

Dignity, Democracy, Diversity

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Title of Workshop

SW 105: Restoring Dignity Beyond Criminal Justice: Truth Seeking and Reparation in Persistent Contexts of Impunity

Abstract

The ‘right to truth’ and the right to reparation have been championed in international human rights contexts as a means for the restoration of victims’ dignity and the (re)establishment of democratic order in societies recovering from violent conflicts or repressive regimes. The implementation of both rights is presented as a responsibility of the State. In some (post)transitional justice processes, it has materialized through mechanisms such as trials, reparation programs, inquiry commissions, the search for and exhumation of bodies and the commemoration of victims. Conversely, seeking for the truth and redressing victims have become a taxing enterprise in states that confront violent pasts through a politics of silence and denial. The effects of enduring amnesty laws in post-conflict states; political pacts of silence in swift democratic transitions; the permanent legacies of lasting authoritarian regimes; or the neglect of the demands of victims in post-transitional scenarios, have shaped contexts in which impunity for past mass crimes has prevailed.

This panel addresses how claims for reparation, accountability and knowledge of past crimes are articulated in reticent political and legal settings. In so doing, the panel will compare distinct forms of social mobilization, truth production, victims’ reparation and State response in different national contexts of impunity. It will deal with the role of investigations and reparations at the margins of state action in vernacular searches for the recognition of gross human rights violations. How is truth-seeking articulated in the face of silent and failing states? How is the right to reparation conceptualised and implemented when faced with perpetrators *other* than the state? What role do extrajudicial and non-state mechanisms play in fighting impunity, in addition to, or in the absence of criminal justice?

Organiser(s)

Prof. Sévane GARIBIAN, Universities of Geneva and Neuchâtel
Marion VIRONDA DUBRAY, University of Geneva

Keywords

Impunity; transitional justice; human dignity; reparations; truth-seeking

Speakers and papers’ titles (individual abstracts below):

Prof. Sévane GARIBIAN, Universities of Geneva and Neuchâtel, Switzerland (co-organizer and speaker), “Right to Truth, Truth(s) through Rights: Mass Crimes Impunity and Transitional Justice”

Marion VIRONDA DUBRAY, University of Geneva, Switzerland (co-organizer and speaker), “Fighting against Impunity or Truth-seeking for Dignity: Rethinking Mass Crimes Impunity Beyond Criminal Prosecution”

Adriana SCHNYDER, University of Geneva, Switzerland (speaker), “Extrajudicial Truth-Seeking Mechanisms in the Case Law of the Inter-American Court of Human Rights: The Examples of El Salvador and Uruguay”

Camille MONTAVON, University of Neuchâtel, Switzerland (speaker), “The Women’s International War Crimes Tribunal on Japan’s Military Sexual Slavery (2000): Fighting Impunity Through the Acknowledgment of Victims”

Olivia HERMAN, University of Leuven, Belgium (speaker), “Towards a Duty to Repair for Non-State Armed Groups: Experiences from Reparative Justice in Colombia”

Prof. Daniela ACCATINO, University Austral of Chile, Valdivia (guest speaker), “Incomplete Justice and Nonpublic Truth in Chilean Human Rights Trials: Challenging the Concept of Mass Crime Impunity and the Scope of the Right to Truth”

Papers to be presented during the Special Workshop

Title of Paper **1. Right to Truth, Truth(s) through Rights: Mass Crimes Impunity and Transitional Justice**

Abstract The purpose of this presentation is to introduce a research project hosted by the Law Faculty of the University of Geneva and funded by the Swiss National Science Foundation. The project, titled 'Right to Truth, Truth(s) through Rights: Mass Crimes Impunity and Transitional Justice' was created on the basis of this observation: the right to truth is increasingly claimed by victims or their families as a new right against the state and is enshrined in UN law and international human rights law, yet it remains underexplored *per se* in legal literature. When it is studied, it is never specifically analysed in contexts of persistent impunity, which are the result of, for example, the maintenance of amnesty laws, state denial, systematic practices for the disappearance of bodies, or, simply, the death of those responsible. This research project hence addresses the following question: if the right to truth supposes a state obligation to investigate, and constitutes the first pillar of the 'fight against impunity', what meaning(s) and what function(s) does it have in contexts of *a priori* irreversible impunity?

The project questions the reach of the right to truth, confronting violent pasts and historical injustice, in connection to the treatment of three types of evidence: the testimony, the archive and the dead body – three *remains* that every criminal enterprise aims to destroy, erase or conceal, particularly when such enterprise is the product of state action. As history and science teach us, this (testimonial, documentary and corporal) evidence never disappears or remains silent completely. Moreover, it plays a decisive role in the materialization of the right to truth outside the scope of criminal law. By questioning the right to truth and its implementation in contexts of impunity, this interdisciplinary research renews the understanding of justice in the face of extreme violence. In so doing, the project also reflects, more generally, on the relationship between law, history and science in the handling of mass crimes, the protection of the dignity of the victims and the (re)establishment or consolidation of democracy.

