

# **Time passes, impunity remains**

Universal jurisdiction, a tool with which victims of the Civil War and Franco eras in Spain can combat impunity

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## 1. EXECUTIVE SUMMARY

The rights to the truth, justice and reparation for the victims of crimes under international law committed during the Civil War and under Franco (1936-1975) are still being denied in Spain. One way of combating impunity is therefore to carry out investigations in other countries in line with the so-called “principle of universal jurisdiction”.

In November 2008, the Fifth Central Examining Magistrate’s Court (*Juzgado Central de Instrucción Nº5*) of the National High Court (*Audiencia Nacional*) – then in the charge of Baltasar Garzón – declined jurisdiction (in other words, declared itself incompetent) to hear the action brought in 2006 for homicides and enforced disappearances – within the framework of crimes against humanity – committed in Spain between 1936 and 1951, which listed 114,266 cases of disappearance. Jurisdiction was thus referred to many different competent regional courts.

Amnesty International has investigated how the Spanish courts dealt with the cases in question and, in its May 2012 report entitled *Casos cerrados, heridas abiertas: El desamparo de las víctimas de la Guerra Civil y el franquismo en España* (Cases closed, open wounds: The victims of the Civil War and Francoism left abandoned)<sup>1</sup>, showed that Spanish judges were still tending to close such cases.

This trend increased following the Supreme Court ruling of 27 February 2012. Against that background, the possibility that crimes committed during the Civil War and under Franco might be investigated by courts in other countries as a result of applying the so-called “principle of universal jurisdiction” is another important means by which the victims can combat impunity.

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<sup>1</sup> Report only available in Spanish.

## THE SUPREME COURT REJECTS INVESTIGATION OF CRIMES COMMITTED DURING THE CIVIL WAR AND UNDER FRANCO

In judgment 101/2012 of 27 February 2012, the Supreme Court ruled that crimes committed during the Civil War and under Franco should not be investigated by the Spanish courts, using arguments that Amnesty International believes to be in breach of international law.

**The principle of legality in criminal proceedings:** According to the Supreme Court, given that at the time the alleged offences were committed Spain had not established crimes under international law as criminal offences within its own legal system and did not know that they had force of law, they are not applicable to events that took place during the Civil War or under Franco. This reasoning fails to acknowledge that at the time Spain was in fact bound by international custom (as expressed in the Hague Conventions of 1899 and 1907 as well as the Nuremberg Principles, which were endorsed by the United Nations in 1946).

**Statutory limitations:** According to the Supreme Court, since the alleged offences were committed over 20 years ago, the maximum time limit established in the Spanish Criminal Code for bringing criminal action passed long ago. This is at variance with the principle of the non-applicability of statutory limitations to crimes under international law (Rome Statute, Article 29)

**Those allegedly responsible presumed dead:** The Supreme Court presumes that those responsible are dead and sees this as an impediment to investigations. In so doing it is disregarding the fact that, in the case of crimes under international law, States have an absolute obligation to investigate and guarantee the victims the right to truth, justice and reparation, and that this obligation is not removed by the passing of time. Some of the alleged perpetrators have been found to be still alive, thereby refuting the Supreme Court's presumption that they are dead.

**The Amnesty Law:** Applying amnesties to crimes under international law is a violation of both the right to an effective remedy enshrined in the International Covenant on Civil and Political Rights, which takes precedence over the law, and the ban on States invoking provisions of domestic law as grounds for failing to comply with a treaty (Vienna Convention on the Law of Treaties). States also have a duty to put an end to impunity by exercising their criminal jurisdiction over those responsible (Rome Statute, Preamble).

**The Law of Historical Memory.** The Supreme Court said that "*the right to know the truth does not form part of the criminal process*" and is the task of other bodies, especially historians. However, the Law of Historical Memory does not establish the right to know – or the need for crimes under international law to be thoroughly investigated – and therefore does not guarantee the right to truth or justice.

