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Beyond Nuremberg: The Historical Significance of the Post-apartheid Transition in South Africa

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Abstract
The contemporary human rights movement holds up Nuremberg as a template with which to define responsibility for mass violence. I argue that the negotiations that ended apartheid—the Convention for a Democratic South Africa (CODESA)—provide the raw material for a critique of the "lessons of Nuremberg." Whereas Nuremberg shaped a notion of justice as criminal justice, CODESA calls on us to think of justice as primarily political. CODESA shed the zero-sum logic of criminal justice for the inclusive nature of political justice. If the former accents victims' justice, the latter prioritizes survivors' justice. If Nuremberg has been ideologized as a paradigm, the end of apartheid has been exceptionalized as an improbable outcome produced by the exceptional personality of Nelson Mandela. This essay argues for the core relevance of the South African transition for ending civil wars in the rest of Africa.

Keywords
South Africa, apartheid, Nuremberg, CODESA, TRC

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

Beginning the late 1970s, Nuremberg was ideologized by a human rights movement that moved away from a call for structural reform to accent 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 post-apartheid 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," as "a moral criticism of politics."[1] In this essay, we 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 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 of the French Revolution.[2] Whereas the 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 redefine the problem and the solution. The problem is extreme violence—radical evil—and the question it poses involves 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, and kidnapping: did de Klerk know of these? Had he authorized any of these? It was striking how different this was from what we know 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 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 suggest that the present rush for courtroom solutions advocated by the human rights community is the result of a double failure: analytical and political. Analytically, it confuses political with criminal violence. Politically, the focus on perpetrators is at the expense of a focus on the issues that drive the violence. 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. 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 that ended legal and political apartheid and provided the constitutional foundation to forge a post-apartheid political order. The TRC followed from CODESA, and not the other way around. Nuremberg 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, which I call *survivors' justice*.[4]

Nuremberg

Nuremberg was one of two trials at the conclusion of the World War II. 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 has noted, was a euphemism for "a group of 'civilized nations,' to which otherwise sovereign polities were ultimately answerable."[6]

Nuremberg was born of a debate among victorious powers on how they should deal with defeated Nazis.[7] 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 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.[8] In a speech that is said to have persuaded Truman to appoint him to the position of chief prosecutor at Nuremberg, Robert Jackson had argued only three weeks before his appointment: "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."[9]

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. For their part, the accused preferred to be tried by the United States rather than by any one else. They expected a fairer trial from Americans who, unlike the victims—Jews, Russians, French, British—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."[10]

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 as a model for victors' justice.[11]

The accused at Nuremberg were charged with four crimes: 1. Conspiracy to wage aggressive war. 2. Waging aggressive war. (Counts 1 and 2 were together 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).[12] 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.[13] 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."[14] 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 Law School, conceded that the court's judgment on counts 1 and 2 did indeed rely *on ex post facto* law.[15]

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 the 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 of civilian areas killed some 300,000 and seriously injured another 780,000 German civilians.[16]

Nuremberg is also identified with victims' justice, often thought of as an alternative to victor's justice, but in fact 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, a Baptist minister, a lawyer, and the first black member of the Ohio state legislature, in a letter to the U.S. Secretary of State in which he documented atrocities committed by King Leopold's colonial regime in Congo, concluding that this was a "crime against humanity."[17] We have already pointed out that crime against humanity was 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 toward 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 early nineteenth century and Europe's leading manufacturers and suppliers of guns and munitions by World War I. They had armed Germany in three major wars. During World War II, Krupp managed 138 concentration camps. Ranged throughout Europe, all Ire privately owned by Krupp. Alfred Krupps used slave labor from the camps and prisoners of war to build his factories and provided Hitler's wars with money and weapons, as combination of investment and commitment. One of those charged at Nuremberg, Krupp was released in 1951, his fortune restored.[18] There was little

justice for victims at Nuremberg. When it came, it was political and it 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 12 and 14 million Germans had fled or were expelled from east-central Europe. Historians consider this the largest forcible movement of any population in modern Europe history. This, in turn, was part of a larger forced transfer of populations from Central and Eastern Europe, estimated at more than 20 million. German federal agencies and the German Red Cross estimate that between 2 and 2.5 million civilians died in the course of expulsions. Some writers have described this forced movement of populations as "population transfer," others as "ethnic cleansing," and yet others as "genocide."[19]

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 also the case in contemporary Rwanda. In both cases, the state governs in the name of victims.

