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The Challenges posed to the recent investigation of crimes committed during the Spanish Civil War and Francoism

Javier Chinchón Álvarez

1. Introduction

In response to the complaint presented to the Argentinean Federal Court on criminal and correctional matters on 14 April 2010, María Servini de Cubría, magistrate of this Court, sent a rogatory to the Spanish authorities asking for information:

‘...as to whether there is an investigation about the existence of a systematic, generalized, deliberate, and organized plan to terrorize Spaniards who supported the representative form of government through their physical elimination, and a plan which

favoured the ‘legalized’ disappearance of minors with the loss of their identity, realized in the period between 17 July 1936 and 15 June 1977.¹

This document puts a judicial heading to a reality that has been accurately characterized in a recent study of Professor Sánchez Legido:

‘Although it is common to situate the *Nacht und Nebel* Decree of 1941 as the origin of enforced disappearances, numerous historical facts occurred a few years before in the Iberian peninsula mark the initiation of the execution of systematic and generalized plans similar to the ones that were extended until the beginning of the 50s of last century and which left all the national geography plagued by ignominious graves of Francoism. In spite of everything, with the pretext of national reconciliation, the amnesty law of 1977 has supported until this date the most absolute impunity; the recent events, both at the legislative and judicial levels, do not let us foresee substantial changes to this panorama. It is not strange, in this context, that the then chancellor Insulza, on the occasion of Pinochet’s detention, questioned the legitimacy of our country to do, with respect to what happens abroad, what we have not been capable of doing here (...). The objection is, without any doubt, irrefutable (...)’².

Nevertheless, the official position of Spanish authorities on this matter can be found in their response to a recommendation that was set forth by Mexico during the UN-based Universal Periodical Exam of Spain in 2010 urging Spain to ‘investigate, punish and redress crimes of

¹ Juzgado Nacional en lo Criminal y Correccional Federal, Case *N.N. s/ genocidio* (No. 4.591/2.010 (A-12.447), decision of 14 October 2010. Available <[HTTP://www.crimenesinternacionales-franquismo-casogarzon.es/p/documentos-legales.html](http://www.crimenesinternacionales-franquismo-casogarzon.es/p/documentos-legales.html)>.

² A. Sánchez Legido, ‘Diez años de Derecho internacional penal’, in: J. Soroeta Liceras (ed.), *Los Derechos Humanos frente a la impunidad. Cursos de Derechos Humanos de Donostia-San Sebastián. Volumen X*, Servicio Editorial de la Universidad del País Vasco, Bilbao, 2009, pp. 318-319.

enforced disappearance, regardless of the time of their occurrence, in the light of the continuous nature of the crime and in accordance with its international obligations'.³ Spain replied that:

'In the Spanish legal order, the judges and courts instruct and prosecute all complaints concerning enforced disappearances that come before them and settle them in accordance with the principles that govern the judicial function in Spain: independence, irremovability, responsibility, and the submission to law and laws only.'⁴

Furthermore,

'The current Spanish legal order obliges, in a clear and sufficient manner, the persecution of crimes against humanity and of genocide, in the terms of, and within the scope recognized, among others, in the International Covenant on Civil and Political Rights, the Convention for the Sanction of Genocide, the Convention for the Protection of All Persons against Enforced Disappearances as well as in the rest of the national and international legislation which our Constitution recognizes and protects.'⁵

Against this background, the objective of this chapter is to give a general account of what the Spanish courts have done so far in terms of investigating and prosecuting the past violations of human rights. This general account elaborate on the grave crimes that were committed: 1) in the Spain Civil War (1936-39); 2) in the immediate post-war period -years that has been designated as 'the great repression' (1939-48);⁶ 3) in the years that followed and labeled by the Council of Europe as the 'deeply disturbing human rights record' of Francoism;⁷ and, finally, 4)

³ UN Human Rights Council. Report of the Working Group on the Universal Periodic Review: Spain (A/HRC/15/6), 16 June 2010, para. 86.26.

⁴ UN Human Rights Council. Report on the Working Group on the Universal Periodic Review: Spain. Addendum (A/HRC/15/6/Add.1), 13 September 2010, para. 20.

⁵ *Ibid.*, para. 21.

⁶ See M. Núñez Díaz-Balart (ed), *La gran represión. Los años de plomo de la posguerra (1939-1948)*, Flor de Viento Ediciones, Barcelona, 2009.

⁷ Council of Europe, 'Need for international condemnation of the Franco regime'. Report of the Political Affairs Committee (Doc. 10078), 4 October 2005, para. 51.

the crimes committed in the initial stages of the transition to democracy⁸. These crimes include cases of enforced disappearances which have been explicitly recognized by the UN Working Group on Enforced and Involuntary Disappearance.⁹

2. From the Amnesty Law of 1977 to the Historic Memory Law of 2007

The initial stage of the most recent Spanish transition to democracy (1975-78) was characterized by the election of what has come to be known as the ‘model of absolute oblivion of the past’,¹⁰ i.e. a posture towards the past—the crimes of the past—founded on the renouncement of all kind of punishing and reparatory measures as well as all forms of investigation and searches for the truth. This choice was made without any consideration, at least not in the public arena, about the viability and conformity of such decision with international law.¹¹ From this point of view, a crucial element of the inaugural design of the Spanish model was the adoption of the

⁸ For an account of this period, see e.g. M. Soler, *La transición sangrienta. Una historia violenta del proceso democrático en España (1975-1983)*, Península, Barcelona, 2010.

⁹ Report of the UN Working Group on Enforced or Involuntary Disappearances (E/CN.4/2004/58), 21 January 2004, paras. 259-267; Report of the UN Working Group on Enforced or Involuntary Disappearances (A/HRC/4/41), 25 January 2007, para. 380; and Report of the UN Working Group on Enforced and Involuntary Disappearances (A/HRC/13/31), 21 December 2009, paras. 478-495.

¹⁰ This is the terminology employed by the Max-Planck Institute for Foreign and International Criminal Law in its study devoted to different transnational experiences. See J. Arnold, ‘Cambio de sistema político y criminalidad de Estado desde una visión del derecho penal’; ‘Esbozo del Proyecto: Elaboración jurídico-penal del pasado tras un cambio de sistema político en diversos países’, in M.A. Sancinetti and M. Ferrante, *El derecho penal en la protección de los derechos humanos. La protección de los derechos humanos mediante el derecho penal en las transiciones democráticas*, Argentina, Ed. Hammurabi, Argentina, 1999.

¹¹ For a consideration of this perspective, see e.g. J. Chinchón Álvarez, ‘Transición española y Justicia Transicional: ¿Qué papel juega el ordenamiento jurídico internacional en un proceso de transición? A propósito de la coherencia, buena fe y otros principios de derecho internacional postergados en la transición política española’, in: S. Gálvez Biesca (ed), *La memoria como conflicto. Memoria e historia de la Guerra Civil y el Franquismo*, *Entelequia, Revista Interdisciplinar*, no 7, 2008, pp. 331-354. For a more general account of the problema in focus, see e.g. J. Chinchón Álvarez, ‘Derecho internacional y “transformaciones del Estado”: Del desuso, uso y abuso del ordenamiento jurídico internacional cuando de ciertas transformaciones que afectan a la forma de gobierno’ in: J. Soroeta Licerias (ed.), *Cursos de Derechos Humanos de Donostia-San Sebastián. Volumen XI*, Servicio Editorial de la Universidad del País Vasco, Bilbao, 2010.

Amnesty Law 46/1997¹² whose article 2, paragraphs e) and f)¹³ give amnesty to *all crimes committed by public officials and agents of the public order against the exercise of the rights of persons*. The contents of this provision is notably similar to subsequent laws that have come to be commonly defined as ‘impunity laws’, such as the Chilean Law Decree (1978),¹⁴ the Argentinean Amnesty Law related to terrorism or subversive crimes between 25 May 1973 to 17 June 1982 (1983),¹⁵ the woefully celebrated Uruguayan Caducity Law (1986),¹⁶ the Argentinean Laws of Final Stop and Due Obedience (1986-1987),¹⁷ the Honduran Decree (1990),¹⁸ the El Salvadorian General Amnesty Law for the Consolidation of Peace (1993),¹⁹ and the Peruvian Law no. 26479 (1995),²⁰ grotesquely complemented a few months later by Law no. 26492 (1995)²¹.

Following the adoption of the Amnesty Law in 1977, a slow and confused process developed in which a wide range of measures purportedly reparatory in character were adopted, but never affecting the validity of the Amnesty Law,²² which until this day continues to receive official

¹² *Boletín Oficial del Estado*, no. 248, 17 October 1977.

¹³ See e.g. J. Chinchón Álvarez, ‘El viaje a ninguna parte: Memoria, leyes, historia y olvido sobre la Guerra Civil y el pasado autoritario en España. Un examen desde el derecho internacional’, *Revista del Instituto Interamericano de Derechos Humanos*, no. 45 (2007), pp. 12-129.

¹⁴ Law Decree no. 2191 of 19 April 1978.

¹⁵ Law no. 22924 of 23 March 1983.

¹⁶ Law 15848 of 22 December 1986.

¹⁷ Law 23492 of 23 December 1986 and Law 23492 of 5 June 1987.

¹⁸ Decree no. 30-90 of 14 December 1990.

¹⁹ Decree no. 486 of 20 March 1993.

²⁰ Law no. 26479 of 14 June 1995.

