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Justice Visions Podcast - Reparations beyond the state

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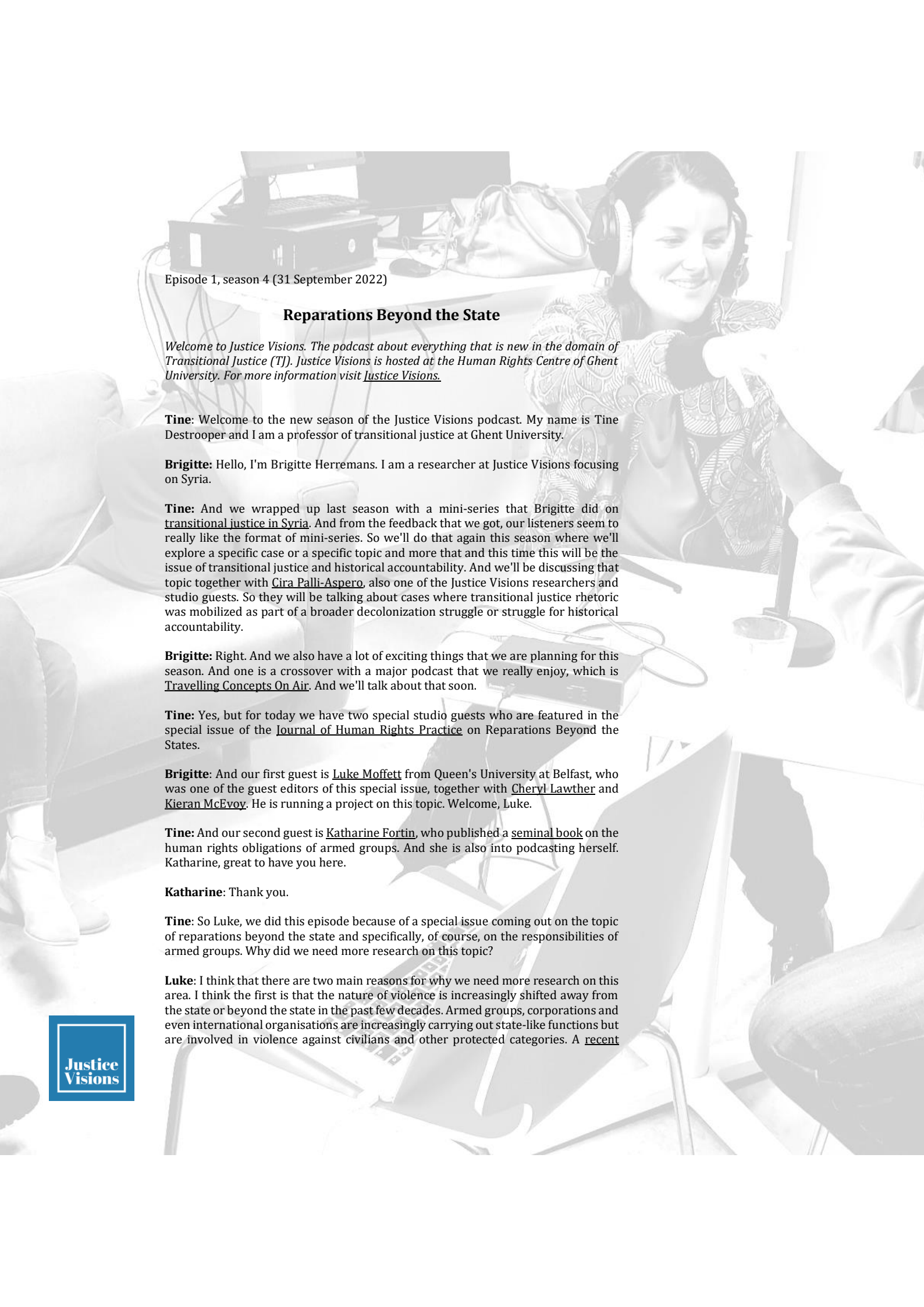
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Episode 1, season 4 (31 September 2022)

Reparations Beyond the State

Welcome to Justice Visions. The podcast about everything that is new in the domain of Transitional Justice (TJ). Justice Visions is hosted at the Human Rights Centre of Ghent University. For more information visit [Justice Visions](#).

Tine: Welcome to the new season of the Justice Visions podcast. My name is Tine Destrooper and I am a professor of transitional justice at Ghent University.

