JUSTICE IN EL SALVADOR: The Jesuit Case

Observations of a visiting judge on the trial of nine soldiers accused of murder

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Introduction

From September 26-30, 1991, I was in El Salvador to observe the trial of nine members of the Salvadoran army accused of a vicious murder of eight persons on November 16, 1989. The murder victims were six Jesuit priests who worked and taught at the University of Central America in San Salvador, their cook and the cook's 15-year-old daughter.

At the conclusion of the portion of the trial I observed, seven of the accused were acquitted; one, a Colonel, was convicted of all eight murders; and one, a Lieutenant, was convicted of the murder of the daughter only. No sentence had been imposed when I left El Salvador on September 30. By law, the trial judge must sentence the convicted men within thirty days of the verdict.

More than 20 international observers attended the trial, a reflection of considerable international attention to the crime and to the subsequent investigation and trial. I attended as an official observer on behalf of the Montreal-based International Centre for Human Rights and Democratic Development. The Centre, established by an Act of the Canadian Parliament, has a mandate to study and further the protection of human rights throughout the world.

I am a judge of the Ontario Court of Justice (Provincial Division). Prior to becoming a judge, I represented many Latin American immigrants to Canada, including Salvadorans, on their claims to refugee status in Canada and, in certain cases, before the Criminal Courts of Ontario. Through this work and in the course of extensive travel and study in Latin America, I learned Spanish.

Chief Judge Sydney Linden and Regional Senior Judge Bernard Kelly of the Ontario Court of Justice, Provincial Division, permitted me to be absent from my court for the court days that the trip required. Dr. Mauricio Gutiérrez Cassio, President of the Supreme Court of El Salvador, assisted me and the other observers by providing passes permitting entry to the courtroom.

The Case

The public hearing I observed was the final stage of the trial. The trial process began in January 1990, before Judge Ricardo Zamora of the Fourth Criminal Court of El Salvador. Subsequently, the Judge conducted the "instruction" and "proof" phases of the trial preceding the public hearing that I observed. Much of the evidence taken from January 1990 to the commencement of the public hearing was read at the trial. That evidence is a main source for my information about what occurred before September 26, 1991.

Sources for History of the Case

The complete history of the legal proceedings was part of the record, which was read at the *vista pública*. In a step that would be unfamiliar to a Canadian lawyer, the Judge at the public hearing makes his or her own previous rulings on the detention of the accused, and on the decision to submit the case to a jury trial, part of the case that goes to the jury. These rulings, combined with the evidence presented to the jury, provided a thorough review of the procedures preceding the *vista pública*.

Some parts of the history of the case were part of the record that went to the jury but were not read in open court, and so I neither heard nor read them. Concerning these, I have relied on the publication of the Lawyers Committee for Human Rights in New York City entitled "The Jesuit Case — The *Vista Pública*", a history of the case up to the commencement of the *vista pública*. In addition I have referred to the Salvadoran Criminal Code (*Codigo Penal*) and the Code of Criminal Procedure (*Codigo Procesal Penal*) for the applicable law.

The Crime

The murder victims were six Jesuit priests — Father Ignacio Ellacuría, Father Amando Quintana, Father Juan Moreno, Father Joaquín López y López, Father Ignacio Martín-Baró and Father Segundo Montes — cook Elba Ramos and her daughter, Celina Ramos.

The most well-known of the murder victims was Father Ellacuría, a naturalized Salvadoran citizen who had been born in Spain. He had often appeared on Salvadoran television and in the press, and was known and

respected internationally for his work in philosophy and theology. His stature and credibility was such that he had been seen as a possible negotiator between the government and the FMLN. The FMLN is the Farabundo Martí National Liberation Front, a coalition of groups opposing the government that has wide support throughout much of the country and that has fought the army to a military equilibrium over the past ten years. Father Ellacuría was also accused, by certain people in the Salvadoran military and right-wing political circles, of encouraging and intellectually guiding the FMLN. The Jesuits deny this, no evidence of it was presented at the trial, and the defence hardly alluded to it.

Father Ellacuría returned to El Salvador from Europe on November 13, 1989. Later that day, the military searched the small building and grounds where the Jesuit priests lived on the University of Central America (UCA) campus. Father Martín-Baró, one of the priests, described the search in a report he prepared at Father Ellacuría's request and that was found in a computer after the deaths. Expert evidence established that the November 13 search resembled a reconnaissance of the location more than a search for weapons or specific documents.

The murders occurred on November 16, 1989, in the early morning. On November 11, the FMLN had launched an offensive against the Salvadoran military that initially, succeeded in giving the FMLN control of a significant part of the capital city of San Salvador. The University of Central America campus, where the murders occurred, is in a part of San Salvador with several important military installations and buildings, including the *Escuela Militar* (Military School). At the time of the murders, this area was controlled by military forces under the command of the head of the *Escuela Militar*, Colonel Guillermo Benavides Moreno, the one accused who was eventually found guilty of all eight murders.

The murders were accompanied by destruction of the building and automobiles and the firing of ammunition and flares, which was heard in the surrounding area — all suggesting a military confrontation. A sign on the school entrance to the campus was turned around and the words "The FMLN executed the enemy spies. Victory or Death ... FMLN" were scrawled on the back. An AK-47, a weapon known to be used by the FMLN, was used in the murders.

The killings were investigated by the Special Investigations Unit, a force independent in name from the army but whose members were subject to army control over such matters as job security and promotion. There were no leads or arrests until January of 1990, six weeks after the murders, when a United States army officer advising the Salvadoran Army's Joint Command, reported that a Salvadoran officer had told him that Colonel Benavides had admitted involvement in the murders. The American officer

disclosed this information to his superiors, though he later retracted some of his disclosures.

