

Access

Victims' rights before the International Criminal Court

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Callixte Mbarushimana transferred to the ICC - Jonathan Venet

Callixte Mbarushimana, former executive secretary of the Democratic Forces for the Liberation of Rwanda (FDLR) is now facing a potential trial before the ICC, after being surrendered from France where he was initially detained.¹ He was transferred to the ICC Detention Centre on 25 January 2011, following the French Court of Cassation's decision confirming his surrender. He appeared before Pre Trial Chamber I three days later.

So far, the charges encompass crimes allegedly committed between January and December 2009 in the Kivus, eastern Democratic Republic of Congo (DRC). Although Callixte Mbarushimana had been living in Paris since 2003, it is argued that he contributed to the atrocities of the FDLR on the ground. It is also alleged that the FDLR, under his leadership, perpetrated atrocities for a longer period of time. The Prosecutor has also stated that he was investigating mass rapes committed in summer 2010 in Walikale territory of North Kivu, DRC.²



Callixte Mbarushimana appeared before the ICC for the first time on 28 January 2011 © ICC-CPI / Jerry Lampen

Indeed, between 30 July and 2 August 2010, more than 300 civilians were raped in the Walikale region, and the FDLR together with the Maï Maï Cheka militia are said to be responsible for the attacks. Local activists have reported that the crimes extend to more locations than the ones named in the Prosecutor's application. As the confirmation of charges' hearing is due to take place on 4

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Six high-ranking individuals summoned in the Situation in Kenya

On 8 March 2011, Pre Trial Chamber II (PTC II) ordered summonses to appear for the six individuals suspected of crimes against humanity in the Situation in Kenya, opening two separate cases.¹ ICC Prosecutor Luis Moreno Ocampo had announced, on 15 December 2010, the names of the six individuals who, he believes, bear the most responsibility for the Post-election violence of 2008.² In one application he requested summonses for William Samoei Ruto (suspended Minister of Higher Education), Henry Kiprono Kosgey (Minister of Industrialization), Joshua Arap Sang (head of operations of a radio company). In the other application, he requested Francis Kirimi Muthaura (Head of the Public Service), Uhuru Muigai Kenyatta (Deputy Prime Minister and Minister for Finance) and Mohamed Hussein Ali (Former Chief Police).

This announcement has given rise to a lot of criticism from various Kenyan actors who claim that the cases should be dealt with nationally. It led the Parliament of Kenya to issue a motion on 22 December 2010, urging the government to withdraw from the Rome Statute. However, as some have noted, a withdrawal from the Statute would not discharge Kenya from its current obligations arising as a State Party to the ICC. According to article 127 of the Statute, it would not

affect proceedings that have already started in the Kenyan Situation. Some Kenyan officials have also requested that the UN Security Council defer the cases under Article 16 of the Statute. This raises concerns on the future cooperation of the Kenyan authorities with the ICC, bearing in mind a recent African Union's decision to support the request for deferral of the Kenyan cases. In contrast, numerous national and international civil society actors have welcomed the Prosecutor's requests and urged the Kenyan government and parliament to reaffirm their support for the ICC. They also proclaimed that such a withdrawal would signal an intention to side with the perpetrators of the post-election violence rather than its victims.

With the next elections in Kenya planned for December 2012, it is hoped that efforts to hold those responsible for past violence accountable will act as a positive deterrent. •

¹ Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, 8 March 2011, ICC-01/09-01/11-01. Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, 8 March 2011, ICC-01/09-02/11-01

² Prosecutor's Application Pursuant to Article 58 as to Ruto, Kiprono Kosgey and Arap Sang, 15 December 2010, ICC-01/09-30-Red; Prosecutor's Application Pursuant to Article 58 as to Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, 15 December 2010, ICC-01/09-31-Red

July 2011, they are urgently calling for the Prosecution to extend the list of facts supporting the charges as well as the period covered. Indeed, once charges are confirmed, the Prosecution will only have until the commencement of the trial to seek an amendment with a view to extend the said charges.³

The extent of victims' participation in ICC proceedings and ability to claim reparation is also at stake considering that victim's status in a case can only be granted on the basis of facts and dates included in the charges. Should the additional facts be added and the charges be confirmed, this would allow a larger group of victims to be recognised in the proceedings, potentially including a large number of victims of sexual violence in Walikale territory.

