THE DISAPPEARED CHILDREN OF EL SALVADOR – A FIELD STUDY OF TRUTH, JUSTICE AND REPARATION

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1. INTRODUCTION

The subject of this master thesis is the victim’s right to an effective remedy and reparation for crimes against international human rights law committed during the armed conflict in El Salvador and the state’s obligation to provide for this. In many post-conflict and transitional societies impunity prevails. Impunity is the term for the phenomenon where states fail to meet their obligations to investigate violations, to take appropriate measures in respect of perpetrators and this unwillingness to deal with past human rights violations leads to victims not being provided with effective remedies and reparation for injuries suffered. It is a fact that once state authorities fail to investigate the facts and to establish criminal responsibility, it becomes difficult for victims or their relatives to carry on effective legal proceedings aimed at obtaining just and adequate reparation. The topic of impunity and post-conflict justice has been increasingly dealt with in scholarly debate. However, the focus has mainly been put on individual criminal liability, so called ‘retributive’ justice. The recent development in the field of international criminal law and the creation of the International Criminal Court has inspired these discussions.

This study concentrates on the process of ‘reparative’ or ‘restorative’ justice at the national level. This sort of justice refers to efforts to acknowledge and repair the harm and pain of victims, even though nothing can ever fully repair the damage done to victims, or more specifically, to alleviate the suffering of a parent who has lost a child. Perhaps the most important goal of this process is the ‘re-humanisation’ of the victims and their restoration as functioning members of society. Achieving these restorative goals is fundamental to both the peace and security of any state since it eliminates the potential of future revenge. In other words, providing victims with reparation is important to reconcile a post-conflict society. What makes the issue of victims’ remedies for human rights violations problematic is that there are traditionally two tendencies in post-war societies: on the one hand, the civil society movement of human rights which demands truth, justice and reparation and on the other, the official politics of negation and impunity which insists on “forgetting and forgiving” the past.1

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For obvious reasons, grave and systematic violations of human rights are irreparable. There cannot be any proportional relationship between the reparation and the injury inflicted upon the victims. It is, nevertheless, an imperative of justice that responsibility of perpetrators should be established and that attention given to the victims in terms of reparation. Notwithstanding the widespread abuses of recent history, few efforts have been undertaken to provide redress to the victims and their families. This is the result of the fact that either the violating regime or a succeeding government often has treated post-conflict justice as a bargaining chip used in negotiations rather than an affirmative duty. Many national authorities consider the victims’ perspectives an inconvenience and consequently ignore their rights in favour of the politics of impunity. Despite the fact that the victims’ rights to a remedy and reparation in most cases has been neglected at the national level, it is becoming increasingly important in the case law of international human rights bodies as well as through the efforts to draft guidelines on the right to remedy and reparation, which aims at providing a framework that ensures redress of violations of human rights.²

The country chosen for study is El Salvador, which is the smallest and most densely populated country in Central America. Up to 50 per cent of the population lives below the poverty line and the literacy rate is about 80 per cent. The Salvadoran legal system is based on civil and Roman law, with traces of common law, and judicial review of legislative acts takes place in the Supreme Court.

During the 1980s, the country was torn by a conflict between the government forces and the guerrilla opposition, Frente Farabundo Martí para la Liberación Nacional (FMLN). There is wide agreement that the root causes of the conflict were twofold: the power of the armed forces and the depth of social injustice. Estimates reveal that more than 75,000 persons were tortured, subjected to extra-judicial killings, or simply disappeared during the Salvadoran conflict.³ Thousands of children became victims during the conflict and hundreds disappeared. The peace was brokered by the UN and the final peace agreement between the Salvadoran government and the FMLN was signed in January 1992. Since the end of the civil war, El Salvador has started to build its democracy and when it comes to holding free elections El Salvador has succeeded fairly well. What still needs to be improved is the consolidation of the fragile democracy. The rule of law constitutes an important aspect of consolidating democracy and as long as impunity prevails for serious human rights violations democracy can never be fully consolidated.

Regarding the political situation in El Salvador during the last decade, great political polarisation remains between the right and left. In December 1992, FMLN became a political party, but they have not, until recently, been able to compete with the leading right-wing party, Alianza Republicana Nacionalista (ARENA). In the