These revelations led President Alfredo Cristiani of El Salvador to establish a commission to investigate the murders, which did so in private but with some co-operation from the army. In January 1990, Judge Zamora was given the names of the nine people who ultimately went on trial at the *vista pública*, although the source of these names has never been established: Colonel Guillermo Benavides, Lieutenant José Espinoza, Lieutenant Yusshy Mendoza, Second Lieutenant Gonzalo Guevara, Subsergeant Ramiro Avalos, Subsergeant Tomás Zarpate, Corporal Angel Pérez, Private Oscar Amaya and Private Jorge Sierra. Sierra went absent without leave in December 1990, and was tried in absentia.

Statements were obtained from seven of the nine accused. In each statement the soldier completely confessed to the offence and implicated some of the others. In four cases the soldiers actually confessed to the shooting. Several statements established that the soldiers simulated a combat confrontation with the FMLN and made the writing on the sign to make the FMLN seem responsible. Colonel Benavides did not confess, but the others' statements all implicated him explicitly as the mastermind of the operation who ordered the murders. These statements and the circumstances in which they were taken played an important part in the prosecution, the defence and, very possibly, in the verdicts. They will be discussed below.

Judge Zamora was assigned to the case. He ordered the pre-trial detention of the accused and then began the instruction stage of the trial. During the instruction stage, witnesses were called by the Judge, the prosecution and the defence. A record was made of the interrogation of each witness, which was done in private.

Two developments concerning the lawyers on the case during the instruction phase are significant.

In a trial in El Salvador, victims of the crime or their representatives can be represented at the trial with a full right of participation. The two lawyers acting for the private prosecutors (*acusación particular*) at the trial had worked for the government prosecutor's office on the case. They resigned from their positions and the case because they felt that they were not being allowed to fully prosecute it. They were then hired by the Society of Jesus (the Jesuits), who also represented the survivors of Elba and Celina Ramos, and appeared for the private prosecutors in the *vista pública*.

In Canada no such thing could have occurred: there is only one prosecutor. A complainant can hire a lawyer to prosecute the case only if the complainant (not the police) has laid the charge, and only if the Attorney-

General does not intervene. Apart from this, as a rule no lawyer who has represented one party in a case can ever act for another party in the same case. In the Salvadoran case, although the private and public prosecutors had the same goal, conviction, their approach and strategy may have differed. It could not be said that their interest was identical.

In a related step, the defendants decided to present a joint defence. There were some apparent and some less apparent conflicts in their interests. For instance, Lieutenant Mendoza, who was eventually found guilty of one murder, said in his statement that he did not know what he was being sent to do.

At the conclusion of the instruction stage, Judge Zamora decided the evidence was sufficient to elevate the case to the public hearing or jury trial. The defendants appealed this decision twice, first to the first appellate court and then to the Supreme Court of El Salvador. It was upheld.

The Jury Trial (*Vista Pública*), September 26-28, 1991

The jury had been selected by September 25, 1991, the day before I arrived in San Salvador. Jury selection was not public. Five jurors and one alternate were selected from twelve persons who were chosen by lot from a list of names. The Salvadoran Code of Criminal Procedure provides for the parties to challenge the jurors for cause (Article 342), but apparently there were no challenges in this case.

The Physical Layout of the Courtroom

Since all of the trial was public, the jurors would normally have been visible in the courtroom. This was not the case, however. A special wall was constructed so the jurors normally could not be seen by anyone except the Judge and the Judge's assistant charged with reading the minutes to the jury. Prosecuting and defence lawyers could see the jury only when they were actually addressing it. The public never saw the jury and, most significantly, the accused never saw the jury and the jury never saw the accused. An accurate representation of the courtroom scene that appeared in a San

Salvador daily newspaper on the second day of the trial is attached to this report, with my translations of the Spanish words added.

Concealing the jury, the only departure from procedural regularity in the layout of the courtroom, was significant. The clear reason was to protect jury members from reprisals for their verdict. The same concern emerged when the Supreme Court of El Salvador requested foreign observers planning to attend the trial not to announce the date of the trial publicly before travelling. Prospective jurors summonsed in El Salvador were not told that they might be chosen for the Jesuit trial, because it was feared that jurors would be afraid to serve on the jury for this trial.

Hiding the jury highlighted the power of the Salvadoran military and the danger for those who crossed it, throughout the trial. This theme was repeated by threats of varying explicitness in the defence addresses to the jury and in a dramatic demonstration outside the courtroom during the defence addresses.

During the four days I spent in El Salvador, I did not hear any suggestion that jury members were in danger if their identity was known to the supporters or families of the eight deceased persons. The clear reason for hiding the jury was to protect them from reprisals by those who supported the defence. Thus any conclusion about the propriety and procedural fairness of the trial must be viewed in light of the necessity of hiding the jury from the accused.

One other aspect of physical layout must have worked hardship on the accused men, even if it did not affect the result of the trial. As the diagram in the Appendix shows, the accused faced outward, which Salvadoran lawyers present advised me was the usual position in a *vista pública*. In this case, the trial was televised live and in full throughout the country and hot camera lights were focused directly on the accused. Court was in session almost sixteen hours on September 27, and on one occasion continued for four hours without a recess.

Of note to a Canadian legal observer was that the forward-facing position of the accused meant they could not see all of the proceedings. For example, a large display board on a tripod showed all of the charges against each of the accused in relation to each of the victims. At one point during the reading of the evidence when there were repeated references to nicknames used by the accused in their battalion, these nicknames were added beside their names on the display without their knowledge. Their lawyers of course could see. In Canada the accused must be able to see and hear everything that occurs in the trial or the verdict may be set aside.

The Minutes of the Case

The Judge's assistants read selected portions of the record — called the minutes — that had been adduced during the trial's instruction and proof phases. The portions read were selected by the Judge prior to the jury trial. The defence could have requested that other portions be read, but did not do so. All parties can also refer to all of the evidence in the record in their closing arguments. Also, any party can request that a witness be called to testify before the jury but the Judge does not have to allow it.