Brigitte: Hello, I'm Brigitte Herremans. I am a researcher at Justice Visions focusing on Syria.

Tine: And we wrapped up last season with a mini-series that Brigitte did on [transitional justice in Syria](#). And from the feedback that we got, our listeners seem to really like the format of mini-series. So we'll do that again this season where we'll explore a specific case or a specific topic and more that and this time this will be the issue of transitional justice and historical accountability. And we'll be discussing that topic together with [Cira Palli-Aspero](#), also one of the Justice Visions researchers and studio guests. So they will be talking about cases where transitional justice rhetoric was mobilized as part of a broader decolonization struggle or struggle for historical accountability.

Brigitte: Right. And we also have a lot of exciting things that we are planning for this season. And one is a crossover with a major podcast that we really enjoy, which is [Travelling Concepts On Air](#). And we'll talk about that soon.

Tine: Yes, but for today we have two special studio guests who are featured in the special issue of the [Journal of Human Rights Practice](#) on Reparations Beyond the States.

Brigitte: And our first guest is [Luke Moffett](#) from Queen's University at Belfast, who was one of the guest editors of this special issue, together with [Cheryl Lawther](#) and [Kieran McEvoy](#). He is running a project on this topic. Welcome, Luke.

Tine: And our second guest is [Katharine Fortin](#), who published a [seminal book](#) on the human rights obligations of armed groups. And she is also into podcasting herself. Katharine, great to have you here.

Katharine: Thank you.

Tine: So Luke, we did this episode because of a special issue coming out on the topic of reparations beyond the state and specifically, of course, on the responsibilities of armed groups. Why did we need more research on this topic?

Luke: I think that there are two main reasons for why we need more research on this area. I think the first is that the nature of violence is increasingly shifted away from the state or beyond the state in the past few decades. Armed groups, corporations and even international organisations are increasingly carrying out state-like functions but are involved in violence against civilians and other protected categories. A [recent](#)

report by the ICRC is highlighting between 60 and 80 million people currently live under state-like governance of armed groups. So there's definitely a stronger call to focus on this issue. I think the second issue is that reparations really struggle to be implemented by states due to a lack of political will or other priorities that take greater focus. I think if we encourage other actors to remedy the harm they have caused, it is a public relations exercise, it's political. It may encourage states as well think about their own responsibility.

Tine: You're showing how important this phenomenon is, empirically speaking. Looking at our podcast, we always talk about kind of the future and innovations in the domain of transitional justice. So what is this topic telling us about the direction in which transitional justice as a field is evolving?

Luke: I think it's a good thing. For me, transitional justice is about having difficult conversations with those who are often marginalized, whether they're victims or perpetrators, as a way to find ways to deal with the past. Reparations are, I think, sort of a key mechanism for doing that. Louis Joinet when he was drafting the first impunity principles for the United Nations, said that no transitional justice solution is sustainable unless it comes from within the country. I think we're going more in depth in that sort of your research carried out about 15 years ago about bottom-up approaches and the need to have local ownership and respect local agency, in driving dealing with the past. I think armed groups as actors who carry out violence and are responsible for violations is tapping into this more micro-level notion of ownership of dealing with the past. This goes beyond the state. And for victims they know they are affected by the violence by armed groups who want to see certain reparations that only armed groups can do. I think a good example of this was done in Colombia three years ago where we met a group of mothers whose sons have been disappeared, and part of having that difficult conversation and get some sort of remedy that was adequate for them was to go to the paramilitaries who disappeared their children and engage in dialogue. And it was very dangerous then, it's in high security prisons. But engaging with them in human terms and treatment like almost like their own children to love and care and to encourage them to see what harm that they cause to these victims. Dozens of these women had actually secured the remains of their children. So I think the difficulty with transitional justice is we often focus on the state and we get a lot of resistance in trying to move forward on transitional justice issues. But I think reparations are a key mechanism to get, not just redress for victims, but for those who are responsible for violations to take ownership of the harm that they have caused to move away from denial, get out of their ideological trenches that justifies such violence, and to move forward. And I think this topic is gaining more interest as we see there are over 30 conflicts ongoing in the world. Most involve armed groups and there's hundreds that exist. And we see that the UN special rapporteur has recently brought out a report which was conducted with research of Kieran McEvoy and Danielle McLroy at Queens that points that this is an important emerging narrative that we need to be engaging with.

