

Zimbra:**leticiabarrera@conicet.gov.ar**

Re: Social & Legal Studies - Decision on Manuscript ID SLS-19-0064.R1

De : Vanessa Munro <V.Munro@warwick.ac.uk>

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Asunto : Re: Social & Legal Studies - Decision on Manuscript ID SLS-19-0064.R1 1 ficheros adjuntos**Para :** Leticia Barrera Lopez <leticiabarrera@conicet.gov.ar>**CC :** Carl Sytchin <Carl.Sytchin@sas.ac.uk>, noa vaisman <noa.vaisman@cas.au.dk>

17-Dec-2019

Dear Drs. Barrera Lopez & Vaisman,

It is a pleasure to write, on behalf of the editorial board of Social & Legal Studies, to accept your co-authored manuscript entitled "On Judgment: Managing Emotions in Trials of Crimes Against Humanity in Argentina" in its current form for publication. Both reviewers have specifically asked me to pass on their thanks to you both for the careful consideration of their previous comments. They have concluded - and I hope that you agree - that the piece is improved as a result of those changes, and have both recommended the piece for publication as it now stands.

Thank you for your fine contribution. On behalf of the Editors of Social & Legal Studies, we look forward to your continued contributions to the Journal. This will now pass to the editorial team at SAGE who will be in touch.

Yours sincerely,
Prof. Vanessa Munro
Coordinating Editor, Social & Legal Studies

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On Judgment: Managing Emotions in Trials of Crimes Against Humanity in Argentina

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journals.sagepub.com/home/sls**Noa Vaisman** *Aarhus University, Denmark***Leticia Barrera***CONICET-IDAES, UNSAM, Argentina*

Abstract

For over a decade, judicial accountability of mass human rights violations committed during the last civil-military dictatorship in Argentina (1976–1983) has been carried out in federal courts by regular judges, following the rules of the National Code of Criminal Procedure. Research on these trials has focused mainly on the victims and the accused. This article opens a different path by exploring the affective experiences of the judges presiding over and leading the trials.

Based on interviews with 18 federal court judges and some participant observation, in this article we present a descriptive exploration of the judges' experiences and sense-making processes. We examine the complex interaction between the professional requirement to separate emotions from judgment and the emotional toll that these trials produce in the personal and professional lives of the judges. We end with short reflections on these crimes against humanity trials in the post-Transitional Justice context.

Keywords

Argentina, crimes against humanity, emotions, judgment, Transitional Justice

Corresponding Authors:

Noa Vaisman, Department of Anthropology, Aarhus University, Moesgaard Allé 20, Højbjerg, Denmark.

Email: noa.vaisman@cas.au.dk

Leticia Barrera, Instituto de Altos Estudios Sociales, Universidad Nacional de San Martín, Edificio de Ciencias Sociales - Campus Miguelete, Av. 25 de Mayo 1021, San Martín, Pcia de Buenos Aires (1650), Argentina.

Email: leticiabarrera@conicet.gov.ar

In Argentina, the victims' struggle for recognition, truth, and accountability began during the years of dictatorial rule (1976–1983) and has seen ebbs and flows. In the early 2000s, it led to the reopening of judicial proceedings against perpetrators of mass human rights (HR) violations. Scholarly interest in these crimes against humanity trials has mainly focused on specific trials (Guthmann, 2015; Lessa, 2019; Natarajan, 2013), on the victims' perspective (Layús, 2015, 2018) or on the legal outcomes of these monumental events (Anitua et al., 2014; Bouvier et al., 2014; Lorenzetti and Kraut, 2011; for a distinctly broader exploration see Bell and Di Paolantonio, 2018). Our article, somewhat differently, explores the emotional impact of these trials on the judges who have taken part in one or more trials in recent years.

Our research examines the following questions: how do judges, who sit through hundreds of very difficult testimonies that recount forced disappearances, rapes, torture, and other horrific violations of basic rights and dignity, who conduct 'ocular visits' in the clandestine centers (or, more often than not, in their ruins), and who must face the horrifying violence and its marks on a daily basis – handle the detailed information and its inevitable emotional toll? What do they do with the emotional turmoil that such information can generate? And how do they incorporate or resist its incorporation in their management of the court and the writing of sentences? Specifically, we are interested in learning about the subtle and repeatedly negotiated relations between legal thinking and ideas of detachment and disinterest in judicial decision-making contexts, on the one hand, and emotions and their expressions or recognition, on the other hand. In what follows, we offer a *descriptive exploration* of various trial courts judges' experiences of presiding over trials of crimes against humanity seeking to convey the complexity of judicial adjudication in the prosecution of these crimes. We elaborate on the judges' accounts of different techniques utilized and the paths chosen to engage with, or at the very least, to mitigate the emotional consequences of these oral processes. We reflect on their emotional engagements by situating their interventions in a larger context, locally and regionally. We also suggest how this examination might shed light on questions of emotions, objectivity, and judgment in the context of judicial accountability measures in the long aftermath of an authoritarian rule. In this vein, our analysis of judges' emotional worlds brings into dialogue contributions from different fields such as Law and Emotions, Transitional Justice (TJ), and the large and growing literature on TJ in Argentina.

Before turning to the protagonists and their words, in the next two sections we provide an overview of the trials and their historical context and a short note on our methodological choices. The next three sections each deal with the relationship between emotions and judgment from a slightly different angle: the first, explores the relationship between objectivity, law, and judgment in socio-legal research and in our interviewees' world-views; the second, examines the subjective emotional toll of the trials; and the third, depicts the management of emotions in the courts. Thus, our exploration moves through scales from the subjective to the social context of the court. Lastly, we turn to the contextual setting to explore the judges' view of the trials in the local and international framework of judicial accountability in the post-TJ era (Collins, 2010). Here we detail the judges' views of the stakes of the trials as a way to make sense of some of their emotional responses as well as insistence on objectivity and emotional impartiality. We

conclude with short reflections on emotions and judgment in light of the coexistence of oral and written proceedings in federal criminal trials in Argentina.

