
Justice Delayed

The Slow Pace of Judicial Reform in El Salvador

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Introduction

A key cause of the war in El Salvador, and its prolongation over twelve years, can be found in the failure to establish a system of justice willing or able to investigate, prosecute or resolve human rights abuses. Not only were police and military units responsible for human rights abuses, but the highly politicized and ineffective judicial system compounded the problem.

Problems in the judicial system transcended its failures in the area of human rights and extended to common criminal and civil matters, leading to widespread perceptions that "justice" depended in large part on the political connections and resources of the parties involved.

The peace negotiations between the government of former President Alfredo Cristiani and the Farabundo Martí National Liberation Front between April 1990 and January 1992 did not produce a detailed formula for judicial reform, unlike the peace accords' treatment of military and police issues. Few judicial reforms were included in the Peace Accords, leading the Truth Commission and ONUSAL to focus on the need for additional reforms.

This report, the tenth Hemisphere Initiatives report on post war political processes in El Salvador¹, gauges the progress made so far in reformation of the judiciary and recommends further action.

Several factors have converged to make this a propitious moment for fundamental judicial reform in El Salvador: the peace process, the Truth Commission's report and recommendations, the U.S. AID administration of justice project "judicial reform II", increased Salvadoran consciousness of the need for judicial reform, and the UN's insistence on reforms.

Though progress has been slow since the January 1992 signing of the peace accords, recently there have been important developments. The accords called for a constitutional change in how Supreme Court justices are selected, requiring a 2/3's legislative assembly majority instead of a simple majority, lengthening terms to 9 years and staggering them so that no Assembly (after the first one) can appoint the whole court. The Assembly now must choose justices from lists submitted by the National Council of the Judiciary.

Under the old system, the constitutional scheme allowed the majority party in the legislature — traditionally following the President's wishes — to name the entire (14-member) Supreme Court to a five year term which, in turn, named lower court judges. Appointments were based more on politics and family connections than legal acumen.

Power inside the judicial branch was highly centralized giving little independence to lower court judges. The President of the Supreme Court could select and discipline lower court judges and controlled their budget. The Supreme Court also selected justices of the peace, often on blatantly political grounds. The new procedure resulted in the selection last July of a Supreme Court which is more professional, politically independent and pluralistic than its predecessor.

The accords called for an independent National Council of the Judiciary with powers to nominate judges at all levels and to train judges.² The Supreme Court still appoints, promotes and disciplines judges, although it is now supposed to rely on the Council's lists and evaluations. The UN and other international legal experts have advocated broader powers for the National Council of the Judiciary, including administrative authority over lower court

judges — notably appointing, transferring, promoting and disciplining them.³

An office of Ombudsman for Human Rights has been created as a result of the accords and, along with the attorney general, must be selected by a 2/3's majority: It has been slow to establish its authority and make its presence felt on key human rights issues. Aided by ONUSAL's technical cooperation, the office is now handling increasing numbers of complaints and is improving its procedures as it prepares to take on many of the functions ONUSAL's Human Rights Division has performed over the past 3-1/2 years.

The April 1991 peace agreements also called for the establishment of a Truth Commission with international investigators to examine the most serious "acts of violence" committed during the war. The Truth Commission's March 1993 Report, "From Madness to Hope", severely criticized the sitting Supreme Court and the whole judicial system for obstructing investigation of human rights abuses. It called for the resignation of the Supreme Court and a thorough cleaning out of the judicial system.⁴

The Supreme Court Chief Justice severely criticized the Truth Commission stated that only God could force his resignation. But a year later and following the general election, the Truth Commission's recommendations and the peace agreements gave the election of a new Supreme Court heightened significance and sensitivity.

Much remains to be done in retraining and replacing the personnel of the lower courts. Though powers over the lower courts remain (in our judgment) overly centralized in the Supreme Court, a more professional Supreme Court, working with the new National Council of the Judiciary and the Judicial Training School should be able to create a more professional

judicial corps. Although efforts at constitutional reform in this area have not been successful, secondary legislation could make a substantial difference by establishing objective criteria for entry into the judiciary, evaluations of judges, and oversight.

There are serious concerns in other areas. Past police practices in solving crimes were often abusive and generally inadequate. Training and deployment of an entire new civilian police force is continuing despite ongoing difficulties. Yet those who commit serious human rights abuses still enjoy impunity because of failures in investigation and serious prosecution, and because those affected by crime do not trust the police and judicial system. A recent UN human rights report notes that none of the 75 most serious cases of human rights abuses reported to ONUSAL over a 20-month period have been successfully prosecuted, principally due to lack of adequate investigation. Reports of serious abuses by the new civilian police force highlight the need for better training, oversight and prompt effective action to address problems.

Proposed legislation to reform the criminal justice system remains stalled in the legislature, slowing and complicating the process of reform. The situation in the country's prisons is so desperate that the UN has called for emergency measures.

Improving criminal investigation and reforming criminal justice in El Salvador are unfinished tasks that must be completed if human rights are to be respected and systematic impunity ended. The progress that has been made in establishing civilian control over public order and eliminating abuses is not yet sufficient or irreversible. With the international presence in El Salvador scheduled to diminish dramatically in a few months, speeding up reforms to the justice system must be a top priority.

The Politics of Electing the New Supreme Court

In June 1994, the new constitutional formula for electing the Supreme Court was put to the test. The Salvadoran Supreme Court is composed of four chambers — civil, criminal, administrative and — by far the most important — the constitutional chamber. The president of the constitutional chamber presides over the entire Supreme Court and judiciary.

