

# THE USE OF EVIDENCE PROVIDED BY INTELLIGENCE AGENCIES IN TERRORISM PROSECUTIONS: CHALLENGES AND LESSONS LEARNED FROM ARGENTINA’S AMIA BOMBING

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## I. INTRODUCTION

The July 18, 1994 attack against several Jewish institutions in Buenos Aires has been under investigation for years by Argentina's judicial authorities and several State agencies. Among those agencies, the Argentine Intelligence Secretariat (SIDE, for its Spanish acronym)—the agency that oversaw national intelligence—played a significant role. SIDE would later be replaced by the Intelligence Secretariat (SI, for its Spanish acronym) and after that by the current Federal Intelligence Agency (AFI, for its Spanish acronym).<sup>1</sup> Because the information is classified, crucial information about the attack has been kept from the parties in the judicial investigation.

The first requests to declassify government information related to the attacks date back to 1999.<sup>2</sup> Since then, a series of decisions issued by different government institutions have gradually resulted in information declassification. Recent milestones towards declassification include Presidential Decree Nos. 395/2015 and 229/2017.<sup>3</sup>

The declassification process is part of a wider trend aimed at facilitating open access to classified information. 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.<sup>4</sup> On December 1, 2015, Decree No. 2704/15 established a public access mechanism and authorized access to all the information contained in the Historical Records Database belonging to the AFI's Directorate of Database and Intelligence Files, which does not fall under any of the exceptions stipulated in Article 3 of the Decree.<sup>5</sup> More recently, Law No. 27275 regulating access to public information was passed

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1. Law No. 27126, Mar. 3, 2015, [33083] B.O. 1 (Arg.).

2. *See On Declassification of Files of the Former SIDE*, MEMORIA ACTIVA (Dec. 30, 2015), <http://memoriaactiva.com/?p=1236>.

3. Law No. 395/2015, Dec. 3, 2015, [33089] B.O. 1 (Arg.); Law No. 229/2017, Apr. 5, 2017, [33600] B.O. 1 (Arg.).

4. Law No. 4/2010, Jan. 5, 2010, [31815] B.O. 4 (Arg.); Law No. 200/2012, Feb. 8, 2012, [32335] B.O. 1 (Arg.); Law No. 503/2015, Apr. 6, 2015, [33101] B.O. 3 (Arg.); Resolución 103/2011, Jan. 27, 2012, [32327] B.O. 38 (Arg.); Resolución 408/2009, Dec. 29, 2009, [31810] B.O. 13 (Arg.).

5. Law No. 2704/2015, Dec. 1, 2015, [33269] B.O. 4 (Arg.).

establishing the government's duty, without exception, to grant access to information in cases involving severe human rights violations.<sup>6</sup>

Throughout the early 2000s, the 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.<sup>7</sup> The Court found procedural irregularities occurred during the judicial investigation and ordered another investigation into the possible crimes committed by, among others, the same intelligence personnel that conducted the initial investigation.<sup>8</sup>

Thus, a decade after the attack, it became evident that a discussion with respect to the original evidence gathered in the investigation was necessary, as the evidence could potentially shed light on both the attack itself and the irregularities in the investigation. This is the backdrop of all declassification processes of government-held information about the attack.

This article attempts to identify potential lessons and challenges learned from the 1994 attacks investigation and the use of declassified intelligence in the criminal proceedings. Part One will look at three time points in the declassification process. This includes the declassification that resulted from the trial before the Oral Criminal Court No. 3 beginning in 2001, the administrative selection of evidence and its remission to the Prosecution Unit (UFI, for its Spanish acronym) in 2005, and the massive declassification that resulted from Decrees in 2015 and 2017. Part Two examines three conclusions and current unresolved challenges with the hope of revealing some valuable lessons. The first lesson relates to the identification and characterization of evidence, the second considers the validity and admissibility of declassified evidence in criminal proceedings, and finally, the third discusses evidentiary performance.

## II. PART ONE: PHASES OF THE DECLASSIFICATION PROCESS

The declassification process can be broken into three phases. The first phase started in 2001 with the trial before the Oral

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6. Law No. 27275, Sept. 29, 2016, [33472] B.O. 1 (Arg.).

7. Memorandum from Alberto Nisman, Attorney General in Charge of Attorney General's Unit, to Jose Pablo Vázquez, (Mar. 4, 2015) (on file with Southwestern Law Library) [hereinafter Nisman Memo].

8. Dexter Filkins, *Death of a Prosecutor*, NEW YORKER (Jul. 20, 2015), <https://www.newyorker.com/magazine/2015/07/20/death-of-a-prosecutor>.

Criminal Court No. 3, the second phase began with an administrative selection of documents that culminated in their submission to the Investigations and Prosecutions Unit in 2005, and the third phase is the massive declassification that commenced in 2015.<sup>9</sup> Despite numerous false starts and setbacks, each phase marked a favorable trend toward declassification.

The initial investigation into the 1994 attack was conducted by a federal judge, aided in part by the national intelligence services and with the support of foreign intelligence agencies. It is worth mentioning that, by that time, a prior 1992 attack on the Israeli Embassy in Buenos Aires was being investigated under a similar framework by the Supreme Court of Argentina.<sup>10</sup> The Supreme Court ordered that a federal first instance judge investigate the 1994 attack.<sup>11</sup> In short, regardless of the hierarchical differences between investigating judges, both investigations were carried out by the judiciary with the support of national intelligence.

President Carlos Saúl Menem was incumbent at the time of the attacks, from mid-1989 to late 1999, and was succeeded by Fernando de la Rúa. Rúa took on a more explicit role in the investigation. Thus, on June 8, 2000, just months after taking office, Rúa created a Special Investigation Unit within the executive branch and charged it with the task of assisting the judiciary in its investigation.<sup>12</sup>

The Special Investigation Unit was formed by the Argentine Federal Police Force's (PFA, for its Spanish acronym) antiterrorist and intelligence divisions, SIDE, the Argentine National Gendarmerie (GN, for its Spanish acronym) and the Argentine Federal Penitentiary Service (SPF, for its Spanish acronym).<sup>13</sup> Each government agency shall prioritize requests from the Special Investigation Unit as urgent. In addition, the Special Investigation Unit had power to conduct its own investigations and report its findings to judicial authorities.

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9. Law No. 395/2015, Dec. 3, 2015, [33089] B.O. 1 (Arg.); Law No. 229/2017, Apr. 5, 2017, [33600] B.O. 1 (Arg.).

10. Art. 116, Constitución Nacional [CONST. NAC.] (Arg.).

11. *See Terrorism: Bombings in Argentina*, JEWISH VIRTUAL LIBR., <https://www.jewishvirtuallibrary.org/terrorist-bombings-in-argentina> (last visited Oct. 16, 2019).

