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Enforced Disappearances of Persons: Interactions between International and Domestic Law

Case Studies: Argentina and South Africa

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The purpose of this paper is to answer the question of how international and domestic law on the crime of enforced disappearances interact with each other, focusing on the examples of Argentina and South Africa. Regarding the international aspect of this paper, the current legal status of the prohibition of enforced disappearances under international law will be examined by conducting doctrinal legal research, such as mapping out the legislative framework and analyzing the jurisprudence of international and regional international courts. Concerning the domestic aspect of this paper, doctrinal and comparative legal research will be conducted. The two countries of Argentina and South Africa were chosen due to their history with enforced disappearances and their striking similarities and differences in dealing with this crime, especially in the context of international law. Although research on enforced disappearances in Argentina already exists, a comparison with South Africa, which will allow for a better assessment of the value of international law, is still missing. This paper aims at filling this gap in research.

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1. Introduction: The Crime of Enforced Disappearances

In 2007, the *International Convention for the Protection of All Persons from Enforced Disappearances* (ICED)[1] was opened for signature by the United Nations (UN), after immense efforts taken by non-governmental organizations (NGOs) and relatives of victims in order to combat the practice of enforced disappearances.[2] This crime is especially heinous since it violates a number of human rights at once, such as the right to life, the right to liberty and security of a person and the right to a legal remedy.[3] Moreover, if used in a systematic way, it results in a multiplicity of victims and leaves relatives of victims in an uncertain state without access to information. A definition can be found in article 2 of the ICED which states that an 'enforced disappearance' is considered to be:

> the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.[4]

Due to the crime's ability of spreading terror in society and paralyzing political opponents, it has been a characteristic of repressive, dictatorial regimes for decades. The phenomenon was firstly used in a systematic manner during World

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[1] International Convention for the Protection of All Persons from Enforced Disappearance (adopted 20 December 2006, entered into force 23 December 2010) 2716 UNTS 3 (ICED).

[2] Nikolas Kyriakou, 'The International Convention for the Protection of All Persons from Enforced Disappearance and Its Contributions to International Human Rights Law, with Specific Reference to Extraordinary Rendition' (2012) 13 Melbourne Journal of International Law 424, 425.

[3] Gabriella Citroni and Tullio Scovazzi, 'Recent Developments in International Law to Combat Enforced Disappearances' (2009) 3 Revista Internacional de Direito e Cidadania 89, 90.

[4] ICED art 2.

War II when the Nazis, acting under Hitler and Keitel's *Nacht und Nebel* ('Night and Fog') decree, made people who were 'endangering German security' disappear without a trace.[5] During the Algerian War (1954-1962)[6] and the period of Latin American military dictatorships in the 1970s,[7] the systematic practice re-surfaced and can also be observed in multiple African countries and European regions, such as Turkey or Chechnya.[8] Although this crime used to be the product of military dictatorships, the global problem of disappearances today also results from issues such as long-standing internal conflicts, gender-based violence and the decimation of indigenous populations.[9] Due to the uncontested severity and global nature of the crime, many steps have been taken by the international community to combat it. The prohibition has been codified in various treaties and has been dealt with by multiple human rights bodies and courts. However, next to international law, the question arises how specific countries which have experienced the phenomenon of enforced disappearances in the past have dealt with this in their domestic legal systems. This paper seeks to combine these two aspects by answering the question of how international and domestic law on the crime of enforced disappearances interact with each other, focusing on the examples of Argentina and South Africa.

In order to answer this question, this paper will utilize a hybrid methodological approach. Next to literature review, doctrinal and comparative legal research will be conducted. Doctrinal research will be conducted by critically analyzing the legal status of the prohibition of enforced disappearances in both international and domestic legislation and jurisprudence. Comparative

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[5] Dalia Vitkauskaitė-Meurice and Justinas Žilinskas, 'The Concept of Enforced Disappearances in International Law' (2010) 120 Jurisprudencija: Mokslo darbu žurnalas 197, 198.

[6] Human Rights Watch, 'Time for Reckoning: Enforced Disappearances in Algeria' (2003) 15(2)(E) *Human Rights Watch Reports*.

[7] Vitkauskaitė-Meurice and Justinas Žilinskas (n 5) 198.

[8] Citroni and Scovazzi (n 3) 90; Ophelia Claude, 'A Comparative Approach to Enforced Disappearances in the Inter-American Court of Human Rights and the European Court of Human Rights Jurisprudence' (2010) 5 International Human Rights Law Review 407, 408.

[9] Ioanna Pervou, 'The Convention for the Protection of All Persons from Enforced Disappearance: Moving Human Rights Protection Ahead' (2012) 5 European Journal of Legal Studies 145, 148.

research will be conducted by comparing the jurisprudence of different (regional) international courts and the different levels of interactions between international and domestic law in Argentina and South Africa.

Following this introduction (1), the paper will examine how the prohibition of enforced disappearances is defined and classified in international legislation and international jurisprudence (2). Thereafter, it will analyze how the countries of Argentina (3) and South Africa (4) dealt with this crime in their domestic legal systems and which interactions exist with international law. Lastly, a conclusion will be drawn which provides an answer to the question of how international and domestic law on the crime of enforced disappearances interact with each other by briefly comparing the two countries (5).

2. Enforced Disappearances under International Law

In order to answer the question of how international and domestic law on the crime of enforced disappearances interact with each other, this section will analyze the current status of the crime under international law. To do so, doctrinal legal research will be conducted by critically analyzing international conventions and jurisprudence.

2.1 International Conventions: Classification and Definitions

It is important to note that the crime of enforced disappearances exists both in the context of International Human Rights Law (IHRL), in which human rights courts are deciding whether certain practices by states violate their citizens' rights, and in the context of International Criminal Law (ICL) in which courts try responsible individuals for the commission of this crime. Over the last decades, the international community, including both IHRL and ICL, has slowly but surely, taken steps to combat the phenomenon of enforced disappearances.

As concerns IHRL, to date, three main instruments have come into force: Firstly, the *Declaration on the Protection of All Persons form Enforced*

Disappearances (1992),[10] a UN General Assembly resolution of non-binding character.[11] Secondly, the *Inter-American Convention on Forced Disappearance of Persons* (1994),[12] which, although it does constitute a legally binding instrument, has only been ratified by 15 states due to its regional character. Lastly, in 2007, the *International Convention for the Protection of All Persons from Enforced Disappearance* (ICED)[13] came into force, 'fill[ing] a legal gap and represent[ing] an effective tool to prevent and suppress the international crime of enforced disappearance as well as [to send] a political message that this odious practice and ultimate denial of human beings will no longer be tolerated'.[14] These three instruments contain a relatively similar definition of the crime, which is comprised of three different elements:[15]

1. the deprivation of liberty of the victim;
2. the perpetrators are State agents, or persons acting with the authorization, support or acquiescence of the State; and
3. a refusal to acknowledge the deprivation of liberty or concealment of the fate or whereabouts of the disappeared person. The result of an enforced disappearance is that the victim is placed outside the protection of the law.

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[10] Declaration on the Protection of All Persons from Enforced Disappearance, UNGA Res 47/133 (18 December 1992).

[11] Tullio Scovazzi and Gabriella Citroni, *The Struggle against Enforced Disappearance and the 2007 United Nations Convention* (Brill Nijhoff 2007) 249.

[12] Inter-American Convention on Forced Disappearance of Persons, Organization of American States (OAS) (adopted 9 June 1994, entered into force 28 March 1996).

[13] International Convention for the Protection of All Persons from Enforced Disappearance (adopted 20 December 2006, entered into force 23 December 2010) 2716 UNTS 3 (ICED).

[14] Gabriella Citroni, 'The International Convention for the Protection of All Persons from Enforced Disappearance: A Milestone in International Human Rights Law' <https://boa.unimib.it/retrieve/handle/10281/7287/8611/The_International_Convention_for_the_Protection.pdf> accessed 2 March 2019. Moreover, ICED established the Committee on Enforced Disappearances which monitors the implementation of the treaty.

[15] Gabriella Citroni, 'Enforced Disappearance as a Human Rights Violation and An International Crime' (*Case Matrix Network*, 22 October 2014) <http://blog.casematrixnetwork.org/toolkits/enforced-disappearance/?doing_wp_cron=1551951000.7882430553436279296875> accessed 2 March 2019.

