

Gangster's Paradise? Framing Crime in Sub-Saharan Africa

Expanding Crime and Liberal Governance

Recent human rights and rule of law initiatives pursued by both national governments and international institutions are part of a continent-wide project of liberal reform that has altered the landscape of law and governance in Sub-Saharan Africa. The central questions motivating this essay are twofold: how have contemporary societal and legal categories of criminality changed in Sub-Saharan Africa over the last twenty years, and what role has been played by national institutions such as the South African Truth and Reconciliation Commission and international tribunals such as the International Criminal Court? Since this essay aspires to say something about both the law and popular discourse on crime, it reviews legal decisions and African literature and film.

First of all, I need to set out my understanding of the term “crime.” It still bears reiterating that this is not a stable and self-evident category but one that possesses a shifting history and genealogy. Capacious in its scope, crime may or may not involve violence against the person, and it runs the gamut from the interpersonal to widespread armed confrontations between collective actors. In positive law, crime is simply defined as lawbreaking, whatever the law declares in any particular moment, and regardless of whether the institutions of adjudication are moral, principled, or have any legitimacy. Moreover, legal positivism does not explain how the definitional boundary of crime is the site of intense contestation between political actors and as a result changes over time.¹

At specific historical junctures in twentieth-century Africa, and especially during the decolonization process, many acts of lawbreaking 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 rule, expressions of illegality were often integrated into a metanarrative and a political teleology—usually that of Marxism or anticolonialism—and were construed less as “crime” than as “the struggle.” Such acts were lauded by the champions of colonized peoples as forms of legitimate protest that advanced the self-determination of a group or a nation. During the anticolonial ferment of the mid-twentieth century, common crime in Africa occupied a peculiar residual status, defined negatively by its lack of political connotations. Here “crime” was simply lawbreaking without any accompanying metanarrative, as the artless transgression of the statutes, absent a higher ethical justification.

Two colorful figures in the politics of crime of the twentieth century illustrate

these points: Jean Genet and Margaret Thatcher. Jean Genet, French dramatist and advocate of causes such as the Black Panthers and the 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.² British Prime Minister Margaret Thatcher adopted the opposite stance in 1981 when confronted with demands for political recognition by Irish Republican Army prisoners on hunger strike in the Maze Prison in Northern Ireland.³ Even after ten deaths and immense international pressure, Thatcher stonewalled the prisoners' claims for political status, adamant that the jailed republicans were no more than common criminals.⁴

While Jean Genet and Margaret Thatcher represent polarized extremes that bookend my reflections on crime in Sub-Saharan Africa, in reality the contrast between lawbreaking with a telos and purposeless crime is not a binary distinction but a continuum, since illegal behavior has a variety of subjective motivations, as well as social and political contexts. Nor is the distinction stable and fixed. What constitutes "common crime" at any given moment is the product of a historical struggle over the gossamer sliver of a distinction between criminal and political behavior, between vulgar criminality and the transcendental (and therefore, in some quarters, justifiable) violation of unjustified laws.⁵ Rival political actors unremittingly press against the barrier separating illegitimate crime from valid protest in the direction that suits their aims and objectives.

Over the past few decades, both international agencies and national elites have promoted human rights discourse and established liberal institutions in order to enlarge the category of criminality and hence to constrain the space for justifiable lawbreaking. What is remarkable is that they have done so with an alacrity that had eluded the authoritarian and oppressive regimes that preceded them. Moreover, the ascent of institutions of international criminal law since the early 1990s—such as the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone, and the International Criminal Court—further expanded the category of criminality to implement and enforce newer international crimes, such as crimes against humanity, war crimes, and genocide. As a number of commentators have noted, national and international public order and security are now pursued more through the idiom of criminal justice and the rule of law than through the political and legislative process.⁶

As a result, there is now more crime than there used to be in Sub-Saharan Africa. This does not necessarily imply that there is more generalized lawbreaking, although the paucity of reliable sources makes it difficult to know.⁷ Instead, it means that lawbreaking and collective opposition are more often construed by governments and international institutions as specifically criminal (rather than, say, political) behavior, in part because the political narratives that once sanctioned transgression—in particular Marxism and the self-determination of colonized peoples—have fallen away, and as the institutions and discourses of liberal democracy and international law have proliferated. Not only have the classifications changed but so have the ways of knowing about violence in Africa, and all the while a liberal legal prism of individual criminal responsibility has gained greater prominence.

Some scholars have disparaged the rise of a culture of legality in Africa, and no

one more consistently than Mahmood Mamdani, who sees in international humanitarian interventions (legal and otherwise) echoes of an earlier blueprint of colonialist trusteeship. In selectively labeling events in Darfur or Rwanda as “genocide” and precipitating a judicial intervention, the international system deprives Africans of their sovereignty and autonomous political agency and undermines their ability to resolve their own political conflicts. The argument advanced here reinforces elements of Mamdani’s general thesis, for instance in how the implementation of international criminal law has depoliticizing consequences, and in how legal institutions often detach themselves from the political and social context they are adjudicating. However, I am not as confident as Mamdani that national political processes are willing and able to resolve entrenched armed conflicts and that pursuing post-conflict accountability has such deleterious consequences. On the basis of my empirical research in African courts, my sense is that critics such as Mamdani underestimate Africans’ commitment to addressing conflict and pursuing social stability through legal means, and also the degree to which accountability and predictable legal procedure can serve as a common good that may benefit even the poor and disenfranchised, as E. P. Thompson observed many years ago.⁸

The discussion begins with South Africa during its transition from apartheid in the 1990s and then moves to consider 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 thesis is most applicable to those governments that have implemented liberal political and legal reforms and/or acceded to the jurisdiction of an international criminal tribunal, which 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 it may one day, once a post-Mugabe transition is underway.

Crime and the Anti-Apartheid Movement

From the unbanning of the African National Congress in 1990 to the multiracial elections in 1994, South Africa was in the violent throes of its transition from apartheid. This final chapter in the story of African decolonization has been widely characterized as a “peaceful transition,” but this formulation is perplexing.⁹ The death toll from what observers called “the violence”—note the use of an anodyne term to sidestep any political connotations—was spectacularly high during the peace negotiations. Human rights monitors estimated that 14,000 people, most of them ordinary African bystanders, were killed in politically related incidents between 1990 and 1994.¹⁰

Since the 1950s, the ruling National Party had striven 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; as Richard Abel has illustrated in *Politics by Other Means*, trade unions and religious groups engaged the law to overturn key tenets of apartheid.¹¹ While opposition figures used the apartheid legal system strategically, the ANC’s program of “making the townships ungovernable”

meant that for anti-apartheid activists, lawbreaking 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 1973.¹² 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 an oppressive state.

