



**Impunity on Trial:
The Case for Repealing El Salvador's Amnesty Law:**

Winning essay of the 2011 undergraduate-level Baptista Essay Prize

by

Rolando Aguilera
Law, Osgoode Hall, York University

Baptista Prizewinning Essay

March 2012

BAPTISTA PRIZEWINNING ESSAYS

The Baptista Prizewinning Essays include papers submitted as coursework at York University that have been nominated by instructors and selected annually by a committee of CERLAC Fellows. The selection committee does not suggest any editorial changes, and prize-winning essays may be slated for publication elsewhere. All responsibility for views and analysis lies with the author.

The Michael Baptista Essay Prize was established by the friends of Michael Baptista and the Royal Bank of Canada. This \$500 Prize is awarded annually to both a graduate and an undergraduate student at York University in recognition of an outstanding scholarly essay of relevance to the area of Latin American and Caribbean Studies, from the humanities, social science, business or legal perspective.

Reproduction: All rights reserved to the author(s). Reproduction in whole or in part of this work is allowed for research and education purposes as long as no fee is charged beyond shipping, handling, and reproduction costs. Reproduction for commercial purposes is not allowed.

CERLAC

8th Floor, YRT
4700 Keele Street
York University
Toronto, Ontario
Canada M3J 1P3

Phone: (416) 736-5237

Email: cerlac@yorku.ca

Contents

Introduction.....	Error! Bookmark not defined.
Part I: Historical Background.....	3
The Law of Amnesty	5
El Salvador’s Amnesty Laws.....	6
The National Reconciliation Law	6
The General Amnesty for the Consolidation of Peace.....	7
Part II: the Case against El Salvador’s Amnesty Law	8
‘Blanket’ Amnesties are No Longer Acceptable	8
Blanket Amnesties Contravene International Treaty Law	10
Obligation to Prosecute.....	13
Amnesty Has Impeded Fulfillment of the Peace Agreements	13
Amnesty Has Not Led to Reconciliation.....	14
Part III: Beyond Impunity-Prosecution and Legislative & Institutional Reforms	16
Prosecution.....	16
Legislative Reforms	18
Institutional Reforms	19
Conclusion	20
Aknowldgment	21

Impunity on Trial: the Case for Repealing El Salvador's Amnesty Law

1. INTRODUCTION

One of the main challenges post-conflict societies face is how to deal with past human rights abuses under the post-conflict regime. The decision to either re-integrate ex-combatants into society, or prosecute those accused of human rights violations can cause significant debate and tension among competing social and political actors. Often times the choice is framed as between peace and justice. This dichotomy of choice has been referred to in the literature on transitional justice as the 'peace vs. justice debate'.¹

Where peace-building is chosen over justice, truth commissions have served as a compromise to prosecution with a premium placed on 'truth-seeking' rather than trials. Partly motivated by political pragmatism, and partly by administrative constraints, truth commissions became a popular choice among post-conflict actors in Latin America during the latter part of the 20th century.²

¹ See Lisa Laplante, "Outlawing Amnesties: The Return of Criminal Justice in Transitional Justice Schemes" (2008) 49 Va J of Int'l L 915 at 920-931 for an outline of this debate. See Martha Minnow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (Boston, Beacon Press, 1998) for a book length analysis of this issue. See also Lucy Hovil & Joanna R. Quinn, "Peace First, Justice Later: Traditional Justice in Northern Uganda" (2005) Working Paper No. 17 Faculty of Law, Makerere University online: Refugee Law Project <http://www.refugeelawproject.org/working_papers/RLP.WP17.pdf> where the authors argue that "the separating out of restorative and retributive aspects of justice is seen to be false" at 1.

² Gregory Jowdy, "Truth Commissions in El Salvador and Guatemala: A Proposal for Truth in

In addition to truth commissions, states have employed amnesty as a way of moving beyond past crimes. In essence, amnesty exempts individuals from prosecution and accountability.³ Transitional justice, human rights, and international law scholars all weigh in on the legitimacy and desirability of amnesty as a means of transitioning to democratic rule. Generally speaking, the consensus in the literature is that 'qualified amnesties', which provide some degree of accountability, are acceptable in certain circumstances, while 'blanket amnesties', which provide no measure of accountability for human rights abusers, are unacceptable.⁴

This paper focuses on one such blanket amnesty, El Salvador's General Amnesty for the Consolidation of Peace

Guatemala" (1997) 17 BC Third World L J 291 at 292 [footnotes omitted].

³ Gwen K. Young, "All the Truth and as Much Justice as Possible" (2002) 9 UC Davis J Int'l Law & Pol'y 209 at 211-212 [Young, "All the Truth"] [footnotes omitted].

⁴ Laplante, has identified a gap in the human rights law and international criminal law fields claiming that "the discipline of international criminal law still supports the theory of 'qualified amnesties' in transitional justice schemes, while international human rights law now stands for the proposition that no amnesty is lawful in those settings." Laplante, *supra* note 1 at 918-9.

Ronald Slye groups the various positions regarding amnesties into three schools: first, the obligation to prosecute school; second, the fundamental rights of victims school; and third, the social stability school. It appears the even social stability scholars are uncomfortable with blanket amnesties. Instead social stability scholars tend to favour what they term 'qualified' amnesties that is, amnesties which provide for some kind of redress, reparation, truth and justice. See Ronald Slye, "The Legitimacy of Amnesties under International Law and General Principles of Anglo-American Law: Is a Legitimate Amnesty Possible?" (2002) 43 Va J Int'l L 173 at 9-11. See also Naomi Roht-Arriaza & Lauren Gibson, "The Developing Jurisprudence on Amnesty" (1998) 20:4 Hum Rts Q 843 at 884.

(hereinafter “Amnesty Law”).⁵ Legislated shortly after the Commission on the Truth for El Salvador published its Report yet prior its widespread diffusion, the main thinking behind the Amnesty Law, as evidenced by the title, is that peace was best served by forgiving and forgetting past human rights abuses. A prosecutorial model of transitional justice that could have brought reputed human rights abusers before the courts to face justice, therefore, was eschewed.

Instead, persons responsible for notorious acts of violence walk free, quite possibly among the very persons whom they victimised. In some instances, individuals complicit in the violence hold important positions of power and influence while the victims and their families continue to wonder if they will ever find their disappeared loved ones.⁶ At the same time, the elites call for harsher penalties for those accused of committing petty crimes. A status quo that affords one set of citizens the privilege of immunity from the justice of the law, while demanding the increased incarceration of another can only breed contempt for the ‘rule of law’.⁷ Such a state of affairs is unsustainable and viable alternatives to amnesty must be explored

⁵ La Ley de Amnistía General Para La Consolidación de la Paz Decree No. 486, 20 March 1993 published on 22 March 1993 online: United Nations High Commissioner for Refugees <<http://www.acnur.org/biblioteca/pdf/1841.pdf>>. See also The Amnesty Law Database Queen’s University Belfast El Salvador 1992, online: <<http://incore.incore.ulst.ac.uk/cgi-bin/Amnesty/agree.pl?full=254>>. [La Ley de Amnistía].

⁶ Margaret Popkin & Nehal Bhuta, “Latin American Amnesties in Comparative Perspective: Can the Past be Buried?” (1999) 13:1 Ethics & International Affairs 99 at 109.

⁷ Margaret Popkin & Nehal Bhuta, “Latin American Amnesties in Comparative Perspective: Can the Past be Buried?” (1999) 13:1 Ethics & International Affairs 99 at 109.

if truth and reconciliation are to move out of the realm of words and into the realm of reality.

This paper seeks to contribute the development of such alternatives. Referencing international, human rights, and customary law, I argue that El Salvador’s Amnesty Law—in addition to being ineffective—contravenes the State’s commitments to uphold human rights standards and bring those responsible for human rights violations committed during the civil war period to justice.

In addition, I outline the legal and practical basis upon which a repeal of El Salvador’s Amnesty Law could be launched. While recognizing that repealing the law would not lead to the immediate prosecution of human rights violators, I maintain that repealing the Amnesty Law is a necessary and symbolic first step in the establishment of a new social contract in El Salvador; based on the respect for human rights and the rule of law.

In the first part of this paper, I provide an historical outline of the political and social antecedents to the current Amnesty Law. I also examine the institution of amnesty generally, including its various manifestations, and outline the scope of El Salvador’s Amnesty Law.

In the second part, I make the case against the Amnesty Law. Relying on legal scholarship and legal instruments I argue broadly that a) amnesty is not acceptable at international humanitarian and human rights law; and specifically that El Salvador’s Amnesty Law b) violates its treaty commitments; c) contravenes the Peace Agreements; and d) has been ineffective in achieving the reconciliatory aspirations that proponents assert it establishes.

