

JPP (9 pages)

BACKGROUND ON THE JUDICIAL SYSTEM OF EL SALVADOR

The judicial system of El Salvador is based on traditional Spanish law and Napoleonic code and, as such, is different in many ways from most judicial systems of the United States. El Salvador's judicial system is also more closely tied to older Napoleonic codes and procedures than most legal systems now in effect in Latin America.

In El Salvador, judges have the responsibility for supervising both criminal investigations and trials. When a crime is committed, the judge with proper jurisdiction in the matter supervises the security forces in the gathering of evidence in order for the judge to determine whether the evidence is sufficient to warrant a trial of any suspects. The attorney general's office prepares the state's case, but the judge has significant power throughout the judicial process to bring forth evidence and even present evidence in the judicial proceedings.

The security forces of the country play a key role in investigations in that they are the primary staff that a judge may use in gathering evidence. The security forces can also detain persons for up to 72 hours before releasing the person or presenting him or her to a judge.

Despite the appearance of some order in the judicial system, virtually all analysts of the Salvadoran situation believe that the judicial system in El Salvador is seriously flawed and does not often work well in practice.

The State Department's recently released "Country Reports on Human Rights Practices in 1989" characterized the Salvadoran judicial process as "hindered by archaic procedures, inadequate facilities, intimidation of judges, and corruption." U.S. Ambassador to El Salvador William Walker recently wrote to this Task Force that "El Salvador's criminal justice system has always been seriously flawed. Since 1979, this already fragile system has been further disrupted and weakened by the political and economic upheavals caused by the civil war." Ambassador Walker believes that some progress has recently been made against corrupt judges, but he also provided the Task Force with a long list of problems with the judicial system, including the intimidation of judges and investigations and court proceedings that drag on and cannot reliably prosecute criminals.

The intimidation of judges is often backed up with violence. One of the most recent high-profile judicial killings occurred in May 1988 when Judge Jorge Serrano was killed while presiding over the widely publicized case of a kidnapping-for-profit ring run by rightist forces. Judge Serrano's predecessor had also been assassinated. On March 8, 1990, a death threat was publicly announced in El Salvador against all civilian and religious personnel involved in the Jesuit case. The threat was signed by the anonymous leaders of three notorious right-wing death squads. Judges in many human rights cases have been threatened and many

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have ceased their investigations because of such threats, including the first judge in the Archbishop Romero case.

Another serious problem with the justice system concerns the issue of amnesties. In 1987, the Salvadoran government passed a wide-ranging amnesty that freed and stopped the prosecution of all who had committed crimes of a political nature, with a few notable exceptions such as the Romero case and the case of the four U.S. church women. Military personnel amnestied included the convicted killers of the two AFL-CIO land reform advisors and the troops indicted for the 1983 murder of 74 peasants at Las Hojas. The amnesty was a blow to many in the human rights and judicial reform community who began to feel that any attempted prosecution of human rights abusers was futile if they were only to be set free later.

The National Assembly of El Salvador has just begun consideration of yet another amnesty proposal, this one proposed by the ARENA party, that would set free the few remaining military prisoners, including the killers of the four U.S. church women, the major indicted for killing 10 peasants in San Sebastian in 1988, and the lieutenant convicted in 1989 of a triple assassination. The indictment of the major and the conviction of the lieutenant had been highlighted by the State Department in its recent "Country Reports on Human Rights" as an indication of change away from the tradition in El Salvador of putting military officers beyond the law. The President of the Assembly has said that he does not believe that the convicted killers of the Jesuits would be covered by this amnesty because the amnesty law was proposed before the charges were brought in the Jesuit case. *of 9 months?*

