HAKIMANI
e-Newsletter of Jesuit Hakimani Centre
the faith and justice centre of the Society of Jesus in Eastern Africa
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News and Events

Walking together: Centrality of building relationships on divided society requires walking together by stepping to the unknown to look back, present and future as reflected in the picture on the left Dennis Oricho of Jesuit Hakimani Centre (far right) and participants during a peacebuilding workshop in Kisumu.

Civil society organisations meet at HakiJamii over constitutional reforms

On February 10, 2010, Jesuit Hakimani Centre joined other civil society organisations (CSOs) in a meeting held at HakiJamii office, Naiorobi to assess the recommendations made by the Parliamentary Select Committee (PSC) on the Harmonised Draft Constitution to the Committee of Experts. According to the Constitution of Kenya Review Act 2008, the Committee of Experts were mandated to finalise the constitutional review process and deliver a new constitution; while the PSC is supposed to deliberate and build consensus on the contentious issues on the basis of the recommendations of the Committee of Experts.

There are concerns among civil society organisations and other stakeholders that the PSC went beyond its mandate and altered some chapters that were not contentious. It is for this reason that CSOs met to come up with strategies that could be critical for lobbying CoE and the members of PSC to ensure that social and economic rights are not adulterated in the final draft that will be subjected to a referendum later this year.

Generally, the CSOs and other human rights groups had been satisfied with the Bill of Rights as presented in the Harmonised Draft Constitution. After changes made by the PSC in Naivasha

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World Social Justice Day, 20th Feb. 2010

On this day the world marks the 2nd world social justice day. There will be a special edition of Hakimani e-Newsletter.

meeting, there are growing concerns that the Bill of Rights especially the social and economic rights have been diluted in the PSC draft.

The CSOs meeting deliberated on a number of issues: To prepare a document outlining what the civil society would like to be included in social and economic rights of the Bill of Rights. To submit a proposal on these issues to the COE before they present the draft constitution to the National Assembly. The members of civil society should engage legislators at various levels to ensure that social and economic rights are entrenched in the new constitution in a non ambiguous manner. Finally, the civil society organisations present at the meeting also observed that communities should be mobilised to present their petition on social and economic rights to the authorities in the constitutional review process.

The Haki Jamii meeting also observed that community radio stations and other media could be used to educate the public on these critical issues in the constitution-making process. The following organisations were present at the meeting: Amnesty International, Kituo Cha Sheria, HakiJamii, Jesuit Hakimani Centre, Pamoja Trust, Kenya Land Alliance, Eastern Africa Coalition on Economic Social and Cultural Rights (EACOR), Muungano ya Wanavijiji, Nairobi Youth Human Rights Network, Kasarani Youth Congress, Nairobi People's Settlement and Students Consortium for Human Rights Advocacy and representatives from community based organisations within Nairobi.

Civil society organisations petition Committee of Experts on economic, social and cultural rights

The quest for a new constitution has been long and gruelling. As its guiding star, Kenyans have pursued and desired a new dispensation as an instrument that shall lay the topography to improve their quality of life and free the potential of all citizens. Although the subject of Bill of Rights has never been contentious on the now two decades for a new constitution, the most recent version of the draft constitution as proposed by the Parliamentary Select Committee, has introduced a new twist on what was a rather settled matter. This draft departs from the initial version by creating differentiation between what is commonly referred to as first generation rights, the second and third generation of rights (social economic and cultural rights). The division, which is lacking in jurisprudence and practice, has introduced a hierarchy between these traditional categories of rights. The Bomas Draft had been explicit on the place of human rights and declared that "Every person has a right to: Health, education, housing, food and water."

In departure from this explicit declaration – which is also common in most contemporary bill of rights, the PSC Draft merely states: "The state shall take legislative, policy and other measures including the setting of standards to achieve the progressive realisation of the right to every person to: Social security, health, education, housing, food and water." The same approach is adopted with regard to the rights of women, people with disabilities, marginalised communities and the youth; while the rights of the elderly are left out.

