

## FROM THE LIBERATION STRUGGLE TO “PURE AVARICE”: INTERNATIONAL CRIMINAL LAW AND THE FRAMING OF CRIME IN SUB-SAHARAN AFRICA

### DA LUTA DE LIBERTAÇÃO À “AVAREZA PURA”: DIREITO PENAL INTERNACIONAL E O ENQUADRAMENTO DO CRIME NA ÁFRICA SUBSAARIANA

Richard A. Wilson\*

**Abstract:** The view advanced in this article is that over the past few decades, the efforts of Sub-Saharan Africa elites to promote human rights discourse and establish liberal institutions of the nation-state have constrained the space for justifiable law-breaking and enlarged the category of criminality. Taken together, national and international security are now pursued more through the idiom of crime and rule of law than through the political process. As a result, there is more crime than there used to be in sub-Saharan Africa. It means that law-breaking and collective political opposition is more often construed as criminal behavior. Not only have the classifications changed, but so have the ways of knowing about violence in Africa, and all the while, a legal prism for apprehending transgressions has gained greater prominence. This paper illustrates this general argument by reference to South Africa during its transition from apartheid in the 1990s and to the international criminal tribunals presently prosecuting violations in the Democratic Republic of the Congo and Sierra Leone. The argument works best for those post-conflict countries affected by liberal political and legal reforms and the interventions of international criminal law, and that now includes many sub-Saharan countries, but not all. It does not apply to relatively peaceful and prosperous countries such as Tanzania or Botswana. It does not work for Zimbabwe, but may once a post-Mugabe transition is underway.

**Keywords:** Human rights. Crime. Rule of law

**Resumo:** A visão apresentada neste artigo é que, ao longo das últimas décadas, os esforços das elites da África subsaariana para promover o discurso dos direitos humanos e estabelecer instituições liberais do Estado-nação dificultou o espaço para justificar a violação da lei e ampliou a categoria de criminalidade. Tomadas em conjunto, a segurança nacional e internacional são agora mais realizadas através da linguagem do crime e do Estado de direito do que através do processo político. Como resultado, há mais crime do que costumava haver na África subsaariana. Isso significa que a violação à lei e a oposição política coletiva são mais frequentemente interpretados como comportamento criminoso. Não só as classificações mudaram, mas também os modos de saber sobre a violência na África, e durante todo o tempo, um prisma legal para apreender transgressões ganhou maior destaque. Este trabalho ilustra este argumento geral por referência à África do Sul durante a transição do apartheid na década de 1990 e para os tribunais penais internacionais, que atualmente acusam a República Democrática do Congo e a Serra Leoa de violações a direitos humanos. O argumento funciona melhor para os países pós-conflito afetados por reformas políticas e jurídicas liberais e as intervenções de direito penal internacional, e que agora inclui muitos países da África subsaariana, mas nem todos. Não se aplica a países relativamente pacíficos e prósperos como a Tanzânia ou Botswana. Ela não funciona para o Zimbábue, mas pode uma vez uma transição pós-Mugabe está em andamento. Palavras-chave: Direitos humanos. Crime. Estado de direito.

\* Richard A. Wilson, University of Connecticut School of Law, Estados Unidos, richard.wilson@uconn.edu

## 1 Introduction

Recent initiatives in human rights and the rule of law in Africa are part of a continent-wide project of liberal reform pursued by both national governments and international institutions that have altered the landscape of law and governance, albeit unevenly.<sup>1</sup> The central questions motivating this essay are; how has the way in which law-breaking is defined and explained in Sub-Saharan Africa changed over the last 20 years, and how have national and international human rights institutions such as the South African Truth and Reconciliation Commission and the International Criminal Court shaped societal and legal categories of criminality? Since it aspires to say something about both the law and popular discourse on crime, this article approaches these questions through legal judgments and African literature in the hope that it can offer a distinctive perspective on the political and legal changes in sub-Saharan Africa.

First of all, I need to set out my understanding of the term “crime.” It still bears reiterating that this is not a self-evident category, but one that possesses a shifting history and genealogy. A compendious category, crime may or may not involve violence against the person, and may run the gamut from the inter-personal to widespread armed confrontations between collective actors. In positive law, crime is simply defined as law-breaking, whatever the law is at any particular moment, and regardless of whether the law is moral or principled or legitimate, or not. What legal positivism does not explain adequately is how the boundary and content of crime is the site of intense contestation between political actors and changes over time as a result.<sup>2</sup>

At specific historical junctures in twentieth century Africa, and especially during the decolonization process, some acts of law-breaking were accompanied by an ideological justification that lifted them out of the category of common crime and framed them as dignified and transcendent acts of defiance. During colonial and authoritarian post-colonial rule, expressions of illegality inspired by a metanarrative and a political teleology (be it Marxism or anti-colonialism) were construed less as “crime” than as “the struggle.” Such acts were lauded by colonized peoples as forms of legitimate protest that advanced the self-determination of a group or a nation. During the anti-colonial ferment of the mid twentieth century, common crime in Africa became a strange kind of residual category, defined negatively by its lack of political content. In this picture, crime is law-breaking without an accompanying metanarrative, the simple transgression of the statutes, in the absence of any higher ethical justification.

This contrast between law-breaking with a *telos* and purposeless crime is not a binary distinction, but a continuum, since illegal behavior has a variety of

---

<sup>1</sup> This article was first presented as keynote lecture at a conference on “Crime and its Fictions in Africa” held at Yale University in March 2012. I thank the conference organizers Jacob Dlamini, Jeanne-Marie Jackson, and Nathan Suhr for their invitation to present these ideas.

