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A Historical Approach to International Criminal Law through the Lenses of Domestic Prosecutions: Judging Massive Human Rights Violations in Argentina

Natalia M. Luterstein*

8.1. Introduction

Recent developments in international criminal law, in particular the creation of *ad hoc* tribunals and the establishment of a permanent international criminal court, seem to lead to the conclusion that the international branch of international criminal law has become central to this discipline. In the wake of both internal and internationalised conflicts, the international community demonstrates a preference for the prosecution of international crimes by international or mixed tribunals, with an emphasis on international prosecutions. Nevertheless, it is submitted here that this preference for the international branch is simply a misleading impression, at least in the case of post-transitional societies.[1]

This chapter traces the evolution of international criminal law through the lenses of domestic tribunals, using as a case study the ongoing domestic trials of the human rights violations that occurred during

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1 By "post-transitional societies" I refer to those countries that have returned to democracy at least 15 years ago. In the case of Argentina, I do not use the more usual term "transitional societies" because I believe that after 30 years of democratic government the situation there cannot be compared to that of the first decade after the end of the dictatorship, and the applicable principles and rules are different now.

the dictatorship in the late 1970s in Argentina.[2] It will be argued that in spite of the trend towards international prosecution of past human rights abuses that dominated legal doctrine in the 1990s, the new millennium has ushered in a new twist. While in the so-called Trial of the Juntas (*El Juicio a las Juntas*)[3] international legal terms such as "crimes against humanity" were not mentioned and the tribunal applied almost exclusively domestic norms, the current decisions of the Argentinian judiciary are mainly based on international law. Indeed, the decision to reopen the trials closed in the 1980s was grounded on international instruments and case law and the developments that had taken place in that realm since that decade.[4]

Given that the main paradigm shift took place during the 1990s at the time of the greatest development of the international branch of international criminal law, it is possible to assert that all its enforcement mechanisms (both international and domestic) are linked together and the transformations that occurred in one branch of the discipline affect the other.

This chapter commences with a brief overview of the Argentinian case followed by three mains parts. In section 8.3. I will provide an outline of the content of international criminal law. In section 8.4. I will analyse the ways in which the national courts enforce international criminal law. I will do so by looking into the institution of amnesty and the exercise of universal and territorial jurisdiction. I will concisely examine the amnesty laws in the context of the international obligations undertaken by states. With regard to universal jurisdiction, even if its exercise has played

[2] I will use the terms "dictatorship" and "state terrorism" interchangeably. The latter refers specifically to a new form of a state of exception. The state acquired clandestine structures and permanently institutionalised the most abhorrent forms of illegal and repressive activities. Terror became a permanent method and practice in order to achieve the physical annihilation of the opposition and the destruction of all traces of democratic organisation. See Eduardo Luis Duhalde, *El estado terrorista argentino: quince años después, una mirada crítica* [The Terrorist State: Fifteen Years Later, a Critical Look], Eudeba, Buenos Aires, 1999, pp. 217–19.

[3] The Federal Criminal Court of Appeals tried the leaders of the three military juntas that ruled the country during the dictatorship (1976–1983) and issued its Judgment on 9 December 1985. Argentina, Federal Criminal Court of Appeals, *Videla, Jorge R. y otros* (*Juicio a las Juntas Militares*), Judgment, Causa 13/84, 9 December 1986 ('Videla case').

[4] See, for example, Argentina, National Supreme Court of Justice*, Recurso de Hecho Simón, Julio Héctor y otros s/ privación ilegítima de la libertad, etc*., Judgment, Causa 17.768C, 14 June 2005 ('Simón case') (https://www.legal-tools.org/doc/6321f1/).

a very important role in the developments regarding the prosecution of the crimes committed by the last dictatorship, I will include a brief account of the most important events, in order to concentrate on the developments that took place after 2003 in Argentina, which will be analysed in section 8.5. Finally, in section 8.6. I will examine the outcome of this process, particularly the effects of the application of international criminal law by national courts.

8.2. Overview of the Argentine Case: A Circular Story

The relationship between international criminal law and domestic law in post-dictatorship Argentina can be explained as resembling the shape of a circle.[5] The starting point of the circle is 1985, the year of the Trial of the Juntas. A domestic court heard the cases against the heads of the military who were accused of being responsible for offences, which by virtue of their nature could be labelled international crimes.

The first turn of the circle took place in 1986 and 1987, when the Full Stop[6] and the Due Obedience[7] laws were enacted, respectively. These amnesty laws precluded any legal action from being pursued against the military for the alleged commission of international crimes. The Full Stop law established a 60-day time limit to bring claims against military officers, while the Due Obedience law determined that certain categories of officers had acted under superior orders, hence exempting them from criminal liability.

The following turn moved the circle to Europe. During the 1990s several European countries asserted their jurisdiction over the crimes committed in Argentina. As a result, the trials were moved from Argentina's fora to foreign jurisdictions. While the amnesty laws precluded any prosecution in Argentina, foreign countries were not limited by such laws and were able to pursue criminal trials.

The next significant turn occurred in 2001. A federal Argentinian judge, Gabriel Cavallo, in a leading case usually referred to as the *Poblete*

5 The last dictatorship government remained in power from 1976 to 1983.

6 Argentina, Ley 23.492 Punto Final [Law 23.492 Full Stop], 24 December 1986 ('Full Stop Law') (https://www.legal-tools.org/doc/d464a5/).

7 Argentina, Ley 23.521 Obediencia Debida [Law 23.521 Due Obedience], 8 June 1987 ('Due Obedience Law') (https://www.legal-tools.org/doc/a4be3b/). See Full Stop Law, p. 507, *supra* note 6.

or *Simón* case,[8] declared the Full Stop and Due Obedience laws unconstitutional on the grounds that they violated the international obligations the country had undertaken when ratifying various human rights treaties, which had been incorporated in the National Constitution in 1994.[9] Just one week later, the Inter-American Court of Human Rights held in the so-called *Barrios Altos* case that amnesty laws breached the American Convention on Human Rights ('ACHR').[10] In line with this trend, the Argentinian Federal Court of Appeals[11] and the National Supreme Court of Justice eventually upheld the *Simón* judgment.[12]

The final turn of the circle came about in August 2003. The National Congress passed Law 25.779,[13] which declared the Full Stop and Due Obedience laws null and void. As a consequence, the Argentinian courts have reopened the cases closed in 1987 due to the previously invalidated laws, thus bringing the trials back to Argentina's domestic jurisdiction and to the starting point of the circle.

All the turns of this circle are related to each other and demonstrate the way international criminal law interacts with the national law.

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8 Federal Criminal Tribunal, no. 4, *Simón, Julio y Del Cerro, Antonio s/sustracción de menores de 10 años*, Judgment, Causa 8686/2000, 6 March 2001 (https://www.legal-tools.org/doc/7d7b10/).

9 Art. 75(22) of the National Constitution of Argentina establishes that certain international human rights instruments possess constitutional hierarchy, including, *inter alia*, the American Convention of Human Rights ('National Constitution') (https://www.legal-tools.org/doc/cee560/).

10 Inter-American Court of Human Rights, *Chumbipuma Aguirre and others v. Peru*, Judgment, Serie C No. 75, 14 March 2001 ('Barrios Altos case') (https://www.legal-tools.org/doc/f1439e/).

11 Argentina, Federal Criminal Court of Appeals, Sala II, *Simón, Julio y Del Cerro, Antonio s/sustracción de menores de 10 años*, Causa 8686/2000, Judgment, 9 November 2001.

12 Simón case, Judgment, see *supra* note 4.

13 Argentina, Ley 25.779 Nulidad de las Leyes de Obediencia Debida y Punto Final [Law 25.779 Annulment of Laws on Due Obedience and Full Stop], 2 September 2003 (https://www.legal-tools.org/doc/94ffd6/). At this stage, I should mention that I do not intend to examine the legal validity of the annulment law. Nevertheless, it is worth noting that this norm has been questioned by the defence of the military on a constitutional basis relating to the capacity of the National Congress to annul a law passed by a democratic legislature. It has also been challenged on the basis of violation of the acquired rights during the time in which the Full Stop and Due Obedience laws were in force. In any event, the National Supreme Court of Justice upheld the law in June 2005 on the grounds that the norm purports to comply with Argentina's international obligations with regard to the prosecution of gross human rights violations, as in the Simón case, see *supra* note 4.

8.3. International Criminal Law: Some Definitions

International criminal law has often been defined as a hybrid between international law and domestic criminal law, as being formed by the internationalised elements of criminal law and by the criminal elements of international law.[14] Antonio Cassese[15] has stated that international criminal law is a branch of public international law because both areas of the law share the same sources.[16] Some commentators have argued that international criminal law encompasses interstate co-operation in the administration of justice, that is, extradition treaties, conventions that suppress certain crimes such as hijacking or hostage-taking, and transnational crimes such as money laundering and drug trafficking.[17] Nonetheless, with respect to the substantial part of this discipline, I will focus on a narrower definition of international criminal law, one that entails individual criminal responsibility for international crimes, essentially war crimes, crimes against humanity and genocide, the so-called *jus cogens* or core crimes.

On the other hand, I will adopt a wide notion of international criminal law with respect to its enforcement methods. I include not only international tribunals, but also domestic courts asserting universal jurisdiction and domestic courts prosecuting acts that amount to international crimes committed in their territories. Further, I make a distinction between the various enforcement mechanisms and I divide them into an international branch and a national branch. The former includes the international tribunals, such as the International Military Tribunal at Nuremberg and the International Military Tribunal for the Far East at Tokyo, the *ad hoc* tribunals created by the UN Security Council for the former Yugoslavia and Rwanda and the International Criminal Court ('ICC'). The national branch includes national courts asserting some form of jurisdiction over international crimes, from territorial to universal jurisdiction. The Special

[14] M. Cherif Bassiouni, *International Criminal Law*, vol. 1, Transnational Publishers, Ardsley, NY, 1998, p. 4; Ilias Bantekas, *International Criminal Law*, 2nd ed., Cavendish, London, 2003, p. 1.

