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Criminal Past

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CRIMINAL PAST

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"En paz con ellos" collage 2001

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CONTENTS

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Foreword / Préface / Prólogo

How does a society deal, in words and arguments, not by revenge and murder, with its criminal past? How does it come to terms with a resistance to have the past become past? And what is to be done with those who committed political crimes, with perpetrators? Which are the best ways to repair the irreparable? And who is authorized to decide it? This issue of the *African Yearbook of Rhetoric* examines a range of answers given by post-criminal societies, as well as the deliberative, even rhetorical arguments on which they are the grounded. Punishment, remembrance, reconciliation, truth-seeking, amnesty, referendum, are questioned without prejudice (be it moral or political), but under the sharp light provided by a variety of local experiences, those of Argentina and South Africa, of Rwanda and Uruguay, of Haiti and the ex-USSR.

Sortir du crime exige d'affronter la force et la convenance du silence. Ce silence concerne la communauté entière. Les criminels, tout d'abord, parce qu'ils veulent éviter la souffrance du châtient, mais aussi les victimes, qui ne veulent ni peuvent plus souffrir davantage, et la société en général, qui voudrait mieux oublier le passé et, du coup, oublier aussi le travail de reconnaissance, de *accountability*, de responsability. "J'ai voulu parler mais je ne pouvais rien dire" ("Quise hablar pero no me salía nada"), dit Hebe de Bonafini, Madre de Plaza de Mayo, quelques jours après le décès de Videla, l'ancien dictateur argentin qui dut passer, sa vie durant, devant plusieurs tribunaux. Dire la violence, en parler, la montrer, sont des conditions pour surmonter le passé criminel et autant de manières de le faire – dire, parler, montrer constituent le but et les moyens au même temps. Encore faut-il admettre qu'il y a des différents dispositifs de reconnaissance? Lequel le plus "parlant", lequel le plus juste ? La question de la représentation de l'horreur est solidaire de celle du fondement du droit de même que la question du fondement des représentations publiques l'est de celle de la représentation du droit et du droit des représentants à dire la loi.

No se encontrará, a lo largo de este volumen, un modelo o un paradigma; sí, en cambio, la posibilidad de un debate, de varios debates. Se sostiene la singularidad de cada caso. Se afirma, por ejemplo, que la experiencia de Sudáfrica es indócil e inexportable. En Argentina, ha podido afirmarse algo también indócil e inexportable: "el modelo sudafricano es inmoral". Podría asimismo decirse que la inmoralidad está en la idea de *modelo*. En ese sentido, ¿no es acaso también inmoral, indócil, inexportable, un museo del horror, de la violencia extrema, una museografía del desastre? ¿No es también inmoral, indócil, inexportable, juzgar penalmente el Mal, traducirlo al lenguaje de la ley? El derecho internacional provee los medios y

© African Yearbook of Rhetoric 6, 1, 2015, Online ISSN 2305-7785:
Lucas G. Martín, "*Foreword / Préface / Prólogo*", pp. 1 - 2.

el lenguaje desde un lugar transfronterizo, global a su modo, que evita la pregunta por lo ex-im-portable, en una palabra, la pregunta sobre lo que importa. Es un lenguaje moral, de lo imprescriptible, lo inamnistiable, lo que debe ser sancionado. Un lenguaje también indócil e inexportable, acaso in-importable.

Guest Editor, Lucas G. Martín.

"Por eso, Sr. Eichmann, debe Ud. colgar". De *Eichmann en Jerusalén* a los "Juicios" en Argentina (reflexiones situadas)

Claudia Hilb

Al inicio del epílogo de su crónica del juicio de Eichmann en Jerusalén, Hannah Arendt afirma que dicho juicio nos coloca frente a problemas políticos, morales y jurídicos que sin embargo el juicio mismo, por cómo fue llevado adelante, lejos de ayudarnos a elucidar, contribuye a oscurecer. Me propongo aquí restablecer brevemente cuáles son, a ojos de Arendt, estos problemas políticos, morales y jurídicos, a fin de apoyarme en su reflexión para interrogar, a partir de allí, cuáles pueden ser los problemas políticos, morales y jurídicos con los que nos confronta el juzgamiento, en Argentina, de los autores de los crímenes cometidos por la Dictadura militar que asoló el país entre 1976 y 1983.

Cómo es sabido, Arendt afirma repetidamente, desde los años cuarenta, que el totalitarismo ha hecho estallar las categorías morales y jurídicas de las que disponíamos, al confrontarnos a un nuevo tipo de crimen – la vocación por convertir al hombre en superfluo, y la eliminación de poblaciones enteras de la faz de la tierra, y a un nuevo tipo de criminal, que no puede captarse en los términos habituales de quién infringe – a sabiendas, o por inadvertencia – las normas compartidas, y que sólo parecemos poder captar vagamente si nos referimos a lo que Kant, sin ir sin embargo mucho más lejos, denominó mal radical. En los primeros años Arendt insistirá en que nos encontramos inermes, que sólo podemos decir de estos crímenes que no deberían haber sucedido, y que no podemos castigarlos ni perdonarlos en tanto no podemos comprenderlos, puesto que no son subsumibles bajo las categorías con las que comprendemos y juzgamos. Esos crímenes y esos criminales parecen exceder, en su radicalidad maligna, la esfera de los asuntos entre hombres, que es la escena común en que actuamos, y en que podemos comprender, juzgar, y así castigar, o también perdonar. Y no obstante, aunque carezcamos de las herramientas para hacerlo, debemos juzgarlos y castigarlos. Como escribe en "La imagen del infierno, es tan necesario castigar a los culpables como recordar que no existe castigo que pudiera corresponder a sus crímenes".[1]

Ahora bien, desde sus primeras manifestaciones en este sentido

[1] Hannah Arendt, "The image of hell", *Commentary* 2, 3, (1946): 291-95.

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Claudia Hilb, "Por eso, Sr. Eichmann, debe Ud. colgar". De *Eichmann en Jerusalén* a los "Juicios" en Argentina (reflexiones situadas), pp. 3 - 13.

hasta su crónica del juicio de Jerusalén, Arendt se habrá abocado, precisamente, a la tarea de comprender. De comprender "qué sucedió" – y los *Orígenes del totalitarismo* marca sin dudas un hito fundamental en esta empresa – y de comprender "cómo fue posible que sucediera".[2] En ese trayecto, irá afinando y modificando su reacción primera respecto del nuevo tipo de criminal, y su insinuación originaria, que parecía apuntar al carácter radical de la maldad del autor de este nuevo tipo de crímenes, irá dejando lugar a la configuración de otra figura, a la del criminal banal, la de aquel que está dispuesto a adscribir a cualquier máxima, sea cual fuere, que le sea dada. No parece haber, en ese personaje, ningún atisbo de maldad diabólica, de aquello que – al sobrepasar lo asible en el concepto – correría el riesgo de codearse con lo sublime.[3] Se trata, por el contrario, de alguien a quien apenas puede corresponder el nombre de persona, si llamamos persona, con Arendt, a quien resguarda en sí la pluralidad propia de la condición humana;[4] se trata de aquel que está dispuesto a hacer cualquier cosa, a subsumir sus actos bajo cualquier norma que se le proponga, porque ha renunciado a pensar, porque ha renunciado al diálogo consigo mismo, porque ha renunciado a la interrogación acerca de lo que está bien y lo que está mal. No obstante, no por el hecho de haber comprendido algo más, la pregunta acerca de cómo juzgar, cómo castigar este nuevo tipo de criminal autor de un nuevo tipo de crímenes, se ha vuelto más sencilla. Si en los años 40 Arendt insinuaba que el mal radical no poseía castigo a la medida de ese mal, y escapando a la esfera de los asuntos humanos sólo podía convocar a la retribución o la venganza, el agente banal del mal extremo con que nos confronta su reflexión en los años sesenta no nos deja en mejor situación para juzgar. Porque un agente tal nos sustrae aquello que, desde siempre, ha estado en nuestra tradición unido a la posibilidad de castigar el crimen: esto es, nos priva de la conciencia, de la voluntad de actuar en contra de la ley que atribuimos necesariamente al criminal, para considerarlo tal.

Si a ojos de Arendt el juicio de Jerusalén es en buena medida un fracaso, esto se debe a que – pese al hecho no menor de haber condenado a

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[2] Cf. Hannah Arendt, *The origins of totalitarianism*, "Preface to Part Three" (Orlando: Harcourt, 1973): xxiv.

[3] Ya en 1946, en una carta a Karl Jaspers, ante las objeciones de este Arendt reconocía la necesidad de precaverse contra la idea de una "grandeza satánica" en el nuevo mal. Hannah Arendt / Karl Jaspers, *Briefwechsel 1926-1969* (Munich: Piper, 1985): 106.

[4] "Pensar y recordar, dijimos, es la manera humana de echar raíces... Aquello que comúnmente llamamos una persona o una personalidad, en tanto se distingue de un mero ser humano o de un nadie, de hecho surge de este proceso enraizador del pensar…". "Some questions of moral philosophy", Hannah Arendt, *Responsiblity and Judgment* (New York: Schocken Books, 2003): 100. O también, "En el mal que carece de raíces ("*rootless*") no queda persona alguna a la que poder siquiera perdonar" (*Ibid*. 95)

Eichmann – no ha contribuido a esclarecer los problemas morales, políticos y jurídicos con los que nos confronta, sino que por el contrario los ha oscurecido. Para lo que aquí me interesa, ha obturado la comprensión de que (1) nos encontramos frente a un nuevo tipo de crimen para el cual no disponemos de leyes, y que convocan entonces o bien a leyes que no dan cuenta de la novedad del fenómeno ni cuadran con los nuevos crímenes cometidos, o bien a leyes de nuevo tipo que deberán aplicarse retroactivamente, y (2) de que nos enfrentamos a un nuevo tipo de criminal, que como señalaba, no cree ser responsable de otra cosa que de haber cumplido con eficacia las órdenes y leyes bajo las cuales ejerció su tarea. Si el primer problema pone en jaque nuestras categorías jurídicas, el segundo jaquea, asimismo, nuestras categorías morales respecto de la relación entre culpa, responsabilidad y conciencia moral.

La dificultad que esto supone está expresada en los párrafos finales del epílogo de Eichmann en Jerusalén, y sin lugar a dudas la interpretación de la postura de Arendt frente a los problemas suscitados por el juicio se decide en la atenta comprensión de esas líneas. Allí, recurriendo a una cita de Yosal Rogat, Arendt escribe: "rechazamos, y las consideramos bárbaras, las afirmaciones de que "los grandes delitos ofenden de tal modo a la naturaleza, que incluso la tierra clama venganza; que el mal viola la natural armonía de tal manera que tan solo la retribución puede restablecerla; que las comunidades ofendidas por el delito tienen el deber moral de castigar al delincuente"". Esto es, rechazamos como bárbara la idea de que hay crímenes que violan la armonía natural de modo tal de que es nuestro deber moral retribuir el mal con la venganza y el castigo. Pero a la vez, frente a este mal novedoso, extremo, para el cual no disponemos de instrumentos de justicia que se hallen a la medida de su novedad y su radicalidad, no disponemos de una alternativa de castigo que pueda prescindir de la venganza, o que no contraríe nuestros principios corrientes de justicia que objetan que apliquemos, con el poder que nos otorga la victoria, una nueva ley de manera retroactiva, a la medida del nuevo crimen.[5] Hay así, en el juicio de Israel, un elemento trágico in-asimilable: debemos hacer actuar a la justicia, aún si no sabemos cómo hacerlo, o más aún, aún si no estamos en condiciones de hacerlo.[6] Y puesto que debemos hacerlo, la justicia que de

[5] Arendt no objeta que se aplique una ley retroactiva, ya que entiende que nuevos crímenes, los crímenes contra la humanidad, convocan inevitablemente la necesidad de nuevas leyes. Lamenta, en cambio, que el juicio de Eichmann no haya redundado en la conformación de un Tribunal penal internacional, que podría haberse constituido como nueva instancia duradera para afrontar este nuevo tipo de crimen hacia el futuro, y que en cambio haya constituido el último en la serie de los "juicios sucesorios" de Nuremberg, es decir, de juicios instrumentados por los vencedores.

[6] En un excelente artículo, Susannah Young-ah Gottlieb ha señalado que si asimilamos esta situación a la tragedia, el héroe de la misma ciertamente no sería Eichmann, sino los jueces que deben pronunciar una justicia para la cual no tienen

allí resultará esconderá bajo sus ropajes los elementos de la venganza, de la retribución, afirmados en nuestra certeza de que los grandes delitos que ha cometido Eichmann "ofenden de tal modo a la naturaleza, que incluso la tierra clama venganza; que el mal viola la natural armonía de tal manera que tan solo la retribución puede restablecerla". Es en esa clave que debemos interpretar los extraños ecos del alegato que Arendt pone en boca de los jueces, de aquello que según Arendt los jueces deberían haber dicho si hubieran dado efectiva cuenta del principio de su accionar. Ese supuesto alegato diría así que "del mismo modo que Ud. apoyó y cumplimentó una política de unos hombres que no deseaban compartir la tierra con el pueblo judío ni con ciertos otros pueblos de diversa nación – como si Ud. y sus superiores tuvieran el derecho de decidir quién puede y quién no puede habitar el mundo – , nosotros consideramos que nadie, es decir, ningún miembro de la raza humana, puede desear compartir la tierra con Usted. Esta es la razón, la única razón, por la que debe ser colgado". No importa, para el caso, que Eichmann no se sienta culpable, que no crea haber cometido un delito: percibimos la obligación moral de castigarlo, aunque esta obligación moral no pueda encontrar otro fundamento que nuestra certeza arcaica, bárbara, de que – aunque los crímenes excedan nuestras categorías, aunque sus agentes no se sientan culpables – hay males que exigen castigo. Que es justo que Eichmann deba morir.

En otras palabras, el juicio de Jerusalén oculta, malamente, que nuestra convicción de que al condenarse a Eichmann se ha hecho justicia no puede fundarse en nuestros principios morales y jurídicos explícitos, sino en una remisión a una relación arcaica, cuasi natural, a lo justo, y a nuestra negativa a admitir que hombres normales puedan renunciar a la capacidad de distinguir el bien del mal. ¿Es esta relación arcaica a lo justo y esta imputación universal de la capacidad de distinguir el bien del mal, en ausencia o en oposición a normas impartidas, un fundamento suficiente, satisfactorio, de nuestra acción, que es nada menos que la condena de Eichmann a la horca? Allí, claro está, reside la pregunta que el texto de Arendt pone en escena de manera extraordinaria, en la incomodidad que nos suscita la conclusión, "es por eso que Ud. debe ser colgado". Y en ese sentido, el juicio de Eichmann pone ante nosotros las preguntas morales, jurídicas y políticas que debemos enfrentar una vez que hemos perdido las certezas con las que, hasta no hace tanto tiempo, nos orientábamos sin mayor dificultad en el mundo común.[7]

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palabras adecuadas. Susannah Young-ah Gottlieb, "Beyond tragedy: Arendt, Rogat and the judges in Jerusalem", *College Literature*, 38/1 (2011): 45-56 (52).

[7] En "Personal responsibility under dictatorship", Arendt escribe: "mi formación intelectual temprana ocurrió en una atmósfera en la que nadie prestaba mucha atención a los asuntos morales; fuimos criados con el supuesto: Das *Moralische versteht sich von selbst*, la conducta moral va de suyo". "Personal responsibility...", en

Inspirados en nuestro recorrido de *Eichmann en Jerusalén* intentemos ahora hacer surgir las preguntas a las que nos conminan los juicios en Argentina a los agentes del terror estatal. No ignoro, claro está, las diferencias monumentales que separan ambos casos, pero creo aún así que el texto de Arendt puede ayudarnos a pensar lo que queremos pensar. Quiero centrar mi reflexión sobre dos momentos: el primero, el periodo que conduce a los Juicios a las Juntas bajo el gobierno de Raúl Alfonsín en 1985, y la posterior sanción en 1987, bajo ese mismo gobierno, de las leyes de obediencia debida y de punto final;[8] el segundo, la reapertura de los juicios por delitos de lesa humanidad cometidos bajo el régimen militar 1976-1983 a partir del año 2005, tras la declaración de nulidad, en 2003, de las leyes de 1987, seguida en 2007 por la declaración de inconstitucionalidad de los indultos firmados por el Presidente Menem en 1990.[9]

En ambos casos, y de manera distinta como veremos, la percepción de que ha sucedido entre nosotros un crimen sin precedentes, la exterminación clandestina de un grupo de personas – no importa si son diez mil o treinta mil – organizada desde el Estado,[10] convoca a la certeza de que "un crimen tal merece castigo". En ambos casos el crimen, en su naturaleza de crimen organizado desde el poder del Estado, involucrando a centenas o miles de agentes, parece no tener precedentes que nos permitirían sin dificultad aplicar las herramientas jurídicas existentes.

Así, yendo al primer momento, ya cuando releemos las palabras finales del fiscal Strassera en el Juicio a las Juntas,[11] ("[L]a Nación argentina... ha sido ofendida por crímenes atroces. Su propia atrocidad torna monstruosa la mera hipótesis de la impunidad. Salvo que la conciencia moral de los argentinos haya descendido a niveles tribales, nadie puede admitir que el secuestro, la tortura o el asesinato constituyan "hechos politicos" o "contingencias del combate""), o cuando recorremos los argumentos del

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Arendt, *Responsiblity and judgment* : 22-23.

[8] Estas leyes pusieron fin a la posibilidad de procesar a gran mayoría de los integrantes de las fuerzas militares y de seguridad por actos cometidos entre 1976 y 1983.

[9] Los indultos de 1990 habían beneficiado no sólo a los condenados en los Juicios de 1985 o en juicios posteriores, sino también a quiénes se encontraban bajo proceso.

[10] Existe en Argentina una disputa, más política que verdaderamente historiográfica, acerca del número de víctimas de la Dictadura.

[11] "Por todo ello, señor presidente, este juicio y esta condena son importantes y necesarios para la Nación argentina, que ha sido ofendida por crímenes atroces. Su propia atrocidad torna monstruosa la mera hipótesis de la impunidad. Salvo que la conciencia moral de los argentinos haya descendido a niveles tribales, nadie puede admitir que el secuestro, la tortura o el asesinato constituyan 'hechos politicos" o "contingencias del combate"... [Y]o asumo la responsabilidad de declarar en su nombre que el sadismo no es una ideología política ni una estrategia bélica, sino una perversión moral". http://archivohistorico.educ.ar/sites/default/files/IX_04.pdf : Accessed 17 February 2015.

libro de Carlos Nino, *Juicio al mal absoluto*,[12] que relata las discusiones que rodearon la preparación de esos juicios entre los asesores cercanos al Presidente Alfonsín, percibimos la convicción de que, poseamos las herramientas idóneas o no, esos crímenes deben ser castigados. Pero en uno y otro caso, en toda la letra del libro de Nino, o en las referencias de Strassera a los problemas de la justicia retributiva, percibimos al mismo tiempo y en todo momento la preocupación por encontrar en el orden institucional recuperado esas herrramientas jurídicas idóneas, para escapar así cuanto se pueda a todo atisbo de excepcionalidad. Si resituamos esta preocupación en los términos que nos provee Arendt, podemos decir que encontramos desde 1983 la percepción de la novedad del crimen, frente a la cual no tenemos propiamente herramientas precisas, acompañada de la certeza, anclada firmemente en nuestro sentido de justicia, de que hay crímenes que merecen castigo, pero que hallamos también simultáneamente en aquel momento el intento de soslayar la novedad del crimen, de subsumirlo bajo reglas conocidas, a fin de escapar así a todo parecido con una justicia de vencedores que pudiera prevalerse de su supremacía para imponer leyes excepcionales o retroactivas. Podemos avanzar: en aquella primera instancia los problemas a los que refiere Arendt parecen percibirse – el problema del crimen inédito, de la ausencia de pena a la medida del crimen, y a la vez, de la necesidad de castigarlo – y la solución buscada es disimularlos, hasta donde sea posible, bajo el manto de la normalidad. Pero esto, claro, solo es posible parcialmente. Y allí donde el sentido ofendido de justicia – el problema moral, podemos decir v choca con el intento de ocultar las dificultades bajo el manto de normalidad – ocultando el problema jurídico, como si este no existiera –, la solución hace crisis: en el punto 30 del fallo del Juicio a las Juntas, o en las excepciones que introduce el Senado a la obediencia debida en la reforma del Código Militar. En efecto, aquel punto 30 del fallo en el Juicio a las Juntas, contrariando el intento de limitar los juicios a los acusados en aquel momento, establecía que correspondía enjuiciar no solo "a los Oficiales Superiores, que ocuparon los comandos de zona y subzona de Defensa, durante la lucha contra la subversion" sino también a "todos aquellos que tuvieron responsabilidad operativa en las acciones". Con esa sencilla afirmación, la extensión se ampliaba considerablemente, más allá de lo previsto por el Gobierno. Asimismo, la modificación introducida por el Congreso al proyecto de reforma al código militar, una de cuyas finalidades era reglamentar la obediencia debida a fin de exonerar a los mandos inferiores – una modificación que el Poder Ejecutivo sorprendentemente no veto – había establecido ya que la obediencia debida no podía argüirse en caso de hechos atroces o aberrantes.[13] Nuevamente, el

[12] Carlos Nino, *Juicio al mal absoluto* (Buenos Aires: Emecé, 1997).

[13] Ley 23.049 de Reforma del Código Militar (febrero 1984): Art. 11 – "…podrá presumirse, salvo evidencia en contrario que se obró con error insalvable sobre la

propósito de limitar los alcances de la justicia por un lado, chocaba con la necesidad, empujada por una suerte de impulso moral, de ampliarlos. Así, podemos advertir, el intento alfonsinista de esconder, bajo los ropajes de la legalidad, la excepción ineludible a la que se ve confrontada frente a crímenes sin precedentes que demandan castigo, deja traslucir sus dificultades, o sus imposibilidades, en esos momentos clave, en que el sentido de la justicia dañada se sobresalta frente a la inadecuación del orden jurídico. Con la clausura del momento alfonsinista con las leyes de obediencia debida y punto final de 1987 esa crisis encuentra una resolución que ahora es abiertamente, eminentemente política.[14]

Cuando recorremos los principios que parecen subyacer al proceso que, a partir de 2003, conducirá a la reapertura de los juicios en 2005, percibimos que aquella voluntad de subsumir, hasta donde fuera posible, los juicios bajo la normalidad de las reglas previas parece haber perdido toda importancia. La excepcionalidad es asumida casi abiertamente, en nombre del sentido ofendido de justicia: si la clausura política de 1987, aumentada por los indultos de Menem, han instalado una sensación si no universal, por lo menos bastante extendida de impunidad, la oposición a la impunidad en nombre del sentido ofendido de la justicia – hay crímenes que no deben permanecer impunes – parece dar el tono dominante del camino emprendido. La declaración de nulidad de las leyes del Parlamento de 1987, la derogación de los indultos, el desconocimiento de la cosa juzgada, el juzgamiento de los crímenes como crímenes de lesa humanidad (una figura incorporada a la Constitución en 1994, o sea posterior a los hechos), todas estas medidas altamente discutibles desde la óptica del Estado de derecho, se justifican esencialmente en nombre de la necesidad de juzgar crímenes que exigen castigo.[15] Y si en 1985 la búsqueda estuvo orientada a ocultar la excepción bajo la regla, a partir de 2003 la referencia a los juicios de Nuremberg, juicios excepcionales realizados por los vencedores, resulta por el contrario un aval de peso en la afirmación de la prioridad de la justicia por encima de la seguridad jurídica, para utilizar la expresión del ministro de la

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legitimidad de la orden recibida, excepto cuando consistiera en la comisión de hechos atroces o aberrantes." La Reforma era objetada por los defensores militares por su efecto retroactivo (como lo era también la derogación de la auto-amnistía decretada por la Dictadura en septiembre de 1983).

[14] Esa solución implica un cierre jurídico al límite de la legalidad puesto que se prohíbe a la justicia examinar siquiera los casos subsumibles a priori bajo la figura de la obediencia debida, lo cual puede interpretarse como un avasallamiento de la independencia del Poder Judicial.

[15] Por razones de espacio, no podemos detallar aquí el proceso político y jurídico que condujo a partir de 2003 a este conjunto de medidas. Véase, entre otros, Centro de Estudios Legales y Sociales (CELS), *Derechos Humanos en Argentina: Informe 2013* (Buenos Aires: Siglo XXI, 2013).

Corte Suprema de Justicia Ricardo Lorenzetti.[16] Nuestro sentido de justicia exige castigo, y si para castigar no disponemos de las herramientas idóneas nuestra voluntad de justicia habrá de procurarlas. Declarando nulas leyes legítimamente votadas, acudiendo a figuras penales – el crimen de lesa humanidad – retroactivamente, desconociendo la cosa juzgada.[17]

Nuestro sentido de justicia se ha visto ofendido. Pero ¿cuál ha de ser la medida de ese castigo, cuando no disponemos de los instrumentos jurídicos idóneos? ¿Cómo escapar de la justicia de los vencedores, cuando aplicamos leyes retroactivamente, cuando derogamos leyes legítimamente sancionadas, cuando desconocemos la cosa juzgada? En lo que aquí me interesa, ¿nos provee esta reapertura mayor claridad para pensar los problemas morales, jurídicos y políticos a los que nos vemos confrontados, o los da por resueltos en la afirmación de que un crimen tal merece castigo?

