



The Question of Justice – Lessons and Challenges

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Introduction

I am greatly honored to be invited to give the Kenya Human Rights Commission's Annual Human Rights lecture. I am deeply conscious of how important and sensitive is the discourse and mobilization around human rights at this particular time in Kenya's history. Finally, I am humbled by the well known fact that I am not a scholar of Kenya. My knowledge of Kenya is that of a neighbor. I propose both to restrict myself within the prerogative of a neighbor and to take advantage of it: which is to say that I will dispense some advice, knowing fully well that, having done so, I shall have the privilege of exiting the scene.

This means that while my talk will have bearing on the situation in Kenya, that bearing will be indirect, not direct. Rather than claim to provide definitive answers to questions, I shall seek to open up a debate on the issue of justice in the context of civil conflict and civil war. I will talk about several African contexts, contexts not very different from that of Kenya. I will propose lessons that can be learnt from these contexts. But I will leave it to you to decide which lessons are relevant, and which ones not; more precisely, which lessons are more relevant, which ones less.

My focus will be on questions of justice in two specific forms which call for urgent attention: criminal and political. I will for the moment leave aside the issue of social justice, a question of longer term significance. My immediate argument will focus on the tension between criminal and political justice, beginning with why this tension is worthy of attention.

Sudan and Darfur

I have spent the past five years working on Sudan, in particular Darfur. All of us know of the terrible violence unleashed in Darfur and on Darfur in 2003-04. That violence has a history. It also has a meaning. Violence is not its own explanation. When people fight, whether non-violently or violently, there is inevitably a history and inevitably issues around which they fight.

The violence in Darfur began as a civil war in 1987-89. There was a reconciliation conference at the end of that civil war. Both sides made representations at this reconciliation conference, putting forth their point of view on the conflict. Both claimed to be victims.

Human rights organizations – from Human Rights Watch to the International Crisis Group – have focused on the *atrocities* committed during the violence in Darfur. I want to focus on the *background* that they have ignored: why the violence? What were the *issues* that drove the civil war? The violence in Darfur is usually named as an ethnic conflict, sometimes even as a racial conflict. The question is: Do Africans fight one another just because they are different? Or do they fight because they have differences?

The background to the conflict in Darfur is marked by several issues. I will point out two of the most important ones. The *first*, the more immediate though not necessarily the most important, is that of sheer survival in the face of an ecological crisis, a crisis of drought and desertification. According to a UNEP study issued last year, the Sahara moved roughly 100 kilometers in 40 years, pushing northern tribes southwards.

The second issue was more longer term. It stemmed from the land tenure system created during the colonial period. Like most places colonized by Britain after the Berlin Conference in late 19th century, Darfur was tribalized during the colonial period. It was divided into tribal homelands. The British divided the tribes of Darfur into three: settled peasant tribes got the largest homelands, equivalent to their settled areas; semi-settled cattle nomads got smaller homelands that included their villages but not necessarily their grazing grounds; finally, tribes of camel nomads who had no settled villages got no tribal homelands. To understand the responses of different tribes to the drought that reached its most acute expression in the mid-80s, you needed to understand this background of how tribal homelands had been created in the colonial period.

When nomadic groups from the north came down south, a confrontation built up between peasant and pastoral groups around the lush territory of the Jebel Merra – a mountain in central Darfur. Each side justified its demands in a different language. The peasant tribes spoke the language of group rights; they

defended their exclusive right to the land as their tribal homeland. In contrast, nomads spoke the language of individual rights: we are citizens of Sudan, citizens have a right to go, to live and to make a living anywhere in the country. Land is not a tribal possession; it is a statutory right conferred – in law – by the state. One side stood the ground on the basis of tribal right, the other did so on the basis of citizen's right.

The dilemma of Darfur may be specific, but it is not unique. To understand the ways in which Darfur resonates with other African contexts, we need to look at the colonial legacy more fully. We shall then be able to understand the kind of challenge we faced at independence, and the extent to which we have proved equal to meeting it.

