CONCURRING OPINION OF JUDGE DIEGO GARCIA-SAYÁN
JUDGMENT OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS
CASE OF *THE MASSACRES OF EL MOZOTE AND NEARBY PLACES v. EL SALVADOR*
OF OCTOBER 25, 2012

1. On several occasions, the Inter-American Court of Human Rights has referred in its judgments to the issue of amnesties in relation to the protection of human rights and the obligation of the State to investigate and, as appropriate, punish serious human rights violations.

2. For a long time, the question of amnesties has been a significant issue in international law, in international relations, and in the examination of non-international armed conflicts. In Latin America, throughout the twentieth century, amnesties were routinely used as a tool to end civil wars, outbreaks of violence, failed coups d'état, and different armed conflicts. At least until the early 1990s, these amnesties were used without any preliminary discussion or analysis.

3. In more recent times, they are a matter of growing relevance in international human rights law, as indicated in various judgments of the Inter-American Court that refer to the issue. The problem concerns horrendous events and contexts that usually give rise to these controversial responses by the law. Authoritarian or dictatorial regimes, political transition processes, internal tensions or armed conflicts, among other matters, within frameworks that are usually very complex, from a political and social perspective, usually provide the objective conditions based on which amnesties are proposed.

4. Regardless of the decision in previous cases, the question of amnesties and their relationship to the obligation to investigate and punish serious human rights violations requires an analysis that provides appropriate criteria for a considered opinion in contexts in which tensions could arise between the demands of justice and the requirements of a negotiated peace in the framework of a non-international armed conflict. This concurring opinion addresses precisely these issues, based on the Court's judgment in this case.

5. It is well-known that the "exemplary" case establishing what, for some, is the Court's interpretation of this issue is the *case of Barrios Altos v. Peru* decided on March 14, 2001. In the most known and most quoted paragraph of this judgment, the Court established that:

> *"41. […] amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law."*

6. In that specific case, this approach was in response to two laws enacted in Peru in 1995, which the Court described in its judgment as "self-amnesties." The condition of "self-amnesty" of the laws examined was so relevant, that it appeared that the Court had limited its interpretation to that type of amnesty.[1]

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[1] This interpretation could arise from the considerations in paragraph 43 of this judgment: "43. That is why the States Parties to the Convention that adopt laws that have this effect, such as self-amnesty laws, incur in a violation of Articles 8 and 25 in relation to Articles 1(1) and 2 of the Convention" (underlining added).

7. On that occasion, the concurring opinions of Judges García Ramírez and Cançado Trindade, whose reasoning I share, emphasized the contradiction between the "self-amnesty laws" and *"the general obligations of the State under the American Convention on Human Rights."*[2] It was affirmed that *"[t]he so-called self-amnesties are, in sum, an inadmissible offence against the right to truth and the right to justice (starting with the very access to justice)"*;[3] that *"[…] the perverse modality of the so-called laws of self-amnesty, even if they are considered laws under a given domestic legal order, are not so in the sphere of international human rights law of"*;[4] that *"[…] 'laws' of this kind are devoid of a general nature, as they are measures of exception"*[5], and that *"[…] the so-called "laws" of self-amnesty are not truly laws: they are nothing but an aberration, an inadmissible affront to the juridical conscience of humanity."*[6]

8. Since then, the Inter-American Court has had the opportunity to examine and rule on different cases on amnesty laws and their application. In these cases, the Court focused on the substantive incompatibility between the amnesty provisions and the State's obligations in relation to human rights violations. This was based on the underlying purpose of the law, its *ratio legis:* to leave these grave violations unpunished, rather than on the process of the adoption of the law or the authority that enacted it. These are the cases of *Almonacid Arellano et al. v. Chile* (2006), *La Cantuta v. Peru* (2006), *Gomes Lund et al. v. Brazil* (2010) and *Gelman v. Uruguay* (2011). In these cases, the Court followed its case law in the *Barrios Altos* case and further developed some aspects. In general, it reiterated what it had already indicated regarding the *"the incompatibility of amnesty laws relating to serious human rights violations with international law and the international obligations of States"*[7] and that the provisions of amnesty laws that prevent the investigation and punishment of serious human rights violations have no legal effects and, therefore, cannot obstruct the investigation of the facts and the identification and punishment of those responsible for human rights violations.[8]

