

“I can’t get no satisfaction”: Accountability and Justice for Past Human Rights Violations in Argentina.

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I. Introduction

In Latin America rulers of democratic transitions face a disquieting challenge: how to make members of the Armed Forces accountable for their past human rights violations? Should they punish or pardon them? While punishment could trigger Armed Forces revolt against the new democratic regime, pardons could endanger the legitimacy of the new democracy, and its ability to do justice and to subordinate the military to civilian rule. The consolidation of democracy implies equality before the law and respect for human rights, but the new regimes also need the collaboration of armed forces that still vindicate the used repressive strategies that still command strong resources to revolt and that could threaten its survival. The way this dilemma is solved is not only a problem about the past (how to treat past human rights violations?), it also affects the present and future of the new regimes. And it is relevant not only for its ethical implications but also because it could determine the success or failure of the democratic processes.

The way in which Latin American countries initially¹ confronted the question was diverse. While in some countries, pre transition negotiations between the military and civilian actors explicitly precluded judicial treatment of past human rights violations (Chile, Uruguay) in others, judicial treatment could not be deterred (Argentina). In contrast to other countries of the region, the Argentinean case is characterized by two singular features: the early judicial treatment of human rights violations and the persistent pursue of justice through judicial and non judicial retribution measures. While the first feature involved specific juridical innovations regarding how to carry out this type of trials with domestic legislation and in domestic courts; the second resulted in the creation of an array of alternative measures that includes truth trials, monetary compensations, public apologies and creation of new rights. The paper shows that the measures implemented in the Argentinean case comprise the complete repertoire of procedures included in the transitional justice menu. Since 1983, there have been Truth commissions, domestic and extraterritorial trials, demands in international courts, indictments, concealed amnesties, presidential pardons, public apologies of individual and of institutional actors, monetary compensations for different types of damages, cases of lustration, the establishment of public commemoration monuments, spaces and dates, cases of social ostracism and the creation of legal institutes to protect new rights.

¹ I emphasize the word initially because although in many countries initial agreements precluded judicial treatment of past human rights (i.e. Chile, Uruguay) as time went by and other actors, such as the foreign courts and active social movements, entered the scene some of those restrictions were lifted (i.e. Chile).

This chapter analyzes the diverse strategies pursued to make human rights violators accountable in the Argentinean case and the different justice outcomes achieved by the victims throughout the process. It will consider the conditions that led to the early judicial treatment of past human rights violations, the succession of strategies and measures implemented to overcome the restrictions that emerged in the process and the political dynamic and consequences of these two developments. It also shows that this highly politicized process resulted in diverse “justice outcomes”, in the subordination of the military actor to civilian rule, and in the transformation of human rights issues as a political program of the new democracy.

In the next section I describe and analyze the initial evolution of the legal retributionist strategy, how it became predominant, the type of outcomes it rendered, and the difficulties and restrictions it faced. The following section analyzes the alternative roads to justice explored and implemented after the legal retribution venue was put on hold and the way this other strategy also produced justice outcomes. And the last section analyzes how these different justice outcomes (formal and informal) interacted and led to the consolidation of the human right question as an ongoing task of the new democracy.

II.²

Between 1930 and 1983 Argentina had twelve military coups. The ferocity of the military regimes escalated throughout the period and the repression procedures used to neutralize political opponents varied. Their recurrence established a pattern of civil military relations characterized by the lack of military subordination to civilian rule, the increase of the political autonomy of the military actor and by the internal politicization of the armed forces. The 1976 coup³ had, however, a

² This section is based on two research projects I carried out with Carlos Acuña: "Human Rights and the Consolidation of Democracy: The Trial of the Argentine Military," with the support of the John D. and Catherine T. McArthur Foundation and the Ford Foundation; and "The Military as Political Actors in the Latin American Southern Cone," with the support of the North-South Center of the University of Miami and published as "Adjusting the Armed Forces to Democracy. Successes, Failures and Ambiguities in the Southern Cone" in E. Jelin and E. Herschberg, *Constructing Democracy. Human Rights, Citizenship and Society in Latin America*, Westview, Boulder, Colorado, 1996; and Guarding the Guardians in Argentina: Some Lessons about the Risks and Benefits of Empowering the Courts in J. McAdams *Transitional Justice and the Rule of Law in New Democracies*, University of Notre Dame Press, Notre Dame, Indiana, 1997.

³ For a detailed description of the 1976-83 military government see C. Acuña and C. Smulovitz, *Militares en la Transición Argentina: Del Gobierno a la Subordinación Constitucional*, in C. Acuña (et al.), *Juicio, Castigos y Memorias. Derechos Humanos y Justicia en la Política Argentina*, Buenos Aires, Nueva Visión, 1995; and M. Novaro and V. Palermo, *La dictadura militar (1976-1983) : del golpe de Estado a la restauración democrática*, Buenos Aires, Paidós, 2003.

special characteristic: the nature and magnitude of illegal repression set it apart from all the other previous dictatorial experiences. In September 1975, the Commander in Chief of the Army decided that repression of terrorism was to be clandestine. Repression was going to be used to neutralize and to physically exterminate the militant opposition, regardless of their involvement in armed struggle. The clandestine nature of repression had various objectives: to delay protests and international pressures of the kind that confronted the Chilean dictatorship, to prevent possible checks and controls of military power, and to paralyze popular reactions through terror. In 1984, The Comisión Nacional sobre la Desaparición de Personas (CONADEP) documented the disappearance of 8,960 people and made clear that it estimated that the number of victims exceeded the 9,000 cases. Amnesty International estimated that the number of victims surpassed 15,000, and other human rights organizations have maintained that the victims reached 30,000. Between 1984 and 1999, the Undersecretariat for Human Rights established the existence of around 3,000 new cases, increasing up to nearly 12,000 the number of confirmed disappearances.