Under the new system for electing the Court, 42 of the 84 names presented to the Assembly were selected by a vote of all lawyers in the country.⁵ In an unprecedented election held in March, 75% of Salvadoran lawyers turned out to vote for candidates for the Supreme Court.⁶ Unlike other Salvadoran elections, this one was remarkable for its transparency and the results reflected a desire to depoliticize the judiciary.

Nongovernmental organizations waged campaigns urging lawyers to vote and, in some cases, listing names of recommended candidates. Some candidates, including former Supreme Court President Gutierrez Castro, actually campaigned for votes.⁷ AID's contractor for judicial reform in El Salvador, Checchi & Co, provided financial and technical assistance to the Salvadoran Lawyers Federation to encourage participation in the vote and to make sure that proper conditions existed for voting and vote counting. The Federation sent letters and reminders to every registered lawyer, explaining the election and urging each to vote.

The lawyers who received the most votes were attorneys who had dedicated themselves to the legal profession and teaching law rather than those known for their political ties. Topping the list was Anita Calderón de Buitrago, then the assistant human rights ombudsman for women's rights and formerly on the staff of CORELESAL, an AID-funded law

reform project. No woman had ever served on El Salvador's Supreme Court.

The Truth Commission's condemnation of the prior Supreme Court appeared to have an impact, since none of the justices who sat on the prior Court was seriously considered for a post on the new Court, although several of their names were on the Lawyers Federation list. Gutierrez Castro was in 18th place on the Lawyers Federation list.

After the lawyers' election, the National Council on the Judiciary compiled its own list with an additional 42 names, and presented the two lists to the Legislative Assembly on March 19. The Council chose not to duplicate any of the names on the lawyers' list. Nor did it rank its candidates, who were listed in alphabetical order. Candidates included lawyers from all parts of the political spectrum with widely varying experience. Thus the Council left the legislature considerable latitude.

Transitional provisions to the 1991 constitutional reforms called for electing the new Court within 90 days of the (June 30, 1994) end of the outgoing Court's term. The outgoing Assembly, which left office on April 30, left this task to the new Assembly. The new Assembly found itself unable to reach the necessary consensus to elect the Court when the former Court's term expired on June 30, 1994.

To achieve a two-thirds majority required some consensus, since ARENA and its allies could attain no more than a simple majority of the Assembly's 84 votes without opposition support. ARENA and its ally in the Assembly, the PCN, have 43 seats, while the opposition parties — the FMLN, Christian Democrats, Democratic Convergence and the Unity Movement — have 41.

National Assembly Seats

Party	ARENA	FMLN	PDC	PCN	MU	CD
Seats	39	21	18	4	1	1

The opposition parties in the Assembly formed a solid bloc on this issue. While ARENA (and its ally, the PCN) was willing to accept some of the opposition's candidates for positions on the Court, it rejected three key figures: José María Méndez, José Fabio Castillo, and Abraham Rodríguez.⁸ Rodríguez was the opposition's candidate to be President of the Court.

After an internal debate, ARENA decided not to propose candidates for the Court on the basis of party membership. Still, ARENA initially claimed the right to designate the Supreme Court president. ARENA proposed José David Escobar Galindo for the presidency of the Court.⁹

On the last day of the prior Court's term, when it became clear that neither of these candidates would be accepted by the requisite 56 deputies, Escobar Galindo withdrew as a candidate for any position on the Supreme Court. The opposition then nominated Abraham Rodríguez for the presidency of the Court, but could only muster its 41 votes. ARENA, while opposing Rodríguez, declined to nominate anyone else to lead the Court.

The deputies settled into a protracted (four-week) period of discussion with little sign of agreement on the composition of the Court's constitutional chamber. Each side accused the other of intransigence. The entire selection process became overtly politicized as newspapers published charts showing which political parties supported which candidates.

The Assembly increased the number of justices to be elected to the Court to 15 so that a third of the justices would be up for election every three years.¹⁰ Although it already had 84 names to choose from, the Assembly asked the National Council on the Judiciary and the Lawyers Federation to supply lists of three additional names each, but this failed to break the deadlock.¹¹

On July 27, in a marathon session, the Political Commission of the Assembly agreed to name José Domingo Méndez as president of the Supreme Court. With a strong reputation for honesty and integrity and not linked to any major political party, Méndez emerged as a compromise candidate acceptable to all although he ranked only 38 out of 42 on the original list presented by the Lawyers Federation. His candidacy was formally proposed by the Unity Movement (MU) party, which has one deputy in the Assembly. (Méndez had prepared the Unity Movement's legal documents.) The remainder of the constitutional chamber consists of René Hernández Valiente, vice-president of the Court, and former Minister of Justice who embraced the AID-sponsored judicial reform project during his tenure as Justice Minister; Orlando Baños Pacheco, a management labor lawyer close to ARENA; Enrique Argumedo, a professor of public finance, head of the UCA's law faculty; and Mario Solano, former Minister of Justice for the PDC and a former Supreme Court magistrate (also an UCA professor). ARENA dropped its opposition to José María Méndez who became President of the Criminal Chamber. Both Anita Calderón de Buitrago and Aronette Díaz were named to the Court, ending the tradition of all-male Supreme Courts.

The Constitutional Chamber:

Dr. José Domingo Méndez, President
 Dr. René Hernández Valiente (Vice President)
 Dr. Mario Antonio Solano
 Dr. Orlando Baños Pacheco
 Dr. Enrique Argumedo

The Criminal Chamber:

Dr. José María Méndez, President
 Dr. José Artiga Sandoval
 Dr. Roberto Gustavo Torres

The Civil Chamber:

Dra. Ana Calderón de Buitrago, President
Dr. José Ernesto Criollo
Dr. Carlos Amilcar Amaya

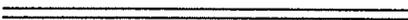
The Administrative Chamber:

Dr. Manuel Novoa Flores, President
Dr. José Carlos Costa
Dr. Mauro Alfredo Bernal Silva
Dra. Aronette Díaz vda. de Zamora

The constitutional reform had the intended effect of ending one-party domination of the Supreme Court. It did not, however, end the problem of politicization. Politicians are not yet able to consider the professional merits of candidates without also considering their political inclinations. It may well be unrealistic to expect them to do otherwise. The participation of the legal profession in selecting candidates for the Court

represents an important advance as does the success and transparency of the election sponsored by the Lawyers Federation. The failure to name a Court within the constitutional framework was a serious matter and an unfortunate precedent, even though the delay may ultimately have resulted in a better balanced Court.

