



# Challenging the Amnesty Law in El Salvador:

**Domestic and International  
Alternatives to Bring  
an End to Impunity**

# **Challenging the Amnesty Law in El Salvador: Domestic and International Alternatives to Bring an End to Impunity**

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## **Introduction**

Societies recovering from mass atrocities have pursued reconciliation by a variety of means, but too frequently, the post-conflict processes fall short because they lack a comprehensive approach and sustained efforts to guarantee truth, justice, reparation, and non-recurrence. This is the case in El Salvador.

To end the civil war that devastated the Salvadoran population, the government and guerrilla groups negotiated reforms to economic, security, and judicial institutions, along with a number of human rights commitments, embodied in a set of peace agreements. In theory, a pillar of these accords was overcoming impunity for grave human rights violations. Nonetheless, a variety of legal and political obstacles to accountability were put in place, encouraging the society to *forgive and forget* those responsible for the widespread violence.

The nature of the conflict, the political power remaining in the hands of the outgoing regime, the role of the international community, the weaknesses of democratic institutions, and civil society's bargaining capacity, among other factors, explain the relative successes and failures of the transitional justice mechanisms adopted in El Salvador. These included a truth commission, a vetting process, a land restitution program, and judicial and security sector reforms.

Twenty-three years have passed since the Commission on the Truth for El Salvador issued its report, and Salvadoran authorities remain staunchly resistant to changing the post-conflict status quo. The purpose of this essay is to evaluate the criminal justice measures that could be implemented in El Salvador today, including those internationally available, and explain how they might help bring an end to the impunity that has prevailed since the peace accords were signed.

Section one summarizes the characteristics of the internal conflict, the route to the peace agreement signed in January 1992, and the enactment of a broad amnesty law in March 1993. Section two describes the pressures from the international community to revise this law and explores the possibility of moving forward with additional mechanisms. The essay concludes by

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suggesting that renewed efforts in the international arena as well as at national level are needed to encourage El Salvador's judicial branch to overturn the amnesty law and open a new path to justice.

## **Section one: The armed conflict in El Salvador and its legacy**

### ***The peace process***

Between 1980 and 1992, El Salvador was submerged in a conflict that took approximately 75,000 lives; its costs included at least 8,000 disappeared people and countless victims of torture, sexual crimes, and forced displacement.<sup>1</sup> Extreme poverty and severe economic exclusion, institutional weaknesses, and repression by the armed forces—as well as the positive model of the Sandinistas' 1979 success in Nicaragua—strengthened the Salvadoran guerrilla groups, known collectively as the FMLN.<sup>2</sup> The civil strife began when these groups launched an insurrection with material and ideological support from Nicaragua, Cuba, and the Soviet Union.

The Salvadoran government mounted a counterinsurgency campaign with battalions financially supported and trained by the United States. Government forces carried out massacres and massive displacements against peasants in rural zones where the guerrillas were active. In a single operation conducted in December 1981, the army's Atlacatl Battalion killed more than 1,000 civilians in El Mozote and surrounding villages—the most brutal massacre anywhere during the US-backed “dirty wars” in Central America.<sup>3</sup> In urban areas, the armed forces and death squads allied with them forcibly disappeared and tortured people considered to be political opponents, such as students, teachers, trade union members, and individuals linked to the social

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<sup>1</sup> Human rights organizations estimate that the number of victims could be even higher. See *From Madness to Hope: The 12-Year War in El Salvador: Report of the Commission on the Truth for El Salvador*, chap. III, sec. I, “1980–1983: The Institutionalization of Violence.” Available on the United States Institute of Peace website, [www.usip.org/files/file/ElSalvador-Report.pdf](http://www.usip.org/files/file/ElSalvador-Report.pdf).

<sup>2</sup> Frente Farabundo Martí de Liberación Nacional (FMLN) was created in 1980, bringing together the five armed political opposition groups: Fuerzas Populares de Liberación, Ejército Revolucionario del Pueblo, Fuerzas Armadas de Liberación, Fuerzas Armadas de Resistencia Nacional, and Partido Revolucionario de los Trabajadores de Centroamérica. In 1981 the FMLN launched an offensive to promote a popular uprising and overthrow the government. Although it failed to achieve this objective, the FMLN gained control of a number of villages, established areas of political influence, and achieved international recognition as a fighting force. After the peace agreements the FMLN became a political party.

<sup>3</sup> For a detailed description of these events, see Mark Danner, *The Massacre at El Mozote: A Parable of the Cold War* (New York: Vintage, 1994). See also Inter-American Court of Human Rights (I/A Court HR), *Case of the Massacres of El Mozote and Nearby Places v. El Salvador*, Merits, Reparations and Costs, Judgment of October 25, 2012, Series C, No. 264.

work of the Catholic Church.<sup>4</sup> The FMLN was also responsible for acts of sabotage, selective killings, and other forms of violence against civilians, but to a much lesser extent.

In September 1989, the FMLN and the Salvadoran government initiated a dialogue under the auspices of the United Nations Secretary-General.<sup>5</sup> In the San José Agreement of July 26, 1990, both parties agreed to accept the presence of an international mission of verification, to respect the human rights of the civilian population, and to assign priority to the investigation of acts against life, integrity, and liberty during the conflict.<sup>6</sup> The UN Observer Mission in El Salvador (ONUSAL) was established by Security Council Resolution 693 of May 20, 1991, for the purpose of verifying compliance with the agreements throughout the peace process.<sup>7</sup>

In the Mexico Agreement of April 27, 1991, the parties undertook to consolidate respect for human rights through constitutional and legal reforms. They signed a final peace agreement in the Palace of Chapultepec, Mexico, on January 16, 1992.<sup>8</sup>

### ***The Truth Commission and the vetting process***

The Commission on the Truth for El Salvador was established in July 1992 with a mandate to investigate the “serious acts of violence that have occurred since 1980 and whose impact on society urgently demands that the public should know the truth.”<sup>9</sup> Published on March 15, 1993, its final report, *From Madness to Hope: The 12-Year War in El Salvador*, stated that the security forces, allied paramilitary groups, and death squads were responsible for the great majority of crimes against the civilian population during the armed conflict. The Truth Commission

registered more than 22,000 complaints of serious acts of violence that occurred in El Salvador . . . Over 60 per cent of all complaints concerned extrajudicial executions, over 25 per cent concerned enforced disappearances, and over 20 per cent included complaints of torture. Those giving testimony attributed almost 85 per cent of cases to agents of the State, paramilitary groups allied to them, and the

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<sup>4</sup> *Report of the Commission on the Truth for El Salvador*, *supra* note 1, chap. I, sec. E, “Convulsion of Violence.”

