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

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Nuremberg is the template through which we have come to define responsibility for mass violence in the post-Cold War period. Whether in Rwanda or Sierra Leone, Congo or Sudan, international criminal trials are the preferred response to extreme violence. The International Criminal Court claims to follow the precedent of Nuremberg. Its preferred credo is that violence must be criminalized without exception, its perpetrators identified and tried in a court of law. I want to suggest an alternative way of thinking of mass violence, as political rather than criminal. Rather than arguing that no one be held responsible for violence, I suggest that we suspend the question of criminal responsibility to arrive at a new political imagination, a new state form, a more inclusive political participation. The point of shifting accent from the criminal to the political is to create a political space for reform so as to reestablish the sovereignty of a *reformed* political order and an associated criminal law.

To make the point, I contrast Nuremberg with the political negotiations that brought an end to political and juridical apartheid, and that were known as Convention for a Democratic South Africa (CODESA). The contemporary discourse on human rights is silent about the end of apartheid. The tendency is to reduce this remarkable political development to biography – an exceptional event tied to an exceptional personality: Nelson Mandela. Africa's problem – the violence of civil wars – is said to require a different solution, Nuremberg-type criminal justice,

calling for punishment, not political reform. I propose to extricate CODESA from the language of compromise and pragmatism so as to highlight what is durable and translatable in this experience. For a start, I will take CODESA as a site from which to reflect on the limitations of Nuremberg.

Nuremberg and CODESA were responses to two great crimes against humanity. But each was based on a radically different understanding of violence and justice, crime and punishment. Whereas Nuremberg shaped a notion of justice as *criminal* justice, CODESA calls on us to think of justice as primarily *political*. Whereas Nuremberg has become the basis of a notion of *victims' justice* – as a complement to victors' justice than a contrast to it – CODESA provides the basis for an alternative notion of justice, which I call *survivors' justice.* To understand the difference between them, we need to appreciate each as a response to particular human wrongs, rather than as abstract declarations of so many human rights.

Nuremberg

Nuremberg was an innovation for a number of reasons. To begin with, Nuremberg zeroed in on the perpetrator. It spoke of war as crime and responsibility for war as an individual and criminal responsibility. The judges at Nuremberg refused to absolve individual officials of responsibility on the grounds that they were carrying out "acts of state". Second, Nuremberg stood for a virtual universalism whereby "the international community" claimed authority to suspend state sovereignty to protect individuals or to impose norms, thereby holding individuals directly accountable to this same "international community." In reality, the "international community" was a euphemism for "a group of 'civilized nations', to which otherwise sovereign polities were ultimately answerable." From this point of view, Nuremberg was a precursor to the International Criminal Court.

Nuremberg was born of a debate among victorious powers on how they should deal with defeated Nazis. Winston Churchill argued that "Hitler and his gang had forfeited any right to legal procedure" and should be summarily shot. Henry Morganthau, Jr., US Secretary of the Treasury and a close friend of Franklin Roosevelt, agreed. Morganthau went further and called for a destruction of German industry so Germany would never again rise as a power. The

opposition was led by Henry Stimson, Roosevelt's Secretary of War, and joined by the Chief Prosecutor at Nuremberg, Robert Jackson. Stimson wanted a trial, not just a show trial, but a trial with due process. In a speech that is said to have persuaded Truman to appoint him as Chief Prosecutor only three weeks later, Jackson argued: "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."

The credibility of Nuremberg was based on its claim to due process. On their part, the accused preferred to be tried by the US than any one else. They expected softer treatment from Americans partly because, unlike the victims – Jews, Russians, French, British – Americans had for the most part enjoyed a grandstand view of the war, and partly because Americans were likely to be allies of Germany in the oncoming Cold War. Nuremberg also needs to be understood as a symbolic and performative spectacle. 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."

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 presumption that justice would follow victory was not new. It followed a long established tradition of how we think of justice, as the result of war between states or revolution between classes: the conflict has ended and there is a clear victor under whose power justice can be administered. This is victors' justice.

