

Overview of the Argentine Lawsuit against the Crimes of the Franco Regime: Outcomes and Challenges

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ABSTRACT

Ten years after the beginning of the Argentine lawsuit against the crimes of the Franco regime, this work provides a general overview of the proceeding, analyzing the legal grounds and the main outcomes and challenges of this universal jurisdiction prosecution. The lawsuit has provoked a noteworthy increase of the visibility, in Spain and internationally, of the crimes of the Franco regime and of the demands of the victims, becoming a topical issue. Likewise, there has been a significant intensification of the pressure on political parties and the judicial system to put an end to the impunity of these crimes. The Argentine proceeding has given recognition and credibility to the victims and their demands. Definitive steps have been made towards the achievement of many of them. This study examines as well how the beginning of criminal proceedings in Spain could promote and complement the development of the Argentine lawsuit.

Keywords: Human rights; Transitional justice; International criminal law; The argentine lawsuit; Franco-era crimes

INTRODUCTION

Franco's regime in Spain was one of the longest and most dreadful dictatorships of the twentieth century (1936-1977). The repression and terror policy implemented by the regime during the Spanish war [1], and the post-war period resulted in the deaths of more than 150.000 civilians outside of conflict zones [2]. Spain is currently ranked as the second country in the world in number of enforced disappearances, just behind Cambodia. More than 2.300 mass graves have been identified, of which only 400 have been exhumed [3]. Human rights abuses were widespread and systematic until the arrival of democracy in 1977. However, none of these crimes have ever been prosecuted, remaining in absolute immunity.

After Franco's death in 1975, democracy returned to Spain through a transitional process that was praised and taken as a model for many years. But Spanish transition was grounded in the unspoken 'pacto del olvido' (pact of forgetting) agreed by the political elites, reflected in the still in force 1977 Amnesty Law, and resulting in a situation of complete impunity of previous human rights violations [4]. Even if in the last 20 years this pact

has started to be questioned and a policy of historical memory has been initiated, Spanish courts of justice have repeatedly refused to investigate and prosecute these crimes [5]. Given this judicial obstruction the victims could only resort to foreign courts to find justice, and in 2010 they filed a criminal complaint in Argentina, based on the principle of universal jurisdiction, starting the so called Argentine lawsuit against the crimes of the Franco regime.

Since the 1980s States have been using trials, among other transitional justice mechanisms, to address past human rights violations [6]. Foreign court prosecutions are playing a key role in this global trend towards individual accountability that has been called the justice cascade or revolution in accountability [7]. The Argentine lawsuit contributes in the actual debate of the political science and international law literature about the impact and desirability of prosecutions for individual criminal accountability for international crimes. The Argentine lawsuit is an example of universal jurisdiction prosecution capable of promoting the human rights situation in a foreign country, potentially diminishing violations of rights in the future. Even if it is an ongoing judicial proceeding, yet without sentences, the

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actual and potential outcomes of the proceedings are of significant relevance for multiple research fields, though, to date, it has received scarce attention from the academia.

This work intends to provide a general overview of the Argentine lawsuit against the crimes of Franco regime, pointing at some elements that could be of interest for future transitional justice studies. First, the outlines of the proceeding, the context, and legal grounds will be explained, together with an analysis of the objectives and prospects that motivated the filing of the criminal complaint in 2010. Then, the outcomes of the proceeding will be analysed, paying special attention to those regarding the victims. Finally, the current and future challenges faced by Argentine lawsuit are examined, focusing on the issue of concurrent jurisdictions and the possibility and desirability of potential criminal proceedings in Spain coexisting with the Argentinean process.

General overview of the argentine lawsuit

What is the Argentine lawsuit?

The Argentine lawsuit refers to the judicial proceeding that investigates in Argentina the crimes committed in Spain between 17 July 1936, beginning of the coup d'état that triggered the Spanish War, and 15 June 1977, date of celebration of the first democratic elections [8].

In October 2008 Judge Baltasar Garzón started an investigation in the Instruction Court № 5 of the Spanish National Court on the alleged crimes against humanity committed in Spain between 1936 and 1952 [9]. However, less than two months after, the Criminal Chamber of the Spanish National Court blocked the investigation considering that the judge had no powers to investigate these facts [10]. Following this judicial obstruction, and since territorial courts having jurisdiction over the crimes at that time were inactive, two victim's relatives of Franco's regime travelled to Argentina seeking justice that was being denied in Spain. On 14 April 2010 they filed a criminal complaint before the Argentine courts. Since then, the number of victims joining the proceeding has never stopped growing. To date, more than 330 complaints have been filed on behalf of numerous victims, and countless claims have been presented through Argentine Consulates in different countries.

The facts under investigation are, among others: forced disappearances, torture, executions carried out without trial or after summary trials before courts-martial, prison sentences that often caused death due to imprisonment conditions, slave labour, various sexual crimes, infants-stealing and appropriation of identities, different forms of mistreatment and repression of children in preventorios and other quasi prison institutions, exile and permissiveness and complicity of the extermination of many exiled by the Nazi regime [11].

According to international criminal law, these acts constitute crimes against humanity if they are committed as part of a widespread or systematic attack against a civilian population. To clarify the definition of the crimes of the Franco regime as crimes against humanity, it is relevant to make some explanations. The repeated or continuous commission of the crimes, following a policy or preconceived plan, constitutes a

systematic attack [12]. The systematic character of such attack does not imply the existence of a warlike conflict [13], and the civilian population object of the attack can be a group identified by its political orientation, religion, ethnicity, or gender among others [14].