9. Each of the cases on amnesty laws examined by the Court up until the massacres of El Mozote and nearby places had its own characteristics, nuances and emphasis, either with regard to the context in which the law originated or its scope. However, they all had in common that none of these amnesty laws was created in the context of a process aimed at ending, through negotiations, a non-international armed conflict.

10. This amnesty case arises from a different context to all the previous ones. This has implications for the analysis and legal characterization of the facts, and for the Court's concepts and considerations on this amnesty law enacted following an armed conflict and a peace negotiation process. That is why, according to the Court's reasoning, it has been necessary to take into account not only the norms and principles of international human rights law, but also the relevant provisions of international humanitarian law in view of the context in which the events occurred.

11. As described throughout this judgment, the facts of the massacres of El Mozote and nearby places occurred in the context of a non-international armed conflict. As it developed throughout the 1980s it had reached a point at which the global and regional

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2 Concurring opinion of Judge Sergio García Ramírez, para. 1.

3 Concurring opinion of Judge Antonio A. Cançado Trindade, para. 5.

4 Ibid., para. 6.

5 Ibid., para. 7.

6 Ibid., para. 26.

7 *Case of Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil.* Judgment of November 24, 2010, para. 147.

8 *Case of Gelman v. Uruguay*. Judgment of February 24, 2011, para. 232.

conditions arose coalesced to seek and achieve peace through negotiation. Under the Esquipulas II Agreement, signed in August 1987, the Presidents of five Central American countries agreed to seek a solution to the internal armed conflicts underway in El Salvador and other Central American countries. Among other matters, dialogue and reconciliation were proposed as solutions to the conflicts, and the cessation of hostilities and the democratization of Central American societies were counseled.[9]

12. The Salvadoran peace negotiations began, as the judgment recalls,[10] after the Central American Presidents requested the intervention of the Secretary-General of the United Nations. In September 1989, an agreement was signed between the Government of El Salvador and the Farabundo Martí National Liberation Front (FMLN) to initiate a dialogue process and to end, by political means, the armed conflict in El Salvador. Following the signature of the partial agreements (the first was the Human Rights Accord signed on July 26, 1990), the peace agreement was finally completed on December 31, 1991, and was formally signed on January 16, 1992, at Chapultepec Castle in Mexico City.

13. As this was a negotiated end to a long and intense armed conflict, it was no surprise that the question of what to do about the past was raised. First in the process that led to the signature of the peace and its implementation and, then, within the framework of the on-site verification by ONUSAL, the United Nations Mission in El Salvador. Thus, the Mexico Accords of April 27, 1991, referred specifically to the effects of the violence during the armed conflict and, to this end, established the creation of the Truth Commission, whose recommendations the parties undertook to comply with. In the final peace accord of January 16, 1992, there was agreement on "*the need to clarify and to overcome any indication of impunity regarding the officers of the Armed Forces, especially in cases where there was a commitment to respect human rights"* and the Truth Commission was cited to this end, emphasizing that events of this kind must "[…] *be used as exemplary action by the courts of justice*."

