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CHASING GHOSTS: PURSUING RETROACTIVE JUSTICE FOR FRANCO-ERA CRIMES AGAINST HUMANITY

ANGELA M. GUARINO*

Abstract: In October 2008, Judge Baltasar Garzón declared himself competent to open Spain's first criminal investigation of Franco-era atrocities. His decision formally classified the 114,000 executions and thousands of forced disappearances that occurred during the Spanish Civil War and ensuing dictatorship as crimes against humanity. It also accused Francisco Franco and thirty-four of his generals and ministers of having committed these crimes. Throughout Spain's transition to democracy and beyond, Spain has adhered to a "pact of forgetting," formalized by a 1977 amnesty law, in which political leaders agreed that regime members would not be prosecuted for their acts. Given this traditional silence and the fact that the majority of the acts concerned were committed seventy years ago, critics disputed Judge Garzón's jurisdiction over the action. This Note considers four jurisdictional obstacles to prosecution and whether international law provides a method through which they might be overcome.

*Si muero,
dejad el balcón abierto.
El niño come naranjas.
(Desde mi balcón lo veo.)*

*El segador siega el trigo.
(Desde mi balcón lo siento.)
¡Si muero,
dejad el balcón abierto!*

—Federico García Lorca, *El balcón*¹

INTRODUCTION

Famed Spanish poet and playwright Federico García Lorca penned the above verses at the age of twenty-three, fifteen years before his tragic execution by a Nationalist firing squad at the beginning of the Spanish

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¹ Federico García Lorca, *El balcón*, reprinted in JASON WEBSTER, ¡GUERRA!: LIVING IN THE SHADOWS OF THE SPANISH CIVIL WAR 79–80 (2006). The poem's translation is: "If I die, / leave the balcony open. / The child eats oranges. / (I see him from my balcony.) / The reaper harvests the wheat. / (I sense him from my balcony.) / If I die, / leave the balcony open!" (author's translation).

Civil War.² His body was thrown into a mass grave in a Granadan mountainside, representing one of several thousand victims of Francoist forces whose ties to the defeated Republican side of the Spanish Civil War led to the same fate.³ From the beginning of the 1936–1939 War to Franco’s death in November 1975, approximately 150,000 Republican lives were claimed.⁴ While Franco’s regime recovered the majority of Nationalist victims’ bodies and granted reparations to the winning side for its losses, the same treatment certainly was not extended to Republican casualties and their families.⁵ Thousands of individuals “disappeared,” with their deaths left unregistered.⁶ It has been estimated that those buried in mass graves could total 100,000 or more.⁷

Traditionally, silence has shrouded the wrongs committed during the Civil War and the near forty-year dictatorship that followed.⁸ After Franco’s death, Spaniards and their political leaders chose to leave painful memories behind in a “*pacto del olvido*” (“pact of forgetting”) in order to make a peaceful transition to democracy.⁹ In line with that pact, those responsible for the mass suffering of the Franco era were never pursued.¹⁰ For this reason, Judge Baltasar Garzón’s October 2008 decision to open Spain’s first criminal investigation into executions conducted by Franco and his henchmen was a stunning development.¹¹ In a sixty-eight page court document, Judge Garzón,¹² who sits on the *Audiencia Nacional*, Spain’s highest criminal court, accepted a petition filed by thirteen associations of Republican victims’ families seeking

² See Dale Fuchs, *Judge Orders Investigation of Executions in Franco Era*, N.Y. TIMES, Oct. 17, 2008, at A8; Marina Montes Pérez, *Si muero, dejad el balcón abierto . . .*, Elplural.com, Aug. 18, 2008, <http://www.elplural.com/andalucia/opinion/detail.php?id=24080>.

³ See WEBSTER, *supra* note 1, at 79; Fuchs, *supra* note 2.

⁴ Mike Elkin, *Judge Seeks to Clarify Fate of Franco Victims*, GUARDIAN (London), Sept. 3, 2008, at 20.

⁵ See *id.*; Fuchs, *supra* note 2.

⁶ FRANCISCO J. ROMERO SALVADÓ, *THE SPANISH CIVIL WAR: ORIGINS, COURSE AND OUTCOMES* 188 (2005).

⁷ Elkin, *supra* note 4.

⁸ See WEBSTER, *supra* note 1, at 9; Fuchs, *supra* note 2.

⁹ WEBSTER, *supra* note 1, at 87; Fuchs, *supra* note 2.

¹⁰ *Ghost Story*, ECONOMIST, Oct. 25, 2008, at 36.

¹¹ See Giles Tremlett, *Franco Repression Ruled As a Crime Against Humanity*, GUARDIAN (London), Oct. 17, 2008, at 31.

¹² Judge Garzón’s predilection for challenging legal limits to pursue human rights violators is well-known. Victoria Burnett, *Spanish Judge Drops Inquiry into Atrocities of Franco and Allies*, N.Y. TIMES, Nov. 19, 2008, at A7. For instance, in 1998, Garzón had former Chilean dictator Augusto Pinochet arrested on the general’s visit to London while Garzón endeavored to extradite him to Spain to prosecute him for crimes against humanity. *Id.*; *Ghost Story*, *supra* note 10.

information surrounding the forced disappearances of thousands.¹³ In this acceptance, Judge Garzón both declared himself competent to investigate the killings of 114,000 people and ordered the exhumation of nineteen mass graves, including that believed to contain the remains of Federico García Lorca.¹⁴ Most importantly, the judge formally declared the atrocities carried out by Franco and his allies as crimes against humanity for the first time, and accused the former dictator and thirty-four of his generals and ministers of these acts.¹⁵

Judge Garzón's controversial October 2008 decision sparked heated criticism from Spanish conservatives, who admonished that scrutinizing past acts would only reopen old wounds in Spanish society.¹⁶ The impending investigation also triggered intense debate in legal circles as to whether the judge would even have jurisdiction over the crimes.¹⁷ The realities that the crimes were covered by an amnesty law passed in 1977 and committed seventy years ago by now-deceased individuals were chief among these concerns; in fact, they were raised by state prosecutors in a formal appeal of Judge Garzón's jurisdiction.¹⁸ Following this challenge, Judge Garzón ultimately decided to drop the case against Franco and his allies on November 18, 2008.¹⁹ The judge issued a 152-page statement that ceded responsibility to regional courts for opening the nineteen mass graves he had ordered exhumed the previous month.²⁰

This Note focuses on the various jurisdictional obstacles that stood in Judge Garzón's path in his attempt to try Franco and thirty-four of his followers for crimes against humanity, and whether international law

¹³ Fuchs, *supra* note 2; Katherine Iliopolous, *Spain's Memory War: Judge Halts Attempt to Enforce Justice for Franco's Killings*, Crimes of War Project, Nov. 19, 2008, <http://www.crimesofwar.org/onnews/news-spain.html>.

¹⁴ Burnett, *supra* note 12; Fuchs, *supra* note 2.

¹⁵ Burnett, *supra* note 12; Tremlett, *supra* note 11.

¹⁶ See Burnett, *supra* note 12; Fuchs, *supra* note 2.

¹⁷ See Rachel Nolan, *Reviving Spain's Ghosts: Judge Looking into Fate of Franco's Victims*, SPIEGEL ONLINE INT'L, Sept. 3, 2008, <http://www.spiegel.de/international/europe/0,1518,576051,00.html>.

¹⁸ See Burnett, *supra* note 12. In fact, in September 2009, Judge Garzón was called to testify before the Spanish Supreme Court in relation to a complaint filed by the right-wing organization *Manos Limpias* (Clean Hands), which avers that, given the 1977 Amnesty Law, Judge Garzón knowingly overstepped legal boundaries in pursuing his October 2008 inquiry. *Judge Garzón in the Dock*, ECONOMIST, Sept. 12, 2009, at 58; *Spanish Judge Faces Supreme Court*, BBC NEWS ONLINE, Sept. 9, 2009, <http://news.bbc.co.uk/go/pr/fr/-/2/hi/europe/8245664.stm>.

¹⁹ Burnett, *supra* note 12.

²⁰ *Id.* For a copy of Judge Garzón's statement in its original Spanish, see A.N., Nov. 18, 2008 (Sumario (Proc. Ordinario) 53/2008 E), <http://www.crimesofwar.org/onnews/news-spain.html> (follow "Judge Garzon's statement of November 18" hyperlink) [hereinafter Judge Garzón's Statement].

provides an avenue to overcome these obstacles. Part I traces the crimes against humanity committed during the Franco era, the reasoning behind the “pact of forgetting,” the 1977 Amnesty Law that blocked prior prosecution of the wrongs committed, and the recent movement towards breaking the silence surrounding the atrocities. This section concludes with an introduction to truth commissions as an alternative forum to seeking justice in cases where traditional criminal prosecution may prove unworkable. Part II of the Note weighs the individual jurisdictional obstacles blocking a possible investigation of Spain’s potential obligations under international law to investigate crimes against humanity. Part III considers whether, after respecting jurisdictional roadblocks, an alternative method to a formal criminal investigation of Franco and his allies may still exist in the form of a Spanish truth commission.