Al final del epílogo a *Eichmann en Jerusalén* Arendt nos da a entender que en el entrelazamiento del sobresalto de nuestro sentido de la justicia – un crimen tal merece castigo – y nuestra imposibilidad de encontrar, en las normas establecidas, la medida de ese castigo, recurre, bajo las formas aparentes de la justicia, el círculo trágico de la venganza, de la retribución del mal por el mal. La celebración de la reapertura de los juicios, de la persecución de los criminales, no debe obturar que examinemos esta posibilidad: de que también entre nosotros la afirmación de un sentido arcaico, insoslayable, de justicia, en ausencia de las herramientas jurídicas que pudieran enfrentar el mal advenido, no pueda evitar la comparecencia del círculo trágico de la retribución del mal con el mal. De que la afirmación de un sentido insoslayable de justicia se mezcle, de manera casi imperceptible, con la celebración de una justicia de los vencedores. De que entonces, la convicción de detentar en nuestras manos el sentido de lo justo, situado con certeza por encima de los instrumentos jurídicos, convierta el triunfo sobre la impunidad en la imposición de una justicia parcial, injusta, que cree saber demasiado, que cree saber a priori quienes son culpables y quienes inocentes, en una afirmación de lo justo desinteresada del Estado de derecho y de los derechos de los acusados.

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[16] Ver Ricardo Lorenzetti y Alfredo J. Kraut, *Derechos humanos: justicia y reparación*, (Buenos Aires: Sudamericana, 2011): 41-2.

[17] El crimen, aquí, no nos es desconocido como lo es el genocidio para Arendt: es el crimen de lesa humanidad. Y aunque este no haya formado parte de nuestro ordenamiento jurídico, Lorenzetti argumenta que encontramos en nuestra tradición de derecho natural, o del derecho de gentes, o en nuestra certidumbre "de que son reconocibles para una persona que obrara honestamente conforme a los principios del estado de derecho", suficiente apoyo para poder sostener su pertinencia (*Ibid*. 42). Señalemos en contraste que en 1985 se omitió juzgar con la figura del genocidio, por no estar ésta incluida en la Constitución.

La celebración de la extensión, en los tiempos actuales, del delito de lesa humanidad – única figura imprescriptible de la que disponemos, pero a la vez, recordemos, retroactiva respecto de los delitos juzgados – , a los llamados cómplices civiles de la dictadura parece insistir en ese sentido: aunque no dispongamos de instrumentos idóneos, sabemos dónde está el bien, donde está el mal, y por él vamos. No parece haber complejidades ni claro-oscuros de nuestro pasado reciente que resistan a esta convicción. Pero de pronto, así como el punto 30, o la enmienda del Senado referido a delitos aberrantes y horrendos, pusieron en los años '80 tácitamente ante nuestros ojos la imposibilidad de subsumir bajo la normalidad aquello que escapaba a ella – la necesidad de juzgar crímenes horrendos, sin precedents – ahora las excepciones a la excepcionalidad ponen también ante nuestros ojos los problemas morales, políticos y jurídicos ocultos bajo el entusiasmo punitivo. El caso Milani ha puesto en evidencia que la vocación de extender el castigo sin establecer niveles de responsabilidad entre los partícipes de los crímenes considerados de lesa humanidad choca, aún para sus defensores acérrimos, con sus intuiciones morales, sus presupuestos jurídicos y sus convicciones políticas y ha puesto, o debería haber puesto, un signo de pregunta sobre la celebrada extensión indiscriminada de la culpabilidad a los mandos menores de las FFAA.[18] Del mismo modo, el caso del matrimonio Hurban, los padres de crianza de Ignacio Montoya Carlotto, ha producido una grieta evidente en el discurso público de quienes parecían, hasta entonces, no tener dudas respecto de la distinción neta entre culpables e inocentes cuando de apropiación de niños se trataba.[19]

Las dificultades del tratamiento jurídico de los años '80 condujeron, como señalábamos, a la clausura política de las preguntas, clausura que fue, con el tiempo, sedimentando como una capa de impunidad sobre nuestra memoria común. La reapertura de los juicios a partir de 2005 pudo asentar su legitimidad sobre la afirmación de que los crímenes habían quedado impunes – y tanto caló esta convicción en muchos que hasta pudo llevar a ignorar, por momentos, la existencia del histórico Juicio a las Juntas de 1985. En nombre de la lucha contra lo que se construía como el triunfo de la

[18] César Milani, Jefe del Ejército nombrado por la Pdte. Cristina F. de Kirchner, está acusado de haber participado en hechos sindicados como crímenes de lesa humanidad cuando revistaba como teniente. Me permito remitir a Claudia Hilb, "Reflexiones sobre el caso Milani", Anuario 2014*, Lucha Armada en Argentina* (2014).

[19] En un acontecimiento que conmocionó a todo el país, Ignacio Montoya Carlotto, nacido en cautiverio y dado en adopción por los asesinos de su madre Laura Carlotto, hija de la Presidenta de Abuelas de Plaza de Mayo, recuperó su identidad en agosto de 2014. Desde entonces ha resultado visible el interés de diferentes voceros de los derechos humanos de sostener el deseo de Ignacio de proteger a sus padres de crianza – quienes lo anotaron como propio, y por ende pueden ser condenados como cómplices del delito de apropiación de menores –, de la persecución de la justicia, contrariando la postura habitual en casos similares.

impunidad pudo legitimar en los hechos el desconocimiento de elementos esenciales del Estado de Derecho. Considero que es un debate esencial preguntarnos por qué estamos, como la mayoría de la Corte Suprema de entonces, de acuerdo con la legitimidad de hacerlo, o por qué estamos, como Andrés D'Alessio, juez del Juicio a las Juntas, radicalmente en contra.[20] En nombre de la lucha contra aquella impunidad la reapertura pudo también soslayar las preguntas que no debemos dejar de hacernos: si admitimos –y yo estaría dispuesta a considerarlo – que nuestro sentido ofendido de justicia es una guía moral que nos impone que crímenes horrendos no queden impunes, ¿es nuestro sentido ofendido de justicia un criterio suficiente para establecer con precisión *cuáles* crímenes no pueden quedar impunes, aunque para ellos debamos olvidar aquellos principios básicos del orden jurídico? Si nuestro sentido ofendido de justicia nos habilita – que sea sobre la remisión arcaica a lo justo (Arendt), o sobre nuestra "conciencia moral" (Strassera) – a saber qué es un crimen horrendo y aberrante, ¿nos habilita también a saber hasta dónde se extiende la culpabilidad que legitima aquel olvido, y a perseguir como criminales del crimen imprescriptible (y retroactivo) de lesa humanidad desde quiénes ordenaron esos crímenes desde la cúpula del poder – Videla, Massera, Suarez Mason, para citar a algunos – hasta el subteniente que encabezó un traslado, o los padres de Ignacio Montoya Carlotto, o el periodista que fraguó una entrevista con un desaparecido?[21]

En otras palabras, la reapertura de los juicios en 2003-5 acarrea para mí a la vez, entremezcladas, la afirmación del sentido ofendido de justicia frente a un crimen horrendo que considera que quedó y no puede quedar impune – esto es, acarrea la afirmación de un sentido de la justicia – , pero también junto con esta afirmación más abstracta, más elemental, acarrea la auto-adjudicación de la capacidad de instituir, positivamente, la distinción entre lo justo y lo injusto. El peligro que percibo, en el olvido de las preguntas que esta reapertura ha acallado, es que la celebración actual del accionar de la justicia encubra, en demasiadas ocasiones, con demasiada facilidad, la pasión retributiva, que lejos de deplorar – en clave trágica – la excepcionalidad a la que el sentido ofendido de justicia debe hacer frente, parece gozar con ella. En la aparición, aquí y allá, de excepciones a la excepción – en el caso Milani, en el caso Hurban, o en otros tantos casos que podrían aparecer en una ampliación creciente de la punibilidad hacia las zonas grises del pasado reciente – , se manifiestan los problemas que la pasión retributiva ha logrado hasta entonces soslayar, y se abre, a mis ojos, la

[20] Véase Andrés D'Alessio, *Los delitos de lesa humanidad,* (Buenos Aires: Abeledo Perrot, 2008).

[21] Dado el tiempo transcurrido desde los hechos, solo son susceptibles de persecución penal los delitos encuadrados bajo la figura imprescriptible del crimen de lesa humanidad.

posibilidad de que nos interroguemos sobre los problemas políticos, jurídicos y morales que la reapertura de los juicios desde 2003 – 5 no debería dejar de evocar.

~ Universidad de Buenos Aires / CONICET ~

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De l'indocile et de l'inexportable

Philippe-Joseph Salazar

Pour Martial S.

Lors de la renonciation de Benoît XVI au pontificat suprême j'ai durant une bonne journée souffert d'une sorte de Mardi-Gras de la sottise journalistique, ou plutôt de l'idiotie de l'idiome public enfermé dans des conventions qui ne lui permettait pas de voir une chose pourtant évidente : que le Saint Père avait choisi la langue latine pour cette étonnante proclamation, et qu'il avait proclamé son annonce deux jours avant le Mercredi des Cendres, quand les cendres des palmes incinérées de l'année précédente sont marquées au front des fidèles. Qui, en lisant l'admirable texte latin, a compris que le saint père affirmait ne pas pouvoir physiquement pratiquer les mortifications supplémentaires qu'imposent au successeur de saint Pierre la période et les liturgies des Quarante-Jours. Qui a vu le sacrifice stupéfiant du pontife à ne pas pouvoir annoncer la Résurrection du dieu vivant ? Qui aura vu que sa renonciation est en elle-même un jeûne, et le carême supérieur, celui du monde allant à la destruction de sa chair salvatrice, le Christ incarné ? Un acte docile d'indocilité, un acte inexportable.

Le langage que je viens de tenir est indécent pour beaucoup. Je ne suis pas croyant mais je crois à la force des langages de croyance dont, nous, en rhétorique, sommes souvent les interprètes.

Cependant face à l'événement de cette renonciation au vicariat du Christ et Messie sur la terre, proclamation "globale" s'il en est, l'indécence réelle à mes yeux fut la barre idiomatique levée entre le discours pontifical et le discours de la sphère publique. Journalistes et politiques étaient face à un hapax rhétorique Et quand cet événement sur-vient, sur-git, *Dasein*, la méthode la plus éprouvée de l'idiotie consiste à faire des grimaces, à imiter simiesquement la parole raisonnable au lieu de parler avec raison. Les singes alors règnent en parleurs globaux comme dans la sublime scène du *Livre de la Jungle*.

Cette situation rhétorique m'a remis en mémoire que souvent je dois m'exprimer en public sur l'Afrique du Sud devant un auditoire qui croit déjà tout savoir, et qui veut donc m'imposer le silence ou me forcer à parler idiot. Ce qui toujours me donne alors envie de parler indocilement, dans une autre docilité, celle que je dois à ce que je sais.

Docilité, en français, vient de *docere*, en latin, l'aptitude à apprendre. Je veux parler d'un moment de docilité politique, en Afrique du Sud, voilà vingt ans, quand ce qui eût pu être un hapax et une idiotie, a provoqué,

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depuis l'idiome religieux, l'invention d'une langue politique, et d'une langue de pacification, et le terme nécessaire de cette pénitence qu'est une *reconciliatio* : la reparation.[1] Une société qui eut l'aptitude à apprendre à parler pontificalement.

Ceci n'est qu'un tableau, et une narration de l'hapax de la réconciliation en Afrique du Sud. De son indocilité et de son inexportable. Question de mots. Traduire, naturellement, *Truth and reconciliation* par "Vérité et réconciliation", ne pas peser la traduction de ces deux termes qui nomment, à jamais, l'exception sud-africaine, les ranger dans l'attirail d'un glossaire politicien, c'est en effet faire injure à la Commission et, peut-être, esquiver le terrain rhétorique.

De la confiance

Nous savons d'où vient "vérité", de *veritas,*[2] mais savons-nous ce que dit *truth* ? De *triewð* (saxon), *treowð* (mercien), qui veut dire "fidélité", *faithfulness*, en anglais moderne, au sens d'être fidèle (*faithful*) à la parole donnée, bref lorsque l'acte et la parole s'ajustent ; plus avant, *truth* remonte au proto-germanique **trewjaz* et lui-même, au point de départ de la lignée étymologique, au proto-indo-européen **dru-* qui veut dit "arbre". Est vrai ce qui se tient aussi ferme qu'un arbre et, au premier chef, l'arbre symbolique de tout arbre, le chêne, c'est-à-dire l'arbre sacré sous lequel le prêtre proclame l'assemblée dont les délibérations, religieuses, judiciaires, bref politiques, avèrent le bien commun, guidées par une parole de garantie, celle du *dru*ide. Un chêne dit le vrai d'une communauté par sa résistance au temps, au vent, aux pluies, de même que la fidélité aux engagements pris en assemblée permet à la communauté de consister en tant que communauté et de résister au temps politique. Le chêne tient parole dans le temps. Je reviendrai, plus loin, sur ce que *time* signifie, effectivement, pour la Commission.

"Vérité" traduit donc mal *truth*. Mais cette mé-traduction illustre le

[1] Jean Paul II, *Réconciliation et pénitence. Exhortation apostolique, Reconciliatio et paenitentia*, (Paris: Pierre Téqui, 1984).

[2] Article "Vérité", *Vocabulaire européen des philosophies*: "Le paradigme latin, *veritas*, déterminant pour la majorité des vernaculaires modernes, est normatif : il désigne la correction et le bien-fondé de la règle; c'est la vérité juridique que "verrouille" (le rapprochement étymologique est parfois proposé), que "garde" et "conserve" (comme *Wahrheit* en allemand) une institution légitime… Le substantif *veritas* est postérieur à l'adjectif *verus*. L'adjectif *verus*, et sa forme adverbiale, *vero*, existent anciennement ; le substantif *veritas* n'existe longtemps que dans des formes à l'ablatif. *Verus, -a, -um* renvoie à la série "vrai", "véritable", "véridique" et, par extension, "usité de tout temps" …La plupart des hypothèses actuelles font dériver *verus*, et les mots signifiant " vrai " qui s'y rattachent – *vérité, wahr, Wahrheit* –, d'une racine indo-européenne **wer* qui retiendrait les significations de "plaire, faire plaisir, manifester de la bienveillance, cadeaux, services rendus, protection, fidélité, pacte".

fait que la Commission n'est pas un tribunal où la vérité se fait dans le jeu des évidences et des preuves, mais une "commission". Cette Commission représente un acte de confiance (*committere* en latin c'est "confier à") fait par la nation à des hommes qui sont *true*, "dignes de confiance" et chercheurs de vérité – la Commission est claire à ce sujet: formant un *truth-seeking body*, les commissaires sont donc doublement *true,* comme fidèles à l'instauration démocratique et comme dignes de rassembler les récits.

Le mouvement de "confiance" essentiel à la réconciliation est donc un aller-retour, un échange. À la Commission, des criminels (se) confient et font confiance: ils confient les preuves de leur bonne foi[3] ainsi que leur vécu de *perpetrators*, bref à la fois leur vérité au sens de preuves matérielles des actes commis et du vécu qui signalent leur "humanité", et leur vérité-fidélité à l'apartheid (ou aux mouvements de libération) jusqu'à l'abus des droits de l'homme. Ces criminels sont donc, aux termes de la loi d'amnistie, *true*, à la fois par le comment de ce qu'ils disent (la règle de *full disclosure* ou divulgation complète) et par le quoi de leur adhésion à un objectif commun, politique, bref, des "fidèles" ("l'octroi de l'amnistie à des personnes qui auront fait une divulgation complète de tous les faits pertinents relatifs à des actes associés à un objectif politique").[4]

Du même geste, les *perpetrators* doivent faire confiance à la Commission. Comme le stipule l'Épilogue de la Constitution provisoire, qui instrumente la Commission, "l'amnistie sera accordée", si celui qui fait l'acte de *truth telling* l'a fait selon la définition de la loi. Mais la nature impérative de ce *shall be granted*, loin de diminuer la responsabilité de la Commission, augmente le degré de confiance que les criminels doivent avoir dans l'obéissance de la Commission à l'injonction, obéissance qui relève de la "fidélité" à la loi.[5] Le risque de ne pas faire confiance, c'est la poursuite pénale.

De la part des victimes, à partir de l'audition publique fondatrice du

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[3] Rappelons les conditions de l'amnistie : avoir agi pour un " bon " motif, un motif politique (Loi portant création de la Commission, Titre II, article 20: " (1) Si le Comité, après examen d'une demande d'amnistie, est convaincu que (a) la demande répond aux conditions de la présente loi; (b) l'acte, l'omission ou l'infraction à l'origine de la demande est un acte associé à un objectif politique commis au cours des conflits du passé conformément aux dispositions des sous-sections (2) et (3); et (c) le requérant a fait une divulgation complète de tous les faits pertinents, il octroie l'amnistie sur le fondement de cet acte, de cette omission ou de cette infraction "). Voir mon édition de référence, bilingue du rapport, *Amnistier l'apartheid*, avec la Préface de Desmond Tutu, (Paris: Le Seuil, 2005).

[4] *Ibid.*, alinéa 1 (b).

[5] Si la Constitution provisoire avait dit "l'amnistie pourra être accordée" (un débat, politique, a eu lieu sur le *may be granted*), la Commission aurait dû s'engager dans une interprétation des clauses.

15 avril 1996 (à la suite de quoi vingt-et-un mille victimes se déclarèrent et voulurent parler), un processus identique de confiance se met en place par le récit victimal (nommé, plutôt, *storytelling*).[6] Mais, dans ce cas, l'enjeu n'est pas l'amnistie mais la guérison (*healing*) et la réparation. Comme le souligne le dernier chapitre du *Rapport*, si "raconter constitue une partie importante du processus de guérison"[7] et que "(se) raconter ne guérit pas nécessairement", il n'en reste pas moins que la condition nécessaire à l'actualisation du potentiel de guérison contenue dans les récits de ce vécu est de "divulguer la vérité [au sens de "vécu"] devant un public respectueux et une Commission en majesté".[8] On ne formule pas mieux les conditions rhétoriques de production de la confiance.

L'exception sud-africaine de réconciliation tient donc à un redoublement de l'échange confiant de parole donnée: contre la parole donnée du récit criminel (*account*) consiste la parole donnée de l'amnistie, contre le récit victimal (*storytelling*) consiste la promesse de réparation et le potentiel de guérison (qui affecte aussi les *perpetrators*). Les uns et les autres (se) font confiance, et cela permet, justement, "d'instaurer réconciliation et reconstruction".[9] Ce double don de confiance fonde la possibilité de *restorative justice* laquelle est "relationnelle". La dimension de guérison, sur laquelle je reviendrai en conclusion, est en effet liée à la doctrine de la justice réparatrice (*restorative justice*), laquelle implique que le criminel aille vers la victime qui, en retour, accueille le mal, à fin de remède commun:

> La justice réparatrice est un processus par lequel les parties concernées par un délit spécifique décident ensemble de la façon de réagir aux conséquences néfastes du délit et à ses implications pour l'avenir… Les rencontres entre les victimes, les délinquants qui les ont agressées et les membres de la communauté affectée sont un moyen important d'aborder la dimension relationnelle de la criminalité et de la justice.[10]

Dit autrement dit, les quatre types de vérité que fournit la typologie du

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[6] *Rapport*, V, 9, paragraphe 6, traduction partielle de ce volume, intitulé "Réconciliation", Dans *Amnistier l'apartheid*.

[7] *Rapport*, Préface, paragraphe 65. Dans *Amnistier l'apartheid*.

[8] *Rapport*, V, 9, paragraphe 6. Je traduis *official body* par "Commission en majesté" pour rendre aussi exactement compte que possible la "grandeur" constitutionnelle de la CVR outre qu'elle est "souveraine" (*statutory body*). Le français, sauf à y faire résonner le droit romain, ne rend pas bien cela. Dans *Amnistier l'apartheid*.

[9] Épilogue de la Constitution intérimaire: *In order to advance such reconciliation and reconstruction, amnesty shall be granted…*

[10] "Qu'est-ce que la justice réparatrice ?", *What is restorative justice ?* PFI *Centre for Justice and reconciliation*, accessible sur www.pfi.org.

Rapport – vérité judiciaire (*forensic truth*), vérité narrative (*narrative / personal truth*, *truth-telling, storytelling*), vérité sociale (*social truth*), vérité-guérison (*restorative, healing truth*) – ne sont pas de rang égal ni dans un ordre indifférent; l'*account* du criminel (dans l'*account* le criminel "rend compte", au double sens d' *account*, récit et compte rendu) est la clef du processus qui "divulgue", c'est à dire rend au public (*divulgare* en latin) "la vérité [qui] a toujours existé" et qui "n'avait tout simplement pas été rendue publique".[11]

Dans le terme *truth*, se donnent, liées, l'essence des divulgations faites par les criminels dont les récits doivent respecter, pour être amnistiables, la parole donnée de "tout dire", et l'essence des récits de victimes dont la vérité-vécu ouvre la réparation, deux actes sans lesquels la *truth*, au sens de récit du réel, sur la guerre raciale et la réconciliation, ne résisterait pas au temps du politique – pour reprendre l'indication sacerdotale et sacrée recelée dans *tree*-druide-*truth*. Cette construction dans l'Histoire politique, par des "histoires", permet enfin la somme des récits qui permettra, un jour, à des historiens de récrire, pas forcément mieux, l'histoire de l'Afrique du Sud: les récits seront alors "vrais" mais d'une autre manière, dans la volonté historienne de rendre compte exactement des faits (*akribeia*- vérité, par opposition à *alêtheia*-vérité que je traduis par "divulgation").[12] Le *Rapport* est *drui*dique; l'histoire historienne est acribique; les histoires-récits des victimes et des criminels, sous l'écoute de la Commission, sont "confiantes".

De la réconciliation ou, de la proclamation qui répare

La fascination qu'exercent les pires des *perpetrators*, c'est-à-dire les meilleurs car les plus en confiance, sur la Commission ou le public (au point qu'on les appelle de leurs prénoms) est anecdotique mais largement documentée. Mais comme tout doit être anecdotique dans un récit, qu'il soit *account* criminel ou *storytelling* victimal, pour qu'il soit "vrai", l'anecdotique n'est pas ici le banal.

Le criminel fascine, il est "sacré" Sans reprendre les analyses de Mauss et de Benveniste portant sur le caractère limitrophe entre la vie et la mort, le sacré (au sens banal) et le profane, de ce qui est nommé comme *sacer,* on peut suggérer que le *perpetrator* est "chargé d' une souillure ineffaçable, auguste et maudit, digne de vénération et suscitant l'horreur"[13] et qu'il fait, effectivement, communiquer deux mondes, celui des morts et celui des vivants – l'apartheid et la démocratie. L'adage latin, "que celui qui a violé

[11] *Rapport*, I, Préface, paragraphe 51. Dans *Amnistier l'apartheid*.

[12] Sur cette question rhétorique, de *pseudos-plasma-historia*, je reste tributaire de Barbare Cassin, *L'Effet sophistique*, (Paris: NRF.Essais et Gallimard, 1995): 470-512.

[13] Émile Benveniste, *Le vocabulaire des institutions indo-européennes*, (Paris: Minuit, 1969) (II): 188 (renvoi à l'*Essai sur la nature et les fonctions du sacrifice,* in Marcel Mauss, *Œuvres*, I, (Paris: Minuit, 1968): 193-307).

la loi soit sacré", veut dire que le criminel est intouchable, réservé à un sort-de-justice, celui-là même du *perpetrator* – à la justice majeure, de majesté, de la Commission, qui rend les criminels "intouchables" par la justice normale[14]. Le *perpetrator* touche à la fondation de l'être-ensemble: au fond de *perpetrator* on trouve *patria potestas*, le pouvoir d'auteur du père.[15] Mais, pour en rester au fait que cette position-limite, cette position de communication entre le passé et le présent, ne s'effectue que par le récit devant les victimes, par l'*account* (et non pas, anthropologiquement, par un sacrifice, la mise à mort de l'être *sacer*), il se trouve que le latin *sacer* active, en ancien anglais, le terme de *sake*, lequel signifie "discussion, entente, compromis, arrangement", soit la parole du peuple assemblé (la parole efficace, comme dans l'expression *for god's sake*, "par la parole divine").

L'ajointement philologique de *truth*-vérité et de réconciliation se situe ici. Lorsque le chêne parle dans *truth* il ne parle pas dans "vérité " mais il étend ses branches vers la parole commune de compromis, *sake*, où se donne le deuxième terme de ma question sur la traductibilité de "Vérité et Réconciliation": peut-on traduire *reconciliation* par "réconciliation"? Nous sommes au rouvre de l'idiome religieux.

Reconciliation – "réconciliation", en dépit du latin qui leur est commun, n'est pas une paire anodine. De fait, le latin *reconciliatio* appelle la rhétorique, la met au premier plan, complétant le rappel contenu, sur le versant *truth*, dans le germanique *sake*. En démembrant *recon-cil-iatio*, en ouvrant le sertissage des préfixes et du suffixe, on trouve *cil* soit *cal*, racine du verbe latin calāre ("proclamer" religieusement). Ici, dans *cal*, se décide l'essentiel de la rhétorique de proclamation, en direction du politique, depuis la clameur publique qui réclame jusqu'au parler clair (*cla-ritas*) de la bonne éloquence. Lorsque la Commission entend des criminels leur *truth*, et puisque sa "commission" est d'instaurer la *reconciliatio*, il n'est pas surprenant de la voir mettre en action, un à un, l'efficacité rhétorique contenue dans *cal* de *reconciliatio*.

