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# Justice Impugned

The Salvadoran  
Peace Accords and  
the Problem of Impunity

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Hemisphere Initiatives  
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## Introduction

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Ten months before national elections, scheduled for March 1994, delays and failures in implementing important provisions of the Salvadoran peace accords cast doubt on whether conditions for free and fair elections will exist during the political campaign period.

The first objective of the peace accords was to end the military conflict. Under the accords the Salvadoran government and the FMLN agreed to demobilize the guerrilla military forces and destroy their weapons under UN supervision, reduce the size of the Salvadoran armed forces and reintegrate FMLN combatants and their supporters into Salvadoran society. Significant progress has been made toward achieving this objective. The FMLN military structure has been dissolved and its weapons destroyed. The army has been reduced in size. Progress has been made in re-integrating former FMLN combatants, but land transfers and other important reintegration programs are behind schedule and the object of dispute.

The peace accords also sought to abolish repressive military structures and the structures of *impunity* that allowed those who violated human rights to escape punishment. The accords called for:

- Abolition of security forces responsible for human rights abuses;
- The creation of a new civilian police force independent of military control;
- The creation of an Ad Hoc commission empowered to review the records of all military officers and make binding recommendations for the transfer or removal of officers with unacceptable human rights records;

- The creation of a Truth Commission authorized to investigate significant human rights abuses that occurred during the war to establish responsibility for those acts and make recommendations related to the cases examined and to prevent the recurrence of such acts;
- Reforms of the judicial system to increase its independence.

Some progress has been made in abolishing repressive military structures: the Treasury Police and National Guard were officially dissolved, as were the army's special counterinsurgency battalions. The armed forces no longer have constitutional responsibility for internal security functions. These are very tenuous advances, however. The Treasury Police and National Guard units were absorbed into the armed forces and given new responsibilities as military police and as border guards, albeit in reduced numbers. Units of the counterinsurgency battalions were similarly incorporated within regular battalions. The National Police, which under the accords was to be gradually abolished and replaced by a new civilian police force, has actually increased in size and some former members of security forces officially dissolved have been transferred to the National Police.

Dismantling the structures of impunity has proven especially difficult. The government response to the reports of the Ad Hoc and Truth Commissions raises serious doubts about the extent of civilian control over the military and the continuing role of the judicial system in perpetuating impunity. A blanket amnesty approved immediately after the March release of the Truth Commission report has virtually assured impunity for past violations. The findings of the human rights division of ONUSAL, the U.N. observer

mission in El Salvador, based on its close monitoring of the criminal justice system, reinforce the suspicion that past practices that permitted impunity still prevail.

Elections do little to guarantee democracy if there is no effective means of holding accountable those in power who commit abuses. Under the original timetable of implementation of the peace accords, the structures of military repression were to be abolished well in advance of the electoral period that will precede the March 1994 elections.

That is no longer likely. Top army officers whose removal was required by the Ad Hoc commission remain in office at this writing, and will apparently remain in the armed forces until the end of the year. Those named as responsible for major human rights crimes by the Truth Commission have been given a blanket amnesty by the Legislative Assembly. No action has been taken to remove them from the military or public office. Training and deployment of a new civilian police force is underfunded and well

behind schedule, while former military men have been incorporated into its ranks in violation of the Accords. The judicial system is still controlled by a highly politicized and defiant Supreme Court which was itself identified by the Truth Commission as a principal impediment to justice.

As we noted in the first Hemisphere Initiatives report last December<sup>1</sup>, international support for the peace process has been a critical element in achieving what progress has been made. Continued progress is going to be even more difficult in the months ahead as political actors in El Salvador jockey to position themselves for the election campaign. Yet without further progress the elections will take place under conditions in which the free exercise of individual and political rights is impossible to guarantee and abuses all but impossible to remedy.

In this report we examine the status of efforts to implement provisions of the accords designed to abolish the system of impunity and to establish an independent judiciary.

## The Nature of Impunity

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El Salvador in the 1980s presented a textbook case of a state that failed to guarantee human rights. Tens of thousands of human rights abuses were committed during that decade<sup>2</sup>: they included massacres of civilians, extrajudicial executions often involving multiple victims, targeted political killings, disappearances, and torture. Only a few of these acts were investigated before the end of the war, still fewer resulted in prosecution, and the number of individuals actually convicted for political murder was trivial. Those who masterminded the killings were never even tried.

Those who committed crimes were protected by a justice system disinclined to investigate. According to the Truth Commission, agents of the state were responsible for the vast majority of these crimes. Police investigators were part of the military institution responsible for most of the killing, and showed no interest in identifying or locating culprits. The Attorney General's office was weak and politicized. The executive branch showed itself unwilling or unable to take meaningful action. Often no investigation took place. In other cases, investigations were botched from the outset: evidence disappeared and courts made patently absurd rulings. Those responsible for the cover-up were never prosecuted.

The Truth Commission report graphically illustrates this pattern.<sup>3</sup> For example, the December 1981 murder of the head of the Salvadoran agrarian reform agency and two U.S. labor advisors in the coffee shop of the Hotel Sheraton was only reluctantly investigated because of U.S. government pressure. The killing was carried out by two National Guardsmen in civilian clothing, on the direct orders of a National Guard intelligence officer and an army captain linked to death squad activities. Rodolfo Viera had become a death squad target because of the implementation of the March 1980 agrarian reform which expropriated — with compensation — the holdings of large landowners.

