

Transitional Justice and the Public Sphere

Engagement, Legitimacy
and Contestation

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Introduction: The Rational and the Emotional

Issues of Transparency and Legitimacy in Transitional Justice

CHRISJE BRANTS AND SUSANNE KARSTEDT

TRANSPARENCY IS A fundamental principle of justice. A cornerstone of the rule of law, it encourages public engagement with the ‘social project of justice’, allows democratic control of the decisions and actions of justice authorities and judiciary, promotes the acceptance of those decisions by society as a ‘shared truth’ and in essence determines their legitimacy. In this sense, the existence of a public sphere is not merely conducive to but is also constituent of legitimate justice. Normally, however, the only requirement to ensure transparency is that proceedings are public, which is said to make secret trials impossible, and to promote democratic control by communities and participation in justice by involving the public in decision-making, simply through allowing public attendance or more usually through ensuring that the mass media have the means and the freedom to report on trials and hearings. For it is through the mass media that most people obtain knowledge of and form opinions on what goes on in the law courts.

These widely held notions are neatly embodied in the aphorism ‘Not only must Justice be done; it must also be seen to be done’. But seeing is not necessarily believing or understanding, and the fact that trials are public is no guarantee that they are also transparent in the sense that the public can fully comprehend, let alone endorse, the end to which such trials are held or the conclusion to which they come with regard to the ‘truth’ of past events, the apportioning of blame and the imposition of punishment. Nevertheless, if ‘Justice done and seen to be done’ begs the question of who justice is for, who has to see it and, indeed, what justice *is*, it still applies to domestic systems of justice in democratic states (and in particular to criminal justice);

their legitimacy, although increasingly challenged in the wake of diminishing faith in the rational discourse of democracy and law and the rise of political populism, is nevertheless sufficiently entrenched to allow those systems to adapt to the demands that such questions imply.

This book transcends the domestic sphere and everyday delivery of 'ordinary' criminal justice. It is concerned with transitional justice, the process by which societies and individuals traumatised by mass (political) violence and human rights violations seek a reckoning with the past in order to create a viable future. In the context of such transition, the development of a global legal order is often seen as both a necessity and a given, which will lead to a peace driven by a shared morality and commitment to human rights. Indeed, the substantive and procedural rules of humanitarian and international criminal law have culminated in a system of international criminal justice, epitomised by the establishment of the International Criminal Court (ICC). The most important aims of the ICC as well as its predecessor international criminal tribunals include not only ending impunity with regard to genocide, crimes against humanity and war crimes, but also establishing or reinforcing the rule of law and democracy through reconciliation, conflict solution, deterrence and retribution, and providing a platform for the recognition of, and redress for, victims. Intriguingly, while most national jurisdictions recognise that the legitimacy of criminal justice can be challenged and therefore requires continual reinforcement among the public and its audiences, international criminal law finds itself in an ambiguous situation. On the one hand, its claim to such cosmopolitan legitimacy, even if not uncontested, is more or less taken for granted; on the other hand, an array of outreach activities by courts and tribunals testify to the tacit or open acknowledgement of a rather precarious basis of legitimacy in the societies where international justice is to apply, and the necessity of remedies to a situation upon which public opinion might be deeply divided.

However, international criminal law is only one of the mechanisms of transitional justice, with not only the international criminal court but also ad hoc international tribunals and domestic criminal courts as its instruments. What this branch of transitional justice can and cannot achieve is the subject of fierce academic debate and, moreover, there are vast differences between what is perceived as paramount in international political, legal and academic circles and what is regarded as most important by the societies and individuals concerned, victims, perpetrators and bystanders alike. Like all criminal justice, the international variation is reactive; it looks back towards past events and can merely hope for some effect in the future. And it is finite; it ends with conviction (or acquittal) and sentencing by professional judges. While it brings some (hopefully, the most important) perpetrators of violence to justice and may contribute to redress and reconciliation in future, the inevitable reduction of the human experience to the 'facts' of

a criminal trial is rarely able to do justice to the reality on the ground and the suffering of victims.

Although the very term ‘transition’ also implies finality, a ‘before’ and an ‘after’, it may not necessarily be felt or lived as such. Transitional justice is an ongoing process of many years, decades even, that does not depend on law alone, but can engage many different social and political actors in many different ways. Not only are there other legal institutions such as truth commissions or traditional methods of settling disputes (for example, mediation), the search for justice (and therefore also for truth) is conducted and continued by historians, activists, artists and writers. It is not surprising that a verdict in a court of law or other official determination of ‘the truth’ does not bring closure in this context, or even always contribute to the legitimacy of the overall process, though it might be an important part of it. While the above could be said (*mutatis mutandis*) of domestic criminal justice too, criminal procedures as part of a transitional justice process face particular challenges as they address mass atrocities. These differ from ‘ordinary’ violent crimes not only in their perceived greater heinousness, but also in that they involve by definition collectivities of perpetrators and victims, categories that are sometimes interchangeable and blurred, so that accounts of what actually took place continually shift and differ. Transitional justice must therefore always operate in divided public spaces where ‘truths’ are contested, hidden and suppressed. Given the nature of the situations and societies in which such justice must function, in some ways the role of public trials and transparency differs profoundly from its contours and functions in national systems of justice that are designed to deal with ‘normal’ situations in stable societies.

Far from being stable, the societies that transitional justice is meant to benefit are usually torn and divided as a result of past or ongoing conflict and atrocity. Transitional justice institutions are set up ad hoc and operate within a limited timeframe; this applies to international and hybrid criminal tribunals as well as to domestic justice institutions which are specifically established for the task (eg, the *gacaca* courts in Rwanda) or operate under domestic statutes of limitation (eg, the prosecution of Nazi war criminals in post-war Germany). The ICC, despite being a permanent court, is not only young but also has limited temporal and territorial jurisdiction. Such institutions lack the legitimacy that derives from legal-cultural tradition and acceptance, and in many instances—particularly true of international criminal tribunals or the ICC—the different audiences have little or no opportunity to be physically present and are dependent on public accounts of what took place from governments, journalists or activist groups, all of whom may be politically or emotionally involved. Moreover, in the context of transitional justice, transparency is not an unambiguous concept—a quality that attaches to justice automatically if certain (legal) conditions are met, such as

publicly accessible procedures and free media, and that promotes rational debate and accountability. What people see of and in justice after conflict and mass atrocity depends to a large extent on perceptions of the past, on definitions of what was and is criminal, and who the perpetrators and victims are. As the past has often been largely hidden and documents and evidence have often been destroyed, a wide space opens up for decidedly differing interpretations in courts and truth commissions as well as among the public. As much as interpretations of the past differ, so do expectations for the future.

Transitions imply that new and different truths emerge that will distinguish the troubled past from the peaceful future, that truths are defended and defeated in processes of transparency and ‘counter-transparency’, where spaces of ‘non-truth’ are created. But what kind of truth is requested, by whom and for whom? The quest for justice might emerge even after decades of suppression and acquiescence, as in Spain, or after starting with a landmark trial subside and re-emerge, as in Germany. Both processes testify to the *longue durée* of transitional justice and to the possible necessity of specific types of transparency and engagement in order to promote legitimacy and achieve acceptance among its different audiences, locally as well as globally. Questions then arise as to the role of the public and the media in changing the discourse and public spaces of justice, and to the role of courts and trials in this process: how do the newly created institutions of international criminal justice muster support, and how do actors in the public sphere actively engage with and shape transitional justice?