When in the early 80's the transition process began, the treatment of past human rights violations became a political problem and a political program for the emerging democracy. Several factors, in addition to the magnitude of the atrocities, explain this development. On the one hand, a few months after the military had seized power, some groups and organizations⁴ --most of them born as a consequence of the retreat of other institutions—started to organize and to denounce governmental repression. At the beginning, the military government was able to neutralize the public visibility of the accusations. However, the work of these organizations led to the early international knowledge of the situation and provided organization and assistance to victims. In 1980, when Adolfo Perez Esquivel was awarded the Peace Nobel Price, the human rights organizations' claim also achieved international and domestic acknowledgment. In 1982 after defeat in the Malvinas⁵ war, intra-military conflicts sharpened⁶ and the government's authority vis-à-vis

⁴ Among the human rights organizations, one should mention: Madres de Plaza de Mayo, Familiares de Detenidos y Desaparecidos por Razones Políticas, Abuelas de Plaza de Mayo, Servicio de Paz y Justicia, Movimiento Ecueménico de Derechos Humanos; Asamblea Permanente por los Derechos Humanos, Centro de Estudios Legales y Sociales, Liga Argentina por los Derechos del Hombre.

⁵ Several analysts pointed out that in order to freeze growing internal opposition, the military leadership decided to invade the Malvinas Islands. However, historical analysis of the conflict show that the military's decision was only partially related to the internal situation. See, L. Freedman and V. Gamba-Stonehouse, *Señales de Guerra: El Conflicto de las Islas Malvinas de 1982*, Buenos Aires, Javier Vergara, 1992.

⁶ For a description of these conflicts see C. Acuña and C. Smulovitz, *Militares en la Transición Argentina: Del Gobierno a la Subordinación Constitucional*, in C. Acuña (et al.) *Juicio, Castigos y Memorias. Derechos Humanos y Justicia en la Política Argentina*, Buenos Aires, Nueva Visión,

society was lost. Unable to negotiate a way out of the crisis with civilian forces, the military Junta attempted to halt future legal punishment for human rights violations and investigations of all the military operations carried out in the period⁷ through a series of unilateral measures. Regardless of the military's failure to impose these measures, the retreat strategy advanced by the Armed Forces helped to place the treatment of past human rights violations as the central problem of the transitional agenda. The Peronist candidate (Luder), taking for granted his electoral victory, expressed his willingness to accept the Armed Forces conditions. In contrast the Radical Party candidate (Alfonsín) explicitly announced he was going to ignore them. Alfonsín's strategy produced the best results and in October 1983, for the surprise of many, he won the presidential elections.

The strategy designed by the new president to treat the problem intended to simultaneously sanction members of the Armed Forces that had committed violations of human rights, and to incorporate the military into the democratic arena. The government expected a self-depuration of the military that would simultaneously allow the judicial sanction of a limited and emblematic group of human rights violators and the fulfillment of electoral promises, without becoming an enemy to the Armed Forces. The government's initial strategy also included the creation of a truth Commission (National Commission on the Disappearance of Persons, CONADEP) that was to receive denunciations and evidence of disappearances, send them to the justice system, check their whereabouts and determine the location of lost children. Although the creation of the Truth Commission was intended to block a bicameral investigation promoted by most of the human rights organizations, it is generally recognized that the Commission's work exceeded the government and the public expectations.⁸ In addition, the government initial strategy included the detention of the members of the former military Juntas and of some other emblematic human rights violators, the prosecution of some guerrilla leaders⁹, the repeal of the "Law of National Pacification" ("Self-amnesty" law), and the reform of the Military Code (Law 23,049).

1995; and A. Fontana, *Political Decision Making by a Military Corporation: Argentina 1976-1983*, Ph. D. Dissertation, University of Texas at Austin, 1987

⁷ In 1983, the military government established the Acta Institucional (Institutional Act), that decreed that all military operations undertaken by the Armed Forces had to be considered acts of service and thus were not subject to punishment. Afterwards it sanctioned the Ley de Pacificación Nacional (Law of National Pacification or Law of Self-amnesty), that granted immunity to suspects of acts of state terrorism and to all members of the Armed Forces for crimes committed between May 25th 1973 and June 17th 1982, and finally, in its last days of government, it passed a decree ordering the destruction of documents referring to military repression.

⁸ E. Crenzel, *Historia Política Del Nunca Mas*, Buenos Aires, Siglo XXI, 2007.

⁹ Decree 158/83 ordered the arrest and judicial prosecution of the members of the military juntas that governed the country between 1976/1983 and Decree 157/83 ordered the criminal prosecution

In December 1983 Congress repealed the self-amnesty law. However, the governmental strategy faced its first problem when the Military Code was debated in Congress. As the executive wanted, the new law conferred upon the Supreme Council of the Armed Forces the initial jurisdiction to prosecute military personnel and it established a mechanism of automatic appeal in civilian courts, but the parliament intervention also precluded the indiscriminate use of the concept of "due obedience" in cases of infamous and aberrant crimes (*delitos atroces y aberrantes*). This last modification prevented the government from limiting "ab initio" the scope of the trials.

In September 1984, when it became evident that the Supreme Council of the Armed Forces would not carry out the self-purge of the military, the Federal Appeals Court of Buenos Aires took the Juntas case in its hands. The trial of the members of the military Juntas started in June 1985 and for a few months, the juridical logic took primacy over the political logic which had governed the conflict until then. At the end of the trial, former military President Jorge Rafael Videla and ex Commander in Chief of the Navy Admiral Emilio Massera were given life sentences, ex President Eduardo Viola was given 17 years in prison, and the Junta members for the Navy and Air Force Admiral Lambruschini and Brigadier Agosti were given 8 years and 3 years and nine months respectively¹⁰. The trial had an enormous impact on the public opinion, it was followed daily on the TV and newspapers, and it gave place to the publication of a newspaper, "El Diario del Juicio" that covered its development¹¹. In addition to its juridical consequences, the trial gave credibility to the narratives of the past; put beyond suspicion the accounts of the witnesses and it became an effective mechanism for the historical and political judgment of the dictatorial regime. Furthermore, and contrary to what was expected, instead of closing the "human rights question", the trial ended up reopening the issue in so far as the Court recommended to follow-up all the leads gathered about officers and about others who were accused for their involvement in human rights violations.

When the trial ended, the increasing pressure from the Armed Forces, led the executive to take a series of actions to restrict the scope of the verdict in order to ensure military acquiescence. These moves included three measures: the Instrucciones a los Fiscales Militares ("Instructions to Military Prosecutors"), the Ley de Punto Final ("Law of Full Stop"), and the Ley de Obediencia Debida ("Law of Due Obedience"). The "instructions" were intended to reduce radically the number of prosecutions, by exempting from accountability the cases where those accused of torture,

of guerrilla leaders Mario Eduardo Firmenich, Fernando Vaca Narvaja, Enrique Gorriarán Merlo y Roberto Perdía.