Speaker *Prof. Sévane GARIBIAN* (sevane.garibian@unige.ch)

Sévane Garibian is a Swiss National Science Foundation (SNSF) Professor of Law at the University of Geneva, Associate Professor of Law at the University of Neuchâtel and Associate Researcher at the Laboratoire Anthropologie bio-culturelle, Droit, Ethique & Santé (Aix-Marseille Université / CNRS). She is currently leading the SNSF funded research project "Right to Truth, Truth(s) through Rights: Mass Crimes Impunity and Transitional Justice" at the Law Faculty of the University of Geneva. Professional webpage: <http://www.right-truth-impunity.ch/en/members/sevane-garibian>.

Keywords Transitional justice; impunity; truth-seeking; evidence; human dignity

Title of Paper **3. Extrajudicial Truth-Seeking Mechanisms in the Case Law of the Inter-American Court of Human Rights: The Examples of El Salvador and Uruguay**

Abstract Transitional justice measures – such as trials, truth commissions, memorials etc. – are catalysts for coming to terms with the past, establishing accountability for past human-rights abuses and creating new, stable, and often democratic societies. These measures help mitigate the pain of the living and recognize and restore their dignity as citizens and as human beings. Transitional justice is based on four fundamental pillars, aimed at combating impunity for mass crimes and preventing any repetition of past atrocities: the right to truth, the right to justice, the right to reparation and the guarantees of non-repetition. These pillars are reflected in the State's obligations to investigate, to prosecute, to sanction and to provide adequate reparation for serious violations of human rights. The reality of mass crimes sometimes results in the fact that ordinary retributive justice is inaccessible. This situation has led to the development of alternative truth-seeking mechanisms, to render other forms of justice to victims. This presentation focuses on the investigations conducted by these *other* mechanisms in the cases of El Salvador and Uruguay – affected by an internal conflict and a military dictatorship between 1970 to 1990. Numerous serious violations of human rights were committed, such as massacres causing hundreds of deaths or enforced disappearances. The paper will specifically examine the following questions: what is the scope of the State's obligation to investigate when national criminal justice is inaccessible either for *de facto* (there is no true intention to investigate and to prosecute) or *de jure* (legislation such as amnesty laws prevent any investigation or prosecution) reasons? What is the relationship between the State's obligation to investigate and the victim's right to know the truth? Finally, what is the role, according to the Inter-American Court of Human-Rights, of alternative truth-seeking mechanisms in fulfilling the obligation to investigate?

Speaker *Adriana SCHNYDER* (Adriana.Schnyder@unige.ch)

Adriana Schnyder is preparing a doctoral thesis at the University of Geneva under the supervision of Professor Sévane Garibian. She is an associate researcher in the SNSF project "Right to Truth, Truth(s) through Rights: Mass Crimes Impunity and Transitional Justice". Her research examines the State's obligation to prosecute mass crimes in the inter-American human rights system (cases studied: Uruguay and El Salvador). She is a research assistant at the Centre d'étude, de technique et d'évaluation législatives of the University of Geneva. Professional page: <http://www.right-truth-impunity.ch/fr/membres/adriana-schnyder>.

Keywords Transitional justice; obligation to investigate; mass crimes; Inter-American Court of Human Rights; truth-seeking mechanisms

Title of Paper **4. The Women’s International War Crimes Tribunal On Japan’s Military Sexual Slavery (2000): Fighting Impunity Through the Acknowledgment of Victims**

Abstract During World War II, thousands of women – euphemistically termed “comfort women” – were forced into sexual slavery by the Japanese military. These crimes, omitted in the 1946 Tokyo Trial and persistently denied by the Japanese government, hence fell into oblivion. Faced with the absence of an official response to this state of impunity, NGOs and activists gathered in Tokyo in 2000 to create the Women’s International War Crimes Tribunal on Japan’s Military Sexual Slavery (hereafter Tokyo Women’s Tribunal), in order to investigate, analyse and denunciate these massive violations of human rights. Drawing from the experience of the 1967 Russell Tribunal and the Permanent Peoples’ Tribunal, it is one of the many people’s tribunals set up by civil society as a mean to counter impunity and acknowledge the dignity of victims. Designed to fill a gap where official institutions remained passive or proved insufficient/inadequate, these non-governmental and non-retributive justice mechanisms participate to the democratisation of the application, the interpretation and the creation of international law. However, although they bear considerable advantages, including the participation of victims in the proceedings, they nevertheless face harsh criticisms, mainly questioning their legitimacy. Generated and led by non-state actors, these “tribunals of opinion” indeed challenge the monopoly of States over law and justice and underline the shortcomings of existing legal institutions. Our presentation thus aims to contribute to the debate on the meaning and legitimacy of such mechanisms, by studying their main advantages and limits in the light of the Tokyo Women’s Tribunal’s experience. In doing so, it highlights a little-known extrajudicial practice, which looks both within and beyond the frames of state-based law to explore new imaginaries of justice and offer a different reading of the concepts of impunity and sovereignty.