The public sphere of transitional justice is made up of spaces that are created by different actors: courts, tribunals and other truth-finding bodies, and those leading the procedures, media and journalists, perpetrators, victims, and civil society and cosmopolitan actors. The legitimacy of the institutions of transitional justice requires that courts, tribunals and commissions present themselves as principled, independent and impartial institutions, indispensable to truth-finding, history-telling, retribution and reconciliation. That is no easy task in highly charged, politicised and divided public and international spheres. It means that they must find a way through the intricate constellation of networks and actors with different narratives and understandings of truth and justice in order to reach out to the relevant public and open up new spaces for victims and families of victims of mass atrocity crimes and gross human rights violations, thus restoring their space and presence in society. For this reason, and contrary to the domestic criminal process, the victim is said to take centre stage in these institutions and proceedings, as a participant, a witness and a ‘moral institution’. Indeed, victims’ quests for justice have been a driving force in establishing transitional justice institutions, and their engagement in and satisfaction with the process are seen as decisive for its legitimacy. The provision of protection and security for victim witnesses testifies to the efforts of courts and truth

commissions, and thus enhances their credibility in the search for justice and truth. However, victims come with goals and hopes, and with very specific quests for knowledge and truth, which do not sit easily with the requirements of legal institutions and procedures. These are received as 'victims' expectations' by courts and commissions that need not only be addressed but also channelled and 'managed' in order to make them compatible with the exigencies of justice, the legal restraints of criminal procedure or the remit of a truth commission.

At the same time, courts, tribunals and commissions have the perpetrators and their group to deal with, to speak to and to whom to convey their message of an end to impunity and of 'never again', in order to gain legitimacy across the dividing lines of post-conflict societies. The intensive and sweeping efforts around the Nuremberg trials to engage the public and solicit support and legitimacy have never been repeated, perhaps because failures soon became visible and the actual long-term impact was hard to detect. However, the quest for legitimacy needs to engage the whole of society and the claims of justice need to be acceptable and accepted across all social sections and factions.

Past and/or ongoing atrocities, whether committed by state or non-state agents, are not only highly politicised issues, but wider (international) public knowledge about such events is dependent on those who witness them. Without their reports, there would be little incentive or support for the very procedures that are meant to ensure truth-finding, retribution and reconciliation. Non-governmental organisations (NGOs) and victims' organisations operate at the local and global level as moral crusaders and entrepreneurs. They have often been seminal in bringing atrocities to the attention of local and international communities, and establishing transitional justice institutions or engaging the wider public in activist endeavours to end impunity and find the justice that victims seek. As much as this enhances public engagement with the legal process, it poses continuous challenges and puts considerable pressure on courts and commissions. Rather than being assured, legitimacy needs to be constantly re-asserted, and courts and truth commissions are confronted by hostile publicity both locally and globally, not only from perpetrators but equally from victims. Furthermore, the presence of high-profile victims and victim-activists in the public sphere, and widely circulated narratives of their plight make their role as witnesses in court particularly difficult.

This tension that is built into the role of victim-witnesses also applies to witness-activists. Without the commitment of journalists, camera crews and ordinary members of the public to promote the cause of victims through the (social) media or even risk their lives to report on situations of conflict, efforts to establish the transitional justice process would be in vain. However, as the media promote the publicity and transparency of events, this brings its own problems when it comes to both the credibility of media

reports for establishing the ‘truth’ and the proceedings in which the perpetrators are called to account. It has been known for professional journalists to identify with victim groups, both emotionally and in their reporting, which endangers professional-ethical standards of an objective and impartial journalistic search for the truth. Likewise, while they can—indeed, as professionals, should—claim immunity from testifying, they may come to regard it as their duty (albeit unprofessional) to do everything in their power to assist in bringing perpetrators to justice, and thus ensuring justice for victims, by testifying and telling the truth as they see it. This endangers the impartiality required from the media to promote rational public debate on the process of justice, for action groups and citizen journalists are, by definition, part of the events they are reporting and, in the contested spheres of transitional justice, therefore by definition partisan.

To a great extent, the transparency of transitional justice is established and driven by individual emotion and a desire for individual participation, interests that are essentially private. Simultaneously, collective emotions drive transitional justice processes, which in turn contribute to the emotional climate in post-conflict communities and societies. While the increasing invasion of the public sphere of justice by private emotion is seen as a ‘new’ development with which national systems of justice also struggle to cope, it should not be forgotten that this is precisely what justice is about—turning private interests into public ones. Justice defines the violation of, and by, the private as a public interest, but at the same time the delivery of justice is a rational endeavour that leaves little room for emotion and participation. This rationality has been increasingly contested in the domestic sphere, and particularly for transitional justice from the outset, where individual and collective emotions are writ large. In a way, transitional justice has been groundbreaking in this respect, becoming the epitome of highly emotionalised justice; in many ways, its legitimacy is based on giving space to and addressing both individual and collective emotions. This has consequences for the nature of what could be termed the ‘emotional transparency’ of transitional justice and the particular mechanisms through which it aims to achieve legitimacy.

Publicity and transparency are seen as a condition of accountability of the instruments and authorities through which justice is enacted; this is why the Allies who presided over the Nuremberg trials took great pains to ensure that they could not be blamed for providing ‘victor’s justice’. In a different sense, these conditions are also essential for making the perpetrators of mass atrocities accountable. The nature of the events with which the ongoing process of transitional justice deals precludes making the emotional transparent exclusively through the rational mechanisms that justice has on offer. It needs more: activism, art, film and memorialisation. However, these operate in highly contested spaces where legal and political elites frame these events in terms and concepts that hide the other ‘truths’ that such processes would

promote. ‘Counter-framing’ by alternative mechanisms and the emotions these solicit has to be transparent and public for it to have any effect, but risks being captured and contested by the more powerful.

This brings us to the question of the power to silence. In some cases such power may be used directly to suppress alternative truths and definitions by hindering, preventing or even criminalising efforts to make them public or to find evidence that supports them. But the power to silence is also a much more subtle mechanism embodied in the regulation of the public sphere in general. The vast majority of those who are affected by mass atrocity and would participate in transitional justice have little choice but to participate vicariously. They do so either in the context of (legal) procedures or through others, such as journalists, who are familiar with and are prepared to obey the rules of the rational public sphere. Even if direct participation is possible (for example, as witnesses in court or to truth commissions), this is still regulated by the rational context of the endeavour and the prescriptive rules that surround it. Social action is direct, unregulated participation, as are the use of social media and all journalism outside of the professional rules of impartiality and objectivity. This in its turn throws transparency as a precondition and mechanism of accountability into doubt: transparency in itself is a notion deriving from the necessity of the (democratic) public sphere being regulated rationally, and promoting rational and responsible engagement with information.

