

April 2012

The Wane in Spain (of Universal Jurisdiction): Spain's Forgetful Democratic Transition and the Prosecution of Tyrants

James J. Friedberg

West Virginia University College of Law, james.friedberg@mail.wvu.edu

Follow this and additional works at: <https://researchrepository.wvu.edu/wvlr>

 Part of the [Courts Commons](#), [European Law Commons](#), and the [International Law Commons](#)

Recommended Citation

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. (2012).

Available at: <https://researchrepository.wvu.edu/wvlr/vol114/iss3/5>

This *Civil Resistance and the Law: Nonviolent Transitions to Democracy* is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in *West Virginia Law Review* by an authorized editor of The Research Repository @ WVU. For more information, please contact ian.harmon@mail.wvu.edu.

**THE WANE IN SPAIN
(OF UNIVERSAL JURISDICTION):
SPAIN'S FORGETFUL DEMOCRATIC TRANSITION
AND THE PROSECUTION OF TYRANTS**

*James J. Friedberg**

I.	PREFACE AND INTRODUCTION.....	826
II.	TRANSITION MEN: FANTASY DIALOGUE.....	829
III.	HISTORY, MEMORY, AND THE MYTH OF THE TWO DEVILS	841
	A. <i>"Europe Stops at the Pyrenees "</i>	841
	B. <i>The Myth of the Two Devils</i>	844
IV.	SELECTIVE AMNESIA AND PROTO-TRANSITION.....	847
	A. <i>Expedience Sows the Seeds of the Pact of Silence</i>	848
	B. <i>Preparing to Cross the Pyrenees</i>	852
V.	KING, COMPROMISE, CONSTITUTION, AND COUP	855
	A. <i>1977 Amnesty Law and the 1978 Constitution: Legislating Amnesia (or Silence)</i>	859
VI.	BRIEF FANTASY ROUNDTABLE IN THE YEAR 2000	863
VII.	UNIVERSAL JURISDICTION IN SPAIN: ADVENT AND EXPANSION	865
	A. <i>Stalking the Condor: Pinochet and the Argentines</i>	870
	B. <i>Beyond Pinochet: Spain Prosecutes More Spanish-American Tyrants</i>	877
	1. <i>The Scilingo case</i>	877
	2. <i>The Cavallo case in Mexico and Spain</i>	878
	3. <i>The Rios-Montt case</i>	879
VIII.	THE WANE IN SPAIN OF UNIVERSAL JURISDICTION	880
	A. <i>International Tribunals</i>	881
	B. <i>The Pinochet Effect</i>	882
	C. <i>Diminished Credibility</i>	882
	D. <i>Foreign Relations Difficulties</i>	883
	E. <i>Breaching the Pact of Forgetting and Reclamation of Memory</i>	884
	F. <i>Universal Jurisdiction Law Amended</i>	888
IX.	BALTAZAR IN WONDERLAND	888
X.	CONCLUSION	893

* Posten Professor of Law, West Virginia University College of Law. J.D., Harvard Law School, 1975. B.A., Temple University, 1972. Diplome, Institut International des Droits de L'Homme, 1989. I thank Joseph Schaeffer, Bertha Romine, Crystal Canterbury, and Helene Friedberg, without whose substantial help I could not have written this Article. I also acknowledge with thanks the financial support of the West Virginia University College of Law Hodges Fund.

I. PREFACE AND INTRODUCTION¹

While living in Spain in 1995 as a visiting scholar at the University of Seville researching comparative environmental regulation, I casually asked my friend and colleague Professor Jesus Jordano Fraga why no one talked about Franco or the Civil War.² He replied (in essence) that it was a painful and divisive subject and that people wanted to forget pain and avoid division. It was twenty years after Franco's death. Democracy was new and invigorating, and prosperity had increased dramatically in those two decades. Spain had rejoined Europe. Life was good. Why rock the boat?

Although the average Spaniard of the mid-1990s refused to discuss the Civil War or Franco, and while critical media denounced this "collective amnesia," numerous authors and filmmakers were producing works based on these publicly-avoided themes.³ This contrast struck respected intellectual Paloma Aguilar as a paradox.⁴ However, it seems no paradox that society's critics and creative forces would confront suppressed discontents that the public and political elites avoided.

Besides my 1994–95 sabbatical research focus on Spanish environmental issues, it happened that I also taught international human rights. So when British authorities detained General Augusto Pinochet three years later in 1998 for crimes against humanity committed in Chile, the news caught my attention.

¹ I am grateful for the prior scholarship of Paloma Aguilar, whose work on the "Pact of Forgetting" was groundbreaking and definitive; of Christina Palomares for her work on democratic transition in Spain; and of Naomi Roht-Arriaza for her work on the "Pinochet Effect."

² I now realize that the same question struck Paloma Aguilar, who wrote the following in 1996:

My interest was initially aroused by the contradictory impressions that I formed from reading the abundant literature which exists regarding the Transition as well as numerous pieces from the daily press. From my reading of the former I sensed the existence of a *deliberate silence* regarding the recent past which, nevertheless, seemed to underlie the most important decision-making processes of that period. The obsession with peace and stability, the particular caution regarding issues relating to public order, *the systematic avoidance of conflictual issues* . . . led me to focus . . . on the collective memory of the Spanish people. . . .

PALOMA AGUILAR, MEMORY AND AMNESIA: THE ROLE OF THE SPANISH CIVIL WAR IN THE TRANSITION TO DEMOCRACY xviii (Mark Oakley trans., 2002) (emphasis added). See also Daniel Hannan, *Lorca's Skeleton Speaks of a New Spain*, THE TELEGRAPH (UK), Aug. 29, 2009, available at www.telegraph.co.uk/comment/personal-view/6111468/Lorcas-skeleton-speaks-of-a-new-Spain.html.

³ Sebastiaan Faber, *The Price of Peace: Historical Memory in Post-Franco Spain, a Review-Article*, 58 *Revista Hispánica Moderna* 205, 206 (2005) (discussing the growth in Spanish media treating the topic of memory).

⁴ AGUILAR, *supra* note 2, at xix.

That *Spanish* judges requested Pinochet's detention to seek the general's extradition for trial in Spain piqued my interest further. I was sure that this strange and marvelous legal action somehow shed light on my brief discussion with Jesus three years earlier. More was emerging with this news than "merely" a historic human rights and legal struggle testing the controversial doctrine of universal jurisdiction. The Pinochet prosecution also appeared to offer a metaphor for the legal process that never had been pursued against Franco,⁵ a stand-in for a public voicing by Franco's victims.⁶ A *pact of forgetting* tacitly "negotiated" in the late 1970s to facilitate Spain's transition to democracy had silenced that voice.⁷

Political analysts, not legislators, named the Pact of Forgetting (*Pacto de Olvido*)—that is, there is no formal written agreement by that name.⁸ It was an implied understanding, a political deal made after Franco's death in 1975, under which Spanish conservatives and the military acquiesced to democracy, while liberals and leftists agreed to forgo any accounting for the crimes of the Franco regime.⁹ The elites across the Spanish political spectrum (except at the insignificant extremes) felt that such a trade-off was required to ensure civil peace.¹⁰ Some critics assert that "Pact of Silence" (*Pacto de Silencio*) describes this unwritten social contract better than "Pact of Forgetting," since the wrongs of the Francoists were not forgotten, but only repressed from public discourse.¹¹ Both designations appear in scholarly and popular literature. In any event, the silence of my Spanish colleagues in 1994–95, as explained by my friend Jesus, reflected this society-wide compact.

Spain's transition to democracy and its assertion of universal jurisdiction over human rights abusers reflect, at the national level, themes visible in the global human rights picture in the decades bordering the turn of the millennium. Spain successfully achieved its democratic transition in the 1970s and 1980s

⁵ Metaphor and irony, particularly regarding the themes of this Article, surrounded Pinochet's only previous trip to Europe. In 1975, he flew to Spain for Franco's funeral, the only head-of-state to so honor the dead dictator. The apparently ungrateful transitional government gave him forty-eight hours to depart the country. NAOMI ROHT-ARRIAZA, *THE PINOCHET EFFECT: TRANSNATIONAL JUSTICE IN THE AGE OF HUMAN RIGHTS* 1 (2005).

⁶ *Id.* at 1. See also Stanley Meisler, *Spain Forgets Franco, But Not Pinochet*, L.A. TIMES, Dec. 6, 1998, at 2, available at articles.latimes.com/1998/dec/06/opinion/op-51109.

Judge Baltazar Garzon, chief Spanish prosecutor in the Pinochet extradition, initially denied that any Franco metaphor was implicit in the Spanish cases against former Latin dictators.

⁷ Madeleine Davis, *Is Spain Recovering its Memory? Breaking the Pacto del Olvido*, 27 Hum. Rts. Q. 858, 863–64 (2005). See also PAUL PRESTON, *THE POLITICS OF REVENGE: FASCISM AND THE MILITARY IN TWENTIETH-CENTURY SPAIN* 33 (1995).

⁸ OMAR G. ENCARNACION, *SPANISH POLITICS: DEMOCRACY AFTER DICTATORSHIP* 2 (2008).

⁹ PRESTON, *supra* note 7, at 33 (discussing the conflict between a desire for revenge and the fear of another civil war as the basis for the unspoken pact of forgetting). See also ENCARNACION, *supra* note 8, at 2.

¹⁰ PRESTON, *supra* note 7, at 33.

¹¹ Faber, *supra* note 3, at 205.

under a public amnesia toward the dictatorship it was leaving behind. Yet its prosecuting judges led the world in the 1990s and 2000s in promoting the use of universal jurisdiction to secure justice for human rights victims. These two accomplishments seemed ethically discordant: Spain's forgetfulness toward Franco's crimes did not jive with its leading role in the movement toward enforcement of international criminal law against deposed tyrants. However, progressive Spanish lawyers have purposely, though perhaps stealthily, interwoven these two threads.

Manuel Fraga Iribarne¹² and Baltazar Garzon have rarely, if ever, spoken to each other.¹³ The dialogue I created for them here never really occurred. But to add some biographical narrative to my analysis, I highlight elements in the careers of these two "transition men," one of the political right and one of the left, both lawyers and professors, both controversial, and both fascinating players in Spain's democratic transition. Fraga began his career a generation before Garzon. The former was a chief architect of the Proto-transition that occurred in the final decade and a half of Francoist rule.¹⁴ The latter became known at the millenium's turn as the international legal profession's most visible advocate of universal jurisdiction.¹⁵ Ironically, he now finds himself a defendant in Spanish court for purportedly overstepping the prohibitions of Spain's 1976 Amnesty Law by initiating an investigation of Francoist crimes.¹⁶

The Pinochet case debuted on the international political stage when British police arrested the former dictator prior to departing England after medical treatment in 1998.¹⁷ The significance of Spanish prosecutors initiating this prosecution (and a number of similar ones within a few years) underlies a major theme of this paper—dealing by indirection with the unresolved moral legacy of Francoism. Pinochet was a metaphor for Franco. Therefore, this Article examines how universal jurisdiction rose and flourished in Spain for about a decade, changing Spanish politics and international law profoundly.

¹² For readers unfamiliar with Spanish name order, please note that where an individual has two family names (as in Manuel *Fraga Iribarne*) the former is usually the paternal one, the latter the maternal, and simple identity is usually given by the paternal name only, hence *Sr. Fraga*.

¹³ Research in English-language sources reveals no interactions between these two prominent Spaniards. However, given their decades of public service, albeit in opposing political camps, one would suspect they were in the same room at the same time on occasion. Maybe they talked.

¹⁴ CHRISTINA PALOMARES, *THE QUEST FOR SURVIVAL AFTER FRANCO: MODERATE FRANCOISM AND THE SLOW JOURNEY TO THE POLLS, 1964–1977*, at 4 (2004).

¹⁵ See ROHT-ARRIAZA, *supra* note 5, at 216–17.

¹⁶ See *infra* Part IX.

¹⁷ *In re Pinochet*, Opinions of the Lords of Appeal for Judgment in the Cause (Jan. 15, 1999), available at <http://www.publications.parliament.uk/pa/ld199899/ldjudgmt/jd990115/pino01.htm> (Background Facts).

Further, this Article observes the decline, especially in Spain, of pure universal jurisdiction in national tribunals. Ironically, this waning occurred shortly after the Spanish Constitutional Court's 2005 ruling validating precisely such pure universality-based judicial competence.¹⁸ The decline reflects the consequences of a breach in the Pact of Forgetting facilitated by the election of President Zapatero, by the increased newly confident activism of families victimized under Franco, and by legislation repudiating Franco's coup and dictatorship.¹⁹ This waning also reflects the diminished need for national assertions of universal jurisdiction as international human rights tribunals (e.g., the International Criminal Court) mature.

We end at the Valley of the Fallen, an immense cave-basilica-mausoleum, a monumental tribute by Franco to himself and to the bloody Civil War victory by one half of Spain over the other half. The nation's ambivalence regarding how now to deal with this grand project of granite, hubris, and forced labor reflects the uncertainty and compromise that have characterized the Spanish transition—and perhaps which ironically have made peaceful democratic change possible.

In 1976, Spain chose to forget because it remembered all too well. Now that it has secured democracy without spilled blood, it can remember again.

II. TRANSITION MEN: FANTASY DIALOGUE²⁰

Manuel Fraga (F): Your prosecutions are publicity stunts. You confuse politics and law. You seek judgments from courts that can only be made by history. And you ignore sovereign rights.²¹

¹⁸ See *Guatemala Genocide Case*, S.T.S., Sept. 9, 2005 (Boletín Oficial del Estado [B.O.E.], No. 258, p. 45), available at http://www.boe.es/aeboe/consultas/bases_datos/doc.php?coleccion=tc&id=SENTENCIA-2005-0237.

¹⁹ Carolyn P. Boyd, *The Politics of History and Memory in Democratic Spain*, in 617 THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 133, 143 (Martin O. Heisler ed., 2008) (discussing condemnation of Francoist coup by Cortes Commission on Foreign Affairs). See also Davis, *supra* note 7, at 859.

²⁰ **DISCLAIMER:** This dialogue and the one in Part Six are fictional, literary devices intended to further the academic purposes of this Article. The public men portrayed here never spoke these words. Nor can I claim with certainty that they even thought the thoughts that the words imply. Like much historical fiction, these dialogues aim to throw light on the actions taken by these men in matters of public consequence. I have tried to make that light illuminating, not glaring. Like political cartoons, these dialogues emphasize isolated aspects of the actions and characters of complex persons. My sketches might be incomplete like those cartoons, not purporting to be biographically comprehensive.

²¹ Why Fraga and Garzon? Each has led a public life whose acts constituted landmarks in Spain's transition. They represent two sides of the present Spanish political spectrum, Fraga on

Baltasar Garzon (G): I respect sovereignty. But it is not absolute. Sovereignty cannot excuse the violation of the most basic universal legal norms. When powerful officials torture or instigate genocide, they wrong not only the victim, but also all humankind. The concept “crime against humanity” denotes precisely this. And, as you should know as a former law professor, the prosecution of crime is the province of law, not politics.

F: Crimes against humanity! What nonsense! A false concept fabricated by socialists and fools.

G: The judges and lawyers at Nuremberg were no fools, and only the Soviet representatives were socialists. The British, French, and Americans were respected members of the Western legal establishment and among its finest legal minds. Their governments’ decision to try the Nazis for crimes against humanity, rather than summarily lining them up against a wall and shooting, elevated law over brute power. I understand, though, how a seminal precedent established by the conviction of Nazi criminals creates unease in a gentleman like you who so faithfully served a Spanish dictator installed by those same Nazis.

F: You leftists disrespect the truth, as you do most other traditional values. Franco led a crusade at the demand of a Spanish nation reclaiming its patrimony from the threat of world Communism. It is true that certain states supported our cause—Germany among them—but Stalin aided the other side. No Nazi installed the Generalissimo. The Spanish people did that.

the right and Garzon on the left. Their careers have overlapped in history, but they come from successive generations. Fraga rose to prominence in the 1960s as a new young voice within the Franco government. From the late 1950s until Franco’s death, he argued for a gradual opening of the repressive regime. Garzon was a child, then a student, during those twenty years and mounted the political stage only after the new democracy had been established by the 1978 Constitution. They have shared that stage for most of the last three decades. The continuous rise of Garzon’s career has coincided with the long maturity and the eventual decline of Fraga’s.

Fraga and Garzon both studied law. They have practiced it, taught it, interpreted it, and created it—as attorneys, professors, legislators, and bureaucrats. They understand the law’s power and have used it for justice (and, some argue, for injustice). As Franco’s Minister of Information and Tourism, Fraga midwived the 1966 Press Law that opened up the Spanish media to a degree unprecedented since the Civil War. However, he also supervised repressive action against media that he felt had overstepped the bounds of that statute. PALOMARES, *supra* note 14, at 91–94. By his creative prosecutions under Spain’s universal jurisdiction statute, Garzon prompted groundbreaking development of international human rights doctrine, most notably through the House of Lords decision in the Pinochet case. *R v. Bow Street Metro. Stipendiary Magistrate, ex parte Pinochet Ugarte* (No 3), [2000] 1 AC 147, [1999] 2 All ER 97, [1999] 2 WLR 827, 1999 WL 250052 (hereinafter *Pinochet No. 3*).

G: And tens of thousands of Moroccan mercenaries.

F: So was it the Moors or was it the Nazis? Truth is a flexible thing with you. You illustrate why the past should be left to historians. We can all shape a story to our liking, picking this fact, ignoring that one. So what if the General did use the loyal Foreign Legion in the initial rising on 18 July? A mere tactic. And a successful one in furtherance of a just cause. But more importantly, arguing about these things at this moment serves no good purpose. It just reopens wounds on both sides. With no chance of agreement on eternally disputed facts, such argument offers no prospect of reconciliation. Let the fallen lie in peace.

G: The “fallen”! Hypocritical rhetoric. Franco built his “Valley of the Fallen” with slave labor—Republican political prisoners—as an obscene memorial to himself. The worst sort of fascist monumentalism! Stalin or Hitler could have done no better.

F: Liberals, socialists, atheists—you love to mock the sacred. Can’t you even let the dead have their honor without your sneers? The monument at the “Valley of the Fallen” honors all those Spaniards who sacrificed their lives for their beliefs between 1936 and 1939. Have you no respect?

G: The Valley of the Fallen was built with the bone and blood of enslaved Republican prisoners to honor only fallen Nationalists, and most particularly Franco himself who lies in front of the altar of the monstrous basilica. Yet Falangist²² apologists like you would have us believe that that monstrosity of a tomb honors all Spanish Civil War dead! A convenient revision now that the prevailing wind blows democratic! Today the triumphalism of the 1940s is your embarrassment. The victors wish the victims to forgive and forget. The robber offers the robbed a hand of peace, but no return of treasure and no regret.

²² Jose Antonio Primo de Rivera, son of 1920s Spanish dictator Miguel and right-wing martyr (executed by the Republican government during the Civil War) founded the Falange in 1933. ANTONY BEEVOR, *THE SPANISH CIVIL WAR* 42 (Penguin Books 2001). The Falange Espanola was more-or-less the Spanish version of a fascist party. Franco adopted the party as his own and incorporated it into his broader Nationalist “Movement.” With the establishment of his Movement, Franco purported to outlaw political parties. See ENCARNACION, *supra* note 8, at 22. However, the Falange continued its influence and, in a sense, its existence within the regime. While claiming to have created a state without political parties, Spain under Franco was effectively a one-party state. Gunther et al. argue that Spain is more properly regarded as a “no-party” state, despite the 1958 incorporation of the Falange into Franco’s *Movimiento Nacional*. RICHARD GUNTHER ET AL., *DEMOCRACY IN MODERN SPAIN* 65–66 (2004).

F: I have no regret. I owe no one an apology. I never was a Fascist, let alone a Fascist. In fact, I helped dampen the so-called triumphalism you condemn and open the door to progress and democracy. Not that there was anything wrong with celebrating our triumph over anarchy and atheism.

G: The triumph of one half of Spain over the other half!

F: If I may complete my thought. . . . By 1960 it made sense to focus on the peace and stability that General Franco brought to Spain, rather than on his military victory.

G: A convenient shift in emphasis. Particularly for audiences in Paris, London, and New York who remembered their recent war against fascism quite well.

F: We cared about economic development and social harmony in our country, not about opinion abroad.

G: Who is “we”? Some reformist group of fascists?

F: You try to bait me with your simplistic and inaccurate slander of “fascist.” I’ve heard that before and learned to ignore this calumny. But I will answer the substance of your question.

G: Please.

F: We were young reformers in the 1950s and ’60s. Spain needed to modernize and to feed its people. General Franco had given us the peace and unity necessary to do this. Tourism and foreign investment could supplement national economic renewal. We did not doubt the heroism of the Nationalist triumph, but it was time to look forward. Our reformist line made the transition to democracy possible.

G: Really, this is too much! Your “reformist line” sought to preserve Franco’s regime and his so-called Movement—a close cousin to the Nazi Party and Italian Fascism—not to promote democracy.

F: I served during the final two decades of the General’s forty-year rule. During that time, we moved Spain’s economy from third-world status to a high stage of development. Our citizens learned to work for their common advancement and not waste energy on partisan conflict. We fostered a respect for social consensus that allowed for the transition of the late 1970s.

G: Absurd revisionism! As Information Minister in the '60s you successfully promoted legislation that severely restricted freedom of expression. You condemned the 1962 Munich meeting of moderate Spanish reformers and democrats.²³ Your government continued to suppress dissent and trample on liberties right until Franco's death. You were never part of a vanguard for democratic transition. You helped lead the rear guard *against* it.

F: The legislation I created in 1966 opened the press. It certainly did not restrict it—it was a crucial step toward democracy.²⁴

G: You've learned the rhetoric of democratic transition, but you are not a democrat. You speak for only half of Spain. You value only half of Spain—the authoritarian, the centralist, the economic elite, the Catholic. Your notion of reconciliation during the last two decades of Francoism—when you yourself wielded authority—was not true reconciliation. It was submission. Submission by the libertarian, by the regionalist, by the worker, by the secularist. You won. They lost. You murdered and stole and made peace with your boot on their neck. You stole their children and gave them to Francoist families.²⁵ Such

²³ The June 5–8, 1962, Munich Gathering was between moderate oppositional elements, both from within Spain and from the exile community. The participants discussed the future of Spain in addition to the incorporation of Spain in the European Community. AGUILAR, *supra* note 2, at 102–10.

²⁴ Ley de prensa e imprenta [Spanish Press Law], (B.O.E. 1966, 67) (Spain). Palomares quotes Joaquin Ruiz-Gimenez regarding the two edges of Fraga's Press Law, the latter asserting:

“[T]he Press Law of 1966 was the most important step taken towards the ‘democratization’ of institutions and of the habits of Spanish public life . . . It may sound strange perhaps . . . that I say this when it is notorious that *Cuadernos para el Dialogo* has many scratches in its skin [caused by] some of the thorns hidden under this law . . . But, it is no less true [to say] that, under the protection of this law, new newspapers, new magazines and new book series have emerged in our homeland [which have lead to] a new climate for information, criticism and promotion of collective dialogue.”

PALOMARES, *supra* note 14, at 39.

Palomares herself (no right-winger) goes on to observe, “Fraga's Law constituted an irreversible step towards modernization, which undoubtedly contributed to the weakening of the Francoist foundations.” *Id.*

²⁵ Christine Toomey, *Spain's Stolen Children*, THE TIMES (UK), Mar. 1, 2009, available at www.christinetoomy.com/pdfs/Spains_stolen_children.pdf. Franco's regime took thousands of children from imprisoned or executed Republican parents and, erasing their identities, gave them to Nationalist families. A number of survivors of such dismembered families have attempted reunification with lost siblings, parents, and children since the advent of historic memory recovery in recent years.

were your “traditional values.” And now that history has reversed your triumph, through the ineluctable progress of European democracy, you try to give your old domination a new coat of paint and call it peace and the door to change.

F: We did open the door to democratic change by our policies in the '50s, '60s, and '70s.

G: A rather long time just to open a door.