In the third part, I set out possibilities of prosecution and legislative and institutional reforms in the effort to redress past human rights abuses and prevent future violations. Specifically, I

examine the prospect of prosecution under the current Amnesty Law, the qualified amnesty as an alternative to the present Law, and the necessity to implement the recommendations of the Truth Commission as a means to reckon with human rights violations in the transition to democratic rule.

PART I: HISTORICAL BACKGROUND

Between 1980 and 1992 El Salvador was rocked by civil war. The main adversaries, the Farabundo Marti National Liberation Front (hereinafter “FMLN”) and Armed Forces of El Salvador (hereinafter “FAES”)⁸ employed various strategies in their efforts to subdue one another.⁹ Towards the end of the war both sides sought a political resolution to the conflict through a United Nations (hereinafter the “UN”) brokered peace process which culminated in the signing of the Chapultepec Peace Agreement.¹⁰

⁸ See generally Jowdy, *supra* note 2 at 292-295, for a brief historical overview of the circumstances and events that lead to the civil war. See also Michael Kramer, *El Salvador: Unicornio de la Memoria* (San Salvador: Museo de la Palabra y la Imagen, 1998); and Philip L Russel, *El Salvador in Crisis* (Austin: Colorado River Press, 1984).

⁹ Report of the Commission on the Truth for El Salvador “From Madness to Hope: The 12 Year War in El Salvador” [“From Madness to Hope”] (United Nations Publication S/25500, April 1, 1993) in *The United Nations and El Salvador: 1990-1995*, The United Nations Blue Book Series, vol 4 (New York: United Nations Reproduction Centre, 1995) at 384.

¹⁰ The Chapultepec Peace Agreement, signed on January 16, 1992 in Mexico City, was preceded by a series of UN brokered agreements including: the Geneva Agreement, signed on April 4, 1990 in Geneva; the General agenda and timetable for the comprehensive negotiating process, signed on May 21, 1990 in Caracas; the Agreement on human rights, signed on July 26, 1990 in San Jose; the Mexico Agreements, signed on April 27, 1991 in Mexico City; the New York Agreement, signed on

By the time the Peace Agreements were signed, the war had claimed the lives of more than 75,000 Salvadorans; left 8,000 people disappeared; and displaced 1 million of the country’s 5 million inhabitants.¹¹ Recognizing the widespread and institutionalized impunity that had come to characterize life during the conflict, and the human rights violations that had been committed by the both sides, the negotiators to the peace process agreed to refer such acts to the Commission for the Truth in El Salvador (herein after “Truth Commission”) for the purpose of investigating “serious acts of violence that [...] occurred since 1980 and whose impact on society urgently demands the public should know the truth.”¹²

The Truth Commission registered 22,000 complaints of serious acts of violence that occurred in the country between January 1980 and July 1991.¹³ Of the 22,000 testimonies submitted to the Commission almost 85% attributed cases involving extrajudicial executions, forced disappearance, or torture to agents of the State, while 5% was attributed to the FMLN.¹⁴ Due to time and budgetary

September 25, 1991 in New York; the Compressed Negotiations, signed on September 25, 1991 in New York; the New York Act, signed on December 31, 1991 in New York; and the New York Act II, signed on January 13, 1992 in New York.

¹¹ Tommie Sue Montgomery, *Revolution in El Salvador: From Civil Strife to Civil Peace*, 2nd ed. (Boulder: Westview Press, 1995).

¹² Mexico Peace Agreements Mexico City, 27 April 1991, UN DOC.S/25500 (April 1, 1993) [“Mexico Agreements”] in Neil J. Kritz, ed, *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, vol 3 Laws, Rulings, and Reports (Washington DC: United States Institute of Peace Press, 1995) at 175.

¹³ “From Madness to Hope”, *supra* note 9 at 311.

¹⁴ “From Madness to Hope”, *supra* note 9 at 311. While these figures do not add up to 100 percent they illustrate, as the Commission states, the systemic patterns of violence that that occurred

constraints, the Commission was unable to investigate all cases brought before it and did not propose any mechanism to pursue investigating the thousands of cases that it was unable to investigate.¹⁵

In its Report, published March 15, 1993, the Commission declared that pardon was essential in seeking peace,¹⁶ but qualified this statement by emphasizing that pardon is predicated on serious consideration of the violent acts described in the report, including the importance of “punishing the guilty and adequately compensating the victims and their families.”¹⁷

Indeed the Commission emphasized this point, writing that “public morality demands that those responsible for the crimes described [in the report] should be punished.”¹⁸ The parties agreed that such abuses would be

during the war. Interpretation of the data has varied from the Commission’s report. See Jowdy, *supra* note 2 at 296 where he notes that “The report found Government actors responsible for 5100 deaths and 1600 acts of violence and the FMLN responsible for 400 deaths and 300 disappearances” (90% and 10% respectively). See also Daniel Valencia, “La Ley Necesaria Para la Paz” *El Faro*, online: <http://www.elfaro.net/secciones/Noticias/2006_0123/noticias2_20060123.asp> where the reporter states the the Commission attributed 85% of war crimes to the Armed Forces and 10% to the FMLN.

¹⁵ Margaret, Popkin, *Peace Without Justice: Obstacles to Building the Rule of Law in El Salvador* (University Park: The Pennsylvania State University Press, 2000) at 134 [Popkin, *Peace without Justice*].

¹⁶ “From Madness to Hope”, *supra* note 9 at 384. The Commission’s use of the word ‘pardon’ as used in the Report does not appear to mean ‘amnesty’ or ‘pardon’ in the legal sense, but rather pardon on an individual and community level. For a discussion on the institution of pardon see Faustin Z. Ntoubandi, *Amnesty for Crimes against Humanity under International Law* (Boston: Martinus Nijhoff Publishers, 2007) at 10-11 and Andreas O’Shea, *Amnesty for Crime in International Law and Practice* (New York: Kluwer Law International) at 2-3.

¹⁷ “From Madness to Hope”, *supra* note 9 at 385.

¹⁸ *Ibid*.

the object of ‘exemplary action’—that is, prosecuted—by the Courts, irrespective of the sector to which their perpetrators belonged¹⁹ “particularly in cases where respect of human rights [was] jeopardized.”²⁰ The Truth Commission also made recommendations to the parties which they agreed to implement.²¹ These recommendations included:

- reforms to the armed forces;
- reforms in the area of public security;
- the investigation of illegal groups, otherwise known as “Death Squads”;
- institutional reforms to prevent the repetition of human rights abuses and violence, including reforms in the administration of justice, and the protection of human rights;
- material compensation to the victims of violence, moral compensation in the form of commemorative monuments, and a national holiday in memory of the victims; and
- the establishment of Forum for Truth and Reconciliation charged with following-up on the efforts of the State to implement these recommendations.²²

Despite parties’ agreement to honour the recommendations of the Truth Commission, several individuals and institutions named in the Report reacted publicly against the Commission’s findings. Their criticisms were largely reactionary and centred on the potentially

¹⁹ Peace Agreement between the Government of El Salvador and the FMLN (United Nations Publication A/46/864-S/23501, 16 January 1992) in *The United Nations and El Salvador: 1990-1995*, The United Nations Blue Book Series, vol 4 (New York: United Nations Reproduction Centre, 1995) [Chapultepec Peace Agreement].

²⁰ Chapultepec Peace Agreement, *supra* note 19 at 196.

²¹ *Ibid* at 151.

²² “From Madness to Hope”, *supra* note 9 at 379-386.

harmful consequences of Commission's findings. For example, General Rene Emilio Ponce of the FAES said the report was "illegitimate, unjust, incomplete, illegal, unethical, biased and insolent."²³ The Minister of the Presidency, Oscar Santamaria, who represented the FAES during the negotiations said the report was "an insult to Salvadoran society and very explosives."²⁴ Members of the Popular Revolutionary Army (ERP), a faction of the FMLN, protested against having received what they felt was a disproportionate share of blame—even going so far as to accuse the Truth Commission of harbouring political and partisan motivations.²⁵

The reaction from within the FAES helped suppress the publication of the Report of the Truth Commission. State agents and the national press assisted in suppressing the Report to such a degree that seven years after the report had been published, it had not been made widely available nor had it been widely read.²⁶

The Truth Commission's mandate was to serve justice just as much as it was about uncovering the truth. The Truth Commission not only provided recommendations that struck at the heart of impunity, but also called for the prosecution of emblematic cases. Institutional and individual reactions of those implicated in human rights abuses paved the way for amnesty. However, this was not legislated immediately. The Amnesty Law was preceded by a National Reconciliation Law which included some

measure of accountability. Before focusing on El Salvador's Amnesty Law, I provide a definition of amnesty as well as an outline of the various purposes of amnesty.

