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REPARATIONS FOR CRIMES AGAINST HUMANITY AS PUBLIC POLICY

Argentina's Relationship with the Past:
From the Individual to the Collective
as a Tool for Prevention

by **Andrea Gualde**

Translated from Spanish by Kerry Whigham





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The Auschwitz Institute for Peace and Reconciliation

2 West 45th Street, Suite 1602

New York, NY 10036

<http://www.auschwitzinstitute.org>

Cover Design by:

Mirko Ilic

studio@mirkoilic.com

www.mirkoilic.com

Cover Photo:

Desaparecidos, Emmanuel Frezzot

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PART I: INTRODUCTION

In the present article I will review the reparatory politics of the Argentinean government in relation to the crimes against humanity of our recent past. To do so I will take the reparatory parameters of international human rights law—both in its regional and universal contexts—as a framework of analysis. I will try to locate within those parameters the politics of memory, truth, and justice, which have been outlined since the restoration of constitutional order in 1983, but which took on a special dimension in recent years since the reopening of the judicial process for crimes committed during the military dictatorship.

To begin the analysis in detail, we must formulate two questions upon which the whole of society, which has endured a past of massive human rights violations,

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must reflect. Why must we deal with the past, and to what end? Why must we develop a program of reparations, and to what end? These are two different questions. The “why” is related to principles. We could say that we do it because we must do it, because both the victims and society need answers. The “to what end,” on the other hand, relates more to the universe of the pragmatic.

However, I believe that an adequate response to this subject must, by necessity, deal with both the ethical and the practical. We can attempt a first response that somehow encompasses others—to learn from the past and to know it so that it does not happen again. At the same time, that necessity to understand and learn must be complemented by the responsibility of every society with a past of massive human rights violations; namely, the responsibility to return to the victims their lost or violated dignity and, through that process, to restore the social fabric that has been damaged by the aberrant crimes of the past.

These first assertions lead us to reflect in a similar sense on reparations: reparations for individual victims and for the affected society; reparations that emerge out of a State of Law and that must remedy human rights violations. This is the essence of a democracy that respects the rights of persons and that concerns itself with establishing the mechanisms necessary for

society to restore the order that was altered by genocidal practices.

Having clarified this first issue regarding the why and to what end of a reparatory politics, we must deepen our understanding of what is central to this work, how it is related to the past, and how to design a process of reparations. The following analysis will continually affirm that no single response to this issue exists. Rather, there are as many responses as there are realities and societies. Likewise, the same question can be repeated at different historical moments and produce different answers. Each society must design its own program of reparations; no single recipe exists. What works for one country in a given moment could not be what is needed by another country in another moment. It is necessary that we be careful and respectful in analyzing each reality. There is no value in imposing a model or giving lessons in the abstract. It is important to keep this in mind regarding the remarks I present in the following pages, in that I am making reference specifically to the Argentinean case. I will attempt to cover 30 years of history. These years were not linear—there were advances and regressions. There were stages that required major efforts to achieve a process of full reparations, as well as stages of impunity. Throughout these 30 years, Argentinean society learned many lessons. And, as we are dealing with a process that is, at its core, always changing, it will continue to learn.

PART II: THEORETICAL FRAMEWORK OF POLITICAL REPARATIONS: REPARA- TIONS AS PUBLIC POLICY

This section is dedicated to outlining the standard principles that international law provides for designing a reparatory policy for serious human rights violations. I will analyze the Argentinean case within this theoretical framework.

The first thing that I want to highlight is that reparatory politics is a public policy. Indications that a political will existed to design a human rights agenda began to emerge amid the reestablishment of democracy in 1983. It began with the ratification of the American Convention on Human Rights (at the very beginning of

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Alfonsín's presidency), which sent a message to the international community. It continued with the National Congress's annulment of the so-called Amnesty Law passed by the dictatorship in its final days and led to the crucial decision to bring to trial the human rights violators of the dictatorial period. In this way, a path was laid for the reparatory process described in this work.

This process received a second and definitive push after 2003, when the agenda of the Argentinean government emphasized human rights as a central public policy of the State. The work that had been done to that point in isolation—at times by various parts of the government, but especially by the human rights organizations—was thus brought together and given direction. The State institutionalized policies that crystallized into an important number of projects, programs, resolutions, decrees, and reparatory laws. The concept of “reparations” was redefined, and policies for the protection and promotion of human rights were drafted simultaneously in all areas of the government. In effect, the awareness of the wide-ranging dimension of human rights across civil, political, economic, social, and cultural arenas resulted in each area of the State, within its own sphere of competency, to define policy through the lens of and with a focus on human rights. The scope of international protection of human rights also gained traction in all public policy.

In this setting, reparatory policy also underwent an evolution, which the rest of this work will address. This evolution is shaped by the guiding principle in public policy that, to have any meaning, it is not possible to think about policies in isolation from each other, but rather in how they operate in a coordinated manner.¹

1. General Theoretical Framework

Best practices in the subject indicate that a public policy of reparations must be comprehensive and consistent, not a mere summation of disjointed policies. It must be thoroughly conceived, even if not all of it can be implemented initially. The principal challenge of a process of reparations is to avoid re-victimization and to restore dignity to the victims. In other words, to prevent the individual, whose rights have already been debased by the State, from feeling newly violated. We could go further and say that the objective of not re-

¹ Gualde, Andrea and Natalia Luterstein, “The Argentinean Reparations Programme for Grave Violations of Human Rights perpetrated during the last Military Dictatorship (1976-1983)”, in Ferstman, C., Goetz, M., and Stephens, A. (eds.) *Reparations for victims of genocide, war crimes and crimes against humanity: Systems in place and systems in the making*, Martinus Nijhoff, Leiden, 2009, p. 434.

victimizing must be accompanied by an effort to re-legitimize the victim within society.²

When designing a reparatory policy for mass atrocities, it is crucial to understand the singularity of the atrocities being repaired. To put it another way, the process of reparations must function to break down the effects of the crime against humanity.

The biggest challenge of reparations in these cases is that mass crimes are essentially *irreparable*. For this reason, many authors prefer to say that the value of reparations lies in *bringing the damage to light*. Best practices also indicate that reparations must be made in accordance with the victims. Additionally, to be able to design a useful reparatory process, it is necessary to know that reparations for this type of crime have both an individual and a collective dimension.

The individual dimension is related to the necessity to repair the damage suffered by the individual victims, while the collective dimension is given through measures that are geared towards the community or society more generally, which was subject to massive and systematic human rights violations. Fundamental-

² See Beristain, Carlos Martín, *Diálogos sobre la reparación: Qué reparar en los casos de violaciones de derechos humanos*, Instituto Interamericano de Derechos Humanos, San José, Costa Rica, 2010, p. 6.

ly, this is linked with the development of *collective memory* and, ultimately, with prevention.³

2. Specific Theoretical Framework

Current International Standards

International human rights law assists us in outlining a framework for a reparatory policy for mass crimes. For this analysis, I will refer to three indispensable sources: 1) the Van Boven Guidelines, as expressed in UN General Assembly resolution 60/147; 2) Louis Joinet's Principles of the Struggle Against Impunity; and 3) the principles enshrined in the Inter-American system of the protection of human rights. The first two sources spring from the global field of human rights protection, while the third comes out of our regional field through the recommendations and sentences of the Inter-American Commission of Human Rights and the Inter-American Court of Human Rights.

The Van Boven Guidelines

First, let us look at the different types of reparations foreseen in the "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law

³ Ibid., pp. 395 and 397.

and Serious Violations of International Humanitarian Law.”⁴

The “Basic Principles and Guidelines” are not legally binding. They serve as a guide and an instrument for victims and their representatives, as well as for States, on how to develop and apply their own public policies of reparations. They are flexible enough to provide the States with an ample margin for maneuvering during their application.

