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## Juicio y Castigo: Nestor Kirchner and accountability for past human rights violations in Argentina

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By Francesca Lessa

On October 27, 2010, former President of Argentina, 60-year-old Nestor Kirchner, died after suffering a heart attack. This blog reflects on one of Kirchner's legacies, namely his efforts to favour the re-opening of judicial proceedings against members of the most recent military regime in Argentina, 1976 to 1983.

Kirchner, a lawyer from the Patagonian province of Santa Cruz, together with his wife, current Argentine President Cristina Fernández, belonged to the Peronist Party and hinted on several occasions to having been victims of the military regime. This blog does not aim to discuss Kirchner's overall legacy as a politician. Still, Kirchner's actions at the beginning of his presidential mandate unlocked a situation of complete impunity in Argentina, regarding the massive human rights violations that had been committed by the military dictatorship. In 2003, exactly twenty years after the democratic transition, President Kirchner set in motion a number of actions that resulted in reopening of trials for human rights abuses, including torture, executions and disappearances. Prosecutions resumed since 2005 in various parts of Argentina, including in the capital Buenos Aires and provinces such as Formosa, Salta and Santa Fe.

How can we explain the return to accountability, after over a decade of silence and oblivion? And, five years on from the beginning of trials, what assessment can we make?

### Military Rule in Argentina, 1976 to 1983

When the Armed Forces took over power from Perón's wife Isabel in the early hours of March 24, 1976, few imagined this would constitute the beginning of Argentina's darkest hour. In fact, Argentina was accustomed to frequent military interventions in political life, there having been five coups (1930, 1943, 1955, 1962, and 1966) in less than forty years. Still, the new dictatorship, the Argentine Process of National Reorganisation (or Proceso as normally shortened in Spanish), openly wished to transform the state, economy and society, doing so through recourse to systematic violence and terror.

On the backdrop of the global confrontation of the Cold War and taking ideological inspiration from the National Security Doctrine, unprecedented human rights abuses occurred. The repression lasted for the whole duration of the regime, reaching its peak between 1976 and 1979; nonetheless, violence continued unabated till the very end of the Proceso, with disappearances reported as late as 1983. In Argentina, at that time, the state was 'Janus-faced': an invisible and clandestine terrorist structure tasked with repression co-existed with a government subjected to norms and legal scrutiny. A façade of legality masked the invisible and violent hand of the state that arbitrarily tortured, murdered and disappeared thousands of human beings. Repression was a common feature throughout the Southern Cone of Latin America; cross-border repression – particularly strong between Argentina and Uruguay – however extended to Bolivia, Brazil, Chile and Paraguay. The framework of Operación Cóndor (Plan Condor) effectively established a borderless area of terror.

In Argentina, the repression focused primarily on the suppression of left-wing terrorism; the country's two major guerrilla groups, the Ejército Revolucionario del Pueblo (The People's Revolutionary Army, ERP) and the Peronist Montoneros were heavily targeted. However, subversion was perceived as a highly contagious social disease: thus, the list of possible subversives encompassed students, professors, journalists, trade unionists, workers and priests.

Repression was implemented under orders from highest military authorities, and coordinated through the military hierarchy. Operations followed a territorial scheme and were carried out by task forces (grupos de tareas), composed of members of the armed and security forces: their changing composition ensured the blood pact of silence – still strong nowadays. The distinguishing feature of the Argentine repression was the practice of enforced disappearance of people. The word *desaparecido* (missing), a Spanish term sadly famous throughout the world, refers to persons forcefully apprehended at home, work or on public thoroughfares. After abduction, nothing was ever known about their destiny. Later on, the pieces of this unimaginable puzzle of torture and murder were put together. The *desaparecidos* were taken to one of over 500 clandestine detention centres, often police commissions and military premises, in which they



were subjected to the worst humiliations, including sexual violation and electric shocks. It is estimated that up to 30,000 individuals went missing, most of their bodies still hidden in unmarked clandestine graves or thrown drugged but alive into the River Plate from airplanes, the (in)famous vuelos de la muerte (death flights). The human cost of repression was multi-faceted: in addition to the thousands disappeared, we must include approximately 500 children – born to women in clandestine detention – whose identities were altered through illegal adoption to families of the security forces. Further, there were 12,890 political prisoners, 2,286 murders and an estimated 250,000 people that left the country for exile.

