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WOLA ■ WASHINGTON OFFICE ON LATIN AMERICA

# THEMES AND DEBATES IN PUBLIC SECURITY REFORM

A manual for civil society

## Criminal Investigations

Gustavo Palmieri

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## Themes and Debates in Public Security Reform Introduction to the Series

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The Washington Office on Latin America (WOLA) has monitored police abuse and U.S. and international police assistance since our founding in 1974. Peace processes and political transitions set the stage for efforts to reform public security functions, demilitarize internal security, professionalize police forces and increase democratic accountability for security policies. In El Salvador, Haiti and Guatemala, large-scale reform processes have been undertaken and have received significant support from the United States and the international community. More than any other region, Central America and Haiti have been a testing ground for international assistance for post-conflict security reforms.

As WOLA monitored the evolution of police reform in the region, we became convinced that the long-term consolidation of the police as a professional, effective, and apolitical institution depends on developing greater citizen involvement in and support for public security reforms. Reform processes are taking place in the context of dramatic increases in crime and face constant resistance and challenges from authoritarian sectors. Without a strong domestic constituency for police reform, these processes may founder. To support civil society organizations in the region seeking to engage with issues of citizen security, WOLA launched the “Advocacy Training Program for Police and Judicial Reform” in Central America in 1996 with support from PRODECA.

*Themes and Debates in Public Security Reform* aims to make the issues of public security reform more accessible to civil society organizations. This series examines selected key aspects of police reform, drawing on lessons from Central America, the United States, and the world. Each section frames the debates on the issues, provides examples of how issues have emerged and been resolved in different contexts, and offers examples of civil society advocacy for police reform. *Themes and Debates* also explores how key actors have affected police reform in various countries, including the role of international donors, national decision-making structures, and civil society. The series includes:

- 1: Police Recruitment
- 2: Police Training
- 3: Internal Controls and Disciplinary Units
- 4: External Controls
- 5: Community Policing
- 6: Criminal Investigations**
- 7: International Police Assistance

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## CRIMINAL INVESTIGATIONS

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### 1. Investigations in Adversarial and Inquisitorial Legal Systems

Traditional analyses divide police functions between order maintenance and crime prevention activities, and after-the-fact law enforcement activities such as collecting evidence to establish guilt in a criminal trial.<sup>i</sup> This paper focuses on the latter crime-fighting activities.

Police investigations are one part of a larger legal process in which police coordinate with other institutions, such as the district attorney or prosecutors office (the *fiscal* or *ministerio público* in much of Latin America). This separation of powers is an important way in which democracies seek to control the state's coercive power. However, this essential oversight function appears to be far stronger in common law, adversarial legal systems than in the civil law, inquisitorial legal system in place throughout Latin America.

Under inquisitorial legal systems, the judge is primarily responsible for the criminal prosecution. The system is focused on the accused and, once the minimum evidence necessary is obtained, his or her pre-trial detention is ordered. Detention serves to punish the suspect, to create pressure on the suspect to confess, or simply as a "fall-back" in a system which is frequently incapable of gathering sufficient evidence for a trial to go forward. Thus, the investigation's first and principal aim is to arrest the accused rather than to establish what actually happened. The investigative process itself is written, secret, formal, and intermittent. The case file is a compilation of chronologically arranged documents and affidavits covering a wide range of subjects. On the rare occasions in which a sentence is issued, it becomes just one more document in the file based on the information in the preceding pages.<sup>ii</sup>

In recent years, a number of countries throughout Latin America have undertaken reforms of their criminal justice systems incorporating aspects of the adversarial model, seeking to limit or end inquisitorial processes. The adversarial model clearly distinguishes between the roles of prosecutor and judge, identifying the judge as the arbiter in a conflict between two parties – the prosecution and the defense. Unlike the inquisitorial system, in which underlying legal principles require the prosecution of all crimes, in the adversarial system both the prosecutor and the victim have broad powers of discretion. They may reject the charges, file suit, plea-bargain, seek arbitration or mediation, and so forth. Of course, a public prosecutor may also use these faculties to exert various kinds of pressure on the accused.

In adversarial systems, the prosecutor directs (or receives from the police) a highly informal investigation since, as a rule, the only admissible evidence that which is accepted during public and oral trial proceedings. The purpose of the investigation is to obtain information that will convince the prosecutor that sufficient proof exists to prosecute and convict the accused. This makes it futile to document officially everything taking place as typically happens in inquisitorial processes. Thus, pre-trial detention is understood as an extreme measure to ensure that the defendant will appear for trial. As such, pre-trial detention cannot be ordered unless the requirements for holding a trial have been met and there is reason to believe that the defendant will not appear. Such an order, therefore, is only issued during the relatively advanced

stages of the investigation.

Clearly, the differences between the two systems lead to different approaches to police investigation. During investigations in inquisitorial processes, a case file remains open for an indefinite period, and items are added as information is obtained by the police or others involved. Since this evidence does not have to be articulated as a formal charge, it does not matter very much if no one is in charge of the investigation.

At a practical level, the two systems differ greatly in their oversight of police investigations. In the adversarial system, in addition to the prosecutor's oversight function (which is virtually nonexistent in the inquisitorial system), the judge also performs an oversight role and does not conduct the investigation. Under the inquisitorial system, the individual police officer is rarely identified, nor will he or she testify about the events; instead, the officer's signature authenticates documents introducing evidence into the proceedings, greatly reducing the potential for judicial oversight of police activities.