The anti-apartheid movement was aware of crime, both petty and syndicated, in the townships, but it downplayed its significance. It went a step further to dignify crime as a form of political resistance that was simply unaware and untutored. Paradigmatically, the South African film *Mapantsula* (1988) reassured its audience that even the most ruthless African gangsters could be tamed and incorporated into the liberation struggle. In keeping with its liberationist message, the gangster film included the hit single “Everything Must Change.” In the antinomy between the ANC’s and the 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 fresh concern with human rights, promulgated new distinctions between legitimate and illegitimate lawbreaking. The brittle Government of National Unity (1994–96) immediately embarked upon a program of criminalizing the politically motivated violations of the past, if only to then indemnify perpetrators. 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*, urging residents of African townships to pay for their utilities and local municipal services.¹³ Community policing forums, mandated by the new constitution, were set up to restore popular faith in the South African Police Service. Now that they held the reins of the state, ANC leaders scrambled to put the genie of mass noncompliance and illegality back into the bottle by condemning the very acts they 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 (TRC) mandated a panel of judges to grant amnesty to those individuals who had committed an “act associated with a political objective committed in the course of the conflicts of the past.”¹⁴ Such acts must not have been carried out for “personal gain” or “out of personal malice, ill-will or spite.”¹⁵ Here was a newfangled reframing of criminality in the contemporary 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 violations as politically motivated. The legal and political regime of the “New South Africa” cast transgressions against apartheid state laws as pardonable but demanded a form of

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EVEN MORE REMARKABLE
THAN CRY FREEDOM
AND A WORLD APART."**

Derek White, The Guardian

WAPANTSULA



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SHARON AND DAVID HANNEY PRESENT A MAX MONTECCHIO PRODUCTION OF A FILM BY OLIVER SCHMITZ AND THOMAS BOGOTURE
WITH THOMAS BOGOTURE AND OLIVER SCHMITZ
EDITED BY MARK ELLARD (ART DIRECTOR ROBYN HOPKINS) MUSIC BY THE OUTLIER EXECUTIVE PRODUCERS DAVID HANNEY AND KEITH POSNERAUM PRODUCED BY MAX MONTECCHIO DIRECTED BY OLIVER SCHMITZ
FEATURING THE HIT SINGLE "EVERYTHING MUST CHANGE"

individualized and public penance in the form of an open admission before the TRC's amnesty committee.

Putting themselves in the role of perpetrators of human rights violations was something most ANC activists were loath to do, and by and large only the indigent, marginal, and already imprisoned applied for amnesty. The ANC filed a collective petition for amnesty for all its members that 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 wish to be seen as "victims," and ministers in the Government of National Unity such as Mac Maharaj, Jay Naidoo, and Dullah Omar, who had been detained (and most of them tortured) as activists, eschewed an appearance before the Commission's human rights violations committee. With this retrospective reconfiguration 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 police informers were detained and tortured in ANC camps or doused in gasoline and burned alive in the townships.¹⁶ In public human rights violations hearings held in town halls, schools, and hospitals, TRC commissioners scrupulously treated crimes committed by the security service and progovernment Inkatha Freedom Party as morally equivalent to those committed by the anti-apartheid movement.¹⁷ The TRC commissioners' moral equalization of apartheid-era crimes met with a firestorm of protest from ANC stalwarts, many of them serving government ministers 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. TRC chair Archbishop Desmond Tutu countered with a view long espoused by South African liberals and indeed liberals everywhere, namely, that the individual's right to life, liberty, and due process cannot be sacrificed for collective goals, no matter how noble.¹⁸ 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.

"After Every Revolution Comes a New Order"¹⁹

From 1994 onward, crime became the universal idiom in which virtually all political and social discussions took place in South Africa.²⁰ 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 stories saturated the radio and television day and night, not only on the news and current affairs programs but also in soap operas and drama programs. It was as if South Africans could not consume enough fictional

representations of crime. This was the case in part because crime narratives are a euphemistic language, a way of talking about racial politics without overtly talking about racial politics, but also because the statistics for all categories of crime—violent robbery, theft, rape, murder, and assault—escalated steeply between 1989 and 1995. Official crime statistics are notoriously controversial and subject to challenge, and South African crime statistics are no exception. The national murder rate may have been misreported for a variety of reasons, including police inefficiency, an urban bias, the ethnic divide between white, African, and Coloured communities, under-reporting during the states of emergency in the 1980s, an absence of data for the apartheid-era African *bantustans*, and inconsistencies in the methods for calculating the murder rate by different agencies, such as the Medical Research Council and the National Injury Mortality Surveillance System.²¹ Political expediency is also part of the mix, and it did not inspire confidence when the embattled Minister of Safety and Security Steve Tshwete ordered an indefinite moratorium on the release of crime statistics in 2000.²²

These shortcomings in the official statistics notwithstanding, most criminologists agree on the general contours of crime rates in the country in the 1990s as follows: there was a sharp spike in crime in 1989 and then again in 1995, after which time homicide declined gradually, while the overall crime rate continued to rise.²³ By 1997, there were nearly three times the number of murders in South Africa than there had been in 1986, the zenith of the popular rebellion against apartheid.²⁴ In 1997, police departments reported 12,900 rapes and 54,000 motor vehicle thefts in just one province, Gauteng, which includes Johannesburg. In the decade 1990–2000, South Africa's murder rate averaged 54 per 100,000, one of the highest in the world.²⁵ To give an international comparison, in the 1990s homicides hovered at a rate ten times that of the United States, which has one of the highest murder rates among industrialized nations.²⁶ By 2002, the British Broadcasting Company designated South Africa the most dangerous country in the world not at war.²⁷

While the distribution of crime varied according to region, social class, race, and gender, all citizens of post-apartheid South Africa experienced a growing sense of personal insecurity. In this respect, South Africa was no different from 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 military-grade weaponry.

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 a few fiction writers to learn more about how crime resonated among the country's various constituencies.²⁸ 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.²⁹ 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. Dismissed from his teaching position, he takes refuge at his daughter Lucy's farm in the Eastern Cape, where impoverished African

neighbors drag him from his daughter'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 interracial restitution.³⁰ 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 nonfictional account, Rian Malan's *My Traitor's Heart: A South African Exile Returns to Face His Country, His Tribe, and His Conscience* (1989).³¹ A crime reporter for *The Star* of Johannesburg, Malan wrote his book in the dying embers of the apartheid era, shortly before the release of Nelson Mandela and the onset of the official peace negotiations. Both books offer a deeply conservative counsel of despair, portraying Africans as inherently predisposed toward 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. Coetzee was, after all, also the author of *Waiting for the Barbarians* (1980) and the scourge of colonialism and white supremacy. In retrospect, *Disgrace* was 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.³² In 1996–97, I conducted over one hundred interviews with survivors who had testified before the TRC in the townships around Johannesburg and mostly those of the Vaal, such as Sebokeng, Boipatong, and Sharpeville. Seemingly every conversation got around to the latest outrages of the *tsotsis*, or township gangsters, later the title of a 2005 South African film written by Athol Fugard.³³ 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 11 p.m., 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 also the time at a petrol station when a young man approached me and asked to try on my sunglasses, saying, "Man, these Oakleys are not yet available for purchase in South Africa." With little hesitation, I handed them over, and, after showing them to friends, he strolled with a gangster shoulder roll back to me with a polite, even effusive, hand-clapping thanks.

