

UNIVERSAL JURISDICTION AS A WORKAROUND TO DOMESTIC AMNESTY: AN ANALYSIS OF THE ARGENTINE CASE BROUGHT BY SPANISH FRANCO-ERA VICTIMS

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ABSTRACT

Enacting an amnesty law requires striking a difficult and consequential balance. On the one hand, the laws are often necessary to facilitate a country's transition to democracy. But, during that transition and for the years that follow, those same laws prevent victims of human rights abuses from seeing their abusers held accountable. This balancing act has played out in Spain over the past fifty years. The 1977 Amnesty Act grants immunity to General Francisco Franco and his administration for human rights abuses they committed. Legally prevented from seeking justice in Spain, victims and their attorneys traveled to Argentina to file suit in 2010. Victims asked Argentina to use the international law doctrine of universal jurisdiction—a legal principle that permits extraterritorial countries to exercise jurisdiction over an accused person regardless of where the crime was committed, provided that the alleged crime is sufficiently serious to pose a serious threat to the entire international community—to investigate and prosecute these abuses. This Comment explores the facts of that lawsuit: its achievements, challenges, and overall prognosis. It argues that Spain's lack of cooperation with the lawsuit presents challenges for the lawsuit's efficacy in seeing through criminal prosecutions of Franco-era leaders. But it acknowledges that the lawsuit has nonetheless spurred a shift in policy regarding amnesty on a domestic level in Spain, which, through its own legislative acts and judicial decision-making, is better able to respond to the remedial measures sought by Franco-era victims than an extraterritorial court like Argentina.

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INTRODUCTION

Many countries have suffered through civil wars, political coups, revolutions, and other threats by insurgents that have cost hundreds of thousands of lives and destabilized those countries for years to come. Whether hostilities last one year or thirty, when they finally end it is common for the government to enact legislation that relieves the conflict's participants of any legal consequences for their actions. Such legislation is frequently referred to as amnesty laws; these laws grant human rights abusers impunity, making it impossible for any of their victims to take legal action against them.¹ Amnesty laws often pass in times of crisis—when the old regime has been dissolved and the country is moving towards democracy.² The primary justification for these laws is transitional democracy.³ Amnesty laws allow a country to move on from its difficult past without endless legal battles against the prior regime interfering with its movement towards a more democratic country.⁴ Amnesty laws open the door to negotiation after conflict, bringing warring parties to the table with the promise of peace.⁵

Following the death of Spanish General Francisco Franco in 1975, Spain passed the 1977 Amnesty Act.⁶ The Amnesty Act was Spain's attempt to deal with the colossal aftermath of the Spanish Civil War and Franco's subsequent thirty-six-year dictatorship.⁷ The Amnesty Act pronounces that "Amnesty is hereby granted to: all politically-motivated acts, regardless of their result, established as criminal offenses and committed prior to 15 December 1976."⁸ The Act, seen as necessary to repair the country and reestablish its democratic state, grants immunity for the Franco regime's crimes against humanity committed against Spain's

¹ Nadine Ansorg & Sabine Kurtenbach, *Promoting Peace and Impunity? Amnesty Laws after War in El Salvador and beyond*, 8 J. GLOB. SEC. 1, 5 (2023).

² *See id.*

³ *Id.* at 4.

⁴ *See id.*

⁵ *See id.*

⁶ Christina Franzese, Note & Comment, *Balancing Justice and Peace: A Historical and Hypothetical Exploration of Justice During Spain's Post-Franco Transition from Dictatorship to Democracy*, 31 TEMP. INT'L & COMP. L. J. 497, 501–02 (2017).

⁷ *Id.* at 501; The Spanish Civil War lasted from 1936 to 1939 and resulted in the deaths of 500,000 people. Lucas Laursen, *Gathering the Genetic Testimony of Spain's Civil War Dead*, SCI. AM. (June 8, 2016), <https://www.scientificamerican.com/article/gathering-the-genetic-testimony-of-spain-s-civil-war-dead/> [<https://perma.cc/49L7-C4FX>].

⁸ Ley 46/1977, de 15 de octubre, de Amnistía (B.O.E. 1977, 248) [Law 46/1977, Oct. 15, of Amnesty (Official Bulletin of the State, 1977 number 248)] (Spain) [hereinafter Amnesty Act].

own citizens.⁹ The Act similarly protects crimes committed by Republican forces against members of the Franco regime as it refers to “all acts.”¹⁰ The Amnesty Act ensured that the right-wing cooperated during Spain’s transition to democracy, especially those who committed abuses during the Franco administration.¹¹ The Act essentially functions as a statute of limitations, preventing Franco-era human rights violations from being investigated and prosecuted.¹²

The international community has largely condemned the 1977 Amnesty Act.¹³ The United Nations (UN) has admonished the Act and unsuccessfully called for its repeal.¹⁴ Modern day leaders in Spain have tried to prosecute Franco-era crimes but have faced backlash and even been prosecuted themselves for violating the 1977 Amnesty Act.¹⁵ Hope for Franco-era victims reignited in 2010 when they filed a lawsuit in an Argentine court seeking prosecution of Franco-era officials under the legal principle of universal jurisdiction.¹⁶ In 2013, Argentinian Judge María Servini de Cubría took the case and subsequently issued several arrest and extradition warrants for Franco-era officials.¹⁷ The past several years have been a legal struggle between Judge Servini de Cubría and Spanish authorities unwilling to cooperate with the warrant and extradition requests.¹⁸ Still, the lawsuit has proved important for Spanish victims who have yearned for a tribunal to hear their stories and acknowledge their suffering.¹⁹

For Franco-era victims seeking to prosecute despite the 1977 Amnesty Act, universal jurisdiction offers them a legal tool to seek prosecution abroad. Universal jurisdiction is the ability of an

⁹ See Franzese, *supra* note 6, at 501.

¹⁰ See Amnesty Act, *supra* note 8.

¹¹ Haley L. Wehner, *The Spanish Stolen Baby Crisis: Why Stolen Baby Plaintiffs Have Been Unsuccessful in Spanish Courts and What Remedies Remain*, 31 MICH. ST. INT’L L. REV. 71, 100 (2023).

¹² *Id.*

¹³ *Id.* at 101.

¹⁴ *Id.*

¹⁵ *Spain’s Franco-era probe judge Baltazar Garzon on trial*, BBC (Jan. 24, 2012), <https://www.bbc.com/news/world-europe-16696330> [<https://perma.cc/MZ5M-D5BA>].

¹⁶ Alejandro Lerena Garcia, *Overview of the Argentine Lawsuit against the Crimes of the Franco Regime: Outcomes and Challenges*, 9 J. POL. SCI. PUB. AFF. 1, 1 (2021).

¹⁷ *Id.* at 3.

¹⁸ See *id.*

¹⁹ Gina Benevento, *Will Spains ‘disappeared’ find justice in Argentina?*, AL JAZEERA (Aug. 30, 2017, last visited July 4, 2024), <https://www.aljazeera.com/opinions/2017/8/30/will-spains-disappeared-find-justice-in-argentina> [<https://perma.cc/DJ6E-RRWD>].

extraterritorial state to prosecute a citizen of another state, provided the citizen allegedly committed an extremely serious crime. However, the Spanish government's failure to cooperate and delay tactics have stifled Argentina's indictment and conviction efforts. Thus, universal jurisdiction has largely been an ineffective tool in giving Franco-era victims a judicial remedy.²⁰ Despite the lack of judicial remedies available for Franco-era victims, the Argentine court's efforts have seriously pressured the Spanish government. The lawsuit has forced Spain to enact domestic-level policy change aimed at giving Franco-era victims alternative remedies and eradicating the culture of silence that the Amnesty Act had fostered for nearly fifty years.

This Comment analyzes how Franco-era victims have sought justice in the legal system despite the 1977 Amnesty Act safeguarding their abusers. Part I of this Comment offers context on the international legal framework of universal jurisdiction, the history of the 1977 Amnesty Act, and the Argentine case. Part II analyzes the indicators of success for a universal jurisdiction case, applies those indicators to the Argentine case, and finds that universal jurisdiction may not be an effective tool for Franco-era victims to achieve justice through the legal system. Further, Part II argues that because of the combination of Spain's noncooperation and the variety of judicial remedies sought by Franco-era victims, the international framework of universal jurisdiction is better suited to force domestic policy change than it is to carry out remedial action through the legal system.

