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REVIEW ARTICLE

*Chiara Chisari**

THE JUDICIAL IMPLEMENTATION OF THE RIGHT TO THE TRUTH: SOME THOUGHTS ON THE ARGENTINIAN EXPERIENCE OF THE *JUICIOS POR LA VERDAD*

Abstract: *Safeguarding the right to the truth has become crucial in dealing with systematic violations of human rights. Especially in contexts of transition to democracy, telling the truth is considered of utmost importance for fighting against impunity and promoting peace. Nevertheless, scholars have paid little attention to the judicial implementation of this right and, in particular, to the value of judicial protection of the right to the truth. The article aims to fill this gap by discussing the* Juicios por la Verdad *(the Truth Trials), a unique experience promoted by the Argentinian civil society in the wake of the military dictatorship. Specifically, it investigates the impact of the judicial recognition of the right to the truth on both the victims' lives and society's attempt to come to terms with the past. The analysis shows that the right to the truth may serve as a tool for knowledge, acknowledgment, strengthening the rule of law and, to an extent, for justice.*

Key words: right to the truth, judicial implementation, value of the judicial truth, *Juicios por la Verdad*, the Truth Trials, Argentina, transitional justice.

1. Introduction

In the aftermath of systematic violations of human rights, it has become apparent that victims, their families, and societies have the right to know the truth about what happened. This, in turn, requires States to investigate the facts, in order to "provide all relevant information concerning the commission of the alleged violation[s], the fate and whereabouts of the victim[s] and, where appropriate, the process by which the alleged violation[s] [were] officially authorized."[1] Full and effective protection of

* PhD Student, University of Milano-Bicocca and the Union University, Belgrade; e-mail: c.chisari@campus.unimib.it

1 Human Right Council, *Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff*, UN doc. A/HRC/24/42 (28 August 2013), para. 20.

the right to the truth is considered of paramount importance for fighting against impunity and preventing the recurrence of future crimes.[2] However, the subject is not without debate.

Most of the literature on the topic has concentrated on the legal sources and the legal status of this right. Specifically, attention has been paid to the normative foundations of the right to the truth, especially in light of its scarce recognition in legally binding texts. Indeed, from America to Europe and Africa, the right to the truth emerges as the product of the work of courts and mainly international organs rather than legislations. Along these lines, research has also focused on international jurisprudence, wondering how judges have framed the non-codified right to the truth in legal terms.[3]

From a different angle, scholars have also discussed the mechanisms for implementing the right to the truth and its value for individuals and societies. They have mainly focused on truth commissions, with the aim of assessing their functioning and influence in reconciliation processes and peace building.[4] However, less attention has been paid to the judicial mechanisms for implementing the right to the truth and, in particular, to the effects of the courts' protection of this right in terms of its impact on people's lives. This is probably because the right to the truth is not clearly positivized, a circumstance that raises doubts about its possible exercise. Additionally, courts are traditionally not considered the best venue for bringing the truth to light in the face of widespread violations:[5] "trials

2 See, among others, Commission on Human Rights, *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 (18 February 2005), Principle 2.

3 See part 2 of this article.

4 On truth commissions, see, *ex multis*, Allen, J., 1999, Balancing Justice and Social Unity: Political Theory and the Idea of a Truth and Reconciliation Commission, *The University of Toronto Law Journal*, Vol. 49, No. 3, pp. 315–353; Freeman, M., 2006, *Truth Commissions and Procedural Fairness*, Cambridge, Cambridge University Press; Hayner, P., 2011, *Unspeakable Truths. Transitional Justice and the Challenge of Truth Commissions*, New York, Routledge.

5 This is especially the case when courts are compared to truth commissions. For instance, the Sierra Leone Truth and Reconciliation Commission reported that "Just as the Commission may address the 'right to truth' component of the struggle against impunity better than the Special Court for Sierra Leone, the contrary may be the case with respect to the 'right to justice' component." Sierra Leone Truth and Reconciliation Commission, *Witness to Truth: Report of the Sierra Leone Truth and Reconciliation Commission*, Vol. 1, Chapter 1, para. 80 (https://www.sierraleonetrc.org/index.php/view-the-final-report/download-table-of-contents, 28. 2. 2022). See also Haldemann, F., 2008, Another Kind of Justice: Transitional Justice as Recognition, *Cornell International Law Journal*, Vol. 41, No. 3, p. 725.

seem at best imperfect means to tell the complexity and depth of large-scale evil."[6]

While there might be good reasons to emphasize the narrow nature of judicial truth in relation to the intricacies of the social, political, and historical dynamics pervading contexts torn apart by serious human rights violations,[7] some cases exist that prompt reflection on the role that the right to the truth could play in these situations. The reference here is to the *Juicios por la Verdad* (the Truth Trials): situated between truth commissions and classical criminal proceedings, they comprise a judicial procedure without criminal sentencing or punishment, whose purpose and scope are generally limited to truth-telling. Although relatively unknown, they are a unique experience, stemming from the exercise of the right to the truth by the Argentinian civil society as an effort to fight against impunity, know the circumstances of past abuses and strengthen democracy.

This article endeavors to consider the Truth Trials as an emblematic example of a judicial mechanism for implementing the right to the truth. In view of their specific characteristics, they provide an opportunity to shed light not only on how the right to the truth can be assured while still being under construction, but also on the significance of its recognition by courts. Despite the possible limitations of judicial truth and the uncertainties surrounding the legal status of the right to the truth, the main argument of the present work is, indeed, that securing this right could be a valuable tool in the face of serious human rights violations, particularly in post-conflict settings. Along these lines, the value of the judicial implementation of the right to the truth for Argentinian society and the impact it has had on the lives of the victims will be investigated. This will also contribute to the debate on whether the right to the truth should be firmly recognized.

The article develops as follows. Part 2 maps the chronology of the development of the right to the truth, referring to the main international documents that mention it, as well as Inter-American and European jurisprudence on the subject. Part 3 focuses on the Argentinian experience

6 Haldemann, F., 2008, p. 725.

7 On the subject of judicial truth and possible divergences between judicial and historical truth, see, *ex multis*, Borgna, P., 2019, Verità storica e verità processuale, *Questione giustizia*, (https://www.questionegiustizia.it/articolo/verita-storica-e-verita-processuale-09–10–2019.php, 31. 3. 2022); Calamandrei, P., 1939, Il giudice e lo storico, *Rivista di Diritto Processuale Civile*, No. 17, pp. 105–128; Hayner, P., 2011, pp. 107–109; Ricoeur, P., 2006, *Memory, History, Forgetting*, Chicago, The University of Chicago Press; Summers, R.S., 1999, Formal Legal Truth and Substantive Truth in Judicial Fact-Finding – Their Justified Divergence in Some Particular Cases, *Law and Philosophy*, Vol. 18, No. 5, pp. 497–511.

in dealing with human rights atrocities committed in the Dirty War, from the first trials and the adoption of amnesty laws and pardons to the Truth Trials. It explains the emergence and functioning of the Truth Trials and their impact on the fight against impunity. Part 4 provides insight into what the judicial recognition of the truth has signified for Argentinian victims and society in terms of knowledge, acknowledgment, strengthening the rule of law and justice. In view of the paucity of empirical studies on different transitional justice mechanisms,[8] including the Truth Trials, the arguments are mainly based on secondary literature and reports of human rights organizations involved in the Truth Trials, which are then put in the context of the doctrinal consideration of the effects produced by transitional justice mechanisms. Part 5 offers conclusions.

2. The Right to the Truth

In December 2010, the General Assembly of the United Nations established the International Day for the Right to the Truth[9] and, in September 2011, the Human Rights Council appointed a Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence.[10] Although lacking proper legal significance, these are two crucial events that mark the international community's awareness of the gradual establishment of the right to the truth.

Trying to map chronologically the different stages of its development,[11] the right to the truth has its roots in international humanitarian law.[12] Specifically, Articles 32 and 33 of Additional Protocol I to the

8 This sort of empirical work is in its infancy and focuses mainly on assessing the impact of truth commissions: Velez, G., Twose, G., López-López, W., Human Rights and Reconciliation. Theoretical and Empirical Connection, in: Rubin, N. S., Flores, R. L. (eds.), 2020, *The Cambridge Handbook of Psychology and Human Rights*, Cambridge, Cambridge University Press, p. 543.

9 General Assembly, *Proclamation of 24 March as the International Day for the Right to the Truth concerning Gross Human Rights Violations and for the Dignity of Victims*, UN doc. A/RES/65/196 (3 March 2011).

10 Human Rights Council, *Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence*, UN doc. A/HRC/RES/18/7 (13 October 2011), renewed in 2020 in Human Rights Council's Resolution UN doc. A/HRC/RES/45/10 (12 October 2020).

11 This paragraph is mainly based on previous work by Pagotto, T., Chisari, C., 2021, Il riconoscimento del diritto alla verità dall'America latina all'Europa. Evoluzioni e prospettive di un diritto in via di definizione, *Rivista di Diritti Comparati*, No. 2, pp. 57–90.

12 For a comprehensive overview of the evolution of the right to the truth, see, among others, Groome, D., Principle 2. The Inalienable Right to the Truth, in: Haldemann, F., Unger, T., (eds.), 2018, *The United Nations Principles to Combat Impunity. A Com-*

Geneva Conventions[13] recognize the "right of families to know the fate of their relatives" and require of Parties to the conflict to search for missing persons.[14]

The right to the truth became an established part of international and regional human rights bodies' discourse in the 1970s, in light of the emergence of the practice of enforced disappearances in Latin America. Without claiming to be exhaustive, it is worth remembering the first resolutions adopted by the UN General Assembly on the subject,[15] concerning missing persons in Chile.[16] Although not explicitly referring to the right

mentary, Oxford, Oxford University Press, p. 59 etc.; International Commission of Jurists, 2015, *International Law and the Fight against Impunity. Practitioners' Guide No. 7* (https://www.icj.org/wp-content/uploads/2015/12/Universal-Fight-against-impunity-PG-no7-comp-Publications-Practitioners-guide-series-2015-ENG.pdf, 5. 3. 2022), pp. 227–268; Klinkner, M., Davis, H., 2020, *The Right to The Truth in International Law: Victims' Rights in Human Rights and International Criminal Law*, London, Routledge; Méndez, J. E., Bariffi, F. J., 2012, Truth, Right to, International Protection, *Max Planck Encyclopedias of Public International Law* (https://opil.ouplaw.com/home/mpil, 29. 3. 2022); Rodríguez Rodríguez, J., 2017, *Derecho a la verdad y Derecho internacional en relación con graves violaciones de los Derechos Humanos*, Madrid, Instituto Berg; Stamenkovic, N., 2021, *The Right to Know the Truth in Transitional Justice Processes. Perspectives from International Law and European Governance*, Leiden, Brill Nijhoff, p. 77 etc.

13 International Committee of the Red Cross, *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)* (8 June 1977).

14 Under the Geneva Conventions of 12 August 1949, belligerent Parties shall search for, identify and collect information on combatants and missing, dead or detained persons. Moreover, they must set up appropriate bodies to handle the information. See International Committee of the Red Cross, *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention)* (12 August 1949), Arts. 18 and 19; International Committee of the Red Cross, *Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention)* (12 August 1949), Art. 122 etc.; International Committee of the Red Cross, *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)* (12 August 1949), Arts. 16 and 136 etc.

15 General Assembly, *Protection of Human Rights in Chile*, UN doc. A/RES/3219 (6 November 1974); General Assembly, *Protection of Human Rights in Chile*, UN doc. A/RES/3448 (9 December 1975); General Assembly, *Protection of Human Rights in Chile*, UN doc. A/RES/31/124 (16 December 1976); General Assembly, *Human Rights in Chile*, UN doc. A/RES/34/179 (17 December 1979).

