

The Living Disappeared and their 'True Identity'

The role of the Rights to the Truth and to a Personal Identity in
the conflict between disappeared children and their Abuelas

Name: Dieke Brockhus
Supervisors: Filipa Raimundo and Otto Spijkers

LLM Public International Law
20 February 2014

Table of Contents

Table of Contents	1
Introduction	2
Chapter 1 Historical context: Dirty War and the Transitional Justice Process in Argentina.....	4
1.1 Dirty War	4
1.1.1 Births in captivity.....	6
1.1.2 Human rights groups	7
1.2 The Argentine Transitional Justice process	8
1.2.1 Activities during amnesty laws	11
1.2.2 The Abuelas	13
1.3 Conflict of interests	15
1.3.1 Truth and identity	19
Chapter 2 The right to the truth.....	21
2.1 The development of the right to the truth	21
2.1.1 International level.....	22
2.1.2 Inter-American system: Articles 8 and 25 ACHR	26
2.1.3 European system: Articles 2, 3 and 13 ECHR.....	28
2.2 Content of the right to know the truth.....	29
2.3 Right holders.....	30
2.4 The right to the truth and conflicting rights.....	33
2.4.1 International law and limitation of human rights.....	34
2.4.2 Individual rights	36
2.5 The right to the truth in the Argentine context	37
Chapter 3 The Right to a Personal Identity	39
3.1 Development of the right to a personal identity	40
3.1.1 International level: Article 8 CRC, Article 25 CPPED	40
3.1.2 Inter-American system: Article 8 and 12 ACHR.....	42
3.1.3 European system: Article 8 ECHR.....	44
3.2 Right holders.....	45
3.3 The right to a personal identity in the Argentine context.....	46
3.4 Conclusion.....	48
Chapter 4 Analysis.....	50
Chapter 5 Conclusion	52
Bibliography.....	53

Introduction

'For Hilario Bacca, it was a knock on the door that threatened not only to change his life, but his name as well.

Armed police entered, searching for DNA. They took a toothbrush and socks, but it was a razor blade that gave them what they wanted. The sample confronted Bacca with a truth he had been avoiding since the age of four, when the couple he believed were his real parents told him he was adopted. His name was not his real name. Bacca was one of hundreds of children born to people who were "disappeared" during the 1976-1983 dictatorship. The search for truth has taken a generation.

"I was born in a death camp, then the dictators killed my parents, then during a democracy they entered my home at gunpoint and took a DNA sample without my consent and opened a court against my adoptive parents," Bacca said. "And now they want to change my name." ¹

This thesis is about the children of enforced disappeared persons in Argentina, their rights and their grandmothers. The issue of what happened to them, their lives and their identity is a current one. When former president of Argentina Jorge Rafael Videla died on the 17th of May 2013, the theft of babies from political prisoners was one of the most cited crimes he was convicted for.²

On March 24th, 1976, a military coup took place in Argentina. General Jorge Rafael Videla became the new president³, and the junta launched its process of National Reorganisation. All 'subversive elements' had to be eliminated, and enforced disappearances proved an effective tool to do this. This 'Dirty War' lasted until 1983.

It is estimated that between 10.000 and 30.000 persons disappeared during the seven years of the 'Dirty War'.⁴ People were abducted and never heard of again.

¹ Uki Goni, The Guardian, Friday 23 September 2011. To be found at the website of The Guardian: <http://www.guardian.co.uk/world/2011/sep/23/child-argentina-disappeared-adoptive-name>, visited on 18 June 2013.

² News agency Reuters published a short issue about it, stating that Videla has been convicted for human rights crimes, including the theft of babies born to political prisoners in the regime's secret detention centres. (Reuters website, Friday 17th May 2013). This particular crime was mentioned in the news bulletin of the Dutch radio, too.

³ He was Argentina's president until 1981, then other members of the Junta took over.

⁴ According to the Comisión Nacional sobre la Desaparición de Personas, Argentina's National Commission on Disappeared People (CONADEP), at least 8,960 people disappeared (See the Nunca Mas report). Human Rights organisations have a higher number. See Wright&Robinson, 1998, page 34; UNHR Council Report: 'Report of the Working Group on Enforced or Involuntary Disappearance- Addendum- Mission to Argentina', January 5th 2009, UN Doc. A/HRC/10/9/Add1, in para 9.

When family members turned to the police or the military, they were told that there was no information on the missing person.

Of all the people that disappeared, 10% were pregnant women. These women delivered their babies in captivity, and died shortly after giving birth. The babies were provided with false birth certificates and adopted by military officers and other people who were loyal to the regime. Until this day, some of these adopted children do not know the real story of their birth.

The Grandmothers of the Plaza de Mayo (Abuelas) searched for these children, who they called 'the living disappeared'. In their search for their grandchildren, they make use of DNA tests to establish the genetic link between them, and prove the 'real' identity of the children. At this moment, the war ended thirty years ago and the children have become adults. Some of them do not want to know the truth, but the Abuelas argue that in order to regain their 'real identity', they have to know the truth. The Argentine state is obliged to re-establish the identity of the adult children, and Argentine law obliges the adult children to cooperate with the DNA test.

In the cases where the adult children refuse to cooperate, a conflict arises between the Abuelas and the adult child. The right to the truth and the right to a personal identity seem to play a key role in this conflict. However, I wondered how these human rights can be applied in this way. It seems strange that those who do not want to know the truth can be forced to do so, and that an identity can be imposed.

The main question of this thesis is: What is the role of the right to the truth and the right to a personal identity in the conflict between the adult children and the Abuelas? In order to understand this issue, it has to be seen within its context. The conflict between the Abuelas and their grandchildren appears against the backdrop of the Transitional Justice process in Argentina. This Transitional Justice process has been called retributive, aiming at truth revelation and punishment of human rights violators.⁵ The Abuelas played a significant role in this process, and their claim that the truth has to come out was one of the major issues.

Therefore, the first chapter will deal with Argentina's history of the Dirty war, and with the Transitional Justice process that took place in the aftermath of this period. The role of the human rights groups in general, and of the Abuelas especially, is discussed, and the conflict between the Abuelas and the adult children is introduced.

The second chapter will deal with the right to the truth. The development of the right at the international level is elaborated upon, and its application in the Argentine context is analysed. The third chapter will elaborate on the right to a personal identity. Here, too the development of the right is analysed, and its use in Argentina is explained.

The Fourth chapter will analyse the findings of the foregoing chapters, and chapter five will provide for a conclusion.

⁵ Grandsman, 2012, page 424.

Chapter 1

Historical context: Dirty War and the Transitional Justice Process in Argentina

This chapter provides for a historical context and is divided in three parts: Part one deals with the Dirty War, the period from 1976 to 1983 (paragraph 1.1). The use of enforced disappearances, births in captivity (paragraph 1.1.1) and the emergence of human rights groups (paragraph 1.1.2) are discussed. Part two deals with the Transitional Justice (TJ) process that Argentina went through until today (paragraph 1.2). The activities of the human rights groups during the amnesty laws are discussed (paragraph 1.2.1) and the role of the Abuelas in this process is focussed on (paragraph 1.2.2). Part three deals with the conflicting interests of the various victim groups, the Abuelas and some of the adult children (paragraph 1.3), and two important factors in this conflict – the right to the truth and the right to a personal identity – are introduced (paragraph 1.3.1).

1.1 Dirty War

On 24 March 1976, the Argentine military committed a coup.⁶ The junta, with General Jorge Rafael Videla as the first president⁷, launched its process of National Reorganisation. The regime declared itself as the defender of tradition, family and property.⁸ A war against all 'subversion' began – by legal and illegal means.⁹ In the name of the National Security, the Junta systematically used torture, mass executions and disappearances in its fight against political and ideological resistance. Argentina's 'Dirty War' lasted until 1983.

Approximately 10.000-30.000 people disappeared during the junta.¹⁰ The use of enforced disappearances was not new, but the name is.¹¹ It is a relatively new term, which evolved in the vocabulary of Argentine human rights groups.¹²

⁶ Nunca Mas, page xii.

⁷ He was Argentina's president until 1981, then other members of the Junta took over.

⁸ The junta made decrees that gave them far-reaching powers (the death penalty was reintroduced, suspects of subversive activities could be detained for an unlimited term) but in the fight against every critical sound the military began to rely on illegal, guerrilla terrorist kind of ways to deal with their enemies. See Arditti & Lykes, 1992, page 463.

⁹ Nunca Mas, page xiii.

¹⁰ Wright & Robinson, 1998, page 34; UNHR Council Report: 'Report of the Working Group on Enforced or Involuntary Disappearance- Addendum- Mission to Argentina', January 5th 2009, UN Doc. A/HRC/10/9/Add1, in Para 9.

¹¹ Under the 'Nacht und Nebel' decree of Hitler's Nazi Germany, people disappeared without a trace, leaving their relatives in fear and uncertainty. The effects of a disappearance go further than that of an execution: it does not only punish the supposed offender, but it also creates fear among the population. The Sicherheitspolizei made sure that the relatives did not get any information on the whereabouts or the fate of the missing person, as not to undermine this effect. See Vermeulen, 2012, page 4 and 5.

The International Convention for the Protection of All Persons From Enforced Disappearance describes it as follows:

For the purposes of this Convention, “enforced disappearance” is considered to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law. ¹³

As such, enforced disappearances are undertaken by the state, or in cooperation or knowledge of the state. This involvement is denied, no information is given, and in some cases the state even starts ‘investigations’ on the whereabouts of the missing person.¹⁴ The disappeared person is deprived of his/her liberty and stripped off all (human) rights. In Argentina, people were abducted anywhere, and they just disappeared.¹⁵ No information whatsoever was given to the family members of the disappeared person. The state would time and time again deny any involvement, stating that the person was not known to be held in custody by the authorities. And meanwhile, the abducted person was brought to one of the 600¹⁶ secret detention centres, and held in inhuman circumstances. The torture used in these centres is described as ‘horrendous’.¹⁷

¹² Sikkink, 2008, page 5. Ernesto Sabato called the ‘desaparecidos’ a ‘sad Argentine privilege’. Nunca Mas, page 13.

¹³ International Convention for the Protection of All Persons from Enforced Disappearance, G.A. res. 61/177, U.N. Doc. A/RES/61/177 (2006), adopted Dec. 20, 2006. Article 2.

¹⁴ The Working Group on Enforced or Involuntary Disappearances received information about the disappearance of 84 children in Argentina, and reported about it in its annual report of 1981 (E/CN.4/1492). The government was asked to respond, and did so by stating that there is no real evidence for the ‘alleged disappearances, and ‘so called clandestine centres’, and that the ‘so called witnesses’ are lying. With regard to the missing minors, the state responds: ‘respect for the human person and the full enjoyment of human rights has been and continues to be current practice in the Argentine Republic and human life from its very beginning is protected by positive law, to the point where my country has not followed the legislative trends towards the legalization of abortion. Thus the Government of Argentina pays particular attention to reported cases of alleged violations of human rights affecting minors or unborn children, even when they concern events which are said to have taken place in times of extremely serious disruption, such as those experienced in the Republic, or in abnormal circumstances when it is frequently impossible to ascertain completely the accuracy of the facts reported.’ (E/CN.4/1492 page 23). It is even suggested that the parents may have left the country, because they ‘have decided for some reason to avoid the other members of their family group, (..), we must accept that this is a private decision in respect of which it is not appropriate to take any action whatsoever’ (page 24).

¹⁵ People were taken from their work, the street, the bus, or their house, in broad daylight or in the middle of the night. Usually, a gang burst into the house, threatening everyone, looting the house, and taking the wanted person with them. See Nunca Mas, part 1, anonymous groups or gangs and page 3.

¹⁶ CONADEP only identified 340, but more centres have been found later on. Marguerite Feitlowitz, page 330.

¹⁷ Nunca Mas, conclusion.

In the end, the great majority was killed, and buried in anonymous mass graves or thrown out of airplanes into the sea.¹⁸

The junta used enforced disappearances on a massive scale, and in a very systematic way. A very broad group of people was targeted: not only known members of terrorist groups were taken away, but also people who potentially sympathised with them.¹⁹ As Videla put it: 'A terrorist is not just someone with a gun or a bomb, but also someone who spreads ideas that are contrary to Western and Christian civilization'.²⁰

The systematic way in which the disappearances were performed can be placed within the context of Operation Condor. This was a secret intelligence cooperation between military and paramilitary groups of various countries, aimed at the destruction of all possible left threat.²¹ The secret parallel organisation of paramilitary made the crime easier, and resulted in the disappearance of hundreds of people.²²

1.1.1 Births in captivity

Among the disappeared persons were children and pregnant women.²³ It is estimated that about 500 children have been kidnapped (both born in captivity or kidnapped later).²⁴

Most of the babies were born in the ESMA²⁵ and the Campo de Mayo Hospital. There, in an apart unit, the pregnant prisoners gave birth to their children. They were constantly guarded, blindfolded and tied, and their presence in the hospital was not registered.²⁶ A witness testified that the women were tied to their beds, received a serum to speed up the delivery and then brought to the Gynaecological and Obstetrics Department. At the moment the baby was born, the mother was taken away for an unknown destination. Most women received Caesarean sections. Other women had to deliver their baby in the detention centre where they were detained, always under terrible circumstances.²⁷

¹⁸ Nunca Mas, page xiii. Even the death of a person was not acknowledged, although in some cases the persons were named in short newspaper items, in which they were presented as terrorists who died during a fight with the security forces.

¹⁹ 'All sectors fell into the net: trade union leaders fighting for better wages; youngsters in student unions; journalists who did not support the regime; psychologists and sociologists simply for belonging to suspicious professions; young pacifists, nuns and priests who had taken the teachings of Christ to shanty areas; the friends of these people, too, and the friends of friends, plus others who whose names were given out of motives of personal vengeance or by the kidnapped under torture.' Nunca Mas, page 4.

²⁰ The Times, London, 4th January 1978, quoted in Nunca Mas, page xiii.

²¹ At the time, Argentina was not the only country in Latin America with a military dictatorship. Chile, Brazil, Paraguay, Bolivia, Uruguay and Argentina (and later Peru and Ecuador) joined in this intelligence and operation system, which was supported by the US. See McSherry, 2002.

²² McSherry, 2002, page 38.

²³ Of all the disappeared persons, 30% were women. Of those disappeared women, 10% were pregnant (that is 3% of all disappeared persons). Nunca Mas, page 285.

²⁴ Grandsman, 2012, page 425.

²⁵ The ESMA was the Navy Mechanics School, located in Buenos Aires.

²⁶ Nunca Mas, page 294.

²⁷ For practical reasons (word limits), I will not include testimonies of births in captivity. However, I think it is important to know that these women went through a lot. The Abuelas

Only a few of the mothers who gave birth to their babies in custody, survived.²⁸ The majority was only kept alive to deliver their babies and sometimes to feed them for a couple of days. One might wonder why they weren't killed before, or why the babies were taken away instead of killed too.

One possible reason is that these children were wanted. There was a list with couples working for the regime who were unable to have children and wanted to adopt one of these children.²⁹ In some cases, they could even select which baby they wanted- based on data about the mother (like the colour of her hair and eyes, and her education). Children with dark skin could not pass as their own kids, so they were killed just like the older ones.³⁰ Another possible reason is that certain people might benefit by selling the children. Feitlowitz suggests that doctor Berges had a side business by selling the babies of political prisoners.³¹ Avery states that the regime made a profit out of the illegal adoptions³², and Scovazzi and Citroni suggest that some couples 'were perhaps willing to pay money to get one' [of the babies].³³ A related reason would be the idea that these children were not (yet) subversives. By bringing them under the wings of good, respected citizens, they could become good citizens themselves.³⁴ If they were sent back to their families, there was a chance of creating a new generation of subversives. To prevent this from happening, all ties with the biological family were to be cut.³⁵

Each individual case may have had other reasons, but the fact is that a lot of children were illegally adopted, under false identities, and their parents killed.

1.1.2 Human rights groups

Despite the threat from the regime, numerous human rights groups were active during the dictatorship.³⁶ The variety of groups was huge; not only in members but also in the way they acted. Different strategies were pursued.

estimated that about 500 children were born in captivity, which means that about 500 women had to deliver their babies in terrible circumstances. This is important for the recognition of these crimes in itself, but also to understand the fight of the Abuelas and the size of the truth that they want to reveal. There are not a lot of testimonies, as most mothers did not survive. However, one moving testimony is included in the *Nunca Mas* report, page 291-292.

²⁸ Feitlowitz, 2011, page 78.

²⁹ *Nunca Mas*, page 289.

³⁰ Jan McGirk, 2000, page 15.

³¹ Feitlowitz, 2011, page 278.

³² Avery, 2004, page 141.

³³ Scovazzi&Citroni, page 14.

³⁴ Scovazzi and Citroni, 2007, page 14.

³⁵ Feitlowitz, 2011, page 74.

³⁶ This is remarkable, because of the high level of repression. The massive use of enforced disappearances would also suggest low resistance, because everyone could be the next to disappear. However, Sikkink points out that the disappearances also incited to more activism, as family members wanted to believe that their missing loved ones were still alive and that their action could possibly save them (Sikkink, 2008, page 18). Another possible reason is more practical. Argentine activists 'had organizational, financial, social, and cultural resources to draw on that were not available to activists in all countries that suffered extreme human rights violations' (Sikkink, 2008, page 19). Sikkink also points out at the tradition of social engagement

This made the overall movement very broad, and provided for a broad organisational network in the period of the transition, which resulted in the strong position of human rights groups in the new democratic society.³⁷

Among the human rights groups that emerged during the dictatorship were the Mothers of the Plaza de Mayo, and later the Grandmothers of the Plaza de Mayo (the Abuelas). Both groups kept on searching for their missing relatives, and protested by walking the Plaza de Mayo, holding photographs of their missing sons, daughters and grandchildren, and protested in silence.³⁸ The Abuelas focussed on the search for the 'living disappeared', their grandchildren. When a pregnant woman disappeared, they searched orphanages for the newborn, analysed birth certificates and adoption papers.³⁹ They posted small advertisements in the newspapers, with the photographs of their missing children, asking if anyone had seen them or had any information about them. People secretly handed them information: teachers shared their suspicion when a birth certificate seemed weird and neighbours told about the sudden appearance of a child, while nobody had seen the mother pregnant.⁴⁰ They also tried to involve the international community, inter alia by sending a letter to the pope in 1978, but he did not respond. From 1981 onwards, they focused on ways in which to prove their 'grandparenthood'.⁴¹

1.2 The Argentine Transitional Justice process

When the junta ended, Argentina was facing the question as to how to deal with the past atrocities. What should be done with violators and victims, how can justice be done in a new, vulnerable democracy? The dilemmas that come with these questions are the focus of Transitional Justice (TJ) theories. Until that time, human rights activists had tried to shame governments into the right behaviour.⁴² When in Argentina the dictatorship ended, the human rights groups focussed not only on the current human rights violations, but also on those of the past. They understood that human rights had a lot of potential, and that moments of transition like in Argentina, offered a lot of opportunities.⁴³ Researchers in the upcoming TJ field began analysing various moments during a transition, searching for political choices that influenced democracy, and the role of elites and civil society.⁴⁴

It is argued that the TJ process in Argentina is retributive, aimed at the

under lawyers, which provided for a large amount of human rights lawyers who could help people respond to the disappearances.

