



Effective Criminal Defence in Latin America

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Derechos Civiles



CERJUSC

CENTRO PARA EL DESARROLLO DE LA JUSTICIA
Y LA SEGURIDAD CIUDADANA




CONECTAS
DIREITOS HUMANOS



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Por una cultura de justicia y equidad

INECIP

25 años

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PREFACE AND ACKNOWLEDGEMENTS

This book is based on a research project *Promoting Effective Defence Rights of Criminal Defendants in Latin America*, which was conducted over a two and a half year period commencing in July of 2012. The Project was implemented by the Asociación por los Derechos Civiles—ADC—(Argentina), Instituto De Estudios Comparados en Ciencias Penales y Sociales—INECIP—(Argentina), 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), Instituto de Justicia Procesal Penal (Mexico) and Centro para el Desarrollo de la Justicia y la Seguridad Ciudadana—CERJUSC—(Peru), in collaboration with the Open Society Justice Initiative (the Justice Initiative). The Open Society Foundations' Human Rights Initiative and the Latin American Program funded the research.

The overarching goal of the project is to contribute to effective implementation of the rights 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. The overall aim is, by exploring access to effective criminal defence across six Latin American countries, to advance the rights of accused and suspected persons in criminal proceedings through improving regional standards on defence rights, by providing policymakers and practitioners with evidence on how they operate in practice, and by offering recommendations for reforms to promote their implementation.

However, effective criminal defence is also part of the dynamic process of criminal justice reform in Latin America. This means that it is not possible to provide an absolutely up to date account of the situation of the defence in each country, but it

does allow us to clearly show the structural and stable features that have resulted from these changes. Thus, the national chapters describe the situation until early 2014. Subsequent changes have not been incorporated, but we are confident that they do not alter the main findings of this research.

The project in Latin America was inspired by a similar project conducted in Europe, culminating in the publication of a book entitled *Effective Criminal Defence in Europe* in 2010,¹ 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 Project Management Team was in charge of planning, directing and executing the project and consisted of the representatives of the eight implementing organizations from six Latin American countries and the Justice Initiative: Rafael Custodio and Vivian Calderoni (Conectas); Isadora Fingermann (IDDD); Mario Avalos (ICCPG); Ana Aguilar Garcia (IJPP); Miguel La Rota (Dejusticia); Nataly Ponce (CERJUSC); Sebastian Narvaja (INECIP); Alvaro Herrero (ACD) and Marion Isobel and Zaza Namoradze from the Justice Initiative. Also, Dejusticia provided overall financial management and Dejusticia and the Justice Initiative coordinated the project. Miguel La Rota from Dejusticia and Marion Isobel from the Justice Initiative played an invaluable role in the overall realisation of this project and provided significant substantive contributions.

The Research Advisory Team provided research guidance to the country researchers and contributed comparative and analytical chapters to the publication. It consisted of: Alberto Binder, Ed Cape and Zaza Namoradze. All have substantial

¹ Ed Cape, Zaza Namoradze, Roger Smith and Taru Spronken, *Effective Criminal Defence in Europe*, Antwerp: Intersentia, 2010

knowledge and experience of criminal justice systems in a wide range of jurisdictions across the world. Alberto Binder is a Professor of Criminal Procedure Law at the University of Buenos Aires, founder and vice president of INECIP, member of the Argentinian Association of Procedural Law and the Iberoamerican Institute of Procedural Law, and author of several publications, such as *De las Repúblicas aéreas al Estado de Derecho. Ideas para un debate sobre la reforma judicial en América latina*. Ed Cape, who is a law professor at the University of the West of England, and Zaza Namoradze, who is a Director of Budapest Office of the Justice Initiative, collaborated on and co-authored (together with others), *Effective Criminal Defence in Europe* (2010) and *Effective Criminal Defence in Eastern Europe* (2012). Ed Cape has also carried out a number of projects concerned with defence rights and criminal process in the EU and beyond, including a publication by the Open Society Justice Initiative, *Improving Pre-trial Justice: the Roles of Lawyers and Paralegals*; and *Early Access to Legal Aid in Criminal Justice Processes: a Handbook for Policymakers and Practitioners*, which was produced by the UNODC and the UNDP with technical input from the Open Society Justice Initiative. Zaza Namoradze has directed a large number of projects concerning legal aid reforms, including national legal aid reform initiatives in Eastern Europe, and in a number of countries in Africa and Asia.

A project of this nature inevitably relies on a large number of people. The project management team was given considerable assistance by Carolina Villadiego (Dejusticia) and Katalin Omboli (the Justice Initiative). The authors of the relevant country chapters, of course, played a crucial role and they are: Lucas Gilardone and Sebastian Narvaja (Argentina); Isadora Fingermann; Maira Zapater and Rafael Custodio (Brazil); Carolina Bernal Uribe (Colombia); Juan Pablo Muñoz Elías (Guatemala); Ana Aguilar García and Gregorio González Nava (Mexico); and Liliana Bances Farro and Nataly Ponce Chauca (Peru). In-country reviewers also played an important role in providing a critique of and validating the data provided by the authors of the country reports. The reviewers were: Alfredo Pérez Galimberti and Francisco Marull (Argentina); Ludmila Vasconcelos Leite Groch, and Vivian Calderoni (Brazil); Miguel La Rota Uprimny (Colombia); Luis Rodolfo Ramírez García, Mario Avalos Quispal and Mario Ernesto Archila Ortiz (Guatemala); Miguel Sarre Iguíniz (Mexico); and Nataly Ponce Chauca (Peru). The authors received valuable support from researchers whose names are set out in the respective chapters in Part II. We thank Juanita Duran for editing the final text and extend our gratitude to all of those, both named and unnamed, who have contributed to the research project and the book.

We hope that this book, 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 System 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 in the first semester of 2015. We trust that this book 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.

June 2015

Alberto Binder

Ed Cape

Zaza Namoradze

CONTENTS

Preface and Acknowledgements	V
Biographies.....	XXVII

PART I. EFFECTIVE CRIMINAL DEFENCE IN A LATIN AMERICAN CONTEXT	1
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Chapter 1. Effective Criminal Defence and Fair Trial.....	3
1. Introduction.....	3
2. Effective criminal defence and fair trial.....	5
3. The research project and the methodology.....	9
3.1. The goal and aims of the project	10
3.2. The content and scope of the project	11
3.3. The project methodology.....	12
4. Fair trial rights in an international context.....	14
4.1. The global context	14
4.2. The Latin American human rights system.....	18
4.3. The European approach.....	20
4.3.1. Introduction	20
4.3.2. The European Convention on Human Rights.....	21
4.3.3. The European Union and procedural rights	24
4.3.4. Procedural rights in Europe—an example.....	27
5. Conclusions.....	30

6. Bibliography.....31

Chapter 2. Latin American Standards Regarding

Effective Criminal Defence.....33

1. Introduction.....33

2. The context of criminal justice; a process of change and reform37

 2.1. The Inter-American Court. Concerns of the era.....39

 2.2. Inquisitional models of organization.
 The problem of the bureaucracy of problems40

 2.3. Exercising legal advocacy: formalism against
 the exercise of rights41

 2.4. Prison conditions and defence43

 2.5. Due process, impartial trial, or fair trial44

 2.6. Some clarifications on criminal systems (criminal
 infractions, factual and de facto charging,
 apprehension, arrest, detention).....47

3. International standards50

 3.1. Right to information54

 3.1.1. The right to be informed of the nature
 of the arrest or detention and the rights
 that arise from this situation56

 3.1.2. The right to be informed of the nature
 and cause of the charges or accusations59

 3.1.3. The right to receive information regarding
 the rights of the accused.....61

 3.1.4. The right to access material case evidence
 and the case file (docket, record, dossier, etc.)63

 3.2. The right to defend oneself and legal assistance.....65

 3.2.1. The right of the accused to self-defence
 and to represent himself.....65

 3.2.2. The right to legal assistance and representation
 of one’s choice.....66

 3.2.3. The right to legal assistance during questioning67

 3.2.4. The right to consult in private with a defence attorney.....68

3.2.5. The right to an attorney free of charge for those who cannot pay for one.....	69
3.2.6. Right to have an independent attorney who complies with minimum professional standards, and who approaches their work based exclusively on his or her client’s interest.....	71
3.3. Generic rights or judicial guarantees related to a fair trial.....	72
3.3.1. The right to be presumed innocent	72
3.3.2. The right to remain silent and not to testify	73
3.3.3. The right to remain free during the process, while the trial decision is pending	74
3.3.4. Right to be present at trial and to participate	79
3.3.5. Right to have decisions that affect him substantiated	80
3.3.6. The right to a full review of a conviction.....	82
3.4. Rights and protections tied to the effectiveness of defence	84
3.4.1. Right to investigate the case and propose evidence.....	84
3.4.2. The right to sufficient time and possibilities to prepare one’s defence	85
3.4.3. Equality of arms in the production and control of evidence and the development of public, adversarial hearings	86
3.4.4. The right to a trusted interpreter and the translation of documents and evidence	87
4. Final Considerations.....	87
5. Bibliography.....	88

PART II. NATIONAL APPROACHES
TO EFFECTIVE CRIMINAL DEFENCE..... 91

Chapter 3. Country Analysis. Argentina 93

1. Introduction.....	93
1.1. Political and demographic information	93
1.2. Selection of jurisdictions.....	94
1.3. Description of the criminal justice system. Organizational structures and reforms	94

1.4.	Description of the criminal process. Procedures and reforms	98
1.4.1.	Beginning the criminal prosecution process	98
1.4.2.	Indictment and freedom	99
1.4.3.	Bringing an accused to trial.....	100
1.4.4.	The trial.....	101
1.4.5.	Victims and their rights	102
1.4.6.	Judicial control of rights protection	102
1.5.	Social and political problems related to criminal justice	103
1.6.	Methodology.....	104
2.	Free legal assistance.....	105
2.1.	Expenditures on defence.....	105
2.1.1.	Public defence expenditures by jurisdiction.....	105
2.1.2.	Income of public defenders compared with other actors.....	106
2.2.	Organization of free legal defence	106
2.2.1.	Organizational scheme by jurisdiction	106
2.2.2.	Material resources by jurisdiction.....	110
3.	Rights and their implementation	111
3.1.	Right to information	111
3.1.1.	Right to be informed of the reasons for arrest or detention and the rights that accrue in that situation	111
3.1.2.	The right to be informed of the filing of charges, indictment, or accusation.....	112
3.1.3.	The right to be informed of defence rights	114
3.1.4.	The right to access incriminating evidence	115
3.2.	The right to actively defend oneself.....	116
3.2.1.	The right to represent oneself personally	116
3.2.2.	The right to appoint and have a trusted, capable attorney.....	117
3.2.3.	The right to be interrogated in the presence of an attorney	120
3.2.4.	The right of the accused to communicate in private with his attorney	121
3.2.5.	The right to be provided with an attorney when the accused cannot afford one.....	122

3.2.6. The right to an attorney who puts the interests of the accused above other considerations and institutional interests.....	123
3.3. Procedural rights.....	125
3.3.1. The right to remain free during the process.....	125
3.3.2. The right to participate directly and to be present at the trial	130
3.3.3. The right to be presumed innocent and treated as such.....	131
3.3.4. The right to remain silent during the proceedings.....	133
3.3.5. The right to decisions supported by evidence.....	134
3.3.6. The right to review of a conviction.....	136
3.3.7. The right to an effective defence during enforcement of the sentence.....	137
3.4. Guarantees regarding an effective defence	139
3.4.1. The right to investigate the case and to present evidence.....	139
3.4.2. The right to sufficient time and facilities to prepare a defence	141
3.4.3. Equality of arms in the production and control of evidence at all stages of the investigation and trial.....	142
3.4.4. The right to a trusted interpreter and the translation of documents and evidence.....	146
4. The professional culture of private attorneys and public defenders.....	147
4.1. Rules and perceptions regarding the role of defence attorneys and their duties toward their clients.....	147
4.1.1. The role of attorneys in laws regulating bar associations	147
4.1.2. Ethics and disciplinary sanctions.....	148
4.2. Bar associations and their role.....	150
4.3. Responsibility of bar associations in the provision of free legal assistance	151
4.4. Mechanisms of quality control for legal services.....	151
4.5. Professional independence of defence attorneys	152
5. Rights of indigenous peoples	153

5.1. Normative recognition of indigenous peoples	153
5.2. Specific institutions for the defence of members of indigenous communities.....	154
5.3. Attorneys who specialize in the defence of members of indigenous communities.....	155
5.4. Hearings in indigenous languages	156
5.5. Recognition of sanctions imposed by indigenous tribunals.....	156
6. Political commitment to effective criminal defence	157
6.1. Criminal matters in public discourse	157
6.2. Reform processes. The current situation.....	158
6.3. Other forms of criminality: the Minor Crimes Code	160
7. Conclusions.....	162
7.1. Recommendations	166
8. Bibliography.....	167
Chapter 4. Country Analysis. Brazil	175
1. Introduction.....	175
1.1. Political, social, and cultural context of the Brazilian criminal justice system	175
1.2. Summary of the structure and procedure of Brazilian criminal justice.....	177
1.3. Justification for the geographical demarcation and methodology of the research	180
2. Legal assistance.....	184
3. Rights and their implementation	190
3.1. The right to information.....	190
3.2. The right to defence and self-defence.....	193
3.3. Procedural rights.....	198
3.3.1. The right to remain at liberty during the proceedings and issues relating to imprisonment during the proceedings.....	202
3.3.2. The right to be present at trial.....	205
3.3.3. The right to be presumed innocent	206
3.3.4. The right to remain silent.....	207

3.3.5.	The right to a substantiated decision	207
3.3.6.	The right to defence during the execution of the sanction	207
3.4.	Rights related to an effective defence	208
3.4.1.	The right to investigate the case	208
3.4.2.	The right to adequate time and conditions to prepare ones defence.....	210
3.4.3.	The right to equality of arms in witness testimony	210
3.3.4.	The right to translation and an interpreter when the person does not speak the national language	211
4.	The professional culture of defence attorneys and public defenders.....	211
4.1.	Professional associations of attorneys	211
4.2.	The role of attorneys in legal proceedings, and their duties to clients.....	212
4.3.	Mechanisms to guarantee the professional independence of defence attorneys.....	213
5.	Rights of indigenous peoples	214
6.	Political commitment to effective criminal defence.....	215
7.	Conclusions.....	218
7.1.	Recommendations.....	222
8.	Bibliography.....	223
 Chapter 5. Country Analysis. Colombia		225
1.	Introduction.....	225
1.1.	Basic socio-demographic information	226
1.2.	Rates of criminality and the prison situation.....	227
1.3.	Characterization of the criminal system	228
1.4.	The criminal process in the framework of the adversarial system	229
2.	Legal assistance.....	231
2.1.	Organization and structure of the public defence office	231
2.2.	Public defence service	233
2.2.1.	Public defenders.....	233

2.2.2. Users.....	236
2.2.3. Provision of public defence services.....	238
3. Rights and their implementation	241
3.1. The right to information.....	241
3.2. The right to self defence.....	244
3.3. Procedural rights.....	248
3.3.1. The right to freedom of movement during trial and issues regarding pretrial detention	248
3.3.2. The right to be present at trial.....	250
3.3.3. The right to the presumption of innocence	251
3.3.4. The right to remain silent.....	252
3.3.5. The right to substantiated decisions	253
3.3.6. The right to appeal and other procedural rights after the decision.....	254
3.4. Rights related to an effective defence	255
3.4.1. The principle of equality of arms and the defence's right to undertake investigations	256
3.4.2. The right to sufficient time and facilities to prepare one's defence	260
3.4.3. The right to equality of arms in questioning witnesses.....	260
3.4.4. The right to interpreters during hearings and translations of the case file.....	260
4. Professional culture of defence attorneys.....	261
5. Political commitment to effective criminal defence	262
6. Conclusions.....	264
6.1. Recommendations	267
7. Bibliography.....	270
 Chapter 6. Country Analysis. Guatemala	 273
1. Introduction.....	273
1.1. Political and demographic information	273
1.2. General description of the criminal justice system.....	274
1.3. General structure of the criminal justice system and description of the criminal process	275
1.4. The phenomenon of criminality and the State's response	278

2. Legal Assistance	280
3. Rights associated with the right to criminal defence and their implementation in practice	285
3.1. The right to information	285
3.2. The right to self-defence and legal representation	287
3.3. Procedural rights	288
3.3.1. The right to remain free during the process while the trial is not complete	288
3.3.2. The right to be present at trial	290
3.3.3. The right to be presumed innocent	292
3.3.4. The right to remain silent and/or not testify against oneself	293
3.3.5. The right to decisions based on reasonable arguments	294
3.3.6. The right to challenge decisions	295
3.3.7. The right to legal assistance during the execution of the sanction	297
3.4. Rights related to effective criminal defence	297
3.4.1. The right to investigate the case and propose evidence	297
3.4.2. The right to sufficient time and possibilities to prepare one's defence	299
3.4.3. The right to equality of arms in the production and control of evidence and in public, adversarial hearings	301
3.4.4. The right to a trusted interpreter and the translation of documents and evidence	303
3.5. The right to defence during the execution of the sanction	304
3.6. The right to defence of indigenous peoples	306
4. The professional culture of attorneys and defence attorneys	308
5. Political commitment to effective criminal defence	311
6. Conclusions	313
6.1. Recommendations	315
7. Bibliography	316
 Chapter 7. Country Analysis. Mexico	 319
1. Introduction	319

1.1. Basic demographic and political information	319
1.2. General description of the justice system	320
1.3. The criminal process and its stages	321
1.3.1. Federal District (traditional system)	322
1.3.2. Baja California (adversarial system)	323
1.4. Rates of criminality and the prison population	325
2. System of criminal defence	326
3. Rights and their implementation	329
3.1. The right to information.....	330
3.1.1. The right to be informed regarding the nature and cause of arrest or detention and the rights that accrue in this situation.....	330
3.1.2. The right of the prosecutor or public ministry to access the investigation file.....	333
3.1.3. The right to be informed of the nature and cause of the indictment or accusation.....	334
3.2. The right to defend oneself and to legal assistance.....	334
3.2.1. The right to legal assistance during questioning	334
3.2.2. The right to speak privately with one's attorney.....	335
3.2.3. The right to a technical defence	336
3.2.4. The right to an adequate defence during the criminal enforcement stage	338
3.3. Rights and guarantees tied to the effectiveness of defence	339
3.3.1. The right to offer evidence and witnesses	339
3.3.2. The right to sufficient time and possibilities to prepare one's defence	341
3.3.3. Equality of arms in the production and control of evidence and the development of public, adversarial hearings	341
3.3.4. The right to a trusted interpreter and the translation of documents and evidence	343
3.4. Generic rights or judicial guarantees, related to a fair trial.....	345
3.4.1. The right to be presumed innocent	345
3.4.2. The right to testify or remain silent	347
3.4.3. The right to remain free during the process, while the trial has not concluded	349

3.4.4. The right to be tried within a reasonable timeline	351
3.4.5. The right to be tried in a public hearing by an impartial and independent judge.....	352
3.4.6. The right to substantiated and reasoned decisions	354
3.4.7. The right to appeal a guilty verdict.....	355
4. The professional culture of litigating attorneys.....	356
5. Political commitment to effective criminal defence.....	359
6. Conclusions.....	360
6.1. Recommendations.....	363
7. Bibliography.....	364
Chapter 8. Country Analysis. Peru.....	371
1. System of criminal defence	371
1.1. Basic demographic and political information.....	371
1.2. General description of the criminal justice system.....	372
1.3. Structure of the new criminal procedure model	373
1.4. Crime levels and the prison population.....	375
1.4.1. Levels of crime and citizen insecurity.....	375
1.4.2. Prison population	376
2. Legal Assistance	376
2.1. Organization and Management of the legal assistance system	377
2.2. Spending in legal assistance for criminal matters.....	378
2.3. Methods of providing legal assistance in criminal matters	380
2.4. Eligibility for legal assistance in criminal matters and appointment procedures	382
2.4.1. The mechanism to appoint a public defender based on the applicant	383
2.5. Remuneration for criminal legal aid.....	383
3. Rights and their implementation	386
3.1. The right to information.....	386
3.1.1. The right to be informed regarding the nature and causes for detention.....	386
3.1.2. The right to be informed of the nature and cause of the charges against oneself.....	387

3.1.3.	The right to access information relevant to the case during the police, prosecutorial, and court phase	390
3.2.	The right to defence.....	391
3.2.1.	The right of the accused to defend himself and to represent himself.....	392
3.2.2.	The right to assistance and technical legal representation of one's trust and choosing.....	392
3.2.3.	To have access to the services of an attorney free of charge for those who cannot afford one	393
3.2.4.	The right to speak in private with one's attorney	395
3.2.5.	The right to legal assistance during questioning	396
3.3.	Procedural rights.....	397
3.3.1.	The right to physical liberty during the process, while the trial has not concluded	397
3.3.2.	The right of the accused to be present at trial	399
3.3.3.	The right to be presumed innocent	400
3.3.4.	The right to remain silent.....	401
3.3.5.	The right to substantiated decisions	402
3.3.6.	The right to appeal decisions.....	403
3.4.	Rights related to an effective defence	405
3.4.1.	The right to investigate the case	405
3.4.2.	The right to sufficient time and possibilities to prepare one's defence	406
3.4.3.	The right to equality of arms in evaluating witnesses.....	406
3.4.4.	The right to interpretation and translation of documents free of charge	407
4.	The professional culture of defence attorneys.....	408
5.	Rights of indigenous peoples	413
6.	Political Commitment to an effective criminal defence	414
7.	Conclusions.....	415
7.1.	Recommendations.....	418
8.	Bibliography.....	418

PART III. ANALYSIS, CONCLUSIONS AND RECOMMENDATIONS.....	421
Chapter 9. Improvements and challenges regarding compliance with international standards.....	423
1. Introduction.....	423
2. The specific context of each of the countries. The level of implementation of criminal justice reform	424
3. Limits of the investigation	427
4. Thematic areas.....	429
4.1. The right to information.....	429
4.1.1. To be informed of the nature and cause for arrest or detention and the rights that emanate from that situation	431
4.1.2. To be informed of the nature and causes of the indictment (formulation of charges) or accusation	432
4.1.3. To obtain information about one's rights	434
4.1.4. Obtaining access to material evidence in the case, and the case file (record, docket, brief, dossier, etc.)	435
4.2. The right to defence and to an attorney	436
4.2.1. The right to defend oneself and to represent oneself.....	436
4.2.2. The right to trusted, freely chosen legal (technical) representation and assistance	437
4.2.3. The right to legal assistance during questioning	438
4.2.4. To meet privately with one's attorney.....	439
4.2.5. The right to appoint and have free legal assistance for those who cannot afford it.....	440
4.2.6. The right that attorneys fulfill minimal professional standards, are guided exclusively by their clients' interests, and are independent.....	442
4.3. General rights or judicial guarantees regarding a fair trial.....	443
4.3.1. The right to be presumed innocent	443
4.3.2. The right to remain silent or refrain from self-incrimination	444
4.3.3. To remain free during the process, while the trial is underway	445

4.3.4.	The right to be present at and participate in trial.....	447
4.3.5.	The right to decisions that affect one's rights are reasonable and substantiated	448
4.3.6.	The right to a comprehensive review of a conviction	449
4.4.	Rights related to effective criminal defence	450
4.4.1.	The right to investigate and propose evidence	450
4.4.2.	The right to have sufficient time and possibilities to prepare one's defence	451
4.4.3.	Equality of arms in the production and control of evidence and the development of public, adversarial hearings	451
4.4.4.	The right to a trusted interpreter and the translation of documents and evidence	453
5.	Special problems.....	454
5.1.	Defence during the enforcement stage	454
5.2.	The situation of indigenous peoples.....	455
6.	Conclusions.....	456

Chapter 10. Improving access to Effective Criminal Defence 459

1.	Introduction.....	459
2.	Common themes.....	462
2.1.	Avoidance of procedural rights.....	462
2.2.	Overuse of pre-trial detention.....	465
2.3.	Inadequate time, facilities and information for consideration of the evidence and preparation of the defence	467
2.4.	Lack of access to competent, independent, legal advice and representation.....	469
2.5.	Quality and professional cultures.....	472
3.	Conclusions and recommendations for individual countries.....	474
3.1.	Argentina.....	474
3.1.1.	Major Issues.....	474
3.1.2.	Recommendations	478
3.2.	Brazil.....	479
3.2.1.	Major Issues.....	479
3.2.2.	Recommendations	483

3.3. Colombia	484
3.3.1. Major Issues.....	484
3.3.2. Recommendations	487
3.4. Guatemala.....	489
3.4.1. Major Issues.....	489
3.4.2. Recommendations	492
3.5. Mexico	492
3.5.1. Major Issues.....	492
3.5.2. Recommendations	495
3.6. Peru.....	496
3.6.1. Major Issues.....	496
3.6.2. Recommendations	499
4. Bibliography.....	500

ANNEXES	501
---------------	-----

Annex I. Development of international standards on the right to effective criminal defence.....	503
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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).	504
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).	504
3. The right to obtain information regarding the rights to defence. ACHR, art. 8(2)(c).	505
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).	505
5. The right of the indicted person to self-defence and to represent himself. ACHR, art. 8(2)(d).	505
6. The right to legal assistance and representation of a free and trusted attorney. ACHR, art. 8(2)(d).	506
7. The right to legal assistance during questioning. ACHR, art. 8(2)(d).	506

8. The right to meet in private with an attorney. ACHR, art. 8(2)(d).	506
9. The right to representation by an attorney who complies with minimum professional standards, is independent, a nd who treats their client’s interests as paramount. ACHR, art. 8(2)(d).	507
10. The right to have access to an attorney free of charge for those who cannot afford one. ACHR, art. 8(2)(e).	507
11. The right to be presumed innocent. ACHR, art. 8(2), first paragraph.	507
12. The right to remain silent or to refrain from self-incrimination. ACHR, art. 8(2)(g); ACHR, art. 8(3).	507
13. The right to remain at liberty while a trial is pending. ACHR, arts. 7, 2, 3 and 5.....	508
14. The right to be present at trial and participate in it. ACHR, art. 8(2)(d).	508
15. The right to decisions that affect one’s rights to be substantiated. ACHR, art. 8(1).	508
16. The right to a comprehensive review of a conviction. ACHR, art. 8(2)(h).	509
17. The right to investigate the case and propose evidence. ACHR, art. 2(f).	509
18. The right to sufficient time and opportunities to prepare one’s defence. ACHR, art. 2(c).	509
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.	509
20. The right to a trusted interpreter and the translation of documents and evidence. ACHR, art. 2(a).	510

**Annex 2. Annex to the Directive 2012/13/EU
of the European parliament and of the council of 22 May 2012**

Indicative model Letter of Rights	511
A. Assistance of a Lawyer/Entitlement to Legal Aid	511
B. Information About the Accusation	511

C. Interpretation and Translation	512
D. Right to Remain Silent	512
E. Access to Documents	512
F. Informing Someone Else about Your Arrest or Detention/Informing Your Consulate or Embassy	512
G. Urgent Medical Assistance.....	512
H. Period of Deprivation of Liberty	513
Annex 3. Desk review Pro-forma.....	515
1. General statistical and other information	516
2. Right to information concerning the accusation	518
3. The right to defence.....	520
4. Facilitating effective defence	524
5. The right to interpretation and translation.....	528
6. Additional guarantees for vulnerable groups	529
7. Guarantees for trials in absentia.....	530
Annex 4. Critical account Pro-forma.....	531
Purpose of the critical account.....	531
Style Guide.....	532
1. Introduction.....	532
2. Crime in its social and political context	532
3. The structure and processes of the criminal justice system.....	533
4. Criminal justice professionals and institutions	533
5. The organisation of legal aid	534
6. Rights and freedoms	534
7. Preliminary Conclusions.....	535
8. Selected bibliography.....	535
Annex 5. Country report Pro-forma.....	537
Purpose of the country reports.....	537
The need to be analytical and critical	537
Word limit	538
Style Guide.....	538

Structure of the country report.....	539
1. Introduction (1,800)	539
2. Legal aid (900)	539
3. Legal rights and their implementation (9,300).....	540
3.1. The right to information.....	540
3.2. The right to defend oneself	540
3.3. Procedural rights.....	541
3.4. Rights relating to effective defence.....	541
4. The professional culture of defence lawyers/public defenders (1,800).	542
5. Political commitment to effective criminal defence (600)	542
6. Conclusions (900)	542
7. Bibliography.....	542

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PART I

EFFECTIVE CRIMINAL DEFENCE IN A LATIN AMERICAN CONTEXT

Alberto Binder
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CHAPTER 1. EFFECTIVE CRIMINAL DEFENCE AND FAIR TRIAL

1. Introduction

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, taken together, they represent the most significant reforms in Latin American criminal procedure in nearly two centuries.¹ Whilst the reforms differ in terms of detail across different countries, and result from a variety of pressures and influences, broadly they 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 crime, and victims of crime.

¹ Langer 2007, p. 618.

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 mediated 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 often do not accord with the objectives of the organisations for which they work.

It is in this context of change and complexity that we set out in this study 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 crime. The right to 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 fair trial. We take as our normative framework both 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 (see Chapter 2). 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),² and also in the ACHR.³ 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 and the right to a hearing within a reasonable time, release from detention pending trial, and the right to legal assistance.

² ICCPR Article 14, para. 3(d).

³ ACHR Article 8(2).

There are two major reasons for using the ECHR, in addition to the AHRC, as an aid to analysis in the Latin American context. First, the right of individuals to apply to the ECtHR to determine whether their rights under the ECHR have been breached means that there is now a wealth of case law concerning fair trial rights generally, and the procedural rights of suspects and accused persons in particular. It represents the most comprehensive body of international case law on procedural rights. Furthermore, this body of case law has provided a foundation for a programme of European Union (EU) legislation on procedural rights of suspected and accused persons—the EU ‘roadmap’ of procedural rights—which all EU Member States are, or will be, required to implement (see further section 4.3 below).⁴ Second, the research project which forms the subject-matter of this book was inspired by, and modeled on, two projects examining the procedural rights of suspects and accused persons in Europe, both of which used the standards embodied in the ECHR (and to a certain extent, the legislation issued under the EU roadmap) as a basis for analysis.⁵ Together, these two studies examined access to effective criminal defence in fourteen European countries, all of which are signatories of the ECHR. The countries encompass both the inquisitorial and adversarial procedural traditions, and half were former members of the Soviet bloc, and which, since the early 1990s, have been engaged in fundamental reforms of their criminal justice systems. Whilst some of the reforms have differed from those being undertaken in Latin America—in particular, reducing rather than enhancing the role and influence of the prosecutor—many echo those adopted in Latin America, such as the adoption of certain adversarial elements and the strengthening, at least in law, of the procedural rights of suspected and accused persons.

2. Effective criminal defence and fair trial

The objective of our study is to examine and assess, by reference to Latin American and global standards, access to effective criminal defence in six Latin American countries—Argentina, Brazil, Colombia, Guatemala, Mexico and Peru. The focus of the study, in common with the two projects conducted in Europe, is the suspected or accused person and their experience of the criminal justice process. Broadly speaking, it is concerned with examining the right to fair trial in practice, but by adopting a

⁴ Subject to certain opt-out arrangements negotiated by Denmark, England and Wales, and Ireland.

⁵ The studies were published as Cape et al. 2010, and Cape & Namoradze 2012.

focus that concentrates on the suspected or accused person it recognises that the right to fair trial, and the contribution that access to effective criminal defence makes to the realisation of fair trial, is not confined to fair outcomes but also includes a fair process.

There are a number of reasons for adopting this approach. Across the jurisdictions in the study, tens of thousands of people are arrested and/or detained by police each year. Whilst the majority of them are citizens of those countries, some are foreigners and, in some countries more than others, many are from ethnic minorities or from indigenous communities. A majority are likely to be poor, or relatively poor, and most cannot afford to pay for legal assistance even if, at any particular stage of the criminal process, they have a right to legal assistance and such assistance is available. Many will not have been arrested or detained before, and therefore will have little or no knowledge and experience of criminal justice processes. Others, on the other hand, may be from socio-demographic groups that are particularly at risk of arrest and detention and who, as a result, may be particularly vulnerable. Some are detained for long periods of time before being produced before a court and, for a variety of reasons—innocence, lack of evidence, diversion from the criminal process—many may never appear before a court. In some of the countries in the study there is minimal, or no, judicial supervision or independent oversight of the arrest, detention and investigation process. What happens during this phase is likely to affect how the person is dealt with if and when they are eventually placed before a court, and may well determine the outcome of the proceedings. For some people the arrest and detention will comprise their full experience of the criminal justice process.

Another reason for adopting an approach that is centred on suspected and accused persons is that the fair trial and procedural guarantees embodied in the ACHR, and other international and regional human rights instruments, are rights of, or possessed by, those persons: ‘*Every person* has the right to a hearing, with due guarantees and within a reasonable time...’;⁶ and ‘*Every person* accused of a criminal offense has the right to be presumed innocent...’ (emphasis added).⁷ This may seem to be an obvious point. However, it cannot be assumed that domestic laws designed to give effect to the procedural rights of suspected or accused persons are expressed in such terms, nor that they are given effect so that they are experienced as rights by those most affected by them. Furthermore, suspected and accused persons are not a constituency that has ‘voice’ or influence. In most countries, those institutions and professionals that

⁶ ACHR Article 8(1).

⁷ ACHR Article 8(2).

are charged with the duty of delivering, or facilitating, such rights are normally more organised, more powerful and more influential than those who are the 'recipients' of such rights. Thus it is the interests and concerns of such institutions and professionals that predominate, and often little thought is given to how such rights are experienced by those whose rights they are. In those countries where legal aid mechanisms are developed, the concerns of the institutions and personnel that deliver legal aid often predominate over those of the 'consumers' of legal services.

From the perspective of suspected and accused persons fair trial guarantees may be of little value if they are restricted to the trial in the narrow sense of the court proceedings in which guilt or innocence is determined. Trial is a process which commences, at the latest, when a person is arrested or detained by law enforcement authorities and continues until acquittal or conviction and, thereafter, to appeal. As noted earlier, any particular suspect or accused person may experience the whole of that process, or only one or more of the earlier stages. To an extent, this is recognised by the ACHR in providing guarantees both in the form of a (conditional) right to liberty under Article 7, and in the form of specific procedural guarantees that are essential elements of the right to fair trial under Article 8. Both sets of rights are crucial from the perspective of the suspected or accused person. In any particular case, there may be a fair and just outcome, but the accused may nevertheless (rightly) feel aggrieved if they have not been dealt with fairly during the course of events leading to that outcome. An ultimately successful appeal against a conviction which was obtained using evidence of a confession obtained by torture, or following denial of the right of access to a lawyer, which is secured following months, or even years, in pre-trial detention is very likely to leave the accused dissatisfied with and sceptical of the criminal justice system as a whole.

The issue of trust in, and perceptions of the legitimacy of, criminal justice institutions and personnel, is not only relevant to the question of whether international norms are complied with in national criminal justice systems. Research on procedural justice internationally has demonstrated that the perception of the legitimacy of state institutions, and particularly of the police, is a key factor in encouraging people to comply with the law and to co-operate with investigative and trial processes.⁸ Perceptions of legitimacy rely on people trusting the police and other criminal justice agencies which, in turn, depends upon whether they believe that they will be treated fairly and with respect. Thus an analysis that focuses on the experience of suspected and accused persons is relevant not only to those directly involved, and to the question of

⁸ See, for example, Tyler 2006, Myhill & Quinton 2011, and Jackson et al. 2012.

compliance with international norms, but also to the efficiency and effectiveness of criminal justice systems more broadly.

However, our focus in this study is not simply on fair trial rights, but on access to effective criminal defence as a pre-condition for the enjoyment of fair trial guarantees. Fair trial, in terms of both process and outcome, without access to effective criminal defence, would require law enforcement agents and prosecutors to be completely neutral, and even-handed, and would require judicial authorities to take a pro-active approach, taking nothing at face value. Experience and research evidence tells us that this is not possible, but even if it were such a system would, at best, be paternalistic and undemocratic. Thus, fair trial requires suspected and accused persons to have access to effective criminal defence. Effective criminal defence involves a series of interconnected procedural rights. The most obvious is the right to legal assistance, a right that is recognised by all international conventions and instruments concerned with criminal processes. To be effective, the right to legal assistance requires professionally committed, and appropriately trained and experienced, lawyers to be available when they are required (which is often at short notice). Therefore, mechanisms need to be in place to ensure that suspected and accused persons know about the right to legal assistance and how to access it, and that legal assistance is available as and when it is needed, including for those who are unable to pay for it. But a right to legal assistance is not a sufficient condition to guarantee access to *effective* defence. However good legal assistance is, it will not guarantee fair trial if other elements of effective defence are missing. Effective criminal defence requires that a suspected or accused person is able to participate in the processes to which they are subjected; to understand what is said to them, and to be understood; to be given information regarding the suspected offence or accusation; to be informed of the reasons for decisions taken; to have access to case-file or evidential materials; to have time and resources to enable them to respond to accusations and to prepare for trial; to be able to put forward information and evidence that is in their favour; to be dealt with in a way that does not put them at a disadvantage; and to appeal against significant decisions made against their interests.

From this perspective, it is apparent that whilst appropriate laws are necessary, they are not sufficient to ensure access to effective criminal defence. The gulf between law as it is written and law as it is experienced is nowhere greater than in the realm of criminal procedure. It is therefore necessary to approach the assessment of access to effective criminal defence in any particular jurisdiction at three levels:

- (1) Whether there exists a constitutional and legislative structure that adequately provides for criminal defence rights.

- (2) Whether there are in place regulations, institutions and procedures that enable those rights to be effectively recognised and delivered.
- (3) Whether there exists appropriate professional cultures amongst those responsible for facilitating and delivering criminal defence rights and, in particular, whether there exists legal professions the members of which are sufficiently competent, and willing and able, to provide legal assistance to suspected and accused persons to an appropriate standard.

These three questions provided the basis for the study, and for the collection and analysis of information regarding the six countries in the study, which are covered in Chapters 3 to 8.

Latin American standards are then dealt with in detail in Chapter 2. These standards—Latin American and European—are used in Chapters 9 and 10 to analyse the data in respect of the six countries, and to provide a foundation for recommendations for improving access to effective criminal defence in Latin America. Building on this analysis, in Annex 1 we set out a set of detailed standards designed to ensure that access to effective criminal defence is assured in Latin America.

3. The research project and the methodology

One of the objectives of the original study of access to effective criminal defence in Europe⁹ was to develop a methodology that could be used to obtain comprehensive and reliable data by NGOs and other non-academic organisations in a range of jurisdictions. The methodology was subsequently successfully adapted to enable a group of NGOs to carry out a similar project in a range of Eastern European jurisdictions.¹⁰ Following initial discussions, representatives of NGOs from six Latin American countries—Argentina,¹¹ Brazil,¹² Colombia,¹³ Guatemala,¹⁴ Mexico¹⁵ and Peru¹⁶—met in Lima, Peru, in July 2012 to discuss whether to conduct a similar research project in

⁹ See Cape et al. 2010.

¹⁰ See Cape & Namoradze 2012.

¹¹ Asociación por los Derechos Civiles (ADC) and Instituto de Estudios Comparados en Ciencias Penales y Sociales (INECIP).

¹² Conectas Direitas Humanos (CONNECTAS) and Instituto de Defesa do Direito de Defesa (IDDD).

¹³ Centro de Estudios de Derecho Justicia y Sociedad (DEJUSTICIA).

¹⁴ Instituto de Estudios Comparados en Ciencias Penales de Guatemala (ICCPG).

¹⁵ Instituto de Justicia Procesal Penal (IJPP).

¹⁶ Centro para el Desarrollo de la Justicia y la Seguridad Ciudadana (CERJUSC).

those countries. These countries share a common criminal procedural tradition both with each other, and with the majority of the countries in the European studies. However, there are some significant differences between Latin America and Europe. The *Code d'instruction criminelle*, introduced by Napoleon in the early 19th century, and which spread through much of Europe, was not adopted in Latin America. In those countries that had been part of the Soviet bloc, the power and influence of the prosecutor (an office that had been introduced into the inquisitorial system in Europe) was enhanced, whereas in many Latin American jurisdictions this was an office that was only introduced in the past couple of decades. Another significant difference is one of jurisdiction rather than procedure. All of the countries studied in Europe are unitary whereas, whilst Colombia, Guatemala and Peru share this characteristic, Argentina, Brazil and Mexico are federal jurisdictions. It was understood by the participants at the meeting that this would present some methodological challenges, but it was agreed that in the context of significant, ongoing, reforms to the criminal justice systems in Latin America, it was important to carry out research designed to improve knowledge and understanding of access to effective criminal defence, and to provide a basis for further reform designed to improve access to effective criminal defence.

The eight NGOs represented at the meeting in Lima agreed to manage and implement the research project, and appointed a project management team consisting of one representative from each of those organisations. The project management team also included Zaza Namoradze (Director of the Budapest office of the Open Society Justice Initiative), and Professor Ed Cape (a British academic lawyer), both of whom had been involved in the design and execution of the European studies, and Professor Alberto Binder, a highly experienced and respected Argentinian academic lawyer. It was agreed that Dejusticia (Colombia) would act as the secretariat of, and co-ordinator for, the project.

3.1. The goal and aims of the project

The principal goal of the project is to contribute to effective implementation of the right of suspected and accused persons, especially those who are indigent, to real and effective criminal defence throughout Latin America. Access to effective criminal defence is a necessary pre-requisite for fair trial and, ultimately, the rule of law. Therefore, the research that was conducted, and which is reported in this book, was conceived of as a way of producing credible and reliable information about access to effective criminal defence in the six countries in the study which could provide the

basis for determining what actions are needed to improve the situation, and to identify existing best practice. 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 general, 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 a number of 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.

3.2. The content and scope of the project

Whilst we are interested in the legal frameworks governing the procedural rights of suspected and accused persons, we also set out to understand the detailed regulations and procedures as they operate in practice, the institutional frameworks, and the professional cultures and working practices of those who are involved in facilitating and delivering procedural rights.

The rights and guarantees which we identify as being crucial to effective criminal defence are:

Procedural Rights Relating to Fair Trial in General

The presumption of innocence; the privilege against self-incrimination and the right to silence; equality of arms; the right to an adversarial hearing; the right to be released pending trial; the right to reasoned decisions; and the right to appeal.

The Right to Information

The right to information regarding procedural rights; the right to information regarding arrest and detention, the nature and cause of the accusation, and charge; and the right of access to material evidence or the case file.

The Right to Defence

The right to legal advice, assistance and representation during pre-trial stages and throughout criminal proceedings; choice, and provision, of legal assistance for indigent suspects; the right to private consultations with lawyers; the independence, role and professional standards of lawyers; and the right to self-representation.

The Right to Legal Aid

The right to free provision of legal assistance for indigent suspected and accused persons, and the quality of legal aid provision.

Procedural Rights Relating to Effective Defence

The right to seek evidence and to interview prospective witnesses; the right to call and question witnesses; the right to adequate time and facilities for preparation of the defence; the right to be tried in one's presence and to participate in the trial process; guarantees regarding the length of proceedings; the right to interpretation and translation; and guarantees and safeguards for vulnerable suspects and accused persons, indigenous peoples, and those from ethnic minority groups.

3.3. *The project methodology*

The project commenced with the meeting in Lima in July 2012, and consisted of three primary stages, which were completed by October 2014.

Stage 1—July to November 2012

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 (see Annex 3). In addition, the country researchers prepared a *Critical Account* of the criminal justice system, designed to provide an in-depth, dynamic, account of the system and processes (see Annex 4). The desk reviews and critical accounts were

reviewed by members of the project management team, and also by country reviewers (who were appointed for each country on the basis of their expertise and reputation in the country concerned). The purpose of the review was to identify: (a) whether the information in the desk review and critical account adequately covered the questions and issues raised by the research instruments; (b) whether any of the information required clarification; and (c) what empirical research might usefully be carried out. Following the review process, the country researchers revised their desk reviews and critical accounts.

Stage 2—December 2012 to August 2013

Country researchers conducted interviews with key criminal justice personnel in order to obtain insights from and perceptions of lawyers, police officers, prosecutors and others. Researchers also commenced work on writing the *Country Reports* for their country (see Annex 5). A meeting of the project management team and researchers was held in Bogota, Colombia, in April 2013. The purpose of this meeting was to share experiences of carrying out the research, identifying major areas of concern and also of best practices, to consider what further work was necessary to complete the country reports, and to place the work in the context of Inter-American human rights standards. Following this meeting, researchers continued with conducting interviews and with writing the country reports.

Stage 3—August 2013 to October 2014

A meeting of the project management team and researchers was held in Mexico City, Mexico, in August 2013. A primary purpose of this meeting was for the country teams to present their country reports, identifying the main findings, indicating what recommendations they were considering, and also indicating what further information needed to be obtained. Thus 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, but which was also important in identifying common themes (and those that were country specific), and best practices. Plans for national, regional and international advocacy, based upon the research findings, were also discussed. Following the meeting, researchers carried out further work on their country reports, and developed their conclusions and recommendations. The country reviewers then submitted the reports for review before they were finalised (these form the chapters in Part II of this book). The information contained in the country reports was then analysed by reference to the Inter-American standards set out in Chapter 2, and

in order to identify common themes (see Chapters 9 and 10). Finally, a meeting was held in New York in October 2014 at which all chapters were subjected to review by members of the country teams and the project management team.

4. Fair trial rights in an international context

In this section we examine international and regional standards regarding the rights that are relevant to access to effective criminal defence. We start by looking briefly at international instruments regarding fair trial rights, and the ways in which they inter-relate. We then outline the Inter-American human rights system, which is explored more fully in respect to fair trial rights in Chapter 2. Finally, we examine the European approach to fair trial rights.

4.1. *The global context*

The Universal Declaration of Human Rights (UDHR), Article 11, states that every person charged with a criminal offence has a right to a ‘public trial at which he has had all the guarantees necessary for his defence’. This is developed in the International Covenant on Civil and Political Rights (ICCPR) in the following terms:

3. In the determination of any criminal charge against him, everyone shall be entitled... (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.¹⁷

Similar provisions are contained in the ECHR (art. 6, para. 3 (c)); the Arab Charter on Human Rights (art. 16); and the African Charter on Human and Peoples’ Rights (ACHPR) (art. 7, para. 1 (c)), together with the ACHPR *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa of the African Commission on Human and Peoples’ Rights*.¹⁸

The United Nations Basic Principles on the Role of Lawyers¹⁹ states that ‘all persons are entitled to call upon the assistance of a lawyer of their choice to protect and

¹⁷ ICCPR Article 14, para. 3(d).

¹⁸ ACHPR *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, 2001, para. H.

¹⁹ *Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders*, Havana, 27 August-7 September 1990: report prepared by the Secretariat (United Nations publication,

establish their rights and to defend them in all stages of criminal proceedings' (principle 1), and that any such person 'shall, in all cases in which the interests of justice so require, be entitled to have a lawyer of experience and competence commensurate with the nature of the offence assigned to them in order to provide effective legal assistance, without payment by them if they lack sufficient means to pay for such services' (principle 6).²⁰

Thus, the right of a person to defend themselves, the right to legal assistance, and the right to legal aid (that is, legal assistance without payment by the person assisted) are commonly agreed international standards with a respect for what is essential to ensure a fair and just criminal process. Whilst the right to legal representation at trial is, in principle at least, respected internationally, a more contested issue has been the point at which the right to a lawyer arises. The United Nations Human Rights Committee (UNHRC) has consistently held that failure to allow access to a lawyer during the initial period of detention, and during any interrogation, amounts to a breach of the ICCPR, Article 14(3)(b) and (d).²¹ This is reflected in the Statute of the International Criminal Court,²² the Statute of the International Tribunal for the former Yugoslavia,²³ and also in the case law of the ECtHR (see section 4.3 below). The UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems (the UN Principles and Guidelines) state that any person 'who is arrested, detained, suspected of or charged with a criminal offence should be entitled to legal aid,²⁴ and that (in the absence of compelling circumstances) a person should not be interviewed by the police in the absence of a lawyer unless they have waived that right.²⁵ The UN Special Rapporteur on the Independence of Judges and Lawyers has stated that the presence of a lawyer during police interviews is a key safeguard against ill-treatment,²⁶ and the

Sales No. E.91.IV.2), chap. 1, sect. B.3, annex.

²⁰ For other instruments containing provisions regarding legal aid, see *Report of the Special Rapporteur on the independence of judges and lawyers*, UN Human Rights Council, A/HRC/23/43, 15 March 2013, section III.

²¹ See, for example, *Gridin v. Russian Federation* 20 July 2000, UNHRC, 770/1997; *Carranza Alegre v. Peru* 28 October 2005, UNHRC, 1126/2002; and *Toshev v. Tajikistan* 30 March 2011, UNHRC, 1499/2006.

²² Art. 55.

²³ Art. 18(3).

²⁴ Which is defined to include legal advice and assistance. See UN Principles and Guidelines, para. 8. A/RES/67/187, adopted by the UN General Assembly on 20 December 2012.

²⁵ Principle 3 and Guideline 3 respectively.

²⁶ Report on mission to the United Kingdom, E/CN.4/1998/39/Add.4, para 47, 5 March 1998.

UN Special Rapporteur on Torture has recommended that ‘No statement of confession made by a person deprived of liberty, other than one made in the presence of a judge or lawyer, should have a probative value in court’.²⁷ The European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment, in its *CPT Standards*, recognises the right of access to a lawyer by people in police custody as being a ‘fundamental safeguard against ill-treatment’.²⁸

With regard to legal aid, the commonly adopted formula in international law is that if a person cannot afford to pay for legal assistance they should be provided with it without payment if the interests of justice so require. This gives states a wide degree of discretion to determine the circumstances in which the interests of justice require legal aid to be provided, and the level at which a person is financially eligible.

In addition to the right to legal assistance and the right to legal aid, a range of procedural rights are recognised in international law, of which the following are particularly relevant to effective criminal defence:

- Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of their liberty except on such grounds and in accordance with such procedures as are established by law.²⁹
- Anyone who is arrested shall be informed, at the time of arrest, of the reasons for their arrest and shall be promptly informed of any charges against them.³⁰
- Anyone arrested or detained on a criminal charge shall be brought promptly

²⁷ UN Special Rapporteur on Torture, Report to the UN Commission on Human Rights E/CN.4/2003/68 17 December 2002, para. 26(e). See also the recommendation by the Special Rapporteur to the UN General Assembly, A/56/156, 3 July 2001, para. 39(d).

²⁸ European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, *CPT Standards* (CPT, 2006), p.8.

²⁹ ICCPR, art. 9. ACHR, art. 7 is almost identical, as is ACHPR, art. 6, and ArCHR, art. 14(1). The ECHR, art. 5 does not contain an express prohibition on arbitrariness, although this is regarded by the ECtHR as fundamental, but it does set out an exhaustive list of exceptions. Article 5(1)(c) permits deprivation of liberty by lawful arrest or detention for the purposes of bringing the person before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably necessary to prevent them committing an offence or fleeing after having done so.

³⁰ ICCPR, art 9(2), and ArCHR, art. 14(3). ECHR, art 5(2) is similar, but in addition requires that the information be given in a language that the person understands. ACHR, art. 7(4) requires such information to be given to anyone ‘who is detained’. There is no equivalent provision in the ACHPR.

before a judge or other judicial officer and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial.³¹

- Everyone charged with a criminal offence shall have the right to be presumed innocent until proven guilty according to law.³²
- In the determination of any criminal charge against them, everyone shall be entitled to be tried without undue delay.³³
- In the determination of any criminal charge against them, everyone shall be entitled to have adequate time and facilities for the preparation of their defence.³⁴

In addition, the ICCPR states that in the determination of any criminal charge, a person is ‘[n]ot to be compelled to testify against himself or to confess to guilt’.³⁵ A similar formulation is to be found in the ACHR and the ArCHR.³⁶ Whilst the ECHR does not include a corresponding guarantee, the ECtHR has consistently held that the right not to incriminate oneself, and the right to silence, are fundamental features of the right to fair trial, being ‘generally recognised international standards which lie at the heart of the notion of a fair procedure’.³⁷

³¹ ICCPR, art. 9(3). Similar provisions are found in ECHR, art 5(3), ArCHR, art. 14(5), and ACHR, art. 7(5). The ACHPR art. 7(1)(d) does provide for the right to be tried within a reasonable time before an impartial court or tribunal, but there is no provision regarding prompt production before a judge, nor to release pending trial, although these are provided for by the ACHPR Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2001, paras. M5 and N3 respectively.

³² ICCPR, art. 14(2). See also ECHR, art. 6(2); ACHR, art. 8(2); ACHPR, art. 7(1)(b); and ArCHR, art. 16.

³³ ICCPR, art. 14(3). See also ECHR, art. 6(1), which refers to the right to a hearing within a reasonable time, as does ACHR, art. 8(1), ArCHR, art. 14(5), and ACHPR, art. 7(1)(d).

³⁴ ICCPR, art. 14(3)(b); ECHR, art. 6(3)(a); ACHR, art. (2)(b); and ArCHR, art. 16(2). The ACHPR does not contain a parallel provision, although art. 7(1)(c) does provide for a right to defence, and the right to adequate time and facilities is provided for by the ACHPR Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2001, para. N3.

³⁵ ICCPR, art. 14(3)(g).

³⁶ ACHR, art. 8(2)(g) and (3), and ArCHR, art. 16(6).

³⁷ See ECtHR 25 February 1993, *Funke v. France*, No. 10828/84, paras. 41-44; ECtHR 17 December 1996, *Saunders v. UK*, Reports 1996-VI, para. 68; ECtHR 8 February 1996, *John Murray v. UK*, No. 18731/91, para. 45; ECtHR 21 December 2000, *Heaney and McGuinness v. Ireland*, No. 34720/97, para. 40; and ECtHR 22 July 2008, *Getiren v. Turkey* No. 10301/03, para. 123. Note that the ECtHR has held that the right to remain silent can be restricted provided that the

4.2. *The Latin American human rights system*

As is the case with the European human rights system, the Inter-American System is the result of worldwide concern that existed after the devastation and ruin of WWII (1939-1945), as well as increased awareness of the enormous and mass violations of fundamental human rights that occurred during the war.

The creation of the Organization of American States (OAS) was the first start; and while its founding Charter (1948) did not develop a special system of human rights protection, it did establish the protection of the person as one of the fundamental goals of the new organization. The OAS immediately adopted the American Declaration of the Rights and Duties of Man (1948), in tune with the Universal Declaration. However, it was not until 1959, with the creation of the Inter-American Commission on Human Rights (IACHR) that the protection system began to emerge as a concrete mechanism for the application of the rights contained in the American Declaration.

In 1969 the system took a decisive step by signing the American Convention on Human Rights, which not only laid out the rights and obligations of the State Parties, but also created an entire system of supervision and control, formed by two bodies. On the one hand, it consolidated its legal basis in the Inter-American Commission on Human Rights, and, on the other hand, created the Inter-American Court of Human Rights. The Convention, preceded by nearly twenty years of progressive work regarding human rights protection, concerned itself with developing a complete catalogue of rights and freedoms, defining States' obligations, circumscribing permissible limits on those rights, and defining criteria of interpretation. But the great innovation was the creation of a control system and a tribunal with the power to interpret the Convention in cases that are brought before it. State Parties to the Convention were invited to accept the Court's obligatory jurisdiction. The Commission's powers, however, derive from both the OAS Charter, as well as from the Convention.³⁸

authorities can demonstrate good cause: *John Murray v. UK*, para. 47; and *Heaney and McGuinness v. Ireland*, para. 47.

³⁸ It is important to reiterate that the Inter-American Commission is not just a Convention body, but is also an OAS body (OAS Charter, art. 112), as the entry into force of the Convention did not end the activities that the Commission had begun undertaking in 1960. The Commission continues to be charged with (i) protecting the human rights of the American Declaration of Rights and Duties of Man, in the case of an alleged human rights violation by a State that is not a party to the Convention, (ii) to protect the human rights contained in the American Convention, when the alleged violation is attributed to a State-party of the Convention, and (iii) protecting specific rights

The Inter-American System has a procedure that is similar to the former European System of Human Rights Protection and to the Optional Protocol to the International Covenant on Civil and Political Rights (Medina 2010, p. 29). In the first stage, the petitioner files his complaint before the Commission,³⁹ which analyzes the admissibility requirements (in particular, jurisdiction and the exhaustion of domestic remedies, except in the case of exceptions) and later notifies the State that it has a period of two months (with the possibility of a short extension), or shorter in urgent cases, to object to admissibility. Once the Commission receives the State's response, it declares the petition admissible or inadmissible (which also requires a substantive analysis of its merits and plausibility) and begins to process the case on its merits. From this point an investigatory stage begins, in which the parties can present reports and proof. Additionally, the Commission's role as mediator begins as it attempts to assist the parties to reach a friendly solution to the case. When this stage has finalized, the Commission prepares a report on the merits of the case, determining whether there exist violations of fundamental rights and formulating recommendations. The State concerned has a certain amount of time in which to comply with these recommendations or continue with the friendly settlement.

Once this timeframe has expired, either the State or the Commission have a period of three months in which they may send the case to the Inter-American Court of Human Rights. It is important to note that for the Court to intervene, the Commission must have exhausted the procedures established in articles 48 to 50 of the ACHR. When the Commission presents the case, it must send a final report regarding its intervention in the case. The most recent regulatory reforms promote an intervention by the victims in the case, in addition to the Commission's report. From there forward, the procedure follows common procedural rules. The Court's decision is binding on States, but the Court still faces difficulties in ensuring that States fully comply with its decisions.

contained in other Inter-American instruments, when the violation is attributable to a State-party of such instruments, in which case, the procedure is that contained in the American Convention. (Medina 2010, p. 29).

³⁹ Article 44 of the Convention authorizes any group of people to file complaints regarding the violation of Convention rights. This broad standing is a characteristic feature of international human rights protection. As the Court has stated, the formalities that are characteristic to certain branches of domestic law do not apply in international human rights law, whose objective and principal concern is complete rights protection, without subjecting them to formalities or requirements that create obstacles.

Although the system had a slow or even faltering start, in recent years, and in particular since the regulatory reforms of 2003 and 2009 (to guarantee due process within the system and permit greater participation by victims) there has been a noted increase in the Court's activity. In spite of these reforms, the Court is still designed to be a Court dealing with only a few cases, the work of which is filtered by the Commission's activities. However, as one can see in Annex 1 regarding 'particularized development of international standard regarding effective criminal defence,' this has not prevented the Inter-American Court, nor the Commission's complementary work, from developing a broad and varied jurisprudence on the topic of this book.

4.3. The European approach

4.3.1. Introduction

Fair trial rights in Europe are governed by two regional normative frameworks, the European Convention on Human Rights (ECHR), and European Union (EU) legislation on procedural rights in criminal proceedings. There is a complex inter-relationship between the two. Whilst all member states of the EU are signatories of the ECHR, the number of countries that have signed up to the ECHR (47 countries) is significantly greater than those that are members of the EU (28 countries).

Most of these countries have an inquisitorial procedural tradition, and although they share common features there are also significant differences. For example, whilst in the majority of countries the police are primarily responsible for crime investigation, the extent of supervision of investigations by prosecutors or judges differs. Some countries have retained the office of the examining magistrate (or *juge d'instruction*) in investigations of more serious crimes, whereas in others that function has been abolished, although prosecutors retain a role in crime investigation. States that were formerly part of the Soviet bloc have mostly introduced new criminal codes and criminal procedure codes since the early 1990s, but some have been more successful than others in reforming professional cultures and working practices. In particular, in some jurisdictions the prosecutor continues to occupy a powerful position, whereas in others their power has been reduced in favour of the judiciary.⁴⁰ Whilst the inquisitorial tradition is that courts must always consider the evidence, procedures similar to the

⁴⁰ See, for example, Cape & Namoradze 2012, and Schumann et al. 2012.

guilty plea procedure (that is familiar in common law jurisdictions), and expedited hearing procedures, are increasingly being adopted across European countries.

A minority of European countries have an adversarial procedural tradition under which the police are responsible for crime investigation largely without control or supervision by prosecutors or judges. Whilst the trial stage is firmly adversarial in these jurisdictions, in many of them suspects have, until recently, had few procedural rights other than the right to silence. Most cases that go to court are dealt with, in practice, by way of a guilty plea as a result of which the court does not hear or consider the evidence.

One of the challenges for the European Court of Human Rights (ECtHR) in interpreting the ECHR, and the EU in devising and implementing a procedural rights framework, has been that of establishing and interpreting procedural rights norms in the context of differing procedural traditions and current legal frameworks.

4.3.2. The European Convention on Human Rights

The ECHR, like all regional human rights instruments, is concerned with a range of rights that go significantly beyond fair trial and criminal procedural rights. The two articles of the ECHR that are explicitly concerned with criminal procedure are Article 5 (the right to liberty), and Article 6 (the right to fair trial).⁴¹ Article 5 states that arrest and detention must be lawful and in accordance with a procedure prescribed by law, and that where effected for the purpose of bringing a person before a competent legal authority, arrest requires a reasonable suspicion that the person has committed an offence (or is justified by the need to prevent the person from committing an offence or fleeing after having done so) (art 5(1)(c)). A person who is arrested must be informed promptly, in a language which they understand, of the reasons for the arrest and of any charge against them (art 5(2)). Any person arrested or detained in accordance with Article 5(1)(c) must be brought promptly before a judge or other officer authorised by law to exercise judicial power, and is entitled to trial within a reasonable time or to release pending trial (which may be subject to guarantees to appear for trial) (art 5(3)). A person deprived of their liberty by arrest or detention is entitled to take proceedings in order to determine the lawfulness of their detention, which must be decided ‘speedily’ by a court, and their release must be ordered if the detention is not lawful (art. 5(4)).

⁴¹ Article 7 (No punishment without law) is principally concerned with substantive criminal law, and is not further considered here.

Article 6(1) guarantees the right to a fair and public hearing, within a reasonable time, by an independent and impartial tribunal established by law. Judgements must normally be pronounced publicly, although the press and public may be excluded from all or part of a trial in limited, prescribed, circumstances. The presumption of innocence is guaranteed by Article 6(2). Minimum procedural rights are accorded to persons charged with a criminal offence: the right to be informed promptly, in a language which they understand and in detail, of the nature and cause of the accusation against them (art. 6(3)(a)); the right to adequate time and facilities for the preparation of their defence (art. 6(3)(b)); the right to defend themselves in person or through legal assistance of their own choosing or, if they have insufficient means to pay for it, to be given it free when the interests of justice so require (art. 6(3)(c)); the right to examine or have examined witnesses against them, and to obtain the attendance and examination of witnesses on their behalf under the same conditions as witnesses against them (art. 6(3)(d)); and the right to free assistance of an interpreter if they cannot understand or speak the language used in court (art. 6(3)(e)). The guarantees in Article 6(3) are specific aspects of the right to a fair hearing guaranteed by Article 6(1). Derogation from the rights guaranteed by Articles 5 and 6 is permitted under ECHR Article 15, but only ‘[i]n time of war or other public emergency threatening the life of the nation’.

The rights encompassed by Article 6 have been expanded upon by principles developed in the jurisprudence of the ECtHR, such as those concerning equality of arms between the prosecution and the defence,⁴² the privilege against self-incrimination and the right to silence,⁴³ the right to adversarial trial, and the immediacy principle (meaning that all evidence should normally be produced at trial in the context of adversarial argument).⁴⁴ It is a well-established principle that the Convention is designed to guarantee rights that are ‘practical and effective’, not merely ‘theoretical and illusory’,⁴⁵ and the accused must be able to exercise ‘effective participation’ in

⁴² ECtHR 15 May 2005, *Öcalan v. Turkey*, no. 46221/99, para. 140.

⁴³ ECtHR 25 February 1993, *Funke v. France*, A 256-A, and ECtHR 19 March 2009, *Bykov v. Russia* no. 4378/02.

⁴⁴ ECtHR 28 August 1991, *Brandstetter v. Austria*, A 21, para. 67, and ECtHR 6 December 1988, *Barberà, Messegué and Jabardo v. Spain*, A 146, para. 78.

⁴⁵ *Artico v. Italy* (1981) 3 EHRR 1, *Airey v. Ireland* 91979) 2 EHRR 305, ECtHR, 9 October 2008, *Moiseyev v. Russia*, no.62936/00, para. 209, ECtHR 24 September 2009, and *Pishchalnikov v. Russia*, no. 7025/04, para. 66.

criminal processes.⁴⁶ Article 6 rights, especially those set out in Article 6(3), are also applicable to pre-trial proceedings⁴⁷ and, in particular, proceedings conducted under Article 5(4) (pre-trial detention) should meet, to the greatest extent possible in the circumstances of an on-going investigation, the basic requirements of a fair trial, such as the right to an adversarial procedure.⁴⁸

Two other Articles are relevant to particular aspects of effective criminal defence. Article 3 states that no one shall be subjected to torture or to inhuman or degrading treatment or punishment and this, of course, applies to criminal proceedings including the conditions of detention and interrogation. No derogation from Article 3 is permitted (art 15(2)). Article 8(1) guarantees the right of a person to respect for their private and family life, their home and their correspondence. In the context of effective criminal defence, Article 8 is particularly relevant to lawyer/client communications, access to legal assistance, and to investigative acts of the police such as surveillance and entrapment. Significantly, interference with exercise of the right is permitted provided that it is in accordance with the law and is necessary in a democratic society, inter alia, in the interests of national security, public safety, or the prevention of disorder or crime (art 8(2)). The right to appeal in criminal proceedings is set out in the ECHR Seventh Protocol, Article 2, which states that a person convicted of a criminal offence by a tribunal has the right to have their conviction or sentence reviewed by a higher tribunal.⁴⁹ The right may be made subject to exceptions in the case of minor offences, or where the person was tried in the first instance by the highest tribunal or was convicted following an appeal against acquittal.

Some signatories of the ECHR have incorporated the ECHR into domestic law so that it is directly applicable, whereas others have not. Generally, an individual who claims that their ECHR rights have been breached may make an application for the claim to be determined by the ECtHR, but only once they have exhausted domestic remedies. With regard to fair trial rights, although the ECtHR does consider specific procedural rights, it regards its primary function as being to assess whether proceed-

⁴⁶ *Ekbetani v. Sweden* (1991) 13 EHRR 504, and *Stanford v UKA/282* (1994).

⁴⁷ ECtHR, 24 November 1993, *Imbrioscia v. Switzerland*, no 13972/88, para. 38, ECtHR, 27 November 2008, *Salduz v. Turkey*, no. 36391/02, para. 50, and ECtHR, 11 December 2008, *Panovits v. Cyprus*, no 4268/04 para. 64.

⁴⁸ ECtHR, 13 February 2001, *Garcia Alva v. Germany*, *Lietzow v. Germany* and *Schöps v. Germany*, nos. 23541/94, 24479/94 and 25116/94, and ECtHR, 9 July 2009, *Mooren v. Germany*, no. 11364/03, paras. 124-125.

⁴⁹ Not all signatories of the ECHR have signed and ratified the protocol.

ings were fair as a whole on the particular facts of an individual case.⁵⁰ Therefore, if the breach of a procedural right is capable of being rectified or compensated for by other procedural or trial processes, it may not render the trial unfair overall. Moreover, the Court generally treats the admissibility of evidence as a matter for regulation by national law and the national courts, the Court's only concern being to examine whether the proceedings have been conducted fairly.⁵¹ There are also some elements of effective criminal defence, such as the quality of legal assistance, which the court largely regards as beyond its proper, constitutional, compass.⁵² Judgements of the ECtHR are not directly enforceable, but under Article 46(1) of the ECHR all state parties undertake to abide by the final judgement of the ECtHR in any case to which they are a party. Execution of a judgement is supervised by the Council of Europe Committee of Ministers, the role of which is to ensure that appropriate remedies are put into effect by the state concerned. If the Committee of Ministers concludes that a state party is refusing to give effect to a final judgement it may refer the matter to the Grand Chamber of the ECtHR, and if the Court confirms the violation, the matter is referred back to the Committee for it to consider what action to take. In the case of a serious violation, the Committee may take action to suspend the state and request that it withdraws from the Council of Europe.⁵³

4.3.3. The European Union and procedural rights

The EU adopted a 'roadmap' of procedural rights in criminal proceedings in 2009, with the aim of introducing EU legislation on a range of procedural rights for suspected and accused persons over a number of years.⁵⁴ The EU had, over a decade and more, introduced extensive legislation on police, prosecution and judicial co-operation and mutual recognition, and it was recognised that this should be matched by measures that would protect the rights of individuals in criminal proceedings. The legislative mechanism to be adopted was the EU Directive, the effect of which is that

⁵⁰ ECtHR 20 November 1989, *Kostovski v. Netherlands*, no. 11454/85, para. 39, and ECtHR 6 December 1988, *Barberà, Messegué and Jabardo v. Spain* 11 EHRR 360.

⁵¹ ECtHR, Grand Chamber, 1 June 2010, *Gäfgen v. Germany*, no. 22978/05, para. 163, and see the judgements noted therein.

⁵² ECtHR 24 November 1993, *Imbrioscà v. Switzerland*, no. 13972/88.

⁵³ Statute of the Council of Europe, art. 8.

⁵⁴ *Roadmap with a view to fostering protection of suspected and accused persons in criminal proceedings*, 1 July 2009, 11457/09 DROIPEN 53 COPEN 120.

EU member states must introduce legislation, regulations and other measures that ensure that the provisions of the Directive are complied with in domestic law.

The first measure to be adopted, in October 2010, was the EU Directive on the right to interpretation and translation, which had to be transposed into the domestic law of Member States by October 2013.⁵⁵ In summary, the Directive requires Member States to ensure that suspected and accused persons who do not speak or understand the language of the criminal proceedings concerned are provided, free of charge, with interpretation during those proceedings and translation of essential documents (arts. 2 and 3). Member States are also required to take concrete measures to ensure that interpretation and translation is of a sufficient quality to safeguard the fairness of the proceedings (art. 5), and to request those responsible for the training of judges, prosecutors and judicial staff ‘to pay special attention to the particularities of communicating with the assistance of an interpreter so as to ensure efficient and effective communication’ (art. 6).

This was followed, in May 2012, by a Directive on the right to information, which had to be given effect by Member States by June 2014.⁵⁶ This Directive provides for three separate, but connected, rights. First, a suspected or accused person must, from the time that they are made aware by the competent authorities that they are suspected or accused of committing a criminal offence (art. 1) be promptly provided with information, orally or in writing, regarding: the right of access to a lawyer; any entitlement to free legal aid; the right to be informed of the accusation; the right to interpretation and translation; and the right to remain silent. The information must be provided in simple and accessible language, taking into account the particular needs of vulnerable people (art. 3). Where a person is arrested or detained, they must be provided with a written Letter of Rights, which they must be allowed to keep during their detention, setting out the foregoing rights and also certain other rights, such as the right to have consular authorities informed (in the case of a foreign suspect or accused person), the right of access to urgent medical assistance, and information about the maximum period for which they can be detained (art. 4). Second, a suspected or accused person must be promptly provided with information about the criminal act they are suspected or accused of having committed, and the reasons for

⁵⁵ *Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings.*

⁵⁶ *Directive 2012/12/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings.*

their arrest or detention (art. 6). Third, such a person must be provided with access to documents related to the case against them in sufficient time to enable them to challenge the lawfulness of their arrest or detention, and to enable them to prepare their defence (art. 7).

In October 2013 the EU adopted a Directive on the right of access to a lawyer and to have a third party informed upon deprivation of liberty, which has to be given effect by Member States no later than November 2016.⁵⁷ The right is subject to an exception in respect of minor offences where a sanction can be imposed by an authority other than a criminal court (arts. 2(4)). Generally, suspected and accused persons have a right of access to a lawyer from the time that they are made aware by the competent authorities that they are suspected or accused of having committed a criminal offence, irrespective of whether they are deprived of their liberty (arts. 2(1) and 3(1)). Specifically, they are entitled to have access to a lawyer before, and during, any questioning by the police, without undue delay after being deprived of their liberty, when certain investigative acts are carried out, and in due time before any court appearance (art. 3). A suspected or accused person who is deprived of their liberty shall have a right to have at least one person informed of their detention (art. 5), and to communicate with such a person (art. 6). There is provision for temporary derogation from the right of access to a lawyer, but only if there is an urgent need to avert serious adverse consequences for the life, liberty or physical integrity of a person, or where immediate action is imperative to prevent substantial jeopardy to criminal proceedings (art. 3(6)). Any derogation must be strictly limited in time, must not be based exclusively on the type or seriousness of the alleged offence, and be authorised by a judicial authority or be subject to judicial review (art. 8).

Proposals for a series of measures to complete the procedural rights roadmap were published by the European Commission in November 2013.⁵⁸ These include proposed directives on: strengthening certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings; special safeguards for

⁵⁷ *Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicated with third persons and with consular authorities while deprived of liberty.*

⁵⁸ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Making progress on the European Union Agenda on Procedural Safeguards for Suspects and Accused Persons—Strengthening the Foundation of the European Area of Criminal Justice*, Brussels 27 November 2013 COM(2013) 820/2.

children suspected or accused in criminal proceedings; and provisional legal aid for suspects or accused persons deprived of liberty. In addition, the Commission proposed two non-binding sets of recommendations regarding procedural safeguards for vulnerable suspects and accused persons, and the right to legal aid.

Whilst an EU Directive does not have direct effect on the domestic law of Member States, as noted earlier, Member States must introduce legislation and take measures that are necessary to give effect to them. Each of the Directives includes provisions requiring Member States to provide the European Commission with the text of the measures taken, and for the Commission to make an assessment of the measures adopted and report to the European Parliament and Council on whether they are sufficient. The Commission can also take a case to the Court of Justice of the European Union (CJEU) if it considers that a Member State has failed to comply with a Directive, and the court has power to impose a financial penalty on the relevant state. In addition, any domestic court can request the CJEU to provide a ruling on an issue involving compliance with a Directive, and there is provision for an expedited hearing in the case of urgency, such as where a person is in custody. Thus the mechanisms for enforcement of procedural rights under EU law are both stronger and quicker than those under the ECHR.

4.3.4. Procedural rights in Europe—an example

In order to assist with understanding the European approach to procedural rights, we here provide an example of a case that concerned the right of access to a lawyer at the investigative stage of the criminal process.

In May 2001 Yusuf Salduz, who was under 18 years, was arrested by anti-terrorism police in Turkey and taken into custody on suspicion of having participated in an unlawful demonstration in support of an illegal organisation, the PKK (Workers' Party of Kurdistan). Whilst Turkish law provided that a suspect had a right of access to a lawyer from the moment that they were taken into police custody, this did not apply where they were suspected of offences falling within the jurisdiction of the State Security Courts. As a result, Salduz was interrogated without having been given access to a lawyer, and admitted having participated in an unlawful demonstration and of having displayed a banner supporting the leader of the PKK. The following day he was taken before the public prosecutor and subsequently the investigating judge before whom he retracted his statement to the police, alleging that he had been beaten and insulted whilst in police custody and that the statement had been obtained under

duress. Salduz was remanded in custody, and only then allowed access to a lawyer. Six months later a State Security Court convicted him relying principally, although not exclusively, on his statement to the police, and sentenced him to four years and six months' imprisonment.⁵⁹ His appeal to the Court of Cassation, on the grounds of breach of the ECHR Articles 5 and 6, was dismissed.

Salduz made an application to the ECtHR, and in a Chamber judgment in April 2007, whilst the court decided that there had been a violation of ECHR Article 6(1) on the grounds that at the appeal the prosecutor's written opinion had not been disclosed to him, it held that the denial of access to a lawyer did not amount to a breach of Article 6(3)(c). Salduz then requested that the case be referred to the Grand Chamber of the ECtHR which in November 2008, more than seven years after his initial arrest, made a determination in his favour:

The Court finds that in order for the right to a fair trial to remain sufficiently 'practical and effective' Art. 6(1) requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right (para 55).⁶⁰

The rationale for the decision focused on the importance of access to a lawyer in safeguarding the privilege against self-incrimination and preventing ill treatment:

Early access to a lawyer is part of the procedural safeguards to which the Court will have particular regard when examining whether a procedure has extinguished the very essence of the privilege against self-incrimination... In this connection, the Court also notes the recommendations of the CPT (paragraphs 39-40 above), in which the committee repeatedly stated that the right of a detainee to have access to legal advice is a fundamental safeguard against ill treatment. Any exception to the enjoyment of this right should be clearly circumscribed and its application strictly limited in time. These principles are particularly called for in the case of serious charges, for it is in the face of the heaviest penalties that respect for the right to a fair trial is to be ensured to the highest possible degree by democratic societies (para. 54).

The *Salduz* decision was confirmed in many subsequent decisions of the ECtHR.⁶¹ However, whilst the decision made clear that the right of access to a lawyer

⁵⁹ Reduced to 2 years and 6 months' imprisonment because he was a minor at the time of the offence. ECtHR, Grand Chamber, 27 November 2008, *Salduz v. Turkey*, No. 36391/02.

⁶¹ See, for example, ECtHR 10 March 2009, *Böke and Kandemir v. Turkey*, nos. 71912/01, 26968/02 and 36397/03, ECtHR 3 March 2009, *Aba v. Turkey*, nos. 7638/02 and 24146/04, ECtHR 17 February 2009, *Aslan and Demir v. Turkey*, nos. 38940/02 and 5197/03, and ECtHR 17 February

applies ‘as from the first interrogation’, it did not explicitly state that suspects have a right to have their lawyer present during police interrogations. Some European governments took the view that in the absence of express language to this effect, the decision did not require them to introduce such a right. However, subsequent judgments of the ECtHR put the issue beyond doubt, holding that the right of access to a lawyer includes the right to have a lawyer present during police interrogations.⁶²

The consequences for *Salduz* of his successful application to the ECtHR were relatively modest. In accordance with its general approach to violations of ECHR Article 6(1), the Grand Chamber considered that the most appropriate form of redress would be the retrial of the applicant, conducted in compliance with Article 6,⁶³ if the applicant so desired. In addition it awarded a nominal sum for costs and expenses. However, the wider consequences of the decision were considerable. Turkish law was amended well before the ECtHR decisions, extending the right to custodial legal advice to all suspects, and making the appointment of a lawyer mandatory in the case of a suspect who is a minor or who is accused of an offence punishable with imprisonment for five years or more. Other European jurisdictions in which the law did not provide for a right of access to a lawyer for suspects detained in police custody introduced such laws, although in some cases only after domestic courts found the existing law to be incompatible with the *Salduz* decision.⁶⁴ Furthermore, the European Union, in adopting the Directive on the right of access to a lawyer, explicitly took into account the *Salduz* decision, and other decisions of the ECtHR, in laying down minimum rules concerning the right of access to a lawyer in criminal proceedings.⁶⁵ As a result, as noted in section 4.3.3 above, all member states of the EU will have to bring in laws and regulations in order to ensure compliance with the Directive and failure to do so may result in sanctions being applied.

2009, *Oztürk v. Turkey*, no. 16500/04, ECtHR 24 December 2009, *Pishchalnikov v. Russia*, no. 7025/04.

⁶² ECtHR 21 June 2011, *Mader v. Croatia*, No. 56185/07; ECtHR 28 June 2011, *Sebalj v. Croatia*, No. 4429/09.

⁶³ Which would mean that the court should not rely on the evidence of the applicant’s admissions made to the police.

⁶⁴ For example, France and Scotland. See Blackstock et al., 2014, ch. 3.

⁶⁵ *Directive 2013/48/EU of the European Parliament and of the Council of 22 October on the right of access to a lawyer in criminal proceedings*, Recital 12.

5. Conclusions

Most countries across Latin America are currently engaged in large-scale reforms to their criminal justice systems. Many have experienced social and political upheaval over the past few decades, and face significant problems in terms of overloaded and under-resourced criminal justice systems. In this context, the challenge is to develop criminal justice institutions that are democratically accountable and processes that are transparent, which are effective, fair, and just, and which meet acceptable standards. Whilst each country has its own unique combination of political history, institutions, procedural traditions, and cultures, their criminal justice systems share many common features and may benefit from learning about the experiences of each other. Whilst some of the characteristics of the criminal justice systems are particular to Latin America, countries in the region are not unique in terms of the challenges faced. In particular, many Eastern European countries have faced substantial political, economic and institutional change since the late 1980s, and also share with Latin America the experience of transforming their approach to criminal justice generally and criminal procedure in particular.

In a period of change and transformation, evidence of how things work in practice is very important. There is often, if not normally, a significant difference between how laws and processes are intended to operate, and how they actually work. If reforms are to be effective, and regional and international norms and standards are to be met, it is important to understand how laws, institutions and processes work in practice, particularly from the perspective of those most affected by them. The research reported in this book was designed to contribute to a better understanding of how criminal justice systems work in the countries included in the study, in particular in terms of access to effective criminal defence. The study used, and adapted, a tried and tested methodology that had been used in two previous studies in Europe, which produced evidence, and resulted in recommendations, that were regarded as objective, credible and authoritative.⁶⁶

⁶⁶ For example, the study reported in Cape et al. 2010 was used as a source of information for the three impact assessments commissioned by the European Commission when developing proposals for the EU Directives on the right to interpretation and translation, the right to information, and the right of access to a lawyer. See *Proposal for a Council Framework Decision on the Right to Interpretation and Translation in Criminal Proceedings: Impact Assessment*, Brussels, 8/7/2009 SEC (2009) 915; *Impact Assessment Accompanying the Proposal for a Directive of the European Parliament and of the Council on the Right to Information in Criminal Proceedings*, 20/7/2010 SEC (2010) 907; and *Impact Assessment Accompanying the Proposal for a Directive of the European Parliament and*

Criminal justice systems and processes are complex, reflect different interests and values, and are often political and politicized. As a result, our findings and recommendations may well be contested and are contestable. We regard this as a positive attribute. We hope that this study will generate argument and debate. This is a necessary process in developing a better understanding of the phenomena that we uncover and analyze. Most of all, we hope that this study will contribute to improvements in, and compliance with, international standards regarding justice, fair trial and access to effective criminal defence.

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CHAPTER 2. LATIN AMERICAN STANDARDS REGARDING EFFECTIVE CRIMINAL DEFENCE¹

1. Introduction

The research that forms the basis of the national reports as well as the study regarding international standards in the Latin American region follows the same approach as the studies conducted in Europe, in particular Eastern Europe.² This implies, as the section on European standards in Chapter 1 indicated, that there is a methodological similarity between the three studies, the goal of which is to facilitate a comparison between the different regions, as well as the transfer of positive experiences, leading to a unification of criminal defence standards, and the way in which they may be applied in practice.

The main focus of these investigations is characterized by placing the suspect or defendant at the centre of the study, because he is defined as the rights-holder.³ This requires that the studies not only address the normative structures or results of trials, but also the way in which the accused passes through the lifecycle of a case that should treat him as a party. Additionally, one cannot limit the discussion to the traditional idea of ‘trial defence’ since, for hundreds of thousands of people, the actual experience of passing through the criminal justice system has very little to do with the moment of trial in itself, but rather with police detention and the preparatory stages of the

¹ Translator’s note: unless otherwise noted, in this chapter, quotations from international bodies, treaties, declarations, courts, and the like, are from the official English version of the document or court decision, while textual quotes from domestic courts, laws, and institutions are unofficial, internal translations.

² Cape et al. 2010; Cape and Namoradze 2012.

³ Cape et al. 2012, p. 9.

process.⁴ With respect to the Latin American region, the phenomenon of prolonged pretrial detainment as a concrete alternative to a true public, oral trial is still a massive, central reality that distorts the majority of the institutions that make up the criminal justice process.⁵

It should be clear, then, that the focus of this chapter is based on the belief that access to effective criminal defence is a necessary condition to ensure the enforcement of guarantees that define a fair trial. It is clear that this set of guarantees includes more than a right to effective criminal defence, but such guarantees weaken in the absence of that right. The idea of a *system of guarantees*, now common in our region, shows us, on the one hand, the *dynamic interdependence of all the rights that protect the accused*, and, on the other hand, the central role of the accused's defence rights in translating this system into *genuine protection*.

As we will see, although the set of rights can be considered as a general formula (due process, fair or impartial trial, with the different analyses that we will undertake below), which is anchored in articles 7 and 8 of the ACHR, what is important is to identify, within this general concept, the specific and concrete rights that make up an effective criminal defence. Following the methodological framework of the adopted in this study, we have grouped these 'concrete' rights into four categories:

1. The first group concerns rights related to the information that must be provided to the accused. This refers to: (i) all information concerning the arrest or detention and the rights related to that situation; (ii) information regarding the indictment⁶ or formal charge, depending on the procedural stage; (iii) information regarding all of the evidence against the accused; and (iv) the right of access to evidence against the accused.
2. The second group consists of those rights related to being a true participant in the process, meaning the right of an accused to take an active role in his defence. This group includes: (i) the right of an accused to defend himself and to represent himself, as the most basic manifestation of the recognition of his role as an active subject; (ii) the right to have and choose one's own, competent, lawyer; (iii) the right for all interrogations, no matter the phase

⁴ *Ibid.*

⁵ VVAA CEJA 2011.

⁶ Translator's note: In this book 'indictment' does not have the same meaning as its counterpart from the United States, which is only used when a suspect is formally charged as the result of a grand jury. Rather, here, indictment is another form of formally bringing charges against an individual, but does not imply a grand jury.

during which they occur, to be undertaken in the presence of an attorney; (iv) the right to attorney/client privilege for information regarding his case; (v) the right to have a state-appointed attorney in the event that an accused cannot afford a private one; and (vi) the right for the accused's attorney to put his client's interests and rights above all other interests or considerations.

3. The third group consists of rights related to a real and effective participation as well as special protection during the process. This involves: (i) the right to be presumed innocent and to be treated as such; (ii) the right to remain silent during the entirety of the process, in particular the trial, and not to be required to testify against himself; (iii) the right to freedom of movement during the process and trial, and for any prior restrictions on his liberty of movement to be limited by strict requirements of legality, reasonability, and time limits, and, in any case, for such restrictions not to impede the accused's ability to carry out his defence; (iv) the right of the accused to be present and to participate in his trial; (v) the right that decisions be justified and free from arbitrariness; and (vi) the right to appeal a guilty verdict.
4. The fourth group ensures that the other rights are *effective*; this implies that rights are not formal in nature, but that there is a duty to create practical conditions for the exercise of the rights. This includes: (i) the right to investigate the case by one's own means and to adduce evidence; (ii) the right to sufficient time and facilities to prepare one's defence; (iii) equality of arms in the production and control of evidence before and during trial; and (iv) the right to an interpreter and the to translation of documents and evidence.

In addition to maintaining the grouping proposed in the general investigation, which will facilitate the comparative aspect of the book, we have highlighted these as forming the *twenty fundamental rights that make up an effective criminal defence*, for mnemonic reasons, as well as to facilitate their use as a tool to promote these rights in regional contexts or as a guide to examine local legislation. The classification is a conceptual tool that facilitates the development and understanding of these rights. Its enumeration as a basic list attempts to provide a *communication tool for practical use in fulfilling these rights*.

First, we look for the *most direct normative basis for each right*. This requires exploring their normative basis in the American Convention on Human Rights. Not only is the Convention the main instrument of rights protection that the Inter-Amer-

ican Court of Human Rights interprets, but there is also a growing practice (which should be encouraged) in which domestic courts directly apply the Convention, either through hierarchical superiority or directly by the trial court judges. Thus, the Inter-American Court's interpretation of these instruments is important to us but, as we will demonstrate, there is not yet a broad development of this interpretation, which means that we must turn to high-level domestic sources in order to complete our interpretation. This is relevant, given that the Court's development of the rights of accused persons is still in the early stages of development. This early stage of development is explained by some regional characteristics, which demonstrate current problems and tasks. Nonetheless, we will give them at least a superficial analysis, given their relevance to a better understanding of the state of the right to defence.

These clarifications are useful to help understand some of the realities of the Latin American context that should be taken into consideration when undertaking any type of comparative work. These have to do with: (i) the process of criminal justice reform in Latin America; (ii) the stage of development of the Inter-American System of Human Rights (IASHR); (iii) the persistence of models of judicial organization that determine legal practices; and (iv) a model of learning and practicing law that molds the professional practices of defence attorneys. These situations must be mentioned, albeit briefly, in order to understand the context of different international standards in the region. Some reflections on this point are necessary to cover the three levels that this investigation seeks to understand.⁷

Additionally, we must make a brief reference to the concepts of 'impartial trial,' 'fair trial,' 'trial defence,' and 'due process,' as their ambiguous and imprecise use has contributed in no small part to weak jurisprudence regarding the clarification of the concrete contents of each of these rights. Additionally, the translation of 'impartial trial' or 'just trial' as 'fair trial' is not passive; nor are connotations of 'justice' in the sense of a value. A precise and objective content of this value can create confusions between the fulfillment of rights and protections and that of the 'justness' of the case, regarding the satisfaction of that value. Similarly, an indiscriminate use of the expression 'due process' has also created much confusion, which has weakened the precise and concrete content of many of the rights of the accused.

⁷ Cape et al. 2012, p. 12, and see Chapter 1, Section 2.

2. The context of criminal justice; a process of change and reform

Toward the middle of the 1980s, the previous systems of criminal justice began a long, complex, and deep process of revision. This was a result of various factors, including the reinstatement or normalization of democracy and criticism of judicial systems, in particular, as criminal justice systems had been implicated in serious human rights violations and the impunity of State terrorism in previous decades. More or less close to inquisitorial models of justice, in practice Latin American justice systems were fundamentally systems based on writing, with little or no publicity and little or no division of tasks between actors, and a low standard of ensuring rights were fulfilled. In fact, such systems recognized very few rights of defendants, even at the formal level.

This process of change, which is still underway, led to the overhaul of criminal procedure legislation, of many substantive and organic laws, and also of the doctrine and jurisprudence, but did not extend to police reforms. The translation of the new conception of the process into concrete practices is somewhat slow, although it shows some results, but also involves a permanent distortion known as *the inquisitorial reconfiguration of the adversarial system*. Of the group of countries that make up this study, the national reports show the state of the discussion and the extent of this process in each country (in federal countries, such as Mexico, Argentina, and Brazil, this process is slower and more complex, given the more complex characteristics of task distribution between states and the national government). Nonetheless, the criminal justice reforms should be highlighted as a *regional process*, as it has meant a new exchange of ideas and the development of a new paradigm, of new expectations and networks of exchange between public and private entities within the sector.

Generally, the reform process has included:

- a) The definitive adoption of an oral, public trial based on the principle of contradiction as the only valid form of reaching a guilty verdict. In fact, the reform process has led to the first trials of this nature in some countries. Gradually, the transition from written to oral has made its way through the different stages of the process (hearings in earlier phases), creating a more profound change in the system's dynamics.
- b) The division of labor between the judge, the prosecutor, and the defence. The figure of the examining magistrate, or a prosecutor that is molded to the style of the examining magistrate, has given way to a clear three-part division of labor for the tasks of judging and controlling the prosecutor (judges), preparing the case, guiding the investigation and bringing charges (prosecutors and

individual accusers), and the tasks of critique and defence (the defendant and his attorney). This division of tasks, although it seems somewhat obvious, has been one of the most difficult reforms to put into action, given the tendency to grant a leading role to one of the actors in the process, or the tendency of judges to refuse to abandon their previous role as prosecutor and judge.

- c) Broadening the rights of defendants. This has been achieved through the formal recognition of rights of the accused in criminal procedure legislation, which in this field was particularly limited, even in more modern constitutional texts which include provisions expanding the protection of such rights. Additionally, such rights have been recognized through the creation and development of new systems of public defence, which has led to a qualitative leap in the real possibility of defendants to access a defence attorney, in particular in the most poor and vulnerable sectors of society.
- d) The broadening of the ways in which criminal processes end, via the incorporation of options including: plea agreements contingent upon reparation for harms inflicted and the suspension of the process once proof of compliance with diverse measures has been offered; reparation as a justification for dropping charges; the possibility to agree to lesser charges; and other changes which have created both advantages as well as new challenges for the exercise of the right to defence in the face of the danger of manipulation of the process through the phenomenon known as ‘indirect punishment.’
- e) A much stronger incorporation of victims’ rights and their participation as accusers within the process. Beyond the discussion regarding the political-criminal desirability of this measure within the Latin American context, it has created new demands and challenges for the exercise of the right to defence, which manifests differently depending on the type of case and the intensity of the victim’s participation depending on the type of crime.

The intensity of change, the fact that reforms have not remained solely on paper, but which have been executed, however imperfectly, has created serious problems for its implementation or resulted in delay in its geographical development. These reforms have had impacts on doctrine, jurisprudence, and teaching, although they have not managed to modify training patterns of lawyers completely. They are still conditioned by police systems that are difficult to control, and face serious problems of efficacy or respect for rights. In summary, this set of variables must be highlighted to explain the particular moment in which this study has been carried out, as well as to point out that international standards regarding this topic are still under construction.

2.1. *The Inter-American Court. Concerns of the era*

A set of variables that must be highlighted come from the development of the Inter-American System of Human Rights (IASHR), in particular from the type of cases that the Inter-American Commission on Human Rights (IACHR) sends to the Inter-American Court. One of the main tasks given to both the Commission and the Court, during its first stages, was to limit or repair, as much as possible, the enormous impunity that existed in the region in the face of horrific human rights violations, particularly the right to life, which stemmed from acts of State terrorism, carried out at the height of the doctrine of national security. This doctrine sustained many Latin American dictatorships, stained many weak democratic governments, or formed the basis for military invention in uprisings or civil wars. Brutal attacks against populations and the systematic cover-up of the serious crimes committed (genocide, disappearances, extrajudicial executions, etc.) forced the Inter-American System *to pay special attention to the situation of victims, to develop an Inter-American doctrine regarding the judicial protection of their rights or to denounce the fraudulent use of guarantees that were used to ensure the grossest impunity.*

This clarification is important because it has impacted an entire era of the IACHR's interpretation regarding legal protections. This has been characterized, in the first place, by a permanent emphasis on the State's duty to guarantee a minimum effectiveness regarding the protection of victims' rights. This guarantee includes the criminal process, as the cases under the Commission's consideration involved large-scale criminal cases. Second, although it cannot be argued that the Commission has sought to weaken the protection of the accused in the criminal process, it has also not refrained, within a precise, and particularly founded framework, from lifting the accused's protections (retroactivity, *res judicata*) when it was clear, in the context of serious cases and in particular circumstances, that maintaining such protections would create an intolerable situation leaving victims unprotected from such serious violations. This trend in international jurisprudence has been criticized, and even considered 'neo-punitive.'⁸ Third, that era's concern for this dimension of rights has prevented, in a large part due to the selective nature of the cases that the Commission decides to take to the Court, the consolidation of an international jurisprudence specifically dedicated to the rights of the accused or the effectiveness of those rights.

⁸ Regarding these criticisms and the debate regarding them, see Malarino (2010) and Pastor (2011).

As we shall see in the following chapter, this does not mean that the Court has entirely abandoned the subject of defendants' rights. On the contrary, the Court has solidified the bases for these rights, although it has not sufficiently advanced the necessary detail or precision of those rights. This leads one to believe, however, due to the Commission's decisions or pressure from victims, that new cases regarding the rights of the accused or convicted are reaching the Court, in particular as a result of the horrendous prison conditions that distort the entire criminal justice system. The conditions are ripe for the Court to slowly consolidate a greater balance in cases, and it is even possible that we will enter a new era in which the Court and Commission concern themselves with the rights of the accused, whether directly or through the Commission and Court's clear concern for prison conditions.

Although these circumstances create greater difficulty when developing international standards of effective criminal defence, and require us to integrate the research with jurisprudence from other tribunals, it provides this study with additional motivation: it should not only seek local actors, whether tribunals or defence attorneys, as partners, but should also address actors of the Inter-American System to help develop a broader and more precise international jurisprudence on the matter. Involvement in these transitions, unique to the Latin American region, is a characteristic of this study that should be expressed with clarity to facilitate and enrich the comparative work.

2.2. *Inquisitional models of organization.*

The problem of the bureaucracy of problems

Another set of variables that must be considered has to do with a consciousness, during the criminal reform process, of the continuing influence of inherited organizational models in the definition of problems and the exercise of rights, including those of the accused. In essence, the inquisitional model of criminal justice that must be overcome is not only characterized by specific procedural rules (secrecy, a judge investigator, a focus on written documents, the lack of a defence) but also by vertical, rigid, compartmentalized organizational models, with a strong cultural tendency toward formalism and bureaucracy. These organizational models have not been questioned as intensely as procedural rules, and when they have been, there has been insufficient support or strength to lead to concrete changes.

It is true and evident that all organizations suffer from bureaucracy, and that this is not specific to the region; it is also true that this bureaucracy produces phenomena of autonomy and 'trained incapacity.' However, here we do not refer to *ordinary levels*

of bureaucracy, but rather the persistence of an organizational model that contains the largest reserve of inquisitorial culture and practice, which produces large distortions in the interpretations of norms. This can be noted on two levels: (i) the first tells us that the rejection of the advancement of defendants' rights, or the consolidation of more precise standards, clashes with the organizational impact of these rights or standards; (ii) second, the interpretation of these rights or standards is undertaken from the organizational sphere, from the particular environment where these rights are defined. This dual process of organizational distortion is important in order to realize that the gap between norms and reality is not always a problem of resources, lack of commitment, or moral indolence. There is contention regarding what rights mean, produced in the interior of organizations, with a view that is profoundly distorted by the inquisitorial tradition.

This situation is the norm, even though processes of change that attempt to alter both the organizational model as well as its culture exist. For example, there are some new models of public defence that modify the traditional form, or judicial or prosecutorial structures that also do so. Nonetheless, there are still many organizations that have not yet begun the process of change, or do not even consider it important to do so. Thus, for example, in the specific case of public defence organizations, many of them maintain traditional forms of work tied to the activity of the tribunal, limiting themselves to 'accompanying' the process, according to the timetable that the courts impose. This is also the case with organizations that revolve around the filing process and only address one another through it, as is common between prosecutors and defence attorneys. This occurs with organizations that lack and reject any form of control or supervision of their work, and distort and skew priorities, to the detriment of the simplest cases in bureaucratic terms. In sum, *this organizational measurement is not only a problem of practice but also of determining what norms mean, and therefore, should also be taken into account when defining international standards.*

2.3. Exercising legal advocacy: formalism against the exercise of rights

Another set of variables that one must consider involve the way *in which legal advocacy is exercised in the Latin American region.* Whether as a consequence of the functioning of the administration of justice, or as the result of a certain type of education, which is not geared toward legal practice or service, the *basic pattern of professional practice* is also a form of conditioning that must be considered in order to understand and practice the rights of the accused. This situation is reinforced by other factors: for example,

law schools have not learned how to interpret the criminal reform process, and have hardly concerned themselves with teaching the necessary skills to litigate in the new systems. At the same time, bar associations and professional associations do not exercise real control over lawyers, either by setting standards for professional practice or reacting in the face of ethical shortcomings or malpractice.

This set of factors makes the common lawyer (as many individuals cannot access a specialist in criminal law), or even a criminal lawyer (who forms part of public defence), *naturalize forms of action* that are prejudicial to the rights of the accused. For example, it is still hard for many defence attorneys to pay sufficient attention to the concrete interests of the accused, whether because they do not consult him or because the lawyer grants primacy to general organizational criteria, or avoids confronting his co-workers from other legal organizations. Attorneys tend to pay attention only to procedural issues, and do not take advantage of other aspects of the process that could be much more favorable to their clients (and new procedural legislation is rich in alternatives to prison); or they pay little attention to keeping their clients updated on case developments and, frequently, are reluctant to visit them in prison. It is common for cases to be abandoned at crucial moments (such as the trial), taking advantage of a certain permissiveness of judges on this issue, as well as so many other practices considered part of the *normal exercise of legal advocacy*. This would not be worth highlighting if it were just the behavior of a negligent or unprepared attorney. However, these tend to be deeply rooted practices of attorneys that their peers do not generally identify and criticize.

We will use as a reference the Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Havana, Cuba from August 27 to September 7, 1990. We chose these not only because they represent international standards, but also because even though they do not provide a direct normative source they, along with the Minimum Rules for the Treatment of Prisoners, have been cited by the IACHR⁹ as a reference point. As indicated in its preamble:

The Basic Principles on the Role of Lawyers, set forth below, which have been formulated to assist Member States in their task of promoting and ensuring the proper role of lawyers, should be respected and taken into account by Governments within the framework of their national legislation and practice and should be brought to the attention of lawyers as well as other persons, such as judges, prosecutors, members of the executive and the legislature,

⁹ *Case of Lori Berenson Mejía vs. Peru*, Judgment of November 25, 2004, Series C, No. 119.

and the public in general. These principles shall also apply, as appropriate, to persons who exercise the functions of lawyers without having the formal status of lawyers.

2.4. *Prison conditions and defence*

The general state of prison conditions also forms a set of significant variables. Overcrowding in inhuman conditions, in addition to the abuse of pretrial detention and its prolonged use, *strongly distorts the exercise of defence rights. The focus ceases to be on the dispute between guilt and innocence, and instead focuses on that of liberty or detention, leaving substantive questions as background issues.* This is evident in the importance that defence attorneys give to release, in how they accept convictions without trials, through expedited procedures, even when they could undertake an effective defence or have some real possibility to argue the quantity or quality of the evidence.

This point has been of particular concern to both the IACHR and the Court.¹⁰ In the Case *Pacheco Teruel and others vs. Honduras*,¹¹ the Court ratified its doctrine that

¹⁰ In several decisions, the Court has established the legal bases for detention and imprisonment. For example, see *Villagrán Morales and others vs. Guatemala*, Judgment of September 11, 1997, Series C, No. 32, § 131; *Suárez Rosero vs Ecuador*, Judgment of November 12, 1997, Series C; *Case Gangaram Panday vs Suriname*, Judgment of January 21, 1994, Series C, No. 16, § 47; *Case Yvon Neptune vs. Haiti*, Judgment of May 6, 2008, Series C, No. 180, among others.

¹¹ Judgment of April 27, 2012, Series C, No. 241. Additionally, in this case, the Court reviews international standards that it has accepted, including: (a) overcrowding is, in itself, a violation of personal integrity; in addition, it hinders the normal execution of essential functions in prisons; (b) Those who are being processed must be separated from those who have been convicted; and children must be held separately from adults, so that those deprived of liberty receive treatment appropriate to their situation; (c) All those deprived of liberty must have access to drinkable water for personal consumption and to water for personal hygiene; lack of drinking water constitutes grave negligence by the State with regard to its obligation of guarantee to those in its custody; (d) The food provided in prisons must be of good quality and sufficient nutritional value; (e) Regular medical attention must be provided, with the necessary and appropriate treatment, and by qualified medical personnel when required; (f) Education, work and recreation are essential functions of a prison, and must be provided to all those deprived of liberty in order to promote the rehabilitation and social adjustment of inmates; (g) Visits must be guaranteed in prisons. Detention under a restricted visiting regime may be contrary to humane treatment in certain circumstances; (h) All cells must have sufficient natural or artificial light, ventilation and adequate conditions of hygiene; (i) Latrines must be hygienic and offer privacy; (j) States cannot claim financial difficulties to justify detention conditions that do not comply with the relevant minimum international standards and that fail to respect the inherent dignity of the human being, and (k) Disciplinary measures that constitute cruel, inhuman or degrading treatment, including corporal punishment, prolonged solitary confinement, and any other measure that may severely jeopardize the physical or mental

when a person is imprisoned, ‘given this special interaction and relationship between the inmate and the State, the latter must assume a specific series of responsibilities and take special actions to guarantee that inmates have the necessary conditions to lead a decent life, and to contribute to the exercise of those rights that, under no circumstances, can be restricted or whose restriction does not necessarily arise from the deprivation of liberty’ (para. 64). In spite of this call, the penitentiary system in the region is resistant to complying with these standards. In particular, the fact that those imprisoned are subject to violent interactions is notorious. This violence encompasses greater or lesser brutality of prison officials, but also involves the tolerance of internal mafias, often with ties to prison guards. In the context of degrading conditions, this means that an adequate defence of the case becomes less important than the immediate need to get out of prison at any cost. It becomes a case of defending the accused’s life.

2.5. *Due process, impartial trial, or fair trial*

Latin American doctrine and jurisprudence uses the concepts of ‘due process’ and fair or impartial trial indiscriminately. Additionally, these two expressions can bring ambiguities as a result of various traditions, among which the weakest version is that used in Anglo-Saxon law. These same imprecisions are found in the Court’s jurisprudence, and have a large impact in practice, because they blend all the protections into the concept of due process or weaken the idea of trial as a result of the lack of a historical construction of oral, public, adversarial trials.

We can avoid this topic and decide to use these phrases as synonyms. However, we do not believe this to be an appropriate path, not for any sense of purism in translation, but rather because in practice, the identification of the concept *fair trial* with

health of the inmate is strictly prohibited. These standards, according to the Court, are derived from the following instruments: UN *Minimum Rules for the Treatment of Prisoners*, Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955 and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977; UN, *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* adopted by the General Assembly in Resolution 43/173, of December 9, 1988; UN, *United Nations Rules for the Protection of Juveniles Deprived of their Liberty*, adopted by the General Assembly in Resolution 45/113, of December 14, 1990. See also, UN, *General Comment 21 of the Human Rights Committee*, April 10, 1992, A/47/40/(SUPP), *Replaces general comment 9 concerning humane treatment of persons deprived of liberty* (art. 10), 44th Sessions, 1992, and IACHR, *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*, adopted during the 131st Regular Period of Sessions, celebrated from March 3-14, 2008.

due process, which is doubtless a broader concept, *has led to a jurisprudence and doctrine that has weakened the concept of the trial as a central point of the criminal process*. This has also occurred with the translation of ‘hearing,’ translated as ‘to be heard,’ which has led to a ratification of the model of hearing in the inquisitorial tradition (appear before an authority to explain their written complaints in person) without capturing the difference in the model of hearing in the Anglo-Saxon tradition of a public discussion.¹² This dimension must be highlighted to ensure that the comparative work in this book is rigorous, clear, and historically relevant and accurate.