16 More about the international community's fight against enforced disappearances, in, among others, Citroni, G., Scovazzi, T., 2009, Recent Developments in International Law to Combat Enforced Disappearances, *Revista Internacional de Direito e Cidadania,* No. 3, pp. 89–111; Scovazzi, T., Citroni, G., 2007, *The Struggle against Enforced Disappearance and the 2007 United Nations Convention*, Leiden, Martinus Nijhoff Publisher.

to the truth, they called upon the Chilean authorities to ensure human rights in compliance with their conventional duties and urged them to disclose to the victims' families all that could be reliably established about the fate of persons reported to have disappeared.[17]

A few years later, driven by similar concerns, the Inter-American Commission on Human Rights (the IACHR) advocated for a free-standing right to the truth:[18] "Every society has the inalienable right to know the truth about past events, as well as the motives and circumstances in which aberrant crimes came to be committed [...]. Moreover, the family members of the victims are entitled to information as to on what happened to their relatives."[19] Since the American Convention on Human Rights (ACHR) does not expressly mention the right to the truth, the Commission gradually turned to framing its legal basis, which has been identified to include the rights to a fair trial (Art. 8 ACHR), to judicial protection (Art. 25 ACHR) and to seek information (Art. 13 ACHR),[20] read in conjunction with the States' obligation to respect rights and to carry out effective investigations (Art. 1 ACHR).[21]

17 Several UN bodies have over time adopted resolutions and reports stressing the importance of the right to the truth in order to fight impunity and protect human rights. See, *inter alia*, Human Rights Council, *Right to the Truth*, UN doc. A/HRC/RES/12/12 (12 October 2009); Human Rights Council, *Report of the United Nations High Commissioner for Human Rights on the Right to the Truth*, UN doc. A/HRC/15/33 (28 July 2010); Human Rights Council, *Right to the Truth*, UN doc. A/HRC/RES/21/7 (10 October 2012); General Assembly, *Right to the Truth*, UN doc. A/RES/68/165 (21 January 2014).

18 Although the right to the truth was initially conceived by the Commission within the context of enforced disappearances, it has gradually extended to other human rights violations, such as extrajudicial executions and torture.

19 IACHR, *Annual Report of the Inter-American Commission on Human Rights 1985–1986*, OEA/Ser.L/V/II.68, Doc. 8 rev. 1 (26 September 1986), Chapter 5. For an overview of the evolution of the right to the truth in the Inter-American System, see Dykman, K., 2007, Impunity and the Right to Truth in the Inter-American System of Human Rights, *Iberoamericana*, Vol. 7, No. 26, p. 47 etc.; Ferrer Mac-Gregor, E., 2016, The Right to the Truth as an Autonomous Right under the Inter-American Human Rights System, *Mexican Law Review*, Vol. 9, No. 1, p. 126 etc.; Mendez, J. E., An Emerging "Right to Truth": Latin-American Contributions, in: Karstedt, S., (ed.), 2009, *Legal Institutions and Collective Memories*, Oxford, Hart Publishing.

20 For an extensive account of the right to the truth in connection with Art. 13 ACHR, see Perlingeiro, R., 2015, Garantías del derecho a la verdad y del acceso a la información en la justicia transicional en América Latina, *Verba luris*, p. 37 etc.

21 IACHR, *Manuel Stalin Bolaños v. Ecuador*, Case 10.580, Report No. 10/95, OEA/Ser.L/V/II.91 Doc. 7 of 12 September 1995; IACHR, *Alfonso René Chanfeau Orayce at al. v. Chile*, Cases 11.505, 11.532, 11.541, 11.546, 11.549, 11.569, 11.572, 11.573, 11.583, 11.585, 11.595, 11.652, 11.657, 11.675 and 11.705, Report No. 25/98 OEA/Ser.L/V/II.95 Doc. 7 rev. of 7 April 1998; IACHR, *Ignacio Ellacuria et al. v. Salva-*

In this regard, reference should also be made to the jurisprudence of the Inter-American Court of Human Rights (IACtHR), which has significantly contributed to the process of establishing the right to the truth not only in cases of enforced disappearances, but in connection with other serious human rights violations as well.[22] The first rulings on the subject date back to the late 1980s.[23] However, it was not until the 2000s that the right to the truth was explicitly mentioned in the *Bámaca-Velásquez v. Guatemala* case: "[it] is subsumed in the right of the victim or his next of kin to obtain clarification of the facts relating to the violations and the corresponding responsibilities from the competent State organs, through the investigation and prosecution established in Articles 8 and 25 of the Convention."[24] As the IACtHR argued at a later stage, the right to the truth encompasses not only an individual dimension but also a collective one, which results in the society's right to know what happened in the face of grave violations of human rights.[25]

Looking at the development of the case law, the IACtHR's hermeneutic approach appears to be fairly constant: the judges have framed the right to the truth as being anchored to the right of access to justice and closely

dor, Case 10.488, Report No. 136/99, OEA/Ser.L/V/II.106, doc. 6 rev. of 22 December 1999; IACHR, *Third Report on the Human Rights Situation in Colombia*, OEA/Ser.L/V/II.102, Doc. 9 rev. 1 (26 February 1999).

22 As the Special Rapporteur on the promotion of truth put it: "the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights were at the forefront of developing jurisprudence on the right to truth of the victim, his or her next of kin, and the whole of society." See Human Rights Council, *Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff*, UN doc A/HRC/24/42 (28 August 2013), para. 19.

23 See the *Velásquez Rodríguez v. Honduras* judgement, where the IACtHR affirmed the existence of the States' obligation to investigate serious violations of human rights and recognized the right of the relatives of victims of enforced disappearance to know the fate of their loved ones and, eventually, the location of their remains. IACtHR, *Velásquez-Rodríguez v. Honduras*, Judgment of 29 July 1988, para. 181. For a comment, see Witten, S. M., 1989, Velasquez Rodriguez Case, Series C, No. 2, 28 ILM 291 (1989), *The American Journal of International Law*, Vol. 83, No. 2, p. 361 etc.

24 IACtHR, *Bámaca-Velásquez v. Guatemala*, C Series No. 70, Judgment of 25 November 2000, para. 201. Alongside the majority opinion of the Court, Judge Salgado Pesantes' concurring opinion also warrants mention. The right to the truth was linked not only to the right to access to justice (Arts. 8 and 25 ACHR), but also to Arts. 11 ACHR (Right to Privacy) and 14 ACHR (Right to Reply).

25 See, *ex multis*, IACtHR, *Trujillo-Oroza v. Bolivia*, C Series No. 92, Judgment of 27 February 2002, para. 114; IACtHR, *Myrna Mack Chang v. Guatemala*, C Series No. 101, Judgment of 25 November 2003, para. 274; IACtHR, *Carpio-Nicolle et al. v. Guatemala*, C Series No. 117, Judgment of 22 November 2004, para. 128; IACtHR, *"Mapiripán Massacre" v. Colombia*, C Series No. 134, Judgment of 15 September 2005, para. 298.

linked to the States' obligation to carry out effective investigations.[26] In this perspective, the more recent cases *Gomes Lund v. Brazil*[27] and *Guidiel Alvarez v. Guatemala*[28] seem to be somewhat innovative. In the former decision, the IACtHR found an independent violation of the right to the truth under Articles 1, 8 and 25 ACHR in connection with the right to seek and receive information under Article 13 ACHR.[29] In the latter one, the IACtHR established a link between the right to the truth and the right to personal integrity under Article 5 ACHR – namely, that suffering caused by the denial of the truth constitutes inhuman treatment.[30]

Partly as a result of the IACtHR's ruling, the General Assembly of the Organization of American States (OAS) started adopting resolutions in the early 2000s recognizing the importance of guaranteeing the right to the truth.[31] In the same period, at the international level, the UN updated its Principles to Combat Impunity.[32] Specifically, Principle 2 provides that the victims, their families, and the general public are entitled to

26 See, *ex multis,* IACtHR, *Barrios Altos v. Peru,* C Series No. 75, Judgment of 14 March 2001; IACtHR, *Gómez-Palomino v. Peru,* C Series No. 136, Judgment of 22 November 2005; IACtHR, *Blanco Romero et al. v. Venezuela,* C Series No. 138, Judgment of 28 November 2005; IACtHR, *The Pueblo Bello Massacre v. Colombia,* C Series No. 140, Judgment of 31 January 2006; IACtHR, *Servellón García et al. v. Honduras,* C Series No. 152, Judgment of 21 September 2006; IACtHR, *The Rochela Massacre v. Colombia*, C Series No. 163, Judgment of 11 May 2007; IACtHR, *Zambrano Vélez et al. v. Ecuador,* C Series No. 166, Judgment of 4 July 2007; IACtHR, *"Las Dos Erres" Massacre v. Guatemala,* C Series No. 211, Judgment of 24 November 2009.

27 IACtHR, *Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil,* Judgment of 24 November 2010, C Series No. 219. For a comment, see Frizzo Bragato, F., Marasch Coutinho, I., 2012, A efetivação do direito à memória e à verdade no context brasileiro: o julgamento do caso Julia Gomes Lund pela corte interamericana de direitos humanos*, Revista de Direito Internacional*, Vol. 9, No. 1, p. 125 etc.

28 IACtHR, *Gudiel Álvarez et al. ("Diario Militar") v. Guatemala*, C Series No. 253, Judgment of 19 August 2012.

29 IACtHR, *Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil*, Judgment of 24 November 2010, C Series No. 219, sixth operative paragraph.

30 IACtHR, *Gudiel Álvarez et al. ("Diario Militar") v. Guatemala*, C Series No. 253, Judgment of 19 August 2012, paras. 301–302.

31 See, among the first adopted, OAS General Assembly, *Right to the Truth*, AG/RES. 2175 (XXXVI-O/06), 6 June 2006; OAS General Assembly, *Right to the Truth*, AG/RES. 2267 (XXXVIIO/07), 5 June 2007; OAS General Assembly*, Right to the Truth*, AG/RES. 2406 (XXXVIII-O/08), 3 June 2008; OAS General Assembly*, Right to the Truth*, AG/RES. 2509 (XXXIX-O/09), 4 June 2009; OAS General Assembly, *Right to the Truth*, AG/RES. 2595 (XL-O/10), 8 June 2010.

32 Commission on Human Rights, *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 (18 February 2005). The *UN Principles* were originally formulated in 1997: Commission on Human Rights, *The administration of justice and the human rights of detainees. Question of the impunity of perpetrators of human rights violations (civil*

"the inalienable right to know the truth about past events concerning the perpetration of heinous crimes and about the circumstances and reasons that led, through massive or systematic violations, to the perpetration of those crimes."[33] This partially reflects the wording of the so-called Bassiouni Principles adopted by the UN General Assembly in 2005, according to which victims "should be entitled to seek and obtain information [...] on the causes and conditions pertaining to the gross violations of international human rights law and serious violations of international humanitarian law and to learn the truth in regard to these violations."[34] However, it is important to highlight that truth is conceived as a form of reparation in this context.[35]

In 2006, the UN High Commissioner for Human Rights released an important study on the right to the truth,[36] qualifying it as "inalienable and autonomous".[37] The study stresses the relationship between the right to the truth and the States' obligations to guarantee human rights and to conduct effective investigations when violations occur.[38] It also acknowledges the inextricable link between the right to the truth and other rights, such as the right to legal and judicial protection, the right to an effective

and political). Revised final report prepared by Mr. Joinet pursuant to Sub-Commission decision 1996/119, UN doc. E/CN.4/Sub.2/1997/20/Rev.1 (2 October 1997).

33 Commission on Human Rights, *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 (18 February 2005), Principle 2. The inalienable right to the truth. On the topic, see Groome, D., Principle 2. The Inalienable Right to the Truth, in: Haldemann, F., Unger, T., (eds.), 2018, p. 59 etc. Principle 1 provides that States must "ensure the inalienable right to know the truth about violations." Under Principle 4, "Irrespective of any legal proceedings, victims and their families have the imprescriptible right to know the truth about the circumstances in which violations took place and, in the event of death or disappearance, the victims' fate."

34 General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, UN doc. A/RES/60/147 (21 March 2006), Principle X, para. 24.

