

AMNESTY IN EL SALVADOR: THE LONG AND WINDING ROAD TO JUSTICE, TRUTH, AND MEMORY

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Using the lens of memory and the figure of the memory entrepreneur, this article traces the struggle between Salvadoran actors who support amnesty and forgetting and so do not wish investigations into the human rights violations committed during the war to take place, and actors who oppose amnesty and promote memory, truth, and justice. I argue that, as this latter group (i.e., human rights memory entrepreneurs) chipped away at the 1993 unconditional Amnesty Law in Salvadoran courts and in the Inter-American Human Rights System (IAHRS), creating a possibility for memory, state memory entrepreneurs worked to eliminate these possibilities.

Utilisant le prisme de la mémoire et la figure de l'entrepreneur de mémoire, cet article retrace la lutte entre les acteurs salvadoriens qui soutiennent l'amnistie et l'oubli et donc ne souhaitent pas que des enquêtes sur les violations des droits humains commises pendant la guerre aient lieu, et les acteurs qui s'opposent à l'amnistie et qui promeuvent la mémoire, la vérité et la justice. Je soutiens que, alors que ce dernier groupe (c'est-à-dire les entrepreneurs de la mémoire des droits humains) érodait la loi d'amnistie inconditionnelle de 1993 dans les tribunaux salvadoriens et dans le Système interaméricain des droits de l'Homme (SIDH), créant une possibilité pour la mémoire, les entrepreneurs de la mémoire de l'État ont travaillé pour éliminer ces possibilités.

A través del lente de la memoria y la figura del empresario de la memoria, este artículo recorre la lucha entre los actores salvadoreños que apoyan la amnistía y el olvido y por lo cual no desean que se investiguen las violaciones de derechos humanos cometidas durante la guerra, y los actores que se oponen a la amnistía y que promueven la memoria, la verdad y la justicia. Argumento que, mientras este último grupo (es decir, los empresarios de la memoria de los derechos humanos) socavaron la Ley de Amnistía incondicional de 1993 en los tribunales salvadoreños y en el Sistema Interamericano de Derechos Humanos (SIDH), creando una posibilidad para la memoria, los empresarios de la memoria del Estado trabajaron para eliminar estas posibilidades.

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The Salvadoran government and guerrilla of the Farabundo Martí National Liberation Front (FMLN) committed to eliminating impunity when they signed the Peace Accords ending El Salvador's Civil War (1980-1992). Though the brief paragraph titled "end to impunity," found in the first chapter of the Peace Accords on the armed forces, refers the issue to the Truth Commission (also created by the Peace Accords) for "consideration and resolution," the parties did recognize the need to end impunity for human rights violations committed "on the part of officers of the armed forces." They also recognized that all perpetrators, "regardless of the sector to which [they] 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."¹

The official commitment to ending impunity was short-lived. One week after the final peace agreement was signed on 16 January 1992, the Legislative Assembly, led by the conservative Nationalist Republican Alliance (ARENA), passed the National Reconciliation Law. The Law was framed as being part of a "process of national reconciliation in which pardon plays an important role." The Law granted amnesty to the perpetrators of political crimes and common crimes connected to them. Exceptions included kidnapping and the then undefined list of cases the Truth Commission would investigate.

The 1992 partial amnesty was extended in March 1993, days after the Truth Commission released its report damning the military for responsibility for over 80% of the gross human rights violations committed during the war. The 1993 General Amnesty Law for the Consolidation of Peace was ARENA President Alfredo Cristiani's way to "turn this painful page of our history and seek a better future for our country."² He declared that, since the report included only a "sample" of what had happened,³ "it is time to pardon."⁴ It was, he said, important to "erase, eliminate, and forget the entirety of the past" and so proposed a "general and absolute" amnesty.⁵ The timing of Cristiani's speech, however, leaves little doubt as to what he really wanted to be forgotten. It was not "the entirety of the past," but the State's overwhelming responsibility for human rights violations. Even so, until it was declared

¹ UNSC, 46th Sess, UN Doc A/46/864 (30 January 1992), online: *Chapultepec Agreement* at Chapter 1, Section 5 <peacemaker.un.org/elsalvador-chapultepec92>.

² "Mensaje dirigido a la nación por el excelentísimo señor presidente de la República, Licenciado Felix Alfredo Cristiani el día 18 de marzo 1993", *La Prensa Gráfica* (19 March 1993) ["Mensaje dirigido a la nación el día 18 de marzo 1993"]; unless otherwise noted, all translations from Spanish sources are the author's own.

³ *Ibid*; Cristiani is correct that the report only included a sample of the violence, but his point was clearly that this sample was not representative. It would have been impossible for the Commission to investigate *all* the crimes committed in the short time it was given to operate and given its limited budget, and the Commission recognizes this. However, the Report is framed as offering readers information about "illustrative cases" that are representative of "patterns of violence" (Commission on the Truth for El Salvador, *From Madness to Hope: the 12-year war in El Salvador: Report of the Commission on the Truth for El Salvador*, 1993, online: United States Institute of Peace <www.usip.org/sites/default/files/file/ElSalvador-Report.pdf>.)

⁴ "Perdón mutuo y amnistía total propone Cristiani", *La Prensa Gráfica* (15 March 1993).

⁵ "Mensaje dirigido a la nación el día 18 de marzo 1993", *supra* note 2; see Rachel Hatcher, *The Power of Memory and Violence in Central America*, Palgrave Macmillan, 2018 [Hatcher, *Power of Memory and Violence*], for a more in-depth discussion of why many see pardon as synonymous with forgetting.

unconstitutional in 2016, state institutions interpreted the 1993 Amnesty Law as legislating the forgetting of the “entirety of the past.”

This article traces the struggle between actors who do not wish to see investigations into or trials for the human rights violations committed during the war, and so support amnesty and forgetting, and actors who promote memory, truth, and justice, and so oppose amnesty. These struggles are explored through the lens of memory, which Elizabeth Jelin describes as “a process of giving meaning to the past.”⁶ More particularly, the actors discussed here are seen as what Jelin calls “memory entrepreneurs.” They are social actors who aim to “establish/convince/transmit their narrative,” or memory, of the past so that other actors will embrace it rather than other narratives/memories.⁷

The decision to explore struggles about the 1993 Amnesty Law through the lens of memory might seem surprising since the actors described here as memory entrepreneurs began trying to convince others about their own narrative *before* the Amnesty Law was even law. It is hard to see how their declarations about the Law “giv[e] meaning to *the past*.”⁸ Cristiani’s comment about turning the page takes on additional relevance here. Cristiani and like-minded state⁹ memory entrepreneurs (i.e., various, though not all, state institutions at various points in the post-Peace¹⁰ era, including when the FMLN was in power [2009-2019]; the military, though it rarely makes explicit declarations about past violations; members of ARENA, which controlled the state from the Peace to 2009; and often, though not always, the FMLN) see the 1993 Amnesty Law as both a “cornerstone”¹¹ of the peace and as the final chapter in the now-completed history of the war. With Cristiani’s declaration in favour of unconditional amnesty, they understood that the war was truly over and that Salvadorans could look to the future without ever having to look back at the past. There was no need to open up the “wounds” of the past, as Minister of Defense René Emilio Ponce declared the Truth Commission had done,¹² by, for example, complying with INTERPOL’s 2011 arrest warrant and extraditing officers named in the Jesuit Massacre to Spain¹³ or by publicly naming the officers responsible for the El Mozote massacre and asking for forgiveness on the State’s behalf, as FMLN President Mauricio Funes

⁶ Elizabeth Jelin, *State Repression and the Labors of Memory*, translated by Judy Rein and Marcial Godoy-Anatívia (Minneapolis: University of Minnesota Press, 2003) at 21.

⁷ *Ibid* at 26.

⁸ *Ibid*. Emphasis added.

⁹ The state is certainly not homogenous, as this article shows; the use of the term “state memory entrepreneur” is a necessary simplification of a fractured reality.

¹⁰ I use the term “post-peace” because “peace” in Salvadoran public discourse lasted only a brief moment before it was replaced by the violence and conflict of common crime, street gangs, and, more recently, narco-trafficking (Hatcher, *Power of Memory and Violence*, *supra* note 5); on 30 January 1992, for example, the leftist *Diario Co-Latino* published an article titled “Despite the signing of the Peace Accords, delinquency and homicides increase” (Pablo Iacub, “Pese a firma de los Acuerdos de paz crece la delincuencia y asesinatos”, *Diario Co-Latino* (30 January 1992)).

¹¹ ARENA, *El Diario de Hoy* (11 August 2011); Gloria Morán, “Derogar amnistía, un paso para la democracia”, *Contrapunto* (25 September 2013), online: <www.alainet.org/fr/node/79597?language=en>.

¹² “Fuerza Armada critica informe Comisión de la Verdad”, *Diario Co-Latino* (24 March 1993).

¹³ Morán, *supra* note 11.

did in 2012 (see below).¹⁴ Rather, it was time to “look to the future with optimism.”¹⁵ Thus, they relegated the Amnesty Law to the “past” even before it became law. This is the meaning of the amnesty that state memory entrepreneurs such as Cristiani embrace.

