to British Rule, 1890–1906*.

26 See ibid. and Berman and Lonsdale, *Unhappy Valley*, vol. 1.

27 Karuti Kanyinga, "The Legacy of the White Highlands: Land Rights, Ethnicity and
    Post-2007 Election Violence in Kenya," *Journal of Contemporary African Studies* 27
    (July 2009): 325–44.

Maasai, who were evicted and involuntarily resettled at Kilgoris,
were the ones that had inhabited Eldoret at the inception of Kenya.
Kanyinga goes further and points out that other ethnic groupings in
the Rift Valley like the Iteso, Gusii, and Abaluhya, who were once
the servants of white settlers in the Right Valley and consequently
benefited from the white settler land when the settlers left Kenya
at independence, are not victimized as foreigners. The question
then is why are the Kikuyu considered foreigners in the Rift Valley?
Kanyinga's response is that the Kikuyu are the majority non-Kalen-
jin-owners of land in, for instance, Eldoret, and the blame should
not be pinned on the Kikuyu but on the independence govern-
ment, whose Africanization policies favored the Kikuyu against
other Kenyans in accessing white settlers' land. However, postinde-
pendence governments have remained aloof to such observations
as Kanyinga's in terms of policy responses. These governments have
instead been reinstating the status quo.[28] Consequently, this social
question of land has been left to politicians to solicit support from
the grassroots. As the findings of this research show, the contest
now is between those who say "you took our land"[29] against those
who say "we bought our land."[30] These seem to be the implications
of the first-level experiences of violence – when Kenya was being
sketched with the pen of violence, creating land inequality that
has persisted to the present. As such, Kenya has become a land of
landless and owners of large tracts of land as well as a land where

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28 This is depicted in the attitude of the nationalists, as James Kariuki has captured
    it. Thus, "for some nationalists, doing good was equated to doing well for oneself.
    President Jomo Kenyatta attacked one of his socialist detractors by rhetorically
    saying: 'We were together with Paul Ngei in Jail. If you go to Ngei's home he has
    planted a lot of coffee and other crops. What have you done for yourself? If you go
    to Kubai's home, he has a nice house and a nice shamba (farm). Kaggia, what have
    you done for yourself? We were together with Kungu Karumba in jail, now he is
    running his own buses. What have you done for yourself?'" (cited in Mkandawire,
    "From the National Question to the Social Question," p. 156).

29 This is attributed to the Kalenjin's accusation against the Kikuyu and other non-
    Kalenjin in the ethnically instigated violence in the Rift Valley.

30 This is attributed to the Kikuyu and other social formations like the Luhya, Luo,
    Iteso, Gusii, etc., in defense of their land in the Rift Valley during the ethnically
    instigated violence.

land ownership is tied to ethnic identity.[31]

My research, however, found that there have been attempts to address the land question. Most of the respondents pointed out that the 2010 constitution created the National Land Commission to implement a land policy that sought to address restitution, compensation, and historic injustices. Respondents added that at lower levels of government, the constitution provides for the establishment of the County Land Commission under the office of the County Governor. However, by the time of completion of this research, these commissions at the county level had yet to be established. Furthermore, the land and survey departments, which are supposed to be operationalized at these county-level commissions, were nonexistent, mainly because parliament had not allocated sufficient funds to the National Land Commission (NLC).

Additionally, hiccups have emerged in the realization of the provisions on the land questions contained in the 2010 constitution. For instance, at the time this research was conducted, conflicting mandates between the NLC and the Ministry of Lands over the signing of land titles and over prerogatives in decision-making elicited conflict. According to the 2010 constitution, although the two institutions are autonomous, they are supposed to cooperate in resolving the land question. This conflict, coupled with the insufficiency of funds allocated to the NLC have kept attempts to address the land question in abeyance.

The research that informs this paper found that there are real opportunities that the government can take advantage of to address the land question. For instance, most of the 1909–2019 land leases by multinational companies, which own plantations of cash crops like tea, will soon expire. The government can take this opportunity

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31 For instance, as Douglas Noll indicates, "the family of Kenya's first president, Jomo Kenyatta, collectively owns about 500,000 acres. The family of the former president Daniel arap Moi owns a vast swath of fertile land in the Rift Valley. The president Mwai Kibaki owns hundreds of thousands of acres. Prime Minister Raila Odinga, who campaigned on promises to more equitably distribute resources and tackle corruption, has been implicated in a questionable land deal in the Rift Valley" (Douglas E. Noll, *Elusive Peace: How Modern Diplomatic Strategies Could Better Resolve World Conflicts* [New York: Prometheus Books, 2011], p. 179).

to initiate national debate over the way to go about handling these leases. My findings, however, suggest that some counties like Kericho are considering not renewing these leases. They instead want to transfer the land to the county and divide it among the county's denizens. While this is a viable option, it is, in my view, not sustainable. A more viable path would be, I argue, to transfer the leases while treating the land as corporate-owned. The multinational companies would then be subcontracted to carry on with the growing of cash crops. The proceeds from these cash crops should be shared between the central government, the county government and the denizens of the county, and the multinational companies. Such an approach is not only viable and sustainable, but is also in line with the thinking in the country about the sharing of the recently discovered minerals and oil. The sustainability of this proposal lies in the assumption that the multinational companies have the requisite knowledge of growing, processing, and selling cash crops. Their inclusion would mean that this knowledge is retained. Second, even though the denizens of the county would not directly own the land, they would be among the beneficiaries of its produce. This will, in a way, destabilize some of the conditions for violence in the name of land. Finally, the shares allocated to central and county governments will be direct sources of revenue for running government programs at the central and local levels. A new Kenya will emerge with or without reduced ethnic and land-based violence and conditions susceptible to political incitement. But by implementing the above-stated policy, it would be a Kenya with reduced historical inequalities and injustices.

There have also been attempts to address the plight of displaced people. At the outset of these attempts, displaced persons were given a small piece of land and 10,000 Kenyan shillings to start a new life. However, there were complaints from resettled persons that some of the places like Naivasha where they were being resettled were arid. In response, the government decided to compensate monetarily rather than resettle the displaced in a given piece of land. The government gave four hundred thousand

shillings each to displaced persons and they were left to look for land on their own. However, another complaint emerged – that the government was only compensating people who had been evicted from the forests and those who previously had land. Squatters were not being compensated.

Becoming Kenya Through Mobilization of Ethnic Identity

At the second level of becoming-Kenya, those who became elites thanks to colonialism and who already had the education and culture of the colonialists started demanding recognition of equal rights with the colonialists and creation of autonomous spaces. The colonial government's vehement resistance to these attempts consequently led these elites to create ethnic identities. For example, Kenyatta[32] and Odinga[33] claimed the identities of Kikuyu and Luo, respectively. But due to the weaknesses of these identities as separate bases of mobilization for compelling the colonial government to grant their demands, these elites began to claim and broaden

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32 As Kenyatta put it, "I participated in the activities of my age-group, and was chosen as its leader. Afterwards, through my knowledge of the outside world, I came to take a leading part in the progressive movements among the Gikuyu generally, and still hold that position. As the General Secretary of the Gikuyu Central Association, I started and edited the first Gikuyu journal, *Muigwithania*, in 1928 - 1930. This gave me the opportunity to tour all over the Gikuyu country and to meet many people, old and young, with whom I have discussed various aspects of cultural problems, political, social, religious, educational, and others. In due course I have passed three stages of eldership (*Kiama kia mbori ithato*), and this has enabled me to participate in Councils of elders and to learn their procedures in various parts of the Gikuyu country. As a member of the warrior class, I not only have a practical knowledge of the Gikuyu methods of warfare, but have lived in the Masai country at a place near Ngare Narok, where I came in close contact with Masai military methods and learnt much about them, and have also visited many other tribes" (Jomo Kenyatta, *Facing Mt. Kenya: The Tribal Life of the Gikuyu* [1938; London: Mercury Books, 1961], p. xix).

33 As Odinga put it, "I was convinced that to start the battle against white domination we had to assert our economic independence. We had to show what we could do by our own effort. We had had it drummed into us that the Whites had the brains to give the orders and it was for Africans to carry them out. We had to show we were capable of enterprise and development in fields beyond our shambas. It was no good bridling at accusations of our inferiority. We had to prove our mettle to the government, to the Whites. We Luo had also to assert ourselves among the other peoples of Kenya" (Oginga Odinga, *Not Yet Uhuru: An Autobiography* [London: Heinemann Education Books Ltd, 1967], p. 76).

their scope to other ethnic groups. In doing so, the sense of a Kenya of the colonized was emerging against the Kenya of the colonizers.

In reaction to this emerging broad resistance, the colonial government took drastic measures such as repatriating the Kikuyu who had earlier been dispossessed of their land in their ancestral home of central Kenya and bringing them to work in the white highlands in the Rift Valley. This was a big mistake for the colonial government, as they left Kikuyu people with no alternative other than taking up arms to fight for a home. This marked the emergence of the Mau Mau rebellion, which used the available cultural technology of oath-taking as a tool of conscripting everyone into the resistance; they ensured loyalty by keeping the tenets of the resistance secret. At this level, the formerly disparate identity groups that had been crushed by the conquering colonial machinery had now become desperate resisters of this machinery. Neither the spirit of Mau Mau nor the oath-taking went away with the achievement of independence. It has persisted to the present day with the transformation of Mau Mau into Mungiki prior to the 2007–08 violence. It is clear that Kenyans have become desperate resisters of injustice by falling back to previous strategies that had worked. Apparently, it is not only the adoption of these past resistance strategies that has persisted, but some past problems as well. As it emerged in the research that informs this paper, there are still squatters on some farms in the Rift Valley. Whenever the owners of these farms want to sell them or have sold them, the squatters find themselves in a crisis of having to find a last resort to fall back on. With respect to the current government's policy, the solution lies not in subdividing land to squatters, but opening new avenues for livelihoods such as giving the youth micro-finance loans to start businesses. However, the question is, if the business fails, what do squatter youth fall back on? It is worth noting that these strategies do not specifically target squatter youth, but all the youth in Kenya. This still leaves the gap between youths who can expect to inherit land from their parents and youths who will likely inherit squatter status if everything else fails to help them graduate from squatting

to land ownership. At the social question level, Kenyans have become "those who inherit and own land" and "those without land to inherit, but who can work very hard to buy and own land or remain within squatter status." A culture of "working hard" is thus part of this becoming.

Becoming Kenya through Political Parties

At the third level of becoming-Kenya – towards independence – Kenyans were introduced to party politics, but these parties were not different from the previous ethnic socializations. For instance, the Kenya African National Unity (KANU) was a party of macro-identity groups, the Kikuyu and the Luo. This alliance between the Kikuyu and the Luo sent a chilling message to minority social and political formations such as the Maasai, Kamba, and the then-splinter groupings of Kalenjin. The minority groups thus started their own political alliance, and Kenya African Democratic Unity (KADU) was the result. The major concerns of KADU were land and representation. The elites of the minorities like Moi (for the Kalenjin) and John Keen (for the Maasai) were afraid that if the giant social and political formations that had allied under KANU took over the government from the colonialists, their people were at risk of losing their land and being underrepresented. This marked the emergence of Majimbo (regional) politics, which essentially stated that resources such as land in a particular region belong only to the people who hail from that region. The independence constitution captured this arrangement. However, after independence, this was abrogated and the question of land access was left to the market on willing-seller, willing-buyer basis. This was a positive step in becoming Kenya. However, it was limited to only those with the capacity to buy land. Land as a socioeconomic question was thus not addressed fully, and has remained unaddressed to date. It has become a national question because most of the ethnically instigated violence is linked to it at a national level.

Becoming Kenya Through Multiparty Politics

At the fourth level of becoming-Kenya, there has been a move away from the socioeconomic question toward a focus on the political question. This move started with the transition from a brief moment of multiparty politics at independence to a de facto one-party system in the 1960s. From the time of independence up to 2002, a single party was in power in Kenya, and this party was KANU. Attempts in the late sixties to rekindle the independence spirit of multiparty politics were thwarted with violent crackdowns and imprisonment of organizers. In 1982, after the failed coup attempt, the multiparty spirit was "laid to rest" and Kenya was transformed from a de facto to a de jure one-party system. This officially thwarted the preindependence and independence attempts of addressing the land question socioeconomically. Attention was instead directed to the question of opening space for multiparty politics. This effort bore fruit in the early 1990s when Kenya embraced multiparty politics, but the effort was costly. The cost was the ethnic violence instigated by the incumbent president, Moi, who was scared of losing power in a multiparty contest. Some of the respondents to the research informed me that the strategy employed by the then-government was to unsettle pockets of opposition in the Rift Valley. These pockets happened to also be places inhabited by non-Kalenjin – places like Molo, and specifically, Olenguruone[34] – that were and are still predominantly inhabited by Kikuyu. In addition, places such as Kericho that have large tracts of tea plantations were highly destabilized because many non-Kalenjin work in such places. The assumption of this politics of destabilization was that non-Kalenjin were pro-opposition and Kalenjin were pro-KANU, the incumbent's party. Unsettling the non-Kalenjin involved disenfranchising them. The incumbent was thus sure of a landslide victory in these areas. This strategy worked in favor of the incumbent, and since then, this

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34 Anderson, while referring to Throup's *Economic and Social Origins of Mau Mau, 1945-53* (Nairobi: Heinemann Kenya, 1987), pp. 129–39, observes that "Olenguruone was the name given to a government resettlement scheme in the Nakuru district, established in 1941 to accommodate some of the squatter families evicted from the Rift Valley" (Anderson, p. 26).

sort of politics has retained appeal during general elections and by-elections. This politics has made Kenyans apprehensive of one other, and a divide has developed between "those whose leaders are in government" and "those whose leaders are in opposition." However, after elections, the situation gradually normalizes without much effort from the government, implying that the violence is just employed for a short-term end: winning elections. In addition, the Kenyan political terrain has become one of coalitions based on ethnic identities. Together with this is the politics of big men, who lead specific parties and have kept their ethnic groups hostage in these parties. This tendency has persisted since independence.

There has been an attempt to address this divisive politics through the National Cohesion and Integration Commission, which was created by the National Cohesion and Integration Act of 2008. This commission's mandate as outlined in the Act is "to encourage national cohesion and integration by outlawing discrimination on ethnic grounds."[35] One of the ways in which this commission seeks to encourage cohesion and integration is by ensuring that "all public establishments shall seek to represent the diversity of the people of Kenya in the employment of staff."[36] However, in practice, this seems far from reality. In addition, the current government seems to interpret this provision to mean that there are some positions meant for specific ethnic groupings. For instance, the former Inspector General of Police (IGP) was from the Marakwet community, and when he resigned, President Uhuru Kenyatta appointed the current IGP from the same community.

Nonetheless, some of the provisions of this Act are difficult to implement. For instance, the following provision: "No public establishment shall have more than one third of its staff from the same ethnic community."[37] This does make sense in multiethnic places. The question, however, is what of counties that have one ethnic group — where will they go in search of this ethnic equation in order to meet these provisions? This commission seems to con-

35   Republic of Kenya, National Cohesion and Integration Act, No. 12 of 2008, p. 7.
36   Ibid. p. 9.
37   Ibid. p. 10.

form to the view that ethnicity in itself is harmless; it is only when resources are associated with it that it becomes harmful.

A view encountered in the course of this research is that this commission would make more sense to Kenyans if it embraces emerging national and social questions and tackles them head-on rather than just focusing on naming and shaming corrupt government officials. It seems to me that the real issue this commission and the entire government and state of Kenya ought to embrace should be the spirit of democratization. From this observation, it appears that the question of democratizing political parties needs to be addressed urgently. The government needs to come up with bold moves to bring sanity to the democratization of political parties. For instance, there should be only two term limits for any Kenyan attempting to become president and be a leader of a political party. This way of thinking is in line with the spirit of the 2010 constitution, oriented around ending the sense of impunity among Kenyan leaders. This constitution has, for instance, devolved presidential powers that had made previous presidents the center of Kenya. It has discouraged the belief that once you are in good stead with the president, you can do anything and you are accountable to no system or community other than the center of power, the president. Such a bold move, if adopted, would not only bring sanity to Kenyan politics, but would also destroy the sense of impunity that has been thriving since the inception of Kenya. This bold move would be strengthened if the government improved the financing of county government. It is the view of this paper that the government needs to strengthen county governments financially by allocating a 45:55 ratio of revenue between county government and central government. This suggestion is in line with ongoing debates in the country about the allocation of revenue.

Becoming Kenya through Direct Participation in Governance

At the fifth level, there have been very interesting developments in the effects of the early 1990s violence and the 2007-08 violence. The research found that during the early 1990s violence, displaced persons started advocating for themselves by letting the world know their situation. For instance, Rural Women Peace Link was formed to advocate for the agenda of the women victims of the 1990-92 clashes in Eldoret. This advocacy was sufficiently successful that this Rural Women Peace Link as an organization remained intact without disintegrating even when the violence had dissipated. However, to justify its existence, it transformed itself into a nongovernmental organization. To survive, it moved its headquarters to Nairobi. This, in my view, is interesting in that, out of violence, people from the grassroots initiate mechanisms that are somewhat sustainable in soliciting resources from within the country and abroad to fight against violent tendencies. One of the implications of this is that from violence, something positive can emerge.

Along this line of thinking, during the 2007-08 violence another grassroots initiative emerged. In this initiative, people from antagonistic identity groupings at the grassroots reached out to one other to make peace. This move was the beginning of what are today called peace committees. Later, when the government saw the success of this initiative, it built them up from the grassroots to the national level. Nonetheless, this level of national consciousness is quite different from the preindependence level of national consciousness. While in preindependence Kenya, leaders from ethnic groupings reached out to leaders from other ethnic groupings to solicit synergies to fight against colonialism, during the 2007-08 violence, ordinary Kenyans from different ethnic ascriptions reached out to perceived adversaries for purposes of making peace. In doing so, ordinary Kenyans participated directly in governance and defined themselves as forging sustainable political communities as well as sustainable peace. These ordinary Kenyans realized that Kenya is not anybody else apart from themselves: they are Kenya, and there-

fore they have a political duty to define what they want to be.

Apart from these grassroots initiatives, the research found that civil society, especially churches and nongovernmental organizations, have been active in giving relief to displaced persons during the violence of the 1990s, 1997, and 2007-08. However, the difference between civil society organizations and the grassroots initiatives is that a spirit of defying the moves of perpetrators of violence is being formed among the grassroots, who normally bear the brunt of this violence. This to me signifies hope for what Kenya is becoming: people are beginning to define their future directly, which is creating a tension between direct participation and representation in governance.

There is a need for the government to build institutions that nurture direct participation in the governance of the country by Kenyans at the grassroots. In line with this, the peace committees should be delinked from government ministries. Putting them in the mainstream ministries is tantamount to reducing them to the role of "government early warning system informers" that do not have the power to make decisions. Rather than reducing them to a tool of governance, they should be left to the control of people, which indeed they are — people who know what they want and where they want to go. The spirit that brought these committees into existence should be allowed to thrive by making them autonomous from government organs. In doing so, Kenyan society would develop homegrown systems as well as checks and balances on the use of power. If these peace committees are permitted to develop and become autonomous, they might give civil society another look, different from the current one portrayed by the nongovernmental organization and religious worlds.

Conclusion

This paper has attempted to show what Kenya has been and what Kenya is becoming, as opposed to the dominant thinking that endeavors to show what Kenya has not been and has failed to become. In this paper, it has been argued that even though violence should

never be condoned, something good can emerge from it. That is, this paper has argued that that the way violence is addressed should never permit reoccurrence of violence. This is significant because in addressing violence permanently, those involved also define themselves: they become the systems, programs, and activities they create and put into practice. By implication, Kenya may be what it is today because Kenyans are not agents of their fate. In other words, Kenya not only needs to liberate herself from the various traps in her history but also needs to heal herself from the almost fatal blows that she has suffered in history. As a survivor of these blows, she has a paramount role in defining her future: becoming what she wants to be.

