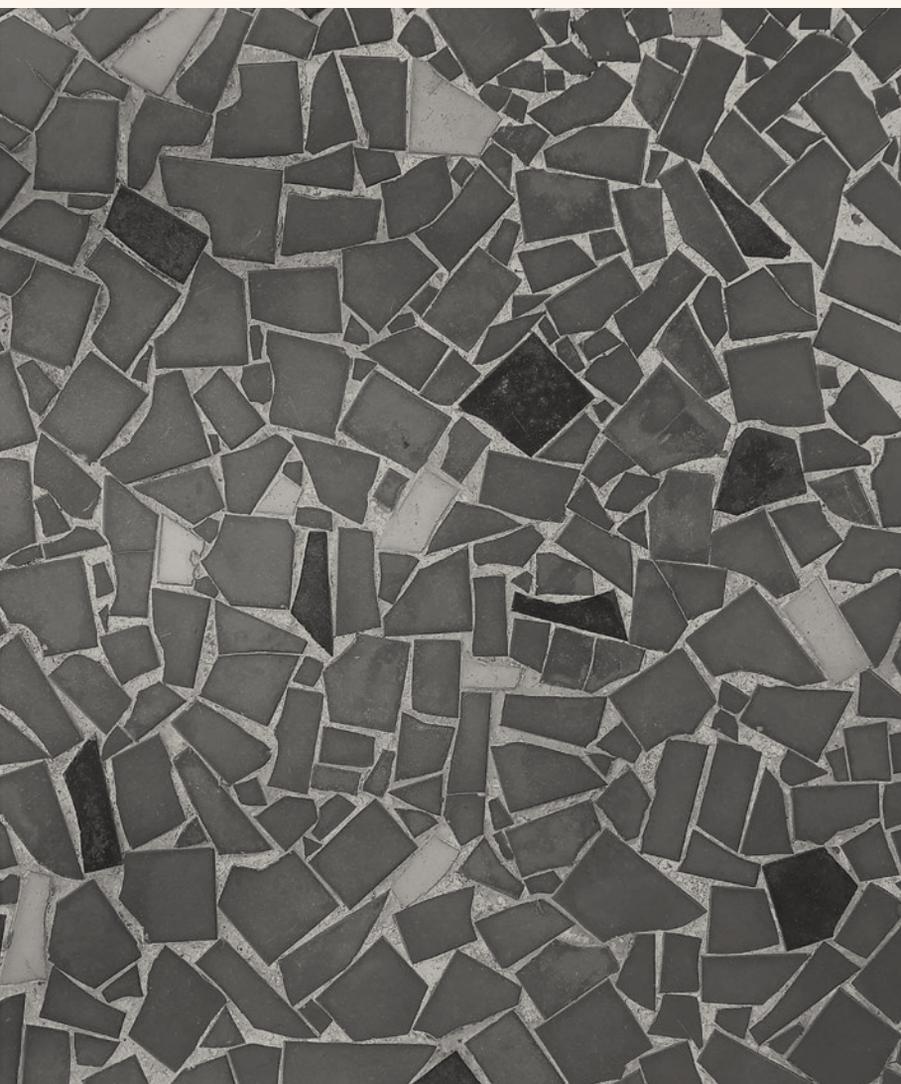


# HUMAN RIGHTS, TRANSITIONAL JUSTICE, AND THE RECONSTRUCTION OF POLITICAL ORDER IN LATIN AMERICA

*Michelle Frances Carmody*



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and the Reconstruction of Political Order  
in Latin America

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palgrave  
macmillan

Michelle Frances Carmody  
University of Melbourne  
Melbourne, Australia

ISBN 978-3-319-78392-5      ISBN 978-3-319-78393-2 (eBook)  
<https://doi.org/10.1007/978-3-319-78393-2>

Library of Congress Control Number: 2018936602

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Printed on acid-free paper

This Palgrave Macmillan imprint is published by the registered company Springer International Publishing AG part of Springer Nature  
The registered company address is: Gewerbestrasse 11, 6330 Cham, Switzerland

## ACKNOWLEDGEMENTS

No book or any project can be conducted without large amounts of assistance, some of it directly obvious and some of it more hidden. I will attempt here to recall the many who over the years have offered invaluable assistance.

This book began its life as my doctoral research project, which was conducted within the Latin American Studies program at La Trobe University, Melbourne. My doctoral supervisors Claudia Haake and Roland Burke provided possibly the most invaluable support and assistance throughout the project. Many years later, and now having supervised students and juggled a workload of my own, I appreciate their help more than ever. Barry Carr provided support in his role as supervisor at an earlier stage of the project, introducing me to the fields of testimony and memory studies, and he has proven to be a continuing support in the years that have followed.

Others at La Trobe who played an important role both in the research project directly and in my own development more generally include Alex Tyrrell, Philip Bull, Charles Mott, Patrick Wolfe, Shannon Woodcock, Ben Silverstein, Andrew Self, Ralph Newmark and the Institute for Latin American Studies research seminar participants, and the participants of the Postgraduate Research Seminars of the History Program. The staff at the Inter-Library Document Delivery Service of the Borchard Library was always helpful and facilitated my use of such a wonderful resource. Without Damir Mitric and Randall Sheppard I would not have enjoyed

the time as a doctoral candidate so much, nor would I have got as much out of it.

Thanks to Ron Adams and the participants in the 2010 Performing the Word writing retreat at Tolmie Lodge, as well as to the La Trobe History Program for the chance to participate in this event.

At a practical level, this research would not have been possible without the assistance of an Australian Government Postgraduate Award, as well as a Faculty of Humanities Travel Grant from La Trobe University.

The work in this book has been presented at numerous conferences, including the Association of Iberian and Latin American Studies of Australasia's annual conference held at the Australian National University in 2010, the International Society for Cultural History annual conference held at the University of Queensland in 2009, the States of Statelessness postgraduate intensive held at the University of Sydney in 2010, the workshop *Confronting Power after the Vietnam War* held at the University of Sheffield in 2012, and the International Studies Associations' Human Rights Section conference held at Kadir Has University, Istanbul, in 2014, and again in New York in 2016. I thank all fellow participants and others who offered comments or in other ways stimulated my thinking on this and other topics.

In Melbourne, a great number of people contributed not only to this book but to life as I worked on it. They are too many to mention but I must make special note of John Marnell, who has always been there for me. Mark Pendleton stands out as an exceptionally generous friend and fellow academic. Colleagues at the University of Melbourne's Interdisciplinary Foundation Program, especially Jordana Silverstein, Carolyn Stevens and Rhada O'Meara, and everyone who helped me celebrate the submission of this research in its thesis form at Long Play in Fitzroy, particularly Kristy Lee Tyrrell for helping me get there and Jenna Nation and Leanne Spence for helping me home.

In Argentina the Universidad Torcuato Di Tella received me in 2006 and offered me the use of its many resources, for which I am very grateful. Horacio Gustavino offered a similarly warm welcome in my early days. In 2009 I spent the (southern hemisphere) spring semester as a Visiting Researcher at the Instituto de Derechos Humanos at the Universidad Nacional de La Plata. I benefitted from the conversations and institutional support offered by the Institute and associated individuals such as Professor Fabian Salvioli. The staff of the archives and

documentation centers I visited, especially Ana María at the biblioteca Asociación Madres de Plaza de Mayo, Luz at the Comisión Provincial por la Memoria, and the staff at the following institutions: Archives of the Madres de Plaza de Mayo—Línea Fundadora, Centro de Estudios Legales y Sociales, Servicio Paz y Justicia, CEDES, Archivos Orales del Instituto Gino Germani, University of Buenos Aires, Archivos Orales de Memoria Abierta, Biblioteca del Congreso, Biblioteca Nacional, Archivo Nacional de Memoria, and the Archivo Intermedio del Archivo General de la Nación. In Uruguay, thanks to Rita at CLAEH, and Laura and Mauro at SERPAJ Uruguay. At a more personal level, people like Andrew Dwyer, Leonardo Puw, Paulo Jimenez, Dany Clarke, Jorge Puw, Carla Stazzone and Adrian Vazquez.

The writing of this book and its revision occurred during my time at Leiden University in the Netherlands, where I was fortunate enough to come across a great many exceptional people dedicated to constructing a good program and to creating a collegial and intellectually stimulating environment. Finding time to work on this book around all the other obligations that a new job (and new country) and building a new program entails was exceptionally difficult, but getting to know these people made it worth it. Patricio Silva proved to be an exceptionally generous colleague and friend who demonstrates what it means to be an honest and committed professor. If it were not for Patricio's good example I may have left this industry in despair long ago.

My colleagues in International Studies: Matt Frear, Jeff Fynn-Paul, Stefano Bellucci, Giles Scott-Smith and Simanique Moody. From further afield than BAIS: Alanna O'Malley, Lindsay Black, Crystal Ennis, Honorata Mazapus, Johannes Magliano, Jaap Kamphuis, Marat Markert and the members of the LIAS History Group, including Limin Teh and Kiri Paramore. Meike de Goede made coming to work every day a pleasure (for the brief period we shared an office) and is inspiring in her dedication to her research and her students. In Holland more generally thanks must go to two main people, Marie Claire Dangerfield and my partner, Jan Adriaans. Thanks also to the anonymous reviewers for their perceptive and helpful comments, and to Megan Laddusaw and Christine Pardue at Palgrave.

Sections of Chapter 3 were originally published in the *Journal of Historical Sociology*. I thank Leiden University for funding the open access fees that allow me to republish this work here.

Three very important people that I haven't mentioned yet have accompanied this book project for the beginning but are no longer here to see its completion. My dearest friend Nick Salzberg, with whom I spent many lovely times in Montevideo and Buenos Aires trying to pretend we were locals. And my parents, Agnes Carmody and Frank Carmody. Although it cannot do it justice, I dedicate this book to their memory.

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## CHAPTER 1

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# Transitional Justice and the Construction of Democracy in an Age of Human Rights: An Introduction

‘Assassin!’ screamed the elderly lady on the street in downtown Buenos Aires. ‘*Hijo de puta!*’ It was impossible to ignore, and a crowd of people gathered around, including the security guards for the government office building outside of where she stood. As people joined the crowd it became immediately obvious what was going on. A 65-year-old man had just gotten out of his car, a green Ford Falcon, on his way to renew his driver’s license. It was Emilio Massera, a former high ranking officer of the Argentine Navy. The security personnel refused to let him pass into the building, and the screams of abuse from the people gathered on the street, especially from the elderly woman, forced him back into his car and back to the safety of his home.

It was January 4, 1991. Five years earlier, Massera had been sentenced to life imprisonment for being one of the architects of the *Proceso de Reorganización Nacional* (National Reorganization Process), the repressive military government that had ruled Argentina between 1976 and 1983. Five days earlier, he had been pardoned by the current government and freed from prison. But, he was finding, he was not exactly free to move about the city. People recognized him, and they hated him. They wanted him locked up. A few days later, his colleague and ex-president during the *Proceso*, Jorge Videla, also attempted to renew his driver’s license. The same scene repeated and continued to be repeated across the city as

individuals connected to the military government attempted to conduct mundane tasks.<sup>1</sup>

This feeling that the repressive actions and actors of the past had no place in present Argentine society became a central principle following the transition to democracy. *Never again!* This was the central objective both in Argentina and in other places that had emerged from authoritarian rule to enact what became known as a transitional justice policy. *Never again* encapsulated the intent behind these policies, which were enacted by over thirty countries across Latin America, Africa, Asia, and Europe from the 1980s onwards in order to shape the post-authoritarian political order. These policies sought to establish and entrench a democratic political culture and structure, ridding society and the state of the presence and influence of the kinds of illiberal tendencies epitomized by Massera and Videla. Democratic state actors consulted with social movements, assembled teams of experts, changed laws, and created bureaucratic structures to ensure that *never again* would the past repeat itself. In creating this policy, state actors drew on practices developed by human rights activists, both domestic and international, instrumentalizing them to create a new political order, a revolution in political culture. As they did, they reinterpreted and redefined these practices to fit with their own objective of democratic state formation. The concept of democratic transition has been used to classify these political changes, highlighting the way that state makers negotiated the opportunities and constraints of their particular context to implement a democratic political structure. But this concept fails to capture some of the most important aspects of this process of change. It overlooks the deep transformations in political culture that these state makers sought to achieve and fails to account for the ongoing and open-ended nature of this process. In this book, I highlight these aspects through an examination of the creation and implementation of transitional justice in South America during the decades following the return to civilian rule.

The development and implementation of transitional justice occurred in the context of the winding down of the Cold War and the rise of human rights as an organizing principle globally. The Cold War in Latin America had seen a prolonged period of struggle to define the

<sup>1</sup>Sergio Ciancaglini and Martín Granovsky, *Nada más que la verdad: El Juicio a las Juntas* (Buenos Aires: Planeta, 1995), 321.

relationship of the individual to society.<sup>2</sup> The authoritarian regimes in Argentina, Brazil, Chile, and Uruguay were a part of this struggle and represented the apex of efforts to assert a particular vision of social organization that linked personal liberty and free markets with modernity and to eliminate, physically as well as ideologically, opposing visions that emphasized social equality and political participation.<sup>3</sup> As a response to this cycle of violence, state makers who engaged in transitional justice proposed the harmonization of social relations by eliminating political conflict and confrontation from political culture. Rather than looking at the causes of past conflicts, they started by addressing their physical manifestations, the violent methods of social change employed by previous authoritarian regimes. Addressing these methods and articulating them as human rights violations also served as a vehicle for the telling of their own vision of social organization, where individual social and political rights were upheld through the rule of law and the democratic state effectively managed social and political conflict. The discourse and practice of human rights, which had begun to be used politically during the authoritarian period, provided a framework for this vision.

State makers in the 1980s and 1990s drew on human rights as a result of developments in the 1970s. As authoritarian regimes had physically eliminated progressive social-democratic actors, new responses to their rule emerged. These new actors had drawn on the concept of human rights, a useful and eminently portable political framework that allowed them to oppose authoritarian tactics while also proposing a vision of the relationship between the individual and society that differed from that of the regimes' traditional targets. Working both at the transnational level, particularly in the United States, and at the local level, these actors sought to rearticulate the meaning of political violence as human rights violations, delegitimizing it as a practice. They used information about these violations to place both moral and political pressure on offending states to stop, or at least stem, the violence.

When the transitions to democracy occurred in the region, starting with Argentina in 1983, aspiring state makers were faced with the task of rebuilding a legitimate relationship between the state and its citizens. The human rights practices that had been developed to oppose the

<sup>2</sup>Greg Grandin, *The Last Colonial Massacre: Latin America in the Cold War* (Chicago: University of Chicago Press, 2004), 191–198.

<sup>3</sup>Ibid., 197.

dictatorship's violent methods provided an appealing model for what, at a bare minimum, this relationship should look like. The approach of these state makers to resolving the conflicts of the past was to first focus on eliminating the physical clashes; then, once the democratic state was established, it could serve as a central mediator in social and political conflicts at the level of ideas. It was therefore imperative that the authority of the state be asserted symbolically, rather than coercively. This meant accumulating authority by working alongside social actors as well as by enacting bureaucratic and administrative reforms that limited the political autonomy of other institutional actors. The human rights actors that had engaged in symbolic practices to limit the power of the military dictatorships served as an invaluable political resource for this task. Information practices, as well as other human rights strategies and demands—such as the demand for justice—appealed to state makers interested in achieving transition to and consolidation of democracy as they could be used as tools in the establishment of a new political culture and political structure.

Over time, while the actual transition to democracy became a thing of the past, transitional justice remained as a central state policy. Transitional justice continued to be renewed and readjusted as the state responded to new grievances from local human rights activists, transnational human rights actors, and domestic institutional actors. The first challenge came as social and institutional actors responded to early transitional justice policy itself. While the policy of information gathering, which had resulted in the establishment of official truth commissions in places like Argentina and Chile, attracted some criticism, it was justice policies that attracted the most controversy. Argentina had been the first country in the region to democratize and, innovating in terms of transitional justice, in 1986 had implemented a trial of the heads of the military juntas who had ruled between 1976 and 1983. This trial enthused human rights groups and judicial actors, who went on to initiate proceedings against other responsible individuals who held lower ranks within the military. These indicted individuals responded by threatening violence, creating a situation in which the state no longer had control over the effects of its transitional justice policy. The response was a reconfiguration of transitional justice around the concept of reconciliation, which in practice meant limiting the possibilities for retributive forms of justice as a way of bringing the conflict under control. During the second half of the 1980s those thinking about democratization and transition turned their attention to developing

ways to avoid conflict and confrontation with the military, leading to a reconfiguration of transitional justice policies away from confrontation and towards appeasement. Reconciliation was how this reconfigured policy of amnesty in the place of trials was framed. In neighboring Uruguay, where state makers felt less desire to embark upon a deep transformation of political culture, these ideas led to a transitional justice policy that abolished the possibility of retributive justice before it could even commence. Across the Andes in Chile, state makers saw their desire to use limited trials to symbolize the beginning of a new political era become subordinated to their desire to eliminate potential sources of conflict. In all three places, transitional justice—understood as reconciliation—provided a way for state makers to address present conflicts over the past.

Reconciliation, however, did not bring about the end of the transitional justice story. Instead of eliminating social conflicts over the past it actually gave rise to new ones, and different social actors developed new practices and alliances to express their opposition to the reconciliation narrative. Internationally, ideas about amnesty, the cornerstone of reconciliation policies, had shifted from considering it a helpful tool for democratization to seeing it as damaging. New practices around transitional justice also challenged the state's ability to restrict prosecutions for past human rights violations. And notions of memory and identity gave rise to memorialization practices that challenged the state's attempt to turn the page on the past. Throughout Argentina and across the region, the 1990s saw transitional justice policies face numerous challenges by anti-impunity and memory practices.

Moving into the twenty-first century, twenty years after the return to democracy in Argentina, these challenges saw a further reconfiguration of transitional justice as state makers attempted to gain some stability in the wake of the multiple dislocations of the 1990s. The opposition practices of anti-impunity and memory became the cornerstones of state policy, and memorials and commemorations proliferated, as did trials against ageing human rights violators.

In Argentina, then, as in Chile and elsewhere in South America, transitional justice has proven to be anything but transitional. Instead it has become a permanent feature of the political landscape and struggles over transitional justice have continued to function as a microcosm of broader struggles to shape the political order. Transitional justice was employed to position the civilian state as the mediator of social and political conflicts, and ongoing transitional justice policy allows the state to continue its attempt to

maintain this position. In this book, I look at these ongoing efforts to shape transitional justice as a way of examining the negotiated and contested process of state formation in the post-authoritarian period in the region.

Transitional justice is most often understood as an area of policy and practice that seeks to address past human rights abuses and other experiences of political violence as a method for building a post-authoritarian, democratic, or simply post-conflict political, social and cultural order. Addressing past violence is seen as a key way of achieving political transformation in the present and in the future.<sup>4</sup> In this book, however, I argue that transitional justice is not simply or even primarily a process designed to address the violations and conflicts of the past, but is instead best understood as a process designed to control and manage present conflicts over that past. These are, of course, not the only conflicts that the democratic state must deal with: Argentina in particular has confronted serious economic breakdowns that exposed the fragile consensus between social groups, and new political-economic frameworks, such as neoliberalism or post-neoliberalism, have been employed to deal with these dislocations. Transitional justice is not the only rationality of rule in post-authoritarian Latin America, but it is a central one that has become an ongoing feature of these societies, outlasting many economic grand narratives.

I came to this focus from a fairly simple premise, a desire to investigate the *longue durée* of transitional justice and the reasons for its longevity beyond the moment of transition. What I found by looking first at Argentina was that transitional justice has come to function as a site of both cooperation and contestation between state actors and others. At times state actors embraced civil society demands and initiatives and transformed them into official policy, while at other times they developed their own particular initiatives. In doing so they addressed the legacy of the past, but it was also something more. State actors would at times align themselves with others to boost their authority, while at others move away from this alliance in order to exercise this authority and limit the power and influence of others. This struggle to shape and control transitional justice had become central to the broader struggle on the part of the state to assert its presence and authority. In many respects we often take the presence and the authority of the state for granted, paying particular attention only when it abuses this authority and engages in human rights violations. Yet the presence of the state is not a given: it is constructed through the accumulation of authority, a process that is

<sup>4</sup>See Louis Bickford, 'Transitional Justice,' in *The Encyclopedia of Genocide and Crimes Against Humanity*, ed. Diana Shelton (New York: Macmillan, 2004), 1045.

ongoing and one that deserves attention beyond moments where this authority is exceeded or is obviously absent. A study of this accumulation of authority complements studies of democratization that focus more on the transformation of political culture and citizenship regimes. In order to understand how the state is able to shape political culture, we need to understand how it accumulated the authority to legitimately do so, and how it maintains that authority over time in the face of challenges. Transitional justice, as a form of state formation, provides a window onto this process. In this book, then, I look both at the state project of transforming political culture and structure as well as the process of accumulating and maintaining authority that allowed the pursuit of this project.

Transitional justice as a form of state formation is a product of the age of human rights. While human rights has been dealt with by legal scholars and political scientists for much longer, the history of human rights, of the different understandings and mobilizations of the term, is only now beginning to be written.<sup>5</sup> What this recent historiography highlights is the wide range of actors, both geographically and ideologically, that have instrumentalized human rights, particularly since the end of the Second World War.<sup>6</sup> This opens up our awareness of the contingency of

<sup>5</sup>See, for example, Jan Eckel, *Die Ambivalenz des Guten. Menschenrechte in der internationalen Politik seit den 1940ern* (Göttingen: Vandenhoeck & Ruprecht, 2015).

<sup>6</sup>To give a small overview, there are contributions on conservative actors in Europe embracing human rights after the Second World War to protect their own political values, on global South actors and their engagements with international human rights in the 1960s and beyond as a way of forcing a change in the international community, on the conditions that led to the US embracing human rights in the 1970s, and on the embrace of human rights on the part of Latin American actors struggling against dictatorship. See Marco Duranti, *The Conservative Human Rights Revolution: European Identity, Transnational Politics and the Origins in the European Convention* (Oxford: Oxford University Press, 2017); Roland Burke, *Decolonization and the Evolution of International Human Rights* (Philadelphia: University of Pennsylvania Press, 2010); Steven Jensen, *The Making of International Human Rights: The 1960s, Decolonization, and the Reconstruction of Global Values* (Cambridge: Cambridge University Press, 2016); Mark Philip Bradley, *The World Reimagined: Americans and Human Rights in the Twentieth Century* (Cambridge: Cambridge University Press, 2016); Barbara Keys, *Reclaiming American Virtue The Human Rights Revolution of the 1970s* (Cambridge, MA: Harvard University Press, 2014); Patrick William Kelly, *Sovereign Emergencies: Latin America and the Making of Global Human Rights Politics* (Cambridge: Cambridge University Press, 2018); Jan Eckel, "Under a Magnifying Glass": The International Human Rights Campaign Against Chile in the Seventies,' in *Human Rights in the Twentieth Century*, ed. Stefan-Ludwig Hoffmann (Cambridge: Cambridge University Press, 2011).

uses of human rights, showing how the concept has been mobilized in different contexts for different political purses in a way that much of the political science literature overlooks. Much of this literature focuses on the 1970s as the moment when human rights became a dominant framework for understanding and acting on political change, at least within the Americas.<sup>7</sup> Within this history Latin America has played a crucial role: events in and actors from the region were central to the development of human rights politics and practices in the United States, and human rights politics and practices were central to creating a space to shape political processes within the region itself.<sup>8</sup> Following the dictatorships and moving into the 1980s and 1990s, human rights continued to influence state policy, with a series of specific human rights demands becoming transformed into transitional justice policies. Latin America, then, also has a particular place within the history of transitional justice: The first Argentine president after the dictatorship, Raúl Alfonsín, embarked upon a transitional justice program in 1983 before the ‘boom’ in transitional justice as a professionalized policy prescription complete with experts and NGOs focused on policy advice such as the International Center for Transitional Justice from the mid-1990s onwards.

In this book, I draw on the appreciation for context, both local and transnational, agency and change over time that historians of human rights insist upon. State makers embraced human rights and developed transitional justice programs in the way they did because they were looking to create a new political culture and establish a new relationship between state and society. In doing so they operated within a context in which human rights had risen to hegemonic status as a political program, both locally and internationally. While human rights had their breakthrough in the 1970s, it was in the following decades that the concept became mainstreamed as a political program. This process of mainstreaming involved the continued debate over what human rights meant in practice and how best to inscribe them into political structures,

<sup>7</sup>For an overview, and a different take that emphasizes the 1990s, see Stefan-Ludwig Hoffmann, ‘Human Rights and History,’ *Past and Present* 232 (2016): 279–310.

<sup>8</sup>William Michael Schmidli, *The Fate of Freedom Elsewhere: Human Rights and US Cold War Policy Towards Argentina* (Ithaca, NY: Cornell University Press, 2013); James N. Green, *We Cannot Remain Silent: Opposition to the Brazilian Military Dictatorship in the United States* (Durham, NC: Duke University Press, 2010); Kelly, *Sovereign Emergencies*.

a debate which state makers were forced to respond to. As a contribution to the history of human rights this book goes beyond the search for origins and looks at the instrumentalization of human rights at the end of the Cold War and beyond, showing how this instrumentalization intersected with the project of 'third wave' democratization.

At the same time, however, this book is not purely historical in its approach. While accounting for agency I am also concerned with structure, specifically with analyzing the effects that the instrumentalization of human rights practices as transitional justice had upon state (re)formation. I employ both sociological and cultural approaches and analyze actions, rather than just intentions, within a theoretical framework. I do so in order to identify and explain patterns in the relationship between transitional justice and state formation. Within the social sciences transitional justice is a topic that is traditionally looked at by political scientists and legal scholars who seek to evaluate its effectiveness and, at times, make recommendations for improvement. This book does not do that: it is explanatory rather than evaluative, but it remains firmly anchored in the sociological tradition of investigating the state and emphasizing interactions between social and institutional actors.

It is therefore best characterized as interdisciplinary, making its contribution in the field of Latin American studies by drawing on various disciplines, particularly history, sociology and cultural studies to produce an insight into the area. I align myself with the trend in Latin American studies to look at the region *in the world*, accounting for global processes as well as regional ones in constructing my narrative. I focus primarily on Argentina in the forty years following the 1976 military coup, using a comparison with other Latin American countries to contextualize the turn to transitional justice on the part of state actors, as well as explain why transitional justice took the form that it did. I divide this forty-year timeframe into four distinct but overlapping periods. These four periods can roughly be characterized as representing the transition to democracy, the attempt to consolidate this transition, challenges to state authority, and finally the reformulation of state authority. In these four periods state and non-state actors interacted with each other to create and shape transitional justice policy. In doing so, state actors struggled to position the state as the central source of political authority by positioning it as the guardian of the most important political processes of the day.

Taking a cultural approach to state formation, I look at the state less in terms of the institutional buildup of the various agencies,

bureaucracies and networks that constitute it, and more in terms of the construction of a *sense* that the state is strong, comprehensive and in control. This sense is the result of the work of state actors to make the state ‘visible’ and present across areas of social and political life, principally through attempting to define political culture, and to make sure that there is a common awareness of the existence of the state and a common agreement to respect its authority. The policies of the government of the day may be challenged, as we will see with transitional justice, but the existence of the state and the ability of it to engage in national policy-making is not. As Miguel Centeno and Augustin Ferraro point out, ‘the study of the state ... is the history of how it constructed its own sense of inevitability. It is the quality that places the authority of the state, as such, out of the bounds of contention.’<sup>9</sup> By reaching down to the popular level and embracing dictatorship-era human rights practices, state actors during the transition built an acceptance of the state as the central provider of human rights guarantees and protections. Non-state actors struggled in the following years to modify government policy to extend or even rescind particular protections, but the fact that the state would be responsible for providing them was, for the most part, not called into question. In Argentina, when a political and economic crisis hinted at a questioning and rejection of state authority, transitional justice was reformulated and new demands relating to the authoritarian past incorporated into official policy, helping to quell any deep destabilization.

The dynamics of resistance and accommodation between the state and popular actors are central historical features of Latin American state formation.<sup>10</sup> These features become all the more apparent following dramatic shifts in the political order, be it a revolution or the end of forms of rule like colonialism or authoritarianism. Deep ruptures provide an opportunity to examine conscious efforts to (re)build political order,

<sup>9</sup>Miguel A. Centeno and Augustin E. Ferraro, ‘Republics of the Possible: State Building in Latin America and Spain,’ in *State and Nation Making in Latin America and Spain: Republics of the Possible*, ed. Centeno and Ferraro (Cambridge: Cambridge University Press, 2013), 13.

<sup>10</sup>See for example Steve Stern, *Peru’s Indian Peoples and the Challenge of Spanish Conquest: Huamanga to 1640* (Madison: University of Wisconsin Press, 1993); Gilbert M. Joseph and Daniel Nugent, eds., *Everyday Forms of State Formation: Revolution and the Negotiation of Rule in Modern Mexico* (Durham and London: Duke University Press, 1994).

where interactions between the state and other social groups produce something new, even when they ostensibly looking backwards towards the past. Looking at transitional justice as a form of state formation, then, means looking at it as producing a new order, not merely repairing damage or agreeing on a common interpretation of the past.

## LOOKING AT TRANSITIONAL JUSTICE: AN INTERDISCIPLINARY OVERVIEW

Much work on transitional justice has a strong normative element and emphasizes the need to improve or extend its application.<sup>11</sup> Critical studies of transitional justice have highlighted its instrumental function, with legal scholar Ruti Teitel, for example, characterizing transitional justice as a ‘pragmatic balancing of ideal justice with political realism that instantiates a symbolic rule of law capable of constructing liberalizing change.’<sup>12</sup> Teitel’s definition, while focused on the law, highlights the instrumental nature of transitional justice: it is a tool for change rather than an end goal in and of itself. Scholars across a range of disciplines have shown how the state has instrumentalized transitional justice, using it to resignify the meaning of the authoritarian past, with the aim of bolstering the construction of a new order.<sup>13</sup> While these contributions are invaluable for going beyond examinations that seek to merely improve the delivery of transitional justice, they do not properly account for why and how transitional justice has taken the form that it does in different moments across time and space. Historians have yet to fully examine the breakthrough of transitional justice as a model for democratization, meaning that we do not yet fully understand the context that gave rise to this form of state formation, as well as the particular contingencies in each case that shaped its development and implementation. Exceptions to this include investigations of individual policy elements of transitional justice, such as the influential contribution

<sup>11</sup>See for example Naomi Roht-Arriaza and Javier Mariezcurrena, eds., *Transitional Justice in the Twenty-First Century: Beyond Truth Versus Justice* (Cambridge: Cambridge University Press, 2006).

<sup>12</sup>Ruti Teitel, *Transitional Justice* (Oxford: Oxford University Press, 2000), 213.

<sup>13</sup>Hugo Vezzetti, *Pasado y presente: Guerra, dictadura, y sociedad en la Argentina* (Buenos Aires: Siglo XXI, 2003). For the case of South Africa, see Richard A. Wilson, *The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post-apartheid State* (Cambridge: Cambridge University Press, 2001).

of historian Greg Grandin on the truth commissions of Argentina, Chile, and Guatemala. Grandin shows how the policy-maker's belief in the symbolic importance of law as the primary site for exorcising illiberal political practices, as well as the influence of ideas about reconciliation and rebuilding, led the Argentine and Chilean investigations to refrain from providing a nuanced account of the origins of the violence. Instead they chose to create an account that presented violence as the result of political breakdown, a cautionary parable designed to promote democratic nationalism.<sup>14</sup> Grandin's analysis highlights the essential point that truth commissions, like other transitional justice measures, are products of a particular context that shapes their form and influences their impact.

By focusing on the truth commissions as state policy, however, Grandin does not explore the influence of civil society actors, either on the development of the commissions or on their operation. Yet truth commissions, like many other transitional justice measures, began as civil society demands, in this case for information. They are themselves both products of and windows into the interactions between state and civil society actors. As sociologist Elizabeth Jelín notes, while governments 'took as their own the principles and demands of the human rights movement, [they did not take] all the demands, and not in a comprehensive manner.'<sup>15</sup> Presidents along with their advisors and relevant ministers made decisions about which demands and initiatives to adopt, modify or abandon. Important are the perceptions, preferences and attitudes of state actors themselves in confronting these encounters.<sup>16</sup> Each transitional justice policy is a product of the historical context in which it was developed, and of the historical context of the transitions, as well as the product of interactions between state and civil society actors within that context.

<sup>14</sup>Greg Grandin, 'The Instruction of Great Catastrophe: Truth Commissions, National History and State Formation in Argentina, Chile and Guatemala,' *The American Historical Review* 110, no. 1 (2005): 46–67.

<sup>15</sup>Elizabeth Jelín, 'La Política de la Memoria: el movimiento de derechos humanos y la construcción democrática en la Argentina,' in *Juicio, castigo memorias: Derechos humanos y justicia en la política argentina*, ed. Carlos H. Acuña et al. (Buenos Aires: Ediciones Nueva Visión, 1995).

<sup>16</sup>Alexandra Barahona de Brito, *Human Rights and Democratization in Latin America: Uruguay and Chile* (Oxford: Oxford University Press, 1997); David Pion-Berlin, 'To Prosecute or to Pardon? Human Rights Decisions in the Latin American Southern Cone,' *Human Rights Quarterly* 15 (1997); José Zalaquett, 'Balancing Ethical Imperatives and Political Constraints: The Dilemma of New Democracies Confronting Past Human Rights Violations,' *Hastings Law Journal* 43, no. 6 (1992).

More recently, a second wave of transitional justice and democratization scholarship has emerged, looking at the continued influence of politics and practices centered on the past even in the post-transitional period. As historians Eugenia Allier-Montaña and Emilio Crenzel show, in Latin America struggles over the past and the appropriate way to deal with them remain a central feature of post-authoritarian democracies. These clashes, they argue, have taken the place of the physical and violent clashes of the past.<sup>17</sup> Historian Kirsten Weld looks at the project to reconstruct the Guatemalan National Police Archive as a way of understanding the struggle over the past and the labors of Guatemalan civil society to negotiate democratic social relations, while Steve Stern, also an historian, has examined the emergence of memory in post-authoritarian Chile as a space for negotiating both political and cultural legitimacy.<sup>18</sup> These contributions rightly highlight the role of contemporary social struggle and conflict in the creation and reformulation of transitional justice. But many of the other more recent contributions, while acknowledging the centrality of state-civil society interactions, fail to fully contextualize and critically analyze the forms of transitional justice that have emerged in the post-transitional period, replicating the normative aspect of earlier transitional justice works. While these contributions have engaged in an important debate over the relative weight of national and transnational factors in shaping transitional justice they fail, for example, to critically reflect on why certain policies become emblematic of transitional justice at certain moments. Criminal justice, for example, has experienced a particular rise since the 1990s; this rise is viewed by many in normative terms, with political scientist Cath Collins, for example, arguing that ‘the persistence of the justice question ... in the form of renewed accountability pressure, can be viewed as positive signs of democratic institutional health.’<sup>19</sup> It has been critical scholars of international law who have focused on explaining why certain practices such as criminal justice have come to dominate within international human rights law, rather than simply praising it.<sup>20</sup>

<sup>17</sup>Eugenia Allier-Montaña and Emilio Crenzel, eds., *The Struggle for Memory in Latin America: Recent History and Political Violence* (New York: Palgrave, 2015), 2.

<sup>18</sup>Kirsten Weld, *Paper Cadavers: The Archives of Dictatorship in Guatemala* (Durham and London: Duke University Press, 2014); Steve J. Stern, *Remembering Pinochet's Chile: On the Eve of London, 1998* (Durham and London: Duke University Press, 2009).

<sup>19</sup>Cath Collins, *Post-transitional Justice: Human Rights Trials in Chile and El Salvador* (University Park: Pennsylvania State University Press, 2010), 21.

<sup>20</sup>Karen Engle, Zinaida Miller, and D. M. Davis, eds., *Anti-impunity and the Human Rights Agenda* (Cambridge: Cambridge University Press, 2016).

Some transitional justice scholars have begun to interrogate old assumptions, showing for example that amnesty may not be as antithetical to democratization as it was once considered to be.<sup>21</sup> These contributions, however, still seek to evaluate effectiveness, concluding respectively that the rise of criminal justice practices has resulted in a too-narrow human rights focus, and that amnesties can make a positive contribution to democratization.

What this body of recent work lacks is a critical engagement with transitional justice that seeks to understand the policy in terms of the aims of the very actors that developed and implemented it. State actors constructed transitional justice policies in order to facilitate the construction and legitimation of a new democratic order. They co-opted and transformed existing practices relating to the authoritarian past in order to do so, asserting symbolic control both over that past and over the debates around it. Through transitional justice, state actors demonstrated their ability to control the meaning and the impact of the authoritarian past. This ability was never exclusive, and it was frequently challenged, bringing them into conflict with other social and institutional actors who had different ideas about the meaning and legacy of this past. Challenges to official transitional justice policy, and the state's response to these challenges, represented an ongoing process of resistance and accommodation in which state actors were forced to constantly work to position the state as the central authority on the key political issues of the day. Analyzed as such, transitional justice was not just a policy designed to address the violations of the past; it was a strategy for managing and shaping the present conflicts over that past, conflicts which were the most explosive at the time of the transition and remained among the most heated throughout the following years.

Examining transitional justice as an example of the instrumentalization of certain human rights practices links my project with some of the aforementioned works that explore the history of engagements with human rights. These studies explain the rise of human rights throughout the twentieth century by demonstrating the varied meanings that different actors across time and space gave to the concept, and the different uses they put it to. Taken together they show the breadth of

<sup>21</sup>Francesca Lessa and Leigh Payne, eds., *Amnesty in the Age of Human Rights Accountability: Comparative and International Perspectives* (Cambridge: Cambridge University Press, 2012).

instrumentalizations of human rights, from conservative actors in post-World War II Britain and France who used the concept to establish a regional system that could protect the individual rights they saw as under attack from socially democratic minded governments, to Third World nationalists in the 1950s and 1960s who drew on human rights to frame their struggle for self-determination within the international community, and Latin American exiles who, working with sympathetic North American politicians, used the concept to push the United States government to change its policy towards the region and isolate the authoritarian regimes in their home countries.<sup>22</sup> These historical investigations of human rights illustrate the series of flashpoints throughout the twentieth century that contributed to the ‘making’ of international human rights, including decolonization in the 1950s and 1960s, the Vietnam War in the 1960s and 1970s, and the experience of authoritarianism in the Southern Cone of Latin America during the 1970s and 1980s.<sup>23</sup> They highlight the role played by diplomats, lawyers, experts, and activist transnational networks in mobilizing and giving shape to human rights by engaging the concept.<sup>24</sup> Methodologically, they emphasize the importance of using a transnational frame to understanding the history of human rights.<sup>25</sup> Historians have brought to the study of human rights an appreciation for the ways in which the meaning of the concept has been constructed through the various engagements with it, as well as an appreciation for the conditions in which it appealed to actors looking to pursue their political goals.

<sup>22</sup>See Duranti, *The Conservative Human Rights Revolution*; Burke, *Decolonization and the Evolution of International Human Rights*; Lynsay Skiba, ‘Shifting Sites of Argentine Advocacy and the Shape of 1970s Human Rights Debates,’ in *The Breakthrough: Human Rights in the 1970s*, ed. Jan Eckel and Samuel Moyn (Philadelphia: University of Pennsylvania Press, 2014), 107–124.

<sup>23</sup>Burke, *Decolonization and the Evolution of International Human Rights*; Jensen, *The Making of International Human Rights*; Bradley, *The World Reimagined*; Keys, *Reclaiming American Virtue*; Kelly, *Sovereign Emergencies*.

<sup>24</sup>Sarah B. Snyder, *Human Rights Activism and the End of the Cold War: A Transnational History of the Helsinki Network* (Cambridge: Cambridge University Press, 2013).

<sup>25</sup>Patrick William Kelly, ‘On the Poverty and Possibility of Human Rights in Latin American History’, *Humanity* 5, no. 3 (2014): 444–445; Jensen, *The Making of International Human Rights*.

Anthropologists, sociologists and political scientists have also contributed to the study of human rights in action, often, in studies of the Southern Cone of Latin America, looking at it interchangeably with transitional justice. Political scientists, for example, have examined the evolution of both the dictatorship-era human rights movement and transitional justice, showing the importance of competing memories in (re)shaping transitional justice.<sup>26</sup> While earlier political science studies of transition and democratization focused almost exclusively on the state, these newer contributions see state and civil society actors and initiatives as mutually constitutive.<sup>27</sup> Anthropologists have also examined shifts in mobilizations of human rights, highlighting how the concept has been used in Argentina to push for an extension of citizenship rights into the realm of the social as a counter to neoliberalism.<sup>28</sup> These contributions help us understand the changing nature of engagements with both human rights and transitional justice beyond the moment of transition to civilian rule and into the late twentieth and early twenty-first centuries. Sociological work has looked at the role of transnational elites and governmental structures in the export of human rights norms to peripheral states, particularly those in Latin America, while political scientists have drawn on Kathryn Sikkink's influential body of work to argue that the resurgence of retributive, criminal justice practices in the region finds its roots in the connections between local activists and international judicial actors and structures.<sup>29</sup> Together these works explain how human rights and transitional justice emerged in the region, placing emphasis on the structures for the transfer of knowledge and ideas.

<sup>26</sup>Francesca Lessa, *Memory and Transitional Justice in Argentina and Uruguay: Against Impunity* (New York: Palgrave, 2013); Francesca Lessa and Vincent Druliolle, eds., *The Memory of State Terrorism in the Southern Cone: Argentina, Chile, and Uruguay* (New York: Palgrave, 2011).

<sup>27</sup>Collins, *Post-transitional Justice*.

<sup>28</sup>Karen A. Faulk, *In the Wake of Neoliberalism: Citizenship and Human Rights in Argentina* (Stanford: Stanford University Press, 2012).

<sup>29</sup>Nicolas Guilhot, *The Democracy Makers: Human Rights and International Order* (New York: Columbia University Press, 2005); Yves Dezalay and Bryant G. Garth, *The Internationalization of Palace Wars: Lawyers, Economists, and the Contest to Transform Latin American States* (Chicago: University of Chicago Press, 2002); Naomi Roht-Arriaza, *The Pinochet Effect: Transnational Justice in the Age of Human Rights* (Philadelphia: University of Pennsylvania Press, 2005); Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics* (New York: W. W. Norton, 2011). Cf. Collins, *Post-transitional Justice*.

Beyond contributions that engage with attempts to deal with past political violence, there is a new wave of Latin American historiography that is reinvestigating this violence itself. These contributions seek to reconnect the violence and state repression of the Cold War with the social struggles of the time, demonstrating that violence, rather than being the result of a breakdown in political order, was a central part of the search for this order and of forms of state formation. They show that political violence was not just the result of authoritarian forms of thinking but was a tactic deployed by counterrevolutionary actors as a way of responding to and managing revolutionary political projects and visions.<sup>30</sup> These responses were not simply imposed from outside, as older scholarship on the Cold War that emphasized US dominance argued, but were equally a product of local political projects as they confronted domestic and international conditions.<sup>31</sup> As it aimed to perform its work on the whole of society, the violence had an effect on more than just its direct victims. Political violence shaped the middle classes' understanding of politics generally, leading them to simultaneously condemn it as a tactic when used by insurgent actors whose political vision they disagreed with while approving of it as a tactic for reasserting state control and authority.<sup>32</sup> These contributions help us to understand the mentality of those reformers who in the 1980s sought to develop a form of democratization that was palatable to these key middle class constituents, while also helping us understand the novelty of the task these reformers set for themselves. Through transitional justice they truly sought a political and cultural revolution.

In this book, I synthesize across these and many other works, drawing out a focus on the construction of transitional justice as the instrumentalization of a subset of human rights practices, as well as a focus on the decisions and political goals of state actors in Argentina and elsewhere. While historians of human rights disagree on the exact moment of

<sup>30</sup>Greg Grandin and Joseph Gilbert, eds., *A Century of Revolution: Insurgent and Counterinsurgent Violence During Latin America's Long Cold War* (Durham and London: Duke University Press, 2010).

<sup>31</sup>Gilbert Joseph and Daniela Spenser, eds., *In From the Cold: Latin America's New Encounter with the Cold War* (Durham and London: Duke University Press, 2008).

<sup>32</sup>Sebastián Carassai, *The Argentine Silent Majority: Middle Classes, Politics, Violence, and Memory in the Seventies* (Durham and London: Duke University Press, 2014).

human rights' breakthrough they broadly concur that by the late 1970s the various engagements with the term had led to the birth of a human rights regime with specific implications for the ordering of politics in the wake of the demise of socialism. In this book, I look at a specific attempt to order politics, transitional justice, identifying its origins as a series of human rights practices based around the monitoring and reporting of violations during the 1960s and 1970s. I specifically link transitional justice to an attempt to order politics by approaching it as a form of state formation, explaining exactly how the embracing of and officialization of popular practices helps to build the authority of the state, and how the design of transitional justice functions to assert and exert that authority vis-à-vis other social and institutional actors. This approach differentiates my work from others that look at transitional justice merely as a form of policy making, rather than as state formation. In doing so I contribute to our understanding of the making of the post-Cold War world by demonstrating one of the ways in which human rights have been instrumentalized to bring about structural political change.

### *The Approach*

As the historiography on human rights demonstrates, there has been a thickening of human rights practices since the end of the Second World War, with an increasing number of political goals pursued under the umbrella of the concept. Human rights operates as a framework or platform for the pursuit of these various political goals, bringing different actors into contact with each other to establish a dominant definition of human rights that facilitates and legitimizes their political goals.<sup>33</sup> Since Argentina's return to civilian rule in 1983 there has also been a thickening of transitional justice, as state and non-state actors propose and demand an increasing number of measures designed to address the human rights violations of the past. Struggles and interactions between these actors to shape transitional justice and include their own proposals and demands have been a dominant feature of social and political life since the end of authoritarianism. These struggles and interactions are my primary focus in this book.

<sup>33</sup>Guillhot, *The Democracy Makers*, 17.

Looking at these struggles and interactions I have identified a process whereby the state absorbs, embraces and co-opts existing popular practices and demands, transforming them into official transitional justice policy. This process can be understood as a cultural or everyday form of state formation where popular expressions of political culture are used to bolster the centrality and authority of the state. This approach emphasizes the ongoing nature of state formation as well as the contributions of non-state and semi-state as well as state actors to state formation and has been incredibly influential in shaping my approach to understanding the political processes at work in this study. Historians of Latin America have used this approach to explain the symbolic aspects of state formation, with historians of Mexico in particular focusing on the ways in which the post-revolutionary state incorporated popular practices as part of its efforts to establish both its symbolic and its physical presence.<sup>34</sup> They argue for a focus on popular culture with a recognition that its study ‘can only be conducted alongside or in concert with dominant culture and an examination of power itself, and particularly those organizations of power that provide the context for “everyday struggle”. One organization of, or form of regulating, power that is critical in this regard is the state.’<sup>35</sup> These Latin Americanists were particularly influenced by work on the cultural aspects of state formation in England, via Philip Corrigan and Derek Sayer’s *The Great Arch*. In their study Corrigan and Sayer point out that ‘moral regulation is coextensive with state formation, and state forms are always animated and legitimated by a particular moral ethos.’<sup>36</sup> When thinking about what I was observing in Latin America with transitional justice, these works struck a deep chord, helping to link state engagements with human rights, the great moral framework of the late twentieth century, with their embrace of popular opposition practices and their project of political reconstruction.

The classic definition of the state from Max Weber and, later, Charles Tilly defines it as the exclusive legitimate holder of coercive power in a given territory. According to this definition, the state is formed through the accumulation of coercive power and the delegitimization of the right

<sup>34</sup>See the contributions in Joseph and Nugent, *Everyday Forms of State Formation*.

<sup>35</sup>Ibid., 18–19.

<sup>36</sup>Philip Corrigan and Derek Sayer, *The Great Arch: English State Formation as Cultural Revolution* (Oxford: Basil Blackwell, 1985), 4.

of others to wield this power. Yet the state also holds other types of power and authority, such as administrative authority within its given territory as well as a symbolic power that allows it to shape cultural forms, practices and understandings.<sup>37</sup> It is not the exclusive holder of this power, just as it is often not the exclusive holder of coercive power, and the state will often allow and facilitate the cultural expressions of others when they do not threaten its own authority. But if they do present a threat, state actors will move to delegitimize these expressions, often presenting them antithetical to the cultural values of the nation.

The state, then, has a strong cultural element, and the accumulation of cultural authority is a central feature of state formation. Sociologists Pierre Bourdieu and Mara Loveman have explored this process of accumulating cultural authority, or symbolic capital as they call it. Loveman argues that in order to accumulate symbolic capital, 'the state must [either] carve out a new domain of social life to administer, co-opt the administrative practice of others, or wrestle existing administrative functions away from their traditional executors, imbuing them with new meanings in the process.'<sup>38</sup> Since new cultural expressions are always emerging, the state must respond to them either by delegitimizing them or by incorporating them into the official culture. At the time of the democratic transitions in Latin America, fledgling state actors were confronted with the task of building a new republic. They needed to accumulate authority on the part of a delegitimized state and found a ready source of that authority in the flourishing political culture that expressed the rejection of authoritarianism using the language and practices of human rights. The area of human rights was a domain of social life that they did not control, but it was also one that demonstrated a clear affinity with their own goals of constructing a democratic political order. Embracing and co-opting certain dictatorship-era human rights practices and transforming them into official transitional justice policy, they moved to assert the authority of the state to define the issue of the recent past and its relationship to the present. This was, of course, not a smoothly consensual process. As the state took over and modified

<sup>37</sup>George Steinmetz, 'Introduction: Culture and the State,' in *State/Culture: State Formation After the Cultural Turn*, ed. Steinmetz (Ithaca and London: Cornell University Press, 1999), 8–9.

<sup>38</sup>Mara Loveman, 'The Modern State and the Primitive Accumulation of Symbolic Power,' *American Journal of Sociology* 110, no. 6 (2005): 1657–1658.

existing practices, a struggle between state and other actors broke out. Both Loveman and Bourdieu call these struggles ‘jurisdictional’ or ‘classification struggles’, whereby social and institutional actors vie with each other over the ability to define the elements of culture and its meaning.<sup>39</sup> The accumulation of symbolic capital is rarely uncontested, but even when it is, this very process of contestation helps to assert the presence of the state and its centrality to social life.

The conceptual frameworks of both Bourdieu and Loveman were developed in the context of analyzing the formation of modern states, but they lend themselves to the study of post-authoritarian contexts. Whereas, as Loveman points out, ‘bureaucratic administration is at the heart of the modern state’s ability to exercise symbolic power’, the post-authoritarian state has both the bureaucratic administration of transitional justice as well as judicial administration at its center.<sup>40</sup> The trials and other measures conducted by transitional states functioned as a symbol of modernization and the rule of law in the context of post-Cold War democratization and liberalization.<sup>41</sup> The establishment of the rule of law and control over administering the law as well as control over protecting and administering human rights is a sign of the state’s political modernization. State actors deployed transitional justice in order to shift understandings of democracy and citizenship, making legal rights central and positioning the state ‘not as a potential executor of social justice but as an arbiter of legal disputes and protector of individual rights.’<sup>42</sup> Thus to understand the post-authoritarian state we must focus on how state actors worked to position the state in this way, and how they worked to maintain this position.

This, in turn, helps us to understand the concrete effects of human rights within contemporary political processes. Critical human rights scholarship encourages us to go ‘beyond the problem of enforcement’ and explore the tension between the universal and the local within human rights.<sup>43</sup> In this book, the tension between the universal

<sup>39</sup>Ibid., 1663.

<sup>40</sup>Ibid., 1660.

<sup>41</sup>Ruti Teitel, ‘Transitional Justice Genealogy,’ *Harvard Human Rights Review* 16 (2003): 76.

<sup>42</sup>Grandin, ‘The Instruction of Great Catastrophe’, 47.