I. BACKGROUND

A. THE LEGAL FRAMEWORK OF UNIVERSAL JURISDICTION

Universal jurisdiction is defined by legal tenets but is best explained through its utilization in a modern-day case. This section explains the basic legal and moral principles of universal jurisdiction and illustrates how it is applied using the case of General Augusto Pinochet.

²⁰ For the purposes of this comment, "judicial remedy" means some sort of enforceable judgment against the defendants, here, the Franco administration.

1. Basic Principles

Universal jurisdiction is the ability of a country's domestic judicial system to investigate and prosecute certain crimes committed beyond its borders.²¹ The doctrine first appeared in the 1949 Geneva Conventions on the law of wars, providing that parties must prosecute those suspected of war crimes.²² There are a limited number of crimes that allow universal jurisdiction's exercise, including, but not limited to: war crimes, torture, crimes against humanity, genocide, piracy, hijacking, acts of terrorism, and attacks on UN personnel.²³ The majority of countries recognize the validity of universal jurisdiction by virtue of being parties to the 1949 Geneva Convention.²⁴ Additionally, many countries' individual constitutions contain a provision authorizing the country to exercise universal jurisdiction.²⁵

Universal jurisdiction is a legal safeguard.²⁶ It provides victims of grave offenses who cannot seek redress in their home country the ability to turn to other countries to prosecute or investigate.²⁷ Frequently, domestic actors are unwilling to conduct investigations, prosecute, or hold trials themselves; thus, universal jurisdiction provides another route to justice.²⁸ The rationale for universal jurisdiction is that some crimes are egregious enough to constitute crimes against all humankind.²⁹ Such crimes cannot be left unaddressed.³⁰ Proponents of the doctrine point to the horrific nature of some crimes as a morally justifying extraterritorial

²¹ *Basic Facts on Universal Jurisdiction, Prepared for the Sixth Committee of the United Nations General Assembly*, HUM. RTS. WATCH (Oct. 19, 2009, 8:45 AM), <https://www.hrw.org/news/2009/10/19/basic-facts-universal-jurisdiction> [hereinafter *Basic Facts on Universal Jurisdiction*] [<https://perma.cc/3YXT-UAFK>].

²² Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 146, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

²³ *Basic Facts on Universal Jurisdiction*, *supra* note 21, at 1.

²⁴ 196 countries have ratified the 1949 Geneva Conventions. *Geneva Conventions*, BRITISH RED CROSS, <https://www.redcross.org.uk/about-us/what-we-do/protecting-people-in-armed-conflict/geneva-conventions#:~:text=The%20best%20known%20of%20these,1949%2C%20ratified%20by%20196%20countries> (last visited Sept. 19, 2024) [<https://perma.cc/NPC8-E6W2>].

²⁵ Sec. 118, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg. 1853).

²⁶ See *Basic Facts on Universal Jurisdiction*, *supra* note 21, at 2.

²⁷ *Id.*

²⁸ *Id.*

²⁹ Karinne Coombes, *Universal Jurisdiction: A Means to End Impunity or a Threat to Friendly International Relations?*, 43 GEO. WASH. INT'L L. REV. 419, 427 (2011).

³⁰ See *id.*

jurisdiction.³¹ Critics of the doctrine assert that it affords too much discretion to international actors over domestic affairs in another country and add that only a limited number of cases have actually been brought to trial using universal jurisdiction.³²

2. *Universal Jurisdiction in Practice: The Arrest of General Augusto Pinochet*

Augusto Pinochet was a Chilean dictator who led a military coup in Chile in 1973.³³ The coup ultimately overthrew the established government and Pinochet subsequently declared himself the head of the new military regime.³⁴ During his seventeen-year reign, Pinochet committed mass human rights violations.³⁵ He also enacted an amnesty law that shielded him, and other members of his government accused of human rights violations, from facing legal consequences.³⁶

In October 1998, acting on a warrant from Spanish authorities, police in London arrested General Pinochet.³⁷ Spain, under the doctrine of universal jurisdiction, charged Pinochet with human rights crimes after victims filed criminal complaints in Spain because the amnesty law prevented them from doing so in Chile.³⁸ Spain adopted universal jurisdiction in 1985, allowing it to exercise extraterritorial jurisdiction over Chile.³⁹ Spain wanted Pinochet extradited, but Pinochet claimed that heads of state enjoy immunity from extradition.⁴⁰ The House of Lords,

³¹ Nahal Kazemi, *Justifications for Universal Jurisdiction: Shocking the Conscience is Not Enough*, 49 TULSA L. REV. 1, 2 (2013).

³² Coombes, *supra* note 29, at 421; *see also Basic Facts on Universal Jurisdiction*, *supra* note 21, at 1.

³³ *Augusto Pinochet*, HISTORY (Aug. 21, 2018), <https://www.history.com/topics/south-america/augusto-pinochet> [<https://perma.cc/9TCS-GUQ9>].

³⁴ *Id.*

³⁵ *The Pinochet Precedent: How Victims Can Pursue Human Rights Criminals Abroad*, HUM. RTS. WATCH (Nov. 1, 1998), <https://www.hrw.org/report/1998/11/01/pinochet-precedent/how-victims-can-pursue-human-rights-criminals-abroad> [hereinafter *The Pinochet Precedent*] [<https://perma.cc/8DDW-N985>].

³⁶ The law was passed in 1978 and prevented individuals suspected of committing human rights violations between 1973 and 1978 from facing the courts. *Chile: Amnesty law keeps Pinochet's legacy alive*, AMNESTY INT'L (Sept. 11, 2015), <https://www.amnesty.org/en/latest/news/2015/09/chile-amnesty-law-keeps-pinochet-s-legacy-alive/> [<https://perma.cc/W287-6B28>].

³⁷ *The Pinochet Precedent*, *supra* note 35.

³⁸ *Id.*

³⁹ Ley Orgánica 6/1985, No. 157, Art. 23, sec. 4(a), de 1 de julio, del Poder Judicial (B.O.E.) (Spain).

⁴⁰ *The Pinochet Precedent*, *supra* note 35.

Britain's highest court, found that crimes against humanity were not functions of a head of state, and thus determined that Pinochet could be extradited to Spain.⁴¹ Ultimately, Pinochet was never extradited as it was determined that he no longer had the mental capacity to stand trial.⁴² He was released and allowed to return home to Chile, where he died in 2006.⁴³ While Pinochet never stood trial, his arrest alone signaled to victims and offenders alike that seeking justice abroad is an option.⁴⁴

B. SPAIN'S 1977 AMNESTY ACT

Spain's 1977 Amnesty Act has a deep history and its implications in the present day cannot be understood without understanding its enactment. This Part details the Spanish Civil War, the Franco regime, and Spain's transition to democracy to offer background on how the Act came to be and why it still matters.

1. *The Spanish Civil War*

The Spanish Civil War began in 1936 when right-wing leaders Emilio Mola and Francisco Franco overthrew the democratically elected Republican government.⁴⁵ Franco's Nationalists were not able to gain control of the whole country and conflict quickly began between Franco's Nationalists and those loyal to the Spanish Republic.⁴⁶ Both sides called for foreign aid, but much of the international community was hesitant to step in, fearing that the Spanish conflict could turn into a full-fledged European war the likes of World War I.⁴⁷

Ultimately, Franco declared himself de facto "head of the state of Spain," and by the end of 1936, the governments of Germany and Italy recognized him as the legitimate ruler.⁴⁸ Franco imposed martial law

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Augusto Pinochet*, *supra* note 33.

⁴⁴ *The Pinochet Precedent*, *supra* note 35.

⁴⁵ *Spanish Civil War*, U.S. HOLOCAUST MEM'L MUSEUM, <https://encyclopedia.ushmm.org/content/en/article/spanish-civil-war> (last visited July 5, 2024) [<https://perma.cc/C7JK-MHG4>].