In this paper, what Kenya and Kenyans are becoming has been conceptualized from internal political and social processes that started with colonial conquest and that continued in resistance to this conquest. These processes have shaped the national consciousness of Kenyans. Socioeconomic issues like land, employment opportunities, and the nature of national politics mediate this consciousness. However, there are persistent socioeconomic and political issues on which government needs to take a decisive position in order to improve the quality of this national consciousness. Specifically, the government needs to address the persistent land question that seems to influence ethnic and political dynamics in Kenya. In addition, the government, through its intellectuals, should spearhead a new thinking that redefines ways of owning property, for instance (as suggested above) corporate ownership of land for which leases are expiring and redistribution of the proceeds from this land to ensure equitable quality of life for all Kenyans. By implementing such policies, Kenya would most likely not only be a sustainable political community but also a community enjoying sustainable peace.

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"Kitu Kichafu Sana": Daniel arap Moi and the Dirty Business of Dismembering Kenya's Body Politic

Akoko Akech

ABSTRACT Recent studies of the general-election-triggered political violence in Kenya have mainly focused on the resultant death, displacement, dispossession, and humanitarian crises. Other studies have focused on the impact of the violence on Kenya's political economy, especially on land, property rights, and agricultural production. However, few studies have examined how Kenya's post-Mau Mau war counterinsurgency state strategy interweaves several unresolved ethnoregional colonial land and labor questions, occasioned by settler agriculture, that in the era of multiparty politics arguably make the Rift Valley the epicenter of the violence. Using discourse analysis, this paper examines the sedentary agrarian land biases that underpin Kenya's post-Mau Mau and postcolonial counterinsurgent state power and the contemporary land and political contestations in the Rift Valley. It also examines the type of politics that this form of state power, in an encounter with popular civil resistance, has produced since 1990: the mostly Kalenjin, elite-driven, Faustian bargain for state power and this group's strategic deployment of political violence; heightened ethnic and rights consciousness; the unresolved pastoralist community land grievances and symbolic repossession of land lost to settler agriculture and contested postcolonial settlement schemes; peasants' truncated civil, political, and socioeconomic rights and the killing, displacement and dispossession of mostly smallholder peasants in the Rift Valley, producing a dismemberment of bodies of peasants as well as of Kenya's body-politic; and the elision of pastoralist land grievances and claims in contemporary Kenyan discourses of property rights, human rights, land, "historical injustices," and justice.

Introduction

Kenya's return to multiparty politics since 1991 has been defined by campaigns for democracy and human rights, the intensification of politicization of ethnic difference or ethnicization of political differences, intense political competition over state power, cyclical political violence, mass murder, rape, destruction, displacement, and land dispossessions. Kenya's general elections, except in 2002 and 2013, have been characterized by waves of political violence of varying regional intensity. The Rift Valley, however, more than any other location, including the Coast Province, has experienced the most frequent and intense forms of election-related violence.

These waves of violence beg several questions: why has the Rift Valley been the epicenter of Kenya's election-related political violence? What distinguishes the Rift Valley's cyclical waves of political violence from other forms of political violence witnessed elsewhere in Kenya? To what extent does the unresolved question of the land – the land past and present that pastoralist communities lost to the European settlement schemes and the contested Kenyatta (independence) era resettlement schemes – account for the violence in the Rift Valley? To what extent does the British and the Kenyatta government's Mau Mau counterinsurgency strategies and economic policies account for these waves of violence?[1] To what extent does the explicit and implicit colonial and independent governments' sedentary agrarian biases against the pastoralist mode of production explain the silences on the pastoralist communities' claims for restorative justice in the wider debate on land, dispossession, and displacement in the Rift Valley?

Political Violence and General Elections in Kenya

In October 1991, a new wave of violence that had variously been labeled "land clashes," "ethnic violence," "tribal clashes," and "ethnic cleansing" hit the communities who were living in the then Rift Valley Province and along the borders of the Rift Valley, Nyanza,

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1   Daniel Branch, *Defeating Mau Mau, Creating Kenya: Insurgency, Civil War and Decolonization* (Cambridge: Cambridge University Press, 2009).

and Western provinces, perceived to be supporting political movements opposed to the KANU one-party state in the struggle for the return of the multiparty system of government. In the Rift Valley, this wave of violence continued intermittently until 1998, while the Coast Province experienced violence in the run-up to the 1997 General Election and into 1998. The official and the various unofficial reports on the violence suggest that the peasants and farmworkers of the Rift Valley were the primary victims of the violence in the 1991–98 wave.

Media reports, the Parliamentary Select Committee's report and the Akiwumi Commission's Report suggested that gangs, armed with bows, arrows, spears, Molotov cocktails, and sometimes guns, and whose real identity or identities remains disputed, perpetrated the first wave of violence with the complicity of the security officers of the Daniel arap Moi government. These reports also suggested that Daniel arap Moi's government instigated the violence and was the primary beneficiary of its consequences. Some Kalenjin peasants who continue to occupy or use the lands left vacant by those displaced were the secondary beneficiaries of the short-term and long-term consequences of the violence.[2]

However, unlike the first wave of violence in the 1990s, the political violence in 2007–08 was swift, more widespread, and socially intimate: various urban and rural locations within six out of eight of Kenya's provinces experienced the violence. Only the North Eastern and Eastern Provinces did not experience violence. The official report of the Commission of Inquiry into the Post Election

Violence suggests that at least 1,113 persons were killed, the Kenyan security forces killing 405 persons, with 728 deaths attributed to citizen-on-citizen violence.[3] The Rift Valley accounted for the highest number of reported deaths, injuries, and displacements. The report also notes that about 350,000 persons were displaced and about 1,916 sought refuge in Uganda.[4]

The 2007–08 wave of political violence was both spontaneous and organized. It affected rural and urban locations, with the main targets of the violence being peasants, farm workers, petty-traders and wholesalers, the urban poor, and other workers perceived to belong to or sympathetic to either the Party of National Unity (PNU) or the Orange Democratic Movement (ODM). The violence in its organized form was mostly perpetrated by state security agents and militia groups acting on behalf of PNU on the one hand, and various militia groups in the Rift Valley and urban slums allied to politicians in ODM on the other. It set neighbor against neighbor and targeted government installations in ODM strongholds. It also led to the deep politicization of everyday market relations and exchanges: the Orange Democratic Movement launched a bitter consumer boycott of goods and services whose providers were perceived to be pro-PNU. Some PNU landlords in Nairobi's low-income housing areas as well as slum lords evicted their tenants perceived to be pro-ODM, while some ODM slum dwellers refused to pay rent to the slumlords perceived to be pro-PNU.

Kenya's transition from authoritarian one-party state, through multiparty politics, to a new constitutional order has thus been violent and bloody. However, various explanations put forward by academics and human rights advocates, who view the political violence in the Rift Valley through humanitarian lenses, have focused mostly on the present claims and demands for justice. Other academic literature that historicizes the political violence has examined only the Kalenjins' political claims based on past historical injustices, but not the claims of other pastoralist communities of

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2   Government of Kenya, *Report of the Parliamentary Select Committee to Investigate Ethnic Clashes in Western and Other Parts of Kenya*, 1992 (The Kiliku Report); Government of Kenya, *Report of the Judicial Commission Appointed to Inquire into Tribal Clashes in Kenya*, 2002 (Nairobi: Government Printer, 2002) (The Akiwumi Report, hereafter cited as Akiwumi Report); and Government of Kenya, *Report of the Commission of Inquiry Into Post Election Violence* (Nairobi: Government Printer, 2008) (The Waki Report, hereafter cited as Waki Report). Prisca Kamungi provides higher figures, which contest those of the official report. However, unlike the Waki Report, Kamungi does not account for how she arrives at figures higher than those of the government, Kenyan Red Cross, and the United Nations sources. See Prisca Mbura Kamungi, "The Politics of Displacement in Multi-Party Kenya," *Journal of Contemporary African Studies* 27, no. 3 (2009): 345–64, hereafter cited as Kamungi.

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3   Waki Report, p. 331.

4   Ibid., p. 352.

the Rift Valley counties, the political subjectivities engendered by the violence, and the politics that violence enables and constrains in contemporary Kenya.[5]

These studies have also arguably not paid sufficient attention to the significance of past and present pastoralist communities' claims of land loss, fear of economic and political marginalization, and historical injustices, as well as the explicit or implicit sedentary agrarian biases that occlude meaningful engagement with these pastoralist claims.

Prisca Kamungi, for example, discusses the pastoralist land question merely as a background to the present humanitarian crisis, and a crisis that calls for state intervention. However, Kamungi is silent on the justice claims of the pastoralist communities and makes no recommendation on how they should be redressed. She also does not pay attention to the impact of the ingrained bias toward sedentary agriculture, a bias that always talks about the land in the Rift Valley only as "arable," and legitimates political claims of sedentary farmers (Kamungi, p. 346). It delegitimizes pastoralist land claims for justice for past and independent-era historical injustices.[6]

This paper seeks to explore the type of politics enabled by the historical injustices suffered by present and past pastoralist communities of the Rift Valley, and the liberal democratic politics such injustices constrain. I examine the ways in which politics and violence in the Rift Valley have been defined by the interplay between class and ethnicity. I also examine the ways in which the political alliances forged by leading Rift Valley elites define the contours of the political violence, arguing that due to the bargains and conces-

sions they extracted from Kenya's body politic, the elites have fallen short of demanding distributive and reparative justice for the past and present pastoralist communities they represent. The paper largely focuses on the early 1990s political violence in the Rift Valley that fundamentally redefined political competition in Kenya.

The paper also attempts a discourse analysis of some of the media reportage and seminal documents that have shaped the discussion of the violence and demands for justice. It is organized as follows: first, the paper examines academic and human rights discourses on the violence in the Rift Valley. Second, the paper examines the political violence that came to be variously known as "land clashes," "tribal clashes," "ethnic violence," "ethnic cleansing," or "political violence." It looks at what the official government explanation and dissenting views on the violence reveal and elide about the political significance of the violence. It also examines the sedentary agrarian ideological biases that continue to delegitimize the Rift Valley pastoralist communities' land claims. Lastly, the paper briefly looks at what the political contestations and violence during democratization and the transition to multiparty elections has produced in Kenya vis-à-vis the political demands of the pastoralist communities.

I argue that claims for restorative and redistributive justice by past and present pastoralist communities rest on the claims over the land they lost to European settler agriculture, to fabled game reserves such as the Nairobi, Amboseli, and Maasai Mara national parks, and to the independent-era settlement schemes. As Daniel Branch notes, independent-era land redistribution was informed by British and Kenyatta's counterinsurgency strategy that sought to undermine the political base of the militant Mau Mau nationalists and radical nationalists who favored the nationalization and redistribution of the White Highlands to the landless.[7] This strategy, coupled with sedentary agrarian biases against pastoralism, favored mostly multiethnic Kenya elites (the high-ranking bureaucrats and the nationalists, with a few exceptions such as Bildad Kaggia and

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5   See Gabriella Lynch, *I Say to You: Ethnic Politics and the Kalenjin in Kenya* (Chicago: University of Chicago Press, 2011) and Karuti Kanyinga, "The Legacy of the White Highlands: Land Rights, Ethnicity and the Post-2007 Election Violence in Kenya," *Journal of Contemporary African Studies* 27 (July 2009): 325–44; 325–44, the latter hereafter cited as Kanyinga.

6   Africa Watch, *Divide and Rule: State-Sponsored Ethnic Violence in Kenya* (New York: Human Rights Watch, 1993), hereafter cited as Africa Watch, and Human Rights Watch, *Ballots to Bullets: Organized Political Violence and Kenya's Crisis of Governance* (New York, 2008).

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7   Branch, *Defeating Mau Mau, Creating Kenya*.

Joseph Murumbi), communities, notably, the Kikuyu, the Luo, the Meru, the Luhya, and the Kisii, who were better represented in Kenyatta's government, the European settlers who stayed on after independence, and the multinational companies. Pastoralist communities, especially the Maasai, the Saboats, Kipsigis, and the Nandi, who claimed the Rift Valley Highlands as "ancestral lands," were the most disadvantaged in the settlement schemes.

This counterinsurgency strategy spawned a multiethnic Kenyan elite that included the Kalenjin and the Maasai, with vested interest in unequal land ownership and control of state power as the only guarantees against the landless. The Kalenjin elites (especially Daniel arap Moi, who had acquiesced to the Kenyatta regime's consolidation strategy) more than their allies from the Coastal and other parts of the Rift Valley, traded off land for the ultimate political prize: state power. In this Faustian bargain, the non-Kalenjin and non-Maasai peasants could keep their lands as long as the Kalenjin elite and their allies kept state power.

Arguably, as Gabriella Lynch suggests, successive Rift Valley political elites, apart from Jean Marie Seroney, William Murgor, and Chelegat Mutai, have not only used the unresolved pastoralist land claims and social justice questions as a resource for constructing a historical, political, and moral community, but also for extracting political concessions from Kenya's body politic. However, even when in power, these elites have not proposed a nonviolent alternative for redressing the pastoralist land claims and historical injustices, alongside the social justice claims of those displaced and disposed by the cyclical waves of election-related political violence.

Thus, in 1991, claims to "ancestral land" by the pastoralist communities, namely the Maasai and the Kalenjin, included but were not limited to the smallholder lands of the independent-era settlement schemes. However, the Moi regime successfully contested only the smallholder lands owned by non-Kalenjin and non-Maasai peasants. In doing so, the Moi regime parried both an internal (Rift Valley) threat and external (national) threat to the regime. The Moi regime successfully turned a growing restlessness by the landless in the Rift Valley from an interclass conflict between the large landowning, multiethnic Kenyan and the multinational companies and the landless in the Rift Valley, into an intraethnic land conflict amongst the smallholder peasants and the landless of the Rift Valley.

Externally, the violence, as part and parcel of a wider strategy to contain the opposition, ensured that opposition politics was largely confined to the urban areas and that an electoral threat to Moi's hold on power was substantially reduced. On the one hand, bloody multiparty political struggles spawned a strong human rights and democracy movement, which culminated in the enactment of a new constitution in 2010. On the other hand, as Kamungi notes, the displacements and politicization of ethnic differences spawned social movements such as the *Mungiki*, the Saboat Land Defence Force (SLDF), and more recently, the Mombasa Republican Council (MRC), whose initial goal was to reclaim lost "ancestral lands" in the Central Province, Bungoma, and Coastal strip, respectively (Kamungi, p. 360). However, some of these movements turned into violent and criminal outfits, terrorizing the very communities they claimed to belong to or sought to liberate, or as with the *Mungiki*, became gangs for hire by Kenyan political elites in deadly political contests.

Discourses on Political Violence in Kenya

Some academic literature on property rights, such as Ato Kwanema Onoma's[8] and some influential international human rights advocacy literature on political violence in Kenya, such as Human Rights Watch and Kamungi have foregrounded the questions of humanitarianism, property, and justice for the present victims of violence as entry points into understanding the political violence in Kenya's Rift Valley counties. However, these approaches have arguably not sufficiently historicized the pastoralist communities' land question and its significance in Kenya's postcolonial politics.

These studies have also not paid sufficient attention to the

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8   Ato Kwanema Onoma, *The Politics of Property Rights in Africa* (Cambridge: Cambridge University Press, 2015).

intricate interconnection between the control of state power, the colonial and postcolonial counterinsurgency against the Mau Mau movement for land and freedom, and the interplay between ethnicity, class formations, and struggles. These studies have tended to place emphasis mostly on the more recent dimensions of political violence: humanitarian crises, the ethnicity of the alleged perpetrators of the violence and its victims, the plight and the social justice questions of the recently displaced and disposed, and property rights and restitution. They have elided the question of restorative and distributive justice for past and the present pastoralist communities of the Rift Valley.

Moreover, these studies have ignored the significance of the nature of the citizenship crises, the competing political communities, and forms of political organizations, not to mention the political consciousness engendered by successive governments' failure to redress the political fears of the pastoralist communities.

In short, these studies have not paid sufficient attention to the political crisis produced by the breakdown in the elite political consensus between Daniel arap Moi and Jomo Kenyatta. This was a consensus that allowed Kenyatta to export Central Kenya's and some of the densely populated locations' social crises into the Rift Valley. The Kenyatta-era settlement schemes were only a safety valve that eased the social crises brought about by the establishment of the White Highlands, the appropriation of land for sedentary agriculture, and the Mau Mau war of resistance. These settlement schemes, rather than redressing the land question, compounded the social justice question and its politics in postcolonial Kenya.

Arguably, these studies have also ignored the political claims legitimized or delegitimized by the ingrained sedentary agricultural biases of successive colonial and postindependent governments, and ignored how Kalenjin and Maasai elites have deftly deployed unresolved historical land injustices to build a political constituency and extract significant political concessions from Kenya's body politic. However, the historical injustices against peasants in Cen-

tral Kenya and the pastoralists in the Rift Valley have invariably shaped Kenya's political history and continue to shape Kenya's political trajectory.

Arguably, the political economy approach of Onoma and Karuti Kanyinga offers a better understanding of the politics in the Rift Valley, unlike the extant human rights reports and Kamungi's emphasis on the manifest humanitarian crisis. Rather than a narrow focus on the manifest humanitarian crises brought about by political violence in the Rift Valley, both Kanyinga and Onoma provide a broad political economy approach to understanding the politics of land, class, ethnicity, and state power in the Rift Valley.

Kanyinga mostly focuses on class formation and class struggles and the interplay between class and ethnicity, land and representation, as well as the consequences of independent Kenya's government policy choices and their outcomes. Kanyinga argues that power relations determine the agrarian pattern of land tenure, relations, and conflicts. Consequently, to understand the nature of a power structure is to understand the agrarian conflicts within a state.

Rational Choices and the Property Rights Approach

Through a comparative study of Ghana, Kenya, and Botswana, Onoma argues that an understanding of the nature of a country's political economy is important if one is to understand the politics of property and property rights in Africa. Onoma seeks to understand why some political leaders in Africa create strong institutions of land management and secure property rights and why others destroy such institutions. Using a rational-choice reading of what determines a government's choice of property regime, Onoma primarily focuses on how attitudes of leaders towards property and competing authorities variously define property rights, transparency of transactions on land, and security of tenure and transparency.

Onoma argues that the type of property (land) regime and security of property a country enjoys is determined by the type of benefit a regime derives from land. That is, a regime can draw either direct or indirect material benefit from land. On the one

hand, Onoma suggests that politicians or political leaders who derive benefits from land indirectly, through putting land to productive use (from agriculture, mining, and forestry) prefer secure, transparent and reliable systems of land management. Mancur Olson's "stationary bandits" are an example of this. On the other hand, political leaders who derive direct benefit from land, using land for patronage-client relations and political exchanges, like Olsen's "roving bandits," prefer an opaque, insecure, and unpredictable land management regime.[9]

Moreover, Onoma, through Michel Foucault, focuses on what competing interests of the ruling elites who derive benefits from land produce. Bureaucrats and land brokers produce the conflicts and parallel registers of property and political patronage. Onoma argues that the confusion created by chaotic management of land or property encourages such governments to behave as roving bandits. He suggests that Kenyan political regimes typify both the stationary and the roving bandit approaches to managing land, unlike Botswana which typifies the stationary bandit or Ghana which typifies the roving bandit.

Onoma discusses Kenya in terms of early Kenya and late Kenya, a periodization that largely coincides with the Kenyatta regime and the Moi regime, respectively. According to Onoma, the early and the late Kenya, the era of a secure Kenyatta-led government, and the era of a less secure Moi-led government, managed land differently. His analysis holds that there was a qualitative difference between the Kenyatta and the Moi (dominated by Kikuyu and Kalenjin, respectively) regimes' management of institutions of land. The Kenyatta regime and the early Moi era managed land as stationary bandits. However, the introduction of multiparty politics exacerbated the insecurities of the Moi-led government. It occasioned the Moi regime's shift from a stationary bandit to a roving bandit mode of land management. In the terms commonly used in Kenya, Kenyatta's was a regime of farmers, who use land judi-

ciously, tend well to crops, and live off its produce, while Moi's was a regime of pastoralists, who use land extravagantly, overstocking and razing pasture to the ground and moving on to the next one, leaving destruction in its wake.

