CONSTRUCTING A COMMON LANGUAGE

THE FUNCTION OF NUREMBERG IN THE PROBLEMATIZATION OF POST-APARTHEID JUSTICE[1]

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Abstract

This paper analyses the function acquired by the historical Nuremberg trial in the constitution of a specific discourse about transitional South Africa and about what should be done about the brutality of the past. This function is best described as *mythical*: emptied of content, "Nuremberg" was a blank slate on which all parties to the debate could write their conflicting representations of the situation and their respective proposed solutions. The organization of fundamentally incompatible representations of reality around unifying myths such as Nuremberg was key to the production of visible consensus on the proper evaluation of the socio-political situation and the basic characteristics of the right course of action, and thus the appearance of effective state administration in a reconciled nation.

1 Introduction

The Nuremberg trials are probably the most important legal precedent in the continuing international effort to address the reality of state-sponsored crime. While equally solid legal arguments can and have been made both in support of and against the principles, goals or procedures they represented, by all accounts the trials certainly marked the beginning of a new conceptualization of the rule of law and its area of application. What is considerably less clear, however, is the actual, practical manner in which the experience of Nuremberg becomes useful in dealing with specific contemporary socio-political problems involving state-sponsored crime.

These problems arise most often in the context of political transitions where repressive regimes have been replaced by more democratic forms of dispensation. Now, this is a context in many ways different from that of the end of the Second World War, mainly because it usually involves a negotiated transfer of power and a much less obvious "legitimacy gap" between the parties' past actions (Hayner, 1994; Huyse, 1995; Jung and Shapiro, 1995; Nel, 1995). However the very need for a transition is commonly understood to imply that the previous organization of the state was corrupt and that those responsible should account for their actions (Cohen, 1994; Ensalaco, 1994). I think it is safe to assume that the idea of former state officials having to face the nation immediately *sounds* like "Nuremberg," and that because of this conceptual proximity in such contexts the memory of Nuremberg is bound to be invoked. How it will be invoked, and for what purpose, is central to my investigation: will it be a positive example of one possible remedy, or a warning of a pitfall to be avoided. It is the use of this comparative potential I wish to explore here. Post-apartheid South Africa is a prime example of the function of popular knowledge about Nuremberg in the creation of an institution intended to deal with injustices linked to political conflict and a past anti-democratic government. And as it turns out, during the elaboration of that institution "Nuremberg" contributed much more than its baggage of legal knowledge or its nature as a quasi-precedent in international law.

The South African National Assembly voted in 1995 to create a special institution to deal with the remnants of apartheid-era violence, called the "Truth and Reconciliation Commission" (TRC). From the title and with some knowledge about other "truth commissions" around the world, the reader can already guess that this institution was in no way to follow the Nuremberg precedent. In fact it was designed and

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sold to the public as a better solution than conventional retributive criminal justice, and precisely as avoiding "a" Nuremberg. In this case, *Nuremberg* acquired the function of reflective myth, it was adopted by opposing groups as an image (i.e. rather than an *example*) of various possible perils embodied by conventional justice. It was one of the basic materials needed in the construction of a unified discourse in favour of a "truth commission." Its power laid not in the legal knowledge it provided but in the way it afforded speakers the ability to rhetorically unify diverse and in fact contradictory positions about "the past," post-apartheid society and the nature of justice, and thus overcome potential administrative paralysis.

For my present purposes it suffices to mention that the resulting TRC was meant to investigate the past, to collect the testimony of victims, and to take the confessions of wrongdoers in exchange for granting them individual immunity from prosecution and indemnity from civil action (together referred to as "amnesty"; see TRC, 1998). It was also to make recommendations to the government as to how to best compensate victims of brutality. This followed a clause in the historic 1993 Interim Constitution enjoining that amnesty be granted in relation to "conflicts of the past," which is widely thought to have been a *sine qua non* condition to the transfer of power from the old government.

While the subsequent TRC-supporting discourse generally contained multiple and forceful references to this constitutional guideline as legally forcing a departure from conventional retributive justice, the Constitution is in fact rather vague as to who should be eligible, for what kind of "amnesty" and under which conditions. Further, this was not South Africa's first dabbling in criminal immunity laws: there had already been two separate "Indemnity Acts" in 1990 and 1992, the 1957 Defense Act contained provisions for secret immunity for state agents (art. 103*ter*). On the whole it is far from clear what exactly the Constitution added to this context or made mandatory for the new government, and therefore this argument was severely crippled from the start. However, there existed an alternative way to organize a public legitimating discourse for the TRC, and without the complexity of constitutional analysis: this is where "Nuremberg" was of great help.

2 Myth as building block of reality

"Legitimating discourse" refers to the institution's internal logic or rationale, where its goals, methods and principles are articulated in harmony with prevalent norms and may be presented as "right" (or lesser evils) or "good" (or the best possible) to the concerned social groups. Following Foucault (1972, 1984), this does not entail the eradication of any competing discourse and in fact if it did our vocabulary would not contain a word like "controversy." Rather, it is sufficient that a context arise where a critical mass of individuals 1) perceive a discrepancy between current practice and the dominant conceptualization of the social context and 2) adopt a sufficiently unified way to define the "problem" and the new solution it appears to demand. The original moment of "problematization" may be instigated by social, economic or political processes (Foucault, 1984: 388) that make the conventional at odd with new empirical realities–and the abandonment of apartheid is certainly an extreme example of such change. What is then needed is an adjustment of the intellectual tools we use to understand reality, in order to repair the broken consistency between the world and our actions.