After five years of U.S. pressure, the triggermen were convicted in February 1986. The officers who gave them weapons and the order to kill were repeatedly protected by the judicial system. One judge permitted Lt. Lopez Sibrian to change his appearance to prevent witnesses from identifying him in a line-up. A powerful Supreme Court justice, who was the uncle of the other officer, reputedly intervened on various occasions to protect his nephew, who was also reportedly involved in the killing of Archbishop Romero.

The two triggermen were released from prison in December 1987, when a broad amnesty law was applied to their case and the prosecution was not notified so that it could file a timely appeal.

Several provisions of the Salvadoran peace accords were designed to weaken this system of impunity: an Ad Hoc commission was established to review the records of the officer corps and make binding recommendations to transfer or remove those with records of human rights abuse; a Truth commission was authorized to investigate major cases of human rights abuses in order to identify those responsible and make recommendations to prevent recurrences; the accords called for reforms of the justice system to establish an independent and professional judiciary; the accords authorized the replacement of the militarized national police by a new national civilian police force with professional training and technical capacity to conduct scientific investigations.

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## Implementation of the Report of the Ad Hoc Commission

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The three Salvadoran civilians named to the Ad Hoc Commission, after consultation with the Salvadoran government and the FMLN, reviewed records and available information, interviewed officers and ultimately recommended to the President the transfer or discharge of 102 officers, including most of the High Command<sup>4</sup> President Cristiani declined to carry out the recommendations of the Ad Hoc Commission within the time frame established in the Accords, alleging that their proceedings had been unfair and that to do so would destabilize the peace process.

In November, 1992, after intense negotiations with top UN envoy Alvaro de Soto, President Cristiani agreed to issue an order (shown to de Soto) that would implement the Ad Hoc recommendations by December 31, 1992. Based on this agreement, UN Secretary General Boutros Boutros Ghali certified to the leadership of the FMLN that compliance was sufficient to obligate the FMLN to demobilize the final 20% of their combatants, and to begin UN-supervised destruction of their weapons.<sup>5</sup>

The order issued by President Cristiani on January 1, 1993, differed significantly from the one agreed to in November. The Secretary General reviewed the measures and time frame proposed by the Government and accepted the proposed actions in 87 cases, even though they did not fully conform to the procedures established in the Accords for carrying out the findings of the Ad Hoc commission. In 15 cases, however, the Secretary General rejected the Government's proposal as "not in compliance" with the Commission's recommendations and therefore "not in conformity with the Peace Accords."<sup>6</sup>

The 15 officers included seven assigned to Salvadoran embassies abroad as military attaches and eight who were to retain leadership positions in the armed forces throughout the remainder of President Cristiani's term (until June 1994). Under the original calendar of the Accords the Ad Hoc commission recommendations were to have been carried out by mid-October 1992.

Despite the U.N.'s public display of dissatisfaction with his actions, President Cristiani refused to speed up the process. He maintained that discharging certain key officers could destabilize the peace process, and he told U.S. journalists that the Ad Hoc commission report suffered from legal defects.<sup>7</sup>

This is where matters stood until March 12, 1993, three days before the Truth Commission report was scheduled to be released, Defense Minister Ponce offered his resignation to President Cristiani, alleging U.S. pressure.<sup>8</sup> President Cristiani did not immediately respond to Ponce's offer.

After the Truth Commission report found that virtually the entire High Command of the Armed Forces had been involved in the 1989 killing of the Jesuits, the Government presented the U.N. with a new timetable for removing the 15 disputed officers from active duty. The new timetable called for removing the officers from official duties by June 30, 1993, but maintaining them on the payroll until the end of the year. This timetable, which was accepted by the U.N., is closer to President Cristiani's original proposal than to the calendar Mr. Cristiani worked out with the U.N. last November. There are indications that some steps have been taken to implement this timetable.<sup>9</sup>

Difficult as this process has been, it has nonetheless established an important precedent. Military officers have been evaluated on their human rights record and discharged based on the decisions of civilians. While the Ad Hoc review was inevitably incomplete, since the Commission had neither the time nor sufficient information to review more than 2200 officers, the inclusion of officers in the High Command and others in the leadership positions in the Army had an important symbolic effect. This was an unprecedented civilian review process, which went so far as to name and cashier ranking officers, a major step toward ending impunity.

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# Impunity and the Mandate of the Truth Commission

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The Truth Commission, comprised of former Colombian President Belisario Betancur, former Venezuelan Foreign Minister Reinaldo Figueredo, and U.S. law professor and honorary president of the Interamerican Human Rights Institute Thomas Buergenthal, was given a broad mandate 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." In carrying out this task, the Commission was to take into account the "exceptional importance" of the acts investigated, "their characteristics and impact, and the social unrest to which they gave rise," as well as creating confidence in the positive changes promoted by the peace process and assisting the transition to national reconciliation.<sup>10</sup>
- Recommend legal, political or administrative measures based on its investigations, including recommendations to prevent the repetition of the acts investigated and to promote national reconciliation.