The FDLR have been terrorising civilian populations for many years and this arrest, as well as the arrest of two other major leaders of the group in November 2009, may contribute significantly to diminishing the FDLR's capacity.⁵ Colonel Bizimana, a former FDLR commander who recently joined the reintegration process in Rwanda, stated that those arrests were a "big blow to the force".⁶ Although other measures were taken against those individuals -such as freezing of assets and travel ban- it becomes palpable that prosecuting such leaders might help to dismantle their militias and end impunity for crimes against humanity and war crimes.

On 21 December 2010, Callixte Mbarushimana was also indicted by the French authorities for his alleged role in the 1994 Rwandan genocide, when he was officer in charge of the United Nations the Development Programme in Kigali. Investigations by the Prosecution of the International Criminal Tribunal for Rwanda (ICTR) led to his arrest in Germany in 2008. However he was subsequently released following the ICTR Prosecutor's decision to drop the case at the time.

Only crimes allegedly committed since 1 July 2002 fall under the jurisdiction of the ICC. The French indictment is instead for crimes falling within the ICTR's jurisdiction, based on French law enabling universal jurisdiction. For now, proceedings



Women protesting against the scourge of sexual violence in the country, on 17 October 2010, Bukavu, South Kivu © Pierre-Yves Ginet.

against Callixte Mbarushimana before the ICC are on their way and it is not clear yet how proceedings with regard to his role in the Rwandan genocide will be continued in France.

Regardless, a trial against Callixte Mbarushimana before the ICC could be an opportunity for victims in the Kivus to have their voices heard and to bring reparation claims before the Court. It may contribute to deterrence of further atrocities in a region which has known violence since 1996. ●

¹ Information from the French authorities in relation to the surrender of Callixte Mbarushimana, 14 January 2011, ICC-01/04-01/10-34..

² See Statement by ICC Prosecutor on transfer of Callixte Mbarushimana to The Hague, 25 January 2011.

³ As provided by article 61.9 of the Rome Statute, "[a]fter the charges are confirmed and before the trial has begun, the Prosecutor may [...] amend the charges. After the commencement of the trial, the Prosecutor may, with the permission of the Trial Chamber, withdraw the charges."

⁴ See "Decision on the Applications for Participation in the Proceedings of Applicants a/0327/07 to a/0337/07 and a/0001/08", ICC-01/04-01/07-357, 2 April 2008.

⁵ Ignace Murwanashyaka and Straton Musoni, respectively former President and First Vice President of the FDLR, were arrested in Germany on 17 November 2009, and indicted before a tribunal in Stuttgart on 8 December 2010 for crimes against humanity and war crimes.

⁶ See ICC's OTP weekly briefing, 11-17 January 2011.

Victims take the stand in the Katanga and Ngudjolo trial - Gaëlle Carayon

The trial of Mathieu Ngudjolo and Germain Katanga has received little coverage in comparison to other ICC trials. Katanga and Ngudjolo are the first Congolese militiamen to be accused, *inter alia*, of murder, rape, destruction of property and directing an attack against a civilian population. The violence relates to an attack on the town of Bogoro in Southern Ituri Province, Eastern DRC, on 24 February 2003. The second case to be tried at the ICC, the trial started in November 2009 and has run relatively smoothly, with the Prosecution closing its case in December 2010, having brought 26 witnesses to testify in The Hague.

While the appearance of three victims in the Lubanga case, who went to The Hague to testify on their own account in January 2010 was ground breaking, the same practice followed in the second case has gone unnoticed. The role of victims now firmly goes beyond presenting "views and concerns". When certain criteria are met, victims can question evidence and present their own evidence in person or through their legal representative.¹

In the *Katanga & Ngudjolo trial*, two victims have now come to testify on their own account. While most of their testimony occurred in closed sessions, the first victim to take the stand, a Hema woman, explained that before 2003, there was little tension between the different ethnic groups living in Bogoro. However, it is alleged that the Bogoro attack might have been ethnically motivated. She also explained that she discarded warnings of the attack, believing they were a ruse for them to leave their houses unguarded. She later

took refuge at the Bogoro Institute, where the Hema UPC camp was established, though she did not stay inside. Had she done so, she believes she would have been slaughtered.

