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A PROMISE UNFULFILLED?

The Special Prosecutor's Office in Mexico

Written by Paul Seils
the *International Center
for Transitional Justice*

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EXECUTIVE SUMMARY

This report considers the work of the Special Prosecutor's Office (SPO) in Mexico, established as a result of a Presidential Accord in November 2001 to deal with crimes that public servants committed against social and political groups. Although the report touches on the issue of political will, it has a primarily technical focus. It describes in detail the basic requirements of investigation into what are referred to as "system crimes," emphasizing the need for an approach that differs from that used in the investigation of ordinary crimes. The report analyzes the SPO's interpretation of its mandate and its universe of cases and concludes that, in general terms, the SPO has sufficient resources to fulfill its mandate. It also considers the way in which the SPO has sought to address victim participation and the role it will play in establishing an official record of serious human rights violations.

The SPO has several positive attributes. The Presidential Accord that created it also ordered the release of a large quantity of secret documents that not only indicated a commitment to transparency, but has been a considerable practical help in investigations. The structure of the SPO also indicates that some thought went into anticipating the challenges that lay ahead. This includes the creation of a Program for Information and Analysis (PIA) and a unit to deal with victim outreach and participation. There has also been a notable legal success in that the Supreme Court supported the SPO's view that disappearance cases charged as illegal deprivation of liberty would not fall foul of the statute of limitations in cases where the victim's body could not be located. Additionally, small gestures, such as the Special Prosecutor's visit to the small town of El Quemado, indicate a genuine concern for victims and their circumstances.

On the other hand, there are many serious concerns. After two-and-a-half years, it appears that arrest warrants have been issued for only three cases relating to isolated incidents concerning one victim. In one case, three warrants have been issued; in another, four; and in another, one. The public perception is that progress is unacceptably slow. High-level sources within the SPO have indicated that there is some concern that the Federal Investigation Agency has been less effective than hoped in executing the arrest warrants. Only one person is in custody. While the public's concern about slow progress is not without justification, the quantity of cases developed is only one factor to be considered. Of greater concern is the way in which cases are being investigated. The creation of the PIA held great promise, but it has not been allowed to fulfill its potential. As such, the opportunity has been missed to carry out a truly multidisciplinary investigation with analysis at its center. Instead, investigations are based on traditional lines of investigating the immediate facts around the results of the crime through the search for eyewitnesses and forensic evidence. An over reliance on such investigative techniques is fundamentally unsuited to establishing the criminal responsibility of those involved in planning and directing system crimes, such as patterns of forced disappearances and killings. The principal concern to arise from the study is that the SPO has not fully grasped the true nature of system crime investigation. This seems to be confirmed by the fact that two of the field investigation units have increased staff by 300 and 600 percent, while the PIA, with an already insufficient staff, has effectively been cut in half since January 2004. The Special Prosecutor indicated in early 2004 that he recognizes these issues as a result of an interim report presented by the author in December 2003 and intends to expand the intelligence and analysis capacity considerably.

Regarding the work of the investigations unit, results are mixed. The team charged with investigating disappearances is the only one to produce any concrete results so far, and it has demonstrated the ability to work professionally and competently, albeit with a limited understanding of the nature of the challenge. While it is encouraging that the few cases brought so far are against high-ranking former police officers, relatively little headway has been made relating to allegations involving military personnel. The fact that there is a tendency to bring cases on the basis of isolated incidents also raises serious issues in relation to cost-effectiveness, security of witnesses and officials, and prospects for success in establishing the guilt of those in charge of planning the criminal strategies that led to the violations in question.

The team charged with investigating two key massacres from 1968 and 1971 is reportedly close to completing its investigations. After 18 months, the team's progress has been minimal and has raised serious doubts as to the technical ability and political will to make serious inroads into determining responsibility for these mass killings. Although the Special Prosecutor has pointed to a significant increase in activities as the investigations have proceeded over the past year, serious grounds for skepticism remain regarding the thoroughness of the investigations and their ability to achieve a criminal conviction.

The remaining team, charged with two fairly complex investigations, is also responsible for providing legal advice to the SPO. While the political will may exist, its small numbers and variety of tasks make it difficult to see how the investigators will make any significant progress at an acceptable pace.

The creation of a team to concentrate on victims' issues indicated a degree of planning and foresight that should be commended. The small team that works on the issues is diligent and committed, but insufficient in terms of numbers and specialization to make the idea as effective as it might have been. In particular, more effective collaboration with NGOs working with victim groups might lead to better results, allowing victims to feel genuinely included in the process of justice.

The report also notes that while the original idea of creating a committee of notable citizens to support the SPO's work seemed imaginative, it has not borne fruit because of a lack of clarity on precisely what functions it was to serve and how it would work.

Further concerns are raised about the fate of cases investigated but that, for a number of reasons, do not reach the courts. In short, what is the SPO's overall truth-telling capacity? As matters stand, there is no mechanism to ensure that victims whose cases do not reach the court might nonetheless obtain the moral vindication of a public declaration on the fate of the dead or disappeared.

Recommendations

1. The SPO should make the PIA a central axis of its investigations. The PIA should coordinate strategic investigations into the systems and institutions involved in the criminal activity under investigation, analyzing such matters as command structures, communication systems, logistics, weaponry, and disciplinary practice and procedure, as well as investigations of the areas where disappearances occurred, to establish a clear understanding of the social dynamics and organization of political or armed groups as they existed at the time of the crimes in question.
2. The investigations of disappearances, especially in the state of Guerrero, should be based on the study of patterns of violations, and not on isolated incidents. If cases are presented

- on the basis of multiple incidents, the chances of securing a conviction will be generally increased. Such an approach improves the chances of proving that high-ranking accused knew what was happening and were in control of the events. This is more difficult with the presentation of cases of isolated incidents, which, in the absence of evidence directly linking the accused to the acts in question, might easily be dismissed on a case-by-case basis as rogue occurrences. Expanding the number of incidents brought as evidence in a single charge has several other advantages: it allows for more victims to be included in the process of justice; it is more cost-efficient (one trial concerning 10 disappearances is almost certainly cheaper and quicker than 10 trials dealing with isolated incidents); and the prospect of fewer trials will generally diminish the exposure to risk on the part of both witnesses and justice officials.
3. The investigations into the Tlatelolco and Corpus Christi massacres should be reviewed, with the assistance of appropriate experts, to ensure that a proper analysis of all aspects of the massacres was carried out. In particular, the analysis of command structures, communication systems, and investigative and disciplinary proceedings are vital to ensure a thorough consideration of the role played by those who planned or ordered the killings. Even if high-ranking officials are accused of these crimes, the apparent failure to investigate proactively and robustly such issues renders doubtful the possibility of uncovering the truth or achieving a conviction, should the issue of the statute of limitations be overcome.
 4. Increased staffing is necessary if the unit charged with victims' issues is to be effective. More creativity on how it might collaborate with NGOs may also prove to be more efficient and cost-effective.
 5. A mechanism should be created to ensure that those cases that do not reach trial are considered in a public way so that President Fox's assurance that there would be some form of moral judgment is made a reality. Similarly, a documentation center should be created to house the records of the SPO investigations.

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About the ICTJ

The International Center for Transitional Justice (ICTJ) assists countries pursuing accountability for mass atrocity or human rights abuse. The Center works in societies emerging from repressive rule or armed conflict, as well as in established democracies where historical injustices or systemic abuse remain unresolved. It provides comparative information, legal and policy analysis, documentation, and strategic research to justice and truth-seeking institutions, nongovernmental organizations, governments, and others. The ICTJ assists in the development of strategies for transitional justice comprising five key elements: prosecuting perpetrators, documenting violations through nonjudicial means such as truth commissions, reforming abusive institutions, providing reparations to victims, and advancing reconciliation. The Center is committed to building local capacity and generally strengthening the emerging field of transitional justice, and works closely with organizations and experts around the world to do so.

CONTENTS

- I. Introduction
- II. Methodology
- III. Background on the Creation of the SPO
 - A. Mixed Messages From President Fox
 - B. Civil Society Views
 - C. The Mandate of the SPO
 - D. The Universe of Human Rights Violations: A Comparative Perspective on Resources
 - E. Availability of Documentary Information
 - F. Preliminary Conclusion
- IV. The Structure of the SPO
 - A. The Legal Investigations Programs
 - B. The Program for Information and Analysis
 - C. The Program for Cooperation, Citizen Participation, and Institutional Relationships
 - D. Subprograms on Legal Analysis and Dissemination
 - E. The Support Committee
- V. The Investigations of the SPO
 - A. Massive Crime Base; Issues of Scale and Selection
 - 1. Understanding System Crimes
 - 2. The Need for a Multidisciplinary Investigation
 - 3. The Central Place of Analysis and Expertise
 - 4. The Significance of Patterns in the Investigation of System Crimes
 - 5. The Challenge for the SPO
 - B. The Investigative Process
- VI. Analysis of SPO Programs
 - A. The Program for Information and Analysis
 - 1. The PIA and the National General Archive
 - 2. The Nature of the PIA's Work
 - 3. Reflections on the PIA
 - 4. Proposal for Center of Documentation
 - B. Program A: The Investigation Arising Out of the CNDH Inquiry
 - 1. Multidisciplinary Investigations
 - 2. The Division of Labor
 - 3. Reflections on Program A
 - C. Program B: The Investigations Into the Tlatelolco and Corpus Christi Massacres
 - D. Program C: Cases From Other Sources
 - E. The Program for Cooperation, Citizen Participation, and Institutional Relationships
 - F. The Support Committee
- VII. The Truth-seeking Capacity of the SPO
- VIII. Conclusions
 - A. Political Will of the Government
 - B. Political Will of the SPO
 - C. Initial Processes
 - D. Resources
 - E. Technical Capacity
 - F. Social Impact

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I. INTRODUCTION

On November 27, 2001, President Vicente Fox issued a Presidential Accord that set out the framework of a transitional justice policy. The Accord contained three main elements in which the President (1) requested the Attorney General to create a Special Prosecutor's Office (SPO)¹ to investigate alleged past crimes; (2) required the Ministry of the Interior to present a proposal for reparations to those who had suffered human rights abuses; and (3) ordered a huge quantity of previously classified documents held by former secret service institutions to be sent to the National General Archive. President Fox's initiative seemed designed to achieve the goals of accountability and transparency.

This report focuses on the work of the SPO. While it is not a unique model,² it was the first of its kind in Latin America, and President Fox opted to establish it for two reasons. First, he felt that constitutional restrictions prevented the executive from creating a body that might investigate criminal activity or human rights violations.³ Second, the President felt that the SPO would be more effective than a truth commission because it would establish the truth *and* bring those responsible to justice, while simultaneously strengthening democratic institutions, legitimacy, and the rule of law.⁴ This report focuses on the SPO's technical capacity to deliver on these expectations.

This paper is not intended as either an attack or a defense of the SPO. Rather, its goal is one of technical support. The investigation of crimes committed by state officials represents one of the most complex challenges in criminal prosecution. An effective investigation requires considerable strategic and technical sophistication. The growth of the SPO's size and budget over the past two-and-a-half years demonstrates that those who originally decided to pursue this path may not have foreseen the true scale of the project. This has been one of the contributing factors to its relatively slow progress. A central difficulty, however, lies in the fact that the remedy to this slow pace has been sought almost entirely in quantitative, rather than qualitative, terms. That is, more and more resources have been dedicated to the traditional task of crime-base investigation (investigators dealing with the immediate circumstances of the criminal act in terms of witnesses and forensic evidence). Insufficient emphasis has been placed on the resources needed to develop those areas of particular significance to system crime investigation. This requires a multidisciplinary investigation into the system itself, involving historical, social, and political analysis, as well as expert understanding of technical issues in relation to the key institutions involved in the alleged crimes. Such technical issues require an expert appreciation of strategy, tactics, logistics, communications, discipline, and control within the relevant institutions.

¹ The full name of the SPO is the Special Prosecutor's Office For The Attention Of Matters Allegedly Related To Federal Crimes Committed Directly Or Indirectly By Public Servants Against Persons Linked To Social Or Political Movements Of The Past.

² The Transitional Government of Ethiopia established a similar Special Prosecutor's Office in 1992 that was also a hybrid of investigative and prosecutorial functions and a "kind of truth commission." See, e.g., Neil J. Kritz (ed.), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, Vol. III, Washington, D.C.: US Institute of Peace Press, 1995, p. 559. See also W. Kidane, "The Ethiopian Red Terror Trials" in M. Cherif Bassiouni (ed.), *Post-Conflict Justice*, Transnational Publishers, 2002.

