

MASTER  
box 120

# INTERNATIONAL COMMISSION OF JURISTS

COMMISSION INTERNATIONALE DE JURISTES - COMISION INTERNACIONAL DE JURISTAS  
INTERNATIONALE JURISTEN-KOMMISSION

P.O. Box 120,  
109, ROUTE DE CHÊNE, 1224 CHÊNE-BOUGERIES/GENEVA, SWITZERLAND - TEL. 49.35.45  
CABLE ADDRESS: INTERJURISTS, GENEVA

## REPORT

by

Donald T. FOX, Esquire  
Attorney-at-Law, New York

upon his

MISSION TO EL SALVADOR

in July 1978 to study

THE APPLICATION OF THE NOVEMBER 1977

"LAW OF DEFENCE AND GUARANTEE OF PUBLIC ORDER"

\* \* \*  
\* \*  
\*

September 1978

21 1032

C O N T E N T S

	<u>Page</u>
I Geopolitical Context	1
- Social and Economic Development	1
- Political Evolution	1
II Promulgation of the Law of Defence and Guarantee of Public Order	4
III Constitutional and Juridical Framework	5
- Political Constitution of the Republic	5
- Organic Law of the Judicial Power	6
- Criminal Code	6
- Code of Criminal Procedure	8
IV Analysis of the Law of Defence and Guarantee of Public Order	9
V Implementation of the Law	11
VI Conclusions	13

## I. Geopolitical Context

### 1. Social and Economic Development

El Salvador is a small, mountainous country of approximately 21,000 square kilometers. Its population growth rate is 3.4 percent. If this rate of growth is maintained, the population, which was approximately 3.5 million in 1971, would more than double by 1990 and would amount to 10.7 million at the end of the 20th century <sup>(1)</sup>. The only readily available escape valve for the pressure of this rising population was cut as a consequence of the 1969 war with neighboring Honduras. Therefore, the country faces the inexorable prospect of a population of over 500,000 persons per square kilometer, the majority of whom will be less than 15 years old, requiring massive investments in the public sector <sup>(2)</sup>.

The Salvadorean economy is predominantly agricultural, based on the intensive cultivation of coffee, which accounts for about half of export revenues, sugar cane and cotton. In recent decades, a group of active entrepreneurs has developed a number of a new sectors, increasing the industrial share of the gross national product to 19% in 1971 <sup>(3)</sup>. The reserves of foreign exchange which finance this growth in the industrial sector arise primarily from the export of coffee. These reserves reached \$ 85.9 million in 1972 and even higher in 1977, due to higher international prices for this commodity.

Although El Salvador has foreign exchange control laws <sup>(4)</sup>, they are subject to evasion. It is alleged that most of the recent export earnings have been invested abroad, rather than to continue development of the domestic economy. This is attributed to fear on the part of the relatively small group of capitalists over the prospects of subversion of the existing social and economic order.

### 2. Political Evolution

El Salvador obtained its independence from Spain peacefully in 1821 when the region of Guatemala, to which it belonged, followed the example of Mexico and declared itself independent. For a short period of time El Salvador belonged to the Federal Republic of Central America. When this Federation broke down, El Salvador proclaimed its own constitution in 1824. For the rest of the century, as was the case with most of its fellow Central American republics, liberal and conservative parties struggled turbulently and power

---

(1) Annual Report of the Inter-American Development Bank (1971)

(2) Statement by Professor Jose Hernandez, La Prensa Grafica, 23 julio 1978

(3) O.E.A., Imagen de El Salvador S-17 (1973)

(4) International Monetary Fund, Exchange Restrictions, 28th Annual Report 166 (1977)

alternated between them. From 1931 to 1944, the country was subjected to the harsh dictatorship of General Maximilian Hernandez Martinez. The military has controlled the government ever since, with presidential elections being held every five years and municipal elections every two years.

