

“The Use of Evidence Provided by Intelligence Agencies in Terrorism Prosecutions: Challenges and Lessons Learned from the Example of Argentina’s AMIA Bombing.”

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INTRODUCTION

The July 18, 1994 attack on several Jewish institutions in Buenos Aires has been under investigation for years by Argentina’s judicial authorities and several State agencies. Those agencies included the Argentine Intelligence Secretariat (SIDE, for its acronym in Spanish), which was the agency that oversaw national intelligence, and which would later be replaced by the Intelligence Secretariat (SI, for its acronym in Spanish) and later by the current Federal Intelligence Agency (AFI, also for its acronym in Spanish).¹ As a result, crucial information about the attack has been kept from the parties in the judicial investigation, as that information constitutes classified intelligence.

The first requests to declassify government information in relation to the attacks date back to 1999.² Since then, a series of decisions issued by different government institutions have gradually resulted in the declassification of information. Recent milestones in that direction include Presidential Decrees No. 395/2015 and 229/2017.

With its own distinctive features, this declassification process is part of a wider trend to grant access to classified information.³ On December 1, 2015, Decree No. 2704/15 established a public access mechanism and authorized access to all the information contained in the Database belonging to the Federal Intelligence Agency’s Directorate of Database and Intelligence Administration, which does not fall under any of the exceptions stipulated in article 3 of the Decree. More recently, Law No. 27,275 regulating access to public information established that, without exception, the government has a duty to grant access to information in cases involving severe human rights violations.⁴

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¹ Law No. 27,126. Sanctioned on: February 25, 2015. Enacted on: March 3, 2015.

² On November 30, 2015, some of the victims’ families requested permission from the Federal Appeals Court of La Plata to access some of the case files of the former Intelligence Directorate of the Buenos Aires Police Force (cf. UFI-AMIA, case No. 8566, investigating the AMIA/DAIA attack (pgs. 428, file No. 388).

³ This includes, but is not limited to, several government decisions that ordered the declassification of files, documents, and reports linked to historical events and human rights violations. For example: Presidential Decree No. 4/2010 (related to the actions of the Armed Forces between 1976 and 1983), Decree No. 200/2012 (related to the Rattenbach report), and Decree No. 503/2015 (related to the South Atlantic conflicts), Resolutions No. 408/2009, 103/2011, 239/2014 of the Ministry of Foreign Relations, International Commerce and Worship (related to the actions of the Armed Forces between 1976 and 1983).

⁴ See article 8, last paragraph of Law No. 27,275.

Throughout the early 2000s, Federal Oral Criminal Court No. 3 of the Federal Capital oversaw the trial pertaining to the 1994 attack. The trial ended in 2004 with the defendants' acquittals. The Court found irregularities in the conduction of the investigation; and, in fact, ordered an investigation on, among others, alleged crimes committed by intelligence personnel who had conducted the investigation.

Thus, a decade after the attack, it became evident that a discussion was necessary with respect to the evidence gathered in the investigation; as the evidence could shed light on both (or alternatively) the attack itself and/or irregularities in the investigation of the attack. And this has been the backdrop against which all declassifications of government-held information about the attack have occurred.

In this presentation, we will identify potential lessons and challenges with the goal of reflecting upon the use of declassified intelligence in criminal prosecutions in view of Argentina's experience. In part one, we will look at three time points in the declassification process. The declassification that has resulted from the trial before Oral Criminal Court No. 3 as of 2001, the administrative submission of evidence to the Investigations and Prosecutions Unit (UFI, for its acronym in Spanish) in 2005, and the massive declassification that resulted from Decrees No. 2015 and 2017. In part two, we'll look at three conclusions of these facts and attempt to extract, to the extent possible, three lessons and challenges from them: first, with respect to the identification and characterization of evidence; second, with respect to the validity and admissibility of declassified evidence in criminal proceedings; and third with respect to its evidentiary performance.

PART ONE: Phases of the Declassification Process

The declassification process can be broken down into three phases. The first phase started in 2001 with the trial before Oral Criminal Court No. 3; the second began with an administrative investigation that culminated in the submission of evidence to the Investigations and Prosecutions Unit in 2005; and the third was a massive declassification that began in 2015. Overall, each phase marked a favorable trend toward declassification, despite numerous false starts and setbacks.

The initial investigation into the 1994 attack was conducted by an auxiliary federal judge and, among others, national intelligence agencies, with the support of secondary agencies. By then, a prior 1992 attack on the Israeli Embassy in Buenos Aires was being investigated under a similar framework by the Supreme Court of Argentina.⁵ The Court ordered that the 1994 attack be investigated by a federal first instance judge. In short, regardless of the hierarchical differences between investigating judges, both investigations were overseen by the judiciary with the support of national intelligence agencies.

President Carlos Saúl Menem was incumbent at the time of the attacks, from mid-1989 to late 1999, and he was then succeeded by Fernando de la Rúa. The new president took on a more explicit role in the investigation. Thus, on June 8, 2000, just months after

⁵ This is consistent with article 116 of the Argentine Constitution.

taking office, de la Rúa created a Special Investigation Unit (AMIA-UEI, for its acronym in Spanish) to look into the attack⁶ and charged it with the task of assisting the judiciary in its investigation.⁷

The Special Investigation Unit consisted of the Argentine Federal Police Force's (PFA) antiterrorist and intelligence divisions, the Argentine Intelligence Secretariat (SIDE), the Argentine National Gendarmerie (GN) and the Argentine Federal Penitentiary Service (SPF).⁸ Each government agency was to treat requests from the Special Investigation Unit as urgent and preferential. In addition, the Special Investigation Unit had the power to conduct its own investigations and report its findings to judicial authorities.

On September 19, 2000, the Executive delegated the oversight of the operation of different units to the Secretary of Political Affairs of the Ministry of the Interior.⁹ The Secretary was given several powers, including that of directing the Special Investigation Unit.¹⁰ In that capacity, he had unlimited access to files and documents related to the attacks.¹¹ Throughout those months, there were several changes in the Special Investigation Unit's authorities.¹² Additionally, the imminent trial before Oral Criminal Court No. 3 also contributed to the prompting of witness protection measures.¹³

The relatively increased notoriety of the Executive's work with respect to the evidence produced by different agencies and the political role of the Special Investigation Unit's authorities marked the onset of the declassification process that took place in the context of the trial.

DECLASSIFICATION OF SPECIFIC JUDICIAL ORDERS (2001-2004)

Between 2001 and 2003, there was an elaborate exchange between judges and the Executive with respect to the declassification of documents and waiver of the confidentiality duties of intelligence officials. Despite opposing views, there was a tendency toward granting access to information. The oral trial outlasted several

⁶ The Special Investigation Unit was created by way of Executive Decree No. 452/00 on June 8, 2000.

⁷ See Resolution No. 39/00 of the Argentine Attorney General's Office, available at (<http://bit.ly/2cIVxls>).

⁸ This specifically included the Antiterrorist Investigations Unit of the Argentine Federal Police Force, SIDE's Counter-Terrorism and Transnational Crimes Directorate, the Argentine National Gendarmerie's Counter-Terrorism Division, and the Argentine Federal Penitentiary Service's Intelligence Department.