The Government of El Salvador and the FMLN agreed to cooperate fully with the Commission to permit "access to sources of information available to them." The parties also agreed to "undertake to carry out the Commission's recommendations."<sup>11</sup>

The Commission's crucial role in overcoming impunity *on the part of officers of the armed forces* was specified in the final Chapultepec Peace Accords, which referred this issue to the Truth Commission for "consideration and resolution." The agreement specifically recognized that the Commission's task was "without prejudice to the principle....that acts of this nature, regardless of the sector to which their perpetrators belong, must be the object of exemplary action by the law courts so that the punishment prescribed by law is meted out to those found responsible."<sup>12</sup>

## The Truth Commission Report

The Truth Commission's report was officially presented to the U.N. Secretary General and the parties on March 15, 1993, at a ceremony in New York attended by many representatives of other countries.<sup>13</sup> There were few surprises in the findings, but the report provided new information about some cases, particularly the widely rumored involvement of the Armed Forces High Command in the planning and cover-up of the Jesuit murders. The Commission confirmed allegations that Roberto D'Aubuisson, founder of ARENA (the governing party), ordered the 1980 murder of Archbishop Oscar Romero. It also confirmed that D'Aubuisson ran death squads using military intelligence units and it suggested that powerful businessmen and other politicians were involved in planning and financing death squad operations. The Commission's report warned that absent decisive preventive action, death squads can still be reactivated.

The Report set forth the gruesome reality of the 1981 El Mozote massacre (in which hundreds of campesinos died) and named a number of the officers involved. Internationally recognized forensic anthropologists and other experts working with the Commission concluded that the Government's contention that the hundreds of deaths in the area had been the result of combat or a clandestine guerrilla cemetery was not consistent with the evidence.<sup>14</sup>

The FMLN was found responsible for its policy of killing mayors in conflictive areas as well as other killings of civilians. The report assigned responsibility for the killing of 11 mayors to six leaders of the People's Revolutionary Army, one of the five organizations that make up the FMLN.

## Recommendations of the Truth Commission

Although the Commission made clear that those responsible for serious crimes should be punished, it stopped short of recommending prosecution under the existing judicial system. The Commission described the deficiencies of the Salvadoran justice system and noted that "If the judicial power had functioned satisfactorily, not only would acts that the Commission had to investigate have been clarified opportunely, but the appropriate sanctions would have been applied." It also found that "the Judicial Branch continues under the leadership of the same persons whose failure to act was part of the situation that now needs to be overcome and nothing indicates that their practices will change in the immediate future."

Arguing that the current administration of justice fails to fulfill minimum requisites of fairness, the Commission called upon Salvadoran society to make changing this situation a "primary goal." It urged pardons for those who remain in prison while accomplices and masterminds remain at liberty.<sup>15</sup> The Commission also urged the Supreme Court to resign.

The report called for the discharge from the Armed Forces of all officers named in the report for perpetrating or covering up violations, and for the discharge of military officers or public officials named for failing to collaborate in the investigation and punishment of serious acts of violence. Those no longer in office were to be barred from public office for 10 years. The Commission also recommended that all those named for their participation in serious acts of violence be barred from holding any public office for at least ten years and permanently barred from any activity related to public security or national defense. The Commission recommended a series of measures, including full implementation of the Peace Accords, to assure that the kinds of acts examined in its report not be repeated, and it proposed measures aimed at promoting national reconciliation.

## Reaction to the Truth Commission Report

The report's recommendations provoked a verbal firestorm of reaction in El Salvador. Drawing the most fire were the Commission's call for the voluntary resignation of the entire Supreme Court and its

recommendation to ban those found responsible in the report for human rights violations from holding public office of any kind for 10 years. Chief government negotiator Oscar Santamaría publicly rejected this last recommendation as contrary to established legal principles.<sup>16</sup> President Cristiani argued that such a prohibition would be unfair because others equally guilty were not named.

The military High Command rejected the report as "unfair, incomplete, illegal, unethical, biased and insolent."<sup>17</sup> The Supreme Court *en banc* held a press conference to reject the Report's conclusions and recommendations on the grounds that it aimed to, "subvert the order established by the Constitution, international treaties or legislation in effect in El Salvador."<sup>18</sup> Supreme Court President Gutierrez Castro later said that signing the agreement to establish the Truth Commission had been a "stupidity".<sup>19</sup>

ARENA legislators and political figures also attacked the report as biased and unfair, claiming that it focused on government abuses while devoting insufficient attention to the FMLN's use of violence.<sup>20</sup> The ARENA party rejected the Commission's findings about ARENA founder Roberto D'Aubuisson's role in the killing of Archbishop Romero and death squad activity in general.

The former FMLN General Command—the leaders of the five organizations that comprise the FMLN—stated that they would accept the recommendation of the Truth Commission and refrain from seeking public office, along with the FMLN members named in the report, if the Government similarly complied. There is no indication that other political parties intend to comply with such a ban.

The U.N. has emphasized that the recommendations of the Truth Commission are just as binding as any other aspect of the Accords. Despite this, members of the Government's negotiating team rejected the Truth Commission report,<sup>21</sup> and President Cristiani also expressed his dissatisfaction. The President said that he would only implement those recommendations within the jurisdiction of the Executive that were compatible with the Constitution.<sup>22</sup>

## The Government's Amnesty Law

Three days after publication of the Truth Commission's Report, President Cristiani, in a nationally televised address, urged an immediate and general amnesty covering all those named in the report. Two days later the ARENA party pushed through a far-reaching amnesty law despite objections by opposition parties in the legislature. Previous legislation related to the Accords has been passed by consensus or compromise.

The new amnesty law superseded the "Law of National Reconciliation," passed days after the Peace Accords were signed in January 1992. That law stipulated that amnesty could not be granted to persons convicted by juries (an exception intended to prevent the release of the two officers convicted for the Jesuit killings) or to those found responsible for serious acts of violence in the Truth Commission report. The 1992 law specifically provided that the Legislative Assembly could take any action it chose on these cases *six months after the publication of the Truth Commission report*.