The Colonial Legacy

If you are an economist and you want to give your audience a pictorial explanation of how the distribution of wealth divides up a country, you will turn to statistical tables on GNP and National Income. But if your interest is not the distribution of income but the political question of how a country is ruled – more specifically, how particular methods of rule divide up a country – the GNP or National Income statistics will be of little use. Census data will be far more useful.

In most African colonies in the 20th century, the census classified the population into two broad, overall groups. One group was called *racés*, the other *tribes*. In some places, authorities distinguished between those said to belong to a race and those said to belong to a tribe; in other places, they distinguished between two kinds of races, between uncivilized races that were further sub-divided into tribes and races that were civilized enough not to be so sub-divided. It was said that tribe and tribalism would go away with modernity – modernization, urbanization, industrialization, and so on. Whatever the case, this single distinction – between race and tribe – will illuminate for us how colonial power governed the colony. It sums up the technology of colonial governance. I shall explain this with four observations.

First, the census divided the population into two kinds of groups, some tagged as races and others as tribes. The distinction between races and tribes was not one between colonizers and colonized, but between non-natives and natives: *non-natives* were tagged as *racés*, whereas *natives* were said to belong to *tribes*. *Racés* were said to comprise those not indigenous to Africa (Europeans, Asians), or those who were constructed as not indigenous (Arabs in Sudan, Coloreds in South Africa, Tutsi in Rwanda). *Tribes* said to be all those defined as indigenous in origin. The state thus distinguished non-indigenous races from indigenous tribes.

Second, this distinction had a direct legal significance. All *racés* were governed under a single law, civil law. Civil law was full of discriminations: racial discrimination distinguished between *master racés* (European colonizers) and *subject racés* (colonized immigrant groups such as Asians, Arabs, Coloureds and so on). Subject races were excluded from the exercise of those rights considered the prerogative of only members of the master race. But this discrimination was internal to civil law, the body of which applied to all races.

This, however, was not true of tribes and customary law. There was never a single customary law to govern all tribes as natives, as one racialized group. Each *tribe* was ruled under a separate set of laws, called customary laws. It was said that tradition was tribal: natives must thus be divided into tribes, with each tribe governed by a law reflecting its own tradition. Yet most would agree that the cultural difference between races – such as Whites, Asians and Arabs – was greater than that between different tribes. To begin with, different races spoke different languages, mutually unintelligible. Often, they practiced different religions. They also came from different parts of the world, each with its own historical archive. Different tribes, in contrast, were neighbors and usually spoke languages that were mutually intelligible (thus it was said that neighboring tribes could 'hear' one another).

My point is simple: even if *racés* were as different culturally as were whites, Asians, and Arabs, they were ruled under a single law, imported European law, called civil law, modified to suit a colonial context. Even if their languages were similar and mutually intelligible, *tribes* were governed under separate laws, called 'customary' laws, which were in turn administered by ethnically distinct native authorities. With

*rac*es, the cultural difference was *not* translated into separate legal systems. Instead, it was contained, even negotiated, within a single legal system, and was enforced by a single administrative authority. But with *tribes*, the case was the opposite: cultural difference was reinforced, exaggerated, and built up into different legal systems and, indeed, separate administrative and political authorities. In a nutshell, different races were meant to have a common future; different tribes were not.

My *third* observation: the two legal systems were entirely different in orientation. We can understand the difference by contrasting English common law with colonial customary law. English common law was presumed to change with circumstances. It claimed to recognize different interests and interpretations. But customary law in the colonies assumed the opposite. It assumed that law must not change with changing circumstances. Rather, any change was considered *prima facie* evidence of corruption. Both the laws and the enforcing authorities were called 'traditional'.

