

The International Tribunal of Restorative Justice for El Salvador

Introduction

Although more than twenty years have passed now since the signature of the Peace Accords, in El Salvador the impunity that surrounds international crimes has been pervasive. Impunity within the country is vested in the General Amnesty Act for the Consolidation of Peace. Since its enactment none one has been tried for gross violations to international human rights law and for serious violations to international humanitarian law. With the passing of time, the perpetrators in El Salvador remain victorious and unchallenged.

The International Tribunal of Restorative Justice for El Salvador is an original transitional justice mechanism conceived within the country by its own civil society. Its mission is, on the one hand, to listen to the surviving victims who have been in silence all these years and who are desperate to speak and, on the other, to publicly acknowledge their suffering. The anguish endured by these victims has not been previously sanctioned in public by any official or unofficial body. In this sense, the International Tribunal of Restorative Justice for El Salvador provides a “testimonial space for oppressed voices to be heard.”¹ Finally, due to a recent ruling provided by the Constitutional Chamber of the Supreme Court of Justice of El Salvador which urges the Attorney General to investigate several cases from the armed conflict, the mission of the International Tribunal of Restorative Justice for El Salvador has expanded. Nowadays its mission also includes the collection of evidence to serve as legal proof before a court of law. That is how this

¹. Irene Wirshing, “Ariel Dorfman’s Death and the Maiden: Testimonial Theater of the Paranoid” in *National Trauma in Postdictatorship Latin American Literature: Chile and Argentina* (New York, Peter Lang Publishing: 2009), 61.

unofficial transitional justice measure will eventually become part of the official narrative within the country.

This article aims to explain what the International Tribunal of Restorative Justice for El Salvador is, why such an institution is needed in the country and what it has been accomplished by it over its years of existence. Due to the value that it represents for the victims of the civil war and their relatives, this entity has to have a place in the history of El Salvador. The perpetrators have vehemently tried to erase the memories of the armed conflict from society. Nevertheless, the civil society has kept them alive through such measures. Since there is no single formula for dealing with a past plagued by human rights violations in the aftermath of political violence, this entity constitutes an attempt to put the victims and their relatives in the spotlight in order to remind the government that their claims for truth, justice and reparations have not ceased to exist. Contrary to what the official position has stated, the wounds are still open and pouring blood every time someone scrapes them.

1. The civil war

On January 10, 1981, the guerrilla forces in El Salvador carried out a military operation which became known as the “final offensive”. This “final offensive” failed in its objective to overthrow the government and marked the official beginning of the armed conflict in the country. Its causes were not part of the spur of the moment. They were deeply connected to the repression and marginalization that large sectors of the population suffered for a long period of time under the

rule of military regimes directly supported by a few families.² Among the causes of the civil war were the economic and social exclusion to which the vast majority of the inhabitants of the country were subjected, the institution and the perpetuation, for almost fifty years, of military regimes which closed every space for political participation, the violent response by the government to the social, economic and political demands of the population and, finally, the absence of the rule of law.³

During the armed conflict, violence became a “fire which swept over the fields of El Salvador”⁴ and affected all sectors of its population. In words of the Truth Commission for El Salvador, violence “turned everything to death and destruction, for such is the senselessness of that breach of the calm plenitude which accompanies the rule of law, the essential nature of violence being suddenly or gradually to alter the certainty which the law nurtures in human beings when this change does not take place through the normal mechanisms of the rule of law. The victims were Salvadorians and foreigners of all backgrounds and all social and economic classes, for in its blind cruelty violence leaves everyone equally defenseless.”⁵ According to that body, the “main characteristics of this period were that violence became systematic and terror and distrust reigned among the civilian population. The fragmentation of any opposition or dissident movement by

². See Benjamín Cuéllar Martínez, “Los Dos Rostros de la Sociedad Salvadoreña” in *Verdad, Justicia y Reparación, Desafíos para la Democracia y la Convivencia Social*, eds. Gilda Pacheco Oreamuno, Lorena Acevedo Narea and Guido Galli (San José and Sweden: Inter-American Institute of Human Rights and Institute for Democracy and Electoral Assistance, 2005), 146-149.