Historical Context

The brutality of the HR violations carried out during the last civil-military dictatorship (1976–1983) in Argentina was a turning point in this country's political and legal history (Crenzel, 2008). It was not only the significance of the crimes perpetrated by the state – including forced disappearance, assassination, torture, and child appropriation, to name the most devastating ones – but the long-term effects they had on Argentina's legal system and judicial practices. Within the first two decades, these effects included the trial and condemnation, in 1985, of the juntas' leaders by a federal appellate court in Buenos Aires City; the passing of amnesty laws that foreclosed criminal prosecution of violators; and a set of presidential decrees issued in 1989 and 1990 that pardoned the heads of the juntas and other high-ranking military officials, and blocked further prosecution of other officials who were still being tried for HR violations.¹

Following these tremendous setbacks in judicial accountability, the struggle to bring the perpetrators to justice continued and very slowly grew and gained force. HR activists and survivors worked hard using every available official mechanism while also bringing the demand for justice into public awareness, thus generating the conditions for change. At the same time, HR litigation outside of Argentina (Sikkink, 2011) including requests for extradition and interventions under the doctrine of universal jurisdiction over HR crimes generated extensive pressure on the Argentine courts (Balardini, 2016; Layús, 2018: 106).² In 2001, Judge Cavallo, a first instance federal court judge, used international HR law in the *Simón* case (also known as the 'Poblete/Hlaczik' case) to rule that states must prosecute serious HR crimes. When in June 2005, the case reached the Argentine Supreme Court, an almost new composition of the Court delivered a landmark opinion holding that the systematic and mass violations of HR carried out during the dictatorship were 'crimes against humanity' and thus, were imprescriptible and could be prosecuted. In addition, in July 2007 in the *Mazzeo* case, this Court held that presidential pardons granted to a group of high-ranking military officials were unconstitutional, and followed this precedent on similar cases that challenged the pardon of the military chiefs.³ The result of the decisions on *Simón* and *Mazzeo* allowed HR trials that had been 'frozen' due to the passing of the impunity laws to resume. They also opened up the way for extensive prosecution of many other HR crimes that these earlier statutes and decrees had banned. Consequently, in recent years, many trials have been conducted throughout the country where perpetrators of HR crimes have been held accountable before the courts.⁴

However, legal prosecution has not always been a smooth process. For some years, there was no organizational structure within the state – specifically, the judicial branch – that coordinated these trials or their distribution among the courts. This meant that individuals had their cases discussed but there was no clear connection made between the individual case and the repressive apparatus and its mode of functioning. In 2007, a new unit within the Public Prosecutor's Office was established to develop a national legal strategy and coordinate the trials nationwide (Balardini, 2016: 63). This was

followed, in 2009, by the creation of an interbranch commission that included the legislature, the Public Prosecutor's Office, and the Supreme Court.⁵ And in 2010 Congress declared the trials “state policy” that should and would persist independent of political alternations’ (Balardini, 2016: 64). With these symbolic statements and concrete structures in place, the trials have become a fixture in the Argentine social imaginary. In fact, when the Supreme Court in its newest composition ruled in the *Muiña* case (May 3, 2017), effectively cutting down prison time for convicted felons including HR violators (applying the so-called 2×1 law),⁶ the public response against the decision was tremendous. Within hours, social media was in frenzy and critique of the ruling was heard in both the legal and the political realms. The social backlash was surprising to some, but the massive demonstrations that took over the streets in Argentina and in other parts of the world only a week later made the position of the populace clear: HR violators should not go free and the trials are here to stay. That same week Congress passed a law that restricted the application of the 2×1 law to cases that are not classified as crimes against humanity (Law 27.362), and in December 2018 in the *Batalla* case the Court ruled that the 2×1 law is not applicable to cases of crimes against humanity.⁷

At the same time, since the mid-1990s and more so since the mid-2000s, other voices have been heard in the public sphere. These include both official statements by Mauricio Macri's administration (2015-2019) and demonstrations and public presence of pro-military groups that include retired officers and wives of convicted officers or those who are awaiting trial (Salvi, 2012). The tone of these comments and public activities is critical, questioning either the legal premise of the trials or arguing that the trials should be broadened to include crimes perpetrated by members of the armed guerilla movements that functioned mostly before or in the early years of the dictatorial rule (Salvi, 2015). Recent research into the experience of both victims and perpetrators in the trials has also provided some insight into the conflicting and irreconcilable worldviews and understanding of history that these protagonists hold (Kaiser, 2015; Natarajan, 2018; Robben, 2018; Stockwell, 2014 and more broadly Hilb et al., 2014; van Roekel, 2014, 2016). These contradicting interpretations of history and the present are the backdrop to some of the statements and narratives we heard from the judges during the interviews we held with them, as will become clear below.

A Note on Methods

This article is based on interviews and some participant observation in trials and other public events over the last few years (2015–2018). In total, we interviewed 18 judges that have sat in at least one and many times a number of trials of crimes against humanity in recent years. The interviews – almost all conducted in the judges' offices – lasted 1–3 hours and were all recorded and transcribed. All names have been changed to protect the anonymity of our interlocutors. In most cases, interviews were carried out by both of us in an open-ended manner allowing the interview to develop in different directions and in line with the narratives and issues discussed. For example, in some cases where judges were forthcoming and told us about the effects of the trials on their personal lives, we chose to further inquire into these situations rather than to bring them back quickly into the professional realm. Similarly, we led them to talk about their social and legal

backgrounds, how they joined the judiciary, and how they were appointed as judges as a way to gain better contextual understanding of legal processes and decisions.

In the interviews, we reflected on our observations and experiences in the courts and solicited reflections from our interlocutors about the everyday unfolding of their work and the challenges they face. In addition, whenever possible we attended oral sessions including both closing remarks and the reading of a verdict. We paid close attention to the setting, the audience, and the interactions that took place in these contexts. We also observed and noted the material display of the different courts offices and the happenings in the corridors. Sometimes, we were even able to enter into brief exchanges with others who attended the trials. Their comments and observable reactions to the judges' interventions or to the opinions different judges delivered in the reading of a judgment, contributed to our understanding of the broader context of the trials. In situations where we were unable to attend closing remarks or the reading of verdicts, we sometimes resorted to the Internet, watching the sessions either live or recorded.