35 *Ibid*., para. 22(b). For a discussion of the Basic Principles and Guidelines, also known as the van Boven/Bassiouni Principles, see Zwanenburg, M., 2006, The van Boven/Bassiouni Principles: An Appraisal, *Netherlands Quarterly of Human Rights*, Vol. 24, No. 4, pp. 641–668.

36 High Commissioner for Human Rights, *Study on the Right to the Truth*, UN doc. E/CN.4/2006/91 (8 February 2006).

37 *Ibid*, para. 55. Critics have pointed out that the Study blurs the historical and legal foundations of the right, and that it "failed to engage with the recognized sources of public international law at all." See Sweeney, J. A., 2018, The Elusive Right to Truth in Transitional Human Rights Jurisprudence, *International & Comparative Law Quarterly*, Vol. 67, p. 358.

38 *Ibid*, paras. 45 and 56.

remedy, the right to obtain reparation, the right to family life, the right to seek and impart information and the right to be free from ill-treatment.[39] Here again, the collective dimension of the right to the truth is emphasized, also with a view to preventing the recurrence of crimes.[40]

The International Convention for the Protection of All Persons from Enforced Disappearance, which was adopted the same year, recognizes "the right to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person".[41] Although far from being universally ratified,[42] this treaty is an important development, as it is the first one to enshrine the right to the truth as "an enforceable right in itself".[43]

Looking at the Council of Europe (CoE) system, the emergence of the right to the truth has undoubtedly been slower,[44] probably because of the specificities of the reference context. Europe has not experienced large-scale enforced disappearances, a phenomenon which, as mentioned, triggered the valorization of truth as a right in the American scenario. Nevertheless, mainly from the early 2000s, a series of resolutions of the Parliamentary Assembly have repeatedly affirmed the need to establish the truth and obtain justice in cases of missing persons.[45] Moreover, reference must be made to the case law of the European Court of Human

39 *Ibid*, paras. 42–43 and 57.

40 *Ibid*, paras. 55–58.

41 General Assembly, *International Convention for the Protection of All Persons from Enforced Disappearance*, UN doc. A/RES/61/117 (20 December 2006), Art. 24. The provision spells out the States Parties' additional obligations, including to identify and return the remains of missing persons, provide compensation and reparations, and conduct investigations and clarify the fate of the missing persons. For a comment, see McCrory, S., 2007, The International Convention on the Protection of All Persons from Enforced Disappearance, *Human Rights Law Review*, Vol. 7, No. 3, pp. 545–566.

42 Sixty-seven states have ratified the Convention to date. For updates, see the United Nations status of ratification interactive dashboard (https://indicators.ohchr.org/, 23. 5. 2022).

43 González, E., Varney, H. (eds.), 2013, *Truth Seeking. Elements of Creating an Effective Truth Commission*, (https://www.ictj.org/sites/default/files/ICTJ-Book-Truth-Seeking-2013-English.pdf, 28. 2. 2022), p. 5.

44 Panepinto, A. M., 2017, The Right to the Truth in International Law: The Significance of Strasbourg's Contributions, *Legal Studies*, Vol. 37, No. 4, p. 746; Sweeney, J. A., 2018, p. 72.

45 See, *inter alia*, CoE Parliamentary Assembly Resolution 1371 of 28 April 2004, *Disappeared Persons in Belarus*; CoE Parliamentary Assembly Resolution 1463 of 3 October 2005, *Enforced Disappearances*; CoE Parliamentary Assembly Resolution 1868 of 9 March 2012, *The International Convention for the Protection of all Persons from Enforced Disappearance*. See also Citroni, G., 2016, *Missing Persons and Victims of Enforced Disappearance in Europe*, Issue paper, CoE Commissioner for Human Rights.

Rights (ECtHR), which has been crucial in defining the contents and contours of the right to the truth.

Strasbourg judges were initially somewhat reluctant to address the issue, referring only to a general entitlement of the relatives of victims of serious human rights violations to receive information about what had happened to them, corresponding to the States' obligation to carry out effective investigations to clarify the facts.[46] As time went by, the ECtHR warmed to the idea of fully recognizing the right to the truth: in its judgment in the case of *Association "21 December 1989" et al. v. Romania*,[47] it referred to the "right of victims and their families and heirs to know the truth about the circumstances surrounding events involving a massive violation of rights."[48] However, the judgment in the *El-Masri v. the Former Yugoslav Republic of Macedonia* case[49] was the first that explicitly mentioned the right to the truth, which ECtHR judges framed as a procedural corollary of Article 3 (Prohibition of torture),[50] Article 5 (Right to liberty and security)[51] and, partially, Article 13 (Right to an effective remedy),[52] read in conjunction with Article 1 (Obligation to respect Human Rights) of the European Convention on Human Rights

46 ECtHR, *Kurt v. Turkey*, no. 24276/94, Judgment of 25 May 1998; ECtHR, *Cipro v. Turkey*, no. 25781/94, Judgment of 10 May 2001 [GC]; ECtHR, *Varnava et al. v. Turkey*, nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, Judgment of 18 September 2009 [GC]. For an overview of the development of the right to the truth in ECtHR case law, see Oriolo, A., 2016, Right to the Truth and International Jurisprudence as the "Conscience" of Humanity. Comparative Insights from the European and Inter-American Courts of Human Rights, *Global Jurist*, Vol. 16, No. 2, pp. 184–193; Panepinto, A. M., 2017, p. 746 etc; Pagotto, T., Chisari, C., 2021, pp. 73–86.

47 ECtHR, *Association "21 December 1989" et al. v. Romania*, no. 33810/07, Judgment of 24 May 2011.

48 *Ibid*, para. 144. See Sweeney, J. A., 2018, pp. 380–381.

49 ECtHR, *El-Masri v. the Former Yugoslav Republic of Macedonia*, no. 39630/0913, Judgment of 13 December 2012 [GC]. For a comment, see Fabbrini, F., 2014, The European Court of Human Rights, Extraordinary Renditions and the Right to the Truth: Ensuring Accountability for Gross Human Rights Violations Committed in the Fight against Terrorism, *Human Rights Law Review*, Vol. 14, No. 1, pp. 85–106; Napoletano, N., 2013, Extraordinary renditions, tortura, sparizioni forzate e "diritto alla verità": alcune riflessioni sul caso El-Masri, *Diritti umani e diritto internazionale*, Vol. 7, No. 2, pp. 331–364; Meloni, C., 2013, Extraordinary renditions della Cia e responsabilità europee: il punto di vista della Corte europea dei diritti dell'uomo, *Diritto Penale Contemporaneo*, 2013, pp. 1–17.

50 *El-Masri v. the Former Yugoslav Republic of Macedonia*, no. 39630/0913, Judgment of 13 December 2012 [GC], para. 186 etc.

51 *Ibid.*, para. 242 etc.

52 *Ibid.*, para. 256 etc.

(ECHR).[53] Specifically, the Grand Chamber found that the inadequate character of the investigation carried out by the national authorities in response to the applicant's complaints of human rights violations had fostered impunity and undermined the right to the truth.[54] Indeed, the failure to carry out prompt, accurate and thorough investigations, capable of shedding light on alleged violations of human rights, render the ECHR's guarantees ineffective in practice.[55] The judges also underlined "the great importance of the [...] case not only for the applicant and his family, but also for other victims of similar crimes and the general public, who had the right to know what had happened".[56]

All of the above manifests the international community's favorable attitude towards the recognition of the right to the truth. However, at the same time, some ambiguities also emerge. Firstly, there appears to be a "certain conceptual elusiveness"[57] of the right to the truth, which can be implemented not only through judicial procedures, but also via different mechanisms, such as truth commissions, fact-finding investigations, official archives, and public reports.[58] Even the name of this right is unclear, given the indiscriminate use of the terms right to know, right to the truth, and right to know the truth.[59] Moreover, the European and Inter-American Courts of Human Rights have often subsumed the right to the truth in the violation of other guarantees, with the consequence that its qualifi-

53 In its previous case law, the ECtHR associated the more general "right to know the truth" and the need to carry out effective investigations not only with the procedural limbs of Arts. 3 and 5 ECHR, but also with Art. 2 ECHR, read in conjunction with Art. 1 ECHR. See ECtHR, *Cipro v. Turkey*, no. 25781/94, Judgment of 10 May 2001 [GC], para. 123 etc; ECtHR, *Varnava et al. v. Turkey*, nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, Judgment of 18 September 2009 [GC], para. 187 etc.; ECtHR, *Association "21 December 1989" et al. v. Romania*, no. 33810/07, Judgment of 24 May 2011, paras. 144–145.

54 ECtHR, *El-Masri v. the Former Yugoslav Republic of Macedonia*, no. 39630/0913, Judgment of 13 December 2012 [GC], paras. 191–192.

55 The concurring opinions in the *El-Masri* case offer important insights into the status of the right to the truth, its autonomy, and its relation to the duty to investigate. See *El-Masri v. the Former Yugoslav Republic of Macedonia*, Joint Concurring Opinion of Judges Casadevall and Lopez Guerra and Joint Concurring Opinion of Judges Tulkens, Spielmann, Sicilianos and Keller.

56 ECtHR, *El-Masri v. the Former Yugoslav Republic of Macedonia*, no. 39630/0913, Judgment of 13 December 2012 [GC], para. 191.

57 Sweeney, J. A., 2018, p. 357.

58 High Commissioner for Human Rights, *Study on the Right to the Truth*, UN Doc. E/CN.4/2006/91 (8 February 2006), paras. 47–54.

59 Groome, D., Principle 2. The Inalienable Right to the Truth, in: Haldemann, F., Unger, T., (eds.), 2018, p. 70.

cation as an autonomous and independent right is debated.[60] Finally, the right to the truth is mentioned almost exclusively in non-binding soft law instruments, a circumstance that raises questions about the legal status of the truth. In this respect, some have questioned its qualification in terms of a customary right or a general principle of law, albeit mainly drawing tentative conclusions.[61]

However, this uncertainty does not deny the existence of a legal dimension of the truth: the increasing references to the right to the truth undoubtedly testify to its gradual establishment within the framework of international human rights law. In short, it seems that this right is currently in the process of being positivized: it lies somewhere between a genuine legal claim and a moral demand for justice, asserted in support of the urgent needs and interests of individuals. Overall, this should not be surprising: before becoming legal entitlements, human rights emerge as social instances, which are gradually translated into official requests toward institutions and finally (and possibly) into norms.[62]

This last consideration opens new questions, which have been scarcely investigated by the literature. Indeed, research has rarely wondered what the progressive emergence of the right to the truth represents and which concerns supporting the demands for truth are making their way into the courtrooms. In other words: what underlies the truth claims brought before the courts? Is it just about gaining knowledge, or is there more to it? What is, then, the value of the judicial implementation of the right to the truth?[63] Providing some answers is of fundamental importance, not least to reflect on whether it is worth securing this controversial right.

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60 On this highly debated topic, see Burgorgue-Larsen, L., The Right to the Truth, in: Burgorgue-Larsen, L., Úbeda de Torres, A., (eds.), 2011, *The Inter-American Court of Human Rights: Case Law and Commentary*, Oxford, Oxford University Press, p. 695 etc.; Ferrer Mac-Gregor, E., 2016, p. 121 etc.; Napoletano, N., 2013, p. 361 etc.; Oriolo, A., 2016, p. 175 etc.

61 Groome, D., Principle 2. The Inalienable Right to the Truth, in: Haldemann, F., Unger, T., (eds.), 2018, p. 61 etc.; Naqvi, Y., 2006, The Right to the Truth in International Law: Fact or Fiction?, *International Review of the Red Cross*, p. 254 etc.; Panepinto, A. M., 2017, p. 756 etc.; Sweeney, J. A., 2018, p. 358; Werkheiser, I., 2020, A Right to Understand Injustice: Epistemology and the "Right to the Truth" in International Human Rights Discourse, *The Southern Journal of Philosophy*, p. 196.

