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AFTER ATROCITY EXAMPLES FROM AFRICA: THE RIGHT TO EDUCATION AND THE ROLE OF LAW IN RESTORATION, RECOVERY, AND ACCOUNTABILITY

Erika R. George[†]

I. Introduction

In recent years, there has been a proliferation of international legal institutions to respond to the challenges confronted by many countries emerging from armed conflict, mass violence, or systematic human rights violations. Unfortunately, there are ample recent examples of atrocities throughout the world—the killing fields of Cambodia, ethnic cleansing in the former Yugoslavia, and the genocide in Rwanda are but a few. To date, efforts of the international community to restore respect for human rights and ensure that those responsible for atrocities and human rights abuses in post-conflict societies have predominately centered on criminal justice models.¹ For example, the last decade has seen the creation of the International Criminal Court, ad hoc tribunals for Rwanda and the former Yugoslavia, and a special court in Sierra Leone. Recent negotiations resulted in the formation of a hybrid tribunal for Cambodia. Most of these contemporary responses have associated criminal accountability in the international legal system with advancing the rule of law.² Yet the “rule of law,” now promoted by the international community as a means for establishing peace and stability in societies where massive human rights tragedies have occurred, has often been uprooted or may never have taken root in those countries.

An increasing number of weak or failing states and humanitarian crises over the past several years sparked greater demand on the part of the international community for rule of law promotion efforts designed to build or rebuild legal institutions, provide accountability for abuses and war crimes, restore functioning civilian democratic governments, and foster economic recovery.³ In parts of the African continent recently plagued with armed conflict such as Sudan, Liberia, Sierra Leone, and Rwanda, the rule of law ceased to meaningfully exist. In those areas not devastated by war, systemic rights violations such as those associated with the maintenance of South Africa’s apartheid regime served to discredit the

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¹ Ruti Teitel, *The Universal and the Particular in International Criminal Justice*, 30 COLUM. HUM. RTS. L. REV. 285, 286 (1999) (considering how criminal processes effect the liberal transformation of transitional states emerging from authoritarian rule).

² *Id.*

³ JANE STROMSETH, DAVID WIPPMAN & ROSA BROOKS, CAN MIGHT MAKE RIGHTS? BUILDING THE RULE OF LAW AFTER MILITARY INTERVENTIONS 62 (2006).

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rule of law. There, implementation of unjust and racially discriminatory laws undermined respect for the law generally. Yet, in those countries where atrocities, armed hostility, and systematic abuses have ended, Africa has attempted to recover and restore the rule of law. What lessons can we draw from these varied experiences of African nations emerging from situations of violent conflict and/or systematic human rights abuses? Of the multiple models employed to hold perpetrators accountable after atrocities are committed, what potential do these models hold for advancing human rights and furthering freedoms in civil society? Are present structures sufficient to respond to the challenges of fostering restoration, recovery, and accountability after an atrocity? Are any of the current strategies used to realize the rule of law after an atrocity likely to deliver justice in Africa?

This article begins to consider these important questions through a discussion of the multiple models used to address, and redress massive human rights violations in South Africa, Rwanda, and Sierra Leone. I argue that lawyers and policy makers working to advance the rule of law must consider the *role* of law in transitional societies not only as a means of ensuring that perpetrators of grave human rights abuses are held accountable, but also as a foundation for the future. I submit that for the rule of law to take root, the conditions of a society must be fertile; and respect for the right to education must be honored in order to cultivate such conditions. Creating durable solutions to humanitarian and security problems requires a long-term commitment to rebuilding and reforming repressive or conflict-ridden societies. In particular, long-term solutions require building or rebuilding the rule of law by creating a widely shared public commitment to human rights, and a preference for relying on law and the political process rather than resorting to violence to resolve conflict.⁴ Education is a vital precondition for strengthening the rule of law and enabling reconstruction that has not received sufficient attention in the literature on transitional justice.

Part II of this article briefly reviews a predominant model of transitional justice: the criminal trial; as well as some of the criticisms of this approach. Part III describes the human rights violations that occurred in South Africa, Rwanda, and Sierra Leone and offers an assessment of the different institutions created to respond to the violations in each situation. Part IV argues that the experience of delivering justice in Africa after atrocities teaches that lawyers and others who care about promoting the rule of law must move beyond a narrow criminal prosecution model for transitional justice, and towards a broader scope that creates space for a range of approaches to address the variety of problems faced by post-conflict societies. This section also posits that the lesson to be learned is that there is no one model in the abstract which by design will deliver justice in Africa. Rather, designs for delivering justice will depend on the context of each situation such that multiple methods of response may be necessary. Part V concludes with a discussion of the contribution that respect for, and realization of, the right to education may offer to averting future atrocities and systematic human rights violations.

⁴ *Id.*

II. The Predominant Paradigm and its Problems

*A trial in the aftermath of mass atrocity, then, should mark an effort between vengeance and forgiveness. It transfers the individuals' desire for revenge to the state or official bodies. The transfer cools vengeance into retribution, slows judgment with procedure, and interrupts, with documents, cross-examination, and the presumption of innocence, the vicious cycle of blame and feud.*⁵

Today's international and national prosecutorial initiatives for war crimes and crimes against humanity are legacies of the Nuremberg and Tokyo trials conducted after World War II. The Nuremberg Trials are credited with planting the seeds of social consciousness which grew into an international movement for human rights, a body of human rights law, and the subsequent creation of institutions to implement and enforce human rights law. The Nuremberg Tribunal established, among other things, the concept of individual criminal responsibility for crimes against humanity, including: murder, extermination, enslavement, deportation, and other inhumane acts committed against civilians as well as persecutions on political, racial, or religious grounds. Irrespective of whether or not these acts would violate the domestic law of the country where they were perpetrated, the concept of crimes against humanity is grounded in an understanding of the universal nature of certain rights.⁶

The heritage of modern human rights law owes much to the potent symbol of "crimes against humanity," signaling the law's universality. Human rights' universality maintains that there are basic human rights that are the same for everyone everywhere. In the prevailing post-conflict paradigm, "mass violence is constructed as something extraordinarily transgressive of universal norms," and the "[a]cts of atrocity are characterized as crimes against the world community or, more emotively, as offenses against us all."⁷ Accordingly, because human rights tragedies are constructed as being of central concern to humanity as a whole, "international institutions putatively representative of the global community become appropriate conduits to dispense justice and inflict punishment."⁸

A. Purposes of Post-Atrocity Processes

The post-WWII paradigm of a universalized criminal justice system to redress human rights violations persists to the present day as evidenced by the proliferation of international and hybrid tribunals. According to Ruti Teitel, that human rights protections are still thought to be attainable through international punishment processes is evidence of the continuing dominance of the postwar paradigm

⁵ MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE* 26 (1998).

⁶ Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, art. 6, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279.

⁷ Mark A. Drumbl, *Collective Violence and Individual Punishment: The Criminality of Mass Atrocity*, 99 Nw. U. L. REV. 539, 540 (2005)[hereinafter *Collective Violence*].

⁸ *Id.*

and its central symbols.⁹ Successful criminal convictions of the perpetrators of the worst atrocities have been few and far between despite numerous genocidal campaigns and the commission of other atrocities since WWII. Some argue that this relative lack of enforcement through the criminal justice process has contributed to a pervasive sentiment that the international human rights regime is deeply flawed.¹⁰ Nevertheless, the judicial procedural feature of the universal conception of rights retains an ongoing significance in today's efforts to address atrocities. The dual purposes said to be served by the introduction of judicial processes after massive human rights tragedies are: (1) to ensure that perpetrators of the violations are held accountable for their crimes; and (2) to reestablish or establish the rule of law in post-conflict societies.¹¹

1. *Ensure Accountability, End Impunity*

Advocates of the establishment of criminal justice processes following atrocities argue that the risk of prosecution can serve as a deterrent.¹² Would-be violators of human rights will be less inclined to employ measures of extreme violence or transgress internationally recognized norms of crimes against humanity where there is a risk of conviction and punishment. Ensuring that perpetrators face some reckoning may also be critical to future societal stability as criminal trials signal to all members of society that abuses will not be permitted to recur. The process of ensuring accountability in turn reinforces broader efforts at reform of the justice system.¹³

2. *Promote the Rule of Law*

Although few legal scholars believe criminal trials should be the only, or entire response to mass atrocities, many have ascribed considerable transformative potential to trials because trials contribute to the establishment of the rule of law.¹⁴ As commonly used, the phrase "the rule of law" has come to be associated with a nebulous collection of concepts, including fairness, order, and equality under the law.¹⁵ Richard Fallon has observed that "virtually all understandings of the rule of law share three purposes, or values; the rule of law serves to protect

⁹ Teitel, *supra* note 1, at 289.

¹⁰ See generally, JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005); Eric A. Posner, *All Justice, Too, Is Local*, N.Y. TIMES, December 3, 2004, available at http://www.nytimes.com/2004/12/30/opinion/30posner.html?_r=1&oref=slogin.

¹¹ Miriam J. Aukerman, *Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transnational Justice*, 15 HARV. HUM. RTS. J. 39, 65-7 (2002).

¹² See e.g. Rosa Ehrenreich Brooks, *The New Imperialism: Violence, Norms and the "Rule of Law"*, 101 MICH. L. REV. 2275, 2276-77 (2003).