[15] Antonio Cassese, *International Criminal Law*, Oxford University Press, Oxford, 2003, p. 16.

[16] Statute of the International Court of Justice, 26 June 1945, Art. 38 (http://www.legal-tools.org/doc/fdd2d2/).

[17] Bassiouni, 1998, see *supra* note 14; Bruce Broomhall, *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law*, Oxford University Press, Oxford, 2003.

Court for Sierra Leone and other mixed tribunals, such as the Extraordinary Chambers in the Courts of Cambodia, the Special Tribunal for Lebanon or the East Timor Special Panels for Serious Crimes, stand in the middle of these two branches as a kind of transitional or compromise arrangement.

International criminal law provides several means of enforcement. Admittedly, as a branch of international law, it shares the same characteristics, that is, a decentralised system of implementation. Nevertheless, it also presents its own particular features. The application of international criminal law has two aspects: state responsibility and individual criminal responsibility.[18] In this chapter, I concentrate on the latter. Therefore, it is possible to identify four ways of enforcing international criminal law: 1) international tribunals; 2) mixed tribunals; 3) domestic courts asserting universal jurisdiction as agents of the international community; and 4) domestic courts asserting territorial or national jurisdiction over international crimes. It is thus submitted that international tribunals are not the only enforcement mechanism, and that domestic courts play a vital role in this process, as it will be shown in the Argentinian case. Moreover, the original means of enforcement of international criminal law were domestic courts that used to suppress acts of piracy and war crimes.[19]

Nonetheless, not all authors consider every one of these instances as part of international criminal law, and some have expressed their preference for enforcement through international tribunals.[20] Along these lines, M. Cherif Bassiouni has referred to the period from 1955 to 1992 as "the years of silence"[21] due to the lack of progress with regard to the creation

[18] In this sense, see, for example, International Court of Justice ('ICJ'), *Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro) (Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide)*, Judgment, Case No. 91, 26 February 2007 (https://www.legal-tools.org/doc/5fcd00/).

[19] Julio Barboza, "International Criminal Law", in *Collected Courses of the Hague Academy of International Law*, vol. 278, Brill/Nihjoff, Leiden, 1999, p. 28.

[20] Antonio Cassese, "Reflections on International Criminal Justice", in *Modern Law Review*, 1998, vol. 61, no. 1, p. 1; Ben Chigara, "Pinochet and the Administration of International Criminal Justice", in Diana Woordhouse (ed.), *The Pinochet Case: A Legal and Constitutional Analysis*, Hart Publishing, Oxford, 2000, p. 127; Carlos Nino, "The Duty to Punish Past Abuses of Human Rights Put Into Context: The Case of Argentina", in *Yale Law Journal*, 1991, vol. 100, no. 8, p. 2638.

[21] M. Cherif Bassiouni, "From Versailles to Rwanda in Seventy-five Years: The Need to Establish a Permanent International Criminal Court", in *Harvard Human Rights Law Journal*, 1997, vol. 10, p. 4.

of international tribunals and the failure to adopt a code of international crimes.

Moreover, international criminal law has gained importance in recent decades as a means of enforcing international law and human rights law, particularly in transitional and post-transitional societies. Therefore, in defining international criminal law, it is necessary to analyse the influence of human rights law, especially in Argentina where the human rights movement and the developments of this regime have played a fundamental role in the application of international criminal law.

The Inter-American system of protection of human rights has been instrumental in enforcing human rights in Argentina, as in many Latin American countries that suffered dictatorships and human rights abuses. The jurisprudence of the monitoring bodies of this system has been a key factor in the ongoing trials for human rights abuses in Argentina. The accountability processes – or lack thereof – that took place in Latin America after the return to democracy has played an important part in the transition from a human rights protection system to a system of individual criminal responsibility. The strategies adopted by the newly elected governments to deal with past gross human rights abuses have had an impact in the sphere of international criminal law.[22]

The Inter-American system presents a wide and comprehensive jurisprudence regarding states' obligations under the ACHR. In the leading case decided by the Inter-American Court of Human Rights, known as the *Velasquez Rodriguez* case,[23] the Court analysed the content of the obligation under Article 1 to "ensure and guarantee" the rights under the ACHR. It held that such an obligation entailed the duty to organise the governmental apparatus so that it is capable of juridically ensuring the free and full enjoyment of human rights, and it also affirmed that the duties to prevent, investigate and punish violations of human rights were necessary consequences of the obligation to guarantee set forth in the ACHR.[24] Nevertheless, as Michael Scharf has noted, the Court did not require Hon-

[22] Steven R. Ratner, "The Schizophrenias of International Criminal Law", in *Texas International Law Journal*, 1998, vol. 33, no. 2, p. 248.

[23] Inter-American Court of Human Rights, *Manfredo Velasquez Rodriguez v. Honduras*, Judgment, Serie C No. 4, 29 July 1988 (https://www.legal-tools.org/doc/b6abdc/).

[24] *Ibid.*, para. 166.

duras to institute criminal proceedings.[25] Even so, it is worth noting that *Velasquez Rodriguez* was the first contentious case and thus the Court might have been reluctant to invade states' jurisdictions.[26] In fact, since then, the Inter-American Court of Human Rights has gradually moved on to impose more concrete obligations on states regarding the obligation to investigate, prosecute and impose sanction on those responsible for grave violations of human rights.[27]

It is therefore possible to assert that states party to the ACHR, such as Argentina, are bound by the obligations to investigate, prosecute and punish acts of genocide, grave breaches, acts of torture and the most serious violations of human rights, among which it is possible to include forced disappearances.

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[25] Michael Scharf, "The Letter of the Law: The Scope of the International Legal Obligation to Prosecute Human Rights Crimes", in *Law and Contemporary Problems*, 1996, vol. 59, no. 4, p. 50.

[26] Naomi Roht-Arriaza, *Impunity and Human Rights in International Law and Practice*, Oxford University Press, Oxford, 1995, p. 31.

[27] See, for example, Inter-American Court of Human Rights, *Almonacid Arellano and others v. Chile*, Judgment, Serie C No. 154, 26 September 2006 (https://www.legal-tools.org/doc/3543c4/); Inter-American Court of Human Rights, *Gelman et al. v. Uruguay*, Judgment, Serie C No. 221, 24 February 2011 (https://www.legal-tools.org/doc/a8c7db/); and Inter-American Court of Human Rights, *Gomes Lund and others ("Guerrilha do Araguaia") v. Braail*, Judgment, Series C No. 219, 24 November 2012 (https://www.legal-tools.org/doc/a66e9e/). In these cases, starting in *Almonacid Arellano*, the Inter-American Court of Human Rights has imposed such obligations by applying a doctrine called "control of conventionality" (*control de convencionalidad*) that deals with the responsibility of national authorities to ensure that the application of national legislation does not adversely affect the rights under the ACHR, para. 124, "the Judiciary has to take into account not only the treaty, but also the interpretation thereof made by the Inter-American Court, which is the ultimate interpreter of the American Convention". For more information see, for example, Walter Carnota, "The Inter-American Court of Human Rights and Conventionality Control", 2000 (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2116599); Oswaldo Ruiz Chiriboga "The Conventionality Control: Examples of (Un)successful Experiences in Latin America", *Inter-American and European Human Rights Journal*, 2010, vol. 3, p. 200.

8.4. International Obligations to Investigate, Prosecute and Punish: The Argentinian Amnesty Laws and the Exercise of Universal Jurisdiction

8.4.1. Full Stop Law and Due Obedience Law

The Argentinian National Congress passed the Full Stop law in December 1986. The government of President Raul Alfonsín (1983–89) had been subject to military pressure in the face of the trials of the mid- and low-ranking officers that began after the end of the Trial of the Juntas. Those officers who had been summoned were refusing to appear before the courts and others were refusing to give testimony.[28] The law aimed at bringing some degree of certainty among the restless military by establishing a 60-day time limit for the filing of claims against the armed forces officers, after which all rights to bring a claim would be extinguished.[29] However, it had a boomerang effect, and within that period the number of defendants rose to 400, some 20 times the number up to then.[30]

The military's resistance to the trials continued, and by Easter of 1987 a group of military rebels took over a garrison in the outskirts of Buenos Aires and made a number demands. Alfonsín finally reached an agreement with the group that later submitted itself to a trial before a military court. In June the Due Obedience law was passed. It created an irrefutable presumption that chief officers, subordinate officers, sub-officers and troops of the armed forces, together with security and prison forces, had acted under orders without the possibility of opposition to such orders.[31]

Finally, in 1989 and 1990 President Carlos Menem (1989–1999) granted presidential pardons to members of the armed forces, including the members of the juntas, and to members of guerrilla groups.[32] The list

[28] For a full – and first-hand – account of the events of the 1983–87 period, see Carlos Santiago Nino, *Radical Evil on Trial*, Yale University Press, New Haven, 1996.

[29] Full Stop Law, Art. 1, see *supra* note 6.

[30] Nino, 1996, p. 94, see *supra* note 28.

[31] Due Obedience Law, Art. 1, see *supra* note 7.