<sup>43</sup>Steve J. Stern and Scott Strauss, ed., *The Human Rights Paradox: Universality and Its Discontents* (Madison: University of Wisconsin Press, 2014), 4.

and the local manifests, as elsewhere, in the use of human rights to make demands that are predicated on the state. In responding to these demands, however imperfectly, state actors (re)constitute the state itself, strengthening it as a legitimate repository of political power. This is the history of human rights; thanks to its broad appeal, it is used by a wide range of at times opposing actors to pursue their political goals, but by bringing these actors into dialogue and struggle with each other, more radical or specific goals are tempered. By investigating the struggles between these different mobilizations of human rights and their outcomes we can come to understand the history of one of the most dominant discursive spaces of the post-Cold War period.

### *The Structure*

Chapter 2 offers an historical context for the emergence of transitional justice by focusing on the international development of specific human rights practices aimed at bringing about a change in authoritarian regime behavior from the 1960s onwards. I look specifically at the development of information practices, which developed throughout the world but particularly in the Americas as a way of taking action around the authoritarian regimes and human rights violations that had come to characterize the region by the 1970s. I then move to the Southern Cone of Latin America to give an account of the development of information practices by local activists in their struggle against dictatorship. As throughout the whole book, I focus most of my attention on Argentina, with comparative references to how this process played out in neighboring Chile. I highlight the importance of transnational connections between local Argentine activists and others, which were essential in, for example, facilitating the investigatory visit of the Inter-American Commission on Human Rights. Overall, this chapter demonstrates the international and regional context of the emergence of human rights practices focused on changing authoritarian regime behavior.

The account of the construction of transitional justice policy begins in Chapter 2. In this chapter I look at the transition to civilian rule in Argentina and Chile, showing how, through a series of measures that were both symbolic and material, the newly elected presidents moved to position the state as the central authority within the domain of human rights and the legacy of the authoritarian past. Focusing primarily on Argentina and the political project led by Raúl Alfonsín, Argentina's

president between 1983 and 1989, I look at the transitional justice policies of this administration as an example of the co-option and instrumentalization of existing human rights practices. This was not an opportunistic endeavor. Alfonsín drew on the links he already had with the human rights movement and embraced their techniques and demands as a way of creating a political culture that rejected authoritarianism as a form of rule. In this chapter, I also give an account of similar processes in Chile where we also see that state actors also sought to co-opt the political space created by activist groups during the authoritarian period to facilitate their desire to create a new political culture. This chapter serves to strengthen our understanding of the process of symbolic capital accumulation in transitions from authoritarian rule.

The embrace of human rights repertoires and their transformation into official transitional justice policy did not, however, mean that there was a seamless convergence between the new state and civil society actors. In Argentina, Alfonsín envisaged limits to these practices, and in 1986 he moved to establish these limits, curtailing the political power of other actors and their demands. In Chapter 3, I show how state actors engaged others in a jurisdictional struggle, attempting to exercise state power and define transitional justice. This process was characterized by limiting the judicial processing of perpetrators of past human rights violations and rearticulating transitional justice around the goal of reconciliation. In Argentina, we see how Alfonsín and his presidential successor, Carlos Menem, positioned retributive justice as endangering the goal of reconciliation, replacing it with measures that voided the sentences of those previously tried, and prevented any further judicial action from taking place. They did this in order to curtail the protagonism of the human rights groups and the judiciary, which were threatening to extend transitional justice beyond the limits set by the state. Menem replaced retributive justice with reparative forms of justice, offering reparations to victims while attempting to rearticulate human rights in general beyond an exclusive relationship with the military dictatorship. The Argentine experience is complemented by a look at that of Chile and Uruguay, where transitional justice was articulated in terms of reconciliation from the moment of transition. In Chile reconciliation was actually used to push for limited trials as a way of asserting the ability of the state to control and define transitional justice and to try to bring both the military and the judiciary under state control. In Uruguay, however, the civilian government moved as quickly as it could to prevent any trials

of the military from taking place, arguing that only amnesty would quell any military threat and ensure democratic consolidation. While all three instrumentalized reconciliation in different ways, in this chapter I show how reconciliation functioned in each case as a way to both corral other institutional actors and to assert stability in the face of current conflicts over the past.

The limits of this pursuit of authority by ruling *over* rather than ruling *alongside* other social and institutional actors are shown in Chapter 4. Here I look at how new challenges within transitional justice developed as a response to reconciliation. I show how during the 1990s a range of social and institutional actors developed new practices around memory and justice in opposition to the project of reconciliation, in particular the turn away from retributive justice. While I begin the chapter with an account of the development of these practices by dictatorship-era groups in Argentina, I spend the most time looking at how these new practices and demands relating to the authoritarian past were mobilized by institutional actors, some of which straddle the line between the state and civil society. Elected representatives within non-executive levels of government and the military itself began to use the concept of memory to challenge the official version of reconciliation and its assertion that the past was a closed book. Meanwhile the judiciary drew on developments at the international level to continue to pursue retributive justice and challenge state jurisdiction. These challenges exposed the state's inability to define transitional justice and to set the tone for the democratic political culture. Then, taking a comparative look at neighboring Chile and Uruguay, I show how different actors drew on transnational developments to push for shifts in transitional justice policy. In the case of Chile, members of the judiciary linked into international developments to implement the limited retributive justice that the state had been unable to achieve. In Uruguay, where official transitional justice was characterized by an absence of truth *and* an absence of justice, activists drew on developments across the Latin American region to delegitimize their government's insistence that amnesty and turning the page on the past was the key to democratization and stability. Overall this chapter shows the impact that reconciliation had upon political culture, highlighting how, rather than eliminating socio-political conflict, it actually provoked a new series of challenges to state authority and alternative visions for political organization.

With the proliferation of challenges to transitional justice, the state was in a fragile political position. In Argentina the crisis of 2001 demonstrated the dangers of this situation, prompting a renewed effort to

acquire symbolic capital by reaching down and embracing popular practices. In Chapter 5, I examine this revision of transitional justice in the wake of political crisis. Focusing on the Nestor Kirchner and Cristina Fernandez regimes in Argentina from 2003 to 2015, I show how the state adopted many of the repertoires around truth, justice and memory that had emerged in the preceding decade, interpellating them in the service of constructing a new sense of post-authoritarian national identity. This national identity was then used to bolster the credentials and authority of the state by positioning the latter as the political guardian of the former. Looking also at the comparative cases of Chile and Brazil I show how, even in a context without political crisis, national identity was reconfigured around an embrace of popular transitional justice practices as a way of moving beyond the failures of neoliberalism more generally. Both Kirchner and Fernandez in Argentina, and presidents Michelle Bachelet and Dilma Rousseff in Chile and Brazil, respectively, used this new national identity to mark the return to an active state that was responsive to popular demands.

Together these chapters (Chapters 3–6) examine the post-authoritarian state as both a political and a cultural revolution. This revolution was constructed through transitional justice, which produced a new understanding of both political structure and political culture. This revolution was state-led, but it was not an elite project. Instead it was the product of constant negotiation between the state and other social and institutional actors, who continually responded to state attempts to define and delimit this political culture. The post-authoritarian state is most commonly understood in terms of transition to democracy, a formula that posits elite decision-making as central to the construction of a new order. I argue that democratization was also carried out in the realm of political culture, where these state-making elites struggled with others to gain and exert symbolic capital, the precondition for all other types of capital.

In the conclusion, I draw together the findings from the four periods examined in the central chapters in order to assess the nature as well as the limits of transitional justice as a form of state formation. In Argentina the Fernandez government stepped down in 2015 and was replaced by a new president who was accused by those aligned with the previous regime of planning to abandon transitional justice altogether. While he dismantled many of the previous period's policies, rather than abandoning transitional justice he replaced them with new initiatives, reconfiguring the policy yet again. The appeal of transitional justice to a new series

of state actors looking to pursue their particular political goals indicates the durability of transitional justice and its flexibility. This durability shows us that while transitional justice is ostensibly about dealing with human rights violations under previous authoritarian regimes, it is largely a powerful way of managing present social conflicts and asserting the ability of the state to provide leadership in the age of human rights.

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## CHAPTER 2

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# Human Rights, Political Action, and the Precursors to Transitional Justice

Activist and lawyer Adolfo Pérez Esquivel left his house in Avellaneda, a district of greater Buenos Aires, on the morning of 13 October 1980 and headed into the capital for work as normal. Around midday he received a phone call from his wife, telling him his presence at the Norwegian Embassy was urgently requested. He took the bus across town, completely in the dark as to what could be going on, but assuming that a Norwegian citizen had become one of the military regime's victims and his assistance was needed advocating for the case. He arrived to a flurry of activity, although with a distinctly different feel to what he was expecting. Instead of being greeted with the grim news of another *desaparecido*, he was informed that he was being awarded the Nobel Prize for peace. The award committee considered him to represent 'the struggle for the image and the reputation of Argentina in the world.' The press began to contact him almost immediately, with Pérez Esquivel's first response being that the prize belonged to 'all those who worked for the dignity of man in Latin America.' He then began the process of obtaining a passport to attend the award ceremony in Norway. After much delay and difficulty, the military regime that governed Argentina finally allowed Pérez Esquivel, who had been released from detention the year

before, to travel—with his passport marked to indicate his status as a ‘subversive,’ subjecting him to the undignified process of interrogation upon arrival at any port.<sup>1</sup>

The awarding of the Nobel Prize to Pérez Esquivel reflected a number of developments both internationally and within Latin America itself relating to human rights. Firstly, by 1980 human rights was widely considered to be a legitimate political discourse and was used by actors across the globe as a way of thinking about and pursuing political change. In the Americas in particular human rights had become increasingly ubiquitous during the previous decade. Both local and international actors mobilized the concept to put pressure on the authoritarian states of the region to provide information on the *desaparecidos* (the disappeared) and on clandestine detention, for the release of political prisoners, and for an end to torture and other forms of repression. Regional governance bodies adopted human rights as a normative goal and engaged in monitoring practices in order to evaluate member state compliance with these norms. For the United States, human rights offered a new framework for foreign policy and, by extension, a new way of interacting with the world. And, as the decision to allow Perez Esquivel to travel shows, even the authoritarian state strategically engaged with human rights, complying with new demands in order to alleviate diplomatic and economic pressure. By the end of the 1970s the political balance had tipped towards human rights, and the Argentine regime and others like it in the region were increasingly forced to accommodate these political challenges.

Perez Esquivel’s case also demonstrates the links that had been forged between local actors and their international peers. High levels of mobility—often involuntary in the form of exile—among activists, as well as the availability of improved communications technologies and the increase in the number of international non-governmental organizations (NGOs)—connected activists in Latin America with policy-makers in the United States and Europe, as well as with emerging regional and international human rights organizations and structures. The decidedly transnational nature of human rights politics facilitated the development and spread of new tactics and practices that could be used to articulate opposition to the military regime.

<sup>1</sup> *El Universal*, October 10, 1980; Adolfo Pérez Esquivel, ‘A 32 años de recibir el Premio Nobel de la Paz ... y un traje,’ October 13, 2012, Accessed September 12, 2014, [www.adolfoperezesquivel.org](http://www.adolfoperezesquivel.org).

A particular feature of these practices was a focus on the protection of the civil and political rights of individuals and the concomitant restriction on the ability of states to violate these rights. This focus was the result of the particular historical context in which human rights rose to prominence in the Americas, where military regimes had suspended the rule of law and engaged in the gross and systematic violations of these rights on a massive and institutionalized scale. The clandestine nature of this state repression, as well as shifts in the international community and international relations, shaped the particular ways in which activists sought to protect these rights. They attempted to bring hidden state behavior out into the open by producing and disseminating information about these violations, information that was used to shape global public opinion and, ultimately, foreign policy within the United States and in international organizations. At times local activists produced this information themselves, collaborating with transnational groups to produce and distribute print material or using their connections with these groups to gain an audience before commissions of inquiry, where they distributed information through oral testimony. At other times they publicly demanded that the regime itself provide information, allowing the unmet demand to exert pressure. They also organized for international actors to tour the country in search of information. As mentioned above, the purpose of this information gathering and dissemination was to exert diplomatic pressure on the military regimes to stop the repression. The objective was to achieve change in the present, to change regime behavior and protect lives under military rule. Over time, as the possibility of an end to military rule appeared on the political horizon, and with it the promise of a useable, enforceable legal framework, some activists began to think about judicial sanction for the crimes and violations committed. And although they did not know it, by engaging in these practices these activists laid the groundwork for the emergence of something completely new that would emerge after the fall of the dictatorship: transitional justice. In this chapter, I explore the human rights actions that developed in opposition to dictatorship, showing the key practices and their development as well as the debate over them in order to contextualize the transitional justice policies that followed.

The rise of human rights to its current position of global ubiquity is currently the subject of much historical investigation. Likewise, many political scientists and social movement scholars have investigated and explained the rise of a movement for human rights within Argentina

and other Southern Cone states. In this chapter, I seek not to replicate their work but rather to synthesize across it and draw out the story of the particular development of practices that were later used as the basis for official transitional justice policy. In particular, I look back over the history of human rights to identify the emergence of information politics and practices both within the broader international sphere and within the specific Latin American context. I start by looking at the increasing instrumentalization of human rights across the globe since the Second World War, highlighting the extremely wide range of actors that were attracted to human rights as a way of advancing their own particular political goals throughout this period. Both state and non-state actors, as well as those from the political right and the left, found human rights to be a useful way of framing and advancing their political demands. This historical context is important because it illustrates how human rights have operated as a platform or framework for the pursuit of political demands and objectives, rather than as a normative end point in and of itself. An awareness of how human rights has historically functioned as a broad church that could accommodate a wide range of actors and goals allows us to appreciate the conflicts that later arose between and among state and non-state actors in post-authoritarian Latin America as a struggle *within* human rights for particular goals rather than a struggle *for* or *against* human rights. I then chart the specific development of practices that mobilized information as a way of achieving political change, showing how this rise of information practices was connected to the goals that political actors were pursuing at this time. A concern with state repression in Latin America in particular led to the use of information to shape international public opinion and US foreign policy towards the region, with the ultimate goal of shaping regime behavior. In Latin America itself individual activists living under these regimes also used information to challenge and resist repression. I focus most of my examination on the case of Argentina to demonstrate the development and deployment of these information practices, noting how they changed over time and how they facilitated a concerted local and transnational effort to reduce the political space for the dictatorship to operate. Many of those who engaged in information practices were lawyers who, in lieu of effective judicial practices, used information and monitoring to lay the basis for possible future enforcement mechanisms.

This examination of the emergence and development of information practices within human rights activism and the various mobilizations of law, and the discussion of competing notions of justice introduces what became the blueprint for later transitional justice policies in Argentina and in neighboring countries. As this chapter shows, this blueprint was shaped by transnational interactions, themselves facilitated by the particular historical moment of the 1970s when changes in international relations saw international organizations come to play an important role in regulating state behavior, and when changes in the foreign policy of the US saw human rights become an important political framework. But as the next chapter will point out, while important for understanding its origins and the shape it took, the emergence of transitional justice was not overdetermined by this historical context. The desires of democratic state makers to rebuild the state via a revolution in political culture led them to turn to human rights practices. Argentina under president Raúl Alfonsín enacted a transitional justice policy in 1983, well before the development of transitional justice as a professional policy field in the early 1990s.<sup>2</sup> He drew on many of the demands and practices of local anti-dictatorship activists in shaping this policy, as the following chapter will demonstrate. The neighboring countries of Brazil, where civilian government was restored in 1985; Uruguay, which returned to civilian rule in 1986; and Chile, where the transition occurred in 1990, also implemented transitional justice as a way of bringing about political transformation following dictatorship. While their trajectories differed from that of Argentina, state makers in these countries also engaged with human rights practices in order to define and legitimize a new vision of social and political organization. This does not mean that official transitional justice policy was created from the bottom up, but rather that, as the next chapter will explain, the practices discussed in this chapter provide a framework and a reservoir of legitimacy that democratic state actors later found invaluable in their pursuit of state (re)formation.

<sup>2</sup>The existence of this professional field was confirmed by the 1995 publication of the proceedings of an earlier international conference of experts on the topic. The first-hand experience of Argentine and Chilean policy advisors was central to the subsequent formalization of transitional justice as a professional field. See Paige Arthur, 'How Transitions Reshaped Human Rights: A Conceptual History of Transitional Justice,' *Human Rights Quarterly* 31 (2009): 321–367.

## INSTRUMENTALIZATIONS OF HUMAN RIGHTS IN THE POST-WAR PERIOD

Human rights have been mobilized by a wide range of actors in their pursuit of political change. From early revolutionary Atlantic declarations of the rights of man that posited that citizens have inalienable rights with respect to their rulers to the creation of the 1948 Universal Declaration on Human Rights, whose framers declared universal rights irrespective of citizenship, many who have sought to extend the membership and benefits of an imagined political community have mobilized a language of natural or universal rights to pursue their goal. The developers of the Universal Declaration, for example, saw it as a blueprint for future forms of political community and citizenship, influenced by a post-War euphoria for internationalism and transformed notions of citizenship.<sup>3</sup> In the 1960s newly decolonized states in Africa and Asia used the Universal Declaration to challenge power and claim political space, demanding that the United Nations implement measures for ensuring the principles contained within it. By pushing to make the guarantees in the document truly universal they claimed a place at the international table.<sup>4</sup> But the post-War period also saw mobilizations of human rights as a way of protecting the interests of groups and individuals *against* change. In Western Europe, for example, British conservatives championed human rights laws as a way of protecting key aspects of their political agenda from the social democratic governments that were on the rise around them.<sup>5</sup> Differing and contradicting uses and mobilizations of human rights can even be seen occurring at the same time and place. While dissidents in the Soviet bloc during the 1970s used the concept to criticize their governments on issues of civil and political

<sup>3</sup>Mark Philip Bradley, 'Approaching the Universal Declaration of Human Rights,' in *The Human Rights Revolution: An International History*, ed. Akira Iriye, Petra Goedde, and William I. Hitchcock (Oxford: Oxford University Press, 2012), 327–343.

<sup>4</sup>Roland Burke, *Decolonization and the Evolution of International Human Rights* (Philadelphia: University of Pennsylvania Press, 2010).

<sup>5</sup>Marco Duranti, *The Conservative Human Rights Revolution: European Identity, Transnational Politics and the Origins in the European Convention* (Oxford: Oxford University Press, 2017).

rights, the Soviet government highlighted the affinity between their own Constitution and the Universal Declaration, particularly its articles relating to social, cultural and economic rights.<sup>6</sup>

The expansion of the number of groups and individuals embracing and mobilizing human rights that occurred in the second half of the twentieth century, then, brought with it a proliferation of interpretations of what exactly human rights meant and how to go about achieving them. The goals of the different actors that have embraced and instrumentalized human rights have been different, even conflicting, and the contexts in which human rights have been invoked have differed widely, producing competing meanings of the concept. This multiplicity of interpretations, mobilizations and contestations has, in turn, forged the very meaning of the term, giving it a core understanding that prioritizes the rights of people(s) rather than the rights of states and sovereigns. While authoritarian actors have at times engaged in a cynical embrace of human rights with the purpose of legitimizing themselves and deflecting criticism and sanction, for the most part political actors engage with human rights because it provides a framework for the realization of their particular ideal political community, one in which the rights of the individual are protected against abuse by the state.

### *Ways of Instrumentalization: The Mobilization of Information*

With the rise of human rights as a framework or political platform came the development of new contentious practices, strategies and ways of working that were articulated in terms of human rights and designed to enact political change. Some of these were judicial in nature, with the creation of international law as well as international and regional human rights courts for upholding this law. The creation of these bodies was driven by lawyers but also shaped by the wishes of sponsoring states, producing outcomes that reflected the political context of their creation. In the Americas in particular the political priorities of many states in the region, which at the time included numerous authoritarian regimes,

<sup>6</sup>Jennifer Amos, 'Embracing and Contesting: The Soviet Union and the Universal Declaration of Human Rights, 1948–58,' in *Human Rights in the Twentieth Century*, ed. Stefan-Ludwig Hoffmann (Cambridge: Cambridge University Press, 2012), 147–165.

meant that efforts by jurists to strengthen the mandate of the Inter-American Court of Human Rights failed at the moment of its creation.<sup>7</sup> Those looking to develop ways to enforce human rights-related change in state behaviour instead sometimes found more success in developing practices designed to shape this behaviour indirectly, through influencing foreign policy in the United States and through targeting what they called ‘global public opinion.’

Information and data played a central role in both the shaping of US foreign policy and the influencing of global public opinion. While representations, either in the form of stories or images, had long been key to creating a sense of empathy necessary for mobilizing concern about victims of rights violations, in the 1960s and 1970s information became a tool for attempting to bring about an end to violations themselves.<sup>8</sup> This data was qualitative, with exile testimonies before congressional committees, as well as increasingly quantitative, measuring the degree to which states complied with new international norms. Both governmental and non-governmental actors collaborated in the collection of information, producing a series of human rights censuses in which the behaviour of states towards their own citizens was made legible.

The rise of information practices in the Americas had its roots in African engagements with the United Nations (UN). Information gathering had been a key tactic of the African bloc during the 1960s in their struggle to censure the apartheid regime in South Africa. This bloc had first attempted a judicial route towards their goal, turning to the International Court of Justice, but when this failed they began to push the UN to engage in information gathering and dissemination activities with the aim of galvanizing international opinion to bring about the end of apartheid.<sup>9</sup> In 1967 the UN Human Rights Commission, at

<sup>7</sup>Thomas Buergenthal, ‘Remembering the Early Years of the Inter-American Court of Human Rights,’ *New York University Journal of International Law and Politics* 37, no. 2 (2005): 262.

<sup>8</sup>Lynn Hunt argues that as early as late eighteenth century printed materials were used to create an ‘imagined empathy’ between subjects of rights. *Inventing Human Rights: A History* (New York: W. W. Norton, 2007), 32. Mark Philip Bradley discusses the impact of literature on shaping a human rights culture and consciousness in US in the 1970s: ‘American Vernaculars: The United States and the Global Human Rights Imagination,’ *Diplomatic History* 38, no. 1 (2014): 16–20.

<sup>9</sup>Ryan M. Irwin, *Gordian Knot: Apartheid and the Unmaking of the Liberal World Order* (Oxford: Oxford University Press, 2012), 141–146.

the urging of the African bloc, authorized the first Special Commission of Experts to investigate and report on human rights violations in the Southern African region.<sup>10</sup> In 1968 Jamaica urged the UN to expand and institutionalize these monitoring and reporting activities, while in the same year a meeting of international NGOs in Paris developed a blueprint for human rights action that emphasized fact-finding in order to inform diplomacy and policy as well as to influence global public opinion.<sup>11</sup> Information about human rights violations was seen to have a political power that human rights law did not yet possess.

International NGOs were also engaging in monitoring and reporting, with Amnesty International publishing their first research report on conditions in particular countries in 1966. To make this report they drew on sources such as legislation, parliamentary transcripts and prison regulations, as well as interviews with community members when conditions allowed it.<sup>12</sup> Following the 1968 meeting of international NGOs in Paris these kinds of monitoring activities became increasingly linked to outcomes in the realm of policy and public opinion, particularly in the United States. As Raymond Gastil from the NGO Freedom House argued, ‘a recurrent American policy has been to go to the aid of other countries ... But this policy can hardly be implemented if we cannot distinguish convincingly the more free from the less free states, particularly in the Third World.’<sup>13</sup> This enmeshing of human rights and foreign policy saw the further development of understandings of human rights as state and non-state actors worked together on pursuing political change. Freedom House itself, for example, worked closely with Washington policy makers during the 1970s pushing for both a clear policy focus on political and civil rights, as opposed to economic and social rights, as well as a strong monitoring regime focused on Soviet compliance with these rights.<sup>14</sup>

<sup>10</sup>Steven Jensen, *The Making of International Human Rights: The 1960s, Decolonization, and the Reconstruction of Global Values* (Cambridge: Cambridge University Press, 2016), 176.

<sup>11</sup>*Ibid.*, 189, 199.

<sup>12</sup>Amnesty International, *Prison Conditions in Rhodesia*. AFR 46/001/1966 (August 1966).

<sup>13</sup>Raymond D. Gastil, *Freedom in the World: Political Rights and Civil Liberties* (New York: Freedom House, 1980), 3.

<sup>14</sup>Carl J. Bon Tempo, ‘From the Center-Right: Freedom House and Human Rights in the 1970s and 1980s,’ in *The Human Rights Revolution: An International History*, ed. Akira Iriye, Petra Goedde, and William I. Hitchcock (Oxford: Oxford University Press, 2012), 229–232.

Ruptures and changes in the domestic political environment created the conditions for this convergence of state and non-state interests within the United States. Human rights provided a way to conceptualize a way forward following the fundamentally destabilizing experience of the Vietnam War, which finally drew to a close in 1975. Human rights appealed at this juncture precisely because of the concept's flexibility: it could be used by liberals and conservatives alike to make sense of the world and to articulate a way for the United States to change it, functioning as a new moral imperative for the country.<sup>15</sup> Older motivations like anti-communism were losing popularity, with even conservative policy advisors such as Samuel Huntington arguing for a 'new formulation of interests and purpose – a new ideology – to replace that of anti-communism, which has lost both its validity and utility.'<sup>16</sup> Human rights had already seen an upsurge in international interest thanks to activism and reporting around developments such as the Greek military junta.<sup>17</sup> This upsurge led the concept to catch the eye of both state and non-state actors looking to reconfigure their political identity and their understanding of ways to achieve political change. Throughout the decade of the 1970s, the United States consolidated its identity as a superpower by moving definitively towards a foreign policy based on a self-image of justice crusader, drawing on human rights as the moral-political basis of this new policy and new identity.<sup>18</sup> Of course, the United States was not the only state to embrace human rights within its foreign and domestic policy at this time. But for Latin America, it was the most consequential.

Following the wave of military coups across South America in the 1970s, investigatory efforts on the part of northern state and non-state actors intensified. Amnesty International carried out missions in each

<sup>15</sup>Barbara Keys, *Reclaiming American Virtue the Human Rights Revolution of the 1970s* (Cambridge, MA: Harvard University Press, 2014); Mark Philip Bradley, *The World Reimagined: Americans and Human Rights in the Twentieth Century* (Cambridge: Cambridge University Press, 2016).

<sup>16</sup>Samuel Huntington, 'Preface,' in *Engines of Change: United States Interests & Revolution in Latin America*, ed. George Lodge (New York: Knopf, 1970), vii.

<sup>17</sup>Barbara Keys, 'Anti-torture Politics: Amnesty International, the Greek Junta and the Origins of the Human Rights "Boom" in the United States,' in *The Human Rights Revolution: An International History*, ed. Akira Iriye, Petra Goedde, and William I. Hitchcock (Oxford: Oxford University Press, 2012), 201–221.

<sup>18</sup>Daniel J. Sargent, *A Superpower Transformed: The Remaking of American Foreign Relations in the 1970s* (Oxford: Oxford University Press, 2015).

country shortly after the military took over. Following the 1973 coup in Chile, for example, they produced a report that described the country, until then widely admired for its democratic embrace of socialism, as essentially an open-air torture site.<sup>19</sup> Those involved in the collection of this information then went on to testify before US congressional committees established by individuals within government interested in reviewing and reshaping foreign policy. These committees found their origins in both the anti-Vietnam War movement, which had produced congressional investigations into the issue of US military assistance, and in the work of NGOs who called for investigations into the link between US policy and aid, and state repression and violence in places like Brazil.<sup>20</sup> Those who testified used the opportunity provided by these hearings to argue that the nature of what was occurring in their home countries transcended conceptions of sovereignty and therefore was of interest and importance to the rest of the world.<sup>21</sup> Exiled Argentine lawyers used their legal expertise to make the same sorts of arguments when they came before the congressional committees.<sup>22</sup> And, as activists were given the ear of congressional bodies, they worked to improve their collection of information, both to better influence the politicians as well as to capitalize on and further develop the momentum of human rights activism that was generating in response to South American developments.<sup>23</sup> Some focused their presentation of information on demonstrating the connection between the violent acts that were occurring and previous US foreign policy as a way of providing evidence to support the argument for a change in foreign policy.<sup>24</sup>

<sup>19</sup>Patrick William Kelly, 'The 1973 Chilean Coup and the Origins of Transnational Human Rights Activism,' *Journal of Global History* 8 (2013): 172–176.

<sup>20</sup>William Michael Schmidli, *The Fate of Freedom Elsewhere: Human Rights and US Cold War Policy Toward Argentina* (Ithaca: Cornell University Press, 2013), 61–63; James N. Green, *We Cannot Remain Silent: Opposition to the Brazilian Military Dictatorship in the United States* (Durham: Duke University Press, 2010), 238–239.

<sup>21</sup>Kelly, 'The 1973 Chilean Coup,' 174; Schmidli, *The Fate of Freedom Elsewhere*.

<sup>22</sup>Lynsay Skiba, 'Shifting Sites of Argentine Advocacy and the Shape of 1970s Human Rights Debates,' in *The Breakthrough: Human Rights in the 1970s*, ed. Jan Eckel and Samuel Moyn (Philadelphia: University of Pennsylvania Press, 2014), 113–116.

<sup>23</sup>Schmidli, *The Fate of Freedom Elsewhere*, 64.

<sup>24</sup>Green, *We Cannot Remain Silent*, 240–244.

Information was also central to the practices of international organizations and transnational networks concerned with human rights.<sup>25</sup> Within the UN, member states pushed for action on places like Chile, putting forward resolutions condemning the junta and establishing an ad hoc working group to monitor developments in the country.<sup>26</sup> Ultimately, however, it was NGOs rather than member states themselves that used the information they had collected on countries such as Chile to push for censure of the regime within the international body.<sup>27</sup> By the 1970s human rights had become the dominant way of talking about new political developments, from détente to the rise of state-sponsored repression and the disappearance of victims, ‘a way of storytelling about the human condition,’ as Steven Jensen phrased it, as well as a way of articulating efforts to shape and improve that condition.<sup>28</sup>

### INFORMATION PRACTICES AND HUMAN RIGHTS DEMANDS IN LATIN AMERICA

Information also became a key element within grassroots opposition practices in the Southern Cone countries themselves. However, these grassroots practices initially took a very different form from those circulating in the transnational sphere. In Argentina, for example, following the 1976 coup that brought the military government of the *Proceso de Reorganización Nacional* (National Reorganization Process) to power, a group of women developed an informal network as they repeatedly encountered each other on their search for their missing children. This search led them, as a first point of contact, to police stations, where it was assumed information could be provided about apprehended persons. This information was always refused. In 1977 these women formed the group the *Madres de Plaza de Mayo* (Mothers of the Plaza de Mayo) and

<sup>25</sup>What has been termed the Helsinki Network, for example, was established to monitor human rights across the Soviet bloc in the context of détente. See Sarah B. Snyder, *Human Rights Activism and the End of the Cold War: A Transnational History of the Helsinki Network* (Cambridge and New York: Cambridge University Press, 2011).

<sup>26</sup>Jan Eckel, “‘Under a Magnifying Glass’: The International Human Rights Campaign Against Chile in the Seventies,” in *Human Rights in the Twentieth Century*, ed. Stefan-Ludwig Hoffmann (Cambridge: Cambridge University Press, 2011), 324.

<sup>27</sup>Jensen, *The Making of International Human Rights*, 239–240.

<sup>28</sup>*Ibid.*, 238.

began to gather in the Plaza de Mayo, the central square in downtown Buenos Aires, where they would walk in pairs around a public monument, carrying signs asking for information about their disappeared children. These information practices were tactical on a number of levels. Information requests made in the central square allowed the group to publicly challenge the regime whilst remaining outside of any reasonable definition of subversion. When president General Jorge Videla stated that anyone who tells the truth need not fear repercussions, the Madres published an advertisement in national newspaper *La Nación*, asking ‘Where are our children? All we ask is the truth!’, accompanied by the name of 136 disappeared family members.<sup>29</sup> The practice of demanding information fed into the assumption, held by wider society, that the state was supposed to know what was going on within its territory and have control over it.<sup>30</sup> By asking the state for information which it was unwilling or unable to provide, they exposed the lack of control and, by extension, lack of legitimacy enjoyed by the regime.

Information was not the only contentious practice Argentine groups used to oppose the dictatorship and stop the repression. They also challenged the state through the legal system. Groups whose membership comprised lawyers, such as the *Asamblea Permanente de Derechos Humanos* (Human Rights Permanent Assembly), had focused on collecting witness statements and preparing habeas corpus demands in the courts since their formation in 1975: in the period 1976–1979 there were 5487 such writs presented in the capital alone.<sup>31</sup> While not a single one of these demands resulted in the presentation of a prisoner, a by-product of the process was that it allowed them to start compiling detailed information on the repression which they could then use against the regime. Much like in the international context, then, the lack of opportunities to pursue legal avenues led to an emphasis on information, which groups like the *Asamblea* used in turn to push the state to comply with its legal obligations. In August 1977 they issued a letter to de facto President Videla via the media requesting action on the numerous

<sup>29</sup> *La Nación*, December 10, 1977.

<sup>30</sup> Sebastian Carassai, *The Argentine Silent Majority: Middle Classes, Politics, Violence, and Memory in the Seventies* (Durham and London: Duke University Press, 2014), 160–168.

<sup>31</sup> Comisión Nacional sobre la Desaparición de Personas (CONADEP), *Nunca Más: Informe de la Comisión Nacional sobre la Desaparición de Personas* (Buenos Aires: Eudeba, 1984), 317.

habeas corpus requests filed by families of disappeared persons that had not been acted upon.<sup>32</sup> Judicial practices and information practices thus became entwined. This practice of publicizing legal work and presenting cases before the court of public opinion drew upon past practices: in the 1930s the first Argentine group to use the concept of human rights, the *Liga Argentina por los Derechos del Hombre* (Argentine League for the Rights of Man), had also worked in such a way.<sup>33</sup> While they were lawyers, the members of both the *Liga* and the *Asamblea* were also activists, leading them to apply their professional training to the development of new practices in pursuit of their political goals.

The process of gathering this information also proved useful in developing an analysis of the regime itself and its repressive methods. As members of the *Asamblea* worked on collecting statements, the magnitude as well as the logic of the repression became increasingly evident. Based on the information gleaned through the filing of cases and talking with families of the disappeared, some individuals began to articulate the thesis that the repression, far from being random, was part of a deliberate, institutionalized plan attributable to the state. This idea was not entirely new: as early as 1977 certain media outlets such as the English-language *Buenos Aires Herald* began to run editorials warning that ‘one day the government will have to account for what has happened. It will not be able to convince its critics that the disappeared and the dead were inevitable consequences of war.’<sup>34</sup> Many knew that the disappearances were occurring at the hands of the state security forces, but without concrete evidence it remained unclear exactly how and why they were occurring. With the information collected, however, activists were able to confidently assert that it was the regime itself, rather than individual rogue agents, which was responsible for the disappearances, structurally engineering them as well as physically perpetrating them.

<sup>32</sup> *El País*, August 13, 1977.

<sup>33</sup> Skiba, ‘Shifting Sites of Argentine Advocacy,’ 109.

<sup>34</sup> *Buenos Aires Herald*, August 14, 1977. The *Buenos Aires Herald* is an English language newspaper, and was therefore afforded greater scope in what it could say than the Spanish-language press.

*From Information About the Disappearances  
to Information About the Regime*

In 1980 a number of members of the *Asamblea* created a new organization, the *Centro de Estudios Legales y Sociales* (Centre for Legal and Social Studies), in order to pursue strategies informed by this analysis.<sup>35</sup> Through professional links, these individuals had become the principal Argentine contacts for two investigative missions conducted by international legal groups in 1979, one by the New York City Bar Association and the other by the Washington-based Centre for Legal and Social Studies. From observing the organizational style of these missions the lawyers were inspired to create the *Centro de Estudios* in Argentina, where they adopted their North American peers' approach to collecting and systematizing information in their efforts to back up their thesis regarding the regime's responsibility for the repression. Their contacts also gained them access to US diplomatic circles and to development funding.<sup>36</sup> This financial support allowed them to begin producing research-based analyses of the repression in which they argued that 'these operations follow a model and are subject to norms dictated to personnel in minute detail.' They found that their investigations 'confirmed the thesis of the responsibility of the Government of the Armed Forces in the disappearance of many thousands of Argentine citizens and the existence of a hierarchical system of repression that, although clandestine and parallel to the regular system, is no less official and is subordinate to the command of the highest military authorities.'<sup>37</sup> While it had long been understood that the security forces were responsible for the disappearances, this conclusion went even further and asserted that they were the result of orders given by the highest levels of the military command. This then focused future efforts on the regime itself.

<sup>35</sup>Emilio F. Mignone, *Derechos Humanos y Sociedad: El Caso Argentino* (Buenos Aires: Ediciones del Pensamiento Nacional, 1991), 108–109.

<sup>36</sup>Iain Guest, *Behind the Disappearances: Argentina's Dirty War Against Human Rights and the United Nations* (Philadelphia: University of Pennsylvania Press, 1990), 212.

<sup>37</sup>Centro de Estudios Legales y Sociales, 'El secuestro como método de detención,' Pamphlet, no date.

The *Centro de Estudios*' transnational connections did not just result in a one-way transfer of political resources; it facilitated the mutual development of information practices. Connections provided the Argentine organization with financial and technical resources to develop its information gathering and dissemination, and the organization then provided labour that shaped international information-gathering initiatives. Using their contacts within the New York Bar Association and the International League for Human Rights, the *Centro de Estudios* organized a visit to Argentina by the Inter-American Commission for Human Rights. For the Commission, the Argentine visit marked a turning point within their own monitoring activities. Although the practice of in-country visits had begun in 1961 with a visit to the Dominican Republic, the framework for investigations was piecemeal. This lack of pre-defined structure led the Commission to rely heavily on the assistance of local partners for the design and planning of the investigation.<sup>38</sup> This in turn allowed the *Centro de Estudios*, the local partner in the Argentine visit, to structure the investigation around their thesis regarding the regime's involvement in the disappearances, rather than just around the disappearances themselves. In order to do this, their methodological design focused on what they called 'paradigmatic cases,' cases that attributed the disappearances to the military regime. From the wealth of documentation held by the *Asamblea* they selected 300 paradigmatic cases; from these they identified fifty for further investigation. During the in-country visit in September 1979 they oversaw the collection of a further 600 testimonies, but they mainly relied upon the selected paradigmatic cases to inform the conclusions of the report.<sup>39</sup>

The report concluded that 'disappeared persons [are those that are] understood to have been apprehended in operations ... which involved the participation of state authorities'. This was the first time that the Inter-American Commission had produced such a strong verdict against one of its member states, identifying the state itself as directly responsible for the violations investigated.<sup>40</sup> This conclusion helped to demonstrate the independence of the Commission vis-à-vis its member states, establishing

<sup>38</sup>Tom Farer, 'Presentation,' Colloquium for the 30-Year Anniversary of ICHR Visit, Ministerio de Relaciones Exteriores, Buenos Aires, September 2009.

<sup>39</sup>Mignone, *Derechos Humanos y Sociedad*, 112.

<sup>40</sup>Comisión Interamericana de Derechos Humanos, *Informe sobre la situación de derechos humanos en la Argentina*, April 11, 1980.

its legitimacy as a regional watchdog willing to act, in the words of a former commissioner, as a “hemispheric grand jury” storming around Latin America to vacuum up evidence of high crimes and misdemeanours.<sup>41</sup> Perhaps more important, however, it positioned the authoritarian state as the violator of rights, the starting point for the delegitimization of the military’s claim to be in control of the state. From this moment onwards, whereas previously the state was called upon to meet its responsibilities and provide information, human rights discourse was used to demonstrate the illegitimacy of the military state, setting the stage for eventual regime change.

### AFTER THE COMMISSION: FROM INFORMATION ABOUT VIOLATIONS TO THE STRUGGLE OVER THE MEANING AND IMPACT OF INFORMATION

The aim of information practices or politics is, according to Margaret Keck and Kathryn Sikkink, to ‘move politically usable information quickly and credibly to where it will have the most impact.’<sup>42</sup> The nature of the impact that human rights-related information will have, however, is not predetermined. In terms of the Inter-American Commission visit, some have argued that its impact was objectively positive as its constrained state behaviour was pointing to the decline in the numbers of disappearances starting from the date on which the visit was authorized.<sup>43</sup> Others, such as historians Marcos Novaro and Alejandro Avenburg, argue that, initially at least, the Commission visit actually provided a space for those opposed to human rights politics, such political parties, the press, the Church and business and professional organizations, to publicly re-emphasise the mantra of the war against subversion and the necessity of the *Proceso* in safeguarding Argentina.<sup>44</sup> Indeed, immediately after the departure of the Commission the regime began attempting to shape the impact of the

<sup>41</sup>Tom Farer, ‘The Rise of the Inter-American Human Rights Regime: No Longer a Unicorn, Not Yet an Ox,’ *Human Rights Quarterly* 19 (1997): 512.

<sup>42</sup>Margaret E. Keck and Kathryn Sikkink, ‘Transnational Advocacy Networks in International and Regional Politics,’ *International Social Science Journal* 51, no. 159 (1999): 95.

<sup>43</sup>Kathryn Sikkink, *Mixed Signals: US Human Rights Policy in Latin America* (Ithaca: Cornell University Press, 2004), 114, 115.

<sup>44</sup>Marcos Novaro and Alejandro Avenburg, ‘La CIDH en Argentina: Entre la democratización y los derechos humanos,’ *Desarrollo Económico* 49, no. 193 (2009): 82. The War against Subversion was the way that the *Proceso* legitimized its coming to power: the need to combat subversion and therefore save the Argentine state.

information produced, repeatedly insisting that ‘terrorist groups, hiding behind a campaign supposedly on behalf of human rights, are destroying [our] country’s social and economic structure.’<sup>45</sup> The ability to establish legitimacy vis-à-vis their opponents was key to being able to shape the impact of the information that was circulating, and they chose to invoke the nation in their struggle to do so. Claiming a privileged connection to the nation the regime argued that the Commission visit, and any other human rights-related critique, was part of an international ‘anti-Argentina’ campaign, a reference to the challenge to sovereignty that human rights claims were seen to represent.<sup>46</sup> The *Centro de Estudios* fought back, placing an advertisement in one of the major national newspapers that explained the Commission’s visit as ‘a fraternal presence in the name of the same values and principles that oversaw our emergence as a free and sovereign nation,’ invoking the Universal Declaration on Human Rights as an example of those values.<sup>47</sup> Both the regime and its opponents sought to legitimize themselves by attaching themselves to competing visions of the nation; this legitimacy would allow them to control the impact of the information the Commission’s visit had produced.

The military regime had actually begun as early as 1976 to try to control what was said about them by allowing Amnesty International to conduct its in-country mission. Eager to avoid the fate of Chile and South Africa, both of which had received strong condemnation in the international community related to their human rights record, the generals saw a need to be proactive in regards to the increasing international attention on human rights, which would allow them to have the upper hand in controlling how they were portrayed. Similarly, they had envisaged the Inter-American Commission visit as an opportunity to secure international support for their own explanatory framework for the violence, the idea of the War against subversion.<sup>48</sup> They saw support for this framework as an essential precondition for an opening of the political system

<sup>45</sup>Quoted in Oscar Troncoso, *Proceso de Reorganización Nacional: Cronología y documentación*, vol. 2 (Buenos Aires: Centro Editor de América Latina, 1988), 68.

<sup>46</sup>Guest, *Behind the Disappearances*, 110.

<sup>47</sup>*La Prensa*, September 2, 1979.

<sup>48</sup>Another key factor in convincing the military to extend an official invitation to the Inter-American Commission was more coercive: it was made a condition of the approval of a \$270 million loan from the Import–Export Bank, as well as the restoration of US government aid which had been stopped in 1978 due to the regime’s human rights record.

and a return to civilian rule, as then the historical legacy of their state project would be assured.<sup>49</sup> The ability to control the content of human rights-related information was therefore key to controlling the memory of the *Proceso* and, by extension, the values of the post-authoritarian order. In neither the Amnesty International visit nor that of the Commission, however, was the regime successful in controlling the outcomes of the investigation. Faced with these critical reports they began the process of discrediting both organizations to try to control the impact of the information, denouncing the existence of an international ‘anti-Argentine’ campaign.

Controlling the impact of information was particularly crucial at the time of the Inter-American Commission visit and final report, as this coincided with the beginning of the liberalization of the political order in Argentina. In 1979 the military announced the successful completion of the war against subversion and the commencement of a new phase of their project, the *Dialogo Político* (Political Dialogue), which would lead to an eventual return to civilian rule. This political opening was supposed to allow the regime to negotiate with political parties and therefore control the democratization process, but when combined with the revelations and the language of the Inter-American Commission report, it began to have an impact totally in contrast to what the regime wanted. Human rights activists began to take a more combative approach, targeting their dissemination of information to key actors. When the regime suppressed the publication of the testimonies that made up a large part of the Inter-American Commission report, the *Centro de Estudios* smuggled 500 copies of the prohibited material into the country, distributing them among influential journalists, politicians, judges, and leaders of religious, social and cultural groups. They also managed to make a further 1000 copies of individual sections of the report.<sup>50</sup> Bolstered by this direct action and by the delegitimizing effect of the report’s contents, other groups also began to make more assertive strides. In 1981 the *Madres de Plaza de Mayo* declared the first public demonstration since the 1976 coup in celebration of the fourth anniversary of their formation.<sup>51</sup> At the same time, they also began to advance the demand

<sup>49</sup>Novaro and Avenburg, ‘La CIDH en Argentina,’ 66–70.

<sup>50</sup>Mignone, *Derechos Humanos y Sociedad*, 111.

<sup>51</sup>Héctor Ricardo Leis, *El Movimiento por los derechos humanos y la política argentina/1* (Buenos Aires: Centro Editor de América Latina, 1989), 21.

for '*aparición con vida*' (return [of the disappeared] alive). The demand, which began as '*con vida los llevaron, con vida los queremos*' (they took them alive, we want them back alive), was first used in 1980, and over the following years it became one of the key slogans of the *Madres* and the rest of the domestic human rights movement.<sup>52</sup> It directly built upon the thesis that the regime was responsible for the disappearances, moving beyond demanding information to demanding the victims themselves. This slogan built on earlier, more formal practices of filing habeas corpus writs, which also demanded the presentation of the prisoner and, by implication, pointed to the state as the body responsible for that prisoner's disappearance. A key difference, however, was that with *aparición con vida* there was no longer presumed to be any legal order within which the state was acting, and to which activists could turn. Direct action took its place instead.

Finding themselves in a position where they were unable to deny that the disappearances had occurred at their own hands, the military focused on attempting to negate the thesis that the repression was part of a centralized plan by advancing the new concept of 'excesses.' They had begun to advance this notion during the Inter-American Commission's visit, arguing that 'one of the causes of disappearance is "excesses or abuses in repression"... According to these authorities, during this "war", excesses may have been committed in the repression of subversion that resulted in the disappearance of persons.'<sup>53</sup> The narrative of excesses reemphasized the existence of a war against subversion while arguing that the disappearances which occurred within that war were isolated external incidents. But the narrative of excesses failed to gain traction. The military's inability to completely control the meaning of information was accompanied by an increasing inability to control the use of public space, as throughout 1981 more and more people began to defy the ban on public demonstrations and take to the streets. Large demonstrations against the *Proceso* were held in April, May and October, attracting larger and larger crowds, particularly following the reactivation of the trade union movement

<sup>52</sup>In 1979 the military passed the Ley de Fallecimiento Presunto por Desaparición (Presumed Death by way of Disappearance law). This law established presumption of death in the case of 'a person who has disappeared from their home or place of residence, and of whom there is no news,' as was passed as a response to the Inter-American Commission report.

<sup>53</sup>Comisión Interamericana de Derechos Humanos, *Informe sobre la situación de derechos humanos en la Argentina*, April 11, 1980.

around the same time.<sup>54</sup> On March 30, 1982 a massive demonstration called by the *Confederación General del Trabajo* (General Assembly of Labour, CGT) saw workers alongside human rights groups protesting the political social and economic situation; days later the military made a final move to control the political conversation by invading the Falkland/Malvinas Islands, a South Atlantic territory claimed by both Argentina and Great Britain, but occupied for over a century by the former.

The decision to launch military action and reincorporate the islands aimed at ensuring military control over the memory of the *Proceso de Reorganización Nacional* as a state project. As the editor of the magazine *Convicción*, a close affiliate of the Argentine navy, stated, ‘if as well as having won the war against terrorism, the Malvinas are recuperated, the *Proceso* will be distinguished by these events and history will forgive the clumsy mistakes it made.’<sup>55</sup> But while initial reactions to the war were positive for the regime, when the Argentine forces declared their retreat after only ten weeks of combat the floodgates were opened for an explicit discussion of the failings of the regime more generally.<sup>56</sup> These discussions came to focus on the issue of the disappeared. Media reports talked of a ‘power vacuum’ as the military failed to respond to the ‘three fundamental issues to emerge from the crisis: the external debt, the conclusion (or not) of the conflict with Great Britain and its allies, and those disappeared during the “dirty war”.’<sup>57</sup> The issue of the disappearances was seen as the most urgent, with critical commentators observing that ‘if there are disappeared, then there must be *disappearers*.’<sup>58</sup> The narrative of excesses had failed to shape the way that the repression was remembered and to prevent the emergence of alternative narratives that focused on the perpetrators; in fact it had inadvertently highlighted their existence through saying that they should not be held responsible for what they had done. Talk soon spread about the question of responsibility. The magazine *Humor* argued that ‘we have to talk about the *desaparecidos*. It doesn’t matter who gets dirty. Police and military personnel who have been excessive in their use of repression must pay for

<sup>54</sup>María Sonderéguer, ‘Aparición con vida. El movimiento de derechos humanos en Argentina,’ in *Los movimientos sociales/2. Derechos Humanos. Obreros. Barrios*, ed. E. Jelín (Buenos Aires: Centro Editor de América Latina, 1985), 19–20, 22.

<sup>55</sup>*Convicción*, January 27, 1982.

<sup>56</sup>Federico Guillermo Lorenz, ‘La Necesidad de Malvinas,’ *Puentes* 20 (2007): 11.

<sup>57</sup>*Humor* 89 (1982): 30.

<sup>58</sup>*Humor* 90 (1982): 32.

these human rights violations with prison ... a government of the people does not deserve to inherit the scum of the military government.'<sup>59</sup> This talk of what would happen to the perpetrators under a new democratic order increased after the military announced at the end of 1982 that elections would be held in November the following year, allowing for the amplification of a demand that had been floating around amongst the human rights groups for some time but that had, until this point, lacked clarity: the demand for legal justice.

Judicial measures had previously been referred to in the Inter-American Commission report, which recommended that 'regarding those deaths that have been attributed to the public authorities and their agents, corresponding investigations should be opened and those responsible for these deaths be tried and sanctioned with the full force of the law.' Activist groups subsequently began to debate the idea, with not all organizations and individuals in favor of the proposition.<sup>60</sup> Arguments against centered on the idea that strategically it was best not to push the armed forces too much by demanding more than information, in the form of truth, but following the Malvinas War, with the weakening of the military position, the demand for a judicial response became more prominent. From this moment onwards the slogan '*juicio y castigo a [todos] los culpables*' (Trial and punishment for [all] the guilty) began to dominate the human rights-based opposition movement.<sup>61</sup> The two versions of this slogan, one emphasizing all perpetrators, the other more open, reflected the lack of clarity on who exactly was to be considered culpable: the intellectual architects of the repression within the highest levels of command, or the material perpetrators of the violence? Unlike with the development of information practices, within the transnational human rights network there was less of a tradition of judicial processing of human rights violators which local activists and organizations could draw on to develop a concrete strategy. Domestically, most previous legal work had focused on habeas corpus writs, which focused on the victim. Regionally, while the Inter-American Commission on Human

<sup>59</sup> *Humor* 89 (1982): 31.

