

Alberto Binder, Ed Cape and Zaza Namoradze

# Effective Criminal Defence in Latin America

Executive Summary and Recommendations

Argentina | Brazil | Colombia | Guatemala | Mexico | Peru

ADC, CERJUSC, CONECTAS, DEJUSTICIA  
ICCPG, IDDD, IJPP, INECIP



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Derechos Civiles



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INECIP  
25 años

Alberto Binder / Ed Cape /  
Zaza Namoradze/  
ADC/ CERJUSC /  
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Alberto Binder, Ed Cape and Zaza Namoradze  
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Effective Criminal Defence in Latin America



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Dejusticia  
Carrera 24 # 34-61  
Bogotá D.C., Colombia  
Phone: (57 1) 6083605  
E-mail: [info@dejusticia.org](mailto:info@dejusticia.org)  
<http://www.dejusticia.org>

The book was primarily written in Spanish.  
Translation: Celeste Kauffman  
Copy-editing English version: Matthew Battle

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## INTRODUCTION

This executive summary provides an overview of the results of a research project, Effective Criminal Defence in Latin America, which was conducted over a two and a half year period commencing in the summer of 2012. It provides: (i) a summary of the main issues concerning criminal defence rights for each jurisdiction in the study; (ii) in light of these findings, recommendations designed to improve access to effective criminal defence in practice for each jurisdiction; and (iii) recommendations for the development of international standards on effective criminal defence for the Latin American region.

The Project was implemented by the Asociación por los Derechos Civiles – ADC – (Argentina), Instituto De Estudios Comparados en Ciencias Penales y Sociales – INECIP – (Argentina), Centro para el Desarrollo de la Justicia y la Seguridad Ciudadana – CERJUSC – (Peru), Conectas Direitos Humanos – Conectas – (Brazil), Instituto de Defesa do Direito de Defesa – IDDD – (Brazil), Centro de Estudios de Derecho, Justicia y Sociedad – Dejusticia – (Colombia), Instituto de Estudios Comparados en Ciencias Penales – ICCPG – (Guatemala) and Instituto de Justicia Procesal Penal – IJPP – (Mexico) in collaboration with the Open Society Justice Initiative. The research was funded by the Open Society Foundations’ Human Rights Initiative and Latin America Program. The complete results of the research project and a full account of the analysis and conclusions are published in the book: *Effective Criminal Defence in Latin America, 2015*.

During the past two decades most Latin American countries have undergone substantial changes to their criminal justice systems, and in many of those countries the process of reform continues. The majority have adopted new criminal procedure codes, and it has been suggested that this represents the most significant reform to

Latin American criminal procedure in nearly two centuries. Whilst the reforms differ in terms of detail across different countries, and result from a variety of pressures and influences, they broadly represent a shift from an inquisitorial to an adversarial approach to criminal procedure. The reforms are characterised by the introduction of oral trials conducted in public, the introduction and/or strengthening of the role of the prosecutor with responsibility for pre-trial investigations, improvements in the procedural rights of suspects and accused persons, and a number of other innovations designed to make the trial process more efficient and to recognise an enhanced role for crime victims. This is, of course, to simplify a complex process that has been argued for and contested over a number of decades, and which has been implemented in different ways, and to a greater or lesser extent, in different countries. Nevertheless, the changes are profound and affect, or have the potential to affect, all those involved in the criminal process including judges, prosecutors, police officers, those suspected or accused of crimes, and victims of crime.

It is commonly recognised that there is often a substantial gap between normative rules – constitutional provisions, legislation, regulations, and formal procedures – and criminal justice processes as they are implemented and experienced by those involved. This is particularly true during periods of significant change which involve not only modifications to the law, but which challenge traditional or customary procedures, attitudes and professional cultures. Therefore, it cannot be assumed that changes to the law translate into changes in practice, or that the intentions that motivate legal and procedural reforms are fulfilled when those reforms are implemented by the range of institutions and individuals that are involved in criminal justice systems and processes. Criminal justice institutions develop and embody their own imperatives and cultures that do not necessarily align with legislative intent, and their objectives, procedures and cultures often conflict, or are in tension, with those of other institutions. Moreover, individuals working within those institutions are subject to a range of pressures and influences which mean that their attitudes and working practices might not accord with the objectives of the organisations for which they work.

Within this context of change and complexity, we set out to examine a central feature of the criminal justice systems of a number of Latin American countries – access to effective criminal defence by those suspected and accused of crimes. The right to a fair trial is internationally recognised as a fundamental human right, and access to effective criminal defence is a necessary pre-requisite to the realisation of the right to a fair trial. We take as our normative framework the global and regional human rights instruments and, in particular, the American Convention on Human Rights (ACHR) as interpreted by the Commission on Human Rights and the Court

of Human Rights. We also pay particular regard to the fair trial rights guaranteed by the European Convention on Human Rights (ECHR), as interpreted by the European Court of Human Rights (ECtHR). The fair trial rights encompassed by the ECHR broadly reflect the expression of fair trial rights in the International Covenant on Civil and Political Rights (ICCPR),<sup>1</sup> and also in the ACHR.<sup>2</sup> In particular, both the ACHR and the ECHR contain similar provisions in respect of the presumption of innocence, guarantees on arrest and detention, prompt production before a judge, the right to a hearing within a reasonable time, release from detention pending trial, and the right to legal assistance.

The project in Latin America was inspired by a similar project conducted in Europe, culminating in the publication of the book *Effective Criminal Defence in Europe* in 2010,<sup>3</sup> which marked a major development in comparative criminal law in Europe, and which has been an important resource supporting reforms across the region. Like the original research project, the current study places the suspect and accused at the centre of the enquiry and examines the question of access to effective criminal defence from their perspective as a precondition for effective enjoyment of fair trial guarantees. Procedural safeguards and effective criminal defence are not only essential to fair trial as an outcome, but are also essential to fair trial when considered in terms of process. Effective criminal defence has a wider meaning than simply competent legal assistance. However good legal assistance is, it will not guarantee fair trial if the other essential elements of a fair trial process are missing. Thus, for criminal defence to be effective there must be an appropriate constitutional and legislative structure, an adequate institutional framework, political commitment to effective criminal defence, and legal and professional cultures that facilitate it.

The overarching goal of the project is to contribute to effective implementation of the right of suspects and defendants, especially those who are indigent, to real and effective defence throughout Latin America, and thereby to enhance the right to fair trial in practice. By exploring access to effective criminal defence across six Latin American jurisdictions, the overall aim is to advance the rights of accused and suspected persons in criminal proceedings by providing policymakers and practitioners with evidence on how these rights operate in practice, and by offering recommenda-

<sup>1</sup> ICCPR Article 14, para. 3(d).

<sup>2</sup> ACHR Article 8(2).

<sup>3</sup> Ed Cape, Zaza Namoradze, Roger Smith and Taru Spronken, *Effective Criminal Defence in Europe*, Antwerp: Intersentia, 2010.

tions for reforms to promote their implementation. Thus the aims of the project can be specified as follows:

- a) To define the content and scope of the right to effective criminal defence, and the corresponding state obligations to ensure the practical and effective implementation of this right for suspected and accused persons, in particular for those who are indigent.
- b) To explore access to effective criminal defence, both at the pre-trial stage and throughout criminal proceedings, across six Latin American jurisdictions.
- c) To provide empirical information on the extent to which the key procedural rights for an effective criminal defence are provided for in practice.
- d) To document, promote and share best practices identified in the study.
- e) To develop recommendations for each of the countries in the study to improve the standard of criminal defence, and to use the research to advocate for domestic reform of law, policies and practices.
- f) To use the research to support advocacy, litigation, and other activities to enforce and broaden the scope of rights both domestically and regionally.
- g) To assess the state of effective criminal defence comparatively across the countries in the study and to develop recommendations for the Latin America region.
- h) To engage with the Inter-American system of human rights to advance and build regional standards for effective criminal defence in Latin America.

In order to conduct the research and to come to meaningful conclusions the project management team initially defined the scope of the right to effective criminal defence and created a basis for data collection and analyses. Researchers in each country carried out a desk review, using existing sources of information, which was designed to elicit information about the criminal justice system in general and the constituent elements of effective criminal defence in particular. In addition, the country researchers prepared a written critical account of the criminal justice system, designed to provide an in-depth, dynamic account of the system and processes. The desk reviews and critical accounts were reviewed by members of the project management team, and also by expert country reviewers. Country researchers then conducted the fieldwork, which included a series of interviews with key criminal justice personnel in order to obtain insights from and perceptions of lawyers, police officers, prosecutors and others. Where possible, the interviews were supplemented with interviews and surveys of detained people and inmates, trial monitoring and case file reviews and interviews with members of the public about their experiences with the criminal justice system.

Country reports were produced for each jurisdiction from this research. The draft country reports were subjected to peer review by experts from across the region and from Europe, which was an important quality control mechanism and was also important in identifying common themes and best practices.

We hope that this executive summary and the full report, like the original study, will contribute to a deeper knowledge and understanding of the factors that influence effective criminal defence. Our aim is that it will be a source of inspiration for a constructive and effective programme of policies and actions for setting standards and guidelines regionally within the Organization of the American States and the Inter-American Commission of Human Rights, and nationally through mechanisms designed to make access to effective criminal defence available to all who need it. The research was presented and the book launched at the 2015 Autumn Session of the Inter-American Commission of Human Rights, to which many of those with responsibility for standard-setting and implementation of defence rights were invited. We trust that our study will provide them with a valuable source of information and analysis. The millions of people who are arrested, detained or prosecuted every year across Latin America have the right to be dealt with fairly and justly. This right should be made a reality.

*Alberto Binder*

*Ed Cape*

*Zaza Namoradze*

October 2015

## CONCLUSIONS AND RECOMMENDATIONS CONCERNING INDIVIDUAL JURISDICTIONS<sup>1</sup>

### *1. Argentina*

#### **1.1 Major Issues**

Each of the provinces in the study, Cordoba, Chubut and Buenos Aires, demonstrate characteristics that are unique to their own structure. Their complexity derives in large part from their political processes, which are difficult to classify as going in the same direction with respect to reforms. This is due not only to the autonomy of each province, but also their internal wavering. However, this diversity allows for the replication of more successful experiences and to have a broad repertoire of practices that may benefit other provinces. Since 1940, Cordoba has inspired most of the reforms, and now Chubut has taken its place, together with other provinces including La Pampa, Neuquén and Santa Fe.