Salvadoran human rights and victims’ organizations are the most vocal proponents of memory, truth, and justice, and critics of amnesty. Some state institutions also sometimes echo their views. As memory entrepreneurs, they worked tirelessly to have the Law declared unconstitutional and so remove what they viewed as an obstacle to both peace and to formal investigations into past violations. They reject amnesty as “official forgetting,” as the Human Rights Commission of El Salvador (CDHES) described the amnesty shortly before it became law.¹⁶ The CDHES viewed the amnesty as “inopportune”¹⁷; it had come too soon. With the war officially over, the “next logical step [...] is not amnesty” but “an intermediate phase for justice and [other] transformations that guarantee” non-repetition. Human rights memory entrepreneurs like the CDHES understand that the war, its victims, and its legacies will be present in the post-Peace period, and they believe this is how it should be. Thus, they demand truth, memory, and justice.

This article explores human rights memory entrepreneurs’ over 20-year-long campaign to have the Amnesty Law revoked. Revoking the Amnesty was an end in and of itself, but also a means to an end, that of un-turning, or turning back, the page on the past. I argue that, as human rights memory entrepreneurs chipped away at the Amnesty Law in Salvadoran courts and in the Inter-American Human Rights System (IAHRS), creating a possibility for memory, state memory entrepreneurs worked to eliminate these possibilities, or at least ignore—or forgot—them.

The article begins with a history of human rights organizations’ attempts to have the Amnesty Law declared unconstitutional and state institutions responses, before turning to look at the IAHRS’ role in amnesty and remembering in El Salvador. The next two sections explore the FMLN’s two consecutive presidencies (2009-2019) and the first 18 months of Nayib Bukele’s Great Alliance for National Unity (GANU)/New Ideas presidency, each of which began hopefully for human rights memory entrepreneurs. The conclusion reminds readers of the article’s main points and points to continued challenges for human rights memory entrepreneurs despite the 2016 elimination of the Amnesty Law.

I. Amnesty

Human rights memory entrepreneurs quickly rejected Cristiani’s call for unconditional amnesty. The CDHES and other human rights organizations were not necessarily opposed to amnesty in theory, as long as investigations were conducted

¹⁴ Zoraya Urbina, “Ochoa Pérez reta al presidente Funes”, *Diario Co-Latino* (17 January 2012).

¹⁵ ARENA, “A la conciencia nacional e internacional”, *La Prensa Gráfica* (18 March 1993).

¹⁶ CDHES, [untitled ad], *La Prensa Gráfica* (20 March 1993) [CDHES].

¹⁷ *Ibid.*

and the perpetrators identified and tried before amnesty was granted.¹⁸ And the 1993 Amnesty did not explicitly prevent any of this from happening. Indeed, over 40 cases were opened between 1992 and 2013.¹⁹ During that period, however, few “progress[ed] past the initial evidence gathering stage, in which prosecutors decide whether to take the case to trial.”²⁰ This lack of progress was because Attorney Generals, who have considerable weight in determining which cases will be pursued, were reluctant to investigate war-time crimes.²¹ It was also certainly related to Cristiani’s framing of the Amnesty Law as forgetting, which sent a clear message as to how the Law should be interpreted.

The Law, therefore, was framed and has been used as a tool to prevent investigations into the past. This, combined with the law’s unconstitutionality, pushed human rights organizations to file suits to have the law declared unconstitutional, and allow the past to have a place in the present. In this, they too were using the law (i.e., the Constitution) as a tool to further their pro-justice and pro-truth agenda. Human rights organizations first challenged the law in May 1993. The CSJ refused to hear the case.²² In 1998, the CSJ finally agreed to hear the suit filed by then director of the Archbishop of San Salvador’s Legal Aid Office (Tutela Legal), María Julia Hernández Chavarría, and other human rights defenders.²³ The CSJ’s 2000 ruling concluded that the 1993 Law was constitutional, but left it up to individual judges to apply the amnesty in a particular case. The CSJ also recalled that the Constitution prevents a government from granting itself amnesty. The Law was passed during the Cristiani presidency, so all crimes committed during his time in office were not covered by the Amnesty.²⁴

¹⁸ See, for example, CDHES, *supra* note 16; CESPAD, “Amnistia: una tesis alternativa: perdonar a quienes pidan perdón”, *Diario Latino* [El Salvador] (16 March 1993); Sinoda Luterana Salvadoreño & Socorro Jurídico Cristiano, “Monseñor Romero” CDHES, IDHUCA, “El perdón no se impone por decreto”, *La Prensa Gráfica* (24 March 1993); “DCL Gobierno y FMLN deben pedir perdón: Jesuitas” *Diario Co-Latino* (18 March 1993).

¹⁹ Elena Martínez Barahona & Martha Gutiérrez, “Impact of the Inter-American Human Rights System in the Fight Against Impunity for Past Crimes in El Salvador and Guatemala” in Par Engstrom ed, *The Inter-American Human Rights System: Impact Beyond Compliance* (Cham, Switzerland: Palgrave, 2019), 247 at 251-2.

²⁰ *Ibid.*

²¹ Elena Martínez Barahona, Martha Liliana Gutierrez Salazar, and Liliana Rincon Fonseca, “Impunidad en El Salvador y Guatemala: ‘de la locura a la esperanza: ¿nunca más?’” (2012) 61 *América Latina Hoy* 101 at 106.

²² *Case of the Massacre of El Mozote and Nearby Places (El Salvador)* (2012), Merits, reparations and costs, Inter-Am Ct HR (Ser C) 252 at para 277, online: www.corteidh.or.cr/docs/casos/articulos/seriec_252_ing1.pdf [*Case of the Massacre of El Mozote and Nearby Places*].

²³ Sala de lo Constitucional de la Corte Suprema de Justicia, No 24-97/21-98 (26 September 2000), online: www.jurisprudencia.gob.sv/busqueda/showFile.php?bd=1&data=DocumentosBodega%2FD%2F1%2F2000-2009%2F2000%2F09%2F1266.PDF&number=4710&fecha=26/09/2000&numero=24-97=ac=21-98&cesta=0&singlePage=false%27>; see also Dinorah Azpuru, Ligia Blanco, Ricardo Córdova Macías, Nayelly Loya Marín, Carlos G Ramos & Adrián Zapata, *Construyendo la democracia en sociedades posconflicto: un enfoque comparado entre Guatemala y El Salvador*, (F&G Editores, IDRC, 2007).

²⁴ *Ibid.*; see also Edward Gutiérrez & Roxana Hueza, “Constitucional Ley de Amnistía”, *El Diario de Hoy* (4 October 2000).

The CSJ ruling opened the possibility of formal investigations and trials for a portion of the violations committed during the war, notably the 1989 Jesuit Massacre. However, as stated above, most Attorney Generals of the post-Peace era opted not to investigate. In the Jesuit Massacre case more specifically, a few months after the CSJ ruling, the Attorney General's Office (FGR) requested that the case be dismissed. This request was rejected and the trial was allowed to proceed. On the first day of the trial, however, the judge ruled that the deadline for investigations had passed,²⁵ effectively closing the case. With these moves, the possibility for truth and justice that the CSJ's ruling had created was quickly eliminated and state memory entrepreneurs' memory of the 1993 Amnesty Law as turning the page was reinforced.

From 2000 until 2013, when the CSJ again agreed to examine the 1993 Law,²⁶ human rights memory entrepreneurs remained firm in their rejection of amnesty. In a 2004 civil trial, for example, a judge in California found Captain Álvaro Rafael Saravia liable *in absentia* for extrajudicial killing and crimes against humanity in the 1980 assassination of Archbishop Óscar Romero. In response to this historic ruling where the assassination of one person is considered a crime against humanity, Tutela Legal called on the Salvadoran government to revoke the 1993 Amnesty Law and argued that crimes against humanity could not be amnestied. The Salvadoran government's response at that time is typical and points to the reasons why so many in El Salvador stand firmly behind the amnesty. In 2004, ARENA President Tony Saca said that everyone had a right to ask for justice, but that "open[ing] the wounds of the past" was not "the most convenient thing to do for a country looking to the future."²⁷ The past, this implies, should stay in the past.

In 2013, during the presidency of the FMLN's Mauricio Funes, the CSJ agreed to review the 1993 Law once again. In response, former ARENA President Francisco Flores (1999-2004) described it as the cornerstone of the peace.²⁸ Shortly thereafter, the hierarchy of the Catholic Church in El Salvador shut Tutela Legal. Former Tutela Legal employees denounced the closure as "kidnapping historical memory,"²⁹ in reference to the sudden inaccessibility and uncertain future of Tutela Legal's extensive archive of denunciations of human rights abuses committed during the war. These archives had formed the backbone of the Truth Commission's findings³⁰ and, were the 1993 Law to

²⁵ Gabriel Labrador, "Juez ordena reapertura del caso jesuitas y abre proceso contra Cristiani y el Alto Mando de 1989", *El Faro* (18 April 2018), online: <elfaro.net/es/201804/el_salvador/21756/Juez-ordena-reapertura-del-caso-jesuitas-y-abre-proceso-contra-Cristiani-y-el-Alto-Mando-de-1989.htm>.

²⁶ "Admiten nueva demanda contra Ley de Amnistía", *La Prensa Gráfica* (21 September 2013), online: <www.laprensagrafica.com/elsalvador/Admiten-nueva-demanda-contra-Ley-de-Amnistia-20130921-0046.html>.