Met opmerkingen [CPA1]: Cut from 3:40 to 3:42

Met opmerkingen [CPA2]: Cut 5:48 to 5:50

Brigitte: Thank you. I wanted to broach the issue of non-state actors with you, Katharine, because in your article, of course, you zoom in on non-state actors and particularly on the al-Hassan case before the International Criminal Court, and al-Hassan is an alleged member of Ansar Eddin and chief of Islamic police who is alleged to be involved in the work of the Islamic Court in Timbuktu. So, you are making this very innovative, and maybe somehow controversial, argument about how we should be rethinking the command and control responsibilities of those armed groups to prevent abuses under international humanitarian law, which basically approaches

these groups as installing or featuring something like a domestic legal realm. Could you say a little bit more about how you're constructing that argument?

Katharine: I use the same case in my article as an returning point of analysis. Arguing that this is a case that's currently before the International Criminal Court that has really put rebel governance initiatives under the spotlight and is forcing the International Criminal Court to look at some really difficult issues relating to armed group law and armed groups courts. But my broader argument is that the al-Hassan case is by no means unique and that comes back to what Luke indicated before about this research about 60 to 80 million people who are living under the control of non-state armed actors to the exclusion of the *de jure* government. So in these instances there is quite plentiful research right now that studies what groups do when they control territory in this manner to the exclusion of the *de jure* government. I utilize this report, this information, in [my article](#) to piece together and provide facts and figures on the use of law by armed groups. So, for example, I cite studies showing that between 25 and 35% of armed groups do establish legislative bodies, courts, laws, police stations, schools, health clinics. 11% of armed groups have employed judicial processes. So the al-Hassan case is not unusual and Mr. al-Hassan, as I said, the beginning of the article is probably just one of hundreds of thousands of very similar individuals who are taking on public functions in these areas, whether it be as police officers, as judges, as all kinds of other semi-government functions. And the fact that these individuals are doing this is really forcing the practice to figure out how to respond. So when I wrote the article, I was thinking in particular about Special Rapporteurs for the UN, about people working at Commissions of Enquiry, the Human Rights Council, the Legal Council that I just mentioned, in front of the International Criminal Court who are increasingly having to struggle with questions like: 'Is armed group law, law? Are armed group courts, courts?' And this is kind of a preliminary question that they need to grapple with because the answer is going to determine how they engage with these kinds of law. Should the international community be asking armed groups to investigate if a particular violation has taken place? Should the international community ask armed groups to prosecute if a particular crime has taken place? And what happens when an armed group does prosecute, like in the al-Hassan case and then the court does not adhere to fair trial norms? What is the legal significance of that? So, these are really difficult legal questions. And in fact, many authors have written on some of that before. But I try and take a high altitude perspective in my article to look at the debate and figure out what's going on and what are the different kind of forces that are pushing and pulling within it. And of course, they are not only questions of law, but questions of policy. And so these are the questions that I tried to address in my article.

Tine: So in what you just said, you're focusing on what these actors are actually doing, but also on what the international community can do in response. Maybe going back to what Luke was saying about what this means for people on the ground. Could you elaborate on that, what the advantage of this approach that you're proposing or describing is for actual civilians or victims living in these territories controlled by armed groups?

Katharine: So, I think that the practice in this area and by practice I mean, the instances where you have international bodies or monitoring mechanisms addressing the acts of armed groups, has always been driven by the reality of what's happening on the ground. Perhaps even more than the law. In that regard there is this strange dynamic where you have a set of facts on the ground that somehow has demanded the intervention of monitoring mechanisms. In instances where the law has remained

