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Delayed Justice in El Salvador

Prospects for Transitional Justice 25 Years after the Signing of the Peace Accords

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BIOGRAPHY

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ABSTRACT

This thesis analyses the political transition process in El Salvador after its twelve-year civil war and the Transitional Justice mechanisms used in the post-conflict context: first the Truth Commission and then the amnesty laws. The objective of this research is to establish the effects of the amnesty on the peace building process and the scenarios that may occur after its recent declaration of unconstitutionality in connection to democratic governability and the pursuit of justice for serious human rights violations perpetrated during the armed conflict, which remain still unpunished 25 years after the signing of the Peace Accords.

KEYWORDS

Transitional Justice, Peace Accords, amnesty.

TABLE OF ABBREVIATIONS

ACHR	American Convention on Human Rights
ARENA	Nationalist Republican Alliance
Art.	Artícle
CEJIL	Centre for Justice and International Law
CIC	Crime Investigations Commission
CIDAI	Centre for Information, Documentation and Research Support
CIHD	Commission for the Investigation of Criminal Acts
COPAZ	National Commission for the Consolidation of Peace
DNI	National Intelligence Directorate
DPLF	Due Process of Law Foundation
ERP	People's Revolutionary Army
FDR	RevolutionaryDemocraticFront
FMLN	Farabundo Martí National Liberation Front
FPL	Popular Liberation Forces
IACHR	Inter-American Commission on Human Rights
ICC	International Criminal Court
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
IDH Court	Inter-American Court of Human Rights
IDHUCA	Human Rights Institute of the Central American University
IHL	International Humanitarian Law
IRIB	Immediate Reaction Infantry Battalion
OHCHR	Office of the High Commissioner for Human Rights
ONUSAL	United Nations Observer Mission in El Salvador
ORDEN	Democratic Nationalist Organisation
p.	Page
pp.	Pages
para.	Paragraph
paras.	Paragraphs
PCN	National Conciliation Party

PCS	Communist Partyof El Salvador
PRTC	Revolutionary Party of Central American Workers
RN	National Resistance
RS	Rome Statute
UCA	Central American University “José Simeón Cañas”
UN	United Nations
UNHCHR	United Nations High Commissioner for Human Rights

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INTRODUCTION

Nothing seems more like injustice than delayed justice.
Seneca

The past is a huge stone path that many would like to travel as if it were a highway, while others, patiently, go from stone to stone and lift them up, because they need to know what is underneath. Sometimes scorpions or scolopendras or thick white worms or chrysalises will come out to them, but it is not impossible that, at least once, an elephant will appear...
José Saramago
The Elephant's Journey

The issue of consolidating democracy is as complex as the very process of a democratic regime emerging or being returned to, especially when justice is conceived as one of its main paths.[1]

Most countries in the Latin American region experienced unfortunate internal conflicts and dictatorial and repressive governments in the 1970s, 1980s and 1990s, and faced the arduous task of overcoming differences and building democracy once again. It was dealt with differently in each case, but the common denominator was the difficulty that societies had in carrying out justice for serious human rights violations. These experiences provided the first inputs for universal jurisprudence, from

[1] This complexity is recognised in the literature on democratisation, which made a quantum leap in the 1990s, as earlier studies emphasised the importance of institutional design and the negotiation game among political leaders, while the analysis of other measures seeking to promote more substantive justice measures was relegated to the background. Therefore, the crux of the matter was no longer to explain the emergence and development of the democratisation process, but to account for how democratic consolidation was woven together (Ramírez Barat, 2007).

which international transitional justice standards have been forged (Canton, 2007).

Understood as the set of processes through which a society returning to democracy confronts human rights violations committed in the previous regime or conflict, the notion of transitional justice was developed in the second half of the twentieth century, in parallel with the advance of the International Humanitarian Law, International Human Rights Law and International Criminal Law (Teitel, 2003; Ramírez Barat, 2007).

However, the numerous studies and experiences of political transitions have taught us that, although there are international standards that establish action guidelines to deal with accountability to the past, there is no recipe applicable to all cases. Each society must build its own formula, according to its own legal, social and political context (Botero and Restrepo, 2006).

This paper addresses the complex political transition process that El Salvador had to go through after ending a bloody 12-year-long civil war, the negotiation and signing of peace agreements in 1992 and the way the violent past was faced on the road back to democracy.

Thus, what we purport to highlight about the Salvadoran transitional process is the justice component with respect to the serious human rights violations committed during the internal armed conflict. The debates and tensions generated by the possibility of judging war crimes and crimes against humanity have been the key points explaining the adoption of certain transition mechanisms; firstly, the establishment of a UN-sponsored temporary Truth Commission that sought to clarify acts of violence and identify those responsible, and, subsequently, in response to the Truth Commission Report, the approval of a broad, absolute and unconditional amnesty law, with the purpose of avoiding the investigation, prosecution and punishment of the reported perpetrators.

25 years after the Peace Accords signed by representatives of the Government of El Salvador and the Farabundo Martí National Liberation Front (FMLN), it seems that the transition cannot be put to an end yet. The consolidation of peace lacks pieces, consisting in the attainment of truth, justice and reparation for victims of human rights violations.

What we have in El Salvador is democracy and peace based on a political agreement between two belligerent forces. Hence, to operationalise the political negotiation that made peace possible, a

context prone to returning to confrontations conditioned the use of an internal legal measure like the General Amnesty Law, which ended up guaranteeing that the parties complied with the ceasefire pact, but at the price of ignoring the victims and their expectations of justice.

This analysis of the Salvadoran transitional process thus starts from the negotiations and the Peace Agreement and focuses on the amnesty as a mechanism that moved away from that agreement, but that, at the same time, functioned as a guarantee against a return to armed confrontation. We also address the tensions between the characteristics of the amnesty and the international norms and standards protecting human rights, since its breadth, generality and unconditionality generate a subjective and objective extension that collides with the right of access to justice, the effective protection of rights and the comprehensive reparation for victims of serious human rights violations.

This lack of compatibility of the General Amnesty Law for the Consolidation of Peace with the standards of the International Humanitarian Law, International Criminal Law and International Human Rights Law and with the Constitution of the Republic of El Salvador led the Constitutional Chamber of the Supreme Court of Justice to declare in July 2016 that its provisions were contrary to the Constitution and the American Convention on Human Rights. Meanwhile, its broad configuration kept the Salvadoran State from complying with international obligations to prevent, investigate, prosecute, punish and make reparations for the rights recognised in the Constitution and the aforementioned Convention.

Nevertheless, the General Amnesty Law for the Consolidation of Peace was the biggest obstacle to the criminal prosecution of human rights crimes for 23 years, the argument used by the Attorney General's Office not to exercise public criminal action and by the judges to reject the claims of victims and human rights organisations.

In view of the expulsion of this obstacle from the legal system, new expectations and uncertainties arise about the possibility of prosecuting all the cases indicated in the Truth Commission Report and other excesses of the conflict that were not included but can be qualified as crimes against humanity or war crimes, since they are imprescriptible.

Naturally, it becomes an opportunity for the victims to curtail the pattern of impunity and obtain truth, justice and reparation, through the only mechanism currently available: the criminal process. For those responsible identified by the Truth Commission Report and for

the actors of the war, the unconstitutionality of the Amnesty Law is an attempt to open past wounds, a wrong decision that endangers reconciliation, since it allows the possibility of obtaining revenge.

Certainly, given El Salvador's recent history and the polarisation inherited from the war, we should wonder what to do now with the human rights crimes that were committed during the armed conflict. Are there conditions for the prosecution of cases of serious human rights violations? Is the criminal process the best way to meet the victims' expectations of truth and reparation? Is the transitional process sufficiently consolidated so that judgments will not affect democratic governability?

Obviously, the change is too recent to answer all these questions, as well as others that may arise. Nonetheless, the first step in seeking these answers is understanding the current situation, based on the path that has been walked, the rationality of the conflict, the political negotiation, the peace agreements, the approval of the Amnesty Law and its declaration of unconstitutionality.

Therefore, the objective starting off this investigation is to determine the effects of the General Amnesty Law for the Consolidation of Peace on the Salvadoran transitional process and the scenarios made possible by its recent declaration of unconstitutionality in seeking justice for the serious violations to human rights perpetrated through the armed conflict.

An explanatory-comprehensive approach was chosen for this, through the qualitative analysis of the facts. Thus, possible scenarios could be established and predicted from understanding and interpreting the behaviour of the social, legal and political actors of the transitional process, the actions and debates that led to decreeing an amnesty, the legal and political issues that led to its unconstitutionality and the new expectations and tensions that arise now in the absence of it. These scenarios are supported by legal debates to brainstorm trajectories of actions and create a viable transitional justice formula for El Salvador.

Within this perspective, this work is structured in four chapters and a section of concise final considerations. The first chapter is basically a historical contextualisation of the Salvadoran political transition: the negotiations and peace accords; the Truth Commission and its report; the National Reconciliation Law and the General Amnesty Law for the Consolidation of Peace; the declaration of unconstitutionality of the General Amnesty Law and the new context in which it is framed.

The second chapter is dedicated to the theoretical and legal framework of Transitional Justice, analysing its conceptualisation, genealogy, models and mechanisms. In addition to its conceptual evolution, there is a review of its recognition and development in International Law, through the norms and standards that have been built into the International Humanitarian Law, the Universal and Inter-American Human Rights Systems and, more recently, the International Criminal Law.

The third chapter tries to take a critical look at Retributive Justice and Restorative Justice as Transitional Justice models. Arguments for and against that have been wielded around these modalities are compared in their respective sections, thus highlighting both the benefits and limitations seen in their application to transitional contexts.

Finally, chapter four provides an analysis of two exemplary cases of serious human rights violations carried out during the armed conflict in El Salvador, which were also included in the Truth Commission Report to reveal the systematic patterns of violence that characterised the war and among the cases that caused the most commotion at the domestic and international level. The idea is to expose the way they have been processed, the existing level of impunity, as these are the only cases that have been prosecuted, and the effects produced on them by the General Amnesty Law for the Consolidation of Peace and its unconstitutionality.

1.

A NEW SCENARIO FOR JUSTICE: THE DECLARATION OF UNCONSTITUTIONALITY OF THE GENERAL AMNESTY LAW FOR THE CONSOLIDATION OF PEACE IN EL SALVADOR.

1.1. BACKGROUND

1.1.1. Dialogue and peace negotiation

On 16 January 1992, in Castillo de Chapultepec, Mexico City, the final and definitive agreement was signed between the representatives of the government of El Salvador and the Farabundo Martí National Liberation Front (FMLN)[2], concluding a rough process of pacification attempts and a long set of negotiations[3]between the belligerent parties, with which an end was put by political means to a brutal civil war[4] more than a decade long[5].

[2] Five political structures gave life to the FMLN: the Communist Party of El Salvador (PCS), the Popular Liberation Forces "Farabundo Martín" (FPL), the People's Revolutionary Army (ERP), the National Resistance (RN) and the Revolutionary Party of Central American Workers (PRTC). See http://www.fmln.org.sv/index.php/nuestro-partido/historia-del-fmln.

[3] According to Benjamín Cuéllar Martínez's article, *Los dos rostros de la sociedad salvadoreña*, in Verdad, justicia y reparación, Inter-American Institute of Human Rights and the Institute for Democracy and Electoral Assistance, 2005, between 1982 and 1989, the FMLN and the Revolutionary Democratic Front (FDR), formed by democratic left-wing organisations, called for dialogue with the government thirty-five times.

[4] Depending on the source, the dead or missing victims have been estimated between seventy and eighty thousand, the displaced persons around two million and, according to El Salvador's Truth Commission Report, more than twenty-two thousand complaints of human rights violations were received within six months; these are exorbitant figures when we consider that the territory of El Salvador is approximately twenty-one thousand square kilometres, with a population that at that time did not exceed six million.

[5] It is usual to assume the armed conflict in El Salvador started in 1980; there was a great escalation of violence during that year. Widespread repression and the systematic official and semiofficial persecution and terror campaign against all kinds of political opposition, like deadly attacks on public demonstrations or the assassination of Monsignor Óscar Arnulfo Romero y Galdámez, were met with sporadic harassment and sabotage guerrilla action in response to the closure of all political space; however, the armed struggle grew to such a level that it can be argued that "the war" officially began on 10January 1981, the day when the first

The dialogue process between the FMLN and the government began practically simultaneously with the armed struggle[6], with repeated failures and deadlocks. In the late 1980s, there was even a proposal by US President Jimmy Carter[7] in response to the revolutionary social conflict unleashed that year. The first formal achievements referred to are President Duarte's[8]proposal to the United Nations in 1984 and the subsequent meetings in La Palma, Chalatenango and Ayagualo, La Libertad, in October and November of that same year, which constitute the first official approaches for peace between the government and the FMLN-FDR insurgency (Ellacuría, 1986).

Although more dialogues were planned during Duarte's administration of, they did not happen and everything fell into a stalemate. Their reactivation came from the agreement reached at the summit of Central American presidents known as "Esquipulas II", in August 1987[9], as far as the exhortation to cease hostilities and international cooperation for peace negotiation in El Salvador, which led to the meeting between the government and the insurgency that took place on 4 October of that same year (Cuéllar Martínez, 2005).

Later, at the dawn of President Cristiani's term[10], a new meeting

FMLN military offensive was launched. See Ignacio Martín-Baró's article *La guerra civil en El Salvador*, in Revista Estudios Centroamericanos, ECA, Vol. 36, No. 387-388,1981, p. 17, http://www.uca.edu.sv/coleccion-digital-IMB/articulo/la-guerra-civil-en-el-salvador/. The IACHR 1980-1981 Report on the human rights situation in El Salvador also highlighted the "truly alarming number" of illegal executions in El Salvador, "committed directly by security forces acting with impunity outside the law, as well as by paramilitary groups acting with the acquiescence or tacit consent of governments".

[6] In 1979, some of the members of the first reformist Junta that emerged from the 15 October military coup invited dialogue with revolutionary groups not yet unified under the FMLN. In 1980, there were other offers coming from some military members participating in the second Junta (Equipo Envío, 1984).

[7] James Earl Carter, Jr. Thirty-Ninth President of the United States of America, for the Democratic Party, from 1977-1981; his policy, although interventionist, was inclined to a negotiated solution, to avoid repeating what had happened in Nicaragua with the Sandinista Revolution. However, this approach changed radically during the Reagan Administration (1981-1985), which framed the conflict within cold war dynamics, adopting a more militaristic and inflexible position with regard to proposals for dialogue.

[8] José Napoleón Duarte Fuentes came to power under the banner of the Christian Democratic Party (PDC), which he had founded, as El Salvador's first democratically elected civilian president since 1931, when the military dictatorship began; his presidential term was from 1June 1984 to 1June 1989.

[9] Referring to the evolution of this process, Ricardo Ribera (2014) identifies a previous phase or "pre-dialogue" that went from the beginning of the war to the first official meetings in 1984 mentioned above, which was when the "dialogue phase" started in earnest; in 1987, the dialogue phase would then go into crisis to make way for a "pre-negotiation" phase.

[10] Alfredo Félix Cristiani Burkard, entrepreneur of the Salvadoran bourgeoisie belonging to the right-wing Nationalist Republican Alliance party (ARENA), whose mandate was from

was held on 15 September 1989; however, there was an important disagreement, due to attacks with explosives against the headquarters of iconic civil organisations[11]attributed to the military, by reason of which the FMLN abandoned the dialogue and launched its second military offensive on 11 November 1989.[12]

The guerrilla offensive named "to the top", which involved the greatest deployment of forces on both sides, was decisive in making the negotiation process viable, for there were neither winners nor losers. The contextual impossibility for the FMLN to take power by armed means and likewise for the government to achieve a quick military victory over the insurgent forces opened the way for negotiation as a political means to achieve a political end, which was precisely the negotiated solution of the conflict.

The political negotiation process began to become official with the Geneva Agreement of 4 April 1990. It is worth noting the decisive role of the Secretary General of the United Nations Organisation, Javier López de Cuéllar,[13]who intervened at the request of the Central American presidents, within the framework of the good offices mandate conferred by the Security Council[14] (Ribera, 1994), in which the format, mechanics and pace with which the negotiating tables were to be developed were agreed upon. This first approach to the negotiation rounds was of the utmost importance, since it was where the great objectives of the process were expressed: a quick end to the war by political means, the democratisation of the country, the unrestricted respect of human rights and the reunification of society (Cuéllar Martínez, 2005).

This meeting was followed by: the Caracas Agreement of 21 May 1990, which established the general agenda and schedule of the negotiation process; the San José Agreement of 26 July 1990, which addressed the need to protect and guarantee human rights and apply international humanitarian law and also established an unprecedented

1June 1989 to 1June 1994.

[11] The headquarters of the Committee of Mothers and Relatives of Prisoners, Disappeared and Victims of Political Murders (COMADRES) and the National Trade Union Federation of Salvadoran Workers (FENASTRAS).

[12] The guerrilla offensive at the end of 1989 was a landmark event that generated the conditions for the parties' rethinking of their positions around the need to undertake the "negotiation phase".

[13] On a personal basis and through his representative in the negotiation process, Special Adviser and Peruvian diplomat Álvaro de Soto.

[14] Security Council Resolution No 637 of 27July 1989.

international peace process verification mechanism through the creation of a special UN mission; the Mexico Agreement of 27 April 1991, whose provisions established that the nature of the Truth Commission is not jurisdictional; the New York Agreement of 25 September 1991, whose purpose was to create the conditions to ensure compliance with the agreements, including the purification of the Salvadoran Armed Forces and the creation of the National Commission for the Consolidation of Peace (COPAZ);[15]and the New York Act of 31 December 1991.

A relevant aspect characterising the armed conflict in El Salvador since its inception was that it developed along a double path: arms and politics. The dialogue-negotiation-agreement process that led to the peaceful solution of the Chapultepec Peace Accords was facilitated by the legal situation with which the FMLN intervened, with a belligerent condition recognised by other States which gave the insurgent movement the status of being subject to international law and the laws and customs of war, but also the legitimacy to negotiate at the highest level.[16]

This pacification process through political means was considered avant-garde at the time, due to the fact that the San José Agreement of 1991, on the respect and guarantee of human rights, as well as Security Council resolution 693 (1991), which created the United Nations Observer Mission in El Salvador, were unprecedented in terms of transitional processes; it has been considered one of the most successful in recent history.

Short-term achievements reflected the effectiveness of the agreements and partly justified the fact that they were taken as a reference[17] or model

[15] COPAZ comprised two government representatives, including one member from the Armed Forces and two from the FMLN, and each of the parties or coalitions represented in the Legislative Assembly. Its decisions were adopted by majority, but did not have executive powers, reserved to the signatory Parties (FMLN and government). A mechanism was created to monitor compliance with the agreements in parallel with ONUSAL's international mission.