But listening more closely, it soon dawned on me 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 that "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 to at least the 1950s, but it was a deeply held and widely expressed view. Reverend Peter Moerane, pastor of St. Luke Methodist church in Sharpeville, told me dejectedly in 1997,

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.³⁴

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. Mda's *Ways of Dying* 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.³⁵ 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, which connected the deceased to a political destiny. Now that the destiny has been realized, however imperfectly, all that is left is the private pain of loss and grief, shorn of any pretense of transcendence. In the wake of the successful political struggle came an internal reign of terror inflicted upon the local population by the same men who had been the "lions" of the armed liberation movement.

This in turn instigated a ferocious vigilante response from ordinary South Africans. One newspaper story from 1996 begins, "It was a horrific scene even by South Africa's exceptionally violent standards. The furious mob trampled reputed drug baron Rashaad Staggie, shot him, burned him, and then shot him some more. Then they jeered."³⁶ In *Ways of Dying*, Zakes Mda captures both the popular anger and frustration toward criminals, and also the tragedy of vigilante justice. Of Toloki he writes how

in one village he 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, 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.³⁷

Mda's fiction conveys a message on crime quite divergent from that of Coetzee and Malan, and that is the numbness and disorientation of African communities, the struggle to make sense of the current insecurity. Even though some African politicians

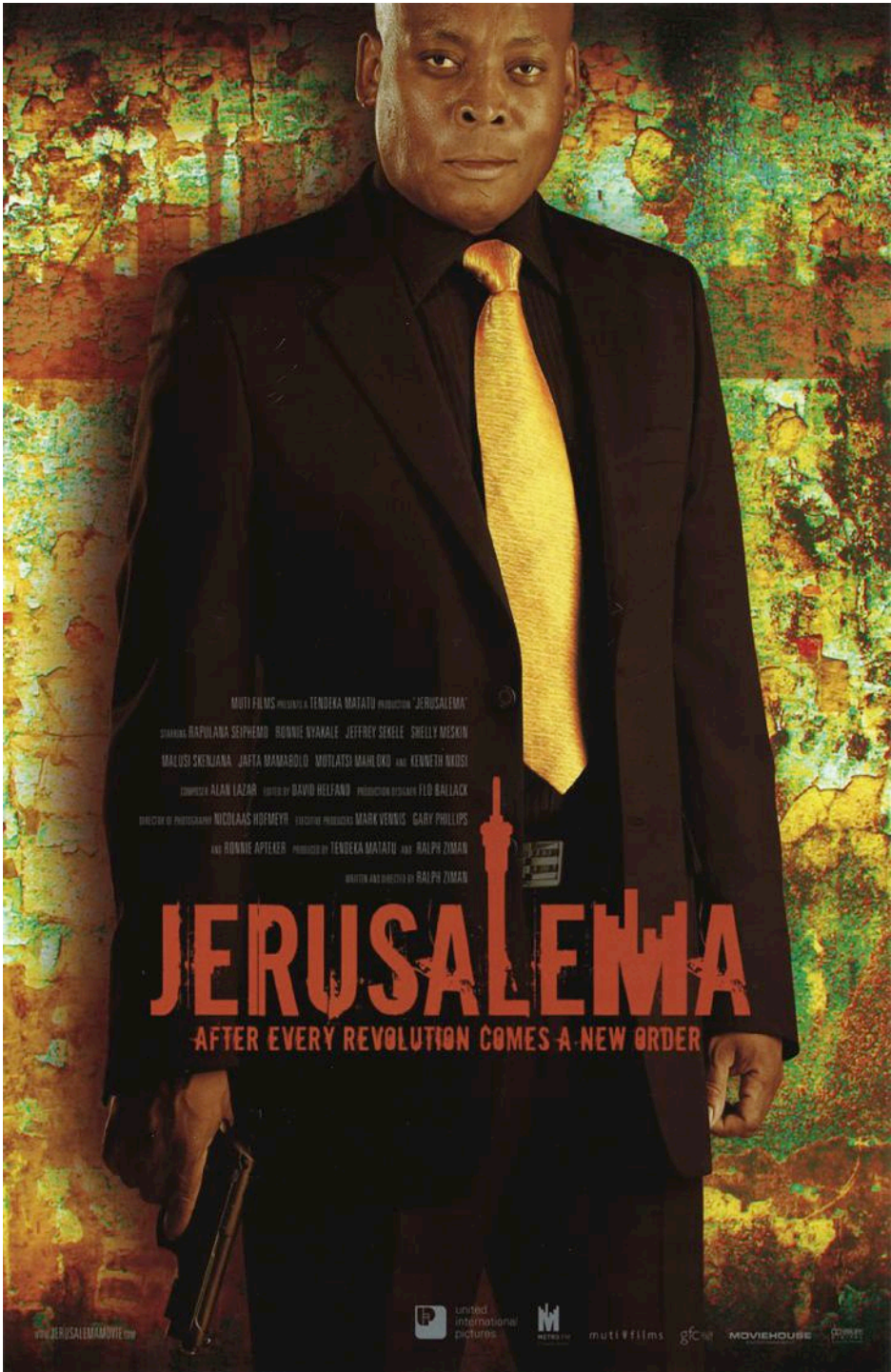
and businessmen publicly espoused its virtues, popular vigilante justice was hardly a satisfying long-term solution, since it turned ordinary villagers into killers of their own kith and kin. Whereas Coetzee's and Malan's crime writing still contains a note of righteous indignation, writing by Africans from the same era already has a more despondent and resigned quality.