<sup>60</sup> Elizabeth Jelín, 'La Política de la Memoria: el movimiento de derechos humanos y la construcción democrática en la Argentina,' in *Juicio, Castigos y Memorias: Derechos humanos y justicia en la política argentina*, ed. Carlos H. Acuña et al. (Buenos Aires: Ediciones Nueva Visión, 1995), 120.

<sup>61</sup> *Ibid.*

Rights had been granted the power to investigate state behavior in 1965, subsequently developing its investigatory practices through direct experience, the Inter-American Court for Human Rights only began its work in 1979 after the American Convention on Human Rights entered into force the year prior. While other regional human rights legal systems such as the European Court existed for much longer, providing an example of a judicial human rights structure, the violations occurring in that region were of a substantially different nature to those in Latin America, and judicial practices in Europe were more focused on the right to a fair trial or freedom of expression than large scale disappearances or extrajudicial killings.<sup>62</sup> With no precedent for judicial practices within the transnational sphere, and little time to develop concrete strategies locally, justice remained a demand without a corresponding plan for action.

The first legal response to the violations actually came from the regime itself. Despite the lack of concrete strategies for achieving justice on the part of the human rights movement, the prospect of judicial action frightened the military, which moved to protect itself. The generals' first move was to shift attention back to the demand for information by providing what they claimed to be a definitive account of their time in government, and of the political violence that had occurred during it. This document, the *Documento final de la junta militar sobre la guerra contra la subversión y el terrorismo* (Final Statement of the Military Junta regarding the war against subversion and terrorism) reaffirmed the idea of the war against subversion and gave an answer the question of what happened to the disappeared. The Documento stated that while 'in all armed conflicts it is difficult to give complete details,' many of those named in lists presented by human rights organizations were either terrorists killed in conflict or had gone into exile.<sup>63</sup> With this line of defense they positioned themselves not as violators of the human rights of the disappeared but as defenders of the rights of those left behind, arguing that 'this historical account [presented in the Documento] of a painful past is a message of faith, a message for justice and for the right to life. The moment has come to concern ourselves with the future ... the actions [of the terrorists],

<sup>62</sup>David Harris, 'The Regional Protection of Human Rights: The Inter-American Achievement,' in *International Human Rights in Context: Law, Politics, Morals, 3rd edition*, ed. Henry J. Steiner, Philip Alston, and Ryan Goodman (Oxford: Oxford University Press, 2007), 1027.

<sup>63</sup>Proceso de Reorganización Nacinal, 'Documento Final de la junta militar sobre la guerra contra la subversión y el terrorismo' (April 1983): 10, 11.

designed to paralyse the population, were characterized by a permanent and indiscriminate violation of the most fundamental human rights.<sup>64</sup> The Argentine junta's claim that it was in fact they who acted to protect human rights was echoed by their Chilean counterpart, Augusto Pinochet, who presented his regime as the inheritor of a long tradition of human rights in its work to save the country from the Marxist threat.<sup>65</sup> In their interpretation, human rights were intimately connected to the viability of the nation, which they as an institution existed to protect.

In Argentina the Documento Final was followed with a self-Amnesty, a direct attempt to neutralize any judicial form of the demand for justice. This law was designed to place the armed forces beyond the reach of any other authority, proclaiming that 'nobody can be interrogated, investigated, summoned to appear or imputed on suspicion of having committed a crime' during the period of military government.<sup>66</sup> This attempt to pre-empt any judicial processing, however, sparked a more forceful turn towards it on the part of activists. In Argentina they held public demonstrations where they chanted slogans presenting the self-Amnesty as equal to immunity for repression, rather than as a tool for reconciliation (the name of the self amnesty law referenced national pacification, or reconciliation and peace-making). They demanded instead 'justicia, lucidez, dignidad' (justice, clarity, dignity).<sup>67</sup> Yet while the demand for justice intensified in the face of the self-Amnesty, a lack of clarity remained on what that actually would mean in practice.<sup>68</sup> As late as the September 1983 *Marcha de Resistencia* (Resistance March), human rights groups articulated justice in vague terms that focused less on it as a concrete practice, describing it instead as 'a concept based in ideas of equality, respect and defense of the sacred rights of the people.'<sup>69</sup> This lack of clarity would later become evident in the struggles over transitional justice following the return to civilian rule in December 1983.

<sup>64</sup>Ibid., 1, 2.

<sup>65</sup>Eckel, 'Under a Magnifying Glass,' 330.

<sup>66</sup>Ley 22.924, 'Ley de Pacificación Nacional: Medidas políticas y normativas tendientes a sentar las bases de la definitiva pacificación del país,' *Boletín Oficial de la República Argentina*, September 27, 1983.

<sup>67</sup>Sonderéguer, 'Aparición con Vida,' 27.

<sup>68</sup>Jelín, 'la Política de la Memoria,' 120.

<sup>69</sup>*La Razón*, September 22, 1983.

### *Information Practices Across the Southern Cone*

The emergence of new opposition strategies that drew on the concept of human rights could also be seen in neighboring countries across South America. As in Argentina, these new strategies were characterized by a focus on the production of information, and were facilitated by transnational links between local actors and others located mainly in the United States and Europe. Even though in Argentina information served a particular purpose in combating the secrecy of the practice of disappearance and the professed lack of knowledge on the part of the state, in other contexts where disappearance was less widespread information was also deployed as a powerful tool for shaping global public opinion and pressuring the regime to account for its actions. In Chile one of the principal groups active in the defense of victims of the regime was the *Vicaría de Solidaridad* (Vicariate of Solidarity), which embraced the concept of human rights in its work. Alongside other groups like the *Comisión Chilena de Derechos Humanos* (Chilean Human Rights Commission) the *Vicaría* produced regular bulletins on the human rights situation in Chile, which were then distributed among and used by international journalists and organizations in their work on the country.<sup>70</sup> International actors were particularly interested in the Chilean case, and the Pinochet regime had been a target of international human rights campaigning since its early days in September 1973. Multiple organizations sent investigatory missions, including the Inter-American Commission for Human Rights, Amnesty International, and the United Nations, which also operated more broadly as a forum for sustained international diplomatic pressure, adopting numerous resolutions and creating an ad hoc working group focused on the country.<sup>71</sup> The production and dissemination of information about the violations of the Pinochet regime fed the growing network of groups and individuals across the world concerned with human rights in Chile, while in turn this growing network contributed to the production and dissemination of even more information.<sup>72</sup>

<sup>70</sup>Barahona de Brito, *Human Rights and Democratization in Latin America*, 115.

<sup>71</sup>Eckel, 'Under a Magnifying Glass,' 325.

<sup>72</sup>*Ibid.*, 339.

In both Uruguay and Brazil, the practice of disappearance was even less widely employed than in Chile; nevertheless the publication of information about cases of torture was still used as a strategy for exposing the regimes' methods and for reclaiming public space. In Uruguay international organizations conducted fact-finding missions while exiled political actors testified in front of bodies such as the US Congress' Committee for International Relations.<sup>73</sup> Exiles were particularly important actors, working with organizations in the United States to bring the Uruguayan issue to the attention of bodies like the Inter-American Commission.<sup>74</sup> In Brazil various groups and individuals came together under the *Comissão Arquidiocesana da Pastoral dos Direitos Humanos e Marginalizados* (Pastoral Archdiocesan Commission for Human Rights and Marginalized People) where they worked to create links with international organizations in order to amplify their protest. Monitoring and reporting became the central method for resisting and opposing dictatorship across the region, linking local actors with their transnational counterparts in the process.

The information gathering and dissemination work of these organizations and activists often served both truth and justice purposes. In Brazil, for example, the military regime passed an amnesty law on August 29, 1979 that covered both the armed and security forces as well as others accused of political crimes. This law allowed exiles to return to the country and those imprisoned by the regime to apply for release, providing the pretext for lawyers and activists to request copies of official records relating to prisoners. Through these records requests individuals such as Paulo Evaristo Cardinal Arns, Archbishop of São Paulo and Presbyterian minister Jaime Wright, working in collaboration with the World Council of Churches, directed a project to amass detailed information on the treatment of detainees, including explicit accounts of torture. They made clandestine copies of this documentation, eventually compiling it into the

<sup>73</sup>Ferreira Aldunate of the Partido Blanco (National Party) testified in Washington in June 1976, while Zelmario Michelini of the political party Frente Amplio (Broad Front) had previously testified at the Russell Tribunal in Rome in March 1974. International organizations that visited included the International Commission of Jurists in November 1974, Amnesty International in December 1975, the US Bar Association in May 1978, and the Red Cross in 1979.

<sup>74</sup>Vania Markarian, *Left in Transformation: Uruguayan Exiles and the Latin American Human Rights Network, 1967–1984* (London and New York: Routledge, 2005), 120–126.

publication *Brasil: Nunca Mais* (Brazil, Never Again), drawing on the title of the 1984 Argentine truth commission in their dissemination of information about the regime's practices.<sup>75</sup> Judicial processes required paperwork, which could then be used for truth-telling purposes. In Chile, as in Argentina, the majority of documentation produced by local activists was in the form of habeas corpus writs, which were later used by international organizations and local initiatives as an inventory of repression.

In Uruguay, the question of retributive justice was entangled with the question of amnesty. Whereas in other contexts Amnesty was used exclusively to talk about the military indemnifying itself for crimes committed in Uruguay, as in Brazil, the large number of political prisoners meant that amnesty held broader appeal. Uruguayan exiles working with judicial organizations began to talk about amnesty in the late 1970s, using the term to mean release of political prisoners, as well as the reappearance of the disappeared and the lifting of civil and political restrictions and the re-establishment of democracy. All key organizations both within Uruguay and in exile supported this call, although there were some key disagreements over the implications it might have for calling the military to account.<sup>76</sup> While groups such as the Uruguayan branch of the *Servicio Paz y Justicia* were successful in pushing the political parties to include references to the need for truth and justice measures in their statements during the elections, following the return to civilian rule these issues were taken off the table.<sup>77</sup> The call for justice for the military actions in particular had never developed as a strong demand within Uruguay, while the protracted negotiations and discussions that characterized the Uruguayan transition meant that more combative demands along these lines failed to develop in the final years of the regime.<sup>78</sup>

Information and judicial practices were not the only responses that local actors developed in the face of authoritarianism. In Chile, for example, cultural events were organized by groups like the *Vicaría de Solidaridad* to promote the idea of human rights. There were also important

<sup>75</sup>See Laurence Weschler, *A Miracle, a Universe: Settling Accounts with Torturers* (Chicago and London: University of Chicago Press, 1990), 10–22 for an account of this process. The documents were published as Paulo Evaristo Cardinal Arns, ed., *Brasil: Nunca Mais* (São Paulo: Arquidiocese de São Paulo, 1987).

<sup>76</sup>Markarian, *Left in Transformation*, 135–137.

<sup>77</sup>Barahona de Brito, *Human Rights and Democratization*, 80.

<sup>78</sup>The terms of the Uruguayan transition began to be discussed from 1980 onwards, with formal talks between the military and political parties occurring in 1984 and 1985.

international actions carried out in opposition to the Pinochet dictatorship that framed their action in terms of solidarity rather than human rights per se.<sup>79</sup> In Argentina numerous protests erupted over economic issues, with the trade union movement organizing the biggest public demonstration since the coup on 30 March 1982. But as the next chapter will discuss, it was the human rights-based demands of truth and justice that were embraced by aspiring state makers, who married the demands of the human rights movement to their own belief that democratization could be achieved through a formal reckoning with the past.

### THE GENESIS OF TRANSITIONAL JUSTICE

Human rights activists across the Southern Cone and internationally engaged in information practices in order to stop current human rights violations. As the 1974 Amnesty International report on Chile stated, the hope was that ‘it will provide a factual basis for a continuing program of assistance to the victims of the coup and for what is equally urgent, a renewed campaign of international pressure upon the Chilean government to restore human rights in Chile.’<sup>80</sup> Broader structural questions of democratization and regime change were not necessarily the object of human rights information practices at this time. It would take the arrival of new actors specifically interested in democratization and transformation in political culture to instrumentalize human rights in their search for a new, stable political order.

For these new democratizing actors to be able to emerge, however, changes were necessary within the military regimes and their hold on power. In Argentina, the first Southern Cone country to return to civilian rule and embrace human rights practices at the level of the state, the breakdown of the authoritarian project following the Malvinas/Falklands War created the conditions for the rise of democratizing political actors. As the next chapter will discuss, within a few years of the Inter-American Commission visit, the Argentine authoritarian state experienced a crisis so profound that the regime was forced to call elections well in advance of its planned schedule for stepping down from power. This context of transition,

<sup>79</sup>Vicaría de Solidaridad, ‘Documentos Oficiales del Simposium Internacional de Derechos Humanos,’ Fundación de Documentación y Archivo de la Vicaría de Solidaridad, November 22–25, 1978; Alison J. Bruey, *Bread, Justice and Liberty: Grassroots Activism and Human Rights in Pinochet’s Chile* (Madison: University of Wisconsin Press, 2018).

<sup>80</sup>Amnesty International, *Chile: An Amnesty International Report* (London: Amnesty International Publications, 1974), 5.

in which the armed forces and their political project had lost all legitimacy, differentiated the Argentine case from its neighbors. In Argentina in particular, democratic state makers faced the question of how to (re)build the legitimacy of the state and (re)shape the political order after military rule. Those who assumed responsibility for answering this question, political parties and other state actors such as their advisors, were concerned about the repressive actions of the dictatorship but were also concerned with the more procedural question of how to bring about democracy following authoritarianism. They desired to create a new political culture that would ensure that the past would never again repeat itself. This desire led them to look to others for inspiration on how to do this. Those others were, overwhelmingly, the human rights activists and organizations that had been responding to the military regime throughout its rule.

In this chapter, I have concentrated on showing the development of these opposition practices themselves, in order to show the basis for future transitional justice policies. I began by charting the broader history of human rights, noting how following the Second World War the concept began to be used as a platform or framework by a wide range of actors from across the political spectrum. Human rights appealed to both state and non-state actors, and to both conservative and progressive forces, as they sought a way to frame their particular political goals. It is above all this plurality that has characterized the instrumentalization of the concept since 1945. The period following the demise of authoritarian rule in Latin America has been no different. As the rest of this book will demonstrate, both state and non-state actors from a range of political backgrounds came to use human rights as a way of articulating their demands regarding the authoritarian past and its legacy within the present. For democratic state makers, this became transitional justice, the application of human rights-related initiatives designed to deal with the authoritarian past, with the ultimate goal of strengthening and consolidating the democratic order. Transitional justice, as the instrumentalization of human rights, is part of this longer history of human rights.

Throughout this history of human rights different actors have engaged the concept in different ways as they pursue their goals. In this chapter, I examined the emergence, in the late 1960s and early 1970s, of information practices, the use of information about human rights violations to produce political change. In the context of developing international networks and organizations and the emergence of a sense of a global civil society, this information was used to produce a

change in state behavior, either by shaming the regime into changing or, more often, by influencing others to place pressure on that regime. This mobilizing of information as a way of acquiring political power and achieving international goals in the face of state sovereignty became what Margaret Keck and Kathryn Sikkink called the ‘quintessential human rights methodology’ during the 1970s and beyond, in part because of a lack of enforceable international law that could have facilitated the development of human rights judicial practices.<sup>81</sup> As the reach and impact of these information practices grew, so did their precision, organization, and professionalism, as activists gained further experience and saw the potential impact of their work increase. Transnational actors worked to target their information to influence policy, particularly in the US, as well as to shape international public opinion and awareness about the situation in South America. At the same time, a different set of information practices developed domestically among activists opposing the military regime on the ground. They used information to challenge the regime and to chip away at its legitimacy, while also funneling this information out to the transnational level to support policy-shaping processes.

By the time of the South American transitions in the 1980s the practice of information politics was well developed, with actors working locally, regionally within the Inter-American system, and internationally within the US Congress, mobilizing information about the regime to create a context in which the regime would no longer be able to engage in repression against its own citizens. The rise of information practices within the broader field of human rights activism was due to the nature of new human rights actors as well as their particular political goals. Transnational NGOs such as Amnesty International pursued their aim of shaping global public opinion by transmitting information via media and communications channels that were themselves undergoing a revolution in reach and accessibility. For Amnesty International, of course, their ultimate goal was to put pressure on states to change their human rights—violating behavior, and international public opinion was envisaged as shaping, in turn, the foreign policy of relevant nation-states such as the United States. Political changes and ruptures within the United States itself led to an increased desire to see foreign policy revamped within the framework of human

<sup>81</sup>Margaret Keck and Kathryn Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics* (Ithaca and London: Cornell University Press, 1998).

rights, leading policy-makers to seek out information to assist them in this change. Information coming from in-country reports as well as directly from individuals with in-country experience such as exiles became the principal tool in this process. Particularly in Argentina the demand for truth also became a central way of articulating opposition to the regime domestically, challenging the dictatorship while still affording a degree of protection from outright repression.

Information and truth were not the only focus of human rights activists in their efforts to oppose the dictatorships. Many lawyers and organizations interested in international law participating in the transnational human rights network and judicial practices such as filing habeas corpus writs formed the backbone of opposition and victim support work. Particularly as military regimes attempted to protect themselves from possible future legal implications by passing self-amnesties, many activists developed the counter-demand that there be justice for the violence and repression experienced. Justice, however, remained murky as a demand with little comprehensive agreement on what it would mean in practice. It would take the return to civilian rule and the subsequent issue of needing to establish the authority of the civilian state to allow concrete proposals for justice to flourish. It is to this process that we will now turn.

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## CHAPTER 3

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# The Official Story: Truth and Justice as Transition and Transformation

Students of world literature know the writer Jorge Luis Borges as the grandfather of magical realism.<sup>1</sup> On 22 June 1985, Borges listened as a man related his own story, a story whose premise was beyond Borges' own imagination. In this story, the man had been held prisoner for four years. Along with several others, he was subjected to daily beatings, whippings, taunts, torture. His routine was one of handcuffs, shackles, dungeons, the electric cattle prod. Under torture, he had given up the names of his political associates; they soon joined him in captivity. One year, on 24 December, *Nochebuena*, he and his fellow prisoners were herded into a room they had never been inside of before. In the room there was a large table, set out for an equally large feast, with tablecloths, porcelain plates, cutlery and bottles of wine. Then the food began to arrive. Delicious, extravagant food the likes of which they had not seen in quite some time. The prisoners sat down to eat, welcomed to the table by the head of the guards who encouraged them to enjoy themselves. It was Christmas dinner. Tomorrow they would go back to being tortured, and the guards would go back to torturing. But for this one moment,

<sup>1</sup>Portions of this chapter were previously published as 'Post-authoritarian State Formation in Argentina: Transitional Justice as the Accumulation of Symbolic Power,' *Journal of Historical Sociology* 30, no. 3 (2017): 496–517. They are republished under the terms of CC BY 4.0.

the normal rules were suspended and for the prisoners, it was as if they had entered a magical inversion of reality.

He told this story in a calm, measured tone that made Borges, Argentina's master storyteller, feel like he himself was in that prison. It was a story that the writer would later attempt to free himself from, would hope to forget.<sup>2</sup> As Borges listened to this story, around him judges, defense lawyers and journalists furiously scribbled notes, in contrast to the audience members who sat still in silence, some stunned, some vindicated by what was being said. Borges was in attendance at the testimony of Victor Melchor Basterra, one of the 833 witnesses for the prosecution in the *Juicio a las Juntas*, the trial conducted soon after the return to civilian rule against those responsible for the repression during the *Proceso de Reorganización Nacional*. This trial was conducted only a handful of years after the events it bore witness to had occurred, but there was a feeling that it was happening in a completely different Argentina. This chapter is about the efforts to construct this new Argentina.

When an individual with links to the human rights movement won the 1983 elections, the state became a site for the guarantee and protection of rights, rather than the violation of them. Looking at this moment and the policies that followed, it is easy to see it as a period of 'democratic enthusiasm,' where state and civil society actors came together in spontaneous coalition and worked in unison, albeit not in perfect harmony, reconstructing democratic community through action around human rights.<sup>3</sup>

Raúl Alfonsín, the first post-*Proceso* president, institutionalized many of the human rights-related demands that had emerged during the dictatorship as a central part of his efforts to establish civilian state rule after authoritarianism. In doing so Alfonsín enacted a transitional justice policy well before such a thing began internationally circulating policy advice for democratizing countries. He drew on the practices of civil society human rights activists but the result was not simply an authentic expression of dictatorship-era opposition demands. Rather his government selected certain human rights practices that fit with its own vision for political order and incorporated them into official state policy, creating a program of transitional justice.

<sup>2</sup> *Clarín*, July 31, 1985.

<sup>3</sup> Inés González Bombal, '1983: El Entusiasmo Democrático,' *Agora*, no. 7 (1997): 147.

Searching for a way to rebuild the state around an adherence to the rule of law and a rejection of anti-democratic political practices, Alfonsín and his advisors theorized that the sanction of the previous regime could provide a vehicle for the kind of change in mentality, as well as change in structure, needed to achieve this goal. This led him to look towards the human rights movement, which as we saw in the previous chapter had been working with others to sanction the authoritarian regime for many years. Drawing on the demands and practices of this human rights movement, he developed what later became known as transitional justice policy. In this chapter, I take a new look at this process, employing the theoretical perspective of state formation to explain the relationship between human rights, transitional justice and democratic reconstruction. I show how Alfonsín expanded the state into one of the most important areas of social and political life, human rights, through this incorporation and co-option of the practices of dictatorship-era human rights groups. Through this process the state accumulated symbolic capital, or legitimacy, establishing the centrality of the civilian state in the new, post-authoritarian order. This process was both successful and had unexpected consequences. As I also showed in the previous chapter, there were important ambiguities and differences in human rights demands and practices during the dictatorship, especially in the lead-up to the transition. These ambiguities and differences were amplified, rather than overcome, following the return to civilian rule. And while Alfonsín came from within the human rights milieu and had developed a theoretically informed analysis of the problems in Argentine political history, his transitional justice policy was also surprisingly ad hoc and towards the end of his presidential tenure he found himself responding to the demands of others rather than exerting authority and control over political developments. The enthusiasm of the immediate transition helped to create a favorable environment for democratic state formation, but this feeling did not last. The process of selecting certain practices and incorporating them into official state policy functioned to assert the presence of the state in one of the most important areas of social and political activity, human rights, building the symbolic capital of the state, but it also plunged Alfonsín into a process of negotiation with other actors that he struggled to control. This chapter, and this book as a whole, argues that this conflict and struggle became a central feature of democratic state formation in Argentina and elsewhere in Latin America in the late twentieth century.

This chapter focuses primarily on the immediate post-transition period when the main elements of Alfonsín's transitional justice policy were enacted, the national truth commission investigation and the trial of the military juntas. I begin the chapter with the decline of the power of the authoritarian state, which occurred following a failed military intervention in the South Atlantic in mid-1982. Coinciding with this decline, new political actors were emerging within the traditional parties, looking to reformulate old approaches to politics. It was this new political force, led by Alfonsín, which won the 1983 elections. In this section I account for the politics of the Alfonsín project, focusing on the analysis of Argentine society and of authoritarianism proposed by his key advisors, and on their ideas around democratic transition. This analysis and these ideas led them to develop a transitional justice program to achieve their goal of transforming Argentine politics. In the next section I look at the design and implementation of this transitional justice program. In particular, my focus is on analyzing this program for the way in which it worked to accumulate symbolic capital on the part of the state. I look at two main initiatives, the official investigation into the disappeared and the trial of a selected group of perpetrators. The truth commission drew on the information practices and the demand for truth that had developed throughout the years of the *Proceso*, both locally and internationally. Alfonsín incorporated both the practice of producing information on human rights violations, as well as the actual labor of human rights activists themselves, to produce what was to be an authoritative version of the authoritarian past. In doing so, he incorporated an important area of social and political life into the state, strengthening the latter and asserting its authority to engage in these practices and to structure them. I then look at how Alfonsín responded to the call for justice with a trial of the architects of the violence and repression. As with the truth commission, the trial of the former military government embraced civil society demands and transformed them into state policy, bringing the issue of justice into the domain of the state. It also saw the dramatic assertion of civilian jurisdiction over the military, bringing the armed forces themselves under democratic control. This was a bold move towards reforming historical patterns, symbolically asserting the authority of the civilian state over the political process in Argentina.

Complementing the focus on Argentina I then look at transitional justice at the moment of transition across the Southern Cone. No two

experiences were exactly alike, and in places like Uruguay and Brazil, while there had been strong human rights-based opposition during the dictatorship that also developed information practices, there was less desire to create a completely new type of political order on the part of incoming state makers. This meant that human rights practices were not transformed into official transitional justice policy as in Argentina. In Chile, however, President Aylwin did desire to create a new political culture that was distinct both from the authoritarian regime that immediately preceded it and from the democratic period prior to the coup. He drew on information practices as well as the labor of the human rights groups to create a truth commission. This brief comparative glance at the broader regional context strengthens our understanding of how dictatorship-era human rights action provided an important source of legitimacy for democratic state makers, while also remaining attuned to the fact that these state makers embraced human rights and engaged in transitional justice for a particular reason. Both Alfonsín and Aylwin wanted to create something new, leading them to embrace popular human rights practices in their construction of transitional justice. This provides a complement to studies of transition that emphasize the institutional constraints upon newly democratic governments and how these determine transitional justice outcomes. Constraints are of course important, as they are part of the context, and in Chile for example trials did not form part of transitional justice policy partly because of the strong institutional role of the military. But while constraints can help explain paths not taken, they don't fully explain the path that *was* chosen. By demonstrating the strong links between official transitional justice policy and the history of human rights activism we can understand why the former took the shape it did. An account of the construction of transitional justice that highlights its roots in human rights activism also highlights the way that this policy entwines the state with social actors, producing new socio-political relations. Transitional justice in the cases explored in this chapter was not simply a product of constraints and opportunities; it became a forum for ongoing negotiation between different social and political forces as democratization unfolded.

Overall in this chapter, I sketch out the idea that transitional justice was used to shape and legitimize post-authoritarian states. Following the transition the state engaged in the instrumentalization of human rights and justice initiatives, becoming the central player in the process of resignifying the meaning of the authoritarian past, and using this resignified

meaning to bolster the construction of a new order.<sup>4</sup> State actors made decisions to incorporate and modify existing practices and transform them into a transitional justice program based on their own political preferences. As sociologist Elizabeth Jelín warns us, while governments ‘took as their own the principles and demands of the human rights movement, [they did not take] all the demands, and not in a comprehensive manner.’<sup>5</sup> Decisions were made about which demands and initiatives to adopt, modify or abandon, and both conflict and cooperation were features of the transitional period. With this in mind, this chapter focuses on these conflicts, and these moments of cooperation, as the central dynamics in democratic state formation. Through this process of conflict and cooperation with others, state actors established the centrality of the state as the arbiter of justice and as the author of the transition. They built the state’s legitimacy and the right to rule through these engagements with others. The state, previously the perpetrator of events like the ones that stunned Borges, was now reclassifying them and sanctioning them. This chapter is about the dynamics of this shift.

#### TRANSITION FROM MILITARY RULE AND THE TRANSFORMATION OF POLITICAL IDENTITIES

In the previous chapter, we saw how the visit of the Inter-American Commission on Human Rights bolstered local groups, who began to act more defiantly and employ various oppositional discourses and strategies. The ability of the military to keep political space closed through the threat of coercion was waning. But while cracks in the military project had begun to develop before 1982, it was not until after the conflict with the British over the Malvinas/Falkland islands that it truly fell into crisis. In that year the *Proceso* decided to act on a long-standing claim the Argentine state had made over the islands, which had been under British jurisdiction since 1833. Throughout the short-lived conflict, the military

<sup>4</sup>Hugo Vezzetti, *Pasado y Presente: Guerra, dictadura y sociedad en la Argentina* (Buenos Aires: Siglo XXI, 2003).

<sup>5</sup>Elizabeth Jelín, ‘La Política de la Memoria: el movimiento de derechos humanos y la construcción democrática en la Argentina,’ in *Juicio, Castigos y Memorias: Derechos humanos y justicia en la política argentina*, ed. Carlos H. Acuña, et al. (Buenos Aires: Ediciones Nueva Visión, 1995), 125.

deceived the public by perpetuating the idea that the Argentine forces were triumphing, when in reality they were suffering increasing losses in a clearly unwinnable conflict. When defeat was announced, the failed venture that had been designed to rouse national unity instead resulted in an irrevocable rupture on the legitimacy of the *Proceso* as a state project, acting as a fulcrum for a series of issues that had begun to plague the regime.

The elections that were announced soon after the defeat in the South Atlantic, then, occurred within a context characterized by two main features. Firstly, the military government suffered a symbolic loss of power. The incident in the Malvinas had shown the military state was unable to control territory that it claimed as Argentine, while the massification of opposition on the human rights issue delegitimized their use of repression. This symbolic loss of authority provoked an ‘organic crisis’ of the military state, a structural, multi-layered crisis that could not be resolved within the current structure.<sup>6</sup> Second, and as a result of the first, civil society, especially the dictatorship-era human rights groups, became the new political protagonists. Their legitimacy and strength came from the fact that, unlike the political parties, who had been content to negotiate with the military on the question of an eventual pacted transition, these groups had consistently challenged the legitimacy of the military’s claim to rule and its use of coercive capital.<sup>7</sup> Within this context, the new civilian president, Raúl Alfonsín of the *Unión Cívica Radical* (Radical Civic Union), began the task both of shaping democracy and of re-establishing the state’s right to rule. He did this through pursuing a series of policies that drew on the demands and repertoires of the civil society groups that had actively opposed the dictatorship throughout the recent years.

### *The Unión Cívica Reconfigured*

The *Unión Cívica* pursued the reshaping of the state through the embrace of popular practices represented a major shift in the party’s political praxis and identity. The reasons for this shift can be found in changes that had been underway within the party since the 1960s. The *Unión Cívica* had formed towards the end of the nineteenth century with a platform that

<sup>6</sup>Ernesto Laclau and Chantal Mouffe, *Hegemony and Socialist Strategy: Towards a Radical Democratic Politics* (London: Verso, 1985), 136.

<sup>7</sup>Gonzalez Bombal, ‘El Entusiasmo democrático,’ 149.

emphasized the extension of civil and political rights to the local middle classes.<sup>8</sup> Throughout the twentieth century, despite their liberal democratic credentials, the party developed a relationship with the military characterized if not by active collaboration then by strategic alliance, facilitated by a shared belief in the developmental state as a driver of politics. During the 1960s, however, dissident factions within the party developed a critique of the strong state model and the uneasy alliance with the military that it implied, particularly in light of the experience of repeated military dictatorship and bureaucratic authoritarianism. This faction called for social democracy, rather than a state-led path to development.

Following the 1976 coup this faction, while still subordinate to the developmentalists within the party, began to criticize the military government for their lack of respect for individual rights and due process and for the political deactivation of civil society. Raúl Alfonsín, a lawyer from the province of Buenos Aires, brought his experiences and ideas as a founding member of the *Asamblea Permanente de Derechos Humanos* to his position as the faction's leader. While party leader Ricardo Balbín clashed with activist organizations over the question of the *desaparecidos* (he had declared them dead during an appearance on Spanish television, antagonizing those who demanded their return, alive) Alfonsín maintained a close and active position vis-à-vis the human rights and anti-dictatorship movement through his work with the *Asamblea*. Following the death of Balbín in 1981 the party as a whole saw in Alfonsín the potential to reconfigure itself and to capture the political momentum of the human rights movement. He was therefore installed as leader for his capacity to represent the demand for change, a deliberate decision to move away from the traditional identity of the party.<sup>9</sup> When the conflict in the Malvinas arose, it was Alfonsín's chance to demonstrate this changed *Unión Cívica*, and he criticized the legitimacy of the mobilization in the South Atlantic. Following the defeat by the British and the *Proceso's* loss of political legitimacy, this critical distance from the military and the alignment with the human rights movement helped to define Alfonsín and the Radical party as a force capable of articulating a political alternative. Subsequently the *Unión Cívica* contested the elections with a campaign that presented the party as the only force

<sup>8</sup>The classic history of the Unión Cívica is David Rock, *Politics in Argentina, 1890–1930: The Rise and Fall of Radicalism* (Cambridge: Cambridge University Press, 1975).

<sup>9</sup>Vezzetti, *Pasado y Presente*, 132.

capable of ensuring a clear-cut dividing line between democracy and authoritarianism.<sup>10</sup> Their election campaign made numerous references to the issue of human rights, especially the right to life. But, while alluding to the repression of the *Proceso*, the campaign was also sufficiently generic, promoting political values in a more general sense rather than directly addressing the violations that had occurred or the *desaparecidos*. Ending of the violations of the past was tied to the idea that the transition was to be a clear-cut shift in political culture. Slogans such as ‘more than an electoral exit, it’s the entrance to life’ conveyed the idea that these elections were the beginning of a new democratic era, where rights and wellbeing sprung from the ballot box.

So while the *Unión Cívica* won the election with 51.75% of the primary vote, they did not do so exclusively as a result of their engagement with human rights, and certainly not because of any alignment with the demands for *justicia y castigo* of the human rights movement. Immediately after the vote, however, this became the central focus of the executive branch under Alfonsín. Once in power, he incorporated the demands of the human rights movement into the program of the state itself.

### TRANSITIONAL JUSTICE: HUMAN RIGHTS AS STRUCTURAL AND CULTURAL CHANGE

In the previous chapter, I showed how activists both within Argentina and internationally used human rights to pursue their political goals during the dictatorship. Following the election, the Alfonsín government joined them, using human rights practices to pursue the goal of democratic state formation. While Alfonsín himself had previously been active within the civil society human rights field, at least nominally, his election to the presidency saw him begin to conceptualize the relationship between human rights and government. He began to talk about human rights as a normative end goal, arguing that ‘the basic justification for a political organization is the promotion of human rights; a government

<sup>10</sup>To underscore this, they accused the Peronist opposition of political collusion with the military, an accusation that received widespread coverage in the lead-up to the ballot. See Sebastián Barros, *Orden, Democracia y Estabilidad. Discorso y política en la Argentina entre 1976 y 1991* (Córdoba: Alción Editora, 2002), 73–113.

is thus morally illegitimate if its actions are not so aimed.’<sup>11</sup> In a ‘natural’ or universal reading of human rights, he saw rights as naturally occurring; the role of the state was to facilitate the enjoyment of these pre-existing rights. In the case of Argentina, removing barriers to the enjoyment of rights meant addressing deep-seated historical patterns. Rather than being faced with a return to democracy, Alfonsín saw that the country had never fully developed a democratic state, leading him to investigate the factors that had historically prevented this democracy from emerging. Since the beginning of the 1980s he had been consulting with a variety of intellectuals, academics and technocrats in order to formulate his position on these matters, and many of these individuals were incorporated into the structures of government and his cabinet following the election. Alfonsín’s Foreign Affairs minister, Dante Caputo, and his Education Minister, Jorge Sábato, for example, were not members of the *Unión Cívica* but instead came from an organization called the *Centro de Investigaciones sobre el Estado y la Administración* (Center for Investigation into State and Administration), a policy NGO that had formed out the Argentine left *intelligencia* in 1974. These two had also been Alfonsín’s principal speechwriters during the campaign.<sup>12</sup> Also prominent in his group of consultants was a pair of lawyers whom he had engaged to work as his advisors on the political philosophy of human rights and justice. These *filósofos* (philosophers), Jaime Malamud Goti and Carlos Nino, concurred with Alfonsín’s emphasis on the importance of constructing a culture of human rights and respect for the centrality of the law.

According to these *filósofos*, Argentina’s lack of a democratic history and the political violence that occurred under the *Proceso* were connected. There were, according to Nino, ‘four recurrent characteristics [within Argentine history] that help explain the widespread violation of human rights’ during the *Proceso*: ideological dualism, corporatism, anomie, and the concentration of power.<sup>13</sup> Anomie, Durkheim’s conceptualization of the lack of harmony between the interests of the people and

<sup>11</sup>Quoted in Carlos Nino, ‘The Human Rights Policy of the Argentine Constitutional Government: A Reply,’ *Yale Journal of International Law* 11 (1985): 218.

<sup>12</sup>Josefina Elizade, ‘La participación política de los intelectuales durante la transición democrática: El Grupo Esmerelda y el presidente Alfonsín,’ *Temas de historia argentina y americana* 15 (2009): 62.

<sup>13</sup>Carlos Nino, *Juicio al Mal Absoluto: Los fundamentos y la historia del juicio a las juntas del Proceso* (Buenos Aires: Emecé, 1997), 80.

those of the state and the resulting lack of legitimacy on the part of the latter, was seen to be deeply rooted in the political history and culture of Argentina. Nino saw that ‘the tendency towards illegality and the failure to comply with social norms ... [is] a legacy of the colonial period, when local officials frequently proclaimed “here the law is observed but it is not upheld”.’<sup>14</sup> He pointed to evidence of this tendency in narrative representations of national identity such as José Hernández’ *Martín Fierro*, in which the hero, a *gaucho*, deserts the army and lives on the margins of society, fighting against the establishment in pursuit of a better life.<sup>15</sup> Nino also pointed to the long history of military intervention in the judiciary and the subsequent Supreme Court sanctioning of laws enacted by de facto governments as clear examples of the prevalence of this tendency within Argentine history to accept and even authorize the illegal.<sup>16</sup> Identifying anomie as the primary historical factor preventing the consolidation of democratic hegemony, Alfonsín and the *filósofos* set about to implement a transitional justice program designed to shift the mentality of Argentine society. For this, the practices of the dictatorship-era human rights groups proved invaluable.

Nino, Malamud Goti, and Alfonsín were also connected to a group of scholars and policy makers who were starting to think about the question of how to bring about democratization following periods of authoritarianism. In the late 1970s a group of scholars interested in political processes in the region came together to create the Latin America Program at the Woodrow Wilson Centre, housed at the University of Notre Dame in the United States. Their purpose was to engage in ‘policy-relevant work that could inform “opinion-leaders”,’ mainly in the sphere of US–Latin American relations.<sup>17</sup> This program spawned a key initiative relating to democratization and the South American region: the transitions project, which gathered together political scientists interested in theorizing the process of democratization. The transitions project saw individuals such as Argentine Guillermo O’Donnell, Brazilian Fernando Henrique Cardoso, and Chilean Manuel Antonio Garretón work together to devise

<sup>14</sup>Ibid., 84. See also Emile Durkheim, *Suicide: A Study in Sociology*, trans. John A. Spaulding and George Simpson (London: Routledge, 2002).

<sup>15</sup>José Hernández, *Martín Fierro* (La Habana: Casa de las Americas, 1979 [1872]).

<sup>16</sup>Nino, *Juicio al Mal Absoluto*, 84–85.

<sup>17</sup>Nicolas Guilhot, *The Democracy Makers: Human Rights and the Politics of Global Order* (New York: Colombia University Press, 2005), 139.

a theoretical model for the transition to democracy that was informed by their experience of socio-political struggle and authoritarian responses in their home countries, emphasizing the role of political elites in negotiating between conflicting institutional actors to achieve democratic outcomes.<sup>18</sup> Part of this negotiation would involve settling past accounts (such as human rights violations) without endangering the transition itself, but there was no hard and fast rule for how this could be done. While at times, they argued, it may seem that ‘it is better (or at least more prudent) just to bury the past and get on with the future ... this risks provoking justifiably indignant reactions, which may prove more difficult to cope with than the specter of a possible coup.’<sup>19</sup> The ideas of the transitions project shaped the broader intellectual milieu of people like Nino and Malamud Goti, particularly as they started to come together with others to formalize the policy prescriptions that would become transitional justice in Argentina.<sup>20</sup> Alfonsín himself was connected to another initiative of the Latin America Program, the Inter-American Dialogue, which, while more formal than the transitions project, sought to advance many of the same ideas about democratization in the region.<sup>21</sup> The policies that they developed together reflected their attempt to address the historical problems of democracy in Argentina within the framework of these new ideas about democratization itself.

The first and most concrete policy proposal in this respect emerged in response to the military’s enactment of a blanket self-amnesty covering the events of the previous eight years of their rule, issued just before the handover of power. The self-amnesty presented the Alfonsín campaign with its first opportunity to formulate a response to the issue of

<sup>18</sup>See Guillermo O’Donnell and Philippe Schmitter, *Transitions from Authoritarian Rule: Tentative Conclusions About Uncertain Democracies* (Baltimore: Johns Hopkins University Press, 1986). While this volume was published in 1986, after the Argentine transition, it was based on the discussions within the transitions project at the end of the 1970s and beginning of the 1980s. While many who discuss this project agree on its emphasis on democracy as the product of elite negotiation and choice, O’Donnell himself later disagreed with this reading. See Guillermo O’Donnell, ‘Democratization, Political Engagement, and Agenda-Setting Research,’ in *Passion, Craft and Method in Comparative Politics*, ed. Gerardo L. Munck and Richard Snyder (Baltimore: Johns Hopkins University Press, 2007), 291–292.

<sup>19</sup>O’Donnell and Schmitter, *Transitions from Authoritarian Rule*, 30.

<sup>20</sup>Paige Arthur, ‘How “Transitions” Shaped Human Rights: A Conceptual History of Transitional Justice,’ *Human Rights Quarterly* 31 (2009): 348.

<sup>21</sup>Guillhot, *The Democracy Makers*, 140–141.

anomie. While the military spoke of the necessity of a *manto de olvido* (blanket forgetting) and his main opponent declared his intention to uphold the law if elected, Alfonsín saw that ‘no society can begin an era like that which we are about to commence on the back of such an ethical void ... There can only be justice.’<sup>22</sup> In repudiating the self-amnesty, Alfonsín showed himself to be attuned to the general sentiment of the population, with one survey finding that 55% of respondents saw the law as ‘very negative’ and a further 12% as ‘somewhat negative.’<sup>23</sup> Embracing the human rights groups’ demand for justice, Alfonsín made it clear that he did not intend to authorize the illegal.

Until now, while justice had been a widespread demand within the human rights groups it had lacked specific content. The military self-amnesty provided Alfonsín the opportunity to position the state in the role of protagonist, making concrete proposals for the realization of justice. ‘Faced with the document issued by the Military Junta,’ he announced, ‘it is necessary to formulate the following reflections ... The illicit acts committed during the repression should be judged by the Courts and not just by history; this Court will be the civilian court, the court of all Argentines.’<sup>24</sup> The self-amnesty provided the opportunity for Alfonsín, in his new capacity as presidential candidate, to instrumentalize the demand for justice and give it a concrete expression for the first time: *justicia* within the courts, *castigo* decided by civilian judges.

Following his official inauguration as president Alfonsín was able to announce his government’s human rights-related policies. Key among these was the derogation of the self-amnesty law, which opened the possibility of trials against the perpetrators of the repression. Others, such as the creation of the *Comisión Nacional sobre la Desaparición de Personas* (The National Commission on the Disappeared—CONADEP), which was to investigate the fate of the disappeared, incorporated the long-standing demand of the human rights groups for information. More than just addressing civil society demands, these policies co-opted and subsumed them, transforming them into official state policy and bringing them, therefore, under the discursive control of the state. In doing so they were rearticulated, giving

<sup>22</sup> *Clarín*, May 14, 1983.

<sup>23</sup> Inés González Bombal and Oscar Landi, ‘Los derechos en la cultura política,’ in *Juicio, castigos y memorias. Derechos humanos y justicia en la política argentina*, ed. Carlos Acuña et al. (Buenos Aires: Nueva Visión, 1995), 158.

<sup>24</sup> *La Razón*, May 3, 1983.

them new meanings that were supportive of the broader project of post-authoritarian state formation. The investigatory commission into the disappeared, for example, drew heavily on existing practices but at the same time made key modifications, transforming them in line with the ultimate goal of reaffirming the state's right to rule. This change did not occur without resistance, however. As the next section will show, throughout the trajectory of the commission, from its design, its operation and to its final report, Alfonsín was forced to interact and struggle with other actors in an effort to establish a canonical repository of information.

### FROM THE DEMAND FOR TRUTH TO A TRUTH COMMISSION

The very idea for an investigatory commission came from the *Proceso-era* activist groups, who demanded the establishment of a parliamentary commission that would document the repressive activities of the state. In a document released on the eve of the 1983 elections, they argued that 'the construction of a parliamentary commission of investigation with ample powers to determine political responsibilities coming out of the period of state terrorism, with the collaboration and guidance of the human rights organizations, is indispensable.'<sup>25</sup> The political nature of the investigation and of any sanctions enacted was of central importance to groups like the Madres de Plaza de Mayo. Meeting with the president in the first days of his mandate they urged him to 'submit all those responsible for the disappearance of thousands of people to a political trial' and that 'this issue be judged as a political one.'<sup>26</sup> They clearly linked an investigatory commission and the establishment of responsibility to a trial, but not to a legal trial, preferring instead an official political sanction coming from the legislative arm of the state.

Alfonsín, however, favored making CONADEP an independent body, arguing that 'the question of human rights transcends public power to include civil society and the international community.'<sup>27</sup> This became the first source of friction between the government and the human rights groups. Alfonsín attempted to incorporate them in the independent Commission, offering positions to Augusto Conte and Emilio Mignone, two of the founders of the *Centro de Estudios*

<sup>25</sup> *Diario de las Madres* 1, no. 3 (1985): 49.

<sup>26</sup> Quoted in Jelín, 'La Política de la Memoria,' 121.

<sup>27</sup> *Clarín*, December 16, 1983.

*Legales y Sociales* (Center for Legal and Social Studies), and to Adolfo Pérez Esquivel, another human rights activist who had been awarded the Nobel Peace Prize in 1980 for his activism in support of the victims of the *Proceso*. They all turned the offer down in protest over the independent nature of the final commission. Undeterred, Alfonsín appointed writer Ernesto Sábato to head the Commission, which also integrated high profile individuals from across social sectors beyond the human rights movement. The decree establishing the Commission charged it with ‘clarifying events relating to the disappearance of people,’ and in particular focusing on the whereabouts or fates of both the disappeared and of the children who were born to the disappeared while in detention, but not with the clarification of political responsibility, as the human rights groups had initially wanted. This limitation meant that not all dictatorship-era groups supported the Commission in its operations: the *Madres de Plaza de Mayo* refused to collaborate, restating their insistence that what was needed was an investigation into the perpetrators, not the victims.<sup>28</sup> Alfonsín found that achieving consent for his modifications to long-standing popular demands was more difficult than expected, with many human rights groups reluctant to cede the authority to decide on the shape of the investigation to the state.

Other human rights organizations, however, while initially disagreeing with the independent nature of the commission, agreed that it was more important to try to make the most of the commission as it stood, and so offered access to the wealth of information on disappearances they had collected throughout the years of dictatorship. As a result, while Pérez Esquivel and Mignone had refused positions on the Commission board, many of the dictatorship-era human rights organizations and activists provided the bulk of the project’s day-to-day labor and the Commission drew heavily on the practices already initiated by these groups. CONADEP drew particularly on the expertise that groups such as the *Asamblea* and others had acquired during the Inter-American Commission for Human Rights investigation in 1980. Graciela Fernández Meijide and Noemi Fiorito de Labruno of the *Asamblea*, for example, were given responsibility for the design of a strategy for the collection of testimonies. The rest of the 100-person-strong team was also drawn from other non-governmental organizations that were responsible for the running of the investigation.<sup>29</sup>

<sup>28</sup> *Diario de las Madres* 1, no. 1 (1984): 10.

<sup>29</sup> Graciela Fernández Meijide et al. ‘The Role of Historical Inquiry in Creating Accountability for Human Rights Abuses,’ *Third World Law Journal* 12 (1992): 273.

CONADEP can thus be seen as the beginning of the process whereby of the reach of the nascent post-authoritarian state extended into a domain of social life previously administered by others, in this case the dictatorship-era human rights organizations. The documenting of human rights violations already existed as a social and political practice, and so the new government needed to either co-opt or displace those previously responsible for administering this practice in order to position the state as a central actor. According to Mara Loveman, co-optation is one of four ways that the state can extend its reach and help particular activities become recognized as legitimate state practices. ‘Indeed,’ she remarks, as a strategy for building authority, ‘it could be to the state’s advantage to capitalize upon the experience and legitimacy of traditional authorities rather than directly challenge them.’<sup>30</sup> With CONADEP, the government chose to co-opt already-existing actors and systems, allowing the human rights organizations to design and conduct the bulk of the Commission’s investigatory labor. By designing an independent but open and flexible commission, Alfonsín was able to deflect much of the initial resistance that came about as a result of the non-parliamentary nature of the Commission. In fact, the human rights organizations agreed that it was unethical to deny the Commission access to the information they had collected throughout the years of activist work, giving the state a victory in what Loveman calls the struggle over the ‘*boundaries* and *nature* of state involvement in particular areas of social life.’<sup>31</sup> With CONADEP, while the nature of state involvement in information practices was contentious, the right of the state to act was established and the boundaries of state involvement in information gathering and dissemination were redrawn.

These boundaries, however, became a source of conflict once again with the release of the commission’s final report. Titled *Nunca Más* (Never Again), the report focused on the victims, and reflected the detailed investigatory work of the human rights activists who had given their labour to the commission. The printed version was structured around the first-person testimonies and exemplary cases as CELS had

<sup>30</sup>Mara Loveman, ‘The Modern State and the Primitive Accumulation of Symbolic Power,’ *American Journal of Sociology* 110, no. 6 (2005): 1663.

<sup>31</sup>*Ibid.*, 1658.

done with the Inter-American Commission report, placing the *desaparecidos* themselves at the center of the narrative. A televised version was also produced, in which members of the *Abuelas de Plaza de Mayo* and the *Madres* appeared telling their stories and demanding ‘*juicio y castigo*’ for *all* the guilty, which they linked to guaranteeing that never again would the past repeat itself. Emphasizing *all* the guilty, the *Madres* differentiated themselves from Alfonsín, who had always spoken of different levels of responsibility, with only the intellectual architects of the repression being truly culpable. Moreover, the information focused on the practice of disappearance, helping to concretize it as a specific violation of human rights and a crime against humanity. Through their involvement, then, dictatorship-era human rights groups had managed to shape the information produced by the truth commission, even when there were differences with the state.

Alongside these civil society voices, however, the state took the opportunity to present its own understanding of events, and it structured the report in a way that subordinated the other voices to its own. In *Nunca Más*, the stories of the victims and the violations they suffered were foreshadowed by a contextualizing prologue that proposed a historical framework for understanding the information contained within the report. Known as the *dos demonios* (two demons) theory, it argued that the disappearances occurred as ordinary Argentines were caught in the middle of a war waged between two opposing and equally violent sides, the military and the guerrillas. The prologue, written by Commission president Ernesto Sábató, explained that ‘during the 1970s Argentina was thrown into disarray by terror from both the extreme right and from the far left ... the armed forces responded to the crimes of the terrorists with a terrorism infinitely worse than that which they fought against.’ Similarly, the televised version was preceded by an announcement by Alfonsín’s Minister for the Interior, Antonio Troccoli, warning the audience that ‘what you are about to see [a report on state terrorism] is only one aspect of the violence, because the other aspect was the explosion of terrorism in our country directed from overseas in order to take power through violence [the revolutionary organizations], unleashing an orgy of blood and death.’

The *dos demonios* theory, emerging from the one part of the Commission’s work that was outside of the influence of the human rights groups, became a key site in the struggle over boundaries. *Proceso*-era activist groups were enraged by the prologue. The *Madres de Plaza de Mayo* declared that ‘one of the most perverse consequences

of state terrorism is the aberrant distinctions between *innocent* victims and *guilty* victims, which implies a partial legitimization of the genocidal dictatorship ... it seems to be legitimate to violate the elemental human rights of those victims who can be presumed to be guilty.<sup>32</sup> They also insisted on broadening the report to include a list of the military personnel responsible for the violations described therein. Alfonsín held firm, however, refusing to include this list in the final version. Following the partial victory over boundaries in incorporating human rights groups into the Commission's labor, in *Nunca Más* the state moved more forcefully to assert its ability to define truth and information by refusing to include one of the products of this labor, the list of perpetrators. Sábato, writing in his capacity as an intellectual contracted by the state, and Tróccoli used their prologues to shape the reception of the rest of this labor, framing it within the notion of war.