62 This view of human rights as a social construction stands alongside the traditional idea that human rights are rooted in human nature. More on the origin and development of human rights and the debate on the topic in Jacqmin, A., 2017, When Human Claims Become Rights. The Case of the Right to Truth over "Desaparecidos", *Oñati Socio-legal Series*, Vol. 7, No. 6, p. 1250 etc.

63 In this regard, international documents and jurisprudence refer to the individual and the collective dimension of the right to the truth. On the one hand, victims, their

Intending to delve into this issue, it is interesting to look at the experiences of those territories where denial has long been pervasive. The reference here is to Argentina, which was among the first countries that officially assumed the obligation to recognize and assure the right to the truth. Specifically, the purpose is to consider the *Juicios por la Verdad*, a mechanism of judicial implementation of the right to the truth promoted by civil society as a strategy to challenge impunity. This will allow both a close look at how a judicial mechanism for implementing a right still under construction works, and an understanding of what is the value of the judicial protection of the right to the truth – or, at least, what has been its value in the Argentine context.

3. Justice, Truth, and Impunity: The Argentinian Transition to Democracy

The history of Argentina in the 1970s is sadly famous for the so-called *Guerra Sucia* (Dirty War). Following a coup d'état on March 24, 1976, a military junta took over the country and established a dictatorship that lasted until 1983.[64] The Junta promoted the *Proceso de Reorganizaciòn National*,[65] an authoritarian national reorganization process that led to the denial of democracy and widespread human rights violations. In this climate of terror, the opponents of the regime were condemned to disappear. "Disappearance" was indeed the main form of repression wielded by the dictatorship. Typically, it involved task forces made up predominantly of military personnel kidnapping alleged subversives at night. The victims

families and heirs are asking for the truth about the circumstances surrounding human rights abuses driven by a need for knowledge, acknowledgement, and redress. On the other hand, societies want to know what happened as a part of a process of re-appropriation of public space and re-elaboration of the past, to avoid the recurrence of the crimes. See *El-Masri v. the Former Yugoslav Republic of Macedonia*, Joint Concurring Opinion of Judges Casadevall and Lopez Guerra and Joint Concurring Opinion of Judges Tulkens, Spielmann, Sicilianos and Keller. See also Commission on Human Rights, *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 (18 February 2005), Principles 2 and 3; High Commissioner for Human Rights, *Study on the Right to the Truth*, UN doc. E/CN.4/2006/91 (8 February 2006), para. 35 etc.

64 On the topic, see Lewis, P. H., 2002, *Guerrillas and generals: the "Dirty War" in Argentina*, Westport, Praeger Publisher; Wright, T. C., 2007, *State Terrorism in Latin America: Chile, Argentina, and International Human Rights*, Maryland, Rowman & Littlefield Publishing Group, pp. 141–178.

65 About the *Proceso de Reorganización Nacional*, see Manríquez, J. L. L., 1989, El "Proceso de reorganización nacional" y los derechos humanos en Argentina, 1976–1983, *Rivista di Studi Politici Internazionali*, Vol. 56, No. 4, pp. 562–578.

were then taken to clandestine detention camps, where they were tortured to obtain information about other possible opponents of the regime. Most of them were subsequently murdered, leaving no trace of their fate.[66]

As the abuses intensified, the first mobilizations of human rights movements took place,[67] which grew considerably after the fall of the regime. Together with victims' associations and lawyers, they demanded to know what had happened to the *desaparecidos* and called for the punishment of those responsible for their disappearance. Given the unsatisfactory response of the post-dictatorship government and the impossibility of bringing the military to justice, their requests changed shape, turning into claims for the judicial protection of their right to the truth. Thus, the *Juicios por la Verdad* began.

Before going into the details of the *Juicios*, it is important to look at the context from which they emerged. The idea is that this analysis will provide a deeper understanding of what drove the judicial demands for truth in Argentina and, consequently, what value the recognition of the right to the truth has had in this territory.

3.1. IN THE AFTERMATH OF THE DICTATORSHIP: BETWEEN TRIALS AND IMPUNITY

Raúl Alfonsín became the President of Argentina after free elections in October 1983. Grappling with a weakened democratic structure and an army denying any responsibility for past atrocities,[68] he was tasked with

66 See CONADEP, 1984, *Nunca Más. Informe de la Comisión Nacional Sobre la Desaparición de Personas*, Buenos Aires, Editorial Universitaria de Buenos Aires.

67 Among the first to start the demonstrations were the Madres de Plaza de Mayo (Mothers of the Plaza de Mayo), who began to demand the truth as early as 1977. On the topic, see, *ex multis*, Cuchivague, K. O., 2012, Las Madres de la Plaza de Mayo y su legado por la defensa de los derechos humanos, *Trabajo Social*, Vol. 14, pp. 165–177. About the emergence of human rights movements in the Argentinian society, see Brysk, A., 1994, *The Politics of Human Rights in Argentina: Protest, Change, and Democratization*, Stanford, Stanford University Press, pp. 42–51.

68 Before leaving office, the military government attempted to implement a strategy to preclude investigations of enforced disappearances and trials for human rights violations. On the one hand, the Junta in 1983 published the *Documento final sobre la guerra contra la subversiòn y el terrorismo* (Final Document on the Struggle against Subversion and Terrorism) which aimed at rejecting the accusations and justifying the disappearance of thousands of persons in the custody of security forces. On the other hand, the military adopted a self-amnesty law (Law 22.924, 23 March 1983), which was then repealed by Law No. 23.040 of 22 December 1983. It is worth noting that the repeal was found constitutional by the Argentinian Supreme Court of Justice. See Americas Watch, 1991, *Truth and Partial Justice in Argentina: An Update* (https://www.hrw.org/reports/argen914full.pdf, 23. 5. 2022), pp. 9–12.

restoring peace, the rule of law and human rights in the country. Only a few days after taking office, he established the National Commission on Disappeared Persons (Comisión Nacional Sobre la Desaparición de Personas, CONADEP),[69] specifically to investigate human rights abuses committed by the military dictatorship. The Commission worked for nine months, visiting the sites of former secret detention centers, and travelling to different Argentinian provinces and foreign countries to collect testimonies.[70] Its famous Report *Nunca Mas* (Never Again) – also known as the Sábato Report – documents almost 9,000 cases of enforced disappearances, remaining one of the most complete writings on the repressive system implemented by the dictatorship to this day.[71]

The historic *Juicio a las Juntas* (the Trial of the Juntas) began on 22 April 1985. Albeit not without difficulties,[72] the military leaders were thus tried for the crimes they had committed in the context of the *Proceso.*[73] The trial was welcomed with great enthusiasm by the Argentinian civil society and internationally, since it testified to Argentina's condemnation of past atrocities and its commitment to the fight against impunity. However, its outcomes were not so favorable. Only General Videla and Admiral Massera were ultimately sentenced to life imprisonment, while the other defendants were acquitted or given lesser penalties.[74] This triggered the

69 Presidential Decree No. 187, 15 December 1983.

70 On the CONADEP, see Brysk, A., 1994, pp. 68–72; Crenzel, E., 2008, Argentina's National Commission on the Disappearance of Persons: Contributions to Transitional Justice, *International Journal of Transitional Justice*, Vol. 2, pp. 173–191; Hayner, P., 2011, pp. 45–46.

71 CONADEP, 1984. See Americas Watch, 1991, pp. 17–19.

72 It was initially decided that the Trial of the Juntas should be conducted in the first instance by the Supreme Council of the Armed Forces, the administrative tribunal in charge of military disciplinary matters. However, the Supreme Council did not cooperate – mainly by failing to rule on the cases submitted to it – and the Trial was transferred to civil jurisdiction. See Americas Watch, 1991, pp. 21–24; Crawford, K. L., 1990, Due Obedience and the Rights of Victims: Argentina's Transition to Democracy, *Human Rights Quarterly*, Vol. 12, No. 1, pp. 21–23.

73 Presidential Decree No. 158/83, 18 December 1983. The decree ordered that all the nine officers who had led the first three juntas be brought to trial. The defendants included, notably, Gen. Jorge Videla, Adm. Emilio Massera, Brig. Orlando Agosti (first junta); Gen. Roberto Viola, Adm. Armando Lambruschini, and Brig. Omar Graffigna (second junta); Gen. Leopoldo Galtieri Adm. Jorge Anaya, and Brig. Basilio Lami Dozo (third junta). By this decree, President Alfonsín ordered the prosecution of leaders of the left-wing guerrilla organizations, namely the Peronist Montoneros and the People's Revolutionary Army (Ejercito Revolucionario del Pueblo, ERP).

74 Brig. Agosti was sentenced to a prison term of four and a half years; Gen. Viola was sentenced to 17 years' imprisonment and Adm. Lambruschini to eight years' imprisonment. They were found guilty of, *inter alia*, aggravated homicide, torture, unlawful arrest, robbery, violence, and threats. Brig. Graffigna was acquitted, as were Gen.

discontent of human rights movements, which considered the judgment inconsistent with the thousands of deaths resulting from the regime.[75]

In addition to the charges brought against the ex-commanders, private parties filed many other criminal complaints of violations suffered during the *Guerra Sucia*; their number was estimated at over 2,000 in 1984.[76] This led to growing tensions within the ranks of the military, prompting President Alfonsín to pass two quasi-amnesty laws for the sake of peace, national unity and social reconciliation. Specifically, the Full Stop Law (*Ley de Punto Final*), enacted in 1986,[77] placed a time limit for prosecution, laying down that further charges of human rights violations against military officers could be filed within 60 days. The result was exactly opposite to the government's intentions and expectations: the judiciary was flooded with a wave of new complaints by the deadline, leading to an escalation of military discontent.[78] In consequence, Alfonsín adopted the second law, known as the Due Obedience Law (*Ley de Obediencia Debida*),[79] granting impunity to low and middle-ranking officers, who could not be held accountable because they were presumably merely following orders.[80] Although many challenged the constitutionality of the Due Obedience Law, the Supreme Court backed it in June 1987.[81]

Galtieri, Adm. Anaya and Brig. Dozo. See National Federal Criminal and Correctional Appeal Chamber of 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 of 9 December 1985. The decision was subsequently overturned by the Supreme Court of Argentina. On the Trial of the Juntas, see Americas Watch, 1991, pp. 25–30; Brysk, A., 1994, pp. 75–79; Speck, P. K., 1987, The Trial of the Argentine Junta: Responsibilities and Realities, *The University of Miami Inter-American Law Review*, Vol. 18, No. 3, pp. 491–534.

75 Madre de Plaza de Mayo newsletter of January 1986 reported that "those who committed genocide had been absolved of fault and of charge". See Haas, K., 2012, *Truth, Trials, Transition: The Meaning of Justice in Post-Dirty War Argentina*, Senior Essay, History Department, Yale University, (https://history.yale.edu/sites/default/files/files/Haas%2C%20Katherine%20senior%20essay%202012.pdf, 2. 3. 2022), p. 28.

76 Americas Watch, 1991, p. 21. See also Haas, K., 2012, pp. 31–44.

77 Law No. 23492, 24 December 1986.

78 Americas Watch, 1991, p. 49 etc.

79 Law No. 23521, 8 June 1987.

80 See Americas Watch, 1991, pp. 49–52; Crawford, K. L., 1990, pp. 27–28.

81 Supreme Court of Justice of the Argentine Nation, Case no. 547, Judgment of 22 June 1987. See Crawford, K. L., 1990, p. 27 etc. The IACHR took a different view in 1992. Specifically, it indicated that the Full Stop and the Due Obedience Laws, as well as Decree No. 1002/89 on pardons, were in conflict with Art. XVIII of the American Declaration of the Rights and Duties of Man, Arts. 1, 8, and 25 of the American Convention on Human Rights, and with the duty of the Argentine State to bring to light the events and identify those responsible for the human rights violations that had occurred during the military dictatorship. IACHR, *Report 28/92, Cases 10.147, 10.181, 10.240, 10.262, 10.309,* and *10.311* (2 October 1992).