³. See Paula Cuéllar Cuéllar, *The Judicial Enforceability of the Individual Dimension of the Right to Truth Through the Writ of Amparo in El Salvador*, University of Notre Dame, Center for Civil and Human Rights, Working Paper No. 6, Spring 2010.

⁴. The Commission on the Truth from El Salvador, *From Madness to Hope: The Twelve Year War in El Salvador*, United Nations, 1993, 6.

⁵. The Commission on the Truth from El Salvador, *From Madness to Hope*, 7.

means of arbitrary arrests, murders and selective and indiscriminate disappearances of leaders became common practice.”⁶

The consequences of the widespread, systematic and indiscriminate violence in El Salvador were, among others, thousands of innocent civilians killed, thousands of deaths among the combatant forces, total breakdown of the rule of law, widespread insecurity, ongoing power shortages, economic recession and financial instability, inflation, devaluation of its national currency, destruction of an important part of its productive means and other important infrastructure, increased polarization and prevalent psychosocial trauma among the population.⁷

In figures, more than 75,000 civilians were the victims of extrajudicial killings, more than 8,000 people were the targets of forced disappearances and more than 1,000,000 people fled the country. On the military side, according to the information gathered by the armed forces, approximately 28,000 combatants were killed in action, wounded, maimed or disappeared. The economic losses during that period were estimated to be more than 1,600,000,000 dollars and, as a consequence, the gross domestic product (GDP) of the country decreased to the levels that the country had two decades before, as well as its position in the human development index. Finally, a significant amount of the economic resources of the State was devoted exclusively to military purposes and, therefore, social investment projects were practically left aside in its entirety.⁸

⁶. The Commission on the Truth from El Salvador, *From Madness to Hope*, 27.

⁷. See Instituto de Derechos Humanos de la Universidad Centroamericana “José Simeón Cañas”, *La Agenda Pendiente, Diez Años Después: De la Esperanza Inicial a las Responsabilidades Compartidas*, (San Salvador, Universidad Centroamericana “José Simeón Cañas”: 2002) 18.

⁸. See Instituto de Derechos Humanos de la Universidad Centroamericana “José Simeón Cañas”, *La Agenda Pendiente, Diez Años Después*, 17-18.

The civil war ended through a negotiated settlement in which the international community played an important role. Through one track diplomacy measures, the United Nations acted as mediator in the conflict. This entity was able to bring to the negotiation table both the government and the guerrilla forces. However, it is worth acknowledging that this negotiated settlement would not have been possible if the warring parties had not realized that none of them had enough power to triumph over the other by military means.

On January 16, 1992, the parties to the conflict signed an agreement which put an end to the bloody civil war. The Chapultepec Agreement was the last of many agreements which were signed within a period of almost two years. The first agreement signed by both parties on April 4, 1990 described the four core objectives of the peace process. The four core objectives were to “end the armed conflict by political means as speedily as possible, promote the democratization of the country, guarantee unrestricted respect for human rights and reunify Salvadoran society”.⁹ Up to this date, the fulfillment of the last two goals is still pending. In fact, El Salvador nowadays is considered one of the most violent countries in the world housing one of the most polarized societies in the world.

2. Why an International Tribunal of Restorative Justice for El Salvador?

To investigate a past plagued by gross violations of international human rights laws and serious violations of international humanitarian laws, the warring parties decided to set up a truth commission with the auspices of the United Nations. Following the footsteps of both Argentina

⁹. United Nations, *El Salvador: Geneva Agreement, April 4, 1990* in *The United Nations and El Salvador 1990-1995*, United Nations Blue Books Series, Vol. IV., United Nations, Department of Public Information, New York, 1995, 164-165.

and Chile, El Salvador became the third Latin American country to include a truth commission within its transitional process. The decision to create such an entity by the guerrilla forces and the government was included within the Peace Accords, particularly in the Mexico Agreements.¹⁰ At the beginning of its period, both parties agreed to fully cooperate with its investigations and to comply with its recommendations.