The 1993 amnesty law ignored the six month requirement and granted a general amnesty virtually without exceptions. Individuals denied amnesty under the 1992 law were quickly freed, including the two officers convicted in the Jesuit case.<sup>23</sup> The new amnesty law also precluded prosecutions and civil responsibility.<sup>24</sup>

In addition to covering political crimes and common crimes connected to political crimes, this amnesty law covers justice system crimes such as judicial resolutions that knowingly go against the law or the facts (*prevaricato*), bribing jurors and inadequate representation of clients (*patrocinio infiel*).<sup>25</sup> Such crimes are not normally covered by amnesty laws and reflect the focus on the administration of justice in the Truth Commission report. Their inclusion appears to violate the Constitution, which specifies the kinds of crimes for which amnesty can be granted.

U.N. Secretary General Boutros-Ghali expressed concern about the amnesty law and reminded the parties that compliance with the Truth Commission recommendations is mandatory. Salvadoran human

rights groups have filed constitutional challenges to the amnesty law. The Human Rights Ombudsman's office publicly criticized the way in which the amnesty law was passed and the inclusion of common crimes. The Ombudsman's office stressed the importance of giving constitutional challenges to the law a fair hearing.<sup>26</sup> Since challenges to the amnesty law will be decided by the current Supreme Court, however, there is little reason to believe that the law will be thrown out.

Despite the failure to implement specific recommendations, publication of the report has had an impact on the peace process in El Salvador. The moral weight of the Truth Commission report makes it difficult for any of those named to run for public office in the 1994 elections. Although some steps have yet to be taken, publication of the Truth Commission report appears to have resulted in finally carrying out the Ad Hoc commission's recommendations.

## The Link Between Impunity and Death Squad Activity

The possibility of a resurgence of death squad activity poses a very serious threat to the consolidation of democracy in El Salvador. The Truth Commission said that it had no doubt about the existence of close links between members of the business community and death squads. It stressed the potential danger that businessmen or members of wealthy families may still decide to finance paramilitary assassination squads, acting with impunity.<sup>27</sup>

While the Commission's report explained how death squads functioned and the relationship between civilians (who financed and gave orders) to military men, it named few names. The Commission instead emphasized the need for further investigation and action to eliminate the threat of renewed death squad activities. It called for:

- Investigation of the proven structural connection between death squads and state agencies by Salvadoran institutions;
- Institutional cleansing of military intelligence services that were used to identify death squad victims and identification of those who were responsible for these practices;

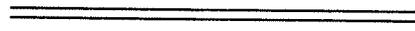
- Investigation and clarification of the role of members of the business community and some wealthy families in financing and directing death squads;
- Recognition by the Government of the serious danger that death squads will engage in illegal activities such as drug trafficking, arms trafficking and kidnapping for profit.<sup>28</sup>

The Commission noted that the government of the United States tolerated the actions of Salvadoran exiles living in Miami who directly financed and otherwise supported death squads, particularly between 1979 and 1983. It urged other investigators with more time and resources to uncover this "tragic history".

The Commission urged the Salvadoran government to take measures to prevent the resurgence of death squads, including soliciting international cooperation to ensure their total and absolute eradication. In this vein, the Commission noted that "to find out the truth about a series of specific violations and assign responsibility, it will be necessary to investigate serious acts of violence committed by death squads case by case."<sup>29</sup> It recommended that an in-depth investigation be undertaken with the support of police from friendly countries.

The Commission's insistence on the need for further investigation and measures to prevent any possible resurgence of death squads highlights an issue crucial to overcoming impunity and guaranteeing respect for human rights. Yet, the persistence of structures of impunity makes it difficult to take these measures. The recent amnesty reflects an unwillingness to look further into the past. Although the Legislative Assembly could form a special commission to investigate death squads, in practice, such a commission would be dominated by members of the ARENA party, many of whom have been linked to death squad activities.

Any systematic resumption of death squad activities will be fatal to prospects for a free and fair electoral process. Investigating the composition and functioning of earlier death squads is an essential step to preventing their recurrence. The United States can assist such an investigation by releasing all information in the hands of any U.S. agencies or personnel regarding death squad activities in El Salvador and support activities in the United States. An even more important necessity is the creation of a judicial system in El Salvador willing to take effective action against death squads, instead of permitting them to act with impunity.



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## The Salvadoran Justice System

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The Salvadoran justice system was and is a weak link in the chain of institutions needed to support and maintain a democratic society. Power in the justice system resides in the Supreme Court, which acts as the ultimate constitutional and appellate authority. The Supreme Court also names all lower court judges, is responsible for disciplinary and administrative functions for judges and court personnel, and authorizes and suspends lawyers from practice.

Corruption has been endemic in the system. It is notorious for its failure to investigate serious crimes. Neither police, prosecutors nor judges have fulfilled their duties to investigate serious crimes, especially when the military was involved. Investigations, albeit flawed and limited, were only carried out in cases where external pressure was intense. Even in those cases, evidence was often ignored or distorted. Courts have been adept at finding means not to prosecute or to dismiss cases in the face of overwhelming evidence.

Defendants' rights have been routinely ignored. Habeas corpus protection is ineffective. Defendants are jailed for years, without trial, often on the basis of forced "extrajudicial" confessions. Courts routinely ignore evidence exonerating defendants or confirming torture. Defendants may languish in prison for years awaiting trial or release, sometimes longer than the maximum sentence they could possibly receive.

