

REPORTING TRANSITIONAL JUSTICE

A Handbook for Journalists



Front Cover: Kitgum, Northern Uganda, March 2005. A youth from the Amida camp for internally displaced persons. Thousands have sought refuge here after having their homes destroyed and possessions taken by the Lord's Resistance Army (LRA). Countless camp residents have also had loved ones murdered or children abducted by the LRA. Photo © Thomas W. Morley.

Reporting Transitional Justice

A Handbook for Journalists



Reporting Transitional Justice, A Handbook for Journalists
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Bush House PO Box 76 The Strand. London WC2B 4PH

Contributors: Julia Crawford, Janet Anderson and Karen Williams.

Editor: Julia Crawford

Layout: David McGhee

Administrative and research support: Nesryn Bouziane

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ABOUT THE HANDBOOK

This Handbook is part of a project called “Communicating Justice”. The project is led by the BBC World Service Trust, in partnership with the International Center for Transitional Justice. Its aim is to raise public awareness and debate around transitional justice (TJ) issues in five post-conflict African countries: Burundi, the Democratic Republic of the Congo, Liberia, Sierra Leone, and Uganda.

Our project has three broad strands:

- Population surveys of knowledge and attitudes toward TJ issues in project countries
- In-country training of 20 selected journalists, as well as activities designed to engage the support of their managers or editors
- Follow-up activities via online learning, Internet, and local mentoring

The project is designed to ensure continued commitment from local actors—especially journalists—to improve the quality and quantity of TJ coverage. The training of journalists is seen as a key factor in providing better information to the public. This Handbook is not meant to be an exhaustive guide. However, we hope that it will provide a useful, quick-reference manual on key TJ issues. It is designed principally for journalists, but we hope that it may also prove useful to civil society actors and all those concerned with moving transitional justice forward.

About the Trust

The BBC World Service Trust uses media to promote development and human rights around the world. As the BBC's independent charity, it relies on the BBC's reputation, resources and expertise to implement its donor-funded projects. The Trust works in over 43 countries worldwide. As of December 31, 2007, it is working in Africa, Asia, the Middle East, former Soviet Union and Europe, using media creatively in the fields of health, livelihoods, governance, human rights and post-disaster rehabilitation.

About the ICTJ

The International Center for Transitional Justice (ICTJ) is a human rights organization that assists countries pursuing accountability for mass atrocity or human rights abuse. Founded in 2001, the Center has worked in more than 30 countries around the world.

The ICTJ provides support to human rights trials, truth commissions, reparations programs, judicial and security sector reform initiatives, and peace negotiations. Working with local partners, the Center provides comparative information, legal and policy analysis, and research to justice institutions, nongovernmental organizations, governments, the United Nations, and others.

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PREFACE

Facing legacies of past abuse and injustice is crucial to promoting human rights around the world. By helping to address past human rights crimes, transitional justice aims to break cycles of violence and reduce the likelihood of future conflict. Ensuring that criminals are held accountable in court; that the truth about the past emerges and is documented; that the relationship between citizens and their governments is repaired; and that democratic institutions are created, are all distinct, effective, and compatible ways to address the past.

From the Americas to Asia, transitional justice initiatives have helped societies move from conflict and oppression toward democracy, the rule of law, and human rights. In the last decade alone, transitional justice measures and their positive effects have become particularly prevalent in Africa. Burundi, Ghana, Liberia, Sierra Leone, South Africa, Uganda, and even the Democratic Republic of the Congo, are all countries that, either reluctantly or proactively, have begun grappling with their pasts. A necessary first step is for a few key groups in a society—from government officials to civil society to professional communities—to recognize that there is a problem with the past and start calling for change. In this respect, all of these countries have made some progress.

It goes without saying that if mere recognition were enough, transitional justice as a field would not be as advanced and sophisticated as it is today. In fact, transitional justice is most effective when its various approaches or “tools” are integrated into a comprehensive and nuanced solution that is customized to the particularities of the country in question. The International Center for Transitional Justice (ICTJ) advances such solutions to meet the challenges faced by societies seeking to move forward and heal, and believes that all those involved in a transition must be consulted and participate in the process of pursuing justice

The key to engendering such effective and broad participation is to provide accurate information and facilitate deeper understanding. In most transitional country contexts, the media is the primary—and often only—channel of communication and public information. The more informed, accurate, and independent the media is about important transitional justice issues, the better equipped citizens are to become involved in the process, even if only as informed bystanders.

Transitional justice is not only about looking backwards. More fundamentally, it is about dealing with the unresolved problems of the past in order to move forward and lay the foundation for a stable and peaceful future. There should be nothing of greater interest to a country and its people than their collective and individual futures. It is this that makes transitional justice so important and so relevant to so many.

There is natural partnership that exists between transitional justice as a living and locally-relevant issue, and in-country journalists, who bear the very serious responsibility of helping their audiences understand these important developments. With these goals in mind, the BBC World Service Trust and the ICTJ have embarked on a two-year “Communicating Justice” project to train African journalists. It is an ambitious and exciting endeavor that we hope and expect will have a positive impact on each of the countries involved for many years to come.

Juan E. Méndez
President
International Center for Transitional Justice

INTRODUCING TRANSITIONAL JUSTICE



Young militia fighters stand guard outside their leaders hut close to Bunia, Ituri region, Democratic Republic of Congo. August 2006 Photo © Tiggy Ridley/IRIN



There has been widespread use of young combatants by all parties involved in the conflict. The DRC is one of the countries with the largest number of child soldiers Photo © Tiggy Ridley/IRIN

INTRODUCING TRANSITIONAL JUSTICE

What is Transitional Justice?

Broadly defined, transitional justice (TJ) includes all efforts to help societies deal with the legacy of mass human rights abuse. Such efforts may include national prosecutions of alleged perpetrators, but also international and hybrid tribunals, truth commissions, reparations for victims, and institutional reforms. Examples include the international criminal tribunals for Rwanda (ICTR) and the former Yugoslavia (ICTY), which paved the way for the establishment of the International Criminal Court (ICC), and the truth commissions of South Africa, Sierra Leone, Liberia, and Ghana.

The development of TJ as a field began after World War II, when the Nuremberg and Tokyo tribunals were established to try those most responsible for the atrocities committed during that war. But international interest and support for TJ took off only in the 1980's with the end of colonization and the beginning of democratization in Africa and Latin America. Although it has grown exponentially since then, the field continues to expand and develop.

In recent years, peace agreements in Africa and elsewhere have increasingly included provisions for TJ mechanisms. In the aftermath of brutal civil wars—with economies and infrastructures often in ruin—international financial support has been crucial to supporting these mechanisms. For example, donors have played an important role in army and police reform in countries such as Burundi, the Democratic Republic of Congo, Sierra Leone, and Liberia. Truth commissions, international and hybrid tribunals have also tended to rely heavily on United Nations and donor funding. By the same token, with judicial systems and security sectors often in shambles after conflict, many countries have come to rely on nongovernmental organizations and expert groups who can help guide them through the necessary reforms and changes to become functional, just, and credible.

Transitional justice (TJ) refers to a range of approaches that societies undertake to reckon with legacies of widespread or systematic human rights abuse as they move from a period of violent conflict or oppression toward peace, democracy, the rule of law, and respect for individual and collective rights.

Source: International Center for Transitional Justice, ICTJ

(<http://www.ictj.org/en/tj/>)

The objective of TJ is to confront the painful legacy of past abuse or trauma in order to:

- achieve justice for citizens;
- establish or renew civic trust;
- reconcile people and communities; and,
- prevent future abuses.

By working to ensure accountability for mass atrocity and combating impunity, TJ is increasingly considered to be one of the cornerstones of breaking cycles of violence and preventing their recurrence.

Major approaches to TJ include:

- Supporting domestic, hybrid (i.e. mixed national and international), and international prosecutions of perpetrators of human rights abuse;
- Determining the full extent and nature of past abuses through truth-telling initiatives, such as truth commissions;
- Providing reparations to victims of human rights violations;
- Designing sound institutional reform programs, which may include “vetting” (the process of excluding from public employment those known to have committed human rights abuses or been involved in corrupt practices);
- Promoting reconciliation within divided communities, including through work with traditional justice mechanisms;
- Constructing memorials and museums to preserve the memory of the past; and,
- Taking into account gendered patterns of abuse to enhance justice for female victims.

Societies may choose a combination of TJ mechanisms. As ICTJ President Juan E. Méndez* has put it, the real challenge is:

“to determine which elements of truth, justice, and clemency measures are compatible with one another, with the construction of democracy and peace, with emerging standards in international law, and with the search for reconciliation. The most appropriate mix will depend on context, circumstances, and the free and rational choices made by local actors.”

Why Cover Transitional Justice?

Transitional justice (TJ) is a rewarding and exciting field for journalists because of its tremendous potential to impact individuals, societies, and the development of international law. Also, it is a newly emerging and constantly developing field that often generates controversy, something journalists tend to thrive on!

The media are the eyes and ears of the public and nowhere is this more relevant than when covering transitional justice. If peace, democracy and the rule of law are to work, then the mechanisms and institutions created in their name should themselves be under close scrutiny. Journalists also have a vital role to play in helping the public to understand and engage in TJ processes. They can raise the concerns of victims and help bring them into the debate around TJ issues. Through balanced and informed reporting, the media can also help to ensure fair trials and hearings for alleged perpetrators of human rights abuses.

Rwandan journalist Augustin Twagirayezu of the independent Hironde Foundation has been reporting on the trials at the International Criminal Tribunal for Rwanda since they began in 1997:

“I think that media coverage of the ICTR trials is of vital importance, to make known the important historical moments that are taking place here for current and future generations. The trials must have an impact on the population, especially in the regions that were affected, and so the media have an important role to play in the fight against impunity.”¹

* Until early 2007, Méndez was also Special Advisor to the United Nations Secretary-General on the Prevention of Genocide.

¹ Augustin Twagirayezu. Telephone interview with BBC World Service Trust, June 15, 2007, from Arusha, Tanzania.

Binta Mansaray of Sierra Leone is Deputy Registrar of her country's UN-backed Special Court, set up to try those most responsible for crimes committed during the civil war there, and formerly its Outreach Coordinator. She agrees that good information to the public is vital:

“This is a transitional criminal justice system assisting Sierra Leone to move from war to peace, and if the court is to achieve that objective, then the people in whose name the court was created must understand how the court works and they must be given an opportunity to express their views and opinions.”²

Special challenges for journalists: Transitional justice can be challenging to cover. As we know, it can encompass a broad range of international and/or local mechanisms, from courts and truth commissions to memorials, gender-specific initiatives and traditional justice ceremonies. Each poses its own challenges for journalists, and yet many of these challenges will be similar. For example:

- Most TJ mechanisms deal with sensitive and /or conflict-related issues. As a journalist, you must be especially careful not to inflame tensions. You will have to put your personal views and experiences aside, while remaining sensitive to issues of trauma and security, especially for witnesses and survivors.
- TJ issues and processes are often very complex. You will need to break them down and put them in context for your audience. This will probably entail substantial research, including consulting historical and media records, and conducting background or follow-up interviews with concerned parties, being careful to present all sides of an argument.
- Particularly with courts and truth commissions, proceedings may be dense and lengthy. You will need to hone your news sense and knowledge of the issues so that you can help your audience understand what is most important and how it concerns them.

Liberian journalist John Stewart is a member of his country's Truth and Reconciliation Commission (TRC). He told the BBC World Service Trust:

“Such complex issues need to be broken down and given to the people, so that they can be able to understand and contextualize it, what is coming out of there, within their own realm of experience [...] so that they can be part of the process.”³

² Binta Mansaray. Interview with BBC World Service Trust, Freetown, May 3, 2007

³ John Stewart. Interview with BBC World Service Trust, Monrovia, May 15, 2007

Transitional Justice and International Law

Transitional justice initiatives rely on international human rights and humanitarian law to demand that states halt, investigate, punish, repair, and prevent abuses. These bodies of law are based on international treaties, conventions, and other instruments which are still being developed and interpreted, including by international criminal courts.