[32] Decrees 1.003/89, 1.004/89, 1.005/89, 2.742/90 and 2.743/90.

included individuals who had been convicted and individuals who were still on trial.[33]

Even if at the time of the commission of the alleged crimes Argentina was not a party to the International Covenant on Civil and Political Rights ('ICCPR'), the ACHR and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ('Torture Convention'), by the time the amnesty laws were passed, Argentina had already ratified those three treaties and thus violated the obligations undertaken in those instruments, and, at least, Article 18 of the 1969 Vienna Convention on the Law of Treaties in the case of the Torture Convention.[34] In fact, the validity of such laws was discussed at the time of their adoption by the National Supreme Court of Justice, which upheld them on the grounds that the National Congress possessed the authority to enact such a law and that by virtue of separation of powers, the judiciary should not interfere with political decisions.[35] Nonetheless, it is worth noting that

[33] The latter aspect clearly clashes with the rationale of the presidential pardon insofar as they can only be granted after a conviction, and on 19 March 2004 decrees 1.002/89 and 2.846/90 were declared unconstitutional within the case of Federal Criminal Court of Appeals, *Suárez Mason, Guillermo y otros s/homicidio agravado, privación ilegal de la libertad* agravada, Judgment, Causa 450 (http://www.legal-tools.org/doc/67496a/). Moreover, in 2007, the National Supreme Court declared that the presidential pardons violated international peremptory norms recognised in the ACHR and in the International Covenant on Civil and Political Rights ('ICCPR'), and specifically, the international obligations to investigate, prosecute and sanction the perpetrators and the victims' right to a judicial remedy. See National Supreme Court of Justice, *Mazzeo, Julio Lilo y otros s/ rec. de casación e inconstitucionalidad – Riveros*, Judgment, M. 2333. XLII, 13 July 2007, paras. 29, 32 ('Mazzeo case') (http://www.legal-tools.org/doc/7ed416/).

[34] For example, the Inter-American Commission on Human Rights in 1992 issued its Report 28/92 whereby it asserted that the laws violated Article 1, Article 8(1) (right to fair trial) and Article 25 (right to judicial protection) of the ACHR. In spite of acknowledging that Argentina had taken exemplary measures vis-à-vis the human rights violations – such as the National Commission on the Disappearances of Persons ('CONADEP'), a commission created in 1983 mandated to gather information and receive testimonies about the crimes allegedly committed by the military, issued a report *Nunca Más* [Never Again] where it documented over 9,000 cases of torture, abductions, disappearances and executions and the existence of many clandestine detention centres, the Trial of the Juntas, and the economic compensation set up for victims – it nonetheless recommended that Argentina adopted measures necessary to clarify the facts and identify those responsible.

[35] National Supreme Court of Justice, Causa No. 547 incoada en virtud del Decreto No. 280/84 del Poder Ejecutivo Nacional, 1987-D Revista La Ley 194-266 [Case No. 547 filed by Decree No. 280/84 of the Executive Branch, 1987 – Law 194-266], Judgment, 22 June 1987 in Fallos de la Corte Suprema de Justica de la Nación, 1987-310:1162.

only one member of the high tribunal, Justice Petracchi in his concurring vote, acknowledged the existence of international norms governing this issue, and in particular the Torture Convention. He remarked that even though the instrument had not yet entered into force,[36] Argentina was already a state party to it – having ratified on 24 September 1986 – making Article 18 of the 1969 Vienna Convention applicable.[37] Yet he did not elaborate further on this point and joined the majority's decision.

This shows that in transitional societies the role of international law is limited and there is a preference for the domestic law,[38] as a means of asserting the power of the new regime. However, international criminal law, in the shape of human rights treaties imposes duties on the states to conduct domestic trials. By invalidating certain amnesty laws, such as the Argentinian ones, international law requires states to prosecute those accused of committing international crimes, thus highlighting their role in the enforcement of international criminal law.

The incompatibility of the amnesty laws with Argentina's international obligations was recognised at the national level at the end of the 1990s. In March 1998 the National Congress decided to repeal the amnesty laws.[39] Since the repeal did not have retroactive effect, it did not bring about any practical results; only an annulment would produce such consequences.

It was in the judicial branch of the state that the main development took place. In the *Simón* case already noted,[40] the National Supreme Court of Justice declared the laws unconstitutional and confirmed the constitutionality of Law 25.779. The Supreme Court explicitly based its decision on international human rights law and international instruments that enjoy the highest level of constitutional hierarchy in relation to Argentinian do-

[36] The Torture Convention entered into force only days after the Supreme Court's decision, on 26 June 1987.

[37] This provision establishes the obligation of signatory states or states party to "refrain from defeating the object and purpose of a treaty prior to its entry into force".

[38] John Dugard, "Retrospective Justice: International Law and the South African Model", in A. James McAdams (ed.), *Transitional Justice and the Rule of Law in New Democracies*, University of Notre Dame Press, Notre Dame, IN, 1997, p. 269.

[39] Argentina, Ley 24.952 Derogación de las leyes de Obediencia Debida y Punto Final [Law 24.952 Derogating Laws Due Obedience and Full Stop], 15 April 1998 (https://www.legal-tools.org/doc/0fd487/).

[40] Simón case, see *supra* note 4.

mestic law.[41] The Supreme Court asserted that to the extent that every amnesty is orientated towards "oblivion" of grave violations of human rights, they oppose the norms of the ACHR and the ICCPR, and are thus constitutionally intolerable.[42] The Court went on to state that even if the Peruvian *Barrios Altos* case, decided by the Inter-American Court of Human Rights, presented a different set of characteristics, the decisive factor was that the Full Stop and Due Obedience laws possessed the same vices that led the Inter-American Court to reject the Peruvian self-amnesty laws, because all of them had resulted in the impossibility of prosecuting grave breaches of human rights.[43] Moreover, the parliamentary debate that took place prior to the approval of Law 25.779 shows that the intention of the legislators was to abide by international human rights standards by eliminating the obstructions to the investigation of such violations and facilitating the fulfilment of the obligation to repair harm committed in the broadest form possible.[44]

In this sense, it is interesting to note that the Congress debated the annulment together with a bill that proposed to grant constitutional hierarchy to the 1968 Convention on Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity ('Convention on the Non-Applicability of Statutory Limitations'). This reveals that the parliamentarians identified a link between the amnesty laws and international criminal law. Indeed, during the Congressional debate,[45] many representatives advanced arguments related to international law and the duties undertaken by Argentina under this legal order. They referred to the *jus gentium*, to the Inter-American Commission on Human Rights ('IACHR') Report 28/92, to the trials taking place in Spain and even to the Rome Statute of the International Criminal Court ('ICC Statute').

While both the national and international orders regulate the same conduct, they do so in different ways and with different consequences. Whereas in the domestic order amnesty laws could be said to be in ac-

41 National Constitution, see *supra* note 9.

42 *Simón* case, Judgment, para. 18, see *supra* note 4.

43 *Ibid.*, para. 24.

44 *Ibid.*, para. 32.

45 Cámara de Diputados de la Nación [National Congress], meeting 12, sess. 4, Anulación De Las Leyes 23.492 Y 23.521 De Punto Final Y De Obediencia Debida [Annulment of Laws 23.492 and 23.521 Full Stop and Due Obedience, 12 August 2003 (https://www.legal-tools.org/doc/c41b1d/).

cordance with the law, they violate norms of the international order. By nullifying national norms using international law, the Supreme Court reasserted the role of national courts in applying international criminal law and blurred the distinction between the domestic and the international, which will be addressed in the final part of this chapter. It is also worth noting that those norms had come into force vis-à-vis Argentina at least nine years before this decision took place. However, during that time, international criminal law manifested itself in the form of another institution: universal jurisdiction, that is, the possibility of prosecuting conduct that amounts to international crimes that take place without any link, neither territorial nor national, with the prosecuting state.

8.4.2. Universal Jurisdiction and the Argentinian Case: A Brief Account

Although a number of countries that have asserted their jurisdiction over the events that occurred during the last Argentinian dictatorship,[46] I will succinctly examine the trials set up in Spain, because it was the only state to base prosecution on the grounds, *inter alia*, of universal jurisdiction.

Before asserting their jurisdiction over crimes committed in Argentina, the courts in Spain had to address the issue of the amnesty laws because many of the defendants had benefited from them. Both Baltasar Garzón, acting as the investigator judge, and the Audiencia Nacional (Spain's Appeals Court) found that those laws had no extraterritorial validity, mainly because they were not legal under international law. Indeed, Garzón referred, *inter alia*, to Report 28/92 of the IACHR to justify such invalidity.[47] This demonstrates that international criminal law's enforcement mechanisms create a backup system, whereby if the front line, that is, the national courts, fails to enforce its norms, foreign courts asserting universal jurisdiction will step in and "do the job". In the case of Argentina, not only did the Spanish trials help prevent those crimes committed during the dictatorship remaining unpunished but they also triggered a number of consequences that culminated in the annulment of the amnesty laws.

[46] For example, Italy and Germany.

[47] Spain, Audiencia Nacional, Central Investigative Tribunal no. 5, Decision, 25 March 1998 para. 15(e) (https://www.legal-tools.org/doc/d9c132/).

The Spanish trials played an important part in the events taking place in Argentina, but they mainly served the function of reopening the debate, socially and legally, on Argentina's recent tragic past.[48]

In fact, the decision of Judge Gabriel Cavallo in the *Poblete* case, the first judicial decision to determine the invalidity of the amnesty laws, can be framed within the "collateral effects" of the Spanish trials, and, indeed, the judgment refers to them and to trials in other states such as Italy and Germany. He asserted that the judicial activity vis-à-vis the events that occurred in Argentina crossed all frontiers because of their heinous nature. This assertion is in line with the wide conception of the enforcement mechanisms of international criminal law. In 2005 the Supreme Court finally followed Judge Cavallo's cue and declared the amnesty laws contrary to the National Constitution.[49] All these judgments have in common the fact that the judges relied heavily on international law norms to justify their decisions.