<sup>2</sup> As Roger Cotterell notes, legal positivism rigidly separates fact and value, ignores values and attitudes in its elevation of rules, and therefore cannot explain why rules change. Roger Cotterell (1992) *The Sociology of Law*. 2<sup>nd</sup> edition. London: Butterworth. Pp. 8-15.

subjective motivations, as well as social and political contexts. What constitutes “common crime” in any moment is the product of an historical struggle over that sliver of a distinction between criminal and political behavior, between vulgar criminality and the transcendental violation of unjustified laws. Rival political actors seek always to push the barrier separating illegitimate crime from valid protest in the direction that suits their aims and objectives. We could illustrate this point by considering two colorful figures in the politics of crime in the twentieth century; Jean Genet and Margaret Thatcher. Jean Genet, French dramatist and advocate of the causes of the Black Panthers and Palestinian Liberation Organization, famously maintained that all crime is political in capitalist society because it is an active expression of the self-determination of the poor and oppressed.<sup>3</sup> British Prime Minister Margaret Thatcher took the opposite view in 1981 when faced with demands for political status by Irish Republican Army prisoners on hunger strike in the Maze Prison in Northern Ireland.<sup>4</sup> Despite ten deaths and immense international pressure, Thatcher denied republican prisoners’ claims for political status, insisting they were no more than common criminals.<sup>5</sup>

Jean Genet and Margaret Thatcher represent polarized extremes that bookend the discourse on crime in Africa. The view advanced in this article is that over the past few decades, the efforts of national elites to promote human rights discourse and establish liberal institutions of the nation-state have constrained the space for justifiable law-breaking and enlarged the category of criminality. What is remarkable is that they have done so with an alacrity that evaded previous authoritarian regimes. Moreover, the ascent of institutions of international criminal law such as the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone and the International Criminal Court since the early 1990s further expanded the category of criminality to encompass newer international crimes such as crimes against humanity and genocide. Taken together, national and international security are now pursued more through the idiom of crime and rule of law than through the political process. As a result, there is more crime than there used to be in sub-Saharan Africa. This does not necessarily imply that there is more law-breaking, although I am not sure how we could ever know, given the paucity of reliable sources. Instead, it means that law-breaking and collective political opposition is more often construed as criminal behavior, in part because the political narratives that once sanctioned transgression –and in particular Marxism and the self-determination of peoples–have fallen away, and as the institutions and discourses of liberal democracy and international law have gained traction. Not only have the classifications changed, but so have the ways of knowing about violence in Africa, and all the while, a legal prism for apprehending transgressions has gained greater prominence.

<sup>3</sup> Jean Genet (1994) *The Thief’s Journal*. London: Grove Press.

<sup>4</sup> “Thatcher-Thirty Years On” BBC News: Northern Ireland. 28 August 2009. [http://news.bbc.co.uk/2/hi/uk\\_news/northern\\_ireland/8226806.stm](http://news.bbc.co.uk/2/hi/uk_news/northern_ireland/8226806.stm)

<sup>5</sup> The same dynamic played out in South Africa where Robben Island prisoners such as Nelson Mandela campaigned to be categorized as political prisoners rather than as common criminals.

I illustrate this general argument by reference to South Africa during its transition from apartheid in the 1990s and to the international criminal tribunals presently prosecuting violations in the Democratic Republic of the Congo and Sierra Leone. The argument does not work perfectly for all African countries over the past two decades, but it works quite well for the cases under consideration. The argument works best for those post-conflict countries affected by liberal political and legal reforms and the interventions of international criminal law, and that now includes many sub-Saharan countries, but not all. It does not apply to relatively peaceful and prosperous countries such as Tanzania or Botswana. It does not work for Zimbabwe, but may once a post-Mugabe transition is underway.

## 2 The obscuring of crime in the anti-apartheid movement

We begin with South Africa in the throes of its transition from apartheid, roughly during the years 1990-1994. This final chapter in African decolonization has been widely characterized as a “peaceful transition,”<sup>6</sup> but this formulation is perplexing. The death toll from what observers called “the violence”-note the use of an anodyne term to side-step any political connotations -was spectacularly high during the peace negotiations. Human rights monitors estimated that 14,000 people –most of them Africans-were killed in politically-related incidents between 1990-1994.<sup>7</sup>

Since the 1950s, the ruling National Party had sought to criminalize the anti-apartheid movement whenever possible, referring to African National Congress (ANC) or Pan Africanist Congress (PAC) activists as common criminals and terrorists in an attempt to deny them any privileged political status. It would be too much to say that all opposition politics was by definition criminal, since As Rick Abel demonstrated in *Politics By Other Means*, trade unions and religious groups engaged the law to overturn key tenets of apartheid.<sup>8</sup> While opposition figures used the apartheid legal system strategically, the ANC’s program of “making the townships ungovernable” meant that for anti-apartheid activists, law-breaking was sanctioned on the grounds that it contributed to the destabilization of an apartheid order that had, after all, been declared a crime against humanity by the United Nations General Assembly in 1973.<sup>9</sup> Refusing to pay electricity bills, building shacks on government land, brewing African beer and enforcing boycotts at the barricades all chipped away at the edifice of the state. The anti-apartheid movement was aware of crime, both petty and organized, in the townships, but never considered it a pressing issue. Indeed, the South African film *Mapantsula* (1988) assured its

<sup>6</sup> Roelf Meyer: Celebrating South Africa’s peaceful transition. <http://reconciliationbarometer.org/volume-eight-2010/roelf-meyer-celebrating-south-africa%E2%80%99s-peaceful-transition/>

<sup>7</sup> Truth and Reconciliation Commission South Africa, Report. Vol. 2, p. 584. Cape Town: Juta and Co. <http://www.justice.gov.za/trc/report/index.htm>

<sup>8</sup> See Abel, Richard 1995. *Politics by Other Means: Law in the struggle against apartheid, 1980–1994*. London: Routledge.