In any event, this study was able to identify various areas that still face important challenges in each province.

First, there are problems that stem directly from the design of criminal legislation. There are procedural regulations that cause dysfunction and affect the effective defence of defendants. These include rote incorporation of written investigation materials into the trial; placing full confidence in documents produced by public officials, which impacts on the defendant's right to contradict evidence against them; and

<sup>1</sup> This part reproduces the conclusions and recommendations of the national chapters of the “Effective Criminal Defence in Latin America” Book. For editorial purposes, some footnotes included in the book have been excluded. Also, Marion Isobel provided extensive input in the development of the conclusions and recommendations.

norms that inadequately regulate or restrict cross-examination required in an adversarial system, normally by prohibiting the use of leading questions. Organic and procedural norms perpetuate the use of the formal case file as a working document and allow courts to control the file prior to the hearing, which impacts on the judge's impartiality.

Another serious problem is that, by law, individuals accused of certain crimes may not be released on bail. In some circumstances, the law creates absolute or relative legal presumptions based on the length of the prison sentence or type of crime. Jurisprudence that approves of these practices creates another challenge. This includes jurisprudence permitting prosecutors to order pretrial detention without getting immediate and effective approval from a judge, tolerating a failure to provide public, adversarial hearings to determine the imposition or duration of pretrial detention. The interpretation of deadlines as 'guidelines' favors the excessive duration of proceedings, which encourages the abuse of plea deals and pretrial detention, resulting in prisoners who have not been convicted, and convicts who have not been tried. The underuse of alternative precautionary measures has a notable correlation with abuse of imprisonment. These problems are much more serious in Cordoba and Buenos Aires, a drastically different situation than that which prevails in Chubut. It is not surprising that pretrial detention ceases to be an exception and has become the rule in a disproportionate number of cases, because judges authorize an extensive interpretation of its applicability.

Practices that must be overcome through reforms tend to survive normative changes, repeating themselves under a different name. This empirical study clearly demonstrates that in Cordoba and Buenos Aires the judges do not limit themselves and intervene in excess of their already broad powers. Judges consider it their responsibility to review the case file prior to the oral hearing, which demonstrates that they have not understood their role as an impartial participant, nor the impact that this behavior has on the right to an effective defence.

Argentina's justice system does not have information systems adequate to facilitate the possibility of monitoring and auditing compliance with defence standards. The indicators used at the public level are uncertain and lack sufficient quality data. There are also no strong policies to finance such monitoring, nor university or civil society studies.

There are also problems related to the implementation of applicable norms. One of the main problems we identified is the difficulty for those accused of crimes to access legal assistance during the early stages of detention. This has negative impacts

on many of their rights, including the right to be informed of the reasons for their arrest and of their defence rights (for example, the right to remain silent and to access a translator when the accused does not speak or understand Spanish), and to hear the evidence of the charges against them. Once an individual is before a judge or prosecutor, his defence functions more or less adequately, but until then, there are no concrete mechanisms to ensure his right to defence. Cordoba has the most serious problems; if a detained individual lacks the means to hire a private attorney, they can be detained for ten days or more before being brought before a judge.

Each of the actors that make up the criminal justice system have reasons to develop practices that create obstacles for effective defence, although the extent to which these practices are naturalized and made invisible is noteworthy. The deficient regulation of defence explains only one part of these practices, but fundamentally demonstrates that they cannot be replaced with a simple normative reform. In the confrontation between Latin American standards and the inquisitorial tendency, the latter tends to prevail in almost all cases.

There are problems related to the training of attorneys and supervision of the profession. Neither bar associations nor public defence offices have mechanisms to supervise attorneys' performances, even when an attorney's work is considered inadequate.

Bar associations are largely absent in this process and are not active enough to avoid the crises we see in the legal profession. Those lawyers we interviewed stated that they did not receive adequate assistance from bar associations in complicated cases, and clients had similar complaints about the inactivity of the bar associations. The high quality of the services the Public Defence Office offers limits this problem to defendants with a certain level of income: too high to qualify for public defence but too low to afford high quality private attorneys. A culture based on paper pushing and the particularly complex way of teaching in law schools has resulted in the production of lawyers that are trained more for written proceedings and lawyers are known to complicate matters for litigation, rather than simplify them.

University education teaches the legal process as a gradual, linked process of bureaucratic proceedings, and not as a tool to resolve cases. Universities have not been involved in or followed the reform processes. From the answers of the officials we interviewed, it may be deduced that their incomprehension of the accusatory system stems in a large part from a formal education geared toward inquisitorial, written processes.

Nearly all of the officials we interviewed stated that they lacked specific training to address groups with special legal needs. It is revealing that some officials consider

that practical experience (as one of them stated) ‘is the best school’. This explains the continued existence of inquisitorial practices and problems of access to justice in vulnerable sectors, in spite of significant public spending on the judiciary. It is also revealing that only Chubut has adopted obligatory training classes, which explains the undeniable advances in this province.

Those interviewed mentioned that the demands of professional life make it difficult to find the time and resources to complete a course, unless they are also university professors, who have more university training and have integrated study into their professional lives. These attorneys tend to be more receptive to the fundamentals of legal practice, and more likely to guide their practice according to the principles of the accusatory system.

Our research confirmed that attorneys do not carry out investigations, defence services do not have investigators, and there are no private investigators. The absence of investigation has a profound relationship with the lack of cross-examination practices. There are problems related to the availability and use of economic resources. In this sphere, even when the resources of public defence offices are scarce, there is also a lack of effort to use them rationally. The public defence office lacks a reasonable organization; the system of assigning cases is random and does not follow criteria that would allow for a proper distribution of work. Attorneys that fulfill the same requirements to be a defence attorney are hired to perform bureaucratic functions, rather than to litigate, or to act as assistants to senior attorneys. Public defence offices dedicate significant efforts to human resources, but investigators do not form part of the human resource agenda.

It is impossible to think of real reform without starting from a system of criminal justice that includes the professional re-training of all those who operate the system, in order to internalize a vision of the legal system as an instrument of peace that contributes to democratic governance. Such reforms must include: pedagogical changes in law schools to train lawyers on how to practically deal with defence cases; the regulation of the exercise of law so that defence attorneys focus on their client’s interests; the reform of the offices providing services to the judges to ensure that the judges do not delegate their responsibilities inappropriately, and of the role of police in investigating and preventing crime.

Only Chubut has made consistent improvements with regard to several of these issues. In contrast, Cordoba is mired in inertia and backsliding, and Buenos Aires is hindered by demands of punitive populism. Without ignoring the particularities of each jurisdiction, this study demonstrates that effective defence in Argentina is only

possible when institutional actors make concrete decisions to make constitutional and legal provisions a reality. Authoritarian tendencies that persist must be addressed with an efficient criminal policy that confronts and replaces the paradigm of law and order with one of democratic security.

## 1.2 Recommendations

1. Introduce and strengthen concrete mechanisms to guarantee effective, quality legal representation for individuals within 24 hours of their detention, through concrete obligations and orders implemented by authorities and independent agencies, to benefit people with public and private legal representation. Introduce public hearings to control the legality of detentions within 24 hours of detention. Guarantee that communications between attorneys and clients can occur in physical locations adequate for defence preparation.
2. Develop initiatives to strengthen a culture of greater professionalism in the exercise of the legal profession, both in the public and private sector. Proactive investigations and defence strategies should be strengthened, especially during the pretrial phase. Effective continuing education institutes should be established and effective mechanisms for the control and monitoring of the quality of public and private defence attorneys should be created. Both public defence offices and attorney bar associations should promote minimum standards of professional performance and guarantee their monitoring.
3. Ensure functional and budgetary independence in public criminal defence services. These services should be focused on serving their beneficiaries, whose interests should not be subordinated to institutional priorities. Ensure that each defence attorney has a reasonable workload that does not affect the quality of his services.
4. Legislation and judicial practices should move definitively away from formalized, case-file based proceedings. All decisions should be made in public through adversarial hearings. The principle of contradiction should be ensured through effective cross-examinations, ending the practice of setting evidentiary categories with differentiated probative value (such as the higher value of proof afforded to public documents or official expert testimony).
5. Establish legal and practical measures to restrict pretrial detention to truly

exceptional circumstances. Counteract, through legislation or judicial involvement, the application of pretrial detention by investigatory bodies, such as prosecutors or instruction judges. Introduce and strengthen alternative precautionary measures and develop specific bodies to oversee their application and control. Recognize a public, impartial and adversarial hearing as the only valid sphere for the application of pretrial detention, which must be held within 48 hours of the initial detention.

6. Promote and strengthen the production of information and official data, in sufficient quality and quantity, regarding the functioning of the criminal justice system and the effective implementation of the right to defence. Promote the production of independent academic investigations.

## 2. *Brazil*

### 2.1 Major Issues

The 1998 Federal Constitution, which reestablished democracy, inaugurated a new paradigm in Brazilian criminal procedure law: the text included individual protections in the proceedings and granted them the status of inalienable fundamental rights. Additionally, the country ratified the main international treaties related to criminal justice.<sup>2</sup> Nonetheless, Brazil has a long way to go in fulfilling its international obligations on the topic.

There are stark contrasts between legislation and what happens in practice, along with recurring and direct violations of legal norms regulating the right to defence. Bad practices contaminate the daily reality of the justice system, which formally complies with legal and constitutional obligations, but which violates human rights in practice. However, in some cases, these violations are made possible due to normative weaknesses.

These violations can be divided into three groups. The first includes those related to the lack of information and includes problems associated with the written notice of rights, access to files, and publicly accessible data.

With respect to the written notice of rights, there are normative differences regarding the exercise of the right to access information contained in the accusation.