Emotions, Judgment, and TJ

Scholarly work on judicial behavior has consistently argued that judges are rational actors (Posner, 2005) that are able to separate their emotional reactions from their professional decision-making processes. Drawing on strategic behavior analysis or rational choice attitudinal models, these works have highlighted the ability of judges to distance themselves from the case and its emotional impact while also stressing the supposed opposition between emotions and reason (Weber, 1968), a distinction that has continued to permeate judiciaries in the West (Young, 2000). In fact, it is very common across many judicial institutions to hold 'that in order for the law to perform an objective function in society – essential for the production of wide public trust in and compliance with the law – emotions must be "put aside"' (Bergman Blix and Wettergren, 2016: 32). As many feminists and queer legal scholars have argued, at stake is a false dichotomy advanced by Western legal thought between reason and emotion, mind and body, objective and subjective, power and sensibility, public and private, culture and nature (Olsen, 1990). These binaries have influenced the workings of Western legal institutions enabling classifications and hierarchies that limit or even exclude women and minority groups from participation in the legal arena on equal terms (Olsen, 1990; Young, 2000).

At the same time, the developing field of 'law and emotions' has provided considerable evidence and new tools to consider the role and importance of emotions in judgment and in the judicial process as a whole (Bandes and Blumenthal, 2012; Borenstein and Wiener, 2006; Karstedt, 2002; Maroney, 2011). Various works in this growing field have pointed to the place of certain emotions such as disgust (Nussbaum and Kahan, 1996) or remorse (Murphy, 2007; Weisman, 2009) in shaping interpretations of legal problems. Others have explored the professional command of jurors, judges, and parole boards in putting their feeling of sympathy aside when making a decision (Wistrich et al., 2015) and yet others have focused on judges' ability to interpret the display of emotions in both victims and perpetrators (Wettergren and Bergman Blix, 2016).

Thus, studies in the field have been challenging existing assumption about rationality and distance in judgment (Dahlberg, 2009; Epstein et al., 2016; Latour, 2010). More

specifically, recent research has amply demonstrated that emotions may have a decisive impact on the final verdict (see Maroney and Gross, 2014 and references within). For example, emotions that were a product of live versus videotaped testimonies had a stronger effect on judges' decisions, while judge's inability to dissociate from emotionally charged evidence was also linked to more guilty verdicts (Blumenthal, 2005, Maroney, 2006). In these and similar works (Anleu and Mack, 2005; Anleu et al., 2016), the focus has been on the 'emotional labor' (Hochschild, 2012 [1983]) of the judge or the constellation of professionals within the court (Bergman Blix and Wettergren, 2018); or, as noted in the case of some trials of crimes against humanity in Argentina, on 'arts of dramatization' or 'theatrical' effects that prosecutors are able to display inside and outside the courts to evoke judges' empathy for the victims and their families (Bell and Di Paolantonio, 2018).

One prominent solution to the conundrum of emotions and rationality in judicial decision-making has been to introduce the 'emotions regulations perspective' (Maroney and Gross, 2014), which suggests that while acknowledging their emotional reaction to the job, judges can also learn to manage and regulate their emotions. Maroney and Gross (2014) point out numerous strategies and argue that the most significant for judges is cognitive change, that is, developing an ability to change the meaning of emotional stimuli and our perception of it. Bergman Blix and Wettergren, on the other hand, highlight the context that enables and produces emotions. They analyze the subtle coproduction and management of emotions by the different professionals of the court, which they argue create the 'appearance of a rational (unemotional) procedure, constitutive of the judicial emotional regime'. (2016: 36). Though focusing on the accumulation of microprocedures of detachment which unfold throughout the legal process rather than on 'emotion management', Bruno Latour's analysis of the French Conseil d'État shows similarly how these procedures work to construct judging as a dispassionate phenomenon (2010).

The broad set of works mentioned above paves the way for considering the underpinning assumptions of judicial labor in the TJ setting. These works offer an apt contextualization because the trials in Argentina, as many of our interlocutors pointed out, are conducted in federal courts using the same criminal procedural code as any other trial within the federal jurisdiction. It is also worth noting that these proceedings are embedded in a mixed system: on the one hand, the criminal procedural code establishes the delivery of oral arguments before trial courts (tribunales orales), similarly to the common law adversarial system, with all its ritual and performative dimension; and, on the other hand, the same code sets that the pretrial instance (instrucción) is conducted by investigative judges in a quasi-inquisitorial fashion. These judges build their accusation on files (expedientes) that are deemed to be founded on a rational (dispassionate) basis. We will return to this point in the conclusion.

But this is not the only reason we turn to this literature, a thematic examination of the now large and still growing field of TJ exposes a lacuna – there are writings on the emotional aims, emotional responses to, and emotional toll of TJ mechanisms among both victims and perpetrators (Doak, 2011; Hearty, 2019; Mendeloff, 2009; Mihai, 2011; Ure, 2008) including clear statements to the effect that one of the main aims of TJ is the emotional healing of individuals and societies (Karstedt, 2016: 50–51). There are also

works that do not use emotions as their analytic lens but incorporate descriptions of emotional reactions in response to different TJ mechanisms such as reparations, trials, reconciliation, and apologies (Barkan and Karn, 2006; Hinton, 2011; Roht-Arriaza and Mariezcurrena, 2006). Moreover, there is important literature stemming from political philosophy that explores different emotional reactions to mass HR violations and their aftermath (e.g. Minow, 1998; Nussbaum, 2013). However, as far as we have been able to trace, there is very little if any work that considers the emotional experiences of judges who sit in TJ and post-TJ trials (see Rousseaux, 2016).

This lacuna, we suggest, may be the result of the fact that Argentina is one of the first and most prominent examples of post-authoritarian societies that have engaged in judicial accountability measures within the regular (i.e. not extraordinary) justice system for the second time since the fall of the regime (see Collins, 2010). But it may also be rooted in the assumption underpinning much of Western legal culture to this day that judicial work and the act of judgment must be done from a rational, objective stance and cannot be shaped or influenced by emotions. Bergman Blix and Wettergren (2019) call this 'positivist objectivity', an ideal that has been largely criticized within the social sciences although it still holds a strong influence in the field of the law. According to this positivist notion, judicial decision-makers must free themselves 'from all physical and social affiliations and acquire knowledge through independent empirical observations and evidence' by using pure or instrumental rationality. It could be argued that in the context of abhorrent violations of HR where it is expected that reactions are strong and emotional, the process of judgment must be, and must present itself as, even more rational than similar proceedings that examine less massive and extreme circumstances (albeit devastating nonetheless).