Moreover, these three instruments classify the crime of enforced disappearances as a crime against humanity, if it is practiced systematically or on a widespread basis.[16] This classification is of paramount importance since it leads to considerable legal consequences concerning, i.a. universal jurisdiction, the state's responsibility to punish and investigate, and the prohibition of amnesties.[17]

As concerns ICL, the prohibition of enforced disappearances has been included in article 7 of the Rome Statute of the International Criminal Court (ICC), which also classifies the phenomenon of enforced disappearances as a crime against humanity, if practiced systematically or on a widespread basis.[18] However, this definition is narrower, as the intention of removing the victim from the protection of the law for a prolonged period of time constitutes an element of the crime.

The international community has thus, albeit rather slowly, made considerable progress regarding the crime of enforced disappearances by integrating it into the Rome Statute of the ICC and establishing ICED as a tool to end the practice of enforced disappearances. Nonetheless, apart from these treaty instruments, international human rights bodies and courts still remain crucial for closing gaps via interpretation, clarifying the status of this crime, providing redress to victims and by holding states responsible for their actions.[19] In the following section, multiple international and regional international courts and their jurisprudence on enforced disappearances will be examined.

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[16] Declaration on the Protection of All Persons from Enforced Disappearance (n 10) preamble; Inter-American Convention on Forced Disappearance of Persons (n 12) preamble; International Convention for the Protection of All Persons from Enforced Disappearance (n 13) preamble and art 5.

[17] Scovazzi and Citroni (n 11) 285.

[18] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 38544.

[19] Helen Keller and Corina Heri, 'Enforced Disappearance and the European Court of Human Rights: A 'Wall of Silence', Fact-Finding Difficulties and States as 'Subversive Objectors'' (2014) 12 Journal of International Criminal Justice 735, 736.

2.2 International Jurisprudence: Interpretational Differences

2.2.1 *Jus Cogens* and the Silence of the International Court of Justice (ICJ)

Although a clear definition of the prohibition of enforced disappearances can be found in article 2 of the ICED, there is still much uncertainty about its status under international law. In particular, the question has arisen whether the prohibition has attained the status of a peremptory norm (*jus cogens*). *Jus cogens* norms are rules of customary international law that hold the highest hierarchal position in international law.[20] The notion of *jus cogens* has been codified in article 53 of the Vienna Convention on the Law of Treaties (VCLT);[21] however, both its content and scope have never been clearly defined.[22] If the prohibition of enforced disappearances was to constitute a *jus cogens* norm, this would lead to significant legal consequences: State immunities and amnesty laws should cease to exist, each state should have to codify this crime under their domestic criminal law and be under the obligation to 'investigate, judge and sanction those responsible for enforced disappearance without exception'.[23] Classifying the prohibition of enforced disappearances as a peremptory norm would thus be an important step to prevent impunity.

The court with primary competence to clarify the scope and definition of article 53 VCLT is the International Court of Justice (ICJ).[24] Unfortunately, however, the ICJ has been very reluctant in this regard and has not clarified the matter in its jurisprudence. As a consequence of the ICJ's unwillingness to elucidate this issue, it has been argued that other international courts and

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[20] Jeremy Sarkin, 'Why the Prohibition of Enforced Disappearances Has Attained *Jus Cogens* Status in International Law' (2012) 81 Nordic Journal of International Law 537, 566.

[21] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, art 53.

[22] Ignacio Alvarez-Rio and Diana Contreras-Garduño, 'A Barren Effort? The Jurisprudence of the Inter-American Court of Human Rights on Jus Cogens' (2016) 14 Revista do Instituto Brasileiro de Direitos Humanos 113, 113.

[23] Sarkin, 'Why the Prohibition of Enforced Disappearances Has Attained *Jus Cogens* Status in International Law' (n 20) 543, 582.

[24] Vienna Convention on the Law of Treaties (n 21) arts 53, 54, 65(3), 66(a).

tribunals also have the competence to identify *jus cogens* norms, pursuant to article 53 VCLT.[25] In that respect, the Inter-American and European approach to this topic will be examined. Furthermore, their jurisprudence concerning the topic of enforced disappearances in general will be compared and contrasted.

2.2.2 The Progressive Approach of the Inter-American Court of Human Rights (IACtHR)

The IACtHR, contrary to the ICJ, has been vocal in granting the prohibition of enforced disappearances the status of *jus cogens*. Mr. Cançado Trindade, former judge at the IACtHR, was the first to address this issue. In 1996, in his concurring opinion in the case *Blake v Guatemala* he acknowledged that 'non-derogable fundamental rights' are *jus cogens* norms[26] and that the prohibition of enforced disappearances falls within this category.[27] After much ambiguity surrounding this remark, the Court itself finally found in 2006 in the case *Goiburú v Paraguay* that 'the prohibition of the forced disappearance of persons and the corresponding obligation to investigate and punish those responsible has attained the status of *jus cogens*'.[28] Following this landmark judgment, the Court decided many cases following the reasoning in *Goiburú v Paraguay* and

[25] Arguments in favor of this can be found by Special Rapporteur Waldock and in the 2001 commentaries on State Responsibility for Internationally Wrongful Acts, see Alvarez-Rio and Contreras-Garduño (n 22) 116. Moreover, the International Law Commission (ILC), has made reference to the high support of inter-American and domestic courts classifying enforced disappearances as *jus cogens* norms, although it has not included it itself in the draft conclusions, see UN General Assembly, International Law Commission, Seventy-first session, 'Fourth report on peremptory norms of general international law (*jus cogens*) by Dire Tladi, Special Rapporteur' (Geneva, 29 April – 7 June and 8 July – 9 August 2019) paras 124–127.

[26] *Blake v Guatemala* Series C no 27 (IACtHR, 2 July 1996) Separate Opinion of Judge Cançado Trindade, para 15.

[27] Alvarez-Rio and Contreras-Garduño (n 22) 121. Judge Cançado Trindade further elaborated his opinion on this topic in Antônio Augusto Cançado Trindade, 'Enforced Disappearances of Persons as a Violation of Jus Cogens: The Contribution of the Jurisprudence of the Inter-American Court of Human Rights' (2012) 81 Nordic Journal of International Law 507.

[28] *Goiburú et al v Paraguay* Series C no 153 (IACtHR, 22 September 2006), para 84 (emphasis added).

reaffirmed the characterization of the prohibition of enforced disappearances as a peremptory norm.[29] However, the legitimacy of the Court's rulings concerning the elucidation of *jus cogens* norms and thus the interpretation of art. 53 VCLT are contested in the international community.[30]

Nonetheless, the classification of the crime as a *jus cogens* norm clearly demonstrates the Court's ambition to put an end to the practice of enforced disappearances and to end impunity. These efforts can also be observed by the Court's decision to declare so called 'self-amnesty laws' (domestic laws granting amnesty only to state agents) as incompatible with the Convention,[31] and by stressing that each state has the obligation to codify the crime of enforced disappearances in their national criminal code as an autonomous offense.[32]

Moreover, the Court has underlined the complex nature of the offense. Already in 1988, in *Velásquez Rodríguez v Honduras*, the Court stressed that 'the phenomenon of disappearances is a complex form of human rights violation that must be understood and confronted in an integral fashion'.[33] Consequently, the Court adopted the so-called 'multiple rights approach' which concludes that if a violation of the prohibition of enforced disappearance has been found, then, automatically, multiple other rights have been violated as well. Thus, the Court does not analyze each right separately, but recognizes their violation as an

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[29] *Myrna Mack Chang v Guatemala* Series C no 101 (IACtHR, 25 November 2003), para 27; *La Cantuta v Peru* Series C no 162 (IACtHR, 29 November 2006), para. 157; *Tiu-Tojín v Guatemala* Series C no 190 (IACtHR, 26 November 2008), para 91; *Chitay Nech et al v Guatemala* Series C no 212 (IACtHR, 25 May 2010), paras 86, 193; *Radilla-Pacheco v Mexico* Series C no 209 (IACtHR, 23 November 2009), para 139; *Anzualdo-Castro v Peru* Series C no 202 (IACtHR, 22 September 2009), para 59; *The Río Negro Massacres v Guatemala* Series C no 250 (IACtHR, 4 September 2012), para 114.

[30] Alvarez-Rio and Contreras-Garduño (n 22) 114.

[31] *Barrios Altos v Peru* Series C no 70 (IACtHR, 14 March 2001), para 41; *Gomes Lund and Others v Brazil* Series C no 219 (IACtHR, 24 November 2010); Eleonora Mesquita Ceia, 'The Contributions of the Inter-American Court of Human Rights to the Development of Transitional Justice' (2015) 14 The Law and Practice of International Courts and Tribunals 457, 468.

