

# Privatising the search and identification of human remains: the case of Spain

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## Abstract

During the Spanish Civil War, extrajudicial executions and disappearances of political opponents took place and their corpses were buried in unregistered mass graves. The absence of an official policy by successive democratic governments aimed at the investigation of these cases, the identification and exhumation of mass graves, together with legal obstacles, have prevented the victims' families from obtaining reparation, locating and recovering the human remains. This paper argues that this state of affairs is incompatible with international human rights law and Spain should actively engage in the search for the whereabouts and identification of the bodies with all the available resources.

**Key words:** enforced disappearances, exhumations, mass graves, privatisation, right to truth

## Introduction

Almost forty years have elapsed since the end of the Franco dictatorship in Spain. However, a significant number of human remains of those who disappeared during the civil war and dictatorship continue to this day hidden in mass graves within Spain's territory. Unlike other countries that suffered from enforced disappearances and extralegal executions, there has been neither an official investigation nor a census on the missing people of that era and the efforts to exhume the corpses depend mainly on private initiatives. Although a protocol on exhumations has been developed in compliance with the Law on Historical Memory, there are no national regulations dealing with the remains after exhumation and there is no genetic database.<sup>1</sup> This lack of an official policy fully dealing with the exhumation of mass graves and identification of human corpses fuelled an important Non-Governmental Organisation (NGO) movement that has assumed a role that, according to international human rights law, belongs to State authorities. In this sense, Article 12 of the International Convention for the Protection of All Persons Against Enforced Disappearances (ICAED) establishes that where there are reasonable grounds for believing that a person has been subjected to enforced

disappearance, the authorities shall undertake an investigation even if there has been no formal complaint.<sup>2</sup> This obligation continues as long as the fate and whereabouts are unknown and includes the search, location, identification and return of the remains to the relatives.<sup>3</sup> Between 2000 and 2012, the Association for the Recovery of Historical Memory alone conducted exhumations of mass graves in the territory of Spain and found 1,328 victims of the Franco repression.<sup>4</sup> Despite these efforts by private entities, a large amount of remains of the disappeared of the Spanish Civil War and Franco dictatorship continue to exist in mass graves, although the numbers remain difficult to ascertain. While the Inter-ministerial Commission's 2006 General Report for the study of the situation of the victims of the civil war and Francoism estimates the existence of between 30,000 and 40,000 disappeared as a consequence of the civil war<sup>5</sup>, the list submitted in 2008 to Judge Baltasar Garzón in the unsuccessful proceedings on the investigation of Spain's Franco era crimes notes 114,266 disappeared in that era.<sup>6</sup>

This absence of an official policy aimed at the investigation of disappearances, exhumation of mass graves and identification of remains in Spain, together with the legal obstacles at the national level, have prevented the families from obtaining redress and reparation, even if in these cases such reparation 'only' means the recovery and undisputed identification of the remains of those who disappeared during the Franco dictatorship. Against this background, this paper argues that this state of affairs is incompatible with international human rights law and Spain should engage in the search for the whereabouts and identification of the bodies through the performance of scientific methods, including DNA tests, and return the remains to relatives. The paper first presents the characteristics of the enforced disappearances phenomena in Spain, discusses the gaps in the so called 'Law on Historical Memory' to deal with this issue and compares the case law of the European and Inter-American Court of Human Rights in cases of disappearances and exhumation of remains. It will then compare three laws at the local level as examples of further action in Spain. Finally, the paper will draw conclusions.

## Enforced disappearances in Spain

Enforced disappearances gained widespread attention in the 1970s and 1980s as a result of the practices conducted by the military regimes in Argentina, Brazil, Chile, Paraguay and Uruguay. The first international recognition of the phenomenon by the United Nations came in 1977 in relation to the missing people in Chile.<sup>7</sup> In the Latin American cases, the military juntas established systematically committed disappearances as a method of combat against the so called 'subversive' threat and the advance of communism in the region. The victims were mainly political opponents, members of local associations<sup>8</sup> or other persons that could be considered a threat to the security of the State. As a general rule, the disappearance started with the kidnapping of the person in the middle of the night by unidentified State agents and using unmarked cars to drive the prisoners to clandestine detention centres. The detainees were tortured to obtain information about the opposition's plans and eventually murdered; their bodies simply disappeared with

no trace. The use of this strategy against political opponents was framed in what has been known as State terrorism, aimed at controlling the population through fear and generalised terror.<sup>9</sup>

