Access

Victims' rights before the International Criminal Court

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LUBANGA TRIAL HEARS FIRST WITNESSES

On 26 January 2009, the ICC opened its first trial in the case against Congolese warlord Thomas Lubanga Dyilo. Lubanga was the first person charged in the Democratic Republic of Congo (DRC) situation as well as the Court's first detainee. As the alleged leader of the Union of Congolese Patriots (UPC) and the commander-in-chief of its military wing, the Forces patriotiques pour la libération du Congo (FPLC), Lubanga is accused of enlisting and conscripting children under the age of fifteen and using them to participate actively in hostilities, from September 2002 to 13 August 2003.

Legal Representatives of Victims representing 93 victims are participating in trial hearings. In their opening statements, the lawyers put Lubanga's crimes into context and explained the extreme consequences that participating in armed conflict has on children.

Since the start of the trial, a number of witnesses have been called by the prosecution, some of those that were called also hold the status of 'victim participants'.

Given that this is the first prosecution at the ICC, the Trial Chamber is considering for the very first time how to deal with the vulnerability of witnesses coming to testify. As His Honour, Judge Fulford, President of Trial Chamber I, noted, in respect of one particularly vulnerable witness:

'I think it needs to be remembered that particularly for those who are not used to court proceedings, coming into this room with the number of people who are present and the particular procedures that are used in order to receive the evidence of a witness can be extremely intimidating, and we're going to need to look at this not only for this witness but in relation to other witnesses who may be similarly placed.'

[con't on p. 2]

'Sometimes you were beaten by three people at the same time if you lost the weapon. And if you started to scream whilst you were being beaten, you were beaten even harder. Then other people would come. They would hold you by your arms, handcuff you, and it made it easier to beat you up. We suffered far too much during the military training.'

[The first witness to testify]

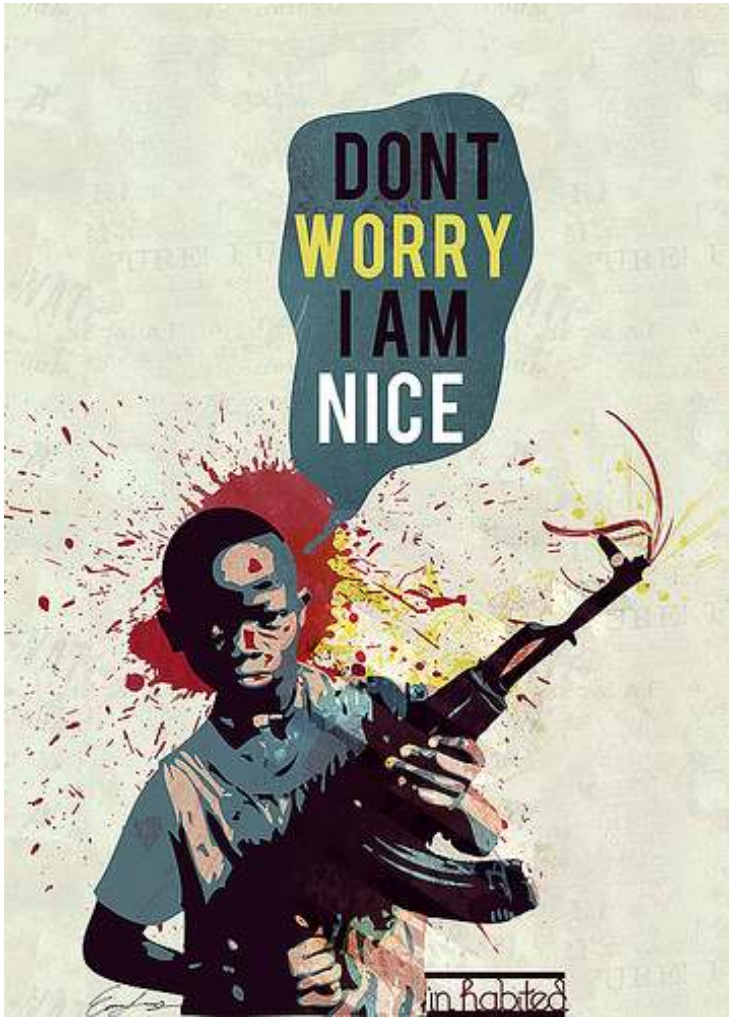
In this bulletin:

Team of Legal Representatives for Victims at the opening of the Lubanga trial- © ICC-CPI/Michael Kooren

The first witness

This particular witness, a former child soldier himself, was the first witness to testify before the Court. But, soon after his testimony began, he froze and recanted what had been said. There are a number of reasons why this could have occurred.

"And so we went there to where there was a war going on, and at one stage we had killed a lot of people, and once you were killed, your -- either your head was chopped off or your eyes were taken out of their sockets. And so we went there, and we started to fight. But we were just obeying orders. We were asked to do things, and we obeyed the orders."



Don't Worry I am Nice, © Mil/Flickr 2009

Warnings on Self-Incrimination:

Immediately before he recanted, he was provided with a formal warning by his counsel about the potential that his testimony might incriminate himself for possible future criminal proceedings. This warning was given on the instruction of the President, to comply with Rule 74(1) of the Rules of Procedure and Evidence which obliges the Chamber to "notify" a witness of the provisions of this Rule before his or her testimony. The President indicated that the witness should be notified by his or her lawyer, or if there is none, by a suitably qualified lawyer, familiar with the provisions of the Rome Statute framework and the operation of the relevant criminal law in the DRC. Whilst it is clear under the Rome Statute that an individual who was under the age of 18 at the time of the events cannot be prosecuted before the ICC, the potential liability under Democratic Republic of Congo law is less clear, and this was debated before the Chambers. The view was taken was under Congolese law, children aged 15 years and below at the time of events are not criminally responsible; those aged 16 and above are in principle criminally liable, though the ICC Privileges and Immunities Agreement that the DRC Government ratified makes clear that anything a witness says in the ICC courtroom cannot form the basis of a domestic prosecution. This last minute 'warning' to the witness may have unnerved him.

Inadequacy of Protective Measures:

The witness was shielded from the public, with voice and face distortion, and referred to by means of a pseudonym. Nonetheless, he was testifying in plain view of the accused, who, in the context of the crimes alleged, was the witness' former superior commander.

Following an adjournment of several days, the witness returned to complete his testimony, this time, with additional protective measures in place. The President summarised these measures as follows:

'The witness, therefore, will continue his testimony in this court. The current protective measures will be in place. The number of people in the courtroom should be reduced to the bare minimum, and each team must do everything they can to abide by this. The curtain round the witness seating area will be slightly extended so that the witness will not be able to see the accused or the accused the witness directly, although Mr. Lubanga will have a screen in front of him which shows him in realtime the witness, and the witness will come into court when the accused is outside of the courtroom. A name has been suggested to be used for the witness. He will be known by the name of Dieumerci. Questioning to the maximum extent possible should be non-confrontational and should not be pressurising.'

These later additional measures had a marked improvement on the witness' testimony, who was given the liberty to recount his experiences in a long narrative.

It is not clear why such measures were not in place from the outset of the testimony, given the particular sensitivities of child testimony, especially when the testimony is against someone who exerted so much power or control over the witness. •

CAMBODIA: FIRST TRIAL GETS UNDERWAY

Kaing Guek Eav, aka Comrade Duch, is the former director of interrogation centre S-21, a former high school where more than 15,000 people were tortured and killed. His trial before the Extraordinary Chambers in the Courts of Cambodia (ECCC), a hybrid tribunal with both Cambodian and international judges, began on 17 February 2009.

The accused,Kaing Guek Eav. also known by the alias 'Duch'
17-02-2009 (c) ECCC

Duch faces charges of crimes against humanity and grave breaches of the Geneva Conventions of 1949, in addition to the offences of homicide and torture under Cambodian criminal law.

