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## Human Rights Education: The Third Leg of Post-Conflict/ Transitional Justice

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## Human Rights Education: The Third Leg of Post-Conflict/Transitional Justice

### Abstract

Emerging out of the same foment of war and violence that led to the recognition of international human rights, post-conflict or transitional justice represents one of the most important political developments in efforts to advance human civilization to arise during the course of the twentieth century.

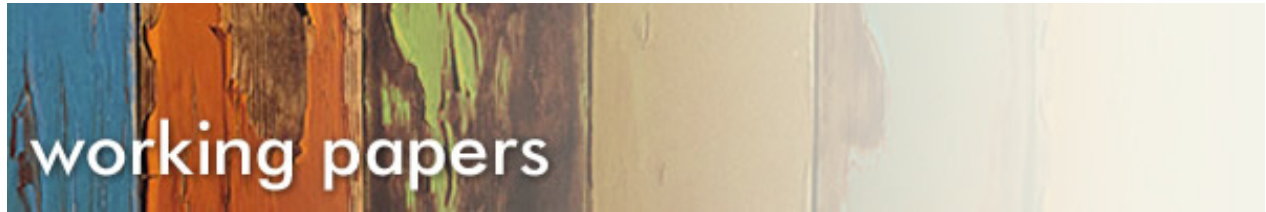
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### **Human Rights Education: The Third Leg of Post-Conflict/Transitional Justice**

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## Human Rights Education: The Third Leg of Post-Conflict/Transitional Justice

Emerging out of the same foment of war and violence that led to the recognition of international human rights, post-conflict or transitional justice represents one of the most important political developments in efforts to advance human civilization to arise during the course of the twentieth century. As more and more countries undergo the trauma of civil war or revolutions against repressive regimes, they and the international community must confront the problems of transforming these situations of violent conflict into healthy, functional democratic states. The guiding principle behind post-conflict or transitional justice is that complying with the demands of justice is a necessary prerequisite to peace and stability.<sup>1</sup>

The two terms, post-conflict justice and transitional justice, while often used interchangeably to cover the same basic concerns with justice, reflect developmental changes within the field and slightly varying perspectives on its application. The former, growing out of the Nuremberg trials (though having roots as early as the Treaty of Versailles)<sup>2</sup> initially focused on retributive justice through judicial mechanisms as a means of punishment and prevention

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<sup>1</sup> Michael P. Scharf and Paul R. Williams, *The Functions of Justice and Anti-Justice in the Peace-Building Process*, 35 CASE W. RES. J. INT'L L. 161 (2003); M. Cherif Bassiouni, *Justice And Peace: The Importance Of Choosing Accountability Over Realpolitik*, 35 CASE W. RES. J. INT'L L. 191 (2003); Anja Seibert-Fohr, *Human Rights as Guiding Principles in the Context of Post Conflict Justice* 13 MSU-DCL J. INT'L L. 179, 182 (2005).

<sup>2</sup> M. Cherif Bassiouni, *From Versailles to Rwanda in Seventy-Five Year: The Need to Establish a Permanent International Criminal Court*, 10 HARVARD HUMAN RIGHTS JOURNAL 11 (1997).

arising out of concluded conflicts.<sup>3</sup> Transitional justice emerged in the 1980s in situations where the conflict had not yet been resolved. Instead of focusing upon individual perpetrators, it shifted attention to broader social issues relating to the need for reconciliation and social reconstruction.<sup>4</sup> It supported the development of truth commissions and victim reparations, issues of restorative justice. Along with the possible inclusion of trials, transitional justice embodies those practices that take place after or facilitate “the transition from one political regime to another.”<sup>5</sup>

Whether labeled post-conflict or transitional, the nature of justice does not change – merely the context within which justice must be understood and brought to bear.<sup>6</sup> Specifically, issues of post-conflict/transitional justice arise in societies attempting to make a change in government from one in which significant abuses of human rights have occurred (generally in the context of violent domestic conflict that may or may not rise to the level of civil war) to a

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<sup>3</sup> See, e.g. RUTI TEITEL, *TRANSITIONAL JUSTICE* (Oxford U. Press, 2001) 31-39; Erin Daly, *Transformative Justice: Charting a Path to Reconciliation*, 12 INT’L LEGAL PERSP. 73 (2002); STEVEN R. RATNER AND JASON S. ABRAMS, *ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY* (2d) (New York: Oxford, 2001).

<sup>4</sup> See, e.g. Leila Nadya Sada, *International Criminal Law and Alternative Modes of Redress* in *INTERNATIONAL CRIMINAL LAW AND THE CURRENT DEVELOPMENT OF PUBLIC INTERNATIONAL LAW* (Andreas Zimmermann, ed) 161 (2003); HEATHER STRANG AND JOHN BRAITHWAITE, (EDS), *RESTORATIVE JUSTICE AND CIVIL SOCIETY* (2001).

<sup>5</sup> JON ELSTER, *CLOSING THE BOOKS: TRANSITIONAL JUSTICE IN HISTORICAL PERSPECTIVE* (Cambridge: Cambridge University Press, 2004) 1. Also see, Emily Daly, *supra* n. 3.

<sup>6</sup> Eric A. Posner and Adrian Vermeule, *Transitional Justice as Ordinary Justice*, 117 HARV. L. REV. 761 (2004). *Contra* David Gray, *An Excuse-Centered Approach to Transitional Justice*, 74 FORD.L.REV. \_\_\_\_ (2006) available at <http://ssrn.com/abstract=840045> (Accessed Nov. 15, 2005) (cites to ssrn version) 1-3.

new, generally democratic form of government.<sup>7</sup> (In light of this understanding, the term to be used hereinafter will be transitional justice, though it is applicable to all of those approaches taken under either label.)

