

**BALANCING JUSTICE AND PEACE: A HISTORICAL AND
HYPOTHETICAL EXPLORATION OF JUSTICE DURING
SPAIN’S POST-FRANCO TRANSITION FROM
DICTATORSHIP TO DEMOCRACY**

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ABSTRACT

This analysis endeavors to explore how Spain should have dealt with massive, systematic human rights violations committed during the Francoist era; a difficult, normative question to answer, but one worthy of examination. This Comment will discuss the human rights violations committed by the Franco regime during the Spanish Civil War (1936–1939) and the Franco dictatorship (1939–1975), and the subsequent Spanish legislative and judicial actions that addressed those violations. It will then introduce various hypothetical scenarios, imagining alternative historical events in Spain and how Spain might have dealt differently with the Franco regime’s human rights violations in each. Finally, this Comment will conclude that—considering history as it actually unfolded—Spain’s actual legislative and judicial actions regarding those violations were adequate, and enabled a peaceful and successful transition from dictatorship to democracy.

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I. INTRODUCTION

How Spain should have dealt with massive, systematic human rights violations committed by the Franco regime is a difficult, normative question to answer, but one worthy of examination. On July 22, 2014, Pablo de Greiff, the United Nations (U.N.) Special Rapporteur on the promotion of truth, justice, reparation, and guarantees of non-recurrence, issued a report on behalf of the U.N. Human Rights Council assessing Spanish authorities' handling of the human rights violations committed by the Franco regime during the Spanish Civil War and the Franco dictatorship.¹ The report criticized Spanish authorities for the lack of investigation and prosecution.² Other U.N. bodies have provided similar opinions.³

This Comment will argue that—considering history as it unfolded—post-Franco Spain's legislative and judicial actions in response to the Franco regime's human rights violations committed during the Spanish Civil War and Franco dictatorship were adequate and enabled a peaceful and successful transition from dictatorship to democracy.

First, this Comment will discuss the Franco regime's human rights violations committed during the Spanish Civil War and under the Franco dictatorship.⁴ Then, it will note Spanish legislative and judicial actions addressing the Franco regime's human rights violations. Finally, it will present three hypothetical scenarios envisioning a change in historical events that led to Spain's transition to democracy, and speculate how Spain might have dealt with the Franco regime's human rights violations in those hypothetical contexts. The hypothetical contexts discussed are: (1) Franco retired as a dictator in 1975; (2) Franco died as dictator in 1955 at the height of his regime's human rights violations; and (3) Franco was defeated during the Spanish Civil War in 1939.

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1. Pablo de Greiff (Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence), *Mission to Spain*, U.N. Doc. A/HRC/27/56/Add.1 (July 22, 2014).

2. *See id.* at 15 (criticizing the lack of investigation).

3. *See, e.g.*, Human Rights Comm., Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations of the Human Rights Comm., U.N. Doc. CCPR/C/ESP/CO/5 (2009); Comm. Against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Concluding Observations of the Committee Against Torture, U.N. Doc. CAT/C/ESP/CO/5 (2009).

4. *See generally* Madeleine Davis, *Is Spain Recovering Its Memory? Breaking the "Pacto del Olvido"*, 27 HUM. RTS. Q. 858, 860 (2005) (providing general description of the atrocities during the Spanish Civil War and subsequent Franco dictatorship).

II. BACKGROUND ON FRANCOIST SPAIN

A. *Human Rights Violations Committed by Franco's Regime during the Spanish Civil War and the Franco Dictatorship*

According to Madeleine Davis,⁵ “[i]t is difficult to establish with precision the number of people killed, exiled, imprisoned, or tortured during or as a result of the civil war (1936–1939) or of Franco’s dictatorship (1939–1975).”⁶ Paul Preston⁷ estimates at least 300,000 people were killed in the Spanish Civil War, although it is not clear how many deaths were the result of combat and how many were the result of atrocities committed against civilians.⁸

Even after the Spanish Civil War concluded with Franco as victor, Franco’s intentional and systematic retaliation against the defeated Republicans continued during his regime,⁹ and approximately 440,000 Republicans went into exile.¹⁰ Mass trials and executions of Republicans by tribunals providing minimal due process were common after the war.¹¹ Indeed, Franco was known to sign piles of death warrants after lunch.¹² About 400,000 people were committed to prisons, labor camps, or mobile forced labor battalions¹³ working on projects such as a colossal monument to Franco’s triumph in the Valley of the Fallen north of Madrid.¹⁴ In proportion to its population, Spain rivaled Nazi Germany in terms of political prisoners.¹⁵ Guards in administrative detention centers tortured prisoners and sexually abused female inmates.¹⁶ Franco’s psychiatrist, Dr. Antonio Vallejo-Nájera, performed psychiatric experiments on prisoners.¹⁷ Dr. Vallejo-Nájera conducted these experiments to prove a causal relationship between mental illness or low intelligence and support of democratic or left-wing ideology.¹⁸ The results

5. Madeleine Davis, M.A., Ph.D., is a Lecturer in Politics at Queen Mary University of London and Associate Fellow of the Institute for the Study of the Americas, University of London. Davis, *supra* note 4, at 858.

6. *Id.* at 860.

7. Paul Preston is a Professor of Contemporary Spanish Studies at the London School of Economics and Political Science. *Professor Paul Preston*, EUR. INST., <http://www.lse.ac.uk/europeanInstitute/staff/academicStaff/preston/home.aspx> (last visited Sept. 27, 2017).

8. Davis, *supra* note 4, at 860 (citing PAUL PRESTON, *THE POLITICS OF REVENGE: FASCISM AND THE MILITARY IN TWENTIETH-CENTURY SPAIN* 41–42 (1990)).

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. Peter Burbidge, *Waking the Dead of the Spanish Civil War: Judge Baltasar Garzón and the Spanish Law of Historical Memory*, 9 J. INT’L CRIM. JUST. 753, 755 (2011).

15. EUR. PARL. ASS., *Need for International Condemnation of the Franco Regime*, 48th Sess., Doc. No. 10737, para. 60 (Mar. 2006) <http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewHTML.asp?FileID=11237&lang=EN>.

16. Burbidge, *supra* note 14, at 757.

17. *Id.*

18. See Rafael Huertas, *Spanish Psychiatry: The Second Republic, the Civil War, and the*

of Dr. Vallejo-Nájera's experiments provided the Franco regime with scientific support that its Republican opponents were mentally inferior,¹⁹ and therefore additionally deserving of harsh treatment, incarceration, execution, and separation from their families.²⁰

In order to prevent children of inmates from becoming inculcated into Marxism, Francoist authorities separated the children from their parents, and sent them to live in orphanages or with families loyal to the Franco regime.²¹ Franco's "external 'repatriation' service" even kidnapped children of Spanish exiles abroad.²² Franco loyalists and religious institutions raised thousands of children of imprisoned and murdered Republicans under new identities.²³ The idea was to "kill the seed of sedition in its origin" and "prevent the disease of Marxism."²⁴ Additionally, Francoist troops secretly abducted and murdered thousands of civilians suspected of Republican allegiance,²⁵ and political prisoner suicides were common.²⁶ Authorities often reacted to suicides by executing one of the deceased's relatives.²⁷ The Franco regime's human rights violations were commonplace up until Franco's death²⁸ as a result of Parkinson's disease in 1975.²⁹ In fact, in its final years, the Franco regime struggled to maintain control, and instances of human rights violations escalated.³⁰

For twenty years during the dictatorship, Francoist authorities carried out an official and comprehensive nationwide investigation into enforced disappearances of Franco supporters in areas controlled by the Republicans during the Spanish Civil War.³¹ The Franco regime made efforts to find, exhume, and return to their families the bodies of people killed by the Franco opposition.³² The same is not true, however, for the bodies of those people killed by the Franco regime.³³ Additionally, Francoist authorities either deliberately destroyed or hid

Aftermath, 35 INT'L J. MENTAL HEALTH 54, 58 (2006) (discussing Dr. Vallejo-Nájera's experiments).

19. *Id.*

20. *See id.* (explaining the effect that Dr. Vallejo-Nájera's research had on punishment of political prisoners).

21. *Id.*

22. Burbidge, *supra* note 14, at 757.

23. *Id.*

24. Huertas, *supra* note 18, at 58–59.

25. Davis, *supra* note 4, at 860 (citing PAUL PRESTON, *THE POLITICS OF REVENGE: FASCISM AND THE MILITARY IN TWENTIETH-CENTURY SPAIN*, 41–42 (1990)).

