

International Refugee Rights Initiative



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SPOTLIGHT

Repatriation or Else: Closing the Mtabila Refugee Camp in Tanzania

The Mtabila refugee camp in northwestern Tanzania, home to approximately 36,000 Burundian refugees, was scheduled to close 30 June 2009. However, prior to the deadline, realising that it would be logistically impossible to meet the deadline the government of Tanzania and UNHCR announced the Burundian population would be allowed to repatriate through the end of September 2009. While the extension is welcomed by many to ensure a more orderly return, the failure to offer alternative, durable solutions means the extension may merely delay potential forced returns.

Refugees in Tanzania

Since independence, Tanzania has played host to millions of refugees and has a reputation as one of the most welcoming countries for those seeking refuge in the region. Julius Nyerere, the first post-independence Tanzania president, espoused a Pan-African vision arguing against the constraints of colonial borders and welcomed migrants and refugees.

However, over time, Tanzania's policies have become more restrictive for displaced persons as the government seemingly views repatriation as its preferred option. While the 1998 Refugees Act, a replacement of the 1966 Refugees Control Act, was seen as a step forward in many respects by aligning national law with international standards, such as the 1951 UN Convention on the Status of Refugees and the 1969 Organisation of African Unity Refugee Convention, the new act makes integration difficult by restricting movement and the ability to work for refugees.

In contrast to the restrictions placed on many refugees, Burundian refugees who arrived in the 1970s (known as the "1972 caseload") have been offered citizenship as an alternative to repatriation. Nearly 80% of the roughly 220,000 refugees in the 1972 caseload have opted for naturalisation – although the verification process is ongoing and there have been reports of undue pressure on refugees to choose repatriation over naturalisation. This

possibility has not been offered to the 36,000 Burundians living in the Mtabila settlement who arrived more recently, and repatriation appears to be the only option on offer. (See [“Going Home or Staying Home? Ending Displacement for Burundian Refugees in Tanzania”](#))

The International Law Framework

On 30 June, the planned closure date for Mtabila, UNCHR released a statement welcoming the extension, and noted, “[t]he Minister [of Home Affairs, Hon. Lawrence Masha] also reiterated that no refugee will be forcibly returned and reaffirmed his government’s commitment to uphold international laws and standards relating to the protection of refugees.” While Tanzania has ratified the applicable international agreements and has committed itself to upholding them, forced return of Burundian refugees would be in violation of the country’s legal obligations. The concept prohibiting forced return, *non-refoulement*, is not strictly limited to physically removing or expelling refugees from the country, and more subtle government actions may be in violation of the principle. As the UNHCR Global Consultations session on the topic concluded in 2001

The principle of *non refoulement*...encompasses any measure attributable to the State which could have the effect of returning an asylum seeker or refugee to the frontiers of territories where his or her life or freedom would be threatened, or where he or she is at risk of persecution, including interception, rejection at the frontier or indirect *refoulement*.

Regarding the 2007 expulsion of Rwandan and Burundian refugees by the Tanzanian government, but still applicable to the current situation, the late Alison Des Forges noted, “Tanzania has the right to expel people who are illegally within its territory, but it must assess cases individually. Arbitrary expulsion of people based on their national origin is a serious violation of international law.”

According to articles 32 and 33 of the 1951 UN Convention on the Status of Refugees, the 1969 OAU Convention Governing the Specific Aspects of the Refugee Problem in Africa, and Tanzania’s 1998 Refugees Act refugees cannot be returned to a place where they might be subject to persecution except under certain limited circumstances. Even under the exceptional circumstances removals must be conducted with due process of law.

The “1993 Caseload”

The majority of the people living in the Mtabila refugee camp fled Burundi during its 1993 civil war, and the camp is the last remaining settlement for the “1993 caseload.” Since refugees in the camp were not given land to farm, they have been completely dependent on food rations and other supplies from UNHCR and NGOs. These refugees are not being given the option of naturalisation afforded to the 1972 caseload. According to Eric Pitois, the Head of Burundi/Tanzania Office for the European Commission’s Humanitarian Aid department, “[a] small number of refugees who fled Burundi as a result of the 1993 conflict have been resettled as they have genuine concerns for their safety were they to go back to Burundi. The policy towards this so-called ‘1993 caseload’ is, however, clear; they are refugees and they should go back to their own country.”

Although violence in Burundi has subsided, many refugees are reluctant to return. According to Pitois, “[t]here are of course many people who are apprehensive for a variety of reasons. They have bad memories of the conflict; family members may have died. They are worried about access to land.” Concerns over the reclamation of land are often cited as a major concern for returning refugees in the region. As 45,000 refugees from the 1972 caseload have returned to Burundi, many have found their land occupied. The land commission established to resolve disputes has thousands of cases with a waiting

period of up to eight months. As a result, many of these returning refugees are living in temporary settlements created by the UN in Burundi.

In addition to concerns regarding land, Burundian refugees in Mtabila camp face additional barriers to return. The camp has a tradition of supporting the opposition *Forces Nationales de Libération* (FNL-Palipehutu), and many of the refugees say that they fear that they will be targeted by the government because of their presumed association with this group. The fear of political repression is compounded by the upcoming 2010 Burundian elections, which refugees fear may lead to a destabilisation of the government and further insecurity.

[In]voluntary Repatriation?

As the process of closing the Mtabila camp has unfolded, various problems have arisen, raising concerns among the refugees that the closure is a precursor to forced return. Tanzania has a recent history of forcibly returning refugees, including expelling hundreds of thousands of Rwandan refugees in 1996 and, more recently, in 2006 and 2007 returning thousands of Rwandan and Burundian refugees against their will.

