

*Richard
S. ...*

Introduction

On January 7, 1991 Congressional aides Jim McGovern and Bill Woodward wrote a report to Rep. Joe Moakley (D.-Mass.) regarding their December 8-13, 1990 trip to El Salvador to ascertain the status and progress of the Jesuit case. During a recent trip to El Salvador, Congressman John Murtha (D.-Pa.) met with President Cristiani to discuss several issues of importance to both countries. At the end of their meeting and without comments, Rep. Murtha gave the President a copy of the McGovern/Woodward memorandum.

Although the staff memorandum makes a sincere attempt to probe and get to the bottom of this case, it contains a series of assumptions, misstatements, and innuendos from which the authors reach conclusions and make accusations which are not supported by the history and record of the case.

The Staff memo sets forth the following summary assessment regarding the status of the Jesuit case:

1) While the accused parties (including Col. Benavides) may be convicted of the crime, the Armed Forces High Command has successfully limited the scope of the investigation, has been uncooperative, and has protected certain officers from possible prosecution.

2) It is still possible that the murders were ordered by senior military officers not presently indicted.

3) President Cristiani has been "unwilling or unable" to change the military's uncooperative attitude.

4) The Fiscal General has failed to press the investigation against senior military officers.

The staff memo's assumptions in support of these four propositions cannot be sustained by the evidence and the record of the case. Indeed, the staff memo attacks the integrity of the investigation and that of Salvadoran government officials, while ignoring the unprecedented progress that has been achieved in this case and the constitutional and procedural constraints any democracy faces in prosecuting criminals. The fact of the matter is that no other case in El Salvador's history on human rights has gone further to

investigate and prosecute those responsible for the crime. In fact, this is the first time in El Salvador's history that within 60 days of the commission of a crime, suspects have been placed under the jurisdiction of a judge with sufficient evidence to prosecute military personnel, including a high-ranking officer.

The following pages set forth a detailed analysis of the assertions in the staff report.

1. The jury trial against the accused.

The only positive statement contained in the staff memorandum is an acknowledgment that the Jesuit case is likely to go to trial this year and result in the conviction of the accused, including Col. Benavides, the highest ranking military officer ever accused of a human rights crime in El Salvador. The memorandum also acknowledges the effective work performed in the case by Judge Ricardo Zamora.

Barely one year ago, most critics had predicted that the Jesuit investigation would be inconclusive and would not lead to the indictment, prosecution, or conviction of any members of the Armed Forces of El Salvador. Now that those predictions have been proven wrong, these same critics have

begun to criticize other aspects of the case which they deem to be unsatisfactory or inadequate, or the result of a concerted attempt to cover-up and subvert the investigation and prosecution of the case.

While these more recent criticisms will be addressed below, it is important to acknowledge that considerable progress has been made by the police and judicial authorities of El Salvador, with the full support of the Cristiani administration, in performing an effective criminal investigation and prosecution against the nine accused. This is a major and unprecedented accomplishment for a country in the midst of a bloody armed conflict and with a decade-old democracy still in gestation.

2. Cooperation by the armed Forces in the Investigation.

There is much evidence already on record demonstrating that the military High Command has cooperated in this investigation. When the first ballistic tests of the Atlacatl Battalion were concluded, they proved to be negative. Since the SIU is headed by military officers, the High Command could have easily turned the investigation at that point away from the military, with the result that today the case would stand totally unresolved. But the investigators

proceeded to make further ballistic tests with the weapons fired in the full automatic mode, which was probably the most important evidentiary breakthrough in the case.

One of the most egregious charges in the staff memorandum is the flat assertion that Salvadoran military officers have "repeatedly either failed to testify, failed to remember, failed to make sense, or failed to tel the truth." These charges are not fair. Col. Benavides testified before the judge on January 16. The only Salvadoran officer who has failed to provide sworn testimony or statements to the judge is Lt. Mendoza, who as a charged defendant has invoked his constitutional right against self-incrimination. All members of the High command who have been asked by Judge Zamora to provide a statement under oath have done so. Gen. Rene Emilio Ponce (current Minister of Defense and former Army Chief of Staff) has provided three sworn affidavits to the judge during the past 15 months. General Humberto Larrios Lopez (former Defense Minister), General Rafael Villamariona, Col. Ivan Lopez y Lopez, Col. Heriberto Hernandez, Col. Dionisio Ismael Machuca, and others have similarly provided affidavits.