¹³ STROMSETH ET AL., *supra* note 3, at 250-51.

¹⁴ Drumbl, *Collective Violence*, *supra* note 7, at 546 (citing Jackson Nyamuya Maogoto, *WAR CRIMES AND REALPOLITICK* (2004); see also Payam Akhavan, *The International Criminal Court in Context: Mediating the Global and Local in the Age of Accountability*, 97 AM. J. INT'L L. 712 (2003) (calling for a more critical discourse on the efficacy of managing massive atrocities in distant lands within the rarified confines of international legal process).

¹⁵ STROMSETH ET AL., *supra* note 3, at 68-70.

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people against anarchy; to allow people to plan their affairs with confidence because they know the legal consequences of their actions; and to protect people from the arbitrary exercise of power by public officials.”¹⁶ While a generally agreed upon definition has been elusive, rule of law projects underway in post-conflict societies primarily seek to foster the establishment of legal institutions and structures including well-functioning, respected courts, judicial review, fair and adequate legal codes, and well-trained lawyers.¹⁷ Most scholars define the rule of law in a formal or minimalist manner emphasizing the rule of law’s formal and structural components rather than the substantive content of the laws.¹⁸

Even in the absence of a precise definition, most policymakers and practitioners from a variety of different constituencies take it for granted that the rule of law is needed in post-conflict societies.¹⁹ Members of the economic development and corporate communities assume that the rule of law will produce effective dispute resolution mechanisms as well as a predictable and fair legal framework, which will protect property interests and enforce contracts. For many human rights advocates, however, “where the rule of law is absent, human rights violations flourish.”²⁰ Accordingly, human rights advocates are also enthusiastic about promoting the rule of law, expecting that it will guarantee due process and equal protection to individuals and limit the power of governments over individual liberties. Increasingly, international and national security experts view expansion of the rule of law in certain societies as a key aspect of preventing terrorism.²¹ While the causes of terrorism are complex, misery and repression are believed to create fertile ground for radicalization and incitement to violence. The rule of law may play an important role in eliminating the conditions that give rise to sympathy for the use of violence and terror, as well as to bring attention to and redress perceived grievances.²²

B. Problems with Post-Atrocity Processes

Commentators have advanced both pragmatic and principled critiques of the expansion of criminal justice models to address atrocities. Critics attribute the faith in international tribunals and international criminal justice on the part of so many activists, scholars, states, and policy makers to “a perplexing fusion of

¹⁶ Richard H. Fallon, “*The Rule of Law*” as a Concept in International Discourse, 97 COLUM. L. REV. 1, 7 (1997).

¹⁷ STROMSETH ET AL., *supra* note 3, at 56.

¹⁸ *Id.* at 70 (citing Paul Craig, *Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework*, PUB. L. 467 (1997)); see also Robert S. Summers, *A Formal Theory of the Rule of Law*, 6 RATIO JURIS 127, 135 (1993) (offering a discussion of substantive rule of law theories).

¹⁹ STROMSETH ET AL., *supra* note 3, at 74 (citing Tom Carothers, *AIDING DEMOCRACY ABROAD* (1999)).

²⁰ *Id.* at 58–59.

²¹ Jane E. Stromseth, *Pursuing Accountability for Atrocities After Conflict: What Impact on Building the Rule of Law?*, 38 GEO. J. INT’L L. 251, 253 (2007) [hereinafter *Pursuing Accountability*].

²² STROMSETH ET AL., *supra* note 3, at 59–60 (citing Tom Carothers, *Promoting Democracy and Fighting Terror*, 82 FOREIGN AFFAIRS Jan.-Feb. 2003).

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exuberance and under theorizing.”²³ For example, Mark Drumbl observes: “[a]lthough there is much to celebrate in holding systematic human rights abusers accountable for their actions; an iconoclastic preference for the criminal law may not always be the best way to promote accountability in all afflicted places and spaces.”²⁴ He and others are concerned that the “structural simplicity” pursued by the dominant model of prosecution and punishment may discount the complexity of justice and reconciliation.²⁵

A rights-based approach argues that major perpetrators of atrocities must be held legally accountable if a country is to make an effective transition to a society guided by the rule of law. Realists raise pragmatic concerns disputing the beneficial impact of trials, arguing that criminal prosecutions can be destabilizing since those at risk of prosecution will be unwilling to relinquish power.²⁶ Instead, conditional amnesties can, they argue, remove elements that would disrupt transition efforts and create a better prospect for peace and the rule of law in the long term.²⁷

Other commentators raise objections based on principle, concerned that current criminal justice models may be too limited and limiting.²⁸ Many of these commentators are also concerned about imperialist overtones of international criminal justice, and argue that the judicialization of mass violence actually involves the transplantation of the domestic criminal models of Western legal systems.²⁹ Western models are in turn presented as value neutral and universal.³⁰ Although globalized, these models are not universal but rather deeply culturally

²³ Drumbl, *Collective Violence*, *supra* note 7, at 547–48.

²⁴ *Id.* at 547.

²⁵ *Id.*; see generally, TRANSITIONAL JUSTICE IN THE TWENTY-FIRST CENTURY: BEYOND TRUTH VERSUS JUSTICE (Naomi Roht-Arriaza & Javier Mariez Currena eds., 2006)[hereinafter TRANSITIONAL JUSTICE].

²⁶ Stromseth, *supra* note 21, *Pursuing Accountability*, at 253-54.

²⁷ See, e.g., Charles P. Trumbull IV, *Giving Amnesties a Second Chance*, 25 BERKLEY J. INT’L L. 283, 285 (2007); Charles Villa-Vicencio, *Why Perpetrators Should Not Always be Prosecuted: Where the International Criminal Court and Truth Commissions Meet*, 49 EMORY L. J. 205 (2000); Minow, *supra* note 5, at 44-48.

²⁸ See, e.g., Trumbull, *supra* note 27, at 285 (acknowledging the difficulty governments in transitional societies face in determining how and whether to bring violators of human rights to justice); see also Chandra Lekha Sriram, *Revolutions in Accountability: New Approaches to Past Abuses*, 19 AM. U. INT’L L. REV. 301 (2003).

²⁹ See, e.g., Leila Nadya Sadat, *Exile, Amnesty and International Law*, 81 NOTRE DAME L. REV. 955, 994-95 (2006) (explaining why international criminal justice is “tainted by a lack of evenhandedness that has a certain imperialist tinge”).

³⁰ Mark A. Drumbl, *Toward a Criminology of International Crime*, 19 OHIO ST. J. ON DISP. RESOL. 263 (2003); Mark A. Drumbl, *Pluralizing International Criminal Justice*, 103 MICH. L. REV. 1295, 1327 n. 24 (2005) (observing: Although international criminal justice institutions may have harmonized adversarial and inquisitorial methodologies, this harmonization is a political settlement among powerful international actors. It is not a genuinely inclusive process that accommodates the disempowered victims of mass violence—largely from non-Western audiences and often estranged from any state or government—who consistently lack any clout in international relations).

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contingent.³¹ Under this view, implementation of international criminal law risks a democratic deficit insofar as it excludes the perspectives of precisely those communities traumatized by the criminality on trial in the international forum. Thus, replication of the predominant international criminal law model without respect for context and differences may mean externalizing justice away from the very communities closest to the conflict.³²

III. Examples: Multiple Models of Delivering Justice after Atrocity

Most of the early literature on international justice debates the relative merits of criminal prosecutions versus truth commissions. Now, a consensus is emerging that either a truth *or* a justice approach was inappropriate and unnecessary.³³ Indeed, a number of recent transitional justice efforts have stressed both a truth *and* a justice approach. There is a growing recognition that no single method may adequately serve societies rebuilding after conflict. I will now analyze how efforts to deliver justice after atrocity in South Africa, Rwanda, and Sierra Leone have sometimes combined multiple institutions and experimented with community level initiatives that draw upon traditional law and culture.

A. South Africa

1. Historical Overview

After years of wars of conquest and competition between European colonials and Africans over resources in the region, the Union of South Africa was officially founded by Dutch and English colonists in 1910. Only whites participated in the National Conventions that led to the formation of the Union.³⁴ Shortly after the formation of the Union, the white government introduced legislation to prevent blacks from purchasing and possessing property outside of designated reserved land areas. Africans living in the new Union formed the Native National Congress, which would later become the African National Congress (“ANC”) in 1912. The National Party, which would later become the architect of the modern systemic Apartheid rule, was formed in 1914.

Apartheid, the policy of separateness, was solidified when the National Party came to power in 1948.³⁵ Under apartheid policies, the country’s population was legally classified by race and the principle of “separate development” was promoted by the political leadership as the best way of dealing with the “native problem.”³⁶ Policies adopted by successive South African governments since

³¹ For a discussion of the underappreciated significance of culture in transitional justice projects *see generally*, Ariel Meyerstein, *Between Law and Culture: Rwanda’s Gacaca and Postcolonial Legality*, 32 *LAW & SOC. INQUIRY* 467 (2007).

³² *See generally* Drumbl, *Collective Violence*, *supra* note 7; *see also* Brooks, *supra* note 12.

³³ *TRANSITIONAL JUSTICE*, *supra* note 25.