According to their legal representative, the victims who testified wished to raise the harm they suffered, as well as the ethnic character of the attack, providing the family, ethnic and social context.² A recognition that the attack might have been ethnically motivated, targeting the Hema population only, is important as it underlines a specific element of the harm suffered. This could in turn impact upon the determination of future reparation awards against the accused if they are convicted.

The Court is still a young institution and reparation proceedings are yet to take place. However, the justice process raises much potential for the Bogoro victims, many of whom wished they had the opportunity "to be present at the court, [...] and express what they have experienced and suffered [...]."³ ●

¹ Decision on victims' participation, 18 January 2009, ICC-01/04-01/06-1119, paragraphs 115 and 116; Appeals Chamber, Judgment on the appeals against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, 11 July 2008, ICC-01/04-01/06-1432.

² Décision aux fins de comparution des victimes a/0381/09, a/0018/09, a/0191/08 et pan/0363/09 agissant au nom de a/0363/09, 9 November 2010, ICC-01/04-01/07-2517, <http://www.icc-cpi.int/iccdocs/doc/doc964978.pdf>.

³ This was expressed by Maître F. Luvengika Nsita, victims' legal representative, in his opening statement to the trial.

The impact of trauma on recall, evidence and testimony

Ellie Smith *

Resort to reparative processes can be difficult for all in post-conflict or transitional societies, where there may be numerous practical and legal barriers impeding access. For many torture survivors, however, the clinical impact of their trauma poses an additional barrier to accessing post conflict justice processes.

Trauma can affect the ability of survivors to give a clear and coherent account of their abuse because traumatic memories are stored, processed and retrieved differently to non-traumatic memories.

Declarative or explicit memories, which include our day-to-day awareness of facts, and events that have happened to us, are recorded and stored chronologically.¹ During deeply traumatic events, however, greatly heightened emotional arousal appears to interfere with the processing and storage of information in narrative memory, and explicit memory essentially fails. Non-declarative or implicit memory, however, which includes emotional responses, habits and reflexive actions, does not appear to be affected by trauma. As a result, while a survivor of trauma may not be able coherently to articulate a narrative of the event, they may be aware of sensory perceptions and behavioural reenactments emanating from it.² Memories stored at the implicit level are retrieved through qualitatively different “pathways”, however, and survivors may struggle to access parts or all of their traumatic memories. Where they are able to retrieve memories, these are often not chronological. Where survivors dissociate at the time of the trauma, this may lead to further fragmented recall.

As a result, survivor accounts can appear disjointed, incomplete and incoherent. Their nature is at odds with legal approaches to assessing the credibility of testimony, which typically require coherence and consistency. However, far from suggesting that the account of a survivor lacks credibility, the difficult and fragmented nature of evidence may in fact be supportive of their claim to have been tortured.

In addition to functional problems in recall, a deep and profound sense of shame, humiliation and guilt, particularly although not exclusively in the context of sexual violence, can have a huge impact on the ability of a survivor to disclose or report abuse.

Where a survivor has been able to reveal that she/he has been raped, such revelations often occur some time after the disclosure of other, non-sexual violence. Within the relative security of the clinical environment, late disclosure of sexual violence is common, yet within the legal process it is often misunderstood, and may be used to impugn a survivor’s credibility.

In addition, feelings of depression and suicidal ideation which arise as a clinical response to the trauma can lead to feelings of intense helplessness and hopelessness, producing an inability to proactively seek any form of remedy or help. This is compounded by exhaustion typically associated with sleeplessness, nightmares, the re-experiencing of traumatic memories through flashbacks, ongoing pain and shock.

Finally, survivors may experience emotional numbing, in which they feel no emotional connection to their experiences. While this feeling of “deadness” might come as a relief to many, it also impacts upon the manner in which testimony is given, leading potentially to perceptions of “coldness” which may not accord



Women sit together outside their dormitory at the Heal Africa Transit Center for women victims of sexual violence in Goma, DRC. © Aubrey Graham/ IRIN

with lay notions of how a survivor of torture should conduct themselves, and in turn, can impact upon perceived credibility.