²¹ For a more detailed analysis, see J. Chinchón Álvarez, ‘Modelos de persecución penal y Justicia Transicional en Iberoamérica. Algunas enseñanzas jurídico-internacionales tras los procesos de transición iberoamericanos: Impunidad fáctica, amnistías e indultos’, in M. Capellà I Roig and D. Ginard I Ferón (eds), *Represión política, justicia y reparación. La memoria histórica en perspectiva jurídica (1936-2008)*, Ediciones Documenta Balear, Palma de Mallorca, 2009, pp. 255-339

²² P. Aguilar, *Políticas de la memoria y memorias de la política*, Alianza Editorial, Madrid, 2008, pp. 233ff, including the tables on pp. 506-520. See also A. Gil Gil, *La justicia de transición en España. De la amnistía a la memoria histórica*, Atelier, Barcelona, 2009, pp. 47-92.

support through ‘omission’²³ and ‘action’.²⁴ For many, this process was finalized thirty years later with the adoption in December 2007 of what has come to be popularly known as the ‘Historic Memory Law’.²⁵ In fact, according to its preamble, the law in question represents a complete and final response to the demands voiced by Spanish society in relation to the past and will thus contribute to the closing of wounds that are still open in the Spaniards and to the full satisfaction for those who suffered, directly or in the name of their family relatives, the consequences of the Civil War and the Francoist repression.²⁶

Both the Historic Memory Law as well as the great majority of measures that had been adopted earlier on are based on a common logic whose unravelling will help to understand the background and motives behind the complaints that have come to be presented by different persons and associations of victims²⁷ to Spanish courts and especially the *Audiencia Nacional*

²³ INFORME GENERAL DE LA COMISIÓN INTERMINISTERIAL PARA EL ESTUDIO DE LA SITUACIÓN DE LAS VÍCTIMAS DE LA GUERRA CIVIL Y DEL FRANQUISMO, 28 July 2006, p. 30. See Report of the Inter-Ministerial Commission for the Study of the Situation of the Victims of the Civil War and Francoism, 28 July 2006, p. 30. Available at: www1.mpr.es/uploads/media/pdf/6/informegeneral2_1232475655.pdf. According to the Commission, the Amnesty Law of 1977 reflects the political decision to renounce the judicial persecution of the servants of the Francoist regime who had participated in the repression.

²⁴ See e.g. UN Human Rights Committee, *Comentarios del Gobierno de España sobre las observaciones finales del Comité de Derechos Humanos (CCPR/C/ESP/CO/5/Add.1)*, 13 January 2009, p. 3.

²⁵ Ley 52/2007, de 26 de diciembre, por la que se reconocen y amplían derechos y se establecen medidas en favor de quienes padecieron persecución o violencia durante la Guerra Civil y la dictadura. *Boletín del Estado*, no 310, 27 December 2007.

²⁶ *Ibid*, paras. 3 and 18.

²⁷ According to art. 24.1 of the UN Convention on the Protection of All Persons from Enforced Disappearances, ‘victim’ means the disappeared person and any individual who has suffered harm as the direct result of an enforced disappearance. Considering the jurisprudence derived from the European Court of Human Rights, a family-relatives of a direct victim of enforced disappearance is also considered to be victims of torture and inhuman, cruel or degrading treatment. See the European Court of Human Rights, *Kurt v. Turkey*, judgment on 25 May 1998, *Reports 1998-III*, paras. 130-134; *Çakici v. Turkey*, judgment on 8 July 1999 n°. 23657/94, paras. 88-99, esp. 98; *Orhan v. Turkey*, judgment on 18 June 2002, n°. 25656/94, para. 358; *İpek v. Turkey*, 17 February 2004; n°. 25760/94, paras. 178-183, esp. 181-183; *Osmanoğlu v. Turkey*, judgment on 24 January 2008, n°. 48804/99, paras. 96-97.

(AN) as from the end of 2006 and onwards.²⁸ Already at the beginning of the 90s, the Spanish Constitutional Court held that while some of the measures adopted in relation to the past had been officially defined as ‘indemnities’, the measures were in reality ‘benefits’ that had been established by the legislator as a matter of grace on the basis of a political decision which, in the case before it, must be brought into relation with the amnesty-related legislation.²⁹

From my point of view, this is the key to understand the background of the Spanish experience. In spite of what has been said in multiple forums and although many of the measures that have been implemented in recent years deserve to be celebrated, all of them, including the Historic Memory Law, are based on the idea that such measures are afforded as a matter of grace and

²⁸ See complaint presented on 14 December 2006 by Mr. Marcial Muñoz Sánchez in his name and on behalf of the association Nuestra Memoria, Sierra de Gredos y Toledo; complaint presented on 14 December 2006 by the Associació per a la recuperació de la Memòria Històrica de Catalunya; complaint presented on 14 December 2006 by the Asociación por la Recuperación de la Memoria Histórica do 36 en Pontearas; complaint presented on 14 December 2006 by the Comisión pola Memoria Histórica do 36 en Pontearas; complaint presented on 14 December 2006 by the Asociación por la Recuperación de la Memoria Histórica de Arúcas; complaint presented on 15 December 2006 by Associació per a la recuperació de la Memòria Històrica de Mallorca; complaint presented on 15 December 2006 by Ms. Carmen Dorado Ortiz; complaint presented on 4 June 2007 by Teófilo Goldaracena Rodríguez; complaint presented on 18 July 2007 by the Asociación Andaluza Memoria Histórica y Justicia; complaint presented on 14 September 2007 by Politeia, asociación para la defensa y progreso de los intereses ciudadanos; complaint presented on 24 December 2007 by the Asociación para la Recuperación de la Memoria Histórica de Valladolid; complaint presented on 19 May 2008 by Mr. Francisco Javier Jiménez Corcho, Mr. Juan Pérez Silva y Mrs. Francisca Maqueda Fernández; complaint presented on 28 July 2008 by the association Fòrum per la Memòria del País Valencià; complaint presented on 31 July 2008 by the Confederación General del Trabajo; complaint presented on 12 September 2008 by the Asociación para la Recuperación de la Memoria Histórica de Granada and by Mrs. Nieves García Catalán; complaint presented on 12 September 2008 by Mr. José Luis Cerdeira Villegas; complaint presented on 12 September 2008 by Mr. Crispulo Nieto Cicuéndez; complaint presented on 22 September 2008 by the Asociación de Familiares de Fusilados y Desaparecidos de Navarra, Asociación de Héroes de la República y la Libertad, Asociación para la Recuperación de la Memoria Histórica en El Bierzo, León, Burgos y Zamora, Asociación para la Recuperación de la Memoria Histórica de Soria; complaint presented on 26 September by the Asociación Todos los Nombres de Asturias; complaint presented on 3 October by Mrs. María Nieves Galindo Arroyo; complaint presented on 6 October by Grup per la Recerca de la Memòria Històrica de Castelló, Izquierda Republicana de Castilla y León, by Mrs. Julia Maroto Velasco and by Mr. Julián de la Morena López. For an extended list of the complaints, see the Decision of the same, Audiencia Nacional, on 24 December 2008, para. 5.

²⁹ See Spanish Constitutional Court, judgment related to the possible unconstitutionality of the additional provision 18 of the Law 4/1990 of 29 June 1990 concerning General Budget of the State for 1990. STC 361/1993, legal foundations, para. 2.

not obligation. Indeed, the Historic Memory Law never speaks of ‘obligations’ or ‘rights’, but only of ‘legitimate claims or demands’ of some citizens³⁰ as though the questions of justice, truth and reparations for past crimes concerned the relations among persons or private subjects and the function of the State would be limited to that of a facilitator or subject that is capable of ‘establishing subsidies’.³¹ In fact, the Supreme Court has admitted that the Historic Memory Law implies nothing more than ‘the mere collaboration with private persons (and) the contribution of public powers in the desired reparation of the victims of the Civil War and the dictatorship that followed’.³² The reality is such that, as says Alicia Gil Gil, ‘the Law renounces an official investigation of human rights violations (...), maintaining the rule of impunity and no-investigation’.³³ In this light, the response by the Spanish authorities to the allegation set forth by the UN Working Group on Enforced and Involuntary Disappearances and cited in its December 2009 Report must be seen as clearly unjustified, when it maintains that:

‘Regarding the allegation that there have been no investigations into disappearances that took place during the Spanish civil war and General Franco’s regime, the Government quoted a number of measures that have been taken since 2004, including the creation of the Historical Memory Documentation Centre, and the passing of a law in 2007, which recognizes and expands rights and establishes measures for persons who suffered persecution or violence during the civil war and dictatorship.’³⁴

That the adoption of the Historic Memory Law is based on the same logic as previous measures becomes evident when turning attention to the formulation of articles 11 to 14 related to the

³⁰ See Explanation of the Motives for the Law 52/2007 of 26 December.

³¹ See e.g. art. 11.2 of Law 52/2007 of 26 December.

³² Supreme Court, Decision on 3 February 2010, n°. 20048/2009, p. 52.

³³ A. Gil Gil, *La justicia de transición en España...*, *op. cit.*, p. 76.