³⁴ FRANK WELSH, *A HISTORY OF SOUTH AFRICA* 365 (2000).

³⁵ South Africa declared itself a Republic in 1961, leaving the Commonwealth.

³⁶ Business Hearings: Hearing Before the South African Truth and Reconciliation Commission (November 11, 1997), *available at* <http://www.doj.gov.za/trc/special/business/busin1.htm>.

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1948 were increasingly repressive. By the 1970s, over three million people were forcibly removed and resettled in black homelands by the government.³⁷

The government's apartheid policies were met with opposition and resistance. The ANC challenged apartheid with campaigns of civil disobedience. The government in turn responded with violence. The massacre of peaceful protesters at Sharpeville by police forces in 1960 triggered an international outcry.³⁸ The massacre was not the only, or the worst, outrage atrocity committed by police. However, because it came in the middle of a treason trial and was coupled with the callous attitude of the government, the massacre established South Africa as politically "untouchable" for most other countries.³⁹ In the months following the massacre, international capital and investment was withdrawn at a rate that halved the country's reserves and shook the currency.⁴⁰

In 1960, the government banned the ANC. The ANC continued to operate underground and eventually formed a military wing to launch a sabotage campaign against the government. Nelson Mandela, who co-founded and led the military wing was captured, tried and sentenced to life imprisonment in 1962. Conflict and violent clashes continued, while protests by blacks were brutally put down by government security forces. Uprisings continued undeterred despite military efforts. Anti-apartheid activists refused to be governed by racism and resolved to make the streets of South Africa "ungovernable" by the white government.

In 1989, FW de Klerk replaced PW Botha as South Africa's president and met with Mandela. During de Klerk's tenure, some public facilities were desegregated and a number of ANC activists were released from prison.⁴¹ In the early 1990s, opposition political parties were unbanned, and Mandela was released from prison after being confined for 27 years. While 1991 marked the start of multiparty talks, during the four-year period between the release of Mandela and South Africa's first democratic elections, it appeared that rampant political violence would destroy the country.

In April 1994, the ANC won a majority in the first national elections in which every citizen was given the right to vote.⁴² Mandela became president and formed a Government of National Unity. South Africa's Commonwealth membership was restored and the remaining international sanctions were lifted. South Africa took a seat in the United Nations General Assembly after a 20-year absence. De Klerk and Mandela were awarded the Nobel Peace Prize for negotiating a relatively nonviolent transition to a democratic society.

³⁷ Jeanne M. Woods, *The Fallacy of Neutrality: Diary of an Election Observer*, 18 MICH. J. INT'L L. 475, 494 n.139 (1997).

³⁸ Ibrahim J. Gassama, *Reaffirming Faith in the Dignity of Human Beings: The United Nations, NGOs, and Apartheid*, 19 FORDHAM INT'L L.J. 1464, 1482-83 (1996).

³⁹ Welsh, *supra* note 34, at 454.

⁴⁰ *Id.* at 456.

⁴¹ Kimberlee Ann Scalia, *A Delicate Balance: The Effectiveness of Apartheid Reforms in the Struggle for the Future of South Africa*, 6 FLA. J. INT'L L. 177, 179 n.13 (1990).

⁴² Makau wa Mutua, *Hope and Despair for a New South Africa: The Limits of Rights Discourse*, 10 HARV. HUM. RTS. J. 63, 75 n.58 (1997).

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2. *The Process of Restoration, Recovery, and Accountability*

The Apartheid system faced accountability not in a court or tribunal, but before a Truth and Reconciliation Commission (“South African TRC”).⁴³ The objectives of the Commission were to promote national unity and reconciliation in a spirit of understanding transcending the conflicts and divisions of the past.⁴⁴ The South African TRC was tasked with establishing as complete a picture as possible of the causes, nature and extent of the gross violations of human rights which were committed during the period from March 1960 through 1993. The South African TRC also researched the antecedents, circumstances, factors, and context of such violations.

The South African TRC was to facilitate the granting of amnesty to persons who made full disclosure of their acts, to establish and make known the fate or whereabouts of victims, to grant survivors an opportunity to relate their own accounts of the violations they suffered, and to recommend reparation measures.⁴⁵ Finally, the South African TRC was to compile a report providing as comprehensive an account as possible of its activities and findings.⁴⁶

Three committees comprised the South African TRC: (a) the Committee on Human Rights Violations, which was directed to address matters pertaining to investigations of gross violations of human rights; (b) the Committee on Amnesty, designed to deal with claims relating to amnesty; and (c) the Committee on Reparation and Rehabilitation tasked with dealing with matters relating to reparations.⁴⁷

3. *Future Prospects*

More than a decade after the South African TRC’s final report, evaluations of its efficacy continue.⁴⁸ Some observers of the South African TRC’s process, while appreciating the stark choices facing the parties involved in the transition, have raised concerns about the nature of the nation’s agreement, which transferred power largely without a settling of historic wrongs, displacements, and economic disadvantages.⁴⁹ Essentially, some see the South African TRC’s process as a compromise to the apartheid government, guaranteeing that white politicians, police, and army officers would never be tried for the crimes they

⁴³ See RICHARD A WILSON, *THE POLITICS OF TRUTH AND RECONCILIATION IN SOUTH AFRICA: LEGITIMIZING THE POST-APARTHEID STATE* 9–10 (2001).

⁴⁴ Promotion of National Unity and Reconciliation Act No. 34 of 1995, July 26, 1995, ch. 2, para. 3–4.

⁴⁵ Marianne Geula, *South Africa’s Truth and Reconciliation Commission as an Alternative Means of Addressing Transnational Government Conflict in a Divided Society*, 18 B.U. INT’L L. J. 57, 64–66 (2000).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ See, e.g., Penny Andrews, Book Review David Dyzenhaus, *Judging the Judges, Judging Ourselves: Truth Reconciliation and the Apartheid Legal Order* 24 MELB. U. L. REV. 236 (2000).

⁴⁹ Gillian Slovo, *Making History: South Africa’s Truth and Reconciliation Commission*, Dec. 5, 2002, available at http://www.opendemocracy.net/democracy-africa_democracy/article_818.jsp.

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committed in the name of the system in exchange for insurance against a right wing revolt backed by the power of the armed forces.⁵⁰ In South Africa, because neither side could impose a victor's justice as neither side won a decisive victory,⁵¹ many saw a negotiated transition as the best alternative at the time.⁵²

South Africa exchanged retributive justice or criminal prosecution for a variant of restorative justice, which attempted to direct attention to the needs and participation of victims who would hopefully find that "revealing is healing."⁵³ The South African TRC hearings allowed people to speak of what had been done to them. Some have argued that, given existing inequalities due to past discrimination, there was a tension in the purpose of the South African TRC itself, in that "it was a commission set up to draw a line under the past, to seal it up so that it could not contaminate the future, to expose the truth about past illegalities without throwing the weight of law against them, and to offer compensation without revenge."⁵⁴

Despite its shortcomings, perhaps the most significant contribution of the South African TRC was the history it made and the possibility of its promise, not just for those participating in the hearings but also because the report it produced rewrote the history of South Africa for future generations. Because atrocities were confessed, they cannot be denied, so it can be said the battle for history was won by those who suffered systematic human rights violations.⁵⁵

B. Rwanda

1. *Historical Overview*

While the 1994 genocide in Rwanda was Africa's worst in modern times, ethnic violence in the country was not unprecedented. Rwanda had long been beset by ethnic tensions associated with the traditionally unequal relationship between the dominant Tutsi minority and the disadvantaged Hutu majority.⁵⁶ A Tutsi King, Kigeri Rwabugiri, established a unified state in Rwanda in the late 1800s.⁵⁷

⁵⁰ *Id.*

⁵¹ See DESMOND TUTU, *NO FUTURE WITHOUT FORGIVENESS* 25 (1999).

⁵² See generally HEINZ KLUG, *CONSTITUTING DEMOCRACY: LAW, GLOBALISM AND SOUTH AFRICA'S POLITICAL RECONSTRUCTION* (2000); Albert L. Sachs, *Honoring the Truth in Post-Apartheid South Africa*, 26 N.C. J. INT'L L. & COM. REG. 799 (2001); Peter Bouckaert, *The Negotiated Revolution: South Africa's Transition to a Multiracial Democracy*, 33 STAN. J. INT'L L. 375 (1997).

⁵³ Slovo, *supra* note 49.

⁵⁴ *Id.*

⁵⁵ See Justice Pius Langa, *South Africa's Truth and Reconciliation Commission*, 34 INT'L LAW. 347, 348 (2000) (observing "[t]he story of the [South African TRC] is consistent with remembering and then closing the book on the past. The book will always be there, it is a record of the cruelties human beings are capable of—people who are otherwise flesh and blood humans" and asking "is there a lesson for us there, as a developing generation?").

⁵⁶ For a general discussion of the political history of Rwanda and how that history influenced the ethnic hatred motivating the genocide see generally, Human Rights Watch, *Leave None to Tell the Story: Genocide in Rwanda* 31-64 (1999).

⁵⁷ See ALAIN DESTEXHE, *RWANDA AND GENOCIDE IN THE TWENTIETH CENTURY* (1995); GERARD PRUNIER, *THE RWANDA CRISIS: HISTORY OF A GENOCIDE* 23 (1995).