The relationship between clinical and legal approaches to accessing justice is multi-layered and complex, and this short article provides only a brief overview of some of the clinical consequences of trauma which impact upon seeking justice. In addition to issues relating specifically to the clinical impact of trauma upon disclosure, evidence and testimony, there are many other factors, including issues around timely documentation and the use of psychological evidence, the security of the recovery environment and its impact upon the nature and quality of testimony, the potential need for ongoing therapeutic support throughout the judicial process, the potential impact on a survivor of the way in which evidence and testimony are sought and the clinical impact of pursuing justice *per se*.

Sofia Candeias, Co-ordinator of UNDP’s Access to Justice project in the Democratic Republic of Congo, noted recently that more rapes are reported in places where there are also available health services. Although largely untested, the same is likely to be true of other, non-sexual forms of gross human rights violations, suggesting a need for a more co-ordinated, multidisciplinary approach to bringing justice to survivors.

Within research practices with vulnerable individuals, alternative methodologies for the collection of testimony are being developed which better reflect the clinical, as well as legal needs of the survivor. Although ostensibly untested, the approaches are understood to improve the nature and quality of testimony gathered, as well as the level of survivor “buy-in” or continued participation in the process. Further investigation into the success of these techniques is needed.

In the meantime, improved and consistent sensitivity amongst legal actors of the clinical impact of trauma on evidence and testimony may serve both to improve the quality of information given, as well as survivor experiences of the process of justice. ●

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¹ Squire and Zola-Morgan, 1991.

² Janet, 1925; Nemiah, 1995; van der Kolk and van der Hart, 1989, 1991.

Reparations for victims of sexual gender based violence in Sierra Leone

Heike Niebergall*

Hawa Bangura¹ is from the Kailahun District, in the Eastern Region of Sierra Leone, where some of the most intense fighting and violence took place during the conflict that raged through the country from 1991 to 2002. We learned about Hawa's story in the spring of 2009, when she came to register with the newly established Sierra Leone Reparations Programme for victims of the war (SLRP). At registration, she told about a day in September 1994, when Rebel forces came to her home town. She described how a group of six of them entered her house and brutally killed her husband in front of her eyes, before turning to her and repeatedly raping her. At that time, Hawa was seven months pregnant. She lost her baby and suffered serious injuries, which due to the lack of medical attention left her with disabling medical problems.

Hawa was accepted as a beneficiary of the SLRP and, in the course of 2009, received an interim financial grant of 100 US Dollars –this will buy rice for a family of 4 for three to four months. Maybe equally important, as a recognised beneficiary, Hawa received symbolic acknowledgment for her unspeakable suffering.

Despite the modesty of the benefits that Hawa has received so far, her fate stands in stark contrast to that of thousands of other women all over the world, where sexual violence against women in conflict remains unaddressed, and where social and cultural norms and judicial systems conspire against victims of sexual crimes seeking justice and redress. As such, the reparation efforts in Sierra Leone represent an important step forward in the recognition of women's rights and in taking actions when these rights have been violated.²

The SLRP was established in late 2008, following the recommendations of the Sierra Leone Truth and Reconciliation Commission (TRC).³ The TRC, which had listened to the testimonies of hundreds of women, girls and boys who were abducted, mutilated, sexually abused and enslaved during the conflict, had recommended that women and children should be the prime beneficiaries of the country's reparation efforts.⁴

Many challenges had to be overcome before Hawa and others were informed about the programme, called to register and eventually received a benefit. The SLRP's establishment was only made possible after the UN Peace Building Fund allocated 3 million USD in 2008, as seed money. The complexity of handling thousands of individual cases in a short period of time, under high political pressure and with limited resources, posed significant challenges to the national programme staff,

all of whom had no prior experience in implementing a reparations programme.

During the first weeks of registration, only a relatively small number of applications from victims of sexual violence were recorded.⁵ It became apparent that the general outreach and information campaign via radio and posters was not reaching the women or at least did not convince them to come forward, particularly in rural regions. Thus, a special outreach strategy had to be developed, which relied on established women groups throughout the country, where women spoke to women.