Therefore, the Argentine courts understand that the crimes described above occurred in the context of 'a systematic, generalized, deliberate and organized plan to terrorise the Spaniards who supported a representative form of government, through the physical elimination of the most representative proponents' [15].

The crimes described could as well constitute genocide if they intended the partial or total destruction of a population group. Doubts about whether the crimes of the Franco regime should be considered as genocide or not, come from a debate present in the international community. It is contentious the inclusion of groups defined by their political orientation within the groups protected by this criminal classification. It exist jurisprudence, doctrine and legislation supporting both opinions, but the option excluding political groups remains predominant [16].

The legal qualification of the crimes investigated by the Argentine lawsuit is 'genocide and/or crimes against humanity'. The formulation 'and/or' responds to the abovementioned debate that was as well present in Argentina when the criminal complaint was filed. This formula allowed the judge to postpone the definitive legal qualification of the acts to a later stage of the proceedings. The judge hearing the case is María Servini de Cubría, head of the Federal Criminal Court №1 of Buenos Aires, and at the time of delivery of this work the case is at the pre-trial phase.

Why Argentina?

The reasons leading the victims to go to Argentina are of numerous and different nature. Firstly, universal jurisdiction is contemplated in Argentine legislation enabling this kind of proceedings. In addition, the courts of this country have a broad experience and knowledge regarding the prosecution of serious human rights violations. Currently Argentinian courts are prosecuting more than 900 people for the crimes committed in the country during the last military dictatorship.

Similarly, the shared experience of massive violations of human rights, the round trips and the dynamics of reciprocity in the fight for human rights that both countries have maintained over the last century, were decisive elements to choose Argentina. During the dark years both countries have lived in their recent history, they have served each other as shelter. Argentina provided protection to countless Spanish exiles during the Franco regime, and in turn, many Argentinians found protection in Spain during the dictatorship of the Military Junta. In fact, several lawyers of the Argentine lawsuit are exiles that found refuge in Spain.

Bringing criminal actions in Argentina intended to complete a round trip against impunity, implementing this idea of circular justice. The judicial proceeding before Spanish courts against the crimes of the Argentinian dictatorship concluded with a heavy prison sentence against former military Adolfo Scilingo

for crimes against humanity. This proceeding, based as well on the principle of universal jurisdiction, served as a driving force in the opening of numerous proceedings in that country, thus bringing an end to existing impunity [17]. The Argentine lawsuit aims to complete this circular justice process, serving to boost the opening of criminal proceedings against the crimes of the Franco regime in Spain.

Can Argentina prosecute these crimes?

The crimes committed by Francoism can be classified as international crimes, meaning that, due to their extreme gravity, not only direct victims are affected but the entire international community. Therefore, the fight against the impunity of these crimes is not limited to the country where they were committed [18]. Article 118 of the Argentine Constitution implicitly admits universal jurisdiction and has been interpreted by the doctrine and the jurisprudence as recognizing the capacity of Argentine courts to prosecute international crimes even when they are not committed within its borders [19].

The aforementioned article 118 expressly refers to crimes against *ius gentium*, 'law of nations', which facilitates Argentine courts to prosecute crimes that at the time of commission were regulated only by customary international law. It includes offenses prohibited by international law but not yet included in treaties, such as the international crimes committed during the Spanish War and the first years of the Franco regime.

Regarding compliance with the non bis in idem principle, the issue will be further analysed below in relation with concurrent jurisdictions. Suffice it to say here that since Spain has never prosecuted anyone for these crimes, investigations in Argentina would fully respect the principle. Finally, concerning the interest of Argentina in prosecuting these crimes committed in Spain, Messuti refers to the principle of coherence [20]. Since Argentina is judging international crimes committed on its own territory that affect the entire international community due to their extreme gravity, it would not be coherent to reject the prosecution of similar crimes that occurred in another State and that affect Argentina as well as a member of the international community. In addition, this kind of judicial proceeding can have a positive impact on the image of the country at the international level since it shows a great commitment to the protection of human rights.

Expectations and objectives of the Argentine lawsuit

The expectations of the victims of the Franco regime when they travelled to Argentina were very different depending on the type of crime suffered. Some wanted their torturers to be tried, others wanted to know the fate and whereabouts of their loved ones, to unveil the identity of the murderers and clarify the circumstances of the crimes. Others wanted to locate the mass grave where to find them, to exhume the remains and bury them in dignity. Some intended to know what had happened with their stolen infants; others wanted the annulment of their sentences dictated by Franco's tribunals.

The expectations and demands of the victims were as different and numerous as the forms and typologies of the crimes committed during the Franco regime. But all of them, like the

hundreds of plaintiffs who have joined the lawsuit over the years, shared a larger and more ambitious goal that embraces all these particular objectives: to put an end to the impunity of Franco's crimes, to obtain justice.

The fight against impunity goes far beyond the simple punishment of the perpetrators of the crimes and is much broader, deeper, and more difficult to achieve. It is directly linked to justice. Indeed, the international community understands that the fight against impunity is based on four principles: a) the State's obligation to investigate, prosecute and punish the alleged perpetrators of serious human rights violations; b) the right of the victims to know the truth about the abuses suffered; c) the right to obtain reparation; and d) the obligation of the State to prevent such crimes from happening again in the future [21].

When the victims started the proceeding in 2010, they pursued much more than the punishment of the criminals. Regardless of their own criminal complaint related to the specific crime suffered, the victims wanted a judicial investigation of the crimes, to finally obtain answers and to make public what happened during those years, but as well to be heard, repaired and recognized as victims. This broad conception of impunity is useful to ensure a comprehensive analysis of the outcomes of the Argentinean lawsuit expanding the focus beyond the punishment of the perpetrators.