I. BACKGROUND

A. *Crimes Against Humanity and Francoist Repression*

Judge Garzón planned to try Franco and thirty-four of his followers for their responsibility for “mass killings, torture and the systematic, general and illegal detentions of political opponents” without disclosing their whereabouts as crimes against humanity.²¹ Historical accounts of Nationalist treatment of Republican forces during the War, as well as the Francoist regime’s repressive practices following, indicate an investigation would find such crimes occurred.²²

As Richard Herr summarizes, the early stages of the 1936–1939 Civil War were characterized by “ferocious cruelty.”²³ As Nationalist forces seized control of cities and towns in the Franco-led military coup against the democratically-elected government of the Popular Front,²⁴ troops would hunt down not only those bearing arms against them, but also anyone believed to sympathize with the Republican cause.²⁵ Waves

²¹ Tremlett, *supra* note 11; Iliopoulos, *supra* note 13. The acts Judge Garzón alleged in his October 2008 statement would fit the Rome Statute’s definition of crimes against humanity. See Rome Statute of the International Criminal Court art. 7, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

²² See RICHARD HERR, AN HISTORICAL ESSAY ON MODERN SPAIN 190, 212 (1971).

²³ *Id.* at 190.

²⁴ The Popular Front was an electoral alliance of left-wing parties, including Republicans, Socialists, and the Spanish Communist Party, that won a narrow victory in the 1936 elections to claim control of the Spanish Parliament. See *id.* at 181–82.

²⁵ *Id.* at 190. These groups included those who had belonged to workers’ and leftist organizations, freemasons, and anyone who had supported the Popular Front. *Id.* Intellec-

of these individuals were condemned on mere hearsay without trial, loaded onto trucks, taken to deserted areas outside city boundaries, summarily shot, and buried in mass, shallow graves that began dotting the Spanish countryside in the wake of the advancing Nationalists.²⁶ None of this violence in areas lacking organized armed resistance was “necessary” from a military standpoint.²⁷

Francoist atrocities persisted even after the official end of the Civil War in April 1939, behind the dictator’s philosophy that the *vencedores* (victors) should enjoy their spoils, while the *vencidos* (vanquished) should suffer a cruel repression which included persecution, execution, torture, or exile.²⁸ Franco undertook a “reign of terror” upon victory whereby via a 1939 law, all persons who had engaged in subversion or had opposed the Nationalist regime, even by a demonstrated passivity, were considered criminals.²⁹ An estimated one million men were imprisoned on this basis, with thousands condemned to death and executed outside cities like Madrid and Barcelona at a steady pace through 1941.³⁰ Explicit orders often precluded the issuance of death certificates, even in cases of courageous family members willing to identify the corpses of the executed.³¹ Additionally during this period, military courts issued life or long-term sentences to hundreds of thousands of other victims.³² Large numbers among them perished from disease or malnutrition in overcrowded prisons, where individuals were also subject to frequent humiliation, beatings, and torture.³³

tuals and doctors were especially targeted, as considered political leftists. GABRIEL JACKSON, *A CONCISE HISTORY OF THE SPANISH CIVIL WAR* 82 (1974).

²⁶ HERR, *supra* note 22, at 190; MICHAEL RICHARDS, *A TIME OF SILENCE* 38 (1998).

²⁷ RICHARDS, *supra* note 26, at 38.

²⁸ RAYMOND CARR, *SPAIN: DICTATORSHIP TO DEMOCRACY 18–19* (1981).

²⁹ HERR, *supra* note 22, at 212.

³⁰ *Id.* An estimated 200,000 death sentences were issued during this period. *Id.* Although the vast majority of post-war executions occurred in the five to six-year period immediately following the war, it should be noted that the Francoist regime continued to execute those identified as enemies until the end of the dictatorship in the 1970s. RICHARDS, *supra* note 26, at 30.

³¹ See RICHARDS, *supra* note 26, at 30.

³² HERR, *supra* note 22, at 212; see SALVADÓ, *supra* note 6, at 190.

³³ HERR, *supra* note 22, at 212; SALVADÓ, *supra* note 6, at 190. It should be noted that children of alleged Republican-sympathizer parents endured a different type of disappearance during this period. See Victoria Burnett, *Families Search for Truth of Spain’s “Lost Children,”* N.Y. TIMES, Mar. 1, 2009, at A12. It is estimated that hundreds of minors were taken from their biological families and adopted or sent to religious schools or state-run homes for political reorientation. In some instances, these minors were stripped of their true identities and given new ones. *Id.*

B. A “Pact of Forgetting”

As Spain entered the post-Franco era in the mid-1970s, a “culture of silence” became the norm in a country looking to leave the painful truths of the Civil War and ensuing dictatorship in the past.³⁴ This culture was particularly prevalent in the political realm, where the new political elites of both the right and left abided by a tacit, unwritten pact known as the “*pacto del olvido*,” or “pact of forgetting,” when it came to the wrongs committed and bitter divisions created during the previous four decades.³⁵ As a result, a spirit of consensus pervaded Spain’s transitional period from dictatorship to democracy, enabling representatives of the old, Francoist order and an opposition seeking a quick, complete eradication of Francoism to reform the system through the legal framework of the former regime.³⁶

In the end, the “pact of forgetting” helped fuel Spain’s remarkable political transformation after Franco’s death in 1975 to the extent that the nation was able to hold its first peaceful, democratic national election under two years after the dictator’s passing.³⁷ For this reason, it is still considered a pillar of Spanish democracy.³⁸ A 1977 general amnesty law officially codified the pact and served to insulate any who may have committed politically-motivated crimes that occurred before the transition from prosecution.³⁹ Under the Amnesty Law of 1977, which remains in existence today, it was understood that Franco’s allies could and would not be tried for any past wrongs.⁴⁰

C. *Breaking the Silence*

A movement in favor of breaking the silence surrounding Franco-era atrocities had been gaining support well ahead of Judge Garzón’s proposed investigation, as Spain moved into its third decade removed from the democratic transition.⁴¹ For instance, since 2000, under the auspices of the non-profit Association for the Recovery of Historical

³⁴ WEBSTER, *supra* note 1, at 244; *see Ghost Story*, *supra* note 10.

³⁵ SALVADÓ, *supra* note 6, at 192; Tremlett, *supra* note 11; *see Ghost Story*, *supra* note 10.

³⁶ *See* CARR, *supra* note 28, at 209, 220–21; SALVADÓ, *supra* note 6, at 192.

³⁷ *See* CARR, *supra* note 28, at 227; SALVADÓ, *supra* note 6, at 192; Tremlett, *supra* note 11.

³⁸ Fuchs, *supra* note 2; Nolan, *supra* note 17.

³⁹ Amnesty Law (B.O.E. 1977, 24937), *available* at http://www.boe.es/aeboe/consultas/bases_datos/doc.php?coleccion=iberlex&id=1977/24937; *see* Iliopoulos, *supra* note 13; *Ghost Story*, *supra* note 10.

⁴⁰ *See* Fuchs, *supra* note 2; *Ghost Story*, *supra* note 10.

⁴¹ *See Ghost Story*, *supra* note 10.

Memory (ARMH), teams of volunteer forensics, archaeologists, and anthropologists have worked to excavate 120 mass graves containing the remains of about 1200 people.⁴² Most recently, Judge Garzón's planned criminal investigation of Franco and his allies for crimes against humanity was fueled by around 1200 petitions received from families and associations seeking information on victims who disappeared from the beginning of the Civil War to the end of the dictatorship.⁴³

The most significant development indicating a newfound momentum toward moving past the "pact of forgetting" was the Spanish Parliament's passage of the Historical Memory Law in 2007, despite sharp criticism from the political right.⁴⁴ The legislation represents the first instance in which Spain's democratic government formally condemned the Francoist Civil War activities and the dictatorship that followed.⁴⁵ The Law's stated objective is "recogniz[ing] and widen[ing] the rights of those who suffered persecution or violence for political, ideological or religious reasons."⁴⁶ Its provisions call for a removal of Francoist symbols from public places and for town halls to facilitate the exhumation of the unmarked mass graves.⁴⁷ The Law also acknowledges that the summary trials conducted by Francoist forces against civilians accused of supporting the Republican government were illegitimate.⁴⁸

Given the promise of the Historical Memory Law and Judge Garzón's initial commitment to criminally investigating Franco-era atrocities,⁴⁹ advocates looking to the state to finally assume responsibility for exhuming mass graves and pursuing some form of retroactive justice were understandably frustrated with the judge's ultimate decision to abandon the case.⁵⁰ Despite the Historical Memory Law's symbolic promise to support grave exhumation and the victim identification process, such efforts are in actuality reliant on weekend volunteers and have received little official backing.⁵¹ Moreover, turning to the regional courts indicated in Judge Garzón's November 2008 statement

⁴² Elkin, *supra* note 4.