A victim has the opportunity to recount her story during a registration interview conducted by a Sierra Leone Reparations Programme staff © Nick Danziger / IOM

In a society where victims of sexual gender based violence (SGBV) are stigmatized and often ostracized by their families, husbands and communities, a lot of courage and trust was required from Hawa to come forward and talk about what had happened to her. The SLRP was mindful of this and established strict confidentiality rules and special procedures aiming to protect the victims' privacy and to avoid further exposure.

On the legal side, evidentiary standards to prove eligibility had to be adjusted to take into account the special circumstances of women and the nature of the violations. At the same time, there was concern that the programme and its scarce resources needed to be protected from fraudulent claims. Rather than insisting

on documentary evidence and medical attestations, it was decided to use existing community structures to protect against fraud. Women could bring a letter of support from trusted female community leaders, so called Mummy Queens, and needed no further proof to support their statements.

Throughout 2009, the programme registered approximately 3,600 victims of SGBV and 11,700 civilian war widows.⁶ With the funds available in 2009, the programme was able to provide educational support or interim financial assistance to two thirds of the registered victims. Hawa and others are still waiting for the continuation of the assistance, in particular training and a micro-grant that would help them to learn a skill and then find employment or set up their own business.

Further support came from the United Nations Development Fund for Women that gave a grant of 1 million USD. With this money, 650 particularly vulnerable women will receive a vocational skills training and a micro-grant for livelihood generation. And while the Sierra Leone Government has not been able to secure the necessary funding, and calls for further international donor support have not been answered so far, the UN Peace Building Fund decided to reengage and make an additional 450,000 USD available in 2011. Yet, without further support, the SLRP will fall short of the recommendations of the TRC and leave many victims without any financial or in kind benefit at all.

The SLRP was a breakthrough, as for the first time war reparations were specifically tailored to acknowledge the suffering of victims of SGBV.

With last year's commemoration of the 10 year anniversary of UN SC Res. 1325 on women, peace and security still echoing, it is hoped that the reparation efforts in Sierra Leone will receive further support so that they can serve as a model and inspiration to provide redress to the many women who suffer cruelty and abuse in conflicts. •

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¹ Name changed.

² See the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law adopted by the Commission on Human Rights in its resolution 2005/35 of 19 April 2005, by the Economic and Social Council in its resolution 2005/30 of 25 July 2005, and adopted and proclaimed by the General Assembly Resolution 60/147 of 16 December 2005, UN Doc A/RES/60/147; see also: Nairobi Declaration on Women's and Girl's Right to a Remedy and Reparation, available at http://www.womensrightscoalition.org/site/reparation/signature_en.php.

³ The Sierra Leone Truth and Reconciliation Commission was operational from 2002 to 2004. For information relating to its establishment and operations, see United Institute for Peace at <http://www.usip.org/publications/truth-commission-sierra-leone>.

⁴ Following the recommendations of the Sierra Leone Truth and Reconciliation Commission, the Sierra Leone Reparations Programme grants reparations to the most vulnerable victims of the conflict, i.e. amputees, war wounded, victims of sexual violence, child victims and war widows.

⁵ Estimates are that over 250,000 women, or 33% of the total female population of Sierra Leone at the time, became victims of gender crimes during the conflict. Amnesty International, "Sierra Leone: Getting reparations right for survivors of sexual violence, 1 November 2007, available at: <http://www.amnesty.org/en/library/info/AFR51/005/2007>.

⁶ In total, over 34,000 victims registered with the Sierra Leone Reparations Programme in 2009 out of which 20,000 received the interim financial grant or educational support grant.



Villagers in Kenema, Sierra Leone, await the return of family members and friends who have been living as refugees in a Liberian refugee camp, Camp David in Western Liberia for more than a decade. © UN Photo/Eric Kanalstein

Interview with Pieter de Baan, Executive Director of the Trust Fund for Victims of the ICC

Gaëlle Carayon



Pieter de Baan is the Executive Director of the Trust Fund for Victims at the ICC © ICC-CPI

1. Mr. de Baan, you joined the Trust Fund as its new Executive Director in September 2010, could you tell us about your previous experiences?