In Foucault's writing, as well as in subsequent literature using the concept, problematization generally appears to start slowly, with a few or even one individual thinker articulating a new model of representation, which is eventually taken up by mainstream society (for example the modern idea of "government," see Foucault, 1991). But what we see in a context of political transition is a much shorter "acclimation" time where a major revision of practice must defuse resistance and reduce controversy long enough to constitute a solution to what is usually an enormous and pressing problem; this with the added administrative necessity to make government appear effective and to show that the nation's politics are moving forward and making the transition successful. This sense of urgency is probably why cogent popular images are recycled in public speech and transformed into mythical examples of resounding, history-defining successes–or in this case impending doom. The function of such myths is not to remind us of historical truths but rather to illustrate concerns, fears, desires and various normative positions that are of immediate importance to parties and individuals concerned (see Carbonell and Rives, 1990; Edelman, 1964; Flood, 1996; Thompson, 1985). One further benefit is that, as an intricate part of what Edelman (1964) calls "hortatory language," (a form of speech meant to reassure, to convince and to co-opt), the widespread use of a few central myths is a powerful way

to show that basic, functional agreement exists and that all differences between the groups in power are limited to the details of the projects, the methodology, etc. and never undermine the fundamentals (138). This is very important in the wider discourse of the "new South Africa" where the "conflicts of the past" are over and where democracy is relatively functional.

Nuremberg, then, was a very important element in the building of a narrative of a just and well-governed post-apartheid South Africa. However, it was obviously not the only such element and I am not arguing that it was the sole, or even the primary determinant in the construction of a new social reality around the TRC. Through it, we can glimpse at the mechanism by which the building takes place: a new problematization, a new language, a new reality are being built, and this building is in no way limited to the institution itself as a "solution." Rather, it includes the context, the people, the problems and the solutions. But let us be careful when speaking of the creation of new realities. First, "new" should be taken as a rearrangement of previously existing elements, with rarely anything created *ex nihilo*; and as we will see below, the novelty of the TRC project, by far, lies in the way it makes use of old ideas and not in the way it reinvents justice. Second, the way powerful individuals or groups shape reality is, as Foucault might say (see Dreyfus and Rabinow, 1983: 187), at the same time voluntary and unexpected: all intellectual activity involved, while clearly willfully directed at fulfilling personal or organizational goals, leads to a created reality mostly through the unforeseen consequences of the infinitely re-interpretable discourses being reproduced and the inevitably flawed practices being designed. Discourse has no masters and it has a way of escaping the narrow confines of immediate necessity and create new ways of understanding reality independently of its originators' intentions.

3 The Nuremberg variations: creating consensual space

Without getting into the details, I have already noted that the rationale represented by the TRC is fundamentally at odds with conventional thinking about the "crimes" it is meant to address. But that is part of the question: what if those were not really crimes, or not primarily crimes after all? The "one-best-way," Taylorist language used by government officials to describe projects such as the TRC (see Crozier and Friedberg, 1977) holds reality as objectively given and good administration as the proper arrangement of things for maximum benefits (including morality) to the nation. But far from a simple descriptive and prescriptive tool, this language has intense creative power and its use results in significant readjustments of the working definitions of *all* elements of reality, after much discussion and negotiation[2]. And it so happens that the best way to deal with apartheid brutality implied creating and observing restrictions on the use of the word "crime."

This section explores three broad themes in the building of post-apartheid justice, as illustrated, organized and conveyed by "Nuremberg." These themes were focal points around which a few basic facets of the new institution could be constructed in relation to the objects they were to address. They helped neutralize dissent and harmonize contradictory political strategies. Naturally there is much politicking in the events I describe. But what is particularly interesting is how this continuous effort to match a solution with a problem, beyond serving more obvious utilitarian goals (the ordinary power grabs, enhanced party political marketing, as well as the more straightforward desire to avoid punishment), was also more or less unwittingly creating and consolidating a number of fundamental truths about South Africa and post-apartheid justice. I have explored the consequences of some of these truths elsewhere (Leman-Langlois, 2000). In many ways this is the story of short term strategy creating long-term reality. Throughout, Nuremberg was used in public speech as a reflection and amplification of those characteristics of criminal justice which were thought to be detrimental to truth, reconciliation, peace and the proper administration of the country. The direct effect was to strip all these signifiers of many possible alternate meanings and to redirect them in very specific ways.

a) *Moral condemnation and administrative objectivity*

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[2]Negotiation" here does not refer to the simple, immediately obvious meeting of parties around discussion tables, but to the determination of what may or may not be held and spoken as competent discourse about the world. It is important to bear in mind that the negotiated production of social reality and the haggling associated with setting the technicalities of projects are two very different things.

At the time of the debate over the truth commission the government of South Africa was organized as a "Government of National Unity" (GNU). This meant that while the African National Congress (ANC) had gained a landslide majority in the elections, the rival regional Inkatha Freedom Party (IFP) and the newly freshened up National Party (NP, the one party/government/state of the apartheid past) were constitutionally entitled to participate in government. This "power sharing" arrangement was in fact only the logical extension of the dynamic of negotiation and compromise that was at the heart of the transition from the start. One of the most important effects of this dynamic is that any agreement reached either around a negotiation table or between "sides" in Parliament is only as legitimate as the least legitimate of the parties involved (Nel, 1995). Therefore all participants have a stake in insuring a minimum respectability for the others, in affirming the other sides' right to be there as an integral part of the appropriateness of dealing with them and making the GNU a morally sound and effective mode of administration.