[16] This recognition was achieved thanks to the diplomatic management undertaken in parallel with the armed struggle by Guillermo Manuel Ungo and Héctor Oquelí Colindres, Vice-President of the Socialist International (IS) and Vice-Secretary General of the IS for Latin America, respectively, both leaders of the Salvadoran political party National Revolutionary Movement (MNR), whose political lobby prompted France and Mexico to consult on the situation of violence in El Salvador and urged the international community to cooperate to end the conflict through negotiations, by issuing the Franco-Mexican Declaration on 28August 1981, in which they also acknowledged the FDR-FMLN alliance to be representative of a political force, possessing military force and, moreover, willing to negotiate (Martínez Peñate, 2013).

[17] On 18January 2017, the digital newspaper El País, Colombia, on the occasion of the 25-year-anniversary celebration of the Chapultepec Peace Accords and in relation to the Colombian peace process, published the following: "crucial issues exist that are by definition

of successful democratisation: demobilisation of the army, reorganisation of the security forces for their demilitarisation and depoliticisation and dismantling and incorporation of the FMLN military structure into the country's civil, institutional and political life within a framework of full legality (ONUSAL, 1992); also the celebration of presidential and legislative elections,[18]two years after the peace signing, with FMLN's first participation as a political party, without outbreaks of violence and without objections from international observers (Parthenay, 2012).

Nevertheless, the process was very complex and required the concurrence of very specific conditions that made the pacification viable. According to Santiago Cantón (2007), the international dimension acquired by the negotiations was decisive for the political management carried out by both sides, which led to the active participation of various governments[19]and the United Nations by means of an official monitoring and verification mission, and so was the creation of a Truth Commission, made up of notable, well-known non-Salvadoran experts[20]appointed by the Secretary General of the United Nations to investigate serious acts of violence that occurred during the conflict from 1980 to 1991.

1.1.2. The Truth Commission Report

In the Geneva Agreement of 4April 1990, the government and the FMLN expressed their common purpose of settling the war and working for peace restoration and the Salvadoran people's reconciliation and reunification; to implement this political pact, it became imperative to

the essence of an agreement and in the light of this postulate there is no doubt that if there has been a successful process, that must be the one in El Salvador. In a country where radical right-wing sectors have a strong tradition of violence and the military have a historical and deep-seated presence in the various aspects of national life (beyond its strict competence), the peace pact between the guerrillas and the Government had an essential purpose. This was the demilitarisation of the country and the structuring of a new political framework of democratic participation with full guarantees...".

[18] El Salvador's first electoral test after the signing of the Peace Accords took place on 20March 1994, in the first multi-party elections; the FMLN participated by forming a Coalition with the Democratic Convergence party for the presidential candidate and independently for the legislative candidates.

[19] Mexico, Venezuela, Colombia, Spain, the United States, the countries of the Central American isthmus and Panama.

[20] Former Colombian President Belisario Betancur; former Venezuelan Minister of Foreign Affairs Reinaldo Figueredo; and former Inter-American Court of Human Rights President Thomas Buergenthal.

carry out timely reforms to the 1983 Constitution[21] and create some legal bodies.

These commitments were developed in the Mexico Agreement of 27 April 1991; constitutional reforms were laid out with the purpose of submitting the Armed Forces to civil power, eradicating paramilitary bodies, creating the National Civil Police and training professional public defence and security bodies, together with judicial system reforms in terms of reorganising, modifying Supreme Court of Justice appointment processes, regulating judicial careers, allocating a quota of the national budget to the Judicial Body and creating the National Judiciary and Prosecutor Council for the Defence of Human Rights, and electoral reforms, creating the Supreme Electoral Tribunal and making the elections more transparent by reforming the electoral roll.

Likewise, said Agreement stipulated the creation of the Truth Commission for El Salvador, stating the following:

> We agreed to create the Truth Commission, which will be composed of three persons appointed by the Secretary General of the United Nations after hearing the Parties' opinions. The Commission will elect its own President. The Commission shall oversee the investigation of serious acts of violence that have taken place since 1980, whose footprint on society demands public knowledge of the truth with major urgency. The Commission shall take the following into account:
>
> a. The singular importance that can be attributed to the facts to be investigated, their characteristics and repercussions, as well as the shock they caused to society; and
>
> b. The need to create confidence in the positive changes promoted by the peace process and to stimulate the transition towards national reconciliation.

As for its mandate, it was established that the functions of the Commission were not jurisdictional; its powers were limited to recommending legal, political or administrative measures to prevent new acts of violence, not repeat those already committed and propose national reconciliation initiatives.

That is to say that it was predictable that the Commission, due to its

[21] After the military coup of 15 October 1978, which overthrew President Carlos Humberto Romero, a Revolutionary Government Junta came into power that suspended the validity of the 1962 Constitution; elections were called in March 1982 for a Constituent Assembly that appointed Major Roberto d'Abuisson as its President and Álvaro Magaña as Provisional President of the Republic, approving the Constitution on 15 December 1983.

transitory nature,[22] could not investigate the totality of violent acts that occurred during the conflict, so it had to prioritise those that had a special or deeper impact on Salvadoran society or international significance, without losing sight of its main objective, which was knowledge of the truth for the sake of national reconciliation; in addition, Article 5 of the Chapultepec Peace Accords gave it the task of clarifying and overcoming the accusations of impunity attributable to the State, particularly those concerning human rights violations by El Salvador's Armed Forces.

This clause entailed a challenging task. Although the Commission was denied jurisdictional functions, it was tasked with the clarification of the facts in order to overcome the impunity of serious human rights violations by the Salvadoran Army.

On this topic, Thomas Buergenthal (1996), one of the three Truth Commission members, reports that El Salvador's Army and political right criticised the work of the Commission and branded it as anti-militarist, because, in their commitment to fulfil the mandate, the commissioners determined that it was not possible to end impunity and achieve reconciliation if the human rights violations committed by the Armed Forces were not reported and those responsible identified. In addition, although they could not perform the functions of a special court, they did have the power to make binding recommendations to pursue the prosecution of atrocities and make sure that these facts would not be repeated.[23]

The negotiating parties and the mediators both realised that the maelstrom of reciprocal accusations and counter-accusations, in relation to the most serious crimes whose dimension had attracted worldwide attention,[24] constituted thorny obstacles to the peaceful solution of

[22] As established in the 1991 Mexico Agreement, the Commission had a period of six months to conduct its investigation and deliver its report to the Secretary General of the United Nations.

[23] On this point, the former commissioner observes that it was the first time in a peace agreement negotiation process that the parties to an internal armed conflict allowed a Truth Commission with a total integration of foreign notables appointed by the UN the power to investigate human rights violations committed during the conflict and make binding recommendations, a practice that was later to be replicated in other peace processes.

[24] Among them, the murder of Archbishop Óscar Arnulfo Romero by the Death Squads, the El Mozote massacre, the killing of the Jesuit priests who ran the Central American University, the rape and murder of four US nuns, numerous cases of torture and disappearance due to the El Salvador Armed Forces, the armed attack and death of off-duty US Marines in the Zona Rosa and the kidnappings of mayors and prominent businessmen, attributed to the guerrilla forces.

the conflict. In fact, the negotiations were put in danger several times. Due to which, to overcome all the "Gordian knots", it was crucial that the Truth Commission[25]integrate with foreign experts of well-known suitability, with unquestionable track records and objectivity, to carry out the investigations and establish the "truth", while generating confidence of impartiality in the parties (Buergenthal, 1996).

The Truth Commission team was set up in El Salvador for a period of six months, during which they received complaints, interviewed victims, witnesses, government, Army high command and FMLN leadership officials and civil society organisation members and examined administrative, military and judicial records and documents, one of the first conclusions being that most cases revealed systematic patterns of State violence intended to repress and sow terror.

In the Mexico Agreement of 1991, the parties committed to providing the Truth Commission with all the necessary cooperation for the investigation of the facts, facilitating access to information sources within their reach; this notwithstanding, investigators found it difficult to obtain service and personal records of army officers and their command information and location during specific periods of the war, as they were claimed to have been lost or destroyed. By the same token, the information provided by the FMLN in relation to the identity and specific deployment of its superior command officers was either incomplete or vague, which complicated the determination of personal responsibilities. Access to US government classified and declassified information was hampered in the same way; the commissioners were met with delaying attitudes from some officials who did not agree with the functions assigned to the Commission, which did not coincide with the formal United States decision to support the peace process (Buergenthal, 1996).

Despite these difficulties, the Commission obtained sufficient information to present its report.With 22,000 complaints on the table, they decided that they could not investigate all the cases thoroughly,

[25] According to Douglas Cassel, a member of the Truth Commission team as Adviser to Commissioner Thomas Buergenthal: "no one in El Salvador was going to trust a Salvadoran who could be on the other side. If an investigator was Salvadoran, the defendant could use it to try to discredit the Commission's report". Interview released to the digital newspaper El Faro, published on 8 February 2012, https://elfaro.net/es/201202/noticias/7525/%E2%80%9CEn-un-juicio-la-informaci%C3%B3n-que-recabamos-habr%C3%ADa-resultado-en-la-condena-de-D%C2%B4Aubuisson.htm.

so they selected 30 that they considered the most important or representative. They systematised the rest to extract figures and illustrate patterns of action, the profile of the most common human rights violations during the civil war (Martínez, 2012).

Another complication that the commissioners faced was the fear persisting in society about possible reprisals for pressing charges or testifying, for which reason it was decided to keep information confidential, weighing the disadvantages that this implied in relation to the guarantee of due process (UN, 1993, p. 14).

The investigation carried out on more than 22,000 charges of serious acts of violence led to the following conclusions:

> More than 60% of the total correspond to extrajudicial executions, over 25% to enforced disappearances, and more than 20% include torture allegations.
>
> The testimonies attributed almost 85% of the cases to State agents, paramilitary groups allied with them and death squads.
>
> The Armed Forces were accused in almost 60% of the complaints; members of the security forces in approximately 25%; members of military escorts and civil defence in approximately 20%; and death squad members in more than 10% of the cases. The reported accusations made the FMLN responsible for approximately 5% of the cases. (UN, 1993, p. 41).

Prior to the presentation of the Commission's Report to the Secretary General of the United Nations, there was strong opposition from government officials and senior military leaders against publishing the names of perpetrators of serious human rights violations and identifying those responsible for the greatest atrocities committed during the war. This led to a heated debate among the parties to the agreements on the need to modify the Commission's mandate by restricting the possibility of including the names of those responsible in the future report. It was argued that identifying those responsible would jeopardise the Peace Accords, what with coup threats coming from a group of high-ranking military personnel who still felt they had enough power to do so. The pressure was so great that President Cristiani himself undertook a strong diplomatic campaign urging several Latin American leaders, the United States and the UN Secretary General himself to persuade the Commission not to divulge the perpetrators' names (Buergenthal, 1996).

Former Commissioner Buergenthal remarks that it was important to identify the material as well as the intellectual perpetrators, especially

when it began to appear that many of them still held positions of influence in El Salvador. Ceasing to report them would have been one more act of concealment, so the Commission decided to issue the report in its entirety despite the pressures to which it was subjected. This decision was stated in the report as follows:

> The parties to the Peace Accords made it very clear that it was necessary to obtain full knowledge of the truth and that is why the Commission was created. However, you cannot tell the whole truth by omitting names. After all, the Commission was not entrusted with writing an academic report on El Salvador. It was asked to investigate and describe acts of violence of singular importance and recommend measures to prevent the recurrence of such events in the future. This task cannot be achieved in the abstract, omitting information (such as the names of those responsible for these events) when there is reliable testimony about it. (UN, 1993, p. 15).

The adverse reactions of government representatives and the high command of the Armed Forces would later result in the non-observance of the recommendations made in relation to the dismissal and disqualification of those public, administrative, military and judicial officials reported to have participated in or covered up human rights violations. This was essential to clean up the institutional framework and establish a favourable political and social environment for the discussion, tolerance, respect and co-responsibility of the past in the attempt to overcome it (Cuéllar Martínez, 2005).

One of the most radical refusal postures was that of the Supreme Court Justices,[26]following the recommendation on the need for the Justices to resign their positions to allow the Court to be renewed, in application of the constitutional reform of judicial system restructuring introduced by the Peace Accords (Cuéllar Martínez, 2005).

[26] The Court stated its official response to the Truth Commission Report and recommendations in the following terms: "reject energetically the conclusions and recommendations that go against El Salvador's justice administration in general and against the Supreme Court of Justice and its President contained in the report by the 'El Salvador Truth Commission´".

1.2. GENERAL AMNESTY LAW FOR THE CONSOLIDATION OF PEACE

On 20March 1993, that is, exactly five days after the public presentation of the Truth Commission Report *"From madness to Hope"*, the Legislative Assembly, through Decree no 486, approved the General Amnesty Law for the Consolidation of Peace,[27]which repealed the recently approved National Reconciliation Law of 23 January 1992[28] (Cuéllar Martínez, 2005).

TheGeneral Amnesty Law for the Consolidation of Peace of 1993 is considered to be the first express violation of the Peace Accords,[29]since none of them included the option of granting this type of pardon, neither as a condition for the confrontations to cease nor with the goal of concretising what was agreed in the negotiations. On the contrary, referring to the Armed Forces, chapter I, number 5 of the Chapultepec Peace Accords states the following:

> We recognise the need to clarify and deal successfully with all reports of impunity regarding Armed Forces officers, especially in cases where respect for human rights is compromised. To this end, the Parties refer the consideration and resolution of this point to the Truth Commission. All this without prejudice to the principle, which the Parties likewise recognise, that such acts, regardless of the sector to which their perpetrators belong, should be the object of exemplary action by the courts of justice, so that the penalties contemplated by law are applied to those responsible.

Previously, the Legislative Assembly had approved the National

[27] In Kofi Annan's opinion, the speed with which the Amnesty Law was approved showed lack of political will to investigate and reach the truth through judicial measures and punish the guilty (Secretary General Report, General Assembly, Fifty-first session, Agenda item 40, A/51/917, 1July 1997).

[28] However, this was not the first amnesty. Another three were decreed between 1983 and 1989, during the armed conflict, some of them were created to dissuade the FMLN guerrillas or encourage them to lay down their arms and return to civil life; as a result, there were fighters who sought protection from the benefit to desert the war and others, who were crippled, to receive medical treatments (Blanco, 2001).

[29] This was stated by Rubén Zamora in an interview released to the digital newspaper El Faro, published in the article *Así se fraguó la Ley de Amnistía*, 7April 2014, available in https://www.elfaro.net/es/201404/noticias/15217/As%C3%AD-se-fragu%C3%B3-la-Amnist%C3%ADa.htm Zamora was a founding member of the Revolutionary Democratic Front (FDR). In 1987, he founded the Democratic Convergence to participate in the 1988 elections. He and his party were the FMLN's parliamentary political nexus while peace was being negotiated.

Reconciliation Law,[30]which was also not explicitly provided for in the accords. Nevertheless, it was the mechanism designed to allow the FMLN commanders to enter the country, before 1February 1992, to form the National Commission for the Consolidation of Peace (COPAZ),[31]which would verify compliance with the accords, as well as the participation of former guerrilla members in political life without being arrested or prosecuted.[32]

Still, the National Reconciliation Law followed the spirit of the Accords as far as the rejection of impunity, the need to clarify what happened and the establishment of responsibilities for the serious human rights violations committed during the conflict, the reasons why it did not contemplate that a pardon could be granted in the cases and for the persons reported by theTruth Commission.

The approval of the National Reconciliation Law was the product of serious debates between the signatory parties, due to discords that threatened the last phase of the accords; the military and sectors of the political right thought that the FMLN was the only beneficiary, to the detriment of the officers who would be later indicated as violators of human rights by the Truth Commission Report. According to General Mauricio Ernesto Vargas,[33]this impasse was overcome with the commitment of the FMLN representatives to continue the talks for a later "broader and more general" amnesty law.

For this militia representative at the Peace Accords, if the General Amnesty Law had not been planned and agreed upon by both parties, peace would not have been possible. He suggests that at that time the Armed Force High Command still had enough power to carry out a coup or stop the pacification process by other means (Caravantes, 2014).

Considering the threats coming from one of the signatory parties, it is undeniable that, if a political consensus to draft the amnesty had not

[30] By Legislative Decree No 147 of 23 January 1992.

[31] The creation of the National Commission for the Consolidation of Peace was set forth in the New York Agreement of 1991.

[32] The signatories of the agreements thought that the National Reconciliation Law was part of what was agreed, in terms of dictating legislative measures that would allow all Salvadorans to fully enjoy the rights established in the Constitution, with the FMLN members integrating into civilian life within a framework of full legality.

[33] Retired general, military adviser to the government's peace negotiation commission, signatory of the Peace Accords and presidential commissioner to verify compliance therewith. Currently a regular member of the Legislative Assembly, for the right-wing party Nationalist Republican Alliance (ARENA).

been reached, there would have been a real risk that the commitments for the cessation of hostilities would be broken, the acts of violence resumed and the war prolonged.

Thus, the seed of this last Amnesty Law, with a broad, absolute and unconditional character, was the concern of the High Command and other members of the Armed Forces before the result of the Truth Commission's investigations, which revealed that the majority of crimes, more than 90%, were attributed to the Army and State security forces. This led the Armed Forces to disown and criticise the results of the investigation, their opinion being that the report presented biased, unilateral or incomplete truth (Blanco, 2001).

President Cristiani himself made a public call to encourage the political forces to enact the amnesty. He said that the Truth Commission Report had not met the Salvadoran people's expectations with regard to national reconciliation -to forgive and forget the painful past -and pointed out that "It is important then to see what we are going to do, as for erasing, eliminating and forgetting the whole of the past" (Popkin, 1998).

Subsequently, on 17March 1993, two days after the Truth Commission Report, the National Conciliation Party[34] (PCN)presented the motion to the Legislative Assembly for approval of the General Amnesty Law, in which it stated the following:

> In these moments of our country's history, we Salvadorans should be interested in reconciling, consolidating peace and strengthening our democracy, and never in revanchist and negative attitudes, because what is necessary is for this Assembly to approve a decree of general, *absolute* and unconditional amnesty, whose basic and primordial purpose is the reunification of the great Salvadoran family by forgiving and forgetting according to Christian doctrine.