Onoma draws attention to the significance of regime security and its impact on property rights and ways of managing land. He also draws attention to the salience of the interplay between class and ethnicity in Kenya's Rift Valley. However, Onoma does not sufficiently historicize the specificities of the Kenyan case study. He elides the significance of the settlers' appropriation of large swathes of land and the first postcolonial regime's policies on the land in the Rift Valley as the linchpin of Kenya's political stability in general, and property rights regimes' stability in particular.

Onoma's comparative study of Ghana, Botswana, and Kenya also elides the historical specificity of Kenya's politics of rights (civil, political, and private property) as the politics of an erstwhile European settler colony. The political contestations in Kenya, though having played out as a struggle over land, have never been solely a struggle for land, but may be more accurately read as a simultaneous struggle for land and representation. That is, it has been a struggle for a form of government that would guarantee political representation and voice, especially against ethnic domination and on issues of state power, land ownership, control, and use. Stated differently, it is the politics of the contemporary legacy of Mahmood Mamdani's bifurcated colonial state power: the contest between the political subjectivities of homelands produced by the Native Authority and the political subjectivities produced by the civic and political institutions of universal individual rights and equality, and representative government.[10]

B. A. Ogot observes in Kenya that the only spheres in which the British allowed African politics were local or in the African Native Reserves or districts, a fact which engendered an ethnic consciousness and ways of organizing politics that preceded national

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9   See Mancur Olson, *Power and Prosperity: Outgrowing Communist and Capitalist Dictatorships* (New York: Basic Books, 2000).

10 Mahmood Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (Kampala: Fountain Publishers, 1996).

consciousness and political organizations.[11] Moreover, no national coalition of notable ethnic elites, from the Kenya African Union (KAU) to the National Rainbow Coalition (NARC) leaders, has been sufficiently national or held out long enough to transcend its own ethnoregional cleavages. Conversely, the collapse of these coalitions has often led to ethnicization of political differences.

Consequently, how do political conflicts that pit liberal democratic citizenship against communitarian citizenship redefine civil political rights as well as property rights and its management regime? How does the unresolved tension between a politics that invokes collective rights based on "reserves or homelands" as the abode of particular "natives" or ethnic groups, on the one hand – a politics which demands a federal system of government and seeks protection in circumscribing the reach of a unitary state and remit over land – and the politics of a unitary state, as the abode of atomic, civil, and political rights bearing individuals, on the other, define property rights and politics of control of state power in the Rift Valley?

This analysis ignores the impact of substantive appropriation of land for sedentary agriculture and game reserves and how it hemmed in the pastoralist mode of production, turning cattle-keeping into a tragedy. However, Onoma's contentions raise important questions for the politics in the Rift Valley: to what extent did the size of the available resources, including land for regime consolidation and patronage, define the differences between the Kenyatta and Moi regimes? What does the nature of the political threats that the regimes faced tell us about the politics of property rights? How did these regime insecurities play out in the Rift Valley? What was the impact of Moi's own "counterinsurgency" strategy against the human rights and democracy movements, viewed against the outcomes of the British-Kenyatta counterinsurgency against the militant Mau Mau and radical nationalists?

Onoma's distinction between direct and indirect material

11 B. A. Ogot, *History as Destiny and History as Knowledge: Being Reflections on the Problem of Historicity and Historiography* (Kisumu: Anyange Press, 2005), pp. 440–82, hereafter cited as Ogot.

benefit as an explanation of political choices of different regimes, however, ignores the fact that both Moi and Kenyatta used land according to both logics: directly and indirectly. The two logics are not mutually exclusive. Successive independence-era regimes in Kenya have used land to lay the foundation of an African bourgeoisie and to co-opt political opponents, military leaders, and supporters. They have also used either public land or land previously owned by settler farmers for patronage politics. However, Kenyatta had more settler lands and a more favorable international regime of aid than Moi for use in his patronage politics.

What was at stake, arguably, was not the regime of property rights per se, but whose property rights the two regimes sought to secure in the face of political threats. The security of large lands or plantations owned by multiethnic Kenyan elites and multinational companies has largely been maintained by both the Kenyatta and the Moi governments. In contrast, public land, and the communally owned pastoralist land, under group ranch or trust land titles, have been highly insecure during these two regimes, even if to varying degrees.

In the Kenyan context arguably, the nature of property rights and the land management system cannot be understood without examining the major political question: the legacy of the British and the Kenyatta government's counterinsurgency strategy against radical nationalists and the Mau Mau militants' demand for land. Moreover, one cannot ignore the ingrained policy bias of both colonial and independent Kenya that privileges sedentary agricultural communities' claims to land and its productivity over nomadic pastoralist claims for restorative justice.

Human Rights Discourses

Early international human rights reports on the political violence in the Rift Valley such as Africa Watch's *Divide and Rule* suggested that Kenya's land questions consisted of: the question of the British white settlers who still occupied the land; the question of the pastoralists who were originally ousted from the land; and the question of the

tion of the squatters—farmworkers who had been drawn into the settler agricultural economy. The report also notes that the post-colonial government addressed the interests of the British settlers and made no effort to settle the situation of the pastoral communities who had been displaced by the simultaneous creation of the White Highlands and the Native Reserves.

The report's framing of Kenya's land questions, however, ignores an important question: the resettlement of some of those rendered landless by colonialism and class struggles in Central Kenya and how this has shaped Kenya's political trajectory. It similarly ignores the class and gender dimensions of the land question. The colonial land and labor policy not only linked the Central Kenya and the Rift Valley pastoralist land questions and resistance against colonialism, but also the major options contemplated by Kenyan leaders.

Whether the militant Mau Mau had won or lost the struggle for land in Central Kenya, the Central Province land crisis would arguably still have had an impact on the land question in Rift Valley Province. John Lonsdale notes that the question of who amongst the mostly Kikuyu militants should be allocated the Rift Valley land was one of the issues that divided this militant nationalist movement.[12] Mau Mau militants argued that the land in the Rift Valley "must go to the tiller: the squatter who had cultivated the 'white highlands' and formed the major *riigi* ranks."[13] However, as Branch details, the moderates—"home guards or the loyalists" under Kenyatta—won the struggle. Kenyatta's loyalist-dominated government used the Rift Valley land not only to form and consolidate the nascent African bourgeoisie but also to ease social tensions within Central Kenya.

The Maasai Land Question

A report by Africa Watch discussing the Maasai and the land conflict not only reiterates sedentary agrarian claims, which have been used to delegitimize past and present pastoralist communities' claims, but also ignores how the policy contestations and contexts of colonial and independent Kenya delegitimize past and present pastoralist communities' claims. The Africa Watch report argues thus: "Among the Kikuyu, unlike the communal pastoral groups such as the Maasai and the Kalenjin, farming was an established practice. Accordingly, many Kikuyu were eager to take advantage of the opportunity to purchase land" (Africa Watch, p. 24). However, the fact that "squatters," or farmworkers of other ethnic groups held more land in the Rift Valley's resettlement schemes than the Kalenjins, Maasai, or the Sabaots cannot be explained by group or communal attitudes towards farming or mastery of farming skills only, as the Africa Watch report maintains. This argument not only undermines the report's own critical observation that the pastoral land question was not addressed, but also blames the victims for their loss.

Likewise, the report ignores the subjectivities of past victimhood and the connection of such victimhood to present suffering. Indeed, the Maasai, as participants in a pastoral mode of production that was interdependent with the sedentary agricultural mode of production of their Kikuyu neighbors, hardly needed to cultivate their own farming skills. The Maasai's losses cannot be blamed on sets of skills that were sufficiently catered for by an interdependent economy. Rather, the Maasai losses should be understood as political losses to mightier political forces reflected in the policy and discourses of government and human rights organizations that describe the Rift Valley as Kenya's "most fertile area" for sedentary agriculture.

The skewed land allocation in the settlement schemes in the Rift Valley, largely at the expense of pastoralist communities, was the result of several factors. It reflects the political as well as the social capital that each community had at the time of independ-

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12 John Lonsdale, "Moral and Political Argument in Kenya," in *Ethnicity and Democracy in Africa*, ed. Bruce Berman, Dickson Eyoh and Will Kymlicka (Oxford: James Currey, 2004), p. 73.

13 Ibid., p. 87.

ence. It also reflects who was favored by the policies of the Kenyatta regime with regard to agriculture, the allocation of loans for resettlement, and the formation of land buying companies and co-operatives, and who had control of national and the district-level government land offices.

European Settlers and the White Highlands of the Rift Valley

As a consequence of colonial settler agriculture's land and labor practices, the Rift Valley province or present day counties there have had one of the most ethnically diverse rural populations in Kenya. The 1902 Crown Land Ordinance declared that "any land which was unoccupied, whether temporarily or otherwise by Africans, was available to the European settlers without reference to the Africans" (Akiwumi Report, p. 61).

Through this and other decrees, the British colonialists alienated land that runs from Nairobi to Mount Elgon, and especially in Naivasha, Laikipia, Nyandarua, Nakuru, Kericho, Nandi, Uasin Gishu, Trans-Nzoia, and Bungoma (incidentally, these are also the places, where most of the political violence has historically occurred). The colonial government also created several native reserves for pastoralists in these places, notably for the Maasai, the Samburu, and the Kalenjin, and created game reserves out of parts of these native reserves (ibid.).

The British settlers thus alienated more land from pastoralist communities, whose land use pattern, following the pastoral mode of production, was often defined by temporary absences from locations that spanned large swathes of land, but which were construed as "unoccupied" and wasteful by the British. In absolute terms, despite their spirited resistance, especially the resistance by the Nandi of the Rift Valley, the pastoralist communities lost the largest acreage of land to the British settler economy among ethnic groups.[14]

While the British settler economy alienated land from the pastoralists, it drew its labor from other Native Reserves. The pastoralists were considered ill-adapted to sedentary agrarian labor. As Lynch points out, "the White High Lands" drew its labor from the Native Reserves comprising Kikuyu, Luo, Kamba, Teso, and Luhya. These policies not only altered the demographic makeup of the White Highlands, but also the politics of who would have the right to land and to represent the residents of such locations after independence.[15]

Land and Political Violence

If, as Ogot argues, the Mau Mau war was at once "a militant nationalism and a peasant war emerging out of the growing class struggles" within the Gikuyu community, then the Africa Watch argument ignores the significance of the Rift Valley to class formation and capital accumulation by the Kenyatta regime elite (Ogot, p. 336). The report ignores the connections between past injustices and the humanitarian and other injustices it advocates should be redressed.

The land question in Central Kenya was settled in favor of the home guards, multiethnic independence-era Kenyan elites, remaining British settlers, and the multinational corporations, largely at the expense of the Mau Mau of Central Kenya and the pastoralists in the Rift Valley. The "availability" of Rift Valley land, however, greatly facilitated the consolidation of the political and economic positions of the home guards in Central Kenya and stabilization of the Kenyatta regime: it enabled them to export the social and political crisis, wrought by colonial dispossession, to the Rift Valley.

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14   Caroline Elkins's *Britain Gulag: The Brutal End of Empire in Kenya* (Capetown: Jonathan Cape, 2005) grudgingly concedes this fact in footnote number 26.

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15   Lynch, *I Say To You.*

The Lancaster House Constitutional Conference and the Maasai Agreement

The successful consolidation of Kenya's counterinsurgent state, however, also rested on the ability of both the Kenyatta and the Moi regimes to suppress pastoralist claims championed by leaders such as Jean-Marie Seroney among the Nandi and William Ole Ntimama among the Maasai.[16] These demands had been volubly expressed during the Lancaster House Constitutional Conference. Ogot points out that the Maasai, for example, lost huge swathes of land under the Anglo–Maasai treaties of 1904 and 1911, and more land when three game reserves – Mara, Amboseli, and Samburu – were created out of the Maasai Native Land (Ogot, p. 461). However, the colonial government and the successor postcolonial government have remained indifferent to Maasai land claims. During the Lancaster Constitutional talks the Maasai land claims were dismissed, to the chagrin of Justus Ole Tipis, the leader of the Maasai members of the legislative council and Maasai delegation to the Lancaster talks.

Tipis argued for restorative justice, proposing that each land case should be addressed discretely and only by the signatories to the agreement that supposedly transferred the land to the British. Among others, the Maasai delegation had raised the following issues:

2. All along the African political cry has been that Africans in Kenya, by their tribes, should get their lands back. . . .

4. The bulk of the Kenya Highlands fall within the original Masai territory which fact the agreement admits and recognizes.

5. In the process of re-acquiring land to hand back to African tribes – for this is in effect what resettlement comes to – the Masai claims and rights must be fully recognized

and their lands must not be used as pawn in the game of political appeasement of non-Masai.[17]

The Maasai delegation also raised an interesting legal argument on the controversial 1904 and 1911 Anglo-Maasai agreements:

(6) The Masai cannot accept that a special guarantee under the agreement should be a subject to be provided for in any special manner under the independent constitution of Kenya. Whereas Her Majesty's Government was a foreign government the future Kenya government, of which the Masai are one; and just as the Masai will not be in a position to appeal to Her Majesty's Government if the new Kenya government discriminates against them as a tribe, it is idle to pretend that the Masai should transfer the faith and trust which they had in Her Majesty's Government to a new Kenya government to safeguard their tribal right in any other manner that does not apply to all other tribes alike.

(7) To this effect, Sir, it should be noted that no monetary return was paid to the Masai for land, and what we are asking is the return of our land from those who took it from us. [Lancaster House]

According to the fair copy of the report on the conference, the Maasai delegation made the following proposals among others:

(i) the land which the Masai vacated in accordance with the Agreement belong to the Masai. The Masai wanted their ownership to be recognized and have the first claim on these lands when they were vacated by the Europeans who now farmed them. . . .

(iv) they asked that some means should be found whereby the tribes akin to them now occupying land to the north and west of the Rift Valley should be enabled to unite. [Lancaster House]

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16 In the early 1980s, President Moi detained William ole Ntimama over the Maasai land claims. While the Kalenjin elite closed ranks with the Maasai elite in the 1990, there was a tension over land claims between the two groups. The Maasai claimed Uasin Gishu and protested the resettlement of the Kipsigis in parts of Narok, and the Mau forest region.

17 *Report of the Kenya Constitutional Conference*, Lancaster House, February 6 1962 – March 13, 1962, Kenya National Archives, MAC/KEN/47, hereafter cited as Lancaster House.

On the contrary, the British argued that:

> Her Majesty's Government could not admit any claims in respect of lands which the Masai claim had vacated under the Agreements. The Masai had agreed to give up the occupation of certain lands; in return they had received a guarantee of quiet enjoyment in respect to the lands reserved to them, and this would continue to be guaranteed under the constitution. There was nothing in the Agreement to suggest that Masai retained a right to re-occupy their former land if Europeans vacated it, nor could such a suggestion be founded on any legal principle to this case. [Lancaster House]

However, the rough notes, archived as part of the report, give a glimpse into the underlying attitudes of the British colonial government toward the Maasai, ones that explain their reluctance to entertain the Maasai demand for restorative justice:

> The Masai tribe holds some 16,000 square miles of land in Kenya by treaty with the British government. The Masai who today number some 75,000 have in the past, because of their war-like activities, occupied the most fertile grazing lands in Kenya by keeping out other tribes by force. After the advent of the European, the Masai were removed from most of the fertile lands held by them and this land was given over for European settlement. The Masai are now claiming all their former lands as and when they are taken over by an African Government from the European farmer. The Conference decided that the Masai treaties of 1904 and 1911 are no longer valid largely because the extent of the present Masai reserve (16,000 square miles) is more than enough for the needs of the Masai and for the foreseeable future. [Lancaster House]

The Maasai delegation saw the refusal of the British to acknowledge their land claims as betrayal, but remained resolute in their quest for restorative justice. Tipis concluded that:

> since the so-called British justice has been betrayed, has diminished, in the way the Masai case has been handled, in that this is a case of robbing Peter to pay Paul, the land-hungry and the land profiteers and those who took our land from us, when the British Government withdraw, we register our dissatisfaction in no uncertain terms to Her Majesty's Government, who are parties to this agreement—that there is no settlement, that the Masai on their part must have their land back to benefit by it, that Her Majesty's Government have responsibility which should not be lightly discharged, and that those who take it that they are going to benefit at the expense of the Masai should duly take heed. No man on earth could dream and expect the Masai as a people to be on the dry, arid lands on to which they were pushed, whereas our former rich and very fertile lands is given to people who had no claim to it whatsoever. [Lancaster House]

The rough notes revealed the British government's prejudice against the Maasai in particular and pastoralism in general. The KANU delegates to the Lancaster Conference expressed a similar view, with echoes of the British colonial rationale for dispossessing Africans of their lands. In an antecedent to the policy choice offered by Kenya's seminal development policy, *African Socialism and Its Application to Development: The Sessional Paper no. 10 of 1965,*[18] the KANU delegation noted:

> Land is a national asset and its full development is urgently necessary in the interests of all the people of Kenya, and indeed of the future East Africa Federation. The wealth of the country is dependent to such a great extent on its agriculture that no racial or tribal considerations should be permitted to interfere with the attainment of its maximal potential. It is recognized that land is an

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18 Government of Kenya, *African Socialism and Its Application to Development: The Sessional Paper no. 10 of 1965* (Nairobi: Government Printer, 1965).

emotional issue in Kenya; that many grievances, real or imaginary, exist; and that some areas wish to guard most jealously against central government control. Whatever measure may be necessary to allay such fears, it must be clearly established that the Government's principle aim must be to ensure maximum productivity for the benefit of all. Mr. Jomo Kenyatta has consistently re-iterated his broad policy as regards land. It is that the maximum security must be given to those irrespective of race or tribe, who have developed their land and that idle underdeveloped acres must be made available for the benefit of the landless and the impoverished. This memorandum is directed towards the detailed attain-ment of this policy. [Lancaster House]

The Sessional Paper no. 10 of 1965 was a seminal policy document whose publication Kenyatta hoped "should bring an end to all the conflicting, theoretical and academic arguments that have been going on." Kenyatta noted that Kenya could not develop if Kenyans "continue with debates on theories and doubts about the aim our society." Therefore the government would pursue growth and pro-ductivity. The policy noted that "*idle land and mismanaged farms will not be permitted whether such is owned by Kenya citizen or foreigner.*"[19]

The policy recommended that land should be put to produc-tive use, effectively and closely controlled so that its ownership was not concentrated in the hands of a few. More importantly, land would be progressively Africanized, with a ceiling placed on own-ership and the formation of cooperatives promoted to ensure eq-uitable distribution of land. On the former European settler farms, the policy said: "*it should be established that property in future should be given to producer co-operatives formed by people such workers and squat-ters already employed on the land*"[20] and a credit facility extended to such cooperatives to achieve this goal. Kamungi notes that Oginga Odinga, leader of the radical nationalists who favored nationaliza-

tion of these lands, had proposed that land be allocated on a six-ty-forty ratio, sixty for the "indigenes" and forty for the "outsiders" (Kamungi, p. 350). What did the policy produce?

"Robbing Peter to Pay Paul"

Ogot argues:

> Kenyatta appeased the land hunger of the former Mau Mau by successively settling them into the Million-Acre, Haraka and Harambee Settlement Schemes on soft loans terms. Between 1960 and 1966, the Kikuyu came back to the Rift Valley, and the Gikuyu reserves of Kiam-bu, Muranga and Nyeri were now extended into Nakuru, Laikipia and Nyandarua districts — which became fully Kikuyu reserves — and also into Eastern Nandi, East-ern Kericho, and the Southern — Uasin-Gishu districts. Also, tracks of land in the Rift Valley were given to the President's closest sycophants such as Njenga Karume and Kihika Kimani. In this process, the concept of com-munal land ownership that was so dear to the framers of Majimboism was jettisoned and nobody listened to the cries of the historically aggrieved communities such as the Maasai and the Kalenjin about their "lost land." [Ogot, p. 461]

Kanyinga also notes that the need to contain the social crises that underpinned the Mau Mau war of independence, led to an ini-tial Africanization process that favored the Kikuyu peasants and annexation of parts of the Rift Valley such as Kinangop, to Cen-tral Province to settle landless Kikuyus' claims. The subsequent resettlement schemes favored laborers and also skewed the redis-tribution in favor of the Kikuyu, who constituted the majority of laborers in the settler farms (Kanyinga, pp. 328–32). This undercut the social base of both Mau Mau militants and radical nationalists. It at the same time ethnicized the land question in the Rift Valley and provoked Kalenjin resistance, as expressed by Jean Seroney's

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19 Ibid., p. 39.
20 Ibid., p. 38.