In fact, the IACHR uses the term ‘due process’ with sweeping broadness. In a large and rigorous study on its use in the Inter-American System, Sergio García Ramírez informs us: ‘The due process adjective, is generally characterized by the invocation of the elements that form it and whose merits are derived from the trial’s compliance with the law, but also between both of those and justice. This leads to the

¹² As Sebastián Narvaja explains (2012): DUCE y RIEGO (2007, pp.380-381) emphasizes the idea that these translations or forms of writing are not due to linguistic problems or the inaccuracy of translations, but rather a lack of serious knowledge within the Latin American legal culture, regarding the concept and reaches of the protection of what is considered a fair trial. This is evident in the fact that the values of publicity, orality, and adversarial trials have not been adopted as important in the procedures that determine the criminal responsibility of individuals. The traditional procedural doctrine, based on a sequential and scholastic analysis of the inquisitorial or mixed procedural models, has permitted an analysis and interpretation that would not fit in Anglo Saxon legal cultures. Regarding the model that has been developed using these conceptual categories of traditional criminal procedure law, see BINDER (2000, p. 25 and ss.; s.a.: 1-7). In their English versions, international instruments formulate these rights in the following language: ‘ [...] Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal [...]’ (UDHR, art. 10); ‘[Right to due process of law] [...] Every person accused of an offense has the right to be given an impartial and public hearing, and to be tried by courts previously established [...]’ (UDHR, art. xxvi); ‘[...] everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal [...]’ (ICCPR, art. 14, §1); ‘[Right to a fair trial] [...] Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal [...]’ (ACHR, art. 8, §2); ‘[Right to a fair trial] [...] everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal [...]’ (ECHR, art. 6, §1). The difference between ‘being heard’ and the common translation of ‘hearing’ can be easily appreciated by turning to the Oxford Dictionary: ‘Law an act of listening to evidence in a court of law or before an official, especially a trial before a judge without a jury: the court may stay execution pending a hearing’. Finally, ‘In some way, the legal due process mentioned earlier in United States law, or the protection of a fair trial, from English law, or its translation to continental European law, which provides “equal opportunities” for the accused at trial (*Waffengleichheit*), and rights protected in article 6.1.1 of the European Convention on Human Rights, is the equivalent to our “right to defence”’ (Maier 1996, pp. 540-541).

establishment of a type of process that focuses on justice, meaning a fair trial. Under the concept of due process diverse rights of the accused are consolidated'.¹³ According to the author, the Court has repeatedly conceptualized due process as a limit to state action, which refers to the set of requirements that procedures must observe in order to ensure that *people are able to adequately defend their rights before any state action that may affect them*. This conceptualization is present in various cases.¹⁴

Moreover, with respect to criminal cases, the concept of due process includes all the minimum protections in article 8 of the American Convention on Human Rights (ACHR), as well as additional protections that may be necessary for the integration of this concept not only at the formal level, but also so that these rights and interests may be defended effectively and in conditions of procedural equality with other litigants. Cases such as *Lori Berenson Mejía vs. Peru*¹⁵ and *Hilaire, Constantine and Benjamin and others vs. Trinidad and Tobago* have established this concept.¹⁶

We can see that that Court has made extensive use of the concept of due process, but it has also used the expression 'fair trial.' For example, 'every judge has the obligation to ensure that proceedings are carried out in a manner that guarantees and respects those due process rights necessary to ensure a fair trial in each case'.¹⁷ Thus, we cannot find clear criteria in the Court's own language to distinguish between the two. Nonetheless, it seems that such a differentiation is necessary to avoid confusion. Thus, we propose the use of the concept 'due process' as its broadest, which includes all the protections and procedural requirements that allow any litigant to defend his rights and interests in any kind of process. This concept of due process can be assimilated

¹³ García Ramírez et al. 2012, p. 13. This text is particularly useful, not only because of its author, who is the former president of the Inter-American Court of Human Rights, but also because it undertakes a detailed analysis of almost the entirety of the Court's decisions. We have used it as a reference in the selection of Court decisions.

¹⁴ Cfr. *Baena Ricardo and others vs. Panamá*, Judgment of February 2, 2001, Series C, No. 72, para. 92; *Case of Fermín Ramírez vs. Guatemala*, Judgment of June 20, 2005, Series C, No. 126, para. 78; *Case of the Constitutional Court vs. Peru*, Judgment of January 31, 2001, Series C, No. 71, para. 68, and *Case of Ibsen Cárdenas and Ibsen Peña*, Judgment of September 1, 2010, Series C, No. 217, para. 178.

¹⁵ Judgment of November 25, 2004, Series C, No. 119, para. 176, and *Exceptions to the exhaustion of domestic remedies requirement* (American Convention on Human Rights, articles 46.1, 46.2.a and 46.2.b), Advisory Opinion OC-11/90 of August 10, 1990, Series A, No. 11, para. 24; *Juridical Condition and Rights of the Undocumented Migrants*, OC-18/03 of September 17, 2003, Series A, No. 18, para. 121; *The Right to Information on Consular Assistance in the Framework of the Guarantees of the due Process of Law*, Advisory Opinion OC-16/99 of October 1, 1999, Series A, No. 16, para. 117.

¹⁶ Judgment of June 21, 2002, Series C, No. 94, para. 146.

¹⁷ *Case of Dacosta Cadogan vs. Barbados*, Judgment of September 24, 2009, Series C, No. 204, para. 84.

with that of a ‘fair trial’ if one attempts to include elements of evaluation unique to some idea of justice, or elements of the decision’s reasonability, which tends to be the case with the concept of substantive due process.

In any event, due process and fair trial are broad concepts, which go beyond the framework of the criminal process. The criminal process has unique legal protection compared to other legal proceedings, in particular its preference for the accused’s rights, materialized in the ‘presumption of innocence,’ which means that one cannot speak in any strict sense of equality between the parties. To refer to these protections, and to highlight the central role of the right to defence within a specific kind of trial; namely, one that is oral, public, and adversarial, we use the idea of an impartial trial, as a more useful translation for the criminal process of fair trial¹⁸ and as a more precise and specific concept than that of due process.

2.6. *Some clarifications on criminal systems (criminal infractions, factual and de facto charging, apprehension, arrest, detention)*

As a result of the reform process, which has also meant a certain unification of categories in many countries of the region, today a clearer and more fruitful dialogue is possible between criminal justice systems, their jurisprudence, and doctrine. Nonetheless, there are still differences, (in particular between countries such as Mexico, Argentina, or Brazil, whose reform processes are slower, as a result of their federal structures). Countries, notwithstanding this process of standardization and unification, conserve their own languages and characteristics, often tied to traditions and vernacular doctrine rather than to new procedural legislation. Each national report in this study shows these particularities. Nonetheless, given that it attempts to *examine national realities* based on international standards, it is necessary to highlight equivalencies and make some clarifications.

First, there is a problem regarding the classification of crimes. The classical French division of crimes, misdemeanors and infractions has lost ground. Nonetheless, it still

¹⁸ In the Tomasi dictionary on Criminal Procedure Law, the translation of fair trial is the same as impartial trial, with the following support: ‘According to *Black’s Law Dictionary*, *fair trial* means the following: “A trial by an impartial and disinterested tribunal in accordance with regular procedures; esp., a criminal trial in which the defendant’s constitutional and legal rights are respected. —Also termed fair and impartial trial”. As we see with this last term, “*fair and impartial*” this repetition does not add any substance, but is rather a redundancy (tendency of legal English)’ (see <http://www.bilinguallawdictionary.com/>).

has some relevance. With respect to the distinction between crimes and misdemeanors (which Paraguayan legislation recently re-established), this differentiation is still somewhat important for determining whether a court or jury trial is appropriate, for example, but it does not have any other relevance for the system. Thus, there should be no doubt that international standards are applicable in all cases, whether it involves crimes or misdemeanors, without any distinction between categories of crimes. This is in spite of the fact that different procedures apply to different crimes, or of whether the word ‘crime’ is used for more serious cases.

With respect to infractions it is necessary to make some differentiations. Some countries still refer to minor infractions as ‘minor crimes or infractions’,¹⁹ although they can be punished with jail sentences of thirty to seventy days. In these cases, it must be understood that, *beyond the denomination, international standards are still applicable*. Although it involves a continuum in respect of which it is difficult to set limits, it is possible to affirm that when infractions do not contemplate a jail or prison sentence, or the jail sentence is shorter than the limit normally constitutionally established for a simple ‘administrative arrest’ (around 48 hours maximum), these standards cannot be applied with the same intensity, *even when one should support the idea that the broad concept of due process of the IASHR requires a level of effective defence*. Insofar as they form part of the criminal system, infractions are on the same level as crimes.²⁰ It is beyond the scope of this investigation to determine the level of this intensity, or which concrete rights should apply to infractions. This principle should be supported for all administrative procedures that may impose a sanction that restricts basic rights or that deprive a person of liberty for less time than a permitted administrative arrest.

The case of the various procedures established to impose restrictions on the liberty of children and adolescents is different. In this case, the Convention on the Rights of the Child *requires a higher level of protection, given the vulnerability of the child or*

¹⁹ Translator’s note: The original Spanish version refers to ‘*crímenes y delitos*’ and ‘*contravenciones o faltas*’. Both *crimen* and *delito* are often translated to English as simply ‘crime’, however, in some Latin American countries (but not all), ‘*crimen*’ is a more serious offence than ‘*delito*’, which is why I have translated them as ‘crime’ and ‘misdemeanor’. ‘*Contravenciones o faltas*’ similarly mean different things depending on the legal system (in some countries they are administrative in nature, and in some they are judicial, for example, and in some countries a ‘*contravención*’ is more serious than a ‘*falta*’ while in some there is no difference). Due to the differences between legal systems, these concepts do not have a direct translation into English. ‘Minor crimes and infractions’ is a close approximation.

²⁰ *Case of Baena Ricardo and others*, para. 106, and *Case of Vélez Loor*, Judgment of November 23, 2010, Series C, No. 218, para. 132.

adolescent. In this case, any restriction on liberty, whether or not it is referred to as a sanction, *requires respect for a higher level of protection and, therefore, all concrete rights and international standards are applicable, regardless of the name given to the procedure for children, adolescents or minors provided for in the legislation of each State*. Even when it is maintained that the goal of the restrictive measure is not to ‘punish’ him, but rather ‘protect’ him from future risks or his life choices, international standards regarding the right to defence still apply.²¹

In the legislative, jurisprudential or doctrinal tradition prior to the reform process it was common for the accused to have no rights until a formal act of charging or indictment which, normally, given the distortions of the former Latin American process, consisted of formal detention (pretrial detention) or formal notification of the interrogation process. Prior to that, the person under investigation as a suspect did not have any formal capacity to designate a defence attorney, or his possibilities to that effect were limited due to secrecy or the petitions he was permitted to make. This began to change thanks to the new procedural legislation that States adopted in the second half of the 1980s, and to the influence of the Model Code for Ibero-America. New legislation establishes that the status of ‘accused’ is a *de facto status that stems from a complaint or investigation directed at a particular person*. Nonetheless, it is still not clear whether it is from this factual situation that the accused’s set of rights is derived, or whether only some rights accrue in this situation. It is also not clear whether an individual must be informed that he is being considered as a subject of investigation, or whether that obligation refers to formal charging. The new procedural legislation recognizes ACHR norms and establishes a point of formal charging, whether that is through direct communication of a formal prosecutorial decision, or through charges filed before a judge in a specific audience. There are no doubts regarding the obligation to communicate this decision to the accused, together with information regarding the nature and reasons for the charging. The generic idea of charging plays an important

²¹ Inter-American Court, OC-17/2002 *Juridical Condition and Human Rights of the Child*. ‘While procedural rights and their corollary guarantees apply to all persons, in the case of children, the exercise of those rights requires, due to the special condition of minors, that certain specific measures be adopted for them to effectively enjoy those rights and guarantees’ (*Case of the ‘Juvenile Reeducation Institute’ v. Paraguay*, Judgment of September 2, 2004, para. 209). Additionally, ‘Basic procedural safeguards such as the presumption of innocence, the right to be notified of the charges, the right to remain silent, the right to counsel, the right to the presence of a parent or guardian, the right to confront and cross-examine witnesses and the right to appeal to a higher authority shall be guaranteed at all stages of proceedings’ (*Juridical Condition and Human Rights of the Child*, para. 123).

role in determining factual situations in which formal charging has been avoided, or in which the process has been manipulated to create a sort of informal harassment. It is, in any event, a tool that the accused can use to *begin to exercise his defence and request judicial protection against fraudulent types of criminal persecution*.

Something similar occurs with the concept of detention or arrest. A formal perspective considers that rights accrue upon a formal definition of detention, which a judge or prosecutor decrees or ratifies. Although this conception has changed, the distinction is still made through the use of the word ‘apprehend’ to refer to the material fact of immediate deprivation of liberty of movement, and ‘detention’ when this deprivation of liberty is formalized in an act or communication to the prosecutor or judge. This differentiation is not permissible, given that the ACHR clearly attempted to address the factual situation of a direct and immediate deprivation of the freedom of movement (and therefore uses the words arrest or detention, to address all the factual possibilities). This creates a special risk of abuse that demands the communication of rights to the detained person that allow him to protect himself in the situation at hand.

3. International standards²²

International norms that protect defence rights for the accused form an extensive, precise, and clear body of norms, similar to those which constitute the basis for other human rights conventions. It may be said that, at the normative level, there is *a uniform basis of rights recognition, which forms the first level of the right to defence for the*

²² For the development of international standards, we have adopted the language that prior studies have used (Cape et al. 2012; Cape et al. 2010). This is due to the need to finally make use of information as a whole, as homogeneously as possible to facilitate comparisons. Nonetheless, there are other important reasons for this. When the ACHR was written, in the Spanish version, namely, the Latin American region was far from Anglo-Saxon legal models. Direct Spanish influence or the adoption of the French model (directly or through Italian versions of the same model) predominated. Certain formulas of the Spanish version of the ACHR or certain interpretations of it were made in this context. From the mid-1980s, as we have explained, this situation has changed substantially. Criminal justice systems in the region are now close to the Anglo-Saxon model (adversarial or accusatory model) with some regional variations due to the history of each country or the particular design that they have been given. Nonetheless, these particularities are not so relevant so as to alter the basic model. This makes it necessary and appropriate to undertake a reading of the legal guarantees of the ACHR *from the new reality of adversarial systems in Latin America*.

accused.²³ Thus, the set of 20 rights that we have selected as a central part of an effective

²³ Numerals 2 to 5 of article 8 of the American Convention establish the following:

2. Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:
 - a. the right of the accused to be assisted without charge by a translator or interpreter, if he does not understand or does not speak the language of the tribunal or court;
 - b. prior notification in detail to the accused of the charges against him;
 - c. adequate time and means for the preparation of his defence;
 - d. the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel;
 - e. the inalienable right to be assisted by counsel provided by the state, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law;
 - f. the right of the defence to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts;
 - g. the right not to be compelled to be a witness against himself or to plead guilty; and
 - h. the right to appeal the judgment to a higher court.
3. A confession of guilt by the accused shall be valid only if it is made without coercion of any kind.
4. An accused person acquitted by a non-appealable judgment shall not be subjected to a new trial for the same cause.
5. Criminal proceedings shall be public, except insofar as may be necessary to protect the interests of justice.

Additionally, article 7 protects the right to personal liberty

1. Every person has the right to personal liberty and security.
2. No one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto.
3. No one shall be subject to arbitrary arrest or imprisonment.
4. Anyone who is detained shall be informed of the reasons for his detention and shall be promptly notified of the charge or charges against him.
5. Any person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial.
6. Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful. In State Parties whose laws provide that anyone who believes himself to be threatened with deprivation of his liberty is entitled to recourse to a competent court in order that it may decide on the lawfulness of such a threat, this remedy may not be restricted or abolished. The interested party or another person on his behalf is entitled to seek these remedies.

criminal defence has the following direct normative basis, without prejudice to their recognition in declarations and universal covenants:²⁴

1. Right to be informed of the reasons for one's detention and to be promptly notified of the reason for one's arrest or detention and of the rights that arise from that situation. ACHR, art. 7, 4, A.
2. Right to be informed of the reasons for one's detention and promptly notified of the charge or charges against one. ACHR, art. 8, 2, B.

7. No one shall be detained for debt. This principle shall not limit the orders of a competent judicial authority issued for nonfulfillment of duties of support. These articles are similar to those established in the European Convention on Human Rights; indeed the Commission has stated as much. In particular, article 8.1 of the American Convention is essentially equivalent to article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. (*Case of Genie Lacayo vs. Nicaragua*, Judgment of January 29, 1997). Thus, the comparison of standards is not only pertinent but also the Court has taken jurisprudence from the European Court of Human Rights as a guide, given the further development of European jurisprudence. Nonetheless, we should not forget the determining impact of context, as we stated in the introduction.

²⁴ To grant specificity to our work, we have concentrated on providing direct references to the ACHR. However, the right to defence is also provided for, in The Universal Declaration of Human Rights that the UN General Assembly adopted in 1948; the American Declaration on the Rights and Duties of Man, approved in the 9th International American Conference in 1948; the International Covenant on Civil and Political Rights, adopted in 1966 by the UN General Assembly, and in force since 1976; The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the UN General Assembly in 1984 and in force since 1987; the Convention on the Rights of the Child, adopted by the UN General Assembly in 1989 and in force since 1990; the Convention on the Elimination of All Forms of Discrimination Against Women, adopted by the UN General Assembly in 1979 and in force since 1981; the International Convention on the Elimination of All Forms of Racial Discrimination, adopted by the UN General Assembly in 1965 and in force since 1969; Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by the UN General Assembly in 1988; Standard Minimum Rules for the Treatment of Prisoners, Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977; Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders; Guidelines on the Role of Prosecutors, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders in 1990; Inter-American Convention to Prevent and Punish Torture, adopted by the OAS General Assembly in 1985 and in force since February 1987; United Nations Standard Minimum Rules for the Administration of Juvenile Justice ('The Beijing Rules'); United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules).

3. Right to obtain information about the rights regarding one's defence to which one has access. ACHR, art. 8, 2, C.
4. Right to have access to evidence related to the case and the case file (record, docket, brief, dossier, etc.). ACHR, art. 8, 2, F; CADH, art. 7, 4.
5. Right to defend oneself and personally represent oneself. ACHR, art. 8, 2, D.
6. Right to have trusted legal assistance and representation (technical) of one's choosing. ACHR, art. 8, 2, D.
7. Right to have legal assistance during interrogation. ACHR, art. 8, 2, D.
8. Right to meet privately with one's defence attorney. ACHR, art. 8, 2, D.
9. Right to choose and have access to legal services free of charge, for those who cannot afford their own attorney. ACHR, art. 8, 2, E.
10. Right to a lawyer that meets minimum professional standards, guided exclusively by his client's interests. ACHR, art. 8, 2, D.
11. Right to be presumed innocent. ACHR, art. 8, 2, first paragraph.
12. Right to remain silent and be free from self-incrimination. ACHR, art. 8, 2, G; ACHR, art. 8, 3.
13. Right to remain free during the process, while the trial is underway. ACHR, art. 7, 2, 3, and 5.
14. Right to be present at one's trial and participate in it. ACHR, art. 8, 2, D.
15. Right that decisions that affect one's rights are reasonable and substantiated. ACHR, art. 8, 1.
16. Right to a comprehensive review of a conviction. ACHR, art. 8, 2, H.
17. Right to investigate the case and propose evidence. ACHR, art. 2, F.
18. Right to have sufficient time and facilities to prepare one's defence. ACHR, art. 2, C.
19. Right to equality of arms in the production and control of evidence and in public and adversarial hearings. ACHR, art. 2, first paragraph.
20. Right to an interpreter of one's choosing and the translation of documents and evidence. ACHR, art. 2, A.

3.1. *Right to information*²⁵

The set of rights related to access to information play an important role in the creation of a protected status for people subjected to the criminal process. As occurs in the European system, the ACHR does not expressly establish the right to all information regarding the consequences of entering the criminal justice process, or the information regarding the rights that the accused (charged) person has and the assistance he may request to exercise them. However, from a holistic reading of articles 7 and 8 of the ACHR, it is clear that this right exists. The Court has specifically stated this:

To comply with Article 8(2)(b) of the Convention, the State must notify the accused not only of the charges against him, that is, the crimes or offenses he is charged with, but also of the reasons for them, and the evidence for such charges and the legal definition of the facts. The defendant has the right to know, through a clear, detailed and precise description, all the information of the facts in order to fully exercise his right to defence and prove to the judge his version of the facts. The Court has considered that timely compliance with Article 8(2)(b) is essential for the effective exercise of the right to defence.²⁶

The obligations of 'Article 8(2)(b) of the Convention applies even before the 'charges', in a strict sense, are filed. For this right to fully operate and satisfy its inherent aims, it is necessary for said notification to take place before the accused renders his first statement before any public authority'.²⁷

²⁵ In a strict sense, the only Inter-American Court cases that constitute precedent are contentious ones. The advisory function does not have the same level of 'bindingness', although that is still an issue discussed in the Court's doctrine. In fact, the Court has recognized the different status of binding regarding each type of case (Advisory Opinion OC-1/82, regarding 'Other treaties' subject to the consultative jurisdiction of the Court. Decision of September 24, 1982, Series A, No. 1: 'the advisory opinions of the Court and those of other international tribunals, because of their advisory character, lack the same binding force that attaches to decisions in contentious cases (Convention, Art. 68.)', para. 51). Nonetheless, for example, the Supreme Court of Costa Rica has recognized, in at least one decision, the binding nature of Advisory Opinions (Action of Unconstitutionality No.412-S-90, November 13, 1985 Chamber IV, regarding Advisory Opinion a OC-5/85 on *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*). For the effects of this investigation, we will use both contentious as well as advisory opinions, as they have the same reach for the purpose of determining the content and reach of standards of defence.

²⁶ *Case of Barreto Leiva vs. Venezuela*, Judgment of November 17, 2009, Series C, No. 206, para. 28.

²⁷ *Case of Barreto Leiva vs. Venezuela*, Judgment of November 17, 2009, Series C, No. 206, para. 30; *Case of Palamara Iribarne vs. Chile*, Judgment of November 22, 2005, Series C, No. 135, para. 225, and *Case of Acosta Calderón vs. Ecuador*, Judgment of June 24, 2005, Series C, No. 129, para. 118.

Additionally, a central aspect of IACHR and the Court's²⁸ doctrine maintains that the accused's participation in the criminal process can never create a situation of arbitrariness, which depends on the circumstances and increases the vulnerability of the accused. In the words of the Court, "The second obligation of the States Parties is to "ensure" the free and full exercise of the rights recognized by the Convention to every person subject to its jurisdiction. This obligation implies the duty of States Parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights. [...] The obligation to ensure the free and full exercise of human rights is not fulfilled by the existence of a legal system designed to make it possible to comply with this obligation—it also requires the government to conduct itself so as to effectively ensure the free and full exercise of human rights'.²⁹

Moreover, the Court has understood that judges should pay special attention to those who participate in a legal process, as the 'Court deems that the State, to ensure due process, must provide all necessary means to protect the legal operators, investigators, witnesses and next of kin of the victims from harassment and threats aimed at obstructing the proceeding and avoiding elucidation of the facts, as well as covering up those responsible for said facts'.³⁰ To this end, 'every judge has the obligation to ensure that proceedings are carried out in a manner that guarantees and respects those due process rights necessary to ensure a fair trial in each case'.³¹ In sum, the Inter-American Court has concerned itself with *protecting the exercise of rights within legal processes, in particular criminal processes*. Thus, a person subjected to criminal proceedings *must at all times have access to the information necessary to the exercise of rights as a central aspect of due process or a fair trial, as the only way to ensure a sufficient defence*.³² This general right to be sufficiently informed, as a necessary condition for the exercise of the right to defence, can be broken down into more concrete rights, with their respective normative recognition and jurisprudential development.

²⁸ Medina 2003.

²⁹ *Case of Velásquez Rodríguez vs. Honduras*, Judgment of July 29, 1988, Series C, No. 4, para. 166-167; *Case of Gelman vs. Uruguay*, Judgment of February 24, 2011, Series C, No. 221, para. 189.

³⁰ *Case of Myrna Mack Chang*, Judgment of November 25, 2003, Series C, No.101 cit., para. 199. *See also, Case of Moiwana Community*, Judgment of June 15, 2005, Series C, No.124, para. 159, and *Case of Carpio Nicolle and others*, Judgment of November 22, 2004, Series C, No.117, para. 134.

³¹ *Case of Dacosta Cadogan*, cit., para. 84.

³² *Ibid.*

3.1.1. The right to be informed of the nature of the arrest or detention and the rights that arise from this situation

According to article 7.4 of the ACHR, the right to be informed belongs to any detained or arrested person. We have already explained the traditions against which this standard has been developed. The ACHR is clear in attempting to *describe all possible situations of deprivation of liberty, in particular by police bodies, which cause direct and immediate deprivation of liberty*. The use of formulas such as detention, arrest, apprehension, capture, etc. is irrelevant, and differences in rights may not be based on formal or semantic difference. First, each person must be informed of the *reason for his detention*. This is derived from article 7.3 of the ACHR, *which establishes that no-one may be subjected to arbitrary detention*. If ‘arbitrary’ is defined not only as the whim of the authority, but rather as every act of authority whose foundation is unknown, it stands to reason that all detention in which the detained person has not been informed of the reason therefore constitutes an arbitrary detention.

Moreover, given that one of the essential, minimum judicial guarantees is the right to an interpreter (ACHR, art. 8.1), and the reason for this guarantee is the concern that *all communication with the accused be effective*, it may be concluded that the communication of the *reasons for the detention or arrest must be made in such a way that the accused understands*. This requirement is particularly important given that it is a situation of vulnerability caused by the very deprivation of liberty. This right is not fulfilled by mere generic formulas, the transcription of articles in the detention file, or with any formalism that is not designed to provide clear, precise, and effective information. The minimum information should consist of the identification of the authority authorizing the detention, the motivation (commission of a crime in flagrante, suspicion of a crime, transfer to a court, carrying out a proceeding of the investigation, etc.) and the place in which the person will be detained. The entirety of this information must be provided in order to fulfill the ACHR’s mandate.

Furthermore, the *raison d’être* of these immediate communications is to preserve the set of defence rights that form a crucial part of the concept of a fair trial. Therefore, at the moment of detention, the person should also be informed that he has the right to exercise his defence, personally or through a chosen or appointed attorney. This communication is also not a merely formal procedure. Rather, it is to grant a protected status to a person who, by virtue of his detention, is in a position of vulnerability that historically has led to the violation of rights, including the right to life. Compliance with these requirements is the duty of the authority, and is not dependent

on the subject of the detention. Such communications are a *minimum guarantee*, or a mechanism of protection for the *effectiveness of their defence rights*. Thus, what should be ‘guaranteed’ is that, in all cases and situations, this information reaches the accused, regardless of the nature of the case or the particular circumstances, and without being subordinated to a duty of the individual detained, as this would no longer fulfill its function as a guarantee.

The Inter-American Court has indicated that ‘to prevent a person from exercising his right to defence from the moment the investigation against him begins and the authority in charge orders or executes actions that imply a curtailment of rights is to enhance the investigative powers of the State to the detriment of the fundamental rights of the person under investigation’. As we have stated, the Court has also clarified that the right to defence must necessarily be exercised from the moment a person is accused of perpetrating or participating in an unlawful action.³³ The moment of detention is, doubtless, one in which a person is accused of perpetrating or participating in a crime, meaning that the person is now considered accused. Additionally, as we shall see in the following section, the Court has reiterated the goal of providing this information, in all cases, prior to the accused’s first declaration before a public authority.³⁴

Moreover, article 7.6 of the ACHR establishes that ‘[a]nyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful’. The Court’s concern for creating a broad right to habeas corpus is evident due to the history of the region, where the moment of detention has, in many cases, meant the disappearance of this person, and where the remedy of habeas corpus is not used as an exceptional measure, but rather is frequently used as an ordinary tool that every accused person has to ensure *the immediate legality and reasonability of his detention or any other form of privation of liberty*. Thus, the Court has also considered it as part of judicial guarantees. In effect, the Court considers that habeas corpus ‘represents the appropriate means of guaranteeing liberty,

³³ *Case of Cabrera García and Montiel Flores*, Judgment of November 26, 2010, Series C, No. 220, para. 154. Cfr. *Case of Barreto Leiva vs. Venezuela*, para. 29; *Case of Suárez Rosero vs. Ecuador*, Judgment of November 12, 1997, Series C, No. 35, para. 71; *Case of Heliodoro Portugal vs. Panama*, Judgment of August 12, 2008, Series C, No. 186, para. 148, and *Case of Bayarri vs. Argentina*, Judgment of October 30, 2008, Series C, No. 187, para. 105.

³⁴ *Case of Barreto Leiva*, para. 30; *Case of Palamara Iribarne*, para. 225, and *Case of Acosta Calderón*, para. 118.

controlling respect for a person's life and integrity, and preventing his disappearance or ignorance about his place of detention, and also to protect the individual from torture or other cruel, inhuman or degrading punishment or treatment'.³⁵

The Court clarifies this interpretation in the *Tibi* case, in which the Court develops the topic of the right to defence in greater detail.³⁶ On September 27, 1995, at 4:40pm, Daniel Tibi, a French citizen, was detained in the city of Quito. INTERPOL agents carried out the detention, without a judicial order and with a declaration of another accused man as their only proof. Mr. Tibi was not committing any crime at the moment of his detention. When his arrest was carried out, the police did not inform him of the charges against him; he was told that the detention was a form of immigration control. He was not permitted to communicate with his partner, nor the French Consulate. Mr. Tibi was held in pretrial detention for 28 months. With respect to the issue of communication, the Court indicated that:

1. Article 7.4 of the Convention contemplates a mechanism to avoid illegal or arbitrary conduct from the very act of deprivation of liberty and guarantees the right to defence of the detained individual;
2. Both the detainee as well as his legal representatives have the right to be informed of the motivation and reason for the detention and regarding the detainee's rights;
3. The 10th principle for the Protection of All Persons under Any Form of Detention or Imprisonment of the United Nations declares that anyone who is arrested shall be informed at the time of his arrest of the reason for his arrest and shall be promptly informed of any charges against him;
4. Additionally, the detained individual, at the moment of detention and before making his first statement to the authority, must be notified of his right to contact a third person, for example, a family member, an attorney, or a consulate employee, to inform him or her that he is in State custody. The notification is particularly important so that the accused's

³⁵ *Case of the Serrano Cruz Sisters vs. El Salvador*, Judgment of March 1, 2005, Series C, No. 120, para. 79; *Case of Juan Humberto Sánchez vs. Honduras*, Judgment of June 7, 2003, Series C, No. 99, para. 122; *Case of Bámaca Velásquez vs. Guatemala*, Judgment of November 25, 2000, Series C, No. 70, para. 192; *Case of Cantoral Benavides vs. Peru*, Judgment of August 18, 2000, Series C, No. 69, para. 165, and *Case of Durand and Ugarte vs. Peru*, Judgment of August 16, 2000, Series C, No. 68, para. 103. See also, *Case of Cesti Hurtado vs. Peru*, Judgment of September 29, 1999, Series C, No. 56, para. 121; *Case of Castillo Petruzzi and others*, Judgment of May 30, 1999, Series C, No. 52, para. 187; *Case of Panel Blanca (Paniagua Morales and others) vs. Guatemala*, Judgment of March 8, 1998, Series C, No. 37, para. 164; *Case of Blake vs. Guatemala*, Judgment of January 24, 1998, Series C, No. 36, para. 102; *Case of Suárez Rosero*, paras. 63 and 65; *Case of Neira Alegria and others vs. Peru*, Judgment of January 19, 1995, Series C, No. 20, para. 82, and *Case of Chitay Nech and others*, Judgment of May 25, 2010, Series C, No. 212, para. 203.

³⁶ *Tibi vs. Ecuador*, Judgment of September 7, 2004, Series C, No. 114, para. 180.

family knows his whereabouts and his circumstances, and so that they may provide assistance and protection. Contact with an attorney is important so that he may meet with the detainee in private, which forms an inherent part of his right to defence.

5. In the case of consular notification, the Court has indicated that the Consulate may assist the detained person in various forms of defence, such as providing him with counsel, obtaining evidence in his country of origin, the verification of the conditions of his legal assistance and observation of the process while he is in prison.³⁷

All of these precedents demonstrate that *de facto* detention is a critical moment for the protection of fundamental rights and, therefore, the Court has built a set of rights that must be analyzed together, whose principal objective is to protect the detainee with a set of guarantees. Among those guarantees, providing indispensable, clear, and accurate information, in particular regarding the reason for, authority behind, and duration of the detention, fulfills a central role in ensuring that the detainee, within his limited possibilities, is aware of his detention and the rights to which he has access.³⁸

3.1.2. The right to be informed of the nature and cause of the charges or accusations

As we have analyzed, in current criminal justice processes in Latin America, the practice of a *formal start* to the process has slowly consolidated, whose *main function is to warn the accused of the State's actions in sufficient time to enable him to prepare his defence*. In the words of the Inter-American Court:

To comply with Article 8(2)(b) of the Convention, the State must notify the accused not only of the charges against him, that is, the crimes or offenses he is charged with, but also of the reasons for them, and the evidence for such charges and the legal definition of the facts. The defendant has the right to know, through a clear, detailed and precise description, all

³⁷ Inter-American Court of Human Rights, *Case of Tibi v. Ecuador*, Judgment of September 7, 2004. Series C No. 114, paras. 109-112.

³⁸ The Basic Principles on the Role of Lawyers indicate the same information with greater precision. Article 7 states that, 'Governments shall further ensure that all persons arrested or detained, with or without criminal charge, shall have prompt access to a lawyer, and in any case not later than forty-eight hours from the time of arrest or detention'. Article 8 establishes that, 'All arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in full confidentiality. Such consultations may be within sight, but not within the hearing, of law enforcement officials'.

the information of the facts in order to fully exercise his right to defence and prove to the judge his version of the facts. The Court has considered that timely compliance with Article 8(2)(b) is essential for the effective exercise of the right to defence.³⁹

Similarly,

Article 8(2)(b) of the Convention applies even before the ‘charges’, in a strict sense, are filed. For this right to fully operate and satisfy its inherent aims, it is necessary for the said notification to take place before the accused renders his first statement before any public authority.⁴⁰

In a strict sense, this does not yet constitute an *accusation*, but a *harmonious reading of the various articles that we have already analyzed regarding the information that the State must provide at the moment of detention or arrest, and article 8(2)(b) of the ACHR, clearly suggests that the detailed and prior communication not only refers to the indictment in a strict sense, but rather to the formulation of charges or equivalent formal act that initiates the preparatory work of the accusers.*⁴¹

In the *Tibi* case, highlighted above, the Inter-American Court indicated, albeit indirectly, that one should consider the initiation of proceedings (for the purpose of determining a reasonable period) as either the moment the accused is detained or apprehended,⁴² or ‘when this measure is not applicable, but there is an ongoing criminal proceeding, the said term begins when the judicial authority takes cognizance of the case’.⁴³ Additionally, the Court uses the UN Human Rights Committee General Comment No. 13, regarding ‘equality before the courts and tribunals and the right to a fair and public hearing by a competent, independent and impartial tribunal established by law’, in which the HRC indicated that:

³⁹ *Case of Barreto Leiva*, cit., para. 28.

⁴⁰ *Case of Barreto Leiva*, para. 30; *Case of López Álvarez vs. Honduras*, Judgment of February 1, 2006, Series C, No. 141, para. 149; and *Case of Palamara Iribarne*, para. 225; *Case of Acosta Calderón*, para. 118.

⁴¹ In a stricter sense, the Constitutional Tribunal of Oeru has stated that the phrase ‘during the process’ mentioned in article 8, must be understood to apply, in criminal cases, to the pre-judicial sphere, referring to actions of the Public Prosecutor. Thus, before the formulation of charges, there should be a reasonable time between the notification of citation and when the person must appear, in which the person may adequately prepare his defence against the charges against him. (Decision 1268-2001-HC/TC).

⁴² *Case of Suárez Rosero*, para. 70.

⁴³ *Case of Tibi*, para. 168.

the right to be informed of the charge ‘promptly’ requires that information is given in the manner described as soon as the charge is first made by a competent authority. In the opinion of the Committee this right must arise when in the course of an investigation a court or an authority of the prosecution decides to take procedural steps against a person suspected of a crime or publicly names him as such. The specific requirements of subparagraph 3 (a) may be met by stating the charge either orally or in writing, provided that the information indicates both the law and the alleged facts on which it is based.⁴⁴

In short, the right consists both in being informed (prior communication) of the formulation of charges, whether this is undertaken by a formal act by prosecutors (formal charging) or by informing the accused of such charges in a judicial hearing (indictment). It does not matter if such acts are provisional or do not constitute formal charges in a strict sense. When such charges exist, or are done immediately, whether via indictment or its substitution (immediate trials, for example) this must also be communicated in a prior, precise, integral way, with sufficient time for the person to prepare his defence.

Justifiably, the Court has granted the accusation (indictment) a central role in the determination of the facts (principles of congruency), such that they cannot be modified so as to prejudice the accused during the course of the trial. This is the doctrine that arises from the *Case of Fermín Ramírez vs. Guatemala*, in which the Court states that:

the defendant has the right to know, through a clear, detailed, and precise description, the facts he is being charged with. Their legal classification may be varied during the process by the prosecutor or the judge, without this violating the right to a defence, when the facts themselves are maintained invariable and the procedural guarantees included in the law for the change to the new classification are observed. The so-called ‘principle of coherence or correlation between the indictment and the conviction’ implies that the judgment may fall only upon the facts or circumstances included in the indictment.⁴⁵

3.1.3. The right to receive information regarding the rights of the accused

The information that must be provided regarding the reasons for the detention or arrest, as well as the prior communication regarding the charges or indictment, not only involves the communication of these facts; but rather these must be accompanied, in all cases, by clear and precise information regarding the defence measures that

⁴⁴ UN Human Rights Council, General Comment No. 13 (1984), para. 8.

⁴⁵ *Case of Fermín Ramírez vs. Guatemala*. Judgment of June 20, 2005, Series C, No.126,

the accused has at his disposal in order to *confront this situation*. This set of rights form the central structure of article 8(2) of the ACHR, and must be communicated in their totality, with a special emphasis on those that are indispensable for the immediate exercise of these rights. For example, in the case of a detention or arrest, the detainee must be informed of the immediate right to habeas corpus; in the case of the communication of charges filed, he must be informed of the right to have legal assistance prior to making any statement. When details of the charges are provided, the accused must be informed of the set of rights that make his defence effective.

The *Tibi Case* clearly indicates that one of the reasons for providing information regarding the reasons for the arrest and formulation of charges is to guarantee the right to defence of the detainee. The fact that article 7.4 is placed within the section of rights regarding ‘personal liberty’ does not mean that these rights are not related to the right to an effective defence. Therefore, it may be deduced that the information that the State provides is not only that which permits an immediate protection of liberty (the right to habeas corpus), but rather that which allows him to exercise the right to defence in its entirety. Therefore, the accused, as well as his family, must be informed regarding the rights that the accused has.⁴⁶ Following this same logic, communication with a lawyer and consular representative whose mission is to assist the detainee in undertaking his defence is even more important.⁴⁷ Likewise, as we have seen, all of these rights are even more important when the detainee is a child or adolescent.⁴⁸ This information must be specific, clear, complete, and sufficiently detailed to enable the accused to exercise his right to defence and provide the judge with his version of the facts.⁴⁹ It is not sufficient that the accused infer that he has such rights, but rather

⁴⁶ *Case of Gómez Paquiyauri Brothers vs. Peru*, Judgment of July 8, 2004, Series C, No. 110, paras. 85 and 92; *Case of Maritza Urrutia vs. Guatemala*, Judgment of November 27, 2003, Series C, No. 103, para. 72; and *Case of Bulacio*, Judgment of September 18, 2003, Series C, No. 100, para. 128.

⁴⁷ In the case of a foreign detainee, the State is required, according to the Court, to inform the relevant consulate office regarding the situation, to transmit, without delay, any communication from the detainee to the consulate office. (Vienna Convention on Consular Relations, art. 36.1.b. Document A/CONF.25/12 (1963) open for signature April 24, de 24 1963, entry in force March 19, 1967). Also, *Case of Vélez Loor*, Judgment of November 23, 2010, Series C, No. 218, para. 153, and generally, Advisory Opinion OC-16/99, October 1, 1999, regarding the right to information regarding consular assistance.

⁴⁸ OC 17/02, from August 28, 2002, regarding the *Juridical Condition and Human Rights of the Child*

⁴⁹ *Case of López Álvarez vs. Honduras*, Judgment of February 1, 2006, Series C, No. 141, para. 149, and *Case of Palamará Iribarne*, para. 225.

state officials have an obligation to provide this information. The information must be clear, not only in the sense that it is not transmitted in a different language, but also in that it should avoid excessive formality or legal or police jargon, given that the goal is the *effectiveness of the right to defence as a set of rights*. In any event, we have also indicated that with respect to each particular circumstance, the duty to inform the accused regarding certain rights is even greater, inasmuch as it refers to the immediate situation of rights protection.

3.1.4. The right to access material case evidence and the case file (docket, record, dossier, etc.)

In the context of the Latin American region, access to material evidence (the case file, in the common terminology of courts) has always been problematic. From former legislation that sought to surprise the accused into confessing in the quickest and most compelling way possible, different practices remain rooted in Latin American criminal legal culture, in spite of the efforts of new procedural legislation, new constitutions, and the ACHR to move in the opposite direction. Even in new adversarial systems, in which the former dossier is slowly transforming into the investigation case file, this custom has not been lost. Frequently, the transformation of the former dossier into the ‘investigation case file’ has exacerbated obstacles to access to information.

In its early years, the Inter-American Court confronted cases where prohibitions on accessing information for those accused were enormous, and the criminal consequences, in particular those of special jurisdictions, such as special tribunals for terrorism, were immense. For example, in the *Case of Castillo Petruzzi and others vs. Peru* the Court considered that:

This particular case illustrates how the work of the defence attorneys was shackled and what little opportunity they had to introduce any evidence for the defence. In effect, the accused did not have sufficient advance notification, in detail, of the charges against them; the conditions under which the defence attorneys had to operate were wholly inadequate for a proper defence, as they did not have access to the case file until the day before the ruling of first instance was delivered. The effect was that the presence and participation of the defence attorneys were mere formalities. Hence, it can hardly be argued that the victims had adequate means of defence.⁵⁰

⁵⁰ Judgment of May 30, 1999, Series C, No.52, para 146.

If this is applicable to defence attorneys, it applies with even greater force to those exercising their own defence, or where the right to do so exists independently of whether the accused has an attorney. It would not be permissible to deny the accused access to information based on the fact that he already has a designated attorney. As in the *Case of Palamara Iribarne*, the Court considered the structure of military jurisdiction that established rules in secret inadmissible under the Convention.

Later, in specific decisions, the Court began to address the implications of the right to access information in the case file. For example, the Court argued that not duly communicating the incorporation of expert evidence into the case file, as well as failing to give sufficient warning regarding measures of inquiry, constituted violations of the Convention.⁵¹ The Court has also ruled that ‘the failure to issue copies of the investigation to the victims constitutes a disproportionate burden to their detriment, not compatible with their right to participate in the preliminary inquiry’.⁵² These cases demonstrate the trend of the Court towards limiting the possibility of holding back information during criminal justice proceedings. The Court has yet to issue a decision that analyzes the limitations on access to certain information during the investigation, but the Court has recognized that there may be some limitations to this access:

[T]here can be no doubt that the State has the right and the duty to guarantee its own security. Nor is there any question that violations of the law occur in every society. But no matter how terrible certain actions may be and regardless of how guilty those in custody on suspicion of having committed certain crimes may be, the State does not have a license to exercise unbridled power or to use any means to achieve its ends, without regard for law or morals.⁵³

This informs us that the limitations placed on access to information in the hands of prosecutors may only be based on general reasons of strict necessity and never on mere procedural processes permitted as routine.⁵⁴

⁵¹ *Case of Chaparro Álvarez and Lapo Íñiguez*, Judgment of November 21, 2007, Series C, No. 1701, para. 152-153.

⁵² *Case of Radilla Pacheco*, para. 256.

⁵³ *Case of Castillo Petruzzi and others vs. Peru*, para 204.

⁵⁴ Similarly, article 21 of the Basic Principles on the Role of Lawyers clearly states, ‘It is the duty of the competent authorities to ensure lawyers access to appropriate information, files and documents in their possession or control in sufficient time to enable lawyers to provide effective legal assistance to their clients. Such access should be provided at the earliest appropriate time’.

3.2. *The right to defend oneself and legal assistance*

3.2.1. **The right of the accused to self-defence and to represent himself**

There tends to be confusion in the sense that the right to defence always implies the right to an attorney. Of course, having legal assistance is one of the central rights encompassed by the right to defence, *but this is but one form of the right to personal defence, and does not exclude the right to represent oneself*. The Inter-American Court has not developed the implications of the right to personally represent oneself, although it has recognized this right.⁵⁵

The point that still remains unexplored is the requirement that defence be effective and not merely formal. Does this same principle apply in respect of personal defence? Or, in such cases, given that it is a personal decision of an assumed risk, ought it to be accepted? Perhaps the point does not address this question, given that no judge should remain as a mere spectator in the face of an ineffective defence undertaken personally. Judge García Ramírez directly addressed this point in his reasoned opinion when he stated that the judge must ensure the effective protection of the legal order and not limit himself to waiting for other participants in the process to do so. He observed, ‘I cannot endorse the idea that, according to the strict rules of the accusatory criminal procedural system, the judge should abstain from assuming probative initiatives and wait for the parties to request essential measures. I refer to the production of evidence on points on which much more than a secondary procedural advantage depends: the determination of the pertinence of a trial that must necessarily culminate in the death penalty. I consider it unacceptable for a judge to act passively in such a case—the omission referred to in the *DaCosta* judgment—which can lead to the most serious violation of the applicable norms and lead to an injustice’. It could be argued that this might lead the judge to abandon his impartial role but, in any event, the Inter-American Court indicated in the same case that the judge is a guarantor of the legality of the process. Therefore, the judge must adopt measures that tend to guarantee the broadest defence of the accused in the trial, in the interests of due process.⁵⁶

The main thrust of the personal dimension of defence consists in the fact that, at all times, the accused is the main actor in his own defence, even when an attorney carries out his defence. The right to self-defence means that the accused is always the sub-

⁵⁵ Case of *Barreto Leivacit*, para. 64.

⁵⁶ *Ibid.*, para. 85.

ject of the process and never an object of judicial proceedings. It also means that the defendant should maintain adequate control over the exercise of his defence through professionals. This is particularly important as a control mechanism and guiding principle for public defence systems, as often they become bureaucratized and defendants lose real contact with their case. It must not be forgotten that this is about the defence of concrete interests, and the holder of those interests is the one who suffers the risk of a conviction.

3.2.2. The right to legal assistance and representation of one's choice

One of the rights we could call 'classic' in this area is the power to choose an attorney to represent oneself in the process, and the right for this choice to be made freely, and to be someone that the defendant trusts. The Inter-American Court has recognized this, and has additionally indicated that the defendant must have this assistance in a timely fashion.⁵⁷ This means that 'the right to defence must necessarily be exercised from the moment a person is accused of perpetrating or participating in an unlawful action and only ends when the proceeding concludes'.⁵⁸ As we have seen, this means that the right to appoint an attorney cannot be subordinated to a specific procedural act, and emerges from the indictment.

The right to a defence attorney, in its most genuine form, means having a trusted attorney. Only in the subsidiary sense does it refer to the State's obligation to provide an attorney to those who cannot afford one, as we will see below. Given the extremely high number of cases that public defenders represent, the basic feature of this right - to have a relationship of trust between the defendant and his attorney - is often forgotten. The focus of criminal justice systems on poor sectors of society that cannot afford legal representation has resulted in the central importance of public defence systems which, fortunately, have been strengthened in recent years. The question thus moves toward establishing mechanisms that allow, when possible, the creation of this trust-

⁵⁷ *Case of Acosta Calderón*, para. 124; *Case of the Yakya Axa Indigenous Community vs. Paraguay*, Judgment of June 17, 2005, Series C, No. 125, paras.116 and 117; *Case of Tibi*, para. 194; *Case of Castillo Petruzzi and others*, paras. 146-149, and *Case of Suárez Rosero*, para. 83.

⁵⁸ *Case of Cabrera García and Montiel Flores*, Judgment of November 26, 2010, Series C, No. 220, para. 154. *Case of Barreto Leiva vs. Venezuela*, *supra* nota 100, para. 29; *Case Suárez Rosero vs. Ecuador*, Judgment of November 12,1997, Series C, No. 35, para. 71; *Case of Heliodoro Portugal vs. Panamá*, Judgment of August 12, 2008, Series C, No. 186, para. 148, and *Case of Bayarri vs. Argentina*, para. 105.

ful relationship within the framework of public defence systems. In this regard, the Inter-American Court's admonishment that public defence be effective⁵⁹ must also extend to the creation of a greater relationship of trust, within the context of complex organizations that employ systems of random case assignment and which, in many cases, have heavy caseloads.

3.2.3. The right to legal assistance during questioning

In the context of Latin American criminal justice reform, a drastic change prohibiting police interrogation has been made to the legislation of many countries. This decision has been based on the historical and current problems of the justice system. These include arbitrariness in the treatment of defendants in police systems, the current impossibility of making significant changes to these systems, the difficulties in putting into practice mechanisms of control regarding the first moments of police investigation, and the tendency to obtain false confessions that are later endorsed by justice systems.⁶⁰ The appropriateness of this change of approach, from the point of view of effective criminal investigations, is debatable, and has been the subject of discussion. However, it was a response to the need to protect the defendant from systemic mistreatment and torture that had gone unchecked for a long time. This procedural reality has meant that there is not a rich Inter-American jurisprudence on the issue, except with respect to special legislation, which subjected civilians to torture in the context of military justice, or to special legal regimes, such as drug-trafficking regimes.

⁵⁹ *Case of Chaparro Álvarez and Lapo Íñiguez*, para. 159.

⁶⁰ For example, the Criminal Code of Guatemala provides: 'The police may only ask questions of the accused to determine his identity, with the warnings and conditions established in the above articles. They must also instruct him regarding what he may inform the prosecutor or judge, according to the case' (art. 88). The Federal Criminal Procedural Code of Argentina provides: 'They may not receive the accused's statement. They may only ask him questions to determine his identity, prior to a reading aloud regarding the rights and protections contained in article 104, paragraph 1, and, 197, 295, 296 and 298 of this Code, of analogous application to this case, all under penalty of annulment of the case; without prejudice to the communication that the judge will make to the superior authority of the official to the effects of administrative sanction for failure to comply' (art. 184, 10). The Criminal Procedure Code of Chihuahua (Mexico) provides: 'The police may not take any statement of the accused while he is detained. In the case that he manifests his desire to make a statement, this fact must be communicated to the prosecutor, so that he may receive his statement with the formalities provided for by law' (art. 173).

In the cases of *Cabrera García* and *Montiel Flores*,⁶¹ the Inter-American Court indicated that the right to defence must be exercised from when the investigation against an individual begins, and that States may not strengthen their investigatory powers to the detriment of the fundamental human rights of the person under investigation. Thus, the right to an attorney during questioning, to freely consult with the attorney regarding his statement (to give his version of the facts, in the Court's language) is a central nucleus of the right to defence. Whether the questioning is prosecutorial, judicial, or administrative in nature, the State may not place limitations on the presence of and consultation with an attorney.

3.2.4. The right to consult in private with a defence attorney

Together with the content of the right to defence indicated in the section above, the Inter-American Court has recognized that the State may not impose limitations on the defendant's ability to freely consult in private with his defence attorney. The Court established this in the *Case of Castillo Petruzzi and others vs. Peru*.⁶² Violations of this right do not only arise in emergency legislation which, as we have seen, have led to decisions within Inter-American jurisprudence, but also in common criminal proceedings, when States imposed obstacles to the free and private communication between the accused and their attorneys, which is inadmissible regarding the right to defence.⁶³

Communication with a defence attorney must be free from interference. In this respect, the Inter-American Court has adopted the Basic Principles on the Role of Lawyers Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27th of August to 7th of September 1990, which includes the provision that States must provide adequate facilities for this type of communication, whether in judicial accommodation or in prisons in the case of detained defendants. The presence of custodial personnel which create a context of coercion is not permissible. Private communication must be guaranteed, which means it is free from interference or coercion. If this is not ensured, the possibility to prepare one's defence, as well as the right to defence itself, may be negatively affected.⁶⁴ The

⁶¹ Judgment of November 26, 2010, Series C, No. 220, para. 154.

⁶² Paras. 146-149.

⁶³ *Case of Cantoral Benavides*, para. 127.

⁶⁴ *Case of Suárez Rosero*.

Court has even more emphatically stated that any form of incommunicado detention must be established by law and used only in exceptional circumstances. This means that ‘incommunicado detention is an exceptional measure the purpose of which is to prevent any interference with the investigation of the facts. Such isolation must be limited to the period of time expressly established by law’.⁶⁵

The Basic Principles on the Role of Lawyers have also pronounced on this point: (1) Governments shall recognize and respect that all communications and consultations between lawyers and their clients within their professional relationships are confidential (art. 22); and (2) All arrested, detained, or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in full confidentiality. Such consultations may be within sight, but not within the hearing of law enforcement officials (art. 8).

3.2.5. The right to an attorney free of charge for those who cannot pay for one

In reality, for the vast majority of the population that becomes involved in the criminal process, the right to defence is materialized through a public defence attorney. Thus, the Inter-American Court has been careful to protect this right and to set precise standards with respect to its fulfillment. First, the Court has stated that the mere appointment of an attorney is insufficient if he is not ‘suitable and competent’.⁶⁶ This simple declaration is important, given that in the history of the region, public defence systems have been regularly used as a means to formally comply with defence. The jurisprudence of the Inter-American Court has rejected defence attorneys who have only signed paperwork, did not even know the defendants, and offered their signature merely to fulfill a requirement, along with many other instances of merely formal defence. This also means that in the process of strengthening public defence in the region, not only have public defence offices become serious organizations, but they often have the highest levels of professionalism with respect to criminal defence. The principle is clear: any form of merely apparent defence violates the ACHR.

In the words of the Inter-American Court, ‘State-provided defence must be effective, and therefore the State must adopt all adequate measures’. It is insufficient to name a public defence attorney with the sole purpose of complying with a pro-

⁶⁵ *Ibid.*, para. 51. Similarly, *Case of Cantoral Benavides*, para-. 84.

⁶⁶ *Case of Chaparro Álvarez and Lapo Íñiguez vs. Ecuador*.

cedural formality. This would be the equivalent of not having access to a technical defence, which is why it is imperative for the defence attorney to act diligently in order to protect the procedural guarantees of the accused and to prevent his rights from being violated.⁶⁷ Similarly, the Basic Principles on the Role of Lawyers indicate that: (1) Governments shall ensure the provision of sufficient funding and other resources for legal services to the poor and, as necessary, to other disadvantaged persons. Professional associations of lawyers shall cooperate in the organization and provision of services, facilities and other resources (art. 3); and (2) Any such persons who do not have a lawyer shall, in all cases in which the interests of justice so require, be entitled to have a lawyer of experience and competence commensurate with the nature of the offence assigned to them in order to provide effective legal assistance, without payment by them if they lack sufficient means to pay for such services (art. 6).

Moreover, a derivation of the principle of equal and effective access to a defence attorney is relevant to the reality of indigenous communities. Appointing an interpreter does not remedy the problem of inequality, given that the relationship of trust between the attorney and client, added to the tasks of protecting his client's rights that the attorney must assume, including protection against the interpreter, means that indigenous people must have access to attorneys who can undertake their work in the same language that the client speaks, and who have knowledge of the client's specific culture. Although the Court has not spoken about this specific point, it is a clear derivation of the requirements of efficacy, trust, access, and respect for language and culture, which are central in many cases. Additionally, article 11 of the Basic Principles on the Role of Lawyers states that:

In countries where there exist groups, communities or regions whose needs for legal services are not met, particularly where such groups have distinct cultures, traditions or languages or have been the victims of past discrimination, Governments, professional associations of lawyers and educational institutions should take special measures to provide opportunities for candidates from these groups to enter the legal profession and should ensure that they receive training appropriate to the needs of their groups.

This has led some countries (Guatemala, Chile, Mexico, Argentina, and others) to organize special sections within public defence offices that are dedicated to providing advice to defendants who belong to different indigenous communities.

⁶⁷ *Case of Cabrera García and Montiel Flores*, Judgment of November 26, 2010, Series C, No. 220, para. 155.

3.2.6. Right to have an independent attorney who complies with minimum professional standards, and who approaches their work based exclusively on his or her client's interest

The nature of effective, timely defence, carried out by competent individuals, in which it is clear that the public defence is not a state function conceived of solely to grant legitimacy to the process, but rather a way of strengthening the defence of the accused's concrete interests, constitutes the nucleus of the Inter-American System's jurisprudence regarding the right to defence. Furthermore, the fact that the Inter-American Commission recognizes the value of the Basic Principles on the Role of Lawyers⁶⁸ means that they may also be used as a source of standards, in particular with respect to much more concrete problems regarding the function of lawyers.

In this way, these indicate the following principles related to this point: 1) Governments shall ensure that efficient procedures and responsive mechanisms for effective and equal access to lawyers are provided for all persons within their territory and subject to their jurisdiction, without distinction of any kind, such as discrimination based on race, colour, ethnic origin, sex, language, religion, political or other opinion, national or social origin, property, birth, economic or other status (art. 2); 2) Governments and professional associations of lawyers shall promote programmes to inform the public about their rights and duties under the law and the important role of lawyers in protecting their fundamental freedoms. Special attention should be given to assisting the poor and other disadvantaged persons so as to enable them to assert their rights and where necessary call upon the assistance of lawyers (art.4); 3) Governments, professional associations of lawyers and educational institutions shall ensure that lawyers have appropriate education and training and are made aware of the ideals and ethical duties of the lawyer and of human rights and fundamental freedoms recognized by national and international law (art. 9); 4) The duties of lawyers towards their clients include the following: (a) Advising clients as to their legal rights and obligations, and as to the working of the legal system in so far as it is relevant to the legal rights and obligations of the clients; (b) Assisting clients in every appropriate way, and taking legal action to protect their interests; (c) Assisting clients before courts, tribunals or administrative authorities, where appropriate (art. 13); 5) Lawyers

⁶⁸ Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, August 27th to September 7th, 1990.

shall always loyally respect the interests of their clients (art. 15); 6) Governments shall ensure that lawyers (a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; (b) are able to travel and to consult with their clients freely both within their own country and abroad; and (c) shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics (art. 16); 7) Lawyers, in protecting the rights of their clients and in promoting the cause of justice, shall seek to uphold human rights and fundamental freedoms recognized by national and international law and shall at all times act freely and diligently in accordance with the law and recognized standards and ethics of the legal profession (art. 14).

3.3. Generic rights or judicial guarantees related to a fair trial

3.3.1. The right to be presumed innocent

The presumption of innocence is not a right in itself, but rather a generic principle that allows for the organization of a procedural system that respects the guarantees that the ACHR provides. It forms the basis of the procedural system and establishes the parameters for actions in respect of, and general protection of, the accused. The Inter-American Court has recognized this generic character on several occasions.⁶⁹

The Court has used the concept for various purposes, given that as a result of its generality it is a concept to which reference is regularly made.⁷⁰ For example, the

⁶⁹ *Case of Chaparro Álvarez and Lapo Íñiguez*, para. 145; *Case of Ricardo Canese vs. Paraguay*, Judgment of August 31, 2004, Series C, No. 111, para. 153, and *Case of Suárez Rosero vs. Ecuador*, Judgment of November 12, 1997, Series C No. 35, para. 77. The Court reiterates this jurisprudential line in the *Case of Norín Catrیمان and others vs. Chile*, Judgment of May 29, 2014. The Supreme Court of Justice of Mexico makes an adequate distinction, considering that the presumption of innocence is as much a rule as an evidentiary rule. (*Case of Cassez Crepin*, Direct Amparo on Appeal 517/2011).

⁷⁰ An even broader vision of this principle is that adopted by the Supreme Court of Justice of Mexico (Amparo on Appeal 89/2007), given that it has stated, ‘The principle of the presumption of innocence, which in criminal procedure matters impose the burden of proof on the accuser, is a fundamental right that the Political Constitution of the United Mexican States recognizes and protects in general, whose reach transcends the sphere of due process, as with its application the protection of other fundamental rights, such as human dignity, honor and good name, are also protected, which could be violated by irregular criminal or disciplinary actions. Therefore, this principle operates in extra-procedural situations as well and constitutes the right to receive consideration

Court has used the violation of the presumption of innocence to determine that civilians may not be subjected to a military regime contrary to that principle, for example, to military jurisdiction.⁷¹ The Court has also used this principle to establish limits on pretrial detention;⁷² and to prevent the presentation in public of a person as guilty even though they have not been convicted,⁷³ in particular when it is demonstrated that public condemnation has adverse effects on a subsequent trial.⁷⁴ The Court has also used it to justify immediate habeas corpus proceedings regarding detention.⁷⁵

The two most clear and direct consequences of the presumption of innocence relate to the burden of proof. The accused is not under any obligation to prove anything regarding his innocence; establishing proof regarding the facts and culpability is the exclusive responsibility of the accusers. The Inter-American Court has recognized this. In effect, it 'is an essential element for the effective exercise of the right to defence and accompanies the defendant throughout the proceedings until the judgment determining his guilt is final. This right implies that the defendant does not have to prove that he has not committed the offense of which he is accused, because the *onus probandi* is on those who have made the accusation'.⁷⁶ The second consequence, which derives from the first, means that any doubt regarding the value of the proof should be resolved in favor of the accused. The Court has stated that '[i]f the evidence presented is incomplete or insufficient, he must be acquitted, not convicted'.⁷⁷

3.3.2. The right to remain silent and not to testify

One of the classical protections against torture or illegal coercion consists in *removing any obligation to respond to the charges or to confess*. Whilst the former legal obligation to do so has been removed, there still remain practices that seek to obtain the accused's

and treatment of the "author" of a criminal act or in any other type of infraction, while culpability is not demonstrated; therefore, it grants the right that to not have the consequences of such acts, regarding any issue'.

⁷¹ *Case of Loayza Tamayo vs. Peru*, Judgment of September 17, 1997, Series C, No. 33.

⁷² *Case of Suárez Rosero vs. Ecuador*, Judgment of November 12, 1997, Series C, No. 35.

⁷³ *Case of Cantoral Benavides vs. Peru*, Judgment of August 18, 2000, Series C, No. 69.

⁷⁴ *Case of Lori Berenson vs. Peru*, Judgment of November 25, 2004, Series C, No. 119.

⁷⁵ *Case of García Asto and Ramírez Rojas vs. Peru*, Judgment of November 25, 2005, Series C, No. 137.

⁷⁶ *Case of Ricardo Canese vs. Paraguay*, Judgment of August 31, 2004, Series C, No. 111, para 154.

⁷⁷ *Case of Ricardo Canese*, para 153 and *Case of Cantoral Benavides*, para. 120. *Case of Cabrera García and Montiel Flores*, Judgment of November 26, 2010, Series C, No. 220, para. 183.

confession as the main source of evidence and proof. This is why the Inter-American Court's jurisprudence refers, above all, to cases of torture, coercion, and mistreatment. In this area, the Court has been categorical in sustaining the absolute and universal character of the prohibition on such actions.⁷⁸ It has emphatically stated, 'The prohibition of torture and cruel, inhuman or degrading punishment or treatment is absolute and non-derogable, even under the most difficult circumstances, such as war, threat of war, the fight against terrorism and any other crimes, martial law or a state of emergency, civil commotion or conflict, suspension of constitutional guarantees, internal political instability or other public emergencies or catastrophies'.⁷⁹

The right implies, first, the right to testify as often as the accused wishes and, as we have seen, the Inter-American Court has placed special importance on ensuring that the accused has a real opportunity to provide his version of the facts. Conversely, the right to remain silent means the right of the accused to refrain from providing any account, to simply abstain from testifying and, finally, the right not to be subjected to crimes that are formulated in such a way as to require a response. In the latter sense, the right is a reaction to the 'statement of objections', to which a response was obligatory, and in respect of which silence or evasive answers constituted a 'tacit confession'. Coercion results from any form of threat, even when that threat is not carried out or consists of psychological coercion.⁸⁰ Threats against family members may also constitute prohibited coercion.⁸¹

3.3.3. The right to remain free during the process, while the trial decision is pending

The Court's jurisprudence has made it clear that any type of restriction on liberty during the criminal process, before a decision has been reached as to guilt, is exceptional;

⁷⁸ *Case of Caesar vs. Trinidad and Tobago*, Judgment of March 11, 2005, Series C, No. 123, para. 100. Similarly, *Case of Tibi*, para. 143; *Case of the Hermanos Gómez Paquiyauri Brothers*, para. 112, and *Case of Maritza Urrutia*, para. 92.

⁷⁹ *Case of Lori Berenson Mejía*, para. 100; *Case of Cruz Flores vs. Peru*, Judgment of November 18, 2004, Series C, No. 115, para. 125; *Case of Tibi*, para. 143. Similarly, *Case of the Hermanos Gómez Paquiyauri Brothers*, para. 111; *Case of Maritza Urrutia*, para. 89, and *Case of Cantoral Benavides*, para. 95.

⁸⁰ *Case of 19 Merchants vs Colombia*, Judgment of July 5, 2004, Series C, No. 109, para. 149; *Case of Cantoral Benavides*, para. 102; *Case of the 'Street Children' (Villagrán Morales et al.)*, para. 165; *Case of Valle Jaramillo vs. Colombia*, Judgment of November 27, 2008 Series C, No. 191, para. 108.

⁸¹ *Case of Bayarri*, para. 87.

resulting from the right to remain free until a sanction is imposed, as an elemental application of the presumption of innocence. It is from this principle that the ‘obligation of the State not to restrict the liberty of the detainee beyond the limits of what is strictly necessary to ensure that he will not impede an efficient investigation or avoid law enforcement’ is derived. In this regard, preventive imprisonment is a precautionary measure, not a punitive one.⁸² Without a doubt, the Court tells us, pretrial detention ‘is the most severe measure that may be applied to the person accused of a crime, for which reason its application must be exceptional, since it is limited by the principles of legality, the presumption of innocence, necessity, and proportionality, indispensable in a democratic society’.⁸³

According to the Inter-American Court, then: (i) freedom during the investigation and trial proceedings is a natural derivation of the presumption of innocence; (ii) the restriction of this liberty should be exceptional; (iii) it is limited by the principle of legality; (iv) it should be applied within only strictly necessary limits to ensure the effective development of the investigation or to prevent a situation where the accused avoids justice by fleeing; and (v) the principle of proportionality must be respected. According to the Court, pretrial detention is a non-punitive measure. In addition to these five basic requirements, the Court has established that pretrial detention is subject to two more conditions: reasonable duration; and permissible conditions of detentions. In effect, the Court has said, ‘[p]reventive detention must strictly conform to the provisions of Article 7(5) of the American Convention: it cannot be for longer than a reasonable time and cannot endure for longer than the grounds invoked to justify it. Failure to comply with these requirements is tantamount to a sentence without a conviction, which is contrary to universally recognized general principles of law’.⁸⁴ Additionally, the Court has stated that:

[a]rticle 7(5) of the American Convention guarantees the right of any person detained in pre-trial detention to be tried within a reasonable time or released, without detriment to the continuation of the proceedings. This right imposes temporal limits on the duration of pre-trial detention and, consequently, on the State’s power to protect the purpose of the

⁸² *Case of Tibi*, para. 180. Similarly, *Case of Bayarri*, para. 110; *Case of Chaparro Álvarez and Lapo Íñiguez*, para. 145; *Case of Acosta Calderón*, para. 111, and *Case of Suárez Rosero*, para. 77.

⁸³ *Case of Tibi*, para. 106. Similarly, *Case of Chaparro Álvarez and Lapo Íñiguez*, para. 146; *Case of Acosta Calderón*, para. 74; *Case of the ‘Juvenile Reeducation’*; Judgment of September 2, 2004, Series C, No. 112, para. 228, and *Case of Ricardo Canese*, para. 129.

⁸⁴ *Case of the ‘Juvenile Reeducation Institute’*, para. 229. Similarly, *Case of Acosta Calderón*, para. 111; *Case of Tibi*, para. 180; *Case of Suárez Rosero*, para. 77.

proceedings by using this type of precautionary measure. When the duration of pre-trial detention exceeds a reasonable time, the State can restrict the liberty of the accused by other measures that are less harmful than deprivation of liberty by imprisonment and that ensure his presence at the trial. This right also imposes the judicial obligation to process criminal proceedings in which the accused is deprived of his liberty with greater diligence and promptness.⁸⁵

Additionally, with respect to the conditions of detention, the Court has stated that ‘detention in conditions of overcrowding, isolation in a small cell, with lack of ventilation and natural light, without a bed for rest, or adequate sanitary conditions, incommunicado or undue restrictions in the visiting regime, constitute a violation of the right to humane treatment’.⁸⁶

The Court has also established that given the conditions for ordering pretrial detention, such detention may not be imposed upon any basis, but rather requires a *minimum factual basis, with respect to both the justification for detention as well as the participation and culpability of the accused*. According to the Court, ‘in order to comply with the requirements necessary to restrict the right to personal liberty, there must be sufficient evidence to lead to a reasonable supposition of guilt of the person submitted to a proceeding’.⁸⁷ Moreover, the suspicion must be based on specific facts and articulated in words, that is, not on mere conjecture or abstract intuition. Thus, the State must not detain and later investigate; by contrast, the State may only deprive a person of his liberty when there is sufficient evidence to reasonably believe that the person subject to such a measure may have participated in the illicit act under investigation.⁸⁸

From the very act of limiting the right to personal liberty, the State has a special responsibility to guarantee the conditions of detention. In effect,

The State has a special role to play as guarantor of the rights of those deprived of their freedom, as the prison authorities exercise heavy control or command over the persons in their custody. So there is a special relationship and interaction of subordination between the person deprived of his liberty and the State; typically the State can be rigorous in regulating what the prisoner’s rights and obligations are, and determines what the circumstances of the

⁸⁵ *Case of Bayarri vs. Argentina*, para. 70.

⁸⁶ *Case of Lori Berenson Mejía*, para. 102, and *Case of García Asto*, para. 221. Similarly, *Case of Caesar*, para. 96; *Case of Tibi*, para. 150; *Case of the ‘Juvenile Reeducation Institute’*, para. 151; *Case of Hilaire, Constantine and Benjamín et al.*, para. 164; *Case of Cantoral Benavides*, para. 89; *Case of Loayza Tamayo*, para. 58.

⁸⁷ *Case of Servellón García et al. vs. Honduras*, Judgment of September 21, 2006, Series C, No.15. para. 90

⁸⁸ *Case of Chaparro Álvarez and Lapo Íñiguez vs. Ecuador*, para. 103.

internment will be; the inmate is prevented from satisfying, on his own, certain basic needs that are essential if one is to live with dignity.⁸⁹

And later the Court underscores this, stating:

Given this unique relationship and interaction of subordination between an inmate and the State, the latter must undertake a number of special responsibilities and initiatives to ensure that persons deprived of their liberty have the conditions necessary to live with dignity and to enable them to enjoy those rights that may not be restricted under any circumstances or those whose restriction is not a necessary consequence of their deprivation of liberty and is, therefore, impermissible. Otherwise, deprivation of liberty would effectively strip the inmate of all his rights, which is unacceptable.⁹⁰

For this reason, within judges' special duty of protection, they should ensure the fulfillment of requirements that affect the right to liberty. The Court has clearly stated that, 'judges do not have to wait until a judgment absolving them has been delivered for the detained persons to recover their liberty, but rather should assess periodically that the reasons and purposes that justified the deprivation of liberty subsist, whether the precautionary measure is still absolutely necessary in order to achieve these purposes, and whether it is proportionate'.⁹¹

Although it is not jurisprudence, nor an advisory opinion, the report 'Peirano Basso' deserves special mention, as it provides more detail regarding freedom of movement during the process.⁹² In it, the Commission establishes the following standards, based on its activities and jurisprudence:

- 1) 'By virtue of the presumption of innocence, within the framework of a criminal process, the defendant shall remain free, as a rule' (69).
- 2) Without detriment to the above-mentioned, it is accepted that the State, only as an exception and under certain conditions, is authorized to provisionally arrest a defendant whose trial has not been completed, taking into account that the excessive length of such pre-trial detention may cause the risk of inverting the sense of the presumption of innocence, turning this precautionary measure into a sentence in advance (70); The guiding principle to establish the legality of the pre-trial detention is the principle of 'exception-

⁸⁹ *Case of the 'Juvenile Reeducation Institute'*, para. 152.

⁹⁰ *Ibid.*, para. 153.

⁹¹ *Case of Chaparro Álvarez and Lapo Íñiguez vs. Ecuador*, para. 117; *Case of Yvon Neptune vs. Haiti*, Judgment of December 14, 2006, Series C, No. 180, para. 108; *Case of Bayarri vs. Argentina*, para. 76.

⁹² Inter-American Commission on Human Rights, Report on Peirano Basso, May 14, 2007, case No. 12.553, para. 70.

- ality', by virtue of which the pre-trial detention does not become a rule, impairing its purpose (93).
- 3) 'From the principle of innocence stems the principle that a "reasonable" period for pre-trial detention is mandatory, according to which every person under such conditions must be treated as innocent, as long as a condemnatory sentence establishes the opposite' (72).
 - 4) Since any restriction affects human rights, this shall be restrictively interpreted by virtue of the *pro homine* principle, by means of which, regarding the recognition of rights, the broadest rule and the most extensive interpretation have to be applied; and regarding the restriction of rights, the most restrictive rule and interpretation have to be applied. This is also imposed to avoid the exception becoming a rule, since such precautionary restriction is applied only to a person who enjoys innocence until a final sentence destroys it. Therefore, restrictions on individual rights that are imposed during proceeding and before the final sentence must be interpreted in a restricted way in order to ensure that the above-mentioned guarantee is not contradicted (75).
 - 5) The judicial proceedings depriving defendants of their liberty shall be given priority (76).
 - 6) The assumption to decide the deprivation of liberty of a person within the framework of a proceeding entails serious proof elements that relate the defendant to the investigated fact (77).
 - 7) Therefore, all attempts to justify detention during the process that are based, for instance, on preventive purposes, such as the dangerousness of the accused, the possibility that he may commit offences in the future, or the social impact the alleged offence may cause, should be rejected, not only because of the above-referred principle, but because such causes are sustained on criteria of the material criminal law and not on criteria of the procedural law, which are the pertinent criteria for a punitive response. These former criteria are based on the evaluation of the past event, which does not respond to the purpose of every precautionary measure that is aimed at preventing or avoiding facts that exclusively refer to the procedural aspects of the object of investigation, thus violating the presumption of innocence. (84).
 - 8) '[T]he procedural risks of absconding or obstructing the investigations should be based on objective circumstances. Allegations that do not consider the specific case, do not meet this requirement. Therefore, legislation can only establish *iusuris tantum* presumptions on this risk' (85).
 - 9) The State can always impose restrictive conditions on the decision of maintaining the deprivation of liberty (85)
 - 10) 'Both the "seriousness of the offence and [the] severity of the punishment" can, in principle, be taken into account when the risk of the detainee's evasion is examined, [...] [but] the anticipation of severe punishment, after a lengthy period of detention has elapsed, is an insufficient criterion for assessing the risk of the detainee's evasion'. (89); 'Upon determining the sanction to evaluate the procedural risk, the minimum criminal scale or the slightest sanction shall always be considered'. (91).
 - 11) The body that makes the decision than an individual be detained shall determine his/her release when the reasons to sustain such imprisonment, even trial in a criminal court, are no longer valid (102).

- 12) The obligation of having alternative non-custodial precautionary measures to ensure the appearance and obligation of the accused, and of replacing them as required by the circumstances of the case (107).
- 13) Pretrial detention is not an option when the punishment for the alleged offence is non-custodial. Neither can it be used when the circumstances of the case permit the suspension of any eventual punishment. If, in the event of conviction, release on license is possible, this should also be taken into account. (110).
- 14) A court officer [must] control the grounds for detention or justification for preventive detention. (116).
- 15) When detention is used as a precautionary measure such a definition should be interpreted more strictly. (128).
- 16) The procedural activities of the accused and his defence cannot be used to justify the period of detention since the use of means provided for in law to guarantee due process should not be discouraged, much less should active intervention during the process be considered in a negative manner. (130).
- 17) 'The right to the presumption of innocence requires that pre-trial detention should not exceed the reasonable period mentioned in Article 7.5 of the American Convention'. Pretrial detention can be substituted by less restrictive precautionary measures, but in any cases liberty must be granted. (134).
- 18) Once a person has been released from pretrial detention, this can only be withdrawn if a reasonable period in the prior detention was not served, and as long as the conditions for such detention are satisfied (145).

3.3.4. Right to be present at trial and to participate

Although the Inter-American Court has not given special consideration to this issue, this right necessarily flows from the explicit recognition of the right to *personal defence*, as we have seen in previous sections. Additionally, in various decisions, the Court has indicated that the State must ensure that the parties (whether victims or the accused) have 'full possibilities of being heard and appearing at the corresponding legal proceedings, in furtherance of the discovery of the truth, the punishment of the offenders as well as to be awarded an adequate compensation'.⁹³ It would be pointless to maintain this aspect of procedural rights and then place limits on the accused's presence or participation in the trial.

Furthermore, all the Inter-American System's doctrine regarding pretrial detention, which recognizes, with relevant restrictions, the State's right to impose detention

⁹³ *Case of Ximenes Lopes*, Judgment of July 4, 2006, Series C, No. 149, para. 193; *Case of the Ituango Massacres*, Judgment of July 1, 2006, Series C, No.148, para. 296, and *Case of Baldeón García vs. Peru*, Judgment of April 6, 2006, Series C, No. 147, para. 146.

to ensure the accused's presence at trial, implies that he has the right to be present and directly participate in that trial. As we have seen, the right to a defence attorney cannot mean that the accused loses control over his defence. This means that he has the right to maintain control during the trial, which is a key element in the progress of the case.

3.3.5. Right to have decisions that affect him substantiated

The right to substantiated decisions is not found in any expressed normative clause, but rather requires a systematic interpretation, based on the set of defence-related rights. First, the accused, as well as other parties involved in the process, have the right to be heard (ACHR art. 8.1 and ICCPR, art.14.1), and international law recognizes that his right to review of a conviction must be integral (ACHR, art. 8.2. h and ICCPR, 14.5). Furthermore, at no point may the accused be subjected to arbitrary detention or deprivation of liberty. This set of rights implies that *any decision that affects the accused's rights must have a sufficient, reasoned basis, and this forms part of the set of rights related to the right of defence*. This also includes the right to be heard (regarding the strength of the evidence, the law, or requested measures) where there is no duty to respond to these allegations and requests. Moreover, a right to a full appeal means nothing if this does not also include the obligation to adopt substantiated decisions that are capable of being re-evaluated.

The Court has had the opportunity to ratify these principles. In effect, the Court has stated that,

[...] the reasoning of a Court decision should show that the allegations made by the parties have been taken into account and that the body of evidence has been considered. Likewise, such reasoning shows the parties that they have been heard and, in those cases where decisions are subject to appeal, it affords them the possibility of challenging the Order and obtaining a new examination of the issues by higher Courts. Based on all of the foregoing, the duty to give the grounds for Court decisions constitutes one of the 'due guarantees' enshrined in Article 8(1) of the Convention in order to safeguard the right to the due process of the law.⁹⁴

In this way, the basis and reasoning of decisions form both a basis for guarantees as well as for the legitimacy of the administration of justice, as this 'protect[s] the right

⁹⁴ *Case of Tristán Donoso*, Judgment of January 27, 2009, Series C, No. 193, para. 78 and 153; *Case of Apitz Barbera et al.*, Judgment of August 5, 2008, Series C, No. 182, para. 78.

of citizens to be tried for the reasons provided by Law, and giving credibility to the legal decisions adopted in the framework of a democratic society'.⁹⁵

A substantiated decision is, according to the Court, the opposite of an arbitrary decision⁹⁶ and the grounds for such a decision should be understood as 'the exteriorization of the reasoned justification that allows a conclusion to be reached'.⁹⁷ The Court has stated that it is insufficient to merely state that decisions are based on the law, or include mere legal formalities, if the State does not indicate the supposed legal basis and substantiation for the decision during the process, in spite of having ample opportunity to do so.⁹⁸

The Court has yet to resolve the problem regarding the validity of jury verdicts, with respect to the obligation to make substantiated decisions. One part of the doctrine understands that a substantiated conviction includes the obligation to establish a specific jury system (a jury of one's peers), which demands such substantiation, or requires the jury to deliver its verdict together with its reasoning. Another aspect of the doctrine indicates that the jury has a special form of control (jury instructions) and a type of review for the decision, with a similar quality and possibility for the defence, and therefore there is no violation of the ACHR. The issue will continue to be subject to controversy, given that the number of countries that require jury trials is increasing.

Decisions that must be reasoned (a clear and precise expression of the reasons) are all those that affect rights and are carried out in a process subject to the rules of an impartial trial. This means that this rule applies to decisions that courts make in ordinary processes, in special proceedings, and even in administrative proceedings that affect rights (such as those that lead to deportation or resolutions regarding migrants). The Court has said that this applies even to authorities that are not formally courts, but that have characteristics of that nature. This is to say, what creates this obligation is the type of decision and not the formal classification of the authority that issues it.⁹⁹ This is especially true of the Prosecutor's Office; the determining factor is not the type of institution, but rather the type of decision the institution makes. For example,

⁹⁵ *Case of Apitz Barbera et al.*, para. 77. Similarly, *Case of Escher et al. vs. Brazil*, Judgment of July 6, 2009, Series C, No. 200, para. 195, 208; *Case of Tristán Donoso*, Judgment of January 27, 2009, Series C, No. 193, para. 152.

⁹⁶ *Case of Yatama*, para. 152; *Case of Tristán Donoso*, para. 156.

⁹⁷ *Case of Escher et al.*, para. 208; *Case of Chaparro Álvarez and Lapo Íñiguez*, para. 107; *Case of Tristán Donoso*, para. 152; *Case of Apitz Barbera et al.*, para. 77.

⁹⁸ *Case of Baena Ricardo*, para. 111.

⁹⁹ *Case of Yatama vs. Nicaragua*, Judgment of June 23, 2005, Series C, No. 127, para. 149.

when the Prosecutor's Office clearly acts as a procedural subject that petitions the court, it is also subject to the rules of clarity and certainty of its petitions, in order to facilitate the right to defence, but it is not the same duty of reasoned decisions that applies to judges. If procedural legislation grants prosecutors a type of jurisdictional authority, such as the power to order pretrial detention, then the duty to issue reasoned decisions is the same.¹⁰⁰

3.3.6. The right to a full review of a conviction

The ACHR clearly establishes that the possibility to review decisions that negatively affect the accused in the formal criminal process forms part of the right to defence (this is established in articles 4, 7, 8, and 25 of the ACHR). Additionally, the right to appeal a conviction is explicit and central: '[t]he Court considers that the right to appeal a judgment is an essential guarantee that must be respected as part of due process of law, so that a party may turn to a higher court for revision of a judgment that was unfavorable to that party's interests'.¹⁰¹ First, the right must be effective, meaning that it must include a real possibility of revision. Thus, effective defence and respect for guarantees and protections that make up an impartial trial, including the assistance of an attorney, must be ensured during the appeal stage as well.¹⁰²

The Court has reiterated this key point, both in respect of an appeal, as well as in the set of protections that must guide the court's proceedings and decisions, including the protection of the presiding judge:

[S]tate Parties have, under the American Convention, the obligation to provide effective judicial remedies to the victims of human rights violation (Article 25) and that these remedies must be provided in accordance with the principles of due process (Article 8(1)).¹⁰³

¹⁰⁰ The Supreme Court of Peru has developed legal doctrine regarding the constitutional requirement of reasoned decisions and the validity of expressing such reasons orally, in the Plenary Accord N° 6–2011/CJ–116. The substantive part states that, 'to the measure that fulfillment of material and formal premises of a jurisdictional resolution are made known, this prevents the manipulation of legal decisions and guarantees an ideal and reasonable mechanism of documentation, oral decisions in some way affect the goals of achieving reasoned decisions'.

¹⁰¹ *Case of Herrera Ulloa vs. Costa Rica*, Judgment of July 2, 2004, Series C, No. 107, para. 158. Similarly, *Case of Barreto Leiva vs. Venezuela*, Judgment of November 17, 2009, Series C, No. 206, para. 42, and *Case of Vélez Loor*, Judgment of November 23, 2010, Series C, No. 218, para. 179.

¹⁰² *Case of Hilaire, Constantine and Benjamin et al.*, para. 148.

¹⁰³ *Case of Zambrano Vélez et al. vs. Ecuador*, Judgment of July 4, 2007, Series C, No. 166, para. 114; *Case of the Dos Erres Massacre vs. Guatemala*, Judgment of November 24, 2009, Series C, No. 211,

Additionally, the right must be effective. The Court has stated that ‘those remedies that, owing to the general conditions of the country or even the particular circumstances of a case, are illusory cannot be considered effective’.¹⁰⁴ Effective means, as we have said, a real possibility for a review during the process, which must also be decided within a reasonable time and which must be based on reasoned arguments.

A specific point, which has had a significant impact in recent years, tied to the effectiveness of the right, has been the possibility of a full review of a conviction.¹⁰⁵ In general terms, until that decision was issued, in the Latin American region cassation appeal was considered acceptable as a review of a conviction, provided that it allowed for the control of *in judicando* errors (regarding the application of the law), *in procedendo* errors (regarding procedural guarantees and the legality of evidence), and the reasoning of the decision (whether the decision was arbitrary). The Court considered this type of appeal insufficient: ‘Regardless of the label given to the existing remedy to appeal a judgment, what matters is that the remedy guarantees a full review of the decision being challenged’.¹⁰⁶ This decision is leading to a revision of appeals in various countries, although they have yet to design a form that is clearly acceptable. In any event, what the Court indicated is that there must be a way to review how the Court

para. 104; *Case of the ‘Mapiripán Massacre’ vs. Colombia*, Judgment of September 15, 2005 de2005, Series C, No. 134, para. 195; *Case of the Pueblo Bello Massacre vs. Colombia*, Judgment of January 31, 2006, Series C, No. 140, para. 169; *Case of the Ituango Massacres vs. Colombia*, Judgment of July 1, 2006, Series C, No. 148, para. 287; *Case of Goiburú et al. vs. Paraguay*, Judgment of September 22, 2006, Series C, No. 153, para. 110; *Case of Kawas Fernández vs. Honduras*, Judgment of April 3, 2009, Series C, No. 196, para. 110; *Case of Trabajadores Cesados del Congreso (Aguado Alfaro et al.) vs. Peru*, Judgment of November 24, 2006, Series C, No. 158, para. 106; *Case of Chitay Nech et al. vs. Guatemala*, Judgment of May 25, 2010, Series C, No. 212, para. 190, and *Case of Ibsen Cárdenas e Ibsen Peña*, Judgment of September 1, 2010, Series C, No. 151, para. 151; *Case of Vélez Loo*, Judgment of November 23, 2010, Series C, No. 218, para. 143.

¹⁰⁴ *Case of 19 Merchants*, para. 192; *Case of Baena Ricardo et al*, para. 77; *Case of Maritza Urrutia*, para. 111; *Case of Juan Humberto Sánchez*, Judgment of June 7, 2003, Series C, No. 99, para. 122; *Case of ‘Five Pensioners’*, Judgment of February 28, 2003, Series C, No. 98, para. 126; *Case of Las Palmeras*, Judgment of November 26, 2002, Series C, No. 96, para. 58; *Case of Iucher Bronstein vs. Peru*, Judgment of February 6, 2001, Series C, No. 74, para. 136; *Case of Cesti Hurtado vs. Peru*, Judgment of September 29, 1999, Series C, No. 56, cit., para. 125, and *Judicial Guarantees in States of Emergency* (articles 27.2, 25 and 8 American Convention on Human Rights), Advisory Opinion OC-9/87 of October 6, 1987, Series A, No. 9, para. 24; *Case of Abrill Alosilla et al. vs. Peru*, Judgment of March 4, 2011, Series C, No. 223, para. 75.

¹⁰⁵ *Case of Herrera Ulloa*, para. 163.

¹⁰⁶ *Ibid.*, para. 165. This doctrine has been reiterated in the *Case of Mohamed vs. Argentina*, of November 11, 2012.

established the facts of the case, as it is impermissible for an error in the evaluation of proof not to have any form of judicial control.

Finally, in death penalty cases, the Court has been even more demanding, given that States have

the obligation to guarantee that an offender sentenced to death may effectively exercise this right. Accordingly, the State has a duty to implement a fair and transparent procedure by which an offender sentenced to death may make use of all favourable evidence deemed relevant to the granting of mercy.¹⁰⁷

3.4. *Rights and protections tied to the effectiveness of defence*

3.4.1. **Right to investigate the case and propose evidence**

The Court has clearly indicated that defence must be effective. First, this implies that in the process the parties have the real possibility to propose and discuss the evidence. The Court has said that it is necessary to create the greatest possible equality between the parties, for the due defence of their interests and rights. This implies, amongst other things, that the principle of contradiction is respected.¹⁰⁸ This has been emphasized within the Court's own proceedings,¹⁰⁹ and its rules of procedure establish this as well (art. 35, e).

For this to be an effective right, it is important for the accused and his defence attorney to have real opportunities to investigate the case and propose evidence. This requires not only the legal power of having the time and specific procedural opportunities to do so, but also the possibility to undertake investigation and to find evidence. In the case of private attorneys, as well as public defence attorneys, this is a difficulty that must be overcome. The legislation of various countries includes clauses regarding 'assistance', *either from the Prosecutor's Office or from judges themselves*. Nonetheless, even with these legal powers, it continues to be a problem that has yet to be solved. Some public defence bodies have special funds to allow for certain types of evidence

¹⁰⁷ *Case of Hilaire, Constantine and Benjamín et al.*, para. 188. Similarly, *Case of Fermín Ramírez vs. Guatemala*, Judgment of June 20, 2005, Series C, No. 126, para. 188.

¹⁰⁸ *Juridical Condition and Human Rights of the Child*, para. 132.

¹⁰⁹ *Case of Acosta Calderón*, para. 40; *Case of Yatama*, para. 106; *Case of Fermín Ramírez*, para. 43; *Case of the Indigenous Community of Yakye Axa*, para. 29, and *Case of the Moiwana Community Moiwana*, para. 76.

collection, for example for experts, or their own investigators. However, this is still in its early stages and is insufficient.

The Court has indicated that the ACHR requires that an accused may defend his rights and interests effectively and in conditions of procedural equality with the other parties in the process.¹¹⁰ The Court has used, as we have seen, the adjective ‘adequate’ to characterize the defence.¹¹¹ It has also used the phrase ‘actual defence’, rejecting the apparent defence and demanding a ‘diligent’ defence.¹¹² All of these adjectives and phrases thus suppose the right to ensure an effective defence, meaning the right to a proactive defence, rather than one that merely criticizes the prosecution.

3.4.2. The right to sufficient time and possibilities to prepare one’s defence

As we have seen, the Inter-American Court has reiterated that there is not only a right to defence, but rather to an effective defence. Thus, the defence must be timely, meaning that it must have sufficient time to enable it to be effective. States may not ‘prevent a person from exercising his right to defence from the moment the investigation against him begins and the authority in charge orders or executes actions that imply any curtailment of rights’.¹¹³

The exercise of defence should not only be permitted, but favored. It is a violation to impede communication between the accused and the defence attorney in any way. In this regard, the Court has stated,

[t]his particular case illustrates how the work of the defence attorneys was shackled and what little opportunity they had to introduce any evidence for the defence. In effect, the accused did not have sufficient advance notification, in detail, of the charges against them; the conditions under which the defence attorneys had to operate were wholly inadequate for a proper defence, as they did not have access to the case file until the day before the ruling of first instance was delivered. The effect was that the presence and participation of the defence attorneys were mere formalities. Hence, it can hardly be argued that the victims had adequate means of defence.¹¹⁴

¹¹⁰ *Case of Hilaire, Constantine and Benjamin et al. vs. Trinidad and Tobago*, judgment of June 21, 2002, series C, No. 94, para. 146.

¹¹¹ *Case Baena Ricardo et al. vs. Panama*, judgment of February 2, 2001, series C, No. 72, para. 92; *Case of Fermín Ramírez vs. Guatemala*, judgment of June 20, 2005, series C, No. 126, para. 78.

¹¹² *Case of Cabrera García and Montiel Flores*, judgment of November 26, 2010, series C, No. 220, para. 155.

¹¹³ *Ibid.*, para. 154.

¹¹⁴ *Case of Castillo Petruzzi et al. Vs. Peru, Judgment of May 30, 1999*, Series C, No. 52, para 141.

3.4.3. Equality of arms in the production and control of evidence and the development of public, adversarial hearings

The jurisprudence cited above establishes that one of the conditions of an impartial trial consists in actual contradiction. This requires, for example, ‘the right of defendants to examine witnesses against them and those testifying on their behalf, under the same conditions as the State, with the purpose of defending themselves’.¹¹⁵ ‘Imposing restrictions on the alleged victim and the defence lawyer violates this right, established in the Convention, and also their right to call witnesses who might shed light on the facts’.¹¹⁶

Additionally, the Inter-American Court has insisted that a truly impartial trial (due process) must guarantee equality between the parties of the subjects. The Court has indicated that ‘[t]he presence of real disadvantages necessitates countervailing measures that help to reduce or eliminate the obstacles and deficiencies that impair or diminish an effective defence of one’s interests’.¹¹⁷ Obstruction of justice that is manifested in obstacles to the reception of admissible evidence constitutes a violation of the American Convention, inasmuch as it affects the right to defence.¹¹⁸ The Court has also recently indicated that the special measures of investigation, such as unnamed witnesses, must be established with care and sufficient protections.¹¹⁹

¹¹⁵ *Case of Dacosta Cadogan v. Barbados*, Judgment of September 24, 2009, Series C No. 204, para. 84.

¹¹⁶ *Case of Lori Berenson Mejía*, cit., para. 185. See also, *Case of the Yakya Axa Indigenous Community*, para. 117; *Case of Ricardo Canese*, cit., para. 164 y 166, and *Case of Castillo Petruzzi et al.* para. 155.

¹¹⁷ *Legal Condition and Rights of Undocumented Migrants*, para. 121; *The Right to Information and Consular Assistance in the Framework of Legal Due Process Guarantees*, para. 117 and 119; and *Case of Hilaire, Constantine and Benjamin et al.*, footnote 131.

¹¹⁸ *Case of the Yake Axa Indigenous Community*, para. 116 and 117; *Case of Lori Berenson Mejía*, para. 167; *Case of Ricardo Canese*, para. 164; *Case of Myrna Mack Chang*, para. 164-211; *Case of Las Palmeras*, para. 57; *Case of the Constitutional Court*, Judgment of January 31, 2001, Series C, No.71, para. 83; *Case of Cantoral Benavides*, para. 127; *Case of Castillo Petruzzi et al.*, para. 153, and *Case of the ‘Panel Blanca’ (Paniagua Morales et al.)*, Judgment of March 8, 1998, Series C, No. 37, para. 150.

¹¹⁹ The Court will also take into account if in concrete cases the State ensured that the affectation of the right to defence of the accused as a result of failure to identify witnesses was sufficiently compensated for by countervailing measures, such as the following: a) the legal authority must know the witness’ identity and have the possibility to observe his behavior during questioning in order to develop his own opinion regarding the trustworthiness of the witness and his testimony, and b) the defence should be provided a broad opportunity to directly question the witness during one of the stages of the proceedings, regarding questions that are not related to his identity or current location, in order to allow the defence to view the witness’ behavior while being questioned, in

3.4.4. The right to a trusted interpreter and the translation of documents and evidence

At all times the accused must have complete access to the necessary information for his defence, which must be comprehensible and easily accessible. Doubtless, the first problem to resolve is the language barrier. The Inter-American Court has faced such cases regularly, not only when foreigners are involved, but also with respect to indigenous peoples, who in some countries in Latin America form a large portion, if not the majority, of the population. On this topic, the Court has said:

The Court notes that foreigners detained in a social and juridical environment different from their own, and often with a language unknown to them, experience a situation of particular vulnerability. The right to information on consular assistance, in line with the conceptual universe of human rights, attempts to remedy this so that the detained foreigner may enjoy true access to justice and benefit from due process of law, on an equal footing with those not having those disadvantages, conducted with respect for the person's dignity. To accomplish its objectives, the judicial process must recognize and resolve any real disadvantages faced by those brought to justice. This is how the principle of equality before the law and the courts, and the correlative prohibition of discrimination are addressed. The existence of conditions of true disadvantage necessitates countervailing measures to help reduce or eliminate the obstacles and deficiencies that impair or diminish an effective defence of one's interests.¹²⁰

In this regard, among the compensations that must be granted to facilitate a defence and preserve the conditions of equality required by an impartial trial, are that:

an interpreter is provided when someone does not speak the language of the court, and [that a] foreign national is accorded the right to be promptly advised that he may have consular assistance. These measures enable the accused to fully exercise other rights that everyone enjoys under the law. Those rights and these, which are inextricably inter-linked, form the body of procedural guarantees that ensure the due process of law.¹²¹

4. Final Considerations

The Inter-American Court has considered the issues of a fair trial, just trial, or due process in many decisions. As the Court has used the concept of a fair or just trial, or

order to discredit it, or at least raise doubts regarding the trustworthiness of his testimony (in *Case of Norín Catrیمان et al. Vs. Chile*, Judgment from May 29, 2014).

¹²⁰ *Case of Vélez Looz*, Judgment from November 23, 2010, Series C, No. 218, para. 152.

¹²¹ *The Right to Information regarding Consular Assistance in the Framework of Legal Due Process Guarantees*, para. 120

due process, to refer to the rights of all parties, whether in criminal processes or others, it has been able to develop the concept of fair trial to a large degree. In what it refers to as the special protection of the accused within the criminal process, the Court has had the opportunity to ratify and clarify the ACHR norms, but it has not advanced much beyond that stage.

This has occurred, to a large extent, because the Inter-American Court has faced cases where the violation of the rights of the accused was serious and evident. A large majority of cases that have reached the Court have concerned defendants subjected to exceptional criminal regimes, such as terrorist or drug trafficking regimes, or which have involved the death penalty. In spite of this limitation, the Court has clearly established the international requirement of an effective criminal defence, and has indicated several key points in that respect. It has also cited other documents that more clearly define the requirements of a timely, adequate, and effective defence.

In the Latin American context, the use of Court precedent is varied and weak. However, without a doubt, in recent years there has been a more progressive use of Court decisions by high courts in various countries. However, within each national reality, there is not a clear and precise respect for precedent. Even in countries that, thanks to the French tradition, maintain systems of obligatory jurisprudence, tribunals are not always precise in applying this legal doctrine, and tend not to know it in depth, either due to the conceptualist tradition of legal teaching, or because of the abuse of *obiter dictum* in decisions that should determine precedents.

As we indicated in the introduction, this set of variables, unique to the Latin American region, constitute limitations, but also provide a framework to address challenges to access to effective criminal defence. These challenges place us in a special period of strengthening of the right to defence in general, and public defence in particular. There is still a long road ahead, but starting the process of clearly determining the parameters of an effective defence, and discussing their continuous broadening, based on the progressive application of human rights is, doubtless, one of the most important tasks that we face.

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PART II

NATIONAL APPROACHES TO EFFECTIVE CRIMINAL DEFENCE

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CHAPTER 3. COUNTRY ANALYSIS. ARGENTINA^{1,2}

1. Introduction

1.1. Political and demographic information

Argentina has a population of 41,281,631.³ It is made up of 24 provinces and the Autonomous City of Buenos Aires, which has a special government regime.

¹ Sebastián R. Narvaja guided this research. The research team was made up of Lucas Gilardone as lead researcher (lawyer from the National University of Cordoba, member of the Institute of Comparative Studies in Criminal and Social Studies, INECIP, LLM in Human Rights from Central European University, Budapest (2008)), and Celeste Leonardi (lawyer from the National University of La Plata, master's candidate in human rights from the same), Federico Espiro (lawyer from the National University of La Plata and current adjunct prosecutor in Chubut province), Luciano Caliva (lawyer from the 21st Century Business University and member of the Institute of Comparative Studies in Criminal and Social Studies), and Magli Vereda (lawyer from the National University of Cordoba and member of the Organized Front Against the Criminal Code). This chapter was revised by Alfredo Pérez Galimberti and Francisco G. Marull.

² Translator's note: A note on citations and terminology. In this chapter, textual translations from domestic sources (laws, court decisions, quotes, etc.) are unofficial, internal translations. In many Latin American countries, when a person is charged or indicted (a form of charging that, unlike the US version, does not involve a grand jury) he is referred to as an '*imputado*' for the relationship with the '*imputación*' (indictment). There is then a second phase, in which the *imputado* becomes an *acusado*, which is when the prosecutor brings him to trial (*lo acusa*). In US legal terminology, a person is a defendant or accused from the time that he is charged with a crime, and there is no differentiation between these two stages (*imputación* and *acusación*). Thus, in this chapter, I have used the word 'accused' to refer to an individual who has been formally charged (*imputado*) with a crime, and 'defendant' when the accused is brought to trial as an *acusado*.

³ Projection based on the 2010 census.

This study is based on three jurisdictions: Cordoba, located in the centre of the country, with a population of 3,304,825, of which around 1,300,000 live in the capital city of Cordoba. Chubut is in Patagonia, in the south of the country. Of its 506,668 inhabitants, approximately 180,000 live in Comodoro Rivadavia and around 40,000 live in the provincial capital, Rawson. The province of Buenos Aires is located toward the centre-east of the country, and has a population of 15,625,024, the majority of which live in and around Buenos Aires. The capital is La Plata, with a population of 654,324.

Argentina obtained its independence from Spain between 1810 and 1816, but only managed to adopt a National Constitution in 1853. It established a representative, republican, and federal government, with a period of civil-military dictatorships that began in 1930 and ended in 1983 when democracy was reinstated. This process was consolidated with a constitutional reform in 1994, which incorporated a series of international human rights treaties.

1.2. Selection of jurisdictions

The Cordoba, Chubut and Buenos Aires provinces are representative of three different points in the process of reform of criminal justice. Cordoba was a pioneer of the reform movement, but has not sufficiently implemented the reforms it adopted, and has suffered serious setbacks in the reform movement; Chubut has advanced further and has the best national indicators; and Buenos Aires is at an intermediate point, and suffers from vast disparities between its main cities. The variation in reform processes makes it impossible to provide a comprehensive analysis of the entire country.

1.3. Description of the criminal justice system.

Organizational structures and reforms

Each province has its own justice system. The basic criminal legislation covers the entire country, but procedural codes are adopted on a provincial basis.⁴ Argentina inherited inquisitorial procedural systems from the Spanish colonizers, which are characterized by their formality and secrecy; they are led by an investigating judge,

⁴ There is a federal system of justice with jurisdiction for exceptional cases, in general, those that involve questions that affect that national State.

involve limited participation by the defence, and embody a bureaucratic logic centred on a formal, written case file.⁵

In 1939 Cordoba undertook a reform process with a new procedural code. It left the investigation in the hands of the presiding inquisitorial judge, but established a public trial before a collegiate tribunal, with a prosecutor, and the right to defence for the defendant.⁶

When democracy was reinstated in 1983, there was a new wave of procedural reforms designed to move forward with the constitutional plan and the advances achieved in the 1930s. This process has developed and continued in a dynamic, fragmented way, with different timescales in each provincial jurisdiction and at the federal level.

The changes in each jurisdiction do not respond to homogenous political programs (such as national constitutional reforms), but rather they have advanced through the activism of experts and academics, social movements sparked by cases of impunity or the abuse of public forces, and jurisprudence of the courts - of the National Supreme Court of Justice (CSJN) or of the Inter-American Court of Human Rights.

Cordoba began the implementation of a new procedural system between 1991 and 1998. These reforms assigned criminal investigations to the Prosecutor's Office,⁷ strengthened the system of oral trials, incorporated a system of popular participation in trial courts (formed by three professional judges and two lay citizens), broadened defence rights and the recourse to request a review of decisions, and established a judge to control constitutional guarantees during the investigation. However, two aspects retained an inquisitorial quality: prosecutors could autonomously order pre-trial detention, and trial judges entered the trial 'contaminated' with the prosecutor's investigation (and case theory), because the prosecutor formalized his investigation in a case file that he then sent to the trial court. Additionally, the information in this case file was often included as evidence at trial, replacing witness or expert testimony and making it difficult to cross-examine them.

In 2005, jury trials were introduced for serious cases,⁸ which were made up of three professional judges and eight citizens, who resolved issues regarding fact,

⁵ Traditional forensic language identified the case with 'the cause', understood as the written document, the case file.

⁶ This new code had a large influence in many Argentinean provinces and other countries in the region, for example, in Costa Rica. See, LANGER 2008. Also, Vélez Mariconde 1969, pp.169-194.

⁷ Except when the accused has constitutional privileges, in which case the trial judge will investigate.

⁸ Typically, homicides, serious sexual crimes and some crimes of public officials.

law, and the sanction. This strengthened public trial because it prevented juries from accessing the case file, and all evidence was introduced at trial.

In Chubut, the reform process began in 1999, but was not implemented due to judicial opposition to the new model of the College of Judges (*colegio de jueces*) (which was to be approved in that year).⁹ The College of Judges is a key organizational mechanism for making judicial organization more horizontal, a key tenet of a democratic judiciary.¹⁰ In 2006, a new Code was approved.¹¹ The transition was completed in 2009, and the new system is operative. Chubut today has the most adversarial and accusatory system in place in Argentina. Its public defence system is perhaps the best structured in the country.

Buenos Aires reformed its Code in 1998 and approved a set of laws that formed an adversarial system, particularly in the organization of its prosecutor. It underwent a counter-reform process in 2003, which granted prosecutors excessive powers to restrict personal liberty.

Cordoba and Buenos Aires maintain a rigid organizational structure, with hierarchical formalistic courts, and an excessive emphasis on the bureaucratic culture of the case file. Prosecutors in these provinces work in the same way and with the same tendencies, which limits their investigatory capacity, which they delegate to the police.

By contrast, in Chubut, judges are organized in chambers and fulfill various duties in rotation. This has ‘radicalized’ orality as¹² the main method of decision-making. The organizational culture has become less formalized, and more horizontal, as the central elements in decision-making are produced in a hearing that the judge presides over, and not in a bureaucratic process. The length of each case is reduced, and exercise of the defendant’s rights is made easier.

⁹ Law V 127 2, 3 and 4. A single criminal judge may control legal protections, address appeals regarding infractions, carrying out the decision, or the trial, with respect to cases with sanctions up to six years, or private actions, and, together with two or three judges, to resolve challenges to decisions of another judge of the same level, such as in the case with pretrial detention. The chamber judges address broad appeals from defendants against a conviction, the denial of a suspended sentence, or abbreviated trial. See the Code of Criminal Procedure of Chubut, 71 and 72.

¹⁰ In the national context, a large part of violations to judicial independence do not stem from the intervention of other government branches, but rather from the affectation of internal autonomy, meaning pressures from higher courts. These manifestations tend not to be jurisdictional mandates, but rather informal pressures or via administrative measures. For detailed information, see Binder 2002.

¹¹ Inspired in the first code and a 2005 INECIP project.

¹² Schiappa Pietra 2011, p. 25.

In the other provinces there is a range of judicial officers: correctional judges, who deal with cases involving sanctions up to three years (six years in Buenos Aires), or private actions;¹³ judges responsible for controlling legal protections to ensure both legality and defendant's rights during the pretrial investigation;¹⁴ trial judges;¹⁵ and criminal enforcement judges.¹⁶ In Cordoba there is a specific tribunal to appeal trial judge decisions and resolve issues of jurisdiction between lower courts,¹⁷ and the Criminal Chamber of the High Court of Justice (TSJ) resolves cassation petitions, petitions of unconstitutionality, and reviews sentences.¹⁸ In Buenos Aires there is a specific tribunal for cassation petitions,¹⁹ and the Provincial Supreme Court addresses extraordinary petitions (SCPBA).²⁰ In all cases, the highest court of appeal is the CSJN.

The task of investigating and filing charges is the responsibility of the prosecutor in each of the three provinces.²¹ In Chubut, the prosecutor can investigate and litigate each case;²² while in Cordoba the instructing prosecutor (*fiscal de instrucción*) investigates and the chamber prosecutor (*fiscal de cámara*) litigates. In Buenos Aires, the prosecution agent investigates and litigates, although in practice there is one prosecutor for the litigation and another for the trial.²³

In each of the three provinces in the study, the presence of an attorney is guaranteed from the start of the investigation, although there tends not to be extensive interaction between public defenders and private attorneys.

