Seeking the dead among the living: embodying the disappeared of the Argentinian dictatorship through law¹

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Y así seguimos andando
curtidos de soledad,
y en nosotros nuestros muertos
pa' que nadie quede atrás.
(Atahualpa Yupanqui²)

Introduction

The state policy of enforced disappearances in Argentina, planned and implemented during the military dictatorship of 1976–83, still has a striking effect today: in the absence of any corpses of the disappeared, the families *seek the dead among the living*. Their quest through the law *embodies* the victims who were ‘disappeared’ and thereby placed *outside of the law*: ‘we might say that the absolutely defeated person is the outlaw, the disappeared. This was indeed [Walter] Benjamin’s thesis on the vanquished of history: those who leave no traces, those whose bodies cannot be shown, any more than the story of their end, have deserved their fate: to have none.’³ From this perspective, disappearance is a challenge to the law.⁴

To find a juridical solution to the enigma of disappearance is to treat the disappeared precisely as *disappeared*, not as deceased, through the law, from which, in the executioner’s point of view, the disappeared is excluded, as non-existent. Even the former head of the military junta, Jorge Videla, said in a confession recently

collected and published by the Argentinian journalist Ceferino Reato that 'every disappearance might be understood as a masking, a concealment of death'.⁵ We find the echo of this substantive denial in the international definition of the crime of enforced disappearance, which includes a 'refusal to acknowledge the deprivation of liberty or concealment of the fate or whereabouts of the disappeared person, which places such a person outside the protection of the law'.⁶

Moreover, still from the juridical perspective, this substantive denial makes enforced disappearance a *continuous crime*,⁷ thus creating an interesting paradox: so long as the disappeared body is not found, the crime of disappearance (denied by the executioner – 'there are no disappeared, but absentees who will return'⁸) continues while at the same time being deprived of its physical, material and 'corporeal' proof. In other words, the crime of disappearance continues as long as the *corpus delicti* is not provided, or as long as its history is not retraced: the crime is perpetuated by its own effacement, through its effect on the families of the victims and, more generally, within a society weary of the activist injunction, the cry, the tirelessly reiterated slogan 'Present! Now and forever' (*¡Presente ahora y para siempre!*).⁹ This is the locus of the 'infamy of the disappearance': 'indefinitely prolonged doubt, for the disappearance is an event that lasts forever. What lasts forever is that a person I can name is neither present nor absent.... The disappeared "is" in the middle of neither, nor.'¹⁰

It is thus a question of reversal: if the nature of war is to turn the corpse of the Other ('the enemy without') into a trophy and a proof of victory, then, conversely, the nature of the policy of enforced disappearance is to turn the corpse of the Self ('the enemy within') into an absence, a non-fact, a *neither-nor* – a double negative that strangely recalls the NN of *Nomen nescio*¹¹ or the Hitlerian *Nacht und Nebel* (Night and Fog) directive.¹² According to Lefeuve-Déotte, 'The technique of disappearance not only attacks the life of a supposed enemy, it robs it of death, dissolves, and pulverizes it. It aims to destroy this essential human dichotomy, of life and death, creating a special category, that of neither living nor dead.'¹³ The body of the disappeared – 'sucked up' (*chupado*) as it was previously termed in Argentinian military jargon¹⁴ – then becomes the missing evidence of the crime. Moreover, and most interestingly, 'not seeing the corpse reinforces denial of the death',¹⁵ which is entirely crystallized in the slogan of some of the mothers of the Plaza de Mayo when they claim maternity has been reversed

(the disappeared children have given birth to them and they – the mothers – are born into the struggle) and the disappeared appear again alive (*¡Aparición con vida!*).¹⁶