D'une part, la Commission pro*cl*ame que le *cal*endrier de la démocratie est mis à jour puisque les *cal*endes sont dites avec la proclamation des termes, 1960 – 1994, *cal*endrier à l'intérieur de quoi les violations sont amnistiables (à défaut d'affirmer que 1994 marque l'an I de la République). D'autre part, la Commission convoque le con*cil*e des choses non-dites, *untold sufferings* (est *concilium* l'assemblée convoquée par proclamation) ; elle promeut (*to advance*, selon l'Épilogue) et place sur le devant de la scène politique les gestes de récon*cil*iation – excuses, demandes de pardon, pardons offerts, larmes, embrassements qui affichent le concret de l'interaction publique que dit *conciliāre.* La Commission instaure (autre

[14] C'est la base d'une saisine infructueuse de la Cour. Voir *Amnistier l'apartheid*.

[15] Voir mon essai "*Perpetrator* ou De la citoyenneté criminelle", *Rue Descartes*, "Philosophies Africaines: Traversée des experiences", 36, (2002): 167-179.

sens de *to advance*) donc un échange rhétorique par lequel des citoyens désormais libres et souverains peuvent se conseiller les uns les autres, en "concile", restituant le sens et la pratique d'assemblée perdue ou pervertie sous l'apartheid.[16] En outre, n'est-elle pas le lieu de la *declamatio*, des discours et harangues que sont, par exemple, les auditions des corps constitués et des appareils politiques, économiques et sociaux et les auditions dites "thématiques"?[17] Enfin, la Commission est l'occasion de *reclamatio* pour les victimes, qui se récrient contre les violences et demandent réparation.

Entendre le latin *reclamatio* sous l'anglais *reparation* permet de prendre *reconciliation*-"réconciliation" au pied de la lettre, en l'occurrence le premier pied du mot, le préverbe -*re*.

D'une part le préverbe -*re* ne peut pas signifier seulement un regard en arrière, un retour sur le passé mis au jour par la parole donnée de *full disclosure*, "divulgation", laquelle est l'objet des *accounts* donnés par les *perpetrators,* des récits faits par les victimes ou les déclarations (le terme est le plus souvent *statement*) prononcées par les corps et les institutions, qui, ensemble, ont pour but de rassembler, de "réconcilier" au sens comptable, une vérité de type documentaire, car documentée, de l'apartheid. D'autre part le préverbe ne peut pas non plus simplement signifier un retour à un état antérieur, car cet état-là, l'apartheid, est justement ce que la réconciliation annule dans un régime de citoyens souverains. La Commission donne la formule rhétorique d'un processus de proclamation de la nation sud-africaine, dans la mesure où elle est à la fois le dernier moment d'un calendrier de proclamation et, avec l'Assemblée constituante, le premier geste constituant de la nation, sa première assemblée.

Le sens du *re* de *reconciliation* est donc à chercher ailleurs, dans la conjonction même des deux sens, le regard et le retour, bref le regard qui porte plus loin que le simple retournement, qui porte vers une fondation religieuse de justice, que la philologie pointe dans le chêne de *truth* et le *cal* religieux. L'instrument est le *sacerdos*. Le croisement de *truth* et de *cal* se dit: transformation. Et l'instrument de cette transformation, ce qui assure le passage de la nation du mal au bien, du crime à la guérison, des *conflicts of the past* (pour ne pas dire "guerre civile") à une *peaceful co-existence*[18] est, justement, un *sacerdos*, Desmond Tutu.

"Transformation" est le terme le plus répandu pour qualifier, en Afrique du Sud, le processus démocratique. Il domine tout l'idiome politique, la langue de l'idiotie politique.

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[16] Voir mon article "Afrique du Sud. Éloges démocratiques", in *Le Genre Humain,* "Qui veut prendre la parole?", 40-41, Marcel Detienne, (ed.), (2003): 33-45.
[17] Voir *Rapport*, I, 10; pour une liste de ces auditions.
[18] Les deux tours de phrase sont dans l'Épilogue de la Constitution provisoire.

Il exprime, politiquement, trois sortes de réconciliation: premièrement, le passage pacifique d'une non-nation sud-africaine, fabriquée par la mise à l'écart les unes des autres de communautés assujetties à la minorité blanche, en une seule Nation de citoyens, qui est ainsi capable de porter un regard sur son passé, se retourner sur lui et de regarder au delà; deuxièmement, l'acceptation de la démocratie, dans le donnant-donnant de l'amnistie, par les *perpetrators* ; troisièmement, la reconnaissance par les victimes d'abus de la nécessité sinon de pardonner et de se réconcilier (au sens banal, pathétique du mot), avec les criminels, du moins de vivre avec eux, bref de partager, d'égal à égal, le droit de souveraineté, et de prendre sur eux la charge du *concilium* démocratique, de l'être-délibérer ensemble ou *reconciliatio*. Reste la réparation qui devrait être l'autre de la reconnaissance. Mais ces trois acceptions n'ont de valeur qu'animées et ligaturées par le religieux, au cœur de *truth* et *cal,* puisque "transformation" exprime, telle que Desmond Tutu la pense et la formule dans une suite de prédications, la dynamique rhétorique d'une "conversion" à la démocratie d'une nation et d'une conversion démocratique du religieux au politique. Les Trente-Quatre principes constitutionnels, qui instrumentent l'accord politique de paix civile (*negotiated settlement*), la Constitution provisoire, qui fonde juridiquement l'amnistie et la Commission, puisent leur force persuasive et leur acceptabilité publique dans cette indocile parole de proclamation.

C'est déjà dire que la réconciliation est in-exportable. Ou que son exportation doit procéder d'une importation, mais cela est une autre histoire. Celle de quand les démocraties auront disparu.

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The quietude of transitional justice: Five rhetorical questions

Erik Doxtader

1. Dealing with a criminal past

What are we talking about? For a day, a virtual eternity in the governing "news cycle", the left-leaning international media buzzes with commentary regarding the South African government's decision to parole Eugene de Kock.[1] For those familiar with South Africa's history and its transition to non-racial democracy, de Kock requires no introduction. An Afrikaner who "distinguished" himself in the apartheid government's "border wars", he is best and widely known as the leader of an apartheid death squad that took its name from the farm outside of Pretoria where it was headquartered — Vlakplaas. Operating from the mid-1980s into the early 1990s, de Kock's Vlakplaas unit kidnapped, tortured, and murdered scores (the precise number remains unknown) of anti-apartheid activists, many of whom were members of the ANC's Umkhonto we Sizwe (MK).

Arrested for some 89 different crimes and sentenced in 1996 to over 200 years in prison, de Kock was branded "Prime Evil", a nickname that has led to more than a few comparisons to Eichmann and which set him out as a symbol of apartheid's crime against humanity. He was also a star of the South African Truth and Reconciliation Commission's (TRC) amnesty process, at least in the sense that he was one of the few members of the old government's security regime who seemed to embrace the TRC's call to come forward and detail the nature and extent of apartheid-era human rights violations. From prison, de Kock thus launched myriad amnesty applications and gave testimony to the Commission regarding his actions and the operations undertaken by the Vlakplaas unit. To the satisfaction of some and the horror of others, he consistently maintained that the leaders of the apartheid state, including Presidents PW Botha and FW de Klerk, were aware of the unit's existence and activities. In the end, the TRC's Amnesty Committee granted amnesty to de Kock for all but two applications, finding in

[1] The decision is announced on 30 January 2015, just a few days after commemorations of the 70th anniversary of the liberation of Auschwitz. The proximity of the two events passes without reflection or commentary on their (non)relation.

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the latter that while he had made a "full disclosure" regarding the murder of several individuals, the crimes were not "politically motivated" acts and thus fell outside the established criteria for amnesty.[2] With this judgment, de Kock was returned to prison for "ordinary" murder. For the rest, as he received amnesty (not a pardon) for the vast majority of his applications, de Kock's "acts and omissions" were deemed "not to have taken place".[3]

Provoked by the news of de Kock's parole, the international media manages to capture almost none of this history. The coverage unfolds over the course of a day in which I am away from South Africa, driving across the American southwest, a landscape defined by the semi-industrial poverty (including the casinos) that attends life on Native American reservations and tribal land. Reading over a lunch break, it is clear that the New York Times has failed to grasp the difference between an amnesty and a pardon.[4] Back in the car, I listen to broadcasts on BBC, CNN, and National Public Radio, all of whom are quick to report that Desmond Tutu, the former Archbishop who chaired the TRC, has blessed de Kock's parole and that the Ministry of Justice has defended the decision on the grounds of "nation-building" and reconciliation.[5]

Over the course of several hours, in which various experts are mobilised and forums convened, what proves most interesting is an absence – at no point in the discussion and quasi-debate over de Kock's parole is the word "amnesty" uttered. Not once. The concept seemingly does not exist. At the very least, it is unspeakable. With this omission, the entirety of de Kock's record is put on trial – and in isolation; the relative justification for the parole

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[2] News24 Archive: http://www.news24.com/SouthAfrica/Politics/De-Kock-denied-amnesty-20010517. The archive of amnesty hearing transcripts and decisions by the TRC's Amnesty Committee can be found on the TRC's archived website: http://www.justice.gov.za/trc/amntrans/index.htm. Also see Erik Doxtader and Philippe-Joseph Salazar, *Truth and reconciliation in South Africa – The fundamental documents* (Cape Town: David Philip, 2007).

[3] This is the explicit language of the TRC's authorizing legislation. In some detail, I have traced and considered the development and terms of this legislation, see Erik Doxtader, *With faith in the works of words: The beginnings of reconciliation in South Africa* (Cape Town/Lansing: David Philip/Michigan State University Press, 2009). Elsewhere, I have taken up the controversial terms and justification for amnesty in South Africa, see Erik Doxtader, "Easy to forget or never (again) hard to remember? History, memory and the 'publicity' of amnesty," in Charles Villa-Vicencio and Erik Doxtader (eds.), *The provocations of amnesty: Memory, justice and impunity* (Cape Town: David Phillip, 2003): 121-155.

[4] http://www.nytimes.com/2015/01/31/world/africa/eugene-de-kock-south-african-death-squad-leader-is-granted-parole.html?src=xps.

[5] http://www.tutu.org.za/archbishop-tutu-welcomes-eugene-de-kocks-release; http://www.rdm.co.za/politics/2015/01/30/why-i-freed-eugene-de-kock-and-not-clive-derby-lewis.

unfolds as if amnesty did not occur and without concern for De Kock's claim that the existence of Vlakplaas was known at the highest levels.[6] In a single stroke, a criminal past is cast in a way that erases any legal distinction at the same time that is contained by law. In part, this means that for commentator after commentator, the idea of reconciliation functions only as a pretense, a gateway from guilt to arguments about the possibility of forgiveness and contrition, neither of which were a condition for amnesty, but which serve to support various moral-legal claims about the demands of justice and what is necessary to reconstruct the conditions of collective life and restore rule of law. Wound around all of this, sealing the logic, is an expressed consensus that it is counterproductive to question the concepts that ground and enable the debate. Again and again, such theoretical reflection is derided as unhelpful "abstraction". For those that applaud the parole and those who oppose it, the controlling law that underwrites their respective positions *is* the law, a law whose rule defies question in the name of securing a restorative or retributive justice.

The de Kock case, including the parole, is instructive for the way in which it suggests that the criminal past is that which refuses to pass into the past. Evident in the way that de Kock is figured and indeed reduced to a symbol, the abiding presence of such criminality cannot be divorced from the function of law; it is a claim to its transgression and a standing cause to invoke its power of redress, a rule of law that may in fact legitimise itself by invoking the criminal past in order to conceal the way in which this past follows from what Hannah Arendt called "legal violence", a violence that may be exposed only as the law takes exception to itself and opens the question of its rule – as a question. Put in a slightly different way, the memory of the criminal past may often depend on the law's invitation to forget the way in which this past is implicated in a rule of law whose self-constitution can be recalled only as the law is led to forget the self-proclaimed necessity of its own expression. And put differently still, it is not always a straightforward thing to differentiate individual, collective or systemic histories of criminality and it is not always easy to differentiate these from the criminality of history that is frequently supported if not underwritten by law. In this light, the idea (the concept?) of the criminal past constitutes a tight and complex knot, a (triple) problem of how to best grasp its presence, redress, and source. Perhaps more than any other, this problem marks the exigence of transitional justice and its concern that deeply-divided societies find a way to "deal with the past" and move forward. As it is well-expressed and reflected in the thin coverage of de Kock parole, this interest often begins by begging the

[6] There is nothing surprising about this glaring omission given the way in which standing accounts of transitional justice go to significant lengths to formally and informally ban the use of amnesty.

question at hand, the question of what it means to speak in the name of "coming to terms".

2. Dissoi-Logoi

WHAT TO SAY FIRST?

[↔]

In the name of transition, the voices of dissent reach a critical mass. Grievances are announced. Offences are documented. Calls for more or less radical change find a larger audience. The tradition-clinging claims of governing institutions fall on increasingly deaf ears. Visions of change are articulated by leaders who claim to speak on behalf of the public. The case for the new and the case for the old coalesce into a *stasis*, a moment of decision, a moment in which no single language suffices. Those who sense that something must give begin to talk about talk, to discuss the possibility of interaction between those who have long contended that they have nothing in common. Tentative exchange yields signs of good faith and a basis to negotiate a language with which to turn announced rationales for violence into productive forms of disagreement. Visions of a new dispensation are presented and debated. Constitutive words are crafted, debated, and revised.

A transition is announced. Its declared promise of the future is interrupted by the assertion of the past. There is untold suffering. The truth has (yet) to be told. The

The critical dissonance of transition is the threat of noise that relieves the name of its referent. Grievance blurs with counter-grievance, their meaning thrown open as the announced traditions that differentiate acceptable and unacceptable behavior are called into fundamental question. Institutions react with emergency decrees that fracture the public and silence its voice. Conflict escalates, until violence and language fold into one another. Announced positions harden into absolute principles that have nothing to give. The cost of stepping over the party line let alone attempting to speak with the enemy is treason. Good faith is a function of silence, the discipline to stand pat and stay the course in the face of the other side's treacherous gestures and hollow words. Endless promises of incremental reform legitimize the violence and deter dangerous talk of the new. If and when it arrives, the decisive break is a turn that sets language's constitutive power against itself.

A transition begins, equally a fracture of continuity and the emergence of form. Between the opening of an abyss and the appearance of an ideal, the old

silence is deafening. And it threatens a return to the violence that forecloses the future. Calls for "coming to terms" with the past thus appear and gather momentum. An architecture for giving accounts and breaking silence is advocated and negotiated. It is time for a trial of words. The voice of wounded bodies must be restored and the damaged body politic must be healed, with and through the pronouncement of legal judgments, open-ended dialogue, and the performance of understanding, all of which sit atop inquiry which allows for a declaration of the facts and the formation of consensus about history, a consensus that opens space for the emergence of symbols that memorialise and represent. Juridical and executive institutions issue indictments and deploy "campaigns of persuasion" to mobilise public interest and to convince perpetrators and collaborators to disclose if not confess their acts and omissions.

Into various forums, victims are called to give testimony and articulate statements about their experiences. They are asked questions that open space for expression and guide its direction. Narratives are offered, sometimes easily, sometimes with sobs that echo across the gallery and which are noted ("witness pauses") in transcriptions that are often translated, circulated, and claimed to underpin the formation of a shared history that renders

and the new swirl, combining in ways that defy the rules of predictability. Telling the truth rests on the fantasy that lattices of time and space are not bending in ways that unhinge the given meaning of history and culture. With the damage not yet (un)done, the aura of violence leaves language beyond and beside itself such that the call to come to terms presupposes ground that remains to be created. The silences are overwhelming and an open secret, the disclosure of which marks a threat to young institutions with democratic aspirations. The law's announced and standing precedents are suspect. Too many words are an unbearable trial. Old vocabularies of power remain, a scaffolding that provokes opposition as much as it supports consensus about the need to move forward in a different way. If they say anything at all, the criminals who sustained the old regime shrug off their indictments as so much hypocrisy and plead guilty on the grounds of socialisation.

Some of their victims appear and give words that are then cited for their paradigmatic iterability, a precedent that lacks the force of context. Others, caught between the pressures of contributing to a new nation and a wish to remain with their thoughts, offer words with more than a bit of reserve. Others still are not asked to speak. The narratives appear in a scene both controlled from the

expression of plausible deniability implausible and (re)constructs the ground rules – the common sense – of collective life. The words bring catharsis. Rage is relinquished in exchange for recognition, a recognizing expression that marks the return of dignity, a sense of standing and the beginning of reparation. The deliberative fabric of citizenship is restored. The capacity to appear in public life is returned. Exclusion and factioning are supplanted with gestures that build trust and allow old conflicts to be transformed into productive disagreements, the aim of which is to build a path from past to future, an archive and a discourse that promises to transform legacies of deep division into an abiding unity in difference.

top and held to be evidence that "everyone is damaged." The claim that all stories need to be heard sits with arguments about the ongoing effects of subjugation, the violent subjection of human beings to the point where they can neither be seen nor heard, a bare life that possesses no recognizable vocabulary and no standing to speak. The claimed healing value of public discourse collides with the contention that publicity is corrupted and that the meaning of collective life has been disappeared. Narratives do not reach audiences and defy translation across cultures divided by deep distrust. The archive provokes debate if not outright division over its constitutive exclusions and how it fails to recognize the reparative "value" of so many wounds.

3. This is (not) a language game

> For there would be no truth without that word-hoarding [thesaurisation], which is not only what deposits and keeps hold of the truth, but also that without which a project of truth and the idea of an infinite task would be unimaginable.[7]

In how many ways are words at work? Perhaps the truth is that the promise of transitional justice abides in the potential of (its) language. This idea is as obvious as it is enigmatic. To begin, take a moment for a though experiment: subtract language from any of the standing theories, accounts, and recipes for transitional justice. What remains when victims cannot testify and perpetrators can neither confess nor hear their indictment, when there is no chance for citizens to articulate, discuss, or contest the meaning of history, when individuals, communities, and institutions cannot debate the meaning

[7] Jacques Derrida, *Edmund Husserl's Origin of geometry: An introduction*, (trans.) John P. Leavey, (Lincoln, NE: University of Nebraska Press, 1989).

or articulate the need for retribution, reparation, or reconciliation, when there are no announced judgments from courts or no final reports from truth commissions?

Transitional justice does very little without words. Its work not only entails but demands various and variable *forms* of expression: institutional, public, and legal argumentation; negotiation, debate, and controversy; dialogue, discussion, and persuasion; individual and collective narration; interpretation and translation – across battle lines, communities, and cultures; literary (re)presentation and aesthetic performance. While this list can and likely does need to be extended, the more pressing point is that transitional justice is a function of expression. At times operating as a discourse, it takes form with(in) language and appears through modes of address that define its aims, enable its practices, and justify its value. When heard "on the ground", a common place instantiated through a commonplace, the call for transitional justice frequently places a premium on the ability of individuals to find their voice, tell (their) truth, and come to terms. This is not straightforward work. Whether conciliatory, restorative, or retributive, the coming of terms whereby it is possible to come to terms presupposes the ability of citizens and institutions to construct and advance extended arguments that articulate the necessity of talk and codify its rules.

In the name of transitional justice, words about words matter. Indeed, the ongoing (and somewhat overdrawn) controversy over whether the centre stage of transitional justice belongs to trials or truth commissions is a question about who must speak, what they might say, and how particular modes of speech alter the conditions of individual and collective life. It is a mistake, however, to view this question only in instrumental terms, as a call to find and fit means of expression to a set of pre-given ends. If transitional justice is in fact addressed to transition, if it is addressed to an undefined if not undefinable moment that exceeds or defies "ordinary" justice, its work proceeds through speech acts that disclose its goals, compose its goods, and instantiate its values. This is to say that the experience of transition is an experience of loosening (and losing) taken for granted meaning. It is the experience of an opening, a space in which the ends, modes, and methods of (inter)action are thrown open to question. In the midst of transition, to borrow from Wittgenstein, the call of transitional justice stands before the problem that "Because skill at playing the game is no longer enough the question that keeps coming up is: can this game be played at all now and what would be the right game to play?"[8] In the words that enable and enact transitional justice, the ends and means of expression blur. The evident necessity of speech proceeds without clear let alone stable grounds. Playing the language game requires setting the very language of the game into play. And, as the

[8] Ludwig Wittgenstein, *Culture and value,* (Chicago: University of Chicago Press, 1984): 27e.

game throws us back to the question of its rules, as the given rules that codify the appropriate goals and proper methods of transitional justice are seen to beg the question of their invention, meaning, and power, its theory and practice (now undifferentiated and mutually constitutive) take shape in a rhetorical economy, a contingent field of expression and exchange in which it is tasked to speak as if it knows what it is talking about at the same time that it troubles and relinquishes (its) taken for granted language.

This dynamic explains precisely why it is important to begin in two places at once. The question of beginning (again, and often in the name of "never again") that drives transitional justice is a question of what to do with words that are altogether necessary and altogether outside the control of common understanding, convention, tradition. Confronting this problem is surely awkward, often anxious, and sometimes terrifying – precisely, as it entails thinking the dispossession of that which counts as a certain possession: language. Without a doubt, it is far more comfortable to remain above the fray that appears when the problem of beginning can no longer be severed from a question of origin, the question of how we (be)come by the way of words that we cannot claim to possess, the question of the violence that abides in the decision to simply assert the language which may only emerge *through* the work of transitional justice. It would be far easier to assume otherwise, to assume that language remains – intact, at the ready, and meaningful. And, it is just such an assumption that tends to define contemporary theoretical and practical accounts of transitional justice. Again and again, the word remains a given – a ground that can be taken for granted and a mechanism of expression that is thought to merit little theoretical reflection.

If transitional justice does very little without words, it has yet done very little with the question of (its) words. In no small part, this means that the announced logic of transitional justice tends to be a logic of transitional *justice,* an assumption that the language of justice remains – without question – in the midst of transition, a moral foundation, an end that simultaneously underwrites and directs expression. Evident in the way that dominant accounts of transitional justice stress the priority and integrity of rule of law, this vision of talk that requires no talk about talk may secure the moral at the cost of ethical life.[9] It betrays that what remains largely unthought is the possibility that transitional justice is a practice that takes place *through* words and an event that takes place *in* the word. As a professed

[9] The pervasive and rarely questioned priority of the "rule of law" as the guiding principle of transitional justice is readily evident in its theoretical and policy literature. For an account of this presumption and its rhetorical cost, see Erik Doxtader, "A critique of law's violence yet (never) to come: United Nations' Transitional Justice Policy and the (fore)closure of reconciliation", in Alexander Hirsch (ed.), *Theorising post-conflict reconciliation: Agonism, restitution & repair* (New York: Routledge, 2011): 27-64.

responsibility to alleviate suffering and cultivate a culture of human rights, transitional justice may turn on an ability to constitute and enable an ethics of *response-ability* in the midst of inhumane violence, a capacity to reply to what remains unspeakable. Its demand for *accountability*, a disclosure of truth and a reckoning with evil, may then turn on the creation of *account-ability*, the ground (rule) which secures the power to make a definitive (sovereign) claim. Promising the restoration of dignity and the emergence of democratic action, its call for *recognition* may turn on the discovery of *recognize-ability*, a turn from the language of recognition to the recognition of language as such, a struggle to grasp how the laws that govern the relation between individual and collective life take shape only as the standing word – the word with standing – is dispossessed in the name of recollecting and reconstituting its necessity.

4. The appearance of last words

> Poetic language takes place in such a way that its advent always already escapes both toward the future and toward the past… The word, taking place in time, comes about in such a way that its advent necessarily remains unsaid in that which is said.[10]

What of all this obvious chatter? People do speak, thank you very much—enough with this didactic nonsense! These so-called "rhetorical questions" are simply a distraction, a theoretical luxury. It is time to actually get some work done. After all, for goodness (or god's) sake, people are suffering!

This impatience is the norm. It is understandable, at least insofar as it conveys the modernist faculty of expression that Cheikh Anta Diop saw as a mechanism for the colonial attempt to erase language as a question. Thus before rushing off to do the good on the ground, an impulse that usually overwhelms *kairos* with distraction, it is instructive to consider that just a few months before it declared in no uncertain terms that the promise of transitional justice demands a "standard language", a common vocabulary and grammar that might tame its unruly "multiplicity of definitions and meanings", the United Nations hosted a lecture in which its members gathered to hear Chinua Achebe and Paul Muldoon reflect on "the use of language in war and peace".[11] It is worth wondering after the connection between the proclamation and the lecture, and, more precisely, whether the UN's "definitive" statement of (its) transitional justice policy is nothing less

[10] Giorgio Agamben, *Language and death*, (trans.) Karen Pinkus with Michael Hardt (Minneapolis: University of Minnesota Press, 1991).

[11] Report of the Secretary General, "The rule of law and transitional justice in conflict and post-conflict societies", United Nations, Security Council, 23 August 2004 (S/2004/616). The Achebe-Muldoon forum is available on streaming video: http://www.un.org/webcast/sg/lectureseries.htm.

than evidence that the renowned Nigerian author and the wild-haired Irish poet went largely unheard.