F: Learn courtesy, please. I listened to your oration. We could only open that door if we suppressed that consciousness of two Spains. No more authoritarian against anarchist. No more centralist against regionalist. No more peasant and worker against landowner and industrialist. No more priest against secularist. Finished with those old Manichaeian rivalries, we created a new Spain which could progress united toward democratic governance. It could not so progress if every generation or two, our nation tore itself apart in some kind of Hegelian Marxist dialectic.

G: But admit that your version of unity was to eliminate dissent. It did not permit social, humanist, and decentralist voices to harmonize with your National Movement.

F: Those voices seem to have survived quite well. Perhaps too well. Now we have men marrying men and our 1936 Crusade declared a crime by parliament—while real crime increases every day, not apparently concerning your Socialist government. For someone who squats upon such high moral ground, you have very little regard for the difference between right and wrong. Society cannot survive without a firm set of values that articulates and enforces what is good and proper.

G: We agree that the distinction between right and wrong underlies civilization. I do differ from you by finding mass murder a greater breach against decency than gay marriage.

F: And what mass murderers have you caught today?

G: Scilingo and Cavallo, major military torturers and murderers from Argentina. We came close with Rios-Montt from Guatemala and established excellent precedent at the Constitutional

Tribunal by his prosecution.²⁶ And we would have had Pinochet had the British government not found his supposedly failing health an obstacle to extradition.

F: Thank God for some common sense.

G: More likely, political cowardice. Britain's courts were less timid than its government. The House of Lords upheld our right to prosecute Pinochet for crimes against humanity, reaffirming the Nuremberg precedent that no doctrine of immunity—sovereign, head of state, or whatever—shields the perpetrators of torture and genocide. Its decision advanced the international rule of law through universal jurisdiction.

F: Universal nonsense! I have lectured at law. No such jurisdiction exists except in the minds of zealots and naïve idealistic fools who blindly follow them.

G: Furthermore, men like Pinochet and Rios-Montt, even if they have avoided Spanish prison, will live less easily and travel less freely. Some have been prosecuted in their own countries only after our international investigations gave local judges the courage to resist intimidation by lingering military bosses.

F: But who made you God? Why should you decide that a president from Chile or a general from Guatemala should stand trial, particularly outside their home countries? And not even in an international tribunal—that would be bad enough. But you have the nerve to bring them before a local Spanish court. And you left-wingers constantly complain about neocolonialism! What hypocrisy.

G: I am not a politician. I am a lawyer. I don't care in my investigations about right-wing or left-wing—only right and wrong. I seek no political power—just to change the world one case at a time.²⁷

²⁶ Guatemala Genocide Case, S.T.S., Sept. 9, 2005 (Boletín Oficial del Estado [B.O.E.], No. 258, p. 45), available at http://www.boe.es/aeboe/consultas/bases_datos/doc.php?coleccion=tc&id=SENTENCIA-2005-0237 (upholding universal jurisdiction in Spain).

²⁷ Lola Galán, *The Judge Who Never Rests*, EL PAIS (ENGLISH), Oct. 30, 2008, at 4, available at 2008 WLNR 20647774.

F: When I was your age, I had the world in my hands, and I was about to change it.

G: What happened?

F: A king.

G: Juan Carlos.

F: I had worked for reform for years. With success. Billions of tourist dollars and pounds and deutschmarks. Millions of tourists. A free press. An intellectual blossoming. All with stability. And respect. Not the degeneracy we see today. *Aperturistas*?²⁸ I was *the Aperturista*. I created those openings. And I could have guided Spain through those openings to a stable democracy, one that did not rupture with our great national heritage. But the King chose a nobody—a fool.²⁹

G: Suarez was no fool. And Don Carlos helped create and then saved our new democracy. The King was a good captain and Suarez an excellent pilot. Particularly after Arias³⁰ had shown himself to be an obstructionist. When Juan Carlos chose him, Suarez had already done good work at national television preparing the country for establishment of the constitutional monarchy. And he had functioned competently in other posts.

F: Competent? Ordinary!

G: You are a bit of an elitist.

F: Of course! But so are you. Did you become a judge of the *Audiencia* by failing examinations? Or by striking for a shorter workweek? You bourgeois leftists are all alike.

I saw it in England, as well.³¹ You get degrees with honors from Oxford or Harvard or Madrid Computense and then spout the virtues of leveling us all to mediocrity.

²⁸ Reformists within the latter stages of the Franco regime were known as “*aperturistas*”—those favoring a gradual opening of society. PALOMARES, *supra* note 14, at 1.

²⁹ Suarez was certainly less well-known than Fraga, a fact that may have actually played to his advantage. ENCARNACION, *supra* note 8, at 33–34 (describing King Juan Carlos as choosing “his own man” from within Franco’s regime).

³⁰ Carlos Arias Navarro was the last of Franco’s prime ministers, initially retained in that post by the new King Juan Carlos after Franco’s death in November 1975.

³¹ Fraga was ambassador to the United Kingdom. PALOMARES, *supra* note 14, at 111–15.

G: Equality is not mediocrity. It is unbiased and meaningful access to justice and to the means of survival. Your purportedly Spanish values excused crimes against those not accepting such pseudo-values.

F: But it is you, my friend, who is the criminal.

G: How?

F: You have violated your sacred judicial trust in a number of ways. But your most egregious crime has been to violate the Law of Amnesty³² so fundamental to our present democracy. You who are so vocal in purporting to promote that democracy! But your actions do not support your words. Typical leftist hypocrisy.

G: That Law of Amnesty was negotiated more than thirty years ago under military threat.

F: Nonsense, there was no military threat.

G: Of course there was. The generals were not about to give up their privileged positions and risk prison. Nor were your friends in the “Bunker,” the Francoist elite.

F: Sophistry and slander! I know that you are somewhat intelligent and modestly well-informed. Therefore, only dishonesty can explain that you link me to the so-called Bunker. I was no friend to the intransigent old men within the old regime who resisted all progress. You know that for two decades I fought against them, often to the detriment of my career.³³ But my behavior is not the topic here. You broke the law.³⁴ Even more se-

³² Ley de Amnistia [Amnesty Law] (B.O.E. 1977, 248) (Spain), available at <http://www.boe.es/boe/dias/1977/10/17/pdfs/A22765-22766.pdf>.

³³ Although Fraga has since become identified with conservative Spanish politics, he (claims to have) decided during his service in Franco’s regime to serve as an “instrument for political openness.” PALOMARES, *supra* note 14, at 88–89 (internal quotes omitted).

³⁴ Anita Brooks, *Baltasar Garzon Vowed to See Spain’s Fascists in Court. But Not This Way*, THE INDEPENDENT (UK), Apr. 8, 2010, available at <http://www.independent.co.uk/news/world/europe/baltasar-garzon-vowed-to-see-spains-fascists-in-court-but-not-this-way-1938725.html>.

riously, you broke the social contract that for three decades has prevented civil rupture and bloody strife.³⁵

G: Now you speak of the unwritten Pact of Forgetting, as well as the formal Amnesty Law of 1977?

F: They are one.

G: No, they are distinct.

F: They are one, and you have been indicted for their breach.

G: No, they are distinct, and that's just the point. The so-called³⁶ Pact of Forgetting—I prefer “Pact of Silence”—was a political deal made by political elites just after Franco's death to enable a peaceful transition without military interference. In exchange, moderate and left democrats would accept a monarchy and forgo a national accounting for Franco's repression and violence. I admit ignoring only that non-legal pact.

F: You admit it? You admit opening old wounds? That guilt is even greater than your legal culpability. You would tear the social fabric.

G: I would require men like you to answer for your service under one of the twentieth century's worst tyrants. Besides, I did not open those old wounds. They were already bleeding. You know that before I began my investigation, groups of concerned families and friends were already digging up mass graves left by your Caudillo's³⁷ death squads.³⁸ They had never agreed to your Pact of Silence and were not bound by it.

F: You talk of tyrants! Franco saved us from Stalin, the greatest tyrant in memory. Perhaps thousands died for Spain—on both sides—but Stalin butchered millions. And Stalin was the

³⁵ Christine Spolar, *Tortuous path to Spain's painful past: Crusading judge's exit from probe of Civil War-era mass graves may leave truth in the ground*, CHICAGO TRIBUNE, Nov. 19, 2008, at 6, available at 2008 WLNR 22062470.

³⁶ See the discussion of the designation, “Forgetting” or “Silence,” *supra* Part I.

³⁷ “Caudillo” (Leader) was the Nationalists' title of reverence and obedience for Franco, analogous to “Der Führer” Hitler in Nazi Germany or “Il Duce” for Mussolini in Fascist Italy. AGUILAR, *supra* note 2, at xi. All three titles might be used with some irony by non-admirers.

³⁸ *Spain and the Civil War: A Ghost Story*, ECONOMIST, Oct. 25, 2008, available at www.economist.com/node/12470581.

hero who directed your Republican cause. His tanks, his airplanes, his secret police!

G: I have no love or nostalgia for the Soviets. But the Republic only turned to Stalin after Franco and his fellow plotters invaded our homeland from Morocco with foreign troops, Moors and legionnaires, flown across the Gibraltar straits in German planes by Nazi pilots. And even then, the liberal and democratic Republic would have preferred assistance from America, Britain, and France—sister democracies—but it was not forthcoming. Right-wing and Vatican elements in those countries saw to that. As Hitler and Mussolini continued to provide weapons and men to the invaders, the Loyalists³⁹ had no one but the Soviets to support their just struggle.⁴⁰ I condemn the way that the Republican government was hijacked by the communists as the war dragged on, but look to London and Washington and Paris for that guilt—not to mention Rome and Berlin.

F: And what about the 1977 Amnesty Statute? You represent yourself as a man of the law! Yet you trample on it when that suits you.

G: No national statute can grant immunity for crimes against humanity. That is settled international law, as well as the law of Spain. The 1977 Amnesty is effective, but must be interpreted consistently with *jus cogens*.⁴¹ Don Manuel, you were a law professor. You understand this basic rule of legal interpretation.

F: You open a Pandora's box when you accuse Franco of crimes against humanity. Your beloved Republic murdered, tortured, raped, and burned. Better you should continue forgetting if you don't care to revive memories of left-wing crimes.

G: That is the "myth of the two devils." And indeed it is a myth.

F: You deny that Republicans committed atrocities?

³⁹ "Loyalist" was another term for "Republican," those *loyally* supporting the elected government against the Franco-led rebellion.

⁴⁰ ENCARNACION, *supra* note 8, at 21.

⁴¹ *Jus cogens* is an overriding norm of international law (such as the prohibition against slavery) that may never be violated, even by otherwise-valid treaty or consensual practice.

G: It was a civil war! Of course crimes were committed on both sides. But that does not make the guilty equal. Francoists perpetrated abuses that were more systemic, more brutal, and more numerous than those of the Republicans. Rape, terror, torture, and execution without trial were so common as Nationalists conquered new territory, they could only have been official Nationalist policy. In the Republic, such abuses were the exception and never official policy.

F: Republicans burned churches, raped nuns, murdered priests, and executed Nationalists without trial. Such outrages were too frequent to not be sponsored. Furthermore, historical reports consistently describe the torture and murder by the Republican secret police.

G: There is no evidence of raped nuns—a nasty and cynical blood-libel to inflame the worst in people.⁴² Priests died as part of the civil strife wherein the Church inexcusably sided with fascism. Churches burned in the same context. But neither crime was promoted by the government. As to the secret police, it was only after the Soviets gained influence in a Republican government abandoned by the Western democracies and subject to German and Italian assault on behalf of Franco that security abuses occurred regularly—often against fellow Republicans unwilling to toady to Stalin’s puppets.

F: So you accept that the communists controlled the Republic?

G: No. I only accept that they gained undue influence as the Civil War progressed, with Hitler and Mussolini carrying Franco while Britain, France, and the United States refused aid to their fellow democracy. Unfortunately, only the Russians came to the aid of the elected Republican government.

F: Your elected government was tearing Spain in two—no, into many little pieces.

G: It was elected, and Franco’s coup was illegal. From that illegality flowed all the other crimes and slaughter of the Civil War. Add to that the abuses by the victors—mass arrests, torture, disappearances, executions, stolen children—in the years that followed.

⁴² Beevor, *supra* note 22, at 70 (stating that the 1946 Nationalist indictment of Republicans for Civil War-era crimes offers no evidence in support of these allegations).

F: Had the Republic won, it would have done the same, with Stalin's assistance.

G: We don't know that—we only know that Franco did commit these crimes.

F: Not crime—purification and unification. Without the Caudillo's crusade, Spain would not exist today.⁴³

III. HISTORY, MEMORY, AND THE MYTH OF THE TWO DEVILS

Spaniards take human rights seriously—more so than almost any other Europeans. Surveys have shown this attitude.⁴⁴ (Maybe this reflects Spaniards' desire to once again *be* Europeans.)⁴⁵ Decades of Francoism make such a human-rights consciousness perhaps surprising, perhaps expected. Surprising—that a populace conditioned over forty years to passive apolitical acquiescence should suddenly demonstrate libertarian assertiveness; expected—that a populace repressed for forty years would naturally rebound to embrace its freedom. Observers of Spain note the anarchic strain in the national character.⁴⁶ They also note an authoritarian strain.⁴⁷ Possibly, at last, these strands have interwoven in a state that is both secure and libertarian.

A. “*Europe Stops at the Pyrenees*”

For centuries, Spain sat at the political and cultural, as well as the geographic, periphery of Europe (or, at least, that was the common wisdom).⁴⁸ Spain *did* experience the Renaissance. In fact, along with a few other nations, Spain led Europe in the artistic and exploratory achievements of that era. But it

⁴³ Manuel Fraga Iribarne died on January 15, 2012, as this manuscript was in its final editing. Associated Press, *Manuel Fraga Iribarne, Aide of Franco and Spain Political Force, Dies at 89*, N.Y. TIMES (Jan. 15, 2012), http://www.nytimes.com/2012/01/16/world/europe/manuel-fraga-iribarne-aide-of-franco-dies-at-89.html?_r=1. His nephew and my friend Prof. Jesus Jordano Fraga informed me of Fraga's passing by an e-mail on February 4, 2012.

⁴⁴ *Eurobarometer 66: Public Opinion in the European Union*, Eur. Commission, Autumn 2006, at 8, available at http://ec.europa.eu/public_opinion/archives/eb/eb66/eb66_es_en.pdf (stating that fifty-five percent of Spaniards named “peace” as the most important value, and an additional forty-one percent named “human rights” as the most important value).

⁴⁵ For decades under Franco and perhaps centuries before that, Spain suffered from an underdeveloped economy and lack of personal freedoms compared to its Western European neighbors.

⁴⁶ BEEVOR, *supra* note 22, at 11 (noting that the political climate in pre-Civil War Spain made anarchy the most popular political philosophy among the Spanish working class).

⁴⁷ *Id.* Beevor sees three historic axes of division in Spain: right-left (including class), authoritarian-libertarian, and regional-centrist. One might also add religious-secular or include it under the right-left division.

⁴⁸ See, e.g., Helen Graham, *Spain and Europe: The View from the Periphery*, 35 THE HIST. J. 969 (1992) (book review).

lost its cultural and political centrality through misguided policies: an ultimately stultifying (albeit initially energetic) counter-reformation, the expulsion of Jews and Moslems, and an economy in the sixteenth century that, while appearing to thrive, in fact, lived off colonial loot to the detriment of real economic development.⁴⁹

Consequently, by the time the Enlightenment burst onto prospering France and England, Spain had become a bejeweled shell of a power, closed to the ideas of Locke and Montesquieu. Talleyrand summarized this decline when he Frenchly observed, “Europe stops at the Pyrenees.”⁵⁰ Regardless of whether the attribution is accurate,⁵¹ his apocryphal remark has been so often repeated, as to become a common truism for those describing Spain’s isolation from mainstream Europe in the eighteenth, nineteenth and twentieth centuries.⁵² Neither the 1689 English Bill of Rights, nor the 1789 French Declaration of the Rights of Man would find their equivalent in Spain prior to the 1978 Constitution.⁵³

While the nineteenth century saw a brief flirtation with liberalization and modernization (including a brief First Republic), Spain remained politically and socially reactionary, as well as economically backward, into the twentieth century.⁵⁴ The poor were desperately poor, and the small liberal intellectual subclass was desperately alienated. The repressive proto-fascist dictatorship of Miguel Primo de Rivera in the late 1920s increased the polarization between the favored and the disfavored.⁵⁵

⁴⁹ SIMON BARTON, *A HISTORY OF SPAIN* xvi, 101–02 (2009); RICHARD HERR, *AN HISTORICAL ESSAY ON MODERN SPAIN* 39 (1971); HAROLD LIVERMORE, *A HISTORY OF SPAIN* (1958).

⁵⁰ Of course, Talleyrand’s government was not without blame for Spain’s closure to the Enlightenment. Napoleon’s down-your-throat approach to bringing modernity to his southwestern neighbor in 1808 cast those Spaniards who would have welcomed social liberalization into the role of quislings to the French imperialists.

⁵¹ Another source claims Dumas said, “Africa begins at the Pyrenees.” Carlos Fuentes, *A Glory Seldom Seen: Spain: A Nation Recovers Its Open, Democratic Tradition*, L.A. TIMES, Aug. 3, 1986, http://articles.latimes.com/1986-08-03/opinion/op-1056_1_democratic-tradition.

⁵² Steven Greenhouse, *Spain, Losing Backward Image, Booms as It Lures Foreign Money*, N.Y. TIMES, Jan. 15, 1989, <http://www.nytimes.com/1989/01/15/world/spain-losing-backward-image-booms-as-it-lures-foreign-money.html?pagewanted=all&src=pm>.

⁵³ The 1812 Cadiz Constitution (drafted by Spanish democrats resisting the Napoleonic French occupation in most of the rest of the country) was a political blip-on-the-screen that failed to achieve the national staying power of the English, French, or American documents, although it did inspire a few short-lived liberal governments in nineteenth-century Spain.

⁵⁴ Limited enclaves of relative modernity, such as Barcelona, existed with little impact on the Spanish heartland. Carlos Fuentes wrote of Spain’s other tradition, a liberal one, in an article where he spoke of the positive cultural and political contributions 200,000 refugees from Francoism brought to Mexico in the 1930s and ’40s. Fuentes, *supra* note 51.

⁵⁵ BEEVOR, *supra* note 22, at 23–24. Interestingly, certain national minority regions like Catalonia (of which Barcelona was capital) and the Basque country were less underdeveloped, less reactionary, and thus more alienated from Spain’s establishment—the monarchy, the Church, the landed elite.

In a country immemorially dominated by Church, King, and Seigneur, when one was anti-clerical or anti-monarchy, one often was so with a bitter vehemence. So when a coalition of the alienated—republicans, socialists, communists, anarchists, regionalists, and others—achieved resounding victory in local elections in 1931 and forced the abdication of the ineffectual Alfonso XIII, they were uncompromising in pushing through reforms that attacked the old guard under their newly declared Second Republic.⁵⁶ Although their mandate was democratic and legitimate, it was not overwhelming. The winners made little effort to forge a national consensus as would be obsessively pursued by transition democrats after Franco's death forty years later.⁵⁷ The losers under the Second Republic were powerful clerical, military, and landed elites, and the Republic did little to court them or win over their sympathizers—monarchists, traditionalist Catholics, and conservative landed peasants.⁵⁸ One might argue about numbers and foreign interference, but Franco's 1936 coup would not have morphed into a successful revolution had there not been substantial support throughout the country.

After Franco's invasion from Morocco in July 1936,⁵⁹ Spain assumed a significance to the European narrative that it had not held for centuries. Millions of democrats and leftists sympathized with the besieged elected government, and thousands volunteered to fight for its survival.⁶⁰ However, governments of the major democracies—particularly the United States, France, and Britain—kept their distance and maintained military neutrality.⁶¹ On the other hand, Fascist Italy and Nazi Germany gave substantial military assistance to Franco.⁶²

⁵⁶ STANLEY G. PAYNE, 2 A HISTORY OF SPAIN AND PORTUGAL, 633, available at <http://libro.uca.edu/payne2/payne25.htm> (last visited Apr. 6, 2012).

⁵⁷ A number of commentators partly attribute problems of polarization under the 1930s Republic to legislative structure. First, the Cortes was unicameral, without the buffering influence of a less-frequently changing upper chamber to dampen the political swings of the moment. Nor, of course, was there the buffering influence of a broadly respected, politically neutral monarch—the last one, Alfonso XIII, having failed in that role by supporting Primo de Rivera's dictatorship, which had supported the continued impoverishment of the Spanish masses, especially the unlanded peasants in the southwest. Second, the unicameral Cortes was elected on a winner-take-all majoritarian scheme, lacking any proportional representation. Under such a scheme, the majority could govern without consultation or compromise, opposition within the legislature was powerless, and some viewpoints went totally unrepresented. The system promoted aggressive partisan governance by winners and alienation of the losers from democracy. From 1930 until Franco's *coup d'état* in 1936, the government swung from hard left to hard right to hard left again. AGUILAR, *supra* note 2, at 173–81. See also BEEVOR, *supra* note 22, at 27–38.

⁵⁸ See Payne, *supra* note 56, at 633.

⁵⁹ BEEVOR, *supra* note 22, at 51–52.

⁶⁰ See Isaac Rosa, *A Bellyful of Memory*, EL PAIS (ENGLISH), July 13, 2006, available at 2006 WLNR 12035822.

⁶¹ BEEVOR, *supra* note 22, at 109–10.

⁶² *Id.* at 112–14.

Franco's government *promoted* its own version of historical memory during its first decade in power and promoted it without ambivalence.⁶³ Dominated by Falangist and right-wing, Catholic, quasi-fascist ideology, it portrayed its Civil War victory as a successful crusade against godless communism.⁶⁴ Furthermore, Franco's government painted this victory as contingent: without continued vigilance (that is, elimination of all opposition by whatever merciless means) that triumph would be threatened. Franco's security and rump judicial forces executed as many as 200,000 perceived enemies of state in the five years following the Republican surrender.⁶⁵ Franco entrenched his power by exaggerating the power of the National Enemy. He was not the first or last totalitarian to employ this tactic. In any event, it was a tactic that *remembered*. To be sure, Francoist memory was flawed, biased, and selective—but it was, in any case, a policy that eschewed amnesia and reconciliation.

During these early years after the Civil War, primarily the 1940s, Franco's defeated foes—those who survived—kept alive the *counter-memory* of fascist violence and repression, during and after the war. And there is much evidence to support such counter-memory.⁶⁶

B. *The Myth of the Two Devils*

However, many western and Spanish observers of the Civil War and its aftermath have chosen a false middle ground, whereon mushy memory set the stage for subsequent amnesia. The myth goes like this:

Franco's forces did many bad things, but so did the Republicans. Bad dictators, Hitler and Mussolini, aided Franco, but an equally bad dictator, Stalin, helped the Republic. Franco's victory resulted in a quasi-fascist government, but only for the first few years. The Republic would have been a Soviet-dominated communist puppet had it survived. So, it's a moral wash—devils on both sides.

And if it was a moral wash—if everyone was equally guilty—it makes some sense to just forgive and forget. Especially forget.

⁶³ Franco, for instance, frequently claimed that the Spanish Civil War cost one million lives in order to emphasize the high cost of political and social strife. Other estimates place casualties closer to 580,000. The great irony, of course, is that either figure—both entailing great costs to humanity—would not have come about without *Franco's* invasion of Spain. ENCARNACION, *supra* note 8, at 24.

⁶⁴ See Paddy Woodworth, *Group created by angry young students grew to become brutal, popular force*, IRISH TIMES, Oct. 22, 2011, available at 2011 WLNR 21661201.

⁶⁵ BEEVOR, *supra* note 22, at 266.

⁶⁶ *Id.* at 69–82 (describing a “relentless purging” of dissident forces by Nationalists).

But, everyone was not *equally* guilty. Both sides indeed committed crimes and moral transgressions. It would be surprising otherwise in a long conflict, especially a civil war. But abuses, even gross abuses, among enemies do not signify moral equivalence. Britain and the United States illegally and inhumanely bombed civilian Dresden at the end of World War II, but this unjustifiable act did not create a moral equivalence with the Nazis.⁶⁷

So here is the sad scorecard.