These two laws marked a significant paradigm shift in Argentina's transition to democracy: while, initially, many efforts were made to punish those responsible for the past atrocities, the protection of human rights seemed to be increasingly taking a back seat to the need to restore order and ensure the new political regime's continuity. This trend was perpetuated by President Carlos Menem, who took over from Alfonsín in 1989. Specifically, he enacted a series of decrees[82] granting pardons to all those who could not benefit from the previous government's laws, including the already convicted General Videla and Admiral Massera. In President Menem's words, pardons were intended to encourage Argentina to "transcend a painful era" and to "foster social reconciliation".[83]

There are conflicting views about the impact of such measures and the value of the Trial of the Juntas. As mentioned, the government considered them consistent with the transitional proposal made initially by President Alfonsín, which focused on the need to strengthen democracy and promote reconciliation. The main idea was that human rights-based societies stem from a clear and severe condemnation of atrocities rather than from the number of people sentenced, so that limiting convictions to those primarily responsible seemed reasonable and effective in Argentina.[84] Along these lines, some observed that "[t]he pardons mitigate but do not eliminate the value of the trials. History cannot be erased" and trials are *per se* "example[s] of moral value".[85]

On the other hand, others opined that the failure to comprehensively punish state crimes undermined the process of consolidating democracy and the embedding of a human rights culture.[86] The absence "of

82 Decree No. 1002/89 (6 October 1989); Decree No. 2741/90 (29 December 1990). See also Law No. 23.043 (27 November 1991), Law No. 24.411 (7 December 1994) and Law No. 24.321 (8 June 1994).

83 Menem, C. S., 2001, *For Argentine Healing*, The New York Times, August 15, 2001, as quoted in Haas, K., 2012, p. 36.

84 See Galante, D., 2015, Los debates parlamentarios de "Punto Final" y "Obediencia Debida": el Juicio a las Juntas en el discurso político de la transición tardía, *Clepsidra. Revista Interdisciplinaria de Estudios sobre Memoria*, Vol. 4, pp. 16–20. See also Nino, C.S., 1991, The Duty to Punish Past Abuses of Human Rights Put into Context: The Case of Argentina, *The Yale Law Journal*, Vol. 100, No. 8, p. 2630. The famous debate between Carlos Nino and Diana Orentlicher on the benefit of prosecuting human rights violations warrants mention in this context. See Orentlicher, D., 1991, Settling Accounts: The Duty to Punish Human Rights Violations of a Prior Regime, *The Yale Law Journal*, Vol. 100, No. 8, pp. 2537–2615.

85 Brysk, A., 1994, p. 87. This view is also shared by part of the civil society. See Haas, K., 2012, p. 29.

86 Malamud-Goti, J., 1991, Punishment and Rights-Based Democracy, *Criminal Justice Ethics*, Vol. 10, No. 2, pp. 3–9; Malamud-Goti, J., Punishing Human Rights Abuses in Fledgling Democracies: the Case of Argentina, in: Roht-Arriaza, N., (ed.), 1995,

punishment on state criminals will, in and of itself, frustrate attempts to 'de-authoritarianize' society".[87] Human rights groups have mainly taken this view. In their opinion, the Due Obedience Law "is not, as it pretends, a guarantee of security and stability for the constitutional government"; "only by accepting the truth of the horror that we have lived, and achieving trial and punishment of all those responsible, can we guarantee that it will never occur again, and strengthen democracy and the rule of law".[88] Similarly, they qualified Menem's pardons as a "perverse impunity" with an "amnestic purpose".[89]

In this context of great social discontent, something unexpected happened: as of 1994, mainly low-ranking officers broke the silence about the atrocities occurred in the recent past. In this regard, the interview given by ex-Navy chief Adolfo Scilingo was particularly meaningful. He provided an accurate account of the "death flights" and referred to the existence of registers documenting the incarceration of the alleged subversives in clandestine centers.[90] Against the background of such confessions, the request for justice and truth intensified in Argentina, leading to the beginning of the *Juicios por la Verdad*.

3.2. THE *JUICIOS POR LA VERDAD*

The *Juicios por la Verdad* are alternative and innovative forms of judicial intervention in Argentina, implemented nowhere else in the world. Specifically, they are hybrid proceedings, halfway between "truth commissions and classic criminal [trials], symbolic reparation and retribution".[91]

Impunity and Human Rights in International Law and Practice, Oxford – New York, Oxford University Press, pp. 163–164.

87 Malamud-Goti, J., 1991, p. 7.

88 *Ley de obediencia debida*, pamphlet, 3, Princeton University Latin American Microfilm Collection, Human Rights in Argentina: A Collection of Pamphlets, Reel 9, as cited by Haas, K., 2012, pp. 34–35.

89 Zamorano, C., *Indulto: La Perversa Impunidad*, pamphlet, November 1989, Liga Argentina por los Derechos del Hombre, 20, Princeton University Latin American Microfilm Collection, Human Rights in Argentina: A Collection of Pamphlets, Reel 2, as cited by Haas, K., 2012, p. 37.

90 Brett, S., 2001, The Argentine Government's Failure to Back Trials of Human Rights Violators, *Human Right Watch Publication*, Vol. 13, No. 5, Chapter III (https://www.hrw.org/reports/2001/argentina/, 3. 3. 2022); Centro de Estudios Legales y Sociales, 1996, *Informe anual sobre la situación de los Derechos Humanos en la Argentina. 1995*, Buenos Aires, pp. 123–145.

91 Garibian, S., 2014, Ghosts Also Die: Resisting Disappearance through the "Right to the Truth" and the Juicios por la Verdad in Argentina, *Journal of International Criminal Justice*, Vol. 12, No. 3, pp. 4–5.

As in the case of the truth commissions,[92] their primary objective is to uncover the truth about past human rights violations, without any reference to the categories of defendant and charge. However, the Truth Trials rely on the procedure and tools of criminal proceedings, as well as on the spaces ordinarily intended for them. Their outcome takes the form of a court decision, but it does not imply any criminal liability or impose sanctions on the perpetrators.[93]

As mentioned, the *Juicios* are bottom-up practices, originating from the stubbornness of Argentinian civil society that has not given up in the face of impunity. With the help of NGOs,[94] families of the *desaparecidos* continued to bring cases before the courts, with the aim of circumventing the amnesty laws and learning the truth about the fate of their loved ones. They explicitly referred to the right to the truth as the legal basis of their demands, although it was neither enshrined in the Argentinian legislation nor mentioned in the jurisprudence of its courts. This required the applicants to develop innovative arguments in support of their petitions, referring to both the international and national legal contexts. Their essential aspects are presented in the following paragraphs.

First and foremost, the applicants invoked international human rights law, notably on enforced disappearances. Drawing also on the relevant case law of the IACHR and the IACtHR,[95] they insisted on Argentina's international obligation to investigate the fate of missing persons and to inform their relatives and society of the truth about what had happened.[96] This takes even greater importance given the 1994 Argentinian constitutional reform, which granted main international human rights treaties constitutional hierarchy.[97]

92 On truth commissions, see *supra* note 4.

93 Some argued that the Truth Trials should not have been opened due to the existence of the amnesty laws, which prevented the prosecution of the offenders. However, the Truth Trials were not about initiating proceedings to convict perpetrators: they were about uncovering the truth – understood as a value in itself – by allowing investigations that had never been carried out before. Abregú, M., 1996, La tutela judicial del derecho a la verdad en la Argentina, *Revista IIDH*, Vol. 24, p. 15.

94 A predominant role in this was played by the Center for Legal and Social Studies (Centro de Estudios Legales y Sociales, CELS) https://www.cels.org.ar/web/en/. See also Abregú, M., 1996, p. 12 etc.

95 See para. 2 above.

96 Abregú, M., 1996, pp. 18–19. For an overview of the international law documents requiring Argentina to guarantee the right to the truth and to prosecute those guilty of human rights violations, see Schapiro, H. I., 2002, Surgimiento de los "juicios por la verdad" en la Argentina de los años noventa, *El Vuelo de Icaro: Revista de Derechos Humanos, crítica política y análisis de la economía*, No. 2–3, p. 389 etc.

97 Section 75, para. 22 of the Argentinian Constitution. See Bidart Campos, G. J., El artículo 75, inciso 22, de la Constitución Nacional, in: Abregu, M., Courtis, C., (eds.),

Secondly, the petitioners emphasized that the right to the truth was implicit in the republican form of government, recognized by Article 33 of the Argentinian Constitution. Along these lines, they also recalled the constitutional protection of human rights, the violation of which must be investigated and sanctioned by the courts.[98] Revealing the truth was thus presented as a categorical imperative for a democratic state, whereas the persistent denial of information about the fate of the *desaparecidos* would mean condemning the victims' relatives to tragic oblivion, given the absence of any alternative inquiry options.[99]

Finally, the applicants referred to the right to mourn, relying both on international human rights law and on domestic provisions on the need for respect for the body of the deceased.[100] They wanted to know the whereabouts of their loved ones' remains, believing that the denial of the right to mourn amounted to a violation of their very humanity.[101]

The first cases presented to the Argentinian courts were those of Mónica Candelaria Mignone[102] and Alejandra Lapacó.[103] They were brought before the *Cámara Nacional de Apelaciones en lo Criminal y Correccional Federal de la Capital Federal* (National Federal Criminal and Correctional Appeal Chamber of Buenos Aires) in 1995 by the parents of

2004, *La aplicación de los tratados sobre derechos humanos por los tribunales locales*, Buenos Aires, Editores del Puerto, pp. 77–88.

98 Abregú, M., 1996, p. 19.

99 *Ibid.*, pp. 20–22.

100 *Ibid*., p. 20.

101 As reported by Alicia Oliveira, the lawyer who had represented Emilio Mignone and Carmen Lapacó in their petitions for the opening of the Truth Trials: "So one of the things that Emilio said, and that Carmen said [...]: they denied my right to mourn. I have the right to mourn. I cry because I am a man. We men exercise our right to mourn. I want my right to mourn" (my translation). See Memoria Abierta, 2010, *Abogados, derecho y política*, Buenos Aires, Memoria Abierta, p. 127.

102 Mónica Mignone disappeared after she was abducted on 14 May 1976 and taken to ESMA (*Escuela de Mecànica de la Armada*), the Navy school of mechanics that operated as a clandestine detention center during the dictatorship. The petition was presented by Emilio Mignone, Mónica's father and president of CELS at the time. See National Federal Criminal and Correctional Appeal Chamber of Buenos Aires, *Mignone Emilio s/presentación en causa n. 761 ESMA*, no. 3/95, Judgment of 20 April 1995.

103 Alejandra Lapacó was detained on 17 March 1977 and held in an army detention center housed in the Buenos Aires Athletic Club, together with her mother. The mother was released, while Alejandra was never seen again. The petition was submitted by Alejandra's mother, Carmen Lapacó, who was a member of CELS at the time. See National Federal Criminal and Correctional Appeal Chamber of Buenos Aires, *Carmen Aguiar de Lapacó: Petición en el marco de la causa 450 "Suarez Mason, Curlos Guillermo y, otros s/ihomicidlo y, privación de la libertad"*, Judgment of 18 May 1995.

the two *desaparecidos*.[104] The Federal Court initially upheld the demands of both petitioners, urging the Navy and the Army to disclose any information they had on the fate of the victims. However, following their refusal to cooperate, the Court dropped all efforts.[105]

After unsuccessfully appealing to the Supreme Court,[106] Ms. Lapacó turned to the Inter-American Commission on Human Rights, complaining about violations of her right to the truth and her right to a fair trial by the Argentinian State. Her expectations were not betrayed: on the basis of a friendly settlement she had reached with the State, the Commission recognized that "[t]he 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."[107] The friendly settlement offered also some practical instruction: it provided for the creation of a special body of prosecutors and gave the national federal criminal and correctional courts exclusive jurisdiction to ascertain the fate of persons who had disappeared before 10 December 1983.[108]

The most relevant Truth Trials were conducted by the *Cámaras Federales* of Buenos Aires, La Plata, Bahía Blanca, Mar del Plata, Córdoba and Rosario, which developed various features and were guided by different criteria.[109] While, for example, the Buenos Aires judges mainly aimed at finding and identifying the bodies of the *desaparecidos* essentially on the basis of already collected documents, the ones in La Plata held public

104 The cases submitted to the courts were selected according to their relevance and their ability to illustrate the practices commonly implemented by the dictatorship, so that their outcomes could be used to shed light on different situations. On the strategic selection of the cases and the choice of the tribunal, see Abregú, M., 1996, pp. 16–17.