⁹ Presidential Decree No. 846/00. The decree ordered the following: a) the promulgation of Law No. 25,241 which authorized more lenient sentences for defendants who collaborated with the investigation of terrorist acts; b) the coordination and collection of human and institutional resources within the Public Prosecutor's Office to facilitate the investigation; c) the creation of the Special Investigation Unit; d) the granting of powers to the Special Investigation Unit to conduct its own investigations; and e) an order to all government bodies to cooperate in full with the investigators, treating each request as urgent and immediately dispatching requested documents.

¹⁰ The Argentine Congress confirmed the Special Bicameral Commission for overseeing the investigation into the attacks on the Israeli Embassy and AMIA/DAIA building. And the Commission ultimately released three reports.

¹¹ Cf. art. 3, Decree No. 846/00. Not long after, the recently created Anti-Corruption Office also joined the list of government bodies working with the Special Investigation Unit. Decree No. 107/01, enacted on January 25, 2001.

¹² Decrees No. 952/00, 960/00 of October 23, 2000, and 430/01 of April 17, 2001.

¹³ Powers granted by way of Decree No. 262/1998 (of March 9, 1998 and Official Gazette of March 18, 1998) creating the Office for the Protection of Witnesses and Defendants. See Decree No. 1198/01 enacted on September 21, 2001.

presidential administrations; thus, as time elapsed, there were variations in the Executive's responses. For the most part, requests for evidentiary information with respect to the attacks and to the government's response to the attacks were usually granted.

In October 2001, Oral Criminal Court No. 3 requested that the Executive waive the confidentiality duties of a group of SIDE agents and former agents and order them to testify in court.¹⁴ In response to the request, the Executive waived SIDE's top official's duty of confidentiality and authorized him, through Decree No. 490/02, to testify in court as to the agency's investigation of the attacks.¹⁵ The Executive also ordered the then-Secretary of Intelligence to authorize certain other agents to testify before Oral Criminal Court No. 3.¹⁶

The Executive's authorizations did not extend to actions or facts that involved citizens of other countries.¹⁷ Therefore, Oral Criminal Court No. 3 changed its criteria. The Court believed that restriction could diminish its fact-finding efforts and hinder the investigation of relevant circumstances of the case.¹⁸ The Executive clarified, in Decree No. 41/03, that the issue was not one of nationality, but one of the government's relationship with foreign intelligence agencies.¹⁹ The Executive also believed that certain secrets could affect national security as well as other ongoing investigations. And thus, concluded that if the scope of the investigation was going to be broadened, the list of authorized personnel who could testify would have to be reduced. This was ordered through Decree No. 490/02. Hence, it authorized only the testimonies of qualified, high-ranking agents with direct knowledge of the facts.²⁰ In other words, the Executive only waived the confidentiality duty of some of the agents requested by the Court, i.e. directors and operation heads.²¹

The Court struck down the Executive's new restrictions. On February 20, 2002, the Court ordered all witnesses, including the officials mentioned in the first decree, to testify.²²

¹⁴ Oral Criminal Court No. 3, Case No. 487/00, Entry No. 809, "Teleldin, Carlos A. y otros s/ homicidio calificado (atentado a la AMIA)," October 17, 2001, Paragraph No. 4.

¹⁵ Decree No. 490/02. Oral Criminal Court No. 3 issued its order during then-president DE LA RÚA's administration, but the order was fulfilled many months later, under Eduardo DUHALDE's administration.

¹⁶ See Decree No. 490/02, article 2.

¹⁷ Id. article 3 of the Decree.

¹⁸ Cf. Oral Criminal Court No. 3, Case No. 487/00, Entry No. 854, "TELLELDIN, Carlos A. y otros s/Homicidio calificado (atentado a la AMIA)," August 8, 2002, paragraphs 3 and 4.

¹⁹ Enacted on January 8, 2003.

²⁰ The Executive also agreed to allow previously authorized witnesses who had knowledge of information that could acquit a defendant to testify before the Court. The authorization of agents who only had to ratify their signature in documents submitted as evidence was not required either. In accordance with Law No. 25,520, article 16, paragraph 2. See Decree No. 950/02, which regulated Law No. 25,520.

²¹ See Resolution No. 2/03 of the Intelligence Secretariat.

²² Oral Criminal Court No. 3, Case No. 487/00, Entry No. 869, "TELLELDIN, Carlos A. y otros s/Homicidio calificado (atentado a la AMIA)," February 20, 2003, paragraph 3 of the ruling. In addition, Oral Criminal Court No. 3 urged the Executive to reconsider its denial to allow the testimony of a particular agent. Oral Criminal Court No., Case No. 487/00, Entry No. 886, "TELLELDIN, Carlos A. y otros s/Homicidio calificado (atentado a la AMIA)," June 10, 2003, paragraph 5. See Resolutions No. 35 and 43 of January 21 and 29, 2003, respectively.

On June 30, 2003, the incumbent reviewed the request and finally agreed to authorize the testimonies in question (Decree No. 291/03).²³

In short, the trial resulted in an unprecedented declassification process that allowed classified evidence to be used in court. The Court first requested that the Executive declassify certain information and waive the confidentiality duties of witnesses. Then, in each individual case, the Court analyzed the Executive's rationale and ultimately reserved for itself the final say with respect to the scope of the confidentiality duties in question. This also highlighted the Executive's erratic behavior, which varied significantly before different requests from the Court; while the Court was more consistent in its behavior.

Another series of declassification-related decisions more directly impacted the judiciary's assessment of the legality of the investigation of the attacks. In August 2002, for example, Oral Criminal Court No. 3 requested the declassification of an internal SIDE brief²⁴ containing the testimony of a former judicial officer who had blown the whistle on irregularities in the investigation. The request was turned down on basis of the need to keep matters of national interest quiet, such as the composition of the intelligence service, the conduction of special operations, and the work conducted with information communities, as well as its division of labor.²⁵ However, on May 27, 2003, Oral Criminal Court No. 3 ordered the Executive to declassify the brief, redacting only portions that revealed the agency's operations and the identity of its agents.²⁶ The court's decision was, in turn, challenged by the Executive in the same court proceedings; however, before the Court could decide on the matter, the Executive pivoted its position and authorized the declassification of the brief in question.²⁷

In June 2003, the Executive also waived the confidentiality duty of the former intelligence head and authorized him to testify in the judicial investigation of the alleged embezzlement of intelligence funds in March of the year in which the attack had been

²³ See Decree No. 291/03 and Resolutions No. 809/03 and 886/03—of January 17, 2003 and June 10, 2003, respectively. However, Decree No. 291/03, reiterated that the testimonies could only involve information related to the attacks under investigation, with the exception of matters that concerned national security or citizens of other countries involved in foreign intelligence services. The Decree also added that the waiver did not authorize the witness to testify as to how intelligence activities were conducted, the identity of intelligence personnel (with the exception of those who had already been cleared to testify), or any documents that exceeded the scope of the facts at hand. (Cf. articles 3 and 5 of Decree No. 291/03). Article 5 of the Decree also ordered Oral Criminal Court No. 3 to take necessary measures so that testimonies were given only before Court staff and the parties to the trial. However, these restrictions were rapidly struck down and voided by Decree No. 785/03, enacted on September 17, 2003, which ratified that the only valid restrictions were those relative to foreign intelligence personnel who had cooperated with the judicial investigation and the dissemination of information that could threaten national security.

