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## Prosecuting International Crimes at National Level: Lessons from the Argentine ‘Truth-Finding Trials’

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### 1. Introduction

Truth-finding trials (*juicios por la verdad*) constitute a novel solution devised by the Argentine judicial system to cope with crimes committed by the military dictatorship that ruled the country between 1976 and 1983. The mechanism at the basis of truth-finding trials is original because it is based on the use of criminal courts, as well as on criminal procedure and methods, to achieve a goal which is different from that typically pursued in criminal trials. Truth-finding trials are deemed to investigate the truth about the dictatorship’s crimes and concerning the victims’ respective fate. Nevertheless, their aim is neither to allow judges to establish criminal responsibility, nor to sanction the perpetrators of crimes.

This mechanism has played a pivotal role within the Argentine transitional process. At the same time it seems to offer a novel solution to the dilemmas faced by transitional justice experienced all over the world; that is, how to reconcile justice with peace and the consolidation of the new regime.<sup>1</sup> Despite its relevance, there are few studies on this topic.<sup>2</sup>

This is why this paper aims at describing the main features and peculiarities that make truth-finding trials an interesting case study. From among the many perspectives taken to evaluate them, that of criminal law and criminal procedure has been selected. Two features under this frame of reference raise certain problematic issues: the hybrid nature of such trials leads to questioning whether the criminal arena is the appropriate place in which to conduct this kind of investigation, which seems more appropriate to a Truth Commission, or whether this mechanism overturns the goals and structure of criminal trial. Secondly, the setting up and regulation of the truth-finding trials are led entirely by judges; this feature

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1 For a comparative analysis of the various institutional practices that have been developed all over the world to face the transitional justice dilemmas, see C. Stahn, ‘The Geometry of Transitional Justice: Choices of Institutional Design’, 2005 *Leiden Journal of International Law* 18, pp. 425-466 and N. Roth-Arriaza & J. Mariezcurrena (eds.), *Transitional Justice in the twenty-first century: Beyond truth versus justice*, 2006. See also M. Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence*, 1998; R. Teitel, *Transitional Justice*, 2000; K. Ambos & J. Lagre (eds.), *Building a future on Peace and Justice. Studies on Transitional Justice, Peace and development*, 2009. For an historical overview of transitional justice, see J. Elster, *Closing the books: Transitional Justice in Historical Perspective*, 2004 and, from a more anthropological perspective, see for instance A. Laban Hinton (ed.), *Transitional Justice: Global mechanisms and local realities after genocide and mass violence*, 2010.

2 See D. Pastor, ‘¿Procesos penales sólo para descubrir la verdad? La experiencia argentina’, in P. Eiroa & J. M. Otero (eds.), *Memoria y derecho penal*, 2008, pp. 349 et seq. Critical remarks on Pastor’s view appear in J. Tamarit Sumalla, ‘Comisiones de la verdad y justicia penal en contextos de transición’, 2010 *InDret - Revista para el análisis del derecho*, no. 1, <<http://www.indret.com/pdf/694.pdf>> (last visited 20 December 2011). See also M. Abregú, ‘La tutela judicial del derecho a la verdad en Argentina’, 1996 *Revista IIDH* 24, pp. 11-47. No English-language literature on the issue is available.

makes one wonder whether such courts are indeed able to set the means and methods to hold a trial, given the absence of a specific norm on the point.

The second part of the paper considers the current situation, in which truth-finding trials have acquired renewed topicality since the Argentine impunity laws were declared unconstitutional, and criminal proceedings have reopened. Notwithstanding the reinstatement of a punitive response, truth-finding trials still take place. The relationship between this hybrid mechanism and the reopened criminal proceedings must be addressed. However, whether truth-finding trials still have a meaning in the context of this new scenario remains open to question. The new pathways of the Argentine transition to democracy and the restoration of a classic punitive paradigm seem to diminish the uniqueness and self-sufficiency of the truth-finding trials as an alternative mechanism to deal with past crimes, perpetrated as they were on a massive scale.

## 2. Explaining the pillars of the mechanism based on both impunity laws and the right to the truth

In Argentina, a democratic regime was restored as recently as 1983. Since then, Argentina has been dealing with serious human rights violations committed by the previous military regime.<sup>3</sup> Argentina adopted different paths in an attempt to move towards democracy. In the aftermath of the collapse of the dictatorship, the first President Raul Alfonsín tested a combination of a selective criminal prosecution<sup>4</sup> with a full discovery of the truth about the facts. This latter activity was charged to a Truth Commission called CONADEP.<sup>5</sup> Shortly afterwards, when new military uprisings threatened the still weak democratic regime, the Government opted for the adoption of impunity as a means to benefit those responsible for State crimes.<sup>6</sup> The Full Stop Law (*Ley de Punto Final*)<sup>7</sup> and the Due Obedience Law (*Ley de Obediencia Debida*),<sup>8</sup> both enacted under the Presidency of Raúl Alfonsín,<sup>9</sup> caused the freeze of any criminal proceedings against perpetrators of the crimes of the dictatorship.<sup>10</sup> At the same time, the valuable work

3 Gross human rights violations committed during the military dictatorship may properly be considered – and have been considered by national courts – as international crimes, and specifically as crimes against humanity, although Argentine law did not expressly provide for this category at the time of the commission of the facts. In fact, the forced disappearances, tortures and murders were committed in the context of a widespread and systematic attack planned and executed by the governing military *Juntas* against a wide band of the civilian population.

4 In the first and most important criminal trial, the so-called *Juicio a las Juntas*, the nine most senior leaders of the Armed Forces who ruled the country during the dictatorship were put on trial; five of them were convicted. See: Cámara Federal Nacional de Apelaciones en lo Criminal y Correccional de la Capital de Buenos Aires, *Causa originariamente instruida por el Consejo Supremo de las Fuerzas Armadas en cumplimiento del Decreto 158/83 del Poder Ejecutivo Nacional (Juicio a las Juntas)*, no. 13/84, Judgment, 9 December 1985. This Judgment provided that the responsibilities of direct perpetrators also needed to be investigated (Para. 30): starting from that provision, many other trials took place, at the very beginning of democracy, against those members of the Armed Forces and the Police who perpetrated the crimes.

5 The CONADEP (*Comisión Nacional sobre la Desaparición de Personas*) was created in 1983 by Decree no. 87 with the task of collecting the testimonies of the survivors and investigating the location and working of the clandestine detention centres. At the end of its 180-day mandate, the Commission collected the results of its investigation in a report that would become known worldwide under the title *Nunca más*. The report has been translated into English and published under the title *Nunca más: The Report of the Argentine National Commission on the Disappeared*, with a Preface by R. Dworkin, 1986.

6 For further details on the steps characterising the transitional justice process in Argentina, see: C.S. Nino, *Radical Evil on Trial*, 1996, and, by the same author, 'The duty to punish past abuses of human rights put into context: the case of Argentina', in N.J. Kritz (ed.), *Transitional justice. How emerging democracies reckon with former regimes*, 1995, pp. 417-43. See also, more recently, P. Parenti, 'The Prosecution of International Crimes in Argentina', in 2010 *International Criminal Law Review* 10, pp. 491-507.

7 Law 23.492 of 23 December 1986 (see <<http://www1.hcdn.gov.ar/dependencias/cdhygarantias/Leyes/ley23492.htm>>, last visited 20 December 2011). This provision barred criminal prosecution for those suspects or defendants who had not then been summoned to provide a statement in relation to the crimes described by Art. 20, Law 23.049 of 13 February 1984 (basically, the dictatorship's crimes) within the compulsory 60-day period after the enactment of the law.

8 Law 23.521 of 4 June 1987 (see <<http://www1.umn.edu/humanrts/research/argentina/ley23-521.html>>, last visited 20 December 2011). This law modified the interpretation of the due obedience clause, by changing a relative presumption into an absolute presumption (*juris et de jure*). The new presumption claimed that subordinated members of the Armed Forces and Police could not be considered guilty of the crimes because they had simply obeyed orders emanating from their superiors.

9 Many argue that this was to discourage a new military *coup*. According to a second perspective, this choice was based on the idea of a selective prosecution, which would have been considered within Alfonsín's strategy from the very beginning, and which would have been justified by the well-known 'theory of the three levels'. See Nino, *supra* note 6.

10 These laws are commonly referred to as 'impunity laws', given their ability to prevent prosecutions from taking place. The next President, Menem, confirmed and somehow completed this absolute impunity by granting a pardon to many defendants and convicted people (see Presidential Decrees 1002-1003-1004 of 1989 and 2741 of 1990). Some of those decrees would later be declared unconstitutional by the

performed by the CONADEP proved inadequate, since its short-term mandate made it impossible to substantiate and even to become aware of all cases of forced disappearance. The alleged full discovery of the truth about the facts had not been attained by the time the Commission finalised its work.

