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**HUMAN RIGHTS IN NEGOTIATING PEACE AGREEMENTS:
EL SALVADOR**

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I. INTRODUCTION

1. The Salvadoran peace process was unprecedented for the central role of human rights in the process and for the vital role of the United Nations in both negotiating and monitoring implementation of the agreements. Since social injustice and human rights violations had played such an important role in triggering and perpetuating the conflict, it was necessary for any substantive negotiations to address the root causes of the violence.
2. The centrality of human rights was reflected by the fact that the first substantive agreement signed between the Salvadoran Government and the insurgents was the San José Agreement on Human Rights (July 1990). In fact, the San José Agreement paved the way for broader agreements on a host of issues. It was also unprecedented in that it provided for international verification by the United Nations.
3. The final peace accord signed in January 1992 included many provisions with direct bearing on human rights. The agreements provided for an Ad Hoc Commission to purge the military of human rights violators and a Truth Commission to investigate past abuses; the replacement of military security forces by a new National Civilian Police; constitutional reforms to de-politicize the judicial system and enhance its independence; and the creation of an ombudsman's office.²

¹ The views expressed herein are those of the author and do not necessarily reflect the views of the United Nations.

²As Americas Watch observed in 1993, "While many aspects of implementation of the peace accord remain in question, the accord itself is a stunning document, addressing many of the root causes of the conflict and establishing concrete mechanisms for change." Americas Watch, Accountability and Human Rights: The Report of the United Nations Commission on the Truth for El Salvador, Vol. V, Issue Nr. 7, August 10, 1993, p. 2

II. CONTEXT AND BACKGROUND

4. The Peace Accords signed by the Government of El Salvador (GOES) and the Frente Farabundo Martí para la Liberación Nacional (FMLN) in Mexico on 16 January 1992 put an end to twelve years of civil war which had left 75,000 dead and over one million – almost one quarter of the total population – displaced. The root causes of the war were the dominance of the armed forces and social injustice. This tiny, densely populated and predominately agricultural country in Central America had an extremely inequitable system of land tenure, with 60% of the population landless. Society had become highly militarized and civilian affairs subordinated to military power.

A Decade of Terror

5. The conflict was characterized by brutal political killings, disappearances, arbitrary detention and torture. Anyone with a different opinion was considered subversive and targeted. Those most at risk were political, human rights and trade union activists, church leaders, teachers, students and journalists. Credible reports linked the majority of violations to the Salvadoran Armed Forces and death squads in large part comprised of members of the military or supported by them.³ Institutionalized impunity for human rights violators was the norm, aided by a weak and corrupt judiciary, the overwhelming strength of the military and paramilitary groups and subsequent amnesties promulgated by the Salvadoran Government.
6. With regard to violations of international humanitarian law, the Armed Forces (FAES) were responsible for indiscriminate aerial bombings and other attacks against the civilian population and collective summary executions in rural areas.⁴ The FMLN was also responsible for abuses, albeit on a smaller scale. The principal violations by the FMLN were targeted assassinations of mayors and other government officials and of suspected informants, execution of captured combatants, kidnapping for ransom, committing acts of sabotage against the economic infrastructure and widespread use of landmines. Both sides engaged in forced recruitment, including of children under 15 years-of-age.⁵

National and international attention to human rights violations

7. The massive violations of human rights before and during the civil war were well documented by both international and national human rights NGOs as well as the UN and the Inter-American Commission on Human Rights.⁶

³According to the Truth Commission, of the more than 22,000 complaints of serious acts of violence in El Salvador between 1980 – 1991, 85% of the cases it received involved state agents, paramilitary groups allied to them and death squads. 5% of the cases were attributed to the FMLN. See From Madness to Hope: The 12-year War in El Salvador. Report of the Commission on the Truth for El Salvador, UN Doc. S/25500, 1 April 1993, in The United Nations and El Salvador: 1990-1995, United Nations Department of Public Information, New York, 1995, p. 311, hereinafter cited as From Madness to Hope.

⁴The Truth Commission investigated several of the worst massacres, such the December 1981 el Mozote massacre in Morazan Province. The Truth Commission found that the elite Atlacatl Battalion killed more than 500 identified victims in el Mozote and surrounding hamlets (see From Madness to Hope, in The UN and El Salvador, pp. 347 – 351); the total number of dead is believed to be much higher, reaching up to 1,000 people.

⁵See, inter alia, From Madness to Hope, p. 304 and Americas Watch, El Salvador's: Decade of Terror, New York, 1991, pp. 64-70, hereinafter cited as Decade of Terror.

⁶For accounts of the human rights situation during the 1980's, see inter alia, From Madness to Hope; El Salvador's Decade of Terror, the reports by the UN Special Representative to the Human Rights Commission and of the Inter-American Commission.

8. Salvadoran NGOs, in particular, played a vital role in forcing human rights concerns to the centre of public debate. They persevered, despite bureaucratic obstacles and repression. During the civil war, intimidation and attacks against the popular movement intensified. Several leaders of the non-governmental Human Rights Commission (CDHES) were murdered; others were jailed and tortured. A number of human rights activists were forced into exile.⁷ Both CDHES and the Catholic Church's Socorro Jurídico Cristiano worked for a time from outside the country.
9. While the capacity of Salvadoran human rights NGOs to conduct thorough investigations of human rights cases was limited, they continued to take testimonies and publicly denounce violations. They also worked closely with international human rights NGOs. This enabled NGOs such as Americas Watch, Amnesty International and the Lawyers Committee for Human Rights, who were closely monitoring the situation in El Salvador, to publish hard-hitting reports and conduct effective advocacy.
10. Particularly in the latter half of the conflict, the human rights issue was used politically by both parties, often quite effectively. In response to increasing public concern about human rights, Salvadoran authorities established their own human rights institutions, such as the governmental Human Rights Commission set up in 1982 and the armed forces' human rights office, which publicized violations it attributed to the FMLN. Both sides had notified the ICRC their acceptance of the applicability of Additional Protocol II of the Geneva Conventions.
11. The UN had raised concerns about the human rights situation in El Salvador since 1980. From 1981-1992, a Special Representative appointed by the UN Human Rights Commission made yearly visits and presented reports to the Human Rights Commission and the General Assembly. Both the Commission and the General Assembly adopted resolutions throughout the 1980s condemning the Government's failure to comply with basic human rights norms and calling on both sides to respect humanitarian law. In 1992 the Commission terminated the Special Representative's mandate and appointed Pedro Nikken as Independent Expert under its agenda item on Technical Assistance. Nikken's mandate was terminated in 1995. The existence of these mandates proved helpful, in different ways and in different times, in keeping the international spotlight on the country's human rights situation. Their reports, often contained constructive recommendations, particularly on the justice sector.
12. The Inter-American Commission on Human Rights of the Organization of American States had followed the situation closely since 1978. Its annual reports included sections on El Salvador, observing for example that the situation relating to the right to life was "alarming."⁸ By 1983-84, the Commission found that 50,000 had been "assassinated, many in the most inhumane way, in acts attributable to the security forces or those who operate with their acquiescence". The Commission was particularly critical of the consequences of the state of emergency, which was declared in 1980 and, with one brief interruption, remained in effect until 1987.⁹

⁷ Lawyers Committee for Human Rights, Improvising History: A Critical Evaluation of the United Nations Observer Mission in El Salvador, New York, December 1995, p 93. El Salvador's Decade of Terror, p. 17 ff.

⁸ Annual Report of the Inter-American Commission on Human Rights 1983-1984.

⁹ El Salvador's Decade of Terror, p. 8. Both the 1962 and 1983 Salvadoran Constitutions provided that "in case of war, territorial invasion, rebellion, sedition, catastrophe, epidemic or other general calamity, or grave disturbances of public order," certain constitutional guarantees could be suspended. See Peace Without Justice, p. 38.