⁴⁶ *Id.*

⁴⁷ *See id.*

⁴⁸ *Illustrated Timeline of the Spanish Civil War (In-Depth)*, UNIV. WARWICK, https://warwick.ac.uk/services/library/mrc/archives_online/digital/scw/timeline (last visited July 5, 2024) [<https://perma.cc/3437-E35S>].

throughout the country and his Nationalist forces executed over one hundred thousand civilians and Republican supporters.⁴⁹ The war gave rise to mass political violence from both sides with roughly five hundred thousand casualties in the span of three years.⁵⁰ In 1939, the Republican forces surrendered and the international community recognized Franco as the official leader of Spain.⁵¹

2. *The Franco Regime*

In the aftermath of the Spanish Civil War, Franco's government focused on gaining ideological and political control of the population.⁵² Despite the "end" of the civil war, Franco's animosity toward Republican loyalists did not falter.⁵³ His administration held mass trials for those perceived as disloyal and commonly resorted to execution without due process.⁵⁴ Four hundred thousand people were committed to prisons, labor camps, or forced labor battalions.⁵⁵ Four hundred forty thousand Republicans went into exile.⁵⁶ Franco's policies placed immense importance on the role of the family and the role of motherhood—essentially nationalizing the reproductive role of women.⁵⁷ Fearful that Republicans were spreading messages of Marxism to their children, the Franco regime sought to intercept these messages by separating children from their parents, forcing them into orphanages or with families loyal to Franco.⁵⁸ Franco's troops secretly abducted and murdered civilians suspected of fostering Republican allegiances and held numerous political prisoners.⁵⁹ The egregious human rights violations perpetuated by the Franco regime continued for nearly thirty years until Franco's death in 1975.⁶⁰ As of 2008, estimates suggest that Franco's regime caused the disappearance of anywhere between 136,062 to 152,237 people.⁶¹ Many

⁴⁹ *Spanish Civil War*, *supra* note 45.

⁵⁰ *Id.*

⁵¹ *Illustrated Timeline of the Spanish Civil War (In-Depth)*, *supra* note 48.

⁵² Wehner, *supra* note 11, at 77.

⁵³ See Franzese, *supra* note 6, at 499.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ Wehner, *supra* note 11, at 79–80.

⁵⁸ Franzese, *supra* note 6, at 500.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ See *id.* at 501.

victims were murdered, buried in unmarked graves, and remain unidentified to this day.⁶²

3. *The 1977 Amnesty Act and Spain's Transition to Democracy*

After Franco's death in 1975, Spain's transition to democracy did not come easily.⁶³ Between 1975 and 1982, there were 644 politically motivated deaths at the hands of organizations on both sides of the political spectrum, as well as law enforcement.⁶⁴ Despite the struggle, King Juan Carlos, politicians, and labor groups transitioned Spain from a dictatorship to a democratic constitutional monarchy within three years of Franco's death.⁶⁵

Cognizant of the years that preceded this new democratic state, both the Nationalist and Republican parties agreed to an unwritten *pacto del olvido* (Pact of Forgetting) to facilitate a smooth post-Franco transition.⁶⁶ While thought of as a means of uniting Spain for the betterment of all people, the Pact had a different effect. No one would be held accountable for the thousands who lost their lives during the war, or for those executed, tortured, and exiled during the Franco regime.⁶⁷ The 1977 *Ley de Amnistía* (Amnesty Act) codified the intentions of the Pact by legally prohibiting investigations and prosecutions for the crimes committed during the war and during the Franco regime.⁶⁸ The Act states that amnesty shall be granted "to all politically motivated acts, regardless of their outcome, categorized as crimes, committed before December 15, 1977."⁶⁹ The law was approved by a 93 percent majority of Parliament.⁷⁰

⁶² John Lee Anderson, *Why Spain Was Long in Denial About Franco—and Still Stands by Columbus*, NEW YORKER (Nov. 2, 2021), <https://www.newyorker.com/news/daily-comment/why-spain-was-long-in-denial-about-franco-and-still-stands-by-columbus> [<https://perma.cc/HR4T-5PUE>].

⁶³ See Alexandra García, *Transitional (In)Justice: An Exploration of Blanket Amnesties and the Remaining Controversies Around the Spanish Transition to Democracy*, 43 INT'L J. LEGAL INFO. 75, 84 (2015) [hereinafter García, *Transitional (In)Justice*].

⁶⁴ *Id.*

⁶⁵ Franzese, *supra* note 6, at 501.

⁶⁶ *See id.*

⁶⁷ Omar G. Encarnación, *Forgetting, in Order to Move On*, N.Y. TIMES (Jan. 22, 2014, 2:24 PM), <https://www.nytimes.com/roomfordebate/2014/01/06/turning-away-from-painful-chapters/forgetting-in-order-to-move-on> [<https://perma.cc/4SNZ-2F4V>].

⁶⁸ Franzese, *supra* note 6, at 501; *see also* Amnesty Act art. 2 (B.O.E. 1977, 248) (Spain).

⁶⁹ Amnesty Act art. 1 (B.O.E. 1977, 248) (Spain).

⁷⁰ Franzese, *supra* note 6, at 501.

Spain defended the Act as being necessary to balance the dichotomy between peace and justice.⁷¹ Those who drafted and passed the Act felt that it was important to avoid more political violence and risk falling back into another civil war.⁷² Proponents of the Act said that it put an end to a horrific chapter that defined so many lives.⁷³ The Act gave Spain the ability to move towards national reconciliation and establish a democratic regime, without being defined by wrongs from the past.⁷⁴ Specifically, the Act's proponents feared that outrage over the past would disturb the armed forces, the entity most capable of disrupting the young democracy.⁷⁵ And, while the country did become more stable, the passage of the Act also resulted in permanent collective impunity for those who had committed grave human rights abuses during the war and during the Franco regime.⁷⁶

The Amnesty Act has been met with resistance from some Spanish political and judicial leaders who seek justice for Franco-era victims.⁷⁷ In 2008, Judge Baltazar Garzón opened an investigation into the disappearances of victims during the Franco dictatorship.⁷⁸ Judge Garzón said that the crimes were not subject to the Amnesty Act because they were crimes against humanity.⁷⁹ His decision to open an investigation sparked criticism and anger, causing two right-wing organizations, Clean Hands and Liberty and Identity, to bring criminal charges against Judge Garzón for violating the Amnesty Act.⁸⁰ Amnesty International called the charges against Garzón “a blow to human rights and efforts to obtain justice.”⁸¹ The Criminal Chamber of the Spanish National Court soon after held that

⁷¹ García, *supra* note 63, at 88.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *See id.*

⁷⁵ Franzese, *supra* note 6, at 502.

⁷⁶ García, *supra* note 63, at 83, 90.

⁷⁷ *Cf. Spain's Franco-Era Probe Judge Baltazar Garzon on Trial*, *supra* note 15 (discussing the charges brought against a Spanish judge “accused of violating [the 1977 Amnesty Act] by investigated civil war and Franco-era crimes”).

⁷⁸ *Id.*

⁷⁹ *See id.*

⁸⁰ *Id.*

⁸¹ *Spain: Trial of Judge Baltazar Garzón 'A Blow to Human Rights'*, AMNESTY INT'L (Jan. 20, 2012), <https://www.amnesty.org/en/latest/news/2012/01/spain-trial-judge-baltazar-garzon-n-blow-human-rights/> [https://perma.cc/3VHG-MQZZ].

Judge Garzón had no powers to investigate such crimes and blocked the investigation.⁸²

Traditionally, how a democratic government chose to legislate around criminal matters was a matter of domestic discretion and not of concern to the international community.⁸³ However, the UN has said that prohibiting investigation and prosecution into serious human rights violations is blatantly inconsistent with international law and with the UN's policy.⁸⁴ In 2013, after sending a working group to Spain to see how it was investigating the Franco-era disappearances, the UN called for Spain to revoke the Amnesty Act.⁸⁵ The UN found that there was no criminal investigation taking place and stated that "the state must urgently assume political responsibility to clear up these disappearances."⁸⁶ Still, the Amnesty Act remains in force today.⁸⁷

C. THE ARGENTINE CASE

The Amnesty Act is a massive barrier for victims of Franco who suffered a great deal of harm and were never able to seek relief. It wasn't until 2010 that victims had a glimmer of hope. This Part discusses the Argentine lawsuit's beginnings, successes, and where it stands to this day. Further, it discusses how Spain itself has reacted to the lawsuit and the legislation it has produced since the lawsuit began.

1. *Argentina's Criminal Investigation into Franco-era Crimes*

After the Spanish National Court declared Judge Garzón's criminal investigation to be beyond his powers, two relatives of the

⁸² The Spanish National Court has jurisdiction throughout all of Spain and has jurisdiction over (1) cases relating to more than one of the provinces throughout the country, (2) serious monetary and drug trafficking cases, and (3) serious crimes committed outside the country when Spanish courts have jurisdiction to prosecute. *The Spanish National Court*, CTR. FOR JUST. & ACCOUNTABILITY, <https://cja.org/what-we-do/litigation/legal-strategy/the-spanish-national-court/> (last visited Mar. 17, 2024) [<https://perma.cc/7NNN-SYR4>]; see also García, *supra* note 16, at 2.