Bearing this in mind our first theme in the perils of retributive justice is one that may be described as "apprehended mutual accusation." It makes wielding the criminal justice system a very delicate exercise, because it spontaneously awakens questions about "fairness," objectivity, political neutrality and at what stage of the process they are most important, and ultimately who should be allowed to participate in government and the creation of law. For instance, some critics have used actual *numbers* of TRC investigations to reject the process as unfair (Giliomee, 1997, and personal communication), the implication being that it would be better to make sure that a roughly equal number of government officials and resistance fighters were investigated in order to avoid an "unbalanced" account of the past. This view of fairness is widely held and it is the direct consequence of a narrative of the past with two clearly defined "sides" equally involved in, equally affected by, and equally responsible for all past violence. This narrative reinforces the all-important moral equality of the major parties that justifies their participation in a democratic South Africa – "raw" historical fact being secondary.

In general, within the ANC "Nuremberg" was used to demonstrate that unrestrained, simplistic, "wild" accusations would be avoided, while still reiterating superior moral standing and actually enhancing it with the appearance of calm, effective government:

> I think the ANC has throughout [...] gone out of its way to make sure that this commission will be a balanced and an even-handed one. Unlike other liberation or resistance movements that overthrew evil systems of government, we have not – and we have said that we will not – instituted war crimes trials. We have not had Nuremberg trials (W. Hofmeyr [ANC], NA Hansard, May 1995: 1397).

Hofmeyr was involved in the original drafting of the TRC bill, and he later sat on the joint Assembly-Senate Committee on Justice which reviewed and redrafted the Bill before the final vote. His reference to war crimes trials, of which Nuremberg is taken as the epitome, shows how the powerful image can serve to demonstrate that moral superiority existed then – and still does now, in a different context of political "fairness." It also underlines that rationality, calm and pragmatism will prevail in the treatment of wrongdoers. Hofmeyr continues:

> a few weeks ago, we ourselves honoured some of those pilots ["who bombed innocent German women and children in cities"] in and outside this House. They were not vilified and they were not named for maiming and killing innocent people, because it is recognised that they did it in furtherance of a struggle that was for the greater good. Nonetheless, in an effort to make sure that this commission will work, and to make sure that it keeps our country together, the ANC has said that everybody should be investigated (W. Hofmeyr [ANC], NA Hansard, May 1995, 1397-8).

The idea of the "greater good" is another very important part of this discourse, from all sides of the debate. It allows the ANC to investigate itself out of fairness but with no implication or admission of wrongdoing. It also defines truth-finding as establishing moral superiority or "the proper moral order," as the euphemism goes, because it will shed light on the nature of the greater good and the struggle for it. Minister Omar put it this way: "in the same way that we honour and salute those who fought against Nazism, we honour and salute our freedom fighters" (A. Omar [ANC], Sen. Hansard, 1995, 2210). Since "a Nuremberg" will be avoided it is demonstrated that despite the moral superiority (there *could* be a string of trials) political/administrative realism has prevailed and a pragmatic and "neutral"

half-point situated before the full use of criminal justice has been found. This half-point is at the same time between the terms of the invented dichotomy of arbitrary punishment and ignorance of the past, as well as between the ANC and the NP, confusing agendas with groups, methods with goals and legal fairness with moral neutrality.

"Saluting the freedom fighters" of course has other uses. By the time the TRC was being debated in the National Assembly, the ANC had released the findings of two internal investigations (ANC, 1992, 1993) which had uncovered some abuse in its internment camps abroad and had already led to limited disciplinary action against some of its members. The first commission had not named any of the perpetrators, but the media had soon recognized those responsible and published their names (e.g. *Weekly Mail*, 23.10.92: 4-5). The second commission (the Motsuenyane Commission; ANC, 1993) had simply gone ahead and named the perpetrators. Naturally, there might have been some qualms about the prosecution of ANC members from its military wing, uMkhonto weSiswe ("Spear of the Nation," MK), and presumably some of its higher-level members who were involved in its command structure. The commanders had accepted responsibility even before the first commission's report, further underlining the difficulties and dangers of going full steam ahead with the justice system. In short the ANC was forced to admit, comparatively early on, that even just causes could lead to abuses of power and crimes; but it was also evident that the greater good gives the abuses a different, more acceptable meaning. The Nuremberg/Nazi comparison had the power to rehabilitate their intentions, if not their actions.

As for the NP/ex-government, we must note right away that the entire idea of Nuremberg had a very special cultural resonance. It so happens that the NP itself was born out of the ashes of Nazi-supporting political formations after the Second World War. Further, there is an unavoidable connexion between apartheid and official NSDAP policy, especially with the "Nuremberg Laws" of 1935 (not to be confused with the trials later held there, precisely for the symbolic effect), that immediately springs to mind. The fairness discourse is therefore deeply modified by this glaring metaphorical proximity: even if all violators of human rights, including those from the ANC, had been processed through a Nuremberg-like system, only the nationalists would be likely to bear the "Nazi" stigma.

In order to undermine the comparison, pro-apartheid/pro-government fighters also embraced the idea of the "just war" or "greater good" whole-heartedly, avoiding the Nazi analogy by recasting themselves as anti-communist fighters (although ironically this was also a favourite Nazi claim during the war, one used to recruit *WaffenSS* in occupied countries and send them to the Eastern front, e.g. the *Charlemagne* division from France). Not that the idea of a "communist threat" was entirely an after-the-fact justification; it was and still is at the forefront of South African politics. One can find full-page NP newspaper ads for the 1994 elections showing the Communist Party wolf in ANC sheep clothing. Still, this allowed the complete eradication of race segregation or any past and/or present racist conceptualization of society from the NP's history. In their first submission to the TRC, the NP and former President F. W. de Klerk as its only spokesperson made no mention of race segregation, presenting a "sanitized" version of apartheid. In his second submission to the TRC, de Klerk had this to say: "those who fought on the government side were motivated by a number of factors [...] all these factors are, in my opinion, legitimate and had nothing to do with racism or apartheid per se" (*2nd written submission to the TRC* , NP, 1997: 25).

