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# Obstacles to the Prosecution of Crimes Committed During the Civil War and Dictatorship in Spain

*Ostacoli alla persecuzione dei crimini commessi in Spagna durante la Guerra civile e la dittatura*

*Obstáculos a los intentos de paliar la impunidad de los delitos cometidos durante la guerra civil y el franquismo en España*

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AMNISTIA, PRESCRIZIONE

AMNISTÍA, PRESCRIPCIÓN

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## ABSTRACTS

Aunque en los últimos años se han adoptado algunas medidas para tratar de paliar la impunidad de los delitos cometidos durante la guerra civil y el franquismo en España (en particular, la conocida como "Ley de Memoria Histórica" de 2007), lo cierto es que, en el ámbito penal, la única resolución existente fue la Amnistía de 1977 que dejó, entre otros, más de 100.000 casos de desapariciones forzadas impunes. Con todo, en los últimos años, se han sucedido diferentes intentos de iniciar procedimientos penales contra algunos de los delitos cometidos. En este trabajo se exponen los numerosos obstáculos a los que estos intentos se han enfrentado, abordando cuestiones como el controvertido recurso a los crímenes de lesa humanidad como contexto de la calificación de los hechos, la prescripción de los delitos o la extensión del indulto, tanto en los casos de desapariciones forzadas como en los de los denominados "bebés robados".

Sebbene negli ultimi anni siano state adottate alcune misure per cercare di alleviare l'impunità dei crimini commessi durante la Guerra Civile Spagnola e il Franchismo (in particolare, la cosiddetta "Legge di Memoria Storica" del 2007), resta il fatto che, in ambito penalistico, l'unico provvedimento esistente è l'amnistia del 1977, che ha lasciato impuniti, tra gli altri, più di 100.000 casi di sparizioni forzate. Negli ultimi anni ci sono stati diversi tentativi di avviare procedimenti penali in relazione ad esse. In questo lavoro si espongono i numerosi ostacoli che questi tentativi hanno affrontato, mettendo alla luce questioni come il ricorso controverso ai crimini contro l'umanità in sede di qualificazione dei fatti, la prescrizione dei crimini o l'estensione della clemenza, sia nei casi di sparizioni forzate sia in quelli dei cosiddetti "bambini rubati".

In recent years some measures have been adopted in order to try to alleviate the impunity of crimes committed during the Spanish Civil War and Francoism (in particular, the so-called "Historical Memory Act" of 2007). Nonetheless, in the field of criminal law, the only existing resolution was the amnesty law of 1977, which left, among others, more than 100,000 cases of forced disappearances without punishment. In recent years, there have been various attempts to initiate criminal proceedings in relation to some of them. This work exposes the numerous obstacles that these attempts have faced, addressing issues such as the controversial recourse to the category of crimes against humanity in the legal qualification of the facts, the issue of statute of limitation or the extension of the amnesty, as much in the cases of enforced disappearances as in those of the so-called "stolen babies".

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## 1. Introduction.

When referring to transitional justice in Spain, labels such as “impunity” or “oblivion” are recurrently used to characterise the Spanish case. Although different measures have been implemented since 1975 to address reparation to the victims<sup>1</sup>, this has only been partially achieved, even after the passing of the Historical Memory Law<sup>2</sup>; most importantly, the only criminal measure adopted since the restoration of democracy has been the 1977 Amnesty that left, among others, more than 100.000 cases of enforced disappearances unsolved and unpunished<sup>3</sup>.

Although the achievements in the fight against impunity have been little, the attempts to overcome it have been numerous. A number of claims have been filed before different courts scattered around the Spanish territory<sup>4</sup>. At least 7 complaints have been filed before the European Court of Human Rights<sup>5</sup>. In October and November 2008 two Pre-Trial Decisions were issued by renowned Judge Garzón, concerning crimes committed between 1936 and 1952, in response to the 22 complaints filed before the Spanish *Audiencia Nacional*. In January 2019, a complaint was filed before the United Nations Human Rights Council based on an infraction of the International Covenant on Civil and Political Rights, alleging the lack of remedy for two enforced disappearances committed in 1936<sup>6</sup>.