## 2. THE SUPREME COURT JUDGMENT CLOSSES THE DOOR TO INVESTIGATIONS IN SPAIN

### THE SITUATION IN SPAIN

Amnesty International has been continually monitoring the actions taken by Spanish courts since the National High Court declined jurisdiction in favour of regional courts in November 2008. As a result it has found that, of the 47 cases in question, at least 38 have been closed by Spanish judges (though this number may be even higher). This is a significant increase over the 17 closed cases identified by Amnesty International in its previous report, “*Casos Cerrados, heridas abiertas*”, in May 2012.

The cases closed by judges subsequent to the Supreme Court judgment of 27 February 2012 all relied specifically on the ruling handed down by that court, whose arguments Amnesty International believes to be in breach of international law. The Supreme Court judgment therefore seems to have blocked off the last avenue for clarifying these crimes in Spain, and cases are continuing to be closed automatically throughout the country.

### THE EUROPEAN COURT OF HUMAN RIGHTS DISMISSES COMPLAINTS AGAINST SPAIN

Amnesty International is aware of the filing of eight complaints against Spain at the European Court of Human Rights (ECtHR). They were all declared inadmissible, standing out the grounds given in the case of *Gutiérrez Dorado*, namely: the events took place prior to the entry into effect of the European Convention on Human Rights and the late filing of the claim.

Amnesty International has noticed several inconsistencies. On the one hand, the ECtHR has recognized that the State’s obligation to investigate evolves and is autonomous in respect of when the Convention enters into force (ECtHR, *Silih vs. Slovenia*). On the other hand, by blaming the victims for the time delay in filing their application, it specifically disregards the fact that domestic law continues to place obstacles in the way of them accessing justice, thereby transferring the duty of due diligence incumbent on the State (whose responsibility it is to investigate) to the victims.

In the organization’s opinion, the victims of the Civil War and Franco continue to be deprived of the *right to an effective remedy before a national authority* as specified in Article 13 of the Convention.

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## SPAIN FAILS TO COMPLY WITH ITS INTERNATIONAL OBLIGATIONS

Amnesty International has documented the fact that Spain is not investigating the crimes committed during the Civil War and under Franco, thereby failing to comply with its international obligations.

Spain is also failing in its duty to exercise its criminal jurisdiction in order to combat impunity for crimes under international law (Rome Statute, Preamble).

The right to an effective remedy enshrined in the International Covenant on Civil and Political Rights, which takes precedence over the law, is also not guaranteed. Spain is also failing to comply with the principle that a State “*may not invoke the provisions of its internal law as justification for its failure to perform a treaty*” (Vienna Convention on the Law of Treaties, Article 27).

## 3. WHETHER OR NOT SPAIN INVESTIGATES DOES NOT PREVENT ARGENTINA FROM DOING SO

### THE INVESTIGATION IN ARGENTINA: PROGRESS OF THE PROCEEDINGS

Federal National Court for Criminal and Correctional Matters No. 1 (*Juzgado Nacional en lo Criminal y Correccional Federal n° 1*) in Buenos Aires is investigating an action, filed on 14 April 2010, concerning genocide and crimes against humanity committed in Spain between 17 July 1936 and 15 June 1977.

The Argentinian judicial authorities have approached the Spanish authorities on two occasions - 14 October 2010 and 13 December 2011 – asking them, in the first case, to inform them whether Spain is investigating crimes committed during the Civil War and under Franco and, in the second, to provide information concerning the perpetrators, victims, burial sites and companies that benefitted from forced labour.

In response to the first request, on 6 May 2011, the Attorney-General’s Office told Argentina that Spain was indeed investigating the cases covered by the High Court’s referral of jurisdiction. In answer to the second request, on 27 March 2012, the Attorney-General’s Office reiterated this argument – though it acknowledged that 22 cases had been closed due to death – and requested that the proceedings be referred to the Spanish courts on the grounds that they have preferential jurisdiction for conducting any such investigation (in other words, Spain has priority).