The Law of Amnesty

Historically, the granting of amnesty has come within the purview of the sovereign who grants forgiveness to individuals that committed offensive acts,²⁷ treating the acts as if they had never occurred ab initio.²⁸ Generally, amnesty shields a group or class of from prosecution for past offences.²⁹ Amnesty usually results in impunity since amnesty renders a perpetrator unaccountable for their crimes.³⁰ In modern practice, amnesties vary in scope as well as purpose. While not an exhaustive list, the following are examples provide an overview of the type of amnesties used in post-conflict, post-authoritarian contexts.

The first set of amnesty laws are referred to as 'self-amnesties'. These are enacted by the person or institution that would otherwise be held liable for committed offences. One prime example of a self-amnesty is the Chilean amnesty

²³ Irina Carlota Silber, "Commemorating the Past in Postwar El Salvador" in Daniel J. Walkowitz & Lisa Maya Knauer, eds, *Memory and the Impact of Political Transformation in Public Spaces*, (Durham: Duke University Press, 2004) 211-231 at 213.

²⁴ Popkin, *Peace without Justice*, *supra* note 15 at 121.

²⁵ Ralph Sprenkels, *The Price of Peace: The Human Rights Movement in Postwar El Salvador*, vol 19 (Amsterdam: Cuadernos del Celda, 2005) at 83.

²⁶ Popkin, *Peace Without Justice*, *supra* note 15 at 122.

²⁷ Blacks Law Dictionary in John J Moore, "Problems with Forgiveness: Granting Amnesty under the Arias Plan in Nicaragua and El Salvador" (1990-1991) 43 Stan L Rev 733 at 211.

²⁸ Paul Ricouer, *Memory, History & Forgetting*, Trans Kathleen Blamey & David Pellauer (Chicago: University of Chicago Press, 2004) at 455.

²⁹ Young, "All the Truth", *supra* note 3 at 211 [footnotes omitted].

³⁰ Young, "All the Truth", *supra* note 3 at 211 [footnotes omitted]. The Inter-American Court has described impunity as "the overall lack of investigation, pursuit, capture, trial, and conviction of those responsible for violations of rights protected under the American Convention," which, when not addressed, "fosters chronic recidivism of Human Rights violations and total defencelessness of the victims and of their next of kin." *Bulacio*, 2004, Inter-Am Ct HR (Ser C) No. 100, at para 117 in Laplante, *supra* note 1 at 969.

law enacted by and in favour of General Augusto Pinochet of Chile which exempted him from any prosecution by subsequent governments for human rights violations committed under his regime.³¹

'Brokered amnesties', on the other hand, are negotiated between benefiting parties³² and have often been used as a bargaining chip in peace negotiations and to re-integrate opposition forces into the political life of the nation.³³

The scope of amnesty also differs from context to context. Amnesties can be limited to certain types of offences and to specific members of a given population. For example, it can apply to senior military officials, to low-ranking officials, or both. Some amnesties have been referred to as 'blanket' amnesties, in that they apply without requiring individuals to apply to be covered by the law or even an initial inquiry into the facts to determine if they fit the law's scope of application.³⁴ Amnesties can also be made dependent on the provision of information or the undertaking of certain acts by the potential beneficiary of the amnesty.³⁵

Relying on this framework, and as will become apparent below, El Salvador's

Amnesty Law can be understood as a self/brokered blanket amnesty. Before turning to El Salvador's Amnesty Law, I provide a short outline of the Amnesty Law's legislative precursor, the National Reconciliation Law, in order to illustrate the legal-historical context that facilitated the move to blanket amnesty.³⁶

El Salvador's Amnesty Laws

The National Reconciliation Law

In 1992, the Legislative Assembly of the Republic of El Salvador enacted the National Reconciliation Law (herein after "Reconciliation Law"), Legislative Decree No.147 just seven days after the signing of the Peace Agreements.³⁷ At the time of enactment, the Reconciliation Law covered crimes committed by twenty or more persons and those committed by anyone in the course of the armed conflict.³⁸ The Reconciliation Law also applied to combatant and non-combatant members of the FMLN.³⁹

The Reconciliation Law provided some measure of accountability. For example, Article 6 of the Law provided that "persons who, according to the report of the Truth Commission, participated in grave acts of violence" would not benefit from the legal protections the law afforded. The Reconciliation Law, however, provided the Legislative Assembly the authority to revisit it six months after the publication

³¹ Decreto Ley 2, 191, Diario Oficial No. 30.042 (19 April 1978), *The Amnesty Law Database*, online: "Queens University Belfast" <<http://incore.incure.ulst.ac.uk/cgi-bin/Amnesty/agree.pl?full=48>>.

Similar amnesties have been enacted by military dictatorships of Argentina and Uruguay.

³² Young, "All the Truth", *supra* note 3 at 216-225.

³³ See especially Luc Huyse, "Justice after Transition: On the Choices Successor Elites Make in Dealing with the Past" (1995) 20 *Law & Soc Inquiry* 51.

³⁴ Louise Mallinder, *Amnesty, Human Rights and Political Transitions* (Portland: Hart Publishing, 2008) at 6. Also referred to as 'discrete amnesty'. See Gwen K. Young, "Amnesty and Accountability" (2001-2002) 35 *UC Davies L Rev* 427 at 442.

³⁵ See Ntoubandi, *supra* note 16 at 151-182 for a detailed analysis of the South African model.

³⁶ I return to the Reconciliation Law as an alternative to the current Amnesty Law below.

³⁷ Ley de Reconciliación Nacional, Legislative Decree No. 147 of 23 January 1992 published in the Official Report on 23 January 1992 online: United Nations High Commissioner for Refugees <<http://www.acnur.org/biblioteca/pdf/1840.pdf>>. See also "El Salvador 1992" *The Amnesty Law Database*, online: Queen's University Belfast <<http://incore.incure.ulst.ac.uk/cgi-bin/Amnesty/agree.pl?full=254>>.

³⁸ Article 1 of the Reconciliation Law.

³⁹ Articles 3 and 4 of the Reconciliation Law.

of the Report of the Truth Commission in order to cover cases not covered by the Law.⁴⁰ Despite provisions for accountability, then, it appears that it was always the intention of the government to pass a blanket amnesty law at a later date.

The General Amnesty for the Consolidation of Peace

On March 18, 1993, three days before the Report of the Truth Commission was made public, then President Alfredo Cristiani openly criticized the Truth Commission asserting that it had failed the Salvadoran people's expectations with regard to national reconciliation.⁴¹ Ignoring the terms of the Peace Agreements which sought to redress systemic impunity, Cristiani advocated amnesty as an instrument of peace predicated on oblivion:

(...) one also has to consider that the Report of the Truth Commission examines only a part of everything that happened in all those years of violence. And because the Report speaks of only certain cases and mentions only certain people, we have to think much more carefully about what course of action we should take. What is most important now is to see what has to be done to

⁴⁰ See generally Lawrence Michael Ladutke, *Freedom of Expression in El Salvador: the Struggle for Human Rights and Democracy* (Jefferson, North Carolina: McFarland & Company, Inc., Publishers, 2004). (Ladutke provides an insightful discussion on the political process behind the enactment of this law, including the willingness of the leftist coalition—the Democratic Convergence—to sign on and vote for such a law, referring to the passage of the law as pact among elites or an ‘inter-elite pact.’ He further highlights that in some way, the left actually prevented the efforts of ARENA, the right-wing party at the time, from enacting a complete and unconditional amnesty which had control of the Assembly and the Presidency at the time of the enactment of the law).

⁴¹ Popkin, *Peace without Justice*, *supra* note 15 at 150.

erase, eliminate and forget everything in the past.⁴²

The Reconciliation Law was followed by Legislative Decree No. 486, the General Amnesty Law for the Consolidation of Peace, five days after the release of the Report of the Truth Commission on March 15, 1993, and continues to be in force at present.⁴³ The scope of the Amnesty Law is broad as provided for in Article 1:

Full, absolute and unconditional amnesty is granted to all persons who in any way participated in the commission of political crimes, common crimes related to these political crimes, and common crimes committed before January 1, 1992 by persons numbering no less than 20, whether said persons have been sentenced, proceedings have been initiated or not for these same crimes, granting grace to all those persons who participated directly or indirectly or as

⁴² Inter-American Commission on Human Rights, *Report on the Situation of Human Rights in El Salvador*, OEA/Ser.L/V/II.85 Doc. 28 rev. 11 February 1994 CIDH, online: <<http://www.cidh.oas.org/countryrep/ElSalvador94eng/II.4.htm>> [emphasis added].

⁴³ La Ley de Amnistía, *supra* note 5. The Legislative Assembly passed the Amnesty Law with a total of forty-seven votes from ARENA and two smaller right-wing parties. Nine Democratic Convergence deputies voted against the bill, while thirteen Christian Democratic Party deputies abstained.

