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Article



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Truth, Evidence, Truth: The Deployment of Testimony, Archives and Technical Data in Domestic Human Rights Trials

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Abstract

This article analyses how judicial activity in domestic prosecution of dictatorship-era human rights violations shapes and contributes to the accumulation and verification of archival evidence. In particular, it discusses the ways in which trials challenge the status of existing sources of truth, such as truth commission findings, as well as producing new kinds of information and new sources of doubt about crimes of the recent past. The paper argues that novel 'truth orders' are produced by transitional artifices such as the truth commission and other administrative instances. Trials constitute another such order, with a separate and in some senses more socially established claim to legitimacy. It is in some senses inevitable, therefore, that competing truth claims arise when prosecutions are added to the post-transitional mix. Particular aspects of the technically challenging process of investigating long-ago crimes introduce additional professional considerations. The procedures and protocols applicable to forensic science and police work must be assimilated and evaluated by judges charged with turning old and new data into usable evidence. The particular rules of evidence, probatory value, and standards of proof that judges are mandated by law to apply challenges and transforms, in sometimes unpredictable ways, the social legitimacy or veracity previously attributed to such data. This challenge is particularly significant when the imperative of judicial truth interacts with sources of social truth. The production and diffusion of verdicts in criminal trials affects public perceptions of past and present judicial neutrality and legitimacy, and also alters relatives', survivors' and bystanders' views about past events and present responsibilities. Investigations carried out under written judicial procedure lead, eventually, to the production of a new meta-archive, a repository of tested and

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validated truth which may reinforce, challenge, complete or utterly discredit previous versions of events.

Keywords: archives; forensics; proof; prosecution; transitional justice

1. Introduction

Since the year 2000, Chile has placed around 1,000 former security service agents under investigation or on trial for gross human rights violations committed during the 1973–90 military dictatorship. Cases draw on an ever-growing repository of official and unofficial information, since the Pinochet regime's crimes were extensively denounced and recorded both inside and outside the country. Recent trials, which reverse previous impunity, have drawn heavily on this wealth of existing evidence. They have also consulted the archive of Chile's first official truth commission. Immediately after the return to democracy, that commission gathered up, sifted, and validated as 'state truth' a portion of the panoply of competing official and social truths then in circulation. The recent trials have also produced revelations, narratives, artefacts and archives of their own. Investigative magistrates, operating in a written, inquisitorial criminal justice system, have overseen exhumation of remains, location and exegesis of documents, questioning of witnesses, interrogation of suspects, and the requesting of information and extradition across borders.

These inputs are entered into a single, compendious, judicial record. Existing truth(s) therefore become evidence, subject once more to challenge and doubt. For a verdict to be delivered, this body of evidence is scrutinized afresh by the judge, who adjudicates between competing truth claims. The judicial process becomes a black box, within which inputs are processed according to defined rules of evidence in order to produce a new iteration or form of truth: 'judicial truth'. This, once confirmed by higher courts, duly takes its place in the canon of available truths about atrocity. It becomes, in one sense, simply one more competing version of truth. Like other versions, it can be accepted, refuted, celebrated or simply ignored. Judicial truth, however, has a special nature that sets it apart. It requires the suspension of previous belief and disbelief, since it opens up the possibility that previous versions, texts and truths may be called into question. Even texts which already carry the state imprimatur, such as official truth commission reports, may be challenged by the defence or otherwise found to be lacking or inaccurate. Pre-existing social and official truths are incorporated into the pages of the case record only as hypotheses. Their status as accepted fact or superseded fiction will be newly determined only once new investigations are complete. Moreover, in revalidating or discarding existing information the judge does not, or does not only, rewrite history, or inscribe a new version. He or she also attributes guilt or innocence, thereby writing a new chapter in the state's understanding of its own past.

This article explores how existing and new sources of truth are called into question, deployed, and/or discarded in the process of domestic trials for past human rights violations or

- 1 The National Commission for Truth and Reconciliation, known as the Rettig Commission, dealt with deaths and disappearances. A second truth commission over a decade later repeated the process for survivors, but its archive was deliberately placed beyond judicial reach (see below).
- 2 This system was replaced in the mid-1990s by an adversarial, prosecutor-driven system, but under the terms of the reform pre-1990s crimes continue to be seen under the old system (see Collins 2010 for details).

other atrocity crimes. It examines tensions inherent when truth commission and other existing archives are used to produce new narratives—statements of proven fact contained in judicial rulings—that make special claims to truth. The article draws primarily on the setting of contemporary Chile. Chile's substantial, ongoing experience of such trials, the well-marked paper trail which repression and resistance left behind, and the existence of two separate truth commission archives—one judicially accessible, one currently not—all make Chile a suitable setting for understanding how domestic trials interact with domestic truth sources. The article draws on over a decade of close observation of case progress through the Human Rights Observatory (since 2014, the Transitional Justice Observatory) of Chile's Universidad Diego Portales. The Observatory has produced regular practice-based publications since 2009, and regularly interacts with the key case actors referred to throughout this article. Interviews were also carried out for this article, and interviews for a related project were drawn upon where specific permission for this was given (see Section 2. 5 below).

A range of questions can be asked about how recent Chilean human rights trials have constructed judicial truths, and whether and how their outcomes matter. How are pre-existing 'truths' accessed, selected and filtered to determine which will, and which will not, become fodder for judicial investigation and eventually be incorporated into the judicial archive? What specific weight, if any, is given to official truth commission proceedings or other forms of official truth? Can clandestine archives produced by repressive agencies during the authoritarian period be trusted, even supposing they can be located? What happens when findings in a new case threaten the status of a previously established official, even judicial, truth? How does the demonstrable premium that the system, and its operators, place on face to face revalidation and confirmation of previous testimony affect the potential for revictimization? Does the experience of being summoned and interrogated as a witness affect survivors' sense of being believed and affirmed by a state that has supposedly already administratively recognized the essential truth of their victimization?