In parallel to the creation of the Truth Commission for El Salvador, the government initiated the process to reintegrate the rebels into society. In that sense, the Congress of El Salvador adopted the National Reconciliation Act after the signature of the Chapultepec Agreement. That law created the conditions for a disarmament, demobilization and reintegration process. It also “exempted from the potential benefits of amnesty those persons named in the Truth Commission report as being responsible for serious acts of violence.”¹¹

The mandate of the Truth Commission for El Salvador was, primarily, to investigate “serious acts of violence that have occurred since 1980 and whose impact on society urgently demands that the public should know the truth.”¹² To be included as part of their report, the commissioners, on the one hand, had to evaluate the “exceptional importance that may be attached to the acts to be investigated, their characteristics and impacts, and the social unrest to which they gave rise.”¹³ On the other hand, they had to consider the “need to build confidence in

¹⁰. Inter-American Commission on Human Rights, Report on the Situation of Human Rights in El Salvador, Organization of American States, Washington D.C., 1994.

¹¹. Popkin, Margaret, “The Salvadoran Truth Commission and the Search for Justice”, Criminal Law Forum, Springer Netherlands, Volume 15, Numbers 1-2 (March 2004): 108.

¹². The Commission on the Truth from El Salvador, *From Madness to Hope*, 8.

¹³. Margaret Popkin and Naomi Roth-Arriaza, “Truth as Justice: Investigatory Commissions in America Latina”, 20 Law & Soc. Inquiry, 1995, 87.

the positive changes being promoted by the peace process.”¹⁴ As a consequence of its limited mandate, among the many cases in which 75,000 civilians were the victims of extrajudicial killings, 8,000 people were the targets of forced disappearances, and 28,000 combatants were killed in action, wounded, maimed or disappeared, only 32 cases made it into the report of the Truth Commission for El Salvador.¹⁵

Five days after the release of the report of the Truth Commission for El Salvador, the Salvadorian Congress promulgated an unconditional, blanket and self-amnesty that almost twenty years later is still in force. The General Amnesty Act for the Consolidation of Peace granted a “full, absolute and unconditional amnesty to all those who participated in any way in the commission of political crimes or common crimes linked to political crimes or common crimes in which the number of persons involved is no less than twenty”¹⁶ during the armed conflict in El Salvador. It also includes all those persons who had been excluded from that benefit one year before through the enactment of the National Reconciliation Law.

In 2000, as a consequence of an application for a constitutionality review, the Constitutional Chamber of the Supreme Court of Justice of El Salvador declared that the General Amnesty Act for the Consolidation of Peace was in conformity with the Constitution.¹⁷ Nonetheless, it declared the “legal impossibility of implementing the Law on General Amnesty for the

¹⁴. Id.

¹⁵. See Instituto de Derechos Humanos de la Universidad Centroamericana “José Simeón Cañas”, *La Agenda Pendiente, Diez Años Después*, 17-18.

¹⁶. See Legislative Assembly of El Salvador, *General Amnesty Act for the Consolidation of Peace*, Article 1, Decree 486, March 1993.

¹⁷. See Constitutional Chamber of the Supreme Court of Justice of El Salvador, *General Amnesty Act for the Consolidation of Peace*, Application for Constitutional Review, 24-97 21-98, September 26, 2000.

Consolidation of Peace in cases of gross violations of human rights.”¹⁸ Thus, it “opened the possibility for criminal judges, upon hearing specific cases of human rights violations that occurred during the internal armed conflict, to consider its inapplicability.”¹⁹

That decision led to the filing of new judicial petitions to try perpetrators of war crimes and crimes against humanity. However, they were dismissed based on statutory limitations. In a case filed before a lower court in El Salvador, the general attorney requested the dismissal of the petition on the grounds of the existence of statutes of limitations for the crimes committed during the civil war.²⁰ His arguments were, on the one hand, that El Salvador had not yet ratified the United Nations Convention on the Non-Applicability of Statutory Limitations, and, on the other hand, that the Salvadorian Criminal Code did not contemplate the imprescriptibility of such offences at the time of the perpetration of those crimes.²¹

That was argued in total disregard of the fact that retroactive application of suspension statutes is, actually, “based on the idea that suspects of international crimes should not benefit from statutes of limitation during the period that they are systematically left unpunished by a particular political regime. In this approach, statutes of limitation are deemed not to have run during periods where there is no realistic prospect of international crimes being prosecuted.”²²

¹⁸. Inter-American Court of Human Rights, *Case Gelman v. Uruguay*, Judgment of February 24, 2011 (Merits and Reparations): 221.