¹⁰ Members of the Junta that governed between 1979 and 1982 were acquitted because the Court considered that evidence against them was insufficient and inconclusive.

¹¹ C. Feld, *Del Estrado A La Pantalla: Las Imágenes Del Juicio A Los Ex Comandantes En Argentina*, Buenos Aires, Siglo Veintiuno de Argentina Editores, 2002.

kidnapping and/or murder could prove that they acted according to orders. This initiative to politically close the question did not succeed, given the opposition it awoke among the ranks of the Peronist Party, sectors of the Radical Party, human rights organizations, and the Federal Court of the Federal Capital. The Ley de Punto Final approached the issue from another angle. Instead of considering whether those who violated human rights were or were not liable, it established a deadline for summoning the presumed violators of human rights. When the law was approved, seven Federal Courts suspended their January holidays to work on the pending cases. By February, when the lapse of time determined by the law ended, more than 300 high-ranking officers had been indicted. Thus, even though the President had managed to pass the Ley de Punto Final, its practical consequences had vanished. The Ley de Obediencia Debida (Due Obedience Law) was approved in April 1987 shortly after a rebellion (Easter Rebellion)¹² in opposition to the human rights policies of the Radical party took place. The Due Obedience Law established that those individuals who, at the time of the events, were chief officers, subordinate officers, non-commissioned officers and soldiers of the Armed Forces, security, police and penitentiary police, were not punishable for crimes that violated human rights, provided it could be assumed that they had acted within the scope of "due obedience." For important sectors of the population, this law was a clear evidence that the government was giving up one of the banners that in 1983 had allowed it to become the main guarantee of democracy and the rule of law. In spite of the setback the law involved, its sanction continued to leave an open flank in the dispute with the Armed Forces: the political vindication of the repression committed by the Armed Forces since 1976.

After the "Easter Rebellion" a new front of conflict opened in the relationship between the government and the Armed Forces. The discussion over how to penalize those responsible of violations of human rights was shadowed by the debate over how to reinstall the chain of command in the Army. Even though the government was willing to end the trials for those responsible for human rights violations, neither the government nor important sectors of the Army High Command were willing to reinforce the "carapintadas" political power within the military. This second conflict, over the hegemony of the Armed Forces among military sectors, led to three military uprisings, Monte Caseros 1988 and Villa Martelli 1988 during the Alfonsín government and the 1990 December rebellion during the Menem government.

In 1989 Carlos Menem was elected president. The "carapintadas" expected that his electoral victory would result in the dismissal of the sanctions imposed by the Army Chief Staff to their

¹² The rebellious forces were called "carapintadas", or "painted faces", due to the dark camouflage paint these commandos used.

comrades who had participated in the military rebellions. In October 8, 1989, Carlos S. Menem, announced a first presidential pardon. Among its 277 beneficiaries there was military personnel convicted for violations of human rights, for their intervention in the Malvinas war, for their participation in the military uprisings that took place during the Radical government, and civilians who had been condemned for guerrilla activities. The ex-commanders Videla, Viola, Massera and Lambruschini, Generals Camps, Richieri, and Suarez Mason, and the head of Montoneros, Mario Firmenich, were not included in this pardon. A few days after, it also became evident that the pardon was not going to reverse the sentences to the “carapintadas” set by the Army Chief Staff. Although the presidential pardon allowed the “carapintadas” to avoid being condemned by civilian courts, it did not allow them to obtain impunity in the military scene. Disenchanted with Menem, the “carapintadas” made a last effort to gain control of the Army Chief Staff. Their last uprising, on December 3rd, 1990, was the bloodiest and most violent. This time repression of the uprising was forceful. When the rebellion ended, the “carapintadas” had been defeated in the military field and neutralized in the political arena. Since the "Law of Due Obedience" was passed, the “carapintadas” had been facing difficulties to keep followers among officers. When the recurrence of incidents that broke the chain of command started to be perceived as a mechanism to advance the “carapintadas” interests and as a danger for the future of the Army, the sympathy for their cause among officers began to vanish. This last victory of the military command sent an unequivocal signal to dismiss the risks that the repeated challenges of the chain of command implied for the survival of the institution.

A few days after this last rebellion, Menem made public a second pardon. It included the first two military juntas as well as Generals Camps, Suarez Mason and Richieri, together with Mario Firmenich and a few other civilians. Its sanction reaffirmed the "menemist" strategy: past rebellions were going to be forgiven, but present and future disobediences were going to be punished in order to strengthen the Army Chief Staff and to prevent the “carapintadas” from becoming once again the spokespersons of corporatist causes.

In sum, between 1982 and 1990, the treatment of past human rights violations was characterized 1) by the installation of the treatment of past human rights violations as a central topic of the transitional agenda, and 2) by the initial triumph of the judicial strategy as the prevalent response to deal with the question. Given the way in which political conflicts developed at the outset of the transition, accountability for human rights violations during this first period was characterized by the predominance of the judicial strategy and by the search of legal retribution. These developments led in turn, 3) to political and legal struggles regarding the definition and reach of the judicial response and 4) to the eventual realization of the trial of the military juntas. This first

period was also characterized 5) by the reversal, due to the military reaction, of some judicial and policy outcomes, 6) by the politicization of the internal military conflict and 7) by the presidential pardon of the sentences. Even though the Armed Forces succeeded in gaining the benefit of the pardon, the former reconstruction shows that the transition confronted them with an extremely dangerous and costly scenario. They could not avoid the trials and the conviction of its leadership, they faced the emergence of internal political divisions that threatened to divide them across class lines and they could not reverse the discredit their former actions arose among members of the civil society. The high costs and threats originated in the investigations and judicial convictions for human rights violations and the need to prevent their further internal politicization ended up subordinating the military to the constitutional power. And although victims and human rights organizations initially thought that presidential pardons closed the judicial venue that predominated during those first transitional years, they soon found alternative mechanisms to continue in their pursue of justice. In the next section I analyze those alternative mechanisms and some of their consequences.

III.