We approach these questions firstly at a higher level of generality, discussing in Section 2 some of the relevant conceptual issues regarding the search for truth in transitional contexts and the role of criminal trials in this complex cartography. We next consider to what extent the experience of recent judicial investigations in Chile exemplifies or challenges these ideas. Discussing the meaning and impact of judicial truths once produced, we examine their interaction with other forms of socially validated or contested forms of truth. We identify factors influencing whether and how far verdicts, and judicial archives, acquire social meaning or weight. This includes considering how conservative forces square a traditional discourse demanding deference to the law with a desire to continue insisting on the innocence of state agents or the illegitimacy of judging past crimes.

2. The complex nature of transitional truths

The reconstruction of truth about past atrocities, by many and varied means, is an almost universal aspiration for transitional justice frameworks. 'Transitional truths', once produced, however, tend to be plural and complex. The fourfold truth classification provided by the final report of the South African Truth and Reconciliation Commission is both well-known and much criticized:³ its very existence nonetheless serves to illustrate that truth-seeking

3 The classification distinguished between: factual or forensic truth; personal or narrative truth; social truth; and healing or restorative truth (acknowledgement) (see Wilson 2001 and Posel 2002). mechanisms, like their end products, can encompass different kinds of truth claims. Gready (2011: 20–56) proposes the notion of 'truth as a genre', distinguishing between human rights reports, state inquiries, and official history as different reporting genres, before analysing the truth commission report as a hybrid genre. Even if we limit ourselves to only one of these possible 'truth types', selecting the superficially most objective of all—factual or forensic truth—we see that complexity persists. Even this resolutely pared down notion of truth—the one to which human rights reports and trials most often make reference—often entails the simultaneous and successive superimposition of versions and fragments of truth. This section of the article examines the place of judicial truths in the complex truth mosaic. We discuss, in turn, the inescapable contestation to which even the 'who did what to whom' approach of some human rights reporting is subject; the gradual construction of truth as a right in international law—and, specifically in the Inter-American system, as a right best satisfied through criminal investigation; the non-monolithic character even of judicial truth, given the multiplicity of legal orders, and, finally, how different institutional orders of truth interact with, challenge, and may supersede one another.

2.1 'Just the facts, ma'am'

At the risk of oversimplifying sophisticated disciplinary epistemologies, cultural studies approaches to memory generally highlight the subjective, multiple, and contingent truth(s) that may be told even by a single subject about a key event that he or she has lived or witnessed. Human rights activists and practitioners may tend, on the other hand, to emphasize a stripped down view of truth as 'facticity'. Here the truth of an act is to be arrived at principally through a forensic recitation of time, place, perpetrator and victim: 'who did what to whom', referred to by Landman and Carvalho (2009) as 'events-based data'. ⁴ This is the kind of truth claim that, for example, US anthropologist David Stoll appeared to demand when, in 1999, he took issue with the forensic veracity of various aspects of the biography of Nobel Peace Prize-winning indigenous Guatemalan activist Rigoberta Menchú. ⁵ Forensic truth aims here to cut a path through the thicket of multiple versions and interpretations, establishing a lowest common denominator, a core of incontrovertible facts which any version with pretensions to validity must be able to account for.

This construction of truth as best achieved by marshalling facts about things that indisputably happened in the physical and social world cannot, of course, completely eliminate contention. Thus the debate about body counts in the Colombian armed conflict, and particularly about numbers and attribution, is bitter and long-running (see, inter alia, Landman and Carvalho 2009: 53; Tate 2007). Such controversy is perhaps the logical consequence of privileging tangible physical evidence in the quest to identify things that 'really', incontrovertibly, happened. Thus, for example, the sophisticated statistical modelling used by the 2004 Peruvian truth commission to project total figures for deaths or

- 4 See also Dudai (2006) and Gready (2011: 32—4) for analysis of human rights reports as a special genre which seeks objectivity via established methodologies of data collection, corroboration techniques, and legal standards of proof.
- 5 Stoll claimed that many central events in Menchú's narration could not have happened the way she told them. Eventually Menchú conceded that the account mixed personal biography with 'collective testimony'. Her supporters insisted that this was simply a cultural mismatch between Western notions of precise truth-telling and a Latin American, and/or indigenous, tradition of testimonio as the blending of personal and community history (see Stoll 1999 and Arias 2001).

disappearances (Ball et al. 2003) did not entirely succeed in using science to dispel speculation: the lack of an individual roll-call of victims was seized on by critics, some ill-equipped to assess the validity of such techniques.

2.2 Truth as a right

In this way even events-based approaches to truth do not escape contestation over how narrative truth(s) can be established, by whom, and with what level of durability. This is equally true of truths constructed following established legal conventions, as Santos (1987: 282) suggests when he discusses law as a cartographic exercise, mapping social terrain and reality in ways that inescapably—albeit not arbitrarily—distort in order to represent. Legal or transitional justice approaches which seek to enforce a normative 'right to truth' rarely take such complexities on board. Instead, truth as a dimension of transitional justice is often discussed simply as an endpoint, around or towards which mechanisms and public policy can be constructed (Teitel 2000: 69-117; Chapman 2009). From the perspective of international human rights law, particularly as interpreted by the Inter-American system, the investigation, documentation and publication of truth surrounding serious past violations is increasingly treated as a state duty. The corresponding right to truth was initially somewhat narrowly conceived of as inhering in directly affected individuals, such as relatives of victims of forced disappearance or extrajudicial execution. The notion gradually expanded to cover other kinds of subject or violation (Méndez 2006; Bisset 2012: 13–19), and, eventually, collective rights holders. Thus the Inter-American system now considers that 'society as a whole' has the right to truth: '[e]very society has the inalienable right to know the truth about past events, as well as the motives and circumstances in which aberrant crimes came to be committed' (IACHR 2014: 35, para. 71, citing IACHR 1986: Chapter V; see also McGonigle 2014).