"Nandi Hills Declaration" of 1969.[21]

Stephen Brown notes that at the Coast, resettlement in "schemes" such as Mpeketoni was done in favor of the Luo, Kikuyu, Kisii, and the Kamba. These communities are politically referred to as "wabara," or people from the hinterland, as opposed to "wapuani" or the Coastal people.[22] Wapuani's landless lost out in these settlement schemes despite having a long history of being dispossessed that ran as far back as the establishment of Arab plantations such as the contested lands owned by the Mazrui family. They lost more land in Kwale, Kilifi, Malindi, and Taita Taveta to settlement schemes such as Mpeketoni and Lake Kenyatta, and to appropriation of beach plots by the Kenyatta era elite.

The pastoralists' land claims and hard feelings lay latent under the authoritarian one-party state, until Moi stoked the smoldering embers of 1960s Majimbo fires in the 1990s to stave off the opposition that had emerged from an emerging multiethnic political coalition agitating for political change. This is arguably the politics that contextualizes William ole Ntimama's callous remarks, cited in the Africa Watch report, in response to accusations of instigating the killings in Enosopukia. The report quotes Ntimama saying that "he had no regrets about the events in Enosopukia because the Maasai were fighting for their rights," and further, that the Kikuyu "had suppressed the Maasai, taken their land and degraded their environment…we have to say enough is enough. I had to lead the Maasai in protecting our rights" (Africa Watch, p. 59). Indeed, the connections between the violence and the unfinished politics of federalism (Majimbo) were widely articulated by various politicians, academics, and public intellectuals in the 1990s.

David Ndii, in a critique of the emerging national consensus on the way to end the economic and political crisis of the Moi era, noted that Kenya is a nation of tribes.[23] Yet the ascendant discourses of human rights, constitutional reform, rule of law, and economic development seem not to have factored in this important fact. Ndii observed that Kenya, "like Ethiopia, Tanzania and every other African country, [is] a nation of tribes and there seems to be little point in chasing a nation of make-believe, something different from the sum of its tribes" (Ndii). According to Ndii, ethnic identities were legitimate political identities, yet the current constitution and constitutional debates seem not to acknowledge this political fact and address it as such. According to Ndii, the emerging national consensus on how to reform Kenya's politics and economics did not address important questions, those of land and ethnicity. Kenya's transition to democracy must confront issues of land and ethnicity, perhaps in the manner in which Ethiopia and Tanzania have variously addressed these issues. The critical issue was: "are tribes legitimate identities in a constitutional order?" (Ndii).

Moreover, in making a case for a serious consideration of the question of ethnicity and federalism, Ndii points out:

> It is foolhardy to hold the view, like one often hears among the well-heeled Kikuyus, that the community owes their geographical spread in the country entirely to their entrepreneurial prowess.
>
> It is matter of historical fact that the co-optation of Kadu into Kanu after independence gave the Kenyatta government the latitude to pursue, not only a land policy that benefitted Kikuyus and other favoured groups, but also to deploy the provincial administration to entrench and protect the interests of the favoured groups everywhere in the country. [Ndii]

Ndii also suggests that Kenya's political crisis was not only underpinned by the Kenyatta regime's use of the provincial administrative structures to entrench and protect elite and favored groups' interests, but also by the application of the lessons of the counterinsurgency land reforms of the 1950s. Ndii argues:

> More importantly, the land reform process initiated

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21 Lynch, *I Say To You*, p. 98.

22 Stephen Brown, "Quiet Diplomacy and Recurring 'Ethnic Clashes' in Kenya," in *From Promise to Practice: Strengthening UN Capacity for the Prevention of Violent Conflict*, ed. Chandra Lekha Sriram and Karin Wermester (Boulder, CO: Lynne Rienner, 2003), pp. 69-100.

23 David Ndii, "Law Reforms Must Address Land Issue," *Sunday Nation*, July 23, 1995,

p. 7, hereafter cited as Ndii.

under the Swynnerton Plan in the 1950s was already rigged in that direction. The architects of the plan made it plain that they considered the creation of a "landed" capitalist class among the peasantry as the solution to political dissent and economic viability of the colony. But it does not matter whether this is the true interpretation of history or not. It only matters that it is perceived as such.

Hence the perception that the current constitutional order, in so far as land rights are concerned, carries historical injustice. This perception is not inconsequential. [Ndii]

Although he makes a case for the constitutional recognition of ethnicity and federalism as a means of protecting ethnic land rights, Ndii also observes that there was either a perception or fact that "the presidency and not the constitution…is the ultimate safeguard of tribal interests and the seemingly irrational unwillingness of any tribe to compromise on the occupancy of State House" (Ndii).

Consequently, Ndii suggests that Kenya's land reforms should consider Tanzania's land reform, which recommended the abolition of centralized land registration, the institution of local registries and land controlled by elected local land committees, and the vesting of communal or public land titles in a national commission and not the president.

Echoes of Lancaster House Constitutional Conference

Ndii writes that the proposal for recognized ethnic identities to possess corresponding land rights recalls the KANU-KADU debates at the Lancaster House conference, where there was a political divide not just by ethnicity as is often stated, but also in terms of socioeconomic inequality between the communities represented by the parties. These were the centralist and Majimboist/federal debates on state power, the structure of government, and land. KADU had argued for a system of regional governmental powers over land, regional police forces, and a bicameral system of parliament,

where a senate and a high threshold for legislative reform would protect regional interests.[24] KANU opposed these propositions.

KANU, however, tactically conceded and Kenya was briefly a federal state. KANU did not want the difficult issues of land, ethnic identity, and regionalism to delay independence. Its strategy was to use democratic procedures and the cooptation of the KADU elite to undo these constitutional guarantees. KANU's understanding of democracy as majoritarianism is instructive in this regard. At the Lancaster House conference, Kenyatta, the president of KANU, had argued:

First, KANU has set itself firmly on the path of Parliamentary Democracy, fully understanding and accepting its implications. That is what we mean when we say we want the British or Westminster pattern of Constitution. That is why we demand a clear and comprehensive Bill of Rights and an independent judiciary. I would like to make it very clear Sir, that my party and I are definitely against any form of dictatorship and we are, and have always been, ready to consider reasonable proposals to ensure that dictatorship does not emerge. We believe that our proposal contain the necessary safeguards for this purpose. But it must be made equally clear that Parliamentary Government means effective Government. It means Government by the majority party and the consent of the minority to the predominance of the majority party, its leadership and its policy until the next election. That is what my friend Mr. Odinga termed dictation by consent, and he cited the British Government as a good example of this. Today the Conservatives Party rules, sometimes very strongly, but this system is very different to dictatorship.[25]

In other words, KANU, the dominant preindependence national

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24 KADU Parliamentary Group, memorandum, Kenya constitutional conference, February 20, 1962, Kenya National Archives, MAC/KEN/47.

25 Jomo Kenyatta, president of KANU, statement, Kenya constitutional conference, February 21, 1962, Kenya National Archives, MAC/KEN/47.

political coalition, thought of democracy as the right of the major-ity to impose their will on the minority willy-nilly, not as a system of government that recognizes the fears, rights, and opinions of the minorities as legitimate or that requires various institutional and electoral safeguards. To KANU, what was good for the British, how-ever brutish, was good for Kenya. KANU ensured that the Majimbo Constitution died on the vine: the first amendments to the Lancas-ter House Constitution made Kenya a republic with an executive president, one with immense unchecked powers over the judici-ary, parliament, and the police. These amendments abolished the revenue base of the Majimbo government and strangled it out of existence.

Settlement Schemes in Independent Kenya

The European settler state's mode of rule and white settler econo-my produced two political subjects whose claims to land are mutu-ally exclusive. One set, the pastoralist communities, who were dis-placed from the land to make room for settler farms located mostly in the so-called White Highlands, claimed the land on the basis of ancestry and precolonial occupation. They argued that the White Highlands should be reallocated on the basis of the claims of an-cestry and restorative justice. However, the second set — members of particular ethnic groups that had worked on settler farms — ar-gued that the White Highlands should be allocated on the basis of residency and labor that had turned these lands into areas of profitable sedentary agriculture.

During the Lancaster House conference, leaders of the pas-toralist communities, mostly in KADU and allied to various settler political parties, unsuccessfully pursued the right to former White Highlands land in a quest for restorative justice. The failure of KADU's quest was compounded by the Kenyatta government's po-litical strategy and policy choices, which were a continuation of the counterinsurgency strategy of the British against the Mau Mau and radical Kenyan nationalists, who were demanding redistribution of White Highlands without compensation.

Kanyinga points out that early settlement schemes, mostly of the monoethnic types, were skewed in favor of the landless Kikuyus, considered the most restless landless people, and whose demand for land could destabilize the independent Kenyan polity. For ex-ample, the Kinagop settlement scheme in Nyandarua district was carved out of land that the Kalenjin and the Maasai claimed, but which was used to resettle landless Kikuyus from the highlands and the adjoining populated former native reserves (Kanyinga, p. 332).

Kanyinga adds that Kenyatta's Africanization of the White Highlands ethnicized the land question. The independence era re-settlement policy favored labor-residence claims and willing-buyer purchases, but repressed the pastoralist communities' indigeneity, claims to historical injustice, and the quest for restorative justice over lost lands. The pastoralists were the most disadvantaged by these policies. However, the Kikuyu, by virtue of a long history of collective solidarity, the colonial and Kenyatta government coun-terinsurgency strategy, knowledge of the intricacies of modern land management system and titling (Kanyinga, p. 328),[26] and con-trol of key government offices and banks by Kikuyu elites, were the most advantaged in the market-mediated competition for land.

The Kenyan government's 2002 *Report of the Judicial Com-mission Appointed to Inquire into Tribal Clashes in Kenya* (known as the Akiwumi Report) notes that the Kenyatta government effect-ed resettlement in three ways: the government bought land and "transferred to Africans in either high density schemes, in which plots were small or low density schemes where larger plots were available"; it set up a parastatal, the Agricultural Development Cor-poration (ADC), which bought and managed, singly or jointly with private companies, some of the settler farms in the former White Highlands or Scheduled Areas; and lastly, individuals, through co-operative societies or land-buying companies, bought large lands with single block titles, taking out loans from the Land Banks, the Agricultural Finance Corporation, and other sources (Akiwumi

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26 Kanyinga notes that the transformation of land tenure system for Africans; the individualization, surveying, consolidation, and registration of individual titles began in Central Province.

Report, p. 62).

The ADC or sometimes the Ministry of Agriculture directly took over the management of some of the former settler farms. They eventually subdivided these farms into small parcels and sold them to land companies or cooperative societies owned by the farm hands who had been "squatting" on them. The land co-operatives and companies' shareholders were ethnically diverse. However, while some peasants got a title deed for their piece of land, others, due to ethnic discrimination by the Moi government, were not given title deeds.

As Paul Syagga points out, multiethnic Kenyan elites were allocated the "Z plots," 100-acre land that included a farmhouse, following a 1964 Kenyatta directive that such lands should be allocated to prominent people, who, unlike the smallholder peasants, could preserve their beauty and grandeur.[27] But, more importantly, the directive was used to coopt the elite and prop up an African bourgeoisie that would have stakes in moderate politics and the status quo. The list of beneficiaries of land allocated on this basis reads like who's who of Kenya at the time, with notable exceptions like Joseph Murumbi, the second vice president, and Bildad Kaggia, an assistant minister.

The manipulation by government officials of bureaucratic processes for titling land and differential access to state power, loans from land banks, and distress sales exacerbated land inequality in the Rift Valley between classes and between ethnic groups. The land conflicts did not, however, become violent until the demand for multiparty politics gained ground. The former ADC farms are the farms that have borne the brunt of the political violence that defines Kenya's competition for political office, especially the presidency. A case study of two such farms, Meteitei and Buru, the first to experience the violence, is illustrative in this regard.

27   Paul Syagga, "Public Land, Historical Land Injustice and the New Constitution of Kenya," Working Paper Series no. 9. Society for International Development, Nairobi, 2011.

Meteitei Farm

On October 28, 1991, violence broke out in Meteitei Farm in Tinderet, Nandi District, in the Rift Valley province of Kenya. Ogot notes that from 1895 to 1905, the British organized several military attacks against the Nandi, killing over 100,000 Nandis, including the *Orkoyiot*, their political and spiritual leader (Ogot, p. 397). The Nandi lost 1,250 square miles of land to the British White Settler schemes. The 1934 Carter Land Commission noted that the Maasai and the Nandi had lost the greatest acreage of land to colonial settler agriculture (ibid.).

Unsurprisingly, the political violence began with the settlement schemes most vulnerable to competing political claims and grievances over land. A number of questions prefigured these claims and grievances: who has the right to own and use land in the former "scheduled areas" or White Highlands, and what is the basis of land ownership and control of land? Does the market confer rights to property or do historical claims of ancestry and belonging?

KANU politicians exploited these grievances, but politicized only the hard feelings expressed by the Nandi or Kipsigis against the smallholder peasants from the ethnic communities perceived to be supporters of, or sympathetic to, the opposition pressure group Forum for the Restoration of Democracy (FORD). The victims of the violence as well as other Kenyans were puzzled by the surprise attacks.

The violence quickly spread to neighboring farms such as Owiro and Buru, and along the boundaries of Kericho, Nandi, and Kisumu districts. On November 4, 1991 the *Daily Nation* reported that:

> Six more people have died following clashes over land in Tinderet Division of Nandi District. Three primary schools have been closed while police estimate that over 10,000 people were rendered homeless after their homes were set on fire by rampaging youth. The clashes, which started at the Meteitei Land Buying Company farm in

Songhor Location last week, have now spread to Kois-agat Farm, Kitororo, Kimwani Agricultural Corporation (ADC) farm and Owiro Farmers Co-operative Society.[28]

The chairman of Owiro Farmers Company, Mariko Muga, whose company owned the 1,600 hectare farm, told the *Daily Nation* that "nearly 2000 people out of the 3000 (including children) who had inhabited the farm had been rendered homeless. Muga also told the Daily Nation that his society had bought the Owiro farm from a European in 1968 for 740,000 Kenya shillings. According to him, there were no land disputes among the members of his society. Those who had raided the farm, however, claimed that the members of his company were "outsiders" ("Six More"). Mariko Muga also told the *Daily Nation* that raids at his farm started on Friday night and continued most of Saturday and Sunday. He said that the attackers ordered those they considered to be outsiders to leave their homes after which the huts or houses were set on fire. He estimated the gang, which attacked on the first night numbered 300 and 400 people. Mr Muga claimed that prior to the attack, the chief of Songhor location, Mr Henry Tuwai, had advised residents against sleeping in their house because of the danger of raid by *morans*. Mr Muga claimed that on Saturday, police came and fired in the air but the morans continued looting and burning houses ("Six More").

Indeed, the *Daily Nation* reporter "saw several of the raiders armed with bows and arrows, patrolling Owiro farm" ("Six More"). The *Daily Nation* further reported that when political leaders (who included the Nandi District Commissioner David Mativo, the Minister for Co-operative Development John Cheruiyot, the Nandi KANU branch chairman Henry Kosgey, and the Rift Valley Provincial Officer) and a contingent of antiriot police office visited the area during the violence, these leaders saw "over 200 grass thatched huts being set ablaze by over 400 unruly youths" ("Six More"). Gerry Oduor, a *Kenya Times* reporter who covered the same story also noted that:

Hundreds of villagers fleeing land clashes in Tinderet Division, Nandi District, yesterday continued to pour in the neighbouring Kisumu District. Following the clashes – which spread to Songhor, Koru, Kopere, Kadan, Chemelil and Muhoroni – hundreds of security personnel have been deployed as far as from Kericho to restore order on the main highway where mobs have erected road block barricades.[29]

Oduor added:

Yesterday at least two people were admitted at the New Nyanza General Hospital following the land clashes, which erupted over eight days ago at Meiteitei, Nandi District. …the assailants from Nandi District, numbering between 200-300 youths dressed in red and white uniforms, on Monday afternoon set hundreds of villagers, mainly small scale farmers fleeing for their lives as they stormed the ADC farm at Kowiro. [Oduor]

One victim of the violence, Martin Ogango, told Oduor that the raiders struck at about 8 pm and shot him with three arrows: "I managed to pluck out the arrows and raised alarm. The raiders fled after setting my house on fire." The raiders also escaped with a few of his belongings, including household goods (Oduor).[30]

Flora Mumbi Kaguaru, a resident of Momoniet farm (Kipkelion constituency in Kericho district) who experienced the violence told a *Daily Nation* correspondent that "a band of arsonists raided Momoniet farm on Wednesday at 6.00pm and burnt homes."[31] According to the victims of the violence, "the raiders were heading towards Sitoito Farm and the Keringet area in Nakuru District."[32]

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28 "Six More Killed in Land Clashes," *Daily Nation*, November 4, 1991, pp. 1-2, hereafter cited as "Six More."

29 Gerry Oduor, "More Families Flee Tinderet Clashes," *Kenya Times*, November 6, 1991, p. 1, hereafter cited as Oduor.

30 In a press statement to *The East African Standard*, the Nandi leaders accused the Luo community of sparking the violence. The Nandi leaders alleged that while the situation in Meteitei farm was tense, violence began when a "Luo policeman shot a Nandi during a riot on Meteitei farm on the October 29" (Kihu Irimu, "Clashes: Nandis Not to Blame – Kosgey," *The East African Standard*, November 6, 1991, p. 15).

31 "46 Charged Over Land Clashes," *Daily Nation*, November 8, 1991, p. 9.

32 Ibid.

Similar patterns of violence were witnessed in Saboti, Ende-
bes, and Kwanza in the Trans-Nzoia district, from December 23,
1991 to July 1992,[33] in the Mount Elgon region from January 1992 to
August 1992, the Nandi-Uasin Gishu-Kakamega district common
border, in the Nyamaiya, Nyangusu, and Kilgoris borders of Rift
Valley and Nyanza province in January 1992, and in Eronge and
Sotik in 1992. Molo, Olenguruone, and Burnt Forest experienced
continual attacks in the 1990s.

The attacks in these places followed a similar pattern: a sur-
prise night- or daytime attack by a group of well-organized in-
vaders who mostly targeted non-Kalenjin and non-Maasai eth-
nic groups living in ethnically diverse settlement schemes of the
former White Highlands. They torched houses and maimed and
killed while those in charge of state security apparatuses dithered.

Official Alibis: Tradition, Cattle Rustling, and Border Disputes

Although the patterns of these attacks were similar, the govern-
ment explanation for the violence was varied. As Brown notes, the
government successfully represented the conflicts as something lo-
cal that did not call for international intervention. Yusuf Haji, the
highest ranked administrator in the Rift Valley province, described
the violence that hit the settlement schemes as "kitu kichafu sana"
(a very dirty affair), but exonerated the KANU majimboists of any
wrongdoing.[34] President Moi explained that the violence along the

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33 "5 More Killed in Ethnic Clashes," *Sunday Nation*, December 29, 1991, pp. 1, 11.

34 The Rift Valley Provincial Administrator, Yusuf Haji, described the seven-day
attacks in Meteitei and Owiro farms as "*Kitu chafu sana*," Kiswahili for "a very dirty
affair," as Emman Omari and others reported ("Nandi Clashes: Govt's 'Return to
Home' Orders," *Daily Nation*, November 7, 1991, p. 32, hereafter cited as "Nandi
Clashes"). However, Haji's statement hardly expresses moral indignation or
disgust. The *Nation* reported that Haji told the public at Maraba in the affected
region that "the skirmishes illustrates what it means to have chaos." In Charles
Tilley's formulation, what was sordid was the dirty business of valorizing ethnic
differences, land grievances, and reconstructing borders and boundaries in the
Rift Valley along the 1962 fault lines by the Daniel arap Moi regime as a bulwark
against the threat posed by multiparty politics to the regime's hold on state power.
See Charles Tilly, *Identities, Boundaries and Social Ties* (Boulder, CO: Paradigm
Publishers, 2005).