### Transitional Justice in Argentina, 1976 to 2003

By the early 1980s, internal divisions within the ruling junta regarding economic and political goals, the regime's demising legitimacy due to international and national denunciations of human rights crimes, combined with an economic and financial crisis, and internal pressures to open up the system, cleared the way for transition. The fiasco of the Falklands/Malvinas War in mid-1982 aggravated the already existing internal conflicts, putting under the spotlight the government's lack of authority.

Since 1983, Argentina has been a pioneer in transitional justice, using a variety of mechanisms such as trials and reparations, and pioneering new ones like truth commissions and the truth trials. The October 1983 national elections saw the victory of Radical Party candidate Raúl Alfonsín who had most forcefully expressed his commitment to the return of the rule of law, and to provide truth and justice regarding the human rights violations under military rule.

During Alfonsín's mandate, the traumatic legacy of repression was initially confronted head-on. The President immediately established the National Commission on the Disappearance of Persons (CONADEP) and decreed the prosecution of nine military commanders for the crimes of homicide, unlawful deprivation of freedom and torture in December 1983. The CONADEP was the first truth commission to ever complete a final report and obtain widespread international attention. It was composed of highly reputable figures, and charged with shedding light on what had occurred to the desaparecidos. After months of work, the CONADEP presented its findings to Alfonsín and a summary of its conclusions was later published as the famous Nunca Más report. The report emphasised how the military adopted a strategy of terror and repression, during which human rights were violated in a systematic and organic manner throughout Argentina. Enjoying absolute power and total impunity, the armed forces kidnapped, tortured and murdered thousands of Argentines and foreigners.

On the justice front, the Buenos Aires Federal Appeals Court condemned the military commanders in December 1985, with sentences ranging from life imprisonment for General Videla and Admiral Massera, to detentions of various lengths for other defendants. This historic trial was unprecedented not only in Argentina but in Latin America too, where amnesia had traditionally been the norm. Still, further prosecutions proved impossible. By the late 1980s, after several military rebellions happened, triggered by increasing dissatisfaction with human rights trials, two amnesty laws were adopted by Congress to limit prosecutions. The Full Stop Law (December 1986) set a 60-day limit for filing all claims relating to past human rights abuses (otherwise all would be extinguished after 22 February 1987). Further, the Due Obedience Law (June 1987) established that chief officers, subordinate officers, sub-officers, and troops in the armed, security, prison forces had acted under orders and were not punishable. Finally, newly-elected President Menem strengthened the mantle of silence and oblivion regarding the recent past, by granting two sets of pardons, in October 1989 and December 1990, benefitting hundreds of people, including some of the already convicted officers and commanders. By the early 1990s, a veil of impunity tightly surrounded questions of truth and justice in Argentina.

Between 1990 and 2002, the Presidency of Carlos Menem purposely closed off the question of the past, favouring a 'forgive-and-forget' policy regarding accountability, at whose heart rested the pardons granted at the beginning of his mandate. The President's policy was a sort of trade-off: Menem was willing to forget the crimes of the past, but would not tolerate any future disobedience by the armed forces (i.e. uprisings as in the late 1980s). During Menem's first term (1989 to 1994), the subject of the past was absent from the political agenda and the Executive only favoured progress in areas of human rights deemed to be less confrontational, namely economic reparations and the search for missing children. A particularly important event, in addition to the quite controversial policy of economic reparations to victims of detention and disappearance, was the enactment of Law 24,321 of Absence by Forced Disappearance, which created an unprecedented legal status for all persons who involuntarily disappeared before 12/1983.