Decree number 486, which gave life to the General Amnesty Law for the Consolidation of Peace, was approved three days after the motion, with waiver of procedures. In its preamble, the Legislative Assembly refers that the National Reconciliation Law granted an amnesty with

[34] Nowadays known as the National Concertation Party, it is a political party formed in 1961, a populist and anti-Communist right-wing political force since its origins, made up of conservative members of the military and civilians, which also had at its base a mass organisation denominated Democratic Nationalist Organisation (ORDEN), later transformed into a paramilitary group that operated during the armed conflict.

restrictions, which prevented its general application to all the people who, regardless of the sector to which they belonged in the armed conflict, had participated in acts of violence, which created a situation of inequity that had to be corrected in order to ease the development of the democratic process and the reunification of Salvadoran society.

This way, the Legislative Power repealed the provisions of the National Reconciliation Law and ordered the following instead:

> Artícle 1.- Broad, absolute and unconditional amnesty is granted in favour of anyone who in any way participated in the commission of political offenses, common crimes related thereto and common crimes committed by no fewer than twenty people before the first of January one thousand nine hundred and ninety-two, whether a sentence has been pronounced or proceedings initiated for the same crimes against said people; this pardon is hereby granted to all people who participated in said criminal acts as direct perpetrators, perpetrators-by-means or accomplices [...].

With the issuance of this law, given its general and absolute formulation, all possibilities of criminal prosecution, establishment of the truth and reparation for the victims were curtailed. This violated the accords in terms of guaranteeing that the impunity of the serious acts of violence reported by the Truth Commission would be overcome.

The effects of the amnesty were immediate. Out of the few who had been brought to trial for crimes of the conflict, two officers were released who had been convicted in the murder case of the Jesuits of the Central American University "José Simeón Cañas", and judicial investigations were suspended in other highly relevant cases, such as that of the El Mozote massacre.

The complaints filed after the Amnesty Law entered into force were rejected from the start. Although the judges had to analyse each case individually and determine if it could be framed within the cases provided by the Law, in practice, it began to function as a veritable barrier against access to justice for war victims.

This legal subterfuge constituted a clear violation of the right to justice and the obligation of the State to investigate, prosecute and punish the perpetrators of serious human rights violations, and completely ruled out the possibility of compensating the victims and their families (Blanco, 2001).

1.3. DECLARATION OF UNCONSTITUTIONALITY OF THE AMNESTY LAW

After its approval, before the notorious protection of the perpetrators of serious human rights violations, human rights organisations filed lawsuits for unconstitutionality of the law, but the Supreme Court itself, which had also been reported by the Truth Commission, because of its connivance with these violations, did not take long to reject it.The Court suggested that approving the Amnesty Law was a political issue outside its jurisdiction and distorted the arguments by invoking Additional Protocol II to the Geneva Conventions,[35]which allows calling for a broad amnesty after the end an internal armed conflict (Popkin, 1998).

Article 131, ordinal 26th of the Constitution of the Republic of El Salvador establishes that it is up to the Legislative Assembly, "to grant amnesty for political crimes or common crimes related thereto, or for common crimes committed by no fewer than twenty people; and grant pardons, after a favourable report from the Supreme Court of Justice". Article 244 makes the following proviso:

> Art. 244. (...) the violation, infraction or alteration of constitutional provisions shall be specially punished by the law, and for this reason, no amnesty, commutation or pardon shall be admitted for civil or criminal liabilities incurred by public, civil or military officials during the presidential period within which they were committed.

However, the amnesty included facts committed during Cristiani's presidential period, which began on 1July 1989;among them, the massacre committed within the facilities of the Central American University "José Simeón Cañas", where six Jesuit priests were murdered together with their collaborator and her daughter, as well as other human rights violations that occurred during the final offensive of November 1989. This way, the law turned into as a self-amnesty for public, civil and military officials who were in power at the time of its issuance.

After exhausting their chances with the national authorities, human

[35] In 1995, the International Committee of the Red Cross (ICRC), which interprets the provisions of the International Humanitarian Law, clarified that the Protocol II amnesty provision should not be applied to International Humanitarian Law violations. Conversely, the ICRC interprets this article as an immunity for hostile acts committed by combatants, as long as they were committed according to the International Humanitarian Law.

rights organisations and relatives of the victims turned to the regional system for the protection of human rights, submitting their cases to the Inter-American Commission on Human Rights. The study and analysis of these petitions led to some of the most important doctrinal and jurisprudential inputs on the incompatibility of amnesty laws with the American Convention on Human Rights and the obligation of the States Parties to prosecute and punish massive and systematic human rights violations.[36]

The positions adopted by the IACHR established that amnesties cannot be used as mechanisms to achieve peace in internal conflicts. According to Santiago Cantón (2007), although amnesty laws can be thought of as an important instrument of political negotiation for States, if they do not comply with the minimum international standards for the protection of human rights, they could be declared invalid by courts of justice.

Furthermore, on 25October2012, the Inter-American Court of Human Rights (IDH Court) declared El Salvador internationally responsible for the human rights violations committed by its Armed Forces in the Massacres of the El Mozote hamlet and other nearby places. The IDH Court stated that the approval of the General Amnesty Law for the Consolidation of Peace and its subsequent application, in this case by the Salvadoran courts, was contrary to the letter and spirit of the Peace Accords and incompatible with the American Convention.[37]

The State did not change its position even when the IACHR and the IDH Court determined that the Salvadoran State failed to comply with its international obligations in the aforementioned cases, pursuant to Articles 1, paragraph 1, 8 paragraphs 1, 13 and 25 of the American Convention. The amnesty continued to be justified as an instrument to maintain peace, arguing that "forgiving and forgetting" were necessary to achieve reconciliation (Canton, 2007).

In the face of demands for the Amnesty Law to be declared unconstitutional, the Supreme Court of Justice ruled that the Law was

[36] IACHR approved cases include: Report 26/92, Las Hojas Massacre v El Salvador; Report 1/99, Lucio Parada Cea and others v El Salvador; Report 37/99, Monsignor Óscar Arnulfo Romero and Galdámez v El Salvador; Report 136/99, Ignacio Ellacuría and others v El Salvador; in addition to the Commission's annual and special reports by country.

[37] Inter-American Court issued official summary of the Sentence of 25October 2012, case of Massacres of El Mozote and Nearby Places v El Salvador, http://www.corteidh.or.cr/docs/casos/articulos/resumen_252_esp.pdf.

in accordance with the Constitution, if interpreted in the sense that ordinary judges or courts had to assess amnesty applicability in each individual case.[38]

In spite of this, the interested parties continued to face the obstacle of judicial operators denying them justice, in view of complaints being dismissed solely because of the existence of the Amnesty Law.

However, on 13July2016, the Constitutional Chamber of the Supreme Court of Justice changed its jurisprudential line by resolving two unconstitutionality lawsuits filed in 2013 against the General Amnesty Law for the Consolidation of Peace.

With judgment 44-2013/145-2013,the Chamber established that the amnesty is contrary to the right of access to justice and judicial protection and the right to full reparation for victims of crimes against humanity and war crimes constituting serious International Humanitarian Law violations. Therefore, the amnesty is incompatible with Articles 2, paras. 1 and 3 and 144, para. 2 of the Constitution, in relation to Articles 1.1 and 2 of the American Convention on Human Rights, 2.2 of the International Covenant on Civil and Political Rights and 4 of Protocol II of 1977,in addition to the Geneva Conventions of 12August1949, concerning the Protection of Victims of non-International Armed Conflicts.[39]

Furthermore, given that Article 4, point e) of the Amnesty included the extinction of civil liability, the Constitutional Chamber determined that it contravened the right to compensation for moral damages, provided in Article 2, para. 3 of the Constitution, and the State's international obligation of provide forms of reparation or remedy for serious human rights violations.

When Articles 1 and 4 of the Amnesty Law were declared directly unconstitutional and Articles 2, 3, 4, 5 and 7 unconstitutional on account of their connection to the previous articles, the National Reconciliation Law of 1992 was revived, for it did not consider the option of a pardon for crimes against humanity, International Humanitarian Law violations and the serious cases of violence reported by the Truth Commission.

Having been expelled from the Salvadoran legal system, its provisions

[38] See Sentence 24-97/21-98 of the Constitutional Chamber of the Supreme Court of Justice of El Salvador.

[39] See Sentence 44-2013/145-2013 dated 13July 2016 of the Constitutional Chamber of the Supreme Court of Justice.

could no longer be applied by any administrative or judicial authority, invoked in their favour by any individual or public servant, produce or continue to produce effects in judicial proceedings related to war crimes or crimes against humanity or be incorporated by the Legislative Assembly in any other regulations related to Salvadoran transitional justice.[40]

1.4. NEW CONTEXT

Certainly, the expulsion of this amnesty from the legal system opened a new chapter in the history of El Salvador. For victims and human rights organisations, it represents "a light in the midst of impunity" (Diario Digital Contrapunto, 2016), for it opens the doors for the Attorney's Office to prosecute those materially and intellectually responsible for serious acts of violence, such as the assassination of Monsignor Óscar Arnulfo Romero and the massacres of El Mozote and nearby places and of the Jesuit priests with their two collaborators.

With this, the judicialization of the war's atrocities appears for the first time as a possibility in the public agenda. At the moment, the Salvadoran State does not seem to have a definite strategy to address this new legal-political context. It has not shown whether it will opt for perpetuating or fighting impunity in "times of peace", which has led to the revival of old debates between the sectors that seek truth and justice and those that continue to promote forgive and forget policies.

After the sentence of the Constitutional Chamber, what has prevailed is a climate of uncertainty and speculation. For example, René Hernández Valiente, Supreme Court Justice of El Salvador between 1994 and 2003, maintained that "The entire country is expecting for whatever may happen to have definite consequences (...) this will shake up our society, but it is an opportunity to continue building the democracy that we long for and the rule of law" (BBC Mundo, 2016).

For others, such as the current Minister of Defence, David Munguía Payés, the decision of the Constitutional Chamber may imply a setback in the peace process, and he has publicly stated that it is a political error: "It is a mistake to declare the Amnesty Law unconstitutional, I hope it

[40] Constitutional Chamber Press Release, San Salvador, 13July 2016.

does not turn into a witch hunt. I do not want to think that repealing the law could turn the country on its head" (La Prensa Gráfica, 2016).

The Attorney General of the Republic, Douglas Meléndez, stated that "the presiding institution was not fiscally prepared to deal with a repeal of the Amnesty Law (...) and to investigate armed conflict cases special units must be created for which there is no budget" (El Blog, 2016).

President Salvador Sánchez Cerén publicly stated that he ordered the creation of a new act that will move away from prison those servicemen or ex-guerrillas who committed crimes during the civil war, in exchange for a transitional justice that will disqualify criminal prosecutions by the Attorney General's Office of the Republic (El Faro, 2017).

In this initiative, the FMLN official has the support of the opposition, led by the ARENA party, promoter of the amnesty, which was reluctant to investigate and prosecute the crimes committed by the army throughout its twenty years of government.

The challenge is precisely to look for a viable alternative that will not compromise governability- established by the Peace Accords-, nor endanger democracy and the Rule of Law. But, above all, a solution that will consider the position of the victims who have been made invisible, and demand truth, justice and reparation.

2.

TRANSITIONAL JUSTICE: CONCEPT, EVOLUTION AND INTERNATIONAL STANDARDS

2.1. THE TRANSITION TOWARD DEMOCRACY

El Salvador's political transition from military dictatorship to democracy had in its middle the particularity of an internal armed conflict; which means that two "democratisation" phases can be identified, the first one starting from the 1979 coup, which overthrew General Carlos Humberto Romero and put an end to the last military government, and the second one after the Peace Accords of 1992.[41]

The 1979 coup marked the decline of the oligarchic-military dictatorship that had ruled since 1931. It was followed by a period of counterinsurgent reformism with de facto transitional governments by two successive civic-military juntas and a provisional president who governed until 1982;in that year, a Constituent Assembly was convened resulting in a new Constitution in 1983.The first constitutional government that was the product of "free" elections was installed in 1984, although at that time the armed conflict was fully underway. During that period, although officially it no longer ruled, the military still held a lot of power and had a determining role in the peace negotiation and, later, in the preparation of the amnesty (Martínez Ventura, 2009).

In the present investigation, emphasis is placed on the second phase: the transitional process of the post-war period and, specifically, the way

[41] According to Farid Benavides Venegas, cases such as Spain, Argentina, Chile and Eastern Europe are classic examples of justice in times of transition to democracy, whereas the Nuremberg, Tokyo, former Yugoslavia and Rwanda cases would be examples of post-conflict justice. But there are cases, such as El Salvador, where both situations converge: an authoritarian government as well as an armed conflict. In these cases, it is a matter of transitioning to both peace and democracy at once (Benavides, 2011).

the legacy of massive and systematic human rights violations was faced.

The Salvadoran peace process entailed the implementation of "transitional justice"[42]mechanisms, such as the establishment of a "Truth Commission" in charge of investigating crimes against humanity and violations of the laws and customs of war,the purification of the Armed Forces and other security forces and a process of disarmament, demobilisation and reintegration programmes for former combatants on both sides, as well as constitutional and legal reforms aimed at the implementation of the agreements, the integration of FMLN leaders and combatants into civil life by forming a political party being one of them (Martínez Ventura, 2009).

Although the political negotiation showed the need to adopt measures aimed at guaranteeing reparation, compensation and rehabilitation for the victims and the non-recurrence of serious human rights violations, these did not materialise, because there was no official recognition of the crimes nor their victims in the Truth Commission Report. Instead, the Salvadoran State opted for the enactment of the General Amnesty Law for the Consolidation of Peace.

This way, the measures that were implemented contributed only to the ceasefire, the removal of the military from political power and the integration of members of insurgent groups into civilian life. Based on the argument of maintaining commitments and not triggering new hostilities between the former belligerent parties, the restoration of the rule of law, the settling of accounts and the overcoming of impunity were abandoned.

The peace consolidation process was based on a strategy that considered the general amnesty a necessary condition for peace and the prosecution of crimes a possibility of prolonging the conflict that would endanger the social stability achieved and the continuity of the pacification process itself.

This phase of El Salvador's political transition is described by Martínez Ventura (2009)as a justice for peace transaction, which led to

[42] According to Nikolina Zidek (2016), the first study on justice in the transition to democracy was written by Herz (1982), who analysed the first waves of transitions after the world wars, identifying the factors that affect the way in which countries deal with their old regimes. And in 1988, the Aspen Institute Conference on "State crimes: punishment or pardon" brought forth the substantive issues of what is now called "Transitional Justice", namely, the dilemmas over the duty to punish human rights violators, establishing the truth and international legal obligations.

a democracy based on impunity that is against the international legal imperatives to investigate, prosecute and punish serious human rights violations.

However, when examining some studies by authors such as Joinet (1985), Uprimny and Lasso (2004), Chinchón Álvarez (2009) and Dorado Porras (2016), one infers that the current attitude of intolerance regarding amnesties, due to their incompatibility with the International Human Rights Law and International Humanitarian Law, has not always enjoyed consensus in the doctrine and even in the position of the United Nations and the agencies of the Inter-American Human Rights System.[43] These organisations came to believe at some point that amnesties were ideal tools to overcome periods of conflict or authoritarian regimes, especially in cases where severe barriers or obstacles made the application of criminal justice impossible, for example, where there is no judicial power or there is but it is akin to the previous regime, or when judicialization endangers peace or democratic stability.

In El Salvador, in addition to claiming that prosecuting and condemning the military and government officials was going to provoke reprisals and a return to armed confrontation, the Truth Commission noted the structural deficiencies of the Judiciary and its inability to administer justice efficiently and impartially. Therefore, in its report it preferred not to recommend the immediate prosecution of the identified perpetrators; instead, it implicitly suggested a deferral of justice, until the judicial system would be reconfigured and strengthened, based on the structural and legal reforms assigned to it. However, even when legal and institutional reforms were made to the justice administration system, and a more independent and impartial judiciary was achieved;

[43] The Inter-American Commission on Human Rights took an interesting position in relation to the Amnesty Decree 27-83 promulgated in Guatemala: "a difficult problem that recent democracies have had to face is the investigation of previous human rights violations and the eventual penalty for those responsible. The Commission recognises that this is a sensitive and extremely delicate matter, to which, like any other international body, there is little it can contribute. Therefore, it must be dealt with by the affected national sectors themselves and where the urgency of national reconciliation and social pacification must be harmonised with the unavoidable demands for truth and justice. Hence, the Commission believes that only the appropriate democratic bodies - usually the Parliament - may determine the appropriateness of an amnesty or extension thereof, after a debate with the participation of all the representative sectors and it being understood that previously decreed amnesties by the persons responsible for the violations themselves may have no legal validity" (see IDH Commission, Report on the human rights situation in the Republic of Guatemala, OAS Doc., OEA/Ser.L/V/II.61 doc. 47, 3October 1983, Chapter I, para. J.),

the judicialization of serious human rights violations never took place.

The General Amnesty Law for Consolidation of Peace, which took effect from 22March 1993, constituted an adequate formula to maintain impunity. However, when the provisions of that Law were declared unconstitutional, Salvadoran society was confronted with a new scenario, in a completely different context from that which "justified" amnesty with the objective of maintaining the social and political stability of the incipient democracy.

Therefore, it is relevant to try and envision the possible scenarios in this post-transitional period, 25 years after the signing of the Peace Accords, in order to find a way to guarantee the expectations of truth, justice and reparation for the victims of the armed conflict, under International Law standards.

2.2. TRANSITIONAL JUSTICE

2.2.1. Concept and genealogy

Transitional justice has been defined as a conception of justice associated with periods of political change characterised by legal responses shedding light on crimes perpetrated by previous repressive regimes or in the context of a ceased armed conflict (Teitel, 2003).

According to Uprimny (2006),"transitional" refers to the processes through which radical transformations of a social and political order are made, either by going from a dictatorial regime to a democratic one, or from a state of war to a peaceful social order.

Roht-Arriaza and Mariezcurrena (2006) define transitional justice as "a set of practices, mechanisms and concerns that arise after a period of conflict, civil war or repression, directly addressed to past human rights and humanitarian law violations".

Thus, the term encompasses all those theories and practices derived by or applied in political processes by means of which societies try to settle accounts with a past of atrocity and impunity and do justice to the victims of dictatorships, civil wars and other crises, in order to advance to or return to democracy (Valencia Villa, 2008).

Along the same lines, Garfunkel (2017) states that the concept of transitional justice encompasses all those political and legal mechanisms whose goal is for a State to move from an oppressive system violating

human rights to a democratic one respecting human rights, where there is reparation for events suffered by the victims and punishment for the acts committed by the perpetrators.

