

# International Refugee Rights Initiative



## *Refugee Rights News*

Volume 4, Issue 4

June 2008

In this issue:

SPOTLIGHT:

***Ocampo Throws Down the Gauntlet***

ACTION AND  
ADVOCACY:

***Calling for an End to the  
Violence against Women  
through Film***

FEATURES AND  
ANALYSIS:

***Somalia: A Humanitarian  
Crisis Disregarded***

***South Africans, Foreigners  
and the Dynamics of  
Identity in South Africa***

LAW AND POLICY  
DEVELOPMENTS:

***Bemba Arrested in Brussels  
for Alleged Crimes in CAR***

PUBLICATIONS

### SPOTLIGHT

#### ***Ocampo Throws Down the Gauntlet***

On June 5, the International Criminal Court's prosecutor, Luis Moreno Ocampo, addressed the Security Council to update them on the progress of his investigation.

It was his strongest speech thus far. He stressed that the government of Sudan was failing to cooperate with the Court, particularly in refusing to hand over the two individuals against whom arrest warrants have been issued. He also updated the Court on two new incidents which are under investigation and which he intends to prosecute.

#### *Ongoing violence and crimes*

The prosecutor made it clear that he is continuing to monitor the situation on the ground in Darfur. And there is much violence and suffering to monitor, the humanitarian situation has only deteriorated. More than a year after arrest warrants were issued, women and girls continue to be raped and villages have been subjected to aerial bombardment. A group of eight humanitarian agencies reported on June 22, that 180,000 Darfurians were displaced in the first five months of 2008. Those who try to assist the most vulnerable in Darfur have equally been targeted. This year alone, 160 humanitarian vehicles have been hijacked and eight humanitarian workers have been killed. In May, a peacekeeper serving with the joint United Nations - African Union Mission in Darfur (UNAMID) was killed in the latest in a series of attacks on peacekeepers in the region. Making this violence all the more difficult to address is the dizzying array of actors aligning on the ground, from splinter rebel groups to the main rebel factions, from *janjaweed* militias to government forces.

## *Cooperation*

The Prosecutor's message on cooperation was clear--"The government of Sudan is not cooperating with the Court. The government of Sudan has not complied with United Nations Security Council Resolution 1593. The government of Sudan has taken no steps to arrest and surrender the suspects and stop the crimes."

Indeed, the government is steadfastly refusing to handover Ahmad Muhammad Harun, a state minister for humanitarian affairs and a junior member of President al-Bashir's government, and Ali Muhammad Ali Ab-Al-Rahman aka Ali Kushayb, a member of the *janjaweed*. Not only has the Sudanese state allowed these two to evade justice, they have rewarded them. Harun continues to serve as Minister of Humanitarian Affairs, and taken up new roles--including taking part in a committee liaising with the United Nations and the African Union on the deployment of the hybrid peacekeeping forces. Kushayb, who was in government custody at the time that the charges were announced, has since been released, the government citing lack of evidence.

The government of Sudan has continued a rhetorical campaign against the Court as well. Interior Minister Zubeir Beshir Taha was quoted in June 2007 as insistent that the government would not take action against Harun and Kushayb, "I tell the whole world that [Harun] and [Kushayb] are in safe hands and are not at all worried." In April 2008, the government of Sudan took aim at the Court's prosecutor himself. Sudanese Ambassador to the United Nations Abdel-Mahmoud said the proceeding was, "nothing but a ridiculous political play trying to provoke countries against Sudan." Abdel-Mahmoud suggested that it was the Prosecutor himself who should be in the dock.

Darfurians have looked to the international community for a decisive response. When the Prosecutor announced that he was opening his investigation in June 2005, Darfurians rejoiced, seeing the Court as their best chance for justice.

## *The international response*

Despite the fact that the Prosecutor reported in December of last year that the Court was not cooperating with the Court, the Security Council did not respond. This failure is just one example of how diplomats have too often allowed the need for justice to be set aside by other priorities.

International civil society, however, took up arms in an effort to change that. In April 2008, Justice for Darfur was launched bringing together organizations and networks such as the Darfur Consortium, Human Rights Watch, the *Federation Internationale des Ligues de Droits de l'Homme*, and the Cairo Institute for Human Rights Studies, calling on the Security Council to pass a resolution requiring the immediate arrest of Harun and Kushayb and to raise the issue in its meetings in Khartoum.

Members of the Security Council expressed serious concern with Sudan's failure to comply with the Court and the Security Council resolution which had referred the situation. In particular, Costa Rica offered a passionate response with Foreign Minister Bruno Stagno Ugarte accusing the Council of being "too shy in responding to Sudan's refusal to comply with regards to Darfur.... The ghosts of Srebrenica and Rwanda should awaken us to the fact that some in Sudan believe that the graves in Darfur are not sufficiently full."