See Ladutke, *supra* note 40 at 115 [footnotes omitted] While some scholars note that in principle the FMLN opposed the passage of the second amnesty law, others note that there was little protest among the ranks of the FMLN to the potential passage of an amnesty law. In fact, there was little volition on the part of the FMLN to implement the Truth Commission's recommendations, since, in the words of one of its members, “the government ha[d] not complied with the recommendations, then, why should we (comply with them).” See Sprenkels, *supra* note 25 at 84.

accomplices in the aforementioned crimes.⁴⁴

Article 2 of the Amnesty Law broadened the definition of political crimes to include ‘crimes against the public peace,’ ‘crimes against judicial activity,’ and crimes ‘committed because, or as a result of armed conflict, irrespective of condition, militancy, allegiance, or political ideology.’⁴⁵ The Law, furthermore, applies to serious human rights violations that were perpetrated in El Salvador between January 1, 1980 and January 1, 1992 including, *inter alia*, to summary executions, torture, and the forced disappearance of persons.⁴⁶ Pursuant to Article 3 of the Amnesty Law ‘acts of terrorism’ are defined as the deprivation of freedom to third parties, threats of or causing death for profit, kidnapping, extortion, or drug-related crimes,⁴⁷ And are not covered by the law.

PART II: THE CASE AGAINST EL SALVADOR’S AMNESTY LAW

In this part, I have three bases for arguing that blanket amnesties, such as El

⁴⁴ La Ley de Amnistía, *supra* note 5 (Se concede amnistía **amplia, absoluta e incondicional** a favor de **todas las personas que en cualquier forma** hayan participado en la comisión de delitos políticos, comunes conexos con éstos y en delitos comunes cometidos por un número de personas que no baje de veinte antes del primero de enero de mil novecientos noventa y dos, ya sea que contra dichas personas se hubiere dictado sentencia, se haya iniciado o no procedimiento por los mismos delitos, concediéndose esta gracia a todas las personas que hayan participado como autores inmediatos, mediatos o cómplices en los hechos delictivos antes referidos).

⁴⁵ *Ibid.*

⁴⁶ *Parada Cea et al. v El Salvador* (1999), Inter-Am Comm HR, No. 1/99, at para 113, Annual Report of the Inter-American Commission on Human Rights: 1998, OEA/Ser.L/V/II.102/Doc. 6 rev [*Parada Cea et al.*].

⁴⁷ Ley de Amnistía, *supra* note 5.

Salvador’s Amnesty Law, are no longer acceptable. First, customary practice tends to demonstrate that amnesty is not acceptable in cases involving human rights abuses. Second, El Salvador’s Amnesty Law contravenes international treaty law as evidenced in the regional jurisprudence on amnesties in cases involving human rights violations. Third, there is evidence that a legal international obligation exists to prosecute perpetrators of human rights violations despite the existence of a domestic amnesty law. I conclude this part by demonstrating that the parties to the Peace Agreements have violated the solemn agreement they entered into by enacting a blanket amnesty law and highlighting the ineffectiveness of the amnesty law in achieving peace and reconciliation.

‘Blanket’ Amnesties are No Longer Acceptable

Customary international law is defined as “practice that is widespread and consistent” which reflects the “practice of those states that are involved in the relevant activity.”⁴⁸ The substance of customary law include the norms and customs that states generally and consistently follow and are performed out of a sense of legal obligation.⁴⁹

Customary international law has never recognized the ability to avoid justice for human rights abuses. Some scholars, however, argue the contrary.⁵⁰

⁴⁸ Charles P. Trumbull, “Giving Amnesties a Second Chance” (2007) 25 Berkeley J Int’l Law 283 at 290 [footnotes omitted].

⁴⁹ Young, “All the Truth”, *supra* note 3 at 227 [footnotes omitted].

⁵⁰ Despite this, Charles Trumbull has opined that state practice over the last twenty years demonstrates that amnesties do not violate international customary law. Michael Scharf echoes Trumbull’s assertions claiming that there is “scant evidence requiring that customary international law

Yet these arguments fail to consider the historical context in which Latin American amnesties were enacted and thus are based on a skewed data set. Lisa Laplante raises this point in her discussion of human rights law, and the right to justice, and the duty to prosecute. According to Laplante,

It is important to remember the political transitions in Latin America occurred before a strong and cohesive international human rights framework existed, and thus the choice of approaches was presented in terms of [...] a logic of peace and war that omitted almost entirely a 'logic of law.'⁵¹

While amnesties may have been treated as acceptable in the past, a State practice vis-à-vis amnesty has changed significantly, leading to the impression that they in fact were never acceptable measures in the first instance. The recent move away from amnesties as viable instruments in the transition to peace renders amnesty for human rights abuses outside the realm of customary practice. The most significant regional case demonstrating a shift in State practice regarding amnesties is that of Peru.

In 1995, then President Alberto Fujimori introduced an amnesty bill which received the approval of the Peruvian legislature and was signed into law. This

requires the prosecution of crimes against humanity" labelling such claims as "chimerical." Scholars and advocates of this persuasion belong to what Ronald Slye refers to as the 'social stability school' on amnesties. The thrust of the social stability school's position is that amnesties facilitate the transition from war to peace; from authoritarian rule to democratic rule. See Slye, *supra* note 4, at 9-11. See Trumbull, *supra* note 48 at 291; Scharf, "The Amnesty Exception," *supra* note 7 at 519; Michael Scharf, "From the eXile Files: An Essay on Trading Justice for Peace" (2006) 63 Wash & Lee L Rev 359 at 360.

⁵¹ Laplante, *supra* note 1, at 935.

law absolved the military, police, and civilians for any human rights abuses committed between May 1992 and June 14, 1995 if they were related to the counterinsurgency war.⁵²

Peru repealed the law in 2002 in light of the Inter-American Court on Human Rights (hereinafter "Inter-American Court") judgment in the Barrios Altos case.⁵³ In its judgment, the Inter-American Court held that the self-amnesty laws were invalid as they violated, inter alia, the right to judicial protection, the right to the truth, and the State's duty to investigate.⁵⁴

Similarly, in 2005 the Supreme Court of Justice of Argentina delivered a final blow to the nation's amnesty laws, two years after the National Congress of Argentina repealed two of its earlier amnesties.⁵⁵ It held that laws oriented towards 'forgetting' gross human rights violations contravene the provisions of, inter alia, the American Convention on Human Rights (hereinafter "American Convention") and as such are

⁵² See "Perú: Las leyes de amnistía consolidan la impunidad por las violaciones de los derechos humanos" online: Amnistía Internacional <<http://www.derechos.net/amnesty/doc/americas/peru1.html#6>> for the text of the law in Spanish and English.

⁵³ *Barrios Altos*, 2002 Inter-Am Ct HR (ser.C) No.75 [*Barrios Altos*]. *Barrios Altos* concerned the massacre of fifteen people, in the Barrios Altos neighbourhood of Lima, at the hands of a death squad composed of members of the Peruvian Armed Forces. The perpetrators of the massacre mistook the fifteen individuals for members of the Shining Path. See especially Pablo Livia, "El Expediente Montesinos: Case Barrios Altos Revive" (12 October 2000) Ed No. 1640, online: [caretas.com](http://www.caretas.com), <<http://www.caretas.com.pe/2000/1640/articulos/barrios-altos.phtml>>.

⁵⁴ *Ibid* at paras 43-44.

⁵⁵ The Argentine Congress repealed the laws in 2003, Peter Greste, "Argentina overturns amnesty laws" online: BBC <<http://news.bbc.co.uk/2/hi/americas/3146379.stm>>.

constitutionally intolerable.⁵⁶ As a result of the ruling, national prosecutors proceeded to open up criminal prosecutions against almost 300 military officers who benefited from earlier amnesty laws.⁵⁷

The regional trend appears to be a move away from blanket and self-amnesties to a practice of investigation and prosecution of gross human rights violations. Peru and Argentina have led the way and demonstrate a new practice and position with respect to amnesty laws in the region.

The examples of Peru and Argentina highlight the degree to which El Salvador is currently falling out of step with the practice and jurisprudence on amnesty trends in the region. It is important to note that the Supreme Court of Argentina held that its decision did not limit itself to self-amnesties, as in the case of Peru, but rather to all amnesties including those enacted for so-called reconciliatory purposes.