Although there are coinciding elements in the previous definitions, insofar as Transitional Justice creates a set of processes that, in a context of returning to democracy, seek to deal with the human rights violations committed in the violent past, this concept continues being the subject of constant dispute because, according to Pilar Domingo's analysis (2012), its limits change constantly, while the ways different transitional mechanisms are applied vary in each country, depending on the particular conditions of each experience and the expectations of victims and other actors, therefore, it keeps evolving over time.

The term transitional justice was developed in the second half of the twentieth century,[44]intrinsically associated with historical processes of political change, especially starting at the end of World War II (Dorado Porras, 2016; Teitel, 2003; Benítez Jiménez, 2014)and more recently during what Hungtinton (1998)called the "Third Wave of Democracy".

Teitel's work (2003) on the genealogy of the conception of transitional justice identifies and characterises three phases in its historical evolution: number one, the period after World War II, that is, after 1945, when the Nuremberg Trials took place along with the creation of the universal system for the protection of human rights; number two, the post-Cold War phase, associated with the wave of transitions to democracy and modernisation that began in the 1980s and went on until the 1990s, since world politics was characterised by acceleration in the resolution of conflicts and persistent discourse for justice in the world of law and society;[45]and number three, the stable phase of transitional justice, related to globalisation and typified by conditions of marked violence and political instability, which lay the foundations for establish as normal

[44] The first study on justice in the transition to democracy and how to, "cope with the legacies of authoritarianism and totalitarianism" was written by Herz (1982). It involved two waves of transitions preceding Huntington's third wave: the first after the Second World War and the second in the 1970s. Herz also identified the factors affecting the way countries will cope with their previous regimes, the old regime type and transition type, to establish the perspectives and the issues to be addressed (Zidek, 2016).

[45] In accordance with the prevailing paradigm of this phase, O'Donnell, Schmitter, and Whitehead (1994) referred to the importance of settling past accounts without disrupting the transition process underway and underscored that the most difficult and immediate issues were to determine how to administer justice to those directly responsible for past acts of repression and establish a degree of civil control over the armed forces.

a right to terrorism related violence. In this last phase, transitional justice moves from the exception to the norm and becomes a paradigm of the rule of law.

From the above it may be deduced that, at first, the conception of transitional justice[46]was based solely on demands for truth and justice after an episode of war or dictatorship, with a punitive justice model, that is, with an emphasis on its retributive character; which is why the transition mechanisms were geared toward achieving the truth by investigating the crimes committed, establishing responsibilities and punishing the perpetrators.

Later, during the period of political fragmentation and democratisation processes of the so-called "Third Wave", in Huntington's terms (1998),the concept of transitional justice incorporated the dilemma of the application of justice in nascent democracies, with the concern that a punitive perspective could endanger their fragile transitional processes. Thus, expectations of peace and reconciliation went on to integrate also the notion of transitional justice, which was reflected in the political transitions of the 1980s and 1990s, when justice was compromised for peace (Benítez Jiménez, 2014).

To the extent that the definition and expectations of transitional justice have been developed, so has the range of objectives that it encompasses, since mechanisms of restorative justice have gradually been included, granting the victims a more key role, aiming at their recognition and comprehensive reparation.

According to the analysis by Valencia Villa (2008), the fundamental challenge facing transitional justice today is finding a reasonable balance between the conflicting demands of justice and peace, the duty to punish crimes that went unpunished and honour their victims and the duty to reconcile the old political adversaries. To this end, criteria of reasonableness and proportionality must be addressed that will not focus on restricting rights, but on prioritising a greater democratic

[46] Transitional Justice understood as the practical application of transitional measures, and not in relation to the concept, considering that Transitional Justice mechanisms have existed historically prior to the appearance of the term(Elster, 2006). According to Zidek(2016), the current concept of "Transitional Justice" is to be attributed to Ruti Teitel (2000), who at the time gave it a broad, but laconic definition: "justice in periods of political transition". Zidek believes that this definition was valid at that time, when the conception of transitional justice focused strictly on legal measures, but today, when Transitional Justice as a field of study is trying to keep up with new phenomena, it does not reflect the reality of the field and its main components (2016).

purpose that will more than compensate for any violation. Thus, the purpose of transitional justice, as it is conceived now, "is not only the restoration of law and order or the rule of law, but also and above all the vindication of victims and judicial justice" (2008, 2 and 13).

According to Javier Dorado Porras (2016), transitional justice is a discipline that has gained greater significance and importance in recent decades, to the point of becoming a specific field of research, activism and work within the context of human rights.A movement that in its development has been nourished first and foremost by the transitional experiences of Latin America and Eastern Europe, and that has been perfected with each experience through the accumulation of knowledge and interactions with diverse actors. It would behove us to mention deep and complex processes such as those of South Africa, Rwanda, former Yugoslavia, East Timor, Sierra Leone, the Democratic Republic of the Congo and Colombia, which have led to linking transitional mechanisms not only to peace negotiations and the restoration of democratic governability, due to internal conflicts and repressive regimes, but also to the need of promoting social and economic development, good governance and ways to include victims and other people affected in the reconstruction, consolidation and reconciliation process (2016, 86).

In the same context, according to Kai Ambos (2009), the idea of a new transitional justice paradigm is not limited to post-conflict situations and/or regime changes, but also includes peace process situations within an ongoing conflict and/or formal democracy.This means that that the measures applied in such situations may be of a judicial or non-judicial nature, or both,with or without distinct levels of international participation, and may consist of individual prosecutions, reparations, truth seeking, institutional reforms, disqualifications and dismissals, or a combination of them.

Furthermore, transitional justice should not be reduced to the time immediately after the end of the repressive regime or armed conflict, as it may be included while the conflict is developing, like in Colombia, in the medium term, which would cover the period of five to twenty years after the return to democracy, or in the long term, over twenty years, as the case that now concerns us in El Salvador (Hazan, 2006, cited in Ambos, 2009).

According to Teitel (2003), this new perception of transitional justice, which has existed since the end of the 20th century and extends into the new millennium, reflects a sense of meta-transition brought

about by the actors' becoming aware of the permanence of old injustices and postponed transitional justice experiences, which has led to the re-emergence of "calls for apologies and reparations, the publishing of memoirs and all kinds of score settling connected to past crimes and suffering" (2003, 18).

This is explained by the fact that transitional justice is related to exceptional political conditions, where the State itself is involved in crimes and, therefore, seeking justice must necessarily wait for the regime to change.[47]Transitional justice does not imply here a linear treatment of time, postponed demands and litigations being valid, so as to take advantage of the feasibility produced by changes in conditions and opportunities as time goes by; an issue that has been resolved also thanks to the imprescriptibility of war crimes and crimes against humanity (2003, 19).

2.2.2. The legal framework of Transitional Justice

Undoubtedly, one of the most important and, at the same time, problematic aspects is that of accountability for human rights violations and war crimes perperated during a dictatorship or an armed conflict.

The diverse experiences of democratic transitions worldwide, together with the studies carried out in this regard, allow us to infer that there is no single model or recipe applicable to all cases, which means that each society must build its own formula according to its local context. However, it is possible to make use of basic transitional justice parameters generated by international consensus in reports and declarations by bodies of the different human rights protection systems, international treaties and doctrines and legal systems that integrate the corpus juris of Public International Law (Botero and Restrepo, 2006).

Félix Reátegui (2011) explains this in his introduction to the Latin American Handbook on Transitional Justice, where he argues that, apart from the obvious restrictions or political conditions that surround any justice effort, there is an axiological foundation, an axis of principles

[47] In recent years, this has been characterised by some as the *"Scilingo Effect"*, after a confession given two decades subsequent to the end of the military junta regime in Argentina. This confession reopened the issue of justice for the crimes committed during the dictatorship according to M. Feitlowitz (1988), who analyses this effect in relation to justice delays (Teitel, 2003).

and values and a set of basic legal rules that would come to constitute minimum legal imperatives for every State.

These guidelines and obligations derive initially from the International Humanitarian Law and the International Human Rights Protection System, as frameworks for the creation of binding norms for States. But the development of the protection and promotion of human rights has also led to the recognition of "individual responsibility"[48]for human rights crimes, by means of the International Criminal Law and the recognition of these crimes also in the domestic Criminal Law of States.

For this reason, Ramírez Barat (2007) argues that in order to understand how human rights protection works within the "umbrella" provided by International Law, the four following areas must be analysed: International Humanitarian Law, International and Regional Human Rights Systems, International Criminal Law and domestic Criminal Law Systems, to the extent that serious International Law violations are incorporated in their jurisdictions.

2.2.2.1. International Humanitarian Law

The International Humanitarian Law (IHL) is that aspect of Public International Law which aims to protect people whether they do or do not participate in international or non-international armed conflicts, regulate warfare's means and methods used in hostilities and impose preventive limitations and legal consequences in the event of non-compliance.

The IHL sources are the so-called Law of Geneva and Law of The Hague. The former is aimed at the protection of war combatants and victims, while the latter regulates the conduct of hostilities. These IHL branches are complementary and come together definitively with the adoption of the Additional Protocols of 1977 (Lozano, 2012).

The first Geneva Convention was signed in 1864;[49]today, it is

[48] The quotation marks highlight the fact that the international law system was conceived in order to regulate and mediate conflicts between states - which meant that only States were subject to international responsibility - and limited to the obligation of guaranteeing protection and material or symbolic reparations to the victims of violations for which responsibility had been determined.

[49] Named "Convention for the Amelioration of the Condition of the Wounded in Armies in the Field". Henry Dunant stood out with his call for "some international, conventional and sacred principle" to protect the wounded and those who helped them; he and the other founders of the International Committee of the Red Cross laid the cornerstone of conventional

recognised as the protocol that gave rise to International Humanitarian Law as such. Then, in 1899, an Agreement on land warfare laws and customs was signed in The Hague, which adapted the principles of the Geneva Convention of 1864 to maritime war. The Second Geneva Convention of 1906, which protects the wounded, sick and shipwrecked of armed forces at sea during wartime, improved and completed the provisions of 1864. In 1907, the Fourth Convention of The Hague defined the combatant category and the prisoner of war status, whose provisions were expanded by the Third Geneva Convention of 1929, relative to the treatment of prisoners of war (Lozano, 2012; ICRC, 2010).

The international community also approved other treaties governing the conduct of hostilities: the St. Petersburg Declaration of 1868 and the Geneva Protocol of 1925, which prohibits the use of chemical and bacteriological weapons (Kellenberger, 2007).

Finally, in 1949, the first three Geneva Conventions were revised and the fourth adopted; this last Convention is of the utmost importance because, in addition to establishing the protection of civilians during war time, it harmonised the previous ones (Lozano, 2012). The Geneva Conventions are the basis of the International Humanitarian Law currently in force. Their importance lies in the fact that their acceptance showed that it was possible to adopt norms, during peacetime, that would mitigate the horrors of war and protect the people affected thereby (Kellenberger, 2007).

It is important to mention the relevance of Article 3, common to the four Geneva Conventions, which constituted a breakthrough in the protection provided by the IHL, as it covers non-international armed conflicts, that is, civil wars, internal armed conflicts that extend to other States or internal conflicts in which third States or an international force intervene together with the government. It specifically prohibits attacks against life, mutilations, hostage taking, torturing and humiliating and cruel and degrading treatment. This provision also indicates that all judicial guarantees must be provided to persons who are prosecuted in this context (ICRC, 2010). This article has the value of customary law and constitutes the minimum of respect required of the belligerent parties (Lozano, 2012).

humanitarian law.

Due to the increasing number of non-international armed conflicts and national liberation wars that took place after the approval of the Geneva Conventions, two additional Protocols were approved in 1977. These instruments reinforce the protection afforded to victims of international (Protocol I) and non-international conflicts (Protocol II). In addition, they set limits to the way in which wars are waged, Protocol II being the first international treaty dedicated exclusively to non-international armed conflict situations (ICRC, 2010),with the purpose of protecting people who do not participate directly in hostilities or have ceased to do so, that is, ex-combatants, against power abuses and inhuman and cruel treatments that could be inflicted on them by military or civil authorities (Rivera Agudelo, 2008). These provisions had special relevance in the transitional processes that were followed in the last decades of the 20th century.

2.2.2.2. International Human Rights Protection

A) Universal System

In the post-conflict period that followed World War II, the international community promoted the creation of organisations and the conclusion of a series of international treaties and declarations that committed States Parties to respect, guarantee and promote the dignity, value and fundamental rights of all human beings, in response to the general commotion caused by crimes committed before and during the conflict and the yearning for peace.

The first instrument of this human rights positivization process was the United Nations Charter of 1945, which sought fundamentally to constitute a community of nations capable of preventing war and promoting cooperation and international solidarity.[50]It incorporates the obligation for States to protect human dignity, which unfailingly implies a restriction of the full sovereignty concept, which would later be decisive for the advancement of the International Criminal Law during the 1990s (Botero, 2006). In 1946, the United Nations created the Human Rights Commission to promote human rights and assist in the drafting of treaties (Almqvist, 2013).

[50] The Preamble to the United Nations Charter states as its objective the creation of conditions under which justice and respect for obligations arising from treaties and other international law sources can be maintained.

The Convention for the Prevention and Punishment of the Crime of Genocide and the Universal Declaration of Human Rights were adopted in 1948; subsequently, special agreements were signed to protect particularly vulnerable individuals in armed conflict situations or contexts of massive and systematic human rights violations, such as the Convention on the Status of Refugees of 1954 and its respective protocol of 1967 (Botero, 2006).

The UN also entered into agreements to prevent and avoid the impunity[51]of crimes especially repudiated by international consensus, such as the 1970 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, the 1976 International Convention on the Suppression and Punishment of the Crime of Apartheid and the 1987 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (2006, 292).

The International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights of 1976 and their optional protocols of 1976 and 1991, respectively, are an integral and significant part of the corpus juris of the International System for the Protection of Human Rights (2006, 293).

In addition, the Universal System has different protection bodies, mechanisms and agencies, some based on the Charter of the United Nations, such as the Security Council, which manages the peaceful resolution of conflicts and authorises peace missions, the Human Rights Council and Special Procedures and other human rights treaty bodies, such as the Human Rights Committee or the Committee Against Torture (UN, 2017).

The United Nations agency directly responsible for the promotion and protection of human rights is the Office of the High Commissioner for Human Rights, which provides support to human rights departments involved in peace maintenance missions in several countries. Said office has compiled a series of publications on Rule of Law instruments for societies that have suffered a conflict, aimed at fostering sustainable institutional capacity within UN missions, as well as aiding transitional

[51] Impunity has been defined by the United Nations Human Rights Commission as: "the impossibility, de jure or de facto, of bringing the perpetrators of human rights violations to account - whether in criminal, civil, administrative or disciplinary proceedings - since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making reparations for their victims" (UN, 1997).

administrations and civil society, so that they can improve their responses to the needs of transitional justice (UNHCHR, 2008).

The main judicial organ of the United Nations is the International Court of Justice (ICJ), based in The Hague; its function is to resolve legal disputes between States in accordance with international law. It also advises on legal issues referred by specialised UN organs and agencies. In addition, a wide variety of ad hoc international tribunals and UN assisted tribunals and courts have been established, such as the Tribunals for the former Yugoslavia and Rwanda, the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia and the Special Court for Lebanon (UN, 2017), whose experiences have gone on to nurture the theories, practices, measures and mechanisms that currently make up transitional justice.

As an example, on 3 August 2004, the Secretary General of the United Nations presented to the Security Council Report S/2004/616 "*The rule of law and transitional justice in conflict and post-conflict societies*", which condensed the UN's stock of experiences and knowledge until that time, so that it could be used by the States Parties when they required the establishment or re-establishment of justice and the Rule of Law (UN Secretary General Report, 2004).

It is worth noting that, by defining the concepts of "justice",[52] "Rule of Law"[53]and "transitional justice",[54]this report provides a common terminology essential for the work of States and agencies in charge of human rights promotion and protection. In addition, it establishes that the International Human Rights Law, International Humanitarian Law and International Criminal Law must be the normative foundation of all United Nations activities in support of justice and the rule of law. Likewise, it considers of utmost importance recognising the political

[52] It defines the term justice as an ideal of responsibility and equity in the protection and claim of rights and the prevention and punishment of infractions. Justice implies considering the rights of the accused, the interests of the victims and the welfare of society as a whole.

[53] The Rule of Law refers to a principle of government according to which all public and private persons, institutions and entities, including the State itself, are subject to publicly promulgated, equally enforced and independently applied laws that are also compatible with international human rights standards and principles.

[54] According to the UN, "transitional justice" encompasses all the processes and mechanisms used by a society to address the issues derived from a past of large-scale abuses, in order to hold those responsible accountable for their actions, serve justice and achieve reconciliation, and recognises that such legal or political mechanisms include the prosecution of persons, compensation, seeking truth, institutional reforms, background investigations, removal from office or combinations of all of them.

context of countries that are in a transition process, so as to be able to develop the best transitional justice guidelines.

Following this line of thought, Security Council resolution 1674/2006 underscored "the States' responsibility to fulfil their relevant obligations, end impunity and prosecute those responsible for war crimes, genocides, crimes against humanity and serious international humanitarian law violations..." (UN, 2006). The above explains the position that currently governs the Universal System, which opposes the use of mechanisms such as amnesties preventing the establishment of responsibility for human rights violations that constitute international crimes.

B)Inter-American Human Rights System

The Inter-American Human Rights System has achieved significant contributions in terms of transitional justice, especially because Latin America's transition policies of the 1980s and early 1990s privileged the judicial oblivion of crimes through amnesty laws. Faced with this situation, the victims turned to this system to denounce these contexts of impunity and seek protection for their violated rights. This way, the Inter-American Commission on Human Rights (IACHR) and the Inter-American Court of Human Rights (IDH Court) have had the opportunity to analyse various contexts of political pacification during and after military dictatorships and internal armed conflicts (Gutiérrez Ramírez, 2014).

In this area, the fight against impunity of the most serious human rights violations has been based mainly on three instruments: the American Convention on Human Rights (ACHR), the Inter-American Convention to Prevent and Punish Torture and the Inter-American Convention on Forced Disappearance of Persons (Botero, 2006).

Both the Inter-American Commission and Court have used the "international standards" concept to refer to criteria and interpretations of legal rules, standards of behaviour of the States parties to the Convention and evaluation of the States' progress as far as the consolidation of eligibility contents and levels for the rights to truth, justice and reparation, together with the commitment to the non-recurrence of the facts(Oliveros Ortíz and Sánchez, 2017).