The fact that these officers provided sworn affidavits in lieu of oral testimony regarding their knowledge of and/or involvement in the case is just as admissible in the trial as a transcript of their oral testimony. In the Salvadoran system of criminal justice as well as in most Latin American countries, witnesses generally do not testify at the trial. In Fact, the witness' testimony is simply read to the jury rather than being presented live. Only in very exceptional cases could a judge call a witness to testify in person. Thus, it is irresponsible to assert that these officers failed or refused to testify or provide evidence. In the case of General Ponce, he had anticipated that due to his office, he would be asked for detailed information by the investigation, some of which he had to personally investigate prior to writing his affidavits. It was more efficient and helpful to the investigation to summarize his data in writing rather than attempt to recall it piecemeal in oral testimony. Gen. Ponce has said that if the judge asks him to appear in person, he would gladly do so.

The staff memo chastises the Salvadoran government for failing to detain Lt. Col. Camilo Hernandez, who was Col. Benavides' second in command, at the same time that Benavides was detained -- simply because he was in the chain of command. The reason he was not detained is because there was (and is) no evidence implicating Lt. Col. Hernandez in the murders. He was at his

post in the military school on the night of the murders. He was subsequently charged with destruction of evidence after the fact, and only after evidence of this crime was established. Nothing more or less would have been done against a similarly-placed suspect under the U.S. judicial system. Even El Salvador's most severe critics, upon reflection, must agree that guilty by association is not acceptable.

The staff memorandum also faults the investigation for not detaining a group of captains and majors who were also at the military school on the night of the crimes. The staff memo readily admits that these officers, when questioned, stated they had been asleep or knew nothing of any help. Nevertheless, the report asserts, "It was their job to know what was going on." One cannot help but ask on what legal theory is being relied on to detain these captains and majors for failure "to know what was going on?". Due process of law is not served under any reasonable standard of fundamental fairness by a wholesale and blind assumption of guilt by association or lack of knowledge. There is no evidence to contradict the fact that these officers have no first-hand information about the murders, and the fact that they were either at the school, were working colleagues of, or were in the chain of command with some of the accused, bears no relevance to the lack of knowledge they have avowed

to investigatory authorities.

It is nothing short of incredible to suggest incarcerating these individuals because they did not have any information about a crime committed by their associates at a distant location.

In the "Unanswered Questions" section of the report, it reads:

"Last January 6th, President Cristiani ordered the detention of Col. Benavides, Lt. Yussy Mendoza from the military school, and 45 members of the Atlacatl Battalion, including two lieutenants. For reasons no one seems to understand, Lt. Col. Camilo Hernandez and the captains and majors who were between Col. Benavides and the Lieutenant in the chain of command were not among those detained."

The answer to this "Charge" is not difficult. President Cristiani in fact did not order the detention of Col. Benavides and Lt. Mendoza on that day (January 6, 1990). While the SIU at that point in time, had concluded that the possible murders were members of the Atlacatl Battalion, the SIU could not be specific about which individuals had committed them. What President Cristiani actually did was to give instructions reconvening all members of the



unit in three security forces headquarters and established a Military Honor Committee to interrogate them, in coordination with the SIU, so as to find out exactly what had occurred at the UCA on the night of November 16. It was several days later that one of the Atlacatl members, Lt. Espinoza, provided information on the individuals that had received the orders to commit the crime from Col. Benavides and that Lt. Mendoza had accompanied them. Only after being aware of this fact (January 13) did the authorities order the detention of Col. Benavides, Lt. Mendoza and the members of the Atlacatl Battalion that had directly participated in the assassinations. Since no one implicated Lt. Col. Hernandez or any captain or major in the chain of command, there was no reason or basis to order their detention. If they had been detained, the judge would have had to order their immediate release because of lack of evidence and probable cause.

Note: In order to further broaden the investigation, on February 22nd President Cristiani and the High Command, asked the Minister of Justice to instruct the SIU to question those officers further about what they might know regarding events at the military School the night of November 15th, and the morning of the 16th. The results will be provided to the judge.