³⁴ Report of the UN Working Group on Enforced or Involuntary Disappearances (A/HRC/13/31), 21 December 2009, para. 486.

victims of enforced disappearances during the Civil War and the Francoist period.³⁵ The wording, spirit and design of these provisions reveal that the Spanish official understanding of these measures are the result of the will of the Spanish State to exercise its discretionary powers and not efforts to fulfill any obligation. Nevertheless, such understanding is difficult to reconcile with any recognition about the existence of (international) State responsibility to investigate and repair to the persons whose rights have been violated, in conformity with the detailed international rules regulating this realm. And this understanding also includes the victims of enforced disappearance, in spite of the permanent and continued character of the crime of

³⁵ Article 11: Collaboration of public administrations with individuals to locate and identify victims. 1. The public administrations, in the framework of their competences, will *facilitate*, for the direct descendants of victims who so request, the activities of investigation, location and identification of persons who disappeared in violent circumstances during the Civil War or the subsequent political repression and whose whereabouts are unknown (...). 2. The General State Administration will prepare work plans and establish subsidies to assist with the costs of the activities foreseen in this article. Article 12: Measures for the identification and location of victims. 1. The Government, together with the public administrations, will prepare a protocol of scientific and interdisciplinary activities to ensure institutional collaborations and an adequate control of the exhumations. *Similarly, it will prepare appropriate collaboration agreements to subsidize the social bodies which take part in the work.* (...). Article 13. Administrative authorizations for location and identification activities. 1. The competent public administrations will *authorize* search activities to locate the remains of victims referred to in article 11, paragraph 1 (...). The findings will immediately be communicated to the competent administrative and judicial authorities. 2. The public administrations will exercise their powers to establish the procedure and conditions in which the direct descendants of the victims referred to in article 11, paragraph 1, or the bodies acting in their name, *may recover* the remains buried in common graves, to be identified and eventually removed elsewhere. (...). Article 14. Access to locations affected by identification and localization activity. 1. The activities of localization and eventual identification or removal of the remains of persons referred to in article 13, paragraph 1, are considered to be of public utility and social interest, with a view to permitting, where necessary and in accordance with articles 108 to 199 of the Compulsory Expropriation Law, the temporary occupation of the land where they are to be carried out. For the activities described in the previous paragraph, the appropriate authorities will *authorize* the temporary occupation of publicly owned lands except where justified by the public interest. 3. In the case of privately owned lands, the descendants, or the organizations authorized in accordance with the preceding paragraph, *should seek* the consent of the holders of the affected rights over the lands where the remains are. If such consent is not forthcoming, the public administrations may *authorize* temporary occupation, though only after hearing the holders of the affected rights, considering their arguments, and *determining the compensation to be paid by the occupiers.* (unofficial translation) (italics have been added).

enforced disappearance,³⁶ unquestioned in the international legal context, as recently recalled the European Court of Human Rights.³⁷

When it became evident that such recognition would be withheld in the final version of the Historic Memory Law the victims of enforced disappearances lost their patience and ended up convincing themselves that the only avenue that remained to vindicate their rights—hushed and ignored for decades³⁸—was to turn to the AN.

Before analyzing the complaints set forth by the victims to the AN in December 2006 and onwards, it must be noted that these were by no means the first or only complaints related to the crimes of enforced disappearance to be brought before judicial organs. However, the different actions prior to the end of 2006 did not find any other response but the impossibility to advance any investigation; as the decision on 15 December 1999 by the Trial Court no. 1 in the case of *Arenas de San Pedro* well illustrates.³⁹ Furthermore, even if by now there seems to be a widely shared conviction that the recent judicial developments in relation to the crimes of the past is the result of a personal initiative by magistrate Baltasar Garzón, which will end with his removal, in

³⁶ In contrast with domestic law, both qualifications are common and accepted under international law. See e.g. UN 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.4/2006/57) 2 February 2006, para. 113: ‘At the proposal of one delegation, and to take into account the varying terms used in the legislation of Latin American countries, the Working Group agreed that the expression “continuous nature” in paragraph 1 (b) should be translated in the Spanish version of the instrument as “carácter continuo o permanente”’.

³⁷ See *Vardana and others v. Turkey* (GC), Applications nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, 18 September 2009. Available < [HTTP://www.echr.coe.int/echr/Homepage_EN](http://www.echr.coe.int/echr/Homepage_EN)>.

³⁸ See M. Davis, ‘Spain Recovering its Memory? Breaking the Pacto del Olvido’, *Human Rights Quarterly*, vol. 27, no. 3 (2005), pp. 858-880. See also M. Capellà I Roig, ‘Las “desapariciones forzadas” en España durante la guerra civil y el franquismo: violaciones y crímenes de derecho internacional sin reparación ni castigo’, in: J. Soroeta Licerias (ed.), *Conflictos y protección de derechos humanos en el orden internacional*. Cursos de Derechos Humanos de Donostia-San Sebastián, vol. VI, 2006.

³⁹ Investigative Chamber 1. Arenas de San Pedro. Decision on 15 December 1999. Preliminary Matters. 1557/1999.

reality, they are the result of years of struggle by the pro-memory movement. As the historian Espinosa Maestre observes:

‘although it is not said, this generalized recognition to honour the victims of fascism is fully the fruit of the pro-memory movement, which since the 90s and more concretely since the year of 2000 has succeeded to demonstrate to society a reality that was hidden and prohibited during Francoism and also from the time of the transition and onwards (the exhumations at the time were done at the margins of the system when not against).’⁴⁰

Thus, in an important sense, the AN presented itself as the only and last effective way to advance the demands of family-relatives of those who had suffered as direct victims of enforced disappearances during the Civil War and Francoism, following years of difficult and unproductive efforts of turning to political and judicial authorities with their demands.

3. Judicial Actions and Responses: The Decision on 18 October 2008

The first judicial actions by the AN were the result of a process initiated by a series of complaints as from mid-December 2006 and onwards by different associations and private about the alleged commission of crimes against humanity (enforced disappearances) during the Civil War and Francoism. The core of these actions was especially complex as the petitioners’ representatives on several occasions manifested that it was not their intention to seek the establishment of criminal responsibility for the crimes that had been committed. Rather, as one of the first petitioners, *Associació per a la Recuperació de la Memòria Històrica de Mallorca*, put it, and which reflects the basic demand of the great majority of petitioners: ‘On the basis of all this told,

⁴⁰ See F. Espinosa Maestre, ‘Cuando el presente excluye el pasado’, *Todos (...) los nombres*, August, 2010, p. 1. Available < [HTTP:// www.todoslosnombres.org](http://www.todoslosnombres.org)>. For a more detailed analysis, F. Espinosa Maestre, ‘De saturaciones y olvidos. Reflexiones en torno a un pasado que no puede pasar’, *Hispania Nova-Revista de Historia Contemporánea*, no 7 (2007), pp. 427-428.

we ask for the assistance by justice to localize the whereabouts or final destiny of the listed persons'.⁴¹

A first general question to be asked then was –and is- how and in which manner an organ with the character of a court/criminal chamber of the AN may attend to this fundamental demand. The question was present, directly or indirectly, in the entire jurisdictional vicissitude,⁴² although it competes with an aspect that became the object of most polemics, i.e. the more than likely death of the majority of the persons most responsible for the crimes.

The complaints received a judicial response in the Decision of 16 October 2008.⁴³ The Magistrate behind that decision, Baltasar Garzón who were probably aware of the enormous consequences and possible opposition that his decision would have on several levels, initiates his decision by stressing that it has been produced with the outmost respect for all the victims who suffered violent hideous acts, massacres, and very grave violations of their rights during the Civil War and the post-war period. No distinction whatsoever is made among the victims on the basis of their differing political, ideological, religious, or other attributes.⁴⁴ Magistrate Garzón furthermore indicates that the current proceeding does not pretend to undertake a revision of the Spanish Civil War in a judicial setting since that would imply the formulation of a 'General Cause'.⁴⁵ The Magistrate also notes that, unlike other crimes from the Civil War period, the ones in focus in the present case had never been subjected to criminal investigations by the Spanish

⁴¹ Complaint made to the court (Juzgado de Instrucción Central de Guardia) by *Associació per a la Recuperació de la Memòria Històrica de Mallorca*, 14 de diciembre de 2006, p. 31.

⁴² Decision on 16 October 2008. Preliminary Matters-Summary Procedure 399/2006 V. Investigative Chamber no. 5 of the Audiencia Nacional. Legal Reasoning, paras. 13 to 15.

⁴³ Decision on 16 October 2008. Preliminary Matters-Summary Procedure 399/2006 V. Investigative Chamber no. 5 of the Audiencia Nacional.

⁴⁴ *Ibid.* Legal Reasoning (I), para. 2.

⁴⁵ *Ibid.*, para. 3.

judiciary; they also exhibit a number of magnifying facts that render it appropriate to characterize them as amounting to crimes against humanity.⁴⁶

Following these preliminary clarifications, the Magistrate elaborates on the alleged facts in the case and, to this end, differentiates among three periods: the massive repression realized by the bands in the Civil War (from 17 July 1936 to February 1937), the period of the emergency War Councils (from March 1937 to the first months of 1945), and, finally the repression exerted by the dictatorship to eliminate the guerrillas and those who assisted them (from 1945 to 1952).⁴⁷ Also noted in this context that these temporal limits are not fixed in a final manner but may be extended if other cases were to appear later on provided that it can be proved that they formed part of a systematic plan of enforced disappearances, the fundamental object of the investigation.⁴⁸ According to the first provisional estimates, approximately 114.266 persons were victims of enforced disappearances in these periods.⁴⁹ However, more recent estimates raise this number to 136.062 and even up to 152.237 victims.⁵⁰

The Magistrate thereafter engages in a detailed analysis of what, as we quoted before, Leo Brincat has defined as Franco's 'deeply disturbing human rights record'.⁵¹ From the standpoint of many of the victims, this part of the decision is of great significance in that it approximates their demands in terms of affording public recognition of the crimes that were committed during the Francoist dictatorship.⁵² The following lines stand out:

⁴⁶ *Ibid.* Legal Reasoning (I) para. 1 and Legal Reasoning (XIV).

⁴⁷ Legal Reasoning (I), para. 6.

⁴⁸ *Ibid.* Legal Reasoning (VI).

⁴⁹ *Ibid.* Legal Reasoning (VI).

⁵⁰ Audiencia Nacional, Investigative Chamber no. 5, Decision on 26 December 2008 (Ordinary Procedure) 0000053/2008 E, para. 7.

⁵¹ Council of Europe, 'Need for international condemnation of the Franco regime', *op. cit.*

⁵² Decision on 16 October 2008, *op. cit.*, Legal Reasoning (XIV).