14. A few days after the signature of the Peace Accord,[11] the "National Reconciliation Law" of January 23, 1992, was adopted. It granted amnesty to those who had "*participated as masterminds, perpetrators or accomplices in committing ordinary political offenses and ordinary offenses committed by no less than twenty persons, prior to January 1, 1992, with the exception, in all cases, of the common offense of kidnapping, defined in article 220 of the Criminal Code*."[12] The same law excluded from this pardon those who *"[…] according to the report of the Truth Commission, had participated in serious acts of violence since January 1, 1980, whose impact on society demands public awareness of the truth with greater urgency, irrespective of the sector to which they belong.*"

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[9] Among other aspects, the Esquipulas II Agreement contained an explicit reference to amnesty: "In every Central American country, with the exception of those in which the International Support and Verification Committee determines that it is not necessary, amnesty decrees shall be issued that shall establish all the provisions that guarantee the inviolability of life, liberty in all its forms, property and the safety of the people to whom these decrees apply. Simultaneously with the issue of the amnesty decrees, the irregular forces of the respective country shall release all those who are in its power. "

[10] Para. 266 of the Judgment.

[11] Para. 274 of the Judgment.

[12] National Reconciliation Law. Legislative Decree Nº 147, published on January 23, 1992.

15. Subsequently, the Truth Commission explained[13] the need to meet the requirements of justice in two ways: *"[o]ne is the punishment of those responsible; another is the reparation due to the victims and their families.*" Thus, according to the agreement reached by the parties, the route proposed by the Truth Commission, whose recommendations the parties had undertaken to comply with, was that of justice and reparation with regard to the cases it handled. This was consistent with the spirit and letter of what the parties had negotiated and specified in the Peace Accord. Nevertheless, within days of the publication of the Truth Commission's report, the General Amnesty Law was enacted with a very different purpose.

16. A context such as the one outlined here – and that is described in more detail in the judgment – is different from the one that preceded the other amnesty laws to which the Court's case law has referred. Thus, as previously indicated, the Court's analysis and reasoning has characteristics that led it to incorporate elements of international humanitarian law elements to produce an interpretation that harmonized with the obligations established in the American Convention, in order to make a juridical assessment of amnesty in a context such as this one.

17. There is no norm in positive international law that has explicitly prescribed any kind of amnesty. The only explicit mention of amnesty in a multilateral treaty is contained in article 6(5) of Protocol II Additional to the Geneva Conventions of August 12, 1949.[14] In the commentaries to that article, the International Committee of the Red Cross (ICRC) indicated that its purpose "[…] *is to encourage a gesture of reconciliation that will help restore the normal course of life in a people that has been divided.*"[15] According to the Proceedings of the Diplomatic Conference in which Additional Protocol II was adopted in 1977,[16] the meaning of that norm was to grant immunity to those detained or punished for involvement in the armed conflict.

18. Pursuant to the foregoing, in this judgment, the Court has indicated that, even though amnesties may be permitted as a component of the ending of a non-international armed conflict, they have a limit which is in relation to war crimes and crimes against humanity, so that these crimes cannot remain unpunished or be forgotten (see paragraphs 285 and 286 of the judgment). These limits are also found in what some call "*sources implicitly related to amnesty.*"[17]

19. Moreover, within the United Nations it has been stated "*that peace agreements approved by the United Nations can never promise amnesties for genocide, war crimes,*

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[13] Para. 290 of the Judgment.

[14] Article 6(5) of Protocol II, establishes that *"at the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained."*

[15] ICRC. Comments to the Protocol of June 8, 1997, additional to the Geneva Convention of August 12, 1949, relating to the protection of victims of non-international armed conflict. Colombia. 1998. Page 168.

[16] Proceedings of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974-1977). Volume 9. Geneva, Switzerland.

[17] Freeman, Mark. Necessary Evils. Amnesties and the Search for Justice. Cambridge University Press. 2009. Page 36. It underscores Article I of the Convention on the Prevention and Punishment of the Crime of Genocide of 1948, certain regulations contained in the Geneva Conventions and Protocol I on international conflicts, Article 7 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment (1984); Article 6 of the Convention to Prevent and Punish Torture 1985; Article IV of the Inter-American Convention on Forced Disappearance of Persons,1994, and the International Convention for the Protection of All Persons from Enforced Disappearances, 2006.

crimes against humanity or gross violations of human rights."[18] For its part, the Rome Statute of the International Criminal Court, although applicable only to crimes falling within its competence and jurisdiction, entails the obligation of the States parties to hold credible trials for the crimes defined therein (genocide, crimes against humanity and war crimes).

