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Editorial Note

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Editorial Note

Victims are a problem for transitional justice. They are the moral momentum for the creation of transitional justice mechanisms: legal justice, truth commissions, reconciliation, reparations, structural reforms and other measures claimed to satisfy their needs for repair in the aftermath of violence. Yet, the implementation of every significant transitional justice initiative has fallen short in meeting the expectations of victims and their advocates. They are the Achilles' heel of transitional justice, revealing its weakness where it strives to show its greatest strength. Is transitional justice doomed to fail its most valued constituency?

Make no mistake: stating that victims are a problem is not to suggest that they are blameworthy. Mass violence causes great human suffering. Widespread killing, torture, sexual violence and the associated human and material costs of destruction of social networks and infrastructure exact a high price. Repairing this damage or restoring things to their prior state is generally impossible, especially when it comes to addressing the damage to individuals and communities. Yet the imperatives are to strive to do so.

The nature of conflict has changed since World War II, with the scale of civilian casualties reaching new, horrific heights. Indeed, out of that war came a new category of crime: crimes against humanity. The new offense prohibits 'widespread or systematic attacks against a civilian population,' thus acknowledging that conflict had changed and so too must the human response to it. Civilian victims were thus thrust into the heart of the international criminal justice system.

At the same time, developments in technology have brought victims into the international spotlight. Photographs, radio, film, television, the Internet and other forms of digital and social media inundate an increasingly globalized public audience with images and information about the human dimension of the objects of mass violence. This audience may recoil in horror, but it cannot entirely avoid or ignore the gaze of victims. And from the confrontation of human suffering comes the demand for a response.

This is the first problem for victims. They are always mediated in their demands. Whether by the interviewer, the methods of communication that themselves serve to promote or filter out particular perspectives or the legal, political and other contextual lens, victims are always interpreted for the audience. Insights of critical theorists about the nature of human experience help us to understand that any interaction with victims is an act of construction.¹ Simply put, there is no such

¹ Louis Althusser, 'Ideology and Ideological State Apparatuses (Notes towards an Investigation),' in *Media and Cultural Studies: Keywords*, ed. Meenakshi Gigi Durham and Douglas M. Kellner (Hoboken, NJ: Wiley, 2006).

thing as an 'authentic' victim; we only understand that category through the lens with which we view it. Even when victims speak on their own behalf, this problem of a constructed victim is not overcome. The mechanisms through which victims assert their desires shape and filter the claims and perspectives that victims may share. In this regard, transitional justice is a performance. Victims are always actors in role speaking for an audience. Look carefully and one may see the casting director.

The adage 'one man's terrorist is another man's freedom fighter' reminds us that where some see victims, others see perpetrators or their associates who got their just deserts. For example, the two million Hutus who fled Rwanda after the collapse of the genocide in fear of retaliation by Tutsis included *Interahamwe* fighters, participants in the killing as well as bystanders. They were crowded into makeshift refugee camps in Zaire (now Democratic Republic of Congo), which were soon ravaged by cholera, requiring massive humanitarian intervention to stop the spread and save the dying. Were these victims of postconflict dislocation or simply *genocidaires* who received retribution not from a judge but from a humanitarian disaster of their own making? Victims are never a simple, unidimensional category, either in terms of their own complex needs or in terms of the fluidity of identities that characterize an ongoing conflict.

The second problem for victims is that transitional justice mediates their demands. Trials, truth commissions and alternative justice processes seek to respond to the needs of those who have suffered the effects of mass violence, but they identify and prioritize those needs differently. Each mechanism has a particular mandate to pursue – retributive justice, truth seeking, restorative justice – that shapes discursively the needs of victims. Depending on the mechanism, victims acquire different qualities and preferences. For criminal courts, victims want retributive justice for those who carried out atrocity crimes. For truth commissions, victims want to narrate their experiences and receive official acknowledgment and validation of their suffering. For alternative justice mechanisms, victims want to participate in culturally relevant processes to restore social relations with former enemies.