One of the widely used examples of the ineffectiveness of the Salvadoran judicial system is the investigation of the murder of Archbishop Oscar Romero. Days after beginning his investigation, the first judge in the case was the subject of death threats and an assassination attempt. He quit the case and fled the country. The National Police abandoned their initial investigation of the case after only six weeks saying they had found few clues. In fact, their report included no information on the calibre of the fatal bullet or the type of weapon used, and they appear to have only spoken with four of the two dozen witnesses at the scene of the assassination. Another round of investigations conducted by the Attorney General's office was abandoned in 1984 by an Attorney General who was the former personal attorney of Roberto D'Aubuisson, the widely-believed intellectual author of the archbishop's murder. In 1988, Antonio Garay came forward and claimed to have chauffeured the car that took the assassin to the Romero murder. Garay testified that the assassin he drove was a D'Aubisson associate, Rafael Saravia. Former President Duarte's Attorney General attempted to extradite Saravia from the United States only to have the Salvadoran Supreme Court -- filled with ARENA appointees -- countermand the extradition request ruling that the testimony of Garay was too old and that his testimony was not admissible against Saravia since they were both allegedly involved in the same crime. The

investigation into Romero's murder has progressed little to this date.

In 1984, the government of El Salvador began a judicial reform program which received much of its funding from the U.S. Agency for International Development. The program proposed to revise outmoded laws, train investigators and judicial personnel, investigate politically sensitive crimes, and provide protection to judges, jurors, and others involved in such cases.

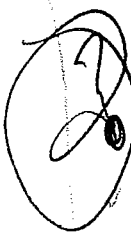
Most aspects of the program appear to have failed to deliver on their promised reforms. The commission formed to revise outmoded laws has presented few proposals to the Legislature, and the few presented do not appear to touch on the elements of Salvadoran law most relevant to human rights. The judicial protection unit has been criticized by most observers, including State Department officials and an AID-commissioned study. The AID study called the unit "one real design dud." Attempts to redesign the unit seem to have foundered on how and, institutionally, where the unit can function in a society ~~that~~ where the official security forces are seen to be part of the problem with judicial security. One portion of the AID judicial reform program, the Commission on Investigations, has produced some positive results mixed with some serious problems.

At the heart of the Commission on Investigations is the Special Investigative Unit (SIU). The SIU was created to be an arm of the civilian Justice Department, staffed by detectives who would receive F.B.I. training in police investigation techniques and who would investigate the most sensitive political crimes, such as the murder of Archbishop Romero. However, due to the regulations in Salvadoran law concerning who may produce evidence in the judicial process, the SIU detectives had to be security force personnel so that their evidence could be submitted into court. Thus, the conflict of interest of having security force personnel investigate other security force personnel was not solved with the creation of the SIU. Indeed, while the SIU has provided investigative services concerning some cases of human rights abuses, including the Jesuit case, they have also ignored many other serious human rights cases with apparent military connections and have spent considerable time on non-human rights cases such as car theft rings.

Many in the human rights community have questioned whether the SIU conducted a complete investigation into the Jesuit murders and even whether the SIU purposely avoided certain avenues of investigation that might have led to conclusions harmful to the security forces. The Task Force found both that there are some troubling questions about the SIU's actions and that the information we have is not complete enough to reach a firm conclusion about the SIU's performance in this case.

One troubling question is Why did the SIU apparently not systematically question all who were at the officers' meeting that took place two hours before the murders in order to

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determine whether others there had knowledge of the Jesuit murders? Another troubling question is Why did the the SIU first choose to run the ballistics tests on the weapons of the Atlactal unit only for single shot fire as opposed to automatic weapons fire? When tested for single shot fire, weapons will not produce the same markings on bullets as they will for automatic shots. Those who heard the shooting at the Jesuits' residence indicated that they heard automatic weapons fire. The ballistics' evidence from the single shot testing might have produced results that tied no one to the murders. As it turned out, the automatic shot ballistics tests do tie the accused triggermen to the killings. It is not known exactly when the SIU decided to test the weapons for automatic shots, but it is widely believed to have been several weeks after the single shot tests were run and possibly as late as the first week of January 1990. The first week of January is also when the U.S. MilGroup notified Salvadoran Colonel Ponce of the evidence linking ~~the~~ *Ch.* Benavides to the crime. The suspicion thus exists that the SIU only performed the ballistics tests that they knew would truly implicate the killers after the U.S. confronted the military with evidence on who the killers most likely were. Neither the SIU nor the FBI has provided the evidence to the Task Force that would allow the suspicion to be removed and a conclusion to be reached in this regard.