Judicial decisions are strictly applicable to the individual case, and do not have *ergo omnes* effects, although provincial and federal courts that resolve cassation petitions, as well as the CSJN, have the duty to unify jurisprudence regarding specific

¹³ Code of Criminal Procedure of Cordoba, CPPC 37; Code of Criminal Procedure of Buenos Aires, CPPBA 24.

¹⁴ CPPC 36; CPPBA 23.

¹⁵ Called chamber judges (de cámara) CPPC 34; CPPBA 22.

¹⁶ CPPC 35 bis; CPPBA 25.

¹⁷ Called the accusatory chamber (CPPC 35).

¹⁸ CPPC 33.

¹⁹ CPPBA 20.

²⁰ CPPBA 19 and title V.

²¹ CPPC 71; CPPCH 112; CPPBA 56.

²² In each court district, the prosecutor is divided into three agencies: investigations, plea deals, and complex crimes, with one or more prosecutor and other personnel. In complex cases the investigating prosecutor also presents at trial. Less serious cases often lead to alternatives to trial.

²³ CPPCH 112; CPPC 73, 75; CPPBA 59. In Buenos Aires, the differences between investigation and trial prosecutors are not included in criminal procedure norms.

points of law. Nonetheless, lower courts have the authority to rule differently, as the obligation to follow such jurisprudence is moral rather than legal.

It is difficult to obtain quality information on the judiciary, given that there is a weak tradition of academic research on the topic and an institutional lack of interest in the production of quality information. This creates a poor perspective in discussions and decisions regarding judicial reform policies. Nonetheless, there are efforts from civil society experts and a network of reform-minded experts to guide the process based on reliable information.²⁴

1.4. Description of the criminal process. Procedures and reforms

The three provinces have an accusatory system, although with marked differences at a normative as well as a practical level. Criminal procedure codes structure the process, as well as define the tasks of justice system bodies.²⁵ Chubut and Buenos Aires have adopted organic defence laws to grant them independence from other institutions; while in Cordoba there is not an organic law of public defence.²⁶

1.4.1. Beginning the criminal prosecution process

In Cordoba, formally, the criminal investigation begins with the accused's statement and lasts for three months. The prosecutor can request the judge to grant another three months, or twelve in serious and complex cases.²⁷ In Buenos Aires, it begins with

²⁴ In this context, the regional dimension that the Latin American network of reform experts provided has been fundamental, promoting investigation and the dissemination of public policy analysis tools regarding criminal justice. Therefore, the CEJA's role, as well as the material it provided, along with other organizations that promote research and disseminate results and recommendations for decision making in local policies. For example, *see* LANGER 2010.

²⁵ Law No. 8.123, CPPC; Law No. V 9, CPPCH; Law No. 11.922, CPPBA.

²⁶ Law No. V 90, Organic Law of the Chubut Public Defence Ministry (LODP-CH); Law No. 14.442 (LODP-BA); Law No. 7.192 of Free Legal Assistance in Cordoba (LAJG). The National Constitution establishes a model of two differentiated Public Prosecutor's Offices, the National Attorney General, who serves as the supervisor of all prosecutors, and the National Defence Attorney General supervises all defence attorneys. Each province organizes its own justice system, but recognizes an implicit mandate regarding the model of the organizational structure for public defence systems, which is the opposite of the former historical model in which public defenders depended on judges or superior prosecutors. Only Chubut and the new law of Buenos Aires replicate this former model. (National Constitution 120).

²⁷ CPPC 337.

the accused's detention or plea, and lasts for four months, which the judge may extend by two more months, and in exceptional cases, up to six months.²⁸ In both provinces charges must be lifted if the investigation has not been completed during that time-frame. Nonetheless, judges have interpreted these deadlines as guidelines, divesting them of all practical effect.²⁹

In Chubut, the prosecutor formalizes the opening of an investigation, which lasts for six months. The judge may authorize up to four more months if the number of accused or investigatory challenges justify it. If the prosecution cannot complete a certain measure during that time, he may request up to four additional months. Once this deadline has past, the investigation is closed.³⁰

1.4.2. Indictment³¹ and freedom

In Cordoba, the prosecutor determines whether there are sufficient reasons to believe that an individual has committed a given crime. Upon such a determination, the prosecutor formally indicts the individual, and interrogates him regarding the reason for the indictment and his rights.³² He may order pretrial detention, and the defence may challenge this before a judge via a written motion. Generally, judges confirm the prosecutor's decision.³³ The procedure is written, cumbersome, and prolonged, while the accused remains imprisoned.

In Buenos Aires, the prosecutor must request pretrial detention before a judge.³⁴ Nonetheless, this does not prevent judges from confirming prosecutor's requests, as in Cordoba.³⁵ In Chubut, the prosecutor decides whether to formally open an investigation, reject the complaint or police report, close the case, continue prosecution,

²⁸ CPPBA 282, 283.

²⁹ The police only directly intervene in cases of *in flagrante delicto*: they collect evidence and interrogate suspects and witnesses (although in Cordoba and Chubut they may only do so to identify them). If they have sufficient evidence to open a formal investigation, the police send the information collected to the Prosecutor's Office. CPPC 304, 314, 276; CPPCH 261, 266; CPPBA 268. CPPC 321, 326; CPPCH 266; CPPBA 269, 293, 297.

³⁰ CPPCH 274, 282, 283.

³¹ Translator's note: As mentioned above, here, indictment (*imputación*) is a form of charging an individual with a crime, but does not, as in the US legal system, involve a grand jury.

³² CPPC 306.

³³ CPPC 269, 338.

³⁴ CPPBA 146, 158.

³⁵ CPPCH 269.

or call a conciliation hearing. In the first case, the judge calls the accused to a public, oral hearing to formally inform him of his indictment and ensure his defence.³⁶ If the accused was detained, the judge will call a control hearing within 48 hours to determine if he will remain in detention. While in Cordoba and Buenos Aires the discussion regarding pretrial detention occurs when the accused is already in detention, in Chubut pretrial detention is not determined without a prior hearing.

Chubut and Buenos Aires have laws regarding the criteria that permit the prosecutor to drop a case for reasons concerning criminal justice policies, although these are only used consistently in Chubut.³⁷ In Cordoba, the law requires prosecutors to investigate all cases, although in practice they abandon a large number of them.³⁸ Informally, prosecutors admit that they only investigate cases where the alleged criminal is detained, that relate to a particular complainant, involve serious crimes, or in which public officials are implicated.³⁹

In Chubut and Buenos Aires legislation provides for the adoption of alternative measures, such as conciliation or reparation, from the beginning of the case.⁴⁰

1.4.3. Bringing an accused to trial

If the prosecutor determines that the investigation is complete, and has sufficient evidence, he will ‘*acusar*’ (a second form of charges, second to the *imputación* or indictment/filing of charges)⁴¹ the accused, and the case will go to trial. If he does not have sufficient evidence, he closes the case (in Cordoba) or requests the judge to drop it (in Chubut and Buenos Aires).⁴² The charge must include the accused’s personal details, a clear, precise, and specific description of the facts, the basis for the charges and the category of crime the facts constitute. In Buenos Aires, it must also identify

³⁶ CPPCH 274. This is also decided via hearing in later stages, CPPCH 219, 223.

³⁷ CPPCH 44; CPPBA 56, 56 bis.

³⁸ CPPC 5.

³⁹ The rest of the cases are typically closed due to the statute of limitations. This impacts the case selection and encourages a criminal selectivity focused on the persecution of crimes that allow for pretrial detention.

⁴⁰ CPPCH 47, 48; CPPBA 56 bis.

⁴¹ Translator’s note: For information regarding the difference between the indictment/filing of charges/*imputación* and this form of charging/*acusación*, in which the individual is brought to trial, see footnote 2.

⁴² CPPC 354, 348, 350; CPPCH 284, 291, 285; CPPBA 334, 334 bis, 323.

circumstances that allow for the specific categorization of the crime.⁴³ In Chubut, the prosecutor must include the name and address of the defence attorney, the evidence he plans to introduce, the circumstances that will allow for the determination of the sanction or precautionary measure (with evidence to substantiate it) and the proposed sanction.⁴⁴

This leads to the opening of an intermediate stage to control the basis of the charges and the admissibility of evidence. In Cordoba and Buenos Aires, both the prosecutor's charges and the defendant's motions must be written; the judge decides the questions posed and decides whether to bring the case to trial.⁴⁵ Both the defendant as well as the prosecutor may appeal the judge's decision.⁴⁶ The process is written, formalistic, and slow. This prevents a quality litigation regarding the motions and admissibility of the evidence.

In Chubut, the litigation regarding the justification and content of the charges is undertaken in an oral hearing in which the judge determines each issue. The decision to open a case may not be appealed. Only the final conviction or exoneration may be challenged in a higher court.⁴⁷

1.4.4. The trial

In all three provinces, trials are oral and public.⁴⁸ In Cordoba and Buenos Aires, judges do not take an impartial role, and often intervene in the interrogation, asking the witnesses questions. The prosecutors tend to limit themselves to reproducing the files regarding the formal investigation, while defence attorneys tend to merely criticize the prosecutor's evidence. Normally defence attorneys do not have their own theory of the case with an investigation to support it.

By contrast, the practice in Chubut has adapted more closely to the adversarial system. The parties are more active in the construction and presentation of their cases,

⁴³ CPPC 355; CPPBA 335.

⁴⁴ CPPCH 291.

⁴⁵ CPPC 357, 358; CPPBA 336, 337.

⁴⁶ CPPC 358, 352; CPPBA 337, 325.

⁴⁷ CPPCH 295, 297, 298.

⁴⁸ There is a type of 'fast track trial', in which the accused and his attorney agree with the prosecutor and judge to assume some criminal responsibility and avoid trial, in exchange for a level of certainty and reasonability of the conviction. A majority of cases are resolved using this proceeding, which is similar to plea bargains.

and excessive intervention by judges provides a basis for challenging a guilty verdict. If the judge convict the defendant, he may appeal the decision.

The national and provincial constitutions have emphasized the centrality of the trial. The CSJN, in *dictum*, has ratified that ‘the criminal process of a horizontally organized judicial system may not take any form other than a public, adversarial trial. Thus, our Constitution sets oral, public trial by jury as a goal’. The national constitution, as well as provincial constitutions, emphasis the centrality of the trial.⁴⁹ Furthermore, the CSJN emphasized the importance of the evidence presented at trial, stating that ‘the evident violation of the right to defence that occurs when the court incorporates prosecutorial testimony by reading, makes it futile to examine the other complaints of the appellant, invoked from the perspective of orality, publicity, and immediacy of the debate’.⁵⁰ Unfortunately, courts in Cordoba and Buenos Aires continue to approve of the reading of previously obtained testimony into the record.

1.4.5. Victims and their rights

The three codes provide for the participation of victims before and during the trial. They have the right to present evidence, obtain information, and even move the criminal action forward as individual complainants. They can control and participate in decisions regarding the defendant’s liberty of movement and request and control precautionary measures.⁵¹

1.4.6. Judicial control of rights protection

In each of the three provinces, judges have the task of controlling the defendant’s rights and guarantees during the investigation. In practice, judges rarely contradict the prosecutor’s conclusions and petitions. Only in Chubut is there greater diligence in fulfilling this role. In Cordoba and Buenos Aires, the traditional structure of control judges assigned to a prosecutor generates a dynamic of camaraderie in which judges avoid conflicts with those that they consider their co-workers. This negatively impacts on their position of impartiality.

⁴⁹ CSJN, C. 1757 XL, *Casal, Matias Eugenio y otros/ robo simple en grado de tentativa—Causa 1681C*, Judgment of September 20, 2005.

⁵⁰ CSJN, B. 1147 XL, *Recurso de hecho deducido por la defensa de Anibal Leonel Benítez en Benítez, Anibal Leonel s/ lesiones graves—Causa 1524C*, Judgment of December 12, 2006.

⁵¹ CPPC 96; CPPCH 15; CPPBA 83.

1.5. *Social and political problems related to criminal justice*

Official data indicates that 6.1 per cent (33 per cent, or 18.2 per cent according to other data sources) of Argentines live below the poverty line.⁵² According to these numbers, the poor are overrepresented both in prisons and as victims of crimes. The ethnic composition of the country is predominately white, of European ancestry (85 per cent of the population), with 11 per cent *mestizos*, 1 per cent indigenous and 3 per cent belonging to other ethnicities.

There is a high perception of insecurity, although criminal statistics suggest that crime levels are not particularly high for the region.⁵³ This perception translates into social and media pressure to increase imprisonment which, along with other factors, leads to the excessive use of pretrial detention.

Argentina suffered terrorist attacks in 1992 and 1994, the culprits of which have not been caught. The country adopted anti-terrorist laws in 2007⁵⁴ and 2011,⁵⁵ which reflect the emergencies during and around September 11, 2001. Social and human rights organizations question these laws, maintaining that they criminalize social protest and perceive them as a threat in situations of conflict, referring to the fact that peasant and indigenous groups are resisting displacement from their lands at the hands of powerful businessmen, which has led to the unresolved death of several peasant and indigenous leaders in recent years. This fear does not seem to be misplaced, if

⁵² See INDEC 2013. The government suspended the publication of such numbers (www.indec.gov.ar/desaweb/uploads/gacetillasdeprensa/gacetilla_24_04_14.pdf). According to CIPPES, in 2013 devaluation increased this percentage to 33%; and 18.2% according to the CTA.

⁵³ According to official statistics, the rate of criminal homicide has decreased from its height of 9.2/100,000 in 2002 to 5.5/100.000 in 2009, the last year for which such information has been collected. See MinJus 2013.

⁵⁴ Law No. 26.268, promulgated on July 4, 2007, incorporated article 213(3), which imposes 5 to 10 years of imprisonment against those who form part of an illicit organization who terrorizes the population through crimes or requires the government or an international organization to take or refrain from taking certain actions, and 5 to 15 years to those who finance such organizations but do not commit any acts of terrorism. <http://infoleg.mecon.gov.ar/infolegInternet/anexos/125000-129999/129803/norm.htm>.

⁵⁵ Law No. 26.734 substitutes article 213(3) for 41 Quinquies, which doubles the sanction for any crime committed in order to terrorize the population or force national public authorities or foreign governments or agents of an international organization to take or refrain from taking any action. <http://infoleg.mecon.gov.ar/infolegInternet/anexos/190000-194999/192137/norm.htm>.

one considers that in Chile there have been dozens of arrests based on the antiterrorist law that criminalizes the Mapuche protests.⁵⁶

1.6. *Methodology*

Researchers studied the norms and jurisprudence of each of the three provinces, and requested reports from public offices, although several did not respond to their requests in a timely, appropriate manner.⁵⁷ The information refers to provincial totals, although interviews and statistical and empirical information refers to the cities of Cordoba, Trelew, Comodoro Rivadavia and La Plata, which is indicated in each case. Difficulties in accessing official information are notorious; in some cases it does not exist or is irrelevant, and in other cases there is not a culture of transparency.

Between July 24 and November 8, 2014, researchers interviewed judges, prosecutors, defence attorneys, attorneys, and imprisoned individuals. In Cordoba city researchers interviewed 14 people;⁵⁸ in the city of La Plata, 11 people;⁵⁹ and in the city of Trelew, 9 people.⁶⁰

⁵⁶ In 2002, members of the Coordinator of Aruako Communities in Conflict were convicted under an anti-terrorist law, which included the suppression of procedural guarantees for Mapuche defendants and permitted the secrecy of the investigation during six months, prolonged pretrial detention, and the use of faceless witnesses as the primary source of incriminating evidence (Mella Seguel 2007, p. 106).

⁵⁷ In Cordoba, researchers requested information from the Supreme Court of Justice, the Prosecutor's Office, the Administrative Management of the judiciary (the three offices forwarded the requests to other officials who, in the best of cases, admitted that they did not have such information), from the Office of Administrative Dockets of the judiciary (which referred to the statistics of the Office of Research and Projects of the judiciary), from the judiciary Director of Administration, from the Attorney Bar Association and the Tribunal of Attorney Discipline. In Chubut, researchers requested information from the Public Defence Office, from the Attorney Bar Association of Trelew and Comodoro Rivadavia. In Buenos Aires, researchers requested information from the Secretariat of Criminal Policy of the Attorney General, the Office of Statistics/Secretariat of Personnel, the Undersecretary of Administration, the Undersecretary of Criminal Policy of the Ministry of Justice and Security, which deferred to the Police Superintendent and from there to the Operative Secretary (file office), from the Ombudsman Office and the Ministry of Security.

⁵⁸ A trial judge, a guarantee control judge and a judge of enforcement, two instructional and trial prosecutors and a public defender of those accused and one of those convicted, four attorneys (three of them specifically trained for litigation in adversarial contexts), and three detainees.

⁵⁹ Three judges, a prosecutor, two public defence attorneys, two private attorneys and two former detainees.

⁶⁰ Two judges, two prosecutors, two public defenders, an attorney and two detainees.

2. Free legal assistance

2.1. *Expenditures on defence*

2.1.1. Public defence expenditures by jurisdiction

There is no comparable information between the three provinces in the study because their budgetary design reflects differences in institutional organization, either because the Public Defence Office is located within the Judiciary, or because it does not distinguish between the general functions of the public defence offices and those specifically related to criminal matters.

In Cordoba, only information regarding the entire judiciary budget was available, which amounted to 255,538,153.31 USD, but the information available did not indicate how much of this was dedicated to public defence.⁶¹

In Buenos Aires, the budget for Public Defence in the year 2012 was 73,969,181.18 USD, although it did not differentiate between civil work and criminal defence.⁶² The Public Defence Office of the Appeals Courts had a budget of 1,765,731.70 USD. This indicates an expenditure of some 1.52 USD per person on public defence in general, and 0.11 USD per person on the Appeals Courts Public Defence Offices.

In Chubut, Public Defence had an annual budget of 23,785,032.58 USD in 2013 (which is 3.26 per cent less than the Prosecutor's Office, with 24,586,809.76 USD). The budget also does not identify the amount that is dedicated to criminal defence.⁶³ These numbers indicate an expenditure of 46.94 USD per person for public defence.

⁶¹ The official Exchange rate of the dollar at the time of analysis was 1 USD = \$ 5.74. The province reported a budget of \$ 1,466,789,000 for the entire Judiciary. See PresCba 2013, p. 453. Regarding the number of advisers, see PresCba 2013, p. 164. An example of the reduced budget of the Public Defence Office can be seen in the account for daily expenses. During 2102, 8,891.41 USD was spent on daily expenses for public defenders, while some USD 10,235.89 are projected for 2013. According to the report of the Administrative Director of the Judiciary of Cordoba, (DAAPJ), \$ 51,036.70 were budgeted for 2012 and \$ 58,754 for 2013.

⁶² According to a report of the Public Ministry (which houses the prosecution and the public defence office) from December 28, 2012, \$ 10,135,300 was designated for defence offices of Appeals Courts and \$ 424,583,100 for departmental offices of public defence.

⁶³ The province reports a Public Defence Office budget of \$136,526,087, of which \$89,540,349 was designated for personnel. Comparatively, the Office of the Public Prosecutor had a budget of \$ 141,128,288, and a salary budget of \$ 123,146,088. Source: <http://www.defensachubut.gov.ar/prensa/?q=node/7276>.

2.1.2. Income of public defenders compared with other actors

Public defenders in Cordoba received between 5,510 and 5,987 USD,⁶⁴ depending on their seniority, which is equivalent to 8.78 a 9.55 times the minimum wage.⁶⁵

In Buenos Aires, public defenders receive between 2,885 and 6,224 USD,⁶⁶ depending on their seniority, which is equivalent to 4.6 to 9.9 times the minimum wage.

In Chubut, public defenders receive basic salaries of 4,162 USD, while associated attorneys receive around 2,992 USD, equivalent to 6.63 and 4.77 times the minimum wage, respectively.⁶⁷

In all cases, public defenders receive the same basic salary as instruction judges and prosecutors (the lowest category of judges and prosecutors).

2.2. Organization of free legal defence

Argentina has a model of technical assistance characterized by obligatory representation. Traditionally, a person may not choose not to have an attorney. If he does not hire one, the State (normally the court, but in stages prior to the trial it may be the prosecutor) imposes *ex officio* public defence representation. This system identifies the defence attorney conceptually as an 'assistant to justice', rather than a representative of his client's interests.

The organization of older public defence systems in the country (such as the one in Cordoba) are based on this conception. Thus, each attorney is attached to a court or specific activity of the proceedings. This idea has changed as a result of the individual attitudes of those who make up defence offices, but its organizational design continues to follow this concept.

2.2.1. Organizational scheme by jurisdiction

In each province, the Public Defence Office forms part of the Judiciary. In Cordoba, a body of advisors depends functionally and economically on the TSJ, with no inter-

⁶⁴ According to a DAAPJ report, the net income of a public defender varies between \$ 34,364.71 y \$ 31,491.46, depending on his seniority.

⁶⁵ The minimum salary is 627.18 USD or \$ 3,600. See, MINTES 2013.

⁶⁶ Salaries refer to April, 2013, according to an August 8, 2013 report of the Undersecretary of Administration of the Public Ministry of the province of Buenos Aires.

⁶⁷ According to a report of the General Public Defence Office of Chubut from August 23, 2013, the salary public defence attorney is \$ 23,893 and that of an affiliated attorney is \$ 17,174, p. 3.

mediate institutional structure.⁶⁸ The criminal defenders have an administrative secretariat that co-ordinates some functions, such as collecting statistical information. They periodically hold informal meetings to organize practical aspects of their work although, due to their nature, the decisions are not obligatory. They lack a supervisory or control structure.⁶⁹

Each defence attorney attends to his own office. Due to the heavy workload, the Office authorized the delegation of some tasks to assistants,⁷⁰ but their functions are limited, and they cannot broadly represent clients. This limitation is due, to a great extent, to corporate resistance of attorneys to maintain their status and salary.⁷¹ They receive their appointments after a public competition, although the majority have worked for their entire career within the judiciary.

The Public Defence Office of Cordoba cannot determine the number of cases in which it intervenes, but assumes that it does so in approximately 70 per cent of all cases requiring a defence attorney, and 90 per cent of cases in which the person was already convicted.⁷² Each defence attorney attends to around 500 cases, and in approximately 40 per cent of those cases the accused is currently deprived of liberty, with his trial pending.⁷³

Buenos Aires recently approved Law No. 14.442, which grants independence to the Public Defence Office.⁷⁴ The Public Defence Office forms part of the judiciary, but the Public Defence's service has functional autonomy, technical independence, and financial self-sufficiency.⁷⁵ Previously it depended upon the Office of the Prosecutor, although it had greater autonomy and functional structures than in Cordoba, and it was subject to the authority of the head of the prosecutors.

⁶⁸ LAJG 2, 6.

⁶⁹ According to interviews with three advisors.

⁷⁰ According to Regulatory Agreement 924 Series 'A', from December 19, 2007, these assistances must have a degree in law and four years of experience in the judiciary or as an attorney.

⁷¹ According to the market guidelines for legal services, the salary of a junior advisor is attractive for a young professional. It is logical and appropriate to allow these individuals, who could act as defence attorneys in the private sphere, to do so within public defence offices.

⁷² See Soria 2013, p. 39. Judges and prosecutors confirmed this estimate in interviews, which explain that the difficulty to determine precise numbers is due to the fact that private and public attorneys often intervene in the same case, at different points, which is why percentages overlap.

⁷³ According to estimates by four advisors.

⁷⁴ LOMPD-PBA 2.

⁷⁵ LOMPD-PBA 3, 4.

The Public Defence Office has authority to define policies of public defence and develop general and specific instructions with functional authority. Chief defenders⁷⁶ set their policies and exercise tasks of supervision and evaluation of each one of the bodies that make up the Public Defence Office with respect to their quality, efficiency, and efficacy, in accordance with guidelines established by the law.⁷⁷

A Council of the Defender was created, as an advisor to the chief defender. It established guidelines for the supervision of complex cases and collaborates in the training of those within the Public Defence Office.⁷⁸ Meanwhile, the law establishes that the Chief Prosecutor (chief of the prosecutors) has authority over the Public Ministry.⁷⁹ The law is currently in the process of implementation and the authorities have not yet been appointed. Public defenders continue to depend on the Public Ministry. However, the Defence Council established in the former law continues to be in force.

With respect to strategic planning, the Public Ministry has elaborated a strategic plan, but our researchers did not have access to it.⁸⁰

This law establishes strategic criteria regarding how defence attorneys act, in particular the predominating interest of defendants, functional autonomy, integrity, strategic action, transparency and flexibility, access to justice, avoiding bureaucratization, specialization and teamwork, differentiated responsibilities, and quality of attention.⁸¹

⁷⁶ The Public Defence Office leadership is exercised by a person with the title 'chief defender'.

⁷⁷ LOMPD-PBA 23, 24. Management indicators mentioned in the law are a) the total length of the processes and each of their phases; b) compliance with deadlines established to emit decisions; c) workload, congestion, and pending cases; d) visiting the workplace of the responsible judge; e) organizational officials and personnel and work attendance; f) any other indicator established by regulations (24.27).

⁷⁸ Formed by the chief defender, the court of cassation defender, departmental defence attorneys, two defence attorney per interior judicial departments and three for each of the metropolitan area, who rotate and are elected annually among all the defence attorneys (LOMPD-PBA 102, 103). In addition, an Assembly of Public Defence has been created, which meets annually and approves the discipline regulations, proposes criteria for public defence policy for the following year, addresses issues that the chief defender submits and establishes criteria to elaborate reform projects. This is made up of the chief defender of the province, the defence attorney from the court of cassation, departmental defence attorneys, official defence attorneys, advisors of incapacitated persons, and the chief curator of marginalized citizens (LOMPD-PBA 104, 105). Both the Council and the Assembly are completed when the chief defender is appointed.

⁷⁹ LOMPD-PBA 20.

⁸⁰ According to report by the Buenos Aires provincial Fiscal Attorney General report from April 4, 2013, p. 4.

⁸¹ LOMPD-PBA 37.

According to the Public Ministry, the Public Defence Office intervenes in 77 per cent of criminal cases.⁸²

In Chubut, the Public Defence Office has its own organization. The head of the organization is a chief defender who directs a complex organizational structure and co-ordinates the activities of the five offices of the Public Defence office distributed throughout the province.⁸³ The first chief defender was appointed in the year 2000, and developed a policy of sustained institutional strengthening through annual planning, the formulation of a proposed bill that provided for the participation of all the members of the Public Defence Office, and protocols regarding intervention articulated by the leadership of each office.⁸⁴

A Defence Council was created as a sphere of independent participation, whose main mission is to advise and propose agenda issues to the chief defender.⁸⁵ The guiding principles of the Public Ministry's actions are: flexibility, specialization, teamwork, and the personal responsibility of each defender regarding his cases, and shared responsibility regarding the management of the office to which they belong. The system avoids any type of unnecessary procedures and neglect regarding public attention.⁸⁶ It authorizes the chief defender to supervise the work of his employees and permits him to delegate this task to chief defenders in each office.⁸⁷

The Defence Office has adopted systems of management and performance standards provided for in the Bill of Citizens Rights Regarding Justice.⁸⁸

⁸² According to PGSCBA 2012, p. 16.

⁸³ Various institutions depend on the chief defender, including the secretariats of Coordination and Technical-Operational Management, and the Prevention of Institutional Violence, Institutional Policy and Defence of New Rights, a body of rapporteurs, and the areas of accounting, informatics, human resources, public and ceremonial relations, the database of torture, and the head of social services. See, <http://www.defensachubut.gov.ar/?q=node/110>.

⁸⁴ See, <http://www.defensachubut.gov.ar/?q=node/112>, where annual planning is listed since 2004.

⁸⁵ Made up of magistrates (who are not court or chamber judges, but rather defence attorneys), officials and employees of the Ministry that are periodically chosen by their peers. See, Barone 2010, p. 7. Available at: <http://www.defensachubut.gov.ar/?q=node/292>.

⁸⁶ Organic Law of the Public Defence Office of Chubut (LOMPD-CH) 11.

⁸⁷ LOMPD-CH 13.2, 17. Chief defender supervision of Public Defence Office defence attorneys is provided for in art. 18.1.

⁸⁸ See annex to Resolution D.G. 25/06 from March 23, 2006. Available at: <http://www.defensachubut.gov.ar/?q=node/134>.

2.2.2. Material resources by jurisdiction

In the city of Cordoba, there are 17 trained defenders for the city's more than 1.3 million inhabitants, meaning there are 1.2 defence attorneys per 100,000 inhabitants,⁸⁹ or one per every 81,250 inhabitants. One public defender works in the Office of Human Rights, two attend to and advise victims of crimes, and the rest represent those charged with crimes and legal breaches.⁹⁰ Therefore, only 12 advisors defend those charged with crimes. They have a Secretariat and two Under-secretaries, one of which is dedicated exclusively to advise those who have already been convicted, 22 assistant attorneys and 22 employees. Each advisor has the support of an assistant and an employee. Their offices have basic technical input, but they cannot interview their detained clients there, although they do have a car that is used to visit prisons.⁹¹ Defence attorneys lack assigned budget experts: when experts, translators, or interpreters are needed, they use the expert service of the Judiciary.

In Chubut, the Public Defence Office has an office in each of the five judicial districts in the province;⁹² in which 32 attorneys and 15 employees work specifically on criminal cases, in addition to interns and contract attorneys.⁹³ This means that there are 6.3 defence attorneys per 100,000 inhabitants. In each office there are attorneys that specialize in juvenile criminal law and in applying criminal punishment. The Public Defence Office of Chubut intervenes in 90 per cent of criminal cases and in 77.7 per cent when the accused is detained.⁹⁴

In the entire province of Buenos Aires there are 282 public defenders, which means there are 1.8 defenders per 100,000 inhabitants.⁹⁵ There are 12 defenders in the Judicial Department of La Plata, in addition to four who undertake defence work in decentralized offices and a departmental defender. They form six functional units with two defenders in each. In addition, there are four defenders in the juvenile criminal justice system. This means that there are 2.9 defenders per 100,000 inhabitants. The

⁸⁹ See, Macchione 2012.

⁹⁰ According to interviewed defence attorneys, the vacant position is one for Attorney Advisor to Convicts, and the remaining two divide up that work among themselves.

⁹¹ Interviewed public defenders mentioned that they were permitted to interview their defendants in the Wardenships of criminal tribunals, which is prohibited for private attorneys.

⁹² Trelew and Rawson, Puerto Madryn, Comodoro Rivadavia, Sarmiento and Esquel.

⁹³ See <http://www.defensachubut.gov.ar/?q=node/110>.

⁹⁴ According to an interview with a judge, and DEFCH 2013, p. 16.

⁹⁵ According to PBGSCBA, p. 6.

departmental Public Defence Office has a secretariat, made up of five people.⁹⁶ The office has an investigator for checking and collecting evidence (with transportation), two social workers and a psychologist. They may use official experts.⁹⁷

Table 1.
Number of public defenders per inhabitant and per 100,000 inhabitants

Province	Public Defenders	Inhabitants	Inhabitants per public defender	Public defenders per 100,000 inhabitants
Cordoba*	17	1,300,000	81,250	1.2
Chubut	32	506,668	15,834	6.3
Buenos Aires	282	15,625,024	55,407	1.8
La Plata	16	654,324	34,438	2.9

* This only covers the city of Cordoba. As incredible as it seems, it was impossible to obtain the number of public defenders in the province; this number is not available in the information published in the judiciary’s webpage, nor did any of the reports we requested from various judicial offices provide the number.

3. Rights and their implementation

3.1. Right to information

3.1.1. Right to be informed of the reasons for arrest or detention and the rights that accrue in that situation

The National and provincial constitutions provide that no-one may be arrested without a written order from a competent authority; additionally, they require that the authorities immediately inform the detainee of the reasons for his detention.⁹⁸ Procedural codes ratify that the order of detention must include, as a minimum, information regarding the act attributed to the suspect.⁹⁹ The CSJN has determined that lack of information regarding the causes for arrest and regarding the right to an attorney

⁹⁶ According to the report of the Fiscal Attorney General of Buenos Aires, pp. 1-2.

⁹⁷ *Ibid.*, p. 4. When external experts were required, the Prosecutor’s Office paid their fees.

⁹⁸ CN 18; CCOR 42; CCH 47; CPBA 19 (in this case, within 24 hours).

⁹⁹ CPPC 272; CPPCH 20, 215 (by reference to CCH 47); CPPBA 60.

and to remain silent constitute a violation of constitutional guarantees of defence and due process.¹⁰⁰

Detainees who were interviewed stated that when they were detained they were not given detailed information regarding the cause for their arrests, nor regarding their rights, and when they requested to call a family member or attorney, the police reprimanded them.¹⁰¹ Evidence indicates that while a person is in the hands of the police (until being taken before a judge or prosecutor), he is at his highest level of vulnerability. The police do not inform him of his rights, or do so in a formulaic manner, after interrogations that are often violent and always illegal. According to the law, the police are only authorized to interrogate people to identify them. Therefore, the illegal questions are not recorded, and the police do not make them known to the judges and prosecutors, which explains the silence regarding the issue in jurisprudence. In Argentina, in spite of isolated efforts, the police continue to be ineffective at providing detainees with required information. Any delay in obtaining the assistance of an attorney heightens the problem.

3.1.2. The right to be informed of the filing of charges, indictment, or accusation

The same constitutional regulation indicated above applies. Codes detail that the accused has the right to be informed of the reason for the accusation during his first meeting with the prosecutor, police, or judge. This will be explained in a written document that he must read and sign.¹⁰² The CPPCH establishes that failing to do so constitutes serious misconduct.¹⁰³

The CSJN requires that the accused receive detailed information regarding the facts that make up the crime of which he is accused, in a sufficiently clear way so as to permit him to fully exercise his right to defence.¹⁰⁴ The TSJ has clarified that ‘[...] the

¹⁰⁰ CSJN, A. 1773 XL, *Recurso de hecho deducido por el Defensor Oficial de Sergio Delfin Albornoz en la Causa Albornoz, Dante Sergio Delfin s/ robo cuatro hechos en concurso real—Causa 8877*, Judgment of September 13, 2001.

¹⁰¹ One of those interviewed in Buenos Aires indicated that the police read him his rights rapidly, after hitting him to get him to testify and shooting him. He was only able to call his attorney when they took him to the court and a public defender facilitated the call.

¹⁰² CPPC 261; CPPCH 82.1-3; CPPBA 60, 312.

¹⁰³ CPPCH 82.

¹⁰⁴ CSJN, N. 107 XXIV, *Navarro, Rolando Luis y otros s/ homicidio culposo—Causa 58886* (opinion of Enrique Petracchi), judgment of August 9, 2001. Similarly, see, CFCEP, *Dulbecco, Claudio Daniel s/*

information of the facts and events attributed to the accused [...] must be concrete, express, clear and precise, verifiable, integral, and timely. [...] The failure to inform him of existing evidence against him will affect his right to defence at trial'.¹⁰⁵ The Bonarense court of cassation (TCPBA) has determined that 'the right to trial defence is violated when officials do not inform the accused of his rights, the crime of which he is accused, and the evidence against him'.¹⁰⁶

Public and private defenders interviewed explained the difficulty they face in ensuring that the accused understand the nature of the charges they face: they try to explain these points to their clients in simple and common terms, but they always doubt whether the clients have actually understood.¹⁰⁷ The interviewed detainees affirmed that they did understand the explanations that defence attorneys, judges, and prosecutors provided but, according to defence attorneys, it does not seem that way.

The greatest problems regarding access to information occur from the moment of detention until the detainee is brought before a prosecutor or judge. During this time, it is common that not even defence attorneys can obtain sufficient information regarding charges and evidence, especially in Cordoba and Buenos Aires. Public defenders interviewed in Cordoba stated that 10 days generally pass between a detention and when the detainee is brought before a judge. Only then can public defenders begin their work.¹⁰⁸

The accused only accesses reasonably complete information once his case reaches the prosecutor or court, but that is often too late to develop an effective defence strategy.

In the Cordoba and Buenos Aires legislation,¹⁰⁹ the possibility to access the complete content and extent of the charges is tied to the procedural act of the accused's statement. This is supposed to be a defence measure, but the legislation referred to does not consider it to be a voluntary act. That is to say that the legislation recognizes the right to remain silent or to speak in one's defence, but he must in any event attend

Casación—Reg. 524, *Causa 285*, judgment of February 16, 1996 (opinion of Dr. Hornos).

¹⁰⁵ TSJ, judgment 20, *Pompas, Jaime y otros p ss. aa. Defraudación Calificada—Recurso de Casación*, of April 5, 2000.

¹⁰⁶ *V. R. N. s/ Recurso de Casación*, judgment of June 16, 2004.

¹⁰⁷ A public defender in Buenos Aires mentioned the difference between understanding rights and comprehending them, emphasizing the difficulty that defendants face in understanding their situation clearly and productively.

¹⁰⁸ Private defence attorneys tend to be much more active in this respect. They visit their clients in their detention centres, even when judicial authorities have not yet intervened.

¹⁰⁹ CPPC 308; CPPBA 258, 261.

the ‘statement’, and may even be detained to be taken to declare (in his favor). During the ‘declaration’ the judge or prosecutor formally communicates the charges to the defendant, often reading the formal statement of charges.

The nature of this act is confusing, its design and dynamic are inadequate to ensure the accused’s right to information. At the same time, it is a form of coercion regarding the right to information, given that the accused will only receive the investigation files if he participates in the ‘declaration’.

In Chubut, by contrast, the declaration is not obligatory for the accused, and legislation conceives of it as completely separate from the formalization of the investigation. Therefore, there may be a process without the accused’s declaration (if the accused prefers it that way).¹¹⁰ At the same time, the court establishes a specific oral and public hearing, referred to as the ‘opening of the investigation’, the goal of which is to formalize the filing of charges.¹¹¹

The fact that the accused do not understand their defence attorneys is a consequence of a highly formalistic criminal justice system, rather than apathy of the lawyers.

3.1.3. The right to be informed of defence rights

Only the Cordoba and Chubut constitutions explicitly mention the accused’s right to be informed of his defence rights, and even then the constitutions only mention such rights when the accused is detained.¹¹² Codes of procedure add that officials must inform the accused that he may remain silent and demand an attorney.¹¹³ In Chubut, officials must also inform him of his right to make declarations within 24 hours of detention, as often as he likes, to be free from techniques and methods that alter his free will or affect his dignity, to conserve his freedom of movement, and to access all available information from the time he learns of the process.¹¹⁴

The CSJN recognized the right to be informed of possible defences, in particular ‘the right to a defence attorney’.¹¹⁵ The TSJ clarified that the failure to ‘inform the

¹¹⁰ CPPCH 86.

¹¹¹ CPPCH 274.

¹¹² CCOR 42; CCH 47. The Constitution and the CPBA both establish the principle of the sanctity of the right to defence established in articles 18 and 15, respectively.

¹¹³ CPPC 261; CPPCH 82.1-3; CPPBA 60, 312.

¹¹⁴ CPPCH 82.5-9.

¹¹⁵ CSJN, *Albornoz*, cit.

accused regarding his right to remain silent and request an attorney' would lead to the invalidity of the process.¹¹⁶

In practice, it is common that an accused does not learn of his rights until he appears before a judge, and in some cases until after he has spoken to the police. Ensuring that those accused understand this information suffers from the same difficulties mentioned above. In this case, the situation is exacerbated because, in general, the police do not undertake serious efforts to explain these rights and even benefit from their violation.

3.1.4. The right to access incriminating evidence

The constitutions of Cordoba and Chubut establish that evidence is public and, therefore, available to the accused.¹¹⁷ Procedural codes establish the right to access evidence against the accused throughout the process, which may only be limited when publicity puts at risk the ascertainment of the truth.¹¹⁸

In Chubut, the judge may only provide for the temporary secrecy of certain evidence, but not all the evidence, and only for ten days. If the period must be extended, the judge must request authorization from an additional two judges.¹¹⁹ The accused must have access to all the information when charges are filed.¹²⁰ This is important because it is also where the parties determine what evidence will be produced at trial.

The TSJ added that '[...] to effectively and efficiently guarantee the right to be heard, the accused must have information regarding the evidence obtained during the process to which he has not yet had access'. The TCPBA also rejects the introduction of evidence that the defence attorney did not review, in particular with respect to oral testimony incorporated into the debate by 'reading in' despite the objection of the defence.¹²¹

Access to the file is generally ensured after the accused has been called to testify. However, in Cordoba and Buenos Aires, there are often practical obstacles that

¹¹⁶ TSJ, *Pompas*, cit.

¹¹⁷ CCOR 41; CCH 46.

¹¹⁸ CPPC 261, 312 (10 days); CPPCH 82.9; CPPBA 280 (48 hours).

¹¹⁹ CPPCH 23.

¹²⁰ CPPC 355; CPPCH 291; CPPBA 335, cited above.

¹²¹ TCPBA, *Z., S. F. s/ Recurso de Casación*, Judgment of June 29, 2010, referring to *Dicesare, Alejandro s/ Rec. de Casación*, Judgment of July 17, 2009. The decision of the aforementioned case *V., R. N. s/ Recurso de Casación*, Judgment of June 16, 2004 is also applicable.

impede or deny access, without written substantiation, as the denial is based on practical, rather than legal, reasons.¹²²

In Chubut, this problem is less common, as the purpose of the hearing to open the investigation is to make information from the investigation available to the judge and defence (in addition to formally communicate the charges), and the accused may request copies of the files.¹²³ All the hearings are tape-recorded, and access to evidence upon which the charges are based is guaranteed prior to being called to trial, as occurs in Cordoba and Buenos Aires.

In spite of what courts have ruled, the enduring ‘logic of the case file’ in Cordoba and Buenos Aires impedes the effective exercise of this right in accordance with Latin American standards. Only Chubut balances this asymmetry through a public hearing to open the investigation, allowing the defence attorney to appear before a judge to debate access to the case file in a public, oral hearing, although the defence will only obtain an order for the prosecutor to show the file or provide copies of it.

3.2. *The right to actively defend oneself*

3.2.1. **The right to represent oneself personally**

Codes in the three provinces allow the accused to personally represent himself, provided that this does not prejudice his defence nor the smooth running of the process.¹²⁴ In the latter case, the accused must appoint a private attorney, or a public attorney will be appointed. Only Chubut reinstates the accused as the protagonist of the criminal process and recognizes his right to defend himself even when he has an attorney. In the case of disagreements, the clearly and freely expressed will of the accused is granted primacy.¹²⁵

The TSJ maintained that although the law did not require that one be an attorney to represent oneself, ‘[...] this may provide an unquestionably relevant criteria to judge the appropriateness of the accused to develop an effective technical defence of his interests, and not harm the normal consideration of the case’.¹²⁶ Additionally, the

¹²² It may be the case that the employee in charge of the case is absent or busy, or the prosecutor is studying the file, or any other reason that the relevant official can give to refuse to provide it.

¹²³ CPPCH 274, 257.

¹²⁴ CPPC 118; CPPCH 91; CPPBA 89.

¹²⁵ CPPCH 9; CCH 45.

¹²⁶ TSJ, judgment 32, *Anselmi, Alberto Ángel Alejandro p.s.a. de calumnias e injurias—Recurso de Casación*, May 7, 2003. As we see, the court establishes a criteria that only permits a person to represent

STJ has stated that ‘the possibilities to represent oneself are limited by the demands of the efficacy of defence and the normal functioning of the process’,¹²⁷ which restricts the possibilities for exercising this right.

The judges and prosecutors interviewed stated that people rarely request to represent themselves, and those that do are almost always attorneys. They stated that the result of the decision to represent oneself is broadly unfavorable to the defendant. Only Chubut is seeking to break this resistance, favoring the assumption of a central role of the accused in the process.

Representing oneself is discouraged in Argentina, in large part due to the formalism of the written criminal process, which requires knowledge of esoteric legal language, and is strengthened by a cultural resistance to broad access to courts.

Nonetheless, this principle is beginning to be interpreted in favor of motions *in pauperis forma*, which imprisoned individuals present without formalities and in order for their defence attorneys to develop them more technically.¹²⁸ Thus the courts are at least beginning to take seriously this form of self-representation.

3.2.2. The right to appoint and have a trusted, capable attorney

The Cordoba and Chubut constitutions state that all those accused of crimes have the right to technical defence from the first moment of criminal prosecution, but the latter adds that any limitation on the effective intervention of a defence attorney violates the right to trial defence. It also states that the defence attorney may not be harassed, nor have communication with his client intercepted, nor have his home or office searched for reasons related to his work.¹²⁹

Procedural codes refer to the accused’s right to a ‘trusted’ attorney, which implies that the relationship between the attorney and his client enjoys confidentiality and loyalty protections, and providing for the invalidity of acts carried out in violation of

himself if this does not conflict with the public interest of the success of the case.

¹²⁷ STJ, Z., C. M. y Otro c/ T., S. s/ Querrela, judgment of August 24, 1999.

¹²⁸ Typically, habeas corpus petitions are filed by those who have been convicted and are serving their sentences in prison. Generally, these people lack access to a defence attorney, so it is common to use such petitions without excessive formalism.

¹²⁹ CCOR 40; CCH 45. In Chubut an attorney is never requested by any authority to violate attorney-client privilege, and attorneys who violate this rule are charged with malpractice. The Constitution and CPBA also provide for this right in the right to defence guarantees.

this right.¹³⁰ Nonetheless, in Cordoba and Buenos Aires, the conditions for communication between clients and attorneys are not regulated, and there are no guidelines regarding confidentiality and adequate space for interviews. The codes only state that the defendant may communicate with his attorney immediately before any act that requires his personal presence, although the new Public Defence Law of Buenos Aires includes the right to confidentiality.¹³¹

The Chubut code, by contrast, explicitly protects the accused's right to consult with this attorney in conditions that ensure confidentiality, providing legal responsibility for officials that impede such conditions.¹³² There are no formalisms to appoint an attorney, and in Chubut and Buenos Aires, the attorney may view the case file before accepting the case.¹³³ In Cordoba, defence attorneys assume responsibility for cases blindly.

Defendants may choose their attorney only if they hire their own. If they use public defence services, an attorney is appointed to them, generally through a system of rotation between judicial officials and defence attorneys. The right to appoint one's attorney is also not absolute, as courts can suspend representation due to issues of conflict of interest, lack of technical capacity, or other reasons that compromise the effectiveness of the defence.

The right to a competent attorney is not clearly guaranteed. The only requirement to register as an attorney and exercise private defence in the three provinces is to have a degree in law and have no criminal record, which involves an administrative process.¹³⁴ Obtaining a law degree does not require prior, serious professional practice, and passing all the classes in that major is sufficient to request the title and register. There are no quality controls during or after obtaining the title and registering, nor during an attorney's professional life, beyond any possible disciplinary actions.

By contrast, to be a public defender in each of the provinces, attorneys must have certain professional experience and go through a selection process in which their professional and academic background is considered which, at least *a priori*, guarantees a certain level of professional quality in public defence services.

¹³⁰ CPPC 118, 185.3; CPPCH 91, 164; CPPBA 89, 202.3.

¹³¹ CPPC 273; CPPBA 152. LOMDP-BA 34.

¹³² CPPCH 82.

¹³³ CPPBA 91.

¹³⁴ Law 5805 on the Exercise of Law and Obligatory Membership (LEP-COR) 1; Law 4558 on Public Membership in Chubut (LCP-CH) 1; Law 5177 on Professional Exercise of the Law in the Province of Buenos Aires (LEP-PBA) 1.

The CSJN has recognized the inalienable character of the defendant's right to be assisted by an attorney of his choosing.¹³⁵ The TSJ maintained that 'the right to effective defence is grounded in the defendant's right to receive technical assistance from an attorney of his choosing'.¹³⁶

This right is guaranteed extensively, and although there are no legal barriers to accessing an attorney of the accused's choosing, not all attorneys have the necessary knowledge or skills to provide an effective defence. Nearly all judicial officials interviewed stated that public defenders, in general, provide more effective services than private attorneys, both with respect to the intensity of their work as well as to their loyalty to their clients.

We insist on the importance of the 'black hole' that exists between the time an individual is detained and when he is taken before a prosecutor or judge. During this time, especially in police stations, the police often delay the ability of detainees to call a private attorney, although private attorneys do tend to arrive quickly once the detainee is able to call. In Cordoba, public defenders admitted that often ten days pass before they assume the defence of a particular detainee, so as not to 'steal clients' from private attorneys and to avoid problems with the Bar Association. Private attorneys we interviewed stated that sometimes they cannot immediately see their clients, particularly in police stations.

In Buenos Aires, the public defenders interviewed stated that they are often informed of detentions immediately and then interview the detainee the next day. Private attorneys note a similar situation to that in Cordoba, with practical difficulties when their clients are at the police station.

In Chubut, there is a protocol that requires officials responsible for a detention to immediately inform the Public Defence Office of this fact. This is important not only to permit an effective defence during the first moments of detention, but also to prevent officials from extracting information by torture. The absence of a similar protocol in Cordoba and the lack of a public list of criminal law attorneys that address emergencies facilitate the practice in which the police connect detainees with certain

¹³⁵ The Court has also said that the State must compensate for the inactivity of an attorney that abandons a case in order to ensure the effective defence of the accused. [CSJN, G. 352 XXXIII ROR *Gómez Vielma, Carlos s/ extradición*, judgment of August 19, 1999 (Opinion of Dr. Eduardo Moliné O'Connor), and SCE 251 L.XL *Enrique, José Humberto s/ Recurso de Casación*, Judgment of July 11, 2006 (Opinion of the Attorney General)].

¹³⁶ TSJ, judgment 32, *Anselmi*, cit.

attorneys in a framework of corruption and collusion described by public and private defence attorneys.

It is noteworthy that in Argentina, court officials have a higher regard for public defenders than private attorneys, while defendants and the public in general believe that a private attorney will defend them with greater efficacy.

3.2.3. The right to be interrogated in the presence of an attorney

The Cordoba and Chubut constitutions state that any statements of the detainee in the absence of his attorney are inadmissible in court.¹³⁷ Procedural codes also establish this as a fundamental right whose violation leads to the invalidity of the statement.¹³⁸

The Federal Chamber of Criminal Cassation has determined that the right to trial defence and due process is violated when the defendant makes statements in the absence of his attorney.¹³⁹ The TSJ has also declared that the incorporation of statements made to police in the absence of an attorney is illegal.¹⁴⁰

In general, prosecutors and judges respect this right, at least formally. However, the practice of interrogating the accused in the absence of his attorney during the first moments of his arrest or detention remains. This is exacerbated in Cordoba due to the late entry of the Public Defence Office and the lack of an independent investigation. By contrast, in Chubut, the detainee is taken to a hearing before a judge, with the assistance of his attorney, within 48 hours of detention.¹⁴¹

Although information obtained in these illegal interrogations is not used as evidence at trial, it is occasionally ‘filtered’, so as to appear as though it came from another source and therefore support a conviction. The behavior of judges and prosecutors in such cases is devious.

¹³⁷ CCOR 40; CCH 45. This right is also not explicitly stated in the National Constitution nor that of Buenos Aires.

¹³⁸ CPPC 258; CPPCH 9, 82.6, 86; CPPBA 309.

¹³⁹ Hereinafter, CFCP, Sala I, Causa 32, *Beltrán Flores, Rosemary y otros s/ Recurso de Casación*, judgment of April 30, 2013.

¹⁴⁰ TSJ, judgment 262, *Márquez, Víctor Alejandro s/ Recurso de Casación*, October 6, 2009.

¹⁴¹ CPPCH 219. Originally, the norm imposed a deadline of 24 hours. The 2010 reform, led by prosecutors, led to a deadline of 48 hours. Nonetheless, in practice, the hearing is held within 24 hours of detention, except in complex cases.

3.2.4. The right of the accused to communicate in private with his attorney

Only the Chubut constitution guarantees the accused the right to communicate in private with his attorney, who cannot be required to violate client-attorney privilege, nor have his communications intercepted nor his home or office searched as a result of his defence of the accused.¹⁴² Only the procedural code of this province explicitly guarantees the right of the accused to meet with his attorney in conditions that ensure confidentiality, and provides for legal responsibility for officials who impede this right.¹⁴³

The National Chamber of Federal Appeals extensively cited the Inter-American Court's articulation of the right to private communication between attorneys and clients, criticizing the practice of allowing guards to overhear client-attorney conversations.¹⁴⁴

Nonetheless, the attorneys interviewed stated that this right is not respected when the accused is detained. In detention centres there tend to be boxes for interviews, with intercom facilities. However, these are normally broken and both attorney and client must speak loudly and even shout in order to hear one another. Occasionally, the attorney must enter the cell to talk with this client, who is surrounded by other prisoners. In Buenos Aires, an attorney said that the place to conduct interviews is only three meters away from the prison cells.

The public defender offices in Cordoba lack security measures to allow their attorneys to meet with clients, so they must do so in a small office in the prosecutor's office, or within prison cells.¹⁴⁵ Occasionally they may only talk in low voices in a corner of the office of the same prosecutor that is investigating his client, surrounded by employees and officials.¹⁴⁶ In Chubut and Buenos Aires, interviews with detainees are held in the Public Defender's Office and communication between attorneys and their clients is fluid.

¹⁴² CCH 45.

¹⁴³ CPPCH 82.

¹⁴⁴ CNAPF, Causa 43.455, *Perriconi de Matthaeis s/ Procesamiento con prison preventiva*, judgment of October 22, 2009.

¹⁴⁵ According to defence attorneys interviewed in Cordoba, this is a personal favor that is not granted to private attorneys. The governorship is in the basement of the office where prosecutors and attorneys work.

¹⁴⁶ As an exception, public defenders of those convicted in Cordoba indicate that the director of the prison in the city of Villa Dolores (some 150 kilometers from Cordoba) offers his office for attorneys to interview their clients in private.

According to a report, 40 per cent of detained defendants state that their attorney never visited them in prison,¹⁴⁷ which indicates that the precondition of dialogue is frequently absent. Nonetheless, public defenders in Cordoba indicated that they visit detention centres at least once a week, and showed the researchers calendars, visitation files and call records with detained clients.¹⁴⁸

3.2.5. The right to be provided with an attorney when the accused cannot afford one

Provincial constitutions protect the right to the assistance of a public defender from the beginning of the investigation in circumstances where the accused cannot afford an attorney or does not wish to pay for one privately.¹⁴⁹ Codes and organic laws add that public defenders shall be appointed in cases where the appointment of an attorney is delayed or where a privately appointed attorney drops the case,¹⁵⁰ meaning that at no point may the defendant be without a defence attorney; and in circumstances where he is left without one, the judge or prosecutor must designate one.

The CSJN has stated that ‘sufficient efforts must be made to fully ensure the exercise of the right to defence, [...] such that whosoever is subjected to a criminal process is provided with adequate legal services that ensure a real, substantive, trial defence’.¹⁵¹

Those interviewed did not observe problems regarding access to public defence. It is true that the lack of an autonomous structure that could assist the Public Defence Office in Cordoba in developing its own strategic planning negatively impacts that office, which is at a permanent material disadvantage in comparison to the prosecutors.¹⁵² All the defence attorneys interviewed highlighted their concern regarding the disproportionate amount of resources as between prosecutors and defence attorneys.

¹⁴⁷ See INECIP—OSF 2012, p. 56.

¹⁴⁸ Prisoners may not receive calls, but only make them. All interviewed attorneys (public and private) stated that they always answer their clients’ calls, and public defenders in Cordoba make note of the reasons, date and time, and author of each call.

¹⁴⁹ CCOR 41; CCH 45; CPBA 15.

¹⁵⁰ CPPC 80, 118, 121, 126; CPPCH 9, 82.3, 91, 95, 97; CPPBA 60.2, 89, 97.

¹⁵¹ CSJN, 3 S. 1450 XXXII PVA, *Scilingo, Adolfo Francisco s/ su presentación en causa 6888*, Judgment of May 6, 1997; and similarly, see, TSJ in *Anselmi*, mentioned above.

¹⁵² The descriptive and graphic comparison of Soria (2013, pp. 38, 41) shows the title of the Prosecutor’s Office in Font significantly larger than that used for the Defence Office, accompanied by a comparison of the resources that each one receives mentioned in point two.

Nonetheless, it is questionable whether this disparity accounts for the lack of a concrete investigation, especially in Cordoba and Buenos Aires, given that they do not maximize the tools they do have (such as assistant attorneys in Cordoba) to investigate cases.

By contrast, the Public Defence Office of Chubut clearly has better operative conditions that allows it to offer quality legal services. This superiority is not only in terms of resources, but also because its processes and organizational structures allow it to use its time and resources more effectively.

In accordance with the model of ‘mandated legal representation’ mentioned above, the capacity or incapacity of the accused to afford an attorney is less important, because the process simply cannot move forward without the presence of an attorney (whether paid for by the accused or the State).¹⁵³ Therefore, the efficacy of mechanisms to inform the accused of his right to a State-provided attorney is less relevant, since each individual will have an attorney throughout the entire process, regardless of whether he knows he has the right, and even when he decides he does not wish to exercise it.

This creates two situations: (i) in practice, there are no incentives for defence attorneys to inform the accused that they are there to serve the interests of the accused; and (ii) detainees who have not yet appeared before a judge are the most vulnerable, as even though the law guarantees the effective communication of their rights, there are no mechanisms in place to ensure that detainees understand them.

Chubut has effective mechanisms to guarantee this right, such as quality control, organizational flexibility, and protocols regarding early intervention. In other provinces, good results are due to the efforts of individual public defenders, rather than to a strategic program. The approval of the new Public Defence Law in Buenos Aires seeks to address this problem.

3.2.6. The right to an attorney who puts the interests of the accused above other considerations and institutional interests.

This right conflicts with the traditional concept of attorneys (in particular public defenders) as ‘assistants of justice’. Only the Chubut constitution explicitly mentions this characteristic of the defence attorney, prohibiting any interference with his effec-

¹⁵³ We have already mentioned that it is very rare for a process to move forward without legal representation for the accused.

tive intervention and preserving attorney-client privilege.¹⁵⁴ The Organic Defence Law expressly provides for the pre-eminence of the interests of the client above all others.¹⁵⁵

While private attorneys are only subject to the regulations of non-State bar associations, public defenders are full-time public employees. Public defenders in Cordoba depend on the TSJ for their budget, norms, and disciplinary codes, while those in Buenos Aires depend on the Chief Prosecutor until the new organizational law is implemented. Chubut, however, has granted the Public Defence Office functional and budgetary autonomy, which guarantees the greater independence of defence attorneys. The organic laws of Buenos Aires and Chubut state that public attorneys must guide their actions by respecting their client's interests.¹⁵⁶

There are extensive practices that subordinate the interests of the defendants to other institutional priorities. This is the case with the excessive use of abbreviated trials, since there are strong incentives for the lawyer to convince his client to accept a deal with the prosecutor, given the lawyer's inability to manage his workload. Some lawyers believe that they can complete their task by avoiding the trial phase, and will gain favor with judges and prosecutors which will benefit them in future cases. Moreover, judges and prosecutors can close the case, improving their productivity statistics. Cordoba attorneys mention pressures to persuade their clients to adopt passive defence strategies, particularly in politically sensitive cases. A former prisoner in Buenos Aires said that 'there seems to be an agreement between the Public Defence Office and the Prosecutor's Office to keep him detained'.

There is not always an understanding that an attorney's main concern should be his clients' interests. Laws conceive of public and private defenders as 'assistants to justice', which distorts their role as attorneys and justifies informal incentives to prioritize other interests. Ethical norms also do not sanction the failure to act in a client's best interests, which explains the scant jurisprudence regarding the suitability of the attorney, beyond the betrayal of their client's interests.

Another fundamental problem is the impossibility for public defenders to control their workload. Public Defence offices do not have standards regarding the maximum workload of attorneys that would allow them to identify when attorneys are overworked. In practices, the lack of such controls, combined with the excessive duration of proceedings, and the culture of universal, obligatory defence, and the fact that

¹⁵⁴ CCH 45.

¹⁵⁵ V 90 3.3.

¹⁵⁶ Articles 35 and 37.1, respectively. In the case of Buenos Aires, this is part of the new legislation.

public defenders bear the brunt of providing defence services, means that attorneys must accept more cases than they can effectively defend. This means, logically, that attorneys must subordinate their individual clients' interests to institutional or organizational goals of the office that employs them.

Problems regarding conflicts of interest are another important point. There are no written organizational norms that state that two or more co-defendants must be represented by different attorneys or offices. No one views it as problematic that two public defenders that work in the same office represent clients with conflicting interests. The only province to have taken action in this area is Chubut, whose Public Defence Office has strategies to avoid conflicts of interest, in particular when it involves defending police officials. In such cases attorneys may be hired for the specific case.

3.3. Procedural rights

3.3.1. The right to remain free during the process

In Argentina, the freedom of movement of the accused is a constitutional as well as a procedural rule.¹⁵⁷ Pretrial detention may only be used when it is absolutely necessary to ensure the discovery of truth and compliance with an eventual conviction.¹⁵⁸ However, in its legal implementation, there are notable differences.

In Cordoba, the prosecutor makes decisions regarding the accused's freedom of movement, orders detention, and determines when it ends, combining the functions that the former instruction judge held in the inquisitorial system.¹⁵⁹ The TSJ has justified the position whereby prosecutors make decisions regarding the accused's freedom, asserting that this complies with the constitutional requirement that a 'judicial authority' authorizes pretrial detention since prosecutors form part of the judiciary.

In Buenos Aires and Chubut, the prosecutor may only request a judge to order such measures, who in turn makes the decision regarding the freedom of movement of the accused. If the accused is imprisoned, the judge may order his release at any point during the process, whether he is merely detained or is subject to pretrial detention.¹⁶⁰ In Cordoba and Buenos Aires, these decisions follow a written, bureaucratized system, while in Chubut they are taken in oral and adversarial hearings.

¹⁵⁷ CN 18; CCOR 39; CCH 43, CPBA 10; CPPC 2, 268; CPPCH 212; CPPBA 144.

¹⁵⁸ CPPC 269; CPPCH 213; CPPBA 146.

¹⁵⁹ CPPC 280, 282.

¹⁶⁰ CPPCH 219, 226; CPPBA 147.

The exercise of this right tends to depend on the bail that the judge or prosecutor sets, or the property the accused offers.¹⁶¹ In other cases, the accused is ordered to pay a certain amount of money if he does not attend for trial, which may be foregone if the relevant authority considers it unnecessary or that a simple promise to appear is sufficient.¹⁶² In the latter case, freedom based on personal recognisance does not require any monetary payment.

Additionally, there are other available precautionary measures, such as preventing the accused from leaving the country, city, or area of residence, to refrain from visiting certain places, to appear before judicial authorities on certain days, or to submit to the care or vigilance of designated people or institutions. In Chubut and Buenos Aires, the accused may be prohibited from communicating with certain people (provided that it does not affect his right to defence) and impose bail.¹⁶³

In the *Verbisky Case*, the CSJN expressed its concern about the abuse of pretrial detention, in particular in the Buenos Aires province, and urged the legislative and executive branches to modify legislation regarding pretrial detention so as to conform to international standards.¹⁶⁴ It also rejected the use of pretrial detention based on social condemnation in order to combat delinquency.¹⁶⁵ Nonetheless, in the *Acosta Case*, the Court permitted exceptions to the time limit for pretrial detention in circumstances that put the trial at risk, due to the gravity of the alleged crime, or to avoid dilatory defensive delay tactics,¹⁶⁶ thereby ignoring the Inter-American Court's precedent in the *Bayarri Case* that ordered the limited use of pretrial detention.

The TSJ also shares this ambiguous position: it affirms the value of freedom of movement, explains the exceptional nature of pretrial detention, restricted to those cases in which it is absolutely necessary to ensure the investigation and application of the law. However, at the same time, it provides for a presumption that the accused is a flight risk when the sanction for the crime for which he will stand trial is greater than three years, placing the burden of proof on the accused to demonstrate otherwise. It

¹⁶¹ CPPC 292; CPPCH 227.7; CPPBA 182.

¹⁶² CPPC 290, 268.1; CPPCH 227.7; CPPBA 183, 181.

¹⁶³ CPPC 268; CPPCH 227; CPPBA 160.

¹⁶⁴ CSJN, V. 856 XXXVIII, *Recurso de hecho deducido por el Centro de Estudios Legales y Sociales en la Causa Verbisky, Hourcio s/ hábeas corpus*, judgment of May 3, 2005.

¹⁶⁵ CSJN, H. 356 XXXIV, *Hernández, Guillermo Alberto s/ Recurso de Casación*, judgment of March 21, 2006.

¹⁶⁶ CSJN, A. 63 XXXIV, *Acosta, Jorge Eduardo y otros s/ robo calificado en grado de tentativa*, judgment of August 8, 2012, in regards to *Bayarri vs. Argentina*, judgment of October 30, 2008.

has rejected concrete evidence from the defence, demonstrating that the accused will not flee, because the case ‘involves conditions that do not go beyond the general conditions of a great many of those subjected to criminal proceedings’.¹⁶⁷

The CSJN has rejected these criteria, stating that the irrevocable nature of such a legal presumption does not conform to the standards of the Inter-American Court, given that it is unfounded and prevents the accused from providing reasons in favor of his freedom.¹⁶⁸ The result of this decision is a large, open-ended list of presumptions regarding what constitutes ‘procedural risks’, which legally crystalizes those that the TSJ created through its jurisprudence. Additionally, it states that prior to any review of a decision regarding the detention of a defendant as a result of the TSJ decision, judges must summarily review what circumstances could limit a request for freedom, and allow the victims of the crime to participate in the proceedings.¹⁶⁹

The TCPBA affirms the exceptional nature of pretrial detention, which must also be proportional to the protection of the *tutela* (the concept of special protection) of trial,¹⁷⁰ and states that prolonged pretrial detention causes harm that is impossible to repair once it has occurred, and is equivalent to a conviction.¹⁷¹ The TCPBA also considers mere detention to be exceptional, and does not permit tacit extension of detention, and if the judge does not order pretrial detention the accused must be released immediately.¹⁷²

In practice, the application of precautionary measures, in particular pretrial detention, are the rule, rather than the exception: in 2012, INECIP, ADC and an additional 13 regional organizations presented a report to the Inter-American Commission of Human Rights, denouncing the abuse of this measure. The Buenos Aires province holds almost half of the country’s prisoners (28,878 people), and at least 60

¹⁶⁷ TSJ, *Martínez Minetti, Alfredo José y Otros p.s.a defraudación calificada*, judgment of July 23, 2000; also judgment 110, *Bustos Fierros, Hugo César p.s.a. robo calificado—Recurso de Casación*, judgment of May 19, 2008.

¹⁶⁸ CSJN, L. 193 XLIX RHE, *Loyo Fraire, Gabriel Eduardo*, judgment of March 6, 2014, referring to the opinion of the Attorney General, December 23, 2013.

¹⁶⁹ CPPC 281. ‘Procedural danger’ is inferred, among others, from a prison sentence greater than three years, the accused’s lack of a permanent residence, a contempt ruling, fear that the accused may influence the victim and/or witnesses during the proceedings, or that he may influence the crime scene.

¹⁷⁰ TCPBA, Sala I, *Corbo*, judgment of June 22, 2000.

¹⁷¹ TCPBA, *L., J. s/ Recurso de Casación*, judgment of November 25, 1998.

¹⁷² TCPBA, Sala I, *C., E. s/ Recurso de Casación*, judgment of October 28, 1998.

per cent of them do not have a final conviction.¹⁷³ The situation is relatively similar in Cordoba, where 50.8 per cent of the 5,375 people detained have not been convicted. In contrast, in Chubut, only 29 per cent of detainees are in this situation, well below the national average.¹⁷⁴

The ‘procedural’ criteria, the goal of which is to preserve the process, dominates the constitutional regulation of the use of pretrial detention, while the ‘substantive’ criteria, which compares pretrial detention to a criminal sanction, is contrary to the proceduralist approach. In spite of this, application of the procedural criteria is an exception in Argentina, which demonstrates that far from being a precautionary measure, pretrial detention is being used as advance punishment.¹⁷⁵ The aforementioned report states that tribunals fail to provide a basis for pretrial detention, ‘as they use procedural criteria to deny freedom, but automatically and without indicating how such criteria apply in the concrete case’.¹⁷⁶ Additionally, the alleged dangerousness of the accused and his criminal history are used to legitimize pretrial detention.¹⁷⁷

All of those interviewed (defence attorneys, prosecutors and prisoners) agreed that the possibility of preparing an effective defence is seriously compromised when the accused is detained prior to the trial, as the loss of freedom of movement makes it difficult to locate and interview witnesses, which must be added to the loss of income due to the interruption in employment. According to some lawyers, when a defendant is brought to trial after facing pretrial detention, there is a high probability that he will be convicted and sentenced to a light punishment, even without sufficient evidence, in order to ‘justify’ the time he was detained. In fact, according to the aforementioned report, 45 per cent of interviewed convicts in Cordoba accepted a plea bargain because they were already in pretrial detention.¹⁷⁸ Defence attorneys explain that control judges tend to almost automatically confirm pretrial detention when prosecutors order it in Cordoba.¹⁷⁹

¹⁷³ INECIP-ADC 2012, p. 8.

¹⁷⁴ The national average of those imprisoned that have not been convicted is 59.5%, according to INECIP-OSF, p. 46.

¹⁷⁵ *Ibid.*, p. 12.

¹⁷⁶ *Ibid.*, p. 39.

¹⁷⁷ *Ibid.*, p. 41.

¹⁷⁸ *Ibid.*, p. 56.

¹⁷⁹ In Cordoba, in six of nine cases sent to the control judge for revision, he confirmed pretrial detention. INECIP-OSF 2012, p. 55.

The amount of time spent in pretrial detention demonstrates the practical importance of courts taking the decision regarding pretrial detention. In Cordoba, if a person opposes pretrial detention, he must wait two months for the judge to make a decision and, if detention is confirmed, the accused must appeal to the Accusatory Chamber, which normally takes another two to three months. By contrast, in Chubut, the prosecutor may only request that a judge order detention, in a public hearing in which the accused may provide arguments in favor of his freedom. If the judge orders imprisonment, the accused may request a review before two other judges within the next 24 hours.

Moreover, in Cordoba, 20 days may pass from when an individual is detained and when the prosecutor orders pretrial detention, as prosecutors do not count deadlines from the moment of detention, but rather from when they receive the file and take the suspect's statement at the beginning of an investigation. Even in this situation, the person may be detained without an order for pretrial detention even longer, as prosecutors interpret the 10-day deadline between detention and ordering pretrial detention as a guideline rather than a mandatory rule. One attorney interviewed recounted the fact that one of her clients was detained for three months prior to being formally placed in pretrial detention.

There are no systematic initiatives to use alternative precautionary measures more often. These measures, with the exception of bail, are perceived as a form of impunity or lack of control, because there are no offices or mechanisms capable of exercising effective control over them. The report discussed above states that courts do not even have reliable records regarding what type of alternative or substitute measures are applied, depending on the case, what their level of compliance is, etc.¹⁸⁰

The restrictions on pretrial detention as a procedural instrument are interpreted loosely, and the majority of provinces combine the procedural criteria with the substantive, which means that they apply pretrial detention as a substitute for, or count it toward, time served under the sentence. This focus on the substantive is concealed by using the eventual conviction as an indicator of procedural risk, resulting in a presumption that an individual accused of a crime punishable by more than three years imprisonment will attempt to prejudice the investigation or flee. Additionally, the CSJN and provincial courts have accepted that substantive criteria interfere with the original constitutional design, by permitting pretrial detention based on issues such as the seriousness of the crime or fear of a witness.

¹⁸⁰ *Ibid.*, pp. 21 and 89-90.

3.3.2. The right to participate directly and to be present at the trial

Neither the national nor the provincial constitutions refer to this right, but jurisprudence has systematically interpreted it as part of the inviolability of the right to trial defence. The law allows the accused's presence and participation during the stages prior to the trial, although at differing levels: in Cordoba, his presence is permitted when it is useful to clarify the facts or necessary due to the nature of the act, and in Buenos Aires, additionally, when the investigation involves definitive and unrepeatable acts. In all cases, the defendant must be present during the trial.¹⁸¹ In Chubut, by contrast, the oral nature of the process ensures the principles of immediacy and contradiction, as well as the right to be present at all hearings in which decisions relating to the accused are made.¹⁸² Laws do not permit a person to be judged for a crime *in absentia*, and the failure to appear at trial is grounds for the suspension of the proceedings and their time limits.¹⁸³

This right is reasonably fulfilled with respect to the presence of the defendant at trial, but this does not always mean that he may effectively exercise his right of defence. Some of the prisoners interviewed said that during the trial, they could only talk to the judges that convicted them, and all felt that their words were not taken seriously. In Cordoba, 82.85 per cent of those interviewed said that 'the judge did not listen to them'.¹⁸⁴ Defendants are granted the last word, but more as a ritual formalism than as an important element of the debate.

The defendant's presence does not seem to have a significant impact, especially when the debate moves toward more technical discussions rather than factual ones, with a marked imbalance in favor of the prosecution (judges are guided by the prosecutor's case file, the introduction of evidence by rote repetition of the case file, etc.), especially in Cordoba and Buenos Aires. This is due not only to a highly ritualistic legal culture, but also a culture that does not view the defendant's presence or participation as important.

¹⁸¹ CPPC 308, 375; CPPCH 169, 307; CPPBA 276, 345.

¹⁸² CPPCH 2.

¹⁸³ CPPC 86; CPPCH 85; CPPBA 303.

¹⁸⁴ INECIP-OSF 2012, p. 56.

3.3.3. The right to be presumed innocent and treated as such

The National Constitution prohibits the application of a punishment without a prior conviction based on a law that was in force at the time of the relevant crime. The presumption of innocence is inferred from that same article, which considers the right to defence at trial to be inviolable, and courts have repeatedly interpreted the article in this way. International treaties, which are incorporated into Argentinean law via article 75.22 of the Constitution, consolidate this principle.¹⁸⁵

Provincial constitutions establish similar safeguards,¹⁸⁶ which codes replicate. The code in Cordoba adds a clause that provides for the restrictive interpretation of measures that limit personal liberty, or the exercise of a right, or that establish procedural sanctions or evidentiary exclusions. The Chubut code stipulates that authorities may not present a defendant as guilty.¹⁸⁷ Additionally, the codes establish that the burden of proof falls on the accuser, who may only obtain a conviction if he convinces the trial court that the facts of the accusation are true ‘with full certainty’.¹⁸⁸

The CSJN has held that ‘every person must be considered and treated as innocent of the crimes of which he is accused until a trial that respects due process proves otherwise through a final conviction’.¹⁸⁹ In the *Díaz Bessone Case*, the CNCP seems to consolidate this principle, prohibiting the automatic imposition of pretrial detention, but also approving the presumptions of procedural danger, provided that they accept contrary evidence. This essentially flips the burden of proof to the accused, thus violating the presumption of innocence. The dissenting vote of Judge Ángela Ledesma proposed ‘flipping the question to define when pretrial detention should be ordered, rather than the opposite’.¹⁹⁰

¹⁸⁵ CN 18. DUDH 11.1; DADH 26; CADH 8.2; PDCP 14.2; CTPDC 15; CDN 40.b. I.

¹⁸⁶ CCOR 39; CCH 43; CPBA 16.

¹⁸⁷ CPPC 1, 3; CPPCH 7; CPPBA 1.

¹⁸⁸ CPPC 406.

¹⁸⁹ CSJN, N. 284 XXXII REX, *Nápoli, Erika Elizabeth y otros s/ infracción art. 139 bis CP*, judgment of December 22, 1998.

¹⁹⁰ CNCP, Plenario 13, *Díaz Bessone*, judgment of October 30, 2008, opinion of Ángela Ledesma. She added that ‘by constitutional order, the State must demonstrate that there are reasons for which it is necessary to imprison a person during the proceedings, and not, as currently occurs, that the burden of proof is placed on the accused to demonstrate that he will not flee or cause a miscarriage of justice’.

The TSJ understands this case to mean that ‘the state of legal innocence must be destroyed by the evidence provided by the State’s criminal prosecution bodies’.¹⁹¹ Nonetheless, as we saw in *Bustos Fierro*, it also establishes legal presumptions that do not allow contrary evidence, which is contrary to the presumption of innocence. In practice, prosecutors and their agents tend to degrade this principle through the abuse of pretrial detention and forced legal interpretations in order to achieve convictions.

Both prosecutors and the police tend to present defendants to the media without ensuring their condition of innocence, and the media tends to reproduce this guilty image.¹⁹² Judges are not proactive in protecting the presumption of innocence. The extensive use of pretrial detention and the synergy between control judges and prosecutors creates a chasm between the principle of the presumption of innocence to which judges pay lip service, and what goes on in practice. Political discourse places blame on judges for insecurity, as pundits say that judges let delinquents in one door and out the other, which encourages highly punitive laws.

Finally, we reiterate the judicial practice of convicting individuals (even with light sentences) without full belief of the person’s guilt, in order to ‘justify’ the time they were imprisoned during pretrial detention. The *Carrera Case*¹⁹³ demonstrated the extent to which judges will convict a person in spite of the absence of solid evidence against them.

¹⁹¹ TSJ, judgment 66, *Chandler, Javier Hourcio y otro p.s.a. de robo calificado—Recurso de Casación*, judgment of July 4, 2005.

¹⁹² Media treats pretrial imprisonment in three basic ways: ‘cases in which the reasons for which a person is detained or granted freedom are not explained, those in which the reasons are explained, and, within the latter, the information is often presented in such a way that any information given is overshadowed’. INECIP-OSF 2012, p. 95.

¹⁹³ Fernando Carrera was accused of running over and killing three people while he fled from police who were pursuing him after a robbery. Carrera said that he was casually driving through the area of the robbery, and he fled because he thought he was being assaulted, as the police were not wearing uniforms and their car was unmarked. The police shot him and left him unconscious, at which point he ran over three people. During the trial, his defence managed to show that the evidence against him was fabricated to inculpate someone and exonerate the police, but he was nonetheless convicted. The CSJN threw out his conviction due to serious irregularities in the investigation, but he was convicted again by the same court that had originally convicted him. The case led to a documental called *El Rati Horror Show* (www.youtube.com/watch?v=_u4PcG8S0TI). See, <http://www.lanacion.com.ar/1610018-masacre-de-pompeya-vuelven-a-convictionr-a-fernando-carrera>.

3.3.4. The right to remain silent during the proceedings

The national and provincial constitutions decree that no one may be required to testify against oneself.¹⁹⁴ Codes recognize the accused's right to remain silent during the entire process. The accused cannot be required to take an oath or promise to tell the truth, nor may he be subjected to coercion, threat or other measures to require him to testify against his will, and such actions will lead to the invalidity of the proceedings.¹⁹⁵ In Chubut, the police may not interrogate the suspect regarding the facts.¹⁹⁶ The accused's testimony is always a form of defence; therefore the prosecutor may not call him to testify when it is not at his request and in the presence of his attorney. The accused, additionally, may testify before a judge at any point.

The CSJN has admitted testimony that the accused provided in the police station, provided that it is not a result of coercion. However, in his dissent, Judge Zafaroni excoriated this solution because he doubted the spontaneity of the accused's statements (who was in prison) and recommended maximizing safeguards to ensure that the testimony is spontaneous.¹⁹⁷

The TSJ has stated that 'the presumption of innocence permits the accused to exercise his defence through passive procedural behavior and also implies that he may not be required to testify against himself'.¹⁹⁸ The SCBA adds that in his defence, 'the defendant may avail himself of remaining silent, or even lying, as no one is requiring him to testify against himself'.¹⁹⁹ However, the TCPBA, also indicates that the accused's right to defence 'is not violated if he testifies after being informed of the accusations against him and the evidence against him, and that his silence or failure to testify will not be interpreted as guilt, provided that his defence attorney is previously notified of his client's wish to testify'.²⁰⁰

In practice, this right is partially respected, according to several interviewed prisoners and lawyers. During the investigation and trial phase, although individuals are not generally forced to testify against themselves, judges and prosecutors tend to

¹⁹⁴ CN 18, 75.22; CCOR 40; CCH 45; CPBA 29.

¹⁹⁵ CPPC 259; CPPCH 82.2 y 6, 86; CPPBA 310.

¹⁹⁶ CPPCH 89.

¹⁹⁷ CSJN, M. 3710 XXXVIII, *Minaglia, Mauro Omar y otra s/ infracción law 23.737 (art. 5 inc. c)*, judgment of September 4, 2007.

¹⁹⁸ TSJ, *Chandler*.

¹⁹⁹ SCBA, Causa P 30.056.

²⁰⁰ TCPBA, Sala I, *M., p. s/ Recurso de Casación*, judgment of November 28, 2002.

ignore defendants' complaints of undue pressure suffered at the hands of the police. In Cordoba, the police urge detainees to accept guilt for a small offense rather than stand trial for a more serious crime.²⁰¹

The introduction of the accused's testimony during the investigation also weakens the right to remain silent during the trial, because any record of testimony that prejudices his case will appear before the judge, even when it is not admitted as evidence.

3.3.5. The right to decisions supported by evidence

The National Constitution indirectly establishes the right to a decision supported by the evidence, as the inviolability of a trial defence requires that court decisions are based on logical and solid legal reasoning, which provincial constitutions explicitly state.²⁰²

Codes require decisions to include each of the questions posed during deliberations, present the legal and factual bases for the decision, and to precisely determine the facts attributed to the defendant and the applicable norms. In Chubut, legislation also states that the evidence must be weighed collectively and in harmony, and the basis for the decision may not be replaced with mere reading of documents, dogmatic affirmations, legal fictions, ritualistic expressions, or appeals to morality.²⁰³ In this province, collegiate courts, including the Criminal Chamber of the STJ, must vote and individually substantiate each vote, while in others, court decisions may be based on the reasoned vote of one judge and the adherence of the others.

The violation of the requirement of adequate substantiation of decisions is a basis for the annulment of a conviction upon appeal, for failure to accurately apply the law. In Chubut, it is also a basis for a finding of malpractice and can lead to the judge's removal.²⁰⁴ Specifically, pretrial detention decisions must explicitly provide the reasons why the judge believes that the accused will prejudice the investigation or elude justice, and in Cordoba, the court must provide the basis for sanctions ordered in the case of conviction.²⁰⁵

²⁰¹ In a concrete case, the police ordered a group of young people to 'admit' to disorderly conduct, although in reality they were detained for smoking marijuana in a park. The CSJN legalized this, but required the boys to undertake cumbersome and expensive legal proceedings.

²⁰² CN 18. CCOR 155; CCH 169; CPBA 171.

²⁰³ CPPC 408; CPPCH 254, 330.3, 329; CPPBA 106.

²⁰⁴ CPPC 468; CPPCH 25, 169; CPPBA 448.1, 456.

²⁰⁵ CPPC 282; CPPCH 223; CPPBA 158.

In *Carrera*, the CSJN vacated a CFCP decision because it ‘did not sufficiently address the defence’s arguments against the conviction based on the evidence that the defence expressly individualized’.²⁰⁶ The TSJ also considered that decisions must follow ‘healthy, rational criticism (*sana critica racional*), and the absence of such provides the basis for an appeal’.²⁰⁷

Nonetheless, it is common to find decisions with formal and logical mistakes. When determining whether to impose pretrial detention, judges use empty phrases that contradict the evidence provided. Often, decisions are based on evidence that was not provided during the trial, but rather entered through the case file, meaning that the decision (generally a conviction) is based on information provided by only one of the parties, and not produced in the oral and public hearing.

The individualization of the sanction tends to be established very lightly and without the argumentative rigor applied to the determination of responsibility for the crime. The fact that both issues are resolved in the same trial, before the same judge, and with the same evidence is already problematic. In Cordoba, trial courts are not required to make their decision regarding punishment based only on the information produced during the trial, and have an extremely high level of discretion.²⁰⁸

An attorney from Cordoba stated that judges tend to leave out certain information in the decision that could contradict the basis for their decisions, and prohibit attorneys from filming hearings. An individual imprisoned in Buenos Aires said that ‘what he was detained for was not the same thing with which he was ultimately charged’. A public defender mentioned ‘poorly conducted investigations that validate crimes, cases of invalidity that are not granted, baseless detentions, and the Chamber validates all of it’.

Additionally, there is an extensive practice among judges of writing decisions in esoteric language that are incomprehensible for the majority of defendants. They tend to be excessively long, although this does not necessarily help clarify their arguments. The *Carrera Case*²⁰⁹ mentioned above revealed the level of arbitrariness of many crimi-

²⁰⁶ CSJN, C. 927 XVIV RHE, *Carrera, Fernando Ariel s/ Causa 8398*, judgment of June 5, 2013.

²⁰⁷ TSJ, Sentencia 242, *Aguirre, Víctor Hugo p.s.a. homicidio calificado, etc. Recurso de Casación*, judgment of September 11, 2008.

²⁰⁸ See, Bertone 2010.

²⁰⁹ In reviewing the case and ordering a new trial, the CSJN called attention to the lower court judges for the amount and gravity of arbitrariness in the analysis of the evidence. The prosecutors and judges conveniently left out all the favorable evidence until the case reached the Supreme Court.

nal decisions, especially when, as one attorney interviewed stated, some judges seem to begin the trial with a mandate to convict the defendant.

3.3.6. The right to review of a conviction

This right forms part of the constitutional guarantees regarding trial defence, although it is not textually recognized, with the exception of Chubut, the constitution of which states that the STJ will review (*consulta*) every decision in which the punishment is greater than 10 years.²¹⁰ Criminal procedure codes provide for a petition to challenge a conviction based on the failure to apply or correctly interpret the substantive law, or norms regarding inadmissibility, statute of limitations, or invalidity.²¹¹ In Chubut, the right to petition is broad, and includes the possibility to introduce evidence during the hearing.²¹² In Buenos Aires convicted individuals may file such petitions when the decision erroneously declares the existence of a crime and the individual's participation in it.

Decisions may be reviewed when a conviction is based on laws that have been found unconstitutional, or when the trial court inaccurately denied a petition, or when problems regarding the authenticity or truth of the evidence are discovered while the convicted individual is serving his sentence, when crimes or coercion have been used, or when an exculpatory law or interpretation develops.²¹³

In the *Casal* decision, the CSJN followed the precedent of the Inter-American Court decision in *Herrera Ulloa vs. Costa Rica*. In this decision, the CSJN incorporated the doctrine of 'maximum use' of resources, in particular of appeal, stating that an appeal may not limit itself to a logical analysis of the application of the law, but rather must take a broader approach and incorporate an analysis of the facts, in order to guarantee the right to a full review of a conviction.²¹⁴ Additionally, it ordered that upon reaching a decision regarding unresolved legal questions (such as the determina-

Nothing indicates that this was an exceptional case, except for media attention on the side of both the prosecution and the defence.

²¹⁰ CN 18, 75.22; CCOR 40; CCH 45, 179.2; CPBA 15.

²¹¹ CPPC 468; CPPCH 374, 375, 377; CPPBA 448, 450.

²¹² CPPCH 374.

²¹³ CPPC 483, 485, 489; CPPBA 450, 448, 461, 467; CPPCH 388, 389.

²¹⁴ CSJN, *Casal*, cit.

tion of deadlines to file appeals), courts must adopt the interpretation most favorable to the defendant.²¹⁵

The TSJ also determined that the constitutional right to an appeal implies a broad regulatory interpretation to allow access to the procedure.²¹⁶ The SCBA also adopted the reasoning in *Casal*, explaining that the appeal process is the way in which courts fulfill the constitutional right to a full review of a guilty verdict.²¹⁷ The appeal process must be an efficient remedy that permits the court to examine the validity of the decision with relative ease.²¹⁸ The STJ also referred to *Casal*, eliminating formalisms and unnecessary procedures.²¹⁹

It is true that in practice courts have relaxed some excessive formalisms, particularly in Chubut, which does not use the classic concept of cassation appeal. Nonetheless, excessive delays in its proceedings (written and cumbersome in Cordoba and Buenos Aires) makes it ineffective regarding decisions that require a fast resolution, especially when the convicted individual is imprisoned. In these provinces, it may take up to six months for an accused to have a final decision regarding his freedom.

Prosecutors, judges, and even some imprisoned individuals have warned that petitions are often poorly articulated and therefore rejected, in particular when private, incompetent attorneys present them. By contrast, all officials mentioned that the experience of public defenders allows them to present well-articulated and more successful petitions than the majority of private attorneys. There are even special offices, such as the Cassation Public Defence Office, in Buenos Aires, that are dedicated exclusively to filling petitions for cassations before the Cassation Tribunal.

3.3.7. The right to an effective defence during enforcement of the sentence

The national law of criminal sanction enforcement (which provinces apply) grants prisoners some basic rights of defence against disciplinary sanctions.²²⁰ The prisoner

²¹⁵ CSJN, C. 1787 XL, *Cardozo, Gustavo s/ Recurso de Casación*, judgment of June 20, 2006.

²¹⁶ TSJ, Judgment 152, *Gauna, Ángel Roberto p.s.a. homicidio—Recurso de Revisión*, December 28, 2005.

²¹⁷ SCBA, *N., D. s/ Recurso de Casación*, judgment of November 20, 2002.

²¹⁸ SCBA, *B., M. A. 'Recurso de Casación'*, judgment of March 1, 2006.

²¹⁹ STJ, *García, Néstor Fabián y Otros*, cit.

²²⁰ Law 24.660 (hereinafter, LNEP), art. 91. These rights include the right to be informed of the infraction of which he is accused, present his defence, offer evidence and present to the director of the institution prior to a final decision.

may not be sanctioned twice for the same crime, and in the case of doubt, the more favorable result applies.²²¹

Sanctions may be challenged before an enforcement judge, or other competent judge, who must inform the prisoner upon making a decision. Judges must be notified of sanctions and challenges to sanctions in the most expedient way possible, within six hours of the decision, and if the judge does not resolve the petition within 60 days, the sanction remains in place.²²² Procedural codes also include the prisoner's right to technical defence in issues related to sanctions, benefits, rights and liberties, although in Chubut and Buenos Aires such decisions are made in public, oral hearings, in contrast to the written proceedings in Cordoba.²²³

Both Chubut and Buenos Aires maintain records of torture in prisons, which assists in the exercise of prisoner's rights.²²⁴

The CSJN has stated that with respect to *in pauperis* petitions, the lack of a substantiated decision to enforce the sanction constitutes an inadmissible infringement of the prisoner's rights, which prevents the continued application of the sanction.²²⁵ The TSJ regularly addresses the requests of inmates, and recently ordered the transfer of a transgender woman from a men's prison to a women's prison due to her gender identity.²²⁶ The STJ, in the *García Case* mentioned above, also accepts a broad right to defence for convicted prisoners.

Interviewed prisoners stated that they faced difficulties in contacting the courts, which the aforementioned report corroborates, stating that 40 per cent of prisoners interviewed during the study could not appeal a resolution that negatively affected their rights.²²⁷ Nonetheless, public defenders that represent prisoners (at least in Cordoba) showed researchers records of a large number of reviews and appeals with respect to the conviction, disciplinary sanctions, and benefits and rights of prisoners. The private attorneys interviewed also stated that sometimes they continue to represent

²²¹ LNEP 92, 93.

²²² LNEP 96, 97.

²²³ CPPC 502; CPPCH 9, 399; CPPBA 1, 498 and Law 12.256 of criminal sanction enforcement, 3.a, 9.9.

²²⁴ LODP-CH 10.2, 20.2, 21.6; LOMP-BA 24.3. The Resolution of the Chief Defender of Chubut, 86/04 of July 6, 2004 creates the Torture Database. Available at: http://www.defensachubut.gov.ar/userfiles/file/bancodatos/86-04_crea_bd.pdf.

²²⁵ CSJN, S. 62. XL, *Recurso de Hecho Schenone, Carlos s/ Causa 1423*, judgment of October 3, 2006.

²²⁶ TSJ, Judgment 255, *P. L. D. (o) R. J. s/ Ejecución de pena privativa de libertad*, September 2, 2013.

²²⁷ INECIP-OSF 2012, p. 56.

their clients post-conviction, although enforcement judges and public defenders said that few private attorneys offer good services to convicted prisoners. Therefore, public defenders file more than 90 per cent of petitions filed on behalf of convicted prisoners. All of the individuals interviewed stated that, generally, when a person is convicted, he is left without money, which makes obtaining a private attorney difficult.

In Chubut, collegiate judges fulfill the task of enforcement judge on a rotating, annual basis. All questions related to the enforcement of the sentence are litigated in oral hearings. The policy of the Chubut Public Defence Office is noteworthy, as it undertakes permanent actions of prevention and complaints regarding torture in prisons. The Public Defence Office periodically presents monitoring reports on prison conditions.²²⁸

3.4. Guarantees regarding an effective defence

3.4.1. The right to investigate the case and to present evidence

Procedural codes state that the facts and circumstances of the case may be attested to by any form of evidence, a provision that is also applicable to the defence.²²⁹ This includes the right to find evidence, investigate the facts, interview witnesses and experts, or request the prosecutor to interview them. In Chubut, if the prosecutor considers the defence measures inappropriate, they may request the judge to rule on the matter.²³⁰ Only the criminal procedure code of Chubut explicitly mentions the principle of equality of arms.²³¹

In Cordoba, the criminal procedure code only mentions these powers and the possibility to control the evidence presented by the prosecutor generically. The laws of Chubut and Buenos Aires encourage the defence to undertake an independent investigation, which may request the prosecutor or judge to obtain the services of technical or expert consultants. The judge may only deny such a request if he considers it redundant.²³² The right to conduct private interviews with witnesses is explicitly recognized. In Buenos Aires, defence attorneys may request the Chief Defender to appoint experts to provide a better service. In Chubut, the law provides for a special budget with

²²⁸ See MDPCH 2012.

²²⁹ CPPC 192; CPPCH 165; CPPBA 209.

²³⁰ CPPC 335; CPPCH 195, 198, 209, 278; CPPBA 274.

²³¹ CPPCH 17.

²³² CPPC 308; CPPCH 125, 167; CPPBA 276, 214. Además, LOMP-BA 35.

which to contract technical assistance or experts.²³³ In all three provinces, the defence may request evidence in advance if the attorney believes that the witnesses will not be able to attend the trial or fear they will be convinced to give false testimony.²³⁴

The SCBA requires a response to the measures that the defence proposes.²³⁵ The STJ has also recognized this right, but balanced it with the higher interest of a child witness to refuse the reproduction of interviews via a Gesell camera.²³⁶

In practice, these rights are relatively protected. The main limitations are related to the economic cost of obtaining and presenting technical evidence, and a certain deficiency in the legal culture of defence attorneys to actively make use of tools to produce independent evidence. According to the attorneys interviewed, it is not common for defence attorneys to undertake a private investigation beyond obtaining defence witnesses. Normally, the defence limits itself to challenging and questioning the prosecutor's orders and, very rarely, if the accused has financial resources, requesting the participation of experts. Public defenders also insist that they lack resources to produce certain kinds of evidence.

In contexts such as Cordoba, in which around 80 per cent of cases that result in a trial are property crimes, a high percentage of them being cases *in flagrante*, it is a common myth that it requires extensive technical resources to undertake an investigation. Beyond the efforts of public defence offices, the perception that only wealthy defendants can afford to provide effective evidence is unanimous. In Chubut, the criminal justice system has moved toward an adversarial model, litigation is more demanding, and the public defence office has developed an organization that corresponds to those demands. The public defence office is beginning to develop its own investigatory resources, as well as a budget for requests for technical and expert opinions.

The traditional legal culture affects this area of criminal litigation, in a general context of transition to an adversarial system. Defence attorneys in general have not developed cross-examination techniques. There are many incentives for them not to do so: judges enter the courtroom having read the case file (and having made a predetermined decision), and this allows the parties to adopt a passive approach to the trial. Older procedural codes (those in Cordoba and Buenos Aires) do not even provide

²³³ LOMP-BA 98; LOMP-CH 62.

²³⁴ CPCC 308, 330; CPPCH 186, 279; CPPBA 274.

²³⁵ SCBA, *N., s/ robos reiterados*, judgment of November 9, 1984.

²³⁶ STJ, *Provincia del Chubut c/ Castro, Eduardo Alfredo*, judgment of April 21, 2008. A Gesell camera refers to the procedure whereby a vulnerable witness may be interviewed on camera in a separate room.

detailed regulations regarding cross-examination. In this context, it is uncommon for defence attorneys to cross-examine the prosecutor's evidence based on independently secured information. Additionally, prosecutors tend to broadly interpret their power to exclude evidence that the defence proposed, which also impedes the exercise of the right to an effective defence.

Argentina is not complying with international standards while the exercise of a fundamental right continues to be foreign to criminal law customs, as is the clear assumption that an independent investigation depends entirely on the resources of the accused. In fact, this leads to a defence that is not proactive, nor based on a theory of the case that is favorable to the defendant, but rather remains predominantly reactive and merely criticizes the prosecutor's investigation.

3.4.2. The right to sufficient time and facilities to prepare a defence

This right is not explicitly provided for at a constitutional nor legislative level, but rather is derived from the right to not testify against oneself. The defendant has the right to remain silent and to testify when he so desires and, as the investigation tends to take place over several months, the accused generally has sufficient time to prepare his defence. The only deadlines that must be respected, under penalty of nullity, refer to the abandonment of defence during or just prior to the trial. The new attorney may request a three-day extension to prepare for the trial.²³⁷ This extension is in order to allow the attorney to prepare an effective defence within a reasonable timeframe.

If during the trial new crimes or aggravating circumstances are revealed, or a crime other than that for which the defendant was originally accused, the prosecutor may broaden the charges and the defendant may request a suspension of the trial to offer new evidence or prepare his defence.²³⁸ Once the prosecutor officially charges the defendant, the trial must begin within between 10 and 60 days in Cordoba and Chubut, and within six months in Buenos Aires.²³⁹

The law in Chubut and Buenos Aires expressly provides for the right of the accused to speak with his attorney in conditions that ensure the confidentiality of their conversations, which implies access to an adequate location to prepare their defence.²⁴⁰

²³⁷ CPPC 126; CPPCH 95; CPPBA 97.

²³⁸ CPPC 374, 185; CPPCH 316.7, 161; CPPBA 344.8, 202. In Cordoba and Buenos Aires they have up to 15 days, and in Chubut they have up to 10.

²³⁹ CPPC 367; CPPCH 300; CPPBA 339.

²⁴⁰ CPPCH 82.3; LOMP-BA 34.

Only TSJ jurisprudence refers to the need to have a minimum amount of time to carry out a defense strategy, without which the prosecutor's request to bring the case to trial is void.²⁴¹

None of those interviewed mentioned problems with having sufficient time to prepare a defence. By contrast, all of them stated that access to economic resources is necessary to hire experts or find witnesses and bring them to trial, which is why the possibility to exercise an effective defence seems to depend more on available resources than time.

In general, the defence has access to the prosecutor's case file from the beginning of the investigation, and interviewed attorneys said that the time they have to prepare a trial defence is normally reasonable. However, the practice of basing a defence almost entirely on the information provided by the prosecutor also helps to create the perception of sufficient time. With respect to sufficient space for the attorney and his client to prepare the defence, we have already mentioned that the conditions of meeting spaces, when the defendant is detained, are far from adequate.

Thus, it is plausible to state that Argentina complies with Latin American standards with respect to the time granted to prepare a defence, and with respect to access to the investigation file. However, Argentina does not meet those standards with respect to adequate space for detainees to speak with their attorneys in relative privacy, which is clearly lacking at a national level.

3.4.3. Equality of arms in the production and control of evidence at all stages of the investigation and trial

Criminal codes allow the defence to propose evidence during the pretrial phases. Additionally, they allow the prosecutor to reject such evidence as irrelevant or impertinent.²⁴² Often the defence sees this as an imbalance, given the lack of a defence culture that values the undertaking of independent investigations.²⁴³

In the trial preparation phase, the procedure to propose evidence is relatively balanced. In Cordoba, the court may reject defence witnesses if it believes they are irrelevant or redundant. In Buenos Aires, parties may request a preliminary hearing to

²⁴¹ TSJ, Judgment 137, *Alfaro Farías, Sergio p.s.a. robo*, judgment of April 20, 2012.

²⁴² CPPC 335; CPPCH 278; CPPBA 273.

²⁴³ CPPC 335; CPPBA 334.

discuss the evidence, and the court may only suggest that they eliminate superfluous evidence, but may not exclude it if it is legally introduced at trial.²⁴⁴

In Cordoba, during the trial, the court may introduce new evidence at the request of the parties and include the record of witnesses that do not attend the trial or the opinions of experts without the need for them to testify in person. The court may also contrast statements the defendant or witnesses made prior to the trial with those that they make during the trial or investigation, and may interrogate and cross-examine witnesses.²⁴⁵

In Buenos Aires, the court may not base its decision on the investigation file, but the law provides various exceptions to this principle, and allows the introduction of various pieces of evidence without providing the opportunity to cross-examine it during the trial.²⁴⁶

In Chubut, the inclusion of the prosecutor's evidence is debated in an oral and public hearing prior to the hearing, before a different judge than the trial court judge. This judge must substantiate his rejection or admission of testimony, which the trial court may accept.²⁴⁷ The trial court may not receive information regarding the case prior to the hearing, and unless the inclusion by reading documents into the court file is absolutely indispensable, they may not be included since exceptions to the oral nature of the trial are legally restricted.²⁴⁸

The parties question the witnesses and experts during the trial: first, the party that proposed the witness, followed by the other party. At the request of either party, the court may permit another round of questioning, and if witnesses contradict themselves, the judge may allow them to read from prior testimony or reports.²⁴⁹ In Chubut, judges may not add to the parties' questions, while in Cordoba and Buenos Aires they participate more actively, as the president of the court has the power to question witnesses and even invite them to 'spontaneously testify' prior to the parties' questioning.²⁵⁰

²⁴⁴ CPPC 363, 364; CPPBA 338.

²⁴⁵ CPPC 365, 385, 397, 396.

²⁴⁶ CPPBA 366.

²⁴⁷ CPPCH 293, 295, 297, 299.

²⁴⁸ CPPCH 300, 313, 314.

²⁴⁹ CPPC 396; CPPCH 325; CPPBA 364.

²⁵⁰ CPPC 396; CPPCH 192; CPPBA 364.

Chubut is the only province in which legislation distinguishes direct questioning from cross-examination.²⁵¹ It regulates the use of suggestive or leading questions as a tool of cross-examination, and prohibits their use during direct questioning. Cordoba and Buenos Aires regulate the use of testimony produced during the investigatory stage as evidence during the trial (with the legislative technique unique to inquisitorial models) and do not distinguish between direct questioning and cross-examination, as in this model the judge undertakes questioning. The differences in legislation affect the possibility to carry out a robust cross-examination and control of the evidence the other party proposes.

The CSJN determined that incorporating, by reading, prosecution testimony produced during the investigation without allowing the defence to review it impeded ‘the defence’s adequate and appropriate opportunity to challenge and question the witness or anyone who testified against him and violated his right to an effective defence’.²⁵² The TSJ recognized the right ‘to offer evidence in his defence, and to view and control the production of evidence against him, in equality of arms’ with the prosecution,²⁵³ but also stated that ‘the parties need not be able to view and control the technical reports that the judiciary police produce on the status of people, things, and places through technical exams and other operations’.²⁵⁴

The TCBA recognizes that the ability to produce evidence at an oral and public trial is a corollary to the principle of ‘equality of arms’.²⁵⁵ The STJ affirmed that when the court does not apply legal protections to the reception of evidence that cannot be reproduced, the presumption of trust in public acts disappears.²⁵⁶

Interviewed defence attorneys stated that control judges during the investigation phase tend to confirm prosecutor’s decisions with respect to the witnesses and

²⁵¹ Toward the end of 2013, the Buenos Aires province adopted a Law of Trial by Jury. The law introduced changes in the rules of evidence production during the trial and makes progress in the differentiated regulation of questioning and the cross-examination of witnesses. The law is in the process of being implemented.

²⁵² CSJN, *Benítez, Aníbal Leonel*, cit.

²⁵³ TSJ, Decision 178, *Sánchez, Luis Gerardo p.s.a. homicidio culposo agravado—Recurso de Casación*, July 30, 2010.

²⁵⁴ TSJ, Judgment 259, *Druetta, Hilda Haydée y otros p.ss.aa falsedad ideológica, etc.*, November 2, 2009. The effects of this type of conception are clearly harmful for the defence’s exercise of control in a context of regulation of an oral trial where what type of cross examination using leading questions is not clearly established.

²⁵⁵ TCPBA, *Z., S. F. s/ Recurso de Casación*, judgment of June 29, 2010.

²⁵⁶ STJ, *Zaleski, Cesar*, judgment of August 4, 1999.

evidence that the defence proposes, which weakens the equality of arms. Thus, the prosecutor dominates evidence production during the investigatory phase, while the defence is subject to the prosecutor's decisions on the matter. The evidence obtained during this phase constitutes that which will be introduced at trial, which means that the prosecutor is also granted predominance during the debate, during which (except in Chubut) judges guide the case in accordance with the prosecutor's theory of the case.

In Cordoba and Buenos Aires, it is common to incorporate the testimony of witnesses obtained during the investigatory phase, made in the absence of the defendant or his attorney, as evidence at trial. This tends to occur without the presence of the witnesses at trial. These are records that are neither textual registers, nor transcribed versions of the testimony, but rather interpretations that the prosecutor's assistants have made, which also fail to clearly associate the questions asked with the answers provided. This type of practice does not fulfill the quality control requirements of testimonial evidence in oral trial systems.

An additional problem, especially in Cordoba, is the public nature of the prosecutor's documents, which require the defence to file a special challenge ('challenge of falseness'), which is incredibly demanding and rarely successful. This strengthens the prosecutor's position to the detriment of the defence.

In all three jurisdictions, the material resources of the prosecutor are disproportionate to those of the public defence office, although this is somewhat reduced in Chubut due to the greater resources and efficient organization of public defence offices. The question of professional culture, with respect to the lack of effective interrogation practices, also applies to these considerations.

Practices related to the production of testimony from victims of sexual crimes, children, and other vulnerable witnesses should also be mentioned. Practices that are entirely inadequate have been developed regarding the use of the Gesell camera, without adopting protocols that follow international recommendations for its use, nor taking precautions to preserve balance in the proceedings when it is used. Additionally, completely inadequate techniques, professionals, and equipment are used. However, considerations on this point go beyond the limits of this current chapter.²⁵⁷

It is clear that under such circumstances, there is not substantive equality of arms. Chubut is the only province where such a claim could reasonably be made, in particular when the Public Defence Office is involved in the case.

²⁵⁷ For detailed information on this topic, see Cerliani 2012.

