

Lessons of Nuremberg and Codesa: Where Do We Go From Here?

© Mahmood Mamdani

Professor and Director, Makerere Institute of Social Research, Makerere University,
Kampala

Herbert Lehman Professor of Government, Columbia University, New York

[Text of 2010 Africa Memorial Day talk at the University of the Free State,
Bloemfontein, South Africa, July 14, 2010]

Please do not cite without permission of the author

Lessons of Nuremberg and Codesa: Where Do We Go From Here?

How should we think of political violence in Africa? Of the violence associated with apartheid; and by extension of the violence of civil wars as in Mozambique, Angola and South Sudan; ethnic cleansing as in Congo and Darfur; and genocide as in Rwanda? What can Africa – and the world – learn from the great South African transition from apartheid, of its attempts to reform a social and political order founded on extreme violence?

The South African transition was in the main internally driven. It had no prominent external mediators. Yet, this substantially homegrown achievement presented itself to the world, and to its own people, in a borrowed, universalizing, language, the language of human rights. This was mainly the work of the Truth and Reconciliation Commission [TRC]. It is the TRC that translated the extreme violence of apartheid into a catalogue of human rights violations. I will question the universalizing impulse of human rights theory. My objective is to redirect attention from universalism to context, from first principles to lived reality, from human rights to human wrongs.

I shall begin with two great human wrongs that occurred over the 20th century – Holocaust and Apartheid – and contrast the ways in which we have settled accounts with these great crimes against humanity: with criminal trials in Nuremberg, and a political settlement called Codesa [the Convention for a Democratic South Africa].

Nuremberg has become the explicit basis for the articulation of a post-Holocaust notion of human rights, but the lessons of Codesa have yet to be fully theorized. Whereas Nuremberg shaped a notion of justice as criminal justice, few recognize that Codesa calls on us to think of justice primarily as political justice. And finally, whereas Nuremberg has become the basis of a notion of victims' justice – as a complement rather than a contrast to victors' justice – few acknowledge that Codesa provides the basis for an alternative notion of justice, which I call survivors' justice.

In sum, I suggest that we theorize Codesa, the negotiations that brought an end to apartheid – to draw the outlines of an alternative paradigm – not necessarily a better one, but one that responds to a different context. I am also interested in the limitations of the South African transition, which I trace to the failure to broaden the discussion of justice

beyond political to social justice. I will argue that the responsibility for this failure lies primarily with the TRC.

The contemporary paradigm of justice consciously incorporates the lessons of Nuremberg. Nuremberg was one of two trials at the conclusion of the Second World War. The second was the Tokyo trial. Nuremberg was an innovation for two reasons. First, the judges at Nuremberg rejected the claim that state orders absolved an official of individual responsibility. Besides establishing **individual** responsibility for the violation of human rights, Nuremberg also defined that responsibility as **criminal**.

The trials at Nuremberg could not have been held except as an aftermath of military victory. The victorious powers established a rule of law under which they tried alleged perpetrators. The trials targeted only the defeated, only the perpetrators of the Holocaust, not the perpetrators of the atom bomb, nor the perpetrators of indiscriminate violence against civilians on both sides.

That justice follows victory is a long established tradition. Do we not think of justice as the aftermath of victory, whether in a war between states or in a revolution between classes? Do we not expect the end of a conflict to give us a clear victor under whose power justice can be administered? In this sense, justice is victors' justice. To be sure, Nuremberg combined elements of both victors' justice and victims' justice. But there was no doubt as to which was primary. The accused at Nuremberg faced four charges; the first was that of waging aggressive war; only the last charge referred to the Holocaust. The victors thus nodded in the direction of victims.

As a regime of punishment and deterrence, Nuremberg also presumed a second condition. Though not obvious, this condition was critical: that there would be no need for winners and losers to live together after victory. Yesterday's perpetrators and yesterday's victims will not have to live together, for there will be a separate state – Israel – for survivors. Indeed, post-Holocaust language reserves the identity 'survivors' only for yesterday's victims. As in Israel, this is also the case in Rwanda. In both cases, the state governs in the name of victims, even though, I might add, in Rwanda unlike in Israel, the population includes both yesterday's victims and yesterday's perpetrators.