Blanket Amnesties Contravene International Treaty Law

In addition to being unacceptable in international customary law, El Salvador's amnesty law contravenes the State's duty to victims of human rights abuses under international treaty law. The Inter-American Commission has come to this conclusion in several cases that have directly dealt with El Salvador's Amnesty Law while the Inter-American Court recently released a judgment holding that

⁵⁶ Corte Suprema de Justicia de la Nación de Argentina. Caso Simón Julio Héctor y otros s/privación ilegítima de la libertad, etc. Causa 17.768, Resolución de 14 de junio de 2005, considerado 31 online: United Nations High Commissioner for Refugees <<http://www.acnur.org/biblioteca/pdf/3560.pdf>> cited in *Caso Gomes Lund et al.*, *infra* note 73 at para 163 [Caso Simón Julio Héctor].

⁵⁷ Laplante, *supra* note 1 at 980.

amnesty laws are unacceptable and incompatible with the provisions of the American Convention.

The Inter-American Commission first held El Salvador's Amnesty Law to be in violation of several American Convention provisions in its *Parada Cea et al.* ruling on January 27, 1999.⁵⁸ The petitioners in this claim argued that the crimes under review violated the farm workers' right to life, personal integrity, and liberty and personal security under Articles 4(1), 5, and 7(5) of the American Convention. In addition, the petitioners also claimed that the legal consequence of the Amnesty Law transgressed their rights to judicial guarantees and judicial protection.⁵⁹

The Inter-American Commission agreed with the petitioner's claims and held that the Amnesty Law violated Articles 25, 1(1), 8, and 13 of the American Convention. Furthermore, by promulgating and enforcing the Amnesty Law, the Inter-American Commission reasoned, El Salvador violated the right to judicial protection enshrined in Article 25 of the American Convention to the detriment of the surviving victims and other victims with legal claims.⁶⁰

The Inter-American Commission also held that the Truth Commission's in work related to serious human rights

⁵⁸ *Parada Cea et al.*, *supra* note 46 at paras 1-2. *Parada Cea et al.* involved the torture of seven farm workers at the hands of the Sixth Company of the infamous Atlacatl Battalion and a section of the First Infantry Brigade. These two elements of the armed forces carried out a military operation on July 1, 1989 in which they made attempts to capture alleged members of the Armed Liberation Forces (Fuerzas Armadas de Liberación). Two of the seven men that were interrogated, and tortured during this operation, eventually died as a result of the injuries they sustained while in captivity. See "From Madness to Hope", *supra* note 9 "El Mozote" massacre at 347-351.

⁵⁹ *Parada Cea et al.*, *supra* note 46 at paras 105.

⁶⁰ *Parada Cea et al.*, *supra* note 46 para 129.

violations, did act as a substitute for the judicial process nor did it discharge the State's obligation to investigate the incidents set out in the petitioner's claim provided for under Article 1(1) of the American Convention.⁶¹

Finally, the Inter-American Commission determined that the Amnesty Law violated victims' rights to know the truth as provided for in Articles 1(1), 8, 25 and 13 of the American Convention.⁶² Because of the Amnesty Law, the Salvadoran State did not investigate criminal incidents and nor attempt to identify and punish individuals responsible for human rights violations. Therefore, the State injured the right of surviving victims and their families to be apprised of the truth of what had occurred.⁶³ As part of their recommendations, the Commission called on the Salvadoran State to guarantee victims' rights as provided for in the American Convention and, if need be, to treat the amnesty law as if it had never existed.⁶⁴

In *Ellacuría et al.*, the Inter-American Commission dealt yet another blow to the Amnesty Law. The petition to the Inter-American Commission claimed that the Salvadoran State had violated the American convention by enacting the Amnesty Law to the detriment of six Jesuit priests and two women, their cook and her fifteen-year-old daughter, who were murdered by agents of the State on the Universidad Centroamericana José Simeón Cañas' campus.⁶⁵

Citing the provisions of the American Convention, the Inter-American Commission held that States party to the American Convention have an obligation to adopt "such legislative measures as may be necessary" to give effect to the rights and freedoms enshrined in the American Convention, pursuant to Article 2. This obligation, the Inter-American Commission held, includes the obligation to refrain from enacting laws that "eliminate, restrict or nullify the rights and freedoms enshrined in the convention, or that render them ineffective."⁶⁶

The Inter-American Commission went on to hold that by adopting the Amnesty Law, the Salvadoran State facilitated the release of the only person who was convicted in these murders. In their final recommendations, the Inter-American Commission called on the Salvadoran State to adjust its domestic laws in light of the provisions of the American Convention, and nullify the Amnesty Law.⁶⁷

Finally, Monsignor Oscar Romero⁶⁸ involved a complaint against agents of the Republic of El Salvador who, acting as part of clandestine paramilitary death squads, shot and killed Archbishop Monsignor Oscar Arnulfo Romero y Galdámez—the acting

case, including the criminal proceedings. See also "Violence against opponents by agents of the state, Illustrative Case: The Murders of the Jesuit Priests" in "From Madness to Hope", *supra* note 9 at 312-317.

⁶¹ *Ibid* at para 130.

⁶² *Ibid* at para 148-158.

⁶³ *Ibid* at para 158.

⁶⁴ *Parada Cea et al.*, *supra* note 46 at para 160 (1) under "recommendations".

⁶⁵ *Ignacio Ellacuría, SJ et al v El Salvador* (1999), Inter-Am Comm HR, No. 136/99, at para 1, Annual Report of the Inter-American Commission on Human Rights: 1999, OEA/Ser.L/V/II.106/Doc. 6 rev.[*Ellacuría SJ et al.*]. See also paras 13-37 of *Ellacuría SJ et al.* for the factual details of the

⁶⁶ *Ellacuría SJ et al.*, *supra* note 65 at 210.

⁶⁷ *Ellacuría SJ et al.*, *supra* note 65 at 241(3).

⁶⁸ *Monsignor Oscar Romero* (1999), Inter-Am Comm HR, No. 37/00, at para 1, Annual Report of the Inter-American Commission on Human Rights: 1999, OEA/Ser.L/V/II.106/Doc. 6 rev. [Romero]. See uncontroverted statement of the facts at paras 42-55 of the case. See also "Death Squad Assassinations: Illustrative Case: Archbishop Romero" in "From Madness to Hope" *supra* note 9 at 354-361.

Metropolitan Archbishop of San Salvador—while he was conducting mass on March 24, 1980.

In its analysis, the Inter-American Commission criticized the decision of the Salvadoran Supreme Court of Justice (hereinafter the “CSJ”) that had considered the Romero case. In 2000 the CSJ upheld the constitutionality of the Amnesty Law by relying on the separation of powers doctrine. The Inter-American Commission described the judgment as “the consolidation of impunity which to date has protected the alleged direct perpetrators and planners of the extrajudicial execution of the Archbishop of San Salvador.”⁶⁹ According to the Inter-American Commission, the CSJ’s judicial decision in and of itself constituted a violation of Article 25, the right to judicial protection, of the American Convention.⁷⁰

The Inter-American Commission concluded that by enacting the Amnesty Law, the Salvadoran State deprived Monsignor Romero, his family, the members of his religious community, and Salvadoran society as a whole of the right to justice and neglected its duty to investigate and make reparations pursuant to Articles (1), 8(1), and 25 of the American Convention.

In the preceding cases, the Inter-American Commission dealt explicitly with El Salvador’s Amnesty Law in relation to claims of human rights violations committed by the State. In all of the rulings, the Inter-American Commission called upon the Salvadoran State to adjust its domestic laws in order to fulfill its obligations under international law to provide redress to victims of human rights abuses.

Recently, the Inter-American Court provided lengthy reasons regarding

the invalidity of amnesties for crimes against humanity and thus, in violation of the Inter-American Human Rights system. Although it does not specifically deal with El Salvador’s Amnesty Law, the Inter-American Court’s reasoning in *Gomes Lund et al*⁷¹ provided a rigorous analysis by referring to various tribunal and Court decisions, both within the region and in Europe and Africa, that have held amnesties to be in violation of international criminal law.

In its reasoning the Inter-American Court reiterated in the clearest of terms, the incompatibility of amnesties in relation to violations of human rights at international law,

Amnesty provisions and those that attempt to establish provisions that derogate from accountability and impede the investigation and sanction of those responsible for grave human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, are unacceptable and prohibited because they violate non-derogable rights recognized by International Law of Human Rights.⁷²

⁷¹ *Caso Gomes Lund y Otros (Guerrilha Do Araguaia)* (Brasil) (2010), Inter-Am Ct HR (Ser C) No. 219 [*Caso Gomes Lund et al.*]. In *Gomes Lund et al* the petitioners claimed that during the time of the military dictatorship (1964-85) in Brazil, the dictators had been responsible for the arbitrary detention, torture, and forced disappearance of seventy members of the Brazilian Communist Party and peasants. In their claim, the petitioners asserted that these persons were targeted in connection with military operations undertaken between the years of 1972-75 aimed at eradicating the Araguaia Guerrilla (at para 2).