Human rights violations include torture, summary executions, forced disappearances, slavery, and prolonged arbitrary detention. Not all human rights violations are crimes. According to the UN's Office of the High Commissioner for Human Rights (OHCHR), there are nine core international human rights treaties, and each has a committee of experts to monitor implementation of the treaty provisions by its states parties (states that have signed on to the treaties). You can find more details on the OHCHR Web site: <http://www.ohchr.org/english/law/>

International humanitarian law (IHL) is a set of rules that seeks to protect non-combatants (including civilians) and prisoners of war in times of conflict. The backbone of IHL consists of the four Geneva Conventions of 1949 and their Additional Protocols of 1977 (and a more minor Protocol in 2005). The International Committee of the Red Cross (ICRC) has played a key role in the establishment and monitoring of these rules. The 1949 Geneva Conventions and their Additional Protocols cover the following areas:

- First Geneva Convention (1949) protects the wounded and sick in armed forces in the field.
- Second Geneva Convention (1949) protects the wounded, sick and shipwrecked among armed forces at sea.
- Third Geneva Convention (1949) protects prisoners of war.
- Fourth Geneva Convention (1949) protects civilians.
- Additional Protocol I (1977) strengthens the protection of victims of international armed conflicts
- Additional Protocol II (1977) strengthens the protection of victims of non-international armed conflicts
- Additional Protocol III (2005) establishes a new emblem, the red crystal [non-denominational emblem, i.e. not associated with a particular religion].⁴

The 1949 Conventions apply essentially to international conflicts, i.e. wars between states. Only Article 3, common to all four Conventions, refers to internal conflicts, but it was long argued that this article did not give rise to individual criminal responsibility until the ICTY decided that it did.

⁴ "Discover the ICRC", ICRC, September 2005, p.16

According to the ICRC, 194 states have ratified the Geneva Conventions, which enjoy universal acceptance. The ICRC's Web site contains useful resources on IHL: <http://www.icrc.org/eng/ihl>

The origins of IHL go back to the First Geneva Convention of 1864 and the establishment of the International Red Cross and Crescent movements. Yet horrific acts of mass violence have been committed throughout the twentieth century and into the twenty-first, including the Armenian, Bosnian, Cambodian, and Rwandan genocides, as well as the Holocaust (genocide of Jews perpetrated by the Nazis).

It was not until after the Second World War—when the victorious Allies established International Military Tribunals in Germany (Nuremberg) and Japan (Tokyo)—that individuals were held criminally accountable for war crimes and crimes against humanity. This was an important step, although these tribunals have often been criticized for dispensing only “victor’s justice,” i.e. trying alleged perpetrators of such crimes from only the losing side (as Germany and Japan had been defeated).

In addition to the 1949 Geneva Conventions, the desire to be able to claim “never again” to the atrocities of the Second World War led to the passage of the UN’s 1948 Convention on the Prevention and Punishment of the Crime of Genocide (known as the “Genocide Convention”). Article 1 states that:

“The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.”

The Genocide Convention has proven very difficult to enforce and has given rise to much political debate, both due to the limited definition of genocide and the difficulty in obliging a collective response to the commission of genocide. The UN did not, for example, take effective action to stop the Rwandan genocide of 1994.

Apart from the Geneva and Genocide Conventions, there were no major treaties that defined international crimes until the coming into force of the Rome Statute of the ICC in 2002.

Definitions of International Crimes

International crimes usually refer to those proscribed by international law and falling under the jurisdiction of the international criminal courts, including genocide, war crimes, and crimes against humanity. In order for these acts to be criminal on the national level, they must also exist in domestic law. All crimes consist of an act and a mental state. These crimes are commonly found in the Statutes of the ICTY, ICTR, Special Court for Sierra Leone, and ICC.

Genocide is defined as the commission of any of a number of acts (including killing, causing serious bodily or mental harm, imposing measures intended to prevent births, or forcibly transferring children from their communities) committed

“with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such”.

This definition derives from the 1948 Genocide Convention and is incorporated in the Statutes of the ICTR, ICTY, and ICC.

Crimes against humanity have to form “part of a widespread or systematic attack against a civilian population, with knowledge of the attack”.⁵ Crimes against humanity may include murder, deportation, rape, torture, persecution, forced disappearance and apartheid, and other inhumane acts. The full list of crimes against humanity in the Rome Statute of the ICC is more extensive than the definition of crimes against humanity in other legal instruments, showing the evolving nature of the crime. Like genocide, crimes against humanity can be committed during war as well as during peace time.

War crimes include grave breaches of the Geneva Conventions of 1949 and other serious violations of the laws and customs of war. Article 8 of the ICC Statute provides a lengthy enumeration of acts considered to be war crimes, including 34 relating to international armed conflicts and 16 that apply in non-international armed conflicts.

⁵ Statute of the International Criminal Court, Article 7, 1.
http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_English.pdf

Individual criminal responsibility

The principle of individual criminal responsibility is enshrined in different treaties, as well as the Statutes of the international tribunals (ICC, UN, and UN-backed courts).

Extract from the Statute of the International Criminal Court:

Article 25

1. The Court shall have jurisdiction over natural persons pursuant to this Statute.
2. A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.
3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:
 - (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
 - (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
 - (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
 - (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
 - (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
 - (ii) Be made in the knowledge of the intention of the group to commit the crime;
 - (e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;
 - (f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.
4. No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.

Source: Statute of the International Criminal Court

Universal jurisdiction

Universal jurisdiction is a principle of international law under which a state can claim jurisdiction to try crimes of international concern, even if they were committed outside its territory or not by its nationals. International human rights groups have lobbied hard for this principle as a way to end impunity for genocide, crimes against humanity, and war crimes, as it means that certain crimes could be tried anywhere.

A landmark case was that of former Chilean dictator Augusto Pinochet, accused of thousands of murders, torture, and disappearances under his rule from 1973 to 1990. In October 1998, he was arrested during a visit to London, on the basis of a Spanish extradition request for the alleged murder and torture of Spanish citizens. Pinochet was kept under house arrest in Britain for 17 months amid much legal wrangling. In March 1999, Britain's highest court—the House of Lords—ruled that as a former head of state he was not immune from prosecution for torture and that he could be extradited under the Torture Convention. Although Pinochet was finally freed on grounds of ill health and was never brought to trial (he died in December 2006 at age 91), the case is viewed as a landmark decision in terms of holding former leaders accountable for their crimes. You can find a BBC chronology of the Pinochet case at: <http://news.bbc.co.uk/2/hi/americas/600617.stm>

The Web site of the NGO Global Policy Forum states:

“As a result of the precedents of the Pinochet case, other leaders who have committed well-documented crimes have been pursued, including former US Secretary of State [Henry Kissinger](#) and Prime Minister [Ariel Sharon](#) of Israel. Kissinger has restricted his international travel because he is wanted in so many jurisdictions, either for trial or as a prosecution witness. Belgium currently has the broadest universal jurisdiction laws, and cases there are testing new possibilities for the doctrine.”⁶

Belgium's 1993 universal jurisdiction law permitted victims to file complaints in Belgium for atrocities committed abroad even if the perpetrator was not a Belgian national or not present in Belgium.

Cases related to the 1994 genocide in Rwanda have been brought to trial in both Belgium and more recently in Canada. In 2001, a Belgian court imposed lengthy prison sentences on four Rwandans, including two nuns, for their role in the genocide.

⁶ Global Policy Forum <http://www.globalpolicy.org/intljustice/universal/univindex.htm>

In 2003 however, in response to a ruling by the International Court of Justice, Belgium revised its progressive legislation on universal jurisdiction, significantly reducing its scope. This drew strong criticism from human rights groups such as Human Rights Watch, who denounced US pressure in an August 1, 2003 press release.⁷

The new legislation nonetheless preserved a number of cases that had begun to move forward, including one against former Chadian leader Hissène Habré, who has been dubbed “Africa’s Pinochet”.

A Belgian extradition request was instrumental in Habré’s November 2005 arrest in Senegal, where he had been living for 15 years. Belgium issued an international arrest warrant accusing Habré of massive human rights abuses during his eight-year rule, after earlier attempts to have him tried in Senegal had failed. Following Habré’s arrest, Senegal referred the case to the African Union (AU). At a July 2006 summit, a panel of jurists of the AU decided that the Habré case should be handled by an African mechanism. President Abdoulaye Wade confirmed at the same summit that Habré would be tried in Senegal. According to a BBC report of July 2, 2006, Wade suggested that a special court would be set up in Senegal to handle the case with a wider African jurisdiction, and in cooperation with Chad's current authorities.⁸ As of December 31, 2007, the Senegalese were taking steps to prepare for the trial in Senegal, including a possible request for technical assistance to the European Union.

⁷ Human Rights Watch, August 1, 2003 <http://www.hrw.org/press/2003/08/belgium080103.htm>

⁸ BBC news Web site <http://news.bbc.co.uk/2/hi/africa/5139350.stm>

PROSECUTIONS



Former Yugoslav President, Slobodan Milosevic, at the UN War Crimes Tribunal in the Hague to answer charges of war crimes against ethnic Albanians in Kosovo March 2001 © AP Photo/pool



Former Liberian President Charles Taylor makes his first appearance at the Special Court in Freetown, Sierra Leone in April 2006. Former President Taylor pleaded not guilty to war crimes and crimes against humanity, including sexual slavery, mutilation and sending children into combat. Photo © George Osodi/AP

PROSECUTIONS

“While criminal prosecutions should not be the sole response to impunity, there is no doubt that they must play a central, indispensable role in any policy of accountability. At the same time, at ICTJ we insist that domestic prosecutions represent the State’s fundamental obligation to give victims access to justice. On the one hand, the international community must pay more attention to helping States live up to this obligation by building independent, impartial judiciaries that can prosecute mass atrocities with full respect for due process of law and fair trial guarantees. On the other, our support of the role of the International Criminal Court and other international criminal justice ventures must be oriented towards supplementing the absence of will or capacity to produce fair trials domestically, but also to help generate that capacity in the near future.”⁹

Juan E. Méndez, President of ICTJ and former Special Advisor to the U.N. Secretary General on the Prevention of Genocide, March 2007

Domestic (National) Trials

Before the rise of the *ad hoc* international tribunals (ICTR, ICTY) in the 1990s, there were a number of prosecutions of mass human rights violations in domestic courts. Following the return to democratic rule in Greece in the 1970s and in Argentina in the 1980s, key individuals were tried for crimes against humanity.

Domestic prosecutions allow victims better access to the justice process, are more likely than international tribunals to be in tune with the changing social and political context during a transition in a particular country, and are more likely to strengthen local judicial capacity. At the same time, they may not always be possible, because they require political will, a trained judiciary, a proper legal framework, including criminal law and procedures, and respect for the rule of law.

A recent example of the practical problems that domestic prosecutions can face is **The Iraqi High Tribunal (IHT)** which tried and sentenced former Iraqi President Saddam Hussein to death in November 2006 for crimes against humanity.

⁹ Juan E. Méndez, International Judicial Responses to Violence, University of Pennsylvania, March 22, 2007

The court continues to suffer from a variety of problems, including political interference and perceived lack of legitimacy due to the involvement of the United States. The way it handled the first trial for the killings of more than 100 people in the village of Dujail in 1982 has been heavily criticized by human rights groups, including Human Rights Watch and the ICTJ:

“The court’s conduct...reflects a basic lack of understanding of fundamental fair trial principles, and how to uphold them in the conduct of a relatively complex trial. The result is a trial that did not meet key fair trial standards.”¹⁰

The last few years have seen a proliferation of domestic prosecutions initiatives, including in Argentina, Peru, Colombia, Croatia, Rwanda, Ethiopia, the Democratic Republic of the Congo (DRC), and Serbia. In 2007, a military tribunal in the Ituri District in northeastern DRC sentenced five former militiamen to life imprisonment for killing two UN military observers in 2003. In Rwanda, prosecutions of those suspected of leading the 1994 genocide have taken place locally, but the inability to deal with more than 100,000 accused through trials led the authorities in Kigali to institute a massive programme of traditional courts in individual villages, known as “gacaca” courts. (See section on Other Forms of Transitional Justice for more details on this traditional justice mechanism.)

Ad hoc International Tribunals

In 1993, in an unprecedented step made possible by the end of the Cold War, the UN Security Council passed Resolution 827 establishing the International Criminal Tribunal for the former Yugoslavia (ICTY)—the first international war crimes tribunal since the Nuremberg and Tokyo military tribunals.

The creation of the ICTY was followed by the establishment of the International Criminal Tribunal for Rwanda (ICTR) to prosecute perpetrators of Rwanda’s genocide in 1994.