Thus, in the exercise of its contentious jurisdiction, the IDH Courthas managed to analyse and provide content for the obligation to

investigate, prosecute and punish the serious human rights violations that have occurred in the various cases of authoritarian regimes or internal armed conflicts suffered in the region.[55]

As for the IACHR, in addition to the standards derived from the IDH Court's decisions, it has used as a conceptual framework for its reports and recommendations the principles incorporated in French expert Louis Joinet's final report to the UN on impunity, which included a set of principles for the protection and promotion of human rights through action to combat impunity (Orentlicher, 2004, cited by Botero and Restrepo, 2006).

In the same context, the IDH Court's jurisprudence and the positions of human rights treaty bodies have set the normative standards on the adequacy of transition policies with the American Convention on Human Rights. For example, the contributions on the incompatibility of the absolute amnesty laws with Convention derived international obligations are significant; also, it was indicated that the truth commissions established within the transitional justice framework do not by themselves satisfy the victims' right to truth, therefore, it is necessary that human rights trials be carried out, regardless of when the opportunity arises to do so, based on the imprescriptible nature of crimes of international importance.

In addition, due to the diversity of cases submitted, the IDH Court has been able to rule on the repertoire of legislative and political measures that have been applied in different war to peace transitions. For example, in some cases, it deemed that the application of exceptional pardon measures would be justified by the existence of tensions between justice demands and peace requirements, as, in these exceptional contexts, it would lead to overcoming a conflict situation or the replacement of an oppressive regime with a more democratic one (Gutiérrez Ramírez, 2014).

This means that amnesty could become an effective tool to overcome

[55] The IDH Court's jurisprudential treatment of the State's obligations to investigate, prosecute and punish serious human rights violations may be reviewed in the following rulings: Velásquez Rodríguez v Honduras, Judgment of 29 July 1988, para. 166; Barrios Altos v Peru, Judgment of 14 March 2001, paras. 41-44; La Cantuta v Peru, Judgment of 29 November 2006, paras. 146-160; Valle Jaramillo and others v Colombia, Judgment of 27 November 2008, para. 232; Ibsen Cárdenas e Ibsen Peña v Bolivia, Judgment of 1 September 2010, paras. 197-199; Gomes Lund (Guerrilha di Araguaia) v Brasil, Judgment of 24 November 2010, paras. 137-146.

the division of a conflict in transitional processes promoted by political negotiations, as it was undertaken in El Salvador, but its legitimacy would be conditioned by its compatibility with the standards of the International Law of Human Rights and International Humanitarian Law.[56]

This way, the Inter-American Human Rights System has been able to focus on the standards of Transitional Justice, framed in the principles of truth, justice and reparation,[57]for it has organisations, instruments and mechanisms protecting victim rights with customary rules and practices that prioritise the States' duty of protection and guarantee of compliance according to their respective treaties or conventions and to make them imperatively applicable (Botero and Restrepo, 2006; Quinche, 2009; Valdivieso, 2012; cited by Oliveiros Ortiz and Sánchez, 2017).

About international "right to justice" standards, States have the non-derogable duty to investigate, prosecute and condemn those responsible for serious human rights violations, restore the violated right and/or provide reparation for the damage caused, while adopting all necessary measures to combat impunity. This obligation arises from Articles18and24 of the American Declaration of Human Rights and 1-1, 2, 8 and 25 of the ACHR(Botero and Restrepo, 2006); it was initially established in the resolutions of the cases *Velásquez Rodríguez*

[56] In the case of El Salvador, the Inter-American Commission had determined that the Amnesty Law was contrary to the American Convention since 1999, with theParada Cea and otherscase, (paras. 107 and 121). But it was not until 2012 that the IDH Court ruled on that law in the Massacres of El Mozote and Nearby Placescase(para. 284), where the Court took a slight turn with respect to its jurisprudential line followed since the Gelman v Uruguaycase, in the sense that the amnesty decreed in El Salvador concerned acts committed during an internal armed conflict. This way, its analysis focused on its compatibility with the American Convention on Human Rights, Protocol II Additional to the Geneva Conventions of 1949 and the specific terms of the Peace Accords of 1992. Thus, referring to the sources of the International Humanitarian Law, the Court opened the possibility of granting amnesties in contexts of ending internal armed conflicts; however, because of the meaning of its ruling, concluding that in El Salvador the amnesty resulted in the total impunity of serious human rights violations, it may be inferred that amnesties can help overcome a conflict situation as a means of convincing the belligerent parties to lay down their arms, but only as long as serious human rights and International Humanitarian Law violations are excluded from pardon (Gutiérrez Ramírez, 2014).

[57] Similarly, according to the international standards condensed in the Final Report of the Special Rapporteur on impunity and the Set of principles for the protection and promotion of human rights through action to combat impunity, States have the following obligations: 1) satisfy the victims' right to know; 2) satisfy the victims' right to justice; 3) satisfy the víctims' right to reparations, and 4) adopt institutional reforms and guarantees of non-recurrence of violations (Joinet, 1997).

v Honduras (1988) and*Godínez Cruz v Honduras (1989)*and has been progressively reiterated and detailed in the Court's jurisprudence.

Therefore, by following established standards, it can be inferred that States parties to the ACHR are under the binding obligation to: a) punish those who have committed serious human rights violations, b) impose appropriate penalties on those responsible, c) investigate all serious human rights violations related matters, d) guarantee the victims' right to an effective legal remedy and e) respect due process rules in all trials (Botero and Restrepo, 2006).

Because of these obligations, general, absolute and unconditional amnesties are incompatible with the American Convention. In this regard, the IACHR recommended that granting amnesties should be compatible with the obligation to clarify, punish and redress human rights or International Humanitarian Law violations (IACHR, 2004). Therefore, it is only possible to grant amnesties for political offenses or common crimes linked to politicians and attributed to persons who participated in the hostilities, as long as their conduct did not involve serious human rights violations or war crimes.[58]

As for the "right to the truth", following the *Set of principles for the protection and promotion of human rights by means of the struggle against impunity*, developed by Joinet (1997), one understands that it is the peoples' inalienable right know the truth about the events that happened, the circumstances and the reasons that led to the perpetration of aberrant crimes, and the imprescriptible right of the victims and their relatives to know the circumstances in which the violations were committed and, in case of death or disappearance, to know what happened to the victim. This means that the right to the truth has two dimensions: a collective one, the society where the violations were committed, and an individual one, the victims or their relatives.

In its judgment of the *Velásquez Rodríguez v Honduras* caseof 29July1988, the IDH Court stated that "the right of the victim's relatives to know the fate of the victim and, where appropriate, where his or

[58] In the sentence handed down in the *Barrios Altos v Peru* case, due to their incompatibility with American Convention on Human Rights provisions, the IDH Court ruled the inadmissibility of amnesty provisions, statutes of limitation and the establishment of exculpatory circumstances that seek to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, summary, extra-legal or arbitrary executions and forced disappearances, all of which are prohibited for contravening non-derogable rights recognised by the International Law of Human Rights.

her remains are found, represents a just expectation that the State must satisfy with the means at its disposal" (IDH Court, 1988);although in this case there was no express reference to the "right to the truth", a standard of demand to States was set regarding their duty to guarantee that the facts would be made clear.

The right to the truth started being mentioned with the ruling of *Bámaca Velásquez v Guatemala* of 23February 2002, stating that "the right to the truth is subsumed within the right of the victim or their family or relatives to obtain clarifications on the violations and corresponding responsibilities from the competent State organs, through investigation and trial" (IDH Court, 2000; Garfunkel, 2017).

Thus, the IDH Courtindicated that the individual dimension of the right to the truth arises from the duty of the State to shed light on facts related to any human rights violation and to judge and punish those responsible for them, as established in Articles 8 and 25 of the ACHR. Hence, this right can be made effective through judicial processes and the establishment of truth commissions and investigative commissions or "judgments of the truth"(Botero and Restrepo, 2006).

Regarding the "right to comprehensive reparation", the Inter-American System resumed also the "*UN Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity"*, which recognises that any human right violation gives rise to the right of the victim or their relatives to obtain reparation, which at the same time implies the state's duty to pursue the perpetrators of violations and hold them responsible for such facts(Joinet, 1997).

Along the same lines, the IDH Courtindicated that according to Article 63-1 of theACHR,comprehensive reparation for victims includes the aforementioned fundamental principle of international law and resumes the customary norm of the responsibility of the States, governed in the same way as in the Universal System, insofar as it will not do to address specific internal law issues of the States bound not to comply with it(Botero and Restrepo, 2006).

2.2.2.3. International Criminal Law

The establishment of an international court of justice, such as the International Criminal Court (ICC), obeys the evolution of International Humanitarian Law and International Human Rights Law, marked by historical milestones such as the Treaty of Versailles and the Nuremberg Trials. It was created by returning to the inputs of the

implementation experiences of other special, international and ad hoc tribunals competent in the knowledge of the atrocities committed in various armed conflicts and political transitions.

According to Catalina Botero (2006), the origins of the International Criminal Court date back to 1948, with the celebration of the Convention on the Prevention and Punishment of the Crime of Genocide, which recognised genocide as an international crime that all States must prevent and prosecute. After the adoption of this convention, the UN General Assembly recommended to the International Law Commission that they study the possibility of creating an international criminal court to judge genocide cases.

Subsequently, in 1973, the International Convention on the Suppression and Punishment of the Crime of Apartheid considered the possibility that people accused of the crimes described in that instrument be tried by a court of any State or an international criminal court. Also, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984 enshrined the principle of universal jurisdiction, under which any State could request the extradition of a person accused of Torture when the State where it happened omitted judgment. But it was not until 1989, in response to a request from Trinidad and Tobago, that the UN General Assembly requested the International Law Commission for a report on the need to create a tribunal that could judge the commission of international crimes (Botero, 2006).

In addition, the pressure of civil society and some governments in relation to serious human rights and International Humanitarian Law violations that became international due to their level of atrocity - for example, those committed in Cambodia, former Yugoslavia, Rwanda and several Latin American countries, whose peace processes were characterised by the granting of controversial amnesties that exonerated State agents, paramilitary groups or armed subversives from responsibility - created a context that contributed to the "decisive strengthening of international mechanisms to fight impunity and the creation of the International Criminal Court in particular" (2006, 294).

The International Criminal Court (ICC) was established through the Rome Statute (RS), signed in 1998;according to its own Article 1, it is conceived as a permanent institution, empowered to exercise its jurisdiction over persons with respect to serious crimes of international importance, with the aim of ending the impunity of the perpetrators of

these crimes and thus contribute to the prevention of new violations. It is complementary to domestic criminal jurisdictions, as it intervenes only in their absence, when it is verified that States do not have the conditions or the will to adequately fulfil their justice administering function (Botero, 2006).

The ICI's jurisdiction is limited to the most important crimes for the international community, which are the following according to Article 5 of theRS: a) The crime of genocide; b) Crimes against humanity; c) War crimes; d) The crime of aggression. Articles 6, 7 and 8 typify all the possible situations to be understood as subsumed in those crimes.

Thus, it can be argued that contemporary International Law offers victims of serious human rights and International Humanitarian Law violations multiple ways to defend, protect and restore their rights to truth, justice and reparation(Botero and Restrepo, 2006). The international legal system is supported through two different but not exclusive types of obligations: a) conventional obligations, explicitly established through treaties or agreements signed and ratified by various states and therefore binding for them; and b) obligations corresponding to *customary international law*,[59]which come from the states following general and consistent practices due to a sense of legal obligation, and are therefore considered as enforceable on other states, even when they are not part of the convention that provided for the norm (Roth Arriaza, 1990, citedin Ramírez Barat, 2007).

The advance of the International Law of Human Rights, International Humanitarian Law and International Criminal Law, especially in the last decades of the twentieth century, has led to the development of mandatory Transitional Justice guidelines for States that are in political transition or post-transitional situations, such as the following: 1) substantive increase in international obligations for the defence and guarantee of human rights; 2) establishment of individual criminal responsibility for the commission of serious human rights and International Humanitarian Law violations; 3)expansion and strengthening of international mechanisms to guarantee State

[59] Customary rules are incorporated into the legal practice in relation to their normative force, from being the abstract opinio jurisor common legal conviction of a representative number of States to acquiring the status of *ius cogens* or peremptory norm and becoming an obligation *erga omnes* or towards all, due to their being accepted and supported by the international community.

compliance with international obligations in matters of human rights and International Humanitarian Law; and 4)extension of the international protection of human rights from peacetime to war time and from war time to times of transition(Botero and Restrepo, 2006).

These standards must be the basis on which the Salvadoran State must resume its transition process to the rule of law, which was truncated by the enactment of a general, absolute and unconditional amnesty preventing the due accountability of a past of abuses, access to the truth, justice and comprehensive reparation for the victims.

3.

RETRIBUTIVE JUSTICE AND RESTORATIVE JUSTICE AS MODELS OF TRANSITIONAL JUSTICE

3.1. MODELS OF JUSTICE

As established in the previous chapter, Transitional Justice may incorporate a set of legal or political, judicial or non-judicial, social and institutional measures that seek to overcome a conflictive or repressive situation and give rise to another situation of lasting peace that is democratic and respects the Rule of Law.

As there is no single formula applicable to all transitional processes, mechanisms vary in each case according to specific transition needs and conditions. The tension between demands for truth and justice and forgiving and forgetting has been perceived throughout the development of the Transitional Justice discipline. Some political transition experiences prioritised truth above justice; others privileged forgiveness in order not to obstruct pacification or authoritarian or repressive regime change processes.

To explain this "transitional dilemma", as Teitel (2003) calls it, between different transitional justice designs, it is pertinent to review the typology proposed by Uprimny (2006), in light of the "greater or lesser weight assigned to the punishment of the perpetrators and to the guarantee of the victims' rights or, instead, to forgiving the crimes committed and forgetting the events that occurred" (Betegón, 2013, p. 32). Uprimny mentions several models:"amnesiac pardons", in which the general amnesty and lack of reparation for the victims prevail; "compensatory pardons", which also includes general amnesties, but together with some measures of reparation for the victims and a minimum recovery of the truth regarding the facts that occurred; "punitive transitions", generally limited to the punishment of those responsible for having committed war crimes or crimes against humanity; and "responsibilising pardons",

according to which certain pardons can be granted as long as demands for truth, confession of crimes and reparation for victims are complied with, in order to achieve a balance between the needs for justice and forgiveness and enable future peace (2013).

Uprimny identifies the Salvadoran transition with the "compensatory pardons" (2006) model, since it did decree a broad and general amnesty but it also established a Truth Commission and reparation measures for victims of the conflict. However, we do not share this opinion, because, in practice, the transitional measures applied in El Salvador worked in an exclusive manner, not complementarily as Uprimny understood it.

The Truth Commission provided an exemplary description of the most serious acts of violence that occurred during the Salvadoran civil war and identified those responsible, however, the administrative, judicial and military authorities of that time ignored its report and, in response, five days after its publication, the General Amnesty Law for the Consolidation of Peace was approved. This law had the clear objective of avoiding shedding light on the truth and the determination of responsibilities and respective penalties, and no reparation policy was implemented for the victims, despite the Truth Commission's recommendations.

Therefore, it is possible to maintain that in El Salvador the transitional process was initially designed with a view to adopting a "compensatory pardon" model, according to Uprimny(2006), while following the profile and objectives of the Truth Commission. Later, however, the factual and political powers rejected the commitment made at the peace negotiations regarding the overcoming of impunity and the unrestricted respect for human rights. Instead, they opted for an "amnesiac pardon "model implemented through anabsolute amnesty replacing the first National Reconciliation Law of 1992, which excluded the possibility of amnesty for serious human rights violations in exchange for a more extended one than hindered any investigation, prosecution and punishment of internationally significant crimes committed during the armed conflict.

Therefore, it is now necessary to analyse in a new scenario - whereby the General Amnesty Law for the Consolidation of Peace has been declared unconstitutional and, therefore, its effects do not hinder the judicialisation of the human rights and war crimes of the armed conflict - whether ordinary criminal justice is enough to guarantee the rights to justice, truth, reparation for the victims and non-recurrence of

violations, in compliance with the international legality framework and the standards developed to fight impunity, or it is necessary to formulate new Transitional Justice norms in the way of restorative justice.

3.2. CRIMINAL JUSTICE AS A MECHANISM OF TRANSITIONAL JUSTICE

According to Dorado Porras (2016), the arguments in favour of the criminal prosecution of human rights crimes committed in the previous period focus on the idea that true reconciliation cannot be achieved through impunity and demands criminal prosecution for serious human rights violations. It is argued that criminal prosecution puts the State on the right path towards democracy and the Rule of Law by not making exceptions in the application of justice, which restores citizen confidence in the rule of law, and thatthe rights to truth and reparation and guarantees of non-recurrence are hampered by broad and unconditional amnesty laws that generate impunity, therefore, the victims' right to justice can be satisfied through the penal system.

Obligations involving domestic prosecution of international crimes that derive from instruments such as the Geneva Conventions, the Genocide Convention and the United Nations Convention on Torture, are binding on States parties. As pointed out by Albin Eser and Helmut Kreicker (2003),the customary doctrine on prosecution obligations has been gaining strength towards fulfilling the obligation to prosecute war crimes and crimes against humanity in non-international armed conflicts.

By the same token, the current conception of Transitional Justice tends to consider that "the transition from armed conflict to peace or from dictatorship to democracy requires necessarily that the perpetrators of crimes against humanity and those responsible for the most serious iniquities be indeed punished" (Betegón, 2013, p. 34).

However, there are still positions that try to relativise this idea with arguments that try to express that the application of justice in transitional contexts is not always the most appropriate way. For example, Dorado Porras himself (2016, p. 87) points out that:

> There are many transitional contexts in which the application of criminal justice seems impossible or at least very complicated, due to the existence of some of these factors or problems: 1)the very inexistence of judicial power –

especially in post-conflict contexts –; 2)the inclination of the judicial power for the previous regime –especially in post-dictatorship contexts –; 3)the institutional and economic difficulty in bringing criminal justice to its ultimate consequences in contexts of massive human rights violations; and 4)the possibility that such judgments may endanger peace and social stability and the continuation or consolidation of the democratic regime.

Juan Vera Sánchez (2016) has also analysed some arguments that are usually opposed to the use of the criminal process as a Transitional Justice mechanism and that, in his opinion, can even be considered as real myths. For example, it is common for the criminal process to be attributed an eminently retributive character, by assimilating the notion of sentence with the punishment that is imposed on one who has violated legal norms, in other words, the goal of the criminal process is to punish those who deserve it. But, as he clarifies, this position ignores from the outset that current criminal law has stopped seeing retribution as the only justification for a sentence. Therefore, although retribution cannot be entirely dissociated from imposition of punishment, it must be combined with other elements such as general prevention, special prevention and resocialization. To support this argument, Vera Sánchez turns to Roxin (1976) and Mir Puig (1984), and expresses that, in the criminal process, or implementation of criminal law by judicial application, retribution is present, but to a lesser degree than general prevention and special prevention.