In the Jesuit case, the jury did not hear any witnesses. This is a major difference between a Salvadoran trial and a Canadian trial. It is common in Canadian law to say that cross-examination is the best method ever devised of arriving at the truth. In addition, in Canadian trials much is made of the jury, or the judge in a trial by judge alone, being able to assess the credibility of a witness by the demeanour and manner of the witness when testifying. Because a truthful witness may be nervous and a good liar may be very effective in delivering evidence, the advantages of seeing and hearing a witness are sometimes over-emphasized, especially when the witness testifies over a short period of time. But cross-examination of a witness, particularly of an accused person who has confessed and then retracted a statement, can be of undoubted assistance in determining which is true, the confession or the retraction.

Of course, reading the evidence has some advantages over a procedure requiring all witnesses to testify personally in court. Time is saved, and little is lost in the case of non-controversial evidence.

The Confessions

I arrived in San Salvador at 1 p.m. on September 26. The morning session of the trial had included the forensic evidence and the findings at the scene of the crime and the beginning of the confessions. The afternoon session, which went from 3 p.m. to almost midnight, was in great part taken up with the confessions of all the accused who were present with the exception of Colonel Benavides, who did not confess.

Because of the provisions of Salvadoran law relating to confessions, each of the confessions was effectively read three times. This is because the confessions were not made before a judge during the trial, but to investigating officers after the arrest of the accused. Under the Salvadoran Criminal Code these are called extra-judicial declarations and are admissible in court only under certain conditions:

- that the statements were taken before two witnesses within 72 hours of arrest;
- that no coercion was involved in taking the statements; and
- that the witnesses to the statements subsequently testify before a judge.

Thus for each of the seven accused, the jury first heard a reading of the written statement of the accused, which was not taken before a judge. Then it heard readings of both statements from the two witnesses that were taken before a judge. The statements of the witnesses amounted to a brief recital of the date and place where the statements were taken, and then a verbatim repetition of the accused's confession.

It is impossible to determine the effect on the jury of this repetition of the defendants' confessions. In my opinion, the impression on observers at the trial cannot be captured simply by reading the statements and deserves some emphasis. This is because the jury's acquittal of the seven soldiers (even though it contradicts the conviction of Lieutenant Mendoza) implies a rejection of these confessions.

In the first place, the reading of the statements was tiresome, almost boring. This is not particular to the Salvadoran trial and not a criticism of the procedure; a similar process is followed in Canada whereby each witness to the statement repeats the statement. The near-monotone recitation of the statements in the voice of the Judge's assistant, who of course was not even present when the statements were taken, could have slightly dulled the ear and mind to what was being read — an explicit and horrific description of planned, cold-blooded executions given by people who were there and either observed or committed the killings.

Balancing this dulling effect was an opposite result. The description of the crime was repeated so frequently, in such a condensed period of time, that the main facts of the confessions were firmly impressed on the listener's mind. It seems safe to assume that this was true for the jury.

Finally, the reading and repetition of the statements may have benefitted the accused in a subtle fashion. The flat repetition of the seven confessions highlighted their similarity in style and substance. Although the defence lawyers, in their jury addresses, relied on discrepancies in the confessions to suggest that they were untrue, they also asked the jury to reject the confessions as untrue because they were pressured and forced out of the accused. In my view, although there were some discrepancies and some of the accused focused on different details, the striking feature of the confessions as read was their similarity to one another in style and content. This may have suggested to the jury that they were not honest statements emanating from each accused, and led the jury to reject them.

The Other Evidence

After the reading of the statements, which concluded at about 7:40 p.m. on September 26, further portions of the minutes were read. These can be conveniently divided into two parts. The first part consisted of what was expected in a trial, other evidence.

The case against the accused consisted of mainly their confessions and circumstantial evidence. Evidence was read that the lettering scrawled on the sign left at the gate of the university was similar to the handwriting of two of the accused. Witnesses in the area of the University testified to hearing sounds and seeing lights consistent with explosives being set off.

One important witness, the closest the prosecution had to a surviving eyewitness, was a woman who worked for the Jesuits at the University. She had stayed overnight in a small house joined to one of the walls of the campus with a window looking onto the campus. In a statement to the Judge taken six days after the murders, she described what she saw and heard from the window on the night of the murders. She heard shooting. She testified that she had a clear view of a wall that some of the accused confessed they had climbed over, and that she had seen men in camouflage uniforms with helmets and visors; this apparently describes the uniform of sections of the Salvadoran Army. She also heard Father "Nachito" (Martín-Baró), whose voice she recognized, call out the Spanish for "Scum!" and "Justice!". She testified that she was able to see in the middle of the night because moonlight lit up the area as if it were sunrise. Bright moonlight was also mentioned by one of the accused in his confession and by one of the witnesses in the neighbourhood, and was confirmed by a meteorological report introduced by the prosecution during the jury addresses.

The woman later recanted her testimony while being questioned in Florida by American and Salvadoran officials. The defence lawyers exploited both this fact and the circumstances of her recanting in their jury addresses.

The Prior Proceedings

The next part of the reading of the reading of the minutes struck me, as a Canadian observer, as unusual. The decision of the Judge to order the pre-trial detention of the accused was read to the jury. Then the decision of the Judge to raise the case from the instruction phase to a jury trial was read to the jury. In addition, the rulings of the Appeal Court and the Supreme Court of El Salvador upholding the trial Judge's previous rulings on the admissibility of the confessions were read to the jury.

Each of these rulings contained detailed and repeated references to the evidence that the jury had already heard. Rulings of this type are common in judicial proceeding. In Canada rulings on pre-trial detention are often made, and rulings that there is sufficient evidence to commit an accused for trial must be made prior to a jury trial. But these rulings are based on a different standard of proof, which is much less than the standard of proof required for conviction.