III. Peace Agreements

Background

13. The El Salvador peace process should be considered in the context of broader regional efforts in the 1980's to bring peace to the region.¹⁰ These efforts fell short of the goal, in part because they did not have Washington's backing. Reflecting the East-West confrontation prevailing at the time, foreign interest in Central America was considerable. El Salvador's dismal human rights record notwithstanding, the US Government provided the Salvadoran Government with massive amounts of military assistance and training as well as economic aid, in an attempt to prevent what it viewed as a 'communist' revolution in its 'backyard.' The FLMN received support from the Soviet Union, Cuba and Nicaragua but was in large measure self-sufficient. With the collapse of the Soviet Union and the resulting end of the Cold War, the external factors which had helped sustain the conflict were gone.¹¹
14. At the same time, the Armed Forces and the FMLN realized that they could not win the war by military means. A successful guerrilla offensive on the capital city in November 1989 had proved the FMLN's military might, but also that a popular insurrection was not in the offing. During that offensive, six Jesuit priests, their housekeeper and her daughter were executed by uniformed soldiers.¹² People of good will on both sides of the conflict were horrified by the audacity and brutality of that crime and pledged to step back from the brink. The stage was set for negotiations.

Negotiations and Agreements

15. Between April 1990 – December 1991 the Government and the FMLN concluded a series of far-reaching agreements. The United Nations -- through the Secretary-General and his Personal Representative -- played a very active role in the negotiations of the accords as well as in their implementation.¹³
16. In April 1990 a framework agreement was signed by the parties in Geneva, which identified the objectives of the process as,
 - a) ending the armed conflict by political means;
 - b) promoting the democratization of the country;
 - c) guaranteeing unrestricted respect for human rights;
 - d) reunifying Salvadoran society.

¹⁰ In 1983 the so-called Contadora group -- Mexico, Venezuela, Colombia, Panama-- was formed to seek peaceful solutions to the conflicts in Central America. In the 1987 Esquipulas II Agreement, the Central American Presidents undertook to launch a democratization process, promote free and fair elections and prevent the use of their territory for the destabilization of other countries in the region. The UN and OAS supported these initiatives and, in 1989 the United Nations Observer Group in Central America (ONUCA) was set up, mainly to patrol the borders of the five countries and monitor their compliance with the Esquipulas II Agreement.

¹¹ The United States and the Soviet Union had in fact earlier made a joint démarche to the Secretary-General expressing support for a negotiated settlement.

¹² On 16 November 1989, members of the Army's elite Atlacatl battalion entered the campus of the Jesuit-run Central American University (UCA) and murdered six Jesuit priests, their housekeeper and her daughter. For a detailed account of the assassination case see Martha Doggett, *Death Foretold* (Lawyers Committee for Human Rights, New York, Georgetown University Press, 1993).

¹³ Strong UN involvement in the negotiations began in the fall of 1989 when both the Salvadoran Government and the FLMN asked the UN Secretary-General to assist them in the search for peace.

17. In May 1990, a general agenda and a two-phased timetable were agreed upon in Caracas. The following priority issues were identified: reform and reduction of the armed forces; human rights; judicial, constitutional and electoral reform; economic and social problems. The Caracas agreement also stipulated that all agreements would be verified by the UN.
18. The first substantive agreement was the San José Agreement on Human Rights concluded in July 1990 (see below).
19. In the Mexico Agreements of April 1991 the parties agreed to constitutional reform relating to: the Armed Forces and to the establishment of a National Civilian Police; reform of the judicial and electoral systems; the establishment of the post of National Council for the Defense of Human Rights (ombudsman) and of a Truth Commission to investigate past violations.¹⁴
20. In the New York Agreement of September 1991 the parties agreed to a ‘compressed’ agenda for negotiations covering all outstanding issues. It provided for the creation of COPAZ, National Commission for the Consolidation of Peace¹⁵; an agreement in principle on reduction, “purification” and doctrine of the Armed Forces; the creation of a National Civilian Police; and for some limited economic and social measures.
21. On 31 December 1991, a final agreement was reached in New York setting the timetable for a ceasefire¹⁶ and calendar for the demobilization of the FMLN and its integration into civilian life. (New York Act I). In a subsequent meeting on 13 January 1992 in New York (New York Act II), the parties declared that they had resolved all outstanding issues.
22. The entire package of peace accords was ceremoniously signed at Chapultepec Castle in Mexico City on 16 January 1992.
23. Throughout the implementation process, there were several delays in the time table, as one party made its compliance with certain key points of the calendar contingent on compliance with specific undertakings by the other. The Secretary-General and Under Secretary-General intervened several times to push the parties to get back on track.

IV. THE SAN JOSÉ AGREEMENT ON HUMAN RIGHTS

Background and position of the Parties

24. The San José Agreement on Human Rights came to exemplify the central importance of human rights in efforts to end the war.¹⁷ According to informed observers, it was the UN negotiators -- not the parties -- who made human rights a priority.¹⁸ Recognizing the importance of the issue

¹⁴ This produced considerable pressure, as the outgoing Legislative Assembly had to approve the amendments before 30 April so that the new Assembly, whose mandate began on 1 May 1991, could also ratify them. In the end, all amendments passed, with the exception of those relating to the Army. These were left pending awaiting the outcome of the talks on this issue.

¹⁵ COPAZ was the national mechanism for overseeing the implementation of the agreements, comprising two representatives of the GOES including a member of the Armed Forces, two from FMLN, one of each of the parties in the Legislative Assembly, with the Archbishop and ONUSAL as observers.

¹⁶ 1 February 1992 was set as the formal beginning of the cease-fire, to be concluded on 31 October 1992. This deadline slipped to 15 December. See: United Nations Department of Public Information, The United Nations and El Salvador: 1990 – 1995, New York, 1995, p. 30.

¹⁷ Human Rights Watch, The Lost Agenda: Human Rights and U.N. Field Operations, New York, June 1993, p. 18, hereinafter cited as The Lost Agenda.

¹⁸ Pedro Nikken, in his first report as the UN’s Independent Expert on El Salvador, noted that human rights “form a virtual spinal column of the set of peace agreements”, UN Doc. A/47/596, Nov 13, 1992, para 126.

and the lack of in-house expertise, the UN added Venezuelan law professor Pedro Nikken as a human rights and legal advisor to its team. Furthermore, a group of human rights and legal experts were invited to a series of confidential consultations to brainstorm and provide advice. Five such consultations were held throughout the talks on topics such as the Truth Commission, judicial reform and monitoring during wartime. It was in July 1990 during the first such consultation that Nikken produced the first draft of what became the San José Accord.

25. When the talks bogged down over the most contentious issue, military reform, human rights was taken up as a confidence-building measure and Nikken's draft formed the basis of conversations between the parties.¹⁹ Surprisingly, both the Government and the FMLN accepted the draft without making major changes. Both parties wanted results in order to break the deadlock in the talks, as neither wanted to be seen as torpedoing the negotiations. In retrospect, it was a novelty unprecedented in the history of the UN -- massive *in situ* verification by the UN -- that contributed most to the success of the mission and of the process. According to officials present at the talks, this audacious proposal was accepted because neither party fully comprehended what kind of verification was implied.²⁰ In his book on the negotiations, rebel negotiator Salvador Samayoa says the international verification is what "gave the accord teeth and gave credibility to its practical utility."²¹
26. In agreeing to the San José Accord the Government may have been motivated by a need to improve its international image. The US Congress was threatening to cut military aid unless there was a thorough investigation of the Jesuit murders. Regarding international verification, some on the Right were placated by the fact that the FMLN, which they considered the major human rights violator, would also be scrutinized.

Provisions of the Human Rights Agreement

27. The San José Agreement commits the parties to respect the most fundamental rights enshrined in international human rights law, with a nod to the FMLN, which "has the capacity and the will and assumes the commitment to respect the inherent attributes of the human person."²² The agreement recognized El Salvador's commitments under domestic and international law, defining human rights as "those rights recognized by the legal system, including treaties to which El Salvador is a party, and by the declarations and principles on human rights and humanitarian law adopted by the United Nations and the Organization of American States."²³
28. In the 9 articles that comprise section I entitled "Respect for and Guarantee of Human Rights", the parties commit themselves to take immediate steps to "avoid any act or practice which constitutes an attempt upon the life, integrity, security or freedom of the individual" and to take

¹⁹ See, inter alia, Lawyers Committee for Human Rights, Improvising History: A Critical Evaluation of the United Nations Observer Mission in El Salvador (New York, December 1995), p. 5-9, hereinafter cited as Improvising History.

²⁰ Improvising History, p. 7.

²¹ Salvador Samayoa, El Salvador: La reforma pactada (UCA Editores, San Salvador, 2002) p. 341, hereinafter cited as La Reforma Pactada.