‘...of the facts that happened following 18 July 1936, one can confirm that the armed uprising or insurrection which was materialized that date, was a decision perfectly planned and directed to end with the form of government in Spain, in that moment, attacking and ordering the detention and including the physical elimination of persons who had responsibilities in the high organs of the Nation and this, as a means or at least as an indispensable step to develop and execute the decisions that had been previously adopted concerning detention, torture, enforced disappearance and the physical elimination of thousands of persons for political and ideological reasons, procuring, in this manner, the displacement and exile of thousands of persons inside and outside national territory, a situation that continued, to a greater or lesser extent, during subsequent years, once the Civil War had been brought to an end.’⁵³

Thereafter, the magistrate outlines seven critical legal questions that must be addressed in the case and which he refers to as ‘obstacles’ (*escollos*). One refers to the prohibition against retroactive criminal law and the rules of international (customary) law. A second question is related to the permanence (or non-permanence) of the crimes, essentially illegal detentions without any information about the whereabouts or final destiny of the detainees (‘enforced disappearances’) and its effects on statutory limitations. Also under consideration are matters such as the possible application of the Amnesty Law in relation to the alleged crimes in the present case, the competence of the Trial Court no. 5 and the Criminal Chamber of the Audiencia Nacional to investigate the crimes, the identification of the persons possibly responsible for having committed them, as well as the protection of the victims of these acts.⁵⁴ It would be impossible to analyse, within the space of this chapter, all these important legal questions in great detail; however, as I have argued elsewhere, several of them probably emerge as a result of the deficient Spanish legislation related to the investigation and prosecution of grave crime committed in Spain, especially in comparison with the legislation related to grave

⁵³ *Ibid.* Legal Reasoning (XIII) (unofficial translation).

⁵⁴ Decision on 16 October 2008, *doc. cit.*, Legal Reasoning (V).

crime committed abroad.⁵⁵ Perhaps it never occurred to the Spanish legislator's narrow or biased mind that this type of crimes could be or had been committed in Spain.

Furthermore, the essential question here is to note that the Magistrate's decision on 18 December 2008 in which he affirms the competence of the AN to open a criminal investigation related to crimes that occurred during the Civil War and Francoist dictatorship was based on a sophisticated and complex legal construction, partially sustained by international law as well as the Spanish Supreme Court judgment in the *Scilingo* case.⁵⁶ The decision ends by affirming the competence of the Audiencia Nacional to investigate the crimes, committed during the Civil War and francoism, amounting to illegal detention without giving information about the whereabouts, or to forced disappearance, in the context of crimes against humanity, in connection with crimes against the Constitution and the High Organs of the Nation. The conclusions, evidently, leads to the non-acceptance of the intended effects of the Amnesty Law.⁵⁷

Although the operative clauses of the Decision begin only on page 66, already in the 16th and 18th Legal Foundations, important concrete decisions are taken, which are then reaffirmed in the final part of the Decision.⁵⁸ Following a recognition of the factual difficulties that the investigation of the denounced crimes would give rise to, the Magistrate opts for the creation of an "Expert Group" and a Judicial Police Group for the purpose of advancing the search for and localization of the disappeared so as to be able to respond to the petitions by the victims within a

⁵⁵ See e.g. J. Chinchón Álvarez, 'Examen del Auto del Juzgado de Instrucción N^o. 5 de la Audiencia Nacional por el que se acepta la competencia para investigar los crímenes contra la humanidad cometidos en la Guerra Civil y el franquismo', *La Ley: Revista Jurídica Española de Doctrina, Jurisprudencia y Bibliografía* vol. 5 (2008), pp. 1388-1397.

⁵⁶ Supreme Court judgment no 798/2007, 1 October 2007. See also M. Ollé Sesé, *Justicia universal para crímenes internacionales*, La Ley, Madrid, 2008, pp. 64-67, 161-183, whose views I fully share. For a somewhat contrasting perspective, see A. Gil Gil, 'Principio de legalidad y crímenes internacionales. Luces y sombras en la Sentencia del Tribunal Supremo en el caso Scilingo', in A. Cuerda Riezu and F. Jiménez García, *Nuevos Desafíos del Derecho penal internacional: Terrorismo, crímenes internacionales y derechos fundamentales*, Tecnos, Madrid, 2009.

⁵⁷ Decision on 16 October 2008, *doc. cit.*, Legal Reasoning (XI).

⁵⁸ *Ibid.*, Operative paragraphs 4 and 5.

reasonable period.⁵⁹ The Judicial Police Group is given the task to localize and systematize the victims, clarify the circumstances for their disappearances and deaths, and those who intervened in the disappearances. Its investigations would be carried out under the direction of the competent judicial authority until sufficient evidence related to the commission of the crimes had been established. The much more significant “Expert Group”, in contrast, would be established on the basis of a request from the parties of the judicial procedure. While these parties would designate the names of five persons to form part of this Group, the Investigating Chamber no. 5 would nominate two other persons. The task of the “Expert Group” would be to publish a report in which it would present its study, analysis, evaluation, and conclusions about the location, situation and identification of the victims. The report would include the total number of victims in the period under examination (17 July 1936-31 December 1951) and it would make a three-fold distinction among the victims following an examination of all the collected evidence: (1) Detained and disappeared persons, accompanied by a proposal on how to localize, recuperate and identify their remains; (2) Detained and disappeared persons whose bodies have already been recuperated but are still unidentified, followed by their identification; and (3) Detained and disappeared persons who have already been identified.⁶⁰

In spite of the overtly ‘technical’ character of the Expert Group it is evident that for those familiar with the concept of transitional justice the functions of this Group resembles a truth commission. .⁶¹ Formally speaking, the “Expert Group” certainly does not amount to such a mechanism although in effect its functions do point in that direction. Had it been the case, it would have been possible to finally fill a shameful vacuum in the Spanish history of ‘transitional justice’ insofar as no truth-seeking activities have ever been undertaken. Furthermore, leaving to the side the question about potential conflicts between what should have been the future task of

⁵⁹ *Ibid.* Legal Reasoning XVI.

⁶⁰ *Ibid.*

⁶¹ Priscilla Hayner, *Unspeakable Truths. Confronting Terror and Atrocity*, 2001, Routledge, New York.

the “Expert Group” and what is stipulated in provisions such as article 12 of the Historic Memory Law⁶², and the normative developments of the International Covenant for the Protection of All Persons against Enforced Disappearance,⁶³ it is evident that its eventual accomplishment would depend on its definitive composition, and the mode in which its members would focus and advance its mandate.

The decision also addresses various petitions for exhumations deduced from the case and establishes a set of basic criteria both for current as well as future exhumations with views to authorize their initiation, development and continuation.⁶⁴ Furthermore, the Magistrate undertakes to send inquiries to the corresponding Civil Registries asking them to provide death certificates of the persons who *a priori* have been identified as the most responsible ones for the crimes under consideration with a view to thereafter declaring the criminal responsibility of these persons as extinguished for reasons related to their death.⁶⁵ Additionally, he undertakes to send a request to the Ministry of Interior soliciting information as to who were the highest leaders of the Spanish fascist group *Falange Española* during the period between 17 July 1936 and 31 December 1951. Once identified and in case of death, the Magistrate would proceed to

⁶² See note 37.

⁶³ UN International Convention for the Protection of All Persons against Enforced Disappearances, adopted by the UN General Assembly on 20 December 2006 (A/RES/61/177). For more details, see J. Chinchón Álvarez, ‘La Convención Internacional para la Protección de Todas las Personas contra las Desapariciones Forzadas: Nunca es tarde si la dicha es buena? Examen general y perspectivas en España tras la aprobación de la Ley de Memoria Histórica’, *Revista de Ciencias Jurídicas y Sociales, Foro, Nueva Época* no. 7/2008, pp. 11-55.

⁶⁴ Decision on 16 October 2008, *doc. cit.*, Legal Reasoning (XVII).

⁶⁵ The decision names: Francisco Franco Bahamonde, Miguel Cabanellas Ferrer, Andrés Saliquet Zumeta, Miguel Ponte Manso de Zúñiga, Emilio Mola Vidal, Fidel Dávila Arrondo, Federico Montaner Canet, Fernando Moreno Calderón, Francisco Moreno Fernández, Germán Gil y Yuste, Luis Orgaz Yoldi, Gonzalo Queipo de Llano y Sierra, Francisco Gómez-Jordana y Souza, Francisco Feroso Blanco, Luis Valdés Cabanilla, Nicolás Franco Bahamonde, Francisco de Asís Serrat i Bonastre, José Cortés López, Ramón Serrano Súñer, Severiano Martínez Anido, Tomás Domínguez Arévalo, Raimundo Fernández Cuesta y Merelo, Valentín Galarza Morante, Esteban Bilbao y Eguía, Jose Luis Arrese y Magra, Juan Yagüe Blanco, Salvador Moreno Fernández, Agustín Muñoz Grandes, José Enrique Varela Iglesias, Juan Vigón Suerodíaz, Blas Pérez González, Carlos Asensio Cabanillas, Eduardo Aunós Pérez, Eduardo González Gallarza, and Francisco Regalado Rodríguez. See Decision on 16 October 2008, *doc. cit.*, operative paragraph 3.

resolve the matters related to the imputation of the crimes and extinction of criminal responsibility.⁶⁶ However, even if the decision lists a considerable number of possible perpetrators without prejudicing the possibility that there might be others who are still alive but who have still not been identified,⁶⁷ this leaves unanswered a question of critical importance for the subsequent judicial development: what will happen once it has been clarified that the persons identified are dead?

4. Subsequent Judicial Developments: From the decision on 16 October to the decision of the Criminal Chamber on 2 December 2008

While the victims had to wait for about two years before their first complaints received a judicial response on 8 October 2008, from that moment onwards, the process unfolded with astonishing speed. A period of six weeks, which is the time it took for the Criminal Chamber of the AN to deliver its decision on 2 December 2008, is extremely fast, considering the enormous difficulties that were expected to be encountered in a criminal investigation into the sorts of crimes in focus,⁶⁸ and which the Spanish judiciary had never carried out before, and in relation to which up to this point impunity had been the rule.⁶⁹ To use the words of three magistrates of the AN: de Prada Solaesa, Bayarrui García and Sáez Valcárcel, the case presupposed the examination of a lawsuit of singular ‘historical importance’⁷⁰ since the intensity and magnitude of the alleged

⁶⁶ *Ibid.*, Operative paragraph 3.