⁴³ *Id.*

⁴⁴ *See id.*; Tremlett, *supra* note 11. For the full Spanish text of the Historical Memory Law, see Historical Memory Law (B.O.E. 2007, 22296), available at http://www.boe.es/aeboe/consultas/bases_datos/doc.php?coleccion=iberlex&id=2007/22296.

⁴⁵ *Main Points of Spain's Historical Memory Law*, INT'L HERALD TRIB., Oct. 31, 2007.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *See* Nolan, *supra* note 17; Tremlett, *supra* note 11.

⁵⁰ *See* Burnett, *supra* note 12.

⁵¹ *Id.*; Elkin, *supra* note 4.

would likely be futile, as past attempts to prompt these courts to open investigations were generally unsuccessful.⁵²

Judge Garzón's decision to drop his High Court investigation of crimes against humanity committed under Franco was met with renewed international criticism that Spanish courts are more than willing to investigate such crimes when committed in other countries yet steadfastly refuse to investigate those of the Franco era.⁵³ Amnesty International called for Spain to abide by its international obligations and launch an effective judicial inquiry into the disappearances of the Franco era in November 2008, on the heels of U.N. Human Rights Committee (HRC) recommendations in the same vein.⁵⁴ Stakes are thus high in both the international and domestic arenas to overcome jurisdictional obstacles towards a workable method of investigating the crimes against humanity committed in Franco's Spain.⁵⁵

D. *Truth Commissions*

While much of the debate swirling around Judge Garzón's October 2008 decision to criminally prosecute Franco and thirty-four of his supporters centered on the 1977 Amnesty Law and other jurisdictional concerns, the question of *how* a future investigation might be conducted remained open.⁵⁶ The HRC recommended Spanish consideration of a truth commission for this purpose, which is a suggestion Judge Garzón himself had posed in the past.⁵⁷

Depending on the manner in which a truth commission is defined, approximately thirty have been established worldwide.⁵⁸ These bodies have, in general terms, aimed to promote social and political healing and reconciliation during a period of democratic transition or

⁵² Burnett, *supra* note 12.

⁵³ Tremlett, *supra* note 11; Iliopolous, *supra* note 13.

⁵⁴ Press Release, Amnesty International, Spain: No Global Exception When Investigating the Crimes of the Past, AI Index PRE01/285/2008 (Nov. 13, 2008), available at <http://www.amnesty.org/en/for-media/press-releases/spain-no-global-exception-when-investigating-crimes-past-20081113> [hereinafter No Global Exception].

⁵⁵ *See id.*; Burnett, *supra* note 12.

⁵⁶ *See, e.g.*, Tremlett, *supra* note 11; *Ghost Story*, *supra* note 10.

⁵⁷ U.N. HRC, 94th Sess. at 2, U.N. Doc. CCPR/C/ESP/CO/5 (Oct. 13–31, 2008) [hereinafter U.N. HRC, 94th Sess.]; Christopher K. Connolly, Note, *Living on the Past: The Role of Truth Commissions in Post-Conflict Societies and the Case Study of Northern Ireland*, 39 CORNELL INT'L L.J. 401, 403 (2006). The ARMH currently leading the volunteer initiative for mass grave exhumation would also welcome this approach. *See* Elkin, *supra* note 4.

⁵⁸ Michael Nesbitt, *Lessons from the Sam Hinga Norman Decision of the Special Court for Sierra Leone: How Trials and Truth Commissions Can Co-exist*, 8 GERMAN L.J. 977, 979 (2007).

post-intrastate conflict.⁵⁹ While criminal trials are defendant-centric, truth commissions are regarded as more victim-focused, as they provide an opportunity for direct victims, victims' relatives, or even perpetrators to provide evidence of human rights violations in an official forum.⁶⁰ Unlike a court or administrative tribunal setting, in which the primary function is adjudication, a truth commission is primarily geared toward a fact-finding investigation of past abuses.⁶¹ In this way, one commentator, Mark Freeman, finds truth commissions have provided the international community with valuable alternative fora in which "historical justice" may be obtained for victims and society in cases where traditional criminal justice could not be pursued.⁶²

Generally, a branch of a state's domestic government will make the decision to sponsor a truth commission and will lay the commission's foundation by appointing its commissioners and establishing its mandate, or charter.⁶³ As there is no set commission model universally applicable to states' individual situations, a state will structure the forum to fit its circumstances.⁶⁴ States thus appoint varied numbers and personalities accordingly.⁶⁵ For instance, a commission may be composed of all foreigners (El Salvador), all nationals (Uganda), or a combination of the two (Sierra Leone).⁶⁶ Ultimately, the body's composition will affect the appearance of independent fact-finding and credibility in the eyes of national and international observers.⁶⁷

A truth commission's mandate, which defines the body's mission and scope of investigation, may likewise be adapted on a case-by-case basis to suit a nation's needs.⁶⁸ Such a mandate can be broad, as was the case with the South African Truth and Reconciliation Commission,

⁵⁹ Carsten Stahn, *Accommodating Individual Criminal Responsibility and National Reconciliation: The UN Truth Commission for East Timor*, 95 AM. J. INT'L L. 952, 953 (2001).

⁶⁰ See Modibo Ocran, *Nation Building in Africa and the Role of the Judiciary*, 28 N. ILL. U. L. REV. 169, 180 (2008); Patricia M. Wald, *Foreword: War Tales and War Trials*, 106 MICH. L. REV. 901, 920 (2008).

⁶¹ See MARK FREEMAN, TRUTH COMMISSIONS AND PROCEDURAL FAIRNESS 14 (2006); Connolly, *supra* note 57, at 403–04.

⁶² FREEMAN, *supra* note 61, at 11 & n.28 (citing RUTI G. TEITEL, TRANSITIONAL JUSTICE 81–92 (2000)). Freeman defines "historical justice" as "a perception on the part of victims and society that the worst crimes of the past have been adequately identified and acknowledged." *Id.* at 11 n.28.

⁶³ See *id.* at 27–28.

⁶⁴ Connolly, *supra* note 57, at 404–05.

⁶⁵ See FREEMAN, *supra* note 61, at 29–30 (noting the presence of a few to a dozen commissioners as well as individuals of varied educational and professional backgrounds).

⁶⁶ *Id.*

⁶⁷ See *id.* at 29.

⁶⁸ See Ocran, *supra* note 60, at 180–81.

which was authorized to investigate gross violations of human rights in many forms.⁶⁹ Alternatively, the mandate can be narrowed to an investigation of very specific events, as was the case with the Chilean National Commission on Truth and Reconciliation, which operated within a restrictive political environment.⁷⁰ The Chilean commission's objective was limited to investigating and disclosing events that ended in death or the presumption of death, and the forum was charged with accounting for every person who had been killed or had disappeared, and recommending reparation measures.⁷¹

The mandate will also dictate a commission's inquiry, subpoena, and search and seizure powers.⁷² History indicates the importance of conferring broad powers on a commission in this regard, as blocked access to testimony and relevant documents thwarts the forum's fact-finding capacity.⁷³ Additionally, statement-taking should occur in convenient and widespread locations to promote the participation of victims, victims' relatives, or other witnesses.⁷⁴ The Argentine National Commission on the Disappeared provides an exemplary model in this respect, as Commission representatives took depositions in a central Buenos Aires office and traveled to provincial capitals and remote countryside regions to collect stories.⁷⁵

A final, and critical, issue facing states structuring a mandate is that of whether and how to hold those who have committed human rights abuses accountable.⁷⁶ Some past truth commission models have promoted the concept of retributive justice by laying the foundation for later judicial prosecutions or by assigning responsibility to named individual actors in final reports.⁷⁷ In pursuing retributive justice, it is ex-

⁶⁹ See TERESA GODWIN PHELPS, *SHATTERED VOICES: LANGUAGE, VIOLENCE, AND THE WORK OF TRUTH COMMISSIONS* 105, 112, 159 n.29 (2004).