¹⁹. *Id.*

²⁰. See Constitutional Chamber of the Supreme Court of Justice of El Salvador, Writ of Amparo, 674-2001, 23 December 2003.

²¹. *Id.*

²². Kok, R. A., “Statutory Limitations” in *International Criminal Law*, (The Netherlands: Universiteit Van Amsterdam, 2007) 340.

In addition, the Truth Commission for El Salvador recommended a series of legal, political and administrative measures, including actions designed to thwart the repetition of gross violations of international human rights laws and international humanitarian laws, as well as actions aimed to assist the society in its transition to national reconciliation. Nevertheless, although initially both the guerrilla and the government committed themselves to obey those recommendations, that commitment was later abandoned. Indeed, despite the fact that some measures were adopted, such as the institution of a national civilian police and the creation of the ombudsman, time has proved that, in most cases, only cosmetic measures were adopted. This led to the Secretary General of the United Nations to declare five years later after the signature of the Chapultepec Agreement that it was “to be regretted, however, that more of the recommendations of the Commission were not heeded by the parties, especially the government.”²³

3. What is the International Tribunal of Restorative Justice for El Salvador?

Paul van Zyl has stated that the “overwhelming majority of victims and perpetrators of mass crimes will never encounter justice in a court of law, and it is therefore necessary to supplement prosecutions with other complementary strategies.”²⁴ The International Tribunal of Restorative Justice for El Salvador attempts to become one of those strategies, in light of the climate of impunity that surrounds the country.

²³. Secretary General of the United Nations, *Assessment of the Peace Process in El Salvador in The Situation in Central America: Procedures for the Establishment of a Firm and Lasting Peace and Progress in Fashioning a Region of Peace*, Freedom Democracy and Development, General Assembly, United Nations, 1997, paragraph 25.

²⁴. Paul van Zyl, “Promoting Transitional Justice in Postconflict Societies” in *Transitional Justice: Handbook for Latin America*, ed. Félix Reátegui, (Brasília & New York, International Center for Transitional Justice: 2011), 48.

The International Tribunal of Restorative Justice for El Salvador constitutes a collegiate, unofficial, non-judicial body which meets every year to receive testimonies from the victims of the armed conflict and their relatives, in order to provide a stage for the creation of a collective memory and to gather evidence which at the end will be presented as legal proof before a court of law. Paraphrasing the definition of Priscilla Hayner on truth commissions, the International Tribunal of Restorative Justice for El Salvador (1) is focused on past, rather than ongoing, events; (2) documents war crimes and crimes against humanity that took place over a period of time in order to serve as further evidence before a court of law; (3) engages directly and broadly with the affected population, gathering information on their experiences; (4) is an annually itinerant held body with the aim to produce a yearly moral nonbinding resolution; and (5) is not officially authorized by the State, but empowered from an academic and religious institution such as the Central American University “José Simeón Cañas”.²⁵

This body was instituted by the Human Rights Institute of the Central American University “José Simeón Cañas” and the National Coordinator of the Committees of Victims of Violations to Human Rights during the Armed Conflict. It is composed of seven persons with different nationalities and different backgrounds, such as international jurists, human rights advocates and victims of violations of human rights. That is what makes it an international and an interdisciplinary body prepared to contribute from different points of view to the never ending transitional justice process of the country. Its first edition took place in San Salvador, the capital of El Salvador. Six years later, this body has been held in different communities within the whole country, making it an itinerant entity. However, it has always taken place in symbolic places for

²⁵. Priscilla B. Hayner, *Unspeakable Truth: Transitional Justice and the Challenge of Truth Commissions*, Second Edition, (New York: Routledge, 2011), 12-13.

the victims and their relatives such as churches, chapels or communal houses in order to procure a comfortable environment in which they can feel safe and welcomed.