In the next sections of this article, we explore a number of dimensions of judges' encounter with and management of emotions, specifically, their subjective, sometimes off-the-job handling of the emotional toll of presiding difficult, some would argue traumatic, crimes against humanity trials, as well as the emotional labor that they invest in managing theirs' and others' emotions within the courts.

Emotions and the Everyday Work of Justice

Objectivity and Impartiality in Judgment

When we first began approaching the question of emotions in the trials, many judges seemed eager to state their impartiality. When this position was not mentioned upfront, a statement about their ability to be objective and unaffected by either their personal emotional response to testimonies, ocular visits, and so on, or their emotional response to the media as well as the political and social pressures that are an inevitable part of these trials, appeared later in the interview. These responses included statements such as the following:

... we are trained so that [emotions] do not influence us. . . . I completely untie any personal emotion from the decision and I ask myself 20,000 times before I make a decision if there is something that is influencing me, because this is professionalism. It is the ability to follow the rules of our profession and that absolutely nothing will influence us.

A different judge stated ‘...I consider myself a sensitive person like any other person, but when I take on the institutional task, without losing [my] humanity, I plant myself in my professional responsibilities. Later, later, the catharsis comes outside [the court], I mean. Isn’t it so?’ Another interviewee explained that a judge has to have the ability to leave the emotional drama of the courtroom behind when making a decision. Sometimes, this judge added, she had a massage to relieve tensions, or she tried to work with her breathing. She then went on to explain, ‘[A] judge cannot become used to listening to the victims’ suffering’, and, she stated,

judges must remember that all defendants are innocent until the final sentence is given. Defendants have the right to due process, and they must know – the judges must make them realize – that they will be treated well by the courts. All emotion must be left outside the room when we [the judges] get there to discuss the case and reach a decision.

In contrast, one judge spoke openly about the inability to dissociate the emotions generated from the decision reached.

The judges, as much as one says well I am unbiased, I do not... we are absolutely affected or steeped in [particular] stances, well, life is [an act of] choosing sides constantly for one thing or another, we cannot be oblivious to ideology, [there is] ideology, there are beliefs....

Nonetheless, all our interlocutors pointed out their pursuit of objectivity in judging. In other words, it is not that judges deny the emotional load that the act of judging carries, particularly when it involves the hearing of crimes against humanity cases, but in considering the process of judgment they foregrounded their efforts to set emotions aside.

This professional commitment is shown to be both a tool for making ‘proper’, that is, unbiased, decisions, but also as a method for making objectivity visible and consequently eliminating any suspicion of partiality. The commitment to objectivity can be read as a strong performance of professionalism, particularly, in light of political pressures that emerge around the trials. Moreover, it can indicate the influence of a positivist legal culture in Argentina (Nino, 2014). Indeed, in analyzing judges’ discourse of objectivity we should bear in mind that Argentina’s legal system draws on a civil law tradition that builds on codes, instead of on case law as in common law countries. Codes are often seen as fixed and strictly applied law. As another judge described it, professional training can mean keeping up with positivist legal doctrine, such as scholarly works on criminal law (*dogmática penal*), constitutional guarantees and fundamental rights like due process of law. But, he then added, this criminal legal theory works as a ‘cage’ – the cage of Western legal thought – that keeps the judges’ passions locked in. In other words, underlying this claim for objectivity and rationality is a view of judging as just a ‘technical’ activity. Judges can keep a neutral position in the face of all and any political agenda. According to Böhmer (2012), this image of judicial adjudication was built upon an enduring formalist conception of law that has pervaded the workings of native legal institutions in Argentina, including law schools, since the 19th century.

But how do judges learn to separate emotions from judicial decisions? Our interviewees had two central explanations: professional training and experience. In fact, a number of our interlocutors iterated that this requires repeated work. As one of them elaborated: ‘... these are complex mental structures, it took me many years. I believe that [it] is a problem of experience and training almost...’. Another described it in this way:

... I think you learn while doing... trying to be the most objective possible in relation to the question. This does not mean that things do not hurt one... what I believe I have managed to do is to differentiate. One thing is that I listen to a victim and of course if I am not affected I am not human, I am a machine... [but] If this pain does not allow me to be objective in order to analyze the proofs, then I must excuse myself.

The same judge later in the interview elaborated on the notion of objectivity while stressing the difference between regular criminal trials that are also heard in federal courts and these trials of crimes against humanity:

... it is not the same to say, well, I during 6 months, 8 months, 1 year I dedicate myself to hearing atrocities, or else, what you heard, what was it? Atrocities. People who had been kidnapped, who had been tortured, who had seen how their family was tortured, that had seen how their people [friends and comrades] had been taken [forcibly disappeared], if one wants to feel the total pain there... what happens is that if one is unable to overcome [pull oneself together], actually [he] has to go [do] something else, in other words, he has to overcome this, and later well, these are, I repeat, the mechanics... I can't stop saying that I saw the hell. But I saw it. I lived it, I heard it. I heard it for years. What I must be able to do is to separate and to objectify what is it? Well, these people are guilty of [responsible for] that hell or not? Period.

As emerges from the above quotes, the trials expose judges – many of whom have extensive experience in the federal criminal justice system and hence have encountered difficult cases such as murder and human trafficking – to what this last judge calls ‘hell’. Listening to, or experiencing vicariously hard-to-imagine human suffering and crimes, was felt by this judge to be ‘living it’, that is, living ‘hell’. It is in this context of long exposure to atrocities and the emotions they generate that the judges must exercise their professionalism, and separate emotional reactions from the attribution of guilt or innocence. If this is not done, another judge explained, ‘one cannot live’, and he continued, ‘if I take on, I take all, there arrives a moment when...’. It is this ‘when’ that appeared in a few different interviews that caught our attention. It speaks to the significant emotional impact that these trials have had on the judges, a theme we discuss in detail in the next section.

Subjective Emotions and the Toll of the Trials

The emotional hardships of the trials were mentioned in many of the interviews we conducted, but in numerous cases the judges seemed to be lacking words to describe these feelings. Many resorted to expressions such as ‘it was very difficult [fue muy duro]’ ‘it was very very hard [fue muy muy fuerte]’ ‘it was terrible [fue terrible]’. When probed further some of the judges elaborated on these emotionally tremulous times.