⁷⁰ See *id.* at 91–92.

⁷¹ See *id.*

⁷² See Andrew N. Keller, *To Name or Not to Name? The Commission for Historical Clarification in Guatemala, Its Mandate, and the Decision Not to Identify Individual Perpetrators*, 13 FLA. J. INT'L L. 289, 302 (2001).

⁷³ See Stahn, *supra* note 59, at 955; see also Keller, *supra* note 72, at 302 (noting the difficulties faced by the Guatemalan Commission for Historical Clarification given it could not subpoena witnesses and did not possess search and seizure powers).

⁷⁴ See FREEMAN, *supra* note 61, at 302.

⁷⁵ See PHELPS, *supra* note 69, at 83–84.

⁷⁶ See Elizabeth Kiss, *Moral Ambition Within and Beyond Political Constraints: Reflections on Restorative Justice*, in TRUTH V. JUSTICE: THE MORALITY OF TRUTH COMMISSIONS 68, 74–75 (Robert I. Rotberg & Dennis Thompson eds., 2000).

⁷⁷ See PRISCILLA B. HAYNER, *UNSPEAKABLE TRUTHS: FACING THE CHALLENGE OF TRUTH COMMISSIONS* 107–08 (2002); Kiss, *supra* note 76, at 75. Hayner finds that although the majority of truth commissions had the authority to name offenders, few have exercised this

pected that implicating evidence is proven relevant, probative, and reliable, and that named offenders would have the opportunity to defend their names according to accepted norms of procedural fairness.⁷⁸ In other instances, commissions have served as alternatives to trials rather than leading to them, and have opted against naming individual perpetrators in final reports.⁷⁹ As the Guatemalan Commission for Historical Clarification (CEH) mandate demonstrates, this model may be adopted by necessity to avoid potential legal or political hurdles entangled with prosecution, such as threats of civil and military unrest.⁸⁰ Other impediments may include political amnesty provisions, due process concerns affecting the rights of the accused, and statutes of limitation.⁸¹ Although cases leaving perpetrators unnamed lack a retributive justice element, observers such as Elizabeth Kiss suggest that certain “restorative justice” benefits emerge, including: affirming and restoring the dignity of human rights victims, acknowledging the atrocities they suffered, and fostering respect of human rights in a society where past divisions may be reconciled.⁸²

II. DISCUSSION

A. 1977 Amnesty Law

A principal obstacle critics have cited in regards to any criminal investigation of Franco and the named officers under him is domestic legislation in the form of the 1977 Amnesty Law.⁸³ There are two prongs to the argument that international law compels Spain to prosecute Franco and his allies for crimes against humanity regardless of this apparent

power. HAYNER, *supra* note 77, at 107–08 (citing El Salvador, Chad, the second commission of the African National Congress, and the South African Truth and Reconciliation Commission).

⁷⁸ See Kent Greenawalt, *Amnesty's Justice*, in TRUTH v. JUSTICE, *supra* note 76, at 189, 203 (noting that even if criminal prosecution does not follow, naming an individual a murderer or torturer has serious consequences, which warrants certain due process protections); FREEMAN, *supra* note 61, at 314.

⁷⁹ See HAYNER, *supra* note 77; Kiss, *supra* note 76, at 75.

⁸⁰ See Keller, *supra* note 72, at 290, 298, 300; Kiss, *supra* note 76, at 75. The CEH mandate reflected a peaceful political compromise between the Guatemalan State and the Guatemalan National Revolutionary Unity, a leftist guerilla group. Keller, *supra* note 72, at 290, 298. The mandate prohibited attributing responsibility to individual offenders and stipulated the end report would have no “judicial aim or effect.” *Id.* at 300.

⁸¹ Kiss, *supra* note 76, at 75.

⁸² See *id.* at 79.

⁸³ See Burnett, *supra* note 12; *Ghost Story*, *supra* note 10.

roadblock.⁸⁴ First, leaving *nullum crimen sine lege* concerns aside for a moment,⁸⁵ Spain must abide by its international treaty obligations,⁸⁶ namely, its obligations under the International Covenant on Civil and Political Rights (ICCPR), as the U.N. HRC recently observed in its October 2008 recommendations to Spain.⁸⁷ The ICCPR's Article 7 stipulates that "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."⁸⁸ The HRC viewed the atrocities committed during the Franco era as crimes against humanity that fit this definition, thus requiring investigation.⁸⁹ In addition, the HRC has previously read Article 7 with Article 2 to require the appropriate authorities in member countries to investigate such acts, hold those found guilty of their commission responsible, and provide effective remedies for victims, including the right to compensation.⁹⁰ The HRC's October 2008 recommendations insisted amnesties for serious violations of human rights, such as the 1977 Amnesty Law, are incompatible with the ICCPR, and called Spain's attention to its General Comment No. 20 (1992) for confirmation of the issue.⁹¹ Judge Garzón's November 2008 statement similarly asserted that amnesty enforcement is irreconcilable

⁸⁴ See U.N. HRC, 94th Sess., *supra* note 57 (treaty obligations); Roman Boed, *The Effect of a Domestic Amnesty on the Ability of Foreign States to Prosecute Alleged Perpetrators of Serious Human Rights Violations*, 33 CORNELL INT'L L.J. 297, 314 (2000) (customary international law).

⁸⁵ See *infra* Part II.C.

⁸⁶ The Spanish Constitution of 1978 mandates that "validly concluded international treaties, once officially published in Spain, shall constitute part of [Spain's] internal legal order." C.E. art. 96, § 1.

⁸⁷ See U.N. HRC, 94th Sess., *supra* note 57. Spain ratified the ICCPR on April 27, 1977, and the pact was officially published in Spain three days later. Amnesty Int'l (Spain), *España: La obligación de investigar los crímenes del pasado y garantizar los derechos de las víctimas de desaparición forzada durante la Guerra Civil y el franquismo*, AI Index EUR410008-20809, Nov. 2008, at 25 [hereinafter *La obligación de investigar*].

⁸⁸ International Covenant on Civil and Political Rights art. 7, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

⁸⁹ See U.N. HRC, 94th Sess., *supra* note 57. It is noteworthy that the HRC recognizes an additional element of torture inherent to forced disappearances, whereby the family of a victim suffers torture in the form of stress, anguish, and uncertainty when victims or their remains have not been identified. See *La obligación de investigar*, *supra* note 87, at 20. Such a situation represents a violation of the ICCPR and a further reason to investigate. See *id.*

⁹⁰ Naomi Roht-Arriaza, *State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law*, 78 CAL. L. REV. 449, 477 (1990).

⁹¹ U.N. HRC, 94th Sess., *supra* note 57; see also U.N. HRC, *General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman, or Degrading Treatment or Punishment)*, ¶¶ 14–15, U.N. Doc. HRI/GEN/1/Rev.7 (Mar. 10, 1992) (pertaining to appropriate redress and amnesties). Provided that the Amnesty Law was enacted on October 15, 1977, after Spain had ratified the ICCPR and bound itself to the international responsibilities therein, the amnesty arguably may not be considered a domestic "preconstitutional norm." *La obligación de investigar*, *supra* note 87, at 25.

with the ICCPR and stressed that Article 15, Section 2 in no way admits political exceptions to punishing individuals for criminal acts against the law of nations.⁹²

Secondly, commentators such as M. Cherif Bassiouni argue that customary international law has recognized crimes against humanity for over a half-century and includes a duty to prosecute those who have allegedly committed such crimes.⁹³ This position finds consensus across a variety of sources.⁹⁴ For one, grants of amnesty to offenders would clash with the concept of individual criminal responsibility contained in the Nuremberg Charter and Judgment, which prevented those responsible for crimes against humanity from enjoying any possibility of immunity.⁹⁵ The position also finds support in the Rome Statute's Preamble, which states that "it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes," as well as Article 5 of the recent Draft International Convention for the Protection of All Persons from Enforced Disappearance.⁹⁶ Finally, an array of resolutions advances a customary duty to prosecute, regardless of amnesties.⁹⁷ For instance, Judge Garzón highlights a 1984 Council of Europe Parliamentary Assembly Resolution that calls member state governments to recognize enforced disappearances as crimes against humanity that "may not be covered by amnesty laws."⁹⁸

In reality, however, it is unclear whether international law obligates countries to prosecute individuals for crimes against humanity in a case

⁹² Judge Garzón's Statement, *supra* note 20, at 91; *see* ICCPR, *supra* note 88, art. 15, § 2.