3. The issue of the role of Salvadoran Military Intelligence.

Notwithstanding that there is credible evidence to the contrary, the staff report charges that it is simply not credible that Salvadoran military intelligence knew nothing about the planning or execution of the Jesuit murders. This charge overlooks the fact that the murders took place in the midst of the violence and confusion of the heaviest armed offensive ever launched by the FMLN. Moreover, the items listed in the staff report as the basis of its charges do not add up. Specifically, it refers to:

- unconfirmed reports of shots inside the campus five days prior to the murders;
- a search of the victims' living quarters conducted three days prior to the murders by the accused unit;
- a military intelligence officer's statement that he had heard on commercial radio on the date of the murders that the priests had been killed at a time when no radio reports were allegedly broadcasting the information;

the nearness of the UCA campus to the headquarters of military intelligence.

None of these incidents, taken singly or together, establish any basis for criticizing the effectiveness or assessing potential guilt against the military intelligence units of the Salvadoran Armed Forces. It is more plausible and likely that the UCA campus was searched due to prior shooting reports and because of logical and reasonable suspicion of subversive activities within the area, by the FMLN or its supporters.

On November 12th, in the grounds of the jesuits spiritual retreat house, nearby the UCA campus, a security force found weapons and ammunition during a search of the area.

Note: The High command has asked that the SIU further interrogate Col. Guzman Aguilar and Lt. Cuenca Ocampo, the intelligence officer present at the UCA search on November 13th, to see if more information can be developed with respect to the role of the Defense Intelligence Agency (DNI) in this case.

Also of note is the fact that President Cristiani was informed by the Chief of Staff of the Armed Forces that the DNI did not have "units deployed along the highway adjacent to the UCA" as is stated in the report. He also added that the security of the DNI headquarters has always been provided by a unit belonging to Chief of Staff's office, and that they were deployed there and not where the report situates them.

4. President Cristiani.

The staff memorandum criticizes President Cristiani's "unwillingness or inability" to change the military's uncooperative attitude. This overlooks the basic fact that in El Salvador, just as in the U.S., the Commander-in-Chief of the country cannot order or force a public or private citizen to "cooperate" or testify in a criminal investigation beyond what the citizen agrees to do willingly.

The report seems to assume that since many Salvadoran officers and soldiers have denied having knowledge of the facts in the Jesuit case, President Cristiani should simply "order" them to be more "cooperative" by changing their stories to better fit other hypotheses. However, constitutional democracies don't work this way, and neither does due process of law.

If some individuals are not honestly cooperating on their own, very little can be done to coerce them in that direction. But more importantly, it is a serious breach of the principle of the rule of law to blame a chief executive for the alleged failures of a criminal proceeding which are not institutional failures at all, but rather, the observance of fundamental constitutional rights: the presumption of innocence, the right against self-incrimination, the need for clear evidence to arrest or indict, etc.

Ironically, the staff memorandum makes inconsistent accusations against President Cristiani. On the one hand, he is criticized for being unwilling or unable to force his will upon the military's "attitude" toward the case. Yet, on the same page, he is also characterized as the only person with position, power and respect to require the military to be more forthcoming in providing information. The truth is that President Cristiani has repeatedly and continuously, both publicly and in private meetings with military officers, made requests to that effect. It is also known that the President has, from the start, offered a reward for anyone providing valuable information in the case.

What is particularly disturbing to President Cristiani is the fact that the Salvadoran Ambassador was told by the authors of the staff memorandum

that various military officers had approached President Cristiani with information that linked the High Command to the crimes or to a cover-up. No one has ever given President Cristiani any proof or information whatsoever along those lines, if he was provided such information, he would immediately pass it on the judge. President Cristiani, along with everyone else, has heard much speculation as to whether high ranking officers, besides Col. Benavides, were linked to the crime. If anyone in the U.S. has knowledge of persons who have such information, he should share it with the Salvadoran authorities immediately. Anonymous accusations cannot be deemed credible and they should never be used against anyone, particularly against the president of a country. In the U.S., the Constitution provides that a person accused of misconduct has a right to confront his accusers. Congress should at all times seek to follow this course, instead of making accusations on evidence given by unidentified sources.

The report also states: "President Cristiani convened a meeting of senior officers, the President of the Supreme Court, and the judge. During that meeting, a firm pledge of support and cooperation in the case was solicited -- and received -- from the High Command."