The lecture is a remarkable scene. Muldoon steals the show, with a sonnet sequence, a set of lines entitled "The old country". Words of a place in time. Nowhere in particular and perhaps then everywhere at once, this place is the found object of transitional justice – and its founding object. In time, it appears to us through its collusion, a network of tacit agreements and implicit (mis)understandings:

> Every runnel was a Rubicon
> where every ditch was a last ditch.
> Every man was a "grand wee mon"
> whose every pitch was another sales pitch
>
> now every boat was a burned boat.
> Every cap was a cap in hand.
> Every coat a trailed coat.
> Every band a gallant band
>
> across a broken bridge
> and broken ridge after broken ridge
> where you couldn't beat a stick with a big stick.
>
> Every straight road was a straight up speed trap.
> Every decision was a snap.
> Every cut was a cut to the quick.[12]

And so it goes, verse upon verse, a play that leads Kofi Annan to squirm and sets the UN's translators to giggle. What is taking place here? What sense can be made of this apparent non-sense? The lesson is serious, according to Muldoon. In part and whole, the sonnet is "mimetic of the tedium it is describing", a demonstration of the cliché's ubiquity, a disclosure of the homonymic rituals and taken for granted platitudes that coalesce and collude to form ordinary language. Its lines testify to what happens when the word is appropriated as a simple tool, an instrument that relieves us of the need to think about language, the way in which human beings stand before it. As Muldoon puts it, the sonnet is a call to "be humble before language rather than going into any circumstance with a sense of what the appropriate thing to say might be, to go into it with a spirit of humility".

That this is the wrong thing to say while standing before UN

[12] Muldoon reading at the UN forum includes this transcribed sequence. The full work can be found in Paul Muldoon, *Horse latitudes,* (London: Farrar, Straus and Giroux, 2006).

delegates is precisely the point. The fluency borne of standardised expression marks a path of self-certainty, a road littered with dead bodies. The difference between peace and war, the difference that transition is called to negotiate, hovers around the "fine line" between the instrumental fictions that enable human beings to take (their) place with language and the "genuine barbarities" that take place when being human requires forgetting that we make far less with language than it makes with us. These barbarities prove telling. They betray that the question of *poiesis* is not a question of how to fashion and fix a new language. It is a question of discerning a responsibility, a response-ability in which giving an account begins by recognizing language, a concession that we do not necessarily know what takes place in the taken for granted word. The call to "be humble before language" is a calling, a humble and perhaps even humiliating act of giving away the word in the name of hearing its question.

What then of the refrain, "Actions speak louder than words". So be it, for a moment. Consider what is *done* in the decision – or is it simply a curiously recurring accident? – to punctuate much of the transitional justice "literature" with the words of the poets and the playwrights. Milan Kundera cannot be quoted enough, although rarely in context. Celan and Brecht's laments are repeated again and again. Vaclav Havel's samizdat truth is held up as a beacon, as Ariel Dorfman's deep sadness and subtle sense of absurdity is heard to pronounce a warning. Antjie Krog's poetic account of the South African Truth and Reconciliation Commission, perhaps the only existing book on the Commission that matters, is mined for its life-giving turn of phrase.

These appeals are not rhetorical flourishes. Their appearance is less a matter of calculation than a telling exigence, an experience that unfolds as transitional justice confronts the limits of given words. The poets appear when "proper" words afford nothing meaningful to say and when standardized language is understood – too late – as a source and form of violence. Their invocation thus betrays a moment of exhaustion and a hope for inspiration, the return of breath and its voice. In the literature of transitional justice, this means that the poet functions as secular cover for the unasked question of the word, an angelic figure who has experienced the "poverty of words", who grapples with the unspeakable that abides in what is said, who struggles to show hospitality in the face of a most difficult gift – language. The difficulty, of course, is that this turn to the poetic may well beg the question and does so precisely as it fails to reflect on Adorno's now infamous claim: "To write poetry after Auschwitz is barbaric. And this corrodes even the knowledge of why it has become impossible to write poetry today".[13] For the moment, the point is not that this dictum is necessarily or

[13] Theodor Adorno, "Cultural criticism and society", in *Prisms*, (trans.) Samuel Weber and Shierry Weber Nicholson, (Cambridge: MIT Press, 1967): 34.

timelessly true, but that the theory and practice of transitional justice has yet to think it in any serious way; it has yet to reflect on the condition of the poetic – the "how" of its creativity and its potential as something more (and less) than a kind of sheer magic, as something other than an invocation if not "drive toward the unspeakable", a forgetting of that which is not present – to make it present – that amounts to the "fury of one who must talk himself out of what everyone knows, before he can then talk others out of it as well".[14] In the fold and logic of transitional justice, the invocation of the poets is a manifestation of panic, a deep-seated if not unspeakable fear of being at a loss for precisely that which transitional justice is called to create.

5. The unspeakable sound of the aftermath

> There is a question and yet no doubt; there is a question, but no desire for an answer; there is a question, and nothing that can be said, but just this nothing, to say. [15]
>
> There is no document of culture which is not at the same time a document of barbarism.[16]

What cannot (not) be said? The question amounts to an imperative, or more precisely, it is heard to express an imperative, the precise duty for which the poets are mobilised: the silence is intolerable – it must be broken. Marginal voices call for a hearing. Untold stories need narration. Experience demands expression. History requires articulation. The gap between what people think and what they say must be closed. The empty forms that sustain illegitimate power must be challenged and replaced with meaningful content. Announced and internalized systems of censorship have to be replaced with vibrant debate that can occur only as citizens re-inhabit and re-animate public space. Lost languages need to be recovered and recuperated. Everyone must begin to listen – again.

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[14] Theodor Adorno, "Education after Auschwitz", 2. Online at: http://josswinn.org/wp-content/uploads/2014/12/AdornoEducation.pdf; Theodor Adorno, "The Meaning of Working through the Past", in *Critical Models* (New York: Columbia University Press, 2005), 92. Looking broadly, it is remarkable that Adorno's claim is difficult if not impossible to find in the mainstream literature on transitional justice, an absence that speaks rather loudly to the narrow confines of its theoretical perspective.

[15] Maurice Blanchot, *The writing of the disaster*, (trans.) Ann Smock (Lincoln, NE: University of Nebraska Press, 1995).

[16] Walter Benjamin, "On the concept of history", in *Walter Benjamin: Selected Writings*, 4., (eds.) Howard Eiland and Michael Jennings, (Cambridge: Harvard UP, 2003).

All of this is held out as a matter of necessity, an imperative that defines the impulse and aim of transitional justice. In Priscilla Hayner's unsophisticated but popular account, the possibility of change rests on whether countries are able to "lift the lid of silence and denial" and "effectively unsilence" banned and taboo subjects. Transition founders if it fails to break the "conspiracy of silence" that perpetuates political violence, enforces deep division, and thwarts justice. The lynch-pin to the case is Hayner's contention that "psychologists universally confirm" the value of talk's restorative power.[17] With silence figured as pathology, the word's virtue and necessity can be denied only at the cost of denialism. In the aftermath, speech must be freed. It must be free. Against the desire for impunity that legitimises silence, the past must be disclosed and debated. In wake of human rights violations that mark and enforce silence, deliberation must become the norm.[18] Transformative justice, as Wendy Lambourne puts it, requires a "model of two-way communication, participatory or cogenerative dialogue, which supports collaborative decision-making, civil society participation and local ownership".[19] All of this, in Pierre Hazan's view, amounts to a "new *doxa",* a widespread and increasingly institutionalised presumption that transition hinges on a turn from "silence to speech" which counters "a potential return(s) to barbarity".[20] The word must be brought to bear and it must prevail. So goes the mantra, an appeal to the power of language that remains a fantasy precisely as it assumes that the word stands at the ready, a servant to all those who would employ it.

Setting aside the obvious possibility that some forms of quietude are a precondition of expression and that writs against silence may amount to forced confession, the pressing problem is how transitional justice pronounces a moral-political call to speech that rests on an unspoken assumption of language. This assumption is both a naïve preconception and an act of appropriation. In the aftermath, it is assumed that language is available, intact, and trusted. In the name of transition, the word is to be taken, as if it is ready-made and ready to serve, as if it is simply waiting in the wings, at the command of any and all who seek to vanish and vanquish

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[17] Priscilla Hayner, *Unspeakable truths*: *Facing the challenges of truth commissions* (London: Taylor & Francis, 2003), 25. Here and in many other accounts, the case rests on a single work: Shoshana Felman and Dori Laub, *Testimony: Crises of wtnessing in literature, psychoanalysis and history ,* (London: Routledge, 1992).

[18] For one view of this position, see Amy Gutmann and Dennis Thompson, "The moral foundations of truth commissions", in Robert Rotberg and Dennis Thompson (eds.), *Truth vs. justice: The morality of truth commissions* (Princeton: Princeton University Press, 2000): 22-44.

[19] Wendy Lambourne, "Outreach, inreach and civil society participation in transitional justice", in Nicola Palmer, Phil Clark, Danielle Granville, et al (eds.), *Critical perspectives in transitional justice* (Cambridge, UK: Intersentia, 2012): 258.

[20] Pierre Hazan, *Judging war, judging history: Behind truth and reconciliation,* (Palo Alto: Stanford University Press, 2010): 40.

silence from the stage. In the theatre of transitional justice, this restorative magic becomes a shell game precisely as it forgets its own claim that dehumanisation strips being of language. The result is a shell game – the word is here, now it's over there; but wait it's gone over here and wait now it's back. The game is a cheat, an undue appropriation of the word that plausibly denies the need for inquiry into how language is (dis)appearing. In the architecture of transitional justice, the game becomes self-confounding if not dangerous precisely as it fails to account for how the violence to which it is addressed unfolds through a calculated language that amounts to an attack on the possibility of language itself.

Beyond silence as the "absence of speech", an absence that does not necessarily function to preclude speech, Peter Haidu turns to a 1943 address by Heinrich Himmler to demonstrate how the leader of the SS composed a silence that was "both the negation of speech and a production of meaning".[21] With horrifying subtlety, Himmler's "speech of silence" coalesces into a discourse that "breaks" language – it constitutes "active subjects" who are called to silently carry out their "scared orders", an extermination of those who have been desubjectified, precisely to the extent that they have been stripped of their voice such that they can be declared "subhuman" and thus eligible for elimination. There is nothing to say precisely as expression is mobilised and set against its own power. There is nothing to say precisely because this discourse attacks the given terms of language. With a form that is "not anything that is readily dismissible as pure alterity", it "deploys the linguistic structures from the most exalted reaches of human poetry and spirituality" and draws from "the ordinary furnishings of our institutional, intellectual, and aesthetic lives" such that a "language of responsibility" becomes the basis of an extermination that denies and endeavors to negate the response-ability of language.[22]

What remains is the question of the unspeakable. What cannot (not) be said in the aftermath? This question is a fault-line – choose a side on which to stand or fall into the abyss.[23] For Haidu, as the "process of extermination" to some extent "resulted from the language of silence on which Himmler insisted and which he and Hitler practiced", the unspeakable is a discursive construction. It was "argued by Himmler". It constituted a discourse, one that developed from a genealogy of value in which we are implicated.[24] In this light, Haidu contends, the question of the unspeakable constitutes a call for inquiry into the "sequential linkage between the speech

[21] Peter Haidu, "The dialectics of unspeakability: Language, silence and the narratives of desubjectification", in Saul Friedlander (ed.), *Probing the limits of representation* (Cambridge: Harvard University Press, 1992): 278.
[22] Haidu, "Dialectics", 292.
[23] For one example of this deep fault line see J.M. Bernstein, "Bare life, bearing witness: Auschwitz and the pornography of horror", *Parallax* 10, 1, (2004): 2-16
[24] Haidu, "Dialectics", 294.

of silence and the Event", an inquiry that neither permits the erasure of "the narrative that history performs with the silences of its agents upon the bodies of its victims" nor endeavors to "redeem the dead by asserting their death possessed and inherent redemptive significance".[25] Both within and beyond the problem of the Shoah's uniqueness, its (in)comprehensibility and its (in)comparability, the appeal for words that might support, enact, and secure transitional justice is potentially unjustifiable, an argument for speaking that can neither account for its own words nor give an account of what violence and atrocity have done *to* language *with* language, the ways in which violence renders language to its purpose and the ways in which this erases, distorts, and short-circuits (its) expression. In this light, Haidu's account has heuristic value precisely as it suggests that the aftermath, the beginning of transition, is a moment in which the assumption of language in the name of breaking silence begs the question at hand precisely as there may be no ready-made language to assume. What's more, as George Steiner has put it, such an assumption may mimic the logic that it seeks to oppose to the extent that it conceives language as little more than a machine:

> The world of Auschwitz lies outside speech as it lies outside reason. To speak of the *unspeakable* is to risk the survivance of language as creator and bearer of humane, rational truth. Words that are saturated with lies or atrocity do not easily resume life.[26]

In the midst of the dehumanisation that defines the aftermath, the word does not stand at the ready, a tool that can pry open the past or turn the levers of transformation. Who can speak? Who is eligible to speak? What does and does not admit to words? The opening of transition holds a question of language, a question of language as such – its condition, its ability to be claimed, its ability to support the (ex)change that it has potentially served to corrupt. A great deal of concern has been shown for whether and how individual victims of atrocity can best reach toward language and bear witness. This work, undertaken primarily within the registers of psychoanalysis, is altogether important even as it may not be close to enough, at least insofar as the promise of transitional justice is hinged to a "coming to terms" that promises to transform the terrain of communal, public, cultural, and national life. Recalling Adorno once more, the task at hand may begin only in a concession, an admission that language constitutes a "hollow space", a space unduly and prematurely filled in the rush for normalcy with words that lack for referents, with struggle slogans that no

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[25] Haidu, "Dialectics", 294, 296.

[26] George Steiner, "K", in *Language and silence: Essays on language, literature, and the inhuman* (New Haven: Yale University Press, 1998): 123. For a contrasting view, see Naomi Mandel, *Against the unspeakable: Complicity, the holocaust, and slavery in America,* (Richmond: University of Virginia Press, 2007).

longer reflect the times, with sentiments of a general mood that simply (re)inscribe official taboos, with historical discourses that distort the concept of factuality, with commonplaces that conceal their corruption.[27] The task is made all the more difficult by the desire for action, a "cult of action" that races to redress the wounds "on the ground" without pausing to consider that this ground is precisely what remains in question.

All together: a profound and deep double bind, though it may in fact be triple. In confronting the dehumanisation that echoes from the criminal past, transitional justice struggles to (re)turn language, the very thing that has for so long defined the meaning of what it means to be human, a capacity to speak which, when assumed – attributed and taken for granted – renders language into an instrument, a tool that amounts to both the degradation of language itself and the possibility of violence that turns the human condition against itself. The need for language and its relinquishment must then be thought in the same breath, a moment in which the losses inflicted by the word turned violent touch the terror of being without words. And in all of this, the third thread of the bind, the onset of transition set out in the name of justice amounts to a struggle to reconcile (a concept that is not and cannot be a synonym for forgiveness) the tension between the presumption that talk is so much dangerous (in)action and the call of a rhetorical creativity that exceeds the rule of (its) law. For now, in the midst of transition given to dealing with the criminal past, it will not do to proclaim the necessity of speech while refusing to reflect on the creative potential of talk about the potential of talk. Such a gesture is not simply disingenuous. It is a form of thought riddled with the echo of barbarism.

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[27] Adorno, "Working through the past", 91-95.

Verbalising violence

Etienne Tassin

To achieve the "move" beyond dictatorship and a successful "entry" into democracy – if these terms might have a sense other than the mere metaphorical reference to a "transition", which is, to say the least, problematic – require, as a condition, that the terror wielded in the name of the State should be spoken of. It should be spoken of in public by those who turned to violence, and by those who were subjected to it. Without this public space of expression, it is hard to imagine how a solid and lasting democratic social bond could be established. This is perhaps one of the principal difficulties that Haitian society faces today. The violence has not been spoken of, it is still not spoken of; it has been silenced. This straightforward observation prompts three questions. Can one speak publicly of this violence? Is it sufficient to speak of it in order to overcome it? What provisions are required for its public expression? These three questions lead to a fourth: Can we be sure that this public verbalisation opens a way to move beyond State terrorism? Can we be certain that the fact of recreating a lasting bond of trust between citizens will permit the establishment of democratic practices of power? The question of the conditions under which violence can be spoken of is certainly a prerequisite for two other questions that should be treated together: on the one hand, the sentencing of the dictator and his accomplices and, on the other, the commemoration of the crimes committed and the injuries suffered.

I will start by drawing a distinction between the violence of State terrorism, and forms of violence that one might call ordinary or normal, that are unavoidable in any collective form of life. I shall do this by considering *the expressions of violence*. On the basis of this distinction between violences, I will then consider *the verbalisations of violence* in relation to the three perspectives of the conditions for speaking [*dicibilité*] of violence, the efficacy of such verbalisation, and the procedural arrangements required in order for it to produce the expected effects. Can violence be verbalised? Does the public verbalisation of violence have political efficacy? What institutional procedures might support this efficacy? I will examine the examples of Argentina and South Africa in order to reflect on what is to be understood by a demand for reconciliation. Finally, the third and last question extends the effects of such an operation into a long-term perspective: Is the duty of memory

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Etienne Tassin, "Verbalising violence", pp. 39 - 50.

required as a means of forever preventing the repetition of the violence? In *the commemorations of violence*, the emphasis is on the ways to prevent the return of dictatorial violence. This presupposes that violence – be it political or social, extreme or ordinary – can be overcome: at the very least, we might ask ourselves if there is any sense to the idea that a society can "move beyond" violence.

Forms of violence

Leaving aside the violence specific to war, in which armed forces clash with each other, and which is codified by the Geneva conventions, the forms of violence can be divided into three convenient (though also clearly reductive) groups: mass (collective) acts of violence / "ordinary" (individual) acts of violence; government violence / societal violence; instrumental or strategic violence / spontaneous or reactive violence. These divisions are endlessly contradicted in practice, and their value here is purely analytical.

Conventionally, the former of each of these pairs of terms would be described as political violence, and the second as social violence. At first glance, social violence only becomes political when it involves an upheaval that reconfigures the balance of power. But it might also be noted that some forms of societal or spontaneous violence acquire a political meaning the moment they contest the social order that sustains power, and from which that power draws its authority. They must, therefore, be distinguished not in terms of factual or objective description, but simultaneously from normative *and* pragmatic points of view so as to draw out the meaning of what we are doing. It is also worth asking: what is signified by this violence? Or better still, once we see them as forms of expression: what do these forms of violence *say*?

Thus, we must differentiate between what is publicly signified (what the violence *says*, what it manifests, or demonstrates, and which demands an interpretative position) and the practical modalities of that violence (its – violent – way of *saying* what it says); but we also have to differentiate between the two sides of what violent action is *made to say* (the discourses that justify violence, its ideological garb, for or against violence).

From a normative point of view, violence can be *a-* or *anti-*political despite the political claims made for it; another might have a political meaning because of what it *says* (because it expresses a situation), or through the way it is *said* (the kind of violence that conveys political meaning while the violence itself is anti-political). For example,

State terrorism and mass violence[1] are, in the normative sense, necessarily anti-political (they represent the destruction of everything necessary to the conduct of political life) even though they obviously always have a supposedly "political" justification. It is precisely their utter political illegitimacy that makes such ideological justification necessary. Conversely, an urban riot, like those seen in Europe – or a hunger riot like those seen in Haiti – can be eminently political even though they may seem to involve social violence of no political significance (burning cars and libraries, attacking firemen, and so forth). What is being *said* in these cases (a protest against the social order), but also the way in which it is *said* – violent action against consumer items (cars), public institutions (libraries), and those who represent the authorities (firemen) – can be considered eminently political. It is a matter of interpretation.

So the question is one of the interpretation of events. To plagiarise Nietzsche, one might say that there is no political violence, there are only political interpretations of violence according to the circumstances in which the violence takes place. Why is violence in itself not political? Because, as Hannah Arendt has established, violence is (a) first of all destructive, and is not able to create anything except in times of revolution; and (b) it is purely instrumental: violence is merely a means. (a) Ever since Machiavelli, we have known that while violence can bring a group to power, it cannot sustain it: to do that, you need politics, and above all, the law. The violence on which dictatorship relies has to adopt the guise of legality; and an ideological justification is a necessary means of cloaking it in apparent (but actually usurped) legitimacy. (b) Above all, violence in itself is nothing: it is but an instrumentalisation, and the instrument, of either physical or psychological force, used for the purposes of achieving dominance by means of terror. On its own, therefore, it can neither constitute politics, nor support political life.

It is here that the distinction between instrumental, or strategic violence, and spontaneous, or reactive violence starts to become meaningful, where it partially intersects with the distinction between governmental violence and societal violence. While the former presents itself as political – although in fact it is only a means of achieving domination –, the latter, though seemingly anything but political, can become so when it becomes the last resort against such domination, or a protest against the unacceptable denial of the rights to public protest that

[1] I follow here the definition of mass violence proposed by Jacques Sémelin, *Purifier et détruire* (Paris: Seuil, 2005); and www.massviolence.org; see also: http://www.newsletter.sciences-po.fr/NL_2008_03_25_1.htm.

has been imposed on the people by the social order. For here, violence says – manifests, expresses, shows – a desire for freedom, concern for equality, a need for dignity, the meanings of which are eminently political when the very way it is expressed (the recourse to violence) reflects back the denial of political recognition to the men and women who adopt those methods.

Verbalisations of violence

Armed with the difference between what violence *says*, its way of *saying* it, and the *discourses* to which it gives rise (justifications and condemnations of violence that we will not be considering here), we can now focus our attention on the three aspects of the public verbalisation of violence by linking its expressibility and its effectiveness to the procedures adopted by the mechanisms used in public recognition.

One preliminary observation is, however, unavoidable. While violence (like anger, which Merleau-Ponty described as nothing more than the actions that express it), is always expressed in violent ways, verbalising it is necessarily non-violent. To verbalise violence is to transpose into words the thematic content, and thus initially the subjective meaning, of acts of violence which could not themselves have taken any other form. Talking about violence is what we might call a performative act: the simple fact of *saying* the violence is in itself a step on from the violence, a renunciation of its use. Talking about violence is always an act that takes place after the event, an act which can only be envisaged because the violence is over, has subsided, has ceased to be. But it is also an act that has the effect of recognising that the past has passed, in other words, it records the violence as something belonging to a past which no longer pertains.

The use of words to *say*, peacefully, what took place in the idiom of violence – what happened – liberates the present from the past, and opens up the possibility of a future unburdened by that traumatic past. How does it do this? It does it by clearly separating the act of *saying* (the verbalisation) from what is *said* (the violence itself). While violence is necessarily expressed in a violent way, the verbalisation of violence objectifies the violence of behaviours and actions in the form of words, of something *said* (an item of content) that is not current because it is separate from the act of *saying* (the words used). But, as will be seen, we do not "move beyond" violence just because verbalising it proves that that the violence belongs to the past.

Expressibility, effectiveness, and procedure

There are two interesting aspects to the question of the expressibility of violence: Is it always possible to obtain an expression of the point of view of the author of the violence (even in the case when an institution is the author)? Is it always possible, necessary, and desirable from a social point of view? The ramifications and difficulties of these two aspects cannot be addressed in a few lines. In short, I simply say that a society must provide itself with the institutional and procedural means to make the violence *sayable*. It must create the conditions under which the authors of the violence committed can express the fact and be heard publicly, allowing their words to take their own particular effect. This not only involves waiving all confidentiality regarding the violence that was perpetrated, first and foremost removing the protection of State privilege from governmental or paragovernmental violence; it also requires a formal and substantial commitment on the part of society and its representatives – a commitment to listening, understanding, taking note, and following through with the consequences for the authors who give statements about what was done, and, at the same time, for society as a whole, and not just the immediate victims of atrocities, using whatever means they choose to adopt. The obvious response to these conditions might be to say that the verbalisations obtained through these means are necessary and desirable: necessary because without them the past does not pass; desirable because with them the present can open up to a future free of such violence. But in what way does the public disclosure of the violence create a new kind of social bond, capable of overcoming the trauma?

The effectiveness of public verbalisation of the violence is, of course, linked to the mechanisms through which it is made. Ilt might be pointed out that the therapeutic value of making – and of hearing – a statement detailing a personal experience should not be lost because it is a public statement whose effects are expected to contribute toward the re-establishment of a social bond that has been broken by the extreme violence. But public disclosure alone does not suffice to move beyond violence. Public declaration is a necessary condition, but it will never be a sufficient one. Here, we have to use negative reasoning: the absence of verbalisation can only be a contributory factor for the perpetuation of the trauma, and the self-justification that underpinned the acts committed, and made it possible, indeed desirable, to carry them out. It is also important that the public declaration states first what acts of violence were committed, in what ways and for what purposes, by whom, why, on whose orders, in what circumstances, affecting whom, and in what ways, and so

forth. It should then clearly articulate the meaning attributed to these crimes for those who ordered them, and for those who carried them out. Finally, it should bear witness to the view held today by the authors of the crimes, regarding the acts they once committed. But these three aspects (the disclosure of the facts, the meaning of the behaviour, and the comprehension of the actions) must not become a parody of the public prosecution of the alleged criminals, in the manner of the Moscow show trials. Neither self-denunciation, nor self-criticism can make the verbalisation of violence by its perpetrators have any effect. What, then, are the necessary procedures?