105 Respectively, National Federal Criminal and Correctional Appeal Chamber of Buenos Aires, *Causa no. 761 ESMA, Hechos ocurridos en el ámbito de la ESMA*, no. 10/95, Judgment of 18 July 1995 and *Causa 450 "Suarez Mason, Car/os Guillermo y otros s/ homicidio y privación de la libertad"*, Judgment of 16 August 1995. See also Abregú, M., 1996, p. 27 etc.

106 Supreme Court of Justice of the Argentine Nation, Case no. 321:2031, Judgment of 13 July 1998, mainly expressing concern that the opening of the proceedings would have violated the *ne bis in idem* principle.

107 IACHR, *Carmen Aguiar de Lapacó v. Argentina*, Friendly Settlement, Case 12.059, Report No. 21/00 of 29 February 2000, para. 17, no. 1.

108 With the exception of cases involving kidnapping of minors and theft of identity, which were to continue on the basis of their status. *Ibid.*, para. 17, nos. 2 and 3.

109 Brett, S., 2001, Chapter IV; Maculan, E., 2010, Le risposte alle gravi violazioni dei diritti umani in Argentina: l'esperienza dei "giudizi per la verità", *L'Indice Penale*, No. 1, p. 338 etc.

hearings, at which the victims were allowed to publicly report their experiences under the dictatorship.[110] It may, however, be said that, overall, the Truth Trials have been devoid of the stigmatization outcome of classical criminal proceedings and have been characterized by the crucial role played by the victims. This has been generally counterbalanced by the lack of participation of those responsible for the crimes, who, although summoned to make statements before the courts,[111] gave limited support in establishing the truth.[112]

Over time, Argentinian courts began to question the legitimacy of the amnesty laws,[113] which were definitely declared unconstitutional by the Supreme Court in the *Simón* case of 2005.[114] Simultaneously, the Court confirmed the validity of Law No. 25.779 of 2003, by which the Argentinian parliament repealed the Full Stop and Due Obedience Laws.[115] As a result, criminal proceedings against military personnel were reopened.[116]

In this respect, it should be noted that, after the reopening of criminal proceedings, not all Truth Trials have been discontinued. Their continuation in some federal districts was justified by the high degree of specialization developed by judges and officials, who had become particularly effective over time.[117] In any case, the endurance of the Truth Trials sug-

110 *Ibid*.

111 Some courts ordered arrests of the military who refused to testify. See Brett, S., 2001, Chapter IV.

112 Andriotti Romanin, E., 2013, Decir la verdad, hacer justicia: Los Juicios por la Verdad en Argentina, *European Review of Latin American and Caribbean Studies*, No. 94, p. 13 etc.; Maculan, E., 2010, p. 356.

113 The first tribunal to declare the amnesty laws unconstitutional was the National Federal Criminal and Correctional Appeal Chamber of Buenos Aires, in Case no. 8686/2000, *Simon, Julio, Del Cerro, Juan Antonio s/sustracción de menores de 10 años*, no. 7, Judgment of 6 March 2001. See Brett, S., 2001, Chapter VI.

114 Supreme Court of Justice of the Argentine Nation, *Simón, Julio Héctor et al.*, Case no. 17768, 14 June 2005. For a comment, see Bakker, C., 2005, Full Stop to Amnesty in Argentina: The Simon Case, *Journal of International Criminal Justice*, Vol. 3, No. 5, pp. 1106–1120; Folgueiro, H. L., Inconstitucionalidad de la Leyes de Punto Final y Obediencia Debida. Notas al fallo "Simón" de la Corte Suprema de Justicia de la Nación', in: Madariaga, A., 2006, *Derecho a la Identidad y Persecución de Crímenes de Lesa Humanidad,* Bueno Aires, Abuelas de Plaza de Mayo, pp. 67–120.

115 Law No. 25.779 (2 September 2003).

116 Proceedings have grown quickly in number since 2005 and are still going on today. According to the *Ministerio Público Fiscal* (Ministry for Public Prosecution), 261 cases were under investigation in June 2021 and 1044 convictions for crimes against humanity were handed down by September 2021. Further data are available at: https://www.fiscales.gob.ar/lesa-humanidad/?tipo-entrada=estadisticas. On civil society's reaction to the reopening of the criminal trials, see Haas, K., 2012, p. 39 etc.

117 The Truth Trials have in fact progressively focused on "administrative-judicial activities" not strictly criminal in nature, such as the exhumation and identification of

gests that, although the right to the truth has been invoked in a markedly retributive perspective in Argentina, it has meanings going beyond a mere palliative in the fight against impunity. An attempt to understand these meanings will now be made.

4. Lessons Learned from Argentina: The Value of the Judicial Implementation of the Right to the Truth

Having analyzed the Truth Trials as a mechanism for implementing the right to the truth, there is still an outstanding question: what has been the value of the judicial truth both for the victims and for Argentinian society? In an attempt to provide an answer, what follows does not amount to empirical verification, which would certainly be necessary for a careful assessment not only of the value of the truth uncovered by the Truth Trials but, more generally, also of the truth's impact on promoting democracy, reconciliation and a culture of human rights in societies in transition. Rather, the aim here is to briefly articulate why it makes sense to think that the truth uncovered by the Truth Trials has had any value for the victims and Argentinian society – specifically performing as a tool for knowledge, acknowledgment, strengthening the rule of law and, to an extent, for justice.

4.1. THE RIGHT TO THE TRUTH AS A TOOL FOR KNOWLEDGE, ACKNOWLEDGMENT AND STRENGTHENING THE RULE OF LAW

The Truth Trials have elicited conflicting reactions.[118] Notably, these trials have been opposed by the armed forces and viewed with suspicion by government circles.[119] In an interview released in July 2000, Gen. Ricardo Brinzoni complained about the inefficiency of investigations, as well as the lack of procedural coordination and guarantees for the military. In his words, the Truth Trials "have not accomplished anything. [...] Some

corpses, the creation of databases with information on missing persons or the collection of statements from witnesses and victims, rather than the perpetrators. This means that, since the resumption of the criminal proceedings, the activities of the judges in the framework of the Truth Trials have not overlapped with the work of the criminal courts. See Maculan, E., 2010, pp. 362–364.

118 The Argentinian community and scholars also have divergent opinions about the success of the entire transitional justice process. See Haas, K., 2012, p. 4 etc.

119 Andriotti Romanin, E., 2013, pp. 17–18; Brett, S., 2001, Chapters IV and X.

courts have powers to order arrests or incriminate for perjury. Others understand that this procedure should not be conducted in a court room."[120] Moreover, he asked for the respect of the rights of the soldiers since they "are citizens like any other and no one can be forced to testify against themselves".[121]

Even scholars have highlighted the problematic aspects of the Trials, referring mainly to difficulties in collecting evidence and to a sort of procedural anarchy of the courts, which developed different modes of action from time to time despite the IACHR's indications.[122]

The kind of truth uncovered by the Argentinian courts may also be questioned.[123] As noted, the courts have enjoyed limited institutional collaboration, which led to the disclosure of a truth that has primarily been based on the victims' testimonies and has thus been one-sided.[124] In addition, since they had to comply with the due process guarantees, judges have only been able to ascertain a truth more limited than the historical truth sought to be established by the mechanism.[125] Notwithstanding, the Truth Trials' truth has been broader than judicial truth as traditionally understood,[126] as the Trials were intended to disclose the fate of the missing persons and not merely allocate criminal responsibility.[127]

120 Brett, S., 2001, Chapter IV.

121 *Ibid*., Chapter X. The author argues that, alongside the concerns raised by the General, there are undoubtedly other reasons for them: "the resentment of serving officers forced to appear, negative publicity for the armed forces, and the effect of the trials on civil-military relations".

122 Maculan, E., 2010, p. 343 etc.; Jacqmin, A., 2017, pp. 1257–1258; Schapiro, H. I., 2002, p. 399. However, "both the human rights groups and government human rights officials have considered the existing diversity to be beneficial", Brett, S., 2001, Chapter IV.

123 From a general perspective, it has to be noted that truth is ontologically an "elusive concept", especially in post-conflict settings, where there are often conflicting versions of the past. On the topic, see Parlevliet, M., 1998, Considering Truth. Dealing with a Legacy of Gross Human Rights Violations, *Netherlands Quarterly of Human Rights*, Vol. 16, No. 2, p. 144 etc.

124 Andriotti Romanin, E., 2013, p. 19; Maculan, E., 2010, pp. 358–359; Schapiro, H. I., 2002, p. 399.

125 Maculan, E., 2010, p. 359.

126 See *supra* note 7.

127 Some have argued that the judges have taken on the roles of both historians and witnesses. See Garibian, S., 2014, p. 21; Jacqmin, A., 2017, p. 1258. For an analysis of the role played by the trial judges, their relationship with the perpetrators summoned to testify and their impact on the elaboration of the dictatorial past, see Andriotti Romanin, E., 2016, "Macanas", "tragedias" y "dramas". Los jueces y su presentación del pasado de terrorismo de Estado en el Juicio por la Verdad de Bahía Blanca, Argentina, *Sociohistorica*, No. 37, pp. 1–18.

Although these disapproving arguments provide the image of a "complex and confusing mechanism",[128] Argentinian civil society has generally responded positively to this experience.[129] The report by "Memoria Abierta", which collects the thoughts of lawyers, victims and judges of the Truth Trials, testifies that Argentinians wanted to take the past away from the monopoly of the military, the only ones who knew the truth about the fate of the *desaparecidos*.[130] From this perspective, it seems that the value of the Trials has lain first and foremost in the truth they have been able to tell: the investigations carried out have shed light on the whereabouts of thousands of victims, resulting in the establishment of rich databases complementing CONADEP's work.[131]

The Argentinians' intense need for knowledge of the truth can be traced back to the specificities of the atrocities committed during the dictatorship and the relevant political context. On the one hand, enforced disappearances are based on a "non-fact",[132] since they exist by means of secrecy and denial. Consequently, telling the truth about the victims' fate had the potential to remedy the primary anguish suffered by those left waiting for their return.[133] On the other hand, the ambiguous policy undertaken by the transitional governments heightened the desire for clarification, which had to come from official investigations.

In this regard, the promoters of the *Juicios* felt that ex-Navy chief Adolfo Scilingo's statements amounted to calls for the intervention of a state body that would institutionalize the discussion on the past.[134] "The issue could no longer be reduced to a television debate in which a family member

128 Maculan, E., 2010, p. 359.

129 Only the Madres de Plaza de Mayo were not enthusiastic about this initiative, because they said they already knew the truth. See Andriotti Romanin, E., 2013, pp. 12–13.

130 Among others, Alicia Oliveira, a lawyer involved in the Mignone and Lopaco cases, said "after the Due Obedience Law, I always had an idea, which was that we had to demand the right to the truth about what had happened. Not just the punishment, but the truth." The lawyer Alfredo Battaglia reported that, thanks to the Truth Trials, "the lack of knowledge of the facts has been broken down with information on the places of detention, with prisoners, torturers, commanders, and the discovery of clandestine centers that one did not know about at the time" (my translation). Memoria Abierta, 2010, pp. 127 and 132.

131 Schapiro, H. I., 2002, pp. 399–340. On the possibility of using the evidence gathered during the Truth Trials in criminal proceedings, see Maculan, E., 2010, pp. 364–369.