His call was answered when the Security Council issued a Presidential Statement on June 16, calling on the government of Sudan and all other parties to "cooperate fully" with the ICC under the terms of Security Council Resolution 1593. The resolution also took note of the efforts of the ICC to engage the government of Sudan and in particular the transmission of arrest warrants a year earlier.

The Darfur Consortium, via its Co-Chair, welcomed the statement which although it lacks the binding character of a resolution, "as a statement of the unanimous sentiment of the Council, the Presidential Statement sends a powerful message to Khartoum indicating that its defiance will no longer pass unchallenged."

International advocates had also pushed the European Union to adopt targeted sanctions, including asset freezes, against those members of the government responsible for shielding Harun and Kushayb or any future accused when it meets this month. Such sanctions would be a clear signal to the government in Khartoum that failing to comply with the will of the Security Council, in this case via cooperation with the ICC, will have consequences. Speaking at a press conference in Brussels on June 12, the President of the European Parliament Hans-Gert Pöttering recalled the Parliament's messages asking for the imposition of sanctions. At the same press conference, Salih Mahmoud Osman, a Sudanese member of parliament, reflected that Europeans had a "legal, moral and ethical responsibility" to support justice. Although silence might be expected from states which had never supported the Court, he reflected, he was at a loss to explain the lack of action from the EU, given its expressed commitment both to Darfur and the Court.

Although efforts to push the EU to adopt sanctions have not yet been successful, the European Council "deeply deplore[d] the continued failure of the GoS to cooperate with the ICC and underline[d] that the GoS has an obligation, and the capacity, to cooperate," noting that "[a]ny arrest warrant issued by the ICC should be respected." The Council went on to express its willingness to consider additional measures--including sanctions--against those preventing cooperation with the Court.

"The Sudanese government has been put on warning," Nkunda reflected, "but states must be willing to back this strong rhetoric with strong action in the event that Sudan continues to defy the Court."

And indeed there is speculation that this pressure may be producing results. A June 24, 2008 article by Wasil Ali indicated that a high level government mission had held a high level meeting to discuss the possibility of handing over Harun and Kushayb with the top party leadership divided on whether or not to surrender them to the Hague.

### *Future cases*

The prosecutor also made clear, that he was exploring two new cases, one on ongoing crimes being committed in Darfur and the other on the attacks on peacekeepers. Ocampo said little about the investigation into the killings of peacekeepers simply saying that it was exploring evidence that rebel groups were responsible.

The other investigation, however, provoked a firestorm response. The prosecutor indicated that he would this time be looking for a "big fish"--that he would be looking up the chain of command for those who instructed and have been insulating Harun. The prosecutor pointed to both Harun's continued tenure as a minister, the continued denial of the government of Sudan of the scale of the crisis and the governments cooperation with the *janjaweed* as evidence that "[t]hese are evidence of a criminal plan based on the mobilization of the whole state apparatus, including the armed forces, the intelligence services, the diplomatic and public information bureaucracies, and the justice system."

The news that higher level officials will be targeted has been greeted with jubilation by some who see the uppermost reaches of the government as primarily responsible for the crimes in the Darfur. Others, such as prominent Darfur expert Alex De Waal have argued that indicting a high level official -- whom he indicates might be President Omar el Bashir would undermine the chances for meaningful negotiations and eventual peace.

This issue will continue to be the subject of intense discussion and will be explored more fully in the next issue of the newsletter, following the expected presentation of new evidence to the Pre-Trial Chamber in July.

## **ACTION AND ADVOCACY**

### ***Calling for an End to the Violence against Women through Film***



In conflicts around the world, tens of thousands of women and girls are systemically kidnapped, raped, mutilated and tortured. The conflict in the Democratic Republic of Congo (DRC) is a heart-wrenching and appalling example. United Nations Under Secretary-General for Humanitarian Affairs, John Holmes has said "sexual violence in Congo is the worst in the world, ... [t]he sheer numbers, the wholesale brutality, the culture of impunity — it's appalling." The United Nations says that 27,000 rapes were reported in 2006 in South Kivu province alone. That is an average of 74 women per day, and points to a tragedy of untold proportions considering that violence extends beyond the province and that most women do not report violence against them.

Emmy-Award winning filmmaker Lisa F. Jackson, a survivor of gang rape herself, set out for the DRC in 2006 to document the use of sexual violence as a weapon of war. Seventy-six minutes of chilling testimonies by survivors intertwine with interviews of several indifferent and unabashed rapists, former militia members who have now been integrated into the Congolese army.

One of Jackson's objectives in making the film was to "expose an unimaginable and growing humanitarian crisis" to the outside world. That goal has certainly been accomplished. Produced in association with HBO Documentary Films and the Fledgling Fund, the film has had widespread attention at numerous film festivals around the world. It won Special Jury Prize: Documentary at the Sundance Film Festival in January 2008, and Best of Fest at the London Human Rights Watch Festival two months later.