<sup>5</sup> United Nations Department of Public Information, “United Nations Observer Mission in El Salvador: Background,” September 1996, [www.un.org/Depts/DPKO/Missions/onusal\\_b.htm](http://www.un.org/Depts/DPKO/Missions/onusal_b.htm).

<sup>6</sup> Inter-American Commission on Human Rights (IACHR), *Report on the Situation of Human Rights in El Salvador*, sec. I, “Background: An Overview of the Present Situation,” OEA/Ser.L/II.85, Doc. 28 rev., February 11, 1994, [www.cidh.org/countryrep/ElSalvador94eng/toc.htm](http://www.cidh.org/countryrep/ElSalvador94eng/toc.htm).

<sup>7</sup> “United Nations Observer Mission in El Salvador: Background,” *supra* note 5. After the armed conflict ended in December 1992, ONUSAL verified the elections in March and April 1994. On April 30, 1995, it concluded its mandate, after which the United Nations Mission in El Salvador (MINUSAL), made up of a small group of civilian personnel, continued to monitor the implementation of the accords.

<sup>8</sup> IACHR, *Report on the Situation of Human Rights in El Salvador*, *supra* note 6.

<sup>9</sup> *Report of the Commission on the Truth for El Salvador*, *supra* note 1, chap. I, sec. C, “The Mandate.”

death squads. Armed forces personnel were accused in almost 60 per cent of complaints, members of the security forces in approximately 25 per cent . . . The complaints registered accused FMLN in approximately 5 per cent of cases.<sup>10</sup>

The report highlighted specific cases that illustrated the patterns of extrajudicial executions, forced disappearances, massacres, and death squad killings that plunged El Salvador into what it described as a period of “madness.” It stated that “it is impossible to blame this pattern of conduct on local commanders and to claim that senior commanders did not know anything about it . . . Massacres of the peasant population were reported repeatedly.”<sup>11</sup>

In most of those cases, the Truth Commission named individuals whom it believed to have perpetrated, ordered, or covered up the atrocities. It recommended the dismissal of any military officer or government official named in its report and proposed a series of changes to the judiciary and the police. Most of its recommendations were never implemented.<sup>12</sup>

The peace agreements also called for the creation of an Ad Hoc Commission to review the records of military officers implicated in human rights violations as a vetting measure. This commission launched a partially confidential report recommending the removal or transfer of 103 officers, including almost the entire high command. The government failed to comply with these recommendations, arguing that separating high-ranking officials could destabilize peace process achievements regarding the new role of the armed forces.

### ***Judicial and criminal reform***

The peace agreements included reforms designed to increase the independence of the judiciary from other branches of government and from the control of political parties, and to delegate some of the Supreme Court’s administrative powers to autonomous bodies. In the early post-conflict era, the Salvadoran Congress implemented some of these changes by establishing new procedures for nominating Supreme Court justices, enhancing the independence of the National Judiciary Council, and reforming the judicial career law.<sup>13</sup> Although most of these reforms were

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<sup>10</sup> Ibid., chap. IV, “Cases and Patterns of Violence.”

<sup>11</sup> Ibid., chap. IV, sec. C, no. 4, “Pattern of the Conduct.”

<sup>12</sup> For more information on compliance with the peace agreements, see Ricardo Ribera, “El Salvador: La negociacion del acuerdo de paz ¿Un modelo para el mundo?” *Realidad* 37 (January–February 1994): 89–134, <http://www.uca.edu.sv/revistarealidad/archivo/4e2da01f8b2eeelsalvadorlanegociacion.pdf>, and Roberto Oswaldo López, Carolina Quinteros, and Carlos Guillermo Ramos, *State Reform after the Peace Accords: Negotiating and Implementing an Inclusive Political Settlement in El Salvador*, IPS Paper 13 (Berlin: Berghof Foundation, 2015), <http://ips-project.org/wp-content/uploads/2015/05/Paper-1-El-Salvador-english-layout-final.pdf>.

<sup>13</sup> Margaret Popkin, “Building the Rule of Law in Post-War El Salvador,” in *El Salvador: Implementation of the Peace Accords*, ed. Margarita S. Studemeister, 10–19 (Washington, DC: United States Institute of Peace, 2001), <http://www.usip.org/sites/default/files/pwks38.pdf>.

positive, they did not bring enough pressure to modify bad practices in the judicial culture and diminish the concentration of power in the Supreme Court.

Additionally, the Truth Commission's report called for the National Judiciary Council to carry out a vetting of all judges responsible for impunity and urged the immediate resignation of the complete Supreme Court. These recommendations were never fulfilled. A decade after the signing of the peace accords, an analysis by Margaret Popkin underlined that "despite regular evaluations, relatively few judges have been removed from office and the renewal of the judiciary envisioned by the Truth Commission has not taken place."<sup>14</sup> Unfortunately, as of mid-2016, the situation remains unresolved.

The Truth Commission addressed the need for criminal justice reforms, endorsing the first reform efforts funded by the US Agency for International Development, which began while the peace negotiations were still under way. In late 1996, after the United Nations pressured Salvadoran authorities, new criminal codes were finally approved, taking effect in April 1998. These reforms sought to transform the Salvadoran criminal justice system into an adversarial system, transparent and efficient, with greater protection for individual rights. The attorney general was given the authority to direct criminal investigations, a radical change, but no other substantial reform to the criminal justice system was made. Neither a specialized system nor specific prosecutorial policies for the investigation of grave human rights violations were put in place.