Despite the events occurred in Latin America, the first written piece where elements of enforced disappearances are mentioned is the Decree of Night and Fog signed by Hitler in 1941, ordering the forced and secret transfer of prisoners in occupied territories to Germany. After the transfer, detainees disappeared and the Nazi regime's agents were instructed to deny information about their fate or whereabouts. The measure's aim was to cause the relatives anguish and suffering and, at the same time, dissuade political opponents from resistance.<sup>10</sup>

A similar practice, though not exactly the same, occurred in Spain mainly in the first months of the Spanish Civil War which started in July 1936 and lasted until April 1939 with the victory of the organisers of the Coup d'Etat led by the military against the democratically elected government. During the civil war, both the rebels and those loyal to the Republic committed serious violations of human rights and international humanitarian law.<sup>11</sup> The conflict caused the death of between 500,000 and 1,000,000 people.<sup>12</sup> Around 13,000 persons were sent to German concentration camps and 450,000 persons were exiled in France.<sup>13</sup> The rebels' repression could be divided into two periods; on the one hand, the 'hot terror' (*terror caliente*), that is the killings and executions committed between the start of the civil war in 1936 up until the end of that year, and, on the other hand, the 'cold terror' (*terror frío*), based on the military justice, trials and war councils<sup>14</sup>, starting in January 1937.

Between April and December 1936 rebels conducted a practice of detention towards political opponents in unofficial prisons and their extralegal execution and burial in unidentified mass graves without registration. The victims, accused of being linked with the political left and workers' organisations and unions, were detained and imprisoned in unofficial buildings and later 'paseados' (to take a walk) during the night and executed without trial and judicial protection. Thousands of executions were never registered and their remains and whereabouts are still unknown, giving rise to the disappeared of the civil war and Francoism.<sup>15</sup> Seville is a paradigmatic example; according to the registration book of the mass grave of San Fernando, between July 1936 and December 1938, 3,693 persons were buried, of which only 619 were registered in the Civil Registry, being only seventeen per cent of the total.<sup>16</sup> Illegal executions were also committed by those loyal to the Republic, though to a lesser extent and as an improvised response to rebels' actions.<sup>17</sup>

Franco's dictatorship lasted thirty-six years and, during this time, opposed the reintegration of those separated from office as a consequence of the war as well as their granting pensions and economic rights. The regime also ordered the sequestration of the properties belonging to trade unions, political parties and individuals.<sup>18</sup> As for the human losses of the civil war, those victims loyal to Franco obtained reparations and the crimes committed by Franco's opponents were documented in the Causa General<sup>19</sup>, which is partially available online.<sup>20</sup> In addition, Franco ordered the exhumation of mass graves in which the victims loyal

to the coup were buried. On the contrary, those missing people as a result of the rebels' actions did not receive attention during the dictatorship. Although some informal exhumations took place at the end of the 1970s, for instance in Navarre, Extremadura and La Rioja, it was not until the twenty-first century that a process of excavation was witnessed and began the systematic documentation of the mass graves containing the remains of those executed by Franco's accomplices.<sup>21</sup>

During the transition to democracy, there were no civil and military lustration processes and the monuments and symbols honouring Franco and his regime remained in place.<sup>22</sup> The adoption in 1977 of the amnesty law with the support of a huge majority of the political parties<sup>23</sup> became the first democratic law adopted by the newly created National Congress and contributed to this state of affairs by preventing accountability claims and impairing the rights of the victims to know the truth about the crimes of that era.<sup>24</sup> As such, the fathers of the Spanish transition built a model of forgetting the repressive past with a renunciation of investigating past crimes.<sup>25</sup>