The difficulty relates to the possible confusion of the three categorically-distinct, and pragmatically-divergent social expectations regarding their outcomes: *an epistemic expectation of truth* (we want to know what happened, what really took place); *a judicial expectation of justice* (we want accounts to be settled, the guilty to be punished, and the victims exonerated); *an axiological expectation of ethical judgement* (we want the authors of the crimes to acknowledge the criminal nature of their acts, and to show repentance). This is where the differing mechanisms chosen by countries that have experienced destructive violence also determine the political meaning of the procedure, and its practical results. As we have seen, three terms summarise these expectations: truth, justice, and reconciliation. It is the combination of these three expectations within the procedures adopted that defines the means for talking about the violence. Each country does it in accordance with its own history and its own socio-political circumstances. South Africa's particularity was to invent the Truth and Reconciliation Commission (TRC), and to accord lexical priority to truth and reconciliation over justice.[2] Argentina's was to counter the work of CONADEP,[3] which undertook to seek the truth, with a demand for justice, which was itself rapidly overturned by the so-called Full Stop Law and the Law of Due Obedience,[4] which ended up shielding a large proportion of the authors of violent acts (extra-judicial executions, kidnappings, stolen children, disappearances, tortures) from both justice and the truth, as well as from

[2] Created in 1993, and written into the interim constitution, the TRC offered an amnesty to the authors of political crimes committed under apartheid (1960-1993) in exchange for a full disclosure.

[3] The National Commission on the Disappearance of Persons (from the Spanish: *Comisión Nacional sobre la Desaparición de Personas*), created in December 1983 to inquire into violations of human rights committed under the dictatorship.

[4] The Full Stop Law (1986) considerably reduced the possibility of taking legal action by imposing time limits; the Law of Due Obedience (1987) guaranteed impunity to all lower-ranking officers on the grounds that they had been following orders.

the possibility of public repentance. In the case of Rwanda, a specific International Criminal Tribunal (UNICTR) was created, which reinforced the work of national courts and the community legal institutions known as *Gacaca* courts, which were intended to devolve the judicial process to more local contexts as they attempted to satisfy the demands for truth, justice, and reconciliation.

The example of Argentina and South Africa

The differences between the procedures adopted in South Africa and Argentina make clear what is at stake, politically, when deciding on the mechanisms to be used to speak of the violence. Claudia Hilb has put forward a thought-provoking analysis of the difference between setting trials, as in Argentina, and searching for truth and reconciliation, as in South Africa.[5] I will simply mention two elements that give an outline of the contrast, relative though it is, but significant in terms of the effects it has had on reconciliation.

The first is that despite the work of CONADEP, which compiled the material for the prosecution in the Trial of the Argentinean military Junta, the Trial did not offer an opportunity for the violence committed by the Junta to be *said*: the voices of the criminals were not heard, the voices of the victims were heard just to provide the necessary evidence for the conviction of those responsible for State terror. Conversely, the TRC in South Africa chose to have the killers and the victims speak, offering to the former the chance to repent, and to the latter the chance to obtain a form of reparation, if only symbolic. The consequence of this, as Claudia Hilb points out, was that the criminals were themselves just as interested in the truth as the families of the victims. It could be said that while the "judicial process" option taken in Argentina did enable the guilty to be identified and punished, it did not offer the victims any chance for reparation, nor therefore, for a position to be reached where conciliation might have become possible. In contrast, it could also be said that although the "economy of forgiveness" approach taken by South Africa offered, to those who told of their crimes, the possibility of an amnesty through which they could escape justice, it also made it possible on the other hand, for voices from all sides to be heard; truth was honoured through public expression, meaning that a reconciliation between

[5] Claudia Hilb, "¿Cómo fundar una comunidad despues del crimen?", L. Quintana and J. Vargas (eds.), *Hannah Arendt. Politica, violencia, memoria*, (Bogota: Ediciones Uniandes, 2012): 131-151.

enemies – perpetrator and victim – became possible.

The second element, "the dynamics of the Trials in Argentina set out a radical distinction between perpetrators and civilian victims, the guilty military and the innocent society".[6] Conversely, in the South African approach, "the same ANC combatant could appear in order to obtain both reparation as a victim and amnesty as a torturer";[7] the elementary division between the guilty and the innocent, the perpetrators and the victims, becomes blurred, and from behind this obfuscation of blame and the taking up of positions, a recognition emerges that violence is never the sole responsibility of one side, but is in fact always the product of a balance of power involving the whole of society, which means that it is unrealistic to attempt, as judicial institutions and moral posturing do, to separate the guilty from the innocent, the wheat from the chaff.[8] It is by dispelling, on the one hand, the fantasy of a decisive difference accepted by all involved, between guilt and innocence, while simultaneously acknowledging the specific nature of "the evil spell of living with other people",[9] that the public verbalisation of the violence has a chance to lead to the reconciliation sought.

Through these processes, albeit in different ways, the same question emerges. What are we looking for: the truth, justice, or reconciliation? A degree of incompatibility between these three demands must surely be acknowledged: it is not always pleasant to hear the truth, it provokes anger and stirs resentment; justice makes decisions and separates the guilty from the innocent, it does not reconcile, and it often requires the abandonment of truth for the sake of reaching a verdict; lastly, even though reconciliation invokes both of these as the conditions for the reestablishment of a peaceful society, it often does it at the price of justice. In fact, we have to admit that the fundamental purpose of the public verbalisation of violence is social reconciliation, but that the means of obtaining it, which appeals to truth and justice, is also what makes it difficult. Although indispensable, the quest for truth can only be effective in tandem with a commitment to justice. However, this is controversial: either transitional justice is simple criminal justice, and does not bring about the conditions needed for reconciliation; or it is restorative justice, and already knows what it wants to achieve: the reconciliation of society

[6] Hilb, "¿Cómo fundar...", 144.
[7] Hilb, "¿Cómo fundar...", 145.
[8] Hilb, "¿Cómo fundar...", 145.
[9] This expression is taken from Merleau-Ponty. I should like to refer the reader to Etienne Tassin, *Le maléfice de la vie à plusieurs. La politique est-elle vouée à l'échec?* (Paris: Bayard, 2012).

with itself. From the criminal justice perspective, there is a choice between an international judicial process seen as impartial but distant and abstract – the UNICTR model (which takes place in the name of universal human rights and not in the interests of nations or groups within them, and outside the territory concerned); and national judicial systems whose credentials are undermined by their attachment to one or other side, or by their subjection to the forces they are investigating, as we saw in Argentina with the incrimination of the army. The expectations of restorative justice – which seeks to re-establish the honour and dignity of the victims as much as, if not more than, to punish the authors of the crimes – are such that they demand as a precondition the reconstruction of the social fabric that is, in fact, the end aim of such justice. That is why Rwanda set up three complementary instruments (the International Criminal Tribunal, the national courts, and the community courts), so as to combine criminal justice and its universal remit with national justice – an indication of the involvement of the judicial institutions in the work of reconciliation, a task borne largely by the Gacaca courts, whose jurisdiction is both popular and locally situated. In addition, the violence was publicly *stated*, simultaneously at international, national, and local levels, and also simultaneously in a penal and restorative form, whilst respecting the quest for truth, the need for justice, and the objective of national reconciliation.

The political meaning of reconciliation

Haiti set up a National Truth and Justice Commission in 1995, which had notably little effect in the short time given to it. No social fallout or political impact could have been expected of an instrument which was limited to investigating the depredations carried out under Cedras' military government (from 1991 to1994), and which thereby excluded the State terrorism and mass violence of the Duvalier dictatorships. But the problem was also that nothing in the procedure was motivated by any explicit desire for national reconciliation – not because reconciliation was not desirable or possible, but because the theme of reconciliation appeared right at the heart of the political discourse of the dictatorship, and was used to justify, on the one hand, the elimination of real participants in political life, and on the other to authorise in its place the construction of a fictional Haitian national identity – a racist, elitist, confiscatory one that served to legitimise the depredations and murders carried out by the State. We need, here, to focus our attention on the ambiguity of reconciliation.

The *ideology* of a reconciliation used in support of dictatorship must be challenged by *political* thinking – *political*, not moral, religious, cultural or ideological. Reconciliation does not aim to elicit confessions of violence from the perpetrators in order to then elicit forgiveness from the victims. It does not aim to repair the irreparably-broken bonds between the torturer and the tortured. It does not try to pretend that the crimes of State did not take place, as if one could get over the denial of humanity and live serenely once again with those who refused the right to life and held that refusal as the only basis for their authority. Reconciliation is not about the authors of, or the actors in, past crimes of State. It is not about being reconciled with the criminals, but *with the world* that made them possible, harboured them, and allowed them to prosper – in other words, with the society that did not make their emergence impossible. It is about reconciliation with a world that not only contains within it the possibility of mass crime and State terrorism, but that went so far as to raise them to the level of "politics" at the cost of the destruction of a shared world, and of a divided society. It is about political reconciliation with a world in which the political sphere has been negated by the exercise of criminal activity in the guise of politics.

Far from reuniting the victim with his torturer, political reconciliation dissolves the opposition between them by posing the question of their shared society, or rather of the "evil spell of living with others", which makes it impossible for society to avoid separating into criminals and victims, the guilty and the innocent, just as it cannot avoid separation into classes: the rich and the poor, the dominant and the dominated, owners and proletariat – in short, opposing humours, as Machiavelli put it. Political thinking on reconciliation, rather than undertaking a quest for some fictitious re-harmonization – in the deceptive guise of a people at last reconciled with itself – of the social contradictions and divisions intrinsic to living together, in fact meets these head on; instead of denying them, as instrumental and murderous violence seeks to do, it chooses the difficult path toward political reconstruction. Being reconciled to the world that harboured those who would kill human beings is therefore to encounter once again the conflictive nature of politics and society that dictatorship tries to eliminate, replacing it with State terror, intent on destroying all social engagement, and all politics. That is why, even in a society that has reconciled itself, it remains intolerable for criminals – those who destroyed any idea of the fellowship of the citizen by treating murder as though it were a form of politics – to continue to live among us as if they were citizens. The truth must be spoken, and justice must be done in order that a society can be

reconciled with its own past, and with the world that produced from within itself the means of its own destruction.

Commemorations of violence

To conclude, I shall address the final issue to which we are led when considering the public verbalisation of violence – namely, that of the modes and effects of its commemoration. Here we face the problem of commemoration policies. This has at least two sides. On one of them, we wonder if a duty of memory is required in order to keep alive the memory of the wounds suffered, the wrongs done, and the injustices perpetrated through organised violence, or whether on the contrary, forgetting might not be the condition that needs to be met in order to re-establish broken social bonds. To remember, or to forget – such would appear to be the simple choice to be made. However, Nicole Loraux has written incisively on this issue in respect of the Athenian experience of democracy, in which it clearly emerges that the city needs both a memory of what would best be forgotten, and to forget what it most ought to remember. I can only mention this briefly here, but the crucial point is that separation is the mainstay of social unity, not its destroyer.[10] This is why competing and contradictory memories of the violence suffered and perpetrated contribute to forging and re-forging the bonds of society, even as they seek to maintain the initial division that caused them. This brings us to the other side of the problem. We ask ourselves questions about the specific, effective forms of a "culture of remembrance": speeches of remembrance, acts of repentance by the State, national public ceremonies, the dedication of particular days, legislation, the re-writing of history, pedagogical missions for educational establishments, and so forth. The question thus arises of the complicated relationships between the distinct and divergent memories held by the parties to the conflict. Competition between these revives the division created by the initial violence, but also the issue of the ambiguous relationships between what one might call an exo-memory (as in the term "exo-skeleton"), maintained by political institutions in the name of civic duty, and the living memories that feed on the acts perpetrated and the injuries suffered, the shared memories and the accounts passed on by word of mouth. If we can agree that memory is neither a coherent nor a unifying force, and that in it the divisions that led to the memories are reinvigorated, then the general issue of remembrance policy finds itself facing a still more delicate

[10] See Nicole Loraux, *La cité divisée*, (Paris: Payot, 1997).

question about what it is trying to achieve: to move beyond violence and reunify society.

It is on this latter aspect of the problem that I conclude. It is undoubtedly vain and counterproductive to set as one's objective to "move beyond" violence. If we understand by "moving beyond violence", its elimination, it must be recognised that no society (except perhaps the Amazonian societies studied by Pierre Clastres) has been able to move beyond violence inasmuch as it is a constituent part of social relations. If we understand "moving beyond violence", to mean building a social relationship capable of overcoming the violence that forms an integral part of human relationships, then questions must be asked about the means by which destructive violence might be transposed into a form of political contention capable of generating a social dynamic. It may be that this is the central concern of all politics, and is all the more crucial if that politics claims to be democratic – because democracy is the regime in which the potential for conflict is acknowledged, which ineluctably involves the conversion of instrumental, anti-political violence into civil confrontation capable of generating social intercourse.

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The museography of disaster: Museums faced with the material traces of extreme violence[1]

Elisabeth Anstett

Since the publication of the book edited by Appadurai in 1986 and especially since Kopytoff's contribution, we have known that objects have a social life.[2] From that point on, research on material culture has taken a decidedly culturalist turn, based on the notion that objects have a social and cultural biography. Simultaneously a trace, document, and support for social memory, every object, every artefact, is indeed the product of a world. It offers the possibility of directly reconstructing practices (ways of doing), representations (ways of thinking), and value systems. But to what extent can things render extreme violence intelligible? I have chosen to focus more particularly on museums dedicated to mass crimes and genocides in order to understand the place attributed to objects and the role they are given.

Indeed, museums have also radically evolved during the 20th century. Alongside museums of art and history, Europe has indeed witnessed the birth of museums of society, characterised by the desire to reconstitute a unique social experience, whether it be of rural life or the carrying out of a profession, or even radical and often violent collective experiences such as slavery, political persecution, or genocide. And yet, in spite of the breadth and variety of experiences of extreme violence the world has undergone in the 20th century alone, and in spite of the very large number of museographic spaces that deal with mass crimes, the museography of violence and the specific questions it raises remains a relatively new field.

Yet, all museography (through the discourse used and the scenography) offers a staging of the collective representations of history; these staging enable one – or more than one – society to account for a complex and painful past. Museums are thus places where something is said and shown concerning a collective past. In Europe, as elsewhere in the world, these museums present a narration of the past which simultaneously reflects and affects collective representations of extreme violence. In this regard, the Western museums I will mention here reveal the aesthetic and moral choices made in Europe to show and represent violence.

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[1] This text is the result of research that was made possible by the support of the *Gilder Lehrman Center for the Study of Slavery, Resistance, and Abolition* at Yale University, where I was in residence in 2011. My thanks to all its members, and especially to Melissa McGrath, Richard Huzzey and Richard Rabinowitz for their warm welcome.

[2] Igor Kopytoff, "The cultural biography of things: Commodification as process", in Arjun Appadurai (ed.), *The social life of things: Commodities in cultural perspective*, (Cambridge: Cambridge University Press, 1986): 63–91.

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Elizabeth Anstett, "The museography of disaster: Museums faced with the material traces of extreme violence", pp. 51 - 61.

What objects are we dealing with?

Genocides, and more generally crimes committed on a wide scale, have led to unique material cultures, very different from the material cultures of martial contexts. When it is a matter of mass violence, we find ourselves faced with a material culture that – by contrast – bears the mark of banality.

On the victim's side, this culture remains in effect marked by poverty and a lack of security, because it always involves a material culture of survival, subsistence, and resistance to annihilation, which develops within the narrow and fragile scope of an aesthetic of the insignificant. The objects that speak to us of the experience of violence are objects from everyday life, completely ordinary objects that are often entirely common and domestic: a basket, a dish, a pair of shoes. Such is the case with the series of men's combs or of the various iron keys collected from around the execution site of the Paneriai forest or in the Vilnius Ghetto, and displayed by the Museum of Genocide Victims in Vilnius, Lithuania.[3] Social Anthropologist Maartje Hoogsteyns reminds us, that these small things "never seem to really draw our attention, except when they are not usable or when they are missed" insisting in passing on the concern for the "humility of these objects" from everyday life.[4]

On the side of the executioners, when it goes beyond the usual weapons (here, a pistol or gun; there, a machete) made by the hundreds of thousands, the material culture of the perpetrators is also that of ordinary administrative or police work. The "banality of evil" pointed out by Arendt also refers to the banality of the work tools: handcuffs, typewriters, chairs, tables, or seals made of galvanized metal which may occasionally be transformed into weapons of torture. These are the mundane utensils of a bureaucracy of death (a paper shredder, a telephone made of black Bakelite, a kepi) that Lithuanian photographer Indre Serpytyte has especially chosen to show in her work, "A state of silence (1944-1991)", dedicated to a reflection on the work of the NKVD in the Baltic countries and its social resonance.[5]

What do these objects show?

These objects illustrate first the conditions of life (and survival) of the detainees and the victims of violence: there are tools, dishes, and less frequently clothing. The material with which they are made is ordinary and

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[3] See the rooms dedicated to the museography of the Holocaust: http://genocid.lt/muziejus/en/1896/a/.

[4] Maartje Hoogsteyns, "Bousculée par les objets", in Alexandra Schüssler (ed.), *Villa sovietica–objets soviétiques: import-export*, (Geneva: Infolio-éditions and Musée d'ethnographie de Genève, 2009): 143.

[5] See a presentation of Indre Serpytyte's photographs on her site: http://www.indre-serpytyte.com/.

perishable, such as wood or cloth, like the prisoner's fleece jacket from the Gulag next to very ordinary aluminium spoons or misshapen cafeteria mess kits in the Gulag Museum of the Memorial organisation.[6] They are often objects that have come from the retrieval, recycling, or re-purposing of other objects: in this regard, they represent the waste of the material culture of the dominant classes. Writer Edouard Glissant[7] who was interested in the slave trade, speaks of a culture of "dispossession".

These are everyday objects, but also sometimes objects that can be associated with popular events and as such take part in the restitution of particular intentions. This is the case of the dented metal plaque used to mark the tomb of Anatoli Martchenko, who died in the Gulag in 1986, and that was offered by the family to the museum of the Memorial organisation after the transfer of the dissident's ashes.[8] Some artefacts may thus be directly or indirectly associated with key moments in the history of subjugated populations or the victims of violence. They then refer both to singular events, which are potentially simultaneous but always unique, and to recurring processes, involving complex practices that take place over time with sometimes a possible historic evolution. This is one of the first difficulties faced by museographers, namely, having to situate these extremely ordinary objects chronologically, geographically, and socially. Yet this is not the only difficulty raised by these objects.

What problems do they raise?

These objects first raise the problem of their rarity, because the material culture of extreme violence was not collected in a timely way. Indeed, it is important to stress the limited and belated nature, and even in some cases the total absence, of collection policies. It is clear that the material culture of the victims was ascribed no value at the time the violence occurred. Quite to the contrary, the system of signs, to use Baudrillard's words,[9] in which these objects were produced and used bears the mark of genocidal or criminal social systems. As objects used by the enemy, opponents, or those who had to be destroyed, these artefacts were often, in this regard, considered to be waste, and were marked as having a negative value.

Even more than for personal property, the lack of a heritage policy for

[6] See these photographed objects on the website of the organization in the section dedicated to the museum: http://www.memo.ru/museum/eng/handmade/neizv 990.htm

[7] Edouard Glissant, *Caribbean discourse: Selected essays,* (Charlottesville: University Press of Virginia, 1989).

[8] For the museum catalogue, see: http://www.memo.ru/museum/rus/handmade/ neizv9912.htm

[9] Jean Baudrillard, *The system of objects,* (London-New York: Verso, 1996).

immovable property should be emphasised. In Europe, there has been no global, concerted, and systematic preservation of detention, torture, or execution facilities, nor any attempt to preserve the worlds that were the target of the destruction. Whether it be the sites of violence of the Spanish Civil War or Republican villages, the Gulag camps, places where genocides and crimes against humanity were committed in Bosnia, or even the areas of the Holocaust, the shtetls and the old ghettos, buildings (precarious or not) were most often left to their inevitable decay, when they were not purely and simply subject to policies of systematic destruction. While it is true that objects are difficult to find, the places which are emblematic of terror and violence are also frequently lacking.

However, the material culture of extreme violence (of slavery, deportation, forced labour, or even torture and execution) also presents problems of preservation. Even when objects have been collected, they are not always correctly preserved, in the sense that their history is only rarely documented, and their value is often underestimated. Thus, it has not at all (or only slightly) been possible to document the social life of these objects and the symbolic spaces they supported. Little is known, therefore, about the social life of these objects. Concerning this topic, anthropologist Christine Chivallon, who has long worked on the memory of slavery in the Caribbean, is correct in emphasising a normative discord between the different value systems (those of the victims and those of the society which has to preserve the traces). The memorial and truly patrimonial scope of these objects has in this regard been largely underestimated, and Chivallon even speaks about it as a "gap of memory" in the national heritage.[10]

What status are objects given?

As a source of knowledge and support for private and collective memories, these objects are thus treated most often as "signs" rather than "traces", to use the terms of historian Carlo Ginzburg.[11] These artefacts are, in effect, most often mobilized to simply attest to a time period, and more for their illustrative value rather than their documentary nature. The specifically material, physical, and aesthetic dimension of these objects go unquestioned in the end. There is therefore a great risk of obliterating the scope of these artefacts (or even of negating a part of their intrinsic nature as "remainder") by looking at them superficially.

Here, the controversy from a few years ago that opposed art historian Georges Didi-Huberman and writer and documentary director Claude

[10] Christine Chivallon, "On the registers of Caribbean memory of slavery", in *Cultural Studies* 22, 6, (2008): 870-891.

11 Carlo Ginzburg, *Threads and traces: True, false, fictive,* (University of California Press, 2012).

Lanzmann concerning the photographic and filmic representation of the Holocaust can serve as an illustration. The historian, in defending the very legitimacy of scholarly commentary, recalled that every object – which includes photography – is simultaneously a veil and a tear that of course obliterates reality, but also opens a window onto lost lives[12], and he makes a plea for taking the documentary nature of the image into account. The director, on the other hand, who resisted the simply illustrative use of images and claimed in various interviews given to French newspapers[13] that the horror of mass violence (speaking specifically of genocide) could not be expressed visually or materially, asserted that any representation of this violence would fall short of reality and would be a lie that filled up the void left by the death of the victims. The very possibility of causing objects to speak is not, therefore, so straightforward.

Paradoxically, while the second half of the 20th century has seen the spread of a veritable frenzy of national heritage, it should still be recognized that some historical facts have resisted or escaped this frenetic activity. It is therefore interesting to ask, why? Why have the enslaving of human beings, their abduction, and the systematic torture of thousands of persons or even the murders committed on a wide scale not automatically caused frenetic museum activity everywhere, in the same way that wars have been treated, for example? To try to answer this question, I would note that there are a few museums that have chosen to say something concerning extreme violence. What are thus the goals and challenges that museum spaces that precisely deal with extreme violence seek to answer? We have seen that these places represent, first of all, spaces for the formalization of collective memory, and in so doing they play – it seems to me – a dual role.

Reconstituting a social experience

First, these museums act as a mirror of society by giving an "emic" point of view[14] concerning the trials of suffering, and by showing the systems of representation and values as they were perceived and lived from the inside. These objectives are often advanced by eco-museums[15] that encourage the reconstitution of a local experience (historically, geographically, or socially

[12] Georges Didi-Huberman, *Images in spite of all: Four photographs from Auschwitz*, (Chicago: University of Chicago Press, 2008).

[13] Claude Lanzman, "La Question n'est pas celle du document, mais celle de la vérité", *Le Monde*, (19 January 2001).

[14]Thomas Headland, Kenneth Pike, and Marvin Harris (eds.), *Emics and etics: The insider / outsider debate*, (London: Sage, 1990).

[15] The concept of eco-museum was forged by George-Henri Rivière and Hugues de Varine at the beginning of the 1970s to account for the birth of a new kind of local museum, by adopting a holistic approach to the notion of heritage.

framed). To this end, it should be emphasised that museums that deal with mass violence and genocides are often institutions that favour a local approach by emphasizing a specific place. One of their main objectives is also to recount the history of a precise community. Two methods then tend to be mobilised to reconstitute a collective experience of suffering: the appeal to art and the mobilisation of virtual spaces.

Indeed, in the vast majority of the museums concerned, the reconstitution of the experience of extreme violence is done through works of art. These works (paintings, drawings, stained-glass, or sculptures often monument-sized) display the work of surviving artists as well as the work of renowned artists affected by these experiences, such as the imposing wood and metal sculpture by Camilian Demetrescu entitled "Homage to political prisoners" and shown at the Sighet museum, in Romania,[16] or the large installation by Israeli artist Menashe Kadishman, entitled "Shalekhet" (the dead leaves), which includes several thousand faces cut out of metal plates littering the floor of a hallway in the Jewish Museum Berlin.[17] Exhibiting works of art or crafts never corresponds as such to an attempt to aestheticise the horror, rather to an attempt to elliptically evoke the disaster and extend the metaphor of the unspeakable and ineffable.