The current opposition parties, all of which were established in the 1960's, are the Unión Democrática Nacionalista, the Movimiento Nacional Revolucionario and the Partido Democrática Cristiana. In 1971 these parties established a coalition for the purpose of participating together in the presidential and congressional elections which coincided in 1972. The coalition also participated in the 1974 and 1977 elections, all of which are alleged to have been undemocratic. These claims are supported by a number of facts, including the following: voting totals in individual departments have not been published since 1972; in 1977 the army intervened in all but 38 of the 262 voting municipalities; the opposition presidential candidates in both 1972 and 1977 are in exile; and the electoral law has been amended to make it increasingly difficult for any opposition political party to function effectively.

Such facts led the three opposition parties to conclude that further attempts would be futile and none of them participated in the March 1978 municipal and national assembly elections. The leaders of the opposition political parties believe that the restrictions placed on their activities and the frustration of their attempts at democratic reform lead the younger generation to turn away from these political parties to various left-wing groups: the Partido de la Revolución Salvadoreña, a Marxist-Leninist group with an armed unit called the Ejército Revolucionario del Pueblo (ERP); the Frente de Acción Popular Unificada (FAPU) and its terrorist group Fuerzas Armadas de la Resistencia Nacional (FARN) and the Fuerzas Populares de Liberación (FPL) (5). These groups have claimed responsibility for a series of robberies, kidnappings and killings, including that of the Foreign Minister in May 1977, thereafter of a former President who was chief of police during the 1932 peasant insurrection, and of the rector of the national university in September 1973.

After the February 1977 elections, a rally held by the opposition to protest military intervention in the balloting was suppressed with force. The legislative assembly voted a state of siege, suspending certain articles of the Constitution. Repressive actions taken by the Salvadorean government during this period included even American citizens in the country and affected relations with the United States. According to the Assistant Secretary of State for Latin American Affairs, 15 notes on human rights violations were formally presented to the Salvadorean government from November 1976 to July 1977 (6).

General Romero, who took office as President on July 1, 1978, was the Minister of Defence in the preceding military government. However, he took office with a conciliatory inaugural speech that promised changes. The United

---

(5) A tabular description of these various groups in La Prensa Gráfica of July 21, 1978 is shown from the viewpoint of the existing power structure, stating "the division between these criminal groups is more apparent than real" (campo pagado or paid advertisement by Acción Patriótica Constitucional, p. 39)

(6) Hearings before Subcommittee on International Organisation, Religious Persecution in El Salvador, p.12, 95th Cong., 1st Sess. (1977)

States government apparently accepted this as a feasible commitment and lifted its former opposition to a \$ 90 million loan from the Inter-American Development Bank.

At the same time, prevailing economic conditions led to renewed demands for better treatment for urban and rural labour. Rising coffee prices in 1977 led to a large favourable balance in the balance of trade, but also fueled an increasingly rapid price inflation. As a consequence, the real standard of living for the large majority of the population was substantially lower in 1977 than it was at the beginning of the decade (7).

In October and November of 1977 a number of industrial strikes were called in support of demands for relatively modest increases in minimum wages from the then prevailing levels, which in one case was about \$ 2.48 and in another \$ 3.20 a day. During the same period, two organisations of rural workers, Federación Cristiana de Campesinos Salvadoreños (FECCAS) and Unión de Trabajadores del Campo (UTC) also agitated for an increase in the minimum wage for the cutting of sugar cane, coffee and cotton to a level of about \$ 4.40. Although the Salvadorean constitution guarantees the right to strike and although unions have been legal for over twenty years, such juridical status does not extend to agricultural workers (8). It is alleged that the law does not implement the rights that do exist and that only two strikes have been recognised as legal in the last twenty-five years. It is clear that official toleration of concerted effort by agricultural workers is markedly less than that extended to industrial workers.

These various non-violent manifestations culminated in an attempt by Bloque Popular Revolucionario (BPR) to occupy peacefully the Ministry of Labour in order to obtain a hearing for the demands made by these workers. BPR is an organisation including two major farm workers' groups (FECCAS and UTC), as well as the national teachers' union (ANDES) and several other proletarian groups. Ideologically, BPR is a rival of FAPU in seeking leadership of the masses, but this sit-in brought charges that it was trying to foment a wave of violence as part of a communist conspiracy (9).

Independently of this movement, radical left-wing groups kidnapped and killed a prominent industrialist on November 12. Such proletarian terrorism was matched by torture and assassination of campesinos by ORDEN and security forces.