3.4.4. The right to a trusted interpreter and the translation of documents and evidence

In each of the three provinces in the study, the law guarantees access to an interpreter when necessary to translate texts or testimony in a language other than the official language.²⁵⁸ Both the prosecutor as well as the defence attorney may appoint one. However, if the defendant prefers to appoint his own private interpreter or translator, he is responsible for the cost.²⁵⁹

The Bill of Citizen Rights in the Province of Chubut before the Judiciary states that indigenous peoples and foreigners have the right to an interpreter,²⁶⁰ and that the criminal justice system must provide for the necessary resources to fulfill these rights.²⁶¹

The CNAPC had stated that the presence of an interpreter at all stages must be strictly observed, but later the CSJN put the burden on the defence to explain the concrete damage that the defendant had suffered due to the absence of an interpreter to inform the accused of his rights at the time of detention.²⁶²

Moreover, the TCBA indicated that when the accused cannot understand the nature of the case due to speaking an indigenous language as his mother tongue, he must have a new opportunity to testify, but with the assistance of an expert in his language. In the absence of this opportunity, all steps taken as a result of the first testimony will be considered invalid.²⁶³

Those interviewed in Cordoba and Buenos Aires stated that they rarely need the services of an interpreter or translator, and that when they did, the Judiciary covered the costs. Nonetheless, a recent case in Buenos Aires indicates that there is an unknown number of imprisoned indigenous people and immigrants who did not understand the language in which they were tried and who, therefore, could not reasonably defend themselves.²⁶⁴

²⁵⁸ CPPC 247; CPPCH 86; CPPBA 255.

²⁵⁹ CPPC 246.

²⁶⁰ Hereinafter, CDCCHJ, 31, 33.

²⁶¹ CDCCHJ 45. The Bill of Citizen Rights refers to the STJ, the Public Defence Office, the Judiciary Council, the Association of Magistrates and Officials, and the Attorney Bar Association.

²⁶² CNAPC, *Hui He Jian s/ Inc. Law 24.390*, Interlocutory decision of April 8, 1999. Later, CSJN, *Fabbrocino, Giovanni s/ extradición*, judgment from November 21, 2000.

²⁶³ TCPBA, Sala I, *R. E. s/ Recurso de Casación*, judgment of May 12, 2009.

²⁶⁴ This involved a Bolivian woman who was a member of the Ki-Chwua indigenous community, who was tried and convicted without the assistance of an interpreter. Available at: <http://www>.

Chubut has greater legal protections, and although there are no courts that operate in indigenous languages, the collaborations with institutions such as the *Pastoral Aborígen* permit a reasonable level of compliance with this right.

The efforts that Chubut has taken, the only province under study with a large indigenous population that speaks their traditional language in addition to Spanish, situates it in line with Latin American standards. Nonetheless, the sinuous national jurisprudence means that it is doubtful that Argentina as a whole satisfies such standards, as it admits numerous exceptions to the right to a translator and interpreter at all times. This may make the right ineffective as a whole if certain acts that determine the outcome of the trial have already occurred prior to the presence of an interpreter.

4. The professional culture of private attorneys and public defenders

4.1. Rules and perceptions regarding the role of defence attorneys and their duties toward their clients

4.1.1. The role of attorneys in laws regulating bar associations

In all provinces, membership of bar associations is obligatory. Bar associations are non-state, public legal entities, created by law and governed by their members through representative bodies that are periodically elected among their members.²⁶⁵ Bar membership laws do not describe the role of attorneys, but rather merely refer to their authority to advise, represent, espouse, and defend, and affirm that they shall enjoy the same respect and consideration as judges.²⁶⁶ In Cordoba and Buenos Aires they are considered to collaborate with the judge in the interests of justice, which contradicts their obligation to exclusively represent their client's interests, as the Chubut law provides.²⁶⁷ This is the only province in which the law includes the duty to observe national and provincial constitutions, and is based on a commitment to the constitutional order, which does not appear in the laws of the other provinces.²⁶⁸ Additionally, it devotes an entire chapter of its code of ethics to lawyers' duties to the institutional-

pagina12.com.ar/diario/sociedad/3-231199-2013-10-14.html.

²⁶⁵ LEPACO 1.4, 31, 38; LCPCCH 2.b, 17, 23; Law No. 5177 1.2, 18, 34.

²⁶⁶ LEPACO 16.1, 17; LCPCCH 5; Law No. 5177 56.

²⁶⁷ LEPACO 19.1; Law No. 5177 58. LCPCCH, Annex 1, 17.h.

²⁶⁸ LCPCCH 6.a.

legal order.²⁶⁹ In Buenos Aires, this mandate is entrusted to the departmental bar associations.²⁷⁰

Nearly all of the attorneys interviewed stated that they are committed to their client's defence, in many cases even when their clients cannot pay them. However, they also complained of extensive harmful practices, such as lying to clients or not providing them with complete, up-to-date information, and not bothering to investigate or prepare the case. Judicial officials confirm this, referring to practices such as the presentation of notoriously inexpedient briefs that do not involve much professional work, and the habit of abandoning the defence of a case when the client no longer has financial resources to pay. The interviewed prisoners said that often they felt that their attorneys were 'in cahoots' with the police, prosecutors, and judges, although they did not provide specific examples of this behavior. Nonetheless, the fact that their clients have this perception demonstrates that there are problems fulfilling the right to a trusted attorney.

4.1.2. Ethics and disciplinary sanctions

The laws that regulate legal practice only contemplate two duties of lawyers toward their clients: to maintain attorney-client privilege regarding the facts they obtained knowledge of in order to conduct the case; and to participate in the trial as long as they are responsible for the defence, and to provide sufficient notice to their clients if they decide to abandon the case.²⁷¹ The laws also list ethical violations, but only the Chubut law includes manifest ineptitude or serious failings in fulfilling their professional duties.²⁷² Its Code of Ethics establishes the general duty to permanently attend continuing legal education classes, and requires attorneys to ensure the preservation of the rights and constitutional guarantees of their clients, in particular with respect to criminal matters.²⁷³

²⁶⁹ LCPCH, Annex A, 5-8.

²⁷⁰ Law No. 5177 19.9.

²⁷¹ LEPACO 19.7 and 8; LCPCH 6.g; Law No. 5.177 58.

²⁷² LEPACO 21; Law No. 5.177 25; LCPCH 48 c and d. It is an ethical violation to exaggerate the importance of a case to make it appear as though more work was required, inexcusably abandon or ignore the defence, renounce the case without providing sufficient notice to the client, unjustifiably delay handing over funds or documents that belong to the client, provide false information regarding the status of the case, and violate attorney-client privilege.

²⁷³ LCPCH, Annex I, 9.c, 17.

All of those interviewed agree that there are a large number of attorneys who fail to fulfill these obligations. Court officials referred to unfounded briefs, a nearly non-existent defence strategy, and ill-conceived or untimely petitions. This coincides with what the interviewed prisoners mentioned, in that several private attorneys charge defendants, present a few briefs, and later abandon the case. An attorney said that part of her professional success is due to completing basic tasks such as investigating the case, which the prosecutor often misconstrues. Therefore, she says there is no excuse for the indolent behavior of her colleagues.

Public defenders and some private attorneys said that there are attorneys who bribe the police to put them in contact with detainees, and prosecutors or judges to secure their clients' freedom, or to be removed from the case. The failure to return funds and documents is a crime, and at least in Cordoba it is not uncommon for criminal defence lawyers to be tried and convicted for such conduct.

Individuals who have been prejudiced by a manifestly deficient defence must begin an unwieldy proceeding that involves a complaint, written confirmation, notification of the accused, presentation of evidence, allegations and resolution with an appeal stage, all of which involves the normal judicial rigor. The protection of the right to defence of the attorney accused of malpractice is effective, but the complexity and time involved in any complaint are serious obstacles for any citizen, especially if he is already suffering the consequences of a poor defence. This, together with the lack of periodic, standardized, and independent professional quality controls permits careless attitudes, accounts for the low opinion of the legal profession, and explains the vulnerability of people to malpractice.

The Disciplinary Court of Attorneys in Cordoba could not provide information regarding the number of sanctions against criminal attorneys.²⁷⁴ It only indicated that the majority were imposed in the capital city, which suggests either that legal practice there is worse, or that it is easier to denounce an attorney there, or a combination of the two. The Bar Association of La Plata also does not distinguish between the types of attorney sanctioned in its records.²⁷⁵

²⁷⁴ The Court addressed 310 cases in 2012, of which it resolved 112. Between February and March 2013, it handed down 29 decisions with 20 sanctions. It applied five private reprimands, 11 public reprimands, 2 fines and 2 suspensions. Report of the Disciplinary Court of Attorneys in Cordoba, July 3, 2013.

²⁷⁵ Of 9,064 active attorneys in 2012, only 2 suspensions have been applied, 2 individual warnings, and 2 warnings with the presence of the governing board. Report of the Bar Association of La Plata, February 1, 2013.

Judges may request these bodies to apply sanctions or fines against attorneys, but they do not generally do so. Within the legal profession, there is a corporative behavior: interviews confirm that while in private, judges generically criticize the level of professional performance, there are very few requests for sanctions or fines. Judges tend to justify their excessive intervention in favor of defendants on the grounds that they consider the defence to be inadequate, but at the same time they do not request disciplinary sanctions in such cases. Conversely, attorneys frequently complain about judges' behavior in private, but very rarely denounce the behavior publicly nor use the legal resources at their disposal to address the situation.

4.2. *Bar associations and their role*

Every court district in each of the three provinces in the study has a bar association, which attorneys must join, and whose role is to govern the exercise of the legal profession and undertake union functions to guarantee the free exercise of the profession.²⁷⁶ In spite of their assigned functions,²⁷⁷ the attorneys interviewed viewed bar associations as irrelevant to their daily professional experience. They rarely defend the right to exercise a quality defence, and nearly always do so when problems that lawyers suffer reach scandalous proportions. By contrast, bar associations do not react regarding legal practices that impair the effective defence of those accused, such as prosecutors' systematic failure to comply with procedural deadlines, difficulties in accessing information relevant to their case, or the lack of justification for pretrial detention.

The bar associations have also not taken an active role in the questioning and design of public policies regarding access to justice, nor for the promotion of legal knowledge or high level training activities. The few lawyers who said that they had taken bar association classes stated that their level or rigor was modest and only useful at the beginning of their professional careers.

²⁷⁶ LEPACO 1.2; LCPCH 2.b; Law 5.177 18.

²⁷⁷ They assume the defence and provide legal assistance to individuals without financial resources, report irregularities and deficiencies in the functioning of public bodies, and situations that call for the defence of justice to ensure constitutional rights, and lay the foundation for a system of legal assistance that allows access to justice. LEPACO 32; LCPCH 20; Law No. 5.177 19.

4.3. *Responsibility of bar associations in the provision of free legal assistance*

Bar associations must contribute to the state's provision of free legal assistance to those without sufficient financial resources. However, in Trelew, Chubut, criminal defence is excluded from their area of competence, and others informed us that they do not undertake criminal cases, which are sent to the public defence offices.²⁷⁸ None of the private attorneys interviewed were ever called upon to provide free legal assistance to an individual, which only happens in the rural areas in the interior of the provinces.²⁷⁹

According to public defenders, they only work with private attorneys when they are defending different individuals accused in the same case, and they tend to develop combined and compatible defence strategies. They also consult private attorneys when they successively defend the same individual. In Chubut, the public defence office hires private attorneys to deal with cases in areas where it is not cost-effective to have a full time public defender, or in cases where there is a conflict of interests (for example, in cases concerning police violence if the accused requests free defence services and the public defence office is intervening on behalf of the victim).

4.4. *Mechanisms of quality control for legal services*

In Argentina, there are no control mechanisms regarding the quality of private legal services. Disciplinary courts will only review the work of attorneys in extreme cases of a gross ethical or disciplinary violation, but there are no tools to monitor and guarantee minimum standards, nor to correct structural problems of forensic practices.

The Disciplinary Court of Attorneys in Cordoba is independent from the Bar Association. Its members may not have leadership positions in the Bar Association,²⁸⁰

²⁷⁸ LEPACO 32.15; LCPCCH 20.d; Law No 5.177 19.2; Internal Regulation of the Free Legal Clinic of the Attorney Bar Association of Trelew, art. 7. According to a verbal report of the director of Free Legal Clinic of the Bar Association of Cordoba, the aforementioned La Plata report, and reports from August 5 and 13, respectively of the Bar Associations of Comodoro Rivadavia and Trelew.

²⁷⁹ In 2005, INECIP, together with other organizations in Cordoba, created a program of Legal Extension Courses, but the Bar Association threatened criminal action against the project, which led to several committed members to abandon the access to justice project and weakened it. Later, the plenary meeting of the Bar Association admitted that the program did not constitute an illegal exercise of the profession, but that it would maintain its public position due to the fact that bar association elections were approaching.

²⁸⁰ LEPACO 55. In spite of this, there are strong ties between both institutions.

and it has the exclusive task of addressing disciplinary questions, either due to a complaint or of its own volition. By contrast, in Chubut and Buenos Aires, the Bar Association assumes the task of monitoring the exercise of the profession, and exercises disciplinary power independently of the civil, criminal, and administrative responsibility of its members.²⁸¹

None of the attorneys interviewed referred to ever having been supervised or controlled in the exercise of their profession. They admitted to having received complaints from their clients, but they considered it a natural part of their profession, generally due to misunderstandings or the anxiety of the defendants and their families to obtain their release. Only one attorney interviewed had been called to the disciplinary court, but the court rejected the complaint.

Nearly all attorneys stated that they take continuing education courses, which are obligatory in Chubut. However, very few of these cases are related to professional training that would be applicable to concrete cases, and tend to be interrupted due to the lack of time or resources to complete the course.

4.5. *Professional independence of defence attorneys*

Bar association laws indicate that the defence of the free exercise of the law is one of the duties of such associations.²⁸² The law in Chubut provides that the protection of freedom and dignity of the profession is one of the goals of the bar association.²⁸³ Laws in Chubut and Buenos Aires also provide that attorneys' offices are inviolable, as a derivative of the constitutional guarantee of trial defence, and therefore may not be searched or disturbed in their work, while in Cordoba the State must inform the bar association prior to such a search.²⁸⁴ The code of ethics in Chubut states that attorneys must rigorously respect attorney-client privilege and oppose any judge or other authority that seeks to reveal information protected by attorney-client privilege.²⁸⁵

Individual attorneys said that some bar associations renounce this independence in order to avoid 'confrontations' with judges and prosecutors, tolerating practices that prejudice the defence of their clients. Such bar associations argue that the client leaves after his case, but the attorneys must continue to litigate in the same forum,

²⁸¹ LCPCH 43; Law 5.177 19.3.

²⁸² LEPACO 32.4; LCPCH 21.J; Law 5177 19.4, 42.5.

²⁸³ LCPCH 1; Annex 1, 4.

²⁸⁴ LEPACO 33; LCPCH 7.e; Law No. 5177 69.

²⁸⁵ *Ibid.*, Annex 1, 9.h.

before the same officials. In such cases there is a clear conflict of interests: a client may need an assertive defence strategy, but his attorney knows that if he confronts the judge or prosecutor, his chances of success in future cases will decrease. Therefore, the interests of his client's concrete interests are subject to the calculation of benefits to the attorney or to the interests of future clients.

5. Rights of indigenous peoples

5.1. Normative recognition of indigenous peoples

There are large indigenous populations in the three provinces, but in Argentina there are no specific national laws that provide for their particular needs regarding criminal defence, in spite of the express constitutional mandate for the National Congress to do so.²⁸⁶ Only Chubut addresses cultural diversity and regulates the rights of indigenous peoples in its provincial constitution and the CPPCH.²⁸⁷

The Public Defence Office signed a technical co-operation framework with the National Ministry Team for Indigenous Peoples in order to recognise and defend the rights of indigenous peoples,²⁸⁸ and commits to promoting the constant training of the employees of the Defence Office. Additionally, the Chief Defender has resolved that the 'Defence Offices shall adopt special measures to ensure an adequate attention to indigenous peoples and their communities, respecting and ensuring respect

²⁸⁶ From the constitutional reform in 1994, the National Congress has had the duty to 'recognize the ethnic cultural preexistence of Argentinean indigenous peoples, guarantee respect for their identity, and the right to a bilingual and inter-cultural education [...] ensure indigenous peoples' participation in the management of [...] other interests that affect them' (CN 75.17). According to the *Atlas de los Pueblos Indígenas* of the Ministry of Education, there are 600.329 indigenous people or people of indigenous descent in Argentina.

²⁸⁷ Both refer ILO Convention 169 9.2: CCH 34; CPPCH 33.

²⁸⁸ See the Framework Convention of December 2003, which provides for 1) reciprocal technical assistance; 2) the design and execution of campaigns to promote national and provincial mechanisms for the protection of the rights of communities, organizations, indigenous peoples and their members; 3) the articulation of material, human, and other resources; 4) the promotion of legislation and administrative, legislative, and jurisdictional practices at the national and provincial level that fulfill international human rights instruments; 5) the collective presentation of opinions, legal projects, complaints, administrative and judicial actions, and in particular, the defence of the rights of indigenous peoples. Available at: www.defensachubut.gov.ar.

for their cultures, languages, religion, and social organization'.²⁸⁹ The Defence Office includes personnel training regarding indigenous law within its strategic guidelines, and states that an attorney who specializes in indigenous law provides assistance in cases of the violation of such rights.²⁹⁰

5.2. *Specific institutions for the defence of members of indigenous communities*

There are no specific institutions responsible for the defence of members of indigenous communities in Cordoba or Buenos Aires. Only Chubut has trained the Public Defence Office to fulfill this role, appointing some attorneys who specialize in indigenous law, based in the city of Esquel, but with a presence throughout the entire province.²⁹¹

There is no recorded jurisprudence on this topic. Courts in the country have occasionally required governments to establish specific bodies or public policies to promote the rights of indigenous people, but not with respect to criminal law.²⁹² In Esquel, attorneys daily attend to members of indigenous peoples and community

²⁸⁹ See Annex to Resolution 25/06 of the Chief Defender, March 23, 2006: *Special attention to vulnerable groups*, art. 2. Available at: www.defensachubut.gov.ar.

²⁹⁰ See, Resolution 88/11 of the Chief Defender, April 7, 2011. Available at: www.defensachubut.gov.ar/?q=node/2804. Regarding sensitization and training programs for key operators of indigenous law in Chubut, see, www.defensachubut.gov.ar/?q=node/2845.

²⁹¹ See, Resolution 99/11 of April 14, 2011. Available at: www.defensachubut.gov.ar/?q=node/2803. To prevent an excessive workload from limiting her effectiveness, the attorney only accepts cases that involve indigenous people, requests that her transfer to other areas be the least bureaucratic as possible. Interviewed attorneys and legal officials had not received any special training to address issues of indigenous peoples, including, judges, prosecutors, and public defenders in Chubut (although none of them work in Esquel). Some officials stated that the only training they received is what they have learned in practice from their work with members of minority groups.

²⁹² In a case regarding land trespass in Chubut, the CSJN could have addressed the specific criminal defence needs of indigenous groups, as well as their rights to lands that they historically occupied, but it unfortunately avoided doing so. It merely overturned a resolution that subjected the accused to a criminal process for arbitrariness. In any event, the case reflects the vulnerability of indigenous peoples, as the criminal prosecution of those accused in this case was promoted by constant private complains, in spite of the fact that the Public Prosecutor had closed the case on for separate occasions. CSJN, *F. Mauricio s/ Causa 2061*, Opinion of the prosecutor, October 31, 2007, which the Court adopted. Available at: www.defensachubut.gov.ar/?q=node/3039.

authorities. The Esquel office estimates that it has around 200 consultations with more than 30 communities, and that there are constantly new cases.²⁹³

5.3. *Attorneys who specialize in the defence of members of indigenous communities*

The Public Defence Office of Chubut told us that there are several individual lawyers who specialize in the defence of indigenous peoples and that at least two of them work in Esquel.²⁹⁴ In Buenos Aires, the Provincial Commission for Memory has a program regarding indigenous peoples and migrants that works for the application of multiculturalism in various State institutions.²⁹⁵ This organization noted the presence of detained indigenous peoples who could not be understood in their native language.²⁹⁶

In addition to these groups, at the national level, there is an Association of Indigenous Law Lawyers, which promotes the recognition of Argentina as a multi-cultural republic, promotes the full recognition and application of indigenous law, encourages legal investigation, seeks recognition of the scientific independence of indigenous law, and protects indigenous human rights defenders.²⁹⁷ This is important, as the intimidation that indigenous people suffer means that they need a large number of attorneys to defend them.²⁹⁸

Nonetheless, the reluctance of judges to accept experts or indigenous language interpreters is a barrier to progress in this area, as is the insufficient number of attorneys who are capable of effectively defending the rights of members of indigenous communities.²⁹⁹

²⁹³ Report of the Chubut Public Defence Office: October 7, 2013.

²⁹⁴ *Ibid.*

²⁹⁵ Available at: www.comisionporlamemoria.org/comision.php?a=7. For more information on the case, see, www.congresoestudiosposcoloniales.wordpress.com/2013/10/14/mujer-pobre-boliviana-indigena-garantias-para-una-conviction-segura/.

²⁹⁶ Oral Court of the city of Quilmes, Buenos Aires, *Maraz Bejarano Reina, Tarija Juan Carlos y Vilca Ortiz Tito s/ Crimes: Homicide Agravado 'criminis causa', Homicidio agravado por el concurso premeditado de dos o más personas*. The relevant resolutions are not available.

²⁹⁷ See AADI. Available at: www.derechosindigenas.org.ar/.

²⁹⁸ See AADI 2011, p. 29.

²⁹⁹ *Ibid.*, pp. 34-35. From the newspaper coverage of the *Maraz Bejarano Case*, we know that the accused only had access to a Quecha interpreter after being detained more than three years, and was only allowed to make a new statement with the assistance of an interpreter.

5.4. *Hearings in indigenous languages*

No jurisdiction has laws that permit hearings in indigenous languages, not even Chubut, in spite of its developments in other areas of indigenous rights, and even though it is the province that is most likely to implement such laws. The Public Defence Office informed us that occasionally some members of indigenous communities use their traditional languages in hearings.

5.5. *Recognition of sanctions imposed by indigenous tribunals*

There are also no norms that provide for the recognition of sanctions that indigenous tribunals impose. There are no ordinary criminal courts made up of indigenous peoples, and bodies to address inter-ethnic conflicts between communities that do have such norms are not legally recognized by the national or provincial governments.

Argentinean judges have serious problems recognizing sanctions that indigenous communities impose, as well as with balancing fundamental rights with respect for cultural diversity. On occasions they have attempted to pay attention to ancestral cultures without stopping to study them or consult them, which results in a denial of justice.³⁰⁰

The AADI warns that ‘the criminal code is not receptive to indigenous customs on the issue’ and that ‘procedural codes lack special measures of protection for indigenous culture, fails to recognize collective rights, and devalues their institutions and traditions, which are always at a disadvantage in conflicts with the State or individuals from the majority population’.³⁰¹ The State also ignores community processes that impose sanctions that may be identical to the sanction already imposed, which means that members of indigenous communities are at risk for being tried twice for the same crime: once by their communities and later by the State.

³⁰⁰ Thus, courts have absolved a defendant, considering that having sexual relations with a nine-year-old girl was an accepted practice in his community, in spite of the fact that women from that community strongly questioned that assumption. See, Salta Court of Justice, *Ruiz, J.F.*, judgment of September 29, 2006, analyzed by Guíñazú 2010, p. 271. In another extreme case, two judges maintained, in a dissent, that three defendants should be absolved of sexually assaulting an indigenous girl. The judges alleged that the ‘so called, “chineo” is a cultural custom from the west of our province. It involves mixed-race youth that go looking for “chinitas”, indigenous girls or teenagers, whom they pursue and forcefully have sexual relations with. It is such an internalized cultural custom that it is seen as a youthful game that is neither criminal nor degrading to the victims’. Dissent of Judges Tievas and Hang, Superior Court of Justice of Formosa, *González, Rubén Héctor—Bonilla, Hugo Oscar—Santander, Sergio Andre (prófugo) s/ abuso sexual*, judgment of April 29, 2008.

³⁰¹ AADI 6-7 and 34-35.

6. Political commitment to effective criminal defence

6.1. Criminal matters in public discourse

Matters of criminality are at the centre of public concerns and discourse, with a disproportionate relationship between declining rates of serious crimes, and rates of imprisonment, which continue to increase.³⁰² A survey shows that the greatest concern for Argentines was crime, which 35 per cent of respondents stated that it was their most pressing concern.³⁰³ A recent study regarding governance problems in Córdoba put insecurity at 32 per cent, in addition to drug trafficking (3.9 per cent), youth violence (1.3 per cent), human trafficking (1.3 per cent), and domestic violence (1 per cent).³⁰⁴ The issue has a central place in the discourses of candidates for public office, who all tend to propose similar measures: better equipment for the police, increasing the number of police, increasing criminal sanctions and extending the use of pretrial detention.

In Buenos Aires, security is an inescapable topic in electoral campaigns. More hardline political sectors based almost their entire discourse on extreme proposals.³⁰⁵ In 2009, Governor Daniel Scioli presented a reform project on the Criminal Code, which his Minister of Safety justified by the need for ‘the police to take back the streets’.³⁰⁶ In 2013, a prominent legislator presented, together with Rudolph Giuliani,

³⁰² Between the years 2002 and 2009 (which is the last year with published data), the change in the homicide rate published by the Ministry of Justice and Human Rights indicated a descending curve. See www.jus.gob.ar/areas-tematicas/estadisticas-en-materia-de-criminalidad.aspx. At the same time, for the same period, the number of incarcerated individuals indicate an ascending curve, see, SNEEP 2012, p. 3.

³⁰³ Latinobarómetro 2013. Fleitas (2010, p. 14) cites a 2009 survey by Mora and Araujo, which indicates that for 77 percent of the population it is the most serious problem. A Management & Fit survey, published in the newspaper *Tribuna de Periodistas* (August 8, 2012), confirms that ‘insecurity is the number one concern for Argentines, at 83 percent’. It was not possible to obtain copies of the surveys cited.

³⁰⁴ Córdoba 2013, p. 4. According to the same survey, more than 71 percent of those interviewed disapproved of the management of the provincial police (See page 19) during the beginning of a scandal that led to the resignation of the Minister of Security and the Chief of Police, the arrest of the Chief of the Dangerous Drugs Division and four other directors, the death of two police implicated in the scandal, and the transfer of 70 agents from that division.

³⁰⁵ One candidate for governor expressed the need to ‘fill criminals with lead’.

³⁰⁶ Newspaper *La Nación*, November 8, 2009. In 2010, the provincial Senate expressed a resounding rejection of this project in a public hearing.

his proposals for ‘zero tolerance for drugs and crime’, and attempted to reform the criminal process to ‘stop the revolving door; so criminals don’t enter one door and leave through the other’.³⁰⁷

The press tends to spread macabre details of the crimes it covers and treats dropped charges and not-guilty verdicts as signs of impunity, generally without explaining the legal reasons for the accused’s liberty.³⁰⁸

6.2. *Reform processes. The current situation*

Argentina is currently in transition between the traditional inquisitorial model and an accusatorial and adversarial model that respects international standards. Although this process is being carried out in permanent tension with social pressures to implement greater protections and rights, and pressure to restrict rights in the name of efficiency, in general terms, since democracy was reinstated, justice systems have moved toward respect for an effective criminal defence.

The reform movement is dynamic, with extensive civil society participation, which is committed to strengthening the rule of law. At the time this report was written, several provinces were undergoing reform processes, with varying levels of intensity.³⁰⁹

Cordoba is mired in a judicial model from the first generation of reform, with serious difficulties in guaranteeing rights related to an effective criminal defence. A pilot program to implement steps toward the accusatory model is underway in a small city in the province, San Francisco. This project includes moving toward oral trials, alternative plea agreements, and the reorganization of prosecutors toward a model

³⁰⁷ Statements made by Sergio Massa, winner of the 2013 elections, to the newspaper *La Nación* on October 21, 2013. This legislator managed to halt a bill to reform the Criminal Code with the argument that the reform favored criminals, although there was no serious data to support this statement.

³⁰⁸ INECIP-OSF 2012, p. 91, *Relevamiento de Medios de Comunicación*.

³⁰⁹ These reforms are being undertaken in Buenos Aires, Entre Ríos, Chaco, Santa Fe, Corrientes, Salta, Jujuy, Tucumán, La Rioja, Santiago del Estero, Cordoba, La Pampa, Neuquén, Río Negro, Chubut y la Federal Jurisdiction. A central component of recent reform processes refers to the implementation of a system of jury trials, adopted from the classic jury model in place of the majority of common law countries. In 2011, the PBA adopted a Trial by Jury law that is currently being implemented. In Neuquén, the new Criminal Procedural Code entered into force in January, 2014, which includes trial by jury. Currently, jurisdictions such as Río Negro, Chubut and Ciudad Autónoma de Buenos Aires are discussing the implementation of jury trials.

similar to that of Chubut.³¹⁰ According to the Deputy General Prosecutor, this means that ‘within five days after a person is detained, he is taken before a judge, a prosecutor, and his defence attorney to determine whether the detention is appropriate. The system is much more protective than the former system, in which a person could be detained 15 days without receiving any answers’.³¹¹ Nonetheless, this official indicated that ‘we could not adopt the same system in the capital city’, due to the greater complexity of the situation of criminality.

Chubut has the most successful justice reform in terms of complying with international due process standards. Nonetheless, the new code was quickly amended to permit pretrial detention if the judge considers that the accused will commit new crimes;³¹² to introduce the word ‘suggested’ to the deadline to open an investigation, and therefore render it useless; and to increase the deadline to 48 hours to determine whether a detention is legal, although the Constitution orders that this determination be made ‘immediately’.³¹³

The procedural system of Buenos Aires, which was implemented in 1998, also belongs to the first generation of reform. The complexity and geographical extensiveness of the province, and its large population, has created problems from the beginning, as well as clearly disorganized implementation. Since its entry into force, the code has undergone reforms geared toward reducing the protections of detainees. The most recent, initiated by the executive branch, limits the possibility of granting a person freedom in cases of illegal firearm possession.³¹⁴ As a counterpoint, a law that incorporates trial by jury for criminal cases was recently approved. Its implementation began in 2014, and there are high expectations that it will contribute to improving the quality of the justice system and its transparency, strengthening the rights of the accused. Additionally, the law governing the public defence system has been reformed, as we mentioned earlier.

³¹⁰ Soria 2012.

³¹¹ Newspaper *Comercio y Justicia*, April 4, 2011, *El plan piloto en San Francisco superó las expectativas*, interview with José Gómez Demmel.

³¹² Judges did not apply this legal reform, which was contrary to CCH 49.

³¹³ CPPCH 220.3, 269, 219 respectively, modified by Law 5817 of November 27, 2008. CCH 47. See Heredia 2010, p. 5.

³¹⁴ The Project was approved in the Senate in September 2012. See *Diario Diagonales*, September 27, 2012.

6.3. *Other forms of criminality: the Minor Crimes Code*

Systems to address misdemeanors or infractions require special treatment, especially in Cordoba, whose Minor Crimes Code (CFCOR) is strongly questioned. The police directly apply the CFCOR, who detect infractions and impose sanctions.³¹⁵ A minor crimes judge only intervenes if the defendant appeals the sanction, or the sanction is greater than 20 days in jail.³¹⁶ The police may detain an individual if he does not have a residence in the city, and in the case of loitering, for 24 hours in order to identify them.³¹⁷ Such proceedings do not require the assistance of an attorney, although the police may inform the accused that he can hire an attorney or request the intervention of a public attorney. Additionally, if the accused confesses, his sanction may be reduced by half.³¹⁸ The most commonly used infractions are loitering and the refusal to identify oneself or provide police with information they request.³¹⁹

The Minor Crimes Code of Chubut (CFCH) establishes sanctions of between one and 20 days, but excludes detention where there are no separate institutions for those accused and those convicted, and for minors.³²⁰ It does not include sanctions for loitering, but does sanction ‘scandalous prostitution’ with a disproportionate penalty of 20 to 60 days,³²¹ which encourages police abuse.

Deprivation of liberty is only undertaken to ensure that the minor crime stops, and for the time that this takes.³²² Unlike in Cordoba, peace judges, chosen by the Judicial Council, who are often attorneys, apply infractions. Charges are filed in a public, oral hearing, and the defendant must be assisted by a trusted attorney or public defender.³²³ As in the criminal procedural system, Chubut recognises orality and publicity as the cornerstones of an effective defence system. Perhaps for this reason,

³¹⁵ CFCOR 114, 115, 117, 123.

³¹⁶ CFCOR 119, 120.

³¹⁷ CFCOR 123.

³¹⁸ CFCOR 15 y 19.

³¹⁹ CFCOR 98, and 79. They are sanctioned with 5 and 3 days in jail or with 5 and 10 fines, respectively. Each fine is \$ 25 (around \$4.80 USD). Loitering consists in remaining without a reason, in a suspicious manner, and causing the discomfort of the owners.

³²⁰ CFCH, Law 4145 36, 35, 37

³²¹ CFCH 81.

³²² Available at: <http://www.defensachubut.gov.ar/prensa/?q=node/3192>.

³²³ CFCH 181, 186, 187.

they have been chosen as the location for a legislative reform project of the Cordoba Code of Infractions.³²⁴

In Buenos Aires, Law 13.482 (CFBA) provides for detention to determine one's identity without a court order.³²⁵ The CFBA has been reformed in order to grant peace judges authority to hear cases of misdemeanors.

Seventy per cent of those detained in Cordoba are young men between 18 and 25 years old, who belong to marginalized urban neighborhoods.³²⁶ The majority of detentions occur in busy streets and in clear view of those passing by. One young man interviewed stated that he was detained several times for no reason, and that if he appeals the sanction he will be mistreated and detained again as soon as he is released. This is a common story. The practice was denounced as arbitrary and unmotivated, and was carried out in order to fulfill a set number of arrests: a police officer has denounced the fact that his boss required him to make five arrests to avoid being assigned extra hours and unending guard duty.³²⁷ The boss was tried criminally.

In 2011, 73,100 people were stopped (around 42,700 in the capital city alone), which is around 200 detentions daily,³²⁸ and this number is increasing. A chief prosecutor argued that although it was unconstitutional, it was an adequate tool for the government's criminal policy.³²⁹

By contrast, the CFCH has not ever been used to impose arrest sanctions during the 14 years that it has been in force, as there are no specific places to carry out this sanction, separate from those detained for criminal reasons.

In Buenos Aires, 'in spite of putting peace courts in charge of hearing misdemeanors, in daily practice, the police continue to have broad powers of detention'.³³⁰

³²⁴ See *La Mañana de Córdoba*, 13 de octubre de 2011.

³²⁵ Law No. 13.482, 15.c.

³²⁶ See, *La Voz del Interior*, November 17, 2012.

³²⁷ See, *La Mañana de Córdoba*, August 18, 2005. The situation remained over time, and led to criminal actions against police authorities ordering massive detentions. See, *La Voz del Interior*, February 17, 2012.

³²⁸ See, *La Voz del Interior*, November 3, 2012, and official data of that newspaper.

³²⁹ Statements by Gustavo Vidal Lazcano in *La Mañana de Córdoba*, August 19, 2005, p. 2. Source: Hourcio J. Etchichury, 'Preso sin attorney, sentencia sin judge. El Código de Faltas de la Provincia de Córdoba'.

³³⁰ CPM Report 2009, p. 458. The report states that 'heads of police units characterize detention to determine identity as an effective tool in crime prevention'. They state that 'police intercept and detain [...] suspicious individuals, thereby avoiding the commission of crimes [...] The head of the Statistics Office of the Centres of Police Operations, Claudia Cherecheti, stated that "there are

Nonetheless, the judicialization of misdemeanors and infractions reproduces the problems that plague the criminal system: peace justices base their decisions on written proceedings, without public hearings or direct information regarding the case, which arrives before the court with a police bias, via the case file that forms the basis for the case.

7. Conclusions

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 effective defence of defendants. These include rote incorporation of written investigation materials into the trial; placing full confidence in documents produced by public officials, affecting the right to contradict evidence against the defendant; and 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 them 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 rela-

not statistics or information records regarding this form of detention, because, since it is a simple action and 'escort' that does not qualify as an apprehension, it is not registered, departments do not register anything, as it is not required that police offices communicate information regarding these detentions to the Ministry of Security". (this quotation must be assessed; it's hard to tell where one quotation begins and another ends)

tive 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 the 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.³³¹ 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 the monitoring and auditing of 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 application 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 him. Once an individual is before a judge or prosecutor, his defence functions more or less adequately, but until then, there are no concrete

³³¹ Soria 2012, p. 43.

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.³³² 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,³³³ 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.³³⁴ From the answers of the officials we interviewed, it may be deduced that their incomprehension of the accusatory system

³³² This is a crisis characterized by more and more attorneys, with less work, with greater difficulty for young attorneys to begin practices, a growing need for technical advice, and, finally, more people in need of defence. Binder 2005, p. 63.

³³³ *Ibid.*, p. 65.

³³⁴ This way of teaching privileges the memorization of legislative texts, above developing analytic abilities. Böhmer 2005, p. 35.

stems in a large part from a formal education geared toward inquisitorial, written processes.³³⁵

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 large 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.

³³⁵ Course of oral, adversarial litigation had an impact on students that attended them, but when they are optional, the impact diminishes. Even today, in Córdoba and Buenos Aires they have a limited reach. Bar associations and public defence offices have not addressed this situation as a problem that needs to be resolved. There are exceptions to this reality, given that some universities have incorporated oral litigation as part of required curriculum: within the jurisdictions under study, the National University of Patagonia in Trelew. In the rest of the country, this occurs in the national universities of La Pampa, Comahue, La Rioja, the University del Mar, and the University del Centro Educativo Latinoamericano. Additionally, there are many universities that have begun offering such classes as electives. .

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 the 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 for 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.

7.1. 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. Communication between attorneys and clients in physical locations adequate for defence preparation should be guaranteed.
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.

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CHAPTER 4. COUNTRY ANALYSIS. BRAZIL¹⁻²

1. Introduction

1.1. Political, social, and cultural context of the Brazilian criminal justice system

Brazil is a federal state with a presidential government. The Brazilian federation is composed of 26 states and a federal district, where the capital, Brasília, is located. All the entities of the federation (Federal Union, states, municipalities, and the federal district) are subject to the 1988 Federal Constitution, which defines the attributes of each entity. Their legislative powers are described in articles 22, 23, and 24.

Article 22.1 establishes that criminal and procedural laws must be developed by the legislative branch, the national congress, which is composed of the House of Representatives and the Senate. Thus, any legislation that defines criminal conduct, sanctions, or procedural rules applicable throughout the national territory are of national jurisdiction. It is important to note that although the Criminal Execution Law³ is national in reach, the norm of penitentiary law (which regulates specific issues related to the prison system in each state) may be established by state members, the federal district, and the Federal Union.

¹ Vivian Calderoni and Ludmila Vasconcelos Leite Groch reviewed this chapter.

² The field research used for this chapter was undertaken in July, 2013.

³ Law No. 7.210/1984, which regulates norms for the execution of criminal sanctions and establishes rules for carrying out the sentence.

The Criminal Code in force was promulgated by executive decree 2.848 of 1940 (in force since January 1, 1942), and the Criminal Procedure Code by executive Decree 3.689 of 1941 (also in force since January 1, 1942).⁴

The 1988 Federal Constitution,⁵ which was written and promulgated during the recuperation of democracy after the military dictatorship of 1964-1985, emphatically regulates individual rights and protections. This is enumerated in article 5, which has 78 sub-sections, the second of which indicates that the rights and protections expressly mentioned do not exclude other rights that may be derived from principles that the Brazilian legal order adopts, or from international treaties that Brazil has ratified.

In consideration of this, it is clear that there are differences between the Federal Constitution of 1988 and the original texts of the Criminal Code and Criminal Procedural Codes, which were promulgated during the dictatorship, although they are considered to have been adopted by the current Constitution, and are therefore in force. An important reform to the Criminal Code happened in 1984, before the adoption of the current Federal Constitution, through Law No. 7.209/1984, which modified articles 1 through 120.⁶ Even so, there are several differences between the Code and the Constitution, so it requires effort to interpret the code in accordance with the constitution, as well as with modifications to legal texts, as we will demonstrate with several examples in this report. Law No. 12.015/2009 reformed the Criminal Code,

⁴ The Criminal Code and Criminal Procedure Code were promulgated during the government of President Getúlio Vargas, who instituted a dictatorship inspired by Italian fascism. In the view of the political scientist and historian José Murilo de Carvalho (2007), the dictatorial period under the government of President Getúlio Vargas, (1930 and 1945), during which the Criminal Code and Procedural Criminal Code that are still in force today were developed, is characterized by the restriction of civil and political rights and the expansion of social rights, and in particular labor rights (Carvalho 2007, pp. 88 and 120). The dictatorial culture also impacted on criminal legislation: both codes were created by executive decrees, meaning the executive power unilaterally imposed them and they entered into force without any legislative deliberation.

⁵ After the 1937 Constitution, Brazil adopted three more constitutions (one democratically, in 1946, and two during the military dictatorship, in 1967 and 1969).

⁶ The Brazilian Criminal Code is divided into two parts: the general part (articles 1-120) establish general concepts regarding the application of criminal law, types of crimes, criminal responsibility, accomplice responsibility (*concurso de personas*), sanctions and effects of convictions, security measures, criminal actions, and reasons for the annulment of the criminality; the Special Part (articles 121-360) defines the various crimes. The Law of Execution of Criminal Sanctions (7.210/1984) also entered into force, which judicialized the execution of sentences and established rights and duties of those sentenced to prison.

for example with respect to sexual crimes.⁷ Additionally, since 1988 several criminal laws have been adopted outside the Criminal Code, and several delineate crimes.

The Criminal Procedure Code (CPP) has undergone numerous specific and significant reforms. Some reforms that are closely related to the right to effective defence are worth mentioning upfront. Law 10.792 states that the interrogation of the accused is a method of defence, rather than solely a way to obtain evidence. This law made the presence of a defence attorney obligatory during any questioning of the accused, and granted the parties the right to ask the accused questions (previously, only the judge had this power). Law 10.792 promotes the principle of broad defence that article 5 of the Constitution contains.

Law no. 11.719/2008 was also adopted, which made several changes to the criminal procedure process. An important one involved moving the questioning of the accused to the after procedural instructions, in order to respect the principles of broad defence and due process (art. 5º, LV y LVI). Law No. 12.403/2011 is also important as it created alternative precautionary measures (such as the obligation to periodically appear before the court, to remain away from the victim, electronic monitoring, etc.), due to the high rate of pretrial detention in Brazil. This law recognizes that it is not necessary to provisionally deprive an individual of his liberty when he does not pose a danger to society.

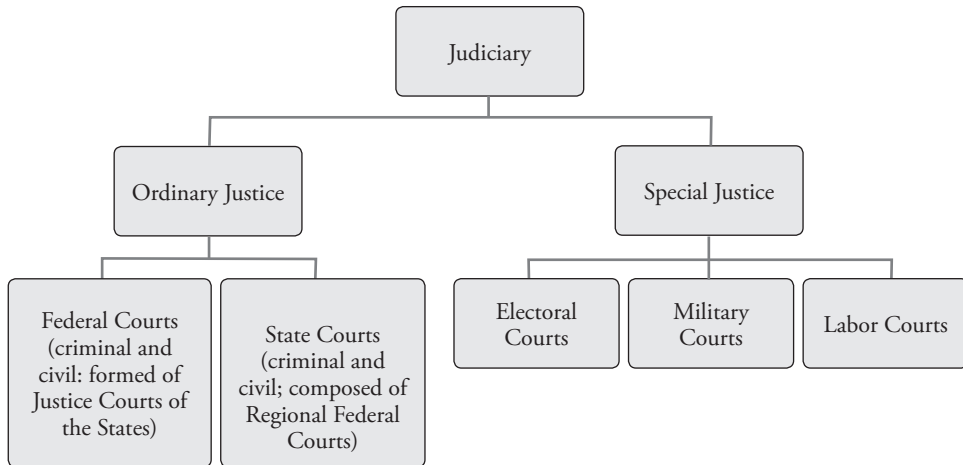
1.2. Summary of the structure and procedure of Brazilian criminal justice

The organization of the Brazilian judiciary is regulated in articles 92 to 126 of Chapter III of the Federal Constitution. The division of the judicial bodies is based on the topics that they are assigned, and may be illustrated in the following manner:

Criminal issues that do not fall within the purview of special courts are processed in ordinary courts. These are in turn divided into federal courts⁸ and state courts, and

⁷ To this end, it is worth noting that the former article called ‘Crimes against custom’ was renamed as ‘Crimes against sexual dignity’, such that the legal good protected formed part of human dignity, provided for in article 1.3 of the Federal Constitution.

⁸ Article 109 of the Federal Constitution defines crimes that belong to federal criminal jurisdiction in sub-section IV (political crimes or crimes against the Federal Union, its bodies or patrimony), V (crimes provided for in international treaties in force in Brazilian territory), V-A (crimes related to human rights violations), VI (crimes against the organization of work, the financial system, or the economic order), IX (crimes committed on ships or planes), and X (crimes of illegal immigration). All the crimes provided for in Brazilian criminal legislation that do not fall within the aforementioned categories are of state jurisdiction.



their territorial jurisdiction is divided between each state of the federation and the Federal District.

Criminal prosecution is divided into two phases:

- (i) The police investigation: an investigatory procedure designed to obtain elements of proof regarding the author and commission of a crime that may serve as a basis for a criminal action. This begins after a suspect is captured *in flagrante delicto*, by order of the police commissioner, or at the request of a judge or prosecutor. This investigation falls within the authority of the criminal police, and the police commissioner leads it. The prosecutor is responsible for externally controlling police activity⁹ and requests for police investigation and the activities undertaken as part of the investigation.¹⁰ Since the investigation includes the testimony of the accused, victims, and witnesses, the law states that the police commissioner is the entity autho-

⁹ Federal Constitution, article 129.VII.

¹⁰ Federal Constitution, art. 129.VIII. The Brazilian Criminal Procedure Code establishes rules only for police investigations, and says nothing with respect to the possibility that crimes be investigated by other bodies or institutions. This means that, although there is not a legal provision, there is also not an express prohibition on investigation by other bodies. Nonetheless, the police investigation may be dispensed with if other bodies with investigatory authority have access to information regarding a crime (such authority is determined by the Federal Constitution or a law), such as legislative investigatory bodies (which address all types of issues: political, administrative, civil and even criminal, and can forward this information to the relevant institution). With respect to the possibility or lack thereof of the Public Prosecutor to investigation, see section 3.4.1.

alized to question the accused.¹¹ In this police questioning, there are some guarantees for legal interrogations, such as the right to remain silent, to an attorney, and to private conversations with one's attorney.¹² Additionally, given that the law establishes that the regulations provided for in article 185 of the Criminal Procedure Code are applicable to police interrogations, it may be argued that there is a legal obligation for the accused's attorney to be present during the interrogation.

There are no laws regulating the Prosecutor's presence during the accused's declarations during the police investigatory phase. Although such presence is not prohibited, it does not happen in practice.

It is important to highlight that all actions undertaken during the police investigation must be registered in a written document. The police also carry out a preliminary investigation in most cases, although it is not required in order to begin the criminal action.

- (ii) The criminal action: The criminal action is public and the Prosecutor heads it. A criminal action is presented in the criminal jurisdiction in the first and second instances, during which the rights to contradiction and broad defence apply. The general rule, with some variations, is that the proceedings are carried out in the following order:¹³ once the criminal action is filed, the accused is given the opportunity to file a written response to the accusation, which in exceptional circumstances, leads to an early closure of the process and the accused is absolved. In cases where the action continues, prosecution witnesses testify first, followed by defence witnesses,¹⁴ and the accused is interrogated last. Afterwards the parties may request other inquiries, when additional clarification regarding the evidence produced in the hearing is needed. After the inquiry has ended and after hearing the

¹¹ Criminal Procedure Code, art. 6.V.

¹² According to article 6.V of the Criminal Procedure Code, which addresses proceedings that the Police Commissioner takes in the course of a police investigation, while subsection V specifically refers to the questioning of the accused during this stage.

¹³ This description refers to the ordinary procedures, used to process and judge crimes whose maximum sentence is at least four years imprisonment. Therefore it applies to the majority of crimes that Brazilian law describes, in addition to serving as a model for other types of proceedings.

¹⁴ Generally, defence witnesses are identified in this phase, almost always without contact from the accused's attorney, which frequently prejudices the production of evidence for the defence in this phase.

parties' final arguments, the judge hands down his verdict (innocent or guilty), which may be appealed.¹⁵ Article 617 of the Criminal Procedural Code prevents appeal decisions that prejudice the accused when only the defence appeals the decision.

- (iii) Execution of the sanction: after the final stage of criminal proceedings is completed, if there is a guilty verdict that includes imprisonment, the proceedings continue to the stage of execution of the sanction. This proceeding is judicial and administrative in nature, and an executory judge and the director of the prison in which the person is detained are responsible for carrying it out. In this phase, constitutional guarantees of due process apply, including procedural equality, contradiction, defence, publicity (the right to know the length of the prison sentence, for example), and the right to appeal before a higher court.

In theory, with the changes to the CPP in 2008, the judge can no longer base his decision exclusively on evidence produced during the investigation, unless this includes experts and evidence that cannot be repeated. Nonetheless, this prohibition can sometimes be avoided by only permitting the testimony of the police responsible for the detention *in flagrante delicto* or for carrying out the investigation during the trial. Often, these police can review the information in the investigation before testifying, which certainly influences their trial testimony.

1.3. Justification for the geographical demarcation and methodology of the research

According to data from the 2010 census, Brazil has 196,655,014 inhabitants: 96,745,275 men and 99,909,739 women. The population is mainly urban (86.91%), while 13.09% is rural. With respect to the racial-ethnic make-up, approximately 91 million consider themselves white, 15 million black, 82 million mixed race¹⁶, 2 mil-

¹⁵ The Justice Tribunal may hear state appeals in cases of crimes that fall within state jurisdiction, while the relevant Regional Federal Tribunal may hear appeals in cases of crimes that fall within the jurisdiction of federal justice, as explained in note 5. For the purposes of this report, all mentions of the appeals phase refer to the Justice Tribunal of the state of São Paulo, due to the geographical scope of this investigation.

¹⁶ Translator's note: the original census category refers to 'pardo', which is roughly equivalent to mixed race.

lion 'yellow',¹⁷ and 817,000 indigenous.¹⁸ This means that by percentages, 47.7% of the population considers itself white, while 50.7% considers itself black or mixed, which is the first time that a larger proportion of Brazilians consider themselves black or mixed than white.

Official bodies do not offer systematized or updated data on national crime statistics, which is why it is necessary to use other studies. The absence of available official information is in itself a relevant point: it indicates that it is difficult to diagnose the cause of violence and crime, or to propose adequate public policies of prevention.

After noting this caveat, it may be said that according to the Map of Violence of 2012,¹⁹ the national homicide rate is 26.2 per 100,000 inhabitants. In the state of São Paulo, this rate is 13 homicides per 100,000 inhabitants; and the highest national average is found in the state of Alagoas (in the northeast region of Brazil), with 66.8 homicides per 100,000 inhabitants. Although there is no systematized national data, it is estimated that the crime that leads to the highest number of imprisoned men is robbery (28.3%), followed by drug trafficking (23%),²⁰ but the rate of incarceration for drug trafficking is increasing more than for other crimes.²¹ With respect to women, the majority are incarcerated for drug trafficking (40%). In the state of São Paulo, 36% of imprisoned men are imprisoned for robbery, and 28% for drug trafficking, while 35% of women are imprisoned for drug trafficking, and 8.3% for crimes against public property.²²

According to data from the Ministry of Justice (Sistema Infopen 2012),^{23,24} there is a clear profile of the imprisoned population: they are men (93.6%), young (48.5% are between 18 and 29 years old), and the majority are black or mixed race (53.83%). In the state of São Paulo, data from the Ministry of Justice presents a similar pic-

¹⁷ Translator's note: the original census category refers to 'amarelo', which is Portuguese for yellow.

¹⁸ Brazilian Institute of Geography and Statistics, 2010 Census.

¹⁹ Waiselfisz 2012, pp. 18-22.

²⁰ National Penitentiary Department of the Ministry of Justice (DEPEN), data from December, 2012.

²¹ The rate of detention for theft is also high, representing 35% of detentions. Instituto Sou da Paz, 2012.

²² National Penitentiary Department of the Ministry of Justice (DEPEN), data from December, 2012

²³ *Ibid.*

²⁴ The National Report of the State of Brazil, presented in the UN Universal Periodic Review mechanism (2012) states that the majority of prisoners are men (93.6%), young (53.6% are between 18 and 29) and black or of mixed races (57.6%). Secretariat of Human Rights.

ture: 93.52% of prisoners are men, 47.17% are between 18 and 29 years of age, and 46.74% are black or mixed race. The possibility that there is a relationship between one's race and the likelihood of imprisonment has been a concern for years, and there are several studies on the topic. One from the 1990s²⁵ compiled a large amount of statistical data that permitted the researchers to conclude that black and whites received different treatment. Given that the proportion of black and mixed race prisoners is high, there is evidence that indicates a relationship between imprisonment and racial discrimination. The authors of this study stated that it is likely that this is due to greater police vigilance and selective treatment on the part of the entire judicial system with respect to the black population.

This study chose the state of São Paulo as its focus, as it is the largest state in the country, with 41,262,199 inhabitants (2010 Census).

Given that the states have the largest criminal jurisdiction in the Brazilian system (compared to the federal system), and that the administration of the penitentiary system is the responsibility of the state, the investigation was undertaken through the compilation of data and the observation of the criminal justice system of the state,²⁶ selected for its representativeness, as in addition to the largest population in Brazil, São Paulo also has the largest number of criminal cases,²⁷ the largest judiciary²⁸ and the largest number of prisoners.²⁹

²⁵ Study *Racismo, criminalidade violenta e justiça penal: réus brancos e negros em perspectiva comparativa* [Racismo, criminalidad violenta y justicia penal: acusados blancos y negros en una perspectiva comparativa], undertaken by the Nucleus of Studies of Violence from the University of São Paulo between 1992 and 1993.

²⁶ It is important to note that the data collected refers to the adult justice system, as children and adolescents that are criminally processed fall under the Child and Juvenile Law, which provides for different procedures.

²⁷ According to the 2012 Report of the National Justice Council, the state of São Paulo began 543,183 new criminal cases in 2011, of a national total of 1,541,536, or around 35 percent of the total number.

²⁸ According to the 2012 Report of the National Justice Council, the state of São Paulo has 3,384 judges, including regular and substitute judges in first instance and appeals courts. Given that there are 15,337 judges in all the state justice systems combined, the state of São Paulo concentrates 22 percent of all active judges in the country.

²⁹ Currently, Brazil has an incarcerated population of around 555,000 people. Of them, 195,000 are in provisional prison, meaning that more than 54 percent of the incarcerated population is awaiting trial in prison. In the state of São Paulo, this proportion is close to the national average: of 190,000 prisoners, 62,842 (almost 33 percent) are provisionally incarcerated. (Data from the Penitentiary Department of the Ministry of Justice).

The field investigation included *in situ* monitoring of the activities of the following institutions:

- Courts of the Central Tribunal of Barra Funda. These courts have jurisdiction to process and judge crimes sanctioned with imprisonment that occur in the central district of the territory.³⁰
- Department of Police Interrogations and Police Chief of the Judicial Police (DIPO).³¹ These are responsible for court decisions taken during a police investigation, such as the decision to convert detention *in flagrante delicto* to pretrial detention, ending pretrial detention, or granting provisional liberty, orders to search and capture, telephone interceptions, among others. Thus, as it is located in the large city of São Paulo, DIPO is the body that exercises judicial control over the entry of the largest number of people into the prison system. Additionally, the Tribunal selects the body's judges and they are not guaranteed irrevocability.
- Criminal Division of the Tribunal of Justice. This is made up of seven groups, each one with two criminal chambers, for a total of fourteen. Each group is composed of five appeal level judges (referred to as *desembargadores*),³² who are responsible for ruling on decisions issued by first instances judges, as well as habeas corpus and *amparo* petitions.

The field research included in-depth interviews, and visits to the Criminal Tribunal of Barra Funda and the Justice Tribunal of São Paulo, in order to observe the physical installations of the tribunals and attend first instance hearings and deliberations regarding habeas corpus and appeals. The investigation was qualitative in nature, and therefore the results cannot be generalized, as few professionals from each area

³⁰ The Brazilian Criminal Code provides for imprisonment, with longer terms for more serious crimes, and shorter sentences for less serious crimes. Although the Law of Criminal Execution determines that such sentences should be carried out in different places, in practice this distinction is not made. The only difference is in the initial regimen of fulfillment of the sanction, as, in the beginning, prison sentences are generally fulfilled in a closed regimen, while those of detention are fulfilled in a semi-open regimen.

³¹ Body responsible for the centralization of all orders of detention in *flagrante delicto* and police investigations in the capital of São Paulo (with the exception of those whose crimes against life and less violent infractions, which are sent directly to the Special Crimes Court), which, when an investigation is completed, are distributed to criminal courts. This body is specific to the state of São Paulo. The Council of Magistrates created it, and the Superior Council of Magistrates established its organization.

³² Nomenclature used to identify the magistrates that hear appeals cases.

were interviewed due to the physical and time constraints of the project. Nonetheless, the results are also based on observations made on the ground and on the experience of Conectas Direitos Humanos and the Instituto de Defesa do Direito de Defesa (IDDD) in the sphere of Brazilian criminal justice.

In total, 15 interviews were carried out between January and March, 2013, with professionals that belong to the three phases of criminal trials:³³ three commissioners (responsible for police commissaries located in areas with different socioeconomic profiles), three prosecutors, three judges, three public defenders, two private attorneys and one court-appointed attorney.³⁴ All of those interviewed answered the same questions related to the two phases of criminal proceedings (police and judicial) and execution of the sanction, in order to glean insight into the perspective of different professionals of the legal system regarding each of these phases, as well as the criminal justice system as a whole.

2. Legal assistance

The presence of an attorney that represents the accused during the judicial phase and execution of the sentence is obligatory.³⁵ The purpose of this requirement, together with the right to legal assistance,³⁶ at least in theory, is to ensure that all those accused, in particular poor people, have access to free legal assistance.³⁷ When the accused does not appoint an attorney of his choosing, the Criminal Procedure Code³⁸ states that the judge shall appoint him a public defender or *ex officio* attorney.³⁹ The

³³ We were not able to interview a member of the Prosecutor's Office that works during the police stage, as none of our attempts to contact this office received an answer.

³⁴ Contract-based court appointed attorneys are those that make up the agreement of legal assistance between the OAB and the Public Defence Office. This is explained in greater detail in point 2, on legal assistance.

³⁵ Criminal Procedure Code, art. 261.

³⁶ Guaranteed to those who lack resources, according to the Federal Constitution, art. 5, LXXIV.

³⁷ Although there is not an economic threshold to guarantee the right to defence in criminal matters, article 263 of the Criminal Procedure Code determines that if a person is not poor and uses the services of public defender, he must pay their wages.

³⁸ Criminal Procedure Code, art. 263.

³⁹ In 1988, the Federal Constitution established that state public defence offices must provide legal assistance to the underprivileged population in cases of state justice. The state of São Paulo, nonetheless, only instituted the Public Defence Office in 2006. Prior to that year, the Attorney General of Legal Assistance (PAJ), tied to the National Attorney General, provided free legal assistance (the

law⁴⁰ permits the accused to name a private attorney at any point during the process, even when the judge has appointed a public defender or *ex officio* attorney earlier in the proceedings.

Public defenders are officials who are licensed to practice law, and selected upon the basis of a public competition and must have passed an entrance exam to the Brazil Bar Association.⁴¹ Their beginning salary is approximately 5,000 USD monthly.⁴²

Additionally, *ex officio* public defenders are those that form part of an agreement between the Public Defence Office and the OAB-SP,⁴³ and are available to be appointed to cases that are sent to the Public Defence Office⁴⁴ when the accused does not have an attorney to address his case. The only legal requirement to participate in the agreement is to have passed the OAB exam.⁴⁵ The Public Defence Office does

National Attorney General is responsible for representing the state of São Paulo in courts), as did attorneys that participated in the agreement between the Bar Association of Brazil (OAB) and the PAJ. With the creation of the São Paulo Public Defence Office, those who provided legal assistance had the option of moving to the career path of a public defender. 87 of 350 legal service providers who worked in the Legal Assistance Office chose(chose what?) (according to Consultor Jurídico website). According to the Public Defence Office, in 2013, after five contests were held, the state had hired 606 defence attorneys: 301 in the capital and 305 in the other court districts. On July 13, 2013, when the field observation portion of this investigation had been completed, São Paulo opened a sixth competition to enter the Public Defence Office, in order to fill 90 vacancies. Of this total, 185 work in the criminal area, and 88 of those are located in the capital.

It is also important to mention that, in lesser numbers, law schools also establish legal clinics in which students work under the guidance of licensed attorneys, who are responsible for the proceedings. This activity is offered through an agreement that law schools sign with the Public Defence Office, as well as with non-governmental organizations or public organizations, as in the case of the Fundação de Amparo ao Preso (FUNAP) (responsible for legal assistance in the criminal execution phase, together with the Public Defence Office).

⁴⁰ Code of Criminal Procedure, art. 263.

⁴¹ The Attorney Bar Association of Brazil represents attorneys and regulates the exercise of the profession. The exercise of the legal profession in contentious cases is subject to passing the OAB entrance exam, which professionals must take in order to exercise as attorneys, a requirement that applies to public defenders as well.

⁴² The Public Defence Office does not disaggregate financing by area.

⁴³ Public Defence Office and Attorney Bar Association of Brazil.

⁴⁴ As the agreement is supplementary to the Public Defence Office, the latter sends cases to contract-based attorneys when it lacks the capacity to attend to more cases.

⁴⁵ In São Paulo, the agreement signed between the Public Defence Office and the OAB establishes in paragraph 10.2 the specific requirements for trying jury cases (test of participation in sessions and a program in the Superior School of Advocacy), and in paragraph 11, taking a specific program in the Superior School of Advocacy as a requirement to practice in the Juvenile Area.

not intervene in the services offered, although legally the Comptroller of the Public Defence Office exercises quality control. The wages of *ex officio* defenders are 367.48 USD for a criminal trial, and 152.28 USD during the execution phase.⁴⁶

In the fieldwork, we observed that the number of defence attorneys is not proportionate to the demand that the sub-divisions in the criminal area face, as some areas lack public defenders, which creates a heavy workload in other areas.⁴⁷ For example, the sector of the Public Defence Office that works with the Department of Police Investigations has only four defence attorneys, who are responsible for all police investigations in the capital when the accused does not appoint a private attorney.⁴⁸ Another area with excessive workload, according to interviews, is legal assistance during the criminal execution phase.⁴⁹

The goal of the agreement for the provision of supplementary legal services signed between the Public Defence Office and the OAB is to cover demand where the Defence Office's services are insufficient.⁵⁰ Sending cases to *ex officio* attorneys

⁴⁶ These wages can be divided into percentages of 70%, 60%, and 30%, depending on the success of the case: in case of a conviction, the attorney will receive part of the payment on the date of the conviction, and the rest when the appeals decision is published. According to field observations and interviews, this form of payment often discourages attorneys from appealing guilty verdicts, as they need not wait for the appeals decision (which may take years) to receive their payment. Data from the Public Defence Office of São Paulo.

⁴⁷ Even in criminal courts of the Foro Central, where there are two public defenders per trial, there is an excessive workload, although it is less severe than during the police investigation and criminal execution phases.

⁴⁸ This information was not made available, but one of the interviewed judges that worked in the police investigation phase stated that he received on average 240 petitions regarding flagrante captures per day, and 1000 each week. Eight judges work in the DIPO (Department of Police Investigations). The Public Defence Office's 2013 activity report mentions that its legal services division received 28,730 prison petitions regarding cases of capture *in flagrancia* in 2012. These attorneys also practice in the court of domestic violence and violence against the family and women and the special criminal court.

⁴⁹ In the capital, only 17 defence attorneys act on behalf of 70,000 prisoners, both in judicial and administrative proceedings. The most recent convocation prioritized the covering of vacancies in the area of criminal execution, according to interviews and government press releases. In the criminal execution phase, those convicted may also make use of an agreement with FUNAP, as explained in greater detail in footnote 39. Data from the Instituto de Investigación Avanzada 2013.

⁵⁰ According to the OAB/SP, there are 44,513 enrolled attorneys. Of the 2011 appointments, approximately 19 percent were for criminal cases. The state of São Paulo has 645 municipalities and 282 court districts, and the 23 public defence offices address all areas of legal assistance, not only criminal matters, in various municipalities. Deficiencies in the structure of legal assistance in

varies according to the demand and reality of each area.⁵¹ A large part of legal services (including areas other than criminal)⁵² in the São Paulo area were provided through the OAB agreement. This situation is problematic. Firstly, because the purpose of the OAB agreement is to provide supplementary legal services therefore, in effect there are no standards of evaluation regarding legal training or oversight of the attorney's work. The low remuneration for *ex officio* attorneys forces them to assume excessive workloads in all areas of the law, which probably compromises the quality of their work. Additionally, the possibility of receiving partial remuneration in the case of conviction leads to many professionals avoiding appeals for guilty verdicts in order to obtain a final decision, and therefore their payment. Those who enter the OAB agreements do not receive any professional guidance, which certainly makes their work more difficult, in particular when attorneys have less experience even if they do have a solid legal education.

Individuals whose monthly family income is below 900 USD, or three minimum monthly salaries, qualify for free legal assistance.⁵³ With respect to an economic threshold to be appointed a public defender, there are two distinct situations:

- (i) Cases sent to the Public Defence Office are evaluated, and only those whose family income is less than three minimum monthly salaries are admitted (approximately USD 900).
- (ii) Those accused in a criminal proceeding who do not appoint a private attorney have the right to a public defender independently of their family

São Paulo are old, since, for example, the agreement was signed in 1986. As the field investigation verified, one of the criteria used to send cases to contract based attorneys is insufficient personnel in court districts where there is not a public defence office, or where there is an office, but insufficient attorneys to respond to the demand for services. Contract-based attorneys also address cases in which there is a conflict of interest between the individual represented by the public defence office and a third party that also requires representation.

Complete data is available in the report on General Data of the Public Defence Office, of June, 2012 (available online).

⁵¹ Public Defence Office of São Paulo.

⁵² The criminal area has 185 defence attorneys in the entire state, of which 88 are based in the capital. Given that the population whose family income is within three times the minimum wage is around 29,543,517, there is one defence attorney per 49,000 people, and one contract-based attorney for approximately every 663 people. This coincides with the fact that the Public Defence Office cannot address the majority of new cases that reach the institution, or the high percentage of cases that are sent to contract-based attorneys.

⁵³ Public Defence Office of São Paulo. All values expressed in USD were calculated using the exchange rate from July, 2013.

income. Nonetheless, the Criminal Procedure Code establishes that if the defendant is not poor and uses the services of a public defender, he must pay the attorney's wages.⁵⁴

This legal assistance covers those detained *in flagrante*, whether they are being processed, left to go free without a conviction, or convicted.⁵⁵ According to field observations, the form of attention varies according to the phase of the criminal procedure:

- With respect to those detained *in flagrante*, the majority of cases that arrive at the public defence office are sent by the Police Commissioner, who sends a copy of documents related to the detention when the accused does not have an attorney.⁵⁶ Sometimes a family member seeks legal services on behalf of the accused.
- Cases of individuals with a criminal proceeding in process are sent to defence attorneys that work in criminal courts.⁵⁷ This is done after the prosecutor files the complaint⁵⁸ and the person has been called to declare and the defence has to present a written defence.⁵⁹ Sometimes a case is sent to the defence attorney months after a complaint is filed, during which time the defendant can be located and called to court. According to interviews and recent research,⁶⁰ an absolute majority of proceedings are undertaken

⁵⁴ Criminal Procedure Code, art. 263.

⁵⁵ Although the Public Defence Office does not have exact data regarding the population that is eligible for its services (the Census calculated an estimate of the families with income between two and five minimum monthly salaries, and the Defence Office proposes to provide assistance to those whose family income is below three minimum monthly salaries), there is data obtained in an Instituto de Investigación Avanzada study from 2013, which indicates that the state of São Paulo has between 40 and 157 thousand eligible people per defence attorney.

⁵⁶ Article 306, paragraph 1 of the Criminal Procedure Code determines that if the person detained *in flagrancia* does not provide the name of his attorney, the police authority must send a complete copy of the petition regarding prison *in flagrancia* to the Public Defence Office.

⁵⁷ In the city of São Paulo, each criminal court has two public defence attorneys, one that works with the trial judge, and another with the substitute, and the Defence Office guides the user to directly approach the defence attorney responsible for his court proceeding. Nonetheless, this guidance can vary between cities, as not all have an identical Public Defence Office structure.

⁵⁸ Document that begins a criminal case proceeding.

⁵⁹ Criminal Procedure Code, art. 393.

⁶⁰ An investigation by the Núcleo de Estudios de la Violencia of the University of São Paulo regarding imprisonment *in flagrancia* for drug trafficking crimes indicates that in 88.64 percent of cases, the proceedings were undertaken with the accused in prison. Another study by the Instituto Souza Paz on imprisonment *in flagrancia* showed that, in the cases under study, only 12.1 percent of those captured *in flagrancia* were granted provisional freedom during the police phase.

with the person in prison, and there is no contact between defence attorneys and their clients until the elaboration of the written defence and the witness selection. This is due to the fact that there are no public defence offices in penitentiary institutions, and the public defender in the case is not willing to visit his client beforehand to prepare the written defence and select witnesses, nor to request the judge to bring the defendant to court to discuss the case in private.

- The first personal contact between the defendant and imprisoned defendants occurs minutes before the pre-trial hearing, in the door of the courthouse, meaning on average 150 days after detention.⁶¹ This is when questioning takes place. This scenario demonstrates that the defence provided to poor defendants is merely formal.

In cases of convicted individuals, documents are sent to the executory phase defence attorney as soon as the decision is registered.⁶² Another possibility is for a family member to seek assistance from the Public Defence Office to provide legal services for the accused individual. In both cases, the defence attorney rarely meets the defendant in person.

According to the OAB agreement, *ex officio* attorneys are appointed through the Public Defence Office. According to information from our investigation, such attorneys are called after the defendant is requested to present a written response to the accusation. As is the case with public defenders, they usually do not have personal contact with their clients (whether he is imprisoned or free) until the hearing, and they are also not required to do so, which compromises the quality of the defence.

Additionally, the law provides for the possibility of appointing a defence attorney in the same procedural act (*apud acta* appointment), which is done during the interrogation and without the need to grant power of attorney.⁶³

⁶¹ As observed in the Núcleo de Estudos de la Violencia of the University of São Paulo study, mentioned in the note above.

⁶² Even while the appeal is pending, a provisional execution of the decision may begin. This will be mentioned in greater detail in the conclusion.

⁶³ Criminal Procedure Code, art. 266. It is important to mention interviews with attorneys, with respect to hearings held in compliance with ‘demand letters’ (a document that the relevant judge sends to a judge in a different locality, to undertake a procedural measure in the latter’s court district, according to article 222 of the Criminal Code Procedure), without the presence of an attorney. As, in these cases, the attorneys usually exercise in the city of origin of the proceeding, they do not always travel to where the hearing is held. Often, contract-based attorneys go to hear-

3. Rights and their implementation

3.1. *The right to information*

In Brazilian legislation, although the right to information is protected during all phases of the process and criminal execution, its exercise has different legal and constitutional provisions according to the phase of the proceedings.

In the police phase, the legal provisions regarding information about the nature and cause of the accusation varies according to the form in which the investigation begins. In investigations that begin with an *in flagrante* detention, the formalization of imprisonment includes providing the suspect with a notice of guilt within 24 hours.⁶⁴ This is the formal communication of the cause for imprisonment, the name of the person who undertook the detention, together with the witnesses, and the signature of the responsible police authority.⁶⁵ According to interviews with defence attorneys, although this document always indicates that the prisoner was informed of his rights, this communication often does not occur if the person is in prison. Additionally, both judges and defence attorneys mentioned that the notice of guilt is standardized, and therefore it is impossible to infer how the defendant was actually informed of his rights in the police station at the moment of detention.⁶⁶

By contrast, in investigations that are initiated via police order, the law does not mention how the accused must be informed of the process. By legal disposition, the police investigation is protected information,⁶⁷ and in principle not even the person under investigation has access to the investigation file. The entry into force

ings offering to act as *ad hoc* defence attorneys in depositions, but interviewed attorneys stated that these hearings are often held without the presence of an attorney. In spite of the serious violation of constitutional guarantees that this implies, it is important to note that this was the only procedural act in which the absence of attorneys was mentioned.

⁶⁴ Police mentioned that the note of guilt is generally issued within 24 hours, which allows for the assumption that the prisoner often responds to police interrogations without having been informed of his rights.

⁶⁵ Criminal Procedure Code, art. 306, § 2º. Article 5 LXIV of the Constitution, promulgated after the Criminal Procedure Code, establishes that the prisoner has the right to identify those responsible for his detention or police interrogation.

⁶⁶ One must recall that public defenders are not present in the police precincts.

⁶⁷ Criminal Procedure Code, art. 20. One must note that the decree that protects the privacy of the police investigation is constitutional, as it ensures the success of the investigation and protects the image and honor of the proceedings, in conformity with article 5, X of the Federal Constitutional.

of the Advocacy Statute introduced exceptions to this rule.⁶⁸ For example, article 7 XIV expressly includes the right of an attorney to review the police investigation files in police offices. Finally, in 2009, the Supreme Federal Tribunal (STF) resolved the question,⁶⁹ guaranteeing the accused and his attorney broad access to information regarding the police investigation. Thus, if the law is interpreted according to the decision of the SFT, the content of the formal accusation is made known to the accused through his defence attorney. According to field research, this is what happens in practice, given that although no one denies the accused direct access to such files, such access rarely occurs.

In addition to these issues, the defence attorneys interviewed cited other obstacles to ensuring a quality defence, such as police investigations that have requests from the prosecutors in separate files, even when the legal proceedings are underway. This would require the closure of the police investigation.

In the procedural phase, access to indictments is generally public,⁷⁰ and communication of the nature of the accusation is required. This is done by summoning the detainee (who is known as the ‘accused’ after being summoned to court) to appear in court regarding the accusation. He is charged with a crime and offered a chance of defence. This constitutional⁷¹ and legal⁷² obligation must be fulfilled in both written and oral form, as the law determines that an official of the court must read and hand over the notification to the accused.⁷³ The official must later certify how this act was carried out.

⁶⁸ Law No. 8.906/1994.

⁶⁹ Through publication of the bulletin of binding jurisprudence no. 14. The bulletin of binding jurisprudence can be defined as the manifestation of a positioning of high courts regarding a determined legal question, which has been repeatedly sent to the court in question, and which acts as guidance for the interpretation that should be adopted in similar cases. Only the Supreme Federal Tribunal may issue the bulletin of binding jurisprudence. It has been given this name because it requires all lower courts to rule in the same way as the STF.

⁷⁰ Exceptionally, the judge may order the secrecy of the indictment for reasons of public interest, for example, in crimes that involve children or adolescents, cases regarding the violation of banking, telephone, or financial secrets, or cases that receive heightened public or media attention), but it is not applicable to the accused or his attorney.

⁷¹ Federal Constitution, art. 5º, LXIV. Indirectly, sub-section LV of the Constitution ensures the right to a contradictory proceeding and a broad defence, as its exercise depends on an effective communication of the contents of the accusation.

⁷² The Criminal Procedure Code regulates subpoenas in articles 351 a 369.

⁷³ Criminal Procedure Code, art. 357.

Nonetheless, fieldwork verified that there is no oversight of the justice official's work, as their work physically happens outside the courthouse. For example, it is not rare to hear reports from law professionals that even those defendants who retain their freedom (supposedly summoned through the normal channels) do not reach the Public Defence Office or appoint private attorneys. This fact calls into question how the accused is summoned and the accused's level of understanding regarding the process.

It is important to indicate that when there are legal provisions (eg. publication of the prison order in cases of *in flagrante*, summons that stem from a complaint, and the publication of a guilty sentence), the right to information must be absolute and respected, even when the person is detained. Nonetheless, some defence attorneys we interviewed stated that it is common for defendants who are imprisoned to not be personally informed of their conviction, as when a guilty verdict is handed down the process moves to the execution phase defence attorney. It is difficult for the execution phase defence attorney to make this communication and the precarious notification system is not conducive to keeping the person informed. Meanwhile, the convicted individual is waiting in prison for a decision regarding his case.

In sum, Brazilian legislation does not contain a document that serves as a notice of rights. Nonetheless, there are other documents with other purposes that formally fulfill the role of communicating some of the accused's rights to him. For example, the 'note of guilt',⁷⁴ given to the accused after the formalization of an *in flagrante* detention, officially informs the accused of the reason for his detention, the name of the authority that formalized the act, and the person that took him to the police precinct.⁷⁵ The notification informs the person that he is being accused and that he has the right to a defence attorney.⁷⁶ However, given that legal provisions stipulate that the note of guilt should be provided after the *in flagrante* proceedings are finalized, this means that this written information regarding his rights is given only after questioning has already happened.

Although article 5, LXIII of the Federal Constitution states that imprisoned suspects must be informed of their rights (for example, to remain silent, to the assistance of an attorney, and to communicate with their families), and article 186 of the Crimi-

⁷⁴ Criminal Procedure Code, art. 306, § 2º.

⁷⁵ This is also a constitutional right that the Constitution recognizes in article 5, LXIV.

⁷⁶ The notification is provided for in article 352 of the Criminal Procedure Code. Although the law does not determine that this document must state the right to an attorney, doctrine understands that this right must be included due to the modifications contained in Law No. 11.689/2008 (when the subpoena communicates to the accused his right to defence).

nal Procedure Code establishes that during questioning the accused must be informed of his right to remain silent and not respond to questions, it may be presumed that the vast majority (usually those with few resources and low levels of education) cannot understand the content of the documents that provide for these rights, which are written in legal language. However, during the fieldwork, we did not encounter any situation in which it was immediately clear that the accused had not understood the content of the note of guilt or notification.

3.2. *The right to defence and self-defence*

Before entering into detail regarding the right to defence, it is important to clarify that the term ‘self-defence’ is understood in two distinct ways in the Brazilian legal system:

- (i) Self-defence as the right to present one’s own version of the facts to the authorities. This is undertaken during questioning. The right to a broad defence established in the Constitution must contemplate two aspects: the possibility to defend oneself when one is being brought before the police or a legal authority to present one’s own versions of the facts (or to remain silent, as one so desires); and technical defence, exercised by an attorney member of the Order of Attorneys of Brazil (OAB), as to work within the judiciary it is necessary to be an attorney.⁷⁷ The sources of law that regulate this right are constitutional (article 5, LV) as well as legislative.⁷⁸
- (ii) Self-defence as the right to defend oneself technically during a criminal trial. Article 263 of the Criminal Procedure Code authorizes this during any phase (police investigation, instruction, appeal, execution of the sentence). When the accused is legally authorized to act as an attorney, this implies that he is a member of the OAB. This rarely occurs in practice, and when it does, it is subject to the same rules as those imposed on other attorneys.

Given this distinction, the term *self-defence* should be understood as the first definition mentioned, that is, *the right to present one’s own version of the facts during questioning*. The term *technical defence* is understood to mean defence undertaken by an attorney (who may be the accused, when he is licensed and legally authorized), and the exercise of this right will change depending on the stage of the criminal process.

⁷⁷ OAB Statute, art. 1.I.

⁷⁸ Criminal Procedure Code, art.185 and ss.

With respect to a suspect who is prosecuted but has not yet been brought before a judge, there is no express law giving him a right to an attorney. There are even authors who maintain that the interference of an attorney during the pre-procedural phase is absolutely inadmissible,⁷⁹ as article 335 of the Criminal Procedure Code authorizes the prisoner or someone acting in his name (who need not be legally authorized) to address the judge through a simple petition when there is a police delay in authorizing bond, and because one need not be an attorney to file a habeas corpus petition. Nonetheless, as mentioned, the attorney has the right to review the orders regarding the police investigation. Additionally, given that article 6.V of the Criminal Procedure Code states that the rules referring to questioning in the judicial phase also apply to police interrogations, this allows us to infer that the presence of an attorney is necessary at that time.

Nonetheless, according to our investigation, there is usually a complete absence of defence attorneys at the point when the accused is giving their testimony during the police phase.⁸⁰ There is normally no attorney during the publication of the detention *in flagrante* or during police questioning. These actions occur without the presence of a defence attorney, and they are later provided with a copy of the documents regarding the detention *in flagrante*. The few occasions in which an attorney is present during police interrogations are those in which the suspect has hired a private attorney. Police officials and attorneys also stated in interviews that even if the suspect is free during the police investigation, it is rare for attorneys to be present during questioning. During the field investigation, we did not note or hear of any situation in which the police suggested that a suspect call an attorney.

Given that the law does not specifically require access to an attorney during the police investigation, this practice is technically considered to be legal. But in reality, serious harm is caused by the absence of technical defence during the first stage of the criminal process, and the impacts of this harm are felt until the execution of the sentence. This is because what is first told about the facts under investigation substantially influence the rest of the process. Thus, irregularities in the investigatory phase are *consolidated* during the judicial stage, rather than *corrected*. It is possible and necessary to interpret the set of legal provisions in such a way that it does not prevent the assistance of an attorney during the police stage, even though there is no express

⁷⁹ On this topic, see Fernando da Costa Tourinho Filho 2010, p. 546, v. 4.

⁸⁰ It is important to note that public defenders in the DIPO undertake follow up by consulting the investigation files that are sent to the court, without personal contact with the accused.

legal provision that provides for such assistance. Additionally, although the absence of technical defence during this stage does not lead to the invalidity of an eventual criminal action, in practice there are evident differences in the result of criminal actions in which the defendant has access to a defence attorney during the investigatory phase and those in which he does not.

In the judicial phase, technical defence is obligatory during all procedural acts. As was already mentioned, the accused has the right to appoint a trusted attorney, and in the case that he does not have one, a public defender or *ex officio* attorney will be appointed. In the summons, the accused will be informed of his right to an attorney, and in the case that he does not hire one of his choosing, a court authority will inform his defender to respond to the accusation within ten days.⁸¹

It is precisely in the judicial phase when the right to speak privately with an attorney is explicitly recognized.⁸² In our interviews, it was stated repeatedly that public defenders do not have contact with suspects until the date of the hearing. In general, the attorney and his client meet that day at the door of the courtroom. Thus, the response to the accusation, elaborated prior to the hearing, is done without any communication between the attorney and his client, which evidently weakens the defence at this point, which ought to include witnesses and present or request documents or other evidence.⁸³ Additionally, in all the hearings we attended, private conversations were undertaken at the door to the courtroom, lasting only a few minutes, in the presence of the police escorting the accused.

In the punishment phase, attorney participation is required. In the field investigation, we verified that the vast majority of inmates in São Paulo do not have private attorneys and are assisted by the Public Defence Office or the Fundação de Amparo ao Preso (FUNAP) during this stage.⁸⁴ The process begins when a certification of imprisonment is issued immediately after registering the conviction before a notary, as will be explained in greater detail in section 3.3.3 (the right to be presumed innocent).

It is important to note an exception with the proceedings in special criminal tribunals (summary proceedings) that focus on minor misdemeanors.⁸⁵ Although there is

⁸¹ Criminal Procedure Code, art. 396.

⁸² Criminal Procedure Code, art. 185, § 5º.

⁸³ On this topic, *see also* deliberation 246 of the Public Defence Office of São Paulo.

⁸⁴ The Fundação Professor Manoel Pedro Pimentel, tied to the Penitentiary Administration Secretariat undertakes social programs in penitentiaries, offering, among other services, legal assistance to prisoners.

⁸⁵ Defined by Law No. 9.099/95, art. 61.

no legal requirement regarding the presence of an attorney in the pre-procedural stage, in practice such a presence is recommended. In fact, in the hearing in which decriminalization measures are proposed, the law requires that an attorney be present.⁸⁶

Although Brazilian legislation requires the presence of defence attorneys in all criminal proceedings, it does not establish specific rules for legal assistance to members of vulnerable groups, such as those with mental illnesses, indigenous people or ethnic minorities. Children and adolescents are tried in special proceedings and they have the right to an attorney.⁸⁷

Although there is no formal difference between technical defence of private attorneys, public defenders, and *ex officio* attorneys, practical observation and interviews demonstrate that those defended by private attorneys receive higher quality defence. Although public defenders are selected via public competition, in practice they are overworked and do not have personal contact with their clients so as to prepare an individual defence. Additionally, public defence offices do not have an efficient institutional policy to address imprisoned defendants, nor individual efforts to visit them or request judges to move them to court. According to reports from judges and public defenders, the defendants who depend on *ex officio* attorneys within the OAB agreement tend to have lower quality defence due to various factors, principally due to the

⁸⁶ Law No. 9099/95 creates special criminal tribunals, and provides for three decriminalizing measures to permit alternatives to the criminal process and imprisonment in the case of less serious crimes, in particular when the accused has no prior criminal record. These measures are, first, civil compensation for harms (provided for in article 74 of the law, this includes the possibility of reaching an agreement between the victim and the accused to compensate for the harm suffered. This process may be closed when the prosecutor requires authorization from the victims to proceed, or when it requires a private criminal action). Second, the law permits a 'criminal transaction', provided for in article 76. This involves the prosecutor proposing the immediate application of a sanction (in the form of restrictions or a fine) rather than a criminal case. The advantage of a criminal transaction is that accepting such a deal does not create a criminal record, and it is only registered so as to prevent the same individual from benefiting from such an agreement within the next five years. (art. 76, §4º).

The criminal process begins when there is neither civil compensation nor criminal transaction, and, at that point, the judge determines whether the accused meets their requirements for a conditional suspension of the proceedings (article 89), such as, for example, not being processed or convicted for another crime. If the suspension is accepted, the proceeding is suspended for a period of two to four years, during which time the accused is subject to certain conditions (compensating for harm, regularly appearing in court to recount his activities, not leaving the area in which the case is being processed). After the period of suspension and the conditions are met, the proceeding ends with the crime's annulment.

⁸⁷ Children and Juvenile Statute, Law No. 8069/90.

lack of any criteria of evaluation, lack of training and education, and lack of oversight of OAB agreement attorneys.

The worst practices were observed in the framework of the OAB agreement. According to interviews and observations, two common profiles appear within the group of attorneys who enroll in the OAB agreement. The first is made up of *ex officio* attorneys who are based in the capital, are recent graduates with little or no professional experience, who enroll in order to gain experience before setting up a private practice or because they did not pass the public contest to enter the Public Defence Office. The second (which is more common in cities in the interior of the country where there is a smaller market for private attorneys) are those attorneys for whom the agreement provides their principal source of income, in spite of low wages, which is why they take on a large number of cases. This frequently compromises the quality of their legal services. Judges and public defenders indicate that the fact that attorneys' wages can be paid in installments leads many attorneys to choose not to appeal their client's convictions so that they can receive their full payment without delay. Additionally, OAB agreement attorneys do not receive any professional guidance, which makes their work more difficult.

Interviews demonstrate that *ex officio* attorneys, even if they are committed to the case and disposed to study the case to ensure quality, face difficulties in addressing practical issues. Often these difficulties are associated with the lack of experience or guidance from a more experienced attorney. Therefore, there was general consensus among those we interviewed that an accused person who has the money to pay a private attorney will receive a better defence. For example, they will be able to get an attorney who will be more combative during hearings and will have more time to dedicate to the case and explore favorable evidence, or they will get an attorney who has more experience with oral defence in higher courts).

It is important to note that low quality defence can lead to the invalidity of the proceedings, if the court considers that the defendant was left without an effective defence, even if he did formally have an attorney. There is no specific legal minimum requirement regarding the quality of legal services. However, the Criminal Procedure Code determines that the judge may remove an ineffective attorney, who will appoint a public defender to replace him, or face the annulment of the proceedings.⁸⁸ None-

⁸⁸ The Criminal Procedure Code includes the express provision in cases in the Jury Court. But the conception is that the right to a broad defence ought to guarantee control of the effectiveness of defence in all types of proceedings.

theless, it is difficult to obtain this type of annulment, as the defendant must demonstrate how and why poor quality defence prejudiced him, which generally only a quality attorney can do.

3.3. *Procedural rights*

The majority of criminal procedure rights are guaranteed in the constitution. Thus, the right to a broad defence, contradiction, an attorney, the presumption of innocence, to remain silent, among others,⁸⁹ form part of the set of fundamental individual rights.

Among the various reforms to the Criminal Procedure Code, we refer again to Law No. 11.719 from 2008. Although the change was positive in recognizing questioning as an act of defence and evidence, because it places it as the final act of the evidentiary phase, the modification means that there is no contact between a public defender and his client prior to the day of witness testimony. After the 2008 changes, the answer to the accusation must be filed ten days after the summons, and the attorney writes it without contact with his client.

Prior to the reform, the interrogation was the first part of the proceeding and an imprisoned defendant (who was usually poor) would meet with his lawyer at least on that occasion and could provide information on witnesses or other evidence for the hearing. This is more difficult today, as the answer to the accusation is sometimes a merely formal act, in which the defence does not provide witnesses, evidence, or experts for the witness.

To improve this situation, civil society organisations pressured the Public Defence Office to publish Disposition 246 of March 23, 2012, which sets rules for the services to be provided to imprisoned defendants. According to the Disposition, meetings with public defenders must take place in court institutions (via a request for the transfer of the person to the court) or in the prison where the client is located. The

⁸⁹ Article 5, sup-paragraphs LIII to LXVI of the Federal Constitution establish criminal procedure rights. In addition to those mentioned, this article includes the right to be processed and sentenced by a competent authority, legal due process, the prohibition of illegally obtained evidence, the prohibition of subjecting those tried civilly to criminal proceedings, the publicity of proceedings, the requirement of a legal order for detention (except in cases of detention *in flagrancia*), the right to communicate with the judge and the family of the detainee regarding the detention, the right to identify those responsible for the detention and police questioning, the right for immediate release in the case of illegal detention, the right to provisional liberty via financial bond. Sub-paragraph LXVIII provides for the right to habeas corpus for cases of illegal detention or abuse of power.

meetings must always be prior to the presentation of the answer to the accusation. This should allow for a better production of evidence and a quality defence, rather than a generic and mass-produced defence. Unfortunately, public defenders do not generally comply with this disposition.

Currently, article 185 of the Criminal Procedure Code establishes that if a defendant is at liberty, he must appear before the tribunal for questioning on the date listed on the notification provided by the court official. When he is imprisoned, the law states that the judge and defence attorney must visit the prison for questioning or undertake it via videoconference (a practice civil society rejects, as it does not allow for certainty that the accused is alone or not being threatened. It also does not provide personal contact between the defendant and his attorney or the judge). When neither option is available, the prisoner must be brought to court.

Additionally, due to the interpretation of articles 185, § 2, III, 217 and 399 of the Criminal Procedure Code, the accused has the right to remain in the courtroom while testimony is given and may only be removed from the room when his presence negatively affects the victim or witnesses, such that it affects their testimony. Similarly, to prevent the accused from intimidating or influencing those testifying, articles 201, § 4, and 210, of the Criminal Procedure Code provide that tribunals must reserve separate rooms for them to wait for hearings.

In practice, we observed several recurring situations that compromise the quality of defence, although they formally comply with the law. For example, although the physical space of the Central Criminal Court has separate rooms for defence and prosecution witnesses in a new, well-maintained building, people still wait in the hallways. In the morning, there is a sign on the doors of some courtrooms indicating that there is a special area where they can speak in the court, but these spaces were not used in any of the interrogations we observed.

It is also common that the main or only witnesses are the military police that carried out the detention. Additionally, we saw defence witnesses in very few hearings.⁹⁰ By contrast, on several occasions members of the prosecution were absent during parts of the hearings. The courts have many proceedings, and to complete all the hearings in a day, instructions are given hurriedly without considering the technical quality of

⁹⁰ A 2011 investigation on criminal proceedings in cases of *flagrancia* in drug trafficking, by the Núcleo de Estudos de la Violencia of the University of São Paulo, indicated that 74 percent of prison orders analyzed only included testimony from the detaining officer, and no civil witnesses.

the introduction of evidence. More than once, witnesses were dispensed with due to the lack of time.

In the hearings we observed, defendants who were imprisoned were brought to trial handcuffed and wearing prison uniforms. It is possible that this image of the defendants had a negative, if unconscious, impact on the perception of those involved in the hearing.

In all the cases we observed, defendants exercised their right to speak with their attorney prior to the hearing and outside the room. However, the conversation was not private, as it was held in the door to the courtroom and together with the police escorting the defendant. Although we did not witness any judge limiting the time of this conversation, we did note that some attorneys did not want to take much time, as those in the courtroom were waiting to begin and due to the high volume of programmed hearings, there is pressure to comply with the schedule. In no hearing did the defendants participate in the hearing and debate, as they were always returned to prison before they should have been.

Another critical point is victim or witness identification of the accused.⁹¹ Although the tribunal has rooms for them, usually the proceeding is carried out with only the accused, or the accused and another person, dressed in a prison uniform, which violate legal dispositions on the topic. The questions that the victims or witness are asked regarding whether they identify the defendant are biased (for example, they request the victim or witness to simply confirm if the person is the person who committed the crime).

Given that the civil police undertake few quality technical investigations, identification is a frequently used method in the police phase that often guides the reception of evidence, which is later validated in the judicial phase. This indirectly prejudices the right of defence. The creation of a narrative in the criminal process is flawed from the beginning. In effect, what initially arrives before the judges is the prosecutor's complaint. This is based entirely on the police investigation as its only source and the police investigation is based on the accused's story given after being captured *in flagrante delicto* (when he doesn't have an attorney) and on the testimony of the police responsible for his capture.

⁹¹ Article 226 of the Criminal Procedure Code recognizes identification of people as a form of evidence. This establishes that i) the person doing the identifying must be invited to describe the person to be identified; ii) the person to be identified is placed, if possible, together with other similar people, for the former person to identify him.

Oral debate, when the prosecutor and defence present their key arguments to convince the judge either to convict or absolve the defendant, is conducted in an automated way through a mere reading of documents to the judge's assistant. Only in one audience did we witness arguments that lasted the 10 legally required minutes. In the others, there were quick readings of texts from laptop computers (sometimes in less than one or two minutes) and even cases in which defence attorneys only handed a USB to the judge's assistance for him to copy into the act. Also, there were cases in which the judge did not pay attention to what was being said or even did other activities during the arguments, such as reading documents from other cases or talking on the phone. It is worth noting that in complex cases, the Criminal Procedure Code permits converting debates into written minutes, but in practice this occurs in simple cases as well, to the detriment of oral proceedings.

In the hearings we observed, judges generally informed and explained to defendants their rights, but it is impossible to know if they truly understood the legal jargon used, in spite of the judge's good intentions. Technical language was always favored in communication. It is important to note that judges and defence attorneys did not encourage the defendants to read the act of the hearing, or their own statement, prior to signing it, in any of the hearings we observed.

With respect to the right to defence on appeal, the Constitution does not expressly recognize the right to an appeal. Nonetheless, the idea that it is a fundamental right derived from the interpretation of constitutional norms and the right to a broad defence prevails. Additionally, Brazil ratified the Pact of San José, which expressly provides for the right to an appeal. Nonetheless, the Criminal Procedure Code rule that defendants must express their desire to appeal makes this right difficult to exercise.⁹²

In appeals trials and the presentation of other resources, the defence attorney is permitted to orally present his arguments to the court. In the sessions we attended, the majority of oral defences that attorneys presented were of poor technical quality and were usually nothing more than a reading of the reasons that led to the presenta-

⁹² Article 392 of the Criminal Procedure Code establishes the rules for the notification of a decision. To respect the right to a broad defence, the general rule is that the accused and defence attorney are notified of a guilty verdict. However, although it is the most adequate interpretation of what the Federal Constitution establishes, sub-paragraph 392 of the Criminal Procedure Code permits only the attorney to be notified if the defendant is free. Both the accused as well as his attorney may comment regarding the conviction, which need not happen together, which often leads to differences between the two.

tion of legal resources. Normally, judges do not pay attention to this reading, except for specific cases in which the attorneys are good public speakers and have a fighting attitude – these are private attorneys in general. We did not see any public defenders undertake oral arguments and according to what public defenders told us, this rarely occurs. The prosecutor always supports the first instance prosecutor, and in the sessions we observed, the prosecutors did not initiate any of the appeals, and therefore the defence always began the arguments.

3.3.1. The right to remain at liberty during the proceedings and issues relating to imprisonment during the proceedings

The Federal Constitution establishes that only the judge may order imprisonment of a person as a result of a guilty verdict or a precautionary measure, of his own volition, or at the request of another party to the case.⁹³

Criminal procedure law provides for three types of precautionary measure:

The first is detention *in flagrante*. The Federal Constitution⁹⁴ and the Criminal Procedure Code⁹⁵ provide for such detention. It is the only time in which detention absent previous court order is permitted. It applies when an individual: i) is committing a crime or has just committed one; ii) was pursued immediately after committing a crime; and iii) was found carrying instruments, weapons, or documents related to the crime after its commission. The court authority must evaluate the legality of the detention within 24 hours and decide whether to: i) free the detainee, as the circumstances to not permit pretrial detention; ii) end an illegal detention; or iii) convert the detention *in flagrante* to pretrial detention or impose another precautionary measure. If the person does not appoint an attorney, the documentation regarding the detention *in flagrante* is sent to the Public Defence Office.⁹⁶

The second is temporary imprisonment. This is a sort of provisional imprisonment of a precautionary nature, which is applied during the police investigation. It is regulated by legislation, rather than the constitution.⁹⁷ The prosecutor or the police commissioner may request it, but a judge may not order it on his own motion. Such detention may last up to five days (which may be extended an additional five days in

⁹³ Federal Constitution, art. 5, LXI.

⁹⁴ *Ibid.*

⁹⁵ Criminal Procedure Code, art. 301.

⁹⁶ Criminal Procedure Code art. 306.

⁹⁷ Law No. 7.960/1989.

exceptional cases)⁹⁸ and is only applicable for certain crimes (enumerated in the law regulating temporary imprisonment),⁹⁹ provided it is necessary for investigations and the person does not have a permanent address.

The third is pretrial detention. This is a form of provisional imprisonment that may be applied more broadly. A judge may order pretrial detention on his own motion, and the prosecutor, victim, or police may request it. It is applied during the judicial and police phase. The law does not establish a specific time limit to such detention, and merely states that the judge may revoke it if there are no reasons to maintain it.¹⁰⁰ According to the law,¹⁰¹ pretrial detention may only be used in four situations, and with respect to crimes of intent commission and not crimes of negligence: i) in crimes punishable by more than four years imprisonment; ii) in the case of prior convictions for intentional crimes; iii) in cases of domestic violence to protect the victim; and iv) in cases of doubt regarding the identity of the person.

When pretrial detention is admissible, the judge must determine whether the requirements for its application are met, which are:¹⁰² i) a material indication that the accused has committed the crime (meaning evidence that the crime has occurred and a strong suspicion that the accused is responsible for it); and ii) evidence of an existing risk if the accused remains free given the need to guarantee public or economic order, the appropriateness for trial, and the guarantee of the application of criminal law. After the modifications that Law No. 12.402/2011 introduced,¹⁰³ some people consider that pretrial detention may be ordered for failure to comply with previously ordered precautionary measures.¹⁰⁴

⁹⁸ The Law of Atrocious Crimes (8072/1990) provides for more serious treatment in the case of certain crimes, such as armed robbery, rape, and drug trafficking, among others. The law states that for such crimes, temporary imprisonment may last up to 30 days, with an additional 30-day extension, when necessary.

⁹⁹ These are: criminal homicide, kidnapping or imprisonment, robbery, extortion, extortion via kidnapping, rape, epidemic that causes death, poisoning water or food sources that leads to death, criminal association, genocide, drug trafficking, and crimes against the financial system, according to article 1.III of Law No. 7.960/1989.

¹⁰⁰ Criminal Procedure Code, art. 316.

¹⁰¹ Criminal Procedure Code, art. 313.

¹⁰² Criminal Procedure Code, art. 312.

¹⁰³ Law No. 12.403/2011 revised the Criminal Procedure Code. It permitted the application of restrictive precautionary measures (such as appearing periodically in court and new rules for the payment of bond), when the accused may not be granted full liberty during the process.

¹⁰⁴ Imprisonment to determine identity was abolished with the 1988 Constitution, and there is no legal basis to maintain someone in custody without a court order (a judge must ratify detention *in*

After finalizing the procedure to formalize the detention when the accused is detained *in flagrante*, the documentation is sent to the judge (in São Paulo it is the DIPO judge) for him to analyze the legality of the detention and the need to order pretrial detention. If the detention has complied with legal parameters,¹⁰⁵ and when there is no legal justification to maintain pretrial detention (in which case temporary imprisonment or pretrial detention would be ordered), the judge must grant provisional liberty, through the use of bond or another precautionary measure, in accordance with article 310 of the Criminal Procedure Code. The police commissioner may impose bond in cases in which a conviction would be sanctioned with more than four years of prison.

The decision to grant and impose bond varies according to the sanction provided for the crime:¹⁰⁶ while with respect to misdemeanors with a maximum punishment of four years, a police authority may grant bond, in all other cases, the judge may decide within 48 hours. Granting liberty upon bond depends on the person's ability to pay the sum required. Even with respect to provisional liberty during the police stage, it is often conditioned upon payment of a sum that goes beyond the economic capacity of the accused, which makes his liberty impossible. In any event, there is a legal provision to exonerate the payment of this amount when the accused does not have the economic means to do so. Additionally, in the city of São Paulo, the payment of bond is done through an online form, which frequently causes difficulties for the family members of the accused, who are often uneducated, poor, and lack Internet access. On such occasions, they depend on the assistance provided by the public defender or another official of the Public Defence Office.

Data is not available regarding the proportion of those convicted that were detained prior to their trial, but it is true that this type of detention is used excessively, given that prisoners awaiting trial represent a significant proportion of the prison population (around a third of the prisoners in São Paulo).¹⁰⁷ Additionally, in interviews it was confirmed that complaints that lead to criminal actions are generally cases of detention *in flagrante*. Similarly, we found judges with a more human rights approach, who oppose the excessive and illegal use of pretrial detention.

flagrancia delicto within 24 hours).

¹⁰⁵ To the contrary, the accused must be immediately released.

¹⁰⁶ Criminal Procedure Code, art. 322.

¹⁰⁷ In December 2012, the prison population in the state of São Paulo was 190, 828, of which, 63, 843 (33.4 percent of the total) were awaiting trial. Data from the Penitentiary Department of the Ministry of Justice.

With respect to good practices we identified during our field investigation, two stand out. First, although there is data¹⁰⁸ on the number of people in provisional imprisonment in police stations,¹⁰⁹ that number has decreased. In fact, there were no cases of this in the stations we visited. Second, according to those interviewed, in the police phase, ‘notices of guilt’ that communicate the rights of those detained *in flagrante* are generally written within the 24 hour deadline the law establishes (but after questioning).

Later, another question that stems from the absence of defence during the police phase, which is perhaps the most serious violation that we were told, are temporary detentions of which the Public Defence Office of the DIPO is not informed. The Defence Office only learns of the detention later when temporary imprisonment becomes pretrial detention, but a period in which the detainee is deprived of liberty without any communication with his attorney or family has already occurred. Additionally, according to interviews, such temporary imprisonment frequently occurs without a court order, which is issued later.

3.3.2. The right to be present at trial

Procedural law allows the accused to be tried *in absentia*.¹¹⁰ This occurs when the accused knows of the indictment against him, is subpoenaed, but does not appear at court.¹¹¹ The process continues without his presence, but while maintaining his other fundamental constitutional protections, such as the presumption of innocence,¹¹² broad defence, the constitutional right to contradict evidence against him,¹¹³ legal due process,¹¹⁴ and the right to remain silent.¹¹⁵ These protections are guaranteed through the requirement to have a defence attorney (public defender, *ex officio* or private), and the theoretical guarantee that the prosecution’s allegations will not be assumed to be true.

¹⁰⁸ Data from the National Council of Justice.

¹⁰⁹ In December, 2012, the state of São Paulo had 4,867 prisoners in the custody of the Secretary of Public Safety. In Brazil, however, there were a total of 34,290 prisoners in police stations. Data from the Penitentiary Department of the Ministry of Justice.

¹¹⁰ Criminal Procedure Code, arts. 366 and 367.

¹¹¹ It is presumed that he is informed because the accused can be subpoenaed publically, rather than personally.

¹¹² Federal Constitution, art. 5º, LVII.

¹¹³ Federal Constitution, art. 5º, LV.

¹¹⁴ Federal Constitution, art. 5º, LIV.

¹¹⁵ Federal Constitution, art. 5º, LXIII.

In the field investigation, we witnessed few trials *in absentia*, and there was always a defence attorney present. Nonetheless, there is no available information regarding the potentially negative effects that the accused's absence has on the defence, nor the number nor proportion of trial held *in absentia*, which requires a statistical analysis.

In the judicial phase, another point worth mentioning is that the 2008 Criminal Procedure Code¹¹⁶ regulates questioning via videoconference, and although the Criminal Court of Barra Funda has the infrastructure, this type of questioning was not held during our field research. Defence attorneys, judges, and prosecutors stated that this method is rarely used. There is no consensus regarding its appropriateness because of the potential harm that it may cause the defence as it avoids personal contact between the judge and the accused during the only point in which the right to self-defence is exercised during the judicial phase.

3.3.3. The right to be presumed innocent

The presumption of innocence is guaranteed in article 5, sub-section LVII of the Federal Constitution, according to which a person may only be considered guilty after he has received a final guilty sentence with no opportunity to appeal. This has practical legal impacts (freedom as a general rule throughout the process) as well as social (for example, the prohibition of exhibiting the person accused of the crime to the public through the media, in particular in cases of crimes against the person that are subject to jury trial). In interviews with defence attorneys, this right was considered to be of utmost importance, but also one of the most violated, which requires greater protection during the judicial phase. Our observations indicated that, in practice, this right is violated in various ways, principally through the excessive use of provisional detention, mentioned above. In Brazil, 41.8 percent of prisoners have not been convicted, and in São Paulo, this number is 33.4 percent.¹¹⁷

Additionally, there are judges that set the beginning of the prison term before a final conviction is reached,¹¹⁸ even though the STF has found this practice to be unconstitutional. This must not be confused with the possibility to count time spent in provisional detention towards the completion of a prison sentence, when the accused

¹¹⁶ Criminal Procedure Code, art. 185.

¹¹⁷ Data from the Penitentiary Department of the Ministry of Justice

¹¹⁸ *See*, decision of habeas corpus, 84.078-7/MG, Rel. Min. Eros Grau, Tribunal Pleno, STF 05/02/2009.

was in prison during the process. This is a positive practice that permits certain advantages during the execution of the sanction, even when appeals are still pending.

3.3.4. The right to remain silent

Although the right to remain silent is protected in article 5, sub-section LXIII of the 1988 Federal Constitution, until 2003 article 186 of the Criminal Procedure Code stated that a defendant's silence may be used against him. In the research, we found that in hearings, this right is respected at least formally. Thus, in the hearings we observed, the judge informed the accused regarding this right prior to questioning, although none of them exercised this right. There is no information regarding the impact that the right to remain silent has on court decisions, when defendants choose to exercise it.

3.3.5. The right to a substantiated decision

Article 93, sub-section IX of the Federal Constitution protects this right and includes the judge's duty to provide a basis for his decisions, in accordance with the law and the facts of the case, and to make the reasons for his decisions public. Although convictions or exonerations generally include the basis for the decision, its absence is evident in some actions, such as in those that order pretrial detention outside the legal basis for such orders, established in section 3.3.1.c.¹¹⁹

By contrast, Law 12.830/2013, published June 20, 2013, established that a police commissioner's decision to bring charges against a person in the police investigation must be substantiated, which seems positive for the right to a defence, at least at the beginning of the proceedings.