Ninety four victims have applied to participate in the Court hearings as civil party complainants. These complainants can play an important role at the ECCC - information they provide can be used as evidence during the trials and they can also be called as witnesses for the prosecution. Civil parties can choose to be represented by a common lawyer or a group of victims may also choose to organise their civil party action by becoming members of a Victims' Association.

Under the Court's internal rules, victims are also able to seek collective and moral reparations. But, unlike the International Criminal Court, no Trust Fund has yet been established in Cambodia to facilitate the payment of reparations awards. Reparations orders are to be made against convicted perpetrators, and given that perpetrators are often indigent, it will be extremely difficult for the awards to have a practical impact. In November 2008, a conference on reparations was organised by the Cambodian Human Rights Action Committee (CHRAC) and the Victims Unit of the ECCC, in which some of these challenges were discussed and proposals for the establishment of a Cambodian Trust Fund were canvassed. •

Co-prosecutors Robert Petit and Chea Leang take their seats ahead of the start of the hearing. ECCC 17-02-2009

SUDANESE HUMAN RIGHTS ACTIVIST MR ABDEL MONIM ELGAK SPEAKS ABOUT DEVELOPMENTS IN SUDAN

Interview by Lutz Oette, REDRESS

On 4 March 2009, the Pre-Trial Chamber II of the International Criminal Court decided to issue an arrest warrant against Omar Hassan Ahmad Al-Bashir, President of Sudan, for war crimes and crimes against humanity perpetrated in Darfur. This is the ICC's first ever warrant issued against a sitting head of state.

The arrest warrant issued against Omar Al-Bashir lists a total of 7 counts as the basis of his individual criminal responsibility, including five counts of crimes against humanity (murder, extermination, forcible transfer, torture and rape) and two counts of war crimes (the act of intentionally directing attacks against a civilian population as such or against individual civilians not taking direct part in hostilities and pillaging).

Immediately after the warrant was issued, a number of aid agencies accused of collaborating with the ICC were ordered to leave Sudan, prompting fears of escalating starvation and disease. There have also been reprisals against local human rights organisations.

Q. In 2005, the Comprehensive Peace Agreement (CPA) was signed and a Bill of Rights adopted. Has the promise of enhanced human rights protection in Sudan been put into practice since?

No unfortunately! The senior ruling party, the National Congress Party (NCP) is working against genuine implementation of the CPA, in particular the provisions related to human rights and democratisation. The only positive is the establishment of a human rights commission in the semi-autonomous South Sudan.

Photo # 276984 UN Photo/Tim McKulka
President of Sudan Addresses CPA Anniversary Ceremony

At the national level, the CPA era has not created the legal and political environment expected and detailed in the Interim Constitution and the Bill of Rights. Indeed, civil society and human rights organizations and defenders continue to encounter serious obstacles and challenges, such as direct harassment by the security forces, a restrictive legal and bureaucratic environment, harsh censorship, interrogation and detention of independent journalists, and repeated arbitrary detention, torture and interrogation by security agencies. All these harmful practices and violations are grounded in unconstitutional laws, e.g. Penal Code, Security Act, Media and Journalism Law, etc, that the NCP is reluctant to bring into conformity with the Interim Constitution and the Bill of Rights. Already, more than three years have passed and only two years remain in the interim period of the CPA, so there is not much time left!

Q. What has been the impact of ICC proceedings on the human rights situation and defenders, in particular the application for an arrest warrant against the President in July 2008?

Last November, I was arrested and tortured together with my colleagues Osman Hummaida and Amir Suliman. This was a shock to all actors in the Sudanese and international human rights movement. It was clear from our torture and arrest that the NCP was trying to send various messages to those advocating for justice and accountability in Darfur. In addition to this, the NCP officials and the security agencies in Khartoum launched a massive campaign of threats and created a state of fear against all those who are in favour or are perceived to be advocating for the ICC. Indeed, these are the old classic tactics uses by the NCP whenever it finds itself trapped in crises created by its own will and practices.