26. Burbidge, *supra* note 14, at 757.

27. *Id.*

28. *See* Davis, *supra* note 4, at 861 ("Although repression was most severe and widespread in the immediate post-war period and through the 1940s, instances of torture, illegal detention, and execution remained frequent right up until the end of the dictatorship . . .").

29. *Need for International Condemnation of the Franco Regime*, *supra* note 15.

30. *Id.*

31. Ursula Urdillo, *Impunity for Enforced Disappearances in Contemporary Spain: The Spanish Search for Truth*, 6 INTERDISC. J. HUM. RTS. L. 41, 45 (2011).

32. ALICIA GIL GIL, *BASES PARA LA PERSECUCIÓN PENAL DE CRÍMENES INTERNACIONALES EN ESPAÑA* 87–88 (S.L. Comares ed., 2006).

33. *Id.*

documentary evidence of Republican deaths in “closed military, church, or private archives.”³⁴ In 2008, Spain’s *Audiencia Nacional*³⁵ tentatively calculated the number of disappearances that occurred between July 17, 1936 and December 31, 1951, including children who were taken and given new names, to be between 136,062 and 152,237.³⁶ Today, many unidentified bodies remain in mass graves scattered across Spain.³⁷

B. Spain’s Post-Franco Legislative and Judicial Actions Regarding the Franco Regime’s Human Rights Violations

Franco died in November 1975 after fighting Parkinson’s disease and other illnesses for years.³⁸ King Juan Carlos I, whom Franco had carefully groomed, succeeded Franco as Spain’s new head of state.³⁹ The King, politicians, and labor groups managed to transition Spain from a dictatorship to a democratic constitutional monarchy within only three years of Franco’s death.⁴⁰

In order to facilitate a smooth post-Franco transition, both political parties in Spain agreed to the unwritten *pacto del olvido* (“Pact of Forgetting”)—a political decision that resulted in “sweeping the crimes of the Franco era under the carpet in order to consolidate democracy”⁴¹ The 1977 *Ley de Amnistía* (Amnesty Law) officially codified the intentions of the Pact of Forgetting,⁴² and prohibited investigations and prosecutions for political crimes committed during the Spanish Civil War and the Franco dictatorship.⁴³ The Amnesty Law was approved by a 93.3% majority of the votes in Parliament.⁴⁴ The adopted law opened by stating, “all politically motivated acts, whatever their result, categorized as crimes,

34. Davis, *supra* note 4, at 867.

35. The Audiencia Nacional is a high court with national jurisdiction in Spain. Its decisions are appealable to Spain’s Supreme Court. See Samantha Salsench i Linares, *Francoism Facing Justice: Enforced Disappearances Before Spanish Courts*, 11 J. INT’L CRIM. JUST. 463, 464–67 (2013) (discussing the workings of this court with regard to criminal investigations).

36. *Id.* at 465.

37. See *Map of Graves*, MINISTERIO DE JUSTICIA, http://mapadefosas.mjusticia.es/exovi_externo/CargarMapaFosas.htm (last visited Oct. 1, 2017) (providing an interactive map of mass graves in Spain).

38. *Need for International Condemnation of the Franco Regime*, *supra* note 15.

39. *Id.*

40. *Id.*

41. Maria M. Delgado, *Memory, Silence, and Democracy in Spain: Federico García Lorca, the Spanish Civil War, and the Law of Historical Memory*, 67 THEATRE J. 177, 183–84 (2015).

42. Law of Amnesty (B.O.E. 1977, 248).

43. The United Nations has issued several statements strongly opposing amnesties. See, e.g., G.A. Res. 60/147 (Dec. 16, 2005); Commission on Human Rights, Report of the independent expert to update the Set of principles to combat impunity, Diane Orentlicher. Addendum: *Updated Set of principles for the protection and promotion of human rights through action to combat impunity*, U.N. Doc. E/CN.4/2005/102/Add.1 (2005); OFFICE OF THE U.N. HIGH COMM’R FOR HUMAN RIGHTS, *RULE-OF-LAW TOOLS FOR POST-CONFLICT STATES: AMNESTIES* (2009).

44. ALICIA GIL GIL, *LA JUSTICIA DE TRANSICIÓN EN ESPAÑA. DE LA AMNISTÍA A LA MEMORIA HISTÓRICA* 49–50 (Atelier, 1st ed. 2009).

committed before December 15, 1977, are amnestied.”⁴⁵

According to Guardian correspondent Giles Tremlett, the Amnesty Law effectively “smother[ed] the past” out of “[a]n atavistic fear of the past, of not repeating the bloody confrontation of the Spanish Civil War” and to not “upset those, especially in the army, who were amongst the biggest threats to the young democracy.”⁴⁶ Tellingly, the Amnesty Law has been referred to as the “Amnesia Law.”⁴⁷ Davis believes that, while it is understandable that the “elite architects of the transition” found the Pact of Forgetting and the Amnesty Law useful, it is perplexing why the general Spanish population embraced this policy of amnesia so readily.⁴⁸ The Spanish population’s lack of demands for justice and recognition as soon as Spain secured democracy alludes to its tolerance of the amnesia policy.⁴⁹ Davis surmises that this passive accord among the elite and general population explains the durability of the Pact of Forgetting.⁵⁰

Decades after the ratification of the Amnesty Law, Emilio Silva, a Madrid journalist,⁵¹ founded the Spanish non-governmental organization *Asociación para la Recuperación de la Memoria Histórica* (Association for the Recovery of Historical Memory) in 2000 to organize exhumations of the bodies of Republican victims to confirm their fate and return the remains to their families.⁵² Silva explained the organization’s hope to achieve a modicum of justice in situations “[w]hen somebody is detained, as they detained my grandfather . . . [when] somebody is kidnapped, tortured and abandoned in a ditch with two shots in the head.”⁵³ Silva has also stated that “while there is no justice for these families [of the victims], democracy [in Spain] will remain a skeleton.”⁵⁴

The Association for the Recovery of Historical Memory applied considerable pressure to the Spanish government to support investigations into the fate of forcibly disappeared Republicans.⁵⁵ Due to the advocacy of their broader

45. B.O.E. 1977, 248. (translated from the source text: “Quedan amnistiados . . . [t]odos los actos de intencionalidad política, cualquiera que fuese su resultado, tipificados como delitos y faltas realizados con anterioridad al día quince de diciembre de mil novecientos setenta y seis.”).

46. Burbidge, *supra* note 14, at 754 (paraphrasing G. TREMLETT, *GHOSTS OF SPAIN: TRAVELS THROUGH A COUNTRY’S HIDDEN PAST* xvii (Faber & Faber eds., 2006)).

47. *Id.*

48. Davis, *supra* note 4, at 866 (“But while it is relatively easy to understand the prevalence of a will to forget among the elite architects of the transition, the extension of this impulse to civil society is more puzzling.”).

49. *Id.*

50. *Id.*

51. Francoists killed Emilio Silva’s Republican, non-combatant grandfather in 1936. *See id.* at 871 (discussing Silva’s creation of the Association for the Recovery of Historical Memory).

52. *See generally* ASOCIACIÓN PARA LA RECUPERACIÓN DE LA MEMORIA HISTÓRICA, <http://memoriahistorica.org.es/> (last visited Sept. 14, 2017).

53. Samantha Salsench i Linares, *Francoism Facing Justice*, 11 J. INT’L CRIM. JUST. 463, 468 (2013) (translating the testimony given by E. Silva).

54. Emilio Silva, *Los Huesos Silenciosos de Federico García Lorca y el Esqueleto de Nuestra Democracia*, REBELIÓN (July 12, 2009), <http://www.rebelion.org/noticia.php?id=96553> (translated from the source text: “mientras no haya justicia para tantas familias la democracia seguirá siendo todavía un esqueleto.”).