Popkin affirms that the Salvadoran peace process "benefited from enormous international involvement, particularly by the United Nations and the United States." She notes that "between 1993 and 1998, El Salvador received almost \$41 million in U.S. rule of law funding, making it the third largest recipient in the world during that period." Despite this large transfer of funds, the US government, the principal donor involved in justice reform, "neither called for justice for past human rights violations nor consistently embraced the Salvadoran priorities reflected in the peace accords."<sup>15</sup> Now the US government might have a new opportunity to endorse the accountability agenda by encouraging greater activity by the Attorney General's Office and criminal courts when advancing the implementation of the Plan of the Alliance for Prosperity in the Northern Triangle. This initiative between the United States and the governments of Guatemala, Honduras, and El Salvador aims to boost security and stimulate economic growth in an effort to diminish the refugee crisis, with \$750 million allocated by the US Congress for fiscal 2016.<sup>16</sup>

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<sup>14</sup> Ibid., 16.

<sup>15</sup> Ibid., 18–19.

<sup>16</sup> White House Office of the Press Secretary, "Fact Sheet: Support for the Alliance for Prosperity in the Northern Triangle," March 3, 2015, <https://www.whitehouse.gov/the-press-office/2015/03/03/fact-sheet-support-alliance-prosperity-northern-triangle>, and "Fact Sheet: The United States and Central America: Honoring our

## *The amnesty laws*

Although the peace agreements made no reference to amnesty, it is reasonable to assume that the peace negotiators expected that an amnesty would eventually be passed to facilitate the reintegration of soldiers and combatants and to prevent a “witch hunt.”

In fact, on January 23, 1992, just seven days after the signing of the Chapultepec Agreement, the National Reconciliation Act provided a limited amnesty, excluding individuals involved in serious human rights violations. Article 1 granted amnesty “to all persons who participated as direct or indirect perpetrators or as accomplices in committing political crimes, related common crimes or common crimes carried out by at least 20 persons, prior to January 1, 1992, excepting in all cases the common crime of kidnapping . . .” Article 6 established that “this amnesty shall not apply to persons who, according to the report of the Truth Commission, participated in grave acts of violence committed after January 1, 1980, whose impact on society urgently demands that the public know the truth, regardless of the sector to which they belonged.”<sup>17</sup>

On March 20, 1993, five days after the Truth Commission published its report, the Legislative Assembly adopted the General Amnesty Law for the Consolidation of Peace, repealing article 6 of the National Reconciliation Act.<sup>18</sup> Various United Nations human rights protection bodies urged the Salvadoran State to amend or even repeal the amnesty law, as it clearly prevented the victims of serious human rights violations from obtaining justice and redress.<sup>19</sup>

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Commitments,” January 14, 2016, <https://www.whitehouse.gov/the-press-office/2016/01/15/fact-sheet-united-states-and-central-america-honoring-our-commitments>.

<sup>17</sup> National Reconciliation Act, Legislative Decree 147, January 23, 1992, available in Spanish at <http://www.asamblea.gob.sv/eparlamento/indice-legislativo/buscador-de-documentos-legislativos/ley-de-reconciliacion-nacional>.

<sup>18</sup> General Amnesty Law for the Consolidation of Peace, Legislative Decree 486, March 20, 1993, available in Spanish at <http://www.asamblea.gob.sv/eparlamento/indice-legislativo/buscador-de-documentos-legislativos/ley-de-ammistia-general-para-la-consolidacion-de-la-paz>. Article 1 of this law stipulates in part: “Absolute, full and unconditional amnesty shall be granted to all persons, whether nationals or aliens, who participated in any manner in committing political crimes, related common crimes or common crimes carried out by at least 20 persons, prior to January 1, 1992 . . . The amnesty extends to the persons mentioned in article 6 of the National Reconciliation Act, contained in Legislative Decree 147 of January 23, 1992.”

<sup>19</sup> These bodies include the Human Rights Committee, the Working Group on Enforced or Involuntary Disappearances, and the Committee against Torture. See UN Human Rights Committee, *Concluding Observations: El Salvador*, Doc. CCPR/C/79/Add.34, April 18, 1994; Human Rights Committee, *Concluding Observations: El Salvador*, Doc. CCPR/CO/78/SLV, August 22, 2003; Human Rights Committee, *Concluding Observations: El Salvador*, Doc. CCPR/C/SLV/CO/6, November 18, 2010; Report of the Working Group on Enforced or Involuntary Disappearances, *Mission to El Salvador*, UN Doc. A/HRC/7/2/Add.2, October 26, 2007; and *Concluding Observations of the Committee against Torture with respect to El Salvador*, UN Doc. CAT/C/SLV/CO/2, December 9, 2009.

For its part, the Inter-American Commission on Human Rights (IACHR) found the amnesty law to be incompatible with the American Convention on Human Rights, in particular with the duty to investigate, prosecute, and punish serious human rights violations, and with the right to truth.<sup>20</sup> Just six days after the enactment of the amnesty law, the IACHR sent a communication to then-President Alfredo Cristiani, which stated in part:

The Legislative Assembly's passage of a General Amnesty Law on March 20, immediately after publication of the Report of the Truth Commission, could compromise effective implementation of the Truth Commission's recommendations and eventually lead to a failure to comply with the international obligations undertaken by the Government of El Salvador when it signed the Peace Agreements.