12. Law No. 452/2000, June 8, 2000, [29510] B.O. 4 (Arg.); Resolución 39/2000, Procuración General de la Nación, Apr. 11, 2000 (Arg.).

13. Law No. 452/2000, June 8, 2000, [29510] B.O. 4 (Arg.).

On September 19, 2000, the Executive concentrated the oversight of the different units' operations to the Secretary of Political Affairs of the Ministry of the Interior.<sup>14</sup> The decree authorized more lenient sentences for defendants who collaborated with the investigation of terrorist acts, coordination and collection of human and institutional resources within the Public Prosecutor's Office to facilitate the investigation, creation of the Special Investigation Unit, granted powers to the Special Investigation Unit to conduct its own investigations, and ordered all government bodies to cooperate in full with the investigators, treating each request as urgent and immediately dispatching requested documents.

Additionally, the Secretary was given several powers, including directing the Special Investigation Unit.<sup>15</sup> Not long after, the recently created Anti-Corruption Office also joined the list of government bodies working with the Special Investigation Unit. The Argentine Congress also authorized the Special Bicameral Commission to oversee the investigation and ultimately issued three reports about the attacks on the Israeli Embassy and AMIA/DAIA building. In that capacity, the Secretary had unlimited access to files and documents related to the attacks.<sup>16</sup> Throughout the following months, there were several changes to the Special Investigation Unit's authorities.<sup>17</sup> Additionally, the imminent trial before the Oral Criminal Court No. 3 prompted witness protection measures.<sup>18</sup>

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 during the trial.

#### A. *Specific Judicial Declassification Orders (2001-2004)*

Between 2001 and 2003, judges and the Executive had a heated exchange with respect to document declassification and

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14. Law No. 846/2000, Sept. 29, 2000, [29499] B.O. 1 (Arg.).

15. *Id.*

16. *Id.*; Law No. 452/2000, June 14, 2000, [29419] B.O. 4 (Arg.).

17. Law No. 430/2001, Apr. 23, 2001, [29633] B.O. 2 (Arg.); Law No. 960/2000, Oct. 25, 2000, [29511] B.O. 2 (Arg.); Law No. 952/2000, Oct. 24, 2000, [29510] B.O. 4 (Arg.).

18. Law No. 262/1998, Mar. 9, 1998, [28859] B.O. 1 (Arg.).

waiving intelligence officials' confidentiality duties. Despite opposing views, the Executive tended to grant access to information.

The trial outlasted several presidential administrations. As time passed, the Executive's responses varied as to declassification requests. For the most part, the requests for classified evidentiary information were related to the attacks and to the examination of the government's subsequent investigation.

In October 2001, the Oral Criminal Court No. 3 requested the Executive waive the duty of confidentiality for a group of current and former SIDE to allow them to testify in court.<sup>19</sup> In response, the Executive waived SIDE's top official's duty of confidentiality and authorized him through Decree No. 490/02 to testify in court regarding the agency's investigation of the attacks.<sup>20</sup> The Executive also ordered the SI to authorize certain other agents to testify before the Oral Criminal Court No. 3.<sup>21</sup>

The Executive's authorizations did not extend to classified information related to actions or facts involving foreign citizens.<sup>22</sup> The Oral Criminal Court No. 3 believed that such restrictions diminished its fact-finding efforts and hindered the investigation of relevant circumstances of the case and consequently changed the criteria.<sup>23</sup> The Executive clarified in Decree No. 41/03 that the issue was not necessarily one of national security, but the government's interest in maintaining its relationships with foreign intelligence agencies.<sup>24</sup> The Executive believed that certain secrets could affect national security as well as other ongoing investigations and concluded that if the scope of the investigation was going to be broadened, the list of authorized personnel who could testify would be reduced.<sup>25</sup> It only authorized the testimonies of qualified, high-ranking agents with direct factual knowledge, testimonies of previously authorized witnesses with information that could acquit a defendant, and clarified the

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19. Nisman Memo, *supra* note 7.

20. Law No. 490/2002, Mar. 12, 2002, [29858] B.O. 3 (Arg.).

21. Law No. 291/2003, June 30, 2003, [30182] B.O. 1 (Arg.).

22. Law No. 41/2003, Jan. 9, 2003, [30064] B.O. 22 (Arg.).

23. Tribunal Oral en lo Criminal Federal N°3 de la Capital Federal [Oral Criminal Federal Court 3], 8/8/2002, Case No. 487/00, "Telledin Carlos A. otros s/Homicidio Calificado (Atentado a la AMIA)," (2000-¶3 and 4) (Arg.) [hereinafter Case No. 487/00].

24. Law No. 41/2003, Jan. 9, 2003, [30064] B.O. 22 (Arg.).

25. Law No. 950/2002, June 5, 2002, [29915] B.O. 4 (Arg.).

authorization of agents who signed minutes or documents to appear exclusively to ratify or recognize the signatures in documents submitted.<sup>26</sup> In other words, the Executive only waived the confidentiality duty of some agents requested by the Court, i.e. directors and operation heads.<sup>27</sup>

The Court struck down the Executive's new restrictions. On February 20, 2002, the Court ordered all the officials mentioned in the first decree (Decree No. 490/02) to testify.<sup>28</sup> On June 30, 2003, the incumbent president reviewed the request and finally authorized the testimonies in question, through Decree No. 291/2003, by reiterating that the testimonies could only involve information related to the attacks under investigation with the exception of matters that concerned national security or foreign citizens involved in foreign intelligence services.<sup>29</sup> The Decree also added that the waiver did not authorize witnesses 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 issue.<sup>30</sup> Article 5 of the Decree also ordered the Oral Criminal Court No. 3 to take necessary measures so testimonies were given only before Court staff and the parties to the trial.<sup>31</sup>

However, these restrictions were rapidly struck down and voided by Decree No. 785/03, enacted on September 18, 2003. The Decree ratified that the only valid restrictions were those relating to foreign intelligence personnel who had cooperated with the judicial investigation and the dissemination of information that could threaten national security.<sup>32</sup>

In short, the trial resulted in an unprecedented declassification process that allowed classified evidence to be used in court. The presiding judges first requested the Executive declassify certain information and waive the witness' confidentiality duties.<sup>33</sup> Subsequently, in each individual case, the Court analyzed the

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26. *Id.*

27. Case No. 487/00, *supra* note 23.

28. See Law No. 490/2002, Mar. 12, 2002, [29858] B.O. 3 (Arg.); see also Law No. 291/2003, June 30, 2003, [30182] B.O. 1 (Arg.).

29. Law No. 291/2003, June 30, 2003, [30182] B.O. 1 (Arg.).

30. *Id.*

31. *Id.* at art. 5.