Despite the difficulty in reaching consensus about the Constitutional Chamber and the Presidency of the Court, the new Court is unquestionably more professional and better balanced than its predecessor. The prior Court was often seen as an obstacle to judicial reform. The major challenge facing the new Court is to play a leadership role in transforming the administration of justice in El Salvador, confronting both corruption and impunity. Among the immediate challenges for the Court is to use the evaluation of all sitting judges carried out by the National Council on the Judiciary (see below) as a basis to begin improving and, where necessary, cleaning out the judiciary.



The National Council on the Judiciary

A National Council on the Judiciary was established in the 1983 Constitution but not actually created until 1989, with a limited mandate and under the firm control of the Supreme Court. The original Council's functions were to propose candidates for first instance judges and appellate (second instance) magistrates to the Supreme Court, which would then select from the list or request additional names. The Council's membership was dominated by Supreme Court representatives.

The peace accords negotiated in April 1991 called for making the Judiciary Council independent of all branches of government, including the judiciary. The Council was also given responsibility for the judicial training school.

The Supreme Court headed by Mauricio Gutiérrez Castro opposed any diminution of its powers and fought to limit the authority and independence of the new Judiciary Council. This resistance to change significantly delayed passage of new enabling legislation for the Judiciary Council.¹² The compromise legislation ultimately passed failed to satisfy all the criteria established in the Peace Accords.¹³ Still, in April 1993 the new Council was selected and began the task of appointing new justices of the peace, evaluating sitting judges, and preparing a list of nominees for the Supreme Court.

The Judiciary Council encountered resistance from the Supreme Court as it tried to take on its new constitutional responsibility for the judicial training school. The former head of the school, Nelson García, was a close ally of Supreme Court President Gutiérrez Castro and refused to cooperate with the Judiciary Council. When the Council sought to replace him, he obtained a temporary injunction from the Court, which never ruled on the merits of the case. He further challenged the qualifications of

several members of the Council. Similarly, when the Council sought to carry out evaluations of judges, Gutiérrez Castro advised them not to cooperate.

Despite these difficulties, the Council proceeded under its new mandate. It found lawyers to serve as justices of the peace throughout the country and conducted an evaluation of first instance judges and appellate magistrates. This evaluation, while an unprecedented effort, followed the provisions of the Council's enabling legislation and focused more on judicial administration and case management than such sensitive issues as respect for human rights and corruption. The judiciary, with some basis, questioned the qualifications of those conducting the evaluations. The UN observer mission in El Salvador, ONUSAL, provided the Council with complaints against judges it had received.

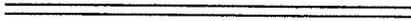
Publication of the Council's initial evaluation, which rated judges as good, all right, or bad produced a strong reaction from the judges, who protested that they had not been given an opportunity to defend themselves. The new Supreme Court dismissed four first instance judges based on the Council's findings. ONUSAL's highly publicized November presentation of another list of 50 judges about whom it had received complaints created a political firestorm. ONUSAL Director Enrique ter Horst's reference to some of the judges as shameless (*sinvergüenzas*) led to complaints that the UN had overstepped its bounds. ONUSAL responded that it was merely passing on information it had received and verified. The Supreme Court asserted that it remains the only body authorized to evaluate judges and it is now reviewing the records of specific judges. Meanwhile, the Lawyers' Association has filed a petition before the Supreme Court challenging the constitutionality of the Council's role in evaluating judges.

Cleaning out the judiciary remains an urgent need and an extremely sensitive task. Further evaluations and a systematic procedure to clean out the judiciary will be necessary. A second round of evaluations of justices of the peace, who were not included in the first round, was scheduled to begin in late November 1994.

Although the Council was unable to replace the director of the Judicial Training School, under the leadership of a deputy director the judicial training school has begun to play an increasingly active role in preparing judges to apply new laws as well as providing more general training for new and incum-

bent judges. As part of a European Economic Community project, ONUSAL has been providing a series of training courses to judges (and prosecutors) that focus on international human rights standards incorporated into domestic law and international instruments. It is too soon to judge whether these courses will produce changes in judicial practice.

Despite repeated UN recommendations, a reformed Judicial Career Service law to regulate the judiciary and establish objective qualifications for entry into and advancement within the profession has yet to be enacted.



Centralization of Judicial Administration

El Salvador has not fundamentally changed the concentration of powers in the Supreme Court over the rest of the judicial system. The UN's Independent Expert urged further reforms to separate the control of the judiciary from the Supreme Court. The Truth Commission also focused on this issue and recommended further constitutional reforms to transfer responsibility for the appointment and removal of lower court judges to the National Council on the Judiciary and to transfer responsibility for licensing and supervising the legal profession to a different entity.