## **2. Criminal Investigations in Latin America: A History of Malign Neglect**

### **2.a Dysfunctional and atrophied criminal investigations**

Latin American security policies have not focused much on criminal investigations. In different countries at different times, a mosaic of irregular, punitive methods have been employed in situations where legal and theoretical guidelines called for judicial and criminal investigations. Under recent dictatorships, for example, security policies throughout the region were premised on a doctrine focused on an "internal ideological enemy," and the corresponding security force was the military rather than the police.<sup>iii</sup> This doctrine blurred the distinction between common criminals, guerrillas, subversives, political opposition, disadvantaged sectors, and labor organizations, and has had lasting repercussions. Criminal investigation was rendered dysfunctional by governments who did not need proof to eliminate their "enemies" nor want evidence of atrocities or illegal behavior by their "friends."<sup>iv</sup>

With the restoration of democracy, the most obvious security practices inherited from repressive regimes were summary executions of supposed criminals, the widespread use of torture, and the fabrication of evidence to build a case. Such methods undermine the development of investigative capabilities in a democratic context. But other deeply ingrained practices have also come to substitute for an atrophied criminal investigation system. "Investigative procedures" are frequently designed as, or even supplanted by, continuous police surveillance operations targeting selected social sectors. Police assiduously detain and harass members of the targeted groups, either using the official excuse of ascertaining their backgrounds or lifestyles, or accusing them of committing a crime, without presenting any concrete proof. Arrests are made without prior investigation – often without any intention of opening an investigation – yet police forces evaluate the effectiveness of their agents based on arrest rates.

While there has been little interest in developing a criminal investigations system to respond to citizens' crime complaints, political and economic elites do want information about certain types of criminal activity. The information will never be used as evidence in trial and therefore need not meet rigorous evidentiary standards. Rather, it is a tool for political survival or for extortion or bargaining. Information is amassed from confidential sources, wiretaps,

surveillance, informer networks, and so on. As a result, broad, costly, and often overlapping internal information and intelligence networks evolved in countries that allocated negligible resources to their criminal investigations divisions. Another information-gathering strategy is the creation of criminal investigation units, either within legal public security agencies or as illegal, para-statal entities. Such units operate under centralized command, their organization reflects a political map rather than a “crime map,” and their activities are not controlled by the judiciary or prosecutors’ offices.

## **2.b The social function of criminal investigation**

The most serious consequence of this neglect and perversion of criminal investigations is that it undermines the social service that they should provide. In many countries, investigative capabilities are not designed as an instrument that the state can use to address specific social problems. Rather, governments use investigations to retain control through coercion when they lack legitimacy, or investigations reflect conflicts between political sectors. Therefore, even as countries across the globe reexamine their law enforcement tactics and criminal justice systems, this kind of scrutiny acquires particular urgency in Latin America.

In seeking to address social problems, governments have many alternatives to criminal investigations. Indeed, many analysts have noted that there are serious limitations to criminal investigations. Given the multiple variables influencing crime rates, we should only expect law enforcement to produce small, localized effects and have little impact on certain types of crime such as larceny, theft on public transportation or in the streets, and domestic violence. While it is true that more efficient punishment of crime raises the opportunity cost of committing crime, this approach has serious limitations in situations where increasing poverty and deteriorating social conditions contribute to rising crime rates. Nor should criminal investigations be the primary strategy for resolving conflicts. To adopt such a punitive approach would imply a serious lack of concern for peoples’ lifestyles and their very lives.

It would be a serious mistake, however, to generalize analyses of the limitations of criminal investigations across countries with very varied law enforcement records. Examining homicide – a crime for which the statistics are more reliable and on which the impact of criminal investigation are presumably greater<sup>v</sup> – nearly 45 percent of cases are solved in the United States,<sup>vi</sup> while in Chile, between 34.6 and 48.9 percent of cases tried result in a conviction.<sup>vii</sup> The percentage drops sharply to just under 30 percent in Honduras (1997), and approximately 7 percent in El Salvador (1996).<sup>viii</sup> Clearly, in many countries, improving investigations remains a critical challenge and an important tool of social development.

In some countries, crimes such as abduction, homicide, extortion, illegal arms trafficking, and gang activity are so widespread and severe that they are having a profound impact on social relations and strain democratic governments’ abilities to respond. Obviously, any strategy to address these problems, including crime prevention initiatives, will require on serious criminal investigations rather than simply increasing patrols or police presence.

Moreover, impunity for crimes such as political murders, official corruption and the involvement of security agents in organized gangs has shaped the balance of power and conduct of politics. Against this backdrop, progress in solving such crimes and ending impunity is intimately linked to genuine democracy-building.

### **3. Criminal Investigation and Judicial Reform**

#### **3.a Criminal justice reforms**

Efforts to improve criminal investigations require broad reforms that go beyond the police and involve other institutions with very different organizations, cultures and backgrounds, such as the judiciary and public ministry. Reform processes rarely address all the related institutions in a coordinated fashion, and changes in one institution may be obscured by the lack of change in another. Given the size of the overall system, reforms must be multi-faceted. This explains the failure of limited reforms whose effects are absorbed by the rest of the system. In either large-scale or gradual processes, reforms must also reflect a long-term strategy in which each step supports further changes in the right direction, rather than generating hurdles.

Most Latin American countries have started or are in the midst of comprehensive criminal justice reforms that affect every step from the initiation to the closure of a case. Reforms seek both to strengthen democracy and increase the efficiency of legal proceedings. Achieving these objectives depends on the legal design and practical implementation of the reforms. Reforms are adopting key elements of adversarial legal models, such as separating the functions of prosecutor and judge. This involves distinguishing between the prosecutor directing the investigation, who requires the information to determine whether or not to indict, and the judge, who must ensure that the investigation does not infringe on individual rights and protections. This separation of powers entails reforming the prosecutor's office, called the public ministry. Under Latin American inquisitorial systems, public ministries have had various oversight powers, though they were very limited in practice.

The redistribution of powers and functions is not the only, or even the main aspect of, criminal justice reforms. To varying degrees, new criminal procedure codes create alternatives to trial in an effort to allocate legal resources more effectively. These codes try to reduce the discrimination inherent to a criminal justice which responds to "alleged" guilt for minor crimes with prolonged imprisonment in inhuman conditions. Among the available alternatives are the suspension of proceedings on the condition that the accused comply with certain actions; giving the public ministry discretion over whether to prosecute in certain circumstances and for certain types of crime; expedited trials; arbitration; and increasing the number of crimes that are only prosecuted at the victim's request.

