

Whose Peace, Which Justice?¹

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I. Introduction

You may not have noticed but I briefly checked myself before getting on the stage. Talk about the power of a story. I was listening to a motivational speaker who related a story about himself. He was at a conference and he took his assistant with him. While on stage, he was all fired up. Talk about being in one's element. Then he saw his assistant making a sign to him, like something is up. Something is up! He just ignored her. He moved from one side of the stage to the other. She followed him. When she couldn't get his attention, she wrote a note on a piece of paper and raised it. He came closer to the edge of the stage to see it and it simply read, "Your fly is open." Every time I get on stage, I remember that story. There is power in stories. Everyone here has a grand narrative that explains how they got to where they are today. Let me ask you a question. What is your story?

¹ This is a text of a speech delivered at the Second Annual "Pursuing Peace Conference: Justice – Prerequisite to Peace" on September 20th, 2019 in Peoria, Arizona. The conference examined Examining the Role of Justice in Promoting Peaceful Outcomes.

What is the story that you tell yourself publicly or privately?

The single biggest life-defining event in my life was a civil war. The Sudanese civil war. It consumed the bulk of my childhood and teen years. It killed more than 2.5 million people and displaced millions more around the world. If you take away the first five years of my life and subtract the 12 years that I have been a U.S. citizen, you end up with the biggest section being the middle part. Those were the great years of the wilderness of my youth.

I spent most of my life running from conflict. I moved first with my family as an internally displaced person within the same country. Then when that didn't lead to peace, we fled to neighboring countries. From country to country, each time I found myself in the middle of a civil war, a genocide, and political unrest. I agree with Rick Warren who said, "Your greatest life messages and your most effective ministry will come out of your deepest hurts."² Ironically, I have spent the last 15 years trying to make sense of violence. With conflict often comes the call for justice. I think we can all agree that we live in challenging times. You cannot turn on the television without hearing about a country or region consumed by the problems of violence and conflict. The question that many plural societies around the world face is how to end violence (the end of hostilities), hold perpetrators accountable (justice), and achieve peace (conflict transformation).

² Richard Warren, *The Purpose-Driven Life : What on Earth Am I Here For?* (Grand Rapids, Mich.: Zondervan, 2002).

I would like to do three things through offering you the benefit of a comparative analysis between two countries: Germany and South Africa. In the process, I would like to introduce the concept of survivor justice. I will challenge the belief that reform can only come through having the courts as the only viable alternative to dealing with the aftermath of mass violence (trials). I want to ask you to keep few things in mind: leadership, institutions, and the importance of seeking a solution from within the parameters of the problem. Often times, our conception of the problem is our main problem. I will argue that in contexts where a decisive military victory is untenable, survivor justice, that is political reform combined with judicial reconciliation, is the best way to resolve today's intractable conflicts.³

Peace and justice involve fundamental ethical challenges and dilemmas in many societies around the world. In divided and polarized societies there are heated public debates on the role and place of perpetrators, victims, beneficiaries and survivors in the new political dispensation. How to resolve the tensions between making peace and promoting justice? And what are some of the lessons to be learned about waging peace and justice in the aftermath of injustice and violence?

II. Global Marketplace

³ Christopher Zambakari, "To Punish or to Reform? Survivor Justice in Africa," *ACCORD Conflict Trends* 2016, no. 2 (2016).

⁴ Adrian Edwards, "Forced Displacement at Record 68.5 Million," UNHCR, <https://www.unhcr.org/en-us/news/stories/2018/6/5b222c494/forced-displacement-record-685-million.html>.

⁵ The Institute for Economics and Peace (IEP), "Global Peace Index 2018," (Sydney, New York and Mexico City: The Institute for Economics and Peace (IEP), 2019).