⁶⁷ *Ibid.*, Legal Reasoning (VI).

⁶⁸ *Ibid.* Legal Reasoning (I): ‘The investigation is very complex, agreed; it presents several difficulties related to evidence, because of the time that has passed, agreed; it is improbable that the authors are still alive, possibly but not impossibly since there are victims [who are still] alive; it will be a different question that related to prosecution in function of age...’. Juzgado Central de Instrucción no. 5 de la Audiencia Nacional See case 53/2008 E on 18 November 2008, summary proceeding (ordinary procedure), p. 132.

⁶⁹ Audiencia Nacional, decision of 16 October 2008, *doc. cit.*, Legal Reasoning (I), paragraph 1 and Legal Reasoning (XIV).

⁷⁰ Dissenting vote of Magistrates de Prada Solaesa, Bayarrui García and Sáez Valcárcel. Decision on 2 December 2008. Ordinary procedure no. 53/08, Juzgado Central de Instrucción no. 5, case file no. 34/08. Question of competence as defined in article 23 of the Organic Law

crimes mean that they are the most serious ones that had ever been investigated by Spanish courts.⁷¹ Nevertheless, in contrast with this prognostic, the decision on 8 October came to be followed by a frenetic and not very uplifting succession of judicial actions and reactions, which started with the decision on 17 October, day in which Magistrate Garzón transformed the initial diligences into Indictment 53/2006,⁷² (a fact that would have repercussions in terms of the eventual appeals) and culminated in the decision by the Criminal Chamber in Plenary Session on 2 December 2008.⁷³

Following this event, the Chief Prosecutor of the AN interposed an extraordinarily severe appeal⁷⁴ on 20 October.⁷⁵ Having refuted each and every point by Magistrate Garzón, the Prosecutor requested that in the light of the nature and significance of the case the decision should be taken by the plenary of the Criminal Chamber of the AN.⁷⁶ This action coincided with Garzón's appointment of the ex-Prosecutor of Anticorruption, Carlos Jiménez Villarejo, and the ex President of Barcelona's Audiencia Provincial, Antonio Doñate Martín, as members of the "Expert Group", created by the Decision on 16 October. The appeal was declared inadmissible by Magistrate Garzón in a Decision on 23 October 2008⁷⁷, in which he also fixed a time-period

governing the criminal procedure, Criminal Chamber of Audiencia Nacional, Plenary Session, paragraph I.1.

⁷¹ *Ibid.*

⁷² Decision on 17 October 2008, Diligencias Previas-Procedimiento Abreviado 0000399/2006 E, Juzgado Central de Instrucción Nº. 5, Audiencia Nacional.

⁷³ Decision on 2 December 2008, *doc. cit.*

⁷⁴ For an account of the position of the Office of the Prosecutor in relation to these proceedings, see Amnesty International, 'ESPAÑA: La obligación de investigar los crímenes del pasado y garantizar los derechos de las víctimas de desaparición forzada durante la guerra civil y el franquismo', November 2008 (AI: EUR410008-20809), particularly pp. 9-10; Plataforma por las Víctimas de las Desapariciones Forzadas del Franquismo, 'Nota de Prensa', 18 October 2008; and Plataforma por las Víctimas de las Desapariciones Forzadas del Franquismo, 'Comunicado Público tras la Jornada de Trabajo de Asociaciones de la Memoria en Barcelona', 15 November 2008 [on file with author].

⁷⁵ Motion of Appeal, Chief Prosecutor, Audiencia Nacional, 20 October 2008.

⁷⁶ *Ibid.*, Primer Orosí.

⁷⁷ Decision on 23 October 2008, Sumario (Proc. Ordinario) 0000053/2008 E, Juzgado Central de Instrucción no. 5, Audiencia Nacional.

of three days to interpose a request for revision⁷⁸. Garzón's response came to coincide with the appointment by the parties of the five remaining members of the "Expert Group": the four historians Julián Casanova, Queralt Solé, Maribel Brenes and Francisco Espinosa Maestre, and the forensic expert, Francisco Etxeberria.

Even so, and perhaps after having read the decision on 17 October together with the internalization of its possible procedural consequences, the Chief Prosecutor, on 21 October filed the almost unprecedented⁷⁹, ambiguous⁸⁰ and extraordinary⁸¹ incident contemplated in article 23 of the Law on Criminal Procedure,⁸² with the result that if the Criminal Chamber of the AN responded that the Central Court of Instruction no. 5 lacked competence, it also meant that all its previous actions would be annulled⁸³ (in accordance with article 238.1 of the Organic Law on Judicial Power).⁸⁴ And that without the Chief Prosecutor having indicated which judicial organ would then, in his view, be competent to rule in the case. Indeed, before this

⁷⁸ *Ibid.*, Operative paragraph 2.

⁷⁹ See Dissenting opinion (de Prada Solaesa, Bayarrui García and Sáez Valcárcel): Decision on 2 December 2008, *doc. cit.*, paragraph III.1.1.

⁸⁰ See A. De la Oliva Santos, et al, *Derecho Procesal Penal*, 2007, Centro de Estudios Ramón Areces, Madrid, pp. 138ff. See also concurring opinion (Javier Martín Lázaro) in relation to the interpretation of article 23 of the Law on Criminal Procedure, procedure 34/08, formulated in ordinary procedure 53/08, 2 December 2008, p. 2.

⁸¹ See Criminal Chamber of the Audiencia Nacional, Plenary Decision, 2 December 2008, *doc. cit.*, pp. 5-7. For a harsher interpretation, see dissenting opinion (de Prada Solaesa, Bayarrui García and Sáez Valcárcel), Decision on 2 December 2008, *doc. cit.*, paragraph III.

⁸² Brief by the Chief-Prosecutor of the Audiencia Nacional, 21 October 2008 'por el que se promueve el incidente previsto en el artículo 23 de la Ley de Enjuiciamiento Criminal' [on file with author]. Reads: "If during the summary procedure or in whatever phase of instruction of a criminal procedure the Office of the Prosecutor or whomever of the parties understand that the examining judge does not have competence to act in the case can file a claim to the higher court to whom it concerns, which, prior to the reports that it considers necessary, resolves entirely and without ultimate recourse' [unofficial translation]. See article 23 of the Law on Criminal Procedure, Gaceta nº 260, 17 September 1882 to Gaceta nº 283, 10 October 1882.

⁸³ See Audiencia Nacional, Criminal Chamber, Plenary Decision on 2 December 2008, Legal Reasoning VX.

⁸⁴ Organic Law 6/1985 on the Judicial Power, 1 July 1985, B.O.E. no. 157, 2 July 1985.

moment, the majority of his arguments had not been designed to challenge the competence of the AN as such, but rather to defend the extinction of possible criminal responsibility.⁸⁵

However, almost two days after the UN Human Rights Committee had communicated its position on the legality of the Amnesty Law of 1977 recommending a few concrete measures to be adopted by Spain in response to the human rights violations that had been committed during the Spanish Civil War,⁸⁶ the Central Court of Instruction no. 5—which judge Pedraz was now in charge of as Garzón was on medical leave—dictated a new Decision in which it ordered some new petitions related to exhumations.⁸⁷ The National Prosecutor did not react to this latter decision with evident opposition. Indeed, he had not reacted against any of the previous decisions related to exhumations that had been taken prior to the one on 16 October.⁸⁸ And, perhaps along the same lines he wished to affirm in his motion of appeal on 20 October on the basis of a very particular and generous interpretation of the Historic Memory Law that, in the localization, identification and exhumation of the remains of those who had been assassinated and executed during this black period of Spanish recent history, the victims could count on the unconditional collaboration of the National Prosecutor⁸⁹

⁸⁵ Audiencia Nacional, Criminal Chamber, Plenary Decision on 2 December 2008: Dissenting opinion (de Prada Solaesa, Bayarrui García y Sáez Valcárcel), *doc. cit.*, paragraph III.1.2.

⁸⁶ UN Human Rights Committee, Considerations of Reports Submitted by States Parties under Article 40 of the Covenant. Concluding Observations: Spain (CCPR/C/ESP/CO/5), 27 October 2008, paragraph 9.

⁸⁷ Among them, in Cáceres, Granada, Valencia (in the public cemetery), and in cemeteries in Mallorca (Porreres and Calviá), cemetery of Aguilar de la Frontera in Córdoba, and in the Valle de los Caídos.

⁸⁸ This fact is mentioned by the Chief prosecutor in his appeal transmitted on 20 October 2008: ‘These measures of localization, identification, exhumation and removal of remains of disappeared can also be agreed in the criminal procedure by the examining judge on the basis of articles 13, 326ff and 334ff of the Law on Criminal Procedure and one must leave on explicit record that the Office of the Prosecutor has never opposed its adoption in a jurisdictional setting, reason for which it did not consider it appropriate the interposition and formalization of any appeal against the providences of 28 August and 25 September’. See Audiencia Nacional, Chief Prosecutor, Motion of Appeal, *doc. cit.*, p. 7.

⁸⁹ Audiencia Nacional, Chief Prosecutor, Motion of Appeal, *doc. cit.*, p. 7.