Accords reached in April 1991 called for Constitutional changes aimed at professionalizing the Judicial system. The key changes:

- Prior to the reforms the National Council on the Judiciary nominated trial and appellate judges, but was dominated by Supreme Court representatives. Under the changes its members were to be appointed by a two-

thirds vote of the Assembly. The new Council would also submit nominations for the Supreme Court.<sup>30</sup>

- The Assembly, by 2/3 vote would elect Supreme Court judges for staggered terms of 9 years from the Council's nomination lists.
- Judges were to be barred from performing notarial functions — often a potential source of conflicts of interest. Six percent of the national budget was to be set aside for the judicial branch.

Implementation of these reforms has been a slow process. The Accords foresaw that the new formula for electing Supreme Court justices would take effect at the end of the current Court's term, June 1994.<sup>31</sup> Different conceptions of how much to modify the existing National Council on the Judiciary delayed passage of enabling legislation, scheduled in the Accords calendar for completion in May 1992, until December. The Supreme Court and its allies in the governing ARENA party sought to retain Court control over the Council, while opposition parties pushed to make the Council fully independent and expand its powers along the lines established in the constitutional reform.<sup>32</sup>

Faced with a deadline to approve legislation before the end of the cease-fire period, the legislature approved a compromise bill, which did not fully implement all the provisions included in the Accords. The Supreme Court retains significant control over the Council through selection of two members (and two others who are lower court judges), disciplinary control over Council members, and potential budget control. The new Council was finally selected on April 29, 1993, and must now draft its regulations before beginning work.

The Truth Commission, taking up an issue raised by the UN's Independent Expert, Prof. Pedro Nikken, urged that the law be modified so that the Supreme Court would not have the power to remove Council members. ONUSAL's Sixth Report recommended having Council members elected directly by the sectors they represent without any role for the Legislative Assembly.<sup>33</sup> ONUSAL also called for a law to implement the Accords' provision calling for Council representation of sectors not directly related to the administration of justice.<sup>34</sup>

The Commission faulted the judicial system for not carrying out investigations because of corruption, timidity and weakness. "If the judicial power had functioned satisfactorily, not only would the acts that the Commission had to investigate have been clarified opportunely, but the appropriate sanctions would have been applied."

The report was especially critical of the Supreme Court: "Moreover, the Judicial Branch continues under the leadership of the same persons whose failure to act was part of the situation that now needs to be overcome and nothing indicates that their practices will change in the immediate future." Overcoming this situation, it said, should be a "primary goal" for Salvadoran society.

## Replacement of the Supreme Court

The Truth Commission called for replacing the Supreme Court before June 1994. It said: "Taking into account the Judicial Branch's enormous responsibility for the impunity surrounding the serious acts of violence such as those described in the Report, the continued delay in renovating the Supreme Court cannot be justified, and its members should permit the immediate application of the Constitutional reform by resigning from their positions."<sup>35</sup>

Supreme Court President Mauricio Gutierrez Castro, singled out for criticism in the Truth Commission report, dismissed its recommendations and told reporters that "only God" could remove him from office before completion of his term. In the unlikely event the Supreme Court does resign, it will be difficult to select new magistrates because the new National Council on the Judiciary is not yet functional.<sup>36</sup>

There is little likelihood that the Supreme Court will resign, but the Truth Commission recommendation that it do so has had repercussions within El Salvador. At an international level, the Commission's recommendation has deprived the current Court of legitimacy. Most Salvadoran observers believe that the report has also effectively precluded the re-election of sitting justices. It also ended talk of a presidential candidacy by the Supreme Court President, Dr. Mauricio Gutierrez Castro, an ARENA party member rumored to have presidential ambitions.

## Lower Court Reforms

The Truth Commission recommended a series of constitutional changes that would limit the powers of the Supreme Court to control the entire judicial system. It proposed that:

- Lower court judges should not be named and removed by the Supreme Court but by an independent National Council of the Judiciary.
- Each judge should be responsible for court administration, rendering accounts to the National Council on the Judiciary.
- A special independent body — and not the Supreme Court — should be responsible for authorizing lawyers and notaries to practice and suspending or sanctioning them for malpractice.

The Truth Commission called for using the increased Judicial budget mandated by the Accords (6% of the national budget implemented over a three year period) to create new courts and improve the salaries of court personnel. To compensate for the loss of notarial income, judicial salaries were raised substantially this year.

The Commission recommended that a new Career Judicial Service Act<sup>37</sup> establish performance criteria for judges: demonstrated judicial vocation; efficiency; concern for human rights; honesty and impartiality in their actions. ONUSAL also called for increased judicial oversight, citing the need to investigate and sanction infractions such as: accepting statements given under intimidation; permitting illegal or arbitrary arrests; failing to carry out adequate judicial inspec-

tions, including autopsies; delaying justice by extended pretrial detention.<sup>38</sup>

Few of these recommendations have been implemented because of delays in creating the National Council on the Judiciary, which must authorize the changes.

## Due Process and Human Rights

To reinforce due process rights, the Truth Commission specifically recommended:

- The total suppression of extrajudicial confessions as evidence.<sup>39</sup> Assuring, in all circumstances, respect for the presumption of innocence of prisoners.
- Strict compliance with the maximum periods for police and judicial detention, establishing immediate sanctions for those who violate these time frames.
- Strengthening the exercise of the right of defense from the beginning of proceedings.

The Truth Commission recommended that guarantees against unlawful detention (*habeas corpus*) and unlawful government action (*amparo*) be made more accessible by giving jurisdiction to trial court judges and possibly justices of the peace. Currently, petitions are normally presented to the Constitutional Chamber of the Supreme Court.<sup>40</sup> Both the Truth Commission and ONUSAL recommended that Salvadoran law establish that these constitutional protections cannot be suspended under any circumstance, even when some constitutional guarantees are suspended under a state of exception.<sup>41</sup>

The need to reform *habeas corpus* proceedings in particular and constitutional justice in general is widely accepted. AID sponsored law reform projects have elaborated two proposals to improve current law. Yet these proposals have not gotten beyond the discussion stage. It appears unlikely that politicians will make this a priority before next year's election, particularly if the Supreme Court opposes proposed reforms.