55. *See* Davis, *supra* note 4, at 858–59, 871–72 (explaining how initiatives by private

movement, on November 20, 2002—the twenty-seventh anniversary of Franco’s death⁵⁶—a resolution was passed by the national legislative body that formally condemned the military coup that led to the Spanish Civil War and acknowledged those who suffered repression under the Franco regime.⁵⁷ In September 2004, a royal decree established a commission to study the atrocities of the Spanish Civil War and Francoism, and issued a report and draft bill proposing measures to adequately recognize the victims.⁵⁸

In 2007, the Spanish government finally passed the *Ley de Memoria Histórica* (Historical Memory Law),⁵⁹ which formally condemned the Franco regime and gave rights to victims and their descendants for the first time.⁶⁰ These rights included the right to Spanish nationality for those who were forced to emigrate, as well as for their children and grandchildren; the right to reparations and personal recognition for individuals who had been sanctioned unjustly by Franco’s tribunals, criminal courts, and administrative bodies; and the right for associations and victims’ families to solicit an administrative investigation to find, exhume, and identify victims’ bodies.⁶¹ According to Davis, “historical memory” is a concept that encompasses the collection of “official records and the writing of history.”⁶² The Historical Memory Law states that “the present Law wants to contribute toward closing the open wounds among Spaniards and to give satisfaction to the citizens that suffered, directly or as relatives, the consequences of the tragedy of the Civil War or the repression of the Dictatorship.”⁶³

Peter Burbidge, Senior Lecturer at the University of Westminster, asserts that “by revealing more about the crimes of Franco and his men, [the Historical Memory Law] has perhaps underlined the injustice of their immunity from prosecution thus increasing hurt for the victims.”⁶⁴ Following ratification of the

organizations, led by Association for the Recovery of Historical Memory, compelled the Spanish government to take action).

56. See *id.* at 874 (detailing the passage of the resolution on the anniversary of Franco’s death).

57. See La Mesa Del Congreso De Los Diputados, Enmienda De Modificación (DIARIO DE SESIONES DEL CONGRESO 2002, 625).

58. See Ministerio de la Presidencia, Real Decreto 1891/2004, 16360 (B.O.E. 2004, 227).

59. See Ley de la Memoria Histórica 52/2007, 22296 (B.O.E. 2007, 310) (“[D]e 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.”).

60. *Id.*; Elizabeth Nash, *Spanish ‘Memory Law’ Reopens Deep Wounds of Franco Era*, INDEPENDENT (Oct. 9, 2007, 6:00 PM), <http://www.independent.co.uk/news/world/europe/spanish-memory-law-reopens-deep-wounds-of-franco-era-394552.html>.

61. *Id.*

62. Davis, *supra* note 4, at 866–67.

63. Ley de la Memoria Histórica, *supra* note 59 (translated from the source: “. . . la presente Ley quiere contribuir a cerrar heridas todavía abiertas en los españoles y a dar satisfacción a los ciudadanos que sufrieron, directamente o en la persona de sus familiares, las consecuencias de la tragedia de la Guerra Civil o de la represión de la Dictadura.”).

64. Burbidge, *supra* note 14, at 780.

Historical Memory Law, Spanish Judge Baltasar Garzón⁶⁵ sought to investigate and prosecute human rights violations committed by Francoists during the Spanish Civil War and the Franco dictatorship.⁶⁶ Judge Garzón initiated twenty-two investigations into purported cases of illegal detentions and forced disappearances involving over 100,000 victims.⁶⁷ However, Judge Garzón encountered five legal obstacles:⁶⁸ non-retroactivity of the applicable Spanish criminal laws; the prescription of crimes; the jurisdiction of the *Audiencia Nacional* (Spanish National Court); the difficulty of identifying those responsible; and the possible application of the Amnesty Law of 1977.⁶⁹

The Spanish Penal Code criminalized specific crimes against humanity for the first time on October 1, 2004.⁷⁰ However, the criminalization of crimes against humanity was not intended to be retroactive, as confirmed by the Supreme Court of Spain's 2007 decision in *Scilingo*.⁷¹ Adolfo Scilingo, a former Argentine naval officer,⁷² was convicted in Spain for crimes he committed in Argentina during the 1976 rule of the military junta.⁷³ The Court found Scilingo guilty of crimes against humanity for illegal detention, torture, and throwing thirty people from planes to their deaths.⁷⁴ Due to the non-retroactivity of the crimes against humanity offense in the Spanish Penal Code, the Supreme Court of Spain held that Scilingo's crimes

65. Judge Baltasar Garzón was the investigating magistrate for Spain's National Court and previously worked on extraditing Pinochet, the former dictator of Chile. *See Profile: Judge Baltasar Garzón*, BBC, <http://news.bbc.co.uk/2/hi/3085482.stm> (last visited Oct. 6, 2017).

66. *See* Burbidge, *supra* note 14, at 753 (describing the troubles Judge Baltasar Garzón faced in his attempts to investigate crimes during the Franco regime).

67. *See* Michael Humphrey, *Law, Memory and Amnesty in Spain*, 13 MACQUARIE L.J. 25, 37 (2014) (describing the investigations initiated by Judge Baltasar Garzón); *see also* Burbidge, *supra* note 14, at 756–57 (explaining that the twenty-two cases involved investigating local authorities and civil governors).

68. In fact, opposition to Garzón's attempts to investigate and prosecute Franco-era crimes caused him to be charged with misuse of power in violation of Article 446 CC. *See* Burbidge, *supra* note 14, at 775–77 (detailing the political and legal retaliation against Judge Baltasar Garzón following his attempts to prosecute Franco-era crimes).

69. *Id.* at 764–76.

70. Burbidge, *supra* note 14, at 764–65; *see also* Delitos de Genocidio [Crimes of Genocide] 607 bis. 1 (C.P. 2003).

71. Sentencia por crímenes contra la humanidad en el caso Adolfo Scilingo, S.A.N. [National Appellate Courts, Criminal Division], Apr. 19, 2005 (J.T.S., No. 16) (holding that the Spanish Penal Code's criminalization of crimes against humanity is not retroactive and cannot be applied to acts committed prior to its entry into force on October 1, 2004).

72. *See* Alexandria García, *Transitional (In)justice: An Exploration of Blanket Amnesties and the Remaining Controversies around the Spanish Transition to Democracy*, 43 INT'L J. LEGAL INFO. 75, 109 (2015) (determining that neither amnesty laws nor any statutes of limitations stopped Spanish prosecutors from charging Adolfo Scilingo).

73. Burbidge, *supra* note 14, at 764–66; *see* *Dirty War*, ENCYCLOPEDIA BRITANNICA (2014), <https://www.britannica.com/event/Dirty-War> (explaining that members of the military overthrew the Argentine government and established a military junta dictatorship).

74. *See* Alicia Gil Gil, *The Flaws of the Scilingo Judgment*, 3 J. INT'L CRIM. JUST. 1082, 1084 (2005) (analyzing Scilingo's charges for crimes against humanity); *see also* Calvin Sims, *Argentine Tells of Dumping 'Dirty War' Captives Into Sea*, N.Y. TIMES (Mar. 13, 1995), <http://www.nytimes.com/1995/03/13/world/argentine-tells-of-dumping-dirty-war-captives-into-sea.html?pagewanted=all&mcubz=1> (discussing the practice of throwing captives into the sea).

constituted crimes against humanity according to *jus cogens* of international law, but not Spanish law.⁷⁵

The second major obstacle faced by Judge Garzón was the prescription or statute of limitations of crimes. Judge Garzón argued that crimes of forced disappearances and forced removal of children should not be barred by any statute of limitations because these offenses are ongoing until victims are found, or until an official investigation proves the victims are dead.⁷⁶ The third major obstacle was the jurisdiction of the *Audiencia Nacional*. Chief Prosecutor Javier-Alberto Zaragoza Aguado argued that, because the alleged offenses were not terrorism or genocide, local prosecutors had jurisdiction,⁷⁷ rather than the *Audiencia Nacional*.⁷⁸

The fourth major obstacle Judge Garzón faced was identifying those responsible, most of whom were presumably deceased.⁷⁹ For instance, a Francoist who had been eighteen years old at the conclusion of the Spanish Civil War would be approximately eighty-six years old in 2007. Likewise, a Franco official who was fifty years old at Franco's death would have been approximately seventy-two years old in 2007. However, scholars suggest that the most significant purpose of these criminal proceedings was not to punish individual offenders but rather to implicate the Spanish government and its resources in the investigation of forced disappearances in a more effective manner than the Historical Memory Law.⁸⁰

Lastly, the fifth major obstacle was the possible applications of the Amnesty Law of 1977. First, although the Historical Memory Law opened the door to addressing Franco-era crimes, it did not repeal the Amnesty Law of 1977; in fact, Spain's Amnesty Law of 1977 remains in force today.⁸¹ Second, the term "politically motivated acts"⁸² used in the Amnesty Law is not clearly defined, so judges typically consider "the normal meaning of the words, their context, the historical and legislative antecedents, the social reality in which the law has to be applied and above all the spirit and purpose of the provision."⁸³

In addition, the government has seldom enforced the new rights given to victims' families by the Historical Memory Law to exhume victims' bodies from

75. See García, *supra* note 72, at 109–10 (explaining how Spanish courts circumvented the statute of limitations obstacle when prosecuting Scilingo).