³⁷ Sikkink, 2008, pages 4,5 and 19.

³⁸ Those grandchildren that were abducted together with their parents, that is.

³⁹ Arditti&Lykes, 1992, page 464; King, 2011, page 542.

⁴⁰ Unicef Innocenti working paper 'Genetic Tracing, Disappeared Children and Justice', Michele Harvey-Blankenship, Phuong N. Pham And Rachel Shigekane, IWP 2010-12

⁴¹ Arditti&Lykes, 1992, page 464. In order to gather information, they travelled to Sweden, France and the United States to talk to scientists about the possibilities of DNA tests. See Oren, 2001, page 139.

⁴² Arthur, 2009, page 334.

⁴³ Arthur, 2009, page 335.

⁴⁴ Arthur, 2009, page 336.

prosecution of human rights violators.⁴⁵ This fits within its time: during the 1980's, a trend emerged. The 'justice cascade' as Lutz and Sikkink call it, is all about accountability for human rights violations.⁴⁶ Sikkink argues that this trend was (partially) made by Argentine human rights activists, and not something that happened to them. The call for justice emerged during the regime (not afterwards) but it was not quite clear what this justice would entail.

The Argentine transition to democracy was a 'ruptured transition', in contrast to a 'pacted' transition, where the former leaders have the power to negotiate their leaving conditions.⁴⁷ This is important for the possibilities of the human rights movement: ruptured transitions often allow for more accountability.

Because of the inability to improve the Argentine economy, and the failure to seize the Falkland Islands from the British, the junta found itself in a very weak position. It had lost its credibility.⁴⁸ However, before handing over power, the 'Law of National Pacification' was created.⁴⁹ All soldiers that served from May 1973 to June 1982 were provided with a safeguard against prosecutions. And after the regime change, the military still had a lot of power. This became clear after a TJ process was started by the elected Argentine government.

The process started in 1983, when the new government, with Raúl Alfonsín as president, initiated a truth commission and criminal proceedings against the former leaders. The truth commission, CONADEP, undertook a massive investigation into the horrors of the former regime and published its findings in the *Nunca Mas* report.⁵⁰ This was the first report of a truth commission that was published, and thus easily accessible to the public.⁵¹ The CONADEP was one of the first truth commissions in the world, and has been of significance for the development and use of the mechanism worldwide.⁵²

The self amnesty laws were nullified, and Alfonsín ordered criminal proceedings against the nine former junta leaders.⁵³ The prosecution relied on information gathered by human rights organisations, inter alia the Abuelas.⁵⁴

⁴⁵ Grandsman, 2012, page 424

⁴⁶ Sikkink, 2008, page 1; Lutz&Sikkink, 2001, page 4.

⁴⁷ Sikkink, 2008, page 18.

⁴⁸ Roehrig, 2009, page 729.

⁴⁹ National Pacification Law, Law No. 22.924 (22 September 1983).

⁵⁰ Comisión Nacional sobre la Desaparición de Personas,

⁵¹ Sikkink, 2008, page 7.

⁵² Sikkink, 2008, page 7.

⁵³ Alfonsín ordered the military's highest court by decree (Decree 158/83, Dec 15, 1983, 1983, 1983-B A.D.L.A. 1943), which was approved by the Argentine Congress (Law 23,049, Feb. 9, 1984, 1984-A A.D.L.A. 8) to prosecute the junta leaders (of the first three juntas). If the military court would not try the former leaders within six months, the non-military Cámara Federal would take over. This happened, and when several defendants appealed against its jurisdiction, the Argentine Supreme Court stated that the President could arrange for such an provision, being the Commander-in-Chief of the Armed Forces (Junta Opinion, Causa originalmente instruida por el Consejo Supremo de las Fuerzas Armadas en cumplimiento de Decreto 158/83 del Poder Ejecutivo Nacional, Cám. Nac. Apel. Cr. y Correcc., Judgement of 30 December 1986, published in Fallos de la Corte Suprema de Justicia de la Nación, Tomo 309, Vol. II, 1986, at 28,289-90). See also Speck, 1987, pages 500-502.

⁵⁴ The Abuelas had asked for the help of Dr Snow, a forensic anthropologist who examined the dead of Laura, the daughter of one of the Abuelas. Laura had been pregnant at the moment of her

The Buenos Aires Federal Appeals Court found five of the nine former leaders guilty in 1985.⁵⁵ They were sentenced to various lengths of imprisonment. In the meantime, the military maintained a lot of power, even when Alfonsín tried to bring them under civilian control. And the precarious balance was threatened when more and more trials started. The Argentine system allows civilians to file cases with the court, and human rights groups made use of this possibility to get as much violators as possible convicted.⁵⁶ After the convictions of the junta leaders, hundreds of other cases were initiated. In the international context, the trial had set a precedent. The 'justice cascade' was set in motion and other countries started to prosecute their former leaders.⁵⁷ Due to several uprisings in the military, Alfonsín felt forced to pass the Full Stop law. This law prevented further cases to begin after February 23, 1987, which meant that all the cases had to be brought to court within sixty days.⁵⁸ The next law, the Due Obedience law, brought further restrictions to the remaining cases as it presumed the innocence of low ranking officers because they were only carrying out orders.⁵⁹ The next president, Carlos Saúl Menem, provided the higher officers with an amnesty law, and pardoned 277 people, i.e. military officers who were suspects in criminal cases.⁶⁰ The result was that for twenty years, the perpetrators of the Dirty War could not be convicted. The junta members who were already convicted in 1985, including Videla, were set free in 1990. The role of the Argentine human rights groups was limited in this period, because of the precarious situation. The military posed such a threat that the government could not, or would not meet all the demands of the human rights movement.⁶¹

disappearance, and while the Abuelas had not found the child, they were able to prove its existence with the help of Dr Snow. He examined the pelvic bones of Laura, and concluded that she had been pregnant indeed, and that she had given birth to a child. But that was not all. He found three bullets in her skull. As such, the Abuelas became involved in the broader process. See Avery, 2004, page 251.

⁵⁵ Causa originalmente instruida por el Consejo Supremo de las Fuerzas Armadas en cumplimiento de Decreto 158/83 del Poder Ejecutivo Nacional, Judgement of 9 December 1985, published in Fallos de la Corte Suprema de Justicia de la Nación, Tomo 309, Vol. II, 1986. The Supreme Court later confirmed this judgment: Causa originalmente instruida por el Consejo Supremo de las Fuerzas Armadas en cumplimiento de Decreto 158/83 del Poder Ejecutivo Nacional, Cám. Nac. Apel. Cr. y Correcc., Judgement of 30 December 1986, published in Fallos de la Corte Suprema de Justicia de la Nación, Tomo 309, Vol. II, 1986.

⁵⁶ Roehrig, 2009, page 731.

⁵⁷ Sikkink, 2008, page 7. Other former leaders that were prosecuted are Pinochet (Chile) and Hector Gramajo (Guatemala). See Lutz&Sikkink, 2001, pages 10-12.

⁵⁸ Full Stop Law (Law No 23,492 of 12 December 1986). The text of this law can be found in the report of Amnesty International and the International Commission of Jurists, see <http://www.amnesty.org/pt-br/library/info/AMR13/018/2003/en>

⁵⁹ Due Obedience Law, (Law No 23,521 of 4 June 1987). The text of this law can be found in the report of Amnesty International and the International Commission of Jurists, see <http://www.amnesty.org/pt-br/library/info/AMR13/018/2003/en>

⁶⁰ Menem issued Decree No. 100/89 in October 1989, which pardoned the 39 military that were suspected or convicted for human rights violations, more than 200 guerrillas and other military. In December 1990, he issued Decree No. 2741/90, which pardoned the former junta leaders, i.e. Jorge Videla. See Mallinder, 2009, pages 75 and 79.

⁶¹ Pereira& Engstrom, 2012, page 8.

1.2.1 Activities during amnesty laws

But when the prosecutions could not continue, other mechanisms could. Human rights policy could be made, and a sub-secretariat of Human Rights was created, in order to supervise this process.⁶² Menem reorganised the military, and by 1999 the whole organisation was under civilian control.⁶³ The trial of the junta members was not in vain, for in order to find evidence, a lot of research was done. (Mass) graves were exhumed, disappeared people identified and their death investigated. The EAAF, Equipo Argentino de Antropología Forense, was created. This was the first forensic organisation with a focus on human rights.⁶⁴ Other groups found various different ways to work around the amnesty laws. H.I.J.O.S invented the *escrache*,⁶⁵ truth trials were started and trials for crimes that were not covered by the amnesty laws were initiated.⁶⁶

The truth trials emerged as a result of the impossibility to start criminal proceedings against human rights violators, and the upcoming understanding of the right to the truth.⁶⁷ The Inter-American Court of Human Rights recognised this right in the case of Velasquez Rodriguez v. Honduras, and the Argentine judges accepted the claim of human rights groups and family members of disappeared persons, that they have a right to know the truth about the whereabouts of disappeared people.⁶⁸ While a truth trial is a judicial procedure, the court that undertakes such a procedure cannot criminally prosecute violators.⁶⁹ The testimony of Adolfo Scilingo was the first huge accomplishment of the truth trials, as he confirmed the existence of records of people in the secret

⁶² Sikkink, 2008, page 10.

⁶³ Pereira&Engstrom, 2012, page 15.

⁶⁴ Sikkink, 2008, page 11. For more information, see <http://www.eaaf.org/>.

⁶⁵ This group, consisting of children of disappeared persons, was created in 1995. An *escrache* is described as 'a carnevalesque form of demonstration'. The goal was to make the Argentine population aware of the past atrocities and the current state of impunity. The past violators often lived among them, unrecognized for what they were. So, the H.I.J.O.S. made their identities and crimes public, aiming at social exclusion. During the *escrache*, the gathered people go to the house of the violator, make a speech and mark the house. The media attention provided for a broad public, but when the *escraches* evolved into violent confrontations with the police, and the media solely focussed on this possible violence, they became less effective. While the *escrache* seems like a form of informal justice, Druliolle argues that the goal was institutional justice (Druliolle, 2013, page 270-271). It was a means to get the government going, to start a real trial and to get convictions. In the mean time, social exclusion should be the punishment. For more information, see Druliolle, 2013.

⁶⁶ Pereira&Engstrom, 2012, pages 16,17 and 18.

⁶⁷ Maculan, 2012, page 108.

⁶⁸ The I-ACHR: Velasquez Rodriguez v. Honduras, 29 July 1988 (Para 181). The Argentine cases were all before a Federal Court (for more information, see Maculan, 2012, page 109 footnote 19) and the first one in which the right to the truth was claimed was Camara Nacional de Apelaciones en lo Criminal y Correccional Federal de la Capital Federal, Mendez Carreras Horacio s/Presentacion en causa n. 761 ESMA, Register no. 3/95, 20 April 1995. When the military refused to cooperate, a claim was filled at the Inter-American Commission of Human Rights. The Inter-American Commission of Human Rights stated that the Argentine state had to respect the right to the truth, and that the military thus had to cooperate. Argentine domestic courts followed its lead. The right to know the truth will be discussed in chapter 2. See Maculan, 2012.

⁶⁹ Maculan, 2012, page 108.

detention centres, and his own cooperation in the 'death flights', where drugged people were thrown out of airplanes into the sea.⁷⁰

Because the crime of kidnapping was not covered by the amnesty laws, the Abuelas could initiate criminal proceedings against the kidnappers of their grandchildren.⁷¹ I will elaborate on the Abuelas in paragraph 1.2.2.

Both juridical and political changes lead to the annulment of the amnesty laws. In 2001, Judge Cavallo decided in the Simon case, that the amnesty laws were unconstitutional and in breach with international law. The case was brought to a higher court, but in the meantime the courts began to label the crimes of the former regime as crimes against humanity, as such placing them outside the Argentine Criminal Code.⁷² A hurdle that had to be taken was the fact that the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity went into force after the human rights violations had occurred. As such, prosecution of these violations would be in breach with the legality principle. But in 2004, the Supreme Court stated in the Arancibia Clavel⁷³ case, that the principle of legality is not breached when human rights violations are prosecuted after such a long time because the crimes were already prohibited in international human rights conventions and as a *ius cogens* norm.⁷⁴ The crime of enforced disappearance was codified later, in the Inter-American Convention against the Forced Disappearance of Persons, but it was prohibited nonetheless under international customary law at the time of the junta.

In 2005, the Argentine Supreme Court confirmed the judgment of judge Cavallo of 2001. The Supreme Court confirms the superiority of international law over Argentine domestic law, since this is explicitly stated in the 1994 Argentine Constitution.⁷⁵ The Inter American system is deemed especially important, and since the Inter American Court of Human Rights (I-ACHR) just stated that member states are not only obligated to prevent violations of human rights, to investigate into the matter and to punish the violators- but also to make sure that the whole state-system works in a way that ensures the protection of human rights-⁷⁶ the Argentine Supreme Court found the amnesty laws incompatible with international law.⁷⁷

⁷⁰ Maculan, 2012, page 109.

⁷¹ Pereira&Engstrom, 2012, page 16. Article 5 of the Full Stop Law (Law No 23,492 of 12 December 1986), and Article 2 of the Due Obedience Law (Law No 23,521 of 4 June 1987) provide for the prosecution of the kidnapping of children, and for the changing of identities.

⁷² Guembe, 2005, page 119.

⁷³ A. 533. XXXVIII. Arancibia Clavel, Enrique Lautaro s/homicidio calificado y asociación ilícita y otros. Causa n° 259.

⁷⁴ A. 533. XXXVIII. Arancibia Clavel, Enrique Lautaro s/ homicidio calificado y asociación ilícita y otros, causa n° 259, Para 33, 36. See also Bakker, 2005, page 1116, 1117; Guembe, 2005, page 121.

⁷⁵ Simon, Julio Hector y otros s/ privacion ilegítima de la libertad, case S. 1767. XXXVIII (14 June 2005), Causa N. 17.768C, Para 15.

⁷⁶ Simon, Julio Hector y otros s/ privacion ilegítima de la libertad, case S. 1767. XXXVIII (14 June 2005) Causa N. 17.768C, Para 19.

⁷⁷ Simon, Julio Hector y otros s/ privacion ilegítima de la libertad, case S. 1767. XXXVIII (14 June 2005), Causa N. 17.768C, Para 16. Bakker, 2005. Page 1112. The case in which the I-ACHR

After this decision of the Supreme Court, the individual pardons that Menem granted to several military were declared unconstitutional.⁷⁸

With the amnesty laws gone, it became possible to prosecute people for the whole story: not only the kidnapping of the children, but also the torture and murder of the parents could be included in court cases.

At the political front, Nestor Kirchner emerged. He was elected as president in 2003, and his new government adopted the agenda of the human rights organisations, 'Memory, Truth and Justice'.⁷⁹ This move gave them both more legitimacy: with the strategic use of human rights, the government made use of the public support for accountability and the popularity of human rights organisations. At the same time, the human rights organisations were officially recognised for their work and their ideas, and the governmental support for their agenda meant, inter alia, help with the reopening of trials.⁸⁰ Kirchner went so far as to state that the Argentines are 'the sons and daughters of the Mothers and Grandmothers of Plaza de Mayo'.⁸¹

While his support for the human rights quest might have had political motives, Kirchner actually undertook action. On August 26th, 2003, he signed the instrument of ratification of the UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, and made the congress annul the impunity laws.⁸² Together with the development at the juridical front, this meant that the amnesty laws were fully annulled. This really meant something: the annulment fully eliminated the amnesty laws.

Pereira and Engstrom argue that the accountability for human rights violations was achieved due to the human rights organisations.⁸³ Because of their determination, trials were eventually starting after all those years of impunity. As such, these organisations played an important role in the TJ process of Argentina.

1.2.2 The Abuelas

The strategy of the Abuelas was to find their grandchildren and to start a trial against the kidnappers. In their search for their lost grandchildren, the Abuelas first relied on their own investigation of birth certificates and adoption papers, and on the tips of people who had seen the children or heard something about them. The Abuelas had to prove that the child was in fact one of their missing grandchildren, and forensic science, in the form of a DNA test, could help them

explicitly determines the obligations is the case of *Barrios Altos*, I-ACOMHR, Chumbipuma Aguirre et al v. Peru (Ser C) No. 75 (2001)

⁷⁸ Pereira& Engstrom, 2012, page 27.

⁷⁹ Pereira&Engstrom, 2012, page 23.

⁸⁰ Pereira&Engstrom, 2012, page 24.

⁸¹ As quoted in Pereira& Engstrom, 2012, page 23.

⁸² Convention on the non-applicability of statutory limitations to war Crimes and Crimes against Humanity. New York, 26 November 1968, entered into force November 11th, 1970. UN Treaty series, vol. 754, pp. 73. The annulment of the Amnesty laws was regulated in Law 24925, April 17 1998.

⁸³ Pereira&Engstrom, 2012, page 22.

with that.⁸⁴ The grandmothers themselves could give their DNA, and the DNA of the supposedly kidnapped child was compared. In this way, a 99,9% certainty could be given about the identity of the child.⁸⁵

When the Abuelas started to make use of the DNA testing, there was no legal regulation. The first time it was used in a court case, was in the case of Paula Logares, on December 13th 1983.⁸⁶

Oren points at three important aspects of this case: the burden of proof, the legal effect of the DNA test and the legal remedy.⁸⁷ The Abuelas had to prove -to a certain extent- that Paula was in fact the granddaughter of one of them, before the court ordered for the DNA test. As to the legal effect of this test, there was no legislation. In the case of Paula Logares it was accepted by the court as part of the proof of her identity, and this set a precedent. Later on, legislation took up with the reality. The remaining question was what to do with this evidence. Now that the court had established her identity, should she live with her biological family or should she stay with her adoptive parents? Starting from the point that it was in the best interest of the child to know the truth (and to use her real identity) the court decided that Paula should live with her grandmother.⁸⁸

Other cases followed. When the test was positive, and it was proven that the child was in fact kidnapped, the issue of the custody was always important.⁸⁹ Sometimes, the child stayed with the adoptive parents, but in the case where the adoptive parents did know about, or even participated in, the disappearance of the biological parents, the Abuelas deemed it not an option for the child to stay with the adoptive parents. In 2009, the Abuelas had found 98 of their missing grandchildren. Of those 98 children, 83 had been adopted by people who knew about the fate of the biological parents, or were responsible for their disappearance.⁹⁰

⁸⁴ The Abuelas were gathering information about the possibility of identifying a child with the help of such a test for a long time. In 1984, they contacted the American Association for the Advancement of Science. This association helped them by developing a DNA test.