In the global marketplace, we know a few things about violence. In our world today, we see an increase in displaced peoples, rising global powers, mass shootings, political divisiveness, and organized protests. The United Nations reports that more than 68.5 million people had been driven from their homes across the world at the end of 2017.⁴ According to the Institute for Economics and Peace (IEP), the global cost of violence in 2018 was \$14.76 trillion.⁵ The U.S cost of war in the post-9/11 era is now over \$5.9 trillion.⁶ That means if you took all 308 million Americans each one owes \$19,000 just for the cost of the wars – mainly Iraq, Afghanistan and the Global War on Terrorism (GWOT). The Bureau of Justice Statistics reports that the combined total of federal, state and local expenditures on the judicial and legal system was \$57.9 billion in 2012. Most of the \$29 billion is court expenditures is related to criminal justice.⁷

According to Richard Rohr, a Franciscan priest, when it comes to justice in the aftermath of crime, mass violence, and grave injustice, the dominant paradigm of justice is retributive justice. When people say, "We want justice", what they mean generally is that bad deeds should be punished or that they want vengeance. He notes that "our judicial, legal, and penal systems are almost entirely based on this idea of retributive justice. This much bad deserves this much punishment; this much good

⁶ Neta C Crawford, "United States Budgetary Costs of the Post-9/11 Wars through FY2019: \$5.9 Trillion Spent and Obligated," (Providence, RI : Costs of War Project at Brown University. Accessible from https://watson.brown.edu/costsofwar/files/cow/imce/papers/2018/Crawford_Costs%20of%20War%20Estimates%20Through%20FY2019%20.pdf, 2018).

⁷ Peter Wagner and Bernadette Rabuy, "Following the Money of Mass Incarceration," Prison Policy Initiative <https://www.prisonpolicy.org/reports/money.html>.

deserves this much reward.”⁸ Fundamentally built on Aristotelian concepts, “justice cannot be equated with simple reciprocity, proportional reciprocation is the basis of all fair exchange.”⁹ As we will see in the next few sections, there is no single format to the pursuit of peace and justice. Each solution must be anchored within the context that gave rise to the violence and injustice. The next two examples will show both the successes and failures, achievements and pitfalls of searching for peace and justice in the aftermath of political tragedy.

III. Germany

During World War II, the Nazi regime organized the systematic persecution and murder of six million Jews, Gypsies and other deemed undesirable. Millions more people died in that horrible war. At the end of WWII, Germany was reduced to rubble. The Allies set up a court at Nuremberg to try perpetrators of the war. Nuremberg is fascinating because it was a compromise among the Allied powers.

The trials at Nuremberg were based on a number of assumptions and realities born from the Second World War that are absent in most contexts today where conflict is ongoing. In other words, where you have a political and military stalemate, you can't impose victor's justice. You are left with the search for an alternative way to end the conflict. Firstly, the precondition for the trials was the decisive Allied military victory over Nazi Germany.

⁸ Fr. Richard Rohr, "Prophets: Part Two-Justice in the Scriptures," Center for Action and Contemplation, <https://cac.org/justice-in-the-scriptures-2019-07-07/>.

⁹ cited in J.A.K. Thomson, H. Tredennick, and J. Barnes, *The Nicomachean Ethics* (Penguin Books, 2004), 123.

Second, there was a clear separation between where the winners, losers, victims, and survivors were going to live: they – largely – weren't going to have to live together, with Israel created for survivors of the Holocaust. Finally, at Nuremberg, only the losing forces were tried, with the Allies countries appointed both the judges and prosecutors. Significant omissions from the trial were the acts that Allied forces themselves had committed during the war, including such atrocities as the firebombing of the cities of Dresden and Hamburg.¹⁰

After the war you had two Germanies: East and West. The Cold War kept the two divided. As Germans began to reckon with their past, there was a need and call for the country to reconcile with its former adversaries. On December 7, 1970, the West German Chancellor, Willy Brandt, visited Poland. While visiting a monument to the Nazi-era Warsaw Ghetto Uprising, he did the unthinkable. Brandt got down on his knees, confessed to the guilt of his country and begged for forgiveness. Years later, he noted, “As I stood on the edge of the Germany's historical abyss, feeling the burden of millions of murders, I did what people do when words fail.”¹¹

Today, if you visit Germany, you will note something very unique to that country. It has memorialized its crimes and put them out for people to see as a reminder that history only repeats itself when we forget the lessons of the past. In 1991, West Germany instituted a solidarity tax starting at 7.5% and settling at 5.5% in 1995 to help cover the costs of

¹⁰ Christopher Zambakari, "Two Paradigms of Justice: Criminal Vs Survivor Justice in Africa," *Contemporary Justice Review* 22, no. 2 (2019).