The Full Stop Law, the Due Obedience Law and the two pardons confronted the actors that had been searching justice for past human rights violations with a new scenario. The measures did not erase the institutional responsibility of the Armed forces for the crimes committed or the political and legal cost they paid due to the imposed sentences. However, after these laws and presidential pardons took place, the judicial strategy for dealing with human rights violations appeared to be closed. This closure had several consequences. At first, these measures appeared to sap the human rights movement and victims' morale. However, and although human rights organizations and victims did not completely abandon the judicial venue, they began to search for alternative ways to achieve justice. The persistence of the demand for justice forced the government to advance some measures to appease the discontent. In the following years a succession of non judicial actions took place¹³. The measures include: a) economic reparation for damages to victims of state terrorism, b) the realization of "Right to Truth" trials, c) the search and legal punishment for kidnapping and subtraction of children, d) the intervention of foreign courts, e) individual and institutional public apologies, f) cases of lustration, g) the establishment of public commemoration

¹³ Although most measures did not involve judicial answers, there were some cases in which legal retributionist measures continued to be pursued (i.e case related to the kidnapping of children) See below.

monuments, spaces and dates, h) cases of social ostracism and i) the creation of legal institutes to protect new rights such as the right to historical truth. Some of these initiatives were promoted by human rights organizations, others by governmental actions. In all cases, they show that, although at the time legal retribution for the committed atrocities appeared to be precluded, the pursue justice and of some kind of reparation continued to be part of the Argentinean political scenario.

In the next pages I describe and analyze some of these measures. Their serial and unending character produced some unexpected developments and “justice outcomes”. It allowed actors to take the conflict into other scenarios and to involve in the process new allies and institutional actors. It forced actors to look for legal and informal innovations that have had lasting consequences. And they gave place to a fruitful interaction between informal and legal mechanisms of justice that led to the reopening of some legal demands or that brought to light information that was later used as legal evidence. Let’s consider then what these measures involved, how they came about, and their impact on the search of justice.

a. Economic Reparations

After the pardons, and in order to appease the discontent they brought about, the Menem government, through the Undersecretariat of Human Rights, sanctioned a Presidential decree and promoted the approval of several laws that enabled reparations for different types of damages for victims of state terrorism¹⁴. The measures appear as a complying response to a recommendation of the Inter-American Court of Human Rights¹⁵ that established that it was the state’s responsibility to economically compensate victims for the human rights violations that had taken place under the authoritarian regime. Although victims had already been searching reparations in civil courts, by 1991 their right to file civil cases had expired. Thus, in 1991, Menem sanctioned decree n° 70/91 that recognized the right to demand compensations due to illegitimate detention for those whose right to claim reparation in court had run out. A few months later, Law 24,043 extended the benefit to those that, between November 6, 1974 and December 10, 1983, had been detained “at disposition of the Executive Power”, to civilians detained by decision of war tribunals; to those who had been

¹⁴ For a detailed account of the process see M. J. Guembe, *The Argentinean Experience with Economic Reparations for Serious Human Rights Violations*, in De Greiff *Repairing the Past Compensation for Victims of Human Rights Abuses*, Oxford University Press, 2006; and C. Acuña, *Transitional Justice in Argentina and Chile. A Never Ending Story* in J. Elster, *Retribution and Reparation in the Transition to Democracy*, Cambridge University Press, 2006.

¹⁵ Recommendations based on the International Pact of Political and Civil Rights of December 19 1966 that states in its article 9.5 “Toda persona que haya sido ilegalmente detenida o presa, tendrá derecho efectivo a obtener reparación.”

detained in military facilities without being sentenced by a war tribunal; to conscripts who had been sentenced by war tribunals, to children born during the captivity their mothers; and to all those detained in clandestine centers¹⁶. And in 1994 Law 24.411 granted economic reparations for victims of forced disappearances and the successors of persons assassinated by the military, by members of security forces, or by paramilitary groups. The approval of this later law opened a series of controversies. Some were associated with difficulties to demonstrate the existence of forced disappearances, an event that, given its clandestine nature and lack of information, could not be easily proved. Others were related to the concerns of some human rights organization that feared the State was exchanging money for impunity and silence about the past. The implementation problems raised by the law 24.411 led to the approval of another one (Law 24.321) that resulted in turn, in the creation of a new civil status: absentee by forced disappearance¹⁷, a legal figure with no precedents in national legislation or in comparative law. Compensations were defined as the equivalent to one hundred times the monthly salary of Category A of the National System of Public Administrators, resulting in a total amount of U\$S 220,000-. By February 2004 the Secretariat of Human Rights, had received 8,200 claims for reparations in cases of forced disappearance and assassination and only 200 were rejected.¹⁸ Guembe estimates that U\$1,170,000,000 has been paid for cases of arbitrary detentions and U\$1,912,960,000 for forced disappearances and assassinations.¹⁹ Finally in 2004, Law 25.914 established reparations for those who were born while their mothers were illegally detained; for minors who remained in detention due to the detention or disappearance of their parents, and for those who had been victims of identity substitution. Lastly, it should also be mentioned that since 1999 there have been demands to contemplate the situation of those forced into exile. However, given the difficulties to establish the political motivations for leaving the country this request has not received legislative approval.

¹⁶ “Victims received a sum equivalent, at the time the benefit was claimed, to one- thirtieth of the monthly amount paid to the highest category of the roster of civil servants of the National Public Administration, for each day of the detention.” Guembe op. cit 2006. This meant that victims received U\$74 for each day of the detention.

¹⁷ According to Guembe (op. cit. 2006), families of victims of disappearances refused to declare them dead until their bodies were found, so when Law 24.411 awarded economic reparations for victims of forced disappearances, the victims could not claim them but neither could the families that refuse to declare them dead. The Law of Absence by Forced Disappearance [Ley de Ausencia por Desaparición Forzada] did not presume the death of the disappeared person, but forced the State to accept that the person was illegally kidnapped by its agents and that he or she had never appeared again, dead or alive.

¹⁸ Guembe, op. cit. 2006.

¹⁹ Guembe op. cit. 2006. On the fiscal burden of these reparations see also Acuña, C. op. cit. 2006.