⁸⁵ Avery, 2004, page 250.

⁸⁶ Causa Ac. 202/83 (Feb. 19, 1988). The case is called 'Paula Eva Logares Grinspon', sentence by Federal Judge Juan Edgardo Fegoli against Raquel Teresa Leiro Mediondo and Ruben Luis Lavallen. Paula was raised by police officer Ruben Lavallen and his wife. Her grandmother, Elsa Pavon, searched her for five years and became a member of the Abuelas.

⁸⁷ Oren, 2001, page 143

⁸⁸ Oren, 2001, page 144.

⁸⁹ In its annual report of 1987-1988, the Inter American Commission on Human Rights (IACHR) recalled that some of the known children (some children disappeared) returned to their biological family and others were adopted. These adoptions are called 'irregular', whether the adoptive parents knew the whole situation or not. The Abuelas are mentioned in the report, and it is explained that their first choice was for a recovered child to live with its biological family. However, they recognised the fact that the children perceived the adoptive parents as their real parents, and wanted to stay with them. Therefore, they would not always fight for the custody over the child, in the cases where the adoptive parents did not know about the circumstances of the birth and adoption of the child. See the Report of the IACHR 1988-1987 (under part 2: Situations Presented, sub c: Delivery to Third Parties)

⁹⁰ Richards, 2009, at

<https://nacla.org/news/new-dna-law-argentina-will-help-find-missing-grandchildren>

When time passed, the children became (young) adults, and the question of custody no longer mattered.⁹¹ After this first court case, the legislation on, and the use of DNA tests developed. In cooperation with the Argentine state, a national Database was established in 1987. Families that searched for missing family members could give blood samples and these blood samples were later used to test the DNA of the found child with the DNA of the alleged family.⁹² The law that created the Databank made it possible for courts to order a DNA test, and non-cooperation with a test led to a less favourable position in court, as it would be regarded as evidence against the objector.⁹³ This law was in line with the viewpoint of the Abuelas, who argued that only guilty people would refuse to cooperate.⁹⁴

In 1992, the Abuelas had another success: the government agreed with the creation of the National Commission on the Right to Identity (CONADI). This was a big step for them, as CONADI had 'broad investigatory and prosecutorial powers to work with the Abuelas, their attorneys, state prosecutors, and the Interior Ministry's Secretariat for Human Rights in a centralized and coordinated effort to find the missing children and return them to their biological families'.⁹⁵ With this commission, the Abuelas seemed to be able to use the power of the state in their efforts to locate their grandchildren. They were also financially backed, as the government created a fund for their activities in 1998.

While the non-cooperation of adoptive parents lead to a less favourable position in court, it was not sure what to do with a non-cooperative child. The Argentine Supreme Court ruled in 1995 and 1996 that minors could be obligated to take a DNA test.⁹⁶ One of the reasons that were mentioned for this outcome was the right of the child to know her identity, and the obligation of the Argentine state to protect that identity, as codified in Article 8 of the Convention on the Rights of the Child. To no surprise, the Abuelas had been involved in the creation of this provision. I will elaborate on this right in chapter 3.

1.3 Conflict of interests

In 2009, Congress approved a law that obliges *adult* children to cooperate with a DNA test, as it changed article 218 of the National Criminal Procedure Code.⁹⁷

⁹¹ While they were busy with court cases and searching for their grandchildren, the Abuelas also took action against the Argentine adoption laws. The closed system made the illegal adoptions too easy, and the search too hard, as it enabled the practice of falsifying the identities of children. In 1997 the law was changed, giving adopted children of 18 years and older the right to access their adoptive file. In this file, they would find information on their biological mother, and their birth. Also, all adoptive children had to be told that they were adopted. See Avery, 2004, page 255.

⁹² Grandsman, 2012, page 425.

⁹³ Ley 23.511 Banco Nacional de Datos Geneticos, Art. 4 states: '(...) La negativa a someterse a los exámenes y análisis necesarios constituirá indicio contrario a la posición sustentada por el renuente'. This is also discussed by Oren, 2001, page 121.

⁹⁴ Avery, 2004, page 253.

⁹⁵ Avery, 2004, page 253.

⁹⁶ Oren, 2001, page 154.

⁹⁷ Ley 26.549, Boletín Oficial, Nov. 26, 2009, available at <http://www.infoleg.gov.ar/infolegInternet/anexos/160000-164999/160779/norma.htm>. King (2011) explains this new law at page 544.

The Abuelas were pleased with this law, because now the child does not have to make the decision, and does not need to feel guilty towards its adoptive parents.

But some of the recovered adult children oppose to this obligation. The interference of the state in the private life is not always welcomed. Marcela Noble, for example, stated:

"Our identity is ours. It's a private thing, and I don't think it's up to the state or the Grandmothers (of the Plaza de Mayo) to come and tell us what is ours".⁹⁸

Next to the actual truth itself, the legal consequences may also be a difficulty. For one, when the true identity comes to light, the old one cannot legally exist anymore. This has far reaching consequences, as even your name might be changed. This happened to Hilario Bacca, whose story I used in the very beginning of the introduction. He did not want to cooperate with the DNA test, and when he was forced to, he refused to change his name (the name his biological parents gave him was Frederico Cagnola Pereyra). He stated that:

"I am an adult and I am uncomfortable with this schizophrenic idea that I have to kill Hilario Bacca to give birth to somebody I am not"⁹⁹

When the truth has come out, some of the children still use their 'other identity'. They feel like their adoptive parents are their real parents, and at the same time they have contact with their biological family. Some even celebrate two birthdays.¹⁰⁰

In most cases, the (obligated) DNA test is ordered as a measure in the criminal proceedings against the adoptive parents. In other cases, the criminal proceedings follow the (voluntary) test. Some children feel like they would betray the parents that raised them, when they are the reason for their criminal prosecution.¹⁰¹ The Abuelas argue that the process of 'restitution' requires the knowing of the truth, and the rejection of the lies. The adult children have to break with their false identity and adoptive parents.¹⁰² Thus, the Abuelas pass on every case to the judiciary, even if the children ask them not to.¹⁰³ The Abuelas feel like they cannot let these human rights violations go unpunished.

⁹⁸ Michael Warren, The Guardian, 4 June 2010. From the website of the Guardian: <http://www.guardian.co.uk/world/feedarticle/9111210>, visited on 18 June 2012.

⁹⁹ Uki Goni, The Guardian, Friday 23 September 2011. From the website of The Guardian: <http://www.guardian.co.uk/world/2011/sep/23/child-argentina-disappeared-adoptive-name>, visited on 18 June 2013. Unfortunately, I have not been able to find the court case of Hilario Bacca, only the case about the change of his name (Causa n. 44.891 "Dr. Castineiras, Daniel Omar s/ apelacion" Juzg. Fed. N.2-Sec n.3, Buenos Aires, 1 September 2011.) More information on the changing names can be found in the thesis of Gjerl w, 2012, inter alia at page 54.

¹⁰⁰ Ibid.

¹⁰¹ King, 2011, page 537.

¹⁰² Gransman, 2012, page 431.

¹⁰³ Grandsman, 2012, page 425.

In 2003, there had been 8 cases of recovered adult children who did not want to cooperate with the test.¹⁰⁴ I will elaborate on three of these cases, each situated in a different stage of the legality of the DNA test.¹⁰⁵

The first case was that of Maria Natalia, before the DNA test was obligatory. The Abuelas had found her in 1993, and her adoptive parents were sent to jail for kidnapping her. However, in 1997 her adoptive mother was released because of a lack of evidence, and Maria Natalia had to be tested in order to clarify the facts. But she refused. It went so far as that the court ordered her to cooperate, and she started a hunger strike.¹⁰⁶ Because she repeatedly refused, the medical personnel did not want to extract blood from her. In the end, she threatened to kill herself if she would be forced to do the test. This put an end to it.

The second case is that of Evelyn Vazquez in 2003, just before the DNA test became legally obliged. In this case, the Supreme Court had stated that a person could not be forced to undergo a DNA test.¹⁰⁷ The Abuelas found Evelyn in 1999, when she was no longer a minor. Evelyn did not want to do the DNA test, because of the criminal consequences for her adoptive parents. In 2000, the Federal Court ordered a DNA test, but in 2003 the Supreme Court stated that she could not be forced to extract blood for the test. The Court argued that even if the adoptive parents were not her real parents, she could not be obliged to testify against them,¹⁰⁸ and that the extraction would be a breach of her privacy.¹⁰⁹ The forced test would have imposed an identity on her, and thus the state had to withhold from such practices.¹¹⁰ An important factor for the Court was that Evelyn was not a suspect in a criminal proceeding, but a witness.¹¹¹

A strange situation occurred, where human rights groups supported the Abuelas in their claim for an obligation to cooperate with a test, and thus the intervention of state power in a private matter. On the other hand were the defenders of the former regime, who stated that this would intervene with the right to privacy

¹⁰⁴ Grandsman, 2009, page 164.

¹⁰⁵ The reason for choosing these three cases is twofold: it made me feel uneasy to search for people who do not want to be found, and these are the only three cases that I could find without asking for help of a Spanish speaking person. Information on these eight adult children is hard to find. Their names do not appear in the articles (newspaper and academic articles) that discuss their fate. Moreover, I did not want to expose them, even if it is in a thesis that nobody will read, while they clearly do not want to have anything to do with this matter. These three cases are discussed in the literature, and they are significant in that they illustrate the different stages of the legality of the use of the DNA tests.

¹⁰⁶ Grandsman, 2009, page 170.

¹⁰⁷ Corte Suprema de Justicia de la Nación. "Vázquez Ferrá, Evelyn Karinas/incidente de apelación". V. 356. XXXVI. Fallos: 326. (30/9/2003).

¹⁰⁸ Corte Suprema de Justicia de la Nación. "Vázquez Ferrá, Evelyn Karinas/incidente de apelación". V. 356. XXXVI. Fallos: 326. (30/9/2003), Para 10.

¹⁰⁹ Corte Suprema de Justicia de la Nación. "Vázquez Ferrá, Evelyn Karinas/incidente de apelación". V. 356. XXXVI. Fallos: 326. (30/9/2003), Para 10.

¹¹⁰ Corte Suprema de Justicia de la Nación. "Vázquez Ferrá, Evelyn Karinas/incidente de apelación". V. 356. XXXVI. Fallos: 326. (30/9/2003), Para 11.

¹¹¹ Corte Suprema de Justicia de la Nación. "Vázquez Ferrá, Evelyn Karinas/incidente de apelación". V. 356. XXXVI. Fallos: 326. (30/9/2003), Para 12.

and integrity.¹¹² Evelyn stated 'My human rights are being violated in the name of human rights'.¹¹³

When the new DNA law went into force in 2009, the situation changed. This becomes apparent in the third case, of Guillermo Gabriel Prieto- the 'Prieto 2' case. Guillermo Gabriel Prieto is the alleged son of two disappeared persons. Criminal proceedings started against his adoptive parents, and personal items were taken from his house for a DNA test, as he had refused to give blood¹¹⁴. The court argued that this case was different from that of Evelyn Vazquez, as the DNA was taken from personal belongings instead of blood samples.¹¹⁵ As such, no coercion or even participation of Guillermo was needed. Thus, the measure was reasonable, and in line with the object of the criminal proceedings against the adoptive parents: it was needed in order to uncover the truth and establish the criminal responsibility. Guillermo appealed. However, the Supreme Court (La Corte Suprema de Justicia de la Nación) argued along the same line in its judgment of 11 August 2009. It stated that the falsification of the identity of children in relation to enforced disappearances constituted a crime against humanity.¹¹⁶ The state is therefore obligated to punish the responsible persons. The interests of Guillermo and his grandmother have to be balanced, within the context of the historical circumstances.¹¹⁷ The rights of the adult child (the right of being heard by a competent and impartial judge; to physical integrity; to identity; to intimacy and to property) are to be balanced against the right of the grandmother to know about the circumstances of the disappearance of her daughter, and to know if this adult child is her grandchild.¹¹⁸ The court continues with stating that rights are limited in order to work in a society, to be compatible with each other.¹¹⁹ The Constitution protects the privacy and autonomy of citizens, so that they are not *unjustly* violated. And because rights are of similar hierarchy, the court has to be extremely cautious when balancing them. The court states that in the end, the personal privacy (article 19 of the constitution) and the interest of society at large have to be balanced.¹²⁰ The right to the truth has to be materialised without, or with a minimum violation of the right of the child.¹²¹ The court argues that this is done properly: the DNA is taken in a way that does not invade the body, without active participation of Guillermo, and the use of the DNA is aimed at the protection of the public interest: truth and justice.¹²² The seizure of the DNA was the only way to uncover the truth, and it complies with the obligation of the state to protect, investigate and prosecute

¹¹² Grandsman, 2009, pages 170 and 171.

¹¹³ La Nación, October 1, 2003, quoted in Grandsman, 2009, page 172.

¹¹⁴ Gualtieri Rugnone de Prieto, Emma Elidia y otros s/ sustracción de menores de 10 años, causa G. 291. XLIII, 'Prieto 2', 11 August 2009.

¹¹⁵ 'Prieto 2', G.291.XLIII, paras 15, 18, 21.

¹¹⁶ 'Prieto 2', G.291.XLIII, Para 4.

¹¹⁷ Prieto 2, G.291.XLIII, Para 8, 9.

¹¹⁸ Prieto 2', G.291.XLIII, Para 10.

¹¹⁹ Prieto 2', G.291.XLIII, Para 11.

¹²⁰ Here, the right of the Abuelas is incorporated into the interest of society without further explanation.

¹²¹ 'Prieto 2', G.291.XLIII, Para 14.

¹²² The determination of the truth is needed in the criminal process against the adoptive parents, and this is in the end a means to achieve the higher values of truth and justice, see Para 15.

serious crimes that have had tremendous effects on the Argentine society.¹²³ As such, the measure does not violate the rights of Guillermo disproportionately.

The court goes even further, stating that even if a blood sample had been taken, this would have been legally sound.¹²⁴ The restriction of the rights of the adult child was fair and reasonable in relation to the aim of the measure, and it is based on the legitimate authority of the state to limit the exercise of certain rights, within a reasonable margin, in order to ensure necessary criminal persecution.¹²⁵

1.3.1 Truth and identity

The right to know the truth about past human rights violations has evolved in the international legal order, especially within the Inter-American system. The right is significant for the Argentine context, as it provides the Abuelas with a legal tool to uncover the fate of their lost family members. Not only the fate of their children, but especially the fate of their living grandchildren is the focus of their quest. The truth has been an important concept within the Argentine Transitional Justice Process, and within the Argentine human rights movement. The Abuelas claim a right to the truth, for themselves but also for the adult children. Within the jurisprudence of the inter-American Court- and Commission of Human Rights, the collective right to the truth has been recognised, giving the Argentine society as a whole a right to know the truth about past atrocities. I will elaborate on this in the third chapter.

The Abuelas argue that the adult children have to know the truth, in order to find their real identity. The truth being the knowledge of the biological parents and family, which leads to the real identity: being the child of your parents and thus a family member of your biological family. As such, the identity seems to exist for a major part of biological factors. When the National Data Bank was created, it became accepted in Argentine society that the truth has to be revealed.¹²⁶ And with the legal obligation to cooperate with the DNA test that determines the identity, the stance of the Abuelas has become institutionalised in the Argentine legal system. It is literally the DNA, the biological factors, that determine who you are. I will elaborate on this in the fourth chapter.

While the rights to the truth and to a personal identity are analysed separately, the Argentine Transitional Justice discourse makes clear that the two concepts are blurred. One has to bear in mind, that these rights are closely related. As Besson argues: 'The right to know one's origins is a dimension of the broader right to ascertain and preserve one's identity'.¹²⁷ The right to a personal identity is related to the right to know ones origins, and thus to the right to the truth. This

¹²³ 'Prieto 2', G.291.XLIII, Para 18. At this point, the role of the right to a personal identity, and the obligation of the Argentine state to re-establish this (biological) identity becomes apparent. I will elaborate on this obligation in chapter 3.

¹²⁴ 'Prieto 2', G.291.XLIII, Para 21.

¹²⁵ 'Prieto 2', G.291.XLIII, Para 21.

¹²⁶ Oren, 2001, page 150.

¹²⁷ Besson, 2007, page 141.

right to the truth originates from the past atrocities; it is rooted in the Argentine history.

Chapter 2

The right to the truth

This chapter will elaborate on the role of the right to the truth in the conflict between the Abuelas and the adult children.

It is important to note that this right is analysed in relation to enforced disappearances, which is only one of the various possible applications of the right. The right to the truth as it has developed in case law of legally adopted children in search for their biological parents, for example, is thus not included.¹²⁸

The development of the right will be elaborated upon in paragraph 2.1, with the international (2.1.1) and regional level (2.1.2). Paragraph 2.2 will discuss the content of the right, and paragraph 2.3 discusses the issue of the right bearers in the context of the Abuelas and the adult children. The conflict between the right to the truth and other rights is analysed in paragraph 2.4. The possibility of limiting human rights is discussed, and the collective perception of the right to the truth is analysed in this regard. Paragraph 2.5 will then place this all in the context of the Abuelas and the adult children, and draw a conclusion.

2.1 The development of the right to the truth

The right to the truth originated from international Humanitarian Law.¹²⁹ This is the field of law concerning armed conflicts. In Article 32 of the Additional Protocol 1 to the Geneva Conventions, families are given the right to know the truth about the fate of other family members.¹³⁰ From this point, the right has been transferred into international human rights law, and developed in relation to enforced disappearances.¹³¹

The right has developed in international and regional law systems. From the 1970's, the right to know the truth in relation to enforced disappearances has evolved. Especially the role of the Working Group on Enforced and Involuntary Disappearances, and the Inter American Commission on Human Rights has been important herein.¹³² The right is attained to victims of gross human rights violations and their family members. While the right has been linked to other

¹²⁸ See Besson, 2007.

¹²⁹ Report of the Office of the United Nations High Commissioner for Human Rights, Study on the right to the truth. E/CN.4/2006/91 8 February 2006, Para 5.