<sup>9</sup> International Convention on the Suppression and Punishment of the Crime of Apartheid (30 November 1973). Enigmatically, the 2002 Rome Statute of the ICC outlawed the crime of apartheid eight years after apartheid ended in South Africa.

audience that even the most ruthless African gangsters could be tamed and brought into the liberation struggle. In observing the ANC and National Party’s policies on crime under apartheid, we can see Genet (all crime is political) and Thatcher (political opposition is criminal) strolling along, hand in hand.

In 1994, the first multiracial elections in South Africa ushered in a constitutional democracy founded upon a Bill of Rights and all the classic trappings of a liberal state. Government officials and institutions, motivated by a novel concern with human rights, promulgated new distinctions between legitimate and illegitimate law-breaking. The brittle Government of National Unity (1994-6) immediately embarked upon a program of criminalizing the politically-motivated violations of the past, if only to then indemnify perpetrators from legal responsibility. Looking to shore up its fragile ability to govern, the new regime enlarged the category of crime to include those acts of defiance that ANC comrades had proudly championed during the anti-apartheid struggle. The centerpiece of the new government’s policy, the Reconstruction and Development Program, launched a nationwide campaign called *Masakhane*<sup>10</sup>, urging residents of African townships to pay for their utilities and local municipal services.<sup>11</sup> Community policing forums were created to restore faith in the South African Police Service. Now that it held the reins of the state, ANC leaders tried to put the genie of mass non-compliance and illegality back into the bottle by condemning the very acts it had condoned only a year or two earlier.

One of the challenges that the Government of National Unity faced was how to address the widespread and systematic human rights violations of the apartheid era—were they to be construed as criminal or political, or both? The 1995 enabling legislation of the Truth and Reconciliation Commission mandated a panel of judges to grant amnesty to those individuals who committed an “act associated with a political objective committed in the course of the conflicts of the past.”<sup>12</sup> Such acts must not have been carried out for “personal gain” or “out of personal malice, ill-will or spite.”<sup>13</sup> Here was a novel reframing of criminality in the new liberal order that firmly divided criminal acts committed for personal gain from acts committed for a political objective. Individuals whose actions fell into the latter category could receive amnesty, but only if they publicly acknowledged their acts as politically-motivated violations. The legal and political regime of the “new South Africa” cast transgressions against apartheid state laws as pardonable, but demanded a form of individualized and public penance in the form of an open admission as violations before the TRC’s amnesty committee. Putting themselves in the role as perpetrators of human rights violations was something most ANC activists were loath to do, and by and large only the indigent, marginal and imprisoned applied for amnesty. The ANC filed a collective petition for am-

<sup>10</sup> *Masakhane* means, literally, “Let Us Build Together.”

<sup>11</sup> For an excellent ethnographic account of the struggle over services in South African townships, see Antina Von Schnitzler (2008). “Citizenship Prepaid: Water, Calculability and Techno-Politics in South Africa” *Journal of Southern African Studies*, Vol. 34, No. 4, December 2008.

<sup>12</sup> Promotion of National Unity and Reconciliation Act 34 of 1995, S.20.b

<http://www.justice.gov.za/legislation/acts/1995-034.pdf>

<sup>13</sup> *Ibid.*, 20.3.f.i-ii

nesty for its members and it was angrily thrown out by Desmond Tutu, chairman of the Truth and Reconciliation Commission and former Archbishop of Cape Town. Many ANC leaders did not even wish to be construed as “victims” and Ministers in the Government of National Unity such as Mac Maharaj, Jay Naidoo and Dullah Omar who had been detained (and some of them tortured) as activists eschewed any appearance before the Commission’s human rights violations committee. With this retrospective reconfiguring of the boundary between crime and politics, the views represented by Thatcher and Genet were being abandoned, along with the politically-charged discourse on crime that had characterized the apartheid era. A liberal conception of crime was being imposed on the South African political context, built on the Kantian premise that persons are ends in themselves and that unjust means are not justified by a just war.

Liberal formulations also informed the TRC’s ethical response to violations carried out by the anti-apartheid movement. Drawing on the distinction between *jus ad bellum* and *jus in bello* that is the foundation of international humanitarian law, the Truth and Reconciliation Commission claimed that a just war had been fought against apartheid but that unjust means had been used, for instance when suspected spies were detained and tortured in ANC camps or doused in gasoline and burned alive in the townships.<sup>14</sup> In human rights violations hearings, the TRC engaged in a moral equalization of acts, treating crimes committed by the security service and pro-government Inkatha Freedom Party as morally equivalent to those committed by the anti-apartheid movement.<sup>15</sup> The TRC’s pronouncements met with a firestorm of protest from ANC stalwarts, many of them government ministers at the time, who still adhered to the anti-apartheid movement’s credo that no act could be criminal if it advanced the aims of the liberation struggle. The TRC countered with a view long espoused by South African liberals and indeed liberals everywhere, that the individual’s right to life, liberty and due process cannot be sacrificed for collective goals, no matter how noble. The elevation of individual human rights and the stripping away of ethical justifications for violations under apartheid created a new prism through which crime would be framed in post-apartheid South Africa.

### 3 South African crime noir

From 1994 onwards, crime became the primary idiom in which virtually all political and social discussions took place in South Africa. It is safe to say that for the first ten years after the transition from apartheid, crime garnered more attention in the public space than any other topic. Crime was on the radio and television all day and night—not only on the news and current affairs programs, but also in the soap operas and dramas. It was as if South Africans could not consume

---

<sup>14</sup> Several hundred people were burned alive with tires around their necks, a practice called “necklacing” and many were later found to be innocent of the accusations against them.