Those accused at Nuremberg were charged with four crimes: 1. conspiracy to wage aggressive war; 2. waging aggressive war (The 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); and 4. crimes against humanity (the torture and slaughter of millions on racial grounds). The first thing striking about this list is that conspiracy to wage war and its actual waging (1 and 2) were defined as the principal crimes whereas waging Crimes against Humanity was listed last among the 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. The Tokyo trial took twice as long as did Nuremberg, partly because of long and substantial dissenting opinions. Justice Radhabinod Pal of India argued that the charge of crime against peace 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."

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

The second dimension of Nuremberg was victims' justice. Often thought of as an alternative to victor's justice, it was in fact a complement to it. One of the charges against the accused was that they had committed "crimes against humanity." The charge was formulated first 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."

Not only was "crimes against humanity" the last of the four charges against the accused at Nuremberg, emphasis on it began to diminish as the trial proceeded. The reason was political: as the Cold War developed, US policy towards Germany moved away from a demand for justice, accenting accommodation over punishment. The effect was most evident in the trial of Alfred Krupp, the leading German industrial magnet. The Krupp family had been manufacturers of steel since early nineteenth century and Europe's leading manufacturers and suppliers of guns

and munitions by the First World War. They had armed Germany in three major wars. During World War II the Krupps managed 138 concentration camps. They dotted the map of Europe, and were all privately owned by the Krupps. Alfred Krupp 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. Among those charged at Nuremberg, Krupp was released in 1951 and his fortune was restored. Indeed, there was little justice for victims at Nuremberg. When it came, it was political and it was obtained outside the court.

Justice at Nuremberg was shaped by two prerequisites. I have already discussed the political prerequisite: military victory. The second was the distinctive political logic that shaped the thinking of the Allies. Key to it was the widely shared assumption that there would be no need for winners and losers (or perpetrators and victims) to live together in the aftermath of victory. In a short period of time, the Allies carried out the most far-reaching ethnic cleansing in the history of Europe, not only redrawing political boundaries but also moving millions across state boundaries. The overriding assumption was that there must be an Israel for survivors – even though Israel in particular was created *after* Nuremberg. Indeed, post-Holocaust language reserved the identity "survivors" only for yesterday's victims. Today, this is the case in Israel, as it is indeed in Rwanda. In both cases, the state governs in the name of victims.

Nuremberg was ideologized at the end of the Cold War. Stripped of its historical and political context, the "lesson of Nuremberg" was turned into a prescription. Thus the widespread claim that the call for criminal justice must be the only politically viable and morally acceptable response to mass violence. This lesson was dehistoricized and turned into a formula, the familiar one-size-fits-all syndrome. Cast in these terms, Nuremberg turned into the founding moment of the new human rights movement.

Even though responsibility for crimes against humanity – the Holocaust – was only the last of the four charges the Allies leveled at the Nazis, Nuremberg has come to be seen as the prototype of victims' justice. Informed by the zero-sum logic of criminal trials, victims' justice is driven by the presumption that one is either innocent or guilty. Victim's justice demonizes the other side, and excludes it from participation in the new political order. To understand the limitations of the judicial process, it is worth contrasting it with the political process that made

possible the South African transition from apartheid. The difference was this: the South African transition did not follow an inter-state war (a war between states) but a civil war (internal conflict). Its founding moment was not a criminal trial but political negotiations, called the Convention for a Democratic South Africa (CODESA).

CODESA

The great myth of the South African transition is that it was driven by the TRC. The TRC was designed as a surrogate Nuremberg where the opponents of apartheid sat in judgment over its operatives. Like Nuremberg, the TRC's claim to have granted amnesty for truth should also be seen as a performance. Even though Bishop Tutu in his introduction to the multi-volume report of the TRC publicly celebrated the TRC as evidence of the ethical and political magnanimity of the victims of apartheid, the real exchange took place before the TRC was set up, in the negotiations known as CODESA. It was not an exchange of amnesty for truth, but amnesty for political reform, that reform being the dismantling of juridical and political apartheid. It is not the TRC but CODESA which made for the real political breakthrough in the South African transition.