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## ERRORS IN THE INTERPRETATION MADE BY THE ATTORNEY-GENERAL'S OFFICE

In Amnesty International's view, the assertions made by the Attorney-General's Office, in its response to Argentina dated 27 March 2012, do not accord with either the facts or the law: Spain is not investigating crimes committed during the Civil War or under Franco and, in any event – since it is a matter of universal jurisdiction – Spain does not have preferential jurisdiction over Argentina.

### 1) ARGUMENT CONTRARY TO INTERNATIONAL LAW

Amnesty International had already found – before becoming aware of the response from the Attorney-General's Office – that, of the 47 cases affected by the High Court's denial of jurisdiction, 17 had been closed without investigation. The grounds for doing so included not only death but also: the Amnesty Law, statutory limitations, application of the principle of legality in order to prevent crimes under international law being brought to trial, and reference to the Law of Historical Memory. The Attorney-General's Office also failed to inform Argentina of the pivotal Supreme Court judgment of 27 February 2012 in which the Spanish courts were denied the opportunity to investigate.

Furthermore, the organization has found that the number of cases affected by the denial of jurisdiction and which have been closed is still growing and that 38 cases have already definitely been closed (and the final figure may well be higher). It has also learned that new complaints – relating to cases not affected by the denial of jurisdiction – have also been closed by Spanish courts on the grounds already mentioned.

### b) UNDER UNIVERSAL JURISDICTION, SPAIN DOES NOT HAVE PRIORITY OR PREFERENTIAL JURISDICTION WITH REGARD TO INVESTIGATIONS

The Attorney-General's Office maintains that universal jurisdiction is subject to certain restrictions and that Spain has *preferential* jurisdiction for investigating crimes committed during the Civil War and under Franco. It has based its arguments on the Convention on the Prevention and Punishment of the Crime of Genocide (Article 6) and the Rome Statute (Article 17.1).

This interpretation – in Amnesty International's view – is incorrect because it imposes unnecessary limits on the exercise of universal jurisdiction which are not provided for in either treaties or customary international law.

First, the Genocide Convention – which assigns jurisdiction for the prosecution of cases to the State in the relevant territory or an international tribunal – has been commonly interpreted as authorizing the exercise of universal jurisdiction by States (ICJ, *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide*; ECtHR, *Jorgic vs. Germany*); secondly, the Rome Statute – which establishes sources of jurisdiction for the ICC rather than for States – can in no way be interpreted – as the Attorney-General's Office has done – as imposing limits on universal jurisdiction. On the contrary, in its Preamble it specifically recalls “*that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes*” and does not stipulate any limits to such State jurisdiction

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on grounds of territory, nationality, etc.

For the reasons given, Amnesty International believes that the arguments put forward by the Attorney-General's Office are unfounded and that the principle of universal jurisdiction authorizes all States – without distinction – to exercise their jurisdiction with regard to crimes under international law, without any notions of preference or subsidiarity being applicable.

The organization, as already reported in “*Casos cerrados, heridas abiertas*”, has found that Spain is not cooperating as it ought to in this process and it is its duty to collaborate fully and in good faith with the Argentinian courts, whose universal jurisdiction exists regardless of whether or not simultaneous investigations are being conducted in Spain or elsewhere.

## 4. CONCLUSIONS

Spain's failure to investigate crimes committed during the Civil War or under Franco constitutes a breach of its obligation to end impunity and ensure that the victims of crimes under international law have the right to truth, justice and reparation.

Amnesty International has noticed that the many different actions of the various Spanish State authorities are aimed at preventing investigation of crimes from the Civil War and Franco eras.

The judiciary has refused to investigate and systematically closed any complaints filed by victims. The Attorney-General's Office has not cooperated in answering requests for assistance from the Argentinian courts – it has not passed on the information asked for; and it claims – falsely – that Spain is investigating, and that it has preferential jurisdiction for doing so. The government has prevented victims from testifying, thereby impeding other countries from investigating crimes under international law. And the legislature, reluctant to ratify the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, has in turn confirmed that the Amnesty Law remains applicable.<sup>2</sup>

It is therefore noticeable that *all* the powers of the Spanish State have taken measures that apparently seek to *ensure impunity* for crimes under international law committed during the Civil War and under Franco.

