IS MEMORY THE FIFTH PILLAR OF TRANSITIONAL JUSTICE? (LATIN) AMERICAN PERSPECTIVES AND THE ARGENTINIAN CASE*

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Abstract: A traditional approach to Transitional Justice (TJ) recognizes four constitutive elements: truth, justice, reparation, and guarantees of non-recurrence. However, the UN Special Rapporteur for this matter proposed in 2020 to add a fifth pillar: memory. This paper aims to recognize if, in the (Latin)American context and, particularly considering the Argentinian experience, Memory can be subsumed in a preexistent element or must be recognized as an independent constitutive pillar.

Firstly, this paper recalls the conceptualization of the four original constitutive elements. A summarized revision of each of them would be necessary to understand whether memory can be considered within one of the four recognized components. Secondly, it identifies what makes an element considered an element. Although it seems to be a play on words, it is critical to understand which criteria are used to determine what constitutes a constitutive component. Third, since state practice and a normative approach are the identified criteria, this paper analyzes the memorialization processes both in practice and legally in Argentina as a case study. Additionally, it identifies the InterAmerican Court of Human Rights case law regarding memory.

Finally, I conclude by analyzing if under the recognized criteria, focusing on the (Latin)American and Argentinian cases, it could be affirmed that memory is an independent component and, thus, it can be recognized as the fifth pillar of TJ.

Keywords: memory — memorialization processes — transitional justice — international law.

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Resumen: Un enfoque tradicional de la justicia transicional (JT) reconoce cuatro elementos constitutivos: verdad, justicia, reparación y garantías de no repetición. Sin embargo, el Relator Especial de la ONU para esta materia propuso en 2020 agregar un quinto pilar: la memoria. Este trabajo se propone reconocer si, en el contexto (latino) americano y, particularmente considerando la experiencia argentina, la memoria puede subsumirse en un elemento preexistente o debe ser reconocida como un pilar constitutivo independiente.

En primer lugar, este trabajo recuerda la conceptualización de los cuatro elementos constitutivos originales. Sería necesaria una revisión resumida de cada uno de ellos para comprender si la memoria puede considerarse dentro de uno de los cuatro componentes reconocidos. En segundo lugar, se identifica qué hace que un elemento sea considerado como tal. Aunque parezca un juego de palabras, es fundamental comprender qué criterios se utilizan para determinar qué constituye un componente constitutivo. En tercer lugar, dado que la práctica estatal y un enfoque normativo son los criterios identificados, este documento analiza los procesos de memorialización tanto en la práctica como jurídicamente en la Argentina. Adicionalmente, se identifica la jurisprudencia de la Corte Interamericana de Derechos Humanos en materia de memoria.

Finalmente, concluyo analizando si bajo los criterios reconocidos, centrándome en los casos (latino)americanos y argentinos, se podría afirmar que la memoria es un componente independiente y, por lo tanto, puede ser reconocido como el quinto pilar de la TJ.

Palabras clave: memoria – procesos de memorialización – justicia transicional – derecho internacional.

I. Introduction

Over the past 50 years, states worldwide, including those in Latin America, have overthrown military dictatorships and totalitarian regimes, in favor of democratic and free societies.[1]

The International Center for Transitional Justice (ICTJ) defines Transitional Justice (TJ) as the way 'societies respond to the legacies of massive and serious human rights violations' by those regimes.[2]

1. Teitel, *Transitional Justice*, p. 3.
2. International Center for Transitional Justice (ICTJ), 'What is Transitional Justice?'.

The UN Secretary-General affirmed that the notion of TJ comprises the processes to deal with past abuses of International Human Rights Law (IHRL). Strategies to achieve such an objective must be holistic, incorporating integrated attention to individual criminal prosecutions, reparations, truth-seeking, institutional reform, vetting, dismissals, or a combination of them.[3]

A different approach was proposed by Ruti Teitel, who describes TJ as a distinctive conception of law and justice in the context of political transformation intending to address past systematic violations of IHRL. TJ may adopt different legal and non-legal responses to IHRL violations which means that the concept itself rejects the idea of a universal or ideal norm that should be applied to liberal democracies everywhere.[4] She stated that a genealogical perspective situates TJ in a political context, moving away from essentializing approaches and thereby illuminating the dynamic relationship between TJ and politics over time. Thus, under her conception, the Rule-of-Law in TJ is a mere product of political change.[5]