Within this entirely unusual configuration of mass state violence constructed on the systematic effacement of the bodies of its victims, we shall attempt to comprehend the disappeared body as the object of a triple challenge: establishment of the facts, to bring them into the light, the (re)construction and understanding of the narrative of what took place; the exposure of the crime and sentencing of those responsible; and an end to the crime and access to mourning. It then becomes a question of thinking of the disappeared/absent body not ‘in the negative’, in respect of what it prevents, but ‘in the positive’, in respect of what it allows juridically: that is, to think of it as generating rights and duties. The absence of the bodies of the disappeared and the demands of the families of the victims in the face of such absence are in fact at the origin of the unusual creation of a new human right in Argentina: the right to the truth (*derecho a la verdad*). Recognition of this new subjective right (protecting the families and relatives of the victims) is mirrored by recognition of the state’s duty to vigorously investigate the very body, present or alive, of the ‘stolen children’ of the dictatorship, in the search for the identity and the fate of them all. The *derecho a la verdad* thus becomes the key to understanding the implementation of two kinds of extraordinary procedures, quite specific to the Argentinian case, that *give body* to the disappeared through the law. The first is direct: the sanctionless so-called ‘truth hearings’ for the reconstruction of their fate. The second is indirect, by means of procedures for the mandatory recovery of the identity of their stolen children. Both actually constitute antechambers of the classic penal process for the trial of those accused of carrying out enforced disappearances and stealing the children of the disappeared (abducted at the same time as their parents, as discussed in the last section of the chapter). If the disappearance is, initially, a challenge to the law, the law thus becomes, in turn, a challenge to the disappearance.

Right to the truth and reconstruction of the fate of the disappeared

Argentina is an extraordinary laboratory in the domain of struggle against impunity and of ‘restoration of the truth’, and constitutes a useful paradigm in the context of reflection on the corpses of

mass violence. Its special character, in the immediate aftermath of the military dictatorship, is to test almost the entirety of juridical mechanisms in the handling of state crimes: adoption of self-amnesty under the military government of General Reynaldo Bignone, in the name of 'pacification of the country' and of 'social reconciliation' just before his fall; then the creation of the National Commission on the Disappearance of Persons (Comisión Nacional sobre la Desaparición de Personas, CONADEP) by Raúl Alfonsín, initiator of the democratic transition (1983); the publication in 1984 of the famous report *Nunca más* (*Never Again*) on the Commission's work; then the organization in 1985 of the trial of the generals in the first three military juntas; a further promulgation of two amnesties by the same Alfonsín (1986–87); the signature of reprieves (*indultos*) and presidential pardon granted in 1990 by Carlos Menem to all the condemned of the 1985 trial; parliamentary annulment of the amnesty laws after the election of Nestor Kirchner in 2003; followed by the declaration of their unconstitutionality by the Supreme Court in 2005 and the reopening of criminal prosecutions.¹⁷

Within the critical period between the adoption of the amnesty laws of 1986–87 and their recent annulment, there emerged and became established the *derecho a la verdad* associated with an alternative judicial practice, *sui generis* and unique in the world: the sanctionless truth hearing (*juicios por la verdad*), a genuine national singularity that was confected in reaction to the policy of forgetting the 1990s and of the blocking of criminal prosecutions until 2005. It all began on 3 March 1995, when the former naval captain Adolfo Scilingo made a public admission of his active participation in the 'death flights' for the first time.¹⁸ This sent an electric shock through Argentinian civil society and marked the start of new claims by the families of the disappeared, demanding resumption of investigations by the state to discover the fate of the victims.

The main aim of the families then was to counter the juridical lock maintained by the amnesty laws still in force at the time, by launching a new kind of action for the right to the truth – just emerging from the (very committed) jurisprudence of the Inter-American Court of Human Rights,¹⁹ but as yet undefined and, moreover, absent from Argentinian law. The national context of this period is even more interesting and richer than in 1994, when a profound reform of the Argentinian constitution was made in a spirit of post-dictatorship 'democratic consolidation'.²⁰ The latter enabled the principal international instruments for the

protection of human rights to be integrated into the Argentinian juridical order, giving them, in addition, a constitutional value in the normative hierarchy.²¹

Between truth commission and classic criminal prosecution, between symbolic reparation and retribution, the hybrid practice of the *juicios por la verdad* offers a new approach in the judges' mission, no longer punitive but simply *declarative*. What this particular framework demands is not the judgement and criminal conviction of persons charged with serious violations of human rights, but knowledge of the fate of victims by disclosure and clarification of the facts (including the search for and identification of the corpses), combined with judicial recognition of the factual truth, beyond the binary dialectic of guilty/not guilty.