Because of these limitations, both human rights associations and victims' families decided to pursue their demand for truth and justice in alternative ways.<sup>11</sup> In the context of this legal minefield fraught with difficulties, the phenomenon of truth-finding trials has been developing since the 1990s.

It may certainly be claimed that the inability to prosecute the perpetrators because of the two impunity laws is the first circumstance grounding truth-finding trials. The second ground that petitioners found to support their plea for judicial investigation was the right to the truth.<sup>12</sup> This principle was emerging in the context of international law, while human rights bodies were progressively claiming and defining the principle on the basis of a creative approach to the text of the Conventions. The Inter-American Court of Human Rights (IACHR) was the first expressly to claim the existence of this right by extracting it from Articles 1(1), 8, 13 and 25 of the *American Convention on Human Rights* (ACHR). These norms affirm, respectively, States Parties' obligation to respect the rights recognised therein, the right to a fair trial, the freedom of thought and expression, and the right to judicial protection.<sup>13</sup>

According to Inter-American jurisprudence, the right to the truth allows both individuals and collective communities to determine the truth about the crimes, and to establish the factual circumstances as well as the fate of the victims. As a consequence, the dimension of the right to the truth is two-fold. It is granted to victims' families in order to inform them what happened to their relatives, which may be considered as a form of reparation; in this case it focuses on the single case of each victim. However, from a collective point of view, the right to the truth covers the general and wide commission of crimes, within the notion that this helps to prevent a repetition of similar serious violations. In both cases, the State has the duty to investigate and to provide information on the crimes.<sup>14</sup>

Following the IACHR's precedents, many other international organs and domestic courts have gradually recognised the right to the truth, thus showing a growing consensus about its establishment.<sup>15</sup> This right has, furthermore, been used as a foundation for the pleas that gave rise to the truth-finding trials. Thus, international jurisprudence has been elaborating a mere principle that legitimates the establishment of a mechanism not yet anchored to a normative regulation, one that openly challenges the Full Stop and Due Obedience Laws. Nevertheless, those who support this mechanism maintain that the trials are possibly located at the margins of the two laws and, in addition, that truth-finding trials are *sui generis*, i.e., that they cannot properly be considered as a criminal trial. In the supporters' view, the uniqueness of this mechanism demands an increased flexibility with regard to the application of criminal law principles.<sup>16</sup>

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Argentine Supreme Court: see Corte Suprema de Justicia de la Nación (CSJN), *Mazzeo. Julio Lilo y otros s/rec. de casación e inconstitucionalidad*, M.2333.XLII, 13 July 2007, just as were the two impunity laws, as will be demonstrated.

11 Strictly speaking, criminal proceedings took place when the two laws were in force, but they were limited to the crimes of child-kidnaping and alteration in civil status. These crimes were not included in the operational context of the impunity laws (see Art. 5, Law 23.492, and Art. 2, Law 23.521).

12 About the right to the truth, see: Y. Naqvi, 'The right to truth in international law: Fact or fiction?', 2006 *International Review of the Red Cross* 88, no. 862, pp. 245-273; J. Méndez, 'Derecho a la verdad frente a las graves violaciones a los derechos humanos', in M. Abregú & C. Courtis (eds.), *La aplicación de los tratados sobre derechos humanos por los Tribunales locales*, 1997, pp. 517-540.

13 See, among many, IACHR, *Velásquez Rodríguez v. Honduras*, judgment, 29 July 1988 (Para. 181) and *Bámaca Velásquez v. Guatemala*, judgment, 25 November 2000 (Para. 201).

14 See, for instance, IACHR, *Bámaca Velásquez v. Guatemala*, supra note 13, Para. 197 and *ibid.*, Judge Sergio García Ramírez's concurring Opinion, Paras. 17-22.

15 We find it in the *Updated Set of principles for the protection and promotion of human rights through action to combat impunity* (UN Doc. E/CN.4/2005/102/Add.1, 8 February 2005), and also in the Preamble to the 2006 International Convention for the Protection of All Persons from Enforced Disappearance (<<http://www2.ohchr.org/english/law/disappearance-convention.htm>>, last visited 20 December 2011). A Report of the Office of the United Nations High Commissioner for Human Rights contains a *Study on the right to the truth* as well (UN Doc. E/CN.4/2006/91, 8 February 2006). Some recent decisions by the International Criminal Court (ICC) affirm it as a victims' right, by quoting Inter-American jurisprudence: see ICC, *Prosecutor v. Katanga & Ngudjolo Chui*, Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, ICC-01/04-01/07-474, PTC I, Single Judge, 13 May 2008 (Paras. 31-36); *Prosecutor v. Lubanga*, Public Document: Observations from the Legal Representatives of the Victims in response to the documents filed by the Prosecution and the Defence in support of their appeals against the Decision of Trial Chamber I of 14 July 2009, ICC-01/04-01/06-2173, Appeals Chamber, 23 October 2009 (Para. 41 and footnote 78).

16 See H. Schapiro, 'Surgimiento de los "juicios por la verdad" en la Argentina de los '90', 2001-2002 *El Vuelo de Ícaro*, no. 2-3 (special issue), pp. 359-401.

### 3. The first steps in the truth-finding investigations

Truth-finding trials are ‘bottom-up’ procedures in the sense that they originated as a consequence of the pleas presented by human rights associations and the families of the victims of forced disappearance.

The testimony given by the former captain of the Navy Adolfo Scilingo is the first landmark in the history of truth-finding trials. In 1995, the Captain confessed to the journalist Horacio Verbitsky<sup>17</sup> to having participated in barbarous practices known as death flights (*vuelos de la muerte*).<sup>18</sup> Most importantly, Scilingo admitted the existence of records documenting prisoners’ transfers and their presence in illegal detention centres controlled by the military.

The first claims filed at criminal courts were aimed at recovering these records. The claims were based on the right to the truth; they demanded both to establish the circumstances in which the dictatorship’s crimes were committed, and to allow clarity in relation to the prisoners’ fate. Following several heated debates on the compatibility between such demands, on the one hand, and the Full Stop and Due Obedience Laws, on the other, many Argentine courts welcomed this drive to judicial activity. In fact, many courts decided to embark upon judicial activities to achieve the truth about the crimes.

The first timid steps were taken by the Appeals Chamber in criminal matters in the Capital (*Cámara Nacional de Apelaciones en lo Criminal y Correccional*).<sup>19</sup> The first claim was reported under the name of *Méndez Carreras*.<sup>20</sup> It was submitted by the relatives of two French nuns who had disappeared, following their detention in ESMA.<sup>21</sup> As a consequence of this move, *Emilio Mignone* – the President of CELS<sup>22</sup> – filed a claim based on the right to the truth, and claiming the start of investigations in relation to the disappearance of his own daughter.<sup>23</sup> Shortly thereafter, *Carmen Aguiar de Lapacó* – the mother of a *desaparecida*, and a member of CELS – initiated legal proceedings in the context of the same Court.<sup>24</sup> Both claims aimed at issuing a judicial order that could urge the Navy and the Army, respectively, to produce the records each possessed. The Court accepted the two claims, yet the records were not made available by the military since they refused to collaborate.<sup>25</sup>

Facing the Court’s refusal to pursue further investigations, *Carmen Aguiar de Lapacó* filed a claim with the Inter-American Commission of Human Rights (IAComHR). The Commission drew up a report confirming a friendly settlement reached by the plaintiff and the Argentinian State,<sup>26</sup> and claimed the following:

17 These confessions were first published by the Argentinian newspaper *Página 12*. Subsequently, they were reported in the book H. Verbitsky, *El Vuelo. Una Forma Cristiana de Muerte*, 1995.

18 A form of elimination of the prisoners in the illegal detention centres: prisoners were first drugged and, still under the effect of drugs, dumped out of military aircraft into the Atlantic Ocean.

19 All truth-finding trials have been held before the courts of the *federal* judicial system, which deal with issues where the State’s or national services are at stake. This system relies on its own criminal procedure, and differs from *ordinary* justice. The federal proceedings are divided into two stages: the pre-trial investigation is held before the Federal Pre-Trial Courts (*Juzgados Federales de Instrucción*), while the Federal Criminal Trial Courts (*Tribunales Orales Federales*) are responsible for the trial stage. The *Cámaras Federales de Apelaciones en lo Criminal y Correccional Federal* carry out the functions of an appeals chamber when decisions are appealed during the pre-trial stage. Among these Appeals Chambers is the *Cámara Nacional de Apelaciones en lo Criminal y Correccional*, referred to here, which has jurisdiction over the Federal Capital. While each district relies on its own Federal Pre-trial and Trial Court and on its Federal Appeals Chamber, there is only one Cassation Court (*Cámara Nacional de Casación Penal*). This court is responsible for appeals (*recursos de casación*) against first-instance judgments or against decisions made by the Appeals Chamber during the course of pre-trial investigation and appealed on grounds of arbitrary decision. Finally, the Supreme Court (*Corte Suprema de Justicia de la Nación*) too is unique for the whole country, and it carries out the functions of a third-instance court for specific appeals such as ‘extraordinary appeals’ (*recursos extraordinarios*) and issues of constitutionality (*recursos de inconstitucionalidad*).