One interviewee explained:

... the people are expecting ... [that] as a judge ... one does not cry or get very emotional in response to what one is hearing because one has to present [oneself] as impartial, not only towards the victims but also before the accused that also have their right to due process, no? So the 'working through' happens inside, no? It is like your stomach turns and nothing, towards the outside one presents oneself as calm [undisturbed].

Another judge described his reactions after listening to testimonies especially at the beginning of the process

... the first testimonies, really yes, it was clear that I was really very upset [notaba que me ponía muy mal], above all ... a few cases of Madres [de Plaza de Mayo] that really put me very much at the limit of my stability at the moment, no?

A different judge reflected on the emotional impact and the residues that some of the testimonies left in him. He retold us a testimony of a woman who was disappeared only a few months after giving birth and how once she was separated from her child had to make a decision of whether to refrain from expressing milk and risk getting her breasts infected or express milk in her clandestine cell and then risk the rats coming. He then added

these things struck me [esas cosas me pegaban]. Later in the interview he said: '... that the abstract disappeared or illegal prisoner, or however you want to call it ...' or an illegal prisoner, or however you want to call it, they have a face and a context. That was something difficult, yes?

The recognition of the actual human beings behind the ephemeral figure of the forcibly disappeared, was repeated in various interviews. Suddenly through these long trials, the disappeared seemed to take on a life while being reinserted into a set of relations or networks of care and suffering.

This (embodied) sensation depicted by the judge in the face of horrid crimes and their long-term effects may in part be the consequence of the work of the prosecution. Indeed, a legal strategy of the public prosecution in the trials has been to add a face, a body, and many times a detailed personal history to each name (Layús, 2018). Using 'dramatization' and 'theatrical' effects, prosecutors seek to give the evidence presented to the courts a more substantial and 'affective tone' (Bell and Di Paolantonio, 2018). This was in fact our own experience in the courts as reflected in our fieldnotes. When hearing the closing remarks of the prosecutor in one of the trials we attended, we noted, for example, that the combined presentation of, on the one hand, photos of the disappeared, highlighted archival documents and pictures from the ruins of the clandestine camp where many of the violations took place, and, on the other hand, emotionally pregnant descriptions of the children of the disappeareds' experiences growing up with disappeared parent(s) produced a very moving, captivating, and convincing presentation.

As the judge previously quoted explained to us: when he hears a testimony, particularly if it is of a difficult case he imagines what it was like. That is, he imagines the beating, the torture, or even what it is like to have your life ruined because you had provided information that led to the disappearance of another. This ability to imagine could be thought of as a form of empathy (Nussbaum, 1997), but maybe, more interestingly, it may indicate a rich and vivid world of vicariously acquired memories.⁸ With time, these memories, narratives, images, and imaginings may create a very lively and detailed picture of the historical period, the repression, and the social, political, and individual marks that the dictatorship left in its wake. And while a great deal of this information emerges in the written sentences, it does not, to our knowledge, make it into the hands of the general public. In this way, unlike CONADEP and the report this investigative (truth) commission produced (Nunca Más, 1984), information gathered in the trials is, for the most part, kept within the judicial system and many times within each individual court where the trial was heard.⁹ This, of course, raises many questions about the role of trials in post-TJ contexts, a topic we reflect on briefly at the end of this article.

Testimonies, however, do not only generate the ability to imagine the horrible experiences of the victims of state terrorism, instead they may have real physical effects. As one of the judges we interviewed explained,

the crimes against humanity trials are exhausting . . . one puts one's whole body in it [unopone el cuerpo ahí],¹⁰ because of everything that [one] hears and the work . . . I got sick twice a week because I had nightmares of the things that I heard . . .

Another judge, who was particularly receptive to our questions, explained that when he listens to testimonies he takes notes. Describing a very terrible testimony he heard in one of the trials, he explained: ' . . . and well, one there has to . . . I take my notes . . . what else can I do, that is how it is'. But using the notes to channel some of his feelings was not as effective as he had imagined and toward the end of his first trial this judge suffered a heart attack. 'I suppose that it was because of the [emotional] burden . . . it was like-well I continued with the trial and later I worked at it in different ways'.¹¹ In his next large crimes against humanity trial, he continued, 'I already had an armor, then I was a little more armored'. But, as he went on to acknowledge, ' . . . there are times [in the trial] when . . . I bite my lips'. Another judge described this armor in slightly different terms: 'we, I think, as part of our unconscious professional formation, we generate defense mechanisms, it is like a psychologist, it is the same so as to be able to bear [the difficult testimonies]'. These mechanisms include, for example, dark humor and 'to see things from . . . what do you call it . . . the system that you have, the participant observation'.

How, then, do these judges handle such a heavy emotional load? In many of our interviews, judges spoke of the role that their families, friends, and close acquaintances play in helping them manage the emotional experiences of the trial. Many told us about regular conversations they held with friends (sometimes mentioning that these were professionals such as psychiatrists or psychologists) or their partners and sometimes their children. In these interactions, they reflected on their day and the stories and testimonies they heard. One judge, for example, explained that

... anything that is suffering, pain, it hurts me a lot and I tend to have a certain empathy with people so it is like, I channel it, I cannot distance myself enough. But later one sees that I told it and told it and told it, [and] it began to come out little by little through this verbal unloading.

This verbal ‘working through’ was not surprising to us as in the Argentine context psychoanalysis is a widespread and common practice (Plotkin, 2002). At the same time, the emotional and performative work (Bergman Blix and Wettergren, 2019) that goes into concealing these experiences throughout the public hearings in the courtroom highlight the stakes inherent in these trials.