Traditional authority in the colonial era was always defined in the singular. We need to remember that most African colonies did not come from a political history of an absolutist state. Instead of a single state authority whose writ was considered law in all social domains, the practice was for different authorities to define separate traditions in different domains of social life. The rule-defining authority thus differed from one social domain to another; besides chiefs, the definers of tradition could include women's groups in the market place, age groups in the battle field, clans when it came to land, religious groups when it came to the spiritual domain, and so on. The big change with the colonial period was that Western colonial powers exalted a single authority, called the chief, as *the* traditional authority. Marked by two characteristics, age and gender, the authority of the chief was inevitably patriarchal and authoritarian.

Fourth, this legal project needs to be understood as part of a political project. The political project was highlighted by the central claim of the indirect rule state that natives are by nature tribal. In time, this very claim, that natives are by nature tribal, would be advanced as reason for why the African colonies have no majority, but only tribal minorities. This claim needs to be understood as political, not because it is not true but because this truth does not reflect an original fact but a fact created politically and enforced legally.

This form of governance had a name in the colonial period. It was called Native Administration. At the heart of Native Administration was an administrative and legal distinction between 'native' and 'non-native' tribes. Immigrants were identified as 'non-natives' no matter how many generations they had lived in the area. The native identity involved three distinct privileges. The *first* was right of access to land. A non-native who wanted access to land in a tribal area had to pay a part of the harvest as tribute to the tribal authority. The *second* involved right of participation in the administration of the Native Authority. The leadership of every Native Authority could only be appointed from among those identified as natives. It was only at the lowest level of administration – the lowest tier of the Native Authority – that 'non-natives' could be appointed as headmen in villages where most residents were not natives. The *third* privilege was in the area of dispute settlement, for every Native Authority settled disputes using a set of what were called 'customary laws' which inscribed in law the prerogative of natives over non-natives.

The regime of inequality between supposedly original residents and subsequent immigrants led to a tribal administration ruling over a population belonging to multiple tribes. With all key rights – from access to land, to the right of participation in local governance to rule-making for settling local disputes – defined as group rights and declared the prerogative of those with a native tribal identity, tribal identity was turned into a fulcrum around which developed, in time, an explosive confrontation between two kinds of residents in every administrative unit: those defined as native and those not. A situation where an ethnic administration oversaw monopoly an ethnic monopoly over land by settling disputes using an ethnically-defined customary law was one where administrative power institutionalized ethnic discrimination.

You may have noted that I have shifted between the use of the words 'ethnic' and 'tribal'. But it is time we distinguished between them. Whereas ethnic identity is a historically-evolved, language-based, cultural identity, tribal identity is better understood as a product of an administratively designated power over a tribal homeland. Although tribal identity in many cases coincided with ethnic identity, by which I mean language-based, cultural, identity, this was not always the case. In some cases, the same ethnic group was divided into several tribes administratively. This made it clear that tribe referred not to an ethnic group

(language group) but to an administratively-designated political community. Sometimes that political community was created out of a language group; at other times, out of a combination of language groups; yet other times, it involved a split of one language group into many tribes; just as in some cases 'tribe' was designated totally arbitrarily – 'invented', it is said in the literature. The only thing common between all these cases is that tribe was an administrative unit, and tribal identity an officially designated administrative identity linked to a tribal homeland. For this reason, I believe it is best to refer to the system of Native Administration and Indirect Rule as a system that institutionalized tribal discrimination, even if it tried to justify this as an inevitable consequence of ethnic difference. Though I have described this system in the context of Darfur, it obtained in all African contexts that I have studied, from Eastern Africa to Nigeria, and from Sudan to South Africa.

Did tribe exist before colonialism? Tribe as an ethnic group with a common language did. But tribe as an administrative entity which distinguishes between 'natives' and 'non-natives', and defines access to land, participation in local governance and rules for settling disputes according to tribal identity – whether native or not – certainly did *not* exist before colonialism. One may ask: did race exist before racism? As differences in pigmentation, or in phenotype, it certainly did. But as a fulcrum for group discrimination which signified 'race' difference, it certainly did not. Race, like tribe, became a single, exclusive, politically charged, total – totalizing – identity only with colonialism.