According to a June Human Rights Watch press release, "Tanzanian officials have 'consolidated' the camp by burning or bulldozing houses. Evicted refugees have not received new building materials, so they have been forced to live in makeshift shelters." Refugees were reportedly told that they must return home and that they did not have any options other than repatriation as the site of the Mtabila camp was going to be converted to a military installation on 1 July. Although Tanzania has assured refugees that they will not be forcibly returned to Burundi, no options are being offered other than return.

In addition to the "consolidation" of the camps, according to the United States Committee for Refugees and Immigrants (USCRI), authorities have, "prohibit[ed] all income generating activities, as well as crop cultivation and animal slaughter...and severely disrupt[ed] schooling". While these factors are not evidence of direct forced return, the government of Tanzania is creating and/or allowing an environment in which refugees have little choice regarding their decision to leave.

By restricting movement and work, the government of Tanzania has made it difficult for any repatriation process for Burundian refugees in Mtabila to be truly voluntary and in accordance with the principle of non-*refoulement*. While the cessation clause could be invoked by the government of Tanzania in order to pave the way for return, they have not yet done so. Even if this clause was invoked, procedural guarantees would need to be respected.

According to Zachary Lomo the former director of the Refugee Law Project at Makerere University in Kampala, with respect to a declaration of cessation for a particular group of refugees "the cessation clause does not apply automatically [to each individual]; a refugee who has reason to fear persecution – reprisals, revenge killings, including deprivation of his or her land – in his country of origin, cannot be forced to return to that country". In other words, if cessation were invoked refugees would need to be given the opportunity to have their cases individually assessed for continuing protection needs. Given the circumstances surrounding the repatriation effort, it is difficult to conceive how Tanzania can uphold its international legal obligations absent other options being clearly presented to refugees. The Tanzanian authorities have given assurances that they will uphold their obligations, but the failure to detail durable solutions beyond repatriation raises questions about the feasibility of closing the Mtabila refugee camp.

ACTION AND ADVOCACY

World Refugee Day Celebrations in Africa—Civil Society Initiatives

The UN General Assembly has named 20 June World Refugee Day. In solidarity with the former Organisation of African Unity (OAU) (whose mandate has now been taken up by the African Union), World Refugee Day coincides with Africa Refugee Day. The goal of the day is to raise awareness and understanding of the needs of refugees and internally displaced persons, as well as to reflect and take stock of the situation, plight, and troubles facing refugees, and peaceful prospects for their futures.

This year, the new High Commissioner for Refugees António Guterres spoke of the need to recognize refugees as "real people, with real needs." He observed World Refugee Day in northern Uganda, and accompanied refugees returning to South Sudan. Remarks made by High Commissioner Guterres focused upon the economic crisis and global uncertainty, and the imperative of ensuring that aid budgets and policy guarantee that IDPs and refugees are not forgotten about. Guterres commented that "of the millions of people forcibly displaced by conflict, persecution and natural disasters, every one has a story to tell; they are real people, just like you and me, and they have real needs. But, despite the best efforts of UNHCR and many others, many of these basic needs are far from being met."

Celebrations and Initiatives in Africa

NGOs around the world highlighted many of the issues listed above, as well as local needs and entry points for instilling reaffirming rights by promoting local capacities, and alleviating the suffering of refugee populations. Many NGOs launched initiatives and advocacy illuminating the refugee experience and encouraging more comprehensive programming to find concrete and durable ways of addressing the myriad of challenges.

A workshop in celebration of World Refugee Day in Goma, DRC, was coordinated by *Reseau d'Action de Citoyennes pour la Democratie (RACID)*, and other local organisations. The day focused on the alignment of the principles of humanitarian action and human rights, as well as the need for coordination between local actors and UNHCR in matters of capacity and access. The workshop provided an opportunity for NGOs to express solidarity with the displaced, particularly in the areas of Lubero and Walikale, two of the territories with the most pressing needs in North Kivu. Dialogue with the participants of the workshop indicated that some, in the words of one participant, had "more fears than hopes for success"; however, others remained optimistic in their hopes that well-organized and voluntary refugee returns in the Kivus would take place in conditions that were beneficial to both refugees and host communities. The prospect of reintegration and returns facilitates that programming in the eastern DRC must address safe and viable security conditions for return, or else Congolese communities run the risk of further displacement.

Another theme discussed was that of assistance given to refugees by UNHCR and NGOs, and the need to ensure that assistance was not abruptly ended on return. Lack of access to rights and livelihoods could be an obstacle to successful reintegration. In this regard, it would be important to prevent future conflict by bolstering durable legal structures around land rights and restitution of property.

Focus on Senegal

Many of the themes and issues discussed in the North Kivu workshop resonated with discussions of access to refugee status, documentation, and livelihoods which occurred across the continent on the same day in Senegal.

On the occasion of World Refugee Day, Djibril Balde, a Senegalese Human Rights activist who works with WARIPNET, the West African Refugees and Internally Displaced Persons Network, and who is the West Africa focal point for the Darfur Consortium, planned and contributed to national radio programs in Senegal to discuss the precarious situation that refugees and asylum seekers face.

It was an opportunity to highlight major obstacles to the full realization of refugee rights in Senegal including the lack of political will and accountability by relevant actors, including the National Eligibility Commission (CNE), which determines refugee status in Senegal. During 2008, 255 asylum seekers filed requests for refugee status. Of this number, only three were recognized as refugees. In 2009, there were a reported 35,900 UN or documented refugee and asylum seekers in Senegal (most of whom had benefited from group recognition and never passed through the individual status determination process), not including IDPs from Senegal's Casamance region. Refugees in Senegal come from all over Africa and from great distances, namely Mauritania, the Democratic Republic of the Congo, Chad, Liberia, Sierra Leone, Guinea-Bissau, the Gambia, Rwanda, and Sudan.