The Transition from Apartheid

The post-apartheid transition in South Africa is popularly identified with the work of the Truth and Reconciliation Commission (TRC). This work is presumed to have been guided by the dictum that perpetrators are forgiven past crimes in return for acknowledging the past (truth). 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 not forget. 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 the problem with this widely accepted notion: it is not quite true. Key to the post-apartheid transition was not an exchange of amnesty for truth, but amnesty for the willingness to reform. That reform was the dismantling of juridical and political apartheid. The real breakthrough represented by the South African case is not contained in the TRC but in the talks that preceded it, CODESA, which have so far been dismissed as nothing but hard-nosed pragmatism.

The ground for CODESA was prepared by a double acknowledgement by both sides of 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) were in the cards. If South Africa is a model for solving intractable conflicts, it is an argument for moving from the best to the second best alternative. That second best alternative was political reform. The quest for reform, for an alternative short of victory, led to the realization that if you threaten to put the leadership from 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 anti-apartheid movement—to court, because the people you would want to take to court are the very people you would need 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.[20] 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 a radically new way of thinking about justice. It presents 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; 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 (PAC) and the Communist Party—were all unbanned. The apartheid regime, the National Party, and the highly secretive underground network known as the Broederbond, also ceased to be treated as pariahs by anti-apartheid activists. In decriminalizing and legitimizing opponents, CODESA turned enemies into political adversaries. In the process, CODESA also moved the goalpost. The goal was no longer the internment and punishment of individuals charged with so many crimes, but a change of rules that would bring 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 that 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], all were treated as "survivors."

CODESA

The 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: "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."[21] The Declaration not withstanding, the negotiations at CODESA were testimony to so much 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, from mass mobilization to targeted violence. When the ultraright white Conservative Party won a by-election in Potchestrom 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 stayaway 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 stayaway with the massacre at Bapoteng, Congress of South African Trade Unions (COSATU) led yet another stayaway, that on August 3, and the ANC organized a march on Ciskei on September 7.

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 within a fixed time frame and within the framework of constitutional principles agreed upon by a meeting of negotiators appointed by all parties; but in reality, it was driven by the principals: the National Party 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 leadership 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: 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 a 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.[22]

Much has been written on the amnesty component of the proposal that 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. Spitz offers this approach as an explicit alternative to the approach that has come to be favored by the Transitional Justice industry, connecting 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 the larger history of anticolonial protest and colonial repression.[23]

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 (1960) and the Soweto Uprising (1976) "fell within the TRC's juridical and investigative mandate," Spitz 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."[24] 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 Spincter, through which all information is meant to pass."[25]

Our 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 followed the political agreement arrived at CODESA. Joe Slovo did not need to state 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 it was sluggish.[26] 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 would 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 National Party, 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, 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, it was seen as necessary to attaining that same majority rule.