In 2011, the Human Rights Council created the UN Special Rapporteur on the promotion of truth, justice, reparation, and guarantees of non-recurrence.[6] The four strategies mentioned by the UN Secretary-General in 2004 were translated into a new UN vocabulary: truth, justice, reparation and guarantees of non-recurrence. The first Special Rapporteur was Pablo de Greiff, who had a normative approach. He stated in his first report that the above-mentioned strategies were the four constitutive elements of TJ.[7] Regarding Memory, he said in 2012 that:

> (…) although (the four elements) is not a closed list —for instance, memorialization is an important element of most transitions and a natural complement to truth-seeking— the point now is to show that these are not elements of a random list. Rather, they are parts of a whole.[8]

3. United Nations Security Council, S/2004/616, pars. 8 and 26.
4. Teitel, *Transitional Justice*, p. 4.
5. Teitel, 'Transitional Justice Genealogy', p. 94.
6. United Nations General Assembly, A/HRC/RES/18/7.
7. United Nations General Assembly, A/HRC/21/46.
8. De Greiff, 'Theorizing Transitional Justice', p. 34.

Memory studies, at that point, had not crossed paths with studies of transitional justice. [9]

Memory was not seen as a constitutive element. Until 2020, when Fabian Salvioli assumed the role of the second UN Special Rapporteur on the promotion of truth, justice, reparation, and guarantees of non-repetition, Memory was not recognized as a constitutive component. He made a Report named 'Memorialization processes in the context of serious violations of human rights and international humanitarian law: The fifth pillar of transitional justice' where he systematically analyzed memorialization processes and proposed that Memory should be identified as the fifth element.[10]

This paper will, firstly, summarize the conceptualization of the four original constitutive elements. Secondly, it will introduce the discussion on the approaches taken to determine which the constitutive elements are. Once those approaches are determined, it will analyze if, under the InterAmerican Human Rights System and, in the Argentinian case in particular, Memory constitutes an independent element of TJ.

II. Transitional justice as earth, water, air, and fire

II.A. Truth

Although there are no treaties that recognized the right to truth *per se*, some authors affirm that it is a binding human right obligation for states in accordance with Customary International Law (CIL)[11] and/or General Principles of Law (GPL).[12] The right to truth is also ruled in several soft law UN resolutions.[13]

The right to truth is not only a legal norm but also a narrative device, standing at the threshold between them. Truth is relevant in the context of TJ since societies must know what gross violations of IHRL were committed by their State. The desire for truth may even be used to justify the

9. Barahona de Brito, *Transitional Justice and Memory: Exploring Perspectives*, p. 359.
10. United Nations General Assembly, A/HRC/45/45.
11. United Nations Economic and Social Council, E/CN.4/Sub.2/1995/20, pars 39-40.
12. Méndez, *The Right to Truth*, p. 264-268.
13. United Nations Human Rights Commission, E/CN.4/RES/2005/66.

non-prosecution of certain alleged offenders in "amnesty-for-truth".[14] In South Africa in the 1980s, those who had violated human rights were allowed to exchange the truth for their amnesty. Although this process was criticized, it is necessary to extract the idea that knowing what happened is a fundamental step to repair the damage caused.

One effective approach for uncovering the legal truth is through Truth Commissions. These commissions are official and temporary bodies established to investigate a pattern of violations over a period that usually concludes with a final report and some recommendations for institutional reforms. Until 2006, 30 States had created Truth Commissions.[15] Currently, over 40 Truth Commissions have been established.[16]

II.B. Justice

The individual criminal liability of those who had committed gross violations to IHRL is currently a fact, but this not always been the case. Before the 1980s, there was no individual criminal liability for governmental officials, [17] with some exceptions as in the Nuremberg or the Tokyo Trials.