Contemporary approaches to transitional justice increasingly view the application of judicial mechanisms, truth commissions, and victims' compensation as elements within the total arsenal of transitional justice, each to be applied as appropriate to the specific situation arising in the country in question.<sup>8</sup> Thus, while all three approaches may be appropriate, one or the other may be accorded primary attention, while the others play roles of lesser public import. These approaches, however, fail to appreciate that, even according to their own justifications for action, they remain inadequate to the task assigned. They are necessary but incomplete. In order to achieve the effects desired, transition from a dysfunctional society to a health democracy, they must be combined with an effective program of human rights education. This applies whether one looks at the issue through the lens of retributive justice (identified principally with post-conflict judicial mechanism approaches) or restorative justice (associated with transitional justice mechanisms.)<sup>9</sup>

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<sup>7</sup> While non-democratic governments may participate in practices associated with post conflict/transitional justice, given their focus upon power and control, it appears unlikely that they are sincerely concerned with justice. See, Steven R. Ratner, *New Democracies, Old Atrocities: An Inquiry in International Law*, 87 Geo. L.J. 707 (1999).

<sup>8</sup> William A. Schabas, *The Relationship Between Truth Commissions and International Courts: The Case of Sierra Leone*, 25 HUM. RTS.Q. 1035, 1066 (2003); Juan E. Mendez, *Accountability for Past Abuses*, 19 HUM. RTS. Q. 255, 267-269 (1997); Seibert-Fohr, *supra* n. 2, at 191.

<sup>9</sup> Ellen A. Waldman, *Healing Hearts or Righting Wrongs?: A Meditation on the Goals of "Restorative Justice"*, 25 HAMLINE J. PUB. L. & POL'Y 355, 357-360 (2004).

## Objectives of Transitional Justice

Justice is a broad, complex term, whether one adopts the approach of John Rawls label of “fairness”<sup>10</sup> or more technical terms, such as retributive or restorative justice.<sup>11</sup> In the context of transitional justice, it must be understood as an effort to address the problems arising out of the prior regime and develop fair systems of governance and treatment within the current regime.<sup>12</sup> Because transitional justice concerns arise specifically out of the context of conflict, at a minimum, any “policy to deal with past human rights abuses should have two overall objectives: Preventing the recurrence of such abuses and, to the extent possible, repairing the damage caused.”<sup>13</sup> Each of the existing transitional justice mechanisms (i.e. judicial tribunals, truth commission, compensation programs) attempts to address these two overall goals, though in somewhat different ways.

### *Judicial Mechanisms and Retributive Justice*

Post-Conflict tribunals or judicial mechanisms emphasize issues of retributive justice. Growing out of the horrors of genocide (e.g. World War II, Rwanda) and ethnic cleansing (the former Yugoslavia), special courts or tribunals respond to the historic social need to exact

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<sup>10</sup> JOHN RAWLS A THEORY OF JUSTICE 11-12 (1971).

<sup>11</sup> See, e.g. Ellen Waldman, *supra* n 9 at 357-363.

<sup>12</sup> RUTTI TEITEL, *supra* n. 3 , at 3.

<sup>13</sup> Jose Zalaquett, *Balancing Ethical Imperatives and Political Constraints: the Dilemma of New Democracies Confronting Past Human Rights Violations* 43 HASTINGS L.J. 1425, 1430 (1992).

punishment from those who have transgressed critical social boundaries—to enact the ancient claim of an “eye for an eye, a tooth for a tooth.”<sup>14</sup> There is a sense that neither the world at large nor the society involved can simply stand by and watch the perpetrators of such crimes go unpunished. This would violate our sense of balance and moral order.<sup>15</sup>

While the idea of exacting just punishment provided the historic grounding for all penal systems, the second element of retributive justice, prevention, now dominates.<sup>16</sup> Prosecuting wrongdoers aims to deter future violations of these criminal norms both through establishment of the norm and threat of sanction for its violation. That is to say, law and the judicial system serves the didactic function within society of identifying for the public certain social norms that are deemed so important that the state stands ready to punish those who violate that norm. It also stands as a threat against potential violators.

In terms of transitional justice objectives, judicial mechanisms face a number of problems and limitations. First, exacting just punishment requires effective prosecution in each case of significant criminal activity, while achieving the goal of preventing future violations of the law closely corresponds to levels of overall enforcement. The less likely the prosecution—the less preventive weight afforded the norm and the less likely the law will be considered prohibitive.

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<sup>14</sup> Matthew 5:38.

<sup>15</sup> See, e.g. Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 UCLA L. Rev. 1659 (1992); JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 263-64 (1980).

<sup>16</sup> See, e.g. Ellen A. Walsman, *supra* n. at 358; Scharf & Williams, *supra* n. 1 at 176-180; Neil J. Kritz, *Where We Are and How We Got Here: An Overview of Developments in the Search for Justice and Reconciliation*, in THE LEGACY OF ABUSE: CONFRONTING THE PAST, FACING THE FUTURE, Alice H. Henkin, ed. (The Aspin Institute/NYU Law, 2002) at 25;



Unfortunately, for a number of reasons, prosecutions under post conflict regimes have been far too rare—to the point that they often appear arbitrary.<sup>17</sup> Often, the mere process of prosecuting these types of criminal perpetrators runs afoul of pragmatic concerns and the practices of *real politik*.<sup>18</sup> Political or military leaders responsible for serious violations of human rights are offered immunity during the course of negotiations to end the violent conflict that they are leading—an effort often characterized as trading peace for justice.<sup>19</sup> The new regime may lack the necessary material resources to prosecute criminals,<sup>20</sup> or a new regime may simply deem it politically necessary or expedient to delay or reject prosecution due to the costs of prosecution or where they lack the support among the population necessary to prosecute leaders of violent segments within that society<sup>21</sup> (though most advocates argue that this is a mistaken effort).<sup>22</sup>

In some cases, the idea of individual prosecution may not adequately apply. While acceptance of the concept of individual culpability for state action stands as one of the great achievements of international criminal law and post conflict justice, there is a “growing recognition of the role of the public at large in the commission of state oppression and atrocity.”

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<sup>17</sup> See, e.g. STEVEN R. RATNER AND JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY 331-339 (2001).