After many twists and turns, the Inter-American Commission on Human Rights reached a friendly agreement, signed on 15 November 1999, under which the Argentinian government would recognize and guarantee the right to the truth, specifying that this right assumed the implementation of all possible means for 'clarification' (*esclarecimiento*) of the fate of the disappeared. This event is totally decisive. It allows for the systematization of the truth hearing in Argentina, in particular before the Federal Chamber in La Plata, where more than 2,000 disappearances were later the subject of public sessions every Wednesday.²²

At Argentina's further initiative, the United Nations Commission on Human Rights adopted on 20 April 2005 the first resolution on the right to the truth. Argentina is one of the states that worked hardest for the adoption of the International Convention for the Protection of All Persons from Enforced Disappearance, in 2006,²³ which enshrines the right of each relative to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation, and the fate of the disappeared person.²⁴ In April 2008, Argentina made a commitment before the United Nations Human Rights Council to prepare an international declaration on the right to the truth and memory, as a step towards subsequent drafting of a universal treaty on the subject. This development in the international and United Nations community led on 21 December 2010 to the proclamation by the United Nations General Assembly of 24 March as 'International Day for the Right to the Truth Concerning Gross Human Rights Violations and for the Dignity of Victims'. Parallel with this juridical development, the guarantee of the right to the truth also became an important issue in the context of a new series of cases:

those concerning the mandatory recovery of the children stolen during the dictatorship period.

Right to the truth and mandatory recovery of the identity of stolen children

The systematic practice of enforced disappearances also involved the stealing of an estimated 500 children of the disappeared – children abducted at the same time as their parents, or born in captivity, then stolen as ‘spoils of war’ (*botín de guerra*) by the soldiers.²⁵ Later they were given either to members of the armed forces or to civilians, or were legally adopted by families sometimes unaware of their origin (in most cases, the judicial authority approving the adoption had – by contrast – knowledge of the precise facts). At the time of writing, 105 stolen children had been ‘restored’ after recovery of their lost identity. Among them, ten children had had to undergo a state-enforced recovery of their identity by being DNA tested against their will.²⁶ These ten cases at the heart of the procedures are our concern here.

The cases in question began at the start of the 2000s: what was at stake was to determine – and on what basis – it would be juridically possible to impose DNA tests on non-consenting persons who were presumed to be stolen children. The special feature of these cases is that they oppose two types of victims of the dictatorship, recognized as such both by the doctrine and by the jurisprudence (national and inter-American) of human rights: the families of the disappeared and their stolen children, who bear in them the traces of their disappeared parents – ‘there is always a *remnant* in the person of the surviving witness’.²⁷

Two main rights were then in conflict, which the judges had to consider: on the one hand, the right to the truth invoked by families seeking the bodies of the disappeared and the identity of their stolen children; on the other, the right to privacy claimed by some of these children who refused to undergo DNA tests, either voluntarily (from loyalty to their adoptive parents), or not (under pressure or threat from the latter). The right to the truth is most often invoked in association with the right to protection of family relations, the right to reparation for the stealing of children by the state, or the right to personal integrity. As for the right to privacy, it is claimed together with its primary corollaries (the right to self-determination, the right to free choice of a life plan and the right

not to know one's biological identity) and/or its secondary corollaries (the right not to testify against one's parents or kin, the right to bodily integrity and the right to mental health).