Nonetheless, justice mechanisms are the defining core of transitional processes, even if they operate in conjunction and disjunction with numerous other endeavours. This raises the question of how legitimacy can be generated by transitional justice processes per se and why and how it is granted by its different audiences. Here, expectations by different audiences and the demands and expectations that are seen as legitimate by courts and tribunals as well as in the public sphere play a decisive role. Legitimacy of transitional justice is overwhelmingly measured by its outcomes rather than the fairness of its procedures and is permanently contested. More than criminal justice institutions that are part of legal traditions and culture, the institutions of transitional and international criminal justice operate under constant pressure to justify themselves—their very existence, their procedures and their outcomes. They are easily criticised for their lack of tangible outcomes that are acceptable to all concerned, and as a consequence they are burdened with ever more tasks and expectations. Institutions of transitional justice and their public spheres are intricately linked and constantly interact. Nonetheless, both the public and the courts and commissions follow their own logic when defining past events, and both are powerful actors in transitions. How do transitional justice institutions navigate the complexity of different public spheres in order to elicit legitimacy? How are these public spheres defined and which actors are powerful enough to define what justice means and how it should be done? These questions constitute

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what can be termed the ‘twin puzzle’ of transitional justice that this volume aims to address.

*Witness Testimony and the
Incommensurability of Truth
in Argentina*

ANTONIUS CGM ROBBEN

I. INTRODUCTION

AT 10:30 on the morning of Tuesday 9 March 2010, 10 handcuffed defendants entered the Federal Court in Buenos Aires. They were part of a group of 17 retired policemen and army officers accused of torturing and disappearing 184 Argentine civilians during the military dictatorship. These human rights violations occurred between 1976 and 1979 in three secret detention centres, codenamed El Club Atlético, El Banco and El Olimpo. Six defendants requested permission to leave the courtroom because they did not want to attend the day's testimony of the ex-disappeared Ana María Careaga, and were duly returned to the backroom by the security guards. The handcuffs of the remaining four men were removed, and they walked slowly to the rows of seats facing the four judges. They glanced upwards to see which relatives were present in the upper-level public gallery, raising a hand in acknowledgement or smiling wryly. On other trial days I had seen relatives leaning perilously across the balustrade that gave a bird's-eye view of the courtroom, but this time I joined the relatives and sympathisers of Ana María Careaga who were in the ground-floor gallery that was separated from the courtroom by a glass wall. The two audiences were kept apart as a precaution because of occasional shouting matches, and pushing and shoving inside the drab court building. The court president Jorge Alberto Tassara gestured everyone to sit down and asked Ana María Careaga to take the witness stand. She was 16 years old and three months' pregnant when she was abducted on 13 June 1977 for being a member of the forbidden Guevarist Youth that operated under the control of the Marxist People's Revolutionary Army guerrilla organisation.

In a calm voice, Ana María Careaga testified how two men in plain clothes dragged her into a car at the intersection of Corrientes Avenue and Juan

B Justo Avenue, and took her to the Club Atlético (Athletic Club) secret detention centre that belonged to the Federal Police, but was under the command of the Argentine Army. She was stripped of her clothing and given identification number K 04. She narrated how she had been given pills to control her heartbeat during the electric shocks to her body, and how she had held her breath with each discharge to control the pain. The interrogators also hung her with her hands and feet tied to a rack. When the lesions from the torture became too great, she was taken to the infirmary and returned to the torture room after treatment. The image that had struck her most during her four months of captivity was the sight of the emaciated captives. It reminded her of a Nazi concentration camp. She was finally released on 30 September 1977. She went into exile first to Brazil and later to Sweden. Amnesty International physicians identified more than 100 scars on her body caused by torture.

Club Atlético remained operative between March 1976 and December 1977, after which the building was demolished to make room for a highway overpass. Archaeologists excavated the site in 2002 and found the small cells that were described by Careaga and other survivors. Their narratives, unbelievable as they seemed to many people at the time, could now be verified by retracing step by step the passage of the blindfolded disappeared down the building's stairway, past the sound of interrogators playing table tennis and into the 0.60 x 1.60 metre cubicles where the abducted civilians were kept before they were tortured. There was also visual evidence provided by members of Club Atlético's prisoner council. These disappeared were allowed to walk around without a blindfold, perform household chores and watch television. They remembered the blue tiles that were found later in the excavation and that gave further credence to their testimonies.

Ana María Careaga's testimony at the Federal Court in March 2010 was interspersed with reflections about her horrifying experience at Club Atlético. She explained that she had been tortured to acquire information and to depersonalise her. She identified her torturers who came by such nicknames as *Baqueta* (ramrod), Dr K, Kung Fu and Fuhrer. After ending her testimony, she answered the questions of the prosecutor, the complainant's lawyer, the defendants' lawyer and several judges. She stepped down from the witness stand after four hours of testimony, with only one 15-minute break at 11:30.¹

What made Ana María Careaga's testimony remarkable was not so much the composed manner in which she spoke about her terrible ordeal, which she had narrated multiple times in the last 38 years, but her PowerPoint presentation that analysed the repressive infrastructure of special task

¹ See a summary of the court testimony in: 21⁰ audiencia—Declaró Ana María Careaga; cels.org.ar/wpblogs/abo/2010/03.

forces and secret detention centres, and the operating procedures of abduction and torture. She occupied multiple roles as victim, survivor, eyewitness and expert witness, switching from a personal account of her torture to an analysis of state terrorism in Latin America, and then to the presentation of hearsay evidence, illustrated with a photograph of an excavated torture room. Her roles represented the many twists and turns in her life as a political actor, disappeared person, torture victim, ex-disappeared, exile and human rights activist. Through the decades, she had accumulated much knowledge to understand her predicament and situate it within a highly personal as well conceptual frame of understanding. This vast mental archive and her comprehensive insight were mobilised in the courtroom to help convict the culprits.

The physical and psychological violence to which Ana María Careaga and tens of thousands of Argentine civilians were subjected was not random but systematic. The structure of state repression only became visible gradually through a piecemeal reconstruction in different public arenas during and after the dictatorship, such as press conferences, fact-finding missions, truth commissions and criminal trials, each with their particular styles of presentation and communication. Eyewitnesses produced testimonies that gave an increasing coherence to their experiences and slowly revealed the state terror. Their credibility was raised by external proof such as supporting testimonies, and documentary and material evidence.

This chapter analyses how testimonial narratives in Argentina changed from the times of authoritarian rule to today's democracy because of the different fora in which they were presented. Disappearances had been occurring in Argentina since 1970, when the Argentine military tried to crush the armed insurgency. A systematic repression began only after the military coup of March 1976. The nationwide wave of disappearances went largely unreported due to censorship. Press conferences and denunciations abroad became the principal means of publicising the state of affairs in Argentina. Fact-finding missions visited Argentina, producing reports that attempted to delineate the repression. In addition, testimonial narratives were published during the regime's latter years. They were succeeded by declarations to a truth commission after the turn to democracy in December 1983 and at the 1985 trial against the junta commanders. Pressure from military rebellions resulted in several amnesties and presidential pardons between 1986 and 1990 that ended the prosecution of perpetrators. These so-called impunity laws were overturned by the Supreme Court in 2005 and 2007, after which more than 1,000 defendants were prosecuted.