The Commission would like to call Your Excellency's attention to the fact that the political agreements concluded among the parties in no way relieve the State of the obligations and responsibilities it has undertaken by virtue of its ratification of the American Convention on Human Rights and other international instruments on the same subject.<sup>21</sup>

In February 1994, the IACHR issued *Report on the Situation of Human Rights in El Salvador*, reiterating that

regardless of any necessity that the peace negotiations might pose and irrespective of purely political considerations, the very sweeping General Amnesty Law passed by El Salvador's Legislative Assembly constitutes a violation of the international obligations it undertook when it ratified the American Convention on Human Rights, because it . . . applies to crimes against humanity, and because it eliminates any possibility of obtaining adequate pecuniary compensation, primarily for victims.<sup>22</sup>

The IACHR position is consistent with the case law of the Inter-American Court of Human Rights, which has asserted that

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<sup>20</sup> IACHR, Report 1/99, Case 10.480, *Lucio Parada Cea et al.*, January 27, 1999, paras. 111–16; IACHR, Report 136/99, Case 10.480, *Ignacio Ellacuría, S.J., Segundo Montes, S.J., Armando López, S.J., Ignacio Martín Baró, S.J., Joaquín López y López, S.J., Juan Ramón Moreno, S.J., Julia Elba Ramos, and Celina Mariceth Ramos, El Salvador*, December 22, 1999, paras. 197–232.

<sup>21</sup> Note from the IACHR to the State of El Salvador, March 26, 1993, quoted in IACHR, *Report on the Situation of Human Rights in El Salvador*, *supra* note 6, chap. II, sec. 4.

<sup>22</sup> IACHR, *Report on the Situation of Human Rights in El Salvador*, *supra* note 6, chap. II, sec. 4.

all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extra-legal, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law.<sup>23</sup>

In its judgment of the El Mozote case, the Inter-American Court examined the application of the amnesty law in relation to the criminal investigation of the massacre. It found the law invalid and ordered the State to take the necessary measures to ensure that the amnesty would not block criminal prosecutions:

Given their evident incompatibility with the American Convention, the provisions of the Law of General Amnesty for the Consolidation of Peace that prevent the investigation and punishment of the grave human rights violations that were perpetrated in this case lack legal effects and, consequently, cannot continue to represent an obstacle to the investigation of the facts of this case and the identification, prosecution and punishment of those responsible, and they cannot have the same or a similar impact in other cases of grave violations of the human rights recognized in the American Convention that may have occurred during the armed conflict in El Salvador.<sup>24</sup>

### ***The constitutional avenue***

In a ruling of May 20, 1993, the Constitutional Chamber of the Supreme Court of Justice declared itself incompetent to review the constitutionality of the amnesty law, arguing that the provision of amnesty constituted “an eminently political act.”<sup>25</sup>

At national level, the Human Rights Ombudsman’s Office (Procuraduría para la Defensa de los Derechos Humanos) called the law contrary to the Constitution and the international obligations of the State, stressing that it “derogated” the victims’ rights to the truth and to an adequate judicial remedy.<sup>26</sup>

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<sup>23</sup> I/A Court HR, *Case of Almonacid-Arellano et al. v. Chile*, Judgment of September 26, 2006, Series C, No. 154, para. 112, citing I/A Court HR, *Case of Barrios Altos v. Peru*, Judgment of March 14, 2001, Series C, No. 75, para. 41.

<sup>24</sup> I/A Court HR, *Case of the Massacres of El Mozote and Nearby Places v. El Salvador*, *supra* note 3, para. 296.

<sup>25</sup> Constitutional Chamber of the Supreme Court of Justice of El Salvador, Decision of May 20, 1993, available in Spanish at [www.jurisprudencia.gob.sv/VisorMLX/](http://www.jurisprudencia.gob.sv/VisorMLX/).

<sup>26</sup> Report of the Ombudsman’s Office with respect to impunity in the case of the arbitrary executions of Ignacio Ellacuría, S.J., Ignacio Martín Baró, S.J., Joaquín López y López, S.J., Amando López, S.J., Segundo Montes, S.J., Juan Ramón Moreno, S.J., Elba Julia Ramos, and Celina Mariceth Ramos [in Spanish], October 30, 2002.

Years later, in December 1998, various human rights organizations presented a new challenge to the constitutionality of the amnesty law. In response, on September 26, 2000, the Constitutional Chamber of the Supreme Court of Justice declared that the law admitted an interpretation consistent with the Constitution. In summary, it held that the law was not unconstitutional *per se*, and that judges should decide on a case-by-case basis whether its application was unconstitutional. In this decision, the Supreme Court held that the amnesty law should be applicable “only in those cases in which the aforementioned pardon does not impede protection in terms of the preservation and defense of the rights of the victims or their relatives, in other words, in those cases involving crimes whose investigation does not aim to redress [the violation of] a fundamental right.”<sup>27</sup>

Although this decision legally allowed the prosecution of persons involved in war crimes and crimes against humanity,<sup>28</sup> there have been no serious efforts, by either the Attorney General’s Office or criminal court judges, to make headway in the investigation and punishment of these crimes.<sup>29</sup> Not a single person has been indicted in El Salvador—let alone tried or convicted—for acts committed during the armed conflict. This systematic denial of justice is mostly attributable

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<sup>27</sup> Constitutional Chamber of the Supreme Court of Justice of El Salvador, Judgment on Constitutionality, September 26, 2000, case files 24–97 and 21–98, available in Spanish at [www.jurisprudencia.gob.sv/VisorMLX/](http://www.jurisprudencia.gob.sv/VisorMLX/).

<sup>28</sup> See Report of the Ombudsman’s Office, *supra* note 25, p. 70. The Ombudsman’s Office at the same time called this decision into question in the following terms: “notwithstanding such advantages, this Office of the Ombudsman regrets that the protection of constitutional justice has not had, in the opinion of the judges, sufficient reach to declare the unconstitutionality of a law that, as has already been said, completely derogates the rights to truth, justice, and reparation of the victims of aberrant crimes such as the massacres of peasants, extrajudicial executions, forced disappearances, torture, and the systematic murder of public servants.” The Ombudsman’s Office also criticized the decision because it did not address the issue of statutes of limitations. This omission led to the use of that concept as an instrument of impunity, regardless of whether amnesty is applied in a given case. A clear example of this occurred in the case against the masterminds of the massacre of six Jesuit priests and two associates in 1989. After the above-cited judgment, the judge in the case ruled that amnesty was inapplicable—the only case of inapplicability to date—but refused to investigate the alleged criminals under the argument that the statute of limitations had expired.