So far, none of these attempts have succeeded, crashing against unsurmountable obstacles such as the 1977 Amnesty Law, statute of limitations or the principle of legality. Among the many resolutions issued in this period, two landmark resolutions are particularly revealing in this regard. On the one hand, the 16<sup>th</sup> October 2008 Pre-Trial Decision issued by Judge Garzón, concerning crimes committed between 1936 and 1952. And, on the other, the 27 February 2012 Supreme Court Judgement, declaring Judge Garzón not guilty of the crime of misuse of power of which he was accused for rendering the aforementioned decision.

As for the Pre-Trial Decision, Judge Garzón unsuccessfully attempted to open an investigation of the numerous enforced disappearances committed during the Civil War and the first years of the Francoism. In this first decision, he accepted competence over the crimes committed and a series of measures were agreed, among them the request of death certificates of 35 alleged perpetrators (including the dictator) and a number of exhumations in sites where victims were believed to be buried. From the start, it became apparent that the goal of the decision was not to convict anyone, but rather to force public administrations to take responsibility on the exhumation of victims. On one of the first pages, it was clearly stated that “with this proceeding it is not intended to carry out a judicial review of the Civil War (...). The purpose of these measures is much more modest and is limited to the issue of the enforced disappearances, notwithstanding with each and every data and information that help stating the conviction on the facts denounced”<sup>7</sup>. Numerous authors have also understood the

<sup>1</sup> A comprehensive list of the measures adopted can be found in “*Informe General de la Comisión Interministerial para el estudio de la situación de las víctimas de la guerra civil y del franquismo*”, 2006 (available [here](#)).

<sup>2</sup> Among others, GIL GIL (2009), p. 93.

<sup>3</sup> The exact number of enforced disappearances is still unclear. The 16 October 2008 Pre-Trial Decision of the Audiencia Nacional established that, even if the data still required confirmation, as many as 114.266 victims are still missing (Auto, Juzgado Central de Instrucción nº 5 de la Audiencia Nacional, Diligencias Previas Procedimiento Abreviado 399/2006 de 16 de octubre de 2008, hechos).

<sup>4</sup> On the prosecution by these courts, see CHINCHON ALVAREZ (2012), p. 77.

<sup>5</sup> According to Amnesty International, all of them have been declared inadmissible (“El tiempo pasa, la impunidad permanece. La jurisdicción universal, una herramienta contra la impunidad para las víctimas de la Guerra Civil y el franquismo en España”, junio de 2013, p. 11 and 39-40).

<sup>6</sup> “Denuncian a España ante la ONU por ocultar crímenes del franquismo”, El Diario, 15/01/2019 (available [here](#)).

<sup>7</sup> Auto, Juzgado Central de Instrucción nº 5 de la Audiencia Nacional, Diligencias Previas Procedimiento Abreviado 399/2006 de 16 de octubre de 2008, hechos, primero, 3: “con este procedimiento no se trata de hacer una revisión en sede judicial de la Guerra Civil (...). El propósito de estas Diligencias es mucho más moderado y se concreta en el tema de la desaparición forzada de personas, sin despreciar todos y cada uno de los datos e información que ayuden a formar la convicción sobre los hechos denunciados”.

Decision in that sense, namely as truth-seeking mechanism, rather than a means to address individual criminal responsibility<sup>8</sup>.

In fact, in the midst of a highly unusual hectic judicial activity, a series of decisions were issued, confirming the extinction of criminal liability due to the death of the alleged perpetrators and establishing the transfer of the cases to the territorially competent courts<sup>9</sup>. This led to a number of resolutions that terminated or suspended the processes<sup>10</sup>.

The difficulties of such a prosecution is apparent in the decision itself. Even from a linguistic perspective this struggle is acknowledged, repeatedly referring to words such as “difficulties” and “hurdles” (*escolllos*) that need to be “overcome”<sup>11</sup>. Legally, some of these obstacles seem hard to be overtaken, such as the prescription of the crimes or the restrictions imposed by the amnesty.