The UN Secretary-General said in 2006 that Justice 'implies regard for the rights of the accused, for the interests of victims and for the well-being of society at large'.[18] Principle 19 of the Set of principles for the protection and promotion of human rights through action to combat impunity, approved by the Commission on Human Rights, rules that states must prosecute, try and convict the perpetrators of violations of IHL and IHRL.[19]

Despite the current recognition of this individual responsibility, it is necessary to emphasize that Justice in terms of TJ is focused on restorative justice:

> While punitive justice sees the State as the victim, retributive justice sees the individual and the community in which he or she lives as

14. Naqvi, *The right to the truth in international law: fact or fiction*, p. 246 and 273.
15. Hayner, *Truth commissions: a schematic overview*, p. 295 and 296.
16. Gonzalez, 'Set to fail? Assessing tendencies in truth commissions created after violent conflict', p.7.
17. Sikkink & Booth Walling, 'The Impact of Human Rights Trials in Latin America', p. 427-445.
18. United Nations Security Council, S/2004/616, par. 8.
19. United Nations Economic and Social Council, E/CN.4/2005/102/Add.1, principle 19.

> the one who has suffered the harm. This idea of retributive justice seems to be better suited to the concept of transitional justice since it would achieve a double objective: compensating the victim and social coexistence. [20]

Both modes of justice, retributive and restorative, have been applied in the processes of TJ, and there is no single formula for success. Experiences have shown that each approach can have positive and negative effects, and they are not mutually exclusive. They can be complementary, depending on the specific context.[21]

Context and Truth should not exclude the establishment of Trials. There is a false dichotomy between Truth and Justice. Those experiences that combined truth and justice obtained the best results in the satisfaction of human rights. Going through judicial processes does not weaken the new political order. Quantitative studies have demonstrated conflict leads to human rights violations, but human rights trials have not led to more conflict.[22]

II.C. Reparation

The concept of 'Reparations' is used in two different concepts related to TJ. The first and best known is linked to judicial processes and has the objective of redressing the harm that victims may have suffered as a consequence of grave violations of IHRL. This context is mainly related to International Law and focuses on individual reparations. It can take various forms such as Restitution (reestablishing the victim's status *quo ante*), Compensation (quantification of harm beyond the economic loss), Rehabilitation (social, medical, and psychological care, as well as legal services), or Satisfaction (a broad category that includes, for example, the recognition of IHRL violations by a State).[23]

20. Garfunkel, 'Verdad y justicia: ¿términos incompatibles en la justicia transicional?', p. 433.
21. Umprimny & Saffon, 'Justicia Transicional y Justicia restaurativa: tensiones y complementariedades'.
22. Garfunkel, 'Verdad y justicia: ¿términos incompatibles en la justicia transicional?', p. 440.
23. De Greiff, 'Justice and Reparations', p. 452.

The UN General Assembly approved, in this regard, the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law. It provides possible juridical measures to implement at a national level.[24]

The second context in which the term is used is in reparation programs. Here 'reparations' refers to a political project focused on the domestic level and collective responses. Programs of reparations aim to offer advantages directly to those who have suffered from specific types of crimes, without considering truth-telling, criminal justice, or institutional reform as integral components of reparations. Reparations programs can pursue material or symbolic reparations. Material reparations may assume the form of compensation and symbolic reparations may include, for instance, official apologies, the change of names of public spaces, the establishment of days of commemoration, and the creation of museums and parks dedicated to the memory of victims, among others.[25]

Although theoretically it seems the right thing to do, implementing reparations during times of transition poses significant obstacles. For example, social acceptance. Reparations are seen from an individual perspective rather than a collective one. Thus, Victims are often at the forefront of claiming reparations. However, reparation programs aim to raise awareness and increase sensitivity in the whole society, even if they are focused on victims. This requires a more inclusive process with broad objectives**,** which in many societies takes time.[26]

II.D. Guarantees of non-recurrence

The right to victim's reparation is not only focused on the past but also on the future. As a component of TJ, guarantees of non-recurrence (GNR) mean that actions, policies, institutions, and other available measures are implemented to prevent massive human rights violations from taking place again. These guarantees have a preventive nature and, thus, issues such as trust, or confidence-building are key factors to avoid future violence.[27]

24. United Nations General Assembly, A/RES/60/147.
25. De Greiff, 'Justice and Reparations', p. 453.
26. Moffett, 'Transitional justice and reparations: Remedying the past?', p. 400.
27. Sarkin, 'Towards a Greater Understanding of Guarantees...', pp. 202-203.