<sup>18</sup> M Cherif Bassiouni, *Justice and Peace supra* n. 1; JACKSON NYAMUYA MAOGOTO, WAR CRIMES AND REALPOLITIK: INTERNATIONAL JUSTICE FROM WORLD WAR I TO THE 21<sup>ST</sup> CENTURY (2004)

<sup>19</sup> See, e.g. Mary Margaret Penrose, *Impunity – Inertia, Inaction, and Invalidity: A Literature Review* 17 B.U. INT’L L.J. (1999).

<sup>20</sup> David Gray, *supra* n 6 , at 6-9.

<sup>21</sup> Paul van Zyl, *Dilemmas of Transitional Justice: The case of South Africa’s Truth and Reconciliation Commission*, 52 J. Of INT’L AFF. 647, 661 (1999).

<sup>22</sup> Sharf & Williams, *supra* n. 1 at 183-186; Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2539-2532 (1991).

<sup>23</sup> As was the case in Rwanda, while individual leaders may be identified as having played particularly important roles in leading the genocide and prosecuted, massive numbers of people within the population ultimately participated in the violence and bear a share of the culpability.<sup>24</sup> One cannot exact just punishment based on individual responsibility against society itself – yet ignoring the guilt does nothing to prevent its reoccurrence in that society nor deter it from arising in any other.

The second major problem faced by judicial tribunals relates to their didactic function within society. Within transitional justice, the tribunal should educate the public as to the existence of important social norms protective of human rights and dignity and their relative value—that is, that they are so important that the state is willing to use state violence (the penal system) to enforce those values.<sup>25</sup> Not only does the failure to prosecute convey the wrong message, the social culture in a post conflict society may distort the message being conveyed even in the face of active prosecutions. At the simplest level, those within a post conflict society may view the prosecution of their leaders by members of the new regime or an international tribunal, such as the International Criminal Tribunal for the former Yugoslavia, as “victor’s justice.”<sup>26</sup> This charge bears particularly legitimacy where, as was the case in the Nuremburg

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<sup>23</sup> Daly, *supra*. n. 3 at 73; PATRICIA MARCHAK, REIGNS OF TERROR 131-145 (2003).

<sup>24</sup> See PHILIP GOUREVITCH, WE WISH TO INFORM YOU THAT TOMORROW WE WILL BE KILLED WITHOUT OUR FAMILIES, 96, 115 (1998); SAMANTHA POWERS, A PROBLEM FROM HELL: AMERICA AND THE AGE OF GENOCIDE 329-390 (2002); DANIEL GOLDHAGEN, HITLER’S WILLING EXECUTIONERS 21 (1996); MARCHAK, *Id*, 199-211.

<sup>25</sup> Ellen A. Waldman, *supra* n. 9, 354.

<sup>26</sup> Michael P. Scharf, *The Legacy of the Milosevic Trial* 37 NEW ENGLAND LAW REVIEW 701, 707-709 (2003).

and Tokyo tribunals, no Allied leaders or commanders were charged for conduct comparably culpable to that for which Axis leaders were charged and convicted.<sup>27</sup>

More troubling, in many post conflict countries, society itself has been distorted by the conflict, either to become culpable as a source or cause of the violence or simply to become insensitive to the existence of the wrong being done.<sup>28</sup> In both Germany, during the Nuremberg trials, and Serbia, during the trial of Slobodan Milosavic, the citizens of the country denied the wrong. Rather than being condemned for their roles in massive crimes against humanity—defendants gained in popularity among the publics in their home country during their trials.<sup>29</sup>

#### *Truth Commissions, Reparations and Compensatory Justice*

What might be referred to as the second stage of transitional justice emerged in the 1970s, starting in the Central and South America.<sup>30</sup> While one might expect that a second stage of development might attempt to address the flaws in the first, as identified above, here the development reflected a totally different approach to the problem of transitional justice. Whereas the initial response to post conflict justice grew out of the context of World War II, the second stage evolved out of efforts to negotiate the resolution of ongoing non-international conflicts, where after the end of the conflict both sides would have to find ways to peacefully

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<sup>27</sup> M. Cherif Bassiouni, *From Versailles*, *supra* n. 2.

<sup>28</sup> MARCHAK, *supra* n. 23.

<sup>29</sup> Michael P. Scharf, *supra* n. 26, 716-717.

<sup>30</sup> See, NEIL J. KRITZ, (ed) TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES 3 vols. (1995).

coexist.<sup>31</sup> A cynical view of this development would emphasize the fact that the initial forays in this direction featured amnesties given to the individuals that were participating in the peace negotiations or were leaders within the new regime.<sup>32</sup> Be that as it may, it quickly began to be recognized that general amnesties were not effective. One could not simply close the door on the past and attempt to ignore it. “[S]ocieties that refuse to address the painful legacy of past abuse do so at their peril.”<sup>33</sup> While still supporting the use of judicial mechanisms, under a transitional justice approach advocates began to attend to the idea of helping society adopted strategies of compensatory justice as a positive step in healing.

In attempting to address the demands of compensatory justice, some post conflict governments, often with international help, have adopted victim compensation schemes.<sup>34</sup> This is in line with contemporary efforts to establish an international norm supporting a right to victim’s reparations for gross violations of human rights.<sup>35</sup> At the same time, a more widely adopted and more noted tactic was the creation of what are known as “truth commissions” or, in the case of South Africa, the Truth and Reconciliation Commission.

Truth commissions can be justified on many bases. They have an intuitive appeal to our

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<sup>31</sup> Charles Villa-Vincencio, *Why Perpetrators Should Not Always be Punished: Where the Interntional Criminal Court and Truth Commission Meet*, 49 EMORY L.J. 205, 220 (2000); ARYEH NEIER, WAR CRIMES: BRUTALITY, GENOCIDE, TERROR, AND THE STRUGGLE FOR JUSTICE 104 (1998).

<sup>32</sup> M. Cherif Bassiouni, *Searching for Peace and Achieving Justice: The Need for Accountability*, 59 LAW & CONTEMP. PROB. 9, 12 (1996); JON ELSTER, *supra* n. 5 at 192.

<sup>33</sup> Neil J. Kritz, *supra* n. 16 at 21.