The statement does not create the entitlement to material conditions of human welfare that Kenyans have been yearning for. The particular significance of economic and social rights is grounded in the fact that they guarantee everyone the right to access not just the important components of an adequate standard of living but also to thing that are ordinarily regarded as basic necessities of life such as food, water, education and so on. For these reasons, we, the undersigned, ask that the Committee of Experts should accordingly rework section 40 of chapter 4 to explicitly state as follows: ***"Every person has the right to: Health, Education, Food, Water and sanitation, Social security and Housing and should further clearly recognise the rights of the youth, people with disability and the aged."***

The duty of the state to take all reasonable legislative and other measures within its available resources to achieve the progressive realisation of these rights, should only be considered after the rights have been unequivocally recognised. Courts can then decide whether such adequate measures have been taken or not.

Signed by:

Kituo Cha Sheria, HakiJamii, Jesuit Hakimani Centre, Pamoja Trust, Kenya Land Alliance, Eastern Africa Coalition on Economic Social and Cultural Rights, Muungano ya Wanavijiji, Nairobi Youth Human Rights Network, Kasarani Youth Congress, Nairobi People's Settlement and Students Consortium for Human Rights Advocacy.

Facing the ICC: Risks and opportunities

Gabriel Dolan[1]

I don't envy Louis Moreno-Ocampo in his position as chief prosecutor of the International Criminal Court (ICC). However, that is not to suggest that I will be either sympathetic or forgiving if he botches the investigations of Kenya's high-profile suspects. This article argues that Kenyans must monitor the approach and performance of the ICC in the country.

When the Rome Statute was enacted in 1998, human rights advocates everywhere enthusiastically gloated over the prospect of a World Court that would finally confront the demon of impunity. We began to believe that leading perpetrators might run but they could no longer hide. Indeed, we thought that prosecuting 'those bearing the greatest responsibility' for war crimes, genocide and crimes against humanity, meant that never again would the world witness atrocities on the scale of the twentieth century.

However, seven years after the ICC's establishment, there is much more scepticism than delight over its capabilities and performance. For most of that time, the Court has lacked staff, resources and international support. Paper pledges and political indifference have characterised most of its tenure.

Beginnings are always difficult and admittedly, much time and effort have gone into establishing the Court and enlisting member states. Currently, 110 states have ratified the Rome Statute. Missing in that list, however, are such superpowers as India, China, Russia and the United States. No wonder then that US Ambassador to Kenya, Michael Ranneberger, could issue only puerile threats about the reform agenda, and have nothing of substance to say about impunity and support for the ICC.

Regrettably, this point was missed by most commentators in their debate on the letters sent by the US to blacklisted Kenyan politicians.

Lacking support from the major powers, Moreno-Ocampo has spent most of his time acting more like a diplomat than a criminal prosecutor. His strategy has focused on persuasion and co-operation rather than enforcement of the Rome Statute. In fairness, he has had little option as the ICC mandate may well be clear and precise but it lacks enforcement powers. In other words without its own police force, the Court is totally dependent on international co-operation to apprehend suspects.

As a result, he has been reduced to going about his work by trial and error. However, we have witnessed more errors of judgment than court trials in the last seven years. Indeed the only trial currently proceeding in The Hague is that of little known Thomas Lubanga of the Democratic Republic of Congo (DRC), and that case is moving at a snail's pace.

Moreno-Ocampo hardly got off to a dream start in 2004 with his handling of the conflict in neighbouring Uganda. Instead of using his prerogative powers, he sought an invitation from the Uganda government to investigate atrocities in northern Uganda. President Museveni gladly accepted the opportunity to co-operate, since he believed the ICC would focus only on atrocities committed by Joseph Kony's Lord's Resistance Army (LRA) with no investigations of atrocities committed by the Ugandan army. To date, the ICC's prosecutorial strategy has mirrored Museveni's expectations. The ICC got its first state referral case and Museveni got another weapon to attack the LRA. Moreno-Ocampo was thereafter widely accused of reluctance to prosecute government officials.