The ground for CODESA was prepared by an acknowledgement shared by both sides to the conflict. Both recognized that there was little prospect of ending the conflict in the short run. For the leadership on either side, this meant accepting that their preferred option was no longer within reach: neither revolution (for liberation movements) nor military victory (for the apartheid regime) was on the cards. The second best alternative was a negotiated end to the conflict. If South Africa is a model for solving intractable conflicts, it is an argument for moving from the best to the second-best alternative. The quest for reform, for an alternative short of victory, led to the realization that if you threaten to put the leadership on either side in the dock they will have no interest in reform. This change in perspective led to a shift, away from criminalizing or demonizing the other side to treating it as a political adversary.

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 an admission that the assumptions that

drove Nuremberg simply did not hold in South Africa. *First*, the conflict had not ended. How then do you stop an ongoing conflict? How do you convince adversaries that it is in their interest to stop the conflict? To insists that the only morally appropriate response is to hold leaders legally accountable can actually be dangerous and counterproductive. Trials strip alleged perpetrators of all political rights, and exclude them from the process of founding new, more inclusive political orders in the aftermath of civil war. Denying these people a say in how to reform countries emerging from civil war, will only increase the chance that the cycle of violence will repeat itself. This ruled out prioritizing criminal justice and threatening to take the political leadership of either side – the apartheid state or the anti-apartheid movement – to court, because the people you would threaten take to court are the very people whose cooperation you need to negotiate an end to the conflict.

Second, however morally abhorrent, the atrocities that drive mass violence can actually teach us important lessons about what divides societies and what triggers communal violence. More often than not, trials merely put a Band-Aid on the wounds that drive civil conflict within a society, rather than tackling the root causes behind the violence. *Third*, there would be no Israel for victims. It is clear that victims and perpetrators, blacks and whites, would have to live in the same country.

Rather than put justice on the back seat, CODESA prioritized political justice over criminal justice. The difference is that criminal justice targets individuals whereas political justice affects entire groups. Whereas the object of criminal justice is punishment, that of political justice is political reform. The difference in consequences is equally dramatic. The pursuit of political justice requires that you decriminalize the other side. This means to treat the opponent as a political adversary rather than as an enemy. This makes sense only because the goal is no longer to punish individual criminals, but to change the rules and thereby reform the political community. Morally, the objective is no longer to avenge the dead but to give the living a second chance. This is clear from the end result of the political reform in South Africa: its point was not to bring the perpetrators of apartheid to justice but to dismantle legal and political apartheid and thereby redefine a more inclusive citizenship.

CODESA unfolded in fits and starts. During the first phase, from December 1991 to May 1992, each side tried to muster a consensus – and if not that, at least a clear majority – within its ranks. Faced with the by-election victory of the ultra-right white Conservative Party in Potchefstroom, the National Party government called a whites-only referendum in March 1992. The ANC responded to the 'Whites only' referendum with 'rolling mass action' of May and a mass stayaway of June 12. Each side turned to political violence, and the threat of more, to mobilize its own ranks and paralyze the opposition. When police responded to the June 12 stayaway with the massacre at Boipatong, COSATU led yet another stayaway, that on 3 August, and the ANC organized a march on Ciskei on 7 September.

Intermittent violence not only triggered heightened mobilization; it also underlined the urgency of further negotiations, ushering a new phase. The two sides drafted a Record of Understanding on 26 September 1992. This was an agreement that a democratically elected assembly would draft the final constitution but within a fixed time-frame and within the framework of constitutional principles agreed upon by a meeting of negotiators appointed by all parties. In practice, the democratic process unfolded within limits established by the two principal parties: the National Party (NP) and the ANC.

As the ANC prepared to make historic concessions, the ground was cleared by "sunset clauses" floated by the General-Secretary of the Communist Party, Joe Slovo. In an article in the party journal, *The African Communist*, Slovo called for power-sharing between the two sides and, in that context, retention of the old bureaucracy (including the police, the military and the intelligence services) and, finally, a general amnesty in return for full disclosure. Joe Slovo did not need to state what was clear to one and all: that the real *quid pro quo* for these concessions was not full disclosure but the dismantling of juridical and political apartheid and the introduction of electoral reforms that would pave the way for majority rule. An acceptance of "sunset clauses" meant that South Africa would not have its own version of Nuremberg.