The Constitutional Principles included a number of key provisions.[27] 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 were clashed, as in the case of white settlers and black natives, the former received constitutional protection, the latter no more than a formal acknowledgement in law.[28]

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 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. "Local government elections were structured 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 be elected by proportional representation. The

remaining 60 percent 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 nonblacks 30 percent 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 made 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 make 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 pre-interim phase, a negotiating forum had to get 80 percent support from its delegates. Because it controlled most of the (white) local government councils in the Transvaal and thus the Transvaal Municipal Association, consensus decision-making processes fit in with the agenda of the white supremacist Conservative Party. The requirement for consensus-based decision making had the effect of vesting elected representative of white residents with an effective veto over local government decisions.[29]

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 had to 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 TRC

There are two debates in South Africa today. The first focuses on the perpetrator, and thus on criminal justice. The second focuses on the beneficiary, and thus on social justice. Whereas there is hardly a popular demand in contemporary South Africa calling for perpetrators of apartheid to be tried and punished, it is the debate around social justice that more and more drives the critique of the post-apartheid transition, in particular the downplaying of social justice in the agreements concluded at CODESA. I have a mixed response to this critique. The demand that the end of apartheid should have delivered social justice ignores the political reality that defined the context in which CODESA was negotiated. The political prerequisite for attaining social justice would have been a social revolution, but there was no revolution in South Africa. If apartheid was not defeated, neither was it victorious. The most one can say is that there was a stalemate. 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 post-apartheid 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 semi-official 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 of a minority of individual victims carried out by an even smaller minority of individual perpetrators.

Did the beneficiaries of apartheid win at the negotiating table what its authors and perpetrators could not win on the battlefield? If so, what set of political conditions made this possible? The main condition was to play off two wings of the anti-apartheid movement, reinforcing the leadership of the external wing and sidelining the internal wing. The anti-apartheid 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 anti-apartheid resistance that knit together dozens of community and shop floor level organizations into a single archetypal network, called the United Democratic Front (UDF), which was responsible for the stalemate in which apartheid found itself. The "sufficient consensus" crafted by the ANC and the National Party stretched and strained the relation between the exile and the internal wings of the anti-apartheid opposition. In marginalizing the forces identified with the internal opposition, the sufficient consensus also sidelined the agenda for social justice. This is, however, not the place to elaborate on this political outcome. Our purpose here is to focus on the double closure—constitutional and narrative—that was the result of the political alliance between reform forces within the ruling National Party and the ANC-based exile wing, the alliance that ushered in the post-apartheid 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 was comprised of 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 semiofficial 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."[30] 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. Second, the TRC defined a human rights violation narrowly, as violating the "bodily integrity" of an individual. This distinction too proved problematic in a context where the vast majority of the population suffered violence as extra-economic. The violence of apartheid did not

target the "bodily integrity" of a population group defined as "Bantu" but 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, extra-economic 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:[31]

> "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 1 March 1960 to 10 May 1994 within or outside the Republic, and the commission of which was advised, planned, directed, commanded or ordered, by any person acting *with a political motive*. (emphasis mine)

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 87 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 Commission accepted the estimate and acknowledged that the process involved "collective expulsions, forced migration, bulldozing, gutting or seizure of homes, the mandatory carrying of passes, forced removals into rural ghettos and increased poverty and desperation."[32] Did these practices constitute "severe ill-treatment"? After noting that "forced removals" were "an assault on the rights and dignity of millions of South Africans," the Commission claimed it could not acknowledge them since these violations "may not have been 'gross' as defined by the Act."[33]

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. But practices such as coerced labor and forced removals could neither be classified as just economic or political; they were

both. Where a command economy was obtained, the familiar distinction between the political and the economic obscured practices where political power directly intervenes 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 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 pass laws—the backbone of a legal regime that targeted every black South African—political? Were 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.[34] "From the early sixties," the Commission noted, "the pass laws were the primary instrument used by the state to arrest and charge its political opponents."[35] Indeed, the Commission found that the proportion of pass law offenders was "as high as one in every four inmates during the 1960s and 1970s."[36] The Commission accepted that "the treatment of pass law offenders could well be interpreted as a human rights violation," but it 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 Commission 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 Commission distinguished political from nonpolitical 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: "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."[37] 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 Commission 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 farm prisoners did not feature in the prison hearings. Why not? Because, said the Commission,

