

# Dictatorship Trials and Reconciliation in Argentina

By Mirna D. Goransky

FICHL Policy Brief Series No. 89 (2018)

## 1. Military Coup, Dirty War, Amnesty and Prosecutions

In March of 1976 there was a *coup d'état* in Argentina. The military, supported by an important part of civil society, seized power and imposed an unprecedented system of repression in the country. On the face of it, they presented their actions as part of what was known as a 'dirty war against subversion'. In reality, their illegal actions were aimed at defeating those whom they considered enemies of the Western and Christian tradition. This not only included individuals belonging to armed organizations, but also students, teachers, trade unionists and religious persons.

With the re-establishment of democracy in 1983 and a strong demand for justice, the main perpetrators of abductions, murders, torture and disappearances were brought to trial, and some were successfully convicted. Famously known as '*Juicio a las Juntas*' (the Junta Trial), the trials continued against those within the military hierarchy, but they were eventually suspended by so-called 'amnesty laws' in 1986 and 1987. For more than a decade, human rights organizations continued to push for truth and justice until 2003, when Congress annulled<sup>1</sup> the 'Full Stop' law of 1986<sup>2</sup> and the 'Due Obedience' law of 1987<sup>3</sup> which had granted immunity to the military except those in positions of command. The trials were reopened and in 2005, the Supreme Court upheld the unconstitutionality of the 'impunity laws'<sup>4</sup> and federal judges struck down pardons that ex-President Carlos Menem issued in 1989 and 1990 to former officials convicted of, or facing trial for, human

rights violations.

By September 2016, the number of persons accused of crimes against humanity had increased to 2,922, of whom 383 were convicted.<sup>5</sup> At the time of writing in 2018, Argentina continued to prosecute members of the armed and security forces and civilians for enforced disappearances, killings and torture during the dictatorship. All in all, this has been a significant effort of the criminal justice system of Argentina.

## 2. Have the Trials Caused 'Reconciliation' in Argentina?

A string of publications in the *FICHL Policy Brief Series* have discussed whether specific criminal justice processes around the world have contributed towards 'reconciliation'. This text seeks to add to that ongoing discourse. The question before us is therefore whether there has been some form of reconciliation in Argentina over the last 40 years either through the first historical trial in 1985, or the hundreds of trials after 2003. The short answer is 'no'.

In order to give a more nuanced understanding of the situation, we must first begin by trying to determine who need to be reconciled, when there is space to reconcile, and by which means and under what social conditions reconciliation can be achieved.

When we consider the topic of reconciliation, it is usually in terms of a war-torn country recovering from civil war. In a few words, there are usually two factions that lead to a violent polarization, ending in a confrontation that finally finishes with some form of reconciliation. This was not the case in Argentina. There were not only two factions, and there was no such polarization. Despite this, at time of the Junta Trial, there was a saying likening the

<sup>1</sup> Ley N° 25.779 Nulidad de las leyes de obediencia debida y punto final, promulgated 2 September 2003 (<http://www.legal-tools.org/doc/94ffd6/>).

<sup>2</sup> Ley N° 23.492 'Punto Final', promulgated 24 December 1986 (<http://www.legal-tools.org/doc/d464a5/>).

<sup>3</sup> Ley N° 23.521 Obediencia Debida Sancionada, promulgated 8 June 1987 (<http://www.legal-tools.org/doc/a4be3b/>).

<sup>4</sup> Simón, Julio Héctor y otros, Case N° 17.768, Judgment of the Supreme Court of Argentina, 14 June 2005 (<http://www.legal-tools.org/doc/c624f4/>).

<sup>5</sup> Of the 2,922, 1,118 were detained, 484 dead, 383 convicted, 871 under investigation, and 72 acquitted. From 2007 to 2011, there were 61 trials; from 2012 to 2016, 106 (2007: 2, 2008: 8, 2009: 11, 2010: 19, 2011: 21, 2012: 25, 2013: 25, 2014: 21, 2015: 20, and 2016: 15). The average of preventive detention is almost six years (reaching 14 years in some cases), and the average age of the prisoners is around 73.

military and the *guerrillas* to two demons. It was said that these two extreme groups were in confrontation with one another, while the majority of society was neutral. This theory had very little to do with reality. There is wide consensus in Argentina that the military had the power of the State to fight against leftist groups. Even the courts have come to recognize that this conflict was a case of *State terrorism* and not a 'dirty war' or confrontation between two enemies. This may be as important for Argentinian society as the ICTY's conclusion that the wars in Bosnia-Herzegovina in 1992–95 were not civil wars, but international armed conflicts.