³ See the Preamble of the Presidential Accord.

⁴ *Id.*

Building investigators' capacity will help to create the necessary skill base, but there is also a need for expert technical guidance.

The SPO's initial structure indicated a formal understanding of the challenges that lay ahead. An appreciation of the central aspects of this kind of investigation is also apparent in the Special Prosecutor's comment that the crimes in question were designed by those in authority.⁵ However, regarding the prospects for multidisciplinary investigation, much of the promise has remained unfulfilled.

Until November 2003, only one case—concerning the illegal deprivation of liberty of Jesus Piedra Ibarra—had reached the preliminary stage of the SPO seeking a trial before the judge in charge of the instruction phase. Progress was halted because of the decision of the local court in *Monterrey* that the statute of limitations had run and that the case was inadmissible. While many criticized the SPO in light of the *Monterrey* decision, the judge's reasoning did not demonstrate any serious attempt to deal with the legal argument at hand. The SPO appealed the decision.

On November 5, 2003, the Supreme Court ruled that the statute of limitations in relation to the illegal deprivation of liberty could run only from when the body of the illegally detained person was recovered. This decision is a vindication of the Special Prosecutor's legal approach.

The ruling now removes the most significant obstacle to prosecutions on such matters.⁶ The decision also brings with it increased pressure on the SPO to begin to demonstrate more publicly the fruits of its labors. In November 2003, a second case was brought concerning the disappearance of Jacob Najera Hernandez in 1974. An arrest warrant relating to the case was issued for the former police chief, Isidro Galeana.⁷

Since November 2003, only one further case (again concerning one victim) has been developed to the point of seeking arrest warrants. Accordingly, the SPO has been criticized for an apparent lack of progress. However, an analysis of the Office's technical capacity must consider broader issues. Rather than assessing only whether the SPO is working quickly enough, one must consider whether the Office fully understands the nature of the investigation of "system crimes" and whether, in the past two-and-a-half years, there has been sufficient development to suggest that successful prosecutions will be brought against those responsible for the crimes set out in the Presidential Accord.

The answers to these questions require careful analysis. There are many positive elements within the SPO, including the basic design of the office, which demonstrates (up to a point) an appreciation of some of the complexities involved. Nonetheless, there remains significant room for development in three main areas: reconfiguring the investigative effort to place more emphasis on the investigation and analysis of the institutions that participated in the crimes in question and amending the focus of investigations from single incident to multiple incident; developing more effective mechanisms in the treatment of victims and the general approach to

⁵ See Mary Jordan, "Mexico Prosecutor to Indict Ex-Officials," *Washington Post*, Nov. 7, 2003.

⁶ It should be noted that the decision relates only the issue of when the statute of limitations runs in relation to permanent or continuous crimes. It has nothing to do with an argument about applying international legal standards, for example, to crimes against humanity. There will still be legal battles to be fought, therefore, in relation to whether alleged crimes against humanity, such as the Tlatelolco massacre, are subject to the statute of limitations.

⁷ Galeana is now considered a fugitive from justice. See Tim Weiner, "Despite Killing of Witness and Flight of Defendant, Special Prosecutor Presses On," *N.Y. Times*, Dec. 5, 2003.

outreach and communications; and improving the ways in which the SPO deals with cases that do not reach trial and identifying the Office's truth-telling role in relation to these cases.

II. METHODOLOGY

The information in this report is based on two trips to Mexico in April and July 2003. The Special Prosecutor agreed to the report during discussions in April, and it was further discussed with the Ministry of the Interior, who concurred that an analysis of technical capacity might be of considerable use. However, the report is an independent work of the ICTJ and neither the SPO nor the Ministry of Interior contracted it. The SPO provided great assistance in organizing meetings with all senior staff. In addition to discussing the methods and procedures with senior staff, research was carried out in the town of Atoyac in the state of Guerrero. Atoyac is considered the epicenter of the human rights violations that occurred, especially in the 1970s. While there, meetings were held with the staff of the regional office of the SPO and with more than 50 victims, survivors, and relatives of victims of human rights abuses from that period. Further meetings were held with a number of human rights organizations and legal experts in Mexico City and with representatives of the Ministry of the Interior.

Several follow-up telephone conversations were conducted after the field trips. The report was submitted to the SPO to allow it to make observations, most of which were positive. However, Programs B and C addressed both factual and analytical matters. Most observations regarding Program C have been incorporated. In respect of Program B, some factual amendments were made, but this did not alter the analysis or conclusions. Useful observations were made on a number of factual issues by the Program for Cooperation, Citizen Participation, and Institutional Relationships, and almost all of these have been incorporated. Others presented their comments but did not seek to amend or correct any factual or analytical aspects of the report. Several telephone interviews and e-mail communications after the initial visits allowed senior SPO staff to give updated information and comment on the developing analysis. The SPO has indicated that several of the interim recommendations would be taken on board. Most notably it was suggested that the PIA would benefit from significant expansion in the second half of 2004. If this were to occur, it would represent a welcome reversal of the decision to reduce its capacity in January 2004.

III. BACKGROUND ON THE CREATION OF THE SPO

A. Mixed Messages From President Fox

Throughout his presidential campaign, President Fox emphasized his commitment to the protection of human rights and the need for transparent government. On several occasions he seemed to indicate that he favored the idea of creating a truth commission.⁸ This concept received considerable support among several human rights organizations, partly because of a lack of

⁸ Juan Jesús Aznárez, "Entrevista a Vicente Fox," *El País*. See <http://www.mujeractual.com/entrevistas/fox>. Martha García, *Radio Nedeland Wereldomroep*, June 28, 2001. See http://www.rnw.nl/informarn/html/act010628_mexicogerrasucia.html. Sanjuana Martinez, correspondent for Proceso, "Prensa extranjera: reacciones e impresiones," *La Fogata Digital*. See <http://www.lafogata.org/mexico/mexico4.htm>. Diego Cevallos, "México: fin de la impunidad de la guerra sucia" (End To Impunity for the Dirty War), *Asheville Global Report*, No. 151, Dec. 6–12, 2001. See <http://www.agrnews.org/issues/151/noticias.html>. El Universal, "Asegura Creel al PRI que no habrá comisión de la verdad" (Creel Assures PRI There Will Be No Truth Commission). See <http://www.prodigyweb.net.mx/dayalau/r2507101.htm>.

confidence in the ability of the Attorney General's Office to carry out effective investigations and prosecutions into past human rights abuses. In addition, many feared the significant legal hurdles of the statute of limitations and issues of *res judicata* as a result of matters dealt with before military tribunals would not be overcome.

While President Fox maintained that he undertook a rigorous process of consultation before deciding against a truth commission,⁹ many human rights organizations felt that his investigations were less than thorough.¹⁰ By claiming that the SPO was superior to a truth commission, a considerable burden was placed on the Office. Those expectations were further complicated when President Fox commented, during a visit to Spain, that it was likely that many perpetrators would not be convicted because of the statute of limitations having run on the crimes in question.¹¹ This remark led some elements of civil society to question the nature of the political commitment to ending impunity and whether the investment in the SPO was genuine. For a body charged with helping to establish the legitimacy of national institutions and the rule of law, many of these circumstances contributed to a difficult beginning for the SPO.

B. Civil Society Views

Two documents serve to illustrate more clearly the differences in opinion between President Fox and many civil society organizations. In February 2003, 16 human rights groups signed a document entitled "Impunity in Mexico,"¹² which highlights several doubts about the creation of the SPO. These include the fact that it took two months to name a Special Prosecutor after the Accord was issued; the prevailing legal uncertainties regarding the applicability of law in relation to the crime of forced disappearance; and the numerous and generally unsuccessful Special Prosecutors that have been appointed in the past to investigate particular matters.¹³ The document also expresses concern at the lack of a transparent or consultative process in appointing the Special Prosecutor and the Support Committee, and at the fact the current Attorney General is a military official who was previously in charge of military justice. A separate document, "Justice and Truth," compiled by a smaller group,¹⁴ goes into greater detail but reiterates similar concerns.

⁹ See the Preamble of the Presidential Accord.

¹⁰ See Section III(B) and notes 12 and 13.

¹¹ See

<http://busquedas.gruporeforma.com/utileriasr/imdservicios3W.DLL?JSearchformatSP&file=reformacom\2002\nacional\articulo\244598\default.htm&palabra=Fox&sitereforma>. Report of David Vicenteno Ortiz, "NGOs Accuse Fox of 'gifting impunity,'" *Reforma*, Nov. 11, 2002.

¹² Academia Mexicana de Derechos Humanos (AMDH); Acción de los Cristianos por la Abolición de la Tortura (ACAT); Asociación de Familiares de Detenidos Desaparecidos y Víctimas de Violaciones a Derechos Humanos en México (AFADEM); Asociación Mexicana para el Derecho a la Información (AMEDI); Asociación Mundial de Radios Comunitarias-México (AMARC-México); Centro de Derechos Humanos "Fray Francisco de Vitoria OP" AC; Centro de Derechos Humanos "Miguel Agustín Pro Juárez" (Prodh); Centro Nacional de Comunicación Social (CENCOS); Comisión Mexicana de Defensa y Promoción de los Derechos Humanos, AC (CMDPDH); Foro Migraciones Franciscans Internacional-Sección México; Fundación Diego Lucero; Liga Mexicana de Defensa de los Derechos Humanos (LIMEDDH); Red Nacional de Organismos Civiles de Derechos Humanos "Todos los derechos para todos"; Servicios y Asesoría para la Paz (SERAPAZ).

¹³ The NGOs list at least four well-known cases of Special Prosecutors being appointed and being replaced several times, but without any results to show for their efforts ("Impunidad en Mexico (Impunity in Mexico)," p. 18).

¹⁴ Fundación Diego Lucero; Centro de Derechos Humanos "Fray Francisco de Vitoria OP" (AC); Asociación de Familiares de Detenidos Desaparecidos y Víctimas de Violaciones a Derechos Humanos en México (AFADEM); Centro de Derechos Humanos "Miguel Agustín Pro Juárez" (PRODH); Servicios y Asesoría para la Paz (SERAPAZ).

While serious concern has been expressed that many cases might be subject to military justice and thereby result in impunity, the Special Prosecutor gave assurances that this would not happen. He confirmed that no case has been referred to the military judicial authorities. He also rejected entirely the claim that the Attorney General was anything but impartial and professional in all his dealings, even though the organizations point to the lack of progress in investigations as vindication of their original skepticism.

On the subject of the applicable law, the Special Prosecutor has indicated that he intends to deal with the issue of forced disappearances under the crime of illegal deprivation of liberty (for those incidents occurring prior to the entry into the criminal law of the crime of forced disappearance). This has already been done in the case of Jesus Piedra Ibarra. Some sectors of civil society, along with the media, felt that the *Monterrey* judge's original decision vindicated earlier skepticism of the SPO's abilities. As it turns out, the Special Prosecutor has been proven correct. It also appears the SPO is considering an accusation of genocide under Article 149 of the Federal Criminal Code, in relation to the alleged intention to destroy a national group, as has been done in a number of cases in other countries. The determination that the group of dissidents (the target of the intended destruction), constitutes a national group for the purposes of the crime of genocide will present a difficult argument for the SPO, but if it succeeds, it would help to overcome obstacles in terms of the statute of limitations that would otherwise persist in cases of murder.

Some of these concerns, it is suggested below, might have been eased if the SPO had undertaken a more effective policy of engagement and communication. On the other hand, some of the specific calls that NGOs made in February 2003 are reiterated in this report, especially regarding the need for technical capacity building.

C. The Mandate of the SPO

President Fox asked that the SPO be charged with investigating allegations relating to matters that may constitute federal crimes committed directly or indirectly by public servants against persons linked with social or political movements. The request for and subsequent creation of the SPO is, therefore, based on a number of relatively narrow factors. First, it relies on the exercise of federal jurisdiction regarding crimes allegedly committed by public servants. This means that the SPO will not, in general, deal with matters committed by public servants at the state level, thus excluding, for example, local state police.¹⁵

Second, it is necessary to demonstrate a link between the victim and social or political movements. This may prove to be difficult, depending on the SPO's and the Court's interpretations. The Accord offers no definition of social or political movements and no guidance on the criteria to be applied.