While the *dos demonios* concept differed from the military's notion of a war against subversion, it also drew on it. The 'war against subversion' had been the framework through which the *Proceso* had represented and legitimized its own actions. This framework was contested by the human rights groups, but its essence was broadly accepted within Argentine society, evidenced by the popular phrase '*algo habrán hecho*' ('They must have done something'), used to explain a person's disappearance or apprehension at the hands of the military state. *Dos demonios* reconfigured the military's portrayal of themselves as saving the nation from attack into a story about them as belligerents in a war between two equally responsible sides. Framed in this way, *Nunca Más* presented the story of the recent past to the Argentine public, where it was widely consumed. The eagerly anticipated report became a best seller upon release, with its first run of 40,000 copies selling out in two days.<sup>33</sup> These readers consumed an account that outlined the methodology of disappearance, a key demand of the human rights groups, but that put these disappearances within an explanatory framework that rephrased *Proceso*-era notions of war within Alfonsín's understanding of shared responsibility.

The project of *Nunca Más* saw the state, by co-opting existing repertoires relating to information, assert symbolic control over the use of force. In it, the state demonstrated not its ability to control the

<sup>32</sup> *Diario de las Madres* 1, no. 8 (1985): 7.

<sup>33</sup> Emilio Crenzel, *La Historia Política del Nunca Más: la memoria de las desapariciones en la Argentina* (Buenos Aires: Siglo XXI, 2008), 131.

deployment of violence, but its ability to control the meaning of violence. The *dos demonios* narrative delegitimized the use of force by both the military and the revolutionary organizations by contrasting it with the innocent victims who became collateral damage when both sides, but especially the military, took things too far. Through Sábato's and Troccoli's framings, the Alfonsín state established what Bourdieu calls 'state forms of classification [through which it] creates the conditions for a kind of immediate orchestration of habituses which is itself the foundation of a consensus over this set of shared evidences constitutive of (national) common sense.'<sup>34</sup> A form of symbolic capital, the ability to author the official version of the past and through this establish popularly accepted understandings about the meaning of the information contained in this version built the legitimacy of the state. It did so upon a foundation of the information demanded by, and then collected by, the human rights groups, as well as upon the military narrative of a War against Subversion.

### THE ACCUMULATION OF JURIDICAL CAPITAL

The reaching down and incorporating popular information practices was one way that Alfonsín used transitional justice policy to (re)build the democratic state. Another was the initiation of a series of trials against certain perpetrators. The trials were a key part of the *filósofo's* plan to eradicate anomie. Carlos Nino saw the process of bringing the military to account as a 'radical modification' of the tradition of ratifying the illegal and illegitimate, itself 'the clearest example of institutional anomie,' and thus an important moment in disseminating a clear version of a moral code of conduct and the state's own adhesion to it (the rule of law) within society at large.<sup>35</sup> While the trials embraced the human rights activists' demands for justice, they did not seek only to castigate those responsible for the disappearances but rather all perpetrators of political violence. As Deputy Prosecutor Luis Moreno Ocampo later reflected, 'the problem in Argentina is that we are accustomed to doing politics through violence ... For this reason the trials were a solution adopted by all political leaders in Argentina in order to uncover the truth and to

<sup>34</sup>Pierre Bourdieu, 'Rethinking the State: Genesis and Structure of the Bureaucratic Field,' *Sociological Theory* 12, no. 1 (1994): 13.

<sup>35</sup>Nino, *Juicio al Mal Absoluto*, 85.

condemn violence no matter its source.<sup>36</sup> Trials were held against the heads of the military juntas, as well as against the leaders of the revolutionary organizations, in order to judge and condemn political violence as a political method, rather than to condemn the perpetrators of particular violations.

But while the trials targeted all architects of violent methods and was aimed at condemning violence as a way of achieving political goals, the process of bringing the military to trial also played a particular role in restructuring the position of the military as an institution vis-à-vis the civilian state. The trial of the military functioned to accumulate what Bourdieu calls ‘juridical capital,’ the symbolic power that is gained when legal jurisdiction became centralized, displacing other justice systems.<sup>37</sup> As with the co-opting of popular practices and the extension of the reach of the state into new domains, the centralization of jurisdiction extends the power of the central state into other previously autonomous institutional areas, subordinating them to the center. Alfonsín initiated trials of both the heads of the military juntas and the heads of the revolutionary organizations, the *dos demonios*, bringing both the popular demands for justice as well as the military’s own justice system, under the umbrella of the state.

The first step in this process was the declaration of the military self-amnesty as ‘null due to its origin and content.’<sup>38</sup> Here the state clearly asserted its ability to act as arbiter over the classification of legality. This then opened the possibility for judicial processing. Immediately following the derogation of the self-amnesty, Alfonsín issued two presidential decrees ordering the arrest of the heads of the three military juntas that made up the *Proceso* and of the heads of the revolutionary organizations. These decrees reflected the specific interpretation of justice that Alfonsín had long advocated, one that was limited to the intellectual architects of the repression, partly ‘because it would be impossible to effectively round up everyone that committed a crime,’ and so that ‘high levels of enthusiasm for the program could be maintained’ by not allowing it to drag out for a long time.<sup>39</sup> Dictatorship-era human rights

<sup>36</sup> *Página/12*, June 4, 1989.

<sup>37</sup> Bourdieu, ‘Genesis and Structure of the Bureaucratic Field,’ 9.

<sup>38</sup> Ley 23.040, ‘Derógase por inconstitucionalidad y declárase insanablemente nula la Ley de facto 22.924,’ *Boletín Oficial de la República Argentina*, December 29, 1983.

<sup>39</sup> Emilio Mignone, Cynthia Estlund, and Samuel Issacharoff, ‘Dictatorship on Trial: The Prosecution of Human Rights Violations in Argentina,’ *Yale Journal of International Law* 10 (1985): 111.

activists opposed this limited classification of responsibility, and groups such as the *Centro de Estudios* assisted families of victims to bring cases to the civilian federal court system, even when the cases involved lower-ranking officers that fell outside of Alfonsín's formula.<sup>40</sup> Under advice from the executive, however, the public prosecutor soon put a stop to this practice by declaring that jurisdiction for acts committed by serving officers lie with the military court.<sup>41</sup> The power to define justice was swiftly taken out of the hands of the human rights activists.

Soon after, the military code itself was modified to formalize military jurisdiction over events that occurred during the *Proceso*. The modification of the *Código Militar* simultaneously established military jurisdiction while also corralling it and subordinating it to the civil sphere. While the Supreme Council of the military was given control of the cases, it was given six months to make a ruling and if unable to do so was required to report to the civilian Federal Appeals Court to explain why. There was also the possibility of appeal (for plaintiffs) within the civilian court in cases where the law was erroneously applied or where the required process had not been followed.<sup>42</sup> It was this possibility of appeal that played a crucial part in the accumulation of symbolic, juridical capital. The process set in motion by the reform of the *Código Militar*, then, was a crucial element in the reformulation of power and the structuring of the democratic state. As appeal processes mean that any judgment delivered within a certain jurisdiction can be deferred to a central power whose jurisdiction encompasses all others, establishing the right of appeal within the civilian courts, as well as the provision for the transfer of the case to civil jurisdiction if the military court failed to meet its obligations, placed the military court in an ultimately subordinate position to the civilian one.

The military court initially refused to engage in the judicial processing of the junta, declaring that given the evidence there was nothing 'objectionable' in the pursuit of the war against subversion and registering no convictions. The refusal of the military to symbolically prosecute a small number of their own and thereby acknowledge the authority

<sup>40</sup>Ibid., 124.

<sup>41</sup>Ibid., 125.

<sup>42</sup>Ley 23.049, 'Codigo de Justicia Militar: Modificaciones,' *Boletín Oficial de la República Argentina*, February 15, 1984.

of the civilian state was seen by some as a blow to the Alfonsín project, which had envisaged the military consenting to a new political order.<sup>43</sup> But despite the military's refusal to engage in the process, the appeal provisions within the modified Military Code meant that this subordination would still occur, albeit coercively. The military challenged the constitutionality of the transfer of the case into civil jurisdiction, but the Supreme Court, citing the role of the president as Commander-in-Chief of the armed forces and therefore ultimate authority over the institution, overturned the challenge. By affirming the constitutionality of the transfer of jurisdiction, the Supreme Court publicly ratified the idea that the state represents the common interest and, by extension, the legitimacy of the state in dealing with military actions in the past.

While the trial of the military, which became known as the *Juicio a las Juntas*, facilitated the accumulation of juridical capital through the process of appeal, it also functioned as a space for the development and democratization of the judiciary itself. The process set in motion by the transfer of trials to the civilian courts saw an empowered judiciary work within special conditions to achieve Alfonsín's goal of a symbolic condemnation of state repression. The prosecution, led by Julio Strassera, was given access to the material collected during the CONADEP investigation, and this material became admissible as evidence. The prosecution was also able to base their argument around 'representative cases,' drawing on the data collection methods of CONADEP, rather than on presenting and proving beyond reasonable doubt each individual crime. These new judicial processes that emerged through the *Juicio* worked towards Alfonsín's goals and demonstrated an alliance of interest between the judiciary and the government. Thus, while the question of limited responsibility was a point of conflict between the government and the human rights organizations, the Alfonsín regime was able to make new alliances with another important group, the judiciary. By giving them special conditions in which to operate, Alfonsín recruited the judiciary to pursue his goals, enhancing the power of the state by ruling *through* this important sector rather than ruling *over* them.<sup>44</sup>

<sup>43</sup>Paul W. Zagorski, 'Civil-Military Relations and Argentine Democracy: The Armed Forces Under the Menem Government,' *Armed Forces & Society* 20, no. 3 (1994): 425.

<sup>44</sup>Philip S. Gorski, *The Disciplinary Revolution: Calvinism and the Rise of the State in Early Modern Europe* (Chicago and London: University of Chicago Press, 2003), 167.

## A COMMON EXPERIENCE? TRANSITIONAL JUSTICE AND DEMOCRATIC STATE FORMATION ACROSS THE REGION

Transitional justice became the dominant model for political reconstruction following authoritarianism in the last part of the twentieth century, and was enacted by state makers across the Latin American region as they presided over a return to civilian rule throughout the late 1980s and early 1990s. But while these transitional justice programs shared many common features, they also differed in important ways. Based on his assessment of Argentine history and what he and his advisors understood as the reasons for the recent experience of dictatorship, Alfonsín had sought the complete transformation of political culture through the application of truth and justice. While many analyses of transition highlight the institutional constraints faced by state makers, focusing particularly on the relative strength of the military as an explanatory factor for the transitional justice policies that they enacted, an equally important consideration is the political vision that led these state actors to choose transitional justice as a tool for democratization. In Uruguay and Brazil, for example, the pacted nature of the transition whereby civilian state actors negotiated the terms of democratization with the military differed sharply from the Argentine experience, where the military struggled to impose their terms upon the political process. While the pacted transition in Uruguay and Brazil certainly left less room for state actors to maneuver, these state actors voluntarily entered into the pact itself, seeking the inclusion of the military in the post-authoritarian political order. The resulting continuity between the old order and the new also meant that Uruguayan and Brazilian actors had less need to look to alternative sources of symbolic capital to legitimize and give shape to their vision. In Uruguay, for example, the political parties had briefly come together with other social sectors as the *Concertación Nacional Programática* (Agreement for a National Agenda), where they emphasized the importance of knowing the truth about the past and pursuing judicial redress for the quality of future democracy.<sup>45</sup> This agreement fell apart following the election, however, when the party most eager to negotiate with the military assumed the presidency.<sup>46</sup> In Chile, on the other hand,

<sup>45</sup> *El País*, November 18, 1984.

<sup>46</sup> For the Uruguayan transition and political negotiations see Alexandra Barahona de Brito, *Human Rights and Democratization in Latin America: Uruguay and Chile* (Oxford: Oxford University Press, 1997).

where the military remained institutionally stronger than in Argentina and thus constrained the scope for transitional justice, there was a desire on the part of the incoming state makers to transform political culture and create something new that explicitly rejected authoritarianism and the extremes of politics. To do so, they drew on previous human rights-based opposition practices, creating a transitional justice program that differed in content from that in Argentina but mimicked it in intent.

### *Chile: Limited Administrative Extension*

From the mid-1980s onwards, various sectors of Chilean society began to talk about democratic alternatives to the by now long-running military rule and about how a transition to a post-authoritarian, democratic order could be achieved. Implicit in these discussions was the need to address the authoritarian experience. At the same time, these discussions were shaped by the key assumptions of transitions thinking as well as by the Argentine experience, both of which pointed to the desirability of placating the military, and by the incoming president's own interpretation of Chilean democracy and political history. In August 1985 eleven interest groups came together to publish the National Accord for a Full Transition to Democracy, an initiative spearheaded by the Catholic Church. The Accord attempted to address the question of how to deal with the legacy of the military repression while promising not to pursue trials. In January 1988 the *Concertación de Partidos Políticos por la Democracia* (Coalition of Political Parties for Democracy) issued their *Programa Básica de Gobierno* (Programme for Government) in which they promised that they would investigate ways to bring about 'the disclosure of truth, the investigation of the facts and the establishment of criminal responsibilities.'<sup>47</sup> These statements, however, were couched in tentative language that emphasized that they would *try* to find a solution, rather than putting forward any concrete proposals. The *Concertación* itself had connections to human rights-based opposition activity, with the Christian Democrats, one of the main coalition partners, linked to the *Vicaría de Solidaridad*, one of the principal human rights actors during

<sup>47</sup>The Concertación's 'Programa de Gobierno' from 1989, quoted in Jorge Correa, 'Dealing with Past Human Rights Violations: The Chilean Case After Dictatorship,' *Notre Dame Law Review* 67 (1991): 1461.

the Pinochet dictatorship. It was largely due to the work of the *Vicaría* and its engagement with the concept of human rights that the concept of rights itself in Chile became divorced from an exclusive relationship with socialist thinking and was instead rearticulated within a liberal democratic framework, making it more attractive to the *Concertación*. In March 1979 they established an internal *Comisión de Justicia y Derechos Humanos* (Human Rights and Justice Commission) to try and formulate more concrete proposals for addressing the human rights violations of the Pinochet regime. Nevertheless, they failed to develop a comprehensive plan for justice: the military's 1978 self-amnesty stood in the way, and the political will to confront the armed forces head on and derogate it was not there.<sup>48</sup> The formulation of a specific transitional justice program would have to wait until after the election.

On 12 March 1990, new president Patricio Aylwin assumed the presidency for the *Concertación*. In his inaugural speech delivered at the National Stadium, which had become a key symbol of the repression under Pinochet, he declared that one of the key tasks of the government would be to address the issue of human rights violations. 'Today,' he said, 'we come together with hope ... because we are, finally, beginning a new period in national life characterized by fraternity and a longing for freedom and justice.'<sup>49</sup> This new period in national life was to be one built upon a rejection of the values and practices of the previous regime, which would be achieved through the implementation of a transitional justice program. He continued,

From this space, ... which for many compatriots was a place of confinement and torture, we say to all Chileans and to the world that is watching us: Never Again! ... Today we assume the responsibility to reconstruct our democracy true to the values that our forefathers bestowed on us ... We have said, and today I repeat, that the moral conscience of the nation demands the revelation of the truth regarding the disappearance of persons, regarding the horrendous crimes and other grave violations

<sup>48</sup>Barahona de Brito, *Human Rights and Democratization*, 104–118.

<sup>49</sup>Patricio Aylwin, 'Discurso del Presidente Patricio Aylwin en el Estadio Nacional,' March 12, 1990, Accessed April 26, 2015, <http://www.gob.cl/2014/12/15/el-discurso-con-que-patricio-Aylwin-reinauguro-la-democracia/>.

of human rights that occurred during the dictatorship. We have also said, and today I repeat, that we must face this delicate topic bringing together the virtue of justice with the virtue of prudence, and when the necessary personal responsibilities have been assigned, then the hour of pardon will come.<sup>50</sup>

Aylwin was clear in his vision for constructing a democratic order based on what he presented as traditional Chilean values, such as ‘the love of liberty and the rejection of all forms of oppression, the primacy of law over arbitrariness ... [and] the tolerance of opposing opinions and the tendency to not inflate conflicts.’ The pursuit of truth and justice was to play a part in achieving this restoration, but would be subject to the framework provided by these values.

Another strong current within the *Concertación* emphasized moderation in transitional justice policy as a way of ensuring their main goal of democratization. This approach was evident already in 1989 when the party’s Human Rights and Justice Commission stated that ‘if one seeks truth and justice at the same time it is probable that neither of the two will be achieved.’<sup>51</sup> Intellectuals working closely with Aylwin were highly sensitive to this idea, and they believed that certain Pinochet-era policies should be maintained, including the self-amnesty as well as the neoliberal economic reforms, in order to provide continuity and stability.<sup>52</sup> One of these individuals, José Zalaquett, had travelled to Argentina, Uruguay and as far afield as Uganda to observe transitional justice policies in action, and he had been a central participant in the international meetings held with people like Nino and Malamud Goti, where transitional justice began to formalize as an area of international policy.<sup>53</sup> While he had a long history of prominent involvement in the international human rights network, when thinking about transition Zalaquett emphasized the idea of balance between the desire to deal with the past and the need to protect the present and future democratic order, arguing that ‘political leaders cannot afford to be moved only by their convictions, oblivious to

<sup>50</sup>Ibid.

<sup>51</sup>Quoted in Barahona de Brito, *Human Rights and Democratization*, 120.

<sup>52</sup>Yves Dezalay and Bryant G. Garth, *The Internationalization of Palace Wars: Lawyers, Economists, and the Contest to Transform Latin American States* (Chicago: University of Chicago Press, 2002), 151.

<sup>53</sup>Arthur, ‘How “Transitions” Shaped Human Rights,’ 350–351.

real-life constraints, lest in the end the very ethical principles they wish to uphold suffer because of a political or military backlash.<sup>54</sup> The influence of these ideas became visible in Aylwin's approach to transitional justice.

During the Pinochet dictatorship Chilean human rights groups had been active demanding both truth and justice, collaborating with international organizations in their fact-finding missions at the same time as presenting habeas corpus demands and, towards the end of the regime's rule, campaigning for the abolition of the self-amnesty as a way to pursue retributive justice against perpetrators. The *Concertación's* emphasis on balance and their reticence on the question of justice raised the concern of human rights groups. Soon after the election the *Agrupación de Familiares de Detenidos Desaparecidos* (Organization of Family Members of Detained-Disappeared Persons) met with the president-elect to encourage him to implement far-reaching truth and justice policies and to not water them down for the sake of political expediency or reconciliation.<sup>55</sup> In spite of these pleas, however, when Aylwin assumed the presidency six weeks later he declared in his inaugural speech that the theme of his presidency would be reconciliation. In terms of justice, Aylwin understood it as important—'as far as it is possible.'<sup>56</sup> Furthermore, any responsibility would be determined within the limits of the currently active law, and the promise to overturn self-amnesty was dropped. Truth, not justice, was for Aylwin 'the great theme of the transition.'<sup>57</sup> As Zalaquett later remarked, 'truth was considered an absolute, unrenounceable value for many reasons ... A nation's unity depends on a shared identity, which in turn depends largely on a shared memory. The truth also brings a measure of social catharsis and helps to prevent the past from reoccurring.'<sup>58</sup> As such, one of the key points in Aylwin's transitional justice strategy was the establishment of a truth commission. The government mandated that in order to move swiftly towards political

<sup>54</sup>Jose Zalaquett, 'Balancing Ethical Imperatives and Political Constraints: The Dilemma of New Democracies Confronting Past Human Rights Violations,' *Hastings Law Journal* 43, no. 6 (1992): 1430.

<sup>55</sup>Barahona de Brito, *Human Rights and Democratization*, 152.

<sup>56</sup>Quoted in Cath Collins, *Post-transitional Justice*, 73.

<sup>57</sup>Quoted in Barahona de Brito, *Human Rights and Democratization*, 155.

<sup>58</sup>José Zalaquett, 'Balancing Ethical Imperatives and Political Constraints: The Dilemma of New Democracies Confronting Past Human Rights Violations,' *Hastings Law Journal* 43 (1991): 1433.

reconstruction, an independent commission should be formed which, in a limited period of time and with limited scope, could establish an ‘overall picture of the events which have most seriously affected our common life together as a nation ... to recommend such measures of reparation and the restoration of the people’s good name ... and to recommend the legal and administrative measures which in its judgment should be adopted in order to prevent further grave human rights violations from being committed.’<sup>59</sup> The Rettig commission, as it came to be known following the appointment of Raúl Rettig as chair, consisted of independent notables including both supporters and opponents of the military, with Zalaquett one of the opponent members.

Like in Argentina, then, Aylwin adopted the dictatorship-era demands of the human rights groups but he did not adopt all of them, making important modifications that tailored them to his own goal of democratization and his vision of what that would look like. At the same time, despite the formal subordination of the human rights groups’ demands to democratic pragmatism, the actual operation of the investigation drew heavily on these activists’ previous work. According to Jorge Correa, secretary and Chief of Staff for the Commission, it ‘would have been difficult, if not impossible, if the documents and files of the human rights groups had not been made available to us (especially the ones of the *Vicaría de Solidaridad*).’<sup>60</sup> As in Argentina, then, the Rettig commission drew on the labor of the human rights groups to uncover truths that were largely already known and transform them into an official narrative, asserting the state’s ability to classify the information therein. It also transformed their judicial practices into a truth project, in line with the *Concertación*’s emphasis on the latter over the former. The truth commission allowed the state to expand into a new area of social life, that of human rights, without jeopardizing the overarching goal of democratization. Aylwin presented the findings of the Commission one month after it finished its work, in a televised address to the nation. In this address he apologized on behalf of the state and asked the victims for forgiveness, further bringing the issue of human rights under the jurisdiction

<sup>59</sup>Decreto Supremo 355, ‘Crea Comisión de Verdad y Reconciliación’ (April 25, 1990), Reprinted in Comisión Nacional de Verdad y Reconciliación, *Informe de la Comisión Nacional de Verdad y Reconciliación* (Andros Impresores: Santiago, 1991).

<sup>60</sup>Jorge Correa, ‘Dealing with Past Human Rights Violations: The Chilean Case After Dictatorship,’ *Notre Dame Law Review* 67 (1991): 1468.

of the state. The response from activists and victim groups was mixed: while some criticized what they saw as ‘a permanent effort to impose reconciliation almost by decree,’ others understood that while ‘Aylwin did not commit himself to justice, his commitment was with the truth ... it is a question of political will versus reality.’<sup>61</sup> While there was resistance to Aylwin’s approach to transitional justice, there was also an acceptance of the government’s self-professed limitations and, ultimately, of the state’s ability to define the most appropriate policy for addressing human rights demands.

As the next chapter will explore more fully, the Aylwin government’s transitional justice program began to flounder following the truth commission. Aylwin seized the opportunity for administrative extension provided by the human rights movement, bringing the demands for truth and justice under the control of the state through the establishment of the Rettig commission, but this extension was marked by a strong reluctance to make any moves that would threaten the democratic order, which he and his advisors took to mean anything that may antagonize the military. The Argentine experience of military rebellion by a group known as the *carapintadas* loomed large in the Chilean government’s imagination, a scenario Aylwin wanted to avoid. Also influential, however, were the ideas of transitions theorists and transitional justice, which by the early 1990s had begun to emphasize the need to limit retributive justice in order to safeguard the political transition. As the next chapter will show, these ideas translated into the concept of reconciliation, which came to dominate transitional justice in the early 1990s.

In both the Chilean cases, as in the Argentine one, we see that the practices of the dictatorship-era human rights organizations were absorbed by the state in the immediate transition period. In both cases state actors moved towards the co-optation of existing repertoires in the domain of information, incorporating the practices of documentation that the human rights network had already developed and, in many cases, incorporating these networks themselves into the state apparatus for establishing this truth. At a crucial moment in the establishment of the post-authoritarian state, state actors engaged in ‘organizational entwining,’ where practices outside the state are harnessed by the state.<sup>62</sup> While the boundaries of the state’s administrative reach were

<sup>61</sup>Quoted in Barahona de Brito, *Human Rights and Democratization*, 161, 162.

<sup>62</sup>Gorski, *The Disciplinary Revolution*; Loveman, ‘Primitive Accumulation of Symbolic Capital,’ 1664.

defined differently in Aylwin's Chile compared to Alfonsín's Argentina, one of the first actions of both governments was to take possession of the extensive documentation on the recent past that the human rights groups had collated. While both truth commissions were extra-parliamentary independent commissions, as products of executive decrees they represented an official extension of the state into the administration of a realm of social life that had, by virtue of the conditions of its emergence, previously been oppositional to and thus outside of the state. The truth commissions, alongside their role in promoting nationalism by creating a common version of history, were a way for state actors to position the state as the mediator of contemporary concerns and processes.

While in this chapter, I have focused on the successful extension of the state into the realm of human rights activity, the cases here also point to the contested nature of this extension. As discussed earlier in the chapter, human rights activists and organizations did not necessarily agree with the way that the Alfonsín government conceptualized the truth commission, but they still used the commission to pursue their own broader goals. The Chilean government, for its part, was cautious in its approach to transitional justice from the beginning, aware of the relatively strong institutional position of the military. Aylwin was also pursuing what he understood as the restoration of Chilean democratic values, as opposed to Alfonsín's aim at achieving a revolution in political culture that would stamp out authoritarian tendencies. This resulted in a transitional justice path in Chile that did not seek to go beyond establishing truth for the purpose of creating a shared historical narrative as a basis for reconciliation. Even so, the military remained a source of anxiety for Aylwin, thwarting his ability to feel that he had fully consolidated the dominant position of the democratic state. Alfonsín also faced resistance from the military, who made it clear that they did not accept civilian jurisdiction over their role in the nation's recent past. Democratic consolidation in both cases remained elusive. Far from being a policy implemented at the moment of transition to re-establish a liberal democratic order, then, the transitional justice policies of the first democratic governments was merely the first step in an ongoing process of negotiation between the state and other institutional actors in an effort to (re)establish an order in which the former claimed jurisdiction over the latter. And, as state actors surveyed the shifts in the political landscape that had occurred in the wake of the return to democracy, they found themselves adjusting their policies to meet and contain new potential challenges to

their authority. In the next chapter, I turn to these readjustments and struggles for control.

### BEYOND LIBERALIZATION: TRANSITIONAL JUSTICE AS STATE FORMATION

Transitional justice is an important source of legitimacy for democratizing states. It helps to create an official story about recent experience, turning it into a useable past rather than a destructive one. As Greg Grandin has discussed, truth commissions in particular created a narrative about the past that was designed to serve as a bolster for the new liberal order. Comparing the Argentine and Chilean truth commissions, he shows how their architects consciously decided, for different reasons, to produce accounts that represented the recent political violence as an historical anomaly, rather than as a central part of state formation.<sup>63</sup> The violence became a symbol that could help inculcate a commitment to and belief in certain values and forms of state formation. As Ernesto Sábato concluded in his prologue to CONADEP's *Nunca Más*, 'only democracy can save people from such a horror.' Yet as I have discussed in this chapter, truth commissions and other transitional justice measures also worked to build the authority of the democratic state. As Grandin rightly notes, these early truth commissions were key in cultivating a new understanding of citizenship that saw the state as the source of legalized, individualized forms of justice, rather than as a facilitator of social justice, a notion that had circulated in the years prior to the dictatorships.<sup>64</sup> But parallel to this process was a struggle on the part of state actors to make sure the state was seen at all. The contribution of transitional justice to state (re)formation was twofold: it transformed the nature of the social contract between the state and civil society, while it also helped establish the presence of the state as a political institution within the new political context and legitimize that institution through the accumulation of symbolic capital.

The choice of state actors to use transitional justice as a way of both reshaping political culture and reasserting the presence and authority

<sup>63</sup>Greg Grandin, 'The Instruction of Great Catastrophe: Truth Commissions, National History and State Formation in Argentina, Chile and Guatemala,' *American Historical Review* 110, no. 1 (2005): 48–49.

<sup>64</sup>*Ibid.*, 47.

of the state is intimately connected to the prior work of human rights activists. The presence of human rights activists, who had been one of the chief sources of opposition during the dictatorship, provided aspiring state actors at the time of transition with a reservoir of symbolic capital to draw upon. This process was particularly important in the transitional context in Argentina, where the ruling state project was massively delegitimized following the Malvinas. Transitional justice extended the presence of the state into a realm of social life it was previously absent from (or was present in a negative sense), the protection of human rights. At a crucial moment in the re-formation of the Argentine state we can see it, in Mara Loveman's words, 'harnessing existing material and human resources and putting them to work for its purposes.'<sup>65</sup> These purposes were the transformation of political order and political culture, but this could only be achieved once the state had accumulated sufficient symbolic capital so as to speak and act with authority. Without this authority, *Nunca Más* would not have become a bestseller in the first place. At the same time, this authoritative version of the past presented a particular version of that past, one in which depoliticized victims suffered depoliticized violence. This version of the past was a key element in the transmission of the new forms of citizenship and the new state form that Grandin discusses. Yet this was also linked to the kinds of demands and discourses advanced by the human rights opposition during the dictatorship. Alfonsín and his *filósofos* found in the dictatorship-era human rights movement a useful foundation upon which to construct their own political project.

The delegitimization of the military in Argentina also allowed more political space for trials to be held. The trials were designed by the *filósofos* to be the judging accompaniment to the narration provided by *Nunca Más*, yet they did not intend to judge all perpetrators.<sup>66</sup> A selected, symbolic group would go to trial, in keeping with the broader aim of sanctioning political violence as a method, rather than sanctioning each individual violation. The trials worked towards the reconfiguring of political culture, while at the same time, like the truth commission, their particular design also worked to accumulate symbolic capital and build the authority of the state. The *Juicio a las Juntas*,

<sup>65</sup>Loveman, 'Primitive Accumulation of Symbolic Power,' 1660.

<sup>66</sup>Grandin, 'The Instruction of Great Catastrophe,' 49.

then, should not be seen as merely a product of the opportunity that a weakened military provided. Alfonsín's emphasis on legal proceedings facilitated the bureaucratization and codification of symbolic capital, establishing the superior jurisdiction of the civilian state. This process was facilitated by what Bourdieu calls the 'specific interests of the jurists,' who themselves were eager to support the establishment of rule of law and civilian domain over the military.<sup>67</sup> In Chile there were no trials, partly because the military was politically stronger, and partly because Aylwin lacked an interested judiciary with whom he could form an alliance. The Chilean state lacked a broad range of available partners with whom it could entwine itself, and as a result was not able to fully control the transitional justice process nor, by extension, the reshaping of political culture and structure. Even for Alfonsín, who had successfully engaged in organizational entwining with other institutional actors, challenges to state authority over transitional justice emerged over time, as these other actors and groups came to disagree with the limits that the government attempted to place on their actions. In the period after the *Juicio*, Alfonsín's ability to control and define transitional justice faced a number of serious challenges. It is to these challenges that we will now turn.

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## Reconciliation: Defining the Limits of Transitional Justice

The new president rose to the podium and faced the Legislative Assembly—*his* legislative assembly—for the first time. Nearly six months earlier than planned, Carlos Menem had ascended to the position of head of state amid economic crisis and scenes of disorder in the streets. These most recent scenes of disorder came on the heels of the resurgence of the military as a political actor, demanding to be heard in the debate around transitional justice and to claim its stake in the post-authoritarian order. For Menem, this was a political state of emergency and one that he needed to bring under control immediately. Addressing the gathered representatives and functionaries, he began to talk of his vision for the country, a vision that would need a serious political commitment from all sectors of the divided society. ‘All Argentines work to heal Argentina, or Argentina dies,’ he said. ‘It dies. This is the cruel reality. This is why we will not waste any time consolidating the reconciliation of all Argentines.’<sup>1</sup> The time for exploring the authoritarian past was over. In order to save the nation, the various sectors of society must come together under state guidance and pull the country back from the brink of social conflict and resulting self-destruction.

<sup>1</sup>‘Mensaje ante la Asamblea Legislativa, July 8, 1989,’ in *Discursos del Señor Presidente de la Nación Argentina, Dr. Carlos Saúl Menem 1989* (Buenos Aires: Secretaría de Prensa y Difusión, 1990).

As Menem's speech made clear, the transitional justice policy was to be fundamentally overhauled to move on with the business of democratic consolidation. While the initial transition period in Argentina was characterized by the absorption of popular practices and demands, the new period of consolidation was to be one in which the state itself played a much more decisive role in determining transitional justice policy. While in the past the demands for truth and justice were seen as key to constructing democratic rule, now they were seen as preventing and even endangering that rule. Rather than settling the issue of the past, the *Juicio a las Juntas* had actually given rise to a series of heated conflicts over justice. How much, and what kind, became questions that brought people out onto the streets, and even led some sectors of the military to take up arms again. The turn away from justice, then, was Menem's way of trying to contain and manage the conflicting positions between the different social and institutional actors engaged in this debate over the past. With reconciliation, Menem used transitional justice to control not only the impact of the authoritarian past but also the impact of the present conflicts over that past. This approach actually began with Alfonsín, who was faced with conflicts over transitional justice in the second half of his presidency. Reconciliation became the way that both presidents attempted to diffuse political challenges and assert the ability of the state to define transitional justice and, by extension, to shape the political order. The limits of truth and retributive justice had been reached, they argued, and so from 1986 onwards they developed structures and practices around the idea of restorative justice and reconciliation. This chapter examines this process.

Reconciliation instituted a new relationship between the state and other social actors. Alfonsín had initially constructed transitional justice by drawing on information practices as well as on the demand for justice circulated by (international) human rights groups, extending the administrative reach of the state into the relatively new social sphere of human rights. Co-opting these human rights practices had allowed him to accumulate symbolic capital on the part of the state, positioning it at the center of transitional justice and human rights initiatives. But at the same time, it also boosted the symbolic capital of these actors themselves, whose long-standing demands and practices were now affirmed and officialized in government policy. This put them in competition with the government for the ability to control and define transitional justice. Following the *Juicio* the balance of this competition seemed to be

tipping in the activists' favor, with broad support throughout society for their demand for extended retributive justice. Rearticulating transitional justice as reconciliation aimed to curtail this process and by extension curtail the relative political power of those pursuing it. At the same time, reconciliation also sought to bring the military under control. The armed forces had begun to challenge the power of the civilian state by threatening to use violence, or coercive capital, if retributive justice practices were not stopped. Under the banner of reconciliation, Alfonsín and Menem sought to diffuse this threat and bring the military under civilian control.

This rearticulation of transitional justice as reconciliation was not easy. Alfonsín and Menem engaged other social and institutional actors in a classification struggle, seeking to assert the political dominance of the state by reclassifying key issues such as truth and justice. This strategy was a departure from the organizational entwining that had allowed the state to accumulate symbolic capital in the initial years of the transition. Whereas initially Alfonsín had sought to recast social and political relations to break what he saw as an endemic anomie within the political culture and structure and, through this, institute a more active democratic culture, after 1986 he became more concerned with asserting control over the political mobilizations that threatened to displace his specific political vision. Menem continued this approach, reinforcing it with administrative measures designed to establish a structured and hierarchical relationship between the state and other sectors.

Reconciliation is often talked about as a post–Cold War phenomenon, a framework for political organization that focuses on coming to terms with the past and that is rooted in a deep distrust of utopian visions for the future.<sup>2</sup> Of course, transitional justice in general fits this bill, with its focus on the past as a parable for the current order. But reconciliation, as a specific discourse within and approach to transitional justice, means something much more specific than simply coming to terms with the past. In Argentina from 1986 onwards, as well as in neighboring countries, reconciliation emerged as a clear counterweight to retributive

<sup>2</sup>John Torpey, *Making Whole What Has Been Smashed: On Reparations Politics* (Cambridge, MA: Harvard University Press, 2006), 7–9. This analysis complements the arguments made by historians of human rights who argue that the breakthrough of human rights in the 1970s was a response to the waning of utopian political frameworks like socialism. See Samuel Moyn, *The Last Utopia: Human Rights in History* (Cambridge, MA: Harvard University Press, 2010).

justice and was used by the state as a way to address *current* political conflicts, often those that had emerged over the question of retribution. In Argentina reconciliation was most fully articulated during Carlos Menem's presidency, where he used the idea of looking to the future to bring about the complete turn away from retributive, criminal justice practices. This was more than simply a balancing of the commitment to the rule of law with pragmatic concerns for democratic stability, as some commentators on transition have argued.<sup>3</sup> Instead it was a deliberate attempt to limit the political protagonism of the judiciary and the human rights groups who had been demanding *justicia* and to assert the ability of the state to determine transitional justice policy. The turn away from retributive justice was not a turn away from *transitional justice*; instead it was a reconfiguring of it as a strategy for state reformation in light of new challenges that had presented themselves since the return to civilian rule.

By attempting to smooth over new conflicts and divisions, reconciliation also functioned to clear the stage for the commencement of a new political economic era. Menem's presidency coincided with the end of the Cold War, the rise of liberal democratic enthusiasm globally, and the associated ascendance of neoliberalism. In fact, Menem's primary concern as president was not transitional justice and the issue of the authoritarian past, but the implementation of neoliberal economic reforms, what he called the *Revolución Productiva* (Productivity Revolution). Reconciliation and the national unity that it implied fit with this goal, as it would allow 'all Argentines, regardless of ideological convictions, to begin the productive revolution.'<sup>4</sup> Reconciliation would bring people together in a socio-political order that was post-conflict physically and, above all, politically.

As both this chapter and the next will show, however, transitional justice as reconciliation ultimately failed to overcome and subdue political divisions, revealing instead a relatively low capacity on the part of the state to set the political agenda and shape political culture. As a form of state formation, then, this curtailing of the power of social groups and institutions was limited in what it could achieve. Reconciliation imposes a fictive vision of unity, and for Menem, as with his contemporary Julio Sanguinetti across the River Plate in Uruguay, this fiction seemed, at

<sup>3</sup>Ruti Teitel, 'Transitional Justice Genealogy,' *Harvard Human Rights Journal* 16 (2003): 75–78.

<sup>4</sup>*El País*, May 16, 1989.

first, to be tenable. But for Patricio Aylwin and Eduardo Frei across the Andes in Chile, attempts to impose a certain vision under the guise of reconciliation only led to ongoing conflicts in which the state was continually unable to come out on top. Menem also faced new expressions of resistance and rejection of reconciliation as his presidency continued.

This chapter begins by looking at Argentina in the wake of the 1985 *Juicio a las Juntas* trial. I show how the trial opened up a space for the further pursuit of retributive justice on the part of human rights activists and an activated sector of the judiciary. This bottom-up pursuit of an expanded understanding of justice in turn activated the military, whose middle- and lower-ranking members threatened the use of violence to protect themselves from these processes. Faced with challenges from both sides, Alfonsín began to use the concept of reconciliation to limit retributive justice in line with his original ideas about limited responsibility. As an indicator of the broader difficulty with imposing unity upon a fractured political community, Alfonsín was unable to consolidate this rearticulation of transitional justice and was forced to leave the presidency early due to an economic and social crisis. This crisis in turn created the conditions for the amplification of the narrative of reconciliation under his successor, Menem. The two main features of Menem's approach were the issuing of pardons for all those charged under previous retributive justice policies and the expansion of a reparations program for victims. This move not only emphasized the reincorporation of the victim into Argentine society, de-emphasizing the figure of the perpetrator, it also moved the administration and control of transitional justice away from the courts and into the bureaucracy. Overall, the period following the *Juicio* represented an attempt to assert state power vis-à-vis other institutional and political actors, using the concept of reconciliation.

I then move to examine the articulation of transitional justice as reconciliation across the region. In Chile the principal obstacles to establishing the authority of the democratic state were the military and the judiciary. Contrary to what happened in Argentina, then, presidents Aylwin and Frei used the notion of reconciliation to actually encourage (limited) retributive justice, in order to break down the autonomous power of the military and the judiciary and commit them institutionally to transitional justice. This was, however, still the same logic as in Argentina: reconciliation was used to limit the power of institutional actors that stood in the way of state power. In the case of Uruguay, I show how state actors

closely aligned themselves with the military and moved quickly to prevent any type of retributive justice measures from being implemented. The Uruguayan case demonstrates how the erasure of social conflict became synonymous with the consolidation of democracy and the construction of a new, post-authoritarian political order.

Ultimately, what this chapter explains is the role of reconciliation—as a specific set of practices within transitional justice—in the process of democratic state formation. I show how reconciliation was used by state makers in Latin America to frame both the conflicts *of* the past as well as the conflicts *over* the past as fundamentally disruptive to the present and, by extension, the future. As an approach to transitional justice, reconciliation is a form of politics that draws its legitimacy and its vocabulary from the past, but it does so fundamentally to reshape the present political order. As a form of state formation, transitional justice-as-reconciliation frames any oppositional visions as destabilizing to this (re) established political order. As the cases of Argentina, Chile and Uruguay demonstrate, state actors have specifically employed reconciliation as a strategy to try to limit the legitimacy of opposing sectors and opposing visions of transitional justice and, therefore, control threats to state power. This is of course not always successful, as the case of Chile shows. Even Menem's reconciliation policy, which did succeed in temporarily subduing the military, came to face serious challenges, which I will explore in the next chapter. Reconciliation is a form of managing social conflicts, not eradicating them, and these conflicts can continue to challenge the state, which in turn must innovate and reformulate in its efforts to establish stable democratic rule.

#### FROM RECOMMENDATION TO RULE: THE LAWS OF PUNTO FINAL AND *OBEDENCIA DEBIDA*

The *dos demonios* narrative of a war of equal and opposing sides and the *Juicio a las Juntas*' focus on the intellectual architects of the repression ensured that transitional justice policy worked within the broad outlines of Alfonsín's emphasis on limited and exemplary justice. But while it had concentrated on the heads of the military juntas, the *Juicio* had also left open the possibility for further judicial action against lower ranking perpetrators, as well as invigorating the judiciary itself as a political actor. As a result, human rights activists and the judiciary continued to pursue

their own goal of a more extended form of justice. Rather than institutionalizing Alfonsín's understanding of justice, the *Juicio* actually gave rise to further struggles over transitional justice and the boundary and nature of state involvement in human rights claims.

As I showed in the previous chapter, during the initial post-transition period under Alfonsín's stewardship the state engaged in organizational entwining, a form of 'cooperation or coordination between state and non-state actors [that] may enhance the symbolic power of both parties.'<sup>5</sup> This meant that while the state accumulated symbolic capital through the co-option of popular practices, so did those groups whose practices were co-opted and imitated. Human rights groups, who had built up their own symbolic power by providing a sustained and legitimate opposition to the dictatorship, found their legitimacy further strengthened after the return to democracy. For their part, the judiciary, which during the dictatorship lacked legitimacy, saw their fortunes reverse with the reform of the military code and the subsequent hierarchical positioning of civilian jurisdiction, as well as with the active role that Alfonsín had written for them in the transitional justice process. After the *Juicio*, Alfonsín was confronted with these two symbolically powerful sectors working together to pursue a common goal of the extension of justice to more perpetrators. The final sentence of the *Juicio* had called on the military court, which still had jurisdiction of first recourse, to take the evidence surrounding the mid-level officers 'and all those who had operational responsibility' to trial. This process was in fact already underway, and before the *Juicio* even came to an end groups such as the *Centro de Estudios Legales y Sociales* (Center for Legal and Social Studies) had assisted in filing hundreds of cases against middle ranking officers, many of whom were still in active duty.<sup>6</sup>

This was a direct challenge to Alfonsín's vision of a symbolic trial of the intellectual architects of the repression. In response, in April 1986 his new Minister for Defense Germán Lopez issued a series of recommendations to the military prosecutors that were to act as guidelines on how to proceed when these cases began to be filed. The military prosecutors were to consider subordinate officers to be liable 'only if they had

<sup>5</sup>Mara Loveman, 'The Modern State and the Primitive Accumulation of Symbolic Power,' *American Journal of Sociology* 110, no. 6 (2005): 1663.

<sup>6</sup>Alison Brysk, *The Politics of Human Rights in Argentina: Protest, Change and Democratization* (Stanford: Stanford University Press, 1994), 80.

exercised decision-making capacity, if they had known of the illegality of the orders given or if they had committed atrocious and aberrant acts.<sup>7</sup> The recommendations emphasized the unconstitutionality of the delays caused by the sheer number of cases that could possibly be brought forward, and encouraged the prosecutors to seek dismissals of cases and to act generally in accordance with the presumption of due obedience, that is, the presumption that they were following legitimate orders. The exception to this was in certain ‘excessive’ cases where it could be proven that the officer in question was aware of the illegitimacy of said orders or if they exercised decision-making capacity in the chain of command. In a repetition of what had gone before, however, the military prosecutors ignored these recommendations, refusing to submit to Alfonsín’s plans even if they were intended to shield them from more extensive treatment. Once again, this set the stage for the cases to pass into civilian jurisdiction. The judiciary was ready and waiting. As much as the military was looking to resist and narrow transitional justice, human rights groups and judicial actors were looking to extend it, and trials began immediately.

A new dynamic was introduced into the arena of transitional justice, one in which the state struggled with others to control and limit the process. The main challenge came from the judiciary, which actively pursued the prosecution of lower- and middle-ranking officers. Faced with the proliferation of trials and prosecutions, Alfonsín looked for other ways to limit further actions. In late December 1986, a year after the final sentence of the *Juicio*, he introduced what became known as the *Ley de Punto Final* (Full Stop Law) in Congress, where it was supported by a majority of representatives, establishing a maximum period of 60 days after which the statute of limitations on claims relating to the dictatorship would be exhausted. The judiciary and the human rights groups pushed back, working overtime during the stipulated period to file over 300 cases. In a direct rebuke to Alfonsín, members of the judiciary stated that they aimed to process a number of cases that were ‘fifteen times what the government wanted, and three or four times their worst case scenario.’<sup>8</sup> Their reaction was an assertion of their own political power and their refusal to subordinate themselves to the government. As Ricardo Gil

<sup>7</sup>Quoted in Marcelo Sancinetti, *Derechos Humanos en la Argentina Post-dictatorial* (Buenos Aires: Lerner Editores, 1988), 229–231.

<sup>8</sup>Quoted in Carlos H. Acuña and Catalina Smulovitz, ‘Militares en la Transición Argentina: Del gobierno a la subordinación constitucional,’ in *Juicio, castigo, y memorias: derechos humanos y justicia en la política argentina*, ed. Elizabeth Jelín et al. (Buenos Aires: Nueva Visión, 1995), 61.

Lavedra, one of the judges that had presided over the *Juicio*, explained, ‘we wanted to decide who we summoned, when we summoned them, and what for.’<sup>9</sup>

Meanwhile, the military continued to resist any attempts at justice, turning to violence when simple non-compliance proved ineffective against the forward march of the trials. This strategy reached its peak in April 1987 when a group of middle-ranking officers took control of the Campo de Mayo barracks in the province of Buenos Aires. While their uprising lasted only five days, it announced the willingness of sectors of the military to resort to old practices in order to limit transitional justice, and demonstrated to Alfonsín and those around him that the government was neither in control of transitional justice nor, for that matter, of public order.

*Reconciliation as a Political Strategy:  
Using the Past to Move Forward*

Although in practice the *Punto Final* law intensified conflicts, it was introduced within a discourse of reconciliation and presented as a way of bringing various social groups together. Alfonsín saw this as a natural stage in the broader process of transition to and consolidation of democracy. Already at the end of 1986, just prior to the introduction of the law, Alfonsín had begun to talk about a juncture that had been reached between the time for looking into the past and the time for looking towards the future. Drawing on political models that outlined a path through transition to consolidation, he declared that,

we have concluded the reconstruction [of democracy] ... but we still need to conclude what we could call the reunion of Argentines, to consolidate the coming together of all Argentines ... because there is not one Argentina for civilians and another for the military ... No one should forget what has happened to us. But I want everyone to understand, everyone to accept that we can no longer live as prisoners of our own decadency. This is why we are doing what we are doing, because now is the time for the future, because now is not the time for a past that will continue to hinder us. It is the time for all Argentines to come together.<sup>10</sup>

<sup>9</sup>Interview, Archivos Orales de la Argentina Contemporánea, Instituto Gino Germani, Universidad de Buenos Aires, May 18, 2005.

<sup>10</sup>Alfonsín, ‘Discurso al País “No creo en puntos finales por decreto”, December 5, 1986’ reproduced in Sancinetti, *Derechos Humanos en la Argentina Post-dictatorial*, 237–238.

By the end of the month he had tabled the *Punto Final* law in parliament, which was based on the idea that 'it is necessary to establish a system that ensures the prompt termination of legal processing, with the additional benefits of the consolidation of social peace and national reconciliation.'<sup>11</sup> The notion of social peace as a political goal superior to retributive justice had been initially invoked by the *Proceso*, whose self-amnesty was officially called the *Ley de Pacificación Nacional* (Law of National Pacification). Both pacification and reconciliation proposed the quelling of hostilities, and in Alfonsín's usage reconciliation was understood to be an essential part in building a democratic order.

The *Punto Final* law provoked an intensified effort at retributive justice on the part of the judiciary and the human rights activists, which in turn activated sectors of the military. In response, Alfonsín intensified his emphasis on reconciliation and the need to move forward. Following the military uprisings his first step was to create a united front with the Congress, which agreed with the Executive that reconciliation was the central political goal of the day and that differentiation between different levels of responsibility for past events was the way to achieve it.<sup>12</sup> This political support for the notion of differing levels of responsibility then allowed him to introduce his next legal measure restricting trials, the *Obediencia Debida* (Due Obedience) law, which protected middle- and lower-ranking officers from prosecution by codifying the idea that they were following orders, in the name of 'the reconciliation of all Argentines.'<sup>13</sup> Introducing the law in parliament, Alfonsín emphasized the link between 'the construction of a new society [and the need] for everyone to definitively overcome [what was] a painful historical moment for the country.'<sup>14</sup> Yet what was really painful for Alfonsín, and what was standing in the way of the construction of a consolidated order, was the conflict over that past, not the past itself. The *Obediencia Debida* law functioned to unilaterally declare this conflict resolved.

<sup>11</sup>Ley 23.492, 'Ley de Punto Final,' *Boletín Oficial de la República Argentina*, December 29, 1986.

<sup>12</sup>*Clarín*, April 20, 1987.

<sup>13</sup>Ley 23.521, 'Ley de Obediencia Debida,' *Boletín Oficial de la República Argentina*, June 8, 1987.

<sup>14</sup>Secretaría Parlamentaria de la Cámara de Diputados de la Nación, *Diario de Asuntos Tratados* Reunión 8 (15 May 1987): 619.

While this new emphasis on reconciliation conflicted with the retributive elements of earlier transitional justice policy, it was still consistent with the ideas about limited responsibility that Alfonsín and his *filósofos* had held since before the transition. They had further developed these ideas about the relationship between justice, prosecutions, and the broader political goals they were trying to achieve in light of the experience of the trials and their political impact. Notably, the experience of the military uprisings indelibly marked discussions about limited responsibility and the extent to which justice should be pursued. In justifying the laws of *Punto Final* and *Obediencia Debida*, for example, advisor Jaime Malamud Goti emphasized the need to balance the demonstrative effects of trials and their ability to encourage identification with and confidence in the democratic system, with the need to avoid antagonizing the military. The experience of the uprisings led him to see things less in theoretical terms and more in terms of the practical measurement of trade-offs: ‘If trust in democratic institutions and the self-esteem of the citizenry have been significantly enhanced, further attempts to allocate criminal responsibility requires us to reassess the political balance.’<sup>15</sup> The state had a moral obligation to prosecute, but also a moral obligation to protect overall stability by not overly antagonizing the military.<sup>16</sup> The explicit inclusion of the military as a legitimate interest group whose concerns needed to be managed was a new element in the *filósofos*’ theorizing. These ideas had developed within the context of their discussions with the budding international network of lawyers, political scientists and human rights professionals that were coming together to develop ideas about transitional justice around this time. These emerging transitional justice professionals from across the ‘post-authoritarian’ and post-conflict world began to come together to discuss the transitions to democracy occurring in these regions and how best to manage and approach them in the late 1980s.<sup>17</sup> Within these circles, the ideas of

<sup>15</sup>Ibid., 14.