In contrast to the abstract legal obligation to investigate all incidents and crimes equally, the legal framework establishing the limits and criteria for judicial discretion in selecting cases should specify a coherent system with specific decision-making responsibilities on cases – a power which was previously the exclusive terrain of the police. Without clear guidelines for case selection, the police and then the courts – which still have to decide where to allocate their resources – use vague criteria that cannot be clearly articulated because they are not legal. Without fair and practical guidelines to organize case selection, bureaucratic processes tend to assign staff and funds to comparatively minor cases.

#### **3.b The public ministry**

In addition to improving individual case management, powers such as preparing an indictment, assuring a higher profile for the victim (or even for civil society organizations) in criminal proceedings, and choosing between a range of alternative sentencing options can

strengthen the role of the public ministry in formulating criminal justice policy and overseeing police conduct. Hierarchically structured public ministries should, within legal parameters, be able to design, implement and evaluate policies for managing different types of cases. This may be overly optimistic given that there are few tangible results to date from the creation and reform of public ministries in Latin America. It is clearly a challenge over the medium term or longer. While the “new public ministries” are in incipient stages, a wrongheaded approach to fundamental aspects is likely to produce bodies that fail to develop an institutional identity and perform poorly. Among the problems are the approach to institutional organization, staff selection and deployment, and the institutional relationship with security forces and other agencies.

### **3.b.1 Structure**

As with other areas of substantive reform, the most worrisome pitfalls and weaknesses have to do with assigning a clear role to the public ministry. While most reform processes create public ministries that are autonomous from the executive, legislative, and judicial branches, there is a risk that they will develop into “appendages” of the judicial structure and culture or float ambiguously between the judiciary and the police.

Judicial systems are founded on the principles of impartiality and autonomy. These principles must be strengthened if judges are to exercise effective oversight of criminal proceedings. Such principles are not necessary for the prosecutorial body which, despite a certain degree of autonomy, more closely resembles an executive agency, rather than an oversight agency. There is no reason why prosecutors’ jurisdiction and areas of expertise should parallel those of the judiciary or the police when other forms of organization are more effective. This is not to suggest that the judiciary or police should be ignored, simply that they should coordinate with the public ministry, not determine its role nor dominate its work. Moreover, the structure of the public ministry should take into account the existence of myriad administrative oversight agencies (central bank, general audit, comptrollers, etc.) which are crucial in the prevention or investigation of unconventional crimes (financial fraud, environmental crimes, contraband, etc.). In sum, the effectiveness of the public ministry depends on a flexible structure that enables it to coordinate its activities with, and adapt to changes in, the judicial, police, and administrative spheres.

The evolution of the public ministry in **Guatemala** provides an interesting illustration of some of the pitfalls. The public ministry first opened offices in areas where district courts (*juzgado de primera instancia*), until then in charge of investigations, already existed. The lack of a regional structure, however, hampered policy planning and coordination. And, because these prosecutorial offices shared a similar institutional structure and culture with the judiciary, they inherited many of its critical weaknesses, including the delegation of functions to administrative personnel and excessively formalistic investigations. This was compounded by the judiciary’s unwillingness to relinquish control of investigations. At the same time, the public ministry’s capacity to direct police investigations has remained weak. In many areas of the country there is no police presence to assist the ministry. And in areas such as Guatemala City, where the police are present, investigations are not coordinated effectively and there are no institutional guidelines on how to develop coordination and collaboration. The level of distrust between the two institutions is such that, on many occasions, they have opted to work in a parallel fashion to avoid sharing information. The public ministry has even

converted its Criminal Investigations Directorate – originally envisaged as a technical division – into an internal armed police corps.

In addition to relations with the judiciary, other factors impinge on the role of the public ministry. In El Salvador, prior to the 1998 reform of the Criminal Procedures Code, prosecutors were assigned to offices of the Criminal Investigations Division of the police with the aim of supervising police investigations under new constitutional provisions. Most of the prosecutors ended up working on tasks that previously had been carried out by police legal advisors.

In structuring the public ministry it is vital to design a deployment plan that:

- Takes local issues into consideration, but does so under a broader regional framework that permits evaluation and planning.
- Is responsive to specific issues at the national or regional level (ethnic, environmental, migration, family, corruption, etc.). Each issue should be separately evaluated to determine whether to create divisions in each jurisdiction or at the regional or central level.
- Coordinates with other institutions in regard to the role of the victim, who should not be seen solely as a complainant who triggers a bureaucratic procedure.
- Decides on procedures for the public ministry to receive input on policy design from other government branches or sectors of society. Various legal frameworks exist. In Guatemala, the public ministry law delineates executive branch involvement. In Honduras, the public ministry has a Citizens Council comprised of diverse sectors. The reports, records and instructions that public ministries must provide to legislative committees provide another channel for policy input. Nonetheless, it is important to acknowledge that in practice there has been little policy input from these institutions. This seems to reflect the purely consultative nature of these relations, the history of weak legislative oversight and fiscal responsibility, and government bureaucracies unaccustomed to dealing with prosecutors and ambivalent about the value of coordinating with them.

### **3.b.2 Selecting public prosecutors**

Experience shows that at least two factors are key to guarantee a respectable level of independence from political authorities: transparent selection procedures for prosecutors and an array of guarantees to help them function effectively and independently. Top leadership will set the tone for the institution and the appointment of the attorney general is key. Beyond political affinity, which will undoubtedly approximate the governing party, candidates should be selected whose backgrounds indicate that initiative and a reasonable measure of autonomy can be expected of them.

In **Honduras**, the law requires that the Attorney General be elected by a two-thirds vote of the National Congress using a slate of candidates previously selected by representatives of public agencies and civil society organizations. These regulations



appear to meet the requirements for an appointment based on demonstrated qualifications and affirmed by a vote of political support.