What accounts for these shifts in the needs presented by or ascribed to victims? Are victims changing or is transitional justice changing victims? The goals of transitional justice mechanisms (and their respective portrayals of victims) are shaped by the political, social, cultural and legal contexts that give rise to them. The circumstances under which one (or more) mechanism is established reflect the particular context, including the strength and nature of advocacy on behalf of victims. Understanding that victims are one of several political influences on transitional justice points to a further problem for victims. Just as any particular mechanism may satisfy some victims, mechanisms also erase other victims, those whose goals will not be served by that mechanism. For example, trials meet the goals of victims who demand legal justice. Those who prioritize community-based restorative practices, or even silence, are rendered invisible in the trial proceedings as well as the narrative that supports criminal justice.

This dynamic requires us not just to appreciate the politics of institutional self-justification (although that certainly plays a role). We must also appreciate that transitional justice itself involves a process of imagining victims. Depending on the mechanism, a particular image of the victim comes into focus: the retributive justice victim, the restorative justice victim and so forth. To varying degrees, victims also participate in this process of construction through their participation – or nonparticipation – in the design and implementation of transitional justice. The constructed nature of victims in transitional justice works against addressing the complex nature of victims' experiences and identities. They may hold multiple and conflicting views, certainly collectively but also individually, that transitional justice is ill equipped to address.

Transitional justice may tell us that victims want everything – retributive and restorative justice – but it gives us no generic principles for deciding how to prioritize these demands. Now a decade old, the 2004 UN secretary-general's report on transitional justice tells us that transitional justice should be holistic – it has no 'one-size-fits-all' approach but rather may involve multiple interventions. More recently, the UN special rapporteur on transitional justice advocated that victims have the right to truth, justice, reparations and measures of nonrecurrence. But there is no consensus about how to sort out competing demands of victims. Some may want perpetrators punished, others prioritize full disclosure of state policies, and still others struggling to reestablish lives and livelihoods want material reparations. Particularly where resources constrain what demands may be satisfied, how are these competing demands to be reconciled? To date, the answer appears to be left to the political process – national as well as international – which depends more on power than principle.

And so we are left with victims and their advocates pressing transitional justice to be more and do more. Transitional justice should be more responsive to victims, should do more to meet their desires for how societies respond to mass violence and their experiences of it, and should do a better job at implementing the promises made by transitional justice mechanisms. These are mechanisms that rely on victims to function and to be considered legitimate. Therefore, there is an ongoing negotiation or struggle between transitional justice mechanism and victims. Transitional justice needs victims but is incapable, even discursively, of recognizing them in their infinite variety, let alone satisfying their competing and conflicting needs.

Yet, without victims, transitional justice ceases to exist. Without victims, responses to mass violence might revert to other amnesia-based state-building projects. Here the state does not need to reckon with the past but is free to build a future without being morally fettered by past victims. In this vision, victims would unproblematically transmute into citizens, or residents, perhaps bound together by rights-based claims or identity-based affiliations. This version recalls much of pre-World War II history. Thankfully, the key ideas of transitional justice have become so popularly accepted in the last quarter-century that such a reversal seems unlikely.

We are left then with victims and their challenges. Transitional justice continues to grapple with the dilemma posed by its discursive celebration and simultaneous silencing of its most important constituents. The authors in this issue of *IJTJ* draw our attention to various ways in which transitional justice continues to be a work in progress, striving to deliver to victims and those invested in its promise of a more just society.

Truth commissions, often lauded for their ability to acknowledge and honor the experience of victims, come under inspection in Onur Bakiner's article, 'Truth Commission Impact: An Assessment of How Commissions Influence Politics and Society.' Bakiner identifies the conditions under which truth commissions influence state policy and the judiciary and points to the key role that civil society groups can play in this regard. We still know too little about what makes a transitional justice mechanism a success in the eyes of beneficiaries. Joanna Pozen, Richard Neugebauer and Joseph Ntaganira shed light on this question through empirical research in 'Assessing the Rwanda Experiment: Popular Perceptions of *Gacaca* in Its Final Phase.' Theirs is the first such study after the end of the *gacaca* process, and the authors find mixed reactions to this alternative mechanism among Rwandan citizens. We see again how the devilish details of implementation threaten the legacy of transitional justice mechanisms.