3.3.6. The right to defence during the execution of the sanction

The execution stage is administrative and judicial in nature. An attorney must be present during this stage, as it addresses issues related to the right to freedom, a change in the sanction, conditional release, and the effective fulfillment of the sanction, among others.

¹¹⁹ It is important to mention that the lack of basis for appellate decisions is common, as the decision simply states that it 'adopts the trial court's reasons for the decision' and transcribes that decision. Article 252 of the Internal Regulations of the Justice Tribunal of São Paulo allow the Tribunal's substantiation of the decision to be based on the trial court decision.

Through the 2011 National Council of Justice's report, *Mutirão Carcerário do Estado de São Paulo*,¹²⁰ one may conclude that convicted prisoners in the state of São Paulo are left practically defenceless during the execution of the sentence, with the exception of those who have a private attorney. According to a defender who works for the execution office of the Public Defence Office, often the administration of the prison demands the protection of the convicted prisoner's rights. In the state of São Paulo, approximately 40 defence attorneys address the execution of the sanction phase,¹²¹ which is notably deficient for a prison population of greater than 180,000 (in the capital there are 17 defence attorneys for around 70,000 convicted prisoners).¹²²

3.4. *Rights related to an effective defence*

3.4.1. **The right to investigate the case**

According to article 4 of the Criminal Procedure Code and article 144 § 4 of the Federal Constitution, activities undertaken during the investigation are attributable to the investigatory police. In June 2013, Law 12.830 was published, which prohibits individual private investigations and indicates that only police may undertake criminal investigations.

The absence of an express prohibition on investigations by bodies other than the police led to an intense, polemic debate in Brazil, while this chapter was under development. This debate focused specifically on the possibility that prosecutors could undertake criminal investigations, which, due to the lack of legal guidance on the issue, they had been doing for several years. The debate ended in a vote, and the shelving of a police-supported proposed constitutional amendment,¹²³ whose goal was to expressly reserve criminal investigations to the federal police and civil state police. However, with the legal modification of Law 12.830/13, the police commissioner has more autonomy in criminal investigations, which probably creates conflicting interpretation between the constitution and the law. The former retains the former text, as the amendment was shelved, which leads to the same interpretation regarding the broadening of the attributes of the criminal investigation.

¹²⁰ Data from the National Council of Justice

¹²¹ As was mentioned, FUNAP attorneys, who were not included in our investigation, undertake technical defence in the execution phase.

¹²² Defence attorneys act not only during the court proceedings, but also in disciplinary proceedings for convicted prisoners. The lack of protection of prisoners' rights in this area is rampant.

¹²³ The complete text of PEC 37 may be viewed on the House of Representatives' website

In the criminal process, the burden of proof falls to the prosecution.¹²⁴ This stems from the law and interpretation of the rights to the presumption of innocence, to remain silent, and to respect the hypothesis of obligatory exoneration, in accordance with article 386 of the Criminal Procedure Code. Thus, the judge must exonerate the defendant when there is certainty regarding his innocence or doubt regarding his guilt. In other words, at least formally, in the Brazilian criminal process, the prosecutor has the burden of proof. Doubt must always be used in favor of the accused and lead to his exoneration.

According to legal norms, the accused's defence attorney may include documents in the proceeding, request experts, and ask the witnesses questions. All evidence production must occur during the trial by an attorney, even when it was originally produced during the police stage, as the trial depends on the ability of the parties to produce evidence in their favor. With respect to experts, the defence may request them when he presents his answer to the accusation, but, as many experts are of an urgent nature (for example, an autopsy), they are called during the police phase without participation of the parties. It is possible to include an expert to contradict the conclusions of the official experts.

The practical obstacles that those accused of crimes face in accessing a quality technical defence prejudice the effective application of these legal provisions. According to our field research, the accused faces greater difficulties in producing evidence in his favor than does the prosecutor to prove his guilt. The defence rarely requests expert evidence, especially when public defenders or OAB attorneys represent the defendant, and defence witnesses are rarely located (due in large part to the lack of contact between the attorney and client prior to trial). In all the hearings we witnessed, there were prosecution witnesses, usually the military police that affected the detention. We also noted a problem related to identification of the suspect when he was illegally detained.

The police also face a problem of so-called 'reports of non-criminal complaints', which is a police record of complaints of rights violations that do not give rise to criminal proceedings (such as lost documents, or car accidents without injuries). This happens because Brazilian culture advises people to go to police stations to report any rights violation, and the presentation of such a report is required to obtain insurance payment or to prove banking fraud in civil proceedings. According to interviewed

¹²⁴ Article 156 of the Criminal Procedure Code establishes that evidence of the allegation falls upon the accuser, and even the judge may require the production of evidence.

police officers, this excessively increases their workload of the police and affects the dynamic of criminal investigations, and is not based on any legal provision.

3.4.2. The right to adequate time and conditions to prepare one's defence

The Criminal Procedure Code does not establish a set time limit to prepare one's defence. Nonetheless, in the ordinary proceeding,¹²⁵ the law sets a deadline of 60 days between the written response to the accusation (which is presented 10 days after the subpoena),¹²⁶ and the instruction hearing and trial. In summary proceedings,¹²⁷ this deadline is 30 days, and for minor crimes with expedited proceedings, there is no established deadline other than as quickly as possible.¹²⁸ Deadlines do not change when there is a change of attorney, and the law does not provide for delaying the hearing to better prepare one's defence.

With respect to private meetings, article 185 § 5° of the Criminal Procedure Code establishes that any form of questioning must guarantee the right to a prior interview with one's attorney. Nonetheless, during the research, we noted that this interview was held at the door of the courtroom, lasted only for a few minutes, and was usually in the presence of the police escort. This inevitably prejudices the exercise of these rights.

3.4.3. The right to equality of arms in witness testimony

When the accused is subpoenaed, the 10-day deadline in which the attorney must present a written defence begins. This includes the set of witnesses that will testify. The absence of prior contact between the accused and his attorney makes the exercise of this right practically impossible. There is no prohibition on attorneys meeting previously with potential witnesses in order to evaluate their usefulness and relevance. However, this rarely happens, in particular in cases with public defenders. It is important to remember that the defence attorney has the prerogative to request notification of witnesses, as during the police investigation there is no right to a broad defence or to contradiction.

¹²⁵ Applicable for crimes whose maximum penalty is greater or equal to four years.

¹²⁶ Criminal Procedure Code, art. 396-A.

¹²⁷ Applicable to crimes whose maximum penalty is less than four years.

¹²⁸ Provided for in Law No. 9.099/95 and Law No. 10.259/2011 for infractions punished by less than two years imprisonment.

Although laws¹²⁹ and the Constitution¹³⁰ include provisions to balance the procedural powers between the accused and the State, the problems in accessing a technical defence taken together with a punitive culture compromise equality of arms in the criminal process.

3.3.4. The right to translation and an interpreter when the person does not speak the national language

Article 193 of the Criminal Procedure Code only guarantees an interpreter during court questioning. Nonetheless, the interpretation of this norm may be extended to include police questioning.¹³¹

In theory, the judge must bring in an interpreter when the accused does not speak the official language. According to interviews, in practice such a service does not exist during the police phase, and help to ensure that those who do not speak Portuguese understand what is happening depends primarily on the good will of police officials and public defenders. In the court phase, those interviewed stated that it is rare to use interpretation services. Article 236 of the Criminal Procedure Code provides for the translation of documents to a foreign language by a public interpreter or another person. The accused's right to freely translate documents is not legally regulated. Doctrine mentions that translation may be abandoned if the parties consider it unnecessary, with the judge's approval.¹³² During field research, we did not see situations that required the translation of documents, probably due to the crimes under study (theft, drug trafficking, robbery with little violence and no weapons)

4. The professional culture of defence attorneys and public defenders

4.1. Professional associations of attorneys

The main professional association for attorneys is the Order of Brazilian Attorneys (OAB), which has the largest number of members and most political influence among

¹²⁹ For example, Criminal Procedure Code, art. 156.

¹³⁰ For example, Federal Constitution, art. 5º, LV e LVII.

¹³¹ Criminal Procedure Code, art. 6º, V.

¹³² On this topic, see, Guilherme de Souza Nucci 2008, p. 318.

such associations.¹³³ It has 845,107 member attorneys in Brazil and 258,413 in its São Paulo section.¹³⁴ Its importance is demonstrated by the fact that attorneys must be members of the OAB in order to practice law, according to articles 1 and 3 of the OAB statute, and in that the OAB requires an entrance exam to be passed.¹³⁵ The regulation of the legal profession is the exclusive responsibility of the OAB.¹³⁶ The OAB is independent from government institutions. Article 44 § 1 of its Statute expressly states that the OAB does not have any functional or hierarchical relationship with the public administration.

4.2. The role of attorneys in legal proceedings, and their duties to clients

Article 133 of the Federal Constitution defines an attorney as a legal professional, necessary for the administration of justice, whose professional acts (taken within the limits of the law) are inviolable. Article 2 of the Code of Ethics reproduces this constitutional description, and adds that the role of lawyers includes to defend the rule of democratic law, citizens, public morality, justice and social peace. Additionally, article 1 of the OAB statute defines activities that are exclusive to attorneys: applying for judiciary positions and to special courts (with the exception of habeas corpus), and providing legal advice and consultation. The Statute adds that an attorney's actions are public in nature, and that this contributes to arguing for a decision favorable to his client and to convincing the decision-maker.

The description and regulation of attorneys' obligations to their clients are found in the Statute of Advocacy and the OAB Ethics and Disciplinary Code. Their main obligations include the right to attorney-client privilege, although information provided within this context may be used in accordance with the client's permission.¹³⁷ Article 5, § 3 of the Statute establishes that when an attorney abandons a case, he must continue representation for ten days following notification, unless he is replaced earlier.

¹³³ In São Paulo there are: the Attorney Union, the Association of Attorneys of São Paulo and the Association of Criminalistic Attorneys of the State of São Paulo. Other states have similar associations.

¹³⁴ Data from the Order of Brazilian Attorneys.

¹³⁵ Statute of Advocacy (Law 8.906/1994), art. 8º, inc. IV.

¹³⁶ According to article 70 of the Advocacy Statute (Law 8.906/1994), the sectional council of the territory in which an attorney member of the OAB commits an infraction, is the competent authority to impose a sanction. The Ethics and Disciplinary Tribunal of the Sectional Council hold the trial. The proceeding is administrative and does not limit criminal or civil responsibility of the attorney.

¹³⁷ Code of Ethics, art. 27.

Attorney obligations are the same in all areas of the law. However, article 21 of the Ethics Code contains a specific obligation in criminal cases, according to which the attorney must assume the defence of a case regardless of his opinion on the culpability of his client.

Clients who are dissatisfied with their attorney's service may request a disciplinary proceeding, which the Ethics and Disciplinary Tribunal may also open.¹³⁸ There is data available (including on the OAB website¹³⁹) regarding disciplinary proceedings. Nonetheless, that data is not disaggregated by area of law, which makes it impossible to know the number of complaints filed against criminal attorneys specifically.

The majority of opinions regarding defence attorneys we obtained focused on public defenders, given the profile of those we interviewed. Although quantitative data is not available, according to interviews and observations, the perception is that more defendants have public defenders or OAB contract attorneys than private ones. In any event, many Statute rules and Ethics Codes apply to all of these professionals.

In general, other justice system actors value the Public Defence Office, and consider its members to be prepared and zealous in their defence. Nonetheless, some judges and prosecutors told us that this zealousness sometimes becomes an 'excess of defence'.¹⁴⁰

Private defence attorneys feel that society views them negatively, which those we interviewed stated is sometimes reflected in a conflictive relationship with judges and prosecutors. Often those interviewed (defence attorneys, judges, and police officers) described prosecutors as 'crime fighters'.

4.3. Mechanisms to guarantee the professional independence of defence attorneys

Attorneys do not face direct interference with their choice of defence strategies. However, the judge or client may replace them for unsatisfactory work, in which case the judge appoints a public defender or OAB attorney.

¹³⁸ OAB Ethics and Disciplinary Code, art. 51.

¹³⁹ Data from the Order of Brazilian Attorneys.

¹⁴⁰ By 'excess of defence', judges and prosecutors refer to the 'indiscriminate' insistence of requests for provisional freedom and habeas corpus petitions. In 2012, the STF restricted the use of habeas corpus. According to the new interpretation, to question a decision denying habeas corpus, the accused must file a constitutional petition, which takes longer to resolve than a habeas corpus petition. On this topic, see: el juicio del hábeas corpus 109.956/PR, Rel. Min. Marco Aurélio, 1ª Turma, 07/08/2012.

Article 261 of the Criminal Procedure Code expressly requires court-based attorneys and public attorneys to act reasonably. This requirement is not expressly stated with respect to private attorneys. There is no available information on cases that have been overturned due to ineffective defence, nor did we witness judges exercising quality control of defence.

5. Rights of indigenous peoples

Although 817,000 out of Brazil's 196,655,014 citizens are indigenous (2010 Census), there are few laws that specifically address this group. The 'Indian Statute'¹⁴¹ mentions that the protection established in Brazilian laws applies to (a) indigenous peoples and their communities in the same terms as to other Brazilians, and (b) their uses, customs, traditions, and special conditions that the Statute recognizes. The Criminal Procedure Code regulates the processing and trial of crimes committed by indigenous people.

Article 26 of the Penal Code establishes that those with incomplete mental development may not be prosecuted. As the Code does not define this term, jurisprudence has elaborated a definition. Several authors consider that indigenous people that are not integrated into the hegemonic culture should be considered to have incomplete mental development, and therefore be exempt from prosecution.¹⁴² Criminal trials rarely adopt this interpretation, especially in the state of São Paulo, as the required factors are generally not met.

In São Paulo, issues of indigenous people are not common in criminal courts, due to its social, geographic, and cultural characteristics. However, the topic is more common in northern¹⁴³ and Midwestern¹⁴⁴ states, where there is a higher concentration of indigenous people.

In order to illustrate a possible problem related to the cultural diversity of indigenous peoples, the Cacique Véron case is relevant,¹⁴⁵ which occurred in January, 2003, in the Mato Grosso do Sul state, in the Midwestern region of Brazil. Chief Marcos

¹⁴¹ (Law No. 6.001/1973), art. 1.

¹⁴² On the topic, see Guilherme de Souza Nucci 2005, p. 237; Cezar Roberto Bitencourt 2010, vol. 1, p. 417; Magalhães Noronha 1995, vol. 1, p. 164.

¹⁴³ Amazonas, Pará, Rondônia, Roraima, Acre, Amapá and Tocantins.

¹⁴⁴ Goiás, Mato Grosso and Mato Grosso do Sul.

¹⁴⁵ See: http://www.ibccrim.org.br/site/noticias/conteudo.php?not_id=13779 and <http://www.conjur.com.br/2010-mai-09/nota-ajufesp-apoia-juiza-suspendeu-julgamento-vero>.

Verón was murdered in an attack against the guaraní-kaiwoá people, who were fighting for the return of their lands. After the federal prosecutor called for the exclusion of area residents from the jury trying the case, (as the suspect exercised significant economic and social power, but also was very prejudiced against the indigenous people of the region), the case was moved to São Paulo with a procedure to transfer to a different court district.¹⁴⁶

During the trial, indigenous witnesses were not permitted to speak in their native language through an interpreter, as the court decided they would testify in Portuguese and use an interpreter only when they did not understand a certain term. The court justified this decision using article 223 of the CCP, which states that an interpreter is only needed when the ‘witness does not know the national language’. According to the judge, this was not the case, as during the process the indigenous witnesses testified in Portuguese, which they stated they could also read and write. The case is awaiting an appeal decision brought by the defendants.¹⁴⁷

Although the crime was tried according to special rules that apply to jury trials (which is outside the scope of this research), and did not involve an indigenous defendant, but rather victim, the former situation exemplifies how the lack of interpreters for indigenous peoples can constitute a serious obstacle to the exercise of defence for indigenous defendants.

6. Political commitment to effective criminal defence

The political decision not to strengthen public defence offices as needed so that the offices could provide assistance to those without the financial resources to pay an attorney, means that a large number of those who cannot afford an attorney receive a deficient defence. The absence of control mechanisms regarding OAB contract attorneys has the same effect.

Some examples help illustrate the practical effects of these political decisions, according to our field observations. First, there is no defence during the police phase. As we have mentioned, as records of prison *in flagrante* are sent to the Public Defence Office when the person does not have an attorney, OAB contract attorneys do not

¹⁴⁶ This provision is in article 427 of the Criminal Procedure Code, and permits transferring cases tried by jury to another jurisdiction when it may be necessary to exclude jury members.

¹⁴⁷ Proceso 2003.60.02.000374-2, Rel. Des. Fed. Peixoto Junior, Subsección Criminal, 2ª Turma, Tribunal Regional Federal de la 3ª Región.

act during this phase in the capital of São Paulo and very few detainees have access to private attorneys. The public defence office is not present in police stations when the police question detainees. Although this is legal, it seriously compromises the protection of the right to defence. Additionally, public defenders have a heavy workload.

Second, in the court phase, there is no contact between the defence attorney and the accused prior to the hearing, and private conversation is hurried and in the presence of the police escort. Additionally, according to defence attorneys interviewed, due to the 2008 legal changes in the ordinary criminal proceedings, in cases *in flagrante*, it is common for the accused to be detained awaiting trial without an attorney, which is why the court appoints a public defender. The law establishes that a response to the accusation must be filed 10 days later, but defence attorneys in the city of São Paulo do not speak with detained clients nor seek to do so in private prior to filing the response. In general, there is no contact between the attorney and imprisoned clients and therefore the attorney does not determine if there are favorable witnesses or evidence. Prior to the reform, the interrogation was the first part of the proceeding, and detained suspects (usually poor) met with their attorneys at that time and could provide information regarding witnesses for the instruction hearing. Currently, this is more difficult, and, sometimes, the answer to the accusation is merely formal in nature.

Third, the execution phase has many structural problems. According to interviews, the person is often imprisoned in a different city from the jurisdiction that processes the enforcement stage. As requests for benefits must be filed where the person is detained, this leads to several difficulties: a) if the person has a private attorney who works in the city where the trial was held, the attorney must travel to a different city each time he requests a benefit or undertakes a follow-up; b) the defence is exercised by a public defender who works in another district (which is the most common), and therefore has no personal contact with his client, as public defenders do not visit prisons.

Fourth, the costs of the criminal justice system and legal assistance are not disaggregated. In any event, according to the report *Justice in Numbers of State Justice*,¹⁴⁸ the cost of free legal assistance in the state of São Paulo is USD 393,112.73, which is .017 percent of the total budget of the state justice system: USD 2,247,714.14. The small proportion provided to free legal assistance and the lack of disaggregated data regarding the cost of criminal justice in general, and legal assistance in particular, demonstrates how unimportant this area is considered and the minimal investment it receives.

¹⁴⁸ National Council of Justice 2010.

Fifth, private attorneys are critical of the OAB agreement, although they recognize the importance of the Public Defence Office. Private and public defenders both state that the weaknesses of the Public Defence Office prejudice defence, and result in an ‘assembly line’ style treatment of cases. By contrast, judges and prosecutors usually stated that the current structure of the Public Defence Office is sufficient and adequate for current levels of demand.

The field investigation (in particular interviews with prosecutors and police) demonstrated that there is a strong discourse regarding the protection of society, as criminality is addressed in terms of social control, rather than social issues. Some of those interviewed consider the justice system to be a repressive body, responsible for punishing and repressing crime in order to exercise social control. They are unsatisfied, as they consider the criminal law and the STF to be softening, and that currently the system of constitutional rights established at the end of the dictatorship is inappropriate.

This position has popular support. According to a survey from the Brazilian Institute of Public Opinion and Statistics (Ibope), the prosecutor is popular, while people do not trust the police (this was corroborated in our attorney interviews, who qualified police corruption as ‘endemic’).

The people of Brazil and São Paulo are becoming more punitive in nature. A 2010 survey by the Nucleus of Studies of Violence of the University of São Paulo in Brazilian capitals, compared the answers to questions regarding attitudes, values, and cultural norms on human rights and violence, with the results of a 1999 survey. The change in approval of the statement ‘courts may accept evidence obtained via torture’ is noteworthy. In 1999, 72.6 percent of participants ‘completely disagreed’ with this statement, while in 2010, this percentage dropped to 53.99 percent.¹⁴⁹

Another investigation by the Senate regarding the reform proposal to the Criminal Code, which is currently under consideration, revealed that 89 percent of those interviewed were in favor of reducing the age at which one is considered an adult for criminal matters,¹⁵⁰ and 20 percent of respondents were in favor of anyone, regardless of age, being tried as an adult.¹⁵¹ There was also a poor interpretation of constitutional guarantees regarding criminal procedure. This is evident, for example, in cases that order pretrial detention due to ‘public outcry’ regarding the crime and its seriousness,

¹⁴⁹ Percentages refer to interviews in the city of São Paulo.

¹⁵⁰ In Brazil, one is considered a legal adult for criminal matters at 18.

¹⁵¹ Senate data.

when these are not criteria upon which such decisions should be based. In these cases, prison is not based on the need to ensure that the proceedings are carried out according to the law, but rather prison is normally ordered due to media attention or the seriousness of the crime. The STF has overturned such orders for detention on numerous occasions for the lack of legal justification. But the accused can spend months, sometimes years, illegally deprived of liberty until the STF decides in his favor.

Although it is hasty to conclusively state that among Brazilians there is a trend toward punitivism and against the rights of defendants, there are important studies that have reached that conclusion. For example, those that the Nucleus of Violence Studies of the University of São Paulo has undertaken (*Attitudes, Cultural Norms, and Values regarding Violence*), or the Senate study regarding the Penal Code Reform.¹⁵²

In our field research, although we did not formulate a specific question on the topic, those interviewed discussed media treatment of media related to criminal cases. 14 out of 15 of the people we interviewed stated that the media influence is harmful to the outcome of criminal cases, and that their analyses are biased. Police officials in particular mentioned feeling pressured to adopt legally unnecessary measure due to extreme influence of media exposure of the case.

7. Conclusions

The 1998 Federal Constitution, which re-established 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.¹⁵³ 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.

¹⁵² Data from the Nucleus of Violence Studies of the University of São Paulo.

¹⁵³ 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.

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. Thus, in the police phase, the law provides for a ‘note of guilt’¹⁵⁴ 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.¹⁵⁵ 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 contain 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.¹⁵⁶ The Federal Supreme

¹⁵⁴ 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.

¹⁵⁵ 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.

¹⁵⁶ Exceptional cases are those in which the judge may order the secrecy of the criminal procedure file.

Court (STF) has supported this development,¹⁵⁷ through Binding Precedent 14, which states that defence attorneys have the right to access police investigation files.

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.¹⁵⁸ 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.¹⁵⁹ In this case, the express normative provision¹⁶⁰ 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.

¹⁵⁷ The STF edited Binding Precedent 14, which assured defence attorneys had access to the decisions of the police investigation.

¹⁵⁸ While not prohibited, there is no legal disposition to make it obligatory, meaning it is essentially inexistent.

¹⁵⁹ 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.

¹⁶⁰ Legal and constitutional.

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, as those awaiting trial make up 35 percent of the prison population.¹⁶¹ 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.¹⁶² 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,¹⁶³ and the perception of the justice system as a mechanism of punishment and repres-

¹⁶¹ 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.

¹⁶² 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.

¹⁶³ In general, those interviewed were active in the police and prosecutor's office.

sion to exercise social control. There is evidence of popular support for this way of thinking.¹⁶⁴

Finally, nearly all people were detained *in flagrante*,¹⁶⁵ which demonstrates the ineffectiveness of criminal investigations.

7.1. 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.

¹⁶⁴ Especially with respect to the prosecutor's office.

¹⁶⁵ 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.

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.
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.

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CHAPTER 5. COUNTRY ANALYSIS. COLOMBIA¹

1. Introduction

In this chapter we describe the normative framework of criminal defence in Colombia, and contrast that with the way in which defence is exercised in practice. We base our observations on five sources of information: current legislation; current jurisprudence; performance evaluations from the National System of Public Defence (SNDP, for its Spanish acronym); semi-structured interviews with judiciary officials undertaken between January and April 2013 of those processed in the criminal justice system, public and private defence attorneys, among others;² and, finally, the responses to petitions for information sent to the Public Ombudsman.³

¹ Miguel La Rota, a former researcher at the Center for the Study of Law, Justice, and Society (Dejusticia) reviewed this chapter. The research team included Carolina Bernal Uribe and Gina Cabarcas, who also worked as researchers in Dejusticia during the research.

² For this study we undertook 55 interviews, which included: ten police officers who work on patrols, five higher level police officers (generally commanders in metropolitan areas and police stations), four judiciary police investigators, five constitutional guarantee control judges, five trial court judges, two coordinators of immediate response units (URI) of the prosecutor, four URI prosecutors, seven prosecutors assigned to specific cases (*fiscales radicados*), ten public defenders, and five administrative officials of the Ombudsman Office responsible for the selection and evaluation of public defenders.

³ We asked the Public Ombudsman regarding budgets for public defence, the number of public defenders (hired professionals and legal clinic students), the workload and remuneration of public defenders, the number of SNDP investigators and assistants, the characteristics of SNDP clients, measures to ensure accessibility of public defence, complaints regarding the work of public defenders, training for public defenders and public defence programs established by indigenous authorities. We received answers to all the questions we asked, as we present in this document,

This chapter has six parts. In the first, we provide an overview of Colombia and a description of the particularities of its criminal justice system. In the second, we review the public defence service in the country, which we continue in the third part with a description and critical analysis of the normative framework of the rights: (i) to information in the framework of criminal proceedings, (ii) to self-defence, (iii) to procedural guarantees, and (iv) to effective defence. In the fourth part we examine the professional culture of attorneys, and in the fifth, we describe the political commitment with respect to criminal defence. We close the chapter with some conclusions and recommendations.

1.1. Basic socio-demographic information

Colombia's continental territory includes 1,141,748 square kilometers, and has a population of around 48 million people.⁴ According to the 2005 Census, 3.4 percent of the population identifies as indigenous and 10.6 percent as Afro-Colombian.⁵ Around 7 percent has some type of disability.⁶

According to the most recent measurement by the World Bank, Colombia is a middle-income country,⁷ where those in poverty represent 33 percent of the total population, and those in extreme poverty make up 10 percent of the total population.⁸ With respect to inequality, in spite of improvements in recent years,⁹ Colombia has high levels of wealth and income concentration in comparison to other countries in the region. While the richest population (in the top 10 percentile) receives 35 percent of all income, the poorest (deciles 1 through 4) receives approximately 13 percent¹⁰. These numbers place Colombia in a below average position compared to other coun-

except those with respect to the characteristics of SNDP clients and disciplinary complaints against public defenders. According to the Public Ombudsman, the office does not collect this type of information.

⁴ Departamento Nacional de Estadística, 2013a.

⁵ Departamento Nacional de Estadística, 2005.

⁶ Departamento Nacional de Estadística, 2008, p. 8.

⁷ In 2013, the per capita income in Colombia as USD 10.110, with parity in purchasing power. Banco Mundial 2013.

⁸ For data on poverty and extreme poverty, see National Department of Statistics 2013b.

⁹ An example of the reduction in inequality is that from 2010 to 2012, the Gini index on income distribution decreased from 56.7 to 53.8. Thus, Colombia went from the third most unequal country in the region to the seventh. Departamento Nacional de Estadística, 2013b.

¹⁰ Comisión Económica para América Latina y el Caribe 2012, p. 20.

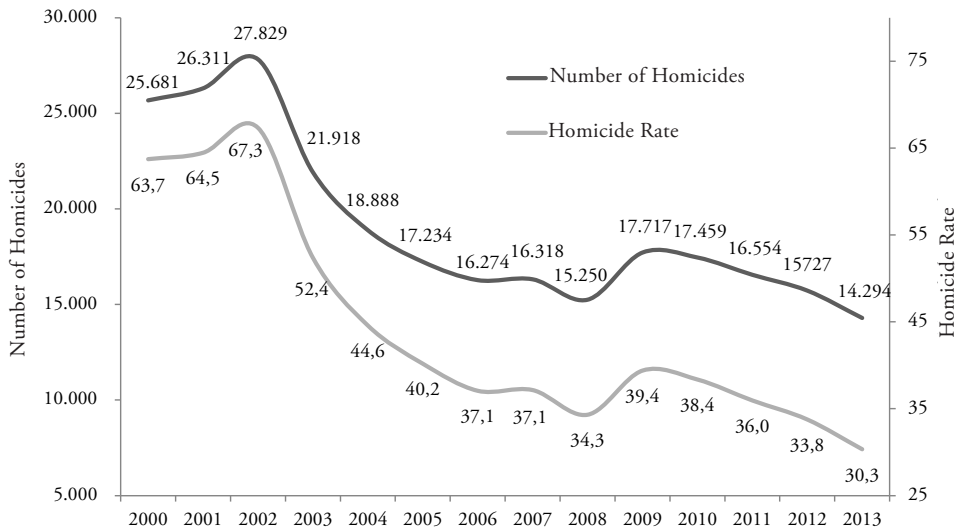
tries in Latin America, where on average the highest decile receives 32 percent of income and the lowest 4 deciles receive 15 percent.¹¹

Colombia is divided into 32 provinces and in accordance with its Constitution, is a social democratic state, organized in the form of a unified, decentralized republic, with autonomous territorial entities.¹²

1.2. Rates of criminality and the prison situation

Due in part to internal conflict and the reality of the drug trafficking business in the country, violent crime in Colombia is relatively high. However, it has decreased somewhat consistently from 2001, as the change in homicide rates shows in graph 1. From 2002, there was a steep decrease in the homicide rate, which decreased from 67 to 30 homicides per 100,000 inhabitants in the year 2013. Although this was a steep

Graph 1.
Criminal Homicides in Colombia, 2000-2013.



Source: Data from Forensis, Instituto Nacional de Medicina Legal y Ciencias Forenses. Elaboration by Dejusticia.

¹¹ The countries in the region with greater inequality than Colombia, in terms of concentration of wealth among the wealthy, are the Dominican Republic (39% vs. 11%), Guatemala (40% vs. 12%), Honduras (36% vs. 11%), Paraguay (38% vs. 12%) and Brazil (40% vs. 13%). Comisión Económica para América Latina y el Caribe 2012.

¹² Political Constitution of Colombia, art. 1.

decrease, the rate continues to be comparatively high, as it is closer to the homicide rate of countries in the south of Africa or some Central American countries than to that of other South American countries.¹³

Additionally, since the 1990s, Colombia has increased its incarceration rate, going from 80 inmates per 100,000 inhabitants in 1993 to 231 in 2013.¹⁴ This increase has been accompanied by a generalized increase in prison sentences¹⁵ and an increase in prison capacity starting in 1998.¹⁶

1.3. *Characterization of the criminal system*

With the passage of Law No. 906 of 2004, Colombia began the implementation of an accusatory procedural system.¹⁷ But institutional change had actually begun earlier, in 1991, when the National Constituent Assembly began to discuss the need to change the inquisitorial criminal process to an accusatory one based on four principles: a) the independence of the National Prosecutor from the Executive, b) the monopoly of the investigatory and accusatory functions, granted to the prosecutor and his agents, c) establishing a single procedure for the investigation and trial of crimes, and d) equality of arms between the prosecutor and defence during all the stages of the process.¹⁸ Nonetheless, the reform did not begin until 2004, once the inquisitorial system of Law No. 600 demonstrated its incapacity to confront impunity.¹⁹

¹³ The average homicide rate in southern Africa is 30; in some countries of Central America: Guatemala (38), Belize (41), El Salvador (69), Honduras (91); South America: Venezuela (45) the average homicide rate is higher than Colombia, but Brazil (21), Guyana (19), Ecuador (15), Argentina (3,4) or Chile (3,2) are below Colombia's homicide rate: those in North America are even lower: Mexico (23) and the United States (4,2); the rate in Western Europe is less than 1. For a comparative analysis, see, United Nations Office on Drugs and Crime 2012.

¹⁴ Calculations based on statistics from the Instituto Nacional Penitenciario y Carcelario (INPEC) 2013.

¹⁵ Law No. 890 of 2004 is a clear example of this hardening, as it generally lengthened minimum prison sentences for crimes by a third, and maximum sentences by a half.

¹⁶ In compliance with Judgment T-153 of 1998, prison capacity was expanded by around 21,600 spaces. For more on this expansion, see, Ariza 2013.

¹⁷ Implementation was gradual, and undertaken by city and in phases. The first phase began in 2005, and the last in January, 2008.

¹⁸ National Constituent Assembly. Constitutional reform project, act No. 11. 'Propuesta de Estructura del Sistema Acusatorio'. Hernando Londoño Jiménez. *Gaceta Constitucional* 10.

¹⁹ A more complete description of this change and the background of the adversarial criminal system is available in Corporación Excelencia en la Justicia 2010.

The gradual implementation of the adversarial system means that there are currently two types of criminal procedure proceedings in place: the mixed system proposed in Law No. 600 of 2000, which applies to crimes committed prior to January 1, 2005, and the adversarial system designed in Law No. 906 of 2004, which applies to crimes committed after January 1, 2005. In this text, we mainly focus on describing and analyzing the normative framework of the adversarial system.

In Colombia, unlike in other countries, the National Prosecutor forms part of the judiciary. To carry out its functions, it receives support from the National Institute of Legal Medicine and Forensic Sciences, which provides forensic services for the investigation. Additionally, it has its own police force (Technical Investigation Body or CTI, for its Spanish initials) and the assistance of two agencies dedicated to the judicial police, within the National Police: the Unit of Criminal Investigation and Interpol (DIJIN, for its Spanish initials) and the units of criminal investigation (Criminal Investigation Section or SIJIN, for its Spanish initials). Law No. 906 states that the National Prosecutor must fulfill the functions of managing, coordinating, legal control, and technical-scientific verification of the criminal police's activities. This is therefore a relationship that combines functional management.²⁰

The role of the judge in the Colombian adversarial criminal process consists of receiving the parties' arguments and determining the truth of the case based on those arguments. To do this, the judge has the authority and the duty to control the parties' (and the public's) activities to ensure that they do not interfere with the development and efficiency of the proceedings.²¹

1.4. The criminal process in the framework of the adversarial system

From the time the authorities learn that a crime has been committed until the author of that crime is sanctioned, there are three distinct stages: (i) the investigation or inquiry, (ii) the trial, and (iii) the execution of the sanction. The first is not a procedural stage, but rather exploratory, and therefore the normative framework sets a broad deadline (two years from when the Attorney General learns of the crime) within which it must be completed.²²

²⁰ On the relationship of functional management between the prosecutors and legal police, see, Centro de Estudios de Justicia de las Américas (CEJA) 2010, p. 18.

²¹ Consejo Superior de la Judicatura y Sistema Acusatorio 2005.

²² Criminal Procedure Code, art. 175, para.

During the investigation phase, the prosecutor has the authority to undertake the majority of actions required to obtain physical and material evidence. Nonetheless, after collecting evidence, he must present it to the control judge, so that the latter may certify that it was collected in accordance with the requirements of the law.

The criminal process as such begins when the National Prosecutor formulates an indictment (*imputación*).²³ This act informs the indicted that there is a criminal investigation against him, and begins the trial stage, which includes discovery, the opening of the trial, and the trial itself. This begins when ‘from the legally obtained probative material, physical evidence or information it can be reasonably inferred that the indicted is responsible for the crime under investigation.’²⁴ In the indictment hearing, the defendant may accept the charges partially or entirely, or negotiate with the National Prosecutor to receive a lower sentence or other benefits, or he may declare his innocence.

If during the investigation, the suspect has not realized that he is subject to an investigation, the indictment is the first formal notice that he may begin to prepare his defence.²⁵ But, even before the indictment, a judge may order the capture of a suspect in response to a prosecutor’s request. When this happens, in the same hearing that legalizes the capture, the National Prosecutor must make the indictment. The prosecutor may also request the imposition of a precautionary measure before the same judge. Moving forward, the other acts in the proceedings take place before a trial judge. Whether a precautionary measure is requested or the captured suspect is left free, he must wait until the prosecutor reveals the evidence he has collected in the hearing that determines whether the case will go to trial to learn what evidence the National Prosecutor will present during the oral trial.

In addition to formally notifying the indicted of the opening of a criminal proceeding against him, this act starts the ‘running of the clock’ for criminal processes.²⁶ From the indictment, the National Prosecutor has 90 days, or more in complex cases, to request to bring the case to trial (*acusación*); if he does not, the judge must drop the proceedings. In the hearing to bring the case to trial, the National Prosecutor and the defence present their evidence to the judge, who determines its validity, as well

²³ Code of Criminal Procedure, art. 286.

²⁴ *Ibid.*, art. 287.

²⁵ *Ibid.*, art. 286.

²⁶ La Rota and Bernal (2014) have demonstrated that the investigation stage creates the most serious bottle neck for trying serious crimes.

as to the other party. Here each party may request that the other reveal the evidence, including that which is favorable to the party making the request for revelation. While the prosecutor has the obligation to reveal the evidence the defence requests, the latter may deny such revelations when he considers that doing so would violate his right to refrain from self-incrimination.

In the oral trial hearing, the parties must present all the evidence previously discovered. From this, the trial judge will make a ruling, and listen to the parties' considerations regarding a sanction in the case of a guilty verdict. As we explain in section 3.3.6, those convicted have the right to challenge convictions through an appeal.

In specific instances, the victim may directly take part in the criminal process. For example, when the National Prosecutor does not request a precautionary measure, the victim may do so, once the prosecutor has explained why he did not make such a request. Although these powers were not part of the initial institutional design of the adversarial system, prior to its entry into force, the Constitutional Court had developed a solid jurisprudence that determined that victims' participation in the proceedings helps uncover the truth and obtain material justice,²⁷ as well as integral reparation.

Finally, when an individual is convicted, he is sent to a prison or his home (in the case of house arrest). In this stage, the proceedings are sent to a judge responsible for sanctions and precautionary measures.

2. Legal assistance

2.1. *Organization and structure of the public defence office*

The Ombudsman (*Defensoría*) administers the State's legal assistance. Formally, it forms part of the Public Ministry²⁸ and the National Inspector General, and munic-

²⁷ The Constitutional Court expanded the victim's rights and participation in the criminal process through decisions such as C-293 of 1995, which reviewed the constitutionality of the Code of Criminal Procedure article that regulated the constitution as a civil party in the criminal process. The decisions C-163 of 2000, C-1149 of 2001 and C-178 of 2002, also expanded victims' rights in the criminal process.

²⁸ The Public Ministry and National Inspector General (*Procuraduría General de la Nación*) are entities whose names correspond to those authorities that in other countries investigate and try crimes. In Colombia, the entity that undertakes such functions is the National Prosecutor.

pal ombudsman's offices,²⁹ and has administrative and budgetary independence.³⁰ Its main objective is to ensure the effectiveness of human rights within the framework of a social democracy based on the rule of law of its Constitution. Therefore, it has ombudsman that focus on various issues, and four national offices among which is the National System of Public Defence (SNDP, for its Spanish initials). In international terms, the *Defensoría* is the Colombian Ombudsman.

Although spending in public defence tends to be a bit more than 50 percent of the Ombudsman's total budget, it is low compared with the National Budget. In 2012, for example, the total budget of the Ombudsman was around 140 million dollars,³¹ which is around 0.17 percent of the National Budget.³² Table 1 presents the evolution of the total budget of the SNDP and its relationship with the National Budget. Additionally, it demonstrates how the number of public defenders has changed, which is a clear indicator of its public policy importance in terms of resources assigned.

The resources of public defence are not used only for the defence of suspects and accused in criminal matters. Additionally, the SNDP represents victims in cases that

Table 1.
Evolutionary Budget of public defence vs. the National Budget,
and the number of public defenders

	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012
Public defence Budget (in millions of dollars)	10,4	10,2	9,99	17,4	22,97	31,7	42,2	46	54,2	66,7	70,5
Defence/National Budget (%)	0,03	0,03	0,02	0,04	0,04	0,05	0,06	0,06	0,07	0,09	0,08
Number of defenders	1.026	987	1.138	1.369	1.646	1.549	2.063	2.251	2.212	2.676	2.911

Source: Answer to a request for information sent to the Ombudsman and the laws regarding the National Budget. Elaborated by Dejusticia using an Exchange rate of 1,900 COP per 1 USD.

²⁹ Constitution, art. 281.

³⁰ Law 24 de 1992, art. 1 (organization and functioning of the Ombudsman).

³¹ This is equal to around 285.000 million Colombian pesos.

³² The National Budget reached \$ 165.3 billion in the year 2012. Ministerio de Hacienda y Crédito Público. 2012.

Colombian legislation establishes and is the legal representative for such cases in civil, labor and administrative courts, among other tasks.³³

Based on the aforementioned, some studies³⁴ have argued that the workload of the Ombudsman means that the resources available to it are insufficient for criminal defence, as they barely cover attorney wages and regular administrative costs, without allowing for investments to improve the system.³⁵ International cooperation has thus played a fundamental role in financing certain public defence activities. In particular, training and sensitization programs have been financed mainly through the Program to Strengthen Justice from the United States Agency for International Development (USAID), and the UN Development Program in Colombia.

2.2. Public defence service

To explain the functioning of the public defence system, we will first present a critical description of the actors involved (defence attorneys and users) and later analyze how services are provided.

2.2.1. Public defenders

As of 2005, only attorneys that the SNDP has hired as public defenders, law graduates undertaking their practicum (in which they provide free legal services in public entities) in the SNDP, and law clinic students³⁶ may offer criminal legal services and representation as part of State-funded legal services.³⁷

³³ To date, there are 10 public defence programs: 1. Ordinary criminal, with the adversarial system and the mixed system, 2. Juvenile Criminal Responsibility, 3. Military Criminal Justice, 4. Prison Decongestion, 5. Criminal Appeals, 6. Civil, 7. Family, 8. Labor, 9. Administrative, 10. Multi-Door Courthouses, 11. Special Support Office, and 12. Indigenous. Currently, the Justice and Peace Law (975 of 2005), Juvenile Law (1098 of 2006), Law on Forms of Violence and Discrimination against Women (1257 de 2008) and of Victims and Land Restitution (1448 of 2011) place responsibility for representing victims under such laws on the SNDP.

³⁴ Corporación Excelencia en la Justicia 2010, p. 87.

³⁵ The Ombudsman's budget for investment has been low. In 2005, when it was at its highest proportion, it was 5 percent of the total budget; in 2006 it was 3 percent, in 2007 and 2008, 2 percent, and from there it has remained at or below 1 percent. Defensoría del Pueblo 2012.

³⁶ Law 941 of 2005, arts. 16 and 17.

³⁷ Prior to Law No. 941 of 2005, which organizes the SNDP, State provided legal assistance was provided by public defenders that the Ombudsman hired for that purpose (as occurs currently) and by private attorneys. The latter are private professionals hired in cases in which the defendant could

With respect to these apprentices (*judicantes*), they act under guidance of the SNDP³⁸ for nine, non-extendable months, during which they work for free as defence attorneys in areas of criminal, civil, labor, or administrative law. To be admitted as an apprentice in the SNDP, one must accredit having completed her legal studies, completion of courses, provide her resume, and pass an interview and/or exam.

Law school faculty supervise law students participating in clinics that have an agreement with the Ombudsman. Students may offer legal advice and representation in criminal matters in which municipal judges act as trial or legal control judges. They are expressly prohibited from acting as representatives for victims and co-defendants in the same criminal case.³⁹

Below we will focus on the services provided by SNDP attorneys. They have broader powers to exercise legal defence and represent the majority of public defenders. SNDP is responsible for the selection of public defenders, which evaluates applicants who have previously registered with the National Registry of Public Defenders to cover public defence needs.⁴⁰

To qualify as a public defender, an attorney must have a post-graduate degree specifically related to the defence program to which she aspires (or have experience within that field), and have at least two years' experience in the area of the program for which she is applying. Nonetheless, according to officials in the Registration and Selection Unit of the SNDP, for 'special treatment areas',⁴¹ which are far from urban centers and may face complicated public safety situations, it is difficult to find attorneys that fulfill the aforementioned requirements. Therefore, requirements are less stringent in such zones, as they omit academic training. Although this effort is under-

not hire an attorney. By law, it was a forced representation, in which any attorney must provide defence free of charge in at least three criminal proceedings, independently of their procedural stage. The results of a 2003 Ombudsman evaluation demonstrated that the service offered by these attorneys was low quality, which justified to a great extent the disappearance of this form of free legal assistance. Defensoría del Pueblo 2004.

³⁸ Provision of free legal defence by law graduates practicing in the SNDP. Defensoría del Pueblo, Resolution 1003 of 2005.

³⁹ Provision of legal services and representation for law clinic students Defensoría del Pueblo, Resolution 713 of 2005.

⁴⁰ Requirements to apply for a position as a public defender. Available in: http://www.defensoria.gov.co/public/pdf/00/inscripcion_registro.pdf. The areas of specialization that defenders can exercise in are mentioned in footnote 32.

⁴¹ In 2013, the departments of Amazonas, Caquetá, Guainía, Guaviare, Chocó, Vaupés, Vichada, San Andrés and were considered special treatment zones.

standable to incentivize more attorneys to work as public defenders, it may reduce the quality of defence in areas where, due to social complexities, precisely the opposite is needed. Therefore, it may be more adequate to apply different incentives to ensure that the supply of public defenders in such areas is sufficient; for example by providing higher wages to attorneys that work there.

After evaluating the candidates, the Ombudsman hires them with a yearly, renewable contract, for which they receive a monthly salary of approximately USD 1,970.⁴² Although this is not low compared to the average Colombian income,⁴³ it is low compared to salaries of private attorneys outside the Ombudsman,⁴⁴ as well as the salaries of other state officials with a similar status to defence attorneys.⁴⁵

Since the creation of the Ombudsman, public defenders have been hired by a contract for services, and not as public officials. Therefore, they are independent workers that may have businesses outside the Ombudsman as private attorneys.⁴⁶ Through

⁴² This remuneration does not vary on the procedural stage or workload of each defendant during the month. Defence attorneys in the Special Office of Support have higher salaries than criminal defence attorneys, which is equal to USD 1,970 (equal to COP 3.700.00). Defensoría del Pueblo 2012.

⁴³ According to the National Department of Statistics (DANE), the average monthly salary of a worker in the formal sector in Colombia for the trimester April-June 2013, was COP 1,409,000 (around USD 725); in the informal sector it was around 642,000 (around USD 330); and of both formal and informal sectors COP 1,030,102 (approximately USD 530) *Portafolio* 2013. The median income of all workers for 2013 was around COP 595,000, which is around USD 306. *Revista Semana* 2013.

⁴⁴ Although there is no data regarding median salaries for private attorneys, the wages set by the Board of Directors of the National Attorney Bar Association for 2012-2013 allows one to understand that a private defence attorney would earn more than a public defence one. An example: according to the fee scale, an oral consultation in criminal matters should cost at least a minimum monthly wage (which in 2013 was COP 589,500, around USD 313). Thus, the salary of a private attorney would be equal to that of a public defender if he undertook five consultations each month, which is far below his real workload. Additionally, according to data from the information system of the Labor Observatory for Education, in 2011, attorneys with a postgraduate degree in criminal law earned around COP 4,019,000 (around USD 2,140). According to the answer to the request for information, the wages for public attorneys in 2011 were the same as those in 2012 (COP 3,700,000, around USD 1,970). With the legal discounts that apply to those with service contracts (like public defenders), this difference is around COP 1,500,000 (approximately USD 805).

⁴⁵ Public defenders earn less than judges and prosecutors responsible for the same cases. The first earn between COP 4,600,000 (around USD 1,470) at the lowest levels and COP 8,900,000 (around USD 4,780) at the highest levels. Administrative Department of Public Functions, decrees 1035 and 1024 of 2013.

⁴⁶ In this text we use the term lawyer/defence attorney and private attorney/lawyer, to refer to the technical defence in criminal matters that is undertaken personally by the accused, defendant, or convict.

several interviews we determined that this situation can be inconvenient to the extent that some defence attorneys take advantage of this situation to bring Ombudsman clients to their private offices. Nonetheless, we could not determine how common this practice is, as there are no consolidated registers of cases in which the replacement of a public defender for a private one did not also cause a change in the individual representing the client.

This situation is clearly a risk for those who need public defence services, as they could be forced to cover the costs of representation even when they cannot do so. To confront this situation, the application of the norm that indicates that the Ombudsman should be paid for its services could be a good alternative, which in the practice is not used, as we explain in section 3.4.1. Additionally, the problem reveals the need to implement an effective monitoring system of public defenders, as well as develop the section on recommendations.

2.2.2. Users

The Law that organizes the SNDP⁴⁷ and the Ombudsman Resolution⁴⁸ determine the conditions under which a person may use public defence services. From a reading of the two, we conclude that there are three situations in which one may use public defence services:⁴⁹

1. When a person does not have the resources or social capacity (from discrimination or other circumstances) to afford a private attorney. According to the aforementioned Resolution, the determination of whether the person requesting services has the resources to assume the costs of a legal proceeding includes a consideration of:⁵⁰ (i) family income and expenses, (ii) assets, (iii) number of persons for whom he is responsible, (iv) the profession of the person soliciting the service, (v) the legal situation of his home,⁵¹ and (vi) his classification in the Identification System of Potential Beneficiaries of Social Programs (Sisbén).
2. When he cannot hire an attorney for reasons of *fuerza mayor*,⁵² understood

⁴⁷ Law 941 of 2005.

⁴⁸ National Ombudsman Office, Resolution 1001 of 2005.

⁴⁹ Law 941 of 2005, art. 2.

⁵⁰ National Ombudsman, Resolution 1001 of 2005, art. 1.

⁵¹ For example, if it is one's own home, rented, mortgaged, or other situations.

⁵² Law 941 of 2005, art. 43.

as private attorneys refusing service for safety reasons; or because of the importance or connotation of the criminal acts for the society. Based on an analysis of special circumstances, the Ombudsman determines the need to appoint a public defender.⁵³

3. Need during the proceedings,⁵⁴ in cases in which the court wishes to form an indictment or request a precautionary measure and the individual is absent,⁵⁵ or both the defendant and his clients do not appear.⁵⁶

The three criteria have in common the characteristics that they reserve public defence services for a subsidiary and residual role, as in principle, private attorneys should generally assume the defence in criminal proceedings. Additionally, the possibility to use public defence services does not depend on the type of crime or what stage the proceedings are at, because due process rights and the right to defence is a fundamental right of all citizens.

In cases in which users lack economic means to afford a technical defence, public defence is completely free. In the other two situations, users must reimburse the Ombudsman the cost of the services.⁵⁷

To determine whether a person lacks economic means to provide for his defence, defence attorneys undertake an intake interview, which determines the person's economic capacity via a brief, summary procedure.⁵⁸ If the SNDP determines that the person does have the capacity to pay during the proceedings, regulations state that the SDNP may cease to provide services.⁵⁹ Nonetheless, in practice, the determination of economic capacity is not rigorous, and it is commonly the client's statement of need that is the basis for determining free services. The evaluation of the client's situation is reduced to filling out a questionnaire regarding his income and financial responsibilities.

According to interviews with defence attorneys, the urgency of the situation does not allow for a verification of the information that the client provides. Nonetheless, we believe that there are simpler verification methods, such as those that law clinics in some universities use, such as requesting the client to provide a copy of his public

⁵³ Resolution 1001 of 2005, art. 7.

⁵⁴ Ombudsman, Resolution 1001 of 2005, art. 1. 1.

⁵⁵ Code of Criminal Procedure, art. 127. Absence of the indicted.

⁵⁶ *Ibid.*, art. 291.

⁵⁷ Ombudsman, Resolution 1001 of 2005, art. 8.

⁵⁸ *Ibid.*, art. 5.

⁵⁹ *Ibid.*, art. 5 and 6.

utility bills, to verify the strata in which he lives. Although this is not conclusive proof, it is a minimum step that can help rationalize costs.

2.2.3. Provision of public defence services

The public defence office provides five types of services⁶⁰ in criminal matters: (i) advice, (ii) extra-judicial representation,⁶¹ (iii) court representation, (iv) criminal investigation activities, and (v) criminalistics and forensic science activities.⁶² The client, an interested third party, the control or trial judge, the prosecutor, the inspector general, or municipal ombudsman office may request such services.

Public defenders may independently define their defence strategy. The Ombudsman only exercises two types of control regarding defence through administrative and management coordinators: (i) one formal, to verify the minimum conditions of diligence in defence work, such as attending hearings and not postponing them, as well as reviewing activity reports that defence attorneys must present monthly; and (ii) one more substantial, of random attendance at some hearings to verify the quality of the defence.

Nonetheless, the control of administrative and management coordinators faces serious limitations. By definition it is the supervision of independent professionals (due to the form in which they are hired) and therefore they must have a broad margin of discretion to choose a defence strategy⁶³ (including the possibility to choose to remain silent as a defence strategy). Additionally, in practice, there are very few cases in which coordinators can undertake substantive control, as they tend to be limited to cases in which coordinators replace defence attorneys during a hearing.

However, the Ombudsman requires public defenders to attend weekly academic training (called '*barras*').⁶⁴ These form the clearest and most sustained training effort, as they have been held since the creation of the public defence office. The goal of these classes is to provide defence attorneys with the necessary relevant training to develop

⁶⁰ *Ibid.*, art. 4.

⁶¹ This service takes place when an individual discovers that there is a criminal investigation against him, and grants authority to a public defender to undertake investigations that could be useful in an eventual criminal process.

⁶² This is the evidentiary activity undertaken by the Operative Unity of Criminal Investigation (UOIC) of the SNDP in order to provide a basis for the defence's theory of the case.

⁶³ Judgment T-957 of 2006.

⁶⁴ Law 941 of 2005, art. 40, 41 and 42.

their defence strategies.⁶⁵ They are weekly meets to provide updated information on criminal defence issues.⁶⁶ The academic coordinators,⁶⁷ which at the end of 2012 consisted of 37 coordinators located in 19 regional offices of the country,⁶⁸ lead sessions to discuss cases and new jurisprudence and doctrine.⁶⁹ According to those interviewed, the quality of these meetings is relatively good. They also serve as a form of control over attorney's work, as they may share strategies they have used in their cases.

In addition to such trainings, there are other activities and tools to update knowledge, such as a periodic publication regarding pronouncements and important decisions in high courts, unified '*barras*', which are meetings of defence attorneys from different areas of the country, decentralized *barras*, which are academic meetings without an academic coordinator,⁷⁰ and short academic courses and other training activities that the SNDP offers its attorneys.

Although the general perception of the results of *barras* and SNDP training programs is good, there are no evaluations on their impact. Therefore, it is not possible to know with certainty how useful they are to ensure the quality of public defence.

Doubt regarding this last point is due to a serious gap in the content of the academic *barras*, which tend to focus on dogmatic discussion and on criminal proceedings, and ignore issues such as the efficient processing of cases and taking advantage of technical evidence. Those interviewed confirmed this gap, as they mentioned the weakness of defence attorneys to handle technical evidence and apply criteria of prioritization regarding cases. Additionally, interviewed judges stated that, occasionally, defence attorneys focus exclusively on dogmatic and procedural discussions, ignoring the evidentiary debate.

An important issue to evaluate the provision of public legal defence is its prevalence over criminal defence provided by private attorneys. However, in Colombia there is insufficient data to determine a reliable answer to that question. Therefore, in addition to noting the need for the SNDP to measure the coverage of its work,

⁶⁵ Defensoria del Pueblo 2013, p. 367.

⁶⁶ *Ibid.*, p. 425.

⁶⁷ In addition to directing the work of academic *barras*, coordinators also implement training programs for defence attorneys.

⁶⁸ Defensoria del Pueblo 2013, p. 425.

⁶⁹ Defensoria del Pueblo s.f., p. 66.

⁷⁰ Employees of the special support offices organize *barras*. These are SNDP offices conformed of public defenders whose work includes training public defenders. Defensoría del Pueblo 2013, p. 431.

we present some calculations that give an illustrative approximation of the size of the service the public defence office provides.

Before the adversarial system entered into force, the Ombudsman undertook studies to determine what changes the entry into force of the new procedural model would require. According to one such study,⁷¹ 5 percent of the defence service was assumed by public defenders, 82 percent by ‘official defenders’ who were paid by the State and assigned to courts (*ex officio* attorneys) and 13 percent by private attorneys. By eliminating the *defensoría de oficio*, the challenge facing the adversarial system was to strengthen the public defence to absorb the demand for free assistance that *ex officio* attorneys were providing. This study indicated that to do so, it was necessary to increase the number of public defenders by 162 percent by 2005.⁷² Nonetheless, as table 1 shows, the number of public defenders in 2005 increased by a mere 20 percent from the year before. In fact, even in 2011, when it would be reasonable to assume that the demand for public defence had increased together with the increased numbers entering the system,⁷³ the number of public defenders did not reach the 2,989 that the 2004 studies had indicated were necessary for 2005.

The Ombudsman⁷⁴ indicates that those 2,676 public defenders have an average yearly caseload of 64 cases, which gives a total of 171,264 cases addressed in 2011. However, this measure does not adequately indicate the workload of attorneys, as the level of work required in each may vary, from a single step (commonly, the indictment hearing), to accompanying the entire process.

The report *La defensoría pública en cifras* (2008) indicates that public defenders play a leading role in the first hearings of the criminal process, in particular the indictment. Between 2005 and 2007, public defenders addressed 75 percent of all indictment hearings.⁷⁵ From this, one may conclude that the work of the public defence

⁷¹ Universidad de Los Andes and Instituto SER de Investigación 2004.

⁷² According to calculations of Los Andes University and Andes y el Instituto SER (2004), the number of public defenders in the country at the time of entry into force of the adversarial system in 2005 should have been 2,989. In 2004, the total number of defenders was 1,138. These calculations were done assuming that the total number of criminal proceedings in 2004 was around one million.

⁷³ According to the 10th Report of the Ombudsman to Congress (2005, p. 80), the total of those entering the criminal system in 2004 was around one million. In 2011, this number had reached 1,100,000, which represents an increase of 11 percent.

⁷⁴ Defensoría del Pueblo 2012.

⁷⁵ The difference between the total percentage of cases that the Public Defence Office would have the capacity to assume, 16 percent of the total demand for legal assistance, assuming that this is

office plays a central role for defence in one of its most important moments: the indictment, and for a number of the most vulnerable, as a large number of cases that the public defence office assumes correspond to incarcerated individuals. The Ombudsman⁷⁶ indicates that between 2006 and 2012, in 61 percent of cases assigned to public defenders, the defence began with a detained defendant.

3. Rights and their implementation

3.1. *The right to information*

Below we will describe the normative framework of the right to information of those accused, in addition to how this framework is applied in practice.

Criminal procedure norms view the indictment⁷⁷ as the point at which the prosecutor formally communicates to the accused that there is a criminal investigation against him, although the evidence obtained is not yet revealed. To indict, the prosecutor must notify the accused, subpoena him to a hearing, and inform him of the crimes for which he is being investigated, and his form of participation. Thus, the indictment is the first moment in which the accused may structure his defence against the criminal accusations against him.

There are situations that may occur prior to indictment, in which norms and jurisprudence have established the need for the accused to receive information regarding the investigation to protect his right to defence. One of these is *capture*, which, independently of the procedural moment in which it occurs, requires the state to inform the individual of his rights. These include the right to know the reasons for his capture, to inform someone of his detention, to remain silent, to not testify against himself or close family members, and to appoint a private attorney or to have the SNDP assign him one.⁷⁸ In practice, this information tends to be provided in Spanish, as this is normally the language the judicial police (when the capture is via court

represented by the number of those entering the criminal system, and cases in the hearing stage of indictment that the Office effectively assumes, 75 percent of all indictments, according to the *Defensoría Pública en cifras* (s.f.), may be due, according to several public defenders interviewed, to the fact that public defence clients often obtain private attorneys after the first stages in the proceedings.

⁷⁶ Defensoría del Pueblo 2012. See table 2 below.

⁷⁷ Law 906 of 2004, art. 286 and ss.

⁷⁸ Code of Criminal Procedure, art. 303.

order) or the ordinary police (when the capture is *in flagrante*) speak. To communicate his rights to him, these police have capture protocols that those captured must sign.

According to interviewed judges, it is common for those accused to not understand the language of court proceedings, the reasons for which they were captured, or their rights. Legal language and the logic of the criminal process are difficult for some people to understand, in particular those with low education levels. Although there is no statistical information on the frequency with which the accused use their right to remain silent during the proceedings, officials interviewed stated that it is a relatively common practice, precisely because of the lack of understanding regarding their rights.

In the case of indigenous people accused of crimes, those interviewed stated that they usually speak Spanish, but have low levels of education. Therefore, they often face similar difficulties as other individuals in understanding proceedings, more for their technical nature than for the language in which they are carried out. Although it is not the majority of cases, there are situations in which an indigenous person does not speak Spanish. As we explained in section 3.4.3, this is a serious obstacle for the evolution of the criminal process, as, in spite of legal dispositions, courts do not have interpreters to assist indigenous peoples with their defence.

The Constitutional Court has indicated that prior to indictment, and without capture, the suspect may need certain information to exercise his right to defence. In particular, when he learns the prosecutor is investigating him, he has two powers: first, begin to collect information of his own accord, to begin his defence in case of indictment; second, to attend hearings to control the legality of evidence obtained prior to indictment. With respect to the latter, the Court clarified that although the restrictions on certain protected information remain in place,⁷⁹ this power does not compromise the effectiveness of the criminal investigation, as ‘it is one thing that the public authority is not required to give notice about the moment in which certain actions will take place: searches, raids, interceptions, etc. [...], and another very different that the person objected to such measures may not contest them in a timely manner, may not freely and fully exercise their right to defence’.⁸⁰

In practice, although the accused needs information to begin to exercise his right to defence, he rarely requests it. Although there is not a register regarding how frequently it occurs, one fact appears to show that public defenders rarely request infor-

⁷⁹ *Ibid.*, art. 345. Situations in which discovery of evidence is kept secret.

⁸⁰ Constitutional Court, Judgment C-025 of 2009.

mation either. This fact is that in the majority of public defenders' cases (61 percent between 2006 and 2012), the attorney was assigned the case when the client was incarcerated, as we indicate in table 2. In this situation, as several attorneys expressed, in general the client has not undertaken any prior investigation efforts.

As the proceeding moves forward, the duty to inform the accused is more comprehensive. Nonetheless, there is no a duty to constantly inform him of the prosecutor's investigation, but rather to provide him with information during specific points of the proceeding. Perhaps the most important moment is the hearing that determines whether the case will go to trial (*acusación*), which is when the prosecutor must reveal the evidence he will present at trial, including that which favors the accused.⁸¹

In practice, according to some defence attorneys, the prosecutor does not always reveal evidence favorable to the accused during the hearing to determine whether the case will go to trial; however, this is not easy to control. For example, when those captured are subjected to examinations that could provide evidence to the criminal process, such as detecting ballistic traces, prior to the arrival of an attorney. Although this situation may be a serious obstacle for the defence, in practice, defence attorneys

Table 2.
SNDP appointments deprived of liberty in Law 906

Years	Appointments Law 906	Appointments with capture	Capture / appointment (%)
2006	34,984	17,744	51
2007	60,501	36,450	60
2008	78,857	52,040	66
2009	86,903	57,815	67
2010	89,596	53,789	60
2011	99,317	60,220	61
2012	86,143	48,603	56
	536,301	326,661	61

Source: Defensoría del Pueblo 2012. Elaborated by Dejusticia.

⁸¹ The preparatory hearing (held before the trial) is also an opportunity for the defence to exercise its right to information, as this is where requests for evidence take place (Code of Criminal Procedure, art. 357) and the exhibition of material evidence (art. 358). Both are activities that give the defence the opportunity to learn what cards the prosecutor will play against him during the trial.

are unconcerned about it, as the request for invalidity of procedural acts serves as an effective safeguard of the right to defence in these types of situations.

3.2. *The right to self defence*

The Constitution protects the right to defence as part of due process,⁸² and develops this right in legislation.⁸³ Colombian jurisprudence distinguishes two components of the right to defence: material defence and technical defence. While the first refers to the possibility of the accused to defend himself,⁸⁴ the second refers to the professional work of an attorney⁸⁵ who represents the defendant's interests.⁸⁶ In the case of disagreements between attorneys and their clients regarding defence strategies, legislation grants primacy to the technical defence.

According to defence attorneys, although this type of conflict is relatively rare, it generally occurs due to differences of opinion regarding the probability of success at key procedural moments, for example whether to accept charges or the advisability of an appeal.⁸⁷

⁸² National Constitution, art. 29.

⁸³ Article 8 of the Code of Criminal Procedure has a list of powers that the right to defence encompasses. This right is also developed in the articles beyond 118 of the same Code. For public defence, see Law 941 of 2005, art. 4.

⁸⁴ The indicted or defendant may exercise the right to material defence, among other methods, by exercising the right to appear personally in the process, to confront the charges against him, to tell his own version of the facts, to provide explanations or justifications in his favor, to undertake positive acts against the evidence against him, and to choose to remain silent. Supreme Court of Justice, Criminal Chamber, Judgment of June 1, 2006, file 20614.

⁸⁵ The requirement that attorneys exercise the technical defence is found in articles 8(e) and 118 of the Criminal Code of Procedure. As we mentioned, in exceptional cases, a law student may provide this defence.

⁸⁶ Under Decree 196 of 1971, the judge could designate an 'honorable citizen' as a representative during the investigation. Law 600 of 2000 removes this possibility, requiring an attorney exercise technical defence, which may be the accused. Law 906 of 2004 also eliminated the possibility to represent oneself.

⁸⁷ Nonetheless, such opinions seem to be rare; as mentioned in section 3.1 it is common for certain types of defendants (namely those with low levels of education) to remain silent as they do not understand the technicalities of the process. In these conditions, the possibility to exercise a material defence are null, as defendants do not have a basic understanding of the process and blindly trust the criteria of their attorneys.

During the investigatory stage, attorney assistance is optional.⁸⁸ However, there are cases in which technical assistance is obligatory even prior to indictment, such as interrogations,⁸⁹ body inspections,⁹⁰ obtaining samples,⁹¹ or identifying a suspect from a line up.⁹² Later, and starting with indictment, technical assistance is obligatory until the end of the oral trial.⁹³

The selection of one's defence attorney is conditioned upon various factors. In private defence, it depends on the economic capacity of the defendant. But in state-provided defence, the administrative and management coordinator assigns cases in each public defence office by alphabetic order, according to the criteria of 'efficiency, equity, and procedural burden'.⁹⁴ Additionally, the coordinator considers the complexities of the cases and the experience of public defenders. In practice, there are places (such as the special treatment zones) where the supply of public defenders is low. As a result, it is not only impossible to assign cases according to their level of complexity, but it is even difficult to access a public defender. After an attorney is appointed, she may act in the proceeding without requiring any further formal authority.⁹⁵

The quality and independence of defence varies broadly. In the case of private defenders, while the SNDP has measures to control the work of public defenders, only their clients evaluate the majority of private attorneys' work. Thus, while the Ombuds-

⁸⁸ Article 267 of the Code of Criminal Procedure states that 'one who is informed or learns that there is an investigation against him, *may seek legal counsel*, to identify, collect, and package material evidence and have experts examine them to use them in his defence before legal authorities'. Additionally, article 268 of the Code indicates that '*the indicted or his attorney, during the investigation, may look for, empirically identify, collect, and package material and physical evidence [...]*'. Emphasis ours.

⁸⁹ Code of Criminal Procedure, article 282. 'Interrogation of the suspect. The prosecutor of judicial police [...] who has sound reasons [...] to believe a person is an author of or participant in a crime under investigation, without indicting him, will inform him that he has the right to remain silent and is not required to testify against himself. [...]. *If the suspect does not make use of his rights and indicates his wish to testify, he may be interrogated in the presence of an attorney*'. Emphasis ours.

⁹⁰ Code of Criminal Proceeding, art. 247. Bodily inspection.

⁹¹ *Ibid.*, art. 249. Obtaining samples that involve the indicted.

⁹² *Ibid.*, art. 253. Line up suspect identification.

⁹³ The defendant may not refuse the assistance of an attorney for his defence. Article 8.1 of the Code of Criminal Procedure indicates that even if the defendant refuses a public trial, he must have an attorney so that his silence is not used against him and so that he is duly informed of the charges against him.

⁹⁴ Ombudsman, Resolution 1001 of 2005, art. 10. Allocation of proceedings.

⁹⁵ Code of Criminal Procedure, art. 120. Recognition of the appointment of a public defender.

man at least has a selection process⁹⁶ for defence attorneys that establishes minimum requirements for candidates and evaluates their suitability on an annual basis, as we explained in section 2.2.1, the selection of private attorneys depends entirely on the criteria of their clients. Similarly, while the Ombudsman undertakes some control, although mainly formal, of the work of public defenders, and promotes continued learning, no one, aside from clients, verifies the level of knowledge and diligence of private attorneys.

Nonetheless, both public and private attorneys have legal obligations to ensure a minimum level of defence. For example, they are required to personally assist the defendant from the moment of capture, to prepare the defence,⁹⁷ to contradict evidence, to not reveal information about the process or their clients, to not carry out the defence of several defendants when there is a conflict of interest, or when their defence strategies are incompatible, among others.⁹⁸ The failure to fulfill these duties, those established in the Attorney Disciplinary Code,⁹⁹ or those in contract for services, in the case of public defenders, can lead to disciplinary, administrative, fiscal, and criminal investigations.¹⁰⁰

In the case of disciplinary proceedings, from the statistics of the Judicial Council, we cannot precisely identify the violations of the right to defence that defence attorneys commit. This is because the data does not distinguish between infractions that public or private defenders commit, nor between areas of law, but rather only between public judicial officials and private attorneys. Considering that public defenders are private attorneys charged with public tasks, who tend to serve as private attorneys in cases outside the SNDP, and, occasionally have more than one area of specialty, the

⁹⁶ Nonetheless, the methods used to ensure the quality of public defenders are also flawed. The current selection and renewal process is an example of this. As we demonstrated in describing some of the stages of this process, the methodology of oral examination without the possibility to appeal the results led to hundreds of legal complaints against the results of the process in 2013. It also led to the dissatisfaction of defence attorneys, who considered the evaluation questions unreasonable.

⁹⁷ In spite of the relevance of the criminal investigation to defence attorney's duties to 'prepare the defence', this activity is only regulated for public defence (Law 941 of 2005). With respect to private attorneys, there is no relevant regulatory norm.

⁹⁸ The principal obligations of public or private defence attorneys to their clients are found in articles 122 and 125 of the Code of Civil Procedure. Several are also addressed in Law 941 of 2005 for public defenders.

⁹⁹ Law 1123 of 2007, Attorney Disciplinary Code.

¹⁰⁰ Law 941 of 2005, art. 46.

Judicial Council's statistics do not allow us to identify which infractions and sanctions included were related to the work of public or private defenders.

In spite of these limitations, we present a summary of disciplinary infractions and sanctions imposed in 2012. From a total of around 19,000¹⁰¹ attorneys registered in the National Registry of Attorneys, 687 were sanctioned for 926 infractions of the disciplinary regime. Nonetheless, the conduct is classified so generally that it is impossible to identify the acts that could clearly affect the right to defence.

Between 2008 and 2012, 377 proceedings were undertaken for public defenders' alleged contractual violations to the SNDP. However, none of the cases were successful, because they did not demonstrate that the conduct constituted a violation of the terms of the contract.¹⁰² The Ombudsman (2012) states that, in any event, many complaints at least served as a reminder to attorneys to ensure they were complying with their contracts.

Constitutional jurisprudence has determined that not every reproachable action of a defence attorney constitutes a violation of the right to defence. This only occurs when actions fulfill three conditions:

- i) That there were failings in the defence that, under no possible perspective, could fall within the margin of discretion attorneys enjoy to choose defence strategies. [...].
- ii) That the aforementioned deficiencies are not the fault of the defendant or the result of his attempt to evade justice [...].
- iii) That the lack of technical defence was of such importance and magnitude that it was determinant in the court decision, such that the decision may be considered patently unlawful due to the defects, and therefore, a violation of the right to due process [...].¹⁰³

Colombian legislation includes several dispositions to make the right to defence effective for several vulnerable groups. In addition to the general adversarial system provisions, there are norms to attend to the specific needs of these groups.¹⁰⁴ For adolescents accused of crimes, the Children and Juvenile Code (Law 1098 of 2006)

¹⁰¹ Consejo Superior de la Judicatura 2011a.

¹⁰² Defensoría del Pueblo 2012.

¹⁰³ Judgment T-957 of 2006. Although the Constitutional Court's jurisprudence is useful to protect the independence of defenders to structure their defence strategy, in practice, it makes it difficult for clients to file complaints regarding flaws in their attorney's work.

¹⁰⁴ Law 1098 of 2006, art. 151. Right to due process and procedural guarantees for juveniles.

establishes a special proceeding¹⁰⁵ in which defendants have the right to a family defender,¹⁰⁶ in addition to a defence attorney.¹⁰⁷

For defendants who cannot communicate orally (those who are deaf and/or non-verbal), as well as those who do not speak Spanish, the Code of Criminal Procedure¹⁰⁸ states that the State must offer free translation or interpretation services. In practice, these special provisions are not always effective at protecting the right to defence of such groups. In the case of indigenous people, for example, several court officials interviewed seemed unaware of concepts such as ‘cultural diversity’ or ‘diverse cosmologies’, and therefore, may not be aware of the specific defence needs of these groups. Although the SNDP developed a guide to provide attention to indigenous people,¹⁰⁹ interviewed defence attorneys noted that very few attorneys make use of it. Similarly, we found that the provision regarding translators or interpreters for those who cannot express themselves in Spanish is not applied in practice (see section 3.4.3).

3.3. *Procedural rights*

Below, we describe the normative content of six procedural rights, the mechanisms established for their protection, and analyze how they function in practice.

3.3.1. **The right to freedom of movement during trial and issues regarding pretrial detention**

The Constitution¹¹⁰ and criminal legislation¹¹¹ recognize the primacy of freedom as a principle of rule of law. Thus, provisions that permit restrictions on freedom are exceptional in nature,¹¹² and restricted to situations expressly stated by law. The CPP recognizes four situations that permit restrictions on liberty: (i) exceptional capture

¹⁰⁵ *Ibid.*, art. 148. Special proceeding and the execution of measures for juvenile criminal responsibility.

¹⁰⁶ *Ibid.*, art. 146. The family defender in the system of juvenile criminal responsibility.

¹⁰⁷ *Ibid.*, art. 154. Right to defence.

¹⁰⁸ Code of Criminal Procedure, art. 8. Defence.

¹⁰⁹ Defensoria del Pueblo 2011.

¹¹⁰ National Constitution, art. 28.

¹¹¹ Code of Criminal Procedure, art. 2.

¹¹² *Ibid.*, art. 295. Statement of freedom and the exceptional nature of restrictions on accused’s freedom. 296.

by order of the prosecutor,¹¹³ (ii) *in flagrante delicto*,¹¹⁴ (iii) capture to impose a precautionary measure that restricts liberty (pretrial detention),¹¹⁵ and (iv) capture after a guilty verdict.¹¹⁶

The interpretation of requirements for restrictions of freedom must consider constitutional jurisprudence. In the case of pretrial detention, the Constitutional Court has stated that the measure must be exceptional and precautionary, and is only compatible with the presumption of innocence when it does not constitute a pre-imposed sanction, but rather seeks to ensure the accused's presence at trial, the preservation of evidence, or the protection of the community or victim in order to prevent the continuation of criminal activity.¹¹⁷

In practice, it does not always follow this logic. In quantitative terms, pretrial detention is not the rule in Colombia; between 2005 and 2012 it was imposed in only two out of every 10 cases in which there was an indictment. Nonetheless, it is used excessively in certain cases, generally those that attract media attention. According to Bernal and La Rota (2013), this is due, in part, to the pressure of making unpopular decisions that make them vulnerable to political or media attack. In this situation, judicial authorities do not have sufficiently effective mechanisms to protect the independence of their officials, and therefore, the freedom of defendants.

Additionally, the Constitution protects the right to habeas corpus¹¹⁸ as a mechanism to correct situations in which deprivation of liberty occurs against legal and con-

¹¹³ *Ibid.*, art. 300. Exceptional capture at the order of the prosecutor.

¹¹⁴ *Ibid.*, art. 301. *In flagrante* situations. Article 302 explains the procedure for *flagrante* cases.

¹¹⁵ The prosecutor (or the victim or his representative) may request pretrial detention, for certain crimes and under certain conditions: 1. There is evidence to reasonably infer that the indicted committed or participated in the crime; and 2. That detention is to ensure: a) that the accused does not obstruct justice, b) the safety of society or the victim, c) that the indicted appears in the process and fulfills his sentence.

¹¹⁶ From the time the decision is notified, the judge may order the capture of the accused, or leave him free until a sanction is determined. Code of Criminal Procedure, art. 450.

¹¹⁷ In Judgment C-774 of 2001, the Constitutional Court analyzed the constitutionality of a list of crimes for which pretrial detention may be ordered. Although it ruled the challenged laws were constitutional, it indicated 'that to order pretrial detention, only the formal and substantive requirements must be met, but the decision must be based on constitutionally permissible considerations'. See also, decisions C-150 of 1993, C-395 of 1994, C-327 of 1997 and C-425 of 1997.

¹¹⁸ National Constitution, art. 30: 'He who is believed to be illegally deprived of liberty, may file before any court authority, at any time, on his own or through a representative, a petition for *habeas corpus*, which must be resolved within 36 hours'. Law 1095 of 2006 regulates the exercise of habeas corpus petitions.

stitutional requirements. This petition may also be used when, although the capture was legal, the time limit within which to grant liberty has passed. In both cases, the deciding judge has 36 hours to make a decision. According to those interviewed, this action is effective in practice.

3.3.2. The right to be present at trial

As the Colombian criminal process is accusatorial and adversarial, the presence of the accused at trial is understood as a guarantee of the right to defence. Thus, one could think that when it is impossible to inform a suspect that there is an investigation against him, or when he decides not to appear during the proceedings, the proceedings should be suspended. However, neither the Constitution nor criminal legislation directly recognize the right to be present as part of the right to defence. Additionally, the Constitutional Court has recognized that this is not an absolute right,¹¹⁹ but rather that exceptions exist, such as the declaration of the indicted absence (due to an inability to locate him to form an indictment or order a precautionary measure)¹²⁰ and contempt (for the defendant's unjustified absence from the hearing).¹²¹

For the Constitutional Court,¹²² these exceptions protect the State's obligation to continue an efficacious administration of justice, and ensure procedural economy. They are thus ways of protecting the interests of oral adversarial proceedings and the efficiency of justice, provided that certain conditions are met. First, the prosecutor must demonstrate to the control judge that it was truly impossible to locate the person required in spite of great efforts to do so. Second, this person's interests must be represented in the process, which is achieved through the presence of a private or SNDP attorney.¹²³ Third, after the indictment, the prosecutor must continue trying to locate the accused, as the trial judge must again determine whether to authorize trial *in absentia* at the hearing.¹²⁴ An additional protection to the right to defence of absent suspects is a higher standard of evaluation regarding their attorney's performance, which constitutional jurisprudence imposes. As the defence of an absent defendant

¹¹⁹ Judgment C-591 of 2005.

¹²⁰ Code of Criminal Procedure, art. 127. Absence of the indicted.

¹²¹ *Ibid.*, art. 291. Contempt

¹²² See Judgment C-591 of 2005.

¹²³ Judgment C-1154 of 2005.

¹²⁴ If he does not authorize it, the judge must declare the nullity of the proceedings for due process violations.

poses greater difficulty and risk to his rights, the attorney responsible for the case is responsible for even minor failures.¹²⁵

In spite of the Court's intention to protect the right to be present at trial, in practice, this safeguard is rarely used. According to officials interviewed, this may be because complaints against public and private defence attorneys tend to be imposed by clients who, as mentioned above, often do not understand the dynamic of the criminal process.

For criminal proceedings involving individuals under 18, the Children and Juvenile Code completely prohibits any trial *in absentia*.¹²⁶

3.3.3. The right to the presumption of innocence

The Constitution protects the presumption of innocence, stating that 'everyone will be presumed innocent until a court of law declares him guilty'.¹²⁷ The CPP develops this provision, adding that those presumed innocent must be treated as such. Therefore, the prosecutor has the burden of proof, and the standard for a guilty verdict is 'beyond all reasonable doubt'.¹²⁸

In practice, the idea that those who have not been declared guilty must be treated as innocent faces difficulties. In certain cases, mainly those of high public interest and attention, justice system officials seem to request/grant pretrial detention or reasons other than those legally established, such as, to defend themselves from pressures that not ordering detention would cause (see section 3.3.1).¹²⁹ When the prosecutor 'detains for processing', he puts the suspect in a worse situation to exercise his defence than if he were free, as an attorney in a case with great media attention mentioned.¹³⁰ Not only does this limit his material defence, but it subjects him to pressures that affect equality of arms. In many such cases, the suspects are freed when deadlines pass.¹³¹

¹²⁵ Judgment T-957 de 2006.

¹²⁶ Law 1098 of 2006, art. 158. Prohibition on the trial of juveniles *in absentia*.

¹²⁷ National Constitution, art. 29. 4.

¹²⁸ Code of Criminal Procedure, art. 7. Presumption of innocence and *in dubio pro reo*.

¹²⁹ On the presumption of innocence during pretrial detention, see, Judgment C-289 of 2012.

¹³⁰ *El Colombiano* 2011. Available at: http://www.elcolombiano.com/BancoConocimiento/L/la_fiscalia_y_la_presuncion_de_inocencia/la_fiscalia_y_la_presuncion_de_inocencia.asp.

¹³¹ In Bernal & La Rota (2013) we present several paradigmatic cases regarding media over-exposure. In the majority, the accused were set free when procedural deadlines lapsed.

Additionally, there are cases in which pretrial detainees are detained together with convicted people.¹³²

3.3.4. The right to remain silent

The Constitutional Court has indicated that the right to remain silent, together with the right to be free from self-incrimination, forms the nucleus of due process. As the burden of proof is on the prosecutor, silence is understood to be a valid defence strategy.¹³³

The CPP mentions three points that protect the right to remain silent. First, during interrogations as part of the investigatory stage, prior to indictment.¹³⁴ Here, the Code requires the authority responsible for the interrogation to inform the suspect of his right to remain silent and to not testify against himself or close family members. Second, those who capture the suspect also have that obligation.¹³⁵ Third, the Code indicates that at the hearing, the trial judge must again inform the defendant of this right. If the defendant remains silent, the law indicates that this should be understood as a statement of innocence.¹³⁶

Although the accused may renounce his right to remain silent, the CPP requires that the judge ‘verify that this is a freely made, conscious, voluntary, informed, decision made with the advice of counsel which requires the judge personally speak with the defendant’.¹³⁷ Additionally, the Constitutional Court clarified that although he who wishes to testify in his own trial¹³⁸ must do so as a witness and under oath, this oath cannot compromise his right to defence. Thus, it cannot infringe upon the right to refrain from self-incrimination.¹³⁹

¹³² In Judgment T-153 of 1998, the Constitutional Court declared an ‘unconstitutional state of affairs’ in prisons, and stated that the presumption of innocence was violated when defendants were imprisoned with convicts. On the persistence of this situation, see Los Andes University 2010, p. 28.

¹³³ Judgments C-782 of 2005 and C-621 of 1998. Although it is not expressly in the Constitution, ‘the right to remain silent is understood to form part of the right of all individuals to refrain from testifying against themselves, their spouse, life partner, or family’. Political Constitution, art. 33.

¹³⁴ Code of Criminal Procedure, art. 282. Questioning the accused.

¹³⁵ *Ibid.*, art. 303.3. Rights of those captured.

¹³⁶ *Ibid.*, art. 367. Initial allegation.

¹³⁷ *Ibid.*, art. 131. Renouncing the right to remain silent and the hearing

¹³⁸ *Ibid.*, art. 394. Defendant and co-defendant as witness.

¹³⁹ Judgment C-782 of 2005.

Officials interviewed indicated that, occasionally, defence attorneys' lack of knowledge regarding the use of technical evidence violates the right of defendants to refrain from self-incrimination. In contrast to the prosecution, which has the duty to reveal all information it finds during the investigation, including that which favors the defence, the defence has the right to reveal only that which favors it. Nonetheless, some defence attorneys do not take sufficient time to prepare the evidence they will present at trial, or do not understand the extent of it, and bring evidence to trial that is contrary to the defendant's interests.

Although there is not quantitative evidence from which to determine the magnitude and seriousness of this problem, anecdotal evidence suggests that, at least in the case of public defenders, the SNDP must strengthen evaluation mechanisms, as such errors demonstrate that, at least for some attorneys, it may be necessary to improve training regarding evidentiary methods, reduce their workload to ensure due attention is given to each,¹⁴⁰ or implement case management systems to ensure that each case is sufficiently prepared.

3.3.5. The right to substantiated decisions

Although the Constitution does not expressly recognize this right, its inclusion in laws and function as a form of protection for other rights included in the Constitution, (such as the right to appeal guilty verdicts), justifies its inclusion in the Colombian legal regime.

The CPP states that judges must briefly and adequately 'provide reasons for measures that affect the fundamental rights of the accused and others parties'.¹⁴¹ To the extent that the right to defence is a fundamental right, judges must provide reasoning for their decision upon which defendants may exercise their right to defence. The Code also provides situations in which authorities' have an express obligation to provide a written or oral basis for their decision. These include orders for capture,¹⁴²

¹⁴⁰ The decision to reduce caseloads should be taken based on a study evaluating the complexity of cases to which public defenders attend, and their efficiency in resolving them. The average caseload per defender (64, according to the Ombudsman 2012) does not seem high compared to other actors in the justice system (for example, homicide prosecutors tend to have around 600 cases, on average, La Rota & Bernal 2014).

¹⁴¹ Code of Criminal Procedure, art. 3. Duties of judges in the criminal process.

¹⁴² *Ibid.*, art. 298. Content and duration of the order of capture.

indictment,¹⁴³ requests for precautionary measures,¹⁴⁴ the decision to bring a case to trial¹⁴⁵ and the decision.¹⁴⁶

The right to substantiated decisions may be exercised in two ways. First, through petitions for the annulment of court decisions¹⁴⁷ when the lack of justification for a decision substantially violates the right to defence or due process. Second, through the use of the *tutela* petition, when ‘the lack of justification for a court decision is proven, such as the lack of a basis or irrelevance of the considerations applied to resolve the controversy’.¹⁴⁸

It is difficult to establish to what extent this right is protected in practice, as aside from cases that openly make decisions that affect the right to defence without any justification, which seem to be scarce, there may be situations in which the justifications are too scant or formal to effectively guarantee a defendant’s right to defence.

3.3.6. The right to appeal and other procedural rights after the decision

The right to challenge decisions is established constitutionally and legally. Articles 29 and 31 of the Constitution protect the right to challenge guilty decisions, and state that all court decisions may be appealed or reviewed, except in the case of exceptions defined by law. Moreover, the Constitutional Court has stated that this right is strongly related to the right to substantiated decisions, as one must know the reasons for the challenged decision.

Additionally, the Constitution indicates that the superior judge responsible for resolving the appeal ‘may not impose a greater sanction in the case of individual appellants’.¹⁴⁹ This norm is an expression of the principle of prohibition on worsening the situation of convicted appellants. Although the Constitution referred only to defendants, the CPP expanded the scope of the principle such that it may benefit any of the parties to the case.¹⁵⁰ The Constitutional Court indicated that such extension was con-

¹⁴³ *Ibid.*, art. 288. Content of the formulation of the indictment.

¹⁴⁴ *Ibid.*, art. 306. Request for the imposition of a precautionary measure.

¹⁴⁵ *Ibid.*, art. 337. Content of the accusation and attached documents.

¹⁴⁶ *Ibid.*, art. 446. Content of the decision.

¹⁴⁷ *Ibid.*, art. 457.

¹⁴⁸ Judgment T-709 of 2010.

¹⁴⁹ Political Constitution, art. 31.

¹⁵⁰ This expansion is in article 20 of the CPP, which says that appeals judges may not worsen the situation of an individual appellant, which the Constitution only refers to individual *convicts*.

stitutional, as it broadened protection, rather than restricting it. Additionally, from the perspective of victims' rights, it is important that the principle of *no reformatio in pejus* also protects them.¹⁵¹

Following the logic of protecting victims' rights to truth, justice, and reparation, the CPP also expanded the right to appeal, so that it applies to exculpatory as well as guilty verdicts. According to the Constitutional Court, 'the right to challenging a conviction is one that the Constitution and other international instruments protect for defendants, but it is equally true that the possibility to appeal an exculpatory verdict is a similar expression regarding the rights of victims, and a fulfillment of authorities' duty to ensure a just order'.¹⁵²

According to the Fourth Survey on the Perception of the Administration of Justice, criminal appeals (20 percent) is practically the same as the appeal rate in other areas of the law (22 percent).¹⁵³ Furthermore, 2.4 percent of criminal verdicts appealed are reversed; in other areas, this number is 4 percent. The proportion of appeals in criminal proceedings (the court proceeding that most seriously affects the rights of the accused) is the same as the proportion of appeals in other proceedings that impact rights less seriously.

3.4. *Rights related to an effective defence*

In this section we will describe some of the rights that determine the effectiveness of defence, and examine how they work in practice. First, to evaluate the extent to which the principle of equality of arms is effective, we present the rights of the defence to investigate. Later, we will provide some considerations regarding the conditions of having adequate time and facilities to prepare a defence strategy. Finally, we will look at the right to translation of proceedings and documents when defendants do not speak Spanish.

¹⁵¹ The Court has indicated that expanding the *reformatio in pejus* is a measure to further protect the rights of victims to justice, truth, and reparation. Judgment C-591 of 2005.

¹⁵² In Judgment C-047 of 2006, the Constitutional Court resolved a request for unconstitutionality regarding the validity of appeals against not-guilty verdicts.

¹⁵³ Consejo Superior de la Judicatura 2011b.

3.4.1. The principle of equality of arms and the defence's right to undertake investigations

Although the Constitution and law do not directly mention it, the Constitutional Court has understood the principle of equality of arms as 'not only the possibility to contradict the other party in equality of conditions (the principle of a fair or just trial), but also to obtain the defendant's participation in the proceeding, in conditions that correct the imbalance between the means available to the prosecutor, and those available to the defendant, the latter of which are clearly inferior'.¹⁵⁴ Thus, the Court considers this principle to be an essential part of the right to defence and due process.¹⁵⁵

To this end, the Court has indicated that diligence in uncovering evidence is key to the effectiveness of this principle. Furthermore, the evidence that each party presents is the result of an investigation that it undertook earlier in the proceedings. Therefore, the question regarding the defence's powers with respect to investigatory activities is strongly connected to the question of the reality of equality of arms during the process.

Procedural regulations allow the accused to access technical defence from the time he knows he is under investigation. From there, and during the following phases, he also has the authority to undertake investigations¹⁵⁶ to support his defence. Specifically, the defendant or his attorney may: (i) 'look for, empirically identify, collect, and organize evidence';¹⁵⁷ (ii) 'request the control judge to exercise control regarding actions that he considers to have affected his fundamental rights';¹⁵⁸ (iii) 'interview people in to obtain information useful for the defence';¹⁵⁹ (iv) 'obtain sworn

¹⁵⁴ Judgment T-1110 of 2005.

¹⁵⁵ Judgments C-127 of 2011.

¹⁵⁶ To make defence investigations effective, CPP article 125.9 indicates that 'public and private entities, as well as private citizens, shall assist as is required, provided that the evidence shall be used in court proceedings'.

¹⁵⁷ Code of Criminal Procedure, art. 267. Powers of non-defendants. Articles 268 to 270 of the CPP establish that the defendant or his attorney may transfer physical evidence to the respective laboratory of the National Institute of Legal Medicine, where it shall be received with the questions to be answered by an expert, after the necessary investigation and analysis. If the expert finds that the evidence is appropriate for analysis, he will undertake the investigation, analysis, and write an expert report.

¹⁵⁸ Code of Criminal Procedure, art. 267.2. Powers of non-defendants. The Constitutional Court indicated that control of all investigatory activities of the defence is unnecessary, but rather is only required in those that may affect the fundamental rights of third parties. Judgment C-186 of 2008.

¹⁵⁹ *Ibid.*, art. 271. Powers of the defence to undertake interviews.

testimony’;¹⁶⁰ and (v) ‘request the control judge to authorize prior presentation or obtention of any type of evidence (*prueba anticipada*), in cases of extreme necessity and urgency’.¹⁶¹

Although the CPP establishes the defence’s authorities regarding investigation, which are in general the same as the prosecutor’s, the way in which they may be exercised is regulated mainly by the public defence¹⁶² and scarcely by private defence.¹⁶³ An innovation of the SNDP is that it has a criminal investigation body. Law 941 of 2005 created the Operative Unit of Criminal Investigation (UOIC),¹⁶⁴ whose purpose is to support the efforts of public defence in the collection of evidence, and providing technical-scientific reports.

For private defence, the law establishes that the Ombudsman has the authority ‘to regulate the payment of services they can offer and charge private attorneys and individuals who request them’¹⁶⁵ such that private defenders may use public investigation services. However, in practice, SNDP officials argued that, since the Ombudsman has not made use of its authority to regulate the cost of such services, they cannot offer investigation services to private defence; UOIC’s work currently only benefits public defence.

To undertake investigations for the defence, the UOIC has a team of investigators, experts, and assistants that, according to estimates of the coordinator, equal 190 officials throughout the country.¹⁶⁶ These officials offer their services in 25 of the 36 regional Ombudsman Offices. Expert services from this unit include five laboratories for technical evidence,¹⁶⁷ which includes three forensic science services (medical forensics, legal and forensic psychology, and physical forensics) and eight criminalist disciplines (ballistics, topography, photography and video, graph and documentation, accounting and economy, lofoscopia/fingerprints, information analysis, and morphology).

¹⁶⁰ *Ibid.*, art. 272. Obtaining sworn testimony on behalf of the defence.

¹⁶¹ *Ibid.*, art. 274. Request for anticipatory evidence on behalf of the defence.

¹⁶² Law 941 de 2005, art. 18. SNDP investigators, technicians, and assistants.

¹⁶³ *Ibid.*, art. 36, par.

¹⁶⁴ *Ibid.*, art. 20.4.

¹⁶⁵ *Ibid.*, art. 36, par.

¹⁶⁶ For 2012, the number of public services working for the UOIC was 150. Defensoría del Pueblo 2013.

¹⁶⁷ Laboratories are located in Bogotá, Cali, Medellín, Cúcuta and Barranquilla.

Although the Ombudsman has tried to increase the number of personnel working on criminal investigations, the investigators and technicians of the UOIC are insufficient compared to the 6,900 CTI investigators.¹⁶⁸ Additionally, we found organizational failings. The UOIC coordinator states that defence investigation confronts an institutional and cultural problem that is reflected in the fact that defence attorneys generally do not take advantage of technical evidence that the UOIC provides. Therefore, in some cases, they present self-incriminating evidence. Moreover, UOIC investigators indicate that it seems that not even the Ombudsman guidelines see the value in the unit's work, nor understand the urgency of investigations, as they have established slow proceedings, which place obstacles in the way of investigation efforts, and the UOIC has found a lack of training in the Ombudsman regarding the unit.

The 20th Report of the Ombudsman to Congress (Defensoría 2013) stated that during 2012, they held five different training sessions for UOIC employees.¹⁶⁹ This disconnection between what investigators report and what the report to congress states is that the training sessions, if they were held, were small, and did not achieve much relevance, or dissemination among employees. It is therefore to be expected that their impact was not noticeable.

In spite of these difficulties, the UOIC's work is highly valued by many court officials and public defenders who recognize that there is a clear problem of insufficient personnel, but that in general defence investigators do quality work. According to some investigators, this may be due in part to the fact that the salaries of Ombudsman investigators are higher than those that work for the prosecutor.

After the investigation and indictment, the principle of equality of arms gains importance during the hearing in which the prosecutor requests to bring the case to trial (*acusación*),¹⁷⁰ in which both parties must provide the evidence they intend to produce at trial (the discovery of evidence). As a response, the opposing party may

¹⁶⁸ 2010 Data. Fiscalía General de la Nación 2011, p. 179. In addition to the CTI investigators, the Prosecutor has judicial police investigators from the national police, which is much larger than the CTI.

¹⁶⁹ Defensoría del Pueblo 2013, pp. 412 and 413.

¹⁷⁰ Code of Criminal Procedure, art. 337. Content of the accusation and attached documents.

request the exclusion of evidence for reasons of invalidity,¹⁷¹ inadequacy, objections, or legal barriers.¹⁷²⁻¹⁷³

During the trial stage, the defence has the same powers as the prosecutor, as the accused and his attorney may (i) contradict evidence, including anticipatory evidence (*prueba anticipada*);¹⁷⁴ (ii) examine and cross-examine witnesses and experts;¹⁷⁵⁻¹⁷⁶ and (iii) request the appearance, including by subpoena, of witnesses and experts.¹⁷⁷

From an examination of the constitutional and legal powers of investigation, and the possibilities for the defence to contradict and challenge evidence during trial, we conclude that the Colombian criminal process guarantees equality of arms. However, this balance is not as clear in practice, in particular with respect to the investigation stage.

According to attorneys, during the investigation stage, it is easy to distinguish between those who have economic resources and those that do not. The second group includes not only those with public defenders, but also private attorneys that represent defendants with little money. According to those interviewed, the possibilities to make use of the investigation stage reduce together with the defendant's income.

With respect to defendants with public defenders, the inability to pay for an attorney is partially compensated by the fact that the Ombudsman has its own investigators.¹⁷⁸ However, the investigatory limitations of the public defence office are evident. For example, in Bogotá, the city with the largest public defence office in the country, there are no psychiatry experts.

Low-income defendants with private attorneys who cannot make use of the Ombudsman's services are those most prejudiced with respect to investigatory activities. Such defendants may not use the SNDP investigation infrastructure, nor can they afford private services.

¹⁷¹ *Ibid.*, arts. 455 to 458. Taxative grounds for annulment of the criminal process.

¹⁷² *Ibid.*, art. 359. Exclusion, rejection, and inadmissibility of evidence.

¹⁷³ Later, parties may also request the revelation of evidence the opposing party did not mention during the accusation hearing. Code of Criminal Procedure, art. 339. Proceeding of the accusation.

¹⁷⁴ Code of Criminal Procedure, art. 125, num. 4.

¹⁷⁵ Articles 391 and 392 of the CPP describe the rules to examine and cross examine witnesses at trial.

¹⁷⁶ Code of Criminal Procedure, art. 125.5.

¹⁷⁷ *Ibid.*, num. 6.

¹⁷⁸ Law 941 of 2005, art. 36. SNDP investigators and technicians.

3.4.2. The right to sufficient time and facilities to prepare one's defence

The defendant has the 'right to private communication with his attorney before appearing before judicial authorities',¹⁷⁹ and to 'reasonable time and adequate means to prepare his defence'.¹⁸⁰ In practice, these minimum rules are often not fulfilled. According to various public defenders, it is common for them to represent a defendant after only 15 minutes to interview and structure a defence strategy. In spite of this short time to plan a strategy, some defence attorneys do not consider this to be an important problem, as even if they had more time for such urgent hearings, they would not do more than manage a basic control of the legality of the prosecutor's actions, which is not definitive with respect to developing a future strategy. Although some simple defence tasks could be standardized for greater efficiency, it is troubling that some attorneys are not concerned with having insufficient time to develop a defence strategy, as simple as it may be. This situation is even more concerning for incarcerated defendants, as it is difficult for their attorneys to meet with them.

3.4.3. The right to equality of arms in questioning witnesses

Legislation protects the right of those accused to 'question prosecution witnesses during trial, and obtain witnesses that may shed light on the facts under debate'.¹⁸¹ This provision supposes equality of arms during the questioning of witnesses, as the defence has the same powers as the prosecutor to subpoena witnesses. Nonetheless, in practice there are difficulties in locating possible witnesses and ensuring that they attend a hearing, which in turn impacts this right.

3.4.4. The right to interpreters during hearings and translations of the case file

Legislation states that the accused must be provided with free translation services when he cannot understand or express himself in the official language, or with an interpreter when he is hard of hearing or nonverbal.¹⁸²

In practice, this procedural guarantee is merely formal, as there are no programs or budgets to pay interpreters or translators to assist or to translate case files. As a

¹⁷⁹ Defensoría del Pueblo, Resolution 1001 of 2005, art. 11.

¹⁸⁰ Code of Criminal Procedure, art. 8.g & i.

¹⁸¹ *Ibid.*, at art. 8.k.

¹⁸² *Ibid.*, lit. f.

result, it is rare for a defendant to have access to a translator or interpreter. This only occurs when he provides his own translator or interpreter. As interviewed judges stated, in such cases, judicial authorities must choose between annulling the proceedings, or carrying out a criminal proceeding while the defendant does not understand why or of what the prosecutor is accusing them. This is particularly problematic when the alleged crime is serious, since in these cases it is more difficult for officials to annul the proceedings or free the accused.

4. Professional culture of defence attorneys

In the adversarial system framework, the role of a defence attorney is key. As the proceeding is one between parties, almost all the responsibility for moving the process forward occurs between the prosecutor and defence. In 2005, when this system was introduced, the recently created SNDP absorbed this idea, and concentrated on ensuring their officials were capable of meeting the demands of the new system. The public defence office understood its role within the criminal process involved assuming an active exercise of defence, ‘as a technical, scientific, and legal team that was capable of addressing practical aspects of procedural activity, often forgotten in mixed procedural methodology’. Similarly, it understood that public defenders were called ‘to be the first protectors of the rights of those using the SNDP, from the moment they learned of the case assigned to them, which may occur at the moment of capture’, during the investigation and the rest of the proceeding.¹⁸³ In line with this understanding, the Ombudsman has invested extensive resources in training public defenders, as we mentioned in section 2 regarding legal assistance.

With respect to private attorneys, it is difficult to generalize how they view their role in the criminal process. However, according to interviews with public defenders and prosecutors, most private attorneys were slower at understanding their role in an adversarial system.

In spite of defence attorneys’ growing clarity regarding their role in the new system, this is not always reflected in the daily exercise of defence. According to interviews with public and some private attorneys, the lack of human and material resources, excessive workload, and the lack of understanding of the usefulness of technical evidence has led to many situations in which the defence strategy is reduced

¹⁸³ Defensoría del Pueblo 2005, p. 8.

to searching for procedural and investigatory defects of the prosecutor, rather than actively constructing an evidence-based defence.

Another factor that affects defence attorneys' view of themselves are bar associations. Colombia does not have an organization like the bar associations of other countries that exercises regulatory tasks of the legal profession, promotes competence, and establishes ethical standards. In its place is the Disciplinary Chamber of the Judicial Council, which processes disciplinary processes against attorneys and legal officials.

The quality of defence services can vary greatly between public and private attorneys, as well as within these groups. However, to ensure minimum standards, the Disciplinary Code of Attorneys provides a long list of professional duties.¹⁸⁴ Additionally, as we mentioned in section 3.2, the CPP outlines some specific duties of attorneys in defence proceedings.¹⁸⁵ Should an attorney fail to fulfill these general duties, or those specific to criminal defence, a client may file a complaint in the Disciplinary Chamber or in the case of public defenders, clients may request the Ombudsman to examine the case and order a change of attorney.

5. Political commitment to effective criminal defence

A goal of the adversarial system is to respect criminal procedure rights. This led to the creation of the SNDP, and reforms to grant primacy to liberty,¹⁸⁶ in particular with respect to pretrial detention. This may be viewed as a recent political commitment to effective criminal defence.

Nonetheless, this commitment has substantial limits, derived principally from the fact that criminal defence must compete, in terms of resources and attention, with the rights of victims. Several laws on victim's rights¹⁸⁷ charge the SNDP with representing victims in criminal and reparation proceedings. According to the most recent report of the Ombudsman to Congress, in 2012, the SNDP represented some

¹⁸⁴ Law 1123 of 2007, art. 28. Duties of Attorneys

¹⁸⁵ Code of Criminal Procedure, art. 125. Duties and special attributes. See footnote 98.

¹⁸⁶ Corporación Excelencia en la Justicia 2010.

¹⁸⁷ These laws include Laws 975 of 2005 and 1592 of 2012 (Justice and Peace) 1098 of 2006 (for minor victims), 1257 of 2008 (for women victims of violence and discrimination) and 1448 of 2011 (for land restitution).

Table 3.
Evolution of the SNDP budget vs the change in workload

	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012
Public defence budget (millions of \$)	19,892	19,362	18,974	32,970	43,642	60,240	80,232	87,493	102,936	126,677	133,894
Budgetary change (%)	...	-3	-2	74	32	38	33	9	18	23	6
Cases per defender	41	61	50	40	56	75	73	89	98	102	100
Change in number of cases (%)	...	50	-19	-19	40	35	-3	22	10	4	-2

Source: Dejusticia calculations based on information from the Ombudsman 2012.

250,000 victims.¹⁸⁸ During the same year, they assisted an additional 7,803 victims in extrajudicial proceedings to prepare reparation incidents.¹⁸⁹

According to public defenders and high-ranking SNDP officials, the increase in workload due to defending victims was not accompanied by a proportional increase in resources. However, a simple revision of budgetary increases between 2002 and 2012 (see table 3) does not allow for conclusive determinations on the issue. Since the Victim's Law entered into force in 2005, the budgetary increases in several years (2005, 2008, 2010, 2011 and 2012) were proportionally larger than the increase in the SNDP's workload. Additionally, to undertake a true evaluation of the sufficiency of SNDP resources, we need information that is not available, such as how difficult the cases the SNDP addresses are, or how large the deficit was prior to the budgetary increases.

6. Conclusions

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 leading 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.¹⁹⁰

¹⁸⁸ The majority of victims the SNDP represents are from the Justice and Peace Process. Defensoría del Pueblo 2013, p. 397-401.

¹⁸⁹ Today they are called 'incidents of identification of affectations'.

¹⁹⁰ Judgment C-799 of 2005.

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 for 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.¹⁹¹

Finally, these problems are compounded by the weak, often merely formal, mechanisms by which the SNDP monitors the performance of public defenders,

¹⁹¹ As mentioned in section 2.2.1, we do not know how widespread this problem is, but the mere fact that it can occur is concerning.

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 by 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 for 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.

6.1. Recommendations

1. Include jurisprudential developments in the normative framework that indicate that the right to defence begins prior to indictment.¹⁹² 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 evaluation¹⁹³ 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 num-

¹⁹² Judgment C-799 of 2005.

¹⁹³ The required study could be similar to the one Los Andes University and Instituto SER undertook in 2004, for the entry into force of the adversarial system.

ber of attorneys necessary to attend to 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.

4. 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.
5. 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 three per cent of those of the investigation unit of the prosecutor. 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.
6. 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.¹⁹⁴ 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.
7. Finally, the Ombudsman should regulate the possibility for private individuals to use the investigation services of the SNDP, as there are a number

¹⁹⁴ 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.

of defendants who hire low-cost attorneys with little possibility to collect evidence for the exercise of their defence.

8. 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.¹⁹⁵ 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 authority¹⁹⁶ 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 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.
9. 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.
10. 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. Addi-

¹⁹⁵ 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.

¹⁹⁶ Authority to regulate the use of UOIC investigation services by defendants or private attorneys (Law 941 of 2005, art. 36. Authority to regulate the cost of counseling, defence, and investigation services for SNDP users with economic capacity to pay for defence. Resolution 1001 of 2005, art. 8.

tionally, 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.