²⁷ Edward Gutiérrez, "Insisten en reabrir caso de monseñor Romero", *La Prensa Gráfica* (8 September 2004); Ernesto Mejía, "Presidente Saca rechaza derogar Ley de Amnistía", *La Prensa Gráfica* (9 September 2004).

²⁸ Morán, *supra* note 11.

²⁹ Center for Justice and Accountability, [no title], (4 October 2013) posted on *Center for Justice and Accountability*, online: *Facebook* <www.facebook.com/CJA/photos/a.10150095083525419/10151919264135419/?type=3&theater>.

³⁰ Graham P. Stinnett, "Oficina De Tutela Legal Del Arzobispado Collection" (last visited 10 February 2020), online: *University of Colorado Boulder, Latin American Studies Center* <www.colorado.edu/lasc/research/tutela>.

be eliminated, would have served as key evidence. Indeed, by 2013, Tutela Legal had long been involved in cases in the IAHRs.³¹ Tutela Legal's successor, Tutela Legal "María Julia Hernández,"³² has continued to be involved in these cases. The role of the IAHRs in struggles about the Amnesty will be explored in greater depth below.

The October 2013 closing of Tutela Legal was followed in November by an attack on the Pro-Search Association of Disappeared Girls and Boys (Pro-Búsqueda) offices. Founded in 1994, Pro-Búsqueda has since received information about approximately 1,000 children who were disappeared during the war. Pro-Búsqueda attributes responsibility for 90% of these to the military.³³ In November 2013, unknown individuals broke into the Pro-Búsqueda offices, took a security guard hostage, destroyed equipment and numerous documents, and set the offices alight.³⁴ As Human Rights Ombudsman David Morales declared, the aim was to "intimidate those who search for the truth."³⁵ Seen from the perspective of memory and struggles over the meaning of the Amnesty Law, the attack was meant to intimidate those who refuse to let the past, and especially the State's violations, remain in the past.

Both the closing of Tutela Legal and the attack on Pro-Búsqueda were significant setbacks for the human rights community and its struggle for truth and justice. Both events were seen as yet other examples of powerful forces (the Church hierarchy and shadowy figures assumed to be tied to the military) working against human rights memory entrepreneurs' refusal to "turn the page."

The CSJ followed its 2013 admission of the Amnesty Law file with a February 2014 ruling in the San Francisco Angulo case. The Court acknowledged victims' right to truth and ordered the FRG to investigate the San Francisco Angulo massacre. The CSJ concluded that the right to truth is a "fundamental right with both individual and collective dimensions."³⁶ The CSJ cited various IACHR and IACtHR decisions in the ruling, including the IACHR's Romero report and the IACtHR's decision in El Mozote.³⁷ As in the past, the state responded with inaction.

The CSJ finally declared the 1993 Amnesty Law unconstitutional on 13 July 2016. Parts of the 1992 National Reconciliation Law remain valid.³⁸ The human

³¹ *Monseñor Óscar Arnulfo Romero y Galdámez v El Salvador* (2000), IACHR, Informe N° 37/00 CASO 11.481; *Case of the Massacre of El Mozote and Nearby Places*, *supra* note 22.

³² FESPAD, "Lanzamiento de Asociación Tutela Legal 'Dra. María Julia Hernández'" (27 January 2014), online: <www.fespad.org.sv/lanzamiento-de-asociacion-tutela-legal-dra-maria-julia-herandez/>.

³³ Asociación Pro-Búsqueda, "La Historia de Pro-Búsqueda" (last visited 10 February 2020), online: *Pro-Búsqueda* <www.probusqueda.org.sv/quienes-somos/la-historia-de-pro-busqueda/>.

³⁴ Asociación Pro-Búsqueda, "Irrumpen violentamente en las oficinas de Pro Búsqueda" (14 November 2013), online: *Pro-Búsqueda* <www.probusqueda.org.sv/irrupmen-violentamente-en-las-oficinas-de-pro-busqueda/>.

³⁵ *Ibid.*

³⁶ Sala de lo Constitucional de la Corte Suprema de Justicia, No 665-2010 (5 February 2014) at section IV, 2, B, b, online: <perso.unifr.ch/derechopenal/assets/files/jurisprudencia/j_20140408_01.pdf>.

³⁷ *Ibid.*; see also Transparencia Activa, "Corte Suprema ordena a la Fiscalía investigar 'Masacre de Angulo'" (11 February 2014), online: *Transparencia Activa* <www.transparenciaactiva.gob.sv/corte-suprema-ordena-a-la-fiscalia-investigar-masacre-de-angulo/#sthash.D5ssSbxm.dpuf>.

³⁸ Sala de lo Constitucional de la Corte Suprema de Justicia [El Salvador], No 44-2013/145-2013 (13 July 2016), online: <<https://www.jurisprudencia.gob.sv/VisorMLX/PDF/44-2013AC.PDF>>; see also Sala de

rights community celebrated this long overdue decision and the removal of what they saw as an obstacle to truth and justice. On the other hand, Mauricio Ernesto Vargas, a retired general and member of the Legislative Assembly for ARENA, repeated conservative arguments about the Amnesty as an essential element of peace. Vargas reminded Salvadorans that “without amnesty, there wouldn’t be [a Peace Accord].”³⁹ The governing FMLN’s immediate response to the decision was to talk about a “soft coup” and “destabilization” and to call the ruling “inopportune.”⁴⁰ President Salvador Sánchez Cerén’s official response included an affirmation of his commitment to justice and reconciliation. He then said the several resolutions the CSJ made that day “heighten[ed]” Salvadorans’ daily struggles and did not correspond to the country’s “actual and current problems.”⁴¹ The governing FMLN, furthermore, did little to comply with the CSJ’s ruling, a situation the Human Rights Institute of the “José Simeón Cañas” Central American University (IDHUCA), Pro-Búsqueda, and other organizations denounced in June 2018.⁴² This recalls the FRG’s failure to accept the recognition of victims’ right to the truth in the San Francisco Angulo ruling by initiating a series of investigations into violations committed during the war.

Attorney General Douglas Meléndez (2016-2018) seemed to distance himself from the inaction of his predecessor when he announced that a special investigative unit (staffed with six attorneys in November 2018) had been created to deal with past crimes and that the El Mozote, Romero, and Jesuit Massacre cases, among others, had all been reopened.⁴³ When the IACtHR visited El Salvador in December 2019, over 180 cases

lo Constitucional, press release, “Sala declara inconstitucional la Ley de Amnistía” (13 July 2016), online: <www.csj.gob.sv/Comunicaciones/2016/07_JULIO/COMUNICADOS/20.%20Comunicado%2013-VII-2016%20Ley%20de%20amnist%C3%ADa.pdf>.

³⁹ Jessica Ávalos & Luis Láinez, “Sala habilita a juzgar crímenes de la guerra civil” *La Prensa Gráfica* (14 July 2016), online: *La Prensa Gráfica* <www.laprensagrafica.com/elsalvador/Sala-habilita-a-juzgar-crimenes-de-la-guerra-civil-20160714-0049.html>.

⁴⁰ Nelson Rauda Zablah, “Al FMLN se le atraganta la inconstitucionalidad de la Ley de Amnistía”, *El Faro* (18 July 2016), online: <www.elfaro.net/es/201607/el_salvador/18979/Al-FMLN-se-le-atraganta-la-inconstitucionalidad-de-la-Ley-de-Amnist%C3%ADa.htm>; see also Beatriz Mendoza, “FMLN sale a la calle para quejarse de la Sala”, *La Prensa Gráfica* (16 July 2016), online: <www.laprensagrafica.com/elsalvador/FMLN-sale-a-la-calle-para-quejarse-de-la-Sala-20160716-0071.html>; “GOES rectifica postura sobre nulidad de Ley de Amnistía”, *La Prensa Gráfica* (19 July 2016), online: <www.laprensagrafica.com/elsalvador/GOES-rectifica-postura-sobre-nulidad-de-Ley-de-Amnistia-20160719-0075.html>.

⁴¹ “Mensaje a la nación del presidente de la república Salvador Sánchez Cerén” (15 July 2016), online: *Youtube* <www.youtube.com/watch?v=gPF2tTPP7mE>.

⁴² “Víctimas y organizaciones de derechos humanos reaccionan ante la Audiencia de seguimiento, a dos años de la Inconstitucionalidad de la Ley de Amnistía” (28 June 2018), online: *Instituto de Derechos Humanos de la UCA* <www.uca.edu.sv/idhuca/nota001/>; see also Benjamín Cuellar, “The Uses of Truth: Truth Commission Archives, Justice and the Search for the Disappeared in El Salvador” (23 April 2018) at 00:30:50 online (video): *Cardozo Law Institute in Holocaust and Human Rights* <cardozolaw.hosted.panopto.com/Panopto/Pages/Viewer.aspx?id=a4314b1e-1225-4559-ae10-a8cb00f4635f>.

⁴³ “Fiscalía reabre los homicidios de monseñor Romero, jesuitas de la UCA y otros crímenes de guerra”, *El Diario de Hoy* (20 June 2018), online: <<https://historico.elsalvador.com/historico/492761/fiscalia-reabre-los-homicidios-de-monsenor-romero-jesuitas-de-la-uca-y-otros-crimenes-de-guerra.html>>, [“Fiscalía reabre los homicidios de monseñor Romero, jesuitas de la UCA y otros crímenes de guerra”].

were open.⁴⁴ However, human rights organizations, including Tutela Legal “María Julia Hernández,” criticized Meléndez for moving too slowly.⁴⁵ He was perhaps unwilling to fully embrace the possibility for memory that he himself had created. His seeming reluctance to actively investigate the past was combined, as Meléndez confirmed, with minimal investigative assistance on the part of the police and the Ministry of Defense’s insistence that documents from the war no longer existed.⁴⁶ Thus, as much as opening the special unit represented a step forward, the move was hamstrung by limited resources and other state institution’s unwillingness to collaborate.