The ICTY, based in The Hague, the Netherlands, was mandated by the Security Council to investigate and prosecute individuals suspected of committing war crimes, genocide, and crimes against humanity committed in the former Yugoslavia since 1991.

The mandate given to the ICTY was broad and included bringing to justice those responsible for crimes under its jurisdiction; deterring future crimes; and contributing to the restoration and maintenance of peace.

¹⁰ Human Rights Watch, Judging Dujail
http://hrw.org/reports/2006/iraq1106/9.htm#_Toc151270369

The ICTR was established by Security Council Resolution 955 in 1994. The ICTR's mandate was similar to that of the ICTY's, but its temporal jurisdiction was limited to the year of 1994. The ICTR is based in Arusha, Tanzania.

The ICTR and ICTY are often referred to as “ad hoc” tribunals (from the Latin meaning “for this purpose”), owing to the fact that they are not intended to be permanent institutions. Both tribunals have faced heavy criticism over the slowness of their work, their large budgets, their geographical distance from the victims and citizens from the two countries, and their lack of positive impact on national judicial institutions (although the ICTY has in fact had impact on judicial institutions in the former Yugoslavia, including assisting the establishment of a War Crimes Chamber in Bosnia). They are both under pressure to complete their work by 2010. By the end of 2007, the ICTR had cost more than \$1 billion, according to a report of the Arusha-based Hironnelle Foundation.¹¹

At the same time, the two tribunals have been a significant means for the international community to show its commitment to accountability for human rights offenders and for the evolution of international criminal justice.

They have also had some notable successes in achieving prosecutions of high-level perpetrators, including Slobodan Milosevic, former President of Yugoslavia, and Jean Kambanda, former Prime Minister of Rwanda. Kambanda was sentenced in 1998 to life imprisonment for genocide and crimes against humanity. The prosecution of Milosevic was cut short by his death in March 2006 while in custody in The Hague.

Advantages of International Tribunals:

- Signal end of impunity and set a precedent of accountability
- Enable prosecutions where affected national criminal justice system is inadequate or unwilling
- Abide by due process protections and other human rights standards
- Thorough investigations of systematic crimes
- Aid development of international law and jurisprudence
- Considerable political impact

Disadvantages:

- Lack geographical and cultural proximity to the victims
- Difficulty of retaining international support and funding
- Very expensive
- Can only prosecute a small number of offenders
- Public expectations may exceed resources and practical outcomes

¹¹ Hironnelle News Agency, 02/01/2008, *ICTR/Review – Tough Year Ahead for ICTR as Completion Strategy Approaches*. <http://www.hironnelle.org/arusha.nsf/English?OpenFrameSet>

Louise Arbour, one of the first prosecutors at each of the two tribunals and now the UN High Commissioner for Human Rights, wrote in the *International Herald Tribune*:

“International trials dealing with massive atrocities must not only expose and record individual guilt, but construct the collective memories upon which both victims and perpetrators, indeed whole nations, will be cleansed of their brutal past.”¹²

But such sentiments have been challenged by studies such as that by Eric Stover and Harvey Weinstein of the University of California, Berkeley, into survivors’ attitudes in Bosnia and Rwanda:

“Our studies suggest that there is no direct link between criminal trials (international, national, and local/traditional) and reconciliation, although it is possible this could change over time. In fact, we found criminal trials and especially those of local perpetrators often divided multiethnic communities by causing further suspicion and fear. Survivors rarely, if ever, connected retributive justice with reconciliation.”¹³

Ultimately, the politicized nature of the UN Security Council and the massive costs and resources required to establish and maintain the *ad hoc* tribunals make any exact replica of this model unlikely, particularly in light of the fact that there is now a permanent International Criminal Court (ICC).

Hybrid Tribunals

Another model of justice has emerged which draws on the lessons learned from the *ad hoc* international tribunals and the challenges and obstacles faced by domestic trials. Mixed or “hybrid” tribunals operate in the countries where the crimes occurred but employ international capacity. Many have jurisdiction to try international crimes. These courts offer an important model for potentially bolstering national judicial capacity with adherence to international standards and procedures, while ensuring that the proceedings have greater relevance for affected communities.

Hybrid tribunals have been established in Bosnia, Cambodia, Kosovo, Sierra Leone, Timor-Leste, and most recently for Lebanon, according to a variety of models ranging from high to low levels of international involvement. At one end of the spectrum is the model in which international involvement provides only very limited technical assistance.

¹² International Herald Tribune, April 5, 2001

¹³ Eric Stover and Harvey Weinstein, *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity* (2004)

On the other end of the spectrum are scenarios in which the UN aims to assist in the reconstruction of the domestic legal system (as in Kosovo and Timor-Leste).

A third type is where the UN helps to establish a Special Court (as in Sierra Leone) or even specialized Chambers within a pre-existing domestic court (as in Bosnia and Cambodia).

The Special Court for Sierra Leone (SCSL) was established by an agreement between the UN and the government of Sierra Leone in 2002, after national authorities invited the UN to establish a hybrid tribunal in the country. The Court can try crimes against humanity (including murder, imprisonment, torture, rape, and other crimes), war crimes, and other serious violations of international humanitarian law (but not genocide). It can also prosecute perpetrators for certain crimes under Sierra Leonean laws relating to the abuse of young girls, the conscription of children into the army, and the wanton destruction of property. Similarly, in 2003 the UN and the Government of Cambodia concluded a lengthy negotiating process and agreed to create the **Extraordinary Chambers in the Courts of Cambodia (ECCC)** to try senior Khmer Rouge leaders. The ECCC had five senior Khmer Rouge officials in custody at the end of 2007, and trials are expected to begin in 2008. The UN Security Council has decided also to establish a **tribunal for Lebanon** to try those responsible for the murder of former Prime Minister Rafik Hariri. This court will be made up of Lebanese and international judges, but will be based in The Hague, Netherlands, because of security concerns.

One of the advantages of hybrid tribunals is that they cost less than purely international tribunals. The SCSL's annual budget is only about 25 percent of the ICTY's annual budget. Another advantage of hybrid tribunals is that they are based in the affected country, which means they employ more local staff and are able to directly support domestic judicial systems by building their capacity.

On the other hand, one of their main disadvantages is that they can be subject to a lack of cooperation by the states in which they are based or by other states. Unlike the international tribunals established by the UN Security Council that have "Chapter VII" powers to threaten uncooperative states with sanctions, hybrids must, like domestic courts, arrange the arrest of the accused hiding in other states through ordinary legal and diplomatic channels.

The SCSL worked for more than three years to finally gain custody in March 2006 of Charles Taylor—former president of Liberia accused of crimes in Sierra Leone—who had been given refuge in Nigeria. The Court transferred him to be tried in The Hague because west African leaders expressed the concern that holding his trial locally could have a destabilizing effect. Though his trial is taking place at the premises of the ICC, he is still being tried by the Special Court for Sierra Leone; the SCSL has an agreement with the ICC to use its courtroom and facilities. The former president has pleaded “not guilty” to 11 charges of war crimes, crimes against humanity, and violations of international humanitarian law over his alleged role in the brutal civil war in Sierra Leone. Presentation of evidence in the Taylor trial started on January 7, 2008.

Apart from Taylor, as of December 31, 2007, the Special Court had brought nine individuals to trial in three separate proceedings. The accused are each associated with one of the three warring factions that operated during Sierra Leone’s conflict: the Revolutionary United Front (RUF), the Armed Forces Revolutionary Council (AFRC), and the Civil Defence Forces (CDF). However, CDF leader Sam Hinga Norman died on February 22, 2007 while in the custody of the court. The Court delivered its first judgment on June 20, 2007, finding three former AFRC leaders guilty of war crimes, crimes against humanity, and other serious violations of international humanitarian law, including the recruitment and use of child soldiers. On August 2, 2007, the court found two former CDF leaders guilty of war crimes but acquitted them of crimes against humanity. On October 9, 2007, it handed down light sentences (7 and 8 years imprisonment) against them. In the RUF trial, which began in July 2004, the defence began presenting its case in May 2007.

The International Criminal Court

The world’s first permanent and independent court dealing with war crimes came into being in July 2002. The Court’s founding treaty—The Rome Statute, which governs the International Criminal Court’s (ICC’s) work—was signed in 1998 by 139 countries. Four years later, a sufficient number of states (i.e. 60) had ratified the Statute to make the ICC a reality. As of December 31, 2007, 105 countries had become States Parties to the Statute and members of the “Assembly of States Parties”, which funds the court, elects the judges, and provides management oversight. When a state becomes a “party” to the Rome Statute, it should criminalize and try war crimes, crimes against humanity, and genocide. The implementing legislation must also contain provisions for the government to cooperate with the ICC.

The ICC has a mandate to investigate and bring to justice individuals who commit the most serious violations of international humanitarian law, including war crimes, crimes against humanity, and genocide. However, it should only

do so if States are “unable or unwilling genuinely to investigate or prosecute” these crimes. This is known as the system of “complementarity” and is described below.

Its definition of crimes against humanity is more extensive than the definition in other legal instruments, showing the evolving nature of the crime and lessons learned from other international tribunals. In addition, discussions are ongoing about whether the crime of **aggression** should be added to the Rome Statute and if so, what the definition of that crime should be.

The ICC, based in The Hague, the Netherlands, is not a UN body.

Jurisdiction

Unlike the *ad hoc* international tribunals, the ICC is not limited geographically, but it can only address crimes committed after July 1, 2002—the date of the Court’s creation—by individuals who were aged 18 or older when they committed the crime.

The ICC can become involved in a case in one of three ways:

- a state itself may refer a case, as has been done by the Democratic Republic of the Congo (DRC) and Uganda;
- the UN Security Council may refer a case to the Court, as was the case with Darfur; or,
- the Prosecutor himself may initiate a case if crimes have occurred in a state party’s territory or have been committed by the nationals of a state party.

Relationship with local courts

As mentioned, the ICC’s jurisdiction complements—or is “complementary” to—that of domestic courts, which means that it is not intended to replace or compete with domestic courts and will only act when a state “is unwilling or unable genuinely to carry out the investigation or prosecution.”¹⁴ A state may be deemed “unable” to prosecute if its domestic legal system is in a state of collapse, or “unwilling” to prosecute if it is clear that any legal proceedings which it is holding or planning to hold are a sham intended to shield parties. The standard of proof is high, reflecting the principle that the ICC should be a “court of last resort” that only acts if states do not.

¹⁴ Article 17, paragraph 1 (a), Rome Statute of the International Criminal Court, 2187 U.N.T.S. 90, entered into force July 1, 2002
http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_English.pdf

Procedures to Bring a Case

The first step of any case before the ICC will entail examining “communications” that may alert the Chief Prosecutor—currently Luis Moreno-Ocampo of Argentina—to the fact that crimes are being committed.

These communications may come from victims or others, including nongovernmental organizations (NGOs) or governments. This stage of the case is referred to as the “preliminary examination.”

Next, the Prosecutor may decide to open an investigation. To do so, (s)he must consider the following:

- Whether the evidence and information indicates that a crime within the ICC’s jurisdiction has been committed;
- Whether the case is admissible (i.e. it is not already being investigated by the national authorities);
- Whether, even if the first two thresholds are met, there are substantial reasons to believe an investigation would not serve the interests of justice; with consideration given to the gravity of the crime, the interests of the victims, the age or infirmity of the alleged perpetrator(s), and whether the suspect played a leading role in the alleged crime, and
- Whether there is a “reasonable basis”¹⁵ for an investigation to proceed.

The Pre-Trial Chamber (a group of three judges assigned to the case) must authorize a decision to initiate an investigation and may review a decision not to investigate.

National authorities must be informed before even very basic investigative steps are undertaken—such as interviewing witnesses—and may be required to cooperate on important issues, such as providing security, access to crime scenes and potential witnesses, and arrests of suspects. In this sense, the ICC is very dependent on its relations with national authorities to do its work. If an investigation is successful and yields sufficient evidence, it will result in an arrest warrant, including a listing of the charges against the accused. This has already happened in the cases of five of the senior commanders of the Lord’s Resistance Army (LRA), who have been fighting in northern Uganda; two of the warlords from eastern DRC; and two individuals from Sudan.

A case can only go to the next stage—prosecution—if the accused is actually arrested.

¹⁵ Article 18, paragraph 1, Rome Statute of the International Criminal Court
http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_English.pdf

Trials before the ICC will be quite different from those in other courts in that victims will have certain rights to participate directly, and may also claim reparations if an accused is convicted.