¹³⁰ Protocol Additional to the Geneva Conventions of 12 August 1949, relating to the Protection of Victims of International Armed Conflicts (Protocol 1), 8 June 1977, Article 32.

¹³¹ Naqvi, 2006, page 256

¹³² Report of the Office of the United Nations High Commissioner for Human Rights, Study on the right to the truth. E/CN.4/2006/91 8 February 2006, Para 8.

crimes as well, I will only focus on the right to know the truth in relation to enforced disappearances.¹³³

2.1.1 International level

At the international level, the UN is involved in the recognition of the right to the truth inter alia through the before mentioned UNWGEID¹³⁴, the Human Rights Committee¹³⁵, the Commission on Human Rights¹³⁶, the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED)¹³⁷ and the International Convention on the Rights of the Child (CRC).¹³⁸

UNWGEID

In 1980, the Commission on Human Rights created the UN Working Group on Enforced or Involuntary Disappearances (UNWGEID).¹³⁹ This was initially for the duration of one year, but it still exists today. The UNWGEID assists family members when a person has disappeared.¹⁴⁰ In 1992, the General Assembly adopted the Declaration on the Protection of All Persons from Enforced Disappearance (Declaration). The UNWGEID became the monitoring instrument of this Declaration.¹⁴¹ It started issuing recommendations and observations on states, and general comments on the Declaration. However, states were not very impressed by this, as the Declaration is not a legally binding instrument.¹⁴²

The Declaration mentions the right of inter alia family members to complain about a disappearance and to receive information on the investigation. Although the right to the truth is not mentioned explicitly, several obligations for states

¹³³ The UN High Commissioner refers in his report to the relevance of this right to crimes such as torture and extrajudicial executions. Apart from those crimes, the right to know the truth is linked with the issue of ending impunity, with internally displaced persons who are searching for lost family members and in general with remedies and reparations in cases of gross human rights violations. It is argued that the right to the truth only arises in cases of such gross human rights violations, like torture, extrajudicial executions and disappearances. See the report of the Office of the United Nations High Commissioner for Human Rights, Study on the right to the truth. E/CN.4/2006/91 8 February 2006, under paragraph 9 and 33.

¹³⁴ UN Working Group on Involuntary and Enforced Disappearances.

¹³⁵ Supervising body of the International Covenant on Civil and Political Rights.

¹³⁶ UN Charter based Human Rights organ of the UN, succeeded by the Human Rights Council in 2006.

¹³⁷ UN General Assembly, International Convention for the Protection of All Persons from Enforced Disappearance, 20 December 2006, available at: <http://www.refworld.org/docid/47fdfaeb0.html> [accessed 24 July 2013]

¹³⁸ UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, available at: <http://www.refworld.org/docid/3ae6b38f0.html> [accessed 4 September 2013].

¹³⁹ Human Rights resolution 20 (XXXVI) of 29 February 1980.

¹⁴⁰ Family members can send reports to the UNWGEID. These are transferred to the government of the country where the disappeared person lived, and the government is asked to start investigations into the matter. The working group has to be informed of the results. Since 1992, the UNWGEID also monitors the member states to the Declaration on the Protection of all Persons from Enforced Disappearances, according to General Assembly resolution 47/133 of 18 December 1992.

¹⁴¹ General Assembly Resolution 47/133, 18 December 1992.

¹⁴² Nowak, 2012, page 184.

that derive from it are mentioned.¹⁴³ It also points at the case of abducted children, and children born during their mother's captivity. States are urged to search for the children, and to reunite them with their biological families.¹⁴⁴ In 2008, the Human Rights Council extended the mandate of the UNWGEID, with an explicit comment about the children of disappeared persons. The working group was 'encouraged' to work together with governments to find and identify these children.¹⁴⁵ It is important to note that the UNWGEID is free to examine all cases of enforced disappearances. This competence is not limited by time. UNWGEID issued a General Comment on the Right to the truth in relation to enforced disappearances in 2010.¹⁴⁶ This will be elaborated upon in paragraph 2.3, where the content of the right to the truth is discussed.

Articles 2(3), 17 and 24 ICCPR

Another relevant UN organ is the Human Rights Committee (HRC), the supervising body of the International Covenant on Civil and Political Rights (ICCPR).¹⁴⁷ There is no specific article in the ICCPR about enforced disappearances or the right of the family to know the truth, but several existing articles are relevant. One of them is article 7 ICCPR, which prohibits torture and cruel and inhuman treatment.¹⁴⁸ In the case of Maria del Carmen Almeida de Quinteros, the HRC argued that the mother of a disappeared person should know what happened to her daughter, and that the not-knowing constituted to inhuman treatment.¹⁴⁹ Another relevant article is article 2(3) ICCPR, which obliges states to start investigations and offer an effective remedy after human rights violations such as disappearances.¹⁵⁰ The family of the disappeared person has to be informed about this investigation and the developments thereof. Article 24 is also relevant, as it states that every child has to be registered at birth,

¹⁴³ UN Commission on Human Rights, Declaration on the Protection of All Persons from Enforced Disappearance, 28 February 1992, E/CN.4/RES/1992/29.

¹⁴⁴ UN Declaration on the Protection of All Persons from Enforced Disappearance 28 February 1992, E/CN.4/RES/1992/29, Article 20, sub 1.

¹⁴⁵ Human Rights Council Resolution 7/12, Para 1, sub d.

¹⁴⁶ A/HRC/16/48.

¹⁴⁷ G.A. Resolution 2200A (XXI), United Nations, Treaty Series, vol. 999, p. 171 and vol. 1057, p. 407. 999 UNTS 171 and 1057 UNTS 407 / [1980] ATS 23 / 6 ILM 368 (1967).

¹⁴⁸ Article 7 ICCPR: 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.' UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: <http://www.refworld.org/docid/3ae6b3aa0.html> [accessed 8 August 2013]

¹⁴⁹ Maria del Carmen Almeida de Quinteros et al. v. Uruguay HRC (1983).

¹⁵⁰ Article 2, sub 3 ICCPR: 'Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.' UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: <http://www.refworld.org/docid/3ae6b3aa0.html> [accessed 8 August 2013]

which means that the child becomes an official person, and has the possibility to find out about his/her origins.¹⁵¹

Article 24 ICPPED

The UN Commission on Human Rights (now succeeded by the UN Human Rights Council) established a working group in 2001 with the instruction to prepare a new legally binding instrument on enforced disappearances. A comprehensive convention was needed because the existing legal framework did not meet the required protection. Nowak points at different factors, inter alia the lack of universal jurisdiction and an obligation to include enforced disappearances into the domestic criminal law, the definition of enforced disappearance and the shortcomings of the existing human rights.¹⁵²

The International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED) was made, and adopted in 2006 by the General Assembly of the UN.¹⁵³ The Convention entered into force on 23 December 2010.

¹⁵¹ Besson, 2007, page 148.

¹⁵² Manfred Nowak, The existing international criminal and human rights framework for the protection of persons from enforced or involuntary disappearances, Expert report submitted to the UN Commission on Human Rights, UN doc. E/CN.4/2002/71, 8 January 2002, Para 72. With regard to the universal jurisdiction, Nowak points at the fact that while enforced disappearances are included in the Rome Statute of the International Criminal Court of 1998 (Rome Statute of the International Criminal Court, 17 July 1998, Article 7), this is limited to a systematic and widespread use. (Report of the Intersessional Open-ended Working Group to Elaborate a Draft Legally Binding Normative Instrument for the Protection of All Persons from Enforced Disappearance, E/CN.4/2004/59, 23 February 2004, Para 170.)

As to the definition, international criminal law recognises both state actors, and private actors as possible violators. In international human rights law, however, it is not common to refer to non-state actors as possible violators of a convention. Human rights law always needs the interference of the state: the member states to the convention are the duty-bearers. Only those who are direct or indirect state actors can be qualified as violators under international human rights law (Expert report submitted to the UN Commission on Human Rights, UN doc. E/CN.4/2002/71, 8 January 2002, Para 72). Nowak states that it is argued that a new convention on enforced disappearances has no adding value, as the existing human rights together already cover every bit of an enforced disappearance (ibid, Para 75). However, he points out that these separate human rights are not enough to protect persons from this crime. The right to personal security, for example, is only recognised by the HRC. The right to be recognised as a person before the law is not codified nor acknowledged in the ECHR, but it is codified in the ACHR (Article 13), and in the ICCPR (Article 3). And even when it is codified, in no case a violation has been found (ibid, Para 73). In order for the right to life to be violated, the death of the person has to be established- which is problematic in the case of an enforced disappeared person. And at last, the violation of right to protection from torture or inhuman treatment is not as straightforward as it may seem in the case of enforced disappearances. The HRC states that only the mere fact that a person has been detained for a prolonged time, incommunicado, is enough to provide for a violation. (Ibid. The line of arguing can be seen in the case of *Mojia v. Dominican Republic*, Communication No. 449/1991, final views of 15 July 1994, Para 5.7). The ECtHR and the I-AcTHR, however, require torture or ill treatment before a violation is established. (I-AcTHR: *Caballero-Delgado and Santana v. Colombia*. Petition No. 10.319/1989, 8 December 1995, Para 65; ECtHR: *Tas v. Turkey*, Application No. 24396/94, 14 November 2000, Para 76). The enforced disappearance itself is thus not enough to establish a violation of the right of protection from torture and ill-treatment. A special convention with specific obligations for states -especially the obligation to include enforced disappearances as a crime in national criminal law- is better suited to protect people.

¹⁵³ General Assembly Resolution 61/177 of 20 December 2006.

In the meantime, the CHR issued a resolution to the right to know the truth in 2005, requesting the UN High Commissioner for Human Rights for a study on the right.¹⁵⁴ The request was accepted, and in 2006, the study on the right to the truth was published.¹⁵⁵ It is stated that this right may differ from country to country, and in different legal systems. For example, the right can also be codified as the right to information. The Commission notes the importance of the right in the fight against impunity, and for respect of human rights. The Commission had already reaffirmed the right of the family to know the truth about disappeared family members.¹⁵⁶

On 23 December 2010, the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED) went into force,¹⁵⁷ and Argentina had already ratified it.¹⁵⁸ The ICPPED was the first international legally binding instrument on the issue of enforced disappearances, and codified the right to the truth in Article 24.

Article 24

‘Each victim has the right to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person. Each State Party shall take appropriate measures in this regard.’¹⁵⁹

While the ICPPED is relevant for the case of the Abuelas and the adult children, it only went into force in 2010, and is thus not applicable to the cases of the enforced disappearance of the parents of the adult children. With the ICPPED came the Committee on Enforced Disappearances. The Committee is important as it supervises the ICPPED. Member states have to report on their compliance with the ICPPED, and if they allow it, individual communications can be issued and examined by the Committee. However, in Article 35 of the ICPPED it is stated that the Committee is only competent with regard to enforced disappearances that started after the ICPPED went into force. As such, the Committee is not competent to deal with the disappearances during the 1970’s, and thus the Abuelas cannot start a communication about the cases of their lost children.

Article 7 CRC

The Convention on the Rights of the Child (CRC) states in Article 7:

‘1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, **the right to know and be cared for by his or her parents.**

¹⁵⁴ Commission on Human Rights, Resolution 2005/66.

¹⁵⁵ Commission on Human Rights, Promotion and Protection of Human Rights, Study on the right to the truth. Report of the Office of the United Nations High Commissioner for Human Rights E/CN.4/2006/91 8 February 2006.

¹⁵⁶ Commission on Human Rights, Resolution 2002/60, Para 2.

¹⁵⁷ See <http://www.refworld.org/docid/47fdfaeb0.html>.

¹⁵⁸ The Argentine state ratified the ICPPED on 14 December 2007. It seems strange that the Convention did not have effect immediately, but this was because of Article 39(1) ICPPED, which provided that the Convention only went into force when twenty states had ratified or accessed it.

¹⁵⁹ UN General Assembly, *International Convention for the Protection of All Persons from Enforced Disappearance*, 20 December 2006, Article 24

2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.¹⁶⁰ [emphasis added by author]

As such, this provision gives the child the right to know (and to be cared for) by her/his parents. Besson argues that 'the term 'parents' is said to include not only one's social or legal parents, but also one's biological or genetic parents together with one's birth parents'.¹⁶¹ The right has to be read in relation to Article 8 of the CRC, on the identity of the child- which underlines the relation between the truth and the identity. I will elaborate on the CRC in Chapter 4, on the right to a personal identity. Suffice here is to say that the CRC provides children (only them!) with the right to know the truth about who their biological parents are.

2.1.2 Inter-American system: Articles 8 and 25 ACHR

The Inter-American system, with the American Convention on Human Rights (ACHR), has been the most progressive one with regard to the right to the truth,¹⁶² and of major importance for the Argentine case.¹⁶³

The Inter American Court of Human Rights (I-ACHR) ruled in 1988 that states have the obligation to inform relatives of enforced disappeared persons in any way that they can, and if the person has died, the family should know the place where the remains are. This obligation to inform the relatives exists also when criminal proceedings are not possible.¹⁶⁴ The right to the truth was linked to article 25 of the ACHR, which entails the right to judicial protection (right to a remedy).¹⁶⁵

Later on, the I-ACHR derived the right to know the truth from both article 25 and 8 IACHR. Article 8 is about a fair trial.¹⁶⁶ While the Inter-American Commission argued that the truth has an individual and a collective dimension, the I-ACHR only found it applicable to the direct victim and his relatives.¹⁶⁷ However, in the

¹⁶⁰ UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, Article 7.

¹⁶¹ Besson, 2007, page 143.

¹⁶² Vermeulen, 2012, page 334.

¹⁶³ The Inter American system is set up by the Organisation of American States (OAS) and consists of the Inter-American Commission (Inter-American Commission) of Human Rights and the Inter-American Court of Human Rights (Inter-American Court). These bodies supervise the Inter American Convention on Human Rights (IACHR). However, the I-A Commission is also organ of the OAS itself, and has as such a broader scope, since the OAS activities apply to all the member states to the OAS, whereas the IACHR only applies to its own member states. The Commission and the Court thus supervise the IACHR, and the Commission is also working under the OAS Charter, and its own Statute and Regulations. For more information about the Inter-American Human Rights system, see Cecilia Medina Quiroga, 'the Inter-American System for Human Rights' in 'International Protection of Human Rights: a Textbook', ed. by Catarina Krause and Martin Scheinin, Abo Akademi University, Institute for Human Rights, 2012.

¹⁶⁴ Velásquez-Rodríguez v. Honduras, Inter-American Court of Human Rights 1988, Para 181.

¹⁶⁵ Article 25, Right to Judicial Protection, American Convention on Human Rights, "Pact of San Jose, Costa Rica" (B-32), 22 November 1969.

¹⁶⁶ Article 8, Right to a fair trial, American Convention on Human Rights, "Pact of San Jose, Costa Rica" (B-32), 22 November 1969.

¹⁶⁷ Case of Bámaca-Velásquez v. Guatemala, Inter-American Court of Human Rights (2000), Para 201

case of the Serrano-Cruz sisters the Court altered its point of view. Not only the close relatives have a right to know what happened to the missing sisters, also society as a whole deserves to know what happened. It also stated that with the international development of the right to the truth, an important measure of reparation is created.¹⁶⁸ The OAS General Assembly stated in 1983 that enforced disappearances constitute to crimes against humanity.¹⁶⁹ Moreover, in the Serrano-Cruz case, the I-ACHR ordered the State (El Salvador) to establish

‘A system of genetic information that allows genetic data that can contribute to determining and clarifying the relationships and identification of the disappeared children and their next of kin to be obtained and conserved’.¹⁷⁰

As such, the Databank in Argentina, and the DNA tests that define the identities of the adult children, seems to be in line with the obligations of States under the ACHR. However, the establishment of such a Databank can be distinguished from obligating innocent citizens to cooperate with a DNA test.

The viewpoints of the Inter-American Commission and Court are very important for Argentina, as they constitute as international law (and are as such directly applicable in the Argentine legal order). Even more, the Inter-American System was especially recognised as very important by the Argentine Supreme Court in the Simon case.¹⁷¹

On June 9th, 1994, the OAS General Assembly adopted the Inter-American Convention on the Forced Disappearance of Persons (I-ACFDP).¹⁷² This was done after a lot of pressure from states and NGO's.¹⁷³ Argentina is a member state to this convention, from the day of ratification at 31 October 1995.¹⁷⁴ The convention entered into force on 28 March 1996, as the first legally binding instrument on the issue of enforced disappearances. Scovazzi and Citroni argue that especially the definition of the crime,¹⁷⁵ and the qualification of the systematic use of enforced disappearances as a crime against humanity¹⁷⁶ are an important achievement.¹⁷⁷ The I-ACFDP obliges states to cooperate in the identification and returning of minors who have been detained or removed to other countries.¹⁷⁸ However, Scovazzi and Citroni point at the fact that the convention fails to elaborate on the prevention of the crime, the judicial guarantees for victims and their families, and the protection of witnesses and

¹⁶⁸ Serrano-Cruz Sisters v. El Salvador, Inter-American Court of Human Rights (2005) Para 62.

¹⁶⁹ OAS, AG/Res.666 (XIII-0/83), in Proceedings: Thirteenth Regular Session, 1983.

¹⁷⁰ Serrano-Cruz Sisters v. El Salvador, Inter-American Court of Human Rights (2005) Para 193.

¹⁷¹ Simon case: Simon, Julio Hector y otros s/ privacion ilegítima de la libertad, case S. 1767. XXXVIII (14 June 2005), Causa N. 17.768C Para 15.

¹⁷² 33 ILM 1529 (1994).

¹⁷³ Nowak, 2012, page 184.

¹⁷⁴ See <http://www.oas.org/juridico/english/sigs/a-60.html>

¹⁷⁵ See Article 1 of the Inter American Convention on the Forced Disappearance of Persons.

¹⁷⁶ See the Preamble of the Inter American Convention on the Forced Disappearance of Persons.

¹⁷⁷ Scovazzi&Citroni, 2007, page 252.

¹⁷⁸ See Article 12 of the Inter American Convention on the Forced Disappearance of Persons.

other people who are involved in court cases about enforced disappearances.¹⁷⁹ Moreover, states are allowed to make reservations to the convention.¹⁸⁰ The right to the truth is not mentioned in the I-ACFDP, and there is no definition given on the victims of enforced disappearances.