My background is in modern history and international law, which I read at Leiden University. I undertook research on the plight of victims of war in Europe and Asia and went on to set up a trial observation program for the ICTY on behalf of Amnesty International, which further developed my

interest not only in International Humanitarian Law, but also in the process leading up to the establishment of the ICC. I have worked in the field of international development for 20 years, with long term postings in Asia, Central Africa, the Middle East and the Balkans.

Thus, my current position combines all of my professional interests in the unique and necessary endeavour that the Trust Fund for Victims is.

2. What do you see as the main challenges/opportunities for the Trust Fund?

Most of the challenges and opportunities are linked to the fact that there is no precedent for such a Fund at the international level. It has had the opportunity to place victims at the heart of international justice, and to make it concrete and relevant for those who are at the receiving end of the most serious crimes. The other, related, challenge has been to manage expectations, not only of victims but also of others with an interest in the process, especially considering the limited resources of the Fund. A big challenge to come in 2011 will be the anticipated triggering of the reparations mandate of the Trust Fund.

3. The first Trial is forecast for completion in 2011, how is the Trust Fund preparing for reparations in the event of conviction?

The Fund has undertaken an in depth research study among current beneficiaries on what they think would be appropriate in terms of reparations. The initial results of this study are included in our 2010 Fall Report and will be very useful as part of our preparations. We have also engaged in consultations with the Registry and the Chambers and meetings involving international experts are being organised.

The Trust Fund has been operational under its general assistance mandate for three years and will also be able to build on the lessons learnt from that experience. So far, we have been able to engage with 70,000 direct beneficiaries and close to 300,000 indirect beneficiaries. Together with our local intermediaries, we have undertaken a range of projects including physical rehabilitation and psychosocial counselling; often filling a gap that is not normally addressed. Projects on reconstructive surgery and counselling are being

implemented in Northern Uganda for example. We also work extensively in DRC with victims of sexual and gender based violence (SGBV). In 2011, we are launching our programme in the Central African Republic, which will have an initial focus on SGBV victims.

4. What are your thoughts on fundraising and increasing the profile of the Trust Fund?

The Trust Fund is funded by voluntary contributions. So far, the majority of our funding logically comes from States parties, as main stakeholders. We are pleased to confirm an increase in the volume of contributions in 2010, with over 1,5 million Euros received. However, there is still plenty of room to increase contributions both in terms of their volume but also in terms of the diversity of their source. The predictability of funding needs to be improved and we will be exploring key partnerships with private parties (such as foundations) as well as reaching out to individual contributors, bearing in mind the legal restrictions in place. The Fund is however limited by the constraints of having a small Secretariat and small resources. Nevertheless, as a uniquely important undertaking with an inspiring set of mandates, the Trust Fund will continue to make a difference on the ground.

5. How might the potential collective implementation of reparations still account for victims' individual right to reparation?

We do not see reparations as having to be either individual or collective. Each case before the Court may lead to specific forms of reparation, depending on the nature of the case and the type of victims concerned. Both types of reparations, collective and individual, may well find a place in the scope and form of implementation. This will very much depend on the deliberations of Chambers. However, I believe that in any case, eligible victims should be proactively consulted on their expectations of appropriate forms of reparations. In this, we need to pay particular attention to vulnerable groups such as women and children.

This year will be an important year for the Trust Fund for Victims, with its reparations mandate most probably coming into play. This coming to maturity of the Fund is both an exciting and challenging prospect. The Trust Fund needs - and is



Beneficiaries of physical rehabilitation - prosthetic limbs, reconstructive surgery, physical therapy and more - at the AVSI GROW centre in Northern Uganda, supported by the TFV since November 2008 © Trust Fund for Victims. All rights reserved. 2009

widely expected - to get things right the first time around, and we will need all the support we can have, at all levels, to make that happen. •

Truth, justice and reparations: Update on Nepal

Mandira Sharma, Advocacy Forum and Sarah Fulton, REDRESS



Families of the Disappeared on a silent demonstration in front of the Presidential Palace in Kathmandu on the eve of the International Day of the Disappeared in 2008. © Advocacy Forum-Nepal

Five years after a peace agreement between the parties to Nepal's decade-long conflict, victims remain in limbo with neither truth nor justice. Promised transitional justice mechanisms are yet to be established, but are being used as an excuse for authorities not to investigate crimes committed by both sides during the conflict, in accordance with international obligations. Nepal needs to act now to address victims' calls for justice, and must ensure that any future transitional justice mechanisms are not used to bargain away their rights.