32. Law No. 785/2003, Sept. 18, 2003, [30237] B.O. 1 (Arg.).

33. See generally *id.*

Executive's rationale and ultimately reserved for itself the final say with respect to the scope of the confidentiality duties in question.<sup>34</sup> The process played a large part in the Executive's erratic behavior, which varied significantly depending on the Court's different requests.

Another series of declassification-related decisions more directly impacted the judiciary's assessment of the investigation's legality. For example, in August 2002, the Oral Criminal Court No. 3 requested declassification of an internal SIDE brief containing the testimony of a former judicial officer, a whistleblower on irregularities in the investigation.<sup>35</sup> The request was turned down on the basis of needing to keep matters of national interest secret, such as the intelligence service composition, special operations, and intelligence community collaboration, as well as its division of labor.<sup>36</sup> However, on May 27, 2003, the Oral Criminal Court No. 3 ordered the Executive to declassify the brief, redacting only portions that revealed the agency's operations and agents' identities.<sup>37</sup> The Court's decision was, in turn, challenged by the Executive in the same court proceeding; however, before the Court could decide on the matter, the Executive pivoted its position and authorized the declassification of the brief in question.<sup>38</sup>

In June 2003, the Executive also waived the former intelligence head's confidentiality duty 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 investigated.<sup>39</sup> The Executive also submitted attack-related accounting records to the Court.<sup>40</sup> A few months later, the Executive broadened the scope authorizing specified officials to testify on all matters relating to the investigation.<sup>41</sup>

Similarly, over the next few years, judicial decisions broadened access to relevant information connected to the investigations. For example, the Courts declassified useful

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34. Nisman Memo, *supra* note 7.

35. Case No. 487/00, *supra* note 23.

36. *See generally* Law No. 116/2003, Jan. 23, 2003, [30074] B.O. 1 (Arg.).

37. Case No. 487/00, *supra* note 23.

38. *See generally* Law No. 146/2003, June 6, 2003, [30166] B.O. (Arg.).

39. *See generally* Law No. 249/2003, June 26, 2003, [30179] B.O. 5 (Arg.).

40. Law No. 293/2003, July 1, 2003, [30182] B.O. 3 (Arg.).

41. Law No. 785/2003, Sept. 18, 2003, [30237] B.O. 1 (Arg.).



government information related to the investigation and prosecution of the alleged irregularities in the investigations. In 2005, the SI authorized the Court to access certified copies of the administrative inquiries related to a payment made to one of the defendants, and other relevant documents.<sup>42</sup> The information was provided in accordance with Decree No. 146/03 which restricted 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 reproduction or dissemination of documents.<sup>43</sup> Former President Carlos Saúl Menem was authorized to testify as a defendant in the trial on the investigation before the Federal Oral Criminal Court No. 2 of the Federal Capital to shed light on some of the facts of the case.<sup>44</sup> More recently, on July 11, 2016, the General Director of the AFI granted the Oral Criminal Court No. 2 unlimited access to all documentary evidence related to the investigation.<sup>45</sup>

#### B. *General Administrative Declassification (2003-2005)*

Some of the Executive's early decisions regarding evidence declassification pertaining to the attacks were issued from 2003 to 2005 and focused on specific documents and witnesses requested by the judiciary.<sup>46</sup> In contrast, in 2003, three presidential decrees greenlighted judicial authorities and the Special Investigation Unit to also access classified information gathered by the security forces and SI.<sup>47</sup>

In July 2003, the Executive authorized the Argentine Federal Criminal and Correctional Court No. 9 to access all classified evidence linked to the investigation of the attack in possession of the PFA, National Gendarmerie, and Marine Forces.<sup>48</sup> Unlike the more specific declassification made to the Oral Criminal Court No. 3, this was generic and did not involve specific documents.

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42. See *Terrorism: Bombings in Argentina*, *supra* note 11.

43. See Law No. 146/2003, June 6, 2003, [30166] B.O. (Arg.).

44. Nisman Memo, *supra* note 7.

45. See generally Resolución 470/2016, July 21, 2016, [33429] B.O. 38 (Arg.).

46. *On Declassification of Files of the Former SIDE*, *supra* note 2.

47. Law No. 398/2003, July 21, 2003, [30196] B.O. 1 (Arg.); Law No. 786/2003, Sept. 17, 2003, [30237] B.O. 2 (Arg.); Law No. 787/2003, Sept. 17, 2003, [30237] B.O. 2 (Arg.).

48. Law No. 398/2003, July 21, 2003, [30196] B.O. 1 (Arg.).

The task was delegated to the Ministry of Justice, Security, and Human Rights, which ordered law enforcement heads to set aside adequate space in their facilities to ensure judicial authorities could access the documents.<sup>49</sup>

Shortly thereafter, the Executive issued two decrees in response to a formal request from the Federal Criminal and Correctional Court No. 9.<sup>50</sup> The first decree was for a detail of the materials.<sup>51</sup> The Executive, thus, ordered the Special Investigation Unit to create an Information Survey Unit (URI, for its Spanish acronym) inside each law enforcement agency to search for and analyze documents, investigate, and report the results to the courts and to the Special Congressional Commission.<sup>52</sup> The decree designated the Executive Secretary of the Special Investigation Unit to be in charge of the URIs, and authorized him to create URIs in other annexes, forces, and divisions, and even petition the police forces to collaborate in order to create similar units in provincial departments.<sup>53</sup>

Further, the Executive issued Decree No. 787/03, which authorized access to the SI's documents and databases with respect to the attacks in the AMIA/DAIA buildings and the Israeli Embassy.<sup>54</sup> It also ordered the Special Investigation Unit to create a URI inside the SI with unlimited access to all types of documents, reports or files—regardless of 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 judges.<sup>55</sup> The decree assigned the Special Investigation Unit's Executive Secretary as head of the URI, established a means of safely including investigative materials sourced by foreign intelligence officers into the official case records, and authorized the participation of authorities from the judiciary and the Public Prosecutor's Office as well as representatives of the complainants.<sup>56</sup>

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49. Resolución 54/2003, Aug. 1, 2003, [30204] B.O. 16 (Arg.).