Therefore, as Naomi Roht-Arriaza affirms, one of the main lessons to learn from the universal jurisdiction trials in Europe is that transnational prosecutions can trigger domestic prosecutions.[50] This is clear in the case of Argentina, despite the fact that in the beginning the trials encountered a certain degree of resistance, manifested mainly in the shape of rejecting the extradition requests made by the Spanish judiciary.[51]

Generally, states asserting universal jurisdiction act in a subsidiary manner. Only when the territorial state does not prosecute those accused of international crimes does a foreign state assert universal jurisdiction over those acts. This can be illustrated with the case of the Spanish trials. In August 2003 the Council of Ministers of Spain decided to suspend the

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48 For example, in 1995 Captain Adolfo Scilingo publicly confessed to the crimes he committed as a member of the armed forces during the dictatorship, which included the throwing of drugged prisoners from planes into a river, and said that these "death flights" were routine in the military activities. See Horacio Verbitsky, *The Flight: Confessions of an Argentine Dirty Warrior*, New Press, New York, 1996. Scilingo flew to Spain to testify where he was arrested by Judge Garzón, and was later convicted. Audiencia Nacional, Judgment, Chamber, 4 November 1998 ('Scilingo case') (https://www.legal-tools.org/doc/edf133/).

49 Simón case, see *supra* note 4.

50 Naomi Roht-Arriaza, "The Pinochet Precedent and Universal Jurisdiction", in *New England Law Review*, 2001, vol. 35, no. 2, p. 315.

51 Decree 1581/01 established a general rejection of extradition requests for offences committed on Argentine territory. This decree was derogated by Decree 420/03, which in its preamble mentions Art. 118 of the National Constitution, see *infra* note 54.

extradition procedure against 40 Argentinian military officers after the annulment of the Full Stop and Due Obedience laws by the Argentinian Congress.[52] The Council of Ministers recognised Argentina's priority to prosecute the alleged crimes committed by the military government during the period of state terrorism.[53] Today, as will be explained below, the cases have been reopened and the military are being tried in Argentina. This therefore shows how the story of the trials for past human rights violations in Argentina has come full circle.

8.5. The Application of International Law by the Argentinian Judiciary

Article 118 of the Argentinian Constitution recognises in the existence of crimes against *jus gentium*.[54] This provision, although having been part of the National Constitution since its inception in 1853, has only come into the limelight in the last decade.[55] Courts describing the events that occurred during the state terrorism as crimes against humanity have justified the applicability of international law through a reference to Article 118 by saying that the Argentinian legal system has always recognised international criminal law and the existence of certain offences that breach the

[52] Spain, Audiencia Nacional, Auto ordenando la remisión al juez argentino de la decisión del Consejo de Ministros de no tramitar las extradiciones y solicitando comunique si enjuiciará los hechos [Order on Argentinian Judge's Referral to the Decision of the Council of Ministers on the Extradition Process and Requesting Information on Whether It Will Prosecute the Facts], 30 August 2003 (http://www.derechos.org/nizkor/arg/espana/autoago03.html).

[53] Federal Court of Appeals, Order, 16 March 2004. Except for Scilingo and Cavallo who remain in Spain.

[54] National Constitution, Art. 118, see *supra* note 9, reads:

> The trial of all ordinary criminal cases not arising from the right to impeach granted to the House of Deputies, shall be decided by jury once this institution is established in the Nation. The trial shall be held in the province where the crime has been committed; but when committed outside the territory of the Nation against public international law, the trial shall be held at such place as Congress may determine by a special law.

It is worth noting that the Spanish version reads "*derecho de gentes*" (*jus gentium*) in lieu of public international law. Constitución de la Nación Argentina, 22 August 1994 (in Spanish) (https://www.legal-tools.org/doc/b07ac0/).

[55] It is possible to make a comparison with the US Alien Torts Claim Act and the fact that although they both date from earlier centuries, they have gained importance through the trials relating to human rights abuses. In this sense, it is interesting to note how old tools are being used for new purposes.

international order as a part of it.[56] The Argentinian courts have contended that Article 118 is an open or progressive clause that should be dynamically construed in order to allow the developments of international criminal law to be included.[57] In the same vein, some judges of the International Court of Justice have recognised that the content of the crimes under international law, particularly that of crimes against humanity, are undergoing change.[58]

Thus, it is possible to assert that since 1853 the Argentinian legal system has been constituted by both domestic and international rules. At this point it is important to mention that Argentina is a monist country that considers that international law and domestic law form part of one system.[59] Further, since the constitutional amendment in 1994 there is no doubt that international law has a priority over national legislation, in accordance with Article 27 of the 1969 Vienna Convention on the Law of Treaties.[60]

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[56] See for example, National Supreme Court of Justice, *Recurso de hecho deducido por el Estado y el Gobierno de Chile en la causa Arancibia Clavel, Enrique Lautaro s/ homicidio calificado y asociación ilícita y otros, para decidir sobre su procedencia*, Judgment, Causa 259, 24 August 2004, para. 16 ('Arancibia Clavel case') (http://www.legal-tools.org/doc/610f30/); and Mazzeo case, paras. 14–15, see *supra* note 33.

[57] See Federal Criminal Court of Appeals, Sala II, *Contreras Sepúlveda, Juan M.C.*, Judgment, 4 October 2000, in *Doctrina Judicial 2001–1* ('Contreras Sepúlveda case'). However, it has been pointed out that Art. 118 refers to *jus gentium* to establish Argentinian jurisdiction over crimes committed outside it territory (universal jurisdiction) and thus, it could not be used to establish jurisdiction of domestic tribunals over crimes committed in Argentina. See Ezequiel Malarino, "La cara represiva de la reciente jurisprudencia argentina sobre graves violaciones de los derechos humanos. Una crítica de la sentencia de la Corte Suprema de Justicia de la Nación de 14 de junio de 2005 en el caso *Simón*" [The Repressive Face of Recent Argentinian Case Law on Gross Violations of Human Rights: A Critique of the Supreme Court of Jutice's Decision of 14 June 2005 in the *Simón* case], in *Jura Gentium: Rivista di filosofia del diritto internazionale e della politica globale*, 2009 (http://www.juragentium.org/topics/latina/es/malarino.htm).

[58] ICJ, *Democratic Republic of the Congo v. Belgium (Case Concerning Arrest Warrant of 11 April 2000)*, Joint Separate Opinion of Judges Higgins, Kooijman and Buergenthal, 14 February 2002, para. 62 (https://www.legal-tools.org/doc/23d1ec/).

[59] National Constitution, Art. 31, see *supra* note 9.

[60] However, pursuant to Art. 27 of the National Constitution, the international rules have to be in accordance with the principles of public law of the Magna Carta. This has been, in fact, the basis of the position of the dissenting judges of the National Supreme Court, in particular Justice Fayt. See, for example, Arancibia Clavel case, paras. 15, 16 and 18, *supra* note 56; Simón case, para. 43, see *supra* note 4; and Mazzeo case, paras. 11, 14 and 17, see *supra* note 33. Until 1992 the Supreme Court had contended that both international

8.5.1. The Characterisation of the Crimes in 1985 and in the Late 1990s Cases

In the Trial of the Juntas the term "crimes against humanity" was not mentioned.[61] The members of the military juntas that ruled Argentina from 1976 to 1983 were convicted for homicide aggravated by cruelty, unlawful deprivation of freedom aggravated by violent threats, and acts of torture followed by death and robbery, all of them domestic offences under the Criminal Code.[62] Nonetheless, the Federal Criminal Court of Appeals considered that the prosecution had proved the existence of a systematic plan, a pattern that included all such acts, and which was carried out against a part of the civilian population. There is no doubt that this description fits within the definition of crimes against humanity, as it is understood today.[63] The Federal Criminal Court of Appeals only made a reference to international law to consider the argument presented by the defence that the acts committed by the military government were justified on the grounds that there existed a state of war. Regardless of the characterisation of the conflict (or whether there was an armed conflict at all), the Court of Appeals made clear that international law, especially the 1949 Geneva Conventions, did not permit the commission of such acts.

Notwithstanding, the term "crimes against humanity" was not mentioned vis-à-vis those acts until the late 1990s. A possible explanation can be found in the fact that crimes against humanity did not exist as an offence within the domestic law in Argentina. Article 18 of the National Constitution recognises the *nullum crimen, nulla poena sine lege* principle (or principle of legality) with the consequence that one can only be prosecuted and punished for acts that were considered as offences by law prior to the commission of such acts. Since the Argentinian law did not foresee

treaties and national legislation had the same hierarchy (see *Martin & Cia Ltda. S.A. c Nación* in Fallos de la Corte Suprema de Justica de la Nación 257:99). In that year, the Supreme Court modified its jurisprudence and asserted that international treaties had priority over national law (see *Ekmekdjian, Miguel Angel c. Sofovich. Gerardo y otros* in Fallos de la Corte Suprema de Justica de la Nación 315:1492), a doctrine that was later expressly recognised by the constitutional amendment.

61 See Videla case, Judgment, *supra* note 3.

62 See extracts of the decision of the Federal Criminal Court of Appeals in 26 I.L.M. 316. Not every member of the juntas was convicted, in fact three of them – Graffigna, Galtieri and Lami Dozo – were acquitted.

63 Rome Statute of the International Criminal Court, 17 July 1998, in force 1 July 2002, Art. 7 ('ICC Statute') (http://www.legal-tools.org/doc/7b9af9/).

the crimes against humanity as a domestic offence, this might have been the reason why the Federal Criminal Court of Appeals did not characterise the acts committed during the dictatorship as such.