Argentina's Supreme Court, from 2003, ruled several times on this question of the balance between the right to the truth and the right to privacy.²⁸ In respect of minors, the Court's tendency has always been to approve the imposition of DNA tests, on the principle of 'the child's best interest', the right to privacy and the duty of the state to prosecute those responsible for the stealing of children. In respect of adults, the jurisprudence is evolving. Since 2009 the Court has regarded the right to the truth (directly associated with the state's duty to investigate and prosecute serious violations of human rights) as more important than the right to privacy. In other words, in the Court's opinion, the latter cannot constitute an obstacle to the recovery of the identity of stolen children, and the right to the truth justifies the state 'going into the body' (*ponerse en el cuerpo*) by force, if that is necessary for carrying out its duties, and if the sampling methods ordered by a judge for a test are reasonable, proportionate and appropriate to the circumstances and the desired goal.

The right to privacy capitulates to the right to truth – the latter being understood as an absolute right that therefore legitimizes state interference in the human being whose body, moreover, becomes a potential piece of evidence in the policy of enforced disappearances. This legal jurisdictional interpretation is enshrined in a new article of the criminal procedure code (article 218 bis), into which it was incorporated in 2009, following a friendly agreement between the Argentinian state and the Inter-American Commission on Human Rights.²⁹ The regulation further clarifies that the rules limiting witness testimony against parents or kin and the right to abstain on the matter (articles 242 and 243 of the code) do not apply in this case.

However questionable this now legalized state interference may be, it is no less true that the carrying out of DNA tests regardless of the will or consent of the presumed stolen children has one benefit: that of easing the guilt arising from a conflict of loyalty towards their adoptive parents, or the fear provoked by threats and pressures. And all of this – these feelings of guilt and fear – occur in an already highly charged context where, in most cases, their previously unknown true origins are brutally revealed. Moreover, there is a kind of ricochet: the truth of the role played by the adoptive family in the disappearance of their own biological

parents and/or their complicity in state terrorism. On the other hand, the current juridical procedures also avoid the need to make these children responsible for the criminal conviction (or, alternatively, for the impunity) of their adoptive parents, while respecting the public character of the penal process. Paradoxically, the 'duty' of state interference in the matter may be seen above all as a way to confront the state with its own responsibility.

In short, the guarantee of the right of the victims' relatives to the truth – initially created to cover a *gap* – is systematically understood by the judges as inseparable from the dual international state duty of investigating and prosecuting massive violations of human rights. The first state duty is precisely expressed in the truth hearings and the procedures for mandatory recovery of the identity of stolen children. The second duty is expressed in parallel in the classic criminal trials of those responsible for the disappearances and the stealing of the children of the disappeared – 'the latter being required so that the parents of the disappeared detainees might "have" the bodies, to "produce" before the courts'.³⁰

All these legal processes, then, are a means of bringing an ongoing crime to an end and according judicial recognition to victims and their families. By embodying the disappeared of the dictatorship, these processes free the bodies of the living.

Notes

- 1 The text of this chapter was translated from the author's French by Cadenza Academic Translations.
- 2 Extract from the song 'Los Hermanos' by Héctor Roberto Chavero, also known as Atahualpa Yupanqui, Argentinian poet, singer and guitarist: 'And so we keep wandering/hardened to solitude,/and our dead within us/so as to leave no one behind'. Translations here and below by the translator.
- 3 'On peut dire alors que le vaincu absolu, c'est le hors-la-loi: le disparu. C'était bien là la thèse de Benjamin concernant les vaincus de l'histoire: ceux qui n'ont pas laissé de traces. Ceux-là dont les cadavres ne peuvent être exposés, pas plus que l'histoire de leur fin, ont bien mérité leur sort: ne pas en avoir.' J.-L. Déotte, 'Les paradoxes de l'événement d'une disparition', in C. Coquio (ed.), *L'Histoire trouée: négation et témoignage* (Nantes: L'Atalante, 2003), p. 557.
- 4 See also M. Nichanian, 'Le droit et le fait: la campagne de 1994', *Lignes*, 26 (October 1995), p. 88.
- 5 'Cada desaparición puede ser entendida como el enmascaramiento, el disimulo de una muerte'. Extract from C. Reato, *Disposición final*:

- la confesión de Videla sobre los desaparecidos* (Buenos Aires: Editorial Sudamericana, 2012).
- 6 'le déni de la reconnaissance de la privation de liberté ou de la dissimulation du sort réservé à la personne disparue..., la soustrayant à la protection de la loi'. Article 2 of the International Convention for the Protection of All Persons from Enforced Disappearance (adopted 20 December 2006).
 - 7 See article 8, para. 1(b), of the 2006 Convention. The statute of limitations of the crime commences from the moment the offence of enforced disappearance ceases, taking into account its continuous nature.
 - 8 'il n'y a pas de disparus, mais des absents qui reviendront'. Déotte, 'Les paradoxes de l'événement', p. 557.
 - 9 This slogan was taken up by almost all the non-governmental organizations (NGOs) and associations of families of the disappeared in Argentina, and is and was often used in the annual commemorative demonstrations of 24 March (24 March 1976 being the date of the military coup d'état).
 - 10 'infamie de la disparition': 'un doute indéfiniment prolongé, car la disparition est un événement qui dure toujours.... Ce qui dure toujours, c'est qu'une personne que je peux nommer n'est ni présente ni absente. [...] Le disparu "est" au milieu du ni, ni'. Déotte, 'Les paradoxes de l'événement', pp. 557–8.
 - 11 Literally 'I do not know the name'. This Latin expression is used to designate an anonymous or undefined person.
 - 12 *Nacht und Nebel* (Night and Fog) was the codename of the operation based on a decree of 7 December 1941 that provided for the arrest of any person representing 'a danger to the security of the German Army', and for the transfer of that person to Germany for eventual disappearance in absolute secrecy.
 - 13 'La technique de la disparition ne s'attaque pas seulement à la vie d'un ennemi supposé, elle lui ôte même sa mort, la dissout et la pulvérise.... Elle cherche à détruire cette distinction essentielle pour l'espèce humaine: celle de la vie et de la mort, en instituant une catégorie particulière, celle du ni vivant, ni mort'. M. Lefeuve-Déotte, 'La mort dissoute. Un cas: l'Argentine', *Quasimodo*, 9 (2006), p. 99.
 - 14 See for example the witness statement of the survivor P. Calveiro, 'La mémoire comme virus. Pouvoir concentrationnaire et disparition de personnes en Argentine', in C. Coquio (ed.), *L'Histoire trouée: négation et témoignage* (Nantes: L'Atalante, 2003), p. 541.
 - 15 'ne pas voir le cadavre conforte "follement" le déni de la mort'. Lefeuve-Déotte, 'La mort dissoute'.
 - 16 After 1985, the association Mothers of the Plaza de Mayo split in two: on one side, the movement led by Hebe de Bonafini, which persists in a radical demand for the appearance alive of their disappeared children – 'Con vida los llevaron, con vida los queremos' ('Alive they took them, alive we want them'); on the other, the 'founding line', one of whose spokeswomen is Laura Bonaparte, which supports a different approach and supports the search for and identification of the bodies.