50. Law No. 786/2003, Sept. 17, 2003, [30237] B.O. 2 (Arg.); Law No. 787/2003, Sept. 17, 2003, [30237] B.O. 2 (Arg.).

51. Law No. 786/2003, Sept. 17, 2003, [30237] B.O. 2 (Arg.).

52. *Id.*

53. *Id.*

54. Law No. 787/2003, Sept. 17, 2003, [30237] B.O. 2 (Arg.).

55. *Id.*

56. *Id.*

However, several important changes occurred by then, particularly with respect to the activities of the Oral Criminal Court No. 3 and its decision to declare a partial mistrial and acquit the defendants. In December 2003, the Federal Appeals Chamber removed the judge who oversaw the investigation and designated another judge in his place.<sup>57</sup> A few months later, on September 13, 2004, the Argentine Attorney General created the AMIA Prosecution Unit to oversee all cases pertaining to the attack and its cover-up.<sup>58</sup>

On February 8, 2005, the federal investigation court delegated the investigation of the attack to an Investigations and Prosecutions Unit. Criminal procedure in Argentina, particularly the pre-trial investigation of crimes, is conducted by investigative courts and prosecutors. Delegating the investigation of the attack to a prosecutor's office meant emulating an adversarial model in which the judge rules on issues brought to him without committing to any particular hypothesis of the facts. Therefore, the investigation was in the Prosecution Unit's hands which, at the same time, had possession of the declassified documents submitted in 2005 that were not accessible to any other parties. It was not for another ten years that the Executive would significantly increase access to the declassified materials by allowing the opposing parties to view them.<sup>59</sup>

From mid-2003 to February 2005, the Special Investigation Unit conducted a series of surveys in different offices to search for information about the attack. As a result, on February 24, 2005, the SI submitted classified evidence to the Prosecution Unit, which consisted of nearly two thousand classified files.<sup>60</sup> The Prosecution Unit, created only one year earlier, had the power to act as both the prosecutor in the judicial proceedings and as the exclusive custodian of the classified intelligence documents.<sup>61</sup>

Finally, on July 12, 2005, the Executive approved the resolution adopted before the Inter-American Commission on

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57. *Apartan a Galeano de la Causa AMIA*, LA NUEVA (Dec. 4, 2003, 9:00 AM), <https://lanueva.com/nota/2003-12-4-9-0-0-0-apartan-a-galeano-de-la-causa-amia>.

58. Nisman Memo, *supra* note 7.

59. Law No. 395/2015, Dec. 3, 2015, [33089] B.O. 1 (Arg.).

60. Nisman Memo, *supra* note 7.

61. *See generally* Law No. 384/2005, Apr. 29, 2005, [30643] B.O. 7 (Arg.).

Human Rights (IACHR) in the framework of Petition No. 12204.<sup>62</sup> The government acknowledged its international responsibility for failing to meet its obligation to prevent the AMIA attack, for covering up the facts, and for the severe and deliberate failure to investigate the event, which amounted to a denial of justice.<sup>63</sup> The Executive included measures regarding declassification and waiving the confidentiality duty which had already been adopted in 2003.<sup>64</sup>

In short, the substantial evidentiary submission to the judiciary in 2005 was the culmination of five years of work by the Special Investigation Unit (in its capacity as an Executive unit) gathering national intelligence information. Unlike the relatively specific requests of the 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 declassified information was greater, it was less detailed with respect to each record’s specific origin, the selection process, and the grouping of these records.

### C. *Second Generic Administrative Declassification (2015 - 2017)*

In August 2014, the Prosecution Unit requested that the PFA, National Gendarmerie, and Marine Forces submit documents that had been declassified under Decree Nos. 398/03 and 786/03 to further the investigation.<sup>65</sup> Each force complied with the request between August and September 2014. Some even submitted

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62. See Law No. 812/2005, Mar. 4, 2005, [30694] B.O. 1 (Arg.).

63. Compare Law No. 229/2006, Mar. 6, 2006, [30859] B.O. 3 (Arg.) (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) with Law No. 1157/2008, July 18, 2008, [31449] B.O. 1 (Arg.) (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).

64. Law No. 229/2006, Mar. 6, 2006, [30859] B.O. 3 (Arg.); Law No. 1157/2008, July 18, 2008, [31449] B.O. 1 (Arg.).

65. Law No. 786/2003, Sept. 17, 2003, [30237] B.O. 2 (Arg.) (request issued 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); see generally Law No. 398/2003, July 21, 2003, [30196] B.O. 1 (Arg.).

inventories of the evidence they had gathered.<sup>66</sup> On March 10, 2015, the Prosecution Unit also requested the declassification of documents that had been submitted to it in compliance with SI's Resolution No. 119/05 as well as any other evidence in under the possession of said agency.<sup>67</sup>

In response to the request, the Executive declassified all of the documents in the Prosecution Unit's custody, the additional documents selected by the URI of the former SI, and all new documents in the AFI's custody that had not already been submitted.<sup>68</sup> In compliance with the order, the AFI inspected its installations with the judges and officials of the Prosecution Unit, together with a government Civil-Law Notary.<sup>69</sup>

This inspection resulted in a massive evidence submission in the most diverse 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 Spanish acronym).<sup>70</sup> Since June 2015, the Special Document Survey and Analysis Task Force restored and systematized information following a work protocol that tried to ensure the parties' rights, including the oversight over such work.<sup>71</sup>

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66. Law No. 229/2017, Apr. 5, 2017, [33600] B.O. 1 (Arg.) (On August 6, 2014, the Federal Police Force submitted three boxes of documents and two days later it submitted twelve more boxes that were stored in the Antiterrorism Investigation Unit's warehouse. On September 2, 2014, the Argentine National Gendarmerie submitted 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. 25665, 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 the 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); see MINISTERIO PÚBLICO FISCAL, UNIDAD FISCAL AMIA, EL PROCESO DE DESCLASIFICACIÓN DE INFORMACIÓN RESERVADA O SECRETA SOBRE EL ATENTADO Y SU ENCUBRIMIENTO 14 (2016), <https://www.fiscales.gob.ar/wp-content/uploads/2016/10/AMIA-Desclasificación.pdf>.

67. See Law No. 229/2017, Apr. 5, 2017, [33600] B.O. 1 (Arg.).

68. See Law No. 395/2015, Dec. 3, 2015, [33089] B.O. 1 (Arg.).

69. See MINISTERIO PÚBLICO FISCAL, *supra* note 66 (The government's Civil-Law Notary's record entries for March 16 and 18 and April 23, 2015).

70. LAW NO. 1872/2015, SEPT. 16, 2015, [33215] B.O. 13 (ARG.).

71. *Id.* (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

Regardless of its broad scope, Decree No. 395/2015 did not encompass every possible piece of documentary evidence.<sup>72</sup> Hence, the Prosecution Unit issued a series of new requests before the Executive, the Argentine National Congress, and even foreign intelligence agencies through the Office of the Attorney General and the Ministry of Foreign Affairs and Worship.<sup>73</sup>

The Executive Decree No. 229/2017 of April 2017 partially granted the request and declassified additional documents. The decree also ordered the Special Investigation Unit to intervene in the surveying, digitalizing, and detailing of the unit's declassified documents. To that effect, the decree assigned the Special Investigation Unit the facilities where such evidence was stored, which was until then under control of the AFI.<sup>74</sup> In addition, the decree ordered the Special Investigation Unit to collaborate with the Prosecution Unit to submit and transfer to their 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 task is finalized."<sup>75</sup>

In June 2015, the Prosecution Unit also requested the Executive declassify the reports submitted in October 2003 by the General Director of Operations of the SI, and define the scope of

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Commission [Comisión Provincial por la Memoria], had in its power approximately 39,000 pages worth of documents that could help with the investigation).