These guidelines constitute a milestone in the fight against impunity, reaffirming the principle of responsibility for the violation of international human rights norms and international humanitarian law. They incorporate a perspective oriented towards the victims. The centrality of the victims and their right to reparations is an achievement of the second half of the 20th century. In effect, after the Second World War, out of the organization of the international community that resulted from the crimes of the war and of Nazism, there emerged what today is known as international human rights law.⁵

⁴ Adopted by the General Assembly of the United Nations through Resolution 60/147 on 16 December 2005.

⁵ Pinto, Mónica, *Temas de derechos humanos*, Editores del Puerto, Buenos Aires, 1999, p. 15 et seq.

All of the international legal standards that we know and apply to these issues appeared in that period. The system of human rights protection resulted in a fundamental innovation in international law: the appearance of a new legal subject. Until this point, international law was based on the relationships between States. Only States could be party to international law and obligations. With the emergence of international human rights law, individual subjects, regardless of their nationalities, can question States and hold them accountable to their international responsibilities.⁶ It is through this paradigmatic shift that the victims' rights to receive reparations must be interpreted and applied.

This international document established that the function of reparations is to alleviate suffering and provide justice to the victims through the removal, whenever possible, of the consequences of the crimes, as well as the prevention of new violations. To this end, the document lists the following State measures:

1. *Restitution*: whenever possible, the State must return the victim to his/her situation before the rights violation (including reestablishment of liberty; enjoyment of human rights, identity,

⁶ Gualde, Andrea. "Las implicancias del arbitraje internacional en el derecho internacional y en el derecho interno de los Estados" in *Jurisprudencia Argentina-2004-11*, p. 1321.

family life, and citizenship; return to place of residence, reinstatement of employment; and return of property).

2. *Rehabilitation*: medical and psychological attention; legal and social services.
3. *Compensation*: proportional to the gravity of the violation and the circumstances of each case, and for any economically-assessable damage.
4. *Satisfaction* (symbolic dimension):
 - a. The verification of facts and the public and complete revelation of truth;
 - b. The recognition of international responsibility;
 - c. The search for disappeared persons, for the identities of kidnapped children, and for the bodies of murdered persons;
 - d. An official declaration or judicial ruling that reestablishes the dignity, reputation, and rights of the victim;
 - e. A public apology that includes the recognition of the acts that have been done and the acceptance of responsibility for those acts;
 - f. The application of judicial or administrative penalties for those responsible for the violations; and
 - g. Commemorations and tributes to the victims.

5. *Guarantees of non-recurrence*: principally oriented towards the strengthening of institutions, regulatory reforms, and educational systems.

Principles of the Struggle Against Impunity

The United Nations commissioned a study by expert Louis Joinet regarding the issue of impunity for the perpetrators of human rights violations.⁷ In his final report, he outlined four stages marking the awareness of international public opinion with respect to the pillars of the struggle against impunity:

- The first stage in the 1970s: Amnesty to political prisoners as synonymous with freedom;
- The second stage in the 1980s: The amnesty becomes an incentive for impunity. The reaction of victims and human rights organizations begins;
- The third stage in the 1990s: Processes of democratization and the return to democracy. We begin to discuss impunity;

⁷ Final report on the issue of impunity of the perpetrators of human rights violations (civil and political rights), prepared by Mr. L. Joinet in accordance with Resolution 1996/119 of the Sub-commission of Discrimination Prevention and Protection of Minorities of the Human Rights Commission of the Economic and Social Council, E/CN.4/Sub.2/1997/20. 2 October 1997.

- The fourth stage: Awareness of the international community of the fight against impunity.

Based on this evolution, Joinet concludes that the victims have: the right to know; the right to justice; and the right to obtain reparations.

As a counterpart to these rights of the victims, States have the obligation to abstain from dictating regulations that impede the investigation for truth in cases of grave human rights violations.

Regional System

Finally, the Regional System of which Argentina is a part has recognized the integral dimension that reparations must assume. The rulings of the Inter-American Court of Human Rights (IACHR), through similar measures to those we have seen in the global system, are consistent in establishing and demanding of the States *restitution ad integrum* and actions against impunity.

I will quickly review the pertinent parts of Inter-American case-law, which defines reparation as, "...the generic term that comprises the different measures a State can take in the face of the international liability it has incurred (*resitutio in integrum*, compensation, satisfaction, guarantees of non-recurrence, among oth-

ers).”⁸ Additionally, the case-law points out that the “specific modes of reparation vary according to the damage done.”⁹

Let us look at the non-pecuniary measures established by the IACHR in cases of the mass violation of human rights. One of the principal orders on the issue of reparations that the IACHR determines relates to judicial measures. The standard was determined in the first case decided by the Court. On the one hand, it held that States party to the American Convention have the obligation to investigate violations of human rights and to prosecute the perpetrators and those who conceal such violations. And on the other hand, it understood as the duty of the State that every person considered a victim of these violations, or their families, have the right to utilize judicial means in order to determine what has occurred, both for their own benefit and for that of society as a whole.¹⁰

This generic obligation to investigate has specific references in the cases involving crimes against humanity.

⁸ IACHR, *Castillo Paez Case*, judgment on reparations. 27 November 1998. Series C No. 43, Par. 48.

⁹ IACHR, *Garrido Baigorria Case*, judgment on reparations. 27 August 1998. Series C No. 39, Par. 41.

¹⁰ IACHR, *Velásquez Rodríguez Case*, judgment on merits. 29 June 1988. Series C No. 4, Par. 166.

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In the case *ALMONACID ARELLANO V. CHILE*,¹¹ the IACHR ruled that “the right to truth is found subsumed in the right of the victim or his family to obtain from the appropriate State bodies the explanation for the acts of violation and the corresponding liabilities, through the investigation and judgment provided by articles 8 and 25 of the Convention,” and that the “State will not be able to make a case for any law or ruling of internal law to exempt it from the order of the Court to investigate and punish those responsible for the death of Mr. Almonacid Arellano.”¹²

The IACHR has applied the principles of international criminal law and ruled that “crimes against humanity are beyond tolerability by the international community and offend all of humanity. The damages done by such crimes effect both national society and the international community, requiring the investigation and punishment of those responsible.”¹³

¹¹ IACHR, *Almonacid Arellano and others Case*, judgment on preliminary exceptions, merits, reparations, and costs. 26 September 2006. Series C No. 154, Par. 148.

¹² *Ibid.*, Par. 22.

¹³ *Ibid.*, Par. 152.

In the CASE OF GOMES LUND AND OTHERS (“GUERRILLA OF ARAGUAIA”) V. BRAZIL,¹⁴ the IACHR signaled that, as reparatory measures, the State must investigate on the basis of the following parameters:¹⁵

- They must take into account the pattern of human rights violations within the period, with the objective that the trial and the pertinent investigations be conducted in consideration of the complexity of these acts and the contexts in which they occurred, avoiding omissions in the gathering of evidence, and in following logical lines of investigation;
- Crimes of forced disappearance are continuing and permanent crimes;
- Just as it had already ruled in Barrios Altos and Almonacid, the Court ruled that laws of amnesty are not applicable to these types of crimes;
- These trials must take place within ordinary courts, not within military courts;
- The State must assure to the families of the victims full access and the ability to participate in every stage of the investigation and judgment of those responsible; and

¹⁴ IACHR, *Gomes Lund and others (Guerrilla of Araguaia) Case*, judgment on preliminary exceptions, merits, reparations, and costs. 24 November 2010. Series C No. 219.