Relationship with the UN Security Council

The Security Council can trigger an investigation under Chapter VII of the UN Charter by “referring” an issue to the ICC, as happened with Darfur, Sudan. The Security Council can also ask for a “deferral” of investigations or prosecutions which, if granted, would mean that an investigation or prosecution would have to stop for a period of 12 months (Article 16). This is in recognition of the role the Security Council plays as the guardian of international peace and security, and the presumption is that the Council would only use this power if it considered that an investigation or prosecution would pose a threat to international peace and security.

A Security Council deferral has sometimes been mentioned in relation to the LRA leadership. The president of the ICTJ, Juan E. Méndez, made it clear in a speech why he considered that a Security Council intervention would set a bad precedent:

“There are some who urge the Security Council to request a suspension of the proceedings for one year at a time (Art. 16). That may well be within the Security Council's powers, but I think it would be a very bad precedent for the Security Council to get seized of the Northern Uganda situation only for the purpose of suspending ICC investigations; it would be an unwarranted interference by a political organ with the independence and impartiality of the Court.”¹⁶

Victims

The ICC has a number of departments dealing with victims:

- the Victims and Witnesses Unit, which deals with issues of trauma and witness security assessments;
- the Office of Public Counsel for Victims (OPCV), which provides lawyers who can represent victims in court; and,
- the independent Victims’ Trust Fund, which aims to provide reparations to victims and is overseen by an independent board of directors.

Under the ICC’s Rome Statute, victims have a right to participate, through legal representatives, in court proceedings.

¹⁶ Juan Méndez, International Judicial responses to Violence, University of Pennsylvania, March 22, 2007

As with much of the ICC, the Rome Statute continues to be subject to various interpretations.

In early June 2006, Chief Prosecutor Moreno-Ocampo argued during the pre-trial phase of the case against former Congolese militia leader Thomas Lubanga that victims should only participate in trials of defendants after the investigations phase. He stated that wider participation could "jeopardise investigations" which were still ongoing. However, his argument was rejected by judges.

In practice, the level of victim involvement and the extent to which their own representatives will be able to question the accused, may well be at the discretion of each individual trial chamber. Judges are obligated to balance victims' rights with the rights of the accused to a fair trial and to ensure that the rights of one do not affect the other.

In addition to participating in investigations and prosecutions, victims can also seek reparations. The court can order those found guilty of crimes to pay reparations. In addition, the ICC plans to help victims by providing them assistance or reparations through the Victims Trust Fund, which may among various options make collective awards and fund projects for victims. Support for the fund will come from governments, foundations, and private donors. As of January 2008, the Fund had active programs in both DRC and Uganda.

Challenges for the ICC

The ICC is a very young institution and is still facing many challenges:

- **Political challenges:** Ratifications, although high overall, remain particularly low in the Middle East and in Southeast Asia. In addition, major world powers China, India, Russia, and the US are still not members. During the early years of its creation, the US pursued several policies that sought to undermine the Court. For instance, the US government sought to obtain agreements with states that they would never surrender US nationals to the Court, even if they had committed crimes on the territory of that state (Article 98 agreements). Recently, the US supported the referral by the Security Council of the situation in Darfur, signaling that its attitude toward the Court might be shifting.
- **Operational and logistical challenges:** In contrast to domestic criminal justice processes, which have a pre-existing supporting infrastructure (prosecution services etc), the ICC has had to build its capacity and lacks its own police force. It often has to operate in ongoing conflicts, such as in the DRC, Sudan, and Uganda, which present highly complex security situations where the challenges of protecting witnesses are tremendous.
- **Opposition from local populations:** In the context of Uganda, there has been opposition from local, traditional, and religious leaders to the work of the Court, because they argue that the Court is interfering with the peace process. They also argue that the society in northern Uganda has its own traditional means of dealing with crimes, and that it should be allowed to pursue those. In the case of Darfur, significant opposition has been voiced by the national government following the referral of the situation there by the Security Council.

CASES AND SITUATIONS BEFORE THE ICC

The Democratic Republic of the Congo (DRC)

In April 2004, the ICC announced that Moreno-Ocampo had received a letter from the Congolese authorities referring to him “the situation of crimes within the jurisdiction of the Court allegedly committed anywhere in the territory of the DRC since the entry into force of the Rome Statute, on 1 July 2002.” The government also pledged cooperation with his investigations. The Prosecutor decided to focus his efforts initially on the Ituri region, as that is where the most serious violations since July 2002 have been perpetrated.

Thomas Lubanga Dyilo, a former militia leader in the eastern Ituri region, was the first detainee of the ICC. He was brought to The Hague in March 2006, after being arrested earlier by the Congolese authorities. As President of the Union des Patriotes Congolais (UPC) and the Commander-in-Chief of its military wing, Lubanga is charged with having conscripted child soldiers and using them in the bloody conflict in Ituri.

Some human rights groups have criticized the prosecution for not having charged Lubanga with responsibility for additional crimes, such as rape and murder. But ICC Prosecutor Luis Moreno-Ocampo has reiterated the gravity of the charges against Lubanga:

“The alleged crimes are extremely serious. Throughout the world, children are being trained to become machines of war. Turning children into killers jeopardises the future of mankind.”¹⁷

ICC prosecutors have also faced criticism in Ituri because only one ethnic group, Lubanga's Hema, was initially singled out to face international justice. However, on October 18, 2007, another militia leader belonging to the Lendu ethnic group, Germain Katanga, was transferred to the ICC from Kinshasa. Katanga is charged with war crimes and crimes against humanity in connection with a 2003 attack on a village in Ituri. ICC prosecutors are also conducting investigations in other parts of the DRC, which could result in further arrests.

¹⁷ ICC press release March 16, 2006 <http://www.icc-cpi.int/press/pressreleases/133.html>

Northern Uganda

In October 2005, the ICC issued its first arrest warrants for five leaders of the Lord's Resistance Army (LRA)—Joseph Kony, Vincent Otti, Raska Lukwiya, Okot Odhiambo and Dominic Ongwen—accusing them of crimes against humanity and war crimes in northern Uganda.

As of December 31, 2007, none of these men had been arrested. Lukwiya was shot dead in a gun battle between LRA guerrillas and Ugandan soldiers in August 2006. Unconfirmed reports suggest that Otti may have been killed by Kony in late 2007. As the ICC has no police force, it must rely on the Ugandan Army or UN forces operating in neighboring DRC to execute the warrants.

President Yoweri Museveni referred the situation in the north of the country to the ICC in December 2003, but it has continued to generate controversy for a number of political reasons. First, the referral concerned only the alleged crimes of the LRA. The Prosecutor has since clarified that the referral is not limited in this way and allows for investigation into allegations against government forces as well.

Northern community leaders also felt the timing was wrong, as the warrants came amid renewed efforts to engage LRA leaders in a peace process. Some traditional and religious leaders have criticized the ICC's role from the start. When Uganda's state-owned New Vision newspaper broke news of the ICC arrest warrants against the five LRA leaders in October 2005, the head of the Acholi Religious Leaders Peace Initiative, Archbishop John Baptist Odama, said to New Vision:

"The warrants of arrest are a big blow to the peace process on the ground. While we are waiting for the ICC to arrest these people, what do we do meanwhile? Do we keep talking or we keep quiet?"¹⁸

In late 2004—a year after referring the case to the ICC—President Museveni announced that if LRA leaders would surrender, he would withdraw the ICC referral so that the two parties could instead engage in internal reconciliation mechanisms. However, there is no apparent mechanism in the Rome Statute allowing for a referral to be withdrawn. The same is true for arrest warrants, which also cannot just be withdrawn.

The debate regarding the role of the arrest warrants continues to rage, with the LRA demanding their withdrawal and a new peace process under way in Juba, South Sudan. The ICC's Prosecutor has since stated that no country, including Uganda, has asked for the withdrawal of the arrest warrants.

¹⁸ New Vision, October 8, 2005
<http://newvision.co.ug/D/8/12/459822/Acholi%20religious%20leaders>

He has also stressed the role that the warrants played in bringing the LRA to the negotiating table in South Sudan. The Prosecutor can always choose to proceed on his own authority. He can also decide after conducting an investigation that “in the interests of justice” he does not want to bring a case.¹⁹ However, for the time being the arrest warrants remain in place.

¹⁹ Article 53, Rome Statute of the International Criminal Court
http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_English.pdf

Darfur, Sudan

The case of Darfur came to the Court through a Security Council referral in March 2005. This was the first time for the Security Council to refer a case to the ICC. The Court would otherwise have no jurisdiction over Sudan, which has not ratified the Rome Statute. The US chose not to exercise its power as a permanent member of the Security Council to veto the referral, even though it has opposed the ICC in the past.

The Prosecutor opened an investigation into the conflict in Darfur on June 6, 2005. The Security Council referral came after a UN inquiry on Darfur found that there had been war crimes and crimes against humanity by both sides of the conflict, but primarily by government forces and pro-government militias.

In April 2007, the ICC issued arrest warrants against former Sudanese interior minister Ahmad Muhammad Harun and Janjaweed militia commander Ali Muhammad Ali Abd al-Rahman, also known as Ali Kushayb, for alleged crimes in the western region of Darfur. ICC prosecutors allege that Harun— Minister of State for Humanitarian Affairs and a close associate of President Omar al-Bashir—and Kushayb committed 51 alleged crimes against humanity and war crimes, including murder, torture, rape, and other forms of sexual violence.

Sudanese President al-Bashir refuses to accept the ICC's jurisdiction over any crimes committed in Darfur and is adamant that his country is willing and able to investigate and prosecute its own suspects to an internationally acceptable standard. As a result the Sudanese government refuses to cooperate with the ICC, an issue that the Prosecutor has raised several times now with the Security Council. Chief Prosecutor Moreno-Ocampo, speaking to the press in February 2007, challenged the Sudanese government's line:

“Our case is about Ahmad Harun and Ali Kushayb joining each other to attack the civilian population in Darfur. There is no such investigation in the Sudan. On this basis, the Prosecution has concluded that the case is admissible. To be clear, the admissibility assessment is not a judgment on the Sudanese justice system as a whole. We are just assessing if the Sudanese authorities are carrying out the same case.”²⁰

²⁰ ICC press release February 27, 2007
http://www.icc-cpi.int/pressrelease_details?id=228&l=en.html

Central African Republic (CAR)

In May 2007, the ICC announced that it was launching an investigation into the violence that followed a coup attempt by former army Chief François Bozizé in October 2002.

The then-president of the Central African Republic (CAR), Ange-Félix Patassé, brought in allies from the DRC, Chad, and Libya to fight the rebels.

ICC prosecutors say the worst allegations of killing, looting, and rape date from October and November 2002 and also from February and March the following year, when Bozizé's forces eventually ousted Patassé. Bozizé remains president of the CAR.

Prosecutors say one of the distinctive features of the allegations they have come across in the CAR is the high reported number of victims of rape. At least 600 rape victims were identified over a period of five months, though the actual number may far exceed this.

On May 22, 2007, ICC Prosecutor Moreno-Ocampo announced the decision to investigate, stating:

"The allegations of sexual crimes are detailed and substantiated. The information we have now suggests that the rape of civilians was committed in numbers that cannot be ignored under international law."²¹

The government of the CAR had referred the situation to the ICC in December 2004, after judges had said that the local judicial system would not be able to cope with crimes of this magnitude.

Commanders from outside the CAR, including Jean-Pierre Bemba from the DRC and Abdoulaye Miskine from Chad, are believed to have played a significant role in the 2002-2003 conflict.

²¹ ICC press release May 22, 2007
http://www.icc-cpi.int/pressrelease_details?id=248&l=en.html

JOURNALISTS' CHECKLISTS

Key stages of criminal trials before international courts

Initial Appearance: This is when the suspect first appears in court. At the *ad hoc* tribunals, a court official reads the charges as laid out in the indictment, and the accused is asked to plead guilty or not guilty to each charge. At the ICC, the Court confirms that the accused knows the charges against him or her, and sets a date for a Confirmation of Charges Hearing, at which the charges in the arrest warrant may be confirmed or modified.