During this time and up until the end of the last century, the group of victims known as the disappeared of the Spanish Civil War did not receive specific governmental attention. Although the successive democratic governments recognised the civil war's victims' economic rights and pensions, the measures were of a fragmentary character and did not directly address the rights of those disappeared during that time.<sup>26</sup> The situation has started to change since 2000, mainly as a consequence of the activities of NGOs at the local and national level. In fact, an article written by Emilio Silva in which he explained that his grandfather was also a disappeared triggered attention and prompted public debate.<sup>27</sup> Silva affirms that behind Cambodia, Spain is the second highest ranked country in terms of reported missing people and the Government is still not dealing with this issue.<sup>28</sup> The inclusion of Spain in the United Nations Working Group of Enforced Disappearances' (WGEID) list of countries with enforced disappearances pending resolution<sup>29</sup> confirms that it is right to talk about enforced disappearances during the civil war and the Franco dictatorship, though the phenomenon differs from that occurred in some Latin American countries. The WGEID affirmed that when a detention is followed by an extralegal execution committed by state agents or with their knowledge and there is a denial to conceal the fate or whereabouts of the victims, we are in the presence of an enforced disappearance.<sup>30</sup> In the case of those disappeared during the Spanish Civil War, these elements are present: a) there was detention in unregistered prisons; b) detainees were illegally executed; c) and committed by Franco's forces and accomplices; and d) there was an absence of the executions' registration and documented place of burial making it very difficult for the relatives to know the truth about the fate of their loved ones. The lack of information continues to this day and there is neither a census nor an official investigation into the fate and whereabouts of this era's disappeared.

The recognition of the existence of enforced disappearances in Spain is relevant from the standpoint of international human rights law because in these cases States have enhanced obligations derived from the serious nature of the crime. First, international human rights law recognises that the crime only ends once the

fate and whereabouts of the victims are known and, in case of death, the remains are returned to the relatives.<sup>31</sup> Second, Article 24 of the ICAED recognises the right of each victim of enforced disappearance (including the disappeared and any other individuals suffered harm as a direct result of an enforced disappearance) to know the truth about the enforced disappearance's circumstances, the evolution and results of the investigation and fate of the disappeared. Third, the State has the duty to take all the appropriate measures for the search, location and release of the persons and, in the event of the disappeared's death, the reintegration of the remains for a proper burial. Besides, United Nations resolution 60/147 (non-binding instrument) recognises that reparations shall include the search for the whereabouts of the disappeared and the State's assistance in the recovery, identification and reburial of the bodies in accordance with the expressed or presumed wish of the victims.<sup>32</sup> The remains should be clearly and indisputably identified through the performance of DNA tests and studied according to systematic anthropological techniques.<sup>33</sup>

### The Law on Historical Memory and its limits

During the democratic transition an emphasis was placed on the promotion of Spanish society's national reconciliation and the forgetting of the wrongdoings of the past. Successive democratic governments took measures to recognise economic and social rights of the victims but without specific rights dealing with the civil war and dictatorship's disappeared.<sup>34</sup> The situation started to change in 2006 when Parliament approved the so called 'Law on Historical Memory' with the objective of enhancing the rights of the victims of the Spanish Civil War and the Franco dictatorship.<sup>35</sup> Among other measures, the Law declares the illegitimacy of tribunals and any other criminal or administrative entity that, during the civil war and dictatorship, had been created to impose political, ideological and religious condemnations (Article 3). The Law also recognises economic rights for the victims and their families (Articles 5 to 9), orders the removal of public monuments and statues of Franco and his regime (Article 15) and promotes the creation of a Centre for the Historical Memory and a General Archive of the Civil War (Article 20).

Articles 11 and 12 are of major relevance because for the first time they specifically deal with the disappeared of the Franco dictatorship and the exhumation of mass graves in Spain. Article 11 establishes the duty of the State to collaborate with the relatives of the disappeared and to facilitate the activities of identification and exhumation of mass graves, provided that there is an initiative led by the relative or an NGO. Article 12 recognises the duty of the State to develop a scientific protocol for the conduct of mass grave exhumation together with the creation of a map of mass graves in Spain.