However, in fairness, the indictments against Kony and four of his rebel leaders did have an impact on the war in the region. The LRA became increasingly isolated as Sudan could no longer grant it a safe haven, and with the signing of the Comprehensive Peace Agreement in 2005, Khartoum was obliged to disarm all militias and maintain peace. Consequently, Kony and company were forced to the negotiating table. Their arrests have remained elusive but the atrocities have considerably reduced. The ICC has also been accused of targeting African states. However, the cases of Uganda, DRC and Central African Republic have all been state referral cases. The case of Sudan, however, represents a serious change in approach. The Sudanese indictments came as a result of a 2005 UN Security

Council Resolution, as Sudan has not ratified the Rome Statute. A UN resolution ostensibly has world backing and Moreno-Ocampo used that leverage to remove his kid gloves and openly indict current state officials for the first time in the ICC's history.

The first warrants of arrest for Sudan were issued for Minister Ahmed Haroun and Janjaweed leader Ali Kushayb in 2007. On 4 March 2009, the Pre-Trial Chamber granted Moreno-Ocampo's

1 Gabriel Dolan has worked in Kenya since 1982, mostly with Catholic Justice and Peace Commission on issues of human rights. Currently, he works on the rights of slum dwellers' rights in Mombasa

request to issue a warrant of arrest for President Bashir. That marked the most significant achievement of the ICC to date as a sitting head of state was indicted for the first time. It sent shock waves across the continent and brought world attention to the ICC and Moreno-Ocampo, who had accused Bashir of 'exterminating his own people'.

At the African Union (AU) summit in Libya in July 2009, continental leaders said they would not co-operate in the arrest of Bashir. In reality the political leaders wanted to protect their allies and were worried they could be the next ones arrested.

So the Kenyan case comes at a very significant moment in the ICC's development. The Chief Prosecutor appears to have grown in confidence and is anxious to have a high profile case to garner international support for the Court. The question is whether he can perform and deliver. The Kenyan case has the potential to make or break the ICC and Moreno-Ocampo knows that.

To date, the ICC has at best operated as a deterrent. The stigmatisation of naming and shaming sitting government officials has spread trepidation everywhere. Arrest warrants have considerably reduced the likelihoods of atrocities and that is a considerable achievement. Yet, the Court was established to prosecute and punish and in that respect it has failed to do justice to victims. Moreno-Ocampo himself has stated that 'arrests are essential for the ultimate efficiency and credibility of the court'.

The ICC cannot be allowed to fail in Kenya. More investigators and professional staff need to be employed while a regional office must be established as a matter of urgency. The International Criminal Tribunal for Rwanda (ICTR) is scheduled to wind up its hearings in Arusha at the end of this year. Would the Tanzanian city not be an excellent venue for ICC regional offices and local tribunal chambers? Elaborate plans for witness protection are also essential if we recall that after a commission of inquiry into the assassination of Dr Robert Ouko, 42 witnesses 'died' in a few years.

Kenyans have great faith in the ICC's ability to prosecute the principal perpetrators of the post-election violence. Those who suffered and survived, the internally displaced persons (IDPs) and the families who lost lives and livelihoods deserve the best justice the world can offer. However, when the ICC begins its work, we must not let the virtual court of the world's political powers allow political expediency to take over at a critical stage in the proceedings. That is why we must treat with suspicion European, American and UN pledges to end impunity. This case is about Kenya, and Kenyans must not sit back passively and wait for the ICC to set the pace for investigations and prosecutions. They must be pro-active on every front to ensure that we have a satisfactory outcome. Kenyan civil society must monitor Moreno-Ocampo's performance from the outset and remind him and the ICC that they are also on trial in this country.

PSC sowed seeds of discord again

Tom Kagwe

We have been here before. In 2005, there was a big retreat in Naivasha where the then Parliamentary Select Committee (PSC) agreed on what was christened the Naivasha Accord. This document was a mutilation of the Bomas Draft Constitution, as had been agreed by majority of the delegates at National Constitutional Conference, between 2003 and 2004. At that Conference, Kenyans were resolute in the quest for a new order, but the politicians took away the 'baby and threw it away with the bath water'. When they arrived in Nairobi, they had changed not only the draft but also their positions.