Jackson's personal story and openness in discussing her own ordeal with the survivors of rape in the Congo add an immense personal element to the film. Whereas she favors herself to live in a society relatively more accepting of what happened to her many years ago, she feels for the Congolese women whose culture offers neither solace nor justice.

The rape victims who agreed to tell their stories on camera recount wrenching testimonies of unthinkable mutilation and shaming. The physical and emotional traumas these women go through are unthinkable. Girls and women are raped, often by gangs, or butchered by bayonets and assaulted with chunks of wood, damaging their reproductive and digestive systems to be beyond repair. Many return to their villages, pregnant, to be left fighting on their own when husbands divorce them.

Numerous survivors tell Jackson their personal stories, showing resilience, resistance, courage and grace. A particular intense moment is when a woman steps forward and tells her story during a gathering at a community support center for women in eastern Congo. She speaks of her horrifying ordeal in front of at least 100 women crammed into a tiny classroom. The overwhelming number of victims is what astonished Jackson when first traveling as a one-person crew to the DRC in spring 2006, and the scene in the community center shows the extent of the human rights violations against women more plainly than any words or statistics could ever describe.

Malteser International, a European aid organization that runs health clinics in eastern Congo, treated roughly 8,000 sexual violence cases in 2007. The organization said that in the town of Shabunda 70% of the women reportedly had been sexually brutalized. Law enforcement is near to non-existent. One of the characters portrayed in the film is a female police officer who represents, on her own, the entire sex crimes police force. And, as if that were not enough, the same police officer is also responsible for child protection. Needless to say that rape victims receive woefully inadequate support, and perpetrators have free reign. As reported in a New York Times article in October 2007, Panzi Hospital located in the epicenter of Congo's rape crisis sees at least 10 new women and girls each day. Dr. Mukwege, a Congolese gynecologist, says that "one thing is clear, these rapes take place to destroy women." But not only do they cause the destruction of women, they also destruct their families and entire communities.

During the post-screening discussion at the New York Human Rights Watch Film Festival on June 17, Jackson informs a sold-out theater that the film will be shown on Congolese television later in the year. For many in the Congo, this may be the first time that they are forced to publicly confront an issue considered taboo.

Not only does "*The Greatest Silence: Rape in the Congo*" succeed in showing the sheer extent of the crisis it also accomplishes its goal of giving a voice to the victims in a way that explores, witnesses and contributes to these women's healing through the empowerment of personal

narrative. Jackson respectfully brings the Congolese rape victims out of the shadows, and assigns the film catalyst status in focusing world attention on the women's plight, "bringing opprobrium upon those in power who are complicit or who turn their backs, and sparking conversations and policy change concerning the fate of women and girls in a world consumed by armed conflict."

Her dedicated effort to show the world the fate of Congolese girls and women must be applauded, but not just for the duration of the film. Human Rights Watch has incorporated this film not only its annual film festival, but also in its advocacy efforts to ensure that the international community more fully addresses the question of rape and sexual violence. Screening the film for representatives at the UN was one tool used to push for a special day-long meeting at the Security Council on women, peace and security.

At the end of the session, the Council adopted Resolution 1820, which affirmed that sexual violence could exacerbate conflict and that measures to address it "can significantly contribute to the maintenance of international peace and security." In other words, addressing violence against women is a legitimate concern of the Security Council, and the Council is committed to taking action. Secretary of State Condoleezza Rice, who represented the United States at the session, reflected that there had previously been a question as to whether sexual violence was really a matter for the Security Council, saying "I am proud that, today, we respond to that lingering question with a resounding 'yes!'" The Resolution also reiterates the status of rape as a war crime and affirms the readiness of the Council to consider the use of sexual violence as a ground for sanctioning regimes and imposing other punitive measures.

*Lisa F. Jackson has been involved in documentary filmmaking for over 30 years. She received three Emmy nominations, two Emmy awards and four CINE Golden Eagles.*

*"The Greatest Silence: Rape in the Congo," by Lisa Jackson, United States, 2007, 76 mins, in English, French, Swahili, Lingala and Mashi with English subtitles*

## **FEATURES AND ANALYSIS:**

### ***Somalia: A Humanitarian Crisis Disregarded***

On June 21, 2008, Hassan Mohamed Ali, head of the Office of the UN High Commissioner for Refugees (UNHCR) in Somalia, was abducted near Afgooye, 30 kilometers west of Mogadishu. Prior to his abduction, he was finalizing plans for a distribution of basic supplies to approximately 40,000 internally displaced persons living in makeshift sites along the road from Mogadishu to Afgooye. Ali has served UNHCR in Somalia longer than any other member of the staff, and is well-known in Mogadishu as a humanitarian and human rights advocate. In 2007, he and his family became victims of displacement themselves as conflict engulfed the capital. Ali's abduction is one of a stream of assaults on local and international humanitarian personnel, he joins eight other humanitarian aid workers currently being held hostage throughout the country. These assaults which are greatly hampering the distribution of much-needed humanitarian aid.