The Law is a step forward in overcoming the wrongdoings of the past. However, it is insufficient<sup>36</sup> because it establishes a sort of privatisation of the activities of identification and location of the remains.<sup>37</sup> Parliamentary records show that this issue was strongly criticised by members of the Parliament.<sup>38</sup> For instance, Senator Sampol i Mas affirmed that these duties could not be delegated to particulars

and explained that the State should cover all the expenses for the use of scientific methods in the identification of the human remains.<sup>39</sup> Civil society actors also criticised the Law because it fails to effectively deal with the human remains of those disappeared during the civil war.<sup>40</sup> Besides, the Law falls short of reflecting the evolution of the international framework on the locating and exhumation of graves, especially in relation to the State's duty to conduct an effective investigation in cases of disappearances.<sup>41</sup>

Despite these criticisms, Spanish governments have taken steps to comply with these Articles and have developed an integrated map of the territory showing the areas where the remains of disappeared people have been found. This map currently contains information for more than 2,000 graves and provides basic information such as the name of the grave, the town where it is located, whether there has been an intervention and whether victims have been identified or not. This map and the protocol on exhumations are available online.<sup>42</sup>

In addition, around twenty million Euros have been officially dedicated to activities related with historical memory issues, such as research projects, conferences, public activities and identification and exhumations of mass graves, the latter receiving the highest economic contribution with an average of twenty-nine per cent in the period between 2006 and 2010.<sup>43</sup> Despite the important economic resources dedicated to exhumations, by granting subsidies to individuals and NGOs willing to perform the search, identification and exhumation of mass graves, the government is in fact *privatising* an activity that according to international human rights law should be conducted by the State itself. Besides, subsidies to associations or research teams to perform these activities can not replace the State's duty to investigate the disappearances and offer integral reparations to the victims. Further, once the exhumation has been done and there is a need to use scientific methods for the corpses' identification, the Law remains silent and, as a general rule, the families cover the expenses with their own resources, although in some cases the subsidies have also been used to pay these expenses. The situation has worsened with the Spanish economic crisis of 2009 and the Government first reduced the budget for historical memory related activities in 2012 and later eliminated the item from the national budget of 2013. Additionally, in 2012 the Government also closed the Office for the victims of the Spanish Civil War and the dictatorship, created to help facilitate the Law on Historical Memory and with the aim of coordinating the exhumation activities in relation with those disappeared during the civil war. Although the Office's functions have been assumed by the 'División de Derechos de Gracia y otros Derechos' based at the Ministry of Justice, Spanish authorities have left the section on the law of exhumations without content, leaving the relatives in a permanent state of helplessness.

At the judicial level, judges have not even shown up when a mass grave is discovered<sup>44</sup> and, when complaints related with disappearance cases during the civil war are submitted, national competent courts have systematically dismissed them without ordering any preliminary measure. This trend is confirmed by Amnesty International's issued report showing that, between 2008 and 2012, Spanish local tribunals have systematically rejected those cases related with the disappearance

of persons during the civil war on the grounds that they are protected by the amnesty law and that the crimes were time barred.<sup>45</sup> Therefore, neither the Law on Historical Memory nor the judiciary offer effective remedy at the national level in relation to the identification and return of remains.

### Jurisprudence of human rights tribunals

Against this background, what does the international case law say about the obligation of the State to locate, exhume and identify the human remains in mass graves? In its first judgment in an enforced disappearance case in 1988, the Inter-American Court of Human Rights affirmed that the State shall assume the investigation 'as its own legal duty, not as a step taken by private interests that depends upon the initiative of the victim or his family or upon their offer of proof'.<sup>46</sup> It also added that the 'State is obligated to use the means at its disposal to inform the relatives of the fate of the victims and, if they have been killed, the location of their remains'.<sup>47</sup> In *Goiburú et al v. Paraguay*, the Court asked the State to locate the remains of the victims and 'return them to their next of kin as soon as possible, once it has proved the relationship through DNA testing'.<sup>48</sup> In *La Cantuta v. Peru*, the Court reminded of the need for the search and location of the victims' mortal remains and 'their return without delay to their next of kin, prior genetic parentage evaluation'. It also recognised the State's duty to bear all the burial expenses.<sup>49</sup> In *Ibsen Cárdenas v. Bolivia*, the Court concluded that in cases of enforced disappearances, the State's obligation includes the finding of the remains accompanied by evidence or analyses to corroborate that the remains belong to that person. To that end,

the appropriate authorities must carry out a prompt exhumation of the mortal remains so that they may be examined by a competent professional. Exhumations must be carried out in a manner that protects the integrity of the remains collected in order to establish, if possible, the identity of the deceased, the date on which he or she died and the manner and cause of death.<sup>50</sup>