Even if it identified justice wholly with criminal justice, Nuremberg was not a wholly backward-looking conception. There was one forward-looking, political, aspect to Nuremberg. It is why the Allied powers, in particular the USA, softened its treatment of German perpetrators over time. The more Western powers began to cast the Soviet Union as the enemy, the more they began to look to Germany as a Cold War ally. As they imagined a reindustrialized Germany as an asset, they lessened the focus on punishment. This was clear in the trial of Krupps, the industrial magnet who had built the Nazi military machine. The Krupps trial was preceded by a historic debate in the US cabinet, between the Secretary of Treasury who demanded that Germany must be defanged, de-industrialized, made agrarian so it would be incapable of waging a modern war, and the Secretary of War who supported the reindustrialization and inclusion of post-Nazi Germany in an anti-Soviet alliance. The latter won the debate. The important point is that though the victors of World War II used different standards in the Krupps trial, they justified the difference as a matter of expediency, not of principle. In principle, Nuremberg came to signify a predominantly backward-looking paradigm of justice as punishment for past crimes.

The contemporary human rights movement has turned the key features of Nuremberg into a paradigmatic legacy. The key move has been to depoliticize conflict and thereby to criminalize it. Human rights groups have given this move a name: Naming and Shaming. The focus is on cataloguing atrocities, identifying perpetrators and demanding that they be held criminally accountable.

Read the field reports of Human Rights Watch or International Crisis Group and you will find that, except for a pro-forma 1-2 page introduction on history and context, the focus is on 'naming and shaming'. These reports either remain downright silent about the issues that drive the conflict or downplay them. Any discussion of context is seen as a sophisticated apology for perpetrators, as undermining the demand for accountability as a way to establish the universality of human rights. By abstracting the agency of perpetrators from historical context, naming and shaming tends to paint a larger than life portrait of perpetrators, and becomes a technique for demonizing them.

In real life, however, political violence is seldom a standalone incident; rather, it is part of a *cycle of violence*. The more you downplay the historical context and ignore the

cycle of violence, the more you arrive at the assumption that the perpetrator is always the perpetrator and the victim is always the victim. In a previous book on Rwanda, as I constructed a historical account of the violence, I realized that victims and perpetrators tended to trade places. Where victims and perpetrators have traded places, each side has a narrative of victimhood. This was true in Rwanda, and it is true in Darfur and in Congo. Downplaying the context has a second consequence. It reinforces the tendency to locate the motivation for violence in either the individual psychology or the culture of the perpetrator. Demonizing goes along with branding. Violence becomes Boer violence or Islamic terrorism.

The assumption is that you can easily and eternally separate the bad from the good. The more our notion of violence is depoliticized, the more we tend to shy away from the issues and think that the solution for violence is to target the perpetrator. To say that the explanation for violence is the perpetrator is to assume that violence is its own explanation. Violence is no longer said to be just the problem, it is also put forward as the solution. The only difference is that their violence is said to be bad violence, and ours is hailed as good violence. Instead of a way out, the solution points to a quagmire. In a recent book on Darfur, I argued that The War on Terror is paradigmatic of this kind of framing.

You can distinguish contemporary Nuremberg-based human rights thinking from earlier forms of rights thinking by focusing on how it treats the question of agency. Rights theory after the French Revolution highlighted the agency of the victim as a citizen. Today, the battle cry of the citizen has been replaced by a plea to big powers to treat victims as their wards and rescue them, as in the doctrine Responsibility to Protect. At the same time as it exaggerates the agency of the perpetrator, contemporary rights theory diminishes the agency of the victim.

But violence is not its own explanation. To understand this, we need to begin with a focus on human wrongs, instead of human rights. Human rights may be universal, but human wrongs are specific. To understand human wrongs, we need to highlight **context**, so as to locate the agency of the individual in a historical process, and thereby go beyond the criminal to the political. It is the presence of a political motive that distinguishes political from criminal violence. To write a narrative of violence would be to highlight

issues that drive the cycle of violence. That should enable us to write a narrative of the political. I believe that this shift, from treating violence as a standalone event to locating it within a larger narrative is key to grasping the key lessons of the South African transition.

In the popular imagination, the South African transition is identified with the work of the TRC. To understand the specific role played by the TRC, we need to come to terms with its key features. The TRC held individual state officials criminally responsible, but only for actions that would have been defined as crimes under apartheid law. It did not hold them accountable for political violence, meaning the violence that was authorized by apartheid law, but only for criminal violence, the violence they perpetrated outside the law. The point is that they were not held responsible when they acted as institutional implementers, but only when they acted as individual authors of violence. They were held accountable for excess, for violence beyond the law. My point is that by setting out to identify only criminal violence, violence that exceeded political orders, the TRC ended up excusing political violence, the violence authorized by apartheid law. Rather than question the rule of law identified with apartheid, the TRC upheld it.