The Republic did execute political prisoners, particularly in the early months of the illegal rebellion against it.⁶⁸ Some argument can be made that those executed had in fact committed the crime of treason against a duly constituted government. But, even so, some of these executions were extra-judicial with little or no due process. Here, we are probably talking about hundreds of, or at most a few thousand, wrongful deaths.⁶⁹ When the Soviet Union obtained influence over the Republican government (after Western democracies refused to come to the aid of their fellow democracy facing a German- and Italian-supported rebellion), government security agents perpetrated serious human rights violations, mostly against fellow Republicans who challenged the rising power of the communists.⁷⁰ In some extreme cases, the Soviet-dominated Republican secret police tortured and murdered political enemies, particularly anarchists. There were also a number of church burnings and attacks on clergy,⁷¹ but not as official Republican policy. Tales of raped nuns and similar outrages are almost uniformly unsubstantiated.⁷²

Not a nice record by the Republicans (particularly where Communists had gained dominance), but nowhere close to the depravity by Franco's forces and his postwar government.

First, the Francoists started the carnage with an illegal *coup d'état* against a legitimate, democratically elected government. The rebels invaded their own country, largely with non-Spanish troops stationed in Spanish Morocco.⁷³ They were shuttled to Spain by Nazi warplanes, an illegal foreign interven-

⁶⁷ Isaac Rosa condemns right-wing revisionist "relativism," implying the existence of Republican wrongs do not balance the systematic terror, murder, and torture under Franco. See Rosa, *supra* note 60; see also ENCARNACION, *supra* note 8, at 22 (quoting estimates of postwar executions at 40,000 to 200,000).

⁶⁸ BEEVOR, *supra* note 22, at 86–91.

⁶⁹ *Id.* at 87 (the estimated death toll from the "red terror" is at 38,000).

⁷⁰ DONALD RAYFIELD, *STALIN AND HIS HANGMEN: THE TYRANT AND THOSE WHO KILLED FOR HIM* 362–63 (2004).

⁷¹ Cf. STANLEY G. PAYNE, *FRANCO AND HITLER: SPAIN, GERMANY, AND WORLD WAR II* 13 (2008). Payne calls the Republican violence during the "Red Terror" the "most extensive and violent persecution of Catholicism in Western History." *Id.* at 12–13.

⁷² BEEVOR, *supra* note 22, at 83, 241.

⁷³ ENCARNACION, *supra* note 8, at 20; Bernard Adams, *Story of the Civil War*, IRISH TIMES, Aug. 10, 2002, available at 2002 WLNR 3692611.

tion at the outset of the coup.⁷⁴ Franco's "Army of Africa" consisted mostly of Moroccan soldiers supported by the Spanish Foreign Legion, also non-Spaniards.⁷⁵ Objective historians have recorded the pattern of war crimes by these troops, including mass rape and murder. Republican forces did nothing comparable.⁷⁶ Executions by the Nationalists during the war ran into the hundreds of thousands.⁷⁷ Torture and organized brutality were common policies.

After the Civil War, Spain again closed itself off to Europe. The Falangist economic philosophy of autarky contributed to this.⁷⁸ The closure also reflected the country's utter devastation and national exhaustion after three years of mass violence. World War II began as Spain's internal war ended.⁷⁹ Although Franco undoubtedly sympathized with the Axis powers that had just assisted his seizure of government, no Spanish resources remained to contribute to the Axis war effort, and exposing Spanish territory to further attack was unthinkable in decimated 1939 Spain.⁸⁰ The British, of course, controlled Gibraltar, and their navy dominated the seas by which the Iberian peninsula is surrounded with the exception of the land border with Britain's major ally France. Franco had plenty to keep himself busy, what with a broken nation and defeated enemies to hunt down, persecute, exile, imprison, and eliminate.

As the war turned against the Axis, neutrality was the only prudent course for Franco. Nevertheless, by war's end, the victorious Allies still regarded his regime as, at best, a passive fascist ally of Nazi Germany. In many western quarters, leaders and observers called for regime change before Spain could be readmitted to the community of civilized nations.⁸¹ The United Nations ini-

⁷⁴ See *id.* at 21.

⁷⁵ See Adams, *supra* note 73.

⁷⁶ BEEVOR, *supra* note 22, at 70 (claiming that Nationalist violence was organized, whereas Republican violence was mostly sporadic and reactionary).

⁷⁷ *Id.* at 74 (recounting that Nationalist killings in their controlled territories may have exceeded 100,000 and may be closer to 200,000).

⁷⁸ While Franco juggled various bases of support throughout his forty-year reign, four or five sources dominated during the Civil War and the immediate aftermath: Falangist, Monarchist, Carlist/traditionalist, the military, and conservative Catholic. Among them, Falangist political "philosophy" was probably dominant in government policy-making.

⁷⁹ The Spanish Civil War is often described as a trial run for Hitler's aggressions in World War II.

⁸⁰ Some scholars claim that Franco's pique at Hitler for not assigning Spain the spoils of French North Africa explains Spain's neutrality. See, e.g., Giles Tremlett, *General Franco Gave List of Spanish Jews to Nazis*, GUARDIAN, June 20, 2010, available at <http://www.guardian.co.uk/world/2010/jun/20/franco-gave-list-spanish-jews-nazis>.

⁸¹ Poland referred the question of Franco's regime to the UN Security Council in 1946 as presenting a security risk. UNITED NATIONS, *The Spanish Question*, in REPERTOIRE OF THE PRACTICE OF THE SECURITY COUNCIL, CHAPTER VIII: MAINTENANCE OF INTERNATIONAL PEACE

tially excluded Spain from membership.⁸² Only with the advent of the Cold War in the late 1940s and early 1950s did Western governments choose to overlook Franco's fascist roots and see him as one more piece in their big game against the Soviets.⁸³ Internally, Franco began to turn away from a decade of severe repression, autarky, and triumphalism. All serious opposition was dead, exiled, or imprisoned. Stressing national unity and peace (on his terms) was more prudent than stressing the struggle against liberalism and modernity—both because it was more conducive to national reconstruction and because it was more palatable to the western victors in World War II, whom he sought to cultivate as patrons internationally. It would be unwise to play the role of Last Fascist Standing. While not wanting to become part of democratic Europe, he nonetheless did want to share some of the fruits starting to fall to it as members of the Atlantic alliance against the Soviets.⁸⁴

IV. SELECTIVE AMNESIA AND PROTO-TRANSITION

The post-Franco Spanish elite—right, left, and center—tacitly concluded a “Pact of Forgetting” (*Pacto del Olvido*) after Franco's death in 1975.⁸⁵ They signed no formal document by that name, but their actions evidenced its existence.⁸⁶ One of the Cortes's⁸⁷ first post-Franco acts was to pass an Amnesty Law, and for over thirty years after Spain's democratic transition, discussion of Franco's regime remained absent from public and political life.⁸⁸ Leaders from

AND SECURITY 306, available at http://www.un.org/en/sc/repertoire/46-51/Chapter%208/46-51_08-7-The%20Spanish%20question.pdf.

⁸² During its first session, the newly constituted United Nations adopted a resolution urging its members to act toward Spain in accordance with Spain's close relationship with the defeated Axis powers. G.A. Res. 39(I), U.N. GAOR, 1st Sess., at 63–64 (Dec. 12, 1946), available at <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/032/90/IMG/NR003290.pdf?OpenElement>. This constituted the basis for an embargo that lasted until 1953.

⁸³ “By the late 1950s the world's geopolitical map had changed dramatically and the Franco regime, however repugnant to the West, had emerged as a useful ally in its fight against the spread of communism in Europe and elsewhere.” ENCARNACION, *supra* note 8, at 27.

⁸⁴ Franco's 1945 Decree of Pardon for “rebels” against the state exemplified the regime's strange ideological dance after WWII, seeking to please the democratic West without becoming democratic. The Decree slandering the defenders of the legitimate Republic as “rebels against the state” would have done Soviet propagandists proud. See 1945 Charter of Rights, (B.O.E. 1985, 199) (Spain), available at <http://boe.es/datos/pdfs/BOE/1945/199/A00358-00360.pdf>.

⁸⁵ ENCARNACION, *supra* note 8, at 2; PALOMARES, *supra* note 14, at 102–106 (discussing the prevalence of political dinners in the absence of political discussion in open society); AGUILAR, *supra* note 2, at xix–xx (discussing a tacit amnesiac pact among Spanish society).

⁸⁶ AGUILAR, *supra* note 2, at xx.

⁸⁷ “The first Cortes would show itself totally subservient to the government in every way.” STANLEY G. PAYNE, *THE FRANCO REGIME: 1936–1975* 323–24 (University Press 1987).

⁸⁸ See Ley de Amnistia [Amnesty Law] (B.O.E. 1977, 248) (Spain), available at <http://www.boe.es/boe/dias/1977/10/17/pdfs/A22765-22766.pdf>.

across the political spectrum feared that publicly airing the merits and demerits of the Civil War and Franco's rule would renew old animosity and make peaceful transition difficult.⁸⁹ Some observers refer to this broad understanding also as the "Pact of Silence" (*Pacto del Silencio*).⁹⁰ This latter label might reflect a mere use of synonyms or it might reflect a nuanced critical stance in those observers who hear in this silence unjustly repressed memory of Francoist crimes.

While elites forged the Pact of Forgetting following Franco's death in 1975, the transition to democracy actually began before Franco's 1975 death—how far before is a matter for debate.⁹¹ Some trace it to the 1973 assassination of Admiral Carrero Blanco—Franco's apparent choice to take the reins of government⁹² and maintain the Caudillo's brand of authoritarian rule.⁹³ However, the seeds of transition were planted much earlier, particularly in the use of repressed memory to promote social peace, if not true reconciliation.

A. *Expeditence Sows the Seeds of the Pact of Silence*

Commentators (particularly on the political left) often have described the forty years of rule under Franco as "fascist." This description oversimplifies both history and his regime.⁹⁴

The fascist label probably does apply aptly to the first decade or so after the Civil War. It was the Fascist and Nazi governments of Italy and Germany that tipped the military balance to the Nationalists in the Civil War, and the United Nations General Assembly declared Franco's regime to be "fascist" in December 1946.⁹⁵ Had Hitler won the war, Franco surely would have formally joined the Axis by its conclusion.⁹⁶

Falangist doctrine dominated the Nationalist coalition in the Civil War and the Franco regime in its first dozen years.⁹⁷ The Falange Party provided the

⁸⁹ AGUILAR, *supra* note 2, at xx.

⁹⁰ ENCARNACION, *supra* note 8, at 2.

⁹¹ PALOMARES, *supra* note 14, at 3.

⁹² See PAYNE, *supra* note 87, at 537–42 (stating Franco's choice of Juan Carlos—note the slight hesitation on page 537, which is interesting). See also *id.* (stating that appointment of Carrero Blanco marked "the first time in the history of the regime that anyone other than Franco held the position of prime minister [(i.e., head of state)].").

⁹³ AGUILAR, *supra* note 2, at 78.

⁹⁴ See PRESTON, *supra* note 7, at 4.

⁹⁵ G.A. Res. 39(I), *supra* note 82.

⁹⁶ See PRESTON, *supra* note 7, at 68.

⁹⁷

Although there was no shortage of fascist army officers, many of the most senior generals, invariably Catholic and often monarchists, adopted a patrician tone and expressed contempt for Falangists as upstart riff-raff. Moreover, in contrast to the ideological zealots of the Falange, the high command was cautious, after the devastation of the Civil War, about making any commitment to the Axis, despite an admiration for German military prowess. . . . In

propaganda and spirit for the July 1936 right-wing coup against the democratically elected Republic. Like other fascist movements, Falangist philosophy was not detailed or profoundly articulated (no fascist Marx or Engels), but it shared the core fascist beliefs of nationalism, autarky,⁹⁸ anti-liberalism, anti-communism,⁹⁹ authoritarian obedience, and triumphal heroism found in Italy, Germany, Japan, and elsewhere.¹⁰⁰ Primo Rivera the Younger,¹⁰¹ the “hero” buried alongside Franco in the gargantuan basilica-cave at the Valley of the Fallen, founded the Falange and was executed by Republicans¹⁰² after his arrest and eventual trial for treason early in the Civil War. Had he survived, he well might have competed with Franco for political leadership of Nationalist Spain after the Nationalist victory. As a martyr for the cause, he presented Franco with no such political competition.

Franco chose not to rule as a pure Falangist, however. Even though Falangists represented a dominant group in the Nationalist coalition, Franco’s forces *were* a coalition. They included Falangists, monarchists, conservative Catholics, Carlists, most of the military elite, as well as an assortment of other traditionalist and nationalist supporters.¹⁰³ The Falange was the closest thing to a fascist party within this Nationalist alliance and certainly ideologically prominent, perhaps dominant, during the Civil War and early years of World War II.¹⁰⁴ In that first decade after his 1936 rebellion, Franco probably shared much of that ideology, exploited Falange mythology particularly through the “martyr-

the aftermath of the Second World War the political pre-eminence of the Falange within the dictatorship was diminished by Franco. Anxious to clear himself of the stigma of his Axis and fascist connections, he began to look for senior political servants among the ranks of authoritarian Catholics. . . . Over the subsequent decades that [Falangist] influence was to decline inexorably, its fascist rhetoric rendered anachronistic by social and economic changes that were impelling Spain towards ultimate integration in a democratic Europe.

Id. at 5.

⁹⁸ PALOMARES, *supra* note 14, at 11.

⁹⁹ The Falange Espanola founded in 1933 by Jose Antonio Primo de Rivera did have a strong socialist wing that excoriated selfish capitalists. These “old shirts” hoped for social reform after a Nationalist victory, but those elements were lost in the larger Francoist *Falange Espanola Tradicionalista* that the Caudillo proclaimed in 1936, amalgamating monarchists, Carlists, Catholic conservatives, and the original Falange with himself at the head. BEEVOR, *supra* note 22, at 180, 261.

¹⁰⁰ Franco’s Falange differed from the Nazi brand of fascism by the degree to which the former placed religion—conservative Spanish Catholicism—at the center of its belief system. (Although there were some anti-clerical Falangists prior to Franco’s purging all dissent.)

¹⁰¹ Jose Antonio Primo de Rivera, son of Miguel, the Spanish dictator (1923–30) prior to the Second Republic.

¹⁰² AGUILAR, *supra* note 2, at 83; PALOMARES, *supra* note 14, at 15; BEEVOR, *supra* note 22, at 180.

¹⁰³ PRESTON, *supra* note 7, at 4. *See also* GUNTHER ET AL., *supra* note 22, at 66–67.

¹⁰⁴ *See* PALOMARES, *supra* note 14, at 15 (explaining that the Falange was dominant in Spanish politics, but was never a true political party).

dom” of Primo Rivera, and drew on the party’s considerable sway on the political right (which by 1939 was the only side that mattered). However, in creating his regime, Franco chose to eliminate all political parties, declaring instead a national “Movement” to which all Spaniards should be loyal. The Falange never did become the official fascist party of the Francoist state. Instead, Franco’s national “Movement” absorbed it.¹⁰⁵

The fascists lost World War II, and the Cold War between the West and the Soviets commenced almost immediately. Franco perceived the need to portray his regime as a conservative Catholic,¹⁰⁶ but *non-fascist*, bulwark against Soviet expansion.¹⁰⁷ At first the West did not buy this pose—memories of the wartime devastation and atrocities perpetrated by the Generalissimo’s Axis patrons were too fresh. The Allies placed Spain under economic boycott and barred its admission to the United Nations. Economic repercussions from the boycott were further aggravated by Falange-inspired autarky, and by 1946 Spain was unable to feed its people.¹⁰⁸ Only last-minute credits and food shipments from Argentina courtesy of fellow charismatic autocrat Juan Peron warded off starvation. Spain remained an international pariah through the 1940s.

Eventually, however, the Cold War did provide the opportunity for Franco to gain some acceptance in the West.¹⁰⁹ By early 1953, the United States at the height of its anti-communist fever was willing to accept the former friend of Hitler and Mussolini as its ally against the Soviet Union.¹¹⁰ The United States granted Franco political legitimacy and trade relations in exchange for military bases on the strategically important Iberian Peninsula.¹¹¹ Western European governments initially balked at dealing with Franco, but they soon acquiesced.¹¹² Within a few years, the United Nations admitted Spain to membership.¹¹³

The first stages of Spanish amnesia at the national level helped facilitate such diplomatic rehabilitation on the global level. Had state propaganda in Spain continued its self-legitimization in the rhetoric of a Crusade against socialism and liberal democracy, western leaders would have found it awkward to do business. It was easy to recall that Hitler and Mussolini had been Franco’s

¹⁰⁵ See GUNTHER ET AL., *supra* note 22, at 66 (explaining that the Falange was absorbed into the *Movimiento Nacional* in 1958).

¹⁰⁶ *Id.* (explaining that Spain under Franco was an “*extremely confessional*” state.).

¹⁰⁷ AGUILAR, *supra* note 2, at 53; PRESTON, *supra* note 7, at 5.

¹⁰⁸ MICHAEL RICHARDS, *A TIME OF SILENCE: CIVIL WAR AND THE CULTURE OF REPRESSION IN FRANCO’S SPAIN, 1936–1945*, at 133–34 (1998).

¹⁰⁹ PALOMARES, *supra* note 14, at 12.

¹¹⁰ *Id.*

¹¹¹ Richard Herr, *An Historical Essay on Modern Spain*, Ch. 15, THE LIBRARY OF IBERIAN RESOURCES ONLINE, available at <http://libro.uca.edu/herr/ms15.htm>.

¹¹² PALOMARES, *supra* note 14, at 11–12.

¹¹³ *Id.* at 12.

material and military supporters in that “crusade.” Instead of constantly remembering the Civil War, as Falangists were wont to do, by the 1950s it had become prudent to forget it.¹¹⁴ (Although as the continued planning construction of the Valley of the Fallen would demonstrate, prudence had its limits for the Caudillo.)

Domestic considerations began to militate against memory as well. With Falange-promoted fascist-style autarky an economic disaster for the country, a new generation of technocrats with little fervor for fascist ideology rose to prominence in the 1950s.¹¹⁵ They espoused trade with the West, as well as government-directed industrial modernization and expansion. They supported tourism as a source of foreign exchange. The economic technocrats allied with *aperturistas* who believed in gradual political opening.¹¹⁶ Other technocrats were followers of *Opus Dei*, a newly energetic Catholic lay organization that promoted modern technical excellence in the service of conservative Church values.¹¹⁷ Each for their own reasons, these mild “reformers” found hard-line Falange policies inadequate for Spain’s economic and political needs.

Perhaps Franco’s heart always remained with the Falangists (as symbolized by the Valley of the Fallen), but his head nodded to the technocrats who promised to pull his nation out of poverty. The development programs of the late 1950s and the 1960s were quite successful. In a couple decades, Franco’s Spain ironically presaged the efforts of Communist China to achieve economic liberalization while maintaining authoritarian political rule.

By the mid-1950s, the Franco regime was experiencing a serious internal psycho-political tension.¹¹⁸ The Francoist elite was torn between continuing to promote the glory of military triumph or seeking legitimacy by emphasizing domestic peace. The Victory Arch in Madrid exemplifies this tension. Conceived in the 1940s, construction began in 1950 with completion five years later.¹¹⁹ The regime scheduled inauguration for July 18, 1956. It was postponed.¹²⁰ The monument celebrates the eventual victory of the Nationalists over the Republicans at the very site—Madrid’s main university—where the latter, with much bloodshed, repelled the former’s initial attempt to conquer the city in 1936.¹²¹ To add insult to injury, a great equestrian statue of the Caudillo would stand under the arch.¹²² No inauguration ever occurred, and the Franco statue

¹¹⁴ AGUILAR, *supra* note 2, at 53, 313, Fig. 2.1.

¹¹⁵ *Id.* at 101 (explaining that Technocrats were well-known for ideological neutrality.).

¹¹⁶ PALOMARES, *supra* note 14, at 1–10 (contrasting *aperturistas* with *inmovalistas*, or intransigent conservatives).

¹¹⁷ AGUILAR, *supra* note 2, at 101–02.

¹¹⁸ See *id.* Aguilar describes this well, particularly in Chapter 2, “From the Justification of War to the Exaltation of Peace.” *Id.* at 29–148.

¹¹⁹ *Id.* at 86.

¹²⁰ *Id.* at 86–87.

¹²¹ *Id.* at 85, 87.

was placed instead at the Ministry of Public Works.¹²³ Stalemate, compromise, or anti-climax, the Victory Arch evidences the growing official ambivalence toward historical memory.¹²⁴

Through the 1950s and 1960s, Spain continued to move gradually from hard-line fascism toward a more pragmatic form of authoritarianism—one that encouraged economic growth and just enough contact with Atlantic democracies to foster that growth without also encouraging democratic demands at home. The government thus jettisoned Falangist autarky.¹²⁵ Franco's government embarked on a policy of domestic amnesia. The Civil War was to be forgotten, or at least recalled in only a very limited way. Propaganda would no longer concentrate on the heroic military victory over godless socialists, but rather on the national peace and unity that Franco had brought to his people.¹²⁶ Conflict would be forgotten and harmony (according to Franco's tune, of course) exalted. The hard-line Falangists did not always support these changes, so such evolution was halting. But policy did evolve. The shift begun in the early 1950s marked the birth of what was to mature into *El Pacto del Olvido*.¹²⁷

B. *Preparing to Cross the Pyrenees*

In the early 1960s, Spain sought entry into the European Economic Community ("EEC"), the precursor to the present European Union ("EU"). Although governments of some EEC states, notably France, favored Spain's admission, memories of fascism were strong among western Europeans. Moderates and leftists had no trouble mobilizing public opinion against an invitation to Franco. Nothing in the Treaty of Rome explicitly limited EEC membership to democracies, but human rights advocates used the occasion of the Spanish entry effort as a line-drawing event: no country would be admitted to membership in the Common Market unless it practiced democracy and respected human rights. Franco was out.

Spaniards, given a taste of the better life by Franco's successful economic development programs through most of the 1960s, began to yearn for the even greater prosperity of democratic Europe.¹²⁸ Their pride began to demand a

¹²² *Id.* at 87.

¹²³ *Id.*

¹²⁴ *See id.*

¹²⁵ *Id.* at 37.

¹²⁶ *See id.* at 33–49 (noting the transition from origin-based to performance-based legitimacy in Francoist propaganda).

¹²⁷ Encarnacion places the origins of the *Pacto del Olvido* much later. He argues that Suarez's 1976 suggestion of a royal pardon for all political prisoners formed the basis for a pact of forgetting that would be institutionalized with the 1977 Amnesty Law. ENCARNACION, *supra* note 8, at 36.

¹²⁸ *See, e.g.,* ANDREA BONIME-BLANC, SPAIN'S TRANSITION TO DEMOCRACY: THE POLITICS OF CONSTITUTION-MAKING 20 (1987).

readmission to the family of European states. A tension arose. Pride and prosperity would not be forthcoming without human rights. This was the price of admission to the new Europe. Furthermore, the same middle-class instincts that sought greater material betterment in the wake of slight material betterment also sought those bourgeois liberties enjoyed by the French, Italians, and other prosperous Europeans. For many Spaniards, human rights were not a price to be paid for European economic relations, but a further benefit to be enjoyed.

In June 1962, mostly moderate Spanish opposition forces—both from within and outside Spain—met in Munich and formed the *Movimiento Europeo*. This modest attempt at opposition to a totalitarian regime presaged a tactic of “indirection” that emerged a generation later as reformists throughout Eastern Europe began to challenge their Communist regimes. Instead of saying that the regime is bad (a dangerous assertion within a dictatorship), indirect opposition is marshaled by supporting a blander, less-threatening cause—Europeanism for the 1962 Munich attendees, and ecology for the opponents of communist regimes in the 1980s in places like Bulgaria.¹²⁹

Manuel Fraga assumed the post of Minister of Information and Tourism in 1962.¹³⁰ This move appeared to enhance the regime’s face-lift, making Spain more attractive to the democratic West.¹³¹ Fraga brought a reputation for brilliance, as well as reformist thinking, to the government.¹³² His early career as a law professor and public administrator gave confidence to the *aperturistas* hoping for political reform.¹³³ His new ministry’s very title, Information and Tourism, offered an odd conjunction of phrase that revealed the new Francoist policy confluence of public relations and economic development.¹³⁴ Show the world a kinder, gentler face and have them visit leaving behind pounds, francs, deutschmarks, and dollars.