In the general framework of IHRL reparations and GNR are phrased together. The principle of non-recurrence was typically invoked for verbal agreements, public apologies, and promises to avoid future violations. However, in the context of TJ, the scope of violations expands to include mass human rights violations committed by state agents against their citizens, using state institutions and laws. [28] Thus, GNR must involve institutional changes and not only isolated measures.

The subject to whom the GNR are directed is society at large, not limiting it to the direct or indirect victims. One of its underlying objectives is to identify and counter the causes of violence or rights violations. Such guarantees are applied in three spheres: institutional, civilian and cultural. At the institutional level, measures include boosting the reunification of separated families, the ratification of international treaties and complying with IHRL standards and making institutional reforms to ensure the independence of the judiciary, among others. In the civilian spheres, the guarantees of non-recurrence comprise preventing any persecution or attacks on civil society representatives and eliminating excessive burdens or disproportional heavy bureaucratic procedures that limit civil society participation. Culturally, educational reforms, cultural interventions, memorialization, or archives of the crimes, are considered part of the non-recurrence policies.[29]

III. Beyond the four constitutive elements

III.A. What means 'Memory' in transitional justice?

Memory, as Memorialization, is the process of creating public memorials, which are the physical representations or commemorative activities placed in public spaces concerning past events. They are created to provoke specific reactions, such as recognizing a past event, personal reflection, or learning, and being curious about historical periods.[30] These memorials can be focused on specific events regardless of the period of occurrence or

28. Davidovic, 'The Law of 'Never Again': Transitional...', p. 406.
29. United Nations General Assembly, A/HRC/30/42, pars. 26 and 103-121.
30. Brett, Bickford, Sevcenko & others, *Memorialization and Democracy: State Policy and...*, p. 1.

in the persons involved (soldiers, combatants, victims, political leaders, or activists, for example).[31]

Memorialization can take different forms: authentic sites (where the gross Human Rights violations occurred); symbolic sites (such as monuments carrying the names of victims or renaming); and activities (such as public apologies or temporary exhibits). Additionally, several cultural works such as films, documentaries, or literature are helpful to establish memorialization processes. Thus, Memorials comprise many ways to remember the wrongs of the past. Not every way is useful for every transition, since they must be suitable for the wishes or culture of the communities concerned.[32]

Elizabeth Jelin asks some questions about the memorialization processes to which further attention must be paid: What is to be remembered? Does this refer to remembering political violence, state repression, and human suffering? Or are the social and political conditions that allowed the violent conflict to emerge part of what we must remember?[33]

III.B. Which is the role of Memorialization processes?

Memory, as a State fostering the remembrance of gross violations of human rights within its territory, was undeniably part of TJ since its beginnings. The First UN Special Rapporteur on the promotion of truth, justice, reparation, and guarantees of non-recurrence, affirmed that Truth Commissions contribute to the creation of a culture of memorialization and remembrance.[34] He also said, regarding reparations, that states should take collective symbolic measures such as renaming public spaces or building museums and memorials. He particularly points out that they have a significant impact since they make memory of the victims a public matter and can provide recognition to victims not only as victims but also as rights holders.[35] Additionally, referring to GNR, he recommended education or cultural interventions, including memorialization and museums.[36]

31. Bickford, *MemoryWorks/Memory Works*, p. 494.
32. United Nations General Assembly, A/HRC/25/49, pars. 6-7.
33. Jelin, 'Memory and Democracy: Toward a Transformative Relationship', p. 174.
34. United Nations General Assembly, A/HRC/24/42, par. 83.
35. United Nations General Assembly, A/69/518, par. 33.
36. United Nations General Assembly, A/72/523, pars. 75-80.

Scholars agree that Memorialization processes highly contribute to transitional periods. However, they disagree on considering it as distinct —or not— from the truth, justice, reparation, and guarantees of non-recurrence.