The effect of these various activities was to intensify demands for new legal means to combat activities deemed to be subversive of the established order.

---

(7) Infor Press, Centro Americana, 226, p. 1a.

(8) Código de Trabajo Art. 208 recognises three classes of union: professional, industrial or shop. Art. 527 et seq. regulates the conditions under which strikes and work stoppages may be called.

(9) La Prensa Gráfica, p. 5, Nov. 12, 1977.

## II. Promulgation of 'La Ley de Defensa y Garantía del Orden Público'

On November 24, 1977, the executive branch, through the Ministry of Defence and Public Security and the Ministry of Justice, proposed the new law. On the day it received the proposal, the Legislative Assembly asked the Supreme Court of Justice, in accordance with established procedure, for a preliminary opinion on the constitutionality of the bill and promptly passed it.

At the outset, it may be useful to describe each of these official bodies and the others that are involved in the implementation of the law:

### (a) Ministry of Defence and Public Security

In the 1960's two separate offices were combined to unify control of the army and all security agencies. The army consists of draftees who serve terms of about 18 months and thereafter constitute a reserve from which certain of them may be selected for further duties. The national guard is a rural police force of professionals with a long tradition of enforcing law and order from the landholders' point of view. Additionally, there exists a treasury police and a customs police and all of these organisations have a secret intelligence section. The Ministry of Defence also controls a civilian organisation estimated to have 60 to 80 thousand members in all parts of the territory. The members of this organisation, Organización Democrática Nacionalista (ORDEN) are allowed to carry weapons and are practically immune from criminal charges when engaged in their function as a para-military security force.

### (b) Ministry of Justice

This Ministry has four principal functions: (1) to harmonise the legislation proposed by the executive branch and to provide legal assistance with respect to projected legislation proposed by other agencies; (2) to operate the penitentiary system; (3) to operate the juvenile courts and detention centres; and (4) to administer the system of commercial and property registers.

### (c) Fiscal General

In addition to a legislative, executive and judicial branch, the Constitution of El Salvador establishes a public ministry consisting of an attorney general (Fiscal General) and a defender of the poor. The attorney-general, who is named by the President, is responsible to defend the interests of the state and of society (Constitution, Article 99). This includes the responsibility of overseeing the processes of the criminal law and of taking action against any official of the security forces who violates his duties. The Law for the Defence and Guarantee of Public Order provides that prosecution can be initiated under that statute by the attorney general. In fact, the current Fiscal General has never instituted such a complaint and, although a member of his staff is assigned to the courts which try proceedings under the statute, he does not play an active role.

### (d) Supreme Court of Justice

In addition to its appellate and administrative duties, the supreme court is required to give a written opinion to legislature on any project of law that modifies or replaces one of the codes. Once the legislature adopts the law and the President promulgates it, its constitutionality can be

challenged and such a challenge must be decided by the Supreme Court. Such a petition challenging the constitutionality of the Ley de Defensa y Garantía del Orden Público is now pending before the Supreme Court, as is a petition for the repeal of the law pending before the National Assembly.

### III. Constitutional and Juridical Framework

In order to understand and evaluate objectively La Ley de Defensa y Garantía del Orden Público, it is essential to consider the legal framework within which it operates. In this connection, the most important provisions of the Constitution and relevant statutory codes are the following:

#### 1. Constitución Política de la República

The 1962 Constitution of the Republic of El Salvador is a direct descendant of the classic liberal Constitution adopted by that country in 1886.

Article 1 provides that sovereignty resides in the people and is limited to what is honest, just, and advantageous to society.

Article 7 explicitly recognises "the right of the people to insurrection".

In establishing the Judicial Branch, the Constitution establishes "a career judicial service" (Article 19). It specifies that magistrates of the Supreme Court of Justice, of the Chambers of Second Instance, and the Judges of First Instance shall be elected for a term of three years and may be re-elected. Upon the third such election, the magistrate is considered "vitalicio"; that is, he has life tenure.