<sup>16</sup>Ibid., 15.

<sup>17</sup>A seminal moment in the development of these circles was a 1988 conference held at the Aspen Institute, with Nino and Malamud Goti in attendance alongside others such as José Zalaquett, who would later play a central role in the Chilean truth commission, Lawrence Weschler, a US journalist who had been covering the process of dealing with the past in Brazil and Uruguay, and Diane Orentlicher, who later worked as an advisor to the United Nations in their principles on impunity. The results of the conference were later compiled with other materials in Neil Kritz, ed., *Transitional Justice: How Emerging Democracies Reckon with Former Regimes* (Washington, DC: The United States Institute of Peace Press, 1995).

transitions theorists were influential in helping them conceptualize political change. Transitions theorists and political scientists such as Guillermo O'Donnell, writing in the late 1970s and 1980s, promoted the idea that democratization was the result of political choices made by elites, whose responsibility it was to negotiate between the relevant actors in their given country in order to achieve the desired outcome of democratization.<sup>18</sup> These ideas shaped the view that justice needed to be balanced with pragmatic concerns for political stability. In turn, this view was central to the policies of *Punto Final* and *Obedencia Debida*, the policy cornerstones of reconciliation.

But despite this discourse of unity and concrete measures to appease the concerns of the military, Alfonsín was unable to quell social tensions. His inability to respond to the challenges presented by the military, which continued to threaten disorder, was seized upon by others as evidence of his inability to establish state authority and consolidate the transition. The political space for critique expanded even further with an economic crisis that worsened from 1987 onwards. It was within this context that the first post-transition elections were held. Reconciliation became a strong theme in these elections, demonstrating the extent to which ideas about democratization as the management of conflict between interest groups had spread. Within the context of Alfonsín's inability to achieve reconciliation, the Peronists made their political comeback. At the time of the 1983 election the Peronists remained connected in collective memory to the rise of the dictatorship and its counterinsurgency tactics. During the Alfonsín government, however, they had abstained from actively supporting the laws of *Punto Final* and *Obedencia Debida*, distancing themselves from both the military and from the failed incumbent. Factions within the political grouping underwent an auto-critique and reorientation of principles, revising their understanding of politics to further differentiate themselves from the Alfonsín approach. This group, the *Renovación Peronista*, theorized reconciliation in line with the traditional Peronist approach to managing social conflict, arguing that 'society is not necessarily conflictive, but is potentially harmonious. To discover and promote these harmonies is part of the task of politics, although

<sup>18</sup> Paige Arthur, 'How "Transitions" Reshaped Human Rights: A Conceptual History of Transitional Justice,' *Human Rights Quarterly* 31 (2009): 343–348. See also Guillermo O'Donnell and Philippe C. Schmitter, *Transitions from Authoritarian Rule: Tentative Conclusions About Uncertain Democracies* (Baltimore: The Johns Hopkins University Press, 1986).

these ideas are labeled corporatist.<sup>19</sup> At the same time, they shifted the focus of their message beyond the concern of civil and political rights that had characterized Alfonsín's government and, indeed, the dictatorship-era human rights movement, explaining that 'our message is directed towards man in all his complexity – beyond his condition as *citizen* – not just as holder of rights and judicial guarantees but also as holder of basic necessities.'<sup>20</sup> The new Peronist message of harmony and reconciliation was able to feed into the generalized climate of discontent and propose a solution to problems beyond the issue of the authoritarian past.

### NATIONAL RECONCILIATION: THE MENEMIST PROJECT

The Peronist candidate, Carlos Menem, won the 1989 election, and proceeded to rearticulate transitional justice around this notion of socio-political harmony. Menem had begun his political career in the province of La Rioja, and like many Peronists he experienced a period of incarceration during the *Proceso*, although his arrest was regular and he was never 'disappeared.' Never having been a member of a human rights-based opposition group, following the return to civilian rule Menem had been a central figure in the *Renovación Peronista*, although ultimately he pursued the presidential nomination independent of that faction. Nonetheless, Menem's political vision echoed that of the *Renovación*, particularly in their emphasis on the social nature of rights.<sup>21</sup> Under the banners '*ahora unidos, ahora Menem*' (Time for unity, time for Menem) and '*cambiamos el presente*' (let's change the present), Menem's political program emphasized harmony and unity, as well as a focus on addressing current rather than past problems. He named his first administration the *Gobierno de Unidad Nacional* (National Unity Government, 1989–1994), arguing that 'Argentine society, recently emerged from scenes of civil and social war, shows a need for reconciliation, verified by the scenes

<sup>19</sup>Antonio Cafiero, 'En qué nos equivocamos,' in *El Peronismo de la Derrota*, ed. Miguel Unamuno et al. (Buenos Aires: Cedral, 1984), 152.

<sup>20</sup>*Ibid.*, 151.

<sup>21</sup>For Menem, liberal democracy in the style promoted by Alfonsín was a European import. See James McGuire, *Peronism Without Perón: Unions, Parties and Democracy in Argentina* (Stanford: Stanford University Press, 1997), 212.

during the peak of hyperinflation in 1989.<sup>22</sup> For Menem, the final years of the Alfonsín government—in which strikes and street clashes with police became a common occurrence and supermarkets were looted in protest over spiraling prices—were illustrative of nothing else but a lack of unity, and reconciliation was the only way to consolidate civil society and establish a sense of governability and state control.

Reconciliation was, of course, also a way to address a more serious threat to the democratic order, military uprisings. Despite the passing of the *Obedencia Debida* law the rebel sections of the military, known as the *carapintadas*, continued to threaten disorder in defense of the dignity of the Army. Alfonsín's delineation of different levels of responsibility for past violations had not been enough to control these sectors, who also sought vindication for the role of the armed forces as an institution in protecting the nation. Menem, then, began his presidency by promoting a different understanding of responsibility. In his inaugural speech as president he announced that 'this government of national unity that begins today starts from one basic premise ... we are all, to a greater or lesser degree, responsible and complicit in the Argentine failure.' This reclassification of responsibility redirected it away from the military and the perpetrators of past human rights violations, and towards a notion of nationwide individual responsibility for national breakdown. Insisting that the country was 'broken, devastated, destroyed, burnt to the ground,' something needed to be done urgently to heal the wounded body politic. He had come to the presidency, he said, 'to close this absurd chapter of cruel divisions between Argentines. Between civilian Argentines and military Argentines. In fact, between the entire Argentine *pueblo*.'<sup>23</sup> This conflict necessitated that the government work towards 'establishing peace within the Argentine community ... and the healing over of a past that does [the country] no good.'<sup>24</sup> It was the state's responsibility to facilitate this healing, which specifically involved reconciling the military and civil society. As he said in his presidential address,

<sup>22</sup>Quoted in Mario Baizán, *Desde el Poder: Carlos Menem Responde* (Buenos Aires: Corregidor, 1994), 63.

<sup>23</sup>Discurso Oficial, November 1, 1989. *Discursos del Señor Presidente de la Nación Argentina, Dr. Carlos Saúl Menem 1989* (Buenos Aires: Secretaría de Prensa y Difusión, 1990).

<sup>24</sup>*El Bimestre*, no. 46 (1989): 11–12.

the state should ‘never nurture a confrontation between civilians and the military, simply because both comprise and enrich the essence of the Argentine *pueblo*.’<sup>25</sup> The idea of generalized responsibility was not entirely new; Alfonsín had earlier argued that the construction of a new society involves everyone overcoming the past, although he highlighted that the symbolic prosecution of the heads of the military juntas created the conditions necessary for this to occur.<sup>26</sup> Neither was the focus on creating harmony between the demands of the military and other groups in society; this was central to transitions theory and shaped the thinking of Alfonsín and his *filósofos*. Menem took these existing themes and added a sense of urgency, tying the resolution of conflicts to the survival of the Argentine political community itself. This approach set the stage for more dramatic policy in the service of reconciliation.

### *The Indultos*

The first move that Menem made in transforming transitional justice was designed to harmonize the relationship between the state and the military, thus reducing once and for all the political threat posed by the latter. His plan was a series of *indultos* (pardons) for those who had been sentenced in the *Juicio a las Juntas*.<sup>27</sup> The logic of this policy followed Menem’s broader ‘shock treatment’ approach, wherein immediately after his election he took a number of dramatic measures that

<sup>25</sup>Mensaje ante la Asamblea Legislativa, July 8, 1989. *Discursos del Señor Presidente de la Nación Argentina, Dr. Carlos Saúl Menem 1989* (Buenos Aires: Secretaría de Prensa y Difusión, 1990).

<sup>26</sup>‘Mensaje del Poder Ejecutivo al Honorable Congreso de la Nación, May 13, 1987,’ in Secretaría Parlamentaria de la Cámara de Diputados de la Nación, *Diario de Asuntos Tratados*, Reunión 8 (15 May 1987): 619.

<sup>27</sup>Menem actually issued the pardons in two stages: the first, issued 7 October 1989, pardoned those arraigned after the *Juicio* but before the laws of *Punto Final* and *Obediencia Debida* came into force, members of guerrilla organisations, those charged with crimes relating to the war in the Malvinas, and those charged for their involvement in the *carapintada* uprisings. Decrees issued 30 December 1990 pardoned those sentenced in the *Juicio a las Juntas*, Mario Firmenich, ex-Montonero leader, and various others sentenced for crimes relating to state terrorism. Decretos 1.002/1989, 1.003/1989, 1.004/1989, 1.005/1989, *Boletín Oficial de la República Argentina*, October 10, 1989.

had either been previously unannounced or even disavowed.<sup>28</sup> Prior to his election Menem had called for the reformation of Alfonsín's policy towards the military, but had actually declared his opposition to any sort of amnesty.<sup>29</sup> A week before the election, however, he reemphasized the need to create harmony between the state and other sectors of society. 'I wouldn't call it an amnesty,' he said, 'I wouldn't call it anything. I believe that what is necessary is a national coming together and if that means a pardon, a commutation of sentences or something like this, then that seems appropriate to me.'<sup>30</sup> The *indultos* were articulated not as an absence of justice, which the term amnesty implied, but as reconciliation, a positive rather than negative implication.

The *indultos* replicated the Alfonsín-era *dos demonios* framework by pardoning 39 members of the armed forces sentenced for crimes relating to the past dictatorship, as well as 64 ex-guerrillas and members of armed revolutionary groups, who had also been sentenced during the Alfonsín period.<sup>31</sup> They did not overturn the guilty sentences themselves; but rather released those charged from any ongoing obligation to serve out their sentences, relegating the issue to the past by voiding any ongoing significance the *Juicio* might have. The *indultos*, then, worked within the jurisdictional structure established by Alfonsín, where the military was subordinate to civilian law, while offering the institution a privileged position within that structure. The relationship between the military and the state, therefore, was redefined, echoing transitions theory's emphasis on the special place of the armed forces as an interest group whose actions were central to the creation of democratic stability. As expected, this had an immediate positive effect on governability, and following the *indultos* the military as an institution helped to quell any continued uprisings from dissident factions.<sup>32</sup>

<sup>28</sup>Upon his inauguration as president Menem announced an approach he classified as 'major surgery without anesthetic,' in which he would take the dramatic measures necessary to address economic, social and political issues facing the country. Central to these measures was the Ley de Emergencia Económica (Economic Emergency Law), which allowed for greater unilateral Executive action regarding spending and budget matters. *El País*, August 10, 1989.

<sup>29</sup>*Página/12*, December 5, 1988.

<sup>30</sup>*Página/12*, May 5, 1989.

<sup>31</sup>They also pardoned the three generals responsible for the Malvinas War, as well as a large number of middle-ranking officers involved in the post-1986 uprisings.

<sup>32</sup>Marcos Novaro and Vicente Palermo, *Política y Poder en el Gobierno de Menem* (Buenos Aires: Editorial Norma, 1996), 255.

Menem's decision to issue the *indultos* was a reflection of his belief that the state had accumulated enough symbolic capital so as to be able to successfully carry out such a move. 'I have more than sufficient authority,' he said in September 1989, 'to take measures that will heal over these old and heavy wounds that bring down the dignity of our pueblo and the institutions that form a part of it.'<sup>33</sup> Positioning the state, and indeed his own Executive, as the central mediator of conflicts, he argued that with the *indultos* 'the Executive desires to create the conditions and space for reconciliation, for mutual pardon, and for national unity.'<sup>34</sup> The *indultos* promised to recapture the political protagonism that the government had lost with the flourishing of judicial practices and with the military uprisings, repositioning it in control of transitional justice and, indeed, in control of socio-political conflict. Menem was quite clear about the *indultos* being a measure designed to regain control of transitional justice, something that he accused his predecessor of having failed to do, likening the situation after 1986 to 'that which Frankenstein created and was subsequently unable to control.'<sup>35</sup> More than simply unifying the country after economic chaos and hyperinflation, Menem wanted to establish order within transitional justice and assert control over the activated judiciary, human rights groups, and military. The *indultos* worked to regaining this control by reclassifying justice as subordinate to reconciliation, and by reclassifying victim and perpetrator, and indeed conflict itself, away from an exclusive relationship with the authoritarian past.

#### ADMINISTERING REPARATION, RECLASSIFYING JUSTICE

Another central element of Menem's reconfigured transitional justice policy was reparations. Reparations were an element in the search for reconciliation. In defending the reparations project in parliament Peronist José Corchuelo Blasco argued that the 'spirit of the project ... [was] the reunion of Argentines, [and] the profound search for a point of connection that will allow us to remain within a framework of liberty and respect, with the full observation of human rights.'<sup>36</sup> Following from the *indultos*,

<sup>33</sup> *Clarín*, September 19, 1989.

<sup>34</sup> Decreto 1.003/1989 'Indultos: Extinción de la pena, indulto, derecho penal,' *Boletín Oficial de la República Argentina*, October 6, 1989.

<sup>35</sup> *Clarín*, May 7, 1990.

<sup>36</sup> Cámara de Diputados de la Nación, *Diario de Sesiones* (27 November 1991): 4834.

which brought transitional justice back under the control of the state and delegitimized retributive forms of justice, reparations helped institute a new form of justice. While retributive justice focused on the perpetrators, reparations explicitly focused on the victim, who was in turn recast as a beneficiary. The redirecting of justice away from retributive forms and into reparative forms also saw the bureaucracy become the site of justice, taking the power to control transitional justice further out of the hands of the judiciary and into the hands of the state. As such, the reparations fed into a broader administrative reform undertaken by Menem that aimed, among other things, at reducing the power of the judiciary vis-à-vis the Executive.<sup>37</sup> The reparations excluded the judiciary from transitional justice, while reincorporating human rights activists on new terms.

The idea of reparations as part of transitional justice did not begin with Menem. It had been a consistent element of responses to state-sponsored violations since the beginning of the 1980s, when human rights activists and professionals began to think about dealing with past violations rather than simply focusing on stopping current ones. It was through the work of human rights activists and victims' groups that the idea for reparations was presented to Menem, who embraced the demand as a timely way to reorient notions of justice following the *indultos*. The *Nunca Más* report had recommended that the government offer reparations for the violations it had investigated. Prior to this, reparations had also been mentioned in the recommendations of the Inter-American Commission report in 1980. Like other early demands for justice, however, these recommendations did not specify what was meant by reparation, and to whom they applied. In 1984 the Alfonsín government had first offered reparation in the form of restitutive measures with a series of laws that reinstated members of the public service who had been retrenched during the *Proceso*.<sup>38</sup>

<sup>37</sup>For a journalistic overview of this process see Horacio Verbitsky, *Hacer la Corte: La Construcción de un Poder Absoluto sin Justicia ni Control* (Buenos Aires: Planeta, 1993).

<sup>38</sup>Ley 23.053, 'Reincorporaciones de Personal del Servicio Exterior de la Nación declarados prescindibles' reinstated members of the overseas diplomatic corps, and Ley 23.117, 'Incorporación de trabajadores despedidos o cesanteados de las empresas mixtas del Estado por razones políticas, gremiales o sociales' reinstated those working for state enterprises fired for political or trade union reasons. There were also separate laws that specifically addressed teachers, bank workers and former holders of public office. *Boletín Oficial de la República Argentina*, April 4, 1984, November 7, 1984.

Financial reparations entered public policy in 1986 when he sanctioned a law that established a pension for partners and children of disappeared persons, administered through the existing social services infrastructure.<sup>39</sup> Following the *Juicio*, dictatorship-era human rights groups also began to talk about the possibility of demanding more extensive reparations alongside truth and justice, but the issue was extremely divisive within and between the different groups; the *Madres de Plaza de Mayo* split into two different organizations over the issue in 1986.<sup>40</sup> Despite these divisions, a number of Argentine activists did actively pursue financial reparation, using regional-level human rights structures to push the state to respond to their demands. At a 1988 meeting held to discuss responses to the crime of forced disappearance, participants included reparations in their proposal as complementary to information and justice practices.<sup>41</sup> These ideas were taken up at the international level in 1989 by the United Nations Sub-commission on Discrimination, which under the direction of Theo van Boven authorized the investigation of guiding principles on the right to restitution, compensation and rehabilitation, and by the Inter-American Commission for Human Rights, which came to see reparations as an integral part of any restitution project.<sup>42</sup>

Within this context, a group of Argentine petitioners turned to the Inter-American Commission for help after the domestic courts rejected their demand for indemnization for damages and losses suffered during their incarceration during the *Proceso*. The Commission then turned to the Argentine government, now under Menem's leadership, to gauge willingness to facilitate these demands. This presented Menem with an

<sup>39</sup>Ley 23.466, 'Otorgamiento de pensiones no contributivas para el derechohabiente de las personas desaparecidas entre el 24/3/76 y el 9/12/88,' *Boletín Oficial de la República Argentina*, February 16, 1987.

<sup>40</sup>María José Gumbre, 'Economic Reparations for Grave Human Rights Violations: The Argentinean Experience,' in *The Handbook of Reparations*, ed. Pablo de Greiff (Oxford: Oxford University Press, 2008), 24; Fernando J. Bosco, 'Human Rights Politics and Scaled Performances of Memory: Conflicts Among the Madres de Plaza de Mayo in Argentina,' *Social & Cultural Geography* 5, no. 3 (2004): 381–402.

<sup>41</sup>Grupo de Iniciativa para una Convención contra las Desapariciones Forzadas de Personas, *La desaparición forzada como crimen de lesa humanidad*, Conference Proceedings, Buenos Aires, October 10–13, 1988.

<sup>42</sup>Resolution 1989/13, 13 August 1989; Theo van Boven, 'Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms,' E/CN.4/Sub.2/1990/10.

opportunity to move transitional justice away from the judicial, retributive sphere. He responded by creating a bicameral commission to establish the details of a reparations program.<sup>43</sup> In order to ensure that reparations policy could be controlled by domestic forces rather than international ones, however, he moved quickly and established the first reparations by presidential decree before the bicameral committee's recommendations could even make their way through parliament. Targeted specifically at the original group of petitioners, the decree stated that 'a solution to the issue [of reparations] must be urgently adopted, given that the Argentine republic must honor the compromise it made upon subscribing to the American Convention on Human Rights.' The desire to conform to external expectations was the reason given for the swiftness, with the decree also stating that 'if this present measure is not taken, the country could be internationally sanctioned.'<sup>44</sup> But beyond the simple desire to conform to international obligations, by taking the initiative and reacting quickly Menem was ensuring that the Argentine state maintained control of the process, rather than ceding this control to an international court or other body.

In addition to preventing the Inter-American Commission from initiating legal practices, the reparations themselves functioned as an opportunity to discursively recast the notion of justice, as well as of truth. Describing the reparations, the head of Menem's human rights bureaucracy, Alicia Pierini, later characterized them as:

Connected to a conception of justice beyond the framework of the court. Justice has to do with the truth, dignity. It's an alternative justice for when there aren't sentences. This generated conflict – some thought that by taking this path we were abandoning the other ... There was a truth for the families ... and there was a truth that exceeded – and included – that of the families. We continue working within this [second] truth.<sup>45</sup>

<sup>43</sup>Decreto 798/90 'Reparaciones. Creación de una comisión integrada por representantes de ambas cámaras del Congreso de la Nación y de una entidad no gubernamental, dedicada a la defensa de los derechos humanos,' *Boletín Oficial de la República Argentina*, May 17, 1990; Guembe, 'Economic Reparations for Grave Human Rights Violations,' 49.

<sup>44</sup>Decreto 70/91, 'Reparaciones: Las personas que durante la vigencia del estado de sitio hubieran sido puestas a disposición del poder ejecutivo nacional,' *Boletín Oficial de la República Argentina*, January 16, 1991.

<sup>45</sup>Archivo Oral de Memoria Abierta, *Testimonio de Alicia Pierini*, Buenos Aires, September 6, 2003.

Truth was decoupled from criminal justice, and even from information initiatives and from the victim's families, who formed some of the most prominent human rights organizations. Instead it was connected to a broader notion of justice and dignity. This truth was the truth of the present moment, not of the past. As Pierini explained,

Conceiving of human rights in democracy when this conception was formed resisting the dictatorship brings with it a change of paradigms ... Although there are still those who think that 'doing human rights' is an oppositional political activity and that to defend victims is to automatically defend just causes ... for the National Government 'doing' human rights has been to construct a public life more inclusive, respectful of diversity and of the demands of different sectors, but, above all, subject to the general interest and to the values of democracy.<sup>46</sup>

This shift of paradigms from human rights as opposition politics to human rights as something that contributed to strengthening the state was something that human rights professionals had been grappling with since the late 1980s, when they had begun to participate in discussions alongside people like Nino and Malamud Goti on the question of transitional justice.<sup>47</sup> People like Pierini, who also came from a human rights activist background, joined the government human rights bureaucracy because they had resolved this dilemma and accepted the benefits of a state-sponsored human rights policy. In order to make this policy work to build governability, she and her colleagues needed to move it away from its combative roots and recast it within a broader understanding of human rights and the defense of dignity.

Under Menem, the human rights bureaucracy itself became the principal site for the diffusion of this broader understanding of human rights. Menem engaged in a broad administrative reform designed to assert the presence and capacity of the state in the context of democratic transition, as well as to concentrate power in the hands of the Executive.<sup>48</sup>

<sup>46</sup>Ministerio del Interior, *Informe: 1989–1999: Diez años de derechos humanos* (Buenos Aires: Ministerio del Interior, 1999), 24, 25.

<sup>47</sup>Arthur, 'How "Transitions" Reshaped Human Rights,' 335–336.

<sup>48</sup>For an analysis of administrative reforms in transitional contexts see, for example, Ben Ross Schneider and Blanca Herardia, eds., *Reinventing Leviathan: The Politics of Administrative Reform in Developing Countries* (Miami: North-South Center Press, 2003). For Menem's particular approach to reform and the concentration of power, see Mariana Llanos, 'Understanding Presidential Power in Argentina: A Study of the Policy of Privatization in the 1990s,' *Journal of Latin American Studies* 33 (2001): 67–99.

The reform and restructure of the human rights bureaucracy saw the presence of the state asserted in new areas where human rights groups had been working, as well as ensuring the colocation of transitional justice alongside broader approaches to rights violations. Whereas the *Subsecretaría de Derechos Humanos*, created by Alfonsín in 1984, was charged with taking possession of the CONADEP archives—continuing to receive testimonies from victims and their families, and overseeing the exhumation and identification of victims—after Menem’s restructure its mandate was broadened to include compliance with human rights norms and the receiving of complaints and testimonies relating to cases of discrimination, as well as processing the reparations.<sup>49</sup> This broadening of human rights work was also evident in transitional justice initiatives that focused on victims of the *Proceso*. In June 1992 the Menem government met with the *Abuelas de Plaza de Mayo* (Grandmothers of the Plaza de Mayo) to discuss, among other things, the creation of a specialized technical commission that would oversee work on the identification of the missing children of the disappeared. This had long been the central concern of the *Abuelas*, who had previously worked with the Alfonsín government and the American Association for the Advancement of Science to establish the *Banco Nacional de Datos Genéticos* (National Genetic Database), whose aim was to identify the biological identity of children suspected of having been kidnapped by the state during the dictatorship.<sup>50</sup> The result of these discussions was the creation of the *Comisión Nacional por el Derecho a la Identidad* (National Commission for the Right to Identity, CONADI). While CONADI had as its initial objective the search and localization of children disappeared during the last military dictatorship, however, this function was rapidly overtaken by the reporting of contemporary theft and trafficking of minors, and of adults with their identity in danger.<sup>51</sup> At the same time, official government

<sup>49</sup>Decreto 645/1991, ‘Estructura Administrativa del Ministerio del Interior,’ *Boletín Oficial de la República Argentina*, April 19, 1991. The restructure saw the Alfonsín-era Subsecretaría de Derechos Humanos (Human Rights Sub-Secretariat) given a lower administrative rank and renamed the Dirección Nacional de Derechos Humanos (National Human Rights Directive). In 1992, after a meeting between Menem and the *Abuelas de Plaza de Mayo*, it was re-elevated to the rank (and name) of Subsecretaría.

<sup>50</sup>See Estela Barnes de Carlotto, ‘Niños desaparecidos por motivos políticos en la República Argentina (1976–1983),’ in *Verdad y Justicia: Homenaje a Emilio F. Mignone* (Buenos Aires: Instituto Interamericano de Derechos Humanos, 2001), 87–94.

<sup>51</sup>CONADI, ‘Creación de la Comisión Nacional por le Derecho a la Identidad,’ Accessed October 30, 2011, [www.conadi.jus.gob.ar/home\\_fl.html](http://www.conadi.jus.gob.ar/home_fl.html).

publications decoupled human rights from the dictatorship, explaining for example that ‘the history of human rights violations did not begin in the 1970s. On the contrary, the history of our country is marked by confrontations and violence ... along the length of this history are recorded moments of advance and others of retreat in the social, political and institutional construction of human rights.’<sup>52</sup> By expanding the services offered under the rubric of human rights, and by expanding the understanding of what constituted a human rights violation and indeed the history of human rights in the country, the human rights bureaucracy continued the work of reclassification begun by the *indultos* and the reparations.

### RECONCILIATION AS STATE FORMATION ACROSS THE SOUTHERN CONE

The embrace of reconciliation as a way to limit the relative power of other institutional actors can be seen beyond the example of Argentina. In other post-authoritarian contexts, reconciliation and national unity were presented as the more realistic, forward-looking alternative to retributive justice measures. Looking at the examples of Chile and Uruguay we can see a similar pattern to in Argentina, whereby state actors emphasized the need for a reconciliatory model in their efforts to regain control of political processes and bring other institutional actors under control. Particularly in the immediate post-Cold War period, in the interregnum between the end of authoritarianism and the thickening of international human rights mechanisms, actors looking to build a forward-looking political community embraced reconciliation, with its concern for containing the military threat. Reconciliation however, like the notions of truth and justice, looked and functioned differently depending on the context. While in Argentina reconciliation was used to limit retributive justice and wrestle control over transitional justice away from the human rights groups, the judiciary and the military, in Chile it played a very different role. On the other side of the Andes, where there had been a truth commission but no trials, reconciliation was used to *encourage* criminal justice processes, as a way of limiting the power of the

<sup>52</sup>Ministerio del Interior, *Informe: 1989–1999*, 22.

military and the threat they posed to democratic consolidation, as well as a way of encouraging democratic commitment from the judiciary itself. In Uruguay, meanwhile, where the incoming government was focused on eliminating conflicts over the past, reconciliation was used—as in Argentina—to introduce measures that closed off judicial avenues. Once these were closed off, the transition was seen to be complete, indicating the degree to which state makers understood stability through the lens of military threat.

### *Chile: The Struggle to Define Reconciliation*

Patricio Aylwin came to the presidency in 1989, the same year as Menem, and articulated his transitional justice policy around the concept of reconciliation from the very beginning. The day after assuming the presidency he made clear that his policies regarding the human rights violations of the past would be directed towards the goal of reconciliation. ‘I consider it my responsibility,’ he declared, ‘to avoid time getting away from us while we look to the past. The spiritual health of Chile demands ... that sooner rather than later the moment will come in which we all, reconciled, look with confidence towards the future.’<sup>53</sup> To this end, he focused transitional justice policy on a swift investigation of the past, moving then into restorative measures. The truth commission itself was officially named the *Comisión Nacional de Verdad y Reconciliación* (National Commission for Truth and Reconciliation), establishing a connection between truth and reconciliation from the outset. This shaped subsequent, related policies: Aylwin also created a human rights bureaucracy, the *Corporación de Reparación y Reconciliación* (Reparation and Reconciliation Corporation), which was charged with overseeing compliance with the recommendations of the truth commission. In keeping with its mandated focus on reconciliation, the commission itself ordered the state to engage in the ‘repair of the moral damage’ to victims.<sup>54</sup>

<sup>53</sup>Quoted in Elizabeth Lira and Brian Loveman, *Políticas de reparación. Chile 1990–2004* (Santiago: LOM Ediciones, 2005), 22.

<sup>54</sup>Ley 19.123 ‘Crea Corporación Nacional de Reparación y Reconciliación, establece pensión de reparación y otorga otros beneficios en favor de personas que señala,’ *Diario Oficial de la República de Chile*, February 8, 1992.

The particular methods of the Pinochet regime shaped the ways in which this repair was pursued, with measures that facilitated the reintegration of victims back into the national community and territory prioritized in response to the widescale use of both regular detention and exile during the dictatorship.<sup>55</sup>

Reconciliation, however, also undergirded other attempts at policy designed to address the military, which in the Chilean transition had retained both a high degree of legitimacy as well as a high degree of political power and autonomy. In line with broader thinking on transitions, Aylwin consciously sought to avoid a military uprising, leading him to emphasize both reconciliation and justice ‘as far as is possible.’ He desired trials, but wanted to avoid what he saw as ‘aggressive actions against those who continued to have the power of arms.’<sup>56</sup> He and his advisors were acutely aware of what had happened in Argentina with the *carapintada* uprisings; in the Chilean context, with a politically more powerful military, this could have disastrous consequences for the democratic order.<sup>57</sup> The self-amnesty passed by the military remained in place as a clear indicator of the subordination of the civilian regime to the will of its predecessor, while at the same time the power and autonomy of the military posed an ongoing threat to democratic consolidation. In response Aylwin designed a transitional justice program that aimed to subordinate the military by inviting it to participate in its own democratization.

Much like Alfonsín before him, Aylwin’s transitional justice program employed limited criminal justice to achieve this aim. Unlike in the earlier case of Alfonsín, however, Aylwin wanted to use limited criminal justice to modernize and corral, rather than empower, the judiciary, which in Chile remained largely aligned with the former Pinochet regime. He invited the Supreme Court to carry out judicial investigation despite

<sup>55</sup>See, for example, Ley 18.979, ‘Rehabilita nacionalidad chilena a don Orlando Letelier del Solar,’ *Diario Oficial de la República de Chile*, May 11, 1990; Ley 18.994, ‘Crea Oficina Nacional del Retorno,’ *Diario Oficial de la República de Chile*, August 20, 1990; Ley 19.074 ‘Autoriza ejercicio profesional a personas que señala que obtuvieron títulos o grados en el extranjero,’ *Diario Oficial de la República de Chile*, August 28, 1991.

<sup>56</sup>Patricio Aylwin, Interview, *Revista Que Pasa* (2016), Accessed June 18, 2017, <http://www.quepasa.cl/articulo/politica/2016/04/la-ultima-entrevista-de-patricio-aylwin.shtml/>.

<sup>57</sup>Carlos Huneeus, *La democracia semisoberana: Chile después de Pinochet* (Santiago: Taurus, 2014), 237.

the presence of a military self-amnesty, but this call was not taken up.<sup>58</sup> Judicial actors brought individual cases forward, but the judiciary as an institution remained uncommitted to the new democratic order. Aylwin did not even enjoy full support for his project within parliament, nor even his own government: Secretary General Edgardo Boeninger warned that the transition would suffer from a loss of momentum if it remained focused on divisive issues from the past, while senator Sergio Fernández argued for an extension of the amnesty law warning that ‘faced with the dilemma between reconciliation or confrontation, we can still choose. But peace is fragile, while hate easily spreads.’<sup>59</sup> These were the same arguments that had been used in Argentina to limit prosecution, the main difference being that here they were being used to prevent even limited prosecution from taking place. Reconciliation, then, for Aylwin proved to be a less than useful framework for his project as it could also be marshaled to argue against any type of retributive justice. Even the military used the idea of reconciliation in its proposals. For them, reconciliation meant stopping after the truth commission; this would allow ‘for a reconciliation that will allow the planning of a better future for Chile.’<sup>60</sup> The national police force also declared their support for reconciliation, but emphasized that the information contained in the truth commission report needed to be understood in context, and that context was one of social disorder and collapse.<sup>61</sup> For the armed and security forces, truth was the key to reconciliation. It could be expanded on and contextualized, but it should not be followed by justice.

Nevertheless, Aylwin continued to try to frame symbolic justice as a necessary precondition for reconciliation. In August 1993 after the military staged an uprising he developed a proposal that would allow for symbolic judgments accompanied by amnesty. This, he said, ‘would aim in the process of national reconciliation and in strengthening our democracy.’<sup>62</sup> But this initiative failed due to lack of political support,

<sup>58</sup>Steve Stern, *Reckoning with Pinochet: The Memory Question in Democratic Chile* (Durham and London: Duke University Press, 2010), 113–115.

<sup>59</sup>Ibid., 121; Elizabeth Lira and Brian Loveman, *El espejismo de la reconciliación política. Chile 1990–2002* (Santiago: LOM Ediciones, 2002), 109.

<sup>60</sup>*El Mercurio*, March 9, 1991.

<sup>61</sup>*El Mercurio*, March 23, 1991.

<sup>62</sup>Quoted in Thomas C. Wright, *State Terrorism in Latin America: Chile, Argentina and International Human Rights* (Lanham: Rowman & Littlefield, 2006), 196.

and as Aylwin was replaced by his presidential successor, Eduardo Frei, it remained clear that the government's transitional justice policy was failing to bring the military as an institution under civilian control, or to gain broader traction as a comprehensive approach to rebuilding political relations. Frei moved increasingly away from the notion of reconciliation, articulating concessions to the military as in the interest of protecting the rule of law, rather than as reconciliation.<sup>63</sup> This shift was a tacit acknowledgement that the government had moved to focusing on maintaining democratic stability, protecting the civilian state from institutional threats rather than seeking to control the military politically and recast political relations. He proposed a version of a Punto Final law that would facilitate the speedy processing of a certain number of exemplary cases, replicating an earlier attempt by Aylwin to do the same. Like his predecessor, however, Frei was unsuccessful at passing even this move, which was considered by many to be an amnesty. Unable to make a definitive move in either direction, for retributive justice or for the symbolic rule of law, the Chilean executive slowly retreated from the issue, leaving it in the hands of civil society actors and individual judges.

Where Frei did eventually have success in bringing the military under control, he did so through direct administrative intervention, rather than through retributive justice. In November 1997 he blocked the appointment of Jaime Lepe, Pinochet's own chosen successor to the position of Commander-in-Chief of the Army. The government based this lustration measure on the fact that Lepe, who was accused of involvement in a case of disappearance, torture and murder, could have a negative effect on the creation of 'harmonious relations between the military and the citizenry.'<sup>64</sup> As the first time that the Frei government had demonstrated its willingness to come into conflict with the armed forces, the measure indicated a recalibration of the reconciliation project. Administrative reform also eventually broke the judiciary's alignment with the military. In 1998 new justices were appointed to the Supreme Court, tipping the balance away from the *Pinochetistas*, the conservative supporters of Pinochet. But while certain measures were articulated as in pursuit of reconciliation, this administrative reform was parallel to rather than an integral part of transitional justice.

<sup>63</sup>Stern, *Reckoning with Pinochet*, 154.

<sup>64</sup>Quoted in *Que Pasa*, no. 1386 (November 4–10, 1997).

In Chile, then, the project of reconciliation and its attendant aim of bringing institutional actors under the political control of the civilian state failed. This is often seen to be the result of the particular context of the Chilean transition and the position of the military within it.<sup>65</sup> While the military was undeniably in a stronger institutional and political position in Chile than in Argentina, this was not the only factor at play. In line with dominant thinking about transitions, and in light of the Argentine experience of military rebellion, President Aylwin and his successor Frei attempted to simultaneously appease the military and bring them under control, a contradictory task that limited their scope of action. The Chilean case shows us how reconciliation, as an approach to state (re)formation that seeks harmony among existing power holders rather than seeking to directly redistribute this power, traps state actors within existing power structures, reducing their ability to control transitional justice. As we will see in the next chapter, this situation allowed transitional justice to remain open to new approaches and for other actors to pursue their own political goals. Reconciliation, far from closing the book on the past, left it wide open.

### *Uruguay: Reconciliation as Complete Absence of Conflict*

The Chilean path of attempting to impose and then quietly abandon retributive justice differed sharply from that of Uruguay, where state actors and others consistently opposed any form of trials. Unlike in Chile, however, where a military self-amnesty made it difficult to get trials off the ground, in Uruguay there was no such restriction at the time of transition. Despite this, even more than in Chile, amnesty became a defining feature of the transitional model in Uruguay, and it was embraced by state actors as a way of controlling human rights and judicial processes and of incorporating the military into the political community, as in Argentina. The absence of political conflict was set as a goal of the transition from early on, and the new president proposed to meet this goal

<sup>65</sup>This is the conclusion reached by many political scientists who focus on the constraints upon state actors during transition. For an example that considers constraints posed by the relative power of the military, alongside other factors, see David Pion-Berlin, 'To Prosecute or to Pardon? Human Rights Decisions in the Latin American Southern Cone,' *Human Rights Quarterly* 15 (1993): 105–130.

through a program of reconciliation. In Uruguay, then, reconciliation did not so much emerge as a way of gaining control over already-flourishing retributive strategies and ensuring they remained limited in scope but as a way of maintaining control over the possible emergence of political expressions and transitional justice proposals more generally.

The Uruguayan transition took place as neighboring Argentina was preparing for the *Juicio*, meaning that the idea of retributive justice as a strategy haunted the political negotiations. Uruguayan human rights activists proposed the idea of trials, only to be rebuffed with a counter proposal of an amnesty. Aware of the international move towards accountability within transitional justice thinking, one month after the transition in April 1985, new president Julio Sanguinetti sent a senator from each of the two traditional political parties, the *Colorados* and the *Blancos*, to the United Nations High Commission for Human Rights, where they succeeded in getting Uruguay removed from a ‘black list’ by promising that the new government would investigate and prosecute past human rights violations.<sup>66</sup> But domestically, the central concern of state actors was a peaceful transition that would lead to an absence of political conflict, which translated into an election campaign in which no candidates raised the issue of retributive justice. Immediately upon inauguration, the new president Julio Sanguinetti began to articulate the way in which political conflict would be managed and eradicated, presenting his proposal for what he called the *Proyecto de Pacificación Nacional* (National Pacification Project). Under this official reconciliation project, a series of measures were undertaken to reincorporate specific groups back into the political community, starting with political prisoners and exiles. Financial reparations for victims did exist, but as Luis Roniger and Mario Sznajder have pointed out, they were more ‘a piecemeal strategy of individual negotiation rather than a comprehensive and regularized legislation [package].’<sup>67</sup> This prevented any debate over victims, who would have to be defined along with what happened to them in order for any wholesale reparations policy to be implemented. Overall, then, the *Proyecto* was focused more on restitution than reparative measures, a return to the way things were rather than a resolution of past issues.

<sup>66</sup>Francesca Lessa, *Memory and Transitional Justice in Argentina and Uruguay: Against Impunity* (New York: Palgrave, 2013), 133–134.

<sup>67</sup>Luis Roniger and Mario Sznajder, *The Legacy of Human Rights Violations in the Southern Cone: Argentina, Chile & Uruguay* (Oxford: Oxford University Press, 1999), 139.

While retributive justice did not form part of Sanguinetti's transitional justice program, it was being pursued through other channels by human rights activists and sectors of the judiciary. After the return to civilian rule dictatorship-era organizations began to assist victims and their families present claims in court, and by December 1986 there were over 700 such cases under investigation.<sup>68</sup> In response, the military indicated that they would not respond when summoned to the civil courts, while alluding to the potential for more serious action being taken if a 'political solution' to the issue was not found.<sup>69</sup> Sanguinetti seized upon the notion of an impending crisis and destabilization as a way of framing his anti-retributive justice stance. According to the president the transition was 'incomplete' and consolidation was needed in the form of the amnesty law, in order to deal with the institutional crisis facing the nation.<sup>70</sup> This bill was formulated as an extension of the existing measure that had revoked the sentences of political prisoners, making it an amnesty couched in reconciliation and restitution rather than struggles over retribution. The project was initially rejected by parliament but later approved, creating what became known as the *Ley de Caducidad* (Law of Expiry), which prevented the prosecution of members of the armed and security forces for actions undertaken during the period of military rule.<sup>71</sup> In defending the law Sanguinetti claimed that 'the armed forces would feel excluded from the spirit of reconciliation of the democratic transition' if it was not in place.<sup>72</sup> Political conflict was seen to produce exclusion from the post-authoritarian political community, something that the project of reconciliation worked against.

<sup>68</sup>Alexandra Barahona de Brito, *Human Rights and Democratization in Latin America: Uruguay and Chile* (Oxford: Oxford University Press, 1997), 126.

<sup>69</sup>Francesca Lessa, 'Barriers to Justice: The Ley de Caducidad and Impunity In Uruguay,' in *Amnesty in an Age of Human Rights Accountability: Comparative and International Perspectives*, ed. Francesca Lessa and Leigh Payne (Cambridge: Cambridge University Press, 2012), 127.

<sup>70</sup>Barahona de Brito, *Human Rights and Democratization*, 141.

<sup>71</sup>The full name for the law was the Ley de Caducidad de Pretensión Punitiva del Estado, which referred to the expiration of the state's capacity to bring charges, or the expiration of the statute of limitations on the crimes committed during the dictatorship. Ley 15.848, 'Se Reconoce que ha Caducado el Ejercicio de la Pretensión Punitiva del Estado Respecto a los Delitos Cometidos Hasta el 1 de Marzo de 1985,' *Diario Oficial (Uruguay)*, December 31, 1986.

<sup>72</sup>Roniger and Sznajder, *The Legacy of Human Rights Violations*, 86.

The *Ley de Caducidad* functioned differently than other amnesties in that at the same time as preventing new retributive justice repertoires from developing, it gave the state the power to decide over processes that were already underway within the courts. Article three of the law stipulated that ‘the judge in charge of the case should request the Executive branch to clarify, within a period of thirty days of receiving such a request, whether the offense under investigation falls within the scope [of the amnesty]. If the executive branch considers this to be so, the judge will dismiss the case.’ Jurisdiction was transferred wholly to the Executive, giving them the ultimate power to decide over the interpretation and implementation of the law. The Executive was also given the authority over promotion within the highest ranks of the military. With the amnesty, then, judicial processes as well as the Uruguayan military were brought under civilian state control. Gaining control over civil society initiatives, however, was a more complicated process. Naturally the law provoked a response from dictatorship-era organizations, which began to campaign for a national referendum on the amnesty. This referendum was eventually granted and held in 1989. Those campaigning in favor of the Law repeated Sanguinetti’s earlier mantra on the importance of consolidating democracy, something that could only be achieved through reconciliation, not retribution.<sup>73</sup> In the end, the majority of Uruguayans voted to keep the amnesty in place, after which Sanguinetti declared that the transition was finally complete.<sup>74</sup> When asked what he meant by this, he explained that ‘Uruguay has solved all the problems of the past. The remnants of the discussions during the dictatorship have been resolved. The country is now facing its future.’<sup>75</sup> For Sanguinetti the amnesty represented democratic consolidation, as it had appeased the military and removed the possibility of human rights activists and the judiciary intervening in transitional justice. Like his neighbours in Chile and Argentina, Sanguinetti labored under the illusion that reconciliation—meaning the erasure of conflict and the establishment of a stable meaning for transitional justice that was determined by the state—equaled stability in the political order.

<sup>73</sup>Lessa, *Memory and Transitional Justice*, 139.

<sup>74</sup>*Ibid.*, 140.

<sup>75</sup>Quoted in Luis Roniger, ‘Transitional Justice and Protracted Accountability in Re-democratized Uruguay, 1985–2001,’ *Journal of Latin American Studies* 43, no. 4 (2011): 703.

## RECONCILIATION AS MODERNIZATION AND CONSOLIDATION

State actors in Argentina, Chile, and Uruguay used reconciliation to move beyond the moment of transition and to solidify the new democratic order. A high-ranking minister in the Frei government, Genaro Arriagada, succinctly encapsulated this desire when he stated that ‘the central axis of the current policy of the *Concertación* is defined by a change from social organization revolving around the logic of transition to social organization revolving around the logic of modernization.’<sup>76</sup> The belief that reconciliation would be the *punto final* of the political divisions of the past—divisions which were seen to be legitimized by retributive justice processes rather than resolved by them—was prevalent. References to ‘finishing’ with the human rights issue indicated the widespread belief among state actors that reconciliation was the key to the much-desired consolidation of the democratic, post-authoritarian order and the end of the ‘transition’ phase. But as the example of Chile clearly shows, reconciliation, or any other state attempt to control and shape transitional justice, was not necessarily successful as a strategy for overcoming divisions and consolidating the autonomous power of the state. And as the next chapter will show, particularly in his second term Menem also faced a number of important challenges as the cracks in his reconciliation project began to show. While Alfonsín and Menem in Argentina, Aylwin and Frei in Chile, and Sanguinetti in Uruguay engaged in a classification struggle in an attempt to establish the limits of transitional justice, they did not necessarily win that struggle. Unmet demands for retributive justice continued well after the amnesties, leading advocates to make new alliances in the pursuit of their goals and to further develop their approach to and understanding of transitional justice. This saw new demands and practices emerge, as we will see in the next chapter.

So if reconciliation did not achieve ‘reconciliation,’ what did it achieve? In Argentina, where there was a real threat from the military to democratic stability, and in Chile and Uruguay where intimations of threats were made, it was successful in rearticulating transitional justice into a form that alleviated the armed challenges to democratic order. With the *indultos* and other amnesties reconciliation reclassified the role of justice in

<sup>76</sup>Quoted in Loveman and Lira, *El espejismo de la reconciliación política*, 132.

the transition, positioning it as destructive rather than productive, which neutralized the immediate threat posed by the military. It also neutralized the judicial practices that human rights activists had embarked on. This was, in fact, a central function of reconciliation, which operated to control not just the meaning and legacy of the past conflicts, but also the meaning and legacy of the current conflicts over that past. This points to the fact that classification struggles can be won, at least temporarily, especially by a state that has accumulated a certain degree of symbolic power, as in the case of Argentina, or by a state that aligns itself with older power structures, as in the case of Uruguay.

A key feature of transitional justice, however, is that it has proved to be anything but restricted to the moment of transition. If that were so, reconciliation would end debates over and innovation within transitional justice, with each post-authoritarian country being considered a consolidated democracy both in technical terms and in political culture. This, however, is not what occurred across Latin America. State-sponsored reconciliation closed off certain avenues for expression and action, but more opened up in its wake. As popular political expressions continued to challenge the state, the state found itself needing to continually adjust to absorb these new challenges and new conflicts over the meaning and legacy of the past. Reconciliation addressed current conflicts and challenges, but could not anticipate new ones that were generated by the policy itself.

An important strain of literature on transitional justice seeks to evaluate whether or not it works, and under what circumstances it is most likely to do so. These start from the assumption that it is possible to bring society back together after a period of authoritarianism and political violence. Reconciliation in particular is highlighted for the promise it holds to ‘enable politics between citizens divided by the violence of the past ... [With reconciliation] community becomes the contingent outcome of politics.’<sup>77</sup> Yet as the examples of Argentina and Uruguay show, this creation of a political community occurs through the active disempowerment of certain social groups whose visions of that community differ from or threaten that of the state. Menem attempted to impose new understandings of justice, even reconfiguring the category of victim, which had been dominant since the transition, proposing instead that all Argentines were ‘victims’ of past political divisions that saw them

<sup>77</sup> Andrew Schaap, *Political Reconciliation* (London: Routledge, 2005), 8.

‘deprived of the national unity indispensable for archiving a greater destiny.’<sup>78</sup> As a form of transitional justice, reconciliation equates the conflicts in the past with the conflicts over that past as an overall strategy for achieving the image of stability. But as Philip Corrigan and Derek Sayer explain in their study of English state formation, this erasure of ‘other ways of seeing, other moralities, which express the historical experiences of the dominated’ can never actually be accomplished, since society is ‘not factually a unity’.<sup>79</sup> Reconciliation, and transitional justice more broadly, cannot (re)create a unified society out of historically rooted opposing positions and conflicts. It can create a temporary harmonization of those social relations through the subordination of certain ways of seeing. In order to do this a certain amount of symbolic capital accumulated through alliances with other sectors is needed on the part of the state. The state can then use this capital its classification struggle against other ways of seeing.

Reconciliation, understood as the shared desire to create a cohesive political community in spite of a divisive past, is a political strategy for consolidating a certain order. For Alfonsín and Menem, reconciliation provided a way of redefining justice, orienting it away from retributive practices towards a more reparative function. They did so in an effort to control the practice of *justicia*, and by extension assert the ability of the state to control the transitional process. This was also attempted, albeit less successfully, by Aylwin and Frei in Chile, where they actually used reconciliation to encourage a process of (limited) justice as a strategy for bringing both the military and the judiciary under control. As the next chapter will show, Menem also came to face increasing opposition and intransigence in the face of his proposal for reconciliation. Menemist reconciliation actually pushed activists, the judiciary and even the military to develop new oppositional practices.

<sup>78</sup>Discurso del Señor Presidente de la Nación Dr. Carlos Saúl Menem, 12 December 1989, *Discursos del Señor Presidente de la Nación Argentina Dr. Carlos Saúl Menem: 1989* (Buenos Aires: Secretaría de Prensa y Difusión, 1990).

<sup>79</sup>Philip Corrigan and Derek Sayer, *The Great Arch: English State Formation as Cultural Revolution* (Oxford: Basil Blackwell, 1985), 6.

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## Reconciliation Under Fire: New Contestations of Transitional Justice

Still recovering from Christmas and New Year's celebrations where her family had insisted on repeatedly raising a toast to her new job as the Junior Secretary for Human Rights, Inés Pérez Suárez received a call from the media. Her boss, President Carlos Menem, had announced the signing of a decree that authorized the demolition of the old *Escuela Superior de Mecánica de la Armada* (Naval School of Mechanics) building and its replacement with a park that would serve as a 'symbol to national unity.'<sup>1</sup> As the Junior Secretary, the reporter wanted to know, what did she think about such a move? Inés was caught off guard. 'I haven't heard the President's declarations,' she replied, 'but it seems to me to be the right decision.' She put the phone down and called an assistant in. What was going on? Less than twenty-four hours earlier her job had suddenly gotten more complicated with opposition parties in parliament calling for the recommencement of prosecutions relating to the previous dictatorship, the *Proceso de Reorganización Nacional*. Now she was being told that her boss wanted to raze the most symbolic *Proceso*-era clandestine detention center, a move that went directly against the spirit of renewed prosecutions. The president was arguing that it would have 'undeniable symbolic value, supported by the desire

<sup>1</sup>Decreto 8/98, 'Trasládase a la Base Naval de Puerto Belgrano', art. 3, *Boletín Oficial de la República Argentina*, January 9, 1998.

to leave behind antipathies and come to terms with the lessons of the recent past, clearly expressing the desire for reconciliation on the part of Argentines.<sup>2</sup> It was 8 January 1998: nine years after Menem had been elected promising to turn the page on the repressive past and move towards the future.