⁷² *Ibid* at para 171 [footnotes omitted]. See also *Barrios Altos*, *supra* note 53 para 41 (son inadmisibles las disposiciones de amnistía, las disposiciones de prescripción y el establecimiento de excluyentes de responsabilidad que pretendan impedir la investigación y sanción de los responsables de las violaciones graves de los derechos humanos tales como la tortura, las

⁶⁹ *Romero*, *supra* 68 at 140.

⁷⁰ *Ibid* at 158.

By relying on and summarizing the jurisprudence on amnesty of similar human rights tribunals in Europe and in Africa, *Gomes Lund et al.* leaves no doubt that El Salvador's Amnesty Law contradicts its commitments under the American Convention. That is, the Salvadoran State cannot dismiss the American Commission on Human Rights' decision as a legal anomaly or the result of regional prejudices. Rather, *Gomes Lund et al.* highlights the consensus among international human rights tribunals that amnesty for human rights abuses, violates an international human rights norm.

Obligation to Prosecute

The duty to investigate, prosecute, and punish those responsible for serious violations of human rights are duties established at international criminal law and seriously undermine the validity of amnesty for human rights abusers. The Special Rapporteur of the United Nations on issues of Impunity, for example, has stated that the "authors of violations should not be able to benefit from amnesty whilst the victims remain without justice."⁷³

Laplante argues that the Inter-American Court's decision in the *Barrios Altos* case should be understood to a) bar all amnesties and not just self amnesties; b) require that criminal investigations not be substituted for other types of non-criminal investigations; and c) apply to all

serious human rights violations and not only crimes against humanity.⁷⁴

Thus, in addition to the obligation to protect victims' rights and investigate human rights violations, there appears to be a strong argument that states have a positive obligation to prosecute human rights violations under international criminal law.

In this section I have outlined the legal framework for the case against El Salvador's Amnesty Law. In all instances, it is clear that the Amnesty Law prevents victims from vindicating their rights and provides the State with a means whereby it can abdicate on its international treaty commitments.

Amnesty Has Impeded Fulfillment of the Peace Agreements

In addition to the legal norms outlined in the first section of this part, the legitimacy of the Amnesty Law is placed in serious doubt given the solemn nature of the Peace Agreements.

The Peace Agreements, entered into freely by both the Salvadoran government and the FMLN, are solemn in nature and oblige both parties to fulfill the implementation of and comply with the terms of the agreement. After observing the parties' hesitation to implementing of the provisions of the Peace Agreements the UN, through correspondence, emphasized the solemn character of the agreements and the importance of their fulfillment to the peace process.⁷⁵ The UN communicated that it was not sufficient to simply comply with the terms of the Peace

ejecuciones sumarias, extralegales o arbitrarias y las desapariciones forzadas, todas ellas prohibidas por contravenir derechos inderogables reconocidos por el Derecho Internacional de los Derechos Humanos).

⁷³ Cited in *Caso Gomes Lund et al.*, *supra* note 71 at 152.

⁷⁴ For a full analysis of her argument see Laplante, *supra* note 1 at 964-974.

⁷⁵ "Letter dated 298 January 1993 from the Secretary-General to the President of the Security Council concerning the developments relating to the destruction of FMLN arms and equipment" s/25200 29 January 1993 in *The United Nations and El Salvador*, *supra* note 9 at 288-289.

Agreement by abiding by a cease fire. Rather, they conveyed that the Peace Agreement represented and continues to represent a commitment to make reforms to the institutional roots of violence and impunity.

Of the commitments the parties to the Peace Agreements agreed to, the commitment to systematically eliminate impunity and the sources of impunity—as set out in the Mexico Agreements—stand out as legitimate reasons for the abrogation of the Amnesty Law. One of the first steps taken to eliminate impunity was the establishment of a Truth Commission in order to learn about the scale and nature of impunity in the Country. The second step was to institute the Truth Commission's recommendations aimed at eliminating impunity.⁷⁶

Although some scholars have argued that peace agreements always operate under the tacit understanding that amnesties are always on the negotiating table,⁷⁷ this assertion does not apply to UN brokered peace agreements. According to the Secretary General of the UN, in his report to the Security Council, "Peace agreements approved by the United Nations can never promise amnesties for crimes of genocide, war, or gross violations to human rights."⁷⁸

The Salvadoran government could have gone about implementing the Truth Commission's recommendations;

however, it appears that questions of realpolitik took precedence over the obligations of the parties to the agreements. To illustrate, members of the war-time regime continued to dominate the judiciary, the executive, and the legislature at the time of transition. Some of these members were involved in human rights violations.⁷⁹ Given the strength of the relationship between military officers, government executives and judges, and the potential for unrest, then President Alfredo Cristiani opted for amnesty as a way to placate the military and keep the peace process on track.⁸⁰

Amnesty Has Not Led to Reconciliation

As stated in the introduction of this paper, States introduce amnesties for a host of reasons.⁸¹ Among these are a reaction to internal unrest and democratic pressure, in response to international pressure, as cultural or religious tradition, as reparation, as a shield for state agents, and as a tool for peace and reconciliation.⁸² The proponents of El Salvador's Amnesty Law have defended it on the grounds that it has continued to provide the juridical means for the reconciliation of Salvadoran society and consequently the peace of the nation.⁸³ Former President Calderon Sol

⁷⁶ These reforms included reforms to the judiciary and the disqualification of known perpetrators of human rights violations from holding public office. Further discussion of the recommendations can be found in the text accompanying note 22.

⁷⁷ Trumbull, *supra* note 48 at 294. See also Popkin, *Peace without Justice*, *supra* note 15 at 6.

⁷⁸ Report of the Secretary General of the United Nations, *The Rule of Law and Transitional Justice that Experience or have Experienced Conflict*. Doc S/2004616 August 3, 2004, cited in *Caso Gomes Lund et al.*, *supra* note 71 at para 10.

⁷⁹ Ntoubandi, *supra* note 16 at 26.

⁸⁰ Mike Kaye, "The Role of Truth Commissions in the Search for Justice, Reconciliation, and Democratization: the Salvadorean and Honduran Cases" (1997) 29 J Lat Amer Stud 693 at 708.

⁸¹ See Part I, "The Law of Amnesty", above, for more on this topic.

⁸² Mallinder, *supra* note 34 at 29.

⁸³ Nery Mabel Reyes, "Controversia sobre Ley de Amnistía en El Salvador" Radio Nederland Wereldomroep online: <http://www.rnw.nl/espanol/article/controversia-sobre-ley-de-amnist%C3%AD-en-el-salvador>;

Gloria Silvia Orellana, "Estado Salvadoreño defiende Ley de Amnistía ante CIDH" Diario Co Latino 10 October 2007 online:

referred to it as the ‘cornerstone’ of peace, warning that derogation from the law might result in another war.⁸⁴

However, the ‘amnesty as reconciliation’ argument should attract suspicion since “all too often reconciliation has been used as a code-word for impunity when invoked as a justification for amnesties.”⁸⁵ In addition, the notion of ‘reconciliation’ presents certain problems since it does not lend itself to a single agreed upon interpretation.⁸⁶ In her study on the use of amnesties in political transitions, Louise Mallinder, for example, identifies three definitions of reconciliation with respect to the use of amnesties, namely, ‘reconciliation as national unity,’ ‘reconciliation as forgetting,’ and ‘reconciliation as forgiveness.’⁸⁷

It is clear from the text of the Amnesty Law, and the arguments supporting it, that the Amnesty Law is premised on the notion of forgetting the past to the detriment of victims’ rights.

<http://www.diariocolatino.com/es/20071010/nacionales/47994/>; “Gobierno rechaza que evalúe derogación Ley de Amnistía” 14 June 2010 Contrapunto online: <<http://www.contrapunto.com.sv/politica-gobierno/gobierno-rechaza-que-evalúe-derogacion-ley-de-amnistia>>. See Ladutke, *supra* note 40 at 116 (“In June 1993, the University Public Opinion institute (IUDOP)...contradicted ARENA’s claim to represent the Salvadoran people’s desires [with respect to the amnesty law]. A total of 55.5% of respondents said that they disagreed with the amnesty law, while only 30.4% stated that they agreed with it. Surprisingly, 49.2% of ARENA supporters opposed the amnesty, while only 39.8% of them expressed support for the measure”) [footnotes omitted].

⁸⁴ Sprenkels, *supra* note 25 at 32.

⁸⁵ Diane F. Orentlicher, “Swapping Amnesty for Peace and The Duty to Prosecute Human Rights Crimes” (1996-1997) 3 ILSA J Int’l & Comp L 713 at 713 [Orentlicher, “Swapping Amnesty for Peace”].

⁸⁶ Mallinder, *supra* note 34 at 48.