Flooding, drought, clan warfare and frequent assassinations are among the threats driving Somalis from their homes in the capital and throughout the country. One million Somalis, a number that includes 60% of Mogadishu residents, 50,000 of whom left between March and June

2008, have fled their homes. Aid workers estimate that 464,000 people have sought refuge in Kenya, Ethiopia, Yemen and Djibouti, and according to the United Nations World Food Programme (WFP), 2.6 million Somalis currently need assistance. This is expected to rise to 3.5 million people, or close to half of the total population, by the end of 2008 if the humanitarian situation does not improve.

The increasingly volatile situation in Somalia has seen a surge in malnutrition rates, disease prevalence and incidence of violent attacks - yet the number of aid workers in the country remains astoundingly low. Violent attacks on aid workers, human rights advocates, local NGOs and members of civil society exacted by armed militias as well as government forces, have kept aid operations at bay. In 2007, eight journalists were killed and several aid workers were abducted and murdered. The deleterious effects of these attacks are compounded by the international community and the media's neglect of the situation in Somalia. While other conflicts on the continent garner consistent media attention, Somalia's developing humanitarian crisis seems to be disregarded at best.

### *The state of humanitarian aid*

The war-ravaged nation of Somalia is one with an intensely complex relationship with humanitarian aid. Since the 1977-78 Ogaden war between Somalia and Ethiopia over a territorial dispute fueled by Cold War tensions, which brought about the first big Somali refugee movement and resulted in an exploitation and manipulation of incoming aid resources, humanitarian aid organizations have had immense difficulty in navigating the entangled social and political dynamics of Somali society. This difficulty has been exacerbated by the demise of the state post-civil war in the early nineties when the fall of dictator Mohamed Siad Barre in 1991 resulted in years of anarchy. Due to increased insecurity and previously stable parts of the country, the autonomous Puntland region in particular, becoming no-go zones for international aid workers, the presence of international NGOs in Somalia has swiftly dwindled since 2006. The United Nations World Food Programme is the largest humanitarian agency in the country with 200 national and international staff, reaching 1.53 million Somalis in need in 2007.

In addition to the fighting, central and southern Somalia has been hit by the worst cereals harvest in 13 years. In late 2007, the United Nations classified Somalia "the worst humanitarian crisis in Africa." Food distributions are hampered, leaving thousands without a basic food supply. The WFP Somalia food supplies come into Kenyan and Tanzanian ports after which they continue via road. In June 2007, however, food distributions in Mogadishu were stopped because of shooting incidents, and piracy severely threatened humanitarian assistance coming in via the various sea routes. By the end of 2007, the French navy escorted ships carrying relief food and Denmark took over in early 2008.

The insecure situation in Somalia presents immense obstacles to the delivery of aid and exposes hundreds of thousands internally displaced to hunger and lawlessness. Attacks on aid workers have also made it difficult to continue vital programs. The UNHCR is, under the division of labor of the UN system, the leader in responding to the IDP crisis in Somalia, but its ability to offer effective protection to IDPs has been hampered by the lack of field based staff. The kidnapping of the head of office on June 21 will only exacerbate this situation. MSF was forced to pull out its international staff, and eventually close its medical and nutritional programs near Bossaso. This pull-out severely limited capacity to address the health concerns of displaced

persons, particularly malnutrition, which, according to the organization, was estimated in December 2007 to affect more than 25% of the population.

### *The vulnerable exposed*

To date, approximately 20,000 civilians leave Mogadishu each month, joining the 600,000 people who already fled the capital in 2007. Refugees International, which conducted a field mission in early 2008 and published its findings in a report entitled “Somalia: Proceed With Caution,” estimates that 250,000 people are camped along a mere stretch of 18 miles between the capital and the town of Afgoye, making it “the most densely populated settlement of internally displaced people in the world.”

Children are particularly at risk. Grave child rights violations are being committed with the recruitment and use of child soldiers in the armed conflict. Peaceline, a Somali civil society group that monitors the situation of children, observed that the vast majority of the thousands seeking shelter in the displacement camps are in fact children. Not only do less than 24% of boys and 20% of girls attend primary school UNICEF noted that cases of rape and other sexual assaults against children significantly increased in 2007. As in other conflicts around the world children are affected and least able to cope.

### *Understanding the violence*

Lawlessness, clan conflict and warlord politics are all features of Somalia’s current political landscape, making it difficult to navigate and effectively direct humanitarian relief.