²⁴ See Resolution No. 540 of the Intelligence Secretariat, enacted in November of 2000.

²⁵ Official letter sent to the President with regards to Resolution No. 863, of October 15, 2002, pages 7633, 7636 (back), Supplemental Proceedings File, Oral Criminal Court No. 3 Case: "Teleldin, Carlos A. y otros s/ homicidio calificado (atentado a la AMIA)," No. 487/00, October 16, 2002. Cf. Decree No. 116/03, January 22, 2003.

²⁶ Oral Criminal Court No. 3, May 27, 2003, by way of Judgment No. 883, paragraph 1 of the ruling.

²⁷ "[A]ll the legal proceedings involving the brief ordered in virtue of Decree No. 540/00 of the former Intelligence Secretariat, the parties to Case No. 487/00, (...) in accordance with articles 16 and 17 of Law No. 25,520," by way of Decree No. 146/03.

Cf. articles 1 and 2 of Presidential Decree No. 146/03.

investigated.²⁸ The Executive also submitted the pertinent attack-related accounting records to the Court.²⁹ Months later, it broadened the scope even further, authorizing witnesses to testify on the matter under investigation.³⁰

Similar decisions were made over the years. Such decisions involved declassifying government information that was useful to the investigation and judicially investigating alleged irregularities in the conduction of the attack investigations. Thus, in 2005, the Intelligence Secretariat authorized the Court to access certified copies of the administrative briefs involving payments to one of the defendants, in addition to other related documents.³¹ Former President Carlos Saúl MENEM was also authorized to testify as a defendant in the trial that resulted from that investigation before Federal Oral Criminal Court No. 2 of the Federal Capital to shed light on some of the facts of the case.³² More recently, on July 11, 2016, the General Director of the Federal Intelligence Agency authorized unlimited access to all documentary evidence provided for the purpose of the investigation to Oral Criminal Court No. 2.³³

2003-2005 GENERAL ADMINISTRATIVE DECLASSIFICATION

The Executive's first decisions with regards to the declassification of evidence pertaining to the attacks were generally issued between 2003 and 2005. The abovementioned measures had focused on specific documents and witnesses requested by the judiciary. Instead, in 2003, three presidential decrees greenlighted judicial authorities and the Special Investigation Unit to access classified information gathered by the security forces and Intelligence Secretariat.³⁴

In July 2003, the Executive authorized Argentine Federal Criminal and Correctional Court No. 9 to access all classified evidence linked to the investigation of the attack that was in the hands of the Federal Police Force, National Gendarmerie, and Marine Forces (Decree No. 398/03). Unlike the declassification involving Oral Criminal Court No. 3, this

²⁸ Case No. 9789/00 of Argentine Federal Criminal and Correctional Court No. 11. See Decree No. 249/03.

²⁹ See Decree No. 292/03.

³⁰ See Decree No. 785/03.

³¹ The information was provided in accordance with Decree No. 146/03 to restrict any information that could reveal the agency's operations and identities of its agents, while also alerting the prosecutor that measures had to be taken to ensure that personal files be kept safe and to prevent the reproduction or dissemination of documents. UFI-AMIA. Case No. 8566, investigating the attack on the AMIA building. (Pg. 116281. Official Letter dated May 06, 2005). See Resolution "R" No. 333/05. The briefs were submitted by way of Resolution No. 540/00 and 473/03.

³² Legal Proceeding No. 200.558-15-2. Argentine National Executive, Legal and Technical Secretariat, December 1, 2015.

³³ Resolution No. 470/16 (ruling): Federal Intelligence Agency the Investigations and Prosecutions Unit provided certified copies of the briefs ordered by the intelligence agency (No. 540/00 and 473/03), which had been submitted in early 2015. Unlike the copies that had already been submitted to Oral Criminal Court No. 2, those copies were not redacted at all. Oral Criminal Court No. 2 made those copies available to the parties under oath not to reproduce or disseminate their content.

³⁴ Decrees No. 398, 786 and 787 of 2003. With respect to the international aspect of the investigation, on May 7, 2003, the then-Intelligence Secretary declassified the intelligence report titled: "Temática: AMIA, La Conexión Internacional. El Esclarecimiento del Atentado Terrorista y la Individualización de sus Autores" [Subject: AMIA, The International Connection. The Facts of the Terrorist Attack and Identity of its Perpetrators] and its annexes, at the request of Federal Criminal and Correctional Court No. 9 (See Resolution No. 301/03 of the Intelligence Secretariat).

declassification was generic and did not involve specific documents. The task was delegated onto the Ministry of Justice, Security, and Human Rights, which ordered law enforcement heads to condition adequate space in their facilities to ensure that judicial authorities could access the documents.³⁵

Shortly thereafter, the Executive issued Decrees Numbers 786/03 and 787/03.³⁶ The first was in response to a formal request from Federal Criminal and Correctional Court No. 9 for clarification of a material fact. The Executive then ordered the Special Investigation Unit to create an Information Submission Unit (URI, for its acronym in Spanish) inside each law enforcement agency to search for and analyze documents, and to investigate and report the results to the courts and to the Special Congressional Commission. Information Submission Units were headed by the Executive Secretary of the Special Investigation Unit.³⁷

Decree No. 787/03 on the other hand authorized access to the Intelligence Secretariat's documents and databases with respect to the attacks in the AMIA/DAIA buildings and the Israeli Embassy. In addition, it ordered the Special Investigation Unit to create an Information Submission Unit inside the Intelligence Secretariat with unlimited access to all types of documents, reports or files, regardless of their clearance level and physical format, to facilitate their search, collection, and analysis, as well as to conduct any necessary investigations and report their results to the competent courts. The decree also stated that the Special Investigation Unit of the Executive Secretary **was to direct the Information Submission Unit and authorized the participation of authorities from the judiciary and the Public Prosecutor's Office as well as representatives of the complainants.**³⁸

Several changes had also occurred by then, particularly with respect to the activities of Oral Criminal Court No. 3 and its decision to declare a partial mistrial and acquit the defendants. In December 2003, the Federal Appeals Chamber disqualified the judge who had, until then, been in charge of the investigation and designated another judge in his place. A few months later, on September 13, 2004, the Argentine Attorney General created the AMIA Investigations and Prosecutions Unit to oversee all cases pertaining to the attack and its cover-up.

On February 8, 2005, the federal investigation court delegated the task of investigating the attack onto that Investigations and Prosecutions Unit. In Argentine procedural law, the pre-trial investigation of crimes is conducted by investigative courts and prosecutors. Delegating the task of investigating the attack onto a prosecutor's office

³⁵ Resolution No. 54/103.

³⁶ Both on September 17, 2003.