This trend is also apparent in South African film. The ebullient optimism of *Mapantsula* is now long gone. The film *Gangster's Paradise: Jerusalema*, released in 2008, refrains from any uplifting moral and political message in its bleak account of Hillbrow, a neighborhood adjacent to downtown Johannesburg where rampant crime is the norm.³⁸ The film depicts a new order characterized by murder, prostitution, and Nigerian drug syndicates that kidnap and hold hostages for ransom, something never envisaged by the proponents of radical social change.³⁹ It is a deeply cynical film in which the leading character, a gangster called Lucky Kunene (artfully played by Rapulana Seipheno), wears a sharp suit and tie and conceals his nefarious activities behind an ostensibly pro-poor, non-profit organization called the "Hillbrow People's Housing Trust." Despite Lucky Kunene's extensive involvement in racketeering, murder, and extortion, the white, former apartheid-era police officer Blackie Swart cannot make any charges stick, and the last scene shows Lucky, as cheekily confident and unrepentant as ever, on the beach in Durban, planning to restart his life of clever but bloody crime all over again.⁴⁰

The Criminalization of Armed Conflict by International Tribunals

The preceding discussion has detailed how in South Africa in the 1990s, crime became a dominant narrative in the post-apartheid public space for a number of reasons: a sharp spike in actual crime in the early part of the decade; the waning of other meta-narratives (Marxism, African nationalism); and the influence of official human rights commissions that denounced, even if only symbolically, acts committed in furtherance of a political objective.⁴¹ South Africa's transition in the early 1990s took place even as a new framework of international criminal law was emerging. This is no coincidence. In geopolitical terms, both had only become possible as a result of the collapse of the Soviet Union and the end of the Cold War. In the fleeting window of international cooperation during the 1990s and first few years of the 2000s, novel international justice institutions were established in Africa, including the International Criminal Tribunal for Rwanda (ICTR, 1994), the Special Court for Sierra Leone (SCSL, 2002), and the International Criminal Court (ICC, 2002). Each court was a new institutional legal apparatus applying legal categories with only a shallow basis in international case law. War crimes, crimes against humanity, and genocide committed in Africa had never been charged and prosecuted in an international tribunal before, and they were legally absent in the South African transition, which drew instead from standard notions of South African criminal law such as murder, kidnapping, and severe ill-treatment.⁴² International justice initiatives expanded the scope of criminal acts that could be tried and punished, as well as the array of competent tribunals that had jurisdiction to hear them. As in the South African transition, they reinforced the concept of individual criminal responsibility rather than collective political agency.

In the ten years since its inception, the International Criminal Court has played a



MUTI FILMS PRESENTS A TENDEKA MATATU PRODUCTION "JERUSALEMIA"
STARRING: BAPULANA SEPPHENO RONNIE NYAKALE JEFFREY SEKELE SHELLY MASKIN
MALUSI SKENJANA JAFTA MAMABOLO MOTLATSI MAHLOKO AND KENNETH NKOSI
COMPOSER ALAN LAZAR EDITOR DAVID HELLAND PRODUCTION DESIGNER TLO BALACK
DIRECTOR OF PHOTOGRAPHY NICOLAAS HOFMEYER EXECUTIVE PRODUCERS MARK VENNIS GARY PHILLIPS
AND RONNIE APPEKER PRODUCED BY TENDEKA MATATU AND RALPH ZIMAN
WRITTEN AND DIRECTED BY RALPH ZIMAN

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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.”⁴³ Thus far, all of the ICC’s indictments have been of African suspects, and the Court has focused on the continent of Africa with such single-mindedness that critics have termed it “the European Court for Africa.”⁴⁴ Less generously still, Mahmood Mamdani portrays it as no more than “a Western court to try African crimes against humanity.”⁴⁵ As international judicial bodies extend their jurisdiction and reach, they advance those features of transitional justice we just saw in South Africa, namely, in stripping out ideological metanarratives, emptying conflict of its political and ethical motives, and construing conflict instead as unadorned criminality driven by crude personal gain.

A review of the judgments of international criminal tribunals provides ample evidence of a narrow legalism that constricts the field of inquiry to the acts of the accused, and to his or her intentions only as they relate to criminal acts. There is little or no room for the freedom fighter or the founder of the nation in the framework of international criminal law, only the warlord. It is worth asking a counterfactual question: how would the framework of international criminal law deal now with opposition figures such as Nelson Mandela or Jomo Kenyatta, who enjoyed widespread popular support and legitimacy?⁴⁶ Judgments issued by the SCSL, for example, contain only the most cursory discussions of the origins and causes of the conflict in the country and region.⁴⁷ Its decisions record the rise of the opposition Revolutionary United Front (RUF) and the latter’s armed confrontation with the Sierra Leone Army, but they say nothing about the deep-seated social tensions in Sierra Leone that sparked and fueled the conflict, including the sharp divisions between young men and elders, and between a cosmopolitan Freetown elite and a disenfranchised rural peasantry.⁴⁸ The prosecution at the SCSL maintains a consistent policy of dismissing all references to the ideology and history of the conflict. The anthropologist Timothy Kelsall has written extensively about how the Court excludes Sierra Leone’s political history, and he quotes Chief Prosecutor David Crane’s objecting to any contextual discussions beyond the *actus reus* or material elements of the crime.⁴⁹ This may be intelligible as a strategy of prosecutorial caution, but unfortunately it leaves open the space for defendants to make all the running on political oratory and historical commentary.

In the six-year-long trial of Liberian leader Charles Ghankay Taylor, prosecutors maintained that Taylor had been motivated to carry out crimes against humanity and war crimes in Sierra Leone not by any discernible ideology but rather by “pure avarice.”⁵⁰ The Trial Chamber’s judgment on Charles Taylor was handed down on May 18, 2012.⁵¹ The Court found Taylor guilty of twenty-two counts of “aiding and abetting” and “planning” war crimes and crimes against humanity, including murder, rape, pillage, enslavement, sexual slavery, and conscripting child soldiers. It then sentenced him to fifty years in prison. In a gigantic 2,532-page judgment, only 26 pages are dedicated to the context and origins of the Sierra Leonean civil war, and much of this section focuses on the military-political organizations and the changing factions and alliances within the RUF. While it is rich in details of abject criminality, the judgment is quite detached from the historical and social context in which the crimes occurred.

The ICC has concluded just one trial in the first ten years since its founding, that of Thomas Lubanga Dyilo in 2012, and here the prosecution's familiar "pure avarice" case theory manifested itself again.⁵² From my interviews with prosecutors and my reading of the Lubanga trial transcripts, it is apparent that the court heard only an anemic account of the conflict in the Ituri district of Orientale Province, located in the northeastern Democratic Republic of the Congo (DRC).⁵³ The prosecution's case was seemingly devoid of any overarching framework of interpretation or explanation. Lubanga's war crimes had arisen out of wanton cruelty, in the relentless pursuit of private gain. The Trial Chamber heard testimony from expert witnesses, such as United Nations Special Rapporteur Roberto Garretón and the journalist and academic Gérard Prunier, on the longstanding hostilities between Hema and Lendu groups, but the prosecution routinely reduced ethnic oppositions to economic motivations and the desire to seize land and other assets. This view was adopted by the judges; 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."⁵⁴ Pure avarice.