⁹³ M. Cherif Bassiouni, *Crimes Against Humanity*, in *CRIMES OF WAR: WHAT THE PUBLIC SHOULD KNOW* 135, 136 (Roy Gutman et al. eds., 2d ed. 2007); *see* Boed, *supra* note 84, at 314. Bassiouni would add crimes against humanity are non-derogable *jus cogens* crimes, strengthening the obligation to prosecute. *See* Bassiouni, *supra* note 93, at 136. For further discussion of *jus cogens* implications regarding conflicting national law, *see infra* Part II.B.

⁹⁴ *See* Boed, *supra* note 84, at 315–16; Michael P. Scharf, *The Amnesty Exception to the Jurisdiction of the International Criminal Court*, 32 *CORNELL INT'L L.J.* 507, 519 (1999).

⁹⁵ Scharf, *supra* note 94, at 519.

⁹⁶ Boed, *supra* note 84, at 316; Iliopoulos, *supra* note 13 (noting Article 5 states that "the widespread or systematic practice of enforced disappearance constitutes a crime against humanity . . . and shall attract the consequences provided for under such applicable international law"). Spain has signed but not yet ratified this Convention, which requires twenty ratifications to enter into force. Iliopoulos, *supra* note 13.

⁹⁷ *See* Boed, *supra* note 84, at 314–15; Scharf, *supra* note 94, at 520. Boed cites two specific U.N. General Assembly Resolutions to illustrate: a 1971 Resolution concerning the punishment of war criminals and persons who have committed crimes against humanity, and a 1973 Resolution on principles of international cooperation in the detection, arrest, extradition, and punishment of persons guilty of war crimes and crimes against humanity. Boed, *supra* note 84, at 315.

⁹⁸ Eur. Parl. Ass., *Resolution 828 on Enforced Disappearances*, 9th Sess., Doc. No. 5273 (1984); Judge Garzón's Statement, *supra* note 20, at 47.

where a domestic amnesty law is at stake.⁹⁹ Despite potential interpretations of ICCPR obligations, there is no specialized convention explicitly compelling states to take a particular action in regards to crimes against humanity, as opposed to crimes of genocide or torture.¹⁰⁰ The argument for compelled prosecution must therefore lie in the uncertain existence of customary law.¹⁰¹ This position is inherently weak, for, as customary law requires a uniform state practice and state practice is not uniform in this area, one would be hard-pressed to say a domestic amnesty violates a customary “duty” to prosecute.¹⁰²

For example, several countries transitioning to democracy have chosen to pass amnesty laws covering individuals who committed human rights abuses as part of former, repressive dictatorial regimes.¹⁰³ In some of these cases, the U.N. actually endorsed these amnesties as measures designed to restore peace and solidify democratic governments.¹⁰⁴ Moreover, as Scharf criticizes, binding customary law demands deeds rather than words.¹⁰⁵ Those claiming customary law bars amnesties cite “non-binding General Assembly Resolutions, hortative declarations of international conferences, and international conventions that are not widely ratified” instead of any consistent state action to the contrary.¹⁰⁶ The Rome Statute itself may even be interpreted to protect amnesties.¹⁰⁷

Lastly, from a practical standpoint, calling Spain to simply abandon the amnesty, as the U.N. Human Rights Committee has suggested, appears unrealistic.¹⁰⁸ All three of Spain’s professional judicial groups, which represent jurists on both the right and left, are in agreement that legally prosecuting Franco and his allies would be a mistake.¹⁰⁹ An investigation would be in direct conflict with an amnesty considered a

⁹⁹ See Boed, *supra* note 84, at 314, 316.

¹⁰⁰ *Id.* But see No Global Exception, *supra* note 54 (citing Spain’s obligations as a party to the ICCPR).

¹⁰¹ See Boed, *supra* note 84, at 314, 316.

¹⁰² See *id.* at 314, 316–17.

¹⁰³ See Milena Sterio, *Rethinking Amnesty*, 34 DENV. J. INT’L L. & POL’Y 373, 373 (2006).

¹⁰⁴ *Id.*

¹⁰⁵ Scharf, *supra* note 94, at 520.

¹⁰⁶ *Id.*

¹⁰⁷ Dwight G. Newman, *The Rome Statute, Some Reservations Concerning Amnesties, and a Distributive Problem*, 20 AM. U. INT’L L. REV. 293, 317–19 (2005). In particular, Newman notes Article 53(1)(c) would allow deference to a national amnesty program, as the provision permits the Prosecutor to opt against investigation where “[a] prosecution is not in the interests of justice” under the circumstances. *Id.* at 317.

¹⁰⁸ See U.N. HRC, 94th Sess., *supra* note 57; Nolan, *supra* note 17.

¹⁰⁹ Nolan, *supra* note 17.

“pillar of democracy,” and which allowed Spaniards to leave a painful past behind them in favor of a peaceful political transformation.¹¹⁰

B. Statute of Limitations

A second potential obstacle in the way of criminally investigating Franco and his supporters lies in domestic application of a statute of limitations.¹¹¹ In November 2008, the Spanish Prosecutor’s Office challenged Judge Garzón to abide by the statute of limitations under the Spanish criminal code in force at the outset of the Civil War, as it was this code that would have been applicable to the alleged criminal acts committed.¹¹² The acts in question under the code at that time would have been considered “ordinary crimes” with a now-expired statute of limitations.¹¹³ Furthermore, the Prosecutor’s Office argued that even if the judge looked to current Spanish law, most crimes are said to have lapsed after a twenty-year period.¹¹⁴

Judge Garzón initially countered the applicability of the statute of limitations argument under the progressive theory that as the bodies of Franco-era victims are still missing, the crime of “enforced disappearance” continues to this day.¹¹⁵ Thus, the statute would not apply to a still-open case.¹¹⁶ The principal argument against the application of the statutory bar in the present context of an investigation into crimes against humanity, however, is that such crimes are not subject to a statute of limitations under international law.¹¹⁷ There is now a general consensus among international authorities that crimes against humanity are non-derogable *jus cogens* crimes under international law, the highest standing international law affords, which would imply that states should prosecute these crimes regardless of statutes of limitations.¹¹⁸ This implication finds support in both the Charter of the International Military Tribunal at Nuremberg (IMT) and explicitly in Ar-

¹¹⁰ See *id.*; Fuchs, *supra* note 2.

¹¹¹ See Iliopolous, *supra* note 13.

¹¹² See *id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ See *id.*

¹¹⁷ See Judge Garzón’s Statement, *supra* note 20, at 24; U.N. HRC, 94th Sess., *supra* note 57.

¹¹⁸ Bassiouni, *supra* note 93, at 136; Leila Nadya Sadat, *Exile, Amnesty and International Law*, 81 NOTRE DAME L. REV. 955, 971, 974 (2006).

article 29 of the Rome Statute.¹¹⁹ Although in the past it was still questionable as to whether customary law precluded statutory limitations as applied to crimes against humanity, the widespread adoption of the 2002 Rome Statute indicates a customary norm against their applicability.¹²⁰ In a trend corresponding to this principle, some states have begun adopting provisions abolishing statutes of limitations as applied to certain *jus cogens* crimes.¹²¹ For these reasons, international law scholar Leila Nadya Sadat concludes that even though the manner in which a state chooses to apply international law is generally left to the individual state, the better rule when a *jus cogens* crime is at stake is that states are bound via international law to apply international over national rules, including statutes of limitations.¹²²

C. *The Nullum Crimen Sine Lege Principle*

A third and major concern that must be confronted when dealing with a concept of retroactive justice involving an international crime is the fundamental principle of *nullum crimen sine lege* (“no crime without a law”).¹²³ In short, the principle demands that “no one [should] be held criminally responsible and punished when at the time the crime was committed, this did not constitute an offense under national or international law.”¹²⁴ This norm is codified in various human rights sources and is designed both to prevent excessive judicial discretion and to ensure an alleged offender will be fully conscious of the “severe consequences which may flow from the criminal process.”¹²⁵ The criti-

¹¹⁹ See Bassiouni, *supra* note 93, at 135–36 (citing article 6(c) of the Nuremberg Charter, which defines crimes against humanity to be international law offenses regardless of whether or not in violation of municipal law in the country where perpetrated); Sadat, *supra* note 118, at 1026 & n.339 (citing Article 29 of the Rome Statute, which states that “crimes within the jurisdiction of the Court shall not be subject to any statute of limitations”).

¹²⁰ Sadat, *supra* note 118, at 1026.

¹²¹ See *id.* The U.N. HRC called Spain to enact such legislative measures in its October 2008 recommendations. U.N. HRC, 94th Sess., *supra* note 57.