The four elements were chosen by an integral analysis of the practice of states dealing with human rights violations. The measures taken were mainly: criminal prosecutions, truth-telling Commissions, reparations, and different forms of institutional reforms. Each element (truth, justice, reparation, and guarantees of non-recurrence) is not limited to such specific measures, constituting a gender-species relationship. The elements of TJ share two 'mediate' goals (giving recognition to victims and promoting civic trust); and two 'final' goals (promoting reconciliation and strengthening democracy). All these aims prove that TJ is a 'holistic' concept.[37]

Fabian Salvioli argues that TJ requires the identification of Memory as its fifth pillar:

> Without the memory of the past, there can be no right to truth, justice, reparation, or guarantees of non-recurrence. For this reason, memory processes in connection with serious violations of human rights and international humanitarian law constitute the fifth pillar of TJ. It is both a stand-alone and a cross-cutting pillar, as it contributes to the implementation of the other four pillars and is a vital tool for enabling societies to emerge from the cycle of hatred and conflict and begin taking definite steps toward building a culture of peace.[38]

He held that the obligation to safeguard human rights through memory processes is particularly important in societies that have experienced gross violations of human rights. This obligation arises from primary (treaties and CIL) and secondary (principles and guidelines, soft-law) sources of international human rights law and is an essential aspect of full reparation, including satisfaction and guarantees of non-recurrence. Memory processes in TJ should take a human rights approach and aim to establish a dialogic truth, creating conditions for critical debate about past crimes and

37. De Greiff, 'Theorizing Transitional Justice', pp. 33-34.
38. United Nations General Assembly, A/HRC/45/45, par. 21.

responsibility. Multiple narratives and interpretations of past violence can coexist. It seems that Fabian Salvioli, as his predecessor, has a normative approach also based on practical experience. In his analysis, he identified three situations: memorialization in times of conflict, memorialization in post-conflict situations, and weaponization of memory in connection with the politicization of social networks.[39]

This paper will look at one study case of memorialization in post-conflict situations: Argentina. To do so, it will analyze, since a normative approach was recognized, the jurisprudence of the Inter-American Court of Human Rights (IACtHR) regarding memorialization. Thus, with a practical and theoretical analysis it will be able to answer whether, in that state, the memorialization processes are a *stand-alone and a cross-cutting pillar.*

III.C. Inter-American System of Human Rights (IASHR)

III.C.1. Inter-American Court of Human Rights

In the case law of the Inter-American Court of Human Rights (hereinafter, IACtHR), symbolic reparations were ordered in several cases. In the Court´s words, symbolic reparations are a tool to:

> … recall the events that resulted in human rights violations, keep alive the memory of the victims and to raise public awareness in an event and avoid such serious incidents occurring in the future. [40]

In a systematic analysis, the terms 'monumento,' 'simbólico,' 'memorial,' 'placa conmemorativa' and 'perdonar/perdón/pedido de perdón,' ('monument,' 'symbolic,' 'memorial,' 'commemorative plaque' and 'forgive/forgive/request for forgiveness,', respectively) were used in 149 over 369 judgments delivered by the IACtHR from 1987 to 2019.[41] This Court referred to the different ways of preserving memory as reparations or guarantees of non-recurrence.

39. United Nations General Assembly, A/HRC/45/45, pars. 17, 31, 36 and 38.
40. I/A Court H.R., 'Case of Rochac Hernández et al. v. El...', par. 235.
41. Greeley, Falcioni, Reyes & others, *Repairing Symbolic Reparations: Assessing the...*, p. footnote 8.

If the measure was agreed upon with the victims and the state, the IACtHR tends to refer to them as reparations. The Court has recognized agreements regarding several measures: to erect a memorial monument,[42] to install a bust,[43] to name streets, parks, and schools,[44] to create a museum,[45] to install a plaque, create a TV program, a diploma course, and a scholarship,[46] and, also, to make documentaries about what happened and to build a National Remembrance Park.[47]

If the measure was acknowledged by the state, the IACtHR has referred to them both as reparations and GNR. While in the case "Trujillo Oroza", the Court refers to the creation of an educational center as a reparation,[48] in the case "Moiwana Community" it refers to the establishment of a memorial as a GNR. [49]