UNHCR is an observer to the CNE's proceedings, which are closed to NGOs. On occasions, the CNE has rejected applicants whom the UNHCR deemed worthy and deserving of protection under the 1951 Refugee Convention. The CNE is governed by Decree No. 78-484, of 5 June 1978, which created the CNE and codified aspects of international law and established legal norms for the treatment of refugees in Senegal. The 2001 Constitution of Senegal states that international agreements, once ratified and published, supersede national law into Senegalese law, which should in principle make the 1951 Convention enforceable at the national level. In practice, the CNE continues to adhere to guidelines that are outdated and sometimes inconsistent with international standards.

Legal Contradictions between Decree No. 78-484 and International Law

Although Senegal is party to the 1969 OAU Convention and the 1951 UN Refugee Convention, the CNE does not seem to apply these instruments in practice. For example, documentation is often unavailable to refugees, including refugee ID cards, and visas and travel documents.

The Decree governing the CNE states that asylum seekers whose applications were rejected must be told why they did not qualify for refugee status. In practice, the CNE chooses to only tell the asylum seekers whose status was *accepted* why their applications were successful, while simply informing those who were denied by mail that they have not qualified for refugee status under Article 10, which defines a refugee. Without an understanding of why they were denied, it becomes difficult for asylum seekers to effectively appeal. WARIPNET is appealing to lawyers in Senegal to help provide legal aid to refugees and promote legislative change. It argues that the archaic texts of No. 78-484 must be reviewed. In addition, national laws and policies relating to the protection of IDPs need to be assessed and amended.

Lack of Accessibility to Documentation and Livelihood

Once refugee status is received the CNE is responsible for providing refugee ID cards and other documentation critical to maintaining livelihoods and accessing services to which refugees are entitled by law. Beginning in 2000, the CNE ceased to produce refugee identity cards. Those that already had IDs were forced to travel to Dakar on their own expense to renew their IDs. The result of this new practice is that even recognized refugees cannot access work permits, bank accounts, and driver's licenses. Both asylum seekers and recognized refugees are constantly in danger of being harassed by local and national authorities, or worse, arrested or deported. Even those that are lucky enough to have refugee ID cards often find themselves in a difficult situation; ID cards are so few and far in between that the validity of government issued ID is often questioned, thus refugees with IDs can be subject to some of the same risks as those without documentation.

International refugee law affirms refugees' right to work, with the 1951 Refugee Convention guaranteeing refugees equal rights to nationals in regards to conditions of work. However, because refugee cards are not available, a majority of refugees cannot work legally, *even if* they are legally recognized.

Further Challenges to the Securing Rights

World Refugee Day presents a sad truth; as much as it is a celebration in solidarity with the struggles of millions around the world, it also recalls the challenges and serves as a reminder of the huge amount that must be done to make refugee rights a reality. While the day provides an opportunity to take stock of the realities facing refugees and IDPs; advocates and those working within refugee rights issues should not forget these struggles all year long.

World Refugee Survey 2009: Limited Progress on Refugee Rights in Africa

Last month, the U.S. Committee for Refugees and Immigrants (USCRI) released its annual *World Refugee Survey*. This year's survey has rated 52 governments around the world based on "refugees' enjoyment of rights in the 1951 Convention relating to the Status of Refugees and other human rights instruments in the leading host country." USCRI grades each country on their treatment of refugees in relation to four main areas: 1) Refoulement/Physical Protection, 2) Detention/Access to Courts, 3) Freedom of Movement and Residence, and 4) Right to Earn a Livelihood. In each category, each country is graded on a scale from A (being the best) and F (being the worst), while also noting their improvement or decline over the past year. Though this grading system might seem an overly simplified presentation for such deeply complex situations, the survey does provide a useful indicator in judging the overall performance of host countries.

The format for the presentation of this information has changed as previously the USCRI's published survey included a synopsis. This year, the published book shows only each country's grades, and country-specific data can now only be found on their website. Countries' "report cards" are compared from 2008 to 2009, with anticipated 2009 grades appearing in gray. As the year goes on, the site will provide frequent updates, and the anticipated grade will change and turn to color when it becomes final. It is hoped that the web text may facilitate, better, and more up to the minute advocacy.

Twenty-four African countries were among the 52 countries rated. According to USCRI, African countries showed an improvement, albeit a small one, across all four areas considered. More governments, however, scored F's in each area than A's, showing that while many have improved, numerous countries are still at the bottom in regards to refugee treatment. As on any other continent, Africa contains both the good and

the bad: South Africa, Kenya, and Egypt were all on this year's "Worst Places for Refugees" list, although each showed some improvements, while Malawi and Niger achieved stellar marks.

Refoulement/Physical Protection

Although grades proved to be disappointing last year, the area that showed the most improvement within Africa was the decrease in *refoulement* and the increase in physical protection of refugees. Seven countries improved their practices in regards to the treatment of asylum seekers and deportation or forced return of refugees, while four got worse.

Among the countries that improved most in this category were Uganda and Tanzania, both of which received a B this year, showing the difference that changes in policy and practice can make in a short time. Uganda's progress in this area can be attributed in part to the Refugees Act 2006, which took effect in May 2007 and, according to USCRI, produced significant impacts by 2008. The Act provides for refugee protection defined by the 1951 Convention, allowing asylum seekers to remain in Uganda for up to two years and establishing a detailed and fair application system. Tanzania's improvement represents an even larger step forward because although they still scored two F's this year, the B in this category shows significant movement from the four F's they received in 2006. (There are serious concerns, however, that practice may be eroding once again given the pressure being exerted on Burundian refugees to repatriate, for more information, see ["Repatriation or Else: Closing the Mtabila Refugee Camp in Tanzania."](#))

On the other end of the spectrum, the Democratic Republic of Congo (DRC) joined Egypt, Kenya, South Africa, and Libya, all of which received F's the past two years in this category, at the bottom – dropping from a C to an F in the last year. Despite having established a National Commission for Refugees (NCR), which is supposed to decide asylum cases in consultation with a UNHCR representative, this body reportedly falls severely short in practice. In addition, USCRI states that the government has provided little or no protection to refugees and asylum seekers, who as a group do not enjoy basic rights. This is a blight on DRC's performance, which in the past few surveys included mostly B's and a few C's.