¹⁵ *Ibid.*, par. 256.

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- The results of the corresponding trials must be divulged publicly so that society learns both the facts of the present case and about those who are responsible.

The IACHR also recognized “the right of the victims’ families to identify the location of the disappeared and, where applicable, to know where their remains are found.”¹⁶ This “allows them to bury the victims according to their beliefs, as well as to find closure in the mourning process that they have endured for all these years.”¹⁷ Additionally, the Court judged that “the place in which the remains are found can provide valuable information regarding the perpetrators of the violations or the institution to which they belong.”¹⁸

In the case *GELMAN V. URUGUAY*, the Court ruled that the Amnesty Law (*Ley de Caducidad*) had no effect due to its incompatibility with the American Convention and the Inter-American Convention on the Forced Disappearance of Persons, as it can prevent the investigation and eventual punishment of those responsible for serious human rights violations. The State should ensure that laws do not represent an obstacle to the investigation of the facts material to the present case nor in the investigation and, if appropriate, sen-

¹⁶ *Ibid.*, par. 261.

¹⁷ *Ibid.*

¹⁸ *Ibid.*

tencing of those responsible for these or other serious human rights violations that occurred in Uruguay.¹⁹

Regarding the search for truth, particularly through Truth Commissions, in the CASE OF GOMES LUND AND OTHERS (“GUERRILA OF ARAGUAIA”), the Court praised the Brazilian initiative to create a National Truth Commission and judged that it represented “an important mechanism, among other existing ones, to fulfill the State’s obligation to guarantee the right to know the truth of what happened.”²⁰ Depending on the objective, procedure, structure, and purpose of their mandate, they can contribute to the construction and preservation of historic memory, the clarification of facts, and the determination of institutional, social, and political responsibility in the relevant historical periods of a society.

However, the Court highlighted that the activities and information that said Commission collects does not substitute for the State’s obligation to establish truth and ensure the judicial judgment of liable individuals through criminal legal procedures.

¹⁹ IACHR, *Gelman Case*, judgment on merits and reparations, 24 February 2011. Series C No. 221, Par. 230 et seq.

²⁰ IACHR, *Gomes Lund and others (Guerrilla of Araguaia) Case*, judgment on preliminary exceptions, merits, reparations, and costs. 24 November 2010. Series C No. 219, par. 297.

With regards to the guarantees of non-recurrence, which are mainly understood by the IACHR as adaptive regulatory measures and education-related actions, in the CASE OF GOMES LUND AND OTHERS (“GUERRILLA OF ARAGUAIA”), the Court urged the State to continue with the legislative process and to adopt, within a reasonable period, all the measures that will be necessary to ratify the Inter-American Convention to Prevent and Punish the Forced Disappearance of Persons. Additionally, it must ensure its speedy passage and entry into force, in accordance with established procedures in the domestic legal system.²¹

In the GELMAN case, the Court ordered that, without prejudice to the training programs for civil servants on the subject of human rights that already exist in Uruguay, the State should implement within a reasonable period permanent programs on human rights, which should be directed at judicial officers. The programs should consist of courses regarding the proper investigation and judgment of acts constituting forced disappearance and child abduction.²²

Finally, with regards to rehabilitation measures in the CASE OF GOMES LUND AND OTHERS (“GUERRILA OF

²¹ Ibid.

²² IACHR, *Gelman Case*, judgment on merits and reparations. 24 February 2011. Series C No. 221.

ARAGUAIA”), the Court ordered that the State, through its specialized public health institutions, provide immediate, adequate, and effective medical and psychological or psychiatric attention free of charge to victims that seek it. The treatments must be offered in Brazil for the until no longer necessary and must include the free provision of any medication required based on the circumstances. And as a constant measure of satisfaction, the Court ordered that the sentence be published in the official newspaper or in a newspaper with wide circulation.²³

Meanwhile, the Court ordered that the State should continue developing initiatives to search for, systematize, and publish all information on the Guerilla of Araguaia, as well as information related to the human rights violations that occurred during the military regime, guaranteeing public access to that information. It also urged the State to adopt legislative, administrative, and any other necessary measures to strengthen the regulatory framework for access to information, in accordance with standard practice.²⁴

In the GELMAN case, the Court ordered that “the State must adopt pertinent and adequate measures to guar-

²³ IACHR, *Gomes Lund and others (Guerilla of Araguaia) Case*, judgment on preliminary exceptions, merits, reparations, and costs. 24 November 2010. Series C No. 219.

²⁴ *Ibid.*

antee technical and structured access to that information, measures that must be supported by adequate budgetary allocations.”²⁵

As noted in the preceding transcripts, the Inter-American system of human rights protection is especially preoccupied with ensuring the applicability of the non-pecuniary aspects of reparations, which cannot be replaced through the State’s implementation of pecuniary measures. While such measures may fall within the broad concept of reparations, they do not, by themselves, comply with international standards.

International Standards and the Argentinean Case

In the Republic of Argentina, the international mandate to adequately fulfill the obligation to take reparatory action that extended beyond mere financial reparation was clearly communicated by the Inter-American Commission of Human Rights. It ruled that, while it valued the economic reparations that the Argentinean government was making to the victims of the dictatorship, they were not sufficient. The reparatory program would not be fully accomplished until it had fulfilled its primary obligation to investigate the rights violations.

²⁵ IACHR, *Gelman Case*, judgment on merits and reparations. 24 February 2011. Series C No. 221, par. 281.

Indeed, in a report fundamental to the fight against impunity in our country, this protective mechanism of the OAS declared that the laws of due obedience, full stop, and the pardons were incompatible with the American Declaration of the Rights and Duties of Man and the American Convention of Human Rights. It recommended the adoption of necessary measures to illuminate what had been done and identify those responsible for the human rights violations.²⁶

Moreover, through the framework of an amicable solution in the system of cases and petitions, the Argentinean government accepted the ruling and guaranteed before the IACHR the right to truth, understood as “consisting of the exhaustion of all means in order to find clarity regarding what has happened with the disappeared persons. It is an obligation of means, not of results, which are to be maintained indefinitely, as long as the results have not been obtained.”²⁷

²⁶ ICHR, Report No. 28/92.

²⁷ ICHR, Report No. 21/00, Case 12.059, *Carmen Aguiar de Lapacó*, 29 February 2000, par. 17.1.

PART III: THE ARGENTINEAN CASE

1. Context

It is beyond the scope of this article to provide a historical analysis of the causes and the development of the Argentinean dictatorship. I will make some references to the past, however, so as to be able to analyze *a posteriori* the different reparatory responses that the Argentinean society has offered over the course of three decades.

Like many countries in the region during the 1960s and 1970s, Argentina was the object of extreme institutional instability. In the majority of Latin American countries, brutal dictatorships overthrew the popularly-elected civil governments, in accordance with the Doc-

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trine of National Security and based on the international fight against communism.²⁸

In the case of Argentina, the dictatorship that took power on 24 March 1976 was the last of a series of constitutional interruptions that date back to 1930. While it was the last, it was also the bloodiest. The State was transformed into a “State of Terror,” a government controlled by the military in which terror was used to disseminate fear and to discipline society.²⁹ Congress was dissolved; judicial power, subordinated; political parties, suspended; unions, abolished; and universities and the means of communication were seized completely. The nation’s territory was divided into military zones.

The annihilation of members of the opposition manifested through forced disappearance and the systematic use of torture in clandestine detention centers (CDCs). All of these activities were carried out in secret.

The dictatorship chose secrecy as its primary mode of operation. But if it is true that their criminal actions

²⁸ Feierstein, Daniel, “Political violence in Argentina and its genocidal characteristics,” *Journal of Genocide Research* (2006), 8(2), pp. 149-150.