<sup>15</sup> On the moral equalization of crimes see Richard A. Wilson (2001) *The Politics of Truth and reconciliation in South Africa: Legitimizing the Post-Apartheid State*. Cambridge: Cambridge University Press. Pp. 111-114.

enough fictional representations of crime. This was the case in part because it was a euphemistic language, a way of talking about racial politics without overtly talking about racial politics, but also because the crime statistics for all categories of crime-violent robbery, rape, murder and assault escalated steeply after 1994.<sup>16</sup> Perhaps appropriately, the South African Institute of Race Relations compiled the most reputable figures at the time on violent crime and in 1997 it reported 12,900 rapes and 54,000 motor vehicle thefts in just one province- Gauteng- that includes Johannesburg. There were nearly three times the number of murders in South Africa in 1997 than there were in 1986, the zenith of political resistance to apartheid.<sup>17</sup> By 2002, the British Broadcasting Company designated South Africa as the most dangerous country in the world not at war.<sup>18</sup> According to most indices, the homicide rate remains ten times greater than in the USA, which itself has one of the highest murder rates among industrialized nations.<sup>19</sup>

While there are many possible explanations for this increase including a shift in policing resources from white to African neighborhoods and better reporting from the populace, all citizens of post-apartheid South Africa experienced a growing sense of personal insecurity. In this respect, South Africa was no different than many other post-conflict countries in Latin America and Africa that did not have enough jobs for a generation of unemployed, disaffected young men with ready access to weapons.

The account thus far, however, is quite general and does not consider the existential dimensions of crime in the new South Africa, so I turn to few fiction writers to learn more about how crime resonated in the country’s various constituencies.<sup>20</sup> In parts of the white community, feverish conversations on crime became a way of talking about deeply-held fears of racial revenge and often served as a pretext for abandoning faith in the post-apartheid political project. In J.M.Coetzee’s *Disgrace* (1999), the protagonist college professor David Lurie, suffers a series of personal humiliations- the first before a workplace inquiry that emulates the Truth and Reconciliation Commission.<sup>21</sup> His colleagues, sitting in moral judgment, demand remorse and repentance for his sexual transgression with a female student, Melanie, that Lurie is too imperious to concede. Dismiss-

<sup>16</sup> Up until 1994, crime statistics had showed a gradual drift upwards. After 1994, they escalated sharply. Of course there is much contention on crime statistics, the consensus is that after 1994, violent crime increased markedly. One of the more reliable sources used for this article is South African Crime Quarterly published by the Institute for Security Studies based in Tshwane/Pretoria and Cape Town. For an excellent overview of crime in South Africa, see the many publications of historian Gary Kynoch, for example, “Crime, Conflict and Politics in Transition Era South Africa” *African Affairs*, 416, 104 (2005).

<sup>17</sup> 24,588 versus 9,913. South African Institute of Race Relations 1998. South Africa Survey. SAIRR: Johannesburg, pp.20; 29-47.

<sup>18</sup> Talking Point: Have you experienced crime in South Africa? Tuesday, 16 April, 2002. [http://news.bbc.co.uk/2/hi/talking\\_point/1924251.stm](http://news.bbc.co.uk/2/hi/talking_point/1924251.stm)

<sup>19</sup> Although it should be noted that since 2010, homicides nationally in South Africa have shown a marked decrease, “Counting South Africa’s crimes.” *Mail and Guardian* (South Africa), 9 September, 2011, <http://mg.co.za/article/2011-09-09-counting-south-africas-crimes>.

<sup>20</sup> One book published at the same time worth reviewing here is Jonny Steinberg’s *Midlands*. Johannesburg : Jonathan Ball Publishers, 2002.

<sup>21</sup> J.M.Coetzee. (1999) *Disgrace*. London: Secker and Warburg.

sed from his teaching position, he takes refuge at this daughter Lucy's farm in the Eastern Cape where impoverished African neighbors drag him from his daughter Lucy's rural home and beat him senseless. They brutally rape Lucy, who refuses to report the sexual assault to the police and seems to construe it as a form of inter-racial restitution.<sup>22</sup> She chooses to raise the resulting child with a forbearance that David, representing the older generation, cannot countenance. In the sharpest exchange between David and Lucy, he exclaims, "Vengeance is like a fire. The more it devours, the hungrier it gets...Do you hope that you can expiate the crimes of the past by suffering in the present?"

In many ways, Coetzee's *Disgrace* echoes an earlier non-fiction account-Rian Malan's *My Traitor's Heart: A South African Exile Returns to Face His Country, His Tribe, and His Conscience*.<sup>23</sup> A crime reporter for *The Star* of Johannesburg, Malan wrote his book at the end of the apartheid era, shortly before the release of Nelson Mandela and the onset of the official peace negotiations. Each book is a deeply conservative counsel of despair, portraying Africans as inherently predisposed towards vengeful acts against whites and bent on winning through violent crime what they could not accomplish on the battlefield-namely driving all whites out of Africa and seizing their land and property. Yet while Malan's nihilist heart beat to the rhythm of the conservative *laager*, Coetzee articulated the perspective of many erstwhile liberals. JM Coetzee was after all, the author of *Waiting for the Barbarians* (1980) and the scourge of colonialism and white supremacy. *Disgrace* signified Coetzee's goodbye letter to Africa-his final novel before emigrating to Australia and renouncing his South African citizenship.