Somalia was created in 1960 when the former British protectorate and an Italian colony merged. Territorial claims on Somali-inhabited areas of Ethiopia, Kenya and Djibouti have since hindered the country’s development, and border disputes, especially with Ethiopia, evolved into hostilities. In a 1969 coup, Muhammad Siad Barre assumed power, declared Somalia a socialist state and nationalized most of its economy. His army invaded the Somali-inhabited Ogaden region in Ethiopia in 1977 and was pushed out with Soviet and Cuban backing for Ethiopia a year later. A peace accord with Ethiopia in 1988, however, did not bring peace to Somalia as power struggles between Somali clan warlords erupted and civilian killings continued after the ousting of President Barre in 1991.

In 1992, US Marines deployed to Mogadishu joining a UN peacekeeping force to restore order and safeguard relief supplies. After the killing of US Army Rangers in 1993 the US mission was aborted in March 1994. Failing their mission UN peacekeepers left Somalia in 1995, and warlords and clan leaders continue their disputes in a lawless society. In 2000, a Transitional National Government was formed with Abdulkassim Salat Hassan as its president. The government was soon opposed when Somali warlords backed by Ethiopia announce their intention to form a national government by the end of 2001. President Hassan's government collapsed and another transitional parliament was inaugurated at a ceremony in Kenya in 2004. During the first half of 2005, the government returns home from exile in Kenya but doesn’t have its first meeting until a year later, in February 2006. In the meantime, the Council of Islamic Courts, control of much of the south, including Mogadishu where fierce fighting between rival militias caused the worst violence in nearly a decade. The Council of Islamic Courts has been accused of being a militant Islamic and terrorist organization, in particular because leaders of its more militant wing, the Hisb'ul Shabaab, have reported links with al-Qaeda.

The Islamic Courts were, however, able to introduce a measure of security in southern Somalia, disarming and bringing on board certain clan leaders. The security was welcomed by much of the local population, even if it came at the cost of the Court's rather strict interpretation of Sharia. The Courts' leadership also stood against Ethiopian intervention in Somalia, which they saw as a threat to the continued existence of the state. At the end of 2006, forces loyal to the Transitional Federal Government, with the backing of Ethiopian troops, attacked the Islamic Courts. After brief fighting, the Council simply dissolved, reverting into factions, some of which continue to fight the government and allowing for previously disarmed clan and local leaders to reassert themselves, recreating the previous, factionalized environment in Mogadishu.

In December 2006 and President Abdullahi Yusuf entered the capital for the first time since taking office in 2004. Around the same time, the African Union (AU) and Arab League urged Ethiopia to pull out its troops and the UN Security Council authorizes a six-month AU peacekeeping mission for Somalia. In early 2007, the humanitarian crisis grows as AU peacekeepers arrive in Mogadishu. The Red Cross described this fighting as the worst in 15 years. In this environment of insecurity, an estimated 60% of Mogadishu residents have fled their homes.

Currently, a meager 2,400 troops from Uganda and Burundi are stationed in and around Mogadishu. However, the recent upsurge in violence has seemingly discouraged other AU countries from contributing troops, and financial backing from the United States and Europe hasn't helped. The UN's Secretary General Ban Ki-moon has called for the UN Security Council to consider sending 27,000 peacekeepers to Somalia, a number that is far greater than the 8,000 troops the AU has agreed to deploy.

### *From apathy to action*

Yet, relief programming must be implemented to affect change in what top UN officials have touted to be Africa's most pressing humanitarian crisis. Despite this UN declaration, media and NGO attention seems to have turned away from the strife in Somalia, focusing largely on other issues of concern, including the crisis in Darfur. There is a pressing concern for heightened media coverage and increased public and NGO understanding of the complex situation if the humanitarian crisis in Somalia is to be dealt with on an international level.

Resource-competition and fighting has caused civilians to lose their property and homes, displacing hundreds of thousands who now live as refugees or are internally displaced. In 2007 alone, three major displacements occurred, rendering 1.1 million internally displaced. Displaced Somalis are in need of food and water, and many lack even rudimentary shelter. The UN Food Security Assessment Unit estimates that currently 555,000 people are in humanitarian emergency and do not have enough food while 945,000 people are in acute food and livelihood crisis and are selling assets to buy food, leaving them vulnerable to further deterioration. Unfortunately, access to displaced persons and other beneficiaries is stifled in Somalia and is largely determined by irregular cycles of local security.

The international community clearly needs to do more to address the interrelated problems of security and humanitarian access. Security of humanitarian workers and civilians is closely linked, and more international attention is needed in order to create a safe environment to

provide crucial aid. While challenging, overcoming insecurity to ensure the effective delivery of aid in Somalia is possible.