Speaker *Camille Montavon* (camille.montavon@unine.ch)

Camille Montavon is preparing a doctoral thesis at the University of Neuchâtel under the supervision of Professor Sévane Garibian. She is an associate researcher in the SNSF project "Right to Truth, Truth(s) through Rights: Mass Crimes Impunity and Transitional Justice". Her research examines the contribution of peoples’ tribunals to International Law and Transitional Justice in contexts of mass crimes impunity. She is a teaching assistant in the Chair of Criminal Law and Criminology at the University of Neuchâtel. Professional page: <http://www.right-truth-impunity.ch/en/members/camille-montavon>.

Keywords Peoples’ tribunals; alternative justice; transitional justice; impunity; democracy

Title of Paper **5. Towards a Duty to Repair for Non-State Armed Groups: Experiences from Reparative Justice in Colombia**

Abstract Non-international armed conflicts involving non-state armed groups (NSAGs) have become the dominant wartime scenario while also increasingly constituting the common post-conflict context in which transitional justice (TJ) mechanisms are being established. Reparations have developed to one of the cornerstones of any TJ approach. Besides constituting a fundamental principle in the majority of domestic legal systems, reparations have gained a firm basis in international law, playing an important role in recognizing the suffering and dignity of victims, and in the broader process of democratic consolidation. Although reparations are provided in principle by those responsible for international law violations, which would in its turn ensure that offenders account for their acts, the question concerning the possibility for victims to obtain reparations from NSAGs is one of the most delicate.

Much as international law fails to keep pace with changing realities, important developments are taking place in practice. At present, a key example constitutes the comprehensive TJ system that is being established in Colombia, which resulted from the peace agreement negotiated with the FARC-EP in 2016. Redressing victims' rights, which is recognized as involving the restoration of human dignity as well as the recognition of responsibility and the deterrence of future violations as to foster a culture of tolerance and democracy, is at the centre of this TJ system. The paper will discuss to what extent this system recognises NSAGs as responsible actors under international law and how it seeks to operationalize their duty to repair, including what forms such reparations will take. While such efforts may play an important role in restoring the dignity of the victims, significant challenges may also surface along the way. Accordingly, these will be identified and addressed.

Speaker *Olivia HERMAN* (olivia.herman@kuleuven.be)

Olivia Herman is a PhD fellow of the Research Foundation Flanders (FWO) at the Leuven Centre for Global Governance Studies and the Institute for International Law, University of Leuven (Belgium). Her research focuses on the duty to repair of non-state armed groups under international law and includes an in-depth case study on Colombia. Professional page: <https://ghum.kuleuven.be/ggs/people/00106879>.

Keywords Reparations; non-state armed groups; transitional justice; Colombia; human dignity

Title of Paper **6. Incomplete Justice and Nonpublic Truth in Chilean Human Rights Trials: Challenging the Concept of Mass Crime Impunity and the Scope of the Right to Truth**

Abstract

The prevailing anti-impunity paradigm in transitional justice assigns a key role to criminal prosecutions as means to achieve truth, justice and remedy for victims of gross human rights violations. However, even when criminal justice is accomplished, the forms and circumstances of prosecutions of mass crimes at a domestic level could vary substantially. This observation leads to question the conditions and the extent of the effectiveness of criminal trials as transitional justice measures, an issue that has not been systematically addressed. Focusing on the example of the allegedly successful Chilean post-transitional process -where the judiciary has managed to gradually overcome a range of legal, political and cultural obstacles, finally reaching a stage of a resolute prosecution of human rights violations committed during the 1973–90 military dictatorship-, this presentation critically discuss the framing of impunity as a binary concept and challenges the autonomy of criminal prosecutions as truth-seeking mechanisms. On one hand, it will argue that criminal prosecutions of mass atrocity can coexist with wider or narrower areas of impunity, as it has happened in Chile regarding some categories of perpetrators and certain types of crimes. On the other hand, the presentation deals with the peculiar procedure that has been applied in Chile to human rights trials, of which inquisitorial and written nature, without public exhibition of evidence and public sentencing, raise doubts as to whether they can contribute to collective truth-telling without the support of other mechanisms of appropriation and dissemination.

Speaker *Prof. Daniela ACCATINO* (daccatino@uach.cl)

Daniela Accatino is a Professor of Law at the University Austral of Chile (Valdivia) and Main Researcher of research project titled "Political Technologies of Memory: Contemporary Uses and Appropriations of Past Human Rights Violation Registry Devices" and funded by the Chilean National Commission for Scientific and Technological Research (CONICYT) (SOC180005). Professional pages: <http://expedientesdelarepresion.cl/nuestro-proyecto/equipo/>; <http://www.derecho.uach.cl/profesores/daniela-accatino.php>.

Keywords Keywords: Transitional justice; impunity; criminal trials; right to truth; Chilean military dictatorship