At its turn, the Supreme Court Judgement tried to strike a difficult balance: arguing that Judge Garzón’s decision was entirely wrong, but that it did not amount to a misuse of powers. In order to achieve this, the reasons adduced seem, at times, contradictory. Ultimately, as acknowledged unanimously by doctrine and NGOs, the conclusion remains clear: the criminal prosecution of the crimes committed in the Civil War and the Franco era is for now shut<sup>12</sup>.

In an unexpected turn of events and despite the inevitable pessimism, certain legal advances have taken place in the cases of stolen babies. A series of non-criminal measures have been agreed and the first judgements have been delivered, the most recent one on 27<sup>th</sup> September 2018<sup>13</sup>. On the 5<sup>th</sup> October 2018 a bill has been presented in the Spanish Parliament to address these cases, considering them crimes against humanity and granting the victims important rights. In addition, a DNA data base, as well as special units in the prosecution and police are among the measures proposed<sup>14</sup>.

In this context, in the following pages I will attempt to address the main obstacles that the prosecution of these crimes faces, with the aim to offer an overview of the difficulties to a criminal prosecution experienced in Spain<sup>15</sup>.

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## 2. Obstacles to a criminal prosecution of enforced disappearances.

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### 2.1. *Characterisation of the acts: murder and illegal detentions in a context of crimes against humanity.*

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The core difficulty in the cases of enforced disappearances during the Civil War and the Francoism is to characterise the acts committed. The criminal category understood to be applicable impacts the evaluation of statute of limitations, retroactivity or the applicability of the amnesty.

According to the 16<sup>th</sup> October 2008 Pre-Trial Decision, the illegal acts committed could amount to crimes against humanity, as envisaged in article 607bis of the Spanish Criminal Code and article 7 of the Rome Statute of the International Criminal Court<sup>16</sup>. However, the crimes prosecuted were committed between 1936 and 1952 and Spain only implemented crimes against humanity into the Criminal Code in 2003<sup>17</sup>. As a result, characterisation of the crimes as crimes against humanity could be seen as a retroactive application of the law,

<sup>8</sup> CHINCHON ALVAREZ (2012), p. 51.

<sup>9</sup> Auto del Juzgado Central de Instrucción nº 5, Audiencia Nacional, sumario 53/2008, 18 de noviembre de 2008, but also other decisions like the Auto del Juzgado Central de Instrucción nº 5, Audiencia Nacional, sumario 53/2008, 26 de diciembre de 2008. With detail on the series of resolutions and motions issued, CHINCHON ALVAREZ (2012), p. 62 et ss.

<sup>10</sup> AMNISTIA INTERNACIONAL (2013).

<sup>11</sup> Auto, Juzgado Central de Instrucción nº 5 de la Audiencia Nacional, Diligencias Previas Procedimiento Abreviado 399/2006 de 16 de octubre de 2008.

<sup>12</sup> ESCUDERO ALDAY (2016), p. 79.

<sup>13</sup> Sentencia de la Audiencia Provincial de Madrid 640/2018, de 27 de septiembre de 2018.

<sup>14</sup> Proposición de Ley sobre bebés robados en el Estado español, Boletín Oficial de las Cortes Generales, Congreso de los Diputados, 5 October 2018, 314-1.

<sup>15</sup> On these matters, in greater detail see ESCUDERO ALDAY (2016); CHINCHON ALVAREZ (2012); GIL GIL (2009); TAMARIT SUMALLA (2010).

<sup>16</sup> Auto, Juzgado Central de Instrucción nº 5 de la Audiencia Nacional, Diligencias Previas Procedimiento Abreviado 399/2006 de 16 de octubre de 2008, f. de D. cuarto.

<sup>17</sup> L.O. 15/2003, de 25 de noviembre. In force since the 1st October 2004.



contrary to the legality principle. To circumvent this difficulty, the Pre-Trial Decision used this category only as the context in which the crimes were committed, relying on ordinary crimes such as kidnapping or murder to characterise those acts<sup>18</sup>.

With this argumentative turn, Judge Garzón intended to “overcome the problems of non-retroactivity that could be adduced regarding this figure”<sup>19</sup>, but also those concerning the prescription of the crimes or the limits imposed by the Amnesty. This approach was not entirely new, as it had been recurrently applied in Latin America<sup>20</sup> and, also in Spain, in the Supreme Court Judgement 798/2007, a case concerning crimes of murders and kidnappings committed by Adolfo Scilingo during the Argentinean Military Dictatorship<sup>21</sup>.