³⁷ He was authorized to create such units in other annexes, forces, and divisions and even petition the police forces for their collaboration in order to create similar units in provincial departments.

³⁸ Decree No. 787/03 also established that the head of the Special Investigation Unit, with prior oversight from both the Minister of Justice and Human Rights and the Secretary of Intelligence, would submit copies of the requested documents to the competent courts and that those documents be added to the case files held by the courts, redacting the identity of foreign intelligence officers who had collaborated with the judicial investigation of the attacks or any matters that could, in the court's opinion, leak secrets that could threaten national security. The decree stressed that the Special Investigation Unit had surveyed different administrative agencies, particularly the Argentine National Directorate of Migration and the Ministry of Foreign Relations, International Commerce and Worship and detected certain documents (some of which were sensitive and confidential) that had not yet been part of the investigation.

meant emulating an *adversarial* model in which the judge rules on the issues brought to him without committing to a particular hypothesis of the facts. Thus, the investigation was at the hands of the Investigations and Prosecutions Unit, which at the same time, had in its power the declassified documents that had been submitted in 2005 and were being kept from the other parties. It wasn't until ten years later that the Executive would significantly increase access to the declassified materials by allowing the other parties to see them (Decree No. 395/2015).

From mid-2003 to February 2005, the Special Investigation Unit had conducted a series of surveys in different offices to search for information about the attack. As a result, on February 24, 2005, the Intelligence Secretariat submitted classified evidence to the Investigations and Prosecutions Unit, which consisted of nearly two thousand files. However, the files were still classified (Resolution "R" No. 119/05). The Investigations and Prosecutions Unit that had been created only a year earlier, had concurring powers to act both as prosecutor in the judicial proceedings and as the exclusive custodian of the classified intelligence documents.³⁹

Finally, on July 12, 2005, the Executive approved the resolution adopted before the Inter-American Commission on Human Rights (IACHR) in the framework of petition No. 12,204.⁴⁰ The government acknowledged its international liability for failing to meet its responsibility to prevent the attack that had taken place two years earlier against the Israeli Embassy, for covering up the facts, and for the severe and deliberate failure to investigate the event which interfered with the judicial investigation.⁴¹ The decree also mentioned declassification measures and reversed the secrecy duties that had been enforced since 2003.

In short, the process by which the Special Investigation Unit (in its capacity as an Executive unit) began to work in the year 2000 with the information gathered by national intelligence agents resulted in the submission of evidence to the judiciary that in turn also resulted in the submission of a massive amount of evidence in 2005. Unlike the relatively specific requests of Oral Criminal Court No. 3 analyzed in the previous section of this work, the requests analyzed in this section are relatively broader in scope, and the Executive's response is, consequently, more autonomous. While the volume of the declassified information was greater, it was less detailed with respect to the specific origin of each exhibit or to the procedure for securing each exhibit or group of exhibits.

SECOND GENERIC ADMINISTRATIVE DECLASSIFICATION (2015/17)

³⁹ On April 28, 2005, by way of Decree No. 384/05, it ordered the heads of all agencies not to destroy any documents, reports or files, pertaining to the attack carried out on March 17, 1992 against the Israeli Embassy as well as the one carried out on July 18, 1994.

⁴⁰ See Decree No. 812/05.

⁴¹ Cf. Executive Decree No. 812/05. On March 1, 2006, the Executive issued Decree No. 229/06 which ordered the Special Investigation Unit to investigate irregularities in the attack investigation and authorized the Argentine Secretariat of Criminal and Penitentiary Policies of the Ministry of Justice and Human Rights to intervene as complainant. At the same time, on July 16, 2008, then-president Cristina FERNÁNDEZ DE KIRCHNER issued Decree No. 1157/08 authorizing the Argentine Attorney General for the National Treasury to file a civil suit for the recovery of assets and remedies for the loss of government assets embezzled in the framework of the investigation into the attacks.

In August 2014, the Investigations and Prosecutions Unit requested that the Federal Police Force, National Gendarmerie and Marine Forces submit documents that had been declassified under Decrees No. 398/03 and 786/03 to further the investigation.⁴² Each force complied with the request between August and September 2014. Some submitted inventories of the evidence they had gathered.⁴³ On March 10, 2015, the Investigations and Prosecutions Unit also requested the declassification of documents that had been submitted to it in compliance with Resolution “R” No. 119/05 of the Intelligence Secretariat as well as any other evidence that said agency could be holding.

In response to the request, the Executive declassified all of the documents under the Investigations and Prosecutions Unit’s custody, the additional documents that had been selected by the Information Submission Unit of the former Intelligence Secretariat, and all new documents in the Federal Intelligence Agency’s custody that had not already been submitted to the investigation.⁴⁴ In compliance with the order, the Federal Intelligence Agency inspected its installations with the judges and officials of the Investigations and Prosecutions Unit, and a government Civil-Law Notary.⁴⁵

This inspection resulted in the massive submission of evidence in different formats. It was initially estimated that, if lined up, the recovered boxes would extend over two kilometers. To review the evidence, a Special Document Survey and Analysis Task Force was created (GERAD, for its acronym in Spanish).⁴⁶ From June 2015, the Special Document Survey and Analysis Task Force restored and systematized information⁴⁷ following a work protocol that ensured that the parties could oversee the work and exercise their rights.

Regardless of its broad scope, Decree No. 395/2015 did not encompass every possible piece of documentary evidence.⁴⁸ Hence, the Investigations and Prosecutions Unit

⁴² The AMIA Investigations and Prosecutions Unit issued the request after learning from a witness that the Federal Police Force had evidence of secret intelligence tasks that had been carried out but were not recorded in the order.

⁴³ On August 6, 2014, the Federal Police Force submitted three boxes of documents; and two days later it submitted 12 more boxes that had been stored in the Antiterrorism Investigation Unit’s warehouse. On September 2, 2014, the Argentine National Gendarmerie submitted to the AMIA Investigations and Prosecutions Unit a summary report on Arab citizens. One was on Ms. Daniela Laura RODRÍGUEZ PIÑAS by the 33rd Precinct of “San Martín de los Andes” and consisted of 57 photographs and a video recording labeled under forensic evaluation No. 25,665, which had been conducted by the former Directorate of Forensic Science. In addition, the Argentine National Gendarmerie reported that it had documents and other evidence in its warehouse; all of which is now in Argentine Federal Criminal and Correctional Court No. 9. Lastly, on August 6, 2014, the Marine Force replied claiming it had no information that could help with the investigation.

⁴⁴ See Decree No. 395/15, issued on March 12, 2015.

⁴⁵ See the government’s Civil-Law Notary’s record entries for March 16 and 18 and April 23, 2015.

⁴⁶ See Executive Resolution No. 1872/15 of June 23, 2015.

⁴⁷ Later, the Special Document Survey and Analysis Task Force also examined the files of the Buenos Aires Police Force’s Intelligence Directorate, which from 2000 to 2002, commissioned by the Provincial Remembrance Commission (Comisión Provincial por la Memoria), had in its power approximately 39,000 pages worth of documents that could help with the investigation.