72. *See generally* Law No. 229/2017, Apr. 5, 2017, [33600] B.O. 1 (Arg.) (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. 119/2005. 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); *see generally* Law No. 395/2015, Dec. 3, 2015, [33089] B.O. 1 (Arg.) (To date, it is 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 power of the legislature).

73. 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 AFI which did not fall under the scope of Law No. 395/2015 because they had been submitted to the AMIA Prosecution Unit after Resolution "R" No. 119/2005 of the SI and had not been used by the Information Submission Unit. *See* Law No. 395/2015, Dec. 3, 2015, [33089] B.O. 1 (Arg.).

74. Law No. 229/2017, Apr. 5, 2017, [33600] B.O. 1 (Arg.).

75. MINISTERIO PUBLICO FISCAL, *supra* note 66 (The process of declassifying reserved or secret information about the 1994 bombing and its cover-up); *Id.*

that decision to allow the parties to access the documents. The SI admitted the request and ordered the reports declassified.<sup>76</sup>

One decade after the first administrative submission of general evidence, documents were massively submitted, but this time, with greater volume and more specific selection of evidence.<sup>77</sup> In fact, Decree Nos. 395/15 and 229/17 limited the description of how to identify the evidence to be declassified, ultimately broadening its scope to include “any and all new documents, reports, and files that have not already been submitted.”<sup>78</sup>

The decrees in question are very similar in scope and were issued by two presidential administrations that held opposing views of the investigation of the attacks. In sum, this situation might have ultimately contributed to establishing an Administration with a pro-access position with respect to the intelligence gathered during the investigation.<sup>79</sup>

However, in the scope of access to information, the government’s practices continue to limit the decrees’ effectiveness. The overall design and efficiency of the system for congressional supervision of intelligence agency operations merits a separate discussion. From a critical standpoint, Roberto Saba highlighted that “the right to access information to ensure the oversight and transparency of espionage and national security agencies is severely hindered, as has been the last thirty years and practically throughout all of Argentina’s history.”<sup>80</sup>

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76. See Resolución No. 1024/2015, June 3, 2015, [33142] B.O. 8 (Arg.) (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).

77. See generally Law No. 395/2015, Dec. 3, 2015, [33089] B.O. 1 (Arg.); see generally Law No. 229/2017, Apr. 5, 2017, [33600] B.O. 1 (Arg.).

78. Law No. 229/2017, Apr. 5, 2017, [33600] B.O. 1 (Arg.); See generally Law No. 395/2015, Dec. 3, 2015, [33089] B.O. 1 (Arg.).

79. See generally Law No. 395/2015, Dec. 3, 2015, [33089] B.O. 1 (Arg.); see generally Law No. 229/2017, Apr. 5, 2017, [33600] B.O. 1 (Arg.).

80. ROBERTO SABA, ACCESO A LA INFORMACIÓN Y SEGURIDAD NACIONAL, ESTUDIOS EN DERECHO A LA INFORMACIÓN, NO. 3, INSTITUTO DE INVESTIGACIONES JURÍDICAS, UNAM 99, 109 (2017) (Mex.).

### III. PART TWO: IDENTIFICATION, VALIDITY AND EVIDENTIARY POWER OF DECLASSIFIED EVIDENCE

#### A. *Evidence Identification and Labelling*

The first question regarding the use of intelligence documents in criminal procedures is whether the documents were adequately identified and labeled. The above analysis clearly reveals that the mere submission of documents previously in the custody of an intelligence agency does not amount to a genuine contribution of official intelligence to a judicial investigation. In fact, even a substantial change in the way the administration views its own role does not necessarily result in collaboration either. In the worst scenario, it can cause delays in the proceeding and create a heavier workload.

Typically, criminal procedure evidence is admitted in compliance with procedures or with a court order. This includes, for example, going through someone's phone records or tapping their phone.<sup>81</sup> Such information can only be obtained with a court order in the interest of preventing or investigating criminal activities.<sup>82</sup> In addition, that kind of surveillance is lawful inasmuch as legal procedure is followed.

Beyond that scope, there is also a large spectrum of cases in which government authorities may legally obtain information. The government can collect data in situations that do not necessarily involve criminal activities.<sup>83</sup> This includes perfectly legal government activities, such as border control, environmental monitoring, or migration control.<sup>84</sup> Under certain circumstances, intelligence can be lawfully gathered for genuine interests and may remain, to some extent, classified. In such cases, there is no direct relationship between the information gathered by the government and a criminal procedure. This information can be

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81. GEOFFREY S. CORN, JIMMY GURULÉ & JEFFREY D. KAHN, NATIONAL SECURITY LAW AND THE CONSTITUTION 618-20 (Wolters Kluwer, 1st ed. 2017).

82. *Id.*

83. Robert C. Power, *Intelligence Searches and Purpose: A Significant Mismatch Between Constitutional Criminal Procedure and the Law of Intelligence-Gathering*, 30 PACE L. REV. 620, 679-85 (2010).

84. See Kristina Davis, *The U.S Tracked Border Activists, Journalists and Attorneys. Is it Legal?*, L.A. TIMES (Mar. 10, 2019, 12:05 AM), <https://www.latimes.com/local/lanow/la-me-ln-us-tracked-activists-20190310-story.html>.



useful to a criminal case even though it is not obtained through the criminal procedure process for that particular purpose.

Moreover, in such cases, information is pieced together without regard for the intelligence agency involved. In other words, the information collected by the Executive often resulted from government activities that are independent of judicial activities, which, as a result, subjects that information to fewer checks. Ultimately then, the output of intelligence activities coexists with that of the judicial investigation.

When evidence is obtained in a transparent manner and for a clear purpose, performance is generally enhanced. The declassification, guided by the successive declassification requests during the Oral Criminal Court No. 3 trial, contributed to a certain calmness and order in the identification of each element. Specifically, the administrative selection of evidence submitted to the Prosecution Unit in 2005, though much more generic, followed a relatively logical criterion and included an index of organized files.<sup>85</sup> In contrast, the massive declassifications of 2015 and 2017 were much broader and their actual contents were never uncovered.

Hence, unlike the first batch of evidence submitted in the framework of the above described oral trial, the later submissions of declassified material posed a significant challenge to the receiving party in terms of identification and characterization. For later submissions of declassified material, the prosecutor, the judge, and the parties had to sort through hundreds of boxes of paper with no indication as to what documents corresponded to judicial orders and what documents were produced by intelligence activities.