The recent experience of rejecting and terrorising 'others', and then accepting the United Nation-African Union Mission in Darfur (UNAMID) is a clear example of how these messages do not and will not achieve their intended purposes. In addition to that, I would add that since the eruption of the conflict in Darfur in 2003, the regime has committed massive human rights atrocities along with developing different patterns of attacks against human rights defenders, whether on those who do the direct on the ground human rights work or others involved in boarder advocacy and media efforts inside and outside the country. In particular the strategy of repeated harassment, summonsing and interrogation is clearly intended to intimidate human rights defenders and to prevent them from carrying out their essential work. The arrest warrant against the President, I believe, is not going to add so much to such behaviours and practices by the NCP and its security organs. And I belief that the courage, commitment and the support of advocates of international justice will make Sudanese human rights defenders more than capable to defend and protect human rights and their own rights as well.

Q. Do you see the role of the ICC as conducive or detrimental to the furtherance of justice and the protection of human rights in Sudan?

It's absolutely conducive. We are talking about a long, bloody history of human rights violations. Darfur is just a total manifestation of this dark history, taking place in the context of a culture of impunity. The role of the ICC is and should be seen as breaking this continuing cycle of violations and impunity.

Yes, the ICC is addressing the most significant crimes committed in Darfur, but also UN Security Council resolution 1593 (which referred the situation in Darfur to the ICC) was based on the finding that the Sudanese legal system is not capable to handle such patterns of human rights violations. The violations in Darfur basically differ in terms of scale, but the regime in Khartoum has been committing similar patterns of violations elsewhere, whether in the war in South Sudan, Eastern region, and against political and civil actors during the ghost houses era. So, the role of the ICC is definitely conducive in the way it is challenging the culture of impunity and bringing the notion of complementarily of Sudanese laws to the centre of how human rights crimes are addressed.

Q. What do you see as the biggest challenge for human rights defenders in Sudan with the arrest warrant issued against the President?

The courage and commitment of Sudanese human rights defenders working in the war torn zone of Darfur and in the capital Khartoum has of course left them vulnerable to targeting by government security bodies. The arrest warrant deepens their vulnerability and reducing this vulnerability is a major challenge. The creation of immediate and long term measures of protection and safety, including coordination of advocacy efforts with regional and international human rights groups is vital.

Q. What are your expectations from the ICC at this juncture on how best to protect (and support) victims, witnesses and human rights defenders in Sudan?

The ICC of course has a direct technical responsibility to protect victims and witnesses and that should be in place since the first applications for arrest warrants against Haroun and Koushaib. Regarding the Sudanese human rights defenders, I think the ICC as an institution should play a different advocacy role. States parties to the Rome Statute already have a clear responsibility to advance and implement the ICC's decisions; they also have the direct responsibility to protect advocates and supporters of the ICC in a country like Sudan which is not a party and directly resisting the ICC. The European Union, for example, has clear guidelines on protection of human rights defenders. It is high time for states parties to the Rome Statute, and member states of the EU in particular, to provide whatever measures needed to protect Sudanese human rights defenders, so they can be able to defend and protect human rights in general and their rights on the top of that. •

Western Darfur Residents Gather for UNAMID Joint Representative Meeting
UN Photo/Sarah Hunter
26 February 2008

THE FIVE DAY WAR BETWEEN GEORGIA AND RUSSIA

Professor Bill Bowring, Birkbeck College, University of London

The "Five Day War" between Georgia and Russia was launched by Georgia on 7 August 2008 and continued until a preliminary ceasefire was mediated by the French presidency of the European Union on 12 August. Fighting did not cease completely until 16 August. There are now a number of legal proceedings at the international level.