Last but not least, in *Trujillo Oroza v. Bolivia*, the Court recalled the obligation of the State to conduct the necessary forensic tests to identify the remains as soon as possible.<sup>51</sup>

The European Court of Human Rights (ECtHR) has also dealt with cases of enforced disappearances although it has not been as straightforward as the Inter-American Court. The ECtHR has affirmed that the duty to investigate enforced disappearances belongs to State institutions and that the failure of the authorities to respond to the quest for information by the relatives or the obstacles placed in their way forces them 'to bear the brunt of the efforts to uncover any facts' and may be regarded as a 'callous disregard of an obligation to account for the whereabouts and fate of a missing person'.<sup>52</sup> Although the Court acknowledged the importance of national commissions' activities in the exhumation and identification of remains, it also warned that they did not exhaust the obligation of national courts to investigate cases of disappearances, which includes the clarification of the facts and

details of the fate of the disappeared.<sup>53</sup> In the same case, the Court added that the 'silence of the authorities of the respondent State in face of the real concerns of the relatives could only be categorised as inhuman treatment'.<sup>54</sup> In *Janowiec v. Russia*, the European Court affirmed that Article 3 (prohibition of torture) of the European Convention requires the State 'to exhibit a compassionate and respectful approach to the anxiety of the relatives of the deceased or disappeared person and to assist the relatives in obtaining information and uncovering relevant facts'. It also added that Article 3 contains the obligation of the State 'to account for the circumstances of the death and the location of the grave'.<sup>55</sup> In a recent case, the ECtHR expressed that in cases of disappearances 'the procedural obligation to investigate can hardly come to an end on discovery of the body or the presumption of death; this merely casts light on one aspect of the fate of the missing person'.<sup>56</sup>

To date, the only case in which the ECtHR entered to shortly elaborate on the duty of the State to perform DNA tests to specifically identify the remains of disappeared people was in *Aslakhanova and others v. Russia*. The Court considered as a pressing need 'the allocation of specific and adequate resources required to carry out large-scale forensic and scientific work on the ground, including the location and exhumation of presumed burial sites', as well as 'the collection, storage and identification of remains and, where necessary, systematic matching through up-to-date genetic databanks'.<sup>57</sup> The Court also considered it reasonable to concentrate all the relevant resources within a specialised institution and under the auspices of a specialist high-level body.<sup>58</sup> Finally, it is important to mention that in a judgment related to the deceased applicant's daughter, the ECtHR recognised the existence of a right to bury a relative under Article 8<sup>59</sup> of the European Convention on Human Rights.<sup>60</sup> Extrapolating this development to a disappearance case, it seems intuitive to think that if there is a right to bury, there should be first a right to locate, identify and recover the remains under the umbrella of the right to truth recognised in international law.

In relation to the disappeared of the Spanish Civil War, to date, three applications have been filed before the ECtHR. All of them have been dismissed as inadmissible and thus the judge has not entered into the cases' merits. In the inadmissibility decision of the *Dorado Luque v. Spain* case, the judge relied, among other grounds, on the lack of the applicant's due diligence and on the fact that there was not a genuine connection between the death and the entry into force of the Convention.<sup>61</sup> However, the judge elaborated on some interesting issues that are worth mentioning. First of all, the judge recognised the continuing nature of the enforced disappearance's crime as long as the fate and whereabouts of the victims are unknown and, as a consequence, the obligation of the State to investigate them during the period of time in which it is reasonable to take all the measures to clarify the circumstances of the crime. Additionally, the judge did not rely on the Spanish amnesty law as a justification for the absence of investigation. Therefore, it could be argued that the judge, as expressed in the *Ould Dah* case<sup>62</sup>, is in fact recognising the inadmissibility of amnesty laws when we are in the presence of serious human rights violations such as those committed during the Spanish Civil War, in opposition to the Spanish national courts' reasoning mentioned above. In the *Canales*