Only day after another authorization related, in this case, to the exhumation of the remains of eight persons who had been buried in the *Valle de los Caídos* without the knowledge or consent by their families,⁹⁰ the Chief Prosecutor presented (on 7 November) an unexpected document requesting the Criminal Chamber of the AN⁹¹ to order the judge in the Central Court of Instruction no. 5 to limit himself to basic formalities without causing irreversible damages to third persons which would be very difficult to repair.⁹²

At this point, it must be noted that even if there is no doubt that the Decision on 16 October 2008 addresses a range of complex questions and the diversity of opinions seems fully legitimate, it is surprising that the Chief Prosecutor discussed and objected to each and every argument that had been set forth by judge Garzón, and even resorting to startling arguments -i.e. about the Amnesty Law⁹³, relying upon an partially contradictory and hitherto unprecedented procedural mechanism with respect to form and substance. In fact, some judges of the AN-Prada Solaesa, Bayarrui García and Sáez Valcárcel- mean that the resort to this procedural mechanism amounts to an abuse of the law that has no legal support.⁹⁴ Furthermore, in the view of the same judges, some fundamental points of the decision of the Prosecutor on 2 December were taken without the knowledge of the parties to the procedure which represented the victims; a fact that may well mean that he had the intention to simply put an end to the process.⁹⁵

⁹⁰ Valerico Canales, Celestino Puebla, Emilio Caro, Flora Labajos, Pedro Ángel Sanz, Román González and Víctor Blázquez, members of Casa del Pueblo de Pajares de Adaja (Ávila), and Fidel Canales, who was buried in the cemetery of Griñón (Madrid) until 30 December 1968 when his remains were brought to Valle de los Caídos.

⁹¹ Extension transmitted on 7 November 2008 of the brief transmitted on 21 October 2008.

⁹² *Ibid.*, paragraph 4.

⁹³ See section 5.

⁹⁴ Dissenting opinion: Magistrates de Prada Solaesa, Bayarrui García and Sáez Valcárcel, Decision on 2 December 2008, *doc. cit.*, para. III.1.1.

⁹⁵ *Ibid.*, para. III, III.3 and V.2.

That being said, the same 7 November the Criminal Chamber of the AN held a surprising “emergency meeting” and adopted a Decision affirming the request of the Prosecutor.⁹⁶ In particular, the Chamber stressed that the activities related to exhumations had to be suspended until the question about the incompetence of the Central Court of Instruction no 5 had been resolved.⁹⁷ The five judges of the Criminal Chamber who voted against this decision (Magistrates Palacios Criado, Fernández Prado, Barreiro Avellaneda, Martínez Lázaro and Sáez Valcárcel) stressed that it had been taken without any prior hearing of the parties and in the absence of any appeal.⁹⁸ The decision on 7 November generated several new actions, among them, one on 10 November by the legal representatives of Carmen Negrín Fetter, Juan Negrín’s grand-child, which was declared inadmissible by the Criminal Chamber in Plenary Session on 1 December,⁹⁹ and one on 17 November, which amounted to a lawsuit to the Supreme Court for breach of official duty against the ten judges of the Criminal Chamber of the AN who had voted in favour of the decision on 7 November.¹⁰⁰

However, the intensity of judicial activity did not end at this point. Instead, on 18 November, the Magistrate Garzon published a new and extensive Decision,¹⁰¹ affirming the extinction of criminal responsibility because of the death of the persons who had been listed in the decision on 16 October¹⁰² as possibly responsible for the crimes against the High Organs of the Nation and the Form of Government as well as the crimes of illegal detention/enforced disappearances,

⁹⁶ Audiencia Nacional, Trial Court no. 5, case Procedimiento Ordinario 53/08: Question of incompetence (expediente) no 34/08, decision on 7 November 2008, Audiencia Nacional, Criminal Chamber, Plenary Session.

⁹⁷ *Ibid.*, dictum, paragraph 2.

⁹⁸ Audiencia Nacional, Criminal Chamber, Decision on 7 November 2008, Dissenting opinion (Magistrados Palacios Criado, Fernández Prado, Barreiro Avellaneda, Martínez Lázaro and Sáez Valcárcel), *doc. cit.*, paragraph 4.

⁹⁹ Audiencia Nacional, 1 December 2008 (34/2008): Cuestión de competencia del artículo 23 LECR.

¹⁰⁰ This complaint is extended on 27 November.

¹⁰¹ Decision on 18 November 2008, *doc. cit.*

¹⁰² See note 67.

amounting to crimes against humanity. In this manner, the case was inhibited in favour of the courts in the localities where the graves had been identified,¹⁰³ (these localities were enumerated in a decision on 24 November),¹⁰⁴ and where such graves would be identified in the future.¹⁰⁵ In reality, however, far from simply inhibiting the case and sending it to these courts, the Magistrate reaffirmed his basic position providing more solid foundations, responded to each and every argument that had been set forth by the Prosecutor in his appeals¹⁰⁶, and extending them so as to include new sinister facts, in particular, those related to the ‘Children lost by Francoism’. Indeed, the magistrate affirms that documents and studies revealed that, in Spain, “a system of disappearances of underage children of republican mothers,” who were dead, imprisoned, executed or simply disappeared, took place under the cover of an apparent legality during various years between 1937 and 1950. For the magistrate, the Judicial Power has the obligation to investigate the criminal scope of these facts, “because of their permanent character and

¹⁰³ That is, in Coruña, Asturias, Badajoz, Burgos, Castellón, Córdoba, Granada, Huelva Huesca, León, Lugo, Madrid, Navarra, Palencia, Pontevedra, Salamanca, Soria, Toledo, Zamora and Zaragoza. In favour of the *Juzgados de Instrucción Decanos* in Barcelona, Burgos, Valencia, Vizcaya, Madrid, Málaga and Zaragoza. *Ibid.*, Dictum, paragraph 2.

¹⁰⁴ Audiencia Nacional, Trial Court no. 5, 24 November 2008 Summary Proceeding (Proc. Ordinario) 000053/2008 E: ...At this time there are petitions of exhumations of bodies in the following locations, where common graves have been found, or knowledge about the existence of remains of persons referred to in this investigation: Aranga (A Coruña); San Martín del Rey Aurelio (Asturias); Finca “La Crespa” and Santa Amalia (Badajoz); Montes Rasneros (Castellón); Córdoba; Las Gabias, Viznar and Alfacar (Granada); La Palma del Condado, Niebla y Bonares and Calañas (Huelva); Artieda (Huesca); Portomarin and Mondoñedo (Lugo); Parrillas (Toledo); Adrada de Haza, Milagos, San Juan del Monte and Valdenoceda (Burgos); La Robla, Ponferrada, Balboa, Dehesas, Camponaraya, Magaz de Abajo, Tejado del Sil, Lago de Carucedo, Brañuelas, Frieria, Rodanillo, San Juan de la Mata, Otero, Sobrado, Algadefes, Fuentes Nuevas, Vilasumil, Toreno, Santa Lucía de Gordón, Busdongo, La Collada de Carmenes, Villaceid, Quintanilla de Combarros, Pombriego, Santalla, Fresnedo, San Pedro Mallo and Toral de Merayo (León); La Serena (Madrid); Valle de los Caídos (San Lorenzo del Escorial); Fuerte San Cristóbal (Navarra); Ventosa de Pisuerga y Villamedina (Palencia); Baiona-O Rosal, Porriño y San Andrés de Xeve (Pontevedra); Robleda (Salamanca); Berlanga de Duero (Soria); Maire de Castroponce and Santa Marta de Tera (Zamora); Calatayud (Zaragoza); Porreres and Calvià (Mallorca). In favour of the trial courts in the locations to which these places pertain and where the identified graves have been found: Coruña, Alicante, Asturias, Badajoz, Burgos, Castellón, Córdoba, Granada, Huelva Huesca, León, Lugo, Madrid, Navarra, Palencia, Pontevedra, Salamanca, Soria, Toledo, Valencia, Zamora and Zaragoza; as well as in favour of the superior trial courts in Barcelona, Burgos, Valencia, Vizcaya, Madrid, Málaga, Manacor, Palma and Zaragoza (operative part, paragraph 2).

¹⁰⁵ *Ibid.*, operative part (III).

¹⁰⁶ *Ibid.*, pp. 18, 36-39, 44, 74, 78, 79, 81-83, 85, 91, 92, 95-97, and esp., pp. 118-139.

contextualization as crimes against humanity,” which “are neither affected by statutory limitations nor amnestied.”¹⁰⁷

It is important to point out that the impressive degree of social and media interest given to the new fact related to the Lost Children must be contrasted with the absolute silence of the Criminal Chamber of the AN¹⁰⁸.

Finally, in the same decision, the Central Court of Instruction no. 5 resolved to end the function of the “Expert Group”, whose members had only had the time to meet on a few occasions, and to inform the Ministry of Justice about its existence and that it was creating a database, including all information and documents which might be made compatible with the activities of this Ministry related to the implementation of the Historic Memory Law.¹⁰⁹

Despite the Decision on 18 November, on 2 December 2008 the Criminal Chamber in plenary session came to consider the appeal of the Prosecutor related to article 23 of the Law on Criminal Procedure and decided that the Central Court of Instruction no. 5 lacked objective competence to investigate the alleged crimes in the case and, thus, left without effect all the judicial decisions that had been adopted by that court since 18 October. The Criminal Chamber upheld that other judicial organs may be competent in the case, but without making clear which organs those would be.¹¹⁰ But it should be noted that not all the judges in the Criminal Chamber agreed with this judgment. Three judges presented an extensive dissenting opinion in which conclusion they express their conviction that closing the process “without indicating the scope of competence of another judicial organ,” affected “the right to access justice and the right to an effective judicial remedy or the rights of those who are the victims and their associations, among them, the right to an adequate investigation.” The dissenting judges also spoke of denial of

¹⁰⁷ Decision on 18 November 2008, *doc. cit.*, pp. 73-74. See also Decision on 18 November 2008, *doc. cit.*, pp. 6-10, 50-75.

¹⁰⁸ See *infra*.

¹⁰⁹ Decision on 18 November 2008, *doc. cit.*, Operative paragraph VI.