The ruling by the Spanish Supreme Court that it is not the task of Spanish judges to try crimes committed in Spain is based on arguments that are in breach of international law, such as: the Amnesty Law, statutory limitations, and invocation of the principle of legality in criminal proceedings to prevent the investigation of crimes under international law. The effect of this jurisprudence has been to close the door to investigations in Spain: judges are not only

<sup>2</sup> Diario de Sesiones del Congreso de los Diputados, Pleno y Diputación Permanente, IX Legislature, No. 264, 19 July 2011. [http://www.congreso.es/public\\_oficiales/L9/CONG/DS/PL/PL\\_264.PDF](http://www.congreso.es/public_oficiales/L9/CONG/DS/PL/PL_264.PDF)

Rejection by an absolute majority of the draft bill submitted by the Mixed Parliamentary Group to amend the Amnesty Law (see the proposed amendment on pp. 11 and ff. and the result of the vote on p. 37).

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continuing to close cases but are now doing so by referring to the jurisprudence of the Supreme Court, a higher court in all respects except in the case of constitutional guarantees and rights.

The European Court of Human Rights has also found all complaints so far submitted against the Spanish State to be inadmissible on the grounds that, among other things, the victims were too late in filing their applications. The duty of due diligence has thus been passed from the State – whose responsibility it is to investigate – to the victims, who remain deprived of the right to an *effective remedy* by Spain.

Argentina is still investigating the action filed in 2010 for crimes committed in Spain between 1936 and 1977. Spain, however, is not cooperating as it should: the Attorney-General's Office not only claims to be investigating crimes from the Civil War and Franco eras but also alleges that it has *preferential* jurisdiction for prosecuting them.

Amnesty International maintains that such assertions are at variance with the reality in terms of both the facts and the law. On the one hand, Spanish judges have been shown to be dismissing victims' complaints on a widespread basis. On the other hand, international law allows States to invoke the principle of universal jurisdiction without any restrictions based on territory, nationality or national interests; no State, therefore, has preferential jurisdiction, and all States are required to act *concurrently* to combat impunity.

Spain must investigate crimes committed under its jurisdiction and cooperate fully with Argentina – and other States – in prosecuting those crimes, regardless of whether or not it (Spain) decides to launch investigations – an obligation that has yet to be met.

Combating impunity in Spain is a universal responsibility since, as pointed out in the Preamble to the Rome Statute, "(...) *it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes*".

## 5. RECOMMENDATIONS

Amnesty International concludes that there are still many obstacles in Spain preventing the investigation of serious human rights violations and breaches of international humanitarian law committed in the past and, as a result, makes the following recommendations:

### **The Spanish Government should:**

- Refrain from hindering and cooperate fully with all criminal proceedings conducted by foreign courts which – under the principle of universal jurisdiction – are prosecuting crimes under international law committed in Spain, regardless of whether or not such crimes are being investigated by the Spanish authorities.

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- Begin the process of accession – without filing any reservations or interpretative declarations that might amount to reservations – to the United Nations Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity.
- Adopt immediate measures to fully implement the recommendations made in relation to the Amnesty Law and the non-applicability of statutory limitations to crimes under international law by international bodies such as the Human Rights Committee, the Council of Europe, the Working Group on Enforced or Involuntary Disappearances and the Committee against Torture.<sup>3</sup>

**The Spanish Parliament should:**

- Promptly authorize the accession of the United Nations Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity.
- Take – and urge the government to take – immediate steps to fully implement the recommendations made in relation to the Amnesty Law and the non-applicability of statutory limitations to crimes under international law by international bodies such as the Human Rights Committee, the Council of Europe, the Working Group on Enforced or Involuntary Disappearances and the Committee against Torture.