²² United Nations Department of Public Information, El Salvador Agreements: The Path to Peace, May 1992, p. 7. Hereafter cited as The Path to Peace, and Improvising History, p. 6. As a non-governmental entity, the FMLN was not bound by human rights treaties, thus the reference to relevant provisions of international humanitarian law contained in Article 3 common to the Geneva Conventions of 12 August 1949 and the Second Additional Protocol to the Geneva Conventions Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II). Samayoa has noted that the FMLN was clear that this mention of humanitarian law obligated the guerrillas to abide by Additional Protocol II to the Geneva Conventions and thereby forego standard FMLN tactics such as kidnappings and some forms of economic sabotage, see La Reforma Pactada, p. 341.

²³ The Path to Peace, p. 7.

“all necessary steps and measures...to eliminate any practice involving enforced disappearances and abductions” (article 1). Article 2 specifies measures to protect against arbitrary detention, mistreatment and torture of detainees. The article stipulates that no one may be arrested for the lawful exercise of his political rights; that an arrest may be made only if ordered by the competent authority in writing and according to the law and carried out by properly identified officers. It provides for the right of the detainee to be informed of the reason for his/her arrest and to be assisted by a legal counsel and prohibits *incommunicado* detention and night-times captures as well as torture or other cruel, inhuman or degrading treatment or punishment. Article 4 stipulates that the legal remedies of *amparo* and *habeas corpus* should be made effective,²⁴ while articles 5 and 6 guarantee the right to freedom of association and to freedom of expression. Article 7 focuses on displaced persons and returnees, stating that they shall be provided with identity documents,²⁵ guarantees their freedom of movement and the freedom ‘to carry on their economic activities and to exercise their political and social rights within the framework of the country’s institutions.’ Article 8 guarantees freedom of movement for inhabitants of conflict areas and promises them identity documents. Article 9 refers to the enjoyment of labour rights, stating that this would be considered under the agenda item on social and economic problems.²⁶

International verification

29. Part II, entitled “International Verification” provides for the establishment of a United Nations human rights verification mission, ONUSAL. Article 11 requires the Mission to give special attention to the rights to life, to personal integrity and security of the person, to due process of law, to personal liberty, to freedom of expression and freedom of association, and in particular to situations which appear to reveal the systematic practice of human rights violations.²⁷ ONUSAL was mandated to investigate cases or situations occurring after its establishment, i.e. 26 July 1991.²⁸
30. ONUSAL was tasked to actively monitor the human rights situation in El Salvador; investigate specific cases of alleged violations; formulate recommendations to the parties; support judicial authorities “in order to help improve the judicial procedures for the protection of human rights and increase respect for the rules of due process of law”; and to carry out an educational and informational campaign on human rights. The broad investigative powers conferred upon the Mission included: unrestricted access to any part of the country; the ability to interview freely and privately any individual or group and receive reports about human rights violations, collecting information and reporting to the Secretary-General and, through him, to the General Assembly.²⁹
31. In specifying that the human rights division would report directly to the Secretary-General, those who designed ONUSAL sought to insulate it from the UN’s role as mediator. Giving the division a measure of autonomy would “guarantee the integrity of human rights reporting and

²⁴ *Habeas corpus* addresses violations of the right to liberty (i.e., illegal detention), while *amparo* provides a remedy for other constitutional rights, see Margaret Popkin, Peace without Justice: Obstacles to Building the Rule of Law in El Salvador, University Park, PA: Pennsylvania State Press, 2000, p. 84. Hereinafter cited as Peace without Justice.

²⁵ Many displaced as well as many of those who remained in conflict areas lost their identity documents in the course of the armed conflict.

²⁶ The Path to Peace, pp. 8,9, see also Ingrid Kircher, “The Human Rights Work of the United Nations Observer Mission in El Salvador,” in Netherlands Quarterly of Human Rights, Vo. 10 (1992), No. 3, pp. 303 – 317.

²⁷ The Path to Peace, p. 10.

²⁸ However, under its mandate to verify respect for due process of law, ONUSAL could examine significant cases of human rights violations which had occurred prior to its establishment but had not yet been brought to trial. See first report by ONUSAL, UN Doc. A/45/1055, S/23037, 16 September 1991, at 72 (p. 23). Thus, ONUSAL followed closely the prosecution of the Jesuit murders and of the el Mozote massacre.

²⁹ The Path to Peace, pp. 10, 11.

ensure that it was not excessively coloured by political or conjunctural concerns”³⁰ In reality, as was observed at the time, “ONUSAL’s reporting was influenced by a changing set of political realities.”³¹

Main proponents and opponents of the Human Rights Agreement and ONUSAL

32. The Human Rights Agreement and ONUSAL were not welcomed by all sides. The FMLN was slow to respond, as it deemed the accord “still partial and insufficient” and without practical implication if the Mission were not installed immediately. Gradually, NGOs began to speak out and particularly the independent ones played a constructive role by welcoming the agreement. Quickly, the demand became the immediate installation of ONUSAL. In the end, the UN relented in the face of strong and widespread pressure, agreeing to install the mission with combat still raging and thereby setting another precedent for the organization.
33. For the GOES and supporters, international supervision was an irritation to be tolerated. Although the reaction of most Salvadorans to the UN presence was positive, the mission came under vicious attack initially by elements of the far right.³² There were also credible threats to the security of UN personnel in the early years.

Applicable human rights treaties and international humanitarian law

34. The San José Agreement on Human Rights refers to international conventions to which El Salvador is a party. The main applicable treaties include the International Covenants on Civil and Political Rights and on Economic Social and Cultural Rights (ratified in 1979); the American Convention on Human Rights (ratified in 1978 with the reservation that El Salvador would recognize the jurisdiction of the Inter-American Court on Human Rights only on a case-by-case basis); the Convention on the Elimination of All Forms of Discrimination Against Women (ratified 1981); the Convention on the Rights of the Child (1990); the Convention on the Status of Refugees and Protocol Relating to the Status of Refugees (1993).³³ With regard to international humanitarian law, General Article 3 common to the Geneva Conventions (ratified in 1953) and Optional Protocol II relating to the Treatment of Victims of Non-International Armed Conflicts (ratified in 1978) were applicable.

V. MECHANISMS ESTABLISHED UNDER THE PEACE AGREEMENTS

35. The agreements established several mechanisms to promote human rights protection, some transitory and others permanent institutions. Among the temporary mechanisms were the UN Observer Mission in El Salvador (ONUSAL), a commission to purge the military of human rights violators -- the “Ad Hoc Commission” -- and a Truth Commission to examine the most serious acts of wartime violence. Another temporary mechanism, the Joint Group for the Investigation of Politically Motivated Illegal Armed Groups, was set up pursuant to a recommendation by the Truth Commission. Margaret Popkin, a human rights expert with long experience in El Salvador, stresses the important role which temporary mechanisms can play, noting that the main challenge for these mechanisms, which are often staffed by foreigners, is “to help state institutions assume their responsibilities and to facilitate a longer term societal process,

³⁰ *Improvising History*, p. 63.

³¹ *Ibid.*

³² Human Rights Watch, *The Lost Agenda: Human Rights and U.N. Field Operations*, pp. 19,20.

³³ At the time of the conclusion of the Peace Agreements, El Salvador was not a party to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). It ratified the CAT in 1996.

not to become a substitute for that process.”³⁴ The permanent mechanisms created under the Peace Agreements were the new National Civilian Police (PNC) and the National Counsel for the Defence of Human Rights.