The Commission also recommended reforms to administrative detention procedures to protect against violations of personal integrity. It proposed the passage of a law to clearly and narrowly establish which government functionaries can order an administrative detention, which can carry it out, on what basis and for how long. The Commission stated that only the courts, and not the police, should be allowed to impose sanctions that restrict liberty.

Police-imposed sanctions for petty misdemeanors have been the subject of intense scrutiny by ONUSAL. An ONUSAL study of petty misdemeanor arrests in November 1992 found that police arrested and sentenced some 5000 persons per month to terms of up to 15 days. Due process protections were totally lacking.<sup>42</sup> ONUSAL suggested transferring jurisdiction over petty misdemeanors to the judicial system.

The Minister of Justice maintains that some of these reforms are already underway. While a bill to ban extrajudicial confessions under all circumstances languishes in the Legislative Assembly, the public defense law approved in May 1992 practically eliminated the use of extrajudicial confessions by requiring that detainees have access to counsel before giving statements to police.<sup>43</sup> A public defender program exists, but defense lawyers are not available to all those arrested, particularly outside the major cities.

The Truth Commission lauded the judicial reform efforts of the Ministry of Justice, which spearheads an AID-funded law reform effort.<sup>44</sup> The Ministry of Justice's law reform project has prepared a draft bill to reduce the maximum period of administrative detention from the current 72 hours to 24 hours. Disagreements among government officials have prevented the Minister of Justice from submitting this proposal to the Legislative Assembly, however.

The Truth Commission reinforced the human rights recommendations of ONUSAL.<sup>45</sup> ONUSAL's Human Rights Division has published six human rights reports since July 1991. All have included recommendations designed to improve El Salvador's human rights situation. According to ONUSAL, "the recommendations as a whole have yet to be dealt with in a manner consistent with the provisions of the San José Agreement."<sup>46</sup> In its latest report,

ONUSAL stated that it has been discussing the establishment of a follow-up mechanism with the Government and the FMLN and that "in the short term, there are plans for establishing the consultative mechanisms required for systematic, effective and mutually agreed follow-up to the recommendations."

The Commission addressed the need to strengthen the Human Rights Ombudsman's office, born of the Accords. The Ombudsman's office has been slow in establishing itself and building public confidence.<sup>47</sup> It recommended that the Ombudsman's Office:

- Evaluate, with the support of ONUSAL and the participation of all interested sectors

(governmental and nongovernmental), its most immediate needs and priorities.

- Extend its presence throughout the country, with provincial offices.
  - Make greater use of its powers to visit any place or installation in the country, especially detention sites.
  - Maintain a centralized and up-to-date list of all persons arrested, their location and legal situation. The appropriate authorities should inform the Ombudsman's office of all arrests they carry out and identify personnel involved.
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## Conclusions: Impunity and National Reconciliation

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Election campaigns tend to polarize political debate. The emphasis is on identifying differences rather than searching for consensus. There are signs that the electoral season has begun in El Salvador. ARENA selected Armando Calderon Sol as its presidential candidate in April and The Christian Democratic Party has been engaged in a tense primary contest between Fidel Chavez Mena (its candidate in 1989) and Abraham Rodriguez (a founder of the party, businessman, and member of the Ad Hoc Commission). In early May, Rubén Zamora was selected as the standard-bearer for the Democratic Convergence, a coalition of leftist parties that does not include the FMLN. The FMLN is also in a process of internal debate over electoral strategy.

As political issues become increasingly filtered through the prism of electoral struggle, progress on implementation of the peace accords is slowing down. The fierce denunciations of the Truth Commission report were the clearest sign that further steps to dismantle the structures of impunity will be difficult to achieve during the next ten months.

This prospect poses real problems for guaranteeing free and fair elections. Under the original timetable, units of the new National Civilian Police would be deployed throughout the country prior to the elec-

tions. Delays in training and deployment make it unlikely that PNC units will be deployed in more than seven of El Salvador's fourteen departments by election time. While that will provide some assurances in departments where the war was most bitterly contested, it will leave the heavily populated western departments still patrolled by units of the old National Police.<sup>48</sup>

Thus, although significant progress toward reducing the role of the armed forces in Salvadoran life has occurred, the basic structures of impunity remain intact. The justice system remains largely unaffected by reforms, military and security forces with a record of human rights abuse remain active, and as yet there is no significant evidence of the ability of civil society to hold accountable those in power who abuse their trust.

The months ahead present great risks to the peace process. At stake is the degree and substance of change achieved through the peace negotiations. The United Nations, the United States, and other international actors have supported the peace process and cited it as a model for the solution of other conflicts. Their strengthened support will be needed during the long electoral period ahead.

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## Notes

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<sup>1</sup> Endgame: A Progress Report on Implementation of the Salvadoran Peace Accords (Cambridge, MA: The Hemisphere Initiatives, Inc., December 3, 1992).

<sup>2</sup> The Truth Commission received direct testimony concerning more than 7,000 alleged violations. Indirect testimony was presented to the commission alleging 18,000 abuses, of which 13,000 were analyzed. The Commission estimated that some 3,000 cases were repeated, leaving a total of at least 22,000 victims [?] presented to the Commission. See De la Locura a la Esperanza, la guerra de 12 años en El Salvador, Informe de la Comisión de la Verdad para El Salvador, (United Nations: San Salvador/New York), March 15, 1993 (hereinafter "Truth Commission Report") at 41.