<sup>2</sup> Minimum Rules for the Treatment of Detainees, Bangkok Rules for the Treatment of Detainees, Convention Against Torture, Pact of San José de Costa Rica, International Covenant on Civil and Political Rights.

Thus, in the police phase, the law provides for a ‘note of guilt’<sup>3</sup> only in cases of *in flagrante* detention. Nonetheless, in our field research, we noted that the standardization of the document does not allow one to determine how the accused was informed of his rights, whether in the police station or the prison. Additionally, the document is only provided after the *in flagrante* proceeding is completed, which means that the accused receives written information regarding his rights after questioning.<sup>4</sup> We observed that court officials responsible for subpoenaing the accused are not monitored, as they act outside the courthouse. This leads to questions regarding the subpoena and the accused’s level of understanding about what it means.

In sum, Brazilian legislation does not prescribe a document that serves specifically as a notice of rights. In practice, the note of guilt and subpoena could fulfill the role of documenting the communication of some rights to the accused. However, the majority of recipients are unlikely to understand the contents of these documents as they are written in technical, legal language, and often the accused are from low-income backgrounds with little education.

With respect to the right to access procedural files, the law authorizes the police commissioner to order the secrecy of the police investigation, and in principle could prohibit the accused from accessing those files. Although the rule of secrecy has been flexibly applied to attorneys, in the majority of cases, the contents of the accusation only reaches the defendant through his attorney. In the procedural phase, access to files is normally public.

In general, in practice, attorneys have access to the files of the police investigation and the criminal procedure. It seems that defence attorneys generally have access to investigation and procedure files in all but exceptional cases.<sup>5</sup> The Federal Supreme Court (STF) has supported this development,<sup>6</sup> through Binding Precedent 14, which states that defence attorneys have the right to access police investigation files.

<sup>3</sup> Formal communication of the reason for detention, the names of witnesses and the person who led to the suspect, which the police must sign and give to the accused within 24 hours after the detention.

<sup>4</sup> Written and verbal act of a court authority that notifies the accused of the action, charges him with a crime, and offers him the opportunity for defence.

<sup>5</sup> Exceptional cases are those in which the judge may order the secrecy of the criminal procedure file.

<sup>6</sup> The STF edited Binding Precedent 14, which assured defence attorneys had access to the decisions of the police investigation.

Another key aspect regarding the lack of information is with respect to the public sphere. The lack of public data makes it impossible to delineate a detailed profile of the number of prisoners, which makes the formulation of public policies more difficult.

The second area of rights violations is the lack of contact between the accused and his attorney and the judge. In this area, there are serious problems regarding the exercise of the right to an attorney, especially to ensure contact between attorneys and detained clients. Thus, the police phase lacks technical defence.<sup>7</sup> Similarly, in the judicial phase, although the presence of an attorney is required, the precariousness of contact between the attorney and his client is obvious, as their first meeting often occurs outside the courtroom door.<sup>8</sup> In this case, the express normative provision<sup>9</sup> that establishes the right to prior, private conversation between the accused and his attorney is not implemented. According to our research, this right is fulfilled only in name, seriously limiting the exercise of the right to defence.

It is worth remembering that the law does not require personal contact between the public defender and imprisoned clients prior to the presentation of the response to the accusation, which prejudices witness selection and the exploration of other evidence useful to the defence. The first contact between the two occurs during the hearing, which is on average 150 days after the initial detention. This demonstrates the deficiency of the right to defence during a critical period of criminal cases. By contrast, in all the hearings we witnessed, the prosecution presented witnesses, who were generally the military police that participated in the detention.

During the trials we monitored, there were few hearings *in absentia* and defence attorneys were always present. The right to remain silent was at least formally respected, and judges informed defendants of this right prior to questioning, although none of them exercised it. Nonetheless, there is no data regarding the possible prejudicial effects the absence of the defendant has on procedural matters, or the impact his silence has on court decisions.

Other rights that face obstacles are the right to freedom of movement during the proceedings and the presumption of innocence. Although there is little systematized data on the topic, there is evidence of an excessive use of pretrial detention in Brazil,

<sup>7</sup> While not prohibited, there is no legal disposition to make it obligatory, meaning it is essentially inexistent.

<sup>8</sup> On May 8, 2014, the Public Defence Office of São Paulo published Deliberation 297/2014, which adopts a policy to attend to those under provisional detention. According to the Deliberation, a public defender will visit penitentiary institutions in order to have personal contact with detainees.

<sup>9</sup> Legal and constitutional.

as those awaiting trial make up 35 percent of the prison population.<sup>10</sup> In interviews, defence attorneys mentioned that the presumption of innocence was the most important right, the most violated, and the most lacking. This situation is due in part to the weak justifications provided for pretrial detention, which are made without legal basis and involve decisions made without personal contact between the judge and the accused.

Finally, the third group of rights violations stems from the lack of quality and effectiveness of defence services. There are several problems in this group. First, there is no legal duty to hold a custody hearing immediately after an *in flagrante* detention. Appearing before a judge immediately after detention would be an effective measure to improve control regarding the legality and necessity of temporary custody, as well as to diagnose and address torture and mistreatment in detention, which are still serious problems in the country.

The sector suffers from a chronic lack of personnel and resources, which makes the use of crime scene investigations and expert witnesses difficult. Attorneys rely excessively on the following evidence: testimonial; identification of the accused; and confessions, often obtained under dubious circumstances. Usually, witnesses in this phase are the military police that carried out the arrest. As the presence of defence attorneys is rare during this stage, when the case reaches court, attorneys do not seek defence witnesses and generally the prosecutor repeats witness and police testimony from the police. During the police phase, the police continue to use physical violence against prisoners and adopt prejudices against those accused of crimes.

The penitentiary system suffers from endemic overcrowding.<sup>11</sup> The lack of legal assistance and the mixed legal/administrative nature of the execution phase have serious consequences for prisoners' access to defence.

Some perceptions noted in the research indicated a strong punitive discourse,<sup>12</sup> and the perception of the justice system as a mechanism of punishment and repression to exercise social control. There is evidence of popular support for this way of thinking.<sup>13</sup>

<sup>10</sup> In December 2012, Brazil's prison population reached 548,003, of which 195,036 were in provisional detention. Data from the Penitentiary Department of the Ministry of Justice.

<sup>11</sup> According to data from Infopen, in December 2012, Brazil had 548,003 prisoners, with space for only 310,687. Data from the Penitentiary Department of the Ministry of Justice.

<sup>12</sup> In general, those interviewed were active in the police and prosecutor's office.

<sup>13</sup> Especially with respect to the prosecutor's office.

Finally, nearly all people were detained *in flagrante*,<sup>14</sup> which demonstrates the ineffectiveness of criminal investigations.

## 2.2 Recommendations

1. Modify the Criminal Procedure Code to make the presence of an attorney during the police investigation phase obligatory, in particular when the suspect is questioned, to ensure the right to defence during all phases of the criminal justice system.
2. Modify the Criminal Procedure Code to require the judge and defence attorney to have contact with the accused once the criminal procedure has begun, prior to the day of the hearing. This would require strengthening of the Public Defence Office's structure.
3. Modify the Criminal Procedure Code to incorporate the custody hearing immediately after detention *in flagrante*. This measure is important to limit instances of torture and mistreatment, possible illegalities which may occur at the time of detention, and to avoid prolonged, unnecessary, and illegal detention prior to trial. The hearing would also help prevent violence, torture, and other cruel, inhuman or degrading treatment.
4. Modify the Criminal Procedure Code to adopt a written notice of rights, which includes all the legal and constitutional procedural rights of those accused of crimes. This should be provided to the person prior to police questioning and be written in simple and accessible language.
5. Restructure the model of the *de officio* legal assistance between the Brazilian Bar Association and the Public Defence Office, in order to define clear criteria regarding how the agreement is executed. Such criteria should include the quality of defence provided, offering assistance and guidance so that attorneys may provide quality legal assistance.
6. Broaden and strengthen the Public Defence Office so that it is present in all court districts, and even detention centers, and has a sufficient number of public defenders.
7. Develop a national system of data collection including criminal statistics and information regarding the justice system, in order to adopt adequate public policies and facilitate critical analysis by civil society.

<sup>14</sup> In the state of São Paulo, 65 percent of detentions are *in flagrancia*. In the capital, this percentage reaches 78 percent. Data of the Instituto Sou da Paz.

8. Create state mechanisms to prevent torture, in accordance with the UN Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment and Law No. 12.847/2013.

### 3. *Colombia*

#### 3.1 Major Issues

The effective exercise of criminal defence in Colombia faces several challenges. Such difficulties are of a practical rather than normative nature, as a review of the legal framework on the right to defence demonstrates that the majority of provisions (perhaps with the exception of those related to pretrial detention or possibilities for plea bargaining in some crimes) grant the defence the power to act in equality of arms with the prosecutor. However, in practice, there are various complications that impede the defence from playing the active role one would hope for in an adversarial system. This does not mean that normative problems do not exist, for example, with respect to when the right to defence accrues, and there is room for improvement in the normative protection of the rights included in an effective defence.

We have identified seven areas of particular concern.

First, there are problems related to when the right to defence accrues. Although the majority of legal references to the right to technical defence indicate that the right accrues at indictment, or before in the case of apprehension, a systematic analysis of legislation and constitutional jurisprudence allows one to conclude that this right applies during the investigation stage, as this is the only way equality of arms and defence rights can be protected.

Second, the demand for criminal defence has not been adequately evaluated or analyzed. In the past decade there has not been a complete evaluation of the needs of criminal defence services, public or private. Among other reasons, this is due to the information systems of the Judicial Council (CSJ), the prosecutor, and the National System of Criminal Defence (SNDP), which do not record essential aspects of defence services, such as who undertakes this work (the SNDP or private attorneys), the quality of the services, who requests/uses them, and their economic situation, and what the needs of different population groups are.

The lack of data collection means that public policy decisions cannot be based on generalizable empirical evidence. In particular, without adequate data, we cannot answer basic questions such as how many defence or investigatory personnel are

needed and how to distribute material and human resources to adequately respond to needs.