[32] *Heliodoro Portugal v Panama* Series C no 186 (IACtHR, 12 August 2008), paras 181, 183; Citroni and Scovazzi (n 2) 97.

[33] *Velásquez Rodríguez v Honduras* Series C no 4 (IACtHR, 29 July 1988), para 150; Claude (n 6) 429.

inevitable consequence of the enforced disappearance.[34] In the same vein, the Court also acknowledged the continuing or permanent character of the offense which means that the offense is considered ongoing or permanent for the period in which the fate of the victim cannot be determined.[35]

Lastly, concerning the Court's quest to end the practice of enforced disappearances, it is important to note its stance on military tribunals. In *Tiu Tojín v Guatemala,* the Court stressed that military tribunals are absolutely prohibited in cases of enforced disappearances due to their restrictive nature and exceptional application which are linked to military functions.[36]

Looking at the IACtHR's jurisprudence over the years, it can thus be said that the Court has taken immense steps to combat the practice of enforced disappearances and to end impunity. It has taken measures such as classifying the prohibition as a *jus cogens* norm, invalidating amnesty laws, emphasizing the complex nature of the offense and declaring military courts incompetent. Hence, there is no doubt concerning the Court's stance and activism on this issue. However, since the phenomenon of enforced disappearances is not confined to the Americas but can also be observed in European regions, in the following section, another major human rights court, the European Court of Human Rights (ECtHR) and its jurisprudence on this issue will be examined.

2.2.3 The Conservative Approach of the European Court of Human Rights (ECtHR)

Contrary to the IACtHR, the ECtHR has been a lot less activist on the issue of enforced disappearances. To start, the ECtHR did not address the issue of *jus cogens* in its case-law at all.[37] This is rather interesting since the two courts are

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[34] Claude (n 6) 431.

[35] Inter-American Convention on Forced Disappearance of Persons (n 12) art 3; Claude (n 6) 430.

[36] *Tiu-Tojín v Guatemala* (n 29) paras 119–120; Citroni and Scovazzi (n 2) 97.

[37] See, for example: *Kurt v Turkey* App no 24276/94 (ECtHR, 25 May 1998); *Cyprus v Turkey* ECHR 2001-IV 1; *Timurtaş v Turkey* ECHR 2000-VI 303; *Mujkanović and Others v Bosnia and Herzegovina* App no 47063/08 (ECtHR, 3 June 2014); *Palić v Bosnia and Herzegovina* App no 4704/04 (ECtHR, 15 February 2011).

not two completely separate entities; in fact, the European Court has on many occasions found its decisions by quoting cases of the Inter-American Court. Such is the case in *Kurt v Turkey*, where the ECtHR did refer to cases of enforced disappearances in front of the IACtHR, however, without mentioning its findings concerning peremptory norms.[38] The ECtHR's deliberate silence in this regard could lead to the assumption that it does not regard the prohibition of enforced disappearances as a peremptory norm of international law. Moreover, it can be argued that the ECtHR has not acknowledged the complex character of the offense of enforced disappearances, since contrary to the IACtHR, it does not make use of the multiple rights approach, but instead examines each right on its own as if they all stemmed from different incidents.[39] Additionally, it does not endorse the IACtHR's 'continuous-offense' approach, and only presumes victims dead, with the help of a quantitative formula, when a significant amount of time has passed without revealing any information on the disappearance.[40]

Notwithstanding these issues, the attitude of the ECtHR has been changing. Although it used to rule cases of enforced disappearances under article 5 of the European Convention on Human Rights (ECHR) (right to liberty and security), it now invokes article 2 ECHR (right to life); thereby following the IACtHR's approach. Moreover, in cases such as *Timurtas* and *Çiçek*, the ECtHR demonstrated that it has discarded its 'proof beyond reasonable doubt standard' for violations of the right to life, stating that circumstantial evidence would suffice, which thus facilitates an easier condemnation of states for the practice of enforced disappearances.[41]

In conclusion, it can thus be said that to date, the ECtHR's approach is more restrictive and not as well developed as that of the IACtHR. Hence, for the future, it would be desirable if the ECtHR was to change its method of interpretation and aligned it even more with that of the IACtHR, especially in the context of the multiple-offense approach and the *jus cogens* classification. By

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[38] *Kurt v Turkey* (n 37), para 67.
[39] Claude (n 8) 432.
[40] Pervou (n 9) 151.
[41] *Timurtaş v Turkey* (n 37); *Çiçek v Turkey* App no 25704/94 (ECtHR, 27 February 2001); Gobind Singh Sethi, 'The European Court of Human Rights' Jurisprudence on Issues of Forced Disappearances' (2001) 8(3) Human Rights Brief 29, 30–31.

doing so, it would contribute to a comprehensive international approach to this topic and to an effective protection of human rights in Europe.

As has been demonstrated above, a comprehensive theoretical framework on the phenomenon of enforced disappearances exists in international law. The crime has been integrated into the Rome Statute of the ICC and multiple human rights instrument dealing solely with this issue have come into force. Moreover, multiple international courts have dealt with this topic, the IACtHR playing a leading role in this regard. Now the question arises whether, and to which extent, this theoretical framework has had interactions with the national level. Has the national legislature made use of the definitions and classifications provided for under international law? Have national courts invoked international jurisprudence in capital rulings? Questions like these will be answered in the following section, using as an example the countries of Argentina and South Africa.

3. *Nunca Más*: Argentina's Long Road to Justice

Argentina was chosen as a country to analyze due to the enormous amount of cases of enforced disappearances which occurred under its military dictatorship between 1976 and 1983. The national truth finding commission has identified around 9,000 cases of enforced disappearances, however, the number estimated by many experts is considerably higher (35,000).[42] Moreover, Argentina's interactions with the international level, particularly in the Inter-American realm, provide for an interesting analysis. The following section will explore how Argentina classified the crime of enforced disappearances in its domestic law and will compare this classification to international law. Furthermore, a chronological overview of how Argentina dealt with the phenomenon of enforced disappearances will be provided.

[42] Comisión Nacional sobre la Desaparición de Personas (CONADEP), 'Nunca Más' (20 September 1984) Prologue.

3.1 Classification of Enforced Disappearances under Argentinian Law

As mentioned in section 2, international law classifies the crime of enforced disappearances as a crime against humanity. Since Argentina incorporated international conventions into its Constitution in 1994 it could be assumed that it would use the same classification for this crime in its domestic law. However, although Argentina adopted this classification in some cases, it has also introduced another, rather unusual classification for the crime of enforced disappearances. In 2006, an Argentinian court declared for the first time that enforced disappearances constitute 'a crime against humanity in the framework of genocide'.[43] This statement, however, seems rather odd since 'a crime against humanity in the framework of genocide' does not actually exists in either international or domestic law. Either the crimes were committed against any civilian population (crime against humanity), or they were committed against a protected group of people with the overall specific intent to destroy it (genocide). What the Argentinian court could have meant here is that the acts that took place constitute crimes against humanity (such as the crime of enforced disappearances); and that these acts occurred 'in the context of genocide', referring to the overall intent of the military regime to extinguish its political opponents between 1976 and 1983. However, since political groups are not counted as protected groups in international law,[44] the international system qualifies this offense (only) as a crime against humanity, in contrast with Argentina which brings it under the umbrella of genocide. A first discrepancy can be observed here between international and domestic law.[45] In combining the two classifications of crimes against humanity and genocide, it could be

[43] *Miguel Osvaldo Etchecolatz LE* No 5124838 (Tribunal Oral en lo Criminal Federal N1 de La Plata, 19 Septiembre 2006).

[44] Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277, art 2.

[45] The crime of enforced disappearances is one instance in which the narrow international-law definition of genocide led to its 'downgrading' as a crime against humanity. For a general discussion on this issue, see Patricia M Wald, 'Genocide and Crimes Against Humanity' (2007) 6 Washington University Global Studies Law Review 621.

assumed that the Argentinian courts finally wanted to acknowledge the horrendous events that occurred by emphasizing the serious nature of the crimes that took place during the military regime. [46] However, as this section will show, Argentina and its courts have not always been willing or able to go to these lengths.

3.2 The Different Phases in Argentina's History of Enforced Disappearances

The following section will provide a chronological overview, divided into four main phases, of how Argentina dealt with the phenomenon of enforced disappearances by examining specific laws and national jurisprudence and their interactions with the international legal system.