Similarly in El Salvador, pre-trial detention in the case of murder and acts of terrorism is justified when there is sufficient reason to think that (*juicio suficiente para estimar que*: Article 246) the accused participated in the crime. Elevation to the jury trial only requires "necessary evidence" of the participation of the accused (Code of Criminal Procedure: Article 275-3). The defence is presented only at the jury trial, and for conviction the jury must have the innermost conviction (*la íntima convicción*) that the accused is guilty, a much heavier burden of proof. Thus the reading of the previous findings of the Judge, which emphasizes to the jury that the Judge thought the evidence sufficient to detain and to elevate the trial, could prejudice the defence. In the result, it seemed to cause no prejudice.

The reasons of the appellate courts upholding the Judge's decision to elevate the case — mainly his decision that the confessions were taken legally and were admissible in evidence — were important information to be read to the jury, given that there was no instruction by the Judge as we know it in Canada. As it turned out, the defence asked the jury to disregard the legal ruling that the confessions were admissible. In Canada, it is improper for a lawyer to tell the jury to disregard the law as stated by the Judge.

The reading of the minutes ended at noon on September 27, the second day of the *vista pública*. At 2:10 p.m. the lawyers' addresses to the jury began (*los debates*).

Request by the Prosecution for a View

After the reading of the minutes, the public prosecutor made an important request that was refused. He asked if the jury would like to go to the scene of the crime. The Judge asked the jury, and then advised the Court that the jury was very familiar with the UCA campus and did not require a view. I saw the scene the day after the trial ended and felt differently. The UCA is very large but the murders occurred in one building and its grounds, with many rooms, walkways, plots of grass and corners, which were accurately described in the defendants' statements. Taking a view

might have bolstered belief in the confessions, making it seem that they had been given by people who had actually been there.

While the jurors may have been familiar with the UCA campus, it is not certain that they were familiar with this small part of it. Their refusal may have had something to do with the fact that the prosecutor's request came in the afternoon of September 27, when they had already had one twelve-hour day and knew eighteen hours of argument plus deliberations were to come. Some of the jurors had health problems, which was one of the reasons the Judge had adjourned court for eight hours the night of September 26; Salvadoran law normally does not allow for adjournments of longer than five hours in a jury trial.

This is a possible structural problem with the trial system in El Salvador. It does not contemplate long *vista pública* phases and therefore cannot handle complicated cases or cases with many charges against many co-accused. If the jury's fatigue did influence their decision not to take a view, then this structural problem may have had an outcome on the verdict — particularly the seven outright acquittals.

The jurors' refusal of the prosecutor's suggestion that they visit the scene of the crime may also have had to do with a well-founded fear of being visible.

The Jury Addresses

The jury addresses were the most dramatic part of the trial I observed. To varying degrees the lawyers brought the political nature of the case to the fore, and the arguments they used contain important clues to the bizarre and contradictory verdict of the jury.

The Private Prosecutors' Addresses

The speeches of counsel for the private prosecutors were the most focused, relating the evidence to the issues in a way that would be helpful to the jury. Citing the advanced state of the fighting in San Salvador by November 16, 1989, and the number of important military and government sites in the area surrounding the UCA, they showed that the campus was surrounded by circles of military forces that could not have been penetrated by anyone except with the authorization of the military under the command of Colonel Benavides. This was the circumstantial case against him and it was very strong. All that defence counsel said in response was that it was true that the area was well-protected and difficult to penetrate, but that nobody was perfect.

Counsel for the private prosecutors also referred to the length of time of the attack on the Jesuits' residence and the noise and lights that it occasioned without any response from the military to argue military responsibility. Further evidence of Benavides's guilt was that he did not investigate the crime after it occurred, though it occurred in his jurisdiction.

They also argued in the alternative that even if Colonel Benavides did not give the order to kill the victims, he was responsible under Article 22 of the Criminal Code. This makes it a criminal offence to omit to do something you could and should do to prevent a crime that you know about.

Further, anticipating the defence, and as it turned out, the verdict, counsel for the private prosecutors stressed the irrelevance of the argument that the soldiers were following orders. Following orders is a specific defence in Salvadoran law, but only if the order is not obviously illegal (Article 40, Criminal Code).

Counsel for the private prosecutors also resorted to appeals to the jury's emotions, based on the evidence, which were within legitimate limits from my perspective as a Canadian observer. They asked the jury for guilty verdicts to show the military, the nation and the world that such acts would not go unpunished any more in El Salvador. They explicitly recognized that it was a political case with political overtones.

In their plea to the jury's conscience they followed to a great degree the lengthy written brief they had presented when they first intervened on behalf of the Jesuits and the families of all the victims. In this eloquent document, they characterized the slain Jesuits as people who opted for life in their work, their writings and their rational discussion of ideas. Those who killed them for their ideas were painted as opting for the solution of death. Although they represented the families of the victims, the private prosecutors did not exploit the heinousness of the crime and the suffering of the victims (that was mostly irrelevant to the point in dispute — that is, the identity of the murderers), while the government prosecutors did so. Defence counsel certainly exploited the suffering of the accused and their families while the accused were in detention, hardly acknowledging the suffering of the victims of the crime and their families and friends.

The Government Prosecutors

The three counsel for the public prosecutors addressed the jury beginning at 4:10 p.m. on September 27. Since one of the reasons the former public prosecutors had resigned was their belief that the Attorney-General did not prosecute the case vigorously enough in the instruction phase, I was attentive to the sincerity of the government lawyers. I concluded that inso-

far as the *vista pública* was concerned, the prosecution was genuinely seeking a conviction and was in no way throwing the case. Although there were differences among them, as a team their style and approach resembled the emotional and inflammatory style of the defence more than the logical approach of the private prosecutors. Whether the jury used logic or emotion, or more likely both, the public prosecutors were the least effective of the three teams of lawyers.

The public prosecutors asked for a guilty verdict as a rejection of the murder of innocent persons and to open the door for future investigations of human rights abuses. They referred to the peacefulness of the victims. They anticipated one of the defences in saying war was no justification for acts of violence such as were committed in this case. They adopted the arguments of the private prosecutors with respect to Colonel Benavides's participation.