Alagir North Ossetia, Russia. Two women ponder their future as they wait on a bus that will return them from North Ossetia, where they found refuge during the fighting in Georgia, to their homes in South Ossetia. 18.08.08 © J. Björgvinsson

Georgia's relations with Russia have a long and troubled history. Georgia is an ancient nation. It became a unified kingdom, and was one of the first countries to adopt Christianity as its official religion, as early as the 4th century. It enjoyed its Golden Age in the 12th and 13th centuries, until it was conquered by the Mongols in 1236. It was annexed by the Russian Empire in 1801, and was completely independent from 1918 until 1921, when it was forcibly incorporated into the Soviet Union. It declared its independence on 9 April 1991.

Mikheil Saakashvili became President on 25 January 2004 following the November 2003 "Rose Revolution". Saakashvili has been accused of grave human rights violations during his rule, including torture. The Georgian Young Lawyers Association (GYLA) together with the London-based European Human Rights Advocacy Centre (EHRAC) has taken a number of cases to the European Court of Human Rights (ECtHR) at Strasbourg.

Georgia is a small country, but a number of languages are spoken within its internationally recognised boundaries. There are three quite distinct language groups. The South Caucasian group of languages includes Georgian (Sakartvelo), Laz, Mingrelian and Svan. Georgia excluding Abkhazia and South Ossetia is about 83.8% ethnic Georgia, with significant Azerbaijani and Armenian minorities. Abkhaz, on the other hand, is an entirely unrelated Northwest Caucasian, or Circassian, language. Ossetian, finally, is an East Iranian language, again entirely unrelated to Georgian or to Abkhaz. South Ossetia's neighbour, North Ossetia, is a subject of the Russian Federation, named the Republic of North Ossetia-Alania, with a population of nearly 1 million.

Abkhazia was historically never part of Georgia. It became part of the Russian Empire in 1810, and enjoyed substantial autonomy within the USSR from 1917 until 1931, when it was incorporated into Georgia, again with the status of an Autonomous Republic. South Ossetia became an Autonomous Oblast within Georgia in April 1922.

When the Soviet Union collapsed at the end of 1991, Abkhazia demanded independence. However, the ethnic Abkhaz population comprised only about 20%; the remainder were ethnic Georgians. Georgia invaded Abkhazia in 1992, but in 1993 the Abkhaz succeeded in defeating the Georgian army, and driving out the ethnic Georgians, who became refugees. Abkhazia adopted a constitution in 1994 and declared independence in 1999. This was not recognised by any state, even Russia. South Ossetia was the scene of violent conflict in 1992, and following a ceasefire a peacekeeping force of Ossetians, Russians and Georgians was established under OSCE monitoring. South Ossetia held independence referendums in 1992 and 2006, and was ruled by a separatist regime.

When Saakashvili came to power, he dedicated himself to ending Abkhaz and South Ossetian separatism. He scored an easy and mostly bloodless victory in the Autonomous Republic of Adjara, which borders Turkey and is predominantly Muslim, in 2004, and forced the resignation of its leader, Abashidze. Perhaps this encouraged Saakashvili to try again in South Ossetia.

Despite escalating tensions during 2008, there is now no question but that Georgia started the war, with a massive attack on South Ossetia's capital, Tskhinvali. Deploying NATO-trained troops, and using advanced weapons acquired from Israel and Ukraine, Georgia had some early success. But Russia responded with overwhelming force.

There are now credible reports that war crimes were committed by both sides in the conflict.

Several sets of proceedings have been commenced.

On 12 August 2008 Georgia submitted an application to the UN's International Court of Justice (ICJ) at the Hague, complaining that from 1990 until 2008 Russia had violated the 1965 Convention on the Elimination of All Forms of Racial Discrimination (CERD), as well as the Genocide Convention. Georgia sought an Indication of Provisional Measures from the ICJ, which responded very quickly. Public hearings were held from 8 to 10 September 2008, and on 15 October the Court ordered that both Georgia and Russia, whether or not any violations in the past may be legally attributable to them, were under a clear obligation to do all in their power to ensure that any such acts are not committed in the future. This was probably not the result hoped for by Georgia. The case will continue for at least a further year. By an Order of 2 December 2008, the Court fixed 2 September 2009 as the time-limit for the filing of a Memorial by Georgia and 2 July 2010 for a Counter-Memorial by the Russia.

