

Addressing the Past, Avoiding the Present, Ignoring the Future? Ongoing Human Rights Trials in Argentina

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The recent death of the former de facto president of Argentina, General Jorge Videla, highlights the long journey travelled since the country's period of state repression. The 87-year-old Army General died in a common prison, convicted of multiple crimes against humanity. The former military strongman will be buried – discredited and repudiated – according to legislation passed in 2009 that prohibits funeral honours for members of the armed forces who have been involved in human rights violations. Fittingly perhaps, the legislation was passed under the leadership of the civilian Minister of Defence at the time, Nilda Garré, herself a former target of the military regime that Videla once led.

Yet, the inglorious passing of the former leader of the Argentine military junta also demonstrates that his compatriots' efforts at truth and justice have been far from linear. Videla was initially convicted together with the other members of the military junta in 1985 for multiple heinous crimes, but pardoned five years later by then President Carlos Menem. In 1998, however, Videla was again convicted and returned to prison for his role in the military regime's systematised abduction of children of the disappeared, but only to be moved to house arrest shortly thereafter. It was not until 2006 that then President Néstor Kirchner ordered the old General transferred to a military base, which was followed by a series of convictions in separate trials that eventually led Videla to serve out his life sentences in the civilian prison where he died.

As Gabriel Pereira and I have argued elsewhere, Argentina has gone through an ‘ebb and flow’ process in which the initial opening to judicial accountability following the transition to democracy was gradually restricted and eventually foreclosed. However, due to gradual shifts in the balance of power and motivations of ruling governments, the military, and human rights organizations (HROs), together with broader shifts in the ‘global accountability regime’, unrestricted prosecution reopened nearly twenty years after the beginning of the transition to democracy.

Since the reopening of the trials for violations committed during the military regime, significant prosecutorial momentum has developed. Although figures vary, around 1,000 individuals are currently indicted (*procesados*), and over 400 have been convicted (though given the Argentine legal system, the number of individuals with confirmed sentences is considerably lower). The sheer scale and scope of the ongoing trials testify to the drama of Argentina’s protracted political and legal struggles over transitional justice (TJ). And yet, even the passing of such a discredited figure as Videla does not dispel the very significant shadows inherent in Argentina’s most recent approach to its past, and its implications for contemporary concerns over both human rights and political accountability. Three sets of issues need highlighting.

First, there are the inherent challenges of the trials themselves. In its recently published annual report, the Centro de Estudios Legales y Sociales (CELS), one of the key Argentine HROs driving the trials forward, laments the many administrative and procedural delays and shortcomings of the ongoing trial proceedings. Progress has been slow, adding to the frustrations of some of delayed justice as justice denied. Significant judicial and administrative resources have been devoted, but the refusal of many indictees – including

Videla – to accept the legitimacy of the trials and cooperate by providing information on the fates of the disappeared, has hampered the proceedings.

Moreover, there is the challenge inherent in the overwhelming emphasis on judicial processes to TJ and the legitimacy of legal approaches more generally. For many in Argentina, particularly in the period immediately following the transition to democracy, there was a strong consequentialist rationale for criminal prosecution of past atrocities as a way to reassert the legitimacy of the state, to strengthen the rule of law, and to promote political democratization. Yet, as the followers of Carlos Nino have pointed out, the legitimacy of judicial procedures, and the law more generally, is based on their degree of inclusiveness and the quality of public deliberation. While there have been robust safeguards in place to protect defendants' due process rights, the criminal prosecutions have not led to any discernible increase in the quality of public debate concerning Argentina's past, and the effects of the trials on human rights accountability more generally are far from clear.

There are also concerns related to the retributive rationale that underpins the trials. Here, Argentina is not an isolated island. The principle of individual criminal accountability has become deeply embedded in global TJ policy and practice. This is in contrast to the more collective notions of accountability – political or regime accountability – that shaped TJ debates in the early transitional period. The enmeshment between international criminal law and TJ has in other words both criminalised and individualised accountability debates in TJ. The significant limitations on retributionist approaches to criminal justice, especially in response to large-scale organised political violence, are rarely acknowledged in Argentina. Simply given the vast number of cases in such contexts, attempts to establish individual criminal responsibility tend ultimately to be unsatisfactory. To focus on a handful of cases

may invite accusations of selectivity and further contribute to the politicisation of the judicial system. To pursue maximalist prosecutorial strategies, an already slow and inefficient judiciary is likely to grind to a halt, undermining the rule of law.

True, the trials in Argentina indicate gradual yet significant changes in judicial thinking with regards to international human rights law and the jurisprudence of the Inter-American Human Rights System in particular. Like judiciaries elsewhere, the Argentine judiciary is attuned to and generally accommodates political shifts. The law, however, and the interests and normative preferences of its practitioners, cannot be simply reduced to politics. Yet, influences external to the judiciary – including the Kirchner governments and HROs – are clearly important when accounting for these judicial changes. And, while successive Argentine governments have acknowledged special international obligations that limit the scope of political discretion and the autonomy of domestic laws in human rights matters, the Cristina Fernández de Kirchner government appeared to signal a reversal recently by failing to support the Inter-American Commission on Human Rights against retrograde attempts to restructure the regional human rights body.