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Rwanda later became part of German East Africa until 1916 when Belgian forces occupied the country.⁵⁸ In 1923, the League of Nations granted Belgium a mandate to govern the Ruanda-Urundi region, which it ruled indirectly through Tutsi kings.⁵⁹ In 1946, Ruanda-Urundi became a UN trust territory governed by Belgium.⁶⁰

In 1957, Hutus issued a manifesto calling for a change in Rwanda's political power structure to give them a voice commensurate with their numbers.⁶¹ Tens of thousands of Tutsis were forced into exile in Uganda following inter-ethnic violence.⁶² Rwanda was proclaimed an independent republic in 1961. With a Hutu president in power after independence, many more Tutsis left the country. In 1963, Tutsi rebels based in bordering Burundi killed some 20,000 Hutus following an incursion into Rwanda. Ethnic conflicts reached a head in 1973 after a military coup led by a Hutu, Juvenal Habyarimana.

Although controversy surrounds attempts to explain what triggered the 1994 genocide, most scholars concede that from April 7 to July 17, 1994, between 500,000 and 1,000,000 Rwandans were killed by hundreds of thousands of their fellow citizens.⁶³ Ten percent of the population died within days. Among the most distinguishing characteristics of the tragedy in Rwanda were the systematic manner of the slaughter and the wide-spread participation in its implementation.⁶⁴

2. *The Process of Restoration, Recovery, and Accountability*

a. *The International Criminal Tribunal for Rwanda*

In 1994, the U.N. Security Council established an International Criminal Tribunal for Rwanda ("ICTR") to prosecute persons "responsible for genocide and other serious violations of international humanitarian law."⁶⁵ The Resolution maintained that criminal prosecution of those responsible for serious violations "would contribute to the process of national reconciliation and to the restoration and maintenance of peace."⁶⁶ The resolution granted the ICTR, sitting in Arusha, Tanzania, power to prosecute persons responsible for violations in Rwanda and in the territory of bordering states between January 1, 1994 and

⁵⁸ See WILLIAM ROGER LOUIS, *RUANDA-URUNDI, 1884-1919* (1979).

⁵⁹ See QUINCY WRIGHT, *MANDATES UNDER THE LEAGUE OF NATIONS* 611-16 (1930).

⁶⁰ Trusteeship Agreement for the Territory of Ruanda-Urundi, Approved by the General Assembly of the United Nations on 13 December 1946.

⁶¹ Office of the President of the Republic of Rwanda, *The Unity of Rwandans Before the Colonial Period and Under the Colonial Rule Under the First Republic* 42 (1999).

⁶² PRUNIER, *supra* note 57, at 61-67.

⁶³ Olivia Lin, *Demythologizing Restorative Justice: South Africa's Truth and Reconciliation Commission and Rwanda's Gacaca Courts in Context*, 12 *ILSA J. INT'L & COMP. L.* 41, 69-70 (2005).

⁶⁴ See generally, Human Rights Watch, *Leave None to Tell the Story*, *supra* note 56.

⁶⁵ S.C. Res. 955, ¶ 1, U.N. Doc. S/RES/955 (8 November 1994).

⁶⁶ *Id.*

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December 31, 1994.⁶⁷ By October 2006, the ICTR had rendered thirty-one judgments related to the genocide.⁶⁸ The ICTR established an outreach project in 1998 and opened an information center in Rwanda in 2000. Although the ICTR maintains a website, but few Rwandans have internet access or other regular access to information about the ICTR's accomplishments.

b. *Gacaca*

Because the ICTR brought so few cases to judgment and the weak domestic judicial system was plagued with severe backlogs and thousands of untried detained suspects, alternative procedures were sought to adjudicate the violations. The Gacaca courts are an alternative dispute resolution mechanism, distinct from the ICTR and traditional systems of criminal justice. Gacaca was introduced after it became increasing clear that prosecutions were insufficient to try the more than 100,000 detainees suspected of having participated in the genocide.⁶⁹

The term "Gacaca", meaning "lawn", recalls the way that members of a traditional Rwandan pre-colonial community court would sit on the grass while hearing disputes brought before the community.⁷⁰ Historically, the Gacaca process emphasized restitution and reconciliation as the principal objectives.⁷¹ While some sanctions might be imposed by a Gacaca gathering, the sanctions were meant to educate the perpetrator regarding the gravity of the offense as well as to reintegrate the accused into the community.⁷² In part, the focus on restorative justice through the Gacaca in Rwanda was a reaction against the limited results from the retributive justice campaign initiated by the Rwandan government after the genocide.⁷³

3. *Future Prospects*

The ICTR has produced groundbreaking legal precedents contributing to the development of international criminal law generally. The ICTR also served to focus the attention of the world on fundamental rules of international law by bringing some major perpetrators to justice. The process has established an official record of the crimes committed and the criminal responsibility of those involved.

⁶⁷ See Security Council Resolution 955 (1994) S/RES/955 (1994).

⁶⁸ 11th Annual Report of the ICTR Presented to the General Assembly by Judge Erik Mose in ICTR Newsletter 2 (October 2006) ("To date, judgments have been rendered, or trials are ongoing in respect of a total of fifty-six alleged leaders of events in 1994").

⁶⁹ Lin, *supra* note 63, at 75.

⁷⁰ L. Danielle Tully, *Human Rights Compliance and the Gacaca Jurisdictions in Rwanda*, 26 B.C. INT'L & COMP. L. REV. 385, 386, 401 (2003); See also Pernille Ironside, *Rwandan Gacaca: Seeking Alternative Means to Justice, Peace and Reconciliation*, 15 N.Y. INT'L L. REV. 31 (2002).

⁷¹ Tully, *supra* note 70, at 396.

⁷² *Id.* at 386-401.

⁷³ Erin Daly, *Transformative Justice: Charting a Path to Reconciliation*, 12 INT'L LEGAL PERSP. 73, 76-78 (2002); see also Lin, *supra* note 63, at 81.

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Despite these accomplishments, the ICTR may be remembered for its shortcomings as much as its achievements. Critics fault the fact that the ICTR was geographically and psychologically distant from those most affected by the atrocities under investigation.⁷⁴ This distance, coupled with only belated and limited outreach attempts, is believed to have undercut the ICTR's legitimacy in eyes of critical domestic audiences. Limited accurate information about the tribunals' proceedings undermined their potential impact to demonstrate fair justice and accountability for atrocities in a way that resonates with the people most directly affected.

Finally, the ICTR contributed very little to the process of building domestic judicial capacity in Rwanda. Indeed, until the recent focus on the ICTR's completion strategy, the ICTR had done very little to help strengthen the ability of local courts to deal with the substantial number of potential suspects remaining to be tried.⁷⁵

In sum, the ICTR's impact within Rwanda has been a mixed one. The tribunal's relationship with the Rwandan government was uneasy from the start. After seeking international assistance in bringing perpetrators of Rwanda's devastating genocide to justice, Rwanda was the only state on the UN Security Council to vote against establishing the ICTR. Rwanda's objections—which still fester— included the failure to locate the tribunal within Rwanda, the lack of a provision for capital punishment, and the limits on the time constraints imposed on the court's jurisdiction.⁷⁶ Management problems and the more than one billion dollars spent on the ICTR while Rwanda's domestic system struggled to try thousands of suspects have also been a source of resentment and tension. The limited number of individuals that the ICTR is able to try, the slow pace of proceedings at the tribunal, and the limited role for and attention to the needs of victims have all been criticism raised by Rwandan political leaders. In light of these issues, the ICTR has had a difficult time establishing broad credibility among the Rwandan public. "For many Rwandans, moreover, the individuals who directly committed atrocities in front of their own eyes matter as much as the more distant architects of the genocide."⁷⁷

Similar to South Africa's TRC, the Gacaca has become a celebrated alternative for restorative justice.⁷⁸ But, despite enthusiasm over the Gacaca courts, the system has yet to progress in implementation beyond a few pilot projects. Participation in the Gacaca courts has been lower than initially predicted, and gather-

⁷⁴ Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities*, 95 AM. J. INT'L L. 7, 25 (2001).

⁷⁵ STROMSETH ET AL., *supra* note 3, at 265; *see also* Victor Peskin, *Courting Rwanda: The Promises and Pitfalls of the ICTR's Outreach Programme*, 3 J. INT'L CRIM. JUST. 950 (2005).

⁷⁶ STROMSETH ET AL., *supra* note 3, at 271; *see also* Aloys Habimana, *Judicial Responses to Mass Violence: Is the International Criminal Tribunal For Rwanda Making a Difference Towards Reconciliation in Rwanda*, in INTERNATIONAL WAR CRIMES TRIALS: MAKING A DIFFERENCE? 83, 84–85 (Steven R. Ratner & James L. Bischoff, eds., 2003).

⁷⁷ STROMSETH ET AL., *supra* note 3, at 271.

⁷⁸ *See, e.g.*, Maya Goldstein-Bolocan, *Rwandan Gacaca: An Experiment in Transitional Justice*, 2004 J. DISP. RESOL. 355, 372–86 (2005).