76. See Burbidge, *supra* note 14, at 768 (implying that the crimes were not established as having occurred until persuasively demonstrated as concluded or resolved). In September 2007, Spain ratified the United Nations Convention on Protection against Forced Disappearances, which reflects Garzón's argument that forced disappearances are crimes against humanity and such crimes continue throughout the detention or disappearance of the victims. *Id.* at 769.

77. *Id.* at 766.

78. For a list of criminal offenses within the Audiencia Nacional's jurisdiction, see Ley Orgánica del Poder Judicial 6/1985, 12666 (B.O.E. 1985, 157) (noting Articles 65 and Articles 23 address criminal elements and procedural rules for such offenses).

79. See Javier-Alberto Zaragoza Aguado, *supra* note 71 (outlining the legal challenges that arise if the status of death is unknown).

80. Burbidge, *supra* note 14, at 766.

81. García, *supra* note 72, at 109.

82. B.O.E. 1977, at 248 (translated from source: "actos de intencionalidad política").

83. Burbidge, *supra* note 14, at 770.

unmarked graves.⁸⁴ “The task of identifying gravesites and getting permission to excavate [is] often prevented, or greatly delayed, by bureaucratic processes and veto at the local community level.”⁸⁵

Alexandria García, a Harvard Law School Human Rights Program Fellow, strongly advocates repealing the Amnesty Law. According to García’s analysis, the Amnesty Law “(1) prevents the prosecution of individuals who could be held accountable for crimes against humanity, (2) interferes with the victims’ right to an effective remedy, and (3) restricts the collective right to know the truth about the violations of human rights that occurred during the civil war and the Franco dictatorship.”⁸⁶ Further, García asserts that although the Amnesty Law was enacted to facilitate the transitional process from dictatorship to democracy, it has outlasted its purpose because this measure no longer prevents the possibility of a military coup or a relapse into civil war.⁸⁷

III. CONSIDERATION OF THREE HYPOTHETICAL ALTERNATIVE HISTORIES

There is a long-held view by some analysts of democratization that “a society cannot indefinitely avoid coming face to face with past trauma.”⁸⁸ Rebecca Evans, Assistant Professor of Politics and International Relations at Ursinus College and Senior Research Fellow at the Council on Hemispheric Affairs,⁸⁹ similarly asserts that “despite explicit efforts to leave the past behind, the contentious issue of human rights refuses to remain buried. Although the issue may lie dormant for quite some time, it constitutes an unstable legacy” that society, when triggered, inevitably resurrects and revisits.⁹⁰ This Comment will now explore how Spain might have addressed the Francoists’ human rights violations within three hypothetical contexts.

A. *Franco Retires as Dictator in 1975*

An analogy could be drawn between the historical events in Chile following former President Augusto Pinochet’s retirement and how Spain might have dealt with Franco-era atrocities had Franco retired in 1975.

1. Chile

In 1973, a military coup overthrew Chile’s democratically elected government, headed by President Salvador Allende.⁹¹ After the coup, Chile was under the command of General Augusto Pinochet.⁹² For five years, “agents of the Chilean government and the . . . *Dirección de Inteligencia Nacional* [(National

84. Humphrey, *supra* note 67, at 40.

85. *Id.*

86. García, *supra* note 72, at 119.

87. *Id.* at 118.

88. Davis, *supra* note 4, at 858.

89. Rebecca Evans, *Pinochet in London-Pinochet in Chile: International and Domestic Politics in Human Rights Policy*, 28 HUM. RTS. Q. 207, 207 (2006).

90. *Id.* at 208.

91. García, *supra* note 72, at 106.

92. *Id.*

Intelligence Directorate)] killed over 2,115 civilians” and committed acts of arbitrary arrest, lengthy detention, torture, and forced disappearance of thousands of others.⁹³ Ruth Wedgwood, Professor of International Law at Yale University and Senior Fellow for International Organizations and Law at the Council on Foreign Relations,⁹⁴ describes Pinochet’s violence against his own citizens as “notorious and public.”⁹⁵ On April 18, 1978, the Chilean military *junta*⁹⁶ issued Decree Law No. 2191,⁹⁷ shielding from prosecution and investigation violations of human rights committed during the five years of the military dictatorship.⁹⁸ Similar to Spain’s Amnesty Law of 1977, Chile’s Decree of 1978 was a blanket amnesty that covered a wide variety of crimes.⁹⁹

Seventeen years after seizing power from President Salvador Allende, Pinochet retired as head of state in 1990.¹⁰⁰ Despite his retirement, Pinochet continued to play a role in Chile’s government as head of Chile’s armed forces until 1998 and as “senator for life” in Chile’s Parliament.¹⁰¹ Confident about his safety and immunity, Pinochet also traveled internationally regularly during his retirement.¹⁰² When Chile’s government was faced with the difficult decision of either punishing a retired Pinochet or “forgiving and forgetting” his human rights violations,¹⁰³ it chose to forgive and forget in order to achieve stability. According to Ruth Wedgwood, “Pinochet seemed beyond the reach of all but history.”¹⁰⁴

Although Pinochet was amnestied in Chile, Judge Garzón attempted to prosecute Pinochet under Spanish law for crimes against humanity committed during the five years of his dictatorship¹⁰⁵ utilizing the universal jurisdiction doctrine of international law.¹⁰⁶ Judge Garzón issued a provisional arrest warrant for Pinochet, and on October 16, 1998, England’s Scotland Yard officers arrested Pinochet at the London Bridge Hospital with the intent to extradite him to Spain to

93. *Id.*

94. Ruth Wedgwood, *International Criminal Law and Augusto Pinochet*, 40 VA. J. INT’L L. 829, 829 (1999-2000).

95. *Id.* at 830.

96. *Junta*, MERRIAM-WEBSTER DICTIONARY (2017), <https://www.merriam-webster.com/dictionary/junta> (defining “junta” as “a council or committee for political or governmental purposes; *especially*: a group of persons controlling a government especially after a revolutionary seizure of power”).

97. Law No. 2191, Ley de Amnistía, Abril 18, 1978, DIARIO OFICIAL [D.O.] (Chile).

98. *Id.*

99. García, *supra* note 72, at 106–07.

100. Wedgwood, *supra* note 94, at 830.

101. *Id.*

102. *Id.* at 830–31.

103. Evans, *supra* note 89, at 212.

104. Wedgwood, *supra* note 94, at 830.

105. Burbidge, *supra* note 14, at 755.

106. *See id.* at 761 n.28 (“Art. 23.4(a) of the *Ley Orgánica del Poder Judicial* (Judicial Powers Act, LOPJ), gave Spanish courts jurisdiction over crimes against humanity, genocide and war crimes regardless of where or when the crime was committed and the nationality of the crime or perpetrators. This wide interpretation . . . was reversed by the *Ley Orgánica* 1/2009 of 3 November 2009 so that there must now be some relevant link with Spain . . .”).

stand trial.¹⁰⁷ At the time of his arrest, Pinochet was eighty-four years old with unstable health.¹⁰⁸

“On March 2, 2000, the U.K. Home Secretary, Jack Straw, decided under Section 12 of the Extradition Act 1989, that [Pinochet] should not be extradited to Spain due to his lack of ‘*mental fitness to stand trial*.’”¹⁰⁹ Pinochet was permitted to return to Chile.¹¹⁰ Upon his return, the Supreme Court of Chile stripped Pinochet of his immunity for his alleged responsibility for human rights violations committed during the military dictatorship and intended to prosecute him.¹¹¹ Found to be mentally incompetent to stand trial in Chile,¹¹² Pinochet was under house arrest orders multiple times in Santiago, Chile, before he died in 2006.¹¹³

2. Spain

A majority of Spaniards supported Spain’s indictment of Pinochet and its attempts to extradite him to stand trial for human rights violations committed during his dictatorship in Chile.¹¹⁴ Francisco Umbral, journalist for the Spanish newspaper *El País*, wrote, “for the Spanish people, Pinochet’s arrest is the vicarious dream of a historical impossibility, that of Franco being arrested in bed.”¹¹⁵ It is possible that Spain’s indictment of Pinochet was an attempt “to do to Pinochet what was not done to Franco.”¹¹⁶

However, it should not be assumed that the way the Spanish judiciary and the majority of Spanish people reacted in 1998 to a retired Pinochet would be identical to their reaction to a retired Franco in 1975. By 1998, twenty years had passed since Franco’s dictatorship, and Spain had a solid, stable democracy.¹¹⁷ Per Madeleine Davis, “[w]hat could not be said during the transition for fear of right-wing backlash or for the sake of ‘reconciliation,’ could be more easily said some twenty years on.”¹¹⁸

Further, if Franco had been indicted immediately upon his retirement in 1975, collecting evidence for his trial could have been challenging. In the 1960s, the Franco regime began to destroy evidence of its past crimes to gain admission into the European Community.¹¹⁹ Between 1965 and 1985, approximately 40% of

107. García, *supra* note 72, at 107.

108. Wedgwood, *supra* note 94, at 831.

109. García, *supra* note 72, at 108.

110. *Id.*

111. Evans, *supra* note 89, at 236.

112. *Id.* at 211.