Fraga represented the new school of pragmatists. They would justify the regime’s existence by what it would continue to do for Spain (i.e., provide domestic peace and prosperity), not by what it *had done* per the old Francoist line (i.e., save Catholic Spain from foreign godlessness through a victorious and glorious crusade).¹³⁵ Like his fellow reformists, therefore Fraga would be an agent of *forgetting*. Such amnesia would presumably promote both national harmony and international acceptance.

As a result of the pragmatists’ policies of opening up to the West and planned development, the economy did grow in the 1960s and 1970s up to

¹²⁹ James Friedberg & Branimir Zaimov, *Politics, Environment, and the Rule of Law in Bulgaria*, 4 DUKE J. COMP. & INT’L L. 225, 254 (1994).

¹³⁰ PALOMARES, *supra* note 14, at 88.

¹³¹ *Id.* at 18, 85–86.

¹³² *Id.* at 74.

¹³³ *Id.* at 86.

¹³⁴ *Id.* at 88–89.

¹³⁵ See discussion of origin-based versus performance-based legitimacy *supra* Part IV.A.

Franco's death, giving *aperturistas* a strong hand. However, the hard right and the military wanted to retain power and limit liberties. Franco found himself in the middle or perhaps placed himself there to maximize his leverage and control.

Franco's enchantment with power conflicted with his traditionalist vision for Spain, at least at one key point. He believed in monarchy and eventually declared Spain to be one in a "fundamental law" that served as a component of the Francoist constitution under his rule.¹³⁶ But it was a monarchy without a monarch. During his almost forty years in power, he never restored a king to the throne, which would have meant relinquishing his role as head of state (and commander in chief). He presumably would have continued as head of government under a figurehead royal, but that was not sufficient for the Caudillo, leader of the Movement. Perhaps in his private thoughts he toyed with the idea of a Francoist dynasty, but biology and twentieth-century politics made that implausible.¹³⁷ By the last years of his regime, Franco had settled on Juan Carlos of the house of Borbón as the future king who would succeed him as head of state, thereby restoring the monarchy.¹³⁸

Franco's handpicked successor as head of state, King Juan Carlos, turned out to be a closet democrat¹³⁹ and, after Franco's death, enthusiastically accepted that Spain's restored monarchy would be a constitutional one. Juan Carlos understood better than did the diminishing ranks of diehard Francoists that most Spaniards simply craved to be like other Western Europeans, prosperous and free.

Franco's designation of Juan Carlos as his successor in 1969 sits as a milestone in Spain's political development. Franco, by naming a successor, implicitly acknowledged the diminishment of his charismatic domination—the sunset on his reign by personal power and by personality power, dictated by the distance in time of the Civil War and the aging of its "hero."¹⁴⁰

Upon Franco's death in November 1975, the Francoist Cortes duly declared Juan Carlos king.¹⁴¹ Many liberals and leftists doubted the new mon-

¹³⁶ Ley Organica del Estado [Organic Law of the State] (B.O.E. 1967, 97) (Spain).

¹³⁷ Juan Carlos's cousin and committed Francoist, Alfonso Duke of Anjou and Cadiz, married the dictator's granddaughter in 1972. Maybe Franco hoped such a union might form the basis of a new dynasty, but he must have accurately calculated that both the Spanish people and the international community would be more likely to accept Juan Carlos as king.

¹³⁸ Interestingly, the Law of Succession required Franco's successor to "swear loyalty to the spirit of 18 July, that is to say, to the origin-based legitimacy of the régime." AGUILAR, *supra* note 2, at 40.

¹³⁹ Some would say *convenient* democrat, arguing the new king realized that monarchy could not survive in Spain without democracy.

¹⁴⁰ Ley por la que se provee la concerniente a la sucesión en la Jefatura del Estado [Law of Succession of the Head of State] (B.O.E. 1969, 175) (Spain); AGUILAR, *supra* note 2, at 40.

¹⁴¹ PALOMARES, *supra* note 14, at 1434. Since the positions of Head of State and Head of Government had been separated in 1973, King Juan Carlos assumed only the position of Head of

arch's inclination or ability to institute significant democratic reform.¹⁴² They doubted his inclination since the new king had appeared as Franco's dutiful standard-bearer and privileged representative of traditionalist Spain, particularly since his 1969 designation and pledge of loyalty to Franco and the principals of the dictator's regime. They doubted his ability because he had shown no evidence of the strength of character and political gravitas necessary to challenge the entrenched archconservative Francoist power structure, both civilian and military.

Juan Carlos would happily surprise many over the transitional decade following Franco's death. To the extent that Juan Carlos appeared to be Franco's toady in the final years of the latter's rule, one may assume that such appearances reflected tactical patience.

V. KING, COMPROMISE, CONSTITUTION, AND COUP

The Francoist Cortes swore in Juan Carlos as King immediately after the Caudillo's death.¹⁴³ The new king, now head of state, requested the old regime's prime minister, Carlos Arias Navarro,¹⁴⁴ to remain as head of government. So far, the established order seemed secure.

However, the new king's hitherto unexpressed desire for meaningful political reform would conflict with Arias Navarro's preference for stasis. The dominant mood in the country likely influenced that of the king.¹⁴⁵ Juan Carlos moved swiftly in exercising his powers in a program to divest those very powers. He called for the Council of the Realm (an institution intended to help the king adhere to Francoist principles) to select three candidates from whom he would choose a new Prime Minister.¹⁴⁶ The king apparently made clear to the Council that he wanted Adolfo Suarez's name on the list.¹⁴⁷ When it accordingly appeared, Suarez was chosen.¹⁴⁸

State. *Id.* at 144. Also interesting for purposes of the democratic transition, Juan Carlos did not become Head of the Movement, a position now incorporated into the Presidency. *Id.*

¹⁴² Prior to overseeing Spain's successful democratic transition, King Juan Carlos was nicknamed "Juan Carlos the Brief" by many Spaniards, who assumed that his reign would be short and insignificant. ENCARNACION, *supra* note 8, at 34.

¹⁴³ See *supra* Part IV.

¹⁴⁴ Arias had a nasty Civil War record, having been the Nationalist prosecutor in Malaga where "horrific" revenge against Republicans included a reported 20,000 executions between 1937 and 1944. BEEVOR, *supra* note 22, at 74. He was not a great candidate to lead a conciliatory transition.

¹⁴⁵ "[T]he Spanish people expected the King to form a new executive capable of transforming Spain into a modern and progressive country." PALOMARES, *supra* note 14, at 144.

¹⁴⁶ In the Spanish system in effect then and now, the "President" of Parliament is the "Prime Minister." Unlike in many other democracies, therefore, the terms are interchangeable and both will be used in this Article.

¹⁴⁷ Symposium, *Peaceful Transitions to Democracy: Peaceful Transitions to Constitutional Democracy*, 19 CARDOZO L. REV. 1953, 1957 (1998).

¹⁴⁸ *Id.*; PALOMARES, *supra* note 14, at 161.

Manuel Fraga, the most prominent reformist in the latter half of Franco's long rule, was passed over. Suarez was the younger and lesser known of the two, and perhaps generational change was a factor in Juan Carlos's calculus.¹⁴⁹ Perhaps Fraga's strong-willed brilliance made him the less attractive partner to the King. Or his occasional resort to repressive actions when he had occupied positions of power.¹⁵⁰ Or perhaps the King and his advisors sensed the relative¹⁵¹ rightward movement in Fraga's beliefs that would characterize his later years,¹⁵² notwithstanding Fraga's reformist credentials. The King presumably wanted a democrat who could sit comfortably in the middle of the political spectrum. And Fraga, while being a man of the reformist center, did not always stay there.

Initially, Juan Carlos's selection of Adolfo Suarez as his own choice for prime minister¹⁵³ in mid-1976 would not encourage progressives' hopes—leftists and many democrats distrusted Suarez for his solid Francoist resumé.¹⁵⁴ At the time of his appointment, most of the Spanish public regarded him as “a mere Francoist,” and many doubted his experience and gravitas to challenge the Francoist bunker.¹⁵⁵ His somewhat thin record seemed to place him to the right of Fraga and Foreign Minister Jose Maria de Areilza, the two other presumed contenders.¹⁵⁶ But Suarez quickly demonstrated that he and the King would move toward constitutional monarchy. As new prime minister, he proposed a one-year timetable for legislating a political reform law, submitting it to national referendum and holding open national elections for the first time in more than four decades.

Suarez and Juan Carlos walked an uncertain middle ground between a distrustful political left, which included outlawed communists and their supporting labor unions, as well as socialists and liberals, and an ultra-conservative right, including much of the military elite and Francoist government hard-

¹⁴⁹ PALOMARES, *supra* note 14, at 162.

¹⁵⁰ *Id.* at 163. See also JOHN F. COVERDALE, THE POLITICAL TRANSFORMATION OF SPAIN AFTER FRANCO 44 (1979).

¹⁵¹ Some, perhaps Fraga himself, would argue that his beliefs did not substantially change—rather the political spectrum shifted leftward.

¹⁵² Some would argue that Fraga's rightward political shift came only *after* Suarez assumed the Presidency, which event left Fraga no ground to dominate the political center as he had previously. PALOMARES, *supra* note 14, at 84.

¹⁵³ In Spain the prime minister is called the “President.” However, since he is only head of government, not head of state, the position is effectively that of a parliamentary prime minister, not that of an American-style president.

¹⁵⁴ In contrast to Fraga, who was also a Francoist insider, Suarez was relatively unknown to the Spanish general public. PALOMARES, *supra* note 14, at 162.

¹⁵⁵ *Id.* at 164.

¹⁵⁶ *Id.* at 163–64. Areilza appeared at the time even more reformist than Fraga, having toured the globe promoting the idea of Spanish democratization, including showing some openness to allowing the Communists to participate in a transitioned political system.

liners.¹⁵⁷ However, the King and prime minister calculated that the bulk of Spaniards wanted both democracy and peace—and would support their one-year plan for birthing a pluralist constitutional monarchy.

National amnesia was a key element in their plan. Spain was not particularly amnesiac at Franco's death. Although his government in its later years had indeed emphasized its present accomplishments rather than its past military conquest of the red threat, thus softening the earlier triumphalism of the regime,¹⁵⁸ the country still well remembered the Civil War. "[W]hatever one's position, whatever one's family circumstances with regard to the war, it was very vivid in society's historical memory."¹⁵⁹ Most Spaniards feared a repetition of the vividly recalled horror. "That such a thing should be avoided at all costs, was the message coming from society and delivered very clearly to its leaders. . . . There was, therefore, a positive consensus on moderation, prudence and peaceful change"¹⁶⁰ Juan Carlos and Suarez thus would follow the people as well as lead them: forget and go forward.

As suggested above, to some degree this would continue the Proto-transition of the government moderates in the last decades of Franco's rule, Fraga most prominent among them. That Proto-transition emphasized domestic peace and economic development to justify the regime's continued existence rather than the Falangist emphasis on the crushing of the Republic in the "crusade" of 1936–39. The moderates' approach (only partially followed by Franco himself) depended in part on *forgetting*—or at least repressing memory of—the antagonism of the 1930s, eschewing both triumphalism and blame, and seeking national quiet with passive acceptance of the regime. Francoist moderates followed this line to preserve power.¹⁶¹ Defeated Republicans inside Spain acquiesced in it to preserve their tenuous survival. But for such an approach to continue after Franco's death, most Spaniards on the hard right and hard left—non-forgetters—would have to be brought into any expansion of such conciliatory amnesia. For the right this meant protection of the military, the monarchy, and the Church. For the left this meant full political participation, including legalization of the Communist Party¹⁶² (as well as all other parties, none of which was permitted under Franco).

So Juan Carlos and Suarez promoted a policy agenda in the early post-Franco years that interwove this constructive amnesia with a legal fabric that

¹⁵⁷ By this point the Church, interestingly, had become moderately reformist, was no longer part of the Francoist right-wing, and supported the kind of gradualist reform pushed by the King and Suarez.

¹⁵⁸ AGUILAR, *supra* note 2, at 35–40.

¹⁵⁹ Symposium, *supra* note 147, at 1955. See also Omar G. Encarnación, *Reconciliation after Democratization: Coping with the Past in Spain*, POL. SCI. Q. 435 (2008).

¹⁶⁰ Symposium, *supra* note 147, at 1955. See also AGUILAR, *supra* note 2, at 163.

¹⁶¹ See discussion *supra* Part 4.

¹⁶² Perez Llorca comments, "The Communist Party was legalized one morning, while the country was more or less on holiday." Symposium, *supra* note 147, at 1959.

would support communal tolerance, political compromise, and democratization. This agenda's legislative menu prescribed a framework of political reform law, legislated labor rights, an amnesty statute, and ultimately a democratic constitution. Western Europe provided the model.¹⁶³

Psychology, economics, and politics came together at this very special point in time. The Spanish people after forty years of repression wanted the liberty of European democracies. After forty years of poverty followed by a taste of prosperity, they wanted the full material prosperity of the European Community. The Proto-transition had exposed them to both this liberty and prosperity, by inbound tourism from democratic lands, by outbound Spanish labor to those same lands, by economic development and by limited liberalization in Spanish media.

Popular will would confirm the political reform law and the Constitution through referendum.¹⁶⁴ Political finesse would bring most of the military and the right-wing under the same tent of national consensus¹⁶⁵ as the Communist Party. There would be no trials, no truth commissions, no lustration, no debates over past wrongs—a Pact of Forgetting entered into implicitly by the elites, right, left, and center, who moved Spain to democracy in the half-decade following the death of Francisco Franco. Democracy was materially expedient. Everyone agreed that picking scabs from the Civil War was not conducive to assuring peace and material comfort.

Perhaps the boldest legislative step—even bolder than the new democratic constitution of 1978—was the Suarez government's first major project, the Law on Political Reform, which would mandate a pluralist, elective democracy. The King and others certainly must have conceived of such a law before Suarez assumed the office of president¹⁶⁶ in July 1976. In fact, it was probably Arias Navarro's unwillingness or inability to aggressively shepherd such legislation that led Juan Carlos to replace him with Suarez. Suarez allowed himself and his government one year to draft the law, pass it through the Cortes and have it ratified by the Spanish people. Suarez masterfully accomplished these tasks between mid-1976 and mid-1977 by successfully shepherding the Law of Politi-

¹⁶³ *Id.* at 1955.

¹⁶⁴ Spanish voters overwhelmingly confirmed the new constitution in a referendum on December 15, 1976. See *Referendum/Diciembre 1976*, Infoelectoral.mir.es (Jan. 18, 2012), <http://www.infoelectoral.mir.es/min/busquedaAvanzadaAction.html;jsessionid=E8254EE51BD7C2F6185A48A55613C998.app2>.

¹⁶⁵ Some claim that Fraga's move rightward and founding of the *Accion Popular* ("AP") party provided a democratic outlet for the political right and thus facilitated peaceful transition, while ultimately and ironically marginalizing himself politically. One suspects that such a sacrifice of his own interests to the nation's might have been inadvertent.

¹⁶⁶ In Spain, the king, of course, is head of state. The head of government is referred to as "President" or as the "Prime Minister." Although the word "president" is used, the functions and powers of that office correspond to what are called prime ministers, premiers, or chancellors in most parliamentary systems.

cal Reform of 1976.¹⁶⁷ Impressively, he persuaded the last Francoist Cortes to vote itself out of existence by passing the legislation that created participatory democracy in Spain.¹⁶⁸

Spanish voters overwhelmingly ratified the Law of Political Reform in a national referendum on December 15, 1976. Communists and Socialists had opposed passage, with the latter interestingly appearing more strident than the former. The leftist elite was apparently out-of-step even with its own constituency since ninety-four percent of voters approved the reform.¹⁶⁹ One suspects that the leftist leaders were more unhappy that a former Francoist Cortes and centrist government officials had authored the reforms without them than with the actual content of those reforms. The reforms paved the way for the let's-not-argue-the-past transition that the King, Suarez, and their broad base of allies would successfully pursue over the next few years.

A. *1977 Amnesty Law and the 1978 Constitution: Legislating Amnesia (or Silence)*

“[E]lections took place on June 15, 1977, . . . under conditions of unbridged freedom, peace and normalcy; and *that was a gigantic step.*”¹⁷⁰ Suarez continued to head government, now as a democratically elected leader, albeit of a minority government. His centrist Union of the Democratic Center (“UCD”) held only a plurality in parliament, requiring cooperation with other parties—sometimes left, sometimes right—to govern.¹⁷¹ This need for cooperation across the political spectrum no doubt strengthened the Pact of Forgetting in the first years of transition.

Fraga’s conservative Alianza Popular (“AP”) finished fourth in the 1977 elections with only eight percent of the vote, less even than the Communists’ nine percent.¹⁷² The elections thus quashed any hope of continuing a

¹⁶⁷ The Law on Political Reform of 1976 is an “organic law.” This concept is found more in civil law systems than in common law jurisdictions. It signifies an important statute that sets broad rules of structure and substance in a particular area of governance, anticipating subsidiary statutes to legislate particulars. Historically, the Law on Political Reform occupied a monumental and somewhat ironic position. Passed by the last Francoist parliament in its final months, it was the eighth and last of Francoist “fundamental laws”—statutes that together formed the Francoist Constitution. See Symposium, *supra* note 147, at 1957. It also marked the end of that constitution and of the old regime and the beginning of the new.

¹⁶⁸ See *id.*

¹⁶⁹ PALOMARES, *supra* note 14, at 172. Socialist leader Filipe Gonzales appeared almost silly, going to the European Parliament to seek its support in opposition to the reforms. The parliament was not interested in opposing what seemed a sensible step toward democracy merely on the grounds that it was authored by former non-democrats.

¹⁷⁰ Symposium, *supra* note 147, at 1960.

¹⁷¹ *Id.* at 1960–61.

¹⁷² PALOMARES, *supra* note 14, at 186.

Francoist government.¹⁷³ Suarez's center-right UCD and Gonzales' center-left Socialists garnered a combined sixty-four percent,¹⁷⁴ demonstrating the electorate's desire for moderation and a peaceful transition.¹⁷⁵ These results starkly contrasted with the polarized elections during the last period of democracy in the 1930s.

The new democratically-elected parliament passed an Amnesty Law as one of its first major accomplishments. While the Pact of Forgetting was an unwritten, implicit political understanding, the Amnesty Law came as close as any formal act to legislating that informal, amnesiac silence. The amnesty covered most alleged political crimes committed on either side during the Franco years.¹⁷⁶

Following elections and the passage of the Amnesty Law in 1977, a Constitutional Committee of the Cortes formed. That committee in turn appointed a drafting subcommittee of seven deputies known as the *Ponencia*. After months of drafting and debate, a modern democratic European constitution emerged. It included basic civil liberties, some social rights, separation of church and state (with recognition of historic connection to Catholicism), primacy of international law, a limited politically neutral monarchy, independent political parties, quasi-federal autonomous regions for the entire state territory, an independent judiciary, and a bi-cameral legislature—all important elements in balancing stability with freedom, as most Spaniards seemed to desire. The Cortes ratified the document on October 31, 1978. The voters did the same by referendum on December 6, 1978.¹⁷⁷

The Amnesty Law of 1977 and the Constitution of 1978, together, helped cement the Pact of Forgetting. A new order formed itself from the old with no violent rupture, only with a peaceful metamorphosis. Suarez and his UCD coalition of moderate conservatives, liberals, and social democrats performed brilliantly in the first phase of the democratic transition, the closing years of the 1970s, fulfilling the promise of the peaceful transition from dictatorship to democracy.¹⁷⁸ The Pact of Forgetting, originating under Franco and sealed with the Amnesty Law of 1977 was necessary to such performance since the Suarez coalition included both moderate Francoists and moderate opponents

¹⁷³ *Id.* at 189.

¹⁷⁴ *Id.* at 186.

¹⁷⁵ *Id.* at 189.

¹⁷⁶ Whether an amnesty law could insulate perpetrators against human rights prosecutions was apparently not debated, an issue that has become of interest during the present attempt to prosecute Judge Garzon for violating that amnesty law by starting an inquiry into Franco-era crimes. The question is all the more interesting in light of Spain's 1978 Constitution, which generally elevates international law above domestic statutes.

¹⁷⁷ ENCARNACION, *supra* note 8, at 39–43. See also Symposium, *supra* note 147, at 1963–66.

¹⁷⁸ AGUILAR, *supra* note 2, at 237; ENCARNACION, *supra* note 8, at 37; PALOMARES, *supra* note 14, at 185.

of Franco. Their unifying goal, successfully pursued, was establishment of a stable pluralist democracy.

However, after Suarez and his allies had largely achieved that goal, the UCD coalition began to fall apart and Suarez's political fortunes declined.¹⁷⁹ Once democracy was achieved, Suarez's coalition revealed its inherent instability. UCD elements disagreed over education, divorce, and the role of the Church, among other domestic issues.¹⁸⁰ Additionally, ETA terrorism on behalf of Basque independence was peaking, with hundreds of resulting deaths in the late 1970s and early 1980s.¹⁸¹ Parts of the military chafed under this social change and perceived instability, as well as the devolution of central powers to the regions under the 1978 Constitution. Periodically during the Suarez years, evidence of coup conspiracies surfaced, but nothing serious occurred.¹⁸² Only in early 1981, after Suarez had resigned the presidency and his UCD coalition dissolved, did elements of the military act. Conventional wisdom credits King Juan Carlos with saving democracy.

On February 23, 1981, just short of a month after Suarez's resignation and at a peak of uncertainty for the new democracy, Colonel Antonio Tejero Molina led a group of Civil Guards into the Cortes with guns firing.¹⁸³ They held the Parliament hostage in an attempt to spark a *coup d'état*. In other locations, tanks moved into the streets. General Alfonso Armada, reputed to be close to the King, apparently organized the rebellion and hoped to install himself as national leader.¹⁸⁴ That evening Juan Carlos went on national television in his Marshall's uniform as Commander-in-Chief.¹⁸⁵ He ordered all soldiers back to barracks, condemned the attempted coup, and declared himself for democracy and the Constitution.¹⁸⁶

The coup collapsed. The King became a national hero.

Spontaneous demonstrations against the failed coup and in support of democracy and the King erupted throughout the country in subsequent days. Fraga joined the demonstrators in the street, firming his credentials as a democrat and supporter of the constitution.¹⁸⁷ His star was to rise again a bit with Suarez off the stage. Moderate conservatives from the dissolving UCD returned to Fraga and strengthened his heretofore struggling AP.¹⁸⁸ The biggest political

¹⁷⁹ PALOMARES, *supra* note 14, at 191.

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 189, 191.

¹⁸² *Id.* at 192.

¹⁸³ *Id.* See also Bill Cernyn-Jones, *King Orders army to crush coup*, GUARDIAN (Feb. 23, 1981), <http://www.guardian.co.uk/world/1981/feb/23/spain.fromthearchive>.

¹⁸⁴ PALOMARES, *supra* note 14, at 192; Cernyn-Jones, *supra* note 183.

¹⁸⁵ PALOMARES, *supra* note 14, at 192.

¹⁸⁶ *Id.*; Cernyn-Jones, *supra* note 183.

¹⁸⁷ PALOMARES, *supra* note 14, at 192.

¹⁸⁸ ENCARNACION, *supra* note 8, at 57.

winner, though, was Filipe Gonzales, who had emerged as the leader of a large center-left party, poised to take power in the 1982 elections.¹⁸⁹

That a monarch should have preserved the democratic transition demonstrates how Spain's successful move toward democracy this time was so much more mature and inclusive than the spasmodic Republican effort in the 1930s that was quashed by civil war and fascist triumph. A consensus had developed for democracy, prosperity, and Europe. A companion consensus enjoined any debate about past injustices that might threaten the newfound democratic peace. The coup attempt likely strengthened the Pact of Forgetting, reminding Spaniards of the danger of opening old wounds.