Opening Statements: After the prosecution and defence have prepared their cases, and all the legal and procedural issues have been resolved, a case will finally come to trial. The preparation process can take some time. The prosecutor opens the trial by outlining the case against the accused, explaining what evidence and witnesses s/he plans to bring, and highlighting the individual responsibility of the accused. The defence can choose to reply at that stage or wait until the prosecution has presented its case. The defence may, for example, argue that the accused was not responsible, or deny that the events charged in the indictment constituted a crime. In some cases, it might also challenge the legitimacy of the court itself. Prosecution and defence opening statements can contain a lot of useful information about the strategies of the parties and the evidence they plan to bring.

Witnesses and Cross-examination: The main way that lawyers from each side try to prove their case is by presenting evidence, either through witnesses, documents, forensic evidence or videos. Sometimes witnesses appear in person to give their testimony, or they may submit a written statement, or sometimes both. There are different types of witnesses:

Expert witnesses provide the court with insight into a specific issue or background to a conflict, and usually were not personally involved or affected by the crimes committed by the defendants on trial.

Protected witnesses: Witnesses who provide the court with accounts detailing their personal involvement are often worried about possible retaliation and do not want their identities known. Courts can offer a range of measures to help protect them, including giving them a pseudonym, concealing their face, disguising their voice, or allowing them to testify behind closed doors.

Protective measures instituted by the court have to be respected. Journalists have been charged with contempt for revealing the identities of protected witnesses.

In most Tribunals to date, the prosecution begins the case by presenting its evidence and its witnesses. A prosecutor will lead each witness in his/her testimony by asking questions. The defence will then be given the opportunity to challenge the witness by asking their own questions. When the prosecution closes its case, the defence mounts its case, and the roles are reversed. The lawyers will have met their own witnesses to talk through the questions and prepare them for their testimony in advance of the court proceedings. They will also have tried to anticipate the questions the other side will ask.

An “**examination**” is when one side questions its own witnesses. A “**cross-examination**” is when it questions the other side’s witnesses. Both processes help the judges to decide whether a witness is reliable or not.

Closing Arguments: Once all the evidence has been presented and the prosecution and the defence have made their cases, the two sides will again tell the judges why the defendant is guilty or innocent of the charges. Each lawyer will sum up the most telling points they have made and will try to destroy their opponent’s case.

Judgment: The judges normally announce in advance when they will deliver a judgment, which can take many months to prepare. A judgment has three main elements:

- analysis of the case, including the judges’ reasons for their conclusion;
- the verdict on whether the person is guilty or not guilty of all or any of the counts against them;
- if found guilty, what sentence the convicted person should serve.

Verdicts and sentences are not always “handed down” (delivered) at the same time.

Appeal: Once sentenced, the convicted person has the right to appeal to a higher court. This is the Appeals Chamber, which is made up of different judges from the ones who heard the original case. The prosecution can also appeal against a verdict or a sentence. The appeals judges will hear any arguments and decide whether to confirm or change a verdict or a sentence. A judgement will only be final after the appeal.

Golden Rules of Court Reporting

The three golden rules of court reporting are **Accuracy, Balance, and Clarity**. They are essential to good coverage of any court proceedings, especially international war crimes trials.

Accuracy: Both the prosecution and defence have a right to expect that their arguments be accurately reported. The best way to do this is to take good notes of the arguments made by both sides during the hearings. The most efficient way to do that is to use shorthand, or some form of speedwriting. Many courts do not allow you to tape the proceedings. If you think you have missed something important, or don't understand it, use your contacts to check it to the best of your ability.

Balance: This can be problematic for reporters. Court reporting is unusual in that newsworthiness is not the only criterion. There is an obligation to present each side of the case. This means that you may have to include passages that are not quite as interesting as others, but which help clarify the case being made by each of the parties. If a case lasts for a long time—in international courts, it often takes months or even years—you will not be able to write a “balanced” report every day, because days or weeks may be taken up by the presentation of the case of only one of the parties or one of the issues in the case. In those circumstances, you must aim for an overall balance in your reports of the case.

In addition, you may not feel very sympathetic toward someone accused of genocide, crimes against humanity, or war crimes. But as a journalist, you are not the judge, and you must never forget that every accused has the right to be presumed innocent until proven guilty.

Clarity: This requires you to learn about court proceedings and the language of the law and translate them into terms that your audience can understand. That sounds very challenging, but most legal terms have an accepted meaning that you will become familiar with as you cover the court and read its documents.²²

²² The Guardian Foundation, 2005 (iLearn module, Court Reporting for Print Journalists) and BBC World Service Trust, 2007. London, United Kingdom.

Be Prepared: International Court Reporter's Checklist

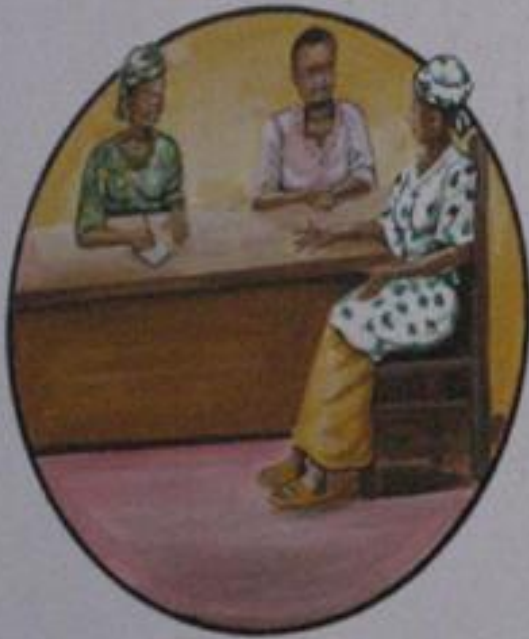
- If it is your first time covering a particular court, try to visit the courtroom in advance, and find out where the judges, prosecution, and defence—including the accused—will sit.
- Get the indictment or the arrest warrant of the accused and read it, summarizing the charges. Indictments or warrants in international criminal cases can usually be found on the Internet. Otherwise, ask for a copy from the court press office or lawyers involved in the case.
- Find out the name of the judge(s), especially the presiding judge.
- Find out the name of prosecutor(s) and defence lawyer(s), get their contact information, and talk to them in advance, if possible.
- Talk to other reporters who have covered the case, to find out what to expect.
- Research the case—make notes on background and be prepared to summarize the court proceedings so far.
- Research the particular court—make brief notes on its track record (e.g. when and why established, budget, number of cases tried). All of the international courts have an official website, but you should also look at NGO and media reports if you have time.

TRUTH COMMISSIONS



Promoting the Truth and Reconciliation Commission (TRC) Monrovia, Liberia. May 2007. Photo: © Ahmed Jallanzo

THE TRC HELPS YOU



**REPORT THE MATTER TO THE TRC
AND TELL THE TRUTH**

**THE
PERSON**

TRUTH COMMISSIONS

“I think the idea of having the truth commission [...] is not only for victims to come and tell their story and seek answers but also for perpetrators to be reintegrated into society so that they don't feel they have to go back into the bush and pick up their guns and kill all over again, that's an extremely important factor in trying to help a country through a transition.”²³

Dr. Alex Boraine, former deputy chairman of South Africa's Truth and Reconciliation Commission, and current chairman of the ICTJ Board of Directors

What is a Truth Commission?

A truth commission is:

“...an official, temporary body set up to investigate a period of past human rights violations or violations of human rights law. After taking statements from victims, witnesses, and others, a truth commission produces a final report that is usually made public and serves as an official acknowledgement of what was often before either widely denied or little understood.”²⁴

Priscilla B. Hayner, ICTJ truth commission expert, and author of *Unspeakable Truths*, a survey and analysis of more than 20 past truth commissions.

²³ Dr. Alex Boraine, PBS online, “Sierra Leone: Truth and Reconciliation,” January 10, 2003 <http://www.pbs.org/wnet/religionandethics/week619/cover.html>

²⁴ Priscilla B. Hayner, “Truth Commissions,” *The Encyclopaedia of Genocide and Crimes Against Humanity*, Macmillan Reference USA, 2004, vol. 3, pp. 1045-1047 <http://www.ictj.org/static/TJApproaches/Truthseeking/macmillan.TC.eng.pdf>

What are the Goals of a Truth Commission?

A truth commission can have a number of objectives:

- to discover or more publicly reveal the extent of past abuses by looking into the causes as well as the consequences of what took place (including identifying patterns of wrongdoing and broader institutional responsibility that cannot always be done through the courts);
- to provide victims and survivors with a supportive context in which to recount their story. Some victims find the process of telling their story to an official and credible body an important part of the healing process, although many still find it painful to remember and describe such traumatic memories in great detail.
- to learn from the past in order to put forward recommended reforms that will help prevent such abuses in the future.²⁵

How do Truth Commissions Fit in with Other Transitional Justice Mechanisms?

“Truth commissions are...part of the broader field of transitional justice, and are best instituted when done in a manner that complements other initiatives to obtain accountability. While truth commissions themselves do not have the power to put someone in jail for their past deeds, they may still make publicly known that certain named individuals were responsible for past crimes, which can have other subsequent effects. Indeed, the late twentieth century has shown that the relationship between truth commissions and other forms of accountability, especially that of prosecution and vetting, can be quite positive. Often there is a clear interrelationship between truth commissions and other measures that address victims, as well as broader societal needs, such as reparations programs and institutional reform.”

—Excerpted from “Truth Commissions,” *The Encyclopaedia of Genocide and Crimes Against Humanity* (Macmillan Reference USA, 2004), vol. 3, pp. 1045-1047

²⁵ “Truth Commissions,” *The Encyclopedia of Genocide and Crimes Against Humanity* (Macmillan Reference USA, 2004), vol. 3, pp. 1045-1047

Although a truth commission is not a court, it may have some quasi-judicial powers, such as the power to **subpoena** witnesses (compel people to appear before it) and the power of **search and seizure** (allowing its staff to enter into premises without prior notice to obtain documents and other information from prisons and government offices). For example, depending on the powers the commission is given, if a witness refuses to appear, the commission may find him/her in contempt. A truth commission may also have the power to grant amnesties to perpetrators who confess their crimes and/ or to recommend prosecutions. This obviously raises questions under international law. It usually publishes a final report, which may make recommendations for the future, as well as establish a record of the past. Recommendations might include reparations for victims and institutional reforms (e.g. Sierra Leone).

Truth commissions primarily aim to acknowledge and uncover details about past crimes but public hearings can also deliver a form of restorative justice. Author and academic Eric Brahm writes:

"The process of coming to terms with the past can have great psychological benefit for those seeking trauma healing. By providing official acknowledgement of past crimes, the process helps restore dignity to victims. Sometimes describing the terrible details can bring peace. A truth commission offers victims a chance to finally tell what happened to them."²⁶

The process of truth-telling can be very painful, emotional, and sensitive. Liberian newspaper editor Philip Wesseh gave his view on his country's TRC, which started its hearings in January 2008:

"People should be willing to swallow bitter pills. The things that were done in the past will come to light, we should accept that. That's the only way we can move forward. If you don't want to hear about the bitter past, then you can't build a sustainable future. It's got to be that way, people have to confess. [...] Who carried out the massacres? Let us know. We're not going to bring back the dead bodies, no, they will not come back to life. But through Liberia, other countries can learn that in a conflict there's no need to go and kill innocent people."²⁷

²⁶ Brahm E., "Truth Commissions", Beyond Intractability.org, http://www.beyondintractability.org/essay/truth_commissions/

²⁷ Philip Wesseh, interview with BBC World Service Trust, Monrovia, May 12 2007

Truth Commissions: What to Expect

A truth commission summons witnesses and holds hearings on the basis of statements that it gathers during an initial stage. Both victims and perpetrators of human rights abuses are encouraged to come forward and tell their stories.

Brahm suggests that important features include:

- A focus on the past;
- Investigation of a set pattern of abuse over a set period of time, rather than a specific event;
- A truth commission is a temporary body, and completes its work by producing a report;
- It is usually sanctioned, authorised, or empowered by the state/government. In principle, this allows the commission to have greater access to information, greater security, and increased assurance that its findings will be taken under serious consideration.²⁸

There are, however, also “unofficial” truth commissions that are not sanctioned by the government, but instead are established by NGOs and other affected communities. One example is the Greensboro Truth and Reconciliation Commission, which was set up to investigate killings that took place in 1979 in Greensboro, North Carolina, in the US.