Title 10 of the Constitution is entitled "Individual Rights". It states that "all men are equal before the law" and specifies the following:

- No person is compelled to do what the law does not command or to deprive himself of anything it does not prohibit. (Article 152).
- Neither the clergy nor laymen may engage in political propaganda of any kind based on religious motive or making use of the religious beliefs of the people. Likewise, the laws of the state, its government, or public officials may not be criticised in religious rites or sermons in places of worship. (Article 157).
- Every person may freely express and disseminate his thoughts provided they are not injurious to morals or to the private lives of persons. The exercise of this right shall not be subject to previous censorship ... Propaganda advocating anarchistic or anti-democratic doctrines is prohibited. (Article 158). It is interesting to note that the latter provision was first established in the 1950 Constitution. Having been adopted not long after the conclusion of World War II, "anti-democratic doctrines" apparently was intended to refer to fascism as well as communism, although neither was named explicitly.
- The inhabitants of El Salvador have the right to assemble and to meet peacefully, without arms, for any lawful purpose. (Article 160).
- No person may be deprived of his life, liberty, property or possessions except after being tried and sentenced in accordance with provisions

of law ... Every person has the right of habeas corpus before the Supreme Court of Justice or the Chambers of Second Instance not sitting in the capital, whenever any authority or individual illegally restricts his freedom. (Article 164).

- No power, authority, or official may issue orders for arrest or imprisonment except in conformity with the law, and such order must always be in writing. If an offender is caught in the act, he may be detained by any person to be immediately delivered to a competent authority. Detention for the purpose of investigation shall not last longer than 3 days, and the investigating court shall be bound to inform the prisoner in person of the reason for his detention, to hear his testimony, and to order either his release or provisional arrest, within the period stated. (Article 166).

## 2. Ley Orgánica del Poder Judicial

The Organic Law of the Judicial Branch provides that the Supreme Court of Justice shall set forth the procedures of testing the constitutionality of laws and for exercising the right of habeas corpus provided for in the Constitution (Article 48, 10a). Upon application by any person, the Supreme Court appoints investigating judges on a temporary, case by case basis, to examine any place of detention in which the prisoner in question is said to be detained. This remedy of habeas corpus or recurso de exhibición personal is designed to enable the judiciary to prevent abuses by the security forces.

This code also provides that the Supreme Court of Justice will name medical examiners attached to the courts, who are required to provide all the attestations, analyses and autopsies that are required or requested by judges in criminal matters (Article 89 - 92).

## 3. Código Penal

Article 151 of the Penal Code, as most recently amended in October of 1977, sets forth the concept of political crime.

Political crimes are defined as punishable acts directed against the international or domestic personality of the state, with the exception of slandering the nation or its symbols. It specifies that political crimes include common crimes committed with political objectives, except attempts against the person of chiefs of state. It adds that common crimes connected with political crimes are those which relate directly or indirectly to the political crime or constitute a natural and frequently utilised method of preparing or carrying out such crimes.

The second book of the Penal Code defines in some detail the acts that are to be sanctioned as crimes. These include the following specific political crimes:

- Acts destined to subvert part of the territory or the state to a foreign power or to depreciate its independence -- 1-10 years (Article 373).
- Acts directed toward dissolving the unity of the state or its territorial or constitutional integrity -- 7-12 years (Article 374).



