

# THE RIGHT TO TRUTH

**The right to truth is a fundamental emerging principle of international human rights law, and central to the project of confronting transitions to democracy and the legacy of massive human rights violations. International law entitles the families of disappeared persons to know the totality of circumstances surrounding the fate of their relatives and imposes an obligation of investigation — the right to truth — on states. This right is particularly crucial in cases of political disappearances because these frequently imply “...the secret execution of detainees without any previous trial, followed by the concealment of the body with the purpose of erasing all material traces of the crime and securing impunity for the perpetrators,”<sup>i</sup> constituting a violation of the right to life.<sup>ii</sup>**

Many of EAAF’s missions and work have as their main objective working toward the right to truth of families of victims of human rights violations and of societies where repression has taken place — the right to know what happened to their loved ones, and how it happened. Part of the right to truth is the right to a proper investigation carried out by a court of law. EAAF currently supports a number of recommendations regarding the right to truth, particularly the right to a proper investigation including the implementation of all possible forensic procedures and analyses to identify the remains, and to provide information about the cause and the manner of death, (please see EAAF’s Recommendations section). In the following, we provide a brief background on the legal development and underpinnings of the right to truth and on ‘truth trials’ in Argentina, where regionally-based investigations into local manifestations of the repression are carried out by courts that have no capacity for prosecution.

The right to truth is an integral part of the right to justice, despite moves to separate truth from criminal conviction. And how and where truth is delivered matters. “Knowledge that is officially sanctioned and thereby made ‘part of the public cognitive scene,’” argues Juan Mendez, respected Argentine human rights activist and lawyer, “...acquires a mysterious quality that is not there when it is merely ‘truth.’ Official acknowledgement at least begins

to heal the wounds.”<sup>iii</sup> This applies not only to investigations carried out by courts but also by Truth Commissions and special commissions of inquiry.

The connections between the right to truth and the right to justice, a right that the state is more generally obligated to protect under national and international law, have provoked a wide-ranging debate about the nature of the connection between the two in human rights cases. In an “ordinary” penal process, for example, there are two goals: the investigation of the truth, and the actual application of the penal law, or sanction of the perpetrators.<sup>iv</sup> As Carolina Varsky, a lawyer with the Center for Legal and Social Studies (CELS), an Argentinean non-governmental human rights organization, comments, “(t)hese obligations of the State to investigate and to sanction — are independent though complimentary. This is why in cases in which the sanction of the responsible individuals is not possible — due to factual or legal impediments — the obligation to investigate still stands.”<sup>v</sup> The right to truth is part of the obligation of the state (and all parties involved in a conflict) to investigate or to collaborate in the investigation of crimes, not an alternative to prosecuting and punishing perpetrators, nor a replacement for the state’s obligation to compensate victims, purge the armed and security forces of those persons or parties known to have committed atrocities and to punish perpetrators through criminal processes.



**Federal Judge Canicoba Corral speaking with the press. He has been instrumental in the annulment of the amnesty laws; he also carried out the extradition request for ex-junta leaders from Judge Garzón of Spain. Photo by B. Avila courtesy of Página 12 Archive.**

Debate around the right to truth and violations of human rights and humanitarian law has been especially intense in countries where wide-ranging amnesty laws were passed in the aftermath of such abuses. Particularly in transitional bodies such as Truth Commissions, the right to truth is conflated with or difficult to distinguish from the rights to justice and reconciliation, all frequently taken as mutually beneficial. However, assumed inter-relatedness among these may often be problematic. Reconciliation quite often provides the basis for amnesty laws, considered by some as necessary in order to close cycles of confrontations. Speaking of the Argentine transition to democracy, Mendez noted that during the transition to democracy in Argentina, reconciliation was “a code word for those who wanted nothing done.”<sup>vi</sup> In relation to the rights to truth and justice, reconciliation may often be flawed in the sense that the logical outcomes of reconciliation and rights to truth and justice may be mutually incompatible.