After refusing to move on the constitutional reforms for many months, the Cristiani administration introduced a packet of proposed constitutional reforms in April 1994, shortly before the end of the outgoing Assembly's term. Prepared by a group of lawyers in the Ministry of Justice, these reforms addressed the Truth Commission recommendations and other areas of concern including due process protections. COPAZ, a council established by the peace accords to oversee their administration, also unanimously agreed to a series of constitutional reforms that included limiting the powers of the Supreme Court.¹⁴

Despite the consensus reached in COPAZ and the proposals presented by the Ministry of Justice and others, the outgoing Assembly failed to pass the reforms that would have limited the Supreme Court's responsibility for the administration of the judicial

branch. Outgoing Supreme Court President Mauricio Gutierrez Castro and some of his allies in ARENA staunchly opposed this reform. A recommendation that supervision of the legal profession be transferred to an independent body was partially implemented in the constitutional reforms. The constitutional reform calls for a National Council of Lawyers and Notaries to oversee attorneys and notaries, but leaves the Court in charge of authorizing the professional activities of lawyers and notaries.

The April 1994 constitutional reforms reallocated the 6% of the national budget set aside for the judicial branch in the 1991 constitutional reforms so that 4% of the budget will now go to the judicial branch, including the National Council on the Judiciary, while the remaining 2% will go to the components of the Public Ministry: the Attorney General's office, the State Counsel's office and the Human Rights Ombudsman's office. This reform was proposed because the earlier change had given the judiciary significantly more funds but left the Public Ministry with no additional funding to carry out its new duties, creating a serious imbalance.

The Salvadoran Constitution requires that constitutional reforms passed by one legislative assembly be ratified by a 2/3 majority vote of its successor. As this report went to press, none of the constitutional reforms relating to the administration of justice had been ratified by the new Assembly.

Criminal Investigation

In previous reports, Hemisphere Initiatives has detailed the problems involved in transition from the old security forces, abolished by the peace accords, to the new civilian police. We plan to report further on that process in early 1995. Criminal investigation has been singled out as a critical weakness that requires changes within the judiciary, the Attorney General's office and the police.

The dangers to the peace process inherent in the continued weakness of Salvadoran institutions and their failure to end impunity has been a constant and recurring theme in UN reports and statements. The gravity of the situation was brought home in ONUSAL's 11th Human Rights Report which reviewed the legal status of 75 of the most significant cases involving violations of the right to life reported to ONUSAL between July 1992 and March 1994 (from the 6th to the 10th report).¹⁵ This review showed that in 18 cases (25%) victims or relatives failed to present the cases to judicial authorities, indicating a continuing lack of trust in judicial proceedings. Worse yet, in the 57 cases which had been brought to the attention of the courts, the police conducted investigations in only 27.

This means that in more than half of these major cases, the police apparently did not investigate the facts or provide any information to the court. When police investigations occurred, they were often superficial and the results were not provided to the courts in a timely fashion. In only 18 of the 75 cases examined was the identity of the alleged perpetrator determined; in only 9 were suspects in custody.

ONUSAL concluded that "From July 1992 until the time of writing of this report [June 1994], no one has been tried or sentenced for having committed any of the 75 most serious cases of violations of the right to life reported to ONUSAL."¹⁶

Faced with this dismal record, ONUSAL called for an accelerated process of judicial reform and noted that the new Supreme Court would have a "very great responsibility." While the appointment of a new Court has increased the likelihood of institutional reforms within the judiciary, these problems remain far from resolution.

The new Court has already taken the significant step of changing the director of the Institute of Forensic Medicine: Former Supreme Court President Gutierrez Castro founded the Institute to carry out investigations for the courts. ONUSAL had repeatedly questioned the institute's practices, and noted that "in many cases, the Institute operates in open violation of the law."¹⁷ For example, the Institute carried out examinations not requested by the courts and publicized their results,¹⁸ while it failed to carry out autopsies ordered by the courts in a timely fashion. The former Director of the Institute, Dr. Juan Mateu Llort, often made public pronouncements on cases. The Institute seemed to function without proper medical supervision. In September, the new Supreme Court replaced Llort with a new director for the Institute, Dr. Hilda Herrera Castaneda. ONUSAL subsequently reported that the Institute is functioning in a much more professional manner.

Police Practices

Police abuse, including violations committed by the new civilian police (PNC), remain of great concern. A recent ONUSAL study of complaints received about PNC conduct found two verified cases of torture to obtain a confession.¹⁹ Of 147 complaints received between November 1, 1993 and June 30, 1994, 30% concerned ill-treatment, excessive use of force and torture. Excessive use of force has resulted in a number of arbitrary executions. In dealing with these problems, internal disciplinary procedures have not been adequately applied.²⁰ Inadequate training and supervision, including lack of clarity about chain of command, have contributed to problems with the new force. Former PNC Operations Director Major Peña Durán, who had earlier headed the U.S.-funded anti-narcotics unit (the "UEA") virtually eliminated UN involvement with the PNC and placed a number of his men in command positions, although they had not gone through the new public security academy and were supposed to be limited to anti-narcotics work.²¹

Some steps have been taken in recent months to address these problems. Following Peña Durán's ouster in May, ONUSAL was again invited to work closely with the civilian police. In June and July the European Economic Community sponsored ONUSAL training courses for PNC officers on laws and procedures and to evaluate areas needing reinforcement. Refresher courses for senior officers were provided in September and October.

The new civilian head of the PNC, Rodrigo Avila, and the new Vice-Minister of Public Security, Hugo Barrera, have expressed a commitment to addressing ONUSAL concerns about the civilian police and making it both more effective and respectful of citizens' rights.

These public statements have yet to be translated adequately into action. After a long delay, the Government recently named an inspector general for

the PNC, attorney Eulogio de Jesús Guerra Payés, formerly of the government's Human Rights Commission and a government representative to COPAZ's Human Rights Subcommittee. Nongovernmental human rights groups objected to his appointment, but he was supported by his colleagues in the COPAZ subcommittee. The new Inspector General has yet to define adequately his role and his relationship with the disciplinary investigation and control unit of the PNC.