The colonial state was based on a double discrimination, racial and tribal. Racial discrimination was institutionalized in the central state, and tribal discrimination in the native authority. Race was said to be about a hierarchy of civilization, whereas tribe was said to reflect cultural (ethnic) diversity within the native race. If the central state *discriminated against the native race on civilizational grounds*, the native authority *discriminated in favor of the native tribe on grounds of origin*. Race and tribe are totally modern constructs. Indeed, they are totalitarian constructs – whereby a single identity determined everything: land, governance, law.

The Post-Colonial Challenge

If you are in agreement with me so far, then we should be able to take the next step together. The nation-building project in African colonies did not begin with colonialism; it really began at independence. The post-colonial challenge was to create a single political community, the nation. To create this nation meant to create a single community ruled by the same set of laws. This project would require eliminating both sets of discriminations that split the residents of the colony into separate political communities: race and tribe. It is more or less how we did this with regard to race. It involved a triple reform – with reference to land, governance and law: removing racially-designated land areas, doing away with separate governance for each race, and creating a single law for all, without regard to racial identity.

My point is that this reform was partial. It was a reform confined to the elite sector. The reform of the popular sector has yet to be completed. This is the reform that must do away with discrimination based on the identity we call 'tribe'. The conceptual challenge is to distinguish tribe as a political identity from ethnicity as a cultural identity. I want to take three examples to make my point: Nigeria, Congo and Tanzania.

Nigeria went through a brutal civil war in the 1960s. After the civil war, they passed a new 'federal' constitution. It was said that this constitution embodied the lessons of the civil war. The central provision in the Constitution was identified with the 'federal character' clause: it said that key federal institutions must reflect the 'federal character' of Nigeria. What were the key institutions? Three: civil service, army, and federal universities. What would it mean for these institutions to reflect a federal character? To do so, each must recruit from all units of the federation – from all states – without discrimination. Each state must have a quota reflecting its share in the total federal population. The next question was: Who can compete for the quota? The answer: only those indigenous to the unit? The final question: Who is indigenous to the unit? The answer: a native, an indigene, only a person born of a father born in that unit.

Let us identify the key consequences of the federal character clause, which was interpreted in such a way that it became an indigenization clause. Most obviously, it disenfranchised ethnic minorities in each

state, those said to have originated elsewhere. But that did not mean that it empowered ethnic majorities. In reality, it divided the population between those most mobile and those least mobile. The constitution disenfranchised those most mobile, whether they were poor – like landless peasants, jobless workers, and itinerant traders – or well-off, like merchants, professionals, industrialists. At the same time, it privileged those tied to the land, in this case too both poor and rich, such as land-holding peasants and landlords. It also disenfranchised women who tended to move residence from their natal community when they got married.

The result was a growing structural tension between the economic system and the political system. Whereas the market economy mobilized more and more strata of the population, moving them beyond local boundaries into a national mix, the political system disenfranchised those most mobile. In the process, Nigerians found themselves with two different citizenship affiliations, one tribal and the other national. The local affiliation was the more meaningful. Over the past four decades, the politics of indigeneity has spread in Nigeria. It is not just the population of a state, but also that of a village, that is now divided between indigenes and non-indigenes.