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ings have been canceled for failure to meet quorum requirements.⁷⁹ Fear of retribution is also a factor dividing Rwandan communities over the Gacaca process. The fears of retribution in Rwanda are real. Human rights monitors have raised concerns about the security of survivors and witnesses in judicial proceedings, and Human Rights Watch has documented incidents of Gacaca participants being slain in reprisal for participating.⁸⁰

C. Sierra Leone

1. *Historical Overview*

In 1787, British abolitionists and philanthropists established a settlement in Freetown for repatriated and rescued slaves.⁸¹ In 1808, Sierra Leone became a crown colony. The country gained independence from British rule on April 27, 1961. Sierra Leone's long civil war began on March 23, 1991, when forces of an organized armed group, known as the Revolutionary United Front ("RUF") led by Foday Kankoh and assisted by Charles Taylor's Liberian military forces, entered Sierra Leone from bordering Liberia to overthrow the government.

International and local pressure led to democratic elections in 1996. On the day of the election, however, the RUF attacked. In response, various civil militia forces united into a centralized force which became known as the Civil Defense Forces ("CDF"). The CDF fought the RUF rebels alongside the standing Sierra Leone Army ("SLA"). After the democratic election, army elements calling themselves the Armed Forces Revolutionary Council ("AFRC") led by Jonny Paul Koroma, overthrew the newly elected government. Koroma invited the RUF to join the government after the coup. Combined RUF/AFRC forces began to attack the CDF as well as civilians deemed to be collaborating with or sympathetic to the CDF.

Eventually, international efforts again produced a cease fire and peace agreement on July 7, 1999. The formal beginning of the end of the conflict was the Lomé Peace Agreement of July 27, 1999 between the government and the RUF. The agreement provided a controversial amnesty for perpetrators of atrocities on all sides of the conflict.⁸² In October 1999, the UN established a peacekeeping mission to Sierra Leone ("UNAMSIL").⁸³ The RUF leader, Sankoh, was arrested on May 17, 2000. British troops were immediately deployed to deter vio-

⁷⁹ Lin, *supra* note 63, at 80-1.

⁸⁰ *Killings in Eastern Rwanda*, HUMAN RIGHTS WATCH, January 2007 (in one set of incidents a genocide survivor, the nephew of a Gacaca judge was killed and eight people, among them children, were slain in reprisal); *see also Another Gacaca Judge Murdered*, N.Y. TIMES, Jan. 2, 2007., available at http://www.newtimes.co.rw/index.php?option=com_content&task=view&id=56&Itemid=39.

⁸¹ For an early history of Sierra Leone *see generally*, A.P. KUP, A HISTORY OF SIERRA LEONE: 1400-1787 (1962).

⁸² William A. Schabas, *The Sierra Leone Truth and Reconciliation Commission*, in TRANSITIONAL JUSTICE, *supra* note 25.

⁸³ *See* Security Council Resolution 1270, S/RES/1270 (1999); *see also* Lisa Danish, *Internationalizing Post-Conflict Justice: The "Hybrid" Special Court For Sierra Leone*, 11 BUFF. HUM. RTS. L. REV. 89, 99 (2005).

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lence and train local army and police. Another cease fire agreement was signed in May 2001. The civil war was officially declared over in 2002. Ultimately, Sierra Leone emerged from decades of civil war with the help of Britain, and a large United Nations peacekeeping mission. Foreign troops disarmed tens of thousands of rebels and militia fighters.

The country now faces the challenge of reconstruction. If the aims of the RUF were initially shared by many of those who were also frustrated by dictatorship, poverty, and underdevelopment, the conflict lost any of its legitimate aspirations when the RUF used barbaric tactics against great numbers of the civilian population.⁸⁴ A lasting legacy of the war, which left some 50,000 to 75,000 dead, will be the after-effects of the atrocities committed by the RUF rebels—whose signature abuse was to chop off the limbs of their victims to terrorize others. Sierra Leone's civil war was also characterized by the forced recruitment of child soldiers, widespread rapes and murders, and the gruesome mutilation of civilians. Trade in illicit gems, known as "blood diamonds," played a role in funding conflict, and thus perpetuated the civil war. The war rendered almost half the country's population of five million either internally displaced persons or refugees. The prevalence of rape and other sexual assaults during the war resulted in an increased spread of HIV/AIDS. The current Sierra Leone government, in combination with several outside groups, put forth serious effort to reintegrate refugees, internally displaced persons, ex-combatants, and victims into their communities—a monumental task.⁸⁵

2. *The Process of Restoration, Recovery, and Accountability*

In July 2002, the United Nations and the Sierra Leone government concluded an agreement establishing a Special Court for Sierra Leone. A U.N.-backed war crimes court was created and seated in Sierra Leone to try those, from both sides of the conflict, who bore the greatest responsibility for the brutalities.⁸⁶ A Truth and Reconciliation Commission for Sierra Leone ("Sierra Leone TRC") was also established in July 2002. Perhaps the most distinctive feature of post-conflict justice in Sierra Leone has been the parallel existence of both an international criminal justice mechanism, in the form of the Special Court, and a parallel Truth and Reconciliation Commission of its own.⁸⁷ In the past, these Commissions have been viewed as an alternative to criminal justice that only informally obviates or, at the very least, suspends prosecutions. In Sierra Leone, these two institutions operated contemporaneously.⁸⁸

⁸⁴ Danish, *supra* note 83, at 99.

⁸⁵ Sigall Horowitz, *Transitional Criminal Justice in Sierra Leone*, in *TRANSITIONAL JUSTICE*, *supra* note 25, at 44–45.

⁸⁶ In 2006, Charles Taylor, the former Liberian president, who faced war crimes charges in Sierra Leone's special court over his alleged role in the country's civil war, has been transferred to the Netherlands-based International Criminal Court. At this writing his trial is underway.

⁸⁷ See Chandra Lekha Sriram, *Wrong-Sizing International Justice? The Hybrid Tribunal in Sierra Leone*, 29 *FORDHAM INT'L L. J.* 472 (2006).

⁸⁸ Schabas, *supra* note 82.

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a. *The Special Court*

On August 14, 2000, the Security Council adopted Resolution 1315, requesting that the Secretary-General of the United Nations negotiate an agreement with the government of Sierra Leone to create an “independent special court” with jurisdiction over “crimes against humanity, war crimes and other serious violations of international humanitarian law, as well as crimes under relevant Sierra Leonean law committed within the territory of Sierra Leone.”⁸⁹ The Resolution also recommended that the special court “should have personal jurisdiction over persons who bear the greatest responsibility of the crimes” and that the judicial process of court should be “fair, impartial and comprehensive in its temporal and territorial reach.”⁹⁰

The stated purpose remains very consistent with the predominant paradigm of prosecution, conviction, and punishment. The Resolution provided that: “in the particular circumstances of Sierra Leone, a credible system of justice and accountability for the very serious crimes committed there would end impunity and would contribute to the process of national reconciliation and to the restoration and maintenance of peace.”⁹¹

b. *Sierra Leone’s Truth and Reconciliation Commission*

Pursuant to section 6(1) of the Truth and Reconciliation Commission Act of 2000 (“Act”), Sierra Leone’s TRC was established “to create an impartial historical record of violations and abuse of human rights and international humanitarian law related to the armed conflict in Sierra Leone spanning from the beginning of the conflict in 1991 until the signing of the Lomé Peace Agreement.”⁹² The Sierra Leone TRC is 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.⁹³ Arguably, the Sierra Leone TRC has been tasked with a more ambitious and expansive mandate than that of the Special Court.⁹⁴

Significantly, the Act also requires the Sierra Leone TRC to investigate and report on the “antecedents” of the conflict.⁹⁵ Commentators have observed that the concept of human rights violations and abuses in the Act seems to suggest that these could be committed by individuals as well as governments.⁹⁶ Under

⁸⁹ S.C. Res. 1315, ¶ 1-3, U.N. Doc. S/RES/1315 (August 14, 2000).

⁹⁰ *Id.* at ¶ 2.

⁹¹ *Id.*

⁹² The Truth and Reconciliation Commission Act 2000, art. 6(1) (Sierra Leone), available at http://www.usip.org/library/tc/doc/charters/tc_sierra_leone_02102000.html (last visited Feb. 29, 2008).

⁹³ Schabas, *supra* note 82, at 23.51.

⁹⁴ Hans Kochler, *GLOBAL JUSTICE OR GLOBAL REVENGE? INTERNATIONAL CRIMINAL JUSTICE AT THE CROSSROADS* (2003).

⁹⁵ The Truth and Reconciliation Commission Act 2000, art. 6(2) (Sierra Leone), *supra* note 92.