In this judgement, the Supreme Court examined in detail this matter and reached the following conclusion:

“The circumstances described, very similar to those contained in international instruments, overlapping acts that are already constitutive of crimes, are what turn these into crimes against humanity, increasing the wrongdoing, which results in a greater punishment; raising the issue of its imprescriptibility; and making it possible to assert that States must proceed to persecute and punish them. In other words, those circumstances added to the murder and illegal detention, in the case, even if they do not allow the application of a criminal offense regulated in a subsequent provision that is not more favorable nor authorize, for the same reason, a higher sentence, can be considered to justify their universal persecution”<sup>22</sup>.

The 2008 Pre-Trial Decision tried to apply this very same doctrine (stressing the limits of the legality principle and that the acts examined *could not* be described as crimes against humanity). Yet, in 2012, the Supreme Court determined that the Judge erred by characterising the facts as crimes against humanity, considering that this mistake “drags others”. According to the Supreme Court, crimes against humanity, even if used only as a “context”, were not applicable in the case, as “the normative body that conformed international criminal legality was not in force at the time of the commission of the acts”<sup>23</sup>. Not rejecting but rather expressly adhering to the interpretation carried out in 2007, the Supreme Court stressed the strict application of the principle of legality, which made article 607bis inapplicable, discarded the validity of international law not implemented in national law and customary international law and considered unacceptable the characterisation carried out in the Pre-Trial Decision<sup>24</sup>.

Even if earlier, in its 798/2007 Judgement, the Supreme Court understood that “the contextual element characteristic of crimes against humanity was internationally recognized at the time of the events with sufficiently precise limits”<sup>25</sup>, it was now deemed that “the normative body conforming international criminal legality was not prevailing at the time when the crimes were committed”<sup>26</sup>. Although not unmistakably stated, this change could be due to the dates in which the crimes were committed; while in the 70’s, according to the Supreme Court’s findings, crimes against humanity could be considered customary international law, from 1946 to 1952 this was not the case<sup>27</sup>.

There is an additional obstacle to this characterization. The Pre-Trial Decision considered that the acts amounted to an aggravated form of illegal detention, not giving notice of the whereabouts of the person detained. Yet, as pointed out by Gil Gil, this crime did not exist in the 1932 Criminal Code and was included in 1944 but applied only when the perpetrators

<sup>18</sup> *Ibid.*, f. de D. noveno.

<sup>19</sup> *Ibid.*, f. de D. cuarto.

<sup>20</sup> Very critical to this approach, MALARINO (2008), p. 443.

<sup>21</sup> Sentencia del Tribunal Supremo 798/2007, de 1 de octubre. On this resort to crimes against humanity, see FERNANDEZ-PACHECO ESTRADA (2008), pp. 101-116.

<sup>22</sup> Sentencia del Tribunal Supremo 798/2007, de 1 de octubre, f. de D. sexto, 9: “[L]as circunstancias descritas, muy similares a las contenidas en los instrumentos internacionales, superpuestas a hechos ya de por sí constitutivos de delitos, son las que convierten a éstos en crímenes contra la Humanidad, incrementando el contenido de injusto, lo que repercute en una mayor pena; planteando la cuestión de su imprescriptibilidad; y permitiendo afirmar que los Estados deben proceder a su persecución y castigo. Dicho con otras palabras, esas circunstancias añadidas al asesinato y a la detención ilegal, en el caso, aunque no permitan la aplicación de un tipo penal contenido en un precepto posterior que no es más favorable ni autorizan por la misma razón una pena comprendida en límites de mayor extensión, pueden ser tenidas en cuenta para justificar su perseguibilidad universal”.

<sup>23</sup> Sentencia del Tribunal Supremo 101/2012, de 27 de febrero, f. de D. tercero.

<sup>24</sup> *Ibid.*

<sup>25</sup> Sentencia del Tribunal Supremo 798/2007, de 1 de octubre, f. de D. sexto, 10: “el elemento de contexto característico de los crímenes contra la Humanidad estaba reconocido internacionalmente en el momento de los hechos con límites suficientemente definidos”.