The King emerged as the undisputed champion of the new democratic Spanish state. Critics debate whether it was conviction or wise self-interest that prompted him to oppose the coup.¹⁹⁰ For more than a decade, the 1982 failed coup was the only significant public breach in the Pact of Silence, interestingly initiated by Francoists, not by Franco's victims. What people *do* ultimately matters in history and politics. We may never know Juan Carlos's thoughts, but his actions stopped the coup before it had a chance to succeed or at least cause terrible strife. The real memory of the Civil War, Spain's public "forgetting" of the Civil War, and its carnage united the bulk of Spaniards in 1981 and aided the King in shutting down the marginalized conspirators.

A decade of transition passed between Franco's death and Spain's admission into the European Community ("EC").¹⁹¹ Moderates came to dominate the military, as hard-line Francoists retired or were marginalized. Spain joined the Council of Europe and accepted its human rights treaty and mechanism in 1977, well before its accession to the EC.¹⁹² This has become the normal pattern for newly democratic European states. It is easier to join the Council, since its requirements (i.e., don't violate human rights) are relatively easy to meet for a new democracy. In contrast, there are complex economic and legal reforms re-

¹⁸⁹ *Id.* at 58.

¹⁹⁰ Ronald Hilton, *Spain: King Juan Carlos*, WAIS STANFORD (July 19, 2003), http://wais.stanford.edu/Spain/spain_kingjuancarlos71903.html (suggesting that King Juan Carlos was cognizant of at least one coup plot).

¹⁹¹ The European Community succeeded its component, the European Economic Community, and the EC itself became a component of the EU. The terms have technical, legal distinctions not relevant here, but have been used somewhat interchangeably by the news media. *See Background Note: Spain*, U.S. DEP'T OF STATE, <http://www.state.gov/r/pa/ei/bgn/2878.htm> (last updated Jan. 5, 2012) (State department listing date of accession as 1986). *See also Spain*, EUROPEAN UNION, http://europa.eu/about-eu/countries/member-countries/spain/index_en.htm (listing 1986 as date of EU entry).

¹⁹² COUNCIL OF EUROPE, *Spain*, <http://www.coe.int/en/web/coe-portal/country/spain> (last visited Mar. 20, 2012). All EU states are members of the Council of Europe, while the converse is not true, as evidenced by Turkey and Norway.

quired for a new European Union (“EU”) entrant. In practice, therefore, European integration exposes populations of emerging democracies to human rights consciousness early in the process. This is reinforced by the knowledge that the EU itself makes human rights observance a criterion for accession.

Until the Pinochet case, no further serious challenges to the Pact came from elites on the right or left. Ironically for most of that period of a dozen-plus years, Spain was governed by socialists under Filipe Gonzales. He did not want the first social democratic government in a half century threatened by civil strife. Also, as a participant in the Pact, he internalized its tactical philosophy. Finally, in later years of his administration, corruption pervaded the government and any reform or radicalism posed a threat to Gonzales’s hold on power.

VI. BRIEF FANTASY ROUNDTABLE IN THE YEAR 2000¹⁹³

Frei:¹⁹⁴ It is hypocritical of you to prosecute our dictators and not your own. Franco was as evil as Pinochet and committed his crimes on your own soil. But you interfere in our affairs and ignore your own.¹⁹⁵

Garzon: If we agree that Pinochet did evil, how can you oppose our attempts to punish that evil? Not all wrongs can be righted at once. We must begin somewhere. And I mean no disrespect to sovereignty over your own soil. In everyday matters, sovereignty should prevail. However, genocide, torture, and the like are crimes of a different sort. They offend all humanity. They threaten all humanity. And so we call them “crimes against humanity.” Universal justice demands that they be prosecuted wherever justice can be done.

Frei: Don’t you admit that it would be less hypocritical if you prosecuted Franco and his cronies first, before hauling Latin Americans into Spanish courts? Particularly considering your colonial history?

Garzon: Our work is neither hypocritical nor blind. Rather, it is a moral and legal strategy that establishes precedent and opens doors. Today, Pinochet is a recent evil whose crimes may be

¹⁹³ See DISCLAIMER, *supra* note 20. Baltasar Garzon and Manuel Fraga are joined in this dialogue by Eduardo Frei Ruiz-Tagle, Chile’s president from 1994–2000 (which coincided with the Pinochet trial), King Juan Carlos of Spain, and Henry Kissinger.

¹⁹⁴ President of Chile at the time of Pinochet’s arrest in London. See *Frei Ruiz-Tagle, Eduardo*, CLUB DE MADRID, http://www.clubmadrid.org/en/miembro/eduardo_frei_ruiz_tagle (last visited Mar. 20, 2012).

¹⁹⁵ ROHT-ARRIAZA, *supra* note 5, at 37.

prosecuted. His prosecution is also a metaphor for what the Spanish have failed to do for three decades since Franco's death. This allegory will awaken conscience and lead to a reexamination of the Franco crimes.¹⁹⁶

Frei: But Spain's transition to democracy since 1975 has only been possible because of your nation's Pact of Silence—a collective national agreement to not debate who was right and who was wrong in your civil war, a debate which surely would have ensued had Franco's victims sought an accounting immediately upon his death. The unspoken social consensus in Spain was to “let sleeping dogs lie” rather than pose a threat to democratic transition or risk another civil war. Now, only decades later, do you dare raise such issues, even metaphorically. How do you presume to deny Chileans and Argentineans that same right to choose silent peace over dangerous dialogue?

Garzon: I do not deny them that right. Feel free to prosecute or not prosecute your dictators. I only assert the right of humanity to enforce universal standards universally. Wherever perpetrators of crimes against humanity can be reached, they should be held accountable for their heinous misdeeds.

Henry: But who appointed you as God, as humanity's representative, as the fiery sword of justice? Don't you see the danger in your doctrine of universal jurisdiction? Once we can prosecute anyone anywhere, politics will take over. A zealous ideologue will find crimes against humanity in the legitimate policy choices of legitimate governments. One person's aggression is another's humanitarian intervention.

Garzon: Self-serving¹⁹⁷ pseudo-moderation! You know very well, Henry, that judges and state attorneys regularly face the

¹⁹⁶ See also Meisler, *supra* note 6. Our fictional Garzon admits here to a metaphorical link between Franco and Pinochet that the real Garzon denied at the time of the Pinochet extradition attempt.

¹⁹⁷ Henry Kissinger, former United States National Security chief and Secretary of State, was accused of international crimes for his alleged role in supporting Pinochet's illegal coup against the elected Chilean government of Salvador Allende and for his role in directing the United States war in Vietnam. Jonathan Franklin & Duncan Campbell, *Kissinger May Face Extradition to Chile*, *GUARDIAN* (June 12, 2002, 23:34 EDT), <http://www.guardian.co.uk/world/2002/jun/12/chile.pinochet>. See also Kenneth Maxwell, *The Other 9/11: The United States and Chile, 1973*, *FOREIGN AFF.*, Nov.–Dec. 2003, at 147, 147–151 (reviewing PETER KORNBLUH, *THE PINOCHET FILE: A DECLASSIFIED DOSSIER ON ATROCITY AND ACCOUNTABILITY* (2003)).

challenge of performing their jobs with integrity. If they prosecute merely out of ideological fanaticism, vendetta, or any other unjust cause, it will be evident to their community—local or global—and their work will be rejected. On the other hand, if they prosecute the guilty—whether Nazis, Stasi, al-Qaeda, or aggressors masking as liberals—and if they are willing to prosecute all of these for justice and not for ideology, then the world will recognize that humanity is served.

Juan Carlos: But what does this mean for Spain? Our *Pacto del Olvido* has served us well. We have rejoined Europe. We are prosperous. We are democratic. We are happy. Why would you choose to reopen old wounds?

Garzon: While we were healing, recovering from Franco, those bandages of silence served us well. We could not bear touching those wounds, and it was good that they remained covered. But democracy has given us strength—Europe has given us strength—and it is time to remove those bandages and clean out the old wounds, which left untreated will fester. Only justice can cleanse them.

Henry: Self-righteous crap. Only an egoist liberal would promote himself and his ideology so unabashedly and call it “justice.”

VII. UNIVERSAL JURISDICTION IN SPAIN: ADVENT AND EXPANSION

Furthermore, Spanish courts have jurisdiction over acts committed abroad by Spaniards and foreigners, if these acts constitute any of the following offenses under Spanish law: (a) genocide; (b) terrorism; (c) sea or air piracy; (d) counterfeiting; (e) offenses in connection with prostitution and corruption of minors and incompetents; (f) drug trafficking; (g) any other offense which Spain is obligated to prosecute under an international treaty or convention.¹⁹⁸

¹⁹⁸ Ley Orgánica del Poder Judicial [L.O.P.J.] [Law on the Judiciary] art. 23.4 (B.O.E. 1985, 157) (Spain) (as effective 1985–2009) (translating the Spanish version of *Artículo* 23.4). The Courts amended this statute in 2009, limiting its scope as discussed below. Note that while this statute gave Spanish courts competence over cases based on universal jurisdiction, the Spanish legislature never granted similar power based on the passive personality principle, in which courts would assert jurisdiction based on the Spanish nationality of the victim. Some commentators assert that this jurisdictional gap led to strained logic in some of the Spanish case law growing out of the Chilean and Argentine cases. *See* LUC REYDAMS, *UNIVERSAL JURISDICTION: INTERNATIONAL*

Universal jurisdiction permits any state or appropriately empowered international tribunal to prosecute perpetrators of certain serious international crimes (such as piracy, genocide, systemic torture, and slavery) regardless of the location of the act or the nationality of wrongdoer or victim.¹⁹⁹ In doing so, universal jurisdiction departs from traditional international legal doctrine, which for centuries adhered to a strict territorial principle. That principle limited a state's power to enact and enforce²⁰⁰ criminal law to activities occurring within its borders.

A few limited exceptions to the traditional territorial principle developed in recent centuries. "Nationality" jurisdiction allows a state to prosecute its own citizens for acts outside its borders, and the "protective" principle allows a state to prosecute a person committing an act outside the state, which act undermines a legitimate fundamental interest of that state (e.g., immigration fraud at a consulate).²⁰¹ By the twentieth century, some governments asserted other disputed bases for jurisdiction, such as "effects" (consequences of action abroad felt in forum state)²⁰² and "passive personality" (forum state's national harmed by acts abroad).²⁰³ The latter doctrine has partnered with universal jurisdiction

AND MUNICIPAL LEGAL PERSPECTIVES 187–188 (Prof. Ian Bownlie & Prof. Vaughan Lowe eds., 2003).

¹⁹⁹ Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785, 785 (1988); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §§ 403–04, 423 (1987) (Section 403 places reasonableness constraints on the exercise of universal jurisdiction.). Some scholars, jurists, and statespersons have challenged the validity of this doctrine or sought to limit its scope, as is discussed herein.

²⁰⁰ Legal analysts recognize two broad functional categories of a state's jurisdictional power: *prescriptive* and *enforcement* jurisdiction. As the phrases imply, prescriptive jurisdiction signifies the authority to make law, as in a parliament passing a statute or a king issuing a decree. Scholars also refer to this as legislative jurisdiction. Enforcement jurisdiction signifies the authority to put prescribed laws into effect. Writers sometimes sub-categorize this authority as judicial and executive jurisdiction, the former being the power of judges to interpret the law and decide cases, the latter being the power to arrest, incarcerate, fine, implement legal mandates, conduct administration, etc. It is mostly under the function of prescriptive jurisdiction that extraterritoriality has expanded in recent decades. So, for example, while many states now might generally accept the power of another state to proscribe some action of that state's national if performed in the host state, no such host state would accept any asserted authority by the national's state to arrest her in the host state's territory.

Universal jurisdiction tests traditional limits by allowing trials (judicial jurisdiction) by states that are not the locus of the wrongful act. Even advocates of universal jurisdiction generally would draw a line between the power to adjudicate certain international crimes extra-territorially (e.g., the legitimate Eichmann trial in Israel) and the exercise of executive jurisdiction on foreign soil (e.g., the illegitimate "arrest" of Eichmann in Argentina by Israeli agents).

²⁰¹ Edwin D. Dickinson, *Jurisdiction With Respect to Crime*, 29 AM. J. INT'L L. 435, 440 (Supp. 1935).

²⁰² Roger O'Keefe, *Universal Jurisdiction*, 2 J. INT'L CRIM. JUST. 735, 739 (2004).

²⁰³ REYDAMS, *supra* note 198, at 21.

in some of the cases central to this Article.²⁰⁴ However, prior to World War II, despite some supportive academic commentary,²⁰⁵ international law did not recognize universal jurisdiction²⁰⁶ except in regard to piracy and perhaps slave trade, which by their nature generally occur largely outside the territorial jurisdiction of any state.²⁰⁷

International law's general restriction against the extraterritorial assertion of jurisdiction comported with the dominant "positivist"²⁰⁸ posture during the nineteenth and early twentieth centuries—that it was a body of law only concerned with behavior between states and therefore *not* concerned with criminal behavior of individuals, except piracy. Furthermore, the twin positivist concepts of exclusive territorial power and absolute state sovereignty made illegitimate any prosecution for wrongs committed outside a state's boundaries. A corollary to these positivist postulates precluded any state or international body from prosecuting human rights abusers for violations within another state.

All this changed with Hitler and Nuremberg.

If traditional international law were to lack a mechanism for prosecuting individuals for massive trans-border heinous behavior due to limitations imposed by doctrines of sovereignty and territoriality, Nazi criminals would escape legal punishment, or at best be subject to haphazard, inconsistent, and incomplete justice within devastated and dysfunctional postwar judicial systems in individual European states. The victorious major Allies—the United States, the Soviet Union, Britain, and France—chose to prosecute the Nazi leaders under international law and thereby changed that law forever. By international agreement, the Allies created a tribunal of distinguished jurists and defined the international crimes for which the defendants would be tried—Crimes Against Peace, War Crimes, and Crimes Against Humanity.²⁰⁹ The Allies cannot be said to have invented universal jurisdiction—the pieces were already in place—but they certainly gave it expression.

²⁰⁴ For instance, prosecutors in Spain and Germany highlighted the status of Spanish and German nationals, respectively, as victims of Pinochet's regime in Argentina. *See generally id.* at 187.

²⁰⁵ *See generally* Dickinson, *supra* note 201 (discussing the status of jurisdiction in international law in conjunction with a 1935 Draft Convention on Jurisdiction With Respect to Crime).

²⁰⁶ Scholars had occasionally used the word "universal" to describe *representative* jurisdiction whereby one state prosecutes an alleged serious felon found in its territory for a crime committed in a sister state because of obstacles to obtaining a trial in the state of occurrence (e.g., extradition difficulties). This was not true universal jurisdiction as we discuss it now. REYDAMS, *supra* note 198, at 31–35. The frequency with which representative jurisdiction was actually exercised is unclear, but one suspects it was a rare practice since little is reported in the literature of its practice.

²⁰⁷ *See* Dickinson, *supra* note 201, at 440 (discussing that the draft convention specifically provided for universal jurisdiction with respect to piracy).

²⁰⁸ REYDAMS, *supra* note 198, at 35. According to positivist theory, "universal jurisdiction" is justified by reference to "a state's internal sovereignty." *Id.*

²⁰⁹ ANN TUSA & JOHN TUSA, *THE NUREMBERG TRIAL* (1986); *see generally* ROBERT E. CONOT, *JUSTICE AT NUREMBERG* (Harper & Row Publishers, Inc. ed. 1983).

Universal jurisdiction doctrine lay dormant for the half-century of Cold War that immediately followed the Nuremberg trials. The world community could no longer create tribunals as it had at Nuremberg to try international crimes because the two great Cold War power blocks, Soviet and Western, would invariably disagree about the criminality of behavior within major international crises, precluding the authorization of judicial action by broadly accepted treaty or by the United Nations Security Council.

By the early 1990s Spain had entered the EC, a democratically elected Socialist government had ruled the nation for most of the decade, the Berlin Wall had fallen, the Soviet empire had dissolved, and democratic governments had replaced dictatorships in Latin America, Eastern Europe, and parts of Africa. Some segments of newly liberated populations called for accountings of the wrongs done by the recently ended dictatorships. Other segments were content to let the past be forgotten or were compelled to silence by menacing militaries that demanded amnesties as the price for democratic transition (as in Chile and Argentina).²¹⁰

Before Spanish attorneys attempted prosecutions of Latin American dictators based on universal jurisdiction, Italian and French lawyers had taken the more narrow approach of bringing cases in their home courts based on “passive personality” (i.e., wrongs suffered by citizens of their countries at the hands of those dictators).²¹¹ Passive personality jurisdiction purports to allow a state to prosecute defendants who commit wrongs against that state’s nationals outside the territory of the state.²¹² Some states and legal experts find this to be an overreaching and illegitimate assertion of extraterritorial executive and judicial power.²¹³ In any event, the Italian and French cases had broken ground for the jurisdictionally more far-reaching Spanish prosecutions.²¹⁴

Numerous Argentine and Chilean nationals moved to Spain during the decades of dictatorship in their own countries, chiefly the 1970s and 1980s. Some were Spanish citizens. A libertarian human rights consciousness pervaded the post-Franco Spain. Like Spain, Chile and Argentina, along with most other Latin countries, had rid themselves of their dictators by the 1990s. The fall of

²¹⁰ REYDAMS, *supra* note 198, at 184–85.

²¹¹ *Id.* at 140 (discussing France’s assertions of passive personality jurisdiction); ROHT-ARRIAZA, *supra* note 5, at 13.

²¹² REYDAMS, *supra* note 198, at 21. *See also* O’Keefe, *supra* note 202, at 739.

²¹³ *See* Dickinson, *supra* note 201, at 440.

²¹⁴ *See* ROHT-ARRIAZA, *supra* note 5, at 130–32; *see generally* REYDAMS, *supra* note 198. .

the Berlin Wall and the end of apartheid in South Africa added to the global political zeitgeist. In this heady political atmosphere, some of these Argentine and Chilean exiles chose to challenge the legal impunity still enjoyed by their former oppressors.

Procedural mechanisms somewhat unique to the Spanish judicial system would support their efforts. An investigating magistrate in the Spanish judicial system²¹⁵ (and many other civil law systems) wields a collection of powers not found in a single individual under United States law. While fully a judge, he exercises significant prosecutorial functions usually associated with the executive branch. He may initiate investigations or pursue them at the request of complainants, and he takes an active role in fact-gathering. The Spanish Constitution of 1978 seems to encourage his initiative where it exhorts “judges to do justice for Spanish citizens.”²¹⁶ As demonstrated by Garzon and his colleagues, the Spanish investigating judge may seek international judicial and executive cooperation on his own initiative, without approval of his government or superior tribunals.²¹⁷

Furthermore, Spanish law provides for an *acción popular*.²¹⁸ This action bears some resemblance to “private attorney general” suits in the United States. Like private attorney general suits, the *acción popular* enables private citizens to bring complaints against societal wrongs so as to vindicate the public’s interest.²¹⁹ However, the Spanish *acción popular* empowers the potential plaintiff in ways its American counterpart does not. First, it initiates a *criminal* procedure,²²⁰ not merely a civil case. Also, standing rules are more permissive than in other legal systems, allowing public-interest groups not claiming personalized injury to sue. Finally, particular United States statutes only authorize private attorney general suits in limited subject areas. The Spanish *acción popular* is broadly available.

²¹⁵ REYDAMS, *supra* note 198, at 185; *The Relation Between the Public Prosecutor and the Police*, EURO JUST., http://www.euro-justice.com/member_states/spain/country_report/630/ (last visited Feb. 22, 2012). See also Beatrix Elsner et al., *The Examining Magistrate’s Function and Involvement in Investigative Matters*, 14 EUR. J. ON CRIM. POL’Y & RES. 225, 227, 235 (2008).

²¹⁶ CONSTITUCIÓN ESPAÑOLA [C.E.] art. 124(1) (B.O.E. 1978, n. 311) (Spain); ROHT-ARRIAZA, *supra* note 5, at 11–12.

²¹⁷ ROHT-ARRIAZA, *supra* note 5, at 4–5.

²¹⁸ Richard J. Wilson, *Prosecuting Pinochet in Spain*, AM. U. WASHINGTON C. L., <http://www.wcl.american.edu/hrbrief/v6i3/pinochet.htm> (last visited Feb. 22, 2012) (discussing that “*acción popular*” means a “popular action” and is akin to a private attorney general, except it also “permits Spanish citizens to file private criminal actions in certain circumstances”).

²¹⁹ *Id.*

²²⁰ *Id.*

A. *Stalking the Condor: Pinochet and the Argentines*

Carlos Castresana started the ball rolling. He brought the first Spanish suit based on universal jurisdiction against Latin American human rights abusers in March 1996.²²¹ Although a public prosecutor, Castresana sued in his private role as head of the Union of Progressive Prosecutors (“UFP”).²²² His complaint alleged international crimes by the Argentine military, including torture, terrorism, illegal detentions, disappearances, and genocide. He probably brought the first formal case of “political genocide” anywhere in the world.²²³ Up until then, the Genocide Convention’s limitation of the concept of genocide to ethnic mass slaughter had pretty much held sway with international lawyers, statespeople, and non-governmental organizations (“NGOs”). Baltazar Garzon soon would take Castresana’s theory and run with it, arguing that the conventional definition of genocide needed expansion.²²⁴

The *Audiencia Nacional* is the Spanish tribunal with original jurisdiction over cases of such international character.²²⁵ The Investigating Judge of the *Audiencia* on duty the weekend that Castresana filed his complaint was Baltazar Garzon. Garzon had made his reputation as a crusader against terrorists and corrupt elites in government and business. In an interview, he claimed that he was not looking for new projects.²²⁶ But he accepted the Argentine complaint and became its fervent advocate.

Within months, a parallel coalition of Chilean exiles and progressive Spanish lawyers filed their own *acción popular* with the *Audiencia Nacional*, again with the Union of Progressive Prosecutors as the principal plaintiff.²²⁷ The *Audiencia Nacional* lottery assigned the Chilean case to Judge Manuel Garcia-

²²¹ While Spain does not permit *in absentia* criminal trials, a prosecution may commence without the defendant present on Spanish soil. In such cases, extradition or voluntary appearance is necessary to complete the case.

²²² ROHT-ARRIAZA, *supra* note 5, at 2.

²²³ While it is generally true that no “classical” ethnic genocide was present in the Argentine case, necessitating the legally creative construction of a political genocide theory, Argentina’s Jewish community was indeed specially targeted by an oft anti-semitic (some would say Nazi-influenced) military. Argentine Jewish victims of torture, disappearance, and murder significantly exceeded the Jewish proportion of the population. *Id.* at 134. Also, the junta and its allies engaged in explicitly racist rhetoric against the country’s Jewish population. *Id.*

Ironically, in one of the German passive personality prosecutions against the junta’s enforcers, the German prosecutor initially rejected the standing of an Argentine of German-Jewish heritage (while retaining other German-Argentine plaintiffs) because the Nazis had stripped the Jewish family of German citizenship before their flight to Argentina during World War II. A higher German tribunal thoughtfully disagreed, as did German public opinion. *Id.* at 135.

²²⁴ *Id.* at 2, 8, 48.

²²⁵ Royal Decree of 1977 for the Creation of the Audiencia Nacional (B.O.E. 1977, 172) (Spain).

²²⁶ See Meisler, *supra* note 6.

²²⁷ ROHT-ARRIAZA, *supra* note 5, at 13.

Castellon.²²⁸ The Argentine and Chilean cases at first proceeded on parallel paths, with Judges Garzon and Garcia-Castellon each conducting his own investigation.

Between 1996 and 1998, significant factual connections began to emerge between the initially distinct Argentine and Chilean litigations. Judge Garzon had uncovered significant evidence of an “Operation Condor” linking the cases.²²⁹ As Garzon investigated the Argentine cases, he and his staff interviewed hundreds of witnesses and read thousands of documents. They uncovered a conspiracy that extended beyond Argentina and that linked their cases with the Chilean ones. The military dictatorships of half a dozen South American countries (Chile, Argentina, Brazil, Bolivia, Uruguay, and Paraguay) had agreed in the 1970s to share resources in their internal “wars” against their perceived enemies. This made refuge for victims more difficult. It also made it easier for the regimes to “disappear” their purported enemies beyond the reach of national judicial process, as weakened as that was. Illegal detentions became transnational. A political refugee from Pinochet could find herself detained by the security forces in Buenos Aires.²³⁰ Because Dirección de Inteligencia Nacional (“DINA”), Pinochet’s secret police, helped lead this effort, Garzon’s investigations expanded beyond the borders of Argentina to include events in Chile.²³¹ Then Pinochet came to England.

