VIVIANA PALACIO REVELLO

Amnesties in transitions from armed conflict to negotiated peace: the State obligation to investigate, prosecute and punish serious human rights violations before the Inter-American Court of Human Rights

Dissertação de Mestrado

Orientador: Professor Associado Dr. Alberto do Amaral Júnior

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Dissertação apresentada à Banca Examinadora do Programa de Pós-Graduação em Direito, da Faculdade de Direito da Universidade de São Paulo, como exigência parcial para obtenção do título de Mestre em Direito, na área de concentração Direito Internacional, sob a orientação do Professor Associado Dr. Alberto do Amaral Júnior.

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To the victims of the armed conflict in Colombia and their dream of truth, justice, reparation and non-recurrence

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"Del mismo modo que la paz no puede ser solamente la ausencia de combate, la reconciliación no es susceptible de ser impuesta por decreto" (Méndez, 2001, p.307)

ABSTRACT

Palacio Revello, V. (2017). *Amnesties in transitions from armed conflict to negotiated peace: the State obligation to investigate, prosecute and punish serious human rights violations before the Inter-American Court of Human Rights* (Master's Dissertation). Faculty of Law, University of Sao Paulo, Sao Paulo.

This work discusses exonerations and limitations from criminal liability represented in amnesties enacted at the end of the hostilities of a non-international armed conflict in the light of standards of human rights protection and State international responsibility. In 2012, Judge García Sayán appended a Concurring Opinion in the *Case of the Massacres of El Mozote and nearby places v. El Salvador* from which some legal scholars have claimed the emergence of some awareness on the part of the Inter-American Court of Human Rights on tensions in transitions from armed conflict to negotiated peace justifying a reassessment of the State obligation to investigate, prosecute and punish serious human rights violations in these specific transitional contexts. Defining the existence of this alleged reassessment gains in importance for the upcoming transition in Colombia. Amnesties are discussed from three approaches: amnesties derived from Article 6(5) of 1977 Additional Protocol II to the Geneva Conventions of 1949; amnesties for serious human rights violations; and amnesties exonerating partially and conditionally from criminal liability, based on the analysis of 2016 Final Agreement for the Termination of Conflict and the Construction of a Stable and Lasting Peace between the State of Colombia and FARC guerrilla group. It is concluded that there is a well-established condemnation for total amnesties for serious human rights violations and international crimes, but amnesties exonerating partially and conditionally from liability require a cautious approach. Selection and prioritization attending the seriousness of the crime and level of responsibility of the offender do not find support in the Inter-American Human Rights System, but alternative penalties and reduced sentences, provided that rights of the victims to truth, reparation and non-recurrence are fulfilled and certain reasonable degree of proportionality is maintained, may be accepted.

Keywords: Human rights. Armed conflict. Amnesties. State international responsibility. Inter-American Court of Human Rights.

RESUMO

Palacio Revello, V. (2017). *Amnesties in transitions from armed conflict to negotiated peace: the State obligation to investigate, prosecute and punish serious human rights violations before the Inter-American Court of Human Rights* (Dissertação de Mestrado). Faculdade de Direito, Universidade de São Paulo, São Paulo.

Este trabalho discute exonerações e limitações à responsabilidade criminal representadas nas anistias promulgadas no fim das hostilidades de um conflito armado não internacional à luz dos padrões de proteção dos direitos humanos e responsabilidade internacional do Estado. Em 2012, o Juiz García Sayán anexou um voto concorrente no *Caso dos Massacres de El Mozote e lugares vizinhos vs. El Salvador* a partir do qual alguns doutrinantes tem afirmado o surgimento de certo reconhecimento de parte da Corte Interamericana de Direitos Humanos sobre tensões em transições do conflito armado para paz negociada que justificaria uma reavaliação dos deveres do Estado de investigar, julgar e punir graves violações dos direitos humanos nestes contextos transicionais específicos. Definir a existência dessa alegada reavaliação ganha importância por conta da próxima transição na Colômbia. As anistias são discutidas a partir de três enfoques: anistias derivadas do artigo 6(5) do Protocolo Adicional II de 1977 às Convenções de Genebra de 1949; anistias por graves violações dos direitos humanos; e anistias que exoneram parcialmente e condicionalmente de responsabilidade, baseado na análise do Acordo Final para a Terminação do Conflito e a Construção de uma Paz Estável e Duradoura de 2016 entre o Governo da Colômbia e o grupo guerrilheiro das FARC. Concluímos que existe uma condenação bem consolidada das anistias totais para graves violações dos direitos humanos e crimes internacionais, porém, as anistias que parcialmente e condicionalmente limitam responsabilidade precisam de uma abordagem cautelosa. A seleção e priorização baseada na gravidade do crime e nível de responsabilidade do perpetrador não encontram suporte no Sistema Interamericano de Direitos Humanos, mas as sanções alternativas e sentenças reduzidas, sempre que os direitos das vítimas à verdade, à reparação e a não repetição sejam atendidos e certo grau razoável de proporcionalidade seja mantido, podem ser aceitas.