More and more museums are also mobilising virtual spaces that make use of a dominant visual dimension and that open onto sound spaces (those of literary works, autobiographical testimonies, as well as musical cultures). Thus, the creation of a virtual Gulag Museum on the scale of the entire former USSR, beginning with an ambitious project entitled *Virtual Gulag Museum; Necropolis of the Gulag* developed by the St. Petersburg branch of the Memorial organisation,[18] the virtual museum of the occupation in Lettonia,[19] or even that the *Museo virtual de la Memoria Republicana de Madrid,*[20] tend to make it seem as though virtuality is in many cases – and especially in the post-Soviet context – the only way to reconstitute the experience of extreme violence. We might then ask whether these virtual spaces have not progressively become substitutes or stopgaps for a museography that is in many ways impossible.

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[16] See a presentation of all the art works exhibited at the museum-memorial at Sighet: http://www.memorialsighet.ro/index.php?option=com_content&view=article&id=525&Itemid=159&lang=en.

[17] See a presentation of the installation on the museum's website: http://www.jmberlin.de/main/EN/01-Exhibitions/04-installations.php.

[18] http://www.gulagmuseum.org/showObject.do?generalSearch=true&textValue=&language=2.

[19] www.occupation.lv.

[20] http://museomemoriarepublicana.blogspot.fr/.

Offering a reading / making meaning

Museums that deal with extreme violence are in fact responding to a second objective, as they also serve to offer an analytical reading (historical, sociological or geographical) of the institutions of death they are describing. In this regard, cultural institutions also reconstitute an "etic" point of view – primarily political in nature – developed outside of the close experience of violence, one that is likely to be supported by comparative analyses and thus nuance or bring some measure of relativism to the presentation of facts, data, or opinions that the larger public holds as certain or given.

These approaches are generally the ones adopted by state museum institutions whose job is to recapitulate a subject at the scale of (and intended for) an entire country. Yet quite remarkably, we have to admit that there has been a sustained absence of a national museum or a state museum specifically dedicated to mass crimes that were conducted by (and in) the country. This is at least the case in Russia (for the Gulag), France (for slavery or the slave trade), Spain (for the Civil War), and in Poland (for the Holocaust). The historical knowledge and museographic expertise are not lacking; instead, it is the possibility of ensuring the reconstitution of the collective experience of violence in a dispassionate context that seems to be missing. Here again, it is a matter of social experience and political consensus. For the moment, the material culture produced by extreme violence is most often used for a peripheral discourse, out of sync with its subject, and objects are often invoked to speak of things other than the collective experience of violence. They are used to speak of community identity, local history or symbolic events. This has occurred to the point that the Canadian historian Carlo Celius has spoken of a "process of repression".[21] I will now try to shed light on the motives for this repression when it takes place in the museum.

Structural problems

Museographic reconstitution of mass crimes remains structurally complex. Beyond the specifically moral question related to the exhibition of suffering and the fundamentally voyeuristic nature of this type of exhibition as opposed to the negationist dimension of their hiding it, the complexity of reconstituting the experience of subjugation, torture, or execution at / by the museum is related to several elements. The first element is the disappearance of victims, as well as of the material traces of their suffering, of the places where they were abused or imprisoned, as indicated above. Let me make a remark in passing. This same lack of evidence, this same absence of traces, opens the

[21] Carlo A. Celius, "L'Esclavage au musée. Récit d'un refoulement", in *L'Homme*, 38, 145, (1998): 249-261.

way for the denial of the Holocaust and will lead some to claim that the gas chambers never existed. In the museum, this recurring lack of traces often leads to staging what remains, like a reconstruction and sometimes of "re-creation" enabling the larger public to see and understand the violence experienced.

Overcoming this absence, the structural lack of artefacts, thus poses very particular ethical and practical problems for the general treatment of violence in museums. These problems are particularly linked to the fabrication and the use of “fakes” (fake woods, fake doors, fake tracks, and fake watchtowers) that might be compared to a falsifying practice of memory if it were not history. They are also linked to the harm they may cause to victims and their descendants by the potentially parodic or caricatured nature of some of these staged scenes.

Second, the complexity of a museographic treatment of violence stems from a plurality of temporalities, in other words, of the difficulty in reconstituting facts referring to events (one time) and processes (historic, sometimes very long), as discussed earlier. These facts can lead to different readings (community or ethnic, political, religious, and moral) that may at times be completely contradictory. A treatment that simultaneously involves the synchrony of the event and the diachrony of the historic process therefore requires, on the one hand, determining what took place, through the support of the work of historians to identify causes and effects, but also, on the other hand, establishing a social consensus on the nature of the facts themselves. The time of the museographic treatment thus always attempts to be, if not contemporary with, then at least close in time to that of the violence, for the risk remains that it may ignite (or reignite) polemics and reawaken divisions. Here again, the discourse of museum specialists assumes a fundamental significance, at the same time that it needs to be used in spite of the sparse presence of objects, or even in their absence.

Museographic impasses

It should be noted, however, that in the face of the significant challenges posed by the museography of mass violence, not all attempts at dealing with the issue have been met with resounding success. It is now possible to identify a certain number of impasses in the attempt of reconstituting the experience of collective suffering through a museum display.

A first limit is represented by the use of allegory and its corollaries, hyperbole and metaphor. This type of approach can also be found in many a museum staging. In light of the lack of evidence and traces, there is a great temptation to appeal to the work of museum specialists or visual artists who have the benefit of using an abstract and symbolic dimension of language and avoiding the figurative or narrative elements usually mobilised by other

media. This is the case, for example, of the general scenography of the Jewish Museum Berlin, generally impacted by the choices of architect Daniel Libeskind, who designed the buildings of the museum around the definition of three major axes symbolising the fate of the Jews: the axis of exile, the axis of the Holocaust, and the axis of continuation.[22] The pitfalls represented by the staging of an "architecture of the void or an aesthetic of disappearance", to use the terms of the French anthropologist J. Assayag,[23] reside in avoiding dealing with the specifically geographic, historical, and sociological dimensions of the facts of extreme violence through a direct effect of de-contextualization. The treatment by allegories thus unquestionably lessens the real and material aspect of violence.

The philosopher Maurice Blanchot noted in regards to this context that "there is a limit at which the practice of any art becomes an affront to affliction";[24] in the case of collective violence, these limits are sometimes hard to grasp and respect. These works or installations lead, in effect, to an abstraction of violence. By holding more readily to a moral reading (through sentiment or emotion) this abstraction does not allow understanding the crime from a specifically analytic perspective. By participating in a metaphoric treatment of the subjugation or destruction of human beings, allegorical discourse brings with it, in a certain way, a denial of historicity.

A second limit resides, furthermore, in the aporia of a strictly pedagogical museography. Indeed, the retrospective reconstitution of the contexts (sociological, cultural, and historical) that presided over the advent of large scale violence, gives the facts an almost inevitable nature by establishing links – which are in a way necessary – between causes and effects, especially through the use of linear chronological friezes that substantiate a chain of successive causalities. Paradoxically, the pedagogical approach thereby participates in giving the facts of violence a certain validity (the facts are explained and seem to be linked in an inevitable way). Beyond the presentation of historical objects and artefacts, we can thus only emphasize the failure of systems that rely solely on the premise of prior empathy with the victims insofar as – precisely – these installations can still be understood by visitors as a process of legitimation of the violence committed.

The last of these pitfalls, but certainly not the least, deals with the problem of "concentration camp kitsch" as expressed by writer and survivor

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[22] See the 8-minute introductory film presenting the architecture of the entire Jewish Museum Berlin and its exhibits: http://www.jmberlin.de/main/EN/00-Visitor-Information/05-film.php.

[23] Jackie Assayag, "Le spectre des génocides", in *Gradhiva,* 5, 9 (2007), Accessed October 9, 2014 from http://gradhiva.revues.org/658.

[24] Maurice Blanchot, *The writing of the disaster*, (Lincoln: University of Nebraska Press, 1986): 83.

Ruth Klüger[25] who, in discussing the issue of Holocaust museums, fundamentally questions the representational systems of an institution of extermination. Every museographic staging in its own way raises the issue of focus and the proper distance, since the risk of transforming calamities into spectacles,[26] at a time when the industrialisation of the representation of extermination (through cinema especially) shows that it is very easy to turn violence into simply an object for consumption. In the museum, the need to reconstitute, to make use of reproduction, comes up against this pitfall concerning kitsch created through unintentional gaps, parodies, or excesses, such as the reconstruction of the entry to the camps, installed at the entry to the National Museum of the History of the Gulag,[27] made out of barbed-wire barriers and mini watchtowers (due to spatial constraints). These failed scenographies, a kind of "apocalypse of falseness" according to literature professor Catherine Coquio,[28] thus represent the counterpart to the aesthetics of abstraction staged by artists' installations and works, and constitute the other rock around which museum representations of extreme violence must navigate.

What does the future hold for the museography of extreme violence?

It now seems clear, in light of the impasses and uncertainties that different systems have come up against, that museographic discourse cannot advance without bringing together the voices of historians and those of witnesses. Academic discourse brings a factual, analytic and objective dimension to the museum which alone enables the visitor to grasp the breadth and complexity of configurations of mass death. As for witnesses, they bring an indispensable dimension to the museum, certainly a subjective one but one that also provides a human side to these cultural institutions. However, this essential weaving together clearly does not suffice. "The era of the witness" also has its impasses and limits.

In my estimation, new perspectives will be provided in the near future by archaeology, the only science able to simultaneously reconstitute the materiality of facts and their historicity. In this regard, the archaeology of the

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[25] Ruth Klüger, *Still alive: A holocaust girlhood remembered,* (New York: The Feminist Press, 2001).

[26] Norman G. Finkelstein, *The holocaust industry: Reflections on the exploitation of Jewish suffering,* (London: Verso Book, 2000).

[27] In spite of its title, this museum is a municipal museum under the aegis of the Department of Culture of the city of Moscow. See images of its exterior and the watchtowers on its website: http://gmig.ru/o-muzee.

[28] Catherine Coquio, "Envoyer les fantômes au musée?", in *Gradhiva*, 5, (2007). Accessed on 9 October 2014: http://gradhiva.revues.org/735.

contemporary has a great future ahead of it. This is because an object brought to light by archaeologists possesses the status of a fully-fledged social actor, a unique ability to act (agency) and cause reactions, as emphasized by sociologist Bruno Latour,[29] and an ability to account for the complexity of social relations that produced it. Archaeology will also – most notably through the (re)discovery of burial sites and neglected or hidden spaces – allow for the creation of a place for the victims and those who are absent, and thus, perhaps, allow the collective mourning that has been put off far too long to finally begin.

The ultimate challenge that remains to be met for these museums resides in the place to give to human remains, to the bones or skulls, to the "singular objects" that are very tangible and yet so difficult to think about. Paradoxically, while bodies and human remains are shown throughout the world in art museums (as mummies) and in science or natural science museums (in the anatomy and medical sections), they are systematically absent from museums dedicated to mass violence, except in a few notable cases such as the Kigali Memorial Genocide Centre in Gisosi, Rwanda (which includes a room where a series of skulls and long bones are exhibited behind glass),[30] and the World War II Museum in Minsk (which – at its former location – included a Plexiglas case in the museography dedicated to the Maly Trotsnets Camp containing several kilograms of human ashes collected from the very site of the camps in 1944).[31]

It should be noted that disaster, in its most material and radical form – the destruction of human beings – is always treated by our museums in an elliptical form that privileges the use of litotes or metaphor. The place accorded to bodies, to bones, and to the remains of the remains is strangely uniform, even when placed at a distance through photography (as at the Museum of Genocide Victims in Vilnius, Lithuania, which displays a huge photograph of scattered human bones along one of its large stairways).[32] Everything happens as if we are still struggling to account for what violence truly inflicts on a society, and to accept recognition of the inevitably material dimension generated by the destruction.

~ Centre National de la Recherche Scientifique ~

[29] Will Wheeler, *Bruno Latour: Documenting human and nonhuman associations* (Libraries Unlimited, 2010).

[30] See the museum site: http://www.kigaligenocidememorial.org/old/centre/exhibition/burialchambers.html.

[31] This museography was in place until the museum moved in spring 2014. It can still be seen on the museum's former website: http://www.old.warmuseum.by/rooms/room_3.

[32] See it on the site that presents the museums of Lithuania: http://www.muziejai.lt/Vilnius/nuotraukos/genocido15.jpg.

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Truth versus impunity: Post-transitional justice in Argentina and the 'human rights turn'

Sévane Garibian

How to turn human wrongs into human rights?[1]

In Argentina, the processes of democratic transition and transitional justice are both inextricably associated with Raúl Alfonsín, for both began with his accession to the presidency after the free elections that followed seven years of military dictatorship (1976-1983). Having thus initiated the transition to democracy, Alfonsín set up, in 1983, the CONADEP (*Comisión Nacional sobre la Desaparición de Personas*),[2] which was tasked with investigating the 'disappearances' and other grave human rights violations committed in the context of the *Proceso de Reorganización Nacional* overseen by the generals. That same year, the Argentine parliament repealed the self-amnesty law which, in an attempt to guarantee the impunity of perpetrators, had been hurriedly passed by General Bignone's government two months before the fall of the dictatorship under the pretext of maintaining civil harmony and achieving national reconciliation[3]. Shortly afterwards, Alfonsín gave the go-ahead for legal proceedings against the generals of the first three military juntas.[4]

On 20 September 1984, the CONADEP handed the president its final report, which would be published on 28 November with the powerfully symbolic title of *Nunca Más* ("Never Again").[5] The Commission's report drew up a preliminary survey of the crimes of the dictatorship, recording almost 9,000 'enforced disappearances' – a figure now put at 30,000. Alfonsín would recall this time in a book published posthumously in 2004: the impact of *Nunca Más*, the first 40,000 copies of which sold out within 48 hours[6], was of crucial importance both in the process of political transition and in the

[1] Graffiti written on the wall of Desmond Tutu's house in Cape Town.
[2] By decree 187/83 of 15 December 1983.
[3] *De facto* law 22.924 of 23 March 1983, revoked by law 23.040 of 22 December 1983. The latter's constitutional validity was later confirmed by the Supreme Court in ruling 309:1689 of 30 December 1986.
[4] By decree 158/83 of 13 December 1983.
[5] *Nunca Más. Informe de la Comisión Nacional sobre la Desaparición de Personas*, (Buenos Aires: Eudeba, 1984).
[6] Raúl Alfonsin, *Memoria política. Transición a la democracia y derechos humanos*, (Buenos Aires: Fondo de Cultura Económica, 2009): 42.

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Sévane Garibian, "Truth versus impunity: Post-transitional justice in Argentina and the 'human rights turn'", pp. 63 - 73.

development of transitional justice, of which it would form the foundation.[7]

The judicial treatment of the crimes of the dictatorship would henceforth proceed in two stages: the transitional phase proper (from 1983 to the 1990s) followed by the post-transitional phase (from the 1990s to the present day). Together, these would describe a return trip, going from punishment to pardon and back again. In between these two phases occurred what we will refer to as the 'human rights turn' on the international stage, a shift that would see the fight against impunity and the restoration of truth become new imperatives in the pursuit of justice. Within both phases, there occurred a series of shifts corresponding to changes in the paradigm through which the abuses committed by the military regime were confronted. This tentative process by which Argentine society 'felt its way forward' meant that the Argentine experience was remarkably varied, illustrating the uncertainties with which we are inevitably confronted when attempting to re-think the very notion of justice during a stage of political (post-)transition in the aftermath of state-committed mass crimes.

The transitional phase: From punishment to pardon, via impunity

The first phase of the transitional justice process began on 22 April 1985 with the opening in Buenos Aires of the historic Trial of the Juntas, which placed the main actors of the dictatorship in the dock. The approach adopted initially was one of penal repression, based on the postulate proclaimed on numerous occasions by Raúl Alfonsín: while bringing the truth to light is a necessary precondition, it is not in and of itself enough to effect the required consolidation of democratic values – for this, punishment must occur[8]. The charges consisted of murder, illegal imprisonment and torture; the applicable statutes were restricted to the military criminal law and common law in force at the time of the offences; the court of competent jurisdiction was the *Cámara Nacional de Apelaciones en lo Criminal y Correccional Federal* of Buenos Aires. The media coverage was massive and well-known personalities (including Jorge Luis Borges and Ronald Dworkin) took their places to listen to the hearings. 833 witness in total took the stand, with evidence also being given by foreign experts such as Louis Joinet (who would, a decade or so later, become the 'father' of the central principles of the fight against impunity).[9] Verdicts were delivered on 9 December 1985: two sentences of

[7] For details of the CONADEP, its work and its impact, see Emilio Crenzel, *La Historia Política del Nunca Más. La memoria de las desapariciones en la Argentina*, (Buenos Aires: Siglo XXI, 2008) and "Argentina's National Commission on the Disappearance of Persons: Contributions to Transitional Justice", *The International Journal of Transitional Justice*, 2, 2 (2008): 173-191.

[8] Alfonsin, *Memoria política*, 45.

[9] See below, note 20.

life imprisonment; three other custodial sentences of varying terms; and four acquittals for "lack of evidence".[10]

The creation and subsequent work of the CONADEP and the conduct of the 1985 trial are for many a model of transitional justice in a South America. Yet the fact remains that Raúl Alfonsín would in the end be unable to escape the clutches of *Realpolitik*. Faced with pressure from the military and threats of uprisings within the armed forces, between 1986 and 1987 he passed what were in effect two amnesty laws in disguise. The first, known as the *Punto final* law,[11] set a deadline leaving 60 days in which to lodge accusations against members of the army and police suspected of human rights violations. Its immediate effects (namely a large wave of new accusations and the opening of 1180 cases) led to threats of a new coup d'Etat by the armed forces, forcing Alfonsín to take the further step of adopting a second law, known as the *Obediencia debida* law.[12] The 1987 law guaranteed immediate impunity to all soldiers below the rank of colonel, on the basis of a non-negotiable assumption that they had been obeying the orders of superior officers.[13]

The shift in paradigm was stark: the punishment of the crimes of the past through the criminal justice system was no longer presented in presidential declarations as necessary for democratic consolidation and the setting up of a state under the rule of law; on the contrary, it was singled out as an element which was creating conflict and threatening the new emerging political balance, national unity and civil harmony.[14] A legal *tabula rasa* was thus created by the amnesty laws,[15] on the pretext of protecting recently-gained democracy and forestalling violence[16].

This politically-motivated change of paradigm would be given legal force in a highly controversial ruling from the Supreme Court which

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[10] For details on this trial, see Marcelo Sancinetti, *Derechos humanos en la Argentina post-dictatorial*, (Buenos Aires: Lerner Editores Asociados, 1988): 1-59 and Stella Maris Ageitos, *Historia de la impunidad. De las actas de Videla a los indultos de Menem*, (Buenos Aires: Adriana Hidalgo Editora, 2002): 170 ff.

[11] Law 23.492, promulgated 24 December 1986.

[12] Law 23.521, promulgated 8 June 1987.

[13] For developments, see Sancinetti, *Derechos humanos en la Argentina post-dictatorial*, 61-152, Ageitos, *Historia de la impunidad*, 183-216 and Andres Gil Dominguez, *Constitución y derechos humanos. Las normas del olvido en la República Argentina*, (Buenos Aires: Ediar, 2004): 53-84.

[14] Alfonsin, *Memoria política*, 243 ff.

[15] These laws did not, however, apply to the appropriation of minors (children of the disappeared) and the substitution of their identities by members of the armed forces, or, in the case of the 1987 law, to rape and the appropriation of property by extortion.

[16] See the interesting analysis provided by Ram Natarajan, "Courtrooms and legacies of violence", in *LASA Forum*, XLIV, 3, (2013): 24-25.

proclaimed the law of 1987 to be constitutional.[17] It would find further support from within a certain strand of judicial doctrine, in particular through the writings of Carlos Nino, who would emphasise the importance of taking into account not only the "factual circumstances of each case," but also the imperatives of deliberative democracy in the face of the sometimes inappropriate interventionism of the international community, and at the same time putting into perspective the "maximalist demands" of NGOs which urged the adoption of "an all-out retributive approach".[18] His position on these questions would lead to a famous debate which pitted him against Diane Orentlicher,[19] a staunch defender of the principle of the international obligation of states to prosecute human rights violations; she would later become an independent expert adviser to the United Nations as part of the project to update the famous "Joinet Principles" which seek to combat impunity.[20] This debate reveals the eternal political dilemma inherent in any transition to democracy.[21] But also, in a more oblique and subtle fashion, raises the question both of the validity and legitimacy of the norms produced by an international legal system lacking any legislative organs, and of the existence and, where relevant, the binding nature and/or practicality of an internationally-recognised obligation on the part of states to investigate and prosecute abuses committed by previous regimes, as a means of achieving – or as proof of having achieved – democracy.

The paradigm shift took a new turn when Carlos Menem, three months after taking over from Alfonsín as President in July 1989, signed the first decree granting a pardon to nearly 300 individuals accused of acts that did not fall within the purview of the laws of 1986-87, citing reconciliation, national solidarity and, once again democratic consolidation as his reasons.[22]

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[17] Ruling 310:1162 of 22 June 1987.

[18] Carlos Santiago Nino, "The duty to punish past abuses of human rights put into context: The case of Argentina", in *The Yale Law Journal*, 100, 8 (1991): 2630. His argument is developed in *Radical evil on trial*, (New Haven: Yale University Press, 1998).

[19] Published in *The Yale Law Journal,* 100, 8 (1991): 2537 & 2641.

[20] See *Question of the impunity of perpetrators of human rights violations (civil and political)*, Revised final report to Human Rights Commission, UN Doc. E/CN.4/Sub.2/1997/20/Rev.1, 2 October 1997, and *Updated set of principles for the protection and promotion of human rights through action to combat impunity*, Report to the Human Rights Commission (update of the Joinet report), UN Doc. E/CN.4/2005/102/Add.1, 8 February 2005.

[21] On this issue in relation to Argentina, see the study by Carlos H. Acuña and Catalina Smulovitz, "Guarding the guardians in Argentina. Some lessons about the risks and benefits of empowering the courts", in A. James McAdams (ed.), "Transitional justice and the rule of law*", in New Democracies*, (Notre Dame: University of Notre Dame Press, 2001): 93-122.

[22] Decree 1002/89 of 6 October 1989.

In December 1990, a second series of decrees 'pardoned' officials who had already been found guilty (among them Jorge Videla and Emilio Massera, sentenced to life imprisonment in 1985), and a policy of financial compensation for victims was instituted.[23]

While, from the point of view of state policy, the 1990s represented an era of forgiveness and oficial pardon, from the point of view of Argentina's civil society this period was, on the contrary, synonymous with intensifying action on the part of human rights organisations, victims and families, all united around the slogan *¡ Ni olvido, ni perdón, justicia !* ("No forgetting, no pardoning, justice!").[24] More seismic change occurred over this decade, its defining feature being a decisive shift which gave rise to a new and unprecedented politico-judicial configuration: the 'human rights turn', at the heart of which lay the emergence and subsequent recognition of an entirely new subjective human right, namely, the 'right to the truth'.

The post-transitional phase: From pardon to punishment, via truth

Various factors and events would have a determining influence on the complete about-turn – that was to come. Firstly, at an international level, the prevailing legal order had been profoundly affected by a number of developments: the new doctrine of the 'fight against impunity' encouraged by the UN;[25] the return in force of international criminal justice (almost half a century after the first experiment at Nuremberg) with the creation of the *ad hoc* International Criminal Tribunals for the Former Yugoslavia (1993) and Rwanda (1994), followed by the permanent International Criminal Court (1998), not to mention a whole series of Criminal Tribunals classed as 'hybrid' or 'internationalised'; the enshrinement in law of the concept of *ius cogens* (the notion of an 'imperative' law applying directly to states and individuals) within the scope of which the gravest human rights violations are considered to fall; and, finally, the increasingly important role played by human rights in the formation and enrichment of the normative corpus of international criminal law which was taking shape at this time. This period also saw a profusion of new theoretical studies, alongside an equal number of concrete

[23] See in particular decree 2741/90 of 29 December 1990; law 23.043 of 27 November 1991; law 24.411 of 7 December 1994. See also law 24.321, promulgated 8 June 1994, that also made it possible to declare legally the absence of a person who had disappeared before 10 December 1983.

[24] See Elizabeth Jelin, "Los derechos humanos entre el estado y la sociedad", in Juan Suriano (ed.), *Nueva historia Argentina,* Volume X, *"Dictadura y democracia, 1976-2001*", (Buenos Aires: Sudamericana, 2005): 507-557. Let us recall that in 1992, the CONADI (*Comisión Nacional por el Derecho a la Identidad*) would also be set up to assist in locating children who had disappeared during the dictatorship.