The later submissions of declassified material posed even greater problems. Under normal circumstances, there is a direct relationship between validly submitted government information obtained for lawful intelligence purposes and interest in the outcomes of criminal proceedings. Whether or not the government can reasonably expect each piece of evidence to remain classified must be analyzed on a case-by-case basis, though a certain deference to the government's credibility is justified, both with

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85. MINISTERIO PÚBLICO PROCURACIÓN GENERAL DE LA NACIÓN [Public Ministry General Procuration of the Nation], 3/09/2004, "Telleldín, Carlos Alberto y Otros s/Homicidio Claificado," (2004) (Arg.).

respect to the content of the documents and the procedures followed for the documents' procurement.

However, some public events as well as the trial itself called for certain necessary clarifications. On 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 inquiry into the possible irregularities committed during the first investigation expanded the scope of the judicial investigation. Thus, different investigations focused not only on the products of the intelligence activities, but also on whether they were obtained through the legal process.

This was the backdrop against which the 2005 and 2015 submissions occurred. Both submissions significantly increased judicial access to intelligence evidence. However, the evidence did not have proper references to descriptions nor to possible authors, and it was in a context of certain distrust towards the assignment's quality. In other words, both the judges and the parties had access to large volumes of evidence, but with insufficient elements necessary for interpretation.

The production of intelligence and dissemination of intelligence involve different, albeit related, procedures. As is the case with any procedure, it is possible to identify better practices. It is widely held that this is especially true when dealing with work that involves different phases, or an "intelligence cycle."<sup>86</sup> For example, The Operations Field Manual of the United States Army's Human Intelligence Collector (HUMINT) stipulates that intelligence procedures involve planning, preparation, collection, processing, and production, together with analysis, dissemination, and assessment.<sup>87</sup> The reporting phase is the last phase of all, and if the information obtained is not reported to the appropriate addressee in a precise and timely manner, the information is not useful.<sup>88</sup> Producing intelligence materials varies, depending on

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86. DEPT. OF ARMY, HUMAN INTELLIGENCE COLLECTOR OPERATIONS, FM No. 2-22.3 (FM 34-52) 1-1, 1-5 (2006), [https://armypubs.army.mil/epubs/DR\\_pubs/DR\\_a/pdf/web/fm2\\_22x3.pdf](https://armypubs.army.mil/epubs/DR_pubs/DR_a/pdf/web/fm2_22x3.pdf).

87. *Id.*

88. John Joseph & Jeff Corkill, *Information Evaluation: How One Group of Intelligence Analysts Go About the Task*, SEC. RES. INST. 97 (2011), <https://ro.ecu.edu.au/cgi/viewcontent.cgi?article=1019&context=asi>; U.N. OFF. ON DRUGS AND CRIME, HANDBOOK ON CRIMINAL JUSTICE RESPONSES TO TERRORISM

specific moments and objectives; the absence of meaningful references prevents the efficiency of generic declassifications.

The 2015 and 2017 decrees could have provided better guidance through more precise and detailed wording. The lack of precision ultimately forced the prosecutor to take on the responsibility of preserving and filing evidence that, for decades, the Executive had produced and stored.

While this approach may seem superficial, the sheer volume of the files and the time that elapsed render it important. This experience suggests that the right to access information also involves a series of positive government obligations that go beyond merely declassifying information. Particularly, with respect to its own discretionary actions, the government should have provided a documented record of how information was obtained. Authorizing access to a warehouse with documents that had previously been deemed 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 have enabled more orderly access to evidence. For example, The Freedom of Information Act (FOIA) in the United States enables access to information about the case through a standard mechanism, which is far more precise than Argentina's procedures.<sup>89</sup>

#### *B. Admissibility of Evidence Gathered by Intelligence Agencies in Criminal Procedures*

This experience also gives rise to a second issue: whether the evidence gathered by intelligence agencies is admissible in criminal procedures. Historians, intelligence agencies, and the judiciary share a common interest of evaluating evidence in a case.<sup>90</sup> However, the fact that some government activities for

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52 (2009),  
[https://www.unodc.org/documents/terrorism/Handbook\\_on\\_Criminal\\_Justice\\_Responses\\_to\\_Terrorism\\_en.pdf](https://www.unodc.org/documents/terrorism/Handbook_on_Criminal_Justice_Responses_to_Terrorism_en.pdf).

89. Freedom of Information Act, 5 U.S.C. §552 (1988).

90. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 6/03/2001, "Andres Pablo Paszkowski y Otros/ recurso extraordinario," Fallos de la Corte Suprema de Justicia de la Nación [Fallos] (2001-324-593) (Arg.).

intelligence purposes are legal does not necessarily mean that its product is admissible in criminal court.

In 1999, the Argentine Attorney General deemed that intelligence reports on the activities of a skinhead group were of “undoubted circumstantial value” with respect to the discriminatory nature of a hate crime.<sup>91</sup> In a decision handed down in the Israeli Embassy case on December 23, 1999, the Argentine Supreme Court 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.<sup>92</sup>

In general, the word “documents” is used to refer to the different records of intelligence agencies. However, not all records are 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.<sup>93</sup>

Evidentiary freedom is the dominant standard in modern Western criminal procedural law. The Argentine Criminal Code (CPPN, for its Spanish acronym) includes the same principle in Article 206, which reads, “restrictions to investigations stipulated by law with respect to evidence gathering shall be not be applicable, with the exception of those pertaining to the civil status of individuals.”<sup>94</sup> Title III, Book II of the CPPN, governing so-called “Evidentiary Means,” does not explicitly govern documentary evidence; thus, it raises the question as to whether documentary evidence is, in a criminal proceeding, classified evidence, or whether it is governed by the rules of civil procedure or other areas of the law that touch on the matter more explicitly.<sup>95</sup>

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91. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 23/12/1999, “Dictamen del Procurador General/ Sobreseimiento Provisional,” Fallos de la Corte Suprema de Justicia de la Nación [Fallos] (1999-322-3297) (Arg.) [hereinafter *Dictamen del Procurador General*]; CORTE SUPREMA DE JUSTICIA DE LA NACIÓN [CSJN] [SUPREME COURT OF JUSTICE OF THE NATION], 14/06/2005, “SIMON, JULIO HECTOR Y OTROS S/ PRIVACION ILEGITIMA DE LA LIBERTAD/ RECURSO DE HECHO,” FALLOS (2005-253) (ARG.) [HEREINAFTER *SIMON*].

92. *Dictamen del Procurador General*, *supra* note 91; *Simon*, *supra* note 91.

93. *Dictamen del Procurador General*, *supra* note 91; *Simon*, *supra* note 91.

94. CÓDIGO PROCESAL PENAL [COD. PROC. PEN.] [CRIMINAL PROCEDURE CODE] art. 206 (Información Legislativa, Buenos Aires, 1921) (Arg.), <http://servicios.infoleg.gob.ar/infolegInternet/anexos/0-4999/383/textact.htm#8>.