The Inter-American system is also particularly vocal in connecting truth and justice rights, with truth clearly conceived of as proceeding primarily from a judicial, rather than a truth commission, process.⁶ The right to truth, then, 'creates an obligation upon States to clarify and investigate the facts, prosecute and punish those responsible...and, depending on the circumstances... to guarantee access to the information available in State facilities and files' (IACHR 2014: 35, para. 70).

2.3 The judge as historian?

Nino (1996), Osiel (2009) and Brants and Klep (2013) assign a central role to criminal trials in the construction and reinforcement of public truth, or historical memory, about the past. The potential for international criminal trials, specifically, to contribute to this goal is stressed by Wilson (2011). The drawing of any straight line between the historical record and judicial findings of fact is, however, extremely problematic. The distinction between the historian's vocation and that of the judge is, indeed, almost always made in scholarly discussion of truth as the goal or endpoint of the trial (see, inter alia, Calamandrei 1939 and Ginzburg 1991). The distinction emphasizes that judges' efforts to reconstruct the facts of a case face numerous limitations. These range from time limits for decision-making to the existence of rules preventing certain information from being presented as evidence, or

6 See, inter alia, Barrios Altos v. Peru (Inter-American Court of Human Rights 2001). The need to connect truth and justice in this way is partly driven by the wording of the Inter-American Convention on Human Rights, a point whose full development escapes the scope of this article.

regulating decisions about its sufficiency. The judge is certainly required to establish the facts of a case, with every possible regard for truthfulness. Nonetheless, it is recognized that, in a rule of law state, there can be other legitimate social ends, including concern for the rights of the accused. These may justify rules of evidence which, for example, exclude illicitly obtained evidence, or set particularly high standards of proof if conviction is to result (Damaska 2003; Stein 2005; Laudan 2006). These norms may prevent otherwise widely or even universally acknowledged truths from being considered judicially proven (Hayner 2011; Jean 2009).

The particular concern to attach prestige to the judicial form of factual investigation, by requiring impartial and rigorous scrutiny, can therefore paradoxically mean that the probability of true, or complete, results is no greater than that which attaches to other social forms of determining truth or writing history. Juridical narrations may need to discount or ignore sources based on lower, or simply different, standards of proof. These can include truth commission reports. Thus the Ríos Montt genocide trial in Guatemala in 2013 attempted to prove in court what the UN-backed truth commission had previously asserted: that counterinsurgency tactics used by the state in the Guatemalan highlands in the 1980s amounted to attempted genocide against the Maya people. The case however reignited a denialist campaign, which still continues. It is hard to gauge with certainty whether this attempt to press home the trope of genocide through the medium of the trial paid off or backfired at the level of public opinion. The problem is compounded where, as in Chile, some truth commission archives are sealed and not susceptible to judicial interrogation (see below). Reconstructions of historical truth achieved by judicial fact-finding are often, in other words, no more likely to closely track reality than alternative versions the judicial narrative may seek to displace.

After all, the judicial process requires the reconstruction only of certain portions of a violent past: those relevant to its principal function of attributing criminal responsibility to named individuals for specified criminal acts. Questions of systematicity, intent and higher orders may require exploration of the 'bigger picture', but not all of the circumstances of state terror are judicially relevant for determining criminal responsibilities, as Arendt classically noted (1965: 61) (see also Koskenniemi 2002: 11–19). Root causes, or alleged historical predispositions, are effectively invisible to judicial investigations for which they are functionally irrelevant. Chapman (2009: 104–5) suggests that judicial narratives at best offer 'micro truths', the sum of which does not amount to a comprehensive picture, although Osiel (2009) and Wilson (2011) strongly disagree.⁷

2.4 The many faces of judicial truth

Moving from questions of completeness to questions of exclusivity, Santos (1987) maintains that legal orders are multiple, between and within local, international and domestic

Osiel (2009) mounts a spirited defence of the capacity of law to address past atrocity at least as comprehensively as do quasi-judicial or non-judicial mechanisms. He implicitly questions the separate need for mechanisms such as the truth commission, often supposed capable of telling a more complete story. Wilson (2011: 18), for his part, considers that '[c]ritical accounts may fail to acknowledge how the liberal rules of evidence of international criminal tribunals allow broader discussions of the past, and how novel legal concepts such as genocide create specifically legal imperatives to write history and include social and political context' and that '[e]ven if courts produce an unsatisfying history, they may provide a body of evidence that is invaluable for historians, . . . in that sense, their impact as producers of history lasts long after the trials are completed'.

levels. Since, moreover, we now live at the 'intersection of different legal orders' (ibid: 298), we see with particular clarity that no order can claim self-sufficiency. Orders overlap, whether across levels—the international and the regional, the regional and the domestic—or within them. For instance, criminal law and civil law can 'compete' within the domestic space, each regulating the same conduct differently. Accordingly the domestic judicial treatment of episodes constitutive of mass atrocity can vary significantly, even at a single point in time, according not only to how the criminal aspect is categorized—as an 'ordinary' crime, as a war crime or as a crime against humanity—but also as to whether criminal responsibilities or civil liability are at issue.

Individual normative orders are not, moreover, immutable. A new law or set of laws may supersede previous ones. Norm change may however run ahead of social beliefs about what is right or just: old laws, 'once revoked, nevertheless leave their imprint... legal revocation is not social revocation' (Santos 1987: 282). In the truth arena too, the dissonance produced when a new truth claim tries to supersede an old one can lead to a range of outcomes, including delay, grudging acceptance, or resistance. What is true of broader society may also be true of judges: what, for example, might be the judicial 'imprint' of transition-era amnesty laws subsequently revoked or interpretively narrowed? The notion of an imprint as the continuing valence of a previous state of affairs, or state of mind, throws new light on recent Chilean judicial behaviour. As it became increasingly unacceptable to continue applying blanket amnesty to crimes against humanity, judges who had favoured this practice sought a middle way, convicting but imposing notably lenient sentencing. The origins of this persistence of the 'old ways' do not lie only in individual judges' preference for impunity or olvido ('forgetting'). It can also proceed from a sense of professional loyalty, since delivering accountability may require judges to pronounce unfavourably on previous sins of omission or commission by their colleagues, or even their own former selves.⁸ This is a particular dilemma for judicial branches which, like the Chilean one, demonstrate high levels of continuity throughout and beyond an authoritarian regime.9