The operations of the public ministry must be solidly grounded in the selection of competent prosecutors. This presents a challenge to many reform processes as, during a relatively protracted initial phase, a large number of important positions must be filled and there are often few qualified personnel available. Here again, the solutions adopted depend on the political momentum driving judicial reform, which is often characterized by apparent political consensus but also tremendous improvisation.

Following the 1998 reform in **El Salvador**, staff members with some experience but without law degrees were retained as prosecutors – although it is assumed that a deadline will be established by which they must graduate. This has added another hurdle to the process of strengthening the public prosecutor's office, as prosecutors must work with judges and defense attorneys who have law degrees and with a police force that may be the best educated in the region.

In many countries, appointments and promotions of public officials are arbitrary and irregular. For this reason, the Honduran public ministry used a private, independent consulting firm to select both new prosecutors and detectives to staff its criminal investigations division. The transparency of this approach, which the public ministry deemed the only one appropriate in the national context, was crucial to its public credibility.

Despite current trends, the attorney general – the highest official in the public ministry – still has significant power to appoint, remove, or reassign prosecutors, either provided for in legislation or, as in the case of Guatemala, due to delays in passing laws regulating the position. Although the public ministry – unlike the judiciary – is structured hierarchically, each prosecutor has such important powers that strict requirements for appointment, removal, and rotation are necessary. Requirements should include both transparent competition for staff selection and career positions and special commissions and tribunals to order the removal of prosecutors. Strict guarantees on these issues are necessary if the institution is to endow its personnel with significant discretion and flexibility in their work. Still, good selection procedures are useless if there is no effort to curtail excessive and illegal delegation of functions to administrative personnel.

Finally, judges can and have played an important role in preventing or supporting the development of the public ministry. When the Honduran public ministry was founded in 1994, the failure to pass procedural reforms threatened to impede its development. In response, the Supreme Court issued a series of rulings that clarified the roles of judges and prosecutors until new laws could be passed. By contrast, in Guatemala, despite legal reforms, judges continue to order pre-trial detention of defendants, even when no prosecutor has requested detention and they have no legal basis for the action.

#### **4. Police Reforms**

While police reforms address only certain aspects of the criminal investigative process, it is critical to develop a strategic approach to improve the performance of police units responsible for investigations. A number of experiences demonstrate the weakness of creating specialized investigative corps in the absence of broader reforms of the penal system such as reform of

criminal codes, effective procedures for oversight and cooperation with the public ministry, reforms to increase transparency, oversight, professionalism in the police agencies housing these special corps, and so on. Criminal investigations are impossible without adequate training and equipment. But simply increasing resources and training will generally fail to overcome a hostile environment or will be used to enhance the short-term credibility of manipulated investigations.

#### **4.a Control of investigative police units**

Police investigative units may be placed under a number of different government agencies – the public ministry, the judiciary, the national or local police, or directly under the executive through a particular ministry or secretariat and come under their administrative control. Organizational hierarchy and administrative control confers important powers for deciding crime policies, including selection of personnel, training, career advancement, chain of command, internal disciplinary controls and the basic allocation of human and material resources. Operational authority is the question of who determines police actions in individual investigations or in categories of investigations. There is an immediate relationship between administrative authority and operational authority. It would be naïve to regard organizational hierarchy simply as a subordinate administrative relationship with no impact on police operations. We must recognize the limitations of operational authority if conceded without administrative authority.<sup>ix</sup>

Persuasive arguments can be made that detectives should belong to the same force as the crime prevention and public order police, including the critical role in investigations of the police patrols who arrive first on the crime scene, the information networks and intelligence gathered by beat cops, and the practical difficulties of achieving real collaboration among different agencies. These arguments are further bolstered by the fact that the investigative capacity of unified police forces does not rely solely on the resources allocated to police investigators, but rather on an institutional culture that considers investigation and related activities (such as preserving the crime scene) to be of fundamental importance.

Yet an analysis of decisions about the structure and placement of police investigative units indicates that technical arguments are secondary and that decisions reflect political interests within the government. In El Salvador, for example, unsuccessful efforts to keep the Commission for the Investigation of Criminal Acts outside the National Civilian Police were supported by sectors who opposed police reforms and sought to preserve their influence over the old corps.

In **Honduras**, scandals leading to the dismantling of the Directorate of National created the pressure to establish an investigative corps independent of the militarized Public Security Forces (*Fuerzas de Seguridad Pública*). The new Criminal Investigations Division was then placed under the new public ministry – itself a new project that reflected a broader political effort to strengthen civilian political authority over the military. While there were many valid technical arguments for these decisions, the 1998 reform of the Honduran police is best understood in political terms.

Irrespective of the placement of the investigative police, it is essential to choose or create an institutional framework in which they can evolve as a transparent, professional and civilian organization. If the investigative police are placed outside the public ministry, adequate

coordination between the two bodies must be sought. Efforts to create channels for coordination have met with differing degrees of success. Among the coordinating mechanisms developed are: assigning investigators to the public ministry for set periods of time; giving prosecutors some authority to change the detective assigned to a case; giving the attorney general a role in the appointment of the chief of investigations; or giving the public ministry an active role in monitoring and overseeing the investigative police.

#### **4.b Operational authority**

The issue of operational authority over police investigations has been hotly debated in Latin America with arguments focusing on the nature of the relationship between police and prosecutors as they conduct investigations. Is it a relationship of subordination, control or coordination? The greatest difficulty lies in defining and developing the expertise and specific job descriptions for prosecutors and police. Do prosecutors run investigations simply assisted by police? Do prosecutors and police simply coordinate their work, or do they have a deeper, symbiotic relationship? The typical police attitude is that there is little left for them to do if the prosecutor is in charge of the investigation, and the judiciary tends to see the police as “assisting” the justice system. However these questions are answered, the clear definition of specific areas of expertise is a prerequisite for a productive relationship. However, in most Latin American countries, both fields are still being defined.