- Moving frontier demarkations to lessen the territory of the state -- 5-10 years (Article 375).
- Promoting, establishing, organising or directing associations with the objective of the violent overthrow of the legal and political order of the state or attempting in any form to subvert by violent means the economic or social orders protected by the political constitution -- 3-5 years. Participation in subversive organisations which teach or spread propaganda favouring anarchistic or anti-democratic doctrines -- 1-3 years (Article 376).
- Promoting, organising or directing associations or branches of foreign institutes that preach anarchistic or anti-democratic doctrines -- 1-3 years. Participation in such organisations -- 1/2-1 year (Article 377).
- Propagating in any manner, including importation or sale of any printed or other type of material, or making propaganda for anarchistic or anti-democratic doctrines -- 1-4 years (Article 378).
- Unjustified possession, either personally or in a dwelling place, office or shop in which the person works, of materials or objects referred to in the prior paragraph in such quantity as to create a presumption of an intention to spread anarchistic or anti-democratic doctrines -- 1/2-1 year (Article 379).
- Knowingly cooperating in the execution of acts of propaganda or spreading anarchistic or anti-democratic doctrines; renting or allowing the use of houses or sites destined to the carrying out of acts of spreading such doctrines; or distributing propaganda, painting, drawing or fixing signs containing any element of subversive propaganda -- 1/2-2 years (Article 380).
- Treason -- 15-20 years (Article 381).
- Provoking war, reprisals or international enmity -- 3-15 years. Suggestions of terminating diplomatic relations or of vexations or hostile acts -- 5-12 years (Article 383).
- Divulging political or military secrets relating to the security of the state -- 2-6 years (Article 384).
- Espionage -- 4-10 years (Article 386).
- Sabotage -- 1-10 years (Article 387).
- Violation of treaties with foreign states -- 1-3 years (Article 389).
- Rebellion not authorised by Articles 5 and 6 of the Constitution -- 1-5 years (Article 392).
- Sedition -- 1-4 years (Article 393).
- Fomenting riots -- 1/2-1 year (Article 394).
- Vilifying the nation or its symbols -- 1-6 years (Article 395).
- Riots or rebellions which are disbanded before causing damage will not cause sanctions against mere participants and will cut in half sanctions against promoters and organisers (Article 396).
- Conspiracy followed by preparatory acts to commit crimes of rebellion or sedition -- 1/2-2 years (Article 397).

- Public officials who do not oppose rebellion or sedition by all means within their power -- 1/4-1 year (Article 399).
- Acts of terrorism -- 5-20 years (Article 400).
- Attempted terrorism -- 3-7 years (Article 401).
- Preparation to commit terrorism -- 2-6 years (Article 402).
- Conspiracy to commit terrorism -- 1-3 years (Article 403).
- Public instigation to commit a crime -- 1/2-5 years (Article 404).
- Publicly making excuses for a crime or a convict -- 1/2-2 years (Article 405).
- Public instigation to disobedience of the laws, to hatred or collective violence -- 1/2-1 year (Article 406).
- Membership in an organisation having as an objective the commission of any crime -- 1-5 years (Article 407).
- Public intimidation -- 1-6 years (Article 408).
- Interference with legal meetings by violence, intimidation or hostile manifestations -- 1/2-1 year (Article 409).
- Illegal possession of a firearm in public or official places -- 1/2-1 year (Article 410).

#### 4. Código Procesal Penal

Article 496 of the Code of Criminal Procedure provides that extra-judicial confessions have no probative value in connection with political crimes as defined in Article 151 of the Penal Code. Until this Article 496 was amended in October of 1977, it provided that extra-judicial confessions could be used in connection with common crimes, subject to the critical appreciation of the judge ("Las Relgas de la Sana Crítica"), and only in accordance with special conditions designed to insure their probatory value. If the extra-judicial confession was taken by the security forces, it had to be taken within 24 hours of capture and witnessed by two persons, not belonging to the security forces, who could testify that it was given spontaneously.

Significantly, when the law was amended in October of 1977, these limitations were loosened. Thereafter, the confession could be taken within 72 hours of capture and the witnesses, who could be members of the security forces which capture the accused, could have heard the confession separately, in different places and at different times, as long as they could declare the accused was not subjected to physical force or intimidation. The revised law provides that such an extra-judicial confession to a common crime can constitute sufficient proof for provisional detention. It also provides that in matters excluded from jury trials, the judge will apply the norms of "Sana Crítica" when the extra-judicial confession is the only proof of the crime.

Article 499 of the Code of Criminal Procedure sets forth the condition for the capacity of witnesses and states expressly that accomplices are not competent as witnesses.

#### IV. Analysis of La Ley de Defensa y Garantía del Orden Público

The Legislative Decree has two preambulatory paragraphs. The first refers to the duty of the state to take steps necessary to guarantee the maintenance of a republican, democratic and representative system of government. The second refers to the Constitution's ban on spreading of doctrines that are anarchistic or contrary to democracy and also points to the severity of terrorist acts and the provocation of international subversion. The paragraphs conclude that the government must have legal means to assure the exercise of individual rights and freedoms and the general welfare of society, giving full standing to the Universal Declaration of Human Rights.