The diversity of judicial outcomes also proceeds from the fact that many actors other than judges play a part. Post-transitional judicial reform in Latin America's predominantly civil law systems has moved for the most part towards a greater role for public prosecutors. Nonetheless, in many countries the existence, framing and outcome of criminal cases for atrocity crimes still depends to a large extent on investigative magistrates and senior judges. Their political and ideological positioning with respect to new or outgoing authorities can therefore be key in determining whether judicial processes happen, and can be appropriated as social and political capital. Other actors also matter, however, in both judge-driven and public prosecutor-driven systems. The discovery of evidence, and decisions about who to pursue or bargain with, may be delegated to professionals including police officers and forensic scientists, each with their own protocols and paradigms for producing truth. In civil law systems, victims or their relatives often have powers to initiate criminal as well as civil

⁸ The documentary film The Judge and the General (2008) shows Pinochet case judge Juan Guzmán recognizing his own signature on dictatorship-era court documents rejecting habeas corpus writs for the disappeared.

⁹ See Hilbink (2007) on Chile, Pereira (2005) on Brazil and the Southern Cone, and Aguilar (2008) on post-Franco Spain.

complaints, taking part in any ensuing case as a de facto ancillary prosecutor. Such activism can shape an investigation towards favouring truth, justice, or other goals.¹⁰

2.5 The ever-changing cartography of transitional truth and justice

As we have seen, the place of truth in the justice process is not a set one. Nor is the relationship between truth and justice linear. Imperatives around truth and justice may complement, and mutually reinforce, or may contradict and openly challenge one another. Which can be considered to have prevailed depends on whose view is sought. Different constituencies are attentive to, and validate, distinct kinds of truth claim and justice outcome. Thus for example the 2013 Ríos Montt case was initially found legally proven, adding judicial weight to the truth commission's allegation of genocide. Once the verdict was overturned on technicalities, however, initially jubilant human rights activists were reduced to claiming moral victory or rebranding the case as a productive exercise of citizenship by victims. On the one hand, the case raises questions about the commitment by those bringing cases to accepting the outcome of the judicial process when it goes against them. On the other, it throws doubt on the legal and social status of 'administrative truths' produced by an official truth commission (see Bisset 2012).

In Chile, an early truth commission, the Rettig Commission, clearly showed previously asserted 'judicial truths' to be little more than legal underwriting of official propaganda, both false, and known to be false. The fact that much of the commission's work was based on the archives of long-standing civil society human rights organizations gave an official imprimatur to the testimonies these contained. However, since transition was pacted and former authoritarians remained powerful, perpetrators and their sympathizers were left to indulge in cognitive dissonance. 11 Subsequent actions by the executive reinforced the idea that case-by-case judicial truths were to be preferred as a way of changing hearts and minds. The first post-dictatorship president, Patricio Aylwin, abandoned ambitious official plans to disseminate the truth commission report. Case files were handed to the judicial branch, at a time when blanket amnesty still prevailed. Reinforcing the impression that the courts were seen as a truth, not a justice, instance, Aylwin did not act to modify or overturn the amnesty law. He instead asked judges to consider shifting its point of application. If applied only towards the end of the investigative process, amnesty would still avoid the attribution of guilt or its consequences, but might allow the production of truth. This attempt to harness the conservative credentials of the courts to the truth imperative proved unsuccessful. It however prefigured the more successful efforts of Argentine prosecutors a decade later to install the precedent of 'truth trials', criminal procedures with full investigation and verdict, but in which sentencing was pre-empted by the invocation of amnesty. By 2014 full justice consequences had been restored to the judicial process in both countries-in Argentina through revocation of amnesty, in Chile by interpretive narrowing of it. Interestingly, however, justice system actors interviewed in Chile in 2014–15 spontaneously

- 10 Cases in Chile have, for example, been steered by relatives to concentrate on locating the remains of the disappeared—a truth goal—sometimes at the 'price' of relative leniency for perpetrators, through sentencing benefits that reward cooperation. The opposite can and does obtain, with families holding out for custodial penalties despite the promise of truth.
- 11 The Supreme Court and the Armed Forces questioned the political neutrality of the commission's report and vigorously rejected its criticisms of their behaviour (see Collins 2013b; Collins et al. 2013).

characterized their role as producing 'truth'—not, specifically, judicial truth—or 'historical memory' rather than justice. ¹²

Since both Chile and Argentina had previously held truth commissions, reaching indepth factual conclusions about events now subject to truth production through trials, we might here circle back to Santos's insight about the increasing proliferation and intersection of different legal orders. Has the transitional justice field's enthusiasm for the generation of novel instances such as truth commissions led to the emergence of various 'truth orders'? How are these overlapping orders conjugated? In Santos's preferred metaphor, how are the different cartographic endeavours combined into a single, Mercator-like, projection? Geographers who want to represent the globe on a two-dimensional plane have to make choices and sacrifices. They must, for example, preserve relative country size at the cost of 'distorting' frontiers or vice versa. Similarly, choosing between truth or justice orders, or using one to arrive at the other, will determine what kind of overall verisimilitude is achieved.

The rest of this article explores how Chile's recent processes of justice for past mass atrocity have drawn on, tested and re-signified existing sources and artefacts in order to produce and disseminate new judicial and social truths about past crimes. It does so by examining, in turn, the relationship of the judicial process to existing truth claims—sifted and transformed into 'inputs' for judicial deliberations—its production of new inputs from reinterrogation of existing sources and the location and examination of new ones; the process of weighing and internally validating these multiple inputs according to the rules of evidence; and, finally, the dissemination of new 'truth claims' as a result of the criminal justice process. While the next section specifically addresses the Chilean experience, much of it has parallels in other Latin American countries' recent accountability trajectories, particularly, though not exclusively, where a civil law system still utilizes written criminal procedure (see DPLF 2013 for an overview).