<sup>34</sup> Chris, Cunneen, *Reparations and Restorative Justice: Responding to the Gross Violation of Human Rights*, in RESTORATIVE JUSTICE AND CIVIL SOCIETY (Heather Strang and John Braithwaite, eds.) 83-98 (2001).

<sup>35</sup> UN Victims Reparations-----UN Doc. E/CN.4/2000/62 (2000)

sense of proportion and the need to know the truth. They may also be justified on social psychological grounds that repressing the truth causes the equivalent of a societal neuroses. However, in terms of justice, they clearly address two key functions: compensatory and preventive.

A truth commission affords compensatory justice in the sense that the victims have a right to the truth – in effect to have it restored to them. “Every people has the inalienable right to know the truth about past events and the circumstances and reasons which led...to the perpetration of aberrant crimes.”<sup>36</sup> One of the remedies identified in the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law is access to factual information concerning violations.<sup>37</sup> Truth is the first victim of any repressive regime, where anything that does not conform to the desires of the regime is denied. The tools of torture, detention and death lie as ominous unspoken threats in the shadows of the regime’s public face against any who would speak out. Forced into silent isolation, the oppressed have no one to voice their concerns to and confirm the reality of their perceptions.<sup>38</sup> Reality itself is distorted, as moral norms are turned upside down and replaced by the corrupted vision of the culture of the regime. Disappearances, the ultimate tool, not only threatens those who would speak but denies victims and their families the reality of

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<sup>36</sup> UN Sub-Commission on Prevention of Discrimination and Protection of Minorities – Principles for the Protection of Human Rights Through Action to Combat Impunity, UN DCO E/CN.4/Sub.2/1997/20 (1997), Principle #2.

<sup>37</sup> Principle VII(c) note 35 *supra*.

<sup>38</sup> Susan Opatow, *Psychology of Impunity and Injustice: Implications for Social Reconciliation*, in POST CONFLICT JUSTICE (M. Cherif Bassiouni, ed., 2002), 201-207.

knowing what happened to the “disappeared.” The families are given no closure to their grief.<sup>39</sup>

Thus repressive regime takes away the voice of the oppressed, denying them their sense of self and dignity. They are denied any sense of the truth within the situation in which they live; they are denied a moral language in which to address that reality; they are even denied the capacity to grieve over losses that cannot be confirmed. Any adequate balancing requires restoration of that voice, giving the victims a language—truth commissions provide the first step.<sup>40</sup>

A truth commission offers hope of prevention in the sense, first, that a public airing of the crimes of the prior regime asserts the norms of society through public affirmation of those norms in relation to those identified by the truth commission as violating them. Much the way the courts and the law serve didactic functions, so too a truth commission teaches the moral norms applicable to the past.<sup>41</sup> Second, it may serve as a deterrent to future violators of human rights by placing them at risk of public approbation. Being publicly identified as a rights violator has some punitive effect.<sup>42</sup> Political leaders are frequently motivated not just by power but by a desire for immortality – to find their place in history. To the extent that truth commissions represent a threat to that reputation, politicians may be persuaded to avoid actions that would put them at such risk.

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<sup>39</sup> *See gen.* DEATH SQUAD. (Jeffrey A. Sluka ed., 2000).

<sup>40</sup> TERESA GODWIN PHELPS, SHATTERED VOICES: LANGUAGE, VIOLENCE, AND THE WORK OF TRUTH COMMISSIONS (2004).

<sup>41</sup> Erin Daly, *supra* n. 3 at 74-75.

<sup>42</sup> PRISCILLA B. HAYNER, UNSPEAKABLE TRUTHS: CONFRONTING STATE TERROR AND ATROCITY (2001) at 106-132.

While truth commissions address both the compensatory and preventative aims of compensatory justice, in practice they have not been as effective as they could – or should have been in advancing these aims. First, the effectiveness of a truth commission cannot be measured simply by how extensive or exact a record of events it is able to assemble in the course of its activities. That record must then be effectively communicated to the victims and the wider public. While virtually all of the truth commissions assembled records about the abuses in the prior regime in their countries and at the conclusion of the investigation wrote a final report, in many cases there was little effort to make that report available or accessible (i.e. written in non-technical language) to the public.<sup>43</sup> Perhaps the most famous and influential report arising out of a truth commission *Nunca Mas*, in Argentina, was privately adapted to make it accessible separate from the commission.<sup>44</sup> In other countries, no public reports were issued,<sup>45</sup> or in the case of the South African Truth and Reconciliation Commission, the final report took up five large volumes – useful for the specialist, but unlikely to be used by the public at large.<sup>46</sup>

More troubling, truth commissions by themselves do not adequately address the fundamental malaise of a repressed society created by the loss or gross distortion of its moral sense and understanding. As was the case with judicial mechanisms, simply asserting that a crime was committed (either at a trial or in a truth commission) may not be persuasive to a populace whose normative understandings have been shaped by the same forces that supported

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<sup>43</sup> *Id.* 50-71.

<sup>44</sup> *Id.* 258.

<sup>45</sup> *Id.* 50-71.

<sup>46</sup> TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA REPORT (1998).

the violation of rights in the first place. In Rwanda, the Tutsi majority were indoctrinated with hatred for many years leading up to the 1994 genocide.<sup>47</sup> To establish what happened or why (in terms of direct cause and effect) is inadequate unless it is matched by efforts addressing the normative values that make the act wrong.<sup>48</sup>

### **Human Rights Education: The Third Leg of Transitional Justice**

Over time, advocates and scholars of post conflict justice have come to think of judicial mechanisms and truth commissions/compensation boards as mutually useful tools to address the goals of transitional justice.<sup>49</sup> What has not been formally acknowledged is that while these are necessary tools – they are not sufficient. As noted above, each approach suffers certain limitations on its effectiveness in meeting its own objectives. Given the limitations in its expressive functions, judicial mechanisms may fail to be perceived as just, and may not adequately serve their normative nor the preventive functions by failing to clearly identify and establish strong social norms.<sup>50</sup> The truth commission/compensation boards may similarly fail to serve compensatory justice through an inability to actually disseminate its finds in ways meaningful or useful to the affected population.<sup>51</sup> Moreover, while judicial mechanisms and truth commissions are complementary aspects of transitional justice – they are not

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<sup>47</sup> PHILIP GOUREVITCH, *supra* n 24.; *Prosecutor v. Nahimana, Barayagwiza & ngeze*, No. ICTR-99-52-T (Dec. 3, 2003) (the “Media” Case).