Thereafter the law specifies eighteen categories of activity which become crimes against the constitutional public order when committed in order to introduce and support totalitarian doctrines contrary to the democratic regime established by the Constitution. The first four of these refer to acts that are already amply characterised as political crimes in the Penal Code. Article 5 through 7 deal with offences that the Penal Code considers as conspiracy or the promotion of anarchistic or anti-democratic doctrines. However, the Penal Code is clearly oriented toward a careful definition relating to violent overthrow of the state or subversion by violent means. By contrast, the new law is vague and subjective, referring to conspiracies or attempts to commit an "offence against the constitutional regime and the peace of the state"; to participating in meetings whose objective is "to depose the legally constituted government"; and to spreading doctrines "that tend to destroy the social order".

Article 8 and 9 refer to relations with foreigners in order to carry out any of the specified offences, whether or not any of these offences are actually committed.

Article 10 relates to governmental employees who do not carry out orders of higher authorities in special and severe circumstances. It does not purport to limit this obligation to orders which are constitutionally valid.

Article 11 expands the ambit of sabotage by penalising any action or omission "whose objective is to alter the normal development of the productive activities of the country".

Article 12 refers to inciting to as well as achieving any interruption of public services and Article 14 relates to membership in organisations that maintain doctrines which are anarchistic or contrary to democracy.

Article 13 refers to association with others in order to prepare or carry out "any of the offences contemplated in the present law".

Articles 16 through 18 also refer to activities already penalised in the Penal Code and again simply expand their ambit by referring to "activities against the public order" or "the legally established regime".

The law then sets forth four elements to be taken into consideration in determining whether or not any of the acts coming within the preceding eighteen paragraphs have been carried out "with the intention of introducing or supporting totalitarian doctrines". These are (a) the identity of the

person against whom the acts are committed, specifically whether or not they are public officials, members of the armed forces or businessmen; (b) the number or status of the participants; (c) the fact of acknowledging participation in the event through mass media; and (d) the connection of the actions with doctrines through letters, signs or symbols of "underground groups" that appear prior to, simultaneously or following the execution of the offence".

The first of these elements appears to create an irrelevant, invidious distinction between crimes against, for example, businessmen and those against peasants. It is contrary to the constitutional provision of equality before the law. The second element is both vague and subject to varying interpretations of a wholly subjective nature. Acknowledgement of participation through mass media presents an occasion for abuse as well as establishing a very remote and indirect link between an act and its real authors. The fourth element is equally vague, subjective, and easily abusable by persons desiring to cast guilt on others. It is difficult to see any justification for specifying these criteria for evaluating the acts, within the context of the Constitution and Penal Code of El Salvador.

The law then proceeds to establish the punishments for the defined crimes. In general, these increase the severity of the punishments over those provided in the Penal Code. The severity is further increased by providing that imprisonment is required in all cases of conviction and in derogating from three provisions of the Penal Code, including one that permits a decrease in sentence in such cases as that in which the only proof against the accused is a judicial confession and the accused surrendered voluntarily.

Finally, the new law provides that if any of the offences are susceptible of a more serious penalty under the Penal Code, the court shall be obligated to give such greater penalty.

Title 2 of the new law provides that proceedings are to be held in the first and second chambers of the second level criminal courts in San Salvador, with appeal to the Supreme Court of Justice. This puts a very heavy burden on the four judges who, in alternate weeks, hear the cases brought under this law in addition to their normal judicial work as a second level criminal court judge.

Title 2 of the law also provides explicitly that offences under the law and the related common crimes will not be subject to hearing by a jury. Although trial by jury is not a constitutional right in El Salvador, the total exclusion of this class of case from hearing by a jury of one's peers leads irresistibly to the implication that participation by the people would not conduce to the objectives of the law. Since the law purports to guarantee a republican, democratic and representative system of government, this is a very damaging implication.

Title 3, in my opinion, is the most significant part of the new law. In setting forth the procedure to be followed under the law, this part of the law provides that the court may decree provisional arrest on the basis of "any presumption or indication about the participation of the accused". Within a period of 45 days, the court's report has to be considered by all the judges of the court, which has an 8-day period to consider the report and thereafter a 12-day period to make a final decision. If an appeal is made

to the Supreme Court of Justice, the accused is not to be liberated pending the decision. During the initial hearing and the plenary hearing any type of evidence that will lead to a conviction may be introduced as well as the evidence referred to in the Code of Criminal Procedure. The law adds that "known or notorious events or actions that belong to the public domain ... shall be accepted as evidence if deemed prudent".