The TRC undertook a statistical analysis of the victims and perpetrators of this ‘crime against humanity’. In the process, it reached some strange conclusions. To begin with, it argued that most rights violations under apartheid, roughly over half, had occurred during the period of transition from apartheid, and not during apartheid proper.¹ The TRC then tabulated the affiliation of all victims and perpetrators as two separate lists, one of “victim organizations” and the other of “perpetrator organizations”; finally, it ranked them. The list of “victim organizations” was headed by the ANC; then followed the IFP, with the South African Police [SAP] in 7th place, and, down the list, followed the Azanian Peoples Organisation [AZAPO].² When it came to “perpetrator organizations”, the IFP was ranked first and the ANC third; the South African Police [SAP] was placed second, and the South African Defense Forces [SADF] fourth.³ Since the Commission also declared apartheid “a crime against humanity”, one could not but resist asking at the

¹ Truth and Reconciliation Commission of South Africa, *Report*, vol. 1, p. 172, Para 25

² Truth and Reconciliation Commission of South Africa, *Report*, vol. 3, p. 7, Table D2A.1-1

³ Truth and Reconciliation Commission of South Africa, *Report*, vol. 3, p. 162, Para 24

end of the Commission's report: who authored this crime? If not only most victims, but also most perpetrators, were black people, as indeed the TRC claimed, then was apartheid, this "crime against humanity", primarily a "black-on-black" affair?

The most interesting thing about the TRC was that it functioned within the paradigm identified with Nuremberg. Even though the TRC called for forgiveness, this was within a broader focus defined by notions of crime and punishment. In other words, the TRC functioned within the paradigm identified with Nuremberg. For a departure from this paradigm, we need to look at the negotiations at Codesa.

Codesa was a response to a different context marked by different conditions than those obtained at Nuremberg. But Codesa also needs to be understood as a statement of the limitations of Nuremberg.

Codesa was born of the realization that that there was no victor in the struggle against apartheid. How do you stop an ongoing conflict in which there was neither winner nor loser? How do you convince adversaries that it is in their interest to stop the conflict? It was obvious that this could not be done by prioritizing criminal justice and threatening to take the political leadership – of either the apartheid state or the anti-apartheid movement – to court, because the people you would take to court are the very people you would need to stop the conflict.

This led to a second realization: that perpetrators and victims from the past conflict would have to live together after apartheid. There was no Israel for victims. Victims and perpetrators, blacks and whites, would have to live in the same country after apartheid, just as Hutu and Tutsi would have no choice but to live in Rwanda after the genocide. Rather than a model to be emulated, Israel was an exception to be avoided.

Codesa did not put justice in the back seat. Instead, it presented us with a radically new way of thinking about justice. My claim is that this new way represents a double breakthrough. First, it distinguished between criminal, political and social justice – so as to prioritize political justice, the reform of the political system, over the other two. As I will argue later, this had both positive and negative consequences. The critical difference is between criminal and political justice: political justice affects groups whereas criminal

justice targets individuals. The object of criminal justice is punishment, that of political justice is political reform.

Second, it *decriminalized* the other side so as to treat it as a political adversary. The result was the unbanning of the ANC, the PAC and the Communist Party on one side, and that of the apartheid regime and the highly secretive Broederbond on the other. The goal was not to punish individual criminals, but to change rules of political life so as to reform the political community. Finally, unlike criminal justice, political justice prioritized the claims of the living over those of the dead. From the point of view of crime and punishment, South Africa is a model of the second best alternative, not the best alternative. That second best alternative is political reform.

My point, however, is that this second best alternative may be better suited to African needs than the paradigm born of Nuremberg. 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 reform for the future. Indeed, Codesa offers us a shift of paradigm where the meaning of survivors changes to include all those who survived yesterday's catastrophe, apartheid: yesterday's victims, yesterday's perpetrators and yesterday's beneficiaries – those described as bystanders by human rights activists. The shift of paradigm is from victims' justice to survivors' justice.

The real trade off that made possible the South African transition was not between truth and amnesty as the TRC would have us believe. The real trade off was concluded at Codesa: the amnesty offered perpetrators and the stay offered beneficiaries was in return for political reform. It is at Codesa that the rules were changed, and the *same* rules were agreed on for *all* survivors. As I have just said, to prioritize political justice over criminal justice meant to give preference to the demands of the living over those of the dead. Simply put, the dead are dead, and the living must have a second chance.