132 Garibian, S., 2012, p. 31.

133 Cohen, S., 1995, State Crimes of Previous Regimes: Knowledge, Accountability, and the Policing of the Past, *Law & Social Inquiry*, Vol. 20, No. 1, p. 19; Jacqmin, A., 2017, p. 1268.

134 Abregu, M., 1996, pp. 38–39.

asked a murderer for information";[135] a public authority had to take over this dialogue by taking a position on the disappeared and condemning the atrocities committed by the military, at least at a symbolic level.[136]

From this perspective, it seems that the positive response to the applicants' demands for truth is enriched with further meaning. The issue of the fate of the disappeared and of the truth about their destiny transcended knowledge of the location of their bodies, becoming the center of a process of recognition of the victims. Indeed, the Truth Trials have given the floor to hundreds of witnesses who had never had the chance to tell their story, to the point of being called a "free speech platform".[137] Newspaper coverage of the proceedings has been enormous,[138] testifying not only to the society's participation in the suffering of the victims, but also to the fact that the truth has been perceived as a shared goal and value among society.[139]

The Truth Trials may therefore have provided a forum for acknowledgement – that is, "what was private becomes public knowledge, shared amongst the wider population, and bearing the official sanction of the State".[140] By accounting the victims' experiences, the authorities have acknowledged that their "pain [was] real and worthy of attention,"[141] thus recognizing their status as victims and possibly giving them back the dignity they had been stripped of.[142] Moreover, the legitimization of the vic-

135 *Ibid*. p. 40 (my translation).

136 It should be noted that the choice of the judiciary as the body charged with safeguarding human rights and the right to the truth was not accidental. The view that criminal justice played a crucial role in telling the truth about past events consolidated, mainly during the Juntas trial in 1985. Moreover, the convictions of the military leaders in the initial stage of the transition were perceived as a tangible expression of a democratic judiciary, ready to commit to the fundamental values of the constitutional order. For this reason, the courts were considered the most suitable, if not the only ones willing and able to hear the truth demands. See Andriotti Romanin, E. A., 2012, p. 12.

137 Schapiro, H. I., 2002, p. 399. See also Jacqmin, A., 2017, p. 1258.

138 Abregu, M., 1996, p. 40.

139 Andriotti Romanin, E., 2013, p. 12; Schapiro, H. I., 2002, p. 400.

140 Parlevliet, M., 1998, p. 143. See also Cohen, S., 1995, p. 18; Greiff, P. de, 2012, Theorizing Transitional Justice, *NOMOS: American Society for Political and Legal Philosophy*, Vol. 51, p. 42. The distinction between knowledge and acknowledgement was originally drawn by philosopher Thomas Nagel.

141 Parlevliet, M., 1998, p. 143. See also Greiff, P. de, 2012, p. 42.

142 Studies investigating the emotional consequences of truth commissions and tribunals in various countries confirm that participants "experience social recognition, pride, relief, and a feeling of completion from having had the opportunity to express their feelings publicly, under oath, in a solemn setting". See Martín-Beristain, C., Páez, D., Rimé, B., Kanyangara, P., 2010, Psychosocial effects of participation in rituals of tran-

tims' demands has proved that institutions stood alongside them in their struggles and may have afforded them "a sense of recognition [...] as (equal) rights-bearers, and ultimately as citizens" of the nascent democracy.[143]

In this respect, it has been noted that the guarantee of the right to the truth in the framework of the Truth Trials has brought back justice and institutions into an "ethical dimension".[144] This arguably resulted in the strengthening of democracy and the rule of law,[145] as well as in fostering trust in institutions – or, at least, in the judiciary,[146] as the following paragraphs explain.

The very fact that the Truth Trials have been held reflects the progressive establishment of a democratic institutional apparatus, adhering to the principles of the rule of law. If it is true that the Argentinian State has been forced by the Inter-American Commission on Human Rights to guarantee the right to the truth, it is also true that the judiciary has accepted this task with diligence and commitment, seriously engaging in capillary investigations aimed at bringing the truth to light.

With specific reference to the truth-telling exercise, research argues that truth can foster the rule of law by shedding light on "the many ways in which legal systems failed to protect the rights of citizens [, thus providing] the basis on which, *a contrario*, legal systems can behave in the future".[147]

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sitional justice: A collective-level analysis and review of the literature of the effects of TRCs and trials on human rights violations in Latin America, *Revista de Psicología Social*, Vol. 25, No. 1, p. 48.

143 Greiff, P. de, 2012, p. 42.

144 Andriotti Romanin, E., 2013, p. 12.

145 According to members of the armed forces, however, the Truth Trials violated the rule of law, as they were contrary to the laws and decrees granting amnesty.

146 Abregu, M., 1996, p. 38 etc. In general terms, it is interesting to note that the jurisprudence of the European Court of Human Rights is consistent with this view. The ECtHR held that "[A]n adequate response by the authorities in investigating allegations of serious human rights violations may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of impunity, collusion in or tolerance of unlawful acts." See ECtHR, *Al Nashiri v. Poland*, no. 28761/11, Judgment of 24 July 2014, para. 495; ECtHR, *Al Nashiri v. Romania*, no. 33234/12, Judgment of 31 May 2018, para. 641; ECtHR, *Abu Zubaydah v. Lithuania*, no. 46454/11, Judgment of 31 May 2018, para. 610. In the same vein, see ECtHR, *Anguelova v. Bulgaria*, 38361/97, Judgment of 13 June 2002, para. 140; ECtHR, *Varnava et al. v. Turkey*, nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, Judgment of 18 September 2009 [GC], para. 191; ECtHR, *El-Masri v. the Former Yugoslav Republic of Macedonia*, no. 39630/0913, Judgment of 13 December 2012 [GC], para. 192.

147 Greiff, P. de, Transitional Justice and Development, in: Currie-Alder, B., Kanbur, R., Malone, D. M., Medhora, R., (eds.), 2014, *International Development. Ideas, Experience, and Prospects*, Oxford, Oxford University Press, p. 422.

Moreover, the institutionalized attempt to confront the past honestly may have been seen by the Argentinian as a good faith effort to initiate a new political project around values and norms shared by the entire society. In fact, the promoters of the Trials point out that the demand for truth has aimed precisely at advocating for a judiciary committed to the defense of human rights.[148] In this sense, it also seems that the Truth Trials may have raised trust in institutions and, more specifically, that the truth discovered by judges may have played the role of a "key trust-engendering reference value":[149] the judiciary, engaged in effective and rigorous investigations aimed at uncovering the truth about the violent past, appeared to be trustworthy, as the public recognized the values informing its action.[150]

The results of an empirical study on the psychosocial impact of transitional justice measures promoted in Argentina are worth mentioning in support of part of this analysis. Although the study did not explicitly focus on the Truth Trials, it found that the institutional intervention in coming to terms with the past transformed the victims' painful experiences into joy and hope.[151] Specifically, the perceived effectiveness of transitional justice mechanisms – in terms of knowledge about what happened, ending impunity, and prosecution or support to the prosecution of those responsible for human rights violations[152] – reversed the climate of fear and terror characterizing the years of the military dictatorship.[153] Whereas the Argentinian society avoided participation in public debate during the military regime,[154] the transition to democracy brought with it marked

148 Abregu, M., 1996, p. 38.

149 Offe, C., How Can We Trust Our Fellow Citizens?, in Warren, M. E., (ed.), 1999, *Democracy and Trust*, Cambridge, Cambridge University Press, p. 73.

150 *Ibid*., p. 67 etc. See also Human Rights Council, *Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff*, UN doc. A/HRC/21/46 (9 August 2012), para. 34; Greiff, P. de, Transitional Justice and Development, in: Currie-Alder, B., Kanbur, R., Malone, D. M., Medhora, R., (eds.), 2014, p. 421. For an extended analysis of institutional trust, see Bornstein, B. H., Tomkins, A. J., (eds.), 2015, *Motivating Cooperation and Compliance with Authority. The Role of Institutional Trust*, New York, Springer.

151 Zubieta, E., Bombelli, J., Muratori, M., 2021, Transitional Justice Measures Implemented in Argentina: Their Psychosocial Impact, *Deusto Journal of Human Rights*, No. 8, p. 45.

152 *Ibid*., pp. 32–33.

153 *Ibid*., p. 44.

154 There was even a process of progressive isolation of Argentinians: "people avoided sensitive issues unless they were certain of the loyalty of the audience [...] [and] sequestered themselves in their own family circle, restricting non-kin relationships to old friends". See Malamud-Goti, J., 1996, *Game Without End*, Norman, University of Oklahoma Press, p. 114.

prosocial behavior and participation in community life,[155] a clear sign of democratization and respect for pluralism.

At the same time, the study also pointed out that the CONADEP, the Trial of the Juntas and, to an extent, the more recent prosecutions for crimes against humanity had been perceived by the Argentinian population as quite effective in preventing future human rights violations.[156] Truth is known for its great deterrent potential, since citizens exposed to the past "[transform] the retrospective judgment on the crime into a pledge to prevent its reoccurrence."[157] It is not by coincidence that the Nuremberg trials were also intended to "establish incredible events by credible evidence" for the benefit of future generations.[158] Similarly, in Argentina, following the unsatisfactory conclusion of the Trial of the Juntas, some human rights groups acknowledged the value of it in the truth disclosed, stressing that "the only way to prevent the dirty war from happening again was to remember it".[159] In this perspective, it has been observed that the Truth Trials constitute "rituals of memory", insofar as they have made it possible to review the events of the dictatorial past and give them new meaning.[160] It would therefore be reasonable to assume that fulfilment of demands for truth in the context of the Truth Trials has also had some deterrent effect. However, some caution is needed in drawing such conclusions: police brutality is widespread in Argentina, a circumstance that some associate precisely with the lack of criminal punishment, thus indirectly claiming truth's failure to promote non-recurrence.[161]

155 Zubieta, E., Bombelli, J., Muratori, M., 2021, p. 44. Since 1983, there has been strong social mobilization in Argentina: it initially resulted in an increase in party and trade union activity and, subsequently, it revolved around human right movements, which acquired a central position on the political scene. See Pereyra, S., Protest, Social Movements, and Malaise in Political Representation in Argentina, in: Joignant, A., Morales, M., Fuentes, C. (eds.), 2017, *Malaise in Representation in Latin American Countries. Chile, Argentina, and Uruguay*, New York, Palgrave Macmillan, p. 236 etc.

156 Zubieta, E., Bombelli, J., Muratori, M., 2021, pp. 32–34.

157 Ricoeur, P., 2006, p. 332.

158 Naqvi, Y., 2006, p. 252. See also Jelin, E., 2003, *State Repression and the Struggles for Memory*, Minneapolis, University of Minnesota Press, who investigates the problems related to second-generation memory and its transmission and appropriation.

159 Haas, K., 2012, p. 29.

160 Mora, N. B., 2005, *Juicios por la verdad histórica, rituales de la memoria. La reaparición de una trama en Mar del Plata*, University of Buenos Aires School of Philosophy and Literature, p. 11.

161 Malamud-Goti, J., 1991, pp. 3–9. See also Bonner, N. D., 2014, "Never Again": Transitional Justice and Persistent Police Violence in Argentina, *International Journal of Transitional Justice*, Vol. 8, No. 2, pp. 235–255.

4.2. THE RIGHT TO THE TRUTH AS A TOOL FOR JUSTICE

If the previous analysis shows that the right to the truth may have served as a tool for knowledge, acknowledgement and strengthening the rule of law in Argentina, the issue now becomes whether the truth disclosed in the framework of the *Juicios por la Verdad* may also have provided justice.