After a bloody bank heist in June a police lieutenant in charge of the old National Police criminal investigation division was identified on a videotape of the crime and arrested as a suspect. This official confirmation of high-level police involvement in organized crime led the President to speed up (the long delayed) demobilization of the National Police. The National Police was scheduled to be fully demobilized in December. Although most of this force has now been demobilized, the Government is unwilling to disband a 450-member Anti-Delinquency Battalion, which it hopes to incorporate in its entirety into the PNC.

While the highly publicized arrest of the police lieutenant and two army officers charged with extortion are positive developments, criminal investigation remains a key weakness. Former Attorney General Roberto Mendoza Jerez²² was recently named to head the PNC's Criminal Investigation Division. Civilian control over criminal investigation is not yet firmly established and there are continuing efforts to bring former military or National Police officers into command positions. Former members of the Special Investigative Unit and the Executive Anti-Narcotics Unit, both of which have been widely criticized for their methods and military ties, were transferred wholesale into the PNC and have yet to undergo proper evaluations or adequate training in the police academy. Insufficient investigation is taking place;

most arrests are not based on prior investigation and arrest warrants. Fewer than 3% of civilian police officers are assigned to the investigations division; they have yet to receive proper training or equipment.²³ The Attorney General's office, which was assigned responsibility for directing investigations by the 1991 constitutional reforms, has yet to fully assume its responsibilities.

In late July, the Joint Group for the Investigation of Politically Motivated Illegal Armed Groups, issued its report.²⁴ Set up to implement a Truth Commission recommendation calling for an in-depth investigation of illegal armed groups, the Joint Group described the generic metamorphosis of former death squad members into organized criminal activity, some of which appeared politically motivated, and called for further measures to address this serious situation.

The Joint Group's report focused on the need to strengthen criminal investigation to combat politically

motivated and organized crime and called for the establishment of a special unit within the PNC to investigate both. It called for enhancing the criminal investigation capability of the civilian police, and taking particular care in the selection of personnel for criminal investigation. The Joint Group report urged greater coordination among the civilian police, prosecutors, and the courts to improve criminal investigative capacity. As a means to combat organized crime, it also called for legal reforms that would allow suspects to be rewarded for their cooperation in solving cases and urged the creation of special courts to deal with these crimes. A small (20-member) specially trained unit has already been formed in the PNC, but bureaucratic delays in assigning three foreign advisors to work with the unit have limited its activities. The Ministry of Justice has yet to form a commission to consider implementation of measures related to the courts.

Remedies for Past Human Rights Abuses

The Truth Commission recommended that 1% of foreign aid to El Salvador be set aside to establish a compensation fund for victims of past human rights violations. No steps have been taken to institute such a fund. Given the lack of financial resources, the magnitude of violations that occurred and the limits of documentation, implementing such a fund would be difficult.

The March 1993 general amnesty, passed in the wake of the Truth Commission report, has been interpreted to preclude judicial proceedings in any case found to fall within its purview. Salvadoran courts have not followed the Chilean model (the "Aylwin doctrine") under which courts are permitted to proceed with investigations to determine what happened to victims and who might have been responsible before applying the amnesty. Instead, relatives of Salvadoran victims have been limited to exhumations in efforts to identify and then rebury those killed during the war. The Salvadoran amnesty also applied to civil responsibility.

Faced with constitutional challenges to the amnesty law, the prior Supreme Court held that the issue was

a political question to be decided by the other branches of government. It also noted that Additional Protocol II to the Geneva Conventions of 1949 called for a broad amnesty at the end of an armed conflict for acts related to that conflict. The Interamerican Commission on Human Rights has concluded that neither the peace accords nor Protocol II to the Geneva Conventions can be used to justify an amnesty as comprehensive as the one passed in El Salvador, because it violates El Salvador's commitments under international law — notably the American Convention on Human Rights.²⁵

If it were to decide that it is not bound by the prior Court's determination, the new Supreme Court could theoretically declare the 1993 amnesty law unconstitutional. At the moment, however, no political sector seems interested in pursuing past abuses.

Since publication of the Truth Commission's report, no steps have been taken to address past violations. Although some steps have been taken to address current and future violations, much remains to be done.

New Protections for Civil and Individual Rights

The Truth Commission and ONUSAL have called for a number of legal reforms, many of which have been prepared under an AID-funded judicial reform project and presented to the legislature. To date, the Legislative Assembly has failed to take action on any of these initiatives. ONUSAL recently termed this an "unaccountable delay" and the "biggest obstacle to the process of institution building...."²⁶ Together with the work of the Human Rights Ombudsman's office, these legal reforms offer the possibility of significant new institutional guarantees for civil and individual rights in El Salvador. It is essential that the Ombudsman's office be strengthened and the legal reforms adopted.

The Human Rights Ombudsman: The Human Rights Ombudsman's office is supposed to play a major role in monitoring respect for due process guarantees and the effective protection and promotion of human rights in the country. The law establishing the Ombudsman's office has been widely criticized as far too broad. The scope of the legislation, which includes deputy ombudsmen for environmental issues, women, children, and the elderly, has distracted the office from its principal mission in this transition period. Funders and the UN have repeatedly urged the office to focus on monitoring and investigating human rights violations so that it is prepared to play a crucial oversight role as the UN pulls out of El Salvador.

The office has been criticized by nongovernmental human rights groups for failing to take a leadership role and tackle major human rights issues. With an inexperienced staff and limited resources, the office is perceived as weak and ineffective. Still, the Ombudsman's reports have shown improvement and the office's work has become somewhat more focused. The current Ombudsman's term expires in February 1995 and the Assembly will have to elect his successor by a 2/3 majority vote.