Witnesses, such as Ana María Careaga, have been providing testimonies for more than three decades under different political circumstances. They moulded their testimonies to the different settings, creating a heterogeneous truth composed of both narratives with a strong emotional veracity to convince people of their unimaginable suffering and limited accounts able

to stand the burden of proof. Careaga's 2010 testimony is emblematic of the struggle with various forms of testimonial truth, where the narrative recollection of extreme personal duress is complemented by an analysis that draws on the accumulated knowledge of nearly four decades. This chapter argues that the desire for truth cannot be satisfied exclusively by the usual instruments of transitional justice, such as international fact-finding missions, truth commissions and criminal courts, because of the incommensurability of different types of truth. Transitional justice requires the acknowledgement of non-judicial experiential truths, often set in an emotional language banned from the courtroom, which can provide a narrative veracity for the witnesses and the general public alike.

II. INTERNATIONAL FACT-FINDING MISSIONS

Diplomatic reports about massive disappearances in Argentina were circulating worldwide soon after the military seized power in March 1976. Governments had been aware of similar repressive methods in Chile since the 1973 coup of General Pinochet, but could not fathom their extent in Argentina. Amnesty International therefore organised a fact-finding mission in November 1976. The delegation heard personal accounts by relatives about more than 100 disappearances, and their report included excerpts of these testimonies, such as that by 72-year old Rosa Daneman de Edelberg, at whose home her granddaughter Bettina Tarnopolsky was staying:

At 1.00 o'clock in the morning of 15 July [1976], plainclothed persons came to my house, bringing my son-in-law, Hugo Tarnopolsky, who knocked on the door and asked us to open it saying, 'Open up, Nona, it's Hugo'. When I opened it, I met my son-in-law and the plainclothes men who said they were the police and, with threats and blows, they asked for my grand-daughter, Bettina Tarnopolsky ... After they had violently locked me out on the patio, I heard them taking away my grand-daughter, half-dressed, since most of her clothes were in her room.²

The report concluded that 'merely on the suspicion of subversion, a citizen may be arrested or abducted, held for a long period *incommunicado*, tortured and perhaps even put to death'.³ The report contains a list of disappeared in which Ana María Careaga and her sister Claudia Mabel figure as having been abducted on 14 September 1976.⁴

Despite these and other testimonies that appeared in the news media, it would take three years before the disappearance method was described

² Amnesty International, *Report of an Amnesty International Mission to Argentina, 6–15 November 1976* (London, Amnesty International Publications, 1977) 28.

³ *ibid* 48.

⁴ *ibid* 73.

clearly. In April 1979, the New York Bar Association sent a fact-finding mission to Buenos Aires to investigate the fate of disappeared Argentine lawyers. They spoke with high-ranking commanders and human rights organisations, but could not gather any material evidence or inspect places that had been denounced as secret detention centres.⁵ The report reads like a legal document and does not include any verbatim testimonies.

Within five months of the visit by the New York lawyers, the Inter-American Commission on Human Rights (IACHR) of the Organization of American States (OAS) travelled to Argentina. The commission's international weight opened doors to President Rafael Videla and former Argentine presidents, the three-man military junta, and prominent leaders of religious congregations, labour unions, human rights organisations and suspended political parties. The delegation visited Argentina's five largest cities and attracted thousands of people, who deposited 5,580 denunciations.⁶ The commission was also given access to the Navy Mechanics School or ESMA (Escuela de Mecánica de la Armada), which was suspected of housing a secret detention and torture centre. Before the visit, however, the Navy had moved the disappeared captives to The Silence, a former retreat of the Archbishop of Buenos Aires, located on an island in the River Plate estuary.⁷

The IACHR report appeared in April 1980. It substantiated its conclusions with many testimonies that had been recorded during the site visit, such as the following excerpt from a statement by Sergio Hugo Schilman that was taken on 18 September 1979 in the sanatorium where he was recuperating following his torture by the provincial police in the city of Rosario:

They began to apply electric shocks to me, I suppose it must have been the *picana* (cattle prod), I never experienced anything like it before. Unfortunately I still have many scars from it; at the same time as they applied the cattle prod, which they first used on my armpits, and then further down on much more sensitive areas, my genitals, they hit me; it was a very large group of people apparently judging from the uproar of voices in the room.⁸

The verbatim transcription shows the jumps in the event's chronology, the narrative disjunctions and the reflective interludes that are characteristic of oral accounts of traumatic experiences. Such testimonies maintain an inner

⁵ OH Schell, Jr, 'Report of the Mission of Lawyers to Argentina April 1-7, 1979' (1979) *Record of the Association of the Bar of the City of New York* 473, 503.

⁶ G Fernández Meijide, *La historia íntima de los derechos humanos en la Argentina* (Buenos Aires, Subamericana, 2009) 112, 115.

⁷ Comisión Interamericana de Derechos Humanos (CIDH), *El informe prohibido: Informe sobre la situación de los derechos humanos en Argentina* (Buenos Aires, OSEA and CELS, 1984) 12, 17; H Verbitsky, *El Silencio* (Buenos Aires, Editorial Sudamericana, 2005).

⁸ Quote from IACHR, *Report on the Situation of Human Rights in Argentina* (Washington DC, Organization of American States, 1980) ch 5, section D: Unlawful use of force and torture, www.cidh.org/countryrep/Argentina80eng/chap.5.htm#D. See also CIDH, *El informe prohibido* (1984) 224.

tension between factual information and intimate sensation that involves different types of truth, one evidential and the other experiential. Other accounts in the IACHR lack this stream-of-consciousness narrative because they were given a coherence of time and place during their transcription or were presented as such by the witnesses, who had acquired a familiarity with juridical discourse. Note, for example, the following denunciation about the disappearance of Hugo Tarnopolsky, already reported by Amnesty International:

On July 15, 1976, at approximately 2 am, armed individuals, identifying themselves as police officers, came to the home of Rosa Daneman de Edelberg, at 3475 Sarmiento Street, 5th floor, apartment J, Buenos Aires. As she went to answer the door, she heard the voice of the owner's son-in-law say 'Open the door, it's Hugo'. The men who were dressed in civilian clothing immediately asked for *Bettina Tarnopolsky*, 16 [years] of age, who was living temporarily in the apartment. They locked up Mrs. Edelberg on the patio, from where she heard Bettina's screams. Once the 'police' left, she found that her granddaughter and son-in-law were no longer there, and objects of value, cash and the identity card of the owner of the house had disappeared also.⁹

The contrast with Rosa Daneman de Edelberg's testimony to the Amnesty International fact-finding mission, reproduced at the beginning of this section, is clear: the 1976 testimony is an emotional narrative, while the 1979 one is a formal statement. By September 1979, relatives of the disappeared had already presented numerous writs of habeas corpus prepared by lawyers to Argentine courts and had given testimony to the missions of Amnesty International and the New York Bar Association. The IACHR's transcriptions and formal case statements transformed empathetic accounts into judicial testimonies, imposing a discursive structure on a disjunctive narrative that might harm their credibility as proof.

The IACHR report's rhetorical combination of emotional narratives and neutral case statements was probably intentional in order to persuade the OAS to take action against member state Argentina. The discursive contradiction in the official report was exploited by the Argentine military government in its November 1980 reaction: 'The most spectacular and impressive aspect of the Report is the presentation throughout most of its chapters of "examples", in the form of denunciations.' These had been received since 1976 and collected during the country visit in September 1979:¹⁰

The choice of denunciations is objectionable. Many of them appear to have been selected because they contain sensational details presumably designed to create an

⁹ Quote from IACHR, *Report on the Situation* (1980) ch 3, section C: Some cases of the disappeared, www.cidh.org/countryrep/Argentina80eng/chap.3a.htm. See also in CIDH (n 7) 85.