Overall, the positive contribution of the SIU is that they have provided a higher degree of investigatory skill to the judicial system than previously available. This skill in police science could help the Salvadoran criminal justice system move away from its current reliance on confessions (often extracted with torture) to a reliance on physical evidence and witnesses as a way to determine guilt. The major negative aspect of the SIU is that it continues the problematic tradition in El Salvador of allowing only the security forces to investigate allegations of security force wrong-doing.

JUDICIAL PHASE AND TIMETABLE

The Jesuit murders occurred at approximately 2:00 a.m. on November 16, 1989. Salvadoran President Cristiani immediately ordered the government's Special Investigative Unit (SIU) to investigate the crime. The SIU began gathering and analyzing physical evidence from the murder site, such as ballistics and fingerprint data. Autopsies were performed on the victims by a government forensic unit. Approximately one month after the murders, the SIU began interviewing and polygraphing military personnel who were in the University area the night of the murders.

On ~~Between~~ December 20~~22~~, a U.S. major in El Salvador received information from a Salvadoran colonel implicating Colonel Benavides in the murders. The U.S. military officer did not immediately pass the information along to his superior. *Early* *On* January 2, 1990, President Cristiani announced that the SIU investigation was "now directed within the Armed Forces." Later

on January 2, the U.S. major finally told his superior about the information he had concerning Colonel Benavides' role in the murders. The head of the U.S. Military Group in El Salvador reported this information to the Salvadoran Chief of Staff, Colonel Ponce, on the evening of January 2.

On January 7, President Cristiani announced that the SIU had presented compelling evidence that members of the Armed Forces had committed the murders. Cristiani then declared that the Armed Forces would convene an Honor Board, an optional body in Salvadoran law, to assist the SIU in better determining which military members were likely involved and should be turned over to civilian authorities for trial.

On January 13, President Cristiani announced that the conclusion of the Honor Board was that nine members of the military were suspected in the Jesuit murders and that the evidence gathered by the SIU and Honor Board would be passed to the court system so that the courts could determine the guilt or innocence of the accused. Cristiani named the nine suspects, eight of which had been placed in detention, although not in jail, including a colonel, three lieutenants, and four enlisted men. The ninth suspect, an enlisted man, had deserted and is at large.

On January 13 and 14, the three accused lieutenants and four enlisted men gave statements to police investigators confessing their participation in the murders. The lieutenants indicated that Colonel Benavides ordered them to carry out the killings.

On January 16, the eight accused military men were brought before Judge Zamora in the Fourth Criminal Court of San Salvador. Before the judge, all eight denied their guilt in the Jesuit murders.

On January 19, Judge Zamora ruled that the available evidence, including the confessions made by the accused in police custody, was sufficient to continue holding the eight detainees and to enter the next stage of judicial proceedings, the investigative phase. The proceedings in the Jesuit case are currently still in the investigative phase.

In El Salvador, judges supervise both the criminal investigations and trials. During the investigative phase, the judge attempts to gather the totality of evidence in order to reach a decision as to whether the evidence justifies a trial. The investigative phase in the Salvadoran judicial process is slated to last a maximum of 120 days after the provisional detention of the suspects begins, which was on January 19. After 120 days, the judge is supposed to decide whether to conduct a trial or release the detainees. In practice, investigative phases often exceed 120 days and detainees are confined until a decision on holding a trial is reached by the judge. (The 120 day "clock" also stops whenever appeals are outstanding and an appeal currently is, so the original May 18 deadline for the decision to go to trial is no longer valid, and there is no effective deadline when a

decision to try must be made.)

At the present time, Judge Zamora is directing the investigation into the Jesuit murders. By law, the police and security forces of the country are required to carry out interrogations, technical investigations, and any other services that the judge deems necessary to gather the totality of evidence in the case. Reports indicate that the SIU ~~are~~ cooperating with Judge Zamora's requests. Judge Zamora told ~~the~~ Task Force ~~staff~~ person that his biggest problems were people failing to show after being issued subpoenas and his heavy caseload, which limited the time he could spend on the Jesuit case.