²⁹ Duhalde, Eduardo Luis, *El Estado Terrorista Argentino. Quince años después, una Mirada crítica*. Eudeba, Buenos Aires, 1999, pp. 217-219.

required secrecy to avoid protests, especially at the international level, they also had to carefully choose how to “show” these operations in order to achieve their objective of social discipline. They did this through the mechanism described by Duhalde as “concealing while showing.”

In this effort to deceive, the dictatorship copied from the Nazi model the use of euphemisms in order to communicate. For example, results from the investigations and testimonies confirmed that use of the terms “transferred” and “final disposition” referred to the acts of murdering and disappearing persons.

To put briefly into figures the criminal heft of the dictatorship and its actions, it is enough to say that there were more than five hundred clandestine detention centers distributed throughout the country. Thirty thousand people were disappeared. Five hundred children were appropriated. Roughly 40,000 people were forced into exile, and hundreds of businesses were deprived of their rightful owners when they were persecuted by the regime.

In parallel and as a counterpart to those atrocities, however, arose the human rights movement. The majority of the human rights organizations came into being in the midst of the military dictatorship. It would be impossible to approach a study of our country’s re-

cent history without stating the central role played by the human rights movement in the political and social configuration of contemporary Argentina.

2. Three decades, Three stages

In December 1983, the dictatorship came to an end. From that moment until today, the Republic of Argentina has experienced periods of revision of the past and periods of impunity. To analyze this journey, I propose that we consider three different historical stages:

- 1983-1986: The first trials
- 1986-2003: Impunity
- 2003-Present: Justice in full

Stage 1: The first trials

In 1983, after 7 years of dictatorship and the defeat in the Malvinas War, Raúl Alfonsín was named president through popular election. One of the first measures of his administration was to establish the truth commission called CONADEP (National Commission on the Disappearance of Persons).³⁰ This commission functioned over 8 months, gathering testimonies and evidence, which were later used to produce the celebrated report *Nunca Más* (Never Again).

³⁰ Created by means of Decree 187/83.

After CONADEP—an undeniable source of the judicial process to come—the historic Trail against the Military Junta began. The principal leaders of the dictatorship were accused of numerous homicides, abductions, and instances of torture. The majority of those accused received life-in-prison or extended sentences.

Stage 2: Impunity

However, when the time came to bring the mid-ranking officers to justice, the military began to lobby to avoid starting new trials. The country experienced moments of great institutional risk. To deal with this situation, the government decided to send to Congress two bills benefitting high- and mid-ranking officers by preventing their prosecution. They were the laws of “Full Stop” (Law No. 23.492) and “Due Obedience” (Law No. 23.521), which entered into law on 24 December 1986 and 8 June 1987, respectively. The only trials that moved forward were those that dealt with acts excluded from the Law of Due Obedience, which presumed the disobeying of orders from a superior officer was impossible. Criminal prosecution of these acts (appropriation of businesses, appropriation of children, sexual crimes) was still permitted.

To complete the scenario of impunity, on Christmas Eve of 1990 the successor government of President

Carlos Menem granted a presidential pardon to all those who were prosecuted and sentenced in the trials of the Junta, returning to them their freedom.³¹

The presence and the voice of the human rights movement was key in these years. The groups comprising this movement operated on two levels: the national and the international. At the national level, they maintained the call for justice for the crimes committed. That demand was only heard by a few judges, who, defying the limits set out by the policy of impunity, creatively began the so-called *truth trials*. These processes, which were real trials, investigated the acts denounced by the victims, establishing their existence. Nevertheless, this verification could not lead to a criminal sentence. The lack of punitive consequences did not deprive the trials of their reparatory effects for the victims, however, nor did it make it any less a producer of truth, as we will see in the corresponding section.

At the international level, the human rights organizations carried their call to the courts of other countries and to international organizations. Foreign judges created trials *in absentia* or applied universal jurisdiction.³² Meanwhile, the United Nations and the OAS

³¹ Decree 1002/89.

³² Mas, Fernando, *De Nuremburg a Madrid. Historia Íntima de un Juicio*, Buenos Aires, Grijalbo, 1999, p. 184.

emphasized the importance of advancing the search for truth and justice.

Stage 3: Justice in full

The possibility of continuing the process of investigating the crimes of the dictatorship remained obstructed until 2003, when Congress pronounced the laws of “Full Stop” and “Due Obedience” null and void.³³ The turning point came in the SIMÓN case,³⁴ in which the Supreme Court declared both the laws *and* the pardons unconstitutional. This reopened the possibility of filing criminal lawsuits against the perpetrators.

³³ By means of Law No. 25.779.

³⁴ Supreme Court of Justice of the Nation, *Recurso de Hecho Simón, Julio Hector y otros s/ privación ilegítima de la libertad, etc. Causa No. 17.768C*, 14 June 2005.

PART IV: AN EVOLUTION IN PUBLIC POLICY?

1. From the first trials to the first reparatory laws

The division of stages described in the previous section is methodologically useful for analyzing if there was a true policy of reparations that guided the entire process, or even if one ever existed at any point along the way.

The reparatory process for crimes against humanity in Argentina was not linear, but erratic. The historical path that I mention accounts for a series of advances and regressions since the restoration of the democratic regime in 1983.

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Today, 30 years later, we can affirm that the Republic of Argentina has developed a comprehensive system of reparations for the massive violations of human rights committed during the military dictatorship. And we may be able to respond to the core question of this subject regarding how the terrorist state is dismantled through reparations.

Today we are in a better condition to articulate and respond to this question. But this was not always the case. As previously stated, the first reparatory response of the government after the restitution of democracy was justice. But it is also clear that the first period of trials was followed by 20 years of impunity. It is within this context that the policy of monetary compensation took shape. This context is crucial for correctly understanding the setting in which the policy I am describing was established.

As I have outlined, the principal demand of the victims has always been justice. That outcry was held and maintained when the government of President Menem, as a result of international demand, decided to advance the policy of economic compensation.³⁵

³⁵ For more on this subject, see ICHR, Report No. 1/93 – Vaca Narvaja, Miguel – By their rights holders; Case 10.310 – Birt, Guillermo Alberto, Caletti, Gerardo Andrés, Di Cola, Silvia, Giuliani, Héctor Lucio and Olivares, Jorge Abelardo; Case 10.436 – Ferrero De Fierro, Irma Carolina Fierro, José

The birth and instrumentation of the policy of monetary compensation within a context of impunity was interpreted in many different ways by the human rights movement. The policy was so contentious that some organizations broke apart into splinter groups that separated those who accepted the pecuniary reparations from those who did not.³⁶

2.1 Description of the system

Monetary compensation comprised a set of regulations that had been passed since 1991. It is a mechanism established by law, with fixed sums of money for each victim group subject to reparations.

The underlying idea is the criteria of equality before the law. The system claims to make no distinctions with respect to the particular situation of each victim. The procedure is administrative, not judicial, and it

Enrique, Gatica De Guilani, Marta Ester; Case 10.496 – Bartoli, Bernardo, Padula, Rubén Héctor; Case 10.631 – Puerta, Guillermo Rolando; Case 10.771 – Torregiani, José Mariano and Caletti, Gerardo Andrés, 3 March 1993.

³⁶ See Guembe, María José, “Economic Reparations for Grave Human Rights Violations: The Argentinean Experience” in De Greiff, Pablo, *The Handbook of Reparations*, Oxford, US, 2006, p. 21.

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employs standardized evidence in order to award the reparations.