The recommendations to alter institutions that defend human rights, those that protect teachers or those that protect public land from the Revised Harmonised Draft, then we must be very wary. If the equality and non-discrimination provisions and the bill of rights have been interfered with, we should be very afraid. If PSC has overstepped their mandate, then we must be ready to salvage this process.

Kenyans must wake up to the fact that their real enemies blocking the search for new systems and structures are some few people: interests of shadowy business elite; corrupt and callous class of political speculators; and of course, the big transnational and multinational companies that milk Kenya dry.

So, as many Kenyans would ask: "what is the way forward?" We propose five options: first, read the report of the PSC, interrogate it, and prepare for a serious battle with the PSC if they have recommended mutilation of the Draft. Second, we must take the bold step and state from the rooftops that our country should and must be run on the principle of rule of law. The law, Constitution of Kenya Review Act, only asked PSC to build consensus on contentious issues. Thus, since the Committee of Experts (CoE) identified four issues (executive, devolution, legislature and transition), where some aspects are also contained in areas such as public finance, the PSC had no business opening up areas that did not have contention such as bill of rights, land or proposing deletion of constitutional commissions.

Third, we should visit the offices of the CoE with thousands of memoranda instructing them to disregard whatever PSC did that falls outside their mandate. Indeed, the CoE work seems to have been taken over by PSC. Who asked PSC to write a new constitution for us? No one! That must be stated categorically. Fourth, the CoE, unlike the defunct Constitution of Kenya Review Commission (CKRC), must be ready to take these public memoranda and use the law to defend their draft. The law is on their side, and they should not waive this opportunity to speak truth to power.

Finally, we propose that all Kenyans engage the entire August House, from the moment CoE redraft the Final Draft for submission to the full House. Political and national battles are won if the people who stand to gain from a new order agree that some few people cannot take over a national agenda of the people and plunge it into chaos as we watch. Already, there is simmering conflict amongst many groups who stand to loose from what PSC is supposedly proposing. Those groups must of necessity agree to have a common enemy, and as we overthrew the KANU regime in 2002, we must exercise our sovereign power and tell Parliament that they have only one option: to agree with what we hold dear. Let us stand on the rooftops and declare Kenya is ours, for our next generation, and all persons are equal as we march towards the new order.

Is Kiplagat-led Truth Commission facing legitimacy test?

Paul Odhiambo

Since Ambassador Bethuel Kiplagat was appointed to chair the Truth, Justice and Reconciliation Commission (TJRC) in July 2009, there has been an outcry that Kiplagat does not deserve to head such a critical institution meant to redress past historical injustices in Kenya since he was a senior civil servant in the government at the height of human rights violations. Critics of Ambassador Kiplagat claim that he cannot be impartial during the investigations of human rights abuses because he was the Permanent Secretary of the Ministry of Foreign Affairs in February 1990 when Dr. Robert Ouko, the Minister for Foreign Affairs and International Cooperation, was assassinated. Further, the opponents of Kiplagat allege that he attended the 1984 security meeting which authorized a disarmament operation that resulted in Wagalla massacre in Wajir District of North Eastern Province. During the heinous security operations, civilians were arrested from their houses, taken to Wagalla airstrip where they were tortured, starved to death or shot dead by the security forces. There are also allegations that ambassador Kiplagat acquired a piece of land irregularly in the leafy suburb of Lavington in Nairobi. Kiplagat has categorically denied that he attended the security meeting that sanctioned Wagalla massacre. He has also consistently said that he does not know the people who murdered Dr. Ouko. The career diplomat has also said that he did not support atrocities committed during one-party dictatorship of KANU (Kenya African Nation Union) regime.

