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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 That same year, the Argentine parliament repealed the self-amnesty law which, in an attempt to guarantee the impunity of perpetrators, had been hurriedly passed by General Bignone's government two months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 reconciliation³. 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 hours⁶, 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 Alfonsín, *Memoria política. Transición a la democracia y derechos humanos*, (Buenos Aires: Fondo de Cultura Económica, 2009): 42.

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 occur⁸. 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 Alfonsín, *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 violence¹⁶.

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

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 Alfonsín, *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

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 official 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 Disappearances³².

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 Commissions' 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 society³⁵. 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: Martín 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

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.

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 *acknowledgment*? 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 Joint 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 developments⁴⁷ 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.