There are other reasons why 'reconciliation' has not occurred in Argentina. If there were two minority groups that confronted each other during the 1970s, these trials did not do much to reconcile them. The trials have been perceived by the military as a form of 'victor's justice'. Among members of the military, with the exception of a few notable instances, there has been little recognition of the abuses, human rights violations, and pleas for forgiveness – actions that are considered preconditions for reconciliation.

It is noteworthy that in the few cases where there was an actual recognition of wrongdoing,<sup>6</sup> those seeking justice (victims, families and human rights organizations) did not utilize reconciliation to make a difference and continued to demand trial and punishment. These responses solidified the perception in the military of justice as revenge; that trials were essentially the continuation of the war by other means.

When the perpetrators of crimes take this position, and remain silent even on the whereabouts of the remains of the disappeared and the babies born during captivity,<sup>7</sup> there has been limited possibility for victims and their relatives to even think about reconciliation.

### 3. Human Rights Organizations Have Sought Justice, Not Reconciliation

The concept of reconciliation has not resounded as much as it could have in Argentina, and it has been strongly resisted by human rights organizations. They have not seen the concept as easily applied to the type of conflict that Argentina experienced in the 1970s. For human rights organizations, it has not been about making peace with the *genocidaires* – it was always about justice for their wrongdoings when they enjoyed dictatorial power. Reconciliation as an agreement or concord was something that was not in the sight of these organizations. Reconciliation was

not seen as part of, or as a means towards, the objective of criminal justice for perpetrators who were no longer in power. From this point of view, there is no reconciliatory justice to be had.

Following this line of reasoning, we could suggest that, when a society is dealing with a situation of gross and systematic human rights violations, there are two main options. First, you may have two adversaries who at one point decide to engage in negotiation and where justice comes out of the negotiation; or, second, one of the two adversaries prevails and society decides to judge authors of wrongdoing by the defeated adversary. In the case of Argentina, after the implosion of the military regime and the military defeat in the Malvinas war, human rights organizations did not have to negotiate with the military, and sought justice rather than reconciliation. They have prevailed.

### 4. Reconciliation of Argentinian Society with Its Armed Forces

Despite this, we also need to think about reconciliation beyond those more directly involved in the trials, that is, the victims, their relatives and the members of the military. In this wider sense, the question would be whether the criminal trials somehow have created conditions for a broader form of reconciliation. It could be argued that the trials, by subjecting the military to the legal system, have forced a reconciliation of Argentinian society with its armed forces.

If we were to explore this alternative understanding of 'reconciliation', it could be argued as follows: the criminal trials allowed society to move on by subjecting the military to the legal system and facilitating the beginning of a new democratic society in which the military is incorporated within a civilian hierarchy. From this point of view, the trials were the first step in that direction. In fact, that is why they generated so many revolts on the part of the military which did not want to submit to civil power. Over the years, it was shown that the trials led to the submission of the military under civilian-constitutional rule, and, in that sense, they led to a certain type of structural reconciliation within Argentinian society.

But the process by which the military submitted to civilian authority was not unidirectional. While the trials were the starting point of reconciliation between society and the military, it was a path that included much more than trials and the courts. For example, one of the main facilitators of ensuring the submission of the military to civilian authority was former President Menem who began his government with pardons, and ended it with members of the military in jail. His strategy that began by forgiving the military proved instrumental in their submission to civilian authority.

When we consider reconciliation in these broader terms, we need to distinguish between different periods in recent history of Argentina. The first period would be im-

<sup>6</sup> See, for example, the confessions of Adolfo Francisco Scilingo in Horacio Verbitsky, *El Vuelo*, 1995, Planeta, Buenos Aires (<http://www.legal-tools.org/doc/3aeefc/>).