And if the eradication of racism is not complete, at least the contrast is less clear: which was worse, apartheid or *Stalinism*? Who is more condemnable? "Yes, apartheid has been referred to as a crime against humanity, but communism is not a lesser crime against humanity" (B. Geldenhuis [NP], NA Hansard, 1994: 3911).

> He [Minister of Justice A. Omar] spent his time on another emotional and uncontrolled attack on so-called apartheid. In many debates a one-sided perception is being created, namely that the NP were the bad guys and the ANC the good guys in this story. In my contribution, I shall put the record straight on the real issue, namely the fight against communism (F. van Heerden [NP], NA Hansard, 1995: 1414).

Extremists in the party never fail to make de Klerk and others sound reasonable; theirs is, though, the same discourse (also to be noted is how the "loss of emotional control" reproach is never far in the administrative discourse about post-apartheid justice). Again, this discourse was possible because it was compatible with a wider effort at levelling the moral playing field, which was crucial to the legitimacy of the government as a whole. Consequently, the future commission could appear to avoid political

entanglements by disregarding the matter of guilt and retribution. In the words of a member of the already mentioned Committee who reviewed the TRC Bill:

> if there is any suggestion that a distinction is to be made between persons who fought for or against the previous government, it can only be perceived as being discriminatory. Then it is not reconciliation on equal terms, but a witch-hunt or inquisition (M. Schutte [NP], NA Hansard, 1995: 1371).

In the words of a senator, also from the Justice Committee:

> if these actions [ANC terrorism] are morally right, what sort of questionable basis does such morality in fact have? If we are looking to the Truth Commission as a springboard to Nuremberg trials, we are in for a dreadful era of recrimination and to quote, "a fate too ghastly to contemplate." I wish to say to the Hon Minister that forgiveness is not and cannot be only one-sided. This is not the spirit of this legislation. There are many innocent victims of the ANC as well (R J Radue [NP], Sen. Hansard, June 1995, 2251).

In perfect logic, the political problem also applies to *forgiveness*. If calls to forgive should be "one-sided" it would imply that only one side was wrong, which amounts to accusation.

Nuremberg helped articulate a specific relationship between crimes of the past and political affiliation, in which retribution (or even forgiveness) was a dangerous power wielded against political opponents: if there are trials, they will be Nuremberg-like group trials and some will find themselves declared guilty by association. By contrast, the reality offered was that all parties were equally blamable, and all criminals equally justified. And as a result, the future commission would demand to hear adequate "political motivations" in order to pardon human rights violations.

So "Nuremberg" was not rejected as a solution because it did not fit the context of post-conflict South Africa; it was used *to* reject a specific conception of this context as a typical criminal justice one, and instead re-emphasise the negotiation/compromise ethos, national unity, the legitimacy of rejecting convention and granting amnesty for politically motivated acts. All the while it also permitted a strong, unequivocal moral discourse to be held against *apartheid* (even though the NP have been timid in their rejection of it so far), something which has already officially and legally disappeared, and for "exposing the truth" about it, telling the story of the wrongs endured by its victims. This condemnation of apartheid was important because it constituted the administrative rationale necessary for doing anything about it in the first place.

In this context of symbols and metaphors any actual knowledge of legal precedent the speaker may or may not have is not relevant to the discourse he or she is reproducing: what is useful here is the image, the emotional charge linked to the well-known historical event and how it can transform the way one thinks of reality, the way post-apartheid justice can appear as a problem beyond the capacity of conventional practical solutions to deal with it. In short, Nuremberg is used to disqualify a particular perception of reality.

b) Legitimacy through the dispersal of blame

I subsume under this theme all rationales that conclude that Nuremberg, because of its accusatory and condemnatory nature, would not work because *everyone* must bear some blame for the "conflicts of the past." While speaking of victory over the old government implied that only ex-officials were corrupt, a victory over *apartheid*, and this is the only discourse that allows "victory" to be claimed by both the "new" NP and the ANC (and other less important formations[3]), implied that anyone who ever supported apartheid or parties that defended it is responsible for conflicts of the past, along with anyone who supported violent opposition movements. I suspect that in reality this still leaves out most of the population, and in a way the fundamental nature of amnesty as political self-pardon is most apparent in this aspect of the discourse. Be that as it may, dispersing blame makes any moral or legal judgement less significant and less rational. It reinforces the tragic/inevitable view of apartheid and the brutality

[3]Less important at the time, that is. The NP is currently losing its opposition status to the Democratic Party, a trend that seems irreversible.

that accompanied it and makes any project of redress seem overly ambitious, time-consuming and costly if it is to reach beyond surface issues or fails to stay focussed exclusively on the extreme.

The problem of scale is of course very real: for instance, the TRC itself was concerned with a relatively large slice of South African history, namely from the Sharpeville massacre in 1960 to the inauguration of President Mandela in May 1994, but, significantly, only as far as "gross human rights violations" were committed, i.e. the bloody tip of the apartheid iceberg. Even with this reduced scope many feared the number of people involved would be too massive to handle, as is almost always the case in transitional situations (see Cohen, 1995). But at the time the Commission was taking shape, all possibilities were still open and the problem appeared nearly unsurmountable. Questions such as, were apartheid laws and policies "criminal," as the UN proclaimed? And if so, how many people are to be held responsible for creating and enforcing them? How far back in time?