One of the lawyers was very loud and theatrical. He argued that the ballistics evidence was equivalent to mute witnesses because it demonstrated that the shots were fired from guns belonging to the military. One of the main defence arguments later countered this argument: defence lawyers argued that the ballistics evidence did not establish that the shots were fired by guns issued to the accused, and was not completely consistent with the confessions of the accused on which the prosecution put such great reliance.

In making his arguments, one lawyer several times picked up a machine gun that was an exhibit, turned squarely to the television cameras and repeatedly banged it on the floor. On some occasions, because of the screen protecting the identity of the jury, it appeared that the jury could not see him doing this. Each time he picked up a gun, many perhaps more than a dozen flashbulbs went off behind me. He called on God and the Fatherland for a conviction, his voice rising to a scream. At one point a public prosecutor asked the jury to exercise a judgment as cold as the tombs of the slain priests. He referred to bullet wounds on the genitals of the two female victims and asked the jury to wonder whether this was an accident or whether it was a case of men showing that they could kill women.

In Canada, references to the violent circumstances of the crime, or arguing to the jury that it must convict in order to prevent future crime, are sometimes considered so inflammatory as to justify setting aside a jury verdict. Thus some of these arguments and others not mentioned struck me as unusual, probably due to my unfamiliarity with the Salvadoran legal system. In any case, the defence lawyers matched and surpassed the prosecutors in inflammatory argument.

The Defence Submissions

The defence lawyers attempted to expose the weaknesses of the prosecution's case; this is basic criminal law advocacy. They also appealed to chauvinist, racist and pro-military ideology. And with the help of a dramatic demonstration outside the courtroom during their address, they tried to intimidate the jury. The politics and the intimidation were explicit, and ran through the submissions from the opening words to the closing argument.

The first defence lawyer argued that thanks to the Salvadoran army "*nosotros, los nativos*" (we, the native Salvadorans) had a country. He asked the jury to return verdicts of not guilty in order to say "enough" to foreign intervention. Although he kept promising to turn to the evidence and occasionally did, this was his theme. He told the jury that Spanish, German and British police were called in to assist the investigation because, they (he, the jury and other pure Salvadorans) were (supposedly) not good enough because they were not white.

He stated that he was there, like them a pure Salvadoran, to ask for justice. Pointing to the Judge, he said that the trial was not justice but a show to see if the United States Congress would or would not give El Salvador aid. On one occasion he apologized for not speaking good English, because he was a pure Salvadoran like the members of the jury.

He also referred to El Salvador carrying the yoke of the Spanish conquest since the time of Columbus and asked the jury to finally free El Salvador of the yoke.

There was more in this vein. Whether counsel was just a good advocate or shared his client's views, I found him frightening to listen to. The families of the accused cheered him when he finished.

The opening defence counsel did refer to inconsistencies in the prosecution case regarding the weapons used, the shots fired and the entry of the bullet wounds. He also attacked the confessions, saying they were illegal because they had been given outside the required 72 hours after detention. This was the very point that had already been determined by the Judge.

On the morning of September 28, the defence submissions continued. While continuing the theme of foreign intervention in the affairs of El Salvador, the defence added another. They gave a history of El Salvador from the start of the civil war eleven years before to show that the murdered priests knew the social situation very well.

In particular they referred to a passage written by Father Martín-Baró and said that he knew the social problems in El Salvador and probably paid for it with his life. This could have been taken to mean that by their work and writing the Jesuits got what they deserved.

In an argument that turned out to be most relevant, given the verdict, the defence also told the jury that military people were subject to military laws and could be punished for failing to follow orders. Returning to the theme of international meddling, he reminded the jury that even if the United States sent millions of dollars in aid, they, the jury, wouldn't see a cent of it.

The third defence counsel concentrated on the confessions. He attempted to pick them apart and compare them with one another, but he came up with only minor inconsistencies. He returned to the argument that the statements had been taken outside the allowed 72 hours.

One of the most dramatic events of the trial occurred during this address. Loud music originating just outside the courtroom was heard right in the courtroom. I did not recognize it but later was told that it was the national anthem. Slogans were chanted followed by the playing of "Taps" — the well-known tune often played at military funerals — on a bugle. This was repeated. I did not see the demonstration, but when I left the courtroom at the lunch break I saw on the street discarded placards denouncing the FMLN and supporting the Army.

I noted in my notebook that if I were a juror I would feel intimidated by the repeated singing of the anthem, the chants from a large crowd and the playing of "Taps". The Judge interrupted the court procedure to instruct jury members not to allow anything taking place outside the courtroom to influence their deliberations. This probably had the same effect as many instructions to a jury to ignore evidence they have just heard — that is, very little.

The third defence counsel also referred to the power of the Jesuits in the world and accused them of desiring to establish their power in El Salvador. He again referred to the Spanish yoke, a reference to the Spanish birth of five of the murdered priests.

The fourth defence lawyer was also the lead lawyer. He continued the combined attack on the prosecution's evidence and foreign interference. He turned and faced us, the international observers, and told us that we should have been in El Salvador during the offensive of November 1989 when not eight people but a thousand died. On another occasion he told the international observers that if we had lived through the time of the murders instead of just stopping in El Salvador for a short time, we would know

what it was like to have people leave home in the morning and not come back in the afternoon. Previously another defence lawyer had stated that the army protected the nation while the jury members were safe in their homes. One of the defence lawyers ended by asking for God's blessing for the jurors and wishing them a safe return to their homes. A Salvadoran lawyer observing the trial later stated to me that these references to being safe at home, to Salvadorans accustomed to disappearances at the hands of the authorities, are a fairly explicit threat.

This lawyer appeared to be the most effective defence lawyer. At the conclusion of his speech, he told the jurors more than once that they could decide they didn't have to hear any reply from the prosecution. However, the Judge ordered reply and the case was adjourned for lunch.