The Legislative Assembly also took action and committed to writing a new National Reconciliation Law, further evidence that the Salvadoran state is fractured and that different institutions sometimes work at cross purposes. An Ad Hoc Commission was created to write the law before the new government took power on 1 June 2019. Led by Nayib Bukele, the new administration was the first non-ARENA, non-FMLN government since 1989. (Though Bukele had been elected mayor of Nuevo Cuscatlán and then San Salvador as a member of the FMLN, he was kicked out of the party and then ran for president as the GANA candidate. He later formed his own party, New Ideas. He is a populist and is increasingly dictatorial.⁴⁷) The Ad Hoc Commission, however, failed to propose a suitable law before Bukele’s inauguration and the drafts that were made public were heavily criticized.⁴⁸

⁴⁴ IACHR, press release, “IACHR presents its preliminary observations following its *in loco* visit to El Salvador” (27 December 2019), online: IACHR <www.oas.org/en/iachr/media_center/PReleases/2019/335.asp> [IACHR, “preliminary observations following its *in loco* visit to El Salvador”].

⁴⁵ Carol Morales, “Fiscal General niega que investigaciones sobre asesinato de San Romero sean ‘lentas’, tras crítica de la Iglesia”, *La Página* (26 November 2018), online: <www.lapagina.com.sv/nacionales/fiscal-general-niega-que-investigaciones-sobre-asesinato-de-san-romero-sean-lentas-tras-critica-de-la-iglesia/>; CDHES, *supra* note 16.

⁴⁶ “Fiscalía reabre los homicidios de monseñor Romero, jesuitas de la UCA y otros crimines de guerra”, *supra* note 43.

⁴⁷ Óscar Martínez, “Bukele, el autoritario”, *New York Times* (20 April 2020), online: <www.nytimes.com/es/2020/04/20/espanol/opinion/bukele-el-salvador-virus.html>.

⁴⁸ Nelson Rauda, Roxana Lazo and Gabriela Cáceres, “La amnistía de Arena y FMLN busca anular el informe de la Comisión de la Verdad”, *El Faro* (16 May 2019), online: <https://elfaro.net/es/201905/el_salvador/23305/La-amnist%C3%ADa-de-Arena-y-FMLN-busca-anular-el-informe-de-la-Comisi%C3%B3n-de-la-Verdad.htm>; Nelson Rauda, Roxana Lazo, Valeria Guzmán, and Gabriela Cáceres, “La nueva amnistía pierde el primer round pese a los esfuerzos del FMLN”, *El Faro* (24 May 2019), online: <https://elfaro.net/es/201905/el_salvador/23330/La-nueva-amnist%C3%ADa-pierde-el-primer-round-pese-a-los-esfuerzos-del-FMLN.htm>; Roxana Lazo & Nelson Rauda Zablah, “Corte Interamericana frena la nueva amnistía que impulsaban Arena y FMLN”, *El Faro* (29 May 2019), online: <https://elfaro.net/es/201905/el_salvador/23345/Corte-Interamericana-frena-la-nueva-amnist%C3%ADa-que-impulsaban-Arena-y-FMLN.htm>; the IACtHR and human rights organization denounced the drafts for various reasons (IACHR, press release, “IACHR Concerned about Bill that Would Leave Unpunished Serious Human Rights Violations of El Salvador’s Past” (25 April 2019), online: <http://www.oas.org/en/iachr/media_center/PReleases/2019/104.asp>; Asociación Pro-Búsqueda, “Denuncian ante el TEG miembros de comisión ad hoc por conflicto de intereses” (24 July 2018), online: <www.probusqueda.org.sv/denuncian-ante-el-teg-miembros-de-comision-ad-hoc-por-conflicto-de-intereses/>; Roxana Lazo, “Arena, FMLN y PCN dejan plantadas a las víctimas y aceleran nueva amnistía”, *El Faro* (22 May 2019), online:

The Special Transitional Justice, Reparations, and National Reconciliation Law was passed on 26 February 2020 without the support of Bukele's Nuevas Ideas party. The Law includes important advances in terms of economic and non-economic reparations and historical memory. It also grants judges the authority to commute the sentences of those found guilty of war crimes and crimes against humanity and to replace jail time with other forms of punishment. Furthermore, judges can reduce a sentence significantly if the individual on trial recognizes his responsibility, asks the victims for forgiveness, helps to further clarify what happened, and helps locate the victims or where their remains might be found.⁴⁹ Victims see the law as another amnesty,⁵⁰ even though the 2020 Law does not “turn the page on the past” in the same way the 1993 Law did, and though it allows the past to be present in the form of investigations and trials.

II. The Interamerican System

With the State's inaction when the possibility for investigations was created, human rights memory entrepreneurs were left with few options and so turned to the IAHRs. The IACHR and IACtHR's ignored denunciations of the 1993 Amnesty Law and their recommendations to eliminate it are significant in a discussion of memory entrepreneurs' struggles over the law and its implications for memory. Indeed, the CSJ cited much of the IAHRs jurisprudence in its 2016 decision of unconstitutionality.

In the 2010 El Mozote case, the Commission concluded

that the amnesty law can have no legal effect and cannot continue to be an obstacle to investigation [...], nor to the identification and punishment of those responsible.⁵¹

The IACHR recommended that the Salvadoran state

[r]ender ineffective the General Amnesty Law [...] as it prevents the investigation, trial and sanction of those responsible for human rights violations and the rights of victims to truth, justice, and reparation. Also, any other *de jure* or *de facto* obstacles, such as judicial or investigative practices, must be eliminated.⁵²

<https://elfaro.net/es/201905/el_salvador/23323/Arena-FMLN-y-PCN-dejan-plantadas-a-las-v%C3%ADctimas-y-aceleran-nueva-amnist%C3%ADa.htm>.

⁴⁹ Asamblea Legislativa [El Salvador], “Dictamen No. 22, Comité Política” (26 February 2020), online: <<https://en.calameo.com/read/006111931d5e684ca83c9>>.

⁵⁰ Nelson Rauda & Roxana Lazo, “Asamblea aprueba ley de reconciliación en contra de la voluntad de las víctimas”, *El Faro* (27 February 2020), online:

<https://elfaro.net/es/202002/el_salvador/24070/Asamblea-aprueba-ley-de-reconciliaci%C3%B3n-en-contra-de-la-voluntad-de-las-v%C3%ADctimas.htm>.

⁵¹ *The Massacres of El Mozote and Neighboring Locations (El Salvador)*, Inter-Am Comm HR, no 10.720 (8 March 2011) at para 330, online: <www.cidh.oas.org/demandas/10.720Eng.pdf>.

⁵² *Ibid* at para 341(3).

The 1993 Law was clearly having precisely the impact Cristiani had wished — “eras[ing], eliminat[ing], and forget[ting] the entirety of the past.”⁵³

As for the Court, its decisions in the El Mozote massacre case and the case of the forced disappearance of Erlinda and Ernestina Serrano Cruz, aged 3 and 7 years, respectively, are the most damning in terms of the 1993 Amnesty Law, and the most relevant in terms of memory and the presence, or absence, of the past in the post-Peace era. In its 2012 El Mozote decision, the Court declared that the approval and application of the Amnesty Law was “contrary to the letter and spirit of the Peace Accords”⁵⁴ and “incompatible” with the American Convention.⁵⁵ The Salvadoran state, therefore, was responsible for ensuring that the Amnesty Law did not prevent investigations or prosecution.⁵⁶ The IACtHR reached a similar conclusion in the 2005 Serrano Cruz case, and can also be seen as affirming that the past must not be forgotten as Cristiani had wished. The Court declared that the State must not use amnesty or any other mechanism to avoid its obligation to investigate and identify perpetrators.⁵⁷

With these conclusions, the IACHR and IACtHR were clearly rejecting Salvadoran state institutions’ use of amnesty as a tool for forgetting and the narrative of the amnesty as closing the book on the past. The same is true of their recommendations and measures related to reparations. As with conclusions about the Amnesty Law, questions related to reparations support human rights memory entrepreneurs’ work against forgetting and provide weight to their view that the past has a place in contemporary El Salvador, for it is still present. The language in the IACHR’s El Mozote report is striking and leaves little doubt as whether or not El Salvador has “turned the page.” The IACHR recognized the impact the massacre had had on society as a whole, declaring that

[t]he State of El Salvador has an urgent duty to pay its historic debt to the memory of the victims, their surviving relatives, and the people of the country who, nearly 30 years after the events, are still unable to heal the wounds through acknowledgment of the truth and punishment of those responsible for these crimes against humanity.⁵⁸

With this introduction, the Commission recommended material and moral reparations, including making the truth known, commemoration projects, and guaranteeing psychosocial care for relatives.⁵⁹ It is worth highlighting that, while ARENA president Saca declared in 2004 that revoking the Amnesty would open wounds of the past,⁶⁰ meaning they had healed, here the IACHR affirms in no

⁵³ “Mensaje dirigido a la nación el día 18 de marzo 1993”, *supra* note 2.