VI. ONUSAL

36. Although the San José Agreement stipulated that ONUSAL would start after a ceasefire, both parties asked the UN to set up the Mission as soon as possible and ONUSAL was officially established on 26 July 1991. While peace talks continued, ONUSAL set up eight regional offices around the country. Following the signing of the Peace Agreements in January 1992, ONUSAL took on a broader role, verifying all other aspects of the agreements. As the first multidimensional peacekeeping operation of its kind, ONUSAL consisted of human rights, police, military and electoral divisions and the office of the chief of mission, with his political advisers.
37. ONUSAL’s mandate ended in April 1995, when it was replaced by a smaller Mission, MINUSAL. Beginning in April 1996, a small team worked out of UNDP until 30 June 1997. And finally, in the last phase of verification, the Department of Political Affairs from UN Headquarters and UNDP in El Salvador followed up on a few pending issues in the accords. Verification ended officially in December 2002. Throughout the decade, the UN played a pivotal role in the implementation process.
38. The San José Accord and mission planning had assumed a cessation of hostilities, yet combat was ongoing. Though violations of humanitarian law were still an issue, it was decided to focus on the "priority rights" spelled out in the accord, with particular attention to civilians, returnees and displaced persons.³⁵ While the decision was sound, it provoked criticism from some who felt this proved a pro-FMLN bias.
39. By focusing its resources and energies on individual cases, ONUSAL missed an opportunity to leave the domestic institutional guarantors -- the courts, the ombudsman, the public prosecutor's office -- stronger and better equipped to carry on alone. While the quality of ONUSAL’s analysis and recommendations on the justice system have been considered among its best reporting,³⁶ ONUSAL was faulted for failing to make a significant contribution to the Salvadoran justice sector. The UN was also limited by its resources. Unlike MINUGUA in neighbouring Guatemala, ONUSAL had no well-endowed trust fund and only on a few occasions conducted justice sector work using EU monies.
40. During its first phase of operations, ONUSAL was criticized for its lack of consistency, as case work was done in very different ways around the country, with little direction from headquarters. It was not until the second year that a *Methodological Guide* was developed.
41. One of the most contentious aspects of ONUSAL's work, both within the Mission and in civil society, was its human rights reporting.³⁷ The mandate simply required reporting to the Secretary-General, and through him, to the General Assembly. The UN saw the reports as a way to send messages to Salvadoran authorities, encouraging better behaviour, and was therefore

³⁴Peace without Justice, p. 249.

³⁵ See ONUSAL’s first report for a discussion of how the Mission chose to adapt the mandate to wartime. A/45/1055, S/23037, 16 September 1991, paras 17-25.

³⁶ Improving History, p. 80.

³⁷ For a contemporaneous critique of ONUSAL's reporting see *Improving History*, pp. 63-92. IDHUCA, the human rights institute at the Jesuit University, published a critique of each report. See the UCA's periodicals, *ECA* and *Proceso*, for articles on ONUSAL throughout the life of the Mission.

careful not to be too condemnatory. NGOs found the reports exaggeratedly diplomatic, putting a positive spin on a grim reality and not speaking in language comprehensible to most Salvadorans.

42. While the NGOs' expectations were unrealistic, ONUSAL could have communicated better with the domestic human rights community and indeed, with the Salvadoran population at large. Given the infrequency of reports, shorter, targeted reports on a particular case or phenomenon or even press releases could have been used. In a society such as El Salvador's at the time where facts were difficult to establish, suspicion rampant and the media unreliable, setting the record straight publicly could have served to diffuse tensions, thereby contributing to keeping the process on track. Salvadoran rights activists complained that the UN's role did not go beyond verifying that a human rights violation had occurred.³⁸
43. NGOs had lobbied for ONUSAL's early installation and their hopes and expectations regarding the human rights verification Mission were high. Many in fact expected there would be a privileged relationship with ONUSAL staff. While the San José Agreement on Human Rights stipulated, "The Director [of the Mission] shall work in close co-operation with existing human rights organizations and bodies in El Salvador,"³⁹ ONUSAL was widely criticized for failing to build a close relationship with NGOs and to strengthen their capacity. Expecting ONUSAL to take a more forceful role in denouncing human rights violations and in supporting their work, the NGOs felt that, if push came to shove, ONUSAL sacrificed human rights concerns to political expediency and were also critical of the lack of knowledge of many observers of the country.⁴⁰ ONUSAL, on the other hand, was critical of the poor capacity of Salvadoran human rights NGOs to investigate cases and meagre technical expertise. As Teresa Whitfield put it, "the mission's inability to develop a more productive relationship with the Salvadoran human rights NGOs remains one of its greatest failings. Above all, it was a waste of the important resource for institution-building that the NGOs represented."⁴¹
44. The Mission's police division remained under-utilised throughout its tenure. Its mandate was vague and division leadership did little to interpret or operationalize it in a way that was useful to the overall mission. The chief-of-mission in fact offered to place the civilian police (CIVPOL) under the human rights division, an offer that was declined. Human rights staffers were on a few occasions alarmed to find that their uniformed colleagues had failed to report wrongdoing by Salvadoran police because they did not wish to threaten their collegial relations.
45. Throughout the life of ONUSAL there was a tension between human rights and the mission's political role, first in achieving a negotiated settlement and later in using its good offices to achieve compliance by the parties. This tension was never resolved and in fact, it is perhaps impossible to do so. Some within ONUSAL's human rights division were harshly critical of what they saw as political compromises forced on the rights agenda. Even some of the division's leadership felt that as soon as the peace accord was signed and other divisions were added to ONUSAL, human rights was downgraded and not given serious treatment, either by UN leadership or by the parties.

³⁸ The *Methodological Guide* in fact confirms that, "Verification of a denunciation of a human rights violation culminates with the positive or negative substantiation of a violation by act or deed and/or the identification of the person or persons responsible, and the communication of the finding to the parties (the person denouncing and the person denounced), not with sanction. If the violation results in legal proceedings, verification can extend to those cases in which due process of law may be affected (which can include verification of the sanction imposed on the person responsible)."

³⁹ *The Path to Peace*, p. 10.

⁴⁰ *Improvising History*, p. 96.

⁴¹ Teresa Whitfield, "Staying the Course in El Salvador," in *Honouring Human Rights: From Peace to Justice*, The Aspen Institute, Washington, D.C., 1998, pp. 177,178. For a discussion on the role of human rights NGOs see also, *Peace Without Justice*, pp. 192-196 and *Improvising History*, pp. 93-102.

46. This dynamic has caused some to suggest that a free-standing human rights component on the margins of a peacekeeping operation might better serve the cause of justice. Yet it is also true that sectioning off the human rights unit might provide the authorities with an excuse to dismiss its findings, treating it like another NGO, albeit one with more resources and the UN imprimatur.

Lustration of the Military: The Ad-Hoc Commission

47. One of the most difficult issues in the negotiations was that of military reform. The FMLN demanded a downsizing of the armed forces and the purge of human rights violators as well as a new doctrinal approach. The Salvadoran officer corps was loath to allow a group of civilians and foreigners to judge Salvadoran soldiers, and initially a military review commission was proposed.⁴² After months of discussions, the parties agreed in September 1991 to establish an Ad Hoc Commission to “purify the armed forces”, although the details of this were left to the final Peace Accord. At the insistence of the Government, the commission was to be composed of Salvadorans nominated by the UN Secretary-General and endorsed by the Salvadoran President.⁴³ Two military observers were present during the commission’s deliberations but not during final decision-making.
48. The commission was mandated to evaluate the officer corps, taking into account their respect for human rights, professional competence and commitment to a democratic society.⁴⁴ It had the authority to recommend the transfer or discharge of the officers reviewed. Its recommendations were binding, and the Government was required to implement them within 60 days.⁴⁵ The commission’s three-month mandate was subsequently extended for one month. Since it was impossible to review the records of all 2,293 active-duty officers, the commission decided to focus on the most senior officers, roughly 10% of the total.
49. Expectations for the Ad-Hoc Commission were low, in part because it was assumed that Salvadorans, unlike foreigners, would be susceptible to pressure. This proved not to be the case, and the confidential report -- submitted to the Secretary-General and the Salvadoran President in September 1992 -- was much stronger than anticipated: 103 of the 232 senior officers evaluated were to be transferred or discharged, including the Minister and Vice Minister of Defence and the most prominent members of the clique then running the military. This provoked strong protests from the Armed Forces, who rejected the recommendations and successfully pressured the Government to delay and avoid compliance.
50. The non-compliance caused a crisis in the peace process, which could only be resolved by senior-level UN intervention resulting in a new timetable. Even then, the Government only complied partially, maintaining some of the officers in question in their posts, including the Minister and Vice-Minister of Defence, and assigning others as military attachés abroad. In a rare public letter to the Security Council, the Secretary-General declared the Government in non-compliance with the Peace Agreement.⁴⁶

⁴² Americas Watch, El Salvador: Accountability and Human Rights: The Report of the United Nations Commission on the Truth for El Salvador, Vol. V, Issue No. 7, August 10, 1993, pp. 7, 8. Improvising History, p. xii.

⁴³ Peace Without Justice, pp. 95,96. Americas Watch, Accountability and Human Rights, p. 8.

⁴⁴ The Path to Peace, pp 49-50.

⁴⁵ Margaret Popkin, El Salvador’s Negotiated Revolution: Prospect for Legal Reform, Lawyers Committee for Human Rights, New York, 1993, pp. 51, 53.