Kisii, Nyamira, and Kericho District administrative borders was
caused by political incitement by FORD activists who stroked what
were "traditionally cattle-rustling and border disputes" between
the Kisii and Maasai."[35] According to this government explanation,
the ethnic communities living in the Mt Elgon region, namely the
Sabaots, the Tesos, and the Luhyas, "have traditionally been suspi-
cious of one another due to cattle-rustling, the dominance of the
Bukusu in district affairs, and land problems."[36]

However, the violence in Trans-Nzoia seemed to have a differ-
ent objective: the immediate cause of the violence was the Sabaots'
campaign for the Mt. Elgon Sub-District to be transferred to Trans-
Nzoia District. The Sabaots, feeling marginalized, demanded a dis-
trict of their own. Similarly, the government discounted the cattle
rustling explanation of the Kipsigis, Kisii, and Luo conflicts along
the Rift Valley and Nyanza province borders. It noted that the vi-
olence caused by cattle theft had continued among these groups
"unabated for decades, without causing serious tribal clashes."[37]
Therefore, FORD, the political movement agitating for the return of
multiparty system of government, had instigated the violence. The
government offered yet another explanation of the violence wit-
nessed on the former ADC farms on the Kericho-Kisumu border,
attributing it to shareholder disputes.

Shareholder Disputes

Government officers at both national and local levels said that
disputes among the residents of Meteitei and Owiro farms on the
Kericho-Kisumu District borders explained the violence. Joseph
Ngutu, the Minister of State in the Office of the President, told par-
liament that "the cause of the of the problem was land shares be-
tween some local residents. There had been claims by the parties
in dispute about the genuine and bogus members."[38] Indeed, the

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35 Kenneth Mwema, "How Clashes Were Planned," *Kenya Times*, May 21, 1992, p. 16.

36 Ibid.

37 Ibid.

38 "Minister Disregard of Law to Blame," *The East African Standard*, November 7, 1991,
p. 4.

Nandi District Commissioner blamed the violence at the Meteitei farm on the unresolved ten-year-old land dispute at the 1,934 hectare farm (Nandi Clashes, p. 32).

The Nandi District Kalenjin politicians, namely Henry Kosgey, Benjamin Kositany, and Hezekiel Bargetuny, accused Luo leaders, namely the Members of Parliament, Onyango Midika of Muhoroni constituency and Ojwang K'ombudo of Nyakach constituency, of inciting their constituents against the Kalenjins. However, K'ombudo asserted that "Kalenjin leaders must bear the full responsibility over the matter" (Oduor). He said that the "land dispute and acts of hooliganism on the non-Nandi members in the area is a direct result of the recent campaigns by Kalenjin leaders for the reintroduction of *Majiboism*" (Oduor).

Kalenjin leaders, however, maintained that the matter was purely a land issue that had got out of control and not a political issue at all. But members of the Owiro cooperative society, the victims of the violence, disagreed. They pointed out that some of "their members had started the clashes over land. We are considered outsiders and therefore, have to be quiet, they said" (Nandi Clashes, p. 32).

The Akiwumi Report notes that Buru Farm, formerly owned by a white settler, was taken over by the Ministry of Agriculture and Animal Husbandry. The Luo squatters, like the landless Kipsigis who were tilling a similar parcel of land, petitioned the government through Daniel arap Moi, then the vice president, and bought the land. The Kericho District Commissioner and the Kipsigis County Council refused to grant the Luo squatters land titles, yet completed the subdivision and titling of land bought by the Kipsigis, arguing that the land belonged to the Kipsigis. The Luo squatters had paid more money than the Kipsigis for the land they wished to buy. The government had not only withheld their money, but also allowed Kalenjin warriors to attack them and kick them out as multiparty politics intensified (Akiwumi Report, pp. 92–103).

Observers of the violence of the 1990s noted that the new wave of violence exceeded elders' efforts at mediation through the

intercommunal conflict resolution mechanism used to mitigate conflicts over cattle theft and land disputes. It also had other, new attributes: the government security apparatuses were either uncharacteristically slow in their response to the new wave of "cattle rustling or land clashes," or were complicit in the attacks.[39] The state was indifferent to the plight of the victims and hostile to any attempts at peace-making and humanitarian assistance by the church or nongovernmental organizations (Africa Watch).

The attackers were not after cattle, but the eviction of the non-Kalenjin. Paul Kimani, who was born in Kunyak in 1937 and knew no other home, told the *Nation Team* "these people are burning our houses and telling us to go back home. Which home do I go to? I know that my dead parents came from somewhere in Kiambu, but this is my home."[40] Moreover, ethnic hostilities had spilled over into other locations within Kericho Districts, namely tea plantations, hotels, and schools, where the Luos, perceived to be pro-FORD were threatened with eviction.[41] Leaflets circulating within the Rift Valley warned non-Kalenjins to leave.

A Human Rights Watch report notes that the violence perpetrated by the armed groups from the Pokot community was different: "before they [the Pokot/Kalenjin] were only stealing cows, but now they also burning houses and killing people." In Bungoma and Trans-Nzoia the perpetrators of the violence were using guns, bows, and arrows. Although the perpetrators of this violence stole cattle from everyone, only the Bukusu houses were being burnt (Africa Watch, pp. 29, 49, 30).

The Akiwumi Report notes that the government did not deploy the police in numbers sufficient to stop the violence. Moreover, the government often selectively applied the law, arresting and prosecuting opposition politicians and those who were defending themselves against the "Kalenjin attackers." However, whenever the "Kalenjin attackers" were arrested, they were released without

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39 "Tribal Clashes: Where Is State Machinery," *The Standard*, January 10, 1992.

40 "Man Speared to Death as Land Feuds Rage," *Daily Nation*, November 9, 1991, p. 1.

41 Kauli Mwatela, Kennedy Masibo, and Caleb Atemi, "10 Killed in More Tribal Fighting," *Daily Nation*, March 16, 1992, pp. 1, 2.

any charge. Government biases were also exacerbated through attempts by the Chief Justice Hancox to intimidate the lower courts handling most of these cases (Africa Watch, pp. 64, 69-70).

The Kiliku Report concludes that the violence experienced in the Rift Valley was political: it was "KANU fighting FORD."[42] The violence was mostly driven by the perceived political threats that the reintroduction of multiparty politics posed to the KANU regime and partly driven by rivalries over administrative posts in places like Molo. The politics of "political zoning," that is, a process of defining a specific region either as KANU zones or FORD zones, were key drivers of the violence.

The Kiliku Report suggested that in the Rift Valley province, the *Majimbo* debate had been understood as the establishment of mutually exclusive ethnically defined regionalisms. Kiliku reported that a Mr. Kurgat of Tarbo in Eldoret told the committee that "in the United Kingdom, the Scots lived in Scotland, the Welsh in Wales and the English in England and they just met for business in London."[43] However, the Kiliku Report incongruously concludes that some KANU politician and government officers could have been complicit in the perpetration of the violence. Nonetheless, neither the ruling party KANU nor president Moi and his government can be collectively held responsible for the violence.

The Report of the Judicial Commission of Inquiry

The Akiwumi Commission also reached a similarly incongruous conclusion. The Akiwumi Commission was categorical that the violence was political. It meticulously investigated all the major incidences of violence, examined the official explanation and alibis, and recommended the prosecution of KANU politicians, businessmen believed to have funded the perpetrators of the violence, and government officers believed to have been complicit in the perpetration of the violence. However, the commission's explanation of the violence as something driven by structurally unchang-

ing cultural traits undermined the significance of its conclusion. The commission uncritically appropriated the alibis and excuses of the ruling KANU regime. For example, the Commission argued that before 1991:

> There existed in some cases, from time immemorial, clashes between various tribes including traditional enemies, in the country and even within clans in a given tribe. These clashes and their causes where relevant, will be taken into account in assessing the causes, objectives and circumstances of the tribal clashes that occurred in the country from 1991to 1998. The phrase 'tribal clashes' within the context of what occurred during the period under consideration, and the political and economic development of Kenya and its advancement in modern civilization, can no longer be limited to the unsophisticated objectives of pre-colonial primitive wars between tribes. [Akiwumi Report, p. 21]

In instances where the report resorts to "tradition," "culture," "traditional stock thieves," "tribal animosity," "customs," "tribe," and "age-old culture," it looks at culture or tradition as static, ahistorical, and essential markers of ethnic difference. It also understands cultural and social relations as something "homogeneous, coherent and timeless."[44] It falls for the Moi regime's propagandistic use of the label "tribal clashes" when it invokes traditional enmity or "traditional way of life," even as it acknowledges evidence that points to deliberate acts of provocation as the trigger of intercommunal violence. Moreover, it references the colonial administrators' reports of 1960s to explain political and social relations of Kenyan communities in the 1990s.

The Akiwumi Report notes that violence at the Coast was more about the elections than land. It was part and parcel of KANU's wider strategy to divide the opposition at the Coast along ethnic and racial lines. Thus the contested beach plots were not

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42 Amos Onyatta, "Uproar in House as Kiliku Reads Report," *The Standard*, September 25, 1992.

43 Ibid., pp. 1, 12.

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44 Lila Abu-Lughod, "Writing Against Culture," in *Anthropology in Theory: Issues in Epistemology*, ed. Henrietta L. Moore and Todd Sanders (Sussex: John Wiley and Sons, 2014), pp. 386-99.

targeted. It elides the significance of class in the Rift Valley case of land owned by Kenya's multiethnic elite and the multinational companies. This is a category of land that, like the contested beach plots in Mombasa, has not been targeted in all the waves of election-related violence.

It may thus be argued that the violence was political. The KANU regime directed the violence against a population whose political choices it feared could tilt the balance of the electoral competition in favor of the opposition parties, especially FORD. The violence was primarily political because it was part and parcel of KANU's wider strategy of confining the politics of democracy and human rights within the urban areas and making it difficult or impossible for emerging opposition political parties to obtain the statutory requirements for a presidential victory. By displacing thousands of peasants perceived to be pro-opposition, the KANU regime reduced the chances of a united opposition obtaining a simple majority vote out of all votes cast in all constituencies or even the statutory requirement of obtaining at least twenty-five percent of total votes cast in at least five of the eight provinces of Kenya.

Arguably, the main motive of the KANU elite was not redistribution of land from below (even though the violence achieved this to a limited extent by diverting the interclass conflict between the landless and large land owners), but the retention of state power by containing the threat of majoritarianism in a polity where poethnic consciousness and elite-mediated political coalitions define electoral victory. Indeed, as Kamungi points out, even though the existence of the internally displaced person justifies new resettlement schemes, "the Agricultural Development Corporation farms slated for resettlement of IDPs in 1995 were grabbed by politicians, business people and army officers and a small fraction of IDPs were settled in forests and swamps" (Kamungi, p. 352). The settlement around Mara, contested by the Maasai, is a case in point.

The main aim of the violence was to stem the political threat posed by FORD. In the face of a strong panethnic political movement, which brought together notable political elites from various

ethnic groups, Moi appropriated and deployed political fears of KADU from the dawn of Kenya's independence. Independence-era politics of "advanced tribes" versus "backward tribes," which were ostensibly represented by KANU and KADU respectively, but reflected ethnoregional socioeconomic inequalities, was recast by the KANU regime as the politics of ethnic domination, the "big tribes" versus "the small tribes," ostensibly represented by FORD and KANU, respectively. KANU ran against a divided opposition in the 1992 and 1997 presidential elections. The violence partly enabled Moi to remain in office for two five-year terms of office, from 1992 to 2002, after the introduction of presidential term limits in 1991. In 2003, KANU's candidate, Uhuru Kenyatta, lost to a united opposition, the National Rainbow Coalition led by Mwai Kibaki. The 2002 presidential election has been the only election since 1991 not only free of violence, but also perceived as free and fair.

Conclusion

Contrary to the popular use of adjectives such as "tribal clashes," "ethnic clashes," or "land clashes," the violence accompanying the resumption of multiparty politics in Kenya has never been solely about ethnicity or land, even though historical land injustices have been invoked to explain it and its victims defined by ethnicity. The violence has more accurately, been political: its victims determined by the nature of the Kalenjin and to a lesser extent, the Maasai political elite alliances in a particular electoral contest. The key determinant of the victims of violence has been ethnic groups whose elites are included or excluded in political parties or alliances for capturing the presidency, in which the Kalenjin and Maasai elite are principal players, except for the Kisii communities of the Rift Valley, who have been targeted in all the waves of the violence.

Unlike other ethnic groups, who mostly vote in a single block for parties that represent regional interests, the Kisii, Meru, and Luhya have tended to vote for the main political parties in general elections. In the 1990s, violence targeted ethnic groups whose elites had been marginalized by Moi's regime, namely the Kikuyu,

Luo, Kisii, Luhya, and Teso. In 2007–08, the targets of the militia violence in the Rift Valley notably spared these ethnic groups except the Kikuyu, who were largely perceived to support the Party of National Unity led by Mwai Kibaki. The Orange Democratic Movement party was an alliance of several ethnic groups, including the Kalenjin and the Maasai, but largely excluding the Kikuyu. In 2013, the Jubilee Coalition, largely made up of the Kikuyu and the Kalenjin, brought the Kalenjin, Maasai and other pastoralist ethnic groups together. Politics in the Rift Valley was largely peaceful for all the ethnic groups. More than any other factor, the interests of the Kalenjin and Maasai elite have been the key determinant of the course of the political violence in the Rift Valley.

Although the Rift Valley Province has been the epicenter of the political violence (Uasin Gishu, Eldoret, Burnt Forest, and Kuresoi), driven by politics of fear of ethnic domination, the Kalenjin community, an ethnic group that was partly constructed in response to such fears, voted overwhelmingly against the 2010 Constitution of Kenya. Indeed, William Ruto, Moi, and some clergymen of the NO Campaign in the 2010 Referendum led the mainly Kalenjin opposition to the new constitutional order. The constitution, which came into force on August 27, 2010, was arguably the most significant political response to Kenya's ethnic discrimination, exclusion, and land questions, and it is telling that the majority of other Kenyans voted in its favor.

The Constitution of Kenya, 2010, addresses Kenya's ethnic question both as a response to a potential national question (ethnoregional nationalism, namely Mombasa and Somali nationalism) and a social question (vertical and horizontal social inequalities).[45] It addresses ethnoregional socioeconomic inequality through a raft of measures including the creation of forty-seven county governments, constitutional allocation of resources and equalization funds, and various provisions on inclusion and ethnic diversity. It also attempts to redress the disadvantages of the biases of past gov-

ernments, and to balance social pluralism with individual rights. However, the current county governments' administrative boundaries, the electoral system, and the dominance of particular ethnic groups within most of these counties arguably reify ethnic identity and identification.

Moreover, the 2010 constitution's provisions on land and land policy has yielded more struggles between the national and county government over the control of land management bureaucracies than did struggles for equity and redistribution of land to the landless and the displaced. Similarly, while the constitution has progressive provisions on ethnicity, the commission it mandates to address ethnic and racial discrimination is arguably unequal to the task.

As Branch points out,[46] the British counterinsurgency strategy has ensured that only moderate and pro-status quo leaders ascend to the presidency. Radicals may however, yet have their constitutional moments. For while the Jubilee Coalition, the political party currently in power, is made up of wealthy Kikuyu and Kalenjin elites and is largely supported by their respective ethnic groups across class lines, the Uhuru Kenyatta–William Ruto government has largely ignored the only serious attempt to deal with some of the issues that fuel violence in the Rift Valley: the findings and recommendations of Kenya's Truth, Justice and Reconciliation Commission.

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45 Thandika Mkandawire, "From the National Question to the Social Question," *Transformation: Critical Perspectives on South Africa*, no. 69 (2009): 130–60.

46 Branch, *Defeating Mau Mau, Creating Kenya*.

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Beyond Nuremberg: The Historical Significance of the Postapartheid Transition in South Africa

Mahmood Mamdani

ABSTRACT The contemporary human rights movement holds up Nuremberg as a template with which to define responsibility for mass violence. The "lesson of Nuremberg" is that state orders cannot absolve officials of individual responsibility. I argue that the negotiations that ended apartheid—known as the Convention for a Democratic South Africa (CODESA)—provide us with the raw material for a critique of these all-embracing claims. I also distinguish CODESA from the Truth and Reconciliation Commission (TRC), whose significance has been exaggerated in the same proportion as that of CODESA has been belittled. The TRC, I argue, shared with Nuremberg a focus on political violence as crime. Whereas Nuremberg shaped a notion of justice as criminal justice, CODESA calls on us to think of justice as primarily political. Whereas Nuremberg has become the basis for a notion of *victims' justice*—as a complement rather than an alternative to *victors' justice*—CODESA provides the basis for an alternative notion of justice, which I call *survivors' justice*. CODESA shed the zero-sum logic of criminal justice in favor of the inclusive nature of political justice. If Nuremberg has been ideologized as a paradigm, the end of apartheid has been exceptionalized as an improbable outcome produced by the singular personality of Nelson Mandela. It is thus said that the violence of civil wars in Africa is a result of a culture of impunity among African leaders, one that calls for punishment rather than political reform. This essay argues for the core relevance of the South African transition for ending civil wars in the rest of Africa.

A dominant tendency in the contemporary human rights movement holds up Nuremberg as a template with which to define responsibility for mass violence. The tendency is to narrow the meaning of justice to criminal justice, thereby individualizing the notion of justice in neoliberal fashion.

Beginning in the late 1970s, Nuremberg was ideologized by a human rights movement that moved away from a call for structural reform to an accent on individual criminal responsibility. More recently, this same movement has tended to exceptionalize the South African transition from apartheid by center-staging the process known as "truth and reconciliation" and sidelining the political process that led to the larger agreement of which the decision to constitute a Truth and Reconciliation Commission (TRC) was but one part. I suggest a critical appreciation of the postapartheid transition in South Africa, one that focuses on the political process known as Convention for a Democratic South Africa (CODESA), both to rethink the centrality of and to suggest a move beyond the logic of Nuremberg.

The human rights movement that gathered steam in the late 1970s anchored itself ideologically in the lessons of the Holocaust and presented itself as a post-Nuremberg movement. What connected this movement of the 1970s and beyond to Nuremberg was less historical chronology than its apolitical thrust. Samuel Moyn has argued that human rights were "born as an alternative to grand political mission," constituting "a moral criticism of politics."[1] In this essay, I will seek to connect the moral and the political, the ethical and the historical, through a discussion of two responses to crimes against humanity: the criminal trials known as Nuremberg and the Convention for a Democratic South Africa (CODESA), the political talks that led to the end of apartheid.

The contemporary human rights movement anchors itself ideologically in the lessons of defeat, not of revolution—the lessons of the Nazi Holocaust, not the French Revolution.[2] Whereas the

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1   Samuel Moyn, *The Last Utopia: Human Rights in History* (Cambridge, MA: Harvard University Press, 2012), pp. 8–9.

2   For an extended discussion, see Robert Meister, *After Evil: A Politics of Human Rights*

movement organized around the revolutionary banner "Rights of Man" was highly political, the contemporary human rights movement is consciously antipolitical, which is the meaning it gives to the notion of "human" and "humanitarian." Nuremberg is said to have redefined the problem and the solution. The problem is extreme violence — radical evil — and the question it poses is responsibility for the violence. The solution, encapsulated as "lessons of Nuremberg," is to think of violence as criminal and of responsibility for it as individual — state orders cannot absolve officials of individual responsibility. Above all, this responsibility is said to be ethical, not political.