Third, generally public defence services are considered to be of an acceptable quality. The importance that the SNDP places on regular training and the *barras* system has led to positive outcomes. Thus, court officials have a high opinion of the public defence office, and public defenders tend to have a high sense of belonging in their institution.

Nonetheless, public defenders note that their work is affected by low salaries, unstable work conditions, an excessive workload, and a lack of control over their work. The feeling with respect to salaries is justified, as the salaries of other parties to criminal processes (i.e. judges and prosecutors) are much higher than those of the public defenders, in particular as one is promoted up the judicial hierarchy. Additionally, their work conditions are relatively worse (at least in terms of stability) than those of judges and prosecutors, since public defenders' contracts are for the provision of services, while the latter are work contracts.

Moreover, the ability of lawyers to work as private attorneys outside of the public defence office has led to problems. Attorneys take on too much work to improve their income, and thus dedicate less time to public defence cases. In addition, it can create a perverse incentive in which, occasionally, public defenders may direct some SNDP cases to their private offices.

Finally, these problems are compounded by the weak, often merely formal, mechanisms by which the SNDP monitors the performance of public defenders, which are further limited due to the professional independence that attorneys have under their form of employment contract.

Fourth, the public defence has fewer resources for investigation than the prosecutor. In spite of efforts to provide the public defence office with an investigatory body and human and material resources to achieve equality of arms, there are still large differences between the resources of the public defence's Operative Unit of Criminal Investigation (UOIC) and those of the prosecutor. This inequality is present both regarding human resources, since the SNDP has fewer investigators, experts, and assistants than the prosecutor, as well as physical resources, as the UOIC has fewer laboratories for technical evidence. These differences affect the quality of investigatory services for the defence and impede sufficient coverage throughout the national territory.

When private attorneys represent defendants with moderate resources (over the threshold to qualify for public defence services, but insufficient to hire high quality attorneys from law firms) the difference in resources and logistical capacity of the

prosecutor increases. When public defenders represent defendants, the UOIC provides an important institutional support for investigatory activities.

Although these differences do not seem serious during the first stages of the process, they become important during the evidentiary debate, as this is the key stage that tests equality of arms. An example of the difference in investigatory resources between the SNDP and prosecutor is the fact that, in many cases, the defence is reduced to hoping to find defects in the prosecution's actions rather than actively developing an evidence-based defence strategy. This is not only due to inequality of resources, but also because occasionally public defenders do not sufficiently know or take advantage of the technical evidence at their disposal, and even present evidence unfavorable to their clients, leading to self-incrimination.

A fifth problem is the perception that the public defence budget is insufficient. Several of the SNDP's problems seem to be the result of this insufficiency. Whether there is a need to expand the number of defence attorneys and investigators or to reduce the workload of each person should be evaluated, as well as the need to improve physical resources and provide training on certain topics, such as the usefulness and management of technical evidence.

The resources assigned to the SNDP have been distributed to activities other than criminal defence, namely representing victims. Although SNDP defence attorneys feel that this increase of responsibilities has not been accompanied with a proportionate increase in resources, simple calculations do not allow us to determine the accuracy of this perception.

Sixth, there is a notable deficit in legal education. This affects the right to defence, with both private and public defenders. This is evident when defendants must simply accept their attorney's opinion of the case because they do not understand the logic or jargon of the criminal process and therefore cannot exercise their right to material defence. Thus, they are often incapable of adequately evaluating the technical defence their attorneys exercise.

Finally, reasonable adjustments to support vulnerable populations have not yet been made. This task has been pending since the SNDP's creation. In particular, it has not implemented effective mechanisms to ensure access to justice to people with disabilities or people who communicate in languages other than Spanish such as indigenous people. Additionally, the SNDP has not adapted conditions of access to incarcerated individuals, who have difficulty contacting their defence attorneys, or for those living in areas far from urban centers, since public defenders are often scarce or non-existent in such areas.

### 3.2 Recommendations

1. Include jurisprudential developments in the normative framework that indicate that the right to defence begins prior to indictment. This is necessary to increase protection of the right to defence in the legal normative framework.
2. Adjust the SNDP, CSJ, and prosecutor information systems in order to ensure data collection on and identification of the demand for criminal defence, the number of users who require free assistance, and the types of needs of those users. Additionally, frequent evaluation of factors such as: (i) the sufficiency of human, material, logistical, and other types of SNDP resources; (ii) what possibility there is to optimize SNDP services through additional economic resources; and (iii) the cost-benefit analysis of carrying out the adjustments identified as necessary.
3. Evaluate the demand for free legal defence. This is necessary to make adjustments to the number of attorneys, as well as to their type of contract. After determining the proportion of cases that require SNDP services, the number of attorneys necessary to meet that demand should be determined. For this analysis, one should consider: (i) that the SNDP is lagging behind on adjusting the salaries of public defenders to make them competitive; (ii) questions regarding whether hiring defence attorneys through contracts for services is positive in terms of a cost-benefit analysis; (iii) that problems of excessive workloads may be due not only to insufficient attorneys, but also inefficient case management.  

Only through such an evaluation is it possible to determine if the SNDP requires adjustments to improve efficiency and, therefore, to adequately respond to the demand for public defence services with its current resources, or whether it requires an increase. Although we do not have sufficient quantitative data to make a conclusive recommendation on this issue, it seems that public defence services require both strategies to adequately address demand.
4. Equalize investigative resources between the prosecution and defence. To make equality of arms effective, the defence must have the same options for investigation as the prosecutor. This implies that the number of SNDP investigators, experts, and assistants must be increased, as they currently represent less than 3 percent of those of the investigation unit of the pros-

ecutor. The physical resources of the SNDP to obtain technical evidence must also be strengthened. Evidence laboratories must be improved and completed, and their geographical coverage must be expanded. As this last point could be very expensive, the way in which professionals provide services from major cities must be streamlined.

Considering that the burden of proof falls on the prosecution, the UOIC should make efforts to think about making criminal investigation more strategic and efficient.<sup>15</sup> Training programs for public defenders should include sessions on the utility of technical evidence, as strengthening the investigative capacity of the UOIC will be ineffective if defence attorneys do not know how to take advantage of the material this unit collects.

Finally, the Ombudsman should regulate the possibility for private individuals to use the investigation services of the SNDP, as there are a number of defendants who hire low-cost attorneys with little possibility to collect evidence for the exercise of their defence.

5. Evaluate whether the public defence budget needs to be increased. Since it is not clear whether the SNDP needs an increase in its work and investment budgets, deeper analyses should be undertaken to determine how insufficient the budget is. Meanwhile, the SNDP could consider other mechanisms to quickly and easily reduce budgetary shortcomings. First, the case management models of attorneys and investigators should be reviewed; although they have not been systematically evaluated, there is evidence of efficiency problems.<sup>16</sup>

Second, the SNDP could harness resources other than those it receives through budgetary appropriations by regulating some of its activities. In particular, the Ombudsman could make use of its legal authority to create mechanisms to charge for its services: (i) users who, in spite of qualifying for state-provided defence services, have the capacity to pay for them; and (ii) those with private defence who require UOIC investigative services. The Ombudsman could design and implement a mechanism to identify users

<sup>15</sup> Although it is necessary to strengthen investigations in the SNDP, it must also be considered that occasionally (specifically, when the defence knows that the prosecutor's evidence is very weak) passive defence strategies may be more effective and less costly.

<sup>16</sup> As we explained before, these problems are due to factors such as, (i) currently, investigation and defence in general do not think strategically, and therefore lose efficiency; (ii) the SNDP has not been able to identify who truly needs their services free of cost.

who truly cannot afford the services, calculate the costs of counsel, legal representation or investigation services, and collect payment for defence office services or UOIC investigation services.

6. Create a culture of legal education. Although this is not an easy task as it involves broader processes of improving education levels of the general population, it is important that those who participate in the criminal process (in particular, judges and defence attorneys) use simple, clear language, and ensure that defendants understand the logic and dynamic of the process, as well as their opportunities for action within it.
7. Make reasonable adjustments to ensure the right to defence for vulnerable populations. The SNDP should develop and implement specific programs, with sufficient budgets, to ensure that those who do not speak or understand Spanish have free, timely access to translators and interpreters. Additionally, it should adapt spaces for incarcerated defendants to meet with their defence attorneys.

In the case of those who live in rural municipalities, the SNDP should create incentives for more public defenders to work in these areas. Rather than adopting less stringent requirements for the exercise of public defence in these so-called ‘special treatment zones’, the SNDP should consider offering better salaries, or other incentives, to those who work as public defenders in these areas.

## 4. *Guatemala*

### 4.1 Major Issues

In Guatemala the right to defence is sufficiently protected at the normative level. First, article 12 of the Constitution states ‘that it is inviolable, and that no one may be convicted or deprived of their rights without being called to court, heard, and having lost their case in a legal proceeding before a competent, previously-established judge or trial’. Additionally, the state has ratified the main international human rights instruments, namely, the American Convention on Human Rights.

Second, criminal procedure legislation develops defence rights in two ways. To start, it states that technical defence during the entire criminal procedure process is obligatory, from the accused’s first statement before a judge to the execution of the sentence. It permits the person to freely choose his attorney and, when the accused

cannot afford his own attorney, the State is required to provide him with one. It also indicates that the prosecutor and judge must ensure that the accused has complete access to the forensic evidentiary file, under the strict supervision of his attorney.

However, in spite of the normative improvements in rights protection, there are still challenges to ensuring the effectiveness of rights.

First, there are problems related to compliance with existing norms, which leads to a gap between what the law provides, and what happens in practice. For example, the right to remain silent is constantly violated by police officers, who during *in flagrancia* detentions induce individuals to ‘admit’ their participation in certain acts, intimidating them on the way from the police station to the court. In turn, judges do not verify compliance with this right nor do they take action when it has been violated. In contrast, in one sense, the right to refrain from testifying against oneself is respected, as the accused’s testimony has no probative value.