⁴⁶ Letter dated 7 January 1993 from the Secretary-General to the President of the Security Council concerning implementation of the provisions of the peace agreements relating to the purification of the armed forces, UN Doc. S/25078 of 9 January 1993.

51. Given the role of the armed forces in violating human rights, the need for lustration was obvious. At the time of the peace process, many officers in leadership positions had been implicated in serious human rights violations. While prosecutions would have been preferable, this was not possible given the weak and corrupt judicial system and the dominance of the military, which would have refused to accept a peace agreement that included provisions punishing its members. In this context, the Ad Hoc Commission “represented a creative answer to the need for a cleansing of the military.”⁴⁷
52. For Popkin, the Ad Hoc Commission’s recommendations “constituted an unprecedented civilian review of military officers,” with the Salvadoran commissioners showing great courage.⁴⁸ She emphasizes, however, that, without the additional pressure in the form of the international community and the Truth Commission, the recommendations would not have been fully implemented. “Even after the publication of the Truth Commission’s report,” Popkin adds, “the Ad Hoc Commission’s recommendations were implemented in such a way that neither the government nor any officers admitted wrongdoing. Instead, officers were allowed to take their normal retirement and honourable discharges.”⁴⁹

Human Rights Ombudsman

53. The National Counsel for the Defense of Human Rights (*Procuraduría para la Defensa de los Derechos Humanos, PDH*) was given a broad mandate.⁵⁰ These powers included: receiving complaints about human rights violations and investigating cases; promoting judicial or administrative remedies; notification of all arrests and authority to visit detainees; oversight of judicial compliance with due process requirements; and proposing relevant legislation.⁵¹ The institution was mandated to publicize its conclusions and recommendations. It was assumed that the office would take on many of ONUSAL’s functions when the Mission departed. The first National Counsel, or ombudsman, was a former labour minister with no prior human rights experience, his appointment “reflecting partisan politics rather than a concern for building a solid institution to safeguard human rights.”⁵²
54. UN Independent Expert Pedro Nikken expressed concern that the institution had so far acted rather timidly and warned that, unless it made its strong presence felt soon, people would become sceptical, and “it will be seen as still another weak entity among so many others in the past history of the El Salvador which were responsible for protecting citizens from the abuse of power.”⁵³ Nikken recommended that the ombudsman’s office establish clear priorities, develop close relationships with NGOs and be provided with the necessary personnel and technical and financial assistance.
55. Cooperation between ONUSAL and the PDH developed slowly, in part because the ombudsman’s office was initially reluctant to collaborate with ONUSAL and because ONUSAL tended to focus more on individual case work, only belatedly dedicating more time to institution building. It was not until the second half of 1994 that meaningful cooperation finally got

⁴⁷ *The Lost Agenda*, p. 32.

⁴⁸ *Peace Without Justice*, pp. 107,108.

⁴⁹ *Ibid.*

⁵⁰ Unlike the original Scandinavian model, ombudsmen in Latin America have been given extensive responsibility for guaranteeing respect for human rights, which generally includes the authority to investigate and denounce malfeasance or inaction” but no prosecutorial functions, see *Peace Without Justice*, p. 167, *El Salvador’s Negotiated Revolution: Prospects for Legal Reform*, p. 35.

⁵¹ *The Path to Peace*, pp. 23, 24.

⁵² *Peace Without Justice*, p. 168.

⁵³ Pedro Nikken, Independent Expert of the Commission on Human Rights, *Report on the Situation of Human Rights in El Salvador*, UN Doc. A/47/596, 13 November 1992, p. 34.

underway, when ONUSAL stationed a few staff at the ombudsman's offices and began joint verification. Gradually, in preparation for ONUSAL's departure in April 1995, the mission's caseload was transferred to the ombudsman's office and new cases redirected to it.

56. Public confidence in the PDH increased after the appointment of a new National Counsel, who was much more active and outspoken than her predecessor, undertaking investigations, challenging legislation which was not in conformity with international human rights norms and denouncing violations committed by the police. While some of the ombudsmen have succeeded in raising the public profile of the office, little has been done to consolidate the institution. Civil service requirements make it difficult to get rid of non-performing staff and some have charged that the PDH has strayed far afield from its mandate and engaged in too many issues. For its part, the GOES has never truly embraced the institution as *the* human rights body of the State and the PDH remains both ignored and isolated from other public institutions.

VII. REFORM OF THE JUDICIARY

57. Judicial reform proved to be one of the most daunting challenges in the Salvadoran peace process. As Margaret Popkin said in her analysis of the Salvadoran justice system, unlike other Latin American countries, El Salvador needed a major overhaul and not merely reform of certain aspects of the system.⁵⁴
58. The glaring deficiencies of the Salvadoran judicial system and the extent of impunity, particularly for crimes involving the military, have been well documented and the lack of justice is often cited as one of the root causes of the war.⁵⁵ The Truth Commission characterized the judiciary as follows:

None of the three branches of Government – judicial, legislative or executive - was capable of restraining the military's overwhelming control of society. The judiciary was weakened as it fell victim to intimidation and the foundations were laid for its corruption; since it had never enjoyed genuine institutional independence from the legislative and executive branches, its ineffectiveness steadily increased until it became, through its inaction and appalling submissiveness, a factor which contributed to the tragedy suffered by the country.⁵⁶

59. By the time the peace talks started there was increased consciousness about the need for judicial reform, due in part to years of work by Salvadoran NGOs focusing on justice issues. The USAID justice reform programme, for all its shortcomings, had also helped put justice reform on the agenda.⁵⁷ Yet the Peace Agreement was weak on judicial reform. One of the reasons for this, according to UN expert Pedro Nikken, was that the FMLN prioritized curbing the role of the armed forces and, in order to obtain this, made greater concessions in the area of judicial reform.⁵⁸ Nor did the FMLN have the expertise necessary to design a sound reform package. The failure to achieve much at the table was also due to the influence of the Supreme Court President, an ARENA member who dismissed the accords as political agreements not binding on the judicial branch.

⁵⁴ Peace Without Justice, p. 8.

⁵⁵ Peace without Justice, p. 7. On the justice system prior to the peace agreement, see, for instance, Lawyers Committee for Human Rights, Underwriting Injustice: AID and El Salvador's Judicial Reform Program; New York, 1989; Americas Watch, Nightmare Revisited, 1987-1988: Tenth Supplement to the Report on Human Rights in El Salvador, New York, 1998 and El Salvador's Decade of Terror, New Haven, 1991.

⁵⁶ From Madness to Hope, p. 378.

⁵⁷ Improvising History, p. 102.

⁵⁸ Peace without Justice, pp. 102-103.

60. In April 1991, the parties agreed to the following constitutional and judicial reforms: changing the procedures for electing judges at all levels; increasing the budget for the judiciary; election of Supreme Court judges, the Attorney-General of the Republic, the Chief State Counsel and the National Council for the Defence of Human Rights by a two-thirds majority of Legislative Assembly deputies; strengthening the independence of the National Council of the Judiciary and giving it additional responsibilities for the nomination of judges and for the Judicial Training School; establishing a new criminal investigation agency under the Office of the Attorney General; and providing for a career judicial service by reforming the career judicial service law.⁵⁹
61. Depoliticizing the Supreme Court and curtailing its far-reaching influence over the entire judicial branch proved extremely difficult. The Supreme Court not only served as the ultimate court of appeals and determined the constitutionality of laws, but was also responsible for judicial governance, with the Justice Ministry playing no role in the courts. Thus the Supreme Court appointed and dismissed all judges and court employees and licensed and disciplined all lawyers. According to the Lawyers Committee for Human Rights, the Salvadoran Supreme Court was “notorious for its corruption and political manipulation of judges and cases.”⁶⁰ Judges were chosen based more on political criteria and family ties than on professional qualifications. Under the constitutional reform justices are now elected for staggered terms of 9 years by a qualified majority of two-thirds of the Legislative Assembly from a list provided by the National Council on the Judiciary.⁶¹
62. Five years after the signing of the peace accords, the UN Secretary-General deplored “persistent deficiencies in the judicial system which have contributed to its lack of credibility with the general population...”⁶² The report described the “greatest failing” in the administration of justice as “the lack of efficacy in the process of vetting judges and officials who are dishonest, incompetent or whose motivation has failed them.”⁶³ By 1997, only some 31 judges had been removed and a somewhat larger number suspended or transferred (out of a total of some 520 judges).⁶⁴
63. The reasons for the meagre results regarding judicial reform are multiple and complex: the fact that neither party made judicial reform a priority; failure to build a strong constituency for reform and the resulting lack of broad-based Salvadoran support and ownership of the process; underestimation of the difficulty of changing entrenched attitudes and resistance from different sectors, including the 1989-94 Supreme Court; lack of political will in implementing the reforms; insufficient support from ONUSAL; lack of coordination among international actors supporting the process; and chronic resource short-falls.