Truth commissions don’t issue guilty or innocent verdicts, but they can and do investigate cases and can reject testimony as untruthful or not meeting the requirements for full disclosure. They can also name perpetrators. Commissions will cross-examine perpetrators and witnesses. Hearings are normally open to the press and public, although some may also be held behind closed doors, such as in the cases of children and rape victims. A commission will likely hold individual case hearings, as well as thematic hearings, which focus on particular kinds of issues, such as disappearances, torture and sexual violence. Hearings may also focus on the roles that business and/or the media may have played in relation to past human rights abuses.

²⁸ Brahm E., op.cit

Truth commissions are not a new phenomenon; in fact, the first were established in the 1970's. The first well-known truth commission was the National Commission on the Disappeared established in Argentina in 1983, which looked into thousands of disappearances that took place under the former military regime. In Uganda, truth commissions were established in 1974 and again in 1986. In the 1990s, there was a significant increase in global interest in truth-seeking in countries emerging from repressive rule or armed conflict. South Africa's Truth and Reconciliation Commission, established in 1995 and chaired by Archbishop Desmond Tutu, is one of the most well-known examples. This increased interest has continued into this decade. Author and academic Eric Brahm writes:

"Particularly since the early 1990s, the international human rights community has advocated truth commissions as an important part of the healing process, and they have been suggested as part of the peace process of virtually every international or communal conflict that has come to an end since."²⁹

By 2004, there had been more than 30 truth commissions that had existed in all regions of the world, including—in recent years—in Ghana, Peru, Morocco, Sierra Leone, and Timor-Leste (East Timor).

The United States Institute of Peace provides a historical list of truth commissions at the following Web site: <http://www.usip.org/library/truth.html>

²⁹ Brahm E., op.cit.

Examples of Truth Commissions in Africa

South Africa

“In my book, its greatest gift was recording the history of the apartheid era. If we wouldn’t have had a TRC, I believe we would have had at least two histories of that period.”³⁰

South African Judge Richard Goldstone, first Prosecutor of the ICTY and ICTR, on his country’s Truth and Reconciliation Commission.

South Africa’s Truth and Reconciliation Commission (TRC) was a product of negotiations between the predominantly white, former ruling National Party and the African National Congress that ended four decades of apartheid in 1994, when Nelson Mandela was elected president. The apartheid era was marked by political violence and human rights violations, including massacres, killings, torture, lengthy imprisonment of activists, and severe economic and social discrimination against black South Africans.

The TRC was established in 1995 by the Promotion of National Unity and Reconciliation Act. It was tasked with establishing “as complete a picture as possible” of gross violations of human rights committed by all sides between 1960 and 1994, and had the power to grant amnesties to perpetrators of human rights abuses who were willing to confess and fully decry their crimes, providing those individuals could demonstrate that the crimes were committed for political rather than personal motivation. The Act also stated that the TRC should compile a report of its findings and include recommendations to prevent future violations of human rights. The “amnesty for truth” offer was the most controversial aspect of the TRC’s mandate and impunity has been an ongoing concern in South Africa, given the few prosecutions of persons implicated in human rights crimes in the last decade.

The Commission was chaired by Archbishop Desmond Tutu and co-chaired by ICTJ Chairman Alex Boraine. Hearings began in April 1996. Testimony was taken from more than 23,000 victims and witnesses, of whom more than 2,000 appeared in public hearings.

In October 1998, the Commission published and presented a five-volume report, which included recommendations on reparations to victims. Its final report was published in 2003 and at the end of that year, the government made modest “one-off” reparations payments to victims identified by the TRC.

³⁰ Judge Richard Goldstone, Interview with BBC World Service Trust, London, May 3, 2007

Sierra Leone: A TRC and a Special Court

Sierra Leone's TRC was part of the 1999 Lomé peace agreement between the government and the rebel Revolutionary United Front (RUF) that ended nearly a decade of civil war. Although passed into law in February 2000, the TRC became operational only in late 2002, owing to a further outbreak of violence.

The Commission's mandate was to "create an impartial historical record of violations and abuses of human rights and international humanitarian law related to the armed conflict in Sierra Leone from the beginning of the Conflict in 1991 to the signing of the Lomé Peace Agreement; to address impunity; to respond to the needs of the victims; to promote healing and reconciliation; and to prevent a repetition of the violations and abuses suffered."³¹

Sierra Leone's conflict was marked by appalling abuses, especially against civilians:

"As the conflict exploded into appalling brutality against civilians, the world recoiled in horror at the tactics used by the RUF, its allies and opponents. Reports emerged of indiscriminate amputations, abductions of women and children, recruitment of children as combatants, rape, sexual slavery, cannibalism, gratuitous killings and wanton destruction of villages and towns. This was a war measured not so much in battles and confrontations between combatants as in attacks upon civilian populations. Its awesome climax was the destruction of much of Freetown in January 1999."³²

The TRC was composed of seven members, four of whom were Sierra Leonean and the rest internationals.

The Commission gathered 7,706 statements, held countrywide public hearings, and submitted an extensive final report to the Sierra Leone government in October 2004, although the report was not made publicly available until mid-2005. The report's recommendations included reparations to victims; reform of the judiciary and security services; and measures to promote human rights, good governance, and freedom of expression.

³¹ The Truth and Reconciliation Act 2000, Part III, 1

³² Report of the Sierra Leone Truth Commission, Volume 2, Chapter 1, 2.

An interesting aspect of the Sierra Leone experience is that the Commission worked alongside a UN-backed court, **the Special Court for Sierra Leone (SCSL)**, which was established by an agreement between the UN and the government of Sierra Leone in January 2002. The Lomé peace accords included an unconditional general amnesty for all parties to the war, which was strongly criticized by local and international human rights groups and others. However, conflict broke out again, bringing a subsequent revision of the amnesty provisions, although they remained part of Sierra Leonean law.

In May 2000, some 500 UN peacekeepers were captured by RUF forces, leading to British military intervention. Subsequently, the government asked the UN to help it establish a Special Court to prosecute human rights abuses. The first officials of the Special Court arrived in Freetown in July 2002, just as the TRC was being formed. The two institutions agreed to operate independently and not to share information on investigations or cases, so that each would receive information confidentially. But Eduardo Gonzalez, a truth commission specialist at the ICTJ, says this caused some problems:

“In Sierra Leone, the biggest complication for the coordination of both instances is that they had incompatible mandates, derived from different historical moments. The TRC was established after the Lomé Accords of 1999 as a neutral forum for victims and perpetrators alike, while the Special Court was established with a mandate to try the major criminals, including Lomé signatories who had failed to comply with their obligations and had attempted to re-initiate the conflict. In that case, an accommodation of sorts was found in the exclusive focus of the Court on major perpetrators, but conflict did emerge when the TRC tried to organize public hearings for people in the custody of the Court. The Court denied that access and asserted its primacy.”³³

³³ Eduardo Gonzalez, E-mail interview with BBC World Service Trust, May 17, 2007.

Liberia

“It [the TRC] is going to investigate the past, ensure that the truth comes out and then make recommendations as to how the country can be set back on a course of democracy, peace, freedom, unity and reconciliation. So in that respect, I think the truth commission has an enormous task and responsibility, and I think it’s a gift to the people of this country, for them to once and for all exorcise the ghosts of the past and move forward as a country.”³⁴

Nathaniel Kwabo, Executive Director, TRC Liberia

Liberia’s Truth and Reconciliation Commission (TRC) came out of the Comprehensive Peace Agreement (CPA) signed in Accra, Ghana, in August 2003. The CPA and the departure into exile of former president Charles Taylor, finally brought an end to 14 years of conflict. After a two-year transitional government, presidential elections in November 2005 resulted in victory for economist and former World Bank official, Ellen Johnson-Sirleaf, who inaugurated the TRC at a public ceremony in Monrovia in February 2006. The Commission has faced a number of institutional, financial and logistical problems, but finally started its public hearings on January 8, 2008.

The TRC was passed into law in June 2005, and tasked with investigating gross human rights violations and violations of international humanitarian law, as well as other abuses, including economic crimes, committed during the period from January 1979 to October 14, 2003. The Commission also has the power to investigate abuses prior to 1979 upon applications from individuals or groups.

The TRC’s powers include “recommending amnesty under terms and conditions established by the TRC upon application of individual persons making full disclosures for their wrongs and thereby expressing remorse for their acts and/or omissions [...] provided that amnesty or exoneration shall not apply to violations of international humanitarian law and crimes against humanity in conformity with international laws and standards.”³⁵

³⁴ Nathaniel Kwabo, Interview with BBC World Service Trust, Monrovia, May 14 2007.

³⁵ An Act to Establish The Truth and Reconciliation Commission (TRC) of Liberia, Article VII, g.

The Commission is composed of nine commissioners and assisted by a three-person International Technical Advisory Committee. The law states that the Commission should be independent and that its commissioners should be persons “of credibility, high integrity, and honour.”

Under the law, the TRC has a two-year lifespan, at the end of which it is required to produce a final report. Its recommendations to the government are to include “reparations and rehabilitation of victims and perpetrators in need of specialized psycho-social and other rehabilitative services; legal, institutional and other reforms; the need for continuing investigations and inquiries into particular matters [...]; and the need to hold prosecutions in particular cases as the TRC deems appropriate.”³⁶

Other Truth Commissions

There have also been examples of problematic truth commissions. Both Indonesia and the Democratic Republic of the Congo established truth commissions which have been strongly criticized by national and international actors, for reasons including a lack of diversity and legitimacy in membership or for a process of establishment that excluded the views of civil society.

³⁶ An Act to Establish The Truth and Reconciliation Commission (TRC) of Liberia, Article VII, j.

Truth Commissions and Journalism Skills

Guidelines for Good Reporting on Truth Commissions

- Make sure you are familiar with the mandate and powers of the commission. This information may be available on the Internet. You should also contact the commission's press and information office, get commissioner's contacts and talk to them if possible.
- Be familiar with the rules of procedure. Find out whether statements will be made public before hearings, or what information you will have access to for a closed hearing, for example.
- Although truth commissions are not courts of law, the same guidelines as for court reporting will ensure good journalism.
- Do not add your own opinion to stories.
- You can get reaction to testimony. Similarly, you can give context to testimony by interviewing victims or referring back to historical records.
- Build relationships with perpetrators, survivors, and victims' families, and be mindful of their rights. Very often some of your most interesting stories come from what happens outside, as well as inside, the hearings.
- Maintain balance and fairness to victims when covering perpetrators, who may still enjoy the overwhelming attention of the public.

Ethical Dilemmas

Journalists covering truth commissions may themselves have been victims/survivors of human rights abuses, or they may have had a long history covering the case in question. As reporters, they might have information on victims who have died, which those victims' families might not have. South African journalist Jacques Pauw found himself in such an ethical dilemma during a truth commission hearing:

“At the first Truth Commission hearings in East London, the Pebco Three widows were some of the first people who testified. It was incredibly dramatic evidence. The widows were pleading for answers about what happened to their husbands. We already had the answer

because a few months earlier I did an interview with (self-confessed killer and hit squad member) Joe Mamasela where he gave a very graphic description of how they tortured and killed the Pebco Three.

I also had an agreement with Mamasela that I wouldn't use the interview [...]. We basically broke our agreement and broadcast the interview. There were some legal ramifications and we had to draw up a new agreement with Mamasela. But we still talk to one another.