113. García, *supra* note 72, at 109.

114. Davis, *supra* note 4, at 869; *see also* OMAR G. ENCARNACIÓN, SPANISH POLITICS: DEMOCRACY AFTER DICTATORSHIP 139 (2008) (“The Spanish public overwhelmingly supported the Pinochet indictment and many private citizens became involved in helping the exile Chilean community in Spain gather the testimony used by the Spanish judges to prosecute Pinochet.”).

115. FRANCISCO UMBRAL, *EL CAUDILLO, EL MUNDO* (1998), *reprinted in* THE PINOCHET CASE: ORIGINS, PROGRESS AND IMPLICATIONS 157 (Madeleine Davis ed., 2003).

116. *Id.*

117. Davis, *supra* note 4, at 870.

118. *Id.*

119. Burbidge, *supra* note 14, at 757. *See generally* *European Community (EC)*,

police and Francoist governmental archives “disappeared.”¹²⁰ According to Leo Brincat, Maltese Member of the Parliamentary Assembly of the Council of Europe:

Amongst the losses during those crucial twenty years are the archives of the single [legal Spanish political] party, the Falange, with its personnel files on hundreds of thousands of members. The archives of provincial police headquarters, of prisons[,] and of the main Francoist local authority, the Civil Governors[,] also disappeared. Convoys of trucks removed the “judicial” records of the repression. As well as the deliberate destruction of archives, there were “inadvertent” losses when some town councils sold their archives by the ton as waste paper for recycling.¹²¹

Without evidence, an indictment against Franco would not have led to a conviction. These same calculations would have been made by authorities at the time, and the likelihood of success would have factored heavily into a decision whether to pursue prosecution.

B. Franco Dies as Dictator in 1955 at the Height of Human Rights Violations Committed During His Regime

Historical events after Hitler’s death could be instructive in hypothesizing how Spain in 1955 might have dealt with the Francoists’ atrocities following Franco’s death while most of the perpetrators were still alive and in the wake of the International Military Tribunal at Nuremberg (Nuremberg Trials).

1. Germany

The facts of Hitler’s rise to power and use of oppression are well known. According to Professor Allan A. Ryan,¹²² from 1941 to the collapse of Hitler’s government in 1945, “six million European Jews were dispossessed of their homes and property, separated from their families, transported by trains to the East, and put to death in gas chambers, their possessions confiscated and sent back to Berlin.”¹²³

Hitler died at the end of World War II, on April 30, 1945, just prior to the Soviet occupation of Berlin, by committing suicide in a bunker.¹²⁴ Although Hitler escaped “earthly punishment” for his human rights violations,¹²⁵ his remaining

ENCYCLOPEDIA BRITANNICA (2017), <https://www.britannica.com/topic/European-Community-European-economic-association> (stating that the European Community is a “former association designed to integrate the economies of Europe,” and was legally replaced by the E.U.).

120. Burbidge, *supra* note 14, at 757.

121. *Need for International Condemnation of the Franco Regime*, *supra* note 15.

122. Adjunct Professor of Law at Boston College Law School, and former Director of the Office of Special Investigations, U.S. Department of Justice. Allan A. Ryan, *Nuremberg’s Contributions to International Law*, 30 B. C. INT’L & COMP. L. REV. 55, 57 (2007).

123. *Id.* at 57.

124. See generally Kristina D. Rutledge, *Giving the Devil His Due: The Pursuit & Capture of Nazi War Criminal - A Call for Retributive Justice in International Criminal Law*, 3 REGENT J. INT’L L. 27, 56 (2005) (describing the circumstances of the suicide).

125. *Id.* at 29.

officers would not. On November 1, 1943, U.S. President Franklin D. Roosevelt, British Prime Minister Winston Churchill, and Soviet Union Marshal Joseph Stalin issued the Moscow Declaration, agreeing that when the war ended, they would ensure that individuals from Hitler's government would be held accountable for their actions:¹²⁶

[T]hose German officers and men and members of the Nazi party who have been responsible for, or have taken a consenting part in [Nazi] atrocities, massacres and executions, . . . whose offences have no particular geographical localisation[,] . . . will be punished by a joint decision of the Governments of the Allies.¹²⁷

However, at the signing of the Moscow Declaration, it was unclear how justice would be rendered.¹²⁸ "There was no precedent, no list of crimes to be charged, [and] no guide as to how [these] . . . nations should proceed . . ."¹²⁹ Further, determining how to deal with individuals from Hitler's government in the post-war period "was driven by a fear that if Nazism itself was not thoroughly obliterated it would rise again."¹³⁰

Initially, President Roosevelt was presented with two schools of thought.¹³¹ One plan, advocated by U.S. Secretary of the Treasury Henry Morgenthau, Jr., called for the immediate round-up of the individuals most responsible, as determined by the United Nations, and their speedy execution by a U.N. firing squad.¹³² Morgenthau's plan for summary execution was typical of world history.¹³³ Inevitably, the plan for a summary execution was rejected because it violated the essence of justice and would have likely yielded martyrs.¹³⁴

The second plan, advocated by U.S. Secretary of War Henry L. Stimson, called for trial by international tribunal with "careful thought and a well-defined procedure . . . embody[ing] . . . at least the rudimentary aspects of the Bill of Rights, namely, notification to the accused of the charge, the right to be heard and, within reasonable limits, to call witnesses in his defense."¹³⁵ On August 8, 1945,¹³⁶ the United States, Great Britain, the Soviet Union, and France agreed upon the process and issued a Charter for the trial of Hitler's officers by the International Military Tribunal convened at Nuremberg, Germany.¹³⁷ The Charter provided all of

126. See Ryan, *supra* note 122, at 58 (citing The Moscow Declaration (Nov. 1, 1943), in THE AMERICAN ROAD TO NUREMBERG: THE DOCUMENTARY RECORD 1944-1945, at 13-14 (Bradley F. Smith ed., 1982) [hereinafter AMERICAN ROAD: THE DOCUMENTARY RECORD]).

127. *Id.*

128. See *id.* (describing uncertainty of punishment for offenses lacking a "geographical localisation").

129. *Id.* at 56.

130. *Id.* at 59.

131. *Id.*

132. Ryan, *supra* note 122, at 59.

133. See Willis Smith, *The Nuremberg Trials*, 32 A.B.A. J. 390, 391 (1946) (explaining that it was common in world history to execute men rather than afford them any semblance of a trial).

134. Ryan, *supra* note 122, at 63.

135. *Id.* (citing AMERICAN ROAD: THE DOCUMENTARY RECORD at 30-31).

136. *Id.* at 72.

137. See Smith, *supra* note 133, at 391.

the legal protections found in a U.S. court except for the right to appeal.¹³⁸

The defendants were given notice of the charges through the indictment, thirty days before the trial began, and they had German counsel of their choosing, many of whom were high caliber. The prosecution had the burden of proof and the judges—with the likely exception of the two Soviet judges, whose system did not acknowledge an independent judiciary, and who dissented from acquittals—were in every objective sense neutral, basing their decisions of guilt or innocence on the evidence and the law as defined by the Charter. The Tribunal allowed the defendants to testify or not as they chose, to call witnesses, and to introduce documentary evidence.¹³⁹

The Tribunal charged twenty-two individual defendants¹⁴⁰ and six organizations.¹⁴¹ The tribunal's selection of defendants was unusual at the time because rather than being soldiers, "the defendants were government officials, generals and admirals, a publisher, a banker, and diplomats; their crimes were state policies they had developed and implemented. The head of state would have been in the dock had he not killed himself."¹⁴² The charges alleged in the indictment were crimes against peace, war crimes, and crimes against humanity.¹⁴³ Defendants were primarily represented by attorneys from Germany, some of them former Nazis.¹⁴⁴ Throughout the process, defendants were treated humanely.¹⁴⁵ The triers of fact for all proceedings were judges¹⁴⁶ from each of the four powers, rather than a jury of laymen,¹⁴⁷ and are regarded "as representing the best in their respective nations."¹⁴⁸

On September 30 and October 1, 1946, the eight judges handed down the judgment.¹⁴⁹ Only three defendants were acquitted on all counts.¹⁵⁰ Of the nineteen defendants found guilty of at least one count, twelve were sentenced to death and seven were sentenced to terms of incarceration ranging from ten years to life in

138. Ryan, *supra* note 122, at 87.

139. *Id.*

140. *See id.* at 75 n.70 (listing the individuals charged); *see also* Rutledge, *supra* note 124, at 34 (describing the decision to try Martin Bormann *in absentia* as very controversial at the time).