Another problem is the reasoning of court decisions. National laws require every court decision to be duly substantiated, which is generally respected. However, it is concerning that only a minority of arrests are based on a court order, as people arrested without a court order may not be told of the reasons why they may face criminal charges. A similar thing occurs with respect to appeals. While the right to appeal is universal, in practice, if people cannot afford to pay the fees for the appeal then they will not have legal assistance for the exercise of this right. This is particularly serious for those who are the subject of guilty verdicts. Generally, the quality of defence a person received is directly related to their economic capacity.

Second, there are problems related to the training of attorneys and their legal culture. There is no professional specialization in criminal defence; any attorney can establish himself as a private defender if he so decides. This is positive in that potentially any active attorney can defend a person who runs into problems with the law. However, it also means that there is no guarantee regarding experience, which is necessary for the construction of an effective defence strategy. Higher legal education focuses on the knowledge of laws, and does not include technical and practical training necessary for litigation. Both public defenders and private defence attorneys, especially those that charge low rates, face challenges in carrying out their own investigation separate from that carried out by the prosecution. This is because attorneys assume that investigations require large sums of money, which few defendants can afford.

This is exacerbated by the fact that Guatemala has a culture that is often opposed to the protection of rights. For example, the right to remain free while the trial is ongoing is not adequately protected. Over fifty per cent of detainees in prison

are awaiting trial. There is a legal culture that is predisposed to putting people in prison. This is supported by the legislature, which promotes reforms to the Criminal Procedure Code and other laws, ordering that certain crimes are subject to obligatory pretrial detention.

There is a punitive culture which violates the right to be presumed innocent, as verified by high numbers in pretrial detention and the way in which the media addresses the situation of detainees. The police even expose many people to the media, a practice that the courts have not yet determined violates the right to be presumed innocent.

This is in addition to a culture of passive criminal defence, both public and private. Defence lawyers often limit themselves to questioning the Public Ministry's (prosecution) information and evidence, without positively putting forward their own investigations and versions of the facts into the trial.

Third, there are institutional limitations that limit the effectiveness of defence. To provide free technical defence, Guatemala created the Institute of Public Criminal Defence (the Institute), the mission of which is to assist those who cannot or do not wish to appoint a private attorney. The Institute's services are valued, and public defence attorneys are recognized as having a good theoretical and practical preparation. They have translators for indigenous people and make use of gender and cultural experts where relevant to prove their client's innocence.

However, there are still serious obstacles to overcome, mainly with respect to the number of public defence attorneys employed by the Institute. There are only 329 in total, which represents 1.49 public defenders per 100,000 inhabitants. These public defenders do not have the capacity to give personal attention to each of their clients or carry out an independent investigation. This is the result of two factors: a small number of defence attorneys, who manage 40 to 65 cases each; and the fact that the Institute only has three investigation advisors. Additionally, many defence attorneys are assigned cases without knowing the facts of the case, which is tied to the case distribution system, and this is demonstrated primarily in the hearings in which those accused make their first statements.

There is a similar problem regarding access to information. Most people who are detained are not given complete information about their rights from the time of arrest, because most are arrested *in flagrancia* and not by court order and the National Police do not have a written notice of rights to read to people or established protocol for their actions. Additionally, in the context of multiculturalism and multilingualism, all hearings are held in Spanish, and for a person whose mother tongue is not Spanish, translation services are important but do not completely fulfill their needs.

## 4.2 Recommendations

1. Promote a greater institutional commitment among criminal justice actors to ensure that all personnel fulfill international and domestic standards regarding effective criminal defence.
2. Academic and human rights organizations should constantly, thoroughly, and technically monitor the criminal justice system from the perspective of the rights of those involved in all stages of criminal proceeding.
3. Strengthen the institutions of criminal defence, principally represented by the Institute of Public Criminal Defence, strategically positioning it and providing it with more resources and better tools to fulfill its duties. This translates into a criminal policy that encourages rather than limits the right to defence, encouraging judges and defence attorneys to effectively fulfill their duties in this respect.
4. Promote the technical specialization of criminal defence attorneys, with the understanding that they perform their role in a context in which the fundamental rights of individuals are at stake.
5. Promote theoretical and practical classes in universities and academic centers to develop useful tools so that professionals are capable of fulfilling the constitutional and legal mandates that this report has described.
6. Promote a cultural change among attorneys to move from a passive attitude toward defence to the construction of authentic defence strategies, making use of forensic sciences.

## 5. *Mexico*

### 5.1 Major Issues

Rights relating to an adequate defence in Mexico have been in constant evolution for several years. The 2005 reform regarding juvenile justice, the 2008 reform of the criminal justice system (an extensive public policy that moved the country from a mixed inquisitorial criminal justice system to an adversarial one), and the 2011 constitutional changes regarding human rights and their corresponding jurisprudential development, represent milestones for the development of human rights related to criminal proceedings.

Among the positive results of criminal justice reform, we would like to highlight the presence of judges at hearings, the public nature of hearings, the introduction of

alternative measures to pretrial detention beyond provisional release on bond, and the reduction of processing times. All of this confirms the consensus regarding the necessity of an adversarial system. As this report documents, it is proven that the adversarial system has overcome practices that negatively impact on the right to defence.

However, although the normative framework provides for high due process standards, some practices are far from respecting the right to an adequate defence. Such practices begin from the moment of detention and continue throughout the entire process, including the enforcement of the sanction, negatively affecting different rights that guarantee an effective defence.

Detention presents a serious problem. The detainee is vulnerable and at a high risk of violation of his personal integrity between the moment of detention and the time when the detainee is transferred to the custody of the prosecutor.

With respect to the right to information, we identified other bad practices, including the fact that detainees do not immediately receive sufficient information regarding their detention and their procedural rights. Within both criminal justice systems researched, authorities do not verify at what point the person received that information, nor whether it was transmitted effectively so that he could exercise his rights. It is also reported that prosecutors often make it difficult for attorneys, in particular private ones, to access their clients and the preliminary investigation or investigation file.

During detention, this lack of information, knowledge, and access not only negatively impacts the preparation of the technical defence but also violates the constitutional right to an attorney throughout the criminal justice process. It also increases the possibility that the person suffers intimidation, humiliation, self-incrimination and, in the worst cases, torture. On the issue of torture, the greater probative value the traditional system assigns to the testimony before the public ministry and the difficulty in contradicting coerced confessions, should be highlighted. Torture and cruel and inhuman treatment continue to be common practices in the justice system, without consequences for the proceeding or the perpetrators, as various reports from domestic and international human rights bodies document.

Generally, both systems researched insufficiently protect the right to a translator or interpreter. It is clear that there are no effective mechanisms to guarantee indigenous people a good quality, culturally appropriate defence.

With regard to the right to remain silent, there is also a divergence between the normative standard and the execution of that standard in practice. While the adversarial system guarantees the right to remain silent and to be free from self-incrimi-

nation, the result of the survey with detainees in Baja California shows that the first contact detainees have with defence attorneys usually occurs only shortly before the first hearing. Thus, not only is the right to an attorney from the time the proceedings begin practically null in practice, but also the lack of an attorney during the period of detention puts at risk due process rights, personal integrity, and the right to personal liberty and personal security.

The Constitution expressly protects the presumption of innocence. However, two factors affect this right in particular: excessive pretrial detention and the constitutional *arraigo* (special pre-charge detention order) for crimes associated with organized crime.

In respect of the former, the constitution requires pretrial detention to be imposed for certain categories of crimes, which violates the international standards that state that pretrial detention should only be imposed if there are legitimate reasons for it. Unfortunately, more than 40 per cent of the country's prison population is in pretrial detention.

In the second case, *arraigo* is practically an arbitrary detention, as it is imposed on those against whom there is not even an ongoing investigation. As it is not established in the constitution, it is a measure that must be removed from the Mexican legal system on the basis that it violates the most basic human rights since, from the time a person is subjected to *arraigo*, he loses his right to a fair trial.

Additionally, there must be a cultural change throughout society, including the government and media, which still tend to assume that a detained individual or defendant is guilty.

Protection of rights during the enforcement stage of the criminal process presents an important challenge for defence attorneys, as there does not seem to be uniformity or clarity regarding the extent of their interventions. Moreover, the penitentiary system maintains inquisitorial practices, such as personality studies by interdisciplinary committees which, when judges validate them, prevent an adequate defence during this stage.

With regards to equality of arms, it is clear that the prosecutor's power in the inquisitorial system is almost absolute. There is practically no effective judicial control of the prosecutor's investigation, perhaps due to its full evidentiary value. In this context, the defence is practically invalidated at the initial stages of the proceedings.

In principle, the adversarial system has created procedural balance by wresting public trust and authority from the prosecutor. However, there are still unfinished tasks. In relation to public defence, these include the unequal apportionment of

resources for prosecutors and public defence offices, insufficient resources to develop independent investigations, the lack of independence of public defence offices, and the complete absence of institutionalized continuing education. Public defence has an institutionally weaker position than the prosecution, which impacts on the quality of services offered to detainees and defendants.

It is important to determine the cause for the high conviction rates in the two states under study (Baja California, 99.8 per cent, and the Federal District, 90 per cent), and their relationship with the effective defence of those convicted.

With respect to private defence, there are several challenges, such as the important deficit in training attorneys in the adversarial system, which affects their clients' right to effective defence.

One must also note that delay in processing *amparo* petitions (special constitutional proceedings) negatively impacts on the principle of expedient trials, which currently occurs in reformed systems. This is an important unresolved issue, as many resolutions impose restrictions on liberty such as precautionary measures, and do not have an effective recourse in constitutional law.

Finally, it is worth noting the lack of information regarding whether attorneys are effectively trained and authorized to provide an adequate criminal defence; and the lack of obligatory professional standards and the absence of control and accountability bodies to regulate the profession. As a result, there are no consequences for poor quality defence that affects the rights of those subjected to the criminal process, rights that may be irretrievably damaged.

## 5.2 Recommendations

1. Ensure that implementation of the adversarial criminal justice system adopts the highest defence standards in the application of a unified criminal legislation, as well as expressly including criminal defence within public policies related to the criminal justice system, such as national and state development and human rights plans. In this regard, ensure the independence of public defence in order to ensure the legitimacy of the criminal justice system.
2. Institute effective mechanisms, such as unrestricted and effective access to an attorney from the moment of detention, and effective communication of rights in simple and accessible language, to empower people to demand their rights during the criminal process up to the enforcement stage.