⁴⁸ This and its following decrees did not order the declassification of evidence submitted to the Investigations and Prosecutions Unit before and after Resolution “R” No. 119/05. It only pertained to documents currently in the power of the Federal Police Force, National Gendarmerie, Marine Force, and former SIDE; nor did it extend to any evidence produced or obtained after its date of issuance. Hence, to

issued a series of new requests before the Executive, the Argentine National Congress, and even collateral intelligence agencies through the Office of the Attorney General and Ministry of Foreign Relations, International Commerce and Worship.⁴⁹

Executive Decree No. 229/2017 of April 2017 partially admitted the request and declassified additional documents. The decree also ordered the Special Investigation Unit to intervene in the surveying, digitalization and categorization of the unit's declassified documents, to assign facilities to that effect, which were to be overseen by the Federal Intelligence Agency in which the evidence was stored, and ordered the Investigations and Prosecutions Unit to collaborate with, surrender and transfer to said facilities any and all documents, reports, and files that were declassified in light of Decree No. 395/15 so that both units could "continue their work until the entire proceeding is finalized."⁵⁰

In June 2015, the Investigations and Prosecutions Unit also requested that the Executive dismiss the reports submitted in October 2003 by the General Director of Operations of the Intelligence Secretariat and define the scope of that decision to allow the parties to access the documents. The Intelligence Secretariat admitted the request and ordered the reports to be declassified.⁵¹

In short, one decade after the first administrative submission of evidence at a general level, documents were massively submitted. This time, the volume was greater and involved a much less specific selection of evidence. In fact, Decrees Nos. 395/15 and 229/17 only superficially described the evidence at hand and instead broadened their

date, it's still possible that there may be information out there of relevance to the investigation in the hands of other security forces, national government office, or within the scope of the Legislative.

⁴⁹ In the framework of these requests, on October 25, 2016, the Investigations and Prosecutions Unit pinpointed certain matters of concern, including a group of documents held by what is currently the Federal Intelligence Agency which did not fall under the scope of Decree No. 395/2015 because they had been submitted to the AMIA Prosecution Unit after Resolution "R" No. 119/05 of the Intelligence Secretariat and had not been used by the Information Submission Unit.

⁵⁰ Almost immediately after that, the final phase in the protocol was temporarily stayed until a decision was made as to how future work was to be conducted. On May 9, 2017, the Federal Intelligence Agency reported that it would not continue to carry out any tasks with respect to those documents and, therefore, refused to sign off on the inventories. As a result, the prosecutors requested that the heads of the Federal Intelligence Agency and Ministry of Justice and Human Rights establish clear guidelines for the implementation of Decree No. 229/2017 to ensure that any previously submitted evidence was preserved and that the survey of declassified information could continue, under the supervision of all parties involved. On May 31, 2017, the head of the Federal Intelligence Agency explained that work was being conducted to remove all documents that did not pertain to the AMIA case and that, once that work was finalized, the Special Investigation Unit would take control of the building and assist the Investigations and Prosecutions Unit without interfering with the procedure or terms of the relationship, or with the evidence or areas in which declassified information was stored. In his note, the General Director of the Federal Intelligence Agency also stressed that the replacement did not affect the validity or integrity of the operations directed, ordered and carried out by the Investigations and Prosecutions Unit and stated that the evidence in question was legally available for the unit. Therefore, until the Special Investigation Unit could effectively use the facilities, the Federal Intelligence Agency would continue to assist with the collection and digitization of the documents, in the same capacity as it had been doing so since Decree No. 229/17 was issued.

⁵¹ It also ordered the Investigations and Prosecutions Unit to take any necessary measures for the parties to personally submit requests wherever the evidence was held, provided they neither reproduced nor disseminated it (see Resolution No. 1024/15).

scope to include “any and all new documents, reports, and files that have not already been submitted.”⁵²

The two successive decrees in question are very similar in scope and were issued by two presidential administrations that have held opposing views with regards to the investigation of the attacks. All in all, this has ultimately contributed to administrations with a seemingly pro-access position with respect to the intelligence gathered in the investigation.⁵³

However, when it comes to access to information, the government’s practices continue to fall short of the mark and ultimately decrease the effectiveness of the decrees. In fact, in light of this experience, the overall design and efficiency of the system that is in place for congressional supervision of intelligence agency operations merits a separate discussion. From a critical standpoint, Roberto Saba has highlighted that: “the right to access information to ensure the monitoring and transparency of espionage and national security agencies is severely hindered, as has been democracy in the last thirty years and practically throughout all of Argentina’s history.”⁵⁴

PART TWO: Identification, Validity and Evidentiary Performance of Declassified Evidence

IDENTIFICATION AND LABELLING OF THE EVIDENCE

A first question with regards to the use of intelligence documents in criminal procedures, no matter how basic, is whether it has been adequately identified and labeled. The above analyzed experience clearly reveals that the mere submission of documents that had previously been in the custody of an intelligence agency does not, in itself, mean that intelligence officials are genuinely collaborating with judicial investigations. In fact, even when there is a substantial change in the way the administration views its own role, that does not necessarily result in collaboration either. In the worst case, the administration can cause delays and place burdens on the work itself.

In the normal conduction of a criminal procedure, evidence results from proper compliance with certain procedures or with a court order; this includes, for example, going through someone’s phone records or tapping their phone. Such information can only be obtained with a court order in the interest of preventing or investigating criminal activities. And that kind of surveillance is lawful inasmuch as procedure is followed.

Beyond that scope, there’s also a large spectrum of cases in which government authorities may legally obtain such information. It can also collect data under

⁵² Decree No. 395/15, article 3.

⁵³ Our point is not to discuss the motivations behind those decisions or contexts of each, but rather to analyze the milestones in the declassification process.

⁵⁴ Saba, Roberto. “Acceso a la Información y Seguridad Nacional” [Access to Information and National Security], in *Estudios en Derecho a la Información*, No. 3, Instituto de Investigaciones Jurídicas, UNAM, Mexico (2017), pp. 99-110, p. 109.

circumstances that do not necessarily involve criminal activities. This includes perfectly legal government activities, such as border control, environmental monitoring or migration control. Under certain circumstances, intelligence can be lawfully gathered for genuine interests, and remain to some extent classified. In such cases, there is no direct relationship between the information gathered by the government and a criminal procedure. Thus, information can be useful to a criminal case without necessarily having been obtained through criminal procedure rules or even for the purpose of that procedure.

The information we are discussing here pertains to both categories, regardless of which agencies may have obtained it. Therefore, the information collected by the Executive often results from certain government activities that are, to some extent, independent of judicial activities; and was consequently subject to fewer checks. In short, the output of intelligence activities coexists with that of judicial investigations.

Hence, when evidence is obtained transparently and for a clear purpose, its performance is increased. Submission of the declassified material requested by Oral Criminal Court No. 3 was slow, but there was a certain order to each exhibit. The selected evidence that was ultimately submitted to the Investigations and Prosecutions Unit in 2005, though much more generic, followed a more or less logical criterion and included an index and systematized files. Lastly, the evidence submitted in the massive declassifications of 2015 and 2017 was instead broader and its actual contents were unknown.