Judge Zamora has the authority to investigate the possibility of additional people having been involved in the crimes (i.e., higher-ups). Presently, we understand that the SIU is carrying out Judge Zamora's request to interview several hundred military personnel, although it is not known who those personnel are and whether they include possible higher-up suspects.

7. The appeal now pending with the Salvadoran Supreme Court is a motion from defense attorneys to have the jurisdiction of the case changed to a different court. The defense claims that the current court lies does not have the jurisdiction for the locality in which the crimes were committed. An American analyst of the Salvadoran judicial system has speculated that the defense may be trying to "shop" for a better judge for their cause.

If the judge determines at the end of the investigative phase that the case should go to trial, the determination of guilty or not guilty will be made by a majority vote of 5 jurors. Sentencing is passed by the judge. Both verdict and sentencing are appealable to the two higher levels of Salvadoran courts.

WILL BENAVIDES WALK FREE? --- PROBLEMS WITH THE SALVADORAN JUDICIAL SYSTEM

On March 22, 1990, Salvadoran President Cristiani announced that he is "not confident that (Benavides) is going to be convicted." Cristiani added, "I'd be sad if he is acquitted because I think he is guilty based on the investigation."

While many in Washington were understandably shocked by this announcement, analysts of the Salvadoran judicial system in both the U.S. and El Salvador had already begun to seriously ponder the real problems that exist in convicting Colonel Benavides given the rules of the Salvadoran judicial system and the type of evidence currently implicating Benavides.

One of the laws of evidence in the Salvadoran judicial system is that the testimony of one co-defendant is not admissible as evidence against another person charged in the same criminal act. This element of the Salvadoran judicial system has played a key role in stopping criminal proceedings in several other prominent

human rights cases against military personnel, including the Romero and AFL-CIO advisors murder cases. The provision prevents soldiers who may have actually pulled the trigger in murders of civilians from indicating to the jury who ordered them to carry out the deed.

The roots of the provision against co-defendant testimony in Hispanic law are in the desire to prevent "biased" testimony in court, i.e., testimony which comes from persons who stand to benefit or lose from the outcome of the trial. Most Hispanic legal systems now allow the judge at least some flexibility in determining whether co-defendant testimony should be allowed. However, the Salvadoran system still firmly prohibits it. The effect of this provision in El Salvador is that the intellectual authors of murder may escape prosecution as long as those who can testify against them have "blood on their hands" from the murder.

The Salvadoran government had altered the co-defendants rule on one occasion. In 1986, criminal proceedings were beginning in a case in which military personnel and right-wing paramilitarists were accused of kidnapping wealthy right-wing civilians for ransom and while making the kidnappings appear to be the work of the FMLN. Prosecution of the case had the backing of some of the wealthiest members of Salvadoran society and yet the prosecution was stymied by the rule against co-defendants testifying against each other. A solution was provided by the Salvadoran legislature and President which passed a law allowing co-defendant testimony in cases involving extortion, drug trafficking, and kidnapping, only. Cases involving murder or other heinous crimes were not included in the law.

There is no indication at this time that the Salvadoran legislature or President have again considered altering the co-defendant provisions of the penal procedures code in time for the Jesuit case and in order to allow prosecutions in future human rights cases.

The current admissible evidence against Benavides appears to consist solely of evidence that indicates he was the commander of all troops within the sector where the Jesuits were killed and that troops in his sector have admitted carrying out the murders and have physical evidence tying them to the murders. Since there are no precedents in El Salvador of officers being tried for crimes committed by their troops, it is just not known whether the current admissible evidence could convict Benavides and withstand appeals through the two higher levels of the courts in the country. Logically, it would seem that there is (a) substantial room for Benavides' defense to successfully argue that the colonel cannot be held criminally responsible for crimes committed by troops in his sector when there is no evidence (admissible in court) that he actually directed the troops to carry out the crimes.