While many elite African politicians dismissed the strident discourse on crime as the new South African "white whine," impoverished Africans faced ever greater threats to their security in their daily lives. There was a palpable sense of both shock and vindication among urban Africans when *The Star* reported in May 1997 that over half the car hijackings in Gauteng province took place in Soweto, and not in the exclusive, mostly white, neighborhood of Sandton.<sup>24</sup> At the time, I was conducting interviews with survivors who testified before the TRC in the townships around Johannesburg for my 2001 book *The Politics of Truth and Reconciliation in South Africa*. Seemingly every conversation got round to the latest outrages of the *tsotsis*-or township gangsters-and later the title of a 2005 South African film written by Athol Fugard.<sup>25</sup> In the African townships, residents would frequently inquire, "Aren't you afraid to be here?" Of course, I was frightened when a group of men in an Orange Mazda tried to drive me off the main road through Sebokeng at 11PM, and when a man got into my car as I waited for a contact outside the Sebokeng post office and offered to sell me rough diamonds from Angola. And

<sup>22</sup> For an insightful treatment of Lucy's response to the sexual assault, see Maria Lopez (2010) "Can We Be Friends Here? Visitation and Hospitality in J.M. Coetzee's *Disgrace*," *Journal of Southern African Studies*, 36:4, 923-938.

<sup>23</sup> Rian Malan (1989) *My Traitor's Heart: A South African Exile Returns to Face His Country, His Tribe, and His Conscience*. New York: Grove Press.

<sup>24</sup> *Star* 9 May 1997.

<sup>25</sup> Richard A. Wilson (2001) *The Politics of Truth and reconciliation in South Africa: Legitimizing the Post-Apartheid State*. Cambridge: Cambridge University Press.

also the time at a petrol station when a teenager approached me and asked to try on my sunglasses. Eager to avoid a physical confrontation over a mere pair of sunglasses, I handed them over and he strolled with a gangster shoulder roll over to a group of admiring friends. He then unexpectedly returned and handed my sunglasses back to me with a polite, even effusive, thanks.

But listening more closely, I realized that the questions were only in part about my welfare, and also served as an entry point into speaking about residents' own anxieties and sense of physical insecurity. Perplexed, countless interviewees told me, “we never knew we had criminals in our own communities until now.” This may have been an act of denial on their part that ignored a long and notorious history of urban crime going back until at least the 1950s, but it was a deeply-held and widely-expressed view. In an interview with Reverend Peter Moerane, pastor of St Luke Methodist church in Sharpeville, he told me,

After the elections, there was nothing for the militarized youth... Until the unbanning of the ANC in 1990, we didn't think there were gangsters in the township. Where did they go? They came into our organizations and defended our communities and could kill in the name of a political organization. When the cloud of political violence went away, they reorganized as criminals. If only criminal justice in the Vaal could be strengthened, but the same apartheid police have their links to the criminals. People are just too angry, coupled with the loss of a political vision...there is a culture of impunity in the Vaal, it is so ingrained in the young people's blood that they are proud of it.”<sup>26</sup>

In portraying everyday life in the townships, South African novelists such as Zakes Mda include constant references to crime, usually with an openness and integrity seldom found among national politicians. In *Ways of Dying*, Mda tells the story of Toloki, a professional mourner who wanders the land, offering re-enchantment in a disenchanted world, a ritual figure from an invented rural tradition transposed to a modern urban setting of violent crime and HIV/AIDS.<sup>27</sup> During the liberation struggle, mass political funerals glorified each individual's demise with rousing songs and speeches and by draping the coffin in the African nationalist colors that connected the deceased to a political destiny. Now that destiny had been realized, however imperfectly, all that is left is the private pain of loss, shorn of any pretense of transcendence. In the wake of the political conflict came an internal reign of terror instigated by the same men who had been the “lions” of the armed liberation struggle. Mda captures both the popular anger and frustration towards criminals and also the tragedy of popular justice:

“in one village he [Toloki] found a whole community in mourning. The previous week, in a moment of mass rage, the villagers had set upon a group of ten men, beat them up, stabbed them with knives,

<sup>26</sup> Personal interview January 1997. Moerane continued in a vein that demonstrated a clear commitment to the rule of law, which is not only an invention of the World Bank and western government aid agencies, but also had local African adherents, complicating the picture somewhat.

<sup>27</sup> Zakes Mda (1995) *Ways of Dying*. London: Picador.

hurled them into a shack, and set it alight. Then they danced around the burning shack, singing and chanting about their victory over these thugs, who had been terrorizing the community for a long time...raping maidens, and robbing and murdering defenceless community members. ...When Toloki got there, all the villagers were numbed by their actions. They had become prosecutors, judges and executioners.”<sup>28</sup>

Mda’s commentary conveys quite a different message from Coetzee and Malan, and that is the numbness and disorientation of African communities, the struggling to make sense of the new insecurity. Whereas Coetzee and Malan’s crime writing still contain a note of righteous indignation, African writing from the same era already has a more despondent and resigned quality. This trend is also apparent in South African film. The optimism of the 1988 film *Mapantsula* is now long gone, and twenty years later, the film *Gangster’s Paradise* refrains from making any moral and political claims in order to describe Hillbrow, a neighborhood in Johannesburg, where rampant crime and hostage-taking is the norm.<sup>29</sup>

#### **4 International criminal law and the criminalization of armed conflict**

The preceding discussion described how in South Africa in the 1990s, crime became a dominant public discourse for a number of reasons; the waning of the metanarratives (Marxism, nationalism) that justified law-breaking, the loss of political control over unemployed and militarized youth, and the rise of official state human rights organizations that criminalized previous acts committed in furtherance of a political objective, even if only symbolically.

South Africa’s transition of the early/mid 1990s coincided with the establishing of new institutions of international criminal law and this is no coincidence—in geopolitical terms both had only become possible as a result of the collapse of the Soviet Union and end of the Cold War. These new international justice institutions include the International Criminal Tribunal for Rwanda (ICTR) created in 1994, and the Special Court for Sierra Leone (SCSL) and the International Criminal Court (ICC) that were both established in 2002. Each court represents a new institutional legal apparatus to apply categories of international law. War crimes, crimes against humanity and genocide committed in Africa had never been charged and prosecuted in an international tribunal before, and were absent from the South African transition.<sup>30</sup> International justice initiatives expanded the range of criminal acts that may be tried and punished and the range of competent tribunals that may

---

<sup>28</sup> Mda *ibid*, p. 66.