Brief chronology of the Argentine lawsuit

On 14 April 2010, several relatives of victims of the Franco regime filed a criminal complaint before the Federal Criminal Court N° 1 of Buenos Aires. At first, the judge dismissed the complaint considering that the facts were already being investigated in Spain. However, the appeals tribunal required the judge to accept the complaint, to open criminal proceedings and to start the investigations.

In September 2013 Judge Servini issued via Interpol different arrest and extradition warrants against four well-known Francoist officials, accused of committing torture during the last years of the dictatorship. However, the Spanish National Court refused to implement the warrants, as well as to take any precautionary measures against the alleged torturers.

In April of the following year two of the accused, including the well-known torturer Billy el Niño, were called to appear in court. Though, at the end of the month, at the request of the Prosecutor's Office, the extraditions were as well denied. It was argued that the tortures committed were isolated crimes implying that they could not be considered as crimes against humanity and, therefore, deeming them to be time-barred.

One month later, Judge Servini visited Spain and travelled during two weeks throughout the territory gathering the testimony of different victims, and even took statements from two of them at the Spanish National Court together with Spanish Judge Andreu.

At the end of 2014, Judge Servini issued several arrest and extradition warrants against 20 senior officials of the Franco regime including Rodolfo Martín Villa, former Minister of Labour (1975-1976) and Internal Affairs (1976-1979), and José

Utrera Molina, former Minister Secretary General of the Movement (1974-1975), among other prominent politicians and judges of the dictatorship [22]. The extraditions were denied, this time by the Council of Ministers of the Spanish Government [23].

Given the refusal of Spain to extradite any accused, in 2016 the Argentine judge requested to travel again to Spain to interrogate them. After months of silence, followed by a multitude of procedural obstacles, the Office of the Prosecutor-General issued an instruction to all Spanish prosecutors asking the suspension of all statement taking that had been programmed. At the date of delivery of this work, Judge Servini is still trying to arrange statements taking from defendants in Spanish courts, for now unsuccessfully.

It is worth highlighting the particular case of one of the most significant figures of Spanish transition, the above-mentioned former Minister of Labour and Internal Affairs Rodolfo Martín Villa. Charged with crimes against humanity for the massacre of the 3 March 1976 in Vitoria, and 6 other deaths, he declared before Judge Servini in the Argentinean Embassy in Madrid the 3 September 2020. It was the first time the Argentinean Judge took declaration of an accused, and this procedural step was of significant importance. According to Argentinean law, the statement taking of an accused is necessary to initiate trial proceedings. After ten years of being in the pre-trial phase, the declaration of Martín Villa may allow Judge Servini to advance in the proceedings and open the trial stage.

General outcomes of the argentine lawsuit

Visibility and topicality of the crimes of the Franco regime

The existence of a judicial proceeding in Argentina investigating such transcendent events in Spanish history, and the charges of crimes against humanity against key political personalities in the country's transition, have provoked an increase of social awareness concerning the gravity of these events. If there is a criminal proceeding it means, at least, that there is evidence of the commission of crimes, and if so, it is not easy to understand why Spanish judges are not prosecuting them if they took place in Spain

The Argentine lawsuit has reinforced and increased the presence of the crimes of Francoism in the Spanish political agenda, making of them a topical subject. It has contributed to make the victims visible to society and to raise awareness by making public the problem of impunity. Since the opening of the proceeding, the Argentine lawsuit has frequently appeared in newspapers, television and radios. The extradition orders against well-known politicians and senior officials of the Franco regime, the Timoteo Mendieta's case, or the visits of the Argentinian judge and various United Nations agencies to Spain, have received particular attention from the media.

In turn, these arrest and extradition warrants against former ministers and senior officials, and the acquired visibility of thousands of stolen infants cases, among others issues, have showed to Spanish society that the crimes of Francoism are not simply a matter of the past; on the contrary, they reach and significantly affect in many ways the present.

The award-winning documentary *The Silence of Others* has played a key role since its released in 2018 providing unprecedented topicality and visibility to the crimes of Francoism. The film tells the story of certain victims and their struggle in the Argentine lawsuit, from the beginnings in 2010 until today, denouncing the impunity of the crimes of Francoism in Spain. Produced by Pedro Almodovar, and directed by Almudena Carracedo and Robert Bahar, the documentary has won awards as the Goya or the Berlinale, among many others. One million people watched the movie when broadcasted in Spanish public television, and many more in the cinemas of more than 30 countries around the world. The impact of the documentary is still to be determined, but it is undeniable that it significantly raised awareness about the actual situation of human rights in Spain, impunity and the struggle of the victims of the Franco regime. Moreover, after the release of the movie, many victims have decided to join the Argentine lawsuit.

Pressure on political parties and the judiciary

Together with the judiciary, political parties are the main factors that could put an end to the current situation of impunity. The Argentine lawsuit has placed political parties under a significant pressure, forcing them to publicly choose between their traditional position upholding the official discourse about Spanish transition, or supporting the lawsuit and the prosecution of human rights violations. The criminal proceeding has forced them to take a stand and make public their position on a topic that until recently was not subject to public debate. For some parties this is particularly compromising since maintaining their traditional position means defending arguments that politically and legally are difficult to maintain today. Taking a stand on this issue means showing to public opinion the confrontation between historical agreements, originated in the Spanish transition, and their commitment to human rights.