### ***South Africans, Foreigners and the Dynamics of Identity in South Africa***

Questions of legitimacy, over who has the "right" to live where, are growing around the world, and nowhere have antagonistic articulations of identity been more graphically illustrated than in the recent attacks on foreigners in South Africa. The sheer scale and brutality of the attacks, which left over 60 people dead and tens of thousands displaced, took many by surprise. Yet, neither spontaneous nor unique, linkages between violence and xenophobia in South Africa have been evident for several years. Warnings have gone unheeded, and the recent upsurge of violence is the inevitable outcome of chronic government inertia – or worse. South Africa, the self-proclaimed "Rainbow Nation," has powerfully illustrated the power of xenophobic sentiment when left unchecked.

As the country now begins to lick its wounds in the aftermath of this intense display of violence, questions are being asked as to how something of this magnitude could have happened. Specifically, it raises uncomfortable questions about notions of identity within South Africa and the way in which lines have been drawn between those who are from within and those who are from outside.

#### *So what does it mean to be South African?*

Xenophobic violence, based on exclusive notions of belonging, did not take place in a vacuum, and recent events bring into sharp focus competing visions of life in South Africa. Questions of national identity are complex at best, not least given the country's history of apartheid, which, by definition, was premised on notions of difference. While the legacy of apartheid is well-rehearsed, the shocking reality is how *little* has changed for so many since the first inclusive elections in 1994. For the majority of South Africans, life continues to be dominated by a plethora of social ills, including growing levels of poverty, chronic high levels of HIV/AIDS infection, deepening inequality, violence against women and children, and growing racial and inter-ethnic intolerance. Poor domestic economic policies have left tens of thousands of young South Africans unemployed, frustrated and very angry.

Within this context, foreigners are seen as a threat and their presence has provided an easy scapegoat for social ills. Civilian prejudice has been reinforced at a political level, not least in the treatment of foreigners by those with a mandate to protect, including law enforcement agents, and xenophobic sentiment has been left to fester. While political rhetoric since the violence has emphasized its uniqueness, in fact it represents the conclusion of years of poor economic policies on top of decades of structural abuse: it has generated a South African identity that projects foreigners as rivals for limited economic resources, ignoring the positive economic impact that foreigners have had.

This is the context in which the violence took place: it is not an excuse, but points to some of the underlying problems of which the violence was symptomatic: 14 years on from the political end of apartheid, the gaps remain between the official discourse of truth and reconciliation in a country that embraces difference, versus some of the realities on the ground.

### *What does it mean to be foreign in South Africa?*

The scale of migration into and within South Africa is vast by any standard. South Africa offers economic possibilities unequalled on much of the continent, and has provided asylum for many who have fled conflict in their own country. While the majority has remained on the margins of the economy, many have done well for themselves and are not only able to support themselves but are contributing to the local economy as well as sending money to family at home or elsewhere. Many are migrants, while others are refugees and asylum seekers – although distinctions are often blurred.

On paper, South Africa is something of a model country for hosting refugees, a party to the 1951 UN and 1969 OAU Refugee Conventions. The country's 1998 Refugees Act, which has been in effect since 2000, is one of the most progressive pieces of refugee legislation on the continent. It prohibits refusal of entry, expulsion or extradition of refugees, and includes in its definition of refugees individuals who have been forced to leave their home countries because of "events seriously disturbing or disrupting public order in either a part of the whole of [that] country." Refugees are granted freedom of movement on account of the Constitution's Bill of Rights, which guarantees freedom of movement to all people in South Africa, as well as the right to work. It even promises free anti-retroviral treatment for all those with HIV/AIDS.

Yet, this progressive legal framework is not reflected in reality for the majority of foreigners living in South Africa. Zimbabweans, for instance, face considerable challenges in accessing asylum, not least given President Mbeki's refusal to acknowledge the current crisis in Zimbabwe. The South African government has deported tens of thousands of Zimbabweans in the past few years, often because the Department for Home Affairs is failing to process their cases for asylum. Thus, despite the rhetoric from the government condemning the attacks, it is clear that the hostile treatment of foreigners comes from the top. In particular, the extent to which the government has failed to respond to previous violence makes it culpable for what has just taken place. Xenophobic attacks, including against refugees and asylum seekers who fled to South Africa seeking protection against persecution and attack in their home countries, have been reported since 2000. For instance, one hundred Somali refugees were allegedly killed in attacks in 2006, according to the US Committee for Refugees.

Similarly, research carried out by the Forced Migration Studies Centre at the University of the Witwatersrand demonstrates that, "...citizens are often prepared to exclude foreigners through vigilantism and systematic harassment when popular sentiment deems state territorial controls inadequate. Many justify such actions by blaming non-citizens for the country's most visible social pathologies – crime, HIV/AIDS and unemployment." This, in turn, has helped to legitimize discrimination by officials, thus eroding the rights of refugees and migrants. For instance, refugee children are reportedly often excluded from schooling, and migrants are refused health services, especially emergency care. Likewise, many have been denied access to formal banking systems, making them particular targets of theft.