It should be noted that amnesty laws themselves are also subject to political change. In Argentina, for example, the self-protecting amnesty declared by the military before the end of their regime was annulled by Congress immediately following the restoration of democracy in 1983. After the trials against top junta members for human rights

violations committed during their rule, two amnesty laws were passed by the democratic government of President Alfonsín, the Final Point and Due Obedience laws.<sup>vii</sup> These laws were struck down by both houses of the Argentine Congress as of August 2003, although annulment is pending a final decision by the Supreme Court. Federal courts and a Federal Appeal Chamber declared the laws unconstitutional in 2001, in rulings that were appealed to the Supreme Court. Although this Court has had jurisdiction over the case for some time, it

has yet to rule on the laws’ constitutionality.

New ways of enforcing compliance of the right to truth are evolving internationally. In Argentina, one way in which this right has been addressed has been through an innovation particular to the Argentine judicial system, ‘truth trials,’ in which investigations into amnesty-covered human rights abuses are carried out but criminal conviction is prohibited. The truth trials are an officially-sanctioned form that has developed in direct response to initiatives aimed at uncovering the truth. Nevertheless, the Argentine truth trials have been challenged on a number of levels, primarily on the grounds that effective penal processes must include both truth and punishment, otherwise they run the risk of selling short the chance for ‘real’ justice,<sup>viii</sup> that is, prosecution, in exchange for truth.

### *EAAF’s Work and the Right to Truth*

EAAF often works on cases in countries where amnesty laws forbid prosecution. Thus, the right to truth, and the right to investigate stand alone, outside of prosecution processes. In most cases, we are able to continue to carry

out forensic investigations despite various limitations, ranging from indifference to direct obstacles. Three main types of problems generally serve to impede forensic work: the impossibility of or severe obstacles to obtaining state documents and/or access to state archives, difficulties around the acceptance of independent experts as part of investigative teams, and full and independent analysis of the evidence.

During the preliminary stage of an investigation, EAAF analyzes judicial, military and police documents, testimonies of witnesses and relatives of victims, autopsy records, cemetery and registrar documents and any other kind of source that can help us understand a case. Some of these sources are usually quite restricted, even (or especially) to independent specialists working as expert witnesses, as EAAF often does. These documents, more importantly, are also withheld from courts and special commissions of inquiry that have the capacity to request them.

In most countries where EAAF works, particularly, in Latin America, the forensic experts are part of the police and/or the judicial systems. Therefore, during non-democratic periods their independence is severely limited. Sometimes, they are not allowed to perform autopsies or full forensic analysis. In other cases, they have also been found working in complicity with undemocratic regimes, destroying or changing evidence, changing autopsy conclusions, writing false death certificates, monitoring torture, etc. In general, these specialists continue to work in the same posts after the onset of democracy. Thus, when investigating crimes where the State is accused, there is a clear conflict of interest that requires the presence of independent experts. This principle has been recognized in a number of international forensic protocols, including the Minnesota Protocol adopted by the United Nations in 1991. As forensic experts are increasingly called upon to investigate human right violations, this problem, while still a major issue, is improving.

Another area of challenge relates to how far the analysis of evidence can progress when the work is conducted in the

context of an amnesty law. Quite often, judges or officials in charge may limit investigations to the identification of the remains, restricting the capacity of forensic experts to investigate the cause of death and the analysis of evidence related to the manner of death, which is key to establishing responsibility. Typically, access to and analysis of ballistic and other associated evidence that can provide more individualized information about perpetrators is also severely restricted.

Nevertheless, as the work of EAAF and other forensic specialists — anthropologists, investigators, consultants and expert witnesses — demonstrates, the right to truth may be approached in various ways, depending on the history of each case and the contemporary political climate.

## TRUTH TRIALS IN ARGENTINA

### *A Brief History*

Truth trials are courtrooms dedicated to the investigation and documentation of human rights abuses committed during the last military government without the possibility of prosecution. Skirting the edges of what is possible relative to the two Argentine amnesty laws that protect the military — Due Obedience and Full Stop — these ‘*juicios por la verdad*,’ as they are known in Argentina, arose from the rights of families and society as a whole to know the truth and the right of relatives to bury and mourn their dead. In these ‘trials,’ victims and perpetrators frequently face each other in courts of law where ‘the truth’ is supposedly exposed as a method of justice. While truth trials do not have prosecutorial capacities in relation to the crimes covered under the amnesty laws, they may and do prosecute for contempt of court. Therefore, such crimes as false testimony and failure to appear before the court have resulted in the detention of at least eight military and fifty-five police involved in cases of torture during the dictatorship.<sup>ix</sup>