We had very good co-operation from the Truth Commission, however. We went to them before we broadcast the interview, and asked them to go and assist the widows with what they were going to hear the next day. A whole Truth Commission team was sent to help them when we broadcast.”³⁷

Reporting on Perpetrators

One of the difficulties for reporters in maintaining fairness—especially to victims who may be dead and therefore only represented by their family—is that very often perpetrators of the most heinous crimes will get overwhelming media and public attention. The challenge is to tell the story of these abuses, but not to let the primacy of the victim get lost; that is, not to let the reporting be just about the power of the perpetrator. South African journalist Fiona Lloyd writes:

“We should explore our fascination with perpetrators. The camera certainly finds Goliath a lot more sexy than David. Dirk Coetzee (a former apartheid hit-squad leader) is actually a gift to any TV programme maker. He is slick. He is a story-teller. You get into a situation where Dirk goes off to meet the relatives of Griffiths Mxenge (one of his murder victims). We travel with him in the car, and everything is seen through his thoughts and from his perspective. It has to do with power, to do with who we allow to tell the story. It is not enough as journalists to say we will show Coetzee, then we will show the victims, and that will be a balanced programme. Sometimes, two sides don't make a balanced programme.”³⁸

³⁷ Rhodes Journalism Review: The Media and the TRC, “A complex of ethics”, p.8, May 1997

³⁸ Rhodes Journalism Review: The Media and the TRC, “Sexy Eyes tell a sick story”, p. 8, May 1997

OTHER FORMS OF TRANSITIONAL JUSTICE



A genocide prisoner faces a Gacaca court in Rwimbogo, 20km east of Kigali, Rwanda, August 2005. The Gacaca courts are an indigenous tribunal of justice inspired by the country's tradition and established in 2001, in the wake of the 1994 Rwanda genocide, when approximately 800,000 mostly Tutsi's were slaughtered. Photo © IRIN



Skulls of genocide victims lying at the Murambi Genocide Memorial site in Gikongoro Province in south-eastern Rwanda Photo © IRIN

OTHER FORMS OF TRANSITIONAL JUSTICE

Traditional (Local) Justice Mechanisms

In some countries, traditional forms of justice and reconciliation have also been used to deal with serious human rights abuses. These can sometimes operate alongside trials and/ or truth commissions. For example, the truth commission in Sierra Leone applied several traditional methods of reconciliation, according to Sylvanus Torto, one of the commissioners. These included working with traditional elders and asking them to perform ceremonies, such as pouring libations to the dead to appease the spirit of the ancestors, or ceremonies to reconcile victims and perpetrators.³⁹

In Liberia, TRC Executive Director Nathaniel Kwabo says the Commission plans to take traditional methods into consideration:

"I understand that some of those who committed crimes have gone back to their communities and have asked for forgiveness, some have gone through the traditional cleansing process where they tell their stories, they ask for forgiveness and they were forgiven. Reconciling that traditional justice system with the process here at the truth commission is something I've asked the commission to look at very closely..."⁴⁰

Traditional Rituals in Uganda

When the ICC issued arrest warrants in 2005 for several leaders of the LRA for crimes against humanity, a peace process was underway in northern Uganda and local leaders from the Acholi ethnic group told the ICC that some traditional forms of justice could be more effective in achieving both peace and justice than the Court.

The Acholi leaders said that former members of the LRA could be held accountable in this way for the crimes they had committed.

Some 15,000 LRA rebels who agreed to disarm, abandon warfare, and renounce their crimes have been pardoned and reintegrated into their communities throughout Uganda under the Amnesty Act of 2000.⁴¹ (See *Amnesties*, p.73). An important consideration in northern Uganda is that some of those who took part in the LRA's atrocities were children kidnapped from villages and forced to act as porters, sex-workers, or soldiers.

³⁹ Sylvanus Torto. Interview with BBC World Service Trust, Freetown, May 18 2007

⁴⁰ Nathaniel Kwabo. Interview with BBC World Service Trust, Monrovia, May 14 2007

⁴¹ Uprooted and forgotten: Impunity and Human Rights abuses in Northern Uganda, Human Rights Watch, September 2005 http://hrw.org/reports/2005/uganda0905/6.htm#_Toc114146493

To some, punishing these children made little sense. A traditional ceremony called “mato oput”, a form of reconciliation and forgiveness between two parties, was proposed by the Acholi leaders—with some support from religious leaders—as an alternative to prosecution.⁴²

In order to go back to their communities, the former rebel soldiers must accept responsibility, ask for forgiveness, and pay compensation. The ceremony derives its name from a brew made from the bitter root of the oput tree, which all parties drink. The former rebels must pay reparations, sometimes in the form of a goat or a cow, to those they have wronged.

In the context of peace negotiations with the LRA, the Ugandan authorities have sometimes talked about an alternative to ICC prosecutions that would involve some form of traditional justice. A defence ministry spokesman has said that the government’s purpose in supporting the traditional justice mechanism is that it would “achieve justice on the culprits”, but at the same time would promote reconciliation between the victims and the perpetrators.⁴³

However, others have voiced concerns that “mato oput” may not be the right means to cope with atrocities as grave as war crimes and crimes against humanity since it has not traditionally been used for these crimes but for ordinary murder. Interviews with victims of LRA violence living in camps in northern Uganda have shown very varied points of view, some advocating amnesty and others prosecution.⁴⁴ International human rights groups have argued that any alternative process must have detailed benchmarks to make sure it would be “fair and credible ... with appropriate penalties.”⁴⁵

In any case, an agreement signed between the Government of Uganda and the LRA on 29 June 2007 at Juba indicates that while traditional justice measures will play a “central role” in an accountability solution in the North, other forms of accountability such as trials may also be necessary.

⁴² Tim Allen, War and Justice in northern Uganda: an assessment of the ICC’s intervention, February 2005 <http://www.crisisstates.com/download/others/AllenICCReport.pdf>

⁴³ Interview with Major Felix Kulayigye, spokesman of the Ugandan ministry of defence by Peter Clotey (Voice of America), 11 June 2007 <http://www.voanews.com/english/Africa/2007-06-11-voa2.cfm>

⁴⁴ Tim Allen, op.cit.

⁴⁵ Human Rights Watch, Uganda: Any Alternative to the ICC Should Meet Key Benchmarks, May 30, 2007 <http://hrw.org/english/docs/2007/05/30/uganda16019.htm>

Traditional Justice in the Aftermath of Genocide

In addition to traditional rituals, some societies also have community-based court hearings inspired by traditional justice. One of the most interesting examples is Rwanda, which has adapted a form of traditional or customary law, to create courts to help deal with the aftermath of the 1994 genocide.

Tens of thousands of people have been in jail since 1994, waiting for their cases to be heard in regular national courts. But because of a shortage of judges, lawyers, and funds, it was estimated that the process of trying all of them in the national courts could take a hundred years.⁴⁶

To tackle this crisis, the Rwandan authorities set up the gacaca courts. The name gacaca comes from the traditional Kinyarwanda (Rwandan language) word for community-based justice and literally means “on the grass”. The hearings are held in the open air. Respected members of the local community are elected to act as judges and given basic training in legal matters. It is the duty of every citizen to attend the gacaca. In 2005, the courts were officially launched. Based in villages, they meet once a week to discuss what happened during the 1994 genocide and to “try” those accused of genocide.

The gacaca are empowered by law to try alleged perpetrators of genocide, except for those placed in “Category One,” which includes alleged planners of genocide and rapists. Category One suspects are still tried under the regular national judicial system. But it is the gacaca courts that decide in which category to place suspects. There is an appeals process within the gacaca structure.

The main criticism of the gacaca courts is that they may not be fair. Critics have suggested that people attending them might be swayed by majority views or cowed into silence, or that they might use the system to settle old grievances. In 2005, groups of Hutus fled across the border into Burundi, claiming that they would be persecuted by gacaca.

Reparations

Reparation is a critical dimension of transitional justice, and the only one that is specifically focused on the recognition of victims' rights and the harms suffered. States can attempt to repair some of the harms victims suffered by providing reparations to those affected, including victims themselves, their family members, and even entire communities.

⁴⁶ Gacaca: a question of justice, Amnesty International, December 17, 2002
<http://web.amnesty.org/library/index/engafrr470072002>

Reparations and other transitional justice (TJ) mechanisms, including prosecutions, truth-telling, and institutional reform, can have a mutually reinforcing relationship. There is an emerging consensus in international law that all states have an obligation to provide some kind of reparation or remedy to victims of serious human rights violations.

In international legal terms, the concept of reparations refers to all measures that can be taken to redress harms suffered by victims and their families.

They can take various forms, such as:

- **Restitution** (restoring, in whatever degree possible, what has been lost);
- **Compensation** (for harm suffered and/or for lost opportunities);
- **Rehabilitation** (providing victims with social, medical, and psychological support as well as legal services) and guarantees of non-recurrence.

Reparations can be further subdivided into two types:

- **Material:** Material reparations might be the provision of money or financial incentives, but could also include the provision of free or preferential-rate services such as health, education, and housing.
- **Symbolic:** Symbolic reparations could be the issuance of an official apology, the creation of a dedicated public space (such as a museum, park or memorial) or the declaration of a national day of remembrance. (see Memorialisation, p.70)

Reparations can also be categorised according to whether they are granted on an individual or a collective basis. Truth commissions have often recommended that reparations be provided to victims. This is sometimes seen as an important counterbalance to amnesty provisions. In South Africa, the government made modest one-off reparations payments in 2003 to victims identified by the TRC.

However, governments, including South Africa's, have come under strong criticism from victims' and human rights groups for their reluctance to grant reparations. Amnesty International cites the case of Sierra Leone:

“Although the TRC’s report made detailed recommendations for the provision of reparations to those who had suffered throughout the conflict, to date these recommendations have not been implemented. The recommendations propose responding to the specific needs of victims, rather than providing financial compensation. It recommends measures in the areas of health, pensions, education, skills training and micro-credit, community reparations and ‘symbolic’ reparations. For certain categories of victims—including those whose limbs had been deliberately amputated, other war wounded, and survivors of rape and other forms of sexual violence—the TRC recommends that they be given free physical and, as appropriate, psychological care throughout their lives or for as long as necessary. As of today, although the TRC does not have the resources or the mandate to provide reparations, the TRC Act requires that the government implement the recommendations of the report in a timely manner as a matter of law.”⁴⁷

An innovative feature in the Rome Statute of the International Criminal Court is its provisions on victims' rights, including a fund for reparations (see p.33).

Institutional Reform

Institutional reform to prevent serious abuses from recurring is an important element of TJ. In addition to creating more ethical and efficient institutions, the goals of institutional reforms are to increase trust in public institutions, strengthen the rule of law, eliminate the structures or conditions that led to conflict or repression, and hold accountable those who might not have been tried in courts of law.

⁴⁷ Sierra Leone's victims should not be forgotten simply because they have not been heard
<http://web.amnesty.org/library/Index/ENGAFR510012007>

There are many examples of institutional reform, including:

- **Removing abusers from official positions**, using fair, transparent, and consistent criteria;
- **Creating new institutions**, such as a specific human rights monitoring arm within the government;
- **Providing education on human rights** to schools, the armed forces, the police, and other groups;
- **Introducing legal or constitutional changes**, such as reforming inheritance laws for women or reducing legal detention periods;
- **Developing incentives for former combatants** to demobilize, disarm, rehabilitate, and reintegrate into society; and
- **Creating accountability mechanisms** within the state security apparatus, such as reporting systems in the prison system that reduce the invisibility of torture and prolonged detention.

Vetting

The assessment of an individual's past conduct to determine their suitability for public employment is one of the key mechanisms of governance reform. However, it is also necessary to ensure that existing institutions remain functional throughout the reform process. Even where the police are notoriously corrupt, it is not possible to remove every officer and rebuild the service entirely.

The vetting process in Iraq—conducted by the US Coalition Provisional Authority—is an example of an ill-conceived vetting process that had seriously negative consequences.

Aside from being done unfairly and unsystematically, it removed anyone who had ever been a member of the Ba'ath Party (former ruling party of Saddam Hussein), regardless of what role or position they occupied and whether or not they had actually committed abuses. This resulted in massive numbers of highly-qualified professionals being removed from office and left the institutions they had worked for unable to function properly.

According to ICTJ, a number of sequential steps can help to ensure a fair and transparent vetting process. These include:

- conducting an assessment of agencies, units, and personnel
- defining the capacity of each institution to determine how far it falls short of acceptable standards of competence and integrity
- designing a process that takes into account how much reform is needed (are there a few “bad apples” in a largely satisfactory barrel; is the whole barrel rotten; or is it somewhere in between?)
- considering reappointment policies, i.e. reallocating people according to competence and ethical performance levels, rather than simply removing them.

Some examples include the United Nations Mission in Haiti which has—with the assistance of ICTJ—developed a census (assessment) of the Haitian national police. Similarly, Burundi is in the process of establishing and implementing a census of its national police. The DRC is also considering conducting a census of its police force. These are necessary first steps in the longer-term vetting process.

Reform of abusive institutions is necessarily a long-term process. It generally takes many years before new laws and institutions can prove themselves to be failures or successes. Other complementary reforms, in the state security apparatus or in the disarmament of former combatants and rebel groups, for example, can also help to prevent abuses from recurring.

Security Sector Reform (SSR) aims to promote effective, accountable, and sustainable security institutions that operate under the rule of law and respect for human rights. SSR measures focus on three areas: building the integrity of the security system; promoting its legitimacy; and empowering citizens, especially victims of abuses.

