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Chairman Toricelli, thank you for convening this hearing and for inviting the Lawyers Committee to participate. My name is Michael Posner. I am the Executive Director of the Lawyers Committee for Human Rights. Since 1978 the Lawyers Committee has worked to protect and promote fundamental human rights in all regions of the world. The Committee's work is impartial, holding every government to the standards affirmed in the International Bill of Human Rights.

You have asked me to address the human rights situation in El Salvador and the trial in the Jesuit case in particular. You have also asked for comments and observations on U.S. policy toward El Salvador, taking special note of the peace process, and in particular the human rights verification initiative through the UN's observer mission, ONUSAL.

Since 1980 the Lawyers Committee has closely monitored the functioning of El Salvador's system of justice, paying particular attention to several prominent unresolved murder cases and the process by which they are investigated. For nearly two years the Lawyers Committee has closely followed the investigation of the November 1989 murder of six Jesuit priests and two women at the Central American University in San Salvador. Since December 1989 the Lawyers Committee has represented the U.S. Jesuit Conference, the Association of Jesuit Colleges and Universities and the Jesuit Secondary Education Association in their efforts to pursue justice in this case. We are also working closely with the Jesuit order in El Salvador in support of their monitoring and advocacy efforts.

The Jesuit murders are part of a widespread pattern of state-sponsored and condoned political violence in El Salvador. Based on more than a decade of unpunished official violence, there was little reason to believe that the murder of the priests would hold the world's attention. Yet, almost two years later, the case continues to demand attention, in part because of the unique role the priests played in El Salvador.

The Jesuit case remains a benchmark of progress regarding human rights in El Salvador. Throughout the last two years Salvadoran newspapers reported almost daily on every detail of the investigation and court proceedings in the case. The case's importance was underscored further last

fall when Congress withheld 50% of U.S. military assistance to El Salvador for fiscal year 1991, an action prompted by congressional frustration over the Salvadoran government's failure to fully investigate all aspects of the crime.

Last month's conviction of two military officers for killing civilians in a human rights crime is unprecedented in El Salvador. That aspect of the verdict is an important break in the Army's longstanding impunity from prosecution. For Colonel Benavides and Lieutenant Mendoza to be tried and convicted of murder, the Army had to make a political decision to allow the judicial process to go forward. The impact of their decision was amplified by the highly public nature of the proceedings. The entire three-day trial, more than 30 hours, was broadcast live on Salvadoran television. The immediate political significance is not just that officers were convicted, but that everybody in El Salvador knows it and many saw it happen.

For the observers who gathered in San Salvador on September 26, the trial proceedings that unfolded over the next three days were a graphic reminder of the grossly deficient conduct of the case from the outset. Among the problems we and others identified were the extrajudicial and inexplicable fashion in which the defendants' names were produced initially by the Military Honor Commission, the inadequate investigation of the Special Investigative Unit, and the judge's ineffectual attempts to penetrate the wall of silence thrown up by the Salvadoran Armed Forces, whose contempt for the judicial process was glaring. The flawed judicial investigation yielded a flawed trial, which also served to lay bare inadequacies of the Salvadoran justice system.

Many aspects of the trial itself failed to meet international fair trial standards. The jury heard no witnesses and were asked to sort through a range of contradictory facts and impressions presented by lawyers from each side. A group of eminent jurists and judges from Europe and South, Central, and North America gathered to observe the proceedings. Their forthcoming reports should prove useful to the Congress as you evaluate the conduct of the Jesuit case as well as future U.S. support for judicial reform efforts in El Salvador.

Many of the problems identified by these international observers at the trial are endemic to El Salvador's legal system. For example, the jury was expected to rule on the basis of a one-day review of a 5,600 page written record and two days of oral arguments by prosecution and defense lawyers.

Other problems reflect the highly politicized nature of the system. A demonstration by more than 200 Army supporters directly outside the courtroom, reportedly led by a senior officer, Col. René Arnaldo Majano Araujo, should not have been permitted to disrupt the proceedings. Clearly intended to intimidate the jury, loudspeakers blared El Salvador's national anthem and military taps into the courtroom itself -- sending an unmistakable message to everyone in the room.