<sup>29</sup> Also titled *Jerusalema* in South Africa, <http://www.gangstersparadisejerusalema.com/>

<sup>30</sup> Which drew instead from standard notions of South African criminal law such as murder, kidnapping and severe ill-treatment. One of the few legal innovations was how the SATRC reconceived rape as a form of torture, but beyond that there was little in the way of legal precedent-setting.

hear them, and as we saw in the South Africa case, they reinforced the idea of individual criminal responsibility rather than collective political action.

The International Criminal Court has played a vital role, as Kamari M. Clarke observes, in the process of “setting new norms for what constitutes particular forms of ‘crime’ and what should be the jurisdictional reach of extranational bodies.”<sup>31</sup> Thus far, the ICC has issued all of its indictments in African cases and focused on the continent with such single-mindedness that some critics call it “the European Court for Africa.”<sup>32</sup> As international judicial bodies extend their reach and jurisdiction, they advance those features of transitional justice we just saw in South Africa—stripping out the meta-narratives, emptying conflict of its political and ethical motives and construing it instead as unadorned criminality, driven by crude personal gain.

A review of the judgments of international criminal tribunals turns up ample evidence of a strict legalism that narrows the field of inquiry to the acts of the accused and his intentions only as they relate to those acts. There is no room for the freedom fighter or nationalist leader in the framework of international criminal law, only the warlord. One wonders how the framework of international criminal law would deal now with a legitimate opposition figure such as Nelson Mandela or Jomo Kenyatta.

The judgments of the Special Court for Sierra Leone, for example, contain only the most cursory discussions of the origins and causes of the conflict in the country and region.<sup>33</sup> The Special Court’s decisions record the rise of the opposition Revolutionary United Front (RUF) and its armed confrontation with the Sierra Leone Army (SLA), but say nothing about the deep-seated social tensions in Sierra Leone that sparked and fuelled the conflict, including the sharp divisions between young men and elders and between a cosmopolitan Freetown elite and a disenfranchised rural peasantry.<sup>34</sup> The prosecution at the SCSL has had an official policy of dismissing all references to the ideology and history of the conflict. Anthropologist Tim Kelsall has written extensively about how the Court excludes Sierra Leone’s political history and quotes Chief Prosecutor David Crane objecting to any contextual discussions beyond the *actus reus* or material elements of the crime, thus allowing the defendants to make all the running on political oratory and historical reflection.<sup>35</sup> In the six-year long trial of Liberian leader Charles Taylor, prosecutors maintained that Taylor was motivated to carry out crimes against humanity and war crimes not by any ideology, but rather by “pure avarice.”<sup>36</sup>

<sup>31</sup> Kamari Maxine Clarke (2009) *Fictions of Justice: the International Criminal Court and the Challenge of Legal Pluralism in Sub-Saharan Africa*. Cambridge: Cambridge University Press. pp. 164.

<sup>32</sup> Rosemary Grey. “A landmark decision for international justice.” *The Punch*. 23 March 2012. <http://www.thepunch.com.au/articles/a-landmark-decision-for-international-justice/>

<sup>33</sup> See, for instance the “AFRC Case”, *Prosecutor v. Brima, Kamara and Kanu*, 20 June 2007, SCSL-04-16-T, ¶1155-6.

<sup>34</sup> For an iconic account of the social basis of the conflict in Sierra Leone, see Paul Richards (1996) *Fighting for the Rain Forest: War, Youth and Resources in Sierra Leone*. Oxford: James Currey.

<sup>35</sup> Timothy Kelsall (2009) *Culture under Cross-Examination: International Justice and the Special Court for Sierra Leone*. Cambridge: Cambridge University Press.

<sup>36</sup> Marlise Simons and David Goodman. “Ex-Liberian Leader Gets 50 Years for War Crimes.” *The New York Times*. Thursday, May 31, 2012. PP. A 1-3.

Even though the ICC has only completed one trial in the ten years since its founding, that of Thomas Lubanga Dyilo decided in March 2012, the same prosecutorial case theory of “pure avarice” is apparent.<sup>37</sup> Reviewing the trial transcripts of the Lubanga case, one can see a similarly anemic account emerging of the conflict in the Ituri district of Orientale Province in the north east of the Democratic Republic of the Congo (DRC).<sup>38</sup> In the prosecution case, Lubanga’s war crimes lack any overarching framework of explanation. The criminal acts arose out of wanton cruelty, in the relentless pursuit of private gain. The Trial Chamber heard evidence from expert witnesses such as United Nations Special Rapporteur Roberto Garretón and journalist and academic Gérard Prunier on the longstanding hostilities between Hema and Lendu groups, but the prosecution routinely reduced them to economic motivations and the desire to seize land and other assets, as one representative passage from the Judgment demonstrates, “much of the violence in Ituri during the period from 1999 to 2003 was initially economically motivated.”<sup>39</sup>

The Lubanga Trial Judgment does not provide an adequate account of the origins and causes of the conflict that would contextualize (although not justify) Thomas Lubanga’s actions as a military commander of the Force Patriotique pour la Libération du Congo (FPLC).<sup>40</sup> The judgment deals with the Hema-Lendu conflict in a little over three pages, noting that “Belgian colonial rule had emphasized the ethnic divisions between the Hema and the Lendu, whilst favoring the former. Even after Congo declared its independence from Belgium, the Hema remained the landowning and business elite.”<sup>41</sup> In 1999, Hema landowners owned 75 of the 77 large farms formerly owned by Belgian colonists.<sup>42</sup> It goes on to note that the conflict began when Hema landowners tried to evict Lendu inhabitants from their land, leading to armed confrontation and the formation of community-based irregular militias. Thomas Lubanga, a political and military leader who defended powerful Hema landowners and communities, thus emerged out of a longstanding context of social and economic subjugation of one group (Lendu) by another (Hema).