Palavras-chave: Direitos humanos. Conflito armado. Anistias. Responsabilidade internacional do Estado. Corte Interamericana de Direitos Humanos.

ABBREVIATIONS, ACRONYMS AND SYMBOLS

§	Paragraph or paragraphs
ACHR	American Convention on Human Rights
ECtHR	European Court of Human Rights
DPLF	Due Process of Law Foundation
HRL	Human Rights Law
I/A Court H.R.	Inter-American Court of Human Rights
IACHR	Inter-American Commission on Human Rights
ICC	International Criminal Court
ICJ	International Court of Justice
ICL	International Criminal Law
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IHL	International Humanitarian Law
JEP	Jurisdicción Especial para la Paz or Special Jurisdiction for Peace
MCJ	Military Criminal Justice
MP	Magistrado Ponente or Reporting Judge
OAS	Organization of American States
OHCHR	Office of the United Nations High Commissioner for Human Rights
TC	Truth commission
TCs	Truth commissions
UN	Organization of the United Nations

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INTRODUCTION

In 2012, Judge García Sayán appended a Concurring Opinion in the *Case of the Massacres of El Mozote and nearby places v. El Salvador* from which some legal scholars have claimed the emergence of some awareness on the part of the I/A Court H.R. regarding tensions in transitions from armed conflict to negotiated peace justifying a reassessment of the State obligation to investigate, prosecute and punish serious human rights violations in these specific transitional contexts. This alleged reassessment gains in importance for the upcoming transition in one of the States Party to the Inter-American Human Rights System: Colombia. This work is aimed at discussing exonerations and limitations from criminal liability, represented in amnesties enacted at the end of the hostilities, in the light of standards of human rights protection and State international responsibility.

On October 25, 2012 the I/A Court H.R. issued a judgment on merits, reparations and costs in the *Case of the Massacres of El Mozote and nearby places v. El Salvador*[1] related to successive massacres committed between December 11 and 13, 1981 in the context of a military operation conducted in seven places located in the Department of Morazán, during which around 1.000 people were extrajudicially executed, including an alarming number of children. Other serious human rights violations such as torture, rape, enforced disappearance and forced displacement were also perpetrated in this context.

From 1980 to 1991, El Salvador experienced a non-international armed conflict. The Government of El Salvador was confronted with Frente Farabundo Martí para la Liberación Nacional (FMLN), which emerged in 1980 seeking to launch an offensive and promote a popular uprising. Although it failed to attain its objective, FMLN ended up controlling some villages, settled areas of political influence and achieved international recognition as a fighting force. Against this background, the armed conflict intensified in the framework of counterinsurgency operations and involved indiscriminate attacks against the civilian population, particularly peasant population where the guerrilla was active.

In this context are framed the massacres of El Mozote and nearby places, the largest massacres against civilian population perpetrated in the contemporary history of Latin America, as acknowledged by the State itself. Between December 11 and 13, 1981, the

[1] For further information about the factual basis and legal arguments related to this case, *see* I/A Court H.R. *Case of the Massacres of El Mozote and nearby places v. El Salvador*, Judgment Series C No.252, 2012 (Merits, Reparations and Costs); Judgment Series C No.264, 2013 (Interpretation of the Judgment on Merits, Reparations and Costs).