95. MICHELE TARUFFO, *LA PRUEBA DE LOS HECHOS*, 403-404 (Editorial Trotta, 2nd Ed. 2005).

It is clear that its inclusion in judicial practice would not be a problem today.

Regardless of how evidence gathered by intelligence agencies is characterized, the core issue involves the imprecision related to the nature of those evidentiary elements. This calls for clarification of, among other aspects, the validity of criminal evidence obtained by intelligence agencies, which depends on how the evidence was acquired. In simpler terms, and as a general rule, a person cannot be tried on the basis of evidence unlawfully obtained or subjected to procedures in which the chain of custody was somehow breached.<sup>96</sup>

The European Court of Human Rights (“ECHR”) had the opportunity to establish certain criteria for the admissibility of evidence in criminal cases obtained by intelligence agencies in the case of *A & Others v. UK* (2009), which involved suspected terrorist activity.<sup>97</sup> The Court analyzed Article 5(4), which provides for the right to have the lawfulness of detention speedily examined by a Court.<sup>98</sup> The defense argued that it did not have the opportunity to challenge the evidence upon which the prosecution’s terrorist activity accusation rested.<sup>99</sup> In response, the applicants stated that “some of the evidence in the proceedings was not disclosed to [them].”<sup>100</sup> In particular, the applicants noted that, in the United Kingdom, the procedure limited their contact with their defense lawyers and refused them access to certain evidence.<sup>101</sup> The Court found that “four of the applicants were indeed unable to effectively challenge the allegations against them.”<sup>102</sup> The ECHR found that:

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96. CÓDIGO PROCESAL PENAL [COD. PROC. PEN.] [CRIMINAL PROCEDURE CODE] arts. 216-217, (Información Legislativa, Buenos Aires, 1921) (Arg.), <http://servicios.infoleg.gob.ar/infolegInternet/anexos/0-4999/383/texact.htm#2>.

97. “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.” Marko Milanovic, *European Court Decides A and Others v. United Kingdom*, EUROPEAN J. INT’L L: TALK! (Feb. 19, 2009), [ejiltalk.org/european-court-decides-a-and-others-v-united-kingdom/](http://ejiltalk.org/european-court-decides-a-and-others-v-united-kingdom/).

98. Article 5(4) of the Convention establishes that “[e]veryone 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.” *Id.*

99. *Id.*

100. *Id.* at 236.

101. *See id.*

102. *Id.*

[T]he requirement of procedural fairness under Article 5(4) does not impose a uniform, unvarying standard to be applied irrespective of the context, facts and circumstances.<sup>103</sup> 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.<sup>104</sup> The guarantees it provides must be appropriate to the type of deprivation of liberty in question.<sup>105</sup> Finally, “[t]he proceedings must be adversarial and must always ensure ‘equality of arms’ between the parties.”<sup>106</sup>

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 source’s secrecy to prevent terrorist attacks.<sup>107</sup> Although 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.”<sup>108</sup> 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, 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.”<sup>109</sup>

According to the Court, terrorism falls into a special category.<sup>110</sup> 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.<sup>111</sup> It is important that the authorities disclose adequate information to enable a detainee to know the nature of the allegations against him and to have the

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103. *Sher v. United Kingdom*, 7 Eur. Ct. H.R. 337, 366 (2015).

104. *Id.* at 386.

105. *Id.* at 366.

106. *A v. United Kingdom*, 3 Eur. Ct. H.R. 595, 647 (2009).

107. *See Sher*, 7 Eur. Ct. H.R. 337, 367 (2015).

108. *Id.* at 368.

109. *Id.*

110. *Id.* at 367.

111. *See generally id.*

opportunity to refute them, and to participate effectively in proceedings concerning his continued detention.<sup>112</sup> Here, 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.”<sup>113</sup>

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 particular counter-terrorism measure(s) on an individual or organization.”<sup>114</sup>

Referring back to the issue of massively declassified evidence, it is clear that such evidence may be considered documentary evidence in the broadest sense and is typically admitted by the courts. However, the tenor of recorded events is not clear, such as the nature of the 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 assessed so as to overcome a certain standard of judicial scrutiny in every case, such as the one established by the European Court, for example. Overall, the evidence cannot be rejected in full. Instead, each element must be assessed individually.<sup>115</sup>

### C. *The Matter of Evidentiary Performance*

A final issue arises with respect to evaluating what evidence can legitimately be identified and used in the prosecution. To what extent is evidence gathered by intelligence agencies deemed persuasive? Should there be specific rules governing such matters? The question is particularly relevant when it comes to extremes like when evidence cannot be replaced by an alternative.

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112. *Id.*

113. *Id.* at 367-368.

114. Rumyana Grozdanova *The Right to Fair Trial and the Rise of Sensitive Intelligence Evidence: Responses from the Dutch and UK Courts*, *VERFASUNGBLOG*, (May 7, 2009), <https://verfassungsblog.de/the-right-to-fair-trial-and-the-rise-of-sensitive-intelligence-evidence-responses-from-the-dutch-and-uk-courts/>.

115. The 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. *See generally* Case No. 487/00, *supra* note 23, at 3.

Inconveniences do not arise in cases where it is possible to prove a part of the information through usual evidentiary means. Imagine a situation in which an intelligence agent, whose confidentiality duties are waived, testifies in court about situations that he or she may have experienced. In such cases, procedures that start as intelligence activities, like tailing a suspect, become direct testimony, assuming, of course, that the agent was duly authorized to carry out such activity.

A more complex question deals with the use of evidence, gathered by intelligence agencies, that cannot be reproduced under any other format, particularly when it constitutes an intelligence agent's evaluation. Should such evidence be deemed as circumstantial evidence or as an expert opinion?

Intelligence analysts are "information translators, whose role is to review information and provide reliable intelligence in a [functionally] practical and operational format."<sup>116</sup> Analysts must look at several factors, including source aptitude, performance record, source origin, source motivation, bias, credibility, and pertinence of the information.<sup>117</sup> As a result, analysts create the actual intelligence product, distribute it, create its context, and advise on it and how it is generally perceived, in order to render it valid for decision-making purposes.<sup>118</sup> However, despite potential overlap, validity criteria at a political level does not always match criminal proceeding requirements.

A possible alternative is to assess whether information that supports an intelligence agency's conclusion could guide judicial proceedings with respect to its efficiency as evidence. There is extensive literature on the matter of producing intelligence, and, naturally, on the correctness of their estimations and which procedures could render such evidence more effective.<sup>119</sup>

Authors, John Joseph and Jeff Corkill, researched and wrote extensively on the assessment of evidence collected by intelligence agencies. According to their field work, the assessment of evidence collected by intelligence agencies is carried out in compliance with implicit and informal procedures.<sup>120</sup> This assessment relates to a number of matters such as relevance

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116. Joseph & Corkill, *supra* note 88, at 98.