It is, of course, possible that Judge Zamora will try to uncover evidence or "clean" testimony implicating Benavides and that the

judge will succeed. However, analysts of the Salvadoran judicial system believe that there are substantial impediments in Judge Zamora's way.

There is ^{information} ~~evidence~~ that some of Benavides' fellow members in the armed forces may know of his involvement in the murders and could offer "clean" testimony but may not come forth with such knowledge or may deny it if questioned. For example, the three Salvadoran colonels (whom the U.S. major indicated had knowledge of the murders) all have denied to military investigators that they have knowledge of the murders. The colonel who the U.S. major says spoke directly to him even denies that he had such a conversation with the U.S. major. The U.S. major would appear to have no reason to lie about such an event. The Salvadoran colonels would.

Part of the problem for Judge Zamora is that there is no tradition in El Salvador of soldiers coming forth with evidence or testimony to help convict fellow soldiers. Indeed, there is extensive evidence of a strong tradition of soldiers and the military establishment obstructing or tampering with evidence in order to prevent the prosecution of armed forces personnel. In the San Francisco case of 1988, the military apparently reconstructed a crime scene where troops had massacred 10 peasants to cast suspicion away from the military. The reconstruction included moving bodies around and laying down banners of the FMLN. Other evidence (and the inept nature of the cover-up) was so overwhelming against government troops that a prosecution was still possible.

In summary, there remain numerous obstacles that could block or severely limit the judicial system's investigation, prosecution, and punishment of those responsible for the Jesuit murders.

CAN ANYTHING BE DONE TO ENSURE THAT ALL THOSE GUILTY IN THE JESUIT MURDERS ARE CONVICTED?

Some analysts of the Salvadoran judicial system believe that some rarely used provision or "loop hole" in Salvadoran law may be found that Judge Zamora will use to allow co-defendant testimony against Colonel Benavides. Analysts also wonder whether pressure on the Salvadoran government from the United States and elsewhere to bring the guilty to justice will cause the Armed Forces to bring forth the admissible evidence, that it may currently be hiding, that firmly ties Benavides, and possibly other higher-ups, to the Jesuit murders.

In a U.S. court system, a possible option in a case such as the Jesuit murders would be to drop the charges on one of the accused triggermen and then use his testimony to build a strong case against one or more higher-ups. In the U.S., charges might even be dropped against someone at Benavides' level if he presented firm evidence that higher-ups ordered him to carry out the murders. In El Salvador, though, there is no tradition of

this type of plea-bargaining or granting of immunity. And, the Napoleonic nature of Salvadoran law, whereby courts may only do that which is clearly stated in the codes, would seem to prevent such a maneuver from being instituted in this case by the judge. However, it appears that such a tact could be followed if the Salvadoran legislature and President passed a law allowing the granting of immunity or plea-bargaining in exchange for testimony.

The Task Force will not presume to recommend a specific legal tact or maneuver for Judge Zamora or the Salvadoran Government to take to bring about justice in the Jesuit case. However, we will presume to draw two conclusions about the Salvadoran judicial system as it relates to the Jesuit murder case. First, the Task Force believes that any reforms in the Salvadoran political or judicial system that are made to bring justice to this case should also apply to cases of "ordinary" people in El Salvador. (The crime committed in this case should not be thought ~~be thought~~ of as the murder of six internationally known priests and their two housekeepers.) This crime was the extra-judicial slaying of eight persons not engaged in any type of military combat. And, this crime, unfortunately, has been committed thousands of times in El Salvador over the past 10 years, and it is this type of crime that must stop.

The second conclusion we have drawn from studying the Salvadoran judicial system is that it clearly appears that where there is a will to bring about a particular result in that system, a way can be found to make it happen. When the Salvadoran Government wished to prosecute the kidnapers of the rich, they reformed the judicial procedures to allow that prosecution.

We are confident that El Salvador possesses men and women capable of crafting the reforms to the judicial system needed to bring justice to all those involved in the Jesuit murders and to the country's other political crimes. What we are not confident of is whether the desire and will exists in El Salvador's political and military ~~establishments~~ to carry out the needed reforms.

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