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CHAPTER 6.¹ COUNTRY ANALYSIS. GUATEMALA²

1. Introduction

1.1. Political and demographic information

Guatemala is located in the northern portion of the Central American isthmus. It measures 108.889km², and is divided into 8 geographical regions, 22 departments or political-administrative entities, and 338 municipal governments. Guatemala is multicultural, multi-ethnic, and multi-lingual. Four main ethnic groups that speak 24 languages in addition to Spanish co-exist in the country. The Ladino population represents 60.36 percent of the population; Mayans (which are subdivided into 22 ethnic groups) represent 39.45 percent; the Garífuna, 0.14; and the Xinka, 0.05.³ In addition to its enormous diversity, it is a highly unequal and exclusive country: the Gini index regarding family income per capita is 55.6 percent and the human development index is positioned far below the Latin American average: Guatemala is ranked 131 of 187

¹ Translator's note: In this chapter, all textual citations from domestic sources, including laws and cases, are internal, unofficial translations.

² Luis Rodolfo Ramírez García, Mario Avalos Quispal and Mario Ernesto Archila Ortiz, masters in Legal and Social Sciences from the San Carlos University of Guatemala (USAC) revised this chapter.

³ These percentages correspond to data from the General Population Census of 2002, carried out by the Instituto Nacional de Estadística (INE). It is worth noting that due to racism in the country, the indigenous population, particularly Mayan, is probably much higher, given that many people will not publically admit their identity (PNUD 2005).

worldwide.⁴ The area that has a majority indigenous population (the western region, central and northern altiplano) has the lowest levels of human development in the country.⁵

Guatemala's estimated population in 2013 was 15,438,384 people, of which, at least 3,257,616 lived in the capital city and surrounding areas.⁶ 7,535,238 (48.8 percent) were men, and 7,903,146 (51.2 percent) were women. It is a predominantly young country; in 2012, 41.6 percent of the population was younger than 15 and 20.2 percent were between 15 and 24.⁷

65.4 percent of the population is economically active. The unemployment rate is 2.9 percent. Of all those employed, only 25.5 percent are formally employed; under-employment for men is 16.7 percent and 19.8 percent for women. The main areas of employment include agriculture (32.3 percent), commerce (29 percent) and manufacturing (13.7 percent). Unfortunately, 19.2 percent of children between the ages of 7 and 14 work,⁸ and only 18.9 percent of the total population has some access to social security.⁹ Additionally, during 2012, it received the second highest number of foreign remittances in Latin America: USD 4,782,000,000.¹⁰

1.2. *General description of the criminal justice system*

Guatemala has legal pluralism. In addition to the official justice system, there are other ancestral systems that are legitimate and effective, which indigenous authorities apply in their communities. Slowly, state officials are beginning to understand that indigenous peoples have their own values and cosmologies including their own opinions

⁴ PNUD 2012. Consulted on the UN Development Program website. Available at: <http://desarrollohumano.org.gt/content/informe-nacional-de-desarrollo-humano-20112012>.

⁵ PNUD 2005. The biannual United Nations Program for Development in Guatemala national reports on human development constantly demonstrate the precariousness in which indigenous families live in a social context of exclusion, understood as a structural lack of individual and collective opportunities for development. The first nine editions may be viewed at: <http://www.desarrollohumano.org.gt/content/informes-del-desarrollo-humano>.

⁶ Projection based on data from the most recent INE General Population Census, in 2002. Available at: <http://www.ine.gob.gt/np/poblacion/index.htm>.

⁷ PNUD 2012, p. 225.

⁸ Results of the 2012 INE National Survey of Employment and Income, Available at: http://www.ine.gob.gt/np/enei/enei_percent202012/ENEI2012.htm.

⁹ Data from the 2012 annual summary of the Instituto Guatemalteco de Seguridad Social. Available at: <http://www.igssgt.org/#>.

¹⁰ *Moneda. Periódico Financiero de Centroamérica*, June 10, 2013, p. 5.

on conflict and justice. State officials also realize that they are incapable of resolving all conflicts, and that indigenous authorities can resolve conflicts faster and with the participation of the community.¹¹

With respect to the official system, the Guatemalan criminal procedure reforms began in 1994, when the current Criminal Procedure Code (CPC) entered into force.¹² Simultaneously the guerilla and government were negotiating an end to the internal armed conflict that had ravaged the country for decades. A fundamental aspect of these negotiations was strengthening civil power, with an emphasis on the criminal justice system. The current system, which grew out of the peace agreements and new norms, proposed a new procedural system. Some of the challenges of this reform included:¹³ guaranteeing access to justice, resolving cases within a reasonable timeframe, trust in laws, respect for human rights, and administrative efficiency.

1.3. General structure of the criminal justice system and description of the criminal process

The Guatemalan criminal justice system, which is adversarial in nature, is made of various institutions, each with separate tasks. The Judiciary is responsible for imparting justice in accordance with the Political Constitution of the Republic of Guatemala (hereinafter the Constitution), and the values and norms of the country's legal system. The judiciary fulfills a fundamental role regarding the right to defence by controlling respect for defence rights.¹⁴ Between the years 2010-2011, criminal courts worked under a 'hearing management model' which moved the judge away from administrative functions, which were sent to court clerks, and allowed him to dedicate himself exclusively to overseeing hearings, with the help of three units: the hearings registry unit, the communications unit, and the public attention unit. Case distribution, where there is more than one criminal court, is done via a specialized entity called 'criminal management'. Currently, the judiciary is discussing making multi-person courts, in which various judges hear cases with the same support staff.

The Public Ministry is an independent institution. It promotes criminal prosecution and leads criminal investigations in public (rather than private) crimes; it must

¹¹ Quim 2013.

¹² Decree 51-92 of the Congress of the Republic.

¹³ Ramírez 2006.

¹⁴ Political Constitution of the Republic of Guatemala, art. 203 and following. Law of Judicial Body (LOJ), Decree 2-89 of the Congress of the Republic.

abide by the principle of objectivity, which means that it must cease to accuse those whose participation in criminal activity seems doubtful.¹⁵ This institution is mainly organized according to a 'prosecutorial management model', which was implemented in 2009, and has moved slowly to all district and special prosecutors in a process that has not yet completed. According to this model, there is a unit of public attention, responsible for dismissing complaints that are not crimes. If they do constitute crimes, the unit sends them to either the Early Decision Unit, to look for measures to remove the case from the judicial process, in the case of minor crimes, or to the Investigation Unit in the case of serious crimes. The latter coordinates criminal investigations and sends the results to the Litigation Unit, which will seek a conviction after an oral, public hearing.

The Institute of Public Criminal Defence (IDPP, for its Spanish initials) is the institution responsible for providing free criminal defence to low-income individuals in the criminal justice system. It has functional and technical independence.¹⁶ The National Institute of Forensic Science of Guatemala (INACIF, for its Spanish initials) is responsible for assisting in the administration of justice, by offering independent scientific investigation services through technical-scientific reports.¹⁷

The National Civil Police is an armed professional institution that exercises functions related to crime prevention, and acts as an auxiliary body of the Public Ministry, investigating crimes in a subsidiary manner, under orders from the prosecutor. The National Civil Police has a Specialized Division of Criminal Investigation for such purposes.¹⁸ Recently, the General Unit of Criminal Investigation was created.¹⁹ This is

¹⁵ Political Constitution, art. 251, Organic Law of the Public Ministry, art. 1. Decree 40-94 of the Congress of Guatemala.

¹⁶ The Political Constitution does not order the creation of this institution, but orders that the right to defence is inviolable (art. 12). Its existence as a public entity is based in article 1 of the Law of Public Criminal Defence Services. Decree 129-97 of the Congress of the Republic of Guatemala.

¹⁷ As with the IDPP, the INACIF is based on the constitutional precept of the right to defence (art. 12) and was created through ordinary legislation: Organic Law of the National Institute of Forensic Sciences of Guatemala, art. 1 and 2. Decree 32-2006 of the Congress of the Republic of Guatemala.

¹⁸ The name of this institution has changed several times. Nonetheless, it was created during the military dictatorships of the 20th century, which is why, with the entire police institution, it carries the image of being incompetent, repressive, and corrupt. Since the signing of the 1996 peace agreements, the police have been redesigned several times, high ranking officials were removed for their ties to organized crimes or for serious human rights violations, but definitive improvements in professionalism, democratic vision, and transparency have not been achieved.

¹⁹ Law of the General Criminal Investigation Unit, Decree 15-2012 of the Congress of the Republic of Guatemala.

civil in nature, and forms part of the Ministry of Governance, and will be responsible for criminal investigations in coordination with the Public Ministry, but has yet to be implemented.

The CPC regulates the different stages of the criminal process.²⁰ The typical form of a criminal process is organized by what is called the ordinary process, but there are other, more specific ones, that exist. In all forms, the principles of legality, immediacy, contradiction, urgency, concentration, orality, and economy apply.

The ordinary process is divided into five stages, which must respect the rights and protection of the defendant, who is considered innocent until there is a final conviction against him. Technical assistance is required at all times, in order to lead the defence and ensure the legality of the proceedings and the validity of judicial decisions.

The ordinary process begins with the preparatory stage, in which the Public Ministry investigates alleged crimes and the possible participation of those identified as authors. The national police assists the Public Ministry. In this stage, judicial control is crucial to guarantee due process during the investigation.²¹

The second is the intermediate stage. Its purpose is for the judge to determine whether there is a basis to subject a person to trial, based on the probability of his participation in a criminal act. This involves a formal accusation, and relevant evidence is offered. It may end in a request to open a trial, or with provisional closure, acquittal, or closure. In this stage, the prosecutor is the accusing party, and the court controls the legality of the investigation.²² If the individual is formally accused and arrives at the evidence stage, this phase culminates in setting a date and time for the beginning of the trial.

During the trial stage, the judge determines whether the accused is responsible for the crime of which he is accused. This is done through an oral, public trial, and the provision of prosecutorial and defence evidence. As opposed to guarantee judges, trials are held before trial judges. Trial courts hear the debates where serious crimes,

²⁰ Second Book (ordinary process, art. 285 to 397) and Fourth Book (special proceedings, arts. 464 to 491).

²¹ The Constitutional Court has indicated that due process is a right that permits for the defence of other rights. Gazette 57, file no. 272-00, p. 121; Gazette 59, file no. 491-00, p. 106, Judgment 16-06-2000; Gazette 61, file no. 551-01, Judgment 09-09-2001; Gazette 4, combined files no. 59-87 and 70-87, et al. Commented edition of the Political Constitution, Constitutional Court, August 2002.

²² Code of Criminal Procedure, art. 332. Decree 51-92 of the Congress of the Republic of Guatemala.

such as genocide, crimes against humanity, organized crimes, are charged, and trial judges hear cases involving all other crimes. Judges weigh evidence based on the rules of sound, reasoned judgment (*reglas de sana crítica razonada*), and issue convictions or exculpatory decisions.

Later, if the parties consider it necessary, they may challenge judicial decisions, whether the final decision or procedural ones, that they consider illegal or unjust. Finally, when all relevant resources have been exhausted, the case arrives at the execution stage. This is to fulfill the sanction or security measure imposed on the convicted individual.

There are also some *sui generis* proceedings. These have particular characteristics to address special cases in which following the ordinary criminal proceeding not followed, to ensure the principle of urgency. These proceedings include ‘abbreviated proceedings’, which apply when the prosecutor considers the imposition of a sanction no greater than five years, or a punishment other than imprisonment. In such cases, there must be an agreement between the prosecutor, the defendant, and his attorney, as the defendant must accept his participation in the criminal activity. This proceeding follows the same preparatory stage as the ordinary process; and the Public Ministry must request it when he presents the charges. If the first instant judge considers it appropriate, he will begin the procedure and during the intermediate stage he receives and weighs the evidence, and issues a decision immediately.

There is also a simplified proceeding for the least serious crimes, proceedings for private actions, proceedings for infractions, and proceedings for security and correction measures. The defence may use these proceedings to obtain a fairer treatment and lower conviction for its client.

1.4. The phenomenon of criminality and the State’s response

Criminality seriously affects Guatemalans due to the high levels of crime and violence the country faces (the level of youth participation is particularly concerning, as is the number of women assaulted, and the presence of organized crime, in particular drug trafficking, which has even penetrated various state institutions).²³ The annual num-

²³ Due to the high level of organized crime within public institutions, from 2006 an International Commission against Impunity in Guatemala was developed. This has led the fight against parallel security bodies and criminal organizations capable of creating impunity, and its mandate goes until 2015. News, annual reports, and other documents may be viewed at: <http://cicig.org/>.

ber of average daily homicides between 2009 and 2012 were 42.32, 41.50, 38.61, and 34.0. The annual rate of violent deaths per 100,000 inhabitants in 2013 was 38.74.²⁴ These numbers are very high, even by Latin American standards. It is important to note that in the eight geographical regions where the majority of the population is indigenous, the annual homicide rate for 2011 was 13.53, while in the eight departments where the majority is non-indigenous, the rate was 75.49.²⁵

Media, the political class, and the State in general has taken a punitive approach to crime prevention focused on increasing penalties for certain crimes,²⁶ dismantling social policies of prevention and even administrative proceedings for their treatment. According to official data, between 2007 and 2011, officials apprehended a total of 197,876 people for the commission of one or more crimes.²⁷ During the same period, the Public Ministry made 57,500 accusations,²⁸ which means that 29.06 percent of those detained were brought to trial.

According to the Public Ministry, between 2007 and 2012, the crimes for which orders for pretrial detention were issued were the following: assassination (4,882), homicides (983), violence against women (525),²⁹ aggravated robbery (823), rape (217), illegal possession of firearms (216), kidnapping (216) and conspiracy (124). Of all the possible coercive measures, from 2005 to 2011, pretrial detention was used in 17.61 percent, 13.92 percent, 13.74 percent, 14.44 percent, 14.51 percent, 10.78 percent and 11.05 percent, of cases, respectively, or an average of 13.72 percent cases.³⁰

The number of people imprisoned in the past 20 years has grown considerably. In 1991 the number of people imprisoned (before or after trial) was 5,584; in 1996,

²⁴ Official data from PM minutes. 2013 data from the National Institute of Forensic Science data on annual violent deaths at: http://inacif.gob.gt/index.php?option=com_content&view=article&id=97&Itemid=18 and INE.

²⁵ Departments with more than 50 percent indigenous people, according to projections from the INE include, Totonicapán, Sololá, Quiché, Chimaltenango, Huehuetenango, Alta Verapaz, Baja Verapaz and Quetzaltenango. Departments with a lower percentage of indigenous people include: Zacapa, Jalapa, El Progreso, Jutiapa, Chiquimula, Escuintla, Guatemala, and Retalhuleu. Quim 2013.

²⁶ Both the current president and the front-running opposition candidate (2011) positioned their campaign arguments on the death penalty and 'hard hand' against crime.

²⁷ Data from the National Civil Police Public Information Unit for this November 2012 report.

²⁸ Data from the Public Ministry for this report, June, 2013.

²⁹ The number is high, although the law specifies that it has regulated this type of crime against women since 2008.

³⁰ Observatorio de Justicia Penal, Instituto de Estudios Comparados en Ciencias Penales. Permanent monitoring through requests for information from the Public Ministry.

that number was 6,637; in 2001, 8,136; in 2006, 8,359; and in 2011, 12,623 (of which, 7.26 percent were women). This indicates that in 20 years, the prison population increased by 126 percent (Samayoa 2012). For the last year, of all detainees, 48.3 percent did not have a final conviction.

2. Legal Assistance

The constitutional right to criminal defence activates when a person has contact with criminal law, or prior to this if he is a police suspect. If someone believes he is being investigated he may ask the authorities, who are required to inform him. It extends throughout the entire legal proceeding, including the execution of the sentence if the person is convicted.³¹ During this time the person may undertake any legal action in his defence, provided that it does not negatively affect his technical defence, which is exercised by one or more qualified attorneys with authority to litigate (for example, public officials do not have this authority).³²

The assistance of an attorney is required from the time an individual appears before a judge. However, if he cannot afford one or does not want one, the State has an obligation to provide one through the Service of Public Criminal Defence. The institution responsible for this is the IDPP,³³ which was created in 1997. The IDPP provides free criminal services, and administers and controls private attorneys when they undertake this task.³⁴ Congress elects the director of this institution every five years from a list of names the IDPP Council proposes.³⁵ The IDPP cannot offer services to those with a private attorney, unless the attorney has abandoned the defence

³¹ The Constitution, art. 8 and 12.

³² CPC, art. 92. Only an attorney may exercise both his material defence and represent himself technically. Two criminal judges were asked about the usefulness of requiring a legal professional in all cases, and both confirmed its usefulness. This is mainly because an attorney can ensure that the other rights are respected.

³³ For this study, in June 2013 we interviewed the directors of the Unit of Technical-Professional Coordinators, the Training Unit for Public Defenders, and the Executive and Human Resources Division of the IDPP. We also held a focus group with IDPP attorneys with more than five years' experience in the institution.

³⁴ Law of the Public Service of Criminal Defence (LSPDP), art. 1. Congressional Decree 129-97.

³⁵ LSPDP, art. 10. The IDPP council is made up of the human rights ombudsman, the president of the Supreme Court of Justice, a representative of the Attorney and Notary Bar Association of Guatemala, a representative of the deans of law schools, and a representative of IDPP attorneys. LSPDP, art. 23.

and the client does not want to or cannot hire a new private attorney. Exceptions to this are urgent requests to obtain evidence, when it is materially impossible to notify the private attorney, in which case the judge may request a public defender to undertake that urgent request.

The work of the IDPP is generally well regarded among judges and prosecutors. However, a criminal branch judge stated that he has seen situations in which defence attorneys meet their client just moments before the hearing. This judge believes that this reduces the quality of services offered. The team of investigators of the Instituto de Estudios Comparados en Ciencias Penales de Guatemala (ICCPG) confirmed this.³⁶

This must be put into context. The IDPP has been one of the slowest growing justice sector institutions in terms of budget. The assigned budget in the last 10 years has varied between USD 8,918,149.48 in 2003 to USD 15,438,125.74 in 2011.³⁷ Its budget has increased by 73.1 percent, which, in 2011 was only 3 percent of the total budget assigned to criminal justice related institutions (which reached USD 516,581,602.21).

In 2012, the IDPP had 73 work areas in the country (distributed in 36 coordinations or offices (*coordinaciones*): 30 departmental defence offices, 18 in municipalities that are not department capitals, 15 ethnic offices, and 10 national coordinations (*coordinadores*) of legal assistance for victims.

There are two kinds of defence attorneys: those who work exclusively for the defence office, and *ex officio* attorneys, who are private attorneys that offer legal services through the institute on specific cases. Institutional dynamics have led to a third type, who are attorneys in training who will replace an institutional attorney when there are vacancies.³⁸ Additionally, regulations establish that all attorneys in the country can be called to offer free legal assistance in a specific case.³⁹

³⁶ Ascencio 2013.

³⁷ Guatemala's currency is the quetzal. The exchange rate used for this report was 1 USD to 7.81729 quetzales, valid for June 21, 2013, according to the Bank of Guatemala.

³⁸ Attorneys in training are those preparing to be public defenders; generally they are the assistants in each office. They may also undertake certain procedural actions in the case of minor crimes, understood to be those with a penalty of five years or less imprisonment or a sanction other than prison.

³⁹ Services are free for those without necessary economic resources, but the State will compensate, according to a determined wage, those called to provide such services. As institutionalized public service has been in place since 1997, private attorneys are not called to provide such services in practice.

Entry into the institute, both for institutional attorneys and *ex officio* ones, begins with a public call for applications, a selection process based on the results of technical and psychological exams, experience, consideration of courses taken, and others. Institute attorneys are assigned an office and an assistant attorney, provided they have more than one year training. They also enter into the public defence as a career so they may reach title III status (according to experience and formal training) and multiple benefits such as training, scholarships, work stability, etc. *Ex officio* attorneys,⁴⁰ by contrast, do not enjoy a public defence career path and only somewhat benefit from training courses. Their contract is for temporary professional services, paid according to a pay scale adjusted biannually by an *ad hoc* commission.⁴¹

In March 2013, the IDPP reported that it had 95 institutional defence attorneys (50.5 percent men and 49.5 percent women)⁴² and 234 contract based attorneys, for a total of 329.⁴³ Additionally, it reported that there are 110 attorneys to assist victims, 75 training attorneys, 19 interns, and attorneys working in coordination and administration. Of those, only institutional attorneys enjoy work stability and the independence this provides.

Training programs for defence attorneys are based on e-learning platforms, and are divided into four levels (entry level for those in training, and levels I, II, and III for institutional attorneys); levels I, II and III are given once, in three year periods with different topics and advanced content. This process began in 2012 with instruc-

⁴⁰ Translator's note: An *ex officio* attorney (called *de oficio* in Spanish) is a private attorney that the State may require, on a rotating basis (according to regulations) to provide defence services to a person who qualifies for public defence services. The State pays the *ex officio* attorney's fees.

⁴¹ Made of the IDPP director, the president of the Attorney and Notary Bar Association of Guatemala and the director of the Popular Law Office of the University of San Carlos (the only public university in the country).

⁴² An institutional defence attorney earns 7.4 times the monthly minimum salary in the country (July 2013, USD 274.01/Q 2,142), in addition to incentives and national monthly and annual bonuses. By contrast, control or first instance judges earn 12 monthly salaries and receive other types of bonuses and delayed payments. Prosecutorial agents (*agente fiscal*), (who work in the public ministry and may bring some, clearly delineated cases, but are not prosecutors yet), earn 6.3 times the minimum salary, in addition to bonuses.

⁴³ Until May 2012, there were 212 institutional and *ex officio* professionals available: 1.49 per 100,000 inhabitants at the national level (far below the 10 prosecutors per 100,000 inhabitants for the same year, and even judges: 1.98 per 100,000 inhabitants). During the same period, defence attorneys were overwhelmingly located in the capital region (53.4 percent). There were 2.77 attorneys per 100,000 poor or extremely poor inhabitants.

tor training, and formally in 2013. The course topics are divided between legal and human rights, and non-legal areas such as leadership.⁴⁴

The IDPP offers free legal services to those whose income is less than three times the minimum wage, which in 2013 was USD 9.13 daily. If someone earns more than that, and does not want or temporarily cannot pay a private attorney (for example, if their assets are frozen), he must pay for the services at a later date. At each meeting, cases are distributed evenly, but also according to complexity (the type of crime and number of people involved). An information system creates records in which the person responsible for the case must record all his activities.⁴⁵

For minor crimes and first statements, *ex officio* attorneys are assigned.⁴⁶ In June 2013, mere days prior to writing this report, a pilot program was completed in which contract attorneys also covered procedural actions of institutional attorneys with excessive caseloads, and under their responsibility, but there has not been an evaluation of the results. According to public defenders, there are 25 institutional attorneys in the capital,⁴⁷ each of whom has around 40 to 65 cases at any given time, with a high percentage of provisionally detained individuals.⁴⁸

Institutional defence attorneys are responsible for their cases until the trial is over. At this point, in the metropolitan area cases are sent to the challenges units⁴⁹ and

⁴⁴ Private attorneys in the focus group stated that training for their public sector colleagues is constant, while they lack such training, unless they pay for their own training at universities.

⁴⁵ For institutional attorneys, criteria for case assignments include an equal number of cases among attorneys, according to the case's complexity. Defence attorneys in courts receive cases that arrive during their shift.

⁴⁶ As mentioned, some are hired full-time to assist public defenders, as the latter cannot increase in number (see, *infra*). Attorneys that take shifts in courts, for first statements, are responsible for cases whose hearings take place during their shift. If the process continues, the case is assigned to a public defender or *ex officio* attorney.

⁴⁷ The Law of Public Criminal Defence has a legislative problem, staging (strange use of word) the city may only have 25 public defenders and that departmental offices may have a maximum of three. This means that no additional defence attorneys may be hired, which is addressed by using *ex officio* attorneys who do the same work as their colleagues, but do not have the same labor conditions and career path (LSDPP, art. 19 & ss.).

⁴⁸ Public defenders estimate that between 35 and 50 of their clients are detained. We explain the effects of this situation below.

⁴⁹ The challenges unit works in the city and, in June 2013, had six total attorneys, for public defenders and two *ex officio*. The challenges are assigned mechanically, without a process for the trial attorney to share his knowledge with the attorney who files challenges, which lowers the level of specialization of attorneys working on this phase. In cases with convictions of greater than 50 years

when relevant, the criminal execution unit. This flow does not apply to departmental offices (that are not in the capital), in which specialized units do not exist, and in which case each defence attorney supervises the entire process, with technical support from regional supervisors. The IDPP has a computerised system that controls the cases being litigated. When a conviction is obtained, the litigating attorney updates the status and sends it to the respective unit to challenge it. In this section, it is given to a new attorney, who obtains access to a file that contains the details of the case, and later receives digital copies of the hearing audio. According to an attorney in this unit, in the case of doubt, she may request assistance from the trial attorney.

There is also a special unit in some departments with attorneys for minors in conflict with the law,⁵⁰ who act within the framework of a special proceeding defined by the Integral Protection Law of Children and Adolescents.⁵¹

Table 1.
Cases attended to by the IDPP between 2007 and 2011

Year	Detail of cases attended to by public defence and private attorneys									
	2007		2008		2009		2010		2011	
	Cases	%	Cases	%	Cases	%	Cases	%	Cases	%
Entered via court	67,856	100	95,133	100	109,383	100	116,502	100	113,820	100
Entered via public defence	21,042	30	23,038	24	24,895	33	24,603	21	23,353	21
Attended by private attorneys*	46,814	70	72,095	76	84,488	77	91,899	79	90,467	79

* This number is the result of subtracting the cases the IDPP attended to from those entering court. There is no other way of determining this number due to the lack of specific statistics.

Source: based on data from the judiciary, in response to a request from May 3, 2012, and consultation of the Public Criminal Defence website, on December 20, 2012.

(the longest permissible sanction), special unit lawyers are involved, even if the cases are not in the jurisdiction of the capital city.

⁵⁰ In June 2013, the capital only had five defence attorneys specialized in such proceedings, and two regarding the execution of sentences. There is no specialized institution because not all jurisdictions have special courts.

⁵¹ Congressional Decree 27-2003.

The IDPP has 14 offices for indigenous peoples and other ethnic groups,⁵² made up of attorneys that speak the language of the region in which they work and litigate special cases, who also work on ordinary cases when necessary.

The caseload of the IDPP is high. If we consider the number of proceedings that enter the court system and the number that the IDPP has attended, the average number of cases public defenders attended between 2007 and 2011 is 25.8 (see table 1).

According to table 1, between 2007 and 2011 the number of criminal cases the institute received increased by 48.25 percent.⁵³ According to the institution, approximately 67.4 percent of public defender's interventions are during the preparatory stage (first statements and revision of coercive measures).

3. Rights associated with the right to criminal defence and their implementation in practice

3.1. *The right to information*

Criminal justice system officials are required to inform individuals of the causes, reasons, and details for which they are being investigated, detained, prisoned, processed, accused, and convicted.⁵⁴ Individuals must always have sufficient information regarding their legal situation. All authorities share this responsibility, according to articles 6 to 12 and 14 of the Constitution; and the authority that violates these rights incurs personal responsibility.

⁵² As mentioned, there are 24 indigenous languages in the country, which is why there is not a specialist in at least 10 language groups.

⁵³ This contrasts with the budgetary increase of only 4.46 percent during the same time frame.

⁵⁴ The situation of detentions during 2011, according to police and court reports, was the following: there were 39,741 detentions, of which 20.8 percent were via court order, and 79.2 percent *in flagrancia*. This is alarming because it indicates that it is not true that, as a rule, detention is carried out via court order (Constitution, art. 6), and that *in flagrancia* detentions are the exception. This situation grants immense power to police officers, considering that the current government has privileged military presence in the street through the creation of mixed groups (police and soldiers). Citizen arrest is a possibility, provided that it respects the being placed under the relevant authority immediately. (CPC, art. 257).

According to the individuals we interviewed for this research,⁵⁵ the right to sufficient information during detention⁵⁶ is irregular, because there is no police protocol regarding how to detain, nor a ‘notice of rights’ that is read or provided to the detainee.⁵⁷ In fact, there are provisional detainees who still do not understand why they are detained (Asencio 2013). In areas with 24-hour courts (also known as shift-courts), individuals must be taken before a judge to make a declaration immediately.⁵⁸

This right also requires that the person accused of a crime knows exactly what he is charged with. The prosecutor must respect the right to defence during the indictment during the preparatory stage and when he describes the accusation at the beginning of the oral, public trial;⁵⁹ the judge is responsible for verifying compliance.⁶⁰ Among the officials we interviewed, there was consensus that this aspect of the right to information is regularly complied with, as a technical defence attorney is always present during hearings. However, among attorneys there is a tendency to express oneself in an overly technical language, to the detriment of non-attorneys attempting to understand them.

Finally, this right is realized through the principle of publicity, through which the accused has the right to access the investigation file of the prosecution.⁶¹ According to the judges and prosecutors we interviewed, they do not deny access to defendants

⁵⁵ A high judge, two first instance judges, a peace judge, a metropolitan prosecutor, a district prosecutor, focus groups with private attorneys and public defenders. For example, article 88 of the CPC orders the National Civil Police to instruct an apprehended person that he should not make statements prior to going before a defence attorney, prosecutor and judge, although the police are permitted to ask questions regarding his name and other information regarding his identity. According to the attorney, there are cases that delay bringing the person before a judge, while he is brought to a police station or other institution, and there the police request him to admit his guilt. There are still cases in which prosecutors request testimony from police officers, even after the police have presented a document containing the statement of those who captured the accused, which legally replaces any other testimony of the police on the topic.

⁵⁶ Legislation does not address this area because even the Constitution requires that a person be detained by judicial order, who identifies why he was detained and at whose order. Nonetheless, as mentioned, only 20 percent of captures are undertaken as a result of a court order.

⁵⁷ The Constitution, art. 7.

⁵⁸ Shift courts are available 24 hours a day, 365 days a year, in five municipalities: Guatemala City, Villa Nueva, Mixco, Sacatepéquez and Escuintla.

⁵⁹ CPC, arts. 326 y 332 bis.

⁶⁰ CPC, art. 81. With respect to indigenous people, see section 3.6 of this chapter.

⁶¹ CPC, art. 314.

or their duly accredited attorneys, however defence attorneys state that such denials do happen in practice, including the in following situations:

- a) When a defence attorney first learns of a case, at the informal request of the accused (who may or may not be provisionally detained), some prosecutors deny access to the case file. They claim that the attorney may only have access to the file when he has been accredited as the defence attorney in the case (in clear violation of the Constitution, which stipulates that verbal designation is sufficient for an attorney to begin to exercise technical defence).⁶²
- b) When the internal organization of the prosecutor states that the investigation file is not available, either because the responsible person is not in the office, or because they arbitrarily determine certain days and hours during which attorneys may access it.
- c) When there are large files and the prosecutor's office claims that a lack of resources prevents them from making an entire copy for the defence attorney, and prevents the attorney from removing the file from the office to make a copy of it.

According to defence attorneys, denying access to files based on protected information has been decreasing, as this is understood only to apply to those with no relation to the case.

3.2. The right to self-defence and legal representation

Article 8 of the Constitution establishes that detainees have the right to an attorney; article 12 states that no one may be convicted without being called to testify, heard, and condemned in a fair trial. 'Heard' means being capable of giving arguments and the evidence that supports them, and "condemned" means that the arguments and evidence against him were stronger than his attempts to refute them.⁶³

The Code also establishes that technical defence is obligatory and universal, from the detainee's first statements to the execution of a conviction, in the case of a guilty verdict.⁶⁴ A person who does not want to make use of this right is still legally

⁶² The Constitution, art. 14.

⁶³ In addition to these general arguments in favor of the right to defence, the Code of Criminal Procedure develops the elements of technical defence, as we will see below.

⁶⁴ There are no legal differences in the exercise of this right. Women and men, adults and juveniles, foreigners and nationals, indigenous or not, all must have a public or private attorney during the criminal justice process.

required to do so, as material defence may never obstruct the effectiveness of technical defence.⁶⁵

The capacity to appoint a private attorney also implies the capacity to discharge him. Those with sufficient economic capacity may appoint and remove private attorneys at any point (although a defence attorney may not leave the case until his replacement arrives).⁶⁶ Those with public defenders may request their replacement in the following cases: inappropriateness for the type of case, negligence, and conflict of interest.⁶⁷

Police, prosecutors, and judges all have the obligation to assist a detainee, accused, or defendant obtain the assistance of a defence attorney by:⁶⁸

- a) permitting him to make a phone call to contact his attorney when has the economic means to do so, and ensuring that he may physically communicate with him;
- b) requesting the prompt intervention of the IDPP.

Within the 24-hour courts, there is at least one public defender and one *ex officio* attorney. This is also the case with respect to first instance criminal courts (in municipalities or department capitals).⁶⁹

3.3. Procedural rights

3.3.1. The right to remain free during the process while the trial is not complete

Prison is a sanction provided by criminal law.⁷⁰ However, constitutionally, Guatemala is required to protect freedom as one of its principal state duties.⁷¹ Procedural legislation establishes that the freedom of the accused is of such importance that any legal interpretation on the issue must guarantee this right to the greatest extent possible.⁷²

⁶⁵ CPC, art. 92, and LSDPP, art. 4.3.

⁶⁶ CPC, art. 92, 98 and 99.

⁶⁷ LSDPP, art. 32.

⁶⁸ If detained, any person is authorized to request legal assistance on behalf of the detainee (LSDPP, art. 6).

⁶⁹ This situation is important to consider, because it means that the creation of new 24-hour courts must be accompanied with an increase in IDPP personnel, or the courts will be inoperative. Criminal Code, art. 41 and 43; Congressional Decree 17-73.

⁷¹ Constitution, art. 2.

⁷² CPC, art. 14.

Thus, at a normative level, pretrial detention is exceptional in nature⁷³ and only appropriate in order to ensure the presence of the accused at trial. A prosecutor is responsible for requesting pretrial detention, while the judge accepts or rejects this request⁷⁴ for pretrial detention depending on whether it fulfills the goals of the criminal process: determining the truth regarding a criminal act and establishing the participation of an individual in this act. The order for pretrial detention may be modified during the investigation, and may be appealed.⁷⁵ In practice, such norms do not work in practice: between 2010 and 2011, for example, the number of people deprived of liberty was 11,145 and 12,681, respectively. Of this number, 54.7 and 50.6 percent, respectively, were provisionally detained.⁷⁶

Contrary to constitutional and procedural norms, in recent years there has been an increase in legislation that requires judges to impose pretrial detention in the case of certain alleged, high-impact crimes.⁷⁷ This manifests itself mainly in special laws that create new crimes. An example of this is a law against femicide and other forms of violence against women, from 2008.⁷⁸ In describing this crime, article 6 orders that ‘those accused of such crimes may not enjoy alternative precautionary measures’. It is important to note that those who are provisionally detained do not receive any psychological assistance and do not benefit from any programs in detention because they are only transitory in the system.

If one analyzes the official statistics regarding pretrial detention, it is important to note that due to the aforementioned legal reforms and the high impact of many

⁷³ The Constitutional Court has pronounced regarding the exceptional nature of pretrial detention in its publication, *Gaceta* 57, file 73-00, p. 285, Judgment 25-07-2000.

⁷⁴ The law states that pretrial detention is not applicable to crimes that do not carry prison sentences or for minor crimes, unless the accused is a flight risk or may obstruct the investigation.

⁷⁵ CPC, art. 259 and ss.

⁷⁶ Data from the ICCPG, retrieved from reports from the Ministry of Government.

⁷⁷ The procedural law taxatively establishes that alternative precautionary measures do not apply in the following cases: a) cases involving repeat offenders; b) crimes of criminal homicide, patricide, assassination, aggravated rape, qualified rape, rape of a child under 12 year of age, kidnapping in any form, sabotage, aggravated robbery; c) crimes included in Chapter VII of the Law against Drug Activity, Congressional Decree 48-92; d) in proceedings for crimes of tax fraud, customs fraud, except economic surety; e) proceedings for crimes of: 1) adulteration of medication; 2) production of falsified medication, falsified pharmaceutical products, medical devices, and falsified medical-surgical materials; 3) distribution and commercialization of falsified medications, pharmaceutical products, adulterated medications, medical devices and falsified medical-surgical materials; and 4) clandestine establishments or laboratories. CPC, art. 264.

⁷⁸ Congressional Decree 22-2008.

crimes, pretrial detention is increasingly applied in cases of serious crimes.⁷⁹ There continues to be a culture of pretrial detention among justice system officials,⁸⁰ which is reflected in the fact that in 2012 there were still individuals deprived of liberty for alleged drug possession (43 percent), concealment (22 percent), failure to provide economic assistance (15 percent), minor injuries (12 percent) and others.⁸¹

In response to our question regarding why there were so many people in provisional detention, the metropolitan prosecutor responded that it is due to the seriousness of the crimes, the legal imposition for certain crimes, and a practical reason: it is difficult to identify those detained, as they change their name from the time they are captured and interrogated in the courthouse or they do not carry legal identification. Public and private defence attorneys interviewed did not share this opinion, as they stated that it is understandable for a person to behave erratically when the police detain him, often violently, and because the ability to identify oneself can be resolved prior to being sent to a prison.

3.3.2. The right to be present at trial

Article 12 of the Constitution clearly states that to be considered guilty, a person must be ‘called to a hearing, heard, and condemned’ and procedural norms state the same.⁸²

Guatemalan legislation grounds this right in two ways: firstly by legal mechanisms to guarantee the accused’s presence at trial, and secondly by mechanisms to prevent the trial from continuing in his absence.

The first has to do with coercive measures, which article 254 of the CPC regulates. These constitute *númerus clausus*: a) provisional deprivation of liberty, b) economic bond, and c) alternative measures to pretrial detention such as house arrest, care of a designated person or institution, obligation to appear periodically before a court, prohibition on leaving the country or locality, prohibition to meet with certain people or travel to certain places, etc. In specific cases, the accused’s word that he will

⁷⁹ To this end, we recall the data cited in section 1.4 of this chapter ‘According to the Public Ministry, between 2007 and 2012, the crimes for which pretrial detention was ordered were the following: assassination (4,882), homicides (983), violence against women (525), aggravated robbery (823), rape (217), illegal possession of firearms (216), kidnapping (216) and conspiracy (124)’.

⁸⁰ To this respect, we consider the data mentioned above, which stated that between 2005 and 2011, judges ordered pretrial detention in 13.75 percent of cases.

⁸¹ Data provided by the Public Ministry, June 2013.

⁸² CPC, art. 20.

be present at trial is sufficient for the investigation to continue, until he is notified that that trial will begin.

With respect to the second point, if the investigation (preparatory) stage is complete, and the accused does not appear, the criminal process cannot continue to the trial stage. Whether this is due to contempt of court⁸³ or because the accused has not been located, the Public Ministry must request the judge to pause the case while the accused is located or appears (CPC, art. 327). The attorneys we consulted stated that they did not know of any cases in which the accused was tried *in absentia*.

Finally, procedural legislation includes the principle of immediacy. Article 354 develops this principle as follows: ‘the accused may not abandon the hearing without permission from the court, if after his testimony he refuses to attend, he will be held in a nearby room and represented by his attorney. If the attorney does not attend or leaves the hearing, he is considered to have abandoned the defence and shall be replaced’. Similarly, if an accused is removed from the courtroom for his behavior, his attorney continues to defend him, or if he disappears and is in contempt of court during ten days, the trial is paused and must begin again.⁸⁴

Since 2011, the country has ‘high risk’ courts that hear serious crimes including genocide, crimes against humanity, torture, forced disappearance, femicide, assassination, patricide, kidnapping, drug-trafficking, and money or asset laundering.⁸⁵ One of the special characteristics of these courts is the emphasis on the personal safety of the accused. For this report, we asked a judge from a high-risk court his opinion regarding this right. He said that he must ensure that the accused is present, even when there are reasons for him to reasonably think that there may be attempts to free the accused or assassinate him in the route from pretrial detention to the court, which, he states, has occurred. In such cases, the accused is transferred to the court under strong protective measures and the court has a special cabin where the accused is held during the trial. This solution was selected over other options to ensure the presence of the accused: undertaking trials via videoconference (where the accused could not constantly communicate with his attorney, unless he has an attorney in court and another with him in prison) or moving the court to the detention center where the accused is held. Judges

⁸³ CPC, art. 79.

⁸⁴ CPC, art. 358 and 361.

⁸⁵ Law of Criminal Jurisdiction in high-risk proceedings, Congressional Decree 21-2009; Agreement 29-2011 of the Supreme Court of Justice.

take care in these cases so that the presence of the accused is sufficiently ensured, as the technical defence can use mistakes in this regard to challenge a decision.

3.3.3. The right to be presumed innocent

According to the Constitution and criminal procedural law, everyone is presumed innocent until proven otherwise, before a natural judge and a final decision that can be executed.⁸⁶ This principle is obligatory for all state authority and does not end until the accused has exhausted all his options for appeals.

An individual accused of a crime, but presumed innocent, has the right to be granted the greatest liberty possible. The exception is pretrial detention, which is based on the premise that such detention should respect all forms of freedom save freedom of movement.

This means that the General Headquarters of the Penitentiary System is required to separate those held in pretrial detention from those who have been convicted. In theory, a person in pretrial detention is innocent and should quickly be released from prison, unless he is proven guilty, while a person who is definitively convicted is held in order to be rehabilitated according to the progressive goals of the penitentiary system.⁸⁷ This goal is constantly violated: judges know that prisons are incapable of guaranteeing detention centers specifically for pretrial detention and do not say anything about it, and even send innocent people to live with convicts; the prison system keeps convicts and those considered innocent together.⁸⁸ This is made worse by the fact that there are people detained in police stations.

A growing problem in recent years is the stigmatization of various vulnerable sectors of society (poor people, 'gang' members, or youth who have had brushes with the law). It is common to see images of detainees in newspapers, and even electronic bulletins of the National Police,⁸⁹ together with statements from government authorities, announcing the capture of 'delinquents' or 'bands of criminals', presenting them publically in handcuffs, sometimes visibly beaten, surrounded by police officers. This

⁸⁶ The Constitution, art. 12 and 14, and CPC, art. 14.

⁸⁷ Law of the Penitentiary Regime, Congressional Decree 33-2006.

⁸⁸ The obligation to separate those awaiting trial from convicted prisoners is found in international agreements and article 10 of the Constitution.

⁸⁹ It is unconstitutional for police authorities to present images of captured individuals before appearing before a judge (CPR, art. 13). However, we did not obtain information regarding legal proceedings against police for such practices.

media pressure creates a social expectation that harms those detained as well as their family, and clearly influences judges through creating a subjective influence. In practice, there are no judicial actions to combat this situation.

With respect to evidence, the right to be presumed innocent includes a legal presumption that places the burden of proof on the prosecutor, and means he must prove all elements of the accused's guilt beyond any reasonable doubt. Any doubt regarding his guilt works in favor of the accused.⁹⁰ On this point, public and private defence attorneys during our interviews concluded that the judge may appraise the evidence during the trial as he sees fit, and a party who disagrees with the result may challenge the decision. However, there are two circumstances that are exceptions to the rule: a) there are judges (who the attorneys know from litigating before them) that tend to be more demanding or lenient on some issues; b) in special courts that try cases of violence against women, male defendants are treated in a particularly hostile manner.

3.3.4. The right to remain silent and/or not testify against oneself

Guatemala regulates the subjective right to testify in a criminal process. According to the Constitution, no police authority may interrogate a person, as this is a task reserved for judges who must do it in the presence of an attorney. If a person makes declarations to police officers, these may only be used as evidence in the form of depositions.⁹¹ No one may be forced to testify against himself or close family members.⁹² Ordinary criminal procedure legislation goes into greater detail, stating that no one is required to testify against himself or plead guilty, to the extent that it requires judges and prosecutors to inform the person that he is free to testify or not, and to answer any question he is asked.⁹³ The judge must explain the proceedings to the defendant, including that failure to testify cannot be used against him.⁹⁴

This is related to the right to technical assistance and advice to develop a defence strategy. According to judges and prosecutors interviewed, this principle is observed; however, one judge stated that attorneys advise their clients deficiently, by persuading them not to testify. The judge stated that this attitude is prejudicial, because occasion-

⁹⁰ CPC, art. 14.

⁹¹ Constitution, art. 8 and 9.

⁹² Constitution, art. 16.

⁹³ CPC, art. 15.

⁹⁴ CPC, art. 90.

ally testimony can help the judge order a measure other than prison when he understands the drama of the crime and criminal process. He added that when a statement is incriminating, if there is no evidence to support it, it will not be considered. Incarcerated women that the ICCPG has interviewed confirmed that they understood their right to testify or remain silent, but did not agree that defence attorneys do not allow them to testify if they wish to do so.⁹⁵

Another aspect of the right to avoid self-incrimination is that a defendant cannot be not reprimanded when he testifies. He is cautioned to tell the truth (either during the preparatory stage or the trial). He may not be coerced in any other way, either with threats or promises not established by the law, such as admitting his participation in a crime as a requirement for the prosecutor to agree to not continue to prosecute the case.⁹⁶

The right to refrain from testifying is complemented by the right to do so when and how often one desires, provided it is timely and not used as a dilatory measure. The corollary of any statement is that the prosecutor may question him on the issue.⁹⁷ Because of this, defence attorneys admit that they prefer to advise their clients not to testify at trial, and to focus on challenging the prosecutor's arguments.

We did not see any evidence that in practice judges or prosecutors force defendants to testify. However, defence attorneys mention needing to closely monitor police officers, as there have been cases in which the police intimidate detainees *en route* from the detention center to the court regarding the consequences of not admitting to what the police claim. In spite of this, there have been no criminal cases against such officers due to the difficulty in proving it.

3.3.5. The right to decisions based on reasonable arguments

According to articles 2, 203, and 204 of the Constitution, the obligation on judges to substantiate their decisions is based on the state duty to guarantee justice, as the Constitution states that any court decision must be based on the Constitution and laws.⁹⁸

Starting with the order to capture, the principal procedural orders (imposing coercive measures, in particular pretrial detention, processing and opening a trial) and

⁹⁵ Ascencio 2013.

⁹⁶ CPC, art. 85 and 370.

⁹⁷ CPC, art. 87.

⁹⁸ Constitution, arts. 2, 203 and 204.

the decision, must include sufficient details regarding their reasons and justifications.⁹⁹ This duty applies to all resolutions that affect the defendant. Article 308 of the CPC establishes that during the preparatory stage, judges must respond to police or prosecutor investigation requests in the same manner as other decisions.

As mentioned, the order for capture must contain the necessary elements to determine why an individual is to be detained, although *flagrancia* is the main form of detention in practice.¹⁰⁰ Moreover, orders for pretrial detention must be based on information that establishes that a criminal act was committed, and that it is reasonable to think that the detainee could have participated in it.¹⁰¹ Such orders must also include the reasons for pretrial detention. Processing orders and those to set trials must meet the same requirements.¹⁰²

Decisions must include a logical reasoning component that outlines facts considered proven, evidence offered and considered, and the legal basis for the final section, which lists orders and their justification. The judicial decision must be congruent with the accusation.¹⁰³

On this topic, defence attorneys interviewed concluded that while decisions do include a section with the judge's reasoning, the arguments are often unsatisfactory for the parties because they go against the evidence or are insufficient, which can only be resolved by appealing the decision.

3.3.6. The right to challenge decisions

The right to challenge judicial decisions stems from the constitutional rights to justice (art. 2), defence (art. 12), and in the regulation of the two-instance trials.¹⁰⁴ From the perspective of effective defence, a challenge is filed in the case of decisions that affect the accused.¹⁰⁵ However, there are clearly formal requirements that must be met for judges to consider a challenge. An appeal may be filed by either party to the proceed-

⁹⁹ CPC, art. 11 bis.

¹⁰⁰ Constitution, art. 6, and CPC, art. 267.

¹⁰¹ Constitution, art. 13, and CPC, art. 260.

¹⁰² CPC, arts. 321 and 324, respectively.

¹⁰³ Law of the Judicial Body, art. 147. Congressional Decree 2-89 and CPC, arts. 385 and ss.

¹⁰⁴ Political Constitution, art. 2, 12, and 211.

¹⁰⁵ Article 398 regulates procedural petitions: reposicion, appeals, cassation, revision, and others. When the person is detained, filing such petitions may extend the process, and, with it, pretrial detention. Therefore, sometimes defence attorneys prefer not to make use of some petitions.

ing, but, the defendant's attorney may automatically file a challenge on behalf of the defendant, as may the Public Ministry when doing so is in the interests of justice.

Specifically, article 404 of the CPC regulates appeals. Guatemala recognizes two types of appeals:¹⁰⁶ first, appeals before control judges and trial courts, and the second, in special appeals courts.¹⁰⁷ The accused or his attorney may file a special appeal, in writing and within ten days of the notification of the challenged decision. The bases for such appeals are errors of a substantive nature (failure to observe or correctly apply the law) or formal nature (failure to observe or correctly apply a procedural law).

In practice, the following circumstances affect its efficacy. From the point of view of public criminal defence, special appeals, by law, are carried out whenever the decision is unfavorable to the defendant (even in the case of confession, unless specific procedures were followed). There is a unit for challenges in the capital to undertake such challenges, as mentioned in section 2 of this report. In the different departments, the trial attorney undertakes the appeals process, with technical supervision from the challenges unit, which affects the principle of specialization of trial attorneys. Of the technical assistance the IDPP provided in 66,316 cases in 2012, 63.2 percent involved criminal litigation, and 1.5 percent involved challenges. The IDPP informs that between the capital city and departments, it filed 1,263 special appeals in criminal cases involving adults during 2012.¹⁰⁸

In cases involving private defenders, the relationship is based on a contractual agreement between the attorney and his client, and the former only undertakes the actions provided for in that agreement. Thus, there are a number of people with the means to pay private attorneys during the first instance, but who cannot do so during the challenge stage. When their clients receive guilty verdicts, many private attorneys recommend that they use public defence services, but do not assist them in obtaining such services. Due to the technical nature of some petitions, the special appeal or petition for cassation before the Supreme Court of Justice requires the defendant to get an attorney with specialized experience, which is often expensive.

¹⁰⁶ Constitution, art. 211, and CPC, art. 49.

¹⁰⁷ CPC, art. 415. In addition to the above cases, a special appeal may be filed against a trial court or its decisions or resolutions, a decision to end the sanction, security measure, or corrective measure, the sanction or a precautionary or corrective measure, or the sentence or security or corrective measure, which prevents their continuance, impedes the exercise of the action, or denies the extinction, commutation, or suspension of the sanction.

¹⁰⁸ Annual data available at: <http://www.idpp.gob.gt/estadisticas/cuadros.aspx>.

3.3.7. The right to legal assistance during the execution of the sanction

Everyone has the right to assistance throughout the criminal process, which includes the execution stage. During this stage, a person may require defence to protect the rights that the Constitution, criminal laws, and penitentiary laws and administrative regulations guarantee.¹⁰⁹

The Law of Public Criminal Defence Service (LSDPP) states that the IDPP must provide services throughout the defence process, even in the case of a guilty verdict. In such instances, the case is transferred from an institutional attorney to a *ex officio* one if necessary.¹¹⁰ As with challenges, the private attorney used at trial may continue to represent the convicted person, depending on the terms of his contract. However, the convicted person must continue to have sufficient funds to pay a private attorney, which is often not the case for imprisoned individuals, in particular those whose income came from salaries.

Because of this situation, procedural legislation states that the State shall appoint a public defender for incarcerated individuals who need legal assistance and cannot afford one. Any public official or private citizen may make such a request on behalf of a prisoner (LSDPP, art. 6, and CPC, art. 492). Regarding this right during the execution phase, see section 3.5.

3.4. Rights related to effective criminal defence

3.4.1. The right to investigate the case and propose evidence

The Constitution refers to a generic right to defence (art. 12), however the right to provide evidence in one's favor is a logical aspect of that right. It is clear that one who is 'heard' ought to have full knowledge of his situation, which means he must know why he is subjected to a criminal process and above all have the possibility to refute the charges against him, whether actively or passively. Therefore, he must know exactly what the Public Ministry accuses him of, in order to respond effectively to it.

This is the context in which one should read article 315 of the CPC, which states that during the investigation, the accused or his attorney or representative may

¹⁰⁹ CPC, art. 492.

¹¹⁰ LSDPP, art. 33. According to official institutional data (from their website) of the 66,316 actions that the IDPP litigated in 2012, 2,214 (3.3 percent) were related to 'incident' (actions filed during the execution phase).

propose evidence at any time. The Public Ministry decides whether such evidence is useful and relevant, and must justify his decision to exclude or deny it. In such cases, the accused may appear before the judge controlling the investigation and request him to order the inclusion of such evidence. The Public Ministry leads the criminal investigation, and the INACIF provides scientific evidence.

However, if the accused has sufficient resources, he may undertake a parallel investigation. He may propose evidence he considers appropriate during the intermediate stage, subject to judicial approval by the control judge, which will then be heard and evaluated during the public and oral trial.¹¹¹ All evidence proposed by either party is subject to objection by the other party. The accused may also focus on questioning the veracity and coherence of the prosecution's argument against him, request the dismissal or provisional closure of the case, if he considers that the investigation is not solid, and that the prosecutor's charges cannot be proven at trial.

The defence has unrestricted access to all the prosecution's actions, including those declared urgent,¹¹² and the judge is responsible for ensuring such access.¹¹³ In any event, the requirement that the defendant be present and his evidentiary capacity benefit from specific procedures, such as presenting evidence prior to the trial.¹¹⁴ A defendant may not be without an attorney at any point in time, which is why, in urgent situations, even when the defendant has a private attorney, the judge will appoint a public defender to control the legality of evidence.¹¹⁵

Legislation provides sufficient tools and guarantees to the defendant to exercise his right to material defence, permitting him to propose exculpatory evidence. However, in practice there are situations that limit the exercise of this right.

An example of this is the impact of the economic capacity of the accused on the exercise of his right to material defence.

In June 2013, the IDPP had three advisors dedicated specifically to investigations, which means, in particular with respect to complex crimes, that defence attor-

¹¹¹ CPC, art. 339.

¹¹² In cases of extreme urgency, or when the accused is not fully identified, the judge may approve the Public Ministry's request, but order a public defender to accompany the process (CPC, art. 318).

¹¹³ CPC, art. 316.

¹¹⁴ This refers to the parties' ability to request the judge to authorize the collection of evidence that cannot wait until trial, as it may be lost, impossible to reproduce, or the person providing it cannot appear at trial. (CPC, art. 348).

¹¹⁵ When any evidentiary or procedural act, is undertaken without the presence of the defence, regardless of responsibilities for those responsible for this failure, the evidence must be excluded.

neys (who are already overworked) cannot count entirely on access to such advisors and must adopt a passive attitude geared toward critiquing the prosecutor's arguments. Public defenders also complain that the INACIF responds to Public Ministry requests in confusing terms (as there is not a universal investigation protocol), and that its experts do not ratify their written statements at trial, as the processes take a long time to reach the debate, and sometimes, the experts no longer work at the institution. Therefore, defence attorneys must adopt an attitude that relies on the presumption of innocence working in their favour because they cannot provide an active material defence.

This often occurs to those with sufficient resources to pay a private attorney, but insufficient resources to pay private investigators or access costly evidence. Even private attorneys consider that the right to propose evidence is at times restricted because the defendant is imprisoned and lacks family support (for whatever reason). Thus, the attorney must assume the role of investigator, for which he was not hired and he may lack the necessary time or experience.

This is contrary to wealthy defendants, who propose costly and sophisticated evidence, such as crime scene reconstruction (undertaken by expert architects) or even digital simulations of the facts. There is inequality between rich and poor defendants with respect to evidence.

Another element that affects the criminal process generally, but which is specifically serious when it affects a defendant, is the suspension of hearings. Due to the precarious economic situation of the majority of Guatemalans, taking a day off to testify in court is an enormous effort. When court agendas are not well planned, such as when complex cases whose hearings run over their allotted time, or prosecutors do not show up, the effort required to testify multiplies.

This right faces serious challenges with respect to those held in pretrial detention (who depend totally on those outside the prison walls) as public defenders have little opportunity to visit them. Commonly, due to their heavy workload, the defender might visit their client only once during the entire investigatory period. In addition to having too many cases, their clients are held in different prisons, far from one another. While defence attorneys make plans to speak with their clients, the conditions are dismal and it is difficult to discuss defence strategies in confidentiality.

3.4.2. The right to sufficient time and possibilities to prepare one's defence

The Constitution does not expressly state that people must have sufficient time to prepare their defence, however article 12 clearly stipulates that the right to defence is

inviolable. Therefore, it is necessary to consider some secondary elements that make up this right: deadlines, institutional case management, the economic possibilities of people, and even the workload of officials. These factors cannot be analyzed separately, and thus, we will try to consider them together to explain how they work in practice.

According to constitutional norms, a detained individual must be brought to a court within six hours, and be allowed to make his first statement within 24 hours.¹¹⁶ When individuals are brought to 24-hour courts, the court may not appoint a public defender until moments before the hearing is held, which does not provide the attorney sufficient time to learn about the case. If the attorney's shift is just beginning, the person may make his statement after having only spoken to an attorney for a few minutes. There have also been cases in which the police responsible for temporary detention centers within courts prevent attorneys from speaking to their clients, which wastes available time, while the attorney obtains a judicial order to interview his client. According to a criminal judge, this problem has improved, as judges have reprimanded the offending officers, who justified their actions on security concerns.¹¹⁷

Once a precautionary measure is ordered, the court orders the closure of the prosecutor's investigation, and that the person will be tried (*auto de procesamiento*), and, from there, the prosecutor has a formal deadline of three months within which to investigate and promote the accusation, during which the defence may develop his own theory of the case. If the person is subject to pretrial detention, he is totally dependent upon his defence attorney and any family he has. His situation is worse if he is assigned a public defender, as his attorney is responsible for between 45 to 60 more people, in identical or more complicated situations. Public defenders note that if they have that many cases, each week they may only take a few hours to visit detainees, who are located in different prisons. As it is materially impossible for public defenders to undertake their own investigation, if the prosecutor requests a three-month extension to investigate (which is a systematic practice) this prejudices the detainee, as it means a longer detention without any material changes in his conditions of defence.

¹¹⁶ Political Constitution of Guatemala, art. 6 and 9.

¹¹⁷ Thanks to interviews with private attorneys, we learned that outside the courthouse for criminal cases in Guatemala City, there are attorneys, and sometimes law students, who wait for detained individuals to be brought to testify, in order to offer their services at a relatively low cost. However, these attorneys often take advantage of their clients' families, charging for work they did not do, or which they did poorly. The result is that families spend money, and when they do not see results, they seek out other private defenders, thus losing time to begin a strategic technical defence. We do not know if there are investigations regarding this practice, or if judges object to it.

In practice, if after the extension the prosecutor still does not have a solid investigation, the defence will request the provisional closure of the cause (ending, where relevant, pretrial detention) or the dismissal of the case. Although this procedure is complied with, it is common for individuals to be detained in pretrial detention for longer than six months, as hearings are postponed and rescheduled repeatedly, sometimes, for three months later.

In general, defence attorneys believe that they have sufficient time to develop a defence, given that the majority of evidence is testimony or documents, since the INACIF provides the scientific evidence, in response to requests from the prosecutor. An advantage of public defenders is their experience, which is the only guarantee they have to refute the prosecutor's pretensions, as they know the general defects of criminal investigations (in form, the type of results, etc.) and the way in which prosecutors litigate.

By contrast, for those who can afford a private technical defence, the capacity to adequately prepare one's defence depends to a large extent on available resources. Attention may be personalized, and the time may be sufficient, but there are complex and specific evidentiary steps that can only be accessed through the prosecutor (with assistance from the INACIF).

The public defenders we consulted mentioned that on several occasions they had been assigned to defend two or more defendants, each accused of more than two crimes, and occasionally the defence of an entire 'gang' (one attorney mentioned a case with more than 20 defendants, although a second attorney finally assisted him). This situation makes procedural deadlines insufficient, above all, because it is impossible to develop a relevant defence for each crime and each case in question.

When we asked judges regarding their opinion of the IDPP's work, the majority considered them to be highly experienced litigants. By contrast, one mentioned that in general, Guatemalan attorneys are seriously lacking in oral litigation techniques, that they read documents during trial, and do not propose a coherent argument for the case (which defence attorneys state is because they cannot litigate well when they do not know the details of the case due to their heavy caseload).

3.4.3. The right to equality of arms in the production and control of evidence and in public, adversarial hearings

The Constitution does not specifically guarantee equality of arms with respect to the evidentiary system, except for a broad interpretation of the generic formulation of

the right to be ‘heard and condemned at trial’, in article 12, as one cannot be condemned if he lacked the opportunity to present the necessary evidence to disprove his opponent’s arguments. Within procedural law, as mentioned in the prior section, the defence formally has the right to propose evidence that it considers necessary, and participate fully in those that the prosecutor proposes during the investigation stage.¹¹⁸

Controlling the evidence goes beyond merely being present during the proceedings, as it also allows the defence to make comments while such acts are carried out. When evidence must be prior to the trial, the judge and the accused or his attorney must be present. If the person is detained and must be present in the proceeding to obtain and present evidence prior to trial, he may request permission to attend.¹¹⁹ The attorneys we interviewed confirmed that they are allowed to participate, although defendants rarely are, in particular if they are in prison.

Special investigation methods (undercover operations, telephone interceptions, monitored deliveries, etc.) were regulated until 2006,¹²⁰ which means that there is not generalized knowledge regarding how such operations work. Among the private attorneys we interviewed, for example, none had taken part in a case that used such methods. In spite of this, the law establishes strict measures regarding the capacity of investigators to request such methods, complete confidentiality of the information obtained, and, above all, court oversight regarding the motives for requesting such measures, the procedures used and results obtained, as a criminal judge informed us.

The evidence that will be used at trial is first presented in the hearing that concludes the intermediate stage. During this trial, the prosecutor offers evidence and states how he will present them, and the defence attorney has the opportunity to provide his opinion on the matter, prior to the judge’s decision to accept or reject the evidence offered.¹²¹ Defence attorneys stated that they were always present during such hearings, and they can indicate defects and urge the judge to not admit the presentation of improperly obtained evidence.

Finally, during the debate, the defendant and his attorney must be present. During the trial, the defence, in addition to presenting his own evidence, may dispute the veracity of the prosecutor or private prosecutor. If witnesses or experts are used,

¹¹⁸ CPC, art. 315.

¹¹⁹ CPC, arts. 316-317 and 348.

¹²⁰ Law against organized crime, Congressional Decree 21-2006.

¹²¹ CPC, art. 343.

the defence may cross-examine them.¹²² Legally, a defendant may hire a technical consultant (on technical issues such as science or art), to interrogate the prosecution's experts, or even provide his own interpretation of the conclusions of the former.¹²³ However, this is an example of a right to which only those with economic resources have access.

3.4.4. The right to a trusted interpreter and the translation of documents and evidence

Criminal proceedings in Guatemala are held in Spanish. However, given the multilingual nature of the country, in addition to the presence of foreigners, the constitutional right to due process includes the right to an interpreter (Constitution, art. 12). Procedural legislation develops this right by expressly permitting a defendant to have the assistance of a trusted interpreter, or one assigned by the State if he cannot afford one, and such assistance is necessary for him to understand and make himself understood during the trial. If this right is not fulfilled, testimony obtained in the absence of an interpreter is not admissible.¹²⁴

As mentioned, the IDPP has 15 ethnic public defence offices, and does not have translators for foreign languages. There are at least nine indigenous languages for which the IDPP does not have specific translators, as there are only 13 such translators in the entire country. Therefore, if the court or prosecutor does not have an available translator, the defence must request assistance from the Academy of Mayan Languages of Guatemala. Interviewed public defenders agree that this support becomes a bureaucratic procedure. IDPP authorities state that, in practice, they request members of the community to translate what they are saying to the defendant, and what the defendant wishes to say with respect to his first statement, if anything. Translators and interpreters can also serve as technical consultants to the defence and address relevant evidence.¹²⁵

With respect to language, evidence, and document, procedural law establishes that when the evidence is in a language other than Spanish, it must be translated into Spanish for the judge and other parties. Additionally, when a person does not under-

¹²² CPC, art. 378.

¹²³ CPC, art. 376.

¹²⁴ CPC, art. 90 and 91.

¹²⁵ CPC, art. 141.

stand Spanish, he must be informed in his language of the contents of the evidence.¹²⁶ These rules also apply to non-verbal individuals who cannot express themselves in writing. Although the defence attorneys we interviewed primarily work in the capital, they stated that they did not know of cases in which these rights had been violated. For more information on the right of indigenous peoples to defence, see section 3.6.

3.5. *The right to defence during the execution of the sanction*¹²⁷

Article 19 of the Constitution and the Law of the Penitentiary Regime¹²⁸ places responsibility for imprisoned individuals, whether in pretrial detention or those convicted, in the General Headquarters of the Penitentiary System. For the purposes of this section, we will refer exclusively to imprisoned individuals with convictions.

The Constitution requires that all those deprived of liberty have the right to communicate, when they desire, with their defence attorney (art. 19). Procedural norms state that the right to defence of imprisoned individuals may not be denied: it states that all those deprived of liberty must have an attorney, whether private or public, to advise them on the rights that accrue to their legal situation.¹²⁹ Penitentiary law therefore provides prisoners with a series of rights and obligations, and regulates how authorities must treat detainees to achieve the goals of social reeducation and reform.¹³⁰

Prisoners have the right to defence, which must be guaranteed, in the following two cases: a) control of access to penitentiary benefits (such as alternative sanctions);¹³¹ and b) administrative-disciplinary sanctions that restrict rights.

In the first case, the law states that the proceeding is to be verified before an execution judge, through a proceeding referred to as ‘incidentes’, with the necessary support of a technical defence attorney. The second case ‘does not require a technical defence’, and is held before penitentiary authorities.¹³²

¹²⁶ CPC, art. 142 and 143.

¹²⁷ Gary Estrada, coordinator of the ICCPG area on individuals deprived of liberty and human rights assisted with the explanation of this point.

¹²⁸ Congressional Decree 33-2006. Administratively, the DGSP is an office of the Ministry of Government, within the executive branch.

¹²⁹ CPC, art. 492 and ss.

¹³⁰ Law of the Penitentiary Regime, art. 2, 3, 12 and ss.

¹³¹ The ‘incidentes’ proceeding is used to address issues related to execution or suspension of the sentence.

¹³² Law of the Penitentiary Regime, art. 90 to 93.

The right to defence during the execution process is notoriously deficient. There is no authentic oral, adversarial process, in which decisions are based on information. Rather, decisions are based on Penitentiary System reports (huge files, which are reviewed by interdisciplinary groups that are often not present full time in the prisons or in contact with the prisoner). Additionally, there are only three multi-person execution courts in the entire country (with two judges each, six total), which means that of the 7,449 individuals sentenced to prison (according to the official data from the DGSP, in June, 2013), each judge is responsible for 1,246 individuals. During his imprisonment, each person will require at least one request for a sentence reduction for good conduct, various requests (to leave the prison, for example), or transfers. In hearings for such matters, only the judge, defence attorney and the Public Ministry attend, and not the convicted person.

Another reason why it is important for the execution of the sanction to be efficient is that this would allow the penitentiary system to reduce the problem of overcrowding. According to a penitentiary system report from 2011, it was over-capacity by 94 percent, a number that continues to grow. The fact that there are prosecutors and judges that oppose sentence reductions is due in large part to the fact that they are unaware of the serious problem of structural collapse that prisons are facing. Prosecutors do not visit prisons, and judges only do so occasionally. Additionally, each prison has a different reality and dynamic: internal-external power relations, ways in which corruption manifests itself, administrative disorder, etc.

In reality, material defence in this stage may only be exercised through technical defence, because the proceeding is too bureaucratic and prison conditions prevent it completely. In detention centers, conditions are terrible, and not conducive to permitting prisoners access to their files, without which they cannot file any petitions. Even if they could access their case file, alleging security concerns, the justice system does not allow them to appear in court to make their petitions or complaints personally.

With respect to administrative-disciplinary sanctions, the fact that it is outside court control and that it is not necessary for a defence attorney to participate lends an arbitrariness to the penitentiary system. In the first place, the disciplinary system is strictly focused on the punishment imposed by the administrative authority and by prisoners. According to the expert we consulted, there is no uniformity with respect to disciplinary regulations in each prison, and there are even incomunicado prisoners for 'safety' reasons. Prisoners generally divide themselves by sectors, and in each one there are prisoners who wield excessive power over the other prisoners, who become responsible for discipline under the permissiveness of guards and with the acquiescence of the prison directors.

With respect to other rights, prisoners do not receive files regarding their rights upon entry. Prisoners are permitted to meet with their attorneys, but not in conditions that guarantee confidentiality, as the conference is held in public spaces, surrounded by security guards.

3.6. The right to defence of indigenous peoples¹³³

The criminal justice system as a whole is not prepared to address the multicultural reality of Guatemala. The constitutional basis for this topic is found in articles 12 (right to defence), 44 (personal rights, recognized via international law, even if they are not specifically listed in the Constitution and other laws), and 58 (cultural identity of indigenous peoples, which includes their value system, practices, and forms of social organization, which involve the practice of indigenous law).

The right to be convicted only if one has been heard and condemned at trial is inalienable. However, 'hearing' a person only happens if there is perfect clarity between what the defendant was told (indictment, charges, etc.) and what he understood and answered (testimony, material defence). This clarity is not limited to language, but also refers to its cultural relevance to the person who absorbs this information. Thus, it cannot be assumed that one has been effectively heard only because, in addition to his mother tongue, he also speaks Spanish. The relationship between the translation of words and one's worldview is not mechanic. Thus, the State must be prepared not only to translate for indigenous peoples, but also to communicate with them, without cultural barriers.

Convention 169 of the International Labor Organization, which Guatemala has ratified, contains specific rules regarding indigenous people. The Convention recognizes that indigenous people have their own worldview and that they should be tried according to their reality and context (political, social, and cultural). This means that in order to try indigenous people for criminal acts, the trial must be undertaken on their own terms, and not official criteria, even if such criteria represents the majority of the population. A main issue that stems from such recognition is that prison is not an efficient, legitimate, recognized sanction for indigenous people, as it is incompat-

¹³³ Juan Santiago Quim provided information for this section, who commented that the category of indigenous peoples is correct, as it has been used politically in recent years, although the term 'original peoples' is also appropriate (existing prior to invasion, as is the case of Guatemala). This debate is more relevant for the Xinka and Garífuna peoples, as they did not exist prior to Spanish invasion, but their culture, values, and identities are different from the majority population.

ible with their cultural identity.¹³⁴ Thus, the State should create culturally appropriate mechanisms.

Another aspect related to the defence of indigenous people is the cultural relativity of legal and illicit behavior.¹³⁵ In such situations, even in actions declared illicit but which are practiced as an exercise of the right to cultural identity, indigenous peoples should not be criminally prosecuted. According to Mr. Santiago Quim, prosecutors and judges must refrain from prosecuting and trying indigenous peoples in such cases, in accordance with the obligations of ILO Convention 169. The correct way to determine if such a situation is present is through a cultural expert. The IDPP indicates that it has taken steps to address issues of multiculturalism, which involves sensitivity training for public defenders, and also the promotion of using indigenous public defence offices to obtain cultural experts. The use of such experts is not generalized in cases involving indigenous peoples, but there are paradigmatic cases in which such evidence has been used to absolve indigenous defendants.

In common practice, indigenous peoples do not enjoy the right to effective defence when they are tried for crimes that do not constitute such in their communities, and/or they are sentenced to punishments that have no cultural relevance to them. This is added to the fact that they are tried in a language that is not their own, even if they know it. Although there are not specialized institutions to provide free legal assistance to indigenous defendants, the IDDP has a unit (indigenous public defence offices) that uses this criteria and ensures its application, although prosecutors and judges do not consider them, and there is no national policy to train public officials on the issue.¹³⁶

In daily life, many indigenous communities have their own authorities. These authorities address conflicts within their territory and resolve them in accordance with

¹³⁴ Added to the level of violence and personal and collective alienation that prison causes, it should not even be considered as an option for indigenous peoples, even as a sanction for a final guilty verdict.

¹³⁵ Two examples of this are the criminalization of ‘illegal’ alcohol, which communities use for ceremonies, or plundering archeological monuments, as many pieces are used by religious leaders for their religious practices. This situation is even more unfair when one considers that private museums and collections possess invaluable pieces, which they show, and do not face investigation regarding where such pieces came from. Clearly, there are racist undertones to criminally prosecuting an indigenous leader, but not one who finances cultural projects.

¹³⁶ According to an expert, in Guatemala a person may be tried in his language, but prosecutors and judges do not know the language of the region. There are also no *ad hoc* courts or specific procedures for indigenous peoples, even when the victim and perpetrator belong to the same ethnic group.

the indigenous custom. It has been difficult to understand that, in this type of case, a criminal case is no longer appropriate, due to the principle of *non bis in idem*, which has been applied thanks to criteria of the Criminal Chamber of the Supreme Court of Justice, and sometimes by local judges.¹³⁷

4. The professional culture of attorneys and defence attorneys

In Guatemala, any active attorney, member of a bar association, may exercise any area of the law, and does not need any type of special registration for criminal litigation. Attorneys are required by the Constitution¹³⁸ to register with a professional bar association: the Attorney and Notary Bar Association of Guatemala (CANG). Registration with the CANG is a requirement to exercise the legal profession¹³⁹

The Law of Obligatory Registration regulates the Bar Association, in addition to its internal statutes and regulations.¹⁴⁰ These regulations state that the purpose of the Association is to ensure that professionals exercise their profession in strict accordance with the Constitution, justice, equity, responsibility, and ethics. Thus, the institution has an Honor Tribunal, which is a disciplinary body that monitors the professional ethics of member attorneys. At the end of 2012, authorities of that tribunal stated that 17 percent of the 16,000 law professionals that existed in Guatemala had been sanctioned for violations of the code of ethics, and at least 34 percent had been subject to investigations.¹⁴¹

¹³⁷ The *Chiyax* case is one such paradigmatic case. In 2003, a first instance judge ordered the dismissal of the case and all coercive measures (pretrial detention, specifically) against members of the maya k'iche', indigenous community, as they had already been tried in accordance with indigenous law. E.312.2003 Of. 6o. Criminal Court of First Instance, Drug Activity, Crimes against the Environment of Totonicapán, June 25, 2003. The decision may be found in a compilation of decisions regarding indigenous law, from the Centro Nacional de Análisis y Documentación Judicial. Available at: http://www.oj.gob.gt/es/QueEsOJ/EstructuraOJ/UnidadesAdministrativas/CentroAnalisisDocumentacionJudicial/resoluciones/resoluciones_percent20indigenas.pdf.

¹³⁸ Political Constitution, art. 90.

¹³⁹ Article 196 of the Law of the Judiciary, Congressional Decree 2-89, lists the following requirements to exercise as an attorney: obtain a degree in law, be an active member of the bar association, register in the Attorney Register of the Supreme Court of Justice, not face suspension of any of their rights.

¹⁴⁰ Congressional Decree 72-2001.

¹⁴¹ Data from the Guatemalan News Agency. Available at: http://www.agn.com.gt/index.php/world/fashion/item/1017-colegio-de-attorneys-sanciona-a-m_percentC3_percentA1s-de-2-mil-profesion-

There is a Code of Professional Ethics that contains guidelines regarding the proper exercise of the legal profession. The principle of loyalty is one of the most relevant for the clients, as it guarantees a lawyer's loyalty to justice and his client, and protects attorney-client confidentiality. Additionally, this ethical norm requires the defence of the poor, imposing an obligation on all attorneys to provide *ex officio* legal assistance free of charge, in accordance with the law, when it is required of them.

An important aspect to mention is that the Bar Association (CANG), in spite of being a professional organization in favor of the improved technical abilities of its members, has a number of attributes that immerse it excessively in the political life of the country¹⁴² (especially both the president of the Bar Association and the Honor Tribunal, as well as some *ad hoc* representatives). Therefore, the Bar Association interferes in permanent councils and periodic commissions responsible for elaborating lists of attorneys that are eligible for positions such as the national attorney general, appeals court judges, judges of the Supreme Court of Justice, justices of the Constitutional Court, or the IDPP director, among others. This situation has politicized the Bar Association to the extent that when there are elections for the board of directors, one can witness huge political campaigns, which involve enormous spending on propaganda, and even paid advertisement in newspapers, radio, and television.

This situation, in addition to prejudicing the transparency of the selection process for important positions, also harms attorney members of the Bar Association, who worry less about their true purpose of furthering the cultural, academic, moral, etc. goals of the organization. With the exception of sporadic comments, Bar Association authorities have remained absent when some of their members are publicly vilified. This was the case of the judges of the high risk court (who heard a case regarding

ales-del-derecho. As there is no official data regarding sanctions against attorneys, we consulted with litigation attorneys, who mentioned two points on the topic: a) the bar association addresses attorneys as well as notaries, and so proportion of these percentages are due to deficient notary behavior; and b) it is common for attorneys to not attend hearings without a valid excuse for their absence, which leads to judges declaring an abandonment of defence and informing the Honor Tribunal so that this may issue the relevant sanction. In general, sanctions include private admonishments, public admonishments, temporary suspension, and permanent suspension (Statute of The Attorney Bar Association of Guatemala). In the case of suspensions, decisions must have the approval of the general assembly plenary, which means it is impossible for them to be fulfilled, given the growing apathy among attorneys and the strong desire to protect one another that still exists.

¹⁴² This situation affects law schools in the country, namely the Faculty of Legal and Social Sciences of the San Carlos University of Guatemala, the only public, independent university in the country.

the genocide of the Ixil indigenous community, and issued a guilty verdict against the ex-dictator, Efraín Ríos Montt, which the Constitutional Court later overturned) who the attorneys for the former members of the military repeatedly and publicly insulted.

Additionally, according to attorneys we interviewed, the economic resources of the accused has a considerable impact on their ability to obtain an effective criminal defence. Both public and private defence attorneys agreed that those with sufficient economic resources have an advantage over poor defendants with few economic resources. According to public defenders, due to their heavy workloads, they cannot offer an optimal and specialized defence in each case. Moreover, private defenders state that the defence services they provide to their clients depend to a large extent on the amount of money they are paid.

With respect to training, university education is basic and focused on memorizing laws, to the detriment of forensic practice, litigation techniques, doctrine, and analysis of laws, jurisprudence, and legal investigation. Private attorneys must find any additional training they want to undertake on their own. Thus, public defenders have a certain advantage due to the constant training they receive through the public defence office, exclusive to institutional attorneys, which allows them to be up to date on criminal reforms and to strengthen their practical exercise of the legal profession. The CANG offers different specializations and conferences, although it does not have permanent professional training for its members.

Defence attorneys consider themselves protectors of the rights and interest of their clients. They believe they are those called to ensure that the rights of those accused of crimes are protected. They assure that they understand the importance of their role, which can be a moral commitment to achieve a better criminal justice system. They consider that external factors, such as corruption in the justice system in general, human rights violations, the lack of material resources and time, etc., seriously impact the right to an effective defence. A criminal attorney interviewed states that in some spheres, the best criminal attorney is considered not to be the one with the greatest knowledge of the law, but rather someone with good contacts within the criminal justice system, and who knows how to use them to benefit his cases.

According to defence attorneys, a common error is considering that the efficacy of a criminal justice system is measured by the number of imprisoned people or convictions obtained.¹⁴³ They consider that such beliefs affect their work and public

¹⁴³ To this end, the critique of institutions (National Civil Police, Public Ministry, and the Judiciary) is justified, as they use systems of performance evaluation that primarily reflect quantitative criteria

image, because, socially they are treated as those who free criminals, when they obtain exculpatory verdicts. They understand effective criminal defence as that which uses all existing legal mechanisms to protect the rights and protections of their clients, without any hindrance or discrimination. One must add to this conclusion that criminal defence is effective, when the former is possible, but also when it occurs under the control and active monitoring of the client, so he feels satisfied and protected by the defence actions undertaken in his favor.

5. Political commitment to effective criminal defence

Recent history of Guatemala is evidence of a social dynamic that favors miniscule, privileged sectors of the population, which different institutions that make up the State guarantee. This was the main cause of the internal armed conflict that ravaged the country, and continues into the post-war period.¹⁴⁴ This is why one of the main peace agreements is a call to strengthen civilian power, principally the judiciary, responsible for the administration of justice and ensuring the democratic application of the law in protection of the person.

Starting in the 1990s, actors tied to organized crime have appeared in the political, economic, and social life of the country, discrediting the government at all levels. Organized crime has permeated State institutions and has made them useless at addressing their true priorities such as health, education, development, or justice. The government has adopted a 'security' rhetoric in the face of such high levels of criminality and occasionally this is the only aspect of political pretensions that people know when political parties win elections. 'Firm hand' policies have been applied nationally, and discourses regarding 'governability' and 'citizen safety' have permeated the social imagination to such an extent that the population supports restricting the rights and freedoms of people, even though security levels do not improve. Meanwhile social ills such as poverty thrive in an environment of 'state of emergency', which is applied against communities who have organized to demand respect for their land and resources against extractive, energy, or mono-crop industries. This is going against the spirit of the peace agreements that ended the armed conflict. The government is opting again for the militarization of the country's streets.

(reflected in statistics): number of apprehensions, accusations, or guilty verdicts. This goes against the context of crime in Guatemala and the individual conditions of people.

¹⁴⁴ CEH 1999, tomo I: Orígenes y causas del conflicto armado interno.

The legislature, in the midst of a crisis of dysfunction and mutual boycotts between parties, has succumbed to a vision that goes against the construction of a strong but democratic criminal justice system, instead proposing punitive bills that go against human dignity. Fortunately, many such bills have been dropped, but others, even if the legislature is not actively discussing them, remain latent possibilities.¹⁴⁵ Some laws create new crimes and stiffen penalties,¹⁴⁶ leaving defence attorneys, progressives, and civil society to fight for such laws to be interpreted in light of the Constitution, and in a way that protects rights and freedoms.

With respect to the death penalty, although political parties use it as a propaganda tool, it is heartening that Guatemala has adopted a *de facto* moratorium on the practice, which has not been applied since 2000. Additionally, there is no one currently on death row, as all death penalty sentences have been commuted, thanks to the work of social organizations and the IDPP. The real concern is that the death penalty has not been formally abolished, and discussions to revive it continue to emerge in electoral contexts and political crises.

Nonetheless, from an integral vision of the right to defence, it is important to clarify that institutions have created strategies to ensure justice. Some examples are the commitment of the Public Ministry to expand a new model of prosecutorial management, so that many cases that do not require criminal intervention may be resolved outside of the criminal justice system, and so that criminal investigation is more efficient (which, under respect for legality, benefits all those involved in criminal processes). Additionally, the Judiciary has taken steps to ensure greater coverage, removing remnants of inquisitorial proceedings, and consolidating oral hearings. The IDPP is increasing the number of public defenders, and improving their training. The next step is to coordinate these steps, so that they do not compete with one another

¹⁴⁵ Some of these increase the age at which one may be criminally charged, chemical castration for those convicted for rape, the application of investigation mechanisms with low standards of protection, the forced application of imprisonment, the increase in sanctions or acts considered criminal, etc.

¹⁴⁶ Particularly in the framework of drug activity and organized crime, mechanisms have been presented that create a large number of crimes with excessively high sanctions. Among others: Law against Drug Activity, Congressional Decree 48-92; Law against Organized Crime, Decree 21-2006; Law against Femicide and Other Forms of Violence Against Women, Congressional Decree 22-2008; Law of Arms and Ammunition, Congressional Decree 15-2009; Law for the Strengthening of Criminal Prosecution, Congressional Decree 17-2009. Although many of these laws are necessary (socially justifiable) the problem they create has to do with the absence of parliamentary and judicial controls to ensure their adequate compliance.

or create implementation problems. Additionally, it should be understood that the best way to consolidate citizen rights is through social organization and social justice.

6. Conclusions

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 this right 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.

6.1. 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 cen-

ters 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.

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CHAPTER 7. COUNTRY ANALYSIS. MEXICO¹

1. Introduction

1.1. Basic demographic and political information

Mexico² covers 1,964,375 km² and is home to 112,336,000 inhabitants, six percent of whom speak an indigenous language. There are approximately 53 distinct indigenous groups in the country.³ Mexico is a secular, representative, and democratic republic composed of 31 states and a federal district (capital). The 32 federal entities have their own structures of government and laws; they are each a free and autonomous state that together form a confederation. The federal power is divided between the executive (represented by the president), the legislature (made up of the Senate and the House of Representatives), and the Judiciary. This structure is reflected at the state level.⁴

The Federal District (hereinafter DF), also known as Mexico City, covers 1,495 km² (less than 0.1% of the national territory) and has a total population of 8,851,080, which makes it the federal entity with the second largest population. The metropoli-

¹ Miguel Sarre Iguíniz reviewed this chapter, who we appreciate for his valuable observations. Patricia Villa Berger and Philippa Ross participated in the research and developing the conclusions of the chapter. This first version of this report was finished in October 2013, and was last revised in September 2014.

² The official name is the United Mexican States.

³ Instituto Nacional de Estadística y Geografía, INEGI 2010.

⁴ Political Constitution of the United Mexican States, CPEUM, arts. 40, 41, 43 and 44.

tan area of Mexico City is home to 20,116,842 people.⁵ The state of Baja California covers 71,450 km² (3.6% of the national territory) and has a population of 3,155,070, of which 92 percent is urban.⁶

1.2. *General description of the justice system*⁷

At the time of writing, the authority to legislate regarding criminal matters belonged to the states and the federation. However on 5 March 2014, the National Code of Criminal Procedure was passed (NCCP),⁸ which will gradually replace all other criminal procedure codes and become the only applicable legislation by June 18, 2016.⁹

The ‘Index on Rule of Law 2012-2013’ elaborated by the World Justice Project, reports that Mexico obtained a score of 0.35/1.00 in the criminal justice system, and was listed 91st out of the 97 countries analyzed, and 13th out of 16 in the region.¹⁰

There are currently two applicable systems of criminal justice, traditional inquisitive justice, and adversarial justice.¹¹ The constitutional text that introduced the adversarial system in 2008 included a transitional legal framework. Thus, those who are tried in states where the inquisitorial system is still in force have different rights than those who are tried in the adversarial system.¹² Today, 16 states have begun to implement the adversarial system.

⁵ INEGI 2010.

⁶ *Ibid.*

⁷ Code of Criminal Procedures in the Federal District, CCPFD, arts. 313-331 and Code of Criminal Procedures for the State of Baja California, CCPBC, arts. 209-385.

⁸ See, NCCP, published in the *Diario Oficial de la Federación*, March 5, 2014. Available at: <http://goo.gl/SRHAD>.

⁹ NCCP, second provisional article. This code is a product of the constitutional reform of article 73, f. XXI which gives Congress the authority to issue a unified criminal legislation applicable for the federation and states. Available at: http://www.dof.gob.mx/nota_detalle.php?codigo=5317162&fecha=08/10/2013.

¹⁰ Agrast et al. 2013, p. 114.

¹¹ The second provisional article of the 2008 constitutional reform requires the federation and all federal entities to reform their traditional criminal justice systems, moving toward an adversarial criminal justice system within 8 years, from June 19, 2008. The federation and states have independence to decide when to adopt the adversarial system included in the National Code of Criminal Procedure.

¹² Supreme Court of Justice, jurisprudence no. 162669, novena época, primera sala, S.J.F. and its gazette, volume XXXIII, March, 2011, p. 17.

This study includes an examination of both the systems currently in force. We concentrate on two federal entities: the Federal District, as it is the capital and most important city in the country with a traditional criminal justice system in force,¹³ and Baja California, which has been a pioneering state in the implementation of the adversarial criminal justice system, in its capital city of Mexicali.¹⁴

Additionally, in some sections we will refer to criminal defence at the federal level. Although this jurisdiction is not part of the original goals of this report, the empirical investigation shed light on important data that cannot go unnoted.

The information included in this study is based firstly on a legal and jurisprudential analysis that encompasses all the rights contained in international human rights instruments, the Political Constitution of the United Mexican States (hereinafter, the Constitution), and domestic legislation and judicial criteria that guarantees an effective criminal defence. Second, it is based on reports, studies, official statistics and public information. Third, it is based on interviews that took place between January and October 2012, with an academic, two judges, three private defence attorneys, two public ministries, two attorneys from civil society organizations, two focus groups with public defenders in each state (with five attorneys in each group), and a questionnaire that 20 people held in pretrial detention in the state of Baja California filled out.

1.3. The criminal process and its stages

Below we will describe the ordinary criminal justice process in both of the states under study in this report.¹⁵

¹³ On July 22, 2013 the Criminal Procedure Code of the DF was published, which implements the adversarial system. It partially entered into force on January 1, 2015 and will be totally in force on June 15, 2016.

¹⁴ Baja California, additionally, was selected for being a state with the most transparency and access to information of the three states that have completely implemented the adversarial system in their territory. It was also a state with appropriate security and political conditions to develop the investigation. Some proponents of the adversarial system consider Baja California to be an example of the implementation of this criminal justice system.

¹⁵ In both states there is an abbreviated procedure and a set of alternative outlets from the criminal process that were not under study in the present study.

1.3.1. Federal District (traditional system)

The criminal process begins with a ‘criminal notice’¹⁶ or a complaint or *querrela* (a complaint filed by the victim of the crime) before the Public Ministry or prosecutor.¹⁷ The process may begin with a person detained *in flagrante* in an urgent case,¹⁸ or against an individual that has not been detained. The investigation prior to the court stage consists of an investigation carried out by the prosecutor, referred to as prior inquiry (AP). When a person is detained, the prosecutor has 48 hours to order his freedom or bring him before a judicial authority. When the person is not detained, the prosecutor can request a court order for apprehension or subpoena for him to be brought or appear before a judge in order to establish his legal situation.¹⁹

The prosecutor is authorized to undertake criminal investigations, and may request the assistance of investigation police or other police bodies (state or federal) to do so.²⁰

If the prosecutor brings an accused before a judge, within the constitutional deadline of 72 hours or 144 if the defence requests to double the deadline, the judge determines whether the person will face a criminal proceeding and if he will do so in freedom or in pretrial detention.²¹ Within the constitutional deadline, the prosecutor and the defence have the opportunity to present evidence to the judge²² and the accused may exercise his right to testify or remain silent.²³

When the time limit is up, the judge begins the instruction phase, where the parties present all available evidence to determine the criminal responsibility of the accused.²⁴

Once the instruction phase has ended, the judge orders the parties to present their conclusions.²⁵ The judge then calls the parties to an ‘appearance trial’ where they

¹⁶ CPPDF, art. 262.

¹⁷ In some states of the republic, the institution responsible for prosecuting crimes is called *Procuraduría* or *Ministerio Público* or *Fiscalía*. Prosecutors are called ‘public ministry’, ‘public minister agent’ or MP.

¹⁸ CPPDF, arts. 267 and 268.

¹⁹ CPPDF, art. 286 bis.

²⁰ CPEUM, art. 21.

²¹ CPPDF, art. 297.

²² *Idem*.

²³ CPPDF, art. 290.

²⁴ CPPDF, art. 314.

²⁵ The MP can present non-accusatory conclusions. See CPPDF, art. 315.

present their final allegations either written or orally.²⁶ Within the next 30 days, the judge must issue a decision.²⁷ The judge's decision must include the reasons for which he considers the person has been proven guilty, including those the law requires.²⁸

1.3.2. Baja California (adversarial system)²⁹

The adversarial criminal justice system also begins with a notice, whether through a complaint or *querrela* (victim complaint).³⁰ If the person is detained *in flagrante* or in urgent circumstances,³¹ the detaining authority must bring him immediately before the prosecutor, who within 48 hours will decide whether to bring the case before a judge. The person is then brought before a control judge, who determines the legality of his detention.³² If it is legal, the prosecutor must file charges. If the person under investigation was not detained *in flagrante* or under urgent circumstances, the criminal proceeding begins with an indictment hearing.³³

After the indictment hearing, the prosecutor requests what is known as 'the attachment' to the proceedings (*vinculación a proceso*). The defence may request that

²⁶ CPPDF, art. 325.

²⁷ CPPDF, art. 329.

²⁸ For example, the nature of the action or omission and methods used to carry it out, the magnitude of the harm caused; the circumstances of place, mode, and time of the fact; the form and seriousness of the accused's participation; family or friendship ties between the accused and the victim; the general and social characteristics of the accused, his psychological and physical conditions, abuse of power or violence of the victim and perpetrator during the commission of the crime; and other relevant circumstances. See CPPDF, art. 72.

²⁹ The adversarial system entered into force in Mexicali on August 11, 2010. Decree 196 determines that it would enter into force in Esenada on August 11, 2014 and in other Baja California municipalities on August 11, 2015.

³⁰ CPPBC, art. 209.

³¹ Article 16 of the Constitution and article 275 of the Code of Criminal Procedure of the Federal District and article 15 of the Baja California Code define an urgent case as a serious crime with a demonstrable risk that the accused may elude justice and, due to the time, place, or circumstances, the MP cannot immediately appear before a court authority. CPEUM, art. 16 and CPPBC, art. 164.

³² CPPBC, art. 162 and CPPBC, art. 166. This adversarial system guarantee meets the international human rights standards, as the American Convention states that any person deprived of liberty has the right to appear before a judge who will rule without delay on the legality of his detention or order his freedom if the detention was illegal. See CADH art. 7.6, and article 9.3 of the Federal District Human Rights Commission.

³³ CPPBC, art. 275.

the hearing be held within a constitutional deadline of 72 or 144 hours to have the opportunity to generate evidence. In this case, at the indicated date and time, parties return to the hearing to present their evidence, and the judge decides whether or not to attach the accused. The prosecutor immediately requests precautionary measures that it considers appropriate for the situation of each person and the defence has the opportunity to counter these requests.³⁴

If the defence does not take advantage of the constitutional deadline, the judge decides on the attachment at the same hearing, and the prosecutor immediately requests a precautionary measure.³⁵

Once the decision to attach has been made, the judge sets a timeline to close the investigation.³⁶ Upon closure, the prosecutor arraigns the defendant or requests the dismissal or suspension of the case.³⁷ If the prosecutor decides to arraign the defendant, the judge calls the parties to an intermediate hearing, where the parties offer and admit evidence and refine the controverted facts that are debated at trial.³⁸ Until the trial is opened, and for some types of crimes, the victim and the accused may agree on an alternative exit (agreement) or a different form of ending the proceeding.³⁹ Once the intermediate hearing is complete, the judge opens the oral trial proceeding.⁴⁰

The oral trial proceeding is held by a trial court, composed of three judges, who must be different to those who participated in the earlier stages of the case.⁴¹ Once the trial court receives the order to begin, the court sets a date and time for the hearing.⁴² In the oral hearing, the parties present their opening arguments, exhaust their evidence, and present their closing arguments.⁴³ The judges deliberate then call the parties so they can issue their decision and set a date to determine the sanction.⁴⁴

³⁴ CPPBC, art. 283.

³⁵ *Idem.*

³⁶ CPPBC, art. 286.

³⁷ CPPBC, art. 288.

³⁸ CPPBC, art. 300.

³⁹ CPPBC, art. 196.

⁴⁰ CPPBC, art. 315.

⁴¹ CPPBC, art. 317. The NCCP provides that one or three judges may make up an oral hearing tribunal.

⁴² CPPBC, art. 318.

⁴³ CPPBC, arts. 316-370.

⁴⁴ CPPBC, art. 380.

1.4. *Rates of criminality and the prison population*

For 57 percent of Mexicans, safety is the problem that worries them the most. In Baja California, 51 percent of the population feels insecure, while in DF, that number reaches 73 percent. The main daily activities that residents of Baja California and the Federal District stop doing to avoid being a victim of a crime are allowing their children to go out, wearing jewelry, and carrying cash. 75 percent of the nation fear being the victim of a crime, while in Baja California and DF that number is 74 and 84 percent respectively.⁴⁵

According to the National System of Public Security, in 2012 there were 125,328 complaints of federal crimes in the country, of which 37,714 were related to drug possession and trafficking.⁴⁶ States registered 1,702,150 complaints for state level crimes, of which 108,682 were in Baja California, and 179,146 were in the Federal District.⁴⁷

In 2010 there were 2,130 complaints per 100,000 people in the Federal District, and 3,886 in Baja California. The most common crime in both states was robbery; in DF it represented 52 percent of complaints and in Baja California 55.9 percent.⁴⁸ The annual crime rate growth between 2009 and 2010 was 3 percent in the DF and -9 percent in Baja California.⁴⁹

At the national level during 2013, 32 percent of homes fell victim to at least one crime. In Baja California and the DF, this number was 39 percent. The national rate of criminal activity was 27,337 victims per 100,000 people, while in the DF it was 31,675 and in Baja California, it was 36,579.⁵⁰

An important number regarding criminal activity is the so-called 'black rate', which refers to crimes that go unreported.⁵¹ At the national level, this rate reached 92 percent. In the DF it was 92 percent and in Baja California 84 percent. The main

⁴⁵ INEGI 2013.

⁴⁶ Executive Secretary of the National System of Public Security 2012b. Crimes related to drug possession and trafficking were equal to the sum of CPF crimes related to production, transporting, trafficking, sale, provision, and possession against public health; the general health law, crimes against health, in its aspect regarding drug trafficking, and the LFCDO in the rubro against health.

⁴⁷ Secretario Ejecutivo del Sistema Nacional de Seguridad Pública 2012a.

⁴⁸ México Evalúa 2009, p. 13.

⁴⁹ Rivera y CH 2011, p. 7.

⁵⁰ INEGI 2013.

⁵¹ Impunity index calculated according to the percentage of crimes for which an investigation has begun and the percentage of those for which there is a conviction.

reasons people do not report the commission of a crime are because they consider it a waste of time and because they do not trust the authorities.⁵²

With respect to the prison population, according to official information available in January 2013, the total number of imprisoned individuals was 242,754. 4.8 percent were women and 95.2 percent men. 193,194 were in the ordinary justice system and 49,560 in the federal system. The average rate of incarceration was 207 per 100,000 inhabitants. The total number of individuals in pretrial detention was 100,304, which is equivalent to 41.3 percent of the total prison population. In the DF, 7,477 people were in pretrial detention, which is 18 percent of the prison population. In Baja California 7,305 were in pretrial detention, which is 44.4 percent.⁵³

An interesting fact with respect to indigenous people is that in July 2012, 8,530 were imprisoned, 7,715 for local crimes, and 815 for federal crimes. Of this total, 3,126 were in pretrial detention, while the remainder had final sanctions.⁵⁴

2. System of criminal defence

By constitutional mandate, from the moment of detention until the execution of the sentence, everyone has the inalienable right to be assisted by an attorney.⁵⁵ Thus, unless he is an attorney, no one may represent himself.

Those who provide legal defence services include private independent attorneys who are compensated directly, and public State-provided attorneys who work for the public defence office. Public defenders must provide legal services to any person who does not appoint a private attorney, regardless of his financial or social condition. Additionally, there are independent attorneys associated with law school clinics and civil society organizations that provide free legal assistance in criminal cases.

According to the Constitution, public defence must be high quality and free for any person who requests it or does not have private defence. Public defenders must be

⁵² *Ibid.*

⁵³ Secretaría de Gobernación 2013.

⁵⁴ Comisión Nacional de Derechos Humanos, Comunicado CGCP/223/12, Acceso a un sistema eficaz de justicia de los indígenas.

⁵⁵ CPEUM, art. 20, B, VIII. This right is also expressed in ACHR, art. 8.2. e), which states that all defendants must have the advice of an public defender, in the absence of a private attorney.

legal professionals and their compensation may not be less than that of prosecutors.⁵⁶ The 32 federal states and the federation each have their own public defence offices.

In the DF, the Public Defence Office is responsible for providing free legal assistance. It is an administrative unit within the Directorate-General of Legal Services, attached to the Legal and Legal Services Department, which in turn is part of the local executive branch.⁵⁷

In 2011, the DF Public Defence Office provided advice and assistance to 108,198 people, 35,150 of which were related to criminal matters. In 2012, it advised 157,538 people and represented 40,492 people. This representation resulted in 537 acquittals, 9,675 convictions, 266 dismissals,⁵⁸ 3,903 other cases⁵⁹ and no alternative resolutions.

In 2012, the results were: 1,387 acquittals, 21,779 convictions, 305 dismissals, 3,599 other cases, and no alternative resolutions.⁶⁰

The DF Public Defence Office has 304 criminal public defenders. The monthly net income of defenders is USD 1,073 for category A attorneys, and USD 930 for category B.⁶¹

In Baja California, the Public Defence Office is part of the General Secretariat of Government of the Executive Branch.⁶² In 2012 the office provided 227,836 instances of assistance to the public. The office gave advice in 91,985 criminal cases and represented 5,044 criminal cases, of which 839 were in Mexicali, the capital of Baja California where the adversarial system is in place. In 2011, these numbers were: 217,195 instances of assistance to the public, advice in 129,611 criminal cases and representation in 4,858, of which 762 were in the adversarial system.

Criminal cases in 2012 ended in 381 convictions, 364 abbreviated proceedings, 17 oral trials, 168 reparation agreements (alternative justice), 17 probations, and 9

⁵⁶ CPEUM, art. 17, para. 7. However, this provision is not completely fulfilled, as prosecutors receive bonuses from federal funds, which increase their salaries.

⁵⁷ Law of the Public Defence office of the Federal District, arts. 2 and 4.

⁵⁸ These are resolutions in which the judge ends the criminal process without a final pronouncement regarding the merits of the case and which have the effect of an acquittal. Criminal and procedural codes contain various articles regarding the dismissal of cases. See Criminal Code for the Federal District, art. 122 and Criminal Procedural Code for the Federal District, arts. 315, 323, 324 y 363 f. III, 660.

⁵⁹ Revocation of a public defender, death of the accused, and/or suspension of the proceeding.

⁶⁰ Information request, file No. 0116000068613 to the Legal and Legal Services Department.

⁶¹ Information request, file No 0116000040213 to the Legal and Legal Services Department. The exchange rate on the day consulted was 12.71 pesos per USD.

⁶² Organic Law of the Public Defence Office in the state of Baja California, art. 4.

ended in forgiveness from the aggrieved party. In 2011, there were 363 convictions, 350 abbreviated proceedings, 13 oral trials, 159 reparation agreements, 11 probations, and 12 cases ended in forgiveness.⁶³ In 2012, 99.8 percent of first instance decisions were convictions.⁶⁴ According to interviews with public defenders, the few acquittals (2 at the time of interviews) were in cases with private representation.

Baja California has 89 public defenders, who earn an average of USD 1,140 monthly.⁶⁵ Eighteen are experts in the adversarial system and are assigned to the Mexicali district.

According to various actors interviewed, the general perception regarding public defence is that it is inefficient, due to the enormous workload, scarce human and financial resources, and the lack of continuous training. In practice, this means proceedings are not completed within the established timelines and that above all else, the defence provided is inadequate.⁶⁶ Carlos Mendoza Mora shares this perception in his cost-benefit analysis of the new criminal justice system at the federal and state level.⁶⁷

Although both defence offices face these problems, the Baja California office seems to have counteracted its negative perception. Local authorities and participants in a focus group with prisoners considered that public defenders are more active and trustworthy in their defence, compared to what occurred in the inquisitorial system.

One of the serious challenges public defence offices face in both systems is their position in public administration, as they are not independent and they are hierarchically below prosecutor's offices within the executive branch. In general, they do not have their own experts or investigators. This is important, because in other federal entities, including at the federal level, public defenders must request the experts that are assigned to the prosecutors.

⁶³ Information request, file No. folio UCT-130912.

⁶⁴ The total number of sentenced individuals was 962. Relevant data from the adversarial system in Mexicali, Baja California, published by the Judiciary, August 2, 2012.

⁶⁵ Information request, file No. 130330. The exchange rate on the day consulted as 12.71 pesos per USD.

⁶⁶ Empirical information obtained from interviews with public defenders, private attorneys, judges and civil society organizations.

⁶⁷ 'In Mexico free, quality, defence services have been more an exception than the rule in the inquisitorial system. Public defence offices have been marginalized, their personnel does not have adequate training or decent salaries, and their workloads are unreasonable. The services they offer defendants are not noteworthy in their quality or efficacy, which is a serious problem'. Mendoza 2012, p. 198.

The United Nations Special Rapporteur on the independence of judges and lawyers recommended the independence of the public defence office from the executive branch in all federal entities, in order to ensure the principle of equality of arms.⁶⁸ Other states currently have good practices regarding independence and equality of arms in public defence offices.⁶⁹

With respect to the practice of law, attorneys must have permission from the Directorate-General of Professions,⁷⁰ a federal body that systematizes the national registry of authorized attorneys. However, the registry does not hold information regarding those that exercise criminal law, such as the number of cases they take each year, their training, or sanctions for misconduct.

Additionally, civil society organizations, law school clinics, and even independent attorneys provide free legal assistance. However, there is no registry of who and which organizations provide such services, or how many cases they attend each year, in spite of the strong impact their litigation has had on developing jurisprudence.⁷¹

3. Rights and their implementation

Human rights standards in the Mexican criminal justice system are derived from the Constitution, international treaties, and decisions of the Supreme Court of Justice (SCJN) and the Inter-American Court of Human Rights.⁷² In 2011, the SCJN estab-

⁶⁸ Naciones Unidas 2011, pp. 2 and 16.

⁶⁹ In the states of Morelos and Nuevo León, public defence offices are decentralized bodies in the executive branch, with independence, including with respect to buildings and expert bodies. In Jalisco, there is an Institute of Forensic Sciences decentralized from the executive, with legal and patrimonial independence. The Institute provides forensic experts technical independence from the judiciary authorities. In Guanajuato, the public defence office has its own body of specialized experts on various topics.

⁷⁰ Authorization is granted via a professional card, which is necessary during the criminal process to accredit oneself as an attorney. See <http://goo.gl/qscZzj>.

⁷¹ For example, the Center of Economic Studies and Teaching (CIDE) in the *Case Acteal*. Available at: <http://goo.gl/EqhGaf>; Miguel Agustí Pro Juárez Human Rights (Centro Prodh) with cases such as *Hugo Sánchez Ramírez*, *Campesinos Ecologistas*, *Mujeres de Atenco*, etc.; and Assistance for Human Rights (Asilegal) in the cases *Zenaida Pastrana y Roberto Pastrana*.

⁷² Hereinafter, each time this chapter refers to a particular human right, it should be understood as part of the list that the Supreme Court of Justice recognizes, whether constitutional or international. Constitutional restrictions on human rights recognized in international treaties, will be addressed below. See *contradicción de tesis 293/2011*. Available at: <http://goo.gl/M4BmPp>.

lished that constitutional restrictions on fundamental rights will prevail over international treaty rights. Thus there is constitutional control over international norms. This catalogue of rights and their restrictions is referred to as the ‘control parameter of constitutional regularity’.⁷³

3.1. *The right to information*

The Constitution establishes that no authority may interfere with anyone without a written order signed by a competent authority. Detention of a person requires a court order that precedes ‘criminal notification’ and sufficient evidence to suspect that the person has been involved in the commission of a crime. This order may only be granted if the crime in question can potentially be sanctioned with a prison sentence.⁷⁴ The written order must contain information such as the reasons and the basis for which an authority is detaining a person.⁷⁵ Such orders may be granted in common cases which precede an investigation. They may also be granted upon the request of a pre-charge detention (*solicitud de arraigo*), which permits the administrative detention of a person for up to 80 days for federal organized crimes.