3.2.1 Military Dictatorship and Self-Amnesties

When the military seized power in Argentina in 1976, it conducted a so called 'war against subversion'[47] – a systematic practice of eradicating its political opposition. Apart from committing heinous crimes such as enforced disappearances and torture, the military junta reorganized the national structure to preserve its power. This reorganization process received an official name – 'Proceso de Reorganización Nacional' – and introduced norms of

[46] Moreover, the crime of enforced disappearances was incorporated into the Penal Code in 2011 which classifies it as a 'crime against individual freedom' ('delito contra la libertad individual'), see Código Penal de la Nación Argentina (Fecha de Sanción 21 Diciembre 1984, Fecha de Publicación en BO 16 Enero 1985) Ley No 11179, art 142ter.

[47] Anne Marie Latcham, 'Duty to Punish: International Law and the Human Rights Policy of Argentina' (1989) 7 Boston University International Law Journal 355, 356.

supraconstitutional nature.[48] It dissolved Congress,[49] dismissed eighty percent of the judges (even the ones acting under life tenure at the Supreme Court) and suspended multiple articles of the Constitution.[50] Moreover, only two weeks before its fall, the junta enacted a self-amnesty law which protected all officers who had committed offenses between May 1973 and June 1982.[51] This, however, stands in contrast with international law. As observed above, the IACtHR ruled that self-amnesty laws are incompatible with the Convention. In the case *Barrios Altos v Peru*, it stated:

> This Court considers that all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law.[52]

Thus, since the Inter-American system does not tolerate domestic laws protecting individuals who committed serious violations of human rights, such

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[48] Estatuto para el Proceso de Reorganización Nacional (Fecha de Sanción 24 Marzo 1976, Fecha de Publicación en el Boletín Oficial 31 Marzo 1976).

[49] To replace Congress, the military regime established the Comisión Asesora Legislativa (CAL), which was composed of three military military officers with legislative force on behalf of the armed forces, see Reglamento para el funcionamiento de la Junta Militar, Poder Ejecutivo Nacional y Comisión de Asesoramiento Legislativo (24 Marzo 1976) Ley No 21256, art 3.2.1.

[50] Daniel W Schwartz, 'Rectifying Twenty-Five Years of Material Breach: Argentina and the Legacy of the Dirty War in International Law' (2004) 18 Emory International Law Review 317, 321; David Weissbrodt and Maria Luisa Bartolomei, 'The Effectiveness of International Human Rights Pressures: The Case of Argentina, 1976-1983' (1991) 75 Minnesota Law Review 1009, 1012.

[51] Ley de Pacificación Nacional: Medidas políticas y noramtivas tendientes a sentar las bases de la definitiva pacificación del país (22 Setiembre 1983) Ley No 22924; Schwartz (n 50) 326.

[52] *Barrios Altos v Peru* (n 31), para 41.

as enforced disappearances,[53] a discrepancy can be observed between the international and domestic legal order.[54]

3.2.2 Post-Military Progressive Start

3.2.2.1 Alfonsín's early presidency

Following the fall of the military, newly elected president Raúl Alfonsín had a difficult task. Although he wanted to restore democracy in the country and punish those responsible for enforced disappearances, he was still constrained by the omni-present military. Nonetheless, his first years in office proved a success. Shortly after his inauguration, Alfonsín created the *Comisión Nacional sobre la Desaparición de Personas* (CONADEP) in order to investigate past cases of enforced disappearances. This truth finding commission later published the well-known *Nunca más* report,[55] which was used as evidence in later trials and sparked a cascade of truth commissions worldwide.[56] In comparison to other truth finding commissions, CONADEP was not aimed at reconciliation, but solely at getting to know the truth of what happened under the military regime, especially concerning the fate and whereabouts of the disappeared.[57] In a 1992 report on Argentina, the Inter-American Commission on Human Rights (the Inter-American Commission) applauded the creation of CONADEP and its

[53] Mesquita Ceia (n 31) 478.

[54] Since Argentina had not ratified the Convention at the time of the enactment of the self-amnesties and the judgment in *Barrios Altos v Peru* was only delivered in 2001, it cannot necessarily be spoken of a violation of international law in this case, but of a discrepancy.

[55] Comisión Nacional sobre la Desaparición de Personas (CONADEP), 'Nunca Más' (20 September 1984).

[56] Carlos S Nino, 'The Duty to Punish Past Abuses of Human Rights Put into Context: The Case of Argentina' (1991) 100 Yale Law Journal 2619, 2623; Kathryn Sikkink, 'From Pariah State to Global Protagonist: Argentina and the Struggle for International Human Rights' (2008) 50(1) Latin American Politics and Society 1, 8.

[57] Ayeray Medina Bustos, 'Paths to Truth, Justice and Reconciliation' (The Ethics of War and Peace 51st Annual Conference of the Societas Ethica Maribor, 21–24 August 2014) 115, 128.

investigation and documentation of the disappearances.[58] Besides this, Alfonsín's presidency proved successful in other ways. In this sense, Congress declared the self-amnesty law by the military null and void, arguing that the law constituted a de facto imposed norm by an authoritarian government with invalid content.[59] Moreover, under Alfonsíns presidency, Argentina ratified multiple international conventions, such as the *American Convention on Human Rights* and the *United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (UNCAT).[60]

3.2.2.2 Trial of the Juntas

In addition to all this, Alfonsín also mandated the trial against nine high-ranking junta members.[61] Concerning the aspect of jurisdiction for the crimes committed by armed forces, Alfonsín was forced to strike a political compromise as he was still constrained by the military. It was decided that military courts would have jurisdiction in the first instance, however, only with the condition of an automatic appeal in front of the federal court of appeals.[62] Alfonsín had hoped that this would give the military a chance to forfeit a couple of high-ranking military officers to restore its integrity;[63] however, much like human rights groups had anticipated, this was not the case. Argentina's military courts

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[58] Inter-American Commission on Human Rights, 'Cases 10.147, 10.181, 10.240, 10.262, 10.309 and 10.311: Argentina' (2 October 1992) Report No 28/92, para 42.
[59] Nino (n 56) 2624.
[60] American Convention on Human Rights, Organization of American States (OAS) (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85.
[61] Sikkink (n 56) 6.
[62] Nino (n 56) 2625. It was later decided by the IACtHR in *Tiu Tojín v Guatemala* that military tribunals are absolutely prohibited in cases of enforced disappearances, due to their restrictive nature and exceptional application which are linked to military functions, see *Tiu-Tojín v Guatemala* (n 29), paras 119–120.
[63] Emilio F Mignone, Cynthia L Estlund and Samuel Issacharoff, 'Dictatorship on Trial: Prosecution of Human Rights Violations in Argentina' (1984) 10 Yale Journal of International Law 118, 142.

refused to prosecute high ranking officials and even decided to stop proceedings against the nine junta members.[64] The *Trial of the Juntas* (also called the *juicio del siglo* due to its popularity) thus ended up in the Federal Chamber of Appeals ('Cámara Federal de Apelaciones en lo Criminal'),[65] and on 9 December 1985, the Chamber convicted five of the nine defendants.[66] This trial, and previous actions taken by Alfonsín and his government, were of particular importance since they demonstrated to the Argentinian people that 'power is not immune from prosecution'.[67] Moreover, this trial did not go unnoticed by the international community. In its 1992 report on Argentina, the Inter-American Commission stated that it was 'pleased to observe the historic precedent the Argentinian Government set when it put on trial high-ranking officials of the de facto government and convicted them of human rights violations'.[68]

3.2.3 Setbacks: Amnesties and Pardons

3.2.3.1 Laws of *Full Stop* and *Due Obedience*

The military, however, was not content with these turns of events. Due to the junta trials, the actions taken by CONADEP, the nullification of the self-amnesties, and the hundreds of cases pending against (lower) military officers, multiple military uprisings arose.[69] Although Alfonsín was able to suppress these uprisings, he was forced to yield to the military's pressures. [70] Hence, in 1986 and 1987, he pushed two laws through Congress which were effectively granting amnesties to those responsible for the atrocities during the military regime.[71]

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[64] ibid 143.
[65] Paula K Speck, 'The Trial of the Argentine Junta: Responsibilities and Realities' (1987) 18 University of Miami Inter-American Law Review 491, 494.
[66] ibid 503.
[67] Nino (n 56) 2630.
[68] Inter-American Commission on Human Rights, 'Cases 10.147, 10.181, 10.240, 10.262, 10.309 and 10.311: Argentina' (2 October 1992) Report No 28/92, para 43.
[69] Schwartz (n 50) 329.
[70] Schwartz (n 50) 332.
[71] Latcham (n 47) 355.