My second example is from Congo. In 1997, a colleague and I were asked by Codesria to go to Kivu and write a report on the growing political conflict between the Kinyarwanda-speaking population and indigenous Congolese. We toured the full length of Kivu. I want to share some of our observations. We found that there were three main Kinyarwanda-speaking communities in Kivu, in Rutshuru (North), Masisi (Central) and Mulenge (South). We noted that whereas the Banyarutshuru were considered Congolese, the Banyamasisi were not, and there were divided views on whether the Banyamulenge were citizens or not. Why the difference? It did not stem from their culture, from the language they spoke, but from when these groups had moved to the Congolese side of the border. If they had moved before Belgium demarcated the boundaries of contemporary Congo, they were considered indigenous Congolese; but if they moved after, they were considered non-indigenous. The issue became volatile after independence, especially as a democratic opposition to Mobutu began to organize. It is worth noting that Mobutu, the dictator, announced in 1972 that all Rwandese who had emigrated to Congo before Rwanda's independence in 1959 would be considered Congolese, but the Sovereign National Conference meeting in Kisangani in the 1990s considered them foreigners. Whereas the dictator wooed the minority, the majority enfranchised the minority – democratically.

The consequence of this decision has been monumental. If you want to understand the causes and issues that have driven the Congo war that is said to have taken the lives of 5 to 6 million people over the past decade, you need to begin with the controversy around the citizenship claims of the Banyarwanda – the Banyamulenge in particular – to understand the internal split that has defined the two sides in the civil war, and only then move to how regional powers like Uganda and Rwanda have attached themselves to different sides in the ongoing civil war.

The conflict that led to the civil war in the Ivory Coast was not that different from the Congolese conflict. The migrants in Ivory Coast came from Bourkina Faso in the colonial period. They too were labor migrants brought to work in the coffee plantations in the north. After independence, when they demanded citizenship rights, the dictator, Houphet-Boigny agreed, but the democratic opposition in the South did not. Thus were sown the seeds of the subsequent civil war.

What is the lesson? The first lesson is to recognize that these issues stem from how rights were defined in the colonial period. Should political identity be defined as distinct from cultural identity, and therefore based on locality as opposed to origin? Should the claim to rights be based on individual citizenship or on group identity? I suggest that the beginning of wisdom is the recognition that there is no one side which is absolutely right and another which is absolutely wrong.

There is a second lesson. To bring it out fully, however, we need to look at another example: that of mainland Tanzania under Mwalimu Nyerere. It is unfortunate that Mwalimu Nyerere is known more for his economic thought – *ujamaa* – than for his political practice. I believe that Mwalimu Nyerere's greatest contribution was as a statesman who decolonized the state, but without using any violence. It used to be the ABC of Marxist intellectuals at the University of Dar es Salaam that the state is an armed

power, and that to dismantle the state you would need to smash it, and that you can smash armed power only with an armed force. Thus the romance with armed struggle as the prerequisite to liberation.

My analysis suggests otherwise; more than an armed power, the colonial state was a legal-administrative power. You could replace the colonial army and police, but you would still not decolonize the state. To do so, you would need to dismantle the legal-administrative power that oversaw a double discrimination: racial and tribal.

Nyerere's contribution was that he went beyond racial discrimination to removing the institutional basis of tribal discrimination. First, he dismantled the dual legacy of tribal homelands and native administration, by giving primacy to building a centralized state bureaucracy. That reform, carried out in the 1970s, was ironically called 'decentralization' because it extended the reach of the state bureaucracy from the centre to the regions and districts. The details of the reform were finalized by an American consultancy firm called Mackenzie and Associates. This was state-building, not democratization. Second, Mwalimu did away with the colonial legacy of a plural legal system based on a split between civil law and different sets of tribally-identified customary laws. Instead, he created a single body of substantive law for all citizens, enforced by a single hierarchy of courts.

The consequence of this set of reforms is also monumental: let us note that mainland Tanzania is the only state in this region which has not victimized a group as a group, either as a race or as a tribe. I believe this is because Mwalimu succeeded in creating a single citizenship in mainland Tanzania, regardless of race or tribe.

What is the lesson here? Democracy is not a magic cure so that it can by itself provide a sufficient guarantee of appropriate statecraft, what we now call governance. The democratic opposition in Congo, as in Ivory Coast, disenfranchised minorities, and created the ground that sustained a civil war. In contrast, Nyerere, not a democrat but a nationalist and a Pan-Africanist, created the institutional basis of a common citizenship and a rule of law in mainland Tanzania.