Truth trials in Argentina began in response to a systematic campaign by CELS in the aftermath of the testimony of

former naval officer Scilingo regarding the ultimate fate of many Argentines held prisoner in detention centers during the 1970s and early 80s until the return to democracy. Although exposed during the 1985 junta trials by military rank and file, this particular testimony in 1995 — the revelation by an ex-officer that unconscious prisoners had been thrown from planes into the Argentine sea<sup>x</sup> — and the social impact it had on Argentine society, raised another issue regarding state terrorism: the right of family members and society in general to know in detail the methodology used by the military dictatorship to kill tens of thousands of Argentines during the repression. As lawyer Mirta Mántaras of the Permanent Assembly for Human Rights in Bahia Blanca comments, “[I]n working out its’ history, a society reclaims its’ identity as a society and defeats terror. The right to know what happened pierces impunity.”<sup>xi</sup>

In a systematic campaign conducted throughout the 1990s, CELS sought to convince Argentine courts that the Full Stop and Due Obedience laws did not rule out further investigation and to persuade the courts to uphold doctrine and jurisprudence on the right to truth established over the course of years by international human rights bodies such as the Inter-American Commission on Human Rights and the Inter-American Court.<sup>xii</sup> This legislation is partly based upon law established in the Geneva Convention in Protocol Two, established after World War II<sup>xiii</sup> One case central to this legislation has been the Velasquez Rodriguez case (July 1988) in the Inter American Court, which established the definition of forced disappearance, and precedent for reparations and restitution.

Human rights groups argued, with CELS, that data already gathered in federal courts in the junta trials and others later in the 1980s provided a strong basis for further investigation. Courts, they argued, could invoke their power to obtain information from official sources and to summon military and police personnel to testify.

Two initial cases pursued in the 1990s were those involving relatives of founding members of CELS, providing the organization with a stronger legal basis for presenting the case to the courts. The first case was that of Mónica Candelaria Mignone, the daughter of the late Emilio Mignone, founder of CELS and a central figure in the Argentine human rights movement. Mónica Mignone disappeared after being abducted on May 14, 1976 and taken to the detention center ESMA, or ‘Navy Mechanics School.’ The second was the case of Alejandra Lapacó, the daughter of Carmen Aguiar de Lapacó, who helped to found the Madres de la Plaza de Mayo and was a CELS board member. Alejandra Lapacó and Carmen Aguiar were detained on March 17, 1977 and held in the detention center ‘Athletic Club.’ Aguiar was released two days later. Alejandra was never seen again.

In response to the Mignone case, in 1995 the Federal Chamber of Appeals of the Federal Capital ordered the Naval Chief of Staff to either track down Navy files on the operations of ESMA or to reconstruct the data and make it available to Argentine courts. In its’ decision, the court acknowledged that in both international and domestic law and jurisprudence, the relatives had a right



**LEFT:** August 7, 2003, Buenos Aires. Argentine former dictator General Videla (second from right), and Retired Captain “Tiger” Acosta (third from right), leaving court after being notified of the extradition request from Spanish Judge Garzón; **CENTER PHOTO:** Federal Judge Canicoba Corral entering the court. *Photo by R. Yohai*; **FAR RIGHT:** July 26, 2003. General (ret.) Menendez inside a car. In September he was detained by a federal judge for his leadership role during the military government at Zone 3. Evidence provided by EAAF contributed to his detention. *Photo by A. Garcia Medina*; *All photos courtesy of Página 12 Archive.*

to know the truth about the fate of their loved ones and the court had a duty to use its powers to assist them. In the Lapacó case, the court ordered the Ministry of Defense to produce all data pertaining to Lapacó and other prisoners who ‘disappeared’ in the custody of the First Army Corp between 1976 and 1983.