Detention/Access to Courts

The arbitrary detention of refugees and their ability to access courts was another area that saw relative progress within Africa as a whole, with four countries receiving the highest marks. Of the six governments that witnessed improvement, Mauritania saw the largest, going from a D in 2007 to a B in 2008 and in 2009. Although they did not receive top grades and still detained migrants, the government of Mauritania has given UNHCR and ICRC permission to meet detainees – an important step which has been reflected in the judgment of USCRI.

Sudan, on the other hand, has shown a decline in relation to refugee detention and access to courts and legal documentation, falling from a D to an F. According to USCRI, Sudan, one of last year's worst places for refugees, "arbitrarily detains scores of refugees and asylum seekers, charging them with illegal entry and lack of documentation under the Passport and Immigration Law of 1993." Furthermore, obtaining refugee documentation is an expensive, time-consuming, and arbitrary process.

Freedom of Movement and Residence

Although two countries did better in this category (South Africa and Sudan) and one (Chad) did worse as compared to last year, Africa as a whole has remained stagnant in regards to confining refugees to camps and restricting their travel. With only two countries receiving A's and four receiving F's, it seems that the continent has much room for advancement in this area.

One country that has reached its goal regarding the freedom of movement for refugees, and has done so for three consecutive years, is Niger. According to USCRI, there are no refugee camps in Niger and refugees are free to move within the country and can choose their places of residence. The 1999 Constitution states that "the state shall recognize and guarantee freedom of movement without limiting the right to citizens." The government also issues both the Refugee Travel Document TVC and *laissez-passer* to recognized refugees, allowing easy international travel.

Juxtaposing the consistent accomplishments of Niger in this category are Algeria, Ethiopia, Kenya, and Tanzania, all of which have scored F's for the past three years. The Kenyan government confines the vast majority of refugees to desolate refugee camps around Dadaab and Kakuma and police regularly demand bribes from refugees holding UNHCR documents. Similarly, Tanzania, under its Refugee Act, requires asylum seekers and refugees to live in designated refugee camps or settlements. Restrictions on unauthorized movement are vigorously enforced with fines of up to 50,000 shillings (US\$45) or imprisonment for up to six months.

Right to Earn a Livelihood

As in the above category of refugee treatment, there has been little change in policies and practice in regards to enabling refugees and asylum seekers to legally work and engage in business. Only one country, South Africa, improved in this category, while none saw a decline in their grades. However, four countries received the lowest possible marks, whereas only two achieved A's.

Malawi, one of the better scoring African countries overall, was awarded an A in this area. Refugees are allowed to legally work for wages, but must obtain temporary employment permits in order to do so. They can also run businesses legally, but unfortunately must do so in Dzaleka camp.

Once again, Algeria fell short by scoring an F in this category for the third consecutive year. According to USCRI, Algerian law severely restricts the rights of foreigners to work and makes negligible exception for non-Palestinian refugees, who have no more rights than foreigners generally. Although some skilled refugees and asylum seekers try to bypass the strict work permit system and engage in self-employment, they risk arrest and detention and enjoy no social security or labor protections.

Conclusion

USCRI's *World Refugee Survey* is certainly not exhaustive and does boil down complex policies and practices into one letter grade. However, while not being perfect, this evaluation undoubtedly serves an important and useful purpose in the refugee rights community. NGOs, both national and international, are provided with an annual progress report on the general advancement or regress of key African nations, enabling them to pressure governments who have been doing poorly, while praising and holding up others as examples of success in dealing with refugee rights. Rather than supplying specific policy changes in each country, this survey serves as a tool for others to use in their fight for the equal rights of refugees and asylum seekers throughout Africa and the rest of the world.

USCRI conducts its assessments in cooperation with local NGO partners in the reviewed country. Please contact USCRI if you are interested in being a research partner for the next survey and look at the *World Refugee Survey 2009* online to gain a more in depth perspective of each country's practices and policies. For further information and to discuss the current refugee treatment in each country graded by USCRI, please visit their new website that they launched this year at www.worldrefugeesurvey.org.

Justice and Reconciliation after Genocide: The Search for Co-existence in Rwanda on Film

From April to July 1994, at least 800,000 people were killed in the genocide in Rwanda. The number of people taking part in the killings has been estimated by state authorities at more than 761,000 persons, or almost half the adult male Hutu population of Rwanda in 1994, though more conservative numbers are estimated at upwards of 80,000. After the violence subsided, the Rwandan government was faced with many challenges: rebuilding the country, establishing a historical record of the genocide, ensuring that those who committed crimes were punished, showing to survivors and victims that justice was being done, and reintegrating the vast number of perpetrators into their communities in such a way as to prevent retributive violence.

In a series of four films, award-winning documentary filmmaker Anne Aghion, who arrived in Rwanda in 1999 and spent nearly a decade in the remote rural community of Gafumba, focuses on the aftermath of the killings and the trauma inflicted on survivors. Aghion recounts the struggle of surviving Tutsis – and also Hutus – and guilty Hutus to find common ground and to live side by side in the very communities where atrocities were committed. In particular, she explores the Rwandan government's challenge of organizing efficient criminal prosecutions of large numbers of accused, implementing a legal system that delivers justice to the victims and reintegrating perpetrators into their communities.