"nobody came forward to give evidence."[38] "Nobody" here presumably refers to the victims of the farm labor system; it could not possibly refer to its institutional managers since the Commission had the legal right to subpoena reluctant or even unwilling witnesses, and had done so in other instances but obviously chose 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 were estimated at some 80,000 South Africans by the Human Rights Committee, whose reports were made available to the Commission. In the words of the Human Rights Committee, as cited by the Commission: "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."[39] The most notorious instance of death in detention was that of Steve Biko. The Commission acknowledged the detention (and murder) of Steve Biko as a gross violation of human rights, but did not acknowledge others. The Commission gave no legal reasons for excluding the category of detainees from prison hearings. It simply did not have the time: "There were practical rather than legal reasons for excluding detention from the prison hearings."[40]

Anyone familiar with the contents of the five-volume Commission Report will testify 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 Commission, 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 Commission. 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 the public outcry grew against the Commission'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 Commission 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 nonpolitical 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.[41]

Why was the "enforced transfer of a person from one area to another" a violation of a right over one's person, but not 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 Commission, both were reduced to "background" and "context."

At the end, the Commission came up with three truly bizarre conclusions. The first was a list of more than 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 post-apartheid state. Second, the Commission compiled a time series of violations over its mandate, which began with the Sharpeville massacre in 1960 and closed with the first democratic elections in 1994. "Most violations," the Commission concluded, "took place in the period after the unbanning of political parties (1990-1994)"[42] and that it was the result of conflict between anti-apartheid groups, especially the ANC and the Inkatha Freedom Party (IFP) in Natal. The Commission then compiled a list of "perpetrator organisations." From this followed the Commission'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.[43]

How could the Commission arrive at these bizarre conclusions? To begin with, the Commission saw itself as working within the framework of the agreement reached at CODESA, which included respecting the legality of apartheid. Second, the Commission 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 anywhere between 13,000 and 21,000. Contrast this with the 7,094 individuals, "the majority of whom were, in concrete terms, drawn from the ranks of liberation movements."[44] If the TRC honored the indemnification granted by a whole series of indemnity jurisprudence, which unfailingly followed on the heels of each human rights catastrophe under apartheid, then was the TRC left with no more than to 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 Commission, but only one minority view was appended to the Commission's 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*"[45] (italics mine). At the same time, Malan insisted that the Commission stay away from any reference to international law: "international law does not provide for the granting of amnesty for a crime against humanity."[46] Malan was the only one to state forthrightly the assumptions that made sense of the Commission's work. Our only problem was that he ascribed these to the Act, and not to the Commission'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."[47] Malan called on the Commission 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."[48] Malan was right that recognizing victims and perpetrators of apartheid can only be the first step to reconciliation. The next step would be to recognize both as *survivors* who must together shape a *common* future. Reconciliation cannot be between perpetrators and victims; it can only be between survivors.

The narrative the TRC crafted also had its 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, aware of its actions or not—they were all, without exception, its beneficiaries when it came to residential 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, the TRC 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 during 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 at least have educated them as to why the political reform that had brought them an end to juridical and political apartheid was unlikely to hold 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 state operatives and the latter political activists. It ignored lived apartheid, 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 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 excess violence of its operatives. Because it did

so, it was unable to achieve even that which Nuremberg did: to compile a comprehensive record of the atrocities committed by the apartheid regime. 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. It limited criminal responsibility to actions that would have been crimes under apartheid law. In doing so, it both upheld 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 that proceeded and made possible its creation. To do so would be to acknowledge the possibilities open before it. Second, it could have turned 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 would have been to frame the terms of post-apartheid discourse by center-staging the question of social justice, and thus going beyond identifying individual perpetrators and individual victims to highlighting both beneficiaries and victims of apartheid as groups. That would have educated 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 individual guilt even though one prioritized reconciliation, and the other prosecution. To stop here and to accent reconciliation over prosecution 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 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 inter-state conflict; it is in most cases the product of civil wars. 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 with the inevitable consequence that alleged perpetrators be politically disenfranchised, but the creation of a CODESA-type inclusive political process that would focus on the most contentious issues that offers a way forward for conflict-ridden African countries. What distinguished the political process was that its focus was neither perpetrators nor victims, but the contentious issues that have driven different cycles of violence. The process aimed to be inclusive of all, whether perpetrators, victims, beneficiaries, or bystanders. The object, too, was 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 not contained in the practices of the TRC, but rather in those of CODESA.