The way forward

How do we move forward? I suggest we begin by recognizing that only extraordinary individuals will change when change is against the grain – to expect ordinary individuals to change you must make change beneficial. So, what is the lesson? Do we have to wait for an enlightened despot, a Nyerere or a Mao tse Tung, to emerge and lead us out of a dark legacy? Not really. We *can* negotiate change. To do so, we need to look for key elements of the solution within the parameters of the problem itself. This means recognizing that the agents of change have to come from the very political class that is our problem today. It may sound like what the Americans call a Catch-22, but it is not.

Karl Marx once asked: who is to educate the educator? His answer was: history. But if we accept that history does not necessarily move in any particular direction, we must interpret this answer to mean that experience is the great teacher, not just our own experience, but that of others even more so. To learn from experience, however, we need the right to learn from mistakes. Let us recognize that only those who are free and sovereign have that right. Eight years ago, in 2000, Americans elected George Bush to the presidency of their country. In the 2008 elections, most Americans said they believed Bush had not really won the 2000 elections, that the election had been stolen. Should Americans have invited an external intervention to reverse the results of the 2000 election? Would such an intervention have been cost-free or would it have turned into a trigger setting in motion an internal civil war, in turn requiring a prolonged external occupation? Americans opted for a different course: learning from their own experience, correcting their own mistakes, as the 2008 election results show. This too was not cost-free. The price of the stolen election was the War on Terror, and that price was paid mainly by the world at large. But I believe it still the better option than an unfree and occupied America.

I have argued that to learn from our own post-independence experience, we need to think afresh, to begin with new metaphors, metaphors other than those of war and revolution (class war). It is not that these metaphors have become obsolete or are always wrong, only that they are not appropriate for the challenges that confront us. I am not talking of but the birth of a new consciousness. The secular

language used to call it 'revolution'; the religious people call it 'rebirth' or 'born again'. In the words of Gandhi, focus on the sin, not the sinner. Lincoln used the religious metaphor – to be born again – so as to heal America after the Civil War. As Gandhi used to say: What would be your response if you switched on the light and realized that the thief is actually your father? To understand the motivation for violence, you have to get under the skin of the perpetrator, and to realize that there is no neat distinction between victim and perpetrator as that between good and evil. In real life, on this earth, good and evil usually go together, in the same flesh.

We have been through several intractable civil wars in this continent over the past several decades. The most intractable of these was in South Africa, what used to be called apartheid. From the Second World War until the end of apartheid, the world had a single reigning metaphor for ending war and bringing justice: this was called Nuremburg. The end of apartheid brought us a new metaphor. The lesson of Kempton Park – the Jo'berg suburb where the negotiations to end apartheid were held – was a departure from Nuremburg. In a nutshell, the lesson of Kempton Park was: forgive but do not forget. Forgive, meaning there will be no punishment so long as the wrong is publicly acknowledged – in other words, impunity in exchange for truth. But the real exchange was not what the TRC (Truth and Reconciliation Commission) advertized globally: it was not the exchange of forgiveness (or impunity) for truth. The promise to forgive actually was in return for another promise: to not forget. We shall forgive the past so long as it is not repeated, so long as the rules change for the future – so long as there is structural reform.

The rationale underlying this deal – the promise to forgive in exchange for the promise to not forget – was that structural reform must have priority over the punishment of individuals. Do we have to choose between the two? Can't we have both? No, for the simple reason that, to reform structures you need to win over the *same* individuals who you would otherwise have to punish and thus end up alienating. The trade off is between criminal justice and political justice. Criminal justice requires victory. There would have been no Nuremburg without an allied victory. Where there is no victory, the only choice is between a truce as the price of reform or a renewal of the civil war for those who want to hold out for victory.