3. The construction of judicial truth in human rights trials: experiences from Chile

3.1 The selection and incorporation of existing truth inputs

Judicial investigations into past violations must begin by accessing and assessing existing inputs, pruning and reshaping them until they are fit to be fed into the black box of judicial deliberation. In the particular case of Chile, although military records are almost never forthcoming, there is if anything an excess rather than a dearth of contemporaneous material. The dictatorship's penchant for legal process and bureaucracy, combined with the fact that its pliant court system was never shut down, meant that state violations left a paper trail. This often included official documents, particularly previous judicial files, from

- Author interviews with a serving Supreme Court criminal bench judge; a retired human rights case magistrate; six specialized human rights brigade detectives; eight state forensic scientists; and five state lawyers representing victims' relatives in human rights cases (Santiago, October and December 2014 and April and August 2015). The related project—'Forensic, Policing and Justice Aspects of the Search for the Disappeared'—studies the role of ancillary justice operators.
- 13 While civil claim-making is a growing phenomenon, criminal justice proceedings are the majority, and will be our main focus for reasons of clarity and space.

military or regular courts. Although few do more than go through the motions of investigation, files serve to support 'facticity' in the sense of acknowledging, at least, the existence of an incident.

The very existence of these contemporaneous judicial records owes much to the actions of organized civil society acting through the Vicaría de la Solidaridad. Formed under the protection of the Catholic Church, the Vicaría quickly became Chile's primary dictatorship-era organization for the defence and protection of human rights. The search for an apolitical idiom for its work led it to adopt a twin-pronged strategy of legal action in domestic courts combined with the accumulation of meticulous records for international denunciation (see Aranda 2004; Lowden 1996; Ensalaco 2000). The Vicaría's archive, preserved after it closed in 1992, has become an obligatory point of reference for presentday judges investigating a dictatorship-era case. A wealth of other potential evidence, including artefacts, survivor accounts, documentary proof and defiant unofficial press reporting, was amassed in a semi-clandestine fashion by regime opponents and exiles. Some is gradually being collected, through donation, by the national Museum for Memory and Human Rights, inaugurated in 2010. Many judges now include this institution among the official and unofficial bodies to which they circulate requests for data on taking up a new case. Judges also consult the civil registry, state forensic service (coroner's office), and border police, to check that a putative victim of death or disappearance has had no subsequent interactions with officialdom.

Investigative magistrates also attempt to consult the records of Chile's official truthtelling instances. Here, a major discrepancy persists between the mandates of two official truth commissions, separated by over a decade. Violations leading to death or disappearance were researched in some depth by Chile's first truth commission, the 1991 Rettig Commission (Comisión Nacional de Verdad y Reconciliación) (for report see CNVR 1993). Copies of Rettig files were made available to the courts, and were supplemented by a follow-up body, the Corporación Nacional de Reparación y Reconciliación, CNRR (1991-1996). From 1996, this instance became the Human Rights Programme, the Programa, offering social and legal assistance to victims' relatives. Rettig Commission records are therefore available to judges via the Programa, which also uses them to open and act in legal cases. From early 2000, the government came under growing pressure from survivors to reopen truth, justice and reparations debates following the 1998 arrest in the UK of former dictator Augusto Pinochet (see Roht-Arriaza 2005). The results included a second official truth commission, Comisión Nacional sobre Prisión Política y Tortura (CNPPT), the Valech Commission, which documented almost 40,000 cases of survived torture and political imprisonment, in two iterations (2004 and 2011) (for initial report see CNPPT 2004). 14 Controversially, however, all proceedings of this second commission, far from being handed to the courts, were made subject to a draconian 50-year secrecy law, applicable to official bodies and the general public alike, supposedly to protect survivors' privacy. Such terms, imposed at a time when the courts were newly active over justice and regional instances had begun, as we have seen, to emphasize the interrelated nature of truth and justice rights, seem almost wilfully contrary. They have been challenged by survivors and by the country's Supreme Court on grounds including principles of access to information. A partial exception was established in 2014, allowing judicial access on a case by case basis to

14 The 2011 iteration only produced names and statistics, temporarily published on a now-defunct government website. some files from the second iteration (only) (see Observatorio 2014). The initial anomaly was not, however, resolved: administratively produced truths about deaths and disappearance are available to the judiciary, but most administratively produced truths about torture and political imprisonment are not. Cases for the latter must therefore rely on survivor protagonism and other, non-official, sources. Partly as a result, torture cases are few and far between.¹⁵

3.2 The production of new inputs through the investigative process

Cases, once begun, do not just sift existing data. The investigative magistrate can order detective police, forensic technicians and actuaries to locate witnesses, take sworn testimony, reconstruct scenes, scientifically analyse original documentation, exhume remains, and undertake medical and psychological tests on victims, witnesses or the accused. The legal powers of the investigative magistrate in the old Chilean system are extensive. Results are accordingly visibly dependent on personal attitudes and aptitude as much as on objective availability of witnesses and evidence. 16 Nonetheless, 'biological impunity' created by the passage of time provides one insuperable limitation. When witnesses or co-accused have subsequently died, the fact that previous sworn statements remain a valid part of the accumulated case file is key. This is one of many senses in which the now-superseded investigative magistrate system under which dictatorship-era cases are still seen in Chile is particularly amenable to the idea of truth creation as a 'long haul'. The admissibility of sworn statements from witnesses not available for cross-examination would certainly be impugned by defence lawyers in an oral, adversarial proceeding. The veracity of written statements can be contested under the written system also, but this system more obviously enshrines a notion of the accumulation, rather than one-off construction, of a set of truths or facts that may stretch back in time.17