<sup>29</sup> Following the return to peace and even during the war, the victims, represented by human rights organizations, filed complaints before the criminal courts of acts that could be classified as serious human rights violations or international crimes, such as forced disappearance, murder, and torture. After the judicial reform toward an accusatory system, the complaints were submitted to the Office of the Attorney General to investigate the facts and bring the appropriate criminal actions. According to information gathered by Salvadoran organizations and the Ombudsman’s Office, in spite of the persistence and cooperation of the victims, these cases remained open for years in their initial phases without any type of procedural activity; in some cases they were shelved without the investigation into the perpetrators having been concluded. Regarding the lack of efficacy in the investigation and punishment of crimes from the armed conflict, see, e.g., “La impunidad en El Salvador: Tragedia del pasado y del presente,” report presented to the IACHR at the 131<sup>st</sup> session, March 12, 2008, by the Comisión de Trabajo en Derechos Humanos Pro Memoria Histórica de El Salvador (Pro-Historical Memory Commission) and the Center for Justice and International Law (CEJIL). See also I/A Court HR, *Case of Contreras et al.*, Merits, Reparations and Costs, Judgment of August 31, 2011, Series C, No. 232, paras. 145 *et seq.*

to the inertia of judicial authorities and to their willingness to cover up the perpetrators, rather than to the amnesty law itself.<sup>30</sup>

In March 2013, a group of human rights organizations filed a new lawsuit before the Constitutional Chamber requesting the reexamination of the amnesty law's consistency with the Constitution. The case was admitted in September 2013, and a final decision was still pending as this essay was written in mid-2016.<sup>31</sup> Given that the current Constitutional Chamber has handed down some groundbreaking judgments,<sup>32</sup> the decision is expected to broaden the scope of the 2000 precedent, declaring the general unconstitutionality of the amnesty law and vacating the cases in which it has been applied, in light of El Salvador's international human rights obligations.<sup>33</sup>

## **Section two: International and local conditions for review of the amnesty law**

### ***Transition with impunity***

Although the Salvadoran armed conflict ended in January 1992, and the Truth Commission made public the atrocities that had been committed between 1980 and 1991, the transition to democracy relied on absolute impunity and on the absence of a reparations program for those affected by the political violence.<sup>34</sup> This scenario was consistent with experiences at that time in other Latin American countries transitioning from civil conflict or authoritarian regimes, where peace agreements or pacts imposed by the outgoing regimes had frustrated the victims'

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<sup>30</sup> On the main criteria of the Latin American case law that rejects the application of amnesty laws to international crimes, which in turn takes account of the standards of the inter-American human rights system, see Due Process of Law Foundation, *Digest of Latin American Jurisprudence on International Crimes* (Washington, DC: DPLF, 2009), p. 273, <http://www.dplf.org/uploads/1271715939.pdf>.

<sup>31</sup> Constitutional Chamber of the Supreme Court of Justice of El Salvador, Admissibility Judgment, September 20, 2013, case file 40-2013. See "Sala admite demanda para declarar inconstitucional ley de amnistía," *La Prensa Gráfica*, September 20, 2013, <http://www.laprensagrafica.com/2013/09/20/sala-admite-demanda-para-declarar-inconstitucional-ley-de-amnistia>.

<sup>32</sup> For more information about the role of the Constitutional Chamber of the Supreme Court of Justice and the conflict with other branches of government because of its judgments, see Due Process of Law Foundation, "DPLF expresses concern about governance crisis in El Salvador due to the refusal of the Legislative Assembly to respect the rulings of the Constitutional Chamber," press release, October 1, 2012, <http://dplf.org/es/news/dplf-expresa-preocupacion-sobre-crisis-de-gobernabilidad-en-el-salvador>.

<sup>33</sup> DPLF presented an amicus brief on this constitutional process, available in Spanish at <http://www.dplf.org/en/news/dplf-presents-amicus-curiae-amnesty-law-salvadoran-supreme-court-justice>.

<sup>34</sup> Benjamin Cuéllar Martínez, "El Salvador," in *Victims Unsilenced: The Inter-American Human Rights System and Transitional Justice in Latin America*, ed. Katya Salazar and Thomas Antkowiak (Washington, DC: Due Process of Law Foundation, 2007), p. 43.

expectations of justice and truth.<sup>35</sup> Since then, several countries have embarked on processes of justice and reparation which, while still insufficient, have made inroads in attacking impunity and providing some redress. El Salvador remains an outlier in the region, with no signs of progress.

Essentially abandoned by political leaders and ignored in the development of the Truth Commission, Salvadoran victims and human rights movements have not been able to bring sufficient pressure to achieve justice and comprehensive reparations. Despite some efforts by the last two governments to implement symbolic measures and reparations, most victims still lack recognition and redress.<sup>36</sup>

During the two decades following the armed conflict, successive Salvadoran governments (at least until 2009<sup>37</sup>), as well as the military and private sector, have shrugged off any responsibility for the crimes committed. They have unremittingly maintained that the amnesty law is a pillar of the peace process<sup>38</sup> and have asserted, under this false premise, that the law is indispensable for

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<sup>35</sup> Elin Skaar, “Truth Commissions, Trials—or Nothing? Policy Options in Democratic Transitions,” *Third World Quarterly* 20, no. 6 (1999): 1109–28. See also Elin Skaar, Jemima Garcia-Godos, and Cath Collins, eds., *Transitional Justice in Latin America: The Uneven Road from Impunity towards Accountability* (London: Routledge, 2016).

<sup>36</sup> A national reparations process is being implemented, with bureaucratic difficulties and scarce resources, under the lead of the National Secretary for Social Inclusion. This process is based on a 2014 presidential decree that allows the creation of a reparations commission composed of public officials and victim’s representatives. Despite the need for such a process, it has received little attention and oversight from national or international bodies.