⁹⁶ See Abdul Tejan-Cole, *The Complementary and Conflicting Relationship Between the Special Court for Sierra Leone and The Truth and Reconciliation Commission*, 6 *YALE HUM. RTS. & DEV. L.J.* 139, 146 (2003).

this view, responsibility could extend to transnational corporations trading in conflict diamonds or private security organization funneling weapons.⁹⁷

In contrast to the mandate of the South African TRC, which spoke only of “gross violations,” in Sierra Leone, the core concept is instead “human rights violations and abuse.”⁹⁸ The Commission process has incidentally also served to highlight the indivisibility and interrelationship among different human rights in the lives of survivors. For example, many victims reported to the Sierra Leone TRC that they were not seeking compensation or restitution tied to the specific harms suffered in the recent past, but rather schooling for their children, medical care, and decent housing for their futures. For the victims of terrible brutality who participated in the process, the future lay in the vindication of their economic and social rights rather than some classic legal concept or restitution.⁹⁹

3. Future Prospects

Sierra Leone’s Special Court (“Special Court”) is the first modern international criminal tribunal located within the country where the prosecuted crimes were committed. It is also the first such tribunal that was created by a bilateral treaty, which coexists with a Truth and Reconciliation Commission and that has planned an extensive outreach program to the affected communities that relies mostly on national staff.¹⁰⁰

Hybrids may have the potential to overcome some of the limitations of purely international or solely domestic proceedings, and as such, may enjoy greater legitimacy among affected local populations than either distant international or discredited domestic alternatives.¹⁰¹ Thus, hybrids may have the further advantage of “contributing to domestic capacity building and institutionalization of accountability norms.”¹⁰² Placing the tribunal directly in countries that have endured atrocities and including national participation in the work of the institution provides an opportunity to build capacity and leave behind a tangible contribution to the national justice system through the necessary provision of resources, facilities, and training.¹⁰³ Finally, by providing for direct interaction between national and international jurists, the Special Court provides enhanced opportunities for outreach to the local population. As Jane Stromseth notes, “[h]ybrids may prove more effective than either international or national processes alone in fostering awareness of and encouraging lasting respect for the fundamental principles of international law, and human rights at the domestic level, among citizens and

⁹⁷ Schabas, *supra* note 82, at 24.51.

⁹⁸ *Id.*

⁹⁹ *Id.* at 25.

¹⁰⁰ Horowitz, *Transitional Criminal Justice in Sierra Leone in TRANSITIONAL JUSTICE*, *supra* note 85, at 4353.

¹⁰¹ Chandra Lekha Sriram, *Globalising Justice: From Universal Jurisdiction to Mixed Tribunals*, 22 *NETH. Q. OF HUM. RTS.* 7, 15–16 (2004).

¹⁰² STROMSETH ET AL., *supra* note 3, at 275.

¹⁰³ Vincent O. Nmechiele & Charles Chernor Jalloh, *The Legacy of the Special Court for Sierra Leone*, 30 *FLETCHER F. WORLD AFF.*, 107, (Summer 2006).

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officials of the country involved. They may be more effective at norm diffusion.”¹⁰⁴

The Sierra Leone experiment stands out as a unique interaction between the UN and the judiciary of the state in the framework of an international entity *sui generis*. Commentators have observed that the borderline between political and judicial processes has been obfuscated by the simultaneous operation of the Sierra Leone TRC, the mandate of which runs parallel to the jurisdiction of the Special Court. It remains to be seen whether the parallel and simultaneous functioning of both the Special Court and the Sierra Leone TRC can be said to have been reconciled with the over-all goal of prosecuting the persons who bear the greatest responsibility for commission of international crimes in the territory. Both institutions have the power of gathering evidence concerning the same events but their aims are essentially different; the former strives for criminal prosecution, while the latter seeks national reconciliation. Some have argued that these differing goals create competing jurisdictions, producing two divergent systems for those whose transgressions will be handled by way of criminal prosecution and those who will simply be summoned to relate their experiences in the interest of national reconciliation.¹⁰⁵

Despite its financial constraints and other challenges, at a minimum, the Sierra Leone experience may help us understand that post-conflict justice requires a complex mix of complementary strategies.

IV. Lessons Learned from Multiple Models of Delivering Justice: Essential Elements for Accountability Processes

No single mechanism or approach can satisfy the many and sometimes conflicting goals of justice, truth, prevention, deterrence, reconciliation, and domestic capacity building in the aftermath of severe atrocities. Recognition of this fact has contributed to a significant recent trend toward mixed approaches to accountability that combine multiple mechanisms designed to advance a number of different goals. In order to be successful, rule of law rebuilding programs must respect and respond to the unique cultural character and needs of any post-conflict society.¹⁰⁶ Now, after many well-intentioned but less than optimal interventions around the world and the African continent, it has become increasingly clear that there is no “one-size-fits-all” form for rebuilding the rule of law in post-conflict settings. Nevertheless, the relative successes and failures of the varied experiments from South Africa, Rwanda, and Sierra Leone teach that at least two features, legitimacy and flexibility, are necessary to any transitional justice effort.

¹⁰⁴ STROMSETH ET AL., *supra* note 3, at 275.

¹⁰⁵ See e.g., Marissa Miraldi, *Overcoming Obstacles of Justice: The Special Courts of Sierra Leone*, 19 N.Y.L. SCH. J. HUM. RTS. 859 (2003).

¹⁰⁶ STROMSETH ET AL., *supra* note 3, at 9–10.

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A. Legitimacy

Often, in post-conflict societies, institutions meant to buttress the rule of law were either badly discredited by the abuses of a corrupt regime or entirely dismantled during armed conflict. In repressive states, such as Apartheid South Africa, the legal institutions lost credibility because they were used in order to further the political agenda of those in power. In weak states like Sierra Leone and Rwanda, legal institutions may simply have been too corrupt and inefficient to win much loyalty. Starting from warped or weak foundations, lawyers and policy makers involved in transitional justice initiatives should see themselves as tasked with the challenge of creating the conditions necessary for the growth of a rule of law culture.

Jane Stromseth has observed that when trial proceedings are widely viewed as fair and legitimate by the community most directly affected, they are more likely to demonstrate credibility in that previous patterns of impunity have been rejected, that law can be fair, and that political position or economic clout does not immunize a person from accountability.¹⁰⁷ If the procedure is viewed as biased, ignoring influential individuals while leaving lesser offenders to answer charges, the process may signal that justice systems are not fair, that nothing has changed, or that deep-seated grievances will not be addressed. On the other hand, proceedings perceived as legitimate by the domestic and international community can strengthen the fabric of a post-conflict society by helping to build and spread domestic support for a norm of accountability and the rule of law.¹⁰⁸ Political scientists have theorized that at some point in the development of a new norm of the rule of law, a “tipping point” is reached where the norm, enjoying broad acceptance, cascades through a society.¹⁰⁹

A primary factor in building legitimacy is the move away from remotely located international tribunals and toward domestic hybrid courts with national participation that are situated in the affected countries. Hybrid tribunals located in-country may be viewed more readily as legitimate by domestic audiences, have greater potential for domestic capacity building by including domestic jurists, and are able to demonstrate the importance of the rule of law to locals.¹¹⁰ In Sierra Leone, defendants have been prosecuted before mixed panels of national and international justices, while the prosecutorial staff is also composed of international and national lawyers. In contrast, international courts, like the ICTR, are physically and psychologically distant from the people most affected by the atrocities prosecuted.

¹⁰⁷ Stromseth, *Pursuing Accountability*, *supra* note 21, at 263-65.

¹⁰⁸ STROMSETH ET AL., *supra* note 3.

¹⁰⁹ See Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 INT'L ORG. 887, 895 (1998).

¹¹⁰ See, e.g., Laura A. Dickinson, *The Promise of Hybrid Courts*, 97 AM. J. INT'L L. 295 (2003).

B. Flexibility

Transitional justice strategies should be adaptive and dynamic, and should aim to build upon existing cultural and institutional resources, moving them in a constructive direction. At a minimum, some space should be retained in post-atrocity accountability processes for alternative and complementary mechanisms beyond just criminal prosecution that draws from local customs, national practices or indigenous legal process. This is not to advocate for a purely national strategy over and above other options. Indeed, other alternatives are highly appropriate where the history and heritage of a discredited legal institution endures in the community memory. International criminal law interventions that engage in practices that actually reflect the customs, procedures, and values of those individuals affected by violence, both as perpetrators and victims, may also help reform domestic institutions and national courts.

Even if establishing respect for the rule of law is a goal for international criminal law and transitional justice, legal institutions are only one means of achieving that end. Sometimes international criminal trials are not necessarily the most effective means.¹¹¹ In the immediate wake of violent conflicts, some commentators have argued that there may be times when non-legal approaches, such as informal or traditional dispute resolution, are more effective to quickly establish the rule of law than any number of courts or judicial training programs.¹¹²

The formal institutional elements of the rule of law, though valuable, are unlikely to reap lasting benefits unless they are integrated into the broader project of ensuring peace, stability, and security. Jane Stromseth has argued that “promoting social change requires creativity, openness to alternative and nontraditional approaches, and a willingness to move beyond political elites to focus as well on grassroots efforts.”¹¹³ In sum, it requires a willingness to consider the role of civil society. Formal and informal education systems play a significant role in shaping civil society. Therefore, our understanding of the *role* of the rule of law must be flexible and expansive enough to incorporate education into the planning of transitional justice programs.

V. Averting Future Atrocities through Education

*In every failed state there is a failed education system.*¹¹⁴

*Without a widely shared cultural commitment to the idea of the rule of law, courts are just buildings, judges are just bureaucrats, and constitutions are just pieces of paper.*¹¹⁵

¹¹¹ See generally MARK A. DRUMBL, *ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW* (2007).

¹¹² STROMSETH ET AL., *supra* note 3, at 329.