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 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 even if not their political objectives.

In Mozambique, six months after the South African elections in 1994, there was another impressive settlement, which followed a fifteen-year civil war. Like CODESA, this settlement also renounced both the battlefield and the courts as two versions of a winner-take-all approach, unsuited to a conflict in which there was no winner. The peace process in Mozambique decriminalized Renamo, an insurgency aided and advised by the apartheid regime, whose practices included the recruitment of child soldiers and the mutilation of civilians. A retribution process in Mozambique would have meant no settlement at all; instead, individuals from Renamo's leadership 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).[49] Like Renamo in Mozambique, the LRA kidnapped children and forced them to become child soldiers, and they mutilated civilians as a regular practice. When the Ugandan parliament passed a resolution calling for a 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. Although it is a pale resemblance 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 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, the focus needs to shift 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.[50]

To de-ideologize Nuremberg is to recognize that the logic of Nuremberg flowed from the context of inter-state war, one that ended in victory for one side, which then put the losers on trial. The logic of a court trial is zero sum: you are either innocent or guilty. This kind of logic ill fits the context of a civil war. Victims and perpetrators in civil wars often trade places in ongoing cycles of violence. No one is wholly innocent and none wholly guilty. Each side has a narrative of victimhood. Victims' justice is the flip side of victors' justice: both demonize the other side and exclude it from participation in the new political order. A civil war can end up either as a renegotiated union or as a separation between states. The logic of Nuremberg drives parties in the civil war to the latter conclusion: military victory and the separation of yesterday's perpetrators and victims into two separate political communities. It is fitting to recall that the founding moment of the South African transition is not a criminal trial, but political

negotiations, 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: catalogue atrocities, identify victims and perpetrators, name and shame the perpetrators, and demand that they be held criminally accountable. The underside of the focus on perpetrators is to downplay issues. Read the field reports of Human Rights Watch or International Crisis Group and you will find that, except for a *pro forma* one or 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.[51]

This is problematic if one recognizes that political violence is often not a stand-alone incident but part of a *cycle of violence*—a fact obscured by the absence of a historical context. In a previous book on the Rwandan genocide,[52] I set about constructing a historical account of the violence: 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. The more you downplay context, the more you tend to locate 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 you can easily and eternally separate the bad from the good. The more depoliticized our notion of violence, the more the temptation to think of violence as its own explanation. Indeed, the tendency is to seek the explanation for violence in the person of the perpetrator. From being a problem, violence also becomes the solution. The temptation is to think that eliminating the perpetrator will solve the problem. But instead of showing a way out of the dilemma, violence introduces us to a quagmire. It feeds the cycle of violence.

Violence is not its own explanation. This much becomes clear with a shift of focus from human rights to human wrongs. Human rights may be universal, human wrongs are specific. To focus on human wrongs is, first, to highlight context. It is, second, to underline issues. And it is, third, to produce a narrative that highlights the cycle of violence. To break out of the cycle of violence we need to displace the victim narrative with that of the survivor. A survivor narrative is less perpetrator-driven, more issue-driven. Atrocities become part of a historical narrative, no longer seen so many stand-alone acts but as parts of an ongoing cycle of violence. To acknowledge that victim and perpetrator have traded places is to accept that neither can be marked as a permanent identity. The consequence is to de-demonize— and thus to humanize—the perpetrator.