3. Train attorneys and public defenders in the use of constitutional law and practice to strengthen the provision of adequate defence in criminal litigation.
4. Eliminate *arraigo* (special pre-charge detention order) from the normative system. Eliminate the list of non-bailable offenses from the Constitution and the National Code of Criminal Procedure, and promote the rational use of pretrial detention based on international standards.
5. Guarantee equality of arms between the public defence office and the prosecutor, which requires granting functional autonomy to public defence offices, increasing the net salaries of public defenders so that they are on par with prosecutors, and expanding the budgets of public defence offices to allow them to hire more public defenders, assistants, and a group of experts that is independent from the prosecutor's office.
6. Establish obligatory quality indicators of public defence to ensure access to a public defender from the moment of detention and throughout the criminal process. Additionally, create efficient mechanisms for accountability of those who practice law, whether through a bar association, certification to exercise defence in all areas of the law, or any other tool that allows for the imposition of professional and ethical standards as well as sanctions for non-compliance. Additionally, permit public access to quality information about those who exercise criminal defence.

## 6. Peru

### 6.1 Major Issues

This section summarises the situation of effective criminal defence in Peru, as well as compliance with due process and the presumption of innocence in the Peruvian justice system, under a human rights paradigm and in a democratic state that respects the rule of law. It presents diverse qualitative and quantitative information about criminal defence in the country and studies the effective compliance with a set of rights that correspond to an adequate criminal defence in normative, jurisprudential, and practical spheres.

The analysis of laws, jurisprudence and practices allows us to conclude that the Peruvian legal system has made important improvements and achievements in recent years, meeting certain standards that demonstrate its efficacy. Thus, in the norma-

tive sphere there have been some positive developments. In particular, in 2006 the new Criminal Procedure Code (CPC) was brought in, which is helping to strengthen respect for due process and equality of arms between prosecutors and defence attorneys in the criminal process.

With respect to jurisprudence, there are decisions from the Constitutional Court as well as the criminal courts that reaffirm the broad array of constitutional rights, such as the right of the accused to be informed of the cause for his detention, the presumption of innocence, the right to remain silent, and other rights related to criminal defence. Recognition of these rights in court decisions is helping to fulfill the legal principles contemplated in the CPC.

With respect to the daily practices of actors in the justice system, this study indicates that the application of the CPC has led to improved performance of judges, prosecutors, police, and defence attorneys. This contributes to not only a more efficient, flexible, and transparent service, but also protects respect for the fundamental rights of those accused in the criminal process. Orality, publicity, and contradiction are the key principles of the new criminal process, and are important principles that all criminal justice system actors must respect.

Nonetheless, Peru's justice system faces several challenges in order to improve and strengthen access to effective criminal defence, principally in the practical implementation of the new laws. These challenges can be split into two spheres, one being the protection of the accused's rights throughout the criminal justice system, and the other being how to guarantee and consolidate a quality criminal defence.

Challenges for the protection of the accused's rights within the criminal justice system are particularly difficult during the first stages of the criminal process. There is case law permitting limitations to be placed on the detainee's ability to remain silent before prosecutors and police, and on their right to have an attorney during questioning. These limitations are not the general rule; however, there can be situations in which the police and prosecutor do not inform the detainee of his legal rights, leading to the detainee being questioned without an attorney, which clearly breaches the right to a defence. Additionally, these limitations are compounded by the fact that detainees are not guaranteed access to a lawyer immediately upon apprehension, but only within 24 hours of being placed in detention. These practices are an area in need of improvement to ensure an effective criminal defence in Peru's justice system.

Another challenge is the exercise of the accused's right to be released from detention while awaiting trial. Although the CPC has improved standards for pretrial detention through oral, public, adversarial hearings and the establishment of more

rigorous requirements to require and order it, pretrial detention is still ordered in most cases. Although the CPC now regulates alternative measures to pretrial detention, the criminal justice system lacks mechanisms to monitor and supervise the application of alternative measures by judges. This leads to the public having little faith in the effectiveness of alternative measures, and to the belief that pretrial detention is the only measure capable of controlling the accused during the proceeding.

Another right regarding effective criminal defence that faces limitations is the right to translation and interpretation. There are two kinds of accused that may benefit from this right in Peru: indigenous peoples and foreigners. With respect to indigenous people, there are two key challenges: first, related to providing a written notice of rights in the appropriate language (for example, Quechua, Aymara, or other indigenous languages); and second, related to the availability of qualified, good quality interpreters. In some hearings, the accused does have access to an interpreter, but due to large geographical distances, the interpreter is not accredited, as official interpreters cannot arrive on time.

With respect to access to translation and interpretation by foreigners, Peru's criminal justice system has qualified translators for the intermediate and trial stages, but not for the preliminary proceedings during the preparatory investigation. In some court districts such as Cusco, the Specialized Tourism Police and Prosecutor have personnel trained in several foreign languages, but such facilities are not available to public or private defenders. This is a weakness in the principle of the equality of arms that the new CPC establishes, and presents an opportunity to strengthen access to effective criminal defence in Peru.

Additionally, the need to strengthen quality defence is challenging. Defence attorneys, both public and private, face serious limitations in accessing experts to support their work. Although the Public Defence Office, through the implementation of the CPC, has improved its organizational structure and increased its budget and the number of public defenders, it still does not have experts to support their work in preparing cases. As a result, the family of the accused must often cover the costs of a private expert or specialist, which in practice is limited by their economic capacity.

Finally, private criminal defence presents serious challenges in delivering an effective criminal defence. Although bar associations exist, there is little available information about them, their resources, budgets, costs and, thus, the quality of performance of private defenders. In comparison to the Public Defence Office, which has made advances in the design and application of mechanisms to control and monitor the performance of public defenders in addition to protocols for attention to clients, private

defenders lack such mechanisms to verify the quality and results of their work. Judges and prosecutors we interviewed agreed that there are private defenders who are not sufficiently trained to carry out the defence of their clients, which reduces their clients' possibilities of securing justice.

## **6.2. Recommendations**

1. Disseminate and promote the effective application of rights and guarantees of the accused by training judges, prosecutors, police and public and private defenders, with an emphasis on the quality standards necessary to ensure an effective criminal defence in practice.
2. Develop an institutional protocol that involves prosecutors, the police and public defenders, to guarantee that the latter are immediately informed of detentions, so the detainee has timely access to a defence attorney within 24 hours of their detention.
3. Design a manual of procedures for defenders, judges, prosecutors, and police that develops in detail the steps that all these actors must take in order to guarantee an effective criminal defence, with respect for principles of due process, human rights, and relevant international standards.
4. Develop a guide that systematizes experiences, strategies, and good practices of public defenders at a practical level, in order to promote competent performance, quality and efficient standards of criminal defence, and which includes immediate communication between prosecutors and public defenders in cases of detention, and control of criminal procedure deadlines.
5. Develop a written notice of rights for detainees in the Quechua, Aymara, and Booraa languages, as well as in English, in order to guarantee that suspects and accused who do not understand Spanish, or whose understanding is limited, are effectively informed of their procedural rights. This notice of rights should be written in simple and accessible language.

Effective Criminal  
Defence  
in Latin America  
Executive Summary

## DEVELOPMENT OF INTERNATIONAL STANDARDS ON THE RIGHT TO EFFECTIVE CRIMINAL DEFENCE

The Inter-American Human Rights System has developed a set of principles and standards on the right to an effective criminal defence that constitute a clear and precise guide to ensure that this right exists in practice. However, research undertaken in this study shows how each country's reality differs from these standards and principles, distorts them, or eludes them.

The ultimate goal of this research is to improve the level of compliance with the right to effective criminal defence in concrete cases. This is achieved, among other ways, by raising awareness of the specific implications of each of the rights related to an effective defence. Therefore, as a basis for more exhaustive work in each country and the region, we consider it important to define particular ways of ensuring these principles and standards are fulfilled in practice. We have based these recommendations on the findings of the research in this study, and the proposals and conclusions from each country. It is not possible at this stage to include all of the possible specifics and details. In the future, it will be important to analyze and determine the necessary level of detail required to ensure that this document serves as a clear guide capable of impacting local practice. We believe that this is a crucial first step and a concrete contribution based on our research to facilitate local and regional discussion on the topic.

Below we present the basis for the development of a Latin American guide to effective criminal defence, containing the detailed development of each individual standard on the topic.

1. *The right to be informed of the reasons for and nature of the arrest and detention, and the rights that accrue in such circumstances.* ACHR, art. 7(4).
  - A. Police bodies or authorities responsible for detention should provide information to the detainee to facilitate his understanding of the situation and his rights, using ordinary and accessible language and avoiding formal language. The mere transcription of legal formulas or legislation does not provide real communication, nor does the simple signing of a formal notice.
  - B. The detainee should be provided with a simple and clear document that precisely lists the rights that he has, in particular those related to his specific situation of detention or arrest.
  - C. This right accrues from the first moment a person is deprived of their liberty, whether during detention, arrest, apprehension, or capture.
  - D. In particular, the authorities should highlight the right to immediately access a defence attorney, and authorities should facilitate the means for him to do so.
  - E. If an accused person cannot or does not have the ability to communicate with a defence attorney, the same authorities that have undertaken the detention should immediately inform the public defence office.
  - F. If the person belongs to an indigenous community, or does not speak or understand the official language, this information should be provided to him as soon as possible in his mother tongue.
  
2. *The right to be informed of the nature and cause of the charges filed, the indictment, or the accusation.* ACHR, art. 8(2)(b).
  - A. The indictment or formal charging should be undertaken in a public hearing, before a judge and in the obligatory presence of a defence attorney, within 48 hours of detention, in understandable language.
  - B. The accusation must include a statement of the evidence that the prosecutor will use during the trial.
  - C. The prosecutors, at the appropriate procedural time, must provide the defence with the complete investigation file, so that the defence may have

access to evidence that the prosecution has not used but which may be useful to the defence.