<sup>26</sup> Sentencia del Tribunal Supremo 101/2012, de 27 de febrero, f. de D. tercero, 1: “el cuerpo normativo que conformaba la legalidad penal internacional no estaba vigente al tiempo de la comisión de los hechos”.

<sup>27</sup> In greater detail, CHINCHON ALVAREZ (2012), p. 100.

were not public agents (but private individuals)<sup>28</sup>. Moreover, it can be challenged, as was done in the Prosecutor's Response, whether the acts were illegal detentions or rather murders, since "it was public and notorious that the victims were executed back then"<sup>29</sup>.

## 2.2. *Prescription of the crimes.*

Another obstacle for the prosecution of these crimes is their potential prescription. Since the crimes were committed between 1936 and 1952. When the prosecution started in 2006, they should have been considered long prescribed: the limit imposed by Spanish Law was 15 years in the 1932 Criminal Code or 20 years as envisaged by our current Criminal Code. Nowadays no statute of limitations applies to crimes against humanity, but this has only been in force in Spain since 2004<sup>30</sup>. Therefore, a non-favourable retroactive application of the law came again into question. Judge Garzón relied on different arguments -scattered across the decisions- to justify that prescription was inapplicable to this case.

First, that no criminal prosecution could have been substantiated until December 1978 so prescription could not start upon commission of the crimes. According to the Decision, this argument relies on ECHR cases, in which the Court stated that until an authoritarian regime was not replaced by the rule of law which removed impunity of its leaders, prescription could not run<sup>31</sup>. Nevertheless, as indicated in the Prosecutor's response, even if such an interruption would be accepted, it would for that reason have ended as the Constitution entered in force in 1978, so the crimes would long be prescribed<sup>32</sup>.

Second, that although the acts could not be qualified as crimes against humanity, it could be considered that the illegal detentions took place in a context of crimes against humanity. However, and as already pointed out, this characterisation of the acts is not flawless, especially since it could be considered a retroactive application of the law<sup>33</sup>.

And finally, Judge Garzón relied on the permanent and continuing nature of the crime of illegal detention not giving notice of the whereabouts of the person detained. This is generally understood to mean that the crimes continue being perpetrated until that information is known, which, in this case, implicates that the crimes are still being committed<sup>34</sup>.

## 2.3. *Amnesty.*

In 1977, an Amnesty Law was passed by the newly-established democratic Parliament, with 296 votes in favour, 2 against and 18 abstentions. As pointed out by Tamarit Sumalla, "the crimes to be amnestied were all the criminal actions taken due to political reasons, whatever its nature or its results, including murders perpetrated by terrorist organizations, and all crimes committed by public servants of the previous regime in defending it from its enemies"<sup>35</sup>. The most relevant provision was Article 1, which granted amnesty to "all politically motivated acts, whatever their result, consisting of crimes committed before December 1976".

Essentially, there are three controversies regarding the Amnesty Law and its effects. First, no definition was given as to what "politically motivated acts" means. There seem to exist two interpretations: understanding that it refers to the perpetrator's *mens rea*, i.e. that any crime committed with political motivation would be amnestied<sup>36</sup>; or considering that only political crimes, such as rebellion and sedition, are included, which is problematic as this category was

<sup>28</sup> A. GIL GIL, "Justicia transicional en España", in GIL GIL (2010), p. 158.

<sup>29</sup> Recurso de Apelación de la Fiscalía de la Audiencia Nacional, sumario 53/08, 20 de octubre de 2008, p. 2.

<sup>30</sup> Article 131.4 of the Spanish Criminal Code, modified by the L.O. 15/2003, 25<sup>th</sup> November, which entered in force the 1<sup>st</sup> October 2004. Spain has not signed nor ratified the 1968 Convention on the non-applicability of statute of limitations to war crimes and crimes against humanity.

<sup>31</sup> The Decision however refers to separate opinions in *Streletz, Kessler and Krenz v. Germany*, Judgement of 22 March 2001.