The abovementioned declaration of former Minister Martín Villa before Judge Servini in September 2020 showed this support of traditional political elites to the official discourse about Spanish transition. Among other relevant politicians and public figures, the last four former Spanish Prime Ministers sent to the Argentinean Judge letters supporting Martín Villa [24].

In the last few years, motions of support to the Argentine lawsuit were presented in almost all representative bodies of Spain. The crimes of the Franco regime were the object of public debates in all of them, forcing political parties to repeatedly show their position on the issue. Regional parliaments such as those of Andalusia, Catalonia, the Basque Country or Asturias and more than 120 municipalities and provincial assemblies have approved these motions of support, calling for an end to impunity [25].

The Argentine lawsuit has also forced the Spanish government to make public its position, having to decide on the extradition of alleged perpetrators of crimes against humanity. However, the government denied the aforementioned extraditions against the criteria of numerous international bodies and human rights organizations [26].

In fact, the pressure has not been enough yet to substantially change the situation. Some significant steps have been taken in the last 15 years, as the 2007 Historical Memory Law [27], some analogous regional laws, or the exhumation and removal of Franco's remains from the Valley of the fallen memorial in 2019. However, these measures, widely considered insufficient by the victims, mainly pursued symbolical results rather than effective measures against impunity [28]. In fact, the main political parties continue today to hinder specific measures regarding criminal prosecutions, as could be the repeal or modification of the 1977 Amnesty Law.

In the autumn of 2020 the Spanish Parliament will debate a new Historical Memory Law presented by the government including some relevant provisions regarding enforced disappearances or the creation of a special prosecutor's office to investigate the crimes of Francoism. However, the effectiveness of these measures raises questions since the draft bill does not include any substantial change concerning the substantive laws that so far have impeded criminal prosecutions in Spain, as the 1977 Amnesty Law [29].

Regarding the judiciary, the proceeding in Argentina has forced numerous Spanish courts to repeatedly decide on the issue of the crimes of Francoism, revealing a significant lack of commitment to human rights and to their international obligations. Following different extradition orders, international arrest warrants and requests for judicial assistance, the Spanish National Court, regional courts, the State Prosecutor's Office and many public prosecutors have been forced to breach Interpol's arrest warrants, the Spain-Argentina extradition agreement and international laws in order to maintain the impunity of the crimes of the Francoism.

Spanish courts are not respecting numerous international obligations that the country has voluntarily undertaken. Without seeking to be exhaustive, they concern among others, the right of victims to an effective remedy and the right to truth, justice and reparation. Likewise, the courts are not fulfilling the obligation to criminally prosecute international crimes. Such obligation arises from different international treaties ratified by Spain concerning among others torture, forced disappearances or genocide. As an example, the Statute of the International Criminal Court establishes in its Preamble that 'it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes'.

The position of the judiciary is exemplified in the aforementioned refusal to extradite to Argentina some Francoist officials. It was claimed that the alleged tortures were isolated crimes and therefore could not be qualified as crimes against humanity, deeming them to be time-barred. Considering that these tortures did not happen in a context of generalized repression of the civil society and of democratic opposition shows an absolute ignorance of the situation in Spain during the dictatorship, or an express will to prevent the prosecution of the committed crimes [30]. Late Francoism, as the rest of the dictatorship, was characterized by the systematic use of violence and intimidation against democratic opponents carried out by the State [31].

Finally, the Argentine lawsuit has endorsed numerous local governments and individuals to bring criminal action against the crimes of Francoism before Spanish courts in order to complete the round trip against impunity that began with the filing of complaints in Argentina. The challenges of these new judicial initiatives will be addressed in a separate section.

International pressure

The Argentine lawsuit has played a key role in the unprecedented increase of pressure from the international community to force Spain to respect its international human rights obligations. In recent years reports, recommendations, campaigns and visits to Spain from different international organizations have frequently denounced the systematic violation of its international obligations, demanding its collaboration with the Argentinian courts and have requested the end of impunity. Without being exhaustive we can highlight the report of the United Nations Human Rights Committee (2015) [32], the reports of the Committee on Enforced Disappearances (2013) [33], and the Committee Against Torture (2015) [34], the observations of the United Nations Working Group on Enforced Disappearances (2013) [35], or the visits of the United Nations Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence (2014 and 2018).

Several Spanish authorities' decisions have been strongly criticized by the international community, such as, for example, the government resolution to deny the extradition of 17 Spanish citizens accused of serious human rights violation. The international community widely criticized it, considering that the government's arguments were 'lacking a legal basis, as they seem to ignore and contradict international norms and standards on human rights' [36]. In turn, the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence exhorted Spanish authorities to 'not postpone measures promoting justice, truth and reparation for victims of the violations of human rights committed during the Civil War and the Franco dictatorship' [37].

Numerous non-governmental organizations have also been very critical with the human rights situation in Spain. Amnesty International has launched different campaigns denouncing impunity (2016, 2017 and 2018) considering that 'Spain continues showing a lack of commitment with the victims of the Franco regime and the Civil War, allowing impunity and the abandonment of those who suffered the worst crimes' human rights organizations started to be used. The movement adopted in its discourse legal expressions and categories such as 'enforced disappearance' or 'crimes against humanity' among many others. However, it was within the context of the Argentine lawsuit that 'this interpretive framework has increased its presence and relevance', becoming widespread in the discourse of the victims of the Franco regime and its environment [38].