<sup>37</sup> In November 2009, within the framework of the case of *Contreras, et al.*, the Salvadoran State admitted the commission of the practice of forced disappearance and acknowledged its responsibility. It also acknowledged the lack of effectiveness of the investigations and agreed to conduct them more diligently. This State position was broadly affirmed by the president of the Republic, Mauricio Funes Cartagena, in January 2010, on the 18th anniversary of the peace agreements. On this occasion he acknowledged the responsibility of the State of El Salvador, and specifically of the armed forces, for serious human rights violations such as massacres, extrajudicial executions, torture, disappearance, and sex crimes, committed against the civilian population during the armed conflict, and he apologized for those acts to the victims and to the Salvadoran people on behalf of the State.

<sup>38</sup> In *Case of the Massacres of El Mozote and Nearby Places v. El Salvador*, *supra* note 3, paras. 291–92, the Inter-American Court categorically affirmed that the amnesty law was not an integral part of the peace accords. Rather, it violated one of the accords’ major objectives, namely putting an end to impunity: “291. However, on March 20, 1993, five days after the presentation of the Report of the Truth Commission, the Legislative Assembly of the Republic of El Salvador enacted the ‘Law of General Amnesty for the Consolidation of Peace,’ which extended the benefit of amnesty to the persons referred to in Article 6 of the National Reconciliation Law; namely, ‘those persons who, according to the Truth Commission, participated in grave human rights violations that have occurred since January 1, 1980.’” In other words, a general and absolute amnesty was granted that prevented the criminal investigation and the determination of liability of those individuals who had taken part as perpetrators, masterminds, and accomplices in the commission of serious human rights violations and grave breaches of international humanitarian law during the internal armed conflict, including in the exemplary cases examined by the Truth Commission. In short, the Court set aside the non-applicability of the amnesty in those situations that had been agreed by the parties to the peace accords and established in the National Reconciliation Law. In addition,

national reconciliation. This repeated message has given rise to hegemonic thinking and created a climate of silence and intimidation—and in some cases, of tacit complicity—that has closed off nearly every space for discussing the law’s effects and alternatives. The official discourse pervades the judiciary, instilling the idea of impunity as the only possible response because of the perpetrators’ power.<sup>39</sup>

### ***The political scenario in El Salvador and the alternatives at stake***

Political analysts such as Alexander Segovia note that the initial stage of El Salvador’s transition featured the adoption of some transitional justice measures based on institutional reforms and the disclosure of truth, while the second stage was marked by impunity.<sup>40</sup> After the end of the armed conflict in January 1992, members of the conservative Nationalist Republican Alliance (ARENA) won election to key offices, including the presidency of the Republic, and a majority in the Congress. ARENA, which governed El Salvador along with other right-wing organizations during the armed conflict, is composed of and supported by landowners, businesspersons, media magnates, and high-ranking military officers or former officers. Its members have made clear that a revision of the amnesty law would cause a backlash, putting in jeopardy the reconciliation process that brought peace to El Salvador. Despite pressures from the international community, ARENA did not take any serious steps to derogate the amnesty law, to acknowledge State responsibility for past crimes, or to implement measures such as reparation programs for the victims.

According to Stephan Landsman, there are some political and social reasons that justify forgoing prosecution in societies emerging from egregious human rights violations. When a majority of voters oppose prosecutions, whether through a plebiscite or the election of candidates, “it is

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beneficiaries of the amnesty included not only individuals whose cases were pending but also those who had not yet been prosecuted and those who had already been convicted, and in all cases, civil liability was extinguished. “292. Consequently, it is evident that the *ratio legis* of the Law of General Amnesty for the Consolidation of Peace was to render ineffectual Chapter I (‘Armed Forces’), section 5 (‘End to impunity’), of the Peace Accord of January 16, 1992, and, in this way, [pardon and leave unpunished] all the grave crimes perpetrated against international law during the internal armed conflict, even though the Truth Commission had determined that they should be investigated and punished. Thus, the enactment of the Law of General Amnesty for the Consolidation of Peace explicitly contradicted what the parties to the armed conflict themselves had established in the Peace Accord that determined the end of the hostilities.”

<sup>39</sup> In this regard, the Inter-American Court takes account of the opinion of the IACHR that “judges, prosecutors and other authorities were abiding by the general understanding that the Amnesty Law excluded the possibility of establishing the criminal responsibility of the perpetrators of human rights violations during the armed conflict.” Ibid., para. 281.

<sup>40</sup> Alexander Segovia, *Transitional Justice and DDR: The Case of El Salvador* (International Center for Transitional Justice, 2009), p. 27, <http://www.ictj.org/sites/default/files/ICTJ-DDR-ElSalvador-CaseStudy-2009-English.pdf>.

questionable whether a democratic government can ignore popular political sentiment.”<sup>41</sup> Similarly, Eric Stover and Harvey Weinstein warn that communities recovering from massive atrocities cannot be forced to undertake social change, which is often a problem when the international community is involved.<sup>42</sup> These findings seem to be applicable to the situation of El Salvador. First, the right-wing party ARENA, linked to the military and to the economic elite, ruled the country for twenty years after the peace agreements, despite its clear agenda in favor of impunity for the human rights violations of the past. While ARENA controlled the government, the majority of Salvadorans did not reject its anti-accountability policies. Second, El Salvador’s peace process was led by the United Nations and did not engage a large sector of the population. Therefore, it was not accompanied by cultural and social change and did not reflect national ownership.