Despite the conviction of two officers for murder, it is clear that the military has still not accepted this verdict. Though he was expected to issue a sentence within 30 days, Judge Zamora has now suspended that time frame, admitting a defense petition to recuse him because he teaches law at the Central American University. Dr. Zamora has referred the question to an appellate court. Two officers still face lesser charges for conspiracy to commit terrorism and destruction of evidence, respectively, and if convicted must be expelled from the Armed Forces. Defense attorneys have warned that the "careers" these two officers, Lt. Espinoza Guerra and Lt. Col. Carlos Camilo Hernandez, "will be ruined by a conviction." What this means is that neither the sentencing of the two convicted officers nor related pending charges against other defendants are likely to be decided any time in the near future. If this is how the system performs under the glare of intense national and international scrutiny, one can imagine how routine cases are resolved.

The acquittal of seven of the nine defendants, including four whose extrajudicial confessions identified them as the triggermen, fell far short of holding the military accountable for civilian murders. It may also be interpreted as a message to the troops that they can commit heinous crimes, as long as they are following orders.

In his recent op-ed article in *The Washington Post*, Congressman Moakley, chairman of the Speaker's Special Task Force on El Salvador, wrote,

I am also disappointed by the silence that we have heard about this trial from the U.S. Department of State and from Salvadoran President Alfredo Cristiani. It is not enough to say, "Well, a colonel has been convicted" or "the legal process has worked its will." We all know better.

A terrible injustice has been done. The people who actually carried out the murders, who made these six respected and courageous men of God lie down in the dirt and shot them in the back of the head, the men who ordered that two women be riddled with bullets while they lay, moaning and wounded, in each other arms, have escaped

justice. Where is the outrage? Where is the leadership? It is an old but true saying that for evil to triumph, all that is required is that good men do nothing.¹

Mr. Moakley also urged "President Cristiani to order the dismissal from the armed forces of the six defendants who were found not guilty. I also ask that the Department of State institute measures that will deny those individuals permission to enter the United States."

The positive effect of the convictions of the two officers may also be undermined if they are pardoned by President Cristiani or released as part of a broader amnesty following a comprehensive peace agreement. In his op-ed piece, Congressman Moakley restated his request to "President Cristiani that he oppose consideration of an amnesty for the killers of the Jesuits as part of any peace negotiation."

Last week, 26 members of the U.S. Senate echoed this request in a letter they sent to President Cristiani. In their letter the Senators urged that Mr. Cristiani uphold the convictions in the Jesuit case, and not include them in a general amnesty. Their letter states in part:

An amnesty which permits combatants to lay down their weapons without fear that they will be prosecuted for their participation in acts of war is a necessary and desirable part of a legitimate peace process. The murder of the Jesuits, however, was not an act of war. The victims were helpless, unarmed civilians, not combatants killed in the heat of battle. Absolving the perpetrators of this ghastly crime would do nothing to advance justice or peace in El Salvador. To the contrary, it would demonstrate the lack of justice for one of the most notorious crimes of the past decade.

A central principle that emerged from the Nuremberg trials at the end of the Second World War was that individuals should not be tried simply for serving in their nation's military forces during a time of war. The only persons tried at Nuremberg were individuals who had committed crimes against humanity -- such as the torture and killing of civilians and prisoners.

Indeed, the entire thrust of the laws embodied in the Geneva Conventions grew out of this fundamental distinction between legitimate activities by soldiers and officers and prohibited acts against civilians and prisoners of war. Providing an amnesty to the only military officers ever convicted of human rights violations in El Salvador would be contrary to the spirit of the Geneva Conventions and would raise serious questions about El Salvador's commitment to the rule of law.

¹*Washington Post*, October 14, 1991.

We strongly urge you to uphold the sentences of those convicted of the murder of the Jesuits, and to pursue justice for all other members of the military who were involved in authorizing or planning this heinous crime.

Among those who signed this letter were Senators Leahy, Hatfield, Pell, Dodd, Specter, Jeffords, and D'Amato. A copy of the letter is attached to this testimony.