⁵⁴ *Case of the Massacre of El Mozote and Nearby Places (El Salvador)* *supra* note 22 at para 295.

⁵⁵ *Ibid* at para 296.

⁵⁶ *Ibid* at para 403 al2 (4).

⁵⁷ *Case of the Serrano-Cruz Sisters (El Salvador)* (2005), Merits, reparations, and costs, Inter-Am Ct HR (Ser C) No 120 at paras 171–72, online: <www.corteidh.or.cr/docs/casos/articulos/seriec_120_ing.pdf>.

⁵⁸ *The Massacres of El Mozote and Neighboring Locations (El Salvador)* *supra* note 51 at para 339.

⁵⁹ *Ibid* at para 341.

⁶⁰ Gutiérrez, “Insisten en reabrir caso de monseñor Romero”, *supra* note 27.

uncertain terms that these same wounds are still open after 30 years because of the Amnesty and a broader failure to investigate the past.

The IACtHR's discourse surrounding reparations is similar. In the Serrano Cruz case, the IACtHR ordered "Measures of Satisfaction and Guarantees of Non-repetition."⁶¹ Investigating the girls' disappearance and searching for them are included in this broad category because the girls' relatives

have lived with feelings of family disintegration, uncertainty, frustration, anguish and impotence, given the failure of the judicial authorities to investigate the reported facts diligently, and also the State's lack of interest in tracing them by adopting other measures.⁶²

The IACtHR's recommendations about how to search for the girls and other children who had been disappeared included recommendations about the operation of the newly created "Inter-institutional Commission to Trace Children Who Disappeared as a Result of the Armed Conflict in El Salvador," the creation of an online database of missing children, and the creation of a DNA database.⁶³ The IACtHR also ordered the state to "organize a public act acknowledging its responsibility [...] and to make amends to the victims and their next of kin"⁶⁴ and create a national day dedicated to the children who disappeared during the war.⁶⁵ These measures leave no doubt that the Amnesty, as legislated forgetting, was an obstacle to many things, and not the cornerstone of the peace.

Just over one year after the IACtHR issued the Serrano Cruz ruling giving the Salvadoran State one year to organize a "public act acknowledging its responsibility,"⁶⁶ the government did more or less just that. Minister of the Exterior Francisco Laínez, accompanied by the president of the CSJ and the Human Rights Ombudsman, represented the state at this "public act." Laínez declared that

[t]he State of El Salvador deeply laments all the events which took place during the armed conflict [...] and that directly affected all Salvadoran families, and first and foremost those [cases] that involved our youth. The state especially laments the events related to Erlinda and Ernestina Serrano Cruz.⁶⁷

Laínez then announced the reunion of the Hernández family, reunited by the government's Inter-institutional Commission.

Pro-Búsqueda pointed out that, as happy as the reunion was, it was the Commission's only success story and that celebrating it made the Serrano Cruz

⁶¹ *Case of the Serrano-Cruz Sisters (El Salvador)* *supra* note 57 at section XI, subsection D.

⁶² *Ibid* at para 177.

⁶³ *Ibid* at paras 183, 189, 192.

⁶⁴ *Ibid* at para 194.

⁶⁵ *Ibid* at paras 196.

⁶⁶ *Ibid* at para 208.

⁶⁷ Adriana Valle, "Estado lamenta hechos ocurridos en la guerra", *La Prensa Gráfica* (23 March 2006).

family “invisible.”⁶⁸ Pro-Búsqueda also criticized the language used to describe the work of the Inter-institutional Commission, that is, reuniting children who had been “involuntarily separated” from their families, as the Executive Decree creating the Commission declared.⁶⁹ The criticism was paired with a criticism of “laments.” In a paid ad, Pro-Búsqueda and IDHUCA affirmed that “[t]o lament something does not mean that any kind of responsibility has been recognized.”⁷⁰ Much like “laments,” “involuntarily separated” silences responsibility—the State’s responsibility in the vast majority of the cases. In this, Láinez’s declarations continue Cristiani’s campaign of forgetting imposed from above.

The State’s disappointing declaration in the Serrano Cruz case was matched by the disappointing language of the initial Decree 829 of 2005 declaring March 29 to be “Family reunion day for girls and boys who for various reasons went astray during the armed conflict,” a move made in response to another of the IACtHR’s orders. In Decree 829, the Legislative Assembly confirmed the State’s “wish that families that were involuntarily separated during the Salvadoran armed conflict, reunite.”⁷¹ As Pro-Búsqueda had already pointed out, speaking of “involuntary separation” does little to recognize that someone was responsible for separating families. The IACtHR agreed in a 2006 resolution that Decree 829 fell short⁷² and the Legislative Assembly responded with Decree 197 of 2007. Citing the Court’s dissatisfaction with the wording of Decree 829 and its failure to mention disappearances, the Assembly renamed March 29 the “Day dedicated to the boys and girls who disappeared during the armed conflict.”⁷³

The Salvadoran State’s only responded to the Serrano Cruz ruling in part, as seen above. As well, the DNA database and a database of missing children have not been created and medical and psychological care have not been provided to relatives.⁷⁴ The Inter-institutional Commission to trace children who disappeared as a result of the armed conflict in El Salvador also proved disappointing, prompting the IACtHR to

⁶⁸ Pro-Búsqueda, “El Estado de El Salvador no ha cumplido con las medidas de reparación ordenadas por la Corte Interamericana de Derechos Humanos en el caso de las hermanas Serrano Cruz”, *La Prensa Gráfica* (30 March 2006).

⁶⁹ *Ibid*; El Salvador, Executive body, *Decreto 45: Créase la Comisión Interinstitucional de Búsqueda de Niños y Niñas Desaparecidos a Consecuencia del Conflicto Armado en El Salvador*, 2004, 365:185 *Diario Oficial* (6 October 2004), art 1, online (pdf): <<https://www.diariooficial.gob.sv/diarios/do-2004/10-octubre/06-10-2004.pdf>>.

⁷⁰ IDHUCA & Pro-Búsqueda, “La dignidad de las víctimas no tiene precio, La burla oficial, sí”, *La Prensa Gráfica* (25 March 2006).

⁷¹ El Salvador, Executive body, *Decreto 829: Declárase el día 29 de marzo de cada año, “Día del Reencuentro Familiar de las Niñas y Niños que por Diversos Motivos se Extraviaron durante el Conflicto Armado*, 2005, 369:201 *Diario Oficial* (28 October 2005) at para IV, online (pdf): <<https://www.diariooficial.gob.sv/diarios/do-2005/10-octubre/28-10-2005.pdf>>.

⁷² *Caso de las Hermanas Serrano Cruz (El Salvador)* (2006), supervisión de cumplimiento de sentencia, Inter-Am Ct HR, online (pdf): <www.corteidh.or.cr/docs/supervisiones/serrano_22_09_06.pdf>.

⁷³ Barahona & Gutiérrez *supra* note 19 at 256; see also El Salvador, Executive body, *Decreto 197: Declárase el día 29 de marzo de cada año, “Día dedicado a los niños y niñas desaparecidos durante el conflicto armado”*, 2007, 374:23 *Diario Oficial* (5 February 2007), online (pdf): <<https://www.diariooficial.gob.sv/diarios/do-2007/02-febrero/05-02-2007.pdf>>.

⁷⁴ Barahona & Gutiérrez *supra* note 19 at 256; see also IACHR, “preliminary observations following its *in loco* visit to El Salvador”, *supra* note 44.

express concern in both 2006 and 2007.⁷⁵ The Serrano Cruz case is clear evidence of the State's reluctance to allow the past into the present, and the State's attempts to use language that forgets the State's responsibility for human rights violations.

III. The FMLN Years

In 2009, after 20 years in power, ARENA lost the presidential elections to the FMLN. The FMLN's new president, Mauricio Funes, was a former TV host who had an often-conflictual relationship with the party, and with his own vice president, former guerrilla commander Salvador Sánchez Cerén. The FMLN has distanced itself from Funes since he fled El Salvador to Nicaragua to avoid standing trial for corruption.⁷⁶

Funes took a different approach to the violations of the past than had ARENA. His administration's initiatives went further in meeting the human rights community's wish for justice, truth, and memory, which had inspired these organizations to file numerous suits with the CSJ to review the 1993 Amnesty Law, to bring cases to the IAHRs, and to build their own monument to the victims. Replacing the Inter-institutional Commission was among Funes' first actions to address past violations. With Executive Decree No. 5, dated 15 January 2010, Funes created the National Search Commission for Girls and Boys Disappeared during the Internal Armed Conflict. The decree cited the Serrano Cruz decision and the IACtHR's subsequent concerns with the Inter-institutional Commission as reasons for the creation of the new Commission. From the perspective of the human rights community, the new Commission was more promising than its predecessor, at the very least because its members could not be former or current members of the military or any other armed group. Pro-Búsqueda could also recommend an individual to form part of it.⁷⁷

The Funes administration brought the past into the present as never before, re-imagining the Amnesty Law as not turning the page on the past in the process. Framed as a break with past denial,⁷⁸ these initiatives included honoring the massacred Jesuits' and their legacy; recognizing and requesting forgiveness for the State's responsibility for serious human rights violations and abuses of power committed during the war; and fulfilling the IACHR's 2000 recommendation by requesting forgiveness for Romero's assassination and constructing a mural at San Salvador's

⁷⁵ As reported in El Salvador, Executive body, *Decreto 5: Se crea la Comisión Nacional de Búsqueda de Niñas y Niños Desaparecidos durante el Conflicto Armado Interno*, 2010, 386:11 *Diario Oficial* (18 January 2010) at para VI, online: <<https://www.diariooficial.gob.sv/diarios/do-2010/01-enero/18-01-2010.pdf>> [El Salvador, *Decreto 5*].