This story is not explored in the Trial Chamber’s judgment, and the Lubanga judgment makes clear that “regardless of whether the origins of the conflict the Chamber is concerned with are to be found in that history, it is essentially too remote to be of direct relevance to the present charges.”<sup>43</sup> The Judgment starts its account in 1997, only a few years before the events in question in the trial. Criminal courts are generally concerned with establishing causation of a particular kind, namely proximate cause-defined as an act that is immediately prior to an

<sup>37</sup> *Prosecutor v. Thomas Lubanga Dyilo* (Case No. ICC-01/04-01/06). Trial Chamber Judgment, 14 March 2012.

<sup>38</sup> See Richard A. Wilson (2011) *Writing History in International Criminal Trials*. Cambridge: Cambridge University Press.

<sup>39</sup> *Prosecutor v. Thomas Lubanga Dyilo* (Case No. ICC-01/04-01/06). Trial Chamber Judgment, 14 March 2012. ¶72.

<sup>40</sup> The FPLC was the military wing of the Union des Patriotes Congolais (UPC).

<sup>41</sup> *Lubanga* ¶74.

<sup>42</sup> ¶74

<sup>43</sup> *Ibid.*, ¶70.

event and that directly produces an event, and without which the event would not have occurred. In US criminal law, this is known as “but for” test of establishing causation. In standard Anglo-American criminal law, historical factors are too far removed from an event to be in a causal relationship with the events under consideration, and are therefore usually deemed irrelevant to the determination of the guilt or innocence of the defendant. The hitch is that this theory of causation was developed to deal with a majority of cases where a sole actor acting alone committed a single or small number of criminal acts, and it is less appropriate to large-scale, often state-sponsored armed conflict with massive popular participation and motivated by a longstanding ethnic, racial or religious animus. The standard criminal law model does not assist in grasping the intention of the perpetrators-if the court truly wished to make sense of Lubanga’s acts, then it would require a more systematic inquiry into ethnic ideology and the collective aspects of longstanding tensions in Ituri. These collective dimensions are seldom fully acknowledged by the prosecution in international criminal law cases in Africa.

One collective element of the conflict that the Lubanga Trial Judgment did address in comparatively more detail was the involvement of international actors in the conflict in Ituri, observing that nine national armies made incursions into the DRC after the assassination of President Laurent Kabila in 2001.<sup>44</sup> The Rwandan and Ugandan governments in particular instigated and participated in the violence- training, arming and even directing the local Ituri militias. The Judgment approvingly cites a report by MONUC (the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo) that “the local ethnic problems ‘would not have turned into massive slaughter without the involvement of national and foreign players’ including the Ugandan and Rwandan armies.”<sup>45</sup> Despite these broader explanations, overall at the ICC the DRC conflict has been represented as a civilizational collapse and an ensuing descent into a war of all against all. Here, the genre of international law’s writing is patterned on Hobbes’ *Leviathan*, or to use a more appropriately African example, Thomas Mofolo’s classic historical novel, *Chaka*. *Chaka* recounts the story of a real Zulu king who starts off as a valiant young warrior, but is dehumanized by war and declaring, “I shall simply kill whomever I wish to kill, whether he is guilty or not, because that is the law of this world,” ends his campaign in a state of bloodlust and depravity.<sup>46</sup>

There may well be good reasons for international criminal trials to steer clear of discussing the political and ethnic ideologies that were part of an armed conflict. Some African wars may well be ideologically bereft and conducted entirely on the basis of “pure avarice.” Yet the international legal prism for apprehending armed conflict may well obstruct other ways of understanding them. Why should this matter? Because in the end, all that the ICC concluded about the motives of Mr. Lubanga- the Court’s definitive answer to the “why” question- was that: “The

---

<sup>44</sup> ¶70.

<sup>45</sup> ¶76.

<sup>46</sup> Thomas Mofolo (1981/1931) *Chaka*. Translation by Daniel P. Kunene. Oxford: Heinemann. p. 48. My thanks to Eleni Coundouriotis for pointing out the relevance of *Chaka* to this argument.

accused and his co-perpetrators agreed to and participated in, a common plan to build an army for the purpose of establishing and maintaining political and military control over Ituri.”<sup>47</sup> According to the ICC Trial Chamber, the underlying motive for the armed conflict was to build an army to maintain power through armed conflict—a rather meager and tautological explanation for the historical complexities of the conflagration in Ituri that by conventional accounts left tens of thousands dead and hundreds of thousands displaced.

Part of the explanation for the ICC’s insensitivity to local context lies in the categories of crime they utilize, their understanding of universal jurisdiction and by their courtroom procedure which regularly forestalls considering the wider social forces at work in a conflict.