The Truth, Justice and Commission Act (2008) states that the TJRC will only investigate historical injustices committed in Kenya between December 1963 and February 2008. Those advocating for the disbandment of TJRC claim that timeframe that should be investigated by the Commission is incomplete because some historical injustices were committed during colonial era. They wonder why the TJRC Act should be limited to post-colonial era yet problems such as land, violation of human rights, widespread impunity can be traced to pre-independence era. Opponents of the TJRC also argue that the Commission cannot achieve the intended goals as long as the Indemnity Act is still in existence in Kenyan laws. The Act grants individuals amnesty from prosecution for the human rights violations committed during the Shifta wars between 1963 and 1967 when Kenya's security forces fought Somali-backed Northern Frontier District Liberation insurgents. The guerillas from the Northern Frontier District (comprising North Eastern Province and districts of Marsabit, Moyale and Isiolo in Eastern Province) supported Somali irredentism that aimed at uniting Somali speaking peoples into a Greater Somalia. Last year, a section of legislators who neither supported the ICC or special Tribunal suggested that the TJRC should be given prosecutorial powers to handle masterminds of post election mayhem. When the cabinet could not agree on either ICC or special Tribunal, the government decided to support TJRC approach towards solving post election violence. The exponents of ICC and special Tribunal have interpreted the new position of government on the trials of masterminds of post election chaos through TJRC as a way of escaping justice from the International Court of Justice or a special Tribunal.

Despite various reasons to oppose the TJRC, the country still needs a truth commission to redress past historical injustices. Gross violations of human rights of individuals and communities might be resolved effectively if the country pursues a multi-thronged approach to ensure that justice is done to the victims of the human rights abuses and sustainable peaceful co-existence between communities is enhanced. While criminal and retributive justice might be achieved via the formal justice systems such as the ICC, special tribunal and national courts, restorative justice could readily be attained through a credible, impartial and transparent truth commission. Between 1974 and 2007, there have been different versions of truth commissions formed to investigate systemic violations of human rights and fundamental freedoms in different parts of the world. It is high time Kenya tapped on experiences of recent truth commissions.

In July 1995, the South Africa's Parliament established a Truth and Reconciliation Commission (TRC) to officially investigate the facts of atrocities, tortures and human rights abuses committed during the apartheid regime. Post-Apartheid government of President Nelson Mandela ensured that the TRC was established after a lengthy process of consultation and public deliberations with different stakeholders to enhance credibility and legitimacy. The commitment of top political and religious leaders set the tone of reconciliation and forgiveness and contributed immensely to the success of the commission. South African government also ensured that the truth about gross violation of human rights had to be established by employing fair procedures. The truth-seeking process during the TRC hearings also ensured that perpetrators fully and unreservedly acknowledged the offences they committed. Moreover, the TRC made sure that the human rights violations were made known to the public together with the identity of planners, perpetrators and victims. The Mandela administration also

enhanced the legitimacy of the TRC by appointing Archbishop Desmond Tutu as the chair of the TRC. As a strong defender of human rights and a respected religious leader in the country, Tutu's presence in the TRC was a boost to the restorative justice processes that South Africa needed to achieve national unity and morally acceptable reconciliation and forgiveness.

Kenya can learn a few lessons from South Africa. While the two countries have different historical contexts in which human rights were violated, it is important to note that methods and processes used by South Africa could benefit Kenya. Walks-outs that have dogged the Kiplagat-led Commission in recent days during the commissioners' tour of Coast Province could have been avoided if the government did more consultations in choosing commissioners that could inspire faith towards such an important but complex process of unearthing the truth. While it is acknowledged that Ambassador Kiplagat has played an exceptional role in the regional peace processes, it is difficult for many to believe that he was a defender of human rights and dignity yet the government he worked for faithfully for several years notoriously violated its citizens' rights. The Ambassador should ask himself why there is growing protest against his appointment to chair the Truth, Justice and Reconciliation Commission while some other Kenyans appointed to chair some commissions such as the Interim Independent Electoral Commission, Interim Independent Boundary Review Commission, National Cohesion and Integration Commission and Interim Taskforce on Police Reforms among others have not faced protest from the public or civil society activists. It is also important that the TJRC Act be amended to address some of the issues that will be covered during the investigation. Does the government fear that the inclusion of colonial period in the investigation will open a can of worms that will make it rub shoulders with some development partners? Won't it make sense to do away with the Indemnity Act so that the crimes committed during *shifta* wars, Wagalla massacres and other human rights violations in marginalized regions could be fully investigated?