Aghion's first film *"Gacaca: Living Together Again in Rwanda"* follows the first steps in one of the world's boldest experiments in accountability and reconciliation, the *gacaca* tribunals, or open-air community hearings set up by the Rwandan government with citizen-judges trying their neighbours accused of committing genocide. Her second film *"In Rwanda We Say... The Family That Does Not Speak Dies"* looks at the impact of the return of one prisoner to his community before his trial, while her third film *"The Notebooks of Memory"* focuses on tribunals of local citizen-judges weighing survivor accounts of the massacres against the testimony of perpetrators. But it is in her fourth film *"My Neighbor, My Killer"* that Aghion captures a human element in the complex process of reconciliation and sets out to find the answer to the question "Could you ever forgive the people who slaughtered your family?"

The gacaca courts

In the aftermath of the genocide, the Rwandan government faced a huge challenge in arresting and trying suspected perpetrators. Unprecedented numbers of arrests were made in the months following the end of the mass killings. Upwards of 100,000 people accused of genocide, war crimes and related crimes against humanity were arrested and crammed in prisons and communal jails. By 2000, roughly 120,000 alleged genocidaires were in custody. Given that in the 10 years between December 1996 and December 2006, Rwandan courts were able to try only about 10,000 suspects it was clear that it was going to be impossible to deal with these large numbers through normal criminal prosecutions. In addition, resources were extremely scarce to actually care for these numbers within the prison system. *Gacaca* was a response to these realities and evolved from traditional or customary cultural communal law enforcement procedures.

Historically, *gacaca* was a community-based informal arbitration mechanism convened by the parties to a civil dispute with its legitimacy founded upon the willing participation of all parties and the community. The ultimate goal of the *gacaca* system was a settlement that was accepted by both parties to the dispute, and the restoration of tranquillity within the community.

The current Rwandan *gacaca* court system was established in March 2001 and put into place in early 2002. The *gacaca* trials include the collection of information relating to the genocide, categorization of persons prosecuted for having committed genocide or having played a role in genocidal crimes, and the trial of cases falling under its jurisdiction. *Gacaca* courts are authorized to try any cases except the accused ringleaders of the genocide.

The official objective of the *gacaca* trials, according to the Rwandan government's website of the National Service of Gacaca Jurisdictions, is "the reconstruction of what happened during the genocide, the speeding up of the legal proceedings by using as many courts as possible, and the reconciliation of all Rwandans and building their unity." Each *gacaca* team consists of nine judges, all of whom are elected from within their communities. They have received basic judicial training, serve without pay and may impose sentences up to 30 years' imprisonment. There are approximately 250,000 popularly elected individuals in the role of "judge." As the majority of survivors and witnesses are women, women's participation has been an important element of the *gacaca* system and the Rwandan government is now requiring that at least 30 per cent of the judges be female in recognition of their role in the reconciliation process and to give them an identity beyond that of victims.

Many have publicly criticised the *gacaca* process by accusing the system of falling short of international legal standards and pointing out that the accused are often prohibited legal assistance. Survivors' and human rights groups have also documented cases of witness intimidation across the country, and there have been reports of reprisal killings of those who testify. In addition, some refugees remaining in exile have pointed to the courts as a barrier to return, claiming that they can easily be manipulated by community members to settle personal vendettas or to eliminate competition for resources. They argue that it is difficult to answer accusations, with the presumption, in their view, being that all Hutu are guilty.

My Neighbor, My Killer: A local and personal view



With more than 11,000 *gacaca* tribunals scattered around the country Aghion concentrated her efforts on a single district. In selecting the subjects for the film she followed a small group of widows, mostly Hutus married to Tutsis, and the Hutu men who killed these husbands and their children. The film has no narration, and so the women and men in front of the camera direct the film with a minimum of expository footage. By focusing exclusively on the testimonies of her subjects, Aghion does not provide a context for the *gacaca* tribunals,

something which would have given the unknowing viewer a better sense of what exactly is at stake in the story playing out on screen. However, she takes the viewer right into the homes and minds of her subjects to witness the emotions at play when perpetrators return to the communities they have killed in. Many, though by no means all, will have served some kind of prison sentence before facing traumatised and grieving survivors in a *gacaca* trial.

In "*My Neighbor, My Killer*" personal stories are told through the words of survivors giving testimony about what happened to them and their families in 1994, how they deal with the present and where they see themselves in the future. In one scene, "he," says a Hutu woman who'd been married to a Tutsi, pointing to

her blood relative without looking at him, "took my baby from my back, threw him down and clubbed his head. He died instantly. He killed my seven children. I begged him to cut me, but he refused, saying I was dead already." The man's response: "I did some things, but I did not kill her children," he avows. "But I was wrong. I am sorry for what happened." The tribunal deliberates and rules: "He is guilty and sentenced to eight years in prison. He has been in prison for nine years and has completed his sentence. He may go." The exchange occurs in variations, with the tribunal decreeing that both people move on with their lives. And, they must.

The most poignant scene is certainly that of two Hutu women whose Tutsi husbands and children were killed. Sitting in a bare dwelling they "talk about themselves as if they were already dead." Their honest dialogue reveals that nothing about this reconciliation process is simple. The events that led up to the thousands being killed, detailed descriptions of the massacres themselves and harrowing stories how they got away are intertwined with the occasional light-hearted moment. During one of the tapings of the two women one of them says quietly "[t]hese whites ask the strangest questions."

From listening to the conversations played out on the screen it becomes clear that many survivors do not offer forgiveness but merely find a way to live in the same community as the men who killed their families.

The impact of the film

"My Neighbor, My Killer" was selected for screening at the Cannes Film Festival 2009 and though not many filmmakers would have to deliberate for long to accept such an invitation, Aghion's film was set to debut in Rwanda as part of the 15th anniversary ceremonies marking the genocide. The Cannes invitation came with the usual proviso that the film could not debut elsewhere, and regrettably for many, Aghion chose for the film to be seen first by the worldwide media and an international audience rather than a Rwandan audience. Her choice to premiere at Cannes seems to have paid off, however, with the film receiving a lot of attention and favourable [reviews](#) from film-focused and the larger media alike.