The groups that qualify for reparations are:

- Detained persons;
- Disappeared and murdered persons; and
- Children born detained as a result of their parents' detention, children in captivity/with a replaced identity

Not all the victim groups that qualified for reparations emerged at once. The journey travelled from the moment of approval of the first law awarding this type of compensation revealed the necessity of adding new categories. The first victims to receive reparations were those who had been illegally deprived of their liberty and tortured. Then those victims who had been murdered and those who remain disappeared. In these cases, the reparations are awarded to the victims' heirs. Later, the category of children in captivity, detained with their parents and whose identities had been replaced, was added. The final victim group to be added were those detained by judicial order and accused. In these (many) situations, illegal detention and torture was masked with the appearance of legality provided by the existence of a court detention order and a judicial process.

This last example reveals how the advance of a reparatory policy contributed to the appearance of new groups of persons who required reparation. Taking this journey produces a virtuous cycle. More is known about the necessity to direct reparations towards other fields. More people lose their fear of testifying to their own experience. And as more victims come forward, the need to continue investigating grows.

The system that we know today began with the passage of Law 24.043, which awarded benefits to people illegally detained between 6 November 1974 and 10 December 1983. As was explained above, this recognition resulted from an international demand, in which the victims asked for the intervention of the OAS's Inter-American Commission of Human Rights when the Argentinean courts were declaring the damages claims expired.

For people who remain disappeared, Law 24.321 created the category "absent by forced disappearance" for those cases in which the person was involuntarily disappeared from his place of residence or work, and for whom there is no information regarding his or her whereabouts. If it is found that the disappearance is related to illegal repression, this absence has the same juridical effects as if the person were presumed dead, though the absence is still referred to as "disappearance" rather than as "death." This legal response was

necessary because the families of disappeared persons justifiably resisted the category of presumed death, since the non-appearance of the persons or their remains made it impossible to declare the facts behind their deaths.

Almost simultaneously, Law 24.411 established compensation for the heirs of people who were found to be in a situation of forced disappearance or who had died as a consequence of the operations of the armed forces, security forces, or any paramilitary group at any time before 10 December 1983.

Finally, in response to perhaps the most horrifying practice of the dictatorship, Law 25.914 established reparatory compensation for people who were born while their mothers were illegally detained or who, as minors, were arrested under circumstances relating to their parents, as long as they had been detained and/or detained-disappeared for politic reasons.

2.2 Best practices: Issues to consider

The diversity of situations identified in the reparatory laws have, in effect, required a great effort on the part of those who administer their application in order to give real reparatory meaning to the beneficiaries.

The experience has taught that in order for the monetary compensation to have its desired effect, we must ask ourselves, from the perspective of the victim: What is the true value of money in offering reparations for severe human rights violations? In other words, if the reparations only consists of money, is the money *only* money, or is the money symbolic of something more?

In the process of applying for pecuniary reparations, whether through formal or administrative means, a work of historicizing the subject is begun again. As one presents him or herself to give testimony to the conditions of victimhood, the subject is newly confronted by the traumatic episodes.³⁷ If this does not help to symbolically process the trauma, the aforementioned reparations remain only associated with the monetary, which can be taken to mean that money is a substitute for the lost life of a family member. As such, it does not fulfill its function of repairing the damage suffered.

With the reopened judicial process and the measures that were gradually incorporated in the fields of memory and truth, the economic compensatory policy is no longer an isolated form of reparations, but one that coexists alongside many others.

³⁷ Booklet “Consecuencias actuales del terrorismo de Estado en la salud mental.” Secretariat of Human Rights, National Ministry of Justice and Human Rights, p. 35.

3. The Birth of a Policy of Memory, Truth, and Justice

As the previous paragraphs have stated, in 2003 the Argentinean Congress nullified the laws of “Full Stop” and “Due Obedience,” opening up the possibility of bringing to justice those responsible for serious violations of human rights. Subsequently, on 14 June 2005,³⁸ the Supreme Court declared unconstitutional the laws of “Full Stop” and “Due Obedience,” while at the same time confirming the constitutionality of Law No. 57.776ñ. In the SIMÓN case, the Court based its decision on international human rights law and on the international instruments that trump the domestic law of our country.³⁹ The Court affirmed that “to the extent that these laws, like all amnesty laws, are oriented towards the ‘forgetting’ of serious human rights violations, they are opposed to the rulings of the American Convention on Human Rights and the International Pact of Civil and Political Rights, and are therefore constitutionally intolerable.”⁴⁰ Additionally, the Court

³⁸ National Supreme Court. “*Recurso de Hecho Simón, Julio Héctor y otros s/ privación ilegítima de la libertad, etc. Causa No. 17.768C*.” 14 June 2005.

³⁹ Article 75.22 of the National Constitution establishes that certain international human rights instruments possess constitutional hierarchy, including, *inter alia*, the American Convention on Human Rights.

⁴⁰ “*Simón*” Case, par. 18.

cited the case of BARRIOS ALTOS⁴¹ from the Inter-American Court of Human Rights and sustained that, even though the Peruvian case presents distinct characteristics, “the critical point here, however, is that the laws of full stop and of due obedience present the same vices that were brought to the Inter-American Court to reject the Peruvian laws of ‘auto-amnesty.’ So, in the same way, both constitute *ad hoc* laws, the final purpose of which are to avoid the prosecution of serious damages to human rights.”⁴²

With the reopening of the cases, a complete program of Memory, Truth, and Justice was crystallized. The erratic nature of the process ended. In these moments, all the pieces came together, including, of course, monetary compensation.

⁴¹ IACHR, *Barrios Altos Case*, judgment on merits, 14 March 2001. Series C No. 75, par.

⁴² “*Simón*” Case, par. 24.

PART V: MEMORY, TRUTH, AND JUSTICE

1. JUSTICE

In the Republic of Argentina, as of writing, there are 531 people who have been sentenced and 1135 who are being prosecuted in trials that are still being carried out across the country.

The reopened judicial process constitutes a true state policy. The executive, legislative, and judicial powers have contributed, each within their respective competencies, to the design, advancement, and consolidation of this process. It is worth stressing that the joint resolution was developed by regular judges and with legis-

lation already in force when the acts were perpetrated, without special laws or special judges.

The entire judicial process is one that avoids the normal parameters of courts and justice officials. It involves a clear rupture of the traditional working paradigms: it is an investigation of unusual size and importance, where thousands of acts are dealt with in a single set of trials.

In that regard it has been argued: “Despite the complexity of the cases of massive human rights violations, they are being carried forward by the Argentinean judicial system, without the assistance of the international community and with respect to the rules of due process.⁴³ Additionally, The National Supreme Court of Justice⁴⁴ and the National Attorney General⁴⁵ created

⁴³ Lorenzetti, Ricardo L and Kraut, A.J., *Derechos Humanos: justicia y reparación. La experiencia de los juicios en la Argentina. Crímenes de lesa Humanidad*, Sudamericana, Buenos Aires, p. 170.

⁴⁴ Unit of Superintendent for Crimes against Humanity, Agreement 42/08, which replaced the Unit of Assistance and Monitoring of the criminal causes, which investigates the forced disappearance of persons occurring before 10 December 1983 (Agreement 14/2007).

⁴⁵ Fiscal Unit of Coordination and Monitoring of the causes of Human Rights violations committed during state terrorism, created by Resolution of the National Attorney General No. 14/2007.

special units in order to coordinate the execution of these trials.”⁴⁶

There have been many challenges in this process. Justice officials have had to emphasize the reconstruction and protection of evidence, not only to promote the strengthening of protection for witnesses and victims, but also given that we are dealing with acts that occurred 30 years ago. These new trials involve the need to reestablish the victims’ confidence in the system of justice. Why would someone who suffered state terrorism, followed by 20 years of impunity, trust in the justice system now? What is the reparatory value of the judicial process? Through the justice process, a double reparatory dimension is established: one individual and one collective.

a. The Individual Dimension

In the individual dimension, the victim recovers a space to be heard, where his or her testimony is valued. Testifying allows the subject to perceive a first reparatory step, namely the social and legal recognition of what has happened to themselves.