On March 15, 2009, a center-left coalition of parties headed by the FMLN won the presidential elections and obtained a majority of seats in the Congress. This shift raised hopes of change among victims of the political violence, since the left-wing FMLN had shown interest in and sensitivity to justice as a pending issue. During the campaign, the FMLN emphasized the need to repeal the amnesty law and provide justice for the victims of the armed conflict. However, after assuming office, President Mauricio Funes announced that the legislative and judicial branches were the ones with authority to decide these matters. He even requested Salvadoran society to refrain from demanding the derogation of the amnesty law, speaking during a 2010 ceremony in honor of Monseñor Oscar Arnulfo Romero, the archbishop killed by paramilitary groups on March 24, 1980.<sup>43</sup>

By the elections of March 11, 2012, ARENA had recovered its majority in the provinces and the national Congress.<sup>44</sup> Some Salvadoran analysts predicted that ARENA would build on its victory at the local level to win the presidential elections of 2014, but despite these predictions, the FMLN won a second presidential term.<sup>45</sup> The current government has continued the symbolic

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<sup>41</sup> Stephan Landsman, “Alternative Responses to Serious Human Rights Abuses: Of Persecution and Truth Commissions,” *Law and Contemporary Problems* 59, no. 4 (1997): 86.

<sup>42</sup> Eric Stover and Harvey M. Weinstein, “Conclusion: A Common Objective, a Universe of Alternatives,” in *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity*, ed. Eric Stover and Harvey M. Weinstein (New York: Cambridge University Press, 2004), p. 326.

<sup>43</sup> Daniel Valencia Caravantes, “Funes pide no le presionen sobre derogación Ley de Amnistía,” *El Faro*, March 24, 2010, [www.elfaro.net/es/201003/noticias/1412/](http://www.elfaro.net/es/201003/noticias/1412/). Romero’s assassination was denounced before the Inter-American Commission on Human Rights, which requested the State to investigate and sanction those responsible, in spite of the amnesty law. See IACHR, Report 37/00, Case 11.481, *Monseñor Oscar Arnulfo Romero y Galdámez v. El Salvador*, April 13, 2000.

<sup>44</sup> *El Faro*, “FMLN pierde control legislativo y Arena gana 33 diputados,” March 11, 2012, [www.elfaro.net/es/201203/noticias/7954/](http://www.elfaro.net/es/201203/noticias/7954/).

<sup>45</sup> The winning candidate, Salvador Sánchez Cerén, a former guerrilla commander and self-proclaimed socialist, had served as vice president. As president, he pledged to deepen his predecessor’s popular social spending programs aimed at combating the vast inequality in the country.

measures in relation to past atrocities, but impunity persists, and the question now is whether the government has the political will to end it. President Salvador Sánchez Cerén recently “warned” the Constitutional Court to be “careful” when deciding on the amnesty law so as not to create a governability problem.<sup>46</sup> International and national pressure from victims’ and human rights organizations still seems to have no impact in achieving justice for the Salvadoran population scourged by the war.

Nonetheless, with a new Constitutional Chamber decision on the amnesty law pending, and in light of the precedent from 2000, civil society organizations should rethink their litigation strategies. In addition to the resistance by the government and the Congress to promoting the derogation of the amnesty law, the Attorney General’s office and the judiciary seem to lack the necessary independence and autonomy when deciding criminal cases against military members for crimes committed during the armed conflict.<sup>47</sup> In this context, renewed international oversight and support—financial, legal, and political—is critical to back up the efforts of civil society and encourage Salvadoran prosecutors and judges to accept indictments of gross human rights violations.

Decisions by the inter-American human rights system have not had a major impact on El Salvador’s criminal justice system so far. Nor have civil lawsuits in foreign countries, brought under statutes such as the Torture Victim Protection Act in the United States.<sup>48</sup> Nonetheless, local and international groups should continue pushing for international processes, which in combination with local work could eventually cause a “justice cascade.”<sup>49</sup>

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<sup>46</sup> Informa TVX, “Cerén pide cautela frente a amnistía,” May 26, 2016, <http://www.informatvx.com/ceren-pide-cautela-frente-a-amnistia/>.

<sup>47</sup> Cuéllar, “El Salvador,” *supra* note 33, p. 58. For a detailed study of the independence of the Salvadoran judicial system, see Due Process of Law Foundation, *Informe sobre la situación de la independencia judicial en El Salvador* (Washington, DC: DPLF, 2012), [http://www.dplf.org/sites/default/files/informe\\_audiencia\\_indep\\_jud\\_sal\\_version\\_final\\_1.pdf](http://www.dplf.org/sites/default/files/informe_audiencia_indep_jud_sal_version_final_1.pdf).

<sup>48</sup> The Torture Victim Protection Act, signed into law by President George H. W. Bush in 1992, gives rights to US citizens and noncitizens alike to bring claims for torture and extrajudicial killing committed in foreign countries. It has been used successfully in many cases. For example, in *Arce v. Garcia*, “Salvadoran refugees who were allegedly tortured by military personnel in El Salvador during a campaign of human rights violations by the Salvadoran military from 1979 to 1983’ had sued two leaders in the Salvadoran military relying on the ATS and obtained a jury award of \$54.6 million in 2002.” Scott A. Edelman, William E. Thomson, and Gregory J. Kerwin, “Defending Actions in the United States Arising from Alleged Foreign-Based Torts,” available at <http://www.gibsondunn.com/publications/Documents/Edelman.Thomson.Kerwin-DefendingActionsInUSArisingFromAllegedForeignBasedTorts.pdf>. The accused in this case, ex-minister of defense José Guillermo García, was deported to El Salvador in January 2016, where he has not faced justice for the human rights abuses in which he was implicated while he was in command. See “Former El Salvador Official Deported from US for Human Rights Abuses,” *The Guardian*, January 8, 2016, <http://www.theguardian.com/world/2016/jan/08/el-salvador-defense-minister-deported-us-human-rights-abuses>.

<sup>49</sup> Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics* (New York: W. W. Norton, 2012).

Criminal trials in domestic courts of foreign countries that recognize universal jurisdiction offer another opportunity to build momentum for pressure on the Salvadoran judiciary to either repeal the amnesty law or admit indictments on a case-by-case basis. Particularly significant are the requests by Spain for extradition of four Salvadoran military officers accused in the 1989 killings of six Jesuits (five of them Spanish nationals) and two women in San Salvador during the armed conflict.<sup>50</sup> It is expected that trials based on universal jurisdiction will provide additional reasons for the Salvadoran judicial system to start proceedings locally and avoid the exposure of Salvadoran citizens to criminal trials abroad.