The late Dr. Alison L. Des Forges, who was Senior Advisor to Human Rights Watch's Africa Division and devoted 40 years of her life to exposing human rights abuses and advocating to secure justice for people throughout the Great Lakes region, especially Rwanda, said about Aghion's work: "with extraordinary sensitivity, Aghion takes us into the heart of the problem of reconciliation in a post-genocidal society – not with wordy abstractions but with the earthy, real expressions of the people, victims and accused criminals, who must try to live together. Those seeking to know whether reconciliation is possible in Rwanda must look for their answer in this compelling expression of Rwandan voices." The 2009 Human Rights Watch Film Festival screenings in New York of *"My Neighbor, My Killer"* were dedicated to Dr. Des Forges.

Aghion collected an astounding archive of 350 hours of extraordinary footage which is of great historical value to the trials in the tiny community of Gafumba. She is working to have this footage preserved and make available to human rights and academic researchers, and possibly use it as the basis for a book.

At the New York film premiere of the film during the Human Rights Watch Film Festival, Anne Aghion was awarded the Néstor Almendros Award for "courage in filmmaking."

"My Neighbor, My Killer," by Anne Aghion, United States, 2009, 80 minutes, in French and Kinyarwanda with English subtitles.

FEATURES AND ANALYSIS

International Community Moves to Address Worrisome Dynamics in Sudan

With less than one and a half years remaining before the end of the interim period of the 2005 Sudan Comprehensive Peace Agreement (CPA), the international community can no longer afford to half-heartedly address the worrisome dynamics in Sudan. One example of international engagement has been in international arbitration on disputed Abyei boundaries, which is a positive international engagement in tackling conflict and advancing peace in Sudan.

On 23 June 2009, advocated and organized by the Obama administration, key signatories of the CPA and more than 30 countries and organizations met in Washington, DC to review the implementation of the agreement. This forum was the largest of its kind since 2005 and was an effort to reinvigorate CPA implementation. The renewed diplomatic push at the forum has, thus far, marked a first step in reengaging the parties and the international community in CPA implementation. Participants restated their fundamental support to lasting peace, stability, security and prosperity in Sudan through full implementation of the CPA. They particularly underlined the responsibility of the parties to fulfill their obligations under the Agreement. Specifically, as recorded by United States Department of State, the participants:

underscored the fundamental importance of the CPA and they reaffirmed their firm commitment to the core principle of the CPA to make the unity of Sudan attractive. Besides, they emphasized the importance of credible, peaceful, and transparent nationwide elections and referendum on self-determination while in the meantime expressed that they would commit themselves to providing appropriate support accordingly.

Equally important, during the meeting Sudan's central government in Khartoum and the southern rebel movement leaders reaffirmed their agreement to accept the findings of the ruling of Permanent Court of Arbitration (PCA) in the Hague on Abyei, Sudan's richest oil-producing region that straddles the border between north and south. In the past, Sudan's government in Khartoum turned down the southern Sudanese leaders' and international arbiters' terms for boundary rights around the disputed oil area. Nonetheless, President Omar Hassan al-Bashir and Sudan's Vice President Salva Kiir Mayardit, who also serves as the President of Southern Sudan, agreed to let the PCA in the Hague adjudicate the border claims.

On 22 July 2009, as a second and step-forward progress, the PCA cautiously redrew the boundaries of Abyei region and reduced the size of the area. The decision puts the Heglig oilfield outside of Abyei where most of the population is said to be loyal to the south. The decision was welcomed by the Sudan Human Rights Organization in Cairo as "a significant step to ensure the stability and democratic transition in the country, in general, and the Abyei region, in particular." Successful implementation of the PCA decision may help move the country towards implementation of the other major portions of the CPA. Most encouragingly, the initial reaction to the decision, at least, seems to be respect for the decision. In the near future, however, the international community should be alert to the possibility of backsliding. As noted by Alex Vines, African specialist at the Royal Institute of International Affairs in London, "[t]hrough Northern and Southern Sudan have committed to respect the PCA decision, tensions have risen in the past few days and the new few months will be absolutely crucial".

Although the Washington forum and the Hague border ruling saw some significant achievements, much more needs to be done. Inter-communal tensions and pervasive insecurity in Southern Sudan, for example, needs to be tackled as a priority. In the past several months, more than 1,000 people have been killed and more than 135,000 displaced by inter-ethnic and inter-clan fighting in Southern Sudan. The death toll in the south now exceeds the number of violent deaths in Darfur during the same period, and as elections draw closer, violence and instability may dramatically increase. In the 15-page report [“No One to Intervene: Gaps in Civilian Protection in southern Sudan,”](#) published in June 2009 Human Rights Watch has documented a recent surge in ethnic violence and the failure of the southern Sudan government, the United Nations Mission in Sudan (UNMIS), and international donors to protect civilians. The danger of such violence across Southern Sudan could intensify in the months ahead, leading up to national elections scheduled for April 2010 and the southern referendum on self-determination in 2011.

The myriad challenges and risks facing Sudan are very urgent. Robust, coordinated, and high-level engagement is essential from all, not just a few, of the CPA’s participants—those who witnessed the signing of the CPA and agreed to support its implementation.

First, many recommend that the United Nations should focus more efforts on establishing security at the local level in conflict-ridden areas in Sudan. UNMIS and UNAMID (the UN African Union Mission in Darfur) should play a more active role in engaging local actors to prevent violence through stronger conflict resolution programs and via effective response teams that can quickly deploy in instances of outbreaks of violence. As Human Rights Watch’s Africa Director Georgette Gagnon said, “in the face of mounting tensions, the United Nations ought to do more work with the local government of Southern Sudan to improve security. The UN peacekeepers should increase its presence in hotspots through regular visits, patrols, and bases in an effort to prevent further attacks and protect civilians.”