While it is true that the preamble to the Presidential Accord specifically mentions the previous report of the National Human Rights Commission (CNDH) into allegations of forced disappearances, nothing in the Accord stipulates that the focus of the investigation should be restricted to the those cases that arise from that investigation or from the Supreme Court decisions

¹⁵ It should be noted, however, that whether a matter is a federal crime is not solely dependent on the alleged criminal being a federal agent, but may depend on where the criminal act took place and the victim of the act. The issue of jurisdiction is not a simple matter and has taken up a considerable period of time in legal analysis.

requiring the investigation into the Tlatelolco and Corpus Christi massacres.¹⁶ This is recognized formally by the fact that the SPO has three investigative programs—A, B, and C. Program A deals with cases essentially arising from the CNDH report. Program B handles the investigations into the two massacres. Program C was created to investigate any other complaints relating to the terms set out by the Presidential Accord. In practice, however, almost all efforts have focused on those cases where some form of prior investigation already existed. In general, the SPO has not undertaken a proactive investigation to inquire into widespread allegations of systematic abuse in relation to illegal detention, torture, and degrading treatment, all of which national and international human rights organizations have reported on throughout the past 30 years.¹⁷

D. The Universe of Human Rights Violations: A Comparative Perspective on Resources

There are two ways to look at the cases facing the SPO. On the one hand, they are a self-imposed and unduly narrow implementation of the original terms of reference. On the other hand, concentrating on cases where there is already good evidence of federal involvement represents the most prudent use of resources. Such a view, of course, leaves a large number of victims of human rights abuses, committed by both federal and nonfederal agents, without either the real prospect of an effective remedy or even the moral satisfaction of recognition and vindication.

In February 2003, several human rights organizations recommended that investigations be carried out for all cases of disappearances, executions, and torture throughout the 1970s and 1980s.¹⁸ However, not all groups are inclined to assist the SPO in expanding the investigations. Some indicated that they had insufficient confidence in the SPO to justify the effort. Others felt that the matters should be dealt with under the normal functioning of the judicial system.

The number of cases the SPO is now dealing with has remained static for several months, and it does not appear likely that there will be a significant effort to expand on those as a result of fresh investigations. In these circumstances, it becomes appropriate to consider the SPO's resources in relation to the cases it has chosen to investigate.

In 2001, the CNDH completed a study of 532 cases of alleged disappearances. Of these, the Commission was satisfied with the evidence provided in 275 of them, and declared that there had been violations of the human rights of the individuals concerned, most likely committed by federal officials. One of the principal areas of the SPO's work is developing cases that the CNDH had previously considered and recommended for criminal investigation.¹⁹ The team charged with investigating these cases estimates that as of May 2003, it was dealing with cases amounting to approximately 320 deaths or disappearances.

The second principal area of investigation for the SPO relates to two massacres that occurred in 1968 and 1971.²⁰ The Tlatelolco massacre of 1968 occurred in the weeks prior to the Olympic

¹⁶ Resolution 968/99 of the Supreme Court.

¹⁷ See, e.g., the long list of Amnesty International's public statements on serious human rights abuses in Mexico, going back only to 1996, at <http://web.amnesty.org/library/eng-mex/index&start=183>.

¹⁸ See note 13, "Impunity in Mexico," p. 22.

¹⁹ Resolution 26/2001 of the CNDH. It should be noted that in 97 cases the CNDH felt that there were insufficient grounds to conclude a disappearance had occurred without being able to discount the possibility entirely. In another 160 cases, the CNDH said that there was insufficient information but that the MP should nonetheless use the information as a starting hypothesis for further investigation.

²⁰ Resolution of the Supreme Court in Amparo 968/99 in relation to the events of 1968.

Games that took place that year in Mexico City.²¹ The Corpus Christi massacre occurred in 1971. The Supreme Court of Justice in Mexico has determined that the Attorney General's Office is required to investigate and let the courts determine whether the matters are subject to the statute of limitations.

The cases arising from the CNDH investigations and the two massacres may include between 600 and 800 dead or disappeared. The number of victims, of course, is not a perfect indicator of the complexity of the investigation. Indeed, it is clear that the number of incidents to be investigated will be much lower than the number of victims, because the Tlatelolco massacre accounts for approximately half of the estimated total and many of the alleged disappearances involved more than one individual being abducted at the same time. On the other hand, the investigation of incidents or crimes scenes, while vital, may not necessarily form the bulk of the investigative effort. Nonetheless, these figures give us a sense of the general scope of the investigations.

Bearing in mind that the overall staff of the SPO now stands at more than 160 and that the investigative capacity of the two principal sources of cases is approximately 65 investigators, it compares favorably to other recent, similar prosecution initiatives. The SPO's current staffing levels were reached as the result of a considerable increase of personnel at the request of the Special Prosecutor in May 2003. Until the approval of that request, the SPO had been operating with a staff of between 30 and 50 in its first year of operations.

The investigative team dealing with the prosecutions in Argentina in 1984 did not exceed more than 15 people working in Buenos Aires, although it had the assistance, when needed, of provincial prosecutors in forwarding information to help develop investigations. That team, working closely with the report of the CONADEP²² inquiry, studied several thousand cases of human rights violations and brought 700 of them together in a number of trials to demonstrate the responsibility of the military juntas for the patterns of torture and disappearance that had occurred. That process was concluded within three years of its inception in 1984, although the great majority of the work was completed in the first year.²³

The International Criminal Tribunal for the former Yugoslavia (ICTY) has a total staff of 1248,²⁴ more than 700 of whom work in the Prosecutor's Office. The Tribunal's cases include serious crimes committed since January 1, 1991, involving more than 250,000 fatalities and many who survived serious violations of the laws of war and crimes against humanity.²⁵

The Prosecutor's Office at the Special Court for Sierra Leone employs approximately 40 staff members, including 10 trial lawyers, 24 investigators, 2 analysts, and 4 administrative staff.

²¹ While precise figures have not been established in relation the victims of the Tlatelolco massacre, some estimates suggest more than 300 people may have died.

²² National Commission for the Disappeared, by its Spanish Acronym.

²³ Conversation on October 30, 2003, at The Hague with Luis Moreno Ocampo, current Prosecutor of the International Criminal Court and former Deputy Prosecutor in the Argentine trials in 1984.

²⁴ See <http://www.un.org/icty/glance/index.htm>.

²⁵ It is not suggested that all of those who died in the conflict in former Yugoslavia can be described as victims of either human rights violations or war crimes. Nonetheless, even the single case of the Srebrenica massacre, involving some 7000 illegal executions, gives a clear sense of the true scale of violations that occurred. Proportionately speaking, the numbers investigating violations in Mexico outweighs the numbers investigating crimes in former Yugoslavia for the ICTY.

While it is generally anticipated that between 20 and 30 people are likely to be prosecuted, the potential crime base may cover thousands of incidents.²⁶

In Timor-Leste, the Serious Crimes Investigation Unit (SCIU) currently has 110 staff members consisting of 42 UN international staff, including prosecutors, investigators, forensic specialists, translators, and support staff, as well as 23 UN police investigators and 45 UN national staff, including forensics. In addition, 11 Timorese trainee prosecutors, case managers, information technology and data coding staff, as well as Timor-Leste police investigators, work in teams with international UN staff at SCIU. The cases subject to investigation include more than 1200 killings and over 1000 cases of sexual violence, along with investigations of thousands of individuals forced into displacement.²⁷

Early figures issued by the Special Prosecutor's Office in Ethiopia indicated that the investigative staff was between 400 and 600.²⁸ It has indicted more than 5000 people in over 10 years of operation and investigated tens of thousands of cases relating to human rights violations committed under the Mengistu regime.²⁹

These figures are intended only to give a sense of context as to what has been considered necessary or appropriate in other large-scale investigative initiatives. Much depends on the quality of experience and training and other resources. However, as matters currently stand, the staffing complement of the SPO compares more than favorably to all other similar initiatives.

E. Availability of Documentary Information

Some further comparisons can be made between the SPO and the Argentine experience. About 270 of the 320 cases being investigated by the SPO were registered and investigated by the CNDH.³⁰ This puts the SPO in a broadly similar position to that of the Argentine prosecutors who could rely extensively on CONADEP's previous investigations as a basis for developing their investigations. Indeed, the SPO is potentially in an even more advantageous situation: as long as the records of investigative acts carried out by the CNDH are authenticated according to law, they can be directly incorporated into the investigations of the SPO without the need to revisit the particular matter and investigate it *de novo*.

A further positive aspect is the potentially immense assistance to investigations provided by the documents held by the National General Archive (NGA). It is probably accurate that, compared

²⁶ See <http://www.sc-sl.org> for copies of the indictments already issued. The charges against the main perpetrators indicate serious crimes committed in several different towns or regions, many single incidents referring to the killing of hundreds of individuals, and possibly thousands of incidents of mutilation and sexual violence.

²⁷ See <http://www.etan.org/et2003/february/23-28/21serios.htm> for a summary of the SCIU and its work.

²⁸ <http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/402e6f4b6d58cb2d80256f73800525646?Opendocument>.

²⁹ These impressive statistical references do not suggest that all is well with the SPO in Ethiopia, and due attention should be paid to concerns about the lack of apparent political autonomy, as the SPO reports directly to the Prime Minister. Other concerns have been raised about the length of pretrial detention, but these are beyond the scope of this report.

³⁰ A more limited example of documentary availability concerns investigations in Timor-Leste by the UN-appointed Commission of Inquiry after the violence in September 1999 as well as the Indonesian Human Rights Ombudsman Report (Komnas HAM). Both reports produced considerable testimony and documents relating to military operations. However, their use was severely limited because the courts could not detain the main perpetrators.

to investigations that have taken place in Argentina, Chile, Guatemala, and Peru, Mexico has the richest and most direct access to documentary evidence.

F. Preliminary Conclusion

All of this leads to the preliminary conclusion that in terms of staff levels, workload, and information, the SPO is in a relatively good position to be able to carry out effective investigations. The issue to be investigated relates to the deployment of resources and the technical capacity of the teams in question to investigate the kinds of crimes involved.

IV. THE STRUCTURE OF THE SPO

Not including the Support Committee, the SPO employs more than 160 individuals. Of these, 58 are investigating attorneys and 72 handle administrative work. The remainder of the staff is divided among tasks of analysis, communications, and outreach, as well as working in the Special Prosecutor's private office.

A. The Legal Investigations Programs

This section is subdivided into three "programs" (also sometimes referred to as "axes"). Program A deals with those cases relating to the CNDH resolution; Program B with the Supreme Court resolution (the two massacres); and Program C with matters not related to either of the original two sources. Program A was investigating about 320 cases, the vast majority (about 270) of which came from the state of Guerrero.

Program A currently has 34 investigating attorneys. Two are permanently based in Sinaloa, and the others are based in Mexico City. None are permanently based in Guerrero. The Program has an administrative staff of seven, three investigators dedicated to finding disappeared persons, and one expert in criminal investigations.

Program B is concerned with the investigations of the Tlatelolco and Corpus Christi massacres. Of 19 attorneys, 2 teams of 7 are dedicated to the investigation of each massacre. Additionally, one attorney works with both teams to ensure adequate communication flow, and another is dedicated to formulating legal arguments relating to jurisdiction and other matters.

While the report the SPO issued in March 2002 indicated that Program C was dealing with 14 cases, it appears that as of July 2003, the number has been significantly reduced. According to the director of Program C, his team is actively investigating only two cases and has handed over the others to Program A. Program C is mainly concerned with the 1995 massacre in Aguas Blancas and the Revolutionary Democratic Party's (PRD) allegations of political persecution by the Institutional Revolutionary Party (PRI), resulting in more than 600 deaths or disappearances of sympathizers or members of the PRD.

Program C has five attorneys, and it also doubles as a centralized team responsible for providing specific legal advice to the rest of the SPO.

B. The Program for Information and Analysis

The objective of this program is gathering and analyzing historical information in order to clarify the crimes committed against persons linked to past social and political movements.

Until January 2004, the program had involved six people: two investigators dealing with inquiries into the Federal Security Directorate, two investigators handling the policies and practices of social and political investigations, one individual concentrating on photographic evidence and information, and another dealing with official military documents. Since the beginning of this year, the team has been reduced to three.

C. The Program for Cooperation, Citizen Participation, and Institutional Relationships

This program attends to victims and relatives of those affected by past crimes and remits information, where appropriate, to the prosecuting authorities. It also establishes mechanisms of cooperation with human rights organizations, academic institutions, and professional groups.