20. The fact is that, in the specific context of processes of widespread violence and non-international armed conflicts, amnesties may lead, at least in theory and according to the specific case or circumstance, in different directions. Consequently, this creates a whole range of possible outcomes that can delimit the exercise of assessing the interests at stake in order to combine the aim of investigating, punishing, and repairing gross human rights violations, on the one hand, with that of national reconciliation and a negotiated solution to a non-international armed conflict, on the other. There is no universally applicable solution to the dilemmas posed by these opposing forces, because it depends on the specific context, although there are guidelines that must be taken into account.

21. Based on international human rights law and, particularly the American Convention, some fundamental criteria can be outlined in order to deal with these opposing forces, which are basically justice and reconciliation.

22. A first and obvious starting point is that the anomalous and exceptional situation of a non-international armed conflict signifies that there are many thousands of violent offenders and, above all, victims. This exceptional situation usually requires exceptional mechanisms of response. The crucial element is to develop a method of assessment that deals, to the greatest extent possible, with this tension between justice and the ending of the conflict. To this end, several components must be taken into consideration, both judicial and non-judicial, that are focused, simultaneously, on seeking the truth, justice and reparation. This is because the demands that arise from massive violations, the responses to the aftermath of the conflict, and the search for long-lasting peace, require both the States and society as a whole to apply concurrent measures that permit the greatest simultaneous attention to these three rights.

23. In this context, the rights of the victims to truth, justice and reparation must be understood as interdependent. Only the integrated application of measures in favor of victims in all these areas can achieve results that are effective and consistent with the inter-American human rights system. Thus, the simple application of criminal sanctions, without these implying a serious effort to find and report the whole truth, could become a bureaucratic process that does not satisfy the valid objective of the victims to obtain the greatest possible truth. Furthermore, the award of reparations without knowledge of the truth about the violations that occurred, and without establishing conditions for a lasting peace, would only produce an apparent relief for the victims, but not a change in the conditions that would permit a recurrence of the violations.

24. These fundamental components can serve, in whole or in part, in the design of procedures that are suitable for the specificity of a process of negotiated solution to a non-international armed conflict. This, within a perspective in which the greater or lesser severity of the facts can make a specific processing of the facts viable – or not. Thus, for example, facts that can be categorized as war crimes or crimes against humanity in the definitions of the Statute of the International Criminal Court should merit being processed specifically and with priority, and this is not necessarily the same for the other crimes or human rights violations.

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[18] Report of the Secretary-General on the rule of law and transitional justice in societies experiencing or emerging from conflict. U.N. Doc S/2004/616. 3 August 2004. para. 10.

25. As for the truth component, in addition to the essential issue of the "judicial truth," which I discuss below in relation to the element of justice, on many occasions, this has led to the implementation of mechanisms such as truth commissions. However, the concept of "truth" is not unique and opens the door to different interpretations. Alex Boraine,[19] former vice-chairperson of the Truth and Reconciliation Commission of South Africa conceptualized the "truth" in this type of situation at three levels: factual truth, personal truth, and social truth. The "factual" truth gives the family specific information on the whereabouts of the mortal remains of the victim or on what happened. The "personal" truth seeks a cathartic effect on the person who expresses or manifests that truth. The "social" truth is that which is adopted by society through dialogue and debate. In pursuit of this "social truth", an important role is played by measures such as access to the documentation held by the State, the revision of scholarly texts, and the construction of museums or memorials relating to what happened.