Second, the trials raise questions concerning the depth of political democratization in Argentina. As is widely documented, the pursuit of accountability for past human rights violations in Argentina continues to co-exist with very persistent impunity for other types of human rights violations. In light of problems ranging from rampant police violence to enduring discrimination against indigenous communities, the morally compelling question should be: how can the continuing pursuit of accountability for crimes committed 30 years ago, shape and contribute to the transformation of the very structures that gave rise to the violations in the first place? To be fair, little is understood about the transformative potential

of TJ. For researchers, there are the inherent difficulties in measuring accountability developments because of the variety of measures used, and the difficulties in assessing what the actual impact are on broader measures of democracy and human rights. But even on the conceptual level, there is still a significant gap between the terms of accountability debates in the TJ literature, on the one hand, and the democratization literature on various forms of political accountability, on the other.

For activists as well, their contributions to broader human rights issues, beyond the sometimes narrow confines of truth and justice concerning past atrocities under the military regime, have been, with some notable exceptions, limited. Fairly few Argentine HROs have been able to make the transition to human rights advocacy in a deeply unequal and problematic but still democratic society. The intimate association in the minds of significant sectors of the population between human rights and abuses by military regimes, has limited the advocacy agenda to abuses of the past, whilst for many sectors of society, the widespread abuses of the present constitute a more pressing concern. The association of the vocabulary of human rights with military abuses of the past has made it difficult to mobilise the human rights discourse around pressing contemporary challenges.

This matters, because the politics of human rights accountability in Argentina has tended to revolve around more narrow concerns about accountability for historically defined past abuses, rather than around broader accountability in Argentina's inevitably – and not uniquely – flawed democracy. This matters as well because the pursuit of accountability does not necessarily lead to improvements in 'democracy' and 'human rights'. Clearly, the trials matter for the many victims of abuses. But what is their broader impact, and how can broader public support be generated, when they have become viewed, in some quarters, as a

set of special interests, or, perhaps even worse, with indifference? There are also considerable accountability deficits in Argentina that are quite unrelated to the extent to which accountability for past human rights crimes are achieved. Yes, accountability for its past is vital for any society, but so is present accountability.

This leads me to the final and concluding cluster of concerns that, in some ways, underpin much of this discussion: contemporary Argentine politics, which has become centred on heated debates around the character of *Kirchnerismo*. Since the election of Néstor Kirchner in 2003, the question of accountability for past human rights abuses has been given a prominent position on the government agenda. Together with the significant weakening of the military as a political actor, the support of successive Kirchner governments has been crucial in precipitating the most recent shift in Argentina's pathway to accountability. True, without the persistence and creativity of Argentina's highly mobilized HROs, these developments would have been unlikely. At the same time, although civil society initiatives are clearly important, they cannot replace state action. In the aftermath of mass atrocity, public institutions have a responsibility to ensure reparations, compensation and restitution of victims. These are responsibilities and functions – both material and symbolic – that state institutions are uniquely placed to fulfil in order to foster a continuing state policy with broad support across political divides.

However, arguably there is now a real risk that the politicisation of human rights discourse and practice in Argentina is reaching a tipping point. For some time it has been pointed out that the Kirchner governments' focus on the crimes of the past has allowed it to avoid dealing with current human rights problems. Moreover, the strong political association between the *Madres* and *Kirchnerismo* may have been mutually beneficial – in addition to its instrumental

role in advancing the trials. But with the moral leadership of *Madres* in doubt as a consequence of the controversies surrounding the Schoklender corruption case, and the Cristina Fernández government facing increasingly vocal accusations of corruption, their respective political opponents have gained leverage in their attempts to portray the trials as a partisan attempt at ‘victors’ justice’. Indeed, supporters of the military regime have sought to appropriate the language of ‘accountability’, with the government as their target, to oppose the trials, and perpetrators have sought to portray themselves as ‘victims’ of government persecution.

This political manipulation of the trials may have been inevitable. Thirty years have passed since Argentina returned to democratic rule, but a basic consensus on TJ remains elusive. A contentious coexistence, to borrow Leigh Payne’s phrase, of opposing, and competing, views about the past may indeed be what can be reasonably wished for. Moreover, delayed justice offers no magic solution to deep-seated problems of impunity. However, there is a pressing and quite urgent need in Argentina – and elsewhere – to connect the past with the present as a way of imagining the future. This, I hope, is not merely a rather nice turn of phrase, but a way to prevent a focus on past crimes from pushing concerns regarding the present and future consequences of the pursuit of accountability to the margins of debates. It is not about an either/or approach, as indeed, the past and present are inexorably linked. But addressing the past at the expense of the present and the future tends to be politically expedient for an incumbent government. Invariably, this comes with a heavy price-tag for society as a whole.