During Menem's second mandate (1995-1999), the question of the past began resurfacing, thanks to the unrelenting work of the human rights organizations, the 1995 military confessions, and the impact of the London arrest of ex-Chilean dictator Pinochet. In the late 1990s, several events occurred inside Argentina, which renovated the momentum towards accountability: the re-opening of judicial trials for crimes not covered by the amnesty laws (economic crimes, kidnapping and false adoption of children) beginning in 1998, and the development of the so-called truth trials. The latter are judicial proceedings documenting past human rights abuses: there is no judgment or defendants, and relatives, victims, and/or military officers are summoned and questioned as if they were ordinary witnesses, to obtain information about the destiny of the desaparecidos. They took place in Federal Appeal Courts in various parts of Argentina, including Buenos Aires, La Plata, Cordoba, Mar del Plata, Neuquén, Jujuy and Bahía Blanca.

President De la Rúa (1999 to 2001), who had promised co-operation on human rights issues in his electoral campaign, instead opted for a mainly hands-off approach, even continuing Menem's practices of promoting officers accused of participating in the repression. The December 2001 severe economic, social and political crisis, however, temporarily overshadowed the issues of past crimes. Still, 2001 represented a fundamental year in the fight for accountability, signalling the beginning of the end of impunity. Back in March 1998, the Argentine Chamber of Deputies had derogated the two amnesty laws, preventing in this way their future application;



nonetheless, the effects of the laws remained as far as past judicial proceedings were concerned. At that time, the Centre for Legal and Social Studies (Centro de Estudios Legales y Sociales, CELS) thus developed an innovative legal argument in this respect. Drawing upon the Poblete case, lawyers from the CELS argued that the amnesty laws put the Argentine judicial system in an untenable position: it could find people criminally responsible for kidnapping a child and falsely changing her identity, but not for the more serious original crime of murder and disappearance of her parents that later gave rise to the crime of kidnapping. In March 2001, Federal Judge Cavallo thus declared the unconstitutionality of the amnesty laws, for violating the Constitution and international law obligations. This first instance ruling, however, only applied to the Poblete case, because a federal judge does not possess the power to declare the unconstitutionality for all cases.

### **Transitional Justice meets Nestor Kirchner (2003 to 2007)**

In May 2003, the quest for accountability found an unexpected ally in President Nestor Kirchner who, surprisingly, backed efforts to prosecute those responsible for the crimes committed during the years of state terrorism. President Kirchner belonged to the generation of the Peronist party that had been severely repressed by the juntas in the 1970s.

Kirchner's human rights policy had four elements: the recuperation of former-detention centres to construct memory spaces; the vetting of governmental officials linked to the dictatorship, purging the federal police and forcing dozens of generals and admirals into retirement; international cooperation with extradition requests from abroad; and, the re-opening of trials inside Argentina. Further, Kirchner created a favourable climate to progress on truth and justice, by appointing three new judges to the Supreme Court, and repealing Decree 1,581 of December 2001, which barred compliance with extradition orders. The President also ratified the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, obliging the government to punish such violations, and making extradition possible. In August 2004, the President also completed the policy of reparations, providing compensation to minors that had been victims of state terrorism.

The President pushed for the effective annulment of the amnesty laws. In December 1983, Law 23,040 had declared the self-amnesty law (Law of National Pacification of September 1983) enacted by the outgoing military junta as 'null and void'. Relying upon this precedent, in August 2003, Congress adopted Law 25,779, which declared the Full Stop and Due Obedience laws as 'null, as if they had never existed'. The amnesty laws had already been derogated in 1998, declared unconstitutional in 2001, and annulled by Congress in 2003. Still, a final decision on the question of the constitutionality of their annulment was eventually delivered by the Argentine Supreme Court in June 2005. The Court upheld the constitutionality of Law 25,779 and simultaneously declared the invalidity and unconstitutionality of the Full Stop and Due Obedience Laws. The Court claimed that the amnesty laws were contrary to international norms of constitutional hierarchy, also taking into account recent developments in international human rights law, such as the 2001 Barrios Altos jurisprudence by the Inter-American Court of Human Rights, to conclude that the State was obliged to investigate and sanction crimes committed under the dictatorship, as the latter cannot be amnestied. The Court considered enforced disappearances as crimes against humanity, and continuous and multiple violations of international human rights law. Since 2004, several federal judges have also denounced Menem's pardons – the last remaining legal obstacles in the way of prosecutions. Some of these rulings, as in the case of General Riveros, were later confirmed by the Supreme Court in 2007, opening the way for other pardons to be deemed null and void.