⁸⁷ Mallinder, *supra* note 34 at 46-60.

The notion of forgetting seems logical given that both the State and members of the FMLN were named as perpetrators of human rights violations during the course of the war. This lends support to Mallinder’s observation that “The idea of a clean break from the past within a programme of national reconciliation can be attractive to governments whether as a means of hiding their own crimes or as a symbol that the period of violence is over.”⁸⁸ The following examples demonstrate how El Salvador’s Amnesty Law has fostered impunity and placed the rule of law and the administration of justice into disrepute.

Ladutke offers a detailed account of the persistence of impunity in the immediate post-war period in El Salvador that lends support to the notion that amnesty laws tend to promote impunity rather than foster reconciliation. He describes the promotion of a reputed human rights violator and high-ranking military official within the ranks of the military and the awarding of a position within government to a notorious death squad leader.⁸⁹

In addition, youth have been a particular target and victims of the reigning culture of impunity in post-civil war El Salvador. Following the end of the civil war, El Salvador faced an influx of deported Salvadorans from the US who had been socialized in the gang culture of the south-western US. Upon their return, they faced poverty and marginalization along with easy access to weapons.⁹⁰ This has led to a proliferation of inter-gang violence and extortion of civilians. The State has responded to the widespread problem of the gangs, with heavy-handed and draconian approaches addressing

⁸⁸ *Ibid* at 53.

⁸⁹ Ladutke, *supra* note 40 at 53-54.

⁹⁰ Amparo Trujillo, “Cutting to the Core of the Gang Crisis” Americas (Nov/Dec 2005) at 56.

organized crime and street gangs⁹¹ including the enactment of the Anti-Gang Laws and Super Mano Dura laws which suspended constitutional guarantees for suspected gang members.

Impunity has led to a resurgence of clandestine vigilante groups that systematically assassinate gang members in an effort to address the gang problem.⁹² Often times, such killings are received with praise and operate under the tacit approval of the Civilian National Police, thus making the pattern of violence and impunity with which the groups operate bear a striking resemblance their death squads predecessors that functioned during the civil war.

These brief examples tend to contradict the general position among social stability scholars that amnesties are an important tool in the establishment of the rule of law and the transition to democracy.⁹³ Far from promoting reconciliation then, El Salvador's Amnesty Law has contributed to and fostered systemic impunity in the face of human rights abuses in El Salvador. The ineffectiveness of the Law raises serious questions as to whether there are better ways to promote reconciliation.

In this part, I have advanced the case that El Salvador's Amnesty Law violates both international customary law and El Salvador's international treaty obligations; contravenes the solemn character and promises made by the parties of the Peace Agreements; and has been ineffective at reconciling the nation. In the following part, I advance and assess alternatives to the status quo.

PART III: BEYOND IMPUNITY-PROSECUTION & LEGISLATIVE & INSTITUTIONAL REFORMS

Several options are available to the Salvadoran State and to civil society in order to move beyond impunity. In this part, I examine the strengths and weaknesses associated with various legal and political options in the effort to a) uphold the rights of victims of human rights abuses, and b) bring El Salvador's law into line with its international treaty commitments.

Prosecution

In 2000, the Supreme Court Justice of El Salvador ("CSJ") determined that Article 244 prohibits amnesty for violations, infractions, or alterations of constitutional provisions committed by a civil or military public official between June 1, 1989 and January 1, 1992, or if the application of the amnesty would deny the possibility of reparation for the violation of a fundamental right as guaranteed by Article 2 of the Constitution.⁹⁴ As such, human rights violations that took place between this time period are legally actionable before the lower courts.⁹⁵

This is because Article 244 prohibits the enactment of amnesty by a government under which human rights violations occurred, in favour of itself.⁹⁶

⁹⁴ Margaret Popkin, "Building the Rule of Law in El Salvador" in Margarita S. Studemeister, ed, *El Salvador: Implementation of the Peace Accords* (2001) Peaceworks No. 38 at 14, online: United States Institute of Peace <<http://www.usip.org/files/resources/pwks38.pdf>> [Popkin, "Building the Rule of Law"].

⁹⁵ Ruling of the Sala Constitucional of the Supreme Court of Justice, dated 26 September 2000. Two previous rulings had upheld the constitutionality of El Salvador's Amnesty Law.

⁹⁶ See Article 244 of the Constitución de la República de El Salvador (1983), online: Political Database of the Americas, Edmund A. Walsh

⁹¹ Pedraza Fariña et al., *supra* note 16 at 108-117.

⁹² *Ibid* at 200-217.

⁹³ *Contra* Massimo Starita, "Amnesties for Crimes against Humanity: Coordinating the State and Individual Responsibility for Gross Violations of Human Rights" (1999) 9 *Italian YB Int'l* 86 at 109.

The ruling also held that lower courts are legally obligated to analyze cases involving crimes that might be subject to amnesty to determine whether or not the Amnesty Law applies in any given case.⁹⁷ Yet despite this promising judgment, efforts to vindicate the rights of victims of human rights violations continue to face several procedural, pragmatic, and political obstacles.⁹⁸

First, under the current adjudicative model, petitions are submitted to and screened by the office of the Attorney General of El Salvador before they are sent onto the judiciary for review. While the office of the Attorney General has the benefit of the CSJ's 2000 judgment, in practice, the Attorney General has been hesitant to submit cases involving human rights violations that took place during the period covered by the law.⁹⁹ Thus, while the CSJ has recognized the invalidity of the Amnesty Law in relation to crimes that occurred within specific timeframe, in practice the Office of the Attorney General continues to uphold the Amnesty Law and thus, sustain the culture of impunity.

Second, this reality has created a chilling effect on Human Rights Organizations (hereinafter "HROs") that have attempted to advocate on behalf of the victims of human rights violations. Cognizant that claims involving human rights abuses that occurred during the civil war period will meet with little success, HROs have tended to focus on

contemporary human rights abuses rather than invest time, energy, and scarce financial resources into historical abuse claims. Thus, victims of human rights abuses may find that HROs are less likely to take on their cases given the current political and legal realities.

Third, the current lack of independence of the Salvadoran judiciary presents a significant challenge to all human rights abuse claims, and especially claims connected to the war-time period. In their Report on the systemic nature of human rights abuses and violence during the civil war, the Truth Commission identified the Salvadoran judiciary as complicit in human rights violations and recommended judicial reform to the process by which judges were appointed and the removal of specific judges that had participated in the impediment of justice.¹⁰⁰ It was the unreliability of the judiciary prevented the Truth Commission from recommending prosecutions in its report.¹⁰¹

Several years later, the influence of politics in the judicial system is still apparent. In their study on impunity and the status of human rights in relation to gang control measures in present-day El Salvador, the International Human Rights Clinic at Harvard Law School attributed contemporary sources of impunity to the lack of judicial independence as a result of the unwillingness to implement the Truth Commission's recommendations with respect to judicial reform.

All this is to say that the Salvadoran judiciary, at present, still operates in the shadow of the executive and the legislature, and efforts to

School of Foreign Service, Center for Latin American Studies
<http://pdba.georgetown.edu/Constitutions/EISal/constitucion2003.pdf>.

⁹⁷ Popkin, "Building the Rule of Law", *supra* note 95 at 14.

⁹⁸ Cath Collins, *Post-Transitional Justice: Human Rights in Chile and El Salvador* (University Park: The Pennsylvania State university Press, 2010) at 173-174.

⁹⁹ *Ibid* at 195-6.

¹⁰⁰ ¹⁰⁰ "From Madness to Hope", *supra* note 9 at 380-1.

¹⁰¹ Margaret Popkin, "El Salvador: A Negotiated End to Impunity?" 198-217 at 209 in Naomi Roht-Arriaza ed. *Impunity and Human Rights in International Law and Practice* (New York: Oxford University Press, 1995) at 200.

prosecute human rights abuses under this juridical reality will meet with little success since the institutional structures upholding impunity remain intact. Examples from Argentina, Chile, and Peru demonstrate that replacing the judiciary that operated during authoritarian regime is an important institutional step before engaging in prosecution.¹⁰²

Legislative Reforms

Amnesty laws that have combined provisions for accountability along with amnesty provisions have met with greater approval from proponents of amnesty as peace instruments than blanket and amnesic amnesties. It appears that a return to the Reconciliation Law, or a similar qualified amnesty, would not preclude further investigation and the fulfillment of the recommendations of the Report of the Truth Commission as has been sanctioned under the Amnesty Law.