The office has opened eight regional offices and is receiving an increasing number of cases. The number of rulings issued by the office has recently increased significantly (27 from January to July 1994, but 47 in August and September alone).²⁷ More effective follow-up is needed to ensure that rulings have the desired impact. Since July, when ONUSAL undertook a more concentrated technical cooperation effort, the Ombudsman's office has expanded its operations. The UN Development Program has been channeling support to the office for internal reforms designed to improve its effectiveness. The Government of El Salvador has yet to provide adequate funding to the office, which needs a significant increase in its budget appropriation to cover its increased activities on a national scale. (The unratified April 1994 constitutional reforms include the Ombudsman's office within the 2% of the national budget to be reserved for the Public Ministry.)

As ONUSAL prepares to leave El Salvador, additional responsibility will inevitably fall on the Ombudsman's office and the UN has been making increasing efforts to share its expertise and accumulated experience with that office. From the outset, UNDP has provided crucial assistance to the office and serves as the conduit for European and Canadian funding for various projects. ONUSAL and the Ombudsman's office are carrying out a series of technical cooperation activities to address such matters as criteria for acceptance and legal characterization of complaints, police and judicial investigative techniques, and the legal basis for determinations. Technical cooperation now includes the joint verification of human rights violations. This cooperation has been institutionalized through UNDP and will continue after ONUSAL's departure.

While the UN has sought to work closely with the Ombudsman's office to strengthen it and help it to fix

priorities, US AID has thus far declined to commit any resources to the office.

Code Reforms/Criminal Justice: The Justice Ministry presented draft Penal, Criminal Procedures, and Penitentiary Codes to the Assembly, prepared as part of the AID-funded judicial reform project.²⁸ The proposed legislation, which would revolutionize criminal justice in El Salvador if fully implemented, has been the subject of numerous consultations with public and private institutions.

The new Criminal Procedure Code would establish a far more adversarial model of justice, increasing the role of the public prosecutor's office and of defense counsel. The proposed system calls for oral proceedings, preliminary hearings and sentencing courts not involved in earlier stages of the proceedings. It would enhance protection of the rights of defendants as well as giving victims a greater role in proceedings. Concerns have been raised that the Criminal Procedure Code, with its strong protections of individual rights, would help criminals escape justice as the country is besieged by a crime wave. Improved criminal investigation could be critical in countering these concerns.

Extrajudicial confession: Salvadoran police and courts have traditionally relied on suspects' extrajudicial confessions as the prime evidence of their guilt. These police confessions are often obtained through coercion or torture. Both ONUSAL and the Truth Commission called for the prohibition of statements taken by the police as evidence against suspects. A proposed reform to the Criminal Procedures Code presented by the AID-funded law reform unit in 1993 was never acted upon. However, a constitutional reform approved in April 1994 and pending ratification would invalidate extrajudicial confessions as evidence. Earlier efforts to suppress extrajudicial confessions were stymied by police claims that without them they could not obtain sufficient evidence to turn criminals over to the courts. The draft Criminal Procedure Code also bans the extrajudicial confession. In the face of a serious post-war crime wave, conservative groups again have raised concerns that such a provision will aid criminals.

Administrative detention: The Salvadoran Constitution and the Criminal Procedure Code permit administrative (police) detention for a maximum of 72 hours. In practice, police have tended to hold suspects for the entire period before remitting them

to the courts. The practice not only allows more opportunity for abuses, but also permits extended periods of detention based on flimsy or non-existent evidence. Proposals to reduce the time and to allow the courts to make an early determination of legality have yet to be acted upon.

In recent months, the urgent need for prison reform has become increasingly apparent because of a series of prison riots. Concerned about the deteriorating situation, ONUSAL has called for the declaration of an emergency situation in the penitentiary system.²⁹ The vast majority of prisoners — approximately 80% of the prison population — are awaiting trial. Overuse of pretrial detention has led to prison overcrowding, as well as infringing on individual rights. Under the current system, judges are to visit those they have ordered detained to monitor their situation. As interim measures, ONUSAL has urged that judges should not routinely jail prisoners pending trial, fulfill their duty to visit prisoners, avoid delays in bringing cases to trial, require public defenders to be more diligent and replace negligent defense attorneys. ONUSAL recommended that the National Council on the Judiciary evaluate judges' performance on these issues. Enacting the proposed Penitentiary Code would be an important step in addressing the prison crisis.

Habeas corpus and amparo: The key constitutional guarantee of habeas corpus, designed to combat illegal deprivations of personal liberty, has been ineffective in El Salvador. Virtually all petitions for habeas corpus are handled by the Supreme Court's constitutional chamber. UN recommendations called for improving citizen access to constitutional justice by giving judges of first instance courts authority to handle petitions for habeas corpus and amparo. Amparo petitions can be brought to challenge violations of constitutional rights other than the right to liberty.

The April 1994 constitutional reforms would partially implement this recommendation, giving trial courts jurisdiction over habeas corpus petitions related to administrative (police) detention or detention by private parties. The recommendation concerning widening the jurisdiction for amparo was not accepted. To make habeas corpus an effective protection, the entire procedure for habeas corpus petitions needs to be revamped; AID-funded law reform efforts have produced several proposals for reform, but new proposed legislation that would incorporate the recent constitutional reforms has yet to be submitted

to the Assembly. The constitutional reform on which it would be based has yet to be ratified.

The legislature has also failed to implement ONUSAL's repeated recommendation that it repeal the 1986 Police Act. Nor has it enacted legislation that would regulate the conduct of law enforcement officers to ensure their respect for human rights and establish basic principles regarding all arrests.