Among two of its most salient features are the collection of oral testimonies to serve as further evidence before a court of law, and its focus on the victims and their relatives to restore their silenced voices. The International Tribunal of Restorative Justice for El Salvador was created to impose a moral condemnation on the State for evading its responsibilities to investigate, punish and prosecute those responsible for committing gross violations to international human rights law and serious violations to international humanitarian law. In addition, it was established to give voice to the victims of the armed conflict and their surviving relatives whose demands for truth, justice and reparations have not found an echo within the State or within the Salvadoran society. In other words, on the one hand, its aim is to evidence the responsibility of the perpetrators for committing war crimes, and crimes against humanity during the civil war, as well as to demonstrate the acquiescence of the State towards the perpetration of those atrocious crimes. On the other, its goal is to contribute to healing the wounds of the victims and their surviving relatives, as well as to construct a new social fabric based on a global truth about the past.

Just as truth commissions, the International Tribunal of Restorative Justice for El Salvador does not intend to substitute trials, but to contribute to its institution through the collection of evidence. Indeed, those proofs have been used to support criminal complaints that have been filed before the Salvadoran State Prosecutor's Office by the Human Rights Institute of the Central American University "José Simeón Cañas". In other words, this body was "created, not

with the presumption that there will be no trials, but to constitute a step towards knowing the truth and, ultimately, making justice prevails.”²⁶

Unlike judicial trials, its focus is on the victims of an armed conflict or a dictatorial regime and on their surviving relatives, not on the perpetrators. In fact, so far, the International Tribunal of Restorative Justice for El Salvador has not had been able to bring any perpetrator before it. Nevertheless, that does not have been an obstacle for them to learn about the existence of this body. As a response to a news reporter, Colonel Sigifredo Ochoa Pérez, now a sitting legislator, claimed that during the war he was only accomplishing his mission in the armed forces which was to “clean up” that place from the guerrilla forces. “Discussing again those things is only mess up with the past. Discussing again those things does not lead to nowhere,” expressed the Colonel. This totally contradicts the testimony of Adela Escobar Hernández who started her narration by stating that for her “it is hard to remember, but I do it for these stories not to remain in the oblivion, I do it for these stories to come to light.”

Just as in the truth commissions for South Africa and Peru, this body allows the victims and their surviving relatives to tell their stories in public, before an entire expecting audience. “If one of the significant things that victims lose in oppression is the ability to use language, then language as retribution begins to make sense”²⁷ in these processes. The fact that the public hearings are also broadcasted through radio and television enable the victims and the surviving relatives to reach a wider audience and to find support among the population.

²⁶. Inter-American Commission on Human Rights, Report No. 136/99, Case 10.488, El Salvador, December 22, 1999, paragraph 230.

²⁷. Theresa, Godwin Phelps, *Shattered Voices: Language, Violence and the Work of Truth Commissions*, (Pennsylvania, University of Pennsylvania Press, 2004) 46.

Finally, unlike judicial trials, the International Tribunal of Restorative Justice for El Salvador ends with a nonbinding resolution. Nevertheless, the decision reached by its members very much resembles a verdict pronounced within a court of law. Although it does not condemn individual perpetrators, because doing it would be a violation to their due process before a court of law, it does urge the State of El Salvador to fulfill its mission to bring to justice those persons who have been named by the victims and their surviving relatives. That judgment also contains a series of recommendations aimed to the State to help it to develop a public policy of reparations for gross violations to international human rights laws and serious violations to international humanitarian laws.

4. The role of the International Tribunal of Restorative Justice for El Salvador so far

Since 2009, through the institution of public hearings which last for a period of three days, this body has listened every year to the testimonies of victims of the armed conflict and their surviving relatives, and has acknowledged their suffering in light of the indolence which has been shown so far by the State to their claims. By hearing the victims and their surviving relatives giving their testimonies for the first time in public and by acknowledging their anguish, this entity has given them back the power to speak out loud about the atrocities suffered and to lift the veil of denial under which those heinous crimes have been buried by the perpetrators for a long time by now.