Pinochet arrived in London for medical treatment on September 23, 1998.²³² No longer Chilean head of state, he came as a private citizen, although his lawyers would try to argue otherwise. Chilean exile groups got wind of his presence at a private clinic and began a battle on two fronts—public opinion and the courts.

Human rights advocates organized demonstrations at the hospital, catching the zeitgeist of a sympathetic Britain in a transition of its own from a dozen years of Thatcherism to a new Labor Party government more vocally supportive of international humanitarian causes.²³³ Thatcher and her allies sprang to Pinochet’s defense,²³⁴ but their views no longer dominated British public discourse. The Chileans and their allies lobbied the cautiously sympathetic Labor government and particularly Home Secretary Jack Straw, the man responsible for any ultimate extradition order by the British government.

²²⁸ *Id.* at 25.

²²⁹ Richard J. Wilson, *The Spanish Proceedings*, in *THE PINOCHET PAPERS: THE CASE OF AUGUSTO PINOCHET IN SPAIN AND BRITAIN 23–25* (Reed Brody & Michael Ratner eds., 2000).

²³⁰ See generally ROHT-ARRIAZA, *supra* note 5.

²³¹ *Id.* at 25.

²³² *Id.* at 1–2.

²³³ *Pinochet Row Escalates*, BBC NEWS, (Oct. 25, 1998) http://news.bbc.co.uk/2/hi/uk_news/200999.stm.

²³⁴ Reed Brody, *The Case of Augusto Pinochet*, in *THE PINOCHET PAPERS*, *supra* note 229, at 9.

Additionally, allies from the Argentine litigation joined in, as Garzon took the lead in securing an English²³⁵ warrant against Pinochet. In the last days before Pinochet's expected departure from Britain, Judge Garzon, the investigating magistrate on the Argentine case, was more accessible or willing than Judge Garcia-Castellon, the investigating magistrate in the Chilean case. On Friday, October 16, 1998, Garzon prepared the Spanish warrant that led to an English warrant for Pinochet's arrest.²³⁶ Garzon linked Pinochet through Operation Condor to the Argentine detention and disappearance of Edgardo Enriquez, a Chilean opponent of Pinochet. He further accused Pinochet of genocide and terrorism against further unidentified victims based on the Condor investigation. English Magistrate Nicolas Evans of the Bow Street Courts in London issued an arrest warrant against the general for "murder [of] Spanish citizens in Chile."²³⁷ English police served the arrest warrant on Pinochet in his private hospital suite, a couple days before his hurriedly scheduled departure from Britain was to occur.

With the connections between the Chilean and Argentine cases so strong and with Garzon already in the lead gathering evidence and pursuing international procedures, Judge Garcia-Castellon decided to hand his Chilean portfolio over to Garzon, who would thenceforth coordinate the two sets of cases.

International support flowed in for the prosecution and extradition, not merely from the expected NGOs, but from the EU and the UN (sort of). The EU's Parliament passed a resolution on October 20 supporting the Spanish and English procedures against Pinochet.²³⁸ The UN Committee on Torture resolved similar support a month later.²³⁹ German Foreign Minister Joschka Fisher observed approvingly, "Dictators are not above the law."²⁴⁰

²³⁵ While generally "British" not "English" would be the correct word to describe United Kingdom interactions with other states in international relations, that is not so here. English law and English courts are separate from their Scottish counterparts within the United Kingdom. English law and English courts controlled this extradition case.

²³⁶ Phillipe Sands, *10 Years of the Pinochet Principle*, GUARDIAN (Oct. 16, 2008, 05:30 EDT), <http://www.guardian.co.uk/commentisfree/2008/oct/16/pinochet-law>.

²³⁷ ROHT-ARRIAZA, *supra* note 5, at 35, 41. The doctrine of dual criminality (that to be an extraditable offense an act must be a crime in both the requesting state and the custodial state) required Magistrate Evans to characterize Garzon's factual charges as one or more English crimes—he chose "murder," a characterization that would require some legal amendment as discussed below. *See id.* at 41.

²³⁸ *Resolution on the Arrest of General Pinochet in London*, DATABASE EUR. L., <http://eur-law.eu/EN/Resolution-arrest-General-Pinochet-London,193858,d> (last visited Feb. 22, 2012).

²³⁹ *UN Torture Committee Calls for Pinochet Prosecution and Reforms in Northern Ireland*, AMNESTY INT'L (Nov. 19, 1998), <http://www.amnesty.org/en/library/asset/EUR45/027/1998/en/73da28e8-e7ef-11dd-a526-05dc1810b803/eur450271998en.html>. UN committees are not law-making or adjudicative bodies—so their resolutions have little legal weight.

²⁴⁰ ROHT-ARRIAZA, *supra* note 5, at 37.

Garzon rewrote the arrest warrant and submitted it on October 22.²⁴¹ The rewritten second warrant based charges on instances of torture, hostage-taking, and murder consistent with dates after which the United Kingdom had enacted into domestic law provisions of the relevant international conventions. Since the United Kingdom had not enacted executed provisions of the Genocide Convention into its national law,²⁴² that crime was dropped from the extradition proceedings. A new English trial judge, Bow Street Magistrate Ronald Bartle, approved Garzon's rewritten warrant as an English order, satisfied that the double criminality requirement (that the alleged extraditable acts were crimes under both Spanish and English law) was now met. Bartle would continue as the trial judge in the extradition case. The Crown Prosecution Service ("CPS") would represent the Spanish government (or more accurately, the Spanish state, given the conservative Aznar government's ambivalence).²⁴³

Pinochet's lawyers appealed Bartle's warrant to the English High Court. The High Court ruled on October 28, 1998. While it found the second warrant (Bartle's) valid, it went on to find immunity for Pinochet.²⁴⁴ The CPS then appealed to the House of Lords, Britain's highest court.²⁴⁵

Meanwhile, proceedings were continuing in Spain. The original 1996 Spanish complaints in both the Argentine and Chilean cases met with little or no official opposition, largely because they were filed during the transition from the Gonzales (Socialist) to the Aznar (conservative *Partido Popular*) government.²⁴⁶ Gonzales (though an enemy of fellow left-winger Garzon) was out of power. Right-wing Aznar was not about to undermine his own democratic credentials by appearing to support former rightist dictators. Also, Aznar had not yet installed his own Public Prosecutor and the mildly progressive prosecutor remaining from the Socialist government was not inclined to oppose the cases at the outset of judicial proceedings in 1996.²⁴⁷ By October 1998, things had changed substantially.

²⁴¹ HERALDO MUÑOZ, *THE DICTATOR'S SHADOW: LIFE UNDER AUGUSTO PINOCHET* 256 (Basic Books 2008).

²⁴² The United Kingdom is a "dualist" state. Its unwritten constitution considers national and international law as totally separate legal systems. Thus, the United Kingdom might assume international treaty obligations by act of its government, but such rules are not enforceable in British courts until enacted by Parliament. Although the count of genocide disappeared from the English case, it would continue to be of significance in Spanish court. See the discussion, *infra*, of "social groups" in Spanish law and political genocide.

²⁴³ Michael Byers, *The Law and Politics of the Pinochet Case*, 10 DUKE J. COMP. & INT'L L. 415, 424-25 (2000).

²⁴⁴ *Decision of the High Court of Justice for England and Wales, 28 October 1998*, reprinted in THE PINOCHET PAPERS, *supra* note 229, at 71-93.

²⁴⁵ See R v. Bartle, *ex parte* Pinochet, [1998] UKHL 41, available at <http://www.publications.parliament.uk/pa/ld199899/ldjudgmt/jd981125/pino01.htm>.

²⁴⁶ See ROHT-ARRIAZA, *supra* note 5, at 15.

²⁴⁷ See *id.*

The new Aznar-appointed Public Prosecutor for the *Audiencia Nacional*, Eduardo Fungairino, suspected by many of harboring anti-democratic Francoist sympathies, opposed the cases administratively at first.²⁴⁸ When they failed to “go away” and Pinochet’s extradition became a real possibility, he appealed them to the Criminal Appeals Chamber of the *Audiencia Nacional*.²⁴⁹ In early November 1998, in the midst of the English proceedings, the Spanish appeals court upheld the legality of the cases under Spanish law.²⁵⁰

The *Audiencia*’s appeals tribunal found the genocide, terrorism, and torture charges legally cognizable under Spain’s universal jurisdiction statute.²⁵¹ It further held that neither the Chilean nor Argentine amnesty laws would insulate the defendants from these human rights prosecutions in Spanish court. The October 30 ruling was pretty much a grand slam for Garzon: the *Audiencia* panel accepted his broad definition of genocide to include elimination of political groups; it found that the kinds of international crimes alleged were not only outlawed by particular treaties and statutes at issue, but that they had been outlawed prior to those such documents by customary law; and it found that all of the persecutor’s defenses of immunity and amnesty were insufficient.

On November 4, five days after the ruling by the Criminal Appeals Chamber of the Spanish *Audiencia Nacional*, the House of Lords held its first session in the Pinochet case.

The House of Lords vindicated the theory of the Spanish lawyers. Twice. This highest British tribunal, one of the most prestigious courts in the world, affirmed the Nuremberg principle that no one is immune to prosecution for certain crimes against humanity and that, therefore, Pinochet’s extradition from England to Spain was permissible.

The first House of Lords’ decision came down on November 25, 1998. Three of the five Lords on the panel ruled against Pinochet and held that extradition could proceed.²⁵² This first decision *R v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte* (“*Pinochet No. 1*”)²⁵³ was set aside by the Lords on December 17 (“*Pinochet No. 2*”)²⁵⁴ after a controversy arose regarding a possible conflict of interest related to one of the five panelists, Lord

²⁴⁸ See *id.*

²⁴⁹ See *id.*

²⁵⁰ See *id.*

²⁵¹ *Order of the Criminal Chamber of the Spanish Audiencia Nacional affirming Spain’s Jurisdiction, 5 November 1998, reprinted in THE PINOCHET PAPERS, supra note 229, at 95–108.*

²⁵² Unlike most national supreme tribunals, the House of Lords does not issue a consolidated opinion of the court. One must read through the individual Lords’ opinions to discern what exactly has been decided on what issues.

²⁵³ *R v. Bow St. Metro. Stipendiary Magistrate, ex parte Pinochet Ugarte*, [2000] 1 A.C. 61, [1998] 4 All ER 897, [1998] 3 W.L.R. 1456 (Eng.) [hereinafter *Pinochet No. 1*].

²⁵⁴ *R v. Bow St. Metro. Stipendiary Magistrate, ex parte Pinochet Ugarte*, [2000] 1 A.C. 119, [1999] 1 All ER 577, [1999] 2 W.L.R. 272 (Eng.) [hereinafter *Pinochet No. 2*].

Hoffman.²⁵⁵ His wife had worked for one of the interveners in the case,²⁵⁶ Amnesty International, and Lord Hoffman himself was an unpaid director and chairman of an Amnesty International-related charity.²⁵⁷ Although *Pinochet No. 1* lacks any legal precedent, its few weeks of authority permitted significant executive action by the United Kingdom government. By early December, based on *Pinochet No. 1*, Jack Straw had issued an “authority to proceed” beginning the actual extradition process. In a detailed assessment of the case, Straw found no legal obstacles to extradition and found Pinochet fully fit to stand trial.²⁵⁸ In view of Straw’s later actions, this was significant.

A newly constituted panel of seven Law Lords heard arguments during the last two weeks of January 1999. They announced their decision on March 24 (*Pinochet No. 3*).²⁵⁹ It was not as broad as *Pinochet No. 1*, particularly on the question of “dual-criminality,” to the disappointment of the human rights coalition and prosecutors. But it did allow extradition to go forward, and it did make international law history.

Regarding dual-criminality, the Lords held that to extradite from the United Kingdom, the alleged acts must be criminal under British law on the date they occurred, not merely on the date extradition was requested. Since Britain did not ratify the Torture Convention and legislatively enact its provisions until 1988, the bulk of Pinochet’s alleged crimes (occurring from the early 1970s onward) would not be extraditable offenses. A few post-1988 allegations remained, however, so those were extraditable offenses according to the Lords.²⁶⁰

On the issue of immunity, the Lords divided in various directions, but the majority agreed that, in these circumstances, Pinochet had no immunity. Four of the seven Lords (with different reasoning) held that systemic torture as an instrument of state policy could never be covered by head-of-state immunity.²⁶¹ Two more felt that Chile had waived immunity by ratifying the Torture Convention. Thus, only one judge of the seven opined that Pinochet had immunity.²⁶² The extradition was legally permissible.

Home Secretary Straw reissued the authority to proceed on April 15, 1999. The British government was still on board. Some critics suspect that

²⁵⁵ The Rt. Hon. Lord Hope of Craighead, Lord of Appeal in Ordinary, *The Rule of Law Legacy of the House of Lords' Pinochet Judgments*, 43 INT'L LAW. 45, 46 (2009).

²⁵⁶ *Pinochet No. 2*, *supra* note 254. See also Jamie Wilson & Nick Hopkins, *Pinochet Law Lord Linked to Amnesty*, GUARDIAN (Dec. 8, 1998, 10:35 EDT), <http://www.guardian.co.uk/world/1998/dec/08/pinochet.chile>.

²⁵⁷ Lord Hope, *supra* note 255, at 45.

²⁵⁸ Jack Straw, *Reasons for Authority to Proceed by Secretary of State Jack Straw, 9 December 1998*, reprinted in THE PINOCHET PAPERS, *supra* note 229, at 183–87.

²⁵⁹ Lord Hope, *supra* note 255, at 46; *Pinochet No. 3*, [2000] 1 AC 147, [1999] 2 All ER 97, [1999] 2 WLR 827.

²⁶⁰ Lord Hope, *supra* note 255, at 46–48.

²⁶¹ *Id.*

²⁶² ROHT-ARRIAZA, *supra* note 5, at 56–57.

something political transpired over the summer to change that government commitment to extradition.²⁶³

The next legal step was taken in Judge Bartle's court on Bow Street in London in late September—the extradition hearing itself.²⁶⁴ Over the summer, Garzon had strengthened his factual case by gathering further evidence of post-1988 wrongdoing to bolster the charges that were now time-limited by the Lords' decision in *Pinochet No. 2*. Bartle's ruling no doubt pleased Garzon and his allies. Since it was a single opinion, it could be clearer than the seven-part disharmony from the House of Lords. He upheld the extradition.²⁶⁵ But he went further. Bartle re-extended the relevant time-horizon for wrongdoing by holding that since conspiracy is a continuing crime, events prior to 1988 could be considered where they were part of a conspiracy that continued past that date. He also accepted that the trial court in Spain could fairly examine allegations that Pinochet continued to inflict mental torture on the families of the disappeared after 1988 by withholding the truth about their status.²⁶⁶

With such a solid approval of extradition in Bartle's court, Pinochet's strategists seemed to shift direction. Instead of concentrating on further appeals, they played the humanitarian card. Pinochet had wanted a legal victory, not release based on infirmity. But by fall 1999, the latter was beginning to seem his only hope.

After twice ordering extradition (after each of the two House of Lords' decisions) Jack Straw changed his mind. In late fall of 1999, the Chilean government "convinced" Straw to order medical tests of Pinochet to determine whether he was fit to stand trial.²⁶⁷ A government-appointed panel concluded (after just a few hours of the tests) that Pinochet had diminished capacity to understand and communicate and was not fit for trial.²⁶⁸ The report was kept confidential. On January 11, 2000, Straw announced that he intended to allow Pinochet to return to Chile on humanitarian grounds.²⁶⁹ The Aznar government in Spain immediately accepted the decision, pulling the rug out from under Garzon.

Pinochet flew home to Chile on March 3.

²⁶³ Lord Hope, *supra* note 255, at 49; ROHT-ARRIAZA, *supra* note 5, at 64.

²⁶⁴ Ray Moseley, *Extradition Hearing for Pinochet Begins*, CHI. TRIB., Sep. 28, 1999, http://articles.chicagotribune.com/1999-09-28/news/9909280062_1_pinochet-lawyer-clive-nicholls-torture-and-conspiracy-chilean-court (last visited Feb. 22, 2012).

²⁶⁵ *The Extradition of General Augusto Pinochet*, HUMAN RIGHTS WATCH (Oct. 14, 2009), <http://www.hrw.org/news/1999/10/14/extradition-general-augusto-pinochet> (last visited Feb. 22, 2012).

²⁶⁶ *Id.*

²⁶⁷ See Marlise Simons, *Spanish Newspapers Disclose Secret Pinochet Health Report*, N.Y. TIMES (Feb. 17, 2000), available at 2000 WLNR 3281681.

²⁶⁸ *Id.*

²⁶⁹ ROHT-ARRIAZA, *supra* note 5, at 61–62.

One assumes that the politics of Straw's about-face were as follows. Chile had evolved its position on Pinochet from an absolute sovereignty defense to a promise to try the dictator itself. Thus, the specter of impunity was diminished. If Chile's assurances were genuine, there was even a human rights argument for returning the accused to justice at the hands of his own countrymen. United Kingdom relations with Chile and other Latin states would be improved by the return. Britain's Labor government was anxious to aid Chile's Socialist Party, hoping for electoral victory that year, and such a resolution of the Pinochet case seemed to promote this outcome. Finally, press reports had indicated that a deal was done over the summer of 1999 among the Chilean, Spanish, and British governments to return Pinochet through humanitarian discretion if the English courts failed to release him and if the Spanish government could not comfortably drop the suit.²⁷⁰ Straw reversed field between spring and fall of 1999—a summer deal would explain the timing.

So Pinochet went home, but the ghost of Franco was disturbed.

At the time of Augusto Pinochet's London arrest, Chile's President Frei (sensitive to present Chilean sovereignty as well as, perhaps, past Spanish colonialism) accused prosecutors of hypocrisy, asking why they were going after Pinochet while having let Franco's crimes in their own homeland go unexamined.²⁷¹ His reaction missed the mark. The political genocide case against Pinochet *did* indict Franco—albeit allegorically. The Pact of Forgetting discussed by Jesus and me three years before in Seville, and tacitly accepted as part of Spain's ongoing democratic transition, mandated indirection when accusing Franco. The Spanish investigating judges were smart people familiar with their own history—they could not have missed the political metaphor imbedded in their actions.

B. *Beyond Pinochet: Spain Prosecutes More Spanish-American Tyrants*

1. The Scilingo case

Months prior to the filing of the Argentine case in Spain, Adolfo Scilingo made headlines in Buenos Aires by confessing his involvement in one of the sorts of illegal abuse that formed the basis of that case. On April 2, 1995, Mike Wallace interviewed Scilingo on *60 Minutes*, turning the story into an international horror story (and, as it turned out, plowing the ground for the Spanish

²⁷⁰ The Aznar regime floated the idea of accepting a Chilean request to turn the extradition case over to arbitration (where a panel presumably would be chosen by the two governments both opposed to extradition). Outraged opposition in the Spanish press and parliament stopped that idea. ROHT-ARRIAZA, *supra* note 5, at 59–60.

²⁷¹ *Id.* at 37.

suits to come).²⁷² This Argentine navy captain had participated in the “death flights” during which prisoners of the regime were murdered by throwing them, naked and drugged, out of airplanes over the Atlantic Ocean. Scilingo cooperated with Spanish investigators. While in Spain, Garzon placed him under arrest.²⁷³ He was convicted of crimes against humanity as a result of his own testimony.²⁷⁴ He now serves multiple lengthy terms in Spanish prison, effectively a life sentence.²⁷⁵ Ironically, he was the only Condor defendant ever convicted under Spain’s universal jurisdiction rule, after having been the only one to have offered any cooperation or repentance.

2. The Cavallo case in Mexico and Spain

Ricardo Miguel Cavallo worked for the Argentine junta at the notorious Naval Mechanics School (EMSA).²⁷⁶ He identified and arrested citizens targeted by the military for detention and its unpleasant consequences. He tortured political prisoners. He ran the “Fish Tank” where slave labor prisoners repaired electronic equipment, assisted in collecting information on perceived subversion, forged documents, and worked as janitors. At least they usually survived.²⁷⁷ With the end of the junta days, Cavallo parlayed his technical and security skills into an international consulting business. This work brought him to Mexico to create an electronic car registry to combat rampant auto theft.

The Mexican ministry sponsoring Cavallo’s scheme ran television spots in mid-2000 featuring him as its huckster to a skeptical Mexican public. Acting on tips from viewers that recognized the transformed concentration camp operative from their own unpleasant interactions at ESMA, the Mexican newspaper *Reforma* investigated.²⁷⁸ The newspaper’s staff in Buenos Aires looked hard, found witnesses and evidence, and eventually connected the dots. Cavallo the

²⁷² MARGUERITE FEITLOWITZ, A LEXICON OF TERROR: ARGENTINA AND THE LEGACIES OF TORTURE 230 (2011) (citing *60 Minutes: Tales from the Dirty War* (CBS television broadcast April 2, 1995)).

The “Scilingo Effect” became the description of a flurry of public confessions by Argentine persecutors. *See id.* at 194.

²⁷³ Giles Tremlett, *Argentinian Jailed for Throwing Prisoners from Plane*, *GUARDIAN*, April 20, 2005, <http://www.guardian.co.uk/world/2005/apr/20/argentina.gilestremlett> (last visited Feb. 22, 2012).

²⁷⁴ *Id.*

²⁷⁵ *Id.*

²⁷⁶ *Cavallo, Ricardo*, HAGUE JUSTICE PORTAL, <http://www.haguejusticeportal.net/eCache/DEF/7/226.html> (last visited Feb. 22, 2012).

²⁷⁷ The Fish Tank evokes Solzhenitsyn’s epic book, *THE FIRST CIRCLE*, describing a Soviet work camp for technical specialists. *See* ALEKSANDR I. SOLZHENITSYN, *THE FIRST CIRCLE* (Harper & Row 1968).

²⁷⁸ Peter Grete, *Mexico Boss Held on Torture Charges*, *BBC News*, Aug. 25, 2000, <http://news.bbc.co.uk/2/hi/americas/895259.stm> (last visited Feb. 22, 2012).

businessman apparently was Cavallo the bad guy from the EMSA Spain requested Cavallo's extradition.

The Mexican Foreign Ministry granted the extradition request after receiving federal Judge Jesus Guadalupe Luna's consultative opinion.^{279 280}

The Mexican Supreme Court upheld the extradition order of the foreign ministry in an *amparo* proceeding.²⁸¹ *Amparo* allows a party to bring a collateral attack (somewhat similar to *habeas corpus*) against an action by the Mexican state that allegedly denies the party some fundamental right under Mexican law.²⁸² The Supreme Court found no such rights violated, so on June 10, 2003, it approved his extradition to Spain, which the government then carried out.²⁸³ The decision was monumental. Mexico became the first country to extradite a defendant to another state for crimes committed in a third state, based on universal jurisdiction.

Cavallo remains in Spanish custody as of this writing.

3. The Rios-Montt case

Spain's highest court embraces pure universal jurisdiction. In September 2005, almost a decade after proponents of Pinochet's prosecution began their legal campaign in Spain, that country's Constitutional Court delivered a landmark opinion regarding universal jurisdiction: it affirmed the right of its national judges to pursue²⁸⁴ charges against gross human rights abusers, even

²⁷⁹ ROHT-ARRIAZA, *supra* note 5, at 147.