It is likely that any of these strategies will provoke the most reactionary sectors—high-ranking militaries and conservative politicians—who have availed themselves of the amnesty. They continue to argue that the law’s repeal would jeopardize the peace.<sup>51</sup> These sectors disregard the fact that impunity for the atrocities of the past is one of the factors that has contributed to the outrageous level of criminal violence facing the Salvadoran population at present.<sup>52</sup>

## Conclusion

Although the Truth Commission’s report documented the atrocities committed during the 12-year conflict and established the basis for accountability and reconciliation processes under a democratic system, the State has not fulfilled its obligation to provide justice and reparations for the victims. The need to comply with these obligations has been reaffirmed by international

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<sup>50</sup> In 2011, Judge Eloy Velasco Núñez of the Spanish National Court issued an indictment accusing 20 former members of the Salvadoran military, including leaders of the high command in 1989, of planning, ordering, and carrying out the murders. The court issued international arrest warrants as the first step toward extradition. The government of El Salvador never acted on Judge Velasco’s 2011 arrest warrants, which were reissued in December 2015. Salvadoran officials continued to be reluctant, arguing that there were legal complications. One of the accused, however, was in the United States, where the US Justice Department supported Spain’s extradition request. A federal judge in North Carolina ruled that the defendant, Inocente Orlando Montano Morales, a retired colonel, should be extradited, but this decision has been appealed. DPLF and two Salvadoran human rights organizations, Asociación Pro-Búsqueda de Niñas y Niños Desaparecidos and Fundación de Estudios para la Aplicación del Derecho (FESPAD), presented an amicus brief before the Salvadoran Supreme Court of Justice in April 2016 in support of Spain’s extradition request. See Due Process of Law Foundation, “Human Rights Organizations Presented an Amicus Curiae for the Jesuitas Case in El Salvador,” press release, May 23, 2016, <http://www.dplf.org/en/news/human-rights-organizations-presented-amicus-curiae-jesuitas-case-el-salvador>.

<sup>51</sup> Among those who have opposed repeal of the amnesty law are former Salvadoran presidents Alfredo Cristiani and Armando Calderón Sol, as well as former guerrilla member Joaquín Villalobos, a signatory to the peace accords. See, for example, Otto Morán, “Calderón y Cristiani cautos ante amnistía,” *La Prensa Gráfica*, September 23, 2013, <http://www.laprensagrafica.com/2013/09/23/calderon-y-cristiani-cautos-ante-amnistia>.

<sup>52</sup> Pablo de Greiff, *Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence*, A/HRC/27/56, August 27, 2014, para. 31. See also Naomi Roht-Arriaza, “After Amnesties Are Gone: Latin American National Courts and the New Contours of the Fight against Impunity,” *Human Rights Quarterly* 37, no. 2 (2015): 341–82.

human rights bodies as well as political organs of the United Nations. The Truth Commission recommendations related to the justice system are of particular interest today because the impunity surrounding atrocities of the past seems to be one of the underlying causes of serious human rights violations being committed by police and army forces in the present. For instance, the Salvadoran Human Rights Ombudsman's Office has reported a new wave of serious human rights violations supposedly committed by unlawful militias composed of or sponsored by militaries and the police.<sup>53</sup> Using State violence to combat criminality clearly goes back to the policies and practices employed during the armed conflict, when war crimes and crimes against humanity were viewed as collateral damage and an accepted part of the counterinsurgency strategy.

Since the end of the conflict, Salvadoran political leaders have rejected the need to annul the amnesty law of March 1993 or have referred to the judiciary and legislature as the competent branches to address this matter. This has contributed to a general tendency in the society to sweep past violence under the rug and focus on the needs of the present.

The reluctance of most political and judicial actors in El Salvador to review the amnesty law and advance prosecutions could be counterbalanced by strengthening the independence of the judicial institutions, especially the Attorney General's Office and criminal judges. Prosecutors and judges could choose not to apply the amnesty law to grave human rights violations or international crimes, in accordance with international law. The law still needs to be revised by the Supreme Court of Justice in such a way as to leave no scope for preventing the investigation and punishment of those responsible. Above all, the time has come for judges and prosecutors themselves to take seriously their role as guarantors of rights<sup>54</sup> and to take the lead in seeking justice for the crimes of the past, so long denied.

Equally important is a renewed effort to build international pressure. International donors can impose conditionality on financial aid to El Salvador to demand human rights compliance. Lawsuits can be brought in the United States under the Alien Tort Statute for human rights abuses committed abroad, and, as noted above, trials can be held in Spain and other countries under the principle of universal jurisdiction.

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<sup>53</sup> See Óscar Martínez and Roberto Valencia, "PDDH concluye que policía y militares cometieron ejecuciones extralegales," *El Faro*, April 25, 2016, <https://segundavueltasv.wordpress.com/2016/04/29/pddh-concluye-que-policia-y-militares-cometieron-ejecuciones-extralegales-el-faro/>.

<sup>54</sup> In exercise of the *control of conventionality* that is binding for "all the State's powers and organs as a whole," every judge and prosecutor has the obligation to "ensure that this law never again represents an obstacle to the investigation [. . .] or to the identification, prosecution and eventual punishment of those responsible for these events and other similar grave human rights violations that occurred during the armed conflict in El Salvador." I/A Court HR, *Case of the Massacres of El Mozote and Nearby Places v. El Salvador*, *supra* note 3, para. 318.

Human rights groups in El Salvador today, especially those representing victims of the armed conflict, must reinvigorate their litigation and advocacy strategies and build stronger alliances with other civil society sectors, including academia and the international community, to continue contributing to and pressing for a national accountability process.

To ensure accountability for grave crimes, the Salvadoran government must continue to promote pending judicial reforms as well as create specialized capacities in the criminal justice system and the Attorney General's Office. But technical improvements will go only so far in addressing what are fundamentally political problems.