⁸³ García, *supra* note 63, at 91.

⁸⁴ *Id.* (citing Off. of the U.N. High Comm'r for Hum. Rts., *Rule-of-Law Tools for Post-Conflict States: Amnesties*, U.N. Doc. HR/PUB/09/1 (2009)).

⁸⁵ *U.N. Tells Spain to Revoke Franco-Era Amnesty Law*, REUTERS (Sept. 30, 2013, 2:12 PM), <https://www.reuters.com/article/world/un-tells-spain-to-revoke-franco-era-amnesty-law-idUSBRE98T0YQ/> [<https://perma.cc/QQ53-SNEQ>].

⁸⁶ *Id.*

⁸⁷ Franzese, *supra* note 6, at 505.

Franco-era victims traveled to Argentina.⁸⁸ There, they filed a criminal complaint on April 14, 2010.⁸⁹ Since then, lawyers have filed more than 330 complaints in Argentina on behalf of Franco-era victims.⁹⁰ Specifically, the crimes alleged are forced disappearances, torture, executions without trial, slave labor, and infant-stealing.⁹¹ The Plaintiffs chose to file their complaints in Argentina for a few reasons.⁹² First, Argentina recognized the doctrine of universal jurisdiction and incorporated it explicitly into its law.⁹³ Additionally, Spain and Argentina have supported one another during dark times in each country's history.⁹⁴

Soon after the complaint was filed, Argentinian Judge María Servini de Cubría began an investigation into Franco-era crimes and opened criminal proceedings.⁹⁵ In September 2013, Judge Servini de Cubría issued arrest and extradition warrants for four former Francoist officials who were accused of committing torture in the final years of the Franco dictatorship.⁹⁶ However, the Spanish National Court refused to implement the warrants.⁹⁷ Two of the accused torturers were called before an Argentine court to testify but to no avail—the Prosecutor's Office denied the request, arguing the claims were time-barred.⁹⁸ In 2014, Judge Servini de Cubría issued twenty more extradition warrants against senior officials of the Franco regime.⁹⁹ However, the Spanish government also denied those extradition requests.¹⁰⁰ In addition, Judge Servini de Cubría issued an indictment on four counts of homicide against Rodolfo Martin

⁸⁸ Garcia, *supra* note 16, at 2.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ See, Art. 118, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.); see, Law No. 26200, Jan. 5, 2007, [XXXILXIX] B.O. 1 (Arg.).

⁹⁴ Many Spanish exiles found refuge in Argentina during the Franco regime and likewise, many Argentinians found protection in Spain during the dictatorship of the Military Junta. Garcia, *supra* note 16, at 2.

⁹⁵ *Id.* at 3.

⁹⁶ Raphael Minder, *Argentine Judge Seeks to Put Franco Officials on Trial*, N.Y. TIMES, (Sept. 30, 2013), <https://www.nytimes.com/2013/10/01/world/europe/argentine-judge-seeks-to-put-franco-officials-on-trial.html> [https://perma.cc/SX75-928T].

⁹⁷ Garcia, *supra* note 16, at 3.

⁹⁸ *Id.*

⁹⁹ *Id.* at 3–4.

¹⁰⁰ *Id.* at 4.

Villa, a former minister of the Franco regime accused of torture.¹⁰¹ The indictment was later annulled.¹⁰² The Argentine lawsuit, which many plaintiffs have joined, is still ongoing, but noncooperation from Spain over the last ten years has significantly hampered proceedings.¹⁰³

2. *Spain's Domestic Policy in the Face of the Argentine Lawsuit*

While proceedings in the Argentine lawsuit continue, the lawsuit has influenced the Spanish and international community to force Spain to take action domestically.¹⁰⁴ In 2020, Spanish Parliament passed the Democratic Memory Law, which contains numerous provisions addressing Franco-era atrocities and enacting restorative measures for victims.¹⁰⁵ The law includes provisions that make the states responsible for recovering the remains of victims missing in unmarked graves, create a national DNA database to assist in identifying excavated bodies, mandate the teaching of the civil war and the Franco dictatorship in schools, pardon anyone convicted of political crimes by Francoist tribunals, ban groups that glorify the Franco regime, and order a “redefinition” of the Valley of the Fallen, the large basilica and memorial where Franco had been buried until he was exhumed in 2019.¹⁰⁶ The Democratic Memory Law has been the most comprehensive piece of legislation enacted that memorializes Franco-era atrocities since Franco’s death. Many argue that the law does not go far enough, but most agree that it is a step in the right direction.¹⁰⁷

¹⁰¹ Graham Keeley & Jorge Otaola, *Argentine Judge Indicts Spanish Franco-era Minister on Murder Charges*, REUTERS, Oct. 16, 2021, 1:58 PM, <https://www.reuters.com/world/europe/judge-indicts-franco-era-spanish-minister-four-charges-homicide-2021-10-16/> [https://perma.cc/AP34-JASE].

¹⁰² *The Argentinian Exercise of Universal Jurisdiction 12 Years After its Opening*, OPINIO JURIS (Apr. 02, 2022), <https://opiniojuris.org/2022/02/04/the-argentinian-exercise-of-universal-jurisdiction-12-years-after-its-opening/> [https://perma.cc/T7NQ-VHPT].

¹⁰³ Laura Íñigo Álvarez & Aintzane Márquez Tejón, *Ten Years of the Argentine Inquiry into Franco-era Crimes: What Has Been Achieved?*, OXFORD HUM. RTS. HUB (Oct. 27, 2020), <https://ohrh.law.ox.ac.uk/ten-years-of-the-argentine-inquiry-into-franco-era-crimes-what-has-been-achieved/> [https://perma.cc/B7QJ-Q75H].

¹⁰⁴ Garcia, *supra* note 16, at 5.

¹⁰⁵ Mark Nayler, *In Spain, Can Truth Ever Bring Reconciliation?*, FOREIGN POL’Y (Nov. 20, 2022, 5:59 AM), <https://foreignpolicy.com/2022/11/20/spain-franco-mass-graves-truth-reconciliation/> [https://perma.cc/U9AY-MZBN].

¹⁰⁶ *Id.*

¹⁰⁷ See Aspen Brooks, *The Democratic Memory Act: Spain Tackles Its Past Once Again*, EURAC RSCH. (July 25, 2021), <https://www.eurac.edu/en/blogs/eureka/the-democratic-memory-act> [https://perma.cc/H2MM-E8SB].

II. ANALYSIS

This Part argues that the criminal prosecution and conviction of any Franco-era officials is unlikely to result from the Argentine lawsuit because universal jurisdiction depends on international cooperation. Spain's noncooperation with the suit is likely to hinder the ability of the Argentine court to execute criminal proceedings to finality. However, the Argentine lawsuit's greatest strength lies not in its ability to provide judicially enforceable remedies, but in the way it has pressured Spain to address the Amnesty Act on a domestic level. The tactic of using universal jurisdiction to open this case was still wise because of the effect the lawsuit has had on the international community and Spain itself. Importantly, what justice means to victims varies and therefore there cannot be one right solution. This Comment seeks to put in perspective the effectiveness of pathways to legal recourse versus policy recourse and is limited in that way.

A. THE PINOCHET PRECEDENT: LESSONS FROM THE ATTEMPTED PROSECUTION OF GENERAL PINOCHET

One of the first examples of universal jurisdiction's use was Israel's prosecution of Adolph Eichmann in 1961 for "crimes against the Jewish people, crimes against humanity, and war crimes."¹⁰⁸ Eichmann was kidnapped in Argentina and brought to Israel to be tried, where he was ultimately sentenced to death for his role in the atrocities committed by Nazis against the Jewish people.¹⁰⁹

A more modern example of the use of universal jurisdiction arose in London in 1998 with the arrest of Chilean dictator General Pinochet.¹¹⁰ His arrest alarmed former heads of state across the globe who were accused of committing international crimes.¹¹¹ While Pinochet did not stand trial, his arrest signaled to victims globally that they could seek justice abroad.¹¹² Additionally, Pinochet's vulnerability to international

¹⁰⁸ AISHWARYA PADMANABHAM, ORIGIN, DEVELOPMENT AND EVOLUTION OF THE PRINCIPLE OF UNIVERSAL JURISDICTION: A STUDY OF ITS APPLICATION IN NATIONAL COURTS AND PRACTICAL OBSTACLES FACING ITS IMPLEMENTATION 7 (2010).