It currently comprises five staff members. The director is primarily responsible for dealing with those who arrive at the SPO's offices with information regarding past crimes, as well as attending occasional meetings throughout the country with victims, their relatives, and former activists and combatants in dissident movements. He is assisted by one individual, two others are dedicated exclusively to mental health issues, and there is one full-time administrator.

D. Subprograms on Legal Analysis and Dissemination

Two subprograms also exist. One is the legal analysis team referred to above (Program C). The other is an innovation created slightly later, dedicated to preparing reports and disseminating information on the SPO's activities. While the focus of this paper relates above all to the technical capacity in investigation, it is appropriate to offer some comments on the SPO's general communication capacity. A great deal of time and effort has been spent producing reports on the office's activities. However, these tend to result in catalogues relating the quantities of meetings held and documents read. It is almost impossible to obtain from the documents a clear sense of the SPO's work in any coherent sense. The current communications strategy provoked considerable criticism and skepticism among civil society groups.

Experience shows that an effective communications strategy is important if credibility and legitimacy are to be achieved and maintained. Communications should seek to explain to the public in a clear and transparent way what the SPO's overall policies and strategies are, how they are progressing, the obstacles encountered, the proposed methods of overcoming these, and a sense of the time frame for expected results. Such a policy does not require conceding a strategic advantage to potential suspects, but would enhance the possibility of greater credibility in civil society.

E. The Support Committee

The Presidential Accord that requested the creation of the SPO also sought to establish a committee of experts in the fields of law, history, politics, and sociology to offer advice and support to the SPO. The Committee originally consisted of 5 individuals, and it was disbanded and reformed in May 2003 with an expanded membership of 20. Although initially viewed as a potentially interesting mechanism, the Support Committee has failed to live up to expectations, partly because it was never clear what its functions were or how it was meant to operate.

V. THE INVESTIGATIONS OF THE SPO

This report is not an academic treatise on the art of investigating system crimes. However, it is necessary to describe certain aspects of the challenges the SPO faces in order to determine the effectiveness of its response.

A. Massive Crime Base; Issues of Scale and Selection

The initial problem that has faced many prosecutors in countries such as Argentina, Chile, Guatemala, and Peru, as well as in the International Criminal Tribunal for Rwanda (ICTR) and ICTY is the sheer scale of the abuses committed. Scarce resources must be applied to a massive universe of crimes. An effective prosecution strategy requires the development of legal and ethically defensible criteria for case selection; the importance of a defined and justifiable strategy is not always immediately apparent. Some have suggested that one of the reasons for the slow progress in the early years of the ICTY was the lack of a developed strategy identifying investigative targets selected on the basis of justifiable criteria.³¹

In several truth commissions, including El Salvador, Guatemala, and Peru, there was a decision to highlight so-called “illustrative cases” selected from the tens or hundreds of thousands of violations reported. While a similar approach may be helpful to prosecutors, some caution must be exercised. The criteria for the selection of such cases have not always been clear and have sometimes been subjected to serious criticism.³² While some illustrative cases clearly help to demonstrate the fact patterns of a great number of other cases, it is also clear that other cases are included on the basis of the perceived political or social importance of the victim, or because of the victim’s nationality. Whether such an approach is prudent for truth commissions is a matter for discussion elsewhere. The criteria for the process of selection of cases in a prosecution program are necessarily influenced by other factors. These must include consideration of the prospects of successful prosecution and a realistic assessment of how many cases can be investigated and people tried in the light of available resources. However, prosecutors should also seek to develop selection criteria that present a historically faithful representation of the events and systems in question, rather than opting for cases with high-profile victims or even particularly egregious but relatively isolated incidents. One of the criticisms of criminal justice in the aftermath of massive human rights violations is that because it focuses on individual guilt, it cannot reflect accurately the scale and systemic nature of the crimes in question. This misunderstands the nature of system crimes prosecutions, but prosecutors must be aware that the cases selected should be chosen, above all, because they help to prove the nature of the system and the participation of the guilty in it, rather than because of the notoriety of the case or the political or social interests in a particular prosecution.

Having accepted a much-reduced universe of cases, many of which have already been investigated to some degree, and bearing in mind the staffing levels and information available, allocating resources and identifying targets should be much simpler for the SPO than it has been for prosecutors in other countries.

In practical terms, there is no good reason why all of the alleged criminal acts relating to Programs A and B cannot be thoroughly investigated. This does not mean that they should all

³¹ Stefanie Frease, Speech on Arresting War Criminals, Oct. 24, 2001, at the American Bar Association, New York, International Law Weekend.

³² See Paul Seils, “The Limits of Truth Commissions in the Search for Justice” in M. Cherif Bassiouni (ed.), *Post-Conflict Justice*, Transnational Publishers, 2002.

give rise to a specific criminal prosecution; that will depend on the information discovered in the investigation.

Closely related to the issue of the selection criteria is the decision of which people should be the primary focus of investigations. In circumstances of scarce resources and massive crimes, the favored approach is to emphasize that those bearing the greatest degree of responsibility should, wherever possible, constitute the focus of investigative efforts.³³ This is important for three reasons. First, a series of prosecutions of low-level perpetrators, however morally and legally culpable, runs the risk of giving the appearance of scapegoats being sacrificed to protect those in positions of power. Second, prosecuting those with the greatest responsibility offers the possibility of conveying to those victims whose cases cannot be directly included in a prosecution strategy that those responsible for the patterns of human rights abuses have been brought to justice. Even though a particular case may not reach trial, the victim may derive some moral satisfaction from knowing that those responsible for ordering or organizing these crimes have been held accountable. Third, if individuals who hold positions of responsibility within state institutions have abused their power by directing or permitting serious human rights violations, institutional legitimacy can be more successfully reconstructed if it is shown that individuals who abuse responsibility will be held accountable.

While Program A indicated that it intends to follow the suggestions set out above, to date it has brought three cases relating to isolated incidents and says that more cases focusing on similar incidents are likely in the near future. It was not possible to get a clear sense of an identifiable strategy in relation to the matters raised above within Program B or Program C.

1. Understanding System Crimes

“System crimes” developed as a concept after World War II as a means of describing the criminal activity of the Japanese and Nazi regimes.³⁴ This idea of abusing elements of the official apparatus of state power was developed further, especially by German scholars, and had an important role in the trials of Argentinean military leaders during the government of Raul Alfonsin.³⁵ The concept shares some of the central characteristics of organized crime, but also has additional complicating factors.

³³ See, e.g., the Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, Jan. 16, 2002, para. 2 of the Preamble.

³⁴ The concept of systems crimes is described in greater detail by the former judge of the International Military Tribunal for the Far East, Professor Bernardus Victor Aloysius Roling in: “Significance of the Law of War” cited by Antonio Cassese: “Current Problems of International Law,” Milan 1975. See also Antonio Cassese, *Reflections on Some of Novel Features of the International Criminal Tribunal for the Former Yugoslavia*, pp. 111–122. In a basic outline of the concept of system crimes it has been suggested that, “system crimes encompass crimes committed by individuals on orders of their superiors or in line with or as adherents to a certain policy. Such crimes are: indiscriminate bombing, willful killing of civilians, systematic abuse of prisoners of war, rapes, persecution of ethnic, religious, racial groups, use of banned weapons, employment of banned methods of warfare with a view to terrorizing civilian population. Such methods of warfare and use of banned weapons, reflects criminal policy of a state. In fact such persons engage in criminal acts by ordering, abetting, or assisting in crimes, don’t prevent crimes, and don’t punish perpetrators of those crimes.” See Helsinki Watch for Human Rights in Serbia at http://www.helsinki.org.yu/pubs_text.php?lang=en&idteksta=417.

³⁵ See, e.g., Claus Roxin, *Straftaten im Rahmen organisatorischer Machtapparate*, GA, 1963, p. 193 ff. The theme has become one of considerable discussion and development in recent years, not only in Germany, but also Spain and Latin America. See, e.g., Francisco Muñoz Conde in *Problemas de Autoría en la Criminalidad Organizada*, Juan Carlos Ferre Olive and Enrique Anarte Borrallo (eds.), University of

Organized crime is generally characterized by a division of labor between planners and executors. Arrangements in structure and execution are such that it is difficult to establish connections between the two. System crimes are complicated by that fact that they are generally committed by official entities, often with the involvement of people who were or may remain politically powerful. The crimes usually involve large numbers of victims. These issues of scale and context obviously make investigations more difficult. On the other hand, system crime investigation is facilitated by the fact that official bodies generally operate under a formal legal framework with established lines of reporting and accountability. That legal and institutional framework provides a useful basis for developing lines of investigation that are not generally available in most cases of organized crime.

The particularities of system crimes require an investigative mentality that differs from that of most ordinary crimes. The work of a prosecutor in investigation and presentation of most ordinary crimes can be likened to that of a film director. His task is to describe clearly how a particular event occurred. His main concern is describing the consummation of the criminal act. The clearer the description, the easier it will be for the court to determine who was responsible. On the other hand, the investigation of systems crimes requires a mentality closer to that of an engineer. The task is not simply to describe the consummation of the criminal act, but to describe clearly the operation of the elements of the machinery that led to the result in question. The techniques involved in investigating the machinery behind system crimes have been the subject of considerable development since World War II, but especially in the light of the experiences of the ad hoc tribunals for Rwanda and the former Yugoslavia.

System crimes investigation, whether in relation to a series of acts or an isolated criminal act, such as a large-scale massacre, requires a detailed exploration of the system itself, and not merely of the results manifested in the crime base (e.g., the act of torture, abduction, killing, etc.). Few investigative bodies have developed the necessary techniques and resources to achieve an effective investigation.

2. The Need for a Multidisciplinary Investigation³⁶

Perhaps one of the easiest ways to describe the kind of investigation necessary is to look at the way the Appeals Court in Argentina described the nature of the participation of the military leadership. In its decision it noted that:

The very important decision taken by the accused to combat the terrorist guerrilla outside the law and by atrocious means was adopted when the armed forces already were engaged in this task and its intervention was regulated by a series of legal dispositions and rules...The whole military structure to combat subversion continued to function normally under the direction of the accused, only the “form” of combat changed...

Huelva and Fundación El Monte. For an extensive example of the development of commentaries on participation in system crimes see the decision of the Argentine Appeals Court in *La Sentencia*, Tomo II, pp. 787–811, Imprenta del Congreso de la Nación, Buenos Aires, 1987.

³⁶ It should be noted that in his first report, the Special Prosecutor makes mention of an interdisciplinary committee that he anticipated working closely with the Support Committee. This proposed committee should not be confused with the kind of multidisciplinary research and investigation capacity. The interdisciplinary committee was conceived of working, above all, in the area of recommendations in relation to possible reparations initiatives. No mention was made of the Committee by anyone from the SPO throughout discussions in April and July 2003.

The accused had *dominio*³⁷ of the acts because they controlled the organization which produced them. The events which have been judged in this case are not the product of an erratic and solitary individual decision of those who carried them out, but rather constituted a method of combat imparted by the commanders in chief of the armed forces to their men. That is, the acts were carried out by a complex range of factors (men, orders, places, weapons, vehicles, supplies etc.) which suppose a military operation. Without the essential concurrence of these elements, the acts would not have occurred.³⁸

Generally, system crimes are committed by security forces (the armed forces or police bodies) and paramilitary organizations. Effective investigation requires appropriate analysis of the ways in which such organizations are legally required to work and how they actually worked during the time in question. Lawyers are often not in the best position to carry out such analyses, and significant input from other experiences and disciplines can be very beneficial.

Such investigations require analysis that presents persuasive evidence in relation to:

- *The particular contexts of military and paramilitary organizations.* Issues of training, command structures, logistics, communications systems, weapons and munitions supplies, and disciplinary procedures all factor in. Expert guidance is necessary if investigations are to be carried out effectively.
- *The general sociohistorical context of the events.* This is particularly important where there is a reasonable hypothesis that the crimes in question were known to, tolerated by, or connived in by political authorities. Several countries have witnessed crimes committed by official forces while apparently under democratic rule. To present an accurate understanding of how these things can occur, it is important that the investigation can explain the real nature of the institutional relationships to a court. Again, this generally requires the work of experts in history and political science, rather than law.
- *The local context and dynamics of violence.* System crimes generally occur in the context of a real or perceived threat to the established political order, such as political opposition or armed resistance. Studies of areas where violence has occurred can be significant for a number of reasons. First, when the alleged crimes took place several years earlier and in places not well known to investigators, such studies allow them to understand more clearly the context of the investigation. This understanding will help them to develop the lines of investigation more effectively and relate more easily to potential witnesses. Furthermore, comprehending the local social, political, and cultural dynamics at the time the crimes were committed will also help in anticipating the accused's lines of defense and allows the investigation to develop hypotheses and counterhypotheses.
- *Analysis of public and restricted documentary information.* Recovering and analyzing documentary information is often vital to the success of these investigations. Documentary evidence has advantages over personal testimony, as it often helps to prove matters more quickly and succinctly. It is not subject to the difficulties presented by intimidation and changing disposition of witnesses. Although always subject to interpretation, it can often provide more conclusive evidence of specific points of evidence than personal recollections or conjectures.