*Bermejo* case, the judge did not even provide reasoning for the decision of inadmissibility and dismissed the case in one single page without further particulars. The case of *Lapeña v. Spain* was submitted in March 2013 and the applicant asked for the condemnation of Spain because of its absence of support to help the victims in their search and locating of those disappeared during the civil war.<sup>63</sup> According to the applicant's attorney, the submission asked for the exhumation of the remains and their return for their inhumation in full respect of the victim's honour.<sup>64</sup> However, the case has been dismissed on formal grounds.

In addition to this jurisprudence, other international bodies, though not of judicial character, have issued recommendations in relation to the disappeared of the civil war and dictatorship. For instance, the Human Rights Committee recommended Spain consider setting up a commission of independent experts to establish the historical truth about human rights violations committed during the civil war and dictatorship and also to allow the families to exhume and identify victims' bodies.<sup>65</sup> Similarly, the Committee against torture encouraged Spain 'to continue the efforts to help the families of victims to find out what happened to the missing persons, to identify them and to have their remains exhumed, if possible'.<sup>66</sup> To date, however, Spain does not have a national body that deals with all matters relating to enforced disappearance or a centralised database on disappearances.<sup>67</sup>

### **A step forward at the local level: the cases of Catalonia, Navarre and Andalusia**

Despite the pessimistic national scenario exposed in this paper, it seems that not all is lost for the relatives of the disappeared, at least in the Spanish communities of Catalonia, Navarre and Andalusia where their respective Governments have promoted laws dealing generally or specifically with the human remains of those disappeared during the civil war and dictatorship. Although these measures are in different stages of progress, they are all compatible with current international law and recognise the obligation of the government to recover and identify the remains found in mass graves in their territories. Chronologically, the first law was adopted in 2009 by the Catalanian Parliament through Act 10/2009 on the location and identification of those persons disappeared during the civil war and dictatorship. The Act was adopted by 114 votes in favour, 14 against and 3 abstentions and contains 12 Articles. The main objective of this law is to locate and, if possible, to recover and identify the remains of those civilians and members of the military disappeared and buried in mass graves during the civil war and dictatorship. Another objective of a broader scope is to develop the right of society to know the truth about the circumstances in which enforced disappearances occurred in Catalonia. The second law was adopted in 2013 by the Parliament of Navarre with an overwhelming support of the political parties through Act 33/2013 on the moral recognition and reparation of those Navarre citizens who were victims of the repression derived from the military coup.<sup>68</sup> Navarre suffered from the repressive policies of the Franco regime with more than 3,400 people assassinated and, until recently, the activities of mass grave exhumation were conducted mainly by associations of

historical memory and sometimes with the funding of the State. The law (containing 17 articles) is based on the assumption that public institutions should assume the obligation to exhume the mass graves and to identify the human remains of those disappeared found there, regardless of the time elapsed since the disappearances' occurrence. The third law, promoted in Andalusia though in a drafting stage, is due to be discussed by the regional parliament in April 2015. This draft Law on the Democratic Memory of Andalusia is composed of six sections and fifty-three Articles with the objective of establishing public policies aimed at the recovery of Andalusia's democratic memory and the promotion of the history of Andalusia's people that fought against the dictatorship.