Operational authority over police investigations depends on the legal powers of the public ministry (what actions must be authorized or requested by a prosecutor) as well as decisions about procedures governing police-prosecutor interactions. It is not surprising that smoother models have been designed for interaction and supervision between prosecutors and police from separate agencies than between those within the same institution.

In the structure now being deployed in **El Salvador**, the police – which are controlled by the executive branch – must immediately inform the public ministry of any complaint. From that moment on, both institutions discuss which official or officials they will assign to the case, and the assigned police officers must periodically apprise the prosecutor of the status and progress of the case.

In **Honduras**, where the investigative police are under the public ministry, beyond an early formal role, prosecutors are not usually involved unless the police require it. Police have significant discretionary authority over how to treat cases, and meetings between prosecutors and police are significantly less frequent than in El Salvador.

The exercise of operational authority varies depending on the nature of the crime and reflects the interaction of the distinct powers and expertise of police and prosecutors. The police demonstrate a great deal of autonomy in straightforward crimes and those that occur on their turf – in the public realm. While the public ministry may proceed practically without the aid of police investigators when investigating crimes committed outside the sphere of “normal police activity” and that are hard to corroborate – such as economic fraud, corruption of public officials, and complex environmental crimes. Overall, the relationship between police and the public ministry varies widely according to a broad range of decisions: where the different groups of experts and professionals are located (economists, legal assessors, etc.), the level of public ministry engagement in routine police investigations, and so forth.

#### **4.c Investigative police development and resources**

One of the main problems in developing investigative units has to do with their relatively limited resources compared to other areas of police activity. The very need to argue for further development of investigative capabilities reflects a level of underdevelopment that is a direct result of past failures to prioritize criminal investigations.

It is essential to evaluate how far police investigative structures have been designed to respond to very concrete problems. According to figures from the Salvadoran public prosecutor's office, the 1996 per capita first degree murder rate was 117.4/100,000, one of the highest, if not the highest in Latin America. However, in 1997, only forty-two agents were assigned to the Homicide Department of the Criminal Investigations Division, which theoretically covers the entire country (and also investigates other crimes against the person). This is fewer than the 45 agents that are assigned to the departments for crimes against property and the 46 assigned to extortion and kidnapping. It is almost six times lower than the staff of 243 assigned to the department of larceny and car theft.<sup>x</sup>

Police deployment should be designed to promote smooth cooperation between investigative and patrol police given that this is essential to resolve many crimes. The investigative unit should be decentralized. Investigators may continue to be assigned to a single unit that retains authority over training, deployment, and even creation and supervision of specific groups. But investigative field units should operate under the command of the local police chief and under the operational authority of the local prosecutor's office.

A fairly common approach to certain high-profile or extremely serious crimes is to create special groups (comprising agents and officials of different government agencies, prosecutors, intelligence agents, police, executive agencies, etc.). It is important to be clear about the different risks and advantages offered by this strategy. First, special units must be organized within a legal institutional framework, otherwise there is a serious risk that units will be formed illegally and allow politicized security practices to continue. In El Salvador and Haiti, special units – both dating from the former security forces and created later – became politicized and committed serious human rights abuses. Moreover, such units or “task forces” only appear genuinely effective as a targeted response to specific crimes. Well-planned and targeted police operations appear to produce relatively lasting results to disband specific kidnapping rings, or attack the structures conducting certain types of contraband, for example. In contrast, to the extent that they do not reflect broader policies, the use of task forces to address structural problems (car theft, larceny, burglaries, etc.) rarely produces lasting results beyond their propaganda value.

#### **4.d Personnel selection and training**

Improving police investigative capability involves not only training investigators and experts, but also training large numbers of police officers whose initial response frequently determines the outcome of an investigation. Examples of this are the patrol officers who arrive first at the crime scene and officers responsible for taking complaints.

All police officers must have solid, basic training in criminal investigations. Further training is obviously required for those wishing to specialize in investigation. Moreover, investigation involves tasks requiring staff with specific skills. In general, it demands a higher

minimum level of formal education than other police tasks and many believe that it is helpful to require experience of basic police work and a good performance record. Police training should not only focus on formal course work, but should also reflect the reality of the work and of a career in investigations (how groups of investigators are put together, the capacity of mid-level chiefs, different subspecialties that may or may not have to be mastered, etc.).

The emphasis on the importance of investigations must go beyond required courses in basic training to reflect an institutional culture that values these skills.

## **5. Evidence**

Evidence is the means to reconstruct an incident during the course of a trial. Standards of evidence and the investigative techniques permitted to gather evidence reflect criminal policy and social norms. The legal parameters defining what evidence is admissible can provide important protections of rights and impose controls on police behavior, or may allow potentially abusive practices. In order to gather evidence, governments are generally authorized to carry out actions that are prohibited to ordinary citizens in order to establish that a crime has taken place, such as entering a private residence without the owner's consent. Governments also operate under significant legal constraints: for example, they may not in any circumstances force confessions from defendants. Prohibitions on specific investigative methods, such as illegal searches, seek to prevent the government from committing illegal acts or to punish the commission of such acts, even when they are committed during investigations of the most serious cases. On the other hand, when the mere testimony of a police officer is sufficient proof to convict someone without other supporting evidence, it indicates that national criminal policies allow the word of the police to override the word of a civilian, thus undermining the principle of "innocent until proven guilty."

Here we will examine some of the most common and most controversial investigative techniques employed by police (this is not an exhaustive list by any means). In many Latin American countries, certain types of investigations are severely underdeveloped – such as forensic capabilities and even the use of witness testimony. Torture and duress continue to be used to extract information from or inflict preemptive punishment on detainees (albeit in very different ways from past decades). Broad and extensive use is made of specific police powers that should be reserved for exceptional situations (such as powers to search individuals, arrest *in flagrante delicto*, etc.). In addition, police continue to depend heavily on informer networks (which supply only information, not proof), and on unregulated and illegal wiretapping. This panorama is completed by the recent addition, albeit with some restrictions, of undercover investigative methods associated with the "war on drugs." In sum, criminal investigations rely excessively on police testimony, while evidence-gathering from other sources such as witnesses testimony, documentary evidence, and forensic evidence remain very weak.