Second, the international community could encourage negotiations between the north and the south. As pointed out by Prunier and Fick writing for the Enough Project, diplomatic efforts can get both parties to consider various scenarios for wealth sharing and lasting peace. In this context, the United States and other key guarantors including African Union, the Arab League, and the Europe Union, should play a proactive and leading role in facilitating dialogue.

Third, international non-governmental organizations can collaborate in advocacy efforts to assist Sudanese to promote CPA implementation. Advocacy networks could use “bearing witness” means to expose the humanitarian tragedy occurring in Sudan so as to draw more attention from the public. In addition, as Enough’s strategy paper [“Sudan: The Countdown”](#) analyzed, “advocacy networks should play a vital role in monitoring ceasefire violations, CPA implementation, and new conflicts generated inside of Sudan in order to secure a better environment for Sudan to go through the elections and referendum in a smooth and timely fashion”.

Fourth, experts such as Dr. Edward Thomas, who holds a PhD in the history of Sudan and has worked for the United Nations in Sudan, have recommended that international donors should consider funding studies to fill information gaps. A study of the politics of land and natural resources in Sudan would help address the problems in implementing the wealth-sharing agreement. Better outcome monitoring of financial allocations to states would also help the parties to quantify the peace in both northern and southern Sudan.

LAW AND POLICY DEVELOPMENTS

The Principle of Complementarity under Scrutiny: The ICC Rules DRC Unwilling to Prosecute Katanga in Attack of Bogoro Village

Germain Katanga, former commander of the *Force de résistance patriotique en Ituri* (Patriotic Resistance Force in Ituri, FRPI), was arrested by Democratic Republic of Congo (DRC) authorities in March 2005. He was detained to facilitate his trial before the Supreme Military Court of Kinshasa on charges of genocide and crimes against humanity, particularly for the murder of nine Bangladeshi MONUC (*Mission de l'Organisation des Nations Unies en RD Congo*) peacekeepers. During the course of his examination by the DRC authorities, Katanga stated that he had committed acts in several locations in Ituri District, including Bogoro village. In July 2007, a warrant for his arrest was issued by the Hague-based International Criminal Court (ICC) for eight counts of crimes against humanity and war crimes, including rape, murder and enlisting child soldiers, largely surrounding the attack on Bogoro village. The DRC authorities surrendered Katanga to the ICC in October 2007.

Katanga and Mathieu Ngudjolo Chui, former leader of the *Front des nationalistes et intégrationnistes* (National Integrationist Front, FNI) are charged before the ICC with leading soldiers of the Lendu and Ngiti ethnic groups in an attack of Bogoro village, residents of which were mostly of the Hema ethnicity, on 24 February 2003. (For more information, see ["Arrest of Mathieu Ngudjolo Chui Marks a Milestone in the Fight Against Impunity in the Congo,"](#) *Refugee Rights News*, Volume 4, Issue 2, April 2008) It is alleged that the attack was launched not only to wipe out the Hema villagers, but also to gain control of the prime transit route between Bunia and Lake Albert. Allegedly, the soldiers set up barricades on roads out of the village in order to kill those attempting to flee. Unarmed civilians were murdered and burnt inside their homes. Soldiers allegedly ordered hostages to call out to their family members and neighbours that the attacks were over in order to lure more people from their hiding places. Approximately 200 people were killed during the attack.

The ICC Prosecutor alleges that those villagers who survived were detained in cells filled with corpses, many women and girls were raped and taken as soldiers' "wives" and forced to accompany the soldiers. Cars and other property belonging to the villagers were taken and houses set on fire and destroyed. Katanga and Chui are alleged to have used children as escorts, bodyguards and soldiers.

On 1 June 2009, Katanga's defence submitted a motion challenging the admissibility of the case, citing the principle of complementarity in the Rome Statute which provides that the ICC may intervene only when the state is unable or unwilling to prosecute or investigate. The defence stated that there is a presumption that the case is inadmissible in that there was no evidence that the DRC is unwilling or unable. In fact there were legal proceedings in the DRC brought against Katanga partly for the same crimes. They pointed out that during a hearing to extend Katanga's detention in the Supreme Military Court of Kinshasa years earlier, in March 2007, Bogoro village was listed among ten locations in which civilians were killed. Katanga himself had also communicated to his lawyers that he wished to be tried before DRC courts and not the ICC.

The ICC Prosecutor submitted that there had in fact been no national investigations into the attack of Bogoro village, a point further supported by the Office of Public Counsel for Victims representing some of the victim participants in the case.

A representative of the DRC government appeared before the Court and confirmed the statements by the ICC Prosecutor and the victims' legal representative – the first time in the ICC's history that a state party to the Rome Statute has spoken during a hearing. The DRC representative stated that national prosecutorial authorities did not investigate the case of the Bogoro village attack because they had difficulty accessing

the site. At that time, the DRC government did not have effective control or authority over Ituri, a district controlled by various rebel groups. Katanga was indeed investigated and prosecuted before the Supreme Military Court in the DRC, but in relation to the murder of Bangladeshi MONUC peacekeepers and not the attack on Bogoro village. The DRC representative further stated the Chamber should dismiss the inadmissibility request and prosecute Katanga and that returning Katanga to the DRC would cause tension between the ICC and the DRC.

The Concept of Complementarity

Much has been written about the concept of complementarity, an integral design element of the ICC, set forth in Article 17(1) of the Rome Statute which states that “a case is inadmissible where the case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution”. The Katanga defence counsel’s motion challenging admissibility on the basis of a violation of complementarity was the first in-depth judicial debate about the concept. Katanga’s defence argued that the ICC is fundamentally different from the International Criminal Tribunals for Rwanda and Yugoslavia by virtue of the principle of complementarity, which prevents the ICC from proceeding unless states’ judicial systems have failed or do not wish to proceed with investigations or prosecutions themselves.