¹¹⁰ *Ibid.*, pp. 11-12.

justice, the eventual international responsibility of the Spanish State, and the obligations of the Spanish judiciary to respect international human rights law.¹¹¹

Similarly, on 16 December 2009, various associations that assisted in the case presented a motion of appeal, which was united with diverse motions of complaint, expedients to annul actions, as well as recusals. Petitions have also been presented to the Supreme Court and the Constitutional Court. Finally, on 2 July 2010, a petition was transmitted to the European Court of Human Rights.¹¹²

To conclude, the twelve pages of the decision on 2 December, in which the Criminal Chamber of the AN declares all the positive judicial actions that had been taken up till that point to be without effect, lead us to a relatively simple conclusion. Indeed, after more than seventy years since the Civil War begun, more than thirty years since the formal initiation of the Spanish political transition, and after ninety days of frenetic judicial activity that has been under consideration in this chapter, the only thing that has been finally clarified by Spanish judicial organs is that the *Coup d'Etat* in July 1936 was a crime of rebellion, but that the *Audiencia Nacional* is not competent to investigate the (connecting) international crimes that were (or may) have been committed during the Civil War and the dictatorship that followed. Who is thus the competent organ? Nowhere has this question been clarified or indicated.

5. The Most Recent Developments: From the Legal Debate to the Accusation of Judge Garzón for breach of duty

From what has been said, it is clear that the jurisdictional situation in Spain seemed to be condemned to a panorama in which the final response to the immense majority of the questions related to the merits which arose between Magistrate Garzón and the Chief Prosecutor of the

¹¹¹ Dissenting Opinion (de Prada Solaesa, Bayarrui García and Sáez Valcárcel). Decision on 2 December 2008, *doc. cit.*, pp. 16-17.

¹¹² The text of the complaint. Available at: [HTTP://www.elclarin.cl/images/pdf/20100702demandadecarmennegrinpdf.pdf](http://www.elclarin.cl/images/pdf/20100702demandadecarmennegrinpdf.pdf)>

Audiencia, would be postponed for a long time. And all of this, in a scenario in which, considering the judicial decisions commented upon, it was difficult to conclude, already from the outset, what are the competent jurisdictional organs in Spain to investigate the crimes committed during the Civil War and Francoism; evidently, not a reassuring situation. Nevertheless, especially since May 2009, the issue took a new turn, which has placed us in front of a radically different territory. This new event was nothing less than the accusation of judge Garzón for having breached official duties. This accusation had originated from the complaints that had been set forth by the so-called labour union *Manos Limpias* on 26 January 2009, the Organization of Liberty and Identity on 9 March, and the ultra-Right wing party *Falange Española de las JONS* on 20 July the same year.¹¹³ All these organizations had accused judge Garzón for having committed the crime of breach of official duty as a result of his decision to investigate in the case in focus.

Nevertheless, before entering into the analysis of this question, it is pertinent to at least point out that in the last days of 2008, I wrote that even if one have followed the path of resorting to the different territorial courts (which had been done prior to turn to the AN), there was no guarantee that these courts would give a uniform interpretation of the norms at stake, an argument in line with what judge Garzón had indicated in his decision and consistent with the position defended by the Chief Prosecutor of the AN.¹¹⁴ Indeed, we did not have to wait for long until it became evident that these courts would interpret the norms at stake in vastly different ways. Thus, while courts declared the case inadmissible and invoked the Amnesty Law, statutory limitations, or the Historic Memory Law, and sometimes all the three at the same time,¹¹⁵ others supported the points made by the Magistrate Garzón, and simply sent back the complaints to the AN in the

¹¹³ The complete text of the three complaints are available at: <http://www.crimenesinternacionales-franquismo-casogarzon.es/p/documentos-legales.html>.

¹¹⁴ J. Chinchón Álvarez, 'Del Auto de 16 de octubre a la decisión del Pleno de la Sala de lo Penal de 2 de diciembre de 2008', en *La Ley: Revista Jurídica Española de Doctrina, Jurisprudencia y Bibliografía*, vol. 1 (2009), pp. 1421. See also Decision on 26 December 2008, *doc. cit.*

¹¹⁵ See Trial Court no. 2 of Aranda de Duero, Decision on 8 February 2010, Preliminary Matters no. 304/09.

light of their consideration that it was still the competent organ, in spite of everything.¹¹⁶ It is a regrettable development and reveals the way in which the complaints concerning the crimes of the past had given rise to ‘a total chaos of responses from whatever instances in the Spanish judicial system’.¹¹⁷

In the end, it seemed to be the Supreme Court that would have to clarify the question as to which judicial organ was competent to investigate the crimes under consideration and this is what was put forward in the case of *Cuestión de Competencia* (a question of competence).¹¹⁸ However, the High Tribunal decided something rather different. Having admitted the complaints presented against judge Garzón, it did not reject his suspension,¹¹⁹ the Supreme Court agreed to suspend the question about competence until the pending case against Garzón for breach of official duty had been settled.¹²⁰ It thus subjected, in the end and surprisingly, a decision concerning competence to what was a criminal case.

Then, what had started out as an initiative to request the AN to investigate the crimes during the Civil War and Francoism before the AN had converted itself into a surprising debate as to whether the actions of judge Garzón had been criminal or not. The words of Luciano Varela Castro, instructing judge of the Supreme Court, are especially telling. He concludes in his decision on 3 February 2010 that the actions of Garzón indicated:

‘...as probable fact, that the accused magistrate acted with the objective to evade the decision of the legislator concerning the regime to localize and exhume the victims of the

¹¹⁶ See decision of Trial Court no. 3 of Granada, Preliminary Matters, no. 3209/2009, 28 May 2009 and decision of Court of First Instance and Trial no. 2 of San Lorenzo de El Escorial, Preliminary Matters no. 427/2009, 2 July 2009.

¹¹⁷ See ‘Contra el ataque a la independencia de un juez, a favor del proceso contra el Franquismo, y a favor de la investigación de todos los crímenes de lesa humanidad’, available at: <http://dimemarchena.blogspot.com/2009/09/manifiesto-contra-el-ataque-al-juez.html>.

¹¹⁸ Court (Question of Competence 6/20380/2009 and accumulated case 6/20431/2009).

¹¹⁹ Supreme Court, Decision on 3 February 2010 (Special Cause N°. 20048/2009).

¹²⁰ Providence of the Supreme Court, Question of Competence 6/20380/2009 (accumulated cases 6/20431/2009), 26 March 2010.

horrendous crimes of Francoism, constructed as an apparent object of the proceeding, knowing that these had been object of amnesty by the democratic Parliament in Spain, whose will he deliberately decided to ignore or pass around. Such fact can constitute the crime of breach of official duty in article 446.3 of the Penal Code.¹²¹

The characterization of the actions of Garzón as constituting a breach of official duty has been highly criticized¹²² as amounting to procedural operations that should not be allowed.¹²³ The arguments set forth by the Supreme Court in defence of this move are notably deficient.¹²⁴ Especially remarkable are the lines of attack invoked by the instructing judge with respect to Garzón's reliance upon international law.¹²⁵ In fact, as we wrote in other place, the proceedings before the Supreme Court seem to attest the maxim: 'Everything for the law, but without international law'.¹²⁶

All these developments leave the big questions concerning the viability to investigate the crimes of the Civil War and Francoism in a regrettable limbo. Moreover, it must be emphasized that

¹²¹ Supreme Court, judgment on 3 February 2010 (Special Cause no. 20048/2009), p. 54.

¹²² See e.g. A. Manjón-Cabeza, 'Prevaricación e interpretación judicial. (A propósito del Auto del Tribunal Supremo, de 3 de febrero de 2010, por el que se deniega el sobreseimiento pedido por el Juez Baltasar Garzón en la causa de la "Guerra Civil")', *Diario la Ley*, año XXXI, no 7367 (2010).

¹²³ See e.g. V. Gimeno Sendra, 'Posibilidad de subsanación de determinados requisitos del escrito de acusación. Comentario al ATS de 28 de julio de 2010', *Diario la Ley*, año XXXI, no 7497, (2010).

¹²⁴ J. Chinchón Álvarez and L. Vicente Márquez, 'La investigación de los crímenes cometidos en la Guerra Civil y el franquismo como delito de prevaricación. Análisis crítico del Auto del Tribunal Supremo de 3 de febrero de 2010 desde la perspectiva del Derecho internacional', *Revista Electrónica de Estudios Internacionales*, no. 19 (2010).

¹²⁵ To be sure, it does not give rise to such extremes as shown by this statement by the Provincial Court of Palma de Mallorca when, in the view of relevant Spanish legislation, affirmed that 'there is no room to consider the incorporation of other rules with an international character, as the existence of a criminal law of this nature cannot at the moment be a desideratum'. See Provincial Court, 2nd Section, Palma de Mallorca, Decision on 25 February 2010, p. 2.

¹²⁶ See J. Chinchón Álvarez and L. Vicente Márquez, 'A propósito de los argumentos esgrimidos en la causa contra Baltasar Garzón. Todo por el Derecho, pero sin el Derecho internacional', *Diario Rebelión*, 23 April 2010, available at: <http://www.rebelion.org/noticia.php?id=104580>.

the position of the Supreme Court (and that of the Chief Prosecutor of the AN)¹²⁷ have influenced, directly or indirectly, some decisions by other courts.¹²⁸ Indeed, all of them have united in the claim which has been restated by the Central Court of Instruction no. 2 of Talavera de la Reina: ‘that there is no legal obligation to open a criminal investigation’,¹²⁹ with the effect that the crimes in question ‘will end up unpunished as a result of applying the Law of Amnesty of 46/1977 of 15 October’.¹³⁰

In my view, quite regardless of the Historic Memory Law, it is not correct that the decision to open a criminal investigation in relation to the crimes under consideration would have as ‘objective to evade the decision of the legislator’; quite the contrary¹³¹. Moreover, it is well-known that there is a wealth of international jurisprudence in support of the claim that the effective remedy to be made available in the event of grave human rights violations must be essentially judicial in character.¹³² And at this point, it is important to recall that in respect to enforced disappearances, as the Inter-American Court of Human Rights upholds:

The duty to investigate facts of this type continues as long as there is uncertainty about the fate of the person who has disappeared. Even in the hypothetical case that those individually responsible for crimes of this type cannot be legally punished under certain circumstances, the State is obligated to use the means at its disposal to inform the

¹²⁷ See, e.g. Trial Court no 10 of Palma de Mallorca, Decision on 14 October 2009 (Diligencias previas proc. Abreviado 0001169/2009), p. 2.