¹⁰ Government of Argentina, *Observations and Criticisms Made by the Government of Argentina with Regard to the Report of the Inter-American Commission on Human Rights on the Situation of Human Rights in Argentina* (Washington DC, OAS, 1980) 22.

impression with greater impact. It does not matter that these are unproven allegations, and all this is apart from the question of the good and bad faith in which the unknown claimant has acted.¹¹

The above critique by the Argentine government was directed not only at the credibility of the testimonies but also at the IACHR report's argumentation, namely drawing general conclusions from selected examples:

[I]f in fact the idea was to formulate general criteria on the basis of individual cases, the procedure was incorrect. If, on the other hand, those individual cases are cited for purposes of objectivity, the effect is the opposite; a subjective and biased account cannot yield to an objective and dispassionate recounting of events.¹²

The tension between highly personal accounts, general conclusions and political consequences became resolved in *testimonio* narratives by survivors that manifested individual hardship as collective suffering and summoned a call to action.

III. TESTIMONIOS

Testimonio narratives are personal accounts of violent events by witnesses with clear political motives and objectives. They became very popular in Latin America during the 1980s. *Testimonios* are not autobiographies, life histories or memoirs because the narrators tried to verbalise the oppression and suffering experienced by many people. They gave a voice to the voiceless, countered the denial of any wrongdoing by military dictatorships and hoped to mobilise international protests against Latin America's repressive regimes.¹³

The first Argentine *testimonio* appeared in France in 1979 under the title *Le diable dans le soleil* (*The Devil in the Sun*). Written by the Argentine journalist-in-exile Carlos Gabetta, it did not become available in Argentina until November 1983 under the title *Todos somos subversivos* (*We Are All Subversives*).¹⁴ The book is a collection of interviews, edited by Gabetta, with parents searching for their children, former disappeared and released prisoners. The interviewees were chosen from all social layers of Argentine society to convey that anyone, irrespective of class or social status, could be considered a subversive by the Argentine military.

¹¹ *ibid* 2.

¹² *ibid* 27.

¹³ J Beverley, *Testimonio: On the Politics of Truth* (Minneapolis, University of Minnesota Press, 2004) 29, 44; GM Gugelberger, 'Introduction: Institutionalization of Transgression: Testimonial Discourse and Beyond' in GM Gugelberger (ed), *The Real Thing: Testimonial Discourse and Latin America* (Durham, NC, Duke University Press, 1996).

¹⁴ C Gabetta, *Todos somos subversivos* (Buenos Aires, Editorial Brujuna, 1983).

Ana María Careaga was also interviewed. She described in very graphic terms the ways in which she had been tortured in Club Atlético, how she tried to control her respiration when given electrical shocks and was administered pills to prevent heart failure. The account is interspersed with self-reflections that enhance empathy in the reader, as in the following description of how she reacted to the torture:

I didn't scream. Now I come and think of this, it seems incomprehensible, after having been there for four months, listening to the terrified screams of people being tortured, I come and think why is it that I didn't scream, but in the end, before such great physical and psychic suffering, everyone reacts in a different way and creates distinct defenses. It is certain that I didn't scream, but I believe that this was worse because they believed that it was to challenge them and that angered them even more.¹⁵

This narrative situates Ana María Careaga's personal conduct amidst the different responses to torture by other captives to convey the predicament of all disappeared. She spoke about the cramped cells, the relations among the inmates, the poor food and the daily regime in ways that are also recognizable in later *testimonios*.¹⁶

The first-person *testimonio* accounts tried to convince the readers that the incomprehensible and unimaginable was nevertheless true. Ana María Careaga explained in her 1979 interview with Carlos Gabetta that this problem worried her even during captivity:

On one occasion, talking softly with my cellmate, we commented how difficult it was going to be to explain, if once we would leave, to be able to convey in the best possible manner, in the most understandable way, the situation and the life that were led in there. They try to accomplish that a human being stops being one, that he turns into an animal, in a constantly humiliated object through acts and words. We could not imagine how we were going to tell to what extent we lived constantly enclosed in a cell, in darkness, without being able to see, to speak, to walk, and experiencing a thousand different sentiments, often being delirious out of hunger.¹⁷

Authors of *testimonios* gave free rein to their emotions because they wanted to persuade their readers rather than to convince them with evidence that could stand up to a judicial inquiry. The account's content was generally accurate, but the particular narrative form highlighted the subjective experience and the message was partisan. *Testimonio* accounts are a form of

¹⁵ *ibid* 160, 161.

¹⁶ See, eg, M Bonasso, *Recuerdo de la Muerte* (Mexico City, Ediciones Era, 1984); A Vázquez and I Vázquez, *Con vida los llevaron: 12 historias del tiempo de violencia* (Buenos Aires, Ediciones La Campana, 1984); LJ Bondone, *Con mis hijos en las cárceles del 'proceso'* (Buenos Aires, Editorial Anteo, 1985); A Portnoy, *The Little School: Tales of Disappearance and Survival in Argentina* (Pittsburgh, Cleis Press, 1986); M Seoane and H Ruiz Núñez, *La noche de los lápices* (Buenos Aires, Editorial Contrapunto, 1986).

¹⁷ Gabetta, *Todos somos subversivos* (1983) 165, 166.

creative nonfiction in the sense that personal information is presented in a dramatic manner through the use of literary techniques, such as flashbacks, inner monologues and moral judgements.

Testimonio narratives were circulating widely during the first years after Argentina's return to democracy in December 1983, and when the National Commission on Disappeared People (CONADEP) was installed by President Raúl Alfonsín to examine whether or not there were still disappeared persons alive in Argentina. The reports of Amnesty International, the IACHR and the *testimonios* provided a testimonial context that must have influenced the CONADEP truth commission when it solicited depositions and wrote its final report.

IV. THE CONADEP TRUTH COMMISSION

The CONADEP truth commission was installed to inquire into the fate of the disappeared persons. The commission did not find anyone alive in secret detention, yet could not prove their assumed death with material evidence, other than through inference from the discovery of mass graves with unidentified human remains. Oral testimony by ex-disappeared and eyewitnesses of abduction therefore constituted the core of proof and made rhetorical persuasion crucial. The choice of the renowned Argentine novelist Ernesto Sábato as the commission's president suggests an early concern about how the findings should be presented in the most convincing way. The opening sentences of the report demonstrate this awareness: 'Many of the events described in this report will be hard to believe. This is because the men and women of our nation have only heard of such horror in reports from distant places.'¹⁸

The solicitation of voluntary depositions about these unbelievable events was of central importance because the truth commission could not subpoena witnesses. A climate of fear still reigned in Argentina, making people who had never visited the human rights organisations during the dictatorship reluctant to testify. The truth commission set up office at the General San Martín Cultural Center, situated among the cinemas and theatres in the heart of Buenos Aires, which conveyed an atmosphere of transparency and trustworthiness. Branch offices were established in Argentina's major cities. The CONADEP invited Argentine citizens through radio and television announcements to offer their confidential depositions about the disappearances to CONADEP staff.¹⁹ Survivors of disappearances, many relatives

¹⁸ CONADEP, *Nunca Más: The Report of the Argentine National Commission on the Disappeared* (New York, Farrar, Straus & Giroux, 1986) 9.