The Multi-Party Negotiating Process that began on 5 March 1993 at Kempton Park was pushed forward by events outside it. The shared sense of a gathering storm both narrowed the initiative to principals in the negotiations (the ANC and the NP) and focused their attention on the concessions necessary to clinch a deal in the short time at hand. This process and its

outcome have been ably summed up in an otherwise tedious book by Richard Spitz with Mathew Chaskalson, titled *The Politics of Transition: A Hidden History of South Africa's Negotiated Settlement*. The start was sluggish. Momentum followed the assassination of Chris Hani on April 10, 1993. The parties agreed on June 1 that elections be held ten months later, on 27 April 1994. The shared sense that storm clouds were gathering on the horizon made it possible to truncate discussions on fundamentals, such as "constitutional principles" and the constitution itself. Both sides took a leaf from the process leading to the drafting of Namibia's 1982 Constitutional Principles – which had been formulated by the apartheid regime and endorsed by the big powers, and which subordinated the democratic process to a deal between principals. This deal was sanctified as "the Interim Constitution" and defined the parameters within which the democratic process would unfold. Key decision-making power was ceded to technical committees (in turn technically assisted by the Harvard Negotiation Project), said to be necessary to prevent and break deadlocks in ongoing negotiations. Known as "sufficient consensus", the process allowed the two principals, the ANC and the NP, to meet outside the formal discussion and define agreement on key issues. The combination of binding principles agreed upon by unelected negotiators and the power of the Constitutional Court to throw out a constitution drafted by an elected assembly was a flagrant violation of the democratic process. Growing numbers in the population at large came to consider this short-cut a political necessity. The result was both the end of apartheid and the inauguration of "majority rule" circumscribed by constitutionally guaranteed "minority rights."

These constitutional Principles included a number of key provisions. The *first* was the independence of key central institutions: the Public Service Commission, the Reserve Bank, the Public Protector, the Auditor General, universities and schools. 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. The *second* provision was the inclusion of a constitutionally-guaranteed Bill of Rights that included protection of private property as a fundamental human right. At the same time, the clause providing the restoration of land to the majority population was placed outside the Bill of Rights. Where property rights were in clash, as that of white settlers and black natives, the former received constitutional protection as part of the Bill of Rights, the latter only a formal acknowledgement in law.

Even more important concessions were made at the local level, an outcome made possible by two political forces that came together in the course of the negotiations: white settlers and apartheid-era Native Authorities. In contrast to the arrangement at national and provincial levels, the passage of Local Government Transition Act of 1993 entrenched consociational government at the local level. To begin with, all executive decisions, including those regarding the budget, would be passed by consensus or, in its absence, by a two-thirds majority. When it came to small towns, the law called for setting up Transitional Councils, but only with the support of 80% delegates. Spitz and Chaskalson note: "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 "ward limitation system" combined two *methods of representation* – proportional (40% seats) and constituency-based (60% seats) – to guarantee "non-blacks" 30% of the seats. Finally, the 1993 Act required that local government taxes and levies be based on a uniform structure for its area of jurisdiction. A revised Clause 17 effectively prevented new local governments from taxing white areas to spend more revenue in black areas. These Councils, in turn, were required to make decisions by consensus. The combined effect of these two provisions was to entrench white privilege in law.

The outcome of CODESA was contradictory. On the positive side, it enabled a trade-off between criminal and political justice. The gist of the trade-off was a blanket amnesty in return for a political reform that dismantled political and juridical apartheid. On the negative side, it put a constitutional lid on measures to advance social justice. Political justice came at the expense of both criminal and social justice. If the former facilitated the transition to majority rule, the latter prevented that majority from using its powers to facilitate meaningful social change.