Could one argue that the lesson of the transition from apartheid is the opposite? Should extreme violence be thought of more as political than criminal? I was part of the audience one grey morning in Cape Town when the TRC questioned F. W. de Klerk. De Klerk had read out a statement enumerating the wrongs of apartheid and concluded by taking responsibility for apartheid. But the TRC was not interested. Its interest was narrowly focused on specific human rights violations such as murder, torture, kidnapping: did de Klerk know of these? Had he authorized any of these? It struck me how different this was from what I had read of Nuremberg. At Nuremberg, the greatest responsibility lay with those in positions of power, those who had planned and strategized, not those with boots on the ground. At the TRC, the responsibility lay with the one who pulled the trigger. The greatest responsibility seemed to lie with the one closest to the scene of the crime. *Why was the leadership of apartheid not held responsible for it?* The answer is political, not ethical.

The negotiations that ended apartheid provide us with raw material for a critique of universalist claims made by the current human rights movement. 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? I will suggest that the present rush for courtroom solu-

(New York: Columbia University Press, 2012).

tions 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. As such it is likely to magnify rather than mitigate violence in the public sphere.

What distinguishes political from criminal violence? The key distinction is *qualitative*.[3] 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. Far more than criminal violence, political violence is issue-driven.

For a start, I suggest two ways of thinking of political violence, one born in the aftermath of the Holocaust and the other in the aftermath of apartheid, two great crimes against humanity. We tend to identify the first with Nuremberg and the latter with the TRC, and think of the TRC as a departure from Nuremberg, as displacing punishment with forgiveness. Not crime and punishment, but crime and forgiveness. I suggest that this is a mistake for a number of reasons. To begin with, the TRC was less an alternative to Nuremberg than an attempt at a surrogate Nuremberg. It shared a critical premise with Nuremberg, the assumption that all violence is criminal and responsibility for it is individual. It is not the TRC but CODESA that provides the real alternative to Nuremberg. It is CODESA that signifies the larger political project that chartered the terms ending legal and political apartheid and provided the constitutional foundation to forge a postapartheid political order. The TRC followed CODESA, and not the other way around. Nuremberg

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3   There is also a quantitative distinction — that of sheer scale. The larger its scale, the more the likelihood that the violence is either unleashed by the state or is part of an antistate mobilization, i.e., a civil war or an insurgency, or both. When it comes to extreme violence, one needs to reflect on the question: can we afford a punishment that even approximates the enormity of the crime? For an analogy, what rationale do policy makers give for not applying the same rules to large-scale theft, say by the banks in the period preceding the recent collapse, as we do to petty crime? The only explanation that makes any sense is the fear of unintended consequences — collateral damage is sure to outweigh the intended punishment. Critics claim that such a context calls for a systemic solution.

and CODESA have radically different implications for how we think of human wrongs and thus of human rights. Whereas Nuremberg shaped a notion of justice as criminal justice, CODESA calls on us to think of justice primarily as political justice. Whereas Nuremberg has become the basis of a notion of *victims' justice* — as a complement rather than an alternative to *victors' justice* — CODESA provides the basis for an alternative notion of justice that I call *survivors' justice*.[4]

Nuremberg

Nuremberg was one of two trials at the conclusion of the Second World War. The second was the Tokyo trial. Nuremberg was an innovation for at least three reasons. The judges at Nuremberg rejected the claim that individual officials were not responsible for an "act of state." Nuremberg established the principle of *individual* responsibility for the violation of human rights. The judges at Nuremberg also established *criminal* responsibility for these crimes. Finally, Nuremberg stood for a universalism whereby "the international community" would "be able to reach back through the boundaries of state sovereignty to protect individuals or impose norms," thereby holding these individuals directly accountable to "the international community."[5] The "international community," as Elizabeth Borgwardt notes, was a euphemism for "a group

of 'civilized nations', to which otherwise sovereign polities were ultimately answerable" (Borgwardt, p. 69).

Nuremberg was born of a debate among victorious powers on how they should deal with defeated Nazis.[6] Winston Churchill argued that "Hitler and his gang had forfeited any right to legal procedure" and so should be summarily shot. Henry Morgenthau, Jr., US Secretary of the Treasury and a close friend of Franklin Roosevelt, agreed. Morgenthau went further and called for a destruction of German industry so that Germany would never again rise as a power. Henry Stimson, Roosevelt's Secretary of War, led the opposition. Stimson wanted a trial — not just a show trial, but a trial with due process.[7] In a speech that is said to have persuaded

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4 I have developed the notion of "survivor" and "survivor's justice" as a way to sublate the distinction between "victims" and "perpetrators" that drives contemporary human rights activism. My own thinking has been strongly influenced by an engagement with Robert Meister that has lasted over four decades, ever since we were graduate students at Harvard. Meister's point of view is best summed up in his latest book, *After Evil*. Whereas Meister approaches the South African transition from the standpoint of what was not achieved, social justice, my concern is to underline what was achieved, political justice.

5 The question of sovereignty remains a bone of contention in international law. Article 2(7) of the UN Charter, for example, opens with the blanket assurance that "nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state" (United Nations, Charter of the United Nations, June 26, 1945, www.un.org/en/charter-united-nations/), only to follow with a clawback qualifier that, as Elizabeth Borgwardt puts it, "the exemption did not apply to matters affecting threats to international peace" (Elizabeth Borgwardt, *A New Deal for the World: America's Vision for Human Rights* [Cambridge, MA: Harvard University Press, 2005], pp. 8, 74, 191; hereafter cited as Borgwardt).

6 The hardline policy was advocated by the Secretary of the Treasury, Henry Morgenthau, Jr., who argued that any attempt to reconstruct Germany industrially — even if to pay back reparations — would have the unintended effect of making Europe dependent on Germany without making Germany similarly dependent on Europe. This would leave the more basic political problem unsolved: what would prevent Germany from making a third attempt in as many generations to dominate Europe? In public speeches, Morgenthau compared Germany to "a mental patient, a problem child…a case of retarded development, a young girl led astray, a slab of molten metal ready for the molder and much else besides," concluding that "the hard facts of defeat and of the need for political, economic and social reorientation must be the teachers of the German people." Secretary of War Henry Stimson disagreed, privately complaining of "Semitism gone wild for vengeance" in a reference to Morgenthau's German Jewish heritage. George Kennan opposed "even the mildest denazification program" as eliminating "the people upon whom Germany had to depend for future leadership" and as likely to lead to "disharmony." American public opinion — with thirty-four percent wanting to destroy Germany as a political entity, thirty-two percent wanting supervision and control over Germany, and only twelve percent wanting to rehabilitate Germany — was in support of a Morgenthau-type approach. A public statement released at the Yalta Conference took the hard line: "It is our inflexible purpose to destroy German militarism and Nazism and to ensure that Germany will never again be able to disturb the peace of the world…. We are determined to disarm and disband all German armed forces; break up for all time the German General Staff that has repeatedly contrived the resurgence of German militarism; remove or destroy all German military equipment; eliminate or control all German industry that could be used for military production; bring all war criminals to just and swift punishment and exact reparation in kind for the destruction wrought by the Germans; wipe out the Nazi party, Nazi laws, organizations and institutions, remove all Nazi and militarist influences from public office and from the cultural and economic life of the German people; and to take in harmony such other measures in Germany as may be necessary to the future peace and safety of the world" (Borgwardt, pp. 207, 210).

7 Norbert Ehrenfreund, *The Nuremberg Legacy: How the Nazi War Crimes Trials Changed*

Truman to appoint him as Chief Prosecutor at Nuremberg, Robert Jackson had argued only three weeks before his appointment that "you must put no man on trial under forms of a judicial proceeding if you are not willing to see him freed if not proven guilty...the world yields no respect for courts that are organized merely to convict" (Ehrenfreund, p. 10).

Even if based on due process, Nuremberg needs to be understood as symbolic and performative. For a start, only the losers were put on trial. The victors appointed not only the prosecutor but the judges too. The accused, for their part, preferred to be tried by the US over anyone else. They expected a fairer trial from Americans who, unlike the victims—Jews, Russians, French, British—had had the privilege of pavilion seats during the war. They also expected softer treatment from the Americans, who were most likely to be German allies in the brewing Cold War. For official America, Nuremberg was an excellent opportunity to inaugurate the new world order by showcasing a performance of how a civilized liberal state conducts itself. At a time when the air was full of cries for revenge, Robert Jackson told the audience at Church House in London: "A fair trial for every defendant. A competent attorney for every defendant."[8]

Nuremberg combined elements of both victors' justice and victims' justice. Victors' justice followed from the outcome of the war: victorious powers established a rule of law under which alleged perpetrators were tried. The notion that justice would follow victory was not new. It followed a long established tradition of how we think of justice in the aftermath of victory, be that victory the result of war between states or revolution between classes or a civil war of a different type. In every case, the assumption is that once the conflict has ended, there is a clear victor under whose power justice can be administered. This overall frame marks Nuremberg

the Course of History (New York: Palgrave Macmillan, 2007), p. 7; hereafter cited as Ehrenfreund.

8   There were some obvious lags. The biggest deficiency was the failure to provide the defendant with the right to appeal convictions to a higher court. Article 26 of the London Charter spelled out that the judgment of the tribunal as to guilt or innocence "shall be final and not subject to review" (Ehrenfreund, pp. 12, 16).

as a model for victors' justice.[9]

The accused at Nuremberg were charged with four crimes:
1. Conspiracy to Wage Aggressive War.
2. Waging Aggressive War. (The first two counts were called Crimes Against Peace.)
3. War Crimes (violations of the rules and customs of war, such as mistreatment of prisoners of war and abuse of enemy civilians).
4. Crimes Against Humanity (includes the torture and slaughter of millions on racial grounds). [Ehrenfreund, pp. 16–17]

Striking about this list is the fact that conspiracy to wage war and its actual waging were defined as the principal crimes (1 and 2) whereas genocide and mass slaughter came last in this series of four crimes.

The Allies were divided on this order. The French disagreed that waging war was a crime in law; it is what states did. At the Tokyo trial, which took twice as long, partly because of long and substantial dissenting opinions, Justice Radhabinod Pal of India argued that the charge of crime against peace (both 1 and 2) was a case of ex post facto legislation which "served only to protect an unjust international order, if there were no other workable provisions for peaceful adjustment of the status quo." Much later, in 1992, Telford Taylor, who had replaced Jackson as the Chief Prosecutor in the twelve remaining US-conducted trials in Germany, and who then had a distinguished career as professor of law at Columbia

9   Nazi officers at Nuremberg were charged with waging aggressive war, conspiracy to wage it, and "crimes against humanity." At the time, there were plenty of criticisms of the hypocrisy of charging defeated states with violence against civilians when victorious states were known to have carpet-bombed and firebombed enemy cities, even targeted them with atomic weapons. The socialist leader Norman Thomas wrote in 1947 of the hypocrisy of charging the German General Staff with the crime of waging "aggressive war": "Aggressive war is a moral crime but this will not be established in the conscience of mankind by proceedings such as those at Nuremberg, where Russians sit on the bench and exclude evidence of Hitler's deal with Stalin. What was the latter's war against Finland, Poland and the Baltic States but aggression? Indeed, what major power had not in comparative recent years been guilty of acts of aggression?" (Borgwardt, pp. 225, 231).

Law School, conceded that the court's judgment on counts 1 and 2 did indeed rely *on ex post facto* law (Ehrenfreund, pp. 14, 234, 56–57).

An even more serious problem arose from the fact that the victors' court was not likely to put the victors on trial. Would not Truman's order to firebomb Tokyo and drop atom bombs on Hiroshima and Nagasaki, leading to untold civilian deaths at a time when the war was already ending, qualify as "gratuitous human suffering" and a "crime against humanity," to use the language of the court? Had not Winston Churchill committed a "crime against humanity" when he ordered the bombing of residential, working class sections of German cities, particularly Dresden, in the last months of the war? Most agreed that the British policy of terror-bombing civilian areas killed some 300,000 and seriously injured another 780,000 German civilians.[10]

Nuremberg is also identified with victims' justice, often thought of as an alternative to victors' justice but which in fact is a complement to it. One of the charges against the accused was that they had committed "crimes against humanity." The charge was first formulated in 1890 by George Washington Williams, a historian, Baptist minister, and lawyer as well as the first black member of the Ohio state legislature, in a letter to the US Secretary of State. In this letter he documented atrocities committed by King Leopold's colonial regime in Congo, concluding that this was a "crime against humanity."[11] I have already pointed out that "crimes against

humanity" was the last of the four charges against the accused at Nuremberg. As the trial proceeded, the emphasis on victims' justice began to diminish. The reason was political: as the Cold War developed, US policy towards Germany moved from a demand for justice to a call for accenting accommodation over punishment. The effect was most evident in the trial of Alfred Krupp, the leading German industrial magnate. The Krupp family had been manufacturers of steel since the early nineteenth century and Europe's leading manufacturers and suppliers of guns and munitions by the First World War. They had armed Germany in three major wars. During World War II Krupp managed 138 concentration camps. Ranged throughout Europe, all were privately owned by Krupp. Alfred Krupp used slave labor from the camps and prisoners of war to build his factories. He provided Hitler's wars with money and weapons, a combination of investment and commitment. One of those charged at Nuremberg, Krupp was released in 1951 and his fortune was restored.[12] There was little justice for victims at Nuremberg. When it came, it was political and was obtained outside the court.

To understand the particular form that victims' justice took, we need to appreciate the political context that framed Nuremberg. 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, Allied Powers carried out or sanctioned the most extreme ethnic cleansing in modern history. By 1950, between twelve and fourteen 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. This, in turn, was part of a larger forced transfer of populations from central and eastern Europe, estimated at more than twenty million. German federal agencies and the German

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10 Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations,* 2nd ed. (New York: Basic Books, 1992), p. 250 (cited in Ehrenfreund, p. 59).

11 George Washington Williams, a veteran of the US Civil War, arrived in Congo in 1890 as a journalist. Expecting to see the paradise of enlightened rule that Leopold had described to him in Brussels, Williams instead found what he called "the Siberia of the African Continent." Traveling a thousand miles up the Congo River, Williams interviewed the Congolese about their experience of the regime, taking extensive notes. He then wrote an open letter to King Leopold that Adam Hochschild has described as "one of the greatest documents in human rights literature." Published in many American and European newspapers, it was the first comprehensive, detailed indictment of the regime and its slave labor system. In a subsequent letter to the US Secretary of State, Williams declared Leopold II guilty of "crimes against humanity" and appealed to the international community of the day to "call and create an International Commission to investigate the charges herein preferred in the name of Humanity." A century later, Hochschild's historical study concluded that a third of the Congolese population had died

during Leopold's rule. See Adam Hochschild, *King Leopold's Ghost: A Story of Greed, Terror and Heroism in Colonial Africa* (Boston: Houghton Mifflin, 1998).

12 Ehrenfreund, pp. 23, 25.

Red Cross estimate that between two and 2.5 million civilians died in the course of the expulsions. Some writers have described this forced movement of populations as "population transfer," others as "ethnic cleansing," and yet others as "genocide."[13]

The possibility of victims' justice flowed from the assumption that there would be no need for winners and losers to live together after victory. Perpetrators would remain in Germany and victims would depart for another homeland. Yesterday's perpetrators and victims would not have to live together, for there would be a separate state — Israel — for survivors. The process culminated in the period after Nuremberg with the creation of the State of Israel, seen as a state for victims. Indeed, post-Holocaust language reserves the identity "survivors" only for yesterday's victims. As in Israel, this is the case in contemporary Rwanda. In both cases, the state governs in the name of victims.

The Transition from Apartheid

The postapartheid transition in South Africa is popularly identified with the work of the TRC. This work is presumed to have been guided by the dictum that perpetrators be forgiven past crimes in return for acknowledging them. It is said that the TRC created a new precedent: immunity from prosecution (some may say, impunity) in return for acknowledging the truth, forgiveness in return for an honest confession. In a few words: forgive, but do not forget.

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13 Here I cite some important works from what is a huge and growing literature on the subject: Mette Zølner, *Re-imagining the Nation: Debates on Immigrants, Identities and Memories* (Brussels: P.I.E.-Peter Lang, 2000); Peter H. Schuck and Rainer Münz, *Paths to Inclusion: The Integration of Migrants in the United States and Germany* (New York: Berghahn Books, 1997); Anna Bramwell, *Refugees in the Age of Total War* (New York: Routledge, 1988); Piotr Eberhardt, *Political Migrations in Poland 1939–1948* (Warsaw: Przegląd Wschodni, 2006); Myron Weiner, *Migration and Refugees: Politics and Policies in the United States and Germany* (New York: Berghahn Books, 1998); Steffen Prauser and Arfon Rees, ed., "The Expulsion of 'German' Communities from Eastern Europe at the End of the Second World War" (EUI Working Paper HEC no. 2004/1, Department of History and Civilization, European University Institute, Florence); Jan Owsinski and Piotr Eberhardt, *Ethnic Groups and Population Changes in Twentieth-Century Central-Eastern Europe: History, Data, Analysis* (Armonk, NY: M.E. Sharpe, 2002); and Alfred M. De Zayas, *A Terrible Revenge* (New York: Palgrave Macmillan, 1994).

This claim is central to the contemporary ideologization of the TRC.

I shall discuss the TRC in greater detail in a later section, but it should suffice to point out here the problem with this widely accepted notion: its central claim is not quite true. Key to the postapartheid transition was not as much an exchange of amnesty for truth as amnesty for the willingness to reform. That reform was the dismantling of juridical and political apartheid. The real breakthrough represented by the South African case is not contained in the TRC but in the CODESA talks that preceded it, which have so far been dismissed as nothing but hard-nosed pragmatism.

The ground for CODESA was prepared by way of a double acknowledgement by both sides in the conflict. To begin with, both recognized that there was little prospect of ending the conflict in the short run. For farsighted leaders, this was equivalent to a recognition that their preferred option was no longer within reach: neither revolution (for liberation movements) nor military victory (for the apartheid regime). If South Africa is a model for solving intractable conflicts, it is also an argument for moving from the best to the second-best alternative. That second-best alternative was political reform. The quest for reform, for an alternative sort of victory, led to the realization that if you threaten to put the leadership on either side in the dock they will have no interest in reform. This change in perspective led to a shift away from criminalizing or demonizing the other side to treating it as a political adversary. Its consequence was to displace the paradigm of criminal justice identified with Nuremberg.

I suggest that we think of CODESA less as an alternative to Nuremberg than as a response to a different set of circumstances. As such, it is also a statement that Nuremberg cannot be turned into a universally applicable formula. CODESA was born of the realization that the conditions that obtained in apartheid South Africa were different from those that led to Nuremberg. The difference was twofold. First, whereas Nuremberg followed a military victory, the conflict in South Africa had not ended. How do you stop a conflict that has not ended? How do you convince adversaries

that it is in their interest to stop an ongoing conflict? Surely, this could not be done by prioritizing criminal justice and threatening to take the political leadership on either side – the apartheid state or the antiapartheid movement – to court, because those likely to be taken to court are the very people that would be needed to stop the conflict. Second, whereas Nuremberg was informed by a larger logic that drove the postwar settlement – that of ethnic cleansing – one that called for a physical separation of yesterday's victims and yesterday's perpetrators into separate political communities, in South Africa there was no question of creating an "Israel" for victims of apartheid.[14] 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. It presents us with a double breakthrough. To begin with, CODESA distinguished between different forms of justice – criminal, political and social. It prioritized political justice, the reform of the political system, over the other two. The difference between political and criminal justice is twofold. One, political justice affects groups whereas criminal justice targets individuals. Two, the object of criminal justice is punishment, and that of political justice is political reform. A shift of logic from the criminal to the political led to decriminalizing and legitimizing both sides to the conflict. The liberation movements – the African National Congress (ANC), the Pan Africanist Congress, and the Communist Party – were all unbanned. The apartheid regime, the National Party (NP), and the highly secretive underground network known as the Broederbond also ceased to be treated as pariahs by antiapartheid activists. In decriminalizing and legitimizing opponents, CODESA turned enemies into political adversaries. In the process, CODESA also changed the goal posts. The goal was no longer the internment and punishment of individuals charged with crimes, but a change of rules that would include

them and their constituencies into a reformed political community. CODESA's achievement was to bring adversaries to agree on a political reform that dismantled legal and political apartheid and redefined an inclusive citizenship.