2.1.3 European system: Articles 2, 3 and 13 ECHR

In Europe, the Council of Europe (COE) and the European Union (EU) have adopted resolutions that refer to the right to know the truth. The COE adopted a Recommendation on Cyprus in 1987 that explicitly stated that the families of disappeared persons were 'entitled to know the truth'.¹⁸¹ And in 2004, the Parliamentary Assembly of the COE stated that it

'(...) recalls that the right to know the fate of missing relatives is a fundamental right of the families concerned and should be respected and implemented.'¹⁸²

The EU made statements along the same lines. The EU Parliament included the role of the government in its description of the right to the truth in relation to enforced disappearances:

'(...) affirming the inalienable right of all families to know the fate of a member of their family who has involuntarily disappeared due to the action of governments or their agents'.¹⁸³

The European Court of Human Rights (ECtHR) is the supervising body of the European Convention on Human Rights (ECHR). The right to the truth is not clearly recognised by the ECtHR, although it follows the HRC¹⁸⁴ in its reasoning that the not-knowing of relatives consists of inhumane treatment. The only case in which the ECtHR has dealt with the right to the truth in relation to enforced disappearance, is *Kurt v Turkey*¹⁸⁵. The ECtHR found a violation of Articles 3 and 13 ECHR, and ordered the Turkish state to compensate the mother of a disappeared man because they failed to help her in her search for her son. This constituted in the not knowing about the fate of her son, which was inhuman treatment.¹⁸⁶

In a 2011 case, '1989 a.o. v. Romania' the Court found the right to know what happened to relatives in the procedural obligations of the right to life (Article 2 ECHR).¹⁸⁷ While the Court did recognise the value of knowing the truth about human rights violations, and stated that there is in fact a right to the truth in these circumstances, this right does not mean that interested persons (victims or

¹⁷⁹ Scovazzi&Citroni, 2007, page 254.

¹⁸⁰ See Article 19 of the Inter American Convention on the Forced Disappearance of Persons.

¹⁸¹ COE Parliamentary Assembly Recommendation 1056 (1987) Para 17 sub ii.

¹⁸² COE Parliamentary Assembly Resolution 1414 (2004).

¹⁸³ Resolution 11.1.1983 on missing persons in Cyprus, Para 5.

¹⁸⁴ Human Rights Committee, supervising body of the ICCPR, see before.

¹⁸⁵ *Kurt v. Turkey* ECtHR 1998.

¹⁸⁶ Vermeulen, 2012, page 338.

¹⁸⁷ *Association 21 December 1989 a.o. v. Romania* ECtHR 24 May 2011, application numbers 33810/07 and 18817/08. Relevant paragraphs are 144 and 145.

others) should get all the information.¹⁸⁸ As Vermeulen argues, the court approaches the right to the truth from a procedural view.¹⁸⁹ The right is found in relation to a fair trial: when people do not have access to all the relevant facts, they are unable to present a strong case in court. So the information has to be shared. Vermeulen detects a movement towards accepting a right to the truth through Article 2 ECHR, and expects this movement to take place when cases on enforced disappearances are dealt with.¹⁹⁰ Up until this moment, the collective dimension to the right to the truth (that has been recognised in the Inter-American system) is not acknowledged in the European system.

2.2 Content of the right to know the truth

The content of the right to know the truth in relation to enforced disappearances is not easily defined. In general, the truth is linked to the investigation of the crime. The whereabouts and the fate of the missing person have to be clarified.¹⁹¹

According to the UNWGEID, the right to the truth encompasses different information at different stages.¹⁹² The working group stresses that the right to the truth is not the same as the right to information about detained people. This is also an important right, as it can be used to prevent enforced disappearances, but the right to the truth is broader, it incorporates the right to information. With regard to the children born in captivity, the UNWGEID states that both the children and their biological families have the right to 'know the truth about the child's whereabouts'.¹⁹³ This would mean that the Abuelas have the right to know the whereabouts of the adult children. The working group refers to Article 20 of the Declaration on the Protection of All Persons from Enforced Disappearances. This Article states that the illegal adoption and the falsification of the identity of children born in captivity is a very serious crime, and should be

¹⁸⁸ Vermeulen, 2012, page 339.

¹⁸⁹ Vermeulen, 2012, page 339.

¹⁹⁰ Vermeulen, 2012, page 340.

¹⁹¹ Vermeulen, 2012, page 478.

¹⁹² Report of the Working Group on Enforced or Involuntary Disappearances, 26 January 2011, A/HRC/16/48. While the person is missing, it encompasses information about the investigation to the whereabouts of the missing person. A state should share the information that is found during such an investigation and only when it would be a threat to criminal investigations, information can be withheld. (A/HRC/16/48, page 14). This should not be taken lightly and a review mechanism has to be in place. States do not suffice by stating that the matter is being investigated; specific information about what is done should be shared. The UNWGEID argues that states are obligated to undertake investigations as long as the person is disappeared, and during this whole time information has to be shared. When the person is found, the information about the whereabouts and the fate of the person is included to the right to know the truth. When known, the circumstances of the abduction and disappearance, and the identity of the people who are responsible for this should be shared.

¹⁹³ Report of the Working Group on Enforced or Involuntary Disappearances, 26 January 2011, A/HRC/16/48, page 16.

codified as such in national law. As a consequence, the punishment of violators should be severe.¹⁹⁴

The UN High Commissioner of Human Rights states that information on the causes and circumstances of the crimes, and information about the investigation (progress and results) are included in the right to the truth.¹⁹⁵

Vermeulen states that the case law of the different supervising bodies (Inter-American Commission and Court, European Court of Human Rights and the Human Rights Committee) acknowledges one core element of the right to the truth, namely the facts about the whereabouts and the fate of the missing person: if the person is still alive, where she/he is located, and if the state is involved. She points out that the content of right to the truth depends on the circumstances of the case at hand. The duty to investigate the disappearance is thus very important, and closely related to this right.¹⁹⁶

Vermeulen argues that the identity of the perpetrators might be withheld under the ICPPED¹⁹⁷. However, the Inter-American Court and the HRC included it into the right.¹⁹⁸

Article 7 of the CRC provides children with the right to know who their biological parents are. Information on what happened to them is not included.

2.3 Right holders

While different supervising bodies recognise the right to the truth, they seem to disagree on the point as to who is entitled to the right. In short, the victim(s) of the enforced disappearance is/are entitled to know the truth. However, 'victims' is not a clear category. Does it only include the person who is disappeared, the (close) family members, or also (parts of) the society?

In relation to the ICCPR, Vermeulen argues that according to the HRC, the family should be able to know what happened to their loved one. She further states that the HRC implies a public dimension to the right to the truth by obliging states to publish the results of truth commissions, as such granting the right to society.¹⁹⁹ The Inter-American Commission, and the UNWGEID have also stated that they perceive the right to the truth in relation to enforced disappearances to be

¹⁹⁴ UN Commission on Human Rights, Declaration on the Protection of All Persons from Enforced Disappearance, 28 February 1992, E/CN.4/RES/1992/29, available at: <http://www.refworld.org/docid/3b00f0b270.html> [accessed 9 August 2013].

¹⁹⁵ Report of the Office of the United Nations High Commissioner for Human Rights, Study on the right to the truth. E/CN.4/2006/91 8 February 2006, Para 38.

¹⁹⁶ Vermeulen, 2012, page 342.

¹⁹⁷ Vermeulen argues that the right to the truth, as codified by the ICPPED, can be divided into two parts. Factual information on the whereabouts of the missing person should always be shared. This is the part of the right that is absolute- states cannot refuse. The other part concerns the circumstances of the disappearance (Vermeulen, 2012, page 342). This part is generally not considered as absolute (Vermeulen, 2012, page 343). The identity of the perpetrators is such a circumstantial fact that might be withheld (Vermeulen, 2012, page 343).

¹⁹⁸ Report of the Office of the United Nations High Commissioner for Human Rights, Study on the right to the truth. E/CN.4/2006/91 8 February 2006, Para 39.

¹⁹⁹ Vermeulen, 2012, page 333.

attainable to the whole society.²⁰⁰ The Inter-American Commission argued that the right to truth is a

‘(...) collective right which allows a society to gain access to information essential to the development of democratic systems, and also an individual right for the relatives of the victims, allowing for a form of reparation, especially in cases where the Amnesty Law is enforced.’²⁰¹

While the Inter-American Court first restricted the right to the victim and his/her relatives²⁰², it argued in 2003 that the right to the truth is an important means of reparation, and as such it should be entitled to society.²⁰³

The Updated Principles on Impunity, published by the UN, also differentiate on the right of family members and of society.²⁰⁴ The state has to provide family members with information on the circumstances and the fate of the victim, and society with information on the context: the circumstances and reasons behind the violations.²⁰⁵

The ICPED does not mention ‘society’, when it defines ‘victims’ in Article 24(1):

‘For the purposes of this Convention, “victim” means the disappeared person and any individual who has suffered harm as the direct result of an enforced disappearance.’²⁰⁶

As to the CRC, only the child is entitled to claim a right to the truth about the biological parents.²⁰⁷

Society as right bearer

Including ‘society’, or a public dimension to the right to the truth raises some difficulties, as human rights are generally perceived as the rights of individual

²⁰⁰ Inter-American Commission: Annual report, 1985-1986 at page 193; UNWGEID: E/CN.4/1990/13.

²⁰¹ Case 10.480, Report N° 1/99, El Salvador, Lucio Parada Cea, Héctor Joaquín Miranda Marroquín, Fausto García Funes, Andrés Hernández Carpio, Jose Catalino Meléndez y Carlos Antonio Martínez, January 27, 1999, Para 151. The OAS has published an overview of the right as it is recognised by the Inter-American Commission and Court at <http://www.oas.org/en/iachr/expression/showarticle.asp?artID=156&IID=1>.

²⁰² Case of Bamaca-Velasquez v. Guatemala, Inter-American Court of Human Rights (2000), Para 201.

²⁰³ Case of Myrna Mack Chang, Inter-American Court of Human Rights (2003), Para 274.

²⁰⁴ Commission on Human Rights, Updates Set of principles for the protection and promotion of human rights through action to combat impunity, E/CN.4/2005/102/Add.1, 8 February 2005

²⁰⁵ See Principles 4 (victims and family members) and 2 (society), E/CN.4/2005/102/Add.1, 8 February 2005. For more information, see Naqvi, 2006, page 260.

²⁰⁶ International Convention for the Protection of All Persons from Enforced Disappearance, UNGA Resolution 61/488. One might observe that this definition is not very precise. This is a result of a ‘considerable discussion’ about the issue (Vermeulen, 2012, page 62). In the end, a broad definition was accepted, which gives the member states a margin of appreciation, the Committee the possibility to explore the concept, and allows for different embodiments with regard to reparation and investigation purposes (Vermeulen, 2012, page 62 and 63). Whether society could have ‘suffered harm as a direct result of an enforced disappearance’ is not clear.

²⁰⁷ The CRC only focuses on the rights of children, that is everyone under the age of 18 (see Article 1 of the CRC, and Besson, 2007, page 144).

persons. The idea of a society as the right holder is met with scepticism.²⁰⁸ As Martin Scheinin states:

‘While human rights norms may be applicable in interstate relationships, their essence is in regulating the ‘vertical’ relationship between the state and the individual, and in focussing on the individual as the holder of rights’.²⁰⁹

In international law, states are the main actors.²¹⁰ Human rights require action from states; while they are attributed to individuals, these individuals are not necessarily subjects of international law. As such, states have the obligation to ensure human rights, which comes down to the duty to respect, protect and fulfil them.²¹¹

It is not clear how a society at large can be the right holder of the right to the truth. How would the right be claimed? Individuals can claim a violation of their rights at a national or international body, if their state is a party to the convention that protects the right, and has accepted the competence of the supervising body. It is not clear how a ‘society’ could claim the violation of a right.

At the same time, collective rights do exist. The right of a people to self-determination is such a collective right.²¹² Other examples are the rights of groups of persons, like children, women and people with disabilities– these do exist within the human rights system. This is possible because they are still shaped as individual rights. While most of the human rights bodies allow for individuals to start a complaint procedure, some also include ‘groups of individuals’. The Optional Protocol to the Convention on the Elimination of Discrimination Against Women (CEDAW) and the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) allow for ‘groups of individuals’ to start a complaint procedure. The Optional Protocol to the CEDAW explicitly states that communications submitted on behalf of groups of individuals need the consent of those individuals, ‘unless the author can justify acting on their behalf without such consent’.²¹³ The CERD only states that communications from groups of individuals are allowed if the State Party has recognizes the competence of the Committee (the supervising body of the CERD).²¹⁴ While the rights in the CERD and the CEDAW are not relevant for the case of the Abuelas and the adult children, the possibility for groups to file a

²⁰⁸ Inter alia by Otto Spijkers.

²⁰⁹ Scheinin, 2012, page 19. States should refrain from violating human rights (respect), prevent others from violating human rights (protect) and make sure that the right circumstances are at hand for human rights to be enjoyed (fulfil).

²¹⁰ Apart from international organisations, but I will not elaborate on them.

²¹¹ Scheinin, 2012, page 27.

²¹² While ‘peoples’ have this right, it is not quite clear who ‘peoples’ are.

²¹³ UN General Assembly, Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, 6 October 1999, United Nations, Treaty Series, vol. 2131, p. 83, available at: <http://www.refworld.org/docid/3ae6b3a7c.html> [accessed 12 August 2013], Article 2.

²¹⁴ UN General Assembly, International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195, available at: <http://www.refworld.org/docid/3ae6b3940.html> [accessed 12 August 2013], Article 14(1).

complaint or communication might be important. It shows that the human rights system seems to acknowledge to a certain extent the collective dimension of certain rights, and provides for a mechanism that accommodates this dimension. However, in the context of enforced disappearances, it is not clear how this collective dimension takes shape in a legal way. Until now, the right of society is only mentioned when dealing with individual cases, and the ICPPED does not mention the concept of 'groups of individuals'.

In relation to Transitional Justice (TJ), a collective right to the truth might be not such a strange idea. Truth revealing mechanisms are important to deal with the past.²¹⁵ Truth commissions have been used in many Latin-American countries. Naqvi states that the right to the truth

'would intermesh strategically with the broader objectives of international criminal law, arguably including those of restoring and maintaining peace (because by exposing the truth, societies are able to prevent the recurrence of similar events), facilitating reconciliation processes (because knowing the truth has been deemed essential to heal rifts in communities), contributing to the eradication of impunity (because knowing the truth about who was responsible for violations leads to accountability), reconstructing national identities (by unifying countries through dialogue about a shared history) and setting down a historical record (because the "truth" of what happened can be debated openly and vigorously in court, adding credibility to the evidence accepted in a criminal judgment).'²¹⁶

These objectives overlap with the general objectives of TJ measures.

Collective dimension in the Argentine case

The acknowledgement of the I-ACHR of the right to the truth as a right of society is important: when seen as such, the truth is an interest of society, and thus a legitimate aim to restrict certain rights of individuals. The Argentine Supreme Court has recognised the right to know the truth in 2005, following the line of the I-ACHR.²¹⁷ This line of thinking can be seen in the case law of the Argentine judges: the right to the truth of the Abuelas is added to the general interest of society.²¹⁸

2.4 The right to the truth and conflicting rights

In the 'Prieto 2' case, the adult child relied on his rights to privacy, identity physical integrity, and property.²¹⁹ The Argentine court stated that these rights have to be balanced with other rights of involved persons (for example the right to the truth of the relevant Abuela) and with the general interest of society.

²¹⁵ Arthur, 2009, page 255.

²¹⁶ Naqvi, 2006, page 247.

²¹⁷ In 2003, the right to the truth was recognised in the Agreement of 1 September 2003 of the National Chamber for Federal Criminal and Correctional Matters, Caso Suárez Mason, Rol. 450.

²¹⁸ See Para 13/14 of the 'Prieto 2 case', G.291.XLIII. The Inter-American court recognised the right of society in the case Serrano-Cruz Sisters v. El Salvador, Inter-American Court of Human Rights (2005) Para 62.

²¹⁹ Gualtieri Rugnone de Prieto, Emma Elidia y otros s/ sustracción de menores de 10 años, causa G. 291. XLIII, 'Prieto 2', 11 August 2009, Para 10.

Without further explanation, the court then merges the right to the truth of the Abuela with the interest of society at large.²²⁰ As such, it is no longer a matter of two (or more) conflicting individual interests or rights, but a matter of an individual right against the general interest of society. This interest of society legitimates the limitation of the individual right, resulting in the situation as it is.

Two important questions rise: Is this in line with international law, and would the outcome be different if the situation was interpreted as two opposing individual rights?

2.4.1 International law and limitation of human rights

Can individual human rights be limited in the interest of society? The individual right here could be the right to privacy, as codified in article 17 of the ICCPR.²²¹ Restrictions to human rights are generally allowed, within certain boundaries.²²² For example, Article 5 of the ICCPR obliges the Argentine state (and the rest of its Member States) to respect its rights, and to withhold from limitations or destruction of these rights, in the name of another international instrument (other human rights conventions, for example).²²³ Next to this explicit regulation, other general rules apply to restrictions. In relation to the right to privacy, the General Comment no. 16 of the HRC²²⁴ on Article 17 ICCPR, and the Siracusa Principles on the Limitation and Derogation Provision in the International Covenant on Civil and Political Rights²²⁵ (Siracusa Principles) are important. The right to privacy as codified in Article 17 ICCPR, does not mention possible limitations or restrictions, but in the before mentioned General Comment 16, the HRC argues that the right to privacy can be restricted:

²²⁰ Gualtieri Rugnone de Prieto, Emma Elidia y otros s/ sustracción de menores de 10 años, causa G. 291. XLIII, 'Prieto 2', 11 August 2009, Para 13.

²²¹ UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: <http://www.refworld.org/docid/3ae6b3aa0.html> [accessed 18 August 2013]. Argentina has ratified the ICCPR at the 8th of August, 1986.

Article 17 reads: '1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

2. Everyone has the right to the protection of the law against such interference or attacks.'

²²² Sepulveda et al, 2009, pages 42 and 43. Some rights are absolute, meaning that restrictions are never allowed (for example Articles 7 (torture) and 8 (slavery) of the ICCPR).

²²³ Article 5 of the ICCPR states: 'Nothing in the present Convention may be interpreted as implying for any state, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms recognised herein or at their limitation to a greater extent than is provided for in the present Covenant.' UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: <http://www.refworld.org/docid/3ae6b3aa0.html> [accessed 18 August 2013].

²²⁴ Human Rights Committee, General Comment 16, (Twenty-third session, 1988), U.N. Doc. HRI/GEN/1/Rev.1 at 21 (1994).

²²⁵ United Nations, Economic and Social Council, Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, U.N. Doc. E/CN.4/1985/4, Annex (1985).