Hence, unlike the first batch of evidence that was submitted in the framework of the above described oral trial, later submissions of declassified evidence meant a significant challenge to the receiving party in terms of identification and characterization. The prosecutor, the judge and the parties had to sort through hundreds of boxes containing tons of papers with no indication as to what documents corresponded to which judicial orders, or even which resulted from intelligence activities.

But the problem is broader. Under normal circumstances, there is a direct relationship between validly submitted government information obtained for lawful intelligence purposes and an occasional interest in the outcomes of criminal proceedings. Whether or not the government can reasonably expect each piece of evidence to remain classified needs to be analyzed on a case by case basis. In addition, a certain deference to the government's credibility can also be justified, both with respect to the content itself as well as to the procedures that were followed for its procurement.

However, some public events as well as the conduction of the trial itself called for certain necessary clarifications. On the one hand, the same level of judicial deference was not possible with respect to the evidence submitted by the government. This decreased the chances of inter-institutional collaboration; and, in turn, resulted in fewer resources for the investigation. On the other hand, the outrage over irregularities in the first investigation changed the focus point of the judicial investigation. Thus, different

investigations focused not only on whether or not the intelligence activities themselves were lawful, but also on whether or not legal procedure was followed.

That was the backdrop against which the 2005 and 2015 submissions occurred. Both significantly increased judicial access to intelligence evidence. However, it all went down without the proper descriptions or identification of suspects and with certain distrust for the evidence submitted. In other words, both the judges and the parties had access to large volumes of evidence, but with insufficient elements for interpreting it.

Production and dissemination of intelligence are different, albeit related, procedures. As is the case with any discipline, one can identify best practices that typically involve different phases. One such phase in this case is the “intelligence cycle.”⁵⁵ The United States Department of the Army’s Human Intelligence (HUMINT) Collector Operations Field Manual, for example, stipulates that intelligence procedures involve planning, preparation, collection, processing, production, analysis, dissemination, and assessment. The reporting phase is the last phase of all. And if the information obtained is not reported in a precise and timely manner to the right addressee, it is of no use.^{56,57}

In short, intelligence efforts resulted in a significant amount of evidence, which was submitted at different times with different objectives, and each submission was characterized by a lack of references and delays in generic submissions. The decrees of 2015 and 2017 could have been more precise and detailed. That lack of precision ultimately forced the prosecutor to take on the responsibility of preserving and filing that evidence, which for decades had been produced and stored by the Executive.

The above can seem superficial. However, the sheer volume of the files and time that elapsed render it important. This experience suggests that the right to access information involves a series of positive government obligations that go beyond merely declassifying information. Particularly with respect to its own discretionary actions, the government should provide a documented record of how information was obtained. Authorizing access to a warehouse with documents that had previously been deemed as classified and confidential is a necessary but insufficient step.

Additionally, this experience clearly reveals that there are several possible procedures for clearing access to declassified information. There is no doubt that access mechanisms require greater certainty. Better classification and storage routines would also have enabled more orderly access to evidence. The Freedom of Information Act

⁵⁵ Human Intelligence Collector Operations, Field Manual, FM 2.22.3 (FM 34-52), Headquarters, Department of the Army, United States of America.

⁵⁶ Similarly, reporting procedures also result in an “assessment” of the collected information. The latter means judging the reliability of the source of that information and its overall quality and content (which also relates to its credibility, an aspect that should neither be played down nor ignored); none of which can be assessed without information as to how it was obtained. John Joseph and Jeff Corkill, citing Mc Dowell (2009, p. 195), in “Information evaluation: How one group of intelligence analyst go about the task,” Edith Cowan University, Australian Security and Intelligence Conference, 2011.

⁵⁷ Handbook on Criminal Justice Responses to Terrorism, ps. 52, United Nation Office on Drugs and Crime (UNODC), 2009.

(FOIA), for example, has enabled access in the U.S. to information about the case through a standard mechanism that is far more precise than that followed in Argentina.

ADMISSIBILITY IN CRIMINAL PROCEDURES OF EVIDENCE GATHERED BY INTELLIGENCE AGENCIES

A second issue that arises out of this experience is whether or not the evidence gathered by intelligence agencies is admissible in criminal procedures. Historians, intelligence agencies, and the judiciary share a common interest in the evaluation of evidence in a case.⁵⁸ However, the fact that some government activities for intelligence purposes are legally valid does not necessarily mean that the outcome is admissible in court in criminal cases.

In 1999, the Argentine Attorney General deemed that intelligence reports on the activities of a skinhead group were of “undoubted value” with respect to the discriminatory nature of a hate crime.⁵⁹ In a decision handed down on December 23, 1999, in the Israeli Embassy case, the Argentine Supreme Court also repeatedly alluded to “intelligence reports” when deciding the fate of a defendant from a procedural point of view and assessing whether the investigation should continue forward.⁶⁰

In general, the word “documents” is used to refer to the different records of intelligence agencies. However, not all records are actually documents in the legal sense of the term, i.e. as a material element that is, on its own accord, sufficient proof (under certain precautions) of an event or fact.

Evidentiary freedom is the dominant standard in modern Western criminal procedural law. The Argentine Criminal Code (CPPN, for its acronym in Spanish) includes this principle in article 206, which reads: “restrictions to investigations stipulated by law with respect to evidence gathering shall be void, with the exception of those pertaining to the civil status of individuals.” Title III, Book II of the Argentine Criminal Code, governing so-called “Evidentiary Means,” does not explicitly govern documentary evidence; thus, it raises the questions as to whether documentary evidence is, in the framework of a criminal proceeding, “innominate” evidence⁶¹ or whether it is governed by the rules of

⁵⁸ CITA.

⁵⁹ Argentine Attorney General, decision P. 393. XXXV. RECURSO DE HECHO Paszkowski, Andrés Pablo y otros s/ infracción ley 23.592; Case No. 214/97.

⁶⁰ CSJN, Judgment 333:3297. The Court’s own case law also sets precedents in which evidence gathered by intelligence agencies was used to prove crimes perpetrated by those same agencies. Thus, an emblematic example of this is the ruling of the Argentine Federal Court of Criminal and Correctional Appeals (Judgment 309:5) in the so called “juntas” trials, in which Jorge Rafael Videla, Emilio Eduardo Massera, Orlando Ramón Agosti, Roberto Eduardo Viola and Armando Lambruschini were sentenced on the count of orders given by them that facilitated the commission of crimes by their subordinates through an organized power scheme which controlled each criminal activity from beginning to end (opinion of Justice Fayt in Judgment 309:5, pg. 1689). The horrific crimes that merited criminal sanction involved capturing individuals who, based on intelligence reports, had allegedly participated in subversive acts, according to the court.

⁶¹ This problem relates to the judicial regulation of evidence, and a subject that has particularly captured the attention of Italian law is that of whether it is possible (and if so, how) to incorporate non-regulated kinds of evidence, which are known as “atypical” and “innominate” evidence. These types of evidence are

civil procedure or other areas of the law that touch on the matter more explicitly. Obviously, its inclusion in judicial practice would not be a problem today.