Both Georgia and Russia have communicated with the International Criminal Court. Georgia is a party: it deposited its instrument of ratification of the Rome Statute on 5 September 2003. But Russia is not a party.

On 20 August 2008 ICC Prosecutor Luis Moreno Ocampo confirmed that the situation in Georgia was "under analysis" by his Office. He said

"Georgia is a State Party to the Rome Statute. My Office considers carefully all information relating to alleged crimes within its jurisdiction – war crimes, crimes against humanity and genocide - committed on the territory of States Parties or by nationals of States Parties, regardless of the individuals or groups alleged to have committed the crimes. The Office is *inter alia* analyzing information alleging attacks on the civilians."

Nothing more has happened so far.

The most significant proceedings are now taking place before the ECtHR. It will be recalled that a very large number of Chechen cases, including violations of Article 3 of the ECHR, the prohibition of torture and inhuman and degrading treatment, have been brought against Russia arising out of the conflict since 1999. The applicants have won more than 30, many with the assistance of EHRAC.

Applications have been made from both the Russian and Georgian sides.

In October 2008 the president of the Strasbourg Court, Jean-Paul Costa, announced that "We have received very close to 2,000 applications… from people living in South Ossetia, against Georgia. There will be a massive increase in the workload of the court. We cannot just throw away these cases." It is plain that these applications are supported by Russia.
On 6 February 2009 Georgia lodged an interstate application against Russia, alleging serious and mass violations. Its initial application was lodged on 11 August 2008, and on 12 August the Court's President applied interim measures.

And on 12 February 2009 EHRAC and GYLA announced that they had jointly lodged 32 groups of cases on behalf of 132 Georgian citizens who allege killing or injuring of civilians, destruction of property, and illegal detention by Russian soldiers. Some complaints rely on Article 3 of the ECHR.

However, it is highly unlikely that any judgments will be delivered for at least three years. •

KENYA: SWIFT ACTION NEEDED TO PREVENT FUTURE VICTIMS

Alison Smith, Legal Counsel and International Criminal Justice Program Coordinator, No Peace Without Justice

During the post-election violence in Kenya from December 2007 to February 2008, over one thousand people were killed, hundreds of thousands were displaced and thousands upon thousands were the victims of personal injury, often of a brutal nature, and property damage. The occurrence of violence was not unexpected – violence as a means to obtain political power has been a feature of Kenyan elections since 1992 – but its scope and intensity was something few had anticipated.

From the moment the violence erupted after the announcement of the disputed Presidential election results in December 2007, the issue of accountability was not far behind. The question of the International Criminal Court taking jurisdiction over crimes committed during the violence was raised; one response was that Kenya was both able and would be willing to investigate and prosecute those crimes itself. It looked, therefore, like the Kenyan situation would provide one of the first concrete examples of ICC complementarity in action, with the vey existence of the ICC acting as a spur for national action, until Thursday, 12 February 2009, when the Kenyan Parliament rejected a Bill to establish a Special Tribunal to investigate and prosecute the crimes committed during the post-election violence.

From the first week of January, the Kenya National Commission on Human Rights (KNCHR) swung into action and, with the assistance of No Peace Without Justice, initiated a country-wide documentation project that visited virtually every area affected by the violence, gathering statements from people who saw what had happened, including victims of the violence. This work culminated in a final report released on 7 August 2009, detailing the breadth of the violence, including the levels of planning, preparation and financing involved; the extent of the crimes that were committed; and indicating which groups were responsible for which crimes. The process was not without its hitches, including controversy over a "secret" annex listing names of alleged perpetrators and allegations of political favouritism. Nevertheless, despite its challengers and detractors, the overwhelming evidence gathered by KNCHR left no doubt, if any really existed, that the violence was not spontaneous, but planned, instigated, directed and financed at the highest levels.