Human rights discourse

The Argentine lawsuit has extended and reinforced the use of the human rights discourse by social movements of recovery of the historical memory [39]. Already in the 2000s, during the first phases of the Francoism victims struggle, the specific

terminology of international human rights organisations started to be used [40]. The movement adopted in its discourse legal expressions and categories such as 'enforced disappearance' or 'crimes against humanity' among many others. However, it was within the context of the Argentine lawsuit that 'this interpretive framework has increased its presence and relevance' [41], becoming widespread in the discourse of the victims of the Franco regime and its environment.

This discourse change is of crucial importance. The language used by historical memory movements could lead to a lack of identification and even rejection from some social sectors. On the contrary, the language of human rights makes Francoism victims' demands more accessible, understandable and shared by the rest of society. This new discourse can create links and identification between the victims and the rest of society, facilitating the emergence of feelings of empathy and solidarity. Serious human rights violations are understood as affecting not only direct victims, but the entire society. Therefore, considering the crimes of the Franco regime as crimes against humanity is easing social support to criminal proceedings aiming to put an end to impunity.

The Argentine lawsuit and the use of the human rights discourse have facilitated the identification and homogenization of the victims of Franco regime with other victims of serious human rights violations that occurred elsewhere in the world. This has provided victims of Francoism an unprecedented recognition and visibility at the international level [42].

Outcomes regarding the victims

Legal recognition of the victims

One of the most important outcomes of the Argentine lawsuit has been the juridical recognition of the victims as such, and the acquisition of this legal status before the courts. Among the plurality of the complainants' objectives, the first and common goal of all of them was to be legally recognized as victims. Such recognition was essential to achieve any other objective. If this legal status had been denied, the access to the proceedings, and the possibility of fighting for their rights before the courts, would have been as well.

(i) The concept of victim

As Messuti explains, 'The concept of victim is broader than that of the perpetrator, because the damage resulting from the crime not only affects those who have suffered it directly, but also their immediate environment, their children, their parents, their spouses' [43]. Unlike culpability, the damage is transmitted to the descendants and, as the author recalls, in the Argentine lawsuit there are countless examples of families that have been stripped of all their property, and abandoned in misery after the death of the parents.

Generally, in domestic legislations the concept of victim is much more limited than in international instruments [44], but in international crimes cases, national courts should apply international norms or interpret internal laws according to international standards.

In the Argentine lawsuit, the issue of the breadth of the concept of victim was widely debated. At first, Judge Servini adopted a restricted notion. She denied the recognition of the victim legal status to a claimant, and therefore refused his request to be part of the proceedings arguing that he had no sufficient connection or kinship with a direct victim. However, the Court of Appeals revoked this decision, considering that 'It is necessary to interpret broadly the legal texts granting capacities or rights in the proceeding, including the power to file a criminal complaint' [45]. The Court applied a broad and inclusive concept of victim, adapted to the circumstances of the crime at stake:

It is not a minor fact that the events denounced by the appellant have occurred a long time ago (1936-37), a circumstance that acquires relevance to make more flexible the degree of kinship required when determining the offended party, especially taking into account that there is no evidence (...) of the existence of closer relatives [46].

Given the wide timeframe in which the crimes were committed and their diversity, the victims of the Franco era are very diverse. The acceptance of a broad concept of victim in the Argentine lawsuit has been of crucial importance and has permitted the proceedings to advance and reach the goals analyzed in this paper.

(ii) Victims in international criminal law

Criminal law's main and almost only actor of interest is the perpetrator of the crime. This branch of law serves to articulate the punitive power of the State, to which the victims give up their 'right' to punish the offender. But at the same time, criminal law limits the power of the State to punish, granting certain rights and guarantees to the criminal. This way, the victims are almost completely 'forgotten' in criminal codes [47].

However, when the crimes are committed by the State or under its protection, as it is normally the case in international crimes, this configuration is no longer valid. In such situations criminal law should, first and foremost, care for the victims and protect them. In fact, international criminal law has evolved in the last years in this direction, granting victims increasing importance and prominence [48].

It is important to point out that this paradigm shift also comes to solve a serious problem of access to justice. Since the criminal procedure focuses on the punishment of criminals, and since the recognition of the victim's legal status depends on the possibility of prosecuting the offender, justice is being denied to a majority of victims of international crimes. Since these crimes are committed by the State or under its protection, many years are usually needed before the political situation changes enough for organs of the State to be renewed and for them to stop protecting the criminals and decide to prosecute them. Thus, very often when criminal proceedings start, perpetrators have already died, are too old or cannot be identified.

From the first steps of the Argentine lawsuit, these international developments have become effective in the proceeding. In fact, Judge Servini decided to dismiss the firsts complaints arguing that only the Public Prosecutor's Office had the power to start

criminal proceedings and that she could not act on her own motion. The decision was appealed and the Federal Court of Appeals declared:

Far from being a mere procedural issue, it is linked to rights and personal guarantees protected by the National Constitution (...) of which the persons harmed by the crime cannot be deprived attributing the exclusive right of accusing to the Public Prosecutor [49].

The Chamber emphasized that this criteria is especially applicable for crimes against humanity, and complies with various international instruments that establish the obligation of States to guarantee the access of victims to adequate and effective remedies, and to reparation.

(iii) Consequences of the legal recognition of victims

A fundamental outcome of the Argentine lawsuit has been the legal recognition of victims, having remarkable consequences for both the victims and the litigation itself. This recognition has made possible for the victims to participate and to be lead actors of the judicial proceedings. It has allowed them to continue fighting for their rights, reaching new goals and advancing in the path of justice.