¹¹³ *Id.* at 315.

¹¹⁴ Emily Vargas Baron, *The Challenge of Education in Emergencies: Policy and Practice*, remarks delivered at the Third Preparatory Committee for the 2001 U.N. Special Session on Children, June 12, 2001.

¹¹⁵ STROMSETH ET AL., *supra* note 3.

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In their book, *Can Might Make Rights? Building the Rule of Law after Military Interventions*, Jane Stromseth and her colleagues highlight the question of culture and the significant role it may play in post-atrocity accountability efforts. She observes that, to date, few efforts to create rule of law programs have paid explicit attention to the challenge of creating cultures that respect the rule of law—perhaps because culture is the domain of anthropologists, not political realists or lawyers.¹¹⁶ Rule of law programs are generally assigned to lawyers who are trained to think in terms of codes and institutions rather than in terms of cultural change. Stromseth suggests that lawyers “need to think less like lawyers and more like agents of social change.”¹¹⁷ Generally, the more deeply-rooted the causes of atrocities, the greater the need for an accountability process to act not only as the arbiter of guilt or innocence in specific cases, but to become an agent for achieving more systemic social change.¹¹⁸

The rule of law is a complex and culturally situated idea, consisting of both institutions and of a particular set of normative cultural commitments.¹¹⁹ The rule of law involves not merely the existence of formal rules, but also the existence of people who voluntarily choose to respect those rules and rights. This definition emphasizes that the rule of law is a matter of cultural commitment, as well as the creation of institutions and legal codes.¹²⁰ There also remains the matter of fostering a cultural commitment to the values underlying the rule of law.¹²¹ Essentially, creating the rule of law is an issue of norm creation.¹²²

The lessons learned from the experiences in Africa should lead to the consideration of the role of law in creating cultures that are less susceptible to massive human rights violations. I submit that education can aid in the cultivation of a culture of respect for the rule of law, a thirst for justice, and a taste for using alternatives to violence to resolve existing injustices. Deep-seated grievances, lasting inequalities, and the systemic problems that may have originally contributed to violence and instability must be fully appreciated and addressed by government and civil society if a stable rule of law is to take root. Education can aid in this task.

A. What can education do to further the rule of law and transitional justice initiatives?

1. *Expanding Transitional Justice to Include Education*

The contemporary understanding of transitional justice for post-conflict societies is broadening to encompass more than just prosecutions, reparations,

¹¹⁶ *Id.* at 314.

¹¹⁷ *Id.* (citing Stephen Golub, *Beyond Rule of Law Orthodoxy: The Legal Empowerment Alternative*, CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, Paper No. 41, October 2003).

¹¹⁸ *Id.*

¹¹⁹ STROMSETH ET AL., *supra* note 3, at 11.

¹²⁰ *Id.* at 78.

¹²¹ *Id.* at 80.

¹²² Brooks, *supra* note 12, at 2285–86.

preventing impunity, and building the rule of law. Transitional justice goals are expanding to include truth sharing, reconciliation, preserving the memory of victims, building peace, and creating respect for human rights and democracy. Education, however, while often invoked conceptually, has been largely absent from the transitional justice discourse. Education should be among the primary goals of future transitional justice initiatives.

Elizabeth A. Cole observes, that “[t]he connection between transitional justice and education, or more precisely its reform, is one that, although acknowledged, has hardly been investigated either theoretically or empirically.”¹²³ While it is generally recognized that representation of the past and intergroup reconciliation matter in a post-conflict society,¹²⁴ in transitional justice work in Africa (and elsewhere), education about that very past has been given little attention. With the exception of Sierra Leone, neither Truth and Reconciliation Commissions nor tribunals have included in their mandates the production of materials specifically aimed at either school-based or non-school based informal education for youth.

a. The Right to Education

Education was historically defined as a responsibility held by parents and the church rather than a right.¹²⁵ While the rights of the child emerged at the international level over a decade ago with the 1990 entry into force of the Convention on the Rights of the Child, the promises of the treaty are only slowly being translated from words on paper to acts in practice. While there is an internationally recognized right to education, evidence of abuses in education is not systematically collected and remains largely unknown.¹²⁶

The officially decreed objectives and purposes of education in many nations tend to affirm the promotion of human rights, often repeating the wording of international human rights instruments that advocate strengthening respect for human rights, understanding and tolerance among nations, racial and religious groups, equality of sexes, peace and environmental protection.¹²⁷

The right to education enshrined in Article 26 of the Universal Declaration of Human Rights, provides that: “Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary edu-

¹²³ Elizabeth A. Cole, *Transitional Justice and the Reform of History Education*, 1 INT’L J. TRANSITIONAL JUST., 115, 115–37 (2007).

¹²⁴ *Id.* at 115-16 (explaining that aside from Sierra Leone’s program, only the Peruvian Truth and Reconciliation Commission had a specific mandate to make recommendations for the reform of secondary education, particularly the civics curriculum, and for the creation of curricula both for students and for teachers in training).

¹²⁵ Klaus Dieter Beiter, *THE PROTECTION OF THE RIGHT TO EDUCATION BY INTERNATIONAL LAW* 21–22 (2006).

¹²⁶ Katarina Tomasevski, *Human Rights in Education as Prerequisite for Human Rights Education*, in *RIGHT TO EDUCATION PRIMERS* NO. 4, 10 (2001), available at http://www.right-to-education.org/content/primers/rte_04.pdf.

¹²⁷ *Id.* at 11.

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cation shall be compulsory.”¹²⁸ The International Covenant on Economic, Social and Cultural Rights (“ICESCR”)¹²⁹ and the Convention on the Rights of the Child (“CRC”) also recognize a right to education.¹³⁰ The purpose of education, as stated in the CRC, is to foster development of a child’s personality, talent, and mental and physical abilities to their fullest potential to prepare him or her for a responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of the sexes, and friendship among all peoples.¹³¹

Education is regarded as an enabling right or, a right of empowerment, which enables children to become familiar with all their other rights and to stand up for and exert these rights. Being aware of human rights is a prerequisite to exercising such rights and respecting the rights of others.¹³²

Public schools especially have an authority that derives from the fact that they directly or indirectly carry the “imprimatur of the state.”¹³³ There is now a rich collection of writings on transitional justice and there is a growing body of work on history education and its relation to political change, democratic citizenship, international relations, and globalization.¹³⁴ More work is needed on the relationship between the frequency of conflicts, the rate of recovery after atrocity, and the efficacy of human rights and history education.

b. The Relationship of Education to Conflict Prevention and Creation

According to Lund and Mehler, the causes of violent conflicts may be traced back to four key causes: (1) political, cultural, and economic disparities; (2) legitimating deficits on the part of the government; (3) mistrust between identity groups and the lack of possibilities for peaceful equilibrium, and (4) the absence of an active civil society.¹³⁵ We can expect that education would have a positive impact on each of these underlying causes of societal conflict. Education could contribute to overcoming the structural causes of conflict in that education reinforces social cohesion and contributes to social balance by opening up employment opportunities for those from disadvantaged groups in a given society regardless of social origin. Education may also promote civic engagement, en-

¹²⁸ Universal Declaration of Human Rights, G.A. Res. 217A(III), at 76, U.N. Doc. A/810 (1948) [hereinafter UDHR].

¹²⁹ International Covenant on Economic Social and Cultural Rights, Jan. 3, 1976, 993 U.N.T.S. 3, 8, 6 I.L.M. 360, 364 (1976) [hereinafter ICESCR].

¹³⁰ United Nations Convention on the Rights of the Child, Art. 29, November 20, 1989, 28 I.L.M. 1448 [hereinafter CRC].

¹³¹ *Id.*

¹³² Klaus Seitz, EDUCATION AND CONFLICT: THE ROLE OF EDUCATION IN THE CREATION, PREVENTION AND RESOLUTION OF SOCIETY CRISES-CONSEQUENCES FOR DEVELOPMENT COOPERATION 33 (2004).

¹³³ Cole, *supra* note 123, at 121 (citing Laura Hein and Mark Selden, *The Lessons of War, Global Power and Social Change*, in CENSORING HISTORY: CITIZENSHIP AND MEMORY IN JAPAN, GERMANY AND THE UNITED STATES, (Laura Hein & Mark Selden eds., 2000)).

¹³⁴ See, e.g., MINOW, *supra* note 5; MARGOT STERN STROM, FACING HISTORY AND OURSELVES: HOLOCAUST AND HUMAN BEHAVIOR: RESOURCE BOOK (1994); MY NEIGHBOR, MY ENEMY: JUSTICE AND COMMUNITY IN THE AFTERMATH OF MASS ATROCITY (Eric Stover and Harvey Weinstein eds., 2004) (considering transitional justice and social reconstruction issues, prominently including education).

¹³⁵ Seitz, *supra* note 132, at 17.