¹⁹ E Crenzel, *La historia política del Nunca más. La memoria de las desapariciones en la Argentina* (Buenos Aires, Siglo Veintiuno Editores, 2008) 69.

who had been searching for their loved ones, civilians who had witnessed abductions or seen bullet-ridden bodies and even a handful of individuals who had participated in the repressive operations came forward.

Truth commission interviewers asked survivors about the period between abduction and re-appearance: where had they been held, how had they been treated, who had been their captors, who else had been present in the secret detention centre and what had been their fate. The depositions of searching relatives were important in order to acquire an accurate record of the disappeared and determine the functioning of state authorities. Particular attention was paid to the judiciary to understand how the Argentine state could carry out its repression with impunity and why the thousands of habeas corpus requests were not properly addressed by the courts. The truth commission came to the following conclusion: 'Instead of acting as a brake on the prevailing absolutism as it should have done, the judiciary became a sham jurisdictional structure, a cover to protect its image.'²⁰

Although some forensic evidence was collected from government archives and through the exhumation of mass graves, the oral testimonies by witnesses were paramount. Their verbalisation of sensorial experiences became regarded as the most authentic expression of narrative truth. 'The evocation of smells and sounds, the tactile impressions, and the sight that succeeded in deceiving the blindfold or hood, were their instruments to reconstruct the topography of horror, the identity of those responsible, and that of other captives.'²¹ Such testimonies maximised the empathy of the listener and gave an emotional truth to accounts. Take, for example, the description given by Norberto Liwski, who was abducted on 5 April 1978:

For days they applied electric shocks to my gums, nipples, genitals, abdomen and ears. Unintentionally, I managed to annoy them, because, I don't know why, although the shocks made me scream, jerk and shudder, they could not make me pass out. They then began to beat me systematically and rhythmically with wooden sticks on my back, the backs of my thighs, my calves and the soles of my feet. At first the pain was dreadful. Then it became unbearable. Eventually I lost all feeling in the part of my body being beaten. The agonizing pain returned a short while after they finished hitting me.²²

The report's prologue mentions that such quotes were 'selected solely in order to substantiate and illustrate our main arguments', but this justification undervalues the impact on the readers.²³ The quotes are typographically highlighted through indentation and the use of a smaller font.²⁴ The report's

²⁰ CONADEP, *Nunca Más* (1986) 387.

²¹ Crenzel, *La historia* (2008) 72.

²² CONADEP (n 18) 22.

²³ *ibid* 7.

²⁴ CONADEP, *Nunca Más: Informe de la Comisión Nacional sobre la Desaparición de Personas* (Buenos Aires, EUDEBA, 1984).

rhetorical weight rests on the testimonies and turns the victims into the truth commission's main focus. Furthermore, the report's polyphonic narrative counterbalances the commission's authoritative voice, according to Phelps:

Thus there is a constant tension between the stories themselves, which are stories of disorder and chaos, of a world in which nothing was predictable, of 'voids' and phantasmagoric sensations and images, and the report, which explicitly puts the stories in an order.²⁵

The narrative excerpts intersperse a well-organised description of the repressive infrastructure and the stages from abduction to torture, disappearance and assassination. After several hundred pages of compelling testimony woven through the report's master narrative by the literary hand of the commission's president Ernesto Sábato, the final recommendations begin with the sentence: 'The facts presented to this Commission in the depositions and testimonies speak for themselves.'²⁶ By pronouncing the oral narratives as self-evident, the commission intended to dispel any doubt in the reader and reinforce the recommendation that 'the courts process with the utmost urgency the investigation and verification of the depositions'.²⁷

The impression made on Argentine society by the report was deep, and most Argentines favoured prosecution of the perpetrators. The horrendous tales of torture and suffering in the commission's report, corroborated in the media by interviews with ex-disappeared, prepared the grounds for a trial against the nine junta commanders who had ruled Argentina between 1976 and 1982. Given the persistent denial of any wrongdoing by the military, Argentine society had no position to fall back on than the confirmation in court of the human rights violations. People's belief in the court's verification process made judicial truths carry more weight than public truths. The Argentine truth commission had given voice to the lived experiences of victim-survivors, but had only limited means to establish their veracity because witnesses could not be subpoenaed, the accused could not be held in custody and sentences could not be imposed.

V. CRIMINAL TRIALS

Raúl Alfonsín won the October 1983 presidential race convincingly and made good on his electoral promise to bring the Argentine military to justice. Within days of his inauguration on 10 December 1983, he not only created the CONADEP truth commission but also ordered the Supreme Council of

²⁵ TG Phelps, *Shattered Voices: Language, Violence, and the Work of Truth Commissions* (Philadelphia, University of Pennsylvania Press, 2004) 89, 90.

²⁶ CONADEP (n 18) 446.

²⁷ *ibid.*

the Armed Forces to prosecute the three military juntas that had been in power between March 1976 and June 1982. The members on the military's supreme court were unwilling to try their peers, stalled the proceedings and declared on 21 September 1984 that they could not pass judgment before the 21 October deadline. It can hardly be a coincidence that on the previous day, the truth commission had presented its final report to the Argentine government, accompanied by 70,000 people, under the motto 'punishment for the guilty'.²⁸ The military supreme court's announcement resulted in the Federal Court of Appeals ruling that now a civilian court could put the nine junta commanders on trial.

The Buenos Aires Federal Court of Criminal Appeals leaned heavily on the work of the truth commission and selected the 670 most solid cases presented in the final report. Public hearings began on 22 April 1985. The opening week of proceedings began with the testimony under oath by Argentine politicians, high-ranking officers and foreign specialists. Adriana Calvo de Laborde became the first survivor of torture and disappearance among the 800 witnesses for the prosecution to be heard by the court. She had already deposited her denunciation at the CONADEP truth commission, but was now facing aggressive defence lawyers and judges intent on acquiring reliable testimonies.

Adriana Calvo de Laborde told the court that on 4 February 1977, 10 heavily armed men entered her house in the city of La Plata. After they searched the house, they asked her some questions and then ordered her to accompany them. Her 18-month-old son was handed to the care of her neighbours. Once in the car, she was pushed to the floor, covered with a sweater and told that she would be killed. After a 10-minute drive, the car arrived at its destination. She was blindfolded and her hands were tied behind her back, despite her being visibly pregnant. At this moment in the testimony, she was asked by Judge Guillermo Ledesma if she knew where she had been taken and whether or not she had been tortured. She responded that she had been threatened and beaten, but not tortured. She did, however, hear how other captives were tortured with an electric prod and by nearly drowning them. The judge asked her how she knew. She responded that she knew from the sound, by hearing the sound of running water and the gasping for breath.²⁹ The testimony continued with more questions about the place and conditions of detention, the presence of other captives and the brutal interrogations by the torturers. She said that one man had been tortured for days in a systematic way. The interrogators were not under the influence of drugs or alcohol, but were conscious of what they were doing.