The example of South Africa was followed in Mozambique and South Sudan. The very Mozambican leaders who were responsible for the kidnapping of children and their initiation into terror – the leaders of Renamo – today sit in Parliament. If there had been an ICC present in Mozambique at the time an end to the civil war was negotiated, there would have been no peace, only a continuing civil war, in Mozambique.

The counter-example is that of Zimbabwe and Sudan. But I will come to this after I look at a few more examples from outside Africa, starting with Europe. Think of the European transition from rule by a Soviet-style single party, armed with a security apparatus. The reform began with the promise to open security files to the public, so as to hold all perpetrators accountable. Soon, there followed the realization that the perpetrators included so many that the price of holding perpetrators accountable may be a further rift and renewed civil war. The same realization in post-Franco Spain led to decades of amnesia and a minimum agreement to defer the demand for justice.

The Latin American transition to civilian rule and electoral democracy suggests the same conclusion. A key part of the deal that concluded the transition from military to civilian rule in Latin America was the promise that the military would not be held accountable for past crimes. The brass of the Zimbabwe army today shares the same fears that the Latin American military brass harbored then: that they may be at the receiving end of a demand for justice articulated by civil society activists. Indeed, the Zimbabwean military has reason to fear more, for one reason: whereas Latin American militaries of that period tended to function as the front paw of American power, the Zimbabwean military dared to offend Western power in the DRC. The history of Western sanctions in Zimbabwe shows that these sanctions were not imposed in response for domestic atrocities – whether against white farmers or against civil society activists – but as a response to the Zimbabwe army moving into Congo. We know that the last agreement to share power broke over who would control the Ministry of Interior – the police and the security apparatus. That disagreement is really about whether the military would be held accountable for past deeds. Thus my question: why not conclude the same deal in Zimbabwe?

A Second counter-example is Sudan. The political reform of Sudan has proceeded through a series of insurgencies and civil wars. The agreement that brought the war in South Sudan to an end, the CPA, was based on the same principle that brought apartheid and the civil war in Mozambique to an end: impunity for past actions combined with political reform for the future. But that agreement has been abrogated in relation to Darfur. I have already pointed out that the violence in Darfur began as a civil war between peasant and pastoral tribes in 1987-89, and went through two successive phases in 1995-96 and 2003-04. When the negotiations to end the violence were held in Abuja in 2005, only one side in the civil war was represented. This was the rebel movements with a base in the peasant tribes. The militias based in nomadic tribes were left out. In the period that followed Abuja, the emphasis shifted to criminal prosecutions through the ICC.

Is there any obvious reason to prioritize political reform over criminal justice in South Africa, South Sudan and Mozambique, but not in Zimbabwe, Darfur and northern Uganda, a case I assume you know too well for me to recount here?

Conclusion

Those who call for prosecutions in the name of justice, do so on the ground that the demand for justice must be met regardless of time or place. This presumption raises a fundamental question: that of the relationship between law and politics. Put differently, what is a legal question and what a political question? In a democracy, politics decides the scope and content of law, not the other way round. Every sovereign power defines rights in its wider political context. Just take the example of the US and Homeland Security Act. If you keep in mind that national security is simply another term for national sovereignty in the American discourse, you would then realize that the relation between security and rights has been the subject of an ongoing debate in the US since the Civil War. In contrast, legal fundamentalism detaches a question – in this case, a legal question – from its context. Human rights fundamentalists detach the question of rights from its political context; instead, they seek to trade in absolutes.

Before you consider inviting an external intervention – legal or military – to solve an internal political problem, I suggest you recognize that any durable solution to an internal problem requires an internal political process leading to an internal political solution. To forget the political context is to tread on extremely slippery ground. To detach moral and legal issues from their political context is to moralize these issues. The challenge is first to persuade your adversaries, and if not that, to isolate them politically, before turning them into enemies. The African experience of the past two decades suggests that the challenge is to build on the common ground – peace – rather than to erode it.

I wish you good luck and good sense in the period ahead.