It is true that Article 15 of the ICCPR states that the principle of legality shall not "prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the *general principles of law recognized by the community of nations*" (emphasis added). Yet, it is also true that Argentina made a reservation to the extent that the application of Article 15 will be limited by Article 18 of the National Constitution.[64] Argentinian courts have solved this obstacle by affirming that by virtue of Article 118 of the National Constitution, the rule established in Article 18 does not apply in the sphere of international criminal law. Thus, the reservation would not take away the effects of Article 15(2) because such provision recognises a rule of *jus cogens*.[65] Therefore, it is possible to assert that the domestic principle of legality does not have the same content at the international level because there are certain peremptory norms that qualify such content. Along these lines, the Supreme Court held that since customary international law recognises crimes against humanity as an offence against the international order, so does the national order by virtue of Article 118.[66]

This change in the doctrine, which began in the 1990s, can be linked to two fundamental developments in both the national and international levels. On the one hand, Argentinian courts began to address the crimes committed by the Nazi regime during the Second World War, which allowed them to introduce certain norms of international law. In 1995,[67] in a case involving the extradition of an alleged Nazi criminal, the

[64] Argentina, Ley 23.313 Pacto Internacional de derechos económicos, sociales y culturales Pacto Internacional de derechos civiles y políticos y Protocolo facultative [Law 23.313 International Covenant on Economic, Social and Cultural Rights International Covenant on Civil and Political Rights and Facilitating Protocol], 16 April 1986, Art. 4.

[65] Which can only be derogated by a rule of the same nature. Contreras Sepúlveda case, see *supra* note 57. Furthermore, in her concurring opinion in the Simón case, Justice Argibay stated that the efficiency of such reservation had weakened after the ratification of the Convention on non-statutory limitations, para. 16, see *supra* note 4.

[66] Arancibia Clavel case, para. 16, see *supra* note 56.

[67] However, it is worth noting that in a pioneer case a Federal Criminal Court of Appeals of the city of La Plata, Province of Buenos Aires, had applied international norms in a case concerning the extradition of another Nazi official, F.L. Schwammberger, and asserted the non-applicability of statutory limitations to the crimes charged against him. Judgment, 30 August 1989 in *El Derecho* 135–326.

Supreme Court relied on Article 118 to determine that the requirement of double criminality set up in the extradition treaty between Argentina and Italy was satisfied since the national legal order recognised the existence of international crimes without the need of an internal act by the National Congress to "define and punish" such conduct. Thus the Supreme Court granted the extradition on the basis of the crime of genocide.[68] It should be noted, however, that this was a case involving an extradition process, which did not require a determination of criminal guilt from the Court. Nevertheless, it was an important recognition of the role of international law within the national system. On the other hand, the developments that took place in the sphere of the international law of human rights also brought about a more frequent application of international norms and standards. Today, national courts apply human rights law not only to cases concerning international crimes but also to cases of non-widespread or systematic violations of human rights, including economic, social and cultural rights.[69]

Furthermore, it is worth noting that international law provides a tool for national courts and victims' group to fight impunity. Once an act is characterised as an international crime, a menu of international criminal law rules becomes available,[70] including, for example, the concept of non-

[68] Unlike the US Constitution, by which this provision is inspired. See Supreme Court of Justice, *Priebke, Erich s/solicitud de extradición*, Judgment, 2 November 1995 in Fallos de la Corte Suprema de Justica de la Nación 318:2148, concurring votes of Justice E. Moliné O'Connor and Justice J. Nazareno, para. 39, and Justice G. Bossert, para. 51 ('Priebke case') (https://www.legal-tools.org/doc/be180b/). However, it is worth noting that Justices A. Belluscio, R. Levene and E. Petracchi in their dissenting opinions remarked the importance of the *nulla poena sine lege* principle and rejected the request on those grounds.

[69] As an example, see Supreme Court of Justice, *Asociación Benghalensis y otros V. Ministerio de Salud y Acción Social -Estado Nacional s/amparo 16.688*, Judgment, 1 June 2000, and *Campodónico Beviacqua, Ana Carina*, Judgment, 24 October 2000, on right to health; Supreme Court of Justice, *S. nchez, Mar.a del carmen c/ aNses s/reajustes varios*, Judgment, 17 May 2005, on right to retirement pensions; Supreme Court of Justice, *Reyes Aguilera, Daniela c. Estado Nacional*, Judgment, 4 September 2007, on rights of persons with disabilities, among many others. For a general overview, see Christian Courtis and Sebastián Tedeschi "Derechos sociales" [Social Rights], in V.ctor Abramovich, Alberto Bovino and Christian Courtis (comps.), *La aplicación de los tratados sobre derechos humanos en el ámbito local: La experiencia de una década* [The Application of Human Rights Treaties at the Local Level: The Experience of a Decade], Editores del Puerto/CELS**,** Buenos Aires, 2007.

[70] Mart.n Abregú, "Apostillas a un fallo histórico" [Notes on a Historic Decision], in *Cuadernos de Doctrina y Jurisprudencia Penal*, 2003, vol, 9, no. 16, p. 26.

applicability of the statute of limitations or the possibility to exercise universal jurisdiction.

The amnesty laws represented the chief obstacle to the investigation and prosecution of the events that occurred during the dictatorship, and international criminal law provided the tools to get around them. International law has also been useful in circumventing arguments that such crimes were statute barred. This was particularly so in the case of the crimes committed by the Nazis, but it also arose during the trials of conduct that occurred in the 1970s in Argentina. Because international criminal law recognises that the statutory limitations are not applicable to international crimes, labelling the conduct as such helps avoid such an obstacle.

As the Advocate General said in the *Simón* case, the development of public international law and the need to work with new tools that serve to prevent horrific and tragic events cannot be ignored. He acknowledged the fact that such developments at the international level, together with domestic developments such as the constitutional amendment in 1994,[71] have produced a new paradigm.

8.5.2. New Developments since 2004

The trend that started in the 1990s with regard to Nazi crimes was strengthened and confirmed after 2004, when the National Supreme Court of Justice issued its seminal decision in the *Arancibia Clavel* case. Since then, the domestic tribunals have been reopening the cases for crimes committed during the last dictatorship and have, at the same time, applied and contributed to the development of international criminal law. Up to December 2014, 1,131 people had been put on trial, 554 persons have been convicted and 59 were acquitted.[72] The cases represent domestic instances of the application of international criminal law and present interesting features. In the context of this chapter, I refer only to three main issues: the non-applicability of statutory limitations, the qualification of

[71] He referred specifically to the constitutional hierarchy of certain human rights international instruments.

[72] Procuración General de la Nación [National Prosecution Office], Prosecution of Crimes Against Humanity: Informe sobre el estado de las causas por violaciones a los derechos humanos cometidas durante el terrorismo de Estado [Report on the State of Cases on Human Rights Violations Committed during State Terrorism] (https://www.legal-tools.org/doc/4e5833/).

the conduct as crimes against humanity and/or genocide, and sexual violence as part of the systematic attack against a civilian population.[73]

8.5.2.1. Non-Applicability of Statutory Limitations to the Crimes Committed by the Dictatorship

One of the main obstacles faced by the prosecution of the crimes committed by the dictatorship was the passing of time. After almost 30 years, the Argentinian tribunals had to deal with the defensive arguments regarding the application of statutory limitations, which, in accordance with domestic law,[74] prevent the trials from taking place. Therefore, the tribunals turned to international law which, in the words of the National Supreme Court, bans the commission of crimes against humanity and must be applied by domestic tribunals, regardless of the express consent of the states, that is, *jus cogens*.[75] As this section shows, the notion of *jus cogens* – vague as it may be[76] – has been instrumental in the case law of the Argentinian tribunals regarding the crimes committed during the dictatorship, both in relation to the characterisation of such crimes and in relation to the consequences thereof.

The case that led to the reopening of the trials, the so-called *Arancibia Clavel* case,[77] was in fact not specifically related to the Argentinian dictatorship, but to its Chilean counterpart, albeit, of course, a part of the so-called *Plan Cóndor*.[78] Indeed, Enrique Arancibia Clavel, a former agent of the Chilean Dirección de Inteligencia Nacional (National Intelligence Directorate) was sentenced to life imprisonment as perpetrator of the murders of Carlos José Santiago Prats, a former Chilean General

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73 There are a number of other interesting issues such as the responsibility of civilians for crimes committed during state terrorism and the crime of abduction of children and the suppression of their identity.

74 Criminal Code, Art. 62.

75 Mazzeo case, para. 15, see *supra* note 33.

76 Stefan Kadelbach, "Jus Cogens, Obligations Erga Omnes and other Rules – The Identification of Fundamental Norms", in Christian Tomuschat and Jean-Marc Thouvenin (eds.), *The Fundamental Rules of the International Legal Order*, Martinus Nijhoff, Leiden, 2006, pp. 27–29.

77 Arancibia Clavel case, see *supra* note 56.

78 The so-called *Plan Cóndor* was a co-ordination structure among the military dictatorships in the Southern Cone of Latin American to persecute and murder (mainly also by the commission of the crime of forced disappearance) all those considered enemies of the regimes.

opposed to the Pinochet regime, and his wife, Sofía Esther Cuthbert Chiarleoni, committed in Buenos Aires. The case was brought to the National Supreme Court of Justice to decide on the application of statutory limitations because the events had taken place in 1974.

The majority of the Tribunal decided that the conduct could be characterised as a crime against humanity because the group to which Arancibia Clavel belonged had the goal of persecuting political opponents of the Pinochet regime by way of murder, forced disappearance and torture with the acquiescence of state agents. In order to justify the application of this legal qualification, the Supreme Court stated that the recent ratification of the Inter-American Convention on Forced Disappearance only meant a conventional affirmation of the label that state practice already bestowed upon such conduct at the time of the events, in light of the developments that had taken place since the end of the Second World War.[79]

This definition, which the Supreme Court and other domestic tribunals later deepened – always on the basis of international law – proved critical for the developments that followed. In fact, the totality of the cases regarding crimes committed during the last dictatorship were opened by virtue of them being considered crimes against humanity and not ordinary domestic crimes. Moreover, the Supreme Court, by quoting the ICC Statute, stated that responsibility does not only stem from traditional forms of perpetration but also from the contribution to the commission or attempted commission of a crime by a group of persons acting with a common purpose (cf. Article 25 of the ICC Statute), which fitted the situation of Arancibia Clavel.[80]

Therefore, the Court decided that the applicable law to the case was the Convention on the Non-Applicability of Statutory Limitations,[81] which, as mentioned above, has constitutional precedence. The Court explained that the crimes against humanity are an exception to the application of statutory limitations because, regardless of the passing of time, they constitute acts that have not ceased to impact the society and the international community as a whole, given their magnitude and meaning.[82]

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79 Arancibia Clavel case, para. 13, see *supra* note 56.