¹¹ Rare Historical Photos, "Warschauer Kniefall, Willy Brandt Falls to His Knees, 1970," Rare Historical Photos,, <https://rarehistoricalphotos.com/warschauer-kniefall-1970/>.

reunification and invest in infrastructure in the former East Germany.¹² In the subsequent 25 years, the gap between the East and West has significantly closed. If Germany combined political reconciliation with economic reform, we will see that in the case of South Africa, the reform was incomplete and the consequences have been very dire for millions of South Africans in the new South Africa.

IV. South Africa

In 1913, the ruling Afrikaner National Party began a national program of expropriating lands from the black majority and giving them to the white minority. The cornerstone of the new program was the Natives Land Act of 1913. This act appropriated 87 percent of all arable land for the whites and left a mere 13 percent for the black majority, who were herded into separate reserves or ethnic homelands.¹³ The law instituted territorial segregation for the first time since the union of 1910. It created tribal homelands for blacks. It also prohibited sales or land transfer in white areas to blacks.¹⁴

In 1948, the Afrikaner National Party introduced apartheid, an Afrikaans word meaning 'apartness': separate by equal. The system cruelly and forcibly separated people, with a fearsome state apparatus to punish those who disagreed. The system banned all inter-marriage and social integration between racial groups in South Africa. The apartheid government passed the Population Registration Act in 1950. The law

¹² <https://www.dw.com/en/german-government-moves-to-end-solidarity-tax-for-eastern-germany/a-49983217>

¹³ South African History Online (SAHO), "The Native Land Act Is Passed," South African History Online (SAHO), <https://www.sahistory.org.za/dated-event/native-land-act-passed>.

¹⁴ "A History of Apartheid in South Africa," <https://www.sahistory.org.za/article/history-apartheid-south-africa>.

imposed a requirement to register everyone according to their race e.g. white, colored, black, Indian or Asian. The act was accompanied by the Group Areas Act of 1950, which instituted physical separation of different races in urban areas. These laws were followed by the Promotion of Bantu Self-Government Act I in 1959. The latter required different races to reside in different areas. Whatever small spot of blacks who resided in areas designated for whites were forcefully removed.¹⁵

Under the apartheid regime, an estimated "3.5 million people were forcibly removed from their communities"¹⁶ between 1960 and 1982. At the end of apartheid in 1994, 60,000 white farmers held 86 percent of all farmland. Thirteen million blacks, many of whose forebears had been dispossessed in 1913, held the remaining 14 percent, much of it poor-quality land.¹⁷

In 1994, when the major stakeholders agreed to transition out of the apartheid system into a popular democracy, they were faced with the legacy of the system. How to deal with the legacy of a system that legislated segregation, dispossessed land from its owners, entrenched racism in law and within political institutions? On the political side, South Africa agreed to political reform. It reformed the political institutions. However, the reform prioritized the "relationship between perpetrators and victims"¹⁸ instead of focusing on the relationship between beneficiaries and victims. It stumbled and failed to address the social and economic

¹⁵ Ibid.

¹⁶ Mahmood Mamdani, "A Diminished Truth," *Siyaya!* Spring, no. 3 (1998): 39.

¹⁷ H.P. Binswanger-Mkhize, C. Bourguignon, and R.J.E. van den Brink, *Agricultural Land Redistribution: Toward Greater Consensus* (Washington, DC: World Bank, 2009).

¹⁸ Mahmood Mamdani, "Reconciliation without Justice," *Southern African Review of Books*, no. 46, November/December (1996).

consequences of apartheid. It left economic institutions untouched.