To expound on this point, the potential for immediacy between the judges and the parties is heightened in this kind of trial. Orality, as performed in current HR litigation, allows for the expression of suffering, pain, sorrow, and anger (to name just a few of the emotions that emerge in these settings) openly in front of judges and audience. This is quiet different from the first wave of litigation on HR in the country. One of the judges interviewed drew an interesting comparison on this point between past and present trials:

Causa 13 [the Juntas trial] created a terrible reality but much more aseptic than these trials of crimes against humanity where all this terrible thing of suffering appears, in other words, where the blood flows The witnesses when they declared in CONADEP and declared in Causa 13 they sat . . . without crying! They gave testimony as if it was objective . . . Ridiculous, because a person that suffered the electric needle, how can he be objective? They sat, of course someone broke down, . . . but they treated them as if they were telling [about] a fraud [case] While in these [current] trials, we had studied, and the Ministry of Justice had to put a type of cabinet of psychologists that accompanied [the witnesses]

In this judge’s view the current trials enable the emergence of actual (sensitive, emotional, personal) accounts of the past within the courtroom as opposed to the Juntas trial, which despite it being conducted in an oral and adversarial fashion did not produce a space for these emotional expressions. Instead the actors’ feelings were kept lock in, while there was clear foregrounding of a disembodied version of the facts. In contrast, as this judge went on to describe, in the present trials there was one court personnel that was always prepared ahead of time: she always had a packet of tissues and a bottle of water on hand

because she knew, there was a moment in the testimony where the people cried. And she approached them with the packet of tissues and she gave them water and left them a glass [of water]. So the people drank the water, cried a little and then continued¹²

While discussing their subjective experiences, judges also noted a range of other emotions including, for example, anger and fear that emerged in response to threats and possible retaliation from the accused or their professional networks.¹³ A short example will suffice to give a sense of the magnitude of these trials and their unexpected consequences. One of the judges described to us how the fear and horror of the trial trickled down into his everyday life. He explained that he used to go cycling in the countryside but as the trial progressed his wife had asked him to refrain from going alone. There was something in his recounting of the day’s events and the subtle or not so subtle

threats that those standing trial had expressed that worried her, he explained. He refused to abandon his cycling routine, although when he went out he thought to himself '[they] will take me in the middle of the countryside, they will shoot me in the head and no one will know' and although he continued he seemed to enjoy it less and with time he stopped. 'I never asked for a guard or anything of that sort but I did think more than once – this can happen'.

Recognizing the impact of the trials on their lives, judges also spoke of the changes that they had undergone presiding over numerous trials of crimes against humanity. Apart from the armor and the defense mechanisms, others spoke of the naturally occurring process of getting used to the narratives recounted and the historical traumas suffered. As one judge explained:

But it is true that with time it may not be as . . . the impact decreases, no? I know that, no it is not right to say that, but it is real and it would be hypocritical if I did not say that . . . because I believe it happens with all behaviors in human life, no? And one facing the reiteration of the same situation, it is very probable that one is not as sensitive towards the end as one was in those first blows.¹⁴

Similarly, other judges mentioned the trials' length, which in a number of cases have continued for a few years, as further contributing to their personal and professional exhaustion. Exhaustion became palpable to us in the course of a series of hearings that we attended devoted to the delivery of arguments (*alegatos*) in a case by one of the defendants' attorney. Rather than an oral plea for his client's innocence, this counsel offered a meticulous and detailed reading of his arguments that took him a few long weeks to complete. In an interview with one of the judges of this case, we heard about his discomfort with the fact that legal professionals read their arguments rather than presented them orally. He then wondered why in oral trials the actors still held on to written procedures. We will return to the tension between orality and writing in the conclusion.

Others' Emotions and the Managing of Affect in the Space of the Courts

As described above, in the trials the brutality of the acts and the suffering of the victims and their families are brought to the court through witnesses' testimonies, reports, and ocular visits in the clandestine detention and torture camps. Unlike regular criminal trials, in these trials the testimonies can be long and very detailed, where both surviving victims and their relatives narrate the crime and the ways in which it had impacted their lives (Layús, 2018: 192). Additionally, the moral character of the perpetrators and the pact of silence they maintain, making it difficult to uncover information and most significantly locate and identify the bodies of the disappeared, contribute to the emotive dimension of these trials. And while like ordinary criminal cases, these trials of crimes against humanity are carried out in federal courts, the ways in which judges manage the display of emotions by the litigants and the audience is quite different. Unlike most other trials, in these the judges we interviewed allowed the victims to express their emotions and to display the symbols of their struggle and their enduring call for justice (e.g. the white scarf of the *Madres de Plaza de Mayo* is a key symbol, often allowed in the

courts).¹⁵ All the judges interviewed mentioned how they created a space for the victims' as well as the defendants'¹⁶ claims and for their needs to be heard.

In general, judges spoke of their court's respect for the victims and their growing flexibility in terms of protocols and court rules. One judge said, 'we let them express in the courtroom everything they want. The defendants too'. This includes, for example, clapping after a victim gives testimony or holding a picture of a disappeared son or daughter and crying during testimonies or in the reading of the final verdict or, as happened in many trials after the reading of the final verdict, shouting in unison '30000 detained disappeared present! Now and forever!' Another judge explained it thus:

We [the judges of the court] said that beyond the law, a few . . . a few claps that take 10 seconds did not seem to us to put in crisis [jeopardy] the development and the order of the trial and we allowed it because . . . I do not know if we wrote it or if I thought it but did not write, I can't remember now, that many times it is a catharsis . . . that after 40 years . . . and when the person declares it is like [they, the audience] clap . . . it is like accompanying the person who gave testimony, so we did not consider it to be disrespect towards the court, nor a [form of] disorder . . .

The aim has been to humanize the proceedings so that victims can face the challenge of giving testimony about tremendously difficult and sometimes unimaginable acts. But due process of law was the limit any party demonstrating demands and needs was allowed in court. As the same judge explained:

[If] a defendant declares and the public begins with "son of a bitch, murderer, we are going to kill you!" that as a judge I would not permit. This is what I think. It has not happened to me but if it will [some day] I would call for order, then I would say silence or else I would evacuate the court, [I] would not permit this.

Accordingly then, even though the judges are more flexible in these trials, they do not hesitate to set clear limits of respect and to enforce the rules.

Humanizing the proceedings can take many forms. A few judges stated that they sometimes meet with the victims before the latter enter the court. Holding an informal meeting (which takes place usually when the victim comes into the offices of the court to sign the act before giving oral testimony) is a way to make the victims feel as comfortable as possible, although, as many acknowledged, anxiety will appear once they are on the stand. Other judges explained that in these trials they do not interrogate the victims but rather give them time to tell their story.

In a way I felt almost like a psychologist that was listening to him, apart from being a judge. That means, I realized that for that person the possibility of saying it [giving testimony] . . . this you must have heard many times, that they tell you I waited 40 years to be able to tell this. And it is really like that . . .

The judge in this case becomes, as another interviewee told us, a psychologist, recognizing the needs of the victims and the role that the court can and sometimes plays in creating a clearly defined authority (i.e. a representative of the [democratic] State) that

acknowledges the suffering and the tremendous impunity these individuals had to endure for years.