‘As all persons live in society, the protection of privacy is necessarily relative. However, the competent public authorities should only be able to call for such information relating to an individual's private life the knowledge of which is essential in the interests of society as understood under the Covenant. Accordingly, the Committee recommends that States should indicate in their reports the laws and regulations that govern authorized interferences with private life.’²²⁶

As such, the general interest of society might be a legitimate objective to limit the right to privacy of the adult children. The Argentine judges clearly argued that this is a general interest of society.²²⁷

Then, the limitations need to be proportional to this legitimate objective. In short, limitations have to be necessary;²²⁸ be in line with the object and purpose of the Convention in which the right is codified; based on law and interpreted strictly, in the light and context of the right in question.²²⁹

These requirements are met by the Argentine DNA law (which regulates the limitation of the right). As argued by the Argentine judges, the restriction is necessary in the light of the general interest of society. It is in the general interest of society that the truth comes out, and justice can be done. And this can only be achieved by making use of the DNA test. The law states that DNA can only be seized if it is necessary (this must be well-founded), reasonable and proportional in the individual case at hand.²³⁰ This seems to meet the requirements of an individual consideration. The restriction is based on a law, which limits the restriction to certain cases.²³¹ Then, only the minimum of DNA should be seized, in the form of blood samples, saliva, skin, hair or other biological samples, in a way that affects the physical integrity of the person the least. The law refers to the gender and ‘other specific circumstances’ of the person in this regard.²³² It is stated that the coercive powers should ‘in no case exceed the strictly necessary for its completion’.²³³ This is in line with the Siracusa Principles.²³⁴ The law explicitly mentions the possibility of examining objects that contain DNA as an alternative to the physical examination, another notion of the proportionality principle. Both the information itself (the DNA) and

²²⁶ Human Rights Committee, General Comment 16, (Twenty-third session, 1988), U.N. Doc. HRI/GEN/1/Rev.1 at 21 (1994), Para 7.

²²⁷ The Argentine society experienced gross human rights violations and is currently going through a TJ process. It can be argued that the truth about the ancestry of the adult children, and thus the truth about the atrocities of the junta, is of general interest for the whole society. The Argentine court argues that against this context, the truth about the descent of the adult children is of general interest, because it clarifies the facts in the criminal proceedings against the adoptive parents. By making use of the DNA test, the State is complying with international obligations (punish violators) and aiming for truth and justice. It is only the information that is ‘essential in the interest of society’ that could be shared. One could argue that this is the case. Only the information on the descent is made public- other information on eventual illnesses etc is not included.

²²⁸ Sepúlveda et al, 2009, page 43.

²²⁹ Sepúlveda et al, 2009, page 43.

²³⁰ Ley 26.549, Section 1, Para 1.

²³¹ Ley 26.549, obtención coercitiva de ADN, to be incorporated in Article 218 bis of the Code of Criminal Procedure. Decreto 1859/2009, 26 November 2009.

²³² Ley 26.549, Section 1, Para 2.

²³³ Ley 26.549, Section 1, Para 4.

²³⁴ Siracusa Principles, Part 1, sub A, Para 11.

the way in which the DNA is taken, can be an infringement of the right to privacy. By recognising this, and providing for an alternative that violates the right to privacy a little less, the law seems to approach the right as carefully as it should. The law states that when a victim is the object of examination, that fact into account when the DNA is taken; re-victimization should be avoided and the specific rights of victims have to be protected.²³⁵ When a victim, such as the adult children, do not want to cooperate, the alternative of examining objects should be used.²³⁶

Restrictions should always provide for a remedy. The case of 'Prieto 2' was a case where the adult child appealed against the seizure of his DNA, which makes clear that a remedy exists.²³⁷

Summarizing, the right to privacy of the adult children is severely restricted. However, this restriction is based on a law, is applied case-by-case and the restriction does not limit the right to an extent that undermines the whole right- the essence of the right is not jeopardized.²³⁸ As such, it is in line with the ICCPR.

2.4.2 Individual rights

Would the situation be different if the court had perceived the situation as two opposing individual human rights (the right to privacy versus the right to the truth)? Brems argues that in this kind of situations, the rights at stake need to be analysed, and their value for human rights as such needs to be included.²³⁹

Furthermore, the core and periphery of each right should be examined. Does the restriction reach to the core of the right, or is only the periphery affected?²⁴⁰

As to the value of the rights at stake, one could argue that the right to privacy is a fundamental right, necessary in a democratic society and closely related to other rights, such as the right to a family life. However, the right to the truth in this situation is also of major importance. It is a means in the struggle to end the impunity of gross human rights violations, and re-establishing the rule of law.²⁴¹ As such, it relates to all other human rights, and is necessary in a democratic society.²⁴² But then again, the right to privacy is a fundamental right, and it seems a contradiction to let the right to the truth prevail because of its significance for a democratic society, when this means that one of the fundamental rights in such a society has to be restricted.

As to the core and periphery of each right, the right to privacy is limited to the

²³⁵ Ley 26.549, Section 1, Para 5.

²³⁶ Ley 26.549, Section 1, Para 6.

²³⁷ The 'recurso extraordinario', or 'extraordinary appeal', is based on Art 14, incl 31 de la Ley 48. See Para 3 of the Prieto 2 case.

²³⁸ Human Rights Committee, General Comment 16, (Twenty-third session, 1988), U.N. Doc. HRI/GEN/1/Rev.1 at 21 (1994), Para 1 sub 2.

²³⁹ Brems, 2005, page 303.

²⁴⁰ Brems, 2005, page 304.

²⁴¹ See the quote of Naqvi, which I used before, in paragraph 3.4. Naqvi, 2006, page 247.

²⁴² In this line of arguing, the right to privacy relates primarily to the adult children alone (it is their privacy), while the right to the truth relates both to the Abuelas, the children themselves (they have a right to know the truth too, although no obligation) and the Argentine society in general. This fits into the opinion of the Inter-American Commission and Court, on the collective dimension of the right to the truth.

core. The adult children have to disclose their biological identity. Both the DNA test (and its results) and the way in which the DNA is seized, breach the privacy of the adult children.²⁴³ On the other hand, the Abuela's right to the truth is limited when the DNA test is not taken. The circumstances of the enforced disappearance of their daughter remain uncertain, and they do not know if they have become a grandmother. However, this limitation is not as grave. Moreover, the truth might come to light in other ways.²⁴⁴

From this analysis, it seems like the result would have been different if the court had balanced these two individual rights.

2.5 The right to the truth in the Argentine context

Argentine law explicitly states that international law is directly applicable in the Argentine domestic legal order, and as such a right to the truth based on international law can be claimed before a national court.²⁴⁵ The children who do want to know their biological ties, can base their claim on Article 7 CRC. The preferable legal basis for the Abuelas would be Article 24 ICPPED, because this Convention codified the right to the truth explicitly. However, the ICPPED went into force after the relevant disappearances occurred, and may not be applied retroactively, according to the 1969 Vienna Convention on the Law of Treaties, Article 28.²⁴⁶ The Abuelas' interest could be based on the ICCPR (Articles 7 and 2(3)), and on the ACHR (Articles 8 and 25).²⁴⁷

However, in this case, the adult children do not want to know, and the individual right of the relevant Abuela is not a decisive factor. It is because the uncovering of the truth is perceived as in the interest of society, that the obligated DNA test is legally possible.

As such, the right to the truth is not only applied as an individual human right. It is the collective dimension, the idea that the truth is relevant and important to the whole society, that leads to this situation. While the Argentine judges do not explicitly apply a collective dimension to the right to the truth in the 'Prieto 2' case, they argue in line with it. The 'interest of society' is used as a legitimization for the restriction of conflicting rights of the adult children, and it is believed that

²⁴³ The privacy of the adult child is violated when a blood sample is used, but also when personal items are used to do the test. The items have to be collected, which means that people have to enter the house of an adult child, look around, and take something with DNA on it- for example a toothbrush or laundry. This can be perceived as an 'invasion' of the home. In this regard, the Argentine court may think too light about this option.

²⁴⁴ For possibilities, see King, 2011, from page 563.

²⁴⁵ See the case of Simon, in the chapter about the TJ process in Argentina.

²⁴⁶ United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, available at: <http://www.refworld.org/docid/3ae6b3a10.html> [accessed 4 September 2013].

²⁴⁷ While the development of the right to the truth in the European system is important for the recognition of the right, the Abuelas in Argentina cannot rely on the ECHR. Argentina is part of the Inter-American system of human rights, and this system is very important for the Argentine Legal system (According to the Argentine Supreme Court, see the Simon case, Simon, Julio Hector y otros s/ privacion ilegítima de la libertad, case S. 1767. XXXVIII (14 June 2005), Ccausa N. 17.768C Para 15).

the uncovering of the truth is in the general interest of society. The Argentine context plays a major part in this –being a society with a lot of disappeared people, and going through a transitional justice process with an emphasis on truth finding and punitive measures.

Chapter 3

The Right to a Personal Identity

This chapter will elaborate on the role of the right to a personal identity in the conflict between the Abuelas and the adult children.

The right to a personal identity seems especially involved in the case of enforced disappearances. The core of an enforced disappearance is after all the placement of a person outside the protection of the law, and as such the denial of the personal identity.²⁴⁸

The concept of identity needs to be discussed briefly here. As it is understood in this thesis, identity is a socially constructed, flexible concept. As Brubaker and Cooper argue, identity is the product of an identification process.²⁴⁹ This means that the way in which 'identity' is perceived, changes over time and place. This perception has consequences for the right to a personal identity.

In the context of the adult children and the Abuelas, it is important to note that Argentina is a state party to the UN Convention on the Rights of the Child (Convention on the Rights of the Child). In this convention, the right to a personal identity of children is codified, and the Argentine state is obliged to respect and protect this right. It is also important to note that the modern state- in this case the Argentine state- is one of the major agents in the identification process.²⁵⁰ The Abuelas are one of the most influential human rights groups in Argentina. Identity is a major concept in their quest, and their definition of identity has become incorporated in the governments' policy regarding the children of disappeared persons.

The development of the right to a personal identity is analysed in paragraph 3.1, with the process at the international level (paragraph 3.1.1) and the regional level. Here, the developments in the Inter-American system (paragraph 3.1.2) are elaborated upon, and the development in the European context is briefly mentioned, as to underline the possible differences in interpretation of the right (paragraph 3.1.3). The issue of right holders of this right is dealt with in paragraph 3.2, and the right as it is placed in the Argentine context is discussed in paragraph 3.3. And Paragraph 3.4 will provide for a short conclusion to the question of the role of the right to the truth in the conflict between the Abuelas and the adult children.

²⁴⁸ Working Group on Enforced or Involuntary Disappearances, General Comment on the right to recognition as a person before the law in the context of enforced disappearances, preamble.

²⁴⁹ Brubaker and Cooper, 2000, page 15.

²⁵⁰ Brubaker and Cooper, 2000, page 15.

3.1 Development of the right to a personal identity

As stated before, the right to a personal identity has been codified in the Convention on the Rights of the Child, and has been developed mainly in the Inter-American system of human rights.

3.1.1 International level: Article 8 CRC, Article 25 CPPED

On 20 November 1989, the General Assembly adopted the Convention on the Rights of the Child, and it entered into force on 2 September 1990.²⁵¹ Argentina ratified the Convention on 4 December 1990.

A novelty in the creation process of the Convention was that NGO's could influence the draft by making comments.²⁵² Avery argues that the Abuelas helped to create the article that the Argentine delegation proposed:²⁵³

'The child has the inalienable right to retain his true and genuine personal, legal and family identity.

In the event that a child has been fraudulently deprived of some or all of the elements of his identity, the State must give him special protection and assistance with a view to re-establishing his true and genuine identity as soon as possible. In particular, this obligation of the State includes restoring the child to his blood relations to be brought up.'²⁵⁴

However, the concept of 'family identity' was debated, and the proposal was changed.²⁵⁵ In the end, it resulted in Article 8. Cerda points at three important aspects: the concept of identity is not defined, but merely illustrated; States are obligated to respect the right of children to preserve their identities; and States are obligated to assist in the reestablishment of the identity.²⁵⁶ I will elaborate on these aspects later on. Although the provision was altered, Article 8 is still known as 'the Argentine Article'.²⁵⁷ It reads as follows:

1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference
2. Where a child is illegally deprived of some or all of the elements of his or her

²⁵¹ UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, available at:

<http://www.refworld.org/docid/3ae6b38f0.html> [accessed 23 August 2013]

The UN General Assembly adopted the UN Declaration on the Rights of the Child in 1959, and the Convention on the Rights of the Child is based on this Declaration.²⁵¹ In 1978, Poland proposed a Convention on the Rights of the Child, and the General Assembly agreed, issuing resolution 33/166 on the "Question of a convention on the rights of the child" on 20 December 1978 in which the Commission on Human Rights was ordered to make a draft proposal. The Working Group of the UN Commission on Human Rights started in 1979.²⁵¹ The drafting process of the Convention was a long one: it took ten years.

²⁵² Turkelli and Vandenhoe, 2012, page 40.

²⁵³ Avery, 2004, page 271.

²⁵⁴ E/CN.4/1985/64, para. 9 and annex II.

²⁵⁵ UN High Commissioner for Human Rights, 2007, Legislative History of the Convention on the Rights of the Child, page 385, para 40.

²⁵⁶ Cerda, 1990, page 116.

²⁵⁷ Avery, 2004, page 271.

identity, States Parties shall provide appropriate assistance and protection, with a view to speedily re-establishing his or her identity.²⁵⁸

As such, the Article obliges the Argentine state to respect the right of the child to preserve its identity. The concept of identity is not defined in a strict way, composed of- but not restricted to- nationality, name and family relations.²⁵⁹ This obligation can be interpreted in various ways: it could either mean that the biological identity has to be preserved, or that the new (falsified) identity has to be recognized. The second part of the Article obliges the Argentine state to re-establish the identity of the child. This implies that the second interpretation of the first part of the Article should be followed. I will elaborate upon this issue later on.

This article has to be placed in the context of the rest of the Convention on the Rights of the Child. Ronen argues that 'the provisions of the UNCRC [Convention on the Rights of the Child] relating specifically to the child's identity do not explicitly protect the child's individualized identity'.²⁶⁰ Member states are obliged to respect family life in a proactive way.²⁶¹ Article 7 of the Convention on the Rights of the Child obliges states to register children after they are born, and states that children have a right to a name, a nationality and 'as far as possible, the right to know and be cared for by his or her parents'. Article 3 of the convention obliges states to make the best interest of the child the primary consideration when they take actions concerning the child. And Article 12 states that the child has to be heard in matters that affect him or her. I will elaborate upon these obligations in section 4.2.

Other UN instruments do refer to the right to be recognised before the law. The Universal Declaration of Human Rights²⁶² has codified the right to be recognised as a person before the law in Article 6, and the ICCPR codified it in Article 16. This right differs from the right to a personal identity, as it only states that people have the capacity to be a person before the law.²⁶³ As such, the right to be recognised before the law mostly enables people to claim their human rights, where the right to a personal identity is already a human right in itself, it seems to have more 'body'. There is little case law on Article 16, because the only situation in which the right is violated in and on itself, is in the situation in which

²⁵⁸ UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, available at: <http://www.refworld.org/docid/3ae6b38f0.html> [accessed 2 September 2013]

²⁵⁹ Ronen, 2004, page 159.

²⁶⁰ Ronen, 2004, page 160.

²⁶¹ Ronen, 2004, page 160.

²⁶² UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), available at: <http://www.refworld.org/docid/3ae6b3712c.html> [accessed 22 August 2013]

²⁶³ The UN Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities (Ad Hoc Committee) has studied the right to be recognised as a person before the law (UN General Assembly, resolution 56/168, 'Comprehensive and integral international convention to promote and protect the rights and dignity of persons with disabilities', adopted 19 December 2001). The Committee stated that Article 12 of the Convention on Rights of Persons with Disabilities was to be interpreted in line with Article 16 ICCPR. Only the capacity to be a person before the law is included, and not the capacity to act as a subject of rights.

a person is declared 'outlawed'. Sentenced to a 'civil death', the person becomes nothing more than an object of law.²⁶⁴

The CPPED refers to the identity of the (disappeared) children in Article 25:

- '1. Each State Party shall take the necessary measures to prevent and punish under its criminal law:
 - (a) The wrongful removal of children who are subjected to enforced disappearance, children whose father, mother or legal guardian is subjected to enforced disappearance or children born during the captivity of a mother subjected to enforced disappearance;
 - (b) **The falsification, concealment or destruction of documents attesting to the true identity of the children** referred to in subparagraph (a) above.
2. Each State Party shall take the necessary measures to **search for and identify the children** referred to in paragraph 1 (a) of this article and to return them to their families of origin, in accordance with legal procedures and applicable international agreements.
3. States Parties shall assist one another in searching for, identifying and locating the children referred to in paragraph 1 (a) of this article.
- 4. Given the need to protect the best interests of the children referred to in paragraph 1 (a) of this article and their right to preserve, or to have re-established, their identity, including their nationality, name and family relations as recognized by law,** States Parties which recognize a system of adoption or other form of placement of children shall have legal procedures in place to review the adoption or placement procedure, and, where appropriate, to annul any adoption or placement of children that originated in an enforced disappearance.(...)' [emphasis by the author]²⁶⁵

As such, the CPPED cites the same elements of the concept of identity as the Convention on the Rights of the Child: name, nationality and family relations. Both the Conventions oblige the Argentine state to preserve or re-establish the child's identity.

3.1.2 Inter-American system: Article 8 and 12 ACHR

In its annual report of 1987-1988, the Inter-American Commission on Human Rights (Inter-American Commission) refers to the situation of disappeared children.²⁶⁶ It states that the children who disappeared with their parents, and who were adopted under false identities afterwards, have a 'fundamental right to their identity as persons and to know that identity.'²⁶⁷

Although the right to a personal identity is not codified explicitly in the American Convention on Human Rights (ACHR), the Inter-American Court has found a violation of this right.

On 24 February 2011, the Inter-American Court stated in the case of *Gelman v. Uruguay*, that the right to an identity could be based on articles 18, 20, 7(1) and

²⁶⁴ Background conference document prepared by the Office of the United Nations High Commissioner for Human Rights on legal capacity, para 8.

²⁶⁵ UN General Assembly, International Convention for the Protection of All Persons from Enforced Disappearance, 20 December 2006, Article 25.

²⁶⁶ Annual Report of the OAS 1987-1988, OEA/Ser.L/V/II.74, Chapter 5: A study about the situation of minor children of disappeared persons who were separated from their parents and who are claimed by members of their legitimate families, doc. 10 rev.1, 16 September 1988.

²⁶⁷ Annual Report of the OAS 1987-1988, OEA/Ser.L/V/II.74, Chapter 5 para 5, Conclusions and Recommendations.