80 *Ibid.*, para. 11.

81 *Ibid.*, para. 12.

82 *Ibid.*, para. 21.

Nevertheless, the Supreme Court had to address the fact that the ratification of the Convention on the Non-Applicability of Statutory Limitations took place after the facts of the case, which gave rise to arguments regarding the legality principle and the *ex post facto* applicability of the law. In this sense, the Court affirmed that the underpinning of the non-applicability of statutory limitations to crimes against humanity relates to the fact that such crimes are generally committed by the agencies that possess punitive power, such as the security forces, acting outside the control of the law.[83] Therefore, the doctrine of the passing of time as a barrier to prosecution does not apply to crimes against international law.[84] Moreover, the Court held that the Convention merely acknowledges the existence of a *jus cogens* customary international law in force at the time of the events – Argentina having contributed to its formation[85] – thus avoiding a violation of the prohibition of non-retroactivity of the criminal norm.[86] Additionally, the Supreme Court invoked the case law of the Inter-American Court of Human Rights – specifically the *Barrios Altos* case – which states that the ACHR bans all obstacles to the prosecution of such crimes, such as the amnesty laws and the application of statutory limitations.[87]

This short section clearly shows that the Supreme Court applied international law – international human rights law and international criminal law – in order to overcome the barriers faced by the prosecution of the crimes committed in Argentina during the military dictatorship, thus opening the door for new developments. Based on the Inter-American Court of Human Rights' doctrine of the removal of obstacles to the prosecution of those responsible for gross violations of human rights, which include both amnesty laws and the application of statutory limitations, the Supreme Court led the way for new trials.

The decision of the Supreme Court was not unanimous; in fact, it was highly divided, being adopted by four votes to three. In particular, Justice Fayt stated that Article 27 of the National Constitution, which requires that treaties must be in accordance with public constitutional prin-

[83] *Ibid.*, para. 23.
[84] *Ibid.*, para. 25.
[85] *Ibid.*, para. 31.
[86] *Ibid.*, para. 28.
[87] *Ibid.*, para. 35.

ciples, forbids the retroactive application of the Convention on the Non-Applicability of Statutory Limitations because it would violate the *nullum crimen, nulla poena sine lege praevia* principle, recognised in Article 18 of the Constitution.[88] Fayt's arguments are thus mainly based on domestic law rather than on international law. Nonetheless, it should be noted that in her concurring opinion, Justice Argibay stated that, in fact the legality principle does not cover issues related to procedural rules such as the application of statutory limitations, but only rules related to the definition of the crimes – the conduct must be defined *ex ante* – and therefore this principle is not affected by an alleged retroactive application of Convention on the Non-Applicability of Statutory Limitations.[89]

However, even from the international perspective, it should be noted that the Supreme Court's conclusions on the qualification of the conduct as crimes against humanity and the resulting application of the Convention on the Non-Applicability of Statutory Limitations could also be criticised. The Court based its conclusions on the existence of a customary international law in force at the time of the facts. Nonetheless, the Court fell short of properly identifying the elements of such customary norm (state practice and *opinio juris*).[90] It merely stated – in a rather dogmatic way[91] – that a *jus cogens* norm existed in 1968,[92] and that its existence stemmed from a tacit acceptance of a particular practice,[93] to which Argentina had contributed.[94]

88 Arancibia Clavel case, Dissenting Opinion of Justice Fayt, para. 19, see *supra* note 56.

89 Simón case, Concurring Opinion of Justice Argibay, para. 16, see *supra* note 4. Justice Petracchi rejected this argument in his concurring opinion in the *Arancibia Clavel* case, para. 19, see *supra* note 56. This doctrine, which limits the scope of the legality principle by excluding rules relating to statutes of limitations was previously developed by the German Constitutional Tribunal in 1969, in the case BVerfG, 26 February 1969, 2 BvL 15, 23/68. Available in BVerfGE 25, 269, cited in Jürgen Schwabe (comp.), *Jurisprudencia del Tribunal Constitucional Federal Alemán. Extractos de las sentencias más relevantes compiladas* [Case Law of the German Constitutional Tribunal: Extracts of the Most Relevant Decisions], Konrad Adenauer Stiftung, Mexico City, 2009, p. 534.

90 Statute of the International Court of Justice, 26 June 1945, Art. 38.

91 Malarino, 2009, see *supra* note 57.

92 Arancibia Clavel case, para. 29, see *supra* note 56.

93 *Ibid.*, para. 30.

94 *Ibid.*, para. 31.

8.5.2.2. Labelling the Conduct: Is It a Crime against Humanity or a Crime of Genocide?

One of the most contentious and polemical developments has been the assertion by some tribunals that the crimes committed by state terrorism could be labelled as genocide. The first time this concept was used was in the judgment of the Federal Criminal Oral Tribunal No. 1 of the city of La Plata in the case known as *Etchecolatz*.[95] In its decision, the Tribunal affirmed that the events that took place during state terrorism could be labelled as crimes against humanity committed in the context of a genocide, because the accused actions showed a complete disregard for his fellow human beings, and formed part of an apparatus of destruction, death and terror.

In order to reach its conclusion, the Tribunal conducted a historical analysis of the crime of genocide that included the UN General Assembly resolution 96(I), which, it noted, mentioned political groups in the definition of the crime. Further, even though it recognised that such group was later excluded from the 1948 Genocide Convention, it still affirmed that the crimes committed during the dictatorship could be labelled as such. To support its argument, the Tribunal referred to the decision of the Audiencia Nacional of Spain in the *Scilingo* case,[96] which stated that the persecuted group was composed of citizens that did not correspond to the requirements of the dictatorship for the establishment of the new order in the country. They were citizens opposed to the regime, but also indifferent thereto. The military did not try to change the group's attitude but to destroy it by means of detention, death, forced disappearance, abduction of children and terror. The Tribunal also referred to Judge Baltasar Garzón's judgment of 2 November 1999, where he stated that the military sought to

[95] Federal Criminal Oral Tribunal no. 1 de La Plata, *Etchecolatz, Miguel Osvaldo*, Judgment, Causa 2251/06, 28 September 2006 (http://www.legal-tools.org/doc/38be2a/). The Tribunal reached the same conclusion in Federal Criminal Oral Tribunal no. 1 de La Plata, *Von Wernich, Christian Federico s/ Inf. Arts. 144bis, 144ter, 80.7, 54 of the Criminal Code*, Judgment, Causa 2506/07, 2 November 2007 (http://www.legal-tools.org/doc/99f075/), among others. For more information, see Elizabeth Gómez Alcorta "Genocidio: Los juicios: calificaciones, narrativas y nuevas interpretaciones" [Genocide: The Trials: Qualifications, Narratives and New Interpretations], in Gabriel Ignacio Anitua, Alexis Álvarez Nakagawa and Mariano Gaitán, Mariano (comp.), *Los juicios por crímenes de lesa humanidad: Enseñanzas jurídico penales* [Trials for Crimes against Humanity: Legal-Criminal Teachings], Ediciones Didot, Buenos Aires, 2014, pp. 291–314.

[96] Scilingo case, see *supra* note 48.

impose a model of Western and Christian morality, exterminating those who did not conform thereto. Consequently, because political groups had been excluded from the legal definition, the Tribunal considered that the victim group was a national group, which had been eliminated in part. The eliminated portion was substantial enough to modify social relations within the country.

Aside from the legality-related issues involved in this decision, one of the questions raised therein pertains to the reasons advanced by the Tribunal to choose such *nomen juris*. They chiefly related to the right to truth, developed by human rights bodies. The Tribunal asserted that because its decision entailed the first conviction after the reopening of the trials in 2004, it was necessary – nearly mandatory – for it to paint a complete picture of the events of state terrorism. After so many years of waiting, the Tribunal stated, victims deserved an adequate response by the state.

Nevertheless, it should be noted that the accused was not convicted of genocide (which is not included in the Criminal Code as an offence)[97] but of multiple murders, torture and illegal deprivation of liberty. In this sense, the reference to international criminal law was not enough to modify or substitute the domestic legislation without violating the *nullum crimen sine lege* principle. Therefore, the reference to the crime of genocide does not have practical legal consequences, but symbolic ones. Indeed, case law seems to show that, unlike other international crimes, the notion of genocide carries specific symbolic weight, which translates victims' expectations of the judicial system.

8.5.2.3. Sexual Violence as Part of the Systematic and Widespread Attack Against a Civilian Population

One key development is the inclusion of charges of sexual violence against the military being tried at the Argentinian domestic tribunals. Even if at the time of the Comisión Nacional sobre la Desaparición de Personas ('CONADEP', National Commission on the Disappearances of

[97] Ley 26.200 Ley de implementación del Estatuto de Roma de la Corte Penal Internacional [Law 26.2000 Law for the Implementation of the Rome Statute of the International Criminal Court] (https://www.legal-tools.org/doc/43268e/) was adopted on 13 December 2006. It refers to the definition of genocide contained in the ICC Statute, without defining it itself, but only establishing the penalty to be imposed on a person convicted for genocide.