For another judge we interviewed, to ‘humanize’ the legal proceedings also meant to make the court staff (law clerks, administrative officers, court policy guards, etc.) engage, and refrain from becoming indifferent. ‘This is something we are all involved in. We all have gone through these trials and heard the horrors that the victims told . . . we all have learned from these’. ‘I have taught them’, explained this judge, ‘that they have to be respectful to the claimants, to be compassionate, to engage in the case’. ‘They need to understand’, she added, that, ‘[O]n the other side of the counter, there is an old lady who has been demanding justice for decades’. But, she stressed, ‘they also have to show respect to the defendants’. In our interview, this judge made it clear that she cared about the people that worked with her at the court, and was aware that they could be deeply affected by the issues discussed in these trials. ‘I listen to them [her staff]; I may suggest to them that they should talk to a psychologist. I even decided once to separate one of my clerks from a case when she was close to giving birth’. To make people engage in the case, she acknowledges them publicly at the end of the trial. ‘I was shocked to see the guards sobbing quietly when I mentioned their names . . . Why not?’ she asked.¹⁷

At the same time, when attending to the everyday minutiae of justice making in the courts we observed justices handling their own emotional reactions, particularly in response to statements by defense and prosecution lawyers, in different ways, many times turning to sarcasm or even expressing anger when responding to an emerging situation. For example, in one of the court hearings we attended, an open exchange between the judges and the defense lawyer exposed a complex situation where the (elderly) accused were transferred from their detention in jail to the court under suboptimal conditions, having to share their space with common criminals and having to wait until late at night or get up in the middle of the night just to arrive in the courts on time. The defense lawyer presented a complaint while adding that one solution would be to release the accused. The judge heading the court looked at him sternly and with a harsh tone asked if he was joking. A moment later the judge seemed to recompose explaining that it was the court’s responsibility to fix this situation (fieldnotes). Another clash took place in the same trial when the defense lawyer expressed his position regarding the validity of the sentences provided by the courts in recent years. The presiding judge interrupted the lawyer’s closing speech to state that he was offended by his statements. Only a short time later that same lawyer continued by claiming that ‘. . . in the *vengeance trials* as we can hear them here . . .’ – this time the statement infuriated the judges and a second exchange that included some threats of misconduct ensued. In these two examples, the judges of the court expressed their feelings directly and openly although soon after the exchange was over they resumed a more stoic and attentive disposition (fieldnotes).

Emotions and the Broader Context of TJ

In the previous sections, we moved between scales – from the subjective to the social and the courtroom context. In this last section, we scale up even further and consider the judges’ conceptualizations of the trials’ aims, and the stakes inherent in conducting them in regular federal criminal courts rather than special tribunals or international tribunals as

is often the case after mass violence (see Hinton, 2018). Illustrating the stakes inherent in these trials can suggest a more detailed context into which our earlier descriptions of the judges' emotions may be read.

In many of the published works on TJ, Argentina is considered a regional protagonist and a model for other countries that are struggling to deal with their violent pasts (Balardini, 2016; Sikkink, 2008). But being a trailblazer also means that the trials and their protagonists are under constant scrutiny, thus adding further pressure on the judges. In effect, for many of our interlocutors the trials are not only a way to provide justice and truth to the victims but also to inculcate in the population, and maybe beyond the borders of the country, the commitment to 'Never Again' [Nunca Más], that is, to ensure that lessons are learned and history does not repeat itself. As an interviewee explained:

... I think that more than vengeance or retribution, for me this is the end, because the re-socialization ... we know that a person who is 70, 80 [or] 90 years old we will not change, teaching him proper behavior and even less so [if he is] in home arrest like the majority are, or in prison. But for everyone else, to see that there are trials that are taking place and that there are punishments [penalties] for any security force, Army, in any place in the world or at least in South America, I believe this is important.

Another judge explained that '... it is to demonstrate to the rest that these behaviors, these crimes against humanity cannot go unpunished, that is why they are imprescriptible, because sooner or later the law will come, no?' Another judge explained that after the trials there will be an end to impunity, 'it is like never again will Argentine society be able to permit that there would be impunity and that from the State [there would be] even minimum excess'. Finding the truth and writing history is an integral part of this process of never again, as one of our interlocutors explained:

... returning to these trials [after the period of impunity] exposed many people who had ... were hidden, shady about their intervention in those years ... Being able to make their situation as those [who are] responsible official. And on the other hand, to give these families, the families of the victims, and I think that an answer in many cases gives the satisfaction of something good, that someone is listening to them.

While recognizing the importance of uncovering the truth and judging these crimes, a number of our interviewees insisted on the legal foundations of their decisions. Even when some of their verdicts may not be welcomed – for example, when they absolve individuals who were suspected of committing terrible crimes because in their interpretation there is no clear evidence to show their responsibility – they insisted that the decisions are based on solid law and sound interpretations. As one of these judges elaborated:

Surely when I leave the court after I read a verdict there is part of the court audience that [thinks] my verdict is fantastic and the other part that does not. And I would have resolved it absolutely from my own convictions and not influenced by other types of questions. But the most important is the validity that my decision has to have for society, and not what the society will think of this decision.

Stressing the significance of the decision, not as a consequence of what Argentine society considers just, but rather, as what the law enables, contributed to the judges' illustration of the judicial process as fair, objective, and founded on existing laws (i.e. not extraordinary law). This depiction of their judgments and their possible implications coincide with the judges' description of their work as objective, impartial, based on professional skills, legal education, and training. This does not mean that they do not recognize the emotions involved both within the court by the different parties and outside the court in their personal lives; rather it is a reiteration of their stance that when it comes to the act of judgment all these emotions are set aside and the evidence is weighed in relation to existing laws. This, in fact, was the claim made by one of the judges we interviewed immediately following a reading of the verdict his court had given in a key crimes against humanity trial. When we entered his office and mentioned that we had been in the audience and heard the verdict he stated: 'people were cursing?' and while we were still hesitating how to answer his question and describe the tensions that we had felt in the crowd, he added 'What can one do, [you] need to apply the law and the law says what it says'.¹⁸ In listening to his explanation and reflecting on the stunned and angry reactions we observed among members of the audience as the verdict was read, we both sensed that this judge felt some discomfort with the judgment but also thought that he had made the correct choice, well founded in the law (fieldnotes). This sense of uneasiness may dissipate with time as the face-to-face interaction of the oral trial recedes into the past and the decision moves through the legal system until a firm and final confirmation of the verdict is provided.