3 of the ACHR.²⁶⁸ This case was about María Macarena Gelman García, who was born in captivity in 1977, in Uruguay, and separated from her mother a few weeks later. She was left in a basket on the doorstep of Ángel Tauriño, a police officer in Uruguay. Her Argentine grandparents searched for her and they met in 2000.²⁶⁹ María took a DNA test and learned of her true identity when she was 23 years old. The Court stated that the abduction of children, the transfer to another family and the modification of their identity constitutes of various violations of rights.²⁷⁰ The court points at Article 8 of the Convention for the Rights of the Child, noting that the components of the identity as laid down in that article are protected under the ACHR.²⁷¹ The right to a name is codified in Article 18 of the ACHR. The court states that the name is essential to the identity, and points at the function of the first and last name to establish a link between family members.²⁷² Article 20 of the ACHR codifies the right to a nationality, which is also part of the identity of a person. This is very important, because the enjoyment of all civil and political rights is 'attached' to this right.²⁷³ María's mother was illegally transferred from Argentina to Uruguay, which resulted in the fact that María acquired the Uruguayan nationality. And at last, a violation of Article 3 of the ACHR, the right to juridical personality, was found. The State failed to guarantee this right, because María was registered under a 'false' name, as the child of 'false' parents.²⁷⁴ As such, facets of the right to an identity are captured in the ACHR.

Later that year, on August 31, the Inter-American Court made another judgment, in the case of *Contreras v. El Salvador*. This case was *inter alia* about Gregoria Hermina Contreras, who was abducted by military in 1982, when she was four years old, and had lived since then under a false name and date of birth with the family of one of the soldiers. Her life was not at all pleasant, as she was forced to work and was (sexually) abused.²⁷⁵ Her mother kept on searching for her, and found her in 2006.²⁷⁶

The Inter-American Commission argued that the ACHR incorporates the right to identity in Articles 18 and 19.²⁷⁷ So, by disappearing Gregoria Hermina Contreras and facilitating the falsification of her identity, the State had violated these rights. Because Gregoria and the other disappeared children were minors at the time of abduction, the State had also violated Article 17 (rights of the family) in combination with Article 19 of the ACHR, according to the Inter-American

²⁶⁸ Inter-American Court of Human Rights, *Gelman v Uruguay*, judgment of February 24, 2011 (merits and reparations)

²⁶⁹ *Gelman v Uruguay*, para 113.

²⁷⁰ *Gelman v Uruguay*, para 121, 122.

²⁷¹ *Gelman v Uruguay*, para 122.

²⁷² *Gelman v Uruguay*, para 127.

²⁷³ *Gelman v Uruguay*, para 128.

²⁷⁴ *Gelman v Uruguay*, para 131.

²⁷⁵ *Contreras v El Salvador*, i.a. para 98.

²⁷⁶ *Contreras v El Salvador*, para 68.

²⁷⁷ Article 18: Right to a name: 'Every person has the right to a given name and to the surnames of his parents or that of one of them. The law shall regulate the manner in which this right shall be ensured for all, by the use of assumed names if necessary.'

Article 19: Rights of the Child: 'Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state.'

Commission. The right to family life should protect families and children from abductions, and states are obliged to search for missing children, and to bring them back into their families and communities.²⁷⁸

The Inter-American Court had another line of arguing. It began by stating that Article 29(c) of the ACHR stipulates that the ACHR has to be interpreted in accordance with international human rights law. The Convention on the Rights of the Child is part of international human rights law, and it recognises the right to a personal identity in its Article 8. As codified, this right encompasses several elements like nationality, name, and family relations (this is no restrictive list). The Court also points at the Inter-American Juridical Committee, which has stated that the right to an identity is an autonomous right, which is 'substantial to human attributes and dignity'.²⁷⁹ As such, the Inter-American Court states:

'Consequently, in the circumstances of this case, and taking into consideration the context of the terms of the American Convention, interpreted in light of Article 31 of the Vienna Convention, the Court finds that the series of violations of the rights established in the American Convention that were analyzed constitute a violation of the right to identity, which is inherent in the human being, and is stipulated expressly in the Convention on the Rights of the Child.'²⁸⁰

Thus, while the right to a personal identity is not codified in the ACHR, the Inter-American Court reads it into the ACHR, and refers to the explicit codification in the Convention on the Rights of the Child.

Moreover, the Inter-American Court continues with stating that while the right to an identity is important for children, it is not a static concept. As such, it is evolving, and thus equally important for adults.²⁸¹ In this case, the Inter-American Court found a violation of Articles 11(2), 17, 18 and 19 of the ACHR, *and* a violation of the right to identity, based on the Convention on the Rights of the Child. It is important to note that at the moment that the Court dealt with this case, the child was already an adult. Paragraph 3.1.4 will elaborate on this issue.

3.1.3 European system: Article 8 ECHR

In the European system, too, the right to a personal identity is not codified. Even the right to be recognised before the law is not codified in the European Convention of Human Rights (ECHR), because the Committee of Experts of the Council of Europe did not find it necessary. The right was perceived as implied in the other rights of the Convention.²⁸² However, the European Court of Human Rights (ECtHR) has interpreted Article 8 ECHR (the right to respect for the private and family life) in a broad way, and as such the right to identity can be read into the ECHR. In 2001, in the case of *Bensaid v UK*, the Court argued that

²⁷⁸ Contreras v El Salvador, footnote 146, at page 37.

²⁷⁹ Inter-American Juridical Committee, Opinion "on the scope of the right to identity" Seventy-first regular session, Rio de Janeiro, Brazil. Document CJI/doc. 276/07 rev. 1, of August 10, 2007, paras. 11(2) and 18(3)(3), approved at the same session by resolution CJI/RES.137 (LXXI-O/07), of August 10, 2010, second operative paragraph.

²⁸⁰ Contreras v. El Salvador, para 112.

²⁸¹ Contreras v El Salvador, para 113.

²⁸² Nowak, 2005, page 369.

‘Article 8 protects a right to identity and personal development, and the right to establish and develop relationships with other human beings and the outside world.’²⁸³ In 2002, the ECHR stated in the case of *Pretty v the UK*, that ‘private life’ entails a lot of things: the physical and psychological integrity of persons; aspects of the physical and social identity; gender identification, name, sexual orientation and sexual life; the right to personal development; and the right to establish and develop relationships with other human beings and the outside world.²⁸⁴ As such, Article 8 ECHR seems to encompass a right to a personal identity, although it is not codified as such. As such, the right to a personal identity has been developed in the European context with regard to cases of gender identity, and not in relation to cases of enforced disappearances.

3.2 Right holders

Obviously, the Convention on the Rights of the Child is addressed to children, who are described in Article 1 of the Convention as ‘every human being below the age of eighteen years’.²⁸⁵

But as seen before, the I-ACHR has used the right to a personal identity in relation to adults, arguing that the Convention (and thus this right) is part of international law, and as such, it is incorporated in the ACHR. However, various questions arise.

The first question is about the retro applicability of the Convention. How can a right from the Convention on the Rights of the Child be used in a case where the disappearance and altering of the identity of a person happened before the Convention entered into force- can a state be bound by treaty obligations before the treaty entered into force? In the *Contreras* case, Gregoria Herminia Contreras disappeared on 25 August 1982²⁸⁶, and the Convention on the Rights of the Child entered into force on 2 September 1990²⁸⁷. One could argue that the state failed to protect Gregoria Herminia from 1990 onwards. At that time, her identity was still falsified. This line of reasoning can be applied to the Argentine case, too. From the moment that the Convention went into force in 1990, the Argentine state was obliged to protect the children, and recover and re-establish their real identity. In this way, the use of Article 8 of the Convention on the Rights of the Child is not retroactive, and thus not in violation of Article 28 of the Vienna Convention on the Law of Treaties of 1969.²⁸⁸

²⁸³ Case of *Bensaid v. The United Kingdom* (Application no. 44599/98). Judgment of 6 February 2001, para 47.

²⁸⁴ Case of *Pretty v. The United Kingdom* (Application no. 2346/02). Judgment of 29 April 2002, para 61.

²⁸⁵ UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, Article 1.

²⁸⁶ *Contreras v El Salvador*, para 65.

²⁸⁷ El Salvador ratified the Convention on 10 July 1990.

²⁸⁸ United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, available at:

<http://www.refworld.org/docid/3ae6b3a10.html> [accessed 2 September 2013] Article 28:

‘Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.’

The second question is about the applicability of the Convention to adults. It seems like the Convention on the Rights of the Child is not intended to apply to adults, as all the rights are addressed to children, and children are described in Article 1 as ‘every human being below the age of eighteen years’.²⁸⁹ In what way can the Convention on the Rights of the Child be used in relation to adults? The I-ACHR argues in paragraph 113 of the Contreras case:

‘In this regard, this Court has previously established that “the right to identity can be conceptualized, in general, as a collection of attributes and characteristics that allow for the individualization of a person in society. In that sense, it includes several other rights according to the subject of the rights in question and the circumstances of the case.” Thus, personal identity is intimately linked to the person in his or her specific individuality and private life, both of which are based on an historical and biological experience, as well as the way in which each individual relates with others through the development of social and family ties. Moreover, it is important to stress that, although identity has special importance during childhood as it is essential for the development of a person, the truth is that the right to identity is not exclusive to children, because it is constantly evolving and the interest of individuals in maintaining their identity and preserving it does not diminish with the passage of time. In addition, the right to identity can be affected by numerous situations or contexts that can take place from childhood to adulthood.’²⁹⁰

Argued like this, the right to a personal identity is composed of numerous other rights, which protect adults. At the same time, the I-ACHR refers to the Inter American Juridical Committees “opinion on the scope of the right to identity”, in which is stated that the right to identity ‘pre-exists as an indissoluble part of the original dignity of people’²⁹¹, that it is an autonomous right that can not ‘be reduced to the mere sum of rights included in the Convention of the Child’.²⁹² So, while the right to a personal identity seems to be more than a bundle of pre-existing rights, it can be applied to adults because the existing rights of the ACHR result in the same protection.

3.3 The right to a personal identity in the Argentine context

As stated before, Argentina is a member state to the Convention on the Rights of the Child, and is thus obliged to comply with its obligations. The first aspect of the obligation with regard to the right to a personal identity can be interpreted in various ways (respect the identity of the children), but the second one clearly reveals the influence of the Abuelas in the drafting process.²⁹³

²⁸⁹ UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, Article 1.

²⁹⁰ Case of Contreras v El Salvador, para 113.

²⁹¹ Inter American Juridical Committee, opinion “on the scope of the right to identity”, OEA/Ser Q CJI/doc. 276/07 rev.1 10 August 2007, para 13

²⁹² Inter American Juridical Committee, opinion “on the scope of the right to identity”, OEA/Ser Q CJI/doc. 276/07 rev.1 10 August 2007, para 14.2.

²⁹³ The Travaux Préparatoires do not suggest another reading of the text, there is no elaboration on the concept of ‘identity’ other than the discussion on the term ‘family identity’ of the Argentine proposal. See E/CN.4/1986/39, pp 8-10, starting under para 41.

As stated before, the modern state is a major force in the process of identification. In Argentina, the Abuelas were one of the most influential human rights groups in the Transitional Justice process. As such, the perception of the concept of identity has been influenced by the Abuelas.²⁹⁴ Enforced disappearances are a major issue in the TJ context of Argentina, and a political subject.²⁹⁵ When the Abuelas, together with the Madres of the Plaza de Mayo and HIJOS, placed the issue of enforced disappearances in the context of identity, this became a very important concept.²⁹⁶

Identity holds an important place in their quest, because they perceive it as the main concept that is attacked by the enforced disappearances, and as the main tool to retribution. According to Gatti, the Abuelas focus on 'the rhetoric of the blood- that of the indissolubility of the tie imagined around it' and as such, the concept of identity is based on biological factors.²⁹⁷ Grandsman argues that this results in a concept of identity that is static and absolute, not something one can choose.²⁹⁸ The two most important facets of this identity are genetics and the family.²⁹⁹ As Gatti puts it:

'Thus, for the Abuelas, for their interpretation of identity, those affected by the forced disappearance of persons are devastated subjects and the way to compensate for that devastation is by reincorporating that subject into the social fabric to which they belonged before the catastrophe: their family, their heritage, and so on.'³⁰⁰

As such, family becomes very important. As DNA tests, and thus the genetics, determine the identity of the missing children, this importance is reinforced. Guillermo Rodolfo Fernando Péres did not want to change his name after he found out that he was one of the missing grandchildren. His sister, who had lived with their grandparents, wrote him an open letter, in which she stated:

'I cannot accept you with any other name that isn't the one that our parents gave you. Because if you are not Rodolfo Fernando, I am not Mariana Eva. Because our names relate us to them and relating us to them relates us to each other.'³⁰¹

The concept of identity is thus highly influenced by biological factors. It is also entangled with a notion of 'the truth'. As mentioned before, in 1993 the Genetic Databank was created after lobbying of the Abuelas. This Databank is part of the Comicion Nacional por el Derecho a la Identidad (CONADI). Gatti interviewed the president of the CONADI in 2005, and cited from this interview:

²⁹⁴ Gatti, 2012, pares 358,359.

²⁹⁵ See Chapter 2, the TJ process in Argentina, where enforced disappearances and the fight of the Abuelas became politized by Kirchner.

²⁹⁶ Gatti, 2012, page 363.

²⁹⁷ Gatti, 2012, page 254.

²⁹⁸ Grandsman, 2012, page 426.

²⁹⁹ Gatti, 2012, page 359. While these two facets seem the same, Gatti states that the genetics, the dna is seen as the essence of persons (page 360), and the family as the embedding of the person: the person has a place in the family structure, and is part of the family history (ia page 362).

³⁰⁰ Gatti, 2012, page 363.

³⁰¹ As quoted in Grandsman, 2012, page 432. Letter from Mariana Eva Pérez to her brother, Mensuario de las Abuelas de Plaza de Mayo (June-July 2001).

‘The basis of identity is the truth, knowledge of the truth, and the truth is unique. In fact, the truth is that one has an inescapable biological origin, with an inescapable genetic load, and later one has a history and a cultural and social development [. . .]. When the biological is disassociated from the cultural, a false contradiction is created.’³⁰²

This quote illustrates how the concept of identity is framed in the Argentine context. It is the main concept in the fight of the Abuelas, as they plead for the ‘restitution’ of the identity of the (adult) children. The Abuelas argue that the identity of the abducted children is stolen from them, and by uncovering the truth, they can regain their real, biological identity, and restitution takes place.³⁰³ The perception of identity in this frame seems to be a static one, based on biological factors such as blood, origin and genetics.³⁰⁴ The presumption has been that the personal identity of the adult children is the identity that is based on biological factors. It is interpreted in a way that relates nationality, name and family relations to the nationality of the biological parents, the name that the biological parents gave the children, and relations with the biological family. However, the adult children that do not want to cooperate with a DNA test, already have personal identities. The way in which the concept of identity is understood, is significant at this point. When identity is something genetic, biologic and static, the right to a personal identity contains the protection of this biological identity. However, if the concept of identity is perceived as a flexible one, one that evolves and can be influenced by the person ‘wearing it’, the content of the concept of identity -and with it the right to a personal identity- becomes suddenly different.

As stated before, Article 8 of the Convention on the Rights of the Child has to be read in the context of the rest of the Convention. The Argentine state has to take the best interest of the child at heart when deciding on matters that affect the child. Gjerløw argues that at the moment that judges had to decide on the fate of found grandchildren, there was a lack of guidelines on how to act.³⁰⁵ They relied on the advice of psychologists and thought that they decided in the best interest of the children. The adult children can decide on their best interests themselves.

3.4 Conclusion

The role of the right to a personal identity in the conflict between the Abuelas and the adult children is multifaceted.

First, the adult children are entitled to have their identity protected. But the perception of the concept of identity, and thus the interpretation of the right, goes against their interest. When identity is defined as based on genetic facts, the right turns against them, as they want to preserve the ‘false’ identity.

Secondly, Article 8 of the Convention on the Rights of the Child obliges the Argentine state to preserve and re-establish the biological identity of the adult

³⁰² Gatti, 2012, page 353.

³⁰³ Grandsman, 2012, page 426

³⁰⁴ Gatti, 2012, page 354.

³⁰⁵ Gjerløw, 2012, page 50.

children. It is at this point that the conflict arises. While the adult children are the right bearers, and can invoke the right if they wish, the right does not only relate to them. The obligations that are included for the Argentine state result in the situation where the state protects and re-establishes the biological identity of the adult children against their will.

Thus, the result of this perception of identity, build upon biological foundations, does not recognize the self-identification of the adult children, nor the identity that they have formed without the biological foundation.

Chapter 4

Analysis

From the foregoing chapters, it can be concluded that the right to the truth and the right to a personal identity play a major role in the tension field between the Abuelas and the adult children. The collective dimension of the right to the truth leads to a shift in the balance between conflicting human rights. And the way in which identity is perceived, together with the explicit obligation to the Argentine state to re-establish the child's biological identity, leads to the situation as it is.

Placed in their historical context, the development of both rights is not shocking, but the situation in which they result seems unpredicted. Human rights ought to be rights that protect a person, rights that enable individuals to live in freedom, equality and peace. These rights ought to be derived from the 'inherent dignity of the human person'.³⁰⁶ It seems like this is not in line with the application of the right to the truth and the right to a personal identity in the Argentine context.

How can this result be altered, in order to reach a more favourable outcome for all parties involved? A practical approach of the truth, and a re-evaluation of the concept of identity could be ways to change the situation.

As to the right to the truth, it should be realized that the idea, that the Argentine society as a whole should know about the past atrocities, and learn from them as to enable them to move beyond the past (and prevent these things from happening again) is an assumption. In this line of arguing, it is in the best interest of the whole society to know the truth, and as the adult children are part of the society, it is in their best interest, too. As such, the adult children are patronized. More practically, one can wonder how the truth can be uncovered, and what has to be known by whom. The uncovering of the truth is done through the DNA test. This is an efficient way of dealing with the matter, as it clearly establishes blood ties between the Abuela and the adult child. But it is a very intrinsic way to establish this ties, even if it is done by testing personal belongings instead of blood. The DNA test obliges the state to use the least intrusive way, but this is the least intrusive way *of taking the DNA test*. Other ways of uncovering the truth about the fate of the disappeared person might be more difficult, but they could be considered to protect and respect the human rights of the adult children who do not want to know.

Even if a DNA test would be the only available option, one can ask what needs to be known by whom? The outcome of the DNA test could be remained concealed for the adult child itself. It might be possible to uncover the outcome to the Abuela, and let the adult child itself decide if and when she or he wants to know

³⁰⁶ Preamble ICCPR.

more.