If the measure was requested by the petitioners, the Court tends to refer to them as Guarantees of non-reparation. The Court ordered States to erect a monument,[50] name well-known streets or squares,[51] establish an educational center,[52] install plaques,[53] and create special mentions of victims in already existing monuments.[54] In the case of 'Chitay Nech', the Court rejected the creation of a museum by arguing that monuments and plaques fulfill the guarantees of non-recurrence.[55]

42. I/A Court H.R., 'Case of Barrios Altos v. Peru', par. 44. f).
43. I/A Court H.R., 'Case of Huilca Tecse v. Peru', par.115.
44. I/A Court H.R., 'Case Benavides Cevallos v. Ecuador', par. 48.5.
45. I/A Court H.R., 'Case of the Río Negro Massacres [...]', pars. 169-170.
46. I/A Court H.R., 'Case of La Rochela Massacre v. Colombia', par. 277.
47. I/A Court H.R., 'Case of Gudiel Álvarez et al.[...]', pars. 347 to 349.
48. I/A Court H.R., 'Case of Trujillo Oroza v. Bolivia', par. 122.
49. I/A Court H.R., 'Case of Moiwana Community v. Suriname', par. 218.
50. I/A Court H.R., 'Case of 19 Merchants v. Colombia', par. 272/3; 'Case of the 'Mapiripán Massacre' v. Colombia', par. 315; 'Case of the Pueblo Bello Massacre v. Colombia', par. 278; 'Case of Goiburú et al. v. Paraguay', par. 177; 'Case of González et al. ('Cotton Field') v. Mexico', par. 471; 'Case of the Dos Erres Massacre v. Guatemala', par. 265.
51. I/A Court H.R., 'Case of Myrna Mack Chang v. Guatemala', par. 286.
52. I/A Court H.R., 'Case of 'Street Children' (Villagrán Morales et al)', par. 103.
53. I/A Court H.R., 'Case of Myrna Mack Chang', par. 286; 'Case of the Ituango Massacres v. Colombia', par. 408; 'Case of Anzualdo Castro v. Peru', par. 201; 'Case of Chitay Nech et al. v. Guatemala', par. 251.
54. I/A Court H.R., 'Case of the Miguel Castro-Castro Prison v. Peru', par. 454; 'Case of La Cantuta v. Peru, par. 236.
55. I/A Court H.R.,'Case of Chitay Nech et al. v. Guatemala', par. 251.

In these cases, different arguments were used to order the state to take memorialization measures. The most common argument was that the measure will 'contribute to awakening public awareness to avoid repetition of acts such as those that occurred in the instant case and to keeping the memory of the victims alive'.[56] In other cases, the Court stated that this was a 'measure to prevent such grave events happening in the future'[57] or 'to preserve (victims) memory and as a guarantee of non-repetition'.[58]

III.C.2. Inter-American Commission of Human Rights

The Inter-American Commission of Human Rights (hereinafter, IACHR) adopted resolution 3/2019 setting the "Principles on Public Policies on Memory in the Americas". It defines Memory as:

> … how people and peoples build meaning and relate the past to the present in the act of remembering serious violations of human rights and/or the actions of victims and civil society in defense and promotion of human rights and democratic values in such contexts.[59]

Principle 1 sets that Memorialization processes must have a comprehensive approach and cross-cutting the justice, truth, reparations, and GNR measures. Additionally, the public policies on memory shall be victim-centered and built with consultations among victims. Memory initiatives include but are not limited to public acts of acknowledgment, human rights education, a national day of remembrance, the establishment of plaques, monuments or museums, renaming streets, and cultural events.[60]

56. I/A Court H.R., 'Case of 19 Merchants v. Colombia', par. 272-273; 'Case of Myrna Mack Chang', par. 286; 'Case of 'Street Children' (Villagrán Morales et al.)', 103; 'Case of Chitay Nech et al. v. Guatemala', par. 251; 'Case of Moiwana Community v. Suriname', par. 218.
57. I/A Court H.R., 'Case of the Mapiripán Massacre v. Colombia', par. 315; 'Case of the Pueblo Bello Massacre v. Colombia', par. 278; 'Case of González et al. ('Cotton Field') v. Mexico', par. 471.
58. I/A Court H.R., 'Case of the Dos Erres Massacre v. Guatemala', par. 265; 'Case of Anzualdo Castro v. Peru', par. 201.
59. I/A Court H.R*, Principles on Public Policies on Memory in the Americas.*
60. I/A Court H.R, *Principles on Public Policies on Memory in the Americas*, principles I and IX.