¹⁰⁹ *Id.*

¹¹⁰ *The Pinochet Precedent*, *supra* note 35.

¹¹¹ *Id.*

¹¹² *Id.*

prosecution led to Chile reevaluating their own amnesty law.¹¹³ His prosecution paved the way for Chile to prosecute other human rights violators.¹¹⁴ By 2003, the Chilean courts indicted three hundred military officers for the forced disappearances that occurred under the Pinochet regime and succeeded in convicting many of those officers.¹¹⁵ Pinochet's prosecution not only transformed the way the international community thought about extraterritorial prosecutions, but it also impacted Chile's domestic law.¹¹⁶

There is a certain sequence of events that allowed the Pinochet case's execution to go as far as it did. These elements offer a framework for evaluating the likelihood of success for other universal jurisdiction cases. The following, relevant elements were crucial to its success:

1. Victims of Pinochet (or their lawyers) traveled to Spain and filed a criminal complaint with a Spanish judge.¹¹⁷
2. Spain adopted universal jurisdiction into its law.¹¹⁸
3. The crimes alleged in the criminal complaint met the criteria for crimes that can be prosecuted under universal jurisdiction.¹¹⁹
4. The Spanish court found that the Chilean amnesty law protecting Pinochet did not bind the Spanish courts.¹²⁰
5. Spain has a democratic government and an independent judiciary, aiding in domestic popular support for Pinochet's arrest and extradition.¹²¹

¹¹³ Alex Yates, *The Pinochet Precedent: Convicting Human Rights Violators*, UAB INSTITUTE FOR HUM. RTS. BLOG (Dec. 22, 2022), <https://sites.uab.edu/humanrights/2022/12/28/the-pinochet-precedent-convicting-human-rights-violators/> [https://perma.cc/547Y-3J3C].

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ "In 1998, Chile's Supreme Court ruled that the [amnesty] law should not apply to cases of human rights violations." *Chile: Amnesty law keeps Pinochet's legacy alive*, AMNESTY INT'L (Sept. 11, 2015), <https://www.amnesty.org/en/latest/news/2015/09/chile-amnesty-law-keeps-pinochet-s-legacy-alive/> [https://perma.cc/LZ26-MQLB]; see also *The Pinochet Precedent*, *supra* note 35.

¹¹⁷ *The Pinochet Precedent*, *supra* note 35.

¹¹⁸ Ley 6/1985, de 1 de julio, de Orgánica de poder judicial (B.O.E. 1985, 157) [Law 6/1985, July 1, of Organic Judicial Power (Official Bulletin of the State, 1985 number 157)] (Spain).

¹¹⁹ *The Pinochet Precedent*, *supra* note 35.

¹²⁰ Naomi Roht-Arriaza, *Article: The Pinochet Precedent and Universal Jurisdiction*, 35 N.E. L. REV. 312, 313 (2001).

¹²¹ States without a democratic government or independent judiciary are typically less responsive to international calls to prosecute abroad and political will in the extraditing country is crucial. Reed Brody, *The 'Pinochet Precedent' at 25: Supporting Justice for Victims with 'Universal Jurisdiction'*, JUST SECURITY (Oct. 16, 2023), <https://www.justsecurity.org/89474/the-pinochet-precedent-at-25-supporting-justice-for-victims-with-universal-jurisdiction/> ("The Pinochet case would never have happened had Margaret Thatcher still been in power in the U.K., or had their not been such widespread support in Spain for the prosecution of a despised general, support that

6. The United Kingdom was bound by the Convention Against Torture to extradite Pinochet to Spain or to establish its own jurisdiction over Pinochet.¹²²

7. The United Kingdom complied with Spain's extradition warrant.¹²³

While the Pinochet case ended there, to see a case through from start to finish would also require the following:

8. The defendant is mentally competent to stand trial;¹²⁴

9. A trial occurs;¹²⁵ and

10. The trial ends in the conviction or acquittal of the defendant, resulting in imprisonment or a different remedy for the victim(s).¹²⁶

While the Pinochet precedent was incredibly important for victims of human rights abuses, due to the complex web of parties and interests involved, a judge overseeing this type of criminal proceeding might easily misstep or be obstructed by individuals or governments outside of their control.

B. UNIVERSAL JURISDICTION'S EFFECTIVENESS IN THE ARGENTINE CASE

The Pinochet framework exemplifies how a universal jurisdiction case can succeed. However, every case is unique and presents its own set of challenges. This Part applies the Pinochet framework to the Argentine case and evaluates the efficacy of the lawsuit, if measured against the legal process used in the Pinochet case.

protected Judge Garzón each time the conservative government there tried to interfere with his arrest.") [<https://perma.cc/2KZX-77JN>].

¹²² Frederic L. Kirgis, *The Pinochet Arrest and Possible Extradition to Spain*, AMERICAN SOC'Y INT'L L. (Oct. 31, 1998), <https://www.asil.org/insights/volume/3/issue/12/pinochet-arrest-and-possible-extradition-spain> [<https://perma.cc/SUF7-WGWZ>]; see generally Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art 8, Dec. 10, 1984, § 208.18 Implementation of the Convention Against Torture, 1465 U.N.T.S 85.

¹²³ *The Pinochet Precedent*, *supra* note 35.

¹²⁴ See *id.*

¹²⁵ See *id.*

¹²⁶ See *id.*

1. *Argentina's Suitability as a Venue to File Suit*

Applying the Pinochet elements to the Argentine case brought by Spanish victims, the framework functions well at the early stages:

1. Franco-era victims, unable to seek legal recourse in Spain because of the 1977 Amnesty Act, traveled to Argentina and filed a criminal complaint in an Argentine court.¹²⁷
2. Argentina authorized the exercise of universal jurisdiction and has significant experience and knowledge regarding the prosecution of human rights violations.¹²⁸
3. The complaint alleged crimes including forced disappearances, torture, executions without trial, infant-stealing, and more—that is, international crimes that allow for prosecution under universal jurisdiction.¹²⁹
4. The Argentine court found that the 1977 Amnesty Act does not impact the jurisdiction of extraterritorial judicial bodies' prosecutorial discretion.¹³⁰
5. Argentina enjoys a representative democracy and independent judiciary.¹³¹ This makes it possible to garner popular support while also executing the judicial proceeding without political influence.¹³²
6. There is an extradition treaty between Argentina and Spain.¹³³

The Pinochet elements translated well to the Argentine lawsuit, at least at the early stages, and the lawsuit provided Spanish victims with an empathetic judicial forum to adjudicate the crimes committed under the Franco regime.

¹²⁷ Garcia, *supra* note 16, at 2.

¹²⁸ Law No. 26200, Jan. 5, 2007, [XXXILXIX] B.O. 1 (Arg.); Garcia, *supra* note 16, at 3.

¹²⁹ Garcia, *supra* note 16, at 3.

¹³⁰ Olga Martin-Ortega & Rosa Ana Alija Fernandez, *Argentinian Jurisdiction and Spanish Amnesty*, JURIST (June 18, 2010), <https://www.jurist.org/commentary/2010/06/argentina-jurisdiction-and-spanish-amnesty/> [<https://perma.cc/2NE2-KYLJ>].

¹³¹ Christopher Larkins, *The Judiciary and Delegative Democracy in Argentina*, 30 COMP. POL. J. 423, 423–24 (1998).

¹³² *The Pinochet Precedent*, *supra* note 35.

¹³³ Treaty between the Kingdom of Spain and the Argentine Republic on Extradition and Judicial Assistance in Criminal Matters, Sp.-Ar., Mar. 3, 1987, 1643 U.N.T.S. 462.; *see generally* Minder, *supra* note 96.