The Menem government promoted the reparation policy as a way to appease the discontent originated by the pardons. However once the first steps of the reparation policy were established, human rights organizations and victims participated in their design and pressured for its extension to cover other damages. Public debates, particularly those related to the morality of the compensations, were difficult and in most cases did not achieve high visibility. Human rights organizations and some of the victims' relatives felt that in the absence of legal punishment for perpetrators, payments were not only a consolation prize but also a sell out. Although the numbers of claims filed indicate that most families of victims accepted reparations, the issue introduced not only moral and political dilemmas that have not vanished but also a divisive cleavage between human rights organizations and victims that accepted or rejected reparations.²⁰

b. Recovery of Kidnapped Children

After the pardons, governmental and human rights organizations' actions also concentrated on the recovery of the children who had been kidnapped together with their parents and of the babies born in clandestine detention camps where their pregnant mothers had been taken. The "Grandmothers of Plaza de Mayo" (Abuelas de Plaza de Mayo) estimate that at least 500 children were kidnapped or born in detention camps. By the end of July 2007, their records register 242 children kidnapped with their parents or born in detention camps and that 166 of them were born while their mothers were in captivity²¹. Most of the children born in captivity or kidnapped with their parents were not returned to their original families and were appropriated by militaries, by members of the police or given for adoption to families, that in some cases were unaware of the children's origin. Since its origin in 1977, the Grandmothers of Plaza the Mayo have been searching for the missing children and for the punishment of their abductors. By February 2009, 97²² children had been recovered and had learnt about the fate and identity of their biological parents. In most cases, they have also reestablished a relationship with their biological families.²³

²⁰ For a description of the conflicts and moral discussion that the policy of reparation for relatives of disappeared awoke see Guembe op. cit. 2006.

²¹ Abuelas de Plaza de Mayo, *Niños desaparecidos / jóvenes localizados: en la Argentina desde 1976 a 1999*, Buenos Aires, Temas Grupo Editorial, 1999. See updates in <http://www.abuelas.org.ar/comunicados>

²² See Clarín May 28, 2008.

²³ When children had been appropriated unlawfully by the military or the police, a judge restituted their original identity. When they had been adopted in good faith, the victims' preferences had been taken into consideration.

The work of the Grandmothers had some additional unexpected consequences: it led to the reopening of judicial demands, it fostered the development of technologies to determine identities and it promoted the diffusion of human right issues through innovative and popular mediums such as soap operas. Judicial actions for the kidnapping of children were possible due to a loophole left in the sentence that in 1985 condemned the first three military juntas. Since illegal appropriation of children had not been part of the crimes judged at that time, this crime was not sanctioned and therefore it was not included in the presidential pardons. For this reason, the Grandmothers could file cases related to the abduction of children. This loophole allowed the Grandmothers to initiate in 1996, and despite the Due Obedience Law, lawsuits against abductors that have led to the detention of several ex high ranking officials such as Videla; Massera; Vañek; Suppich, Bignone, Nicolaidis and Franco. In addition to these detentions, illegal adopting parents have been convicted on charges related to the forgery and subtraction of identities.

c. Persistence of Legal Strategies and Claims for Legal Retribution

At the end of 2000, and in the context of an action advanced by the Grandmothers of Plaza de Mayo regarding the kidnapping of an eight months baby who had been kidnapped together with her parents, CELS (Centro de Estudios Legales y Sociales), a leading human rights organization, filed a legal action concerning the disappearance and torture of the baby's parents, José and Gertrudis Poblete. CELS took advantage of the opportunity opened by the trials for illegal appropriation of children to show "a fundamental contradiction" in the judicial system. That is, that the system allowed the investigation and punishment of the crime of the baby but it prevented the investigation and punishment of the disappearance of her parents. In March 2001, CELS's action was favorably considered by Judge Gabriel Cavallo who nullified the "Due Obedience" and "Full Stop" laws finding them unconstitutional²⁴. In November 2001 the decision was confirmed by the Federal Court, Room II and in June 2005 it was reconfirmed by the Supreme Court of Justice. These confirmations enabled the reopening of cases and in August 2006 Julio Simón was sentenced to 25 years in prison due to the kidnapping and torture of Jose Poblete y Gertrudis Hlaczik, the baby's parents²⁵. Beyond the relevance that Judge Cavallo's decision had in the reopening of past human rights cases, it should also be highlighted the role that the search and use of legal loopholes by human rights organizations and victims had in the reactivation of the legal strategy.

²⁴ Argentina has a diffuse system of Constitutional Review.

²⁵ See the complete sentence in <http://memoria.cels.org.ar/?p=126>

d. Public Apologies

In 1995, retired navy Captain Adolfo Scilingo publicly confessed, in a book²⁶ and in a TV program²⁷, his own participation and the Navy's role in the clandestine repressive methods used during the dictatorship. His confession acknowledged that the Navy had participated in the kidnapping, torture, murder and disappearances that had taken place in the 1970's. To appease the reactions raised by Scilingo's confession, the Chief of Staff of the Army, on TV²⁸ and in a public document, made a first of a series of public apologies²⁹ in which different actors recognized their role during those years. The Army's document not only acknowledged the participation of the Armed forces in the tortures and murders that had taken place during those years but it also stated that "commits a crime whoever attempts against the National Constitution...gives immoral orders...follows immoral orders...to achieve ends believed to be just employs unjust, immoral means."

d. Truth Trials

At the same time these public apologies were taking place, relatives of the disappeared started to file requests demanding for their right to know about the circumstances surrounding the disappearances and fate of their bodies. At times in which the legal retribution option appeared to be precluded, truth trials appeared as an alternative road to achieve some kind of reparation and informal justice. In 1998, a group of human rights organization on behalf of Carmen Lapacó made a presentation at the Inter-American Commission on Human Rights (ICHR) demanding her right to know the truth and her right to mourn her disappeared daughter. In 1999 the Commission stated that the state has to warrant the victims and relatives' "right to truth" for what happened to their disappeared loved ones.³⁰ This decision not only acknowledged the legal status of the "right to truth" but it also gave place to what became known as "truth trials". In 1998 the Federal Appeal Courts in La Plata, following the Interamerican Court of Human Rights recommendation, stated that

²⁶ H. Verbitsky, *El Vuelo*, Buenos Aires, Editorial Planeta, 1995.

²⁷ The TV program was "Hora Clave" and it was broadcast on Channel 9 on March 9th, 1995.

²⁸ The Army's Chief, Martín Balza read on, *Tiempo Nuevo* a TV program broadcast on April 25, 1995 on Channel 11, the Army's apology.