<sup>48</sup> David Gray, *supra* n.6, 91; Erin Daly, *supra* n. , 74.

<sup>49</sup> See works cited *supra* n. 8.

<sup>50</sup> See text *supra* at notes 19-31.

<sup>51</sup> See text *supra* at notes 42-47.



supplementary. Because they focus on alternative approaches to justice (i.e. retributive and compensatory), they do not in all cases address the weaknesses of the other.

Like the proverbial three legged stool, the twin approaches of judicial prosecutions and truth commissions must be buttressed by a third way: education. Education, understood in its broadest sense, provides the tools necessary to remedy the deficiencies of each of the other two. It clearly addresses the compensatory justice need to disseminate necessary information about the past and the process of justice. It is also by definition, didactic, capable of identifying and inculcating important national norms.<sup>52</sup> Moreover, public schools and other forms of public education were likely to have been used by the prior regime to instill its messages of hate and abuse.<sup>53</sup> Thus, if prevention is one of the primary goals of transitional justice, then, education must be included in efforts to achieve it. As noted by the United Nations Revised draft plan of action for the first phase (2005-2007) of the World Programme for Human Rights Education, “Human rights education...contributes to the long-term prevention of human rights abuses and violent conflicts.”<sup>54</sup>

In practice most donor countries, international agencies, and NGOs involved in post conflict situations appreciate the need to provide human rights education. In both Afghanistan, following the fall of the Taliban, and Iraq, following the deposal of Saddam Hussein, the

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<sup>52</sup> Sarah Warshauer Freedman, et. al. *Public Education and Social Reconstruction in Bosnia and Herzegovina and Croatia* 226-248 and Sarah Warshauer Freedman, et. al. *Confronting the Past in Rwandan Schools* 248-266 in *MY NEIGHBOR, MY ENEMY: JUSTICE AND COMMUNITY IN THE AFTERMATH OF MASS ATROCITY* (Eric Stover & Harvey M. Weinstein, eds., 2004).

<sup>53</sup> *Id.*

<sup>54</sup> A/59/525/Rev.1 (Ma5ch 2, 2005) para. 1.

international community initiated many programs to provide human rights training to a variety of constituencies in those countries.<sup>55</sup> Indeed, the idea of human rights as an international concern, as opposed to the traditional approach that the relationship between a state and its citizens was exclusively a domestic concern, arose out of the recognition that the massive violation of human rights of its citizens by a state was symptomatic of a dysfunctional state that presented a risk to international peace and security. As demonstrated by the Nazi regime of the 1930s, gross abuses of the rights of its own citizens preceded acts of aggression towards other states.

Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind...it is essential [that] if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression... human rights should be protected by the rule of law.<sup>56</sup>

The international community codified this linkage within the United Nations Charter<sup>57</sup> in 1945, obligating both the United Nations and its member states to promote human rights. Subsequent instruments have repeatedly reaffirmed this obligation since then.<sup>58</sup>

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<sup>55</sup> See, e.g. The United Nations Human Rights Programme for Iraq (2005-2006) at <http://www.ohchr.org/english/countries/iq/programme.htm>; Afghanistan at <http://www.ohchr.org/english/countries/af/index.htm> (accessd Nov. 21, 2005.)

<sup>56</sup> Universal Declaration of Human Rights *Preamble*, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948) (UNDH).

<sup>57</sup> UN Charter (1945) Arts. 1 (3): 55, June 26, 1945, 59 Stat. 1031, T.S. 993, 3 Bevans 1153, entered into force Oct. 24, 1945.

<sup>58</sup> See, e.g. UNDH *Preamble*, *supra* n 56; International Covenant on Civil and Political Rights, *Preamble*, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976; Convention on the Elimination of All Forms of Discrimination against Women, *Preamble*, G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, entered into force Sept.

Moreover, the international community and the UN have clearly identified the obvious linkage between the promotion of human rights and human rights education in this context:

The World Conference on Human Rights considers human rights education, training and public information essential for the promotion and achievement of stable and harmonious relations among communities and for fostering mutual understanding, tolerance and peace.<sup>59</sup>

Provisions advocating human rights education have been incorporated in many international instruments, including the Universal Declaration of Human Rights (Art. 26),<sup>60</sup> the Convention on the Rights of the Child (art. 29),<sup>61</sup> the Convention on the Elimination of All Forms of Discrimination Against Women (Art. 10),<sup>62</sup> and the International Convention on the Elimination of All Forms of Racial Discrimination (Art. 7).<sup>63</sup>

Given this pervasive appreciation of the importance of human rights education, it is surprising that human rights education has not been explicitly adopted as a clearly coordinated strategy within transitional justice. Moreover, the failure means that an opportunity has commonly been lost to tailor the educational programming to address the special needs of

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3, 1981 (CEDAW); Vienna Declaration, World Conference on Human Rights, *Preamble*, Vienna, 14 - 25 June 1993, U.N. Doc. A/CONF.157/24 (Part I) at 20 (1993).

<sup>59</sup> Vienna Declaration and Programme of Action, *Id.*, Part II.D, par. 78

<sup>60</sup> UDHR *supra* n. 56.

<sup>61</sup> G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), entered into force Sept. 2, 1990.

<sup>62</sup> CEDAW *supra* n. 58.

<sup>63</sup> International Convention on the Elimination of All Forms of Racial Discrimination, 660 U.N.T.S. 195, entered into force Jan. 4, 1969.

transitional societies. Specifically, human rights education in post conflict environments must address three broad goals: correcting social dysfunction; contextualize truth; and establish normative values.