20 *Cámara Nacional de Apelaciones en lo Criminal y Correccional Federal de la Capital Federal, Méndez Carreras Horacio s/ Presentación en causa n. 761 ESMA*, Register no. 1/95, 20 March 1995.

21 The ESMA (*Escuela de Mecánica de la Armada*) was, under the military regime, one of the most active illegal detention centres.

22 The CELS (*Centro de Estudios Legales y Sociales*) is an association for the protection and promotion of human rights.

23 *Cámara Nacional de Apelaciones en lo Criminal y Correccional Federal de la Capital Federal, Mignone Emilio s/ presentación en causa n. 761 ESMA*, Register no. 3/95, 20 April 1995.

24 *Cámara Nacional de Apelaciones en lo Criminal y Correccional Federal de la Capital Federal, Carmen Aguiar de Lapacó: Petición en el marco de la causa 450 ‘Suarez Mason, Carlos Guillermo y otros s/ homicidio y privación de la libertad’*, 18 May 1995.

25 Respectively, *Cámara Nacional de Apelaciones en lo Criminal y Correccional Federal de la Capital Federal, Causa 761 ‘Hechos ocurridos en el ámbito de la ESMA’*, Register no. 10/95, 18 July 1995, and *Causa 450 ‘Suarez Mason, Carlos Guillermo y otros s/ homicidio y privación de la libertad’*, 16 August 1995.

26 IAComHR, Report 21/00, case 12.059, *Carmen Aguiar de Lapacó v. Argentina*, 29 February 2000.

‘The Argentine Government accepts and guarantees the right to the truth, which involves the exhaustion of all means to obtain information on the whereabouts of the disappeared persons. It is an obligation of means, not of results, which is valid as long as the results are not achieved, not subject to prescription. This right is specifically recognized in relation to the disappearance of Alejandra Lapacó.’<sup>27</sup>

The Commission’s report nominated the Federal Appeals Chambers in criminal matters (*Cámaras Federales en lo Criminal y Correccional Federal*)<sup>28</sup> as the bodies having jurisdiction over truth-finding investigations, and it instructed the creation of a body of *ad hoc* Prosecutors in order to deal with such types of cases. The Commission’s directives may be considered as the spark igniting the truth-finding investigations. Thus, it may be argued that the Inter-American organs played a pivotal role in the development of the mechanism aimed at prosecuting serious human rights violations on a national level.<sup>29</sup>

Starting from the jurisdiction of Buenos Aires, and stimulated by the decisive intervention of the Inter-American Commission, truth-finding activities spread throughout the rest of the country; they arose consistently in the jurisdictions of Bahía Blanca, Chaco, Córdoba, Jujuy, La Plata, Mar del Plata, Mendoza, Rosario, and Salta.

Truth-finding investigations may be considered an utterly innovative phenomenon. At a moment when criminal prosecution was totally paralysed as a consequence of the Full Stop and Due Obedience laws, they were the only mechanism – and, it must be said, a rather imaginative one – through which to fight against this absolute impunity, and therefore played a pivotal role in the Argentine transitional process. Nevertheless, at least two of their constitutive features are problematic from the perspective of the criminal system to which they belong: namely, that they are judge-made and hybrid in nature.

#### **4. Judge-made creation and non-homogeneous solutions**

As it has already been argued so far, truth-finding trials were established thanks to the claims that were filed at different courts by victims’ families and human rights associations. Because the Legislator failed to provide a general regulation of this activity, single courts established pillars and methods of investigation. Thus, it is possible to speak of truth-finding trials as mechanisms of judge-made creation, as single jurisdictions established their own procedures in the absence of a normative specific framework. Such involvement of judges in the process of law-making when establishing procedural norms and formats is not easily accepted within the Romano-Germanic legal tradition. Within this area, the prevailing approach shows quite a strong resistance to accepting the idea that the judge may have a broad role, since it is considered to be an infringement upon the legality principle, as it is strictly conceived within this legal tradition. In addition, the absence of a normative regulation did not allow truth-finding trials to develop uniformly. Courts were in fact responsible for establishing and autonomously forging the mechanism in the districts over which they had jurisdiction. This allowed the emergence of *ad hoc* solutions with regard to local demands and possibilities, and therefore brought about a diversity of solutions. On a national level, this lack of homogeneity clearly has a negative effect on the principle of equality before the Law, thus infringing Article 16 of the Argentine Constitution.

The differences amongst the solutions adopted by each jurisdiction are indeed numerous, and involve pivotal trial formats. For example, some jurisdictions opted for oral hearings in open court,<sup>30</sup> while others preferred the written procedure.<sup>31</sup> In some instances, only one truth-finding trial dealt with differ-

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27 Ibid., Para. 17, no. 1.

28 See note 19, *supra*.

29 On the role played by the Inter-American organs in the domestic prosecution of serious human rights violations, see K. Ambos et al. (eds.), *Sistema interamericano de protección de los derechos humanos y derecho penal internacional*, 2010 and, under the same title, *vol. II*, 2011.

30 This occurs in La Plata, where hearings still take place on Wednesdays. It also occurred in Bahía Blanca, Mar del Plata, and, only in an early, short phase, also in Buenos Aires. See L. Miguel, ‘Grietas en la impunidad. Los Juicios por la Verdad’, in 2006 *Puentes*, no. 17, pp. 25-33, and <<http://www.asociacionnuncamas.org/juicios/verdad/index.htm>> (last visited 15 December 2011).

31 This was the case for Jujuy and Buenos Aires, after a failed attempt to hear the suspects: see <<http://www.asociacionnuncamas.org/juicios/verdad/index.htm>> (last visited 15 December 2011).

ent cases;<sup>32</sup> in other instances, there were as many truth-finding trials as the number of claims filed to the Judicial Authority.<sup>33</sup>

#### 4.1. Issues of jurisdiction

A self-evident example of the disparity of solutions achieved in the field of the truth-finding trials may be found in issues of jurisdiction. As has already been mentioned, the Appeals Chamber on criminal matters in the Capital accepted the responsibility for running truth-finding investigations. The Federal Appeals Chambers in La Plata, Bahía Blanca, and Mendoza did the same, even though their jurisdiction was heavily debated.<sup>34</sup> In La Plata, in particular, the Court held two opposing views. One of the two views – that supported by Judge Leopoldo Schiffrin – regained the crucial argument in relation to the jurisdiction of the Appeals Chambers claimed in Article 10 of Law 23.049 in the earliest years of democracy.<sup>35</sup> According to this norm, the Supreme Council of Armed Forces was assigned jurisdiction in relation to any case involving crimes committed during the dictatorship, while subsidiary jurisdiction was given to the Federal Appeals Chambers. According to Schiffrin, the law mentioned here would prevail over the ordinary jurisdiction criteria by virtue of the principle ‘*lex specialis derogat generali*’, i.e., that a special norm prevails over the general one. This solution, however, received objections from Judge Arturo Frondizi and from the Prosecutor.<sup>36</sup> They supported the view that the investigation has to be carried out before the Federal Pre-Trial Courts<sup>37</sup> on the basis of the principle of the legal – or natural – judge, as amended in Article 18 of the Constitution, and as confirmed in Article XI of the Inter-American Convention on Forced Disappearances of Persons.<sup>38</sup> The debate was finally settled by a resolution issued by the General Prosecutor (*Procurador General de la Nación*).<sup>39</sup> The resolution recommended that all public prosecutors should avoid any obstruction of those courts that were taking legal steps in the field of truth-finding investigations. The General Prosecutor based his decision on the ‘obligation of the judiciary to reconstruct the inquired occurrences historically, and persistently to seek for the truth.’<sup>40</sup> In addition, he stated that the criminal arena was particularly appropriate for conducting investigations because of ‘the broad investigative powers and the considerable support of the State’s investigative organs.’<sup>41</sup> Functions connected with the truth-finding trials were therefore carried out by the Federal Appeals Chamber, and investigations were conducted in accordance with the modalities established by the Chamber itself.<sup>42</sup>

Jurisdiction issues arose also in Mar del Plata about the truth-finding investigations. A collective of human rights associations and unions filed a criminal claim with the local Federal Criminal Trial Court.<sup>43</sup> The Navy immediately appealed to the Cassation Court<sup>44</sup> with respect to jurisdiction. The Cassation Court decided to transfer the trial to the Federal Appeals Chamber. As a consequence, this decision was appealed through an extraordinary appeal before the Supreme Court.<sup>45</sup> The Supreme Court’s judgement<sup>46</sup> underlined the comments made by the General Prosecutor,<sup>47</sup> and stated that the Federal Criminal Trial

32 This was the case for Córdoba, Mendoza, Jujuy and Chaco: see Miguel, *supra* note 30.

33 This was the case for Buenos Aires, La Plata, Bahía Blanca, Mar del Plata, and Rosario: see Miguel, *supra* note 30, and <<http://www.asociacionnuncamas.org/juicios/verdad/index.htm>> (last visited 15 December 2011).