Other disadvantages of the passage of time, such as a presumed deterioration in the accuracy of personal recall, can be partially overcome through technology. Some kinds of evidence thereby become more, rather than less, available over time. This introduces yet another potential order or paradigm of truth to be set alongside existing legal and administrative orders: scientific truth. Improved DNA testing of remains, and new techniques allowing 'second-hand' analysis of intermediate artefacts (such as contemporaneous pathologists' reports) can produce new truths and cast doubt on existing ones. ¹⁸ Judges' capacity to fully appreciate new techniques is not, however, a given. Scientific evidence can find

- 15 Estimates peak at a few dozen, compared to over 1,000 cases for death and disappearance ongoing at December 2014 (email communication from the state Human Rights Programme, Programa).
- 16 E.g. in the case of Rioseco and Cotal (4 August 2015), a Supreme Court criminal bench with a particularly unfavourable temporary configuration produced a verdict rejecting the applicability of international law. The verdict was anomalous in the sense of being out of step with immediately preceding and subsequent resolutions in cases over similar issues.
- 17 The case of Alfonso Chanfreau, finally resolved on 30 April 2015, stretched over 40 years and was seen in a range of civilian and military court settings. In the final hearings, held in January 2015, both prosecution and defence based key arguments on the written statement of a notorious former perpetrator who had died some years earlier.
- 18 The Allende, Frei Montalva, and Pellegrin and Magni cases all utilized expert analysis of prior autopsy reports. The case of Osvaldo Marambio, resolved on 18 May 2015, was one of various cases in which damages were paid to relatives for mistaken identifications produced in the 1990s by the use of now-superseded techniques.

itself both over- and under-valued, depending on levels of technical literacy.¹⁹ This means we must consider not only how evidence is preserved or produced, but also how it is assessed.

3.3 Weighing and valuation of trial inputs—the production of judicial truth

This section examines, in turn, how judges set about determining facts according to the rules of procedure; the ample margin of personal and professional discretion which remains; expressed views about truth commission credibility, and the question of whether due process in fact requires judges to remain agnostic about administratively and socially established truths.

Once a judge closes the investigative phase of a case, all evidence, narratives and hypotheses incorporated into the official record must be tested and weighed in order to determine pertinent facts and the legal (criminal and/or civil) responsibility of the accused. In the inquisitorial procedure used for past atrocity cases, the same judge who preferred charges now rules on guilt, innocence and the level of involvement of each defendant. Although higher courts can subsequently modify matters of fact (Appeals Courts only) or the correct application of law (Appeals Courts and/or the Supreme Court), once a case has passed through these higher instances a particular version of events acquires legal force.

For this part of the process, the judge's discretion is in theory tightly regulated. A rulebound process must be followed if mere evidence is to be validly transformed into 'complete proof'. In practice, the system is less rigid than it may at first seem. The components to which the rules of evidence apply themselves allow room for judicial discretion, such as deciding a priori whether a witness is credible or reliable. The rules are also internally flexible when evidence is contradictory, but such flexibility can do a disservice to scientific notions of truth. For example, cases relating to past violations may require new forensic reports. The judicial status of new reports is already delicate when the results challenge previous official versions, and where new reports themselves disagree, the rules leave the judge free to determine their value for him or herself. In a recent emblematic case, 20 new national forensic service reports supported previous truth commission characterization of two deaths as homicides. A police forensic report, however, threw doubt on these findings. The defence, predictably, made much of the contradiction. The very vocabulary of science was turned against itself. Careful, precise language such as 'the evidence supports', or expression of probabilities as 99. 9 per cent rather than 100 per cent, were successfully argued by the defence to constitute the presence of doubt. Forensic scientists interviewed by one of the present authors questioned whether traditionally-trained judges can accurately interpret contending claims about scientific evidence, increasingly relied upon in cases about longago events (group interview, Santiago April 2015).

Another source of flexibility that can seem excessively discretionary allows the judge to absolve the accused, even where evidence meets the thresholds required by law, if he or she has not formed a conviction that events occurred exactly as that evidence suggests (Chilean Criminal Procedure Code Article 456, subsection 2). The point bears repeating: even where

- 19 Anecdotally, forensic investigators in three separate jurisdictions have raised with one of the present authors what each referred to as the 'CSI effect': the tendency of lay audiences informed by TV drama to expect instantaneous, irrefutable case solutions and to doubt the entire forensic enterprise if these are not forthcoming.
- 20 Case Cecilia Magni and Raúl Pellegrin, Supreme Court verdict No. 6373-13, 4 August 2014.

proof exists which meets the objective standard of evidence set down in law, judges may absolve if they have not arrived subjectively at a firm belief in the guilt of the accused. Operating in this relatively permissive environment, it is easy to see how the handful of investigative magistrates who hand down initial verdicts quickly acquire personal reputations as generally inclined to condemn or to absolve. The issue is not one of whether such judges wilfully ignore or misrepresent evidence, but of how likely they are to interpret it according to their pre-existing, perhaps unconscious, preconceptions about an inescapably divisive period of recent history that, given their age profile, they are highly likely to have lived through.

A particular emphasis on direct testimony as a source of proof is clearly visible. One magistrate reported placing more faith in testimony given to him in person in the present day than in written sworn statements taken from the same person closer to the time of the event (interview, Santiago 8 January 2015).²¹ This particular judge was convinced that 'I can tell whether people are lying by looking them in the eye'. This striking faith in the superior ability of the judge to discern truth from falsehood may underlie a judicial habit of which many witnesses complain: citing the same person to give testimony about the same event on numerous occasions. Detectives report attempting to dissuade new judges taking over existing cases from issuing immediate, blanket, orders to re-interview everyone already questioned.

Re-interviewing often consists of little more than verbal corroboration of sworn statements already on file. *Careo*, a practice even more disliked by witnesses, involves the face to face confrontation, in the presence of the judge, of two or more witnesses or suspects whose stories contradict one another. The gladiatorial air of combat which surrounds such episodes is a recipe for revictimization, but a very uncertain method of divining truth.