The International Tribunal of Restorative Justice for El Salvador has also had a transformative effect in people. Something changes when the victims and their surviving relatives are giving their testimonies before the expecting audience. They are not anymore the passive subjects they usually are within their communities. They take the stage with confidence. They name names and they dare perpetrators to visit their communities to look face to face what they have done to them. They tell their accounts with the security that gives you having being an active participant in history and, sometimes, the sole surviving witness of a collective suffering.

So far, the International Tribunal of Restorative Justice for El Salvador has listened to a wide array of testimonies and, as a consequence, has declared the responsibility of the State of El Salvador in the perpetration of 19 cases of torture, 42 extrajudicial killings, 10 forced disappearances, and 13 massacres. It also has declared the violation of the rights to truth, justice and reparations of the victims and their surviving relatives.

“The armed forces did not only want to annihilate the guerrilla forces or their collaborators, they wanted to physically exterminate all of us,” declared María Orbelina López and Mercedes Méndez to the International Tribunal of Restorative Justice for El Salvador. “Since the armed forces could not see us at night, they shot towards the crying children who were in the arms of their mothers with the purpose to murder them all,” expressed Philippe Bourgois to that same body. “The armed forces did not only want to actually kill the people, but they also wanted to destroy our means of lives. They burnt our crops, tore down our houses, slain our animals, and bombed our fields,” said Luis Rivas and Francisco Lopez. These are all testimonies of surviving victims of a brutal scorched earth operation conducted by the military known as the “Massacre of

Santa Cruz”, in which some two hundred fleeing civilians were killed. Testimonies like this are usual within the public hearings that this body held every year in different communities across the country.

Nevertheless, it is important to say that the International Tribunal of Restorative Justice for El Salvador does not want to limit itself to hear the testimonies of the victims and their relatives, and to publically acknowledge their claims. It also attempts to become a body who proposes solutions to the demands of truth, justice and reparations made by the victims and their relatives. As an example, this entity has urged the Attorney General of El Salvador to immediately investigate all of the complaints and cases presented before that body, in recognition of their status as crimes under national and international law, making use of all of the evidence presented before it as well as additional evidence that may be found.

So far, as a consequence of the evidence collected during the public hearings conducted by the International Tribunal of Restorative Justice for El Salvador, 24 criminal complaints have been filed before the Attorney General of El Salvador by the Human Rights Institute of the Central American University “José Simeón Cañas”. Nowadays, by virtue of a judgment pronounced by the Constitutional Chamber of the Supreme Court of Justice of El Salvador, the Attorney General of El Salvador has been told to investigate those cases. Therefore, a light at the end of the tunnel is starting to emerge in the quest for truth, justice and reparations within the country.

Conclusion

The right to truth emerged alongside democracy in Latin America. With the advent of the third democratic wave, a necessity to find the truth about past human rights violations arose and has not gone away. Like never before, the victims and their surviving relatives have developed an urgent compulsion to address past atrocities as a precondition to move on with their lives. Thus, “Forgive, but never forget” has become the motto of transitional societies, including El Salvador. These are the claims that the International Tribunal of Restorative Justice for El Salvador comes to collect every year.

The International Tribunal of Restorative Justice for El Salvador is neither a truth commission, nor a judiciary trial. Indeed, it has a nature of its own which becomes more evident as time passes by. However, it can be said that it does constitute an example of a nongovernmental project which has documented both individual and collective war crimes and crimes against humanity perpetrated during the armed conflict in El Salvador. Through the testimonies of the victims and their surviving relatives, this institution has had been able to acknowledge the commission of massacres, extrajudicial killings, forced disappearances and tortures at the hands of individual perpetrators, and has had also been able to signal the acquiescence of the State towards the commission of those heinous crimes. Through its institution, a stage has been provided to the victims and to their surviving relatives to voice their claims.

Through time it has become an important institution to which people look forward. Despite that fact that in the country, the leaders of political parties claim that wounds from the past have already healed, and that opening it would imply a revictimization of those who suffered the scourges of war, the wounds are still open into the hearts of the victims and their surviving

relatives and they voice their demands regarding truth, justice and reparations every year before this institution.