Thus, in the wake of the attacks, it is hardly surprising that more than 20,000 Mozambicans have reportedly fled the country; and 25,000 Zimbabweans have indicated they want to leave according to the International Organization for Migration (IOM), preferring to risk the violence in their own country. However, Zimbabweans, Congolese and others whose homeland remains in a state of crisis, will continue to be displaced or at risk of renewed displacement even if they return to their country. For many, therefore, they have little choice but to stay in South Africa

despite fear for their own personal safety. (See the statement issued by *Forum des Organisations Congolaises en Afrique du Sud* (FOCAS), <http://www.focascongo.org>.)

### *Irreconcilable identities?*

The South African Human Rights Commission talks of the recent xenophobic attacks as “betraying the vision of the majority of South Africans who wanted to identify themselves with the vision that the founders of the OAU had for Africa.” While this may be true, the scale and impact of the recent violence shows that this is a vision that has yet to be realized, both on the ground and, one could argue, at the top. In other words, poor economic policies, coupled with unfair treatment of foreigners conspire against the ideal of pan-Africanism heralded by government and commentators alike as an antidote to such violence. Thus, until such time as the government puts its money where its mouth is and brings about transformation for those who remain at the bottom of South Africa’s economic pile, xenophobia is only going to continue. It is neither right nor pleasant, but it is reality, and the government needs to respond accordingly.

So, what does the future hold? Clearly, it is impossible to make generalizations about "South African" identity, just as it would be a mistake to label all "foreigners" the same. Yet, the recent violence was premised precisely on such exclusive notions of identity, which targeted people on the basis of their foreignness. While the majority of South Africans neither participated in nor condoned the violence that took place, a small but powerful minority instigated and participated in killing and looting people on the basis of their nationality. In this context, the competing visions of inclusiveness and a pan-African ideal in the context of a progressive Rainbow Nation were shown to be incompatible with the harsh realities of life. What is now critical, however, is whether or not it is possible for "foreigners" to return to their South African homes and continue with their lives, and if not, what does it mean for refugees and asylum seekers who are unable to return home due to fear of violence in their own country?

Finally, it is important to emphasize that xenophobic violence is by no means unique to South Africa. This recent violence brings into focus broader issues of migration, whether forced or not, on the African continent and beyond. The question of what it means to be Congolese or Zimbabwean or Somali, and what it means to be African, are going to be critical to the future of the continent. With increased disjuncture between nationality and territory for thousands of people, the need to create local, national and regional environments that create legitimate space for diversity is critical. In other words, states need to wake up and recognize current realities and adjust their policies and approaches accordingly, or there is much worse to come.

## **LAW AND POLICY DEVELOPMENTS:**

### ***Bemba Arrested in Brussels for Alleged Crimes in CAR***

On May 23, 2008, the International Criminal Court (ICC) issued a sealed warrant for the arrest of Jean-Pierre Bemba Gombo, who is a former transitional vice-president of the Democratic Republic of Congo (DRC), the chairman of the *Mouvement de libération du Congo* (MLC) militia group turned political party, which received the second highest number of votes in the DRC’s 2006 election, and a Congolese senator. According to the warrant, Bemba is allegedly responsible for two counts of crimes against humanity (rape and torture) and four counts of war crimes (rape, torture, outrages upon personal dignity, in particular humiliating and degrading

treatment, and pillaging a town or place) committed in the Central African Republic (CAR) between October 25, 2002 and March 15, 2003.

Belgian police arrested Bemba near Brussels on May 24, 2008, when the warrant and its speedy enforcement were made public. Then, on June 10, 2008, a new arrest warrant was issued adding two new counts of murder to the existing charges. Bemba is currently being held in Belgium pending transfer to the Hague on three counts of crimes against humanity and five counts of war crimes.

Bemba's involvement in CAR began in 2002, when the MLC came to the aid of CAR's then-President Ange-Félix Patassé in putting down an attempted coup. During the ensuing armed conflict, it is alleged that the MLC pursued a plan of terrorizing and brutalizing civilians, a particular feature of which was a massive campaign of rapes and looting.

Patassé was ultimately ousted in 2003 by current President François Bozizé, whose regime quickly filed criminal charges against Patassé and Bemba. On December 16, 2004, a court of appeal in Bangui referred the case to the ICC, citing a lack of capacity. On April 11, 2006, the *Cour de Cassation*, CAR's highest criminal court, confirmed the referral on the grounds that CAR's justice system was unable to carry out effective investigations and prosecutions. Acting on the *Cour de Cassation's* decision, President Bozizé formally requested that the ICC investigate the crimes committed in CAR during 2002 and 2003. The Office of the Prosecutor of the ICC, which had been waiting for the *Cour de Cassation's* decision before determining whether to open an investigation, announced in May 2007 that it would launch an investigation in CAR.