²⁸ ACGM Robben, *Political Violence and Trauma in Argentina* (Philadelphia, University of Pennsylvania Press, 2005) 322.

²⁹ A Calvo de Laborde. 'Testimonio de la señora Calvo de Laborde' (1985) *El Diario del Juicio*, 29 April, 30.

After they abandoned the man in a corridor, he was then tortured for hours by several drunken guards to make him say that his mother was ‘a bitch’s daughter’ (*una hija de puta*). She apologised to the judge for repeating the vulgar expression:

Calvo de Laborde: I regret having said this. But I believe that it is important because here [in this courtroom] they have talked about excesses, and supposedly these are excesses. The rest, the cold and cruel torture, was an act of service, was due obedience.

Judge Ledesma: I ask you, madam, that you tell facts without qualifications.

Calvo de Laborde: Sir, this was a fact.

Judge Ledesma: I take your emotion into account. There is no doubt that the fact was real, but we are talking about your qualification afterwards.

Calvo de Laborde: I apologize, Your Honor.³⁰

The incommensurability of the judicial truth and the experiential truth is apparent in this exchange between judge and witness. This being the first testimony by an ex-disappeared, Judge Guillermo Ledesma wanted to set a standard for the many heart-wrenching testimonies to come in the following months, and curb the display of emotions, feelings and value judgements that might cloud the due process. For the witness, however, a dispassionate testimony undermined the veracity of the intensely lived experience that included sounds, smells, nausea and fear. Adriana Calvo de Laborde was thus guided towards a testimony that differed significantly from her deposition at the CONADEP truth commission, where she had been heard by empathetic CONADEP staffers instead of contentious interlocutors. She and comparable witnesses had to balance and separate two partly overlapping narratives: one emotional and lived to create a narrative truth; and the other factual to provide an evidential truth. The contrast became apparent in the CONADEP deposition and court testimony about one of the most painful and indelible episodes in her life.

Adriana Calvo de Laborde was moved several times to other secret detention centres after her abduction on 4 February 1977. On 15 April, she was taken to the Pozo de Banfield centre by two men and a disappeared captive named Lucrecia. Adriana was nearly nine months’ pregnant and already in labour when she entered the patrol car. She was told they were going to a hospital. As the contractions came faster, she said that she could no longer stop the birth. The men laughed, saying that it did not matter because they were going to kill her and her baby anyway. The men continued driving, but finally stopped when the baby was about to be born. She remained

³⁰ *ibid* 31.

blindfolded and handcuffed, struggling to remove her knickers to deliver the baby in the back of the car:

Thanks to the forces of nature, the birth was normal. The only assistance I received was when 'Lucrecia' tied the umbilical cord which was still linking me with the child as there was nothing to cut it with. No more than five minutes later we drove on, supposedly in the direction of a hospital. I was still blindfolded and my child was on the seat.³¹

She narrated the same distressing event more than a year later while testifying in the trial against the nine junta commanders:

My baby was born well, she was very tiny, she was hanging from the umbilical cord because she had fallen from the seat. She was on the floor. I asked them to, please, hand her to me so that I could have her with me, but they didn't give her to me. Lucrecia asked for a rag to the one sitting in front, who cut a dirty rag and with that they tied the umbilical cord, and continued on their way. Three minutes had passed. My baby was crying, I continued with my hands behind my back, with my eyes covered.³²

The difference in detail between the two accounts is remarkable. The court testimony is much more self-conscious than the CONADEP deposition. Moreover, the deposition focuses mostly on the personal experiences of Adriana Calvo de Laborde, whereas the court testimony revolves around demonstrable evidence, such as the places of detention, the nature of the interrogation, the number and identity of captors and captives, and repeated questions about when she had been blindfolded and what she had actually seen with her own eyes. The narration to a court with a prosecutor eager to make his case, hostile defence lawyers trying to discredit it, inquisitive judges who wanted hard proof and an audience that listened in horror was served with close attention to detail and a precise, almost procedural, chronology intended to enhance its judicial truth value.

How was the testimony transcribed in the verdict? Adriana Calvo de Laborde is case no 1 in a list of 700 cases. The description states that she was abducted on 4 February 1977, at about 12:00 am by armed personnel of a security or armed force, as corroborated by two neighbours. Several appeals, including a writ of habeas corpus, were made by two relatives, but to no avail. The court considers it proven that she was held captive under inhuman circumstances at four different secret detention centres run by the Buenos Aires Provincial Police and under the control of the First Army Corps, as corroborated by the testimony of four fellow-captives, including her husband. The court also considers it proven, by the testimonies of persons who shared captivity with her, 'such as by the pronouncements by

³¹ CONADEP (n 18) 291.

³² Calvo de Laborde (n 29) 32.

Caracoche de Gatica who happened to be under similar circumstances, that was given birth to a baby girl'.³³ The bewildering delivery on the back seat of a patrol car by Adriana Calvo de Laborde is reduced to the bare fact of the birth, denuded of the inhuman circumstances that apparently could not be authenticated by independent testimony and therefore did not figure in the case description. What counted were the abduction, the clandestine detention without being charged with any crime and the negative response to the habeas corpus request. Without the CONADEP deposition and the verbatim transcription of the court testimony, we would never have known what was behind the statement that Calvo de Laborde had delivered a baby in captivity.

Five of the nine junta members on trial, including General Videla and Admiral Massera, were convicted in December 1985. The 1984 ruling that a civilian court could prosecute the nine commanders resulted in a flood of accusations that worried President Alfonsín. To protect the budding democracy, Alfonsín passed the Final Point Law through Congress, which put a 60-day statute of limitations on new accusations. The law was accepted in December 1986, but failed to dispel the growing discontent among indicted low-ranking officers and non-commissioned officers who had carried out orders given by their commanders. After a military rebellion, a Due Obedience Law was passed in June 1987 that reduced the accused to high-ranking commanders. Alfonsín's successor President Carlos Menem proceeded along the same path by pardoning hundreds of indicted officers and guerrillas in 1989, and releasing the five convicted junta members in 1990.³⁴

A 20-year interlude of impunity but certainly not of testimonial silence began because the human rights movement continued to look for new ways to discover the truth about the disappearances and prosecute the perpetrators in its wake. In 1996, an innovative causeway was found in the creation of truth trials (*juicios por la verdad histórica*) based on rulings by the IACHR that family members have a right to know about the fate of their disappeared relatives.³⁵ These trials did not pursue accountability but truth-finding. The criminal prosecution of alleged perpetrators was impossible because of the amnesty laws, but witnesses could be summoned by the court to testify under oath about the cause of death of the disappeared and the whereabouts of their remains. Argentine military officers and searching relatives were thus not each other's opponents as accused and claimants, but they stood formally on an equal footing as witnesses before the court. The truth trials seemed to be a classic double bind: suspected perpetrators

³³ Cámara Nacional de Apelaciones en lo Criminal y Correccional Federal de la Capital Federal, *La Sentencia* (Buenos Aires, Imprenta del Congreso de la Nación, 1987) vol 1, 304.

³⁴ Robben, *Political Violence* (2005) 331, 338.