²⁹ After the Army made public its apology, the Navy and the Air Force also made public documents acknowledging their role in the repression that took place during those years.

³⁰ See A. Oliveira and M. J. Guembe, *La Verdad, Derecho de la Sociedad*, in *La Aplicación De Los Tratados Sobre Derechos Humanos Por Los Tribunales Locales*, Buenos Aires, Editores del Puerto, 1997.

the right to truth and information about the victims' whereabouts was not foreclosed by the pardons and that investigation should continue to allow relatives to know the circumstances of their disappearances and the location of their remains. Although relatives knew their demands were not going to render legal punishment, the procedure still allowed them to frame their claim in the language of rights and to "judicialize" the conflict over the historical truth. Later on, when legal prosecution of human rights violations reopened, the information gathered and disclosed at truth trials became valuable new juridical evidence. There is no aggregate data regarding the number of Truth Trials that have and are taking place. It is known however that "Truth Trials" are taking place in La Plata, Bahía Blanca, Neuquén, Rosario, Córdoba, Mar del Plata, Salta, Jujuy and Mendoza. It should also be mentioned that in 1998, a center left coalition presented a project to repeal the Full Stop and Due Obedience Laws. Although at that time, and due to the non retroactive principle of the law, the approved project did not have major legal consequences, its symbolic effects were significant.

f. Demands in Foreign Courts

The already mentioned resolutions of the ICHR show that during these years in several occasions local actors resorted to the support of international courts. In addition to these international institutions, foreign victims also filed cases in foreign courts. Demands against human rights violators were filed in Italy, France and Germany. In November 1999, the Spanish Judge Baltazar Garzón required INTERPOL the detention of 11 members of the Armed Forces accused of human rights violations. The Menem government, and the following De la Rúa and Duhalde administrations, responded to these requests reaffirming the principle of territoriality and denying collaboration with foreign judges. The problem of how to deal with the demands of foreign courts was "solved" in 2003, with the nullification of the Due Obedience and Full Stop Laws³¹. Regardless of the juridical controversies³² the measure gave place, the nullification enabled the realization of new domestic trials (see below) blocking in turn, the legitimacy of the requests from foreign courts and allowing the Argentinean government to by pass the territoriality questions brought about by the requests of foreign courts.

³¹ In September 2003, Congress approved a law promoted by President Kirchner, declaring null the Full Stop and Due Obedience Law (Law 25.779) and in June 2005 the Supreme Court ruled on the unconstitutionality of the Full Stop and Due Obedience Law.

³² For an analysis of the nullification and of the controversies it gave place see C. Varsky and L. Filippini, *Desarrollos Recientes de las Instituciones de la Justicia de Transición en Argentina*, in *Nueva Doctrina Penal*, N°. 1, 2005.

g. Lustration Policies and Social Ostracism

The alternative roads to legal retribution also included lustration initiatives. The Argentinean legislation does not yet include specific legal limitations to exclude from public offices individuals who were involved in the commission of the human rights violations that took place in the past. In spite of that, NGOs have used alternative avenues to “de facto” enforce lustration policies³³ regarding military personnel, legislators and judges. According to the Constitution, the promotion of high ranking military personnel requires the intervention of the Executive branch, that proposes candidates, and the decision of a Senatorial Agreement Commission, that has to confirm the proposed candidates. Since 1993, before confirmations take place, the Agreement Commission has requested information to the former CONADEP, to the Secretariat of Human Rights, to CELS, and to APDH (Asamblea Permanente de Derechos Humanos) regarding the performance and previous records of individuals proposed for promotion. Civil society organizations have taken advantage of this opportunity. They have participated in these public hearings, reviewing records of candidates, producing evidence and impugning candidates. In 2002 these informal mechanisms were institutionalized by an internal parliamentary regulation.³⁴ At present (June 2008), five different legislative projects are being debated in order to enforce by law article 36 of the 1994 Constitution that establishes that “authors of acts of force against the institutional order and the democratic system will be perpetually barred from occupying public posts and excluded from pardons and commutation of sentence benefits”. Even though legal disqualifying mechanisms have not yet been approved, participation of civil society organizations in confirming procedures has led to debates over the promotion of some well known repressors³⁵. Lustration cases have also reached members of the Legislature and of the Judiciary. The National House of Representatives, for example, has

³³ See V. Barbuto, *Impugnation Procedures in Argentina: Actions Aimed at Strengthening Democracy*, International Center for Transitional Justice, New York, 2007; and D. Zayat, El Caso “Patti” y Otra paradoja de la Democracia, *Revista Jurídica de la Universidad de Palermo* Vol 7, 2, 2006.

³⁴ In order to allow public debates and observations of the candidates by members of the civil society, internal regulations of the Senate established that “Citizens may exercise this right within seven labor days following the moment the petition for agreement is read in the chamber, thus having parliamentary status. The commission will also receive observations regarding the proposals, while the lists are under its consideration.” Art. 22 of Regulations of the Honorable House of Senate of the Nation.

³⁵ According to Barbuto op. cit. the following promotions have been debated and in some cases stopped Capitan de Navio Roberto Luis Pertussio (1985) Coronel Mohamed Alí Seineldín (1990), Coronel Antonio Fichera (1987 and 1997) Navy officer Carlos Rolón (1995), Navy Officer Antonio Pernías (1995), Navy Officer Julio César Binotti (2002), Coronel Marino Braga (2002).

denied the approval of the legislative certification of two elected legislators (Bussi and Patti) due to their participation in human rights violations.³⁶ And at least 9 members of the Federal and Provincial Judiciary have been accused by the Council of the Magistracy due to human rights violations. And although some of the accused judges and prosecutors were able to avoid the sentences because they resigned before the Council decision was known, their early resignation could not prevent their exclusion from the judiciary.³⁷

In addition to lustration cases, while legal actions against human rights violators were still foreclosed, victims and human rights organizations organized actions promoting social ostracism of repressors. Starting in 1995, several human right organizations and in particular HIJOS³⁸, started to organize “escraches”. “Escraches” are a new form of political demonstration intended to denounce and to provoke public shaming. Demonstrators meet at the door of repressors houses to inform neighbors that a human rights violator, that in general has been previously sentenced, is free and lives in the neighborhood. In addition to social ostracism, this type of action intends to promote social condemnation of the crimes in order to avoid political amnesia. Between 1995 and 2005, at least 50 “escraches” were organized just in Buenos Aires City. Provincial branches of HIJOS have also organized “escraches” in different provincial cities.³⁹

h. Memorials and Commemorations

The list of non legal initiatives that have taken place in Argentina also includes an intentional struggle for the memory. The social remembering process has included judicial initiatives and the establishment of public commemoration monuments, spaces and dates. As Elizabeth Jelin⁴⁰ has shown, creating monuments, agreeing on commemoration dates and deciding on what to do with particular spaces, such as former detention camps, have resulted in contested struggles. Conflicts over the memories of the dictatorial past resulted, for example, in the creation of different remembrance monuments, in the establishment of March 24, the day of the coup, as Memorial Day, in the transformation of ESMA the infamous navy detention camp, into a museum

³⁶ For an analysis of the controversies awoken by these legislative decisions see D. Zayat, op. cit., 2006.