Salvadoran Armed Forces conducted a series of massive and indiscriminate extrajudicial executions of defenseless individuals in the village of El Mozote and nearby places, which "were committed with extreme cruelty, mainly using firearms, but also by beatings with sticks, slitting throats and even setting fire to places in which there were people who were still alive" (I/A Court H.R., Judgment Series C No.252, 2012, §128). The Armed Forces executed every individual they encountered, killed animals, set fire to crops and homes, and destroyed anything of community value.

The peace negotiation process began in 1989 when the five Presidents requested the intervention of the UN Secretary General with a view to achieve peace in the Central American region. Some agreements were reached, in all of which the respect for human rights and the need to overcome impunity were reaffirmed, including 1992 Chapultepec Accords or final peace agreement. The TC was set up in 1992 seeking to create confidence in positive changes promoted by the peace process and to facilitate national reconciliation. The TC final report regarding the patterns of violence of State agents and members of the FMLN during the armed conflict was published in 1993.

The Law for National Reconciliation or Legislative Decree 147/1992 following 1992 Chapultepec Accords eliminated the possibility of granting amnesties to perpetrators of serious human rights violations. Nevertheless, the Law of General Amnesty for the Consolidation of Peace or Legislative Decree 486/1993, published five days after the presentation of the report of the TC, extended the possibility of granting amnesties to perpetrators of heinous crimes. Consequently, investigation, prosecution and punishment of serious human rights violations occurred in the context of the massacres of El Mozote and nearby places were dismissed.

Considering the context in which these serious human rights violations occurred, the I/A Court H.R. attended Article 3 common to the four 1949 Geneva Conventions, 1977 Additional Protocol II and customary IHL as complementary instruments of interpretation. In particular, as the *Case of the Massacres of El Mozote and nearby places v. El Salvador* deals with an amnesty law concerning acts committed in a situation of non-international armed conflict, the I/A Court H.R., and notably the Concurring Opinion of Judge García Sayán, included Article 6(5) of 1977 Additional Protocol II concerning penal prosecutions at the end of the hostilities of a non-international armed conflict, in the legal analysis.

First of all, Article 65(2) of the Rules of Procedure of the I/A Court H.R. provides that *"[a]ny Judge who has taken part in the consideration of a case is entitled to append a separate reasoned opinion to the judgment, concurring or dissenting . . . said opinions*

shall only refer to the issues covered in the judgment." In this respect, it should be pointed out that the Concurring Opinion of Judge García Sayán was broadly embraced by Judges Franco, Macaulay, Abreu Blondet and Pérez Pérez.

The Concurring Opinion of Judge García Sayán (I/A Court H.R., Judgment Series C No.252, 2012) exposed as a central argument the need to harmonize criminal justice and negotiated peace, which

> [M]ust 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. (§27)

Judge García Sayán (I/A Court H.R., Judgment Series C No.252, 2012) begins by affirming that in the *Case of Barrios Altos v. Peru*, the I/A Court H.R. considered that legal provisions intending to exclude responsibility in cases of gross human rights violations are inadmissible and lack juridical effect since these offenses attempt against non-derogable rights, and that this idea was reinforced in cases such as *Almonacid-Arellano v. Chile*, *La Cantuta v. Peru*, *Gomes-Lund et al. v. Brazil* and *Gelman v. Uruguay.* According to Judge García Sayán (I/A Court H.R., Judgment Series C No.252, 2012)

> 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. [emphasis added] (§9)

Referring to Article 6(5) of 1977 Additional Protocol II, the I/A Court H.R. opened up the possibility for amnesties granted at the end of the hostilities of a non-international armed conflict, leaving behind the insight in accordance to which any crime committed in these situations could not be amnestied or pardoned. In this respect, Judge García Sayán (I/A Court H.R., Judgment Series C No.252, 2012) emphasized that the I/A Court H.R. concluded 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" (§18). Furthermore, "peace agreements approved by the United Nations can never promise amnesties for genocide, war crimes, crimes against humanity or gross violations of human rights" (I/A Court H.R., Judgment Series C No.252, 2012, Concurring Opinion of Judge García Sayán, §19).