The reply submissions occupied the afternoon of September 28. The private prosecutors argued that the accused were not denied lawyers but agreed to speak without them. The public prosecutor replied to the defence suggestion that God would like an acquittal by arguing that God would want a conviction. He exposed the contradiction between the defence's suggestion that the soldiers were just following orders and their complete denial of any involvement.

In contrast to the usual Canadian trial, I noticed only three objections in the whole trial. Two of these were made by the defence while the public prosecutor was making final reply, and were allowed by the Judge.

Lead counsel completed the replies of the defence team. He pointed out that Major Buckland, the American officer who had first spoken of hearing of Colonel Benavides's involvement, had recanted his statements and claimed pressure by the U.S. Federal Bureau of Investigation. He referred to this, as he had previously referred to the witness changing her evidence after questioning in the United States, as proof that pressure is used during interrogations in the United States as well.

The Jury's Verdict

Shortly after 5 p.m. the speeches ended and the Judge asked the public to leave while the jury deliberated. If the Judge gave any further instructions to the jury, they were not in public. The Criminal Code has no provision for a charge to the jury. The jury was given eighty questions, each in the same form. With respect to every accused and every charge, jurors were asked whether they held the innermost conviction that the accused was guilty as charged. The questions dealt not only with the murder charges but charges of terrorism and preparation of acts of terrorism relat-

ing to the attack. Unanimity was not required, only a simple majority on each question.

At 10:30 p.m. the jury returned, and the Judge read its answers to the questions. The first eight dealt with the murder charges against Colonel Benavides, and were all answered "Yes". He was found not guilty of the terrorism charges. The next questions dealt with Lieutenant Mendoza. The jury found him guilty only of the murder of the young girl, Celina, and not guilty of each other charge. Several observers thought that the single "Yes" must have been an error. All the other questions were answered "No".

The reaction in the courtroom was as if the result was a tie. Those hoping for or expecting acquittal had been silenced by the initial "Yeses". Those connected to the victims were stunned by the acquittal of the confessed participants, especially those who had admitted firing the shots.

Analysis

Legal Issues

The Burden of Proof

In order to convict, the jury had to have the innermost conviction that the accused were guilty. This, I think, is very close to the standard of proof that Canadian lawyers are familiar with: "beyond a reasonable doubt". In trying to explain the test to a jury or to himself or herself a judge can use the paraphrase "with a moral certainty", which has been approved by appeal courts. In my opinion this is a similar standard to innermost conviction. This is supported by Article 363 of the Salvadoran Code of Criminal Procedure, which requires the foreperson of the jury to give the jury the following warning, to be posted in large letters in the jury room (my translation):

> The law does not require the jury to account for the manner in which it has arrived at its conviction. The law does not prescribe rules by which the jury should determine the sufficiency of any evidence; the law only requires that the jurors examine themselves, in silence and privately, and search in the sincerity of their conscience for what impression the ***evidence presented*** for and against the accused has made on their minds. The law does not say to them: Is such a fact true? It asks only this question that encompasses their entire duty: Do you have an innermost conviction? *(emphasis added)*

Simple translation of the Spanish words into their English cognates "intimate" and "conviction" without reference to Article 363 might suggest that the jury can decide on emotion or by a "gut feeling" without regard to the evidence. This, I think, is unfair to the Salvadoran legal system. Article 363 makes clear that the jury must decide on the evidence and that the innermost conviction can only be reached after reasoned examination of the evidence. What the jurors do in private may be something different, as in any country, but it is clear they must be certain of guilt.

The methods set out in Article 363, incidentally, are similar to the law in Canada as recently determined by the Supreme Court of Canada. In two important decisions the Court has held that it does not matter how the jury reaches its conclusion and that different jurors can reach it by different, even contradictory routes; and that the jury need not be satisfied of every fact in the prosecution's case beyond a reasonable doubt but need only be satisfied beyond a reasonable doubt that the offence charged has been made out.

Statements

The requirements for the admissibility of an accused's statement, called an extra-judicial declaration, are set out in Article 496 of the Salvadoran Code of Criminal Procedure (my translation):

> **Article 496** — Extra-judicial confessions have no evidentiary value with respect to political crimes as defined in Article 151 of the Penal Code.
>
> For common crimes, an extra-judicial confession will be considered to be sufficient evidence if the following conditions are met:
>
> 1. If it is proven to the Judge by at least two trustworthy witnesses according to the procedures established in this code even though the confession may have been made to each witness at a different time in a different place;
> 2. If the confession is consistent with other reasonable elements of the case with respect to the same punishable act.
>
> In addition to the preceding requirements, a confession given to a person in authority must comply with the following conditions:
>
> 1. They've been taken within 72 hours of arrest;
> 2. They comply with either the third or fourth clause of Article 142 (authentification of confession by signatures of two people or by tape recording);
> 3. If the same witnesses that prove the taking of the statement also declare that the accused was not subject to physical force or intimidation when interrogated...

The article then says such a statement is sufficient evidence to detain an accused, and sufficient to raise the case from the instructions stage to the jury. It also provides that in cases of homicide, if the statement is the only evidence or if it is combined with evidence that would not be sufficient to convict without the statement, cases punishable by the death penalty will be punishable by twenty to thirty years in prison.

Thus Salvadoran law recognizes the frailties of confession evidence right in the procedural code. It not only renders it of no probative value in certain cases (political cases as defined in Section 151, which was not considered applicable in this case) but provides that a verdict based on a confession or mainly a confession is not safe enough to risk a death penalty.

As in Canadian law, the admissibility of the confession is for the Judge to determine. But also, as in Canadian law, once the Judge determines that the confession is admissible, it is up to the jury to accept it or reject it or give it whatever weight they wish. Acquittals in confession cases usually arise when the accused testifies at the trial and retracts the confession, but they can arise even when the accused does not testify. The jury still has to be satisfied on all of the evidence that the confession is true.

Thus in the Jesuit trial, it seems wrong that the defence continued to tell the jury that the confessions were inadmissible because they were taken outside the 72 hours, but it was perfectly proper to ask the jury to reject the confessions that had later been retracted.