³⁷ The Spanish term *dominio* is not easily translated as a legal concept into English. It refers to the relationship of one person over another but does not necessarily equate precisely with common law concepts of principals and agents or with the matter of command responsibility, although it has clear similarities to both.

³⁸ La Sentencia, supra note 35 at 803, 804.

- *Widespread crime-base reconstruction.* This relates to the more traditional business of gathering personal testimonies and forensic evidence in order to recreate the crime base.

3. The Central Place of Analysis and Expertise

The investigation of any crime requires the prosecutor to reconstruct the “crime base”; i.e., the facts and circumstances of the criminal act. In ordinary crimes, this will often be the exclusive focus of investigation. In system crimes, it remains absolutely essential, but the crime base will often give only limited information about who was responsible. While witnesses may be able to identify the group to which the immediate perpetrators belong, they cannot always identify them personally. Determining criminal responsibility may often be possible only in relation to those behind the scenes, rather than unidentifiable trigger-pullers. (To some extent, this was the experience in Argentina, although there were other factors relating to the limited group that finally stood trial.)

The process of documentation retrieval and analysis is a vital part of investigating system crimes. Depending on the circumstances, these investigations require creativity and subtlety so that those under investigation cannot subvert the process. For example, analysis of general logistical, communication, reporting, and disciplinary practices can lead to strong evidence of general control and make it increasingly difficult to rebut the evidence that participation of those high in the chain of command was essential to the event in question.

In summary, while the reconstruction of the crime base remains essential to the prosecution of system crimes, it has to be understood in the context of the central role that analysis must play. Relying too much on the crime base without adequately developing analysis will overload an investigation with information that may not lead to proof of participation of those “behind the scenes.”

4. The Significance of Patterns in the Investigation of System Crimes

A “pattern” refers to a set of events that, by their frequency, location, and nature, imply some degree of planning and centralized control. The use of patterns in evidence can help prove that a particular crime was part of a planned process. The legal inferences that can be drawn from the use of patterns in evidence will depend on the facts themselves.³⁹ For example, the kinds of massacres the Army committed in the Guatemalan civil war required considerable strategic organization, including surrounding villages, controlling exits and entrances, torturing and murdering unarmed civilians, and destroying houses and livestock. Five examples of these kinds of activities carried out in limited geographical areas would suggest knowledge and control on the part of regional commanders and possibly even at the level of the High Command. However, it is not possible to say with certainty how many specific acts must be included in the proof of a pattern to establish knowledge and control. The more information on planning and organization, the less will be needed in terms of acts showing frequency, modus operandi and location. In the final analysis, the art of investigation in this regard is finding the correct balance of all the elements.

Although not all system crimes relate to patterns of events, the investigation of patterns can prove crucial in determining the responsibility of those behind the scenes. Especially in circumstances

³⁹ For an excellent explanation of the potential significance of patterns, see Bill Fenrick, “Attacking the Enemy Civilian as a Punishable Offence” *Duke Journal of Comparative and International Law*, Vol. 7, p. 539, <http://www.law.duke.edu/journals/djcil/articles/djcil7p539.htm>.

where it is impossible to identify immediate perpetrators, constructing cases based on patterns of events can lead to proof that those in positions of command or authority are responsible.

This issue is particularly important in situations where responsibility may be based on omission, rather than commission. By reconstructing patterns of events, one can build a framework indicating that those behind the scenes knew or had reason to know that the events were occurring or were likely to occur and failed in their duty to prevent them.⁴⁰

Many of the problems with developing patterns relate to the massive universe of crimes. Significant time must be spent on mapping and developing selection criteria, including the quality of information and disposition of witnesses. In the case of the SPO, the issue of patterns is probably relevant only in Program A's work. Because Program A should be able to investigate all of the acts alleged to have occurred in relation to the 320 cases brought to its attention, there is no need to carry out a preliminary exercise to determine possible patterns. What is crucial, however, is that the investigation of the 320 cases is carried out with a view toward establishing possible patterns. As such, it is crucial that all investigators must understand the general strategic aim of the investigation in terms of possible targets, that they are trained to ask the correct questions likely to develop possible links in relation to those targets, and that the operations are sufficiently coordinated to ensure that all appropriate connections are made in a timely fashion to enhance the efficiency of the investigations.

There are further compelling reasons for cases involving similar acts within a pattern to be conjoined. First, as a matter of economy and prudent use of resources, it is much more efficient to run an investigation and trial in this way than to deal with each matter individually. Apart from the simple but expensive issue of court time, an atomistic approach will inevitably lead to huge duplication of efforts of investigators and prosecutors on several aspects of the multidisciplinary investigation.

Perhaps even more important in the context of system crime investigation is the argument that cases based on the proof of patterns are crucial from the point of view of security. A long series of individualized trials dealing with very limited subject matter isolates witnesses, lawyers, and judges. The longer the process takes, the more costly it is to maintain the necessary levels of protection of all those involved.

A final consideration is the important question of the social impact of the trials in question. Long, drawn-out trials on very restricted incidents ignore the important opportunity to present cases in a way that describes to the nation the real nature of the events as they happened—as part of a systematic attack organized at a high level. One of the architects of the trials in Argentina has noted that it was the very drama of the trials, describing the abusive system in question, which

⁴⁰ The concept of omission is a significant element of criminal responsibility in Mexican criminal law and in many other countries. In the context of system crimes, it may be especially important. It has some similarities to the concept of command responsibility in international law, but there are significant differences. Command responsibility requires proof that a relationship between a superior and a subordinate existed and that the superior knew or had reason to know of the criminal activity in question and, having the material ability to prevent or punish, failed to do so. The concept of omission in several civil law traditions, including Mexico, requires proof that the individual had a legal duty to prevent a particular crime and that he failed to act. Although there is not an explicit reference requiring that the person bearing the legal duty to prevent a consequence occurring knowing that it occurred, it is accepted that proof of such knowledge is essential, given the prohibition of objective (also sometimes called “strict”) liability.

played such an important role in helping to restore the rule of law and respect for the administration of justice.⁴¹

5. The Challenge for the SPO

In Mexico, the prosecuting authorities lead the investigative process. The senior SPO staff were frank in recognizing that their own training as proactive criminal investigators was limited. It is only relatively recently that developments in criminalistics and criminology have been considered truly useful tools in conducting investigations in many countries in Latin America, including Mexico. While specific laws and specializations have developed in the areas of organized crime, SPO staff recognized that there remained a serious lack of expertise and awareness of skills needed in various investigations.

Within the SPO it was apparent that investigative techniques can sometimes be hampered by bureaucratic passivity. Rather than proactively investigating a case, efforts are sometimes directed at sending out requests for information to people who are not likely to cooperate. There is sometimes a failure to anticipate the refusal to cooperate or to confront it with effective counterstrategies. However, even the industrious and proactive investigators will emphasize the crime base investigation to the exclusion of other essential matters and will not be able to develop the necessary multidisciplinary investigation mentioned above. Such approaches are the natural consequence of both the daily experience of the kinds of cases normally investigated and the type of generally limited training prosecutors receive as investigators.

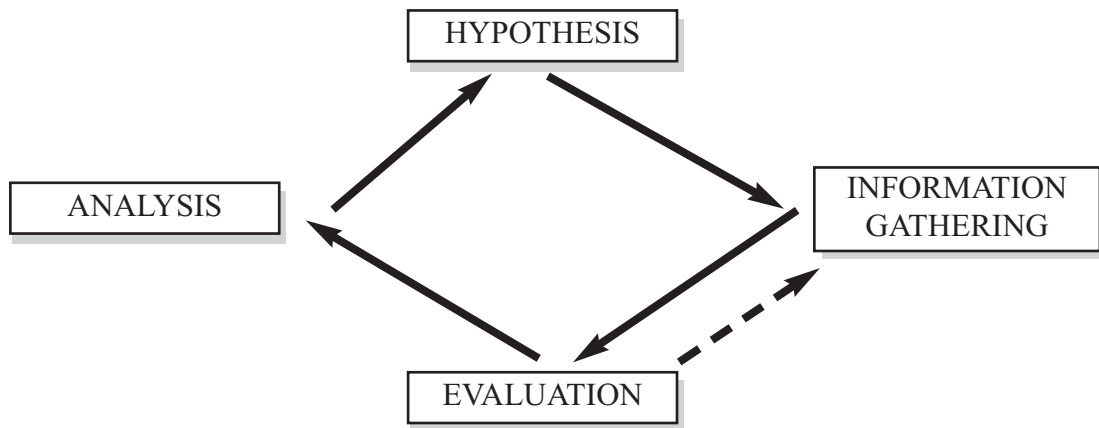
One of the central challenges for the SPO is to understand clearly the nature of the investigations it is undertaking and to develop and deploy appropriately the resources and skills necessary for it.

B. The Investigative Process

The investigation of system crimes will generate large amounts of information. It will, as in Mexico, often involve a great deal of people investigating related subjects. Because of these factors, the need for a disciplined and controlled process is crucial. Not only is this necessary to advance the investigation, but it helps in maintaining an institutional memory, which will be vital in facilitating the integration of new staff and recording the institution's work for the purposes of final reports or other types of scrutiny.

Although there are many ways in which an investigation might be structured, a basic outline that has been followed in various large-scale investigations follows a simple cycle:

⁴¹ Carlos Nino, *Radical Evil On Trial*, New Haven: Yale University Press, 1996, pp. 132–134.



A hypothesis is a statement of a supposition based on limited evidence to be used as the starting point for further investigation. The more complex the case, the more important the discipline of clearly formulated hypotheses becomes. Many individuals are carrying out the investigations discussed in this report, and they will generate huge quantities of information. The development of formally stated hypotheses assists in ordering and controlling information and activities, helps to create the basis for an institutional memory, and enables those in charge to maintain a record that demonstrates the seriousness and professionalism of the efforts.

Experts in the field should formulate hypotheses, working under the guidance of the lawyers in charge of identifying what evidence is needed to prove the participation of persons in question. The process may include general and specific lines for investigation. For example, the general hypotheses that security forces worked effectively under the established command structures at the time of the disappearances in Guerrero must be investigated in order to determine whether the events that occurred there should be understood as occasional excesses of rogue elements, planned excesses at a local or regional level, or the fruits of a more centralized plan. Such an investigation will require an understanding of the systems of control and command and an investigation into how these actually functioned during the time in question. This requires, among other things, research into the communications systems and reporting practices, as well as the general functioning of the military discipline system. In addition, there will have to be investigations on who controlled logistics and supplies. These investigations are not focused directly on allegations of specific crimes, but are intended to establish a general picture of how the machinery actually functioned at the time.

A hypothesis on the responsibility of a particular individual would examine his position, his exercise of command, his role in the formulation or execution of the plan or activity in question, his actions during the relevant period, his effective control over subordinates, his knowledge about the activities of his subordinates or colleagues, and his character, relationships, and professional training.

The process of evaluation relates to the assessment of the credibility and reliability of the information, be it from witnesses, physical evidence (e.g., from an exhumation), or documents. If more work is required, it should be remitted for further development to the investigators initially involved.

After final evaluation, the information should be analyzed in light of the original hypotheses to determine to what extent these have been proven and whether new hypotheses have to be developed.

Although much of this process may seem fairly obvious, the creation of a structured process shared by all elements of the investigative team is important if efforts are not to be wasted and the investigation is to be closely controlled.