<sup>32</sup> Recurso de Apelación de la Fiscalía de la Audiencia Nacional, sumario 53/08, 20 de octubre de 2008, p. 31.

<sup>33</sup> Very critical to this approach, GIL GIL (2009), p. 123.

<sup>34</sup> Auto del Juzgado Central de Instrucción nº 005 de la Audiencia Nacional, Diligencias Previas Procedimiento Abreviado 399/2006, de 16 de octubre de 2008, f. de D. noveno.

<sup>35</sup> TAMARIT SUMALLA (2011), p. 734.

<sup>36</sup> BUENO ARUS (1977).

not expressly indicated in the Criminal Code<sup>37</sup>.

In his Pre-Trial Decision, Judge Garzón argued that crimes against humanity cannot be considered political crimes, relying on international case law (Special Court for Sierra Leone, European Court of Human Rights and Interamerican Court of Human Rights), as well as international treaties such as the Convention against Torture and the International Covenant on Civil and Political Rights. As a result, he claimed that the Amnesty Law did not apply<sup>38</sup>.

The second ground for debate relies on the fact that, in order to benefit from the amnesty, the courts would have needed to previously determine that a politically motivated crime was indeed committed. This was the approach taken in 1995 in the *Ruano* case, where the *Audiencia Provincial de Madrid* did not consider the amnesty as a preliminary matter. Hence, the Court held that the two policemen, who were accused of killing a student, should admit committing the crime and acting politically motivated, in order to benefit from the amnesty<sup>39</sup>. Authors like Gil Gil consider this would have been the path to follow, in order to turn the Amnesty into a truth-seeking mechanism<sup>40</sup>.

The third and main ground for discussion is whether amnesties of crimes against humanity were legal in Spain back in 1977. It is well settled that nowadays amnesties of crimes against humanity or enforced disappearances are illegal. However, it is subject to debate if in 1977 this was also the case.

Various treaties refer to the States' obligation to punish certain crimes: the Geneva Conventions (in force since 1949, ratified by Spain in 1952), the Convention on the Prevention and Punishment of the crime of Genocide (in force since 1951, ratified by Spain in 1968), International Covenant on Civil and Political Rights (in force since 1976, ratified by Spain in 1977), Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (in force since 1987, ratified by Spain in 1987), the Rome Statute of the International Criminal Court (in force since 1998, ratified by Spain in 2000) and the UN Convention on forced disappearances International Convention for the Protection of all Persons from Enforced Disappearance (in force since 2010, ratified by Spain in 2009). However, in the Spanish case the question remains whether this duty affects the crimes committed, since it would again entail a retroactive application of the law.

The applicability of the International Covenant on Civil and Political Crimes is particularly relevant in this regard. Article 2.3.a) determines that “[t]o ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity”. It is debatable if reference to “effective remedy” necessarily entails criminal measures or any kind of legal response<sup>41</sup>. Notwithstanding with the interpretation favored, the fact remains that enforced disappearances can hardly be considered addressed, neither by criminal nor non-criminal measures.

Anyways, as pointed out, the Covenant generally entered into force the 23 March 1976 and in Spain on the 27 July 1977. In the same vein, the Supreme Court relied on the fact that the Human Rights Council had stated that no violation exists before the Covenant entered into force<sup>42</sup>. However, some authors, like Chinchón Álvarez, question this finding, pointing out other references where the Human Rights Council seems to state the opposite<sup>43</sup>. Since a new complaint has been filed before the Human Rights Council, referring enforced disappearances and the International Covenant, there might be a clarification in the future.

### 3. Criminal prosecution of stolen babies.

The prosecution of cases of kidnapping, child trafficking and illegal adoption of babies during the war and the postwar (referred to as “stolen babies”) have surprisingly followed a di-

<sup>37</sup> See BURBIDGE (2011), p. 772.

<sup>38</sup> Auto del Juzgado Central de Instrucción nº 005 de la Audiencia Nacional, Diligencias Previas Procedimiento Abreviado 399/2006, de 16 de octubre de 2008, F. de D. décimoprimer.

<sup>39</sup> Sentencia de la Audiencia Provincial de Madrid de 19 de diciembre de 1995, citada por GIL GIL (2009), p. 101.