**3. *The right to obtain information regarding the rights to defence.***  
ACHR, art. 8(2)(c).

- A. Police stations and courts or the prosecutor should have visible posters describing the defence rights that accused people may exercise, written in the primary languages of the area.
- B. Each indicted person and defendant must be provided with a brochure or note that describes these rights and the telephone numbers to communicate with the public defence office.

**4. *The right to access material evidence of the case and the investigation file (brief, docket, etc.)*** ACHR, art. 8(2)(f); ACHR, art. 7(4).

- A. The police and prosecution's investigation files may not be kept entirely secret from the defendant and his attorney. The permissible time for the secrecy of any particular document must be limited.
- B. If there are difficulties in providing copies or allowing attorneys to examine the files, the police or prosecution office are obliged to resolve these difficulties and provide them or facilitate access to them, free from any charge.
- C. Detention centers should have reserved space to permit defence attorneys to examine the files with their clients.

**5. *The right of the indicted person to self-defence and to represent himself.***  
ACHR, art. 8(2)(d).

- A. Defence attorneys should ensure that the defendant (a formally accused person) is able to participate in his defence and that he understands and agrees to the terms and strategies of his attorney.
- B. All petitions filed by defendants, in particular those in detention, should be accepted and responded to, regardless of compliance with formal or time requirements

- C. The accused has the right to be present and testify in any hearing that involves him, including hearings to resolve or review petitions regarding decisions of the first instance, when they address issues related to the facts of the case.

**6. *The right to legal assistance and representation of a free and trusted attorney.* ACHR, art. 8(2)(d).**

- A. A person detained in a police station must have immediate access to an attorney, and police must not question him formally or informally without the presence of and prior consultation with his attorney.
- B. The trust relationship should be protected as much as possible within public defence systems. There should be flexible mechanisms for defendants to request an evaluation of their attorney's performance.
- C. No public defender should subordinate his client's interests to other social or institutional interests, or those of the preservation of 'justice'.

**7. *The right to legal assistance during questioning.* ACHR, art. 8(2)(d).**

- A. No statement by a defendant should be valid unless he consulted with his attorney within an hour prior to making said statement.
- B. A defence attorney must be physically present during all of the defendant's statements.
- C. The defendant may consult with his attorney at any point during his statement.

**8. *The right to meet in private with an attorney.* ACHR, art. 8(2)(d).**

- A. The personal interview with one's attorney must be in a place that allows for private and confidential communication, without the presence of guards or other police authorities.
- B. Privacy and confidentiality applies to all types of communication between the defendant and his attorney.
- C. No administrative or security regulation or provision may limit or weaken the privacy and confidentiality of communication between a defendant and his attorney.

- D. Detention centers should have a special area to allow for personal and confidential communication, without glass, intercoms, or other security instruments, and which is not in the immediate presence of security guards.

**9. *The right to representation by an attorney who complies with minimum professional standards, is independent, and who treats their client's interests as paramount.* ACHR, art. 8(2)(d).**

- A. There should be a mechanism to ensure the attorney's independence in the event that they are harassed for exercising their profession.
- B. There should be a mechanism of general evaluation of legal services, regulated either by attorneys or other regulatory bodies of the legal profession.

**10. *The right to have access to an attorney free of charge for those who cannot afford one.* ACHR, art. 8(2)(e).**

- A. Public defence systems should establish limits on workloads in order to effectively attend to cases and avoid 'mass-produced' defences.
- B. When there is an obligation to provide a defence attorney in all cases (universal assignment), there must be mechanisms to ensure that this does not weaken defence for the poorest sectors.
- C. Public defence systems must have complete technical and functional independence.

**11. *The right to be presumed innocent.* ACHR, art. 8(2), first paragraph.**

- A. There must be a mechanism that sets precise conditions regarding information that the media can publish regarding suspects and defendants.
- B. Media outlets must have concrete obligations to communicate final decisions when they are exculpatory.

**12. *The right to remain silent or to refrain from self-incrimination.* ACHR, art. 8(2)(g); ACHR, art. 8(3).**

- A. The only valid defendant testimony is that which the defendant decides to provide at trial. It may not be replaced with prior statements.

- B. Waiving the right to remain silent is only valid with the positive and reliable advice and counsel of a defence attorney.

**13. *The right to remain at liberty while a trial is pending.* ACHR, arts. 7, 2, 3 and 5.**

- A. Cases in which pretrial detention is absolutely prohibited should be precisely established.
- B. The decision to order pretrial detention must be taken in a public hearing in which evidence regarding the procedural dangers or need for precaution is presented, making specific reference to the concrete circumstances of the case.
- C. Judges should substantiate their orders for pretrial detention, without using formulaic or scripted phrases, as this is the most serious decision of the criminal process.
- D. There should be a set legal deadline regarding the duration of pretrial detention.
- E. The review of an order for pretrial detention should be undertaken within 48 hours starting from the first deprivation of liberty.

**14. *The right to be present at trial and participate in it.* ACHR, art. 8(2)(d).**

- A. There must not be limitations placed on the presence of the defendant at trial; his presence should prevail over considerations of the safety or convenience of other subjects in the trial.
- B. If trials *in absentia* are permitted, the appointment of a defence attorney and control over his adequate performance must have a higher level of protection.

**15. *The right to decisions that affect one's rights to be substantiated.* ACHR, art. 8(1).**

- A. The substantiation of decisions should be undertaken in clear, precise language, which is accessible to the average citizen, without unnecessarily technical language or legal jargon.

- B. Sentences should be concrete, and avoid the transcription of all the proceedings or narrating the case file such that the object of the proceeding and its basis is lost or hidden.
- C. When substantiation is verbal, it should be recorded and immediately provided to the attorney.

**16. *The right to a comprehensive review of a conviction.* ACHR, art. 8(2)(h).**

- A. A review of a conviction should imply an increase in control and quality of the decision. It should not be an arbitrary evaluation of the evidence or a mere reading (or viewing) of the proceedings.
- B. Revision should be after a public hearing in which evidence that has been challenged may be examined.

**17. *The right to investigate the case and propose evidence.* ACHR, art. 2(f).**

- A. Judges must provide judicial assistance to all attorneys who need to undertake an independent investigation, issuing direct orders to the police or other State entities when necessary.
- B. Public defence offices should have their own investigators or special funds to obtain independent evidence.
- C. Public and private defenders must be able to access and use laboratories, forensic institutes, or state institutes of scientific evidence production.

**18. *The right to sufficient time and opportunities to prepare one's defence.* ACHR, art. 2(c).**

- A. Public defence organisations must provide a mechanism to assist private attorneys who have insufficient resources to prepare a defence.
- B. Judges should ensure during initial hearings that the defence has had sufficient time to prepare the case and meet the defendant.

**19. *The right to equality of arms in the production and control of evidence and participation in public, adversarial hearings.* ACHR, art. 2, first paragraph.**

- A. All judicial activities that supplant the work of the prosecutor or facilitate the success of the prosecution must be prohibited.
- B. Under no circumstances may judges hold meetings with the prosecutor or the victims without prior warning to the defence attorney, who has the right to participate in that meeting.
- C. The use of victim protection mechanisms should not limit the defence's ability to review and control the evidence.

**20. *The right to a trusted interpreter and the translation of documents and evidence.* ACHR, art. 2(a).**

- A. In the case of indigenous defendants, the trial must use the mother tongue of the defendant.
- B. Courts must facilitate the participation of any person who may assist the defendant in understanding the language, without excessive formal requirements.
- C. In the case of people with other types of difficulties in understanding or expressing themselves in the official language of the proceeding, courts should ensure they have appropriate professional assistance in order to permit real participation in an effective defence.

## BIOGRAPHIES

### **Alberto M. Binder**

Professor of Criminal Procedure Law in the Graduate Studies Department of University of Buenos Aires and the University of Comahue, Argentina. Vice President of the Institute of Comparative Criminal Science Studies (INECIP). Technical advisor of the legal reform processes of Argentina, Chile, Bolivia, Paraguay, Ecuador, Venezuela, Honduras, El Salvador, Guatemala, and the Dominican Republic, among others. Co-director of the journal *Sistemas Judiciales* of the Justice Studies Centre of the Americas (CEJA).

### **Ed Cape**

Professor of Criminal Law and Practice at the University of the West of England, Bristol, United Kingdom. He is an expert in criminal procedure, especially in the early stages of the criminal process, and has conducted (with others) a number of research projects in the European Union and beyond, including *Effective Criminal Defence in Europe* (2010), *Effective Criminal Defence in Eastern Europe* (2012), and *Inside Police Custody: An Empirical Account of Suspects' Rights in Four Jurisdictions*. Ed is also the author of *Improving Pretrial Justice: the Roles of Lawyers and Paralegals* (OSJI, 2012) and *Early Access to Legal Aid in Criminal Justice Processes: a Handbook for Policymakers and Practitioners* (UNODC/UNDP, 2014).

### **Zaza Namoradze**

Director of the Open Society Justice Initiative's Budapest office. He oversees activities on legal aid and defendants' rights, and legal empowerment and capacity in Europe,

Middle East, South East Asia and Latin America. He is an expert in criminal defence and legal aid, and has been involved with legal aid reforms in a number of countries in several regions, as well as with defence rights' standards development with the United Nations and the European Union. He has co-authored publications on *Effective Criminal Defence in Europe* (2010) and *Effective Criminal Defence in Eastern Europe* (2012). Namoradze previously served as staff attorney and, later, Deputy Director of the Constitutional and Legal Policy Institute in Budapest, where he managed projects on constitutional and judicial reforms, among others. He graduated from the International Law Faculty of Tbilisi State University in 1992, studied in the Comparative Constitutionalism Program of the Central European University in Budapest, and earned an LL.M from the University of Chicago Law School in 1994.

### **Lucas Gilardone**

Lawyer (UNC, 2002), LL.M. in Human Rights (CEU-Budapest, 2008), OSJI Fellow (2007-2009). Member of INECIP Cordoba since 2002, where he has worked in areas of democratic security, extensionism, the public interest legal clinic, and, recently, on issues of legal reform. He has litigated cases regarding civil and environmental law since 2004.