2. *The Issue of Spain's Non-Compliance with the Lawsuit*

While using the Pinochet framework provided Franco-era victims with a forum that can legally adjudicate their claims, the framework breaks down when it relies on Spain's compliance. When Spain opened its case against General Pinochet, Judge Garzón requested that British authorities arrest Pinochet.¹³⁴ The request received little pushback from the UK; officers arrested Pinochet and, had he been found mentally fit to stand trial, he would have been extradited to Spain.¹³⁵ This is where the Argentine case diverges from the Pinochet framework: there is no party willing to extradite the defendants. In 2013, after opening criminal proceedings against former Francoist officials, Judge Servini de Cubría issued four arrest and extradition warrants for those individuals living in Spain.¹³⁶ While Spain and Argentina do have an extradition treaty, the question of whether Spain would extradite ultimately fell into the hands of the Spanish National Court.¹³⁷ Ultimately, the Spanish National Court rejected the request on the grounds that Spain's own courts should be the only ones allowed to try its own citizens.¹³⁸ The Court also reasoned that the crimes alleged were isolated—meaning they did not fall into the category of crimes that could be prosecuted under universal jurisdiction.¹³⁹

Despite the stalemate at Step 7, after the extradition requests were denied, Judge Servini de Cubría traveled to Spain to gather testimony from the victims.¹⁴⁰ She then issued twenty more extradition warrants for Franco senior officials.¹⁴¹ This time, instead of the Court, the Council of Ministers of the Spanish Government denied the extradition requests.¹⁴² In light of the immense challenge of getting defendants to court in Argentina,

¹³⁴ *The Pinochet Precedent*, *supra* note 35.

¹³⁵ *Id.*

¹³⁶ *See Spain Rejects Argentina Extradition Request for Franco-era Officials*, REUTERS (Mar. 13, 2015, 12:44 PM), <https://www.reuters.com/article/us-argentina-spain-extradition/spain-rejects-argentina-extradition-request-for-franco-era-officials-idUSKBN0M924R20150313/> [<https://perma.cc/WFW8-Z88M>].

¹³⁷ Minder, *supra* note 96.

¹³⁸ Natalie Junquera, *Argentinian Judge Asks to Question 19 Suspects in Franco Crimes Case*, EL PAÍS (Mar. 23, 2016, 8:02 AM), https://english.elpais.com/elpais/2016/03/23/inenglish/1458731616_288131.html [<https://perma.cc/S2XU-4J83>].

¹³⁹ García, *supra* note 16, at 5.

¹⁴⁰ *Id.* at 3.

¹⁴¹ *Id.*

¹⁴² The Council of Ministers is the main collective decision-making body of Spain, composed of the Prime Minister, deputy prime ministers, and ministers. *Id.* at 4.

Judge Servini de Cubría requested to travel to Spain again in 2016 to take statements from the defendants.¹⁴³ However, the Officer of the Prosecutor-General in Spain ordered all Spanish prosecutors to suspend Judge Servini de Cubría from taking statements.¹⁴⁴ The Office of the Prosecutor-General's maneuver was critical because under Argentinian law, a trial's proceedings cannot begin before the court takes the accused's statement.¹⁴⁵

The Argentine lawsuit has stalled for years. To date, the most significant movement in the case has been the declared statement from defendant Rodolfo Martin Villa, the former Minister of Labour and Internal Affairs under Franco.¹⁴⁶ Judge Servini de Cubría charged Villa with crimes against humanity and he became the first defendant to give a statement before her.¹⁴⁷ Villa was subsequently indicted, but the indictment was dismissed due to insufficient evidence.¹⁴⁸ The Argentine Court's investigation into Villa's murders and tortures are still ongoing.¹⁴⁹ While the progress in Villa's case should not be minimized, it is worth noting that Villa is one of many named defendants in the Argentine case, and the only one to face a judge in the fourteen years since the complaint was filed.

So, while Argentina is a suitable venue for Franco-era victims to file their criminal complaint against Franco-era officials, the Pinochet framework is insufficient here to see the case through to a trial for all named defendants. The Pinochet framework requires and depends on international cooperation. While universal jurisdiction allows extraterritorial states to open criminal investigations and prosecute, the defendant must be extradited to the prosecuting state. The Argentine case differs from the Pinochet case because the extraditing party is not a third party such as the UK; Spain is home to the accused and has taken affirmative steps on the domestic front to protect the accused from criminal liability.¹⁵⁰ The incentive to cooperate with international authorities is higher for a third party (like the UK) than for the home country of the party arrested (like Spain) because participating in the

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ TRIAL INTERNATIONAL, *UNIVERSAL JURISDICTION ANNUAL REVIEW 1920* (2023).

¹⁴⁹ *Id.*

¹⁵⁰ See Garcia, *supra* note 16, at 3 ("It is not easy to understand why Spanish judges are not prosecuting them if they took place in Spain.").

prosecution of the party arrested holds less consequence for a third party. Ironically, Spain's eagerness to prosecute human rights violations in the Pinochet case has not translated to cooperation with Argentina's proceedings against Spain.¹⁵¹

3. *The Time-Sensitivity of the Lawsuit*

In addition to the Spanish government's non-cooperation with the Argentine lawsuit, time presents an enormous barrier.¹⁵² Franco died in 1975.¹⁵³ There is a rush to execute proceedings in the Argentine case because victims and perpetrators are dying.¹⁵⁴ Many relatives of Franco-era victims were party to the suit.¹⁵⁵ Plaintiff Cristina Serrano joined the lawsuit on behalf of her grandfather, who was imprisoned and tortured in the 1940s for having left-wing views.¹⁵⁶ While victims or relatives of victims may be able to sustain the lawsuit, perpetrators are nonetheless dying.¹⁵⁷ Spain's tactics in denying extradition warrants and its refusal to comply with the demands of the Argentine lawsuit have delayed the proceedings for fourteen years thus far and are likely to delay proceedings for the foreseeable future. This delay ultimately makes it less likely that victims will see their offenders face the consequences of their actions. So, using the Pinochet framework as the benchmark for success, its application in the Argentine case shows that the lawsuit is unlikely to succeed in holding Franco-era officials legally accountable for their human rights violations.

¹⁵¹ See *The Pinochet Precedent*, *supra* note 35; see also Garcia, *supra* note 16, at 10.

¹⁵² Garcia, *supra* note 16, at 10.

¹⁵³ Henry Giniger, *Franco Is Dead in Madrid* at 82, N.Y. TIMES (Nov. 20, 1975), <https://www.nytimes.com/1975/11/20/archives/new-jersey-pages-franco-is-dead-in-madrid-at-82-juan-carlos-to-take.html> [<https://perma.cc/6ARJ-JXUS>].

¹⁵⁴ Garcia, *supra* note 16, at 10.

¹⁵⁵ Sonya Dowsett & Emma Pinedo, *Spaniards seek justice in Argentina for Franco-era crimes*, REUTERS (Sept. 26, 2013, 12:40 PM), <https://jp.reuters.com/article/us-spain-franco-idINBRE98P0SL20130926> [<https://perma.cc/5MB8-YH8T>].

¹⁵⁶ *Id.*

¹⁵⁷ See Almudena Carracedo, *No more silence: Franco's victims raise their voices*, THE GUARDIAN (Oct. 20, 2018), <https://www.theguardian.com/film/2018/oct/20/no-more-silence-my-mission-to-let-franco-victims-be-heard> [<https://perma.cc/XGR5-KMAK>].

C. PRESSURE ON THE SPANISH GOVERNMENT TO ENACT DOMESTIC
POLICY CHANGE

Despite the Argentine lawsuit's unlikely chances of seeing through its intended goal of trying Franco-era officials, the lawsuit produced other outcomes that may succeed in achieving justice for victims. Since the lawsuit commenced, Spain has been forced to tackle the issue of amnesty for Francoists on the domestic front. The lawsuit amplified public opinion, forced in-depth legislation, and led much of the political and judicial community to question the Pact of Forgetting that has long pervaded the nation's conscience. This Part explores the ways that the Argentine lawsuit has produced outcomes on Spain's domestic front.

1. *Public Opinion on the Matter of Amnesty for Francoist Officials*

Even if the Argentine lawsuit is unable to provide victims a legal remedy, the visibility of the lawsuit has largely impacted public opinion of the 1977 Amnesty Act. In the years since Judge Servini de Cubría initiated the lawsuit, legislators have presented motions of support for the lawsuit to nearly all representative bodies in Spain.¹⁵⁸ Public debates were and still are held on the issue, and political officers have been held accountable for their perspectives.¹⁵⁹ The public nature of the Spanish government's response to the lawsuit has brought about a reckoning within Spain that was previously dormant and suppressed. The lawsuit has publicly called into question the Franco regime's long-recognized impunity. Even though the Spanish government has thus far not cooperated with the lawsuit, the general public is not shying away from discussing the issue of impunity.