International courts, like all formal legal processes also possess their own unique ways of knowing based upon their rules of procedure and evidence. Law imposes a necessary rigor on evidence, but with this comes a strange, insular and self-referential epistemology that is far removed from everyday ways of knowing.<sup>48</sup> As noted earlier, international criminal law’s circumscribed model of causation can forestall a systematic inquiry into the ethnic and nationalist ideologies that often motivate armed confrontations between groups. Relevant here also is international law’s actual methods of fact-finding. At the trial of Lubanga at the ICC, the judges comprehended the events in the DRC primarily through documents and moreover, legally-constituted documents produced by the government or an international body. As has often been noted, courts are passionately inter-textual in their approach to weighing evidence and generating legal judgments.<sup>49</sup> In the Lubanga case, this was apparent in the judges’ clear preference for experts who were UN officials such as Roberto Garretón, who could present UN reports rather than experts such as Gérard Prunier, whose knowledge was based upon a lifetime of personal engagement with Africa. At the International Criminal Tribunal for Rwanda, the number of expert witnesses and eyewitnesses called in a trial has been decreasing, the combination of the insensitive treatment of witnesses by the court and the rickety performances of Rwandan survivors under cross-examination. In the encounter between international law and African experiences and sensibilities, much is lost in translation.<sup>50</sup>

This is not inevitable and not all international tribunals have operated in the same manner as those in Africa. What is intriguing to observe here is that the International Criminal Tribunal for the Former Yugoslavia adopted a broader approach to evidence, in part as a result of the greater influence of civil law procedures at the Tribunal, and it exhibited a greater willingness to debate the origins and causes of the conflict in the Balkans. International law, despite its avowed

---

<sup>47</sup> ¶1351.

<sup>48</sup> See Austin Sarat et al, eds., (2007) *How Law Knows*. Stanford, CA: Stanford University Press.

<sup>49</sup> See Bruno Latour (2004) ‘Scientific Objects and Legal Objectivity’ in Alain Pottage and Martha Mundy, eds., *Law, Anthropology and the Constitution of the Social: making persons and things*. Cambridge: Cambridge University Press. Pp. 73-114.

<sup>50</sup> See Nancy Armoury Combs (2010). *Fact Finding Without Facts: The Uncertain Evidentiary Foundations of International Criminal Convictions*. Cambridge: Cambridge University Press.

claims of universality, generalizability and standardized application, in practice does manifest itself differently in each context.

## 5 Conclusions

How I evaluate the changing definitions of crime in Sub-Saharan Africa depends on how recently a man has invited himself into my car to offer me a special deal on Angolan diamonds. Some developments are to be applauded, notably the enhanced efforts to protect individual rights, the criminalization of sexual violence during wartime, and the reduced tolerance for sacrificing human lives to a political cause. That even legitimate political movements can lose their way when they sanction indiscriminate violence justifies maintaining international humanitarian law's categories of *jus ad bellum* and *jus in bello*.<sup>51</sup> Criminalization may well be, as we are so often told by Bretton Woods agencies and non-governmental organizations alike, the necessary first step in promoting human security and entrenching the principle of accountability. As the grand narratives of Marxism and anti-colonialism recede from view, there is greater awareness of gender violence in Africa and this has been reinforced in the case law and statutes of the International Criminal Tribunal for Rwanda, the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Court which define rape and other forms of sexual violence as war crimes and crimes against humanity.<sup>52</sup> It is, however, too early to tell whether international law will have a lasting impact and diminish violence of both an interpersonal and collective kind in Africa.

There are also grounds for concern regarding the inexorable expansion of the category of crime in Africa. Intention and political context matter, and acts need to be assessed not in isolation but with an awareness of political histories<sup>53</sup>, and, if at all possible, by justice institutions that are more embedded in the national political and legal context in which the events occurred. Thus far at the International Criminal Court, the main discussion of history and politics, and especially the history of economic oppression and social exclusion of particular groups, is being left to the defendant in the dock. This is a repetition of what happened at the ICTR, where only the defense brought up the history of colonial oppression of Hutus. They did so for all the obvious legal reasons, of course, namely to claim that the crimes were a retaliatory response to provocation, and to mitigate their client's sentence. Insofar as a court must be convinced that the defendant possessed special intent to make a finding of genocide, comprehending

<sup>51</sup> For a summary and provocative discussion of the laws of war, see Carsten Stahn (2006) “‘Jus ad bellum’, ‘jus in bello’ [...] ‘jus post bellum’? –Rethinking the Conception of the Law of Armed Force.” *European Journal of International Law*. Vol. 17 No. 5, 921–943.

<sup>52</sup> See Robert Cryer *et al.* 2010 *An Introduction to International Criminal Law and Procedure*. 2<sup>nd</sup> Edition. Cambridge: Cambridge University Press. Pp. 253-258.

<sup>53</sup> Eleni Coundouriotis notes that African war novels from the 1990s exhibit less engagement with history than those published during the decolonization era, a development she attributes to the way in which the human rights legal frame is applied to the issue of child soldiers. Eleni Coundouriotis (2010) “The Child Soldier Narrative and the Problem of Arrested Historicization.” *Journal of Human Rights*. 9:191-206.

the rise of Hutu Power and the way in which the social, political and economic domination of Hutus by Tutsis historically motivated the genocide is a necessary element in the legal judging of the crime. Thus, history and context and ideology are a necessary component of judging international crimes, not just a pleasant addendum to the process, time permitting.

Part of the resolution to international legal myopia in Africa might be found in broadening the evidentiary basis for cases brought before international courts. International legal procedure could afford to move further from the adversarial model which accords the prosecution role of the driver of the trial, and closer to a civil law model where the bench manages cases closely, calls court-appointed expert witnesses and generally guides the process of gathering evidence.

There are not any easy answers to these questions. Absolutists-either African nationalists or human rights advocates- offer spotless rejoinders unblemished by doubt, but thankfully, fiction writers seem to be anti-absolutists by their very nature and craft. The contribution of fiction writing is to delve into the grey areas and moral dilemmas, and to explore the abstract themes in a way that shows their impact on everyday existence, and I expect that fiction writers will be delving into the lived experience of crime in Africa for some time to come.

Data da submissão: 3 de junho de 2012

Avaliado em: 9 de agosto de 2012 (Avaliador A)

Avaliado em: 11 de novembro de 2012 (Avaliador B)

Aceito em: 11 de novembro de 2012