<sup>7</sup> The systematic plan included the taking of babies from women who gave birth in torture centres and giving them to military families for adoption after the mothers were killed. More than 500 babies have been affected; 120 were identified.

mediately after the dictatorship fell in 1983, when the first democratic government promoted a pioneering truth commission and created the conditions for prosecution of the military – that is, the Junta Trial. The second period falls after the passing of the amnesty laws and the presidential pardons to those convicted for gross and systematic human rights violations in 1986–87. The third period began after the annulment of the amnesty laws in 2003, with the subsequent restart of the prosecutions and the wave of new trials still continuing to date.

During the first period, society made major progress by subjecting the military to accountability under the law, albeit with limited success. In the second period, substantive progress was made in placing the military under civilian control, while at the same time securing impunity for their crimes. In the third period, proper civilian control over the military became firmly established, legal order was further consolidated, and society in general embraced both the need for justice and the idea that the armed forces should obey the democratically elected government.

Some of this consensus has suffered as Argentina's society in recent years has entered a new era of polarization, even if the balance has not yet actually shifted. In a context of increased polarization at the time of the administration of Nestor Kirchner and Cristina Fernandez de Kirchner, the persecution and human rights violations during the dictatorship began to be perceived, by some, as a partisan tactic. The fact that some leaders promoted a story that they were the sole defenders of human rights – and that most human rights organizations rapidly and uncritically embraced such views – did not help to preserve the hard-earned consensus in society.

#### **4.1. The Problem of the Children**

Let me briefly refer to three examples that may help to describe the current situation and its nuances. First, in the last two decades, two new groups have entered the conversation in Argentina: (i) Sons and Daughters for Identity and Justice Against Oblivion and Silence,<sup>8</sup> set up in 1995 by the children of the victims of human rights violations, some of whom have come to hold important political positions; and (ii) Bridges for Legality,<sup>9</sup> an organization of the children and grandchildren of military members who were accused of these crimes, who do not deny the wrongdoings committed, but demand due process of law and fair trials. I have written on some of the shortcomings of the current human rights trials. If the greatest legacy of the trials is prosecuting human rights violations and the subjection of the military to civilian government authority, it is key that these processes are conducted legitimately. Any element that generates doubt or bias towards the trials is not good

<sup>8</sup> Hijos por la Identidad y la Justicia contra el Olvido y el Silencio (HIJOS).

<sup>9</sup> Puentes para la Legalidad.

for effective reconciliation.

The fact that the children of the victims and the perpetrators continue to represent their parents' views says a lot about the lack of progress with regards to reconciliation. We should try to open the door for a different conversation with new generations.

#### **4.2. Denial of 'Systematicity'**

The second example is the recent statement by an official of the current government, a former military man (a so-called Malvinas' hero), who said that there was no 'systematic plan' during the dictatorship to commit gross and systematic human rights violations. The notion and existence of a systematic plan was first established by the court that convicted members of the armed forces in 1985. Since that time, the idea that the armed forces conspired to carry out a comprehensive criminal plan has been widely accepted, except by the many members of the armed forces and a small part of society that has aligned itself with their views.

This statement is important, among other reasons, because it highlights the challenge of the difficult contemporary dialogues in Argentina. Even if the majority agrees that there was a systematic plan, it is important to ensure that those who disagree are allowed to express their views – at least so long as they do not deny the crimes that occurred. There is no doubt that as a representative of the federal government, this official cannot say whatever he wishes. Against this background, his statements have been criticized by others, including by various current officials, and yet he felt the need to speak out and say what others believe and did not dare to express.

#### **4.3. Number of the Disappeared**

The last example of these difficult dialogues is the discussion concerning the number of people who disappeared during the 1976–83 dictatorship. Since the end of the dictatorship, human rights organizations have insisted that there were 30,000 victims of enforced disappearance. The Truth Commission identified almost 9,000. Although it stated that the number was preliminary, there has not been any major variation in this official estimate. However, the number 30,000 has prevailed in the public debate. When it has been suggested that there is no official evidence to support that, victims, relatives and human rights organizations have reacted with outrage. There is a sense that this is the undisputable truth – the one held by victims and their advocates – that cannot and should not be questioned.