Persons) and the Trial of the Juntas there already were testimonies regarding sexual abuses committed by state terrorism, the first case in which this was discussed and a conviction secured took place in June 2010.[98] Afterwards, in one of the most important decisions, the so-called *ESMA* case,[99] the Federal Criminal Oral Tribunal No. 5 ordered that certain testimonies be severed from the file of the case and send to the investigative judge (*juez de instrucción*) to commence an investigation of possible charges of sexual abuse and rape committed at the clandestine detention centre.[100]

The prosecution of these crimes raised a number of questions that needed to be resolved.[101] In the first place, it had to be established that acts of sexual violence had been part of the systematic and widespread attack against the civilian population in order to avoid the application of statutory limitations. In the second place, because in previous decisions the tribunals had included acts of sexual violence within the definition of the crime of torture and ill treatment, the independent existence of the former had to be established. In the third place, there is a tendency at the Argentinian judiciary to consider acts of sexual abuse as *delicta propria*, and therefore this raised questions about the responsibility of those who had not themselves committed the material elements of the crime. Finally, there were some questions regarding the evidential burden required to prove such crimes.

With regard to the inclusion of sexual violence within a systematic and widespread attack against the civilian population, in the *Molina* case, the Tribunal observed that already in the judgment of the Trial of the Juntas, the Chamber had identified an illegal state structure, run by the armed forces, that developed a clandestine repression plan looking to eliminate certain groups considered enemies of the country due to their political

98 Federal Criminal Oral Tribunal, Mar del Plata, *Molina, Gregorio Rafael s/privación ilegal de la libertad, etc*., Judgment, Case 2086, 16 June 2010 ('Molina case).

99 Escuela Superior de Mecánica de la Armada ('ESMA', Navy Mechanics School) was the location of the largest clandestine detention centre, where it is estimated that approximately 5,000 people were illegally detained, the majority of whom were later killed and to this day remained disappeared.

100 Federal Criminal Oral Tribunal no. 5, *Donda, Adolfo Miguel s/ infracción al art. 144 ter, párrafo 1° del Código Penal – ley 14.616 – y sus acumuladas*, Judgment, 28 December 2011.

101 See Legal Opinion of the National Prosecution Office, Unit for the Coordination and Follow-up of Cases on Human Rights Violations Committed during State Terrorism, 7 October 2011 ('Legal Opinion of the National Prosecution Office').

ideology. This clandestine plan included a massive and systematic violation of human rights, such as torture, ill treatment and humiliation of those illegally detained. In this context, women were usually subjected to heinous sexual practices that resulted in impunity because of victims' forced silence.[102] Taking into account the testimonies collected by CONADEP and the IACHR, the Tribunal considered that there was enough evidence to consider that rapes suffered by women at the clandestine detention centres were not isolated or random events, but were, in fact, part of the repressive clandestine plan of the armed forces.[103]

To support its findings, the Tribunal made a general reference to the case law of international criminal tribunals, such as the tribunals for the former Yugoslavia and Rwanda (albeit it did not cite any specific case), and also mentioned the ICC Statute.[104] It also referred to the jurisprudence of the European Court of Human Rights and the Inter-American Court of Human Rights.[105] The decision of the Tribunal was appealed before the Federal Court of Cassation. In its decision, it mentioned the ICC Statute and stated that in order to be considered as a part of a crime against humanity, the sexual abuses should have constituted a habitual practice and not isolated facts.[106]

At this point, it should be noted that it seems that the tribunals do not clearly separate the contextual elements or the *chapeau* of crimes against humanity (widespread or systematic attack against the civilian population) from the underlying offences. Indeed, they require that sexual abuses be committed in a widespread or systematic manner, while, in fact, those characteristics should be found in the attack itself, which consists of a "course of conduct involving the multiple commission of acts referred to in paragraph 1 [underlying offences] against any civilian population".[107]

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[102] Molina case, p. 18, see *supra* note 98.

[103] *Ibid.*, p. 19.

[104] *Ibid*.

[105] *Ibid.*, pp. 19–20. The Tribunal mentioned the case of European Court of Human Rights, *Aydin v. Turkey*, Judgment, 25 September 1997 (https://www.legal-tools.org/doc/d5db6e/) and the case Inter-American Court of Human Rights, *Caso del Penal Miguel Castro Castro v. Perú*, Judgment, 25 November 2006 (https://www.legal-tools.org/doc/7d2681/).

[106] Federal Court of Cassation, Chamber IV, *A Molina, Gregorio Rafael s/ recurso de casación*, Judgment, Causa. 12821, 17 February 2012, pp. 21–22.

[107] ICC Statute, Art. 7.2(a), see *supra* note 63.

Regarding the second question, whether sexual violence should be distinguished from the crime of torture, in a second leading case, the Federal Court of Cassation affirmed that because rape and other forms of sexual violence are considered by international law both as crimes of war and as crimes against humanity, they have to be singled out from other similar heinous crimes, such as murder, torture and so on.[108] The Court stated that the ways used to inflict pain at the clandestine detention centres – forced nudity, forced pregnancy and forced abortion – were different in the case of women.[109] Furthermore, even if sexual violence could be equated with torture as a crime against humanity, this does not mean that the former conduct should be subsumed in the latter because sexual violence possesses its own specific elements and its prosecution seek to protect different values, such as sexual integrity and freedom.[110]

Moreover, the Federal Court of Cassation also mentioned resolutions of human rights bodies, such as the Committee of the Convention to Eliminate All Forms of Discrimination against Women, which, in its report of July 2010, regretted that Argentina's tribunals had not imposed sanctions on perpetrators of sexual violence at the clandestine detention centres, and recommended that the state adopt proactive measures to prosecute sexual violence in the context of crimes against humanity. Therefore, the Court asserted that it had to make this conduct visible as autonomous crimes violating human rights because sexual violence in the context of state terrorism expresses a form of sexual terror that exceeds the crime of torture, going beyond its sociological and legal meaning.[111] It was, in fact, an international obligation stemming from human rights treaties, in particular those relating to women's rights.[112]

As regards the issue of sexual violence as *delicta propria*, in the *Menéndez et al.* case, the Federal Court of Cassation affirmed that it was possible to apply the doctrine of commission through another person or

[108] Federal Court of Cassation, *Compulsa en Autos 86-F, "F. c/ Menéndez Luciano y Otros s/ Av. Inf. art. 144 ter C.P. por apelación", venido a esta Sala "B"*, Judgment, 23 November 2011, p. 37 ('Menéndez *et al.* case').

[109] *Ibid.*, p. 38.

[110] *Ibid.*

[111] *Ibid.*, p. 50.

[112] *Ibid.*, p. 51.

indirect perpetration (*autoría mediata*)[113] because the perpetrator is the person who dominates the execution of the act in an organised power apparatus, such as state terrorism.[114] Therefore, in the context of sexual violence, the perpetrator is not only the person who penetrates the victim's body but it is also the person exercising strength over her, issuing the order, the one responsible for the functioning of the clandestine detention centre and, in general, the person with decisive influence over the final act.[115]

In this sense, the Court also asserted that cases of macro-criminality require special rules of responsibility such as the ones developed by international law.[116] Nevertheless, it also observed that the theory of will-domination through a state apparatus of power has been mainly applied by European courts, especially German, and Latin American tribunals, and that the *ad hoc* tribunals, such as the International Criminal Tribunal for the former Yugoslavia ('ICTY'), have concluded that it is not part of customary international law and thus they could not apply it,[117] preferring, instead, the joint criminal enterprise and the responsibility of commanders and other superiors theories. At the same time, the Federal Court of Cassation mentioned that the ICC did accept the theory of will-domination through a state apparatus of power.[118]

Finally, regarding evidentiary issues, due to the characteristics of sexual violence offences and the clandestine nature of the state terrorism plan, the need for special rules have been asserted. Indeed, the National Prosecution Office has made reference to the rules developed by the IC-

[113] Since the Judgment of the Trial of the Juntas, the Argentinian tribunals have applied Claus Roxin's theory of an organised structure (state apparatus) of power where the perpetrator possesses will-domination, is the man from behind (*Hintermänner*) who actually controls the acts. This theory requires: 1) domination of a hierarchical organisation; 2) fungibility of the executor – who can also be responsible; and 3) illegal organisation.

[114] Menéndez *et al* case, pp. 56–57, see *supra* note 108.

[115] *Ibid.*, p. 58.

[116] *Ibid.*, p. 59.

[117] *Ibid.*, p. 63. The Court referred to International Criminal Tribunal for the former Yugoslavia ('ICTY'), *Prosecutor v. Milomir Stakić*, Appeals Chamber, Judgment, IT-97-24, 22 March 2006 (https://www.legal-tools.org/doc/09f75f/).

[118] The Court of Cassation mentioned the case at the ICC, Situation in the Democratic Republic of Cong, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Confirmation of Charges, ICC-01/04-01/07-4, 28 September 2008 (https://www.legal-tools.org/doc/67a9ec/).

TY and the ICC in order to avoid the revictimisation of those who suffered sexual abuses, especially at the time of interrogation and assessment of the evidence.[119] For example, the National Prosecution Office cited Rule 96(1) of the ICTY's Rules of Procedure and Evidence ('RPE'), which established that no corroboration of the victim's testimony shall be required, and Rule 63(4) of the ICC's RPE which also declares that "a Chamber shall not impose a legal requirement that corroboration is required in order to prove any crime within the jurisdiction of the Court, in particular, crimes of sexual violence". In the same vein, the National Prosecution Office referred to Rules 70 and 71 of the ICC's RPE, and to the case law of the ICTY, in particular, the decisions in the *Foča*,[120] *Aleksovski*[121] and *Tadić*[122] cases.