quite controversial and contested, as Brigitte said. I know that there is quite some practice of armed groups being addressed by the UN special rapporteurs by these U.N. working groups, by the commissions of enquiry and U.N. field offices, asking armed groups to investigate certain instances and sometimes to prosecute certain instances. And in my view, these instances are always explained by the facts on the ground and the perceived need to intervene on behalf then of the civilian communities and victims in that area. And the fact that there is just not another recourse for intervention because the *de jure* government in these areas is absent. You know, is very much focusing on the benefits of indeed for people of utilizing human rights law. And I argue in relation to procedural right to remedy that this is a very victim-orientated framework that is well capable of addressing everyday grievances. Perhaps better capable for addressing those kinds of everyday governance-type grievances than international humanitarian law, and so able to deliver access to a remedy for victims. I also know that doing so prevents these territories becoming a kind of information black hole or a human rights vacuum. I guess that at a very basic level, I see the utilization or the engagement with armed groups' legal institutional frameworks in this manner as to be a kind of legal counterweight to their existing practice. So, to explain that is very often the case that armed groups are kind of using their police forces, their courts, their structures as means to affect enforced disappearances, killings, torture, unfair trial. In addressing armed groups and arguing that they should be securing accountability for their members, you're in effect forcing them to use those institutions that they've already been using for bad ends to secure accountability of their members and provide justice for victims. So that's kind of one of my concluding arguments.

Met opmerkingen [CPA3]: Cut 14:03 to 14:08/9

Brigitte: Maybe just to explore this little bit further, actually, you're also addressing the issue of exploring how international and domestic law can be deployed, let's say, more imaginatively, to also create frameworks to better deliver on reparations for victims and maybe the needs also for victims more broadly. Could you maybe also address the issue of how obligations on armed groups also interact with obligations of the state?

Katharine: Whenever you think about armed groups, it's always really important to be very specific about *the* armed group. You cannot make statements about armed groups in a general sense for lots of different factors that need to be taken into account, not least the all group's capacity, but also timing is really crucial. I situated my articles deliberately in a moment in time where like in the al-Hassan case, the armed conflict is ongoing, the state was absent, and the armed group was operating in a kind of closed area of space and time. And in this instance, as is already indicated, it's almost impossible for the state to do anything. But at a later moment in time, I think the landscape becomes very different because at that moment the *katha* government is present again and at that moment it makes much more sense to be also engaging with the state. So I think that you can never look at the armed groups' obligations and even construct the armed groups obligations without looking at their capacity and looking at the capacity of the state. So this is an argument that was made really quite convincingly in another article that was written recently by someone called [Olivia Herman](#), who has looked at reparations of armed groups. And she argues that you should have this kind of cascading approach, where you first approach or consider the armed group to be the primary actor to provide reparations but in instances where the armed group is incapable of providing their operations, or you could even imagine a moment in time where the armed group doesn't exist anymore, then she would suggest that according to this cascading framework that she sets

forward, that the state should be approached either as the sole actor, as a complementary actor, in addition to the armed group.

Tine: Maybe back to you, Luke and zooming out a bit from the specific argument. I was wondering when I look at the special issue of the *Journal of Human Rights Practice*, what I see is that the contributors have different backgrounds. And I wanted to ask you if you could tell us a bit more about how you feel that that affects the proposals that they come up with in response to questions about improving accountability, about ensuring reparations for victims living in territories controlled by these armed groups.

Luke: I think we were lucky enough to get a good range of authors, both with practical experience and also expertise from different disciplines. That speaks well to the audience of the *Journal of Human Rights Practice*, that we need to do deal with the law. But we also wanted those who work with armed groups such as conversation partners with fighters for peace. And like Kieran and myself, we live in a society where armed groups exist. And in Northern Ireland there's about 13,000 people are currently members of armed groups, even if we are 25 years on from the peace process. So that is one out of a hundred adults, which is a crazy amount. And if you look at other countries which are post-conflict or where there's a conflict, you get quite similar numbers. And this poses real challenges to how we engage groups on the law and respect for basic principles that we call under human rights and humanitarian law, but also try to sell to them in terms of practical ways of trying to keep the local civilian community on side and avoid moral reproaches that will lose them supporters. We try to approach it in different ways, dealing with the law, dealing with practical aspects, but also thinking forward, thinking about how armed groups could use this. Hopefully it will be insightful for civil society actors and practitioners, and maybe armed groups, to pick up some of these pieces about how they can do better. Also as part of our *reparations project* recently brought out a handbook for humanitarian organisations to engage armed groups. It draws from the *piece that Kieran, Cheryl and I wrote*, about changing the script, very much looking at the responsibility of armed groups as both armed actors, but also as potential community leaders and peace-builders. So I think it's about engaging differently in this area. And maybe to go back to the question to Katharine and the issue of obligations, we need to deal with the state. There is always the concern with human rights law, and there still is, by focusing too much on the obligations and how human rights can apply to non-state actors, we might take it away from focusing on efforts of the states. At the end of the day, you know, in places like Syria and Yemen, and obviously Ukraine and Russia, the state clearly is able to mobilize violence on a far larger scale than armed groups. At the end of the day it still has obligations under human rights law for people within its jurisdiction. So we're not trying to take away from that. But we are trying to broaden the conversation and how we can deal with armed groups and their violence.