To get a fuller sense of what Codesa achieved and what remains to be done, I suggest we contrast the popular attitude to two different demands. The first is the demand that perpetrators be tried in the name of criminal justice. The second demand is for social justice and is addressed to beneficiaries. My sense is that there is hardly a popular demand in South Africa calling for perpetrators of apartheid to be put on trial. There is,

however, a growing popular demand that the beneficiaries of apartheid consent to social justice for its victims. Those who demand social justice do not question the trade off between criminal and political justice that was part of the hard-nosed realism that marked Codesa. The demand for social justice is about the next step, the step beyond Codesa. It questions the justice of the clause in the post-apartheid constitution that enshrines the sanctity of private property. The present debate is more a critique of the TRC than of Codesa.

The law that set up the TRC gave it powers to define a victim. The TRC made two key decisions in this regard. The first was to recognize as victims only *individuals* and not groups. How could this be when apartheid was brazenly an ideology of group oppression and appropriation? Second, the TRC resolved that it would recognize as human rights violations only *violations of the bodily integrity of an individual*. In plain English, it recognized only torture and murder as human rights violations. How could the TRC make a clear-cut distinction between violence against persons and that against property when most group violence under apartheid constituted extra-economic coercion, in other words, it was against both person and property? When the TRC made public its tally of victims of human rights violations as a little over 20,000, it was telling the public that it did not consider victims of pass laws, that is, all blacks in South Africa, or of forced removals, their numbers running in the millions, as victims of human rights violations. Could it be because both pass laws and forced removals were authorized by the law? I have already argued that the TRC accepted as legitimate the rule of law that undergirded apartheid. It defined as crime only those acts that would have been considered criminal under the laws of apartheid. According to the TRC, though crimes were committed under apartheid, apartheid itself – including the law enforced by the apartheid state – was not a crime.

Let me conclude. The South African transition has a double significance. On the positive side is the recognition of political justice outside of the apartheid-established tribal homelands. It has allowed for a focus on the cycle of violence that threatened the very foundation of the political community. It presented the political leadership on both sides with a challenge and an opportunity: to recognize the political fault lines created by

the violence and refound the political community through an inclusive political reform. The result was the foundation of a liberal political order outside of the apartheid-created tribal homelands, an order based on the recognition of individual rights. This achievement reminds us of an older tradition in political theory, one that recognized political violence – conquest, civil war – as foundational to a liberal political order.

The South African transition also has a negative side. That was the failure to think of violence as foundational in a second sense, as the basis of the socio-economic order. The responsibility for this failure lies with the TRC. To their credit, the participants at Codesa were able to take a step beyond apartheid. That step made for a political reform. Precisely because its recommendations were not mandatory, the TRC had the opportunity to explore the future beyond Codesa. To do so, the TRC would have needed to broaden the discussion of justice beyond the political. Precisely because the TRC was not in a position to legislate, it was strategically placed to act as a vehicle for civic education, one that could have pushed forward social justice as a social project. That the opportunity was there should be clear to anyone who has read the five-volume report of the TRC.

But the TRC was unable to take that step. It was unable to think beyond crime and punishment. It failed to go beyond the political reconciliation achieved at Codesa and lay the basis for a social reconciliation, to make reconciliation durable by expanding the notion of justice. To do this, the TRC needed to go beyond its preoccupation with perpetrators to think of beneficiaries of apartheid. Its great failure was to put the question of social justice on the agenda. The TRC was credible as performance, as theatre, but failed as a social project.

To introduce a discussion on violence and society, the TRC needed to go beyond the liberal focus on bodily integrity, and acknowledge the violence that deprived the vast majority of South Africans of their means of livelihood. Had the TRC acknowledged pass laws and forced removals as constituting the core social violence of apartheid, as the stuff of extra-economic coercion and primitive accumulation, it would have been in a position to imagine a socio-economic order beyond a liberalized post-apartheid society. It would have been able to highlight the question of justice in its fullness, as not only as criminal and political, but also as social. The step the TRC failed to take is the challenge South Africa faces today.

For those parts of Africa torn apart by internal political conflict – from Ivory Coast and Liberia to Sudan and Kenya, from Zimbabwe to Congo – the great lesson is to remember what was achieved at Codesa. That achievement was to recognize that the post-Holocaust demand for criminal justice would only feed the cycle of violence. To end that violence would require nothing less than political reform.