<sup>3</sup> See, e.g., the Truth Commission report sections on the Jesuit murders, the Las Hojas massacre, the killing of Archbishop Romero, the murders of Viera, Hammer and Pearlman (the "Sheraton" case), and the El Mozote massacre. Truth Commission Report at 44-50, 76-81, 132-138, 118-125.

<sup>4</sup> The report actually listed 103 officers, but one was no longer in the armed forces when the report was issued.

<sup>5</sup> See Hemisphere Initiatives, "Endgame: A Progress Report on Implementation of the Salvadoran Peace Accords," Dec. 3, 1992, at 10-12, for background on the Ad Hoc Commission, its mandate, and the agreements regarding implementation of its recommendations.

<sup>6</sup> Letter of U.N. Secretary General Boutros Boutros-Ghali to U.N. Security Council, Jan. 7, 1993.

<sup>7</sup> At President Cristiani's request, the Ad Hoc recommendations have remained confidential. Even in the case of officers ordered removed from the military, no reasons were given for their inclusion in the Ad Hoc list. Many of those included, however, were known to have been responsible for serious human rights violations or to have failed to take appropriate action when human rights violations were committed by troops under their command.

<sup>8</sup> On February 17, U.S. Secretary of State Christopher informed President Cristiani by letter that the United States was withholding delivery of current year military aid pending full compliance with the report of the Ad Hoc commission.

<sup>9</sup> The New York Times reported on May 5, 1993, that Cols. Nelson Ivan López y López and Oscar Alberto León

Linares had been removed from their command posts. Both were included in the Truth Commission report for their role in covering up responsibilities in the Jesuit killings. León Linares was also cited for his role in the 1983 Las Hojas massacre and both are among the eight officers President Cristiani sought to retain in command positions throughout his term.

<sup>10</sup> United Nations, El Salvador Agreements: The Path to Peace, Mexico Agreements, April 27, 1991, at 29-30.

<sup>11</sup> United Nations, El Salvador Agreements: The Path to Peace, Mexico Agreements, April 27, 1991, at 31.

<sup>12</sup> United Nations, El Salvador Agreements: The Path to Peace, New York Agreement, Jan. 16, 1992, Chapter I (Armed Forces), §5 End to Impunity, at 53.

<sup>13</sup> Naciones Unidas, De la Locura a la Esperanza: la guerra de 12 años en El Salvador. Informe de la Comisión de la Verdad para El Salvador, Hereinafter "Truth Commission report."

<sup>14</sup> Add TC Report cite.

<sup>15</sup> Truth Commission Report at 196.

<sup>16</sup> Interview Channel 12 television, March 19, 1993, as reprinted in INSISTEM, March 19, 1993.

<sup>17</sup> "Posición de la Fuerza Armada de El Salvador ante el Informe de la Comisión de la Verdad," nationally televised on March 23, 1993, and published in El Diario de Hoy, March 24, 1993.

<sup>18</sup> "Respuesta Oficial de la Corte Suprema de Justicia al Informe y Recomendaciones de la Comisión de la Verdad," March 22, 1993, published in Diario Latino, March 29, 1993.

<sup>19</sup> Interview, Channel 2 television, April 14, 1993, as cited in El Rescate Human Rights Department Report from El Salvador, March 29 - April 19, 1993.

<sup>20</sup> The Report attributed 85% of the violations examined to the military, security forces or others allied with them. Only 5% of the violations recorded were charged to the FMLN.

<sup>21</sup> Chief government negotiator Oscar Santamaría maintained that the Commission had exceeded its mandate, while the military's representative for the negotiations, Gen. Mauricio Vargas, said the report was biased and incomplete because it did not address the FMLN's attempt to overthrow the Government through violence. See Interview with Dr. Oscar Santamaría, Minister of the Presidency, Channel 12 television, March 19, 1993, as

reprinted in INSISTEM, March 19, 1993; Gen. Mauricio E. Vargas, "La otra cara de la verdad," La Prensa Grafica, April 4, 1993.

<sup>22</sup> Message Directed to the Nation by his Excellency the President of the Republic, Lic. Alfredo Cristiani, on March 18, 1993, as published in La Prensa Grafica, March 19, 1993.

<sup>23</sup> The Central American Province of the Society of Jesus and the Truth Commission had urged that these officers be pardoned. The application of the amnesty, as distinguished from a pardon, eliminates the offense and applies to other officers never prosecuted, such as Generals Rene Emilio Ponce, Juan Orlando Zepeda, and Juan Rafael Bustillo. The Jesuits — and the Truth Commission — distinguished between pardon for those who had been tried and sentenced and amnesty for those who had never been prosecuted. The only political prisoners not freed under the amnesty are four FMLN members jailed for their alleged roles in killing U.S. servicemen in the 1985 "Zona Rosa" murders and the 1991 killing of two wounded U.S. military advisors whose helicopter was downed by rebel fire. The U.S. government maintains that the victims had protected diplomatic status under international law, thus preventing the application of amnesty in these cases.

<sup>24</sup> In so doing it went beyond the amnesty decreed in Chile which, while foreclosing criminal sanctions, permitted assignment of civil responsibility.

<sup>25</sup> The head of the Government's negotiating team, Minister of the Presidency Oscar Santamaría, has been accused of inadequate representation (patrocinio infiel).

<sup>26</sup> La Prensa Grafica, April 29, 1993.