Nevertheless, the Concurring Opinion of Judge García Sayán introduced a point of discussion in this matter, to the extent that State duties related to performing actions aimed

at investigating and establishing the facts–duty to investigate–and identifying individual responsibilities–duty to prosecute–remain untouched, but if applying criminal sanctions is difficult, the duty to impose punishments proportionate to the gravity of the violations–duty to punish–should yield. "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" (I/A Court H.R., Judgment Series C No.252, 2012, Concurring Opinion of Judge García Sayán, §28).

This nuance of the State duty to punish is explained by the emergence of the *peace* as a right of the society and as an aim that shall be pursued by the State. The Concurring Opinion of Judge García Sayán (I/A Court H.R., Judgment Series C No.252, 2012) argued that

> 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 [*sic*] 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 States must achieve it. (§37)

Some distinct and complementary ideas can be drawn from the Concurring Opinion of Judge García Sayán (I/A Court H.R., Judgment Series C No.252, 2012): ". . . a negotiated peace process attempts to ensure that the combatants choose peace and submit to justice" (§30), and if criminal punishes become difficult, "routes towards alternative or suspended sentences" (§30) such as "[r]eduction of sentences, alternative punishments, direct reparation from the perpetrator to the victim, and public acknowledgment of responsibility" (§31) could be designed and implemented, giving priority to the cases of those involved in the most serious human rights violations (§29) like "facts that can be categorized as war crimes or crimes against humanity in the definitions of the Statue of the International Criminal Court" (§24) and distinguishing "between the 'perpetrators' and those who performed functions of high command and gave the orders" (§30).

Judge García Sayán affirms that considering that none of the rights and duties is of an absolute nature, in times of transition from armed conflict to peace, the State can validly be in a situation of inability to implement fully and simultaneously some prerogatives and burdens it has assumed, being entitled to partially override some of them. This being the case,

> [I]n 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. (I/A Court H.R., Judgment Series C No.252, 2012, Concurring Opinion of Judge García Sayán, §38)

Certain experts affirm that no distinction should be drawn in transitional contexts regarding the State duty to investigate, prosecute and punish gross human rights violations (Méndez, 2015), whereas other legal scholars argue that from the Concurring Opinion of Judge García Sayán in the *Case of the Massacres of El Mozote and nearby places v. El Salvador* it can be perceived certain awareness from the I/A Court H.R. about tensions in transitions from armed conflict to negotiated peace (Gutiérrez Ramírez, 2014), represented in a confrontation between justice–as a right of the victims to an effective judicial remedy and judicial protection–and national reconciliation–as a transit from a situation of armed conflict to a situation of definitive ceasefire–. For some legal scholars, this alleged awareness could modify the State duty to investigate, prosecute and punish serious human rights violations for these specific transitional contexts. This is particularly important for the upcoming transition in one of the States Party to the Inter-American Human Rights System: Colombia.

The Concurring Opinion of Judge García Sayán in the *Case of the Massacres of El Mozote and nearby places v. El Salvador* has even substantiated some points in 2016 Final Agreement for the Termination of Conflict and the Construction of a Stable and Lasting Peace concluded between the Government of Colombia and FARC guerrilla group, *e.g.*, the creation of the Special Jurisdiction for Peace.[2] Nevertheless, there is a debate regarding the adequacy of some points contained in this Concurring Opinion of Judge García Sayán to the standards of human rights protection and the State international responsibility, in particular, ideas related to exoneration from criminal liability and the State obligation to investigate, prosecute and punish perpetrators of serious human rights violations.

Although this Concurring Opinion is not the current positioning of the I/A Court H.R., it can be taken into account for further judgments and for the continuity of the debate in the field of international legal doctrine (Serrano Suárez, 2015). According to Olásolo Alonso (2014), this is a topic of current interest that transcends the particularities of the Colombian case, since measures proscribed by international law that cannot be negotiated by actors involved in serious human rights violations committed in situations of armed conflict will be accurately defined through the analysis of Colombia. The positioning of the

[2] *See* 2016 Acuerdo Final para la Terminación del Conflicto y la Construcción de una Paz Estable y Duradera, p.143

I/A Court H.R. on this topic, as ultimate interpreter of the American Convention on Human Rights, will undoubtedly set a parameter for the rest of the world in terms of protection of the rights to an effective judicial remedy and judicial protection, and the correlative State international responsibility.