III.D. Memorialization in Argentina

Argentina is one of the most relevant study cases regarding TJ. This is mainly, due to the trials of the military juntas in the 80s. This was the first time in the world that the trials of perpetrators of gross human rights violations were judged by a regular Tribunal, not created ad-hoc, as the Nuremberg or the Tokyo Trials or even the ICTY and ICTR.

The dictatorships of *el Proceso de Reorganización Nacional* (the National Reorganization Process), particularly, the military juntas (the head of the army, the navy, and the air force) from 1976 to 1983 were forced to stand trial. The *Proceso* was the fifth dictatorship in Argentina and the cruelest and bloodiest.

The brief history of the last dictatorship starts with the death of Juan Domingo Perón in July 1974, who was three-time president and still is one of the most popular figures in national politics. His third wife, Isabel, the vice president, inherited the presidency. The Peronist movement had since the 60s both a left —and a right-wing, wrestling one another—. The presidency of Isabel adopted a right-wing position. To achieve their objective, her welfare minister, José López Rega, created the *Alianza Anti-Comunista Argentina* (*Triple AAA,* Argentine Anti-Communist Alliance), a right-wing death squad created to murder leftist guerrillas, priests, intellectuals, lawyers, politicians, among others. In response, the left wing founded *Montoneros*, a guerrilla organization, fighting the security forces.[61]

In this context, Isabel was forced to resign on March 24, 1976. She was incarcerated by the military forces, who saw the proliferation of leftist ideas in Latin America and Argentina as a serious threat to the Argentinian State. From 1976 to 1983, four juntas governed the State. They elaborated and enforced an extermination plan directed against leftists, journalists, and human rights defenders, among others. It is estimated that there were 30.000 fatal victims of the dictatorship.

The TJ process in Argentina started after the election —in 1983— of a democratic president, Raul Alfonsin, who said he would give impulse to the criminal prosecution of the Military juntas of *el Proceso.*

Francesca Lessa states that three periods can be defined in the aftermath of 1983. The first phase from 1983-1985, which saw the establishment

61. Romero, *A History of Argentina in the Twentieth Century*, pp. 211-213.

of a truth commission and limited prosecutions under President Alfonsín. The second phase from 1986-2002 was marked by the enactment of impunity laws and presidential pardons, which resulted from the armed forces opposing human rights prosecutions. Despite this, civil society and human rights organizations worked to prevent the past from being forgotten. The third phase from 2003-2012 saw a shift away from impunity and towards accountability, with the annulment of impunity laws and presidential pardons, and the resumption of criminal proceedings. [62]

Since the turn of the 21st century, a memorialization process started in Argentina. On August 30th, 2001, access to *Parque de la Memoria* (Memory Park) was inaugurated after a 3 year-plan was approved in 1998. The Monument to the Victims was held on November 7, 2007.[63] It is composed of four concrete stelae containing 30,000 Patagonian porphyry slabs of which about nine thousand are engraved with the victims´ names.[64]

Another memorialization process with state support was the placement of tiles in several streets and squares across Buenos Aires to commemorate the disappearances by the association Barrios x Memoria y Justicia (Neighborhoods for Memory and Justice), since 2005. During the dictatorship, 498 clandestine detention centers were used to kidnap and illegally detained people either to kill them or to torture them in exchange for information. Some of these centers were transformed into memorials to encourage reflection and critical thinking. Some examples are El Olimpo in 2003, Army Mechanic School (ESMA) in 2004, *El Club Atlético* in 2005, *Mansión Seré* and Automotores Orletti in 2006 in Buenos Aires, the Police Intelligence Department in 2006 and *La Perla* in 2008 in Córdoba, and the Brigade of Resistance Investigations in the Chaco.[65]

Additionally, Argentina has adopted laws and issued a presidential decree regarding Memory:

- the 'National Day of Memory for Truth and Justice,' established by Law No. 26,085/06 on March 24th, honors the victims of the

62. Lessa, *Memory and Transitional Justice in Argentina and Uruguay*, pp. 49-50.
63. Lessa, *Memory and Transitional Justice in Argentina and Uruguay*, p. 77.
64. Buenos Aires Ciudad, 'Monumento a las Víctimas del Terrorismo de Estado'.
65. Lessa, *Memory and Transitional Justice in Argentina and Uruguay*, pp. 77-78.