If Nuremberg has been ideologized as a paradigm, the end of apartheid has been exceptionalized as an improbable outcome produced by the exceptional 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. CODESA focused on the cycle of violence as threatening the very foundation of a political community. It dared to reimagine the political community by recognizing in the aftereffects of violence an opportunity to re-found the political community. In doing so, it underlines the need to return to an older tradition in political theory, one that stretches from Hobbes to Arendt and 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 socio-economic order. In the words of Marx, this extra-economic violence was key to primitive accumulation. To imagine a socio-economic 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 conversation about social justice in post-apartheid South Africa. It is arguable that the political balance of forces that shaped the post-apartheid transition 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 on social justice.

Neither victors' justice nor victims' justice, CODESA shed the zero-sum logic of criminal justice for 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 was not to avenge the dead, but to give the living a second chance.

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Notes

1. Sam Moyn, *The Last Utopia: Human Rights in History* (Cambridge, MA: Belknap Press, 2012), 8-9.
2. For an extended discussion, see, Robert Meister, *After Evil: A Politics of Human Rights* (New York: Columbia University Press, 2012).

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 anti-state 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.
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 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," only to follow with a claw-back qualifier that "the exemption did not apply to matters affecting threats to international peace." See, Article 2(7), Elizabeth Borgwardt, *A New Deal for the World: America's Vision for Human Rights* (Cambridge, MA: Harvard University Press, 2005), 8, 74, 191.
6. Ibid., 69.
7. The hardline policy as 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 34 percent wanting to destroy Germany as a political entity, 32 percent wanting supervision and control over Germany, and only 12 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, *A New Deal for the World*, 207, 210.

8. Norbert Ehrenfreund, *The Nuremberg Legacy: How the Nazi War Crimes Trials Changed the Course of History* (New York: Palgrave Macmillan, 2007), 7.
9. Ibid.,10.
10. 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 subject to review." Ehrenfreund, *The Nuremberg Legacy*, 12, 16.
11. Nazi officers at Nuremberg were charged with waging aggressive war, with 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, *A New Deal for the World*, 225, 231.
12. Ehrenfreund, *The Nuremberg Legacy*, 16-17.
13. Ibid., 14.
14. Ibid., 234.
15. Ibid., 56-7.
16. Michael Walzer, *Just and Unjust Wars. A Moral Argument with Historical illustrations*, Second edition (New York: Basic Books, 1992), 250. Cited in Ehrenfreund, *The Nuremberg Legacy*, 59. 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, *A New Deal for the World*, 225, 231.
17. 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. Adam Hochschild, *King Leopold's Ghost: A Story of Greed, Terror and Heroism in Colonial Africa* (Boston: Houghton Mifflin, 1998).

18. Ehrenfreund, *The Nuremberg Legacy*, 23, 25.
19. 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* (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* (Berghahn Books, 1997); Anna Bramwell, *Refugees in the Age of Total War* (Routledge, 1988); Piotr Eberhardt, *Political Migrations in Poland 1939-1948* (Warsaw: Przegląd [COMP: insert symbol-underneath "a"]Wschodni, 2006); Myron Weiner, *Migration and Refugees: Politics and Policies in the United States and Germany* (Brooklyn: Berghahn Books, 1998); Steffen Prauser and Arfon Rees, "The Expulsion of 'German' Communities from Eastern Europe at the end of the Second World War," *European University Institute* HEC No. 2004/1; Jan Owsinski and Piotr Eberhardt, *Ethnic Groups and Population Changes in Twentieth-Century Central-Eastern Europe: History, Data, Analysis* (Armonk: M.E. Sharpe, 2002); Alfred M. De Zayas, *A Terrible Revenge* (New York: Palgrave/Macmillan, 1994).
20. 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.
21. Richard Spitz and Mathew Chaskelson, *The Politics of Transition: A Hidden History of South Africa's Negotiated Settlement* (Oxford: Hart Publishing, 2000), 3, 21, 22.
22. 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 (1996).
23. "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), 4.
24. Ibid., 25.
25. Ibid.,207.
26. This paragraph and the rest of this section, are based on Richard Spitz and Mathew Chaskelson, *The Politics of Transition: A Hidden History of South Africa's Negotiated Settlement* (Johannesburg: Witwatersrand University Press, 2000), 30, 38, 48, 57, 78-80, 84-85, 337-38, 322, 86, 159. Specific page numbers are indicated following the citation in the main body of the text above.
27. 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.