But scale is at once a problem and a *solution*. A (pre)determination of scale serves to support some methods and to evacuate others from the debate. This not done with actual numbers, remember that the truth isn't known yet. But simply discussing it evacuates or displaces the matter of individual responsibility from the centre of the question. It further contributes in creating a narrative of group responsibility.

There are two aspects to the matter of scale. There is the obvious administrative one about the handling of such large numbers of cases, how much it is going to cost, how many qualified people will be needed, etc. But there is the even more complex problem of attempting to define limits to the application of criminal justice, which is contrary to its internal logic. Under a criminal justice rationale one can neither *predict* nor *control* the number of accusations, the time needed to reach a definitive result or the costs involved: once the train is out of the station, it cannot be stopped until the end of the tracks[4]. In the words of Minister Omar, in an early speech in the new National Assembly:

> I want to give assurance to those who have fears and who may have perpetrated human rights violations and want to join in reconciliation, that in respect of politically motivated crimes there will be no Nuremberg-type trials. There will be no vengeance or witch-hunts, there will be no revenge and there will be no humiliation of any person. [...] The advantage of a commission, whatever its name–we must avoid any connotation which suggests revenge or witch-hunts–is that it can facilitate disclosure within a framework that provides amnesty with acknowledgement, justice and dignity. Far from being an instrument of vengeance and humiliation, it has the advantage of forestalling a multiplicity of criminal prosecutions and civil claims (A. Omar [ANC], NA Hansard, May 1994: 188-9).

If the problem of limits is made a crucial one, then the solution must be made (relatively) swift and definitive: "before we can close the book on our past, we must have one last, fairly rapid but penetrating look at it" (K. Asmal [ANC], NA Hansard, May 1995: 1381). By comparison, given free rein, retributive justice has no intrinsic limit: we are told that apartheid only worked because tens of thousands of individuals did their part, including ordinary members of the NP. Maybe all members of the NP should be barred from employment in the civil service, and *a fortiori* from government. At the time this principle of "lustration," of "disinfecting" the public service and the state from its bad elements was being discussed in the former East Germany, in Czechoslovakia, Poland and in some Latin American countries (see Łós, 1995) – as well as having been the main rationale behind post-Nuremberg "de-Nazification" trials, which are all integrated under the metaphor.

Of course, "Nuremberg" could just as well stand for the *opposite* of witch-hunts: the trial of the 24 "major criminals" was more like a swift eradication of group responsibility, a concession to the "handful of Nazis misleading the nation" theory of Hitlerism (see Goldhagen, 1996), in other words, the purification of the nation through the personification of the crimes and of the ethos, which is the opposite of the dispersion we are seeing here. Finding a middle ground between the two extremes of personification or blaming everyone/no-one would have involved defining and circumscribing

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[4]In Argentina, for example, the eventual scramble to put an end to the prosecution of former security forces personnel and former state officials with "due obedience" and "punto final" (final stop) laws transformed a democratic process into an authoritarian one (see Feitlowitz, 1998: 142).

blameworthiness and responsibility – difficult conceptual and political work with little chance of success. Personification was out of the question because the potentially accused and sacrificed were those negotiating the deal. This left blaming everyone/no-one, and it was easily carried in a wide enough political consensus as "not a Nuremberg." Without the very cogent myth of Nuremberg to help reduce the dilemma to these two options, reaching a consensus on post-apartheid justice would probably have been intensely divisive or impossible. Since it was not only readily available but practically unavoidable because of the conceptual proximity I have already mentioned, it was possible to disqualify any nuance or redefinition of the acts or any alternative approach under a criminal justice logic.

Not that the vocabulary of crime, punishment and justice was abandoned altogether. It was merely circumscribed. It became a *problem* to be solved instead of an indisputable, spontaneously suggested solution. "Nuremberg" helped transform any conventional justice argument into a non-starter. In a speech given before the adoption of the TRC law, the Minister of Justice thus explained his intellectual point of departure:

> I would like to point out that international law requires crimes against humanity to be prosecuted and punished [...] it provides further that international criminal responsibility applies, irrespective of motive, to individuals and representatives of the state [...] thus there is little doubt that in so far as the acts envisaged under the amnesty provisions were part and parcel of the apartheid strategy, they ought to be prosecuted and punished in accordance with the requirements of international law (A. Omar [ANC], Sen. Hansard, June 1995: 2215).

There is obvious strategy here: in other words, all things considered, the TRC Bill is a good deal for old regime supporters. Considering the alternative, what in the end really should be done, the ANC has been reasonable and accommodating. However, at the centre of the thinly veiled threat is also a genuine legal problem: strictly speaking international law is of no help in evaluating the depth of responsibility. Between the Geneva Conventions and Protocols, the Convention on apartheid, crimes against humanity, there is no telling how many should be accused, and of what, or when it will all end: much work would be needed to articulate a criminal justice approach, work that is already disqualified. In this speech Omar is speaking about a problem that has already been solved: he is actually using the threat of limitless prosecutions to support the solution he has tabled in the Senate, precisely within the dichotomy already established and reinforced by the Nuremberg myth. The question of limits has been solved through circumvention, the "legalism," the "moralism" have been replaced by rational, objective and effective statesmanship.