### *Correcting Social Dysfunction*

Modern dictatorships no longer exist as a simple aristocracy living off the labor of a broader plebian class with little interaction between the two. Dictatorships and other rights abusive regimes have adopted totalitarian methods to totally dominate the citizenry of the state. Such states want a passive citizenry, one that they can control and manipulate: their senses dulled, their connection to society and their sense of a capacity to act as a responsible agent, repressed.<sup>64</sup>

Exacerbating this psychological harm, in post conflict arenas, the conflict, by definition, results in the creation of an ‘other’ – an enemy. Whether governed by a formal totalitarian state or a rebellious collective, the other is demonized and dehumanized as a means of facilitating action against the demonized group.<sup>65</sup> As practiced in Rwanda, the hated Tutsi’s were blamed for all of the evils within the country and were declared non-humans: they were simply referred

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<sup>64</sup> See, e.g. HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* (1983); Carina Perelli *Memoria de Sangre: Fear, Hope, and Disenchantment in Argentina*, in *REMAPPING MEMORY: THE POLITICS OF TIMESPACE* (1994) 43-44; TERESA GOODWIN PHELPS, *supra* n. 40, 38-51.

<sup>65</sup> M. Cherif Bassiouni, *Accountability for Violations of International Humanitarian Law and Other Serious Violations of Human Rights* in *POST CONFLICT JUSTICE* *supra* n. 38 at 51-52.

to as cockroaches.<sup>66</sup>

In order to achieve both the compensatory and preventive goals of transitional justice, it is necessary to address the cultural and normative distortions within a society in which massive violations of human rights have occurred and clearly communicate them to the public as a whole. As noted by Archibald MacLeish in the Preamble of UNESCO's Constitution, "Since wars begin in the minds of men, it is in the minds of men that the defense of peace must be constructed."<sup>67</sup> In the case of post conflict, transitional societies, the first objective must be to reestablish the human connection among all the citizens and "restore the capacity of society to be moved."<sup>68</sup>

Human rights education contributes to this psychological rehabilitation effort through its focus upon the worth and dignity of every person. The essence of all rights talk is that we are the bearers of rights simply because we are human.<sup>69</sup> Insofar as education can inculcate this belief, it addresses both the disempowerment of the general population and, in post conflict environments, re-humanizes the enemy "other." Individuals, as bearers of rights, demand respect.

### *Contextualization of Truth*

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<sup>66</sup> See Prosecutor V. Nahimana, Barayagwiza, & NGEZE. Case No. ICTR 99-52-T. Judgment and Sentence. At <http://www.icttr.org>

<sup>67</sup> UNESCO Constitution, access at: [http://portal.unesco.org/en/ev.php-URL\\_ID=15244&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=15244&URL_DO=DO_TOPIC&URL_SECTION=201.html) (Nov. 21, 2005).

<sup>68</sup> Susan Opatow, *Psychology of Impunity and Injustice: Implications for Social Reconciliation*, in POST CONFLICT JUSTICE *supra* n. 38 at 211.

<sup>69</sup> JACK DONNELLY, UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE (2d) (Ithica/London: Cornell, 2003) 7; UDHR Preamble, *supra* n.56.

The compensatory justice includes the right of victims to know the truth. At a minimum, this requires that the information be made public. Indeed, it must be made public not just to the victim, but also to the community. One of the ways victims are victimized by an abusive regime is that their stories are hidden. They are made to suffer in mute silence without anyone who can share the information and validate the experience.<sup>70</sup> Education programs provide a structured, comprehensive way to provide this information to a broad audience.

At the same time the cliché question of “what is truth?” takes on special meaning in a post conflict environment.<sup>71</sup> One of the horrors of situations in which massive violations of human rights has occurred is that the magnitude of the crime has been denied by the society in which it is practiced. Indeed, the victims themselves have often been deprived of their sense of humanity to such a degree that they may have lost the capacity to fully comprehend right from wrong.

In order to understand what has happened, the state must not only assemble the raw data of facts, but must find ways to provide normative context for those facts. The abuses of a Himmler or Eichman, a Milosovic or a Pol Pot must be communicated in ways that identify not only what happened but why – and why it was wrong.

### *Establishing Normative Values*

The processes of domination, not only create psychological harms, they are accompanied

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<sup>70</sup> TERESA GOODWIN PHELPS, *supra* n. 40, 38-51.

<sup>71</sup> PRICILLA HAYNER, *supra* n. 42, 72-85.

by a distortion of human values. Indeed, enculturation ultimately merges psychology and values in a mutually self reinforcing system. As argued by Aristotle, virtue as a human characteristic results from virtuous practice.<sup>72</sup> Conversely, non-virtuous conduct results in a non-virtuous person. Regimes that practice torture or other abuses of human rights inculcate those characteristics and norms into the population.

In order to remedy this, transitional justice programs must be designed to reach out to all of the members of that society: abusers and abused alike. And it must do so in ways that challenge the accepted norms that led or contributed to the rights abuse and seeks to transform them. Education is, by definition, transformative. It is the state's primary tool for civilizing and en-culturating its citizens. Human rights education specifically targets cultural norms supporting peace.<sup>73</sup> In this case, the primary effort must be to reestablish the humanity, human dignity, and infinite worth of all of the citizens. These are the foundation values of human rights.<sup>74</sup>

### **Caveat: Relativism and Religion**

Most transitional justice programs have received assistance from members of the international community, either civil society/NGOs or governments. In light of this fact, the use of human rights education may run into two possible objections or sources of resistance. These are, first, the claim that human rights represents western imperialism (the relativist challenge)

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<sup>72</sup> ARISTOTLE, *NICHMECHIAN ETHICS*, Book II.

<sup>73</sup> See, e.g. Vienna Declaration and Programme of Action, *supra* n. 56 Part II.D, par. 78.

<sup>74</sup> See, e.g. JACK DONNELLY, *supra* n.69, 13-17; UDHR *supra*, n. 56, *Preamble*.

and, second, that religion represents a particular threat to the goals and objectives of human rights training.