### **5.a The arrest, mistreatment, and statement of the accused**

Various measures have been used to address serious human rights violations, such as the torture and mistreatment of detainees in police stations in order to force confessions that are used as "evidence." Among the different approaches, those measures which sought to remove the practical circumstances that allow police to commit human rights violations were more effective than legal regulations forbidding abuse. Beyond measures such as reading the detainee his or her rights, guaranteeing the assistance of a defense attorney, and even having witnesses to the arrest

itself, the solution has moved toward reducing to a minimum the time detainees spend in police custody, forbidding police from taking statements from detainees and disqualifying any evidence obtained from such a statement. Although this continues to provoke reactions from the police force, hypocrisy aside, the basic principle is that investigation cannot focus entirely on the accused. Thus, in Chile, efforts to reform police investigations are encapsulated in the principle “investigate in order to make an arrest, do not detain as the principle tool of investigation.” (*Investigar para detener, no detener para investigar.*)

## 5.b Witnesses

Finding ways of encouraging people to overcome their fear and testify is far more complicated. The problem is often complicated by the government’s inability to protect witnesses, even in misdemeanor cases. This is compounded by the suspicion that some police might leak information, or by distrust of legal proceedings in which the witness or plaintiff never know the results of their testimony. This creates a seemingly vicious circle: people will not testify out of fear of crime while the government is paralyzed by the lack of witness testimony. There appears to be a strong correlation between willingness to testify and the level of trust in the security forces. If this is true, this vicious cycle can only be broken if police adopt short-term policies to strengthen evidence-gathering while launching long-term efforts to restore basic trust in the police and the justice system.<sup>xi</sup>

While witness protection programs may be an important means of improving police investigations in Latin America, the appropriate approach needs to be considered carefully. The high-cost traditional, U.S.-style witness protection programs may be of limited use. The U.S. program handles a relatively small number of high-profile cases, often protecting criminals who “rat” on others in organized crime syndicates (the program has been essential in efforts to confront the mafia, for example). One way to counteract this might be to replicate certain features of witness protection programs operated by civil society organizations, such as Brazil’s Legal Aid Office of Grassroots Organizations (*Gabinete de Asesoría Jurídica de Organizaciones Populares*, GAJOP).

In **Brazil**, the Legal Aid Office of Grassroots Organizations (GAJOP) has designed programs to assist and protect low-income people who must testify at trials concerning state, para-state, or organized violence. The program is relatively low-cost and works with the support of professionals from different fields and a large pool of volunteers. As police themselves and, in some cases, judicial authorities have been responsible for intimidating witnesses, they do not run or participate in the witness protection program.

## 5.c Forensic evidence

Errors in collecting forensic evidence – forensic medicine tests, fingerprinting, ballistics, etc. – do not just reflect a lack of equipment as is often asserted. Many problems derive from carelessness or poor observation at the crime scene and mishandling or irregularities during the process of preserving the evidence. Indeed, police often arrive so late at crime scenes – two days after the crime is not uncommon in many countries – that physical evidence is destroyed or seriously compromised by the time they examine it.

In **Guatemala**, any one of the many people with official access to the crime scene (National Police, public ministry, the judge, and even fire-fighters) can collect and

prepare evidence. Although both the public ministry and police have (poorly equipped) laboratories, neither institution has suitable places to safeguard all evidence.

While noting the lack of forensic lab equipment typical in Latin America, it is important to note a chronic problem in the development of police forensic capabilities. The design of even relatively well-equipped laboratories frequently do not appear to reflect local needs and priorities. Underutilized, sophisticated equipment and machinery that is costly to operate and is only useful for specific crimes can be found in laboratories that lack the staff and equipment necessary to organize a fingerprint file that would increase speed and efficiency in many more common cases. Many forensic laboratories are equipped through donations and, to a significant degree, donor preferences determine resource allocation. The development of investigative capabilities should reflect planning based on local circumstances and institutions.

#### **5.d Concerns about undercover investigations**

The two sections below discuss the use of wiretaps and undercover agents, two undercover investigative techniques. Many northern countries (from both civil and common-law traditions) have concluded that undercover police operations are a valuable investigative tool that, when used properly, do not violate due process rights. Without undercover techniques, it is very difficult for police to build evidence to prosecute certain crimes such as corruption, narcotics trafficking and other types of organized crime where there is often no victim to make a complaint.

U.S. pressures associated with the “war on drugs” in the Western Hemisphere have encouraged the use of undercover investigations, such as the use of undercover agents, wire taps, entrapment or sting operations, plea bargaining and guarantees of anonymity for witnesses. As with other elements of US anti-narcotics policies, in Latin American countries where undercover agents have been introduced, there has been little or no consideration of whether this is in fact the most appropriate investigative tool in the circumstances.

In **Nicaragua**, senior police authorities questioned the use of undercover agents in gathering evidence, particularly as their limited resources implied that adopting this technique would take resources from other investigative approaches.

Despite these arguments for undercover investigations, it is clear that they present serious risks in contexts where police forces are still in development, where there are high levels of police corruption, where accountability mechanisms are weak, or where judicial systems have trouble adapting to such investigative tools. While the same concerns apply to all investigative techniques that may violate individual rights, undercover techniques pose particular dangers of increased corruption and political manipulation. The risks of legalizing the use of these undercover investigative techniques outweigh the benefits they offer to crime fighting unless a serious and thorough effort is made to provide adequate resources to control mechanisms including prior and after-the-fact judicial review, congressional review, and the creation of independent oversight committees. Should political, judicial and police authorities fail to create controls or resist their creation it will be a strong indication that they lack political will to deter abuse and therefore should not be legally permitted to use these methods of investigation.