VI. ANALYSIS OF SPO PROGRAMS

A. The Program for Information and Analysis

The staffing and core functions of the Program for Information and Analysis (PIA) have been described above. As noted, a program of information and analysis is critical in the investigation of system crimes. President Fox's decision to release secret documents to the NGA represents a potentially massive aid to investigations. Likewise, the creation of the PIA demonstrated some understanding of the need to address this opportunity systematically. However, there is a serious risk that the potential role of the PIA has not been fully appreciated. This Program should be regarded as a much more central part of the investigative strategy and requires significantly increased resources. It is, therefore, a major concern that this is one of the few areas whose capacity was not increased in 2003, and now it has been reduced by almost 50 percent. It appears that there is an institutional failure in understanding the importance of this element of investigation. There have been indications that there will be a substantial investment in the PIA in the second half of 2004. This would be most welcome, but would have to be accompanied by a shift in the qualitative focus of investigations.

1. The PIA and the National General Archive

The quantity of information the PIA has been required to organize over the past two years is enormous. (The head of the PIA noted that if the files were stacked on top of one another, they would reach over three kilometers.) Not all of the information in the NGA is there as a result of President Fox's decision. Almost half of the documents were obtained from the General Directorate for Social and Political Investigations, which handed them over in 1994. In 1998, they were opened to limited public scrutiny. However, the documents lacked both an index and a catalogue and were of limited use for locating specific information. Since its inception, approximately one-third of the PIA's time has been spent trying to order these papers. That process was completed in the second half of 2003, more than 18 months into the SPO's life. However, as time-consuming and labor-intensive as the process of ordering the documents was, the net result is that SPO investigators now have access to huge amounts of official documentation that is ordered and easily accessible.

2. The Nature of the PIA's Work

Other than ordering the 1994 documents, the majority of the PIA's time has been spent responding to specific requests for information from individual investigators from Programs A, B, and C. In May 2003, the teams of Program A and B were increased, respectively, by approximately 600 and 300 percent. The size of the PIA team did not change. These increases have generated a huge increase in the investigators' demands for information. Apart from the work of cataloguing information and responding to specific requests, senior PIA staff have spent considerable time dealing with victims and relatives as they try to locate information at the NGA, including reading documents to those who are unable to do so.

Notwithstanding these difficulties, there have been some good examples of what the PIA can accomplish with the investigative field teams, as in the case of Jesus Piedra Ibarra, which is discussed in more detail below.⁴² The recovery of key documents and their use in case development shows what is possible; however, a reassessment of the PIA's work methods and resources is necessary if it is to achieve its full potential.

Although the PIA had developed a strategic plan for research and analysis through July 2003, it was unable to advance this plan in any meaningful way because of the demands placed upon it and its relatively low staffing levels.

More recently, however, the team had begun to develop these plans, and there were encouraging signs that the program would be able to play a more significant role in investigations (partly because the 1994 documents are now in order). However, the recent cuts in staffing indicate that these hopeful signs are unlikely to bear significant fruit.

3. Reflections on the PIA

It is the PIA's good fortune that its director has considerable experience and ability in the field of informational research and analysis. Her leadership in developing a more systematic program could be of considerable assistance to the SPO's efforts.

In an organization that has grown to more than 160 people and has almost 60 full-time investigating prosecutors, the fact that the PIA has not been significantly developed points to a possible misunderstanding of its central role. This is confirmed by the staffing cuts in the Program. The basic presumption underlying the division of labor is that the investigating prosecutors will ask questions and the PIA will find and furnish the information.

This approach undermines the PIA's potential as an effective instrument of research and analysis. A multidisciplinary investigation will help to demonstrate the policies, strategies, tactics, structures, and practices of political institutions and security forces. It is only by merging such investigation and analysis with the crime base that one can establish the criminal responsibility in designing patterns of abuse or other systematic violations. Also, those involved in crime-base reconstruction may not be in the best position to develop investigative strategies, whereas experts in political, social, historical, and institutional fields can be essential to the process.

The PIA should be centrally involved in all matters other than crime-base reconstruction. All such work would, of course, require legal guidance and plans would have to be directed toward the investigation of legal hypotheses. The lawyers in charge of each investigative unit would have to analyze the conclusions of all investigations, but the PIA could effectively coordinate investigation and research. To date, the PIA has not been in a position to develop its own hypotheses about the context, structures, patterns, and practices of the relevant institutions because it spends most of its time responding to requests for information. Rather than playing a central role in carrying out detailed research and analysis, the PIA has been little more than an auxiliary arm of the investigative effort.

⁴² See page 32.

4. Proposal for Center of Documentation

The PIA has proposed creating a Center for Documentation. The Center would seek to assist the investigation of specific cases and to help create a historical memory by providing information from witnesses and specialists. Further, it would validate the right of victims to know the truth beyond the relatively narrow confines of judicial investigations.

If the full potential of the SPO model is to be realized, the proposal for the Center should be given extremely serious consideration. As things stand, however, the PIA is not in a position to develop such a proposal meaningfully because of the demands upon it and its low numbers of staff.

Recommendations

1. The PIA's capacity should be increased so that it can carry out its primary functions of information gathering and systematic analysis.
2. The director of the PIA should engage in discussions with experts in system crimes information and analysis to develop a program for lines of inquiry into structures, patterns, and practices relevant to the organizations under investigation.
3. The director should then coordinate the investigations, which will require assistance from legal experts, institutional analysis of police and military organizations, and social and historical context. The results of the investigation would have to be discussed with the legal experts from each program. What is essential, and does not currently exist, is the capacity to maximize the use of the information at the NGA, and the strengthening of a multidisciplinary investigative effort that focuses on crime-base reconstruction and the other elements mentioned above. The PIA is the natural home for such an effort.

B. Program A: The Investigation Arising Out of the CNDH Inquiry

Program A attained its current staffing level, including 34 investigating prosecutors, in May 2003. Its central focus is the cases arising out of the CNDH report. As mentioned above, it is currently dealing with 320 cases relating to killings, abductions, and disappearances. Approximately 270 cases come from the state of Guerrero. The director of Program A has noted that, in broad terms, each investigating prosecutor is working on approximately 10 cases. This is an extremely healthy ratio when compared to initiatives in other countries.

The investigating prosecutors work under the direction of a chief of investigations, who reports to the head of Program A. The investigators are engaged in both crime-base reconstruction and the investigation of associated patterns and structures. Program A appears to have a dynamic and engaged leadership that thinks progressively about the ways in which it investigates matters.

The first case Program A brought demonstrates a professional investigation. It is worth reflecting on the strengths of the investigation. First, investigators used documentation in a thoughtful and professional manner. The staff included evidence that demonstrated clearly that the former chief of police and his deputy had participated in interrogation of the victim. Expert testimony of handwriting experts showed that the signatures on the documents were those of the accused. Second, a good balance of witnesses, including family witnesses and former police officials, described the context of the crime and the circumstances of its execution. Third, documentary and testimonial evidence demonstrated that the federal security forces had developed a practice of working beyond the limits of the law. While this element probably had less bearing on this

particular case, it is crucial in the long-term strategy of proving responsibility of those behind the scenes.⁴³

Program A's general approach was encouraging. Especially noteworthy was the apparently fruitful relationship between its investigation and the PIA. Investigators gathered significant evidence from both the documents transferred from Social and Political Investigations and those that President Fox ordered to be turned over. Nonetheless, Program A recognizes that it will not always locate evidence that so directly implicates those in high positions of authority.

The head of Program A noted that he expects that the next cases will focus on isolated incidents. He nonetheless emphasized his intention to develop in the future cases on the bases of patterns. It is not clear that the risks associated with bringing isolated cases have yet been fully appreciated. Equally, it is not clear to what extent, if at all, the PIA has been involved in the development of systemic cases. The continued development of isolated cases along with the lack of involvement of the PIA in system investigations is a cause for concern.

1. Multidisciplinary Investigations

While Program A has conducted studies that include military analysis, experts in the field neither carried out the research nor analyzed the resulting report; instead, a group of senior prosecutors studied it. While the collegial approach has its benefits, expert analysis is critical. It is encouraging that tentative steps are being taken toward developing a local investigation relating to areas of specific interest to Program A.

2. The Division of Labor

The role of Program A investigators covers a broad variety of tasks, primarily involving crime scene reconstruction in terms of locating the appropriate witnesses and following up on lines of investigation. Additionally, however, the same investigators bear responsibility for developing patterns and structures related to specific crimes.

This is potentially a weak link compared to other elements of Program A's work, and some consideration might be given to the ways in which this may be strengthened. Generally, prosecutors have not been trained in the investigation of structures, logistics, institutional practices, and related matters. Indeed, the director of Program A noted that such training might have been particularly helpful in developing his team's capacity.

3. Reflections on Program A

The most common criticism of the SPO is the slow progress in case development; however, this is difficult to judge because staffing levels have altered so radically. Until May 2003, Program A had only eight investigating attorneys. Until November, only one case had been brought to the point of seeking a trial. This case has now been joined by two other cases, including one from the state of Guerrero.

It is a welcome development that a case from this area has reached this state of progress. There was obvious concern, especially among victims and survivors in Atoyac, that progress appeared to be unacceptably slow. Nonetheless, it is hoped that investigations into the crime base of the

⁴³ This is one of the elements Claus Roxin identified in his theory of criminal responsibility involving those directing state institutions (see note 35).

cases in Atoyac's cases can be completed in the near future and allow for the development of cases demonstrating the systematic nature of the events that took place there. Bearing in mind the detail and conclusions of the CNDH report, and the time and resources already spent by the SPO in Atoyac, it is reasonable to expect to see in the near future the development of a strategically nuanced set of cases based on the patterns of abuses that occurred.

In addition, there is a very strong case for establishing a permanent presence of investigating prosecutors in Guerrero itself, given Program A's large investigatory team and the fact that 270 of its 320 cases are from the region. The local office in Guerrero deals with humanitarian issues, not legal investigations. Witnesses, as discussed below, do not feel significantly involved in the investigative process, do not understand the complexities, and feel a considerable sense of abandonment. These issues, plus the matter of cost-efficiency, could be resolved by establishing a team in Guerrero, preferably in the town of Atoyac.

Notwithstanding the head of Program A's assurances that the focus will turn in due course to patterns of events rather than charges on the basis of isolated incidents, it is a source of some concern that several other isolated cases are anticipated. While it is a good sign that the cases continue to target those in high-level positions within the police authorities, there remain concerns relating to resource and security problems that will accompany this individualized approach. Furthermore, there is some anxiety that investigations so far do not seem to have developed significant information in relation to illegal military activity.

Recommendations

1. The division of labor among the investigators in Program A should be reconsidered. The current situation, whereby one investigator investigates all matters relevant to his case, including command structures, information flow, patterns, and practices, has risks in terms of methodology and efficiency. Some resources could be redeployed in investigating matters beyond the crime base. The current division of labor is atomistic, lends itself to duplication, and runs the risk of missing important investigative opportunities through a lack of appropriate expertise.
2. Serious thought may also be given to the ways in which the PIA should carry out centralized and strategic investigations, as described above.
3. A more permanent presence in the state of Guerrero may help to advance crime-base investigations and develop better relationships with victims and witnesses.

C. Program B: The Investigations Into the Tlatelolco and Corpus Christi Massacres

The Tlatelolco and Corpus Christi massacres are hugely significant in recent Mexican history because of the tragic loss of human life and because the events occurred in an urban setting in the context of political, and especially student, activism.

Although no precise figures on the number of victims of the Tlatelolco massacre have been officially recognized, some estimate that more than 300 people may have been killed. The head of Program B indicated that his office has thus far only received information in relation to 20 victims. The massacre took place on October 2, 1968, in the weeks leading up to the 1968 Olympic Games in Mexico City. There had been several months of demonstrations and strikes against the government of Diaz Ordaz, but the response of the security forces to the demonstration in Tlatelolco was a huge shock (it has been compared, for example, to the Chinese

response in Tiananmen Square).⁴⁴ Witnesses have claimed that the president's security forces were responsible for the violence, but the government points to agitators in the crowd. After the massacre, some of the alleged political activists were tried, but there were no serious investigations into security force activities.

The Corpus Christi massacre took place on June 10, 1971, resulting in an unknown quantity of deaths and injuries. The head of Program B indicated that his office has thus far been able to establish twelve deaths. Investigations already carried out by reputable organizations, such as the National Security Archive, indicate that a specially trained security force known as Los Halcones (The Falcons) likely participated in the massacre. There is evidence that this organization was trained with U.S. assistance to help the Mexican government develop its techniques in confronting student activism.⁴⁵ The head of Program B stressed that he had discovered no such evidence. He also indicated that allegations focused not only on the participation of military personnel but also the federal police force.