⁷⁶ See, for example, Sasha Chavkin, "Former President Charged With Money Laundering in El Salvador" (14 January 2019), online: *International Consortium of Investigative Journalists* <www.icij.org/investigations/panama-papers/former-president-charged-with-money-laundering-in-el-salvador/>.

⁷⁷ El Salvador, *Decreto 5*, *supra* note 75, art 4.

⁷⁸ Secretaría de Comunicaciones de la Presidencia, "20 años de la firma de los Acuerdos de Paz", *La Prensa Gráfica* (15 January 2012).

international airport in his honor.⁷⁹ As well, the site of the massacre of Las Aradas was declared part of El Salvador's cultural heritage, as the survivors wished⁸⁰; the Monument for Memory and Truth, an initiative of human rights organizations, was declared a protected heritage site⁸¹; and María Julia Hernández was posthumously honored for her work recovering historical memory.⁸²

Funes' request for forgiveness at El Mozote on the 20th anniversary of the Peace deserves special attention.

As head of State, I recognize that in the villages of El Mozote, El Pinalito, Ranchería, Los Toriles, Jocote Amarillo, Cerro Pando, La Joya, and Cerro Ortiz, during the days and nights of 11, 12, and 13 December 1981, soldiers from the Atlacatl Immediate Reaction Infantry Battalion, part of the Armed Forces of El Salvador, assassinated close to 1000 people, the majority boys and girls. Endless acts of barbarity and human rights violations were committed here: innocents were tortured and executed; women and girls suffered sexual abuses and hundreds of male and female Salvadorans are now part of a long list of disappeared, while others were forced to emigrate and lose everything to save their lives. In the name of the Salvadoran state, I ask the victims' families and nearby communities for forgiveness for this massacre, for the aberrant human rights violations, and for the abuses committed.⁸³

Funes named Domingo Monterrosa, José Azmitia, and Natividad de Jesús Cáceres as responsible for the massacre and instructed the Armed Forces to "revise their interpretation of history" accordingly. He also instructed the military to stop honoring those who could be tied to the commission of gross human rights violations.⁸⁴ This was widely understood to mean that the names of the military barracks at San Miguel, named after Monterrosa, and La Unión, named after Azmitia, would be

⁷⁹ "Gobierno del Presidente Funes reconoce la verdad e impulsa medidas de reparación a víctimas del conflicto armado" (4 June 2012); "Gobierno del Presidente Funes reconoce la verdad e impulsa medidas de reparación a víctimas del conflicto armado", *La Prensa Gráfica* (15 January 2012), online: .

⁸⁰ Ramón D. Rivas, "La masacre de Las Aradas, río Sumpul", *Diario Co-Latino* (20 May 2011); this is so important because "heritage" is protected by the Heritage Law (Redacción Equilibrium, "Se declara 'Bien Cultural de la Nación' al caserío Las Aradas, Chalatenango", *Equilibrium* (15 May 2012), online: <www.periodicoequilibrium.com/se-declara-%E2%80%9Cbien-cultural-de-la-nacion%E2%80%9D-al-caserio-las-aradas-chalatenango/>).

⁸¹ For more on this, see Rachel Hatcher, "The Victims and Violence of Civil War: Presences and Absences in El Salvador's Monumental Narratives of Reconciliation" (2019) 54:2 *de arte* <doi.org/10.1080/00043389.2019.1611193> [Hatcher, "The Victims and Violence of Civil War"].

⁸² Loral Bernal, "Declaran Monumento a la Verdad y la Memoria como bien protegido", *Diario Co-Latino* (15 March 2013); "Presidente Funes rinde homenaje y condecora de forma póstuma a luchadora social María Julia Hernández" (21 November 2013), online: *Transparencia Activa* <www.transparenciaactiva.gob.sv/presidente-funes-rinde-homenaje-y-condecora-de-forma-postuma-a-luchadora-social-maria-julia-herandez/>.

⁸³ Gobierno de El Salvador, "El Mozote nunca más", *Diario Co-Latino* (17 January 2012).

⁸⁴ Roberto Flores & Iván Escobar, "'Este pedido de perdón no pretende borrar el dolor': Presidente Funes", *Diario Co-Latino* (16 January 2012), online: <www.museodelamemoria.gob.ar/page/noticias/id/460/title/%C2%ABEste-pedido-de-perd%C3%B3n-no-pretende-borrar-el-dolor%C2%BB%3A-Presidente-Funes>; Roberto Flores, "Presidente Funes instruye a militares revisar su interpretación de la historia", *Diario Co-Latino* (17 January 2012).

changed. Funes also asked the Attorney General's Office and the CSJ to investigate the crimes of the past for, as he said, the Amnesty Law did not prevent this.⁸⁵

Former officers responded to Funes by reminding Salvadorans of the FMLN's crimes. Sigifredo Ochoa Pérez, a former colonel who also served in the Legislative Assembly for several years,⁸⁶ declared that Funes should "also [ask for forgiveness] for the massacres and criminal acts the FMLN, his own party, committed."⁸⁷ This view was shared by another retired colonel, Antonio Almendáriz.⁸⁸ Both men are named as responsible for human rights violations in the Truth Commission report. Minister of Security, David Munguía Payés, on the other hand, repeated Cristiani and state memory entrepreneurs' refrain about the past being past. He was, he said, "focused on the future, instead of looking toward the past."⁸⁹

Almost two years after Funes' speech at El Mozote, the San Miguel and La Unión barracks had still not been renamed. When asked why not, Funes responded

I never promised to remove the names of the barracks. I requested that the Ministry of Defense investigate [...] [and the results] are being examined [...] When this has been completed, we, as the government of the Republic, will decide to keep the names [...] or not.⁹⁰

In the end, the Commission to Review Military History and Education limited itself to determining if naming processes had been followed.⁹¹ The Commission, which did not mention Monterrosa, Azmitia, or Cáceres by name, concluded that, since those procedures had indeed been followed, "it is convenient to maintain [these units and installations'] names."⁹² The military's response reveals the very real limits of Funes' power, and the very real power of the military. Despite being commander-in-chief of the armed forces, Funes could not tell the

⁸⁵ Suchit Chávez, "Funes pide a FGR y CSJ investigar crímenes", *La Prensa Gráfica* (1 January 2012), online: <especiales.laprensagrafica.com/2012/acuerdos-de-paz/?p=413>.

⁸⁶ "Sigifredo Ochoa Pérez se retira de la política" *La Prensa Gráfica* (15 December 2014), online: <www.laprensagrafica.com/elsalvador/Sigifredo-Ochoa-Perez-se-retira-de-la-politica-20141215-0154.html>.

⁸⁷ Diana Verónica Ayala, "Funes también debería pedir perdón por las masacres del FMLN", *La Prensa Gráfica* (19 January 2012).

⁸⁸ Fernando Romero, "Militares con reservas ante disposiciones de Funes", *La Prensa Gráfica* (18 January 2012), online: <especiales.laprensagrafica.com/2012/acuerdos-de-paz/?p=440>.

⁸⁹ *Ibid.*

⁹⁰ Daniel Valencia Caravantes, "'Yo no prometí quitar el nombre de los destacamentos militares': presidente Funes", *El Faro* (10 December 2013), online: <elfaro.net/es/201312/noticias/14190>.

⁹¹ Comisión de Revisión de la Historia y la Educación Militares, *Informe de la Comisión de Revisión de la Historia y la Educación Militares* (7 March 2013) at 2-3, online: <www.scribd.com/doc/250756039/Informe-de-la-Comision-de-Revision#from_embed>.

⁹² *Ibid* at 26; see also Jimmy Alvarado, "\$20 mil gastó gobierno de Funes en informe que recomienda continuar el culto a Domingo Monterrosa", *El Faro* (12 January 2015) online: <elfaro.net/es/201501/noticias/16323/\$20-mil-gast%C3%B3-gobierno-de-Funes-en-informe-que-recomienda-continuar-el-culto-a-Domingo-Monterrosa.htm>; Sergio Arauz, "Fuerza Armada recibió hace meses informe de comisión que analizó orden de Funes contra violadores de derechos humanos", *El Faro* (6 November 2013), online: <elfaro.net/es/201311/noticias/13838/>.

military to do something it did not want to do. The military certainly did not want to rename the barracks and it seems that Funes did not want to insist.