A recent study on individuals detained in prisons in the Federal District and State of Mexico reported that 93.7 percent of those apprehended in accordance with a detention order were not shown a document accrediting the judicial order against them.⁷⁶

3.1.1. **The right to be informed regarding the nature and cause of arrest or detention and the rights that accrue in this situation**

According to the Constitution, everyone has the right to be informed of the charges against him and of his rights from the moment of detention until he appears before the prosecutor.⁷⁷

The American Convention on Human Rights (ACHR) also states that no one may be deprived of physical liberty, except for the reasons and under the conditions set out in each country’s constitution. It also states that no one shall be subject to arbi-

⁷³ *Ibid.*

⁷⁴ CPEUM, art. 16, 1st, 3rd.

⁷⁵ CPEUM, art. 16, 8th.

⁷⁶ Bergman & Azaola 2013, p. 35.

⁷⁷ CPEUM, art. 20.

trary detention, and when a person is arrested or detained, he must know the reasons for this detention and the charges against him.⁷⁸

In the Federal District, when a person is detained and brought before the prosecutor, the prosecutor must provide him with a 'notice of rights' that lists his rights according to various constitutional and legal provisions regarding due process. The detainee must sign or fingerprint the document as a sign that he understands his rights. Additionally, according to administrative provisions, the areas available to the public ministry in the DF must have posters in visible areas and distribute pamphlets on the notice of rights.⁷⁹

In Baja California, the Secretariat of Public Safety has a similar document, based on a provision of the Criminal Procedural Code,⁸⁰ which requires the registration of police actions. Additionally, prosecutors have a protocol to read detainees their rights. According to interviews with those in pretrial detention in Baja California, one prisoner learned of his rights through a poster he saw in the prosecutor's office while he was detained.

In reality, the presentation and signing of the notice of rights has become a mere ritual, after which there is no practice to determine if the person has actually understood his rights and how to use them. This failure has a serious impact on defence when individuals are detained or brought before authorities. Additionally, the notice of rights is written in legal language that is unintelligible for those who are not attorneys.

The lack of effective information regarding a person's rights at the moment of police detention affects his ability to immediately request an attorney. According to public and private defence attorneys in the Federal District, the police often use the time between detaining an individual and bringing him before the prosecutor to hold him incommunicado, intimidate him, and in the worst cases to inflict cruel, inhuman, degrading treatment or torture on him.⁸¹ The most recent general observations of the UN Committee against Torture confirm this information.⁸²

⁷⁸ CADH, art. 7.2-7.4; PIDCP, art. 9.1-9.2.

⁷⁹ Procuraduría General del Distrito Federal, 2011, p. 5.

⁸⁰ CPPBC, art. 273.

⁸¹ The American Convention prohibits these practices when it states that no one should be subject to cruel, inhuman, or degrading treatment or punishment. Any person deprived of liberty shall be treated with the inherent dignity and respect due to human beings. See ACHR, art. 5.2, and PIDCP, articles 7 and 10.1.

⁸² Comité contra la Tortura, 2012.

Between 2002 and 2009, the number of detainees that complained of humiliating treatment and violence from the police increased and 94 percent of detainees stated that when they were detained they were taken to a police station instead of directly to the prosecutor. Additionally, surveys of detainees in the Federal District and the state of Mexico indicate that 92 percent of detainees were not explained the difference between the accusatorial and trial phase, and 70 percent were not informed of their right to make a phone call.⁸³

In the DF, the impact of not knowing one has the right to an attorney from the time of detention has important consequences on the defence during the AP phase. According to interviews, once a detainee is in the custody of the prosecutor, there are no rules about when exactly, within the 48-hour limit for administrative detention, he may have access to a defence attorney. This is despite the fact that the Constitution says access must be ‘immediate’.

On this right in particular, the Inter-American Court ruled against Mexico in the *Case of Cabrera García & Montiel Flores* for exceeding the limit for detention and not bringing the accused immediately before a judge to determine the legality of their detention.⁸⁴ The Court also established that ‘information about the “motives and reasons” for arrest shall be provided “once it occurs”, as a mechanism for preventing unlawful or arbitrary detentions from the very moment that a person is deprived of his liberty and, in turn, ensures the individual’s right to defense’. This information should be provided in simple language, free from technical terms; and merely mentioning the legal basis for the detention is insufficient.⁸⁵

According to attorneys in the Federal District, the prosecutor ‘decides’ when to grant a detainee access to an attorney. This could be when the attorney arrives, after taking the detainee’s statement, or when the detainee decides to exercise his right to remain silent. This may occur at any point within the 48 hours.

⁸³ Bergman & Azaola 2013, p. 9.

⁸⁴ ‘[The detainees] were not brought before the competent authority within the time established in the American Convention, which clearly states that the detainee must be “promptly” brought before a judge or other officer authorized by law to exercise judicial power. The Court reiterates that in areas with a significant military presence, where members of the military forces take control of internal security, bringing a person without delay before the judicial authorities is even more important in order to minimize any risk of violating a person’s rights’. Court IDH, 26 de octubre de 2010, *Case of Cabrera García & Montiel Flores vs. Mexico*, Series C, No. 220, para. 102.

⁸⁵ *Ibid*, para. 105.

3.1.2. The right of the prosecutor or public ministry to access the investigation file

According to the Constitution, authorities must facilitate access to all available information that the defendant and his attorney request regarding his defence. This means that the defence should have access to the investigation file during detention and until he appears before a judge. With the exception of cases established by law, this right may not be restricted.⁸⁶

In Baja California, the law requires the prosecutor to allow the defence attorney to review the investigation file, and to provide copies of it. If he fails to do so, the attorney may request a judge to suspend the hearing until he has access to the file.⁸⁷

In the Federal District system, practice indicates that the defence's access to the investigation file is limited and subject to the authority of the prosecutor. For example, prosecutors may delay including new evidence and documents to prevent attorneys from examining them in a timely fashion. If attorneys request access, the prosecutor makes them wait hours or even days, which forces attorneys to file a series of petitions to obtain access to the files.

This also happens with obtaining certified copies of the case file, which must be requested in writing, and causes a several-day delay. Often, attorneys must file an *amparo* petition (special constitutional proceedings) in order to obtain access to the file.⁸⁸

In Baja California, this situation is not as unfavorable for public defenders, as they have direct access to the entire case file via an internal system, and can review it at any time to see if new evidence has been added. They also have the possibility of obtaining scanned copies of all the documents. Unfortunately, private attorneys do not have access to this system, which means they must go to the prosecutor's offices and frequently confront bureaucratic obstacles in obtaining access to the case file.⁸⁹

⁸⁶ CPEUM, art. 20, B, VI.

⁸⁷ CPPBC, art. 148.

⁸⁸ Interviews with attorneys. See also, ABA ROLI 2011, p. 27.

⁸⁹ *Idem.*

3.1.3. The right to be informed of the nature and cause of the indictment or accusation

The Constitution states that any accused individual has the right to be informed of the charges against him.⁹⁰ The prosecutor and the judge have the duty to fulfill this right once the person has been brought before them. This right includes the duty to inform the accused of the crime with which he is charged, the time, place, and circumstances of the act, information that establishes that an act the law defines as criminal has occurred, and finally that it is probable that the accused committed it or participated in its commission. The process must continue for crimes mentioned in the formal Constitutional act.⁹¹ Legislation in the Federal District⁹² and Baja California⁹³ also protects this right.

Nonetheless, the interview with detainees in Baja California brought to light an interesting fact. Approximately 50 percent of them state that their attorney did not explain to them what would happen in their hearings. At the federal level, results from the aforementioned detainee survey indicate that 43.7 percent did not have an attorney when they made a statement to the prosecutor. 44 percent stated that their attorney did not explain what was happening during the hearings; 51 percent did not receive advice from their attorneys prior to the hearing, and 39 percent were not explained the results of the process.⁹⁴

Thus, although the indictment is a merely formal stage during the criminal process that is generally undertaken in a timely and appropriate manner, the lack of information attorneys provide their clients violates their right to be informed of the nature and causes of the charges.

3.2. The right to defend oneself and to legal assistance

3.2.1. The right to legal assistance during questioning

Constitutionally, accused individuals have the right to an attorney at all hearings and procedural acts carried out during the criminal process.⁹⁵ If the attorney was not

⁹⁰ CPEUM, art. 20, B, III. Article 14.3 a) of the ICCPR provides that every person accused of a crime has the right to be informed of the nature and causes of the accusation against him.

⁹¹ CPEUM, art. 19.

⁹² CPPDF, art. 297.

⁹³ CPPBC, art. 281.

⁹⁴ Centro de Investigación y Docencia Económicas 2012, p. 9.

⁹⁵ CPEUM, art. 20, B, VIII.

present during a proceeding, it loses evidentiary value. The police may not question detainees or suspects, as the only actor with the authority to question them is the prosecutor.

The criminal code currently in force in the DF indicates that the accused must have the assistance of his attorney or a trusted person during the preparatory statements. Baja California legislation states that from detention until the execution of the sanction, an individual has the right to a technical defence. However, in response to a direct question on the issue, 50 percent of a group of individuals in pretrial detention in Baja California answered that they were not informed of their right to contact an attorney during their detention. According to one study, 70 percent of those convicted said that neither an attorney nor trusted person was present during their initial statement.⁹⁶

3.2.2. The right to speak privately with one's attorney

The Constitution establishes that accused individuals have the right to an adequate defence, led by an attorney of their choosing, from the moment they are detained and appear in the court proceeding. Additionally, the attorney has the obligation to appear as many times as his client needs.⁹⁷ All private communications between the attorney and his client are confidential and inviolable.⁹⁸ The ACHR expressly establishes that accused individuals have the right to communicate freely and privately with their attorney.⁹⁹

The Baja California Code of Criminal Procedure expressly provides that the accused shall have free and private communication with his attorney.¹⁰⁰ It is worth noting that the legislation regarding the exercise of law in Baja California,¹⁰¹ as well as the Federal District¹⁰² establishes the attorney's obligation to protect attorney-client privilege.

⁹⁶ Bergman 2007, p. 85.

⁹⁷ CPEUM, art. 20, B, VIII.

⁹⁸ CPEUM, art. 16, para. 12.

⁹⁹ CADH, art. 8.2. d). Additionally, General Comment No. 32 of the International Covenant on Civil and Political Rights, para 34 states, '[c]ounsel should be able to meet their clients in private and to communicate with the accused in conditions that fully respect the confidentiality of their communications'.

¹⁰⁰ CPPBC, art. 7.

¹⁰¹ Law on the Exercise of the Legal Profession for the State of Baja California, art. 23, III.

¹⁰² Implementing legislation of article 5 of the Constitution regarding the exercise of law in the DF, art. 36.

In the questionnaire filled out by indicted individuals in pretrial detention in Baja California, some individuals expressed that when their attorney visited, they were near a guard or other authority figure. A recent study corroborated this finding, determining that private communication between clients and defendants is difficult. Even when access to detained clients is generally permitted, it is still common for conversations to be overheard, which means that to ensure privacy, attorneys must often offer small bribes to prison guards.¹⁰³

Based on various interviews with attorneys in the DF and Baja California, it appears that it is not difficult to speak privately with clients when they are in local detention centers, either before the prosecutor or in prisons. All attorneys mentioned the existence of small booths used for such conversations. The main problem is the bureaucracy attorney must pass through to use them.

Attorneys who represent those accused of federal crimes mentioned that this right is not respected in all federal detention centers, as access is provided through a glass that makes hearing difficult, and sometimes necessitates yelling in order to be heard. They also stated that due to security reasons, attorneys may not give any documents directly to the detainee but must send their documents through the detention center. This destroys any expectation of privacy and confidentiality of attorney-client communications.

In the DF, this right is affected during hearings. The small cage-like room for defendants (referred to in Spanish as *rejilla*)¹⁰⁴ and the noise of the courtrooms prevent attorneys from having confidential communications with their clients.

3.2.3. The right to a technical defence

The Constitution states that all accused have the right to an adequate defence led by an attorney, who the client may choose freely, including while detained.¹⁰⁵ If he does not appoint an attorney, the State must provide a public defender.¹⁰⁶ The 2008 constitutional reform established a new standard of technical defence, which may be considered even more favorable than the American Convention as it requires an attorney

¹⁰³ ABA ROLI 2011, p. 23.

¹⁰⁴ On this topic, see section '3.4.5. The right to be tried in a public hearing by an independent and impartial court'.

¹⁰⁵ National legislation should avoid any possibility that a person may defend himself in a criminal trial without the assistance of an attorney. Human Rights Committee 2007, para. 37.

¹⁰⁶ CPEUM, art. 20, B, VIII.

to carry out the defence.¹⁰⁷ On the topic, the Inter-American Court considers that ‘the right to defence must necessarily be exercised from the moment a person is accused of perpetrating or participating in an unlawful action and only ends when the proceeding concludes, including, where applicable, the enforcement phase’.¹⁰⁸

As mentioned in the beginning of this chapter, the 2008 constitutional reform created a differentiated due process regime for the inquisitorial and adversarial systems. According to the text for states that have not been reformed, criminal defence may be exercised by an attorney, the defendant, or a trusted adviser. However, recently the Supreme Court determined that the right to an adequate defence must include the broadest protection possible, meaning that an attorney must exercise the defence, regardless of the constitutional text. Therefore judges may not consider proceedings carried out in the absence of an attorney in order to determine the responsibility of the accused.¹⁰⁹

The Federal District has public defenders attached to the prosecutor’s office. When a person is detained *in flagrante*, he must immediately be brought to the prosecutor. The prosecutor notifies the public defender so that the latter may assist the detained person. In practice, notification takes place a while after the person arrives at the prosecutor’s office. In such cases, the detainee does not have the opportunity to choose his defence attorney, as it will be a different person from the one that will represent him during the criminal process. This is because when the person is brought before a judge, he is appointed a public defender who is attached to the court where his case will be tried. If the decision in the first instance is a conviction and the defendant appeals, he will again be appointed a different public defender attached to the appeals court.

In Baja California the process is different, as there is an institutional agreement between the Chief Prosecutor and the Public Defence Office. Immediately after a person is brought before the prosecutor, the Public Defence Office is notified via email and/or telephone. From this point on, public defenders have access to the electronic investigation file of the detainee. When private attorneys are involved, the prosecutor notifies him by telephone, but to have access to the investigation file, he must go directly to the prosecutor’s offices and jump through several bureaucratic hoops.

¹⁰⁷ ACHR, art. 8.2. d) ‘The right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing’. The ICCPR guarantees this right in article 14.3 d).

¹⁰⁸ Inter-American Court, *Case of Cabrera García & Montiel Flores vs. México*, 2010, para. 154.

¹⁰⁹ Transcribed version of the ordinary public sessions of the SCJN plenary, held on June 3, 4, 6, and 10, 2013. Available at: <http://goo.gl/EGyzuG>.

Public and private defence attorneys in the DF state that during the first hours of detention it is difficult for detainees to be able to call their family members or an attorney. Often the detainee is allowed to make a phone call only after the prosecutor obtains sufficient information to bring the case before a judge. Additionally, attorneys note that the lapse of time during which the person is held incommunicado is of vital importance to develop a defence strategy.

The experience is different in Baja California, as public defenders affirm that detainees are allowed to make phone calls immediately. In their opinion, holding a person incommunicado is rare thanks to the interconnected information system with the prosecutor that immediately informs the Public Defence Office. However, in the same state, only 40 percent of those in pretrial detention stated that the prosecutor allowed them to make a phone call, and 75 percent mentioned that the first time they saw an attorney was during their first hearing before a judge.

3.2.4. The right to an adequate defence during the criminal enforcement stage

The 2008 constitutional reform included a new regime of criminal enforcement, which is now in force throughout the country. It created the figure of the 'enforcement judge' and a penitentiary system based on respect for human rights.¹¹⁰ Adequate defence is no exception.

As a result of this change, each state must issue new laws. However, at the time of writing a single national law that would apply to the entire country is being discussed. There is consensus that this would guarantee the right to defence during this stage of the criminal process.

According to a judge from the adversarial system, in the enforcement stage defence attorneys should 'seek justice', meaning they should determine the exact number of days the person will be imprisoned, the exact day the counting begins, the rationality of the sanction, and provide the judge with submissions to ensure the fulfilment of the sentence is specific to the defendant. Additionally, during the enforcement stage, the focus should be on debating what, if any, benefits related to the sanction the person qualifies for.

The judge also indicated that the attorney is responsible for knowing when alternative sanctions become available to his client. This requires periodic contact with the prisoner and a visit to ensure that authorities are respecting his rights within prison.

¹¹⁰ CPEUM, art. 18.

Where necessary, it also requires the attorney to request an immediate hearing before an enforcement judge to guarantee his client's rights. Thus, during the enforcement stage the attorney must be proactive, dynamic and take initiative.

Public and private attorneys have litigated this issue before enforcement judges in both the adversarial and inquisitorial systems since 2011. For example, in Baja California, the Public Defence Office attended to 24 enforcement phase issues in 2011 and 178 in 2012. In the DF, any person with a conviction must have specialized counsel from a private attorney or public defender during the enforcement stage.¹¹¹ We could not find statistical information on the number of representations by public defenders during this stage in the DF.

In the DF there are two specialized enforcement judges.¹¹² According to testimony from experts, the number of prisoners in the Federal District is so high that they cannot provide effective rights protection for them.¹¹³ They also mentioned that, in theory, enforcement judges are also charged with resolving conflicts between the penitentiary authority and prisoners. The normative regulation on the topic eliminated this power of DF enforcement judges.

Moreover, prisons still undertake 'personality studies', even though the constitutional reform regarding prisons should have eliminated this practice. Academics commenting on these studies in the DF reason that it is regrettable that prisoners are still considered to need therapy to 'morally' change them. Within detention centers, there are still inter-disciplinary committees that treat convicts with programs designed to readapt the person to society, as though they have some type of psychosocial disability.¹¹⁴

3.3. Rights and guarantees tied to the effectiveness of defence

3.3.1. The right to offer evidence and witnesses

According to the Constitution, the defendant and his attorney may provide evidence they deem necessary for the investigation, and they must have the time and facilities to

¹¹¹ Law of Execution of Criminal Sanctions and Reinstatement into Society for the Federal District, arts. 3, II and 5, I.

¹¹² Baja California does not have special enforcement judges. Ordinary criminal judges perform such functions.

¹¹³ Prisons in the Federal District are at 184% capacity, the second highest in the country. See, México Evalúa 2013, p. 33.

¹¹⁴ See Sarre 2011.

ensure their witnesses appear at the proceeding.¹¹⁵ Additionally, the ACHR recognizes the right of the defence to question witnesses and offer evidence to clarify the facts.¹¹⁶

The right to a technical defence, according to the Inter-American Court, does not only include the right to an attorney, but also that this attorney acts diligently in order to protect the rights of the person he is defending.¹¹⁷ Thus, the attorney must be proactive during the process and offer evidence and witnesses that help clarify the facts.

In the criminal process in the federal district, the accused has the right to offer evidence and witnesses that he deems necessary. The judge has the power to help the accused in the production of evidence and the accused may renounce established deadlines when he considers it necessary to exercise his right to defence.¹¹⁸ In Baja California, the law guarantees the parties the right to procedural equality to support the accusation or the defence. Thus, the prosecutor and defence have the same right to offer evidence and witnesses in equal conditions.¹¹⁹

According to interviews with attorneys in the DF, there is no rule regarding access to the documents the prosecutor will use in the AP. Therefore, during the administrative phase it is very difficult to present evidence to contradict the power of the prosecutor.

The lack of rules regarding the detainee's access to AP documents prevents attorneys from learning the facts in a timely manner and preparing a defence strategy. According to interviewed attorneys, an AP that does not allow the defence to offer evidence, in addition to the rule that this AP has full evidentiary value, and the lack of strict judicial control over the prosecutor's actions, in practice leads to a pre-conviction of those they are defending.

In Baja California, judicial control of the investigation stage under the system that has hearings based on the principles of publicity and contradiction, means that the defence have unrestricted exercise of this right.

¹¹⁵ CPEUM, art. 20, B, IV.

¹¹⁶ CADH, art. 8.2. f). Similarly, ICCPR, art. 14.3. e).

¹¹⁷ Corte IDH, *Case of Cabrera García & Montiel Flores vs. Mexico*, 2010, para. 155.

¹¹⁸ Criminal Code for the Federal District, art. 314.

¹¹⁹ CPPBC, art. 13.

3.3.2. The right to sufficient time and possibilities to prepare one's defence

The Constitution states that the accused has the right to the information he requests, with the opportunity to prepare his defence.¹²⁰ Baja California also protects this right.¹²¹ Additionally, the ACHR states that the accused must have sufficient time and resources¹²² to prepare his defence.¹²³

If attorneys consider that the time to prepare a defence is insufficient, they are responsible for requesting the judge to grant more time.¹²⁴ This right is only expressly guaranteed in the adversarial system, as in the DF attorneys may never request the suspension of a hearing to prepare the defence under the DF Constitution or procedural legislation. However, in some cases the Supreme Court has interpreted that the right to adequate defence includes the right for the person to have sufficient time to prepare his defence, offer evidence, and argue in the hearing.¹²⁵ Several attorneys in the DF indicated that in practice it is hard to have enough time to prepare a defence, as the prosecutor always creates obstacles for the defence attorney to review information or evidence that they have collected.

3.3.3. Equality of arms in the production and control of evidence and the development of public, adversarial hearings

The 2008 constitutional reform expressly prohibits judges from discussing issues related to cases they are hearing with one party to the proceeding in the absence of the other.¹²⁶

One of the fundamental characteristics of the traditional system is the prosecutor's power within the criminal process. The prosecutor has public trust (*fe pública*)

¹²⁰ CPEUM, art. 20, B, VI.

¹²¹ CPPBC, arts. 356 y 368.

¹²² Adequate resources must include access to documents and other evidence; which must include all the materials the prosecutor plans to present at trial or which favor the defence. The latter includes not only those that establish the defendant's innocence, but others that are also useful to the defence. See Human Rights Committee 2007, para. 33, p. 13.

¹²³ ACHR, art. 8.2. b) and ICCPR, art. 14.3 b).

¹²⁴ Comité de Derechos Humanos 2007, p. 12.

¹²⁵ Suprema Corte de Justicia de la Nación, case no. 2000976, tesis aislada, décima época, T.C.C., S.J.F. and Gazette, book IX, June 2012, t. 2, p. 865 and case no. 2003152, tesis aislada, décima época, T.C.C., S.J.F. and Gazette, book XVIII, March, 2013, t. 3, p. 2115.

¹²⁶ CPEUM, art. 20, A, f. VI.

and his actions during the preliminary investigation phase hold full evidentiary value. The adversarial system restores procedural balance, expressing the need to for equality between the parties as a fundamental principle.

As mentioned in previous sections, the lack of timely access to prosecution documents during administrative detention in the Federal District is one of the factors that most affects this right in later procedural stages.

Attorneys in the DF reference the lack of evidentiary standards in legislation and practice. They say that occasionally judges place more importance on circumstantial evidence without considering scientific evidence. It is also common for a person to be convicted with only the testimony of one person or expert against him, without other evidence to prove his guilt. This problem worsens due to the lack of expert services or investigators for public defenders, or with the economic incapacity of their clients to afford independent consultants.

In Baja California, judges are responsible for ensuring equality of arms, and must resolve obstacles that prevent equality of arms.¹²⁷ Additionally, legislation prohibits judges from discussing issues related to the proceeding without the presence of both parties. This represents a significant change from the traditional system, in which it is common for public defenders to approach judges with so-called ‘arguments in the ear’, without the presence of the prosecutor, and vice versa.¹²⁸ This prohibition does seem to be applied in practice in the adversarial system, buttressed by the principles of publicity and contradiction.

In the *Acteal* case, the Supreme Court of Justice pronounced – among many other rights regarding equality of arms and adequate defence – about the need to deliver substantiated, reasoned decisions. Among the jurisprudential criteria established are those that permit the defense to request the ‘invalidity of illicit evidence as a protection that the accused has throughout the process, and that this protection can be claimed in court, based on respect for the essential formalities of the proceeding, the right to impartial judges’.¹²⁹

Additionally, the Court determined ‘that it is unacceptable for similar types of evidence offered by both parties to have a different evidentiary value assigned to it

¹²⁷ CPPBC, art. 13.

¹²⁸ ABA ROLI 2011, p. 28.

¹²⁹ Suprema Corte de Justicia de la Nación, case no. 160509, décima época, primera sala, S.J.F. and its Gazette, book III, December, 2011, vol. 3, p. 2057.

based on which party offers it, as this violates the guarantees of an impartial trial, procedural equity, and substantiation of well-reasoned decisions'.¹³⁰

3.3.4 The right to a trusted interpreter and the translation of documents and evidence

The catalogue of constitutional rights of the accused includes the right of indigenous peoples to a translator as part of the right to be tried by the authorized judge.¹³¹ The normative basis for this right is Article 2 of the Constitution, in accordance with the International Labor Organization (ILO) Convention 169, and the principle is applicable to any person who speaks a language other than Spanish.¹³²

In our cultural context, this right is relevant to indigenous peoples whose first language is not Spanish, as there are around 364 linguistic variations that should be treated as languages in the administration of justice.¹³³

In recent years, there has been a serious effort to guarantee and protect the rights of indigenous peoples in light of international guidelines, through the ratification of ILO Convention 169, the UNESCO Universal Declaration on Cultural Diversity, and the UN Declaration on the Rights of Indigenous Peoples.¹³⁴ The Constitution guarantees indigenous people the right to assistance of interpreters at all times, and to access defence attorneys with knowledge of their language and culture. Additionally, authorities must consider the indigenous person's customs and culture within the criminal process.¹³⁵

¹³⁰ Suprema Corte de Justicia de la Nación, case no. 160513, décima época, primera sala, S.J.F. and its Gazette, book III, December, 2011, vol. 3, p. 2103.

¹³¹ Suprema Corte de Justicia de la Nación, case no 2004542, décima época, primera sala, S.J.F. and its Gazette, book XXIV, September, 2013, vol. 1, p. 808.

¹³² Suprema Corte de Justicia de la Nación, isolated ruling no. 2003544, décima época, primera sala, S.J.F. and its Gazette, book XX, May, 2013, vol. 1, p. 535. En this case, the Court explains the importance of the person having not only consular assistance, but also an interpreter in order to guarantee the right to adequate defense.

¹³³ See, <http://goo.gl/BgkQkO>.

¹³⁴ Ramírez 2012, p. 20.

¹³⁵ CPEUM, art. 2.A.VIII. Article 8.2(a) strengthens this right by recognizing that all defendants have the right to be assisted free of charge by a translator or interpreter, if they do not understand the language of the court. Similarly, article 14.3(f) of the ICCPR establishes that '[i]f the accused does not speak the language in which the proceedings are held, but is represented by a counsel who is familiar with the language, it may be sufficient that the relevant documents in the case file are made available to counsel'. Human Rights Committee, 2007, para. 33.

At the national level, the General Law of Linguistic Rights of Indigenous Peoples establishes the reach of the constitutional text on the topic, and creates the National Institute of Indigenous Languages, whose purpose is to promote, preserve, and develop indigenous languages. However, in the administration of justice there are no professional interpreters.¹³⁶

Recently, the SCJN published a protocol for judges who work on cases involving indigenous peoples and communities, which is a useful tool to ensure criminal justice system actors guarantee indigenous peoples' rights. One of the most important provisions establishes that every indigenous person must have access to an interpreter from the moment of detention. Additionally, in order to protect the right to an adequate defence, it recommends judges to request expert interpreters or cultural experts to ensure that the indigenous person understands the proceeding and can make himself understood during it. This interpreter or translator must be provided free of charge. All indigenous people have the right to speak in their own language in court.¹³⁷

In spite of these norms, a 2007 study by the Mexican Office of the UN High Commissioner for Human Rights reported that only 16 percent of detained indigenous people interviewed had access to a translator or interpreter at any point during the proceeding.¹³⁸

In Baja California, authorities are required to ensure that necessary measures are taken so that all people understand what is happening during the criminal process, although there is an express provision that indicates that all court actions must be carried out in Spanish. It also states that any document or recording in a language other than Spanish must be translated. Translation services are free and provided by the State.¹³⁹

Attorneys with experience defending indigenous clients recount that during criminal cases there is a systematic violation of the right to an interpreter. In practice, attorneys state that judges take on the role of linguistic expert, asking detainees or defendants if they understand Spanish, and without obtaining technical opinions, assume that if the person answers yes, that is sufficient to continue with the proceeding.

A generalized complaint among indigenous people and communities is the lack of qualified translators and interpreters, and how such professionals are compensated.

¹³⁶ Ramírez 2012, p. 60.

¹³⁷ Suprema Corte de Justicia de la Nación, 2013, pp. 16, 33 y 34.

¹³⁸ Centro Profesional Indígena de Asesoría, Defensa y Traducción 2010, p. 8.

¹³⁹ CPPBC, arts. 23, 66, 69, II, y 122, V.

Additionally, it is difficult to provide translators for all the existing languages and linguistic variations.¹⁴⁰

3.4. *Generic rights or judicial guarantees, related to a fair trial*

3.4.1. **The right to be presumed innocent**

In accordance with the set of constitutional rights, any person accused of a crime has the right to be presumed innocent until he is found guilty in a sentence issued by a judge.¹⁴¹ The constitutional text prior to the 2008 reform, which is still in force, states that the inquisitorial system does not expressly establish the right of the accused to be presumed innocent as the reformed text does, although SCJN jurisprudence recognizes such a right.¹⁴²

The Constitution establishes two important restrictions regarding the presumption of innocence, which prevail over treaty rights. One is that pretrial detention is obligatory for certain types of crimes that have a high social impact,¹⁴³ and the second imposes *arraigo* that constitutes a deprivation of liberty without charges for up to 80 days for crimes related to organized crime, with judicial authorization.¹⁴⁴

These two provisions clearly violate international standards. For example, the UN Human Rights Committee, in its final observations to Argentina, stated that there should not be any offences for which pre-trial detention is obligatory.¹⁴⁵ Additionally, the Inter-American Court of Human Rights in the *Case of Suárez Rosero vs. Ecuador* established that pretrial detention is a precautionary measure, rather than a punitive one.¹⁴⁶

¹⁴⁰ Ramírez 2012, p. 42.

¹⁴¹ CPEUM, art. 20, B, I, ACHR, art. 8.2 and ICCPR, art. 14.2.

¹⁴² Suprema Corte de Justicia de la Nación, case no. 172433, tesis aislada, novena época, segunda Sala, S.J.F. and its Gazette, vol. XXV, May, 2007, p. 1186.

¹⁴³ CPEUM, art. 19.

¹⁴⁴ CPEUM, art. 16.

¹⁴⁵ Human Rights Committee 2000, para. 10.

¹⁴⁶ Corte IDH, November 12, 1997, *Case of Suárez Rosero vs. Ecuador*, Series C, No. 35, para. 77. '[T]he length of pre-trial detention should never be taken as an indication of guilt and its degree'. Comité de Derechos Humanos 2007, para. 30, p. 11.

The presumption of innocence as a rule requires that all those subject to the criminal process are treated as innocent both by the system's actors (with the exception of the prosecutor) and by third parties.¹⁴⁷

In general, the attitude toward detainees and defendants is a presumption of guilt. The authorities, as well as the media and the public, take it for granted that the detainee is guilty.¹⁴⁸ The term 'alleged criminal' is the most common term used to refer to those accused of a crime.

On March 26, 2012, the Human Rights Committee of the DF issued Recommendation 03/2012, regarding the presentation in the media of those 'allegedly responsible' for crimes.¹⁴⁹ To date, it has not been complied with. According to the Committee's investigation in 92 cases, several people were presented as tied to crimes that were different than those for which they were originally indicted, which were generally less serious, and others were acquitted.

In response to Recommendation 03/2012, the Attorney General issued agreement A/003/2012, which reformed the *Protocol for the presentation of persons brought before the prosecutor to the media*.¹⁵⁰ However, this modification did not change the most important practices that the Human Rights Commission of the Federal District denounced. Finally, after a hearing before the Inter-American Commission on Human Rights in 2013, which the Committee and civil society organizations requested,¹⁵¹ the prosecutor's office of the Federal district published in its official gazette the Protocol for the presentation of persons brought before the prosecutor to the media. According to this document, presentation shall be undertaken through a bulletin, which must include the photo of the detainee and a clarification that he is a 'likely suspect', as well as a summary of the facts and characteristics of the crime that he presumably committed.¹⁵²

¹⁴⁷ In the *Case Gridin vs. Russia*, the Human Rights Committee stated that authorities' statements regarding the guilt of the person were widely spread by media, and considered that the authorities did not act prudently to protect the presumption of innocence of the person accused of the crime. General Comment No. 32 of the ICCPR, in paragraph 30, indicates that 'the media should avoid news coverage undermining the presumption of innocence'.

¹⁴⁸ See, Lara 2011.

¹⁴⁹ Comisión de Derechos Humanos del Distrito Federal 2012.

¹⁵⁰ Procuraduría General de Justicia del Distrito Federal 2012.

¹⁵¹ See, <http://goo.gl/J14n6j>.

¹⁵² Procuraduría General de Justicia del Distrito Federal 2013.

Recently the SCJN ruled in a paradigmatic case regarding the presumption of innocence, *Case of Florence Cassez*, in which it determined that the prior exhibition of the suspect to the media as an ‘alleged criminal’ had a corrupting effect on the evidence, as the suspect had not yet been brought before a judge and had already been publically judged in the media.¹⁵³

The mixed/inquisitorial system has always been deficient regarding the presumption of innocence. For example, a comparative study of state legislation found that none of the legislation in states with the traditional justice system expressly recognized the right to a presumption of innocence, nor that the burden of proof falls on the prosecutor rather than the defendant. However, in state legislation where the adversarial system has been implemented, this right was expressly recognized, as was the fact that the burden of proof falls on the prosecutors.¹⁵⁴

3.4.2. The right to testify or remain silent

The catalogue of constitutional rights recognizes that all people have the right to testify or remain silent. Suspects must be informed of this right, and their silence will not be used against them, from the moment of detention.¹⁵⁵

A 2009 study on the prison population in DF and the state of Mexico found that 72 percent of detainees were not informed of their right to remain silent.¹⁵⁶ Interviews with experts in the Federal District indicate that the general practice during the AP phase is to exercise the right to remain silent during the person’s statement to the public ministry. However, according to some interviews, if a person decides to testify during the preparatory statement based on the advice of his attorney, some judges may believe that he was advised to not testify the first time before the prosecutor. Thus, occasionally, silence during the first opportunity to testify, *de facto*, has a negative effect on the accused.

In the Federal District, one of the serious defects related to this right are confessions obtained through torture, mistreatment, or intimidation. As mentioned above,

¹⁵³ Suprema Corte de Justicia de la Nación, primera sala, amparo directo en revisión 517/2011, pp. 130 and 136. Available at: <http://goo.gl/dxWtfD>.

¹⁵⁴ Mendoza 2012, p. 170.

¹⁵⁵ CPEUM, art. 20, B, II.

¹⁵⁶ Bergman & Azaola 2013, p. 35.

these practices are not exceptional.¹⁵⁷ Thus, at the time of the statement before the prosecutor, the person is in an extremely vulnerable position. This impedes him from following his attorney's advice to remain silent, as his attorney will leave and the defendant will remain in detention. It is difficult to challenge testimony that incriminates third parties or confessions based on the argument that they were coerced, as the prosecutor will argue that testimony was obtained in the presence of the attorney.

This vicious cycle is strengthened by the criteria of the National Judiciary regarding the principle of immediacy, which translates into granting higher evidentiary value to the first declaration.¹⁵⁸ This is in spite of jurisprudential criteria that prohibits granting probative value to evidence that was obtained illegally or in violation of fundamental rights, as doing so would overturn the presumption of innocence,¹⁵⁹ and in spite of the American Convention, which states that a criminal confession is only valid if obtained without any form of coercion.¹⁶⁰ Judges that grant evidentiary

¹⁵⁷ In 2011, the CDHDF received 1,019 complaints for the violation of the right to personal integrity. According to the annual report of the institution, 64.2 percent of the total complaints filed before the commission involve a probable violation of this right. Although not all of the 1,019 complaints necessarily correspond to torture, the perception of citizens that they were subjected to torture is very high. The authorities most commonly accused of torture are the Secretary of Government (responsible for the penitentiary system), the Secretary of Public Safety and the Attorney General. According to the CDHDF report, the Commission has identified systematic practices of leaving individuals incommunicado in detention, a lack of supervision and control during the detentions and before a person is brought before the prosecutor. The identified practices include, injury, asphyxiation, and humiliation. See Informe CNDH 2011, pp. 189-192. Also, Human Rights Watch (HRW) reports that in Mexico, torture is a serious problem. It indicates that torture is most frequently used between the time of detention and when the person is brought before the prosecutor. Some of the common practices include hitting, asphyxiation with plastic bags, electric shocks, and death threats. The HRW report indicates that one of the factors that contributes to the perpetuation of such practices is judicial acceptance of confessions obtained through torture and other degrading treatment, as well as the 'complicity of public defenders responsible for ensuring the protection of their clients' rights'. Another failing is authorities' failure to investigate and prosecute the majority of torture cases, including the 'failure to examine medical reports designed to evaluate the physical and psychological condition of a potential torture victim'. See, World Report 2012.

¹⁵⁸ Suprema Corte de Justicia de la Nación, case no. 201617, novena época, T.C.C., S.J.F. and its gazette, vol. IV, August, 1996, p. 576.

¹⁵⁹ Suprema Corte de Justicia de la Nación, case no. 160500, décima época, primera sala, S.J.F. and its gazette, book III, December, 2011, vol. 3, p. 2058.

¹⁶⁰ ACHR, art. 8.2. g) and 8.3. It must be mentioned that the ACHR and ICCPR in article 14.3. g) prohibit States from requiring defendants to incriminate themselves. Paragraph 41 of General Comment 32 of the ICCPR, states that domestic law must establish that statements or confes-

value to coerced confessions violate this right. Additionally, the Inter-American Court has stated that when an accused claims that his confession or statement was obtained through coercion or torture, the burden of proof falls on the authority to prove that the confession was voluntary.¹⁶¹

According to attorneys who work in the Federal District criminal justice system, it is very difficult to contradict such confessions even if there is evidence of torture. When there is evidence of torture, obtained through the application of the Istanbul Protocol or through the recommendations of human rights commissions, this enters the case file only as circumstantial evidence ‘*indicios*’.

Experts have expressed that in the adversarial justice system it is also possible for judges to sustain a coerced confession, although the probability of this happening has diminished due to the prohibition on prosecutorial interrogation of suspects in the absence of the judge.

According to the questionnaire of detainees in Baja California, 80 percent responded that during their detention they were informed that they had the right to remain silent or to testify, and they had not received any mistreatment or excessive physical force.

3.4.3. The right to remain free during the process, while the trial has not concluded

The catalogue of constitutional rights state that an accused person has the right to remain free, provided that the process continues. This freedom may be conditioned on the fulfillment of certain precautionary measures that ensure his appearance at trial.¹⁶²

sions obtained through methods that contravene article 7 of the Covenant shall be excluded from evidence, unless they are used to prove that there was torture or other treatment prohibited by this provision.

¹⁶¹ Corte IDH, *Case of Cabrera García & Montiel Flores vs. Mexico*, 2010, para. 136.

¹⁶² Article 19 of the CPEUM states: ‘The prosecutor may only request a judge to order pretrial detention when other measures are insufficient to guarantee that the accused will appear at trial, the development of the investigation, the protection of the victim, witnesses, or the community, or when the accused is being processed or has been convicted for the commission of another crime’. The Inter-American Court has also stated in several cases that the State should order the least restrictive measures to ensure the person will appear at trial before ordering pretrial detention. See, Inter-American Court of Human Rights, November 17, 2009, *Case of Barreto Leiva vs. Venezuela*, Series C, No. 106, para. 120, and Inter-American of Human Rights, October 30, 2008, *Case of Bayarri vs. Argentina*, Series C, No. 187, para. 63. See also, ACHR, art. 7.5, and ICCPR, art. 9.3.

Additionally, a recent report from the Inter-American Commission on Human Rights cautioned that the mere fact that a person confronts a criminal process while in pre-trial detention is in itself a procedural disadvantage, because it makes it more difficult to prepare and present an effective criminal defence.¹⁶³

In the Federal District, all accused people have the right during the investigation and trial stage to be granted provisional release on bond, as soon as he requests it and complies with the requirements established by law. These requirements include providing surety for the amount established, reparation and economic sanctions, which guarantee fulfillment of any obligations that come out from the proceeding. Most importantly, the accused cannot get provisional release if they have been charged with a non-bailable offense.¹⁶⁴ The bond may be paid in cash or guaranteed via mortgage, pledge, personal recognizance, or trust fund.¹⁶⁵

When a person is released on bail, the person is required to appear before the prosecutor or judge as often as required, notify any change in address, and sign a weekly register before the relevant authority. Revocation of this benefit occurs in cases in which the person fails to meet one of his obligations, when he disobeys a judicial order, or does not pay a portion of the bail, if paid in installments. He will also lose this benefit if he is charged with a new intentional crime that merits prison time, threatens a victim or witness, or if during the instruction hearing it appears that the crime is particularly serious, and when the sanction issued in the first or second instance is carried out.¹⁶⁶

The reformed constitutional text applicable to the adversarial system, provides that pretrial detention is an exceptional measure or last resort to counteract procedural risks. However, the text immediately contradicts itself by creating exceptions for cases in which the accused has previous convictions for crimes, or is subject to another criminal proceeding. An additional contradiction is the constitutional list of non-bailable offenses.¹⁶⁷

Recently, the Citizen Observatory of the Justice System, through observation exercises, counted the type of judicial decisions taken with respect to precautionary measures applicable to defendants in proceedings in Mexicali. The Observatory iden-

¹⁶³ Comision Interamericana de Derechos Humanos 2013, para. 194.

¹⁶⁴ CPPDF, art. 556.

¹⁶⁵ CPPDF, art. 562.

¹⁶⁶ CPPDF, art. 568.

¹⁶⁷ CPEUM, art. 19.2.

tified that in 50 percent of cases, pretrial detention won out over other measures, such as house arrest or ankle tracking, a finding that strengthens our opinion that pretrial detention is overused.¹⁶⁸

Additionally, as mentioned in the section related to the presumption of innocence, the Constitution provides for *arraigo* as a constitutional precautionary measure in federal cases of organized crime. *Arraigo* is a restriction on personal liberty by judicial order, at the request of the prosecutor, so that the person is detained in a certain place for up to 80 days. Its purpose is to ensure the realization of the criminal process and the success of the investigation, the protection of people or legal assets, and/or to limit a demonstrable risk that the accused will elude justice.¹⁶⁹

At state level, *arraigo* is subject to the provisional article of the Federal Constitution, which authorizes the prosecutor to request the judge to order *arraigo* for up to 40 days for people accused of serious crimes. This provision will be in force until states implement the adversarial system. Recently, in an action challenging its constitutionality, the SCJN determined that states may not use this constitutional provision, which is only available to the federal government in cases of organized crime.¹⁷⁰

Thus, both federal *arraigo* and excessive pretrial detention constitute constitutional restrictions on fundamental rights that, for now, cannot be overcome with the application of the *pro hominem* principle. An individual subject to these measures will have his right to remain free during the criminal process violated.

3.4.4. The right to be tried within a reasonable timeline

The Constitution establishes two maximum timelines for trials: the first is four months for crimes whose punishment does not exceed two years in prison, and the second is one year for crimes with longer sanctions. Additionally, there is a time limit for pretrial detention, which may not exceed two years. All of these deadlines have exceptions for the exercise of the accused's right to defence.¹⁷¹ The ACHR also recognizes the right to be tried within a reasonable period.¹⁷²

¹⁶⁸ Observatorio Ciudadano del Sistema de Justicia Penal 2014.

¹⁶⁹ CPEUM, art. 16, para. 8.

¹⁷⁰ Suprema Corte de Justicia de la Nación, Acción de inconstitucionalidad 29/2012. Available at: <http://goo.gl/Pj1KW0>.

¹⁷¹ CPEUM, art. 20, B, VII and IX.

¹⁷² ACHR, art. 7.5. Article 14.3.c) of the ICCPR provides that all those accused of crimes must be tried without undue delays.

Formally, the maximum duration of trials in both criminal justice systems studied in this research complies with the constitutional standard of one year. In reality, criminal proceedings in the inquisitorial system, such as the Federal District, last an average of 543 days, while adversarial proceedings, such as Baja California, last an average of 152 days, which is a difference of 391 days between the systems.¹⁷³

A study on users and operators of both systems concluded that the perception of the adversarial system is seven times more favorable than that of the inquisitorial. In the traditional system, only 11.8 percent consider that justice is prompt and 21.1 percent say that it is expedited, while in the adversarial system these numbers are 75.7 and 68.3 percent respectively. The study also indicated that, among those interviewed, victims and experts in both systems expressed that this principle is not effectively fulfilled.¹⁷⁴

3.4.5. The right to be tried in a public hearing by an impartial and independent judge

The Constitution and human rights treaties state that all those charged with crimes must be tried in a public hearing by a judge or a previously established tribunal,¹⁷⁵ independent of the type of criminal justice system involved. The adversarial system emphasizes this principle, as public hearings are a principle of the system.

In Baja California, the right to be tried in a public hearing has exceptions including: for reasons of national security; the protection of victims, witnesses or minors; when it would put legally protected information at risk; when the court determines that there are reasons to justify it; and all other reasons specifically established by law. If the court wishes to hold a private trial, it must provide a basis for it and include the arguments in the case log.¹⁷⁶ In the DF, the law only provides an exception to holding a public trial in the case of rape.¹⁷⁷

A recent study that evaluated the principle of public hearings in both systems reports that in the inquisitorial system, such as in the DF, access to courts is restricted. There is neither a courtroom nor places designed for people to adequately hear what

¹⁷³ Mendoza 2012, p. 196.

¹⁷⁴ *Ibid.*, pp. 140 and 141.

¹⁷⁵ CPEUM, art. 20, B, V, ACHR, art. 8.1 and 5, and ICCPR, art. 14.1.

¹⁷⁶ CPPBC, art. 321.

¹⁷⁷ Criminal Code for the Federal District, art. 59.

is going on in the proceedings because they are behind a cage-like set of bars. The areas in which hearings are held are too noisy to hear what is being said. Additionally, court registers are typed by stenographers on computers, and they often do not allow defence attorneys to review what they write. By contrast, in the states that have implemented the adversarial system, there are courtrooms that are open to the public so that anyone may enter to watch the hearing.¹⁷⁸

The existence of these cage-like bars is one of the elements that best characterize the inquisitorial system. It is a space in which the accused is brought to be present during his trial; a grate separates him from the rest of the public and the judge, if present. During the hearing, the accused does not have access to a bathroom, nor a chair. According to sources, access to a chair sometimes requires payment; other sources report visiting a court in the Federal District where a special cloth (*bule*) was placed to prevent the 'bad smell' from that area from spreading to the rest of the courtroom.¹⁷⁹

Moreover, in 2009 it was reported that 72 percent of detainees in the Federal District and the state of Mexico said that the judge was not present during the hearing in which they made their first statement.¹⁸⁰ In a 2012 study in federal prisons, prisoners reported that judges are often absent from hearings, and that when they are present, they generally do not interact directly with the defendants. 75 percent of those interviewed stated that they had never spoken to a judge and 52.4 percent affirmed that the judge was not present when they made their first statement.¹⁸¹

Some of those interviewed in the study regarding the legal profession in Mexico mentioned the fact that the right to a trial before a judge is impeded by the constant absence of judges during many stages of the proceedings. Often clients and their attorneys have to work with the judges' secretaries instead.¹⁸² Some highlighted the importance of *amparo* petitions as an alternative mechanism to ensure the right to a hearing in the first instance.¹⁸³ The 2009 study on detainees in the DF and state of

¹⁷⁸ Mendoza 2012, pp. 127-130.

¹⁷⁹ 'Normally, defendants may not be shackled or engaged during trial, nor be brought to court in any other manner that suggests that he is a dangerous criminal'. See Comité de Derechos Humanos 2007, párr. 30, p. 11.

¹⁸⁰ Bergman & Azaola 2013, p. 45.

¹⁸¹ Centro de Investigación y Docencia Económicas 2012, pp. 8 and 71.

¹⁸² In the traditional system, the person responsible for attesting to the legality of the proceedings is the judge. This figure was eliminated in the adversarial system.

¹⁸³ Naciones Unidas 2011, p. 28.

Mexico supports this finding, as 82 percent of those interviewed stated that they never personally spoke with a judge.¹⁸⁴

This does not happen in the adversarial system. According to a recent general monitoring report on the implementation of the new reform, judges were present in 100 percent of hearings.¹⁸⁵ By contrast, in Baja California, although access to hearings is public, attendees must follow strict procedures to gain entry such as depositing all electronic devices (cameras, telephones, etc) and bags and official IDs, and pass through a metal detector to enter the courtroom.

3.4.6. The right to substantiated and reasoned decisions

Various constitutional provisions order authorities to substantiate their decisions. For example, the Constitution states that no one shall be subject to interference with his person in the absence of a prior judicial order that provides the reasons and legal cause for the interference. By simple analogy, criminal sanctions may not be imposed unless a law regarding the crime in question supports them. Additionally, it states that decisions that conclude oral proceedings must be explained in a public hearing in which both parties are present.¹⁸⁶

Criminal law contains numerous judicial criteria that explain and develop the concept of ‘substantiating’ a decision. For example, there are criteria that determine when a decision has *not* been duly substantiated or based on reason.¹⁸⁷ Additionally, the Supreme Court of Justice defines substantiation as requiring ‘the precision of the applicable legal concept and precisely indictating the special reasons, circumstances, that he has considered in issuing the decisions’. The Court also indicated ‘that it is fundamental that the reasons for the decision correspond with the applicable norms, meaning that the concrete case falls within the normative hypotheses’.¹⁸⁸

With respect to this right, *amparo* judges have established precedents regarding the substantiation of resolutions and indicated that certain resolutions must be

¹⁸⁴ Bergman & Azaola 2013, p. 41.

¹⁸⁵ Zepeda 2012, p. 69.

¹⁸⁶ CPEUM, arts. 14, 16, 17 and 20.

¹⁸⁷ Suprema Corte de Justicia de la Nación, case no. 173565, novena época, T.C.C.; S.J.F. and its Gazette, vol. XXV, January, 2007, p. 2127.

¹⁸⁸ Suprema Corte de Justicia de la Nación, case no. 820034, séptima época, segunda sala, ap. 1988, parte II, p. 1481.

written.¹⁸⁹ The transition from one system to another also implies a paradigm shift, because judges generally face the challenge of leaving behind the inquisitorial system, which is written in nature, to one in which orality prevails. These judges still consider adequate substantiation to be written; however in the adversarial system judges must base their decisions on reasoned arguments that go beyond expressing them on paper.

3.4.7. The right to appeal a guilty verdict

The Supreme Court of Justice did a systematic interpretation of the Constitution and determined that the direct *amparo* resource guarantees the right to appeal.¹⁹⁰ The Convention also recognizes the right to challenge a guilty verdict before a higher court.¹⁹¹ This revision must be simple, rapid, and, above all, effective.¹⁹² In the case of *Castañeda Gutman vs. México*, the Inter-American Court held that Mexico must provide individuals with a real possibility to file a challenge, and that this guarantee is one of the basic pillars of rule of law in a democratic society.¹⁹³

In Baja California there are two ways in which to request a full review of a guilty verdict. The first is a petition for annulment, which is filed when the resolution was not observed or a legal precedent was incorrectly applied. This must be filed within 10 days of notification of the decision.¹⁹⁴ The second is a petition for revision, which is filed against a conviction in the following situations: when the decision has been based on judicially declared false evidence; when new evidence appears that makes it clear that the crime did not happen; or when there is law, jurisprudence, or a decree that benefits the convicted person.¹⁹⁵

In the Federal District, the most commonly used petition that allows a complete review of a first instance decision is the appeal.¹⁹⁶ The same law grants the appellate

¹⁸⁹ Zepeda 2012, p. 68.

¹⁹⁰ Suprema Corte de Justicia de la Nación, case no. 161822, novena época, T.C.C., S.J.F. and its Gazette, vol. XXXIII, June, 2011, p. 980.

¹⁹¹ ACHR, art. 8.2. h). Similarly, ICCPR, art. 14.5.

¹⁹² ACHR, art. 25.1.

¹⁹³ Inter-American Court of Human Rights, August 6, 2008, *Case of Castañeda Gutman vs. Mexico*, Series C, No. 184, para. 78.

¹⁹⁴ CPPBC, art. 415.

¹⁹⁵ CPPBC, art. 426.

¹⁹⁶ CPPDF, art. 414.

body the same powers as the first instance judge, meaning the appellate body may study and consider the evidence offered at trial.¹⁹⁷

A study carried out by the UN High Commissioner and the High Court of the Federal District that developed indicators regarding the right to a fair trial, found that the appeals rate in 2010 was 105 percent. The rate above 100 percent is because there may be more than one appeal in any one case. Another interesting finding is that 67.3 percent of users said that after obtaining a guilty verdict, they would appeal to the High Court.¹⁹⁸

In the current context of transition from one criminal justice system to another, constitutional judges that review *amparo* decisions confront serious challenges, because in practice their lack of knowledge of the adversarial system ‘has introduced bias and anomalies in the conception of new procedural figures’.¹⁹⁹

4. The professional culture of litigating attorneys

The Mexican Constitution protects the right to a profession.²⁰⁰ Based on this, a body called the General Office of Professions of the Secretary of Federal Public Education was established. This office is authorized to issue professional IDs, legal titles, gener-

¹⁹⁷ CPPDF, art. 427.

¹⁹⁸ ACNUDH - México & TSJDF 2011, pp. 110 and 112.

¹⁹⁹ Zepeda 2012, p. 68.

²⁰⁰ CPEUM, art. 5. A point that has been hidden in the exercise of law is the lack of State guarantees of protection for attorneys that are defending those accused of drug trafficking or a crime related to organized crime. According to the Index for reform of the legal profession in Mexico, the perception of some attorneys is that legal advocacy may be the second most dangerous profession after journalism. This is because in such cases they are exposed to intimidation, harassment and State intervention into their private communications. In more serious cases, they have been threatened or attacked by rival cartels to the one to which their client belongs, or even by their client if they do not win the case. This also happens when attorneys represent alleged victims of human rights violations by public authorities, such as the military or police. In these cases, attorneys often suffer threats, assassination attempts, and in many cases have been assassinated. Non-governmental organizations are most vulnerable to these practices as they bring the majority of the most important cases involving human rights violations. The most recent UN report on the situation of human rights defenders in Mexico is based on 89 aggressions registered between November 2010 and December 2012, of which 38% are threats, 13% arbitrary interference, 12% harassment, 11% arbitrary deprivation of life, 11% arbitrary detention, 6% assassination attempts, 7% arbitrary use of the criminal justice system, and 2% forced disappearance. The Federal District is one of the five states of the republic that has the greatest number of aggressions toward human rights defenders.

ally control the functioning of the exercise of the legal profession and professional associations, and to address crimes and administrative fractions in the exercise of the profession.²⁰¹

Anyone who possesses a professional ID card issued by the may exercise law. The principal requirement for obtaining this ID is to have a degree in law from an accredited university. Each university determines its own requirements for obtaining a law degree, as there are no additional norms, associations, or bar associations that impose uniform minimum standards to exercise law.²⁰²

The professional ID is a lifelong document.²⁰³ There is no law requiring periodic certification or that attorneys take continuing education classes to ensure they have the capacity to continue exercising the profession, and thus maintain their professional authorization. There are also no binding codes or professional standards for attorneys.²⁰⁴

At the national level there is no body responsible for bringing together the various bar associations that exist throughout the country; the closest is the Confederation of Attorney Bar Association that claims to represent 54,000 professionals that belong to 390 associations around the country. However, this organization does not have any legal impact on the exercise of the legal profession. Affiliation with bar associations is voluntary and therefore compliance with their rules depends solely on members' commitment and will. An estimated 90 percent of attorneys do not belong to an association due to the lack of legal incentives to do so.²⁰⁵

The failure of regulation in the legal profession goes beyond the need to merely adopt a model of association or certification. A special UN report stated that it is urgent for Mexico to adopt a regulation of the legal profession that guarantees a qualified professional representation.²⁰⁶ This same document notes the lack of uniformity of criteria to exercise law and the absence of an independent supervisory mechanism that can ensure the quality, integrity, and honorability of the profession.²⁰⁷

²⁰¹ Implementing law of Article 5 of the Constitution, exercise of the legal profession in the Federal District

²⁰² ABA ROLI 2011, p. 1.

²⁰³ See <http://goo.gl/sVnE4v>.

²⁰⁴ ABA ROLI 2011.

²⁰⁵ *Idem*.

²⁰⁶ Naciones Unidas 2011, p. 16.

²⁰⁷ *Ibid.*, p. 2.

The professional law, as well as the criminal codes in Baja California and the Federal District, include provisions regarding infractions and crimes committed in the exercise of the profession. In the DF, the minimum fine for an infraction is USD 5, and the maximum USD 500.²⁰⁸ In Baja California, the fine for the least serious infraction is USD 30, and the maximum USD 900. For more serious infractions, the minimum is USD 900 and the maximum USD 1,800.²⁰⁹

The imposition of administrative sanctions in Baja California is the responsibility of the State Department of Professions.²¹⁰ In the Federal District, it is the responsibility of the General Office of Professions, which is the highest national authority of its kind.²¹¹ An administrative sanction contained in both laws is disqualification or suspension from the profession. However, in practice these sanctions are not applied. In 2011 and 2012, there was only one instance of a one-year suspension in the entire country.²¹²

The Criminal Code of Baja California contains a special chapter on crimes of attorneys, which imposes prison sentences between 6 months to 3 years, and suspension from exercising law for up to 3 years.²¹³ The corresponding code in the Federal District provides for prison sentences between 6 months to 4 years and suspension for the same length as the prison term.²¹⁴ Considering that suspension from the profession would be applied for the commission of any such crime, based on national statistics, we conclude that during 2011 and 2012 only two people were convicted for such crimes, if such suspensions were due to a criminal sanction.

In the experience of the attorneys we interviewed, the lack of qualified representation in a criminal process has incalculable consequences for those accused. Many face long prison sentences without any recourse to overturn them due to poor defence, but there are no consequences for the person who provided this service.

²⁰⁸ Implementing law of Article 5 of the Constitution, exercise of the legal profession in the DF arts. 61-73.

²⁰⁹ Law of the Exercise of the legal profession in Baja California, art. 56 bis.

²¹⁰ *Ibid.*, art. 53.

²¹¹ Implementing law of Article 5 of the Constitution, exercise of the legal profession in the DF ar. 65.

²¹² See Dirección de Autorización y Registro Profesional de la Secretaría de Educación Pública, oficio N.º 2603/2013.

²¹³ CPBC, art. 337.

²¹⁴ Criminal Code for the Federal District, art. 319.

5. Political commitment to effective criminal defence

From an analysis of the National Development Plan, and those of the Federal District and Baja California, we noted the absence of public policies with respect to criminal defence, either public or private. This allows us to conclude that criminal defence is not a priority within the criminal policy, nor within public policies related to human rights. In general, the most common concern is that of criminal prosecution, the implementation of the criminal justice system, or the penitentiary system. There is no specific reference to defence.

The 2013 National Human Rights Agenda of the National Human Rights Commission recommends a Constitutional reform to remove *arraigo*, recommend exhaustive and scientific investigations prior to detention, and to ensure that people are not detained first and investigated after, which is what currently occurs.²¹⁵

In contrast to Baja California, the Federal District has a state human rights program. This program has a dedicated section on due process, which has pending work regarding an adequate defence. For example, a strategy is to make the Public Defence Office an independent institution, both in its functions and budget, to allow it to ensure quality work for any person who requests its services, and in this way strengthen the right to an adequate defence and procedural equality.²¹⁶

According to the DF human rights program, an obstacle to due process in the DF is that justice institutions have insufficient material and human resources. This often prevents defendants from having a translator or interpreter, or having access to other methods of communication that guarantee access to information, and can impact on the right to an adequate defence, for example due to judges not being present in hearings due to heavy caseloads.²¹⁷

One of the recommended actions to strengthen the right to an adequate defence is to carry out an analysis of legal education and the regulation of the legal profession, in order to avoid abuse or negligence. To carry out this action, an accountability system for attorneys must be established, one that does not affect the free exercise of their profession in accordance with the UN Basic Principles on the Role of Lawyers.²¹⁸

²¹⁵ Comisión Nacional de Derechos Humanos 2013, p. 41.

²¹⁶ Comisión de Derechos Humanos del Distrito Federal 2009, p. 189.

²¹⁷ *Ibid.*, p. 212.

²¹⁸ *Ibid.*, p. 228.

In the case of Baja California, the public policy of implementation of the adversarial system has included the public defence office from the beginning. It has been provided with appropriate systems and greater economic resources, as well as trained personnel, although it does not have an institutionalized continuing education program.

Given the workload of the institution, which takes on more than 90 percent of the system's cases, its assigned personnel and resources are insufficient for a truly adequate defence for all of the institution's clients. In 2013, the prosecutor's office was apportioned a budget of almost USD 90 million, while the Public Defence Office received slightly more than USD 4 million and continues to depend on the Secretary of Government.²¹⁹

6. Conclusions

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.

²¹⁹ Expenditure budget of Baja California for the 2013 fiscal year. Available at: <http://goo.gl/mr28Dr>.

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-incrimination, 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.

6.1. *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.

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CHAPTER 8. COUNTRY ANALYSIS. PERU¹⁻²

1. System of criminal defence

1.1. Basic demographic and political information

Peru covers an area of 1,285,216 km² and has an estimated population of 30,817,696.³ The country is divided into three geographical regions: the coast, the mountains, and the rainforest. According to the 2007 National Census,⁴ the coast was home to 54

¹ The Centro para el Desarrollo de la Justicia y la Seguridad Ciudadana (CERJUSC) was responsible for this chapter. Liliana Bances undertook the research and drafting, and Nataly Ponce was responsible for supervising and directing the research.

² This chapter analyzes the situation of criminal defence in Peru, in order to objectively determine on a technical basis its level of efficacy under standards for the respect of rule of law and human rights. This study provides in depth information regarding normative, jurisprudential, institutional, and practical aspects of this right. Our research compiles and systematizes statistical and qualitative information regarding the criminal justice system, specifically criminal defence, including relevant jurisprudence. The process of compiling information included 28 interviews with key actors of the justice system in the Lima, Cusco and Lambayeque districts: ten public defenders, five criminal judges, five prosecutors, four police officers, and four private defense officers. We also interviewed the executive director of the Public Defence and Access to Justice, the coordinator of the Criminal Area of the Executive Office of Public Defence (DGDP), the district director of the Public Defence Office of Lambayeque, and the district director of Public Defence in Cusco.

³ Projected population for the year 2013, by the Instituto Nacional de Estadística e Informática (INEI). The most recent national census in 2007, counted a national population of approximately 28.220.764.

⁴ Instituto Nacional de Estadística e Informática, 2007.

percent of the population, the mountains 32 percent, and the rainforest 13.4 percent. 75.9 percent of the population resides in urban centers and 24.1 percent in rural areas. The majority of the population is *mestiza* and the indigenous population is estimated to be 15.9 percent of the country's total population. The country is characterized by heterogeneity, multiculturalism, and multi-ethnicity, with 72 ethno-linguistic groups, 65 of which are located in the Amazonian region and 7 in the Andean region, which are divided into 16 language groups.⁵ However, the majority of Peruvians (84.1 percent) speak Spanish; 13 percent speak Quechua, 1.7 percent speak Aymara and 0.3 percent speak Asháninka.

Territorially, Peru is divided into 25 regions,⁶ and a constitutional province.⁷ 25.8 percent of the population is poor, while 6 percent are extremely poor.⁸ The 1993 Political Constitution guides the Peruvian State,⁹ which is the basis for the national legal order. This document gathers, systematizes and organizes the country's political system, and controls, regulates, and defines the rights and liberties of its citizens.

1.2. *General description of the criminal justice system*

Peru has had five laws regarding criminal procedure: the Criminal Trial Code of 1863,¹⁰ the Code of Criminal Procedure of 1920,¹¹ the Code of Criminal Procedure of 1940,¹² the Code of Criminal Procedure of 1991,¹³ and the Criminal Procedure Code of 2004¹⁴ (hereinafter, CPC).

⁵ Instituto Nacional de Desarrollo de Pueblos Andinos, Amazónicos y Afroperuano 2010.

⁶ Amazonas, Ancash, Apurímac, Arequipa, Ayacucho, Cajamarca, Callao, Cusco, Huancavelica, Huánuco, Ica, Junín, La Libertad, Lambayeque, Lima, Loreto, Madre de Dios, Moquegua, Pasco, Piura, Puno, San Martín, Tacna, Tumbes, Ucayali.

⁷ Constitutional Province of Callao.

⁸ Instituto Nacional de Estadística e Informática (INEI) 2013a.

⁹ Enacted December 29, 1993 and entered into force January 1, 1994.

¹⁰ Entered into force on March 1, 1863, and based on the Regulation of Spain of 1835 and the Code of José II. Cfr. San Martín Castro 2004, pp. 27-68.

¹¹ Enacted through Law 4019, January 2, 1920 and entered into force June 1 of the same year.

¹² This was passed on November 23, 1939, and entered into force on March 18, 1940. The latter was issued via Legislative Decree 638, from April 25, 1991.

¹³ Enacted through Legislative Decree 638, April 25, 1991.

¹⁴ Enacted through legislative decree 957, July 28, 2004.

The country is divided into 31 court districts,¹⁵ with two criminal procedure models in force: the inquisitorial and adversarial system.¹⁶ The first applies to the Code of Criminal Procedure of 1940, and is in force in eight court districts,¹⁷ including Lima, where more than 50 percent of the country's cases are processed. This model is characterized by its formalism, its written nature, and the privacy of the investigation, as well as the duplicity of the functions of prosecutors and judges.

The second system of criminal justice applies the 2004 CPC. It began its progressive implementation on July 1, 2006 in Huaura, and is currently in force in 23 court districts across the country.¹⁸ This new criminal procedure model represents a substantial change in the development of the Peruvian criminal trial, as it involves an adversarial system that privileges the principles of immediacy, concentration, contradiction, publicity, and orality. The entry into force of the CPC involves a substantive change in the criminal investigation and prosecution of crimes, instituting a marked and precise separation of the role and functions of the system's actors.

1.3. Structure of the new criminal procedure model

Below we present the structure of the new criminal procedure model, and the principal functions of each institution of the Peruvian criminal justice system.

The CPC establishes that the new criminal procedure has three clearly differentiated stages. The first is the preparatory investigation, which involves preliminary steps and the formal investigation under the responsibility of the prosecutor, responsible for filing the criminal action and directing the criminal investigation, with the technical and scientific support of the police. This stage begins with a criminal notice and preliminary proceedings. The prosecutor has a deadline of between 24 hours and 20 days, depending on the complexity of the case, to determine if there is evidence that a crime

¹⁵ For the effects of the organization of administration of justice, there are 31 court districts; this division is independent and does not necessarily coincide with the country's regions.

¹⁶ Peru, along with 18 other countries in Latin America, has begun to transition from an inquisitorial criminal system to an adversarial one.

¹⁷ Apurímac, Huancavelica, Ayacucho, Junín, Callao, Lima Norte, Lima Sur and Lima.

¹⁸ The court districts in which the CPC has been implemented and where this norm is applicable for all crimes include Huaura, La Libertad, Tacna, Moquegua, Arequipa, Tumbes, Piura, Sullana, Lambayeque, Puno, Madre de Dios, Cusco, Cajamarca, Amazonas, San Martín, Ica, Cañete, Ancash, Santa, Huánuco, Pasco, Ucayali and Loreto. At the national level, the CPC only applies to crimes of corruption by public officials, according to Law 29574 of September 17, 2010 and Law 29648 of January 3, 2011.

was committed. After this deadline, the prosecutor must decide whether to formalize and continue the preparatory investigation or to suspend the complaint.

The purpose of the formalization of the preparatory investigation is to obtain incriminating or exculpatory evidence that allows the prosecutor to determine, within 120 days, whether to file an accusation or request the dismissal when the crime cannot be attributed to the accused. During this stage, the prosecutor may request the judge to order coercive procedural measures,¹⁹ alternative resolutions,²⁰ or special procedures.²¹ Additionally, during this stage, the preparatory investigation judge guarantees that the accused's rights are respected through the *tutela* of rights²² as well as the formal investigation, deadlines, that the proceedings follow the principle of contradiction by the defence. The preparatory investigation is developed through public, oral, and adversarial hearings.

The second stage of the new criminal process is the intermediate phase, and is the responsibility of the preparatory investigation judge. This phase is between the investigation and the oral trial. The intermediate stage is a control phase, in which the judge verifies if there is sufficient evidence to move to the trial phase, control of

¹⁹ Limitations to fundamental rights, whose purpose is to avoid eluding justice, which hinder the evidentiary activity and impede the property divestment of the accused. Among the measures of procedural coercion are personal measures, those that affect the property rights of the person ('real measures'), and the preventive suspension of rights, established in articles 259 to 320 of the CPC.

²⁰ Alternative resolutions are resolutions that, in specific cases, permit the prosecution to abstain from criminal action, to avoid the process and the imposition of a traditional punishment. It is important to mention that when the preparatory investigation is formalized, the prosecutor may request the application of the opportunity principle, established in article 2 of the CPC, which may be advanced until the formulation of charges. A reparation agreement is another alternative resolution that the prosecutor may apply prior to the formulation of the preparatory investigation.

²¹ Special procedures accelerate or shorten the criminal proceeding and exclude unnecessary formalisms or steps, in order to obtain a decision in a shorter time period, while still respecting minimum due process standards. The special procedures include the immediate process, the process due to public function, the security process, the private exercise of the criminal action process, the early termination process, and the effective collaboration process and for infractions, all of which are established in articles 446 to 487 of the CPC. But the processes that can be applied after the preparatory investigation has been finalized include the early termination process and the effective collaboration process.

²² The rights *tutela* is an action that an accused may file when he considers that the preliminary steps or preparatory investigation did not respect his rights, or that he is subject to measures that unduly restrict his rights, or illegal requirements. Article 71.4 of the CPC regulates this figure, and the investigation judge must immediately resolve it, based on a determination of the facts and a hearing with both parties.

*acusación*²³ charges, in order to avoid the *acusación* of an accused without material reasons or sufficient evidence.²⁴ Thus, this step guarantees the principle of presumption of innocence, as the decision to subject the accused to oral trial is not hurried into, superficial, or arbitrary.

Finally, the third stage is the trial, for which a single or collegiate judge is responsible, and must guarantee the full exercise of the prosecution and defence. This is the most important stage of the criminal justice process, as it involves the oral, public trial, based on the principle of contradiction. During the oral trial, the parties address and develop the admissible evidence, produce final arguments, and the court issues a conviction or acquittal, based on the oral arguments that the parties of the proceeding present.

1.4. Crime levels and the prison population

1.4.1. Levels of crime and citizen insecurity

In 2013, the National Police of Peru (NPP) registered 268,018 crime reports nationally,²⁵ of which 61 percent were related to robbery and theft. The National Institute of Statistics and Information (INEI) corroborates this level of crime, determining that 58 percent of criminal activity in the country corresponds to robbery or attempted robbery of money, cellular phones, and other property crimes.²⁶

In recent years, the crime rate has increased in Peru, in particular violent property crimes, a situation that is affecting the perception of citizen insecurity. Thus 87 percent of Peruvians believe that they will be the victim of a crime,²⁷ a trend that the Regional Report on Human Development 2013-2014 corroborates, indicating that Peru is the Latin American country with the highest perception of citizen insecurity.²⁸

In addition to common crimes, Peru has a problem of organized crime, which is expressed through both violent and non-violent crimes. Illicit drug trafficking, illegal

²³ Translator's note: The *acusación* is another pretrial stage, after the indictment, in which the prosecutor decides to move forward with the case and bring it to trial.

²⁴ Príncipe Trujillo 2009.

²⁵ Policía Nacional del Perú 2013.

²⁶ Instituto Nacional de Estadística e Informática 2013b.

²⁷ *Ibid.*

²⁸ Programa de las Naciones Unidas para el Desarrollo (PNUD) 2013.

logging, illegal mining, human trafficking, extortion, and money laundering all fall into this category.²⁹

1.4.2. Prison population

In the past ten years, the prison population³⁰ in Peru has increased by 56 percent. In 2004, there were 31,311 prisoners, a number that in July 2014 reached 70,813. Currently there are 204 prisoners per 100,000 inhabitants. This situation reflects one of the most important problems facing the Peruvian criminal justice system: prison overcrowding. Prisons are at 126 percent capacity, distributed throughout 67 detention centers whose total capacity is 31,286.

The prison population includes 66,392 men and 4,421 women. 80 percent are first time prisoners, and 20 percent are return inmates. Additionally, the largest number of prisoners are there for aggravated robbery (28.5 percent), followed by basic drug trafficking (12.1 percent) and sexual assault (8.4 percent).

In the first years of its application, the CPC, which started in 2006, had a positive impact on the reduction of the pretrial detention rate, although in recent years this number has started climbing again.³¹ According to official information available, in July 2014, 53 percent of those incarcerated were there under pretrial detention, and 47 percent had convictions.

2. Legal Assistance

The Peruvian Constitution and laws recognize that all people have the right to defence in any stage of the proceeding, from the first steps of investigation until the process is complete.³² In this framework, everyone has the right to the assistance of a freely chosen attorney or a public defender.³³ Thus, from the time of detention, the suspect

²⁹ Ponce et al. 2014.

³⁰ Instituto Nacional Penitenciario 2014.

³¹ Ponce & Bances 2013.

³² In accordance with article 139.14 of the Constitution and CPC, article IX of Preliminary Title and 71.

³³ Currently the term 'public defender' is used; 'public counsel' (*defensor de oficio / ex officio*) referred to those in the inquisitorial system.

must have the assistance of an attorney who is a member of a bar association,³⁴ either a private attorney or public defender. In some cases, they may also be assisted by a pro bono attorney,³⁵ or legal clinics, which are based in universities or civil society organizations.

When a detained, investigated, processed, or convicted person receives public defence services, the assistance and technical counsel is free.³⁶ Public defence is a service that privileges those with scarce economic resources, who cannot afford a private attorney. Public defenders also offer services to those who refuse to exercise their right to defence, in which cases the judge or prosecutor orders the appointment of a public defender to ensure due process and the legality of the proceedings.³⁷

2.1. Organization and Management of the legal assistance system

The Peruvian system of defence includes two models: (1) a defence model in which private attorneys may freely provide services, and (2) the state defence model, in which the State provides free legal defence, through public defenders.

Private defenders are governed by bar associations.³⁸ There are 31 such associations at the national level, one for each court district. Attorney bar associations are independent institutions, as a public legal entity,³⁹ which have administrative independence to determine their internal organization, economic independence to use their resources, and normative independence to develop and approve their own statutes. Currently, bar associations include approximately 130,000 attorneys, of which 25 percent work in the criminal law areas, while 40 percent work in private defence.⁴⁰

³⁴ Article 285 of the Organic Law of the Judiciary states that in order to practice law, one must have the title of attorney, have the full exercise of his civil rights, register his title in the nearest High Court of Justice and register with the Bar Association in his court district, or in the nearest if there is not an association in his district.

³⁵ To fulfill their professional responsibility duties through pro bono work, several law firms contribute to ensuring access to justice to those with scarce economic resources, or vulnerable groups or sectors.

³⁶ According to the Law of Public Defence Service - Law 29360, art. 2.

³⁷ According to the CPC, art. 80, Law of Public Defence Service - Law 29360, art. 14 and Supreme Decree 013-2009-JUS, art. 29.

³⁸ It must be mentioned that, by constitutional disposition, to exercise law, all attorneys must register with a bar association. In addition to registering with the association in their district, they must also register with a high Court, according to article 285 of the Organic Law of the Judiciary.

³⁹ According to article 20 of the Constitution.

⁴⁰ *La Ley*, 'Los abogados en el Perú', April 1, 2014.

Criminal public defenders work in the Directorate General of Public Defence and Access to Justice⁴¹ (hereinafter, DGDPAJ), which is a line agency of the Deputy Minister of Human Rights and Access to Justice.⁴² The DGDPAJ has decentralized bodies in all 31 court districts, called district offices, which offer free assistance and technical advice, mainly to those without economic resources. Criminal public defenders are part of the Office of Criminal Defence, a unit of the DGDPAJ.

2.2. *Spending in legal assistance for criminal matters*

Peru provides budgetary resources for public defence, as clients pay for private defence with their own resources. Between 2006 and 2014, the DGDPAJ budget increased considerably, as a result of the implementation of the CPC; however, starting in 2012, this budget has reduced significantly. This reduction may be related to the postponement of the implementation of the CPC in the eight remaining court districts.⁴³ In 2014, the budget assigned to the DGDPAJ was USD 16,895,001.⁴⁴ Comparatively, this amount represents 2.6 percent of the Ministry of Justice and Human Rights' budget, and 3.5 percent of the Public Ministry's budget. The DGDPAJ's budget is distributed in the following way: 96.9 percent for free legal assistance, 2.5 per-

⁴¹ The normative basis for this institution is Law 27019 of December 22, 1998, which created the National Service of Public Counsel, which was repealed by Law 29360, Law of the Service of Public Defence, from May 2009, which is in force together with its Regulation approved by DS 013-2009-JUS.

⁴² According to Supreme Decree 011-2012-JUS, Regulation of the Organization and Functions of the Minister of Justice and Human Rights. The Deputy Minister forms part of the organic structure of the Ministry of Justice and Human Rights, according to La 29809, Law of the Organization and Functions of the Ministry of Justice and Human Rights. The Minister of Justice is a body of the Executive branch, which includes all the State's institutions, at all levels of government, related to fulfilling national policies of, among others, access to justice.

⁴³ On March 31, Emergency Decree 012-2011 was published, which established several measures to limit the running costs, in goods and services as well as in infrastructure, based on an evaluation of circumstances external to the country, which has limited institutions from having the necessary resources to implement the CPC in the court districts that were to adopt the Code in 2011, according to the Official Calendar of Progressive Application, approved through Supreme Decree 016-2010-JUS. In this regard, the Special Commission on the Implementation of the Criminal Procedure Code decided to modify the Official Calendar of Progressive Application of the Criminal Procedure Code, which it did via Supreme Decree 004-2011-JUS. This norm provided that in 2013, the judicial districts of Apurímac, Huancavelica, Ayacucho, Junín, Callao, Lima Norte, Lima Sur and Lima would implement the CPC.

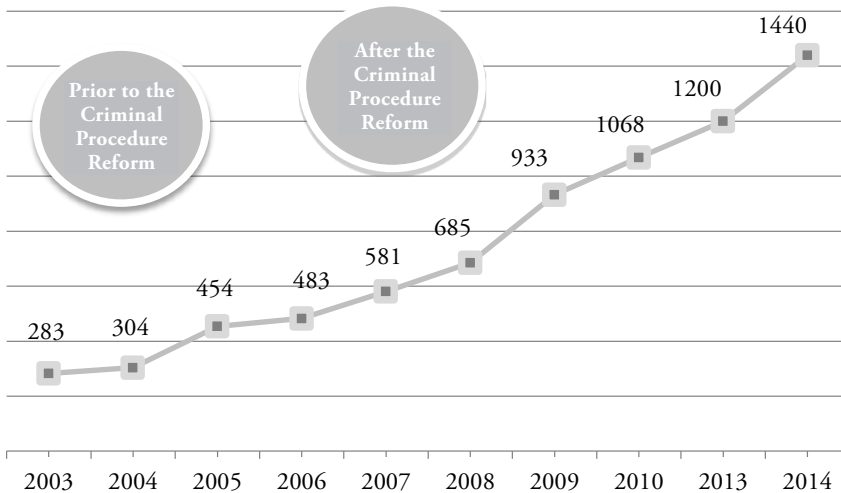
⁴⁴ The official Exchange rate of the United States dollar at the time of research was 1 USD = S/ 2.8.

cent for socio-economic evaluations, and 0.6 percent for functional supervision and monitoring.

The increase in the DGDAJ's budget has allowed for an increase in the number of public defenders. Currently, there are 1,440 nationally, which represents an increase of 60 percent in comparison to 2005, when there were 454 public defenders. This increase of human resources has been adopted to respond to the demands of the CPC.⁴⁵

It is worth mentioning that of the total number of public defenders, 808 offer services in criminal matters in the country's 31 court districts.⁴⁶ Of this total, 593 (73 percent) apply the CPC in the 23 court districts that have implemented this norm; while 187 (23 percent) practice in the 8 court districts with the former inquisitorial criminal procedure, and 28 (4 percent)⁴⁷ work in penitentiary institutions, where they address the needs of prisoners related to penitentiary benefits and requests for presidential clemency from the convicted prison population, which includes 33.021 people.⁴⁸

Graph 1.
Evolution of the number of public defenders between 2003 and 2014



Elaboration: Graph elaborated by CERJUSC, based on information from annual statistics from the Ministry of Justice and CAD Ciudadanos al Día

⁴⁵ Directorate General of Public Defence and Access to Justice. Available at: <http://www.minjus.gob.pe/defensapublica/>.

⁴⁶ Distribution corresponds to the total number of public defenders in 2013, according to the Directorate General of Public Defence and Access to Justice.

⁴⁷ Public defenders assigned to the CPC also cover weekly shifts to attend to incarcerated individuals.

⁴⁸ Instituto Nacional Penitenciario 2014.

2.3. *Methods of providing legal assistance in criminal matters*

The provision of legal assistance in the country varies according to the characteristics of the accused. According to the CPC, when a person is detained, he has the right to be assisted by an attorney from the initial investigatory acts.⁴⁹ If due to scarce resources the detainee cannot afford a private attorney, he will be appointed a public defender, who will provide assistance free of charge.⁵⁰

With respect to practices, prosecutors from the Cusco court district interviewed for this investigation stated that when a person is detained, the police informs the prosecutor, who in some cases goes to the police station and personally asks the detainee if he has a private attorney or needs public defence services. If the detainee indicates that he wishes to have the assistance of a private attorney, the prosecutor allows him to call the attorney. By contrast, if the detainee requests a public defender,⁵¹ the prosecutor communicates with the defender on call, who comes to the police station and helps the detainee determine his economic situation.

However, in some cases, when the prosecutor is informed that the police have detained an individual, he also authorizes the police to ask whether the detainee has a private attorney or whether he needs a public defender. If the detainee says that he would like a public defender, the police call the defender on call. For the effects of communication with public defenders, both the prosecutor and the police have access to phone numbers of public defenders, who cover shifts 24 hours a day, 7 days a week.

The Criminal Procedure Code establishes that when a private attorney does not attend an urgent proceeding (*diligencia*),⁵² the client must appoint a substitute, or the court appoints a public defender,⁵³ to ensure the process is not unduly delayed. Thus, the judge notifies the public defender coordinator, who appoints a public defender to represent the accused, under threat of representing the accused himself. However, if the proceeding can be postponed, the public defender will be notified after the private attorney's second unjustified absence.⁵⁴

⁴⁹ According to CPC, art. 71, inc. c.

⁵⁰ According to CPC, art. 80.

⁵¹ Usually because he does not know a private attorney or cannot afford one.

⁵² *Diligencia* is a procedural act, or set of procedural acts undertaken in accordance with the judge's orders.

⁵³ According to CPC, art. 85, inc. 1.

⁵⁴ According to CPC, art. 85, prior to the modification of Law 30076 of August 19, 2013.

At any procedural stage, the accused or his family may request public defence services, either verbally or in writing to the Directorate General of Public Defence, or to any district offices or relevant branches. The type of service he receives depends on an analysis and verification of his socioeconomic situation, undertaken by social workers in the public defence office.⁵⁵

If the client has scarce economic resources,⁵⁶ he receives free public defence services; however, if it is shown that he does not meet the requirements for free services, he must hire a private attorney or pay the cost of state-provided services. The client is also required to pay the cost of the services if he falsifies information regarding his socioeconomic situation.⁵⁷

Supreme Decree 007-2012-JUS regulates the cost of public defence services,⁵⁸ which establishes a fee scale for the provision of paid public defence services. The scale has three levels, based on the income or economic capacity of the client. However, when the client is processed for crimes against public administration,⁵⁹ the law provides that the client must pay the full amount, without exceptions.

The Public Defence office lacks mechanisms to make the payment of paid legal assistance effective. However, in practice, public defenders issue a receipt for the cost of services rendered, in accordance with Supreme Decree 007-2012-JUS, which establishes that every public defender must report his services rendered to the district director, according to the tariffs established in the payment scale, in order to later settle payment.

⁵⁵ Verification of an individual's socioeconomic situation is undertaken randomly, as, due to the heavy caseload, it is impossible to undertake evaluations of all clients. For verification, the client must make a sworn declaration regarding his socioeconomic situation, in which he indicates his employment situation and that of his spouse, and his healthcare affiliation. To verify his statements, a record issued free of charge by public and private entities dedicated to social programs, social assistance or the defence of fundamental rights, in conformity with Law 29360 - Law of Public Defence Service, art. 16.

⁵⁶ According to Law 29360 – Law of Public Defence Service, art. 15, which establishes that ‘a person is understood to have scarce economic resources when he cannot pay the services of a private attorney without putting either his subsistence or that of his family at risk. A person is presumed to have scarce resources when: a) he is unemployed or does not have known employment or work; b) he receives, by any means, monthly income less than the minimum living wage. This presumption is not applicable the analysis of his economic situation shows that he has sufficient patrimony to cover the costs of a private defence’.

⁵⁷ According to Law 29360 – Law of Public Defence Service, art. 17.

⁵⁸ Enacted March 20, 2012.

⁵⁹ Provided for in Chapter II of Title XVIII of the Criminal Code.

Table 1.
Differentiated scale for the application of fees for paid public defence services

Level	Income or economic capacity subject to evaluation of the Directorate General of Public Defence	Fee level
Level 1	Income: Between 2.5 and 6 mlv* or economic capacity between USD 8,928** and USD 17,857	Fee with 80% discount
Level 2	Income: Between 6 and 12 mlv or economic capacity between USD 17,857 and USD 53,571	Fee with 40% discount
Level 3	Income: Greater than 12 mlv or economic capacity greater than USD 53,571	Maximum fee, without discounts

The official exchange rate of the United States dollar at the time of analysis was 1 USD = S/2.8

* Minimum living wage.

** The official exchange rate of the United States dollar at the time of analysis was 1 USD = S/2.8.

Elaboration: CERJUSC based on information from Supreme Decree 007-2012-JUS.

The public defender does not participate in collecting the fees for his provision of paid services. Whether the user has paid for the services or not, the public defender is responsible for continuing to exercise defence until the client indicates that he no longer needs it, or the district director orders the attorney to cease providing services.

2.4. Eligibility for legal assistance in criminal matters and appointment procedures

Any person who does not appoint an attorney or has refused a private one has the right to be assisted by a public defender in order to fulfill the right to necessary defence,⁶⁰ whom the Public Ministry or judicial body may also appoint.

Thus, public defenders must provide free legal services without any other prior conditions. However, as public defence services are provided to low-income individuals, the social worker must undertake the aforementioned verification process of the

⁶⁰ According to Law 29360 - Law of the Public Defence Service, art. 14.

client's socioeconomic situation, and if he determines that the client has sufficient resources, the service is no longer free,⁶¹ and the client must pay the applicable fee.

2.4.1. The mechanism to appoint a public defender based on the applicant

In practice, when a prosecutor or delegated police officer requests a public defender, there are on-call public defenders available 24 hours a day and they assist any detainee. The number of defenders assigned to each shift varies depending on the number of public defenders in each court district; for example, in the Cusco court district, two public defenders cover each day, and each attorney covers three or four shifts monthly.

When a judge requests a public defender, Public Defence Office personnel search their registries to determine if the detainee has previously used their services. If he has, the Office will assign him the same attorney as in the previous case. If he is a first time user, the Office will create a new case file and appoint a public defender, considering the monthly caseload of each attorney, in order to distribute cases equitably.

2.5. Remuneration for criminal legal aid

Remuneration for defence attorneys depends on the type of attorney. In the case of private defenders, the contract between the attorney and client sets the fee rate.⁶² The client may propose a rate based on the table of minimum fees set by the respective Bar Association. For example, table 2 shows the minimum fees for defence attorneys, as set by the Lima Bar Association.

Although the Attorney Code of Ethics⁶³ does not establish parameters to set defence attorney tariffs, as the previous Code did,⁶⁴ Constitutional Court jurispru-

⁶¹ Other reasons for the loss of free defence are established in article 17 of Law 29360 – Law of the Public Defence Service: i) the beneficiary provides false information regarding his socioeconomic situation, ii) the socioeconomic reasons for this benefit no longer apply, and iii) the user obtains private defence services.

⁶² According to the Attorney Code of Ethics, art. 50.

⁶³ Resolution of the Presidency of the Board of Deans 001-2012-JDCAP-P, from April 14, 2012.

⁶⁴ Article 34 of the Attorney Code of Ethics was signed in April, 1997 and entered into force in May 1997. 'Notwithstanding what professional rates established, to determine the amount of fees, an attorney should fundamentally consider the following: i) the importance of the services, ii) the size of the matter, iii) success obtained and its importance, iv) the level of novelty or difficulty of the legal questions at issue, v) the experience, reputation, and speciality of the attorneys involved, vi) the economic capacity of the client, taking into account that poverty requires a smaller fee or

Table 2.
Minimum fees set by the Lima Bar Association

Assistance in Criminal Proceedings		
Participation of the criminal attorney	Professional Fee (%)	Amount in USD according to 2013 TU*
Preliminary investigation	10% of a TU	136,00
Investigation	10% of a TU**	136,00
Oral trial or hearing	25% of a TU	339,00
Civil party attorney	10% of a TU	136,00
Special proceedings	20% of a TU	271,00
Assistance on issues regarding execution of the criminal action, rehabilitation, or any other special proceeding.	10% of a TU	136,00
First instance oral reports	5% of a TU	68,00
Second instance oral reports	8% of a TU	109,00
Third instance oral reports	10% of a TU	136,00

* The taxation unit (TU), in 2014, according to Supreme decree 304-2013-EF was S/3.800. Equivalent a USD 1.357.

** If the investigation extends to the legal limit, the defence attorney has the right to receive a one-time additional remuneration for the extension, of 10 percent of the taxation unit.

Elaboration: CERJUSC based on information from the Lima Bar Association.

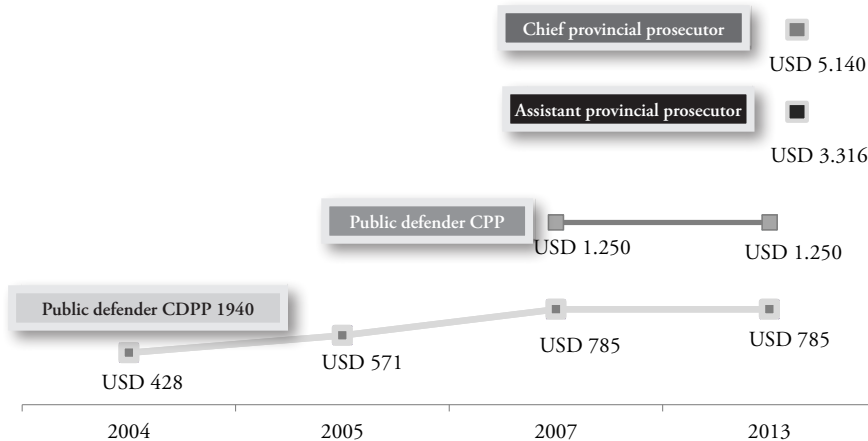
dence has recognized criteria that should be considered to determine the fees of private defenders. This includes ‘not only should attorney time and participation be considered, but also other relevant criteria, such as: a) success obtained and its importance, b) the level of novelty or difficulty of the question, and c) if the professional’s services were isolated, set, or constant’.⁶⁵ As we can see, there are jurisprudential guidelines that establish parameters to determine the amount of fees for private defence attorneys. However, in practice, the principal indicator for setting the price of private defence is

no fee, vii) the possibility that the attorney must forgo other issues or distract himself from other clients or third parties, viii) if the services are isolated, set, or constant, ix) the level of responsibility the attorney assumes regarding the issue, x) the time expended on the issue, xi) the level of the attorney’s participation in the study, proposal, and development of the issue, and xii) if the attorney merely advised the client, or if he also served as his representative’.

⁶⁵ File 00052-2010-PA/TC, from March 27, 2012.

the quality of the service provided, associated with the prestige of a given attorney or law office. Thus, the price of defence in a criminal case can vary between USD 714 to more than USD 18,571. Moreover, the method of payment varies according to what each attorney and client agree upon.⁶⁶ In contrast to private attorneys, public defenders receive a monthly salary that is unrelated to the number of cases they have or proceedings attended, or their results. Currently, 96 percent of public defenders are hired within the framework of Congressional Decree 1057,⁶⁷ which regulates a periodic hiring system, renewable over time, which does not offer job security or a career path. 4 percent of public defenders are hired within the framework of Congressional Decree 276,⁶⁸ which regulates a traditional labor system, with security, but low pay.

Graph 2.
**Change in remuneration of public defenders 2004-2013
 and comparison with remuneration of prosecutors**



Elaboration: CERJUSC, based on information from statements DGDPAJ directors' statements to newspapers.

⁶⁶ Attorneys offer their clients various methods of fees determination, for example, i) hourly wage, in which payment is made monthly, according to a record of hours spent on the client's case; ii) retaining fee, which consists of a set monthly fee; iii) set fees, which sets a consensual, previously determined fee for each particular issue, determined based on the specialty of the material, complexity, amount, time dedicated, among other variables.

⁶⁷ Framework Law of the Administrative Career and Public Sector Remuneration, June 28, 2008.

⁶⁸ Framework Law of the Administrative Career and Public Sector Remuneration Law, March 24, 1984.

As mentioned above, implementation of the CPC has led to an increase in the Office of Public Defence's budget, as well as public defender's salaries. The monthly salary of public defenders varies according to the criminal procedure law they apply: those that apply the CPC earn USD 1,250, and those that apply the 1940 Code earn USD 785. The latter has been in force since 2007, and is an 83 percent increase to 2004, when their monthly salary was USD 428.⁶⁹ There is a large difference between the public defenders' salaries and those of prosecutors. A high chief prosecutor receives a monthly salary of USD 6,633, a chief provincial prosecutor or assistant high prosecutor receive USD 5,140 and a provincial assistance prosecutor receives USD 3,316.⁷⁰ Graph 2 represents the salary differences between public defenders and prosecutors.

3. Rights and their implementation

3.1. *The right to information*

3.1.1. The right to be informed regarding the nature and causes for detention

According to the Constitution, every individual detained has the right to be immediately informed in writing regarding the cause or reasons for his detention;⁷¹ moreover, there are two types of legally permissible detentions: *in flagrante*, and by court order.⁷²

According to the CPC, the police must provide the detainee with the court order for his detention, or, in the case of detention *in flagrante*, immediately inform the prosecutor of the detention, who will determine whether the person shall remain in police custody.⁷³ According to article 71 of the CPC,⁷⁴ the police must read and give the detainee a document that contains a bill of rights, which must contain the following rights:

⁶⁹ Directorate General of Public Defence and Access to Justice. Institution Record. January 2012-March 2013.

⁷⁰ Supreme Decree 330-2013-EF. Approves salaries of Public Ministry prosecutors, December 19, 2013.

⁷¹ According to article 139.14, 15 of the Constitution.

⁷² According to article 2.24.f of the Constitution, which establishes that no one may be detained without a written order from a judge or police authorities, in the case of detention *in flagrante*.

⁷³ According to CPC, art. 71.2-A.

⁷⁴ Article 71.3 determines that the rights listed in article 71.2 must be included in a document signed by the detainee and relevant authority. If the detainee refuses to sign, this will be noted, although with the reason.

1. To enforce, on his own or through an attorney, the rights the Constitutional and relevant laws grant him, from the beginning of the proceeding until the process has ended.
2. To know the charges against him, and, in the case of detention, the reasons and cause for his detention, and to have the court order against him, when applicable.
3. To designate a person or institution to be immediately informed of his detention.
4. To have the assistance of an attorney from the pretrial investigation steps.
5. To refrain from testifying, or, if he wishes to testify, to have his attorney present there and in all proceedings that require his presence.
6. To be free from coercion, intimidation, measures that infringe upon his dignity, or methods that alter his free will, or to suffer from unauthorized or illegal restrictions.
7. To be examined by a medical examiner, or in his absence another health professional, when his state of health so requires it.

On this topic, jurisprudence indicates that ‘if from the principle of providing information regarding the cause of detention seems limited to the moment of detention, at this point, the right to information applies throughout the rest of the justice process’.⁷⁵

With respect to the right to be informed of the nature and cause of detention in practice, operators of the justice system we interviewed for this research agreed that, as a general rule, during detention, police do inform the accused of the charges against him and his rights. However, they also mentioned that in some cases, practices of the former criminal process persist, as the detainee is not informed of his rights, and merely have him sign a paper on the bill of rights in order to comply with a procedural formality, which leads to the detainee ignoring his right to an attorney, or to refrain from testifying, as evidenced by testimony in the absence of an attorney, which leads to a state of defencelessness of the detainee.

3.1.2. The right to be informed of the nature and cause of the charges against oneself

According to the CPC, if the complaint, police report, or preliminary steps uncover evidence of the commission of a crime, for which the statute of limitations has not

⁷⁵ File 02746-2010-PHC/TC, Judgment of September 13, 2011.

run, the detainee has been identified as a suspect, and, if relevant, admissibility requirements are met, the prosecutor will formally open a preparatory investigation. This must have, among other requirements, the accused's full name, the facts, and the specific crime such facts constitute. The norm establishes that the prosecutor may indicate that the facts may constitute alternative offenses, and the reasons for such characterization. The prosecutor must notify the suspect of the formalization of the investigation, as well as inform the preparatory investigation judge.⁷⁶

After the preparatory investigation, the intermediate phase follows, during which the prosecutor formulates the *acusación*.⁷⁷ According to the CPC, the *acusación* must include the legal classification attributed to the suspect, which may be different from that indicated in the formalization of the pretrial investigation.⁷⁸ The procedural parties are informed of the *acusación* in two phases: once, in the written face, via notification of the parties into the process;⁷⁹ and, two, in the oral phase, during the control hearing for the *acusación*. In the latter, the prosecutor may modify, clarify, or add non-substantive information to the *acusación*.⁸⁰

The CPC recognizes another prosecutorial mechanism⁸¹ during the preparatory investigation. Thus, when the prosecutor considers that preliminary steps indicate that there is sufficient evidence regarding the commission of a crime, and the participation of the accused in that crime, he may directly formulate the *acusación*,⁸² which is a

⁷⁶ According to the CPC, art. 336.

⁷⁷ Prosecutorial accusation is an act that the Public Ministry presents, which promotes criminal prosecution of crimes, in accordance with Plenary Agreement 6-2009/CJ-116 - V Pleno Jurisdiccional de las Salas Penales Permanente y Transitoria, of November 13, del 13 2009. Prosecutorial indictment is different from the *acusación*, as it is formulated and informed from the time the preparatory investigation is initiated. According to article IX del Título Preliminar and article 71.2, Plenary Agreement 02-2012/CJ-116 - I Pleno Jurisdiccional Extraordinario de las Salas Penales Permanente y Transitoria, March 26, 2012.

⁷⁸ Although it permits an alternative legal classification, the charges may only refer to facts and people included in the formalization of the pretrial investigation, in accordance with the CPC, art. 349. 2.

⁷⁹ According to the CPC, art. 350.

⁸⁰ According to the CPC, art. 351.

⁸¹ Translator's note: This is a procedural mechanism that allows the prosecutor to skip several steps of the process, to arrive at the *acusación*.

⁸² According to the CPC, art. 336, inc. 4.

type of accelerated process provided for in the CPC and Plenary Agreement⁸³ 6-2010/CJ-116.⁸⁴

On the right to be informed of the nature and cause of the charges, jurisprudence indicates:

‘The guarantee of procedural defence includes the need for the accused to be informed of the charges, to thus be able to defend himself in a contradictory manner. The punitive pretention should be externalized, which means that a tacit or implicit accusation is inadmissible. Knowledge of the accusation means that the accused is informed both of the facts attributed to them, as well as the legal classification of these facts. Although the new procedural regulation authorizes alternative classifications in some situations, this must be done respecting the essential nucleus of the original facts, so that new classifications do not come as a surprise, and thus protect this right, which is instrumental to the right to defence’.⁸⁵

With respect to the practical exercise of this right, there are problems related to the adequate formulation of charges in the prosecutorial accusation. According to interviews, weaknesses in the prosecutorial accusation mean that, in some cases, the accused cannot exercise his right to defence in an adequate and effective manner. This is because of the lack of clear, precise knowledge of the charges against him and his responsibility for the crime, which limits the development of an adequate defence strategy, and makes it difficult to find areas of contradiction and to prove his innocence, or even argue for a reduced sentence. Although in some control hearings, pretrial investigation judges return the prosecutorial accusation to the prosecutor in order to clarify or rectify problems,⁸⁶ in others, judges dismiss the case, which leads to impunity for crimes that actually occurred.⁸⁷

⁸³ Plenary Agreements are consensuses between judges in the framework of jurisdictional plenaries, which are meetings of judges from the same area of specialization, from one, some, or all the high courts, aimed at analyzing problematic situations related to the exercise of judicial bodies, to debate them and reach conclusions regarding the most appropriate criteria for each case. Methodological Guide for Jurisdictional Plenaries of the Judiciary.

⁸⁴ VI Pleno Jurisdiccional de las Salas Penales Permanente y Transitoria, November 16, 2010.

⁸⁵ Casación 62-2009, Decision of July 20, 2010.

⁸⁶ According to CPC, art. 352.2.

⁸⁷ According to CPC, art. 352.4.

3.1.3. The right to access information relevant to the case during the police, prosecutorial, and court phase

The CPC establishes that the accused and his attorney⁸⁸ have the right to be provided information throughout the criminal process.⁸⁹ Thus, he may access simple or certified copies of the prosecutor's file and the case file,⁹⁰ including copies of the first steps and police actions. Similarly, the CPC indicates that the attorney has the right to access the prosecutor and court file to learn about the case, as well as to obtain a copy of the actions during any phase of the proceeding.⁹¹ Recently the Judiciary issued a directive for the provision of acts in court districts where the 1940 Code of Criminal Procedure is still in force.⁹²

Jurisprudence of the Constitutional Court has established a general rule that 'every State body or entity with legal, public personality is required to provide requested information, and denial of access for reasons of national security, personal privacy, or other legally established reasons should be exceptional'.⁹³

The practical exercise of this right varies according to the institution that requests the information. For example, to issue copies to the police, a verbal request is sometimes sufficient. However, in other cases there are practices associated with the secrecy of the investigation from the inquisitorial system, in which some police provide the information, provided that the prosecutor has authorized the release of the information.

⁸⁸ According to article 324.3, 'copies obtained are to be used for defence. The attorney that receives them is required to maintain legal secrecy, under threat of disciplinary responsibility. If he violates this law, the client will be contacted, and substitute him within two days, or a public defender will be appointed'.

⁸⁹ According to CPC, art. 138.

⁹⁰ According to article 324.1, which establishes that the investigation is private, and only parties to the case are privy to its contents, directly or through their duly accredited attorneys. At any point, parties may obtain a copy of the actions.

⁹¹ According to article 84.7.

⁹² Directive 004-2014-CE-PJ – Guidelines for access to information and/or issuing copies of the court file during the instruction phase of the criminal process. This document establishes 'the privacy requirement, provided for in article 73 of the Criminal Procedure Code, is legal restriction of freedom of information of third parties not related to the process, but not those directly involved in the case, which would be an arbitrary act of the jurisdictional body, to the evident detriment of the defendant's right to defence [...] Subjects to the criminal process have the immediate right to request information and/or copies necessary for their defence strategy'.

⁹³ Expediente 02040-2010-PHD/TC, Decision of November 11, 2011.

By contrast, in the Prosecutor's Office, the request for information⁹⁴ and its provision depends on the legal situation of the accused, or urgent circumstances present. For example, in the case of a detainee, information, which may be requested verbally, is provided when necessary. In other cases, in order to exercise the technical defence, information must be requested via written request. To issue copies of the prosecutor's actions, until 2007, attorneys were required to pay an administrative fee. Public defenders challenged this practice in court via *tutela*⁹⁵ for violating the right to defence,⁹⁶ and now, public defenders must only pay the cost of copying documents in order to receive a copy.

With respect to access to information during the trial, there are no limitations, provided that the individual follows the relevant procedure, such as presenting a written document, which is responded through a resolution that authorizes the issuance of the requested information. Simple copies are free, and provided in two ways, through USB drives or other forms of memory,⁹⁷ or photocopies. It is important to clarify that requests for certified copies require the payment established in the Judiciary's unified text of administrative procedures (UTAP).⁹⁸

3.2. *The right to defence*

The Constitution protects the right to a defence attorney from the time a person is called to appear before or detained by any authority, as well as the principle to not be deprived of the right to defence at any point of the proceeding.⁹⁹ The CPC recognizes the accused's right to defence and his right to an attorney of his choosing.¹⁰⁰ Additionally, as previously mentioned, if the accused cannot appoint a private attorney due to

⁹⁴ There are no limitations regarding access to procedural acts, evidence or others. Except occasionally, when the prosecutor makes use of article 324 of the CPC, which establishes that the prosecutor may order the secrecy of an act or document for a period of 20 days. In practice, this provision is used in cases of organized crime.

⁹⁵ On the concept of a *tutela* of rights, see note 22.

⁹⁶ Tutela de derechos frente al cobro de tasas para la expedición de copias simples del expediente fiscal y/o judicial. Expediente: 00027-2011-1-1826-SP-PE-01.

⁹⁷ USB memory, CD, DVD and external hard drive, which belong to the procedural subjects.

⁹⁸ Administrative resolution 265-2012-CE-PJ approved the Judiciary's Unified Test of Administrative Procedures.

⁹⁹ According to the Political Constitution of Peru, art. 139.14.

¹⁰⁰ According to CPC, arts. IX del Título Preliminar and 71.

lack of resources, the State, through the Public Defence Office, will provide him with public defence free of charge.¹⁰¹

3.2.1. The right of the accused to defend himself and to represent himself

Article IX of the Preliminary Chapter of the CPC indicates that all people have the right to exercise material self-defence. In this framework, during the oral trial, during the discussion of the final arguments, the accused is allowed to exercise self-defence,¹⁰² and is given the floor to present what he considers relevant for his defence.¹⁰³

On this point, jurisprudence indicates that the double dimension of the exercise of the right to defence gives the accused the right to exercise his own defence from the moment he learns that he is accused of committing a crime. However, ‘recognizing an accused’s integral exercise of the right to defence, when he is not an attorney, would be to subject him to a state of defencelessness for the lack of a trained professional, versed in the knowledge of the law and the technique of legal proceedings, a situation which, additionally, violates the principle of equality of arms or procedural equality of the parties’.¹⁰⁴

The practical exercise of this right is limited to guaranteeing the accused’s testimony prior to learning the first instance decision. According to those interviewed, allowing material self-defence throughout the criminal process would prejudice the accused, as his defence would be ineffective and merely formal. In this context, if the accused refuses an attorney, the jurisdictional body or Public Ministry must request the services of a public defender from the Directorate General of Public Defence or the District Office.