Background

Nepal's ten-year conflict between government forces and Maoist rebels was the brutal culmination of decades of violence and human rights abuse. Extrajudicial killings, enforced disappearances, torture and rape by both state agents and Maoist insurgents were central features of the conflict, which saw more than 16,700 people killed. More than 1,300 families still await information on the fate of their missing loved ones.

In 2006 the government and Maoists signed the "Comprehensive Peace Agreement" ("CPA"), bringing the conflict to an end and paving the way for elections in which the Maoists emerged as the largest parliamentary party, but did not obtain a majority. Since then political wrangling has often kept the government in deadlock. A May 2010 deadline for the drafting of the Constitution was missed, and extended to May 2011. Hopes are not high that this deadline will be met.

In the meantime not one person from the security services or Maoist insurgents has been brought to justice for the serious crimes committed, and relatives of those missing have been denied investigations into their fate.

Proposed transitional justice mechanisms

The CPA committed both sides to reveal the whereabouts of the disappeared and to set up a Truth and Reconciliation Commission ("TRC"). This is yet to happen.

In April 2010 the government proposed two bills for the establishment of a TRC and a Disappearances Commission. Both bills suffered serious deficiencies, leading to calls for changes in line with international standards. Although the draft bills have been improved, they are still problematic in parts and are yet to be passed.

In the meantime, the government has provided 'interim relief' in the form of economic assistance to victims and their relatives. It clarified that this process is subject to wider reparations to be decided by the TRC and Disappearances Commission. However, even this interim relief program has been beset by problems: excluding some categories of victims and being subject to discrimination, irregularities and political bias.¹

A program is now underway involving the Office of the High Commissioner for Human Rights, the International Organisation for Migration and the Nepalese Ministry of Peace and Reconstruction to develop a comprehensive reparations policy.

Serious concerns

Victims, family members and civil society actors have raised concerns about the need to address past crimes and about the government's plans for addressing them in the future.

First is the failure of authorities – in defiance of international treaty bodies and orders of national courts – to investigate crimes or prosecute those responsible, arguing that these will be 'dealt with' by the yet to be established TRC and Disappearances Commission. Politicians state that accountability takes time, but there is no reason to further delay investigation and justice for victims. Any future transitional justice processes must complement the criminal justice system, not substitute it. The authorities' continued refusals to investigate crimes undermine the demands of victims and reinforce impunity.

Tied to the delays and problems plaguing the draft bills on the TRC and Disappearances Commission, this has led some to fear that – despite widespread support from victims from both sides for trials and

punishment for past human-rights violations² – the concept of reconciliation may be used to prevent meaningful investigations into past abuses.

Alongside this is a concern that the government is relying on 'reparation' (defined narrowly and incorrectly as 'compensation') as a substitute for accountability. This has not been helped by the fact that previous interim relief has focused on providing economic assistance outside a formal and wider process of justice.

Compensation alone is not the answer. "If they can kill my daughter and escape from justice by paying 25,000 rupees" says Devi Sunuwar, mother of a girl killed during the conflict, "I should also be allowed to kill the perpetrators who killed my 15-year-old daughter and pay 25,000".³

Finally, there is concern that the transitional justice process itself is being overshadowed by other developments in the peace process. Resolution of contentious issues such as the reintegration of the Maoist army and return of seized property are seen by political parties as the logical end of the peace process. The rights of victims, and imperatives of accountability, are at risk of being lost – and with them the hopes for a lasting peace.

According to Advocacy Forum, investigation and accountability is key, "[t]he state's acknowledgment of what had happened and assurances that the same would not be repeated in the future is the keystone for the reparations process to begin". Participation in this process by victims is in itself an important part of the reparations owed to them. Only then can the provision of reparations have its full meaning. •

¹ See Advocacy Forum's report: 'Discrimination and Irregularities: The Painful Tale of Interim Relief in Nepal' (2010).