This tension between the Menem government's transitional justice program and other visions of how to deal with past human rights violations was a feature of Argentine politics throughout the 1990s. As we saw in the previous chapter, in his first term as president Menem had engaged in a struggle to redefine transitional justice within the framework of reconciliation. In doing so he moved away from the coalition strategies that had characterized the early transitional period, asserting the boundaries of the state and its hierarchical institutional position. While he still drew on existing practices and demands to construct his transitional justice policy, he did so in a way that marginalized previously powerful claimants. Yet while Menem seemed to have been successful in his quest to subdue what he characterized as threats to the democratic order, especially compared to his Chilean counterparts Patricio Aylwin and Eduardo Frei, new opposition practices and demands continued to emerge. And in his second term as president, these challenges multiplied. These challenges, and their significance for the process of state formation, are the focus of this chapter.

In the previous chapter, I showed how reconciliation was used in an effort to curtail the political power of other social and institutional actors in multiple examples across Latin America. This involved the unilateral declaration of the meaning of past violence and the values of present society on the part of the state. But as with all forms of culture, any attempt to stabilize meaning is temporary and contingent and will always be subject to contestation. These contestations themselves are also contingent. The reservoir of popular practices that we saw the state reach down into during the initial Alfonsín period did not remain static, especially following the introduction of reconciliation. Instead new expressions emerged as social and institutional actors reacted and responded to reconciliation, as well as to the developing international human rights field. While popular political culture shaped state formation, the state also shaped political culture, even, inadvertently, oppositional political culture.

<sup>2</sup> *Clarín*, January 8, 1998.

Far from being an era in which the authoritarian past no longer served as the subject of social conflict and debate, during the 1990s there was a thickening of human rights practices relating to this past, bringing a proliferation of actors and new techniques, each proposing ways to understand its meaning and its relationship to the democratic present. This process began with the dictatorship-era human rights groups, who characterized the lack of retributive justice as both *impunidad*, impunity, and as *olvido*, forgetting. This reclassification of the *indultos*, the cornerstone of Menem's reconciliation policy, gave rise to new opposition practices that resonated at both the national and international level, creating new alliances and involving new actors. The concept of impunity was taken up at the international level, where a new line of thinking developed that saw amnesties as damaging for democracy. While at the end of the 1980s the dominant thinking on transition and democratization emphasized precisely the opposite—that retributive justice, in too great a measure, would actually endanger the democratic transition—moving into the 1990s, new actors within the United Nations and the Inter-American system came to argue that retributive justice and criminal accountability would actually help strengthen democracy. This new intellectual climate opened up the possibilities for the development of practices around international jurisdiction that challenged the authority of the state to impose reconciliation by insisting on an overriding imperative to pursue criminal accountability. These international-level trends were shaped in large part by the Latin American activists who were looking both within and beyond their borders for ways to resist reconciliation.

Closer to home, the reclassification of the *indultos* as *olvido* also spawned *memoria* as an opposition practice. By insisting on inserting the past into the present and highlighting the unresolved nature of many issues relating to that past, *memoria* opened up a space for critiquing reconciliation and its insistence that the past was a closed book. This change in turn attracted a wide range of institutional actors and groups that felt that their own experiences and perspectives were ignored by the government's reconciliation narrative. These challenges also came from beyond civil society, with provincial governments and members of Congress and even the military claiming their place in the debate, demonstrating the limits of Executive-led reconciliation. *Impunidad* and *olvido/memoria* continually challenged Menem in his attempt to impose a principle of domination and consolidate the authority of the state via transitional justice. These challenges were also felt elsewhere in the region, and by the end of the decade

the consensus on how to deal with past human rights violations had been completely transformed, putting the reconciliation approach to transitional justice favored by many Latin American state makers under fire.

This chapter starts from the idea that conflict, and resulting negotiated outcomes, are key features of state formation, and so in a study of state formation it is vitally important to look at the emergence of opposition. This is because state formation is an ongoing process; the state is formed through the accumulation of different types of capital, but it is never the exclusive holder of capital. As such, state actors must continually respond to challenges from these other holders of capital and attempt to position and maintain the state in a hierarchical position. These other holders of capital include activist groups, as well as other social and institutional actors such as the military, the judiciary and political parties. As they challenged reconciliation, the state was forced to respond, resulting in changes in transitional justice over time as the state attempted to maintain a hierarchical position and grow its influence. To understand why it changed in the way that it did, we need to understand the emergence of the new contentious practices that provided the resources for this growth.

I start by looking at the development of the critical concepts of *impunidad* and *memoria* by human rights activists and the new strategies and alliances that they gave rise to. I begin by looking at how Argentine groups in the early 1990s innovated in the face of restrictions on retributive justice. In critiquing *impunidad* they worked with international human rights organizations and bodies to pursue judicial sanction not only of the former authoritarian regime but also of the current government itself and its transitional justice policy. In parallel, the concept of *memoria* heralded a new approach to dealing with the interplay between the democratic present and the authoritarian past, simultaneously reconfiguring actions in recognition of the fact that the broader political context had changed while insisting on the continued relevance of the authoritarian past to the democratic present. *Memoria* sparked two main series of practices, one based around the memorialization and commemoration of past events and another based around the politicization of identity and the subsequent insertion of new social groups and perspectives into the public sphere.

In the next section, I look at the new institutional actors that emerged to challenge reconciliation throughout the 1990s. While the dictatorship-era human rights groups had long been active in making these challenges, they were joined by new groups looking to express their discontent

with Menem's approach to transitional justice. These actors all used the space created by the concepts of *impunidad* and *memoria* to insert themselves into the debate around transitional justice and the post-authoritarian political order. I begin with the military, which engaged in a series of what became known as confessions as a way of insisting on an active role for themselves in political reconstruction. I then move to look at the formation of a new political coalition within Congress that embraced human rights as a way of staking out its own political identity and articulating its opposition to reconciliation. This coalition oversaw the constitutionalization of human rights, as well as the implementation of a memorialization policy that inscribed the authoritarian past into the physical and political landscape of the present. Then I turn to the judiciary, showing how they mobilized ideas and practices around international jurisdiction to challenge reconciliation and to push for retributive justice. In this section I also take a broader look at the regional context, showing how the concept of international jurisdiction provided fertile ground for actors in places like Chile and Uruguay to challenge the dominance of reconciliation in these countries.

Together these examples of opposition to reconciliation demonstrate the contingency of the state's reservoir of symbolic capital and, by extension, the contingency of democratic transition and consolidation. State makers must continually negotiate with other actors in order to maintain control, or at least the image of control, over political culture and political processes. Reconciliation as a form of transitional justice that asserted state authority and attempted to limit the power of other institutional actors saw state actors refuse to engage in these negotiations, desiring instead to impose their own vision of post-authoritarian order. In the previous chapter I described this process as a classification struggle. In this chapter I look at how, rather than put an end to debates over transitional justice this classification struggle gave rise to re-classification struggles, as these other actors pushed back against state policy. The challenges to reconciliation explored in this chapter demonstrate the difficulty of imposing a fictional vision of unity upon society. This in turn explains why reconciliation as a specific approach to transitional justice and to post-authoritarian political reconstruction lost its appeal in the Southern Cone moving into the twenty-first century. As I will discuss in the next chapter, the challenges of the 1990s led to a reformulation of official transitional justice that abandoned reconciliation and its assumptions about unity in favor of an approach that allowed the state to entwine itself once again with social actors, strengthening it in the face of opposition.

## RE-CLASSIFICATION STRUGGLES: OPPOSITION TO MENEM'S RECONCILIATION

By the end of his first term as president Menem felt that the issue of past human rights violations was indeed in the past, and that he had successfully put the country on the path to reconciliation. By directly opposing popular demands, however, his policy of *indultos* had placed the government in a position of isolation. The lack of affinity between the Menemist Executive branch and human rights activist groups led the latter to develop new practices and connections that were often in opposition to or competition with the former. These challenges had already begun in his first term, with human rights groups using the concepts of *impunidad* and *memoria* to challenge the project of reconciliation and reconfigure its meaning. In developing new opposition strategies, Argentine groups turned once again to their transnational counterparts, but the context of this engagement was significantly different than that of the 1970s. Whereas during the 1970s the dominant approach to achieving human rights-related change was to use information to place pressure on offending states, by the late 1980s and early 1990s the focus was not on current violations but past ones and how to deal with their legacy. At the international level, this discussion focused on developing international criminal law practices, while at the local level it focused on the vindication of the victims and their experience as a central part of national history. Despite being shut out from state-sponsored transitional justice, human rights actors continued to search for ways to process the authoritarian past and continued to search for ways to shape the present in line with their understanding of that past.

### *New Practices: Impunidad and the Questioning of Democratization*

A key way in which local human rights actors structured both their thinking about the past and their opposition to current ways of dealing with that past was through the concept of *impunidad*. Activists responded to both Alfonsín's and Menem's curtailing of retributive justice by characterizing it as '*impunidad por los asesinos*', impunity for the assassins. This concept had been used as early as 1986 in response to Alfonsín's recommendations to the military prosecutors designed to help ensure speedy but limited trials. Hebe de Bonafini, the president of the *Madres de Plaza de Mayo* had remarked that 'the

instructions seek a *punto final*, that is, impunity for the assassins,' while mass demonstrations were held under the banner 'no a la impunidad' (no to impunity).<sup>3</sup> As other countries across the region underwent the transition to democracy and the implementation of transitional justice, often structured around the concept of reconciliation, activists in these places also began to use the concept of impunity to express their desire for greater retributive justice. By the end of the 1980s the concept was becoming the central concern of transnational movements concerned with the legacy of the authoritarian past, evidenced in events such as the national sessions on the question of impunity held across Latin America by the Permanent People's Tribunal.<sup>4</sup> Around this time the concept also began to gain traction within international networks of lawyers interested in human rights law and within the international human rights movement.<sup>5</sup> In 1991 Amnesty International released a policy statement on impunity that defined it not only in technical terms, as a lack of justice for past human rights violations, but also as a major contributor to ongoing violations themselves.<sup>6</sup> This marked a major development in the understanding of the concept: impunity itself was inscribed as a human rights violation. This understanding was institutionalized two years later at the 1993 World Conference on Human Rights in Vienna. The *Madres de Plaza de Mayo* (Línea Fundadora), the *Abuelas*, the *Asamblea*, the *Liga*, the *Centro de Estudios* and the *Equipo Argentina de Antropología Forense* (Argentine Forensic Anthropology Team) attended the preparatory Regional Meeting for Latin America and the Caribbean where they argued strongly for addressing the issue of impunity at the Conference. The final report of the Conference itself called for prosecutions as a necessary condition for the establishment of the rule of law and proclaimed impunity

<sup>3</sup> *La Razón*, May 9, 1986; *La Prensa*, May 9, 1986; *La Prensa*, May 17, 1986.

<sup>4</sup> These sessions culminated in a deliberative session held in Bogotá, Colombia, in April 1991, where a program for action over impunity was developed. See Tribunal Permanente de los Pueblos, 'La impunidad de los crímenes de lesa humanidad en América Latina,' Bogotá (April 1991).

<sup>5</sup> In 1992, for example, the Comisión Internacional de Juristas (International Commission of Jurists) and the French Commission Nationale Consultative des Droits de l'homme (National Consultative Commission on the Rights of Man) met in Geneva to discuss impunity.

<sup>6</sup> Karen Engle, 'Anti-impunity and the Turn to Criminal Law in Human Rights,' *Cornell Law Review* 11 (2015): 1077.

as a violation of the right of every individual to a fair hearing.<sup>7</sup> That same year, the UN Sub-Committee on Discrimination called for the establishment of a special international investigation into the issue of impunity. The Chair of this Sub-Committee, Theo van Boven, had served as a jury member for the Permanent People's Tribunal hearings across Latin America a few years earlier, where the issue had been discussed at length.

The development of the concept of impunity served to reimagine prosecutions as preventative and, ultimately, positive for democratization and the protection of human rights rather than as retributive harbingers of stability-threatening division. This reclassification of retributive justice at the international level created a new possibility for overturning the *indultos*. In 1992 Argentine groups pursued this possibility by turning to the Inter-American Commission for Human Rights, which declared the pardons to be in violation of both the American Declaration and the Inter-American Convention on Human Rights.<sup>8</sup> While this victory had limited immediate effect domestically, with Menem insisting that sovereignty over legal processes remained firmly with the nation-state, throughout the 1990s activists continued to use the Inter-American system as a forum for pursuing their opposition to impunity.

The refusal of Menem to recognize Argentina's responsibilities under regional agreements by insisting on sovereignty also sparked a discussion amongst human rights actors on the relationship between past human rights violations, justice, and the obligations of states. The issue of state sovereignty had been a key target of activists, especially those with legal training, during the 1970s as they argued within international forums for an international responsibility to take action on behalf of the victims of authoritarian regimes. As international legal and governance structures became stronger and more developed, the relationship between sovereignty and human rights again became a contentious point of debate. This thinking could be seen in the UN Secretary General's Report from 1992, which noted that while 'fundamental sovereignty and integrity [of the state] are crucial to any international common progress ... the

<sup>7</sup>Report of the Regional Meeting for Latin America and the Caribbean of the World Conference on Human Rights, UN Doc A/CONF.157/LACRM/15; World Conference on Human Rights, *Vienna Declaration and Programme of Action*, adopted 25 June 1993, UN Doc A/CONF.157/23.

<sup>8</sup>Comisión Interamericana de Derechos Humanos, *Informe 28/92* (October 1992), OEA/Ser.L/V/II.82 Doc.24.

time for absolute and exclusive sovereignty has, however, passed ... It is the task of leaders of States today to understand this and to find a balance between the needs of good government and the requirements of an ever more interdependent world.<sup>9</sup> As international-level actors searched for a diplomatic balance between the two, local actors reflected on the state of democracy under the reconciliation framework. On the occasion of the fifteenth anniversary of the *Abuelas*, SERPAJ leader Adolfo Pérez Esquivel commented that the failure of the Inter-American Commission to enforce their finding that Argentina had violated the Inter-American Convention:

places the victims and the people in a new situation of defenselessness. It is not possible to construct a real democracy on the basis of impunity for crimes committed against the people ... It is significant that today, fifteen years later, the struggles continue, when we all expected that with the advent of democracy the people would recuperate their protagonism and human rights would be a reality.<sup>10</sup>

Their critique centered on the idea that without prosecutions for past crimes there could be no real talk of democracy, bringing reconciliation into question as a mode of democratic state making. The *Madres de Plaza de Mayo* had already begun to make these critiques in their responses to *Punto Final* and *Obediencia Debida*. In 1988 the *Madres Línea Fundadora* argued that ‘denying justice to victims – as is happening here in our country – leaves no room for hope and drives us inexorably towards moral and ethical breakdown and therefore to the decline of the Nation.’<sup>11</sup> Reconciliation was seen as endangering national unity and the nation itself, a critique that opened the way for alternative proposals not just for justice but also for imagining and constructing the democratic order.

<sup>9</sup>United Nations Secretary General, ‘An Agenda for Peace: Preventative Diplomacy, Peacemaking and Peacekeeping’ (June 17 1992), UN Doc. A/47/277.

<sup>10</sup>Adolfo Pérez Esquivel, ‘Presentation,’ Seminario Internacional sobre Filiación, Identidad, Restitución: 15 años de la lucha de las Abuelas, April 11, 1992.

<sup>11</sup>Madres de Plaza de Mayo Línea Fundadora, ‘Amnistía o Justicia?’, leaflet, October 20, 1988, Archives of the Madres Línea Fundadora, n.B7.71. In 1986 the Madres de Plaza de Mayo had split into two organizations, the Asociación Madres de Plaza de Mayo (Association Madres) and the Madres de Plaza de Mayo Línea Fundadora (Founding Line).

*Memoria, olvido, and the Politicization of Identity*

The characterization of the *indultos* as impunity and the subsequent characterization of this as leading to the breakdown of the nation's moral framework was soon followed by counter-proposals that sought to reconstruct a common sense of history and identity. While reconciliation proposed an ahistorical version of collective identity, new opposition practices structured around the concept of memory proposed a vision of collective identity intimately tied to the events of the past and people's experiences of it. In the second half of the 1980s dictatorship-era human rights groups had begun to characterize the laws of *Punto Final* and *Obediencia Debida* as *olvido* (forgetting); responding to the *Ley de Obediencia Debida* the *Madres Línea Fundadora* argued that it was a measure that 'seeks to erase historical memory and distort it.'<sup>12</sup> The concept of *olvido* became a way of articulating the broader social effect of the *indultos*, rearticulating them as elements within political culture rather than simply legal procedural measures.

This analysis implied a need to actively work to maintain an awareness of the past and the links between the past and the present. Activists had actually begun to engage in memorializing activities following the *Juicio* when Estela de Carlotto, president of the *Abuelas de Plaza de Mayo*, began publishing *recordatorios*, remembrance notices of individual *desaparecidos* in newspapers *La Voz* and *Página 12*. de Carlotto's first *recordatorio* to her daughter was 'a way of expressing pain, and also struggle' and in it she critiqued the government's amnesty policy, stating that 'ten years after her [daughter's] assassination by the military dictatorship ... 10 years searching for justice ... is too long not to have obtained it.'<sup>13</sup> Soon after initiating this practice they also began to memorialize significant dates. In late 1988 they called for 'all sectors to institute September 16 as Youth Day, the 12 anniversary of the "Noche de las Lápices"'. It will be a homage that will reinforce the historical memory of our community.'<sup>14</sup> The *Noche de las Lápices* (Night of the Pencils) was a notorious *Proceso*-era episode in which ten secondary students were detained and disappeared. This was the first time that a personally significant event for victims was reimagined as of national importance.

<sup>12</sup>Documento B7.63, Archivos de las Madres Línea Fundadora (June 1987).

<sup>13</sup>*Página 12*, August 24, 1988.

<sup>14</sup>Madres de Plaza de Mayo, Línea Fundadora, Documento n.B7.70, Archivos de las Madres de Plaza de Mayo Línea Fundadora, September 16, 1988.

Beyond the commemoration of past events, memory also developed as a way for dictatorship-era groups to reimagine their political identity in the context of democracy and transitional justice. While opposition to the restrictions on retributive justice was near unanimous, Alfonsín's reparative measures had attracted vigorous debate particularly within the *Madres de Plaza de Mayo*, whose formation was centered on the demand for *aparición con vida* (return of the disappeared alive). Reparations laws recognized the death of the person involved even without evidence, such as uncovering the remains. This directly challenged the *Madres*, who in 1986 split into two different organizations based on, among other things, conflicts over their responses to the reparations. Reflecting on the disagreements between dictatorship-era groups on how to relate to state policy, the *Madres Línea Fundadora*, the group that advocated a reassessment of dictatorship-era slogans and demands, saw that:

There is not one Madre but rather many Madres, each and every one of us with the same right to declare Truth and Justice, but also to fight for the preservation of memory, of a memory not only personal but also social and historical ... our intention is that Truth, Justice, Memory, and Nunca Más appear as incentives for intensive investigation, for the continued discovering of new and different forms of struggle for the spreading of all human rights and for the human rights of all.<sup>15</sup>

In this usage memory was a way to validate different positions with respect to official transitional justice, legitimizing a wide range of responses to both the past and current regimes. The other group, the *Asociación Madres de Plaza de Mayo*, also used the concept of memory to claim legitimacy for their own particular position, which was one that argued for a more radical stance vis-à-vis state policy:

We will no longer merely denounce the atrocities against those who were and we who are victims: we now bring to the memory [of the recent past] a clear sense of their struggle, we claim their rights as militants who gave their life for a utopia and to avoid, in the end, this country that we have now.<sup>16</sup>

<sup>15</sup>Documento B7.65, Archivos de Madres Línea Fundadora (1987).

<sup>16</sup>Asociación Madres de Plaza de Mayo, *Historia de las Madres de Plaza de Mayo* (Buenos Aires: Página/12, 1995), 48.

These two very different uses of memory shared an emphasis on identity, reflecting a struggle over symbolic capital among the *Madres* themselves. Both groups of *Madres* emphasized primordial identity and their links to the victims of the regime, something that was inherent in many of the victim-based, dictatorship-era groups. The specific practices that they then went on to develop during the 1990s, however, differed vastly depending on the position of each group in relation to the state and official transitional justice. For groups like the *Abuelas de Plaza de Mayo* and *SERPAJ*, which were generally aligned with the *Madres Línea Fundadora* and were open to working with state-sponsored initiatives, the notion of identity as a right emerged as a way of uncovering information and reinstating victims in the community.

While the *Asociación Madres* refused to work with the state, the *Abuelas* and others found that by working within the transitional justice structure they were actually able to innovate and develop new understandings and practices of justice. Although memory and identity emerged in response to the *indultos* and the inability to pursue judicial redress, changes in international human rights law as well as particular loopholes domestically meant that the concept actually contributed to a transformation of judicial practices themselves. While demands for justice in the wake of the military self-amnesty focused on criminal accountability, the intersection of the demand for identity with the judicial structure opened up a new practice: identity as a right. From the very beginning of the transition the *Abuelas de Plaza de Mayo* had been collaborating with the government to identify the biological identity of the children who had been kidnapped along with their parents during the *Proceso*. In 1984 they worked with Alfonsín's Subsecretariat de Derechos Humanos and with the American Association for the Advancement of Science to establish the *Banco Nacional de Datos Genéticos* (National Genetic Database). This search for the missing children of the *desaparecidos* intensified following the shift to reconciliation, as the very laws that prevented individual criminal accountability actually facilitated judicial processes that aimed to identify children. This was due to the earlier intervention of human rights activists: As the Congress had debated the reform of the *Código Militar*, which paved the way for the *Juicio* and later the *Ley de Obediencia Debida*, Elías Sapag of the *Movimiento Popular Neuquino* (Neuquen Popular Movement), a political grouping with strong links to the human rights groups, had introduced a modification that voided the presumption of due obedience in the case of 'atrocious

or abhorrent acts.<sup>17</sup> The subsequent *Ley de Obediencia Debida* had made special mention that impunity did not apply to ‘the crimes of violation, removal and concealment of minors or the substitution of their civil status,’ opening up the possibility for judicial processes.<sup>18</sup> The accusations in these cases were of a violation of the right to identity.

This notion could be used to push the government to develop new transitional justice initiatives that could assist the human rights groups in pursuing their goals. In 1992 the Abuelas began discussions with the Menem government over the creation of a specialized technical commission that could extend the work of the Genetic Database and further promote the identification of missing children.<sup>19</sup> At the same time, they also acted within the international human rights field to inscribe identity as a right. In 1989 the Argentine delegation to the Working Group of the UN Commission on Human Rights proposed the inclusion of the right to identity, previously absent from the broader discourse of human rights, within the Convention on the Rights of the Child.<sup>20</sup> The original text proposed by Jaime Cerda, head of the Argentine delegation read that ‘a child has the inalienable right to retain his true and genuine personal, legal and family identity.’<sup>21</sup> By inscribing this notion of a true and genuine identity into international judicial structures for human rights enforcement, Argentine activists worked to link notions of identity with the concept of justice and to open up new avenues for challenging reconciliation and state jurisdiction over the past.

<sup>17</sup>Ley 23.049, ‘Modificaciones al Código de Justicia Militar,’ *Boletín Oficial de la República Argentina*, February 15, 1984.

<sup>18</sup>Ley 23.512, ‘Obediencia Debida,’ *Boletín Oficial de la República Argentina*, June 8, 1987.

<sup>19</sup>This commission was later called the Comisión Nacional por el Derecho a la Identidad (National Commission for the Right to Identity, CONADI).

<sup>20</sup>This convention was passed on November 20, 1989. Article 8 of the Convention reads: 1. State parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference; 2. Where a child is illegally deprived of some or all of the elements of his or her identity, state parties shall provide appropriate assistance and protection, with a view to speedily re-establishing his or her identity. Convention on the Rights of the Child, United Nations General Assembly Resolution 44/25 (November 20, 1989).

<sup>21</sup>Report of the Working Group on a Draft Convention on the Rights of a Child, UN Doc. E/CN.4/1986/39. See also Jaime Sergio Cerda, ‘The Draft Convention of the Rights of the Child: New Rights,’ *Human Rights Quarterly* 12, no. 1 (1990): 115–119.

## THE PROLIFERATION OF MEMORY, IDENTITY AND ANTI-IMPUNITY CHALLENGES TO RECONCILIATION

The new concepts and practices developed by human rights groups demonstrated their refusal to accept the totalizing narrative of reconciliation, even when they chose to use the opportunities provided by official transitional justice initiatives. Opposition to reconciliation, however, was not confined to these groups, and over the course of the decade more institutional actors joined them in challenging Menem's approach to transitional justice. Drawing variously on the notions of memory, identity and anti-impunity, these new opposition practices at times insisted on telling a new story about collective identity, while at others challenging notions of state sovereignty over human rights issues.

### *The Military: From 'Unspeakable Truths' to 'Unsettling Accounts'*

Even after the *indultos* Menem faced the problem of continued military discontent. While the presidential pardons had removed the threat of being sentenced in a civilian court, there remained a broader, society-wide condemnation of the *Proceso de Reorganización Nacional* as a political project. This had implications for the historical image of the military as an institutional actor, something that the new leadership of the armed forces wanted to address. The policy of reconciliation, with its turning the page on the past, directly benefitted the past leadership but left the military as a whole in an uncertain position. New Chief of the Army, General Martín Balza, began to talk about the need for the institution to deal with the events of the past now that the power to do so had been placed back in their hands. Rather than put the issue to rest, then, the period following the *indultos* saw the military actively engage in proposing transitional justice measures of their own, insisting on the healing nature of confession and the provision of information from the side of the perpetrators to create a full picture of truth.

This development had its roots in the fact that there was a lack of consensus within the military itself over the meaning of the past, with a deep division over how to interpret and represent their period in government. Some of those who had been pardoned under the *indultos* argued for a vindication of the whole *Proceso* project, reiterating the war against subversion narrative. These sectors had been active throughout the previous decade within the organization *Familiares y Amigos de los Muertos por la*

*Subversion* (Family and Friends of those Killed by Subversives, FAMUS), where they attempted to insert their perspective on the recent past in public debate.<sup>22</sup> Balza, however, advocated the narrative of excesses that had emerged in the final days of the *Proceso*, calling for a military account of the past that could serve to help ‘avoid making the same mistakes again in the future.’<sup>23</sup> He became increasingly outspoken in his opposition to the principle of due obedience as a way of understanding the actions of individuals, arguing instead that those who committed errors needed to admit to them.<sup>24</sup> In 1995 Balza’s position dovetailed with actions undertaken by human rights activists and members of parliament, who as a result of Menem’s administrative restructure had been able to block the promotion of two naval captains with a history of active involvement in state repression.<sup>25</sup> This brought up the issue of individual responsibility and how it was represented and dealt with beyond the courtroom in the public debate. A few months later, another officer, now retired, contacted the journalist who reported the story of the two naval captains to confess to his own involvement in the repression. This retired officer, Adolfo Scilingo, argued that the concept of the war against subversion was contingent: while it explained why he did what he did at the time, it could no longer serve as an adequate framework for looking back on that past. ‘When I did what I did,’ he told the reporter, ‘I was convinced that they were subversives. In this [present] moment I can’t say that they were subversive. They were human beings.’<sup>26</sup> He directly challenged Menem’s insistence that to talk about the past was to reopen old wounds, saying that while it was understandable that at the time no information was released, ‘once the war is over, it’s all history and I think that it would even do the Republic some good not only to know what was done, but that there be an obligatory release of lists of the fallen and the dead ... why has the truth not been told to the Argentine citizenry, after twenty years, if we were carrying out orders given by the

<sup>22</sup>See Sandra Gayol and Gabriel Kessler, ‘*Tributo en la Argentina post-dictadura: los “muertos por la subversión”*,’ *Sociohistórica* 29 (2012): 157–182.

<sup>23</sup>*Clarín*, May 25, 1993.

<sup>24</sup>*Página/12*, December 17, 1993.

<sup>25</sup>The officers were legally protected by the Due Obedience law, but their promotion needed to be approved by the Senate. The Centro de Estudios Legales y Sociales had presented documentation that led to Senate to refuse the promotions.

<sup>26</sup>*Página/12*, March 3, 1995.

chain of command?’ Scilingo reframed Due Obedience, and the legal and moral protection it afforded the perpetrators, as the beginning of truth telling and information practices rather than the end. Scilingo’s confession was followed by several others, including ex-Army Captain Héctor Pedro Vergez, who proposed a roundtable attended by representatives of all involved sectors where they could account for what they did ‘in order to say, finally, *nunca más*.’<sup>27</sup> This call for dialogue over the past was echoed by Balza and Chief of the Navy, Admiral Enrique Molina Pico, who both reaffirmed the existence of a war against subversion while recognizing ‘our part of the responsibility for the mistakes of that fight between Argentines that today continues to affect us.’<sup>28</sup>

The emphasis placed by the military on the inadequacy of the *indultos* and of Menem’s approach to reconciliation, and their insistence on the need for ‘a period of accountability [not judicial but] of conscience,’ presented a serious political threat to Menem.<sup>29</sup> The legal shield provided by the *indultos* had, contrary to Menem’s expectations and desires, created the conditions for a revived debate over the past and over questions of responsibility within the military itself. Seeking a rupture with the reconciliation model, the statements by Scilingo, Balza and others facilitated a society-wide resurgence of debate around the human rights violations of the past and their relationship to the present. This debate revealed the lack of acceptance of the reconciliation narrative on the part of the human rights groups as well as within broader society. The day after the publication of Scilingo’s confessions, the *Centro de Estudios* made a public statement addressed to the government, the military, and to society in general, with a renewed call for the clarification of the destiny of each of the *desaparecidos*.<sup>30</sup> The *Asamblea Permanente de Derechos Humanos* called for the re-establishment of the National Commission on the Disappeared,

<sup>27</sup> Radio Mitre, March 22, 1995. Other confessions following Scilingo’s were those of Julio Héctor Símon, ex-member of the National Police Force known as ‘El Turco Julián’, in the television programme ‘telenoche’, 5 May, 1995, Mario Firmenech, ex-leader of the Montoneros, who appeared in the television programme of Bernardo Neustadt on 6 May, and Enrique Gorriarán Merlo, ex-leader of the Ejército Revolucionario del Pueblo (People’s Revolutionary Army, ERP), who sent a recorded confessional message to the television programme of Mario Grondona.

<sup>28</sup> *Página/12*, March 25, 1995.

<sup>29</sup> Confession of Admiral Enrique Molina Pico, Chief of the Navy, *Página/12*, May 5, 1995.

<sup>30</sup> *Página/12*, March 4, 1995.

while a government-sponsored survey carried out in the weeks after the confessions demonstrated that 45% of the Argentine public supported the military being retried for the crimes committed during the dictatorship.<sup>31</sup> Rather than being an alternative way to bring about reconciliation, then, the ‘unsettling accounts’ provided by the military confessions exposed the lack of consensus on how to achieve *nunca más*, illustrating the incomplete and fragile nature of Menem’s reconciliation project.<sup>32</sup>

The confessions also had an impact on the memorializing activities of the human rights groups. The rupture caused by Scilingo’s confessions saw important dates like March 24, the anniversary of the coup, become important nodal points for thinking about the past. Just weeks after the confessions the anniversary was commemorated with two different actions outside the *Escuela Superior de Mecánica de la Armada* (ESMA) building, while other memorializing activities, including a homage to writer Rodolfo Walsh held at the National Library, and a memorial act on the banks of the Río de la Plata, where victims of the ‘death flights’ that Scilingo had talked about, were also held.<sup>33</sup> By the following year, the twentieth anniversary of the coup, the event had become a multitudinous affair with numerous *Proceso*-era and newer groups coming together under the banner of the *Comisión por la Memoria, la Verdad y la Justicia* to organize an entire month of commemorative affairs.<sup>34</sup> On the date of the anniversary they released a statement that asserted the centrality of the date to contemporary social struggles:

Twenty years after the armed forces’ coup we find ourselves here ... In order to curtail the regeneration of the popular movement [the dictatorship] disappeared people, it shut people away in clandestine detention centers, it tortured, it put into prison and it killed thousands of Argentines ... [but] the context of the 20 year anniversary of the coup is one of

<sup>31</sup> *Página/12*, April 27, 1995.

<sup>32</sup> Leigh Payne has explored how military confessions regarding past authoritarian actions unsettle rather than reconcile society. See Leigh A. Payne, *Unsettling Accounts: Neither Truth nor Reconciliation in Confessions of State Violence* (Durham and London: Duke University Press, 2008).

<sup>33</sup> Federico Guillermo Lorenz, ‘¿De quién es el 24 de marzo? Las luchas por la memoria del golpe de 1976,’ in *Las conmemoraciones: las disputas en las fechas ‘infelices’*, ed. Elizabeth Jelín (Buenos Aires: Siglo XXI, 2002), 81–82.

<sup>34</sup> *Ibid.*, 83.

popular resistance across the whole country [to the social and economic model implanted by the dictatorship].<sup>35</sup>

Memorialization practices were collective protests that linked the political conditions of the present and the struggle against them with the political struggles of the past.

### *Derechos humanos al parlamento*

The confessions came at a time when human rights and the authoritarian past was becoming a concern within parliamentary politics. As new groupings and factions developed within the Argentine party system some political actors embraced human rights practices as part of their opposition to Menem generally and to reconciliation more specifically. The opportunity for them to do so was provided by Menem himself, who upon an overhaul of the state in his pursuit of economic restructuring and liberalization. Seizing this opportunity, they worked to incorporate international human rights standards into the legal basis of the Argentine state, bringing the issue of international jurisdiction into the heart of the political order.

Members of the human rights movement had actually involved themselves in parliamentary politics since the return to democracy in 1983 when Augusto Conte, one of the founding members of the *Centro de Estudios*, ran for election under the slogan '*derechos humanos al parlamento*' ('human rights in parliament'). He won a seat in Congress where he represented civil society demands by pushing for a bicameral investigation into the recent past. In this he was unsuccessful, however, and in the end state-sponsored human rights policies during the transition reflected the ideas of the Executive, not the Congress. This concentration of Executive power over transitional justice continued under Menem, leaving the non-executive members of parliament to develop their relationship to human rights and transitional justice from an outsider position. It was in this context that a group of elected representatives with origins in the *Renovación Peronista*, the same faction that Menem had once been a part of, became motivated to act on the question of transitional justice.

<sup>35</sup> *Página/12*, March 25, 1996.

In 1989 a group of eight congressional representatives led by Carlos Álvarez distanced themselves from the Peronist party, the *Partido Justicialista*, over Menem's *indultos*. In 1990 they formed their own block in Congress and a year later they came together with others outside of the Peronist party to form a new political coalition, presenting Graciela Fernandez Meijide of the *Asamblea Permanente* as a candidate for the Capital's legislature. Unsuccessful, they tried again two years later, under the new name *Frente Grande* (Broad Front), and this time both Meijide and Álvarez were elected as members of parliament. The *Frente Grande* continued to build momentum during this time, running even more candidates from the human rights movement in the 1994 elections to the Constitutional Convention, where they gained significant representation. The idea behind constitutional reform was to cement the basis of the reconciled, neoliberal state—a project already begun in 1990 with the *Ley de Emergencia Económica* and the *Ley de Reforma de Estado* (Economic Emergency Law and State Reform Law). Unintentionally, however, the reform process also created a space for these dissident state actors to begin articulating and advancing alternatives to the project of reconciliation. Since neither the Peronists nor any other party had an outright majority amongst the convention delegates, the process was opened up to new actors, alliances and strategies.

One of these new strategies was the constitutionalization of human rights provisions. The *Frente Grande* delegates, who had 31 seats out of 305 in the Convention, spearheaded this initiative. Working within the *Comisión de Integración y Tratados Internacionales* (Commission on International Integration and Treaties), they ensured that the reformed constitution included the Universal Declaration and the American Declaration on Human Rights, as well as international conventions covering issues such as the guarantee of civil and political rights, the prevention of genocide, the elimination of racial- and gender-based discrimination, the rights of the child, and the prevention of torture.<sup>36</sup>

<sup>36</sup>The incorporated conventions and declarations were: the Universal Declaration on Human Rights, the American Declaration on the Rights and Duties of Man, the American Convention on Human Rights, the International Covenant on Civil and Political Rights, the Convention on the Prevention and Punishment of the Crime of Genocide, the International Convention on the Elimination of all forms of Racial Discrimination, the International Convention on the Elimination of all forms of Discrimination Against Women, the Convention against Torture and other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, and the Convention on the Rights of the Child.

Alfonsín had already ratified many of these conventions in 1983, giving them the same normative standing as national laws. Incorporation into the constitution elevated them to higher jurisdiction than national laws.

The work of his own disillusioned former party-members, these inclusions were a direct challenge not only to Menem's attempt to turn the page on the human rights issue, but also to the question of Executive authority. He attempted to use the reforms to leverage symbolic capital within the international sphere, presenting them to the United Nations as evidence of the state's commitment to upholding its international human rights obligations.<sup>37</sup> But despite Menem's efforts to co-opt the measures, the constitutionalization of these international norms represented a direct classificatory challenge to the Executive. The year after the Constitutional Convention—the same year as the military confessions—Fernandez Mejjide was elected to the senate, running under a new coalition called the *Frente País Solidario* (Front for a Land in Solidarity, FREPASO). The presence and popularity of Fernandez Mejjide as well as other *frepasistas* (members of FREPASO) at various levels of politics signaled the arrival of '*derechos humanos al parlamento*' in the wake of the unsettling accounts of Scilingo and others.

Menem, however, still held power at the level of Executive, having been re-elected for a second term in the same elections. Human rights had arrived in federal parliament, but it was in the lower levels of government such as the provincial and city legislatures that concrete measures moving away from reconciliation were taken. As *frepasistas* gained representation, and as the confessions showed the lack of acceptance of the reconciliation framework, these new state actors began to look at activist practices to develop their own concrete policies and initiatives. One of the key practices that these dissident parliamentary actors engaged with was that of memory. As I introduced earlier, *memoria* became a way of resisting what human rights groups called the *olvido* of the *indultos* and other restrictions on retributive justice. This engagement began in the immediate wake of the confessions, with *frepasista* councilors for the City of Buenos Aires Eduardo Jozami and Raúl Fernandez initiating discussions with human rights organizations over the idea for a museum of memory at the site of one of the former clandestine detention centers throughout the

<sup>37</sup>United Nations Human Rights Committee, 'Summary Record of the 1389th Meeting: Consideration of Reports Submitted by State parties Under Article 40 of the Covenant,' CCPR/C/SR.1389 (5 April 1995).

city. The initial response of many activists to this idea was ambivalent: Mabel Gutiérrez of *Familiares* described the idea as ‘something that seemed retrograde ... but we still went [to a meeting with Jozami and Fernandez] and there we found a proposal for something that we had never thought could be a museum. And well, we changed our mind.’<sup>38</sup> They incorporated the idea of a museum into the demands of the 24 March 1996 commemoration. Jozami and Fernandez pushed the idea within the city council where they were able to successfully pass a resolution in favor of creating a memory museum. That same year, they also promoted a resolution instituting 30 April, the anniversary of the first public demonstration of the *Madres*, as the *Día del Coraje Civil* (Day of Civil Courage), and in the years that followed numerous other significant dates and locations that commemorated the opposition to the *Proceso* became protected as official markers of memory.<sup>39</sup>

While memorialization of opposition to the dictatorship was achieved without a great degree of resistance, the question of transforming ex-military sites into memorials was more complicated. The idea was to house the memory museum within one of the ex-clandestine detention centres that dotted the city, but Jozami and Fernandez met with resistance from both fellow Congressional representatives and from the security forces over the exact location.<sup>40</sup> Civil society groups had initially focused on the *El Olimpo* site as their preferred destination for an eventual memory museum, but soon the site of the ex-clandestine detention center at the ESMA building became the focus of discussion. This led to a true jurisdictional struggle over the site and its use. Although the ESMA site was physically located within the city of Buenos Aires, it was designated to the Navy by the federal government, who retained control over the precinct. As we saw in the previous chapter, this allowed Menem to attempt to claim the site for his own reconciliation project, countering the proposal for a museum with the idea of razing the site and creating a monument to national unity. FREPASO members of parliament worked with activists to counter this move, using the courts to file a successful

<sup>38</sup>Memoria Abierta, ‘Camino al Museo,’ Accessed October 21, 2011 [www.memoriaabierta.org.ar](http://www.memoriaabierta.org.ar).

<sup>39</sup>Examples include the creation of a monument to victims of the Proceso. Ley 46 ‘Paseo Público y Monumento a las Víctimas del Terrorismo del Estado—Creación,’ *Boletín Oficial de la Ciudad de Buenos Aires*, August 25, 1998.

<sup>40</sup>Elizabeth Jelín and Susana G. Kaufman, ‘Layers of Memories: Twenty Years After in Argentina,’ in *Commemorating War: The Politics of Memory*, ed. Timothy Ashplant et al. (New Brunswick: Transaction Publishers, 2004), 97.

injunction against the plan.<sup>41</sup> The injunction used the notion of a right to truth to argue against the destruction of potential evidence relating to the dictatorship, bringing the older demand for truth into the new context and using it to support the newer demand for memory.<sup>42</sup> By the end of the decade, memory and memorial sites had become a small but significant presence across the city, demonstrating the arrival of a new human rights opposition practice that could be used effectively to resist the political project of reconciliation.

### DERECHOS HUMANOS A LOS TRIBUNALES: THE JUDICIARY AS DISSIDENT STATE ACTOR

In their efforts to reclaim the ESMA site and institute it as a place of memorializing rather than of reconciliation, human rights activists and allied parliamentarians found support within the judiciary. This represented a major shift away from reconciliation within that institution that came about in parallel with developments at the international level throughout the second half of the 1990s. These developments centered on two interrelated issues: the right to truth, and the question of jurisdiction. Both were advanced using Latin American cases as tests. Local judicial actors, in turn, used the opening created by these developments to challenge reconciliation and impunity domestically and to reinstate retributive forms of justice.

This process had actually begun in the 1980s when Argentine actors turned to the international sphere to challenge reconciliation and impunity in the wake of *Punto Final* and *Obediencia Debida*. By the second half of the 1990s, these efforts were translating into concrete structures for action and enforcement. As the period of adjustment following the end of the Cold War gave way to the development of the ‘international community,’ repertoires focused around the creation of a normative, rule-driven, international-law order followed suit.<sup>43</sup> Collaborations between activists and international lawyers pushed a growth in the notion of international jurisdiction, and the state was increasingly forced

<sup>41</sup> *Clarín*, October 17, 1998.

<sup>42</sup> Palacio de Lois, Graciela – ex feria n. 10/98 – y otro c/- PEN. s/amparo ley 16.986. Buenos Aires, February 13, 2001.

<sup>43</sup> Tony Evans, *Human Rights in the Global Political Economy: Critical Processes* (Boulder: Lynne Rienner, 2010), 11.

to respond to decisions taken at the regional and international levels regarding events within its own territory. The debate around international jurisdiction in turn created the space for activists to revive their opposition to impunity and to develop new strategies for retributive justice. The political activation of the judiciary saw not only a jurisdictional struggle but also a reclassification struggle, as reconciliation was slowly overturned through the use of the concepts of impunity and truth.

Truth had re-emerged as a contentious issue through the military confessions in the middle of the decade. For people like Balza, this truth could be established through sitting down together and each side exposing what they had done, a process that would lead to true reconciliation. *Proceso*-era groups rejected this approach, and they responded to the confessions by once again calling for retributive justice. As Adriana Calvo of the *Asociación de ex-Detenidos y Desaparecidos* (Association of Ex-Disappeared and Detained) argued, 'we reject absolutely all attempts at reconciliation because the only thing we want is to see them in jail, which is where they should be ... we have had the list of desaparecidos for a long time now and all society needs is justice.'<sup>44</sup> Yet despite Calvo's insistence on the redundancy of new information, in the following years human rights groups found that by linking the notion of truth with justice they were able to develop new ways to oppose reconciliation, in much the same way as they had by linking identity with justice. This link had actually been made already at the international level, with the notion of the right to truth developing within the Inter-American system as a result of complaints against impunity as early as 1988.<sup>45</sup> Argentine groups were able to build on this concept to make advances domestically.

In 1995 the *Centro de Estudios* brought a case to the Federal Court of Appeals in the capital requesting the court subpoena both the armed forces and the security forces for information in their possession relating

<sup>44</sup> *Página/12*, March 22, 1995.

<sup>45</sup> Recommendations by the Inter-American Commission and the Court had begun to recommend investigation as a clarification measure, a type of reparatory justice rather than retributive one, insisting that victims and their families had a right to truth and that the region's states were obliged to satisfy this right. The case that sparked the build-up of this jurisprudence was the Velasquez Rodriguez case. Inter-American Court for Human Rights, 'Judgement: Case of Velásquez Rodríguez vs. Honduras', July 29, 1988. See Juan E. Méndez, 'Derechos a la verdad frente a las graves violaciones a los derechos humanos,' in *La aplicación de los tratados sobre derechos humanos por los tribunales locales*, ed. Martín Abregú and Christian Courtis (Buenos Aires: Editores del Puerto, 1997), 522.

to the disappearance of two women, Mónica Mignone and Alejandra Lapacó. As the basis for the complaint they cited the right to truth: what they demanded was information, rather than criminal sentences. In April 1995—a month after the first confessions—the court admitted the claim in the Mignone case, responding for the first time in Argentine jurisprudence to a brief based in international law arguments. While the military still refused to cooperate and provide information, resulting in a stalling of the case, the linking of domestic and international juridical practice represented by the admittance of the claim set a precedent that could be built on in future cases.<sup>46</sup> It also indicated the recognition, by at least some sectors of the Argentine judiciary, of the legitimacy of international norms that were aimed at overcoming impunity.

Faced with the stalling of the Mignone case domestically, the *Centro de Estudios* took the Lapacó case to the Inter-American Commission. Because of the nature of the Inter-American system, in which complaints are brought against member states rather than individuals, the demand now was that the Argentine state take action to facilitate the victim's right to truth, rather than a criminal charge against the military as it had been in the federal court. Forced into a jurisdictional struggle with the highest regional authority on human rights, in 1999 the state agreed to 'guarantee the right to truth, which means the exhaustion of all possible means for achieving the clarification of what happened with the disappeared persons.'<sup>47</sup>

While the military's refusal to cooperate had led the *Centro de Estudios* to turn to the Inter-American Commission, the decision by the appeals court to accept the case and its positive ruling indicated a return to political action on the part of the Argentine judiciary, who used the notion of the right to truth to work around restrictions on individual criminal responsibility. The late 1990s saw the proliferation of what became known as the *juicios a la verdad* (truth trials), which took place mainly in provincial capitals. In April 1999 the Federal Court of Criminal Appeals in Rosario admitted a petition filed by the family of a *desaparecido* demanding the truth about what happened. In November that same year truth trials began in the Federal Court in Bahía Blanca and in La Plata, where prosecutors were given access to the *Policía Bonarense's* (Buenos Aires Provincial Police Forces) intelligence files to assist in

<sup>46</sup>See Human Rights Watch, *Argentina: Reluctant Partner. The Argentine Government's Failure to Back Trials of Human Rights Violators* (December 12, 2001).

<sup>47</sup>*Página/12*, November 16, 1999.

the process.<sup>48</sup> The right to truth, which reimagined older demands for information and judicialized them, was producing new practices that challenged reconciliation, challenging the ability of the state to control transitional justice.

This same challenge was also coming from the international level, especially Spain, where human rights groups were working with members of the judiciary to develop new strategies for pursuing individual criminal justice through the concept of international jurisdiction. In 1996 an organization of Spanish lawyers, the *Unión Progresista de Fiscales* (Progressive Union of Prosecutors) began to develop a project that would put these ideas into practice. Under the leadership of Carlos Castresana the Union chose Argentina as a test case, presenting a complaint against a group of high-profile *Proceso*-era officers in the Spanish national court. The case was assigned to Judge Baltazar Garzón and, after a year of collaboration between the Prosecutors Union and Argentine human rights groups, charges were issued against General Leopoldo Galtieri, ex-head of the Army.<sup>49</sup> This provoked a transnational debate about the competency of the Spanish courts over acts committed against its citizens but outside of its territory.<sup>50</sup> The Committee Against Torture of the United Nations recognized the right of the Spanish courts to act, while the Argentine executive did not. Menem responded to the challenge by issuing a decree prohibiting international collaboration, declaring national jurisdiction over the case.<sup>51</sup> Menem's second term as president was coming to an end, however, and the election of Fernando de la Rúa to the presidency provoked hope amongst *Proceso*-era groups that he would, in Calvo's words, 'annul Menem's decree impeding collaboration with Garzón ... and then derogate the laws of Punto Final and Obediencia Debida.'<sup>52</sup> In fact, the laws of *Punto Final*

<sup>48</sup> Comisión Provincial por la Memoria, *Dossier Educación y Memoria, n. 6: Las Grietas en la Impunidad: 1990–2001 (2ª parte)* (2005), 12–13.

<sup>49</sup> Naomi Roht-Arriaza, *The Pinochet Effect: Transnational Justice in the Age of Human Rights* (Philadelphia: University of Pennsylvania Press, 2005), 2–20.

<sup>50</sup> See Julia K. Boyle, 'The International Obligation to Prosecute Human Rights Violators: Spain's Jurisdiction over Argentine Dirty War,' *Hastings International and Comparative Law Review* 22, no. 1 (1998): 189–190.

<sup>51</sup> Decreto 111/98, 'Tratado Sobre Extradición y Asistencia Judicial en Materia Penal,' *Boletín Oficial de la República Argentina*, February 9, 1998.

<sup>52</sup> *Página/12*, November 03, 1999.

and *Obediencia Debida* had already been nullified by parliament in 1998, although this move was mostly symbolic, with the repeal not having retroactive effect.<sup>53</sup> Activists held out hope for De la Rúa's support as his party, the *Alianza para el Trabajo, la Justicia y la Educación* (Alliance for Work, Justice and Education), was divided on the issue. Consistent with his predecessor, however, De la Rúa refused to support the reinvigorated demand for justice, leaving the government at odds with the increasingly politicized judiciary.

By the end of the decade this judiciary was increasingly willing to act politically in defiance of the government and of reconciliation. In 2000 the *Centro de Estudios* launched a case in the Criminal and Correctional Court of the Federal Capital against a group of high profile *Procesera* repressors who were all covered by both the *Punto Final* and the *Obediencia Debida* laws. In order to take the case forward, Judge Gabriel Cavallo declared the laws unconstitutional, pointing to the constitutional dictum that transgressions of international law, in particular crimes considered to be crimes against humanity as in this case, are to be heard in national courts and are imprescriptible.<sup>54</sup> Further, he pointed to the dominance of international treaties over national law, and the illegality of the amnesty laws under the Inter-American Convention on Human Rights. The argument of unconstitutionality was not new, but the changed international context in which opposition to amnesty laws was being mounted from people like Garzón, motivated Cavallo to pursue the case and implement the new international repertoires at home.<sup>55</sup> His decision was reaffirmed by several provincial courts, which applied the ruling in other cases.

The Executive continued to resist the reclassification of justice and the challenge presented to state jurisdiction over the matter. De la Rúa denied another of Garzón's extradition requests, in which 98 high-ranking perpetrators were named, including ex-heads of the military juntas Jorge Videla and Emilio Massera. He did so declaring that 'the adequate judicial solution should be found within the current Argentine law.'<sup>56</sup> Denying the validity

<sup>53</sup>Ley 24.952, 'Derogación de las Leyes "Obediencia Debida" en "Punto Final"', *Boletín Oficial de la República Argentina*, April 17, 1998.

<sup>54</sup>'Fallo del juez Gabriel Cavallo', Reprinted in Comisión Provincial por la Memoria, *Las Grietas en la Impunidad*, 7.

<sup>55</sup>Roht-Arriaza, *The Pinochet Effect*, 115.