### **The current state of trials in Argentina**

In 2006, the first trials relating to past human rights abuses in twenty years were held. In August, Buenos Aires Federal Court 5 condemned former-police official Simón to twenty-five years imprisonment for the illegal deprivation of liberty, aggravated by torture and the appropriation of a minor, committed against the Poblete-Hlaczik family. In September, La Plata Federal Court 1 sentenced a former-police official Miguel Etchecolatz to life imprisonment for the illegal arrest, torture and homicides of six disappeared, and the kidnapping and torture of two survivors. For the first time, the court in La Plata contended that these crimes had occurred within the context of the genocide that took place in Argentina between 1976 and 1983. Other important sentences occurred in 2007 and 2008, including a life imprisonment's sentence for involvement in murder, illegitimate deprivations of liberty and torture to the former-chaplain of the Buenos Aires provincial police, and terms of between twenty and twenty-five years for aggravated illegitimate deprivation of liberty to seven high-ranking members of Intelligence Battalion 601, including former-Army Commander Nicolaidés. In April 2008, in the first judgment of its kind, a couple was sentenced to eight and seven years' imprisonment for the appropriation of a baby girl born to disappeared parents and stolen by an ex-Army captain. In Tucumán, in August, former-General Menéndez and former-Governor Bussi were condemned to life imprisonment for the illegitimate deprivation of liberty, torture and disappearance of ex-Senator Vargas-Aignasse.

Trials have continued since and prosecutions are well under way throughout Argentina nowadays. According to the CELS' database as of November 2010, 1,589 people are implicated in crimes against humanity, 277 have been charged, eight-two condemned, 442 are currently under pre-trial detention, eight have been acquitted while 255 have passed away. Trials have started, or are scheduled to begin, in eleven (out of twenty-four) Argentine provinces including in Buenos Aires, Chaco, Chubut, Córdoba, La Pampa and Salta.

In Buenos Aires, four important trials are taking place: the cases of ABO, El Vesubio, ESMA, and Automotores Orletti. The ABO case covers the human rights violations committed by seventeen defendants in three former clandestine detention centres managed by the First Army Corps: El Club Atlético, Banco, and El Olimpo, which operated, overall, between mid-1976 and the beginning of 1979. The El Vesubio trial relates to another ex-clandestine detention centre under that name which existed between 1976 and 1979. The trial investigates instances of illegal deprivation of liberty, torture, homicide, executions, and disappearances, with eight defendants. The so-called mega-cause of the ESMA relates to the former clandestine detention centre that existed on the premises of the Escuela Superior de Mecánica de la Armada (Superior Navy School of Mechanics, ESMA). This centre operated throughout the dictatorship between 1976 and 1983; the (in)famous task force 3.3.2 operated there and it has been estimated that approximately 5,000 disappeared passed through the ESMA, only 200 of which survived. A clandestine maternity ward also existed there. The case sees eighteen defendants and began in December 2009. The Automotores Orletti case, which began in June 2010, refers to the illegal deprivation of liberty, murder and torture of sixty-

five people, perpetrated in the homonymous clandestine detention centre and has six defendants. The centre, which existed between May and November 1976, specifically 'housed' repressive agents operating within the framework of the Plan Condor. In fact, of the 200 detainees there, the majority were Uruguayans, but there were also Argentines, Bolivians, Cubans, Brazilians, and Paraguayans.

Prosecutions have begun outside of the capital city too, including proceedings in:

- the Margarita Belén Massacre, relating to the execution and torture of twenty-two political prisoners in December 1976 in the Chaco province;
- the Trelew Massacre, relating to the execution of sixteen political prisoners in August 1972 in the Chubut province;
- a trial against former dictator Videla and other thirty-one defendants in Córdoba on charges of murder;
- in Rosario, where five officers and a civilian face charges of rape, torture and murder regarding eighty-six victims;
- in Mar del Plata, where three Navy officers are charged with seven murders and nine kidnappings and torture committed between 1976 and 1977;
- Buenos Aires province, a trial against former dictator Bignone, and other three officers.