Regardless of how the evidence gathered by intelligence agencies is to be characterized, the core issue is that the imprecision with regards to the nature of those evidentiary elements calls for clarification of, among other aspects, the validity of criminal evidence, which depends on how the evidence was acquired. In simpler terms, as a general rule, a person cannot be tried on the basis of evidence that was unlawfully obtained or subjected to procedures in which the chain of custody was somehow breached.

The European Court of Human Rights had the opportunity to put forward certain criteria for the admissibility of evidence in criminal cases obtained by intelligence agencies in the case of suspected terrorist activity. The case was *A & Others v. UK (2009)*.⁶² Among other things, the Court analyzed article 5(4) ECHR, which provides for the right to have the lawfulness of detention speedily examined by a Court. The defense alleged that it had not had the opportunity to challenge the evidence upon which the prosecution's accusation of terrorist activity rested.⁶³

The applicants' argument was that some of the evidence in the proceedings was not disclosed to the applicants. In particular, the applicant criticized that in the United Kingdom, the procedure involved cutting off contact with the defendant and refusing access on the part of the defendant to certain evidence. The Court found that four of the applicants were indeed unable to effectively challenge the allegations against them (paragraphs 212-224).

The ECtHR found that the requirement of procedural fairness under Article 5(4) does not impose a uniform, unvarying standard to be applied irrespective of context, facts and circumstances. As a general rule, an Article 5(4) procedure must have a judicial character but it is not always necessary that the procedure be attended by the same guarantees as those required under Article 6 for criminal or civil litigation. The guarantees it provides must be appropriate to the type of deprivation of liberty in question (203). The proceedings must be adversarial and must always ensure "equality of arms" between the parties (204, and in *Sher And Others v. UK*, para. 147)

The Court parted from the fact that at the time the applicants were detained, there was thought to be an urgent need to maintain the secrecy of the sources of relevant

usually admitted; however, when it comes to documentary evidence or alleged or presumed evidence, a series of issues have arisen with respect to the admissibility and effectiveness of atypical evidence. (Cf. Michelle Taruffo, *"La prueba de los hechos" [Proving Facts] Op. Cit., ps. 403-404*).

⁶² According to Marko Milanovic, in this case "... the Court's general position on derogations is quite flexible and undogmatic. It shows that the Court is prepared to cut some slack to governments fighting terrorism, within certain limits." See, Milanovic Marko. *European Court decides A and others v. United Kingdom*, at ejiltalk.org/european-court-decides-a-and-others-v-united-kingdom/ Published on February 19, 2009.

⁶³ Article 5(4) of the Convention establishes that: "4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

information to prevent terrorist attacks (216), and that, while it is true that part of the hearings were closed to enable the judge's scrutiny, the procedure allowing the court to exclude the applicants and their lawyers from any part of a hearing was conceived in the interest of the detained person, and not in the interest of the police. This enabled the court to conduct a penetrating examination of the grounds relied upon by the police to justify further detention to show, in the detained person's best interest, that there were reasonable grounds to believe that further detention was necessary. The Court further found that the District Judge was best placed to ensure that no material was unnecessarily withheld from the applicants (A. and Others, 218).

According to the Court, terrorism falls into a special category. Article 5(4) does not preclude the use of a closed hearing wherein confidential sources of information supporting the authorities' line of investigation are submitted to a court in the absence of the detainee or his lawyer. What is important is that the authorities disclose adequate information to enable a detainee to know the nature of the allegations against him and to have the opportunity to refute them, and to participate effectively in proceedings concerning his continued detention (*Sher and Others v. the United Kingdom*, § 149, where the Court accepted that the threat of an imminent terrorist attack justified restrictions on the adversarial nature of the proceedings concerning the warrants for further detention, for reasons of national security.)

In addition, it has been held that: "despite a traditional reluctance to engage with sensitive intelligence evidence [...] some national courts have become increasingly more at ease with assessing so-called secret evidence before reaching a conclusion on the appropriateness of imposing (a) particular counter-terrorism measure(s) on an individual or organisation."⁶⁴

Going back to the issue of massively classified evidence, it is now clear that such evidence may include documentary evidence in the broadest sense typically admitted by the courts. However, it is not so clear what the tenor of recorded events is, i.e. the nature of that evidence and who authored each of the incorporated elements. Consequently, the quality of the proceedings that led to its inclusion in the government files cannot be easily enough assessed so as to overcome judicial scrutiny in every case, especially the kind of scrutiny established by the European Court. Overall, the evidence cannot be rejected in full. Instead, each element would have to be assessed individually.⁶⁵

THE MATTER OF EVIDENTIARY PERFORMANCE

⁶⁴ Grozdanova, Romyana. The Right to Fair Trial and the Rise of Sensitive Intelligence Evidence: Responses from the Dutch and UK Courts, Mo 7 Mai 2018, at <https://verfassungsblog.de/the-right-to-fair-trial-and-the-rise-of-sensitive-intelligence-evidence-responses-from-the-dutch-and-uk-courts/>

⁶⁵ Oral Criminal Court No. 2 seems to have reached a similar conclusion when striking down a generic challenge against the prosecutor's reliance on evidence that had been gathered in the declassification process.

Lastly, a third question is in order with respect to the evaluation of what evidence can be validly identified and used in the filing of criminal charges. To what extent is evidence gathered by intelligence agencies to be deemed persuasive? Should there be specific rules governing such matters? The question is particularly relevant, of course, when it comes to extremes that cannot be replaced by other means of evidence.

No inconveniences arise in cases in which the usual evidentiary means suffice. But imagine a situation in which an intelligence agent whose confidentiality duties are waived testifies in court with respect to situations he or she may have experienced. In such cases, what could potentially have started as intelligence activities, for example, tailing a suspect, becomes direct testimony, supposing of course that the agent was duly authorized to follow that suspect.

A more complex question is that of using evidence gathered by intelligence agencies that cannot be reproduced under any other format, particularly that which pertains to the scene under investigation. Should such evidence be deemed as hearsay or as an expert opinion?

Intelligence analysts are “information translators, whose role is to review information and provide reliable intelligence in a functionally practical format.”⁶⁶ Analysts must look at several factors: “source fitness, performance record, source origin, source motivation, bias, credibility, and pertinence.”⁶⁷ As a result, it is said that: “analysts create the actual intelligence product, distribute it, create its context, and advise on it and how it is generally perceived to render it valid as a decision-making foundation.”⁶⁸ However, despite potential overlap, validity criteria at a political level don’t always match those required in criminal proceedings.

A possible alternative is to assess whether the basis for an intelligence agency’s conclusion could guide judicial proceedings with respect to the performance of evidence. There is extensive literature on the matter of intelligence evidence; and, naturally, on whether estimates are correct and whether there are procedures that could render the evidence more effective.

Joseph and Corkill have written extensively on the assessment of evidence collected by intelligence agencies. According to their field work, the assessment of evidence collected by intelligence agencies is a practical matter, although it often rests on an implicit and informal foundation. This assessment relates to a number of matters such as relevance and credibility, record, capacity and motivation of the source. The authors also suggest that these matters, when viewed more holistically and with greater emphasis on how the different pieces of evidence, relate with what we already know, rather than what it means in a vacuum.