Firstly, the *Law of Full Stop* ('Ley de Punto Final') was enacted.[72] This law provided a sixty-day limit to bring new cases concerning human rights violations during the military regime before the courts.[73] It was intended to end trials on this issue as soon as possible by not allowing new cases to be prosecuted after the sixty-day period expired.[74] However, the law had the opposite effect. Although this time limit overlapped with the one-month recess of the courts, it sparked a new wave of complaints. By the time the sixty days had expired, more than 450 military officers and soldiers had been indicted.[75]

Secondly, following another military uprising, the *Law of Due Obedience* ('Ley de Obediencia Debida') was passed.[76] This law distinguished military ranks with decision-making powers from those without, and exempted all military personnel below a specific rank from criminal responsibility for acts committed between 1976 and 1983.[77] It presumed that lower-ranking military personnel was only following orders or acting under duress and was thus not liable for the offenses it committed.[78] Due to this law, which was upheld by the Supreme Court in a four-to-one vote, the 400 officers and soldiers who were previously indicted now became immune from prosecution.[79] This immensely reduced the number of defendants, leaving only about 50 high-ranking officers.[80]

With regard to section two of this paper however, it seems evident that these two laws are not compatible with the international legal system. This was confirmed by the Inter-American Commission which stated in its report that Laws Nº 23,492 (*Law of Full Stop*) and Nº 23,521 (*Law of Due Obedience*) are 'incompatible with Article XVIII (right to a fair trial) of the American Declaration of the Rights and Duties of Man and Articles 1, 8 and 25 of the

[72] Ley de Punto Final (23 Diciembre 1986) Ley No 23492.
[73] Schwartz (n 50) 332.
[74] Latcham (n 47) 361.
[75] Nino (n 56) 2629; Elin Skaar, *Judicial Independence and Human Rights in Latin America* (Palgrave Macmillan 2011) 52.
[76] Ley de Obediencia Debida (8 Junio 1987) Ley No 23521.
[77] Latcham (n 47) 362; Nino (n 56) 2629.
[78] Latcham (n 47) 363.
[79] ibid 364; Speck (n 65) 533.
[80] Latcham (n 47) 364.

American Convention on Human Rights'.[81] Notwithstanding this discrepancy between the international and domestic system, these laws were kept in place in the Argentina until 2005.

3.2.3.2 Presidential pardons

Evidently, the pursuit of justice which had been practiced strongly in the early years of the reinstated democracy, stalled in the mid to late 1980s. This halt of justice further intensified in 1989, when newly-elected president Carlos Menem granted presidential pardons to hundreds of prosecuted and/or convicted military officers and even released the five previously convicted junta members.[82] Similarly to Alfonsíns amnesty laws, the *Presidential Decree of Pardon*[83] was condemned by the Inter-American Commission which stated that this decree 'denied the victims their right to obtain judicial investigation in a court of criminal law to determine those responsible for the crimes committed and punish them accordingly'.[84] Furthermore, the Commission noted that, since Argentina had ratified the *American Convention on Human Rights* in 1984, the *Presidential Decree of Pardon*, the *Law of Full Stop* and the *Law of Due Obedience* constituted a violation 'of the right to a fair trial (Article 8) and of the right to judicial protection (Article 25), in relation to the obligation of the States to guarantee the full and free exercise of the rights recognized in the Convention (Article 1.1)'.[85] Nonetheless, despite this clear violation of the Convention, it took Argentina another 13 years to declare these laws as null and void.

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[81] Inter-American Commission on Human Rights, 'Cases 10.147, 10.181, 10.240, 10.262, 10.309 and 10.311: Argentina' (2 October 1992) Report No 28/92; American Convention on Human Rights (n 60).

[82] Antonius CGM Robben, 'Testimonies, Truths, and Transitions of Justice in Argentina and Chile' in Alexander L Hinton (ed), *Transitional Justice: Global Mechanisms and Local Realities after Genocide and Mass Violence* (Rutgers University Press 2010) 188; Weissbrodt and Bartolomei (n 50) 1035.

[83] Decreto 1002/89 (7 Octubre 1989).

[84] Inter-American Commission on Human Rights, 'Cases 10.147, 10.181, 10.240, 10.262, 10.309 and 10.311: Argentina' (2 October 1992) Report No 28/92, para 50.

[85] ibid.

3.2.4 A New Era of Justice

3.2.4.1 The Truth trials

Due to the presidential pardons and the laws of *Full Stop* and *Due Obedience*, the traditional route to justice thus seemed to be closed and the Argentinian people had to resort to other, alternative routes. Apart from focusing on public apologies and the establishment of commemorative monuments,[86] 'truth trials' (*juicios por la verdad*) started to take place in the 1990s.[87] The objective of these trials was not to prosecute those responsible (as this was in any case impossible due to Alfonsín's amnesty laws and Menem's pardons), but for the families of the disappeared to know the truth about the fate and whereabouts of the victims. On the domestic level, NGOs and other human rights groups, such as the *Center for Legal and Social Studies* (CELS) and the *Grandmothers of Plaza de Mayo* were the driving force behind the establishment of those trials.[88] However, these trials also had an international element. Their legal basis, the 'right to truth' and thus the obligation of the state to investigate were in fact established at the international level – in the IACtHR's case *Velásquez Rodríguez v Honduras*.[89] In this context, an interesting interaction between the international and domestic system can be observed: Argentinian NGOs decided to bring cases such the one concerning Carmen Aguiar de Lapacó to the Inter-American Commission, demanding the applicants right to know the truth.[90] As a consequence, this case directly led to the signing of an 'agreement for a friendly settlement' between the Argentinian Government and Carmen Aguiar de Lapacó.[91] In turn, the Commission's report, although not a binding instrument, then put pressure on

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[86] Catalina Smulovitz, '"The past is never dead" Accountability and justice for past human rights violations in Argentina' in Vesselin Popovski and Mónica Serrano (eds), *After Oppression: Transitional justice in Latin America and Eastern Europe* (United Nations University Press 2012) 71.

[87] Skaar (n 75) 57.

[88] Daniel Levy, 'Recursive cosmopolitization: Argentina and the global Human Rights Regime' (2010) 61 British Journal of Sociology 579, 588; Skaar (n 75) 64.

[89] *Velásquez Rodríguez v Honduras* (n 33), para 166.

[90] Inter-American Commission on Human Rights, 'Case 12.059: Argentina' (29 February 2000) Report No 21/00.

[91] ibid, para 17.

the Argentinian judicial system, and federal Argentinian courts started accepting 'the right to truth'. Hence, due to the interactions between the international and domestic level, a new route to justice was born in Argentina – the truth trials.

3.2.4.2 The Cavallo decision

In addition to the efforts mentioned above, the two human rights groups, CELS and *Grandmothers of Plaza de Mayo*, were instrumental in the struggle to have Alfonsín's amnesty laws nullified and voided.[92] Since the amnesty laws and pardons did not include the disappearance of minors, the *Grandmothers of Plaza de Mayo* were able to initiate legal proceedings against military officers for this crime via this route.[93] Once these trials had started, CELS seized this opportunity to demonstrate to the court the flaw in the system which allowed for the prosecution of the crime of enforced disappearances against the minor, but not against its parents.[94] In 2001, in an unexpected turn of events, Federal Judge Gabriel Cavallo, inspired by CELS' reasoning, declared the *Full Stop* and *Due Obedience* laws as unconstitutional and therefore null and void.[95]

To explain this decision, it is important to note that in 1994, international conventions were incorporated into the Argentinian Constitution and given the same legal force as the Constitution itself. In that regard, section 75(22) of the Constitution reads that '[t]reaties and concordats have a higher hierarchy than laws (…) they have constitutional hierarchy'.[96] Thus, when Judge Cavallo declared the amnesty laws as unconstitutional law, he was referring to the fact that they were incompatible with Argentina's obligation under international law. In particular, he emphasized the incompatibility of the *Full Stop* and *Due Obedience* laws with Argentina's treaty obligations under the *International Covenant on Civil and Political Rights* (ICCPR), the UNCAT, the *American*

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[92] Sikkink (n 56) 14.
[93] Coreen Davis, *State Terrorism and Post-transitional Justice in Argentina: An Analysis of Mega Cause I Trial* (Palgrave Macmillan 2013) 9.
[94] Smulovitz (n 86) 74.
[95] *Simón, Julio, Del Cerro, Juan Antonio s/ sustracción de menores de 10 años* No 8686/2000 (Juzgado Nacional en lo Criminal y Correccional Federal, 6 Marzo 2001); Schwartz (n 50) 338; Skaar (n 75) 66.
[96] Constitución de la Nación Argentina (3 Enero 1995) Ley No 24430, art 75(22).