[25] See above, note 20.

actions taken in various states, relating to the 'duty of memory' and the fight against denial. All of these elements, insofar as they form part of the struggle against impunity and the restoration of truth, carry within them the question of how the law can constitute a framework of collective memory.[26]

At the regional level, too, the jurisprudence issued by the Inter-American Court of Human Rights (the San José-based Court) – has often been described as activist in nature.[27] With its very first ruling it brought in two crucial innovations, through a broad interpretation of the 1969 American Convention on Human Rights (ACHR): the first was the upholding of the obligation of states to prosecute the perpetrators of serious human rights violations; the second was the recognition of the right of the families and other loved ones of the victims of disappearance to learn the truth about their fate, even when the crimes in question could not be prosecuted.[28] It was this key notion of the central importance of clarifying the facts and seeking the truth, subsequently reinforced on numerous occasions in the jurisprudence issued by the Court, that would ultimately give rise to an entirely new *right to the truth*, which had not been enshrined as such within the ACHR.[29]

Finally, at the national level, two key events changed the overall situation in Argentina. A phase of deep constitutional reform was undertaken in 1994, and as a result the chief international legal instruments for the protection of human rights were given new prominence, receiving constitutional status within the hierarchy of norms (according to article 75 § 22 of the Constitution, which lists the texts in question), and thus allowing Argentine judges to apply them directly.[30] One year later, as the Truth and Reconciliation Commission was being set up in South Africa, Argentina was rocked by the public confession of former naval Captain Adolfo Scilingo regarding his active involvement in so-called 'death flights'.[31] It was also at this time that Argentina adopted the 1968 Convention on the Non-

[26] See Mark Osiel, *Mass atrocity, collective memory and the law*, (New Brunswick: Transaction Publishers, 2000).

[27] See for example Elisabeth Lambert Abdelgawad and Kathia Martin-Chenut (eds.), *Réparer les violations graves et massives des droits de l'homme: la Cour interaméricaine, pionnière et modèle?*, (Paris: Société de législation comparée, 2010).

[28] See *Velásquez-Rodríguez vs. Honduras*, 29 July 1988, Series C No. 4, §§ 162 ff & 181.

[29] See Juan E. Mendez, "The human right to truth: Lessons learned from Latin American experiences with truth telling", in Tristan Anne Borer (ed.), *Telling the truths: Truth telling and peace building in post-conflict societies*, (Notre Dame: University of Notre Dame Press, 2006): 115-150.

[30] See Hélène Tigroudja, "Le droit international dans les Etats d'Amérique latine: regards sur l'ordre juridique argentin", *Revue internationale de droit comparé*, 60, 1, (2008): 89-119.

[31] See Horacio Verbitsky, *The flight. Confessions of an Argentine dirty warrior*, (New York: The New Press, 1996).

Applicability of the Statute of Limitations to War Crimes and Crimes Against Humanity and, shortly after this, the 1994 Convention on Enforced Disappearances[32].

It was in this context that families of the disappeared, assisted by NGOs, began a new type of legal action: the *juicios por la verdad* ("trials for the truth"). These aimed to circumvent the blockade established by the impunity laws of 1986-87 in the name of the *derecho a la verdad* ("right to truth") which was beginning to take shape at this time through the jurisprudence of the San José court, even though it remained somewhat ill defined and was not yet part of Argentine law. Two cases laid the foundation for a legal approach that would become *sui generis*, the only one of its kind: the *Mignone* and *Lapacó* cases (1995) held in the *Cámara en lo Criminal y Correccional Federal* in Buenos Aires.[33]

After much to-ing and fro-ing, the Inter-American Commission on Human Rights drew up a voluntary agreement, signed on 15 November 1999, under the terms of which the Argentine government would recognise and guarantee the right to the truth, and within which it was specified that this right implied the deployment of all possible means in order to shed light on the fate of the disappeared. This development would allow trials for the truth to be carried out in a systematic manner in Argentina, especially in the Federal Court of La Plata, where thousand of disappearances would henceforth be the subject of regular public hearings, held every Wednesday. In parallel with this judicial (r)evolution, guaranteeing the right to truth would also, from the early 2000s onwards, become a central issue in a new series of cases, namely those which related to the forcible recovery of the identities of children stolen under the dictatorship.[34]

Situated between 'Truth Commisions' and classical criminal trials, the hybrid judicial mechanism represented by the *juicios por la verdad* offered trial judges a new avenue, no longer punitive but simply declarative: it managed to combine the advantages of a trial (criminal investigation and verdict publicly issued by the judicial authorities) with those of a Truth and Reconciliation Commission, i.e. "positive symbolism" centred on the reconstitution of the criminal acts of the past, healing divisions within society[35]. As such, it ended up being a strange cross between these two

[32] Ratified by Argentina in 1996, it is incorporated within article 75 § 22 of the Constitution in 1997 (by law 24.820 of 30 April 1997).

[33] For an overview of the cases: Martin Abregú, "La tutela judicial del derecho a la verdad en la Argentina", *Revista IIDH*, 24, (1996): 11-41.

[34] See Sévane Garibian, "Seeking the dead among the living: Embodying the disappeared of the Argentinian dictatorship through law", in Elisabeth Anstett and Jean-Marc Dreyfus (eds.), *Human remains and mass violence: methodological approaches*, (Manchester: University Press, 2014): 44-55.

[35] On this question of "positive symbolism" based on the model of the Truth and

institutions, lacking both the punitive aim of the former and the "moral cost"[36] of the latter. The objective of such trials for the truth, then, is not to judge and sentence individuals accused of grave human rights violations, but rather to find out exactly what happened to their victims by establishing and clarifying the facts (a process which includes searching for and identifying bodies) and to achieve judicial recognition of this truth outside the dialectic of the guilty/not-guilty binary.[37]

Shortly after the signing of the aforesaid agreement between the Inter-American Commission and the Argentine government, and as *juicios por la verdad* began to spring up throughout the country, it was the turn of the San José Court to enshrine the right to the truth in 2000.[38] Unlike the post-1997 standpoint of the Commission, however, the line taken by the Court only recognises this right as *derived from the right to justice* (guaranteed by articles 8 and 25 of the ACHR). In 2001, the Court confirmed that the *derecho a la verdad* was an essential prerequisite in order for victims and/or families to have effective access to justice. The intrinsic link established by the Court between the right to the truth and the right to justice was made forcefully clear with the important *Barrios Altos* ruling (2001), in which the Court stated that the amnesty laws were incompatible with the state's obligation to investigate *and* prosecute as set out in the ACHR,[39] a crucial position which has been maintained ever since.[40]

This Inter-American jurisprudence of 2001 was to a large extent responsible for the final judicial about-turn in Argentina, which would lead to the official re-opening of criminal proceedings against the perpetrators of the crimes of the military dictatorship. The new 'Kirchner era' (referring to Nestor Kirchner, President of the Republic between 2003 and 2007, and then to his wife and successor, Christina Fernández de Kirchner, who remains President

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Reconciliation Commission in South Africa, see Frank Haldemann, "Drawing the line: Amnesty, truth commissions and collective denial", in Rianne Letschert, Roelof Haveman, Anne-Marie L. M. de Brouwer and Antony Pemberton (eds.), *Victimological approaches to international crimes: Africa*, (Cambridge: Intersentia, 2011): 265-287.

[36] Haldemann, *Drawing the line*, 285 ff, where the author explains the 'moral cost' due to three main critical aspects of the Commission: the sacrifice of justice provided by civil liability; the trade of amnesty for testimony; and the demand for forgiveness.

[37] For a detailed study of the right to truth and the judicial mechanism of *juicios por la verdad*, see Sévane Garibian, "Ghosts also die. Resisting disappearance through the 'Right to the truth' and the *Juicios por la verdad* in Argentina", in *Journal of International Criminal Justice*, 12, 3, (2014): 515-538.

[38] See *Bámaca-Velásquez vs. Guatemala*, 25 November 2000, Series C No. 70, in particular §§ 197 & 201-202.

[39] *Barrios Altos vs. Perú*, 14 March 2001, Series C No. 75.

[40] See for example *Gomes Lund y otros (Guerrilha do Araguaia) vs. Brasil*, 24 Novembre 2010, Series C No. 219, and *Gelman vs. Uruguay*, 24 February 2011, Series C No. 221.

to this day) saw the repealing of the 1986-87 laws by parliament (2003),[41] followed by the declaration of their unconstitutionality by the Supreme Court in the significant *Simón* ruling of 2005.[42] In the latter, the judges confirmed that the laws in question contravened international norms incorporated fully within the constitution (including the ACHR and the Conventions of 1968 and 1994 cited above)[43] in that, like any amnesty measure, their objective was the 'forgetting' of grave human rights violations. The opinions of the majority of the Supreme Court judges, in accordance with the jurisprudence of the San José Court, upheld the indissoluble link between the search for the truth and the criminal sanctioning of perpetrators, both of which were at the heart of the state's obligations in these matters. Once again, the main emphasis was placed: first and foremost, on the complementary and necessary character of these two key functions of the rule of Law (to investigate and punish) as components both of judicial guarantees and of the right to justice; and, following from this, the irreconcilability of these requirements with the existence of the amnesty laws, thus re-igniting the fierce debate which had divided legal thinking when these laws were adopted in 1986-87.[44]

Several elements still remain uncertain, raising important questions in the light of the extremely wide-ranging and particularly varied legal experiment carried out in the Argentine 'laboratory'. The first of these regards the causal link between the penal repression of the abuses of the previous political regime and the success of the transition to democracy: is retribution the precondition or, conversely, the result of the process of democratisation in the aftermath of political transition? In the case of Argentina, for instance, it would seem that the systematic prosecution of the criminals of the past is at once the expression, the evidence and the manifestation of a successful transition to democracy, as it would have been unthinkable in the transitional phase proper. Everything depends on how, in each individual case, the relation between justice and peace on the one hand, and the very function of punishment on the other, are perceived.

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[41] By law 25.779 promulgated 2 September 2003.

[42] Ruling 328:2056 of 14 June 2005.

[43] For developments, see Sévane Garibian, "Le recours au droit international pour la répression de crimes du passé. Regards croisés sur les affaires Touvier (France) et Simón (Argentine)", in *Annuaire Français de Droit International*, LVI, (2010): 204 ff & 211 ff.

[44] For example, see the debate between Carlos F. Rosenkrantz and Leonardo G. Filippini in *Revista Jurídica de la Universidad de Palermo*, 8, 1, (2007), accessible online at http://www.palermo.edu/derecho/revista_juridica/pub_a8n1.html; and Rodolfo Luis Vigo (coord.), *Delitos de lesa humanidad. Reflexiones acerca de la jurisprudencia de la Corte Suprema de Justicia de la Nación*, (Buenos Aires: Ediar, 2009).

Secondly, and following on from this last question, is that of whether the demands of the 'fight against impunity', which went hand-in-hand with the human rights turn of the 1990s, necessarily require the custodial sentencing of the perpetrators. In other words, how exactly should the word 'impunity' be understood? In its strict, etymological sense of the absence of *punishment*, or in the wider sense of the absence of *ackowledgment*? For, if understood in the broadest terms, the fight against impunity could mean the putting in place of mechanisms 'sanctioning' the very existence of crimes, their implementation and their effects, through a juridical framework which might take multiple and varied forms; this is, fundamentally, the principle of transitional justice, which is not necessarily international, penal, or even judicial. From this point of view, a 'hybrid' practice such as the trials for the truth in Argentina is a perfect illustration of how a trial judge may perform a non-punitive function, instead constituting a third party endowed with a special authority and the ability to offer what we might call a *performative recognition*.

Lastly, then, we come to the concomitant issue of the intrinsic link established by the Inter-American Court between the right to the truth and the right to justice. The former have been recently increasingly formalised in international and UN instruments such as: the updated version of the Joinet Report (2005); the new Convention on Enforced Disappearances (2006); various resolutions of the UN Commission on Human Rights and Human Rights Council, along with reports by the office of the UN High Commissioner for Human Rights (2005 onwards); and even the designation by the UN General Assembly of 24 March as the "International Day for the Right to the Truth" (2010)[45]… All of these instruments treat the *derecho a la verdad* in a broader sense, as a fully autonomous right, dual in nature (both individual and collective), absolute and inalienable, the protection of which may be guaranteed through a wide variety of mechanisms and the implementation of which may be carried out by whatever means individual states may choose.

While the turning of 'human wrongs into human rights' may give rise to such new subjective human rights as the right to the truth, these may, paradoxically, contribute to new developments in criminal law in this area, thus leading to an "overturning of human rights"[46] in which the latter are transformed from shield into sword. In other words, the 'human rights turn' has effected a 'criminalisation' of human rights: originally a means of limiting repression, human rights have come to legitimise it through their widespread use as a tool in the fight against impunity for the perpetrators of mass crimes.

[45] 24 March is also the official day of commemoration for victims of the dictatorship in Argentina (24 March 1976 being the day of the military coup d'Etat).

[46] Robert Roth, "Synthèse des débats et perspectives", in Marc Henzelin and Robert Roth (eds.), *Le droit pénal à l'épreuve de l'internationalisation*, (Paris: Librairie générale de droit et de jurisprudence, Brussels: Bruylant, Geneva: Georg, 2002): 354.

The criticisms voiced from certain quarters with respect to these developments[47] are a reminder not only of the careful thought we must give to the complex relationship between justice, peace, truth and memory in (post-)transitional contexts; but also of the need to consider alternative ways of dealing with state crimes given the limits, the aporias even, of classical national or international criminal justice facing mass crimes of exceptional scale and extent. For justice, after all, has more than one function up its sleeve, and should by no means be seen exclusively in terms of its retributive uses. One thing, however, does seem clear, namely that transitional justice in all its forms (international/state, punitive/restorative, judicial/extra-judicial) inevitably involves a degree of creative transformation of the law – a *displacement*. [48]

~ *University of Geneva & University of Neuchâtel* ~

[47] For an example from within Argentina, see Daniel R. Pastor, "La deriva neopunitivista de organismos y activistas como causa del desprestigio actual de los derechos humanos", *Nueva Doctrina Penal*, (2005): 73-114.

[48] This article is a shortened version of "Vérité *vs.* impunité. La justice (post-) transitionnelle en Argentine et le *human rights turn*", in Kora Andrieu, Geoffroy Lauvau, (eds.), *Quelle justice pour les peuples en transition? Pacifier, démocratiser, réconcilier,* (Paris: Presses Universitaires de la Sorbonne, 2014): 91-109.

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'El silencio de los que no hablarán'

Astrid Pikielny, entrevista con Philippe-Joseph Salazar

(Astrid Pikielny) – ¿Cuál fue el impacto y la escala del proceso llevado adelante por la Comisión de la Verdad y la Reconciliación en Sudáfrica?

(Philippe-Joseph Salazar) – La Comisión no nació de golpe, pero recuerdo un acontecimiento que me hizo comprender en lo que se convertiría. Su inventor fue el arzobispo Desmond Tutu. Un día fui a escucharlo a la catedral anglicana de San Jorge y dio un sermón sobre la "transfiguración". Y en ese sermón le dio, con sutileza, un aspecto político a la cuestión: la idea de que la transfiguración se aplica también a la ciudadanía. Cuando salí de la catedral, supe que algo importante estaba ocurriendo y que era la adaptación de un vocabulario teológico a una solución política. En Sudáfrica todas las religiones – la católica, la protestante, la judía – son consideradas, a diferencia de otros países, como un aporte positivo a la reflexión política. Lo extraordinario es que Tutu tenía una suerte de magistratura moral transversal sobre todos, y lo que hizo fue inventar un glosario político tomado de la teología de San Pablo, que incluye la idea de transformación, la idea de tomar la buena oportunidad, de leer los signos. Y como los sudafricanos, blancos y negros, son todos muy protestantes, todos los domingos leían la Biblia y tenían caminos de pensamiento que estaban a disposición y a la mano de la política.

(AP) – ¿O sea que tanto los que estaban a favor del apartheid como en contra tenían un texto común?

(P-JS) – Exacto. El genio de Desmond Tutu fue hacer comprender, tanto a quienes estaban del lado del apartheid como a quienes estaban del lado del movimiento de liberación, que ellos tenían un lenguaje común que podía pertenecer a la política. Una palabra fundamental de ese glosario es la idea de compañerismo, de amigo y ciudadano. Uno es ciudadano porque es amigo y eso lleva a una verdadera revolución política. Con el fin del apartheid no son solamente liberados los negros, sino también los blancos, porque todos son oprimidos. La liberación que sucede en 1994 es una liberación general: los blancos, de una ideología opresiva, y los negros, de una ideología que ellos no aceptaban, pero que los oprimía. Ésa es la base de la reconciliación.

(AP) – ¿Ambos crímenes están en el mismo plano?

(P-JS) – Sí. Los crímenes de sangre cometidos por los movimientos de liberación están en el mismo plano que aquellos cometidos por los agentes del

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Astrid Pikielny & Philippe-Joseph Salazar, "'El silencio de los que no hablarán'", pp. 75 - 80.

apartheid, porque la idea es que la ideología es opresiva para todos. Entonces, con la reconciliación de 1994, es una nueva ciudadanía y una nueva nación la que aparecen. Es un modelo único: aceptar que el opresor es una víctima. Es la única solución para construir una nueva nación.

(AP) – Hay una elección retórica fundacional, que fue usar la palabra "perpetrador" en lugar de "represor" o "criminal". ¿Por qué se eligió ese camino?

(P-JS) – No podía utilizarse el término criminal porque la reconciliación no está fundada sobre un proceso judicial. Desde el comienzo se dijo que no iba a haber Juicio de Nuremberg y eso fue un escándalo porque Sudáfrica era el primer Estado y régimen que podría haber sido juzgado por crímenes racistas después de la Alemania nazi, y eso no pasó. Fue una decisión de soberanía.

(AP) – ¿Por qué se decidió no hacer juicios?

(P-JS) – ¿Qué es un proceso? Evidencia contra evidencia, balance de argumentos y contraargumentos, y al final hay un juicio. Pero no estamos seguros de que ese juicio sea la verdad, porque el acusado sólo dirá aquello que le puede servir. Y todos dijeron: "No, lo que queremos es comprender cómo los seres humanos pudieron matar otros seres humanos". La Comisión buscó reconstruir eso que pasó en el espíritu de las personas, y el único medio era darles la libertad de palabra, que no es la palabra judicial, que no es libre sino controlada. El objetivo es poder reconstruir cómo pudo vivir ese país durante cuarenta años. El resultado fue extraordinario, porque hubo personas que habían cometido crímenes y destruido todas las pruebas y que, sin embargo, se presentaron ante las familias de las víctimas porque querían quitarse eso de la conciencia. En un sistema judicial el criminal jamás hubiera venido y las familias de las víctimas no hubieran podido comprender por qué ocurrió lo que ocurrió.

(AP) – ¿Y si el victimario no mostraba arrepentimiento ni necesidad de perdón?

(P-JS) – En la ley de amnistía no es necesario que el criminal se arrepienta y solicite perdón. Tiene que contarlo todo. Se testea si contó todo y si el crimen ocurrió en el marco de una acción organizada. Eso le dio una dinámica social enorme durante dos años, porque la Comisión fue de escuela en escuela, de iglesia en iglesia, como una caravana de justicia en condiciones que no eran formales, sino humanas. Hoy llama la atención para cualquiera que vaya a Sudáfrica lo feliz que es la gente allá. Es la felicidad de vivir juntos. No quieren más hablar del pasado. Es lo que dijo Mandela sobre la frase de San Mateo: "Hay que dejar a los muertos enterrar a sus muertos", porque si

no enterramos a los muertos, los hijos de los vivos algún día van a tomar venganza. Eso es un círculo infernal. Lo que se ha creado es un "escenario de palabra" y de reparación moral. Y hoy en Sudáfrica todos se sienten iguales.

(AP) – Es difícil no pensar que el proceso sudafricano ha sido excepcional, singularísimo y, hasta en algún punto, milagroso, muy distinto a otros países que salieron de regímenes autoritarios.

(P-JS) – Eso plantea un tema fundamental y es si existen universales en política. La lección de Sudáfrica es preguntarse si hay universales y si son traducibles a otras experiencias. De hecho, se intentó hacer algo parecido en Ruanda y Kosovo, y no funcionó. Cada caso tiene su singularidad. En Sudáfrica el proceso de la reconciliación estuvo al mismo nivel jurídico que el proceso de Constitución. Hubo simultáneamente una fundación ética y una fundación de la nación y del Estado. Un proceso sin el otro me parece problemático. Y el otro tema esencial es que Sudáfrica nunca tuvo un golpe de Estado militar. Los militares siempre estuvieron al servicio del Parlamento. Sudáfrica era una dictadura parlamentaria con elecciones.

(AP) – Aún así, con historias y experiencias tan distintas, ¿cree que haya prendizajes que la Argentina pueda tomar?

(P-JS) – En marzo pasado estuve en Mendoza presenciando los juicios a policías que actuaron durante la dictadura. Asistí como periodista francés a esa escena extraordinaria en la que se leía el fallo y se veían en las pantallas las caras de algunos de los acusados que estaban en otras prisiones del país. Afuera había grupos portando carteles. Cuando se empezó a leer el fallo y alguien vio que yo tomaba notas, me dio una foto con la cara de un hombre joven que había desaparecido. Y entendí muy rápido que yo debía levantarla en el momento de la sentencia. Me sentí muy mal cuando escuché los gritos de euforia y de alegría después de la sentencia. Querían más. Veía la foto de ese hombre joven y bello y veía a los viejos que acababan de condenar, y que cuando ellos cometieron el crimen tenían la misma edad que el joven. Pregunta sudafricana: ¿cómo es que un hombre joven que era un oficial de policía pudo secuestrar a este joven cuya foto yo tengo ahora? Eso es lo que quiero comprender y lo que no se conoce. La gente pedía más sangre y ahí me dije: esto nunca va a terminar. La sangre llama a la sangre y los hijos de los que son condenados algún día van a pedir venganza. No vi ni un gesto de amistad, ni de compasión.

(AP) – Los familiares de las víctimas no usarían la palabra venganza sino justicia: se ha cometido un delito, y por eso tiene que haber un proceso y una condena.

(P-JS) – Pero toda la antropología demuestra que esa justicia es una forma codificada de la venganza. Participé de un coloquio en Francia con los integrantes de la Corte de Casación, máxima autoridad en estos temas, y ellos mismos han dicho que la justicia criminal es una forma de la venganza, y que Sudáfrica permitió comprender, en política, que hay otras formas de justicia. Ellos decían "no podemos aplicar la justicia penal a las relaciones políticas, porque las relaciones políticas son de una naturaleza diferente". Eso es lo que Sudáfrica ha comprendido: que esos crímenes fueron cometidos en situaciones políticas. El tratamiento del crimen, del odio y la venganza deben ser tomados política y no penalmente.

(AP) – En la Argentina esto que usted dice le agradaría mucho a los militares y a sus familias, pero no a los militantes.

(P-JS) – Sí. ¿Por qué razón? Porque el marco sigue siendo un marco penal. Si hacemos comprender a las familias de unos y otros que el fin es crear una reconciliación nacional, entonces puede sonar de un modo distinto. Eso debe venir de la política, pero no sucede porque el interés de los gobernantes es dividir para reinar. Es un escenario que crea infelicidad, y ése no fue el caso en Sudáfrica.

(AP) – A diferencia del proceso sudafricano – en donde se reconstruyeron los hechos-, en la Argentina los militares no hablaron y se da la paradoja de que "hacer justicia" impide avanzar hacia la verdad y tener información sobre el destino final de las víctimas y la identidad de los hijos apropiados.

(P-JS) – Y no conocerán nunca la verdad. Una de las cosas que me parece más escandalosa es que, como consecuencia del marco penal, es imposible oír a los militares que cometieron crímenes, porque si hablan se autoinculpan. Eso quiere decir que hay una mitad de la historia argentina que desapareció en el silencio de aquellos que no van a hablar. Eso no sucedió en Sudáfrica: era necesario saber, y para saber era necesario dejar hablar.

(AP) – ¿Entonces cree que en este contexto acá no habría lugar para palabras de verdadero perdón, reconciliación y verdad?

(P-JS) – La audacia política es crear las condiciones para que la gente comience a pensar de ese modo. Si no hay liderazgo político, eso no va a ocurrir. En Sudáfrica se dio el extraño caso de tres líderes políticos: Frederik de Klerk, Desmond Tutu y Nelson Mandela, que desde puntos de vista diferentes convergieron en una idea, un proceso único y un lenguaje común.

(AP) – ¿Cuán importante es el factor tiempo en un proceso de recuperación y reconciliación?

(P-JS) – En Sudáfrica todos se pusieron de acuerdo en que el trabajo de la memoria es antipolítico porque impide avanzar. Allí se produjeron dos procesos simultáneamente: el constitucional (1994-1996) y el de la reconciliación (1995-1998). El de la Constitución tomó dos años y era necesario que el proceso de reconciliación también fuera corto. La idea de Tutu fue hacerlo rápido, cuando todo estaba fresco, y poder avanzar. Lo que encuentro fascinante es que en Sudáfrica hay muy poco trabajo de la memoria. El pasado fue enterrado y avanzamos. Y hay un museo al que no va nadie, salvo los turistas. Los países que no fueron capaces de resolver el conflicto mental, psicológico y político, han creado una industria de la memoria que es antipolítica porque impide avanzar. Los museos producen pruebas y evidencias, pero ocultan muchas otras: tenemos un muro, ponemos nombres y hay muchos nombres que faltan, al igual que los procesos jurídicos en los que se oculta lo que no sirve y se muestra lo que sirve.

(AP) – Y para usted eso no tendría nada que ver con la reparación de una comunidad.

(P-JS) – No, los lugares de la memoria son lugares cerrados, que se cierran sobre sí mismos, y la reconciliación implica abrir. Los lugares de la memoria son lugares para "maquillar" la cuestión. Es el azúcar sobre una torta que está mal hecha.

(AP) – Usted visitó la ESMA hace algunos años. ¿Qué destino cree que debería tener ese lugar?