Mr. Chairman, the Jesuit murders were treated as a common crime, and thus should not be eligible for inclusion in an eventual amnesty for political crimes as part of a peace settlement. El Salvador's Justice Minister has publicly supported the distinction between common crimes and political crimes. Beyond that, according to El Salvador's Constitution, Col. Benavides, as a military officer, is not eligible for pardon during the tenure of the president at the time the crime was committed.²

A pardon in this case would also be inconsistent with El Salvador's obligation under the American Convention on Human Rights and customary international law to prosecute and punish human rights violators, especially where, as in El Salvador, the military has enjoyed a long tradition of impunity for its systematic abuses of basic human rights. In El Salvador, where the idea of military impunity is still strong, a pardon for Col. Benavides and his co-defendant would undermine justice and reaffirm the military's immunity from the basic norms of international human rights law.

The handling of the investigation in the Jesuit case since late 1989 has also illustrated, often quite dramatically, the military's refusal to cooperate in human rights prosecutions. From the outset, military investigators in the SIU dragged their feet and failed to pursue key leads. Military officers destroyed log books from the Military Academy and other key evidence. Military witnesses refused to appear in court or perjured themselves by claiming that they knew nothing, saw nothing and heard nothing. They engaged in what one of the prosecutors called a "conspiracy of silence." Largely because of the military's failure to cooperate, the case presented to the jury was seriously flawed.

²An amnesty may be issued by a government wishing to wipe the slate clean, forgiving all past crimes and foreclosing the possibility of criminal prosecutions of those responsible for those crimes. Governments often view a general amnesty following a civil war or a period of state-sponsored violence as a means to put the past definitively behind, an assumption which history often does not support.

Pardon is used to forgive all or part of a sentence already levied on a convicted violator. A pardon does not erase the crime, it only lessens the sentence. Ideally, amnesty is used by a government to forgive the actions of rebel forces, not those of its own agents.

Both the investigation and the trial fail to meet the criteria of current U.S. law which requires a determination that the government of El Salvador conducted "a thorough and professional investigation into, and prosecution of those responsible for the eight murders. . . ."

In the weeks since the verdict was rendered, it has become increasingly clear that, unless additional pressure is applied, President Cristiani will not extend the investigation to seek to pursue those who ordered the murders. Unless he commits the government to doing so, such an investigation and prosecution will not happen. Virtually everyone in El Salvador believes that officers senior to Col. Benavides ordered the murder of the priests. As Fr. José María Tojeira, the Jesuit Provincial, said after the trial, logic alone demands this conclusion. The priests were highly visible leaders of the nation's most respected university. They were killed in San Salvador, a mile from the headquarters of the military Joint Command, in an operation involving more than 50 soldiers. A colonel who heads the Military Academy would not undertake such an action on his own.

Two key issues in the Jesuit case have not been fully investigated: first, whether there were "higher orders" to kill the priests, and second, who participated in a cover-up of the crime. Extensive circumstantial evidence points to the existence of higher orders, as well as to the existence of a cover-up. Both issues demand close attention and a thorough investigation and prosecution by Salvadoran authorities. Neither issue was addressed satisfactorily in the legal process which led to last September's trial.

Higher Orders

What we know of the crime indicates that it was planned and carried out within the military command structure, using forces that were officially assigned to Col. Benavides shortly before the murders. The facts strongly suggest that others within the command structure had prior knowledge of the crime or were involved in planning it.

On the evening of November 15, 1989, 24 senior military officers met at Joint Command headquarters to discuss how they should be responding to the FMLN's military offensive. Among those who attended the meeting were the Minister of Defense, the two Vice-Ministers of Defense, commanders of all the units in the metropolitan area, the commanders of special security zones set up

during the offensive, Security Force chiefs, the head of the military press office (COPREFA), and Joint Command Chief, Col. René Emilio Ponce. One of the participants described the meeting to a newspaper reporter as "the most tense and desperate gathering of the country's top military commanders since the war against leftist insurgents began a decade ago."