<sup>40</sup> GIL GIL (2009), p. 8; p. 101.

<sup>41</sup> AMBOS (2008), p. 31.

<sup>42</sup> Citing different resolutions issued by the Human Rights Council on the Argentinean amnesty, GIL GIL (2009), pp. 103 et ss.

<sup>43</sup> CHINCHON ALVAREZ (2012), p. 116.



fferent path. The number of crimes committed is still very unclear. In some instances, reference is made to 30.000 cases. The source for this number appears to be the Pre-trial Decision of 18<sup>th</sup> November 2008, in which Judge Garzón indicated that, between 1944 and 1954, 30.960 children were placed under the State's custody, including war orphans, children of prisoners, exiled, clandestine or disappeared parents<sup>44</sup>. However, it is also not uncommon to go as high as 300.000 cases<sup>45</sup>.

There seems to be the political determination to give certain remedy to these cases. A DNA database was set up in 2010 and a special unit in the Ministry of Justice for the coordination of the searches was established in 2013.

In 2012, the Spanish Office of the Prosecutor issued a memorandum establishing guidelines for the prosecution of such cases, attempting to unify means of investigation needed, the characterization of the conduct or clarify the status of the prescription<sup>46</sup>. Since 2010, over 2000 pre-trial proceedings have been undertaken in the course of investigations, including DNA testing. The results so far are not conclusive and do not proof a widespread or systematic character of such conducts<sup>47</sup>.

In general, criminal prosecution of stolen babies' cases face less obstacles than illegal detentions, since it is generally understood that the 1977 Amnesty Law does not apply. In his Pre-Trial Decision of 18<sup>th</sup> November 2008, Judge Garzón widened the investigation to what he presented as another type of enforced disappearances, where victims are still alive and had been "abducted legally or illegally". However, as already pointed out, the cases were ultimately transferred to (and closed by) the tribunals territorially competent<sup>48</sup>.

The most recent judgment on the matter was delivered by the *Audiencia Provincial de Madrid* on 27<sup>th</sup> September 2018. Although the accused was declared not guilty due to the prescription of the crimes, the Court held the oral hearings, examined the evidence and concluded that a series of crimes had been committed. The possibility that the crimes fell under the Amnesty Law was not even considered. Since the biological parents could not be identified, it was not possible to link the conduct to a war or postwar pattern<sup>49</sup>.

The characterization of the conduct was again troublesome, given that neither the crimes of child abduction with the purpose of illegal adoption nor enforced disappearances exist as such in the Spanish Criminal Code. Ultimately the Court considered that the conduct could amount to an illegal detention (as well as forgery of administrative documents and a modality of fraud specific to childbirth)<sup>50</sup>.

Statute of limitations were also discussed, reaching a different conclusion than the Prosecutor's memorandum. The Court held that prescription should start counting at the moment when the victim found out he or she was adopted and not since he or she started suspecting the adoption could have been irregular<sup>51</sup>. Both parties have already announced their appeals, which, in the case of the Prosecution, will refer specifically to the count of the statute of limitations<sup>52</sup>.

On the 5<sup>th</sup> of October 2018 a new draft bill was presented in the Spanish Parliament (*Proposición de Ley sobre bebés robados en el Estado español*)<sup>53</sup>. Unexpectedly, all the members of Parliament enthusiastically voted in favour of debating its approval, and it was agreed to expedite it. The aim of the bill is to recognise and make effective the victims "right to truth, justice, reparation and guaranties of no repetition". Article 1 of the proposition also openly states that the acts amount to crimes against humanity. Article 6 addresses the judicial protection, enabling the prosecution to initiate the proceedings, granting exhumations and DNA testing

<sup>44</sup> Auto del Juzgado Central de Instrucción nº 5, Audiencia Nacional, sumario 53/2008, 18 de noviembre de 2008, razonamiento jurídico noveno, p. 61. This Decision cites as a source of the figures: VINYÉS RIBAS (2002), p. 83.