International Rights Instruments Unratified: Both the Truth Commission and ONUSAL have urged El Salvador to ratify or accede to a series of international instruments. To date, the Salvadoran Assem-

bly has adopted only the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, subject to significant reservations. The Salvadoran government has yet to agree to accept the compulsory jurisdiction of the Inter-American Human Rights Court even though all the other Central American countries have already done so. Other international instruments to which ONUSAL has assigned priority are: the additional protocol to the American Convention on Human Rights relative to Economic, Social and Cultural Rights, the Optional Protocol to the International Covenant on Civil and Political Rights, and the American Convention for the Prevention and Punishment of Torture.

Summary and Recommendations

With a new Supreme Court committed to judicial reform, this is clearly a propitious moment for implementing reforms. One key element, cleaning out the judiciary, was unthinkable until the recent change in the Supreme Court. The failure to pass needed constitutional reforms to reduce the concentration of power in the Supreme Court leaves a structural problem which remains to be addressed. Still, if the new Court is truly committed to reform it could work in the short run to eliminate or reduce entrenched incompetence and corruption through objective evaluations carried out by the National Council on the Judiciary. Secondary legislation, particularly a reformed Career Judicial Service Act, could do much by setting objective standards and procedures for the judiciary.

As we have detailed in this report, other essential steps (many of which are planned but have not been implemented) that are needed to establish an independent and effective justice system in El Salvador include the following:

- * The new Assembly needs to ratify the constitutional reforms passed last April.
- * The National Council on the Judiciary needs to be strengthened through legislative reforms and im-

proved technical capacity. It needs an adequate budget to hire professional staff.

- * The Legislative Assembly must promptly and thoroughly review the proposed criminal justice reform legislation including the proposed codes, so that needed changes can be incorporated and legislation approved.
- * The Legislative Assembly needs to enact legislation to make habeas corpus effective and accessible. In the meantime, the various institutions involved in the administration of justice should heed ONUSAL's recommendations to address the crisis in the penitentiary system.
- * More resources must be provided to the Human Rights Ombudsman's office through an adequate budget and the selection of a forceful ombudsman with sufficient human rights experience.
- *The PNC must give greater priority to criminal investigation: training carefully selected investigators who are not linked to past abuses, providing them with adequate equipment, and ensuring sufficient oversight.

Endnotes

1. Other Hemisphere Initiatives reports on subjects of the Peace Accords are Endgame: A Progress Report on Implementation of the Salvadoran Peace Accords, December, 1993 (George Vickers and Jack Spence, with David Holiday, Margaret Popkin, William Stanley and Philip Williams); Justice Impugned: The Salvadoran Peace Accords and the Problem of Impunity, June, 1993 (Margaret Popkin, George Vickers and Jack Spence); The Voter Registration Tangle, July 1993 and Voter Registration and the Tasks Ahead, November 1993, (both by Madalene O' Donnell with George Vickers and Jack Spence); Risking Failure: The Problems and Promise of the New Civilian Police in El Salvador, September, 1993 (William Stanley, edited by George Vickers and Jack Spence); Toward a Level Playing Field?: A Report on the Post-War Salvadoran Electoral Process, January 1994 (Jack Spence and George Vickers); A Negotiated Revolution? A Two Year Progress Report on the Salvadoran Peace Accords, March, 1994 (Jack Spence and George Vickers, with Margaret Popkin, Philip Williams and Kevin Murray); Rescuing Reconstruction: The Debate on Post-War Economic Recovery in El Salvador, May, 1994 (Kevin Murray with Ellen Coletti and Jack Spence, and Cynthia Curtis, Garth David Cheff, René Ramos, José Chacón and Mary Thompson); El Salvador: Elections of the Century—Results, Recommendations, Analysis, July, 1994 (Jack Spence, David R. Dye and George Vickers, with Garth David Cheff, Carol Lynne D'Arcangelis, Pablo Galarce and Ken Ward.
2. The peace accords also guarantee the judicial branch 6% of the national budget.
3. In an effort to lessen threats to judicial independence, the constitutional reforms negotiated in April 1991 barred judges from serving as notaries, a potential conflict of interest. For further information about reforms included in the Peace Accords, see Lawyers Committee for Human Rights, El Salvador's Negotiated Revolution: Prospects for Legal Reform (New York) June 1993.
4. Several articles have recently appeared that discuss the Truth Commission in some detail. See, e.g., Thomas Buergethal, "The United Nations Truth Commission for El Salvador," 27 Vanderbilt J. Trans. L. 497 (1994); more generally see Priscilla B. Hayner, "Fifteen Truth Commissions - 1974 to 1994: A Comparative Study," Human Rights Quarterly (1994).
5. The total of 84 was based on a list of three choices for a total of 28 magistrates, 14 to be sitting justices and 14 as alternates.
6. Each lawyer could vote for up to 42 names from lists of candidates prepared by the recognized bar associations.
7. Gutierrez Castro appeared in a full page newspaper reproduction of an enlarged photo with Congressman Joe Moakley with a few friendly words from Moakley. It is highly unlikely that Moakley knew this was the intent of the photo.
8. Abraham Rodríguez was a founder of the Christian Democratic Party and its first candidate for the presidency in 1967. He sought his party's nomination for president in 1994, but was narrowly defeated by party leader Fidel Chávez Mena. A corporate lawyer, he has held important positions in the business world and is respected for his integrity and capacity.
- Rodríguez had been part of the three member Ad Hoc Commission established under the peace accords. The Commission's report called upon the President to remove or transfer 102 army officers due to performance incompatible with high respect for human rights. The list included the powerful Defense Minister and other members of the High Command.
- Méndez, who was proposed for the criminal chamber, is a renowned jurist, now in his 70s, known as an outstanding criminal defense attorney, scholar and poet. José Fabio Castillo is considered a leading constitutional lawyer and teaches constitutional law at the UCA. He prepared the legal documents for the transformation of the FMLN into a political party and has done other legal work for the FMLN.
9. Escobar Galindo, who has never actually practiced law, is a well-known poet and respected intel-

lectual, president of a conservative private university, not known as an ARENA militant. Close to former President Cristiani, he served on the Government's negotiating team during the peace negotiations and has shown a commitment to carrying out the Peace Accords.