VIII. CRIMINAL JUSTICE REFORM

64. Although the Peace Accords did not address criminal justice reform, the Truth Commission subsequently made a number of specific recommendations, including invalidating extra judicial confessions (which were often the only evidence); ensuring the presumption of innocence; strict compliance with maximum time-limits for police and judicial detention (as lengthy delays in sentencing were routine); and reinforcing the right to defence.

⁵⁹ *The Path to Peace*, pp. 14,15; *Peace Without Justice*, p. 101, Lawyers Committee for Human Rights, *El Salvador's Negotiated Revolution: Prospects for Legal Reform*, New York, June 1993, p. 6 – 40.

⁶⁰ *Improvising History*, p. 103.

⁶¹ *Ibid.*, pp. 41, 43. Traditionally Supreme Court justices had been appointed by the Legislative Assembly for a period of five years and the majority party generally selected the entire Supreme Court.

⁶² A/51/917 Report of the Secretary-General, 1 July, 1997, para. 22.

⁶³ *Ibid.*, para 23. Popkin at p. 211 notes that new legislation made the National Council of the Judiciary responsible for evaluating lower court judges, which was criticized by ONUSAL because it valued skills in administrative management rather than judicial performance.

⁶⁴ *Peace Without Justice*, p. 212, 213.

65. These recommendations were reflected in proposals for new criminal justice legislation.
66. Some actively campaigned against the reforms because of their emphasis on individual rights in the face of a serious crime wave. In the post-war period, El Salvador's homicide rate was among the highest in Latin America.⁶⁵ The delays in enacting key legal reforms were described by ONUSAL in 1994 as "the biggest obstacle to the process of institution building."⁶⁶ The new Criminal Procedure Code was finally adopted in December 1996 and the Penal Code in April 1997.

IX. PUBLIC SECURITY: THE NEW NATIONAL CIVILIAN POLICE (PNC)

67. Traditionally, policing in El Salvador was in the hands of the armed forces and its three public security forces – the National Guard, the Treasury Police and the National Police. As they were considered "auxiliary organs" of the court, only evidence collected by these three bodies was admissible in court. In practice, they did little real policing or criminal investigation, but were used for counterinsurgency purposes in the struggle against the FMLN and for repressing dissent.
68. Early in the peace talks, consideration was given to reforming the National Police into a new force under civilian rule.⁶⁷ In the end, the negotiators agreed to abolish the National Guard and the Treasury Police and maintain the National Police during a transitional period. It was to be phased out slowly as the numbers of the new National Civilian Police (PNC) increased. The accord also called for establishment of a new police academy. The aim was to form a professional, apolitical force under civilian control which respected human rights and fulfilled its critical role in the criminal justice process. Twenty per cent of the new force was to be recruited from the National Police, an equal number from the ranks of the FMLN, with the remaining 60% open to citizens from other walks of life who qualified. All were to be properly vetted and trained at the new academy. An inspector general, appointed by agreement among the police chief, the ombudsman and the attorney general, would oversee a system of internal discipline. The PNC was to be the only armed police body with national jurisdiction.
69. In practice, implementing the accords' provisions on public security proved extremely difficult; this was arguably the part of the accords that veered most seriously off course. As one observer put it, though GOES had agreed to the plan, "it had to be pushed at every step of the way for two years to implement the agreement".⁶⁸ The authorities tried to preserve the two forces slated to dissolve; transferred some of their members into the National Police so they would have direct access to the new force; and transferred discredited investigative units into the PNC, to name a few of the problems. Some of the transfers of ex military and units which should have been dismantled were done with the blessings or minimally, the acquiescence, of the FMLN. As

⁶⁵ Draconian emergency anti-crime legislation was passed in 1996, which gave the police a freer hand in law enforcement and limited suspects' rights, and further threatened to derail the proposed Criminal Procedure and Penal Codes. The Supreme Court later declared the most questionable aspects of the emergency law unconstitutional. See *Peace Without Justice*, pp. 224-225.

⁶⁶ ONUSAL, 12th Report on Human Rights, para 18, 113. Popkin lists the reasons for the resistance to enacting and implementing the reforms as follows, "inadequate preparation of the terrain for reform as well as a highly formalistic legal system; institutional resistance; poorly trained police, judges, prosecutors, and defense attorneys; and a lack of societal commitment." *Peace Without Justice*, p. 223.

⁶⁷ For a thorough treatment of the new police, see Gino Costa, *La Policía Nacional de El Salvador, 1990-1997* (UCA Editores, 1999).

⁶⁸ Jack Spence, *War and Peace in Central America: Comparing Transitions Toward Democracy and Social Equity in Guatemala, El Salvador, and Nicaragua*, (Hemisphere Initiatives, November 2004) p. 59, hereinafter cited as *War and Peace in Central America*.

Hemisphere Initiatives observed, ONUSAL was more vigilant and effective at keeping the process on track than was the FMLN, which had little expertise in this area.⁶⁹

70. One of the main weaknesses of the Salvadoran system was the lack of an independent criminal investigative body under civilian control. Since the military police was responsible for criminal investigations, it shielded fellow military officers from scrutiny. The Peace Accords assigned primary responsibility for criminal investigation to the Attorney-General's Office.⁷⁰ A Division of Criminal Investigation (DIC) was established within the PNC under the functional direction of the Attorney-General. It was, however, not provided with sufficient resources to carry out its new tasks and hesitant about its new relationship with the police. More than five years after the signing of the agreements the DIC remained "understaffed, inadequately trained, and plagued by weaknesses in supervision and internal controls that contributed to continuing problems with corruption."⁷¹
71. It proved difficult for the FMLN combatants to meet the entrance requirements and they were underrepresented in the force. Early PNC leadership also favoured ex security force members when choosing officers and former FMLN members were regularly passed over for promotion. In the early years parallel investigative units were formed outside the chain of command, clearly weakening the force. ONUSAL conducted two thorough evaluations of the PNC, offering extensive recommendations for course correction. One recommendation, which was implemented after significant delay and under pressure, was the appointment of a National Commission on Public Security. The Commission was meant to operate as a kind of civilian policy advisory board to the President. Though serious, credible commissioners were chosen, neither the GOES nor police leadership made use of the opportunity.
72. One problem that plagued the PNC in its early years and thwarted its healthy development was that two conflicting visions competed for control of the force. One favored a civilian, rights-respecting model of policing at the service of the citizenry and the other thought that a heavy hand was needed to beat back a formidable post-conflict crime wave. The international community was not uniform in its approach to the PNC and there was a lack of coherence and coordination in the international assistance. ONUSAL's attempts to coordinate the international assistance were resisted by some strong donors.
73. Salvadorans recognized that the PNC was a big improvement and early polls showed the force to be extremely popular. Yet with time it became clear that lawlessness within the force was growing. Furthermore, the Inspector General was not doing the job he was supposed to be doing in investigating alleged improprieties and arranging for sanctions. After a number of spectacular crimes in which PNC were implicated and apparent loss of public confidence, a special review was launched. A backlog of 1,200 cases were processed by a team set up on an ad-hoc basis and 200 officers dismissed.
74. While the PNC remains chronically under-funded and serious problems persist, it is doing well by comparison with another new force in the region, in Haiti, and with the one in neighboring Guatemala, where the old police force was not abolished, but reformed.

X. SPECIFIC PROTECTION ISSUES

75. The accords did very little to address socio-economic issues that had been a main cause of the war. They did establish a forum for discussion of these issues that made very little headway over

⁶⁹War and Peace in Central America, p. 60.

⁷⁰The Path to Peace, p. 23.

⁷¹Peace Without Justice, p. 191.

the next two years, due in part to the opposition of some within the private sector. The accord did address the needs of former combatants with training programmes and access to land. The families of former combatants on both sides and the peasant supporters of the FMLN benefited from several programmes designed to ease their re-integration into society. There were no specific provisions for women or children in the accords.