The Lubanga Trial Judgment (henceforth *Lubanga*) contains few insights into the origins and causes of the conflict that would contextualize, without justifying, Thomas Lubanga's actions as a military commander of the *Force Patriotique pour la Libération du Congo* (FPLC).⁵⁵ *Lubanga* starts its account in 1997, only a few years before the events in question at the trial. 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."⁵⁶ In 1999, Hema landowners owned seventy-five of the seventy-seven large farms formerly owned by Belgian colonists.⁵⁷ 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.

In fact, Lubanga had emerged as a political and military leader who safeguarded powerful Hema landowners and communities, and he therefore owed his position to a longstanding history of social and economic subjugation of one group (Lendu) by another (Hema). This history is left unexplored in the Trial Chamber's judgment, and *Lubanga* 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."⁵⁸ The problem with this stance is that ethnic antagonisms in Ituri, or even the entire Great Lakes region of Africa for that matter, are not just remote history.

How International Law Knows: The Politics of Legal Epistemology

Why was the International Criminal Court so blind to the social and ethnic dimensions of conflict? Part of the answer lies in the general principles of reasoning applied to context and causality by all types of criminal law. Criminal courts are generally concerned with establishing causation of a particular kind, namely, *proximate cause*, defined as the act immediately prior to the event and that directly produces the event,

and without which the event would not have occurred. In U.S. criminal law, this is known as the “but for” test of establishing causation. In standard Anglo-American criminal law, historical factors are generally perceived as too far removed from an event to be in a causal relationship with the events under consideration, and they are therefore usually deemed irrelevant to the determination of the guilt or innocence of the defendant. The hitch is that this domestic criminal law theory of causation developed to handle cases in which, by and large, a sole actor acting alone had committed a single or small number of criminal acts. It is entirely inappropriate for large-scale, often state-sponsored armed conflict with massive popular participation that has been motivated by a longstanding ethnic, racial, national, or religious animus. The standard criminal law model is unsatisfactory for grasping the collective intention of perpetrators acting in concert in a civil war or international armed conflict.⁵⁹ If the Court had truly wished to make sense of Lubanga’s acts, then it would have required a more systematic inquiry into ethnic ideology and the historical aspects of conflict over land in Ituri. These collective dimensions of armed conflict are seldom fully admitted into evidence by the prosecution in international criminal law cases in Africa, although defense counsel occasionally tries to bring them into the courtroom. Discriminatory animus and group dynamics are relevant in genocide cases, but since Lubanga was charged only with war crimes and crimes against humanity, the Court was not interested in hearing evidence on these matters.

One collective element of the conflict that *Lubanga* did address in comparatively more detail was the involvement of international actors in Ituri, observing that nine national armies made incursions into the DRC after the assassination of President Laurent Kabila in 2001.⁶⁰ The Rwandan and Ugandan governments in particular instigated and participated in the violence-training, arming, and even directing of the local Ituri militias. *Lubanga* approvingly cites a report by MONUC (the United Nations Organization Stabilization Mission in the DRC), namely, 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.”⁶¹ Despite these brief forays into broader explanation, the ICC has largely represented the DRC conflict as a civilizational collapse and an ensuing descent into a war of all against all. Here the writing genre of international law is patterned on Hobbes’s *Leviathan*, or to use a more appropriately African example, Thomas Mofolo’s classic historical novel *Chaka*. *Chaka* recounts the story of a historical Zulu king who starts off as a valiant young warrior but is dehumanized by war. Declaring, “I shall simply kill whomever I wish to kill, whether he is guilty or not, because that is the law of this world,” he ends his military campaign in a state of bloodlust and depravity.⁶² Each ICC and SCSL judgment thus far has reproduced the narrative arc of *Chaka*.

Part of the explanation for international tribunals’ insensitivity to African context lies with the categories of crime they utilize, their understanding of universal jurisdiction, and their courtroom procedure, which regularly forestalls consideration of the wider social forces at work in a conflict. International courts, like all formal legal processes, 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.⁶³ As noted earlier, international criminal law's circumscribed model of causation can forestall systematic inquiry into the ethnic and nationalist ideologies that often motivate armed confrontations between groups.

Relevant here as well 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 intertextual in their approach to weighing evidence and formulating legal decisions.⁶⁴ In the Lubanga trial, this was apparent in the judges' clear preference for expert witnesses presenting UN documents and reports, rather than experts such as the historian Gérard Prunier, whose knowledge was based upon a lifetime of personal engagement with Africa. At the ICTR, the number of expert witnesses and eyewitnesses called during a trial has been decreasing, the combined result of 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.⁶⁵ This is not inevitable, and not all international tribunals have operated in the same deracinated manner as those in Africa. The International Criminal Tribunal for the Former Yugoslavia has 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.⁶⁶ International law, despite its avowed claims of universality, generalizability, and standardized application, in practice does manifest itself differently in each context.

There may well be a justifiable rationale for international criminal trials to steer clear of discussing the political and ethnic ideologies spurring an armed conflict. Some African wars may well be ideologically bereft and conducted primarily on the basis of "pure avarice." Yet the international legal prism for apprehending armed conflict may also obstruct other ways of understanding them, and in particular obscure the social tensions that produce them. Why should any of this matter? Because in the end, an international court's judgment constitutes an (the?) official record of an armed conflict. All the ICC concluded about the motives driving Mr. Lubanga—the Court's definitive answer to the "why" question—was the following: "The 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."⁶⁷ Thus, 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, which by most conventional accounts left tens of thousands dead and hundreds of thousands displaced.

There are other reasons beyond the historical record. If international criminal tribunals are going to be relevant to the adjudication and resolution of armed political conflicts in Africa, then they are going to have to engage more deeply with the social and historical origins and drivers of those conflicts. My sense is that there is a constituency in Africa that is open to this role for international justice institutions and is