It is clear that investigating these two massacres differs from investigating alleged practices of disappearance and murder over a prolonged period of time. Nonetheless, these cases can still be described as system crimes and the essential multidisciplinary approach to their investigation is still relevant. Evidence from eyewitnesses and others will be important in demonstrating central issues, including response to a real or perceived threat. However, the investigation will also require significant analysis of the information flow, decision-making processes, logistics, weapons, tactics, rules of engagement, and internal reporting procedures and investigative processes. This requires a proactive and creative strategy that reconstructs the events and structures of the time in question.

Much of the prosecutors' investigative work appeared to focus on the review of previous legal processes relating to the prosecution of several civilians who were present at the massacre. They have also spent significant time taking testimonies from eyewitnesses and their relatives; however, the head of Program B stated that it did not comprise the bulk of the investigation. In the past 12 months, it appears that much more time has been spent interviewing former public servants.

It is, of course, prudent to ensure that information already available is thoroughly revised and analyzed. Because the scandal around the Tlatelolco massacre relates to allegations of an unwarranted use of security force and the government's carefully orchestrated cover-up, it is important that the review of previous cases considers any indication of a plan to conceal the atrocity. However, the issue to be investigated is not whether earlier trials were fair, but the facts and circumstances relating to the massacre and the government's reaction. Any documentation on previous investigations will offer only a limited amount of information, and it is not clear why the process has taken so long. The quantity of documents has been cited as the main reason, but even with a much-reduced staff, the information should have been processed much more quickly.

A further concern in the investigation was the process used in questioning former President Luis Echeverria about the two massacres. Mr. Echeverria was Minister of the Interior at the time of the Tlatelolco massacre and President three years later, when the Corpus Christi massacre occurred.

⁴⁴ See, e.g., Kate Doyle at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB10/intro.htm>.

⁴⁵ See Kate Doyle, *Proceso*, vol. 1338, June 8, 2003, p. 36. See also <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB91/proceso0603.pdf>.

While questioning such high-level figures is always likely to provoke considerable interest in the media, such encounters must be planned carefully. It was always apparent to the investigating authorities that the former President would be likely to invoke his right not to incriminate himself (provided under Article 20 of the Constitution). It was therefore unlikely that the interrogation of Mr. Echeverria would cast new light on the investigations—and so it turned out.

The circumstances of the Echeverria interview indicate the lack of creative strategy that appears to be inhibiting the investigations. If Echeverria was to be interviewed at all, it was important to understand the significance of the process in terms of the psychology of the investigation and the profile of the SPO in general. By interviewing him without detailed analysis of structures, information flows, disciplinary practices, munitions disposition and logistics, the SPO missed an important opportunity to demonstrate that it was developing an impressive investigation. Although the SPO did present the former President with 170 questions relating to the events of 1968 and 159 regarding 1971, indications were that these did not demonstrate a detailed investigation into the issues just mentioned. Instead, the interview reflected a rather passive methodology that relied on the cooperation of people who seem, at best, unlikely to do so.

It is, of course, possible to recall anyone at a later stage in the investigation, and the director of Program B indicated that he would strongly consider doing so. The issue, however, is not simply about evidentiary value. It is partly related to the image of effectiveness of the SPO, but it is also about showing to those who are not willing to cooperate that such a refusal will not impede the SPO, but only result in greater difficulties for those who do not cooperate in due course.

In May 2004, the Special Prosecutor appeared before the Congress' Justice and Human Rights Commission. He indicated that the investigations into the two massacres were nearly complete,⁴⁶ and pointed out that more than 100 public servants were questioned in the investigations into the Tlatelolco massacre. The concern is not that too few interviews have taken place, but that the investigations may have limited value because of lack of preparation and expertise in developing both the structure and content of the inquiry, and the apparent lack of will on the part of the direction of Program B to make use of the analytical tools available in the PIA. Even if high-ranking officials are ultimately accused in these cases, the strength of the investigations is likely to provoke legitimate concerns as to the prospects of obtaining a conviction. Overall, the investigations are passive and unlikely to uncover information that others want to keep hidden. The investigators may not appreciate the need for a multidisciplinary investigation, or how such investigations can clarify the process that led to the events in question. There remains a serious risk that the investigations into these events will not merit the confidence of the public.

Recommendations

1. Because it appears that these investigations are coming to a close, the most that might be hoped for is the possibility of a thorough review of the investigations already carried out. An assessment of the structure of the investigation, the hypotheses developed, the expertise enlisted in preparation of specialized issues to be investigated, and the capacity of investigators to question the recollections and analysis of witnesses should be carried out.

⁴⁶ The Special Prosecutor had indicated in October 2003 that these investigations were nearing completion and that arrest warrants might be issued by January 2004. See http://www.eluniversal.com.mx/pls/impreso/noticia.html?id_nota=174574&tabla=notas.

2. The staffing levels of Program B have been adequate. The underlying issue has been the need to develop a different mentality and methodology of investigation, the driving force of which must come from the SPO's leadership.
3. Investigators also need to appreciate the importance of a multidisciplinary investigation, use information-recovery techniques creatively, and develop lines of investigation that will bolster the process in the face of uncooperative witnesses and institutions. It is not clear that the leadership of the unit is fully persuaded of these issues.

D. Program C: Cases From Other Sources

The five investigating prosecutors of Program C also form the SPO's central legal advisory unit. Its investigations focus on two principal cases: the 1995 massacre of Aguas Blancas in Guerrero, and the PRD allegation that more than 600 members and sympathizers were killed or disappeared throughout the 1980s and 1990s. The head of the unit noted that latter case was not progressing because of the difficulty in locating witnesses and the apparent inability of those who brought the case to offer useful assistance. It appears that the SPO has little confidence in this case, as Programs A and B have been granted much greater resources for far fewer victims. (It should be noted that the SPO is not the principal problem; if information is not forthcoming, there is very little the Office can do.)

A great deal of time was spent determining whether the SPO had jurisdiction in the case of the Aguas Blancas massacre. A local police official is already serving a jail sentence in relation to the crime, but the investigation into high-level involvement has yet to lead to a trial. It is perplexing that, 18 months into the investigation, prosecutors have not managed to interview investigators from the original trial or the individual currently in jail.

Program C's mixed responsibilities make practical progress in complex investigations extremely difficult. It is noted that some progress has been made in the investigations and that the team expects to be able to begin citing witnesses and suspects in the near future. However, the pace of progress is extremely slow because of the variety of tasks this team is dealing with. While it is possible that results might eventually come from their investigations, it will inevitably take an extremely, and perhaps unacceptably, long time.

Recommendations

Given Program C's significant burdens and its lack of progress in these investigations, it might be best to relieve it of all investigative tasks and transfer its outstanding cases to Program A. Given the Supreme Court's decision in the *Ibarra* case, the need for expert legal advice is likely to increase as more cases make their way to trial, and Program C could dedicate its energies entirely to this function.

E. The Program for Cooperation, Citizen Participation, and Institutional Relationships

In his Presidential Accord, President Fox recognized that the pursuit of justice entailed prosecuting the guilty *and* reestablishing the legitimacy and efficiency of state institutions.⁴⁷ A crucial element of this process is the treatment of victims and witnesses. One of the central criticisms of the judicial process is that it concentrates too much on perpetrators, whereas one of the perceived benefits of truth commissions is that they focus on victims. While both of these

⁴⁷ See the Preamble to the Presidential Accord.

points of view may be valid, criminal processes can be designed to restore victims' dignity without impairing the objectivity of the investigations. Central to such an approach is a basic sensitivity to victims, including an assessment of their needs and a strategy to deal with those needs.

The SPO has taken several positive steps to tackle this issue. First, the creation of a separate team indicates an awareness of the need to address these matters. The special attention given to mental health issues is also encouraging. Second, the Special Prosecutor has taken the time to travel to the small town of Quemado, in the state of Guerrero, to explain the SPO's work and its commitment to justice.

However, the team may not be doing enough to build on these promising foundations. Again, the greatest limitation is resources. Leaving aside the issue of mental health, only two people on the team are working on substantive matters. The unit pointed out that throughout 2003 it had participated in more than 70 events organized by relatives of victims in 16 states. It should not be doubted that the small team working in the unit applies itself with diligence to its tasks. However, the majority of the work it does outside the capital is in response to activities organized by others. While their participation is no doubt valuable, it is also essentially passive. The resources are not sufficient to allow for a more proactive role in creating an environment for the restoration of victim dignity through the criminal process. As far as the work in the capital is concerned, when victims and their families visit the PCCPIR, the team's assistance is often limited to advising them to carry out more research themselves, either in the NGA or elsewhere, simply because it is not in a position to offer more help.

This office is also charged with handling information at the SPO relating to new or existing cases, even though no one on the team is legally trained or has expertise in statement taking. Given the numbers of prosecutors in the headquarters, it might be helpful to create a system whereby at least one prosecutor is "on call" to receive statements after a preliminary meeting with the PCCPIR team.

However, the main concern about victims and witnesses relates to the situation in Atoyac, Guerrero. The local office of the SPO there has a very small staff with only one professional and very limited assistance from other staff. The office focuses on humanitarian efforts with victims and witnesses, with some additional promotional work to educate locals about the SPO and encourage participation.

This office is not equipped to develop a communications program with the broad group of victims and their family members in Atoyac. Discussions with more than 50 victims, relatives, and other witnesses revealed a strong sense of alienation; e.g., several people noted that they had had direct communication with investigators on only two occasions throughout the 18 months of operations. The vast majority felt that they had not received adequate information about the complexities involved and the possible legal and practical obstacles to effective investigation. They did not feel well informed about the progress of cases and felt that the poor communication indicated a lack of respect and interest.

The concept of the PCCPIR was and remains a good one, but its mandate should have been more ambitious. The team should have given more thought to how this program could have contributed to a process of communication and engagement that also would allow investigators to do their job.

One possibility is establishing workshops or seminars with civil society. In Guatemala and parts of Peru, such programs have helped to make the investigatory process more meaningful to all citizens.⁴⁸ Taking into account that many individuals lack basic understanding of legal institutions and systems, many areas of interest could be developed. Such meetings should address issues of progress (or lack of) in the investigations, but also elementary explanations of the legal system; the roles of investigators, prosecutors, and witnesses; the phases of instruction and trial; different kinds of evidence; and forensic investigations and exhumations. The PCCPIR could develop materials and capacity to carry out these programs. While Guerrero ought to be a primary focus, similar efforts could be made in other parts of the country that have suffered human rights violations.

Aside from attention to victims and witnesses, the PCCPIR is also responsible for developing relationships with civil society, nationally and internationally, and professional bodies. Again, the fact that such a role was anticipated illustrates the SPO's sensitivity and awareness. Attention to the relationship with civil society was especially important in the light of the views many organizations held regarding the creation of the SPO itself.

However, as is the case with victims and witnesses, PCCPIR does not have the resources to develop these matters in a meaningful way. Meetings with NGOs, for example, happen only occasionally and tend to relate to specific cases rather than broader issues of approaches, strategies, progress, and impact. No real effort has been made toward thinking about the ways NGOs might be invited to engage with the SPO. One possibility is that organizations could be approached to assist in developing the kinds of workshops mentioned above. Some NGOs are skeptical about the efficacy of the SPO itself, and a process of communication and education might help to alleviate this. However, limitations on personnel make outreach to professional bodies beyond the PCCPIR's reach.

Recommendations

1. The PCCPIR's capacity should be increased to allow it to carry out a more proactive role.
2. Serious thought should be given to developing a program of proactive engagement, including case updates and seminars to enhance understanding and participation with victims and witnesses, and making the SPO's work a more meaningful experience for all citizens.
3. A more structured program of information exchange with NGOs may be beneficial for all parties. Holding a meeting every two months would allow the SPO to demonstrate that it intends to be transparent and communicative.
4. The PCCPIR should consider how it uses the capacities of other groups, including NGOs and professional bodies, in its work. As mentioned above, these groups may have the technical ability to offer assistance in some of the outreach tasks that the PCCPIR should be carrying out more effectively.

F. The Support Committee

In his Presidential Accord, President Fox asked that a Support Committee of experts in the legal, social, political, and historical fields be appointed to assist the SPO in its investigations. Some

⁴⁸ The Center for Human Rights Legal Action in Guatemala has developed an impressive program for liaison and communication with 23 communities throughout Guatemala in relation to the killing of 2500 indigenous civilians during the civil war. The organization Paz y Esperanza has developed a smaller, but important, program in Ayacucho in Peru.

interpreted this as an attempt to create a miniature truth commission. Whatever Fox's intention, it augured well for the possibility of a multidisciplinary approach to investigations, which is crucial to investigating system crimes.