34 *Ibid.*

35 Art. 10, Law 23.049 of 13 February 1984.

36 Judge Frondizi suggested deferring the cases to a Federal Pre-Trial Court on *civil* matters. He believed that a civil proceeding would have been more suitable for conducting truth-finding investigations and redressing crimes. This ability would not characterise criminal prosecution, which was instead the activity of the Federal Appeals Chamber on criminal matters: see Cámara Federal de Apelaciones en lo Criminal y Correccional in La Plata, *Resolución Judicial que abre el juicio por la verdad*, no. 18/98, 21 April 1998. The Prosecutor expressed a similar view: see Fiscalía de Cámara de La Plata, Fiscal General Julio Amancio Piaggio, *Presentación sobre la incompetencia de la Cámara Federal*, 28 August 1998.

37 See the description in note 19, *supra*.

38 1994 Inter-American Convention on Forced Disappearances of Persons, <<http://www.oas.org/juridico/english/treaties/a-60.html>> (last visited 20 December 2011).

39 Procurador General de la Nación (PGN), Dr. Nicolás E. Becerra, *Resolución PGN no. 73/98*, 29 August 1998.

40 *Ibid.* (free translation).

41 *Ibid.* (free translation).

42 Cámara Federal de Apelaciones en lo Criminal y Correccional de La Plata, *Resolución 34/98*, 12 May 1998.

43 See the description in note 19, *supra*.

44 *Ibid.*

45 *Ibid.*

46 Corte Suprema de Justicia de la Nación (CSJN), *Rivarola Ricardo Horacio s/recurso*, R. 392.XXXIX, 27 May 2004.

47 PGN, Dr. L. S. Gonzalez Warcalde, *Dictamen sobre el caso ‘Rivarola’*, reported in the Supreme Court’s judgement in the *Rivarola* case (see

Court should be responsible for the truth-finding investigation. On the one hand, the Court asserted that this solution was more suitable to the structure of the Argentine judicial system and to the functions carried out by each of those courts. However, it was not only a question of jurisdiction. Because of legal economy and practicality, the Supreme Court also noted the opportunity to give continuity to the activity of the Federal Criminal Trial Court, which had already carried out sizeable investigations. The Supreme Court also criticised the absence of any legal provision regarding jurisdiction and formats for truth-finding investigations, and noted that this regulatory vacuum compelled the judges to take decisions over those matters.<sup>48</sup>

Differing from what happened in Mar del Plata, Jujuy, Rosario, Chaco and Córdoba<sup>49</sup> the truth-finding activity was performed by the Federal Pre-Trial Courts,<sup>50</sup> under the criteria of a legal – or natural – judge.

#### **4.2. Summoning the alleged perpetrators to provide statements**

The local character of the solutions adopted for each truth-finding trial also appears in the modality according to which suspects have been summoned to court. This is a particularly delicate matter as it involves the balancing of opposing interests. On the one hand, it was clear that any declaration made by the only people who had any specific valuable information at all about the crimes was particularly important. On the other hand, however, the involvement of these people in the trials required the adoption of the cautious measures aimed at granting a fair trial. Although truth-finding trials are not punitive and do not aim to attribute criminal responsibility, they may be located within the borders of the criminal system. Although at the time a formal charge was impeded by the Full Stop and Due Obedience Laws, it was unclear whether the information provided by the military could be used to charge alleged perpetrators with specific crimes for which they were not covered by impunity laws,<sup>51</sup> or could be employed in the context of criminal trials that were being held outside Argentina – where impunity laws had no value.<sup>52</sup> Thus, although truth-finding trials formally dismissed the alleged perpetrators from acting as defendants, the right not to incriminate oneself had to be observed.

In addressing this delicate matter, two different solutions were elaborated. In La Plata, the Federal Appeals Chamber chose to use the method of giving the 'suspect's statement in court (*declaración informativa*)' – a procedural mechanism mentioned by the previous Criminal Procedure Code.<sup>53</sup> This method was applicable when there were reasonable grounds to believe that the person had committed a crime, but lacked sufficient evidence to lead the alleged culprit to provide a statement as a defendant (*declaración indagatoria*). If this condition did not hold, the judge had, however, the power to summon the subject to provide a suspect's statement, in the event that s/he was the only person in possession of essential information for the following investigation. *Per se*, this summons did not mean that the suspect was undergoing trial; according to the principle of *favor rei*, it meant that the suspect could avail him/herself of the same rights as any defendant. Among these rights was the right to be assisted by an attorney and, above all, the right to refuse to make a statement if such statement could be judged adversely. The application of this tool by the La Plata tribunal certainly took account of the right of non-self-incrimination, although it was actually grounded on an abrogated norm. The new Criminal Procedure Code introduced in 1992 does not in fact include the tool illustrated above. The supporters of the truth-finding trials usually deal with this objection by claiming that 'truth-finding trials are sequels to the criminal proceedings which had opened before the approval of the impunity laws. Therefore, procedural law must

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supra, note 46).

48 'At this stage of the trial, and given the considerable amount of collected proof, it would be inopportune to change the court in which this case has been established in order to take the case to a different court – any court within the context of the Federal Jurisdiction – without observing any specific law, for now'. *Ibid.*, Para. V(2) (free translation).

49 For more details, see: <<http://www.asociacionnuncamas.org/juicios/verdad/index.htm>> (last visited 15 December 2011).

50 See the description in note 19, supra.

51 Or even of the same crimes discovered in the context of the truth-finding investigations, as would happen after the impunity laws were declared unconstitutional. Cf. Section 6, infra.

52 For example, criminal proceedings against the Argentine military took place in Spain (see the notorious *Scilingo* case: Tribunal Supremo, Sala de lo Penal, judgment no. 798/2007, 1 October 2007) and Italy (see the recent conviction of *Alfredo Astiz*: Cassazione Penale, I Sezione, *Astiz, Alfredo Ignacio*, judgment, 18 March 2009).

53 Art. 236.2 of the previous Criminal Procedure Code (*Código de Procedimientos en Materia Penal*), which was abrogated in 1992.

be applied as it stood at that time.<sup>54</sup> This argument is hardly convincing; it certainly clashes with the statements made by the Cassation Court, namely, that ‘in the truth-finding trials, it is necessary to apply the Criminal Procedure Code as it stands at the moment of the trial. This must be observed despite the *sui generis* nature characterising those trials and in accordance with the well-known procedural principle *tempus regit actum*.<sup>55</sup>

In Bahía Blanca, the Federal Appeals Chamber dealt differently with the matter of summoning the alleged culprits to provide statements: the Chamber summoned those responsible for the crimes to testify as witnesses. Balancing different interests, this choice was clearly dictated by the need to obtain exclusive information, albeit to the detriment of the right of non-self-incrimination. As some military men refused to leave statements, the Court decided to arrest them. One of the military, Colonel *Julián Corres*, appealed to the Cassation Court.<sup>56</sup> The decision over his appeal played an important role in the development of truth-finding trials. According to the Cassation Court, the Appeals Court in Bahía Blanca ‘had violated basic and primary principles of constitutional relevance’<sup>57</sup> because of having ordered the alleged perpetrators to make a statement under the obligation to tell the truth. ‘This would have had immediate consequences on their personal freedom, their right of defence, their honour, and their dignity.’<sup>58</sup> Despite the peculiar and hybrid nature of truth-finding trials, the violation would have occurred because ‘there is a latent prosecution having punitive implications, and the Court expressly recognises that no statutory limitations may apply to it.’<sup>59</sup> Furthermore, the pronouncement made by the Cassation Court on the *Corres* case wished for the creation of a legal framework that would allow truth-finding trials to develop homogeneously. The Court stated that ‘the legal handling by the Argentine Government – specifically, in relation to the friendly settlement of the *Lapacó* case before the Inter-American Commission – should quickly be translated into a proposition of specific legislation which should allow the National Congress to issue adequate norms for the proper preservation of the rights at stake.’<sup>60</sup>

## 5. A hybrid criminal trial

Notwithstanding the multiple differences characterising the local experiences of truth-finding trials, it is possible to identify one common trait that could be considered, with good reasons, the only shared feature of the trials all over the country. Specifically, although taking place within the context of the criminal system, each local experience was somehow separate from standard criminal proceedings. This caused a *hybrid* type of trial to emerge.