### What assessment can we make of the trials?

Undoubtedly, the re-opening of judicial proceedings has produced diverse responses, being both welcomed and criticised. For the NGO H.I.J.O.S. (Daughters and Sons for Identity and Justice against Forgetting and Silence), trials constitute 'a chance not to be missed', particularly to disseminate information about past crimes to a frequently indifferent society. For the Abuelas de la Plaza de Mayo, recent prosecutions continue what was begun in the 1980s and all the means towards justice should be attempted. For the Association of Former Disappeared-Detainees, justice is needed 'not only to avoid the repetition of similar crimes, but also to stop people from taking justice into their own hands'. It is important to underscore that there have never been instances of personal vengeance in Argentina, even though these could have easily occurred given that repressors were free to walk the streets for years and lived a life of comfortable impunity. Lastly, trials are also seen as providing moral reparations to the victims and helping restore their dignity.

Nonetheless, relevant critiques have also been raised. First, it is rather difficult to collect information over thirty years after the events, and it is important to ensure that innocent people will not be wrongly condemned. Second, it is feared that this is going to be an extremely long process, with several delays and trials likely to last for very long. Never-ending trials may actually backfire on the whole purpose of justice, especially given the old age of many defendants: people that were 'monsters' may be transformed into victims and, furthermore, plenty of symbolic figures of the dictatorship like Admiral Massera have already died. Third, it has been pointed out how the acquisition of new information has been limited and that it is always the voice of the victims that it is heard, while the defendants remain committed to the 'blood pact of silence'. The question of 'bystanders to the violence' also remains. In addition to charging military and police officers involved in human rights abuses, how do we deal with the various shades of culpability that existed during state terrorism? How about the element of civilian collaboration? And the role of the Catholic Church? And that of the big businesses that profited during the regime? Delineating the borders of guilt and responsibility beyond the 'usual suspects' (i.e. the military) is not an easy task, especially through a judicial lens, one in which the dominant categories are those of 'innocent' and 'guilty'.

The re-opening of trials had some negative consequences too. Several witnesses have been intimidated to dissuade them from providing testimony. Some, like Luis Ángel Gerez and Juan-Evaristo Puthod, were abducted and temporarily disappeared. The most disturbing case is that of Jorge-Julio López, a key witness at the Etchecolatz 2006 trial, who disappeared the day before the verdict was delivered and has not been seen since.

### Kirchner and human rights

Overall, Kirchner's human rights policy triggered mixed responses within the community of human rights activists and broader society. For many, the former President played an instrumental role in re-opening the question of accountability. For others, Kirchner '(ab)used' the past for his own political purposes.

After years of fighting against Executives that attempted to strictly circumscribe the scope of truth and justice, several human rights organisations rejoiced to have found a President that was finally willing to take up their cause, and particularly to facilitate the process of justice. A member of the Asociación-Madres de la Plaza de Mayo recounted of their meeting with Kirchner, in which the President told them how he understood their pain and how, while he was a student, some of his best friends were taken away, and he himself could have also disappeared. The Madres have, particularly, enjoyed a much 'friendlier' relationship with the Kirchner's administration, which has been willing to listen to their demands. For other human rights NGOs, the Kirchner's administration had a direct interest in the matter, given it was composed of people who belong to the generation of the disappeared and thus worked for human rights, against impunity and for the social changes desired since the 1970s.

It is important, however, to highlight a number of problems with the Kirchner's administration and its human rights policy. First, it has been suggested that the President's policy focused too much on the past to the detriment of current human rights issues, especially problems relating to the police, the judiciary, governing by decree and the separation of powers. Second, many question the depth of Kirchner's commitment to human rights. It is common knowledge that neither Kirchner, nor his wife, was ever preoccupied with the subject of the past beforehand. Upon being elected, Kirchner was a little known figure in political centres like Buenos Aires or Rosario; thus, some have contended that the President selected the question of the past in the attempt to garner political support, especially from the middle classes. The human rights banner was taken up as a sort of 'differentiation strategy' within Peronism. Third, some even go as far as accusing the President of appropriating himself of the question of human rights. Kirchner can have often been credited with the nullification of the amnesty laws, which was, however, the product of a much longer process that resulted from the work of people that relentlessly continued to demand

accountability throughout the years of impunity. Fourth, the strong link that emerged between the Executive and some human rights organisations, especially the Asociación-Madres, has been criticised as detrimental to activism, for mixing current political issues with human rights demands. This close association caused a big deterioration in the human rights movement that moved away from a liberal and universalist discourse of human rights to a vindication of political projects. Because of this, recent trials have been seen by some as 'historical revenge', rather than as endeavours to strengthen the rule of law.