Convention on Human Rights, and the *American Declaration on the Rights and Duties of Man*.[97] Moreover, he referred to the international law classification of 'crimes against humanity' stating that these crimes do not only carry an international implication but also lead to domestic responsibility.[98] Consequently, this case clearly shows how international law can influence domestic jurisprudence.

3.2.4.3 The Kirchners and the Supreme Court

The Cavallo decision marked a new beginning for justice in Argentina which was further pursued under the precedency of Néstor Kirchner (2003-2007) and, subsequently, under that of his wife Cristina Fernández de Kirchner (2007-2015). Both made it a priority to restore the judicial process, by allowing military officers to be prosecuted again. In 2003, Néstor Kirchner helped pass a law through Congress which finally declared the *Full Stop* and *Due Obedience* laws null and void.[99] This was later upheld by the Supreme Court in 2005 which stated that these laws were evidently unconstitutional and constitute an interference in the judicial system and autonomy of the courts.[100] In its decision, the Supreme Court referred to the IACtHR's judgment in the case of *Barrios Altos v Peru* which established that amnesty provisions are incompatible with the Convention.[101] Moreover, the Supreme Court argued that Alfonsín's amnesty laws were intended to prevent the prosecution of past violations of human rights

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[97] *Simón, Julio, Del Cerro, Juan Antonio s/ sustracción de menores de 10 años* (n 95); International Covenant on Civil and Political Rights (adopted 19 December 1966, entered into force 23 March 1976) 999 UNTS 171; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (n 60); American Convention on Human Rights (n 60)*;* American Declaration on the Rights and Duties of Man, Inter-American Commission on Human Rights (entered into force 2 May 1948); Schwartz (n 50) 339.

[98] *Simón, Julio, Del Cerro, Juan Antonio s/ sustracción de menores de 10 años* (n 95); Levy (n 88) 590.

[99] Sikkink (n 56) 14.

[100] *Simón, Julio Héctor y otros s/ privación ilegítima de la libertad, etc*. No 17768, S 1767 XXXVIII (Corte Suprema de Justicia de la Nación, 14 Junio 2005); Skaar (n 75) 53.

[101] *Simón, Julio Héctor y otros s/ privación ilegítima de la libertad, etc*. (n 100); *Barrios Altos v Peru* (n 31), para 41.

and thus directly violated Argentina's treaty obligations and the Constitution which incorporates these treaties.[102] Lastly, the Supreme Court stated that the crime of enforced disappearances constitutes a crime against humanity, and thus does not allow for any statutes of limitations.[103] Since it was impossible for the state to prosecute crimes such as enforced disappearances due to the enactment of the *Full Stop* and *Due Obedience* laws, the Supreme Court found a violation of international and domestic law and declared the amnesty laws null and void.[104] Again, a clear interaction between the international and domestic level can be observed. Due to the influence of international conventions and the IACtHR's jurisprudence, Argentina's amnesty laws were finally declared null and void.

3.2.4.4 The situation today

As a consequence of the nullification of the amnesty laws, hundreds of suspects were detained and prosecuted, and cases, such as the *Trial of the Juntas*, were reopened.[105] Finally, after decades of struggle, the amnesty laws had been removed, the crime of enforced disappearances was codified into domestic law, and the ones responsible for the commission of the atrocities during the military regime were brought to justice. Nonetheless, trials to prosecute those responsible for the crimes committed during the military regime are still ongoing. In December 2018, an Argentinian court convicted former *Ford Motor* executives, proving how companies helped the military regime by setting up detention centers inside their factories and were able to benefit economically under the umbrella of the dictatorship.[106] Moreover, just recently, on 3 May 2019, a

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[102] *Simón, Julio Héctor y otros s/ privación ilegítima de la libertad, etc*. (n 100); 'Julio Simón et al. v. Public Prosecutor' (*International Crimes Database*, 2013) <http://www.internationalcrimesdatabase.org/Case/49> accessed 6 May 2019.

[103] ibid.

[104] ibid.

[105] Robben (n 82) 190; Sikkink (n 56) 19.

[106] Daniel Politi, 'Argentina Convicts Ex-Ford Executives for Abuses During Dictatorship' (*The New York Times*, 11 December 2018) <https://www.nytimes.com/2018/12/11/world/americas/argentina-ford.html> accessed 6 May 2019.

former chief of the army was put on trial for kidnapping and torture during the military dictatorship and will be facing a separate trial for the crime of enforced disappearances in September.[107] These are only two examples of trials prosecuting those responsible for the crimes committed during the military dictatorship. Many more are still in progress and will follow in the future.

This analysis has shown that the level of interaction between international law and domestic Argentinian law is rather high. Although quite a few discrepancies existed between the two levels, an interesting interplay between the two can be observed. In this regard, it is important to note how international law, in particular treaty obligations and the international law classification of enforced disappearances as a crime against humanity, has influenced domestic jurisprudence and was thus able to contribute to the nullification process of the amnesty laws. Moreover, an interesting interaction between the two levels can be observed regarding the establishment of Argentina's 'truth trials'. It is safe to say that these interactions directly facilitated the creation of this new route to justice. However, interactions to such an extent cannot always be observed. In the following section, the country of South Africa, and its approach towards the phenomenon of enforced disappearances under international and domestic law will be analyzed.

4. The Struggle for Justice in Post-Apartheid South Africa

Similar to Argentina, South Africa was chosen to analyze because of its history with enforced disappearances. During the apartheid era (1948-1994), which was characterized by the government's violent racial oppression against the

[107] 'Former Argentine army chief on trial for torture' (*Channel News Asia*, 4 May 2019) <https://www.channelnewsasia.com/news/world/former-argentine-army-chief-on-trial-for-torture-11502708> accessed 6 May 2019.

indigenous population,[108] many human rights violations which were classified as crimes against humanity under international law were legal in South Africa. As a result, as many as 2,000 people disappeared.[109] Moreover, South Africa's distance to the Inter-American realm, and thus also to the jurisprudence of the IACtHR, provides for an interesting comparison with Argentina. The following section will explore how South Africa classified the crime of enforced disappearances in its domestic law and will compare this to international law. Furthermore, a chronological overview of how South Africa dealt with the phenomenon of enforced disappearances will be provided.

4.1 Classification of Enforced Disappearances under South African Law

Although the phenomenon of enforced disappearances occurred on a regular basis in South Africa during the apartheid regime, the country has not made any efforts to include this offense in their domestic law. No specific crime on its prohibition can be found in the South African legal system and next to this gap in its domestic law the country has, to this date, still not signed or ratified the ICED. Nonetheless, the prohibition of enforced disappearances has found its way into the South African legal system via another, more indirect route, namely by Act No 27 of 2002. This act implements the Rome Statute of the ICC which, as stated above, classifies the crime of enforced disappearances as a crime against

[108] Louise Mallinder, 'Indemnity, Amnesty, Pardon and Prosecution Guidelines in South Africa' (Working Paper No 2 from *Beyond Legalism: Amnesties, Transition and Conflict Transformation, Institute of Criminology and Criminal Justice*, Queen's University Belfast, 2009) 1, 5. Contrary to Argentina where the crimes committed were based on political opposition, the atrocities which occurred in South Africa were based on racial oppression.

[109] Jeremy Sarkin, 'The Role of the International Criminal Court (ICC) in Reducing Massive Human Rights Violations Such as Enforced Disappearances in Africa: Towards Developing Transitional Justice Strategies' (2011) 11 Studies in Ethnicity and Nationalism 130, 133; Jeremy Sarkin, 'Dealing with Enforced Disapperances in South Africa (With a Focus on the Nokuthula Simelane Case) and around the World: The Need to Ensure Progress on the Rights to Truth, Justice and Reparations in Practice' (2015) 29 *Speculum Juris* 23, 27.

humanity.[110] It can thus be assumed that South Africa adopts this same classification for this crime. However, notwithstanding Act No 27 of 2002, section two of this paper has shown that the gravity of this crime and its classification as a crime against humanity and (possibly) as a *jus cogens* norm, require it to be classified as an autonomous offense under domestic law. Unfortunately, South Africa has not made any efforts to end impunity for this crime by including this offense in their national legal system or by ratifying international conventions, such as the ICED. This already foreshadows the extent to which international law and domestic South African law interact with each other in this context.