<sup>27</sup> Truth Commission Report at 144.

<sup>28</sup> Truth Commission Report at 144.

<sup>29</sup> Ibid.

<sup>30</sup> Half the candidates proposed are to be proposed by Salvadoran bar associations and should include the most relevant schools of legal thought. Constitution, art. 186.

<sup>31</sup> The Mexico Agreement on Constitutional Reforms of April 29, 1992, included transitory provisions. Article 39 established that the election of the new Supreme Court justices under the new constitutional formula would take place within 90 days of the completion of the current justices' terms (June 30, 1994). This means that the new justices could be elected by either the current Legislative Assembly if it so chooses, or by its successor. This article was included as a transitory provision (Art. 33) in the Constitutional reforms passed in April 1992 and ratified on October 31, 1992.

<sup>32</sup> See discussion in Hemisphere Initiatives, "Endgame: A Progress Report on Implementation of the Salvadoran Peace Accords," at 19-21.

<sup>33</sup> This would imply a change in the Constitution.

<sup>34</sup> See, ONUSAL, Report of the Director of the Human Rights Division, UN Doc. A/47/912, S/25521, April 5, 1993, at 45-57.

<sup>35</sup> The recommendation has been attacked as an "unconstitutional," move to have the Executive cannot remove Supreme Court justices. Yet the recommendation simply

calls on the justices to resign voluntarily. Other critics claim the Commission is seeking to modify agreements reached in the Accords (i.e., that the FMLN is trying to win through the Truth Commission something it failed to achieve in the negotiations).

<sup>36</sup> One Supreme Court justice, Dr. Francisco Arrieta Gallegos, died of a heart attack on April 30, 1993. An alternate justice will fill his chair.

<sup>37</sup> This law was to be reformed according to the Peace Agreement yet few changes were made in a December 1992 rush to comply with Accords timetable. A technical subcommission has been established in the Legislative Assembly to The Assembly/COPAZ is currently reviewing the law to draft a preliminary bill. See ONUSAL, "Sixth Report" at 48.

<sup>38</sup> ONUSAL, Report of the Director of the Human Rights Division of the United Nations Observer Mission in El Salvador (ONUSAL) up to Jan. 31, 1993. UN Doc. A/47/912, S/25521, April 5, 1993, at 60. (Hereinafter, ONUSAL "Sixth Report.")

<sup>39</sup> Extrajudicial confessions are statements taken by police, often using coercion and usually before a suspect has been given access to counsel.

<sup>40</sup> Constitution, art. 174.

<sup>41</sup> ONUSAL, "Sixth Report," at 60.

<sup>42</sup> See ONUSAL, "Sixth Report," at 28.

<sup>43</sup> Interview with Dr. René Hernández Valiente, Minister of Justice, March 29, 1993.

<sup>44</sup> AID is currently concluding its eight-year "Judicial Reform I" project and initiating a "Judicial Reform II," a \$15 million project over five years. A key part of this project is a law reform effort established under the Minister of Justice which has produced proposals to remedy some of the most serious deficiencies of criminal procedures. To date, only one of these proposals has been enacted into law. The public defense law, which guarantees suspects free legal representation from the time of arrest and prohibits defendant's statements taken without legal counsel, provoked heated debate and has been difficult to implement. Opposition from the President of the Supreme Court, the Attorney General's office, and the current head of the Judicial Training School has made it difficult to win support for other proposed reforms.

<sup>45</sup> The Human Rights Division of the U.N. Observers Mission in El Salvador, ONUSAL, stems from the San José Agreement on Human Rights, the first substantive agreement between the parties, signed July 26, 1990. It provided for unprecedented U.N. verification of a far-reaching human rights agreement.

<sup>46</sup> "Sixth Report" at 57.

<sup>47</sup> See Reports on the situation of human rights in El Salvador prepared by Professor Pedro Nikken, Independent Expert on Human Rights, A/47/596, Nov. 13, 1992 at 33-34 and E/CN.4/1993/11, Feb. 15, 1993, at 33-34.

<sup>48</sup> For a fuller discussion of the reforms to the police, see HI's first report, ENDGAME: A Progress Report on Implementation of the Salvadoran Peace Accords.

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# Hemisphere Initiatives

Hemisphere Initiatives (HI) was formed in 1989 to report on the Central American peace process and efforts to establish and strengthen democratic institutions throughout the region. It monitored and extensively reported on the Nicaraguan electoral process from May 1989 through the February 1990 election.

HI is currently monitoring the implementation of the Salvadoran Peace Accords signed on January 16, 1992 and the impact of those Accords on processes of democratization in El Salvador. The terms of reference for HI's mission include monitoring the political and electoral process leading up to the 1994 elections to assess the extent to which the Accords help guarantee free and fair competition for votes to the entire Salvadoran political spectrum.

Members of HI's Board of Directors visit the country regularly to measure progress and assess

problems. They meet with government and opposition leaders, with journalists, with academic experts and independent observers. HI also maintains an in-country team of experts monitoring the principal areas covered by the Accords: demobilization and reforms to the military and security apparatus, the creation of a new national civilian police force under civilian control, human rights and reforms to the judicial system, the creation of a new electoral tribunal and new electoral code, and social/economic reforms including agrarian reform.

Some of the research of reforms to the judicial system was conducted by the Lawyers Committee for Human Rights. A more complete account of that study will be available from their office, 330 Seventh Avenue, New York, NY 10001. Design and production of this report was facilitated by Colin Bird of the Unitarian Universalist Service Committee and by David Krusé.

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