Finally, the law exceptionally provides that if, in his declaration, the accused implicates another person, an inquiry can be opened against that person as long as the statement is corroborated by other evidence and when it is corroborated by more than one item of evidence it may be considered as an element of presumption.

In sum, the procedure established under this law invites an abuse of power on the part of the security forces and makes it exceedingly difficult for the judiciary to live up to its obligation to make an independent and critical evaluation of the proof in a criminal case. The amendment of the Code of Criminal Procedure to permit the use of extra-judicial confessions as a basis for decreeing provisional detention assures that the security forces will attempt to get such a declaration in almost every case. Once this decree is issued, the accused will be legally confined for a substantial period of time in any event. By permitting the court to take into consideration "notorious events" in order to evaluate the offences, presumably to determine whether they are committed with an intent to introduce or support totalitarian doctrines, invites the court to be swayed by the extraneous and inflamed allegations made in the news media.

To depart from the well-considered rule in the Code of Criminal Procedure that does not countenance incrimination by an accomplice opens another path of abuse to the security forces. Providing a captured suspect an opportunity to obtain his release by inculpating someone else almost assures a widening ambit of consequences from most arrests.

#### V. Implementation of the Law

According to a study prepared in July of 1978 by the Secretaría de Comunicación Social del Arzobispado de San Salvador, 715 persons have been captured by the security forces under the Ley de Defensa y Garantía del Orden Público from December 15, 1977 to July 9, 1978. Of these, 590 were freed after, in a majority of the cases, being beaten. Two were assassinated and 21 "disappeared". Of the 103 brought before the Criminal Court in San Salvador, 88 were brought to the First Court, of which 29 were freed and 59 continue as prisoners. By contrast between the number brought by the security forces to the First Court and to the Second and the differing results in these courts clearly suggests that the security forces are concentrating on the court which will handle their activities most favourably.

In fact, 5 members of the UDN have signed and submitted to the Supreme Court of Justice under the date of July 11, 1978, a complaint against the First Criminal Court asking for an investigation and sanctions against the judges in accordance with applicable laws. The application alleges that the judges of the First Court deny the right of the accused to be defended by counsel; that they use means of delaying the proceedings and the incarceration of the accused; that despite obvious evidence of beatings at the time of

capture and mistreatment in police custody, the judges of this court refused to order the intervention of a medical examiner and refused to take judicial notice of the obvious results of the mistreatment. The judges of the court denied to me these allegations, but the two defence counsel with whom I spoke that are most familiar with proceedings under this law and who are not members of the Partido Unión Democrática Nacionalista confirmed that the allegations are amply supported by evidence.

If these allegations about the First Criminal Court are valid, the Law of Defence and Guarantee of the Public Order will have already corrupted the judicial process in El Salvador. Whether or not the evidence is found sufficient to support the allegations, the nature of the procedure provided for by the law tends to put the judiciary in the control of the organisations of public security.

Although Article 14 of the law provides that prosecution can be initiated by the Attorney General, in fact all prosecutions brought to date have been brought directly by the security forces. The greatest number of these cases, according to the study made in the office of the Archbishop of San Salvador, are against persons arrested because of their membership in suspect organisations or for distributing propaganda. Again, the majority of those captured ~~over~~ overthrow of the government, such as UNO, BPR, UDN, FECCAS-UTC, ANDES, AES and the PDC. Many of these were subsequently released, in contrast to alleged members of the communist party or violent left-wing groups, all of whom are either still in custody, have disappeared, or have been subjected to torture.

Although members of the government insisted that strikes did not become crimes under the law unless committed with an intent to implant totalitarian doctrines, six such strikes have been dissolved under the law from November 25, 1977 to July 6, 1978. Most of the arrested strikers were ultimately released. During the same period, eight mass meetings were dispersed and two non-violent occupations of idle land were suppressed.