c) Avoiding revenge

One last discursive tool created with the help of Nuremberg was the confusion of uncivilized, undemocratic revenge with retributive justice. For the government the danger was to appear to have "lost emotional control" and abandoned the proper rational/administrative attitude, thus to open itself to the already mentioned impression/accusation of fitting widespread racial stereotypes. On the NP side, the role of protector of the white minority's "rights," also claimed by the rival DP, implied constant surveillance of the probational one-person-one-vote government and no anti-TRC speech could leave the impression that this basic mission of the NP had been a failure. In short this was a delicate balancing act for all formations, who had to find a proper equilibrium between ostentatious dissension over what Edelman (1964) calls "transient issues" and functional congruence with regards to the fundamentals of legitimate participation in government. The added difficulty in this case, of course, was that the problem being discussed itself concerned that legitimacy immediately and directly, which is not the case with ordinary criminal justice debates.

In such a chaotic and unpredictable context, achieving consensus on a course of action entirely depends on the ability to articulate the problematic in "hortatory" terms (Edelman, 1964): the type of discourse that enables supporters to speak in a single voice and critics to find satisfactory "cover" for following a path not directly or entirely compatible with their traditional political position. "National reconciliation" of course was a major component of this new public knowledge being constructed. It remains undefined to this day – which helps avoid dissention – but whatever it is, surely it must be the opposite of "Nuremberg." So the myth had two very helpful functions under this theme: on one hand, it helped define, or rather helped avoid having to define the declared reconciliatory objective of the

projected institution; on the other, it helped TRC supporters defuse the accusation of being vengeful while at the same time underlining the extents of wrongdoing (and thus the need for action) by pointing to the *potential* for revenge.

In his very first speech in Parliament, the Minister of Justice said that "the reason for dealing with the past in an open, orderly and systematic way is that we must avoid any recrimination, vendetta or attempts at finding scapegoats" (A. Omar [ANC], NA Hansard, May 1994: 24). J. de Lange, one of the drafters of the original bill, said in August 1994:

> if we do not provide a legislative framework through which our citizens are able to deal with their respective pasts, we will be leaving them to their own devices. This will most certainly lead to persons taking the law into their own hands, or, at the very least, it will lead to continuous prosecutions, counter-prosecutions, civil proceedings and counter-civil proceedings. And at the end of the day the pressure will rise in society and I am not sure in my own mind whether we will be able to avoid even going as far as the way in which matters were dealt with in the Nuremberg trials (J. De Lange [ANC], NA Hansard, August 1994: 862).

There is hyperbole here (a series of trials would actually be worse than "persons taking the law into their own hands") but the point is clear: "Nuremberg" would be entirely wrong and out of place, obviously exaggerated, unjust and arbitrary in the South African post-apartheid context. By contrast, "this Bill represent[s] a historic act of generosity on the part of the victims of apartheid, such as President Nelson Mandela, towards those who committed gross violations of human rights during the apartheid years" (A. Omar [ANC], Sen. Hansard, 1995: 2209-10). Again there is an element of moral superiority to this reconciliation; according to later Deputy Chairperson of the TRC Alex Boraine:

> there are many, many South Africans who would want the state to go much further, who would opt for a Nuremberg-style approach, who would want prosecutions and revenge, but in our wisdom, I think, we have opted for amnesty and reconciliation (A. Boraine, oral submission to the joint Senate/House Committees on Justice, Feb. 1995, trans. p. 55).

From the other side of the house, the discourse is practically the same: "to a great number of people out there the name "truth commission" is synonymous with persecution, reprisals, and even Nuremberg-style trials and a witch-hunt" (R. H. Groenwald [NP], NA Hansard, May 1995: 1411). Against it, it must be reaffirmed that true morality must be pragmatic:

> The last thing we need in this country is a lust for retribution. I know that there are people who want some form of Nuremberg trials. Fortunately, the majority of citizens would resist such a move. The irony of the situation is that those who clamour for such retribution are those who did the least in the liberation struggle. They are the ones who are suddenly more radical (C. Redcliffe [NP], Sen. Hansard, June 1995: 2228).

The senator is trying to articulate an anti-scapegoating argument, implying that those who felt most guilty for not opposing apartheid were actively trying to cleanse their mistake at the expense of others – and risking peace and order in the process. Nuremberg, as "lust for retribution," would be worse than the crimes it was meant to address, and the intentions behind such a plan are highly suspicious. The theme is clear: vengeance/retribution is a disproportionate and devious response to apartheid brutality.

Sometimes excessive retribution can come from less likely places. This is how the leader of the extreme-right Freedom Front (FF), Constand Viljoen, put it:

> [non-governmental organizations workers] are people with a specific psychological makeup. They are invariably moralists and some even sentimentalists and it is good that they have such people, but their judgement in the field of public life is exactly because of their prejudices, not always to be trustfully with undeniable high ideals they tend to suffer from frustration. On these ideals which ends up with some form of frustration (oral submission to the Standing Committee on Justice, Feb. 1995, trans. p. 4-5).