On 12 June 2009, the three Judges of the Trial Chamber II (TCII) delivered their unanimous decision rejecting the challenge to admissibility raised by Katanga’s defence. TCII emphasised that Article 1, Article 17 and paragraph 10 of the Preamble of the Rome Statute must all be read in conjunction to underscore the importance of complementarity and the exception being only when domestic judicial systems are *unwilling or unable* to investigate or prosecute. TCII ruled that it is sufficient for only one of the two criteria to be met, in this case the DRC was unwilling to prosecute the case. TCII gave significant weight to the DRC representative’s testimony during the 1 June 2009 hearing in considering the role of a state referral in determining where there is evidence of unwillingness.

Legal Interpretations of “Case”

Much of the controversy regarding admissibility revolved around the word “case”. The defence contended that the term implies merely an individual, and therefore because DRC was investigating Katanga at the time his arrest warrant was issued, under the principle of complementarity, the ICC was precluded from hearing the case. The prosecution argued that the term should be interpreted as encompassing *both* a person and the specific conduct of that person, and therefore the fact that DRC was investigating Katanga was not enough to divest the ICC of jurisdiction, as such investigation did not involve the events in question, i.e., the Bogoro village attack.

In February 2006, the Pre-Trial Chamber I of the case *Prosecutor v. Thomas Lubanga Dyilo* held that the word “case” means the same person and the same conduct (“for a case arising from an investigation of a situation to be inadmissible, national proceedings must encompass both the person and the conduct which is the subject of the case before the court”). TCII avoided providing a definition for the term “case”, and instead of ruling on the basis of procedural considerations that the motion was filed too late (i.e., that it should have been filed before the Pre-Trial Chamber prior to confirmation hearings), the Court decided to also provide a ruling on the merits of the motion. TCII concluded that it is not the Court’s position to determine a state’s reasons for not investigating or prosecuting a case, but rather when determining whether a state is unwilling to act, the Court must determine the state’s intentions to institute proceedings against the individual in question. The Court can look to the state’s proceedings or the state’s demonstrations of its intentions “in a general manner”. In this case, the situation was referred to the ICC by the DRC itself. The DRC state representative in the 1 June 2009 hearing urged the ICC to proceed with

prosecution of Katanga. Therefore, the Court concluded, “[t]he Chamber can do no more than note the fact that the DRC is quite clearly unwilling to prosecute this case”.

Opening the Door to Outsourcing?

There have been some criticisms that the TCII’s ruling, in accepting a state’s expression that it is unwilling to investigate or prosecute at face value, subverts the concept of complementarity and turns the ICC into a court of first, rather than last, resort. (See, e.g., Bec Hamilton, “[ICC will Judge Katanga](#)”) It is also questionable whether it is fair for the representatives of a State Party to speak for the country’s many constituents, to testify in judicial proceedings that the State Party cannot or does not want to investigate or prosecute. Giving such weight to their testimony may give rise to a “democratic deficit” and mute the desires of victims and national prosecutors who wish for perpetrators to be prosecuted on home soil.

There is some fear that TCII’s ruling shifts complementarity from a principle that encourages states to invest in their domestic legal systems to a system that discourages it by allowing “outsourcing” of cases to the ICC. Scholars such as William Schabas argue that national justice systems must be encouraged to assume their responsibilities to investigate and prosecute cases, and that the ICC should not be hasty to prosecute those who are already before national proceedings. (See William Schabas, “[Stay of Proceedings Ordered by International Criminal Court Trial Chamber in Lubanga Case](#)”)

One Crime Out of Many

Some critics argue that the ICC’s Office of the Prosecutor (OTP) has inappropriately asserted its jurisdiction by exploiting national prosecutorial discretion to disregard one particular incident among many during widespread violence. During the 1 June 2009 hearing, TCII asked the prosecutor how he had chosen the Bogoro village attack among the acts allegedly committed by Katanga. In response, the prosecution stated that it wanted to focus its investigations so as to bring the accused before the court as expeditiously as possible, considering security, witness protection and judicial resources, and thus it chose an incident that resulted in many deaths and was “representative”, i.e., was carried out by two groups, the FNI and FRPI. The OTP also stated that it had as yet not made “negative decisions” not to prosecute a case that it had investigated.

The line of questioning during the hearing echoed similar concerns during the *Lubanga* trial when Lubanga was removed from facing the relatively more serious crimes of genocide and crimes against humanity in the Congolese justice system to face prosecution for the relatively lesser offence regarding child soldiers in The Hague. (See William Schabas, “Prosecutorial Discretion v. Judicial Activism at the International Criminal Court,” *Journal of International Criminal Justice* 6(4) (2008): 744.) If the ICC adopts the perspective that it is permissible for the OTP to focus on discrete incidents which are intentionally not pursued by national prosecutors, what happens if a state attempts to prosecute an individual, but differs from the ICC on which conduct to prosecute? The fear is that the ICC’s adoption of such a view could disrupt national proceedings in states that wish to keep jurisdiction. In the case of *Katanga*, TCII ruled that, given the referral by the DRC and DRC’s representatives’ testimony, the DRC was unwilling to investigate or prosecute the Bogoro attack. If, alternatively, a state attempts to prosecute in good faith but differs from the ICC’s perspective on which incidents are most important to prosecute, if motions challenging admissibility are to be successful, the other criterion of the state’s *inability* to investigate or prosecute will have to be proved.

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Emily Cody, Chris Lindahl, Michael O’Keefe and Yuhan Zhang, interns, and Soo-Ryun Kwon, a fellow based in the Kampala office contributed to this newsletter. The publications section was compiled by Emily Cody.

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