Likewise, the lawsuit has forced the international community to pick a side on the matter.¹⁶⁰ Since the lawsuit commenced, several international human rights organizations have traveled to Spain, compiled reports, made recommendations, and organized campaigns denouncing Spain's conduct in violating its international obligations to cooperate with the extradition requests.¹⁶¹ Several UN working groups have issued reports requesting the end of impunity and promoting truth, justice, and reparation

¹⁵⁸ *Id.* at 4.

¹⁵⁹ *See id.*

¹⁶⁰ *See id.*

¹⁶¹ *See* Dowsett & Pinedo, *supra* note 155.

in Spain.¹⁶² Amnesty International has launched three separate campaigns since the lawsuit commenced denouncing Spain and accusing it of complicity with its past crimes against humanity.¹⁶³ Suffice to say that the international community has doubled down on its commitment to the end of amnesty since the lawsuit was opened.

The Argentine lawsuit, regardless of its lack of success legally, has led to a joint effort by domestic and international forces seeking to end the impunity of the Franco regime. Domestic and international leaders can and should continue to push Spain to cooperate with the Argentine court. But, if Spain does continue its noncooperation and obstruction efforts, the lawsuit's persuasive influence alone may suffice to force domestic policy change.

2. *The Possible Diverse Remedies Resulting from Domestic Policy Initiatives*

There is no single understanding of what it would mean for Franco-era victims to experience a legal or political victory. As is the case with any crime, the wishes of the victims' wishes may vary significantly. The variety of remedies sought in this case are particularly pronounced because the period of crime in question spans thirty-nine years, from the start of the Spanish Civil War to Franco's death.¹⁶⁴

Many victims want to have their torturers or their family member's torturers tried in a court.¹⁶⁵ Others want to know where their loved ones were buried so that they can exhume the graves and give them a proper burial.¹⁶⁶ Many victims simply seek information—what happened to their stolen infants, what were the circumstances of the crimes committed against them or a loved one.¹⁶⁷ This is all to say that there is no one right course of action to achieve justice for Franco-era victims because there is no one right meaning of justice.

While the Argentine lawsuit can provide certain remedies for victims, courts are more limited than legislative policy in the breadth of remedies they can provide victims. The Argentine lawsuit and Judge Servini de Cubría have tried to respond to the varying wishes of the

¹⁶² *Id.*

¹⁶³ Carracedo, *supra* note 157.

¹⁶⁴ *See id.*

¹⁶⁵ *Id.* at 2.

¹⁶⁶ *Id.*

¹⁶⁷ *See id.*

victims.¹⁶⁸ For example, for those victims who wanted information rather than prosecution, the pre-trial investigation conducted largely satisfied this need.¹⁶⁹ Victims of Martin Villa who wanted to see him testify in court achieved that through his in-court testimony.¹⁷⁰ And while these remedies should not be undermined, it is important to recognize that they show that a court is limited in the ways it can respond to the wishes of victims. Courts are not legislative bodies and therefore only have certain remedies available to them—for example, investigation, trial, damages, and punitive sentencing. So, victims who seek a broader array of remedies may be better remediated by more sweeping legislation.

The power of the Argentine lawsuit lies in the ways it has spurred Spain to enact domestic legislation aimed at the issue. Spain's own potential law, unlike a legal outcome, could address a multitude of issues. In addition to the breadth of issues policy can address, it also has greater strength and legitimacy because Spain would enact it itself, not a foreign court. Given Spain's current unwillingness to cooperate with international norms and requirements, it is more likely that Spain will adhere to its own legislation.

3. *The Spanish Government's Domestic Legislation Supporting Franco-era Victims*

Spain's domestic legislation enacted since the Argentine lawsuit's filing is promising for Franco-era victims looking for justice. Spain's lack of cooperation with the Argentine lawsuit prevents the universal jurisdiction framework from effectively seeing the case through from start to finish. From a first glance, the lack of a trial may appear as detrimental to Franco's victims. But the power of the Argentine lawsuit should not be measured by its purely "legal" achievements. Instead, the lawsuit's power should be measured by the impact it has on the international community more generally and the impact it has had on Spain's domestic policy more specifically. Spain's failure to cooperate with international obligations may indicate some failure on its end to recognize and take accountability for the grave human atrocities committed by the Franco regime. However, failure to cooperate internationally does not necessarily indicate hostility toward the victims or their cause.

¹⁶⁸ See *id.*

¹⁶⁹ *Id.*; see also Dowsett & Pinedo, *supra* note 155.

¹⁷⁰ Keeley & Otaola, *supra* note 101.

Although Spanish domestic law gives Franco-era officials impunity for their crimes, since the Argentine case was opened the Spanish government has sought to, at least to some degree, recognize and repair harm endured by Franco victims.¹⁷¹ In 2007, the Spanish Parliament passed law 52/2007, the Historical Memory Law.¹⁷² The law gives rights to the victims and descendants of victims of the Civil War and formally condemns the Franco regime.¹⁷³ The law requires public administrations to remove fascist symbols and monuments from the country.¹⁷⁴ Relatedly, the Historical Memory Law set out measures to rename streets that were at the time, named after members of the Franco regime.¹⁷⁵ Additionally, the law requires the exhumation of the mass gravesites of roughly 114,000 victims, attempting to bring some measure of closure to families of forcibly disappeared victims.¹⁷⁶ While the law attempted some form of justice, some people criticized it as not going far enough and others criticized it as going too far.¹⁷⁷

In 2022, the Spanish Parliament passed law 20/2022, the law of Democratic Memory.¹⁷⁸ The Democratic Memory Law establishes various policies regarding the Franco-era and its remembrance. The law ranges from mandating the teaching of the dictatorship in Spanish schools to banning the existence of groups who applaud Franco and his regime.¹⁷⁹ Importantly, during the amendment process for the Democratic Memory Law, the two parties that make up the coalition government in Spain, the Socialist Party (PSOE) and Unidas Podemos, filed an amendment that forces Spain to reinterpret the Amnesty Law.¹⁸⁰ The amendment declared

¹⁷¹ Brooks, *supra* note 107.

¹⁷² Ley 52/2007, de 16 de diciembre por la que se reconocen y amplían derechos y se establecen medidas en favor de quienes padecieron persecución o violencia durante la guerra civil y la dictadura (B.O.E. 2007, 310) [Law 52/2007, Dec. 16, for the recognition and amplification of rights and establishing of measures for those who suffered persecution or violation during the Civil War or dictatorship (Official Bulletin of the State, 2007 no. 310)] (Spain).

¹⁷³ *See id.*

¹⁷⁴ *Id.* at 8.

¹⁷⁵ Brooks, *supra* note 107.

¹⁷⁶ *See id.*

¹⁷⁷ *See id.*

¹⁷⁸ Ley 20/2022, de 19 de octubre, de Memoria Democrática (B.O.E. 2022, 252) [Law 20/2022, Oct. 19, of Democratic Memory (Official Bulletin of the State, 2022 no. 252)] (Spain).

¹⁷⁹ *Id.*

¹⁸⁰ Carlos E. Cué, *Spanish Government Makes Legal Move That Could See Franco-era Crimes Prosecuted*, EL PAÍS (Nov. 17, 2021, 11:09 AM), <https://english.elpais.com/spain/2021-11-17/spanish-government-makes-legal-move-that-could-see-franco-era-crimes-prosecuted.html> [https://perma.cc/69TH-983M].

that all laws, including the amnesty law, must be interpreted in accordance with international law and therefore certain crimes—war crimes, crimes against humanity, genocide, and torture—can neither be subject to amnesty nor a statute of limitations.¹⁸¹ This amendment passed and signaled a huge victory for those who seek re-imagination and revocation of the amnesty law.¹⁸²

Confusingly, PSOE and Unidas Podemas disagree on the interpretation of the amendment and whether it would make prosecution of Franco-era crimes possible.¹⁸³ PSOE argued that the amendment was only meant to reaffirm Spain's intention to comply with international law.¹⁸⁴ It said the amendment had no effect on whether victims can seek prosecution of their abusers.¹⁸⁵ On the other hand, Unidas Podemas understood the amendment to allow trials for Franco-era crimes in Spain, which is to say that they understood the amendment as nullifying the Amnesty Act and its bar on prosecution.¹⁸⁶ Unidas Podemas' understanding would functionally void the Amnesty Act by interpreting the amendment this way. This disagreement is evidence of a dramatic shift in Spain's view of the Amnesty Act and even if it doesn't revoke the Act, the amendment does make the Amnesty Act weaker in effect.