The facts are otherwise. There was no prior solicitation of support by the President of the Supreme Court or the judge, but a spontaneous offer of support from the High Command to the judge. It was the High Command which asked the judge to deal with the case in a thorough, exhaustive and speedy manner, and that he would receive their full support. In fact, it was the high Command which asked the judge (due to the speculation surrounding a routine working meeting of all the military commanders in the San Salvador theater of operations held at the Army's Chief of Staff headquarters on the night of November 15th) to ask all those commanders who had attended to testify in order to further clarify if there had been any link between that meeting and the commission of the crimes. Everyone who attended that meeting has assured President Cristiani and others that no mention was ever made regarding the Jesuit priests at that meeting.

5. The Transfers of Col. Guzman and Capt. Herrera.

The memorandum seems to suggest that the transfer of two intelligence officers of the Salvadoran Armed Forces may have been linked to a general cover-up scheme. President Cristiani personally authorizes all transfers made within the military because of his position as Commander-in-Chief of the Armed Forces. Most transfers are routine, following a rotation plan among

the different officers and throughout all army units. Others are made as a result of lack of capacity to perform. Col. Guzman Aguilar's transfer to Costa Rica, according to the Army Chief of Staff, was due to the latter reason. This information was known to U.S. Government officials prior to the transfer. Also, the Salvadoran Embassy in Costa Rica has had in many occasions military officers serving as military attaches, even though Costa Rica does not have a formal army, because it does have a large security force. Col. Guzman Aguilar had previously served as the head of the El Salvador National Police.

Captain Herrera's case was considered a routine transfer by the Chief of Staff, but he was assigned to an administrative job and not to a combat unit. His unfortunate death occurred during the FMLN's November 20th, 1990, offensive, something that at the time of the transfer could not be anticipated.

Lastly, the fact that they had been transferred did not free them from being summoned by the judge at any time or from being investigated.

6. The American Officer and "Prior Knowledge".

As to the portion of the memorandum regarding the recanted testimony of a U.S. military officer who had originally alleged prior knowledge of the

Jesuit killing, ("American Officer and Prior Knowledge") the report states: " In the middle of this confusion, in late January or early February, the [U.S.] Embassy decided to show portions of the [U.S. officer's] videotape to President Cristiani. Surprisingly, the President did not suggest that the videotape, or accompanying statements, be made available to the judge."

To set the record straight on this incident, U.S. Ambassador Walker invited President Cristiani to his home to view the videotape. On that occasion, Ambassador Walker said the FBI investigation had concluded that Major Buckland, the officer involved, was under a great deal of pressure and possibly under mental stress, that he had contradicted himself, and that all polygraph tests had either been inconclusive or shown deception. According to President Cristiani, "his opinion at that time was that the tape should either be given to the SIU, to some other judicial support body, or directly to the judge". In fact, after following normal diplomatic procedures when Major Buckland subsequently rendered his testimony to the judge, the latter found nothing useful in it.

7. The Fiscal General.

The report in its summary also accuses the Fiscal General (FG) of failing to press the investigation against senior military officers. There are no other references to the FG in the report substantiating this charge.

For the record, the fiscal General's office was responsible for the following activities concerning the jesuit case:

- . Requesting the court to order the provisional detention of the nine defendants, and opposing in court the defense's motions to suspend said detention.
- . Requesting the court to order the detention of three members of the Atlacatl Battalion (Oscar Armando Solorzano Esquivel, Rufino Barrientos Ramos, and Hector Antonio Guerrero) for perjury.
- . Requesting the court to order the provisional detention of Col. Carlos Camilo Hernandez and Lt. Yusshi Mendoza Vallecillos for destruction of evidence.
- . Opposing the defense's motions for dismissal of all charges against the nine defendants.

- Requesting the court to proceed to the jury trial phase against all defendants.
- Assisted in the taking of declarations from over 100 witnesses.
- Conducted the repeated and exhaustive interrogation of all High Command witnesses to ascertain the facts as well as possible participants and coconspirators.

At all times throughout the process, the Fiscalia General has taken de position that the accused are guilty as charged, and have shared the view of Judge Zamora in every decision and position he has taken procedurally and on the merits in the case, including attempts by the defense to seek a change of venue.