Tine: You were talking about different ways of engaging. But is there an emerging consensus of what that means in practice?

Luke: I'm not sure. I think from a legal perspective it is really nascent that we haven't properly dealt with looking beyond the state. In the eighties and nineties, there was a critical legal studies literature, which was very much looking at the place of civil society and victims in sort of using social movements to challenge the state. Transitional justice has looked at lot at victims, their agency. I suppose what we're trying to do with this special issue is this notion of 'the state has left the building' and

there is very rich literature that Katharine is very familiar in political science on *rebelocracy*, on how people live under the rule of rebels. And marrying this literature with the law. With the special issue we are trying to do that, we have two strands looking at both the legal perspective, but also the political science and the sociological phenomenon of the law and how it is constructed without the state. I think it comes down to how do people act and interact both as victims, civil society and armed groups in the situations? Where in transitional justice we are often are looking at post-conflict cases and post-authoritarian governments, in these situations it's protracted conflict, it's re-emerging conflicts, fragile societies where there is real insecurity for victims to come out and speak out. How do we better protect and allow people to access some sort of remedy without causing some sort of disadvantages for them. And I think Kieran McEvoy and other authors in this issue who have worked for decades on this issue, in Northern Ireland, particularly around issues of restorative justice and encouraging armed actors and advocate communities at some point to stop using intercommunal violence. There's a lot of new emphasis on old ideas, and I think we need to be able to be critical of the place of the states and to politicize transitional justice. But also we need to recognize that transitional justice doesn't happen without victims, so how do you better support them when the state has left the building?

Katharine: Maybe I can just at a small point related to your question about beyond the state, because this is also an issue that I wanted to deal with head on. And it's this issue of legitimacy and the extent to which the legal human rights discourse seems to continue to very much struggle to think beyond the state. So which is indeed, I think one of the principal reasons why there is this very difficult-to-shift view that engaging with armed groups I think particularly on human rights norms somehow gives them a veneer of legitimacy and somehow undermines the state-as-the-state. And so, it's really easy, I think, to draw on the law and say, well, this is nonsense, because we all know that different actors on the international can have different levels of legal obligations and rights. So, if you say that a non-state actor has obligations, this doesn't in any way mean that they are a state. But I feel that that's too easy. And so in the article, I try and unpick where this legitimacy discourse is coming from, particularly within the human rights field and why it is there. I draw on other people's scholarship, by Kieran McEvoy about 'legalism from below', this is this idea that if you adopt a discourse of human rights, which recognizes the state as the sole duty bearer, that to say that another anything as human rights law that you do risk legitimizing them or you do introduce into the discourse this notion that the entity is somehow approaching statehood. But I argue in my article that this highlights the importance of exploring different ways of creating multiple, thicker, interwoven discourses that recognize that different entities can have human rights obligations depending on their capacities and the capacity of state in a given situation. And one of my conclusions is exactly this, that more thought needs to be given to exploring human rights discourse beyond the state, such that you can put a break on this legitimacy idea that is so easy to dismiss, but also so very real.

Tine: Thank you. And actually, Luke and Katharine, I think in these last two things that you said, you already answered the last question that we normally ask to all our interviewees, which is where you are looking for inspiration and what you think a kind of next paradigm shift is in the field. And I'm sensing that for the two of you, that's really in looking beyond the state, which I think is also really interesting because in a way it's like where the future of the field lies and where the field is going. And at the same time, it's also kind of going back to the disruptive origins of transitional justice, isn't it? Which was also not necessarily such a statist approach as it has become

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through processes of formalization and legalization. So that in a way I think is very interesting.

So on that note, I am just going to thank you for a wonderful conversation. And for our listeners, you can reread the show notes of this conversation of this episode on the Justice Visions website. That's JusticeVisions.org. And there we will also hyperlink to all the books and articles and resources that were mentioned in this episode, several of which included Katharine's piece in the new issue is actually freely accessible online.

For our next episode, we'll be back with a miniseries on historical accountability, for which my co-host will be set up by Cira Palli-Aspero. Thank you so much.