Defining the State obligation to investigate, prosecute and punish serious human rights violations in a continent marked by widespread atrocities resulting from situations of armed conflict is an issue of the utmost importance for the Inter-American Human Rights System. El Salvador, Guatemala, and Peru, *e.g.*, represent cases where the concern about what to do with human rights violations committed during the armed conflict could return to their national agendas. Colombia represents a case where the concern regarding the *due diligence* reflected in the State obligation to investigate, prosecute and punish gross human rights violations related to the armed conflict is currently addressed in its national agenda.

On the basis of the considerations outlined above, this work is aimed at discussing exonerations and limitations from criminal liability, represented in amnesties enacted at the end of the hostilities of a non-international armed conflict in the light of the standards of human rights protection and State international responsibility. For this purpose, amnesties are discussed from three approaches related to the State international responsibility in cases concerning armed conflict: amnesties derived from Article 6(5) of 1977 Additional Protocol II; amnesties for serious human rights violations; and amnesties exonerating partially and conditionally from liability, based on the analysis of 2016 Final Agreement for the Termination of Conflict and the Construction of a Stable and Lasting Peace signed between the Government of Colombia and FARC guerrilla group.

We depart from the search and selection of contentious cases related to situations of armed conflict in Colombia, El Salvador, Guatemala and Peru judged by the I/A Court H.R. Other emblematic cases were selected in order to address specific issues discussed herein. The subjects of the cases are briefly exposed seeking to contextualize human rights violations committed in situations of armed conflict in the region. Pursuant to Uprimny Yepes, Sánchez Duque and Sánchez León (2014), rulings of the I/A Court H.R. as a whole constitute guidelines for determining content and scope of HRL. Regarding the IACHR, relevant reports in the framework of the system of petitions and cases, thematic reports and statements are included. Positioning of legal scholars and international bodies, provisions of international treaties, domestic legislation and case-law, and soft law contribute to the discussion.

The first chapter addresses amnesties derived from Article 6(5) of 1977 Additional Protocol II, inasmuch as the I/A Court H.R. (Judgment Series C No.252, 2012), has stated that “[a]ccording to the international humanitarian law applicable to these situations, the enactment of amnesty laws on the conclusion of hostilities in non-international armed conflicts are sometimes justified to pave the way to a return to peace” (§285). If some amnesties are allowed at the end of the hostilities in a non-international armed conflict, it is necessary to define how Article 6(5) can be interpreted in order to determine the scope of this permission. The first chapter begins by exposing the use of IHL as an interpretative resource of the American Convention on Human Rights and the legal base justifying this use; continues by discussing Article 6(5); and concludes by addressing the State duty to prosecute international crimes committed in non-international armed conflicts.

The second chapter discusses amnesties for serious human rights violations before the I/A Court H.R., since the State of Colombia has affirmed that “from the Inter-American Court’s analysis in the case of the *Massacres of El Mozote and Nearby Places,* the Commission must conclude that international law prohibits amnesties in contexts in which peace is being sought, solely with respect to 'international crimes'” (IACHR, 2013, §263). The second chapter begins by presenting a comprehensive vision in relation to the State obligation to investigate, prosecute and punish serious human rights violations in the Inter-American Human Rights System; and concludes by addressing the scope of gross human rights violations.

According to Uprimny et al. (2014), the determination of the scope of the State duty to investigate, prosecute and punish involves defining the object of such an obligation or the conducts covered by it, as well as the specific obligations constituting this duty. In the first chapter, we discuss the scope of war crimes, crimes against humanity and genocide, or international crimes. In the second chapter, we address torture, extrajudicial execution and enforced disappearance, offenses repeatedly defined as serious human rights violations in the contentious case-law of the I/A Court H.R. regardless the existence of elements to be classified as international crimes. The State obligation to investigate, prosecute and punish serious human rights as such is discussed throughout this work.