During the negotiations between Party of National Unity and Orange Democratic Movement in early 2008 to resolve the political crisis caused by the contested presidential polls results, the Kenya National Dialogue and Reconciliation identified four agenda items. Agenda 4 was to address long term issues such as constitutional, legal and institutional reforms, land reforms, tackling youth unemployment, tackling poverty, inequity and regional development imbalances, consolidating national unity and cohesion, and addressing impunity, transparency and accountability. One of the means to achieve the issues raised in the Agenda 4 is to have a credible and impartial Truth, Justice and Reconciliation that can truly redress past historical injustices.

Call for papers

Hakimani Publications

Hakimani: *Jesuit Journal of Social Justice in Eastern Africa*

Call for papers

In the next issue of Hakimani journal we turn our focus to International Criminal Court (ICC)

The establishment of the ICC at the end of the 20th century was seen as remarkable step towards addressing international crimes: Crime of genocide, crimes against humanity, war crimes and the crime of aggression especially in countries facing civil strife, armed conflict or any other form of massive violation of human rights targeting civilian population. There has been optimism among comity of states that the ICC will be the right institution to deal with atrocities committed in various parts of the world. In the first decade of the 21st century, there have been various attempts of ICC intervention in Uganda, Sudan and Kenya. The three states are part of the Eastern Africa Province of the Society of Jesus.
In 2005, the government of Uganda invited the ICC to arrest the five top leaders of the Lord's Resistance Army namely Joseph Kony, Vincent Otti (R.I.P.) Raska Lukwiya (R.I.P.), Okot Odhiambo and Dominic Ong'wen. In Sudan, the ICC indicted President Omar El-Bashir and issued a warrant of arrest accusing him of having committed international crimes in the Darfur where an armed conflict have pitted the black African Darfurians against the Government since March 2003. El-Bashir regime is accused of having used the Janjaweed Arab militias to unleash terror on the black Africans leading to loss of tens of thousands lives, destruction of property, internal displacement of civilian population, flight of other thousands of people to foreign countries and massive violation of human rights in Darfur.

The announcement of results of the 2007 disputed presidential polls in Kenya between the main contenders Mwai Kibaki of Party of National Unity and Raila Odinga of Orange Democratic Movement led to widespread violence that claimed over 1,300 lives, displacement of over 500,000 people, destruction of property and serious violation of human rights. A commission appointed by the grand coalition government and headed by Justice Philip Waki to investigate the post election violence recommended that the perpetrators of the violence be dealt with through ICC and/or local tribunal. It is most likely that the ICC will begin its work in Kenya before the end of this year.

The intervention of the ICC in the three Eastern African countries has prompted a heated debate in various circles at regional, continental and international levels whether the pursuit for justice could be realized through the ICC, national courts, independent tribunals or Truth, Justice and Reconciliation Commission. The issue of respecting the principle of sovereignty and intervention in a conflict-ridden state to protect the victims of violence has also been a major concern in the debate. As our countries strive to establish institutions and democratic culture, norms and practices that should be the foundation of stability, peace and development, it is important that Jesuit Hakimani Centre participates in this imperative debate that touches on matters of justice, peace, social justice and reconciliation. This will inform the next issue of the Jesuit Journal of Social Justice in Eastern Africa in which writers tackle the issue from various perspectives.

- Interested in contributing a reflection on a social justice issue in your locale in Eastern Africa?
- Are you organising or have attended an event seeking to promote social justice in the region?
- Are you involved in a campaign for transformation of unjust social structures?

Email us: editor@jesuithakimani.org

Hakimani e-Newsletter is the electronic monthly supplement of Hakimani: Jesuit Journal of Social Justice in Eastern Africa.
It offers reflections on issues of concern to social justice in the region, as well as announcements of news and events.

Jesuit Hakimani Centre is the social justice, research and advocacy centre of the Eastern Africa Province of the Society of Jesus. The province comprises of Ethiopia, Kenya, Sudan, Uganda and Tanzania.

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