The importance of the interpreter has also been highlighted. In order to make “estimates” in the intelligence fields it is essential to draw conclusions as to the

⁶⁶ Cope, 2004, ps. 188.

⁶⁷ John Joseph – Jeff Corkill, Op. Cit.

⁶⁸ John Joseph – Jeff Corkill, Op. Cit., citing Cooper (2005) and Lefebvre (2004).

credibility of sources, and this unavoidable task cannot be implicitly delegated onto individuals who are untrained or unformed with respect to current intelligence.⁶⁹ If all this is true, then the conclusions of intelligence agencies pertain to an area that can hardly be transferred.

Related literature addresses the matter of the uncertainty surrounding such estimates. Jeffrey Friedman and Richard Zechauser claim that analysts almost always face situations of uncertainty in which probabilities are ambiguous.⁷⁰ Dealing with that while having to produce intelligence is also a matter that has been studied and discussed.⁷¹

An additional issue is the so-called “estimated chance”⁷² that tends to capture the extent to which a person believes a certain statement to be true. The estimated percentage does not express the chances of something actually happening as a personal conviction of the analyst.

What is also noteworthy is the importance of knowing whether the analysts of a same event handle information levels and amounts similarly. Friedman and Zechauser also believe that an agent’s involvement in the collection of evidence can affect credibility with respect to that information. Conversely, analysts who are charged with questioning the evidence, i.e. “Devil’s advocates,” have the opposite bias. In short, making such a prediction is challenging, and must be done in a way in which the decision maker can weigh it in terms of proportion and quality.^{73,74}

Another criterion for evaluating the performance of analysts consists in focusing attention on different units of analysis: individual, team, divisions, agencies, and even community intelligence as a whole. This criterion reveals another layer, which is that of the hierarchy of intelligence sources. Is a team’s account worth more than that of an individual? Or that of an agency more than that of a division? If the hierarchy were based in analytical capacities or responded, at the normative level, to information validation systems, the answer could be affirmative. Thus, who issued the report can constitute a relevant piece of information for ranking the report. Thomas Fingar, Argentine Director of Analytical Intelligence between 2005 and 2008 stated that there are no mechanisms in place to evaluate the collective performance of evidence and that it is currently impossible to determine how well an individual analyst or unit are performing. This systematic lack of information on precision stats: “feeds the perception of politicization or lack of information about the subject of the debate.”

⁶⁹ J. Friedmann y R. Zechauser, “Handling and Mishandling Estimative Probability: Likelihood, Confidence, and the Search for Bin Laden,” ps. 13, available at https://sites.hks.harvard.edu/fs/rzeckhau/Estimative_Probability.pdf

⁷⁰ See the authors cited Op. Cit.

⁷¹ John Joseph – Jeff Corkill, Op. Cit., citing Canton, 2008; Heur 1999; Kent, 1964; Marrin & Clemente, 2005; Weiss, 2008.

⁷² “Estimated chances” are calculated on the basis of three specific factors: prior considerations, information, and method of analysis (Cf. J. Friedman and R. Zechauser, op. cit., ps. 11).

⁷³ J. Friedmann y R. Zechauser, Op. Cit., ps. 10.

⁷⁴ J. Friedmann y R. Zechauser, Op. Cit., ps. 4/5 – 11.

In addition, there are formal assessment systems in place for information obtained for intelligence purposes. One of them is the *NATO System*. The other is the U.K. *National Intelligence Model* which is also known as 5x5x5. The Intelligence Community Directive (ICD 203)⁷⁵ of the year 2015 defined adequate standards for exchanging information.⁷⁶ Despite all these efforts, uncertainty is inevitable. In fact, Friedman and Zeckhauser have stressed that the American intelligence community has been highly criticized for making imprecise predictions. As explained by Sherman Kent: “Estimating is what you do when you don’t know.”⁷⁷

As a result, and for a variety of reasons, even a perfectly confectioned intelligence report is nothing more than an estimation. Hence, the “*batting average*” metaphor. Not even the best players have a high batting average. And this is critical when assessing intelligence reports used as evidence where clashing views are to be expected.⁷⁸

In our case, the legal community will be tasked with increasing the precision of each piece of evidence. Some parts of an investigation, documented in the declassified material, can be easily reproduced in consolidated evidentiary formats. Others will possibly require further clarification of the “evidentiary value” that the Supreme Court is willing to allocate to evidence gathered by the intelligence agencies. Even when giving certain weight to such materials can be justified, unifying all considerations on the basis of a single parameter is not a sufficiently precise criterion, especially not in light of specialized literature.

In addition, the evidence to be pondered is substantially an estimate. In other words, the criminal system must reply to the question of the value of an element which is, by nature, the conclusion of a series of inferences. Thus, the goal is to assess the potential judicial performance of the product of a different discipline, but that is also nurtured by investigations and inferences.⁷⁹

⁷⁵ <https://www.dni.gov/files/documents/ICD/ICD%20203%20Analytic%20Standards.pdf>

⁷⁶ The *College of Policing* of England and Wales is a special law enforcement unit and in one of its publications, it provides a basic characterization of intelligence reports. Cf. Intelligence report, College of Policing, www.app.college.police.uk/app-content/intelligence-mangement/intelligence-report/#

⁷⁷ Jeffrey A. Friedman and Richard Zeckhauser; Why Assessing Estimative Accuracy is Feasible and Desirable.

⁷⁸ Marchio, Jim; “How good is your batting average?” Early IC Efforts To Assess the Accuracy of Estimates, in 4 *Studies in Intelligence* Vol 60, No. 4 (Extracts, December 2016), at <https://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/csi-studies/studies/vol-60-no-4/pdfs/assessments-of-estimates.pdf>

Thus, for example, Anderson, Schum, and Twining have stated that: “The investigations and inferences used in the analysis of the intelligence agencies share characteristics of the tasks performed in other areas, such as law, medicine, history and science. There are three disciplines in which people who carry out analytical tasks must be prepared to find and evaluate all kinds of substantial tests that are imaginable. Those disciplines are the law, the intelligence agency’s analysis and history. Establishing the relevance, credibility and inferential [probatory] force of the evidence is as important in the analysis of the intelligence agencies as in the law.” Cf. Anderson, Terence; Schum, David and Twining, William; *Análisis de la Prueba*, translated by Flavia Carbonell and Claudio Agüero, Marcial Pons, Madrid, 2015, pp. 35-6.

That operation, naturally, is also affected by the suspicion about the way in which part of the investigation was deployed and the relative obscurity that exists with respect to its work methodology. In this way, the probative performance in a trial will tend to be diminished, even beyond the limitations that the use of these materials normally present.

In summary, even though the needs of the criminal process have been further delimited, the government appealed to national security secrets to hinder the investigation each time; thus, a prudent assessment is in order. We have described three moments in the declassification process, each with a broader scope than the one before. But, at the same time, we have shown three matters that must be considered when facing that information. The correct identification of the evidence, its procedural validity, and lastly, a detailed conclusion about the possibilities and limitations of its use must all be part of the equation to better use that information.