The trade-off notwithstanding, CODESA pointed in a direction different from "lessons of Nuremberg." Whereas Nuremberg was backward-looking, preoccupied with justice as *punishment*, CODESA was forward-looking: it sought to *reform* the political community so as to include those previously excluded. Theoretically, CODESA signifies a shift of paradigmatic proportions – from the pursuit of victims' justice to that of survivors' justice – where the meaning of survivors is changed to include all those who survived apartheid, yesterday's victims, yesterday's perpetrators and yesterday's beneficiaries (presumed to be bystanders).

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 it was followed by the settlement in Mozambique. The outcome of the civil war in Uganda made for a political stalemate in a situation in which one side (the National Resistance Army) had 'won' militarily in a war waged in the Luwero Triangle (a small part of the country), but lacked an organized political presence in large sections of the country. Its political resolution was a power-sharing arrangement called the "broad base", which gave positions in the cabinet to those opposition groups that agreed to renounce the use of arms even if not their political objectives. The settlement in Mozambique decriminalized Renamo, the principal opposition movement whose practices included widely publicized acts of terror (kidnapping of children and torture of civilians), so as to include it in the political process. Instead of being tried in court, its representatives came to sit in parliament and compete in national and local elections.

It is worth noting two sets of contrasting approaches to political violence. The first is between the political process ('broad base') through which the NRM government in Uganda responded to atrocities of the Amin regime and of other groups that fought the Obote II and the Lutwa regimes, and the ICC-led judicial process through which the same government has responded to the LRA. The second is the contrast between the NRM's response to LRA (a combination of war and the judicial process) and the political process through which Frelimo responded to Renamo, a movement remarkably similar to LRA in its use of terror as a propaganda weapon. It is not accidental that whereas Renamo has been incorporated into the political process in Mozambique, all that the NRM has managed to do in Uganda is to export the war against the LRA to the region.

The logic of Nuremberg flowed from the context of inter-state war, and it ill-fits that of mass violence internal to a society. Nuremberg was the outcome of a war between states in which one side was victorious; the victors 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. In contrast, CODESA was born of a radically different logic: that yesterday's victims and perpetrators would have no choice but to coexist in a single society.

To understand why this makes a radical difference, let us shift focus from human rights to human wrongs. Human rights may be universal, human wrongs are specific. To focus on human wrongs is to underline the *issues* that drive the violence and, then, to produce a *narrative* that highlights the cycle of violence. To break out of the cycle of violence one needs to displace the victim narrative with the narrative of the survivor. A survivor narrative is less perpetrator-driven, and more issue-driven. Atrocities become part of a historical narrative, no longer seen as so many stand-alone acts but as part 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 the perpetrator and to de-sanctify the victim.

TRC

The significance of CODESA lies in its shift of focus from the criminal to the political. This shift is both positive and negative. On the positive side, CODESA focused on the cycle of violence as threatening the very foundation of a political community. In doing so, it presented us with a challenge: to recognize in the aftereffects of violence an opportunity to reimagine the political community and build it on a new foundation. The point is not new. It recalls an older tradition in political theory (from Thomas Hobbes to Hannah Arendt) that recognized political violence – conquest, civil war – as foundational to a new political order. On the negative side, CODESA obscured the ways in which violence was foundational to the socio-economic order. By ignoring the connection between the political and the economic, it obscured, to use the language of Marx, the ways in which extra-economic violence was key to primitive accumulation.

The downside of the South African transition was silence as regards the social question. To identify where lay the responsibility for this failure, we need to distinguish between the political and the discursive agenda of the transition from apartheid. Given the overall political context of

the early 1990s – the end of the Cold War globally and a local political stalemate characterized by neither victory nor defeat – it would be naïve to expect social justice to have been on the political agenda in South Africa. But it was not unrealistic to expect it to be on the discursive agenda. The responsibility for removing it from the discursive agenda lay with the TRC.