#### **5. Reconciliation Depends on Individuals, but the Trials Must Be Completed**

Let me share some concluding reflections based on a conversation with Judge Ricardo Gil Lavedra, one of the judges in the above-mentioned Junta Trial. His opinions are a clear indicator of the vision that I have developed in this policy brief. When I asked him whether he thought that the

trials had contributed towards reconciliation in Argentina, he replied that he is very sceptical.

He said that reconciliation consists of, not collective, but individual acts, depending on how each offended person perceives or feels about what happened: some may be able to forgive, others not. He believes that the trials are positive because they strengthen the role of the rule of law and nerve of the democratic society. The trials with their scenic apparatus highlight the superior value of the law, help to overcome impunity and materialize the principle of equality before the law, as well as ensure that the trials have a restorative function.

He remarked that the trials bring a sense of reparation to the victims, who are heard and have their claims addressed. The defendants retain their dignity as they have a role in the process, as a passive subject, but not as an enemy. It is not about revenge, but about applying the law. The perpetrators of crimes of this nature often feel that they need some mechanism to rationalize what they did. It is obviously difficult for most human beings to assume responsibility for the commission of such serious crimes.

Judge Gil Lavedra stressed the importance of the judicial system as a civilized way of resolving social conflict. He maintained that there is no other way; if there are no trials, it is just revenge. The trials today have the same nature as the Junta Trial, but the latter was a trial during a period of democratic transition. It in effect served as a hinge of the transition away from dictatorship: it was a repudiation of the military coup. There were symbolic aspects of the first trial that are identified with the very notion of democracy. Democracy came with the law, especially when it was being applied against the powerful. The Junta Trial was an unprecedented and quite unusual trial.

The trials that followed were a continuation of the policy of truth and justice established by the Junta Trial, only 25 years later. I share Judge Gil Lavedra's view that it is correct to complete this string of trials, even if a lot of time has passed. We have to finish the trials, close that stage, and do so with our courts. When that stage is over, it will be possible to open and commence a new phase, one that comes with more truth.

There is some reason to be critical of the trials. They were not undertaken as effectively as they could have been. There may have been persons who should not have been prosecuted. Human rights are universal, and in these pro-

cesses and trials there are always some issues, such as what a reasonable period of pre-trial detention is, and whether and how to use house arrest.

As Judge Gil Lavedra's reflections demonstrated to me, the idea of reconciliation is not one that has been embraced by Argentinian society – even less by those more directly affected by the trials. That does not mean that the trials have deepened past divisions or created new ones. The trials have fostered a wider 'reconciliation' within Argentinian society by relying on the law and democratic order, including by requiring the armed forces to respect civilian constitutional authority. This is no small progress in a country where political divisions and populist leaders have always manipulated the law in their favour – a reality that continues to haunt the legacy of these historical trials. New generations of Argentinians should recognize this and help consolidate the gains that have been made, especially those who descend from prominent members of the armed forces.

*Mirna D. Goransky is Fiscal General Adjunta, Procuración General de la Nación Argentina. She formerly served as Prosecutor of the Special Unit to Investigate Human Rights Crimes during the 1976-83 Dictatorship, in charge of the trials against those accused of crimes against humanity in the Navy School of Mechanics and Operation Condor (2006-2012); Prosecutor of the Criminal Policy Unit (1996-1999); and Prosecutor of the first-ever decentralised prosecutor's office in the City of Buenos Aires (1999). She holds a Law Degree from the Law School of the University of Buenos Aires (1976-1982), where she was an Associate Professor teaching courses on criminal law and procedure and constitutional rights (1987-1997). She has published more than 30 articles on criminal law and procedure, human rights and judiciary reform. She won the 2013 M.C. Bassiouni Justice Award.*

**ISBN:** 978-82-8348-072-6.

**TOAEP-PURL:** <http://www.toaep.org/pbs-pdf/89-goransky/>.

**LTD-PURL:** <http://www.legal-tools.org/doc/b9ed7f/>.



**Torkel Opsahl Academic EPublisher**

E-mail: [info@toaep.org](mailto:info@toaep.org)

[www.toaep.org](http://www.toaep.org)

All rights reserved by the Torkel Opsahl Academic EPublisher (TOAEP).