¹²² See Sadat, *supra* note 118, at 1026–27.

¹²³ See Lynne Miriam Baum, *Pursuing Justice in a Climate of Moral Outrage: An Evaluation of the Rights of the Accused in the Rome Statute of the International Criminal Court*, 19 WIS. INT’L L.J. 197, 203 (2001); Patricia M. Wald, *Sharpening the Cutting Edge of International Human Rights Law: Unresolved Issues of War Crimes Tribunals*, 30 B.C. INT’L & COMP. L. REV. 15, 16 (2007); Iliopoulos, *supra* note 13.

¹²⁴ GEERT-JAN ALEXANDER KNOOPS, *THEORY AND PRACTICE OF INTERNATIONAL AND INTERNATIONALIZED CRIMINAL PROCEEDINGS* 83 (2005).

¹²⁵ *Id.* (citing Article 7 of the European Convention on Human Rights and Article 15 of the ICCPR); Susan Lamb, *Nullum Crimen Nulla Poena Sine Lege in International Criminal Law*, in 1 *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY*

cal question in attempting to prosecute those allegedly responsible for acts committed during the Franco era presently classified as crimes against humanity is whether international law *during* the Franco era clearly established such acts were crimes against humanity.¹²⁶ Judge Garzón respects this concern, although he raises two potential arguments against the applicability of the *nullum crimen* principle.¹²⁷

First, the same reasoning Judge Garzón applied to the statute of limitations issue, that the crime of enforced disappearance is a crime against humanity that continues to this day, would seem to challenge the *nullum crimen* argument.¹²⁸ This argument would fail as a result of present-day understanding that crimes against humanity, such as enforced disappearance, are *jus cogens* crimes under international law, and therefore currently prosecutable.¹²⁹ The Rome Conference evaluated this concept of “continuous crimes” as part of the non-retroactivity principle of Article 24 that was considered in line with the *nullum crimen* standard codified in Article 22 of the Rome Statute.¹³⁰ The Conference could not establish a consensus around this sensitive topic and deliberately left Article 24’s language ambiguous for the ICC’s determination when confronted with alleged disappearances commenced before the Statute entered into force and then continued thereafter.¹³¹ The status of *nullum crimen* as affected by “continued crimes” thus remains unresolved.¹³²

The second argument raised is that if international law recognized crimes against humanity at the time of the Nuremberg trials (1945), international law recognized crimes against humanity stemming from the beginning of the Spanish Civil War occurring a relatively short time earlier.¹³³ Judge Garzón’s initial plan was to investigate within the period of 1936 to 1952, a scope that could be expected to encompass the majority of Franco-era atrocities, which were likely committed from

TARY 733, 734–35 (Antonio Cassese et al. eds., 2002) (citing Article 22 of the Rome Statute).

¹²⁶ See Iliopoulos, *supra* note 13.

¹²⁷ See *id.*; Judge Garzón’s Statement, *supra* note 20, at 11–12, 45.

¹²⁸ See Iliopoulos, *supra* note 13.

¹²⁹ See Sadat, *supra* note 118, at 974.

¹³⁰ Per Saland, *International Criminal Law Principles*, in *THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE—ISSUES, NEGOTIATIONS, AND RESULTS* 189, 196 (Roy S. Lee ed., 1999).

¹³¹ *Id.* at 196–97.

¹³² See *id.* at 197.

¹³³ Iliopoulos, *supra* note 13.

1936 to 1945.¹³⁴ Judge Garzón asserted the Nuremberg proceedings were intended to cover a period beginning on January, 30, 1933—sufficiently earlier than the 1936 Spanish Civil War such that Franco and the named officers could legitimately be accused of crimes against humanity.¹³⁵

In reality, it is problematic to suggest crimes against humanity were established criminal acts under international law at a time pre-dating Nuremberg.¹³⁶ Prior to Nuremberg, international crimes were vaguely understood, and the Tribunals had the task of defining their elements for the first time.¹³⁷ For this reason, the Nuremberg trials themselves have been criticized for applying international law *ex post facto* to acts not explicitly declared illegal at the time of commission.¹³⁸ The Nuremberg trials are instead best viewed as the initial point of confirmation that crimes against humanity would be punishable under international law.¹³⁹

The argument against applying the *nullum crimen sine lege* principle to a criminal investigation of Franco-era atrocities may therefore depend on the unclear status of enforced disappearance as a “continuous crime.”¹⁴⁰ In such a situation, the Rome Statute’s Article 22 instructs that when ambiguous, the definition of a crime “shall be interpreted in favour of the person being investigated, prosecuted, or convicted.”¹⁴¹

D. Due Process Concerns

A final hurdle to be encountered in any form of criminal prosecution of Franco and his allies is preserving the rights of the accused.¹⁴²

¹³⁴ See Tremlett, *supra* note 11; see also HERR, *supra* note 22, at 190; RICHARDS, *supra* note 26, at 30.

¹³⁵ Judge Garzón’s Statement, *supra* note 20, at 10–11 (finding support in Count I of the Nuremberg Trial Proceedings and Control Council Law No. 10, which cover acts beginning in 1933).

¹³⁶ See Lamb, *supra* note 125, at 735. It has been argued that it cannot necessarily be deemed “unfair” to prosecute individuals for crimes against humanity when their acts occurred prior to Nuremberg, given that such acts, like mass murder, were established crimes in every legal system. INTERNATIONAL LAW: CASES AND MATERIALS 1326 (Lori F. Damrosch et al. eds., 4th ed. 2001). Nevertheless, this argument neglects to honor the *nullum crimen* principle that the type of criminal liability at stake, in this case of the international variety, should have been foreseeable at the time of commission. See KNOOPS, *supra* 124, at 83–85.

¹³⁷ Lamb, *supra* note 125, at 735.

¹³⁸ *Id.*

¹³⁹ See *id.*; Roht-Arriaza, *supra* note 90, at 462.

¹⁴⁰ See Lamb, *supra* note 125, at 735; Saland, *supra* note 130, at 197.

¹⁴¹ Lamb, *supra* note 125, at 749 (quoting Article 22 of the Rome Statute).

¹⁴² See Cristian Defrancia, Note, *Due Process in International Criminal Courts: Why Procedure Matters*, 87 VA. L. REV. 1381, 1382–83, 1393 (2001).

The reality of pursuing retroactive justice for acts committed seventy years ago is that the alleged perpetrators are now deceased, as are the majority of survivors or other first-hand witnesses of the acts.¹⁴³ Therefore, any live testimony would likely be dependent on the children of the era who observed or otherwise had knowledge of the atrocities, individuals who have been provided accounts from past generations, and whatever documentation could be obtained from the period.¹⁴⁴ Although international criminal law does not bar the admission of hearsay or indirect evidence,¹⁴⁵ it does maintain the ideal that even individuals accused of the most serious crimes a human being could perpetrate are entitled to a set of basic due process rights.¹⁴⁶

The IMT afforded only limited due process rights to the accused, likely due to the extreme horrors before the court and the inherent difficulty of balancing these rights with society's collective need for justice.¹⁴⁷ Nevertheless, the IMT Charter and Rules of Procedure did provide an early set of due process guarantees now considered fundamental to international criminal procedure, including the rights to conduct a defense, present evidence, and cross-examine witnesses.¹⁴⁸ Since Nuremberg, the right of the accused to a fair trial has become a well-established principle in international, as well as domestic, legal frameworks.¹⁴⁹ Article 14 of the ICCPR has been viewed as the modern instrument of human rights law reflective of the internationally recognized standards for the rights encompassed in the fair trial concept.¹⁵⁰ The Article, echoing its IMT predecessor, solidified the rights of ac-

¹⁴³ Burnett, *supra* note 12; see WEBSTER, *supra* note 1, at 10–11.

¹⁴⁴ See WEBSTER, *supra* note 1, at 10–11; Nolan, *supra* note 17 (noting Judge Garzón had solicited information pertaining to victims' names and circumstances of death from government archives, city halls, the Catholic Church, and the keepers of Franco's tomb before his original decision to conduct an investigation).

¹⁴⁵ KNOOPS, *supra* note 124, at 190–91 (citing case law from *ad hoc* criminal tribunals); WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 294 (3d ed. 2007) (citing the ICC standard that admissibility depends on the relevance and necessity of the evidence).

¹⁴⁶ Aaron Fichtelberg, *Liberal Values in International Criminal Law*, 6 J. INT'L CRIM. JUST. 3, 11 (2008); see Gregory S. Gordon, *Toward an International Criminal Procedure: Due Process Aspirations and Limitations*, 45 COLUM. J. TRANSNAT'L L. 635, 654–56.

