

# JUDGING THE LARGEST MASSACRE IN EL SALVADOR'S HISTORY

INTERVIEW WITH FORMER JUDGE

**JORGE ALBERTO  
GUZMÁN URQUILLA**

CRIMINAL CASE EL MOZOTE MASSACRE, 1981

PHOTO: CRISTOSAL

**A LITTLE MORE THAN 40 YEARS AGO, THE VILLAGE OF EL MOZOTE AND ITS SURROUNDINGS WAS THE SCENE OF AN UNPRECEDENTED MASSACRE. IT WAS DECEMBER 1981 WHEN, IN THIS COMMUNITY IN NORTHEASTERN EL SALVADOR, ALMOST 1,000 PEOPLE WERE EXECUTED BY THE MILITARY, IN THE WORST KILLINGS OF CIVILIANS THAT THE COUNTRY EXPERIENCED DURING THE ARMED CONFLICT (1980-1992). MORE THAN HALF WERE CHILDREN.**

From the beginning it was known that elite soldiers of the Salvadoran army had carried out the massacre, but the details became known years later. Survivors and witnesses were silenced by successive governments, while the members of the military involved, both materially and intellectually, have remained free for decades.

In 1990, the victims in this case filed a complaint before the local court, the Juzgado de Primera Instancia de San Francisco Gotera, Morazán; but shortly thereafter, in 1993, the process was illegally closed when an Amnesty Law was put in place, which represented a seemingly insurmountable barrier to holding the perpetrators criminally accountable.

In July 2016, the Constitutional Chamber of the Supreme Court of El Salvador annulled the Amnesty Law, clearing the way for the continuation of the criminal investigation of this massacre and other serious war crimes. Four years earlier, in 2012, the Inter-American Court of Human Rights (IACHR Court) ruled in the El Mozote case, ordering the State to move forward with the investigations and to leave the amnesty without effect for transgressing the American Convention on Human Rights.

In October 2016, the then-judge of the First Instance Court of San Francisco Gotera, Jorge Guzmán Urquilla, took the task of justice seriously and admitted a petition from the victims to reopen the case: 16 high-ranking military leaders were charged in this unprecedented trial in El Salvador. In October 2021, Judge Guzmán was removed from the case after questioned reforms to the Judicial Career Law forced him into premature retirement.

In Latin America, crimes against humanity and war crimes, such as those of the El Mozote massacre, have been tried through specialized prosecutors and courts of justice; however, El Salvador lacks this jurisdiction. Judge Guzmán, with no major tools, achieved significant advances in what is today one of the most significant cases of the Salvadoran war being tried. This is the story of the difficulties he faced and the challenges in the prosecution of the criminal case.

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# THE CASE OF EL MOZOTE AND SURROUNDING AREAS HAS BEEN THE MOST IMPORTANT

CASE I HAVE HANDLED IN  
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## WHAT DID THE EL MOZOTE CASE MEAN TO YOU AS A PERSON AND AS A JUDGE?

**T**HE CASE OF EL MOZOTE AND SURROUNDING AREAS HAS BEEN THE MOST IMPORTANT CASE I HAVE HANDLED IN MY PROFESSIONAL LIFE. This case marked my life, both personally and professionally. Judges must keep a balance with respect to our emotions; we cannot fail because of emotions or feelings. This case forced me to make an important effort, as a human being, to be able to balance the emotional aspect with my profession.

The El Mozote case left me with a great learning experience, firstly, by confirming the existence of the facts, because there were enough evidentiary facts to confirm that this massacre did happen. Secondly, the seriousness of the facts led me to consider how extreme, how low human beings can fall in their valuation of life and love for their fellow man; arriving to a community, murdering almost all the inhabitants, among them more than half of the victims were children with an average age of



PHOTO: OFFICE PROTECTS LEGA-E ARGUETA

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**I WOULD LIKE TO HAVE FINISHED MY PARTICIPATION IN THE CASE, BUT DUE TO THE ENTRY INTO FORCE OF THE REFORMS TO THE JUDICIAL CAREER LAW IT WAS IMPOSSIBLE”**



six years old, and women, some of them, according to anthropological studies, pregnant at the time of the massacre. I believe that any human being is led to meditate on the reasons why these events took place, if the people responsible were stimulated by external forces. Finally, I also learned to value life, to be empathetic, to seek justice; because as human beings we also have to look out, not only for our own, but also for the rights of others.

As I mentioned, the case was the most important in my life as a public official and on a personal level. I would have liked to finish my participation in the case, but due to the entry into force of the reforms to the Judicial Career Law, it was impossible.