General Ponce, who was then a colonel and the head of the Joint Command, told the Lawyers Committee in February 1990 that the meeting began at 7:30 p.m. and was called "to analyze the positions we had lost since November 11. We analyzed what we needed to do to regain them. We understood that we needed to take stronger measures."

According to participants at the meeting, several decisions were taken, including one to intensify aerial bombardments against guerrilla-held positions. There was also some discussion of eliminating FMLN "ring leaders" and "command posts."

Later that same night, according to several sources, a second, smaller meeting was convened. One person who has described that second meeting is Col. (Ret.) Sigifredo Ochoa, once a top field commander and now a senior official in ARENA. When asked in January 1990 if Col. Benavides was acting alone, he told *Agence-France Presse*, "[t]his action involved much higher officers."³ In April, Col. Ochoa elaborated on what he had said in an interview on the U.S. television program *60 Minutes*. According to Col. Ochoa, it was at the second, smaller meeting on November 15 that Col. Benavides was given an explicit order to kill the Jesuits. Col. Ochoa said that, following the first meeting, "A group of commanders stayed behind. It seems each was responsible for a zone in San Salvador. They gave the order to kill leftists, just as Col. Benavides did. I'll say it again. Benavides obeyed, it wasn't his decision."

When asked if Col. Benavides would have been capable of ordering the Jesuit murders, Ochoa replied: "No, I don't think so. Knowing him, he's a man who could never take or even conceive of making a move as big as assassinating the Jesuits. Benavides acted under orders. He didn't act alone."

³Paris *AFP* in Spanish 2112 GMP, Jan. 12, 1990, as reported in Foreign Broadcast Information Service, *Daily Report* (Latin America), Jan. 16, 1990.

On May 3, 1990, an anonymous group of young officers in the Salvadoran military wrote a public letter supporting Col. Ochoa's assertion. In their five-page communique, they refer to the Jesuit case, saying, "The Ochoa case should be considered more carefully; his position is supported by many young officers, and also by some of our superiors. He has said something which many of us cannot express because we would be punished."

According to Argentine Col. (Ret.) José Luis García, an expert witness who testified during the investigative stage of the proceedings on how military structures work within a top security zone, it is simply not conceivable that Col. Benavides acted on his own. In the extremely unlikely event that he had done so, a whole series of reactions would have automatically come into play. None of them did.

These and other elements of circumstantial evidence have never been pursued. Neither the SIU, the U.S.-funded military investigatory unit which investigated the case, nor the Attorney General's office made any attempt to conduct an aggressive investigation of the issue of higher orders. To the contrary, both bodies acted to limit the scope of the investigation as much as possible.

One reason the issue of higher orders has never been pursued is that even with a civilian government in power in El Salvador, the Army continues to dominate civilians, including those in the courts. The Salvadoran Army acquiesced in allowing Col. Benavides to be tried. They actively resisted any investigation that attempted to go higher and will continue to do so. More than ever before, international attention must now focus on this aspect of the case.

One source of international pressure that has clearly been felt is the Speaker's Special Task Force on El Salvador, chaired by Congressman Joe Moakley. Congressman Moakley has been a tireless advocate for truth and justice in the Jesuit case. In his recent *Washington Post* op-ed, Mr. Moakley made two specific suggestions with regard to the issue of higher orders. He urged "a full investigation of evidence that one of the defendants in the case threatened to talk, implicating other senior military officers in the case, if he is found guilty. Conveniently for the armed forces, that defendant was not convicted."

Secondly, Mr. Moakley called on "the Department of State to bar retired Air Force Gen. Juan Rafael Bustillo from entry into the United States until a full investigation has been conducted into his possible involvement in instigating the murders of the Jesuit Priests."

Success in prosecuting the intellectual authors would dramatically demonstrate the Cristiani government's commitment to purge the armed forces of human rights criminals. Significantly, this issue of purging the army of rights abusers remains a fundamental point of contention between the Salvadoran government and the FMLN in the current UN-sponsored peace negotiations.