³⁵ See IACHR, 'Right to the Truth', www.oas.org/en/iachr/expression/showarticle.asp?artID=156&IID=1.

who refused to answer the judge's questions would be accused of perjury and would risk a four-year prison sentence, while those who refused to appear in court would be charged with the obstruction of justice, detained for two days to reconsider and then sentenced to 30 days in jail if they still refused to cooperate. Some officers were arrested, but the Argentine Supreme Court soon ruled that they could not be forced to give self-incriminatory testimonies.³⁶

Many truth trials were held in major Argentine cities, but the outcomes were inconclusive. Nevertheless, these public hearings served to gather new oral evidence and keep the issue of the disappeared in the public eye in Argentina. The trials also revealed the ambiguous status of the witnesses. Searching relatives, former disappeared and agents of state repression were summoned by the court as witnesses without prejudice, but were expected to act as litigants over the truth. Engaged in a contest of credibility, silence and denial were interpreted as admissions of guilt and were treated as perjury on the basis of the findings of the CONADEP truth commission, the sentences of criminal trials in the 1980s and evidence provided by other witnesses.

The truth trials had served their purpose when a federal judge declared in 2001 that the amnesty laws were unconstitutional, and Congress followed suit in 2003. The Supreme Court derogated Alfonsín's amnesty laws in June 2005 and Menem's presidential pardons in 2007. The first defendant was put on trial in 2006, and by December 2013 a total of 520 persons had been convicted and 60 persons absolved, while 1,069 persons had been at least indicted, of whom 525 were on trial.³⁷

The court testimonies of the 2010s were not duplicates of those given in the mid-1980s. They manifested the accumulated knowledge of decades of archival research, forensic investigations, oral history and long-awaited revelations by perpetrators, but they were also products of self-reflection and the distance of time. Aged mothers, barely able to step on the witness stand, could no longer recall many details of the abductions that marked their lives.

Testimonial transformations were most noticeable among those witnesses, such as Ana María Careaga, who had adjusted the framing of their horrifying experiences through the decades to new conceptual understandings.

³⁶ ACGM Robben, 'Testimonies, Truths, and Transitions of Justice in Argentina and Chile' in AL Hinton (ed), *Transitional Justice: Global Mechanisms and Local Realities after Genocide and Mass Violence* (New Brunswick, Rutgers University Press, 2010); N Roht-Arriaza, *The Pinochet Effect: Transnational Justice in the Age of Human Rights* (Philadelphia, University of Pennsylvania Press, 2005) 104, 107.

³⁷ Procuración General de la Nación, *Informe sobre el estado de las causas por violaciones a los derechos humanos cometidas durante el terrorismo de Estado*, 2014, www.fiscales.gob.ar/lesa-humanidad/wp-content/uploads/sites/4/2014/01/Informe_Lesa_Humanidad_20_diciembre_2013.pdf.

Careaga's earliest testimonies were contextualised in Latin American authoritarianism, while her testimony during the 2010 trial was framed through the concept of genocide. Several times she described El Club Atlético centre as a concentration camp and emphasised that the captors were particularly cruel towards Jewish Argentines.

The verdict of the Club Atlético trial was read on 21 December 2010. Twelve defendants received life sentences, four were sentenced to 25 years in prison and one defendant was absolved. Ana María Careaga commented that:

Justice has been done ... but there is also annoyance at having to accept that it was not considered proven that this repressor with the pseudonym Kung Fu had worked there, despite that everything we went through contradicts with the criteria of justice.³⁸

This acquittal was therefore appealed. Furthermore, even though the prosecution had requested a genocide conviction, the court sentenced the defendants for crimes against humanity.³⁹ We can safely assume that the latter sentence would have satisfied Ana María Careaga 20 years earlier, but, given new historical insights and interpretive frameworks, the verdict no longer conformed to her present understanding of the past as reflected in her multi-layered testimony.

VI. CONCLUSION

Testimonies by survivors of abduction, torture and disappearance have time and again been crucial in changing the course of justice in Argentina, because justice is not confined to the courtroom and judicial truth is only one among many. Fact-finding missions, truth commissions and criminal courts have different relations to testimony. All three use testimony to determine human rights violations and criminal offences, but the first centres on the responsibilities of states to respect people's constitutional rights, the second on acknowledging the suffering of survivors, and the third on prosecuting perpetrators. These objectives result in partially overlapping but still different testimonies because fact-finding missions, truth commissions and criminal courts follow different procedures with respect to witnesses. These procedural differences concern other ways of presiding over the hearings,

³⁸ A Dandan, 'La patota de Miara y Guglielminetti tuvo su condena', *Página12* (22December2010), www.pagina12.com.ar/diario/elpais/1-159138-2010-12-22.html; accessed 21 November 2014.

³⁹ ACGM Robben, 'From Dirty War to Genocide: Argentina's Resistance to National Reconciliation' (2012) *Memory Studies* 305, 315.

gathering evidence, weighing the veracity of the testimonies and presenting the outcomes of the inquiry. Testimonies can therefore only unfold within the structural parameters and contextual limitations set by these three platforms, as has been shown in the Argentine case.

The fact-finding missions that visited Argentina were operating under the restrictions of a military dictatorship that thwarted access to locations and witnesses. They had only limited knowledge of the reigning repression and spoke with many searching relatives, but few ex-disappeared, while the Argentine junta played a politics of deception and denial. The missions grappled with the presentation of their findings in a neutral way. In particular, the report by the IACHR shows the struggle to convince public opinion and at the same time maintain judicial decorum by alternating emotional and formal testimonies. However, the CONADEP truth commission was unambiguous in its moral condemnation of individual perpetrators and the authoritarian state by combining a formal description of the repressive structure with experiential testimonies that showed compassion for the victims of state terrorism. Finally, criminal courts have been seeking to redress grievances during the past three decades by putting the accused on trial. Although important from a legal perspective, court procedures inevitably restrict the testimonial deployment of the lived experiences and therefore exclude non-judicial truths.

The simultaneous appearance of four types of testimony in Argentina during the mid-1980s—namely autobiographical narratives, *testimonios*, the CONADEP declarations and the eyewitness accounts at the commanders' trial—demonstrates the incommensurability of their partial truths. Individual experiences that are rendered through creative narratives that embrace the entire sensorium, and *testimonios* that are composites of multiple personal predicaments may reflect truth as the authors see it, but fail to share a common denominator with courtroom and truth commission testimonies. In fact, courts do not take the declarations of truth commissions at face value, as was shown in Argentina. The prosecutor of the 1985 trial of the junta commanders took the most convincing cases of the CONADEP report and then carried out an independent judicial verification. In fact, the two pairs of testimony are viewed askance by both sides. Autobiographical narratives and *testimonios* appeal to notions of human compassion and moral indignation that legitimise their call for prosecution and justice because of their emotional, empathetic and experiential truth. Yet, judicial truth requires dispassionate, evidential testimonies that provide the kind of proof and discourse considered proper in a court of law, and casts sensorial evidence of smell, touch, taste and other bodily sensations by the wayside of judgment because of their incommensurability. Transitional justice does not end with the conviction of perpetrators, the judicial acknowledgement of suffering and restorative measures for victim-survivors; it also needs room for non-judicial truths that reveal what remained unsaid in the courtroom.

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