The law that set up the TRC gave it powers to define a victim. In this regard, the TRC made three key decisions. First, it *individualized* the victim. This made little sense since it was precisely the branding in law of an entire group as a 'race' ('black', 'African') that made apartheid "a crime against humanity." Second, the TRC defined a human rights violation as an action that violated the bodily integrity of an individual. In a context where the point of most violence was to forcibly appropriate those racially targeted of their means of livelihood, this assumption shifted attention away from the day-to-day violence of apartheid, the violence that normalized apartheid, such as *forced removals* that affected millions and *pass laws* that affected all black people to its spectacular violence which targeted a small minority of activists. Finally, the TRC also individualized the responsibility of the perpetrator, thereby obscuring the fact that the violence of apartheid was mainly that of the state, not of individual operatives. The TRC's insistence on defining the victim narrowly was key to silencing any discourse on social justice.

Here then is the key difference between the TRC and Nuremberg. The TRC hoped to function as a surrogate Nuremberg by displacing the logic of crime and punishment with that of crime and confession. The TRC held individual state officials criminally responsible, but for only those actions that would have been defined as crimes under apartheid law. It distinguished between the law-driven violence of the apartheid state – pass laws, forced removals, and so on – as legal if not legitimate, and the *excess* violence of its operatives, as illegal. In doing so, it normalized the violence of apartheid and directed attention at the excess violence of its operatives. The result was to limit criminal responsibility to actions that exceeded political orders, and thus to actions that would have been crimes under apartheid law. Nuremberg, in contrast, refused to accept law as an alibi; it refused to draw a distinction between law-governed acts and acts that transgressed existing law. For this reason, the TRC was unable to achieve even that which Nuremberg did: to compile a comprehensive record of the atrocities committed by the apartheid regime. The TRC should be seen as a special court within the framework of apartheid

law, one whose official narrative left apartheid – the legalized exclusion, oppression and exploitation of a racialized majority – out of its narrative of 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 is how Commissioner Wynand 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*" (*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." Malan was the only one to state forthrightly the assumptions that made sense of the Commission's work. My only problem is that he ascribed these to the Act, and not to the Commission's interpretation of the Act.

Malan called for a shift from the plane of morality to that of history, and from a focus on the personal and the individual to one on community. In Malan's words: "Slavery is a crime against humanity. Yet Paul, in his letters to the Ephesians and Colossians, is uncritical of the institution and discusses the duties of slaves and their masters. Given a different international balance of power, colonialism too might have been found a crime against humanity." Malan called on the 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." Malan was right to suggest that recognizing victims and perpetrators of apartheid as agents framed by a common history would be a 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.

When it comes to apartheid, one can distinguish between two debates in contemporary South Africa. One concerns the perpetrator and highlights the need for criminal justice. The other concerns the beneficiary and leads to the demand for social justice. It is worth noting that there

is hardly a debate on the perpetrator and a demand for criminal justice in contemporary South Africa; the debate centers on the beneficiary of apartheid and the necessity for social justice.

The lesson of South Africa is to look for a solution within the parameters of the problem and not outside it. The point is to strive for internal reform, not external intervention. The South African transition began as a pragmatic search for a way out of a cul-de-sac in which military victory had evaded both sides – and criminal trials were out of question. This search for a second-best solution provides us with raw material for a breakthrough in the search for an effective anti-dote to civil war and mass violence in post-colonial Africa. Rather than treat it as exceptional, we need to turn to the end of apartheid for key lessons on how to bring civil conflicts to a political conclusion.

The South African transition calls for a deep reflection on the relation between politics and law – on the need to create an inclusive political order as the basis of an inclusive rule of law. The thrust of apartheid, as of indirect-rule-colonialism across the African continent, was that it used law to privilege certain groups and to penalize other groups, thereby fragmenting societies. It should not be surprising that most colonized societies have experienced one or another form of civil conflict as societies divide around questions of who was complicit in colonial rule and who was not, who belongs and who does not belong to the nation, and thus who should have right to citizenship and who should not. The challenge that faces every post-colonial African country is how to reform the political order and create a viable political society. As a reform that turned its back on revenge, the moral significance of CODESA is that it has given the living a second chance; and its political significance is that it has made possible the creation of a new political community of survivors. As such, it has the potential of showing the way forward in a string of civil wars that today mark public life on the African continent.