76. Throughout much of the war the guerrillas controlled large parts of the country. Many residents of these zones had fled over the border into Honduras to escape large military incursions, some of which resulted in massacres. Beginning in 1987, these peasants, many of whom were supporters of the FMLN, began to move back across the border and took up residence in zones that were by then dominated by the guerrillas and of only limited access to the military. Some of the original occupants of these areas had fled to urban areas or left the country altogether. Squatters moved into houses and property and lived there for over a decade without being challenged or taking any steps to legalize the arrangement. Some built new houses or improved existing structures.
77. The communities which returned from Honduras set up new villages known as “relocations” where they built communal structures, schools and productive workshops.⁷²
78. In the years immediately following their return these communities were subjected to harassment and periodic violence by the authorities, who suspected them of producing goods for the guerrilla movement and providing safe haven to combatants. And for the guerrillas, the presence of large numbers of civilians in the zone again was seen as a measure of protection against the possibility of massive military operations or aerial bombardment.
79. By the time the peace accord was signed, most of the refugees intending to return had already done so. They were, therefore, barely mentioned in the accords. The land tenure situation was, however, extremely complicated and contentious.
80. Three different land programmes linked to the accords aimed to transfer and legalize land holdings and other property:⁷³
 - The land transfer programme designed to provide a means of subsistence to landless peasants, in particular former combatants and their families;
 - The break up of holdings that exceed the constitutional limit of 245 hectares; and
 - The human settlements programme aimed at resolving multiple claims on some plots and legal recognition of property improvements made by squatters.
81. A land bank was set up with EU and US funding to buy land for those who needed it. Bank staff worked with the Agrarian Reform Institute (ISTA), peasant associations, the FMLN, ONUSAL and later UNDP, to shepherd the programmes to completion. Donor-funded job training and credits for farmers sought to make the enterprise more viable. The beneficiaries totalled some 36,000, including 7,500 former guerrillas; 8,500 former soldiers; and 21,000 land occupiers. About 100,000 hectares of land were distributed.
82. In practice, eligibility remained a contentious issue for years. The original calendars for these programmes proved unrealistic and they fell grossly behind schedule. The programmes required extensive monitoring by the UN and significant provision of good offices. Some owners did not wish to sell. Some beneficiaries were offered poor quality land unsuitable for farming. The

⁷² For an account of life in one such community, see Mandy Macdonald and Mike Gatehouse, *In the Mountains of Morazan: Portrait of a Returned Refugee Community in El Salvador* (Latin America Bureau, London, 1995).

⁷³ A/55/465, The Situation in Central America, Report of the Secretary-General, 18 October 2000, para 32.

provision and registration of titles moved at a snail's pace. The inequitable land tenure situation had been among the root causes of the conflict.⁷⁴ The issue remained politically sensitive right up to the end of the process. Yet even in the best case scenario – legal title to a fertile plot of land was given to a farmer with the skills and capital to make it work -- the tiny parcels given out were hardly viable in the new economy. Some beneficiaries were unable to come up with the infusion of cash to buy seeds and other inputs; some accumulated large debts, much of which was ultimately forgiven.. Given the country's poverty and joblessness, these programmes made but a tiny dent in the situation. The land programmes and another providing assistance to the war-wounded were verified by the UN until December 2002, when they were deemed adequately completed.

XI. DEALING WITH THE PAST

The Truth Commission

83. The push for a Truth Commission was in large part inspired by the experiences in Chile, Argentina and Brazil, and was promoted forcefully by the FMLN and NGOs. According to Samayoa, the parties agreed that the commissioners should be foreigners and would be named by the Secretary-General.⁷⁵ An early attempt to compile a list of cases to be examined was abandoned when the sides, quite predictably, could not agree. Truth commission language in the accords is very brief and much was left to the interpretation of the three commissioners and staffers. In carrying out its task the commission was instructed to “take into account (a) the exceptional importance that may be attached to the acts to be investigated, their characteristics and impact, and the social unrest to which they gave rise; and (b) The need to create confidence in the positive changes which the peace process is promoting and to assist the transition to national reconciliation.”⁷⁶ The Truth Commission, which consisted of three prominent foreign commissioners and international staff, began its work in July 1992 and presented its report in March 1993.
84. Despite the FMLN's attempts to word the mandate in such a way to exclude its own violations of humanitarian law, it was understood that the case docket would include abuses by both sides.⁷⁷ Early reluctance to cooperate with the commission was overcome by the efforts of NGOs and the Catholic Church. The commission registered 22,000 complaints, recorded 7,000 testimonies and ultimately attributed 85% of the cases to agents of the state, paramilitary groups allied to them and the death squads.
85. Having initially maintained that individuals -- not the military as an institution --was responsible for the violence, civilian and military authorities made an 11th-hour visit to UN Headquarters to lobby for not mentioning names. In the end, the report named over forty military officers and eleven members of the FMLN responsible for ordering, carrying out or covering up abuses and recommended that all those named be banned from public life for ten years. This recommendation was later declared unconstitutional.
86. While many of the case write-ups added little to what was already on the public record, as a whole the report played a useful and positive role. A respected group of international investigators had validated the painful reality that Salvadorans had lived through. Some felt it had a cathartic effect and legitimated long-held feelings.

⁷⁴ In the early 1980s, GOES attempted a land reform as a way to diminish support for the insurgency.

⁷⁵ *La Reforma Pactada*, p. 497.

⁷⁶ Mexico Agreements, 27 April 1991, *The Path to Peace*, pp 16,17.

⁷⁷ *La Reforma Pactada*, p. For an insider's view, see Thomas Buergenthal, "The United Nations Truth Commission for El Salvador," *Vanderbilt Journal of Transitional Law*, Vol. 27, #3 (October 1994) p. 528

87. The report made a number of recommendations aimed at eradicating the structural causes of the violence, institutional reform to prevent the repetition of such violations and steps toward national reconciliation. The report was particularly pointed in its accusation that justice sector institutions and personnel bore responsibility for perpetuating the violence by aiding impunity. Among the commission's most controversial recommendations was the suggestion that the entire Supreme Court should resign, given the "tremendous responsibility which the judiciary bears for the impunity with which serious acts of violence such as those described in this report occurred."⁷⁸ Not surprisingly, the justices vehemently rejected the suggestion and served out their terms.
88. Though ONUSAL continued to monitor progress on the commission's recommendations, they remained in large part unimplemented. The call for "moral and material compensation" for the victims and their families was not acted upon. The commissioners had advocated that both GOES and the FMLN provide financial compensation to those they had harmed. They also recommended some symbolic gestures, such as a national monument including the names of the victims and designation of a national holiday in their memory.
89. One controversial conclusion was that the country had "no system for the administration of justice which meets the minimum requirements of objectivity and impartiality so that justice can be rendered reliably".⁷⁹ For this reason, the commissioners did not call for trials. Incredibly, the commissioners remained silent on the question of amnesty, and, some felt at the time, in so doing helped pave the way for the sweeping amnesty that was adopted by parliament just five days after the report was issued.⁸⁰
90. The amnesty passed on 20 March 1993 was unconditional and far-reaching. While all factions in parliament were on record in favour of an amnesty, the speed with which it was approved, without debate, drew criticism both domestically and abroad, including from the UN Secretary-General. And perhaps fearful of cases that might be inspired by the Truth Commission's criticism of the failings of justice sector personnel, the amnesty also defined as "political crimes" acts such as cover-up and wilfully improper judicial proceedings. Three Salvadoran NGOs filed constitutional challenges to the amnesty, but their petitions were not admitted. In 1994, the Inter-American Commission found the amnesty incompatible with El Salvador's obligation under the American Convention on Human Rights.⁸¹
91. The country's civilian and military leaders vehemently rejected the commission's findings and attempted to denigrate the commissioners themselves. Far from acknowledging the State's role and responsibility for what had happened, the authorities quickly passed an amnesty to guard against trials during which more truth might emerge. As Popkin has said, "The refusal to come to terms with the past, even in an exemplary fashion, or to provide any redress for victims and their families has not helped to end impunity, establish the rule of law, or promote reconciliation. Instead it has left victims and their relatives without recourse".⁸²

⁷⁸ *From Madness to Hope*, p. 380.

⁷⁹ *Ibid*, p. 381.