#### **WHAT WERE THE MAIN CHALLENGES YOU FACED IN PROSECUTING THE EL MOZOTE CASE?**

The main challenge that had to be overcome in the processing of the case was the procedural part because there was a serious controversy among the technical parties about the Criminal and Criminal Procedure Code applicable to the case, due to the fact that the events took place in 1981 and at that time a different Code than the current one was in force.

Another important challenge to highlight was the lack of collaboration of public institutions to provide information related to the case, especially the Ministry of National Defense, which was asked for information on military operations, specifically the list of the members of the main battalion accused of committing the acts.

Also, the attitude of the defendants could be considered as a challenge within the process; their strategy was to consistently delay the process, filing about four appeals for each decision that was made. They also filed three challenges against me to have me recused from the process, and requested a preliminary hearing before the Supreme Court of Justice to prosecute me for the crime of prevarication.

### **WAS THE TRIBUNAL PREPARED TO JUDGE A MASSACRE OF SUCH DIMENSIONS? WHAT ORGANIZATIONAL AND LOGISTICAL MEASURES HAD TO BE TAKEN?**

No, the Court was not prepared. This was because in the first place, at the beginning it was a court of mixed jurisdiction, that is to say, it dealt not only with criminal matters but also with labor, commercial, civil, and tenancy matters, and we had a large work overload. In this aspect, human rights organizations and the Inter-American Court of Human Rights played an important role. Due to the pressure they exerted on the Court, in 2019 the Supreme Court approved a move from mixed jurisdiction to a court of criminal jurisdiction only, which gave some relief in the workload.

On the other hand, the Court lacked human and material resources. At that time, the Court did not have enough staff to handle the daily workload and a case of the dimensions of the El Mozote massacre as well. In that sense, when we opened the case, we asked the Supreme Court of Justice for two legal collaborators; however, they only granted us one more person. Also, the Court did not have computers, printers and scanners for all the collaborators who were going to work on the case

The courtroom of the Tribunal was very small and had to be enlarged to accommodate all the people who would attend the hearings. At the beginning of the process all the people involved in the process could not fit in the courtroom, since the defendants -who were twenty-two at the beginning- were present, as well as the prosecution and prosecutor, and the victims, who of course had the right to be present at the hearings.

### **BASED ON THIS EXPERIENCE, HOW SHOULD THE SALVADORAN JUSTICE SYSTEM BE PREPARED TO TRY WAR CASES? IS THERE A NEED FOR SPECIALIZED COURTS?**

In order to be able to judge cases of grave human rights violations committed during the armed conflict, this case can be a reference for how the justice system should be prepared. In the first place, judges must be sensitized to the fact that the administration of justice is a legal obligation derived from their acceptance of the position conferred upon them and that this obligation must not be evaded. The main thing is to fulfill the function that has been assigned by constitutional mandate, regardless of whether we are equipped with material and technical resources. Secondly, technical personnel must be trained and provided with the necessary tools for the performance of their duties.

I consider it important to create a specialized jurisdiction, that is, courts specially created to handle this type of case, because it is difficult for judges, with their current workload, to dedicate the necessary time to handle cases such as this one. In my case, when I took on this responsibility, from the start of the case it was exhausting, because I had to use two to

four hours a day of my rest time outside the normal working hours of the court in order to study.

In order for the Salvadoran justice system to be prepared to hear this kind of longstanding case, they must provide judges with the necessary tools and resources to attend to them.

**IN TERMS OF THE CRIMINAL AND CRIMINAL PROCEDURE LAW APPLICABLE TO THE CASE, CAN YOU NAME THE THREE MAIN CHALLENGES AND HOW DID YOU RESOLVE THEM?**

As for the challenges in criminal and criminal procedural matters that we had to face, in the first place, there was question of the legal qualification that should be given to the facts that are known. In the case of El Mozote, given its dimension, I considered that domestic criminal law was not sufficient to describe all the cruelty of what happened. Then I had to apply, in my judgment, categories of international crimes that are foreseen, of course, in international criminal law, such as crimes against humanity and war crimes. In December 2018, I declared that the facts perpetrated in El Mozote and surrounding areas, in addition to being national crimes, constituted crimes against humanity and war crimes according to international criminal law. This declaration provoked opposition from the defense, because they did not agree that the category of international crimes should be used for what happened in El Mozote because crimes against humanity and war crimes are imprescriptible; this implied that the accused persons would not be able to allege the statute of limitations of the facts and this caused them to request a preliminary hearing against me.