The full impact of this change in perspective was no less than a shift of paradigmatic significance. Whereas Nuremberg was backward-looking, preoccupied with justice as punishment, CODESA sought a balance between the past and the future, between redress for the past and reconciliation for the future. The paradigm shifted from one of victims' justice to one of survivors' justice, where the meaning of survivors changed to include all those who had survived apartheid: yesterday's victims, yesterday's perpetrators, and yesterday's beneficiaries (presumed to be bystanders) were all treated as "survivors."

Convention for a Democratic South Africa

Political reform defined the challenge faced by the negotiators at CODESA: to forge a transition from a white minority regime to a government elected by an enfranchised population. As an interim measure, the parties to the negotiation agreed to lay down a set of constitutional principles that would define the parameters of the interim constitution. The declaration of intent stated the following: "South Africa will be a united, democratic, non-racial and non-sexist state in which sovereign authority is exercised over the whole of its territory."[15] The declaration notwithstanding, the negotiations at CODESA were characterized by a substantial amount of horse trading, with each side strengthening its negotiating hand using a variety of means, including violence, outside the negotiating chambers.

CODESA assembled in December 1991 and broke up in May 1992. During that period, each side tried to muster a consensus and, failing that, a clear majority within its ranks. In the tussle of political wills that ensued, both sides employed an array of resources,

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14 It is true that the relatively poor and powerless among the beneficiaries of apartheid feared reprisals after the end of apartheid and agitated for a separate, autonomous (though not independent) political community, the Afrikaaner Volkstaat, to defend themselves.

15 Richard Spitz and Mathew Chaskelson, *The Politics of Transition: A Hidden History of South Africa's Negotiated Settlement* (Johannesburg: Witwatersrand University Press, 2000), pp. 3, 21, 22.

from mass mobilization to targeted violence. When the ultra-right white Conservative Party won a by-election in Potchefstroom after the start of CODESA, the National Party government called for a whites-only referendum in March 1992. The government interpreted that victory as a mandate from the white population to continue to negotiate a political end to apartheid. The ANC responded to the whites only referendum with "rolling mass action" in May and a mass stay-away on June 12, which turned out to be a massive withholding of labor. Both mobilized in the face of political violence and the threat of more. Thus when police responded to the June 12 stay-away with the massacre at Bapoteng, the Congress of South African Trade Unions led yet another stay-away on August 3 and the ANC organized the September 7 march on Ciskei.

Sporadic violence triggered heightened mobilization, in turn underlining the urgency of further negotiations. The two sides came together to draft a Record of Understanding on September 26, 1992. The agreement stipulated that a democratically elected assembly would draft the final constitution, but within a fixed time frame and within the framework of constitutional principles agreed upon by a meeting of negotiators appointed by all parties. This process would in reality be driven by the principals: the NP and the ANC.

The ANC cleared the ground for agreement with historic concessions, famously known as the "sunset clauses." Floated by the Secretary General of the Communist Party, Joe Slovo, in an article in the party journal, *The African Communist*, these undoubtedly represented a consensus position shared by the leaderships of both the South African Communist Party and the ANC. The sunset clauses called for power-sharing between the two sides, retention of the old bureaucracy (and presumably other organs of the state, for example police, military, and the intelligence services) and, finally, a general amnesty in return for full disclosure. The different elements that comprised the sunset clauses — such as the introduction of political democracy but a retention of all other structures of the apartheid state, and an amnesty in return for full disclosure — had

been in the air for some time, but this was the first time they were presented as parts of a single package.[16]

Much has been written on the amnesty component of the proposal, which came to inform the work of the TRC. In a brilliant study on the genealogy of the TRC, Adam Sitze has argued for the need to locate both the idea and the provisions of amnesty in the colonial history of South Africa, in particular the practice of granting state indemnity following periods of martial law and brutal suppression of popular protest. Sitze offers this approach as an explicit alternative to the approach that has come to be favored by the Transitional Justice industry, which connects the establishment of the TRC with influences ranging from Nuremberg-style prosecutions to Latin American-style blanket amnesties. Instead, Sitze calls for locating both the TRC and prior state-sponsored indemnities in a larger history of anticolonial protest and colonial repression.[17]

Following the Sharpeville Massacre of 1960 and the suppression of the Soweto Uprising of 1976, the South African parliament "passed extremely wide indemnity acts that protected not only South African police officers but also a large number of state officials for prosecution for the civil and criminal wrongs they inflicted" during these times. As a result, "SADF members were already indemnified in advance for any illegal acts they might commit in honest and good faith service to the public good." This already existing protection from prosecution was "widened even more by the indemnity acts passed by the South African Parliament in 1990 and 1992." Even though the Sharpeville Massacre and the Soweto

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16 Kader Asmal, Louise Asmal, and Ronald Suresh Roberts, *Reconciliation Through Truth: A Reckoning of Apartheid's Criminal Governance* (Cape Town: David Philip Publishers, 1997); Alex Boraine, *A Country Unmasked: Inside South Africa's Truth and Reconciliation Commission* (New York: Oxford University Press, 2001); Priscilla B. Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* (New York: Routledge, 2010); Mahmood Mamdani, "Reconciliation without Justice," *Southern African Review of Books*, no. 46 (November–December 1996): 3–5.

17 "What might we learn if, instead of viewing it as a variation on transitional mechanisms in Germany and Latin America, we were to view it instead as a variation on the theory and practice of indemnity in South African law?" (Adam Sitze, *The Impossible Machine: A Genealogy of South Africa's Truth and Reconciliation Commission* [Ann Arbor: University of Michigan Press, 2013], p. 4; hereafter cited as Sitze).

Uprising "fell within the TRC's juridical and investigative mandate," Sitze argues that the indemnity provisions of the 1957 Defence Act in combination with the specific indemnity acts passed in 1961 and 1977 decreased or even nullified the power of the TRC's "'carrots and sticks' approach." To put it bluntly, "it is unclear why any state official, member of the SADF or officer of the South African Police would feel obliged to run the risk of trading truth for amnesty when he or she was already expressly protected from prosecution by prior indemnity resolution." Indeed, "the South African Defence Force chose to coordinate its contributions to the Truth and Reconciliation Commission by way of a centralized 'Nodal Point,' a single point, suggesting a clenched sphincter, through which all information is meant to pass" (Sitze, pp. 25, 207).

My purpose here is not to trace the genealogy of the legislation that set up the TRC, but to underline its political prerequisite: the simple fact was that the establishment of the TRC was not an independent development, but one that followed the political settlement agreed upon at CODESA. Slovo did not need to restate what was clear to one and all: that the real quid pro quo for the sunset clauses was the dismantling of juridical and political apartheid and the introduction of electoral reforms that would enfranchise the majority and pave the way for majority rule. An acceptance of the sunset clauses would mean that South Africa would not have its own version of Nuremberg.

The Multi-Party Negotiating Process began on March 5 at Kempton Park but was sluggish.[18] It took another political crisis to generate momentum. That crisis was the assassination of Chris Hani on April 10, 1993. The parties agreed on June 1 that elections be held ten months later, on April 27, 1994. The shared sense that storm clouds were indeed gathering on the horizon made it possible to truncate discussions, especially on fundamentals such as the "constitutional principles" and the constitution itself. Power was ceded to technical committees (with further technical assistance

from the Harvard Negotiation Project) in the name of preventing and breaking deadlocks in the negotiations. Agreement was driven forward by a procedure known as "sufficient consensus." It allowed the two principals, the ANC and the NP, to meet outside the formal discussion and define agreement on key issues. There was also agreement that the process that led to the drafting of Namibia's 1982 Constitutional Principles, and that gave the interim constitution a weight more enduring than that of an interim political agreement, would be duplicated in South Africa. The combination of binding principles agreed upon by unelected negotiators and the adjudicating power of the Constitutional Court, giving it powers to throw out a constitution drafted by an elected assembly, was acknowledged by many as a blatant curb on majority rule but, at the same time, as necessary for attaining that same majority rule.

The constitutional principles included a number of key provisions.[19] The central provision was the inclusion of a bill of rights as part of a set of constitutional checks and balances. The bill of rights included protection of private property as a fundamental human right. At the same time, and without a stated rationale, the clause providing the restoration of land to the majority population was placed outside the bill of rights. Where property rights clashed, as between white settlers and black natives, the former received constitutional protection and the latter no more than a formal acknowledgement in law.[20]

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18 This paragraph and the rest of this section are based on Spitz and Chaskelson, *The Politics of Transition*, pp. 30, 38, 48, 57, 78-80, 84-85, 86, 159, 322, 337-38.

19 The first was the independence of key central institutions: the Public Service Commission, the Reserve Bank, the Public Protector, and the Auditor General. The Constitutional Court refused to certify the first draft of the final constitution on the grounds that it did not provide sufficient protection for the autonomy of the auditor general and the prosecutor. This was remedied. Schools and universities also retained autonomy.

20 The scholarly debate focuses on the tensions between the constitutional protection of private property in the bill and the commitment to land reform. The final constitution contains contradictory elements on this point. It does indeed protect private property and existing property relations in the property clause (see Section 25, below), which sets out the conditions under which expropriation can take place. In the interim constitution, land expropriation could take place for, among other things, "public purpose," but this later changed in the final constitution to also say in the "public interest." This opened the existing constitutional framework to contradictory undertakings – on the one hand, the protection of existing property rights, entrenching settler-acquired land, and on the other, opening the door

for restitution and expropriation based on the expressed commitment to the principle that citizens "gain access to land on an equitable basis" (Subsection 5). Compensation, however, had to be considered equitable; in policy, the willing seller / willing buyer approach was agreed upon – thereby leaving property owners with an effective veto on the question until legal and political disputes decided otherwise on what was in the public interest, what was fair compensation, and so on.

This goes back to 1913 only, and deals with existing legal ownership, and therefore does not deal with the political and historical question of conquest and land dispossession that inaugurates a legal regime of private property that privileges settler claims to ownership. The relevant sections of the constitution are as follows:

25. Property

1. No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.

2. Property may be expropriated only in terms of law of general application -
   a. for a public purpose or in the public interest; and
   b. subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.

3. The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including:
   a. the current use of the property;
   b the history of the acquisition and use of the property;
   c. the market value of the property;
   d. the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
   e. the purpose of the expropriation.

4. For the purposes of this section:
   a. the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and
   b. property is not limited to land.

5. The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.

6. A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.

7. A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.

8. No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the

This disparity was reinforced at the local level, through the coming together of two political forces that found common ground in the negotiations: white settlers and Native Authorities in the bantustans. For the Native Authorities, there was Act 3 of 1994, which gave constitutional recognition to the Zulu monarchy, and Schedule 6, which recognized "indigenous and customary law." For the settlers, the prize was the passage of the Local Government Transition Act of 1993. The Act entrenched consociational government at the local level, in contrast to the national and provincial levels. Among its provisions were to structure local government elections "in such a way that they precluded black voters from obtaining two-thirds majority on a local government council." The operative principle was known as the "ward limitation system." Section 245(3) stipulated that only 40 percent of seats on a council could be elected by proportional representation. The remaining 60% would be elected from ward-based constituencies with the proviso that no more than half the seats be drawn from historically black areas. This provision guaranteed non-blacks 30% of the seats. Section 176(a) required a local authority to muster a two-thirds majority to pass its budget. Furthermore, Section 177 required that the executive committee of a local government be composed in proportion to party representation on the local government council; even more, it stipulated that all decisions be taken by consensus. Where consensus could not be reached, a two-thirds majority was required for executive committee decisions. The combined effect of these provisions was that local authorities in former white areas could not take any significant decision without the agreement of councilors representing its white residents.

Two further measures had the effect of entrenching – not just protecting – white privilege in small towns. When it came to establishing a transitional (town) council in the preinterim phase, a negotiating forum had to get 80 percent support from its delegates. Because it controlled most of the (white) local government coun-

provisions of this section is in accordance with the provisions of section 36(1). [Constitution of the Republic of South Africa (1996)]

I am thankful to Suren Pillay of the University of Western Cape for this clarification.

cils in the Transvaal and thus the Transvaal Municipal Association, consensus decision-making processes fitted in with the agenda of the white supremacist Conservative Party. The requirement for consensus-based decision-making had the effect of vesting elected representatives of white residents with an effective veto over local government decisions.[21]

The second measure concerned powers of taxation, putting practically insurmountable legal obstacles in the way of any popular project to redistribute income through taxation. Clause 17 required that local government taxes and levies be based on a uniform structure for its area of jurisdiction. This prevented new local governments from taxing white areas so they could spend more revenue in black areas. Thus did CODESA entrench white privilege, both in the constitution and in the law that established the framework for local government.

The Truth and Reconciliation Commission

There are two debates in South Africa today regarding the TRC. The first focuses on the perpetrator, and thus on criminal justice. The second focuses on the beneficiary, and thus on social justice. There is hardly any 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 postapartheid transition, in particular the critique of how social justice was downplayed in the agreements concluded at CODESA. My response to this critique is mixed. 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 victo-

21 The consensus-building process was marked by three phases: councils in the pre-interim phase were appointed by local negotiation forums in which statutory and nonstatutory delegates were equally represented; then came the interim phase with a "government of local unity"; majority decisionmaking would come into play only in the final phase, after the first local government elections under the new constitution (Spitz and Chaskelson, *The Politics of Transition*, p. 186).

rious. The most one can say is that there was a stalemate. Yet even if social justice could not have been part of the package negotiated at CODESA, it is not unreasonable to expect that it would have figured prominently on the agenda for a postapartheid South Africa. Instead, a lid was put on both legislative endeavors for social justice and narrative attempts to underline its necessity. We have already seen that the constitution negotiated at CODESA defended the integrity of property accumulated during the apartheid era as part of a constitutionally sanctified bill of rights. At the same time, the semiofficial narrative crafted by 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 carried out upon a minority of individual victims 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 two wings of the antiapartheid movement off each other, reinforcing the leadership of the external wing and sidelining the internal wing. The antiapartheid camp was comprised of 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 antiapartheid resistance, which knit together dozens of community and shop-floor level organizations into a single representative network called the United Democratic Front (UDF). The UDF was responsible for the stalemate in which apartheid found itself. The "sufficient consensus" crafted by the ANC and the NP stretched and strained the relation between the exile and the internal wings of the antiapartheid opposition. In marginalizing the forces identified with the internal opposition, the "sufficient consensus" also sidelined their agenda for social justice. This is, however, not the place to elaborate on this political outcome. My purpose here is to focus on the double closure — constitutional and narrative — that was the result of the political alliance between the ANC-based exile wing and reform forces within the

ruling NP, the alliance that ushered in the postapartheid transition.

The basic elements of the new constitution were crafted in CODESA, whereas the outlines of a narrative for the "new" South Africa were crafted by the TRC. In contrast to CODESA, the process guided by the TRC was designed as a civic educational process. The TRC comprised three committees, of which the decisions of only the Amnesty Committee had the force of law. The other two committees—the Human Rights Committee and the Reparations [compensation] Committee—functioned in an advisory capacity. Though set up by legislation and resourced by the state, the TRC was not subject to control by any state authority. It was free to define its own agenda within the framework of the legislation that set it up. This gave it a double freedom: the power to craft a semi-official narrative of apartheid and guaranteed daily access to prime-time media to communicate this narrative to a wider public.

The legislation that set up the TRC gave it the freedom to define "the victim."[22] In interpreting the legislation, the TRC made three key decisions. First, the TRC individualized the victim. To do so was to ignore precisely what was distinctive about apartheid, that it was a system based on group oppression. Secondly, the TRC defined a human rights violation narrowly, as violating the "bodily integrity" of an individual. This too proved problematic in a context where the vast majority of the population suffered violence as extraeconomic. The violence of apartheid did not target the "bodily integrity" of a population group defined as "Bantu", but rather, their means of livelihood, land, and labor. Finally, there was the question of defining the perpetrator. When it came to measures that directly affected the vast majority of the oppressed population, measures such as the forced removal of millions from land gazetted as "white areas" or pass laws that tracked the movement of all black people, extraeconomic coercion was the work of apartheid authorities and not the initiative of individual operatives. Just as

victims were defined and targeted as racialized groups and not as individuals, perpetrators too were part of a racialized power and did not for the most part, function as individuals.

The TRC had the legislative freedom to define the victim, whether as an individual or a group. Whereas apartheid legislation classified the subject population as so many races defined in law—and governed them as groups and not as individuals—the TRC remained adamant that victims had to be individuals. When it came to "gross violation of human rights," this is how Section 1(1)(ix) of the Act defined its meaning:

> "gross violation of human rights" means the violation of human rights through – (a) the killing, abduction, torture or *severe ill-treatment* of any person; or (b) any attempt, conspiracy, incitement, instigation, command or procurement to commit an act referred to in paragraph (a), which emanated from conflicts of the past and which was committed during the period March 1, 1960 to May 10, 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*.[23]

The debate focused on the meaning of "severe ill-treatment" and the definition of "political motive."

In 1959, the apartheid government passed the Promotion of Bantu Self-Government Act. The Act was to provide the legal umbrella for a far-reaching ethnic and racial cleansing of eighty-seven percent of the land that was defined as "white" South Africa. A widely distributed and cited investigation by the Surplus People Project documented that 3.5 million had indeed been moved forcibly by South African authorities between 1960 and 1982 as part of the project to create ethnic homelands. The TRC accepted the estimate and acknowledged that the process involved "collective expulsions, forced migration, bulldozing, gutting or seizure of homes,

22   Mahmood Mamdani, "Amnesty or Impunity? A Preliminary Critique of the Report of the Truth and Reconciliation Commission of South Africa (TRC)," in *Identities, Affiliations, and Allegiances*, ed. Seyla Benhabib, Ian Shapiro, and Danilo Petranovich (New York: Cambridge University Press, 2007), pp. 325–61.

23   The Truth and Reconciliation Commission of South Africa, *The Truth and Reconciliation Commission of South Africa Report*, 5 vols. (Cape Town: The Commission, 1998), 1:60, emphasis mine; hereafter cited as TRC.

the mandatory carrying of passes, forced removals into rural ghettos and increased poverty and desperation" (TRC, 1:34, 2:409). Did these practices not constitute "severe ill-treatment"? After noting that "forced removals" were "an assault on the rights and dignity of millions of South Africans," the TRC claimed it could not acknowledge them since these violations "may not have been 'gross' as defined by the Act" (TRC, 1:34).

The distinction between "bodily integrity rights" and "subsistence rights" echoes a familiar distinction in social theory between the realm of the political and that of the economic, that of the state and that of the market, the former the source of oppressive practices that directly deny rights and the latter the source of inequalities that indirectly limit the means to exercise these rights, respectively. But practices such as coerced labor and forced removals could not be classified as either economic or political; they were both. Where a command economy obtained, the familiar distinction between the political and the economic obscured practices where political power directly intervened in the sphere of economic relations. Like slavery, coerced labor and forced removals required the direct and continued use of force. Neither could be dismissed as structural outcomes lacking in agency and, therefore, not signifying a violation of civil rights. Rather than an outcome of "the dull compulsion of market forces," to use a formulation of Karl Marx, these practices were characteristic of extra-economic forms of coercion. Rather than illuminate the divide between the economic and the political, they tended to articulate the relation between the two.

Then there was the question of distinguishing a "political" from a "non-political" motive. Were not pass laws, the backbone of a legal regime that targeted every black South African, political? Were not arrests under pass laws political? According to estimates made by the South African Institute of Race Relations, over a million people had been administratively ordered to leave urban areas by 1972. "From the early sixties," the TRC noted, "the pass laws were the primary instrument used by the state to arrest and charge its political opponents." Indeed, the TRC found that the proportion of

pass law offenders was "as high as one in every four inmates during the 1960s and 1970s" (TRC, 3:528, 3:163, 4:200). The TRC accepted that "the treatment of pass law offenders could well be interpreted as a human rights violation" but still refused to include the category of pass law prisoners in the institutional hearings on prisons. In spite of the fact that "a strong argument was made for the inclusion of this category of common law prisoners in the hearings," the TRC refused on the grounds that these were common law prisoners and not "political prisoners." Yet the only "common law" these prisoners had violated was the pass law, the law that criminalized the exercise of a basic human right, the right of free movement.