It is also claimed that the criminal process is not a convenient mechanism in transitory processes, insofar as its purpose does not give rise to restorative measures that will help reconciliation. However, criminal justice too can introduce restorative features when it is duly complemented with other mechanisms, as a step prior to the restoration of victims and reconstruction of social fabric, claiming that there are legal consequences for behaviours or practices outside the law and demonstrating that reproach for the social damage caused is imposed while respecting the guarantees of due judgment and emphasising the resocialization purposes of the punishment.

In addition, it is considered that, although the criminal process cannot reach the real truth of the facts, it has a formal system of rules on standard of proof[60]and investigation of truth which allows the closest possible

[60] "Standard of proof" or "proof of guilt beyond a reasonable doubt" should be

approach to said truth and greater objectivity in the reconstruction of the facts. This way, achieving an official truth that applies as much to the victims as to the perpetrators and society in general can serve effectively as a starting point for the restoration, memory recovery[61]and reconciliation process, a matter analogous to what is sought with the installation of mechanisms such as truth commissions in more restorative transitional models. Except that ordinary criminal law has the advantage of having a higher standard of proof and a better system of rights and procedural guarantees for defendants implemented by judicial decisions based precisely on verifiable facts; for these reasons, it is perceived as legitimate and effective by citizens(Vera Sánchez, 2016).

According to Cristina García Pascual (2017), another common criticism of criminal justice in transition periods has been the tension between the individual and collective character of the crimes committed and the response capacity of criminal justice in this regard, meaning that the collective objectives posited by Transitional Justice as "assumption of responsibility for society as a whole, reconstruction of social ties and reconciliation" (2017, 55) are difficult to achieve by means of individualised processes, because one cannot equalise all individuals in an undifferentiated way, making an abstraction of the individual's offence. The criminal process is limited to protecting supra-individual legal assets and establishing collective responsibilities; for example, for organised apparatuses of power, establishing a balance between the magnitude of the crimes and the penalties imposed individually becomes complicated.

However, Vera Sánchez (2016) argues that when it comes to organised apparatuses of power or the criminal liability of legal persons, culpability may be deduced from the sum of the individual culpabilities of the people that make up these organisations, which may also be said in the case of genocide crimes. Accordingly, Sánchez points out that "Although it is possible to speak of meta victims or meta perpetrators

understood as rational control guidelines for determining the facts submitted to judgment that designate the degree of support for the evidence provided, so as to set forth case hypotheses.

[61] The greater the proximity of the criminal prosecution decision to the truth, the greater the contribution of the criminal process to memory understood in modern terms, especially with respect to the hermeneutic meaning of genocidal acts. The more fallible the proof of the facts of a condemnatory sentence, the greater the chances that memory preservation in the sense of the hermeneutic significance of human rights violations will be revoked, diminished or limited (Vera Sánchez, 2005).

and collective or widespread interests, it does not mean that the people who are part of these organised power structures do not matter. The collectivity (in a broad sense) is a form of organisation of individual people who group together and want to act as such" (2016: 490),

According to Feierstein (2015), when dealing with the prosecution of State crimes:

> In the case of war crimes, crimes against humanity and genocide, a very particular difference arises when analysing the power of judging, as very serious crimes were committed by the state's punitive power, which here plays a double role: the power that judges and is judged at the same time. This requires introducing fundamental modifications to the doctrinal logic of criminal law (2015, 93).

The modifications to which Feierstein alludes lie in a rethinking of the justice system itself, since criminal law is usually configured to judge the behaviour of individuals, not the actions carried out by organised apparatuses of power or by the same State that also exercises punitive power. This implies the need to conceive in a different way the system of criminal guarantees and legal principles specially designed to protect individuals against state power, since it is questionable whether the prosecution of State crimes should be carried out under a structure designed for the prosecution of common crimes committed by individuals.

Without prejudice to the reasonableness of Feierstein's analysis of the penal system's configuration as a punitive mechanism of the State, aimed at repressing and punishing individual behaviour, with limitations to achieving what García Pascual calls "the assumption of collective responsibilities", or the prosecution of State crimes, his critique does not seem completely insurmountable, in as much as it seems to omit that alternatives exist within the same penal dogma that try to provide an answer for these difficulties. For example, the theory of *"domain of the will by virtue of organized apparatuses of power",* proposed by Roxin in 1963, also known as the theory of "*perpetration-by-means controlled by organized apparatuses of power",* has been used by some national courts, mainly in Argentina, in the Military Board trials and in Germany, after the fall of the Berlin Wall, to punish those responsible and military leaders for the crimes committed by the apparatus of power they controlled during the dictatorial regimes (Muñoz Conde, 2013).

Roxin's theory holds that in a criminal organization, "the men

behind", those who order crimes with independent control, can also be responsible as perpetrators-by-means, even when the direct perpetrators are equally punished as fully responsible. Detractors of the mediate authorship thesis maintain that if you have a direct perpetrator responsible for a fact, for example, a low-ranking military officer who executed a crime, the "perpetrator behind the perpetrator", whether it be an Army General or Head of State, cannot simultaneously be responsible for the same fact. However, Roxin warns that the detractors' position has misinterpreted the fact that the "instrument" that allows the execution of the orders issued by the "man behind" is just the physical perpetrator, when the real instrument is the organized apparatus of power that backs him up (Roxin, 2006).

As Francisco Muñoz Conde admits (2013), Roxin's theory is a rethinking of the traditional theories on criminal perpetration and participation, with the aim of overcoming the difficulties they presented in laying the basis for perpetration by leaders of organized apparatuses of power as far as crimes directly committed by their members or subordinates.[62]This means that, in seeking the best approach to implement the postulates of Transitional Justice and adherence to international standards, the automatic and unreflective application of criminal justice measures or their a priori rejection as a Transitional Justice mechanism are not enough. It is necessary to appeal to creativity, finding a viable alternative that will consider the available tools.

Similarly, Feierstein (2015) points out that, although it is necessary to have a critical revision of the current configuration of the penal system and of the theoretical-philosophical foundations of penal guarantees and their relevance in judging state crimes, this does not mean giving up on the judicial process as the most socially legitimised arena where to collectively carry out the task of judging the past and clarifying responsibilities.

According to García Pascual (2017), we need to stop waiting for the criminal process to exhaust or cover all the objectives of Transitional

[62] According to Muñoz Conde (2013), Roxin's theory can effectively lay the foundations for the criminal responsibility as perpetrators-by-means of the main people responsible for the criminal power apparatus, both at the top and intermediate levels, but cannot qualify all the members. Such an expansion would take too far and denaturalise the concept of mastery of the fact, which is precisely Roxin's starting point. This does not prevent its being combined with other forms of criminal responsibility or participation.

Justice, since this is a multidisciplinary enterprise where it is possible to differentiate levels of civil and collective responsibility and reprocessing of the past. If criminal law turns out to be useful for any of these levels of responsibility, there is no reason to discard it. This leads to reducing criminal law capacity within Transitional Justice and getting the most out of it.

It is not reasonable for criminal justice to be considered accessible for ordinary crimes. In this case, a criminal sanction makes sense, but not with respect to massive human rights violations belonging to a conflictive or authoritarian past, perpetrated by State organs and considered crimes against the whole of humanity due to their great relevance (García Pascual, 2017).Common criminality is punished, even the most minor faults, but the most serious crimes, which have penetrated deeper into society, for all the suffering they cause, go generally unpunished.

By the same token, criminal justice should not be discarded in transitional processes, because when it is well managed it becomes an ideal way to approach (if not substantial, at least formal)truth, deduction of individual responsibilities, punishment of perpetrators and material reparation for victims.

In some contexts -such as the one El Salvador is currently experiencing -, the criminal process may be the only mechanism available to nearing compliance with international demands for truth, memory, justice, reparation for victims and guarantees of non-recurrence.[63]This does not prevent that "by restoring the moral component of legal action" (Feierstein, 2015, p. 95), its presuppositions may be revised, and a way sought for justice to evolve toward a different mode, overcoming the limitations of criminal law in processing human rights trials, with the special complexities they present, and satisfying the needs of Transitional Justice.

[63] In Argentina, for example, the implementation of a strategy based on the idea of carrying out criminal trials challenged the beliefs of analysts of the time who considered it risky to settle accounts with the past, as they thought it would put democracy at risk. Although there may be reasonable criticism of the judicial strategy undertaken by President Alfonsín in a politically calculated manner and aimed only at the prosecution of an elite of higher-ranking officials for crimes committed by the State, disregarding acts of repression and other violations and trying to conjugate unrestricted truth with limited justice, it can ultimately be said that the transition wager triumphed in the sense that the restoration of democracy has lasted until the present and that the judgments became "the horizon of expectations of those who sought the settling of accounts with the past of human rights violations" (Crenzel, 2015, p. 107).

3.3. THE NEW PARADIGM OF RESTORATIVE JUSTICE

Restorative justice is a new way of considering criminal justice. It focuses on making reparations for the damage caused to people and relationships rather than on punishing criminals. Because of these characteristics, recent studies on Transitional Justice include it as a mechanism with a high potential to optimise social cohesion and the vindication of victims, generally marginalised in other justice models (Márquez, 2007).

This restorative approach has begun to grow in recent times, as an option to address the inequities and dysfunctions of the essentially punitive and retributive criminal system, and so that it can be geared toward seeking reconciliation between victim and victimiser (Uprimny and Saffon, 2005). Similarly, Teitel (2003) believes that restorative justice is part of a relatively recent movement, which essentially criticises the repressive and retributive nature of criminal law and the limitations that this represents in meeting the expectations of Transitional Justice.

This perspective of justice is based on the idea that retributive punishment or punishment imposed on the perpetrator of a crime of international resonance is insufficient to re-establish peaceful social coexistence, as it does not take into account the suffering and needs of the victim, nor does it allow for the offender's adequate return to the community (Uprimny and Saffon, 2005).

Thus, if one considers a criminal proceeding against a perpetrator of serious human rights violations where his criminal responsibility is established and a sentence restrictive of freedom is imposed, this penalty per se does not imply making reparations for the harm caused to the victim. Although the commission of a crime also amounts to a pronouncement as to the civil responsibility derived from it, the penalty of imprisonment accompanied by (economic) compensation may not meet the justice expectations of the victims' relatives as much as explaining the reasons why the fact occurred and the perpetrators asking for forgiveness.

Because of the characteristics we just pointed out, this new paradigm of justice was conceived as a mechanism with a lot of viability in Transitional Justice processes framed within political negotiations for internal armed conflict termination, as in Colombia's current case, for it allows the tension between justice and peace to be reduced, due to the fact that, when transition gives greater preponderance to a conception

that is more retributive or more forgiving with pardons and amnesties, it always implies the inevitable sacrifice of one of these two values. By contrast, restorative justice seeks to achieve the reconstruction of social ties between groups of combatants and regenerate the social fabric destroyed by a conflictual past (Gómez-Velásquez and Correa-Saavedra, 2005).

Thus, we can see that, unlike its retributive counterpart, restorative justice does not posit the determination of the perpetrator's guilt, but the aggressor's acknowledgment of his responsibility, awareness of the seriousness of the harm caused and willingness to make reparations. This, together with its contribution to the reconstruction of social ties and the regeneration of broken social fabric, converges with reconciliation, one of the goals set by Transitional Justice (Gómez-Velásquez and Correa-Saavedra, 2005; Uprimny and Saffon, 2005).

It is therefore understandable that restorative justice in these terms is being increasingly accepted in armed conflict to peace political transitions, as in Colombia, where it resonates more and more as an option to facilitate peace negotiations, since it is clear that the belligerent parties would be "much less reluctant to accept the demands of restorative justice than those imposed by retributive justice" (Gómez-Velásquez and Correa-Saavedra, 2005, p. 229).

In addition, Uprimny and Saffon (2005)point out that the dialogue between victims and perpetrators, the granting of forgiveness and the possibility of the latter's reintegration into society help societies heal the deep wounds and resentments produced by the serious violations committed in the past which they are trying to overcome while also contributing to the stability and durability of the peaceful social order achieved.

Although El Salvador's democratisation process had this double component of moving from both a military dictatorship and civil war to democratic stability and a period free of war hostilities, the ability of restorative justice to contribute to peace negotiations would not be of much use at this post-conflict stage, when 25 years have passed since the signing of the Peace Accords.

Given that restorative justice can privilege the victims' perspective and participation in the process of meeting their expectations of justice, without setting aside the perpetrators and their need for social reintegration, this model could be considered as an option in contributing to social fabric reconstruction and completing the national

reconciliation process. But this presents a new difficulty, which lies in the multiple meanings of justice that may be coined by different victims; even when the conditions of the criminal act and the perpetrator coincide, the answers given by justice will not be homogeneous and, therefore, its legal forecast will be difficult in terms of the law's generality and equality requirements.

Therefore, it would behove us to investigate as to how and by what mechanisms restorative measures are implemented. Gómez-Velásquez y Correa-Saavedra's studies (2005) of Transitional Justice approaches to the Colombian peace process indicate that conditional amnesties are one of the instruments set to achieve these restorative purposes; these could be granted to combatants provided they are not the chief perpetrators of the most serious international crimes committed during the conflict. This is because, while the criminal persecution of the belligerent parties is dispensed with, this type of amnestycan be included in the conditions for forgiveness, recognition of responsibilities and contribution to comprehensive reparations for the victims.

Truth commissions are also mechanisms that can be framed within a restorative justice model, as they allow victims to learn the structural causes and real dimensions of the atrocities caused in the war, while also offering definitive closure with this past (Tamarit, 2005). Likewise, truth commissions can be spaces where victims go to relate their firsthand experiences, recover their dignity to some extent and their ability to relate to society without resentment (du Toit, 2005, cited in Gómez-Velásquez y Correa-Saavedra, 2005).

Material and symbolic reparation programmes are another measure that can be implemented for the victims of serious human rights violations. These reparations can range from specific compensatory benefits to symbolic acts that recognise the harm or damage produced in the previous regime or conflict, such as public speeches and acts recognising and accepting responsibility for the violations committed, building monuments or establishing commemorative dates (UN, 2005).

Furthermore, the restorative justice model conceives the option of imposing alternative penalties on perpetrators who do not have access to conditional amnesties because they are identified as direct perpetrators or perpetrators-by-means of serious human rights violations (Gómez-Velásquez & Correa-Saavedra, 2005). This alternative penalty may focus on the reduction of the penalties that may be imposed when those responsible have collaborated with the determination of the

truth, apologised for the acts committed or contributed to material and symbolic reparations for the victims.[64]

As one can see, restorative justice cannot replace criminal justice in all the cases involving alternative penalties for major international crimes that cannot be included in conditional amnesties without contravening the current International Humanitarian Law and human rights standards; what is done in this case is imposing a penalty anyway, but there is still need for a retributive justice response even when the penalty is substantially reduced.

It may also be noted that a restorative model, where meeting the victims' expectations is a priority, would lead to complications with victims or family members who have a retributive notion of justice. When victims expect people responsible for serious acts of violence to serve a sentence and are not willing to forgive, or when perpetrators do not want to acknowledge their responsibilities or continue to justify their actions in ways that seem reasonable to them, one must have recourse to criminal justice, which, as mentioned earlier, is not compatible with the restorative perspective.

With regard to the above, Uprimny and Saffon (2005) argue that it is very unlikely that all victims and perpetrators will be willing to establish close bonds of solidarity and trust between them, after having suffered or participated in acts as atrocious as crimes against humanity and war crimes. South Africa's transitional experience may be used to illustrate the complexity of the matter, where restorative justice measures were promoted including the pursuit of values, such as friendship, hospitality, magnanimity and compassion, that are very difficult to achieve for those who lived during the apartheid (Crocker, 2002, cited in Uprimny and Saffon, 2005).

By the same token, even though the possibility exists that some of the actors of the transition would be willing to strive to realise these values, "it does not seem practically plausible or ethically justifiable to impose

[64] In Colombia, for example, there has already been an experience of this alternative to criminal justice, during the Transitional Justice process carried out for the termination of the armed conflict between the State and the former paramilitary groups; with Law 975 of 2005, the option was created of replacing the ordinary prison sentence imposed on the ex-combatants of these groups with an alternative penalty consisting in a substantial reduction of the same that ranged between 5 and 8 years in prison if they complied with (i) the disclosure of the truth in relation to the crimes committed, (ii) reparation for the victims and (iii) being included in devolution and disarmament programmes (Gómez-Velásquez and Correa-Saavedra, 2005, p. 236).

such a demanding level of commitment in favour of reconciliation" (Uprimny and Saffon, 2006, p. 12). Likewise, one cannot see the worth of a mechanism that seeks to impose both the petition and granting of pardon for serious human rights violations, which, far from contributing to reconciliation, would lead to a fictional version thereof that is inconsistent with democratic goals, which is what the transition attempts to consolidate in the long run.

On this same point, Uprimny y Saffon (2005, 16) remarked the following:

> Whereas, f or some, national reconciliation is the preponderant objective of the transition, for others, the important demands for justice and truth must also be considered as such. In this contest of choosing the restorative paradigm, these latter sectors of society could be reproached by the defenders of reconciliation for hindering it with their complaints and would end up being silenced. Such a situation would not only turn restorative justice mechanisms into instruments of impunity, but it could also sow seeds of resentment and violence in the silenced, which would seriously jeopardise the durability of the reconciliation achieved.

This way, the preponderant application of a restorative justice model with respect to international crimes would be counterproductive. It is important to emphasise this point, as the foundations of this argument can also be applied to the Salvadoran case in seeking a viable formula to face a past of serious human rights violations that took place during the civil war, according to expectations for truth and justice.

4.

LATE JUSTICE: ANALYSIS OF SERIOUS HUMAN RIGHTS VIOLATIONS CASES IN THE SALAVADORAN ARMED CONFLICT

4.1. INTRODUCTION

Over a period of three months, El Salvador's Truth Commission received more than twenty-two thousand complaints about serious human rights violations that occurred from January 1980 to July 1991 (UN, 1993). ItsReport[65]made it clear that the acts of violence recorded did not represent the totality of those committed, but only a sample. Out of them, the Commission selected 30 cases exemplary of the systematic patterns of violence that characterised the armed conflict (Buergenthal, 1994).

For the present investigation, we analysed the two cases that best illustrate how the Salvadoran State has addressed its violent past and the steps it has taken back and forth in the fulfilment of its international obligations to investigate, prosecute and punish the human rights violations committed in the context of the war:1) the case of the "El Mozote and surrounding areas" massacres, and2) the murder of six Jesuit priests and two of their collaborators in the facilities of the Central American University "José Simeón Cañas" (UCA), both attributed to El Salvador's Armed Forces.