¹⁴⁷ See Baum, *supra* note 123, at 197; Gordon, *supra* note 146, at 642.

¹⁴⁸ Gordon, *supra* note 146, at 641–42.

¹⁴⁹ See SCHABAS, *supra* note 145, at 206–07 (demonstrating the fair trial right is explicitly protected in the Rome Statute, Universal Declaration of Human Rights, and in various regional human rights conventions); Defrancia, *supra* note 142, at 1393.

¹⁵⁰ Defrancia, *supra* note 142, at 1393; see also Håkan Friman, *Rights of Persons Suspected or Accused of a Crime*, in THE INTERNATIONAL CRIMINAL COURT, *supra* note 130, at 247, 248 (noting the ICCPR standard served as a “yardstick” for the Rome Statute's standard).

cused individuals to be tried in person, defend themselves, and examine the witnesses testifying against them, among others.¹⁵¹

Due to the previously mentioned realities of adjudicating alleged crimes against humanity seventy years after their occurrence, the accused would obviously be unable to defend themselves personally at trial¹⁵² or to confront any testimony or evidence against them.¹⁵³ The general rule is that international criminal proceedings do not in principle accept trials *in absentia*, which would clearly be required in the case at hand.¹⁵⁴ It is true that the HRC, as well as the Rome Statute and ICCPR observe certain, but very limited, exceptions to this rule.¹⁵⁵ Even in cases of these exceptions, however, the accused are always informed of the proceedings against them and provided at least an initial right to attend their trials.¹⁵⁶

One would thus seem hard-pressed to say any traditional trial method could apply to the cases of Franco and his allies to yield fair proceedings in accordance with the international standard.¹⁵⁷ This is particularly the case given the likely quantity of indirect accounts, as well as the age of the evidence.¹⁵⁸ In such a situation, underlying reliability and credibility would certainly be at issue, placing even more emphasis on an accused individual's ability to personally examine and challenge the evidence for the sake of establishing legitimacy.¹⁵⁹

¹⁵¹ See ICCPR, *supra* note 88, art. 14, § 3; Gordon, *supra* note 146, at 641–42.

¹⁵² This right is also explicit in Spain's Criminal Procedure Act. Ley de Enjuiciamiento Criminal [L.E. Crim.] art. 118 (Spain).

¹⁵³ See WEBSTER, *supra* note 1, at 10–11; Burnett, *supra* note 12.

¹⁵⁴ See KNOOPS, *supra* note 124, at 89. Friman notes trial *in absentia* was one of the most controversial issues in Rome Statute negotiations. Friman, *supra* note 150, at 255. All agreed to the general principle that the accused should be present, but the issue of exceptions was divisive and ultimately dropped, thereby precluding ICC trials *in absentia*. *Id.* at 255, 261.

¹⁵⁵ See Baum, *supra* note 123, at 206–09 (noting that the HRC and ICCPR commentators have held that trials could occur *in absentia* only when the accused was summoned in a timely manner and given notice of the proceedings, while Article 63 of the Rome Statute allows removal of a disruptive accused from proceedings for “such duration as strictly required”).

¹⁵⁶ See *id.*

¹⁵⁷ See KNOOPS, *supra* note 124, at 89.

¹⁵⁸ See WEBSTER, *supra* note 1, at 11; Burnett, *supra* note 12; Nolan, *supra* note 17.

¹⁵⁹ See KNOOPS, *supra* note 124, at 89; Defrancia, *supra* note 142, at 1424–25.

III. ANALYSIS

A. *Respecting Jurisdictional Concerns and Victims' Rights*

Of the four jurisdictional obstacles discussed in this Note, all but one would bar trial or another form of individual criminal prosecution of Franco and the thirty-four generals and ministers named in Judge Garzón's October 2008 statement.¹⁶⁰ A statute of limitations alone would not block criminal action, given its inapplicability to *jus cogens* crimes according to customary international law.¹⁶¹ Nevertheless, the remaining three hurdles—the 1977 Amnesty Law, the *nullum crimen* principle, and due process concerns—cannot be overcome.¹⁶² The 1977 amnesty would remain intact due to practical domestic realities and the unclear status of international law relating to a duty to prosecute when confronted with amnesty law.¹⁶³ Spain must also recognize the *nullum crimen* norm, as crimes against humanity were not established criminal acts when allegedly committed.¹⁶⁴ Finally, the legitimacy and fairness of criminal proceedings demand the accused have the opportunity to attend, mount a defense, and challenge evidence presented against them.¹⁶⁵ This is an impossibility in the present case involving alleged crimes committed seventy years ago.¹⁶⁶

Although these three jurisdictional obstacles would preclude a criminal prosecution of individual Francoists for crimes against humanity, this does not mean Spain should abandon all forms of investigation.¹⁶⁷ Internationally, Spain has subscribed to the recognition of victims' rights as a party to two critical treaties: the ICCPR and Rome Statute.¹⁶⁸ In addition, as a member of the international community, Spain is obliged to respect the fact that Franco-era victims suffered from what are now recognized as crimes so grave as to warrant *jus cogens*

¹⁶⁰ See KNOOPS, *supra* note 124, at 89; Boed, *supra* note 84, at 314, 317; Lamb, *supra* note 125, at 735; Sadat, *supra* note 118, at 974, 1026.

¹⁶¹ See Sadat, *supra* note 118, at 974, 1026–27.

¹⁶² See KNOOPS, *supra* note 124, at 89; Boed, *supra* note 84, at 314, 317; Lamb, *supra* note 125, at 735.

¹⁶³ See Boed, *supra* note 84, at 314, 317; Nolan, *supra* note 17.

¹⁶⁴ See Lamb, *supra* note 125, at 735.

¹⁶⁵ See KNOOPS, *supra* note 124, at 89; Gordon, *supra* note 146, at 655–56.

¹⁶⁶ See KNOOPS, *supra* note 124, at 89; Burnett, *supra* note 12.

¹⁶⁷ See ICCPR, *supra* note 88; Rome Statute, *supra* note 21; *Main Points of Spain's Historical Memory Law*, *supra* note 45.

¹⁶⁸ See ICCPR, *supra* note 88, art. 7 (stating that “[n]o one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment”); Rome Statute, *supra* note 21, art. 7 (defining murder, torture, and enforced disappearance as crimes against humanity); *La obligación de investigar*, *supra* note 87, at 16 n.34, 25.

status—the highest standing in the hierarchy of international legal norms.¹⁶⁹ Barring the jurisdictional obstacles in large part stemming from the fact that the acts were committed several decades ago, criminal investigations should not be dismissed.¹⁷⁰

On the domestic front, the Spanish government has also recently committed itself to broadening the rights of Franco-era victims in some measure via 2007's Historical Memory Law.¹⁷¹ The legislation included a mandate for town halls to facilitate the exhumation of unmarked mass graves and widen symbolic monetary compensations for victims or their survivors, although this has generally not come to fruition.¹⁷²

A truth commission would be an invaluable forum through which Spain could acknowledge its legal obligations internationally and domestically, formally recognize the suffering of victims, and grant some degree of closure to victims' families.¹⁷³ At the same time, as past experience indicates, the forum could be carefully structured to suit the needs of the host country.¹⁷⁴ In Spain's case, the commission should accommodate the rights of the accused in respecting the 1977 Amnesty Law and the principles of *nullum crimen sine lege* and due process.¹⁷⁵

B. Structuring a Truth Commission

The Spanish government should narrowly construct the mandate for a truth commission toward the victim-centered objective of investigating the circumstances surrounding a disappeared victim's death, thus resembling the Chilean National Commission on Truth and Reconciliation model.¹⁷⁶ The Spanish commission's ultimate goal should similarly be a report containing victims' names, dates and causes of death, and probable burial location (if known).¹⁷⁷ Additionally, this report would list mass grave site locations in need of exhumation and a plan for state funding of this initiative and other symbolic monetary

¹⁶⁹ See Bassiouni, *supra* note 93, at 135–36; Sadat, *supra* note 118, at 971, 974.

¹⁷⁰ See Sadat, *supra* note 118, at 1026–27; Tremlett, *supra* note 11.

¹⁷¹ See *Main Points of Spain's Historical Memory Law*, *supra* note 45.

¹⁷² Burnett, *supra* note 12; *Main Points of Spain's Historical Memory Law*, *supra* note 45.

¹⁷³ See HAYNER, *supra* note 77, at 28–29, 105.

¹⁷⁴ See Connolly, *supra* note 57, at 404–05.