³⁷ The following judges and prosecutors have been accused by the Judicature Council for their involvement in human rights violations: Pablo Bruno, Victor Brusa; Guillermo Madueño; Tomás Inda, María Beatriz Fernandez, Ricardo Lona, Gustavo Demarchi, Carlos Flores Leyes, Roberto Mazzoni, and Luis Angel Cordoba.

³⁸ HIJOS is an organization formed by the son and daughters of disappeared individuals.

³⁹ *Página 12*, 23 de Marzo 2006.

⁴⁰ E. Jelin, *State Repression and the Labors of Memory*, University of Minnesota Press, 2003.

and in the creation of different archives. The struggle for memory has been an integral and continuous element of the Argentinean process. Its relevance can be observed not only in the just mentioned manifestations, it is also an explicit goal of the “escraches”, it has led to the creation of several NGO’s⁴¹ that have the preservation of memory as its principal goal, and it has been one of the central slogans in the banners⁴² that head human rights demonstrations.

i. The Return of the Legal Retribution Strategy

In recent years some important developments have allowed the reopening of the legal strategy in the treatment of human rights violations in Argentina. As was mentioned, in September 2003, Congress approved a law promoted by President Nestor Kirchner, declaring null the 1986 “Full Stop Law” and the 1987 “Due Obedience Law”. Two years after, the Supreme Court ratified the policy when it declared those two laws unconstitutional. Since then, trials for human rights violations have resumed. According to CELS⁴³ records, in March 2008, 1036 individuals (civilians and members of the security forces) had been accused in the human rights lawsuits that had been reopened. Since 2006, 17 have been sentenced. The CELS statistics also acknowledges that although 212 lawsuits are underway throughout the country, only 139 of them are active and that 330, of the 399 individuals that are being accused, are being held in preventive imprisonment.

As was mentioned, in 2003 the legal retributive venue was reopened. The juridical and political significance of this development is unquestionable. Although the presidential decision has been an important and necessary element in its reestablishment, the previous historical reconstruction shows that this reopening has also been possible due to changes in the political, institutional and material conditions and due to the persistent and innovative actions of an array of social actors. While new political and institutional conditions⁴⁴ made the material realization of the

⁴¹ For example, Memoria Abierta, an NGO that comprise different human rights organizations, works to raise social awareness and knowledge about state terrorism in order to enrich democratic culture. Its primary purpose is to “make accessible all documentation regarding the last military dictatorship for the purposes of research and the education of future generations.

⁴² “Verdad, Memoria y Justicia” (“Truth, Memory and Justice”) has been one of the persistent banners and demands of the Argentine human rights organizations.

⁴³ <http://www.cels.org.ar/documentos/index.php?info=detalleDoc&ids=3&lang=es&ss=&idc=663>. For a detailed description see also the statistical appendix of the CELS 2008 Report in http://www.cels.org.ar/common/documentos/Anexo_IA2008.pdf. CELS webpage keeps an updated record of the cases in which they are involved.

⁴⁴ The production of judicial indictments requires enabling legislation and political will but also the solution of practical problems related, among other things, to the availability of evidence and the composition of the judiciary. Before leaving power, the military issued specific orders to destroy

new trials possible, the persistence and innovations of the human rights movement maintained the demand for legal retribution as a pending conflict of the political agenda. The next and concluding section analyzes how the interaction between legal and informal strategies led to the reopening of the legally retributive road and how this interaction contributed to the achievement of different types of justice outcomes.

Argentina 1983-2008.

Stages in the Transitional Justice Process

Period	Predominant Strategy	Conditions	Salient Measures
1983-1990	Retributive legal	<ul style="list-style-type: none"> • Defeat in war • Supply of organized Social Movements (in particular HR Organizations) 	<ul style="list-style-type: none"> • Repeal of Amnesty Law • Truth Commission • Trial and Convictions with Domestic Legislation • Full Stop, Due Obedience, Pardon
1991-2003	Non retributive	<ul style="list-style-type: none"> • Closure of legal retribution due to military threat • Supply of activated and Organized HR organizations 	<ul style="list-style-type: none"> • Reparations • Truth Trials • Constitutional Review • Informal and Formal Lustration • Public Institutional Apologies • Social Ostracism • Trials for Kidnapping of Children
2003-2008	Retributive legal coexisting with non retributive actions	<ul style="list-style-type: none"> • Extradition Demands from Foreign Courts • Supply of activated and Organized HR organizations 	<ul style="list-style-type: none"> • Nullification and Unconstitutionality of Due Obedience Full Stop Law and Pardons • Trial and Convictions with Domestic Legislation of low and high ranking officials • Persistence of all measures of the previous period

files and incriminating evidence, thus at the outset of the transition process unquestionable juridical evidence to prosecute the huge number of accused military was not available for all the cases that had to be judged. On the other hand, in 1984 most of the members of the judiciary had also been judges during the military regime and had pledged alliance to the Statutes of the Military Government. Thus, their ideological stand and impartiality to participate in these trials was in question. See Smulovitz C., *Constitución y Poder Judicial en la nueva democracia Argentina*, in Acuña C., *La Nueva Matriz Política Argentina*, Nueva Visión, Buenos Aires, 1995, pp. 93-4. The availability of evidence and the renewal of the judiciary are only two of the many policy problems that need to be solved in order to pursue a retributionist human rights strategy.