**“ON THE TYPE OF LIABILITY OR THE THEORY FOR DETERMINING CRIMINAL LIABILITY THAT APPLIES IN THIS CASE I USED PERPETRATION-BY-MEANS THROUGH ORGANIZED APPARATUSES OF POWER**



Also, in terms of criminal procedure, another important challenge was to determine the procedural law applicable to the case, because although the events took place in 1981, at the time the case was opened another Code of Criminal Procedure was in force.

Another challenge was the type of evidence to be admitted in the proceedings. Let us recall that we are not talking about events that happened last week, last month or a couple of years ago. This is about events that happened more than 40 years ago. This challenge we were able to solve through the application of the jurisprudence of the international tribunals that have judged this type of case previously.

### WHAT TYPE OF THEORY OF CRIMINAL LIABILITY APPLIED TO THE CASE: CO-PERPETRATION OR INDIRECT PERPETRATION-BY CONTROL OVER ORGANIZED POWER APPARATUSES? AND WHAT ARE THE IMPLICATIONS OF USING THESE THEORIES?

Regarding the type of responsibility or the theory to determine the criminal responsibility that applies in this case, I used the theory of indirect perpetrator by means of control over an organized apparatus of power. This theory was devised by Claus Roxin and came into force, or rather, was published in 1963, and is very useful to define or to clarify cases of criminal responsibility in transcendental, large events such as this one. This theory was used in the Nuremberg trials, in the case of Fujimori, and Videla in Argentina and, therefore, it is applicable to the case of El Mozote, because the people who are being tried at this moment are not being tried as direct perpetrators but as perpetrators by proxy.



**THIS THEORY WAS USED IN THE NUREMBERG TRIALS, IN THE CASE OF FUJIMORI, AND VIDELA IN ARGENTINA AND, THEREFORE, IT IS APPLICABLE TO THE EL MOZOTE CASE, BECAUSE THE PEOPLE WHO ARE BEING TRIED AT THE MOMENT ARE NOT BEING TRIED AS DIRECT PERPETRATORS BUT AS PERPETRATORS BY PROXY”**



This theory is also called “the man behind the scenes” and refers to the person who plans, who conceives in his mind the facts, organizes them, plans them, and gives the order to execute them. The direct perpetrator, the immediate perpetrator is the one who directly executes the acts, the one who murders people, the one who rapes, the one who damages property.

If this theory were not applied, the indirect perpetrator could only be liable, perhaps as an accomplice, as an instigator, but with this theory the one who directly executes the act is equally liable as the one who orders it. The indirect perpetrator exercises a power over

the will of the person who executes the act, he does not participate directly in the act, but determines another through his position, through his power. Here we speak of a chain of command, of a hierarchy, that is to say, that the orders come down from the top to the person who executes the acts.

**THE CASE WAS HEARD BY THE INTER-AMERICAN COURT OF HUMAN RIGHTS, AND THERE IS A JUDGMENT FROM THAT HUMAN RIGHTS COURT. WHAT VALUE DO YOU GIVE TO THAT JUDGMENT AND HOW DID YOU APPLY IT? DID YOU USE CONVENTIONALITY CONTROL?**

The value of the 2012 judgment of the Inter-American Court of Human Rights on the



case is transcendental because it motivated the judgment of unconstitutionality of the Amnesty Law. Likewise, I used the judgment to support the opening of the case, especially because it ordered the State to investigate the case and punish anyone who was responsible for the acts committed, and since El Salvador is a signatory State that has recognized the jurisdiction of the Inter-American Court of Human Rights, we are obliged to comply with that judgment.

**REGARDING VICTIMS, WHAT DIFFERENCE IS THERE IN THE TREATMENT OF LONG-STANDING VICTIMS, SUCH AS THOSE OF THE EL MOZOTE CASE, WITH THE CURRENT ONES?**

The difference in the treatment of the victims of longstanding human rights violations and the current ones could be found in two aspects: first, in the dimension of the suffering they endured; and second, the prolongation in time of that agony.

The victims, having suffered this attack in their community, in addition to having had their loved ones - their parents, husbands, children, brothers and sisters - killed, also suffered other types of humiliation, such as the fact that their environment was totally destroyed, their livelihoods, their crops were burned, their animals, their life project was practically destroyed. Most of them had to leave that place for years, at least during the 10 years of the armed conflict. These people did not return until the Peace Accords were signed. This was a prolongation of their suffering.

Also, the trauma they have is extremely gigantic, it is impressive. The victims should have very special treatment. Unfortunately, the State has done nothing to alleviate some

of the emotional burden of these victims. As part of the procedural steps, a psychological expertise was ordered to the Institute of Legal Medicine (the forensics institute), and it was surprising for me to learn that for the victims it was the first time they had contact with a psychologist. This signifies a total neglect on the part of the State in the treatment of these victims.