willing to engage with such a role meaningfully. This view is informed in part by my experience in June 2001 in Sierra Leone, the year before the Special Court was established. The country was emerging from a brutal civil war, and I was in Freetown to participate as an anthropologist in a technical meeting on children's participation and protection in the Truth and Reconciliation Commission for Sierra Leone, jointly organized by UNICEF and the Human Rights Forum of Sierra Leone.⁶⁸ At consultative meetings with local actors, there was significant agreement about how the truth commission ought to deal with the issue of child soldiers. There were disagreements about other matters of substance, but Africans and Westerners were on all sides of the debates. Both relativism and a conventional African nationalism were dead among this war-weary people. At one meeting, a local university anthropologist gave an account of customary courts and the harsh physical punishments conventionally meted out to youths by their elders. He was rather too cheerful at the prospect of public beatings for former child soldiers returning to their communities, and this had the effect of turning the group away from community justice initiatives. A Sierra Leonean juvenile justice lawyer responded that customary law is "a myth" anyway, since nothing remotely corresponding to the idea of traditional courts had survived ten years of all-out war. My sense was that Sierra Leoneans wished to appropriate international human rights standards and institutions and pragmatically employ them to accomplish their main aims, which at the time were rebuilding their society and consolidating peace and stability. While views differed on whether the government and international community should champion a policy of reconciliation or accountability with regard to the rebel RUF, the majority of Sierra Leoneans I spoke with preferred court prosecutions of the top twenty or so individuals responsible for war crimes to a truth commission, which they saw as an imposition by the United Nations Mission in Sierra Leone (UNAMSIL). This anecdotal evidence is supported by a wider NSF-funded comparative study conducted by David Backer of victims' responses to the transitional justice processes in Ghana, Liberia, Nigeria, and Sierra Leone.⁶⁹ There is enough evidence to say that many Africans both comprehend and favor the idea of national and international justice measures, understood as accountability for the main perpetrators. The fact that international tribunals have neither fully explored the social and historical context of crimes committed during armed conflict nor mobilized the widespread popular support for fair trials that exists represents a missed opportunity.

Toward a Contextual Jurisprudence

How I feel about these 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 initiatives 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 adhering to international humanitarian law's categories of *jus ad bellum* and *jus in bello*.⁷⁰ Criminalization and punishment 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. Most criminologists agree that marked reductions in the murder rate, as have occurred recently in New York or the United Kingdom, have been achieved by a combination of improved social policy (e.g., in public housing) and enhanced criminalization and policing (e.g., of domestic violence).⁷¹ Integrating criminal justice with social justice seems to be the key. Whether or not these crime reduction strategies might be effectively applied to Africa is a subject for further discussion, but what is interesting is how gender seems to be crucial to cutting the murder rate in both settings. As (or even, because?) the grand narratives of Marxism and anticolonialism have receded from view, there is greater awareness of gender violence in Africa, a feature that has been reinforced in the case law and statutes of the ICTR, the International Criminal Tribunal for the Former Yugoslavia, and the ICC, which define rape and other forms of sexual violence as war crimes and crimes against humanity.⁷² 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 Sub-Saharan Africa.

There are also grounds for concern regarding the inexorable expansion of the category of crime in African contexts. Intention and political context matter, and acts need to be assessed not in isolation but with an awareness of political histories, and, if at all possible, by justice institutions that are embedded in the national political and legal context in which the events occurred.⁷³ Thus far at the ICC, the main discussion of history and politics, and especially the history of economic oppression and social exclusion of particular ethnic groups, is being left to the defendant in the dock. This is a repetition of what happened at the ICTR, where only the defense focused the court's attention on the history of colonial oppression of Hutus. They did so for self-serving legal reasons, of course, namely, to claim that the crimes were a retaliatory response to provocation, and to seek to mitigate their client's sentence. Insofar as a court must be convinced that the defendant possessed special intent in order to make a finding of genocide, comprehending 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 form a necessary component of judging international crimes, not just a pleasant addendum to the process, time permitting.

Mahmood Mamdani is correct to excoriate international justice institutions for depoliticizing political conflicts through the adoption of a "strictly legal approach that insists on detaching war crimes from their underlying political reality."⁷⁴ Mamdani goes on to extol the virtues of national sovereignty and political negotiations to end conflict as occurred in South Africa, but he glosses over the shortcomings of national processes and overstates their distinctiveness as compared to international programs. We have seen in this essay how the South African negotiations led to multiracial elections but facilitated neither personal security for the citizenry nor accountability for apartheid perpetrators. All the while, the new ANC government propounded principles of liberal jurisprudence that were relatively indistinguishable from those advocated by international institutions. Finally, it is worrying that Mamdani's critique of international law leads him into the same rejectionist camp as former U.S. ambassador to the United Nations John Bolton, whom he cites approvingly.⁷⁵

One can, however, respond to hardened realists such as Mamdani and Bolton by advocating for necessary changes to the operation of national and international legal institutions. One path out of the myopia of international criminal tribunals working in Africa might be found in broadening the evidentiary basis for cases brought before international courts. International legal procedure could afford to move farther from the adversarial model, which accords to the prosecution the role of the driver of the trial, and closer to a civil law model, according to which the bench manages cases closely, calls court-appointed expert witnesses, and generally guides the process of gathering a wider body of evidence. Innovations such as these could facilitate a “contextual jurisprudence” that bridges the gulf between international criminal law and societal and historical context and enables a broader and more inclusive approach to causality.⁷⁶ In addition to reforming the internal procedure of international justice institutions, one could foresee more structural amendments: international courts could afford to be less focused on Africa, less restricted and biased in their selection of cases, and less amenable to executing the will of governments simply seeking to undermine opposition movements.⁷⁷ They might also seek to localize war crimes prosecutions—another aspect of contextual jurisprudence—and integrate themselves operationally with national criminal justice systems, as the International Criminal Tribunal for the former Yugoslavia has done through transfers of middle-level cases to hybrid national/international war crimes chambers in Belgrade, Sarajevo, and Zagreb.⁷⁸ With this greater integration into national contexts could come an ability to engage with the structural factors (poverty, ethnic hierarchies) that fuel armed conflict.

While this essay ends on a policy note, there are no easy answers to these questions. Absolutists, be they African nationalists or human rights advocates, may offer spotless rejoinders unblemished by doubt, but thankfully we have writers and filmmakers who tend to be anti-absolutists by their very nature and craft. Their contribution is to explore gray areas and moral dilemmas and to highlight abstract themes in a way that shows their impact on everyday existence, and I expect that African writers and filmmakers will be delving into the lived experience of crime in African communities for some time to come.

NOTES

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1. As Roger Cotterrell notes, legal positivism rigidly separates fact and value, ignores values and attitudes in its elevation of rules, and therefore cannot explain why rules change. See Roger Cotterrell, *The Sociology of Law*, 2nd ed. (London: Butterworth, 1992), 8–15.

2. See Jean Genet, *The Thief’s Journal* (London: Grove Press, 1994). Other works also convey Genet’s disdain of the law. His play *The Balcony* is set against the backdrop of a popular revolution against the ruling elite, who huddle together for safety in a brothel, since it is so well guarded (and

often frequented) by the chief of police, army general, and bishop. The judge articulates Genet's views on justice as he declares to the thief before him, "My being a judge is an emanation of your being a thief. You need only refuse . . . for me to cease to be . . . to vanish, evaporated," and as he admits, "I am just a dignity represented by a skirt." Genet, *The Balcony*, trans. Bernard Frechtman (New York: Grove Press, 1962), 19, 80.

3. "Thatcher: Thirty Years On," BBC News, August 28, 2009, http://news.bbc.co.uk/2/hi/uk_news/northern_ireland/8226806.stm (accessed March 21, 2013).