Being legally recognized as victims, appearing before the courts to be heard by judges and being a party in a judicial proceeding, is granting victims an essential social recognition. According to Foucault, in each society there are some mechanisms and instances that create the discourse of what is true or false: different institutions whose status or legitimacy allows them to create statements that will be accepted as the truth [50]. Each society has its regime of truth, its general politics of truth. In our society courts of justice enjoy such a status [51]. Thus 1.when judges grant victims with this legal status, they are providing juridical and institutional recognition. The stories of the victims, previously ignored or questioned, now have the weight, the legitimacy and the guarantee of veracity granted by the courts of justice.

We cannot forget that, unlike the investigation initiated by Judge Baltasar Garzón that only covered the crimes committed between 1936 and 1952, the Argentine lawsuit deals with the entire Franco regime. New crimes are now investigated such as, among many others, trafficking of stolen children, murders and tortures during the last years of the dictatorship, child abuse in preventorios ('re-education' centers for political prisoners' children) or political persecution in the 60^s and 70^s. The existence of a judicial proceeding including all the victims of Francoism reduces the differences that could exist between them regarding their visibility, importance, claims or goals. However, some authors consider that the dynamics of the proceeding are creating new inequalities among victims [52].

Healing effect, restoring hope and confidence

The fact of participating in the lawsuit and declaring before Argentine courts, or before Spanish judges following declaration requests, may have had an important curative effect on the victims. It could have been a significant first step to heal traumas, close wounds. Messuti recalls that when leaving the court, after declaring before the judge, the faces of the victims

radiated happiness, 'a serene happiness, of accomplishing a moral duty, many times with themselves; others, with their parents and relatives, or even with their fellow fighters' [53].

Some statements of victims after declaring before the judge could be good examples: 'Today was a celebration for me. I told the judge that it is the happiest day of my life because someone has listened to me' said Teresa Alonso almost in tears [54]. 'I feel liberated, I left a very heavy weight by declaring before the judge' said Jon Arrizabalaga [55].

In the same vain, the Argentine lawsuit has contributed to restore hope of finding justice to victims. Seeing how the proceeding advances and how some concrete objectives are met, gives victims new strength and new reasons to continue fighting. Again, the words of the victim are significant. Andoni Txasco avowed that: 'sitting in front of a judge to tell what happened is the first glimmer of hope I have' [56]. Teresa Alonso declared, after testifying before the Argentine judge: 'I have high hopes on the judge. Even if I do not see it, because I am very old, I believe justice will come someday' [57] .

The identifications, for the first time in a judicial proceeding, of some of the criminals, the charges against them, the extradition requests, the international arrest warrants issued via Interpol, or the exhumations finally carried out in response to a judicial order, are important victories of the Argentine lawsuit. For the first time as well, precautionary measures have been taken against some of the criminals, such as passport withdrawal or the obligation to appear weekly before the courts. It is clear that this is not enough for the victims, but now it seems more feasible to overcome the wall of impunity that seemed insurmountable not so long ago.

Citizens' confidence in public institutions can be a reliable indicator of the quality of democracy. Such confidence partly depends on the responsiveness of institutions to the demands of citizens. In the case of the victims of the Franco regime, impunity has caused detachment and distrust of the Spanish institutions who have turned their backs on them for too many years. However, it seems that the Argentine lawsuit has opened up the possibility of restoring the confidence in the future, the opportunity of starting a process towards the recognition and reconciliation of victims and institutions.

Although in general Spanish judicial system has refused to cooperate with the Argentine courts, some exceptions have occurred. The alleged torturers J. A. Gonzalez Pacheco, better known as Billy El Niño, and Jesús Muñecas Aquilar had to appear before Judge Andreu in the Spanish National Court to testify. Likewise, certain regional courts have accepted to take statements from several victims at the request of the Argentine courts, as well as to carry out an exhumation.

These judicial actions are of great importance since it is the first time Spanish courts go so far in a proceeding against the crimes of the Franco regime. It is the first time they respond to such an extent to the demands of the victims. Future judicial actions linked to the Argentine lawsuit, or to the opening of criminal proceedings in Spain, can promote this reconciliation process between victims and institutions.

Internationalization

In addition to the support that the Argentine lawsuit has received in the international community, the proceeding has also allowed the victims of the Franco regime to create new alliances and international support networks with human rights organizations or with other victims of international crimes. It happened particularly in Argentina, with associations such as the Mothers of the Plaza de Mayo, the Association of Ex-detained Disappeared, or the H.I.J.O.S association [58].

The Argentine lawsuit has also promoted 'the import and export (...) of different practices and discourses of victims groups' [59]. Montoto considers that the most representative example is the Ronda de la dignidad (Rounds of dignity) at Puerta Del Sol in Madrid, carried out weekly since 2010 by groups of victims of the Franco regime. This mobilization can easily be identified with those of the Mothers of Plaza de Mayo in Buenos Aires, where mothers and grandmothers walk in circles around the square showing photographs of their missing relatives.

Exhumations and the timoteo mendieta case

The most concrete result of the Argentine lawsuit is the exhumation of the remains of 105 victims of Francoism [60]. Despite the Argentinean judge have required Spain to open several mass graves, only in one occasion, in Guadalajara, Spanish courts have responded favorably to the request. Nevertheless, in Mallorca, despite the opposition of the courts of justice, the collaboration of regional and local governments made possible the execution of the Argentinean demand and 55 bodies were exhumed.

However, the most emblematic exhumation case was promoted by Ascensión Mendieta, a 88 years old woman who travelled to Buenos Aires in 2013 to request the judge the exhumation of her father Timoteo, shot and buried in a mass grave. After numerous warrants and letters rogatory from Argentina, and innumerable procedural obstacles, the law courts of Guadalajara finally agreed to exhume the mortal remains and deliver them to Ascensión. Along with Timoteo, the remains of about 50 people buried with him were exhumed and identified.