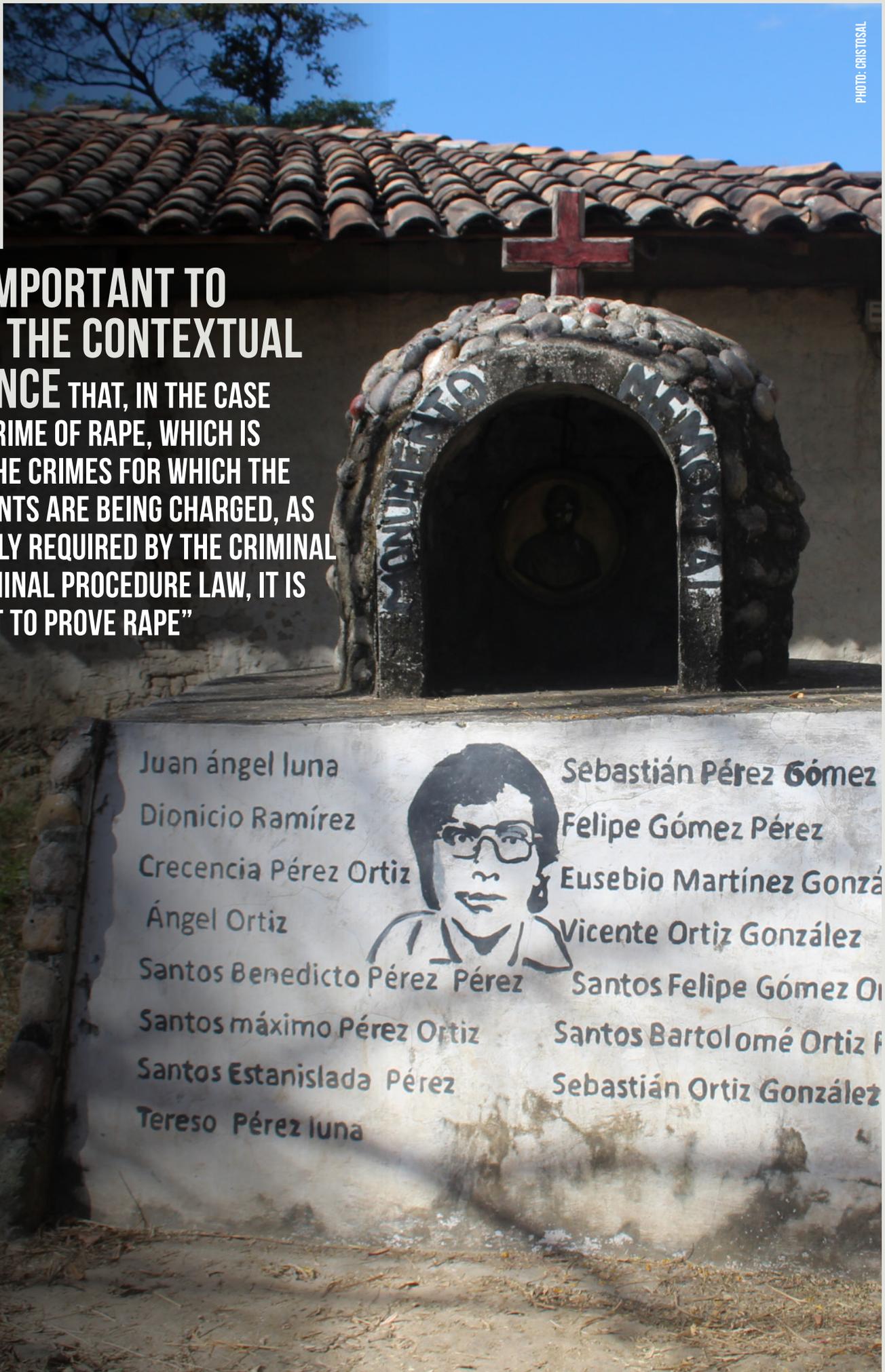
**THIS IS THE FIRST CASE IN EL SALVADOR WHERE AMICUS CURIAE BRIEFS WERE PRESENTED, AS WELL AS EXPERT OPINIONS THAT GO BEYOND FORENSIC ANTHROPOLOGY. WHAT WERE YOUR CRITERIA ON THESE FIGURES AND DID THEY CONTRIBUTE TO YOUR DISCERNMENT IN THE CASE?**

In our environment, the figure of the amicus curiae is relatively new; it hadn't been used in any judicial process. The amicus curiae is defined as a "friend of the court" and what they do is to give a specialized opinion on a certain topic in the case to serve as guidance or support for the judge, who may or may not take it into account. In this case, two amicus briefs were filed, one by the Due Process of Law Foundation (DPLF) and the Human Rights Institute of the UCA; both documents were very important, because they helped me to understand that the category of international crimes to which the massacre had been elevated was the correct one. The other amicus was presented by the American University and dealt with sexual crimes, which helped me to determine that rape executed in the context of a massacre can also be considered as torture of the victims who were raped during that military operation.