The third chapter addresses amnesties exonerating partially and conditionally from criminal liability, intending to define international standards on the protection of human rights and State responsibility from mechanisms enshrined in the 2016 Final Agreement for the Termination of Conflict and the Construction of a Stable and Lasting Peace. Some legal scholars argue that “any peace accord between the Colombian government and the

FARC . . . will not be able to adapt to a strict interpretation of the duty to investigate, judge, and penalize" (Sánchez León, 2016, p.172), thus supporting amnesties exonerating partially and conditionally from criminal liability. The third chapter begins by presenting a discussion regarding the weighing of State obligations for serious human rights violations in times of transition from armed conflict to peace; continues by addressing the nationally-based selection and prioritization system over human rights violations; and concludes by discussing the proportionality of punishment and alternative penalties before HRL.

CONCLUSION

In 2012, Judge García Sayán appended a Concurring Opinion in the *Case of the Massacres of El Mozote and nearby places v. El Salvador* from which some legal scholars have claimed the emergence of some awareness on the part of the I/A Court H.R. regarding tensions in transitions from armed conflict to negotiated peace justifying a reassessment of the State obligation to investigate, prosecute and punish serious human rights violations in these specific transitional contexts. Through the analysis of Colombia, measures proscribed by international law that cannot be negotiated by actors involved in serious human rights violations committed in situations of armed conflict will be accurately defined. This work discussed exonerations and limitations from liability represented in amnesties enacted at the end of the hostilities in the light of standards of human rights protection and State international responsibility.

Some distinct and complementary ideas can be drawn from the Concurring Opinion of Judge García Sayán (I/A Court H.R., Judgment Series C No.252, 2012): ". . . a negotiated peace process attempts to ensure that the combatants choose peace and submit to justice" (§30), and if criminal punishes become difficult, "routes towards alternative or suspended sentences" (§30) such as "[r]eduction of sentences, alternative punishments, direct reparation from the perpetrator to the victim, and public acknowledgment of responsibility" (§31) could be designed and implemented, giving priority to the cases of those involved in the most serious human rights violations (§29) like "facts that can be categorized as war crimes or crimes against humanity in the definitions of the Statue of the International Criminal Court" (§24) and distinguishing "between the 'perpetrators' and those who performed functions of high command and gave the orders" (§30).

The discussion of the standards of human rights protection and State international responsibility begins by considering that in the Concurring Opinion of Judge García Sayán rendered in the *Case of the Massacres of El Mozote and nearby places v. El Salvador*, it was argued that there is no norm in positive international law that has explicitly proscribed any kind of amnesty, and that the only explicit mention of amnesty in a multilateral treaty is contained in Article 6(5) of 1977 Additional Protocol II. Under these circumstances, it was necessary to define what crimes could be validly covered by those amnesties, which required attending a joint analysis of IHL rules and HRL, applicable laws in situations of non-international armed conflict.

Considering that some cases concern serious human rights violations committed in situations of non-international armed conflict, the I/A Court H.R. has attended IHL as an interpretative resource in order to make a more specific application of the provisions of the American Convention on Human Rights when defining the scope of the State obligations. The recourse to this *corpus juris* has been legally based on Article 29(b) in accordance to which human rights shall be broadly interpreted; therefore, when interpreting the American Convention on Human Rights, it is always necessary to choose the alternative that is most favorable to the protection of the rights enshrined therein.

The recourse to IHL, particularly, to 1977 Additional Protocol II gains importance since this treaty is the only multilateral instrument in international law explicitly referring to amnesties. Furthermore, in the specific case under analysis, the armed conflict between the State of Colombia, a High Contracting Party to 1977 Additional Protocol II from August 14, 1995 and FARC guerrilla, a dissident armed group with territorial control, falls under the criteria for the application of this specific international treaty, and therefore, it can be validly used as an interpretative resource for the rights and obligations contained in the American Convention on Human Rights.