The criminal system was considered as the most appropriate legal arena in which to conduct truth-finding investigations, since it offers a public, official, and fair dimension. In addition, in its context, the judging body has both investigative and coercive jurisdiction. It has furthermore been argued that, even assuming that demands for truth and justice may be fulfilled through non-conventional legal procedures, ‘it is not possible to ignore that, if the State does not support bottom-up quests for truth by allowing alternative legal procedures, society is inevitably going to put pressure on the existing criminal system.’<sup>61</sup> Truth-finding trials emerged, in fact, within the context of criminal courts. The Salta jurisdiction may be considered as the only exception, as the pursuit of truth was coordinated by a First Instance Court in civil matters.<sup>62</sup>

54 Author’s interview with Hernán Schapiro, former Secretary to the Office of the Prosecutor before the Federal Appeals Chamber in La Plata, 1-2 October 2007.

55 Judgment *Corres, Julián Oscar s/recurso de queja* (see next note), Section II.

56 Cámara Nacional de Casación Penal, *Sala IV, Causa 1996 ‘Corres, Julián Oscar s/recurso de queja’*, Register no. 2787.4, 13 September 2000.

57 *Ibid.*, Section III (free translation).

58 *Ibid.* (free translation).

59 *Ibid.* (free translation).

60 *Ibid.*, No. II of the Judgment (free translation).

61 See Tamarit Sumalla, *supra* note 2, p. 20 (free translation).

62 The Court of first instance with jurisdiction over civil matters acted in application of the ‘*habeas data*’ appeal. This type of appeal is a Constitutional tool to gather private information contained in public records (Art. 43(3) of the Constitution). This solution had been previously applied and legitimated by a pronouncement of the Supreme Court in the *Urteaga* case (CSJN, *Urteaga, Facundo Raúl c/Estado Nacional-Estado Mayor Conjunto de las FF. AA. s/amparo, ley 16.986*, judgment, 15 October 1998). The pronouncement claimed that the trial in question was the perfect application of the plaintiff’s right to be informed on the disappeared brother by public institutions. In particular,

Although truth-finding trials have taken place within the criminal system and have been subject to the application of the Criminal Procedure Code, it is undeniable that the proceedings are not actually criminal trials. By definition, criminal proceedings involve the categories of 'defendant' and 'charge', which are lacking from the hybrid mechanism. Moreover, far from merely reconstructing felonious deeds, criminal proceedings aim to identify individuals responsible for crimes and impose sentences upon them.

In comparison with criminal proceedings, truth-finding trials lack punitive and stigmatising functions, sentences, and formally constituted defendants. As a consequence, victims have more numerous opportunities to be at the centre of the legal scene in truth-finding trials rather than in criminal proceedings. As has already been explained, in all cases, victims actively participated in legal truth-finding investigations. This means that they were able not only to make demands, but also to testify.

The opportunity to narrate personal experiences publicly, in particular in qualified arenas such as criminal courts, may certainly be useful to the victims, even though in the specific case of truth-finding trials criminal courts have been deprived of their usual punitive power. Victims were sharing their tragic experiences with public opinion, and this may have had a cathartic effect. Besides, victims' narrations were particularly important because the atrocity of forced disappearance is grounded on both the silence and the secrecy surrounding the crime. However, the freedom of the narration of facts could lead to non-critical and sterile narratives, ones likely to fail to meet the specific needs of the investigations; also lacking was a broad framework of analysis. If all this combines, as Antoine Garapon argues, 'victims remain at a narrative stage (...). Giving too much space to narration may contradict the requirements of criminal proceedings since narration demands silence and compassion rather than argumentation.'<sup>63</sup>

In this sense, truth-finding trials highlight the growing tendency in international criminal law to acknowledge victims' protagonism, while criminal systems have typically tried to mitigate it. Some authors criticise the tendency as they believe that it could lead to the weakening of defendants' rights.<sup>64</sup> For example, Daniel Pastor argues that, 'according to the current relation for the victims, the role of victims in the context of both criminal law and criminal procedure is over-powered, misrepresenting the function of criminal law and criminal procedure as instruments for the State, and not for the victims.'<sup>65</sup> His critique implies that, in the context of criminal proceedings, overstating the victims' protagonism could lead the State to lose its very public and impartial nature that enables it to neutralise and rationalise conflicts among victims and perpetrators. The same risk appears within truth-finding trials since, as in criminal proceedings, they are characterised by a public dimension, and ultimately attempt to rationalise the facts. This is evident if the various methodologies of truth-finding investigations are examined. The victims' intense participation and essential narrative freedom contrasted with the very feeble involvement of the alleged culprits. The latter did not, in fact, cooperate in reconstructing the truth, although they had been summoned to provide a statement to the court; they found protection in the constitutionally guaranteed right to avoid self-incrimination. Moreover, while the Full Stop and Due Obedience Laws were in force, there was no way of inducing the perpetrators of the crimes to contribute to the construction of the truth. As a matter of fact, no remission or exemption from penalty in exchange of a statement was contemplated, since those laws granted *a priori* and blanket impunity.

This is why the Argentine experience is ultimately different from the South African Truth and Reconciliation Commission.<sup>66</sup> Although both mechanisms aimed at acquiring a public *acknowledgement*

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in the context of this verdict, Judge Petracchi made an interesting observation. According to the Judge, 'to conduct an investigation aimed at finding a victim of forced disappearance (...), if the immediate objective is to gather data on which decisions are based, it seems clear that a criminal trial cannot be a suitable instrument unless the trial's objectives are changed' (Judge Petracchi's Vote, reasoning 8 (free translation)).

63 A. Garapon, *Crimini che non si possono né punire né perdonare. L'emergere di una giustizia internazionale*, 2004, pp. 137-138 (free translation).

64 On the contrary, some authors maintain the case for a more intense victims' participation in criminal trials for international crimes (see for example M. Findlay, 'Activating a Victims' Constituency in International Criminal Justice', 2009 *The International Journal of Transitional Justice* 3, no. 2, pp. 183-206) or for ordinary crimes as well (see, for example, with special reference to the American system, M.D. Dubber, *Victims in the War on Crime: The use and Abuse of Victims' Rights*, 2002).

65 D. Pastor, 'La deriva neopunitivista de organismos y activistas como causa del desprestigio actual de los derechos humanos', 2006 *Jura gentium*, no. II, <<http://www.juragentium.unifi.it/es/surveys/latina/pastor.htm>> (last visited 20 December 2011), (free translation).

66 For a more detailed analysis of the Truth and Reconciliation Commission (TRC), see: A. Lollini, *Constitutionalism and transitional justice in South Africa*, 2010; J. Sarkin-Hughes, *Carrots and Sticks: the TRC and the South-African Amnesty Process*, 2004.

of the facts, in South Africa amnesty was conditional upon perpetrators' giving a full account of their crimes; the existence of a latent threat of criminal accountability in the background partially explains the success of that experience. On the contrary: in Argentina, the lack of any possible accountability in the framework within which the truth-finding trials were created seems to be the reason for the failure to obtain information from the alleged perpetrators of the crimes. Because the military at the time could count on the previous and complete impunity provided by the Full Stop and Due Obedience laws, they had no interest in cooperating with the courts in order to benefit from amnesty.

Since the perpetrators of the crimes failed in any way to contribute to the reconstruction of the facts, the truth that came out was inevitably unilateral: it reflects only the partial view of one of the two affected parties. The overall structure of truth-finding trials fails to put under cross-examination the evidence brought to court, which is essential for an objective elucidation of all circumstances to be reached and the due process standards to be fulfilled.

Thus, the demand that criminal courts should publicly establish the *historical truth* about the dictatorship's crimes<sup>67</sup> may be considered excessive. By applying the truth-finding mechanism, courts may only establish a partial, if not unilateral, truth. This is due to the lack of cross-examination as well as to the absence of cooperation from the alleged culprits.

Finally, truth-finding trials, and criminal proceedings in general, have to deal with another issue that concerns the nature of the established truth. This paper does not aim to deal with the complex debate surrounding it.<sup>68</sup> However, it is important to observe that the judicial findings are not historical truth, since they are limited to the specific case brought before the court. In addition, the fair trial standards set many limitations on the judge's investigative actions, in order to preserve the defendants' dignity and fundamental rights.