The Democratic Memory Law is not perfect. While people disagree as to the law's actual effect on the Amnesty Act, it has not proven to be an official repeal of the act. It is therefore limited in what it can achieve because the prosecution of Franco-era officials is still not possible. But the law has still had a massive impact on victims and families of Franco officials.¹⁸⁷ The law provided the victims with the avenue to find family members buried in unmarked graves, obtain information on what happened to their friends and family, and to finally feel that Spain recognizes the harm they suffered.¹⁸⁸ Were the Argentine lawsuit to succeed, it would have massive effects for Spanish victims—it would

¹⁸¹ *Id.*

¹⁸² Ley 20/2022, de 19 de octubre, de Memoria Democrática (B.O.E. 2022, 252) [Law 20/2022, Oct. 19, of Democratic Memory (Off Bulletin of the State, 2022 no. 252)] (Spain).

¹⁸³ Marc Gancedo, *Spain: Will Amending the Democratic Memory Draft Law End Impunity?*, GENEVA INT'L CTR. FOR JUST. (Nov. 25, 2021), <https://www.gicj.org/positions-opinions/gicj-positions-and-opinions/2303-spain-will-amending-the-democratic-memory-draft-law-end-impunity> [https://perma.cc/8L2Z-RVVB].

¹⁸⁴ *Id.*

¹⁸⁵ *See id.*

¹⁸⁶ *Id.*

¹⁸⁷ Brooks, *supra* note 107.

¹⁸⁸ *Id.*

allow those victims to see their perpetrators punished. However, even in its unfinished state, the lawsuit has had a massive impact on Spain's domestic policy. The Spanish government has addressed a breadth of remedies and restorative measures for victims through the laws it passed, as exemplified by the Democratic Memory law.

4. *The Possibility of Spain's Own Repeal of the 1977 Amnesty Act*

While the Argentine case may not produce a "legal" victory for victims of Franco, the case has sparked policy change at a domestic level. Importantly, however, the legislation that forced the Argentine case and has presented challenges for Franco victims for nearly fifty years, the 1977 Amnesty Law, remains in effect.¹⁸⁹ Organizations such as Human Rights Watch and Amnesty International called for repeal and investigation of the past before the Argentine lawsuit was opened.¹⁹⁰ Those calls for repeal have continued since the lawsuit began and more groups, such as the United Nations, have joined in calling for repeal.¹⁹¹ Though the Act remains in effect fourteen years after the filing of the Argentine lawsuit, the opportunities for repeal are more likely because the lawsuit has been opened.

As recent as September 2023, a victim tortured by Franco's regime was set to testify in a Spanish court before a judge.¹⁹² Fifty years after the torture, plaintiff Julio Pacheco Yepes filed suit in Madrid court and in May 2023, Judge Ana Maria Iguacel accepted the case, reasoning that it contained possible evidence of crimes against humanity and torture.¹⁹³ This case represents the first time that a Spanish court has opened a case against Franco since his death in 1975.¹⁹⁴ Judge Iguacel plans to hear testimony from victims and also to summon the alleged

¹⁸⁹ *Spain's Franco-era Torture Victim to Testify in Court for First Time*, AL JAZEERA (Sept. 15, 2023), <https://www.aljazeera.com/news/2023/9/15/spains-franco-era-torture-victim-to-testify-in-court-for-first-time> [https://perma.cc/Q46A-T6B4].

¹⁹⁰ *Spain: End Amnesty for Franco Era Atrocities*, HUM. RTS. WATCH (Mar. 19, 2010, 11:31 AM), <https://www.hrw.org/news/2010/03/19/spain-end-amnesty-franco-era-atrocities> [https://perma.cc/VZ8V-J5ZE]; see also *Spain: No Global Exception When Investigating the Crimes of the Past*, AMNESTY INT'L (Nov. 13, 2008), <https://www.amnesty.org/en/latest/press-release/2008/11/spain-no-global-exception-when-investigating-crimes-past-20081113/> [https://perma.cc/C6BJ-6Z7Z].

¹⁹¹ *U.N. Tells Spain to Revoke Franco-era Amnesty Law*, *supra* note 85.

¹⁹² *Spain's Franco-Era Torture Victim to Testify in Court for First Time*, *supra* note 189.

¹⁹³ *Id.*

¹⁹⁴ See *id.*

torturers for questioning.¹⁹⁵ Based on the testimony as well as documents from the National Archives, she will either dismiss the case or send it to trial.¹⁹⁶ As of August 2024 there has been no update on the testimony or case before Judge Iguacel.

Shortly after opening this case, the Prosecutor's Office of Barcelona argued in favor of accepting a criminal complaint filed by another victim of the Franco regime, Carlos Vallejo, who was tortured in the cell of a police station.¹⁹⁷ However, the Barcelona Examining Court ruled the lawsuit was invalid because the alleged crimes are subject to amnesty.¹⁹⁸ The victim and Barcelona Prosecutor's office appealed the ruling.¹⁹⁹ There is no update on this case's proceedings.

The diverging rulings of the Madrid and Barcelona courts demonstrate the diverging opinions of Spaniards that have dominated the discourse around the Amnesty Act for years. However, the Madrid case signifies a massive shift in legal practice since the Amnesty Act's adoption. While it is unclear at this stage whether the Madrid judge will seek to repeal the law, or whether that is within her power, a judgment against the Franco regime would effectively make the Amnesty Act void. So, even though the future of the Argentine case is unknown in terms of the remedy it can provide, it is important that the lawsuit spurred a trajectory shift in public opinion and public policy. Spain is moving in the direction of nullifying its own act, and the Argentine lawsuit certainly helped influence that turn of events.

III. CONCLUSION

It has been forty-seven years since the Amnesty Act first passed in Spain.²⁰⁰ Those forty-seven years have left Franco-era victims with no legal mechanism to hold their abusers accountable. Many Franco-era victims and abusers alike have passed away in those forty-seven years. The Argentine lawsuit offered victims a glimmer of hope in 2013 when it

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ Adrián Ajenjo, *The Revival of Criminal Prosecution of Francoism Crimes in Spain: A New Opportunity for Hope?*, OPINIO JURIS (Nov. 11, 2023), <https://opiniojuris.org/2023/11/23/the-revival-of-criminal-prosecution-of-francoism-crimes-in-spain-a-new-opportunity-for-hope/> [<https://perma.cc/PSY4-8SZL>].

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ Garcia, *supra* note 16, at 2.

was first opened. Many victims hoped that their abusers would be criminally convicted. For others, the opportunity to be heard by a court was justice enough. To date, the direction of the Argentine lawsuit is unknown. The lawsuit is not over, and investigations are apparently ongoing, but the Spanish government's failure to comply with the court's directives presents challenges to investigating and questioning the accused. Universal jurisdiction is a promising legal tool that has led to the effective prosecution of many human rights abusers who otherwise would have never faced the consequences of their actions.²⁰¹ But universal jurisdiction depends on international cooperation, and, in the Argentine case, the process requires Spain's cooperation with the proceedings. Therefore, if Spain's noncooperation continues as it has the past fourteen years, the Argentine lawsuit may not produce any judicially enforceable remedies as ordered by a court of law.

On the other hand, the Spanish government has demonstrated more eagerness to address the concerns of Franco-era victims on the domestic front, rather than allow a foreign court to prosecute. While conviction by a foreign court may not be a likely outcome, the Spanish government has created and can continue to create diverse remedial policies aimed at achieving justice for Franco-era victims. The Democratic Memory Act is just one example. While it is limited, it is more than what was in place prior to the opening of the lawsuit. Further, the lawsuit has changed the political climate in Spain, forcing leaders and potential leaders to address the issue of amnesty head-on, rather than committing to the Pact of Forgetting that has long dominated the public conscience. The Argentine lawsuit is not over, and its progress should be carefully observed by those who want to see Franco-era victims hold their abusers legally accountable for their actions, and likewise by those who maintain that universal jurisdiction is a powerful legal tool to achieve international justice. While the lawsuit itself may not yield success, it has pressured domestic policy change in Spain and may lead to some closure for victims.

²⁰¹ *Basic Facts on Universal Jurisdiction*, *supra* note 21.