With his requests for forgiveness and acknowledgement of the State's responsibility, Funes supported human right memory entrepreneurs' efforts to keep the past present and so reinforced their more general narrative that the Amnesty Law had not condemned the past to oblivion. However, he did little to broaden the possibility for justice (in terms of trials and sentences) beyond the limits of the CSJ's 2000 ruling. Indeed, he had promised not to make any efforts to have the Amnesty Law revoked during his campaign, declaring that the Law did not prevent investigations from being undertaken.⁹³ As president, he insisted that the executive did not have the power to do anything about revoking the Amnesty Law. It was, he said, the Legislative Assembly and courts' responsibility. And, he repeated, the Law did not prevent investigations into past violations. Rather, "the only obstacle is the court's political will."⁹⁴ Funes rejected state's memory entrepreneurs view of the past as a closed book, and of the Amnesty Law as the final chapter in that book. Yet, as much as he embraced human rights memory entrepreneurs' call for memory, truth, and justice, he also rejected their view of amnesty as an obstacle to peace. Rather, he saw political will as the obstacle to peace. While this is certainly true, the continued validity of the Amnesty Law gave those who did not want to open investigations into the past a legal foundation on which to base their position. As human rights memory entrepreneurs knew, with the legal foundation for forgetting eliminated, forgetting would be a far more difficult position to support.

Vice President Sánchez Cerén succeeded Funes in 2014. The Sánchez Cerén administration created the National Search Commission for Persons Disappeared during the Armed Conflict in El Salvador (CONABUSQUEDA) by Executive Decree 33 in 2017.⁹⁵ The creation of the commission was celebrated by the UN and human rights organizations,⁹⁶ but these have since expressed concerns about CONABUSQUEDA. For example, in the final days of the Sánchez Cerén presidency, Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence, Fabián Salvioli, expressed concerns about the Commission and made several recommendations as to how to move forward.⁹⁷ One of these was to grant the

⁹³ Carlos Martínez, "¿Por qué el gobierno no quiere hablar de la Ley de Amnistía?", *El Faro* (23 March 2010), online: <elfaro.net/es/201003/noticias/1407/%C2%BFPor-qu%C3%A9-el-gobierno-no-quiere-hablar-de-la-Ley-de-Amnist%C3%ADa.htm>.

⁹⁴ *Ibid*; Daniel Valencia Caravantes, "Funes pide no le presionen sobre derogación Ley de Amnistía", *El Faro* (24 March 2010), online: <elfaro.net/es/201003/noticias/1412/>.

⁹⁵ El Salvador, Executive body, *Decreto 33: Creación de la Comisión Nacional de Búsqueda de Personas Adultas Desaparecidas en el Contexto del Conflicto Armado de El Salvador*, 2017, 416:153 *Diario Oficial* (21 August 2017), online: <<https://www.diariooficial.gob.sv/diarios/do-2017/08-agosto/21-08-2017.pdf>>; the Sánchez Cerén administration's most spectacular memory initiative was the construction of the Reconciliation Sculpture Park, which included a several meters high, bright blue nude bust of a woman (see Hatcher, "The Victims and Violence of Civil War", *supra* note 81).

⁹⁶ Guadalupe Mejía, Address (delivered at "Desaparición forzada en conflictos armados: Modelos de búsqueda en El Salvador y América Latina", 11 October 2017) [unpublished] at 5-6, online: *Due Process of Law Foundation* <http://www.dplf.org/sites/default/files/desaparicion_forzada_en_conflictos_armados_memoria_final.pdf>.

⁹⁷ "Observaciones Preliminares sobre la Visita Oficial a El Salvador por el Relator Especial sobre la promoción de la verdad, la reparación y las garantías de no repetición, Señor Fabián Salvioli, 23 de abril

commission the power to search for individuals disappeared by either the State or the former guerrilla.⁹⁸ Decree 33 described the forcibly disappeared as “deprived of liberty” by “an agent of the State or a third party who acted with the authorization, support, or acquiescence of the State,”⁹⁹ effectively forgetting the FMLN’s responsibility for forced disappearances, albeit a far fewer number of them.

Any steps Sánchez Cerén and his administration made to promote truth and justice and to invite the past into the present via CONABUSQUEDA were undone with their reaction to the CSJ’s 2016 ruling that the 1993 Amnesty Law was unconstitutional, discussed above, and the FMLN’s quick and wholehearted embrace of a new amnesty. As Elvira Espinoza, a member of a victims’ organization, said

[w]hen president Sánchez Cerén won the presidency, he called all the victims, all the mothers...he told us that he was going to help, but he is leaving [office] now and we victims are maybe worse than we were before.

In the final days of the second FMLN government, Elvira wondered why he had invited them to the Presidential Palace. She asked, “[w]as it to make fun of us?”¹⁰⁰

Presumably, this was not Sánchez Cerén’s intention. A more likely explanation is that consistently high levels of crime meant that, as with Funes, whatever Sánchez Céren meant when he said he would “help” victims’ organizations was subordinated to public security concerns. In El Salvador, as elsewhere in Latin America, the military plays a key role in public security and policing. Dependent on the military, it might have become impossible for Sánchez Cerén to “help” victims’ organizations, especially in terms of their search for justice, truth, and memory. Not “helping” these organizations too much may have been the price Sánchez Cerén had to pay, despite being commander-in-chief, to prevent the military from becoming disloyal.

IV. “Violence always begins with words”¹⁰¹

Salvadoran human rights memory entrepreneurs have spent over a quarter century struggling against forgetting with the goal of securing access to justice. While they have celebrated some successes in these years, their main prize—the elimination of the 1993 Amnesty Law—eluded them until 2016. Yet simply revoking the Amnesty Law is not enough, for the Salvadoran State’s various institutions often work at cross purposes. As seen above, while the CSJ’s ruling created the possibility for justice, the Legislative Assembly passed a new amnesty law.

a 3 de mayo de 2019” (3 May 2019), online: *UN Office of the High Commissioner for Human Rights* <www.ohchr.org/SP/NewsEvents/Pages/DisplayNews.aspx?NewsID=24557&LangID=S>.

⁹⁸ *Ibid* at para 2.

⁹⁹ *Decreto 33*, *supra* note 95, art 3.

¹⁰⁰ Rauda, Lazo, Guzmán, and Cáceres, *supra* note 48.

¹⁰¹ “Urgencia de diálogo” (10 February 2020), online : *Noticias UCA* <noticias.uca.edu.sv/editoriales/urgencia-de-dialogo> [UCA, “Urgencia de diálogo”].

Nayib Bukele's 1 June 2019 inauguration marked the beginning of a new era. His term in office began on a high note for the victims when he ordered that Monterrosa's name be removed from the military base in San Miguel.¹⁰² Unlike the past, the military complied. As well, when Bukele met with relatives of the victims of El Mozote in his first month in office, he promised that he would continue to fulfill the IACtHR's recommendations in terms of reparations programs.¹⁰³ Yet this opening up to the past is balanced by Bukele's other actions. For example, when the state apparatus was reorganized, many of the institutions responsible for programs for the victims were eliminated. As well, human rights organizations that help coordinate reparations programs reported that the Bukele administration's initial responsiveness had turned to silence by the end of August.¹⁰⁴ By September, dozens of human rights organizations denounced both the lack of political will and the Attorney General's "passivity" in investigating violations committed during the war, and they called on the government to improve the capacity of the unit dedicated to investigating these crimes.¹⁰⁵ In November, in response to the order issued by the judge presiding over the El Mozote trial, Judge Jorge Guzmán, Bukele said he would open the military's archives. Following human rights memory entrepreneurs' discourse, he declared that the "only way to heal the wounds of the past is to know the truth."¹⁰⁶ Two weeks later, the Bukele administration said that the military had informed him that archives related to the military's counterinsurgency campaigns did not exist.¹⁰⁷ On 16 January 2020, the government did not celebrate the 28th anniversary of the signing of the Peace Accords.¹⁰⁸

¹⁰² Nayib Bukele, "Se ordena a la @FUERZARMADASV retirar de inmediato el nombre del Coronel Domingo Monterrosa, del Cuartel de la Tercera Brigada de Infantería, en San Miguel" (1 June 2019 at 20:58), online: *Twitter*

<https://twitter.com/nayibbukele/status/1134987672563408897?s=20&t=c9CoB847Ws4ZFI_yN9csJ>.
¹⁰³ Jimmy Alvarado, "Tras defenestrar a Monterrosa, representantes de víctimas dan beneficio de la duda a Bukele", *El Faro* (25 June 2019), online: <elfaro.net/es/201906/el_salvador/23365/Tras-defenestrar-a-Monterrosa-representantes-de-v%C3%ADctimas-dan-beneficio-de-la-duda-a-Bukele.htm>.

¹⁰⁴ Valeria Guzmán & Nelson Rauda, "La reorganización de Bukele manda al limbo los programas para las víctimas de la guerra", *El Faro* (26 August 2019), online: <elfaro.net/es/201908/el_salvador/23588/La-reorganizaci%C3%B3n-de-Bukele-manda-al-limbo-los-programas-para-las-v%C3%ADctimas-de-la-guerra.htm>.

¹⁰⁵ "Denuncian la 'pasividad' del fiscal para indagar crímenes de la guerra salvadoreña", *Agencia Efe [América]* (10 September 2019), online: <www.efe.com/efe/america/portada/denuncian-la-pasividad-del-fiscal-para-indagar-crimenes-de-guerra-salvadorena/20000064-4060977>.

¹⁰⁶ Jimmy Alvarado, "Bukele abrirá archivos militares: 'Si el juez nos pide de la A a la F, vamos hasta la Z'", *El Faro* (1 November 2019), online: <elfaro.net/es/201911/el_salvador/23759/Bukele-abrir%C3%A1-archivos-militares-%E2%80%9Csi-el-juez-nos-pide-de-la-A-a-la-F-vamos-hasta-la-Z%E2%80%9D.htm>; Nelson Rauda, "Juez de El Mozote ordena a Bukele abrir los archivos militares de la masacre", *El Faro* (1 November 2019), online: <elfaro.net/es/201911/el_salvador/23755/Juez-de-El-Mozote-ordena-a-Bukele-abrir-los-archivos-militares-de-la-masacre.htm>.