For the judicial process to be truly reparatory, it is essential to recognize that giving testimony can be a

⁴⁶ Lorenzetti, Ricardo L. and Kraut, A.J., *op. cit.*, pp. 241-242.

traumatic experience, because it means reviewing and reproducing an experience that is, at its core, impossible to recount. This complexity must be integrally understood by the justice officials because, in these cases, the witnesses have a dual character: they are first victims and, after, witnesses.

One must be especially careful that the victims are not seen only as objects of evidence—as normally happens in criminal cases—but also as subjects of law. In these trials, testifying is not only a public duty, but also a right of the victim. Considering all this, it is advisable to establish special support mechanisms for the victims.

In response to this issue, specific protocols exist for the treatment of victim-witnesses in the framework of judicial proceedings.

To this end, it has been expressly established that the “victim-witness must be reevaluated by the State, not only as an object of proof, but as a subject in himself,” and that “during the entire proceeding, special attention must be given that the strategy of questioning not exclude the fact that there is a subject who is bearing witness, with all that this act implies.”⁴⁷

⁴⁷ Recommendations for intervention, point 1 of *Protocol of Intervention for the Treatment of Victim-Witnesses in the Framework of Judicial Processes*, Secretariat of Human

This is based on the fact that “[e]ach process constitutes not only a judicial account but also the historical narration upon which the sentences are based. And in this account, the victims are the principle protagonists. The blackest page of our history is written upon their bodies. Within their experiences, the central proof of the atrocities of state terrorism is nourished.”⁴⁸ It has also been noted that within the context of the motives behind crimes against humanity, the act of giving testimony is related to the dual character of victim and witness. Thus, giving testimony “is not just retelling or communicating simple circumstances; it is reliving, reproducing, and representing an extremely traumatic situation that continues to affect the person.”⁴⁹

Rights, Ministry of Justice and Human Rights, Presidency of the Nation and National Supreme Court of Justice, Buenos Aires, 2011.

⁴⁸ Alén, Luis H., Prologue to *Protocol of Intervention for the Treatment of Victim-Witnesses in the Framework of Judicial Processes.*, Secretariat of Human Rights, Ministry of Justice and Human Rights, Presidency of the Nation and National Supreme Court of Justice, Buenos Aires, 2011, p. 8.

⁴⁹ Referential framework of *Protocol of Intervention for the Treatment of Victim-Witnesses in the Framework of Judicial Processes*, Secretariat of Human Rights, Ministry of Justice and Human Rights, Presidency of the Nation and National Supreme Court of Justice, Buenos Aires, 2011, p. 19.

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Additionally, a variety of tools and programs have been implemented to fulfill the mandate to support and provide measures for the rehabilitation of the victims of serious human rights violations.

Support is a fundamental function of the state's reparatory policies because it contributes to setting up a space of trust so that the witness, through his testimony, makes a political act in relation to memory, truth, and justice. Supporting thus becomes a potential measure of protection, because many times if there is a network that supports the witness, situations where fear paralyzes or prevents the witness from continuing with the process can be avoided.

In order to respond to the aftermath of what the victims have endured, concepts, theories, and techniques had to be redefined, including the very understanding of grief and trauma. From the interchange of experiences with other Latin American and European professionals engaged in the issue, it was agreed upon and established that, since the psychological effects suffered were of a specific nature and were the result of vivid and disturbing traumatic situations, they should be spoken of as "psychological suffering" and not as pathology in the classical sense.⁵⁰

⁵⁰ "Consecuencias actuales del terrorismo de Estado en la salud mental," National Secretariat of Human Rights, National Ministry of Justice and Human Rights, p. No. 9.

For many of those affected, one of the most destructive effects produced by the experiences of horror occurs when the person remains fixed within his identity as victim. This usually effects future generations. That is to say, the process of victimization is continued through the formation of an identity crystallized through suffering, the guilt of having survived, the morality of sacrifice, self-blame, the feeling that one survived because of some heroic or sacrificial act, etc.

Thus, giving testimony, collaborating in the process of making justice, going from having the passive voice of a victim to an active voice: these all represent ways of becoming a protagonist in the course of history, through which those affected give that course a new direction.

b. The Collective Dimension

At the collective level, these trials can help a society to recognize and take responsibility for its history. The development of a judicial process for aberrant acts of the recent past motivates awareness of the past and, in that way, helps in generating “social antibodies” for preventing new instances of human rights violations.

It contributes to creating a *collective memory* and *truth*, bringing light to what remains in the dark, to what the perpetrators kept shrouded in secrecy.

Today we know better the workings of state terrorism and the things that were ignored during the Junta Trials; we know with greater detail how each instance of military force functioned;⁵¹ we know that there were circles of collaboration with security forces;⁵² we know that there was anti-Semitism in the clandestine detention centers,⁵³ that there was civil participation in the

⁵¹ Judgment of 31 May 2011, Case No. 1.627, “GUILLAMONDEGUI, Néstor Horacio y otros s/ privación ilegal de la libertad agravada, imposición de tormentos y homicidio calificado” of the register of the Oral Court in Federal Criminal No. 1 of Federal Capital.

⁵² The Oral Court of Criminal Federal 1 of the Capital ordered the unification of three lawsuits: Plan Cóndor, Plan Cóndor II, and Automores Orletti II. One of them is 1504, “Videla, Jorge Rafael y otros s/ privación ilegal de libertad Personal”-“Plan Cóndor.” The second lawsuit is 1951, “Lobaiza, Humberto José Román y otros s/ privación ilegal de la libertad agravada e imposición de tormentos”-ccdt “Automores Orletti II.”

⁵³ For example, the testimonies collected in the lawsuit “Primer Cuerpo de Ejército” show that the cruelty and brutality towards those politically persecuted for being Jewish were ubiquitous and constant. This characterized the behavior of the victimizers from the leadership to the lowest levels of the organized power apparatus, which was employed to solidify State terrorism. (Rafecas, Daniel, “La especial bru-

repression, and that there were numerous instances of sexual abuse in the clandestine detention centers.⁵⁴ Today we know that the appropriation of children was a systematic plan.⁵⁵

talidad antisemita del terrorismo de Estado durante la última dictadura military,” in *Aportes para un cambio cultural a partir de Auschwitz: Ensayos sobre derecho, historia y educación*. Biblioteca Nuestra Memoria, Museo del Holocausto, Buenos Aires, 2013, p. 80).

⁵⁴ Judgment of 23 September 2011, Case No. 1487, “ZEO-LITTI, Roberto Carlos y otros s/inf. art. 144 bis inciso 1 y ultimo párrafo de la ley 14.616 en función del art. 142 inc. 1 ley 20.642, art. 144 bis ultimo párrafo en función del art. 142 inc. 5 y art. 144 ter, párrafo 1 de la ley 14.616 y art. 90 inc. 2 del Código penal,” of the register of the Oral Court in the National Criminal No. 4 of the Federal Capital. In effect, testimonies emerge from the records of said case that give an account of detained women in the Clandestine Detention Center “El Vesubio” having suffered “particular hardship” (...) “based on their gender.” According to the testimony of one witness: “We women are used for nothing more than the pleasure of the men. We represented sin” (pp. 636-637). The nature of these acts related to sexual abuse means that they must be considered in a different way than the other afflictions suffered by the victims of the present process (p. 640). Moreover, the Court ruled that “in order to break the will of the detainees and their spouses, the captors took advantage of the condition of these women” (p. 640).