Unsurprisingly, there is total agreement between all parties that radical, uncivilized revenge would be a problem. But whether the revenge is an instinctual, violent one, one manifested through excessive use of the courts, or one instituted in an *ad hoc* solution such as a special commission – each option, it seems, likened to "Nuremberg" – it is always made up as a determining part of the problem, and

potential solutions must be evaluated by their capacity to contain it. I think it is clear that the problem being defined is not only about the nature of the crimes or the response: it is primarily about the social situation of the country and the nature of the post-apartheid government as the context of the future solution. It is related to many elements, but mainly: a) it plays on the fundamental distrust towards non-whites' ability to administer objective, unbiased justice (TRC Commissioner P. Gobodo-Madikizela, 1996); b) the fact that the fight against the old government was invariably put in terms of human rights and international law, i.e. it was morally condemnatory, and c) the Mandela-driven "rainbow nation" approach of the ANC and the need to be inclusive in terms of ethics, but also the very real fact that whites still hold the economic levers in the country and an exodus of capital holders would be catastrophic. In all cases the danger of revenge, whether it comes from frustrated human rights types, from the great unwashed or from "radicals," finds a convenient home in the Nuremberg myth, which gives power to the rhetoric without the need for articulation of the argument (while entirely avoiding to attack or question the conventional criminal justice system running in the background).

The problem of recriminations and vendetta is more than a strategic, political question: it conveys significant adjustment or reinforcement of some fundamental concepts. By facilitating the interchangeability of "retribution" and "revenge" Nuremberg has effectively negated the legitimacy of conventional criminal justice in this particular context, by redrawing its contours. This is a context where any judicial action is uncalled for, where the word "crime" itself does not appear in the TRC law, replaced by "gross human rights violations." The myth has made it possible to redefine the past as a struggle where all sides were both right and wrong and where subsequent condemnation is impossible or at least illegitimate. What is left to do is to separate the right from the wrong outside of the responsibility of actors, i.e. to find the truth. It is hoped that truth will provide normative conclusions without raising the matter culpability.

For the most part "reconciliation" has only been negatively defined, as the opposite of revenge, which only marginally narrows down the range of possible meanings – thus keeping everyone on board. But the putative need for airing the past in public adds to this definition that either revenge happens in ignorance of the past, or that official knowledge is revenge enough. In either case knowledge, or truth, is made the central concern, displacing the matter of retribution: establishing truth is more important than retributive – or in fact any kind of corrective justice – because it serves as correction in itself. So reconciliation, because it is only defined as the absence of revenge, starts to be indistinguishable from truth – we air the truth so there is no revenge. Later, the Commission's motto would be, "truth, the road to reconciliation," entirely in keeping with this particular understanding of the past as a festering, tension-rising, generalized misunderstanding.

4 Transforming contradictory political objectives into administrative action

Nuremberg left many questions unanswered: there were still very few, and at best embryonic parameters for the future truth commission. More definitional work was needed, and in reality many other mechanisms came into play to shape the final institution. It was however instrumental in settling a few truths: first, the project should avoid direct condemnation of individuals because it is unhealthy/counter-productive or plain wrong to blame apartheid brutality on individuals or politically identifiable groups; in fact, apartheid is not to be addressed as significant wrongdoing at all, and its brutality is to be understood as an unavoidable consequence of a "war" between opposed factions. Second, and as a corollary, the commission should not actively seek or investigate individual wrongdoers because it would look threatening and vengeful (criminal justice and retribution having been made incompatible with the situation). Rather, should be left to the actors to actively seek the commission, so some benefit must be offered (amnesty) and unpleasant or otherwise negative consequences must be kept to a minimum. Third, the commission should in no way interfere with *already existing* national reconciliation, peace and order.

This emerging TRC discourse did much more than settle some questions about what to do with the remnants of the apartheid era: it transformed and strengthened a specific understanding of the context where the truths became dominant, at least temporarily. Clearly the solution, the course of action to be taken was being defined in conjunction with the problems, with multiple readjustments and new "findings" bringing new nuances and new meanings to the existing context, transforming it. The appearance of these truths does not require or even imply a conspiracy or other directed efforts at

rewriting history: it is simply the result of compromises made at other levels to meet other goals and make the administration appear to solve problems and address public concerns. The inclusion of a handful of easily recognizable myths in the rhetoric of all parties to the debate formed a basis for administrative action by *de facto* reducing the problem in a specific way: the question of retribution became no longer separable from irrational revenge, conventional justice was irremediably vengeful in post-conflict situations, and the remedy to all would be "truth" (that is, truth within extremely strict boundaries). The myth also served to crystalize a series of contradictory positions and to demonstrate reconciliation at the level of the nation's politics: it married a condemnatory and moralistic discourse to judicial pardon, denunciation to compromise, responsibility and accountability to an amnesty process free of corrective obligations, etc.

Later, the actual practices and achievements of the TRC, while in fact not entirely in keeping with the politicians' plans, largely supported and further reinforced this new reality. Edelman (1964: 8) has spoken cogently of this standardizing mechanism: "controversial political acts [...] are bound to become condensation symbols, emotional in impact, calling for conformity to promote social harmony, serving as the focus of psychological tensions." I think this is easily extracted from its psychological assumptions into a more social perspective: "psychological tensions" are simply difficulties of incoherence, or gaps in common sense, representations and mentalities which make further action problematic in an unpredictable situation. Symbols and myths – of which Nuremberg was only a single example – help smooth out the contingent sources of problematization by introducing open-ended abstractions that can be used in a variety of ways to make sense of the situation for different observers: it allows the thinking individual to take pieces of different puzzles and make them fit together to form a new picture, a new structuring of society where contingency has been evacuated.

5 Rhetorical power and problematization

In essence, Nuremberg contributed to the transformation of a large set of objective but meaningless potentialities and uncertain, overly complex, contradictory or unclear notions into a very small range of valid options and proper attitudes. It was of great help in reducing the appearance of arbitrariness in decision-making and it created post-transition South Africa as a series of easily identifiable, specific necessities that had to be met while solving unanswerable, paralysing questions by eradication. The Nuremberg myth allowed this reconstruction by providing key elements of a new discourse, used to convince a critical mass of the population of the reasonableness of a drastic departure from what is conventionally accepted as justice in criminal matters.