One important issue that may arise in the context of the CAR situation is the time limitations included in Bozizé's request for investigation, which focuses on the period of abuses by his predecessor while ignoring serious ongoing conflict in CAR. The prosecutor's office for the moment seems to have agreed with Bozizé's assessment of the worst crimes committed in CAR. The prosecutor's office also, however, made clear in its decision to open an investigation that it was keeping its eyes, and its options, open. "[T]he Office continues to monitor the current situation," read the announcement of the investigation. "There are worrying reports of violence and crimes being committed in the northern areas of the country bordering Chad and Sudan."

The Bemba arrest is the first in the CAR investigation. Bemba's arrest provoked a range of reactions in CAR, DRC and internationally. The MLC denounced Bemba's arrest and requested that the Congolese parliament do the same and more than 2,000 Bemba supporters protested in Kinshasa on May 27, 2008, demanding that he be released. The MLC also requested that parliament call on the Belgian government to respect Bemba's immunity as a senator under Congolese law. Indeed, the Bemba arrest is the first time a person benefiting from parliamentary immunity has been arrested on ICC charges. The MLC has also suggested that the arrest is evidence of collusion between the Kinshasa government and the International Criminal Court.

Several Congolese groups also expressed concern that Bemba has only been charged in connection with crimes committed in CAR, alleging that he is also responsible for atrocities in DRC. For example, *La Ligue pour la Paix et les Droits de l'Homme* (LIPADHO) has suggested "that the ICC investigate (or speedily prosecute) the international crimes committed by the MLC ... in Ituri, and more precisely in the territory of MAMBASA in December 2002, and in BENI, more precisely in the localities of KOKOLA and MAIMOYA in the same period as the operation

known as 'Wiping the slate.'" Other groups, however, welcomed the arrest, noting that it represents a significant step in the fight against impunity because it shows that the Court is capable of getting its hands on the "big fish." For example, the *Club des amis du droit du Congo*, which had questioned the ICC in its December 2007 article, "International Criminal Court: Justice of the 'small fish'?" welcomed the decision, saying that "the Court, through the cooperation of member states, has shown us that it is able to strike hard and fast." Another critical issue for Congo is the precedent set in this case that high level officials can be arrested for crimes committed in other countries, and may pave the way for the ICC indictment of other officials, such as those allegedly committed by Ugandan army officials during their involvement in the wars in DRC.

<p><b>Publications</b></p>	
<p>Amnesty International, "Amnesty International report 2008: state of the world's human rights," Spring 2008.</p>	<p>International Crisis Group, <i>Beyond the Fragile Peace between Ethiopia and Eritrea: Averting New War</i>," Africa Report N°141, June 2008.</p>
<p>Amnesty International, "African Union Summit in Sharm El Sheikh: Amnesty International's Recommendations to the African Union Assembly," June 2008.</p>	<p>Malek, Dahlia. Thesis submitted to Department of Law at the American University in Cairo. "Exposing the protection gap: detention as perpetuating <i>refoulement</i> in Egypt." May 2008.</p>
<p>CICC - Africa, Newsletter of the Coalition of the ICC, Issue 9, May 2008.</p>	<p>Office of the Prosecutor, International Criminal Court, "Seventh Report of the Prosecutor of the International Criminal Court to the UN Security Council pursuant to UNSCR 1593 (2005), June 2008.</p>
<p>du Plessis, Max and Jolyon Ford, "Justice and Peace in a New Zimbabwe. Transitional Justice Options," June 2008.</p>	<p>Refugee Law Project, "Kenyan refugees here to stay," April 2008.</p>
<p>Human Rights Watch, "Neighbors In Need Zimbabweans Seeking Refuge in South Africa," June 2008.</p>	<p>Refugee Law Project, Documentary in two parts on the work of the Project:</p>
<p>Human Rights Watch, "Crackdown in Khartoum Mass Arrests, Torture, and Disappearances since the May 10 Attack," June 2008.</p>	<p>Part one:  <a href="http://www.youtube.com/watch?v=VpqGwaULj9M">http://www.youtube.com/watch?v=VpqGwaULj9M</a>            Part two:  <a href="http://www.youtube.com/watch?v=LjWQOOIKy2w">http://www.youtube.com/watch?v=LjWQOOIKy2w</a></p>
<p>Human Rights Watch, "Collective Punishment War Crimes and Crimes against Humanity in the Ogaden area of Ethiopia's Somali Region," June 2008.</p>	<p>The Observatory for the Protection of Human Rights Defenders, "Steadfast in Protest," Annual Report 2007.</p>
<p>International Crisis Group, "Guinea: Ensuring Democratic Reforms," Africa Briefing N°52, June 2008.</p>	<p>The United States Committee for Refugees and Immigrants, <i>World Refugee Survey 2008</i></p>
	<p>UNHCR. "The Heightened Risk Identification Tool User Guide," June 2008.</p> <p>UNHCR, Global Report 2007.</p>