¹²⁸ For an explicit reception of this stance, see e.g. Provincial Court, 15th section, Madrid, Decision on 8 February 2010, p. 4.

¹²⁹ Trial Court no. 2 of Talavera de la Reina, Decision on 8 February 2007, Undetermined Matters 22/05, pp. 1-2.

¹³⁰ Provincial Court of Burgos, Decision on 18 July 2010, p. 3, reaffirming the position laid down in the decision by the Trial Court no. 2 of Aranda de Duero, Preliminary Matters, no 304/09 of 8 February 2010.

¹³¹ See art 4.1 y and Additional Disposition 2 of the Historic Memory Law.

¹³² See i.e. UN Human Rights Committee, *Caso Nydia Erika Bautista* (Colombia), CCPR/C/55/D/563/1993, 13 November 1995, par. 8.2. See also ECHR, *Aksoy v. Turkey*, judgment of 18 December 1996 (clarifying the notion of effective recourse as including the availability of relevant and effective investigations towards the identification and punishment of those responsible).

relatives of the fate of the victims and, if they have been killed, the location of their remains.¹³³

From an international legal perspective, the arguments set forth by the Supreme Court in relation to the Amnesty Law of 1977 are questionable and, at times, even unsustainable. In any case, these arguments are insufficient if one wishes to take them as evidence of a behaviour classified as a breach of judicial duty.. The argument that can be considered crucial –set also by the Chief Prosecutor of the AN¹³⁴- relates to the democratic character of this Law. In spite of the fact that there is no support in international law for the claim that the international legality of a measure in response to grave crime depends on whether it has been adopted by a democratic parliament or not. Rather, what ultimately matters is whether the content of that measure is contradictory with international legal obligations. A different conclusion would imply the denial of the existence of international law and contradict relevant jurisprudence that denies in absolute terms such line of reasoning. To quote only one example, the recent judgment of the Inter-American Court of Human Rights in the case of *Gomes Lund et al*, which also has a complete summary of the international and national practice attesting to the illegality of such laws.¹³⁵

¹³³ Inter-American Court of Human Rights, Case of *Godínez Cruz v. Honduras*, judgment on 20 January 1989, Series C no. 5, para. 191.

¹³⁴ ‘It must not be forgotten, finally, by those who question the validity of the Amnesty Law by equating it with the laws of ‘Final Stop’ and ‘Due Obedience’, promulgated in the Republic of Argentina in 1986 and 1987 during the Government of ‘Alfonsín’, or with other norms of similar nature adopted in other countries, such as Chile or Peru, clearly illegal in the judgment of the Inter-American Court of Human Rights—which while the latter can be qualified openly as “laws of impunity”, as they were dictated—and to a significant extent imposed with the threat of a military coup—with the end of avoiding the criminal prosecution for the very grave crimes perpetrated by the State apparatus, during the military dictatorship in the period 1976-1983, and demand responsibility from its participants, the law of Amnesty was, during the entire process of its coming into being and approval, an act of democratic political forces, widely supported by Spanish society, and approved by the Parliament that was created by the first democratic elections held on 15 June 1977, the same parliamentary chambers that drafted and approved the Constitution in 1978. It would therefore be an absolute judicial mistake to question the legitimacy of the origin of this norm and, what is worse, attribute it with the stigma of being a ‘law of impunity’. See Motion of Appeal by the Chief-Prosecutor of the Audiencia Nacional on 20 October 2008, p. 34.

¹³⁵ Case of *Gomes-Lund (“Guerrilha do Araguaí”) et al v. Brasil. Preliminary Objections, Merits, Reparations, and Costs*, Inter-American Court of Human Rights, judgment on 24 November 2010, Series C. No. 219, paras. 148-169.

Another line of argumentation relates to article 6.5 of the Second Protocol to the Geneva Conventions and is construed on the basis of a very questionable literal interpretation of that provision as it is directly opposed to the common understanding interpretation given to this provision, i.e. by the International Committee of the Red Cross¹³⁶. Namely, that it is not possible to extract from it that it is lawful that some war criminals—or other persons responsible for crimes against humanity—would evade criminal sanction. Finally, even though the decisions of the Supreme Court do not deny that articles 2e) and f) of the Amnesty Law of 1977 could be or are with difficulty compatible with article 2.3.a) of the International Covenant on Civil and Political Rights,¹³⁷ it maintains that this Covenant is inapplicable in spite of the fact that it was binding for Spain prior to the adoption of the Amnesty Law. In doing so, one equates in an automatic manner the lack of competence of the UN Human Rights Committee to admit an individual petition with the question concerning the compatibility between a law that favours impunity (the amnesty) and international law. However, this bold conclusion is debatable and does not even reflect the unanimous position of the Human Rights Committee itself or the position of international human rights courts for that matter, such as the Inter-American Court of Human Rights,¹³⁸ and partly the European Court of Human Rights.¹³⁹

Furthermore, it must be noted that the Supreme Court does not fully address the deeply controversial and debatable question as to when the crimes against humanity gained their full relevance in the ambit of criminal responsibility and at what point the international rule of non-statutory limitations was recognized. Neither did it address the possible relevance of its judgment in the *Scilingo* case. This disregard did not impede it from extensively considering the claim that the crimes under consideration have passed the temporal limits imposed on criminal

¹³⁶ See J.M. Henckaerts, L. Dowald-Beck, et al., **Customary International Humanitarian Law**, Cambridge University Press, Nueva York, 2005

¹³⁷ UN Covenant on Civil and Political Rights (adopted on 16 December 1966), published in *Boletín del Estado* on 30 April 1977. The Covenant entered into force in Spain on 27 July 1977.

¹³⁸ *Gomes Lund y otros (“Guerrilha do Araguaí”) vs. Brasil*, doc. cit.

¹³⁹ *Vardana and others v. Turkey (GC)*, doc. cit.

investigation and prosecution. An even more significant element of the judgment is the way in which it brings into surface the resistance against any considering of the continuous character of the crime of enforced disappearances, even though this character has been universally recognized, also in the most recent jurisprudence of the European Court of Human Rights.¹⁴⁰

6. Concluding Remarks

In the light of what has been told in this chapter, it may be concluded that the position of the majority of Spanish judicial organs has been to defend, among the many possible legal interpretations, that ‘there exists no legal obligation to open a criminal investigation’¹⁴¹ in relation to the crimes that took place during the Civil War and Francoism. Indeed, the majority of the Spanish Courts have discarded all possibilities to search for a path that would have made such an investigation viable, as was proposed and demanded, i.e. by Judge Amaya Olivas in 2008,¹⁴² and, more recently, by Magistrates Martín Pallín,¹⁴³ and Professor Paredes Castañón.¹⁴⁴

Given this, we may return to our starting point and quote again Professor Sánchez Legido, not only to remind its main idea but also to add another important line:

It is not strange, in this context, that the then chancellor Insulza, on the occasion of Pinochet’s detention, questioned the legitimacy of our country to do, with respect to what happens abroad, what we have not been capable of doing here (...). The objection is, without any doubt, irrefutable (...) The question, however, is whether the necessary

¹⁴⁰ *Vardana and others v. Turkey (GC)*, *doc. cit.*

¹⁴¹ Trial court no 2. Talavera de la Reina. Decision on 9 February 2007.

¹⁴² A. Olivas Díaz, ‘La intervención del juez de instrucción en las diligencias de investigación seguidas por desapariciones forzadas en la dictadura franquista’, *Jueces para la Democracia*, no. 63 (2008), pp. 86-102.

¹⁴³ J. A. Martín Pallín, ‘¿Es posible iniciar un proceso penal contra una persona fallecida?’, *Diario La Ley* (in printing) (document on file with the autor of this chapter).

¹⁴⁴ J. M. Paredes Castañón, ‘Soluciones, haberlas, haylas: Acerca de garantismos falsos y de desconsideraciones verdaderas hacia el Derecho internacional de los derechos humanos’, 12 May 2010, available at: <http://www.crimenesinternacionales-franquismo-casogarzon.es/>

resolution of the contradiction must not, instead of fostering measures that in the end favour the survival of impunity abroad, aim at the removal of the obstacles upon which that impunity is sustained at home.’¹⁴⁵

Because, it must not be forgotten that the families of the direct victims of enforced disappearances and crimes against humanity who presented the complaints to the AN about four years ago are still waiting for a reply to their legitimate demands. They have not had “their moment”¹⁴⁶ yet. All of them seem to be eternally subjected to that ancient military Japanese precept, *ikasazu, korasazu*: ‘You do not let them live, you do not let them die’.

¹⁴⁵ A. Sánchez Legido, “Diez años de...”, *op. cit.*, p. 319.

¹⁴⁶ M. Capellà I Roig, ‘Las “desapariciones forzadas” en España durante la guerra civil y el franquismo: violaciones y crímenes de derecho internacional sin reparación ni castigo’, in: J. Soroeta Licerias (ed.), *Conflictos y protección de derechos humanos en el orden internacional*. Cursos de Derechos Humanos de Donostia-San Sebastián, vol. VI, 2006, p. 302.