The exhumation was the culmination of a life-long struggle, but this case may have as well some important repercussions in the future. As Messuti explains, the exhumation of Timoteo Mendieta is the result of a successful collaboration between two judicial systems and a victory of international criminal law [61]. It opens up the possibility to new exhumations although the Argentine lawsuit was not initially expecting exhumations in Spain given the great procedural difficulties and the involvement of numerous administrative and judicial bodies.

Even if the many of the general objectives have not yet been achieved, the lawsuit has proved valid to meet specific objectives, giving full satisfaction to some victims. Following Timoteo's exhumation, more than 150 families have expressed interest in starting formalities to ask Argentinian courts to exhume the remains of their relatives.

The Timoteo Mendieta case is also very relevant in terms of media impact and visibility. The developments of the proceeding were followed with interest by Spanish mainstream media,

frequently appearing on television and radio programmers, and in international, national and regional press.

Challenges of the argentine lawsuit

Concurrent jurisdiction

The 2015 municipal and regional elections in Spain produced a significant political change in many towns and cities. Political forces sensitive to the demands of the victims of the Franco regime acceded to municipal governments and regional parliaments. Given this favorable political scenario, the victims decided it was time to complete the round trip against impunity started by the Argentine lawsuit, and to come back to Spanish courts.

Until now, dozens of cities, including Valencia, Barcelona, Zaragoza, Pamplona or Victoria, have filed criminal complaints before Spanish courts on behalf of the locals who suffered repression under the Franco regime. Many other cities have expressed as well their willingness to file similar complaints shortly. Likewise, numerous victims are joining this return to Spanish courts, bringing individual criminal actions hoping that finally the courts of their country will listen to them and enforce their rights.

Similarly, the new Spanish Government, in power since January 2020, has shown willingness to comply with some international organizations' demands regarding the crimes of Francoism. As explained above, in the autumn of 2020 the Spanish Parliament will debate a new Historical Memory Law that would establish a special prosecutor's office to investigate the crimes of Francoism. Even if the effectiveness of this measure raises some questions, it may foster criminal prosecutions in Spain.

The possibility of Spanish courts opening proceedings for the same facts that are being investigated in Argentina has raised doubts and sometimes even opposition. It is feared that these proceedings may hinder the development of the Argentine lawsuit, even causing its closure. Next it will be clarified that starting legal proceedings in Spain would not pose any risk for the lawsuit in Argentina and, if anything, may endorse it.

Concurrent jurisdiction in International Law

There is no rule in international law that prevents the exercise of concurrent jurisdiction. Two countries could investigate simultaneously the same international crimes even if one of them is where the events took place [62]. In fact, there are different international instruments contemplating the possibility of this concurrence of jurisdictions. Article 9.3 of the United Nations Convention against Enforced Disappearance is the clearest example, establishing that 'This Convention does not exclude any additional criminal jurisdiction exercised in accordance with national law'.

However, the confusion sometimes comes from the existence of a doctrinal and jurisprudential interpretation that considers preferential those jurisdictions based on the principles of territoriality or active personality. Nevertheless, it should be noted that preference does not mean priority or exclusivity. Thus, the African Union - European Union Expert Report on the Principle of Universal Jurisdiction established that there is

no hierarchy among the various bases of jurisdiction and that a State investigating international crimes ‘is under no positive legal obligation to accord priority in respect of prosecution to the State within the territory of which the criminal acts occurred or to the State of nationality of the offender or victims’ [63].

The preference of the country where the crimes were committed to investigate and prosecute, known as territorial jurisdiction, is based on significant legal and socio-political reasons. Although, by definition, international crimes offend the international community as a whole, it is in the country where the crimes were perpetrated where the direct victims are, as well as the society that suffers most of the consequences. Moreover, a criminal proceeding taking place where the crimes were committed responds better to social demands of justice and reparation of the victims. And it could be more effective in terms of guarantees of non-repetition, showing the capacity of the country to face human rights violations. Likewise, from a procedural point of view, territorial jurisdiction is more effective, facilitating and accelerating the proceeding since; generally, it is in the place of commission where the evidence will be found, as well as most of the victims and perpetrators.

Nonetheless, if a national court, even without having to do so, decides to stop an investigation based on the opening of proceedings in the State where the crime was committed, it has first to verify the actual fulfillment of some requirements. The court should prove that the State where the proceedings are starting has a genuine will and capacity to prosecute the crimes, and that the State provides sufficient guarantees that jurisdiction is to be exercised in good faith, in an actual and effective manner, and respecting the standards of due process [64]. The European Court of Human Rights and the Inter-American Court of Human Rights have asked these requirements [65]. In the same way, the International Criminal Court requires similar guarantees to assign jurisdiction to a State on an international crime [66].

Concurrent jurisdiction in Argentina

Regarding the Argentine lawsuit, it is necessary to point out that the legislation of this country, in accordance with the non bis in idem principle, establishes that its courts will only act if ‘the accused has not been acquitted or convicted abroad or, in the latter case, has not served the sentence’ [67].

This way, if Spanish courts were opening investigations, judging the perpetrators and giving judgments, only then the Argentine judge would no longer be entitled to continue with the proceeding. In the event of a Spanish court prosecuting one of the perpetrators, the Argentinian justice could continue investigating the other criminals, and could even continue prosecuting those who have already been sentenced in Spain, if the investigation addresses different events.