²⁸⁰ The case presented a delicate balancing of policies for the Mexican government. On the one hand it wanted to act on the side of international human rights for which Mexico has long been a strong advocate (notwithstanding some spots on its own domestic record). On the other hand, the Mexican government vehemently promotes the doctrines of state sovereignty and non-interference, a historic consequence of abuses of its own sovereignty by the United States. The former policy would militate toward extradition of Cavallo to Spain, the latter toward refusal of extradition in deference to Argentine wishes. Newly elected President Vicente Fox, the first Mexican president in 70 years from a party other than the long-dominant PRI (Institutional Revolutionary Party), had recently appointed well-known author and political analyst Jorge Castaneda as Foreign Minister. Some believe the winds of change represented by Fox and Castaneda were favorable for this decision that elevated human rights over traditional Mexican sovereignty concerns. Juan E. Mendez & Salvador Tinajero-Esquivel, *The Cavallo Case: A New Test for Universal Jurisdiction*, 8 HUM. RTS. BRIEF, Spring 2001, at 5 (2001), available at <http://www.wcl.american.edu/hrbrief/08/3cavallo.cfm> (last visited Apr. 6, 2012); ROHT-ARRIAZA, *supra* note 5, at 147; Interview with Jose de Jesus Ortega de la Pena, Mexican Federal Appeals Court Judge (Mar. 14, 2011). "Poor Mexico—so far from God, and so close to the United States," the saying goes. Cited by Ortega and various other Mexican friends and colleagues.

²⁸¹ Quejoso: Ricardo Miguel Cavallo Amparo en Revision, Pleno de la Suprema Corte de Justicia de la Nacion [SCJN] [Supreme Court], 10 Junio 2003, Tesis P./J. 140/2002 (Mex.).

²⁸² Mendez & Tinajero-Esquivel, *supra* note 280, at 8.

²⁸³ *Cavallo*, Tesis P./J. 140/2002.

²⁸⁴ Not only are Civil Law judges generally more active players (than Common Law judges) in the inquisitorial system of criminal trials followed in their jurisdictions, but in some countries like

for events that occurred abroad and even where no parties were Spanish.²⁸⁵ The Rios-Montt²⁸⁶ case allowed the prosecution, in Spain under Spanish law,²⁸⁷ of Guatemalan strongman Efraim Rios-Montt. Nobel Prize winner Rigoberta Menchú Tum had charged him with genocide and other abuses against indigenous Guatemalans (including her family), committed solely in Guatemala.²⁸⁸

With no factual links to Spain, this case presented Spanish courts with claims under “pure” universal jurisdiction theory. Spain’s Constitutional Tribunal validated the Garzonian view that crimes against humanity could be prosecuted by any nation against any international criminal. Universal jurisdiction thus waxed full and bright in Spain in 2005.²⁸⁹

VIII. THE WANE IN SPAIN OF UNIVERSAL JURISDICTION

The significance and practice of universal jurisdiction by Spanish courts waned after 2005. A number of factors contributed to this trend—the increasing activity of international tribunals, the willingness of individual emerging democracies to prosecute their own former dictators and cohorts, the diminished credibility of extra-territorial prosecutions due to politicization and failed cases, foreign relations difficulties, the election of Socialist President Zapatero and the opening of direct criticism of the Franco regime.

Spain they exercise prosecutorial powers (shared with separate executive branch prosecutors), as had Baltazar Garzon in the history to be narrated here.

²⁸⁵ Guatemala Genocide Case, S.T.S., Sept. 9, 2005 (Boletín Oficial del Estado [B.O.E.], No. 258, p. 45), available at http://www.boe.es/aeboe/consultas/bases_datos/doc.php?coleccion=tc&id=SENTENCIA-2005-0237 (decision of the Spanish Constitutional Court in the Guatemalan Genocide case upholding universal jurisdiction in Spain).

²⁸⁶ *Id.*

²⁸⁷ Here the law of Spain incorporates International Law. Constitución Española [C.E.] art. 122, (B.O.E. 1978, n. 311) (Spain) (incorporating the jurisdictional provisions of the Organic Law on Judicial Power into the Constitution); Ley Orgánica del Poder Judicial [L.O.P.J.] [Law on the Judiciary] art. 23.4 (B.O.E. 1985, 157) (Spain).

²⁸⁸ Naomi Roht-Arriaza, *Prosecuting Genocide in Guatemala: The Case Before the Spanish Courts and the Limits to Extradition* 3 (George Mason University Project on Human Rights, Global Justice & Democracy, Working Paper No. 2, 2009) (citing Juzgado Central de Instrucción No 1, Audiencia Nacional, Madrid, Dil Previas 331/99, Auto de 27 Marzo de 2000), available at http://cgs.gmu.edu/publications/hjd/hjd_wp_2.pdf.

²⁸⁹ The actual prosecution of Rios-Montt in Spain went nowhere because the Guatemalan government refused to extradite him. However, the “Pinochet Effect” worked again and, just at the time of this writing, a Guatemalan court is itself pursuing the prosecution of Rios Montt for the charges of genocide and other crimes against humanity similar to those brought in Spain. Danilo Valladares, *Guatemala: Rios Montt to Stand Trial for Genocide*, GLOBAL ISSUES, Jan. 27, 2012, <http://www.globalissues.org/news/2012/01/27/12556>.

A. *International Tribunals*

The fall of the Berlin Wall in November 1989 ironically unlocked the gates to new human rights violations in central and Eastern Europe, most terribly in former Yugoslavia.²⁹⁰ Then even more horrific violations occurred in Rwanda. These circumstances contributed to the (somewhat) effective reassertion of universal jurisdiction for the first time after more than four Cold War decades since Nuremberg.

Universal jurisdiction reemerged in the 1990s on two fronts. First, the global community, now unfettered by Soviet/Western political stalemate,²⁹¹ began to create international criminal tribunals. Second, progressive legislators and jurists moved their individual states toward the assertion of criminal jurisdiction over serious human rights violations beyond their borders. The Yugoslav and Rwanda tribunals created by the UN Security Council and the proposed International Criminal Court exemplified the former trend. Extraterritorial prosecutions by Spain and Belgium exemplified the latter.²⁹²

However, by the middle of the first decade of the 2000s, the Rome Treaty for the International Criminal Court had come into effect,²⁹³ and the UN had helped create “mixed” international tribunals with local state participation (e.g., Cambodia and Sierra Leone). Added to the decade of work by the Yugoslav and Rwanda Tribunals, this international judicial activity diminished the perceived need for ad hoc and unilateral prosecutions by states like Spain that were not connected to the human rights violations alleged.²⁹⁴

²⁹⁰ President Tito, the mostly popular Yugoslav dictator for decades after World War II (during which Tito had been a hero leading partisans against Nazi occupation) successfully muted nationalist tendencies within the six component Yugoslav republics. After the Berlin Wall dominoes began to fall, nationalists in Slovenia, Croatia, and Bosnia demanded independence from the Serb-dominated federation. Serbia’s leaders reacted with repression and strident nationalism of their own. All this led to civil war and gross human rights abuses. The UN Security Council created the International Tribunal for Former Yugoslavia (“ITFY”) to try such abuses—the first such internationally sanctioned court since the Nuremberg era.

²⁹¹ Of course, part of such Cold War stalemate was reciprocally blocking vetoes at the UN Security Council. Only after the Cold War ended would Russia, China, France, Britain, and the US find it politically palatable to cooperatively create war crimes tribunals by Security Council action.

²⁹² From a different procedural angle, expanding lawsuits in the US under the Alien Tort Statute reflected this movement on the civil side of the docket.

²⁹³ Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 3 (hereinafter “Rome Statute”); NAOMI ROHT-ARRIAZA, *supra* note 5, at 173.

²⁹⁴ See REYDAMS, *supra* note 198, at 40.

B. *The Pinochet Effect*²⁹⁵

The Spanish prosecutions laid the foundation for their own future redundancy. Within a few years of Garzon's 1998 attempt to extradite Pinochet from Britain and the House of Lords' momentous opinion affirming the legality of such extradition, cases against homegrown tyrants commenced in Chile, Argentina, Guatemala, Uruguay, and Peru. The Chilean government initially criticized Spain for the prosecution of Pinochet, citing its sovereignty and Spain's hypocrisy (i.e., its Franco amnesia).²⁹⁶

However, the Pinochet case in fact broke the ice jam of impunity built up by numerous immunity laws forced on the weak, fledgling, Latin American democracies, which emerged in the 1980s under the threatening shadow of unrepentant militaries. The Pinochet prosecution gave courage to victims, legislators, attorneys, and judges. They saw global support. They saw Pinochet as a weak old bully, no longer protectable by his colonels.

But the commencement of Latin American cases in home courts, enabled by new legislative thrusts, trumping under-the-gun immunity laws with new human rights legislation, moved primary jurisdiction for such matters back to home ground—a forum more convenient and appropriate than Spanish or Belgian tribunals. One might also speculate that a further impact on Spanish assertions of universal jurisdiction was the growth of robust democracy in Latin America and the passage of time, shrinking the pool of dictators to prosecute.

C. *Diminished Credibility*

Failed prosecutions and politicization both have weakened the credibility of Spanish universal jurisdiction practice.

Spanish prosecutors only have succeeded in convicting one Latin American gross human rights abuser, Alberto Scilingo,²⁹⁷ of the dozens of persons investigated during the decade between their attempt to extradite Pinochet and the Cortes ending pure universal jurisdiction in Spain.²⁹⁸ Supporters of such jurisdiction likely would argue that conviction statistics do not fairly measure the value of these judicial efforts. For example, the Pinochet extradition effort birthed the House of Lords opinion that signaled the international legal responsibility of former heads of state for major human rights crimes. It was a landmark ruling from one of the world's most respected tribunals. The Lords set new substantive precedent (or perhaps revived dormant Nuremberg precedent),

²⁹⁵ The reader will note that this subpart shares its title with Naomi Roht-Arriaza's excellent book. Needless to say, her text deals with this subject much more comprehensively than this small portion of my Article. Hers is a definitive work and has been quite valuable in furthering my research for this Article.

²⁹⁶ For the Frei/Garzon dialogue see *supra* Part VI.

²⁹⁷ See *supra* Part VII.B.1.

²⁹⁸ Cavallo still awaits trial. See *supra* Part VII.B.2.

gave courage (notwithstanding threatening militaries) to prosecutors and legislators in Chile and elsewhere to seek justice against former persecutors, and stimulated further exercises of international jurisdiction. And, perhaps, such judicial activity has chilled some misbehavior by contemporary tyrants. But most of the failed Spanish prosecutions ended with small effect, in procedural obscurity.

Furthermore, politics harmed the credibility of the Spanish investigations. In Spain, private parties may initiate criminal investigations.²⁹⁹ Therefore, any group or individual with a political axe to grind may prompt an investigation to be opened. They may target democratic governments like the United States, Britain, and Israel to further political aims. Universal jurisdiction is strongest when there is global moral consensus, as with an Eichmann or a Pinochet. It is diminished otherwise.

D. *Foreign Relations Difficulties*

The government of Chile objected almost immediately upon Spain's efforts to extradite Pinochet from the United Kingdom. Not only did the process strain Spanish relations with Chile, but it placed Spain's EU ally, Britain, in an awkward position regarding its own posture toward Chile's sovereignty objections.³⁰⁰

Diplomatic tension arose when Spanish prosecutors opened a case against China regarding Tibet in January 2006. To critics, the Spanish investigating judges continued their trek further afield and against diplomatic common sense when they opened investigations against the Bush administration regarding activities related to the Iraq and Afghan wars.³⁰¹ The Spanish investigation of Israel's actions during the Gaza conflict raised similar strains.³⁰² Unlike the Pinochet case, the Chinese, American, and Israeli cases involved no Spanish nationals, so critics could claim even greater overreaching. Furthermore, they went beyond Spain's arguable "orbit" into which the Spanish-American cases seemed to fall.

²⁹⁹ See the discussion of the *accion popular*, *supra* Part VII.A.

³⁰⁰ The exercise of unilateral universal jurisdiction by a national court regarding acts in another state at least raises the issue of violation by the litigating state of its international law duty not to interfere in the internal affairs of another sovereign. U.N. Charter art. 2, para. 1. See also REYDAMS, *supra* note 198, at 42. Thus, even if gross human rights violations fall outside this rule (as not "internal affairs") or constitute a legal exception to the rule, the rule itself still evidences that political sensitivity facing the prosecuting state.

³⁰¹ Baltasar Garzon initiated an investigation of the Bush Justice Department for allegations of torture in Spring 2009.

³⁰² The investigation of Israel's actions during the Gaza conflict was initiated in January 2009.

E. Breaching the Pact of Forgetting and Reclamation of Memory

The prosecution of Pinochet put a crack in the cemented memory of the Civil War and the four-decade Francoist era that followed. The election of Zapatero in 2004 began the shattering of that amnesiac encasement. Groups of Republican victims' families and supporters had organized and gained some strength in the years preceding the Zapatero victory.³⁰³ Their confidence to begin challenging the Pact of Forgetting was no doubt enhanced by the example of Garzon and his colleagues in prosecuting foreign tyrants with résumés similar to Franco's. Even before Garzon's prosecutions, by the early 1990s, with democracy entrenched and the military less threatening and reactionary, such families had begun to demand accounting for Francoist abuses.

Observers disagree who broke the Pact of Forgetting and when. Some claim that Garzon did in October 2008 when he filed his aborted judicial warrant to investigate Franco-era disappearances.³⁰⁴ Others attribute the rupture to Zapatero. Zapatero declared 2006 as the Year of Historic Memory, a sign that the Spanish government "ha[d] decisively broken with the 'Pact of Forgetting.'"³⁰⁵ More formally, Zapatero's 2007 Law for the Recovery of Historical Memory "shatter[ed] the pact of forgetting" according to *The Economist*.³⁰⁶ Omar Encarnacion reaches further back to 1998: "The worldwide reaction to Pinochet's arrest destroyed Spain's unwritten 'Pact of Forgetting' that had made the politically connected deaths of 580,000 Spaniards during Franco's reign (1936–75) almost unmentionable."³⁰⁷

Professor Encarnacion seems to have it right. Garzon and his Spanish legal colleagues, as well as the Chilean and Argentine activists that prompted the Spanish suits, are "to blame." Add to them the Spanish survivors of Franco and families and friends of Franco's non-survivors—those who never "for-

³⁰³ See Giles Tremlett, *Bringing Franco's Crimes to Light*, GUARDIAN, July 16, 2002, <http://www.guardian.co.uk/world/2002/jul/17/spain.gilestremlett>; see also Paloma Aguilar, *Collective Memory of the Spanish Civil War: The Case of Political Amnesty in the Spanish Transition to Democracy* (1996), available at http://www.march.es/ceacs/ingles/publicaciones/working/archivos/1996_85.pdf. There were thus popular and academic movements against the Pact of Forgetting before Zapatero's election.

³⁰⁴ Christine Spolar, *Tortuous Path to Spain's Painful Past*, CHI. TRIB., Nov. 19, 2008, at 6, available at 2008 WLNR 22062470.

³⁰⁵ Vance Holloway, Book Review, 33 ANALES DE LA LITERATURA ESPANOLA CONTEMPORANEA 193 (2008), available at 2008 WLNR 25485507. See also Thomas Catan, *Country Ends Years of Silence to Learn Lessons from the Civil War*, TIMES (UK), July 15, 2006, at 47, available at 2006 WLNR 12206738; Isaac Rosa, *A Bellyful of Memory*, EL PAIS (ENGLISH), July 13, 2006, at 5, available at 2006 WLNR 12035822 (criticizing discussion of historical memory in Spanish society).

³⁰⁶ *Spain's Past: A Rude Awakening*, ECONOMIST (Oct. 20, 2007), available at <http://www.economist.com/node/9989965> (last visited Feb. 22, 2012).

³⁰⁷ *Spain's Memory Wars*, 32 WILSON'S Q. 87 (2008), available at 2008 WLNR 25654619.

got”—and one sees that Zapatero merely pried open a substantial crack already chiseled in the wall of silence.

So Garzon's 1998 actions, not his aborted investigation of Franco a decade later, were most instrumental in breaching the Silence. His 1998 disclaimers of any connection between the Latin American prosecutions in Spain and Francoist crimes³⁰⁸ seem disingenuous (or puckish). One suspects that the Pact of Silence led to Spanish universal jurisdiction, and universal jurisdiction helped breach the Pact of Silence. Garzon's allegory was effective.

Those segments of Spanish society that have sought to reclaim memory about the Civil War and its aftermath have successfully re-birthed history over the last half decade. While descendants of Republican families, human rights activists, and their allies have agitated for years,³⁰⁹ it is only with and since the 2004 election of Jose Luis Rodriguez Zapatero³¹⁰ that the state has articulated a public critique of Francoism.

Baltazar Garzon and his fellow investigative judges prepared the way for this ultimate breach in the Pact of Forgetting by their prosecutions of Latin American despots. As mentioned above, when they began this work in the mid-1990s they disclaimed any connection between such efforts and Franco.³¹¹ At that time, just at the ascension of the conservative Aznar regime, both elites and the public widely supported the Pact of Silence, crediting it for helping secure the new democracy. So, a direct assault on the *Pacto* was not possible. Yet attempting to hold tyranny legally accountable in Latin America, in Spanish courts, surely encouraged opponents of the Spanish Silence and must have worried former Francoists. Ten years later (and thirty years after Franco's death) few former Francoists or rightist generals remained—so the democracy-preserving function of the Pact appeared diminished. Spain had fully integrated into democratic Western Europe and its democracy was no longer fragile.

Zapatero did not campaign on the issue of holding Francoism accountable for its crimes. Such a tactic would not have won him many votes he did not already have on the left. And it likely would have lost him votes he needed in the center. His opponent Asnar's unpopular support for the Bush Administra-

³⁰⁸ See *infra* note 341.

³⁰⁹ The Association for Recovery of Historic Memory (“ARHM”) is one of many groups which has investigated (lobbied for government investigation of) Francoist crimes and what happened to victims thereof since its founding in 2000 by respected Spanish academics and scientists. ARHM is the most prominent of such groups, but individual efforts by survivor families preceded it.

³¹⁰ The Socialists defeated the conservative *Partido Popular* (“PP”) gaining 164 seats in the Cortes' Chamber of Deputies to the PP's 148. This gave the Socialists a plurality in the Cortes. With the additional support of minor parties, Zapatero obtained the Prime Minister's seat. Ed McCullough, *Socialists oust Spain's Conservatives After Election Overshadowed By Terror Attacks*, ASSOCIATED PRESS, Mar. 15, 2004, available at <http://www.highbeam.com/doc/1P1-92139391.html> (last visited Feb. 22, 2012).

³¹¹ In interviews in 1998, Garzon denied that his prosecution of Latin American human rights violators had any relation to Franco. Meisler, *supra* note 6.

tion's Iraq war was a major target of Zapatero's election campaign.³¹² Spanish soldiers had died there. As if to dramatically emphasize this issue, Al Qaeda bombed Madrid's main train station a few days before the polls. Aznar's clumsy reaction to the violent tragedy (attempting without evidence to blame Basque separatists and dodge the connection to his Iraq policy) assured Zapatero's victory.³¹³ The specter of Franco had been nowhere on the election horizon.

The rapid social changes in Spanish society with the advent of Zapatero's Socialist government (e.g., gender equality, gay rights, secularization) no doubt encouraged the forces of memory-recovery. By the time of the election, organized groups who sought accounting for disappeared family members under the Franco regime, as well as equal recognition and benefits for Republican veterans, were growing in size and confidence. In a nod to those groups, Zapatero declared 2006 the Year of the Recovery of Historical Memory.³¹⁴ The Law on Historical Memory further rewarded their efforts in 2007,³¹⁵ legislatively breaching the Pact of Silence and Forgetting.

Soon after coming to power Zapatero made his support for accountability obvious. When Zapatero, the grandson³¹⁶ of an army officer murdered by the Nationalists, declared 2006 the "Year of Historical Memory,"³¹⁷ he signaled strong support for the survivors' organizations that were lobbying for redress of Francoist persecution. Such demands included exhumation of unmarked Republican graves, removal of public Francoist monuments and symbols, accounting of children stolen from Republican families for adoption by Nationalists, compensation for victims, equalization of benefits for Republican veterans, re-nationalization of refugees from Francoism and their descendants, and de-legitimatization of convictions under Franco for political offenses.³¹⁸

The Law on Historical Memory answered most of these demands. The Cortes enacted it in the late fall of 2007. The statute condemns the Franco regime, repeatedly referring to it as the "Dictatorship."³¹⁹ It recognizes the victims of the Civil War and the repression that followed under Franco³²⁰ and rejects as

³¹² Ed McCullough, *Spain Votes Out War-backing Party: Incoming Leader Has Said He Will Pull Troops Out of Iraq*, CHARLESTON GAZETTE & DAILY MAIL (WV), Mar. 15, 2004, at 1A, available at 2004 WLNR 1182835.

³¹³ *Id.*

³¹⁴ Javier Pradera, *The Flip Side*, EL PAIS (ENGLISH), June 29, 2006, at 2, available at 2006 WLNR 11225147.

³¹⁵ Ley de Memoria Histórica [Law of Historical Memory] (B.O.E. 2007, 310) (Spain).

³¹⁶ Lisa Abend & Geoff Pingree, *Zapatero Steps Up*, AM. PROSPECT, Apr. 1, 2005, at 28, available at 2005 WLNR 5166590.

³¹⁷ Pradera, *supra* note 314.

³¹⁸ Andrew Greeley, Editorial, *Dispute Over Power of the Church Still Reigns in Spain*, CHI. SUN-TIMES, May 4, 2007, at 41.

³¹⁹ Law of Historical Memory, at art. 1.1.

³²⁰ *Id.* at art. 2.1.

illegitimate laws passed and convictions reached against political opponents.³²¹ The government must offer help to relatives of disappeared victims of the war and repression to locate and exhume the remains of such victims.³²² Surviving victims and descendants of victims of the war and the repression may receive certain compensation.³²³ The law grants Spanish citizenship to surviving members of the International Brigades who volunteered for the Republic to fight the Francoists.³²⁴ Those who fled the dictatorship and their descendants may return to Spain and resume their citizenship,³²⁵ a provision of the law that has led to long lines at the Spanish consulate in Cuba.³²⁶ The memory law (with some unintended irony) requires the removal of Francoist memorial symbols from public buildings, exceptions permitted for artistic, architectural, or religious reasons. A separate article prohibits Francoist activities at the Valley of the Fallen.³²⁷ It further mandates that this vast monument built by Franco to himself be reoriented by its government caretakers to honor all victims of the Civil War and the “repression” under Franco.

International law and institutions have supported breaking the *Pacto de Olvido* and holding Francoism accountable for its misdeeds. International treaty and custom require states to provide families of the politically “disappeared” with reasonably discoverable information about the fate of their loved ones.³²⁸ A policy that purposely frustrates such disclosure probably violates international law. A UN Working Group in 2002 had urged Spain to investigate its Francoist past, particularly the fate of disappeared victims.³²⁹ Amnesty International had similarly expressed concern about lack of justice and reparations for the disappeared and their families.³³⁰ Thus, by Zapatero’s presidency, both international organs and prominent NGOs were advocating memory recovery in Spain.

³²¹ *Id.* at art. 3.

³²² *Id.* at arts. 11–14.

³²³ *Id.* at arts. 5–9.

³²⁴ *Id.* at art. 18.

³²⁵ *Id.* at Seventh Additional Provision.

³²⁶ Rosa Tania Valdes & Esteban Israel, *Cubans Line Up to Apply for Spanish Citizenship*, REUTERS, Dec. 29, 2008, <http://www.reuters.com/article/2008/12/29/us-cuba-spain-immigration-idUSTRE4BS57I20081229> (last visited Feb. 15, 2012).

³²⁷ *See infra* Part X.

³²⁸ International Convention for the Protection of All Persons from Enforced Disappearance art. 18, G.A. Res. A/RES/61/177 (Dec. 20, 2006) (Spain signed this treaty on Sept. 27, 2007, and ratified it on Sept. 24, 2009).

³²⁹ Carlos E. Cué, *UN Group Backs Call for Government to Study Fates of Franco's Disappeared*, EL PAIS (ENGLISH), Nov. 16, 2002, at 3, available at 2002 WLNR 186462. *See also* Omar Encarnacion, *Reconciliation after Democratization: Coping With the Past in Spain*, 123 POL. SCI. Q. 435, 450 (2008).