(P-JS) – Efectivamente, visité la ESMA antes de que fuera un museo, cuando estaba todo destruido. Había que dejar todo así y dejar a la gente reflexionar. No sirve de nada canalizar el discurso. Es como visitar ruinas antiguas: no se necesitan guías. Todo lugar de la memoria es el resultado de una toma de partido. Desde un punto de vista retórico, un lugar de la memoria fabrica un argumento, con un punto de partida y un punto de llegada. Creo que la ESMA debería ser una escuela militar al servicio de una nueva nación y formar a las nuevas generaciones creando conciencia de que ese lugar sirvió a un régimen crápula, y que los militares ahora están a las órdenes de la política.

(AP) – Todo lo que dice hace suponer que a Sudáfrica y a la Argentina las separa un abismo.

[Suspira] Creo que hay una Sudáfrica mirando al futuro y una Argentina encadenada al pasado., lo que es terrible para los jóvenes. Aquí los jóvenes están hundidos y aprisionados en el pasado.

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The interviewer in the above article is Astrid Pikielny, a well-known and influential Argentine columnist, political scientist and an investigative journalist at La Nacion, specialised in human rights; the interviewee is the writer Philippe-Joseph Salazar.

◈

Forms of justice after evil: Argentina, Uruguay, South Africa

Lucas G. Martín[1]

What relationship to justice is established when an attempt is made to respond to the legacy of a criminal regime in the context of a new democratic beginning? To respond to this question, we must confront both the question of the foundation of a new democracy as well as the need for justice that accompanies this new beginning. On the following pages, I will offer interpretations of the different yet exemplary *forms* of responding to this question in Argentina, Uruguay and South Africa at the end of the last century. To do so, I will compare and contrast these three experiences in an attempt to shed light on an issue that is difficult to approach and entails certain debts.

Our approach is based on two premises and one hypothesis. The first premise is also a fact: after criminal regimes, *justice* must have a place. According to our second premise, this justice requires establishing a *relationship* with the perpetrators, that is, justice entails a common law and the recognition of a bond of humanity even with the criminals. This idea is inspired in a well-known speech by Saint-Just during the debate on the trial of Louis XVI. The National Convention was trying to decide whether to try Louis Capet as a citizen or not bring him to trial as Louis XVI, that is, the king, and thus inviolable according to the French Constitution of 1791. Saint-Just opposed letting him off based on the following argument: "To judge means to apply the law. A law is a legal relationship: what legal relationship is there between humanity and a king?"[2] The young Jacobin thus set forth the tyrannicide argument, denying any connection between Louis XVI and the French people, between the tyrant and humanity. Given our first premise (and thus rejecting tyrannicide), what interests me about Saint-Just's discourse is: the understanding of justice as a *relationship*, a *human* bond.

Using this as our basis, we believe it is possible to acknowledge that different *forms* of this necessary relationship of justice can be established in post-traumatic times, forms that depend on the different place given to the *other legitimate ends* that are sought out simultaneously with justice. By

[1] This text is a slightly modified version of my article "Regímenes criminales, refundaciones democráticas y formas de justicia (Argentina, Sudáfrica, Uruguay)," published in Claudia Hilb, Philippe-Joseph Salazar and Lucas Martín (eds.), *Lesa humanidad. Reflexiones después del Mal,* (Buenos Aires: Katz, 2014).

[2] November 13, 1792. Reproduced in Michael Walzer, *Régicide et révolution. Le procès de Louis XVI. Discours et controverses*, (Paris: Éditions Payot, 1989): 202-211.

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Lucas G. Martín, "Forms of justice after evil: Argentina, Uruguay, South Africa", pp. 81 - 90.

legitimate ends, I am referring to the goals that are in some degree connected to justice and to democracy as a polity that enables justice: returning the dignity of the victims, establishing the truth, strengthening democracy or democratic peace, not repeating the past (the concept of "*Nunca Más*"), promoting a culture of human rights and elaborating a collective memory of a traumatic past.

These are the characteristics of the issue we will address in this article. In the comparison of the three experiences of justice during the founding of new democracies, we will follow an analytical order, which we consider more fitting than a chronological one.

Argentina

The form of justice – the type of human bond – that was established in Argentina with the perpetrators of aberrant crimes was *retributive*, criminal justice. The criminals were brought to court to answer for their actions based on a common law. Without that acknowledgement of a *common* bond, without the inclusion of the *communi*ty, it would not have been possible to apply the law, try the perpetrators, or establish a relationship of justice. The *Trial of the Juntas* was not a scene of revenge but a relationship of justice and humanity in which the perpetrators were recognised as autonomous and equal individuals. As autonomous individuals, they were responsible for their actions; and as equal individuals, they could be tried according to a common law. Because autonomy exists, an act becomes an action; but there is crime and a relationship of (retributive) justice because there is a common (criminal) law.[3]

Now, if their autonomy was necessarily *assumed*, it was also *staged* in different ways: for example, with the consent of the dictators to appear in court. The term consent does not suggest that the dictators willingly presented themselves but that, aware of the fact that they would be arrested and tried by civil courts, they did not flee or take up arms. On the contrary, they appeared in court, standing tall and giving evidence of their sound mind; they hired their own lawyers and even in some cases exercised their right to speak in their own defense. During the same scene of the trial, they argued that the trial was illegitimate. That is, they defended themselves on the proposed stage. This same autonomy was *also* expressed both before and after the trial through the former dictators' voluntary refusal to acknowledge the judicial process, though this time off the judicial stage. This denial as *another* indicator of autonomy was manifested in the underground or anonymous threats that were made against a democratic government[4] and in

[3] Cf. Carlos S. Nino, *Juicio al mal absoluto*, (Buenos Aires: Emecé editores, 1997).
[4] In this context, however, no direct threats were made against any of the court judges.

the former dictators' decision to maintain total silence *ipso jure* with respect to the crimes they had masterminded. For better or for worse, autonomy was *also* present there. It was autonomy that was ultimately assumed by the crime they had committed, staged in their appearance in court, silent before society and threatening behind the scene.

In the same way as their autonomy, their equality was assumed and also staged. It was assumed in virtue of the rule of law, which should apply to any crime, even crimes committed under a previous regime. Above all else, this equality was staged during the *Trial of the Juntas*, which supplied an image of the nine dictators following the orders of the court, an image that continues to accompany commemorations of the return to democracy as the most eloquent staging of equality before the law.[5]

Autonomy and equality were the basis for this relationship of justice, the basis of a new human bond. As has been said on countless occasions, the dictators received exactly what they had denied their victims: a trial with due process.

However, we must also say that due to its political nature, to the fact that it was shaped in the setting of a new political order, the judicial stage was more than a judicial stage and less than a judicial stage at the same time. It was more than a judicial stage because of its symbolic potential, because it presented the implementation of a new polity. In this regard, it was not only the instantiation of a lawsuit aimed at compensating the victims for damages but also the certification of a new form of cohabitation (the most radical form of cohabitation, I would say, according to which we must live with the perpetrators under the same law). At the same time, it was less than a judicial stage because justice could not appear as an impartial third party when it was bringing two political systems face to face with one another. One was a humane system, because it established relationships of justice; the other, an inhumane regime, because it was based on crime and terror; the first was represented by the judges and the second was embodied in each of the dictators.

In terms of what has been said here about the Argentine case, I want to emphasize the way retributive justice focuses on the *perpetrator*: he is accused, he is judged, he is discussed and he is guaranteed a defense during his trial. The other aspect I want to focus on is the particular balance between autonomy and heteronomy that was established in the trial. These were the coordinates that made it possible to try the criminals for their actions under the terms of justice and humanity, without reifying them, without exiling the perpetrators under the terms of war or *demonising* them.

Cf. Pepe Eliaschev, *Los hombres del juicio*, (Buenos Aires: Sudamericana, 2011).

[5] Cf. Hugo Vezzetti, *Pasado y presente. Guerra, dictadura y sociedad en la Argentina*, (Buenos Aires: Siglo XXI, 2001).

South Africa

South Africa established another human bond, another form of justice. This was reparative justice, that is, justice oriented primarily towards compensating victims for damages, towards "healing" and returning the victims' dignity. In this regard, the country proposed a unique exchange that required all of the perpetrators (those who were part of the apartheid regime as well as the armed opposition) to provide full disclosure, not just general descriptions or abstract *mea culpa*, of politically motivated crimes they had committed. In exchange for their confessions, a *Truth and Reconciliation Commission* (TRC) was created to grant amnesties for all of the political crimes confessed. This way, the perpetrator could be granted amnesty for one crime but not necessarily be granted amnesty for a second, third or fourth crime.

Although it can be argued that this form of justice adopts a clear strategic rationale – the well-known device of the carrot and the stick—what makes it particularly unique in our view are four elements that define the process of truth and reconciliation: the central role of the victim, the democratic responsibility, the ethical dimension and the openness towards the action of the perpetrators.

The first element, that is, justice oriented first and foremost towards the victims, can best be seen in how it differs from *retributive* justice. The latter focuses on the victimisers, on the guilt or innocence of the accused, and the evidence for the criminal acts is based on the testimony of the victims. In *reparative* justice, in contrast, the crimes are analyzed separately to offer a response *to each victim.*[6] In the first case, a response is given for *each victimiser accused* of crimes; in the second, a response is given for every victim who asks for truth but also from every victimiser who voluntarily presents himself as a perpetrator and as an offeror of truth towards his victims or towards their family members.[7] The South African experience thus teaches us that what appears to be the sheer notion of justice – in other words, returning dignity to the victim – may require focusing on the victim and not, at least not necessarily or not above all else, *persecuting* the victimizer. Naturally, the threat of the South African victimisers being tried persisted, to the point where it could be argued that the significance of the actions of the TRC greatly depended on whether at least some of the perpetrators who did not respond to the offer to exchange truth for liberty could be obliged to provide an account of their actions. It depended, in other words, on following through on that promise of the stick.[8]

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[6] Cf. Philippe-Joseph Salazar, "Récit, réconciliation, reconnaissance, à propos des *perpetrators* et de l'amnistie en Afrique du Sud", s.d. p. 9.

[7] Cf. Philippe-Joseph Salazar, "Un conversion politique du religieux", *Le genre humain*, 43, November (Paris: Seuil, 2004): 62-63.

[8] On this topic, see Charles Villa-Vicencio and Erik Doxtader, *The provocations of*

The second feature of the responsibility attributed to the representatives of the South African people is the creation of a bond of trust that would lay the foundations for the incipient democracy. In this regard, South Africans mistrusted retributive justice and its effects – and perhaps continue to do so even today. Unlike the significance of the *Trial of the Juntas* in Argentina, the retributive form of justice was viewed in South Africa as a kind of vendetta, revenge or reprisal, one that would revive and prolong the conflicts that people wanted to leave in the past. From this perspective, criminal retribution would obstruct the "*historic bridge*" between past and future that South Africans hoped to build, a bridge that required the consent of the victimisers, who would have refused to sit back and watch as a door opened for judicial revenge. With regards to the heavy burden that was thus being imposed on millions of victims, President Thabo Mbeki said:

> Together, we decided that in the search for a solution to our problems, nobody should be demonised or excluded. We agreed that everybody should become part of the solution, whatever they might have done and represented in the past. We agreed that we would not have any war crimes tribunals or take the road of revenge and retribution. …We said that as the majority, we had a responsibility to make our day of liberation an unforgettable moment of joy, with none condemned to remember it forever as a day of bitter tears.[9]

This aspect of the South African solution reminds us of the feeling of "crushing responsibility" that led the Athenian democrats to grant amnesty to the oligarchs after defeating them in the civil war that put an end to the tyranny of the Thirty in the year 403BC. The victors could have used their new sovereignty (*kurios*) to try the defeated. However, the democrats experienced the superiority of their victory with a "crushing responsibility",[10] and thus decided to grant an amnesty (though not to the Thirty) as a way of

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amnesty. Memory, justice and impunity, (Cape Town: David Philip Publishers/Institute for Justice and Reconciliation, 2003).

[9] See Thabo Mbeki, "Statement to the National Houses of Parliament and the Nation, at the Tabling of the Report of the Truth and Reconciliation Commission", in Philippe-Joseph Salazar and Erik Doxtader, *Truth and reconciliation in South Africa. The fundamental documents*, (Cape Town: New Africa Books, 2007): 460. See also in this volume the ruling of the Constitutional Court in response to a lawsuit for access to (retributive) justice: "Judgment in the matter of AZAPO, Biko, Mwenge, Riberio v. The President of South Africa, The Government of South Africa, The Minister of Justice, The Minister of Safety and Security, The Chairperson of the Truth and Reconciliation Commission, Constitutional Court of South Africa, 1996", p. 31.

[10] Nicole Loraux, *La cité divisée: L'Oubli dans la mémoire d'Athènes*, (Paris: Payot, 1997): 260-261.

renouncing their superiority (*kratos*). According to the classification by Aristotle, *kratos* is what situated *demokratia* within a set of polities in which one part of the city imposed itself on the other, that is, within tyrannical regimes.[11] By renouncing this *kratos* of democracy, the Athenians founded a regime that took the name of all of the constitutional regimes, the *politeia*, a system of equality in which no one's will was imposed on others, leaving a legacy in which politics was joined to the *polis.*

In the South African experience, it is possible to hear the echo of that *crushing responsibility* : in both experiences, retributive justice is perceived as a threat for both democracy and for the perpetrators, who must be incorporated to the new polity, in the new relationship of justice and humanity that was in the making. This is the notion as understood by the South African constituent assembly in 1993 when agreeing on the need for amnesty. They argued that the conflicts of the past and the legacy of hatred, fear, guilt and vengeance had to be overcome, as noted in the epilogue to the Interim Constitution, through a "need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for *ubuntu* but not for victimisation".[12]

The judicial threat had to be limited to what was agreed on with the perpetrators and framed in the spirit of reconciliation and *ubuntu* that inspired the new democratic beginning. This is the third element: the ethical dimension, the dimension of reconciliation and brotherhood, of generous humanity in relation to the *other* that the term *ubuntu* refers to[13] and that which established the basis for the South African solution. In addition, at the ethical level, revenge, demonisation and a threat of an eye-for-an-eye retribution were prohibited. In the words of D. Tutu and N. Mandela, in order for there to be a democracy that allowed freedom in South Africa, the perpetrators had to be included in this democracy, and to achieve this, these perpetrators also had to be set free.[14] This ethic of liberation assumed a particular balance between autonomy and heteronomy that expanded the

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[11] See *Politics: Book III* by Aristotle. Cf. Loraux, *La cité divisée*, 259-260; also Barbara Cassin: "Politiques de la mémoire. Des traitements de la haine", *Multitudes*, 9 (6), 2001, 177-196, (http://multitudes.samizdat.net/Politiques-de-la-memoire).

[12] Salazar and Doxtader, *Truth and reconciliation in South Africa*, 5, 29-32.

[13] This humanist philosophy is reflected in the Zulu proverb "umuntu, ngumntu ngabantu!" which could be translated as "people are people through other people". Cf. Wilhelm Verwoerd "Towards the recognition of our past injustices", in Charles Villa-Vicencio and Wilhelm Verwoerd, *Looking back, reaching forward. Reflections on the Truth and Reconciliation Commission of South Africa*, (London/Cape Town: University of Cape Town Press/Zed Books Ltd., 2000), 158; and Philippe-Joseph Salazar, *Amnistier l'apartheid. Travaux de la Commission Vérité et Réconciliation*, (Paris: Éditions du Seuil, 2004).

[14] See Jacques Derrida, "*Versöhnung*, *ubuntu*, pardon: quel genre?" in *Le Genre Humain*.

figure of the victim to include the perpetrators. "In the larger sense, we were all victims of the system of apartheid, both black and white."[15] It is a notable contrast with Argentine justice, whose retributive nature was based on incriminating the military retroactively for their crimes, on equality before the law and on the autonomy of the perpetrators; in the South African experience, equality and liberty were reestablished by acknowledging their absence in a past of injustice. The goal was for all South Africans to make the words of the preamble to the 1996 Constitution their own: "We, the people of South Africa, recognise the injustices of our past."[16] Everyone was a victim of a lack of acknowledgment by the other, of the lack of democracy, of the lack of humanity and *ubuntu*.[17] Democracy had to be restored for all the victims, that is, all South Africans.

The fourth element of the form of South African justice is derived from the first three. The South Africans proposed transforming the perpetrators into "active, full and creative members of the new order."[18] The condition placed on perpetrators was the public offering of a self-condemning truth (repentance was not a condition, though occasionally it appeared) open to public indictment. A defensive and self-offensive act, interested and disinterested at the same time. A new shared space was thus created *among* South Africans and potentially also *among* the perpetrators themselves, a space in which the perpetrators could acknowledge their crimes and testify on what they had done. They could thus move away from *that which they were*, disidentify and be born again (politically), to borrow the terms of Hannah Arendt.[19]

These four elements – the priority of the victim, democratic responsibility, the ethic of *ubuntu* and the transformation of the perpetrators – distinguish the new form of South African reparative justice and its human relationship. Here a new equality among citizens is seen, one that joins on the same stage those who had been *segregated* under *apartheid* law and violence

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[15] Salazar and Doxtader, *Truth and Reconciliation in South Africa*, 467.

[16] Verwoerd, "Towards the recognition…" and Derrida, "*Versöhnung*, *ubuntu*, pardon…".

[17] On this recognition of the experience of the dehumanisation of the humane by politics, see Ph-J. Salazar "La reconciliación como modo de vida ética de la república", in C. Hilb, Ph-J. Salazar and L. Martín (eds), *Lesa Humanidad* (Buenos Aires: Katz, 2014): 161-180. Also see Verwoerd, "Towards the recognition…", 158-159.

[18] I return to the terms of the already cited ruling "AZAPO…" of the Constitutional Court, in Doxtader and Salazar, *Truth and Reconciliation in South Africa*, 31.

[19] On the central role of the perpetrators and their conversion into founding fathers, see the articles by Ph-J. Salazar ("Une conversion politique du religieux") and by B. Cassin ("Amnistie et pardon: pour une ligne de partage entre éthique et politique") in the already cited issue of the magazine *Le genre humain*. On Arendt, see *The Human Condition,* (Chicago/London: The University of Chicago Press, 1958).

only a short time earlier. All were now allowed to speak and be heard, and thus a transaction between victims and perpetrators was staged in the exchange of truth for freedom as the promise of a new polity of citizenship.

Uruguay

The last question that remains is the relationship of justice, if such a relationship indeed existed, in Uruguay. An amnesty law in Uruguay eliminated the possibility of bring the perpetrators to trial and it took years to reach an official and public version of the truth about the crimes of the past.[20]

In 1986, when military officers refused to respond to court summons, the Uruguayan Parliament passed the so-called the Expiry Law (No. 15,848). This law granted a general amnesty for all crimes of a political nature committed by the members of the armed forces and police. There were arguments to justify this decision, which was equated with the amnesty already granted to political prisoners who had not committed murder; the need to turn the page on the painful internal war; the previous civil-military accords on the transition to democracy; and the assurance of social peace and democratic stability. Though challenged by human rights organisations and leftist parties, who called for a referendum in April 1989, the law would obtain the majority at the polls with 56% of the popular vote.[21]

What can be said of the amnesty voted by the people? What can be said of this democratic form of responding to the legacy of violence and terror? Is it an act of justice or is it pure injustice on the part of the *demos*? We can say that in Uruguay, there was no retributive form of justice, there were no trials, just as there was no truth that could generate reparative justice, although the amnesty law expressly stated that all reported crimes should be investigated.[22] Could it be said that the *demos* acted unjustly in Uruguay from all perspectives?

It is possible that Uruguayans believed that through the mere manifestation of the democratic form of power, the popular vote, an act of

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[20] President Battle did not create the Peace Commission until the year 2000. The commission's work continued until 2003.

[21] See Diego Achard, *La transición en Uruguay. Apuntes para su interpretación*, (Montevideo: Ingenio en Servicios de Comunicación y Marketing/ Instituto Wilson Ferreira Aldunate, 1992); Eugenia Allier Montaño, *Batallas por la memoria. Los usos políticos del pasado reciente en Uruguay*, (Mexico/Montevideo: UNAM/Instituto de Investigaciones Sociales/Ediciones Trilce, 2010).

[22] According to Article 4 of the law, "The Executive Branch will immediately order investigations aimed at clarifying these acts. Within twenty days of receiving court notification of the criminal report, the Executive Branch will inform the accusers of the result of these investigations and will supply them with all of the information gathered".

justice would be done. According to this view, democracy appeared as the only fair system and this act of voting and at the same time granting amnesty staged an unquestionable victory of democracy over dictatorship. From this perspective, like the Athenian democrats in 403BC, this act of justice was the expression of democratic power as the only legitimate power. Duplicating it through a second act of (retributive) justice could be taken as impressing the *kratos* of democracy upon the idea of impartial justice, that is, as a demonstration of the superiority of one part of society over another. This ultimate superposition of the power of the *demos* and of fair retribution would necessarily involve double jeopardy, expressing superiority and thus becoming a reprisal or a vendetta of the conquering democrats against the conquered tyrants. In a word: it would appear an act of *injustice*, an act that creates new damage and a new victim, in this case, the perpetrators of the past. To paraphrase Nicole Loraux, whose interpretation I am following here, it is as if the Uruguayan people, in the moment in which democracy is established as the sole polity that adopts the language of the just and the unjust, knowing or wanting to be the victor, had strived to clearly establish in its collective memory that it had not acted unjustly.[23] In exchange, the Uruguayans incurred in a permanent and unpayable debt with the victims, a debt that it has perhaps only begun to acknowledge over the past decade. This debt was incurred, however, in perhaps the only form in which such a lack (of justice, in fact) could become a debt: democratically, through an amnesty put to the people's vote.

One final hypothesis: beyond preventing what could have been considered double jeopardy and a fair popular decision to not bring the unjust to trial, it is possible that the Uruguayan *demos* may not have wanted to publically highlight a division that it already experienced as insurmountable. Especially because, due to the fact that this division had to be overcome by drawing a line between the just and the unjust, the Uruguayans may not have wanted to expose this with a show of force. The contrast with the case of Argentina may shed light on this idea: one thing is depicting the division of society in a court scene and providing compensation for the victims and sentences for the victimizers, all in following with a common law and the authority of the judges. Another thing altogether would be exposing that same division on the stage in which the *demos* manifests their will and their political sovereignty. Would it be possible to imagine a more punitive form of retributive justice, one more radical in the division it establishes by separating the just from the unjust, one less based on the promise of a human bond, than that in which the people, expressed through a majority, embodied in their leaders, take the place of the judge? From this perspective, it is possible to read the Uruguayan referendum as an expression

[23] Loraux, *La cité divisée*, 277.

of the "crushing responsibility" we spoke of earlier. Especially considering the feeling that weighed on the supporters of retributive justice before the referendum. In the words of one of these supporters, "On March 1, 1985, the world was our oyster, we were on top, and everything was in reach".[24]

The forms, the ends and the outstanding debts

On these pages, we have compared and contrasted three forms of justice in the foundation of new polities: *retributive* justice in the case of Argentina, *reparative* or *restorative* justice in the case of South Africa, and democratic justice in the case of Uruguay. To summarise, we can say that through criminal trials, Argentina focused on the victimisers, making them responsible for their actions and equal under a common law. In South Africa, the process of truth and reconciliation focused on the victims, who were offered the truth as recounted by the perpetrators who wished to become free citizens in the new democracy. Finally, in Uruguay a general amnesty was granted in a referendum that also manifested democratic legitimacy as the only rule for cohabiting on equal grounds.

At the beginning of this article, we said that justice is a human bond and an end to itself, one necessary in new post-traumatic beginnings. It takes different forms according to the way in which it has historically related to other "ultimate" *ends*: the dignity returned to the victims, the truth, democracy, the construction of a culture in which human rights are respected, peace, *Nunca Más*. The notion of one particular form of justice is thus disregarded here, and we wish to emphasise certain lessons: that justice can mean bringing to trial those who considered themselves above a common law; that it can mean concentrating on the victims instead of the victimizers; and finally, that it may require emphasising the legitimacy of democracy as the only fair polity.

At the same time, the marks left by these *other ends* on the forms of justice indicate that there may be *outstanding debts* other than those not accounted for when justice is served only partially. These debts are the ones incurred when a country opts for one particular form of justice, prioritizing certain *ends* over others. There are debts in relation to the truth, in the case where the focus was on retribution or on the *demos*; debts with regards to criminal law, where the search for truth or the popular will took priority; and debts related to the ties between justice and the *demos*, when the search for truth or the desire to punish the perpetrators took precedence.

~ University of Buenos Aires & CONICET ~

[24] Quoted by Ollier Montaño, *Batallas por la memoria*, 102.

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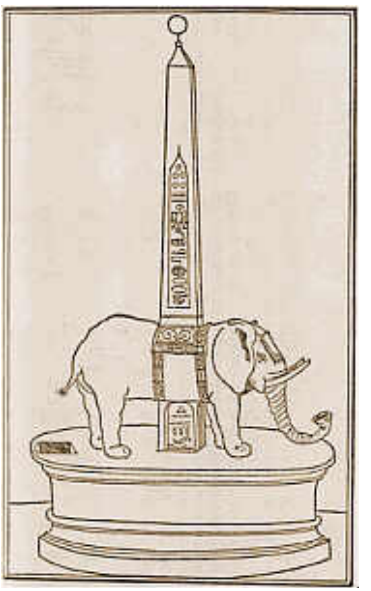

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