*Relativist – Imperialist Challenge*

In many areas of the world, many people hold a strong suspicion of the international community and, more particularly, the West. They distrust the motives of Western NGOs and governments, fearing that even acts that appear helpful mask imperialist motives. This is particularly true in countries with recent experience as a colonial subject.<sup>75</sup>

This suspicion of the West has found expression in attacks on human rights. This attitude was championed by China and the Far East in the 1990s,<sup>76</sup> and regularly reappears in national reservations to human rights treaties in areas such as women's rights or negotiations involving the family or reproductive rights.<sup>77</sup> While a substantial body of literature exists attempting to refute this idea and establish the universality of international human rights,<sup>78</sup> the position

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<sup>75</sup> See, e.g. El-Obaid Ahmed El-Obaid and Kwadwo Appiagyei-Atua, *Human Rights in Africa -- A New Perspective on Linking the Past to the Present*, 41 MCGILL L.J. 819 (1996); Deborah M. Weissman, *The Human Rights Dilemma: Rethinking The Humanitarian Project*, 35 COLUM. HUMAN RIGHTS L. REV. 259 (2004); Beth Lyon, *Discourse In Development: A Post-Colonial "Agenda" For The United Nations Committee On Economic, Social And Cultural Rights*, 10 Am. U.J. Gender Soc. Pol'y & L. 535 (2002).

<sup>76</sup> See, e.g. ANTHONY J. LANGLOIS, *THE POLITICS OF JUSTICE AND HUMAN RIGHTS* (Cambridge, 2001).

<sup>77</sup> See Rebecca Cook, *Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women*, 30 VA. J. INT'L L. 643 (1990); Belinda Clark, *The Vienna Convention Reservations Regime and the Convention on Discrimination Against Women*, 85 AM. J. INT'L L. 285 (1991).

<sup>78</sup> See, e.g. PETER R. BAEHR, *HUMAN RIGHTS: UNIVERSALITY IN PRACTICE* (2001); David Little, *The Nature and Basis of Human Rights*, in *PROSPECTS FOR A COMMON MORALITY* (Gene Outka & John P.



deserves respect in identifying the potential for a type of culture imperialism. This occurs where the human rights perspective offered asserts absolute congruence between a right and the western interpretation of that right.<sup>79</sup> While some rights are so basic and fundamental that they leave no room for interpretation (e.g. the right to life, protection against torture, slavery, etc.) other rights may be legitimately contested as to how they are expressed or implemented.<sup>80</sup>

Beyond the legitimacy of questioning possible bias in international human rights, the problem in terms of transitional justice is that this concern may provide grounds for resistance to human rights education. Clearly, in any post conflict situation, human rights education will identify and address abuses by elements within the prior regime. Those who are identified as responsible may seek to avoid blame or deflect attention by attacking human rights education per se.<sup>81</sup> Those designing and implementing the human rights education program must be sensitive to this risk and ready to meet it. This does not mean resolving the debate provoked by the relativist challenge once and for all – merely that the particular educational program can be justified in the social context of that country.

In developing such a human rights education program, the guiding objectives of transitional justice provides some guidance. First and foremost, the most critical values to be

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Reeder, Jr., eds, 200 1993); Jack Connelly, *Human Rights and Asian Values: A Defense of Western Universalism*, in *THE EAST ASIAN CHALLENGE FOR HUMAN RIGHTS* (Joanne R. Bauer & Daniel A. Bell, 1999).

<sup>79</sup> See, e.g. MICHAEL IGNATIEFF, *HUMAN RIGHTS AS POLITICS AND IDOLOTRY* 69-73 (2001); ANTHONY J. LANGLOIS, *supra* n. 77, 71-72.

<sup>80</sup> See, Donnelly, *supra* n. 69, 93-98.

<sup>81</sup> See, e.g. ANTHONY J. LANGLOIS, *supra* n. 77, 13-24.

drawn from human rights are those which reaffirm the dignity and worth of every citizen. The very conversation over the content of human rights and how they should be expressed in the local context is itself empowering and dignity affirming, and it should be supported on that basis.

Second, a central feature of the education program will be to address the particular abuses of the prior regime. By definition, these abuses represent severe violations of fundamental human rights where there is little to no disagreement over content or protection. Being open to adjustments on less important human rights issues avoids the risk that such disputes could be used tactically to divert attention from the issues over which no disputes exist.

### *Religion*

Religion represents a particularly significant concern with respect to human rights education. At a minimum, it commonly represents the most important expression of the relativist challenge, where the values of religion are said to conflict with human rights. It is viewed as such a serious obstacle that many human rights advocates adopt the stance of political liberalism that seeks to isolate religion and treat it as a private concern separate and apart from the concerns of the public domain.<sup>82</sup> They view religion as an irrational obstacle to human rights. Exacerbating this, in a post conflict situation, religion may itself have been implicated in the prior regime's abuse of human rights by offering religious justifications for those abuses.<sup>83</sup> Finally, western human rights advocates in particular, struggle with the nature of religious

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<sup>82</sup> See, e.g. DAVID E. GUINN, *FAITH ON TRIAL* (Lexington, 2002) 60-62.

<sup>83</sup> R. SCOTT APPLEBY, *THE AMBIVALENCE OF THE SACRED* (2000) 57-120.

freedom itself. If religious belief justifies abuse and religious freedom protects religious belief, how can the state intervene?

Clearly, transitional justice human rights education program cannot ignore religion. It is the primary resource of values for a vast number of believers and there is a vast and growing literature that argues that religious beliefs (from Christianity and Judaism, to Islam, Buddhism and Hinduism)<sup>84</sup> also support human rights. Some human rights advocates have argued that international human rights grew out of the Western Enlightenment and the Kantian ideal of respect for the individual and that any argument seeking to justify human rights on the basis of religious tenet misconstrues human rights.<sup>85</sup> This, however, is little more than a quasi-religious belief in itself, in that it privileges one metaphysical belief (i.e. individual worth) against another (e.g. divine command, image of God, etc). What transitional justice human rights education needs to focus on is not the grounding, but the expression and how that compels respect for the individual.