The Defence of Following Orders

The defence of following orders to avoid responsibility for an illegal act has consistently been rejected. It was rejected at the Nuremberg trials unless no moral option is available to the person receiving the order; it was rejected by the Israeli courts in the Eichmann trial. It is partially recognized in Article 40 of the Salvadoran Criminal Code, but does not apply to cases where the act ordered is manifestly illegal such as the murders at the UCA.

The Verdict

The jurors may have acquitted the seven men who went free from a belief that they were performing their duty as they saw it; they may have thought that the seven should not be punished because they were following orders and had no choice; or they may have been intimidated by the demonstration and defence speeches. They may also have rejected their confessions. Any combination of these factors may have been at work. In

addition, since only a majority was required on each verdict, there may have been different votes on the different questions put to the jury.

If the verdict was the jury's conclusion after applying reasoning and law to the evidence, it is not unreasonable. But it is important to distinguish correct from not unreasonable. A correct verdict is one of acquittal for the innocent and conviction for the guilty. A not unreasonable verdict is one to which a reasonable jury could have come, whether correct or not.

I conclude that the acquittals were not unreasonable because the jury was entitled to reject the confessions. Even though the admissibility of the confessions was a question of law for the Judge to decide, and the defence repeatedly and improperly resurrected it before the jury, the truth of the confessions was a matter for the jury to decide.

Confessions are unreliable and have been the source of many injustices. I have already pointed out that the Salvadoran law mistrusts them, deeming them worthless in certain cases and as an inferior type of proof in others. In addition, I was advised that Salvadoran juries generally mistrust extra-judicial statements. This is in part because there have been established cases of confessions extracted by torture, sometimes by the military.

Over the past two years in two separate cases in England, the Court of Appeal, urged by the prosecutors, has allowed appeals by persons convicted of terrorist crimes on the basis of confessions and imprisoned for between fourteen and sixteen years. In one case (the Guildford Four), it was proven that police officers had concocted confessions, suppressed notes of interrogations and lied in court. In the other case (the Birmingham Six), some of the accused confessed and some did not, but all were convicted on unreliable forensic evidence.

The morning after my return to Canada, on October 1, an article appeared in a Toronto newspaper about a case in Winnipeg. The prosecutor withdrew a charge against a young Canadian native man who had confessed to murder, after jail records showed that the man was in jail on the day of the murder.

As a Canadian, I found it unusual and difficult to understand how the Salvadoran jury could acquit in the face of the confessions when they did not have a chance to hear the accused explain their confessions, and be cross-examined. But if the jury did reject the confessions, it was not unreasonable to do so.

However, this first hypothesis, that the jury simply rejected the confessions, is not the most likely explanation given the finding that Lieutenant Mendoza was guilty of the one murder.

The case against Mendoza depended on his confession, and nothing made it more or less reliable than the others. The only evidence against Mendoza that did not exist in respect to the others was his involvement in burning the Military School's exit logs, which showed who left the school on the night of November 15. While this might have been enough for the jury, combined with his confession, the more likely explanation of his conviction is that the jury held him responsible because he was the officer in command of the operation from the *Escuela Militar*. This would mean that, contrary to Salvadoran law and accepted principles, the jury was accepting the defence of following orders for the seven it acquitted, even if the order was to murder innocent non-combatants.

This reasoning, though arguably illegal, raises one of the most important issues of the case — ultimate responsibility for the crime. Although given in another context (massive participation in mass murders during the Nazi era), a statement of the Israeli Court in the Eichmann trial is appropriate to the investigation of the Jesuit murders. The Court said:

> ... in general, the degree of responsibility increases as we draw further away from the man who uses the fatal instrument with his own hands. (cited in Hannah Arendt, *Eichmann in Jerusalem)*

Whatever the explanation of the conviction of Mendoza and the acquittal of the others at the murder scene, the finding of guilt of the murder of Celina Ramos, but not her mother or the priests, is a puzzle almost defying speculation. The jury may have wanted to say that Lieutenant Mendoza's responsibility was less than the Colonel's and chosen the murder of the most sympathetic victim as representative. The jury may have inferred that, while the killing of adult witnesses (other priests and Elba Ramos) to Father Ellacuría's murder was ordered by Colonel Benavides, the killing of a 15-year-old required independent judgment on the spot, and that it must have been Mendoza's decision. Or, different votes and majorities among the five jurors may have resulted in inconsistent answers to the questions.

Since Colonel Benavides did not confess, the admissible case against him was the circumstantial case so clearly made by the private prosecutors. He was also implicated by each of the confessions, but under Salvadoran (as under Canadian) law, the extra-judicial statements of an accused are evidence against him only and not his co-accused. Though referred to by the defence, this point was not squarely dealt with in the speeches to the jury; it was not in the prosecutors' interest and, though it was important to Colonel Benavides, the argument did not fit neatly into the joint defence strategy.

It is possible that the jury took the statements of Benavides's co-accused against him into account. Juries are constantly being told to disregard what they have heard or to use evidence for one purpose but not for another. It is arguable whether or not the human mind can do this. It certainly requires great mental discipline for a judge sitting without a jury.

It is most likely that the jury was convinced by the argument, graphically demonstrated by the private prosecutors, that the murders could not have occurred without Benavides's approval, if not his planning.

Conclusions

1. The prosecution of the nine accused was hampered throughout the *vista pública* by the need to hide the jury from the accused in an attempt to protect their safety. This single departure from proper procedure permeated the trial because it was a constant reminder of the power of the defendants and the army they represented, and of the fear they instill in the public. No conclusion about the propriety or fairness of the trial can be reached without reference to this fact. The audible pro-defence demonstration during the trial and the frequent references by the defence to the safety of the jury members were simply further examples of the intimidating atmosphere in which the trial took place.