10 . The Constitution does not mandate the number of judges on the Court, so it can be changed by secondary legislation.

11 . The rumored candidacy of PDC leader Fidel Chávez Mena for the presidency of the Court did produce a split in the opposition as those PDC deputies loyal to Chávez Mena (the "Fidelistas") expressed their willingness to make a separate deal with ARENA. Although Chávez Mena was never presented to the Assembly as a candidate for the Supreme Court, this split has deepened over time and recently resulted in the "Abrahamistas" (supporters of Abraham Rodríguez) leaving the PDC.

12 . For further information on the process of enacting new enabling legislation, see Hemisphere Initiatives, Justice Impugned, p. 9 and A Negotiated Revolution, p. 7; Lawyers Committee for Human Rights, El Salvador's Negotiated Revolution: Prospects for Legal Reform at 9-17.

13 . Issues raised by the Truth Commission and ONUSAL include: Council members should be elected directly by the sectors they represent rather than by Assembly vote; the Council should include representatives of sectors not directly linked to the administration of justice; the Supreme Court should not have inappropriate responsibility for removing Council members. The law has been reformed so that Council members can only be dismissed by a two-thirds vote of the Assembly, the same body that elects them.

14 . COPAZ is composed of representatives of the government, the FMLN, and all political parties represented in the Legislative Assembly. Because the composition was equally balanced between the government and its allies, and the opposition, COPAZ has had difficulty reaching consensus.

15 . ONUSAL did not explain its criteria for determining which were the "most significant cases." Forty-seven of the cases involved arbitrary executions; 14 were attempted arbitrary executions; 14 were death threats.

16 . Report of the Director of the Human Rights Division of ONUSAL covering the period from 1 March to 30 June 1994, UN doc. A/49/281, July 28, 1994, hereinafter "11th Human Rights Report," at para. 66.

17 . 11th Human Rights report at para. 71.

18 . When FMLN leader Francisco Veliz was murdered in October 1993, the head of the Forensic Institute performed unrequested blood tests and

announced that the victim was a chronic marijuana user. When a U.S. military officer attached to the Embassy killed himself and injured Salvadorans by gross negligent use of a grenade Dr. Llorca similarly performed a test and announced to waiting TV cameras that the officer was a drug user. The test was proven to be unsophisticated and the allegation false.

19 . See ONUSAL's 11th Human Rights Report at para. 112-126.

20 . Report of the Director of the Human Rights Division of the United Nations Observer Mission in El Salvador (ONUSAL) covering the period from 1 July to 30 September 1994. UN Doc A/49/585, S/1994/1220, Oct. 31, 1994, at para. 43, hereinafter "ONUSAL's 12th Human Rights Report."

21 . See, "Recent Setbacks in the Police Transition", El Salvador Peace Plan Update #3, February 4, 1994, Washington Office on Latin America.

22 . During Mendoza Jerez's tenure as Attorney General, two young prosecutors handling the Jesuit murder case proceedings denounced the Attorney General's refusal to allow them to fully investigate the case and resigned. A campaign was then instituted to discredit the two former prosecutors who subsequently began working as private prosecutors contracted by the Jesuits. See Martha Doggett, Death Foretold (Washington, D.C.: Lawyers Committee for Human Rights and Georgetown University Press) 1993, at 177-180.

23 . Tracy Wilkinson, "An Uphill Fight for Law and Order in El Salvador," Los Angeles Times, Dec. 13, 1994.

24 . The Joint Group was composed of two lawyers named by the Salvadoran Government, the Ombudsman for Human Rights and the Director of ONUSAL's Human Rights Division. For background on the formation of this group, see Hemisphere Initiatives, A Negotiated Revolution? (Cambridge: March 1994) at 4-5.

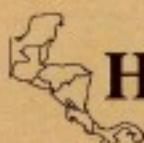
25 . See, IACHR, Report on the Situation of Human Rights in El Salvador, OEA/Ser.L/V/II.85, Doc. 28 rev., Feb. 11, 1994, at 69-81.

26 . ONUSAL 12th Human Rights Report at para. 18, 113.

27 . ONUSAL 12th Human Rights Report at para. 28.

28 . A new Family Code and a Juvenile Justice Code (Código de Menores) have already been passed and are in the process of implementation.

29 . In August 1994 ONUSAL submitted a detailed report on the penitentiary system to the Government, the judiciary and the Attorney General's Office. The report made a number of recommendations to the different institutions involved in the administration of justice. See ONUSAL 12th Human Rights Report at paras. 49-62.



Hemisphere Initiatives

Hemisphere Initiatives (HI) was formed in 1989 to report on the Central American peace process and efforts to establish and strengthen democratic institutions throughout the region. It monitored and extensively reported on the Nicaraguan electoral process from May 1989 through the February 1990 election.

HI is currently monitoring the implementation of the Salvadoran Peace Accords signed on January 16, 1992 and the impact of those Accords on processes of democratization in El Salvador.

Members of HI's Board of Directors visit the country regularly to measure progress and assess problems. They meet with government and opposition leaders, with journalists, with academic experts and independent observers. HI also maintains an in-country team of experts monitoring the principal areas covered by the Accords: demobilization and reforms to the military and security apparatus, the creation of a new national civilian police force under civilian control, human rights and reforms to the judicial system, the creation of a new electoral tribunal and new electoral code, and social/economic reforms including agrarian reform.



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