In the face of army and navy objections to these rulings, pressure on the government to eliminate the truth trials and numerous other setbacks involving decisions passed down by the Supreme Court and other judicial bodies, on November 15, 1999 Argentina submitted to a consensual settlement under the auspices of the Inter American Commission on Human Rights in the case of Lapacó, No. 12.059, establishing that the right to truth is not subject to statutes of limitations. Argentina agreed to “accept and guarantee the right to truth which consists in the exhaustion of all means to obtain clarification of what happened to disappeared persons” and to ensure that civilian courts are charged with the investigation of these cases. Per this agreement, the state awarded competence to federal courts to continue ‘truth trials’ not subject to any statute of limitations.

At present, while little cooperation from the army is generally forthcoming, truth trials continue to be carried out in federal appeal chambers. “Truth trials” have generally been established according to jurisdiction over particular geographic zones that were implemented by the army during the repression. In order to establish operational procedures and chains of command, truth trials were set up in a number of cities throughout the country. The Federal Chamber of the Federal Capital, with jurisdiction over the First Army Zone, started in 1995 and has since continued to assist family members seeking information about the ‘disappeared.’ EAAF has worked closely, though not exclusively, with this court on the identification of remains found in common and individual graves in public cemeteries. Other ‘truth trials’ include the *Juicio por la verdad* in the city of Bahía Blanca, which commenced proceedings in November 1999 and has jurisdiction over the south of the province of Buenos Aires, La Pampa, Neuquén and Bahía Blanca, formally under the jurisdiction of the Fifth Army Brigade; *Juicio por la*

*verdad in the city of Córdoba*, operational since 1998 for the jurisdiction covered by the Third Army Zone; the city of San Martín, for the jurisdiction covered by the Fourth Army Zone; and, the city of Rosario, for the jurisdiction covered by the Second Army Zone.

Perhaps the most famous ongoing investigation is that conducted by the Federal Chamber of La Plata, the capital of the province of Buenos Aires. There, more than 2000 cases of ‘disappearance,’ including many not included in CONADEP, have been reported. Commencing in 1998, this court was established based not only on the right to truth but also on the right to *mourn*. Since its establishment, this court has questioned hundreds of witnesses, and judges have personally inspected police stations, sites of former clandestine detention centers and cemeteries, and have searched in police archives.

Other “truth trials’ are the *Juicio por la verdad* in the city of Mar del Plata, which commenced in February 2001 at the request of representatives of human rights groups and another 60 local organizations, and is working with fourteen cases out of more than 300 it hopes to investigate, among them the disappearances of five lawyers and the pregnant wife of one of them in July 1977, an incident that is referred to as ‘*La noche de las corbatas*’ (The night of the ties); and, *Juicio por la verdad* at Mendoza city, operational since March 2001.

Argentina is a signatory or State party to most international treaties concerning human rights issues and since 1994, these have been ratified into domestic law and made part of the Constitution.

### *An Update of some Current Proceedings in Truth Trials*

In 2002, advances in several truth trials, particularly in La Plata, allowed numerous histories to continue to be reconstructed. Among these are the participation of executives of foreign companies, such as Ford and Mercedes Benz, where managers reportedly took part in

composing lists of union leaders and activists who later disappeared. Recent testimony in the truth trials indicates that these disappearances were systematically carried out. In the case of the Ford Company, according to APDH, the Argentine army had set up barracks and a detention center on the soccer field of the complex where labor leaders were transported in company trucks.<sup>xiv</sup> In November 2002, Judge Felix Crous, a federal prosecutor who presides over the ‘truth trials’ carried out in the La Plata federal court, filed a criminal complaint against Ford Argentina, based partly on the testimony of former employee Pedro Troiani, ordering an investigation into the company’s conduct under the military junta. The complaint, lodged with Judge Rodolfo Canicoba Corral in the Federal Capital, charges that “Ford and its senior executives managed, participated in or covered up the illegal detention’ of Mr. Troiani and nearly two dozen other employees.”<sup>xv</sup> Judge Crous’ criminal complaint specifically targets the management of the Ford plant at General Pacheco and police and military officials with jurisdiction over this section of Buenos Aires province, for human rights violations carried out against those who worked in the plant during the last military dictatorship.<sup>xvi</sup>

As the debate rages about whether justice without teeth is any sort of justice at all, EAAF considers that clearing the by now several-decades long uncertainty of just one family laboring to find out what happened to their disappeared loved ones is indeed an accomplishment. Knowing the concrete details of what happened, and knowing those details as a result of an official judicial investigation, although it will not at the moment result in a sentence for the perpetrators, will still provide some satisfaction to families and society as a whole that is not available through other state mechanisms.