Following the rhetorical "career" of a myth such as that of Nuremberg provides new insights into the process of construction of a logical model of action. It shows how the significant elements of a situation are conceptually and rhetorically bound together in a sufficiently convincing way, and may be used in support of a unified institutional blueprint (whether the actual institution will later comply is a separate question). I used the concept of "institution" here as a set of practices that, taken together, form a consistent whole both in terms of objectives and methods: in other words it is a system with two essential parts, a set of practices and a discourse about them. What we have explored here is the creation of the rationality of this institution, i.e. how it became a coherent plan of action – replacing an older one that used to be equally convincing but is now judged to be inadequate. If at first glance, Nuremberg was used to *illustrate* a number of parameters of the socio-politico-cultural context and the possible solutions, it did much more. In addition to the powerful symbols it carried, it helped exclude a number of traditionally obvious, "go-without-saying," "common sense" truths about criminal justice by supporting an alternative discourse where they were non-starters. Because Nuremberg was understood as an example of perverted legalism and counter-productive judicial excesses it portrayed the situation as potentially explosive and in need of solutions of appeasement rather than solutions of "justice."

This process of displacement of conventionally accepted practice is particularly interesting under a Foucaultian light. Thinking of this phenomena as the "problematization" of an area of the social, the moment where a discrepancy between context and practice appears, easily explains why the process of redefinition involves both. The way the situation is constructed and understood is inseparable from the concomitant construction of its solution. On one hand, the matter of the consequences – and indirectly but unavoidably the *nature* – of apartheid had to be defined in ways that a large number of actors could agree on. What was really left after the transition? A few hardened criminals? A multitude

of misled people? A huge cover-up that needed to be aired? A pent-up desire for revenge? Two reconciled political parties? On the other hand, the basic principles of any compatible and acceptable courses of action had to be articulated in rational, Taylorist language as the best solution for the problem, immediately reinforcing it, but also clearly having influenced its construction from the beginning. Finding a "solution" to a "problem" is not difficult: there are plenty of alternatives and models floating around, all potentially valuable (note that a series of trials was the ANC's preferred response to apartheid until the late 1980s). What is truly demanding is the articulation of a discourse where both the situation and one of the possible actions are represented coherently, and that will be cogent enough to impose itself.

That is what problematization is all about: deciding that the old mentality is no longer adequate and attempting to replace it. But of course the mentality is what serves to describe both the world and our actions within it. Foucaultian problematization is simply the moment where an object calls for attention and triggers intellectual work on a process of reconstruction. But this is a reconstruction from the inside, with the available tools: there are no outside, objective, Taylorist observers. But it is our desire that such objective observation and analysis be possible that makes symbols such as Nuremberg so powerful. Its representation as a historical precedent erased the contingency of the construction process and reinforced the Taylorist rational model of observation-analysis-action of administrative processes, where solutions always follow problems, glossing over the fact that reality is a socially structured accomplishment and that both aspects were defined together. Nuremberg comes complete with a situation (historical Nazi crimes), followed by a solution to it (the application of retributive justice), clearly laid out in a progressive problem-solution sequence. It implies that it was considered and analysed as such by the speaker, in a universally objective/rational evaluation of its flaws and benefits. By extension, this mantle of rationality also covers the preferred solution supposedly taken after careful analysis and given in contrast to it.

Further, I think it is clear that in many ways myths can speed up and homogenize the way we detect and build problem situations. First, myths and metaphors make communication easier and therefore will tend to spread through public speech rather quickly; and once available they will tend to shape, limit and direct problematization by providing the same intellectual tools to all observers and thus reduce the creativity (or "discursive incompetence") of individual thinkers. Not that all will miraculously agree on how the problem should be defined and addressed, and that was obviously not the case here. Rather, it subtly caused large numbers of individuals to see the same slices of routine mentality and practices as problematic, at the same time – whatever their initial conclusions were. Evoking widely held popular images in a specific context, with a specific rhetorical purpose, probably helps a greater proportion of people think of the situation in compatible ways and adopt or at least accept a problematization without thinking about it too long: it immediately sounds right, proper, necessary or inevitable. The use of Nuremberg as a symbol and as a specific form of knowledge – among other factors – provided the power to determine which issues would be raised at what time and imposed a specific understanding of the problems of fairness, revenge, etc. More than simple conveyors of representations, using and thinking in or with myths also influences our capacity to think of the new object in new ways, by providing, and thus by *limiting* the conceptual tools available.

6 Conclusion

The objective of this paper was to understand the process of displacement of a mentality by another and to describe the creation of the fundamental principles of a new administrative project. In the end the reader may be disappointed to find few normative conclusions or even signposts, but that was precisely part of the intent: to see normativity itself being developed. Ethically speaking I think the debate is open: one could argue that the image of apartheid given by the political TRC discourse was severely skewed; that politicians requiring "political motivation" as condition for amnesty was a direct throwback to the old "act of state" defence. At the same time, conventional retributive justice is far from a perfect, or indeed an entirely adequate solution, in *any* context: and all things considered this is probably the worst imaginable context.

However I think it is clear by now that asking, debating and answering such questions is part of the way we continuously make up our reality. And this is not simply a somewhat convoluted restatement

of the truism that morality is relative; morality is not relative, it is not even set: it is continuous, never-ending *work.*

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