4. The same dynamic played out in apartheid South Africa. On the efforts of prisoners to challenge apartheid legal constructions of "terrorist," "communist," and "criminal" through their writing, see Paul Gready, "Autobiography and the 'Power of Writing': Political Prison Writing in the Apartheid Era," *Journal of Southern African Studies* 19, no. 3 (1993): 489–523.

5. A point made eloquently by British social historian E. P. Thompson in a number of essays, such as "Custom, Law and Common Right" and "The Moral Economy of the English Crowd in the Eighteenth Century," in *Customs in Common: Studies in Traditional Popular Culture* (London: Penguin, 1991), 97–184, 185–258.

6. Jean Comaroff and John Comaroff refer to a "judicialization of politics" in "Law and Disorder in the Postcolony," *Social Anthropology* 15, no. 2 (2007): 148. See also Mahmood Mamdani, "Responsibility to Protect or Right to Punish?" *Journal of Intervention and Statebuilding* 4, no. 1 (2010): 53–67.

7. A high-level conference held in South Africa in 2002 on crime in the eleven member states of the Southern African Development Community convened by the United Nations Office on Drugs and Crime struggled to gather reliable data on crime in the region. Only South Africa could provide relatively detailed and up-to-date official crime data for the 1994–2001 period. Angola, the Democratic Republic of the Congo, Lesotho, and Namibia could provide no data at all; Zambia had no police data but furnished information gleaned from court records; Mozambique only had data for 1998–2001; Swaziland had fragmentary official statistics; and the crime record from Botswana, Zimbabwe, and Malawi was patchy for the period in question. See Rob Boone et al., "Measuring and Taking Action against Crime in Southern Africa," *Forum on Crime and Society* 3, no. 1 (2003): 141–55.

8. On the rule of law which he calls "a universal value," see E. P. Thompson, *Whigs and Hunters: The Origin of the Black Act* (New York: Pantheon, 1975): 258–269.

9. Roelf Meyer, "Celebrating South Africa's peaceful transition," Reconciliation Barometer Blog, <http://reconciliationbarometer.org/volume-eight-2010/roelf-meyer-celebrating-south-africa%E2%80%99s-peaceful-transition> (accessed March 21, 2013). Antoinette Louw also refers to the "peaceful nature of the transformation" in "Surviving the Transition: Trends and Perceptions of Crime in South Africa," *Social Indicators Research* 41 (1997): 137.

10. Truth and Reconciliation Commission South Africa, *Report*, vol. 2 (Cape Town: Juta and Co., 1998), 584. See <http://www.justice.gov.za/trc/report/index.htm> (accessed March 21, 2013).

11. See Richard Abel, *Politics by Other Means: Law in the Struggle against Apartheid, 1980–1994* (London: Routledge, 1995).

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

13. *Masakhane* means, literally, "let us build together." For an exceptional ethnographic

account of the struggle over services in South African townships, see Antina Von Schnitzler, "Citizenship Prepaid: Water, Calculability and Techno-Politics in South Africa," *Journal of Southern African Studies* 34, no. 4 (2008): 899–917.

14. Promotion of National Unity and Reconciliation Act 34 of 1995, S.20.b, <http://www.justice.gov.za/legislation/acts/1995-034.pdf> (accessed March 21, 2013).

15. *Ibid.*, 20.3.f.i-ii.

16. Several hundred people were burned alive with tires around their necks, a practice called "necklacing." Later on, many were found to have been innocent of the accusations against them.

17. On the moral equalization of crimes during TRC human rights violations hearings, see Richard A. Wilson, *The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post-Apartheid State* (Cambridge: Cambridge University Press, 2001), 111–14.

18. *Ibid.*, 103–4.

19. From the South African film *Gangster's Paradise: Jerusalema* (2008).

20. On perceptions of crime in South Africa in the 1990s, see Louw, "Surviving the Transition." More recently, this study was updated as Louw, "Crime and Perceptions after a Decade of Democracy," *Social Indicators Research* 81, no. 2 (2007): 235–55.

21. See Antony Altbeker, "The Dangers of Data: Recognizing the Limitations of Crime Statistics," *South African Crime Quarterly*, no. 14 (December 2005): 29–36.

22. Henri E. Cauvin, "South Africa Veils Crime Data, Faulting System," *New York Times*, August 3, 2000.

23. An assertion based upon Louw, "Surviving the Transition," and Gordon Barclay and Cynthia Tavares, "International Comparisons of Criminal Justice Statistics 2000," *Statistical Bulletin 05/02* (London: Home Office Research Development and Statistics Directorate, 2002). Two of the more reliable sources for this article are the South Africa-based journal *Social Indicators Research* and *South African Crime Quarterly*, published by the Institute for Security Studies located in Tshwane/Pretoria and Cape Town. For an excellent overview of crime in South Africa, see the many publications of the historian Gary Kynoch, for example "Crime, Conflict and Politics in Transition-Era South Africa," *African Affairs* 416, no. 104 (2005): 493–514.

24. According to official statistics, 24,588 versus 9,913, as reported in South African Institute of Race Relations, *South Africa Survey* (SAIRR: Johannesburg, 1998), 20.

25. Barclay and Tavares, "International Comparisons," 3.

26. *Ibid.*, 3. 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*, September 9, 2011.

27. "Talking Point: Have You Experienced Crime in South Africa?" BBC News, April 16, 2002, http://news.bbc.co.uk/2/hi/talking_point/1924251.stm (accessed March 21, 2013).

28. One book published at the same time and worth reviewing here is Jonny Steinberg, *Midlands* (Johannesburg: Ball, 2002).

29. J. M. Coetzee, *Disgrace* (London: Secker and Warburg, 1999).

30. For an insightful treatment of Lucy's response to the sexual assault, see Maria Lopez, "Can We Be Friends Here? Visitation and Hospitality in J. M. Coetzee's *Disgrace*," *Journal of Southern African Studies* 36, no. 4 (2010): 923–38.

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

32. *The Star*, May 9, 1997.