Witnesses critical of both practices—repeated citation and *careo*—point to the prior existence of what they consider to be state-validated repositories of the same basic facts: the Rettig report, and/or other judicial case files. Professional jealousies can, however, impede the sharing of case files. Rettig meanwhile seems to be regarded by judges as little more than a useful starting point. The public version of the report can, they point out, be sketchy in detail and has not been updated or corrected. Minor errors discovered after 2009 are often alluded to quite vaguely by judicial operators as reasons not to place too much faith in the report (interview material, Santiago April 2014, on file with Collins). This is so even though what judges see if they request sight of Rettig data is not the published summary but a copy of all current material held about the named person or incident, complemented by subsequent CNRR and Programa activities. In regard to Valech, as we

- 21 Identity reserved on request. This judge is amongst the most prolific in resolving human rights cases.
- 22 One example came at a 2013 public event where detectives explained the utility of case reconstructions. They were interrupted by a renowned human rights defender present in the audience. She upbraided the officers, pointing out that the incident had been documented by her organization and the truth commission: 'It's common knowledge... why are you wasting everybody's time proving what we already know?' (Intervention at the meeting 'El Trabajo Criminalístico de la Brigada DDHH de la PDI', Instituto de Estudios Judiciales, Santiago 10 January 2013). The distinction between common knowledge and admissible legal evidence clearly cut no ice.

have seen, survivor testimony is largely still off-limits even to judges.²³ The relatively little weight given by judges to administrative truth-telling instances seems to be less about accessibility and more about credibility. Speaking personally, one senior judge was unambiguous: '[T]hese administrative bodies have a political tinge. I think people here have more faith in judicial truth. All sides, all parties, have to pay heed to judicial truth in the end' (Collins interview, Santiago, 30 December 2014). Such belief in the superiority of judicial truth over 'truth commission truth' cannot but affect the seriousness with which judges treat it as a source.

It may be quite correct for 'judicial truths' to require a higher standard of proof than their administrative equivalents, particularly when individual guilt is to be attributed for specific, indisputably criminal, acts. Transitional justice contexts, in which the spectre of the accusation of victor's justice is never far away, may also need to be punctilious in avoiding both the appearance and the reality of exemplary punishment in the person of the scapegoat (Osiel 2009: 147; Mihai 2010, 2011). Due process guarantees undeniably limit the potential of trials to simply echo previously established administrative truths, or socially accepted versions, about who perpetrators are and what they are guilty of. Indeed, the suspension of belief sometimes required can undermine social repudiation of perpetrators and weaken the foundations of vetting. In one example, a tacit understanding that army officers associated with past violations would be passed over for promotion and/or encouraged to retire was generally adhered to between 2006 and 2010. However, the armed forces later re-hired the same individuals as consultants, a practice they defended by pointing out that none had yet been convicted (Collins 2013a). Allegations levelled in 2013 by a survivor against former army commander-in-chief Juan Emilio Cheyre were similarly brushed aside, with Cheyre claiming that the existence of a completed court case, in which he had been interviewed but never charged, placed him 'beyond any legal or moral reproach' (Observatorio 2013). Over-reliance on justice proceedings as the 'only' possible producer of socially actionable truth may therefore weaken the value of other forms of collective repudiation of atrocity crimes.

3.4 The impact of trials: the judicial file as meta-archive

Trial verdicts can challenge or reinforce the existing historical record. In the Pellegrin and Magni case discussed above, the criminal bench of the Supreme Court was forced to recognize that no error of legal doctrine existed in the lower court verdicts which had overruled state forensic opinion. It however took the unusual step of dissenting by firmly declaring the deaths to be homicides. The material legal outcome was not affected, since the absolutions already conceded were left to stand. The only plausible motive was therefore a desire to reinstate to the historical record that, as established by Rettig, the victims had been killed by state agents. This action blurred justice and truth-telling functions. Such judicial encroachment should remind us that the Chilean state has already provided two instances of administrative truth-telling. Only the question of individual perpetration was really left

The legal custodianship of both Rettig and Valech repositories—the former including CNRR additions—was awarded in 2009 to the newly created National Human Rights Institute. The files are however physically conserved in a special vault beneath the national Museum of Memory and Human Rights. Magistrates wanting access to Rettig or CNRR files usually deal instead with the Programa, which retains full electronic copies. Valech II files were partially opened to magistrates—but not the public—in April 2014.

open for the courts to determine. This space is, however, narrower than the wholesale reexamination that the judicial branch nonetheless appears to insist is its prerogative. The senior judge quoted above again: 'If I have to modify what Rettig or Valech says ... then so be it' (interview, Santiago, 30 December 2014).

If cases are to have this performative aspect, reinforcing, overwriting, or competing with existing written records, the nature and status of case outcomes is important. Most publicity has therefore to date concentrated on final verdicts. The written nature of the process in Chile makes it difficult to speak of these as 'public legal theatre' in the senses that Osiel (1997) or Hol (2013) discuss. The main partial exception in Chile is 'alegato' hearings, in theory open to the public. Alegatos are a carefully scripted, formalistic, oral rehearsal of technical legal arguments before an apparently impassive bench. Judges do not generally ask questions or otherwise engage with the parties' designated lawyers around their short, set-piece speeches, and parties, even if present, may not speak. Probatory elements are not, strictly speaking, addressed and lawyers must not introduce anything not already in the case file. Unsurprisingly, these instances have not received widespread public attention, with the exception of the first human rights prosecution to be successfully concluded after transition. Alegatos in that case (the Letelier case) were televised, and former secret police chief Manuel Contreras was found guilty and jailed.

Contreras (now deceased) was also at the heart of a later key televised moment, which came to define the new period of active justice. Summoned in 2005 to be notified of a new custodial sentence, Contreras defied judge Alejandro Solís and coolly began to give a self-justificatory TV interview from home. Solís ordered Contreras handcuffed and brought to court, by which time a considerable crowd had gathered. Many present report that the sight of the formerly all-powerful Contreras being hauled ignominiously into court, amid a barrage of catcalls, offered the glimmerings of belief that a new justice era had really dawned. Similarly strong, though not always positive, reactions have come from other relatives and survivors when cases end and an almost lifelong quest is finally concluded. Feelings are particularly mixed when sentences are low, even non-custodial: while justice system operators are inclined to value guilty verdicts per se, for some relatives, at least, proportionate sentencing is clearly also required to make justice meaningful.