Today, out of South Africa's 58 million people, over 27 million are without proper housing, living in matchbox, slum-type shacks, on farms belonging to others and in impoverished communal areas in former Bantustans.¹⁹ The current unemployment rate stands at 27 or 28 percent. That is because in most places the question of how land is utilized and by whom has direct bearing on growing unemployment.²⁰

The real trade-off was not between peace and justice. It was between different forms of justice. The political leadership in South Africa prioritized political justice over criminal justice. The rationale was simple: where there was no victor, one would need the cooperation of the very leaders who would otherwise be charged with war crimes to end the fighting and initiate political reforms. This was summed up in a single phrase: forgive but do not forget. Forgive all past crimes – in plain words, immunity from prosecution – provided both sides agree to change the rules to assure political justice for the living.²¹

Despite the progress on the political front and the economic empowerment of a black elite, according to former President Mbeki, South Africa continues to consist of two nations: "One of these nations is white, relatively prosperous, regardless of gender or geographic dispersal. It has ready access to a developed economic, physical, educational, communication and other

infrastructure...The second and larger nation of South Africa is black and poor, with the worst affected being women in the rural areas, the rural black population in general and the disabled."²²

For us here today, the crucial question is how to get those who supported and benefited from a system that disenfranchised and oppressed certain people in society to say a sincere *mea culpa* and commit themselves to work for the restitution and integration of the victims and survivors of a violent past. In other words, how do we go beyond reforming the political system to addressing the legacies of beneficiaries of previous regimes. How do we go beyond political justice to beginning the conversation about economic and social justice for victims and survivors?

VI. Survivor Justice

The notion of survivor justice arises in response to a dilemma of conflicts in pluralistic, divided societies, when examining the question of how to end ongoing violence and redress historical injustices. Whenever there is violence and injustice, there is a call for peace, reconciliation and justice. Survivor justice combines political reform with judicial reconciliation. It takes as a starting point the survivors of the conflict and prioritizes reform over prosecution. It challenges the belief that reform can only come through the courts. This articulation is increasingly gaining support in places where conflict is intractable

¹⁹ "Why South Africa Can't Avoid Land Reforms " New York Times, <https://www.nytimes.com/2019/06/17/opinion/south-africa-land-reform.html>.

²⁰ Ibid.

²¹ Zambakari, "Two Paradigms of Justice: Criminal Vs Survivor Justice in Africa."

²² cited in Charles Villa-Vicencio, "Where the Old Meets the New: Transitional Justice, Peacebuilding and Traditional Reconciliation Practices in Africa," in *Claude Ake Memorial Papers* (Uppsala, Sweden: The Nordic Africa Institute, Uppsala university. Accessible from <http://nai.diva-portal.org/smash/get/diva2:279374/FULLTEXT01.pdf>), 18.

and victory unobtainable through military means. Survivor justice does not advocate for blind impunity and blank amnesty. It distinguishes between forms of justice by prioritizing the living over the dead, proposing a combination of impunity combined with reform, and sequences the process.²³ According to Mamdani, "If one insists on distinguishing right from wrong, the other seeks to reconcile different rights. In a situation where there is no winner and thus no possibility of victors' justice, survivors' justice may indeed be the only form of justice possible."²⁴

If Nuremberg shaped a notion of justice as criminal justice, the Convention for a Democratic South Africa (CODESA) calls on us to think of justice as primarily political. CODESA shed the zero-sum logic of criminal justice for the inclusive nature of political justice. If the former emphasizes victims' justice, the latter prioritizes survivors' justice by highlighting the relationship between beneficiaries and victims. Durable peace requires quality leadership, the institutionalization of non-violent conflict resolution, and respectful deliberation.

In the South African case, criminal justice was subordinated to survivor justice. Whereas the German example of victor's justice is illusive in many parts of the world, the South African example offers clues to one viable way out of a

stalemate.²⁵ Without addressing the social legacy of apartheid, South Africa continues to be plagued by gross social injustices left behind precisely because apartheid targeted groups of individuals.²⁶ It offers a trade-off between impunity and structural reform (less institutional reform in the latter case than the former). Justice that avoids a zero-sum logic stands a better chance in the search for durable peace in divided societies where decisive military victory is unobtainable.

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²⁴ Mahmood Mamdani, "The New Humanitarian Order," *Nation* 287, no. 9 (2008): 22..

²⁵ Zambakari, "To Punish or to Reform? Survivor Justice in Africa."

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