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<sup>3</sup> The Human Rights Committee recommended that Spain should repeal the Amnesty Law, take the necessary legislative measures to ensure that domestic courts do not apply a statute of limitations or the principle of legality to crimes against humanity, and set up a commission of independent experts to establish the truth (Human Rights Committee, Concluding Observations, Spain, UN doc. CCPR/C/ESP/CO/5 (2009), 5 January 2009, para. 9)

The Council of Europe urged the Government to set up a commission to investigate human rights violations committed under the Franco regime, and to present the resulting report to the Council of Europe (Parliamentary Assembly of the Council of Europe, Recommendation 1736 (2006), 17 March 2006, Need for international condemnation of the Franco regime. Doc. 10737, Recommendation 8.2.1). It should be borne in mind that the Council of Europe, in its Resolution 828 (1984) on enforced disappearances, expressly states that these may not be covered by amnesty laws (para. 13 a).

The Committee against Torture recommended Spain to ensure that acts of torture, which also include enforced disappearances, are not offences subject to amnesty, clarify the fate of the disappeared – which is not constrained by the principle of legality or the statute of limitation – and to ensure redress for victims (Committee against Torture, Concluding Observations, CAT/C/ESP/CO/5, 19 November 2009, para. 21)

The Working Group on Enforced or Involuntary Disappearances reminded the government of its obligation to carry out thorough and impartial investigations into disappearances for as long as the fate of the victims remains unclarified (Human Rights Council, Report of the Working Group on Enforced or Involuntary Disappearances, A/HRC/13/31, 21 December 2009, para. 502.

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**The Spanish Judiciary**, which is obliged to apply international law which, as part of the country's system of laws, takes precedence over all domestic legislation, should:

- Confirm in its judgments that crimes under international law are not subject to amnesties or statutory limitations, whatever the *nomen iuris* of such crimes may be in Spanish legislation and whenever they may have been committed. In particular, the Supreme Court should rectify its judgment and, as a consequence:

a) Interpret the principle of legality in such a way that it complies with international law.

b) Recognize that it is the task of Spanish judges – concurrently with any other foreign court – to investigate war crimes and crimes against humanity committed – by both sides – during the Civil War, as well as crimes under international law committed under Franco, regardless of whether or not investigations – based on the principle of universal jurisdiction – have already been or are being conducted in other States.

**The Spanish Public Prosecutor's Office should:**

- Take action on its own initiative to investigate and prosecute crimes or offences under international law.

- Cooperate fully in any criminal proceedings being brought by foreign courts with a view to prosecuting – in accordance with the principle of universal jurisdiction – crimes under international law committed in Spain, regardless of whether or not such crimes are being investigated by the Spanish authorities.

- Set up a centralized information system for all criminal proceedings relating to the Civil War or Franco periods opened by the Spanish courts.

**The Argentinian judiciary should:**

- Continue without delay to investigate crimes or offences under international law committed in Spain in the past.

- In particular, Federal National Court for Criminal and Correctional Matters No. 1 should continue to deal with case N° 4,591/2010 (A12.447), entitled “genocide, unknown”, investigating the possible commission of heinous acts of genocide and/or crimes against humanity during the Spanish Civil War and under Franco.

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## **APPENDICES TO THE REPORT**

**Appendix 1:** LIST OF CASES RELATING TO THE REFERRAL OF JURISDICTION BY THE HIGH COURT TO REGIONAL COURTS

**Appendix 2:** LIST OF CASES RELATING TO THE REFERRAL OF JURISDICTION BY THE HIGH COURT TO REGIONAL COURTS WHICH HAVE BEEN INVESTIGATED IN THIS REPORT

**Appendix 3:** RECTIFICATION OF THE INFORMATION SENT BY THE SPANISH ATTORNEY-GENERAL'S OFFICE TO THE ARGENTINIAN AUTHORITIES CONCERNING THE CASES COVERED BY THE HIGH COURT'S DECLARATION OF INCOMPETENCE