- 17 For an overview see S. Lefranc, 'L'Argentine contre ses généraux: un charivari judiciaire?', *Critique Internationale*, 26 (January 2005), pp. 23–34.
- 18 The death flights were a practice systematized during the dictatorship, in which thousands of the disappeared were drugged and thrown alive from military aircraft into the Rio de la Plata. The confession, collected by the Argentinian journalist Horacio Verbitsky, was published in English as H. Verbitsky, *The Flight: Confessions of an Argentine Dirty Warrior* (trans. E. Allen) (New York: New Press, 1996), from the Spanish, H. Verbitsky, *El Vuelo: la guerra sale en Argentina* (Buenos Aires: Planeta, 1995).
- 19 See E. Lambert Abdelgawad & K. Martin-Chenut (eds), *Réparer les violations graves et massives des droits de l'homme: la Cour inter-américaine, pionnière et modèle?* (Paris: Société de législation comparée, 2010).
- 20 J.-M. Blanquer, 'Consolidation démocratique? Pour une approche constitutionnelle', *Pouvoirs: L'Amérique Latine*, 98 (2001), pp. 37–47.
- 21 Through the instrument of the new article 75, para. 22, of the constitution. For developments, see H. Tigroudia, 'Le droit international dans les états d'Amérique latine: regards sur l'ordre juridique argentin', *Revue Internationale de Droit Comparé*, 1 (2008), pp. 89–119.
- 22 See the website of Asamblea permanente por los derechos humanos La Plata (APDH), at <http://apdhlaplata.org.ar/v1/category/juicio-por-la-verdad> (accessed 20 March 2013). For a detailed study on the right to the truth and the new judicial mechanism of truth hearings, see S. Garibian, 'Derecho a la verdad. El caso argentino', in S. R. Carulla & C. V. Duran (eds), *Justicia de transición: el caso de España* (Barcelona: International Catalan Institute for Peace (ICIP), 2012), pp. 51–63 (accessible in digital format on www.gencat.cat/icip, accessed 9 January 2014), and S. Garibian, 'Vérité vs. impunité. La justice (post-)transitionnelle en Argentine et le human rights turn', in K. Andrieu & G. Lauvau (eds), *Quelle justice pour les peuples en transition? Pacifier, démocratiser, réconcilier* (Paris: Presses Universitaires de Paris-Sorbonne, 2014), pp. 287–305. See also S. Garibian, 'Les procès de mémoire sont justifiés: créer de nouveaux outils juridiques', *Le Monde*, 15 April 2011, p. 19.
- 23 Argentina was also one of the first countries to have ratified that Convention, on 14 December 2007.
- 24 Preamble and article 24, para. 2, of the 2006 Convention.
- 25 For complete and updated information, see the website of the association Abuelas de Plaza de Mayo (Grandmothers of the Plaza de Mayo) charged with the search for the stolen (grand)children, at www.abuelas.org.ar (accessed 20 March 2013).
- 26 We should remember that 1987 was the year when, at the initiative of the grandmothers, a national genetic databank was officially created for the identification of the disappeared and, where appropriate, their stolen children. Scientific advances resulting in the practice of DNA testing then revolutionized the searches and the judicial use of their results in the context of trials.

- 27 'il y a toujours un *reste* en la personne du témoin survivant'. C. Coquio, 'À propos d'un nihilisme contemporain: négation, déni, témoignage', in C. Coquio (ed.), *L'Histoire trouée: négation et témoignage* (Nantes: L'Atalante, 2003), p. 34.
- 28 For a detailed analysis of this jurisprudence, see N. Piñol Sala, 'La obligación del estado de restituir la identidad a las víctimas de desaparición forzada', in *Jurisprudencia de la Corte Suprema de Justicia de la Nación* (Buenos Aires: Hammurabi, 2010), vol. 8, p. 312; and J. G. Bongiovanni Servera & J. Gabriel, *La prueba de ADN en el proceso penal: análisis del artículo 218 bis del Código Procesal Penal de la Nación y su discusión parlamentaria* (Buenos Aires: Editores del Puerto, 2012); and A. Iud, 'La apropiación de niños y el análisis de ADN obligatorio', in G. I. Anitua & M. Gaitan (eds), *Las pruebas genéticas en la identificación de jóvenes desaparecidos* (Buenos Aires: Editores Del Puerto, 2012).
- 29 On this reform, see L. Filippini & K. Terrina, 'ADN: el nuevo art. 218, CPPN', *Revista de Derecho Penal y Procesal Penal* (May 2010), pp. 842–7.
- 30 'il s'agissait bien de cela, pour les parents des détenus disparus: "avoir" les corps, [les] "produire" devant la justice'. G. E. Mango, *La Place des mères* (Paris: Gallimard, 1999), p. 18.

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