4.2 The Different Phases in South Africa's History of Enforced Disappearances

The following section will analyze in three main phases how South Africa dealt with the phenomenon of enforced disappearances by examining specific laws and national jurisprudence and their interactions with the international legal system.

4.2.1 Apartheid and Indemnities

Similar to what happened in Argentina, South Africa's ruling government during the apartheid era wanted to protect itself from criminal prosecution for the crimes it committed. To do so, it enacted multiple indemnity acts. In 1961 and 1977, the first Indemnity Acts were implemented, ensuring that no criminal (or civil) proceedings could be brought against the officials mentioned in the acts.[111] Later, the issue of indemnity arose again during the formal transition negotiations which took place in the late 1980s to early 1990s.[112] The government argued that it was necessary to grant immunity and indemnity to individuals which had committed political crimes in order to advance

[110] Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002.
[111] Indemnity Act 61 of 1961; Indemnity Act 13 of 1977.
[112] Mallinder (n 108) 12.

reconciliation in the country.[113] As a result, the 1990 Indemnity Act was enacted, granting 'temporary immunity or permanent indemnity against arrest, prosecution, detention and legal process'.[114] Additionally, in 1992, the Further Indemnity Act was implemented, which allowed for a broader scope of indemnity and was seen by many as a measure of self-amnesty.[115]

As established in the theoretical framework above, self-amnesties in relation to the crime of enforced disappearances are not tolerated under international law. Similar to Argentina and the military's enactment of self-amnesty laws, a discrepancy can thus be observed here between international and domestic law. By enacting multiple indemnity laws, the government of South Africa wanted to protect (only) itself from punishment for the crimes that it committed. Although South Africa has not ratified ICED nor is it legally bound by the decisions of the IACtHR, it can still be argued that the indemnity laws are in contrast with international law. Due to the crimes classification as a crime against humanity in international law, and its possible classification as a *jus cogens* norm, state immunities and amnesty laws would not be allowed to exist in any domestic legal order.[116] As a result, there exists at least a discrepancy, if not an incompatibility, between the international and domestic legal system in this regard.

4.2.2 Truth and Reconciliation

4.2.2.1 Promotion of National Unity and Reconciliation Act and the TRC

Following the end of the apartheid era, Parliament enacted the 'Promotion of National Unity and Reconciliation Act' (the Act) in 1995,[117] which established

[113] ibid 18–19.
[114] Indemnity Act 35 of 1990; Mallinder (n 108) 18.
[115] Further Indemnity Act 151 of 1992; Mallinder (n 108) 41.
[116] Sarkin, 'Why the Prohibition of Enforced Disappearances Has Attained *Jus Cogens* Status in International Law' (n 15) 543, 582.
[117] Promotion of National Unity and Reconciliation Act 34 of 1995.

the Truth and Reconciliation Commission (TRC).[118] In South Africa, the truth commission's main objectives were to establish the truth and to pursue national unity and reconciliation.[119] In order to pursue its objectives, the TRC was comprised of three separate committees:[120] The Human Rights Violations Committee, which oversaw public hearings of victims/witnesses; the Reparation and Rehabilitation Committee, which developed a long-term reparation plan; and the Amnesty Committee, which conducted amnesty hearings for perpetrators. However, notwithstanding this well-designed structure of the TRC, an issue can be observed with respect to its jurisdiction *ratione materiae*. In this context, law-makers decided to limit the jurisdiction of the TRC to only include acts which were deemed criminal under the apartheid regime, and not under international law.[121] By doing so, although it never explicitly admitted to this, the TRC effectively excluded the crime of enforced disappearances from its jurisdiction, although this crime had accounted for many deaths during the apartheid era.[122]

However, it is important to reiterate that enforced disappearances constitute norms of customary international law, and maybe even of *jus cogens*. Consequently, as Orentlicher pointed out by drawing on a wide range of United Nations and intergovernmental organizations documents, there exists a 'duty to punish human rights crimes imposed by customary law' especially in relation to torture, enforced disappearances and extra-legal executions.[123] It can thus be argued that there is a discrepancy between the international law obligation to

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[118] John Dugard, 'Is the Truth and Reconciliation Process Compatible with International Law – An Unanswered Question – Azapo v President of the Republic of South Africa 1996' (1997) 13 South African Journal on Human Rights 258, 259.

[119] Alex Boraine, 'Truth and Reconciliation Commisison in South Africa Amnesty: The Price of Peace' in Jon Elster (ed), *Retribution and Reparation in the Transition to Democracy* (Cambridge University Press 2010) 312.

[120] ibid 304; Dugard (n 118) 259; Catherine M Cole, 'Performance, Transitional Justice, and the Law: South Africa's Truth and Reconciliation Commission' (2007) 59 Theatre Journal 167, 173.

[121] Promotion of National Unity and Reconciliation Act (n 117) section 1; Dugard (n 118) 260.

[122] Mallinder (n 108) 55.

[123] Diane F Orentlicher, 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime' (1991) 100 Yale Law Journal 2537, 2583-2599.

punish the crime of enforced disappearances, and the decision of South Africa, not to include international law (and thus the crime of enforced disappearances) in the TRC's jurisdiction. Nonetheless, as will be shown below, hearings in front of the TRC were not the only way through which justice was served in South Africa, as trials on the crimes committed during the apartheid era took place simultaneously.[124]

4.2.2.2 Amnesty within the TRC

Notwithstanding the jurisdiction issue, the TRC still tried to solve cases of enforced disappearances;[125] and when doing so had the unusual power of granting amnesty. Similar to what happened in Argentina, the amnesties in the South African legal system seem to have sprung from a political compromise. Former President Nelson Mandela stated in a private interview that security forces had warned him of severe consequences concerning peaceful elections in case these forces would be subjected to compulsory trials.[126] Under these circumstances, to limit impunity as far as possible, a general/blanket amnesty was rejected and a more 'narrow' definition of amnesty provision was incorporated into the Act.[127] Contrary to the general amnesties of Argentina, applicants for amnesty had to fulfill many conditions, such as fully disclosing their human rights violations, on an individual basis, at a hearing in front of the Amnesty Committee and the public.[128] Moreover, in contrast with Argentina where amnesties existed exclusively to protect the military, amnesties in South Africa were very much focused on providing a mechanism for finding out the truth of what happened. The argument thus existed that the amnesties provided for by the TRC were not in contrast with international law, as they did not solely grant amnesty to state agents and were only awarded in very specific

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[124] Boraine (n 119) 308.

[125] 'South African Republic' (*International Commission on Missing Persons*) <https://www.icmp.int/where-we-work/africa/south-african-republic/> accessed 6 May 2019.

[126] Boraine (n 119) 302.

[127] Promotion of National Unity and Reconciliation Act (n 117) section 20(7).

[128] ibid section 20; Boraine (n 119) 306-307.

circumstances for the sole purpose of getting to know the truth, not to ensure impunity.[129]

4.2.2.3 Challenging the TRC: The *AZAPO* case

This view, however, was not shared by whole population of South Africa. In the case *Azanian Peoples Organisation (AZAPO) and Others v President of the Republic of South Africa and others*, the applicants challenged section 20(7) of the Act, which provided the TRC with the power to grant amnesty, arguing that this provision was not only unconstitutional, but also incompatible with international law.[130] The applicants submitted that, according to international law, States are obliged to prosecute those responsible for gross violations of human rights, and that this was effectively made impossible in South Africa due to section 20(7) of the Act. However, the Constitutional Court's reasoning in this case in respect to international is rather disappointing. After quickly dismissing South Africa's obligations under treaty-law,[131] the court moved on to the point of customary international law.[132] Although it expressly made reference to Orentlicher's paper on 'The Duty to Prosecute Human Rights Violations of a Prior Regime',[133] it nonetheless failed to mention the main point of this paper, namely the above-mentioned obligation imposed by customary law to punish human rights crimes (especially crimes against humanity). Moreover, although the Constitutional Court did refer to other jurisdictions and situations, such as Argentina, Chile and El Salvador, it cleverly ignored the IACtHR's judgment in *Velásquez Rodríguez v Honduras*, which obliges States to investigate and prosecute those responsible for violations of human rights.[134] This judgment

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[129] An example of this line argumentation can be found in the reasoning of judge Mohamed DP in *Azanian Peoples Organisation (AZAPO) and Others v President of the Republic of South Africa and others* Case No CCT 17/96 (Constitutional Court of South Africa, 25 July 1996) para 32.