While social stability scholars have been clear that blanket amnesties such as El Salvador's Amnesty Law are unacceptable under contemporary international human rights law, Salvadorans law-makers have the Reconciliation Law as an example of a

¹⁰² Ellen Lutz & Kathryn Sikkink, "The Justice Cascade: The Evolution and Impact of Foreign Human Rights Trials in Latin America" (2001) 2 *Chi J Int'L* 1 at 24-25. It should be noted, however, that the context in which the amnesty laws of these respective countries was passed ought to be distinguished from the Salvadoran context. The Argentinean, Peruvian and Chilean amnesties were enacted, on one hand, in a transitional period from authoritarian to democratic rule, during the office of the authoritarian regime. El Salvador's Amnesty Law, on the other, was passed during an elected government's term of office. The political nature of the Amnesty Law—and the fact that individuals implicated in human rights violations still occupy government positions—may make it less likely that legislators in El Salvador would be willing to repeal the Amnesty Law.

qualified amnesty in that it provides some measure of accountability and redress. Such a law, it appears, could provide a legitimate alternative to El Salvador's Amnesty Law.¹⁰³

My reasons for suggesting a qualified amnesty is that the possibility of prosecution, namely, accountability and incapacitation can be included under a qualified amnesty. Accountability would include provisions for compensation, and or lustration,¹⁰⁴ while incapacitation could be achieved by incorporating measures to prevent the future commission of human rights offences. Finally, should El Salvador choose a qualified amnesty, it must comply with the country's international legal obligations.¹⁰⁵

Legislative reform presents significant challenges from vested and political interests.¹⁰⁶ However, legislative reform appears to be a favourable option in that it can address concerns and rights of victims, society, and the Salvadoran State. It can address the concerns of victims since the Reconciliation Law, while far from ideal, provides for greater

¹⁰³ Trumbull argues that if an amnesty law is passed by democratic institutions, where voters had access to unbiased information in order to consider the benefits and costs of enacting an amnesty law, and the victims—potential and actual—favoured the amnesty, then the UN ought to recognize and, thus, respect the amnesty law. See Trumbull, *supra* note 48 at 322-4.

¹⁰⁴ See Eric Brahm, "Lustration" Beyond Intractability. Ed. Guy Burgess and Heidi Burgess. June 2004. Conflict Research Consortium. University of Colorado, Boulder Colorado, USA online: <http://www.beyondintractability.org/essay/lustration/>.

¹⁰⁵ Trumbull, *supra* note 48 at 324.

¹⁰⁶ As a member of local NGO, *Socorro Juridico* observed: "If the amnesty law is derogated, there is a situation in which most of the current leaders of the country would be prosecuted, including those of the FMLN. Of course they don't want that." See Sprenkels, *supra* note 25 at 91.

accountability than the present Amnesty Law.

Legislative reform is a better option in order to achieve the reconciliatory aims of the Salvadoran society and the State. Under legislative reform ownership and agency over the process of reconciliation and accountability would be in the hands of domestic institutions. This would go towards the strengthening and democratization of the rule of law in El Salvador. Recognizing the political realities associated with the Salvadoran Peace Agreements, legislative reform would be able to address the political underpinnings of the Amnesty Law in which no Party during the war defeated the other.¹⁰⁷

While judicial and legislative efforts to bring those responsible for human rights violations during the twelve year civil war are ideal alternatives in comparison to the status quo of impunity, both courses of action must be predicated on implementing the recommendations of the Truth Commission, which were aimed at promoting the rule of law and by addressing the source of impunity.

Institutional Reforms

Repealing the Amnesty Law or any legislative reform would be meaningless without concurrent institutional reforms. Among the recommendations, the Truth Commission proposed that individuals who, acting in their professional capacity, covered up serious acts of violence or

failed to discharge their responsibilities in the investigation of such acts ought to be dismissed from their posts in the civil service.¹⁰⁸ The Truth Commission recommended that individuals who had been dismissed, or had voluntarily left their posts in the public service, and those individuals who still remained in their positions, be disqualified from holding public office for a period of ten years. The Truth Commission also recommended that such individuals be disqualified permanently from any activity related to public security or national defence.¹⁰⁹

If the Salvadoran State were to adopt the Truth Commission's recommendations related to judicial reform and the administration of justice, it would mark a significant step towards eliminating the systemic and institutional character of human rights abuses in El Salvador. The likelihood of success of prosecution and legislative efforts aimed at repealing the Amnesty Law might be improved if changes had already been made to the individuals in charge or judicial and political institutions. Furthermore, efforts to promote and foster the institutionalization of the protection of human rights would go towards not only redressing past human rights abuses but also ensuring that human rights are protected at present and on a going forward basis.

While prosecution of perpetrators of human rights violations and abrogation of the Amnesty Law may be ideal, the Salvadoran institutional and human rights cultural matrix appear unwelcoming for such measures at the present time. However, the State is not precluded from and indeed, has a duty to fulfill the recommendations outlined in the Report of the Truth Commission. Among these recommendations, judicial reform and the

¹⁰⁷ I rely on Diane, F. Orentlicher reasoning in "Settling Accounts' Revisited: Reconciling Global Norms with Local Agency" (2007) 1 International Journal of Transitional Justice 10 for the proposition that international actors ought to respect local expressions and realities associated with transitional justice schemes [Orentlicher, "Settling Accounts"].

¹⁰⁸ "From Madness to Hope", *supra* note 9 at 380.

¹⁰⁹ *Ibid.*

lustration of individuals linked to human rights violations during the war period are most pressing.

While the intention of amnesty may be on forgetting, it is doubtful that the legal institution of amnesty can obliterate the public memory of violent acts, including human rights abuses, from the minds of victims and perpetrators alike.¹¹⁰ It would be in the interest of the State and Salvadoran society for the State to undertake the reforms outlined in the Report of the Truth Commission since, as experience in other jurisdictions demonstrates, “interest in the pursuit of justice does not necessarily wane with the passage of time.”¹¹¹ While HROs in their majority may be focusing on present human rights abuses, individual victims and their families may not necessarily give up their desire for justice in the long-run.

Indeed, societies that have been unable to mount prosecutions during the early years of their democratic transition may have greater political space to do so with the passage of time.¹¹² As the examples of Chile and Argentina demonstrate, short term-amnesty can give way to calls for individual accountability.¹¹³ Establishing a basis upon which future prosecutions could be pursued seems the most prudent and practical way forward.

¹¹⁰ Paul Ricouer, for example, suggests that rather than erasing or casting the memory of violence into oblivion, the institution of amnesty forces memory into a clandestine existence; displaced to unofficial spaces in civil society. Ricouer, *supra* note 28 at 455.

¹¹¹ See Ruti G. Teitel, “Transitional Justice Genealogy” (2003) 16 Harv Hum Rts J 69 at 86 [footnotes omitted].

¹¹² Orentlicher, “Settling Accounts”, *supra* note 108 at 22.

¹¹³ Slye, *supra* note 4 at 43.

CONCLUSION

Accountability, the rule of law, and the development of democratic institutions are the ransom the elite have exchanged for peace and reconciliation while the poor are obliged to forget the past.¹¹⁴ Despite the signing of the Peace Agreements and the rhetoric of amnesty as reconciliation, peace does not reign in El Salvador as post-war violence and murder rates have surpassed those of the war time.¹¹⁵

Overcoming impunity in El Salvador is necessarily predicated on repealing the Amnesty Law. Should El Salvador undertake such a legislative measure, law makers could turn to the examples of states in the hemisphere that have either modified or repelled their amnesty laws to conform to current norms underlying international human rights and criminal law. Additionally, the Salvadoran State would also have a body of international law jurisprudence in which to anchor a repeal of the Law. Finally, the State has the Truth Commission Report with recommendations that speak to the institutional means for overcoming impunity.

In providing alternatives to impunity I have suggested that a return to the Reconciliation Law or similar qualified amnesty is a preferable alternative to the status quo. However, given the constraint of this paper, this option has not been examined thoroughly and requires further analysis as to the scope and nature of a qualified amnesty.

¹¹⁴ Tojeira, *supra* note 7 (“Se quiere, por el contrario, obligar a que los pobres olviden el pasado para que unos muy pocos, en el poder, no tengan que asumir ninguna responsabilidad por crímenes de franca atrocidad.”).

¹¹⁵ Sprenkels, *supra* note 25 at 33.

I have attempted to walk a fine line in this paper, arguing that El Salvador must fulfill its international legal obligations yet recognize the political and social constraints that challenge Salvadoran politicians and civil society. What is certain is that effort towards ending impunity will need to be sensitive to the socio-political and historical context and be ever mindful of the rights of victims and their need for healing and justice.¹¹⁶

ACKNOWLEDGMENT

Professor Shin Imai provided me with invaluable, constructive feedback throughout the various stages of this paper's development. I would like to thank Professor Imai for his helpful remarks and his sympathy with the paper's subject matter. Any errors or omissions are mine alone.

¹¹⁶ Laplante, *supra* note 1 at 929.