The KNCHR documentation work and its firm stand on accountability as an essential element for preventing violence during the next elections in 2012 came at a critical time for the country. It helped ensure that accountability was incorporated as an important part of the negotiated power-sharing arrangement that brought an end to the violence. One means for achieving that accountability was the Commission of Inquiry into the Post-Election Violence, chaired by Kenyan Judge Philip Waki, alongside two foreign Commissioners, Gavin McFadyen from New Zealand and Pascal Kambale from the Democratic Republic of Congo, which benefitted from the work previously done by the KNCHR.

The Waki Commission released its findings on 15 October 2008 and recommended, among other things, that a Special Tribunal be established to investigate and, where appropriate, prosecute those responsible for the crimes. Adding weight and teeth to this recommendation, the Waki Commission announced that a list of suspected perpetrators had been given to former UN Secretary-General Kofi Annan, with instructions to hand that list over to the ICC if the Special Tribunal were not established by 1 March 2009.

This last proviso was the masterstroke of the Waki Commission, putting the principle of complementarity square and centre. Under the ICC Statute, States retain their primary responsibility to prosecute persons suspected of committing serious crimes under international law, with the International Criminal Court standing as a guardian, a catalyst and a court of last resort, acting only where a State is unwilling or unable to do so itself. By dangling the threat of the ICC in front of Kenya's decision-makers, the Waki Commission was, in essence, saying, "Establish a Special Tribunal to prosecute these crimes, or risk being considered unwilling or unable to fulfil your obligations under international law, and being dragged to The Hague."

This is exactly where things stand now: when the Kenyan Parliament rejected the Bill to establish the Special Tribunal on Thursday, 12 February 2009, Kofi Anan expressed his clear intent to remain faithful to the letter and spirit of the Waki Commission recommendations. Kenyan Prime Minister Raila Odinga has said the Government will try again, but it is far from clear whether this will be successful. In any event, Kofi Anan will convene a meeting of the Panel of African Eminent Personalities to chart the way forward and it is believed that unless the Kenyan Parliament passes a law soon, the list of suspects and supporting evidence will be given to the ICC Prosecutor.

A man left for dead by rival supporters of different political party is rescued by women from a river where he had been dumped, Mathare slums, Nairobi, 27 December 2007. © Julius Mwelu/IRIN

There are many reasons why the Bill to establish the Special Tribunal for Kenya was rejected, including that some believe the ICC would offer better guarantees for justice (one of the slogans chanted in Parliament was "Let us not be vague, let us go the Hague"). Supporters of international justice, however, should still aim for accountability in Kenya: complementarity is where the system works best. Effective prosecutions in Kenya of those who bear the greatest responsibility, under Kenyan law, best fulfils the promise of the ICC Statute's complementarity principle, so that crimes against humanity are prosecuted closest to the victims, where people can see and heed the consequences of their actions. Violence cannot continue to be rewarded in Kenya, thereby sowing the seeds for its re-occurrence in the 2012 elections. Political wrangling cannot prevent the victims of the post-election violence, many of whom continue to suffer its dire consequences, from obtaining redress. Swift action is needed by Kenya's law-makers to change the landscape and divert Kenya from its current course; to move from ongoing impunity to accountability, and to prevent the victimisation of a new generation of Kenyans. •

Working Group affiliated organisations include:

Amnesty International • Avocats Sans Frontières • Centre for Justice and Reconciliation • Coalition for the International Criminal Court • European Law Student Association • Fédération Internationale des Droits de l'Homme • Human Rights First • Human Rights Watch • International Centre for Transitional Justice • International Society for Traumatic Stress Studies • Justitia et Pax • Medical Foundation for the Care of Victims of Torture • Parliamentarians for Global Action • REDRESS • Women's Initiatives for Gender Justice

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