IV

The ways in which the Human Rights violations that occurred in Argentina took place were treated have place to different interpretations. The interpretation that emphasizes the role that legal retribution has in the achievement of accountability considers the case as an example of delayed justice. This perspective recognizes that restricted trials took place at the outset of the transition process, but highlights that since those initial indictments were reversed by a series of laws and presidential decrees, it wasn't until those laws were first repealed, then nullified and finally declared unconstitutional that accountability could take place. Thus, from this perspective, since judicial treatment has not been speedy and the process has not been exhaustive or efficient, Argentina is seen as an example of delayed justice or delayed accountability.

The interpretation that understands that the achievement of justice involves not only retributive outcomes but also measures to repair victims through other means considers, instead, that the Argentinean case illustrates that different roads can lead to justice and accountability, that these roads can interact, and that these interactions can give place to different "justice outcomes". From this perspective, justice and accountability result not only from a "unique" and powerful judicial event, but from a process involving serial, multiple and nested retributive and non retributive actions. In the Argentinean case, the unexpected interactions between formal and informal outcomes ended up questioning the existing political and institutional restrictions and maintaining the intensity of the claim as a central issue of the political agenda. While the first interpretation also involves a normative assessment of the process in so far as it highlights the distance between claims for justice and outcomes; the second one emphasizes the descriptive dimension of the analysis in so far as it draws the attention to the difficulties and opportunities that determine the feasibility of the actors' decisions and goals.

The recent juridical reactivation has been possible because fundamental legislative and jurisprudential changes took place, but also because after pardons were approved local actors continued to look for evidence, for new juridical arguments, for the support of international actors and for non juridical mechanisms for the reparation of damages. In their forced search for legal and informal innovations, actors found "solutions" and measures that have had lasting consequences such as the right to truth, or the state acknowledgment of a novel civil status ("absentee due to forced disappearance"). In the process they also produced alternative "justice outcomes" such as monetary reparations for victims, measures restricting access to public office to individuals accused for human rights violations, public apologies of some perpetrators and the establishment of memorials. These outcomes transformed the problem of how to achieve justice and defend human rights into an ongoing task and program of the democratic regime and they also gave place to a

fruitful interaction between different mechanisms of justice. In recent years, testimonies obtained in Truth trials were used and accepted as legal evidence in the reopened criminal trials and claims made in lawsuits regarding the kidnapping of children led to the revision of the constitutionality of the Due Obedience Law. As this paper shows, the measures implemented in the Argentinean case comprised the complete repertoire of procedures included in the transitional justice menu: Truth commissions, domestic and extraterritorial trials, demands in international courts, indictments, concealed amnesties, presidential pardons, public apologies of individual and of institutional actors, monetary compensations for different types of damages, cases of lustration, the establishment of public commemoration monuments, spaces and dates, cases of social ostracism and the creation of legal institutes to protect new rights. How can this apparently unending succession of measures be explained? Is this succession the result of an intentional strategy or serendipity governs the sequence?

Although the previous reconstruction appears to show that the implemented measures were the product of a chaotic adjustment to a succession of restrictions, the process had one permanent trait: the presence of intense, active and informed actors able to grasp the opportunity of the hour. Their sustained actions led, on the one hand, to the development of initiatives that by passed political and bureaucratic obstacles and that kept the treatment of the past as a persistent and unsolved claim of the political agenda. Their persistent and informed presence made possible the transformation of apparently innocuous and irrelevant developments into opportunities. And as the literature has shown, serendipity renders fruitful results only if a prepared actor, a “prepared mind” in Pasteur’s dictum, can grasp an opportunity in an accidental development. Thus, even though this sequence of measures can be analyzed as a chaotic succession of accidents, the development of the process can also be seen as the result of the strategy of an intense, persistent and informed actor that has been able to transform those accidents into concealed opportunities. Although they could not totally control the development of their strategy, because many other autonomous actors were involved, the evolution of the process was not accidental: it encompassed an intentional and persistent strategy of Human Rights Organizations to take advantage of opportunities and to maintain the claim alive. These sustained actions led to the development of initiatives that by passed political and bureaucratic obstacles and that kept the treatment of the past as a persistent and unsolved claim of the political agenda. The sustainability of these actions had an additional result: it prevented the weakening of the demand for justice and the weakening of the severity of the punishments. Two developments that Elster’s comparative work⁴⁵ has noted have taken place

⁴⁵ J. Elster, *Closing the Books. Transitional Justice in Historical Perspective*, Cambridge University

elsewhere. According to his analysis when the worst atrocities lay in the remote past the demand for retribution and the ability to punish weakens and punishments are more lenient. This has not been the case in Argentina. As we saw, delays have not weakened the demand for retribution⁴⁶ and although after the nullification of the Due Obedience and Full Stop laws, there have been few indictments, they do not appear to be more lenient than the ones imposed in the 1980's trials.⁴⁷ Thus, it can be argued that this complex and interactive process led to the achievement of different types of "justice outcomes" (i.e. judicial indictments, reparations, truth, etc), prevented the death of the past,⁴⁸ and consolidated the incorporation and oversight of human rights concerns as a continuous political program of the Argentinean democracy.

Press, 2004.

⁴⁶ In a recent empirical study about the use of transitional justice mechanisms around the world, Sikkink and Walling show that Argentina is the Latin American country where domestic judicial proceedings seeking to determine individual criminal responsibility for human rights violations have taken place for the longer period of time. Their Latin American data set includes 19 Latin American countries and 173 from the rest of the world and surveys human rights trials that have taken place between 1979 and 2004. Domestic judicial activity is measured using the US Department of State Country Reports on Human Rights Practices, 1979–2004 and the data record presence of judicial activity measures persistence of judicial proceedings on past human rights violations in a country over time rather than the number of trials or convictions. See K. Sikkink and C. Booth Walling, *The Impact of Human Rights Trials in Latin America*, in *Journal of Peace Research*, vol. 44, no. 4, 2007.

⁴⁷ In the trials that have taken place recently (Nicolaidis, Simón, Arias Duval and Hoya for example were condemned to 25 five years in prison, Etchecolatz and Von Wernich to life in prison, Gualco, Roldán and Simón in another trial were condemned to 23 years; Fontana to 21 and Guerrieri, 20)

⁴⁸ In "Requiem for a Nun" William Faulkner writes "The past is never past. It is not even dead".

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