² In a survey of victims and their families from 17 districts in Nepal in 2007, 90% of respondents supported trials and punishment of perpetrators: see Advocacy Forum/ICTJ Report, 'Nepali Voices: Victims' perceptions of justice, truth, reparations, reconciliation, and the transition in Nepal' (2008), p 39.

Will the ICC live up to the expectation of victims in Libya?

Mariana Pena, FIDH

On 3 March 2011, the Prosecutor of the International Criminal Court (ICC) announced the opening of an investigation into the situation in Libya. The announcement was made only five days after the Security Council unanimously adopted a decision referring the case to the Court.

Reports received about events unfolding in Libya since 15 February 2011 have mostly focused on the uprising, hatred speeches, bloody repression, struggles over oil facilities, territory control, mercenaries, ammunitions and the reaction of the international community. Little has been reported about the situation of victims and their expectations of justice.

Victims of the crimes committed in Libya include peaceful demonstrators and other civilians targeted by indiscriminate and systematic attacks. Violence has been particularly aimed at foreigners, unfairly accused by Muammar Qaddafi of inciting protests. Most reports refer to murder as the main form of attack. However, other forms of violence, including pillage, could have been perpetrated.

Death tolls are difficult to establish. Those responsible for the crimes have reportedly taken measures to eliminate traces of their crimes. For example, it is alleged that corpses have been disappeared or been buried in mass graves.

Tens of thousands of migrant workers (Filipinos, Indians, Bangladeshis, Vietnamese and Chinese, among others) have fled to neighbouring countries, especially to the Tunisian border, bringing about a humanitarian emergency. Some of them have been evacuated and aided to return home.

The situation in Libya is different from other situations before the ICC for a number of reasons. It is the first situation referred to the Court by a unanimous



Women demonstrate in favour the no fly zone in front of the Benghazi Courthouse, Libya, March 2011 © Gratiene De Moustier/ IRIN

vote of the United Nations Security Council. It is also the first investigation to be announced only five days after a referral. The swift nature of the decision can be explained by a desire to increase the Court's deterrent impact.

Victims around the world, including victims of other situations before the Court, have indeed expressed hopes that the Court's actions would prevent further crimes. But the Court has not always had such a deterrent impact for a number of reasons, including delays in making relevant decisions such as the opening of investigations, lack of sufficient outreach and other factors. Victims in other situations have also been disappointed at the slow pace of investigations, which can bring about loss of evidence, as well as at the sequence of arrest warrants, the lack of prosecutions reflecting the whole spectrum of victimization and the perceived partiality of the Office of the Prosecutor in cases where only one party to the conflict has been prosecuted.

As the Court opens its sixth investigation, one cannot but wonder whether the ICC has learned from previous mistakes, whether it has listened and taken into

consideration the views expressed by victim communities. Have the Office of the Prosecutor and the Court as a whole learned lessons from previous situations, like Central African Republic or Kenya where actions could have been more expeditious? The initial steps seem promising, but will the Court now keep up with the swift pace with which it has acted so far?

The ICC cannot afford to let victims down. It is hoped that the Court's involvement will not only have an initial impact on crime deterrence, but that it will also set a precedent for holding those responsible for serious crimes to account, and engender respect for the rule of law. Outreach will certainly play a key role in this regard.

Indeed, it has been demonstrated that international tribunals' impact on the affected population is dependent upon the level of knowledge and appropriation of the relevant justice mechanism. It is thus imperative that the Court designs and implements an outreach strategy tailored to the situation in Libya without delay. The ICC must also start to map and reach out to victims' groups for the purpose of informing victims of their rights. It can be expected that developments on the ground in Libya will have an important impact on the mode and the pace at which the Court will operate. It is submitted, though, that the Court needs to be prepared to deploy resources in the field, should the circumstances on the ground so allow. The ICC should also be ready to reach out to victims and victims' families in neighbouring and other countries.

However, it is not only the Court that must live up to these expectations. States Parties must also lend the Court all the necessary support, as well as provide it with the necessary resources to undertake victim-related actions within its mandate. ●

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 ● UCICC ● UVF ●

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