2. With the exception of the concealing of the jury, the vista pública appeared to take place according to law. Judge Zamora ensured that the defendants had a fair trial and if anything allowed their lawyers too much leeway in their addresses. The positioning of the defendants facing outwards, facing the camera throughout the trial, was not dignified but likely had no effect on the outcome of the trial.

3. The prosecution was hampered by the limited investigations done immediately after the crime. Apart from the attacks on the confessions, any defence argument with merit exploited some gap in the prosecution case resulting from poor police investigation after the crime.

4. The Salvadoran judicial procedure is not well-equipped to deal with a lengthy trial with several co-accused, charges and issues. The reading of parts of the evidence by the judges' assistants is tedious and not conducive to reaching a proper verdict. Particularly in the case of retracted confessions, some chance to observe the accused retracting or explaining his previous confession would assist.

5. The acquittals of seven of the accused, if based on rejection of their weakly corroborated extra-judicial statements, would be a reasonable verdict. A mistrust of confession evidence is written into Salvadoran law and apparently exists among the general public. This is healthy, in accord with other jurisdictions and should be encouraged not only while the military have a major role in governing El Salvador but in any legal system under any form of government.

6. The conviction of Colonel Benavides was reasonable and amply supported by the evidence.

7. The conviction of Lieutenant Mendoza on one count was also reasonable, since the jury was entitled to accept his confession. It is incongruent in view of the acquittal of the other seven and his acquittal on the other seven murder charges. When taken with Colonel Benavides's convictions, it more likely indicates that the jury acquitted the others because they were following orders, a defence not available in this case.

8. The presence of international observers, while exploited by the defence, was positive because it contributed to a fairer trial and a more vigorous prosecution.

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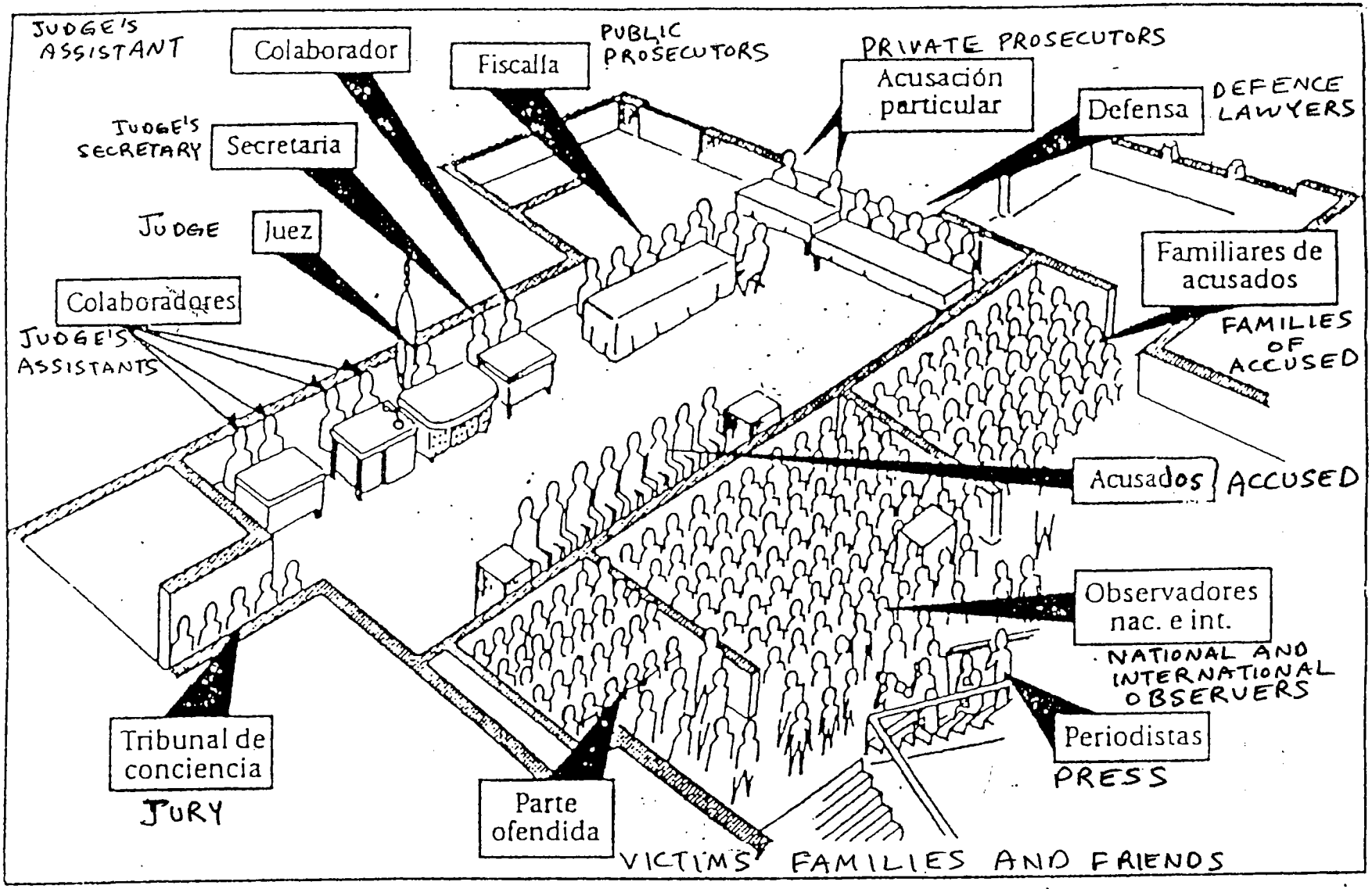

INSTALAN JURADO. En la 4a. planta de la Corte Suprema de Justicia y bajo estrictas medidas de seguridad, se instaló ayer el jurado del caso jesuitas. La gráfica muestra la posición exacta de las partes que intervienen en el jurado. El tribunal de conciencia se encuentra en un lugar que no es visible para periodistas y observadores

Bajo Estrictas Medidas de Seguridad

Instalan Jurado en Caso Jesuitas