Another visible outcome of judicial cases relates, again, to the particularities of written Chilean procedure. Cases, like truth commission investigations, produce voluminous written records. While investigations are ongoing, cases are still work in progress. They become files of a living history which is still being written, and much of their content therefore remains secret. The culmination of a case, however, writes the last page in the judicial file. While verdicts are univocal, the file preserves signs of internal dissent along the way. Thus, paradoxically, the file conserves all of the plurality that must be shed to arrive at the final decision. It is a cumulative, capacious repository from which no artefact is ever removed. Instead, each component is implicitly or explicitly judicially certified or rebutted. Certain putative truth claims are declared reliable, while others are discounted. In the process, the case file becomes a new 'meta archive', later open to new valuations.

Although the final verdict and full case file are both public documents, the conditions of their dissemination are quite different. Verdicts are notified to the parties' lawyers and the accused, and channelled to the public through various media. Summaries of verdicts, and links to their full text versions, are published on the dedicated web page of the judicial branch. Verdicts can also be accessed through the page at any time by entering the unique six- or eight-digit case code assigned to every case. Full case files, on the other hand, consist

of foot-high stacks of well-thumbed papers, sewn laboriously together into archaic 'books' that can run to hundreds or even thousands of pages. Physically transported to a central judicial archive, these can be consulted on special request. A project to digitize files in completed human rights cases is currently ongoing under the leadership of judge Sergio Muñoz.

Physical access is not, however, synonymous with understanding. The technicalities and jargon contained in voluminous full case files are as likely to confuse as to illuminate, and the rule that even discounted or superseded items are kept in the file—their status indicated only by a note or ruling which may appear later—means that pieces of the whole, if seized on in isolation, may confuse or mislead. Some form of mutual interpretation needs to be performed if informed dialogue between society and the judicial process is to ensue.²⁴ Their content may notwithstanding attract the attention of historians, journalists and other researchers in years to come. Each file can be considered as a meta-archive, registering, mapping and navigating the terrain of state terror, and picking over its entrails. This kind of archive also maps its own evolutions and involutions, signposting at what point judges and other justice system actors confronted, or chose not to confront, the violent past. This has been the fate of other kinds of register of justice processes, including those related to crimes of the Second World War. Records of trials from Germany, Italy and France, inter alia, have become important historiographical sources in their own right (see e.g. Wieviorka 1998; Maier 2000; Resta and Zeno-Zencovich 2013). In this sense judicial files can act like any other archive—potentially constituting, in the words of Dyzenhaus (1998: 179), 'an invitation to do better' in the long-standing challenge of retelling past trauma.

The access that various categories of social actor want and have to judicial truth(s), and the value to each of such truth, may vary. While lawyers, the accused, plaintiffs and some human rights organizations can be expected to study entire files and make informed judgements, the general public usually does not have the same capacity or interest. For them, the portion dealing with culpability and sentencing is key. Such verdicts, fleeting as their impact may be, are more recent to the public news agenda than are truth commission accounts, giving them perhaps greater immediacy. The symbolic—and quite real—weight attached to these judicial outcomes even by those who impugn the process was shown in 2006 when crowds of Pinochet's supporters chanted jubilantly, outside the hospital where his death had recently been declared, not 'he was innocent' but 'he was never sentenced' ('y no lo condenaron') (see *The Judge and the General* 2008; Joignant 2013).

Conclusions

We have seen that transitional truths are complex, and that different orders interact in their construction. Specifically, our focus has been on the truth-seeking objectives attributed to criminal justice procedures in transitional contexts. At a theoretical level, it must be noted that the relationship between judicial procedures and historic truth is far from linear.

24 Attempts have been made. A 2013 judicial branch documentary series featured the work of a human rights case magistrate, while writer Diamela Eltit published in 2005 a literary work based entirely on testimony extracts from a well known court case. Judge Sergio Muñoz expressed the view that 'someone should turn these cases into novels' (interview, January 2015). A serialized TV format has already been applied to some of the original incidents behind cases: docudramas entitled 'The Cardinal's Archives', based on Vicaría files, were accompanied by a student-run journalistic website offering original case evidence alongside real-life interviews and images.

The limitations set by the special rules of evidence, more stringent standards of proof, and due process guarantees pertaining to the judicial process can result in previously socially or officially recognized truths being considered not proven in the judicial realm. Paradoxically, this very conservative nature is part of the reason why judicial verdicts attract such particular weight in the first place, given their capacity for ideally impartial scrutiny of pre-existing assertions of all types. Chile's experience of late criminal prosecutions offers a good example of these complex interactions between truth and justice orders. The suspension of previous beliefs, and presumption of innocence, that are part and parcel of judicial procedures can generate disquiet among relatives, victims and others who have good reason to know, or believe they know, the essential truth of what is now being newly judged. The need to reiterate previous testimony, and to set aside or heavily discount previous civil society or truth commission findings and versions, can cause frustration or even offence. At the same time, final verdicts are valued—at least, as long as some guilty verdicts are returned by these same actors. Judgments in human rights cases imply attribution of responsibility to individuals and—arguably—to the state whose agents they were. The effect of this may be particularly strong among sceptical publics still sympathetic with, or affiliated to, perpetrating regimes when the pronouncement comes from the judicial branch. The legal indisputability of a juridically-established fact generally carries a unique political or social weight.

Written systems such as the Chilean one also produce the case file, an output as significant as the verdict. More than a simple register of the process, this meta-archive of documents, testimony, and fragments of previous archives acquires a life of its own. In dialogue with truth commission records and similar, it becomes a potentially significant source in its own right of future transformation and historicizing of the recent past. More perhaps needs to be discovered about exactly how the modes of transmission, and reception, of such meta-archives affect their impact on societal opinion and institutional practice, exposing the transitory nature even of established archival truths.

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