Integrity-building measures include: structural reforms that discourage abuses, such as vetting, building institutional accountability, and strengthening institutional independence; and reforms that increase the responsiveness of the security system, such as promoting community policing.

Legitimacy-building measures include: integrity-building measures mentioned above; verbal or symbolic measures such as memorials, apologies and insignia changes that reaffirm a commitment to ending abuse and endorsing democratic norms and values.

Empowerment measures include: public information campaigns; citizens' surveys identifying their security and justice needs; training of civil society organizations on monitoring the security system; and training the media on how the security sector should function in a democracy.

In Liberia, civil society established a working group on SSR that participates in the development of SSR strategies by the Governance Reform Commission.

Who Belongs to the “Security Sector”?

Core security actors

Armed forces; police; gendarmeries; paramilitary forces; presidential guards, intelligence and security services (both military and civilian); coast guards; border guards; customs authorities; reserve or local security units (civil defence forces, national guards, militias).

Security management and oversight bodies

The Executive; national security advisory bodies; legislature and legislative select committees; ministries of defence, internal affairs, foreign affairs; customary and traditional authorities; financial management bodies (finance ministries, budget offices, financial audit and planning units); and civil society organizations (civil review boards and public complaints commissions).

Justice and law enforcement institutions

Judiciary; justice ministries; prisons; criminal investigation and prosecution services; human rights commissions and ombudsmen; customary and traditional justice systems.

Non-statutory security forces

Liberation armies; guerrilla armies; private body-guard units; private security companies; political party militias.

Source: OECD/DAC

Disarmament, Demobilisation, and Reintegration (DDR)

The term DDR refers specifically to reforming the role of ex-combatants during times of transition from war to peace.

DDR can be extremely complicated in a post-conflict environment, when different fighting groups—including rebel forces and government-sponsored militias—are divided by animosities and face a real security dilemma if they abandon their weapons; when civil society structures have crumbled; and when the economy is stagnant, creating disincentives to giving up the power and authority that comes with being part of an armed group. DDR aims to support the transition from war to peace by ensuring a safe environment, reintegrating ex-combatants back into civilian life, and giving them the resources and skills they need to earn their livelihoods through peaceful means instead of war.

While DDR programs for ex-combatants are not new, ICTJ says they have never been designed or implemented with an explicit awareness of their relationship with TJ measures such as prosecutions, truth-telling efforts, reparations for victims, vetting or other forms of institutional reform. It is still not uncommon, for example, for the benefits of a DDR program to dwarf the benefits offered to victims as part of a reparations program, if one exists. This kind of perceived 'special treatment' for ex-combatants often creates resentment within the community. Similarly, without coordinating reintegration and vetting policies, ex-combatants can be vetted from the security forces and later reinserted into the very same, or transformed, forces. Such reintegration of human rights abusers reduces trust in public institutions.

Memorialisation

Although there is no single response to dealing with the past, victims and their associations often demand action on a number of TJ goals, including a demand for remembrance. On a basic level, remembering the past operates to honour those who died or were victimized. However, memorials can also contribute to other TJ goals including truth-seeking, prevention of future abuses, generating dialogue and discussion about the past, establishing an accurate historical record, listening to the voices of victims, and pursuing goals related to reparations for victims.

Memorials for past atrocities and human rights abuses are places of mourning, and in some cases healing, for victims and survivors. But the designers of these memorials also want to communicate to broader audiences; to educate people about the past; and to proclaim the promise of "Never Again". Memorialisation is not without controversy, however. Victims and human rights activists are often deeply offended at efforts by government—even a democratic one—to create the so-called "official story", a state-generated narrative about the past.

CROSSOVER THEMES IN TRANSITIONAL JUSTICE



A child peeps through the unfinished wall of a hut in one of the many IDP (Internally displaced person) camps in Northern Uganda. Photo © Sven Torfinn/IRIN



Sarafina was fitted with a prosthetic limb six years after her leg was blown off by a landmine. Photo © Sven Torfinn/IRIN

CROSSOVER THEMES IN TRANSITIONAL JUSTICE

Amnesties

An amnesty is a grant of immunity from prosecution or punishment, given by the state to a designated class of persons for a designated class of offences. Typically, amnesties are invoked as an exceptional measure to respond to an extraordinary event or period, and tend to be justified on the basis that they can help promote reconciliation.

When amnesties are implemented in good faith and are not “general amnesties” granting immunity to all perpetrators of all offences, they can play an important peace-making and stabilizing role. But when they are implemented for political reasons and are not carefully conditioned to serve national purposes of peace, stability, and the rule of law, they can be deemed unacceptable by international legal standards and lead to undesirable consequences.

Examples include:

Mozambique: The Mozambique parliament adopted a general amnesty for “crimes against the state” 10 days after the signing of the 1992 Peace Agreement, which brought an end to 16 years of armed conflict between the warring parties there. “Reconciliation” became the central focus of the transition to a new political order and there has been little call for accountability for past crimes.⁴⁸

Uganda: The Amnesty Act of 2000 offers amnesty for “any Ugandan who has at any time since the 26th day of January, 1986 engaged in or is engaging in war or armed rebellion against the government,”⁴⁹ providing they report to the authorities, renounce, and abandon involvement in the war or rebellion, and surrender their weapons.

Sierra Leone: The Lomé Peace Agreement of July 1999 provided a general amnesty for all acts committed during the armed conflict. In signing the agreement, the UN stated that it did not recognize amnesty for genocide, crimes against humanity, war crimes, and other serious violations of international law. The amnesty was reconsidered following the breakdown of the Lomé Agreement in mid-2000, but remained part of Sierra Leonean law.

⁴⁸ Carolyn Bull, “Amnesty”, Commission for Reception, Truth and Reconciliation in East Timor, November 2001

<http://www.easttimor-reconciliation.org/Amnesty-E.htm>

⁴⁹ The Amnesty Act, 2000, Part II, 3.(1), Uganda

In response to a request from the Sierra Leone government, the UN passed a resolution in August 2000 to establish a Special Court to try human rights abuses.⁵⁰

South Africa: The country's Truth and Reconciliation Commission, established in 1995, had the power to grant amnesty, on the basis of individual applications, to "persons who make full disclosure of all the relevant facts relating to acts associated with a political objective".⁵¹ This was in line with a clause in the interim constitution that allowed for such conditional amnesties, in order to advance "reconciliation and reconstruction". In a joint statement, Amnesty International and Human Rights Watch wrote:

*"While both organizations oppose in principle the granting of amnesty for gross human rights violations, the conditionality and specificity of the TRC's amnesty process allowed the commission to make factual discoveries and the open proceedings allowed the survivors of human rights abuses or their relatives to attend and oppose applications."*⁵²

But some survivors and their relatives were aggrieved at the concept of amnesty for perpetrators:

*"Relatives of some prominent anti-apartheid victims of police brutality challenged the amnesty provisions in the Constitutional Court. The court, while acknowledging that the provisions had an impact on fundamental rights, ruled that the clause [allowing for conditional amnesty] added to the end of the interim constitution effectively limited those rights and that victims would have to look to a broader state program of post-apartheid reparations to obtain compensation."*⁵³

ICTJ says amnesties are now generally considered to be undesirable, as they violate the right of victims to redress; subvert the rule of law by allowing perpetrators of human rights crimes to escape liability; and undermine deterrence by creating the impression that serious crimes may be committed with impunity. They may even exacerbate conflict since they may drive some victims to take the law into their own hands and embark on acts of private vengeance.

⁵⁰ Carolyn Bull, op.cit.

⁵¹ Promotion of National Unity and Reconciliation Act, 1995, Chapter 2, 3. (1) (b) http://ftp.fas.org/irp/world/rsa/act95_034.htm

⁵² "Truth and Justice: Unfinished Business in South Africa", February 2003 <http://web.amnesty.org/library/Index/ENGAFR530012003>

⁵³ Ibid.

In recent years, the human rights debate has tended to move away from granting amnesties as a means of political settlement, and toward an emphasis on greater accountability for past atrocities.

Richard Goldstone, a senior South African judge who was also the first Chief Prosecutor of the UN's tribunals for Rwanda and the former Yugoslavia, says that the amnesty provisions in the South African TRC "only just got away with it":

*"Since the TRC was established in South Africa, we got the International Criminal Court, and the democratic world has moved away considerably from amnesties."*⁵⁴

Women and Children

Women's experience of political violence is often neglected in transitional justice approaches, according to ICTJ. Far too often, truth commission mandates, judicial opinions, and policy proposals for reparations and reform have been written, interpreted, and implemented with little regard for the distinct and complex injuries women have suffered. Neglect of gendered patterns of abuse has affected both women and men in their access to justice by limiting the reach of reparations programs, entrenching impunity, distorting the historical record, and undermining the legitimacy of transitional justice initiatives.

There has been some notable progress, however, through strategies such as the introduction of thematic gender hearings in truth commissions, new jurisprudence on gendered international crimes such as sexual violence, and a greater focus on women victims in formulating reparation programs. As one example of this progress, the international tribunals for Rwanda and the former Yugoslavia have helped break new ground with regard to the treatment of sexual violence in international law:

*"The overwhelming evidence of the widespread use of rape as a policy tool in the former Yugoslavia, combined with the tragedy of the genocide in Rwanda, in which rape was also widely prevalent, has led to a legal re-conceptualization of sexual violence in internal and international conflicts. The ad hoc tribunals for the former Yugoslavia and Rwanda, have genuinely broken new ground as they have confronted cases dealing with the complexities of rape, torture and genocide."*⁵⁵

⁵⁴ Judge Richard Goldstone, interview with BBC World Service Trust, May 3, 2007

⁵⁵ Dr. Frances T. Pilch, "Rape as Genocide, The Legal response to Sexual Violence", 2002
<http://www.ciaonet.org/wps/pif01/pif01.pdf>

One judicial landmark was the ICTR's 1998 judgment against Jean-Paul Akayesu, former mayor of Taba in Rwanda, which found for the first time that rape could be considered an act of genocide:

"The court held that sexual violence was an 'integral' part of the process of destruction of the Tutsi ethnic group. 'The rape of Tutsi women was systematic and was perpetrated against all Tutsi women and solely against them', the Chamber concluded. Furthermore, these rapes were accompanied by a proven intent to kill their victims. At least 2,000 Tutsis were killed in Taba between 7 April and the end of June 1994, while Akayesu held office as bourgmestre."⁵⁶

Children

Children are among those most affected by armed conflict and are also at risk from sexual violence. ICTJ says that in addition to women, it is crucial that the children affected by armed conflict are given the opportunity to participate in post-conflict truth, reconciliation, and justice-seeking processes. Failure to address the experiences of child victims wastes the tremendous capacity and potential of young people to serve as catalysts for reconciliation and peace-building within their own communities, according to ICTJ. If young people are excluded from the reconciliation process, the result may be a continuing cycle of violence affecting future generations of young people.

The Special Court for Sierra Leone has broken new ground in prosecuting crimes committed against children. Its first verdict of June 20, 2007, found three former leaders of the former armed forces, AFRC, guilty of war crimes, crimes against humanity, and other serious violations of international humanitarian law, including the recruitment and use of child soldiers.

Human Rights Watch welcomed the ruling:

"The war crimes court for Sierra Leone has handed down the first convictions by a UN-backed tribunal for the crime of recruiting and using child soldiers. Human Rights Watch said that these convictions are a ground-breaking step toward ending impunity for commanders who exploit hundreds of thousands of children as soldiers in conflicts worldwide."⁵⁷

Thomas Lubanga, the International Criminal Court's first detainee, is also charged with using child soldiers in eastern DRC (see p.36).

⁵⁶ ICTR Press Release, September 2, 1998
<http://69.94.11.53/ENGLISH/PRESSREL/1998/138.htm>

⁵⁷ Human Rights Watch, "Sierra Leone: Landmark Convictions for Use of Child Soldiers", June 20, 2007
<http://www.hrw.org/english/docs/2007/06/20/sierra16214.htm>

Back Cover: Kitgum, Northern Uganda, March 2005. An old women from the Amida camp for internally displaced persons. Thousands have sought refuge here after having their homes destroyed and possessions taken by the Lord's Resistance Army (LRA). Countless camp residents have also had loved ones murdered or children abducted by the LRA. Photo © Thomas W. Morley.