The police themselves should only be one actor among others in policy decisions on whether to adopt undercover investigative techniques. With few exceptions, police fail to

recognize that they have neither the material nor personnel resources to strengthen accountability mechanisms themselves that can prevent or punish abuse of undercover techniques. Typical police discourse is uncritical and idealistic in portraying any broadening of police powers as bringing greater effectiveness. In decisions about whether to adopt undercover techniques, the most important factor is the existence of political will to use them in a correct and accountable manner. A broad and open debate about police practices and adoption of strong accountability measures will be key indicators of such political will. Other basic indicators include civilian control of the police and concrete evidence of serious efforts to bring to an end other forms of police abuse and corruption.

### **5.e Wiretapping**

Telephone tapping is risky to the extent that it seriously encroaches on people's personal lives. Without strict controls, this method of evidence collection may violate more rights than it protects. The laws or constitutions of many Latin American countries prohibit wiretapping. In practice, this has only meant that this evidence is not admissible during a trial, since no government has taken steps to prevent such methods and, in most cases, criminal law does not classify illegal wiretapping as a crime. Yet government wiretapping of political opponents is routine practice in some countries. Furthermore, constant tapping of selected telephones reflects police use of wiretapping "to go fishing for crimes" instead of an effort to gather evidence to prove a specific crime.

Minimum controls consist of requiring authorization from a judge to tap a specific telecommunications device for a limited time period only and for the sole purpose of establishing the facts of the case under investigation. The law can establish further prerequisites for judicial authorization: that it involve certain serious offenses, that it be used as supporting ancillary evidence, and that it occur only when other evidence indicates the need for the wiretap. The agency conducting the wiretaps and transcriptions must be strictly regulated. Both sides in the case must review transcripts in their entirety (not just the sections that the police, prosecutor, or judge consider worthwhile) as a form of evidence that might be useful to either side.

### **5.f The undercover agent**

The use of undercover agents presents a number of serious difficulties, only some of that are discussed here. Many Latin American jurists are concerned that undercover activities may contravene several constitutional principles: agents conduct a series of searches without warrants; their conversations qualify as extra-legal interrogations that later may be used against the accused; and agents are authorized to commit crimes if necessary to protect their identity. Certainly, undercover activities cannot be conducted or are useless without such powers, but these actions dangerously blur the bounds of legal authority. At a practical level, compared to other investigative methods, undercover work is relatively expensive for the police force. It may also take a toll on the officer's personal life when investigations require police to maintain their undercover identity for extended periods of time and beyond the sphere of specific investigations.

In the United States, the Department of Justice has guidelines that govern the use of undercover operations by the Federal Bureau of Investigations (FBI). These require approval of operations by an "undercover review committee." The FBI is also required to present financial reports on expenses associated with undercover operations to Congress. However, in the United



States, while judicial authorization is required for wiretaps, it is not necessary for the initiation of an undercover operation. In theory, judicial review exists in the courtroom when the judge must rule on evidence assembled by undercover agents. In practice, however, police frequently use undercover operations to develop other evidence – material evidence and witness testimony for example – and the undercover operation itself may not be examined.

## **6. A Rich and Complex Opportunity for Civil Society**

Civil society organizations (CSOs) have undertaken different initiatives related to criminal investigations. The most advanced initiatives are probably those denouncing irregularities in police and judicial proceedings. A number of organizations promote improved criminal investigations and cooperate with governments to strengthen them, often using procedures similar to those developed to denounce systematic human rights abuses under the dictatorships such as legal assistance and independent investigations. These groups also monitor and denounce irregularities committed by different officials during the course of investigations. Based on this work, these organizations are also able to identify systemic problems and specific weaknesses in the police investigative apparatus and the criminal justice system. The scope of this work is limited to those areas being addressed by non-governmental organizations – human rights, environmental crimes, and family or gender issues.

The potential for a strong role for CSOs is increased by criminal reforms that expand the victim's role and grant more autonomy to the complainant or prosecutor. Criminal law in countries such as Guatemala and El Salvador has even authorized non-governmental organizations to act as plaintiffs in the defense of social interests or other areas related to their work. In Guatemala, in fact, the only lawsuits that have succeeded in advancing investigation of massive human rights violations are those in which CSOs acted as private plaintiffs.

CSOs have increasingly supported their complaints with statistical data and other indicators demonstrating serious problems in the police force and the judiciary, including the number of prisoners in jail who have never been sentenced, police statistics on the number of *in flagrante* arrests, and the allocation of human and material resources. Security forces sometimes oppose these activities, asserting that statistical data on prisoners, resource allocation, requirements for promotion, and so forth, are confidential security-related matters. This should be seen as a challenge rather than an obstacle in the sense that the process of making investigations more democratic includes expanding access to certain information that is still considered secret. In this area, lawsuits based on freedom of information, academic research and the democratic principle of government transparency have successfully obliged the police to provide the requested information.

CSOs such as advocacy and sector-specific groups have also opposed the passage of laws which appear to contravene, or encourage the violation of fundamental rights, and undermine democratic principles and controls. These groups have also opposed sentence reductions for certain categories of crimes or have advocated harsher sentencing. On other occasions, they have designed, supported or monitored projects touching on different aspects of criminal investigations such as juvenile offenders, prison systems, and victims' services. In some countries, CSOs have sat on commissions, usually consultative in nature, dealing with public security issues. This will be the case with the Internal Security Council (*Consejo de Seguridad Interior*) created by the new police law in Honduras.

Private organizations have undertaken specific activities related to criminal investigation by acting as key counterparts to public agencies or by filling crucial gaps. GAJOP's witness assistance and protection program, described earlier, is one example. The Anthropological Forensic Team of Argentina pioneered an area of technical expertise that has become indispensable for gathering scientific evidence of crimes associated with government repression in Latin America. While it was clear that the Argentine government was not interested in pursuing such evidence, this case can also be interpreted as a clear example of the impact of developing technical and investigative methods attuned to the needs of society.