Religions complicit in human rights abuses present a more challenging problem. Clearly, educators can neither ignore the religious involvement nor can they hope to overcome the religious position through purely secular arguments. Instead, educators must enlist religious leaders from that faith tradition in efforts to develop alternative religious positions and

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<sup>84</sup> MUDDATHIR ABD AL-RAHIM et. al. (eds) HUMAN RIGHTS AND THE WORLD'S MAJOR RELIGIONS : FIVE VOLUMES (2005); LEROY S. ROUNER, ed., HUMAN RIGHTS AND THE WORLD'S RELIGIONS (1994); DAMIEN KEOWN (EDITOR), ET AL, BUDDHISM AND HUMAN RIGHTS (1997); ABDULLAHI AHMED AN-NAIM, TOWARD AN ISLAMIC REFORMATION: CIVIL LIBERTIES, HUMAN RIGHTS, AND INTERNATIONAL LAW (1996).

<sup>85</sup> DONELLY *supra* n. 69 at 71-84.

arguments that may be offered to refute the offending approaches.<sup>86</sup> To officially support this practice does not necessarily violate religious freedom in the sense that the educators offer arguments – they cannot compel belief.

### **The Nature of Education and Its Object**

In developing a transitional justice education program, the nature of the educational effort must be tailored to its object—i.e. the individuals or groups it is directed towards. In this case, education must be broadly construed to include not only traditional forms of classroom based training or informational materials (printed or electronic), but also public educational programs that may include radio or television documentaries or news programs or even the arts.<sup>87</sup>

The broad goals of what is meant by human rights education for transitional justice are identical to those identified in the United Nation's World Programme for Human Rights Education which defines human rights education as:

education, training and information aiming at building a universal culture of human rights through the sharing of knowledge, imparting of skills and moulding of attitudes directed to:

- (a) The strengthening of respect for human rights and fundamental freedoms;

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<sup>86</sup> R. SCOTT APPLEBY, *supra* n. 83, 121-162. See MARTIN E. MARTY, DAVID E. GUINN AND LARRY GREENFIELD, RELIGION AND CIVIL DISCOURSE: PRINCIPLES AND GUIDELINES FOR RELIGIOUS PARTICIPANTS (1998).

<sup>87</sup> See, e.g. Susan Tiefenbrun, *The Failure of the International Law of War and the Role of Art and Story-telling as a Self-help Remedy for Restorative Justice* 12 TEXAS WESLEYAN LAW REVIEW \_\_\_\_ (2005).

- (b) The full development of the human personality and the sense of its dignity;
- (c) The promotion of understanding, tolerance, gender equality and friendship among all nations, indigenous peoples and racial, national, ethnic, religious and linguistic groups;
- (d) The enabling of all persons to participate effectively in a free and democratic society governed by the rule of law;
- (e) The building and maintenance of peace;
- (f) The promotion of people-centered sustainable development and social justice.<sup>88</sup>

The Programme goes on to specify that the programme must emphasize three components:

- (a) Knowledge and skills — learning about human rights and mechanisms for their protection, as well as acquiring skills to apply them in daily life;
- (b) Values, attitudes and behaviour — developing values and reinforcing attitudes and behaviour which uphold human rights;
- (c) Action — taking action to defend and promote human rights.<sup>89</sup>

The ability to adequately address each of these skills will vary by intended audience and method of teaching. Nonetheless, these overall goals and objectives should provide the framework for the entire effort.

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<sup>88</sup> *Supra* n. 54, para. 3.

<sup>89</sup> *Id.* Para. 4.

In identifying the groups to be educated, the goals of transitional justice will help identify particular segments of the population to be targeted and the focus of the training to be provided to each segment. They can be categorized as follows.

#### *Government Officials*

The first group that needs to be educated in order to advance the goals of prevention, are those government officials most likely to interact with the citizenry and exercise state authority. Special attention should be given to those that may have participated in prior patterns of abuse. These would include: police, military, judges, prosecutors, prison officials, and all others with authority to infringe the rights of the citizens. The education should be tailored to address the specifics of their jobs to assure that they know the appropriate limits and how their work impacts human rights concerns.

#### *Civil Society Leaders and the Media*

Non-governmental organizations, the media and civil society institutions have proven to be among the most effective advocates for human rights and monitors of human rights abuses. Leaders within this segments should receive broad training in human rights both to gain their support in the object of advancing social transformation of the society and to prepare them to monitor the state (or other potential actors) against future violations. Educating them helps them to educate others.

### *Educators and Students*

In terms of advancing the long term goals of prevention and social transformation, the public (and private) educational systems represent the largest and potentially the most important avenue for promoting change. Educators need to be well informed about human rights so that they can review all elements of the curriculum to assure fair coverage of human rights concerns. Specialized educational materials can then be prepared for students that is age appropriate and subject driven. Courses on history, social studies, etc. will need to be tailored to address what happened historically as well as providing normative content.

### *General Public*

In order to provide compensatory justice to victim, retributive justice for perpetrators and to encourage prevention, educational programs need to be addressed to the general public. Since it will be impossible to create specialized courses of study, these educational efforts will need to be opportunistic and tailored to need. For example, if there are judicial trials of perpetrators of abuse, commentators can be provided to discuss the human rights implications and justifications for the trials or documentaries can be created to set the stage for those trials. With a truth commission, the media may again be engaged to help tell the stories identified by the commission through documentaries, books or even artistic creations.

## **Conclusions**

In summary, current efforts in the area of post conflict/transitional justice generally either

adopt the ideal of retributive justice, utilizing judicial mechanisms to punish and/or deter, or they approach it from the perspective of restorative justice adopting techniques of truth commissions/victim compensation boards, or, sometimes, both; nonetheless these approaches are individually and collectively flawed. While they each represent important aspects within the larger project of transitional justice, they each suffer from certain limits in the ability to meet all of the goals of prevention and restoration. Moreover, while it is increasingly common to see transitional justice efforts utilizing some combination of the two approaches to post conflict justice, the two together nonetheless fail to address each other's weaknesses.

To fully succeed, transitional justice requires a coordinated program involving judicial mechanisms, restorative programs and human rights education targeted to address the needs of that transitional society.