### **Sebastián Narvaja**

Lawyer and doctoral candidate at the National University of Cordoba. Member of the Board of Directors of INECIP. Researcher at the Secretariat of Science and Technology of the National University of Cordoba and INECIP from 2006 to 2011.

### **Alfredo Pérez Galimberti**

Lawyer (1977 UNLP). Obtained a Specialization in Criminal Law (1977 UNP). Deputy General Ombudsman of the Chubut Province. Member of the Board of Directors of INECIP. Professor of Criminal Procedural Law and Adversarial Litigation (National University of Patagonia).

### **Francisco Gabriel Marull**

(La Pampa). Lawyer. Hold a master's in Criminal Science. Associate Dean of the School of Economic and Legal Studies of the National University of La Pampa. Professor of Criminal Procedure Law and Professional Training in Criminal Procedure at the same university. Legal Trainer at INECIP.

**Isadora Fingermann**

Lawyer (University of São Paulo, 2004). Obtained a Specialization in Economic Criminal Law and Legal Public Policy from the School of Law of the Fundação Getúlio Vargas, in 2007 and 2013, respectively. She worked as a criminal lawyer from 2005 to 2012. Currently she is the general coordinator of the Institute for the Defence of the Right to Criminal Defence.

**Maíra Zapater**

Lawyer from the Pontific Catholic University of São Paulo (2001) and political scientist from the School of Philosophy, Humanities, and Human Sciences from the University of São Paulo. Specialist in Criminal Law and Procedure from the Superior School of the Public Ministry of São Paulo (2006). She is in her final year of doctoral studies in Human Rights at the School of Law at the University of São Paulo. Legal university professor and researcher.

**Rafael Custódio**

Lawyer from the Pontific Catholic University of São Paulo (2006). Specialist in Economic Criminal Law and European Criminal Law from the University of Coimbra and the Brazilian Institute of Criminal Science. He worked as a criminal attorney until 2012, when he became the coordinator of Conectas' Justice Program. Member of the Community Council of la Comarca of São Paulo.

**Ludmila Vasconcelos Leite Groch**

Lawyer from the Mackenzie Presbyterian University (1999). Master's in Criminal Law from the University of São Paulo (2004). Professor of Criminal Law in the University Cruzeiro do Sul and Salesiana and the University of Londrina (2004-2008). She was an invited post-graduate professor of Rule of Law at the latter. She is currently a partner at the Criminal Law office of Alonso e Leite Groch Advogados, as well as the director of the Institute for the Defence of the Right to Criminal Defence (IDDD).

**Vivian Calderoni**

Lawyer from the University of São Paulo (USP). Holds a masters in Criminal Law and Criminology from the same institution. From 2011 she has practiced as a lawyer in the Justice Program of Conectas. She is author of the book *Luz e Sombra no Sistema*

*Prisonal: percepciones de juízes sobre agentes penitenciários.* She is a criminology professor for law school competitions.

### **Carolina Bernal Uribe**

Lawyer from Eafit University. Specialization in Economics from the Pontific University of the Javariana. She has worked on issues of criminal policy as a researcher at the Centre for the Study of Law, Justice, and Society (Dejusticia) for five years. She currently works as an advisor for the Public Policy branch of the National Attorney General, where she coordinates economic experiments to evaluate alternative criminal investigation policies.

### **Miguel La Rota Uprimny**

Lawyer and economist from the University of Los Andes, Colombia. Holds a masters in Public Policy and Public Administration from the University of Columbia (United States). He was a senior researcher at the Centre for the Study of Law, Justice, and Society (Dejusticia). Author and co-author of various publications regarding the justice system, including, 'Ante la justicia: necesidades jurídicas y acceso a la justicia en Colombia' y 'Esfuerzos irracionales: investigación penal del homicidio y otros delitos complejos'.

### **Juan Pablo Muñoz Elías**

Studied Social Studies, History, and Legal Education at the University of San Carlos in Guatemala. He has undertaken studies regarding the history of law and the juvenile justice system. He currently coordinates the area of power relations in the Centre for Public Policy for Socialism (CEPPAS-Guatemala) and is a researcher with the Guatemalan Institute for Comparative Criminal Studies.

### **Luis Rodolfo Ramírez García**

Graduated in Legal and Social Sciences from the University of San Carlos in Guatemala. Certified as a Proficient Researcher in Sociology and Political Science granted by the Pontific University of Salamanca, Spain. Post-graduate studies in Criminal Law from the University of Salamanca. Specialization in Indigenous Law from the University of San Carlos and the Autonomous University of Mexico. Consultant for international organizations regarding the criminal justice reforms in Central America and the Caribbean. Researcher with the Institute for Legal and Social Studies at the Uni-

versity of San Carlos. Author of investigations regarding judicial reform. Co-author of *Manual de Derecho Penal Guatemalteco*.

### **Mario Ernesto Archila Ortíz**

Graduated from Legal Studies. Lawyer and notary from the University of San Carlos in Guatemala. Post-graduate studies in Human Rights and Criminal Studies. He has carried out social studies regarding the functioning of the criminal justice system, citizen security, and transitional justice. He currently directs the Research Department of the Guatemalan Institute for Comparative Criminal Studies.

### **Mario Ávalos Quispal**

Graduated in Legal and Social Studies from the University of San Carlos in Guatemala. Master's in Human Rights from the University Carlos III in Madrid, Spain. Master's in Democracy and Good Governance from the University of Salamanca, Spain. He has undertaken social investigations regarding criminality and juvenile criminal justice, the rights of indigenous people, and legal pluralism. He is currently the director of the Guatemalan Institute for Comparative Criminal Studies (ICCPG).

### **Ana Aguilar García**

Lawyer from the Escuela Libre de Law. Holds a masters in Human Rights (LL.M.) from the Central European University. Specialization in Constitutional Law and Jurisdictional Amparo from the University of Pisa. Project Director at IJPP. Certified as a trainer regarding the criminal procedure reform by the Justice Studies Centre of the Americas (CEJA). She was a consultant with the United Nations Office of the High Commissioner for Human Rights in Mexico on issues regarding fair trial indicators. Co-author of the book *Servicios previos al juicio. Manual de implementación* and author of the guide, *Presunción de inocencia*, published by the National Human Rights Commission.

### **Gregorio González Nava**

Lawyer with high honors from the Colima University. Holds a masters in Law from the National Autonomous University of Mexico (UNAM). He worked as a researcher at the Institute for Criminal Procedure Justice. He currently works in the Federal Institute for Access to Information and Data Protection (IFAI). His most recent pub-

lication is *Informe sobre la justicia para adolescentes en conflicto con la ley penal en México* (2013).

### **Miguel Sarre Iguíniz**

Lawyer from the Escuela Libre of Law. Holds a masters in Human Rights from the University of Notre Dame in the United States. Professor at the Autonomous Technological Institute of Mexico. Specialist in due process in criminal proceedings.

### **Liliana Bances Farro**

Lawyer. Holds a masters in Criminal Law from the Pontific Catholic University of Peru. Graduate of the Inter-American Training Program for Criminal Justice Reform (CEJA, Chile, 2011). She is coordinator of the Area of Research and Studies for the Centre for the Development of Justice and Citizen Security (CERJUSC). She has undertaken various investigations regarding criminal procedure reform and citizen security. Her latest publications include: *Estudio de línea de base para la implementación de una office de servicios previos al juicio en el distrito judicial de Huaura, Perú* (CERJUSC 2013); and *Estudio para el fortalecimiento de la transparencia, la rendición de cuentas y el monitoreo social del gasto público en la seguridad ciudadana* (CERJUSC 2014).

### **Nataly Ponce Chauca**

Lawyer. Holds a masters in Latin American Studies. She is the executive director of the Centre for the Development of Justice and Citizen Security (CERJUSC). She has extensive experience as a technical advisor and researcher in areas of criminal justice, human rights, and citizen security in Latin American countries. Her latest publications include *La persecución de delitos complejos: capacidades penales de los sistemas penales en América Latina* (regional coordinator, CEJA 2010); *La delincuencia organizada en un mundo globalizado: análisis de los fines, patrones y procesos comunes de las redes criminales en el Perú, y evaluación de las respuestas del Estado* (UNODC 2014); and *Diseño de indicadores para medir los resultados y el desempeño de las instituciones del sistema de justicia con la aplicación del Código Procesal Penal* (CERJUSC 2014).

### **Marion Isobel**

Legal officer for the Open Society Justice Initiative working on criminal justice reform, focusing on legal aid, pretrial justice, and criminal defence rights. Before joining the

Open Society Justice Initiative, she worked for the Extraordinary Chambers in the Courts of Cambodia within the office responsible for investigating crimes that took place during the Khmer Rouge regime. Previously, she lectured in public international law at the University of the South Pacific in Vanuatu, and worked as a senior legal reporter at Thomson Reuters in Australia. Marion holds masters and bachelors degrees in law, specializing in international and criminal law, from the University of Queensland in Australia.

This executive summary describes the results of a research project, Effective Criminal Defence in Latin America, carried out in Argentina, Brazil, Colombia, Guatemala, Mexico, and Peru between 2012 and 2014. The project was developed by the Asociación por los Derechos Civiles, ADC (Argentina); the Instituto de Estudios Comparados en Ciencias Penales y Sociales, INECIP (Argentina); Conectas Direitos Humanos, Conectas (Brazil); the Instituto de Defesa do Direito de Defesa, IDDD (Brazil); the Centro de Estudios de Derecho, Justicia y Sociedad, Dejusticia, (Colombia); the Instituto de Estudios Comparados en Ciencias Penales, ICCPG (Guatemala); the Instituto de Justicia Procesal Penal (Mexico); and the Centro para el Desarrollo de la Justicia y la Seguridad Ciudadana, CERJUSC (Peru). It received support from the Open Society Justice Initiative and was financed by the Human Rights Initiative and the Latin America Program of the Open Society Foundations. The complete results of the research, the analysis and conclusions are published in the book, *Effective Criminal Defence in Latin America*, 2015.



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