As expressed above, these laws are either specifically drafted to deal with the remains of the disappeared or part of a broader historical memory aim. That being said, in this section I will only address and compare those provisions specially related to the disappeared and the locating, recovery and identification of remains. First of all, the three laws recognise the obligation of the Government (regional) to assume these obligations as their own and to cover all the derived expenses. According to Article 2, the Government of Catalonia shall locate, recover and identify those persons disappeared during the civil war and dictatorship, establishing that the search for and locating of remains could be started by; their own Administration; a request from competent local entities; the spouse/wife of the disappeared as well as his/her ascendants and descendants; or by associations of historical memory. The expenses shall be covered by the Administration (Article 3). In relation to the recovery and identification of human remains, Article 7 recognises the duty of the Catalanian Government to assume them, provided there are available funds. Similarly, the Navarre Law promotes the direct involvement of the authorities in the recovery of the remains of those disappeared in Navarre (Article 4b) and establishes the Government's obligation to support these activities economically, technically and with human resources. Like the Catalanian law, all expenses should be covered by the autonomous community (Article 3). For its part, Article 9 of Andalusia's draft Law establishes that the Office for the democratic memory of Andalusia will be in charge of following up the activities of investigation, locating, exhumation and identification under the supervision of a technical team (Article 10). This Office will be responsible for the conduct of all the activities of recovery and identification of the human remains of the disappeared (Article 7). The procedure for determining the location and identification of remains could be started by the same actors as the Catalanian Law, with the difference that ascendants and descendants are allowed up until the third generation. Researchers could also ask to start the procedure (Article 9).

Another interesting aspect of the three laws is the fact they all establish the obligation of each Administration to create a census of the disappeared during the civil war and dictatorship (Article 4 of the Catalanian law; Article 13.4 of the Navarre law, giving this task to the Historical Memory Documentary Centre; and Article 6 of Andalusia's draft law, giving this task to the Office for the democratic memory of Andalusia). The census shall include the circumstances of the death or disappearance, the date and place of occurrence and any other relevant information. In a

**Table 1. Comparison of the Law on Historical Memory and Local Acts on the issue of the disappeared**

	National Law on Law on Historical Memory (2007)	Catalonia Local Act (2009)	Navarre Local Act (2013)	Andalusia Local Act (2014)
Census of the disappeared		✓	✓	✓
DNA bank		✓	✓	✓
Map of graves	✓	✓	✓	✓
Explicit recognition right to exhume remains			✓	
Protocol on exhumations	✓	✓	✓	✓
Sanctions				✓
Creation of a specific office	✓	✓	✓	✓
Active involvement of government		✓	✓	✓

Source: author's own. Note: The Andalusia Local Act was in draft stage at the time of writing.

report issued by the Government of Catalonia, the office has registered 3,113 disappeared; in 651 cases it has been possible to find information on the last days of the victims and in 152 cases it has been possible to clarify the circumstances of the death and place of burial.<sup>69</sup> As for Navarre, so far there is no census, although a technical commission has been created to coordinate the tasks established in the law.

In a related field, all three laws also recognise the need for the development of a map of graves or places where it is believed human remains are present. This is found in Article 6 of the Catalan law, Article 4 of the Navarre Law and Article 8 of the Andalusia draft law. As for their implementation, the Catalan Government has developed a map of graves that currently counts 237 locations.<sup>70</sup> Similarly, the Government of Navarre has also elaborated a dynamic map of graves available online, dividing them into: a) intervened graves (in which there has been a total or partial exhumation); b) prospected graves (in which there has been visual or mechanical prospecting with no exhumation; and c) non-intervened graves (in which there has been neither exhumation nor prospecting). According to the information provided on the website, only in Navarre, so far there are at least 121 graves (forty-six intervened, twenty-six prospected and forty-nine non-intervened) which would contain more than 1,200 people. The information provided in the map of graves has been collected by using several sources that include books, testimonies from individuals, local organisations and even judicial records.<sup>71</sup> As in Catalonia and Navarre, there is already a map in Andalusia of mass graves created to comply with the Law on Historical Memory (Act 52/2007). This map has been promoted by the Historical Memory General Direction of the Government of Andalusia with the collaboration of associations, researchers, local companies, victims' relatives and citizens and the support of the then *Consejería de Justicia y Administración*

Pública. The data has been collected in ninety per cent of cases as the result of interviews with witnesses, researchers and victims' relatives. In some cases, it has also been gathered from archives of the judiciary, the Civil Registry and different cemeteries. To date, the map informs of the existence of 614 mass graves in the territory of Andalusia where the majority were created in 1936 (492 graves). The remaining mass graves were built between 1937 and 1939 (seventy-three (1937), four (1938) and twenty-five (1939)). After 1939, twenty new mass graves were built.<sup>72</sup> In addition to these maps, other communities have also developed maps of graves. For instance, Cantabria includes five mass graves with an approximate number of 965 persons<sup>73</sup> and Asturias counts 322 graves in its territory.<sup>74</sup>