The role of universities has varied. Given that they train attorneys but not police, they have played different roles at different times in the reform process. Universities in some countries have become forums for building consensus around the need for judicial reform or even helping to design judicial reforms (the law school of the *Universidad Diego Portales* helped draft recent judicial reforms in Chile). Often, however, judicial reform penetrates the universities only after new laws have taken effect. Little attention has been paid to criminal investigations or to the study and analysis of police investigations. Partnerships between universities and CSOs could strengthen the space for reflection, dissemination, and action. In an area as technical as criminal investigation and judicial procedures, it must be emphasized that the education and training of members of civil society has been poor or nonexistent, even in countries that have implemented broad judicial and police reforms and even when international aid agencies have been involved. Training has focused virtually exclusively on direct participants in the system.

The development of alternative approaches to public security that diverge from traditional "law and order" policies presents a difficult challenge, and one in which the accomplishments have been uneven. In Latin America today, the context has shifted significantly. Civil society organizations once created or structured to oppose state actions are now in dialogue with other social sectors and organizations expressing legitimate demands for improved public security. The repeated failure of improvised crime-fighting policies has had a major impact on public opinion. Political parties and the media are increasingly focused on rising crime. Many of the proposals emerging in these debates – such as imposing drastic sanctions, introducing the death penalty, or bringing the military back into a public security role – threaten to undermine democracy and human rights. In this context, civil society engagement can play an important role as democracies seek a legitimate response to the threat posed by crime.

## ENDNOTES

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- i. Of course, police also have duties unrelated to the criminal justice system or crime prevention, such as assistance, protection, traffic safety, etc.
  - ii. In some cases, the law provides for oral arguments prior to sentencing, but this does not change the inquisitorial nature of the process.
  - iii. The distinction between the military and the police goes far beyond whether they operate in the sphere of external or internal security. To give just one example, military institutions operate based on the notion of an “enemy” devoid of any significant rights, an “other,” separate from military institutions and society. In contrast, the primary mission of the police is to protect citizens’ rights, and suspects, criminals and the police themselves are all members of the same society. The measure of successful conflict resolution in the case of police institutions is totally different from the military basis for declaring victory, and militaries elevate concepts such as triumph, heroism, or honor above basic rights. The military structure is designed for armed confrontation, while these are the exception for police institutions which, in some cases, are not even armed. The principal of the proportionate use of force, or use of force a last resort, is foreign to military institutions. These disparities are extremely important when addressing issues such as developing new police doctrines, and they raise serious questions about armed forces’ intervention in the war on drugs or other public security tasks.
  - iv. It is interesting that a characteristic that distinguishes developed countries from “developing” countries is not the ratio of police to inhabitants, but rather the ratio of police to judges. In general, the ratio of police to inhabitants in “developing” countries was one third higher than that of developed countries while the judge-inhabitant ratio was smaller by half. Thus, while developed countries had one judge for every 24 police officers, “developing” countries had one judge for every 74 police. This supports the thesis that the repressive and social control functions of police were built up even as the rule of law was weakened. Crime Trends and Criminal Justice Operations at the Regional and Under-Regional Levels. Results of the Fourth United Nations Survey of Crime Trends and Operations of the Criminal Justice Systems (1986-1990), Draft Report, fig. 5, 8, and 15.
  - v. This assumption is based on common characteristics of homicides (for example, in many cases, the victim and perpetrator had a previous relationship) and on the fact that the gravity of the crime would seem to support the assumption that more resources and greater priority would be assigned to investigate such crimes. In general, homicide statistics tend to be more reliable as investigations begin not only with a complaint, but also with the discovery of a body.
  - vi. 1991 figures from the U.S. Department of Justice. Cited in Bayley, David, *Police for the Future*, Oxford University Press, New York, 1994, p. 7. This figure is for the percentage of reported violent crimes solved by the FBI; it can therefore be surmised that the corresponding rate for homicide cases is higher.
  - vii. Fruhling, H., Hugo, “*Modernización de la policía.*” Forum on citizen peace and security on the Central American isthmus, Haiti, and the Dominican Republic, San Salvador, June 2-4,

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1998, p. 26. The percentages correspond to the annual minimum and maximum for the period between 1988-1992. Figures are for the annual percentage of complaints of homicide, parricide and infanticide presented during a particular year which resulted in convictions.

- viii. Project for the Strengthening and Development of the Criminal Investigation Function of the National Council of Public Security in El Salvador, 1997. Statistics from the Criminal Investigations Division of the Honduran Public Ministry, 1997. Case clearance (*esclarecimiento*) rates are not very reliable and are given here as an indication only. Many different criteria are used in different countries to determine whether a case has been cleared. In Honduras, the term refers to investigations completed by the police and transferred to the public ministry. In El Salvador, clearance is based on whether or not arrests have been made.
- ix. This can be clearly seen in the extensive literature on police management and administration which analyzes the various incentives and disincentives that can be created to influence police behavior through such issues as promotions criteria and assignments, as well as the impact of management and administration on efforts to implement programs such as community policing. See, for example, the publications of the Police Executive Research Forum, Washington, DC.
- x. Consejo Nacional de Seguridad Pública, "Proyecto para el Fortalecimiento y Desarrollo de la Función de Investigación Criminal." El Salvador, August 1997. This observation is valid even when one correlates the number of personnel to the number of complaints received by each department. El Salvador's per capita homicide rate is over six times higher than Nicaragua's, and more than ten times higher than that of Honduras. The number of police officers in El Salvador (approximately 15,000) is more than twice that of the Honduran police and three times that of the Nicaraguan police.
- xi. An efficient investigation policy could analyze which cases would benefit from efforts to seek out witnesses rather than simply wait for them to surface. At the same time, part of the problem is that the police arriving on the scene do not try to establish whether there were any witnesses. In other words, the police are usually too passive.