The Logic of Nuremberg
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In March, General Bosco Ntaganda, the ‘Terminator’, former chief of military operations for the Union of Congolese Patriots (UPC), wanted for war crimes and crimes against humanity, voluntarily surrendered himself to the US embassy in Kigali and was flown to the headquarters of the International Criminal Court at The Hague. The chargesheet included accusations of murder, rape, sexual slavery, persecution and pillage, offences documented in detail by Human Rights Watch over the last ten years. Ntaganda, scheduled for next year, will follow that of Thomas Lubanga, the UPC’s president, who was convicted in 2012. There seems to be no question about the justice of the proceedings. At the same time, however, the UN Security Council has been pursuing a strategy of armed intervention in eastern Congo, using troops from South Africa and Tanzania, against the rebel groups Ntaganda and others commanded. Both initiatives – the prosecution of rebel leaders for war crimes and military operations against their personnel – tone down the buttonText=""">diplomatic context between government and rebels are well underway. This, then, is a co-ordinated military and judicial solution for what is also, and fundamentally, a political problem. Inevitably with such solutions, the winners take all.

Where mass violence is involved, there is always a choice between the judicial approach, enforced by the victors or by external powers, which tends to exclude the losing parties from any political settlement, and negotiation, which necessarily involves all parties in discussions about the future, whatever the terms they have committed. Through the Cold War period and beyond, our response to mass violence has largely been determined by the model of Nuremberg. In Rwanda or Sierra Leone, Congo or Sudan, international criminal trials are the preferred response. The problem here is that mass violence isn’t just a criminal matter, since the criminal acts it involves have political repercussions.

This is not to say that no one should be held responsible for violence, merely that it is sometimes preferable to suspend the political problem that frames it has been named since the criminal acts it involves have political repercussions. Where mass violence is involved, there is always a choice between the judicial approach, enforced by the victors or by external powers, which tends to exclude the losing parties from any political settlement, and negotiation, which necessarily involves all parties in discussions about the future, whatever the terms they have committed. Through the Cold War period and beyond, our response to mass violence has largely been determined by the model of Nuremberg. In Rwanda or Sierra Leone, Congo or Sudan, international criminal trials are the preferred response. The problem here is that mass violence isn’t just a criminal matter, since the criminal acts it involves have political repercussions.

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thing the TRC process individualised the victims, which made symbolic but not political sense, since it was precisely the legal definition of entire groups as ‘racial’ communities that made apartheid a crime against humanity. For another, the TRC defined a human rights violation as an act that violated the individual’s bodily integrity, when most of the violence of apartheid had to do with the denial of land and livelihood to large populations defined as inferior races (forced removals, pass laws and so on). At the TRC the normative, institutional violence of apartheid took second place to the spectacular violence experienced by far smaller numbers of leaders and activists and carried out by perpetrators whose actions were seen as a matter of personal responsibility.

The TRC displaced the logic of crime and punishment with that of crime and confession. In fact it set aside the violence of the apartheid state – which was enshrined in law, if not legitimate – and focused on the new dispensation. The TRC was in this sense quite unlike Nuremberg, where the laws of the Reich were never used in mitigation of a criminal act. For this reason, the TRC was unable to compile a comprehensive record of the atrocities committed by the apartheid regime, as Nuremberg had for the crimes of World War II. It was crucially by a special court, convened in the shadow of apartheid law, whose work did not address the legalised exclusion, oppression and exploitation of a racialised majority.

In his foreword to the TRC’s five-volume final report, published in 1998, Desmond Tutu celebrated the commission as evidence of the ethical and political magnanimity of the victims, but the real change had taken place before the TRC was set up. Codisa had also promised amnesty to the perpetrators, yet the law did not change for truth-telling but, crucially, for joining the process of political reform. The negotiations were conducted with the aim of ending political and juridical apartheid. They involved inevitable compromises on both sides, without which the transition could not have been achieved.

Codisa was a recognition by both sides that there was little prospect of ending the conflict in the short term and that this meant each accepting that its preferred option was no longer within reach: neither revolution (for the liberation movements) nor military victory (for the regime). If South Africa is anything, it is an argument for moving swiftly from the best to the next best alternative. The ANC were quick to grasp that if the TRC had been allowed to address the full extent of the violations, this would have allowed majority rule to propel dramatic or meaningful change.

The constitutional principles that emerg­ed included a number of key provisions. The first was the independence of the Public Service Commission, the Reserve Bank, the public protector (an ombudsman), the auditor general, schools and universities. The second was a constitutionally guarantees Bill of Rights that enshrined private property as a fundamental right. The clause providing for the restoration of land to the majority population was placed outside the Bill of Rights. Where property rights were in question, they were between beneficiaries – settlers and black natives, the former appeared to enjoy a constitutional privilege as a result of the Bill, the latter only a formal acknowledgment of ‘the nation’s commit­ment to land reform’. Even greater concessions on the previous land question at the prin­cipal level, with hybrid voting systems that precluded absolute black majority control in local government and made it impossible for taxes to be levied in white areas for expenditure in black areas. White privil­lege was, in effect, entrenched in law in the same way that South African apartheid law precluded absolute black majority control in local government. The outcome of the Codesa was mixed. It traded criminal justice for a political settlement and offered a blanket amnesty in return for understand­ing ‘(sufficient consensus)’ that led inexor­ably to the dismantling of legal apartheid. At the same time, it put a constitutional ceiling on measures of social justice that would have allowed majority rule to propel dramatic or meaningful change.

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