28. 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 (Section 25, see below), which sets out the conditions under which expropriation can take place. In the interim constitution land expropriation could take place based, among other things, for "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 "citizens to gain access to land on an equitable basis" (Subsection 5). Compensation, however, had to be considered equitable; in policy the willing selling/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.
Here are the relevant sections of the constitution:

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.

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 provisions of this section is in accordance with the provisions of section 36(1)

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

29. 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 non-statutory delegates were equally represented; then came the interim phase with a "government of local unity"; majority decision-making 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*, 186.
30. Mahmood Mamdani, "Amnesty or Impunity? A Preliminary Critique of the Report of the Truth and Reconciliation Commission of South Africa (TRC)," in S. Benhabib, I. Shapiro, and D. Petranovic, eds., *Identities, Affiliations, and Allegiances* (New York: Cambridge University Press, 2007).
31. TRC, *The Truth and Reconciliation Commission of South Africa Report – Volume 1*(1998), 60.
32. TRC, *The Truth and Reconciliation Commission of South Africa Report – Volume 1*, 34; *Volume 2*, 409.
33. TRC, *The Truth and Reconciliation Commission of South Africa Report – Volume 1*, 34.
34. TRC, *The Truth and Reconciliation Commission of South Africa Report – Volume 3* (1998), 528.
35. Ibid., 163.
36. TRC, *The Truth and Reconciliation Commission of South Africa Report – Volume 4* (1998), 200.
37. Cited in *The Truth and Reconciliation Commission of South Africa Report – Volume 4*, 202.
38. Ibid., 202.
39. This from a march 1983 paper by the Committee, cited in Human Rights Committee, *A Crime Against Humanity*, ed. Max Coleman, 1998; quoted in TRC, *The Truth and Reconciliation Commission of South Africa Report – Volume 4*, 201.
40. TRC, *The Truth and Reconciliation Commission of South Africa Report – Volume 4*, 201.
41. TRC, *The Truth and Reconciliation Commission of South Africa Report – Volume* 1, 64.
42. Ibid., 172.
43. TRC, *The Truth and Reconciliation Commission of South Africa Report – Volume 3*, p. 3, 162.
44. Sitze, *The Impossible Machine: A Genealogy of South Africa's Truth and Reconciliation Commission*, 27.
45. TRC, *The Truth and Reconciliation Commission of South Africa Report – Volume 5* (1998), 440.
46. Ibid., 449.
47. Ibid., 448.

48. Ibid., 443; it is for survivors to "succeed in integrating, through political engagement, all our histories, in order to discontinue the battles of the past."
49. For an analysis of the human rights regime in relation to the LRA and the Uganda government, see, Adam Branch, *Displacing Human Rights: War and Intervention in Northern Uganda* (New York: Oxford University Press, 2011).
50. The International Criminal Court, founded after the Cold War, adopted Nuremberg as precedent when it came to trial procedure. Ehrenfreund, *The Nuremberg Legacy*, xvii.
51. I have elaborated the argument in Mahmood Mamdani, *Saviors and Survivors: Darfur, Politics and the War on Terror* (New York: Pantheon, 2010).
52. Mahmood Mamdani, *When Victims Become Killers: Nativism, Colonialism and Genocide in Rwanda* (Princeton: Princeton University Press, 2006).

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