¹⁷⁵ See KNOOPS, *supra* note 124, at 89; Boed, *supra* note 84, at 314, 317; Lamb, *supra* note 125, at 735; Connolly, *supra* note 57, at 404–05.

¹⁷⁶ See PHELPS, *supra* note 69, at 91–92; Martin Roberts, *Spain Prosecutors Set to Block Civil War Probe*, REUTERS, Oct. 20, 2008, <http://www.reuters.com/article/latestCrisis/idUSLK314896>.

¹⁷⁷ See PHELPS, *supra* note 69, at 91–92; Nolan, *supra* note 17.

compensation for victims or their survivors.¹⁷⁸ In this way, the mandate would largely agree with the 2007 Historical Memory Law and Judge Garzón's objectives in his original decision to criminally investigate Franco-era atrocities.¹⁷⁹

Nevertheless, given the need to respect the obstacles of the 1977 Amnesty Law and principles of *nullum crimen* and due process in any investigation, the Spanish truth commission should differ from Judge Garzón's initial plan in a significant way.¹⁸⁰ Although Judge Garzón's October 2008 statement named Franco and thirty-four other individuals as the subjects of a planned criminal investigation, a Spanish truth commission must forego naming individual actors in final reports, as well as any further judicial prosecutions against alleged offenders, similar to the Guatemalan CEH example.¹⁸¹ Any future criminal investigation of individuals based on commission findings would breach the 1977 Amnesty Law and violate the principle of *nullum crimen sine lege*.¹⁸² Moreover, as naming individual offenders in a report would trigger the due process right of the accused to defend themselves, this option must be dismissed.¹⁸³ The uniqueness of the Spanish case should be respected in the fact that the acts in question may be up to seventy years old and concern now-deceased actors, as opposed to other commissions that have dealt with events from a more recent past, which were capable of accommodating the rights of the accused if naming them.¹⁸⁴

Lastly, the mandate's provisions in regards to the commission's evidentiary powers and composition would provide additional reinforcement of the body's victim-centered mission and protection of the rights of the accused.¹⁸⁵ The commission should be vested with broad subpoena and search and seizure powers to collect testimony and build on the documentation Judge Garzón had already solicited from government archives, city halls, the Catholic Church, and the keepers of

¹⁷⁸ See PHELPS, *supra* note 69, at 91–92; Nolan, *supra* note 17; *Main Points of Spain's Historical Memory Law*, *supra* note 45.

¹⁷⁹ See Roberts, *supra* note 176; *Main Points of Spain's Historical Memory Law*, *supra* note 45.

¹⁸⁰ See KNOOPS, *supra* note 124, at 89; Boed, *supra* note 84, at 314, 317; Lamb, *supra* note 125, at 735; Burnett, *supra* note 12.

¹⁸¹ See Boed, *supra* note 84, at 314, 317; Keller, *supra* note 72, at 290, 298, 300; Lamb, *supra* note 125, at 735; Burnett, *supra* note 12.

¹⁸² See Boed, *supra* note 84, at 314, 317; Lamb, *supra* note 125, at 735.

¹⁸³ See Greenawalt, *supra* note 78, at 203.

¹⁸⁴ See PHELPS, *supra* note 69, at 99, 102 (noting the Salvadoran Commission on the Truth interviewed victims *as well as* alleged perpetrators before naming offenders in a final report); Burnett, *supra* note 12.

¹⁸⁵ See FREEMAN, *supra* note 61, at 29, 302; Nolan, *supra* note 17.

Franco's tomb.¹⁸⁶ The body would thus possess full fact-finding powers even if it were to encounter political opposition to its efforts.¹⁸⁷ The commission should likewise provide wide accessibility for statement-taking, using the Argentine National Commission on the Disappeared model as an example.¹⁸⁸ Reaching out to potential witnesses across the country is particularly necessary in the Spanish case, given the probable advanced age of any with direct knowledge of the acts in question and the fact that mass graves are located throughout the countryside.¹⁸⁹

In terms of composition, the current Socialist government of Prime Minister José Luis Rodríguez Zapatero would be wise to engage leaders from both ends of the political spectrum in consultation towards the selection of commissioners in order to facilitate a fair balance of opinion, and thus bolster the legitimacy of the body's findings.¹⁹⁰ To further enhance the commission's capacity for independent, credible fact-finding, appointees should include a combination of foreign and national legal experts.¹⁹¹ The presence of international experts would promote objective inquiry against what has been a fierce partisan debate surrounding the investigation of alleged crimes against humanity.¹⁹² The participation of national legal experts, who would ideally be nominated by both the left and right, would ensure the body's respect of Spanish legal culture and a vested interest in the country's welfare.¹⁹³ Furthermore, the inclusion of nominees from the right would likely serve as a further check on evidentiary reliability and assurance that the rights of the accused are observed in the investigation process.¹⁹⁴

Although the aforementioned proposal for a Spanish truth commission would not result in a sense of retributive justice for surviving victims and victims' relatives, the plan would likely afford significant benefits in the way of restorative justice.¹⁹⁵ The model would affirm the dignity of the victims of Franco-era atrocities via collected stories that would shed light on their suffering and allow their lives to be properly

¹⁸⁶ See Keller, *supra* note 72, at 302; Stahn, *supra* note 59, at 955; Nolan, *supra* note 17.

¹⁸⁷ See Keller, *supra* note 72, at 302; Nolan, *supra* note 17.

¹⁸⁸ See FREEMAN, *supra* note 61, at 302; PHELPS, *supra* note 69, at 83–84.

¹⁸⁹ See RICHARDS, *supra* note 26, at 38; WEBSTER, *supra* note 1, at 10–11.

¹⁹⁰ See FREEMAN, *supra* note 61, at 29–30.

¹⁹¹ See *id.*; Naomi Roht-Arriaza, *Making the State Do Justice: Transnational Prosecutions and International Support for Criminal Investigations in Post-Armed Conflict Guatemala*, 9 CHI. J. INT'L L. 79, 88 (2008).

¹⁹² See Roht-Arriaza, *supra* note 191, at 88; Burnett, *supra* note 12.

¹⁹³ See FREEMAN, *supra* note 61, at 29; Roht-Arriaza, *supra* note 191, at 88.

¹⁹⁴ See FREEMAN, *supra* note 61, at 29; Nolan, *supra* note 17.

¹⁹⁵ See Kiss, *supra* note 76, at 74–75, 79.

memorialized.¹⁹⁶ The commission's final report would also represent a historical document that officially acknowledges that abuses were committed, particularly through recommendations of symbolic reparations to families and state support of mass grave exhumation, even if individual offenders' names are omitted.¹⁹⁷ Finally, the plan would demonstrate a commitment to human rights to both the national and international communities, while also allowing a now-mature Spanish democracy to take a meaningful step toward breaking the silence surrounding its painful history and healing past divisions.¹⁹⁸

CONCLUSION

Despite the fact that individual criminal prosecution of Franco and the thirty-four generals and ministers named in Judge Baltasar Garzón's October 2008 statement may face insurmountable legal obstacles, Spain can still achieve a form of retroactive justice for Franco-era crimes against humanity via a truth commission. The three hurdles consisting of Spain's 1977 Amnesty Law, the principle of *nullum crimen sine lege*, and the necessity of protecting the due process rights of the accused, must all be respected to the point of foregoing retributive justice. Nevertheless, an alternative forum toward achieving restorative justice for victims and victims' families exists in the form of a truth commission. This forum could be molded both to accommodate the obstacles unique to the Spanish situation and to permit the nation to honor international and domestic legal responsibilities. The Spanish truth commission's mandate would provide for widespread statement-taking and document collection that would support a final report describing the circumstances surrounding victims' deaths, identifying victims' ultimate resting places, and providing symbolic reparation recommendations. The mandate would additionally preclude naming alleged offenders in the report and any future prosecution of these individuals to preserve the rights of the accused. In this way, the Spanish truth commission would represent a fair, victim-centered forum capable of promoting the restorative aims of affirming victim dignity, formally acknowledging historical atrocities, and allowing the nation to begin closing its old wounds in earnest.

¹⁹⁶ See *id.* at 79; Roberts, *supra* note 176.

¹⁹⁷ See Kiss, *supra* note 76, at 79; *Main Points of Spain's Historical Memory Law*, *supra* note 45. This official record would thus contribute to the previously discussed "historical justice" benefit to which Freeman alludes. See FREEMAN, *supra* note 61, at 11 n.28.

¹⁹⁸ See HAYNER, *supra* note 77, at 105; Kiss, *supra* note 76, at 79; Roberts, *supra* note 176; Burnett, *supra* note 12; Nolan, *supra* note 171.