This analysis is meant to be an exercise in determining to what extent amnesty as a political solution to the achievement of peace became a mechanism of impunity on the path of political transition, and how the declaration of unconstitutionality of the General Amnesty Law for the Consolidation of Peace, after 23 years of validity, opens up a new

[65] *From madness to hope: the 12-year war in El Salvador*, Truth Commission Report for El Salvador, UN, 1993.

scenario to satisfy the rights of truth, justice and integral reparations for the victims and guarantee the non-recurrence of the crimes.

4.2. MASSACRES OF EL MOZOTE AND SURROUNDING PLACES

4.2.1. The facts

As related by the Truth Commission Report, the reports of the Inter-American Commission on Human Rights (2006; 2010) and the judgment of the Inter-American Court of Human Rights corresponding to this case (IDH Court, 2012), the facts are summarised as follows:

Starting in January 1981, the United States of America significantly increased its military and economic assistance in El Salvador, allocating resources to, "train, modernise and expand the structure as for the number of troops of the Armed Forces" (UN, 1993, p. 1100). Consequently, specially trained counterinsurgency combat elite units were created in the Armed Forces under US military advice and supervision. The first unit was created in March 1981 and given the name Immediate Reaction Infantry Battalion "Atlacatl" (hereinafter, "IRIB Atlacatl"), under the command of Lieutenant Colonel Domingo Monterrosa Barrios.

From 8 to 16 December 1981,theIRIB "Atlacatl" carried out a large military operation in the northern area of Morazán together with other military units of the San Miguel and Morazán departments; the operation was known as "Operation Rescue" or "Anvil and Hammer". Its apparent purpose was to eliminate guerrilla presence – a camp and a training facility –from the La Guacamaya area, in the canton by the same name, Morazán department, and destroy the social base supporting the insurgency (UN, 1993, p. 1196).

The operation began with aerial and artillery bombardments of the area. Concurrently, Salvadoran Air Force helicopters transported members of the IRIB "Atlacatl" to the town of Perquín, Morazán, from where they deployed on land to fence in the target area. The operation included, among others, the hamlets of El Mozote, Ranchería, Los Toriles and Jocote Amarillo,the cantons of LaJoya y Cerro Pando and the location known as Cerro Ortiz, all of them in the Morazán department (IDH Court, 2012, p. 33).

On 10December1981,troops from the different companies of the IRIB "Atlacatl" converged on the El Mozote hamlet, after bombings by

the Salvadoran Air Force, gaining total control of the population in the area. When the soldiers arrived at the village, they had with them several people they had captured in the vicinity.

On 11December1981, at approximately 5 o'clock in the morning, the soldiers got all the people out of their houses and assembled them in the hamlet's square in front of the church. The soldiers separated the men and older children and sent them to a building behind the church called "the convent",while they put all the women and younger children in a house(IDH Court, 2012, p. 35). During that morning, they proceeded to interrogate and torture the men (UN, 1993, p. 113).

Later, the commanders of the IRIB "Atlacatl", the Third Infantry Brigade of San Miguel and the Command Training Centre of San Francisco Gotera together with other high-ranking officials part of the operation allegedly held a meeting out of which came the order to execute the people (IDH Court, 2012, p. 35).

That day marked the beginning of the mass execution of the people located in El Mozote, carried out with extreme cruelty, mainly by means of firearms, but many were also beaten to death, others were beheaded and incinerated alive. After killing the men and children in the convent, they removed the women in groups, forcing them to abandon their children in the aforementioned place (UN, 1993). The older women were machine-gunned by groups and their corpses burnt to ashes. The younger women were raped and killed by members of the army (IDH Court, 2012, p. 36).

Next, the younger children were executed, some in the house where they had stayed with their mothers and others inside and outside the convent; they also were set on fire. More than 95% of the individuals identified were children 6 years old on average (IDH Court, 2012, p. 37).

The victims of El Mozote remained unburied for the following weeks. The Army continued its actions in the following days, operating in the same way: killing everybody they met in each village, separating men, women and children, and then burning the houses and some of the corpses. This happened in the canton of La Joya on 11December,in the hamlet of Ranchería on the 12th and in the hamlet of Jocote Amarillo and canton of Cerro Pando on the 13th(UN, 1993, p. 120).

4.2.2. Denial of the facts, first complaints and investigations

According to the Truth Commission Report, the El Mozote massacre was made known only internationally, when, on 27January 1982, the New York Times and The Washington Post published the articles by Raymond Bonner and Alma Guillermoprieto, who had been on the scene of the crimes and seen the corpses and destruction in the villages (UN, 1993).

At the time of the massacres, the Salvadoran media conveniently reported official information from the Salvadoran military. Their articles even described the soldiers as veritable heroes who were risking their lives in Morazán to rid the country of guerrillas, while failing to mention the massacres (Valencia, 2011):

> La Prensa Gráfica,10 December1981. (...) Happiness. Thousands of peasants come to greet the troops arriving in the areas that for several months have been threatened by extremist groups.
>
> La Prensa Gráfica, 19 December1981. (...)the Armed Forces declared Operation Rescue a success, both from the military and social aspect, as thousands of peasants who fled the terror wrought by the extremists are gradually returning to their lands or homes to rebuild their lives.

After the articles published in the US newspapers, the first Salvadoran official to publicly and openly deny the massacres was the then Ambassador to the United States, Ernesto Rivas Gallont, who said: "I emphatically reject the claim that the Salvadoran army killed women and children. This type of action is not in accordance with the philosophy of the armed institutions" (Valencia, 2011).

Recent journalistic investigations carried out by the digital newspaper El Faro led to learning about some declassified diplomatic cables between San Salvador and Washington in January 1982;the cables revealed information on the military operation during which the massacres occurred (Valencia, 2011):

> These now declassified cables show that the information transmitted by then US Ambassador Deane Hinton to Washington escalated progressively. "We can neither prove nor rule out violence against civilians. The guerrillas did nothing to clear the area. Civilians did die during Operation Rescue but there is no evidence that they were massacred by the Salvadoran army. The number of civilians killed does not come anywhere close to the number described by other international reports";so read one of the first cables, in January 1982.

Then, another memorandum offered already a version of what could have happened: "The population of Mozote is estimated to have been about 300 during the massacre. The Atlacatl Battalion conducted the rescue operation from 6 to 17December 1981.The guerrillas had known about the operation since 15November. The civilians present during the operation and the battles with the guerrillas could have ended up dead.

The Salvadoran authorities always denied the massacres, therefore, to be consistent with their position, they did not initiate any judicial investigation, nor did they disclose any information that could incriminate the Armed Forces (UN, 1993).

It was not until 26October 1990 that criminal proceedings were initiated in the First Instance Court of San Francisco Gotera, Morazán department, following a complaint filed by peasants who had returned from Honduran refugee camps after surviving the massacre and losing all their relatives. These were: Pedro Chicas Romero, who appeared as a complainant, and Rufina Amaya and Juan Bautista Márquez, as witnesses to the events (UN, 1993, Valencia, 2011).

This complaint together with the statements of the witnesses convinced the Judge to order the inspection of the place and the exhumation of the bodies. However, this judicial procedure suffered undue and negative interference from the President of the Supreme Court of Justice himself, Dr Mauricio Gutiérrez Castro, who denied authorisation to appoint qualified foreign experts to handle the exhumations requested by the accusers. Said authorisation was not made possible until 29April 1992, thanks to ONUSAL initiatives (UN, 1993).

In addition, the Truth Commission learned of some incidents that demonstrated the bias and lack of judicial independence of the Salvadoran justice system. For example, according to the Truth Commission Report, Gutiérrez Castro, President of the Supreme Court of Justice, told the commissioners that "the exhumations would show that there were only dead guerrillas in El Mozote", and urged the team of experts to make sure "not to privilege any of the parties, because the political implications of the process go beyond what is legal" (1993, 124),

Moreover, the investigation of the facts ran into the concealment of information obstacle, seeing as how the Judge repeatedly requested the Government to provide the list of officers who participated in the military operation and was told every time that the information was not available(UN, 1993, IDH Court, 2012).

When the General Amnesty Law for the Consolidation of Peace came into effect in March 1993, which limited any prosecution possibility for crimes committed during the armed conflict, even human rights crimes such as the massacres that were perpetrated, the criminal proceedings of the El Mozote case had not yet ended. Therefore, on 4September 1994, the proceedings were terminated with the issuing of a definitive dismissal. As a result, the victims and their relatives who complained could not see their claims for justice satisfied.

4.2.3. Intervention of the Inter-American System for the Protection of Human Rights

In view of the impossibility of continuing the process in the ordinary courts and ineffectiveness of domestic legal system resources, the victims and human rights organisations could only wait for what could be solved by the Inter-American System for the Protection of Human Rights, to which they had turned concurrently.[66]However, the case was temporarily shelved on 14May 1995, because the petitioners had not submitted the additional information requested by the IACHR to handle the answers provided by the Salvadoran State (IACHR, 2006).

Later, on 9March 2005, after receiving the required information and endorsing the participation of the Centre for Justice and International Law (CEJIL) as co-petitioners,the Commission decided to re-open the case and accept the petition for processing (2006).

After analysing the parties' positions, the IACHR (2010) concluded that:

> [...] The State of El Salvador is responsible for the violation of the rights to life and personal integrity of persons executed extrajudicially in the hamlet

[66] On 30October 1990, the Inter-American Commission on Human Rights received a complaint filed by the Office of Legal Guardians of the Archdiocese of San Salvador charging the Republic of El Salvador with international responsibility for human rights violations against 765 people, extrajudicially executed during a military operation allegedly carried out by the Armed Forces of El Salvador in the cantons of La Joya and Cerro Pando and the hamlets of El Mozote, Jocote Amarillo, Ranchería and Los Toriles in the month of December 1981. The petitioners alleged that the facts they denounced violated several rights enshrined in the American Convention on Human Rights (the American Convention): life (Article 4), personal integrity (Article 5), personal liberty (Article 7) judicial guarantees (Article 8), protection of honour and dignity (Article 11); rights of the child (Article 19); private property (Article 21); and judicial protection (Article 25), all in violation of the general duty to respect and guarantee rights (Article 1.1).

of El Mozote, canton of La Joya, hamlets of Ranchería, Los Toriles and Jocote Amarillo, canton of Cerro Pando in a Cerro Ortiz cave. Additionally, the Commission argued that the State of El Salvador was responsible for the violation of the right to personal liberty of the victims executed extrajudicially in the Hamlet of El Mozote.

(...) [That] the State of El Salvador deliberately ignored its obligation to protect children especially enshrined in article 19 of the Convention, in relation to article 1.1 of the same instrument, to the detriment of all the children who were executed extrajudicially in the massacres perpetrated in the hamlet of El Mozote and nearby places.

[...] The acts of sexual violence to which women detainees are subjected constitute torture. In this regard, the Commission referred to the complementarity of Articles 5 and 11 of the American Convention in cases of rape.

[...] Thatthe State is responsible for the violation of the right to mental and moral integrity enshrined in Article 5.1 of the Convention, in relation to the obligations established in Article 1.1 of the same instrument, to the detriment of the surviving family members.

Therefore, it decided to submit the case to the IDH Court's jurisdiction, in accordance with the provisions of Articles 51 and 61 of the American Convention (2010).After examining the case, the Court pronounced a sentence on the matter in 2012. It concluded that the State of El Salvador was responsible for the violation of the prohibition of torture and other cruel, inhuman or degrading treatment as well as the rights to life, personal liberty and integrity, private property, life and domicile, freedom of movement and residence, judicial guarantees and judicial protection, all recognised by the American Convention on Human Rights,and therefore, that it also breached the obligation to adapt its domestic law to the American Convention on Human Rights, contained in its Article 2, in relation to Articles 8.1, 25 and 1.1 of the same instrument (IDH Court, 2012).

Likewise, among the measures tending to vindicate said rights and make reparations for the victims, it ordered the following:

[...] The State must initiate, promote, reopen, direct, continue and conclude, as appropriate, within a reasonable time and with the utmost diligence, the investigations of all the facts that gave rise to the violations declared in this Judgment, with the purpose of identifying, judging and, where appropriate, punishing those responsible.

[...] Make sure that the General Amnesty Law for the Consolidation of Peace will not represent an obstacle to the investigation of the facts of this case nor to the identification, prosecution and possible punishment of those

responsible for these and other serious human rights violations occurred during the armed conflict inEl Salvador.

[...] The State must collect all the available information on possible burial sites to be protected for preservation, so that the exhumation, identification and, where appropriate, delivery of the remains of the persons executed to their families may begin in a systematic and rigorous manner and with appropriate human and economic resources.

The immediate effect of this sentence by the IDH Court against the Salvadoran State was the turn in the authorities' official discourse when referring to the massacres of El Mozote and nearby places. There was no more room for the untrue version of the facts, since the evidence of the excesses committed by the Armed Forces and of the previous officials' concealing actions was now backed by the authority of the jurisdictional body of the Inter-American Human Rights System.

In 2012, President of the Republic Mauricio Funes made pronouncements apologising to the victims and accepting the Salvadoran State's responsibility in a commemorative act, in which he also promised fulfilment of reparations for the victims (CNN, 2012). In the same vein, the Attorney General of the Republic undertook to promote the corresponding investigations, by upgrading a unit in charge of crimes against humanity. The Supreme Court of Justice followed suit, managing the dissemination of the IDH Court's sentence to all judges of the republic and urging courts to analyse the inapplicability of the Amnesty Law through the application of the conventionality control and require the Institute of Legal Medicine to carry out the process of exhumation and identification of the remains and their subsequent delivery to family members (Valencia, 2013). However, putting these initiatives into practice turned out to be complicated, as will be detailed later.

For example, regarding material reparations, although an Executive Decree was issued, the form in which it is available makes its full compliance practically impossible; published in the Official Gazette on 23October 2013, it orders economic compensation to be delivered to the victims and their families, as established in the IDH Court judgment based on a victims register administered by the General Directorate of Statistics and Censuses. According to this Decree, the Social Investment Development Fundwill be the institution in charge of delivering the monthly amount of 15 to 50 US dollars for each victim (Labrador, 2013). This means that, in the case of victims who died, a beneficiary getting

$50 per month would have to live 58 years and 4 months to receive the whole $35,000 compensation established by the sentence.

The measure concerning the exhumation, identification and delivery of the remains of the persons executed to their relatives was the one best implemented, gradually materialising as excavations and forensic practices progressed. For example, on 20 May 2016, the Court was able to make the definitive delivery of 11 new skeletons to their relatives, in addition to the 13 delivered in 2013 and the 496 exhumed between 1992 and 1993 by the Argentine Forensic Anthropology Team (Rauda, 2016).

The biggest issues have been the investigation, prosecution and punishment of those responsible for these crimes. Despite the Attorney General's statements in the days following the IDH Court ruling, until mid-2015, the institution in charge ex officio of investigating the crimes did not make major efforts to deepen the investigations and have sufficient factual foundations to present a strong accusation before the courts of justice.

4.2.4. Progress of the criminal process after the declaration of unconstitutionality of theAmnesty Law

The General Amnesty Law for the Consolidation of Peacewas declared unconstitutional by the Constitutional Chamber of the Supreme Court of Justiceof El Salvador on 13July 2016, thus determining that the facts indicated by the Truth Commission as serious human rights violations, such as the case of the massacres perpetrated in El Mozote and nearby places, could not be part of the pardon.

The decision of the Constitutional Chamber has been most important for victims seeking justice, eliminating the greatest obstacle in domestic law to the investigation and prosecution of crimes against humanity or war crimes of the armed conflict. These crimes do not expire with the passing of time and demand from the States their commitment to prevention, investigation and punishment, according to the International Law of Human Rights and International Humanitarian Law.

This channel having been opened, on 17August 2016, the relatives of the victims, represented by the lawyer of the Human Rights Association Legal Protection "Dr María Julia Hernández", requested the Salvadoran courts to reopen the criminal proceedings and investigate, prosecute and punish those responsible for the death of residents of the hamlet

"El Mozote" and nearby places, attributed to the Salvadoran Army (EFE, 2016).

In response to this request, the Second Court of First Instance of San Francisco Gotera, Morazán department, determined that, since the provisions of the Amnesty Law had been expelled from the legal system, it was appropriate to overrule the definitive dismissal by means of which the criminal procedure was put to an end; it also decreed the reopening of the criminal case and required the completion of investigations (El Mozote Massacre, Criminal Case,2016).

This new scenario that can be glimpsed since the Amnesty Law is no longer in force inEl Salvador,[67] finally, after 35 years from one of the most atrocious crimes committed in all of Latin America,[68]and for the first time ever, made it possible to summon 18 soldiers accused of participating in the Military Operation in whose context the massacres were carried out. Among them, General José Guillermo García, former Minister of defence from 1979 to 1983, accused of the crimes of murder, aggravated rape, robbery, aggravated damages, breaking and entering, special damages, acts of terrorism and acts leading to acts of terrorism, all classified and processed under the criminal legislation and criminal procedure of 1973, in force at the time of the events (Rauda, 2017).

4.3. THE CASE OF THE MURDER OF THE JESUIT PRIESTS AND THEIR COLLABORATORS

4.3.1. The facts

According to the final report of the Truth Commission's investigations (UN, 1993) and the report of the Inter-American Commission on

[67] On 15July 2016, in Geneva, Switzerland, a group of UN experts applauded the decision of the Supreme Court of Justice of El Salvador to declare unconstitutional the Amnesty Law of 1993, which had left unpunished crimes against humanity and of war, as well as serious or systematic human rights and International Humanitarian Law violations committed during the internal armed conflict. They stated, for example, that, "This historic decision for the country brings back hope to the victims and trust in the legal system" and that "More than 20 years after the end of the conflict, this decision by the highest judicial instance restores the fundamental rights of victims to justice and comprehensive reparation" (Paullier, 2016).

[68] According to the humanitarian organisation Centre for Justice and International Law (CEJIL), based in San Jose, Costa Rica, El Mozote is "the largest massacre recorded in Latin America"; the US press compared it to WWII Nazi massacres and Vietnamese genocides.

Human Rights (IACHR, 2006), the facts can be summarized as follows:

On 11November 1989, the FMLN launched its military offensive in the main cities of the Salvadoran territory. As a result, on 12November 1989, Alfredo Cristiani's Government declared the state of siege, imposing a curfew from 6 o'clock in the evening to 6 o'clock in the morning. On the 13th of the same month, the General Staff of the Armed Forces decided to create a special security zone, which included the surroundings of the Central American University "José Simeón Cañas" (hereinafter, UCA),run by Jesuit priests. Within this highly militarised security zone were also the headquarters of the General Staff, the Ministry of Defence, the Military School, the National Intelligence Directorate (DNI), the San Benito National Police Battalion and two residential neighbourhoods for the military, named Arce and Palermo. The security zone command was set up in the Military School and School Director Colonel Guillermo Alfredo Benavides was named as commander (IACHR, 1999).