Then, there is the matter of the legal consequences of this uncovering of the truth. These relate to the criminal proceedings against the adoptive parents, and to the legal identity of the adult child. Even if the truth has to be uncovered in all its details, the adult children should have a say in the consequences. The prosecution of the people who they considered as their parents should be reasonable and proportionate in the given circumstances. Gjerløw shows in her thesis that some of the adult children agree with the criminal proceedings, and others don't.³⁰⁷ This should be taken into consideration.

The legal consequences with regard to the name of the adult children touches the issue of identity. The Abuelas argue that the true identity should be based on biological factors, and that the children themselves have to choose after the DNA test what they want to do with the information. But what choice do they have, if the state is obliged to change their legal identity, including their name?

As to the right to a personal identity, a change in the perception of the concept of identity (and with that the perception of the right and obligation) could influence the situation in a positive way. Ronen argues that the obligation to protect a child's right to identity should mean that states have 'a positive duty to safeguard the child's right to identity as a right to protection of ties meaningful to the child'.³⁰⁸ She argues that identity should be seen as a process, as an interaction between the child's 'need 'to be', to be his/her authentic self and to be recognized as 'somebody' when simply being that self'.³⁰⁹ The importance of family life, as laid down in the Convention on the Rights of the Child, does not necessarily imply the importance of biological factors. Ronen argues that it is all about the ties that the child has with the people who 'fills the *role* of mother or father for the child',³¹⁰ that the perception of the child itself is very important. As such, she concludes that the definition of identity in the Convention on the Rights of the Child should be understood as a 'dynamic, child-constructed identity'.³¹¹ In this view, the adult children's chosen identity should be preserved, even more because they are adults and are believed to be able to decide on their own best interest.

³⁰⁷ Gjerløw, 2012, inter alia on page 52, 62

³⁰⁸ Ronen, 2004, page 147.

³⁰⁹ Ronen, 2004, page 150.

³¹⁰ Ronen, 2004, page 154.

Chapter 5

Conclusion

The role of both rights in the field of tension between the Abuelas and the adult children is influenced by the way in which the underlying concepts are perceived. These perceptions are formed during the developing process in the Argentine context, and are in itself not right or wrong. However, they result in a situation that seems to contradict the general believe that human rights are based on individual human dignity.

The role of the right to the truth is highly influenced by the development to perceive the right as a collective right. As long as it is believed that the truth is to be preferred for the whole society, including the adult child who does not want to know the truth, the individual rights of privacy and physical integrity will be superseded. If the adult child is recognized as a full individual with a major interest in the conflict, whose opinion has to be taken into account, the outcome might change.

The role of the right to a personal identity becomes mainly apparent in the obligation of the state to re-establish the lost identity of the adult children. Because 'identity' is understood as 'biological identity', the Argentine state is obliged to re-establish this biological identity. This perception can be changed, for example into the 'dynamic, child-constructed' concept of identity that Ronen argues for. This would lead to a different outcome for the adult children, as this gives them the possibility to choose who they want to be, and which (part of an) identity has to be preserved.

Bibliography

Primary Sources

International law

- International Convention for the Protection of All Persons from Enforced Disappearance, UN General Assembly, 20 December 2006, available at: <http://www.refworld.org/docid/47fdfaeb0.html> [accessed 17 February 2014]
- International Covenant on Civil and Political Rights, UN General Assembly, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: <http://www.refworld.org/docid/3ae6b3aa0.html> [accessed 18 August 2013].
- Convention on the Rights of the Child, UN General Assembly, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, available at: <http://www.refworld.org/docid/3ae6b38f0.html> [accessed 17 February 2014]
- International Covenant on Civil and Political Rights, UN General Assembly, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: <http://www.refworld.org/docid/3ae6b3aa0.html> [accessed 17 February 2014]
- Convention on the non-applicability of statutory limitations to war Crimes and Crimes against Humanity. New York, 26 November 1968, entered into force November 11th, 1970. UN Treaty series, vol. 754, pp. 73
- Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), International Committee of the Red Cross (ICRC), 8 June 1977, 1125 UNTS 3, available at: <http://www.refworld.org/docid/3ae6b36b4.html> [accessed 17 February 2014]

Organisation for American States

- American Convention on Human Rights, "Pact of San Jose", Organization of American States (OAS), Costa Rica, 22 November 1969, available at: <http://www.refworld.org/docid/3ae6b36510.html> [accessed 17 February 2014]

Council of Europe

- European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, Council of Europe, 4 November 1950, ETS 5, available at: <http://www.refworld.org/docid/3ae6b3b04.html> [accessed 17 February 2014]

Argentine domestic law (these can be found at www.infoleg.gov.ar)

- Ley 23,521; Obediencia debida (Due Obedience Law), Boletín Oficial 9/6/1987.

- Ley 23.492; Ley de Punto Final (Full Stop Law), Boletín Oficial 29/12/1986.
- Ley 23.511 Banco Nacional de Datos Genéticos (National Databank), Boletín Oficial 10/07/1987.
- Ley 26.549; Código Procesal Penal, modificación (modification of the Criminal Procedures Code), Boletín Oficial 26/11/2009.
- Ley 22.924; Ley de Pacificación Nacional (National Pacification Law), Boletín Oficial 22/09/1983.

Jurisprudence

Inter-American Court of Human Rights

- Case of Velazquez-Rodriguez v. Honduras, Inter-American Court of Human Rights, 29 July, 1988
- Case of Bamaca-Velasquez v. Guatemala, Inter-American Court of Human Rights, 25 November 2000.
- Case of Serrano-Cruz Sisters v. El Salvador, Inter-American Court of Human Rights, 1 March, 2005
- Case of Contreras v El Salvador, Inter-American Court of Human Rights, 31 August 2011.
- Case of Myrna Mack Chang, Inter-American Court of Human Rights, 25 November 2003.

Inter-American Commission of Human Rights

- Report N° 1/99, Case 10.480, Lucio Parada Cea, et al v El Salvador, January 27, 1999

European Court of Human Rights

- Case of Kurt v. Turkey (Application n° 24276/94). Judgment of 25 May 1998.
- Case of Association '21 December 1989' and others v. Romania (application no. 33810/07). Judgment of 25 May 2011.
- Case of Bensaid v. The United Kingdom (Application no. 44599/98). Judgment of 6 February 2001.
- Case of Pretty v. The United Kingdom (Application no. 2346/02). Judgment of 29 April 2002.

Argentine domestic jurisprudence

- Corte Suprema de Justicia de la Nación, Arancibia Clavel, Enrique Lautaro s/ homicidio calificado y asociación ilícita y otros, causa n° 259, A. 533. XXXVIII. 8 March 2005.
- Corte Suprema de Justicia de la Nación, 'Prieto 2', Gualtieri Rugnone de Prieto, Emma Elidia y otros s/ sustracción de menores de 10 años. G. 291. XLIII. 11 August 2009.
- Corte Suprema de Justicia de la Nación. "Vázquez Ferrá, Evelyn Karinas/incidente de apelación". V. 356. XXXVI. Fallos: 326. 30 September 2003.
- Causa Ac. 202/83 (Feb. 19, 1988). The case is called 'Paula Eva Logares Grinspon', sentence by Federal Judge Juan Edgardo Fegoli against Raquel Teresa Leiro Mediondo and Ruben Luis Lavallen.

- Consejo Supremo de las Fuerzas Armadas, Causa originalmente instruida por el en cumplimiento de Decreto 158/83 del Poder Ejecutivo Nacional, Judgement of 9 December 1985, published in Fallos de la Corte Suprema de Justicia de la Nación, Tomo 309, Vol. II, 1986.
- Corte Suprema de Justicia de la Nacion, 'Corte Suprema: Fallo anulando las leyes de amnistia', Simon case. Simon, Julio Hector y otros s/ privacion ilegítima de la libertad, case S. 1767. XXXVIII, Causa N. 17.768C. 14 June 2005.

Resolutions, Recommendations and Directives

UN Commission on Human Rights

- Commission on Human Rights, Promotion and Protection of Human Rights, Study on the right to the truth. Report of the Office of the United Nations High Commissioner for Human Rights E/CN.4/2006/91 8 February 2006.
- Commission on Human Rights, Resolution 2005/66.
- Commission on Human Rights, Updates Set of principles for the protection and promotion of human rights through action to combat impunity, E/CN.4/2005/102/Add.1, 8 February 2005
- Commission on Human Rights, Report submitted by Mr. Manfred Nowak, independent expert charged with examining the existing international criminal and human rights framework for the protection of persons from enforced or involuntary disappearances, pursuant to paragraph 11 of Commission resolution 2001/46. UN doc. E/CN.4/2002/71, 8 January 2002.
- Commission on Human Rights, Resolution 20 (XXXVI) of 29 February 1980 (on the establishment of the UNWGEID).
- Working Group to the Commission on Human Rights, on the drafting process of the Convention on the Rights of the Child, E/CN.4/1985/64, Human Rights Council Resolution 7/12

Working Group on Enforced or Involuntary Disappearances

- Report of the WGEID, 26 January 2011, A/HRC/16/48.
- Report of the Working Group on Enforced or Involuntary Disappearances, 26 January 2011, UN doc. A/HRC/16/48.

Human Rights Committee (supervising the ICCPR)

- Human Rights Committee, General Comment 16, (Twenty-third session, 1988), U.N. Doc. HRI/GEN/1/Rev.1 at 21 (1994).

UN General Assembly

- G.A. Resolution 2200A (XXI), United Nations, Treaty Series, vol. 999, p. 171 and vol. 1057, p. 407. 999 UNTS 171 and 1057 UNTS 407 / [1980] ATS 23 / 6 ILM 368 (1967).

Council of Europe

- COE Parliamentary Assembly Recommendation 1056 (1987)
- COE Parliamentary Assembly Resolution 1414 (2004).

European Union

- Directive 95/46/EC, Official Journal L 281, 23/11/1995 P.0031-0050.
- EU Parliament Resolution 11.1.1983 on missing persons in Cyprus.

OAS

- Inter-American Juridical Committee, Opinion “on the scope of the right to identity” Seventy-first regular session, Rio de Janeiro, Brazil. Document CJI/doc. 276/07 rev. 1, of August 10, 2007, approved at the same session by resolution CJI/RES.137 (LXXI-O/07), of August 10, 2010.
- Inter-American Commission: Annual report, 1985-1986 at page 193; UNWGEID: E/CN.4/1990/13.
- OAS, AG/Res.666 (XIII-O/83), in Proceedings: Thirteenth Regular Session, 1983.

Books

- Bossuyt, M.J., 1987, ‘Guide to the “Travaux Préparatoires” of the International Covenant on Civil and Political Rights’, Martinus Nijhoff.
- Feitlowitz, M., 2011, ‘A Lexicon of terror: Argentina and the legacies of torture’ New York, Oxford University Press, 416 p.
- Vermeulen, M.L., 2012, ‘Enforced Disappearance, Determining State Responsibility under the International Convention for the Protection of All Persons from Enforced Disappearance’, school of Human Rights Research Series, Volume 51, page 337.
- Nowak, M., 2005, ‘U.N. Covenant on Civil and Political Rights: CCPR Commentary’, 2nd revised edition, N.P. Engel Publisher
- Nowak, M., 2012, ‘Torture and Enforced Disappearance’ in ‘International Protection of Human Rights: a Textbook’, ed. by Catarina Krause and Martin Scheinin, Abo Akademi University, Institute for Human Rights, 2012.
- Pereira, G., and Engstrom, P., 2012 ‘From Amnesty to Accountability’, Chapter 4 in Leigh A. Payne and Francesca Lessa (eds.), *Amnesty in the Age of Human Rights Accountability: Comparative and International Perspectives*, Cambridge, Cambridge University Press (forthcoming 2012)
- Nunca Mas: Ernesto Sabato, 1986, ‘Nunca Mas, a report by Argentina’s National Commission on Disappeared People’ English translation, Faber and Faber Limited
- Scovazzi, T., and Citroni, G., 2007, ‘The Struggle against Enforced Disappearance and the 2007 United Nations Convention’, Martinus Nijhof publishers, Leiden.
- Sepúlveda, Magdalena, et al, 2009, Human Rights Reference handbook, The Icelandic Human Rights Centre, University for Peace.

Articles

- Arditti, R., and Lykes, M.B., 1992, “‘Recovering Identity” The work of the Grandmothers of Plaza de Mayo’, *Women’s Studies Int. Forum*, Vol. 15, No. 4, pp 461-471.
- Arthur, P., 2009, ‘How “Transitions” Reshaped Human Rights: A Conceptual History of Transitional Justice’, *Human Rights Quarterly*, Volume 31, Number 2, May 2009, pp 321-367.

- Avery, L., 2004, 'A return to life: the right to identity and the right to identify Argentina's "living disappeared"' *Harvard Women's Law Journal*, Vol. 27 2004.
- Bakker, C., 2005, 'A Full Stop to Amnesty in Argentina. The *Simon Case*' *Journal of International Criminal Justice* Vol. 3, pp 1106-1120.
- Besson, S., 2007, 'Enforcing the Child's Right to Know Her Origins: Contrasting Approaches Under the Convention on the Rights of the Child and the European Convention on Human Rights', *International Journal of Law, Policy and the Family*, Vol. 21, No. 2, pp 137-159
- Boussard, H., 2009, 'individual human rights in genetic research: blurring the line between collective and individual interests' in new technologies and human rights, edited by Therese Murphy (oxford, new York, oxford university press 2009).
- Brems, E., 2005, *Conflicting Human Rights: An Exploration in the Context of the Right to a Fair Trial in the European Convention for the Protection of Human Rights and Fundamental Freedoms*, *Human Rights Quarterly*, Vol 27, pp 294-326
- Brubaker, R., and Cooper, F., 2000, 'Beyond "Identity", *Theory and Society*, Vol. 29, No. 1 (February 2000), pp 1-47
- Cerda, J.S., 1990, 'The Draft Convention on the Rights of the Child: New Rights', *Human Rights Quarterly*, Vol. 12, pp 115-119.
- Druliolle, Vincent, 2013: 'H.I.J.O.S. and the Spectacular Denunciation of Impunity: The Struggle for Memory, Truth, and Justice and the (Re-) Construction of Democracy in Argentina', *Journal of Human Rights*, 12:2, 259-276
- Gatti, G., 2012, 'Imposing Identity against Social Catastrophes. The Strategies of (Re)Generation of Meaning of the Abuelas de Plaza de Mayo (Argentina)', *Bulletin of Latin American Research*, Vol. 31, No. 3, pp 352-365.
- Grandsman, A.E., 2012, 'Retributive Justice, Public Intimacies and the Micropolitics of the Restitution of Kidnapped Children of the Disappeared in Argentina', *The International Journal of Transitional Justice*, Volume 6, 2012, pp 423-443.
- Gumenbe, M.J., 2005, 'Reopening of Trials for Crimes Committed By The Argentine Military Dictatorship', *Sur, International Journal on Human Rights*, No. 3, Year 2, pp 115-131.
- King, E.B.L., 2011, 'A Conflict of Interests: Privacy, Truth and Compulsory DNA Testing for Argentina's Children of the Disappeared', *Cornell International Law Journal*, Volume 44, 535, page 536-568.
- Lutz, E., and Sikkink, K., 2001 'The Justice Cascade: The Evolution and Impact of Foreign Human Rights Trials in Latin America' *Chicago Journal of International Law*, Vol. 2 No. 1, Spring 2001
- Maculan, E., 2012, 'Prosecuting International Crimes at National Level: Lessons from the Argentine "Truth-Finding Trials' *Utrecht Law Review*, Volume 8, Issue 1 (January) 2012
- McSherry, J.P., 2002, 'Tracking the Origins of a State Terror Network: Operation Condor' *Latin American Perspectives*, Vol. 29, No. 1, Brazil: The Hegemonic Process in Political and Cultural Formation (Jan., 2002), pp. 38-60

- Michele Harvey-Blankenship et al, 2010, 'Genetic Tracing, Disappeared Children and Justice' Unicef Innocenti Working Paper IWP 2010-12
- Naqvi, Y., 2006, 'The Right to the truth in international law: fact or fiction?' *International Review of the Red Cross*, Vol. 88 No 862, June 2006, pp 245-273.
- Oren, L., 2001, 'Righting Child Custody Wrongs: The Children of the Disappeared in Argentina', *Harvard Human Rights Journal*, Volume 14, pp 123-195
- Roehrig, T., 2009, 'Executive Leadership and the Continuing Quest for Justice in Argentina', *Human Rights Quarterly*, Vol 32, No 3, August 2009, pp 721-747.
- Sikkink, K., 2008, 'From Pariah State to Global Protagonist: Argentina and the Struggle for International Human Rights', *Latin American Politics and Society*, Vol. 50, pp. 2-29.
- Speck, Paula, 1987, 'The Trial of the Argentine Junta: Responsibilities and Realities', 18 *U. Miami Inter-Am. L. Rev.* 491 1986-1987.
- Turkelli, G.E., and Vandenhoe, W., 2012, 'The Convention on the Rights of the Child: Repertoires of NGO Participation', *Human Rights Law Review*, Vol. 12, pp 33-64.
- Wright&Robinson, 1998, 'Children of a Dirty War', *U.S. news and world report*, Volume: 125 Issue: 22 (December 7, 1998), pp: p34, 3p

Other

- Gjerløw, B., 2012, 'Questioning and Assuming Identities in a Process of Transitional Justice. The Case of Argentina's Found Grandchildren'. Master Thesis in Peace and Conflict Transformation, University of Tromsø, May 2012.
- UN High Commissioner for Human Rights, 2007, 'Legislative History of the Convention on the Rights of the Child', Volume 1, United Nations New York and Geneva.

News Articles

- Richards, 2009, 'New DNA Law in Argentina Will Help Find the Missing Grandchildren', 12 November 2009, can be found at <https://nacla.org/news/new-dna-law-argentina-will-help-find-missing-grandchildren>
- Mcgirk, Jan, 2000, 'Stolen Children, The Babies Adopted By Their Parents' Killers', *The Mirror*, 2 May 2000. To be found via LexisNexis, or at <http://www.thefreelibrary.com/Report%3A+Stolen+children%3B+The+babies+adopted+by+their+parents%27+killers.-a061850629>.
- Uki Goni, *The Guardian*, Friday 23 September 2011. To be found at the website of *The Guardian*: <http://www.guardian.co.uk/world/2011/sep/23/child-argentina-disappeared-adoptive-name>, visited on 18 June 2013.

- Warren, M., The Guardian, 4 June 2010. From the website of the Guardian: <http://www.guardian.co.uk/world/feedarticle/9111210>, visited on 18 June 2012.