26. With regard to the element of justice, the State's legal obligation to investigate and punish the most serious human rights violations is - as the Court has repeatedly stated – an obligation of means and forms part of the obligation of guarantee established in the Convention. Thus, States must make adequate remedies available for victims to exercise their rights. However, armed conflict and negotiated solutions give rise to various issues and introduce enormous legal and ethical requirements in the search to harmonize criminal justice and negotiated peace

27. This harmonization must be carried out by weighing these rights in the context of transitional justice itself. Thus, particularities and specificities may admittedly arise when processing these obligations in the context of a negotiated peace. Therefore, in these circumstances, States must weigh the effect of criminal justice both on the rights of the victims and on the need to end the conflict. But to be valid in international law, they must abide by certain basic standards relating to what can be processed and implemented in several ways, including the role of truth and reparation.

28. It can be understood that this State obligation is broken down into three elements. First, the actions aimed at investigating and establishing the facts. Second, the identification of individual responsibilities. Third, the application of punishments proportionate to the gravity of the violations. Even though the aim of criminal justice should be to accomplish all three tasks satisfactorily, if applying criminal sanctions is complicated, the other components should not be affected or delayed.

29. The right of the victims and of society to access the truth of what happened acquires a special weight that must be considered by an adequate assessment in order to delineate the specifics of justice in such a way that it is not antagonistic to the transitional justice required in peace and reconciliation processes. In that context, specific guidelines can be designed for processing those responsible for the most serious violations, opening the way, for example, to giving priority to the most serious cases as a way to handle a problem which, in theory, could apply to many thousands of those held for trial, dealing with less serious cases by other mechanisms.

30. In this context, it is necessary to devise ways to process those accused of committing serious crimes such as the ones mentioned, in the understanding that a negotiated peace process attempts to ensure that the combatants choose peace and submit to justice. Thus, for example, in the difficult exercise of weighing and the complex search for this equilibrium, routes towards alternative or suspended sentences could be designed and implemented; but, without losing sight of the fact that this may

[19] Boraine, Alex. *A Country Unmasked: Inside South Africa's Truth and Reconciliation Commission*. Oxford University Press. Oxford and New York, 2000.

vary substantially according to both the degree of responsibility for serious crimes and the extent to which responsibility is acknowledged and information is provided about what happened. This may give rise to important differences between the "perpetrators" and those who performed functions of high command and gave the orders.

31. It is relevant to consider the shared responsibilities of those involved in an armed conflict with regard to serious crimes. The acknowledgment of responsibility by the most senior leaders can help promote a process of clarifying both the facts and the structures that made such violations possible. Reduction of sentences, alternative punishments, direct reparation from the perpetrator to the victim, and public acknowledgment of responsibility are other ways that can be considered.

32. Full reparation is the third essential element of transitional justice in such a context. It aims to restore relationships of trust within society and seeks to lay the foundations for processes that prevent the repetition of the tragedy that violated this trust, because of the non-international armed conflict. Evidently, this is based on the principle that all violations of international law entail an obligation that they must be repaired and, in this respect, the case law of the Inter-American Court of Human Rights has made a significant contribution.[20] Regarding reparations, there is an extensive array of options that range from pecuniary compensation to measures of rehabilitation and satisfaction, among others.

33. As has been noted in some studies, the component of reparation has its own difficulties – and even impossibilities – in the case of massive and widespread violations of the human rights.[21] In these situations, it would seem that the objectives of these massive programs of reparations is not so much to reinstate the victims to the *status quo ante,* but rather to provide clear signals that the rights and dignity of people will be fully respected.[22] In any case, the legitimacy and effectiveness of reparation programs in these circumstances requires, as an essential ingredient, the design and implementation of effective mechanisms for the participation of those people at whom the programs are directed.[23]

34. Finally, an essential ingredient of reparation, not only for the victims but also for society as a whole, consists in the apologies and accounts of the perpetrators and the acknowledgments of responsibility. The full confession of the facts for which they may have been responsible is an inevitable ingredient - but not the only one - for reparation. It is also a message to society in order to close the door on violence as a way to deal with political or social differences. These “didactic monuments,”[24] as they are an account of atrocities, remind society about what can happen when an armed conflict breaks out and reinforce the capabilities of society in the face of future threats that something like that could happen again.