On the night of 15November, a meeting was convened by Colonel René Emilio Ponce, Chief of the Joint Chiefs of Staff of the Armed Forces, in which the most senior military leaders of the country participated and decided to raise the level of the military offensive against the FMLN. In that meeting, Colonel Ponce, in agreement with General Juan Rafael Bustillo, then Colonel Juan Orlando Zepeda, Colonel Innocent Orlando Montano and Colonel Francisco Elena Fuentes, gave Colonel Guillermo Alfredo Benavides the order to kill the priest Ignacio Ellacuría without leaving witnesses (UN, 1993).

That same night, Colonel Benavides met with officers under his command and transmitted the General Staff's instructions. Subsequently, Major Carlos Camilo Hernández Barahona proceeded to organise the operation, for which he used the commandos of the "Atlacatl"[69] Battalion, under the command of Lieutenants José Ricardo Espinoza Guerra and Yusshy René Mendoza Vallecillos. The plan included the use of AK-47 rifles, commonly used by the FMLN and not by the Army. In addition, after the murders, they had to simulate a confrontation to incriminate the guerrillas (UN, 1993).

Thus, at dawn, on 16November 1989, a group of troops from the

[69] The same Infantry Battalion of the Salvadoran Army trained by US Army officers in counterinsurgency tactics that was involved in the massacres of El Mozote and other nearby places.

"Atlacatl" Battalion crossed the security zone rings and entered the campus. Once inside the campus,they headed towardto the building where UCA Chancellor Ignacio Ellacuría lived, in addition toVice Chancellor Ignacio Martín-Baró, Human Rights Institute Director Segundo Montes, Armando López, Joaquín López y López and Juan Ramón Moreno, all of them priests and professors at UCA (1993).

After searching the building, they took five of the priests to the garden, forced them to lie on their stomachs and shot them. Inside the residence, they killedthe priest Joaquín López y López, along with Mrs Julia Elba Ramos,who worked at the residence, and her daughter Celina Mariceth Ramos. Next, they machine-gunned the facade of the building, launched rockets and grenades to feign a confrontation, as had been planned, and put up a sign in which the FMLN assumed responsibility for the attack (1993).

4.3.2. First investigations and cover-up

Hours after the murders, other priests of the Society of Jesus realised what happened when they arrived at the UCA campus. They decided to inform the Vatican first, along with the Apostolic Nunciature of San Salvador and the international press that covered the events of the guerrilla offensive. In addition, Father José María Tojeira S. J. and Monsignor Arturo Rivera y Damas, Archbishop of San Salvador, met with President Cristiani[70]to denounce their suspicions about the military's participation in the murders and request that investigations be carried out (Galán, 2015).

By means of a communiqué denouncing the attack, Cristiani's government stated the following: "This multiple crime is intended to destabilise El Salvador's democratic process", and ordered the Crime Investigations Commission (CIC) of the Ministry of Justice to look for those responsible for the deaths (El Faro, 2014).

In the first morning hours of the 16th, Major Carlos Camilo Hernández Barahona and Lieutenant José Vicente Hernández Ayala went personally

[70] According to the Truth Commission Report, President Cristiani met with the High Command of the Armed Forces in the hours between twelve midnight and 2:30 AM of 16November 1989, that is, immediately after the High Command had given the order to assassinate Ellacuría, and only a couple of hours before the event took place, due to which there are well-founded suspicions that he had knowledge of what would happen (UN, 1993).

to Colonel Ponce's office to report on everything that had happened at UCA. The latter ordered the destruction of all evidence, documents and money stolen from the priests' residence, together with the weapons used and the Military School building register (IACHR, 1999).

The Investigative Commission learned of several witnesses who had initially mentioned that they had observed the presence of soldiers inside UCA facilities, but later changed their version and retracted their allegations.[71]The commission continued investigating and taking statements from possible witnesses. However, a civilian member of the Commission, Mr Rodolfo Antonio Parker, legal adviser to the General Staff, altered the statements made with the purpose of suppressing the mentions of the existence of superior orders and references to some officers (UN, 1993).

Despite the conspiracy of several military commanders to cover up the crime, the interference of a parallel Honour Commission appointed by the Minister of Defence, the destruction of evidence and the coercion of possible witnesses who could incriminate the High Command, finally, on 12January 1990, the Investigative Commission presented its report to President Cristiani. The report identified ten people as potential perpetrators, five officers and five soldiers who participated in the operation who were arrested and then put on trial. However, the criminal proceedings lasted for two years, until the trial was finally held in September 1991. The result of this trial, in which neither the highest-ranking military commanders nor other intellectual perpetrators who ordered the executions were charged, was as follows:

> Only Colonel Guillermo Alfredo Benavides Moreno and Lieutenant Yusshy René Mendoza Vallecilloswere found guilty of the killings, for which they received the maximum penalty of thirty years in prison. The judge also found Colonel Benavides and Lieutenant Mendoza guilty of proposing and conspiring to commit terrorist acts. Lieutenants Espinoza and Guevara Cerritos Cerritos were sentenced to three years for proposing and conspiring to committerrorist acts. Lieutenant Colonel Hernández was also sentenced by the judge to three years forcover-up; Mendoza Vallecillos was also convicted of that crime.

[71] Lucía Barrera de Cerna, an employee at the University, said she had seen soldiers wearing camouflage uniforms and caps from a building adjacent to the Jesuit residence. In the United States, where she went for protection, she was questioned by the Federal Bureau of Investigation (FBI) and retracted what she had said. CIHD Chief Lieutenant Colonel Rivas Mejía was present at her interrogations. She later confirmed her original version (IACHR, 1999).

Espinoza, Guevara and Hernández were released and kept staying in the Armed Forces (IACHR, 1999).

4.3.3. The Amnesty Law, IACHR intervention and demand for universal justice

The conviction of some of the material perpetrators of the murders of the Jesuit priests and their two collaborators was ruled by the Fourth Criminal Court of San Salvador on 23January 1992. However, this decision never became final nor was it carried out, because the defence lawyers filed appeals against it. While the criminal case was still in the Second Instance Chamber to resolve the appeals, the Amnesty Law became effective. As a result, instead of confirming or annulling the guilty verdict, the court applied the amnesty, issued a final dismissal and released the accused.

On 22 December 1999, the Inter-American Commission on Human Rights (IACHR) issued Report 136/99. Some of its conclusions established the following:

> [...] By virtue of undue action by its prosecution, justice administration and investigation bodies (among which is an ad hoc body composed of military personnel), the Salvadoran State failed in its obligation to diligently and effectively investigate the violations that have occurred, as well as its obligation to prosecute and punish those responsible by means of an impartial and objective trial, as required by the American Convention.
>
> [...] The only people convicted by the Salvadoran courts were granted amnesty shortly thereafter, through the application of theGeneral Amnesty Law. The intellectual perpetrators identified to date, namely, those who gave the order to kill the Jesuit priests, Mrs. Ramos and her daughter, belonging to the High Command of the Salvadoran Armed Forces, were never investigated, prosecuted or punished. By sanctioning theAmnesty Law, the Salvadoran State violated Article 2 of the American Convention. In addition, as a result of its application to the present case, the State violated the right to justice and its obligation to investigate, prosecute and make reparations established in Articles 1(1), 8 and 25 of theAmerican Convention.
>
> [...] The Salvadoran State has violated the right to know the truth to the detriment of the victims' families, the members of the religious and academic community to which they belonged and the whole of Salvadoran society"(IACHR, 1999).

By virtue of this pronouncement, those who were wronged continued to demand justice. In the year 2000, UCA authorities filed

a complaint with the Attorney General's Office of the Republic against the masterminds of the murders perpetrated on the university's campus, taking as considerations on the case, with the effect that the Attorney General's Office would initiate the corresponding investigations (CIDAI-UCA, 2000).

However, the case was not successful; primarily because the Attorney General's Office abstained from acting, claiming that a suit of unconstitutionality was under consideration at the time against the Amnesty Law. Subsequently, on 26September 2000, the Constitutional Chamber issued its decision, which stated that the Amnesty Law was valid if it was applied through an interpretation consistent with the constitutional precepts and left it to the discretion of each judge to determine whether it was applicable specifically to each case. As the complainants persisted, the Attorney General's Office made some attempts to continue the investigation, but again without results, because of having resorted to inadequate procedures (Amnesty International, 2001).

Finally, the Attorney General's Office decided to request the final dismissal of the charges against the intellectual perpetrators because more than ten years had passed since the commission of the crimes and sufficient evidence had not been obtained against them. In response, the Third Peace Court of San Salvador decided that no charges would be brought against the accused, claiming the crimes had prescribed. The decision was appealed, but the Chamber that heard the appeal confirmed the dismissal (2001).

Given the ineffectiveness of the Salvadoran justice mechanisms, human rights organisations turned to foreign courts, based on the principle of universal justice,[72]which allows any State to criminally prosecute war crimes or crimes against humanity, regardless of where they are committed and of the perpetrator's or victim's nationality, because of a universal interest such as the protection of human rights(Philippe, 2006, p. 3).

Thus, in 2008, the Spanish Association for Human Rights and the US Centre for Justice and Accountability filed a complaint with the Central Court of Instruction number 6 of the Spanish National Court

[72] In accordance with the Princeton Principles on Universal Jurisdiction: "universal jurisdiction is understood as the exercise of jurisdiction over a crime by either the ICC or a state in the absence of a territorial, personal, or other nexus to the crime" (UN, 2001).

that included accusations against the intellectual perpetrators and accessories after the fact; but although the Society of Jesus and UCA respected the initiative, they continued to bet that the case would be resolved via internal legal mechanisms(Dalton and Altozano, 2008).

After studying the petition, Spanish Judge Eloy Velasco determined that that the trial that culminated in the conviction of two Salvadoran soldiers for the murder of the Jesuit priests was a fraud and that although the proceedings were set up as a formal trial, it was not so. According to Judge Velasco's resolution, this failing enabled the Spanish authorities to try for a second time those who had already been found guilty, but who in 1993 benefited from an Amnesty Law, as well as the rest who had never been tried, so that, after the end of the investigation, having received evidence and taken witness testimonies, he ordered the indictment of 20 soldiers and requested their extradition (Lemus and Labrador, 2011).

Even though a red notice was issued through the Interpol for the location of the defendants, the arrests were not made effective because the defendants were sheltered in a military barracks and the National Civil Police could not enter. In addition, the Supreme Court of Justice of El Salvador issued a resolution on 24August2011 by which it rejected the soldiers' extradition. The majority of the Court Justices had decided that the red notice did not necessarily imply extradition, but only the location of those involved(Arauz and Lemus, 2011).

In 2012, the Kingdom of Spain arranged again for the capture and extradition of the accused military personnel, but again the Supreme Court of Justice rejected the request. This time around, the Salvadoran Court took into consideration the fact that there was a constitutional prohibition to extradite nationals as of the date of the facts investigated by the Spanish National Court. Although at the time of the request for extradition the Constitution of El Salvador had already been reformed, the highest Salvadoran court held that the new provision was not retroactive (Request for Criminal Prosecution by the Kingdom of Spain to the Government of El Salvador, 2012).

Subsequently, in January 2016, the Spanish judge, Eloy Velasco, reiterated the request for extradition to the Salvadoran Government, after the plaintiffs informed him that the Supreme Court of Justice of El Salvador had issued a new resolution that reinterpreted the scope of red notices for the location and capture of suspects of war crimes and crimes against humanity (ABC Spain, 2016).However, this new request

for criminal prosecution by the Kingdom of Spain would not be fulfilled until after the declaration of Unconstitutionality of the Amnesty Law.

4.3.4. Progress of the criminal proceedings after the declaration of unconstitutionality of the Amnesty Law

In matters of international criminal cooperation, a State is obliged to extradite or prosecute the accused when requested. This dilemma was what complicated the Court's decision in responding to the request for criminal prosecution issued by the Kingdom of Spain.

Meaning that, if it authorised extradition, the Salvadoran State would yield to international pressure, compromising its sovereign power to try its own nationals with the procedural guarantees established in its domestic law. This implied tacitly acknowledging its inability or lack of interest in judging crimes of international significance and, consequently, its consent to impunity. But if it denied extradition, it again faced the international obligation to investigate, prosecute and punish the alleged human rights violators, which it had been trying to avoid with the continued invocation of the Amnesty Law as an obstacle to domestic legislation.

However, while the Court was still deliberating on whether to grant extradition, the Constitutional Chamber issued the ruling declaring the Amnesty Law incompatible with the Constitution of El Salvador and the American Convention on Human Rights. The ruling of unconstitutionality was clear:

> [...] For the purposes of this judgment, it will be understood that the facts that are excluded from the amnesty are those attributed to both parties that may qualify as crimes against humanity and war crimes constituting serious International Humanitarian Law violations. The events excluded from the amnesty after the end of the armed conflict are the cases contained in the Truth Commission Report. According to the terms and conditions established in Article 244 of the Constitution, all the facts that occurred from 1June 1989 to 16January 1992 committed by public, civil or military officials have not prescribed either and therefore do not enjoy amnesty and are subject to investigation, prosecution and punishment.
>
> [...] By this ruling, expressions invalidated because unconstitutional are hereby expelled from the Salvadoran legal system and may not be applied by any administrative or judicial authority, nor invoked in their own favour by any individual or public servant, nor continue to produce effects in procedures, proceedings, trials or actions relating to facts constituting serious and systematic

International Law of Human Rights and International Humanitarian Law violations committed by both parties during the El Salvador armed conflict" (Unconstitutionality Ruling, 2016).

In this manner, the Court pointed out that the grounds for extradition no longer existed, since the national courts were authorised to prosecute the crimes that had been granted amnesty. In addition, annuling the effects of the amnesty also rendered ineffective the dismissals granted to the military personnel that had been convicted, some of whom were also being requested by the Spanish National Court. The Court did again reject the extradition but left open the possibility of prosecuting these crimes through the Salvadoran jurisdiction (Request for Criminal Prosecution, 2016).

Because of the unconstitutionality of the Amnesty Law, criminal proceedings remained active against Colonel Guillermo Alfredo Benavides Moreno, one of the military members requested for extradition to Spain. Consequently, the First Criminal Chamber of the First Central Section of San Salvador solved the appeal filed against the conviction issued in 1992.The decision was to confirm the sentence to 30 years in prison for the murder of the Jesuit priests. Thus, Colonel Benavides became the first to be convicted for these events.

However, on 29May 2017, representatives from UCA and the Society of Jesus, to which the victims belonged, petitioned the Ministry of Justice and Public Security for Colonel Benavides' prison sentence to be commuted. The director of the Human Rights Institute of the Central American University (IDHUCA) stated the following: "That Benavides gave the order is clear. Now, he is not a danger to society". Those who were wronged now want for the intellectual perpetrators to be prosecuted, the truth to be known and a Transitional Justice Law to be passed, so as to give due process to this and other cases of serious human rights violations committed during the conflict (Garcia, 2017).

This shows that sometimes the victims' expectations of justice are met by establishing a formal truth, which can be provided by the judicialization of cases, beyond the retributive purposes of criminal justice, for which, as we see, there are remedy mechanisms also provided in the same criminal process.

FINAL CONSIDERATIONS

With the support of human rights organizations, the victims of Massacres of El Mozote and of the extrajudicial execution of the Jesuit Priests resorted to the organs of the Inter-American System for human rights protection after the denial of justice at the domestic level. Despite this, neither the doctrine nor the jurisprudence of the regional system, including the judgements establishing the international responsibility of the State, were sufficient to make El Salvador modify the legislation and policies on impunity for the crimes committed during the armed conflict.

In this context, the judicial activism of the Constitutional Chamber of the Supreme Court and some lower courts judges were instrumental in reaching a turning point regarding the non-applicability and unconstitutionality of El Salvador`s Amnesty Law. However, for the moment it is still premature to estimate the repercussion that the declaration of unconstitutionality will have on governance and the consolidation of a lasting peace.

In light of the interpretation of the transitional process, it is possible to state that El Salvador is at a point in which a legal and political redefinition is required, in order to comply fully with the judgment of the Inter-American Court, in the case of the massacres of El Mozote, and the 44-2013/145-2013 decision of the Constitutional Chamber of the Supreme Court of Justice, on the incompatibility of the General Amnesty Law for the Consolidation of Peace with the American Convention on Human Rights and the Constitution of the Republic of El Salvador.

Given the conduct of the main social and political stakeholders in the historical evolution of the democratic transition in El Salvador, there are a number of possible scenarios.

Since there are no real threats to reactivate confrontations and the country's institutional framework has been strengthened, government and civil society have the possibility to manage a redefinition of political agreements, dealing with an Amnesty Law which is not adjusted to the current historical moment. These stakeholders could reach a consensus on viable accountability for past atrocities in light of human rights standards, through special legislation leading to the investigation, prosecution and punishment of human rights violations, war crimes as well as the measures of integral reparation for the victims and with guarantees of non-repetition.

The government could implement public policies aimed at promoting the prosecution of the perpetrators. Alternatively it could resort to selectivity and vendettas against groups that have been weakened or could be weakened in political terms. The path chosen will depend on the objective pursued: international standards of protection of human rights can either be truly or apparently embraced.

In the worst case scenario, a new amnesty or other mechanisms –such as pardons or commutations of sentence that eliminate or mitigate the criminal responsibility of the perpetrators of human rights violations— could be resorted to so as not to affect those who are still active in the political arena. On the other hand, El Salvador could choose apathy, and thus delay compliance with international commitments on prevention, investigation, prosecution and punishment of war crimes and crimes against humanity, with the excuse that a prior adjustment of domestic laws and institutions to the new context is required.

If there is no major change in the legal system, judicial activism can be expected to continue, since judges are now more independent and aware of international standards. Judicial decisions could impact the social conscience in term of the necessity to prosecute these cases. As long as there are no alternative mechanisms to seek justice than those offered by ordinary criminal jurisdiction, there will be a collision between judicial decisions and the actions taken by other Branches of Government.

Therefore it is imperative for El Salvador as a Nation to generate a comprehensive strategy to face true accountability vis-à-vis the conflicts of the past. This may consist on the adoption of supplementary legislation to establish the transitional justice mechanisms needed to fulfill international obligations and satisfy fair expectations of truth, justice, reparations and non-repetition guarantees.

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