⁵⁵ Judgment of 17 September 2012, lawsuit no. 1351, “FRANCO, Rubén O. y otros s/ sustracción de menores de diez años,” of the register of the Oral Court in the Federal Criminal No. 6 of the Federal Capital, p. 980.

Having better knowledge of past acts will serve in the present to establish the tools of prevention and early warning, which will impede the repetition of similar acts in the future. Trials and sentences are, moreover, creators of *truth*, owing to the legitimacy implicated in legal processes and the place that the judges occupy within society.⁵⁶ The trials attempt “customarily—though it is not always easy—to exercise their mission and to tell us the factual truth of what occurred in the criminal sphere. They tell us the juridical truth, which is to say the legal classification of what occurred. It is fundamental for the victims and for us, and it is fundamental for humanity, for history.”⁵⁷

2. THE SEARCH FOR TRUTH

Just as with the judicial process, the search for truth also spanned distinct stages and had different expressions. This article has already mentioned CONADEP, which collected very important evidence for the first trials. Afterwards, in times of full impunity and when the courts were not able to judge the perpetrators, the

⁵⁶ Lorenzetti, R. L. and Kraut, A. J., *op. cit.*, pp. 170-171.

⁵⁷ Jurovics, Yann, “El concepto de genocidio: entre las tensiones jurídicas y políticas,” in *La Shoá, los genocidios y crímenes de lesa humanidad: enseñanzas para los juristas*, Secretariat of Human Rights, Ministry of Justice and Human Rights, Buenos Aires, 2011, p. 49.

so-called “truth trials” were initiated. The object of these trials was not punitive; they were designed to state with the force of law those acts of state terrorism that the victims were denouncing. In those times, confronted with the impossibility of establishing criminal liability, the victims found an institutional recognition of the legitimacy of their denunciations through these trials.

It was in these years that the conception of truth as a right began to be instilled.⁵⁸ The human rights movement was, once again, the pioneer in leading this charge. The work of the Grandmothers of the Plaza de Mayo in investigating the fate and location of the children appropriated by the perpetrators has led to, at present, the identification of 115 children—now adults—appropriated by the dictatorship.⁵⁹ With time and the increased involvement of the State in reparatory work, a governmental agency, the National Commission for the Right to Identity (CONADI), was created to collaborate with the work of the Association of the Grandmothers.

⁵⁸ Cattani, Horacio. “Justicia para Nunca Más,” in *Memoria, Verdad y Justicia. De nuestro pasado reciente*, Regional Seminar, Ministry of Education and Culture, Directorate of Human Rights, Montevideo, 2006, p. 136.

⁵⁹ See www.conadi.jus.gov.ar/Libro2010/index.php.

Another inestimable contribution to truth that cannot go without mention is the world-renowned work of the Argentinean Team of Forensic Anthropology (EAFF).⁶⁰

Little by little, the Republic of Argentina was actively participating in the recognition of this right to truth in the international sphere. At the regional level, this right was recognized in the aforementioned case AGUIAR DE LAPACÓ.⁶¹ At the global level of the United Nations, in the year 2005 and with the new domestic setting brought about by the reopening of the trials, Argentina prepared a draft declaration on the Right to Truth, which was backed by 48 states and approved by consensus by the members of the United Nations Human Rights Commission as Resolution 2005/66.⁶² The central tenet of the declaration is the regard for the right to truth as an individual and collective right.

3. THE PRESERVATION OF MEMORY

In this facet it is also important to distinguish between the individual and collective dimensions. At the individual level, recuperating the sites that were used by the repressive apparatus and setting them aside as sites

⁶⁰ www.eaaf.org.

⁶¹ Report No. 21/00, Case 12.059, *Carmen Aguiar de Lapacó*, 29 February 2000.

⁶² 59th Reunion of the Human Rights Commission of the UN, 20 April 2005.

of memory implies a symbolic process of restitution through which names and tombs are given to those who were denied them. At the collective level, this contributes to reconstructing the historic memory of the Argentinean people.

In recent years, “...there have been increasing efforts to revalue as spaces of memory those sites linked to the repression, as well as to build spaces intended to pay tribute to and remember the victims.”⁶³ The formation of this policy of recuperation and resignification of the past takes into account that “...many of the sites that were used as Clandestine Detention Centers were not created for this purpose. They were police stations, prisons, or other military or police offices that served in the structure of state terrorism alongside their ‘regular’ activities.”⁶⁴

The sites that were used as clandestine detention centers were later found in various conditions: some were destroyed in order to eliminate evidence or to construct something new, while other buildings were transferred to different owners or were abandoned over the years. Other places remained in the hands of the Armed

⁶³ Schindel, Estela, “Lugares de memoria en Buenos Aires,” in *Memorias urbanas en diálogo: Berlín y Buenos Aires*, Heinrich Böhl Stiftung Cono Sur, Buenos Libros, Buenos Aires, 2010, p. 86.

⁶⁴ *Ibid.*, p. 87.

Forces or Security Forces until the constitutional authorities ordered their eviction. The most emblematic case is that of the *Escuela de Mecánica de la Armada* (the Navy Mechanics' School, or ESMA), which was still in operation more than 20 years after the return of democracy. More than 5000 people were illegally detained and tortured there, and only 100 survived.

Site recovery continues with a policy for marking the sites. Across the territory of Argentina, a uniform policy exists for denoting the existence of memory sites in order to facilitate their recognition. A cement structure was designed that consists of three pillars, which represent MEMORY, TRUTH, and JUSTICE. These three pillars are united by a horizontal beam with the inscription: "*Here, during the civil-military dictatorship that seized state power from 24 March 1976 to 10 December 1983, functioned a clandestine detention center known as (name of site).*"⁶⁵ To date, hundreds of sites have been marked in this way.

When it is possible, progress is made towards resignifying these spaces. Once again, an example of this is the work undertaken at the ex-ESMA. On 24 March 2004, the government decided to dedicate that space to the creation of a *Space for Memory and for the Promotion and Defense of Human Rights*. It is worth mentioning that it was through this opportunity that, for the first

⁶⁵ Resolution 1309/2006 of the National Ministry of Defense.

time, the human rights organizations and the public in general obtained access to these facilities.

In other cases, the place of commemoration is a site of symbolic significance. The *Parque de la Memoria* (Memory Park), located on the shore of the Río de la Plata in the city of Buenos Aires, is an example of this situation. A memorial with the names of the disappeared has been erected there, where today we know—as a result of investigations—that many bodies of the disappeared were thrown from planes.

In designing a public policy, it is key to recognize that memory is not spontaneous.⁶⁶ People prefer to remember the glorious pages of their history, and not the shameful and painful episodes. In that sense, the role of the State is essential in the creation of archives, the commemoration of acts, or the work regarding historical sites.

With respect to the archives, despite the fact that in the final stages of the dictatorship the perpetrators or-

⁶⁶ For more on this subject, see Todorov, Tzvetan, *Los abusos de la memoria*, Paidós, Barcelona, 2000; Ricoeur, Paul, *La Memoria, la historia, el olvido*, Fondo de Cultura Económica, Buenos Aires, 2004 and “Definición de la Memoria desde un punto de vista filosófico,” in *¿Por qué recordar?*, página 25, Ediciones Granica, Buenos Aires, 2006, p. 25.

dered that all archives relating to the illegal repression be destroyed, investigations continued in order to recover archives and pieces of documentation. The opening of all archives and records between 1976 and 1983 was ordered. Relatedly, in the year 2003 the National Memory Archive was created with the objective of obtaining, centralizing, and preserving the information, testimonies, and documents related to the human rights violations.⁶⁷

⁶⁷ Decree No. 1259/2003.