As a complement to the national protocol on exhumations developed in compliance with Article 12 of the Law on Historical Memory, all three laws also recognise the need to elaborate such a protocol at the local level. This is found in Article 8 of the Catalan law, Article 4 of the Navarre law and Article 18 of the draft law of Andalusia that proposes the development of a protocol aimed at honouring the victims of the repression buried in mass graves. The Catalan and the draft law of Andalusia establish that if the remains are located in private property and the owner refuses to agree on the use of his land, the Government will temporarily expropriate the land in accordance with the applicable law (Articles 11.2 and 11 respectively).

Another key feature is the creation of a DNA databank. Both the Navarre law and Andalusia's draft law are explicit in this sense. According to the Navarre law, this databank will be under the direction of the Institute of Legal Medicine of Navarre (Article 8) and every person whose relative disappeared during the civil war has the right to ask for a DNA test in order to compare it with the database of the Institute. The test has to be carried out in an expeditious way, especially in those cases in which the applicant is elderly. Andalusia's draft law establishes that the Administration will conduct the genetic tests that allow the identification of the human remains exhumed and to that end could establish a DNA databank (Article 13). The Catalan law, for its part, is less explicit than the other two and only establishes that the Government can create a system of databases aimed at the recovery and identification of disappeared people (Article 7).

Last but not least, two distinctive features are found in the laws of Navarre and Andalusia and deserve a separate mention. First, there is explicit recognition in the Navarre law of the right of the relatives of those disappeared during the civil war to exhume and bury bodies according to their traditions and with dignity (Article 1). This is a new feature not included as such in the ICAED although it could be understood as an enhancement of the right to truth recognised in the ICAED's Article 24. In addition, it confirms the idea that a society can not move forward without knowing its history and past. The second feature, found only in Andalusia's draft law, is the establishment of offences and penalties in relation to the handling of remains. For instance, the performance of excavations without authorisation, the destruction of graves and the transfer of human remains without authorisation (Article 50) are considered offences punished with pecuniary (from 200 to 150,000 Euros) and non-pecuniary penalties (the prohibition to receive grants for a period of up to five years in Article 52).

## Conclusion

To date, Spanish authorities have adopted neither an active policy towards the mass grave exhumation and identification of the human corpses nor created an effective mechanism to deal with the claims from the relatives of the disappeared. The Law on Historical Memory, which was approved with the aim of improving the rights of the victims, including the disappeared and their families, is clearly insufficient in this regard because it places the burden of the search and locating of mass graves on the relatives and nothing is said about the identification of the corpses by scientific methods or the development of a DNA databank. By doing so, Spain is in fact privatising activities that should be assumed by the State as its own duty. The situation has worsened as a result of the decision of Prime Minister Rajoy's Government to cancel the granting of funds to historical memory activities as well as by the persistent refusal of local courts to deal with disappearances cases occurred during the civil war, leaving the victims in a current state of helplessness. This state of affairs is incompatible with international human rights law as well as with the international human rights tribunals' case law which establishes that in these cases the State has the obligation to find the human corpses in mass graves, carry out exhumations of the mortal remains and identify them with scientific methods, and this should be assumed as its own duty.

Although the panorama is rather pessimistic at the national level, some light can be expected with the laws adopted by the Parliaments of Catalonia and Navarre and the draft law in Andalusia. They are in line with current international law and offer protection to the families in order to heal their wounds, recover the remains of their loved ones and restore their human dignity. Therefore, in theory, the tools are present in some Spanish communities and the goals of these laws are a welcome development. However, the key to success lies not only in the letter and spirit of the laws but mostly in their effective implementation, which might be jeopardised due to budgetary restrictions. This is unfortunately currently happening with the Catalanian law, leading us to the question of whether there is sufficient political will and long-term commitment to achieve these honourable goals.

## Notes

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