<sup>45</sup> This figure is referred to by some victims associations (SOS Bebés Robados Madrid, [here](#)) and was also mentioned in Parliament, during the proposition's debate (see Intervenciones de los Diputados Mikel Legarda Uriarte y Gabriel Rufián Romero, Diario de Sesiones del Congreso de los Diputados, año 2018, XII Legislatura, nº 166, Sesión plenaria núm. 159, celebrada el martes, 20 de noviembre de 2018, p. 18 y 19).

<sup>46</sup> Circular 2/2012 del Fiscal General del Estado sobre unificación de criterios en los procedimientos por sustracción de menores recién nacidos.

<sup>47</sup> "El análisis del ADN de 81 casos descarta que fueran bebés robados", in *El País*, 16/01/2019.

<sup>48</sup> Auto del Juzgado Central de Instrucción nº 5, Audiencia Nacional, sumario 53/2008, 18 de noviembre de 2008.

<sup>49</sup> Sentencia de la Audiencia Provincial de Madrid 640/2018, de 27 de septiembre de 2018, hechos probados.

<sup>50</sup> Sentencia de la Audiencia Provincial de Madrid 640/2018, de 27 de septiembre de 2018, f. de D. primero.

<sup>51</sup> Sentencia de la Audiencia Provincial de Madrid 640/2018, de 27 de septiembre de 2018, f. de D. sexto.

<sup>52</sup> "La Fiscalía recurrirá ante el Supremo la sentencia de los 'bebés robados' y pedirá que se revise la prescripción", in *Europapress* 9/10/2018.

<sup>53</sup> Proposición de Ley sobre bebés robados en el Estado español, Boletín Oficial de las Cortes Generales, Congreso de los Diputados, 5 October 2018, 314-1.

necessary to investigate (and financing them). Moreover, the project includes the creation of a special DNA data base (although, to a certain extent, this exists since 2010) and special units in the prosecution (*Fiscalía Especial sobre Bebés Robados*) and police<sup>54</sup>. It is therefore reasonable to expect that numerous new cases will take place.

## 4. Conclusions.

Even if there is still a relatively clear social drive to obtain remedy for the crimes committed in Spain during the civil war and the postwar period, criminal prosecution faces important impediments that can hardly be overcome. The fight against impunity collides in the Spanish case with the interpretation of core criminal principles such as legality or the connected principle of non-retroactivity of non-favorable laws. As suggested by, among others, the Human Rights Committee, the clearest path would be repealing the 1977 Amnesty Law<sup>55</sup>. However, in the current political situation, it is extremely unlikely that this could come true.

The lack of consensus is evident, also regarding non-criminal measures such as those included in the Historical Memory Law. The simplest decision finds opposition, as shown by the difficulties experienced to change streets names called after prominent members of the Franco regime<sup>56</sup>. Unfortunately, these matters are highly politicized, traditionally envisaged as left-wing claims and evidence of vindictiveness. Proof of this politicization is the assignment of public funding to the Historical Memory Law (and, ultimately, to the exhumations). After 6 years without any funding whatsoever under right-wing governments, the left-wing government has allocated in the draft national budget a record of 15 million euros.

Unexpectedly, the prosecution of stolen babies leaves some room to optimism. Partly, because the 1977 Amnesty does not apply, opening the way to the first judgements. But also, because it gathers political consensus, which is exceptional in a polarized scenario like the Spanish one. Relevant measures, like a DNA data base or prosecuting guidelines, have already been implemented. If the legislative draft is finally passed, which should be the case given the enthusiastic support recently displayed in Parliament, it seems realistic to expect that more judgments will follow.

One thing is clear: half a century later, this whole debate is far from being closed, as evidenced as well by the ongoing controversy on matters like the repurposing of the mausoleum to the dictator, the relocation of the dictator's grave or the renaming of streets still linked to the dictatorship.

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<sup>54</sup> Proposición de Ley sobre bebés robados en el Estado español, Boletín Oficial de las Cortes Generales, Congreso de los Diputados, 5 October 2018, 314-1.

<sup>55</sup> Concluding observations of the Human Rights Committee, Consideration of Reports submitted by States Parties under article 40 of the Covenant, Human Rights Committee, Ninety-fourth session, CCPR/C/ESP/CO/5 5 January 2009.

<sup>56</sup> On the case of Madrid, see ESCUDERO ALDAY (2018a).

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