The overview has highlighted the unusually hybrid nature of truth-finding trials. These may be seen as forming a new mechanism that shares certain features with criminal proceedings and at the same time is inspired by Truth Commissions.<sup>69</sup> The hybridism renders truth-finding trials a complex arena where the borders between *judicial truth* and *historical truth* are blurred and undefined, and where the criminal system is charged with functions and scopes that, in the end, exceed its natural limits.

## 6. Reopening the criminal proceedings

While the description of truth-finding trials thus far places them as a novel institutional practice in the context of transitional justice, even despite the pitfalls mentioned, their originality needs to be at least partially lessened in light of the recent history of Argentina.

In 2005, the notorious judgement pronounced by the Supreme Court on the *Simón* case declared the unconstitutionality of the Full Stop and Due Obedience laws.<sup>70</sup> This caused the reopening of criminal

67 This demand was expressly recognised by the tribunals: 'The Judge declares that the preceding considerations constitute the *historic truth* about the people, modality, time and place that define the circumstances according to which people were killed': Juzgado Federal III, Juez Garzón de Lascano, *Causa Arroyo, Ruben su presentación en autos Pérez Esquivel Adolfo, Martínez María Elba s/presentación*, Register no. 10.361, 21 March 2003 (free translation, emphasis added).

68 For an overview of the notions of procedural-formal truth vs. historical-material truth, see Pastor, *supra* note 2, and F. Muñoz Conde, *La búsqueda de la verdad en el proceso penal*, 2003. A warning about the risks of confusing the roles of judges and historians may be found in P. Calamandrei, 'Il giudice e lo storico', in 1939 *Rivista di Diritto Processuale Civile*, no. XVII, pp. 105-128 and in C. Ginzburg, *Il giudice e lo storico*, 1991. Interesting considerations about the complex relationship between truth, memory and justice may be found in L. Hennebel & T. Hochmann (eds.), *Genocide Denial and the Law*, 2011 and in Lollini, *supra* note 66. See also, by the same author, 'La commissione sudafricana per la verità e la riconciliazione: la costruzione di una memoria collettiva tra "ipertrofia della storia" e "ipertrofia della sentenza"', 1999 *Critica del diritto*, no. 2-3, pp. 382-397. Within Spanish literature, see the excellent contributions in P. Eiroa & J.M. Otero (eds.), *Memoria y derecho penal*, 2008.

69 Their aim, as was noted, was somehow that of continuing the investigation carried out by the Truth Commission CONADEP yet not completed because of its short-term mandate, even though this activity was now committed to proceed through criminal courts.

70 CSJN, *Simón, Julio Héctor y otros s/privación ilegítima de la libertad*, case no. 17.768, judgment, 14 June 2005. This decision was mainly grounded, once again, in the Inter-American jurisprudence, since it applied to the Argentine impunity laws the same arguments used by the IACHR to declare the invalidity of the Peruvian amnesty law in the *Barrios Altos* case. Basically, the amnesty laws were considered a violation of the international obligation to prosecute and punish serious violations of human rights protected under the Inter-American Convention. This obligation is not explicitly set by the Convention, but the Court has extracted it from its provisions by means of interpretation. For a detailed and critical analysis of this judgment, see E. Malarino, 'Il volto repressivo della recente giurisprudenza argentina sulle gravi violazioni dei diritti umani. Un'analisi della sentenza della Corte Suprema del 14 giugno 2005 nel caso "Simón"', in E. Fronza & G. Fornasari (eds.), *Il superamento del passato e il superamento del presente. La punizione delle violazioni sistematiche di diritti umani*

proceedings against the military, and the restoration of a 'traditionally' punitive approach to the legacy of the dictatorship.

This new phase of the Argentine transitional process was brought about by the vigorous drive of civil society and, particularly, of human rights activists who had lobbied in favour of *tout court* convictions and punishments in relation to State-sponsored crimes.<sup>71</sup> Their view reflects the broader trend in the context of international law to maintain that serious human rights violations – those that may be classified as international crimes – must *always* be prosecuted and punished under criminal law. Although this approach is still debated,<sup>72</sup> since it involves the complex dilemma between peace and justice that transitional societies have to face, it is nowadays maintained by the Inter-American Court's jurisprudence and by many scholars.<sup>73</sup>

Nevertheless, it is necessary to point out that, by the time criminal proceedings have taken place, they may be only minimally useful in relation to both the deterrence and the re-education of those convicted. As the criminals are elderly, sentences are rarely served. This practical criticism counterbalances an objection of a political nature. After a long period when impunity was simply granted, the reopening of *tout court* criminal proceedings could recover the opposition between victims and torturers. From this perspective, the democratic regime might face the threat of failing to reach a national reconciliation. Although it is undeniable that criminal proceedings may allow both the discovery of the truth about criminal actions, and the establishment of a common memory based on a shared tragic past, criminal law is essentially conflictive and punitive.<sup>74</sup>

Finally, criticism has been expressed against the lack of a definite *criterion* to select cases according to their importance or to defendants' identities. Criminal proceedings are mushrooming in all jurisdictions, without a rational selection of cases being provided. These failings may only partially be managed by the official unit within the Office of the Prosecutor (*Procuración General de la Nación*).<sup>75</sup>

## 7. The present-day situation

The new legal framework has clearly affected truth-finding trials. After the reopening of proper criminal trials concerning the crimes of the dictatorship, truth-finding trials need to act in coordination with these. More radically, however, truth-finding trials seem to have been deprived of their very meaning.

### 7.1. Why are truth-finding trials still taking place?

Following the invalidation of the impunity laws, one of the grounds mentioned above supporting truth-finding trials crumbled. Since they had emerged as a consequence of the legally established inability to

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*nell'esperienza argentina e colombiana*, 2009, pp. 31 et seq. Within English literature, see C. Bakker, 'A full stop to amnesty in Argentina. The Simón case', 2005 *Journal of International Criminal Justice* 3, no. 5, pp. 1106-1120.

71 For an overview of the victims' – and human rights activists' – key role in shaping the Argentine transitional process, and a comparison with the South African situation, see M. Humphrey & E. Valverde, 'Human Rights Politics and Injustice. Transitional Justice in Argentina and South Africa', 2008 *The International Journal of Transitional Justice* 2, no. 1, pp. 83-105.

72 See for example the critical remarks by M. Osiel, 'Why Prosecute? Critics of Punishment for Mass Atrocity', 2000 *Human Rights Quarterly* 22, no. 1, pp. 118-147 and, by the same author, *Mass atrocity, collective memory and the law*, 1997.

73 See the key works by D. Orentlicher, 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime', 1991 *The Yale Law Journal* 100, no. 8, pp. 2537-2615, and her more recent 'Settling Accounts Revisited: Reconciling Global Norms with Local Agency', in 2007 *The International Journal of Transitional Justice* 1, no. 1, pp. 10-22: while in the first piece the author derived a general duty to prosecute serious human rights violations in international law, in the second her view is far more nuanced and allows flexibility when such duty is applied at the local level and especially in transitional contexts. See also A. Henkin et al., *State Crimes: Punishment or Pardon*, 1989, and more recently and with a special focus on the Latin-American experience: J. Chinchón Álvarez, *Derecho internacional y transiciones a la democracia y a la paz: Hacia un modelo para el castigo de los crímenes pasados a través de la experiencia iberoamericana*, 2007, especially at pp. 235-269.

74 On the proposal of a new approach embracing both retribution and reconciliation, see, for instance, N. J. Kritz (ed.), *Transitional justice. How emerging democracies reckon with former regimes*, 1995. Very interesting considerations can be found also in C. Bornkamm, *Rwanda's Gacaca Courts. Between Retribution and Reparation*, 2012, although it focuses especially on this peculiar mechanism of traditional criminal justice.

75 *Unidad Fiscal de Coordinación y Seguimiento de las causas por violaciones a los Derechos Humanos cometidas durante el Terrorismo de Estado*, directed by Pablo Parenti. For an overview of the main problems of the ongoing trials for the dictatorship's crimes, see Procuración General de la Nación, *Resolución 13/08* of 13 March 2008 and *Unidad Fiscal de Coordinación y Seguimiento de las Causas por Violaciones a los derechos Humanos cometidas durante el terrorismo de estado, Dictamen* of 9 May 2008, both available at: <[http://www.mpf.gov.ar/index.asp?page=Accesos/DDHH/ufi\\_ddhh1.asp](http://www.mpf.gov.ar/index.asp?page=Accesos/DDHH/ufi_ddhh1.asp)> (last visited 20 December 2011).

prosecute those alleged responsible for the dictatorship's crimes, their existence would have made little sense once this impunity had vanished.