Article 6(5) of 1977 Additional Protocol II encourages States 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, at the end of the hostilities. From a joint analysis of IHL rules and HRL, it follows from Article 6(5) that war crimes, crimes against humanity, genocide and serious human rights violations cannot be amnestied, but offenses strictly related to the armed uprising against the State and minor infractions of the laws of war can be decriminalized.

There is a well-established duty to investigate, prosecute and punish war crimes, crimes against humanity and genocide committed in situations of non-international armed conflict. The I/A Court H.R. has stated that being involved in an armed conflict does not exonerate the State from respecting and guaranteeing human rights, but obliges it to act in accordance with these duties. It could not be different since the I/A Court H.R. has ruled over cases surrounded by cruelty to people taking no active part in the hostilities. The I/A Court H.R. has emphasized that from the existence of non-derogable human rights, serious human rights violations such as torture, extrajudicial execution and enforced disappearance cannot be committed even in states of emergency and even against guerrilla fighters placed *hors de combat.*

Colombia has contended that "from the Inter-American Court's analysis in the case of the *Massacres of El Mozote and Nearby Places,* the Commission must conclude that international law prohibits amnesties in contexts in which peace is being sought, solely with respect to 'international crimes'" (IACHR, 2013, §263). Nevertheless, we conclude that amnesties for serious human rights violations are also prohibited from Article 6(5), considering that 1977 Additional Protocol II intends to protect victims of non-international armed conflicts and the Preamble thereof recalls that international instruments relating to human rights offer a basic protection to human being. A restrictive interpretation of Article 6(5) would not find acceptance before a human rights tribunal.

It should also be considered that HRL is unconditionally applied. The State duty to investigate, prosecute and punish serious human rights violations is a non-derogable duty arising from HRL. In order words, interpretations emerging from the exclusive use of IHL do not override State obligations arising from HRL, for several reasons. Firstly, since IHL and HRL are both applicable to situations of armed conflict. Secondly, because attending IHL does not displace HRL as applicable law by nature before a human rights court. And thirdly, since by virtue of Article 29(b), the I/A Court H.R. attends IHL in order to enhance protection to people not taking part in the hostilities through a joint enforcement of IHL and HRL. Even if it was stated that amnesties for serious human rights violations are not prohibited from Article 6(5), 1977 Additional Protocol II cannot be interpreted to cover violations of human rights contained in the American Convention on Human Rights.

The State duty to investigate, prosecute and punish serious human rights violations not only rejects amnesties for these offenses, but also demands criminal proceedings before competent, independent and impartial judges. The rejection of amnesties by the I/A Court H.R. does not discriminate between self-amnesties benefiting certain regime and amnesties issued in democratic periods, but attends their *ratio legis:* to shield perpetrators of serious human rights violations from prosecution. The I/A Court H.R. has emphasized that serious human rights violations undermine non-derogable rights, even in states of emergency, and that the respect and guarantee of non-derogable human rights constitute *jus cogens* rules.

Amnesties for serious human rights violations result incompatible with State duties to investigate such acts, to guarantee freedom from such acts within their jurisdiction, and to ensure that they do not occur in the future. In addition, considering that non-derogable human rights represent fundamental values of the international community, acquiring the status of *jus cogens* rules that bind all the States independently of their will, amnesties preventing investigations, prosecutions, and punishments of gross human rights violations

such as torture, extrajudicial executions and enforced disappearance, even if they are not assessed as international crimes, would be vitiated of absolute nullity.

The reality is that the legal assets of the victims affected by conducts constituting gross human rights violations do not differ in the presence of their systematic commission or large-scale nature, that is to say, the existence or non-existence of elements allowing the assessment of the conduct as an international crime do not dilute the consequences of each individual act. In accordance with the case-law of the I/A Court H.R., the gravity of acts defined as gross human rights violations such torture, extrajudicial execution and enforced disappearance does not depend on their widespread or systematic perpetration, in a way that the presence of elements allowing the classification of the conduct as an international crime constitute aggravating circumstances, but not sole determinants of the State duty to investigate, prosecute and punish conducts undermining the most precious legal assets.