The office of the Archbishop has also produced, under date of July 23, 1978, a list of persons detained under the law who have been tortured while in police custody. According to this list, 38 persons brought before the penal courts had evident signs of torture and physical mistreatment. Only 7 of these were seen by medical examiners who attested to their physical mistreatment and in no case was any sanction ever taken against the police officials responsible.

Evidence of physical mistreatment by security forces is widespread, according to a file of newspaper clippings maintained in the Archbishop's office. There seems to be no concerted effort to conceal this fact, except for cases such as the recent detention of Dr. Eduardo A. Espinoza Fiallos, who was released on July 20. Dr. Espinoza disappeared on June 17, 1978 and, despite concerted attempts to locate him, was not found until brought before the court. His declaration in the files at the Archbishop's office indicates that one reason for the detention beyond the time limitations provided for in the law was to allow time for the external evidences of torture to disappear (10).

∟ belong to organisations which do not seek the violent

---

(10) La Prensa Gráfica, p. 2, July 21, 1978

According to defence counsel, many tortured prisoners have refused to press their claims because of fear of reprisals. However, several such claims are now pending before the courts and, in the event that no investigations are made, an irresistible implication will be that the judiciary is unwilling or unable to control abuses by the security forces.

It is my conclusion that the incidents of mistreatment of prisoners by security forces are sufficiently numerous and inter-connected to constitute a pattern or system. The decision of the European Court of Human Rights in the 1978 case of Ireland v. the United Kingdom is applicable:

"It is inconceivable that the higher authorities of a State should be, or at least should be entitled to be, unaware of the existence of such a practice. Furthermore, under the Convention those authorities are strictly liable for the conduct of their subordinates; they are under a duty to impose their will on subordinates and cannot shelter behind their inability to ensure that it is respected" (11).

The obligation of El Salvador to prevent abuse of prisoners by the security forces arises both from its own political constitution and the American Convention on Human Rights, which El Salvador has recently ratified. Article 5 of this Convention imposes the following international obligations on El Salvador:

1. Every person has the right to have his physical, mental, and moral integrity respected.
2. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person" (12).

## VI. Conclusions

1. La Ley de Defensa y Garantía del Orden Público has become the focus of opposition by a wide spectrum of groups, including the violent and clandestine left-wing, all opposition political parties and the church.
2. Substantively, the law adds nothing of value to the sanctions already contained in the Penal Code.
3. The additions to the ordinary criminal law introduced by the statute are uniformly bad:
  - (a) the vague and general language directed toward conspiracies and anti-democratic propaganda constitute a serious infringement on the rights of free speech guaranteed by the Constitution and by international treaties to which El Salvador is a party;
  - (b) the invidious discrimination among citizens decreed in the law as an element to be taken into consideration in evaluating the acts

---

(11) European Court of Human Rights, Judgment in Ireland v. United Kingdom (January 18, 1978), International Legal Materials 680, 701

(12) OAS Treaty Series, No. 36, (OEA/SER.A/16, English) (1969)

condemned by the law is undemocratic and contrary to basic provisions of the El Salvadorean Constitution;

- (c) the procedure introduced by the law reduces the independence of the judiciary and its capacity for healthy criticism that is otherwise guaranteed in the law. Furthermore, it undermines the ability of the judiciary to resist attempts by the security forces to produce prisoners, regardless of their real connection with terrorism, subversion or any other violent act against the established order.

4. Although the effects of the law would seem to clearly be contrary to the stated intention of the government to assure individual rights and public order and general welfare, the most serious abuses that take place are to be corrected only by amendment of the October 1977 change in the Code of Criminal Procedure. As long as the standards there provided for receiving extra-judicial declarations are preserved in considering cases under the law, no overhaul of the text of the Law for the Defence and Guarantee of the Public Order will be sufficient to achieve its ends.

5. The Constitution of El Salvador and its ordinary criminal laws provide a sufficient legal basis from which to achieve a society in which essential freedoms are preserved and attempts at violent overthrow of the government are repressed. El Salvador has qualified people of good will who are able to implement these laws. They should be encouraged and assisted as much as possible because the problems of governing the country are great and are becoming increasingly urgent.

Donald T. Fox

\* \* \* \*