[130] *Azanian Peoples Organisation (AZAPO) and Others v President of the Republic of South Africa and others* (n 129).

[131] ibid paras 27-29.

[132] ibid paras 30-31.

[133] ibid para 31.

[134] *Velásquez Rodríguez v Honduras* (n 33), para 166.

thus makes it clear that in relation to the crimes committed under the apartheid regime, the South African legal system quite deliberately ignored the obligations imposed by international law. Although South Africa is not bound by decisions of courts such as the IACtHR, this judgment could have presented an ideal starting point for the Constitutional Court to branch out and to 'embark on a wider survey of comparative precedents'[135] and to explore in more detail the international customary law obligation of punishing human rights violations. This would have demonstrated to the rest of the world that the country shows concern and respect for the international legal system which classifies not only the crime of enforced disappearances as a crime against humanity, but also that of apartheid in general.[136]

4.3.3 Pardons and Prosecutions

Following the expiration of the TRC's mandate, multiple policy changes occurred in South Africa which changed the style of the previous reconciliation process. Firstly, president Thabo Mbeki started offering presidential pardons to political prisoners – an action similar to that of president Menem in Argentina.[137] In 2002, Mbeki decided to pardon 33 individuals, 20 of which appeared to have been denied amnesty by the TRC;[138] and in 2007 he announced a new pardon program 'to bring to a close the vexing matter of those prisoners serving sentences for what might be considered politically motivated crimes', ergo including the crime of enforced disappearances.[139] It can thus be argued that this pardon-scheme undermined the careful and well-designed amnesty process of the TRC, by giving perpetrators a 'second bite at the amnesty cherry' without the conditions which were required to be met under the TRC

[135] Dugard (n 118) 266.
[136] International Convention on the Suppression and Punishment of the Crime of Apartheid (adopted 30 November 1973, entered into force 18 July 1976) 1015 UNTS 243; Dugard (n 118) 268.
[137] Mallinder (n 108) 127–128.
[138] ibid 111–128.
[139] ibid 129; 'South Africa Announces Pardons for Apartheid-Era Political Crimes' (*VOA News*, 1 November 2009) <https://www.voanews.com/a/a-13-2007-11-21-voa42/400702.html> accessed 9 May 2019.

Amnesty Committee scheme.[140] Secondly, following a restructuring process at the 'National Prosecution Authority' in 2003, a new institution was created to deal with post-TRC prosecutions – the 'Priority Crimes Litigation Unit' (PCLU).[141] This institution was i.a. responsible for managing and directing investigations and prosecutions arising from the Rome Statute of the ICC, and for missing person cases which emanated from the TRC process.[142] This thus seemed to open the door for trials against crimes against humanity, such as that of enforced disappearances. Unfortunately, however, not many cases were taken up in this regard since then.[143] Thirdly, another policy change took place which threatened to undermine the TRC's progress. In 2005, the 'Prosecution Policy' was amended and essentially introduced 'prosecutorial indemnity' by allowing a wide scheme of plea bargains and thus taking away victims' right to seek adequate judicial redress.[144] However, this amendment was successfully challenged in the case *Thembisile Phumelele Nkadimeng et al v National Director of Public Prosecutions et al*, in which the court stated that the amendment 'is a recipe for conflict and absurdity'.[145]

The new form of 'reconciliation' which crystallized after the TRC's expiration thus displays both negative and positive aspects in regard to punishing crimes such as enforced disappearances. On the one hand, the presidential pardons and the amended prosecution policy constituted an obstacle to further 'truth finding' and prosecution; on the other hand, the *Thembisile* case and the creation of the PCLU in particular represent the opening of a new door for

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[140] Mallinder (n 108) 135.

[141] ibid 113; Priority Crimes Litigation Unit (PCLU) <https://www.npa.gov.za/sites/default/files/pclu/About%20PCLU%20signedoff.pdf> accessed 6 May 2019.

[142] ibid section 1.

[143] Mallinder (n 108) 115.

[144] ibid 124; *Thembisile Phumelele Nkadimeng et al v National Director of Public Prosecutions et al* Case No 32709/07 (High Court of South Africa, Transvaal Provincial Division, 12 December 2008) para 9.1. For the current policy, see Prosecution Policy <https://www.npa.gov.za/sites/default/files/Library/Prosecution%20Policy%20%28Final%20as%20Revised%20in%20June%202013.%2027%20Nov%202014%29.pdf> accessed 6 May 2019.

[145] *Thembisile Phumelele Nkadimeng et al v National Director of Public Prosecutions et al* (n 144) para 15.5.4.

prosecuting crimes which are deemed illegal under international law, such as that of enforced disappearances.

It is thus evident that, regarding enforced disappearances during the apartheid era, South Africa's interaction with international law is not very high. The country's non-ratification of the ICED and its distance to the Inter-American realm resulted in a low level of interaction between international law and domestic law. Contrary to Argentina, the indemnity laws were not annulled in South Africa, nor were they condemned by a (regional) international human rights commission. Moreover, the South African legal system has shown that it does not pay due regard to international law by excluding international law from the jurisdiction *ratione materiae* of the TRC and cleverly ignoring customary international law obligations in the *AZAPO* case, which could have presented an ideal starting point for interaction between the international and domestic legal systems. Only by establishing the PCLU has South Africa taken action to investigate and prosecute crimes arising from the Rome Statute of the ICC, such as enforced disappearances. It can only be hoped that, in the future, more of such cases will be considered both on the domestic and the international level. To this end, the African Court on Human and Peoples' Rights, which has hitherto stayed quiet on the issue of enforced disappearances, could play a leading role. Such interactions and a higher regard for international law would certainly contribute to a better protection of human rights in South Africa.

5. Concluding Remarks

Due to the severity and global nature of the systematic practice of enforced disappearances, the international community has, although rather slowly, taken multiple steps to combat this practice. It has classified the crime of enforced disappearances as a crime against humanity, has included it into the Rome Statute of the ICC and enacted multiple human rights instruments specifically dealing with this topic. Moreover, significant action has been taken by (regional) international courts, in particular by the IACtHR. By taking steps such as classifying the prohibition of enforced disappearances as a *jus cogens* norm, invalidating amnesty laws, emphasizing the complex nature of the offense and declaring military courts incompetent, the Court has demonstrated its quest to

combat the practice of enforced disappearances and to end impunity. Contrary to the IACtHR, the European approach to end this practice has been more restrictive and not as well developed. It would thus be desirable if the ECtHR would align its interpretation more with that of the IACtHR in order to contribute to a comprehensive international approach to this topic.

To answer the question of how international and domestic law interact with each other in the context of enforced disappearances, the countries of Argentina and South Africa were analyzed. This paper has shown that the extent of interaction between the two levels can vary considerably, depending not only on the legislative framework that surrounds it but also on the countries willingness to interact with international law. It has been demonstrated that, contrary to South Africa, there has been a relatively high level of interaction between the international and domestic level in Argentina. After some early discrepancies, Argentina has shown that it pays due regard to international law in the context of enforced disappearances, by ratifying ICED and the Inter-American Convention. Moreover, this paper has shown that Argentina's ability and willingness to interact with the international level led to positive legislative changes in the country. By making use of international jurisprudence in domestic court-cases and interacting actively with the Inter-American Commission, the Argentinian amnesties were later nullified and a new route to justice, the 'truth trials', was established. In South Africa, however, such interactions did not take place. The indemnities/amnesties were not nullified, and domestic courts did not invoke rulings from the international level.

As the example of Argentina has made clear, a high level of interaction between international and domestic law in the context of enforced disappearances can lead to positive changes in the domestic legal system. It would thus be desirable that such an interaction would also be facilitated in countries such as South Africa. To do so, however, South Africa would have to express its willingness to interact with the international level by ratifying international conventions dealing with this topic (such as ICED) and paying higher regard to customary international law. Moreover, to facilitate South Africa's ability of prosecuting and combatting the practice enforced disappearances, a similar instrument to the Inter-American Convention could

be drafted by the African Union.[146] Thus, if South Africa was to ratify this Convention, the African counterpart to the IACtHR – the African Court on Human and People's Rights – would be competent to hear cases of enforced disappearances which occurred in South Africa during the apartheid era. Such steps would contribute to a comprehensive international approach to this topic and to an effective eradication of the practice of enforced disappearances.

[146] Sarkin, 'The Role of the International Criminal Court (ICC) in Reducing Massive Human Rights Violations Such as Enforced Disappearances in Africa: Towards Developing Transitional Justice Strategies' (n 109) 139.