33. Wilson, *Politics of Truth and Reconciliation*.
34. Personal interview conducted 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 has local African adherents, complicating the picture somewhat.
35. Zakes Mda, *Ways of Dying* (London: Picador, 1995).
36. "Crime Wave in South Africa Spurs Fierce Vigilante Justice," *Christian Science Monitor*, August 9, 1996.
37. Mda, *Ways*, 66.
38. Also titled *Jeruselema* in South Africa.
39. Robyn Pharoah reports 3,004 kidnappings in 2003–4, according to South African Police Service records, down from 4,101 in 1994–95. See Pharoah, "An Unknown Quantity: Kidnapping for Ransom in South Africa," *South African Crime Quarterly*, no. 14 (December 2005): 25.
40. *Swart* means "Black" in Afrikaans. Thus the white police officer's name is, ironically no doubt, "Blackie Black."
41. For a superb study that confirms "social disorganization theory," which explains crime as the result of a loss of social control over disenfranchised youth, see Gregord D. Breetzke, "A Socio-Structural Analysis of Crime in the City of Tshwane, South Africa," *South African Journal of Science* 106, no. 11/12 (2010): 41–47.
42. 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.
43. Kamari Maxine Clarke, *Fictions of Justice: The International Criminal Court and the Challenge of Legal Pluralism in Sub-Saharan Africa* (Cambridge: Cambridge University Press, 2009), 164.
44. Rosemary Grey, "A Landmark Decision for International Justice," *The Punch*, March 23, 2012, <http://www.thepunch.com.au/articles/a-landmark-decision-for-international-justice> (accessed March 21, 2013).
45. Mamdani, "Responsibility to Protect or Right to Punish?"
46. Africa observers will be aware that the ICC has formally charged Jomo Kenyatta's son Uhuru Kenyatta with crimes against humanity for funding and coordinating tribally motivated violence that killed 1,200 people in the days after Kenya's disputed election in 2007. As for the colonial trial of Jomo Kenyatta, during a state of emergency in 1953, British judge Ransley S. Thacker sentenced Kenyatta and five others to seven years' hard labor for organizing "this Mau Mau society with the object of driving out the Europeans and of killing them if necessary." In sentencing, Thacker recognized the popular support for Kenyatta thus: "I am satisfied that the master mind behind this plan was yours, and that you took the fullest advantage of your power over your people and their primitive instincts." "Burning Spears," *Time*, April 20, 1953. For vivid journalistic reflections written in the immediate aftermath of the trial, see Santha Rama Rau, "The Trial of Jomo Kenyatta," *The Reporter*, March 16, 1954; and Montagu Slater, *The Trial of Jomo Kenyatta* (London: Secker and Warburg, 1955).
47. See, for instance, the "AFRC Case," *Prosecutor v. Brima, Kamara and Kanu*, June 20, 2007, SCSL-04-16-T, paras. 155–56.
48. For an iconic account of the social basis of the conflict in Sierra Leone, see Paul Richards, *Fighting for the Rain Forest: War, Youth and Resources in Sierra Leone* (Oxford: Currey, 1996).

49. Timothy Kelsall, *Culture under Cross-Examination: International Justice and the Special Court for Sierra Leone* (Cambridge: Cambridge University Press, 2009).
50. Marlise Simons and David Goodman, “Ex-Liberian Leader Gets 50 Years for War Crimes,” *New York Times*, May 31, 2012.
51. Prosecutor v. Charles Ghankay Taylor, May 18, 2012, SCSL-03-1-T.
52. Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06. Trial Chamber Judgment, March 14, 2012. Henceforth *Lubanga*.
53. See Richard A. Wilson, *Writing History in International Criminal Trials* (Cambridge: Cambridge University Press, 2011).
54. *Lubanga*, para. 72.
55. The FPLC was the military wing of the Union des Patriotes Congolais (UPC).
56. *Lubanga*, para. 74.
57. *Ibid.*, para. 74.
58. *Ibid.*, para. 70.
59. Although some elements of criminal law that were developed to deal with organized crime, such as conspiracy, have been reworked, for instance at the ICTR.
60. *Ibid.*
61. *Ibid.*, para. 76.
62. Thomas Mofolo, *Chaka*, trans. Daniel P. Kunene (Oxford: Heinemann, 1981/1931), 48. My thanks to Eleni Coundouriotis for pointing out the relevance of *Chaka* to this argument.
63. See Austin Sarat et al., eds., *How Law Knows* (Stanford, Calif.: Stanford University Press, 2007).
64. See Bruno Latour, “Scientific Objects and Legal Objectivity,” in *Law, Anthropology and the Constitution of the Social: Making Persons and Things*, ed. Alain Pottage and Martha Mundy (Cambridge: Cambridge University Press, 2004), 73–114.
65. See Nancy Armoury Combs, *Fact-Finding without Facts: The Uncertain Evidentiary Foundations of International Criminal Convictions* (Cambridge: Cambridge University Press, 2010).
66. See Wilson, *Writing History*.
67. *Lubanga*, para. 1351.
68. The report *Children and the Truth and Reconciliation Commission for Sierra Leone* was delivered in August 2001 to the UN Security Council.
69. See David Backer and Anu Kulkarni, “The Subtleties of Victims’ Attitudes toward Amnesty: Evidence from a Four-Country Study in West Africa” (paper presented at the Law and Society Annual Association Meeting, Honolulu, June 6, 2012).
70. For a summary and provocative discussion of the laws of war, see Carsten Stahn, “‘Jus ad bellum,’ ‘jus in bello’ . . . ‘jus post bellum’? Rethinking the Conception of the Law of Armed Force,” *European Journal of International Law* 17, no. 5 (2006): 921–43.
71. A sample of the press reporting on this issue might start with Wendy Ruderman, “414 Homicides in ’12 is a Record Low for New York City,” *New York Times*, December 28, 2012; and Alan Travis, “Analysis: Fall in ‘Domestics’ Cuts Crime,” *Guardian*, July 20, 2012.
72. See Robert Cryer et al., *An Introduction to International Criminal Law and Procedure*, 2nd ed. (Cambridge: Cambridge University Press, 2010), 253–58.
73. 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. See Coundouriotis, “The Child Soldier Narrative and the Problem of Arrested Historicization,” *Journal of Human Rights* 9, no. 2 (2010): 191–206.

74. Mamdani, “Responsibility to Protect or Right to Punish?” 64.

75. *Ibid.*, 65.

76. The only prior reference I could find in legal scholarship to an idea of “contextual jurisprudence” is in Myres S. McDougal and Harold D. Lasswell, “Jurisprudence in Policy-Oriented Perspective” (working paper, Yale University Faculty Scholarship Series, paper 2582, 1967), http://digitalcommons.law.yale.edu/fss_papers/2582 (accessed March 21, 2013). The authors use the term in a way that is broadly consistent with my usage, stating that a “contextually oriented jurisprudence is deliberately designed to bring the whole tangled web of causes and consequences into view.” *Ibid.*, 500.

77. Points all made with more supporting evidence by Victor Peskin, “Caution and Confrontation in the International Criminal Court’s Pursuit of Accountability in Uganda and Sudan,” *Human Rights Quarterly* 31, no. 3 (2009): 655–91.

78. On Bosnia’s war crimes chamber, see Lara Nettelfield, *Courting Democracy in Bosnia and Herzegovina: The Hague Tribunal’s Impact in a Postwar State* (Cambridge: Cambridge University Press, 2010), 234–68.