1976 dictatorship, which started that day. This law was instituted by Law No. 25,633.

- National Law No. 26.323/07 sets December 10th as the 'Day of the Restoration of Democracy.'
- the National Memory Archive was created by Presidential Decree No. 1259/03 in December 2013. Among its functions was the preservation of State documentation related to human rights violations. It is located in the former clandestine detention center ESMA.[66]
- Law No. 26,691 on Sites of Memory was also enacted, whose objective is the preservation, signaling, and dissemination of 'sites of memory of State terrorism', understood as those places that operated as clandestine centers of detention, or where emblematic events of the illegal repression were carried out during *el Proceso*.

There are two additional key concepts to understand how TJ operates in Argentina: *Nunca más* ('Never Again') and *Memoria, Verdad y Justicia* ('Memory, Truth, and Justice').

*Nunca m*ás is the name of the book which reproduces the Report of the CONADEP (National Commission on the Disappearance of Persons) in 1984. The report collects testimonies of the disappearance and death of around 9000 people during the military dictatorship in Argentina. The Commission concluded with a series of recommendations to initiate legal actions against those responsible.

Although Argentina is one of the most important case studies regarding TJ, outside academic circles, the concept of TJ is alien to the Argentinian lexicon. At a domestic level, the transitional process is known by the motto *Memoria, Verdad y Justicia*.

IV. Conclusion

The constitutive elements of TJ were chosen in the eyes of both state practice and regulations. Three questions must be answered to conclude

66. Escalante, 'Memory as a human right in Argentina: a reconstruction based on critical theory', p. 15.

this paper: Rules or judgments are recognizing the Memorialization process? Can 'Memory' policies be found in the Argentinian case? And maybe the most important: Does it operate within a preexistent element or as an independent one?

Firstly, Memorials to remember the victims of gross violation of HR were ordered at a regional level by the IACtHR. The Court has referred to the memorials as reparations or a GNR depending on whether it was proposed by the State or was petitioned by the victims. In the former case, it is categorized as a GNR and, in the latter, as reparations. However, such division seems forced since the measures included in both cases are mostly the same.

Secondly, both at a regional and a domestic level, regulations were passed regarding memorialization processes. The IACHR *Principles on Public Policies on Memory in the Americas* recognized Memory as cross-cutting regarding Truth, Justice, Reparations, and GNR. Additionally, one of the national laws instituted the National Day of Memory for Truth and Justice. Memory, under this law, is a requirement for achieving Truth and Justice objectives.

The difficulty to categorizing 'Memory' unequivocally under one element, noting that the remaining four elements were mentioned by either the IACHR, the IACtHR, or domestic regulations, proves that Memory does not fit within any of them.

Thirdly, Argentina has elaborated several 'Memory' policies such as the establishment of a national park, the installation of tiles where the disappeared worked or studied and the transformation of the detention centers into Memorials inviting to reflection, among others. These memorials, such as the *Parque de la Memoria,* have both an individual and a collective perspective: the names of the 9,000 recognized disappearances are written but there are still 30,000 plaques appealing to the collective memory. Again, individual memory policies can be considered reparations, while collective memory policies can be considered GNR.

The fractioning of 'Memory policies' to categorize them under one of the four original elements, led to the point where Memory cannot continue to be subsumed under a preexistent element and must be considered a constitutive element. In conclusion, instead of considering each memorialization as part of a different constitutive element, its cross-cutting nature must be recognized.

Therefore, 'Memory' must be considered the fifth pillar of TJ in the Americas, in general, and, particularly, in Argentina.

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