Before the condemnation of total amnesties for serious human rights violations and international crimes, the possibility of enacting some amnesties partially and conditionally exonerating from criminal liability started to be discussed. In particular, two exceptional mechanisms for investigation, prosecution and punishment of perpetrators of gross human rights violations set out in 2016 Final Agreement for the Termination of Conflict and the Construction of a Stable and Lasting Peace signed between Colombia and FARC guerrilla: a nationally-based selection and prioritization system relying on greater representativeness of gross human rights violations and level of command, and alternative penalties.

Firstly, regarding the nationally-based selection and prioritization system, Article 3 of Legislative Act 01/2017 provided that the Congress may determine selection criteria to focus efforts on criminal investigations of the highest perpetrators of all crimes assessed as crimes against humanity, genocide or war crimes *systematically committed*, and authorize conditioned renouncing to criminal prosecution of cases not selected. In accordance with the contextual elements of international crimes, the above would mean the possibility of prosecuting exclusively the most responsible for facts that are assessed as crimes against humanity. In order to be prosecuted, a serious human rights violation would thus require to be classified as an international crime, and then, verify its systematic commission.

There is already a precedent in the contentious jurisprudence of the I/A Court H.R. condemning amnesties approached in those terms. In the *Case of the Moiwana Community v. Suriname*, concerning serious human rights violations committed during the military regime and the armed conflict against the National Liberation Army of Suriname, whereby an amnesty law condemned crimes against humanity but left the door open to be applied to

gross human rights violations, the I/A Court H.R. reiterated its jurisprudence regarding prohibition of amnesties for serious human rights violations based on their impairment to non-derogable human rights.

Against this background, we concluded that amnesties limiting criminal liability in these conditions do not comply with Inter-American standards for the protection of human rights. The State duty to investigate, prosecute and punish gross human rights violations before the I/A Court H.R. does not distinguish between those who are the most responsible and those ones who are the least responsible, or among facts constituting all serious human rights violations. There is a possibility of declaring State international responsibility before the I/A Court H.R. for disregarding investigations, prosecutions and punishments based on the level of participation of the perpetrators, or relying on the greater representativeness and severity of cases already found among serious human rights violations.

It should be recalled that international responsibility can be attributed to a State not only by action or omission of State agents and acquiescence or tolerance regarding certain individuals who violate human rights–such as paramilitary groups–but also for neglecting investigations, prosecutions and punishments of serious human rights violations. In this sense, the I/A Court H.R. has progressively strengthened its role in the protection of human rights in the region, a continent marked by widespread atrocities, for the particular case, arising from non-international armed conflicts that have made of people taking no active part in the hostilities, target of the most blameworthy conducts.

Secondly, alternative punishments consisting of substitutes of imprisonment and reduced sentences were enshrined. These criminal benefits distinguish between offenders who recognize comprehensive, detailed and complete truth and those ones who do not; level of participation in serious human rights violations; and stage of the procedure where the recognition of responsibility is given. We concluded that Inter-American standards for the protection of human rights do not oppose to alternative penalties as long as rights of the victims to truth, reparation and non-recurrence are fulfilled and certain reasonable degree of proportionality is maintained in accordance with the seriousness of the offense and level of responsibility of the perpetrator. The imposition of "alternative-reduced" punishments, if they were to become derisory penalties, could represent an amnesty *de facto.*

In the light of HRL, gross human rights violations committed in situations of armed conflict demand from the States the fulfillment of a set of duties that must be understood as accumulative, not as alternative. The State has the duty to investigate and make known facts related to gross human rights violations, prosecute and punish offenders, compensate

the victims for material and moral damages, and dismiss public servants involved in these crimes. These obligations shall be fulfilled to the greatest extent possible and in good faith. This is the way to achieve real national reconciliation. In words of J. E. Méndez, former UN Special Rapporteur on Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment: just as peace is not only the absence of combat, reconciliation is not liable to be imposed by decree.

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ANNEX – Concurring Opinion of Judge García Sayán in the *Case of the Massacres of El Mozote and nearby places v. El Salvador*

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]

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

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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).

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.

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 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,*

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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.

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."

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]

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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.

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, 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

[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.

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.

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.

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

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 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

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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.

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 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