141. *See* Ryan, *supra* note 122, at 75 n.71 (listing the organizations charged).

142. *Id.* at 80.

143. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, UK-U.S.-Fr.-USSR, Charter of the International Military Tribunal, art. 6, Aug. 8, 1945, 1951 U.N.T.S. 290 (creating the jurisdiction and procedure for what came to be known as the Nuremberg Trials).

144. *See* Ryan, *supra* note 122, at 87.

145. Smith, *supra* note 133, at 390.

146. Smith, *supra* note 133, at 391 (listing the identities of the judges).

147. *See* Rutledge, *supra* note 124, at 32–33 (describing the four powers' involvement in prosecuting crimes and the protections afforded to the defendants).

148. Smith, *supra* note 133, at 391 (quoting Willis Smith, President of the American Bar Association at the time of trial).

149. *Trial of the Major War Criminals*, Judgment and Sentences, 1 (Int'l Mil. Trib. Oct. 1, 1946), *reprinted in* 41 Am. J. Int'l L. 172, 186 (1947).

150. *See* Ryan, *supra* note 122, at 88 (breaking down the Tribunal's various judgments).

prison.¹⁵¹ In compliance with the Charter, the judges produced a 154-page document that discussed the evidence, weighed each of the counts of the indictment against each defendant, and provided the reasoning behind their judgment.¹⁵²

According to Professor Ryan, the Nuremberg Trials were the “most significant advancement in human rights law in the twentieth century.”¹⁵³ Ryan also notes that the tribunal established three principles of human rights law:

First, the Charter of the Tribunal explicitly held Individuals accountable under international law for their actions. No longer could men claim that international law applied only to states, and that they were shielded from personal liability. Second, the Charter defined a new category of crime—“crimes against humanity”—to overcome two traditional limitations of international law. Crimes against humanity defined those actions the defendants had taken prior to World War II, or separate from it, where the traditional law of war could not be applied. In addition, it defined the crimes that Germany had committed against its own citizens, chiefly Jews—an arena that most considered beyond the reach of international law. “Crimes against humanity” had nothing to do with combat, weapons or armies. Finally, it established that the leaders of an enemy nation could be held accountable in a judicial proceeding: a trial drawn largely from the Anglo-American adversarial tradition, including remarkably, due process guarantees first laid down in the U.S. Constitution of 1789.¹⁵⁴

The Nuremberg Trials and its fundamental, underlying principle, “that every individual must be held to account for international crimes regardless of their station or official position,”¹⁵⁵ inspired the international community and is expressed in the 1946 United Nations General Assembly Resolution.¹⁵⁶ Following the Nuremberg Trials, each of the four powers individually prosecuted an additional number of alleged Nazi war criminals.¹⁵⁷

2. *Spain*

Inspired by the recent work of the Nuremberg Trials, would Spain’s people, or the international community, upon Franco’s hypothetical death in 1955, have demanded accountability from Franco’s officers most responsible for human rights violations? In order to explore this question fully, it is necessary to dissect the matter into underlying issues and address each issue separately.

It is unclear who, in 1955, would have assumed power in the vacuum left by

151. *Id.* at 86.

152. *See* Ryan, *supra* note 122, at 77 (describing the detailed judgment by the Tribunal as required by the Nuremberg Charter).

153. Ryan, *supra* note 122, at 55.

154. *Id.* at 55–56.

155. Paul L. Hoffman, *Justice Jackson, Nuremberg and Human Rights Litigation*, 68 ALB. L. REV. 1145, 1148 (2005).

156. *Id.* at 1146; *see also* G.A. Res. 95(I), at 188 (Dec. 11, 1946) (affirming the principles of international law recognized by the charter of the Nuremberg Tribunal).

157. *See* Rutledge, *supra* note 124, at 36–40 (detailing the steps Allied countries took to prosecute defendants outside of the Nuremberg Tribunal, and listing the number of defendants various Allies tried or convicted in the immediate years after World War II).

Franco's hypothetical death and what would have been the fate of Spain's government. Spain's 1947 Law of Succession¹⁵⁸ declared Spain a monarchy, which Franco would rule until his death or incapacity, and gave Franco the power to name his successor.¹⁵⁹ If Franco had died before naming his successor, it is possible that there would have been a power struggle among Juan Carlos, the Bourbon heir; Admiral Luis Carrero Blanco; the Falangists; and Opus Dei.¹⁶⁰ If the fascist dictatorship of Spain had continued under a new leader, it is unlikely that the Spanish government would have prosecuted or punished any of Franco's officers for the human rights violations they oversaw, purely for the purpose of justice. These officers would still have been intimately connected with the workings of the new government.

The Franco regime's long history of complicated ties to other nation states, particularly Western democracies, muddles the possibility of predicting whether other nation states would have addressed the Franco regime's human rights violations without Spanish cooperation. During the Spanish Civil War, about 150,000 foreign troops supported the Franco regime, primarily from Nazi Germany and Fascist Italy.¹⁶¹ Nazi Germany and Fascist Italy also provided the Franco regime with 10,000 technicians and \$505 million U.S.D. worth of war materials.¹⁶² The Soviet Union supported the Republican opposition to Franco by providing 2,000 technicians; about \$100 million U.S.D. worth of war materials; and the International Brigades, a group organized by the Komintern,¹⁶³ with 40,000 volunteers from many different countries.¹⁶⁴ Additionally, a group of approximately 2,800 Americans, known as the Abraham Lincoln Brigade, traveled to Spain to fight in defense of the Spanish Republic against the Franco regime.¹⁶⁵

Although Franco maintained a policy of neutrality throughout World War

158. B.O.E. 1947, 208.

159. *Need for International Condemnation of the Franco Regime*, *supra* note 15, para. 28.

160. See Donald Share, *The Franquist Regime and the Dilemma of Succession*, 48 REV. OF POL. 549, 554–63 (1986) (detailing the numerous potential successors to Franco).

161. See Ann Van Wynen Thomas & A.J. Thomas, Jr., *Non-Intervention and the Spanish Civil War*, 61 AM. SOC'Y INT'L L. PROC. 2, 2 (1967) (analyzing foreign intervention and investment in the Spanish Civil War); see also *Need for International Condemnation of the Franco Regime*, *supra* note 15, at paras. 4, 8–19 (providing a historical background of the Franco regime and the support it received from foreign nations).

162. Thomas & Thomas, Jr., *supra* note 161, at 2.

163. The Komintern, also known as the Comintern or Communist International, was an association of national communist parties. See *Third International*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/Third-International> (last visited Oct. 7, 2017) (defining Third International, also known as the Comintern, that functioned chiefly as an organ of Soviet control over the international communist movement).

164. Thomas & Thomas Jr., *supra* note 161, at 2; see also *Need for International Condemnation of the Franco Regime*, *supra* note 15, para. 19 (describing the International Brigade).

165. See Sebastiaan Faber, *Spain's Foreign Fighters: The Lincoln Brigade and the Legacy of the Spanish Civil War*, 95 FOREIGN AFF. 155, 155 (2016) (detailing the role of American fighters during the Spanish Civil War and the recent shift in memorializing these fighters).