However imperfect their operation, the lasting effects of transitional justice mechanisms depend on their design. In 'Reassembling International Justice: The Making of "the Social" in International Criminal Law and Transitional Justice,' Kirsten Campbell theorizes how international criminal justice and transitional justice reconstitute social relations. Her work helps us to think about transitional justice interventions from the perspective of what law can and cannot do to rebuild community. Francesca Lessa, Tricia Olsen, Leigh Payne, Gabriel Pereira and Andrew Reiter offer a different perspective on the role of law in transitional justice. In 'Overcoming Impunity: Pathways to Accountability in Latin America,' these authors offer a new framework for understanding how and why new democracies overcome impunity. Taking key factors associated with the degree of accountability in a new democracy, they examine the dynamic interaction among these factors so as to explain the variation among countries in addressing amnesty laws and holding perpetrators accountable.

Transitional justice traditionally emphasizes the role of the state in confronting the past. Yet Jonah S. Ruben, in 'Transitional Justice against the State: Lessons from Spanish Civil Society-Led Forensic Exhumations,' draws attention to the ways in which nonstate initiatives may do important work to support survivors to memorialize and promote public education regarding past violence in ways that state-directed efforts are not able to do.

Two articles draw attention to new ways in which transitional justice is being utilized. Diana Sankey makes the case for extending transitional justice to cover a new category of wrongs. In 'Towards Recognition of Subsistence Harms: Reassessing Approaches to Socioeconomic Forms of Violence in Transitional Justice,' Sankey introduces the concept of 'subsistence harms' to name

deprivations of the physical, mental and social needs of human subsistence that take place in armed conflict and makes the case for comprehensive recognition of these harms within transitional justice. Turning from the conceptual to the operational, 'Bringing Justice to Unacceptable Health Care Services? Street-Level Reflections from Urban South Africa,' by Bronwyn Harris, John Eyles, Loveday Penn-Kekana, Jana Fried, Harry Nyathela, Liz Thomas and Jane Goudge, analyzes within a transitional justice context bottom-up efforts to reform health care in two communities in South Africa to make health-care delivery accountable and respectful. Framing the need for empathetic provider practices as part of broader efforts to restore justice and health in society expands the purview of transitional justice into new areas of practice.

This issue includes two book review essays by transitional justice practitioners. James Gondi's 'War Crimes Tribunals, Mass Atrocities and the Role of Humanity's Law in Transitional Justice' reviews *Unimaginable Atrocities: Justice, Politics, and Rights at the War Crimes Tribunals*, by William Schabas; *The Rise and Fall of War Crimes Trials: From Charles I to Bush II*, by Charles Anthony Smith; and *Humanity's Law*, by Ruti Teitel. Ambika Satkunanathan's 'The Politics of Reconciliation in Transitional Justice' reviews *Just and Unjust Peace: An Ethic of Political Reconciliation*, by Daniel Philpott; *A Moral Theory of Political Reconciliation*, by Colleen Murphy; and *Identities in Transition: Challenges for Transitional Justice in Divided Societies*, a volume edited by Paige Arthur. We encourage conversation between practitioners and scholars in the field. Inverting the traditional relationship of practitioners being the subjects of study by academics provides a different perspective on scholarship that we hope stimulates a richer exchange between these two groups.

As the works in this issue reflect, transitional justice creates a rich space for multiple stakeholders to practice, innovate, study, debate and experience ways to rebuild after mass violence. Victims are the hub that draws together the diverse spokes of transitional justice actors, ideas and institutions. The process of trying to understand and respond to the complexity of human experience captured by mass violence and its aftermath is unending. Victims will remain a provocation and inspiration to our efforts, reminding us that this is unfinished work that we can never set aside.