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courage an attitude of tolerance and build capability for dialogue with different people and people who may hold different perspectives.¹³⁶

Seen in this light, the lack of appropriate education itself could be regarded as one of the key secondary causes of escalating societal conflicts.¹³⁷ Accordingly, “one of the key questions for the relationship between education and conflict is the manner in which education systems organize their dealings with diversity.”¹³⁸ The issue of the constructive engagement of heterogeneity has to be reflected institutionally as well as conceptually with regard to access and curricula.¹³⁹

While education can be used to promote empowerment, it can also be abused to justify repression.¹⁴⁰ Indeed, “[s]chools, no less than the police or judiciary, can sustain systemic injustices. They model equity and its lack through the inclusion and exclusion of different groups of students and through teaching narratives of inferiority and superiority, hatred and discrimination.”¹⁴¹ The formal education system can contribute to exacerbating and escalating societal conflicts when it reproduces socio-economic disparities and brings about social marginalization or compartmentalization or promotes the teaching of identity and citizenship concepts which deny the cultural plurality of society. These elements of an education system can then lead to intolerance toward the “other”.

Often, getting all children to school is inappropriately equated with their right to education. Questions about what and how children are taught are rarely asked, usually only when abuses of education are detected. Only recently has significance been attached to the negative influences of education structures and processes on societal conflict situations.¹⁴² Whether intended or not, poor education can contribute to the escalation of societal conflicts. Further, schools themselves are sometimes sites of violence.¹⁴³ Children can be exposed to advocacy in favor of racism or incitement in favor of genocide, in schools.¹⁴⁴

Education is a key medium with which ethnicity can be mobilized for the escalation of conflicts or maintenance of divisions, making youth agents of intolerance who serve to further foster exclusion or intolerance of “others.”¹⁴⁵ For example, under the colonial education system in Rwanda and Burundi, Hutu and

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.* at 10.

¹³⁹ *Id.*

¹⁴⁰ Tomasevski, *supra* note 126, at 9.

¹⁴¹ Cole, *supra* note 123, at 120 (citing ANNA OUBA, NEVER AGAIN: EDUCATIONAL RECONSTRUCTION IN RWANDA 29 (2003) (“[I]t is significant that the education system has become a prime target in many civil wars since schools are seen as representing political systems and regimes, and as symbols of peace”).

¹⁴² See, e.g., KENNETH D. BUSH AND DIANA SALTARELLI, THE TWO FACES OF EDUCATION IN ETHNIC CONFLICT (2000).

¹⁴³ For a discussion on the harmful effects of violence in schools see generally, HUMAN RIGHTS WATCH, SCARED AT SCHOOL (2001); Erika George, *Instructions in Inequality*, 26 MICH. J. INT’L L. 1139 (2005).

¹⁴⁴ Tomasevski, *supra* note 126, at 9.

¹⁴⁵ Seitz, *supra* note 132, at 10.

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Tutsi were given restricted and greater access respectively to education, leading to educational disparities which exacerbated the violent ethnic conflicts and massacres during the 1990s.¹⁴⁶ Hutu teachers actively participated in the genocide by murdering or denouncing Tutsi students to Hutu militias.¹⁴⁷ South Africa's education system during the apartheid era exemplified an education system which conveyed to the black majority an image of being inferior and a feeling of superiority to the white elite.¹⁴⁸ In Sierra Leone, the pool of marginalized and/or socially excluded young men with a low level of education was a significant driving force behind the conflict. State education systems are still responsible on a very fundamental level, for creating and recreating a society's image of itself.¹⁴⁹

The interplay between education and conflict is relevant in the context of rule of law initiatives. School enrollment has been said to serve as a "barometer" of a community's perceived hope for the future.¹⁵⁰ For example, since the end of the Rwandan crisis, 67% of children have been enrolled in more than 2,000 primary schools across the country—a tremendous sign of confidence in the nation's future.¹⁵¹ In war-torn countries in particular, education is not only a way of teaching children life skills but can also aid in healing and rehabilitation. Children benefit from the contact with other children and teachers, which helps them preserve their physical and psychological health.¹⁵²

2. *The Potential of Education to Avert Future Atrocities*

Eliminating the lasting legacy of human rights abuses and addressing the long-held grievances that may lead to violent conflict requires going beyond making changes to formal law structures and institutions. Although changes to formal law plays an important role in promoting cultural change, the eradication of discrimination and other injustices that may give rise to societal unrest is a matter of attitudes and beliefs as much as it is a matter of law and structure. Inevitably, putting into place new and improved institutions and legal codes will not create a substantive cultural commitment to equality and rights.¹⁵³ However, putting in place new norms and ideals will over time improve the likelihood of successfully creating a culture of respect for the rule of law and human dignity by equipping individuals and communities with the tools to mediate the pluralities within their societies. Thus, a focus on the role of law in supporting the development of these capabilities through education and educational reform in post-conflict societies is especially urgent and timely.

¹⁴⁶ *Id.*

¹⁴⁷ Lin, *supra* note 63, at 72-73.

¹⁴⁸ Tomasevski, *supra* note 126.

¹⁴⁹ Seitz, *supra* note 132, at 53.

¹⁵⁰ Isabelle Roger, *Open Forum: Education for Children during Armed Conflicts and Post-Conflict Reconstruction*, 3 DISARMAMENT F. 45, 46 (2002).

¹⁵¹ *Id.*

¹⁵² *Id.* at 45-46.

¹⁵³ STROMSETH ET AL., *supra* note 3, at 75.

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To this end, transitional justice initiatives should interface with educational institutions. Educational systems have to be as inclusive and integrated as possible. Educationalists maintain that: “[e]ducation components [should] be expressly anchored with the objective of reinforcing individual and collective conflict transformative competencies.”¹⁵⁴ There should be equal access to education, and curricula should reflect the social and cultural diversity of a given society. Schooling should allow for the development of multiple and inclusive identity concepts which appreciate differences and heterogeneity, and which are able to encounter foreignness with tolerance and empathy.

A strong argument can be made from the experiences of South Africa, Rwanda, and Sierra Leone for the promotion of closer collaboration between transitional justice actors and educators.¹⁵⁵ While education about the history of a particular conflict or injustice in general does not contribute to retributive justice as does criminal prosecutions, it is related to other major aspects of confronting the past such as truth sharing, official acknowledgement of harms, recognition of survivors, and the preservation of their memories, fostering a restorative justice.¹⁵⁶ Schools represent an important vehicle to carry forward and continue the work of transitional justice institutions beyond their original period of their activity and scope of influence.¹⁵⁷ A problem common to most truth commissions and tribunals has been their relatively limited impact. The ad hoc international tribunals for both Yugoslavia and Rwanda have, for example, been criticized for their lack of outreach to the affected communities and the lack of didactic materials for teaching.¹⁵⁸ Once a Truth and Reconciliation Commission has officially ended, there is still a need to carry on its work to develop new frameworks for public discourse, discussion, and analysis in order to continue to engage new audiences and younger members of society.¹⁵⁹

The decision of Sierra Leone’s TRC to produce versions of its report for children and secondary school students was an important innovation in the work of creating respect for the rule of law and deserves closer study; the children’s version of the report included information on international human rights. The Commission reports are intended to be used in schools—possibly in oral history projects where students become historians themselves.

VI. Conclusion

Education shapes the next generation. As the examples discussed illustrate, building a durable rule of law culture is a long-term project, especially in societies where a skepticism of law may need to be unlearned before a more construc-

¹⁵⁴ Seitz, *supra* note 132, at 11.

¹⁵⁵ Cole, *supra* note 123, at 123 (explaining that even for those groups designated as other or enemies, their understanding of history will be crucial to a society’s ability to reconcile with a difficult past for the sake of a more just future).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 121.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 122.

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tive role for law in society can flourish. Educators and historians should be involved from the beginning in planning transitional justice interventions; educators, as well as legal scholars and political and religious leaders, should be given a stake in the work of transitional justice. Transitional justice institutions should encourage the production of didactic materials for both teachers and students based on tribunal mandates and transcripts and truth commission testimonies, and reports.

Support for realizing the right to education at every level is crucial to fostering the rule of law. Support for legal education is already seen as a critical investment in a sound justice system by rule of law advocates.¹⁶⁰ Donors typically focus on short term training for lawyers and judges.¹⁶¹ This focus must expand. Jane Stromseth notes that, “[f]rom primary school onward, lessons about law, legal institutions, governance, and the nation’s human rights history should be integrated into texts and curricula.”¹⁶² Particularly in those societies where secondary schooling is a luxury, special emphasis should be placed on integrating the idea of the rule of law into primary curricula. Programs designed to educate non-elites about law, human rights, and governance will enhance the efficacy of transitional justice sector programs.¹⁶³ Over the long term, the cultivation of a culture of respect for the rule of law will depend in large part on educating not only the next generation of legal professionals, but also non-lawyers.

¹⁶⁰ Nevertheless, in many post-conflict settings, law schools are underfunded and understaffed; curricula may not have been updated for decades. Although investing in law schools may not be the most immediate priority after an intervention, it should not spend too much time on the back burner, for the relative neglect of legal education can have long-term costs. STROMSETH ET AL., *supra* note 3, at 333 (citing Erik G. Jensen, *The Rule of Law and Judicial Reform: The Political Economy of Diverse Institutional Patterns*, in BEYOND COMMON KNOWLEDGE: EMPIRICAL APPROACHES TO THE RULE OF LAW (Erik G. Jensen & Thomas C. Heller eds., 2003)).

¹⁶¹ STROMSETH ET AL., *supra* note 3, at 333.

¹⁶² *Id.* at 342.

¹⁶³ *Id.* at 341.