However, as no specific directive had ruled the opening of the truth-finding trials, no legislative intervention established their closure. Once again, the baton was handed over to single judges; somehow, this manoeuvre was a further occasion for judicial 'autarchy' to emerge. As has been previously explained, judicial 'autarchy' is one of the weakest features of the truth-finding trials.

Several jurisdictions opted for the closure of truth-finding trials, sometimes by taking a tacit decision. In some other cases, truth-finding trials still exist even after the reopening of criminal proceedings. This may raise some apparent contradictions. The supporters of the combination of truth-finding trials with criminal proceedings reinforce their choice by claiming the necessity reasonably to allocate scarce financial and human resources within the judicial system.<sup>76</sup> In reply to the objections, according to which this situation would actually lead to the closure of truth-finding trials in order for resources to be fully used in the context of reopened criminal proceedings, it is stated that both judges and registrars who have been operating in the context of truth-finding trials should continue to do so. The officials have been demonstrated as investigating according to high standards, and gaining great experience in the matter. In addition, truth-finding trials would adopt a rather different approach from criminal proceedings. Specifically, they are not bound into one-to-one relationships between victims and perpetrators; rather, they may deal with broader investigations involving networks of criminals linked to networks of victims.

The difference between truth-finding trials and criminal proceedings is both teleological and structural, and translates into a concrete diversity of duties. More precisely, the number of activities performed in the context of truth-finding trials has been limited by the adoption of the new legal framework in Argentina. Truth-finding trials have progressively focused on 'administrative-judicial activities'<sup>77</sup> such as the disinterment and identification of bodies buried as 'unknown', and the creation of a digital database collating all information that is uncovered. In addition, as happens in La Plata where public hearings are still taking place, the focus is on victims' testimonies, families' declarations or, more rarely, statements by members of the Armed and Security Forces, who did not directly participate in State crimes. On the contrary: alleged perpetrators are finally excluded from testifying in the context of truth-finding investigations, since they are summoned in criminal trials. Once this exclusion has been stated, the need to grant the right of non-self-incrimination may be considered as superfluous.

Nevertheless, these new pathways in truth-finding investigations appear to confirm the idea that these investigations are a sort of preliminary investigative phase, in advance of the pre-trial stage of criminal proceedings, since their aim is to gather evidence that will be used in the context of a criminal trial. Thus, somehow informally, proceedings have been increased by one further stage, one not mentioned in the legislation. Once again, truth-finding trials seem to challenge the standards of legality which are valid in a civil-law system.

## *7.2. Issues in the contexts of coordination and use of the evidence*

Besides this fact, the co-existence of truth-finding trials and criminal proceedings has caused problems as to the coordination of the respective activities.

Firstly, the judges who dealt, or have been dealing with, truth-finding activities need to evaluate – in the light of fair trial standards – whether the issue of incompatibility affects the reopened criminal proceedings. Thus far, this issue has emerged only once, and it was resolved thanks to the abstention of the judge in question.<sup>78</sup> However, it is arguable whether it is possible to apply here the legal obligation for a judge to abstain in order to preserve the impartiality of the judging body.<sup>79</sup> It is still unclear whether the

76 Author's interview with Juan Ernesto Tétaz, Member of the Registrar (*Secretaría Unica*) before the Federal Court of Appeals in La Plata, 11 September 2007.

77 Author's interview with Judge Horacio Cattani, Judge of the Cámara Federal de Apelaciones en lo Criminal y Correccional Federal de la Capital Federal, 17 October 2007.

78 This happened to Horacio Cattani, as he related in an interview with the author: see previous note.

79 Argentine Criminal Procedure Code, Art. 55.

first trial in which the judge was involved (a truth-finding trial) may be considered as a criminal proceeding and the normative vacuum on the matter fails to provide any help.

However, the most controversial feature of the relationship between truth-finding trials and reopened criminal proceedings is the use of evidence collected in the context of truth-finding trials. By means of truth-finding trials it was possible to collect a wealth of testimonies, documents and exhibits. They were useful evidence of many crimes, finding information on the identity of certain victims, and identifying the profiles of certain perpetrators. Had the evidence not been gathered, it would have become lost in the meandering judicial inertia caused by the Full Stop and Due Obedience Laws.

It seems therefore thoroughly logical that the criminal proceedings dealing with the same cases as truth-finding trials may refer to the evidence gathered therein, especially where it is objectively impossible to reproduce it in court. This has occurred in numerous criminal proceedings that either took place or were reopened after the declaration of unconstitutionality of the impunity laws. For instance, the *Etchecolatz*<sup>80</sup> and *Von Wernich*<sup>81</sup> trials – the first two criminal proceedings to end in La Plata after 2005 – used the evidence gathered within the truth-finding trials.<sup>82</sup> This also happened in the context of the *ESMA* case in Buenos Aires,<sup>83</sup> and in the *Alsina* case in Córdoba.<sup>84</sup> In these criminal proceedings, it was clearly acknowledged that the evidence at the basis of the conviction is available 'thanks to the operations run by the judicial system starting from the so-called truth-finding trials which, evidently, are sources of ongoing knowledge'.<sup>85</sup>

Such a perspective could confirm the doubts concerning the integrity of the goal of the truth-finding trials. Far from simply being the context where facts could be reconstructed with no punitive implications, from the very first moment truth-finding trials may have aimed at gathering evidence that could be used in proper criminal proceedings once impunity laws were invalidated. Thus, truth-finding trials would not be instances of *criminal law with no punishment*, nor an alternative to criminal proceedings. As temporary solutions, truth-finding trials would never have discarded the hypothesis of criminal prosecution and punishment for individuals responsible for the crimes committed by the dictatorship.<sup>86</sup> In the early days, this hypothesis belonged to the sphere of eventuality; today, it is a concrete option. However, it is hard to believe that any collection of evidence may be conducted in accordance with specific prescriptive rules used in criminal proceedings to protect the defendants' rights, if such collections do not occur within the framework of a criminal proceeding. This is particularly true when the rigorous standards for collecting and evaluating evidence are not observed, when cross-examination is not guaranteed, and when the fair trial standards are not respected.

Following this observation, it is questionable whether the evidence collected in the context of truth-finding trials may be used in the context of reopened criminal proceedings. To rigorously respect the procedural rules according to which evidence must be collected in the course of the trial, it is necessary to hear the witnesses again in court even if they have already been heard in the context of truth-finding trials. In addition, criminal courts shall not take account of any evidence gathered without the standard cross-examination, or without respecting the defendants' rights.

Accounting documents is generally not an issue. In fact, criminal proceedings tend to allow the use of this type of evidence even though it has been collected in different frameworks such as in administrative contexts. However, dealing with the testimonies is more problematic. On the one hand, as has been stated, truth-finding investigations usually produce a unilateral reconstruction of circumstances,

80 Tribunal Oral en lo Criminal Federal no. 1 La Plata, *Causa Etchecolatz, Miguel Osvaldo, fundamentos de la sentencia*, judgment, 19 September 2006.

81 Tribunal Oral en lo Criminal Federal no. 1 La Plata, *Causa Von Wernich Christian, fundamentos de la sentencia*, judgment, 1 November 2007.

82 The verdicts closing these two trials contain an explicit reference to the information gathered in the context of the truth-finding trial.

83 Juzgado Federal N. 12, Capital Federal, *ESMA, Hechos denunciados como ocurridos en la Escuela de Mecánica de la Armada, Resolución que reabre las causas*, Register no. 14217/03, 16 September 2003.

84 Cámara Federal de Apelaciones en lo Criminal y Correccional in Córdoba, Sala B, *Alsina, Gustavo Adolfo y otros s/ Imposición de tormentos agravados y homicidio calificado*, no. 246/2008, 21 October 2008.

85 Judgment *Von Wernich*, supra note 81, p. 36 (free translation).

86 Judge Leopoldo Schiffrin seems to have a similar view, as he argues: 'From the very beginning, there was the idea that criminal proceedings may have taken place, because the Due Obedience Law had already been in debate, and it was thought that they would have been abrogated'. Author's interview with Leopoldo Schiffrin, at that time President of the Cámara Federal de Apelaciones in La Plata, 5 September 2007.

through narrations made only by victims. This may hardly be accepted in the context of criminal proceedings that are based on the golden rule of cross-examination. On the other hand, hearing victims again in court in the context of criminal trials raises the issue of their *secondary victimisation*.<sup>87</sup> By being forced to give the same testimonies repeatedly, victims would be asked repeatedly to endure the horror of narrating tragic circumstances. Criminal trials would thus no longer be cathartic, but contexts of prolonged suffering. It has frequently been suggested that nowadays victims should be exempted from giving statements because this would prevent their having to re-experience trauma; however, it should be possible to acquire in criminal proceedings the statements provided in the context of truth-finding trials. In relation to criminal procedure rules, deciding whether it is possible to use in trial the statements given by individuals who are allegedly responsible for the crimes is, comprehensibly, the most crucial issue. These individuals, who are currently defendants, benefit from the constitutionally protected right not to incriminate themselves. The principle would be violated if it were possible to use in trial any of the statements given by the defendants within the truth-finding trials. On these occasions, the defendants knew that they could benefit from utter impunity in relation to the crimes committed and therefore could give, without worrying about its consequences, a statement that in theory implied self-incrimination.