Another category that raised questions about how the TRC distinguished political from non-political motives was that of farm prisoners. The notorious farm prisons system was directly connected to the pass law system. Failure by a black person to produce a pass resulted in an arrest. As the number of arrests grew, so did the financial burden on the state. The Department of Native Affairs proposed a solution in General Circular 23 of 1954 thus: "It is common knowledge that large numbers of natives are daily being arrested for contraventions of a purely technical nature. These arrests cost the state large sums of money and serve no useful purpose. The Department of Justice, the South African Police and this Department have therefore held consultations on the problem and have evolved a scheme, the object of which is to induce unemployed natives roaming about the streets in the various urban areas to accept employment outside such urban areas" (TRC, 4:202). This is how the scheme was to work: henceforth, when black persons failed to produce a pass, they "were not taken to court but to labor bureaux where they would be induced or forced to volunteer." In theory, they were to be told that if they "volunteered" for farm labor, charges against them would be dropped as an exchange. The result, the TRC noted, was that "arrests for failure to produce a pass became a rich source of labor for the farms," ensuring the farmers "a cheap supply of labor." But the category of farm prisoners did not feature in the prison hearings. Why not? Because, said the TRC,

"nobody came forward to give evidence" (ibid.). "Nobody" here presumably refers to the victims of the farm labor system; it could not possibly refer to its institutional managers since the TRC had the legal right to subpoena reluctant or even unwilling witnesses, and had done so in other instances, obviously choosing not to do so in this and related cases.

Perhaps the most blatant exclusion from prison hearings was that of prisoners detained without trial. The number so detained between 1960 and 1990 was estimated at "some 80,000 South Africans" by the Human Rights Committee, whose reports were made available to the TRC. In the words of the Human Rights Committee, as cited by the TRC: "There can be little doubt that the security police regard their ability to torture detainees with total impunity as the cornerstone of the detention system."[24] The most notorious instance of death in detention was that of Steve Biko. The TRC acknowledged the detention (and murder) of Steve Biko as a gross violation of human rights, but not that of others. It gave no legal reasons for excluding the category of detainees from prison hearings. Apparently, it simply did not have the time: "There were practical rather than legal reasons for excluding detention from the prison hearings" (TRC, 4:201).

Anyone familiar with the contents of the five-volume TRC Report will testify to the fact that these volumes are a rich source of information on everyday apartheid and its practices. This was the work of the research staff of the TRC, which comprised mainly historians and social scientists. The evidence they accumulated, however, had to be filtered through legislated categories as interpreted by members of the TRC. Unlike researchers, these were drawn from two very different groups: religious leaders and members of the psychological profession. As a group, they were determined that both the confession and the reprieve had to be individual to be meaningful.

When public outcry grew against the TRC's decision to exclude from its hearings all violence that had targeted groups and communities, the TRC responded by holding institutional hearings, but then specified that these were to clarify the background, the context, against which specific violations were committed. The TRC thus distinguished between structural and willed outcomes, the former reduced to "context" and "background" and the latter highlighted as evidence of agency. To make the point, it distinguished between "bodily integrity rights" and "subsistence rights," individual and group rights, and political and non-political motivations—ruling that only politically motivated violations of bodily integrity (but not subsistence) rights, and individual (but not group) rights fell within its legislative purview (TRC, 1:64).

Why was the "enforced transfer of a person from one area to another" considered a violation of a right over one's person, but not so the migrant labor system that involved both coerced movement and coerced labor? If arson was defined as a gross violation, then why did not a similar destruction through bulldozing, a practice characteristic of forced removals, also count as a gross rights violation? Pass laws and forced removals, both targeting communities and not individuals, had been at the heart of the claim that apartheid was indeed a "crime against humanity." But in the report of the TRC, both were reduced to "background" and "context."

At the end, the TRC came up with three truly bizarre conclusions. The first was a list of over 20,000 names of individuals it acknowledged as victims of gross violations of human rights. The TRC recommended only those—and not the millions of victims of pass law, forced removals, and forced labor—to receive reparations from the postapartheid state. Second, the TRC compiled a chronology of violations within its mandate, which began with the Sharpeville Massacre in 1960 and closed with the first democratic elections in 1994. "Most violations," the TRC concluded, "took place in the period after the unbanning of political parties (1990-1994)" and were the result of conflict between antiapartheid groups, especially the ANC and the Inkatha Freedom Party (IFP) in Natal. The TRC then

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24 This from a March 1983 paper by the Human Rights Committee, cited in Human Rights Committee of South Africa, *A Crime Against Humanity: Analysing the Repression of the Apartheid State*, ed. Max Coleman (Cape Town: The Committee, 1998); quoted in TRC, 4:201.

compiled a list of "perpetrator organisations." From this followed the TRC's most scandalous conclusion. It identified the IFP as the top "perpetrator organization" and the ANC as the third in that notorious list of perpetrators. In contrast, the state security services came as runner-ups: the South African Police (SAP) second and the South African Defense Forces (SADF) trailing in fourth place (TRC, 1:172, 3:3, 162).

How could the TRC have arrived at these bizarre conclusions? To begin with, the TRC saw itself as working within the framework of the agreement reached at CODESA, which included respecting the legality of apartheid. Second, the TRC did not even question the legitimacy of apartheid legislation that indemnified state operatives already indemnified by the apartheid parliament through a series of laws, stretching from the Sharpeville Massacre through the Soweto Uprising to the end of apartheid. Scholars who have studied these indemnities estimate that the numbers indemnified between only 1990 and 1994 range from anywhere between 13,000 and 21,000. Contrast this with the 7,094 indemnified individuals, "the majority of whom were, in concrete terms, drawn from the ranks of liberation movements" (Sitze, p. 27). If the TRC honored the indemnification granted by a whole series of indemnity jurisprudence that unfailingly followed on the heels of each human rights catastrophe under apartheid, then could the TRC no more than complete the indemnification begun under apartheid, by granting amnesty mainly to those in the liberation movements alleged to have committed human rights violations?

There were many debates inside the TRC, but only one minority view was appended to its report as a formal expression of dissent. This was penned under the name of Commissioner Wynand Malan. This is how Malan put his "main reservation": "The Act does not put apartheid on trial. It accepts that apartheid has been convicted by the negotiations at Kempton Park and executed by the adoption of our new Constitution. The Act charges the Commission to deal with gross human rights violations, with crimes both *under apartheid law and present law*" (TRC, 5:440, italics mine). At the same time,

Malan insisted that the TRC stay away from any reference to international law: "international law does not provide for the granting of amnesty for a crime against humanity" (TRC, 5:449). Malan was the only one to state forthrightly the assumptions that made sense of the TRC's work. In my view, the only problem was that he ascribed these to the Act, and not to the TRC's interpretation of it.

Malan called for a shift from the plane of morality to that of history, and from a focus on the personal and the individual to one on community. In Malan's words: "Slavery is a crime against humanity. Yet Paul, in his letters to the Ephesians and Colossians, is uncritical of the institution and discusses the duties of slaves and their masters. Given a different international balance of power, colonialism too might have been found a crime against humanity." Malan called on the TRC to put together a narrative that would provide a foundation for national reconciliation: "If we can reframe our history to include both perpetrators and victims as victims of the ultimate perpetrator – namely the conflict of the past, we will have fully achieved unity and reconciliation" (TRC, 5:448, 443). Malan was right, that recognizing victims and perpetrators of apartheid can only be the first step to reconciliation.[25] The next step would be to recognize both as survivors who must together shape a common future. Reconciliation could not be achieved between perpetrators and victims; it could only be achieved between survivors.

The narrative the TRC crafted also had political effects. Because the TRC focused on perpetrators and kept out of sight the beneficiaries of mass violations of rights – such as pass laws and forced expulsions – it allowed the vast majority of white South Africans to go away thinking that they had little to do with these atrocities. Indeed, most learned nothing new. The alternative would have been for the TRC to educate white South Africans that no matter their political views – whether they were for, against, or indifferent to apartheid, and aware of its actions or not – they were all, without exception, its beneficiaries when it came to residential

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25 It is for survivors to "succeed in integrating, through political engagement, all our histories, in order to discontinue the battles of the past" (TRC, 5:443).

areas where they lived, the jobs they held, the schools they went to, the taxes they did or did not pay, the cheap labor they employed, and so on. Because the TRC was not a legislative organ, because its decisions – except on amnesty – did not have the force of law, it did not face the same political restrictions as did the negotiators at Kempton Park. At the same time, the TRC had access to state resources and could reach right into South African living rooms at prime time. It needed to educate ordinary South Africans, black and white, about everyday apartheid and its impact on the life chances and circumstances of generations of South Africans. Such an education would have brought home to one and all the morality and the necessity of social justice. It would in the very least have educated them as to why the political reform that had brought an end to juridical and political apartheid was unlikely to be durable in the absence of social justice.

In the end, the TRC addressed itself to a tiny minority of South Africans - perpetrators and their victims - the former having been state operatives and the latter political activists. It ignored lived apartheid, paying attention to which would have made sense of the lived experience of the vast majority of South Africans. When it came to reconciliation, it addressed a small minority, the old and the new elite, but ignored the vast majority of the population.

In sum, 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. This is because the TRC understood violence as criminal, not political; as driven by individual perpetrators, and not by groups of beneficiaries; as targeting identifiable, individual victims and not entire groups. 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 excessive violence of its operatives. Because it did so, it was unable to achieve what even Nuremberg did: to compile a com-

prehensive record of the atrocities committed by the apartheid regime. This is why the TRC should be seen as a special court within the framework of apartheid law.

The TRC hoped to function as a surrogate Nuremberg by displacing the logic of crime and punishment with that of crime and confession. By linking confession to amnesty, the TRC attempted to subordinate the logic of criminal justice to that of political justice, but the attempt was not successful. 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. Put differently, it held them accountable for violence that infringed apartheid law, but not for violence that was enabled by apartheid law. In doing so, it upheld both apartheid as a rule of law and the law that undergirded apartheid.

What could the TRC have done differently in light of the fact that its work followed the agreement arrived at during the political negotiations known as CODESA? Instead of claiming to be laying the groundwork for "reconciliation," it could, first of all, have openly acknowledged that the basis of reconciliation was arrived at in the political and legislative negotiations that preceded and made possible its creation. To do so would have been to acknowledge the possibilities open before it. Second, it could have used its privileged and daily access to public resources and mass media to turn its public performance into a public educational campaign. The point of this campaign could have been be to frame postapartheid discourse in terms of social justice, and thus go beyond identifying individual perpetrators and individual victims to highlight both beneficiaries and victims of apartheid as groups. To do this would have been to educate the white population about the structural horrors and social outcomes of apartheid as a mode of governing society – to make the argument that the political reconciliation of adversarial elites could only be made durable if followed by social reconciliation of the population at large.

The TRC shared with Nuremberg a neoliberal understanding of justice, one that individualized it. Both were oriented to individ-

ual guilt even though one prioritized reconciliation and the other prosecution. To accent reconciliation over prosecution in this context would be to accent impunity and lack of accountability. When it comes to reconciliation, it is not the TRC but CODESA that shows the way forward. Unless it is combined with reform, reconciliation is unlikely to last. To be durable, it needs to be joined to a protracted process of reform, not only political as with CODESA, but social, as the TRC had had the opportunity to underline — but did not.

Lessons for Africa

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

Both the TRC and CODESA were born of the internal situation in South Africa. If the TRC failed, it was not because of internal factors; rather, its shortcomings flowed from emulating a model defined by the global human rights regime. Even if the TRC offered amnesty in place of punishment, it identified criminal responsibility with individual agents ("perpetrators") and presumed that they should be held individually accountable ("criminal justice"). The choice is between a criminal process, whether in its mock version performed by the TRC or in the strict version promised by the International Criminal Court (ICC), and a CODESA-style political process. Neither the mock court-style process of the TRC, which organized informal hearings and offered amnesty in return for "truth," nor criminal trials offered by the ICC that carry with them the inevitable consequence that alleged perpetrators are politically disenfranchised, but rather, the creation of an inclusive CODESA-type political process focusing on the most contentious issues offers a way forward for conflict-ridden African countries. What distinguishes the political process is the fact that its focus is neither on perpetrators nor victims, but rather, on the contentious issues that have driven different cycles of violence. The process aims to be inclusive of all, whether perpetrators, victims, beneficiaries, or bystanders. The

object, too, is not to identify and punish (or forgive) perpetrators, but to reform the political community and make it more inclusive. If South Africa has a lesson to offer the rest of Africa, that lesson is contained in the practices of CODESA, not in those of the TRC.

The South African transition was not unique. It was preceded by the political settlement in Uganda at the end of the 1980–86 civil war, and was 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 Triangle (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 though not their political objectives.

In Mozambique, six months after the South African elections in 1994, there was another impressive settlement following 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 and 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 leaders were brought into the political process and invited to run in national and local elections. The "broad base" deal in Uganda, the South African transition, and the postwar resolution in Mozambique were all achieved before the ICC came into existence.

Contrast this with the Ugandan government's response to a post-1986 insurgency by a string of groups, the last of these being the Lord's Resistance Army (LRA).[26] Like Renamo in Mozambique, the LRA too kidnapped children and made of them child soldiers,

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26 For an analysis of the human rights regime in relation to the LRA and the Ugandan government, see Adam Branch, *Displacing Human Rights: War and Intervention in Northern Uganda* (New York: Oxford University Press, 2011).

and mutilated civilians as a regular practice. When the Ugandan parliament passed a resolution supporting full amnesty for the leadership of the LRA as a prelude to their participation in the political process, the presidency looked for a way to undercut it. Bent on punishing the civilian population he saw as having supported a string of insurgencies, the president turned to the ICC. The ICC willingly issued warrants against the leadership of the LRA leaders in 2005, a fact that effectively sabotaged both the democratic process within the country and the overall peace process. The LRA moved across the border, at first to Congo and then to Central African Republic. Though a pale semblance of its earlier self, the LRA continues to flicker as an insurgent force.

It is not accidental that all the examples I have 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." From this point of view, the survivor is not the victim who survived, but all who survived the civil war, whether victim, perpetrator, or bystander. The way forward, I argue, lies not with "victims' justice" but with a more inclusive notion of "survivors' justice."

As with Nuremberg, 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 risks setting up the ground for the next war. As I shall argue in the next section, the pursuit of victims' justice risks perpetuating the cycle of violence. For a more inclusive notion of justice – survivors' justice – to be possible, one needs to shift focus from perpetrators to issues that drive the conflict.

Nuremberg and the Contemporary Human Rights Movement

As interpreted by the human rights movement, the lesson of Nuremberg is twofold: one, that responsibility for mass violence must be ascribed to individual agents, and two, that 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 ICC and is held as the fitting antidote to every incident of mass violence.[27]

To deideologize Nuremberg is to recognize that the logic of Nuremberg flowed from the context of interstate 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 no one 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. It is fitting to recall that the founding moment of the South African transition is not a criminal trial, but political negotiations through CODESA, reflecting a radically different context: not a war between states, but civil war.

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: cata-

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27   The ICC, founded after the Cold War, adopted Nuremberg as precedent when it came to trial procedure (Ehrenfreund, p. xvii).

logue atrocities, identify victims and perpetrators, name and shame the perpetrators, and demand that perpetrators be held criminally accountable. The underside of the focus on perpetrators is to downplay issues. Read the field reports of Human Rights Watch or International Crisis Group and you will find that, except for a pro-forma one-to-two 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.[28]

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 historical context. In a previous book on the Rwandan genocide, I set about constructing a historical account of the violence.[29] The more I did so, the more I realized that victims and perpetrators tended to trade places. Where victims and perpetrators have traded places, each side has a narrative of victimhood. Downplaying context tends towards locating the motivation for violence in either the individual psychology of the perpetrator or the culture of a group of perpetrators. 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 one can easily and eternally separate the bad from the good. The more depoliticized our notion of violence, the greater 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 turns into its own solution. The temptation is to think that eliminating the perpetrator will solve the problem. But instead of showing a way out of the dilemma, violence produces a quagmire in the form of a cycle.

Violence is not its own explanation. This much becomes clear with a shift of focus from human rights to human wrongs: while human rights are 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 so many standalone acts but 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 occupying a permanent identity. The consequence is to dedemonize – and thus to humanize – the perpetrator.

If Nuremberg has been ideologized as a paradigm, the end of apartheid has been exceptionalized as an improbable outcome produced by the singular personality of Nelson Mandela. But the lesson of South Africa is to look for the solution within the problem and not outside it. The point is to strive for internal reform, not external intervention. CODESA has a double significance in this regard: it framed the cycle of violence as a threat to the very foundation of a political community, and dared to reimagine the political community by recognizing in the aftereffects of violence an opportunity to refound that community. In doing so, it underlined the need to return to an older tradition in political theory, stretching from Thomas Hobbes to Hannah Arendt, that recognizes political violence – conquest, civil war – as potentially foundational to the creation of an inclusive political order.

On the negative side, CODESA – and the TRC – failed to acknowledge that this same violence has also been foundational to the establishment of a liberal socioeconomic order. In the words of Marx, this extraeconomic violence was key to primitive accumulation. To imagine a socioeconomic order beyond liberalism is to focus on the question of social justice. The downside of the South African transition was its attempt to put a political lid on a public

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28   I have elaborated the argument in Mahmood Mamdani, *Saviors and Survivors: Darfur, Politics and the War on Terror* (New York: Pantheon, 2010).

29   Mahmood Mamdani, *When Victims Become Killers: Nativism, Colonialism and Genocide in Rwanda* (Princeton, NJ : Princeton University Press, 2006).

conversation about social justice in postapartheid South Africa. The political balance of forces that shaped the postapartheid transition arguably also defined its limits, a limitation reflected in the fact that the transition was more political than social. This should have been all the more reason to expect a nonbinding process like the TRC to make room for a discussion oriented around social justice.

Neither bent on victors' justice nor victims' justice, CODESA shed the zero-sum logic of criminal justice in favor of the inclusive nature of political justice: inclusion through the reform of the political community in which yesterday's victims, perpetrators, bystanders, and beneficiaries may participate as today's survivors. 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.

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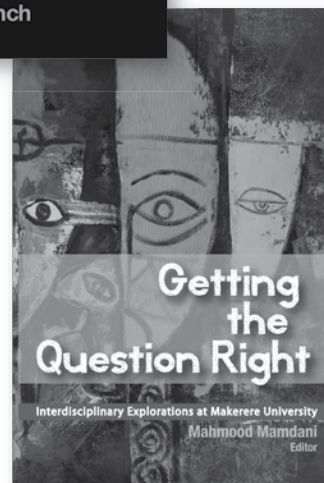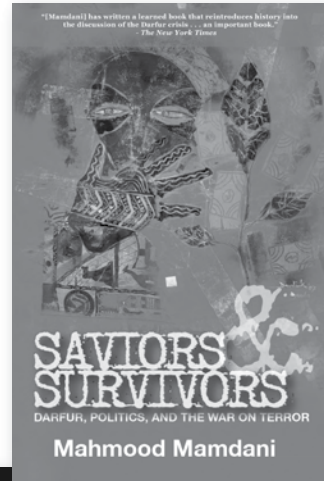
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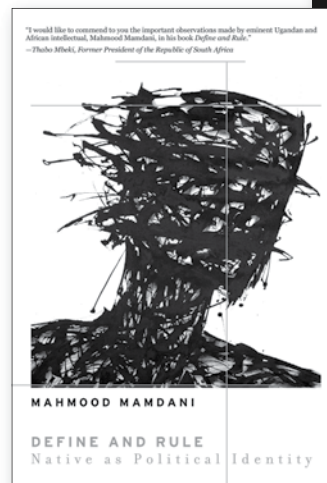
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Submissions should be original contributions and not under consideration by any other publication.

Contributions should be limited to 10,000 words, but should in no case exceed 15,000.

Manuscripts should be submitted to the editors by email attachment in Word format. All manuscripts and editorial correspondence should be addressed to The Editors, *The MISR Review*, at misrreview@gmail.com.

Editors