Conclusions

In this article, we have offered a detailed description of judges' understanding and experience of emotions in the process of presiding over trials of crimes against humanity. In concluding, we return to this dichotomy between emotions and judgment while considering some of the structural limitations inherent in the workings of the Federal Judicial System in Argentina.

As noted above, one of the challenges of the trials of crimes against humanity in Argentina, and more broadly on a structural level in its criminal procedure, is that it is a mixed system. The oral dimension of the trial coexists with a tradition of written documents that are deemed to be emotion-blinded artifacts. Orality, in particular in trials of crimes against humanity, is not trivial as we learned from our interlocutors. For example, one judge explained that in oral advocacy '... there is immediacy that exposes the emotionality of the witness, the accused, as [well as] the judge himself... orality has that particularity, that unveils, to say it this way, the person emotionally and humanly'. And while attentive to these emotions as to their own emotional reactions, the judges we spoke with distinguished, it seems to us, between their role as judges that must evaluate the evidence and decide on a verdict, and their role as judges who are sitting in the court not only to judge but also to listen (as psychologists do), to represent the State and its now functioning judicial apparatus, and ultimately to rewrite history.

This is not a minor claim. In fact, we consider their insistence on their professionalism to be, in part, a statement to a broader audience, both locally and international, that may question their motivations or their abilities to mete out justice in the long aftermath of

state terrorism. At the same time, their reflective responses to our inquiries highlight the ambivalent and impossible position they are in: they must both adjudicate (separating emotions from reason and objectivity) and listen to the horrors, thus allowing traumatic memories and lifeworlds to be narrated in minuet details in the courts. It is these testimonies that push, as Rousseaux highlights (2016), the borders of the acceptable and knowable in the judicial apparatus, and it is also through their exposure to all the materials of the trials and the interactions with the different representatives of the system (e.g. defense lawyers and prosecution lawyers) that these judges become more than just court officials or representatives of the democratic state. They become witnesses to the horror, subjects that listen, register and who are themselves affected by the narratives told. This double, almost impossible, role that pushes at the limits of their professional and personal lives is the unique dimension of judgment in post-TJ processes. Based on the descriptive exploration of emotions in judgment presented in this article, we believe there is rich ground for future examination and the development of more emotionally attentive and detailed analysis of judicial accountability mechanisms in the field of TJ.


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ORCID iD

Noa Vaisman  <https://orcid.org/0000-0002-2484-6436>

Notes

1. The amnesties and the two *impunity laws* did not include cases of robbery, fraud, seizure of private property, and child theft, all of which were still pushed through the courts in the following years.
2. In March 1984, Congress ratified the American Convention on Human Rights and accepted the Inter-American Court's jurisdiction (Law 23054). In 1994, a Constitutional amendment granted some International Human Rights Treaties constitutional hierarchy. Additionally, pressures from Human Rights Organizations and litigation outside of Argentina created the Truth Trials (*Juicios por la Verdad*) that while limited to investigation and documentation it provided evidence that was later used in the ongoing trials (HRW, 2001).
3. Congress approved the annulment of the amnesty laws already on September 2, 2003 under Law 25.779.
4. Current available statistics (2006–2018 March) show that sentences have been given in 203 trials, 278 trials are still in the investigative phase (*instrucción*), 103 have been moved to the oral phase (*etapa oral*), and only 15 are in active oral trial. So far, in the trials 2985 individuals have been accused, but out of the 977 that have been found guilty only 211 have a firm sentence (Ministerio Publico Fiscal, 2018).

5. <http://www.cij.gov.ar/nota-849-Lesa-humanidad-se-integro-la-comision-interpoderes.html>.
6. The ruling applied a law (which was no longer in effect at the time of the ruling) that states that the time spent in prison before a conviction counts double (2×1) toward the time of imprisonment (law 24390). In effect, the ruling would release most if not all HR abusers from prison right after their conviction in court.
7. <https://www.cels.org.ar/web/en/2018/12/corte-suprema-de-justicia-de-la-nacion-no-es-aplicable-el-2x1-para-delitos-de-lesa-humanidad/> (accessed 5 April 2019).
8. Similar to the notion of post-memory that describes the experience and memories of second-generation children of disappeared (see Maguire, 2017). This form of imagining can also be thought of as vicarious trauma and has been discussed in other settings (see Jaffe et al., 2003).
9. One judge mentioned the significance of telling his children about what he learned so that they would know ‘what happens in life, what is real life. This was part of real historical life, but real life nonetheless’.
10. ‘Poner el cuerpo’ is a local idiom that implies engaging fully with a task or a process.
11. This reaction to it, among other things, stress has also been discussed in the literature (see Miller et al., 2018).
12. In a public talk held in July 2019, one of the former judges of the Causa 13 (the Junta Trial) spoke about the court’s decision that facts and testimonies should be presented in the court as objectively and dispassionately as possible. He acknowledged that such a decision was a mistake though it was supported at the time by the judges’ fear of potential challenges to the trial (fieldnotes).
13. These fears were not unfounded as numerous judges and ‘victim-witnesses’ received threats and suffered violence. Maybe the most well known is Jorge Julio López, a key witness that disappeared for the second time only a short while after giving testimony in a trial. He has not reappeared (Varsky, 2011: 61).
14. While not mentioned by our interlocutors, van Roekel (2014) mentions listening fatigue as one of the outcomes of presiding over or participating in these trials.
15. This presentation of symbols in the courts was debated extensively.
16. Alfredo Astiz, probably one of the most iconic figures of the dictatorship, carried different books to the oral trials so as to provoke the audience.
17. At different moments in the interview, this judge stressed the fact that she was a woman. In contrast to male judges that we interviewed, she emphasized her leading role in the proceedings, her handling of her work team, her addressing the defendants (HR violators), and her role as the arbiter of emotional display within the court. It should be noted that this judge had to build her reputation and legitimacy through a firm leadership within a very male-oriented environment.
18. Indeed, right after the hearing one of us approached a lawyer and HR activist who expressed his surprise and annoyance with this judge’s (minority) opinion, but said that he would wait until the rationale (fundamentos) of the decision were made public to file an appeal.

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