35. The acknowledgment of responsibility by senior State officials has been introduced consistently in the case law of the Inter-American Court. This is an essential ingredient of transitional justice that seeks to reconstruct the conditions for democratic institutional

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[20] International law has established this principle explicitly, not only in Articles 10, 63 and 68 of the American Convention, but in many other international instruments such as the Universal Declaration of Human Rights (Article 8), the European Convention on Human Rights (art. 50), the International Covenant on Civil and Political Rights (Article 9), and the Convention against Torture and other Cruel, Inhuman or Degrading Treatment (art. 14).

[21] De Greiff, Pablo. *Repairing the Past: Confronting the Legacies of Slavery, Genocide, & Caste*. Yale University, Connecticut. October, 2005. Page 8.

[22] Ibid. Page. 10.

[23] Ibid. Pages 10-11.

[24] Osiel, Mark. *Mass Atrocity, Collective Memory and the Law.* Transaction Publishers, New Brnswick, 1999. Page. 4.

viability in a society. Although there are many precedents for this kind of act, they multiplied in certain parts of the world at the end of the Cold War.[25] Tony Blair in Great Britain apologized for British responsibility in the nineteenth century Irish famine, Jacques Chirac for the deportation of French Jews to Nazi concentration camps during World War II, and Bill Clinton for the inaction of the United States government during the Rwanda genocide or for the support to dictatorships in Latin America.[26] In the context of processes of transition from internal armed conflict to peace, these acknowledgments acquire special relevance and significance as an ingredient that strengthens and sustains the others.

36. Thus, according to the context derived from the conclusion of the armed conflict, societies can demand that mechanisms exist that are complementary to the obligation of criminal justice and that satisfy the aspirations of the victims to a greater or lesser extent. Truth commissions, instruments for integral reparation, mechanisms to provide care and attention, the protection of vulnerable populations, purges in the public sector, and institutional reforms are some of the options that legislators and leaders have when deciding State policies, in combination with the application of criminal justice developed within a framework of weighing the elements.

37. A negotiated solution to the internal armed conflict raises several issues regarding the weighing of these rights, within the legitimate discussion on the need to conclude the conflict and put an end to future serious human rights violations. States have a legal obligation to address the rights of the victims and, with the same intensity, the obligation to prevent further acts of violence and to achieve peace in an armed conflict by the means at its disposal. Peace as a product of a negotiation is offered as a morally and politically superior alternative to peace as a result of the annihilation of the opponent. Therefore, international human rights law should consider that peace is a right and that the State must achieve it.

38. Thus, in certain transitional situations between armed conflicts and peace, it can happen that a State is not in a position to implement fully and simultaneously, the various international rights and obligations it has assumed. In these circumstances, taking into consideration that none of those rights and obligations is of an absolute nature, it is legitimate that they be weighed in such a way that the satisfaction of some does not affect the exercise of the others disproportionately. Thus, the degree of justice that can be achieved is not an isolated component from which legitimate frustrations and dissatisfactions can arise, but part of an ambitious process of transition towards mutual tolerance and peace.

Diego García-Sayán
Judge

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[25] Hazan, Pierre. *Measuring the impact of punishment and forgiveness: a Framework for evaluating transitional justice.* International Review of the Red Cross. Volume 88, Number 861. March 2006. Page 24.

[26] Ibid.

Pablo Saavedra Alessandri
Secretary

Judges Leonardo A. Franco, Margarette May Macaulay, Rhadys Abreu Blondet and Alberto Pérez Pérez adhered to this Opinion of Judge Diego García-Sayán.

Leonardo A. Franco
Judge

Margarette May Macaulay
Judge

Rhadys Abreu Blondet
Judge

Alberto Pérez Pérez
Judge

Pablo Saavedra Alessandri
Secretary