Some of the National Prosecution Office's arguments have been taken into account by the Argentinian Tribunals. For example, in the *Molina* case, the Oral Tribunal considered that the testimonies of two victims proved the sexual violence acts, though it also noted that statements of other persons who had been detained at the same clandestine detention centre supported those testimonies.[123] In the *Menéndez et al.* case, the Federal Court of Cassation asserted that to demand evidence of a secret order would be tantamount to requiring diabolic proof to the detriment of victims of sexual violence, placing them in a defenceless situation and causing revictimisation.[124]

[119] See Legal Opinion of the National Prosecution Office, pp. 24–26, *supra* note 101.

[120] ICTY, *Prosecutor v. Kunarac et al*., Trial Chamber, Judgment, IT-96-23, 22 February 2001, para. 566 ('Foča case') (https://www.legal-tools.org/doc/fd881d/).

[121] ICTY, *Prosecutor v. Zlatko Aleksovski*, Appeals Chamber, Judgment, IT-95-14/1, 24 March 2000, para. 62 (https://www.legal-tools.org/doc/176f05/).

[122] ICTY, *Prosecutor v. Duško Tadić*, Trial Chamber, Judgment, IT-94-1, 7 May 1997, para. 536 (https://www.legal-tools.org/doc/0a90ae/).

[123] Molina case, p. 108, see *supra* note 97. It is worth noting that a Federal Court of Cassation, Acordada [General Decision], 1/12, *Reglas prácticas en causas de lesa humanidad* [Practical Rules in Cases of Crimes against Humanity], 28 February 2012, stated that tribunals should refer to international law criteria when dealing with witnesses who suffered sexual violence to avoid revictimisation.

[124] Menéndez *et al.* case, p. 59, see *supra* note 108. At the same time, this argument can be considered as asserting an inversion of the legal burden of proof (*onus probandi)* in detriment of the accused, by demanding that he or she did not give the order.

The Argentine case law[125] on this subject, though not very extensive, shows that the developments in the international criminal law field have been instrumental for the advancement of the prosecution of sexual offences.

8.6. Blurring the Distinction between International Criminal Law and Domestic Law

In Argentina, courts are applying international criminal law, even though some of the international provisions have not been implemented in the national order,[126] using international law to fill in a vacuum of the domestic system.[127] Those supporting the characterisation of the events that occurred in Argentina as crimes against humanity assert the double nature of this conduct. They regard them as being both domestic and international crimes. The meaning of this double nature is not clear.[128] Does it mean that judges have a choice on the applicable law when faced with conduct that can be labelled as both a domestic crime and an international crime? Certainly the consequences of only applying domestic law would be different from resorting to international law. Nonetheless, it is submitted here that in such a case, the judges apply neither domestic law nor international law, but a kind of hybrid constituted by both orders. Judges have used international law to overcome domestic legal obstacles; however, they have not convicted the accused for international crimes, but for domestic figures. These convictions would not have been possible without the recourse to international law. In those cases, we can no longer speak of domestic or international law, as they are blurred.

Along these lines, Bassiouni asserts that the interaction caused by the exercise of universal jurisdiction is "breaking down the traditional

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[125] For more information on the subject, see Paula Mallimaci Barral, "Violencia de género en los centros clandestinos de detención: Testimonios, respuestas y silencios de Poder Judicial" [Gender Violence at Clandestine Detention Centres: Testimonies, Answers and Silences of the Judiciary], in Ignacio Anitua *et al.*, 2014, pp. 231–62, see *supra* note 95.

[126] As an example, Argentina has never implemented the Genocide Convention.

[127] Sévane Gariban, "El recurso al derecho internacional para la represión del pasado: Una mirada cruzada sobre los casos *Touvier* (Francia) y *Simón* (Argentina)" [The Recourse to Internationational Law for the Repression of the Past: A Crossed Overview of the *Touvier* (France) and *Simón* (Argentina) cases], in *Revista Jurídica de la Universidad de Palermo*, 2012, vol. 13, no. 1, pp. 53–74.

[128] Malarino, 2009, see *supra* note 57.

compartmentalization between international and national law".[129] This affirmation can also be applied to the case of national courts exercising territorial jurisdiction and applying international law. Moreover, the ways in which the Argentinian courts are gradually more willing to employ international rules demonstrates that international law is leaving its traditional place in the shade. In a similar vein, Frédérique Mégret[130] advances a view that the distinction between international and national law has become less pertinent because the "domestic has become more like the international and the international has become more like the domestic". He argues that the internationalisation of domestic criminal law does not change this discipline as much as the criminalisation of international law changes the latter. Nevertheless, as the Argentinian case shows, the fact that criminal courts are applying international law does have a bearing upon the content of that discipline. Indeed, this situation is not without difficulties.

As mentioned earlier, the principle of *nullum crimen, nulla poena sine lege*, a cornerstone of national criminal law, is being applied with a certain degree of flexibility and not every member of the judiciary regards this as a positive consequence. In fact, five former and current Supreme Court justices asserted in their dissenting opinions that this was a principle that could not be trampled on in order to apply international law with the aim of prosecuting international crimes.[131] Yet, it seems that the notion explained above, that this principle when applied in the realm of international criminal law differs in content from the one applicable in prosecutions of domestic crimes,[132] prevails in the jurisprudence analysed in this chapter. Indeed, the critiques do not seem to include customary norms in their analysis, which constitute one of the sources of international law, and thus, of international criminal law as well.

[129] Bassiouni, 1998, p. 154, see *supra* note 14.

[130] Frédéric Mégret, "Three Dangers for the International Criminal Court: A Critical Look at the Consensual Project" in *Finnish Yearbook of International Law*, 2001, vol. 12, p. 196.

[131] Priebke case, Decisions of Justices Belluscio, Levene and Petracchi, see *supra* note 68. In the same line, decisions of Justices Belluscio, Fayt and Vasquez in the Contreras Sepúlveda case, see *supra* note 57; Dissenting Opinions of Justice Fayt in the Arancibia Clavel case, see *supra* note 56; Simon case, see *supra* note 12, and Mazzeo case, see *supra* note 33.

[132] However, it is worth noting that the ICC Statute recognises the legality principle in Art. 22.

It may be argued that blurring the distinction between international criminal law and domestic law could result in the disappearance of the former as a discipline in itself. On the contrary, the better view seems to be that the trend described here is actually reinforcing this area of international law. Not only do national courts contribute to its development but states are also becoming more receptive to international provisions. The fact that their courts can apply those provisions makes them less wary about the discipline as a whole, including its international branch, which still needs state co-operation to work properly.[133]

8.7. Some Conclusions

International criminal law is an inclusive concept with respect to its enforcement mechanisms. This chapter has suggested that the national branch of international criminal law is actually growing stronger and is playing a paramount role in the development of this subject. Through the exercise of territorial and universal jurisdiction, states are reinforcing the existence of international criminal law as a discipline and are also contributing to the development of its norms.

The prosecution of international crimes by national courts seems to encounter less resistance in post-transitional societies. The case of Argentina shows that courts and government have become more open to the application of international norms. The main change in their attitude took place during the 1990s at the time of the greatest development of the international branch of international criminal law. Thus, it is possible to assert that all its enforcement mechanisms are linked together and the transformations that occurred in one aspect of the discipline affect the other.

This dialectical relationship is mirrored in the interaction between international criminal law and domestic law. For example, on the one hand, states have enacted internal amnesty laws that in turn have shaped the way in which international law deals with this subject. On the other hand, international law has conditioned the kind of amnesties states are allowed to adopt. Moreover, the influence of domestic law on international criminal law has been beneficial because the developments that took place in this realm have spurred the latter onwards, even when its international branch was on pause.

[133] As an example, see ICC Statute, Part IX, *supra* note 63.

Furthermore, post-transitional societies, such as Argentina, demonstrate that amnesty laws for international crimes that are in violation of international norms cannot retain their validity, either at the international or national levels. This indicates that international criminal law has been strengthened since the 1980s. In this sense, while at the end of that decade it was possible to assert that an international duty to prosecute could have had a detrimental effect on a transitional society because it could have destabilised fledgling democracies,[134] this is no longer true in the case of post-transitional societies. In these societies, such an international duty has had the effect of promoting human rights and thwarting impunity, thus contributing to the fortification of democracy.

Therefore, this chapter shows that international criminal law plays a fundamental role in combating serious human rights abuses and complements the international system of protection of human rights, which only focuses on state responsibility. Consequently, the blurring of international criminal law and domestic law has produced positive results. It has enhanced the role of the former so that it would influence the latter into promoting human rights and combating impunity for the most serious international crimes.

The fact that states are incorporating substantive rules of international criminal law seems to have had a favourable effect on the prosecution of international crimes. In this sense, it has been advanced that domestic courts should engage in an "international judicial dialogue" with international tribunals and foreign courts when deciding on a case relating to the commission of an international crime.[135] In this manner, all courts, both national and international, would benefit from each other's findings and contribute to make international criminal law a more integrated and consistent discipline. As a result, it is submitted here that national courts should play an even more important role in the application of international criminal law because this exercise is beneficial for the discipline as a whole. Therefore, in order to tell a complete story, the history of international criminal law must take into account the developments in the domestic realm.

[134] Nino, 1991, p. 2638, see *supra* note 20.

[135] In fact, the existence of hybrid tribunals shows that the future of international criminal law depends on its interaction with domestic law and national experiences.

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This fourth volume in the series Historical Origins of International Criminal Law concentrates on institutional contributions to the development of international criminal law rather than taking a chronological (Volumes 1 and 2) or doctrinal (Volume 3) approach. It analyses contributions made by institutions such as the Nuremberg, Tokyo, ex-Yugoslavia and Rwanda tribunals, INTERPOL, the International Association of Penal Law, the Far Eastern and Pacific Sub-Commission, and internationalised fact-finding mandates. It considers the role played by some jurisdictional principles and work methods of international and national institutions. Part 4 also looks at wider trends in the development of international criminal law

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