II,¹⁶⁶ he also “openly sympathised with fascist principles and acknowledged the enormous debt owed to Mussolini’s Italy and Hitler’s Germany for having supplied the Nationalists with financial and military assistance throughout Spain’s civil war.”¹⁶⁷ Franco’s open sympathy is evidenced by the fact that he—among other actions—exported raw materials to Germany during World War II.¹⁶⁸ Following World War II, Franco’s Spain became an economic and political outcast in the international community because of Franco’s relationship with the war’s losers and his regime’s fascist dictatorship.¹⁶⁹ For example, the U.N. General Assembly barred Franco’s Spain from membership in the United Nations in 1946.¹⁷⁰

Spain’s relationship with Western democracies improved during the Cold War in the 1950s.¹⁷¹ Western democracies began to appreciate Franco’s pro-Catholic and anti-Communist regime.¹⁷² Lawrence A. Fernsworth, an American newspaper correspondent during the Spanish Civil War,¹⁷³ wrote that Spain could offer Western democracies strategic advantages: “Strategically Spain is a redoubt, a fortified castle in the European theater of war . . . Spain is considered to be an indispensable stronghold in the Mediterranean operational area and a bridge between North Africa and the European peninsula.”¹⁷⁴ Perhaps realizing this, Franco and the United States signed the Pact of Madrid—a treaty that “made Spain an important member of the anti-Communist bloc in Western Europe.”¹⁷⁵ Pursuant to the 1953 Pact of Madrid, Franco provided the United States access to several Spanish military and naval bases, and the United States provided Franco with military and economic assistance.¹⁷⁶ Two years later, in 1955, Spain was finally admitted into the United Nations.¹⁷⁷ Spain’s return to the international community stabilized Franco’s dictatorship.¹⁷⁸ Franco’s positive relationship with Western democracies during the Cold War suggests that, upon his hypothetical death in 1955, these Western democracies would have sought to nurture a relationship with his successor rather than prosecute Franco’s officials.

The International Commission Against Concentration Camp Regimes’ 1953 report suggested that the international community was aware of the Franco regime’s human rights violations.¹⁷⁹ The International Commission Against

166. *Need for International Condemnation of the Franco Regime*, *supra* note 15, para. 33.

167. *Id.*

168. *Id.* para. 34.

169. *Id.* para. 37.

170. G.A. Res. 39(I), at 64 (Dec. 12, 1946).

171. *Need for International Condemnation of the Franco Regime*, *supra* note 15, para. 39.

172. *Id.*

173. See generally Lawrence Fernsworth, *Missing Newspaperman*, WASH. POST (July 20, 1979), https://www.washingtonpost.com/archive/local/1979/07/20/lawrence-fernsworth-missing-newspaperman/8e4e4eea-aabf-4c48-8521-e74db63babd6/?utm_term=.183c300611b0.

174. Lawrence Fernsworth, *Spain in Western Defense*, 31 FOREIGN AFF. 648, 648 (1953).

175. *Need for International Condemnation of the Franco Regime*, *supra* note 15, para. 40.

176. *Id.*

177. *Id.* para. 41.

178. *Id.* para. 42.

179. See *id.* para. 68 (detailing findings of systematic abuse of political prisoners held in

Concentration Camp Regimes visited a selection of Franco's prisons and labor camps in Spain and interviewed political prisoners.¹⁸⁰ Its 1953 report commented on the systematic physical and psychological abuse experienced by inmates in Franco's prisons.¹⁸¹ If the international community had addressed the Franco regime's human rights violations, it would likely not have adopted a plan embodying former U.S. Secretary of the Treasury Henry Morgenthau, Jr.'s summary execution proposal for Hitler's regime.¹⁸² The four powers responsible for the Nuremberg Trials rejected the summary execution proposal because it violated principles of justice and would have likely yielded martyrs.¹⁸³ If the international community had become involved, it would have conducted a trial in a similar fashion to the popular and well-respected Nuremberg Trials.

However, as discussed above, the four powers that convened in 1946 to prosecute Hitler's officers would likely not have convened in 1955 to prosecute Franco's officers. The Cold War pitted the communist Soviet Union against the democratic United States, Great Britain, and France,¹⁸⁴ making joint action difficult. Further, the United States, Great Britain, France, and Franco's Spain became fellow members in the United Nations and allies against communism during the Cold War.¹⁸⁵ If a prosecution and trial had occurred, Franco's top officers most responsible for the human rights violations would have been the defendants, decapitating leadership of an important Western ally for the United States, Great Britain, and France. Although Spanish or world leaders were unlikely to pursue justice after a hypothetical death of Franco in 1955, citizen outcry could have eventually led to trials for war criminals.

C. Franco Loses the Spanish Civil War in 1939

Historical events after Franco won the Spanish Civil War in 1939 and his handling of Republicans' atrocities are instructive in hypothesizing how a Republican Spain might have dealt with the Francoists' atrocities if Franco had lost the Spanish Civil War.

1. Francoists

After the Francoists won the war, Franco effectively "demonise[d] his

Spanish labor camps).

180. *Id.*

181. *Need for International Condemnation of the Franco Regime*, *supra* note 15, para. 62.

182. *See* Ryan, *supra* note 122, at 59 (citing Henry Morgenthau Jr., *Punishment of Certain War Crimes and Treatment of Special Groups*, in *AMERICAN ROAD TO NUREMBERG: THE DOCUMENTARY RECORD 1944-1945*, 28 (1982)) (summarizing Morgenthau's execution proposal).

183. Ryan, *supra* note 122, at 63.

184. *See Need for International Condemnation of the Franco Regime*, *supra* note 15, para. 39 (stating that the Cold War caused a rivalry between Western democracies and Communist countries led by USSR).

185. *See id.* (noting how Spain signed a treaty with the United States to lend support during the Cold War).

enemies,” the Republicans.¹⁸⁶ During the dictatorship, the Franco regime punished the defeated Republicans through the enactment of various laws¹⁸⁷ criminalizing support for the Republican government,¹⁸⁸ and socially and economically dispossessing Republicans.¹⁸⁹ For example, the *Ley de Responsabilidades Políticas* (Law of Political Responsibilities) “imposed economic penalties on business people that had supported the Republic.”¹⁹⁰ As a further example, the *Ley de Depuración de Empleados Públicos* (Law of the Depuration of the Publicly Employed) removed Republican supporters from their jobs at public institutions.¹⁹¹ The Franco regime imprisoned over one million people and executed thousands for Republican allegiance.¹⁹²

At the same time, during the dictatorship, the Franco regime “compensated and celebrated” its supporters.¹⁹³ Francoists who committed serious crimes in the name of Franco during the Spanish Civil War “prospered with impunity throughout the 36 years of the dictatorship.”¹⁹⁴ Franco also celebrated his supporters through “spatial glorification”¹⁹⁵ by erecting grand monuments in honor of the dead Francoists.¹⁹⁶ For example, Franco forced workers—many of whom were Republican political prisoners¹⁹⁷—to build the *Valle de los Caídos* (Valley of the Fallen), “an immense cave-basilica-mausoleum”¹⁹⁸ monument to honor Francoists who died in the Spanish Civil War, as well as to honor himself.¹⁹⁹ Franco’s body lies in front of the basilica’s altar.²⁰⁰ Franco also changed many street names to the names of his prominent generals,²⁰¹ such as José Millán-

186. Humphrey, *supra* note 67, at 27.

187. *See, e.g.*, Law of Public Order 45 (B.O.E. 1959, 182); Law of the New Revised Edition of the Penal Code (B.O.E. 1944, 204); Law of State Security (B.O.E. 1941, 101); Law of the Repression of Freemasonry and Communism (B.O.E. 1940, 62); Law of Political Responsibilities (B.O.E. 1939, 81).

188. Humphrey, *supra* note 67, at 27.

189. *See id.* at 30 (discussing how the memory laws had a detrimental effect on Republicans socially and economically).

190. *Id.*

191. *See id.* (discussing how the law took away jobs from Republicans through the “lustration of public employees”).

192. *See id.* at 27 (stating how people were imprisoned and executed for supporting the Republican government).

193. *Id.*

194. Burbidge, *supra* note 14, at 755.

195. LORRAINE RYAN, MEMORY AND SPATIALITY IN POST-MILLENNIAL SPANISH NARRATIVE 79 (2014).

196. *See, e.g., id.* (discussing that the twelve monuments dedicated to the Nationalist dead were the most impressive of all monuments dedicated to the Civil War).

197. *See* James J. Friedberg, *The Wane in Spain (of Universal Jurisdiction): Spain’s Forgetful Democratic Transition and the Prosecution of Tyrants*, 114 W. VA. L. REV. 825, 893–894 (2012) (discussing the origins of the Valley of the Fallen monument).

198. *Id.* at 829.

199. *See id.* at 831 (portraying the differing viewpoints of liberals and conservatives regarding the significance of the Valley of the Fallen monument).

200. *See id.* at 893 (describing the basilica’s interior).