### Final reflections

The re-opening of judicial proceedings regarding the crimes committed during the 1970s and 1980s has not been a phenomenon limited to Argentina. It has been taking place throughout the region. In particular, important sentences have been dictated in the last few years, including in:

- Chile, as of October 2009, 559 former military personnel and civilian collaborators were facing charges for enforced disappearances, extrajudicial executions, and torture; 277 had been convicted (of whom 175 had had the verdict confirmed on final appeal), and 56 were serving prison sentences. Thirty-two of those charged or convicted had been generals in the Chilean army. Pinochet himself was under house arrest and faced prosecution at the time of his death in 2006. In September 2009, 129 former members of the DINA, Pinochet's secret police, were indicted for disappearances and extrajudicial executions dating from the 1970s. For the first time, the Supreme Court's Criminal Chamber expressly declared torture to be a crime against humanity;
- Peru, the sentence to twenty-five years imprisonment to former President Fujimori, for grave human rights violations (including extrajudicial executions and disappearances) handed down by the Special Criminal Court of Peru's Supreme Court of April 2009. Fujimori was the first democratically elected Latin American leader to be convicted for grave human rights violations in his own country. By the end of September 2009, thirteen members of the Colina group, the government death squad directly responsible for the La Cantuta and Barrios Altos killings, had also been convicted;
- Uruguay, important sentences were dictated against key military and civilian leaders of the dictatorship. In October 2009, Former President Gregorio Álvarez was sentenced to twenty five years prison term for his role as co-author in the aggravated homicides of thirty-seven people. In February 2010, former President Juan María Bordaberry was condemned to a forty-five year sentence for crimes including nine enforced disappearances, two political murders and, in the first sentence of this kind in the world, for leading the military takeover and thus violating the Uruguayan Constitution. In April 2010, former Minister of External Relations Juan Carlos Blanco was sentenced to twenty-year imprisonment for the aggravated homicide of disappeared teacher Elena Quinteros.

These judicial developments reflect recent jurisprudence by the Inter-American Court of Human Rights, which has consistently argued that amnesty laws enacted in the aftermath of human rights repression are incompatible with the American Convention on Human Rights – see the judgements in the Barrios Altos (2001) and Almonacid (2006) cases, regarding Peru and Chile.

Although it is important to question Kirchner's real commitment to human rights, it cannot be denied either that he proved to be the 'right person and right time' for human rights organisations in Argentina, helping them re-open the quest for justice after many years of silence. It is true that Kirchner built on years of unyielding work by human rights activists, but the President provided the much needed political will to give a new moment to the justice process. Current judicial proceedings are well under way now and it can be expected that they will continue for the foreseeable future. Kirchner established a climate favourable to the return of the question of past, and there are solid bases to believe that trials will continue, notwithstanding the end of the Kirchner era. There exist, however, threats to these judicial proceedings but they come from 'within' the process itself. In fact, the CELS recently estimated that at the current pace, it would take at least twenty years to complete proceedings, highlighting the risks for the victims, defendants and society as a whole. The slow progress may jeopardise an already fragile process and ways must be found to speed up judicial proceedings, grouping cases together, avoiding unnecessary delays and rapidly resolving logistical issues.

Last but not least, impunity for current human rights abuses by the state must also be addressed, especially regarding the use of excessive force by the police, disappearances, the violent repression of social protests, the (ab)use of preventive detention and the state of Argentina's prison. Looking at the past does not mean closing the eyes to the present.

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**Francesca Lessa** is a research associate for the Latin America International Affairs Programme at the LSE IDEAS centre

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