### *Declassification of US Documents related to Argentina:*

The declassification of non-public archives in Washington, DC in mid-2002 has served to clarify understandings of what happened to the victims of Operation Condor. More than 4600 documents,

including cables, memoranda of conversations, reports and notes between the U.S. State Department and the U.S. Embassy in Buenos Aires illuminate the breadth and extent of the massive and indiscriminate counterinsurgency campaign carried out by the military dictatorship. Based on these documents, on July 10, 2002, Argentine Judge Claudio Bonadio charged General Galtieri, a former president, and thirty additional military officers, for the disappearance of twelve Montoneros in 1980, including Horacio Campiglia and Susana Binstock, detained by members of the Argentine intelligence forces in Brazil with Brazilian collaboration.

### FOOTNOTES

- i. Velázquez Rodríguez case, Sentence, July 29, 1988, Series C, No. 4, pg. 157).
- ii. See Article 4 of the American Convention on Human Rights.
- iii. Cited in Priscilla Hayner, *Unspeakable Truths*, Routledge, 2001.
- iv. Alfredo Velez Mariconde, “Derecho Procesal Penal,” 3<sup>a</sup> ed., 2a reimp., Marcos Lerner, ed., Córdoba, 1986, II:24/5
- v. The Velázquez Rodríguez decision also underscores this point in paragraph 176: “The State is...obliged to investigate every situation where human rights protected by the [American] Convention [on human rights] had been violated ...” an obligation that “continues as long as the incertitude about the whereabouts of the disappeared persons remains. Even in the case in which legitimate circumstances related to the internal judicial order did not allow for the sanction of the individual perpetrators of such crimes, the right of the families of the victims to know what was the final fate of their loved one, and if applicable, the location of his or her remains, represents a fair expectation that the State should satisfy through all available means (cons. 181).”
- vi. In Priscilla Hayner, *Unspeakable Truths*, Routledge, 2001
- vii. Two amnesty laws in particular effectively put a halt to Argentine prosecutions of human rights violators. Full Stop (*Punto Final*), passed by the Alfonsín government on December 24, 1986, halted all judicial procedures against the military by setting a short statute of limitations (to January 30, 1987) with regard to the filing of complaints against Argentine military. Subsequently, the Due Obedience law was passed on June 8, 1987, excluding rank and file Argentine military from prosecution on the grounds that they were obliged to obey their superiors. These laws contributed to impunity and lack of accountability for the major abuses carried out between 1976 and 1983.
- viii. See Reed Brody, *Justice: the First Casualty of Truth?* The Nation, April 30, 2001
- ix. (See, for example, Calloni, December 27, 2002)
- x. See Horatio Verbitsky, *El Vuelo*, Planeta, Buenos Aires 1995, *The Flight: Confessions of a Dirty Warrior* (Sarah Allen, translator), New Press 1996
- xi. APDH Bahía Blanca
- xii. See Human Rights Watch 12/12/01.
- xiii. Additional Protocol I, Article 32 states that families have the right to be informed of the fate of missing relatives. The parties to a conflict must search for persons reported missing by an adverse party (Additional Protocol I, Article 33) and facilitate inquiries made by members of families dispersed as a result of the conflict so as to help them restore contact with one another and to try to bring them together. Article 26 of the Geneva Convention IV states that the parties to a conflict must encourage the work of organizations engaged in this task. A further responsibility of parties to a conflict, as set forth in Additional Protocol I, Article 34) is the establishment of exact location and markings of graves of the deceased and particulars of the dead interred within them, and the exchange of this information. Similar treaty-based and customary rules apply in non-international armed conflicts. (See ICRC, The Missing website for further information.)
- xiv. APDH La Plata, June 11, 2003.
- xv. APDH La Plata
- xvi. APDH La Plata, June 11, 2003