We continue to be concerned about the effect the trial procedure in the Jesuit case will have on the administration of justice and the prosecution of other human rights crimes. The Salvadoran military has treated the case as an aberration. The military continues to resist efforts to investigate other human rights abuses, and there have been many. Ultimately, the Army's impunity will be broken only when soldiers assume that they will be prosecuted whenever they abuse civilians -- not just in cases that draw public attention. On October 9 shortly after the Jesuit case was decided, a jury acquitted 13 soldiers accused of murdering seven people in the so-called Armenia Well Massacre. A total of 29 people were killed from 1981-1983. The acquittals came in this case despite the fact that the court had eyewitness testimony and despite confessions by three of the soldiers. The Attorney General's office has challenged the verdict, citing intimidation of the jury.

Mr. Chairman, we are here today to evaluate the Jesuit case and to decide its implications for future U.S. foreign policy toward El Salvador. To encourage continued military aid to El Salvador, the Bush administration has sought, almost from the outset, to put the best face on the Salvadoran situation generally, and the Jesuit case in particular. They overdo it. Any objective review of the investigation and prosecution in the Jesuit case leaves little doubt that the criteria set by Congress in this case have not been met. On the other hand, the outcome of the Jesuit case should not, in and of itself, decide U.S. policy. After a decade of war and suffering, the people of El Salvador deserve a more nuanced and careful approach to future U.S. policy.

As this committee continues its focus on El Salvador, two points should guide the debate and decision-making. First, whatever policy Washington charts should be consistent with and reinforce

the UN peace process which seeks to end the civil war and to reduce the power and influence of the armed forces of both sides.

In its first report to the UN Security Council in September, the UN Observer Mission in El Salvador (ONUSAL) emphasized that in their view breaking the Armed Forces' impunity is paramount to the success of both the human rights and peace processes. ONUSAL's report concludes that:

In general, viewing the institutional order as a whole, the Mission cannot ignore the fact that many reports by the United Nations and by national and international human rights organizations have testified to the practical ineffectiveness of existing mechanisms in El Salvador for the defence, protection and promotion of human rights. This is especially important when we observe that, despite the high incidence of violations of human rights and humanitarian law, the investigation, prosecution and punishment of those responsible has been virtually non-existent, creating a perception of widespread impunity. The Mission is aware of this situation and will, in the course of its work, point out any failings it observes in all the institutions with which it comes in contact.⁴

ONUSAL's first report also emphasizes the problems the mission faces in attempting to carry out its mandate before a cease fire has been achieved. The mission's first fledgling steps at human rights verification in El Salvador have brought home both the inherent difficulties of what ONUSAL is attempting to do as well as its considerable potential. ONUSAL, as an integral part of the UN's peace-making effort in El Salvador deserves the Congress' full support and understanding.

ONUSAL's first report also notes the warm welcome extended to the mission by the signatories to the accord as well as the people of El Salvador in general. ONUSAL said that the "positive attitude of the Government of El Salvador and FMLN make it possible to predict realistically that the tasks entrusted to the Mission will be duly carried out. [. . .] we can predict with optimism that the human rights situation in El Salvador will improve substantially."⁵

⁴First Report of the United Nations Observer Mission in El Salvador, U.N. doc. A/45/1055, S/23037, September 16, 1991, English (Original Spanish), at 16, para. 36.

⁵First Report of the United Nations Observer Mission in El Salvador, at 5, para. 16.

We were thus disappointed to find in Salvadoran newspapers last weekend several unwarranted and untimely criticisms of ONUSAL. According to *El Mundo*, San Salvador Mayor Armando Calderon Sol, who is also the president of the ARENA party, said that ONUSAL had "done nothing beneficial for human rights" in El Salvador. Mr. Calderon Sol said "It is necessary that ONUSAL review its current role in order to make its work more effective and favorable" to the Salvadoran people.⁶

Second, with respect to the Jesuit case and the broader desire to strengthen the rule of law, Congress should set as a principle the need to strengthen civilian institutions in El Salvador. Until a fundamental restructuring of the Armed Forces occurs, and until the military accepts civilian control as a matter of principle, continued U.S. military aid merely perpetuates a fundamental source of the country's ongoing trauma.

⁶*El Mundo*, Nov. 1, 1991; *Diario de Hoy*, Nov. 2, 1991.