As for expert testimony, they are also extremely important, and this has a lot to do with what I mentioned at the beginning. The time that has



**IT IS IMPORTANT TO KNOW THE CONTEXTUAL EVIDENCE** THAT, IN THE CASE OF THE CRIME OF RAPE, WHICH IS ONE OF THE CRIMES FOR WHICH THE DEFENDANTS ARE BEING CHARGED, AS CURRENTLY REQUIRED BY THE CRIMINAL AND CRIMINAL PROCEDURE LAW, IT IS DIFFICULT TO PROVE RAPE”



passed since the events took place until the case was reopened and an investigation was initiated has been long, and this has allowed many pieces of evidence to disappear due to the passage of time. So, here it is important to know the contextual evidence. In the case of rape, which is one of the crimes for which the defendants are being charged, as currently required by the Criminal and Criminal Procedure Law, it is difficult to prove rape without certain kinds of evidence. As an anecdote, I remember that one of the defense attorneys requested a definitive dismissal for the crime of rape because it was not possible to prove carnal access in a victim who had been raped and who had already died. But the evidence of context allows proving these facts, and it is important to take into account the testimony of the victims, witnesses who commented that, during the events, the young women were taken to a secluded place and there they were all raped. It is also important to take into account the practices carried out during the operations. In the case of El Salvador, history shows that when some people take over a community, they commit all kinds of abuses.

### **DID THE CASE PUT YOU AT RISK, DID YOU SUFFER ANY THREATS, AND HOW DID YOU DEAL WITH THEM?**

Regarding my personal safety, I would like to state that I did have some kind of threats or risks to my life. On some occasions I felt that my life and that of my family were at risk. The most serious event was a chase of which we were the object. When my family and I were returning to San Miguel we were pursued by a vehicle that when it caught up with us, its occupants signaled us with their guns to stop. We did not pay attention to the indication, we accelerated, and my wife called to request

judicial security from the Supreme Court of Justice. A patrol car caught up with us on the road and another one was waiting for us in San Miguel. On another occasion they chased my wife alone in the city of San Miguel, and she had to take refuge in a shopping center. Other events that occurred were that we received calls with no one on the other end, and surveillance near our residence; all of this happened while I was hearing the case.

### **FROM YOUR EXPERIENCE, WHAT WOULD YOU RECOMMEND TO OTHER JUDGES WHO HAVE IN THEIR HANDS THE TRIAL OF CRIMES OF THE ARMED CONFLICT?**

First, to assume an ethical, moral, and legal commitment to justice. One day we judges swore an oath before the Constitution to comply and enforce it, in addition to administering justice. Therefore, we must enforce this commitment and also raise our awareness of all the victims who have suffered these events. Certainly, in our country it is said that we must forget these events, that it makes no sense to judge them, and many have even dared to say that we must disassociate ourselves from these events and that reopening these cases is like reopening wounds. But the wounds are there. The wounds never go away. They have never been closed. They are there.

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THESE PEOPLE, THESE VICTIMS OF CRIMES, AS IN THE CASE OF THE VICTIMS OF EL MOZOTE, ARE PEOPLE WHO HAVE THE RIGHT TO THE TRUTH, THE RIGHT TO JUSTICE, THE RIGHT TO REPARATIONS FOR ALL THE DAMAGES THAT WERE COMMITTED AGAINST THEM. THIS WILL SERVE AS A PRECEDENT SO THAT THESE EVENTS DO NOT HAPPEN AGAIN.

THEN, MY MESSAGE WOULD BE TO THE JUDGES: THAT WE TRULY ASSUME OUR COMMITMENT AS JUDGES AND DO NOT EVADE OUR CONSTITUTIONAL RESPONSIBILITY TO INVESTIGATE THESE CASES. THERE ARE ALREADY TWO RULINGS THAT CHARGE US WITH DOING SO. BUT LET US ALSO ASSUME THIS ROLE ON THE BASIS OF OUR HUMAN SENSITIVITY; WE MUST RECOGNIZE THAT THESE PEOPLE SUFFERED SERIOUSLY.





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