For this reason, the courts have decided that the accused shall provide a statement in the capacity of a defendant, and with the application of the envisaged guarantees, namely, the exemptions from swearing an oath and from telling the truth, the assistance of an attorney, and the right to remain silent. In La Plata, for example, it was concluded that the alleged perpetrators who had provided a statement during truth-finding trials should give a new statement as a defendant.

In the context of the *Alsina* case in Córdoba, it was felt necessary to invalidate the statements given by a few subjects who testified in the context of ‘historical truth-finding trials’ and are now considered as defendants in criminal trials in relation to facts they had described in their previous statements. This decision was enacted through a Resolution,<sup>88</sup> and aimed at avoiding violations of defendants’ constitutional rights. In reality, as is claimed by the Court itself, this invalidation was not necessary since it would have been sufficient merely to avoid the production of such statements in evidence.

There is no impediment to defendants’ ratifying previously produced statements in the context of criminal proceedings; but the statements shall, though, be read in their presence during the hearings. In addition, an attorney shall assist the defendant while the latter is exempted from swearing an oath and telling the truth. Under these conditions, the statements could be used as evidence in the context of criminal proceedings. However, it is hard to believe that the current lack of cooperation of alleged perpetrators who have benefited from amnesty could suddenly be replaced by a more collaborative approach; this is currently the situation, as classic accountability formats have been fully restored.

The use of statements made in the context of truth-finding trials by subjects who are now defendants in criminal proceedings may be considered as the manifestation of a tension – a characteristic of any criminal proceeding – between, on the one hand, the demand to know the truth about a crime and to punish its perpetrators and, on the other, the need to respect the guarantees which both the Constitution and the criminal system grant to defendants in the protection of their rights, freedom and dignity. Given the importance of the interests at stake, it is not easy to identify a solution that allows the fulfilment of both of these, opposing, needs. Certainly, in a modern constitutional and democratic State such as post-1983 Argentina, it is not acceptable to abrogate or suspend the guarantees granted to defendants by the Constitution and the criminal system. This also holds in the case of heinous crimes such as those committed by the military dictatorship in Argentina.

87 See P. Parenti, ‘La persecuzione penale di gravi violazioni di diritti umani in Argentina’, in Fronza & Fornasari, *supra* note 70, pp. 13 et seq. and, for a general analysis of secondary victimisation, J. Doak, *Victims’ Rights, Human Rights and Criminal Justice: Reconceiving the Role of Third Parties*, 2008 (especially Chapter 2).

88 Juzgado Federal no. 3 in Córdoba, *Alsina, Gustavo Adolfo y otros s/imposición de tormentos agravados y homicidio calificado*, Register no. 17.468, 14 September 2007, Para. III.

## 8. New frontiers for truth-finding trials

Nowadays, truth-finding trials seem to have crossed their original borders and have expanded in two directions.

In one direction, within Argentina itself, a recent pronouncement made by a Pre-Trial Court in Buenos Aires<sup>89</sup> was achieved thanks to a model based on truth-finding trials; that is to say, an investigation with no punitive implication, based on the right to discover the truth. The resolution concerns the slaughter of Armenian people perpetrated by the Turkish Government at the beginning of the twentieth century.

However, this *declarative* resolution – the result of a claim filed by the descendants of some of the Armenian victims – transcends the limitations so far granted to truth-finding trials. Firstly, it regards facts that occurred in a foreign country, and have no direct link with Argentina.<sup>90</sup> Then, the resolution claims the Turkish State as responsible for genocide, generating a dangerous confusion among different legal frameworks. In fact, the *historic and/or international responsibility* of a State is claimed here by a *criminal* court. From these two observations, it may be argued that the resolution may be seen as a clear excess and as a form of *degeneration* of the truth-finding trials.

On the other hand, the Argentine experience seems to have inspired the Spanish judge Baltasar Garzón<sup>91</sup> and his well-known pronouncement aimed at opening trials investigating cases of forced disappearance during Franco's dictatorship. This would originate a phenomenon similar to the truth-finding trials. Therefore, with reference to Spain, it is possible to speak of the same doubts and the same issues that have been illustrated with reference to the Argentine experience – a large proportion of which may be found in the objection moved by the Prosecutor<sup>92</sup> against Garzón's pronouncement.<sup>93</sup>

The relevance of Argentine truth-finding trials as an *experiment* to deal with State crimes in transitional frameworks is therefore asserted by these two recent pronouncements. Nevertheless, their possible value as a model for transitional practices does not prevent their limitations and pitfalls from being noted; on the contrary, these critical remarks may serve to overcome those pitfalls in order that future cases of transitional justice may benefit from this experience.

## 9. Conclusions

Argentine truth-finding trials devise a possible solution for dealing with past crimes in the context of transitional societies. While their occurrence and features strictly depend upon the specific Argentine history, they may serve – and have served – as a model for other similar contexts and provide a response to victims' and societies' demand for truth and justice.

Nonetheless, an evaluation of the truth-finding trials from the perspective of criminal law and procedure – since they are held within the criminal system – reveals certain problematic features that cannot be ignored. From one perspective, their totally judge-made creation and regulation seems to infringe upon the legality principle – as it is conceived in a Romano-Germanic system such as that of Argentina – as well as the principle of equality before the law, since it has caused a plurality of different mechanisms to arise.

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89 Juzgado Federal de Buenos Aires, Judge Norberto Oyarbide, *Resolución declarativa de los sucesos históricos conocidos como el genocidio del pueblo armenio – años 1915-1923*, 1 April 2011.

90 The only link was the Argentine nationality of the petitioners.

91 Juzgado Central de Instrucción no. 5, Audiencia Nacional de Madrid, Judge Baltasar Garzón, *Diligencias Previas Proc. Abreviado 399/2006 V*, 16 October 2008, and *Sumario (Proc. Ordinario) 53/2008 E*, 18 November 2008.

92 Fiscal Jefe de la Audiencia Nacional, Javier-Alberto Zaragoza Aguado, *Recurso de Apelación Directo a la Sala de lo Penal de la Audiencia Nacional*, 20 October 2008. On 28 November 2008, the Plenary of the Sala de lo Penal de la Audiencia Nacional gave course to the appeal presented by the Prosecutor, and declared that Judge Garzón had no jurisdiction in relation to forced disappearances committed during Franco's regime.

93 For an analysis of Garzón's resolutions, see: A. Gil Gil, '¿Es posible todavía la persecución penal de los crímenes de la guerra civil y del franquismo?', in M. Requena (ed.), *Luces y sombras de la seguridad internacional en los albores del siglo XXI*, vol. I, 2010, pp. 225-244. Garzón's proposal soon transformed into a political dispute. An extremely conservative organisation sued the judge for *prevaricación* (this crime, according to the Spanish Criminal Code, occurs when a judge voluntarily sentences unfairly). The complaint is currently being heard before the Supreme Court, which has temporarily suspended Garzón from his duties as a judge.

From another perspective, the hybrid nature of these trials implies a sizeable modification of the formats and aims of criminal trial, thereby challenging specific fundamental principles of criminal law and procedure such as the fair trial standards.

These critical remarks about two basic features of the mechanism seem to suggest, in the present author's view, that the criminal trial setting is probably not the best arena in which to undertake a truth-finding activity. Investigations aimed at finding out this *truth* about the crimes and the disappeared victims' whereabouts would probably be best suited to the context of an administrative proceeding or of a Truth Commission – in this case, a new body, outside the judicial system, that should continue the work performed by the CONADEP. Otherwise, the criminal trial would not only be deprived of its essential features, but also burdened with a complex task that it cannot properly perform.

Finally, the description of the recent shift from a situation of general impunity to the full recovery of accountability for past crimes suggests the conclusion that truth-finding trials have not been a real alternative mechanism to criminal prosecution; they are merely a temporary means of collecting evidence that could be used in criminal trials once the impunity laws would be invalidated. In a nutshell, the Argentine experience would not really offer a non-punitive mechanism to overcome the heavy burden left behind by the military dictatorship; on the contrary, the truth-finding trials would support the case for pursuing both full accountability *and* the full discovery of truth.