<sup>56</sup>Decreto 1581/2001, 'Cooperación Internacional en Materia Penal,' *Boletín Oficial de la República Argentina*, December 17, 2001.

of international law repertoires, De la Rúa attempted to challenge the legitimacy of his opposition, but with increasing sectors of the domestic judiciary adopting this internationalized jurisprudence and ‘nationalizing’ international law, this was becoming a more difficult argument to sustain.

### RECLASSIFICATION STRUGGLES ACROSS THE SOUTHERN CONE

In waging this increasingly unwinnable classification struggle, De la Rúa was not alone. An increasingly politically active judiciary that drew on international repertoires to challenge the idea of reconciliation as the prohibition of retributive justice was emerging in other parts of the Southern Cone. Just as across the region Executives had drawn on state power to establish limits on popular demands for justice, these limits had provoked an innovation in human rights practices amongst activist groups looking to continue the pursuit of their political goal of *justicia*. In Chile and Uruguay victim-related groups allied with judicial actors who, drawing on transnational repertoires, developed oppositional practices that confronted the policies of reconciliation in those countries.

As I discussed in Chapter 3, the self-amnesty issued by the Chilean military before their departure from power had never been repealed. The presence of the military in political oversight functions, known as ‘authoritarian enclaves,’ as well as the unwillingness of the judiciary to turn against the military, had prevented even a brief flourishing of retributive justice in Chile, in contrast to what had occurred in Alfonsín’s Argentina.<sup>57</sup> Activist claims for retributive justice, therefore, had to be developed in cooperation with transnational actors. This process was slow, as the domestic judiciary did not support it. When challenged by the Inter-American Commission for Human Rights over the military self-amnesty, for example, the Chilean Supreme Court rebuked the attempt to displace their jurisdiction, insisting that while the amnesty may go against international conventions and agreements it was indeed constitutional.<sup>58</sup> The government also refused to recognize the authority of the Inter-American Commission on other matters relating to the

<sup>57</sup>See Manuel Antonio Garretón, *Incomplete Democracy: Political Democratization in Chile and Latin America* (Chapel Hill: The University of North Carolina Press, 2003).

<sup>58</sup>See Robert J. Quinn, ‘Will the Rule of Law End? Challenging Grants of Amnesty for the Human Rights Violations of a Prior Regime,’ *Fordham Law Review* 62, no. 4 (1994): 914, 919–920.

Pinochet dictatorship. In 1993 and 1995 activist groups brought several cases regarding *desaparecidos* to the Commission but President Aylwin responded by reiterating the democratic stability position on amnesty—that any change would endanger it—and highlighting the reparations measures already taken. Undeterred, more and more families brought their demands to the courts, both regional and domestic. These actions, combined with shifts at the transnational level, engaged both the government and the judiciary in a classification struggle and ultimately in a jurisdictional struggle over transitional justice.

As mentioned above, in 1996 Spain became the location for the development of new repertoires that invoked international law to overturn impunity in post-authoritarian domestic settings. The same day that Judge Garzón declared jurisdiction over the Argentine case the Prosecutors Union presented a new complaint specifically against Chilean General Augusto Pinochet, drawing Chilean actors into a jurisdictional struggle. This challenge was given an unexpected boost in 1997 with the declaration of Manuel Contreras, former head of the Chilean secret police and accused of the assassination of Orlando Letelier in Washington DC, that he had acted ‘according to orders given by the President of the Republic [Pinochet]’.<sup>59</sup> This break with the official silence from the security forces, in combination with a favorable international legal context, mobilized domestic legal actors and sparked actions that drew in lower-ranking members of the judiciary. In January 1998 the Communist Party lodged a complaint against Pinochet in the Chilean courts, and although they were unable to successfully bring charges against him, this case spurred further investigative action on the part of the Chilean judiciary, led by judge Juan Guzmán. In September that year, a long-running case over a *desaparecido* that had been stuck in limbo between military and civilian jurisdiction was finally judged and prosecuted by the Supreme Court, whose newly formed *Sala Penal* declared that ongoing cases of disappearance were criminally equivalent to kidnapping and, as this contravened the Geneva Conventions, was not covered by the 1978 amnesty law.<sup>60</sup> By the end of the decade, the judicial arm of the state was increasingly willing to embrace criminal justice and take action to challenge the military.

<sup>59</sup>Quoted in Cath Collins, *Post-transitional Justice: Human Rights Trials in Chile and El Salvador* (University Park: Penn State University Press, 2010), 82.

<sup>60</sup>Ibid., 83; Lira and Loveman, *El espejismo de la reconciliación política: Chile 1990–2002* (Santiago: LOM Ediciones, 2002), 250.

While both Aylwin and Frei had desired a limited amount of retributive justice, they had articulated this within the framework of reconciliation and had pursued it with the intention of asserting the authority of the civilian state through the symbolic subordination of the military to the democratic order. On September 16, 1998, however, an event occurred which highlighted the inability of the Chilean state to assert this authority, resulting in a breakdown of the notion of reconciliation. In an experiment in international jurisdiction, Pinochet was arrested in London while abroad seeking medical treatment. This assertion of international jurisdiction broke the hold that the concept of reconciliation had over the Chilean political culture: the concept was barely ever invoked in discussions on how to respond to the arrest, and within the *Concertación* a dissident group began to speak out openly against president Frei's policies.<sup>61</sup> Even political parties of the right began to move towards taking action to resolve the human rights question, initiating contact with José Zalaquett, one of the members of the Rettig commission, as well as with human rights groups, the Church and the military. The reactions within Chile to Pinochet's arrest demonstrated the unsuccessful nature of the reconciliation project; Ex-president Aylwin remarked that it all caused him 'great concern and pain. I thought reconciliation had really advanced much more.'<sup>62</sup> The Frei government was then forced to reevaluate its approach to transitional justice in order to recapture the authority of the state and stave off potential effects of these new conflicts. To this end, he created the *Mesa del Diálogo sobre Derechos Humanos* (Human Rights Roundtable), where representatives from the military, the government, the judiciary and civil society met to discuss the human rights issue.

The *Mesa del Diálogo* incorporated a wide range of actors with at times opposing views on the question of the past, bringing them into the realm of the state. The *Mesa* met over a six-month period, during which time Pinochet returned to Chile, and a new president, Ricardo Lagos, took office. As the return of Pinochet provoked an eruption of debate within Chile on the authoritarian past, the *Mesa* focused on information, which had never been forthcoming from the side of the repressors. The two competing proposals were that anonymity should be guaranteed in return for truth over the fate

<sup>61</sup>Lira and Loveman, *El espejismo de la reconciliación política*, 245.

<sup>62</sup>Quoted in Steve Stern, *Reckoning with Pinochet: The Memory Question in Democratic Chile, 1989–2006* (Durham and London: Duke University Press, 2010), 238.

of *desaparecidos* and other victims, versus the criminalization of non-disclosure of information about disappearances.<sup>63</sup> The *Mesa* chose the former. President Lagos used the opportunity to reinvigorate the discourse of reconciliation, commending the group for having taken ‘an important step towards resolving one of the most important problems affecting [Chile]’ and linked the ‘creation of adequate conditions of reconciliation and reconnection ... [to] rapidly and effectively making it possible to find those that are no longer here.’<sup>64</sup> Yet this final dash to resurrect reconciliation and implement new types of amnesty continued to be resisted. Mesa participant and ex-Rettig Commission member Gonzalo Vial refused to support the proposal because of the anonymity guarantee, while judicial actors continued their push for retributive justice with the Courts. Thus, in Chile at the turn of the twentieth century, the state continued to engage actors in a classification struggle, but one in which it was not emerging as a clear favorite to win. Like the technicalities to which Pinochet’s lawyers now clung to keep their client from facing the bench, the *Concertación*’s reconciliation model failed to unite the broader political community behind its vision. Continuing to attempt to rule over—rather than along with—key actors, Lagos, like Menem, failed to achieve the sufficient organizational entwining that would facilitate a broader acceptance of reconciliation as a shared vision for post-authoritarian democratic order.

### *Uruguay: The Persistence of Reconciliation*

In Uruguay, as in Chile, retributive justice was blocked by the existence of an amnesty law, the *Ley de Caducidad de Pretensión Punitiva del Estado* (Law Regulating Expiration of Punitive Claims Against the State). Similar to Argentina, this law was passed in response to the pursuit of retributive justice on the part of victims, their family members and their

<sup>63</sup>‘Declaración de la Mesa del Diálogo sobre Derechos Humanos: Reflexiones fundamentales,’ Ministerio de Justicia de la República Chilena, Accessed October 7, 2016, [http://pdh.minjusticia.gob.cl/wp-content/uploads/2015/12/Declaracion\\_Acuerdo\\_Final.pdf](http://pdh.minjusticia.gob.cl/wp-content/uploads/2015/12/Declaracion_Acuerdo_Final.pdf); Stern, *Reckoning with Pinochet*, 245.

<sup>64</sup>‘Discurso del Presidente de la República, Señor Ricardo Lagos Escobar, al recibir el acuerdo final, June 13, 2000,’ Ministerio de Justicia de la República Chilena, Accessed October 7, 2016, [http://pdh.minjusticia.gob.cl/wp-content/uploads/2015/12/Discurso\\_Presidente.pdf](http://pdh.minjusticia.gob.cl/wp-content/uploads/2015/12/Discurso_Presidente.pdf).

supporters.<sup>65</sup> Unlike Argentina, however, retributive justice had never formed part of the state's transitional justice policies. According to president Julio Sanguinetti, '*no hay que tener los ojos en la nuca*' (there's no need to have eyes in the back of your head); accordingly, transitional justice was configured around reconciliation from the very moment of transition.<sup>66</sup> Along with amnesty, state-sponsored reconciliation in Uruguay was focused on restitution, with information and retributive justice being excluded from state policy. Reconciliation came under pressure from opposition strategies throughout the 1990s, but Uruguayan state actors pushed back with equal force, reconfiguring reconciliation as peace and continuing to propose new measures that resisted retributive justice. In Uruguay, where state makers had desired a return to 'politics as before', rather than the creation of a new democratic form, the struggle against reconciliation was slow going.

The existence of amnesty did not extinguish the desire for retributive forms of justice, however, providing instead a focal point for campaigns around the issue. The first major challenge came as activists pursued the overturning of the *Caducidad* law through a referendum. The referendum transformed the issue into an election campaign, which ultimately ratified rather than overturned the law. For Sanguinetti the failure of the referendum to overturn the law was evidence that 'Uruguay has solved all the problems of the past ... The country is now facing its future.'<sup>67</sup> Indeed, the political engagement on the issue that the referendum campaign had generated did not translate into a sustained classification struggle over transitional justice. As both Luis Roniger and Francesca Lessa note, the years following the 1989 referendum were marked by a relative absence of retributive and other demands in Uruguay.<sup>68</sup> Slowly, however,

<sup>65</sup> Francesca Lessa, 'Barriers to Justice: The Ley de Caducidad and Impunity in Uruguay,' in *Amnesty in the Age of Human Rights Accountability: Comparative and International Perspectives*, ed. Francesca Lessa and Leigh Payne (Cambridge: Cambridge University Press, 2012), 127.

<sup>66</sup> Jo-Marie Burt, Gabriela Fried Amilivia, and Francesca Lessa, 'Civil Society and the Resurgent Struggle Against Impunity in Uruguay (1986–2012),' *The International Journal of Transitional Justice* 7 (2013): 311.

<sup>67</sup> Quoted in Luis Roniger, 'Transitional Justice and Protracted Accountability in Re-democratized Uruguay, 1985–2011,' *Journal of Latin American Studies* 43, no. 4 (2011): 703.

<sup>68</sup> *Ibid.*; Lessa, 'Barriers to Justice.'

new repertoires emerged during the 1990s that drew on developments at the transnational level to challenge the official narrative of reconciliation as silence and as democratic consolidation. While these repertoires drew on transnational resources, they were initiated by local actors and applied specifically to challenge the Uruguayan state's vision of reconciliation and turning the page on the past as the key to democracy and stability.

In particular, the post-referendum period saw the development of a number of practices where local groups attempted to use international norms around disappearance to force a change in state policy and practice. The group *Madres y Familiares de Detenidos-Desaparecidos* (Mothers and Families of the Detained-Disappeared) held events marking international week of the *detenido-desaparecido* (detained-disappeared person) and supported an incipient project to get parliament to declare disappearance as a crime against humanity. When the Organization of American States introduced the Inter-American Convention on Forced Disappearance of Persons in 1994, local activists shifted to encouraging the Uruguayan government to sign and therefore become obliged to uphold its principles.<sup>69</sup> Uruguayan activists had already applied the idea of international obligations to their struggle over the *Ley de Caducidad*, taking their challenges to the Inter-American Commission. In 1992 the Commission declared the amnesty law incompatible with international human rights obligations and, invoking the right to truth and the obligation of states to investigate, ordered the Uruguayan government to fulfil its responsibility to investigate claims of human rights violations.<sup>70</sup> The *Familiares* also worked with other family members at the transnational level, collaborating with the group *Federación Latinoamericana de Asociaciones de Familiares de Detenidos-Desaparecidos* (Latin American Federation of Associations of Families of Detained-Disappeared Persons), an organization that worked within the framework of truth and focused much of their attention on the restitution of children kidnapped during the dictatorship and the restoration of their true biological identity.

The transnational nature of Uruguayan opposition repertoires as well as the varied demands over identity, truth and justice came together in the second half of the 1990s. Events such as the revelation of the existence of Plan Condor, itself a transnational coordination between the military regimes of the Southern Cone, the confessions of Scilingo in

<sup>69</sup>Eugenia Allier Montaño, *Batallas por la memoria: Los usos políticos del pasado reciente en Uruguay* (Montevideo: Ediciones Trilce, 2010), 106.

<sup>70</sup>Inter-American Commission on Human Rights, 'Report 29/92. Cases 10.029, 10.145, 10.305, 10.372, 10.373, and 10.375 Uruguay,' October 2, 1992.

Argentina were compounded with the public declarations of Uruguayan Jorge Tróccoli detailing military culpability in repression, and with the increasing activism of self-identified children of Uruguayan *desaparecidos*, all of which helped to challenge the government's insistence on looking steadfastly forward. In 1996 the son of Zelmar Michelini, a well-known Uruguayan politician and victim of the regime, along with other activist groups initiated what became known as the annual *Marcha del Silencio* (March of Silence). Supported by a wide range of civil society groups, the manifestation focused around a common theme each year, the first being Truth, Memory and Never Again, demands common to classification struggles over transitional justice across the region. Sanguinetti, who had been re-elected to the presidency in 1995, and his model of reconciliation were facing increasing challenges. In particular the case of the grand-daughter of the Argentine poet Juan Gelman attracted attention when she was recovered in the year 2000 living in Uruguay. The Gelman case saw the Uruguayan government come under pressure from Argentina, where repertoires around the missing children of *desaparecidos* were more developed, and Sanguinetti's successor Jorge Battle was forced to help fund identification efforts.<sup>71</sup> Despite the unwavering adhesion to the 'no truth, no justice' approach, the ability of local groups to amplify their challenges through linking to transnational repertoires forced the state to respond.

As a response, the Battle government created an official truth commission investigation. The emergence of state-sponsored information repertoires at a time when civil society pressures focused on memory and retributive justice was a move designed to breathe new life into the project of reconciliation, something Battle had declared his desire for in his inaugural speech, where he claimed that there was a need for 'sealing peace forever between Uruguayans.'<sup>72</sup> The *Comisión para la Paz* (Peace Commission) had the aim of 'consolidating the country's pacification process and securing peace amongst Uruguayans once and for all.'<sup>73</sup> Instead of political consolidation, however, Uruguayan activists continued to pursue retributive justice within both the international

<sup>71</sup> Roniger, 'Transitional Justice and Protracted Accountability,' 709.

<sup>72</sup> Lessa, *Memory and Transitional Justice*, 145–146.

<sup>73</sup> Eugenia Allier-Montañó and Camilo Vicente Ovalle, "'As an Unhealed Wound': Memory and Justice in Post-dictatorship Uruguay,' in *The Struggle for Memory in Latin America: Recent History and Political Violence*, ed. Eugenia Allier-Montañó and Emilio Crenzel (New York: Palgrave Macmillan, 2015).

and the domestic spheres. Despite the election in 2004 of a centre-left coalition government and the concomitant hopes for a paradigm shift, classification struggles continued to be waged wherein activists used the Inter-American system, as well as local judicial structures, to continually challenge the state's reconciliation model. In Uruguay, then, the dynamic within the field of transitional justice sees struggles between the push for retributive justice and attempts to resist it playing out over a much longer period than in its neighbours. However, as in neighbouring examples, the government's approach of working against, rather than with, other actors within the field saw it dragged into a continual struggle that dogged the attempt to impose a particularly closed reconciliation project.

### THE IMPOSSIBILITY OF NATIONAL RECONCILIATION

The purpose of this chapter has been to demonstrate the central role of conflict and dissent within the process of democratic state formation. While the existence of a range of political views and expressions—and the ability of these to freely compete for institutional power—is a measure of democratization, opposition to the state also plays a role in recalibrating and negotiating the development of a democratic political structure and expression of political culture. Both Argentine and Chilean state actors, seeking to limit the power of other social and institutional actors, used reconciliation to control and corral transitional justice. This occurred in a broader context where dominant ideas about transition and the possibilities for constructing democratic rule considered retributive justice—in too great a measure—to be dangerous to good institutional health. Yet as the experience of Menem demonstrated, the unilateral declaration that the past was no longer relevant was impossible in the face of significant social sectors who insisted on the opposite. Opposition to state policy always exists, but in the case of reconciliation, which purports that there is no opposition or dissenting views, this opposition represented a crisis of legitimacy for state-sponsored transitional justice, illustrating the lack of authority held by the state.

Opposition to the state does not necessarily result in a crisis of authority. Oppositional practices may provide an opportunity for strengthening the state through organizational entwining, the embrace of new demands and alignment with those articulating them. However, as the cases of Argentina and Chile demonstrate, when state actors refuse this alignment, they become isolated. The refusal to accept challenges to

the policy of *indultos*, for example, left Menem in a position where his authority was forced to contend with that of international bodies and human rights activists, who were also advancing their own vision for transitional justice and post-authoritarian order. In Chile, where the state had not been able to accumulate enough authority to even carry out its reconciliatory vision for transitional justice, human rights and transnational judicial actors seized a serendipitous moment and asserted their own form of transitional justice with the arrest of Pinochet in London. These challenges demonstrated the shortcomings of reconciliation, which in both cases tried to assert unity where it didn't exist.

Whereas at the beginning of the 1990s transitional justice experts were formulating their ideas about the importance of reconciliation and the need to eliminate measures that they saw would threaten democratic stability and the ability of elites to achieve it, by the end of the decade these ideas were considered anachronistic. The development of international law and the anti-impunity imperative had replaced reconciliation as a dominant approach to transitional justice within the international sphere. Latin American judicial actors and human rights activists both contributed to and drew on these evolving ideas, applying them at home to chip away at the veneer of authority that their governments displayed. Retributive justice, which Menem had recast as politically destructive, was re-interpellated as positive, even essential, for democratization. When combined with the widespread dissatisfaction with reconciliation expressed across society, even within the military, these opposition practices spelled the end of reconciliation as a legitimate practice.

The rise of memory practices in opposition to reconciliation was another important feature of the 1990s, reminding us of historian John Gillis' claim that 'new memories require concerted forgettings'.<sup>74</sup> For state-sponsored reconciliation projects it was necessary to remove reminders of the past, which they saw as preventing a turning of the page on the dictatorships. But these 'forgettings' were challenged and dragged into a classification struggle and thus became themselves generative of new memory and identity discourses. What the human rights groups called *olvido* spawned an active effort at its counteraction

<sup>74</sup>John R. Gillis, 'Memory and Identity: The History of a Relationship,' in *Commemorations: The Politics of National Identity*, ed. John Gillis (Princeton: Princeton University Press, 1996), 7.

with *memoria*. As I will explore in the following chapter, these challenges provided a new series of popular practices for the state to draw on in reinventing transitional justice once more. This abandonment of reconciliation did not occur without a fight on the part of the state, demonstrated by Menem's announcement of his intention to raze the Naval Mechanics School site, and successive Uruguayan leaders' persistent insistence on reconciliation. But as new state makers came to power with the desire to distinguish themselves from those of the 1990s, reconciliation was abandoned in favor of a different approach to unity and political stability. The next chapter will turn to these developments.

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## (Re)Forming the State: Recruiting the Dead and Revitalizing Transitional Justice

On 24 March 2006 the city of Buenos Aires shut down. Government offices were closed, workers stayed home and the Avenida 9 de Julio, the city's twelve-lane principal thoroughfare, was all but deserted. In the early hours of the morning, in the Plaza de Mayo, the *Comunicado Número 1 de la Junta Militar* (First Communication of the Military Junta) was heard, played over loudspeakers to a gathered crowd. This was not another coup; rather, it was the commemoration of the one that had taken place 30 years earlier, the coup of 24 March 1976. It was also the inauguration of the day as a national public holiday, the *Día Nacional de la Memoria por la Verdad y la Justicia* (National Day of Memory for Truth and Justice). Throughout Argentina commemorative events marked the day as one 'for life and for human rights'.<sup>1</sup>

Just a little over five years earlier, in December 2001, the Plaza de Mayo had been the location of a very different scene in which protesting crowds demanded the resignation of president Fernando de la Rúa and, indeed, all political representatives. A state of siege had been called and the security forces attempted to control the protests, resulting in multiple deaths and many more injuries. De la Rúa called on other political

<sup>1</sup>This was the title of the one of the official acts marking the day, held at the Teatro Colón, Buenos Aires. *Página/12*, March 24, 2006.

representatives to join him in creating a new government of national unity, a plea he had been making since the coming crisis became evident months earlier. His call remained unanswered, marking a period of deep political crisis with no clear solution.

The next elections to be held in the wake of this crisis brought Nestor Kirchner to the presidency, a relatively unknown political actor from the southern province of Santa Cruz. Elected in 2003, twenty years after the return to civilian rule, Kirchner made the reformulation of transitional justice the cornerstone of his government's policy, placing the commemoration and memorialization of the *Proceso de Reorganización Nacional* at the center of his agenda. During his government state-sponsored markers of memory—monuments, commemorations, museums, archives—proliferated, as did trials against perpetrators of past human rights violations and other initiatives relating to the authoritarian past.

In this chapter, I look at this reconfiguration of transitional justice in post-crisis Argentina and beyond. This reconfiguration positioned the principles of truth, justice and memory as central to national political culture and identity. Decades after the return to civilian rule both Kirchner and his presidential successor Cristina Fernandez leaned heavily on human rights-based opposition practices. President Raúl Alfonsín had also done this in the past, co-opting and embracing the measures that had been central to opposing the dictatorship that preceded his time in government. Rather than drawing on the same dictatorship-era practices, however, Kirchner embraced the measures that had been developed over the previous decade to resist and critique reconciliation, the transitional justice policy of his democratic predecessors. This involved an instrumentalization of the practices that had developed around the concepts of *impunidad* (impunity) and *memoria* (memory). In the wake of political breakdown Kirchner pursued the reproduction of state power and authority through the incorporation and rearticulation of challenges to this authority, 'reaching down' to the popular level and bringing popular sectors into a productive relationship with the government.<sup>2</sup> The failure of reconciliation throughout the 1990s to actually produce national

<sup>2</sup>Florencia E. Mallon, 'Reflections on the Ruins: Everyday Forms of State Formation in Nineteenth Century Mexico,' in *Everyday Forms of State Formation: Revolution and the Negotiation of Rule in Modern Mexico*, ed. Joseph M. Gilbert and Daniel Nugent (Durham: Duke University Press, 1995), 71–72.

unity, and the irrevocable connection between reconciliation, the Menem government and the social disarray of the end of the 1990s made this revitalizing of transitional justice necessary, even urgent, as the state faced near-total breakdown in its legitimacy and right to rule.

As I showed in the previous chapter, many of the opposition practices that had developed throughout the 1990s were based around the concept of memory. As the state turned away from retributive justice and replaced it with amnesty and reconciliation, activist groups had responded by embarking on a memory struggle. Human rights activists and their allies in political parties were not the only ones using memory to challenge reconciliation, and the military also began to discuss their experience of the past. Memory became an area of social conflict that the state needed to bring under control. Likewise, during the 1990s new practices emerged that were centered around the concept of impunity, with the challenge of international jurisdiction threatening to take control over the issue out of state hands. Reinitiating trials aligned the Argentine state with new international norms while reducing the symbolic challenge to its authority. In this chapter I explore this process of transforming opposition to reconciliation into official transitional justice policy in the post-transitional period.<sup>3</sup> Central to this process was the presentation of the state as a present-day incarnation of the struggles and sacrifices of past generations, particularly those who fought against dictatorship. The sacrifices of these generations were understood as symbolizing the true spirit of Argentine identity, while the state was positioned as the guardian of this identity. As Miguel Centeno and Agustín Ferraro point out, ‘symbolic power and nationalism or nation building are not exactly the same ... nevertheless, nationalism provides the ideological linkages that serve to create collectives that view themselves as such and

<sup>3</sup>A small handful of scholars have observed this phenomenon, calling it the ‘statization of memory’ and noting that ‘government administrations have seemingly taken on the rhetoric and desires of those formally positioned opposition to the state.’ Emilio Crenzel, ‘Toward a History of the Memory of Political Violence and the Disappeared in Argentina,’ in *The Struggle for Memory in Latin America: Recent History and Political Violence*, ed. Eugenia Allier-Montañón and Emilio Crenzel (New York: Palgrave, 2015), 28; Vikki Bell, ‘The Politics of “Memory” in the Long Present of the Southern Cone,’ in *The Memory of State Terrorism in the Southern Cone: Argentina, Chile, and Uruguay*, ed. Francesca Lessa and Vincent Druliolle (New York: Palgrave, 2011), 210.

that provide the foundational legitimacy for state claims to power.<sup>4</sup> By embracing memory and justice repertoires Kirchner accumulated symbolic capital on the part of the state, but he did so in a different manner than Alfonsín. Kirchner's embrace did not so much extend the state into an area of social life over which it previously had no influence; instead, he used the nation-ization of memory and justice to create alliances and connections that positioned his government as the guardian of post-authoritarian national identity.

The chapter begins with the crisis of 2001, a crisis of state capital that provoked a search for a new approach to accumulating and exercising power. In an effort to distinguish themselves from both the neo-liberal policies of the 1990s and from reconciliation, state makers such as Kirchner in Argentina drew on opposition human rights practices to animate a notion of national identity that rejected both. First, I introduce the emergence of Kirchner and his post-election efforts to construct a political identity with roots in the past. Drawing on notions of identity that had also been developed by human rights groups throughout the previous decade, I discuss how he positioned himself as having an authentic link to an imagined anti-dictatorship tradition. I then outline the state-sponsored memory initiatives undertaken by his government, including the establishment of a national commemorative holiday, the declaration of the ESMA site as a memory campus, and the re-release of the *Nunca Más* report. These initiatives saw the state embrace previously contentious, oppositional symbols and interpellate them within a narrative that understood history as a struggle by the state to create a truly democratic political culture. Then, in the following section I discuss his push to re-initiate retributive justice practices, and the way that these were also used to transmit a sense of national identity. I then take a contextualizing look at the rest of the region, showing how in both Brazil and Chile state makers also turned to memory and justice repertoires and positioned themselves as inheritors of an anti-authoritarian spirit in order to give shape to their particular political projects.

<sup>4</sup>Miguel A. Centeno and Agustin E. Ferraro, 'Republics of the Possible: State Building in Latin America and Spain,' in *State and Nation Making in Latin America and Spain: Republics of the Possible*, ed. Miguel Centeno and Agustin Ferraro (Cambridge: Cambridge University Press, 2013), 13.

This chapter caps off the book and brings the examination of the instrumentalization of human rights practices in the form of transitional justice up to the present moment. Transitional justice appealed to state makers across the Southern Cone even in the twenty-first century as a way to address the conflicts of the previous decade and position themselves within the political framework of the post-authoritarian era. In the wake of the dislocations produced by neoliberalism during the 1990s, transitional justice provided a way to link the state with a myth and narrative of national identity that accommodated a spirit of resistance and struggle. Recruiting the dead and disappeared into the project of state building, Kirchner, Fernandez, and their neighbors re-legitimized the pursuit of political reconstruction.

### CRISIS AND RECONSTRUCTION: THE EMERGENCE OF THE *GOBIERNO DE LA MEMORIA*

On 24 March 2002, Argentine newspaper *Página/12* ran a cartoon on its front page referencing the anniversary of the coup that brought the *Proceso de Reorganización Nacional* to power. ‘26 years ago today there was a coup d’état,’ said one figure, to which the other replied, ‘Luckily today that’s not possible.’ ‘Why?’ the first enquired; ‘There is no state’ responded the other.’ A few months earlier, in December 2001, what had begun as an economic crisis exploded into a full-blown political crisis. Identifying the state’s break of the social contract, protestors defied a curfew and surrounded the *Casa Rosada* (Pink House, the Argentine house of government) with the chant ‘*que se vayan todos*’ (kick them all out). President Fernando De la Rúa fled in a helicopter on December 21, and over the next ten days Argentina saw four interim presidents pass through the position, with the last, Eduardo Alberto Duhalde, assuming the presidency on 2 January 2002 and taking on the task of reconstructing governability. The protests that began in December 2001 were sparked by a crisis of the economic structure that had been in place since the dictatorship but was most associated with the neoliberal reforms of the 1990s, especially Menem’s convertibility plan, in which the peso was pegged one-to-one to the US dollar. The collapse of convertibility saw a collapse of the state’s economic capital, built up through the temporary success of the neoliberal reform, seriously weakening state power. This occurred in the context of what Michael Hardt and Antonio Negri

identify as a pre-existing ‘generalized institutional crisis and crisis of representation due in part to both public and private corruption that proved to be a strong obstacle to conventional political strategies to manage the crisis, such as creating a constitutional alliance between classes.’<sup>5</sup> The inability of the De la Rúa government to find political support even as the crowds were gathering to demand *que se vayan todos* served as a reminder of the danger of failing to nurture these alliances. In the previous chapter I showed how the project of reconciliation actually saw the state lose symbolic capital; with the crisis its concentration of economic capital also evaporated. State actors found themselves in a position where new alliances were desperately needed in order to save the state itself.

This task of reaccumulating state capital by making alliances was made all the more urgent by the fact that opposition groups were making alliances themselves, drawing the link between past human rights violations and the economic crisis that was disrupting people’s lives. As the violence and unrest continued, interim president Eduardo Alberto Duhalde began to implement a series of policies designed to re-establish the basic functioning of the state and its institutional presence, starting with scheduling elections for the following year. At a more symbolic level, he also attempted to align the state with *memoria* practices, reconfiguring transitional justice away from the reconciliation framework. He began this task with the designation of the anniversary of the 24 March coup as the *Día Nacional de la Memoria por la Verdad y la Justicia* (National Day of Memory for Truth and Justice). The intention was to ‘consolidate society’s collective memory, generate sentiments opposed to all types of authoritarianism and promote the permanent defense of the rule of law and the coming into effect of human rights.’<sup>6</sup> But while this measure officialized the day as a commemorative one, it failed to align the practice of commemoration with the project of state building. The day was still very much an occasion for opposition; at the 2002 commemoration of the coup, human rights groups in attendance had called for *nunca más* as well as reiterating the demand *que se vayan todos*. The following year the traditional manifestation in the Plaza de Mayo called for justice not only for the crimes of the dictatorship but also for the

<sup>5</sup>Michael Hardt and Antonio Negri, *Multitude: War and Democracy in the Age of Empire* (New York: Penguin, 2004), 216.

<sup>6</sup>Ley 25.633, ‘Institúyense el 24 de Marzo como Día Nacional de la Memoria por la Verdad y la Justicia,’ *Boletín Oficial de la República Argentina*, August 25, 2002.

effects of economic policies and the repression during the December 2001 protests.<sup>7</sup> Far from becoming events that supported the state, memory practices were serving as platforms for a broader critique of neoliberalism and of the state itself. A more radical break with the recent past was needed in order for the state to be able to recompose itself and regain its position as central legitimate holder of capital.

It was in this context that Nestor Kirchner came to the presidency. A Peronist from the southern province of Santa Cruz, Kirchner's election campaign focused on presenting himself as an alternative to Menem, who was running for re-election. The choice was between continuity or change. His actual victory occurred after Menem, who polled higher than him in the first round, withdrew from the runoff vote. Kirchner was now responsible for delivering change. One of the most pressing tasks was to rearticulate the position of the state, divorcing it from the failed and reviled policies of reconciliation and neoliberalism. One of the ways Kirchner did this was positioning it as the guardian of *memoria*, rather than as its target.

He began this process by personalizing the link between the new government and the memory of the past. As I noted in the previous chapter, one of the responses to reconciliation during 1990 involved a politicization of the concept of identity. This involved inventing a sense of continuity between those who opposed the dictatorship and therefore became its targets, and those who opposed reconciliation and *olvido*. This invented political tradition was, in Kirchner's reformulation, no longer something that opposed the state; instead it was something that could save the state. In his maiden speech as president he declared himself there 'to propose to you all a dream of the reconstruction of our own identity as a people and as a Nation. I come to propose to you all,' he continued, 'a dream of the construction of truth and justice ... [a dream] of our generation who gave their all thinking of a country of equals.'<sup>8</sup> The concept of the 'generation' of the *desaparecidos* had been developed by groups like Hijos por la Identidad y la Justicia contra el Olvido y el Silencio (Children demanding Justice and Identity against Forgetting and Silence, HIJOS), who presented themselves as vindicating 'the spirit of the struggle of our parent's generation,' a spirit that had come to mean opposition to authoritarianism as well as opposition to neoliberalism.<sup>9</sup>

<sup>7</sup> *Página/12*, March 25, 2003.

<sup>8</sup> *Clarín*, May 26, 2003.

<sup>9</sup> *H.I.J.O.S. Revista* 1, no. 1 (1996): 1. H.I.J.O.S. (with punctuation) is a related but separate organization from HIJOS, without punctuation. The former was based in the city of La Plata. I have used the name without punctuation in the text despite the fact that the quote comes for the platense group, for consistency throughout the text.

Kirchner presented himself as a representative of this generation and this spirit, someone who would take the political project of the *desaparecidos* all the way to the government. ‘I am,’ he said, ‘part of a destroyed generation ... [that has been] afflicted with painful absences. I involved myself in political struggles believing in values and convictions that I do not intend to leave behind as I enter the Casa Rosada.’<sup>10</sup> By ‘reaching down’ and embracing the narrative that the generation of the *desaparecidos* had been working for a better Argentina, Kirchner created a political identity for himself and for his state project.

Kirchner’s creation of a relationship between *Proceso*-era activists and his government also took a more physical form with the appointment of individuals to key positions connected to the Executive. Eduardo Luis Duhalde, ex-judge and founder of the *Comisión Argentina de Derechos Humanos* (Argentine Human Rights Commission) while in exile was named Human Rights Secretary, while the position of Human Rights Director within the Ministry of Foreign Relations was given to a lawyer from the *Centro de Estudios Legales y Sociales*, Alicia Olivera. A week after assuming the presidency Kirchner received eight *Proceso*-era organizations in the *Casa Rosada*, many of whom were also present at the 2005 inauguration of Jorge Taiana, ex-prisoner during the *Proceso* and former Executive Secretary of the Inter-American Commission for Human Rights, as Foreign Relations Secretary.

These explicit appeals to a broader historical narrative helped to give the new Kirchner government a clear identity. By claiming both identity and memory, Kirchner created a relationship between his government and the social groups that had until recently been opposed to the state. Placing himself at the center—as an individual who belonged both to the destroyed generation and to the state—helped to naturalize this constructed relationship. It also functioned as the first step towards addressing social conflict and division. As John Gillis points out, ‘if the conflicts of the present seemed intractable, the past offered a screen on which desires for unity and continuity...could be projected.’<sup>11</sup> The past was also characterized by conflict, but in this retelling it was one that was much more clear-cut: authoritarianism versus anti-authoritarianism. Positioning himself at the center of the generation of the *desaparecidos*

<sup>10</sup> *Clarín*, May 26, 2003.

<sup>11</sup> John R. Gillis, ‘Memory and Identity: The History of a Relationship,’ in *Commemorations: The Politics of National Identity*, ed. John R. Gillis (Princeton: Princeton University Press, 1994), 9.

made a clear statement regarding the identity of the government, an identity that Kirchner transposed onto the nation as a whole. Addressing the General Assembly of the United Nations for the first time a few months after his inauguration, he declared that ‘the defense of human rights occupies a central place in the new agenda of the republic of Argentina,’ adding that ‘we [Argentines] are the children of the mothers and the grandmothers of the Plaza de Mayo.’<sup>12</sup> Unity, which was elusive under reconciliation, was now to be pursued through the construction of a national identity that recruited the dead, the disappeared, and those who fought for them, as its pantheon of heroes.

### *From Memory Knots to Nation-ization*

By presenting himself as part of the destroyed generation, Kirchner engaged with one of the many memory knots that had been constructed by dictatorship-era activists in the previous decade. Sites or symbols which ‘force the charged issue of memory and forgetfulness into the public domain,’ especially where this issue is seen as relevant to the nation as a whole, memory knots relating to the authoritarian past were used by activists to transmit a broader narrative about this past and, with this, disrupt the official narrative of reconciliation.<sup>13</sup> As such the memory knots created by human rights groups gave rise to what Philip Gorski calls ‘nation-ization struggles,’ where ‘social and cultural actors propose and oppose various conflicting visions of the nation and of the sense of being a group more generally.’<sup>14</sup> Throughout the 1990s memory knots were used to challenge the idea that national unity was possible through a reconciliation approach to transitional justice, proposing instead a more conflictive version of the national story. Gorski says that nation-ization struggles occur when, among other things, there is an ‘invention of new ritual forms and techniques, often facilitated by developments in social or material technology that increase the potential scope or intensity of ritual life.’<sup>15</sup> The proliferation of memory sites, often

<sup>12</sup> *Página12*, September 26, 2003.

<sup>13</sup> Steve Stern, *Remembering Pinochet's Chile: On the Eve of London 1998* (Durham and London: Duke University Press, 2004), 120.

<sup>14</sup> Philip S. Gorski, ‘Nation-ization Struggles: A Bourdieusian Theory of Nationalism,’ in *Bourdieu and Historical Analysis*, ed. Philip S. Gorski (Durham and London: Duke University Press, 2013), 257.

<sup>15</sup> *Ibid.*, 261.

developed with the assistance of local authorities, increased the likelihood of a nation-ization struggle as it gave physical form to memory knots, which in turn forced the issue of the contested past into the present. During the 1990s the aim of this strategy was oppositional, seeking to delegitimize and displace reconciliation. In the wake of the 2001 crisis, however, the narrative about the national past, evoked by the idea of the destroyed generation and other memory knots, became something that could be used by the state to create a sense of collective identity. Kirchner seized this symbolic resource and set about making these memory knots part of his official transitional justice program.

Memory practices relating to the authoritarian past provided a useful tool in this endeavor because they were already concerned with more than just individual experience. Developments around the commemoration of the 24 March coup, for example, were more than just individual or small group acts of remembrance; they also sought to give a certain meaning to the authoritarian past and its relationship to the present for the broader imagined community. For a long time, however, the date of the coup had been an oppositional memory knot that formed part of a narrative that saw reconciliation as an inadequate basis for creating national collective identity and positioned state actors as opposed to the national interest. As mentioned above, Duhalde attempted to change this by making the date a national day and mandating that schools use the occasion to undertake activities that ‘consolidate society’s collective memory, generate sentiments opposed to all types of authoritarianism and promote the permanent defense of the rule of law and the coming into effect of human rights.’<sup>16</sup> But the public commemoration still remained an oppositional practice, an occasion where human rights groups continued to demand the annulment of the amnesty laws and call for *memoria, verdad y justicia*.<sup>17</sup> Kirchner’s subsequent embrace of the date saw him insert the state more explicitly as the guardian of the collective identity it produced.

The first anniversary of the coup following his election, 24 March 2004, Kirchner began the process of domesticating the event by presenting the state not as an adversary but as a supporter of the longstanding

<sup>16</sup>Ley 25.633, ‘Instítuyense el 24 de Marzo como Día Nacional de la Memoria por la Verdad y la Justicia,’ *Boletín Oficial de la República Argentina*, August 25, 2002.

<sup>17</sup>*La Nación*, March 24, 2003.

demands of the human rights groups. In an official ceremony held in front of the *Escuela Superior de Mecánica de la Armada* (ESMA) and attended by representatives from different levels of government and the human rights groups *Madres Línea Fundadora*, *Abuelas*, and *Familiares*, Kirchner began his speech by declaring that he had ‘come to ask forgiveness on the part of the national state for the shame of having kept silent during 20 years of democracy.’<sup>18</sup> Simultaneously erasing the policies of Alfonsín’s early years and declaring a break with past transitional justice, Kirchner used the apology to position his state project firmly within the political space established by human rights groups over the past decade. His government was not seeking to overturn the actions of human rights groups; instead he was looking to overturn the actions (or inaction) of previous state makers who had failed to fully realize these groups’ demands. In this undertaking, Kirchner declared, he was ‘guided by justice and the struggle against impunity,’ central elements of oppositional human rights practices throughout the 1990s.

Over the following years Kirchner continued to transform already-existing memorial practices into official, *national* ones. In 2006, days before the thirtieth anniversary of the coup, Congress approved Kirchner’s proposal to make 24 March a public holiday. All Argentines would now have their routine interrupted and marked by this occasion. The intention behind making the date a public holiday was to deinstitutionalize it, taking it out of the schools and transforming it into a public celebration.<sup>19</sup> Disrupting time forced the charged issue of memory into the routine of all Argentines and created a truly national tradition. Another significant memory site was ESMA. In 2004 Kirchner signed an agreement between himself and the Buenos Aires city mayor, *frepa-sista* Aníbal Ibarra, which converted the site into a co-sponsored ‘space for memory and for the promotion and defense of human rights’ which would have ‘as its principal activity the exaltation of the values of Truth, Memory and Justice and the promotion of Human Rights in terms of civil, political, economic, social and cultural rights, strengthening the

<sup>18</sup>‘Discurso Pronunciado el Día 24 de Marzo 2004,’ *Discursos del Presidente Dr. Néstor Kirchner* (Buenos Aires: Presidencia de la Nación, no date).

<sup>19</sup>Proyecto 1151-S-2006 (Senado) ‘Modificación de la Ley 25.633 Día Nacional por la Memoria, la Verdad y la Justicia,’ *Fundamentos de la Ley*, April 25, 2006.

system of democratic republicanism.<sup>20</sup> Signing an agreement with the city government created a link between the Executive and the already-existing plan to memorialize the ESMA precinct that existed between the city and human rights organizations. It also opened up the possibility for concrete relations of cooperation, creating the productive alliances that were needed in the wake of the 2001 crisis. To decide what would be housed on the ESMA site, a governing body consisting of representatives of the Executive, the City government, and *Proceso*-era organizations was established, meeting fortnightly to discuss the development of the ‘memory space.’

While the precinct was to house the offices of a number of dictatorship-era human rights groups, there would also be a series of state organisms operating within the former detention center buildings. The principal of these was the *Archivo Nacional de Memoria* (National Archive of Memory). Established by presidential decree in 2003, the *Archivo* was to be the repository for documentation relating to the repression held by the *Secretaría de Derechos Humanos*, which had been responsible for receiving reports and claims relating to disappearances after the conclusion of the CONADEP investigation, along with other documentary material relating to the period 1976–1983.<sup>21</sup> This documentation was to provide the evidentiary basis of national collective memory, transforming it into official history. As Kirchner explained at the launch of the *Archivo*, ‘we can continue to live in a society of doublespeak and hypocrisy, or we can move forward with the construction of our truth, the construction of our reality, the construction of justice, the breakdown of impunity, towards the consolidation of a society where other parameters guide our actions.’ Once again, the ESMA site was to function as a tool for national unity, but this time that unity was to be achieved through the construction of a common historical narrative that centered on, rather than erased, the human rights violations of the past.

<sup>20</sup>Convenio 8/2004, ‘Acuerdo entre el Estado Nacional y la Ciudad de Buenos Aires para la Construcción del “Espacio para la memoria y para la promoción y Defensa de los Derechos Humanos” en el predio de la “ESMA”,’ *Boletín Oficial de la República Argentina*, March 26, 2004.

<sup>21</sup>For an account of the construction of the *Archivo*, see Michelle Carmody, ‘Archiving Human Rights in Latin America: Transitional Justice and Shifting Visions of Political Change,’ in *The Routledge History of Human Rights*, ed. Jean Quataert and Lora Wildenthal (New York: Routledge, 2019).

In explaining the concept of memory knots, Steve Stern focuses on their oppositional quality and disruptive potential. In forcing certain memories into the public sphere, he says, they ‘make claims or cause problems that heighten attention and consciousness, thereby unsettling reflexive everyday habits and euphemisms that foster numbing.’<sup>22</sup> In transforming memory knots into elements of official transitional justice policy, however, their disruptive potential was replaced with a unifying function. Instead of operating as an interruption to normal ways of thinking, they became sites around which a new way of thinking was crystallized. In this new way of thinking, the state was not a human rights-violating body but instead represented the realization of long-held demands regarding truth and justice. This was most clearly seen in the reissuing of the CONADEP report, *Nunca Más*.

### *Never Again, Again: The New Function of Memory Knots*

Kirchner’s tendency to erase past transitional justice measures and present his government as the first authentic expression of anti-dictatorship and human rights-related demands continued with the co-option of other transitional justice artifacts, most notably his revival of the *Nunca Más* report originally produced by Alfonsín’s transitional justice policy. It was in the re-release of *Nunca Más* that Kirchner’s pattern of reaching down and incorporating both people and symbols as support beams for the democratic state was most evident.

The report had already been republished a number of times since its original release, including in 1991 at the request of human rights organizations, and in 1995 by the Menem government.<sup>23</sup> In 2001 a revised and an updated edition was authorized with new inclusions reflecting information that had been collected by the Sub-secretariat and other investigative works carried out by the activist groups in the intervening years. This edition was intended to contain a significant digitalized component to facilitate its use as an educational and research resource regarding the period 1976–1983.<sup>24</sup> It was released without a great

<sup>22</sup>Stern, *Remembering Pinochet’s Chile*, 120.

<sup>23</sup>Emilio Crenzel, *Memory of the Argentina Disappearances: The Political History of Nunca Más* (New York: Routledge, 2011), 117–120.

<sup>24</sup>*Clarín*, January 29, 2001.

degree of fanfare, however, and its primary destination was the educational and activist sectors. Since its original release, then, *Nunca Más* primarily operated as an informational resource rather than as a marker of collective memory.

In 2006 the Kirchner government republished the report along with a new prologue that introduced the special thirtieth anniversary edition. This new edition was published under the auspices of the Human Rights Secretariat, which was now a direct dependent of the Office of the President, and it appeared in book format as well as in weekly installments that accompanied the newspaper *Página/12*.<sup>25</sup> The authors of the revised prologue were the Human Rights Secretary Eduardo Luis Duhalde, and his Junior Secretary Rodolfo Mattarollo. Both Duhalde and Mattarollo had been members of the *Asociación Gremial de Abogados* (Trade Union of Lawyers) and had worked in defense of political prisoners during the early 1970s. Both had gone into exile during that decade and became central figures in the *Comisión Argentina de Derechos Humanos* in Madrid and Paris, respectively. In rewriting the prologue Duhalde and Mattarollo abandoned the *dos demonios* theory of the original, which had presented the events within the report as the product of a violent confrontation between two equal sides. Instead they emphasized the link between the state (specifically under the Kirchner government) and the achievement of long-held transitional justice demands held by the people:

Our country is experiencing a historic moment in terms of human rights, thirty years after the coup d'état that instated the bloodiest dictatorship in our history. These exceptional circumstances are the result of a confluence between the national government, which has made human rights the fundamental pillar of its public policy, and the unwavering demands of truth, justice and memory maintained by the people throughout these three decades.<sup>26</sup>

<sup>25</sup>The 1995 reissue was also serialized in *Página/12*. Crenzel, *Memory of the Argentina Disappearances*, 120.

<sup>26</sup>CONADEP/Secretaría de Derechos Humanos, *Nunca Más: Informe de la Comisión Nacional sobre la Desaparición de Personas* (Buenos Aires: Eudeba, 2006), 7.

This implication of continuity with the past had been present before, in particular in Kirchner's use of the concept of the destroyed generation of which he was a part. A transitional justice program characterized by truth, justice and memory, the three pillars of Kirchner's own policy, was presented here as equal to these long-held demands. The prologue continued by stating that 'behind the flags of justice, truth and memory in defense of human rights, democracy and republican order ... *nunca más* is a vast program undertaken by the national State, by the provinces and municipalities and by Argentine society as a whole, if we want to construct a truly integrated Nation and a country more just and more humane for all.'<sup>27</sup> Truth, justice and memory, previously oppositional demands, were now unifying practices in which all should engage. The need for this unity was made all the more urgent with reference to the recent past, with the prologue stating that 'to reaffirm the value of ethics and human rights in the profound crisis inherited from the military dictatorship and from neo-liberal economic policies ... [is an active principle] in post-2001 Argentina.'<sup>28</sup> Drawing directly on the human rights groups' practice of equating the dictatorship and its repression with the economic reforms of the 1990s, Kirchner nationalized the opposition that had developed to both, positioning his government as the clear guardian of this national identity.

Of course, the construction of a national tradition was not an end in itself; like Alfonsín before him, Kirchner aimed at creating a political culture that valued the rule of law and democracy, and that above all was a stable democratic state. This meant positioning the state as chiefly responsible for all processes relating to the past. In introducing the proposal to transform 24 March into a public holiday Kirchner explained that 'it is the responsibility of the constitutional institutions of the Republic to ensure the remembrance of this cruel period in Argentine history within the collective memory, with the objective of teaching current and future generations the consequences of overturning the rule of law.'<sup>29</sup> Unlike Alfonsín, however, Kirchner pursued this shift in political culture through the mobilization of nationalism, an explicitly unifying concept.

<sup>27</sup>Ibid., 8–9.

<sup>28</sup>Ibid., 7.

<sup>29</sup>Ley 26.085, 'Incorporarse el Día 24 de Marzo—Día Nacional de la Memoria por la Verdad y la Justicia—entre los feriados nacionales previsto por la Ley 21.329,' *Boletín Oficial de la República Argentina*, March 21, 2006.

## THE JUDICIALIZATION OF POLITICS AND ITS HARNESSING BY THE STATE

As we saw in the previous chapter, the challenges posed by memory knots were not the only contestations of state authority to have emerged throughout the previous decade. Kirchner had also come to power in the wake of an explosion of international judicial activity focused on past human rights violations in the Southern Cone of Latin America. This activity represented an additional challenge to state makers seeking to ensure that the state remained the principal source of authority and jurisdiction over what occurred within its boundaries. Not only did developing ideas about international jurisdiction directly challenge the state on this matter, but the alliances between local human rights actors and international ones meant that a fertile climate was being created for the development of new judicial challenges to reconciliation and state control over transitional justice. Kirchner's predecessors Menem and De la Rúa had taken a hard line and strongly resisted legitimizing this activity, refusing to cooperate with extradition warrants and to recommence retributive justice practices. When faced with Spanish Judge Baltazar Garzón's extradition requests, the De la Rúa government had responded that 'the collaboration with foreign prosecution of these acts would amount to invalidating or displacing the exercise of public powers [on the part of Argentine judges].'<sup>30</sup> But Argentine judges themselves were divided on the issue, and a great number were in fact supporting retributive justice practices, even international ones. Amnesty was coming under attack from a number of sides domestically, with the Congress having symbolically derogated the laws of *Punto Final* and *Obediencia Debida* and local judges making rulings in defiance of the restrictions. The relationship between law and politics in Latin America had begun to take on new characteristics during the 1990s and early 2000s, with an increasing 'judicialization of politics' characterized by the 'growing importance of law, legal discourse and legal institutions in the political arena.' The result of this was an increasing number of judicial actors who 'cast themselves as defenders of rights and ... intervene in significant political controversies,' evident in the actions of people like Garzón in Spain, as well as a number of federal judges across Argentina who employed the notion

<sup>30</sup>Decreto 1581/2001, 'Cooperación en Materia Penal,' *Boletín Oficial de la República Argentina*, December 17, 2001.

that the *indultos* were unconstitutional in order to pronounce sentences against various *Proceso*-era figures.<sup>31</sup> An official transitional justice policy that emphasized sovereignty over human rights issues was increasingly an anachronism that placed the state out of step with political developments within the broader human rights field.