The juxtaposition of the concepts of truth and justice is not an easy task. The relationship between them has long been debated in the context of truth commissions, and they have been perceived as alternatives to each other. In short, it was felt that the establishment of mechanisms aimed solely at truth-seeking could give rise to impunity since truth commissions might be promoted to avoid more serious accountability.[162] Nowadays, contrary opinions prevail: truth and justice, truth commissions and courts all play a complementary role in the fight against impunity.[163] Moreover, from a different perspective, it has been observed that truth is a prerequisite for justice, as it is needed for determining liability. In turn, justice is a precious tool in discovering the truth and "in the implementation of the right to the truth, [...] since it ensures a knowledge of the facts through the action of the judicial authority, responsible for investigating, evaluating evidence and bringing those responsible to trial".[164] As mentioned, even supranational jurisprudence seems to have advanced similar considerations, linking the right to the truth to the States' duty to carry out effective investigations.[165]

However, less has been said about what role the right to the truth might have in ending impunity, and whether judicial truth can promote justice *per se*. When trying to answer this question by looking at the Argentinian experience, it has to be stressed firstly that, in the context of the Truth Trials, the claims for the protection of the right to the truth have been instrumental to the fight against impunity and for justice. As noted, the aim of the applicants was to circumvent the amnesties and pardons, with a view not only to discovering the fate of their loved ones, but to identifying those responsible as well. During the Trials, the judiciary has shed light on the past atrocities and the perpetrators have been publicly shamed by the witnesses' testimo-

162 Hayner, P., 2011, pp. 91–92.

163 Naftali, P., 2015, The Politics of Truth: On Legal Fetichism and the Rhetoric of Complementarity, *Revue Québécoise de droit international*, pp. 101–128.

164 Commission on Human Rights, *Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy*, UN doc. E/CN.4/2006/52 (23 January 2006), para. 17.

165 See Part 2 above on the framing of the right to the truth by the European Court of Human Rights and the Inter-American Court of Human Rights.

nies. This was a way of punishing, albeit at a symbolic level, the crimes that occurred during the military regime, recognizing the pain suffered by victims and thus providing a degree of accountability.[166]

At the same time, the Truth Trials seem to have helped to pave the way for justice in the most traditional sense. Although the reopening of criminal proceedings in 2005 depended on a number of factors,[167] the Truth Trials have presumably contributed to their resumption by keeping attention focused on the issue of accountability and advancing a judiciary committed to the protection of human rights and democracy.[168]

Moreover, although the Truth Trials were promoted as the second-best option in the absence of criminal justice, they may have themselves been a tool for justice in multiple respects. Specifically, the guarantee of the right to the truth allowed for the reconciliation of the Full Stop and Due Obedience Laws with the right of access to justice.[169] Furthermore, given the specificities of the crimes perpetrated in Argentina, "justice, for the families of the missing, entail[ed] [...] the disclosure of [the] truth. Knowing what happened to the bodies is a way to stop the crime, first of all. As long as facts remain unknown, the crime persists, while the families keep on missing their relative."[170] Further still, acknowledging the victims' experiences through the truth-telling exercise provided them with a form of justice,[171] since their suffering was finally recognized, and their status of full citizens restored.

166 Garibian, S., 2015, Truth versus Impunity: Post-Transitional Justice in Argentina and the "Human Rights Turn", *African Yearbook of Rhetoric*, Vol. 6, No. 1, p. 72.

167 The reference here is, firstly, to the fight against the impunity trend undertaken at the international level since 1990s; see more in Beigbeder, Y., 2005, *International Justice Against Impunity: Progress and New Challenges*, Boston, Brill; International Commission of Jurists, 2015, pp. 11–53. Moreover, it should be noted that, in the 1990s, several European courts requested the extradition of Argentinian military personnel for the disappearance of their nationals and even conducted trials *in absentia*. Although these initiatives were opposed by the Argentinian government and Supreme Court, they served to put international pressure on the government and national judicial institutions to guarantee justice. See International Center for Transitional Justice, 2005, *Accountability in Argentina 20 Years Later, Transitional Justice Maintains Momentum*, (https://www.ictj.org/sites/default/files/ICTJ-Argentina-Accountability-Case-2005-English.pdf, 2. 3. 2022), p. 4.

168 In the same vein Garibian, S., 2015, p. 71. In this regard, it is worth noting that the Truth Trials were conceived by their promoters as a continuation of the criminal trials initiated in the early years of the democracy, as "part of a sequence" that should have resulted in the final conviction of those responsible for the atrocities of the Dirty War. See Andriotti Romanin, E., 2013, p. 15.

169 Abregú, M., 1996, pp. 25–26; Garibian, S., 2014, p. 10.

170 Jacqmin, A., 2017, p. 1268.

171 In general terms, see Velez, G., Twose, G., López López, W., Human Rights and Reconciliation. Theoretical and Empirical Connection, in: Rubin, N. S., Flores, R. L. (eds.), 2020, p. 541.

In this framework, the notion of impunity is not limited to its etymological meaning of "absence of [criminal] punishment"; rather, impunity is understood in a broader sense as "absence of acknowledgement".[172] In parallel, the notion of justice is not construed as punishment or retributive justice. On the contrary, the reference here is to a "vision of justice with a more human face", strictly related to the need of the victims and societies, to the injustice they have suffered, and their demands for recognition.[173] From this perspective, it does not seem unreasonable to think that, in the context of the Truth Trials, the right to the truth may have served also as a tool for justice.

5. Conclusion

The Argentinian Truth Trials have provided an opportunity to deepen the judicial implementation of the right to the truth and to underline its value for victims and societies in transition.

First, a possible mechanism of judicial implementation of the right to the truth has been reviewed, as these experiences have originated precisely in connection to the exercise of the right itself. While lacking an explicit normative basis at the national level, Argentinian courts finally granted the right to the truth in line with the friendly settlement reached by the applicants and the State, which was based on the purposes and objectives of the American Convention on Human Rights.[174]

Second, the positive impact of the recognition of the right to the truth on both individual victims and the society on the whole has also been highlighted. In addition to shedding light on the fate of the *desaparecidos*, the courts may have restored dignity to the victims, promoting their image as equal citizens and strengthening democracy and the rule of law. Moreover, the judicial truth also seems to have succeeded in delivering some kind of justice.

All this paints the picture of a right whose potential is truly remarkable when coming to terms with past abuses. In contexts overshadowed by lies, having the right to know the truth is a powerful action, imbued

172 Garibian, S., 2015, p. 72.

173 Haldemann, F., 2008, p. 678.

174 In this perspective, the *Juicios por la Verdad* are an important example of the effectiveness of the interaction between the national and international normative and jurisdictional levels for the advancement of human rights. Although the protection of the right to the truth in Argentina has been based on the friendly settlement reached with the government, the national authorities' attitude towards the transition suggests that they would not have granted the right to the truth had the relatives of the *desaparecidos* not turned to the international judges, who were open to recognizing it.

with strong political significance: obtaining the disclosure of troublesome truths not only sheds light on the past and the present, but implies important changes for the future as well.[175]

Nevertheless, there is a common belief that tribunals are not the most suitable forum for establishing the truth in the face of serious violations of human rights, mainly because of the limitations inherent in the judicial process of truth-telling.[176] Indeed, trials aim to ascertain, first and foremost, the liability of the perpetrators, thus proving inadequate to portray the complexity of historical truth. Moreover, when ruling on cases, judges mainly take into account the evidence presented by the parties in support of their positions, thereby confronting only a limited portion of reality. In other words, judicial truth is the outcome of the dialectic between prosecution and defense, highly respectful of the guarantees of the defendant. Very little space is given to the victims, as well as to the reference context, which are of crucial importance when it comes to disclosing the truth of abuses committed on a large scale.

In this regard, it is perhaps worth making some considerations, especially thinking about whether the right to the truth should be guaranteed by courts. Firstly, while the weaknesses of judicial truth seem to be unquestionable, it is only so to the extent of the current situation. A judge trying a murder case will focus only on clarifying the circumstances of the death and identifying those responsible for it, because this is what he is required to do. It would be different if he had to rule on a complaint of a violation of the right to the truth. As the experience of the Truth Trials has shown, courts ruling on such claims have taken into account wider considerations. Actors usually excluded from judicial proceedings have been involved in them and investigations of contextual elements have been carried out. This can also be inferred from the international soft-law documents defining the right to the truth in broad terms, as a right that entitles obtaining "all relevant information concerning the commission of the alleged violation".[177] In other words, it would be pretentious to assess the courts' response to the truth question when such a question has never been asked.

One might wonder whether the task of ascertaining the truth can and should be given to a tribunal, if only for reasons of procedural economy. In contexts torn apart by extremely serious violations of human rights,

175 In the same vein, Arendt, H., 1967, Truth and Politics, *The New Yorker*, p. 70.

176 Haldemann, F., 2008, p. 725.

177 Human Rights Council, *Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff*, UN doc. A/HRC/24/42 (28 August 2013), para. 20.

where the truth about what happened must unquestionably be uncovered, courts might be required to establish the truth. After all, this is already happening, to an extent. Judges ruling on international crimes rarely decide only on the guilt or innocence of the defendant. Judicial truth takes on a broader character than the mere establishment of liability since it is also intended to achieve additional purposes, such as combating impunity, deterrence, or peace.[178] Moreover, in these contexts, frequently characterized by a marked political precariousness, the courts are often among the few "refuges of truth".[179]

This is not to deny the merits of non-judicial mechanisms of inquiry, generally believed to be the best option to ascertain the truth in the face of grave human rights violations.[180] There is no single model for coming to terms with the past. However, the fact that a truth commission might be deemed to be the most appropriate solution to bring the truth to light in a given time and place does not undermine the idea of the recognition of the right to the truth as an enforceable right.[181] On the contrary, what has been said with respect to the Truth Trials suggests that the judicial implementation of the right to the truth is a valuable tool, which positively affects both people's lives and societies' attempts to come to terms with the past.

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178 "In trials dealing with international crimes, however, the significance of [...] legal truth has taken on a new dimension, owing no doubt to the unique objectives that international criminal law is supposed to fulfil and that go way above and beyond merely finding guilt or innocence of particular individuals." See Naqvi, Y., 2006, p. 246.

179 Arendt, H., 1967, p. 84.

180 Haldemann, F., 2008, p. 725.

181 Inter-American jurisprudence has pointed out that the establishment of a truth commission "does not fulfil or substitute for the State's obligation to establish the truth through judicial proceedings" .IACtHR, *Contreras et al v. El Salvador*, C Series No. 232, Judgment of 31 August 2011, para. 135. In the same vein, see, IACtHR, *Anzualdo Castro v. Peru*, C Series No. 202, Judgment of 22 September 2009; IACtHR, *Gomes Lund et al ("Guerrilha do Araguaia") v. Brazil*, C Series No. 219, Judgment of 24 November 2010.

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SUDSKA IMPLEMENTACIJA PRAVA NA ISTINU: OSVRT NA ARGENTINSKO ISKUSTVO SA *JUICIOS POR LA VERDAD*

Chiara Chisari

APSTRAKT

Zaštita prava na istinu postala je ključna u suočavanju sa sistematskim povredama ljudskih prava. Smatra se da je govorenje istine od najvećeg značaja za borbu protiv nekažnjivosti i za unapređenje mira, naročito u kontekstu tranzicije ka demokratiji. Uprkos tome, naučnici posvećuju malo pažnje sudskoj realizaciji ovog prava, a posebno vrednosti sudske zaštite prava na istinu. Ovaj članak nastoji da popuni ovu prazninu razmatranjem *Juicios por la Verdad* (Suđenja za istinu), jedinstvenog iskustva koje je argentinsko građansko društvo promovisalo nakon vojne diktature. Konkretno, u njemu se istražuje efekat sudskog priznanja prava na istinu kako na život žrtava tako i na pokušaj društva da se pomiri sa prošlošću. Analiza ukazuje na to da pravo na istinu može da posluži kao mehanizam za sticanje znanja i potvrde, za jačanje vladavine prava i, u određenoj meri, za ostvarivanje pravde.

Ključne reči: pravo na istinu, sudska implementacija, vrednost sudske istine, *Juicios por la Verdad*, Suđenja za istinu, Argentina, prelazna pravda.

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