³³⁰ Ana I. Ariza López, *Historical Memory*, EL PAIS (ENGLISH), Nov. 29, 2008, at 2, available at 2008 WLNR 22850791. *See also* Amnesty Berates Madrid for “Lack of Progress” in Franco Inquiries, EL PAIS (ENGLISH), May 28, 2010, at 1, available at 2010 WLNR 10976108.

F. *Universal Jurisdiction Law Amended*

The Spanish Cortes, in the summer of 2009, amended the statute that had authorized universal jurisdiction, limiting proceedings to cases with a connection to Spain or Spanish nationals. The statute now reads,

Sin perjuicio de lo que pudieran disponer los tratados y convenios internacionales suscritos por España, para que puedan conocer los Tribunales españoles de los anteriores delitos deberá quedar acreditado que sus presuntos responsables se encuentran en España o que existen víctimas de nacionalidad española, o constatare algún vínculo de conexión relevante con España y, en todo caso, que en otro país competente o en el seno de un Tribunal internacional no se ha iniciado procedimiento que suponga una investigación y una persecución efectiva, en su caso, de tales hechos punibles.³³¹

Thus, Spain followed Belgium in reacting both to diplomatic pressure and domestic discomfort in barring its courts from pure universal jurisdiction prosecutions. Significantly, this step back from universal jurisdiction was taken at the very time that it had become acceptable within the country to openly demand some sort of accounting for Francoist crimes against humanity. Criticizing Franco indirectly (through universal jurisdiction cases against other dictators) no longer was crucial to a nation that could openly remember his crimes.

IX. BALTAZAR IN WONDERLAND

Spain's democratic transition has entered its second stage. The frank examination of past political sins represents a national maturity—a public mentality free of fear, either of domestic military intervention or civil strife, or so it seemed until the rather odd prosecution of Baltazar Garzon.

Judge Ramón Sáez Valcárcel notes with irony that the only person to be prosecuted in relation to the many crimes of the Francoists is Baltazar Garzon.³³² The case against him represents a strange climax to this tale of civil war, repressed memory, and universal justice.

³³¹ Ley Orgánica 1/2009 art. 1 (B.O.E. 2009, 266) (Spain), available at <http://www.boe.es/boe/dias/2009/11/04/pdfs/BOE-A-2009-17492.pdf> (last visited Feb. 15, 2012). Without prejudice to international treaties and conventions ratified by Spain, in order to take jurisdiction over the above offenses, it must be established that the alleged perpetrators are in Spain or that victims have Spanish nationality or that there is some important connection with Spain; and in any case, neither another jurisdiction nor international court has begun a procedure involving investigation and effective prosecution, if any, of such offenses.

³³² *Baltasar Garzón v. Spain Background Document*, INTERIGHTS 1, 6 (2011) (citing Ramon Saez, *Los Jueces y el Aprendizaje de la Impunidad, a proposito de los crímenes del franquismo*,

Over his career, Garzon has made many enemies—rightists, leftists, and apolitical bad guys. During his brief stint in politics, he broke with his Socialist Party colleagues and disavowed the powerful, but increasingly corrupt regime of Felipe Gonzales. He has prosecuted organized crime, corrupt officials, Basque terrorists, Spanish security services, Islamist terrorists, Latin dictators, US government officials, and, most recently, dead Francoists. The latter investigations have taken the zealous pursuit of justice too far for the taste of the majority of the country's judicial establishment. The previous regime, dominated by the sons of Francoists, appointed the bulk of that majority. Franco appointed a number of its members himself.

Around the turn of the millennium, Spanish groups for the recovery of memory began to demand accounting for their parents, grandparents, aunts, and uncles who disappeared during the Civil War and Franco's dictatorship.³³³ And sometimes they demanded accounting for non-relatives—spiritual and cultural martyrs, like poet Lorca Garcia.³³⁴ The passage of a generation since Franco's 1975 death gave these petitioners temporal space. The establishment of a consensus constitutional democracy, integrated into European political and economic structures, immunized them from renewed physical repression by police or military. The metaphor scripted by Garzon and his allies in the prosecutions of Pinochet, Scilingo, Cavallo, and Rios-Montt opened the ears of the nation to airing of such grievances. These groups began to dig up mass graves, uncovering Republican bones in the pursuit of closure regarding the last days of their loved ones.³³⁵

The memory-recovery movement increased in vigor through the first decade of the new century. As discussed above, democracy was maturing, Zapatero had been elected, and Franco had been denounced by the Cortes. Memory activists approached Garzon to pursue their cause judicially. He agreed, opening an investigation into hundreds of early Franco-era disappearances and killings,³³⁶ naming Franco and dozens of the Caudillo's henchmen as perpetrators.

114 MIENTRAS TANTO 41 (2010) (Spain)), available at <http://www.interights.org/document/125/index.html> (last visited Feb. 21, 2012).

³³³ See Tremlett, *supra* note 80; see also Sara B. Miller, *Spain Begins to Confront its Past*, THE CHRISTIAN SCI. MONITOR, Feb. 6, 2003, <http://www.csmonitor.com/2003/0206/p06s01-woam.html>.

³³⁴ Relatives of Dioscoro Galindo, believed by them to have been murdered by a Nationalist death squad and buried alongside Lorca and "two anarchist bullfighters," requested the opening of that mass grave. Jesús Ruiz Mantilla, *The Battle to Unearth Lorca's Grave*, EL PAIS (ENGLISH), Sep. 22, 2008, at 4, available at 2008 WLNR 17969844.

³³⁵ Giles Tremlett, *Spanish civil war victims' bodies finally removed from mass grave*, THE GUARDIAN, May 5, 2011 available at <http://www.guardian.co.uk/world/2011/may/05/spanish-civil-war-bodies-removed-mass-grave>.

³³⁶ Spolar, *supra* note 35 (killings by Franco's government and his allied forces through 1951); Brooks, *supra* note 34 (explaining an Amnesty International spokesperson claiming that disappearances continuing thereafter constitute ongoing international crimes according to the UN Commission on Human Rights).

Initially, Garzon's opponents merely accused him of breaching the Pact of Forgetting.³³⁷ Interestingly, Manuel Fraga was one of those accusers. Fraga complained that it was a "grave error to resuscitate this tragedy" and mocked Garzon's efforts as "nonsensical."³³⁸ His criticism is the only public interchange I have found between the two men.³³⁹ In fact, the Pact had been broken well before this by Garzon and others, including Spain's democratically elected President.³⁴⁰

An obscure employee of the Madrid Post Office with Falangist politics founded a labor union of unreported, but presumably limited, membership. That union filed an *accion popular* against Garzon alleging that the judge had criminally breached his judicial duty by opening the investigation against Franco *et al.* The complaint essentially argued that the Spanish Amnesty Law of 1977 so clearly prohibited the Franco investigation that Garzon's actions blatantly and knowingly violated the law.³⁴¹

Whether an amnesty law could insulate perpetrators against human rights prosecutions was apparently not debated in the Cortes or the press, an issue that has become of interest during the present attempt to prosecute Judge Garzon for violating that amnesty law by starting an inquiry into Franco-era crimes. The question is all the more interesting in light of Spain's Constitution, which generally elevates international law above domestic statutes.

To successfully convict a judge in such circumstances, one would need to show that the investigation was knowingly and blatantly beyond his power—a merely erroneous interpretation of legal authority by the accused judge would not support such a charge.³⁴² Garzon has two substantial legal arguments why the 1977 Amnesty Law did not preclude his investigation. First, the Amnesty Law excused only crimes committed prior to October 6, 1977.³⁴³ Because international law recognizes forced disappearances as continuing crimes against humanity³⁴⁴ (and because Spain's 1978 Constitution recognizes the supremacy of international law over domestic statute),³⁴⁵ the investigation into the disappearances is not reached by the Amnesty Law. Second, international law does not

³³⁷ Brooks, *supra* note 34.

³³⁸ Spolar, *supra* note 35.

³³⁹ "Dialogue" might overstate the reality since Garzon did not personally respond.

³⁴⁰ See Pradera, *supra* note 317.

³⁴¹ Lisa Abend, *Crusading Judge Faces His Own Trial in Spain*, TIME WORLD, Apr. 7, 2010, <http://www.time.com/time/world/article/0,8599,1978412,00.html>.

³⁴² Baltasar Garzón, *supra* note 332, at 6.

³⁴³ Ley de Amnistia [Amnesty Law] art. I (B.O.E. 1977, 248) (Spain), available at <http://www.boe.es/boe/dias/1977/10/17/pdfs/A22765-22766.pdf>.

³⁴⁴ International Convention, *supra* note 328, at art. 8.

³⁴⁵ Constitución Española, B.O.E. n. 311, 1978 (Spain) (explaining that Section 10 requires provisions related to fundamental rights and liberties to be interpreted in accord with the Universal Declaration of Human Rights and international treaties and agreements ratified by Spain, and Section 96 incorporates validly concluded international treaties).

recognize the legitimacy of amnesties purporting to excuse crimes against humanity. Spain itself took this position in the Pinochet case and was confirmed in its stance by the British House of Lords.

Regardless of whether both of Garzon's two substantive legal arguments are correct, if either is at least reasonable, then he violated no law. If a reasonable jurist could believe that the Amnesty Law did not prohibit investigation of Franco, then Garzon did not knowingly overstep his judicial power.

Curiously, the reviewing Spanish judiciary thus far has missed this elementary legal logic. It has permitted the Falangist case against Garzon to proceed and has embraced it as its own. Perhaps the situation appears less curious when one examines the political composition of the judges judging the judge.³⁴⁶ Either Franco's government or the 1996–2004 government of the *Partido Popular* (founded by the Francoist Fraga and now run by the sons of Francoists) appointed most of them.

The Spanish Supreme Court and the national judicial commission that supervises all judges both have permitted the prosecution against Garzon to proceed. The latter body has suspended him from his duties in Spain, but, interestingly, has allowed him to accept a position at The Hague as special consultant to the International Criminal Court while suspended at home.³⁴⁷ (In mid-2011, he made headlines advising that court in its prosecution of Muammar Qaddafi while that dictator still held power in Libya.)³⁴⁸ The ICC appointment would seem a poke-in-the eye to the Spanish judiciary for its prosecution of Garzon. It exemplifies the kind of distinguished international legal support that has flowed to Garzon since charges were brought against him.

One suspects that this case is now something of a hot potato for the Spanish judiciary. That judiciary might be embarrassed by the chorus of respected voices that has sounded international support for the judge. It might be embarrassed by the weakness of the legal case against him, given the logic that crimes against humanity and forced disappearances are at least arguably beyond the reach of local amnesties—so Garzon had substantial reason to believe he was acting legally. It might be embarrassed by the neo-Falangist roots of this case, that is, by the extremist who initiated it. It might be embarrassed by the light increasingly being focused on the Francoist roots of a majority of the judiciary.

³⁴⁶ Two additional complaints, unrelated to Franco but still political, are proceeding against Garzon. One grows out of his investigation of political and business interests connected to the conservative *Partido Popular*. Another claims Garzon wrongly accepted a speaking fee (which he donated to charity) from a bank. See *Baltasar Garzón*, *supra* note 332.

³⁴⁷ Raphael Minder, *Spanish Judge Says His Fight for Human Rights Will Endure*, N.Y. TIMES, June 9, 2010, available at 2010 WLNR 13782113.

³⁴⁸ Jose Yoldia, *Garzon Asesora en la Causa de la Corte Penal Internacional Contra Gadafi*, EL PAÍS (Mar. 3, 2011), available at http://www.elpais.com/articulo/internacional/Garzon/asesora/causa/Corte/Penal/Internacional/Gadafi/elpepuint/20110303elpepuint_12/Tes.

Garzon has taken his case to the European Court of Human Rights in Strasbourg, which has jurisdiction over violations by Spain of the European Convention on Human Rights. In March 2011, he filed a complaint with the ECHR that Spain's prosecution of him violated rights to an independent judiciary and to fair criminal procedure, as guaranteed under the European Convention.³⁴⁹ Given the facts discussed above, which seem to strongly demonstrate that Garzon had a reasonable legal belief that his investigation into Franco was appropriate, given the vague and arguably inapplicable statutory language under which he has been charged,³⁵⁰ and given the natural protectiveness that the Strasbourg Court shows toward fundamental rights, Garzon would seem to have a pretty strong case.

However, one wonders whether this case is ripe for the merits. The ECHR requires that a complaining party exhaust national remedies before it will consider a case.³⁵¹ Here, it seems that much procedure remains to be followed in Spain. There has been no trial. There has been no final appeal to the Supreme Court of a verdict. There has been no appeal to the Spanish Constitutional Tribunal. Rare exceptions to the ECHR exhaustion requirement exist, but for extraordinary circumstances, such as a truly corrupt or dysfunctional national court system or the immediate threat of irreparable harm to the complainant if the ECHR does not act right away. Neither appears here.

While perhaps wrongheaded and unjust, the case against Garzon provides excellent theater.³⁵² It is a great climax to the undoing of the Pact of Forgetting, which began with Garzon himself by prosecuting Pinochet. Momentarily, trapped in his own metaphor against Francoism, universal justice, will he frustrate his foes by wielding that justice in Strasbourg or perhaps back in Madrid? Or will he be Franco's last victim?³⁵³

³⁴⁹ *Baltasar Garzón*, *supra* note 332, at 1.

³⁵⁰ Spanish cases have seemed not to apply the charging statute to situations like Garzon's.

³⁵¹ Convention for the Protection of Human Rights and Fundamental Freedoms art. 35, Nov. 4, 1950, C.E.T.S. No. 005 [hereinafter *European Convention on Human Rights*].

³⁵² On Sunday, January 29, 2012, thousands of Garzon supporters marched through the streets of Madrid condemning his prosecution which they view as persecution. Human Rights Watch agrees with Garzon and the marchers that crimes against humanity should not be excused by amnesties or statutes of limitation. Lauren Frayer, *Tables Are Turned On Crusading Spanish Judge*, NPR (Jan. 30, 2012), www.npr.org/2012/01/30/146091836/tables-are-turned-on-crusading-spanish-judge.

³⁵³ As this Article was in its final stages of editing, the Spanish Supreme Court ruled in two of the three ongoing prosecutions against Baltasar Garzon. On February 9, 2012, it held Garzon guilty of illegally wiretapping criminal defendants and their lawyers in a corruption investigation, and suspended him from his law practice for 11 years. He could attack this decision in the European Court of Human Rights in Strasbourg. His supporters have protested against what they view as persecution of Garzon for his human rights advocacy. Raphael Minder & Marlise Simons, *Prominent Rights Judge is Convicted in Spain*, N.Y. TIMES (Feb. 9, 2012), <http://www.nytimes.com/2012/02/10/world/europe/baltasar-garzon-prominent-rights-judge-convicted-in-spain.html>. In a second decision (on February 27, 2012), more pertinent to this Article, the Supreme Court ended the prosecution against Garzon related to his attempts to investigate

X. CONCLUSION

We end at the Valley of the Fallen—a monument whose meaning is yet to be determined. The fascistic triumphalism and monumentalism clash with the amnesiac policy that the Franco regime had begun to adopt by the late 1950s. The huge mined cylinder turned to cave-basilica-mausoleum swallows you in pre-modern monastic semi-darkness. Somber reverence, if you're a Francoist.

In addition to interring thousands of overwhelmingly nationalist soldiers, the basilica hosts two tombs of prominence, Franco's and that of Primo Rivera the Younger.³⁵⁴ The latter founded the Spanish Falange party, much in the spirit of his father, Spain's dictator for most of the decade preceding the establishment of the Second Republic in April 1931.³⁵⁵ You reach the pairs' tombstones after minutes walking through the tunnel-basilica, approaching the church's altar—this after previous minutes of climbing the steps and stones of the monument's exterior, which in turn have been preceded by a long solemn drive through woods and up the mountain. They who conceived it all (Franco dominant among them) presumably intended this ritual of pilgrimage with its sacred implications.³⁵⁶

This "sacred" setting reveals the problem with the Valley of the Fallen. Ardent Francoists saw the Civil War not as a civil war, but as a crusade.³⁵⁷ The Crusade saved Spain from godless Bolshevism. And that vision excluded the Republican dead from any honor the memorial was meant to display for the dead of war.³⁵⁸

By executive decree on April 1, 1940 (the first anniversary of the triumph of the Nationalists and the end of the Civil War), Franco ordered the construction of the Valley of the Fallen.³⁵⁹ He chose the location in the hills outside

Francoist crimes in alleged violation of the 1977 amnesty law. Associated Foreign Press, *Spanish judge Garzon acquitted in Franco-era crime probe*, DAWN.COM (Feb. 27, 2012), <http://www.dawn.com/2012/02/27/spanish-judge-garzon-acquitted-in-franco-era-crime-probe.html>.

³⁵⁴ Michael Kimmelman, *Ending the Silence of the Monuments in Spain*, INT'L HERALD TRIB. 22, Jan. 15, 2008, available at 2008 WLNR 801610.

³⁵⁵ Primo Rivera the Elder had been forced out of office a bit more than a year prior to the overwhelming vote for antimonarchist candidates in local elections in April 1931. BEEVOR, *supra* note 22, at 23–25.

³⁵⁶ AGUILAR, *supra* note 2, at 74. See also PRESTON, *supra* note 7, at 44.

³⁵⁷ AGUILAR, *supra* note 2, at 77 (“[t]he war was considered to be a crusade, or a war of liberation and not a civil war”); PRESTON, *supra* note 7, at 44 (explaining the decree establishing the Valley of the Fallen in 1940 specifically referred to the “Crusade”).

³⁵⁸ AGUILAR, *supra* note 2, at 75 (“[I]t was only a question of paying homage to the nationalists who died.”); PRESTON, *supra* note 7, at 44 (noting that the Valley of the Fallen was originally to be opened in 1941, but even when it opened in 1958, “considerable . . . obstacles were placed in the way of the burial of Republicans”).

³⁵⁹ PRESTON, *supra* note 7, at 44.

Madrid,³⁶⁰ not far from Escorial Palace—mausoleum to generations of Spanish monarchs. The proposed basilica was to house his tomb.³⁶¹ He was not subtle.

Even within the Francoist elite of the 1940s and '50s (a political spectrum whose borders were the right and the extreme right), some moderating voices doubted the wisdom of a triumphalist monument.³⁶²

The espoused ideology of the regime evolved in the almost two-decade span from conception to completion of this Francoist pantheon. Strident fascist beliefs dominated in 1940,³⁶³ when memories of the Civil War were fresh and as Franco's military patron Adolf Hitler conquered most of Europe with seeming ease. By 1959, Franco had successfully remodeled his "Movement's" façade to not offend his new and hard-won Cold War sponsors among the western democracies.³⁶⁴ The regime began to highlight twenty years of Spanish stability and peace rather than the "Crusade" against godless communism. Yet, at the April 1, 1959, inauguration of the Valley of the Fallen (on the twentieth anniversary of the Republican surrender), Franco's speech took a triumphalist and Manichean tone with warnings of the "devils" that threatened the Spanish nation.³⁶⁵

While Franco initiated these Pharoanic³⁶⁶ edifices, the Catholic Church gave them sacred sanction. The Church accepted Franco's proposal to establish a monastery at the site. In 1960 (ironically, under the liberal papacy of John XXIII), the Church designated the sanctuary of the Valley of the Fallen as a "basilica." True, some moderates within the Catholic hierarchy urged a more inclusive slant to the project so that all war dead, including Republicans, would be memorialized. However, the failure to honor equally all Spanish victims ultimately did not deter official Church support.³⁶⁷

Thousands of Spaniards labored to carve the stone mountain into the overbearing monuments and cave-basilica that comprise the Valley of the Fallen. These workers included a large proportion of Republican political prisoners³⁶⁸—some say slave labor.³⁶⁹ The masters of the project required many to

³⁶⁰ *Id.*

³⁶¹ *Id.* at 43.

³⁶² AGUILAR, *supra* note 2, at 78–80.

³⁶³ PRESTON, *supra* note 7, at 27–29 (explaining that immediately following the Civil War, Spanish government had distinct fascist characteristics); *Cf.* JAVIER TUSSELL, SPAIN: FROM DICTATORSHIP TO DEMOCRACY: 1939 TO THE PRESENT 34–58 (Rosemary Clark trans., Blackwell Publishing 2007) (arguing that fascism never fully took hold in post-Civil War Spain).

³⁶⁴ Kimmelman, *supra* note 354 (arguing that Franco intended the Valley of the Fallen to serve as the basis for reconciliation).

³⁶⁵ AGUILAR, *supra* note 2, at 83.

³⁶⁶ *Id.* at 74.

³⁶⁷ There is some evidence that some prelates expressed concern over entanglement of the Church in such a divisive partisan project, but ultimately the Church gave its sanction, as discussed in the text. AGUILAR, *supra* note 2, at 80 n.64.

³⁶⁸ AGUILAR, *supra* note 2, at 75–76 (explaining that although all parties agree that prisoners labored on the Valley of the Fallen, dispute remains as to number); PRESTON, *supra* note 7, at 43.

work in hazardous conditions. Their accommodations often approximated concentration camps.³⁷⁰ Many laborers died. Accidents killed some, mistreatment others, silicosis others still.³⁷¹

As Spain passed through a decade of hesitant Proto-transition in the 1960s and full democratic transition in the 1970s, the Valley of the Fallen continued to stand, unreconstructed, as a symbol of victory for half the nation and of defeat for the other half. Ironically, its continued existence as a concrete bad memory was assured by the very Pact of Forgetting that suppressed national memory in general.³⁷² The grand compromise that allowed the amnesiac democratic transition to proceed from 1975 through 1995 shielded the edifice, as well as lesser Francoist symbols.

Today, Spaniards debate the future of the massive complex. It continues to be maintained at substantial public expense as a national monument. Right-wingers see no harm in honoring the leaders and soldiers in Catholic Spain's struggle against godless and foreign communism.³⁷³ The left is divided, with some arguing for destruction of the monuments and basilica, the fate met by Hitler's and Mussolini's major architectural expressions of fascist domination.³⁷⁴ Other progressives believe preservation of the Valley of the Fallen, as evidence of the evil of Francoism, appropriately supports the national reawakening of memory. Many in the middle would see the site maintained, but truly transformed into a monument remembering all the victims of Spain's twentieth century tragedy and a symbol of reconciliation. (One would assume such a healing vision could not be achieved with Franco and Primo Rivera retaining their tombs of visible prominence.)

The Recovery of Historical Memory Law of 2007 prohibits the sort of Francoist and Falangist demonstrations that have occurred at the monument for decades.³⁷⁵

The official English-language guidebook for the Valley of the Fallen is weirdly silent on the major issues surrounding the monument: forced labor

³⁶⁹ While some writers refer to the group as including Republican "prisoners of war" as well as "political prisoners," such designation draws a false distinction. International law requires states to release prisoners of war after hostilities have ended. Therefore, any person detained significantly beyond April 1, 1939, solely for his service in the armed forces of the Republican government or its allies, would seem to be a political prisoner.

³⁷⁰ AGUILAR, *supra* note 2, at 77 (explaining that conditions resembled those of concentration camps, however, some prisoners were allowed to bring their families to the work site).

³⁷¹ *Id.*

³⁷² Kimmelman, *supra* note 354.

³⁷³ *Id.*

³⁷⁴ *Id.* (explaining that Zapatero's government passed a law requiring Spanish provinces to remove monuments to Franco).

³⁷⁵ Ley de Memoria Histórica [Law of Historical Memory] (B.O.E. 2007, 310) (Spain). See also Kimmelman, *supra* note 354 (arguing that the Law of Historical Memory's ban on political rallies likely intended to prevent celebrations of Franco and Primo de Rivera's deaths).

deaths, its fascist triumphalism, its continued existence.³⁷⁶ Rather the guidebook focuses on geography, architecture, and (sanitized) construction history. My living guide, a local man in late middle age, said nothing of the controversial issues during my tour. However, when I questioned him about forced labor deaths, he agreed that thousands probably had died this way. The tour then continued through the Valley of the Fallen, and if the guide had any more unofficial memories he kept them to himself.

³⁷⁶ Kimmelman, *supra* note 354. See also AGUILAR, *supra* note 2, at 85 n.68.