¹⁰⁷ Valeria Guzmán & Nelson Rauda, "Casa Presidencial responde al juez que el Ejército no tiene archivos de El Mozote", *El Faro* (24 November 2019), online: <elfaro.net/es/201911/el_salvador/23810/Casa-Presidencial-responde-al-juez-que-el-Ej%C3%A9rcito-no-tiene-archivos-de-El-Mozote.htm>.

¹⁰⁸ Eugenia Velásquez, "Tibia conmemoración de la firma de los Acuerdos de Paz", *El Diario de Hoy* (17 January 2020), online: <www.elsalvador.com/eldiariodehoy/tibia-conmemoracion-de-la-firma-de-los-acuerdos-de-paz/677886/2020/>.

On 9 February 2020, Bukele entered the Legislative Assembly surrounded with soldiers and police, told the representatives present in the chamber “now you know who is in control,” and informed them that they had one week to approve funding for Phase III of his anti-gang/anti-crime plan. He threatened to dissolve the Assembly if they did not. He explained that only a message from God telling him to be patient prevented him from carrying out a self-coup at that time. Minutes before, outside the Assembly building, Bukele had spoken to a few thousand supporters, reminding them that the Constitution gives “the Salvadoran people”—and not him—the right to rise up when government officials “break the constitutional order.”¹⁰⁹

The CSJ resolved on 10 February that Bukele had put democracy at risk the day before by using the armed forces for political ends. This is both unconstitutional and opposite to the Peace Accords. Bukele responded by urging the CSJ to interpret the Constitution according to contemporary “realities.”¹¹⁰

In one day, Bukele had re-politicized the security forces, potentially un-doing over 25 years of post-Peace progress toward reversing what had, until 1992, been the State’s overtly politicized use of those security forces to silence opponents. The UCA responded that, while the Constitution does protect the people’s right to rise up, “no one in their right mind would want an insurrection that reminds us of the Civil War and that leads to the establishment of an authoritarian regime.” The authors went on, “[v]iolence always begins with words. And the Executive is supposed to limit violence, not promote it.”¹¹¹

By October 2020, months into the Covid-19 pandemic, Bukele had ignored a CSJ ruling declaring that all Salvadorans, and not only those who are Covid-negative, have the right to return home and attacked the press by initiating a fiscal investigation into the internationally-acclaimed *El Faro*, which has been highly critical of Bukele. As a handful of Republican senators told Bukele, the country had strayed from the rule of law and democracy.¹¹²

Human rights organizations’ initial appreciation for Bukele’s actions in favor of the victims of human rights violations has evaporated. They are left with the image

¹⁰⁹ Carlos Martínez, “‘Ahora creo que está muy claro quién tiene el control de la situación’”, *El Faro* (10 February 2020), online: <elfaro.net/es/202002/el_salvador/24006/%E2%80%9CAhora-creo-que-est%C3%A1-muy-claro-qui%C3%A9n-tiene-el-control-de-la-situaci%C3%B3n%E2%80%9D.htm>; Valeria Guzmán, Nelson Rauda, and Jimmy Alvarado, “Bukele mete al Ejército en la Asamblea y amenaza con disolverla dentro de una semana”, *El Faro* (10 February 2020), online: <elfaro.net/es/202002/el_salvador/24008/Bukele-mete-al-Ej%C3%A9rcito-en-la-Asamblea-y-amenaza-con-disolverla-dentro-de-una-semana.htm>.

¹¹⁰ Sergio Arauz, “Sala ordena a Bukele: absténgase de usar a la Fuerza Armada y poner en riesgo la democracia”, *El Faro* (11 February 2020), online: <elfaro.net/es/202002/el_salvador/24015/Sala-ordena-a-Bukele-abst%C3%A9ngase-de-usar-a-la-Fuerza-Armada-y-poner-en-riesgo-la-democracia.htm>.

¹¹¹ UCA, “Urgencia de diálogo”, *supra* nota 101.

¹¹² Gabriel Labrador & Nelson Rauda, “La noche en que Bukele despreció al juez, las víctimas, la Sala y los congresistas republicanos”, *El Faro* (25 September 2020), online: <elfaro.net/es/202009/el_salvador/24854/La-noche-en-que-Bukele-despreci%C3%B3-al-juez-las-v%C3%ADctimas-la-Sala-y-los-congresistas-republicanos.htm>.

of Judge Guzmán, armed with a judicial order, being refused access to the military archives by a uniformed colonel who interpreted the Constitution for the judge as soldiers filmed the journalists who had accompanied him.¹¹³ With the Presidential Palace occupied with a man who uses security forces to achieve his own political ends and who allows the military to interpret the Constitution, knowing the truth about the violations committed by those same security forces seems further away than ever.

State and human rights memory entrepreneurs have been struggling over the meaning of the Amnesty Law and over what place the past has in the present for decades. As human rights memory entrepreneurs have worked tirelessly to create the possibility for memory, truth, and justice, state memory entrepreneurs have insisted on forgetting. The situation continues to evolve. On 16 January 2021, Bukele continued his denunciation of the “farce” of the Peace Accords and declared the day to be Victims of the Armed Conflict Day. In a series of tweets announcing this change, he reminded his followers that “THEY,” on both the right and the left, had killed, tortured, raped, and dismembered.¹¹⁴ Bukele was presumably referring to the FMLN and ARENA with this comment about “THEY.” Rather than celebrate a “pact of the corrupt,” it was time to commemorate the victims.¹¹⁵

Human rights organizations rejected this as an attempt to “erase what the [Peace] Accords established,” as Ovidio Mauricio of Tutela Legal “María Julia Hernández” said.¹¹⁶ Human rights memory entrepreneurs also pointed out that Bukele had not consulted victims’ organizations and, as David Ortíz of the Foundation for the Study of the Application of Law (Fespad) said, continued to protect the perpetrators.¹¹⁷ This included, for example, not allowing Judge Guzmán to inspect military archives himself. In March 2021, the FRG also challenged Guzmán’s decision to allow an expert witness on sexual violence to testify, stating that she did not meet the necessary criteria.¹¹⁸ The FRG, which had previously paid very little attention to the El Mozote and other cases, then attempted to have Guzmán removed from the case. Neither move

¹¹³ Nelson Rauda, “El Gobierno Bukele, como los anteriores, niega a las víctimas los archivos de El Mozote”, *El Faro* (21 September 2020), online: <elfaro.net/es/202009/el_salvador/24831/El-Gobierno-Bukele-como-los-antiguos-niega-a-las-victimas-los-archivos-de-El-Mozote.htm>.

¹¹⁴ Azucena Henríquez “Bukele: El 16 de enero ahora será el ‘Día de las Víctimas del Conflicto Armado’”, *La Prensa Gráfica* (16 January 2021), online: <www.laprensagrafica.com/elsalvador/Bukele-El-16-de-enero-ahora-sera-el-Dia-de-las-Victimas-del-Conflicto-Armado--20210116-0035.html>.

¹¹⁵ *Ibid.*

¹¹⁶ Verónica Martínez, “Organizaciones no reconocen el 16 de enero como ‘Día de las Víctimas del Conflicto Armado’”, *Diario Co-Latino* (23 January 2021), online: <www.diariocolatino.com/organizaciones-no-reconocen-el-16-de-enero-como-dia-de-las-victimas-del-conflicto-armado/>.

¹¹⁷ *Ibid.*

¹¹⁸ “Fiscalía pide separar al juez Guzmán de juicio El Mozote”, *Diario1.com* (3 March 2021), online: <diario1.com/nacionales/2021/03/fiscalia-pide-separar-al-juez-guzman-de-juicio-el-mozote/>.

was successful, but they reveal the State's attempts to create obstacles in the El Mozote trial, as former human rights ombudsman and current prosecutor in the El Mozote case, David Morales, commented.¹¹⁹ Since then, however, Decree No. 144 has forced all judges over 60 years of age or with 30 or more years of service to retire, including Guzmán. In April 2022, the judge was the victim of threats and harassment.¹²⁰

Since 2016, state memory entrepreneurs have identified new ways to impose forgetting from above (i.e., creating obstacles to trials) to combine with long-standing strategies (i.e., inaction). All evidence suggests, however, that human rights memory entrepreneurs, and Judge Guzmán, will continue to fight for memory, truth, and justice, despite the State's persistence.

¹¹⁹ *Ibid*; Iliana Cornejo, "Fiscales de caso El Mozote pidieron separar al juez Jorge Guzmán y la fiscalía les abre auditoria", *El Mundo* (3 March 2021), online: <diario.elmundo.sv/fiscales-de-caso-el-mozote-pidieron-separar-al-juez-jorge-guzman-y-la-fiscalia-les-abre-auditoria/>.

¹²⁰ Lissette Lemus, "Denuncian hostigamiento y amenazas contra exjuez del caso El Mozote", *La Prensa Gráfica* (18 April 2022), online: <<https://www.elsalvador.com/noticias/nacional/exjuez-denuncia-hostigamiento-juan-duran-mozote/947480/2022/>>.