In fact, some situations of concurrent jurisdiction have already occurred. In recent years, some Spanish judges have challenged the criteria of the Supreme Court and the Prosecutor General’s Office, and have started proceedings regarding the aerial bombardment of Barcelona (1937-39) or cases of stolen children. As well, in 2015 a judge from Almazán (Soria) opened an investigation to clarify the circumstances and identify that

responsible for the death of 10 young locals in August 1936 [68]. These investigations, some still ongoing, have not affected the course of the proceedings in Argentina [69].

Indeed, when the first complaint was filed in Argentina in 2010, it was dismissed by Judge Servini considering that the crimes were already under investigation in Spain. In fact, at that time, there were several ongoing proceedings in Spanish courts since Judge Baltasar Garzón had deferred to regional jurisdictions. However, the decision was appealed, arguing that such proceedings were stayed and that, since the competence of the Argentinian courts was based on universal jurisdiction, concurrence of jurisdictions had to be accepted.

As established by the Spanish Constitutional Court, universal jurisdiction ‘is not grounded on the principle of subsidiarity, but on the principle of concurrence, precisely because its purpose is to prevent impunity’ [70]. The Court reasoned that prosecutions based on universal jurisdiction are grounded on the gravity of the crimes, affecting the international community as a whole, and therefore, the logical consequence is the acceptance of concurrent jurisdictions [71]. The Federal Criminal Appeals Chamber accepted these arguments and ruled that the Argentinian courts should start investigating the crimes of the Franco regime [72].

If a few years ago Argentine courts expressly ruled on this issue, accepting the prosecution of crimes that were as well the subject of open proceedings in Spain, there is no reason to think that now they can modify this criterion.

Benefits of concurrent jurisdiction

International crimes are of great complexity and the existence of proceedings in two different countries may facilitate and accelerate the investigation. Collaboration between the courts of both countries can enrich, supplement and enhance the prospects of success of the proceedings. This would not be the first time Spain and Argentina collaborate in the fight against impunity prosecuting serious human rights violations. When the Spanish National Court was investigating the crimes committed by Argentina’s last military dictatorship, this country initiated numerous criminal proceedings for the same offences. The investigations in Argentina and Spain advanced in parallel, supporting each other. In fact, Argentinian judges and officials actively assisted Spanish courts when they tried and condemned in 2005 former military Adolfo Scilingo for crimes against humanity.

Therefore, the opening of proceedings in Spain resulting from the criminal complaints filed by city councils or individuals, would not pose any threat to the Argentine lawsuit. On the contrary, the proceedings in Spain and Argentina could advance in parallel, complementing and supporting each other.

Race against time

Finally, a study on the Argentine lawsuit cannot ignore what has been, since the early stages, its main challenge: the race between criminal proceedings and time passing. The facts under investigation occurred a long time ago and both, victims and perpetrators are of an advanced age (with some exceptions such as the cases of stolen infants). Thus, a constant throughout all

the proceeding, and that can only be aggravated in the future, is the hurry, the anguish of making the proceeding advance as quickly as possible.

This temporary distance between the commission of the crimes and the judicial investigation makes the Argentine lawsuit an unusual legal process. As Messuti points out, generally, in criminal investigations the rush is to avoid expiration of limitation and prescription periods, or simply because justice is wanted as soon as possible [73]. In the case of Franco's era crimes, the rush is because both the victims and the perpetrators are dying.

The unclear deadlines make the Argentine lawsuit a unique judicial proceeding. In a regular criminal process the limitation and prescription periods are clearly fixed, the deadlines are certain and precise. On the contrary death is unpredictable, one cannot know when it will come, which is why rush becomes anguish. It is a race that may end at any moment, and when that moment arrives, the objectives should be already fulfilled, and the race already won.

The race against time concerns as well the possibility of perpetrators dying. Death would free them from having to appear in court and testify something fundamental to the investigation and to uncover the truth. Death would free them as well from being convicted. However, punishment is not a priority objective of the Argentine lawsuit and many claimants do not seek prison sentences. Victims do not want perpetrators to die either, 'they do not wish them death, but to appear in court to testify, to acknowledge. Death does not replace justice'.

CONCLUSION

After explaining the outlines of the proceeding, the legal grounds and the objectives and prospects behind the criminal complaint, the main outcomes of the proceeding have been analyzed. The proceeding has placed political and judicial authorities under a significant pressure to tackle impunity and comply with international human rights obligations. At the same time the Argentine lawsuit has extended and reinforced the use of a human rights discourse, making the demands of the victims of the Franco regime more accessible, understandable and shared by the rest of society.

The judicial proceeding has provoked as well important outcomes, particularly regarding the victims. Their legal status has been judicially recognized and in some cases full satisfaction of their demands was attained. In turn, the lawsuit has provided substantial visibility to the victims and to their claims, both at national and international levels.

Finally, the current and future challenges faced by Argentine lawsuit have been examined; focusing on the issue of concurrent jurisdiction and showing the potential coexistence of criminal proceedings in Spain and Argentina is possible and even desirable. Collaboration between the courts of both countries would facilitate and accelerate the investigations, and could enrich, supplement and enhance the prospects of success of the proceedings.

Ten years after filing the first complaint, and despite many of the original objectives and prospects have not been met yet, the Argentine lawsuit against the crimes of Francoism has proved to be a universal jurisdiction prosecution capable of promoting the human rights situation in Spain. This study has shown how the proceeding, despite its important limitations, has significantly contributed to approach transitional justice objectives, highlighting the key role of foreign court prosecutions.

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