For Kirchner, rather than representing a barrier to or intrusion on state authority and formation, the judicial sphere offered a chance to resolve many of the conflicts he had inherited from the previous administration. In his first address to the annual Armed Forces' Alumni Dinner in 2003 he stated that 'each person must take responsibility for their actions [in order to] preserve the historical, political and strategic role of the military institution.'<sup>32</sup> This was a shift in thinking from the idea that amnesty would produce political legitimacy and institutional stability, to the idea that judicial responsibility could play that role. This was of course not a new idea: it had underlain Alfonsín's approach to transitional justice and, historically, the ability of the judicial system to absorb social conflict and channel it away from other potentially disruptive forms of resolution had been a central feature of colonial-era state hegemony.<sup>33</sup> As Sarah Chambers has shown, in the post-colonial period the judicial branch of government was reformed just enough to make it legitimate in the new political context, proving 'an arena in the new nations where both state agents and citizens negotiated their claims and interests.'<sup>34</sup> A judiciary that was aligned with the state served as an important escape valve for social pressure and dispute resolution. For Kirchner, too, alignment with the judiciary promised to bring important benefits.

Kirchner's address to the armed forces had coincided with a petition filed in the Spanish courts by Garzón to try 46 Argentines, both military and civilian, for human rights violations committed during the

<sup>31</sup>Javier Couso, Alexandra Huneeus, and Rachel Sieder, ed., *Cultures of Legality: Judicialization and Political Activism in Latin America* (Cambridge: Cambridge University Press, 2010), 3.

<sup>32</sup>*La Nación*, July 8, 2003.

<sup>33</sup>Sarah C. Chambers, 'Citizens Before the Law: The Role of Courts in Postindependence State Building in Spanish America,' in *State and Nation Making in Latin America and Spain: Republics of the Possible*, ed. Miguel A. Centeno and Agustín E. Ferraro (Cambridge: Cambridge University Press, 2013), 356.

<sup>34</sup>*Ibid.*, 357.

dictatorship. This gave rise once again to discussions over the concrete measures that would be taken in Argentina in regards to retributive justice. Over the next couple of months Kirchner went to the Congress and won approval for a series of measures: the derogation of De la Rúa's decree prohibiting cooperation with international extradition in cases of crimes against humanity, giving the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity constitutional ranking, and to declare the laws of *Punto Final* and *Obediencia Debida* as unconstitutional, removing the obstacles to domestic judicial processing.<sup>35</sup> The discussion around the derogation of the laws revealed a broad consensus around the desirability of retributive justice and its ability to shape political culture.<sup>36</sup> Congress member Elisa Carrió described the annulment of the *indultos* as replacing 'a culture of impunity with a culture of truth and justice.'<sup>37</sup> These measures saw the government and the Congress seize the political protagonism that had previously been held by the judiciary. Now it was up to the Supreme Court to ratify parliament's decision to allow trials to occur without the threat of higher appeal. Kirchner himself quickly moved to assert that the ball was now with the Court: following the derogation of De la Rúa's prohibition on international cooperation he stated that 'Spain has acted, and now everything depends on the Court,' while days later, following the derogation of Alfonsín's amnesty laws, he added that 'Argentina must have *memoria* and *justicia*. Now, with the derogation of the *Punto Final* and *Obediencia Debida* laws, this becomes possible.'<sup>38</sup> He was issuing a challenge to the Court to support the parliamentary decisions, a call which many saw as illegal and outside the scope of congressional action.

Two years later the Court pronounced the amnesty laws unconstitutional, making it no longer possible to appeal prosecutions handed down in lower courts. The decision had been based primarily on Argentina's obligations within the Inter-American system and the need to assert

<sup>35</sup>Congress had derogated these laws in 1998, but this had not had retroactive effect. Ley 25.778, 'Convención sobre la Imprescriptibilidad de los Crímenes de Guerra y de los Crímenes de Lesa Humanidad,' *Boletín Oficial de la República Argentina*, September 3, 2003; Ley 25.779, 'Decláranse insanablemente nulas las leyes Nros. 23.492 y 23.521,' *Boletín Oficial de la República Argentina*, September 3, 2003.

<sup>36</sup>See Francesca Lessa, *Memory and Transitional Justice in Argentina and Uruguay: Against Impunity* (New York: Palgrave, 2013), 123–126.

<sup>37</sup>*Página12*, August 24, 2003.

<sup>38</sup>*Página12*, August 30, 2003; *Página/12*, September 3, 2003.

domestic sovereignty over emerging international practices. Kirchner called the decision ‘a breath of fresh air. Impunity,’ he said, ‘is coming to an end.’<sup>39</sup> He then worked to facilitate the development of retributive trials, ensuring that they remained connected to official transitional justice policy instead of becoming purely a formal, legal process. In 2007 Kirchner handed over the presidency to Cristina Fernandez, ex-Senator and a central member of Kirchner’s political faction. It was during her tenure that trials against *Proceso*-era figures multiplied: According to the *Centro de Estudios*, between 2006 and 2011, 239 sentences were handed down in cases initiated after the derogation of the impunity laws.<sup>40</sup> But while many cases were successfully brought to sentence during this period of renewed judicial activity, many more were held up by procedures and practices internal to the courts and the judiciary. Both Kirchner and Fernandez railed publicly against these delays and moved to substantially modify the way these trials were regulated to ensure their speedy and successful processing.

In 2008 the Fernandez government intervened by passing a series of reforms designed to accelerate the process as well as modifications allowing for its filming and broadcasting.<sup>41</sup> As a result of these changes in 2009 the ESMA trial began, the largest case to be heard since the *Juicio a las Juntas* in 1986. As Susana Kaiser has argued, in the ‘megacause,’ as the EMSA trial became known, the courtroom was transformed ‘into a *lieu de mémoire*, a site for the performance of memory.’<sup>42</sup> The memory that was performed, however, was not the loose memory of individual victims but a collective memory that was itself shaped by the context in which it was developed. In particular, the narratives advanced in the courtroom referenced the role of the Kirchnerist state as guardian of the national struggle for justice. This was clearly seen in the ephemera that accompanied the trials. Like with the *Juicio*, the events of the trial were disseminated through regular publications, this time produced under the auspices of the *Instituto Espacio de Memoria* (Memory Space Institute),

<sup>39</sup> *Página/12*, June 15, 2005.

<sup>40</sup> Centro de Estudios Legales y Sociales, *Derechos Humanos en Argentina: Informe 2012* (Buenos Aires: Siglo XXI, 2012), 35.

<sup>41</sup> See, for example, Ley 26,394, ‘Derógase el Código de Justicia Militar y todas las normas, resoluciones y disposiciones de carácter interno que lo reglamentan. Modificarse el Código Penal y el Código Procesal Penal de la Nación,’ *Boletín Oficial de la República Argentina*, August 29, 2008.

<sup>42</sup> Susana Kaiser, ‘Argentina’s Trials: New Ways of Writing Memory,’ *Latin American Perspectives* 42, no. 3 (2015): 199.

the governing body of the reclaimed ESMA site. The new *Diario del Juicio* contextualized the trials by describing how ‘at the height of the genocide the Madres, the Abuelas, fathers and other Familiares of the *detenidos-desaparecidos* began the path towards memory, truth and justice that since 2003 has been part of state policy.’<sup>43</sup> Transcripts of witness testimonies were accompanied by interviews with government ministers explaining the advances in state policy regarding human rights and the collection of evidence. The presence of the state was central to justice, itself the realization of long-held demands.

The ESMA megacause was also indicative of the new relationship between the state and the judiciary within twenty-first century transitional justice. Fernandez had made modifications to the regulations governing the provision of evidence; for example, requiring DNA samples to be provided upon request, and modifying the role of the *Banco Nacional de Datos Genéticos* to function as an officially mandated expert witness in retributive justice processes.<sup>44</sup> More evidence than ever before was now to be made available to assist in the development and successful resolution of cases. During the ESMA megacause civilians with links to the *Proceso* also fell into the ever-widening net of *justicia*, with the third hearing of the megacause including figures such as the ex-Treasury Secretary and other civilian members of the *Proceso’s Grupos de Tareas*. While the trials were ostensibly the domain of the judiciary, the Fernandez government actively worked to ensure that justice was a state-led project.

The new trials were also a national process. What was being judged in these trials was, according to prosecutor Gabriela Sosti, ‘a state policy that became genocidal ... they are trials of history, of the state, not of a common criminal.’<sup>45</sup> Reflecting a ‘belief in law’s potential to assist in the creation of a more just order,’ the trials responded to the demand for justice and the insistence on anti-impunity as a tool for democratization that had become dominant within international human rights circles throughout the previous decade. The degree link between new trials and post-authoritarian order was tested in 2006, with the disappearance of

<sup>43</sup>Instituto Espacio de la Memoria, *Juicio a Megacausa ESMA*, no. 2 (March 2013), 2.

<sup>44</sup>Ley 26.549, ‘Código Procesal Penal: Modificación,’ *Boletín Oficial de la República Argentina*, November 27, 2009; Ley 26.548, ‘Banco Nacional de Datos Genéticos,’ *Boletín Oficial de la República Argentina*, November 27, 2009.

<sup>45</sup>Kaiser, ‘Argentina’s Trials,’ 195.

Jorge Julio López, a key witness in one of the trials that began following the Court's decision.<sup>46</sup> While López' disappearance provoked criticism of the state and its ability to keep its citizens safe, especially on the part of more radical human rights activists, the broader belief in the link between judicial practices and democratization remained steady. Judges, civilians, elected representatives, and the Executive worked together on retributive justice as a shared project, mobilizing the nation-ization of certain narratives about the shared past.

### POST-TRANSITIONAL JUSTICE AND NATION BUILDING IN COMPARATIVE PERSPECTIVE

The embrace of human rights repertoires and their transformation into a central pillar of national identity was, in many ways, unique to Argentina. Kirchner's readiness to (literally) embrace human right actors long critical of the government and steadfastly against the military owed much to the context in which he came to power, in the wake of a crisis of state legitimacy. Nevertheless, his interpellation of the authoritarian past in the service of legitimizing new political formulations can also be seen, albeit in a more incipient form, in a number of examples across the region. In Chile, President Michele Bachelet initiated an embrace of memory as a way of articulating a post-Pinochet nation-state project following the General's death in 2006, while in Brazil Dilma Rouseff embraced memory practices to indicate a new political identity for her party and for the nation. The embrace of memory and anti-impunity and the reconfiguration of transitional justice as a form of nationalism proved to be a useful strategy for state makers in the twenty-first century as they searched for a new political formula in the wake of neoliberalism and in the twilight of military influence.

Chile entered the twenty-first century free from the economic woes of Argentina, but facing its own shift in political mood following the return of Pinochet from his brief arrest and the drama of prosecution attempts both at home and internationally. Following the General's return, the judicial arm of the state continued to pursue retributive justice, although cases often also pursued the aim of investigation and truth telling, compensating for the perceived inadequacy of past state-sponsored efforts. Halfway through its term, the government of Ricardo Lagos (2000–2006) oversaw a reconfiguration of transitional justice, launching

<sup>46</sup>Couso et al., *Cultures of Legality*, 5.

a series of measures including a new investigatory commission and a national human rights bureaucracy. As Steve Stern has pointed out, this represented a shift in state engagements with human rights in Chile as it implied a recognition, albeit limited, that the question of human rights could be something incorporated into ongoing political life, rather than simply an issue to be solved.<sup>47</sup> Bachelet extended this recognition in the period following Pinochet's death, embarking on an attempt to create a post-authoritarian political culture.

As discussed in the previous chapter, following the arrest of Pinochet in London in 1998, society as a whole broke with the concept of reconciliation and the idea of turning the page on the past. In 2003 Chilean political scientist Manuel Antonio Garretón encapsulated this feeling, stating that 'it is around how we solve the problems of the past that our future as a moral-historical community will be defined.'<sup>48</sup> It was not, however, until Pinochet's death in 2006, the same year as Bachelet's ascension to the presidency, combined with his delegitimized political standing at the time of his passing, that a break with the authoritarian legacy allowed the state to attempt to pursue this project. Bachelet commented that the death of the general 'symbolizes the passing of a period of divisions, of hate and of violence in this country' and called for national unity in the face of divisions that Pinochet's death threatened to bring to the fore.<sup>49</sup> For Bachelet the political task in the post-Pinochet era was the overcoming of the division of political identities in Chile, split between those who supported the Pinochet period and those who opposed it. She began by refusing to honor Pinochet with a state funeral, stating that such a divisive figure 'did not deserve to have the flag of the *Palacio de la Moneda* (Presidential Palace) at half-mast.'<sup>50</sup> From here she moved to incorporate a number of civil society repertoires into the realm of state policy. In particular, she announced the construction of a national museum focused on the memory of the human rights violations of the past.

<sup>47</sup>Stern, *Reckoning with Pinochet*, 288–289.

<sup>48</sup>Garretón was writing in the magazine *Mensaje*. Quoted in Jorge Larrain, 'Changes in Chilean Identity: Thirty Years After the Military Coup,' *Nations and Nationalism* 12, no. 2 (2006): 337.

<sup>49</sup>*El Mercurio*, December 13, 2006.

<sup>50</sup>*Diario Libre*, December 20, 2006.

Civil society groups had already been looking towards the construction of a memorialization initiative, with a focus on preserving the archives of the dictatorship-era organizations. Bachelet's museum followed the same general plan, with the idea that the national *Museo de la Memoria y los Derechos Humanos* (Museum of Memory and Human Rights) would take possession of these groups' records and incorporate them into the state's official archives alongside the documents produced in the previous state-sponsored investigations.<sup>51</sup> At the museum's inauguration in 2010 she described it as a space where 'Chilean society can be found and can find itself again. [The museum is a place] where society confronts its own history ... The inauguration of this Museum is a powerful sign of the vigor of a united country. A unity based in the shared commitment to never again suffer a tragedy such as the one this place teaches us about.'<sup>52</sup> As Cath Collins and Catherine Hite have noted, however, despite the emergence of memorialization initiatives, both state-sponsored and independent, 'broader public engagement with the recent past through memorials has proved both elusive and problematic.'<sup>53</sup> Despite the desire of Bachelet, the rejection of the authoritarian past and the memory of its victims did not provoke the development of a post-authoritarian national collective identity in Chile. On the occasion of the fortieth anniversary of the 1973 coup, Bachelet re-emphasized her belief that 'reconciliation cannot exist in the absence of truth, justice or mourning.'<sup>54</sup> The desire for nation building, called reconciliation by Bachelet, under the motif of truth, justice and memory existed at the level of the presidency but was yet to find the conditions necessary for its development.

In Brazil, political changes also brought with them a shift towards 'reconciliation by memory.'<sup>55</sup> Official transitional justice measures in Brazil since the return to civilian rule had mainly focused on amnesty,

<sup>51</sup>Catherine Hite and Cath Collins, 'Memorials, Silences, and Reawakenings,' in *The Politics of Memory in Chile: From Pinochet to Bachelet*, ed. Cath Collins, Katherine Hite, and Alfredo Joignant (Boulder and London: First Forum, 2013), 154.

<sup>52</sup>'Discurso de S.E. la Presidenta de la República, Michelle Bachelet, en Inauguración del Museo de la memoria y los Derechos Humanos, 11 January 2010,' Museo de la Memoria, Accessed 24 March, 2016, <http://ww3.museodelamemoria.cl/wp-content/uploads/2016/01/discurso-presidenta.pdf>.

<sup>53</sup>Hite and Collins, 'Memorials, Silences, and Reawakenings,' 133.

<sup>54</sup>*El País*, September 12, 2013.

<sup>55</sup>Rebecca J. Atencio, *Memory's Turn: Reckoning with Dictatorship in Brazil* (Madison: University of Wisconsin Press, 2014), 13.

with the state upholding the military's outgoing policy of self-protection. While a series of reparations had been offered by the state to victims of the past regime, practices around information and justice remained outside of transitional justice policy. The Brazilian policy of amnesty differed from the Argentine and had its origins in the dictatorship itself, where it was received as a win for the human rights movement as it released political prisoners and allowed exiles to return. The different nature of amnesty in the Brazilian context meant that demands for retributive justice did not emerge in the same way as they did elsewhere. Nonetheless, civil society actors developed their own practices and, over time, came to collaborate with sympathetic members of Congress on repertoires around truth, memory and even reparation. With the election of the *Partido dos Trabalhadores* (Worker's Party) in 2003 began a new phase in the entwining of state and civil society human rights actors, with the appointment of individuals who had been targets of state repression during the dictatorship to key bureaucratic posts. This brought about a shift in official transitional justice from a focus on amnesty and reparation to one that embraced new practices of memory.<sup>56</sup> Consisting of memorials as well as museum exhibitions with an explicitly didactic and informational component, state-sponsored memory initiatives were designed to, in the words of Human Rights Minister Paulo Vannuchi, 'sensitise and promote the importance of practicing democracy, citizenship and human rights.'<sup>57</sup> Three decades after an official transition that has been described as 'more of a continuation of the outgoing regime' the Brazilian state was using memory knots as a way of asserting the bases of national political culture.<sup>58</sup>

In 2011 the Brazilian Congress approved a proposal by the human rights ministry to create a national truth commission, the *Comissão Nacional da Verdade* (National Truth Commission). Speaking at the initiation of the *Comissão* in 2012, president Dilma Rousseff stated that:

what we are doing here, at this moment, is a celebration of the truth of a nation that is on the democratic path but still has some self-reflection to do ... In this fundamental sense, this [truth commission] is an initiative of the Brazilian state and not just a government action ... I am proud that my

<sup>56</sup>Ibid., 17.

<sup>57</sup>Quoted in Nina Schneider, 'Breaking the "Silence" of the Military Regime: New Politics of Memory in Brazil,' *Bulletin of Latin American Research* 30, no. 2 (2011): 206.

<sup>58</sup>Atencio, *Memory's Turn*, 13.

government coincides with the maturation of our democratic trajectory. With it, the Brazilian state is now open to examination, supervision and the scrutiny of society ... I close with an invitation to all Brazilians, regardless of the role they played and opinions they advocated during the authoritarian regime. We believe that Brazil cannot avoid knowing its history. Let us work together so that Brazil can know and embrace this history in its entirety.<sup>59</sup>

Rousseff saw the *Comissão* as providing an opportunity to create a common national narrative in which the state's past actions were investigated as the final stage in the consolidation of democracy. Emphasising the initiative as an action of the democratic state placed it at the end point in this history, the mediator of a sense of national identity. At the presentation of the final report of the *Comissão* Rousseff again emphasized her belief that 'the truth means the opportunity to reconcile ourselves and our history.'<sup>60</sup> Like Bachelet she embraced memory knots as a way of creating a sense of collective identity, articulated here as reconciliation.

In both the Brazilian and Chilean cases, however, it could not be said that these efforts successfully hegemonized a version of national identity in which the authoritarian past is uncontested. In explaining the lack of success in creating a sense of national identity on the back of collective memory of authoritarianism, Nina Schneider has suggested that '[a]lthough the term "dominant memory" seems appropriate for the Argentinean context, public memory in Brazil is better described as being "in denial" or as deeply divided.'<sup>61</sup> The same could be said for Chile. But state actors in Chile and Brazil have still seized upon memory knots precisely because they have the power to provoke nation-ization struggles. Even in cases where visions of the nation and of appropriate transitional justice policies are highly contested, memory knots provide the opportunity for the state to insert itself into this debate. By engaging in this debate and negotiating with the different actors involved, state actors use transitional justice to naturalize the presence of the state and assert its position as the mediator of political and social conflict. While Argentina stands out within the region

<sup>59</sup>'Discurso da Presidenta da República, Dilma Rousseff, na cerimônia de instalação da Comissão da Verdade, 16 May 2012,' Presidência de la República, Accessed March 25, 2016, <http://www2.planalto.gov.br/acompanhe-o-planalto/discursos/discursos-da-presidenta/discorso-da-presidenta-da-republica-dilma-rousseff-na-cerimonia-de-instalacao-da-comissao-da-verdade-brasilia-df>.

<sup>60</sup>*Globo*, December 10, 2014.

<sup>61</sup>Schneider, 'New Politics of Memory in Brazil,' 204.

for its state-sponsored ‘truth, justice and memory,’ attempts to incorporate memory practices in other places still demonstrate a broader recognition of the power of these practices to shape collective identity. This was notably the case under state actors who have emphasised their ‘generational’ connection to the victims of authoritarianism, governments that have also been broadly classified as part of the Latin American ‘Pink Tide’ or left turn in the wake of neoliberalism.<sup>62</sup>

### *Post-transitional Justice and the Continual Process of ‘Reaching Down’*

For its part, the Kirchnerist project was also never able to completely control the narratives that were provoked by the various memory knots. The 2005 commemoration of the March 24 coup particularly demonstrated this, with some civil society groups using the occasion to characterize the government’s economic strategy as an example of how ‘the genocide of yesterday continues today.’<sup>63</sup> While the officialization of memory knots allowed the insertion of the state into the picture as the guardian of collective memory, Kirchner had to continually work at maintaining this position by addressing and incorporating potentially destabilizing critiques into official transitional justice. The disappearance of key witness Lopez, for example, threatened to expose the ‘un-rule of law’ that existed in practice despite its veneration in theory. Kirchner responded to Lopez’s disappearance with the creation of the ‘*Programa Verdad y Justicia*’ within the Ministry of Justice, which aimed to ‘promote and strengthen at the institutional level the process of truth and justice connected to the crimes against humanity committed under state terrorism.’ The idea behind the program was that trials against perpetrators of past repression ‘establish the basis of the rule of law and democratic governability’ and that ‘violence and threats towards those linked to the judicial cases in which the crimes of state terrorism are being investigated has negatively impacted society and requires an energetic and effective response from the state.’<sup>64</sup> Rather than allow the disappearance to serve

<sup>62</sup>For a discussion on the emergence of the Pink Tide and its connection to the rupture provoked by the failure of neoliberalism, see Tom Chodor, *Neoliberal Hegemony and the Pink Tide in Latin America: Breaking Up with TINA?* (New York: Palgrave, 2014).

<sup>63</sup>*Página 12*, March 25, 2005.

<sup>64</sup>Decreto 606/2007, ‘Creáse, en la órbita de la Jefatura de Gabinete de Ministros, el Programa Verdad y Justicia,’ *Boletín Oficial de la República Argentina*, May 28, 2007.

as evidence of the state's lack of capacity and lack of authority over the justice process, Kirchner moved to reaffirm the centrality of justice to the mission of the state and, in turn, the centrality of the state to processes of justice. In responding to new and potentially disruptive challenges to the capacity of the state, Kirchner consistently rearticulated them as challenges to society itself while also emphasizing the role of the state in protecting society and the bases of collective identity.

This equating of transitional justice with collective identity was the principal way that Kirchner pursued the re-accumulation of state legitimacy and symbolic capital following the 2001 crisis. This crisis, as a symbol of the neoliberal reforms of the previous decade, indicated the extent to which the social contract had broken down in Argentina.<sup>65</sup> The notions of memory and identity and justice that human rights groups had developed over the previous decade provided a rich source for reconstructing a sense of collective identity and nationalism that would allow the state to weather the storm of the crisis. Kirchner's neighbors Bachelet and Rouseff, while not faced with such a breakdown of the social, also found that memory, identity and justice allowed them to create a political identity for their project and for the nation that distinguished the present from the recent past.

The process of accumulating symbolic capital and legitimizing the state by incorporating key symbols that I have explored in this chapter and indeed in this book have been best described by Kirchner himself. On the thirtieth anniversary of the coup he declared that:

This Government has proposed the recuperation of the fundamental ethics of the State, a State governed legally not arbitrarily, a State able to eradicate impunity and its perverse effects ... To work for memory and

<sup>65</sup>Speaking about the effects of the neoliberal decade on the social in Argentina, sociologist Maristella Svampa has asserted that 'many types of changes, some foretold since the mid-1970s, underwent a hyperbolic inflection in the neoliberal policies put in motion by Carlos Menem ... In this new social context, riddled with a strong dynamic of polarization, all social classes suffered grand transformations ... The dynamic of social polarization and fragmentation acquired such virulence that during a large part of the decade of the 90s there were great difficulties in finding the political vocabulary to describe the experiences of decollectivization, in which different trajectories and situation were thrown together ... It was no minor thing; the mutation was not only economic, but also social and political. Maristella Svampa, *La Sociedad Excluyente. la Argentina bajo el signo del neoliberalismo* (Buenos Aires: Taurus, 2005), 11.

justice does not contribute to division in society but rather it stimulates unity. To struggle against discrimination is to recover the place of the State as the principal guarantor of human rights.<sup>66</sup>

The state was now cast as the defender of rights, intervening in significant political struggles and moving them forward. By reaching down and incorporating previously counter-hegemonic practices Kirchner, Fernandez, Bachelet, and Rouseff were able to position official transitional justice as a loose framework within which various expressions of discontent could be incorporated.

This process of creating a loose framework in which the state is favorably positioned, rather than attempting to control every element within that framework, resulted in less confrontational opposition to transitional justice than previously with reconciliation. Instead of seeking to assert the authority of the state by limiting everyday expressions of transitional justice, as occurred under Alfonsín and Menem, the Kirchnerist project built its authority and centrality through aligning itself with these expressions and establishing the state's position as the intermediary of these expressions. Examining the state-sponsored activities, such as trials, routines and rituals enacted during the Kirchnerist government, we can see how transitional justice became a common framework within which the terms of political order were established. This discursive framework became the site for dissent and contestation at times, with civil society groups at times criticizing or rejecting state-sponsored initiatives. But the existence of a debate *within* a common framework, rather than as a challenge to that framework, signified the authority of the state to set the terms of debate, rather than calling that authority into question. As Hebe de Bonafini remarked, while there was much that Kirchner was doing that may, at one point, have come under criticism, in the context of the post-transition, post-reconciliation period he was 'doing things nobody else was game to do.'<sup>67</sup> Kirchner's embrace of memory and justice was successful in diffusing conflicts over reconciliation and in convincing key social actors to work with the state, rather than against it.

<sup>66</sup>'Mensaje del Presidente Néstor Kirchner ante la Asamblea Legislativa, March 1, 2006,' *Discursos del Señor Presidente de la Nación Argentina, Dr. Néstor Kirchner* (Buenos Aires: Ministerio del Interior, 2006).

<sup>67</sup>*La Nación*, March 25, 2005.

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## *Nunca Más* and State Making Beyond the Transition: A Conclusion

The desire on the part of state-makers to develop a formula for reordering politics and creating a durable democratic order led to the creation of transitional justice. Drawing on human rights practices, these state-makers developed a formula based around the central conceit that the state shall *nunca más*, never again, violate the human rights of its citizens in the ways seen in the 1970s and 1980s. This meant redefining the political role of the military. It meant redefining the political role of the judiciary. It also meant establishing new official histories and collective memories about the recent past. And it meant redefining the political role of the concept of human rights itself, and the activism carried out in its name, positioning it as a force that productively shaped the state rather than opposed it. In short, it meant engineering a political and cultural revolution.

By calling post-authoritarian, democratic state formation a political and cultural revolution, I imply that it involved the creation of a new political form rather than the restoration of an old one, temporarily interrupted by authoritarianism. During the Cold War, and indeed throughout much of the twentieth century, the Latin American region was characterized by intense struggles between differing visions of social

and political organization.<sup>1</sup> The state makers in charge of the transitions to democracy of the 1980s onwards, then, had no clear pre-existing widely agreed upon political form to return to. Instead they had to draw their own map, influenced by ideas of political change that theorized that the strategic choices of elites such as themselves could determine the course of politics.<sup>2</sup> Setting out to draw this map they found that the transnational efforts to shape politics that had emerged in the previous decade provided a useful set of examples of the types of political messages they wanted to send. These efforts had differentiated themselves from both the traditional social democratic Left of the Cold War period as well as from the authoritarian Right, actively opposing authoritarianism specifically because of its use of political violence. This violence was rearticulated as human rights violations, which became the principle framework through which the political conflicts of the 1970s were understood. The human rights movement of the 1970s was not part of any particular national political tradition nor the product of nationally based political movements or organizations, as the politics of the past had been. Instead it was new, transnational and non-partisan, even becoming the site of political conversions away from more radical politics.<sup>3</sup> The rise of the concept during the 1970s was the result of its appeal to those looking for a new framework, with actors in places like the United States embracing human rights as a way of renewing the country's political identity. It also allowed vulnerable actors to make strategic alliances that strengthened their position and amplified their protest, as in the case of civil society actors in Latin America who used their engagements with others within the transnational human rights network to create a space for opposition to dictatorship.

<sup>1</sup>Greg Grandin and Gilbert Joseph, eds., *A Century of Revolution: Insurgent and Counter-Insurgent Violence During Latin America's Long Cold War* (Durham and London: Duke University Press, 2010).

<sup>2</sup>Guillermo A. O'Donnell and Philippe C. Schmitter, *Transitions from Authoritarian Rule: Tentative Conclusions About Uncertain Democracies* (Baltimore: Johns Hopkins University Press, 1986).

<sup>3</sup>See Samuel Moyn, *The Last Utopia: Human Rights in History* (Cambridge, MA: Harvard University Press, 2010) for the argument that human rights gained dominance as an alternative to more utopian forms of political thought. See Vania Markarian, *Left in Transformation: Uruguayan Exiles and the Latin American Human Rights Network, 1967–1984* (New York: Routledge, 2005) for an account of the political conversion of Uruguayan leftists who came to operate within human rights circles while in exile.

The novelty and difference of this political framework also appealed to aspiring democratic state makers, as what they wanted to do was leave behind the politics of old, with its inherent contradictions and conflicts, and start a new chapter in national political life. Human rights did not necessarily address the reasons behind this conflict, such as social inequality.<sup>4</sup> The appeal, then, was not that human rights provided a way of resolving these conflicts in structural terms but rather that they provided a way of resolving physical and ideological conflicts and bringing different social positions into relation with each other. While human rights had developed throughout the 1970s in Latin America as an opposition practice, the concept was sufficiently flexible and politically promiscuous enough to allow it to be incorporated as state policy also. Incorporating human rights as official state policy would position the state as the mediator of social conflict, something that spoke to the aspiring state makers of the 1980s.

As such, these state makers in places like Argentina drew on human rights practices in order to facilitate democratic transition. At the time of the Argentine transition in 1983, local activists, transnational NGOs, and even state actors within the United States had used human rights to articulate their opposition to the arbitrary and clandestine political violence in the region. While each of these groups differed in the particular strategies and activities they engaged in, common to all was an emphasis on the use of information about the regime in order to bring about the political changes they desired. Following the return to civilian rule, the use of information remained central to pursuing the political change desired by state actors. Information, as well as other human rights strategies and demands such as the demand for justice, appealed to those interested in achieving the condemnation of political violence as a political practice. At the same time, by creating an official, state-sponsored source of information, the democratic state was positioned at the center of what was arguably the most important arena of political and social life coming out of the dictatorship: human rights.

For Argentina's Raul Alfonsín the embrace of these human rights practices was a political choice, informed by his desire to bring about a particular kind of political and cultural revolution. The policies and initiatives that Alfonsín authorized, in particular the truth commission

<sup>4</sup>Samuel Moyn, 'Do Human Rights Increase Inequality?,' *Chronicle of Higher Education* 61, no. 37 (2015): 15.

investigation into the disappeared and the trial of the heads of the military juntas, drew on already-existing practices within the transnational field of human rights and modified them in line with his broader political goal of facilitating a transition to democracy. This transition was, he said, to install '100 years of democracy' in Argentina, a seemingly modest ambition in any other context but, in the Argentine one, a clear statement about the desire to fundamentally reform the way that the state operated and, in particular, which groups were authorized to act in the name of the state. His first initiative, the truth commission, authorized notable representatives of civil society to conduct an investigation into the actions of the state. Following the transitions to democracy in neighboring countries such as Chile, similar commissions were established, with similar goals: the creation of a new official history and collective memory that rejected the use of force as a legitimate expression of state power and legitimacy. And with this rejection came a new way of accumulating power and legitimacy on the part of the state. As a key element in the policies and practices that make up transitional justice, truth commissions are more than just a symbolic gesture. In providing historical justice, they seek to respond to the demand for truth and information on the part of civil society, both domestically and at times internationally. At the same time they are key elements in the (re)formation of the state. This (re)formation saw the state draw its legitimacy from an alliance with human rights actors, engaging in 'organizational entwining' that allowed the state to capture the legitimacy and symbolic capital held by these opposition groups.<sup>5</sup> By incorporating existing practices into the realm of state policy, the state was able to 'capitalize upon the experience and legitimacy of traditional authorities rather than directly challenging them.'<sup>6</sup> Through the very operation of the truth commissions, which were a national-state version of existing practices such as the monitoring and evaluation carried out by international human rights bodies and the information collecting carried out by activist groups, the new post-authoritarian state accumulated symbolic capital.

<sup>5</sup>Philip S. Gorski, *The Disciplinary Revolution: Calvinism and the Rise of the State in Early Modern Europe* (Chicago: University of Chicago Press, 2003), 167.

<sup>6</sup>Mara Loveman, 'The Modern State and the Primitive Accumulation of Symbolic Capital,' *American Journal of Sociology* 110, no. 6 (2005): 1663.

Retributive justice was also a part of Alfonsín's transitional justice policy, and he announced the creation of criminal trials against the heads of the military juntas upon his ascendance to the presidency. The accumulation of symbolic capital was more of an explicit goal with the trials than it had been with the truth commission, as they sought to establish civilian jurisdiction over the military. In line with transitions thinking, Alfonsín began by inviting the military to demonstrate its submission to the civilian order, but when they refused he moved ahead by force. By establishing this jurisdiction, the civilian state directly challenged and displaced the authority and autonomy of the military, bringing it under civilian control and oversight. In doing so, Alfonsín engaged in what Mara Loveman calls usurpation, an approach to accumulating symbolic capital that, she warns, 'is most likely to yield resistance from traditional authorities since it generally implies a diminution of their power, status, and possibly even material well-being.'<sup>7</sup> Alfonsín pursued this path, and he found that indeed the military did resist such a move. The 1985 *Juicio a las Juntas* and the subsequent extension of criminal trials to target middle- and lower-ranking officers provoked a backlash from the armed forces, which deployed the only form of power they had left, coercive power, in order to resist the rewriting of their place in Argentine history and in the political structure. In the face of military backlash, which he understood to be a serious challenge to democratic stability, Alfonsín moved quickly to implement a different strategy: amnesty. An abandonment of even the restricted retributive justice that had been part of state policy with the *Juicio*, amnesty was articulated within the framework of reconciliation, which was an understanding of the relationship between transitional justice measures and democratization that emphasized the latter as the state's principle priority. While this reconfiguring of transitional justice was unpopular with human rights groups and judicial actors, it appealed to other democratizing state makers in the region, who had witnessed Argentina's trailblazing experience of retributive justice and military backlash and were concerned about protecting democratization in their own countries. Transitional justice rearticulated around reconciliation argued for the need to move on from the divisions of the past. Yet in practice what it aimed to do was address present conflicts over that past and ensure the position of the state as the central mediator of these conflicts.

<sup>7</sup>Ibid.

Reconciliation as an approach to democratic transition emerged in the context of the end of the Cold War and the increased professionalization of both transitional justice and democratization as policy areas. Within this context the desire to look to the future and to build a functioning democratic political community were paramount concerns. This line of thinking was encapsulated by Uruguayan president Julio Sanguinetti when he declared that there was ‘no need to have eyes in the back of our head.’ In establishing this new, forward-looking framework, state makers sought to address the conflicts that had erupted over the question of justice and jurisdiction, changing the parameters of the conversion and, in doing so, maintain the position of the state as the central legitimate arbiter of social and political conflict.

Reconciliation did not, however, bring about an end to social and political conflict. The past remained a way to struggle over the present, something that became evident in the new strategies and initiatives embarked upon by human rights groups in response to the amnesties. These groups began to engage in what has been called ‘memory struggles,’ demands that the memory of past human rights violations be kept alive.<sup>8</sup> These struggles were soon echoed by other social and institutional actors who wanted to stake their claim in the public sphere and challenge reconciliation’s pretension that the past was a closed book. In Argentina the military demanded to be taken seriously as an actor in democratic society and to have their experience heard, while a new coalition of elected representatives worked with human rights groups to physically insert their understanding of the past into public space in the form of memorials. At the same time, another set of anti-reconciliation strategies developed around the concept of anti-impunity. These strategies linked local human rights groups with the developing international human rights structure, and these links were in turn used to challenge state jurisdiction over the issue of justice for past human rights violations. For state makers across the Southern Cone, rather than ushering in democratic consolidation, their attempts to turn the page on the past through reconciliation brought about a new cycle of conflict and contestation over the past and, ultimately, over the democratic order. But while these contestations represented a challenge to state authority, they also provided

<sup>8</sup> See Elizabeth Jelin, *State Repression and the Labors of Memory* (Minneapolis: University of Minnesota Press, 2003).

an opportunity for state makers. In the same way that human rights-based opposition practices during the 1970s provided a basis for subsequent state formation in the form of transitional justice, these conflicts and contestations were embraced by state makers looking to reconfigure politics following the dislocations of the 1990s. This shift in thinking set the stage for the continued engagement with transitional justice even in the post-transitional period, a form of ‘post-transitional justice.’<sup>9</sup>

Moving into the twenty-first century, executive actors in post-authoritarian South America continued to locate their search for democratic stability firmly within the realm of transitional justice. The most institutionalized example of this could be seen in Argentina, where presidents Nestor Kirchner and Cristina Fernandez baptized their government the *Gobierno de Memoria, Verdad y Justicia* (Government of Memory, Truth and Justice). In search of stability and reconstruction after a profound political crisis, this government embraced the memory practices and the new anti-impunity practices that had emerged during the 1990s. Rather than simply using these practices as an opportunity for administrative extension however, as had occurred under Alfonsín, Kirchner, and Fernandez worked to nationalize these practices, establishing them as markers of post-authoritarian national identity. In an effort to link the nation to the state and position the latter as the political guardian of the former, Kirchner transformed himself into a symbol of memory, positioning himself as a member of the generation of *desaparecidos* that had come to the presidency to realize the long held dreams of this generation and of all Argentines opposed to authoritarianism and state abuse of power. In neighboring Brazil and Chile new political actors seeking to distinguish themselves from the politics of the previous decade employed similar strategies, emphasizing their affinity with the 1970s and embracing memorialization and justice practices. Positioning the state as the political guardian of national identity, a national identity based on these new transitional justice repertoires, allowed these center-left governments to carve out a new political identity for themselves. This identity represented both continuity and change with the past and linked them to contentious repertoires at both the national and transnational level.

By setting out to investigate the dynamics of the constitutive role that transitional justice plays in bringing about political change, I have

<sup>9</sup>Cath Collins, *Post-transitional Justice: Human Rights Trials in Chile and El Salvador* (University Park: Penn State University Press, 2010).

employed an historical, sociological, and cultural approach to state formation. As Philip Abrams notes, the state is a difficult object of study to pin down, largely because of its nature. As he explains,

The state, then, is not an object akin to the human ear. Nor is it an object akin to human marriage. It is a third-order object, an ideological project. It is first and foremost an exercise in legitimation ... The crux of the task [of state making] is to over-accredit [the institutions of the state] as an integrated expression of common interest cleanly disassociated from all sectional interests and the structures – class, church, race and so forth – associated with them.<sup>10</sup>

This opaque nature of state making and the intangibility of the state itself calls for a theoretical approach to analyzing its construction. State makers rarely spoke about their deployment of transitional justice as a form of legitimation and domination, but it is still important to understand how transitional justice operated in the service of these things if we are to understand the nature of the democratic state in post-authoritarian, post-Cold War Latin America. In analyzing transitional justice through the lens of state formation we can understand the effects that this policy had upon higher order political processes in the region.

At the same time, an appreciation for historical context, contingency and the agency of historical actors is needed to complement the theoretical approach if we want to understand why this approach to democratization emerged where it did and when it did. A number of studies of the rise of human rights in the wake of dictatorship argue that it was the result of the ‘power of ideas’ around human rights, which then imposed themselves upon state makers across the region.<sup>11</sup> Yet this explanation fails to account for why actors like Alfonsín and Aylwin pursued truth and justice policies at the moment of transition while Sanguinetti in Uruguay and Sarney in Brazil opted for a reconciliation approach that favored amnesty and reparation. The respective visions of each state maker and their desire to create a new order, to engage in a political

<sup>10</sup> Philip Abrams, ‘Notes on the Difficulty of Studying the State,’ *Journal of Historical Sociology* 1, no. 1 (1988): 64.

<sup>11</sup> Kathryn Sikkink, ‘The Power of Principles Ideas: Human Rights Policies in the United States and Western Europe,’ in *Ideas and Foreign Policy: Beliefs, Ideas and Political Change*, ed. Judith Goldstein and Robert Keohane (Cornell University Press, 1993), 139–171.

and cultural revolution, were important factors in shaping the tools they employed for democratization. Taking an interdisciplinary approach that draws on both the humanities and the social sciences allows us to approach slippery topics like state formation and place them in their context.

Throughout this book I have addressed two main questions; why did transitional justice emerge when it did and in the form that it did, and why did it prove to be so durable, remaining as a key state policy well into the post-transition period. The rise of human rights practices in the 1970s was important for facilitating the development of transitional justice in the 1980s and 1990s, and for determining its form. But the existence of human rights oppositional practices does not, in and of itself, explain why they were taken up by state makers and seen to be a useful resource for bringing about political change. As Mara Loveman points out, it is important to understand ‘under what conditions did the availability of particular institutions and cultural practices outside the state become a resource for bureaucratic growth? What made the potential of such resources “visible” to state actors? What conditions facilitated the harnessing of such resources, through “organizational entwining” or other means?’<sup>12</sup> Looking at the cases under examination here, we can see that a delegitimizing of the previous regime or framework is important for creating the opportunity to propose something new, and for creating the need for state actors to turn to outside sources of legitimacy and symbolic capital. As I showed in Chapter 3, this happened in Argentina following the military loss in the Malvinas/Faulkland islands conflict, and in Chile following the vote against Pinochet in the 1988 plebiscite. But as Chapter 4 points out, once state makers felt that the transition was under threat from destabilization, they were quick to abandon particular practices and even block them. Justice in particular was the most contentious transitional justice practice, and it was swiftly sacrificed and replaced with amnesty as a tool for building consensus, even through force. Under these conditions, transitional justice was not abandoned but rather reconfigured around the concept of reconciliation. Popular practices became less attractive to state makers as they faced instability and conflict, but transitional justice articulated as reconciliation remained as a useful tool for dealing with this very same conflict. This approach was less successful than these state makers had hoped, and while democratic stability

<sup>12</sup>Loveman, ‘Primitive Accumulation of Symbolic Capital,’ 1664.

was achieved under reconciliation and the military threat was subdued, contentious practices flourished. When the end of the decade brought with it new conflicts, as the failures of the neoliberal reforms of the 1990s in the economic sphere started to show themselves, state makers turned once again to cultural practices within the opposition human rights movement and engaged in organizational entwining to overcome this latest crisis.

Transitional justice emerged when it did because a break in the dominant framework allowed new political proposals to come forth. These structural factors intersected with the agency of state makers themselves. Different actors, and even the same actor at different moments, desired a different approach to transitional justice, and they enacted their political agenda within this broader context of crisis, rupture and challenge. The specific combination of these things shaped the type of transitional justice program they enacted. The same reasons and conditions that facilitated the emergence of transitional justice in the 1980s and 1990s also explain why it has become such an enduring policy, beyond the moment of transition itself. From its early reconfiguration as reconciliation, transitional justice proved itself to be a useful way of responding to and managing present conflicts. While it did not prevent new conflicts from emerging, its flexibility meant that it could always be reconfigured to absorb new practices and, therefore, make new alliances and respond to new challenges. The flexibility and durability of transitional justice is tied to the particular relationship between human rights and transitional justice. As a political discourse, human rights, as noted in Chapter 1, can be—and has been—used by a wide range of actors in pursuit of their political goals, from both the right and the left, from state actors and non-state actors. Thus, human rights have been used simultaneously as both a state discourse and an opposition discourse. This duality is reflected in transitional justice, where opposition to state policy is reflected as a call for *more* transitional justice or a different kind, rather than as *against* transitional justice. Just as human rights operate as a platform for a range of contentious demands, so does transitional justice operate as a space within which different groups struggle over and debate the past and, through this, the present order.

Transitional justice is not, of course, the only political field within which state actors have located their projects. The economy, for example, has often been a key site for building legitimacy and political power. But even those state actors who focused on economic transformation, such as Menem in Argentina, were equally focused on developing their

own transitional justice policy. This raises the question: Will state actors in the future continue to find transitional justice a fruitful way to establish their hegemony and stake out positions vis-à-vis other actors and social groups? In the previous chapters I have brought us up to the present, roughly forty years after the military regimes last took power across South America, and around thirty years since the return to civilian rule and the implementation of transitional justice policies. The authoritarian past is relatively far behind. Has the relevance of transitional justice been exhausted? In Argentina the government of Cristina Fernandez is no longer in power, and her defeat at the ballot box by Mauricio Macri in 2016 brought with it fear, on the part of certain human rights groups, that the authoritarian past would be ignored by the new regime. And yet even Macri has continued to make interventions into transitional justice, requesting that the United States declassify government documents that could shed further light on the authoritarian period. The United States had been engaging in this practice, which has been termed ‘declassification diplomacy,’ since the 1990s under the Clinton presidency with the release of documents on El Salvador.<sup>13</sup> Declassification diplomacy, which seeks to respond to demands for historical justice over past human rights violations and so therefore can be considered an element of transitional justice, is intended to demonstrate a shared commitment to human rights and, indeed, to *nunca más*. For Macri, embracing this particular element of the transitional justice toolbox allowed him to establish a relationship with the United States, a step towards repairing bilateral relations between the two states. It also allowed him to shift official transitional justice policy away from its previous Kirchnerist incarnation in which the trilogy of memory, truth and justice defined national identity. Transitional justice is not the only field in which state actors like Macri operate, but neither do they eschew it altogether.

As the turn away from leftist state projects also occurs in neighboring Chile, as well as in Brazil and Uruguay, a new series of engagements with transitional justice are due to emerge. Transitional justice as an international policy prescription has also been transformed in the decades since its emergence. As I noted in Chapter 5, the 1990s saw a thickening of

<sup>13</sup>See Thomas S. Blanton, ‘Recovering the Memory of the Cold War: Forensic History and Latin America,’ in *In from the Cold: Latin America’s New Encounter with the Cold War*, ed. Gilbert M. Joseph and Daniela Spenser (Durham and London: Duke University Press, 2008).

international structures for the enforcement of human rights, and reconciliation came under attack largely due to the collaborations between local groups and transnational actors operating within these structures. State makers must negotiate between domestic pressures and conflicts but also international ones. Transitional justice is a useful way for them to do this, especially in an age of human rights where the imperative to engage with the concept becomes almost unavoidable. Transitional justice does, of course, have limits, and it does not address every grievance. As a number of scholars have pointed out, for example, transitional justice does not address economic rights and their violation, in particular their structural violation through entrenched inequality and unequal distribution of resources.<sup>14</sup> Yet as I have shown in this book, the transitional justice toolbox is not static, and new practices have been added to it since the return to civilian rule. Having observed the dynamic in which the state will ‘reach down’ into the reservoir of popular traditions to assure its hegemony, it is reasonable to expect that transitional justice may expand to include practices related to economic rights and demands over distribution if social movements and other non-state actors demand it. As I have shown in this book, state formation is an ongoing process meaning that democratic engagement is not just possible, it is central.

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<sup>14</sup>Zinaida Miller, ‘Effects of Invisibility: In Search of the ‘Economic’ in Transitional Justice,’ *International Journal of Transitional Justice* 2, no. 3 (2008): 266–291.

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# APPENDIX

## TRANSITIONAL JUSTICE MEASURES: ARGUMENTS FOR AND AGAINST

Transitional justice is a broad set of policies that address past human rights violations in order to reconstruct political order. The series of measures that make up transitional justice, what is often called the transitional justice ‘toolkit’ by practitioners, reflect the specific national context as well as the dominant human rights practices of the particular moment. As transitional justice evolves over time it is possible to see differing approaches to democratization and political reconstruction reflected in the arguments for (and against) certain measures. The following table gives a non-exhaustive overview to the key elements in the transitional justice toolbox as it was employed in Latin America (Table A.1).

**Table A.1** Transitional justice measures

<i>Type</i>	<i>Definition/ examples</i>	<i>Arguments used for</i>	<i>Arguments used against</i>	<i>Context of employment (examples)</i>
Accountability	(Limited) criminal trials of perpetrators	Symbolizes rejection of unconstitutional/illegal practices. Allows military to demonstrate subordination to/acceptance of civilian state power	Antagonizes military, putting democratization in jeopardy	1983–1986: Argentina. Relatively weak military, state actors with strong vision for reconstruction Argentina 2003 onwards: Argentina. New government looking to create alliances with social movements 1984: Argentina, moment of transition 1990: Chile. Moment of transition 2003: Argentina. New government, post-crisis, post-Pinochet arrest
Information	Truth commissions Opening/establishment of archives and documentation centers 'Right to Truth'	Facilitates recognition and healing, exposes what was previously hidden, awareness avoids repeat of events Allows truth to be established, facilitates judicial processes Allows families to access information ('truth') held by state	Reopens old wounds	2003: Argentina. New government, compliance with international norms important 1985: Uruguay. Return to democracy, return to 'business as usual'
Reparation	Restitution of suspended rights and privileges Financial indemnification for victims	Puts end to unconstitutional/illegal suspension of civil and political rights Compensation for harms suffered at hands of state	(no opposition encountered) Indemnifies state of ongoing responsibility to account for events, assumes death without proof	1991: Argentina. Govt. seeks reformulation of justice, less focused on retribution

(continued)

Table A.1 (continued)

<i>Type</i>	<i>Definition/ examples</i>	<i>Arguments used for</i>	<i>Arguments used against</i>	<i>Context of employment (examples)</i>
Amnesty	Restrictions on trials  Dropping of charges/voiding sentences	Concentrate on symbolic sanction allows clarity, ensures swift process, safeguards democracy, allows nation to move forward Allows nation to move forward, creates conditions for national pacification and reconciliation; Safeguards democracy by not antagonizing military	Restricts retributive justice  Restricts retributive justice	1986: Argentina. Placating military, limiting power of social groups; Uruguay. Limiting power of social groups to pursue justice 1978: Chile. Military self-Amnesty. 1979: Brazil. Release of political prisoners, move towards liberalization. Argentina: 1989–1991. Subdue military, incorporate into democratic order
Memorializing	Memorials, commemorations	Fights forgetting symbolized by amnesties, prioritizes victims	Officializes only one side of story, fails to recognize conflicting memories	2003 onwards: Argentina. 2006: Chile. New governments, establishing new political identity
Administration	Lustration, civilian oversight/control of military affairs, reform of military code  Creation of human rights bureaucracy	Establishes democratic subordination of military to civilian state, avoids repeat of events  Protects human rights, allows for monitoring and reporting to relevant area of state	Infinges on military autonomy  (no opposition encountered)	1983: Argentina. Democratic transition military lacks legitimacy  2012: Uruguay. New government, compliance with international and regional norms

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