201. Ryan, *supra* note 122, at 79.

Astray,²⁰² who co-orchestrated the military uprising in July 1936 with Franco.²⁰³

2. Republicans

The Republicans' conduct during the Spanish Civil War is helpful in hypothesizing how Spain would have addressed the Francoists' human rights violations if the Republicans had won the war. Interestingly, during the war, the Republicans also committed war crimes and crimes against humanity.²⁰⁴ Although the Republicans "paid lip service to democratic principles and tried to practice them, their side devolved into disorder and lawlessness during the war, and anarchists and communists came to dominate their ranks."²⁰⁵ According to Brincat, Maltese Member of the Parliamentary Assembly of the Council of Europe,²⁰⁶ the Republicans committed brutal mass executions during the Spanish Civil War.²⁰⁷ In fact, "there were as many unlawful killings amongst the Republicans (perhaps as many as 70,000) as there were by Franco's army and the *Falangistas*."²⁰⁸ For instance, in a series of organized mass murders during the battle for Madrid, called the 1936 *Paracuellos* massacres, "the Republicans assassinated almost 7,000 priests and nuns and killed roughly 2,500 prison inmates."²⁰⁹ According to Michael Humphrey, Chair in Sociology in the Department of Sociology and Social Policy at the University of Sydney, the Republicans, like the Francoists, committed acts that embraced "an underlying logic of territorial cleansing of the enemy."²¹⁰

The similarity in style of warfare and conception of the enemy by the Francoists and the Republicans during the Spanish Civil War is telling in predicting the actions of a hypothetical Republican post-war Spain. It is likely that if the Republicans had won the war, they would have handled victory in the same fashion as Franco—by punishing the losers and honoring their fallen comrades through memorials.

202. See James Badcock, *Fascist supporters protest in Madrid against removal of Franco general street name*, TELEGRAPH (Sept. 24, 2016, 7:24 AM), <http://www.telegraph.co.uk/news/2016/09/24/fascist-supporters-protest-in-madrid-against-removal-of-franco-g/> (discussing how fascist supporters protested changing the name of the street named after Millán-Astray).

203. See R. Geoffrey Jensen, *José Millán-Astray and the Nationalist 'Crusade' in Spain*, 27 J. CONTEMP. HIST. 425, 425 (1992) (noting the individuals who orchestrated the military uprising of 1936).

204. See Juan J. García Blesa & Víctor L. Gutiérrez Castillo, *The Rights of the Victims of Past Atrocities in Spain: Reparation Without Truth and Justice?*, 29 CONN. J. INT'L L. 227, 229 (2013) (noting that war crimes and crimes against humanity were committed on both sides).

205. Víctor Pérez-Díaz, *Art in the Time of Authoritarianism: Spain's Cultural Success Under Franco*, 93 FOREIGN AFF. 173, 173 (2014).

206. Burbidge, *supra* note 14, at 756.

207. See *id.* (discussing deaths on both sides resulting from brutal mass killings rather than combat).

208. *Id.*; see also *Falange*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/Falange> (last visited Sept. 17, 2017) (defining the word Falange, from which the word Falangistas is derived, as an extreme nationalist political group).

209. Pérez-Díaz, *supra* note 205, at 173.

210. Humphrey, *supra* note 67, at 26.

IV. CONCLUSION

In 1975, upon Franco's death, a fair trial of Franco's officers for human rights violations by a domestic or international tribunal would not only have been impossible, but it could also have hindered Spain's transition to democracy. By then, most evidence connecting the Franco regime to human rights violations had been destroyed, and with the Cold War still underway, Western democracies would not have assisted in prosecuting their ally against communism. Further, in 1975, Franco's officers might not have peacefully forfeited power if they feared prosecution or punishment. According to Peter Burbidge, "at the time there was no road-map for going from authoritarian, dictatorial government to democracy. Spain was unique. It had to find its own way. And it did so by smothering the past."²¹¹ This pivot beyond the past included post-Franco Spain's 1975 adoption of a foreign policy of adherence to "relevant international treaties for the protection of human rights[,]"²¹² an important, transitional step.

Professor of Political Studies at Bard College Omar G. Encarnación²¹³ describes Spain's post-Franco democracy as "the pinnacle of success."²¹⁴ He further explains that "democratic rule has flourished in Spain in the post-Franco era,"²¹⁵ and that "[n]o other new democracy born of this upheaval comes close to matching Spain's record of political, economic, and social achievement."²¹⁶ In fact, Encarnación notes that Spain "became a blueprint for other nations seeking similar transformations" from dictatorship to democracy.²¹⁷ According to Encarnación, Spain has achieved nearly all of the requirements of a mature democracy: free and competitive elections, civilian control of the military, observance of the rule of law, and widespread support for democratic values.²¹⁸ Above all, Encarnación indicates that "Spain succeeded in avoiding hyperinflation"²¹⁹—the misfortune of most new democracies.²²⁰ Encarnación attributes Spain's successful transition to democracy in 1977 to King Juan Carlos's effective and creative non-authoritarian leadership, future Prime Minister Adolfo Suárez's skillful negotiating, and Spanish politicians' ability to compromise.²²¹

211. Burbidge, *supra* note 14, at 754 (citing GILES TREMLETT, *GHOSTS OF SPAIN: TRAVELS THROUGH SPAIN AND ITS SILENT PAST* xvii (2006)).

212. See García, *supra* note 72, at 84.

213. Faculty: Omar G. Encarnación, Program Director, BARD POLITICAL STUDIES PROGRAM, <http://politicalstudies.bard.edu/faculty/faculty.php?id=1080152> (last visited Sept. 17, 2017).

214. Omar G. Encarnación, *Spain After Franco: Lessons in Democratization*, 18 *WORLD POL'Y J.* 35, 35 (2002).

215. *Id.* at 36.

216. *Id.* at 35.

217. *Id.* at 36.

218. See *id.* at 36–37 (explaining how Spain now has the characteristics of a mature democracy).

219. *Id.* at 40.

220. See Encarnación, *supra* note 214, at 40–41 (noting that hyperinflation is directly responsible for loss of government credibility and democratic legitimacy).

221. See *id.* at 38 (identifying notable leaders largely responsible for crafting Spain's democracy).

The U.S. Department of State's 2010 Country Reports on Human Rights Practices²²² supports Encarnación's opinion of the present-day Spanish democracy and provides a glowing evaluation of Spain's current respect for human rights. The report's findings show that today's Spain is worlds apart from Franco's Spain. In 2010, there were no reports of arbitrary or unlawful killings by the Spanish government or its agents,²²³ "no reports of politically motivated disappearances,"²²⁴ "no reports of political prisoners or detainees,"²²⁵ "no government restrictions on access to the internet,"²²⁶ and "no government restrictions on academic freedom or cultural events."²²⁷ Additionally, "prison and detention center conditions met most international standards[,] "²²⁸ "civilian authorities maintained effective control over the armed forces and civil guard[,] "²²⁹ and there was an "independent press, an effective judiciary, and a functioning democratic political system."²³⁰ "Individuals . . . criticize[d] the government publicly or privately without reprisal, and the government did not attempt to impede such criticism."²³¹ Further, trials were public and defendants "enjoy[ed] a presumption of innocence and the right to appeal[,] " and were guaranteed "the right[s] to be represented by an attorney (at government expense if indigent), confront witnesses, present witnesses on their behalf, and have access to government-held evidence."²³² Lastly, citizens enjoyed "the right to change their government peacefully . . . through periodic, free, and fair elections based on universal suffrage."²³³

In conclusion, Spain's policy of amnesty during its transition enabled its people to unite and build a strong, sustainable democracy that exists today. Considering both history as it actually unfolded and other hypothetical scenarios, while they denied justice, Spain's legislative and judicial actions regarding the Franco regime's human rights violations committed during the Spanish Civil War and the Franco dictatorship appear to have been adequate to enable a successful, peaceful transition from dictatorship to democracy. Spain's history and present illustrate how it is possible for a focus on reconciliation and nation-building—rather than retaliation and conflict—to yield an enduring democracy and a non-recurrence of human rights violations. Thus, Spain is a model for other nations dealing with the difficulties of transitioning from an authoritarian regime with a history of human rights violations.

222. U.S. DEP'T OF ST., COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2010, SPAIN (2010), available at <https://www.state.gov/documents/organization/160215.pdf>.

223. *Id.* at 1.

224. *Id.* at 2.

225. *Id.* at 6.

226. *Id.* at 8.

227. *Id.*

228. U.S. DEP'T OF ST., COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2010, SPAIN, at 3 (2010), available at <https://www.state.gov/documents/organization/160215.pdf>.

229. *Id.* at 4.

230. *Id.* at 7.

231. *Id.*

232. *Id.* at 6.

233. *Id.* at 11.