⁸⁰ There had been several earlier amnesties: two in the course of the war years in 1983 and 1987. In January 1992, the parliament had passed a limited amnesty, as the ARENA Government had argued that without an amnesty, the FMLN leadership could not even enter the country and participate in COPAZ.

⁸¹ *Peace Without Justice*, p. 154.

⁸² *Ibid*, p 162..

The Joint Group for the Investigation of Politically Motivated Illegal Armed Groups

92. The Truth Commission had recommended an immediate, thorough investigation of activities by illegal groups (death squads).⁸³ However, it was not until late 1993 after the assassination of several prominent FMLN leaders that the Joint Group was finally established. Even so, significant international pressure -- including from the Security Council -- was required to get the GOES to agree to the group's establishment.
93. The Joint Group carried out an 8-month investigation.⁸⁴ Its mandate was limited to criminal acts committed after the Peace Accords. In addition to a public report, a restricted annex of evidence requiring further investigation was given to Salvadoran authorities, the ombudsman and ONUSAL. The Joint Group confirmed the existence of illegal armed groups and their linkages to the death squads of the past, as well as “the active participation of members of the armed forces of El Salvador and of the National Police”⁸⁵ in many acts of politically motivated violence. The Joint Group made a number of recommendations to the Government to prevent and punish illegal groups. It also recommended further justice sector reform, particularly regarding criminal investigation.

Civil Society

94. Salvadoran human rights NGOs struggled to find a niche in the greatly changed post-war conditions. Whereas in the past their primary focus had been on the public denunciation of human rights cases and support for the victims, they now faced the challenges of monitoring state institutions, voicing proposals and criticisms regarding reforms and finding other new ways to work on behalf of their constituencies.
95. Some NGOs looked at compensation for past violations and victims' rights.⁸⁶ Other human rights NGOs began to monitor the activities of the newly created institutions. Thus, the Human Rights Institute of the Central American University (IDHUCA) published regular critical commentary on ONUSAL and the first National Council for Human Rights, urging them to fulfil their mandate. During the tenure of the second National Council, IDHUCA worked closely with the National Council in the investigation of several high-profile cases and played an important oversight role regarding the new National Civilian Police. Two Salvadoran NGOs, the Institute for Legal Studies (IEJES) and the Center for the Study of Applied Law (CESPAD), which focus on justice issues, played an important role in the transition period, making proposals for and promoting discussion about legal reform.⁸⁷
96. The main problem Salvadoran NGOs encountered was that they did not have the capacity to exert public pressure and develop constituencies for reforms of national institutions when national institutions did not have the will to carry out reforms and when international leverage was lacking.⁸⁸ Later on, technical assistance and training programmes were initiated to

⁸³ From Madness to Hope, p. 382.

⁸⁴ Report issued on 28 July 1994 by the Joint Group for the Investigation of Politically Motivated Illegal Armed Groups, UN Doc S/1994/989, quoted in The UN and El Salvador, p. 569 ff.

⁸⁵ *Ibid.* p. 570.

⁸⁶ For instance, the non-governmental Human Rights Commission (CDHES) presented a proposal to implement the Truth Commission's recommendations to establish a reparations fund. Several NGOs that had been active during the war came together with some of the newer NGOs to preserve historical memory. In 1998 they enlisted the support of the mayor of San Salvador and in a downtown park built a monument to the civilian victims of the war. Peace Without Justice, p. 194.

⁸⁷ Peace Without Justice, p. 194 and p. 220.

⁸⁸ Whitfield, “Staying the Course in El Salvador,” p. 178.

strengthen NGO capacity, such as an advocacy training project to raise concerns about police accountability, monitoring implementation of criminal justice reforms.

XII. CONCLUSIONS

97. Human rights violations were among the root causes of the conflict, a by-product of that conflict and addressing them was key to its lasting resolution. Human rights appropriately figured large in the talks, in the accord and as implementation unfolded. When new issues emerged after the accords, such as the investigation into ongoing death squad activity by the Joint Group, involvement by the Security Council and top UN officials ensured that the matter was treated just as seriously as provisions that were in the accords.
98. The Salvadoran process is largely successful, especially by comparison with others. Violating human rights is no longer state policy, resolving disputes violently is no longer acceptable and the justice sector has been reformed, though much more remains to be done. The importance attributed to human rights compliance, particularly in ONUSAL's first six months, and the presence of monitors throughout the country was a major factor in the Mission's success. It provided the parties with the confidence to continue the peace talks and provided domestic monitors with credibility and political space. The steady drop in human rights violations throughout the Mission's tenure in El Salvador was a tangible demonstration of the benefits of peace.
99. As Hemisphere Initiatives has said, the "Salvadoran peace accords basically did not address, in more than passing vague terms, other issues of poverty, education and health."⁸⁹ What little language there is in the accords under a socio-economic heading had to do with the resettlement of displaced persons, legalizing those occupying lands without a title and providing benefits to the former combatants and their supporters. The struggle for social equity was meant to begin in peacetime, once everyone could engage and compete politically without fear. Yet many of these key issues have not been tackled and while the numbers of poor has decreased, the gap between rich and poor has grown. While some have called the lack of attention to socio-economic concerns a shortcoming of the peace agreements, others see the narrowness of the reform agenda as a strength, and believe that development issues are appropriately left to development agencies and bilateral donors. All can agree, however, that if a society emerging from conflict is to complete its transition to peaceful, stable democracy, socio-economic issues, particularly poverty reduction, must figure in the transition package.
100. Following are some observations on the experience in El Salvador:

- Popkin concludes that "despite this far-reaching international involvement and the overall success of the peace process, progress in establishing accountability, providing reparations to those who suffered the brunt of the war and building the rule of law seems meagre and grudging".⁹⁰ In El Salvador and elsewhere, the pace at which social change can take place is often underestimated. This is especially true in efforts to promote the rule of law. In societies that have collapsed, judicial reform is often a massive undertaking, which requires sustained support and dedicated efforts over the long term. While not much was accomplished as a direct result of the accords, expectations may not have been realistic, given the nature of this kind of reform, how far the sector had to come and other factors particular to the Salvadoran situation. In the last decade, thinking has evolved considerably on these issues, the shift being reflected in the Secretary-General's August 2004 report on transitional justice:

⁸⁹ War and Peace in Central America, p. 82.

⁹⁰ Peace Without Justice, p. 243.

Justice and peace are not contradictory forces. Rather, properly pursued, they promote and sustain one another. The question, then, can never be whether to pursue justice and accountability, but rather when and how. This means recognizing that United Nations peace operations, with some notable exceptions, are planned as short-term interventions, while accounting for the past, building the rule of law and fostering democracy are long-term processes. As such, strategic planning should, from the beginning, take account of the need for phasing and for post-mission international support in these areas, including long-term development assistance.⁹¹

- By opting not to work closely with civil society, the human rights division, and indeed the Mission at large, lost an opportunity to build a solid constituency for the peace process and for the rule of law. Working alongside domestic monitors would have allowed for skill transfer, capacity building of the local groups and spreading understanding of the healthy watchdog or social auditing function that civil society can play. By reaching out more to Salvadorans and viewing them as partners instead of subjects of the work the UN would have helped reduce the post-mission void that often follows the end of a mandate.
- The support of the international community was indispensable in the Salvador process -- in pressuring for compliance, in financing key programmes such as land transfer and reintegration, in creating a community of support in which the process could unfold.
- During the conflict as well as during the transition period, constructive use was made of international mechanisms such as the UN and OAS Human Rights Commissions and the special rapporteurs and experts of the UN System. Likewise, the monitoring and reporting of international NGOs was extremely important to the process.
- While the presence of UN monitors around the country was a major strength of the mission, experience suggests that as long as there is a resident mission of internationals, official domestic monitoring bodies such as ombudsmen's offices are not apt to consolidate and attract the necessary resources. Thought should be given to working jointly with local monitors, both civil society and official ones, from the beginning of a mission's mandate.
- Especially in the human rights area, a mission should find appropriate means of communicating with various audiences and constituents. While the mandated reports to a UN body may not speak effectively to the local population, it is important to find appropriate means in order to build a constituency for the peace process and for the rule of law.
- Reform in the justice and public security sectors must proceed together. If one falls behind, the other's consolidation will also be affected.

⁹¹ S/2202/616, 23 August 2004, "The rule of law and transitional justice in conflict and post-conflict societies," Report of the Secretary-General, para 21.

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