117. *Id.* at 99.

118. *Id.* at 98.

119. *Id.* at 97.

120. *See id.* at 100.



and credibility, record, capacity and motivation of the source.<sup>121</sup> The authors also suggest that analysts assess these matters holistically with greater emphasis on how the different pieces of evidence relate to what is already known, rather than their individual value in a vacuum.

Joseph and Corkill also highlight the importance of interpreters. In order to make “estimates” in the intelligence field, it is essential to draw conclusions as to the credibility of sources, and this unavoidable task cannot be implicitly delegated onto individuals that are untrained or uninformed about available intelligence.<sup>122</sup> If this is true, then the use of intelligence agency conclusions belongs in a practical area of law, but outside of judicial procedures with limited exceptions.

Some authors similarly address the matter of the uncertainty surrounding such estimates. For example, Jeffrey Friedman and Richard Zeckhauser claim that analysts almost always face uncertainty about whether probabilities are ambiguous.<sup>123</sup> They also studied and discussed the idea of dealing with uncertainty while having to produce intelligence.<sup>124</sup>

An additional issue is the so-called “estimated chance” that tends to capture the extent to which a person believes a certain statement to be true.<sup>125</sup> The estimated percentage does not express the chances of something actually happening, but rather the personal conviction of the analyst.

It is also important to know whether an analysts of a single event handles uniform levels and amounts of information.<sup>126</sup> Friedman and Zeckhauser believe that an agent’s involvement in collecting evidence can generate a confidence overload with respect to that information.<sup>127</sup> Conversely, analysts that are charged with questioning the evidence, i.e. “Devil’s advocates,” have the opposite bias.<sup>128</sup> In sum, making a prediction is

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121. *Id.* at 97-103.

122. Jeffrey Friedman & Richard Zeckhauser, *Handling and Mishandling Estimative Probability: Likelihood, Confidence, and the Search for Bin Laden*, 1 J. INTELLIGENCE & NAT’L SEC. 13 (2014), [https://sites.hks.harvard.edu/fs/rzeckhau/Estimative\\_Probability.pdf](https://sites.hks.harvard.edu/fs/rzeckhau/Estimative_Probability.pdf).

123. *Id.* at 4.

124. Friedman & Zeckhauser, *supra* note 122.

125. *Id.* at 11.

126. *See id.*

127. *See id.*

128. *Id.* at 10.

challenging, and must be done in a way in which the decision maker can assess an analyst based on their credibility.

Another criterion for evaluating analysts' performance is focusing attention on different units of assessment, such as individual, team, divisions, agencies, and even the intelligence community as a whole. The criterion reveals another layer: the hierarchy of intelligence sources. Is a team's account worth more than an individual's account? Or, is the agency's assessment worth more than a division's assessment? If the hierarchy were based in analytical capacities or responded, at the normative level, to information validation systems, the answer could be affirmative. Thus, identifying who issued the report can constitute a relevant piece of information for giving value to the report. Nevertheless, Thomas Fingar, Argentine Director of Analytical Intelligence from 2005 to 2008, stated there are no mechanisms in place to evaluate collective performance and it is currently impossible to determine how well an individual analyst or unit is performing.<sup>129</sup> The systematic lack of information on precision, he stated, "feeds the perception of politicization or lack of information about the matters in question."<sup>130</sup>

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) defined adequate standards for exchanging information.<sup>131</sup> Yet, even considering these efforts, it is evident that uncertainty is inevitable. In fact, Friedman and Zeckhauser stressed that the American intelligence community has been highly criticized for making imprecise predictions.<sup>132</sup> As stated by Sherman Kent, "[e]stimating is what you do when you don't know."<sup>133</sup>

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129. THOMAS FINGAR, *REDUCING UNCERTAINTY: INTELLIGENCE ANALYSIS AND NATIONAL SECURITY* 34 (2011).

130. *Id.*

131. INTELLIGENCE COMMUNITY DIRECTIVE, ICD 203, ANALYTIC STANDARDS (2015), <https://www.dni.gov/files/documents/ICD/ICD%20203%20Analytic%20Standards.pdf>.

132. Friedman & Zeckhauser, *supra* note 122, at 3.

133. Sherman Kent, *Estimates and Influence*, in *SHERMAN KENT AND THE BOARD OF NATIONAL ESTIMATES: COLLECTED ESSAYS* (2007), <https://www.cia.gov/library/center-for-the-study-of-intelligence/csi->

As a result, even a perfectly confectioned intelligence report will always be an estimation. This is why the “batting average” metaphor is used.<sup>134</sup> Not even the best players in baseball have high batting averages. This concept is critical when assessing intelligence reports used as evidence in situations where clashing views are to be expected.<sup>135</sup>

In the case at hand, the legal community will be tasked with determining the weight of each piece of evidence more accurately. Some parts of an investigation, documented in the declassified material, can be easily reproduced in established evidentiary formats. Others will possibly require further clarification of the circumstantial value before the Supreme Court is willing to admit the evidence gathered by the intelligence agencies. Even when giving weight to such materials can be justified, unifying all considerations on the basis of a single parameter is not an adequate and precise criterion, especially considering specialized literature on the topic.

In addition, the evidence assessed is ultimately an estimate. In other words, the criminal system must decide as to the value of evidence when the evidence is, by nature, the conclusion of a series of inferences. Thus, the goal is to evaluate the potential judicial efficiency of the product of a different discipline which is also nurtured by investigations and inferences.<sup>136</sup> The operation is naturally affected by the relative obscurity that exists with respect to work methodology and the way in which some of the investigation was deployed. Without such a response by the criminal system, the probative power in a trial tends to diminish,

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publications/books-and-monographs/sherman-kent-and-the-board-of-national-estimates-collected-essays/4estimates.html.

134. Jim Marchio, “How Good is Your Batting Average?” *Early IC Efforts to Assess the Accuracy of Estimates* (No. 4), 60 *STUD. IN INTELLIGENCE* 3, 5-8 (2016).

135. *Id.* at 11.

136. 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.” *TERENCE ANDERSON, DAVID SCHUM & WILLIAM TWINING, ANALYSIS OF EVIDENCE* 35-36 (Cambridge U. Press, 2nd ed. 2005).

even beyond the limitations normally posed by the use of this type of evidence.

#### IV. CONCLUSION

While the criminal process has improved by defining a narrower space for allowing state secrecy into an investigation, there are still several reasons that call for prudence regarding the efficiency of such investigational products. This paper describes three moments in the declassification process, each with a broader scope than the one before. At the same time, it also shows three matters that must be considered when facing the potential problems related to such information. Correctly identifying evidence, examining its procedural validity, and concluding about the possibilities and limitations of its use must all be a part of the equation to better use information appropriately.