PART VI: CONCLUSIONS

In closing this article, I would like to present some conclusions that spring forth from the study of our recent history and from the conviction that the implementation of a reparatory policy is a constant challenge for state officials, both for administrators and for the judiciary and Congress. In that way I will make some reflections on the role of law and of other disciplines in these processes, as well as on the lessons that we have learned, as a society, in our efforts to connect ourselves with the past.

1. On the Role of Law

When addressing the domain of reparations, it is crucial to bear in mind that the Law, by itself, is not enough. We must take into account that the question

that is always at the forefront of designing a reparatory program for serious human rights violations is how to dismantle the scope of state terrorism through reparations.

We must be conscious that the Law alone is not enough to answer this question. It is an essential tool, but when we are confronted with the necessity of repairing crimes against humanity, we cannot be tempted to allow ourselves to adhere dogmatically or uncritically to juridical fictions. It is true that the systems of reparations use these fictions, but, as I stated at the beginning of this article, they are taken as parameters, as standards. The concept of *restitutio ad integrum* is the best example of this. One cannot repair the irreparable. This is not to say that the State must not make available to the victims every last measure to make their damages visible.

Neither is the concept of *status quo ante* fully possible, as it is materially impossible to backtrack so that everything is the same as before the violation of rights occurred. Additionally, the reparatory policy requires from its designer and its executor a dose of flexibility, in that *dura lex sed lex* cannot be interpreted the same as in other juridical fields.

The person who administers a reparatory policy should know that he or she is working within an essentially

dynamic universe, governed by protected principles and that, in cases of doubt, privileges the interpretation that is most favorable to the victim. In this way, he or she should possess the flexibility to interpret the norms that establish the reparatory parameters and, in each moment, to take into account the particular context in which the violations of rights took place.

“How do we value the role of Law and reparations to the victims in such a tragic and irreversible scene? What is the role of law in these limiting situations? Law...has much to learn from other branches of human knowledge. The reparations due to the victims [is a field] in which the law seems to still be in its infancy, and it must still learn much from other branches of human knowledge.”⁶⁸

“In the conceptual framework of what is called—perhaps inadequately—‘reparations’—we stand before a truly irreparable damage. *Restitutio ad integrum* is an impossibility related to the violation not only of the law fundamental to life, but to personal integrity.⁶⁹ Reparations for violations of human rights provide to victimized people only the means to mitigate their suf-

⁶⁸ IACHR, *Bulacio Case*, judgment on merits, reparations, and costs, 18 September 2003. Series C No. 100.

⁶⁹ A survivor of torture, for example, will never be the same person.

fering, making it less unbearable, maybe even bearable.”⁷⁰

2. Best Practices: The Role of Other Disciplines

The implementation of a reparations program requires great responsibility on the part of those who carry out this public policy, especially when it deals with the worst violations of human rights, as is the case recounted in this work. As stated in the previous section, this requires understanding that a multiplicity of agencies with differing competencies and responsibilities must intersect within the State framework.

One problem that comes up daily is the evidentiary requirement when reparatory benefits must be awarded in administrative proceedings. One may be looking for evidence to prove facts that occurred in absolute secrecy. The reparatory program that is designed must be balanced. This is to say that the pecuniary aspect is important, but, in isolation, it does not provide the sense of reparation that international best practices require. In any case, one must consider mechanisms that resignify the value of money within a broader context.

⁷⁰ IACHR, *Bulacio Case*, judgment on merits, reparations, and costs, 18 September 2003. Series C No. 100, par. 25.

Here we return to what was affirmed at the beginning of this article. The reparatory policy must avoid re-victimization. To implement this task requires a system of support throughout the reparatory process.

It is essential not to lose sight that, subjectively speaking, the State is the guarantor of a symbolic contract between the citizens and the state institutions. When grave violations of human rights occur, that symbolic presumption is altered. Not only has the State not fulfilled its role, but it was set up to violate rights. So when the State assumes the responsibility of repairing these acts, it must keep in mind the damage produced in the subjectivity of the victim in order to restore the victim's dignity. This is the re-legitimization that was mentioned at the opening of the article.

In this way, the collective dimension of all reparatory policy should never be sidestepped because ultimately we are giving new form and content to a much broader and universal fight: the struggle against impunity. This is to repair, but it is also to prevent and to ensure that it will not happen again.

3. Lessons Learned for Confronting the Past

Contending with the past is possible. It is possible in mature democracies, and it is a sign of a mature poli-

tics. It is an indicator of the State of Law and of the full enjoyment of democratic rights.

A profound revision of the past is not at all the same as creating institutional instability. Efforts must be directed toward taking advantage of this opportunity to consolidate the democratic institutions, understanding that it is necessary to confront the past in order to be able to understand the present and to think about the future.

A sustainable policy in relation to the past should be the consequence of the perfect coming together of the will of three groups. The isolated efforts of the government, civil society, or the state are not enough to cope with a past of repression and mass atrocities. Political will is required, but also public actors that can interpret social demands and contextualize them. This demands a mature and robust civil society. In the case of Argentina, it was the civil society that carried the banner of memory, truth, and justice when political will was going in the opposite direction. The situation today is the result of the combination of both forces communicating with each other, a path of permanent give and take.

With this synergy of forces, it is desirable that each actor maintains his role and that he can, from that position, incorporate his perspective and offer support in

the construction of policy. This construction will be more solid and definitive if the roles are not confused. Additionally, it is necessary to adjust the structure of government and its bureaucracy to be able to incorporate a human rights perspective in every action of the government. The human rights dimension must cut a wide swath, going through each public policy. At times, a change in the model of the civil servants' daily work is necessary so that they can work alongside these processes and not impede them.

Dealing with the past also requires us to tolerate the frustration and the anxiety of expecting everything to be done rapidly and simultaneously. Not all social demands can be satisfied, nor can they all be accomplished at once. This is a dynamic process that, many times, includes advances and regressions. What is not possible today could be possible tomorrow.

There are no silver bullets that can be applied to every society in any historical moment. Each country has distinct historical, political, and social realities. The success of a long-term and durable policy relies on recognizing the reality of a country and acting accordingly, rather than forcing situations, which can end in disaster. Every effort to recognize best practices and adapt them to distinct realities is positive. Those who design and manage a reparatory policy should take into consideration that it is a process and, as such, it is

dynamic. In this way, it is necessary to make the greatest effort possible in education—especially in the education of values and human rights—because it is the most powerful tool for the prevention of rights violations.

A relationship with the past is necessary because after having dealt with the past in an effective manner, institutions are in better condition to modernize their human rights agendas, to lay out new courses of action, and to undertake the challenge of implementing them through the promotion and protection of human rights.

Some violations of existing rights will not be able to be prosecuted effectively or with sufficient political legitimacy if the past relapses into a state of impunity. The best example of this is given by the policies of the prevention and sanction of torture. Governments deployed great efforts in fighting for this cause, but it will not be properly understood if the acts of torture are not investigated and punished when they were a systematic practice of the dictatorial state.

Dealing with the past is the only real and effective tool we have against oblivion. It is a difficult and painful process. At the same time, the struggle against forgetting is our only real and effective tool against repetition. Genocides and mass crimes destroy the social

fabric. Post-dictatorial societies must work in order to accept their pasts. It is an uncomfortable task, because no one likes to reflect on the causes of something like this. How was this possible in our history? How could we have produced these perpetrators in our society?

We must never stop asking ourselves how it was possible that our society produced such acts of mass human rights violations. That question warrants a response that we, as a society, must answer, for ourselves, for the victims, and for the generations that will succeed us.