Unfortunately, this promising concept has withered on the vine. Until May 2003, the Committee comprised five people who were supposed to offer one day per week to the SPO. However, the Office noted that the Support Committee has contributed almost nothing to date; the only significant involvement was its presence at the interrogation of Mr. Echeverria. The Committee has offered almost no substantive advice or analysis.

In May 2003, the original committee was replaced with a new, larger body of 20. However, the part-time arrangement persists, and the relationship remains fluid. Since May, the Committee has met on a few occasions, but continues to offer very little in the way of substantive assistance or advice.

While a support committee is a good idea in principle, so far it has not worked in practice. While it may appear to be window-dressing, its potential contribution to a multidisciplinary investigation and the creation a broader investigative mentality would have enhanced the SPO's capacity.

The underlying problem with the Support Committee is that its precise functions and mode of operation were never clear, and staffing it with volunteers has resulted in inadequate time and energy being devoted to the program, and the lack of a disciplined approach in its work.

The Presidential Accord describes the Committee's primary purpose as assisting in the SPO's investigations, but it is not clear if this was intended as an oversight role or for the purposes of research into historical, legal, social, and political issues. Neither has occurred: the staff members do not possess the necessary training and expertise to effectively oversee investigations, and staffing levels were inadequate for a research function. The fact that the Committee now employs 20 people indicates some recognition of these issues; however, the reformed Committee will continue to work on a very limited time basis and only voluntarily, and therefore is unlikely to yield significantly improved results.

If the Committee was conceived to advance the understanding of broader issues beyond simple crime base investigation, it was indeed a positive step. However, the central role of multidisciplinary intelligence and analysis was never fully understood and has not been developed.

Recommendations

Multidisciplinary investigation and analysis must form a central part of the SPO's overall strategy. The Support Committee is not the appropriate mechanism to achieve this.

1. The SPO should publish a detailed explanation (subject to the requirements of confidentiality and strategy) of what the Support Committee is intended to do, what it has done to date, and how it has done it.
2. The role of Support Committee might be reconsidered. Its members may be able to provide a service to the SPO as experts in their given field, but this must be channeled into a more formal arrangement that will allow the development of a structured program with lines of accountability to the SPO leadership, rather than the current advisory and voluntary format, which gives the SPO no real power to require an effective contribution.

3. As indicated above, this contribution could be coordinated under the PIA along with assistance from the other heads of the investigative programs. This means abandoning the current model of the Support Committee regarding the way in which it was intended to assist directly in investigations.

VII. THE TRUTH-SEEKING CAPACITY OF THE SPO

In opting for the SPO, President Fox raised hopes that the truth about the past would be known and justice would be done. It is still not clear how the truth might be made known, especially in cases that will not result in a criminal conviction. In the comments attributed to President Fox on his visit to Spain, he indicated that those who cannot be convicted would at least face moral judgment in being publicly exposed, but it is not clear how that process will be carried out.⁴⁹

Cases may not go to trial for a variety of reasons. It may be that investigations reveal no evidence of wrongdoing. However, in other cases, prosecutions may be unlikely because of legal obstacles such as the statute of limitations. Similarly, there may be evidence of human rights violations that would not be strong enough to meet the high standards of proof a criminal court requires to establish individual guilt, but sufficient in terms of establishing some kind of historical record of events that had occurred. The investigation of the SPO, or its presentation of a case before the judge in charge of the instruction phase, should not be considered a sufficient alternative to a transparent presentation of all investigations for public scrutiny. As a matter of fairness to alleged perpetrators and in the public interest of transparency, a mechanism should be created that will allow stories of abuses to be presented publicly, for the truth about violations to be recognized and for innocent victims to be vindicated.

Three things can be done to enhance the truth-telling and dignity-restoration aspects of SPO investigations. First, the proposal for a documentation center presented by the PIA should be given serious thought. A physical space should be created where victims and citizens can access information and understand historical events. The NGA obviously represents one step toward this goal, but a specific program on the SPO's work would also be significant.

Second, the Presidential Accord makes no provision for a final report. To date, the SPO's reports have focused on quantitative analysis but lacked qualitative assessment of progress. Requiring the SPO to publish a final report that explains its methodology, strategic investigative choices, allocation of resources, and information gathered would help to establish a sense of transparency and accountability in keeping with the President's tone in the initial Accord. This report would not inhibit the SPO's freedom of action, as it would be delivered only when the investigative processes were deemed effectively completed. Such a report may be several years away, but an undertaking to produce it would be a positive step.

Third, a mechanism might to be created to allow for those victims or relatives whose cases cannot be heard by a Court to have the opportunity for a public declaration from an objective and reputable body on the circumstances of human rights violations. President Fox has noted the importance of a public moral judgment even in those cases where criminal guilt cannot be established. At the same time, standards of fairness should inform the process without creating

⁴⁹ See note 6. The Supreme Court decision in *Ibarra* relates to continuous or permanent crimes. It is still possible that in crimes such as murder the statute of limitations will make prosecution impossible. For example, the Tlatelolco massacre may only be dealt with in a moral sense, unless the Courts accept legal arguments that these crimes too are not subject to the statute of limitations on the basis of other arguments relying on international standards in relation to crimes against humanity.

the need to revisit all investigations. All that may be required is that a reputable group of individuals, selected after due consultation with civil society to enhance their legitimacy, considers the investigations of the SPO in relation to cases that are not prosecuted. Where appropriate, it may invite comments from individuals likely to be named as responsible if they were not given an opportunity to assist in the SPO investigations and establish their participation in events.

VIII. CONCLUSIONS

A. Political Will of the Government

One of the questions often asked about the SPO is whether it has the genuine political will to address past human rights abuses. A distinction has to be made about the political will of those in government, including the President, who initially sought the creation of the SPO, and of the SPO itself. Although this report has focused on technical issues, the structure of investigations, and the deployment of resources, but some general observations can be made on the issue of political will.

First, the terms of the mandate provided in the Presidential Accord and the positive steps in terms of the releasing important information demonstrate a seriousness of purpose on the part of the President. On the other hand, the President's comments on the problem of statutes of limitations and the civil society perception that the Special Prosecutor should have been appointed via a more consultative process have undermined some of the positive qualities embodied in the Accord itself.

Second, although the SPO's resources have increased at a considerable rate, the need for such an increase indicates that there was perhaps an underestimation of the task in hand by those politicians who originally suggested the creation of the SPO. To this extent, the political leadership can be criticized for a lack of vision and lack of willingness to consult widely on the possible structure of the Office. In various Latin America countries—as well as in Ethiopia, Sierra Leone, Timor-Leste, and the institutions of the ICTY and ICTR—there was enough experience of similarly complex investigations to make consultation by Mexican officials with international counterparts a prudent and viable option. As such, an opportunity was missed that might have allowed for more realistic planning and resources at an earlier stage.⁵⁰

However, the government did respond positively to the Special Prosecutor's requests in 2003, and there are even indications that more staff might be added. If political will is measured in the willingness to provide resources, it is cannot be said that the Government has been unresponsive.

A different question is the degree to which the political leadership can be held responsible for technical issues in the SPO's work. The autonomy of the Office precludes, quite rightly, any political intervention. On the other hand, the Government is entitled to inquire into the nature of the progress and monitor whether the SPO's initial objectives are likely to be met. It appears that the Ministry of the Interior has continued to track the SPO's progress and wants it to be successful.

⁵⁰ It should be acknowledged that some limited efforts were carried out, including a meeting of Latin American prosecutors that took place in Mexico at the beginning of the SPO's life. Similarly, the SPO has heard from some other distinguished experts. However, these interventions have been very limited and not directed at the technical requirements of investigation.

In conclusion, greater consultation and appreciation of the task in hand would have allowed for a better beginning for the SPO. It might have enhanced credibility among civil society, but it would also have established more clearly the need for a different technical approach, identifying the need for capacity building and resources at a much earlier stage.

B. Political Will of the SPO

The structure of the SPO has many encouraging features. It demonstrates, up to a point, an appreciation of the need for an effective division of labor in the investigation of the crime base, analysis, treatment of victims, and dissemination of information. The problems that exist do not relate to the basic structure, but are concerned with the deployment of resources, the technical capacity of some elements, and the need for specialized support in some areas of the investigation.

The SPO has asked for and received the staff it considers necessary. Its insistence on more resources indicates an institution that wants to succeed. Some believe the lack of concrete results indicates a lack of political will within the SPO, but cases reaching the courts ought not to be the only measurement of success. One must ask whether the basic conditions have been developed to advance the investigations in the most efficient and secure ways to achieve the maximum numbers of convictions. In some respects, the reply is positive. Some of Program A's work is encouraging but requires a greater emphasis on analysis of the systems in questions and the investigation of patterns. However, for a variety of reasons that have been explored in this report, the PIA, the PCCPIR, and the Support Committee have had less impact than expected.

It may be that the principal reason for some of these weaknesses relates to a restricted technical vision, rather than a lack of political will. It is extremely difficult to determine where a lack of technical appreciation of the demands of the investigation of system crimes in fact becomes a deliberate political decision not to create or to develop that ability. The apparent advances in the work of Program B in the past 12 months, and the fact that its investigations are now said to be near completion, will answer criticisms that there have been insufficient results. However, it is unlikely that the investigations will be regarded as full and thorough, given their essentially passive character.

Notwithstanding the encouraging signs in much of Program A's investigations and approaches, the general lack of indications that serious investigations into military participation into the disappearances that occurred in Guerrero, linked with the decision to reduce the capacity of analysis into institutional structures and organizations will cast serious doubt on the political willingness of the institution to uncover the truth about what exactly occurred in these cases and what role major state institutions played.

C. Initial Processes

One of this paper's objectives was to investigate whether there are any lessons to be drawn from the Government's initial processes in establishing the SPO. There are two key points to be made. First, there was a lack of understanding of the technical demands of the investigation that might have been avoided through a greater consultation exercise with entities that had been involved in similar processes. Second, the credibility of the SPO could have been greatly enhanced with a more open approach to the appointment of the key positions, including the Special Prosecutor and the members of the Citizen Support Committee.

D. Resources

The comparative perspective offered in relation to the resources currently within the SPO show that, in relative terms, it is better endowed with investigative capacity than many other similar initiatives to date. Nonetheless, in two areas this report has indicated the need for increased resources, namely in the PIA and in the PCCPIR. Almost half of the SPO's 160 employees are engaged in administrative tasks. This seems disproportionate and serious thought might be given to addressing the balance between substantive and administrative tasks. It should be possible to make the necessary increases in the PIA and PCCPIR without increasing the overall economic and personnel burdens of the institution. Similarly, a readjustment in the division of labor within Program A may allow for the development of new types of investigations without the need for further recruitment.

E. Technical Capacity

There are some positive aspects within the SPO's work that indicate a strong basis for effective investigations. These are to be found in particular in the leadership of Program A and in the PIA. It should also be noted that there was within the SPO considerable respect shown for the legal abilities of those involved in providing advice in Program C. Nonetheless, as has been elaborated at various points throughout this paper, there remains room for significant development both in the mentality of the investigation into system crimes. It is essential that the proper role of the PIA is understood and that the appropriate resources be given to it. It is also essential that the work of Program B is informed by a much more proactive methodology. While further resources also appear necessary for the PCCPIR, this team also should reconsider ways in which it might involve civil society organizations more in its work.

F. Social Impact

While there are good reasons to think that effective investigations may be carried out, there are significant concerns that opportunities are being missed as the process develops to ensure that the work of the SPO may have its maximum impact in restoring the dignity to victims and their relatives on the one hand and, in rebuilding trust in institutions more generally on the other. As has been explained it seems unlikely that the Support Committee will serve any significant function in lending a seal of approval from civil society to the efforts of the SPO. In this regard more meaningful programs of communication and involvement have to be developed. These include processes in relation to victims that keep them properly informed of advances in investigations and allow them to play as full a part as possible in the search for justice, but also an overall commitment to make the whole process accountable and durable in the form of some type of final report and documentation center.



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20 Exchange Place
33rd floor
New York, NY 10005
TEL 917.438.9300
FAX 212.509.6036

www.ictj.org | info@ictj.org