3.2.2. The right to assistance and technical legal representation of one’s trust and choosing

The Constitution states that everyone has the right to communicate personally with an attorney of his choosing and to receive his advice from the time he is summoned

¹⁰¹ According to CPC, art. 80.

¹⁰² According to CPC, art. 386, inc. 1.d.

¹⁰³ According to CPC, art. 391.

¹⁰⁴ Expediente 6260-2005-PHC/TC, Judgment of September 12, 2005.

or detained by an authority.¹⁰⁵ Additionally, the CPC establishes that everyone has the right to an attorney of his choosing.¹⁰⁶

On this right, jurisprudence has clarified that formal defence includes the right to a technical defence, meaning ‘the advice and representation of a defence attorney of his choosing, from the time an individual is summoned or detained by an authority, and during the time the preliminary investigation or entire proceeding lasts’.¹⁰⁷

With respect to the practical exercise of this right, although it is respected in the criminal process, in some cases there are limitations on timely access to private defence. Interviewed public defenders indicated that on some occasions, the accused wishes to be represented by a private attorney, but due to the time of detention, or not knowing a private attorney, he uses public defence services. Later, during the preliminary investigation, he may end this service.

3.2.3. To have access to the services of an attorney free of charge for those who cannot afford one

The Constitution and Organic Law of the Judiciary guarantee free defence for those with scarce economic resources.¹⁰⁸ In this framework, every detainee who cannot access the services of a private defender of his choosing must be represented by a public defender.¹⁰⁹

With respect to this right, jurisprudence recognizes free defence as one of the principles of the jurisdictional function, but does not guarantee legal services free of charge for all those accused, but rather ‘only those with scarce economic resources’.¹¹⁰

In practice, access to a State-provided attorney is done through public defenders, in particular for those with few economic resources. It is important to mention that public defenders are not concentrated in the court districts with the highest poverty levels, but rather where there is a heavier caseload, which, if it is an adequate and ratio-

¹⁰⁵ According to the Political Constitution of Peru, art. 139.14.

¹⁰⁶ According to CPC, art. IX del Título Preliminar.

¹⁰⁷ Expediente 00910-2011-PHC/TC, Sentencia del 24 de mayo de 2011.

¹⁰⁸ According to art. 139.16 of the Constitution and, Unified Text of the Organic Law of the Judiciary, art. 295

¹⁰⁹ According to CPC, art. IX of the Preliminary Chapter, and 80, and the Unified Text of the Organic Law of the Judiciary, art. 288. Legislation establishes that all defence attorneys must provide free defence at least once a year.

¹¹⁰ Expediente 1607-2002-AA/TC, Judgment of March 17, 2004.

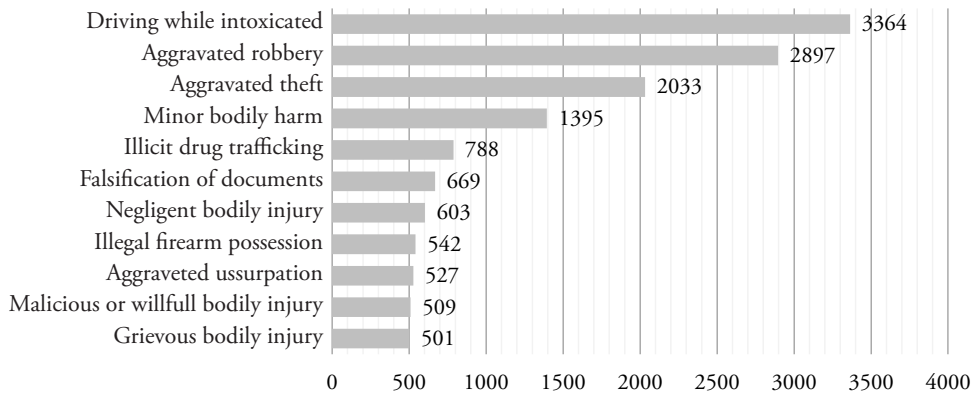
Table 3.
Representation and assistance provided by public defence in the first trimester of 2014

Type of code	Representation	Attention	Total
Criminal Procedure Code (CPC)	41,209	87,935	129,144
Code of Criminal Procedure of 1940 (CCP 1940)	12,226	46,099	58,325

Elaboration: CERJUSC based on information from the Directorate General of Public Defence and Access to Justice - 2014.

nal measure, shows the need to strengthen access to technical defence in the poorest regions of the country. Currently, each public defender may attend to more than 200 cases each year.¹¹¹ In a recent interview, 69 percent of public defenders considered that their caseload is normal, although they must work 9 to 12 hours daily.¹¹²

Graph 3.
New representation in most frequent crimes, first semester of 2014



Elaboration: CERJUSC based on information from the Directorate General of Public Defence and Access to Justice, 2014.

¹¹¹ During 2012, based on the CPC, there were 121,816 consultations, 58,449 new representations, 30,148 finalized representation, and 48,782 cases in transit. Based CCP there were 70,721 consultations, 31,603 new cases, 13,456 finalized cases, and 8,623 cases in transit. Source: Directorate General of Public Defence and Access to Justice.

¹¹² Ministry of Justice and Human Rights, 2014.

Table 3 presents information regarding the number of assistance and attentions of the Public Defence Office in the first trimester of 2014.¹¹³ Assistance refers to users defended in the framework of complaints and criminal proceedings, and are divided into new, (first-time clients), those in transit (those who cases continue from the prior period), and finalized cases (those that ended during the period)

Graphic 3 indicates the type of crime involved in the case public defenders address. In the first trimester of 2014, the highest number of new cases were for driving while intoxicated (3,364), followed by cases for aggravated robbery (2,897).

3.2.4. The right to speak in private with one's attorney

According to the CPC, attorneys have the right to enter prisons and police stations, upon identification, in order to interview their clients.¹¹⁴ Additionally, the attorney may interview the detainee during the development of the process as often as he considers necessary in order to prepare the technical defence.¹¹⁵ Although Peruvian laws do not expressly establish that communication between the attorney and his client must be private,¹¹⁶ article 30 of the Attorney Code of Ethics contains this requirement, in order to ensure confidentiality of the facts and information that the accused provides for his attorney.

Although the prosecutor may request to isolate a person detained for terrorism,¹¹⁷ espionage, illicit drug trafficking, or crimes punishable for greater than six years in prison, this does not mean that such legal isolation can limit private conversations between the detainee and his attorney, which do not require prior authorization, nor may be prohibited.¹¹⁸ The Constitutional Court has recognized this, stating 'there is

¹¹³ According to the Directorate General of Public Defence and Access to Justice, the topics of attention are divided into two groups: (1) representation in cases following the rules of the CPC, and (2) representation in cases following the rules of the 1940 CCP.

¹¹⁴ According to the CPC, art. 84, inc. 8.

¹¹⁵ According to the CPC, art. IX of the Preliminary Chapter

¹¹⁶ According to the CPC, art. 84, inc. 8.

¹¹⁷ Article 265 of the CPP establishes that the prosecutor may request the pretrial investigation judge to order his isolation, provided that this is indispensable to clarify the facts under investigation, and lasts no more than ten days or the length of the detention. The judge will rule on the question immediately, without other proceedings, through a substantiated resolution.

¹¹⁸ According to the CPC, art. 265. This is in consonance with article 280, which establishes that isolation of an accused in pretrial detention is appropriate only when it is necessary to establish a

no impediment or restriction to an attorney meeting with the detainee during the established time'.¹¹⁹

With respect to the practical exercise of this right, it is generally respected, although there are some cases in which there are restrictions, namely related to limitations of physical spaces for private meetings between attorneys and clients. This is true, for example, in police detention. According to public and private attorneys interviewed, when a person is detained, the attorney goes to the police station and verifies if the accused has been read and received his bill of rights. Later, he requests a private area in which to speak with his client. Public defenders interviewed stated that there are cases in which the police provide a private area, but in others, it is not possible due to the lack of space. In the latter cases, the attorney and his client must speak in the same room as the prosecutor and police, although with some physical distance between them, while the attorney asks the accused regarding the facts of the case and informs him of his legal situation.

As has been mentioned, Peruvian legislation states that an attorney may speak with his client as many times during the proceeding as he needs, in order to prepare his defence.

3.2.5. The right to legal assistance during questioning

According to the CPC, the accused has the right to have his attorney present during his statement and during all the proceedings in which he is present.¹²⁰ Thus, the police may only take the accused's statement in the presence of his attorney. In his absence, the police may only verify the detainee's identity.¹²¹

In regards to the practical exercise of this right, although public defenders have shifts to cover defence needs during the preliminary stage; this is not ensured in all cases. In some cases, the police take the detainee's statement with only the presence of the police and prosecutor, but not his attorney, which may lead to the detainee accepting the charges and negotiations in order to obtain benefits from alternative resolu-

serious crime. It may not exceed ten days. Isolation may not impede private meetings between the defence attorney and his client, which do not require prior authorization, nor may be prohibited.

¹¹⁹ Expediente 2076-2005-PHC/TC, Judgment of May 10, 2005.

¹²⁰ According to CPC, art. 71.d.

¹²¹ According to CPC, art. 68.1.l.

tions or plea agreements.¹²² According to interviews undertaken for this study, the attorney analyzes the facts and reviews the evidence collected during the preliminary stages, and, in some cases, rejects previously determined agreements because there is insufficient evidence to prove his guilt. Moreover, in cases where the accused's statement was expressly collected in a written document, the defence attorney files a *tutela* with the preparatory investigation judge, to exclude the statement from oral trial, in order to repair the accused's right to defence.

3.3. *Procedural rights*

3.3.1. **The right to physical liberty during the process, while the trial has not concluded**

The Constitution provides that no type of restriction on personal liberty is permissible, except in cases provided for by law.¹²³ The CPC provides for specific requirements to order coercive procedural measures, especially pretrial detention, in order to ensure its exceptional application.¹²⁴ Article 268¹²⁵ of the CPC indicates that to order this measure, the prosecutor must demonstrate three concurrent premises: i) the existence of serious incriminating evidence that indicate the accused is the author or participant in a crime, ii), that the sanction for said crime is greater than 4 years imprisonment, and iii) the accused represents a flight risk or to the obstruction of justice.

¹²² The accused's statement, in the absence of his attorney is a traditional practice of the inquisitorial justice system, which has been restricted in the court districts where the CPC is in force, mainly thanks to the work of 24-hour public defenders.

¹²³ According to the Political Constitution of Peru, art. 2.24.b.

¹²⁴ The Judiciary, in search of greater and better efficacy of the criminal justice system, in order to address citizen insecurity, issued Administrative Resolution 325-2011-P-PJ, which develops methodological guidelines and legal criteria regarding the use of pretrial detention.

¹²⁵ Law 30076 modified this article; Law that modifies the Criminal Code, the Criminal Procedure Code, the Code of Criminal Enforcement, and the Code of Children and Adolescents, and creates registries and protocols to combat citizen insecurity. The law eliminated sub-section 2 of article 268 regarding a fourth premise, that the accused's participation in a criminal organization or reentry into the same, should be considered as a premise for ordering pretrial detention. This premise is now included in the consideration of whether one poses a flight risk. Article 269 regarding procedural danger, article 274 regarding the prolongation of pretrial detention, 286 on judicial orders to appear before court (subpoena) and 287 regarding orders to appear before court with some restrictions of rights were also modified.

The CPC also regulates measures of procedural coercion¹²⁶ other than pretrial detention,¹²⁷ so that the accused may confront the criminal process without pretrial detention. To ensure personal liberty as a general rule, and restrictions on physical liberty as the exception, the promotion of these alternative measures are necessary, via the implementation of effective policies and strategies that contribute to guaranteeing an adequate development of the criminal process, without abandoning the protection of victims.¹²⁸

Jurisprudence has repeatedly indicated that pretrial detention may not be a general rule, and may only be used as a last resort. Pretrial detention is an exceptional measure that should only be applied when there is a reasonable suspicion that the accused could evade justice; obstruct the pretrial investigation by intimidating witnesses or destroying evidence. ‘It is a necessarily exceptional measure in view of the preeminent right to personal liberty and the risk that pretrial detention poses with respect to the presumption of innocence and due process guarantees included in the right to defence’.¹²⁹

With respect to the exercise of this right in practice, there is evidence to support that at least during the first year the CPC was in force, pretrial detention was reduced in court districts where this norm was applied. However, in recent years, this trend has been reduced due to normative modifications introduced to expand its use.¹³⁰

Additionally, interviewed defence attorneys indicated that there are still weakness in prosecutors’ oral substantiation of elements that accredit risks of flight or obstruction of justice. In effect, the CPC states that pretrial detention should be decided in a public, oral, and contradictory hearing, in which the judge concurrently considers the accused’s presumed participation in the crime, the possible sanction, the criminal history of the accused, and other circumstances, such as family, home, and work ties. However, in the analysis and the debate of the premises for pretrial detention, the valuation of the accused’s ties are usually not granted the same weight as the other

¹²⁶ Alternative measures of procedural coercion to pretrial detention include being required to appear before an authority regularly, forbidden to leave an area, preventive suspension of rights, and house arrest.

¹²⁷ Law 30076, of August 19, 2013, advanced the entry into force of articles 268 (Pretrial detention), 269 (flight risk), 270 (Danger of obstruction) and 271 (oral hearing and resolution) of the CPC throughout the national territory.

¹²⁸ Ponce & Bances 2011.

¹²⁹ Expediente 2934-2004-HC/TC, Judgment of December 28, 2004.

¹³⁰ Administrative Resolution 325-2011-P-PJ. Circular on pretrial detention

premises; thus the likely sanction continues to be the main element that determines whether pretrial detention is ordered, which is generally applied in crimes sanctioned with long prison sentences, such as aggravated robbery, sexual assault, drug trafficking and homicide.¹³¹

When the judge decides that pretrial detention is inappropriate, the most common measure he imposes is to require the accused to appear before a court authority and a set of restrictive measures. However, the justice system does not have mechanisms to effectively supervise the rules that judges impose on defendants, except for the obligation to appear monthly. We consider that the absence of such supervisory mechanisms discourages the application of alternative measures to pretrial detention.

3.3.2. The right of the accused to be present at trial

The Constitution establishes the right to not be convicted in absentia.¹³² In accordance with this principle, the CPC states that the presence of the defendant and his attorney is necessary to carry out a trial.¹³³ If the oral trial is prolonged and the defendant has either made his statement or made use of his right to remain silent and fails to attend the following sessions, the hearing will continue without him, but with the presence of his attorney.¹³⁴

After the oral trial debate, the trial judge may dictate or read the decision to those who are present,¹³⁵ as Peruvian law states that conviction in absentia does not mean that reading the decision must necessarily take place in the presence of the defendant.¹³⁶ Thus, reading the decision does not require the presence of the accused, but his attorney must be present.

On the topic, jurisprudence states that the principle against conviction in absentia also protects the right to an accused to be present when the decision is read, ‘but this right cannot be understood as absolute, to the extreme that the accused can indefinitely put off the reading, refusing to appear when important acts are planned’.¹³⁷

¹³¹ Ponce & Bances 2011.

¹³² According to the Political Constitution of Peru, art. 139.12.

¹³³ According to the CPC, arts. 356 and 369.1.

¹³⁴ According to the CPC, art. 359.4, only if the presence of the accused is necessary for a procedural act, shall he be forcibly taken, and he must also appear during the expansion of the accusation.

¹³⁵ According to the CPC, art. 396.

¹³⁶ High Court of Huaura, Expediente 01145-2010-0-1302 of January 24, 2011.

¹³⁷ Expediente 003-2005-PI/TC, Judgment of August 9, 2006. This decision also indicates that the right to not be convicted in absentia guarantees, in its negative facet, that an accused cannot be

With respect to the exercise of this right, interviewed attorneys state that a bad practice of the inquisitorial system is the failure of the accused to appear during the sentencing, which means it cannot be executed. Thus, with the CPC, attorneys support the new norm with respect to the possibility of reading the decision in the absence of the defendant. In order to issue a sanction in absentia, judges require the presence of the defendant when the trial is begun, that the prosecutor orally inform him of the charges against him, that the defendant has the opportunity to defend himself and has the assistance of an attorney throughout the hearing or debate.¹³⁸

3.3.3. The right to be presumed innocent

The Constitution states that everyone must be presumed innocent until he has been declared guilty in a court of law.¹³⁹ This means that everyone charged with the commission of a crime is considered innocent,¹⁴⁰ and must be treated as such until proven and declared guilty in a final, substantiated decision. This requires sufficient evidentiary activity, obtained and used according to due process guarantees.¹⁴¹

To guarantee the presumption of innocence, the CPC states that until there is a final conviction, no public authority or official may present a person as guilty.¹⁴² Additionally, procedural actions may not be published during the preparatory investigation or intermediate stage;¹⁴³ this is related to the private nature of the investigation, as only parties to the process have access to the contents of these files.¹⁴⁴

sanctioned without first knowing and attempting to refute the accusations against him, and may not be arbitrarily excluded from the proceedings. As a positive facet, this right imposes judicial authorities the obligation to inform him of the process, as well as to summon the accused to all proceedings in which his presence is required.

¹³⁸ It is noteworthy that in Peru there are initiatives for virtual trials, specifically during oral trial. It is argued that this possibility is adequate provided that the accused's rights are protected and judges remain impartial. Hurtado Poma 2013.

¹³⁹ According to the Political Constitution of Peru, art. 2.24.e.

¹⁴⁰ The CPC, art. VIII.2 regulates the legitimacy of evidence, establishing that evidence obtained, directly or indirectly; in violation of the core content of fundamental rights of the person has no legal effect.

¹⁴¹ According to CPC, art. II.1 of the Preliminary Chapter.

¹⁴² According to CPC, art. II, inc. 2 del Título Preliminar.

¹⁴³ According to CPC, art. 139, inc. 1.

¹⁴⁴ According to CPC, art. 324, when those who participate in criminal proceedings violate this prohibition, the prosecutor or judge has the authority to fine them, and order a cease and desist of the undue publication.

On this issue, jurisprudence states that the accused need not prove his innocence, such that his inactivity can never be used against him. The Public Ministry has the duty to prove the elements of the crime and the defendant's guilt; thus, the prosecutor must gather sufficient evidence to destroy the presumption of innocence. However, the exercise of evidentiary activity must fulfill the requirements of pertinence, utility, opportunity, and legality.¹⁴⁵

Additionally, jurisprudence recognizes that the presumption of innocence is a guarantee to ensure the adequate exercise of the right to defence, a basic element to protect due process, and the equality of arms that must exist in all judicial proceedings. Thus, 'practices that present the accused before the media in a way that involves public stigmatization, violate the presumption of innocence'.¹⁴⁶

With respect to the practical exercise of this right, it is common for police authorities to present criminal suspects to media outlets for the latter to issue information together with value judgments regarding the alleged guilt of the suspects. This practice is not judicially authorized, but is supported by Supreme Decree 005-2012-JUS,¹⁴⁷ which permits the public presentation of those detained for any crime.¹⁴⁸

3.3.4. The right to remain silent

Peruvian laws guarantee the accused's right to refrain from testifying from the beginning of the proceedings, until their end, and, authorities must immediately and clearly communicate this right to him.¹⁴⁹ Thus, during the preliminary instructions and prior

¹⁴⁵ Expediente 00655-2010-PHC/TC.

¹⁴⁶ Expediente 06817-2008-AA/TC, Judgment of September 4, 2009.

¹⁴⁷ Published February 23, 2012. This decree repeals Supreme Decree 01-95-JUS, which prohibits public presentation by a police authority of those detained for any crime, except members of terrorist groups. The justification for the derogation of the aforementioned decree is that the struggle against criminality, organized in the framework of a democratic state of rule of law unfailingly requires the adoption of concrete measures to effectively confront those responsible for illicit activities that affect socioeconomic stability and erode the bases of social-legal order. It also adds that in the legitimate exercise of this authority, agencies of criminal control require mechanisms that allow them to effectively combat crime and organized crime, within the framework of respect for fundamental rights and protections of a democratic state that has rule of law.

¹⁴⁸ This decree is unconstitutional, as it violates the presumption of innocence and goes against the CPC.

¹⁴⁹ According to CPC, art. 71.2.d.

to the accused's statement, he must be informed of his right to remain silent, and that his silence will not be used against him.¹⁵⁰

On this topic, jurisprudence recognizes that the right to testify and to remain silent is based on the dignity of the person, and constitutes elements of the right to be presumed innocent and due process. Thus,

The right to remain silent includes the right to be informed that the refusal to testify cannot be taken as evidence of guilt. Thus, to prevent this right from being arbitrarily infringed, the State is prohibited from exercising physical or psychological violence against the suspect or accused and from using deceitful or other similar tactics to obtain information against his will about the facts for which he is investigated or accused in a criminal proceeding.¹⁵¹

In practice, during the pretrial investigation, police and prosecutors do not guarantee this right, as, during detention, when the police have the duty to read him his rights, including the right to remain silent, he is not informed of this right, and when he is taken to the police office, the prosecutor does not verify or rectify its fulfillment. This is contrary to what occurs in hearings, as the judge does guarantee this right.

3.3.5. The right to substantiated decisions

The Constitution recognizes the right of all justice system users to substantiated judicial decisions.¹⁵² The CPC states that the latter must be reasoned and substantiated, and indicates that a requirement of a decision is the 'clear, logical, and complete substantiation' of each of the facts and circumstances taken as proven or unproven. Additionally, the CPC states that the decision must indicate the substantiation of the valuation of the evidence, with the reasoning that justifies it.¹⁵³

On the topic, jurisprudence has developed the reach of the right to a substantiated decision, by indicating that the right to the substantiation of court decisions 'is a protection of the defendant in the face of judicial arbitrariness and guarantees that judicial decisions are not based on a whim of the judges, but rather on objective data that the judicial system provides or that may be derived from the case'.¹⁵⁴

¹⁵⁰ According to CPC, art. 87, inc. 2.

¹⁵¹ Expediente 00926-2007-PA/TC, Judgment of November 3, 2009.

¹⁵² According the Political Constitution of Peru, art. 139.5.

¹⁵³ According to CPC, art. 394, inc. 3.

¹⁵⁴ Expediente 01873-2011-PA/TC, Judgment of March 8, 2012.

In the framework of the CPC, during the first years, there were some practical problems among those who considered that verbally dictated resolutions during hearings, although registered in the audio file, violated the right to written substantiation of decisions, against those who argued that the new adversarial model privileged orality, and therefore, judicial decisions should preferably be oral. Before this operational problem, there were those who made a literal interpretation of the CPC and those who had a constitutional interpretation, the Constitutional Court supported the practice of orality, considering that this ‘does not violate the right to substantiation of judicial decisions, if the decision is sufficiently reasoned and substantiated’.¹⁵⁵

Along this same line, Plenary Agreement 6–2011/CJ–116 addresses written substantiation of court decisions and the principle of orality, and based on the new adversarial model, determines that the interpretation of the constitutional norm cannot be merely formal, as this would oppose the principle of orality and the logic of a trial that makes hearings the focal point of their development and procedural expression.¹⁵⁶ Thus, the way in which the judge issues a resolution that explains the reasons for his decision within the parameters of rational logic and legality, guarantees the right to substantiated decisions.

It is important to recognize that hearings within the CPC during the pretrial phase and trial phase promote the practical exercise of the right to substantiated decisions, as hearings constitute a space of publicity, orality, transparency of arguments of the parties and the judge.

3.3.6. The right to appeal decisions

The accused has the right to appeal a decision, in whole or in part. The Constitution protects this right, which considers it as the right to multiple instances.¹⁵⁷ Additionally, according to the CPC, the accused may challenge a decision through an appeal

¹⁵⁵ Expediente 02937-2009-PHC/TC, of September 25, 2009. This decision validates the conclusions of the Regional Jurisdictional Plenary regarding the Criminal Procedure Code, from July 4, 2009.

¹⁵⁶ VII Jurisdictional Plenary of the Permanent and Transitional Criminal Chambers. Supreme Court of Justice of Peru, December 6, 2011.

¹⁵⁷ According to the Political Constitution of Peru, art. 139.5.

against a first instance decision,¹⁵⁸ which suspends its execution.¹⁵⁹ However, if the decision imposes prison, the appeal is carried out provisionally.¹⁶⁰

Additionally, the CPC regulates that when a guilty verdict or acquittal is challenged, evidence that was not presented during the first instance trial is only permissible if its existence was not known at the time; if the evidence was proposed but unduly rejected, provided the attorney objected in a timely manner; and if admitted evidence was not used for reasons unrelated to the accused.¹⁶¹ In this framework, the decision, in part or in full, may be overturned or confirmed.¹⁶²

Jurisprudence establishes that the right to appeal is a constitutional guarantee of the right to due process, and, through the former,

A functionally higher instance to review a first instance judge's decision, and thus allow this decision to be subject to review by two judges. The constitutional demand to establish a functionally and organically second instance for the resolution of jurisdictional conflicts is directly related to the reach that the pronouncement of the highest instance acquires: immutability of *res judicata*.¹⁶³

In practice, interviewed justice system operators have differing opinions regarding the possibility of sanctioning a person acquitted in the first instance.¹⁶⁴ Thus, for example, the Criminal Appeals Chamber of Arequipa, in case 2008-12172,¹⁶⁵ declared

¹⁵⁸ According to the CPC, art. 401. In this context, the judge, upon reading the decision, asks the defence if it will file an appeal, or wait to make this decision. If the attorney decides to file the appeal orally, he has five days to formalize the request before the High Criminal Chamber.

¹⁵⁹ According to the CPC, art. 418.

¹⁶⁰ Nonetheless, this will not be enforced when the sanction is a fine or a restriction of rights. Additionally, if the convict is free, and a sanction or restrictive measure is imposed, the judge, according to the nature or seriousness of the crime and flight risk, may choose its immediate execution, or to impose some restrictions, according to CPC, article 402.

¹⁶¹ According to CPC, art. 422.

¹⁶² According to CPC, art. 425.

¹⁶³ Expediente 4235-2010-PHC/TC, Judgment of August 11, 2011.

¹⁶⁴ This issue is currently under discussion and was debated in the VI Jurisdictional Plenary of the Supreme Court, where an agreement was not reached.

¹⁶⁵ Judgment of June 22, 2010. Case summary: a first instance collegiate court absolved the accused of the crimes against him, considering that the prosecutor did not have sufficient evidence to overcome the presumption of innocence. The Public Ministry filed an appeal, requesting the withdrawal of the decision, and offering as evidence the victim's statement, which was admitted during the first trial, but was not acted upon for reasons unrelated to her. The High Criminal Court declared, via diffuse control, the inapplicability of the norm that regulated the conviction of an acquitted person, as well as the nullity of the first instance trial and decision, ordering a new trial.

part of article 245.3.b of the CPC inapplicable, if ‘the first instance is exculpatory, the second instance court may issue a conviction, imposing sanctions and appropriate civil reparations’, as there is a collision with the right to have a case analyzed at least two times. However, when the same case was brought to the Permanent Constitutional and Social Chamber of the Supreme Court of Justice,¹⁶⁶ this body disapproved of the resolution, considering that the right to multiple analyses would be protected by the extraordinary petition of criminal cassation.¹⁶⁷

3.4. *Rights related to an effective defence*

3.4.1. **The right to investigate the case**

Peruvian laws recognize that the defence attorney may participate in equality of arms in the evidentiary activity,¹⁶⁸ and, therefore, has the right to provide the evidence and investigation he considers appropriate.¹⁶⁹ In this context, legislation allows the attorney, whether public or private, to request the assistance of an expert in science, art, or other technical issues during the development of a proceeding.¹⁷⁰ In effect, the attorney has the right to designate an expert, which will be carried out within five days of notification of the judge’s appointment of the expert. The defence expert may present the actions of the official expert, make observations and leave a record of the technique used from his perspective.¹⁷¹

In practice, there are some limitations in the development of this right, both within the sphere of private defence as well as public. The development of an alternative case to that of the prosecutor is still a challenge for defence attorneys. By contrast, the possibility of having experts from other disciplines is not a common practice, mainly due to the high costs this involves. There is a minority of private defenders that

¹⁶⁶ Consulta 2491-2010, issued September 14, 2010.

¹⁶⁷ The Criminal Appeals Chamber of Arequipa indicated that the existence of a petition of cassation is insufficient, as its nature and procedural purpose is distinct from the appeal, as it is an extraordinary resource. Cassation is not an instance; therefore, facts cannot be revised, nor can it open or add evidence as occurs in the appeal. The petition of cassation is a vertical, extraordinary measure to challenge decisions, which is appropriate in strictly defined situations (article 429 of the CPC establishes the causes for a petition of criminal cassation).

¹⁶⁸ According to CPC, art. IX of the Preliminary Chapter.

¹⁶⁹ According to CPC, art. 84.5.

¹⁷⁰ According to CPC, art. 84.3.

¹⁷¹ According to CPC, art. 177.

have experts and specialists from the beginning of their work. In the case of public defenders, the right to the support of experts or specialists is not exercised, as the institution does not have a budget to hire them. According to interviews, in some cases, the defendant or his family must cover the costs of experts.

3.4.2. The right to sufficient time and possibilities to prepare one's defence

Legislation establishes that everyone has the right to a reasonable time to prepare his defence,¹⁷² and although there is no express statement regarding the right to adequate means for such preparation, jurisprudence has indicated that 'the accused has a fundamental right to have adequate time and means to organize his defence or design his strategy'.¹⁷³

With respect to this right in practice, some private attorneys fail to attend hearings, in order to draw out the criminal process. In such cases, judges name a public defender to continue with the criminal process. However, when the public defender attends the hearing or proceeding, he has only recently learned of the case, and thus requests a reasonable time to prepare a defence strategy. But some judges grant a very short time, which is insufficient to develop an adequate defence strategy. According to interviews, attorneys believe that the time required to analyze the case and design a defence strategy varies according to the characteristics of the case and the type of hearing in which they must participate. Additionally, interviewed attorneys stated that a short time is, for example, less than an hour for hearings regarding pretrial detention.

3.4.3. The right to equality of arms in evaluating witnesses

Peruvian laws state that the attorney has the right to directly question his client, as well as other defendants, witnesses, and experts during any of the procedural stages.¹⁷⁴

On this point, jurisprudence has clarified that 'the right to question witnesses is an essential element of the right to evidence, as well as implicit to the right to due process, recognized in article 139.3 of the Constitution'.¹⁷⁵ The practical exercise of this right is undertaken without limitations in relevant procedural phases. For example,

¹⁷² According to CPC, art. IX of the Preliminary Chapter.

¹⁷³ Casación 159-2011, Judgment of May 22, 2012.

¹⁷⁴ According to CPC, art. 84.2.

¹⁷⁵ Expediente 1808-2003-HC/TC, Judgment of August 14, 2003.

during the preliminary investigation, when the prosecutor attempts to question witnesses, he notifies the defence attorneys so they may intervene, and if the attorney has not been notified, the attorney may request an expanded testimony, or file a *tutela* action to exclude the testimony from evidence.¹⁷⁶

3.4.4. The right to interpretation and translation of documents free of charge

The Constitution states that all Peruvians may use their own language before an authority through an interpreter. Similarly, foreigners have this same right when authorities summon them.¹⁷⁷ When a person does not understand the language, he must be provided with a translator or interpreter, as procedures are carried out in Spanish.¹⁷⁸

Jurisprudence indicates that the right to defence is not possible if the accused does not have a translator or interpreter, as this right 'is a minimum guarantee of the accused for the respect of his right to due process and cultural identity, therefore, for its validity, as the Inter-American Commission on Human Rights has stated '[...] any statement of a person who does not adequately understand or speak the language in which it is taken has no value'.¹⁷⁹

In practice, section 5 considers the rights of indigenous people. Below we analyze the right to interpretation services for foreigners.

When a foreigner is detained, which happens, for example in the touristic area of Cusco, he is immediately taken to the tourism police,¹⁸⁰ a body with personnel trained in basic knowledge of languages such as English, Japanese, and French, which allows them to inform the suspect of the charges against him. This possibility is not available in the entire country, and even in Cusco, attorneys mentioned that the police do not always adequately inform the suspect in his language, but the formality of signing the bill of rights is fulfilled, although this is written only in Spanish.

¹⁷⁶ For information regarding the concept of the *tutela*, see footnote 22.

¹⁷⁷ According to the Political Constitution of Peru, art. 2.19.

¹⁷⁸ According to CPC, art. 114 and 115.

¹⁷⁹ Expediente 4719-2007-PHC/TC, Judgment of October 3, 2007.

¹⁸⁰ Supreme Decree 017-74-IN, from June 13, 1993 created tourism units. The mission of the tourism police is to plan, organize, direct, execute, coordinate, control and supervise police activities related to tourism and the protection of the environment at the national level, as well as investigate and denounce crimes and infractions in the matter, and ensure the safety and protection of tourists and their property, the historical-cultural, national, and touristic patrimony of the country, as well as national ecology.

Taking the Cusco court district as an example, the specialized tourism prosecutor interviews the detainee,¹⁸¹ who is also trained in foreign languages, namely English, which the vast majority of tourists understand. If the detainee speaks a language that the prosecutor does not know, he coordinates with the relevant embassy. Although embassies do not often provide interpreters, they do provide contact information for accredited interpreters, such as teachers or university professors. In such cases, the Public Ministry covers interpretation costs.

When those accused are foreigners, defence attorneys have difficulties during the police interrogation, as it is not common for attorneys to speak English or other languages fluently. Public defence also lacks attorneys fluent in other languages. Those interviewed stated that, on some occasions, the police and prosecutor understand the foreign language, but the attorney does not, which is why an interpreter is requested to ensure the right to defence. In such cases, the Public Ministry provides interpretation services.

During procedural acts undertaken in court, the preparatory investigation or trial judge, according to the case, requires translation or interpretation services for hearings. In such cases, the Judiciary covers the costs of the translator. There are some difficulties accessing interpreters in some areas of the country, especially the Andean and Amazonian regions of the country, which will be addressed below.

4. The professional culture of defence attorneys

The CPC has significantly changed Peruvian justice, by creating new roles for actors in the criminal justice process, including the role of defence attorneys. Two key elements of the new criminal procedure process are the oral and transparent nature, as the adversarial nature is much more demanding regarding the professional quality of actors. In this context, the exercise of an effective criminal defence within the CPC is a crucial challenge for attorneys. According to interviews, private defenders have had even greater difficulty adapting to the new procedural model, as their culture has been strongly rooted in written documents. By contrast, justice system operators state that public defenders have had greater capacity of adaptation, which they attribute to the training they have received on the new system.

¹⁸¹ Through the Resolution of the Executive Commission of the Public Ministry 667-98-MP-CEMP, from October 8, 1998, in the framework of Law 26961 'Law for the development of tourism' and in the growth of tourism, the Provincial Prosecutor of Tourism of Cusco, court district of Cusco was created and implemented on October 15, 1998.

To ensure an effective defence, starting in 2011, public defence offices adopted control and monitoring mechanisms to measure, through indicators, the efficiency, effectiveness, cover, and quality of public defenders. Specialized personnel undertake this monitoring and evaluation,¹⁸² twice a year at the national level. Monitoring consists of supervising strategic performance of public defenders, by applying a fiche that measures their knowledge of the case, the defence strategy, and compliance with deadlines. It also verifies the operational performance of public defence offices, via compliance with the rights of the accused. Similarly, supervisors visit courts to evaluate the performance of public defenders in the process, based on the hearing, exhaustion of defence measures, and ability in litigation.¹⁸³

Table 4.
Areas of control and monitoring of the performance of public defenders*

Strategic Performance
Guideline 1: Knowledge of the case
a. Copy of the prosecutor's file
b. Meeting with his client
c. Reviewed jurisprudence or relevant doctrine
d. Has a document regarding the theory of the case that: <ul style="list-style-type: none"> - Summarizes the case - Relationship of evidence

* It is important to highlight that the application of the supervisory fiche focuses on fulfillment of the activity. According to some defenders, this form of supervision does not measure the level of effectiveness of each activity.

¹⁸² Public defence has an attorney responsible for control and monitoring the criminal area, which, among other tasks, undertakes the following: i) supervising, evaluating, and informing the work that public defenders do in their cases and/or advising, verifying that they have provided technical legal assistance in a timely and efficient manner; ii) virtually supervise the entry and follow-up of cases public defenders take on regarding criminal matters at the national level, issuing the relevant report; iii) propose guidelines to the general coordinator, of control and monitoring of district directors, coordinators, and public defenders regarding roles for providing permanent service, proceedings, and assignation or distribution of cases tied to public defence; iv) supervise in situ the technical legal defence that public defenders carry out on behalf of their clients, to verify their development during the hearing.

¹⁸³ According to the supervision fiche of the criminal code of procedure of the Directorate General of Public Defence and Access to Justice.

Guideline 2: Defence strategy

- Based on the attorney's theory of the case
 - Based on the request of the client
-

Guideline 3: Adequately controls deadlines

- Preliminary investigation
 - Preparatory investigation
 - Registry or file of control of deadlines
-

Operational performance

Guideline 1: Guarantees the client's rights

a. Rights of the accused

- Questioning in the preliminary investigation
 - Questioning in the preparatory investigation
 - Participate in the hearing to clarify facts
 - Request referral of the process
 - Request and participate in control hearing
 - File protection actions (tutela, habeas corpus, others)
 - Participate in hearing regarding pretrial detention
 - Request revocation of procedural measure of coercion
 - Participate and question during confrontation
 - Offer evidence
 - Deduce technical defence measures (exceptions/questions)
 - Absolve transfer of accusation
 - Request and participate in dismissal control hearing
 - Participate in accusation control hearing
 - Request and participate in alternative resolution hearings
 - Carry out opening arguments
 - Request anticipated conclusion
 - Realize examination and cross examination
 - Examine witnesses and experts
 - 'Oralize' documents
 - Final arguments
 - Participate in the reading of the decision
-

- Present challenge petitions
- Request cassation and/or revision
- Conserve hearing audio, video, or transcriptions
b. Rights of the convicted
- Request certified copies
- Request registration of conviction
- Present judicial or court payments
- Request reconsideration of sanction
- Request an adjustment of sanctions
- Request commutation of sanction
- Request rehabilitation
- Request right to pardon or reprieve
- Request prison benefits
- Participate in prison benefit hearing
- Present challenges
- Substantiate challenge for prison benefits
- Request return of documents
- Request transfer of foreign convicts
Performance in the process
Guideline 1: Performance during the process
a. Preparatory investigation
b. Pretrial investigation
c. Intermediate stage
d. Trial
- Substantiation during hearing
- Exhaustion of defence methods
- Litigation skills

Source: Supervision Fiche of the DGDPAJ.

The parameters described above seek to ensure minimum service standards that DGDPAJ offers clients, through public defenders. According to interviews, results from this fiche measures the results of attorney's performance, and identifies their

strengths and weaknesses. These indicators also help the institution implement training to help overcome deficiencies of public defenders and improve the protection of their clients' rights.¹⁸⁴

Additionally, the DGDPAJ executes the project 'Profile design for abilities and evaluation system for performance of public defenders, mediators, and public officials responsible for defending the state (*procuradores*) for the capacity building',¹⁸⁵ which concludes that public defenders optimally fulfill their duties in 83.7 percent of cases, develops their abilities in 78.2 percent, has sufficient knowledge to carry out his work in 80.1 percent, and masters relevant technical abilities in 41.2 percent, which gives a performance level of 76.8 percent, or an advanced performance level.¹⁸⁶

As observed, public defence is implementing control, supervision, and evaluation mechanisms for its public defenders, in order to identify areas to improve the quality of their services. However, private defence attorneys do not have such mechanisms, meaning they are not subject to mechanisms of control or monitoring regarding their services.

In 2012, the National Registry of Attorneys in Peru (RENAB) was implemented to improve the efficacy of private defenders and transparency of their professional information.¹⁸⁷ However, the results of this initiative are not yet available. Currently, the only way to measure the quality of private defenders is through the prestige, experience, and cases won that they can demonstrate, which is also associated with the cost of their services, although the latter does not always guarantee a good performance.

¹⁸⁴ In this framework, to make the right to criminal defence effective, in 2014 a project was initiated to develop protocols to address detained foreign women and young people between 18 and 24 years old. Until October 2014, there was an abbreviated version that included the steps public defenders took from police detention to the enforcement stage. Directorate General of Public Defence and Access to Justice 2014.

¹⁸⁵ This project was carried out in 2012 with the support of the Project to Improve Justice Services and obtained recognition for Good Practices in Public Administration 2013, in the category of internal management systems. This distinction was granted by the organization Ciudadanos al Día (CAD), which organizes this type of contest on a yearly basis to recognize public administration efforts to improve citizens' services.

¹⁸⁶ Results of an evaluation of 824 public defenders

¹⁸⁷ The World Bank Project to Improve Justice Services implemented this project in October 2012. Through this system, defence attorneys may include their contact information, work and academic experience, which allows a greater contact with the public looking for their services, and to optimize the supply of legal services at the national level. More information about this project is available at: <http://www.conab.org/>.

5. Rights of indigenous peoples

Peru is a multicultural country with great ethnic diversity. The Constitution recognizes this, indicating that ‘no one may be discriminated against by reason of their origin, race, sex, language, opinion, economic condition, or any other nature’,¹⁸⁸ and ‘all Peruvians have the right to use their own language before any authority through an interpreter’.¹⁸⁹

In the Andean region, part of the population speaks Quechua, and in the Amazon region, part of the population speaks indigenous languages.¹⁹⁰ Thus, the CPC states that if a detainee does not speak Spanish, or if in a hearing the defendant speaks an indigenous language, he must be provided a translator or interpreter.¹⁹¹ A novel aspect of the CPC is the incorporation over criminal acts resolved in special or community jurisdiction, and that the ordinary criminal justice system does not have jurisdiction over cases resolved in special or community jurisdiction.¹⁹² Thus, legally, in addition to the Judiciary, community justice may also resolve conflicts within its territory.¹⁹³

In practice, in some court districts in the Andean and Amazon regions, the native language is taught as an obligatory course throughout education,¹⁹⁴ and thus interpreters are not required, since the police, prosecutors, defence attorneys and judges know the language. In the case of public defenders, if applicants are not from the area, one of the requirements for admissibility is to possess a basic knowledge of the native language. Additionally, public defenders, judges, and prosecutors must apply the Protocol of Legal Attention and Orientation with a multicultural approach to indigenous people.¹⁹⁵

¹⁸⁸ According to the Political Constitution, art. 2.2.

¹⁸⁹ According to the Political Constitution, art. 2.19.

¹⁹⁰ For more details, see, footnote 5.

¹⁹¹ According to CPC, arts. 114 and 115.

¹⁹² Article 149 of the Constitution indicates that authorities of peasant and native communities, with the support of peasant patrols, may exercise jurisdictional functions within their territorial spheres, in accordance with customary law, provided that this does not violate fundamental rights. The law establishes coordination mechanisms between this special jurisdiction and peace courts and other instances of the Judiciary.

¹⁹³ This State attribution implies that human rights are always respected, additionally, in criminal cases, those accused must be taken to the nearest police, prosecutorial or court authority. However, there have been some cases of physical abuse by peasant patrols, which have even cause the death of those accused.

¹⁹⁴ An example is Regional Ordinance 025-2007-CRIGRC.CUSCO.

¹⁹⁵ Programa para la Cohesión Social en América Latina 2014.

During interviews in the court district of Cusco, we were informed that there are not many cases within the city center where the accused speaks a native language; this is more common in other provinces of Cusco. Operators stated that difficulties related to translation are primarily evidenced in hearings, as there are not many interpreters, and the geographical distance of some provinces limits their ability to arrive quickly. According to some sources consulted, to address this, judges will appoint unofficial translators to participate in the hearing, but some of them do not understand the legal language, so the translation does not meet the necessary quality standards.

Importantly, in 2012, the Public Defence Office created a special area of indigenous issues to provide attention to the defence needs of mainly Amazon indigenous communities.¹⁹⁶ To be a public defender in this area, the attorney must know the culture, geography, and native language of the respective region.

6. Political Commitment to an effective criminal defence

In the past ten years, the executive branch has undertaken efforts to strengthen criminal defence in the country. The best evidence of this is the entry into force of the CPC, which contemplates various mechanisms to ensure the exercise of the right to defence at a practical level. The implementation of the CPC has been associated with institutional and budgetary strengthening of public defence since 2006. As explained above, this institution has increased geographical coverage of its services, and has more public defenders, who, most importantly, provide notably better quality services.

However, parallel to these efforts, there are also certain contradictions in the commitment of political authorities to effective criminal defence, which translate essentially into legislative modifications to strengthen citizen security, by increasing prison terms, creating new crimes, and reducing or eliminating penitentiary benefits.

Such modifications have been constant during the past 30 years; thus, between 1991 and 2012, the Criminal Code was modified 408 times, 73.5 percent to modify sanctions or crimes in order to heighten them, and 22 percent to incorporate new crimes.¹⁹⁷ The Code of Criminal Enforcement faces a similar situation, which during

¹⁹⁶ Directorial Resolution 068-2012-JUS/DGPAJ.

¹⁹⁷ 4.5% of modifications to the Criminal Code were repeals. National Council of Criminal Policy 2013.

the same time has been modified 28 times, 72 percent to restrict or elevate requirements for prison benefits, and 14 percent to repeal articles.¹⁹⁸

However, this trend to modify criminal norms, justified on the need to strengthen citizen security, worsened in 2013, when the government passed a set of laws to strengthen citizen security,¹⁹⁹ among which was Law 30076, which modified article 84 of the CPC, relating to the rights and duties of the defence attorney in the criminal process. The new norm establishes that the attorney may not use dilatory mechanisms that obstruct the correct functioning of the administration of justice. However, the law does not define such mechanisms, which can create certain risks for the exercise of criminal defence.

By contrast, in Peru, neither the executive branch nor the judiciary addresses the need for a serious reform of the justice system as a priority goal to improve quality of life and development of the country. In 2013, there were confrontations between authorities of both branches, due to budgetary needs. However, there is not a consensual, institutional agenda that addresses short and medium term objectives, activities, and goals, nor from the Public Ministry to improve the administration of criminal justice. However, there are important initiatives in each of these entities. At the same time, the CPC should be understood as a tool that must be inserted into a solid and sustainable public policy.

7. Conclusions

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 of 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

¹⁹⁸ Consejo Nacional de Política Criminal 2013.

¹⁹⁹ In August 2013, Law 30076 was published, which modified the Criminal Code, the Criminal Procedure Code, the Code of Criminal Enforcement, and the Code of Children and Adolescents, and creates registries and protocols to combat citizen insecurity. Law 30077 was also published, which is against organized crime, and establishes procedures and mechanisms for the detection, investigation, and sanction of members of, or participants in, organized crime.

years, meeting certain standards that demonstrate its efficacy. Thus, in the normative 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 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 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 the organizations, 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 moni-

tor 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 that are not sufficiently trained to carry out the defence of their clients, which reduces their clients' possibilities of securing justice.

7.1. *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 is 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, 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.

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PART III
ANALYSIS, CONCLUSIONS
AND RECOMMENDATIONS

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CHAPTER 9. IMPROVEMENTS AND CHALLENGES REGARDING COMPLIANCE WITH INTERNATIONAL STANDARDS

1. Introduction

In this chapter we will analyze the level of compliance with international standards based on the individual investigations carried out in each of the countries included in the study. As discussed in Chapter 2, the context in which these standards are produced is still tied to a set of cases that have reached the Inter-American Court of Human Rights (IACtHR), marked by exceptional seriousness. However, this has not prevented the IACtHR from developing a set of concrete rules and principles that allow for a precise analysis of their level of implementation at the domestic level.

Additionally, we have a point in our favor: new criminal procedure legislation established in the countries included in this study have expanded the normative recognition of many of these principles, so that assessing the state of effective criminal defence does not always require an immediate reference to IACtHR decisions, but rather permits a much more immediate reference to procedural legislation. However, we must remember that the goal of these studies is not only to analyze the level of normative recognition of defence rights, but we are also specifically interested in understanding their level of effectiveness, as a product of the impact of organizations and institutions, and implementation, which stems from the specific culture and practices.

The specific reality of each country cannot be ignored; not only due to the cultural elements that always underlie how institutions work, but also due to the fact that the specific implementation of each of these rights depends on a complex mechanism of interpretations, adaptations, and adjustments between institutions that lead to particularities in procedural legislation, the most relevant court decisions, organizational

forms, etc. Even personal factors or the way in which these organizations condition peoples' concrete actions, is a factor that cannot be forgotten. This set of factors, in addition to others perhaps less immediate, but no less determinate - such as the development of the judicial structure as a whole, real levels of criminality and violence, efficiency and transparency of police organizations, the state of prisons, the obsolescence of legislation that defines crimes, and many other factors - make up a *specific context* that cannot be hidden by the comparative analysis. However, there are other common factors, shared traditions, similar problems and attempts to solve these problems, which render a comparative perspective such as the one in this chapter highly productive. This focus, of course, is on the effective defence that those subjected to the criminal justice process receive. This focus has variations, but remains an important reference point.

2. The specific context of each of the countries. The level of implementation of criminal justice reform

Although Latin America is often considered a region with some homogeneous features, the disparity in social, cultural, demographic, and political realities is large. This study concentrates on countries that respond to these different realities; however, in the specific topic under study, there is a common historical pattern that brings us closer to a homogenous vision. In particular, the cases of Mexico and Brazil are worth highlighting, as the large population of both (nearly 120 million in the former and 200 million in the latter) creates a scale of problems that is useful to study in itself. They also share high levels of cultural diversity (as do the other countries) and conditions of social inequality that, more or less, reproduce a characteristic feature of the Latin American region. However, in the past decade, there has been marked economic growth in the region, which has improved many of its macroeconomic indicators, although it has not had a similar impact on conditions of inequality. In the cases of Peru, Argentina, and Colombia, one can also speak of 'large' countries, not only of their geographical size, but also because Argentina and Colombia have more than 40 million inhabitants, while Peru has over 30 million. Guatemala, although the smallest country in terms of population in the study, is the largest in its sub-region. The first element of the set of national reports is that they involve large countries which, in one way or another, creates difficulties for the State in providing basic and comparable services to the population throughout its territory.

Another common characteristic stems from the fact that Latin America is a region consisting of countries that are highly culturally diverse. In some countries this is due to the significant presence of indigenous peoples, such as in Mexico, Guatemala, or Peru, although they are also present in the other countries, or to diversity resulting from the processes of migration or the transplantation of populations (Afro-descendants). In other countries the realities of *mestizaje*, which obscures the continued existence of different cultures, is stronger. In any event, whether indigenous or the result of spontaneous or forced migration, all the countries in the study must be seen from a perspective that highlights multiculturalism as a basis for their social fabric.

A third element is that three of the countries included in this study (Mexico, Argentina, and Brazil), have a federal political structure which impacts on the organization of justice (in a different manner in each of the three countries, as their national reports indicate). Two countries have the structure of a centralized State, but are also undergoing strong processes of decentralization, which has been accentuated over time (Colombia and Peru). Guatemala is the only centralized country where the main characteristic is the State's extension throughout its territory, rather than decentralization. In any event, whether for formal reasons (federalism or progressive decentralization) or factual ones (weakness of state services throughout the territory), it may be said that all the countries are characterized by a diversity of local realities that cannot be ignored. Therefore, we have made a special effort to indicate the reasons for which each social and democratic reality was chosen for the study. As expressed in each of the national reports, this has enabled general conclusions to be drawn without prejudice to the fact that some aspects have local or regional variations.

The fourth common element is that all six countries are undergoing a serious process of revision of their administration of justice, both in the normative sense as well as in the effective practice of institutions. In the case of Brazil, although its criminal justice process is subject to constant revision, it has completely reorganized its system. As we explained in Chapter 2, the general characteristic of this process has been the abandonment of inquisitorial, written forms of justice for an adversarial/accusatory and oral form. In spite of this common reality, the level of development in each country is different, and must be noted. In the case of Guatemala, for example, as the national report indicates, starting in 1994 the installation of a new criminal justice system has slowly developed new institutions. However, it is a country that has had to confront high levels of violence, as a consequence of the long internal conflict, or resulting from new and complex forms of criminality.

In Mexico, the National Constitution imposes the adversarial system, but implementation is a long, complex process that is still in its infancy. Since, originally, the authority to establish procedural legislation belonged to federal states, implementation has been slower, and fewer than half of the states have developed new criminal justice systems, and many of them have only recently begun implementation. Thus, the original proposed date to complete the process throughout the country seems unattainable (2016). The discussion and adoption of the unified Code of Criminal Procedure for all states and the federation is seen as an instrument to accelerate the implementation process. In any event, the path to make the new adversarial systems effectively operational is long, complex, and plagued by difficulties.

In Argentina, where states also have responsibility for criminal justice, the process has been different. Traditionally states, rather than the federal government, have innovated in the judicial sphere. To date, the principal states (those with the majority of the population), and a majority of the others, have moved towards an adversarial system, although with differing levels of modernization and implementation. Although it may be said that in general terms the country has moved toward complete implementation of this new system, the process is still underway and with local realities of varying value and depth.

Starting in 2004, Colombia began the adoption of an adversarial criminal justice system, which involved:

The gradual implementation, divided into four phases, the first of which entered into force in January, 2005, and the last in January, 2008. As a result of this change, there are currently two types of criminal procedure proceedings in place: the mixed system proposed in Law No. 600 of 2000, which applies to crimes committed prior to January 1, 2005, and the adversarial system designed in Law No. 906 of 2004, which applies to crimes committed after that date.

Implementation has not been easy and has faced many complications due to the laws of justice and peace which, although they are separate laws, both address public policy issues regarding problems and the social energy necessary to put into place a new justice system in a large and complex country. The difficulties of any process of change of the size projected could not be overcome or minimized by a progressive implementation, as was originally hoped.

Brazil, as mentioned, has unique characteristics. Although its criminal justice system is permanently under review, critique, and revision, in particular due to the contradictions with the Federal Constitution of 1988, it has not undertaken a complete, comprehensive change, in spite of long discussions on the topic for more than

a decade. In any event, partial legislative changes, as well as jurisprudential changes, mark a trend toward greater judicial control over police activities, a progressively larger role for prosecutors, and improvement of defence, in addition to the development of alternative resolutions. Thus, reforms are geared toward, in a slower manner, the same goals as the other countries.

Finally, Peru is in a particular situation, beyond broad similarities with the other countries. It has been progressively implementing a new Criminal Procedure Code since 2004, in various court districts, finishing with the most populous districts, such as Lima. The implementation process has faced similar difficulties to other countries, but the final step toward the capital city has been continuously delayed, even though implementation in that city is inevitable. Pressure from various actors (among them the police) and continuous budgetary problems are among the factors blamed for this delay.

It should be clear, then, that the transition from the inquisitorial criminal justice models to new adversarial models is a *firm* decision that has mobilized political energy and social and state resources, but is a process that has *not yet stabilized*. Implementation, in any of its forms, has indicated in the countries in the study that it is a complex process, involves slow changes to organizations, knowledge, and practices, and also requires a strong readjustment of the positions and interests of these institutions'. This context, *firm in its direction, but unstable in its implementation, colors the reality of each of the countries and must be a determinant element when examining each of their situations, as well as the regional reality*.

From the point of view of compliance with international standards regarding effective criminal defence, the instability of this process means that clearly established norms both in constitutions as well as new procedural codes do not yet have a precise, direct application, and also means that courts are much more likely to recognize rights provided for in international legislation and directly apply them to cases in their jurisdiction. Attempting to examine a process that is still so active doubtless causes problems, but it also provides a good opportunity to detect gaps or prejudices that already exist and which deserve support or more precise criticism. We must not forget that the ultimate goal of this investigation is to improve the level of effective defence of those accused of crimes: a social goal that goes beyond purely academic interests.

3. Limits of the investigation

It is clear that none of the dimensions of criminal justice can be outside the functioning of the system as a whole. In particular, certain basic characteristics, such as greater

or lesser respect for evidentiary rules, the duration of the processes, prison conditions in general and during pretrial detention, the real existence of public hearings, etc., are of central importance in assessing the way in which defence is exercised in this system. Additionally, given that the ultimate criterion in assessing whether a defence is effective is its success in practice, and not merely sticking to the rules of the game, it is even more difficult to precisely determine whether a defence fulfills the standards required of attorneys, when he is blasé about compliance, or whether it amounts to a comprehensive adaptation to the rules that govern the particular system, and which are often informal and distinct from procedural rules.

Although the aforementioned is a limit to this investigation, the national reports have attempted to indicate, as closely as possible, the real conditions of the functioning of the criminal justice systems. It must not be forgotten that we have already mentioned that, in all countries, their systems are in a period of transition toward new rules of functioning and this means that there still may be large gaps between legal norms and their functioning in practice. Even advocacy is in a transitional phase, where there is not complete clarity regarding whether sticking to the new adversarial rules is the best way of ensuring success, or if it is better to continue to use former practices, which, in spite of their illegality, are still admitted in court. For example, an extensive defence practice from the former system is to take advantage of all circumstances that draw out the proceeding, so that the case is forgotten, or the statute of limitation runs out. This form of indirect litigation, which avoids addressing the heart of the defence, may be objectionable from the point of view of advocacy in an adversarial system, which prefers the prompt resolution of the issue. However, many attorneys consider that, even in new contexts, these practices constitute a model of effective defence.

Nonetheless, the national studies have demonstrated that an evaluation of the general conditions of the exercise of an effective defence is possible. As with all empirical investigations regarding such complex social spaces, this also has limitations that do not limit its value as a valid approach to general situations. The exercise of defence, finally, is constituted around rules and practices that come from a long historical tradition and the accumulated experience of many countries that have passed through similar situations as those faced by the criminal justice systems in the present study. The nucleus of rights that form an effective criminal defence is not an arbitrary theoretical mix, but rather a historical construction proven over time. Thus, although one must recognize the importance of the systemic functioning mentioned above, as well as the strategic value of certain adaptations to bureaucratic or distorted functioning

of current systems, this does not detract from the importance of the conclusions and findings of the works that they present.

4. Thematic areas

4.1. *The right to information*

As mentioned in Chapter 2 with regard to the jurisprudential development of international standards of effective criminal defence, although there are no specific pronouncements regarding the right to information in general, this right comes from the development of rights directly tied to this principle. Moreover, the IACtHR has stated on several occasions that participation in the process requires *informed actors*. This right is particularly important with respect to the accused, as the worst consequences in general fall on him. This is a basic criteria of an impartial trial in which the accused participates with a sufficient level of information to enable the exercise of all of his rights.

In the countries investigated there is sufficient normative recognition of the obligation to provide information. In countries that already have more developed adversarial systems (Colombia, Guatemala, Peru, and some states in Argentina and Mexico) there is a *formal start* of proceedings (indictment/*imputación*), at which the accused's knowledge of his rights and powers must be ensured. Each of the domestic reports refers to the existence of indictment hearings or legal provisions (including constitutional) that state that there must be documents regarding the reasons the authority is commencing a process against a person, especially in cases of pretrial detention.

Legal recognition of the right to information is sufficient from the perspective of international standards in all of the countries in the study, to a greater or lesser extent. In the case of Colombia, the Constitutional Court has made progress regarding this principle, indicating that it exists even prior to a formal indictment, and independently of the existence of a State obligation to communicate or notify the beginning of an investigation in its preliminary stages, in particular in cases in which the suspects learns that he is under investigation. This knowledge would give the suspect two possibilities: first, to begin taking steps to collect information on his own, in order to begin what could be his defence in the event that he is charged; second, to attend, with his attorney, control hearings regarding the legality of evidence collected prior to his indictment, in order to contradict evidence. On this point, the Court clarified that although the restriction of access to information via the protection of certain topics remains, this possibility of the suspect does not compromise the effectiveness of the

criminal investigations, as ‘it is one thing that the public authority is not required to give notice about the moment in which certain actions, searches, raids, interceptions, etc. will take place [...], and another very different that the person subjected to such measures may not contest them in a timely manner, may not freely and fully exercise their right to defence’.¹ In a similar way, the High Tribunal of Brazil (2009) recognized the right of a defence attorney to access police files. However, compliance with this principle in practice faces many difficulties.

First, all the country studies call attention to the fact that there is a lack of concern with effectively communicating information. Rather, at best, it is approached as a *formal proceeding*, as though it were a requirement that must be fulfilled in order to avoid the invalidity of the proceedings, regardless of whether it truly fulfills its purpose. Even then, this duty is fulfilled irregularly, as there are often *no clear protocols on how to provide this information, in particular in police stations*. There are also generally no brochures or simple or instructive documents that may be given to the accused. Therefore, compliance *tends to be formal and random*. Another common element is that information tends to be communicated to the accused in *formal legal language that is difficult for the accused to understand, in particular those with low levels of education*. Legal formulas are often used, or a reading of transcribed articles or synthetic phrases, with the result that: ‘it may be presumed that the vast majority (usually those with few resources and low levels of education) cannot understand the content of the documents that provide for these rights, which are written in legal language’ (Brazil); ‘It is common for those accused to not understand the language of court proceedings, the reasons for which they were detained, nor their rights. Legal language and the logic of the criminal process is difficult for some people to understand, in particular those with low education levels’ (Colombia); Information is provided ‘in a ritualistic manner’ (Argentina).

It is important to note this first characteristic, as it is a general characteristic, demonstrating the weak commitment of operators of the judicial system to the legal obligation to create conditions for an effective criminal defence. Behind these practices is a common perspective, which should be reversed through training and consciousness building, according to which the exercise of defence is an impediment to the efficient functioning of the administration of justice, and therefore should not be encouraged. In the best of cases, legal provisions should be fulfilled to avoid the invalidity of the proceedings, but it is not generally considered that the exercise of defence is valuable to the system and is to be encouraged. In particular, this general perspec-

¹ Constitutional Court, Judgment, C-025 of 2009. M.P. Rodrigo Escobar Gil.

tive, which all of the studies have detected in national realities, creates an environment ripe for ritualistic, formal compliance, lacking in any intent to transmit real, useful, timely information to the accused.

In the case of indigenous people, this situation is worsened due to language barriers. In some cases it may be that the greatest difficulty is not due to the different language, but rather a lack of understanding of legal formalisms (Colombia).

4.1.1. To be informed of the nature and cause for arrest or detention and the rights that emanate from that situation

We have seen that the right to information regarding one's rights is stronger when the person is arrested or detained. International jurisprudence has indicated that this applies to any deprivation of liberty, regardless of the name or title it is given. Again, country studies note the existence of legal or constitutional norms that recognize this right. In reality, the oldest and most generalized norm around which the entire right to information is based is, precisely, that which indicates the right to know the cause for one's detention. In general terms, within short periods (24 or 48 hours) the state must provide the accused with precise information on the specific reasons for his detention and his rights. This may be written (Brazil) or through a specific act based on a police protocol (Colombia), or through a court appearance (Argentina, Guatemala, Peru), which is favored in courts that are always open (Guatemala City, for example). However, the capacity of these documents to genuinely inform is relative, as they suffer from the same defects mentioned above with respect to the use of overly technical language that does not provide real information to those accused. In this way, as the study on Guatemala mentioned, 'in areas with 24 hour courts (also known as shift-courts), individuals must be taken before a judge to declare immediately', which makes it more likely that detainees' rights will be respected.

In the case of Peru or Argentina, the practice of immediately (within 24 hours) taking a detainee to a public hearing before a judge, in the presence of his attorney and the prosecutor, increases the level of compliance with norms. It seems that this is the clearest and most effective way to ensure compliance with this right, without undermining the importance of information immediately upon detention, as the majority of detentions are carried out *in flagrante delicto*, without a court order (Guatemala).

Where this practice does not exist, the situation is worse. In the case of Argentina, for example, '[t]hose interviewed stated that when they were detained they were not given detailed information regarding the cause for their arrests, nor regarding

their rights, and when they asked to call a family member or attorney, the police reprimanded them'. Interviews suggested that while a person is in the hands of the police (until he is brought before a judge or prosecutor), he is at his most vulnerable point: he is not informed of his rights, or is informed of them in a ritualistic manner and after illegal, and often violent, questioning. According to the law, police may only question a detainee to identify him, and therefore they do not record the illegal questions. Therefore, it is not common for such cases to be brought to court, which explains the jurisprudential silence on the topic.

In any event, the level of real knowledge regarding the causes for detention continues to be low, according to individual studies: 'In Argentina, in spite of isolated efforts, the police continue to be ineffective at providing detainees with required information. Any delay in obtaining the assistance of an attorney heightens the problem'; 'According to interviews with defence attorneys, although this document always indicates that the prisoner was informed of his rights, this communication is frequently missing in the act formalizing his imprisonment. Additionally, both judges and defence attorneys mentioned that the note of guilt is standardized, and therefore it is impossible to infer how the defendant was actually informed of his rights in the police station at the moment of detention' (Brazil); 'The right to sufficient information during detention is irregular, because there is no police protocol regarding how to detain, nor a bill of rights read or provided to the detainee' (Guatemala); 'A recent study on individuals detained in prisons in the Federal District and state of Mexico reported that 93.7 per cent of those apprehended in accordance with a detention order were not shown a document accrediting the judicial order against them' (Mexico). This indicates that the countries in the study study are far from true compliance with the standards established by international jurisprudence, which has focused in particular, on establishing that the detainee has 'indispensable, true, clear [information] about *what is controllable regarding a detention (reason, motive, authority, duration)*'. In Colombia, there is a greater concern with establishing protocols and police practices that ensure increased compliance with this right, and jurisprudence that is more concerned with determining the extent of this right.

4.1.2. To be informed of the nature and causes of the indictment (formulation of charges) or accusation

In the context described above, one could say that access to information increases, although with difficulties, as the case moves forward. In countries that already have

adversarial systems, there is normally a formal act of indictment which, as we have seen, in some cases is carried out in a public hearing, which increases the probability of communication (Guatemala, Peru, Chubut (Argentina)). Additionally, there is a formal communication of the *acusación* (intermediate stage) in which, at least according to norms, authorities must provide the accused with all the evidence the prosecutor intends to use, including that which he has decided not to use and which may favor the defence. In general, all new Latin American legislation already has these characteristics, as evidenced in the national reports.

However, effective implementation of these norms still encounters difficulties. For example, in the case of Colombia (although this could be extended to practices in other countries as well), defence attorneys indicate that the prosecutor does not always provide them with evidence favorable to the defence. In Guatemala, as well as in other countries, although in formal terms operators of the judicial system know that they cannot deny access to information, as the laws are clear in this respect, there are situations that prevent access in practice. For example, prosecutors insist on official accreditation of defence attorneys to create obstacles to or delay in providing information (this generally occurs at the beginning of the process), or rely on bureaucratic impediments, such as the file not being available, or being updated, or that the responsible person is not available, etc.; or there are other practical situations that make access to information difficult, such as problems with obtaining copies of large files or the defendant lacks resources to pay for copies, etc.

In Argentina, as well as in several of the jurisdictions in the study (Buenos Aires, Córdoba), an old practice persists, according to which the accused and his attorney learn of proceedings at the moment of the accused's statement, which is held up to ten days after detention. The information provided is partial and tinged by the urgency of the statement or decision to testify or not. Many attorneys accept this situation as routine, as if it were a natural condition of the process.

In general, access to information during police proceedings is much more difficult. Brazil has made some recent progress, based on the jurisprudence of the Federal Supreme Tribunal. In the other countries, given the trend to send cases as fast as possible to the prosecutor, attorneys tend to prefer learning of a case in the prosecutor's office. Similar improvements are notable in Mexico, in states that already have adversarial systems, where access to information is greater, at least for public defence attorneys.

In general terms, recently, whether due to greater legal recognition or the jurisprudence of high courts, the accused's access to necessary information has improved. However, there are still problems, mostly due to organizational difficulties in allowing

easy access to proceedings and, not in a small part, due to the lack of commitment on the part of prosecutors and officials to provide this information, as though it were not a necessity of the system. Hiding information in the police office has decreased, as processes are less commonly held there or because jurisprudence clearly states that a general right to secrecy from the accused does not exist. An additional problem mentioned in several national reports (Brazil, Argentina, Mexico), is that even when the attorney has information, this does not mean that the accused is informed. This may be due to a practice among attorneys to not keep their clients informed (in particular in public defence), or because it is difficult to arrange meetings in prisons in adequate places, or because clients with low education levels have difficulties understanding legal issues in the way lawyers present them. In any event, the end result is an uninformed defendant.

4.1.3. To obtain information about one's rights

As we have seen, although there are greater efforts to inform a detainee of his rights, the main problem with its application is that it is treated as a *formal proceeding generally expressed in technical language*, which is difficult to understand for those in this situation. In particular, of the set of rights of which he must be informed, the right to immediately have an attorney is perhaps the most relevant for the exercise of other rights. International standards require that this information be provided to a person close to the detainee (family member or trusted person), since the concrete possibilities for the detainee to exercise this right are always limited. Mexico's report recounts several examples where rights are written on posters, so that family members, who normally go to the courthouse, may take note of them.

In general, public defence offices or bar associations do not consistently pressurise the police and prosecutor to ensure that this information is provided, in a clear, precise, and timely manner. Although jurisprudence is clear in determining the invalidity of actions when it is proven that this information was not effectively provided, in many cases this invalidity is not noted, or defence attorneys do not act on it, sometimes out of lack of concern, and others for more strategic reasons, normally related to obtaining the release of the detainee. In fact, as the report on Colombia mentions, normally the accused does not undertake defence activities; he generally waits for the attorney to tell him what to do. Given the broad implications that this has for public defence, a key point is early appointment of attorneys and the existence of administrative mechanisms to quickly inform the public defence office about detentions.

4.1.4. Obtaining access to material evidence in the case, and the case file (record, docket, brief, dossier, etc.)

Both legislation and jurisprudence has recognized this right much more broadly than was common prior to the recent reform process. The obligatory jurisprudence of Brazil (Bulletin 14), decisions from the Colombian Constitutional Court, or high courts of Argentina, have established this right. In systems with initial public hearings, the problem is substantially changed by this dynamic. By contrast, in others jurisdictions prior practices persist, even against competing norms, in which the prosecutor's file is something that should not be reviewed. This occurs even when new legislation has restricted cases in which the secrecy of investigations is protected. Beyond these precise norms, the approach promotes the secrecy of the proceedings.

According to the report on Colombia, '[i]n practice, according to some defence attorneys, the prosecutor does not always reveal evidence favorable to the accused during the *acusación*; however, this is not easy to control'. In particular, it is difficult to detect when certain aspects of the investigation (initial experts, searches for witnesses, etc.) had negative results, as this is not generally recorded. An element that must be considered for an analysis of effective compliance with these and other standards is that in the practical exercise of defence, it is common to allow the prosecutor to accumulate procedural defects in order to later challenge the validity of the proceedings, rather than to remedy them when they occur. Although, from the point of view of rights, it is doubtless necessary to ensure greater compliance with these standards, this demand cannot be placed on defence attorneys concretely, as they are limited to seeking success in their specific case and not implementing rights in the abstract. This creates a limitation regarding the general implementation of these rights.

Moreover, as the report on Argentina mentions,

Access to the file is generally ensured after the accused has been called to testify. But in Córdoba and Buenos Aires, there are often practical obstacles that impede or deny access, without written substantiation, as the denial is based on practical, rather than legal, reasons.

This corresponds with the report on Guatemala, where although the right is recognized in norms and jurisprudence, there are practical obstacles that impede its effective implementation.

4.2. *The right to defence and to an attorney*

4.2.1. **The right to defend oneself and to represent oneself**

From a harmonious analysis of international decisions, it is clear that the right to defence cannot be limited to the right to an attorney. By contrast, the accused must at all times have a leading role, or at least maintain control over his defence. The right to defend oneself means that the accused is a *subject of the process, a concrete person with concrete interests and a personal opinion that must be considered*, and never a mere object of judicial proceedings or spectator of the attorney's actions. Beyond the latent possibility of the accused to represent himself, the operative nucleus of this right is that the defendant, in any case, must maintain *adequate control* over the exercise of his defence through professionals, in particular if they belong to state organizations in which the possibility to subordinate the defendant's interests to general organizational goals (efficiency of the proceeding, organizational stability, streamlining the process, etc.) has been frequently criticised.

In general terms, self-defence by defendant has not been encouraged, even by sectors favorable to the implementation of human rights, since it dates from a period when judges permitted merely formal, fictional defences, involving only the ritual of appointing a defence attorney or permitting self-representation without any concrete activity, even when the possibilities for mounting a valid defence were evident. This has thus favored the assistance of an attorney as a *minimum condition of efficacy of defence*. Additionally, as the report on Argentina indicates, the ritualism and formalism of the process discourages direct participation by the defendant, unless he is an attorney. It may be said that, in general, it is a right that defendants rarely use. However, it has been recognized, and this recognition is growing in cases in which the accused files indeterminate petitions, which may be requests for revision, petitions, etc., in particular when they are filed from prison. Reviewing courts or enforcement judges tend to admit these direct petitions, even when they do not conform to formal and presentational requirements. This is a clear manifestation of the right to defend oneself.

The idea of self-defence has been used more as a basis for recognizing the accused's right to introduce his version of the facts (as a defence mechanism) through his statement; that is to say, to neutralize the idea that questioning the accused is part of the investigation. Today, in general, the statement of the accused is understood as an act of defence, although he may allow himself to be questioned. In Brazil, the report explains 'the term "self-defence" should be understood as the first definition mentioned, that is,

the right to present one's own version of the facts during questioning'. The other countries have adopted this position, sometimes differentiating between *material defence* (which the accused exercises through his statement), and *technical defence*, (which he exercises through his attorney). Beyond doctrinal classifications, what is important is that the concept of material defence has helped consolidate the accused's position as a subject, and to strengthen the conditions of liberty of his statement.

A third consequence of the right to self-defence has to do with of discrepancies between the the attorney and his client. As the report on Guatemala indicates, the obligation to have an attorney is interpreted in terms of the pre-eminence of the attorney's opinion: '[M]aterial defence may never obstruct the effectiveness of technical defence' (Guatemala). Colombia uses a similar criteria, where '[i]n the case of disagreements between attorneys and their clients regarding defence strategies, legislation grants primacy to the technical defence'. However, in practical terms, these differences of opinion are rare, to a large extent a product of the way in which criminal cases proceed, the technicalities and rituals, and the language used, all of which limits the understanding of the average defendant who, due to reasons of selectivity of the system, tends to have a low level of education.

4.2.2. The right to trusted, freely chosen legal (technical) representation and assistance

This right is the nucleus that makes many of the former rights operational. However, the right to defence should not be understood as the right to an attorney, as it often mistakenly is, as the right to an attorney is only part of the right to defence. Additionally, international standards require that it be a *trusted* attorney. This means two things: first, the right to freely choose an attorney; and second, that the attorney is guided by his client's interests. Since, due to the lack of resources of many suspects and defendants, many are appointed public defenders, it is impossible for the accused to freely select his attorney within this system. However, it is a principle that public defence offices should use to guide their work.

In all of the countries in the study there is broad legal (and constitutional) recognition of the right to an attorney and the usual protection of that profession (respect for attorney-client privilege, etc.). New adversarial procedure codes have clearly established this right, both in its positive facet (appointment) as well as negative (authority to remove an attorney, although the attorney must guarantee the continuity of the defence). To protect the accused, an attorney who abandons a case should be sanc-

tioned. Nonetheless, in practice it is common for attorneys to defend one stage of the process and later abandon the case, leading to a late intervention by the public defence office. Courts tend to acquiesce in this practice, which affects the accused's relationship with his chosen attorney.

The main problem is with respect to the real possibility of appointing a trusted attorney, since a large number of suspects and accused do not have the resources to afford an attorney, or may only be able to afford an unsuitable attorney. In this regard, bar associations do not have effective control regarding suitability for the exercise of the profession, which leaves judges to address cases that seem to have merely formal defence. Moreover, although some public defence offices have strong mechanisms for supervision, heavy caseloads do not let them identify many cases in which the defence is inadequate.

In spite of this, in the countries included in this study, the idea that the accused has a right to an attorney has consolidated. Prior to the reform process, there were still laws that limited this right to certain procedural stages (judicial), and did not permit attorneys to participate during the police stage. This has changed, at least with respect to legislation, although there are still practical barriers that impede attorneys' participation during the police stage or preliminary prosecutorial stage.

4.2.3. The right to legal assistance during questioning

We have seen that the questioning (or the accused's statement) is generally understood as a manifestation of the right to defence (self-defence or material defence). We have seen that this is a regional characteristic, compared to other jurisdictions in which police interrogation forms the basis of investigation. However, international standards are clear with respect to the fact that an attorney must assist the accused *from the beginning of the investigation*, independently of the form it takes. The importance of this right must be stressed, as in practice one of the initial actions of the process is the accused's statement, although no longer generally before the police.

In Colombia, this authority is recognized even in the absence of a formal indictment, thus applying when the case involves a mere suspect. Both procedural norms as well as the Constitutional Court's jurisprudence have understood that this forms an essential part of the beginning of the exercise of the right to a full defence. Similarly, in Mexico the prosecutor carries out questioning, and absence of a defence attorney is grounds for invalidating the proceedings. In Brazil, the situation is not as clear, as some still believe that true defence begins in the judicial phase, and not the police

stage. Although this situation is changing, given the progressive ‘constitutionalization’ of the process, in practice researchers found an almost complete absence of defence attorneys during the collection of testimony at the police stage. For example:

the publication of the detention *in flagrante* and during police questioning. Such actions occur without the presence of defence attorney, who, later, by legal requirement, is provided with a copy of the documents regarding prison *in flagrante*. In this context, the few police interrogations in which an attorney is present are those in which the suspect has hired a private attorney. Nonetheless, police officials and attorneys stated in interviews that if the suspect is free during the police investigation, it is most common for attorneys not to be present during questioning. During the field investigation, we did not note or hear of any situation in which the police suggested that a suspect call an attorney.

In the case of Argentina, the situation varies, since although jurisprudence and legislation formally recognize this right, in some states the delay in the accused’s statement leads to ‘informal’ questioning, in which the right to the assistance of an attorney is not respected.

4.2.4. To meet privately with one’s attorney

The obligatory presence of an attorney during questioning or testimony of the accused is often ineffective without the right to meet previously with the attorney, in conditions that permit the development of a relationship of trust, and assurances of confidentiality. On this topic, the Inter-American Commission has clarified that the right includes the obligation to provide adequate installations for such communications where the accused is detained. Conversations in the presence of prison guards that create an environment of coercion are unacceptable. Communication must be *private*, meaning without such interference or coercion. This is the guiding criteria of the right to a private consultation.

In Guatemala, this right also creates obligations for prosecutors, who must ensure that there are adequate physical conditions to permit effective communication between the defendant and his attorney. This situation is facilitated in places where public defenders are always available (such as 24 hour courts). However, it can also lead to a formal interpretation of this right. Although formal recognition that the right to a private consultation forms a central part of the right to defence has progressed, there are still practical obstacles. For example, in the case of Mexico,

[i]n the questionnaire filled out by indicted individuals in pretrial detention in Baja California, some individuals expressed that when their attorney visited, they were near a

guard or other authority figure. A recent study corroborated this finding, determining that private communication between clients and defendants is difficult. Even when access to detained clients is generally permitted, it is still common for conversations to be overheard, which means that to ensure privacy, attorneys often must offer small bribes to prison guards.

Although Mexico has progressed in building small booths to facilitate communication, there are still many bureaucratic obstacles that impede free communication. In particular, in federal cases, these booths only allow communication through a glass partition, which necessitates yelling, and prevents more effective work, such as reviewing documents or judicial actions so that the accused may take notes.

In Brazil, difficulties in meeting and speaking in private prior to the accused's statement are greater, in particular for those cases involving a public defender. According to the report, the majority of accused individuals interviewed 'stated repeatedly that public defenders do not have contact with suspects until the date of the hearing. In general, the attorney and his client meet that day at the door of the courtroom'. Moreover, many of these interviews were held in the close presence of police guards or in the context of physical conditions and speed of process that undermines the effectiveness of this right. The situation is even worse in Argentina. According to the report, interviewed attorneys stated that this right is 'practically nonexistent' when the accused is imprisoned.

Other studies mentioned in the report state that 45 per cent of those deprived of liberty did not have such a meeting with their attorney. Areas for such interviews in prisons are poor, separated with glass and intercoms that often do not work. Sometimes, we were told, interviews must be held in prison cells or pavilions, close to or surrounded by other detainees. In Chubut, interviews are held in public defence offices; in some places in Córdoba, prosecutors' offices or detention centers often provide spaces for interviews. But in general, it may be said that this right is not effectively fulfilled in practice.

4.2.5 The right to appoint and have free legal assistance for those who cannot afford it

In Latin America, including the countries in this study, there has been an increase in legal and jurisprudential coverage regarding the right to defence (without ignoring, of course, the practical difficulties of implementing it), such that it is constitutionally recognized. Additionally, there has been a quantitative and qualitative increase in public criminal defence. Under various organizational forms (public defenders,

private attorneys hired by the state, or a combination of the two), the reports describe institutions that just two decades ago had practically no real presence in the criminal justice system, or had merely a formal presence. Although it is an institution that is still growing, and its reality is different between countries, the situation of public defence has changed most in areas that have developed an adversarial system. For example, ‘the Baja California office seems to have counteracted its negative perception. Local authorities and participants in a focus group with prisoners believed that public defenders are more active and trustworthy in their defence, compared to what occurred in the inquisitorial system’. In Guatemala, although there have been some cases of poor preparation, ‘[t]he work of the IDPP is generally well regarded among judges and prosecutors’. In Brazil, the State of San Pablo is in transition, as the creation of public defence is recent (2006) and its coverage level is low, so *ex officio* attorneys² complement their services through contracts with attorney associations, although there is no strong control over these mechanisms. In Argentina, the situation varies between the areas under study. Chubut has an independent and well-organized public defence office; in Buenos Aires, the state with the highest population, the public defence office is not independent, and does not reach the level of Chubut. Public defence in Córdoba also lacks independence and faces higher levels of bureaucratization. However, all the reports mention common problems, such as a lack of infrastructure, salary disparities between defenders and prosecutors, meager facilities compared to those of the prosecutor, internal organizational problems, in particular forms of supervision, excessive workloads that lead to ‘mass-produced’ defence (Brazil), and other failures that directly impact on the efficacy of defence, in particular in countries that provide high levels of public defence.

Legislation and jurisprudence protects the right to have access to an attorney provided free of charge by the State in all of the countries included in this study. This right is fulfilled through public defence offices, which appoint public defenders, or through complementary mechanisms that appoint *ex officio* attorneys free of charge. Generally, access is broad and the defence office evaluates the required economic conditions, or universally appoints public defenders, regardless of whether there is a mechanism to charge those with the capacity to pay for legal services. There do not seem to be restrictions on access based on economic capacity evaluations; by contrast the prob-

² Translator’s note: private attorneys that the State contracts for specific cases when there are insufficient public defenders. Their work conditions and training are different from those of public defenders.

lem seems to be excessive workloads in universal systems, as the public defence office assumes more cases than it can address, or lacks diversification of services for different economic capacities, such as the program the Colombian public defence office has.

4.2.6. The right that attorneys fulfill minimal professional standards, are guided exclusively by their clients' interests, and are independent

According to international standards, mere access to a defence attorney is not the only parameter of effective defence. Both the IACtHR as well as the Commission have clearly stated that the appropriateness and professionalism of the attorney play an essential role in that effectiveness. In particular, 'the fact that the Inter-American Commission recognizes the value of the Basic Principles on the Role of Lawyers, approved by the Eighth Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August to 7 September 1990, means that they may also be used as a source of standards, in particular with respect to much more concrete problems of the function of lawyers'. However, there are problems with this right, which do not stem from legal or jurisprudential lacunae nor the models of public defence, but rather, from *traditional ways of exercising advocacy, the lack of real control over professional service, and defects that have to do with the preparation of attorneys at the university level.*

In Colombia, quality of service varies greatly, to a large extent because of the fact that the public defence office has a (limited) evaluation mechanism, while the evaluation of private attorneys rests in their clients' hands, who either do not know what they should be evaluating, or when they suffer the consequences of poor service, and have no bodies through which to channel their complaints. Although in Colombia there is a clear concern with establishing control mechanisms and administrative actions, it is difficult to determine how much these systems have improved services. Specifically, the Constitutional Court has established criteria to defend advocacy from influences external to the case, introduced under the pretext of evaluation (which has happened in the past, and which explains the criteria).

In Brazil, the report observes that, generally, those who have access to private defence receive a higher quality defence. Within the public scheme, public defenders are selected via competition, which accredits their adequacy, but many adopt an *en masse* approach to their work, which is often negligent toward their detained clients. Contract-based attorneys from the attorney associations have the lowest quality of services, 'due to various factors, principally the lack of criteria of evaluation, legal formation, and oversight'. According to the study, young attorneys without experience are

hired through this contract, or, especially in the interior of the country, non-specialized attorneys, who accept the low pay, but offer low quality services, and even avoid exercising the right to appeal, for example. This form of contract-based defence does not include training or control programs. Even young attorneys from good universities, but lacking in experience, are left to their own devices, to the detriment of their clients. Although it is possible to overturn decisions for the lack of effective defence, this is difficult to achieve in practice.

In Argentina, there are two main causes of low-quality defence. The first is the extensive practice of subordinating the exercise of the defence to interests other than the clients. This includes accelerating the process through abbreviated proceedings that do not always favor the defendant, avoiding conflicts with judges and prosecutors, and thinking more about the justice system than the interests of the client, meaning that the attorney considers himself more a court official than an advisor to his client. The second reason is the excessive number of cases, the lack of clear criteria in case selection, and lack of modernization of defence offices' work, such that the defence accompanies the proceeding more than actively defending the accused. The same attorney may represent several clients with a conflict of interests within the same proceeding. This leads to a shared defence strategy among the defendants, when an individualized defence would have been more effective.

4.3. General rights or judicial guarantees regarding a fair trial

4.3.1. The right to be presumed innocent

As we have indicated, 'the presumption of innocence is not a right in itself, but rather a generic basis that allows for the organization of a procedural system that respects the guarantees that the ACHR provides. It forms the basis of the procedural system and sets the sphere of action and general protection of the accused'. Thus, it has broad normative and jurisprudential recognition among the countries included in the study. The constitutions of Colombia, Mexico, Guatemala, and Brazil, expressly guarantee the right to be presumed innocent, while more generic clauses of Argentina's constitution have been interpreted to include this right. Thus, in the region, the right to be presumed innocent has a broad, high-level legislative basis and adequate jurisprudential protection. The main problem regarding its implementation is that the general formulation of the right means that the consequences of the principle to be presumed innocent are not clear.

The national reports describe the difficulties of criminal justice systems in coherently sustaining this principle. As we shall see, they discuss problems regarding the use of pretrial detention, prison conditions, the presentation of suspects before the media (Mexico), and effectively placing the burden of proof on the accused. In general, while this principle is used frequently in decisions, teaching, and the consideration of procedural issues, it often remains purely declamatory, as if it were not an operative principle.

The report on Guatemala calls attention to a problem that exists in other countries as well, regarding the creation of criminal stereotypes, used to subvert the principle of innocence.

A growing problem in recent years is the stigmatization of various vulnerable sectors of society (poor people, ‘gang’ members, or youth with brushes with the law). It is common to see images of detainees in newspapers, and even electronic bulletins of the National Police, together with statements from government authorities, announcing the capture of ‘delinquents’ or ‘bands of criminals’, present them publically in handcuffs, sometimes visibly beaten, surrounded by police officers.

These practices are not merely the practice of ‘*amarillismo*’ (exaggerated or sensationalist reporting) from certain media outlets; they are official practices, used to guide public opinion. The creation of archetypes of young criminals is increasing and creates an unfavorable environment with respect to their rights, and is permissive of police abuse of them and other similarly situated sectors.

4.3.2. The right to remain silent or refrain from self-incrimination

The right to be free from coercion to testify (from any form of pressure including, clearly, torture) or to be required to respond to charges, or similar forms of bending the accused’s will, is a historical achievement against inquisitorial practices, in spite of new forms and the continued existence of old nefarious practices. This right is recognized in all the countries, both at a constitutional as well as legal level. On this topic, the Constitutional Court of Colombia has stated that ‘the right to remain silent, together with the right to be free from self-incrimination, forms the nucleus of due process’. In Brazil, although until recently procedural legislation had ambiguous norms on the topic, a constitutional perspective regarding this right has won out. In Guatemala, recognition of this right is broad, both at the constitutional as well as the legislative level, while Argentina has constitutional provisions protecting the right to remain silent and to be free from self-incrimination.

One of the problems regarding this right is that it may be renounced or, in general, admitted that the free and voluntary statement of the accused is a right that may be broadly exercised, and thus accepted that this means that a confession obtained under such conditions is valid, in spite of rules that condition the use of a confession as the only source of evidence. The key is then to determine whether the accused's decision to renounce his right to remain silent and avoid self-incrimination has been freely made. In Colombia, a special norm on this issue states that although the accused may renounce his right to remain silent, legislation provides a protection so that this decision does not affect his right to defence. This consists of a judicial obligation to 'verify that this is a freely made, conscious, voluntary, duly informed, decision made with the advice of counsel which requires the judge to personally question the defendant or indicted'. In other countries, norms are not necessarily so precise, but it is understood that control judges must ensure that the decision to renounce this right is not the result of undue pressure. As the report on Argentina states, this is undertaken 'in part', as there are many cases, including renouncing the right to an oral trial, in which judges do not sufficiently question the freedom of this decision.

Another weak aspect of this right is the practice of granting primacy to the accused's first statements, when his level of knowledge regarding his rights is lower, or his understanding of the problems involved is imperfect and, therefore, the possibility that he 'freely' offers information that prejudices him is greater. Although later in the process, in particular after counsel from his attorney, he may modify his statements, many decisions use the first statement. In Mexico, these situations occur primarily in the Federal District, where there are even cases of confessions obtained through torture, which cannot be considered exceptional, even if the torture is hidden, or involves practices of intimidation or 'permissible' police mistreatment. The report on Argentina tells a similar story, where the first statement is consolidated, such that it is read into the record at trial, prejudicing the statement the accused makes in person.

4.3.3. To remain free during the process, while the trial is underway

According to the Inter-American Court of Human Rights, there is an 'obligation of the State not to restrict the liberty of the detainee beyond the limits of what is strictly necessary to ensure that he will not impede an efficient investigation or avoid law enforcement'. This means, on one hand, to recognize that pretrial detention is a measure that is hard to justify in systems that proclaim the principle of the presumption of innocence. On the other, it is a mechanism that no procedural system has completely

abandoned. Thus, the Court has determined that it 'is the most severe measure that may be applied to the person accused of a crime, for which reason its application must be exceptional, since it is limited by the principles of lawfulness, presumption of innocence, necessity, and proportionality, indispensable in a democratic society'. All the countries included in this study protect the right to freedom, although, procedural legislation limits this right through clauses that require pretrial detention or establish justifications for detention other than those that international jurisprudence recognizes as valid. If this right faces problems in the formal plane, there are even more problems with its practical implementation.

In Argentina, the report informs us that the indiscriminate application of pretrial detention is, to the contrary of what Argentina's norms state, a common occurrence rather than the exception: 'The Buenos Aires province holds almost half of the country's prisoners (28,878 people), and at least 60 per cent of them do not have a final conviction. The situation is relatively similar in Córdoba, where 50.8 per cent of the 5,375 people detained do not have a conviction. In contrast, in Chubut, only 29 per cent of detainees are in this situation, well below the national average'. As we can see, although abuse of pretrial detention is still endemic, there are areas that have notably reduced the indiscriminate use of this instrument. Although it may not be said that the rule is against the principle of freedom, abuse and noncompliance are extensive and accepted, creating a situation far from meeting international standards. Additionally, this abuse of pretrial detention is not a single violation, but undermines the entire exercise of the right to defence, aggravated by excessive prolongation of detention.

In Guatemala there is a tendency to pass legislation that specifies in what cases pretrial detention is obligatory, based on the seriousness of the legal classification. In other cases, it is justified by difficulties in identifying people who change their identity in the case of recidivism. However, while pretrial detention has been increasingly used only in cases involving serious crimes, it is still applied in minor crimes, which indicates that operators of the judicial system still prefer to carry out the process while the accused is detained. The report on Brazil recounts a similar situation, although there is no specific data regarding the number of people subjected to pretrial detention. In Mexico, there are differences in functioning between the states that still use the former system (Federal District) where, in reality, the accused must fight for his freedom (which is impossible for serious crimes), and those like Baja California where the right to remain free is clearly established, and where there are improvements in using alternative measures.

In Colombia, the Constitutional Court has established parameters similar to international standards, and constitutional and procedural legislation clearly estab-

lishes the basic principle of liberty. Thus, the report highlights that ‘in quantitative terms, pretrial detention is not the rule in Colombia; between 2005 and 2012 it was imposed in only two out of every 10 cases in which there was an indictment’. This does not mean that there is not abuse in cases of social concern and extensive media coverage. In such cases, pressure on judges is strong, and this means they prefer to keep the accused in prison rather than face strong public criticism that could lead to disciplinary proceedings or destitution. Colombia does not have mechanisms to protect judges from pressure in these circumstances, nor do the other countries in the study.

4.3.4. The right to be present at and participate in trial

We have seen that the right to be present at trial has not been specifically addressed in legal pronouncements. This may be because in Latin America there has not been an extensive practice of trial *in absentia*, at least formally, as it is common that even if the accused is detained, trials are held in the presence of his attorney. But we have also mentioned that the doctrine of the Inter-American Court of Human Rights tends to strengthen the position of the accused as a *real, leading actor* in the process, and this necessarily includes his direct participation in the trial. Whether through the right to defend oneself or through pretrial detention to ensure the accused’s presence (although this is not done in consideration of their rights, but rather the effectiveness of justice), it would not make sense to provide him with so many concrete rights, but not this one: a direct manifestation of the personal exercise of defence.

However, exceptions are permitted with heightened protection. In Colombia, the Constitutional Court has defined the conditions under which trial *in absentia* is permitted, which necessitates heightened protections and attorney responsibilities. This also occurs with investigative acts that must move forward even in the absence of the accused (anticipated evidence, etc.); in such cases, the public defender has a special role. However, it is difficult to evaluate compliance with these special protections given that, as we have mentioned, control over the quality of defence rests with the accused.

In Guatemala, constitutional provisions and procedural legislation guarantee the presence of the accused. Additionally, norms that protect the right of the accused to be present during proceedings protect the accused, who has formal rights to be present during all hearings. The report on Guatemala indicates that from 2011, there have been special provisions for the most serious cases, in particular organized crime, where there are serious issues of risk and safety of the accused as well as other participants in the proceeding. In such cases, however, the State has adopted greater security measures

or special protection for the accused in special cabins, in order to ensure his presence at trial.

In Brazil, although the law allows trial *in absentia*, they are not often held in practice. Additionally, in all cases, the accused's attorney must be present. The most recent reforms permit participation by video-conference, but attorneys are not very willing to accept this solution. In Argentina, trial *in absentia* is impermissible, although preparatory measures are permissible, and their validity depends on the participation of a public defender, even in cases in which the suspect is not specifically identified. In general, adversarial procedural norms permit the accused to have the last word with the judges. The use of this right is variable, and depends on the attorney's strategy. However, a high proportion of accused with low levels of education struggle to understand the trial development, as it is undertaken in a formalistic manner, using excessively complicated language.

4.3.5. The right to decisions that affect one's rights are reasonable and substantiated

As the IACtHR has stated, 'the reasoning of a Court decision should show that the allegations made by the parties have been taken into account and that the body of evidence has been considered'. Additionally, substantiation demonstrates to the parties that they have been heard and, in cases in which decisions may be challenged, offers the possibility to challenge the resolution and obtain a review of the decision by higher courts. For this, the duty to substantiate is one of the 'due guarantees' included in article 8.1 to ensure due process. We see that although it is not expressly included in the American Convention, it is considered to form part of the fundamental rights that make up an impartial, fair trial, which fulfills legal due process. This applies to all court decisions that restrict rights or involve litigation between parties.

In general terms, new adversarial, procedural legislation includes norms that require the substantiation of decisions. Additionally, high court decisions have understood, as reports indicate, that this forms part of the set of rights that make up the trial defence. In Argentina, the report indicates that in spite of this, it is common for important decisions, such as those that order pretrial detention, to be justified by formalisms. Another important fact is that regarding decisions that individualize the punishment within criminal sanction scales. With respect to this issue, prefabricated phrases are commonly used, which are literally copied from other decisions, which do not provide any information or develop any argument.

In Brazil, the Federal Constitution contains the obligation to substantiate decisions. This is fulfilled with regard to final sentences, but is not common in other types of decisions, such as orders for pretrial detention. Recently, legislation has been modified, requiring the police to substantiate decisions to initiate a proceeding against a specific person. In the case of Guatemala, the Constitution is understood to create this obligation, which may be provided either in writing or verbally (with a record). The report does not provide evidence of significant non-compliance with this duty, beyond the aptness and seriousness of the substantiation. The situation is similar in Mexico where, given the transition between systems, there is still a dispute regarding whether oral substantiation of certain orders (not verdicts) is admissible. Some judges have accepted *amparo* petitions that challenge decisions based on the lack of written substantiation, but there is not yet a consolidated jurisprudence on the issue. The Supreme Court has more precisely defined what constitutes a substantiated decision. In Colombia, although there is not an express constitutional provision on this issue, it is considered a fundamental part of due process. Procedural norms require the substantiation of verdicts as well as other decisions that affect the accused's rights.

4.3.6. The right to a comprehensive review of a conviction

We have described how the Inter-American Court has clearly established that the possibility for a comprehensive review of a guilty verdict is a key part of the right to defence, and thus requires the modification of the traditional doctrine, which permits a partial or technical review of a conviction, without reconsidering the facts established at trial. New procedural systems have not yet completely assimilated this jurisprudence. In former systems where the appeal meant to 're-read the file', the IACtHR's expansion of this right has not created a crisis. In the Federal District of Mexico, procedural legislation authorizes the second instance judge to completely review the evidence. In new systems, such as in Baja California, where the verdict comes after an oral trial, it is still necessary to calibrate new resources, tied to the traditional form of cassation or invalidity, which only allow for the correction of procedural or legal defects, and not a review of the evidence produced at the first trial.

The Supreme Court of Argentina has expressly followed the IACtHR precedent, determining that such a precedent applies within the Argentinean judicial system. Although this has led to a slow opening of the resource and reduction of formal requirements, there is still not full compliance with international standards. Additionally, the delay in processing these resources is a huge problem which creates, as also

mentioned in the Guatemalan report, cases in which the public defence intervenes because the costs have become excessive, even to those who could previously afford a private attorney.

4.4. Rights related to effective criminal defence

4.4.1. The right to investigate and propose evidence

Criminal defence may not be limited to a set of rights without considering the real conditions that permit their exercise. Although the broadening of formal recognition of these rights and the clearer definition of their extent is an important improvement, one must also call attention to the implementation of these rights, so that the possibilities for effective defence are not a chimera. Procedural legislation in the countries that make up this study provide sufficient powers to the accused and his defence attorney, not only to contradict the prosecutor's evidence, but also to offer their own evidence that weakens the prosecution's case or provides the basis for an active, positive defence. The defence attorney may propose evidence at any point, independently of the procedural stages in which the definitive list of proof must be provided. Legislation establishes that other institutions must assist the defence, including the prosecutors or direct judicial assistance.

However, it is still not easy for defence attorneys to carry out effective investigations.

An innovation of the SNDP is that it has a criminal investigation body. Law 941 of 2005 created the Operative Unit of Criminal Investigation (UOIC), whose purpose is to support the efforts of public defence in the collection of evidence, and providing technical-scientific reports.

In Guatemala, although the public defence office does have some investigators, they are completely insufficient in guaranteeing an effective search for evidence. The procedural law gives them the right to propose evidence; but they are subordinated to the Public Ministry's willingness give effect to them. This leads to defence that merely criticizes the prosecution's evidence, without providing its own evidence. Outside public defence, except in cases of those accused with extensive resources, although the accused may be able to afford a private attorney, they cannot assume the cost of complex private investigations or experts.

In Brazil, the report also indicates that the defence's possibilities to produce evidence are even less than those described in other countries. The situation in Argentina

is similar, except in the province of Chubut: in general, in the systems studied in this country, real possibilities to carry out independent investigations are scarce. This is not only due to economic resources, but also because attorneys tend to adopt passive defence strategies and do not take advantage of legislative tools that allows them to present defence witnesses or other evidence the production of which is not particularly complex.

4.4.2. The right to have sufficient time and possibilities to prepare one's defence

Procedural legislation generally establishes deadlines for both parties, and specifically the defence, to prepare presentations: a few days for initial presentations and longer periods to prepare the trial defence. However, in the report on Colombia, many attorneys mention cases in which they barely had time to speak to their client prior to the hearing. In Guatemala, this occurs because police officers needlessly delay the interview that attorneys should have with their clients during this short time. Or, as occurs in Brazil, this interview takes place minutes before the hearing and in the presence of the police.

The material ability to prepare one's defence, in particular sufficient areas for meetings and document revision, appears to be a more serious problem. This is particularly problematic when the case involves a detained suspect, because interviews in prison are somewhat discouraging, as they often involve long waiting periods and inadequate conditions for a short conversation let alone a long working session with the defendant. As a result, even if time is not a serious obstacle to preparing the defence, it may be inhibited by the adverse conditions for conducting interviews and the lack of space to question witnesses. In cases of public defence, this depends on the level of infrastructure available, and resources to travel or to pay for the travel cost of witnesses or to hire investigators. As we have seen, this situation varies between countries, but in general terms it may be said that the discrepancy in resources between the prosecutors and public defenders is very large.

4.4.3. Equality of arms in the production and control of evidence and the development of public, adversarial hearings

The basic rules of the game in new adversarial systems are focused on strengthening the principle of contradiction, meaning the real possibility of the parties to examine and cross-examine the evidence. Thus, new procedural legislation has clearly estab-

lished this principle, and one of its guiding principles is the concept of the judge as an impartial player who ensures compliance with the rules of this adversarial ‘game’, ensuring equality of conditions to do so. However, many codes still allow judges to admit evidence of their own accord, or to undertake questioning, supplanting the role of the parties. Even in legislation that does not specifically permit it, in practice the former system remains in place. In general, judges intervene to correct deficiencies in the prosecution’s evidence, in particular when this would lead to an acquittal, with social costs or media coverage.

In Argentina, the predominance of the prosecutors begins to show during the preparatory stages, when control judges tend to side with the accusers. Additionally, to the extent that judges are willing to admit acts and records of testimony from the preparatory stage as evidence, the lack of true contradiction is accentuated. This situation is exacerbated in certain cases, such as sexual offenses; where the use of certain anticipated mechanisms of testimony, in addition to limitations on the victim’s presence in public trials, weakens the possibility of the accused to cross-examine the witnesses. In Brazil and Guatemala, the possibility to contradict evidence and offer evidence is formally recognized, but the practical limitations and their consequences are similar to other material restrictions that have been mentioned.

In Mexico, ‘the lack of timely access to [the prosecution’s] documents during administrative detention in the Federal District is one of the factors that most affects this right in later procedural stages’. Additionally, the report mentions that although the Supreme Court has indicated that ‘it is inadmissible for similar types of evidence, offered by both parties, to have a different evidentiary value assigned, based on which party offers it, as this violates the guarantees of an impartial trial, procedural equity, and substantiation of well-reasoned decisions’, there is a lack of normalization regarding standards of evidentiary value, which judges may evaluate arbitrarily, generally abusing circumstantial or weak evidence.

In Colombia, the Constitutional Court has precisely defined this principle, indicating that it should be understood,

as not only the possibility to contradict the other party in equality of conditions (the principle of a fair or just trial), but also to obtain the defendant’s participation in the proceeding, in conditions that correct the imbalance between the means available to the prosecutor, and those available to the defendant, the latter of which are clearly inferior.

Therefore, the Constitutional Court considers this principle to be an essential part of the right to defence and to due process. For these reasons, the Court pays

special attention to the moment prosecutors ‘discover’ evidence, which prevents the defendant from being surprised with incriminating evidence. Additionally, the Court understands that the principle of equality of arms depends on the defence’s capacity to obtain evidence independently, as analyzed above. It may be concluded, the report tells us, that the normative framework sufficiently guarantees equality of arms; ‘However, this balance is not as clear in practice, in particular with respect to the investigation stage’.

4.4.4. The right to a trusted interpreter and the translation of documents and evidence

Throughout this work, we have seen how special consideration and importance is granted to ensuring that the accused is *sufficiently informed regarding his situation, of the consequences of it, of his rights and practical tools he has to improve his situation*. We have also seen that criminal justice may be characterized as a social sphere in which communication is difficult due to excessive technicalities, unnecessary jargon, a predisposition toward secrecy, a lack of transparency and little interest in having an informed accused who is capable of exercising his rights. Thus, the Inter-America System has established the right to an interpreter when these characteristics are exacerbated by the accused’s difficulties in comprehension.

In Guatemala, Mexico, or Brazil, this right is most relevant in respect of indigenous peoples and cultural diversity, which is a special focus of this work. Beyond this, legislation provides the possibility to have a trusted or State-provided interpreter and, in general, there are no violations of this right. The situation is different in Colombia, where this guarantee is protected, but does not go beyond formal recognition, as there are no programs or specific budgets for it, and it is only effective when the accused provides his own interpreter, which is exceptional. In other cases, judges recount that they are faced with invalidating the proceedings, which is not easy in serious cases, or continuing whilst knowing that the accused is not sufficiently informed.

In Argentina this right is also sufficiently recognized. In general, those interviewed maintained that in the few cases in which it was needed, there were no problems in obtaining an interpreter, for whom the judiciary paid. However, the number of foreigners involved in criminal cases is increasing, and in some cases it is difficult to locate an interpreter, and in others it goes unnoticed that the accused is a member of an indigenous community, which is the case with some Bolivian individuals accused of crimes in Argentina.

5. Special problems

5.1. *Defence during the enforcement stage*

A special characteristic of the Latin American region, which is applicable in the countries in the study, is the serious crisis of prison conditions. Terrible infrastructure, overcrowding, institutionalized violence, weakness of social re-integration policies, the lack of separation between those convicted and those held in pretrial detention, and among different types of convicts, the lack of health programs, inadequate food, mistreatment of visitors and family members, etc. are variables of a situation that affects the dignity of prisoners, and has been characterized by various international bodies as a serious violation of fundamental rights and the purpose of imprisonment as established in human rights instruments. Therefore, the exercise of defence rights during the enforcement stage is important, in particular when the disciplinary system is used in a discretionary way, which has a direct influence on the benefits of liberty or early release.

Procedural legislation and jurisprudence understand that the right to an attorney continues during the enforcement of the sanction, at least with respect to obtaining conditional release or similar benefits. The internal disciplinary process is not as clear, where there may be defence attorneys, but their presence is not understood as a condition for the validity of the proceedings. This occurs because the former cases are normally brought before a special judge (enforcement judge), or before courts that issued the verdict. By contrast, the latter are held before penitentiary authorities. However, the legislation in some countries (eg., Argentina), allow prisoners to appeal these decisions before judges, or to benefit from other mechanisms (habeas corpus) to permit revision when decisions are particularly serious or affect the prisoner's rights to be released from custody.

In Guatemala:

[t]he right to defence during the execution process is notoriously deficient. There is no authentic oral, adversarial process, in which decisions are based on information. Rather, decisions are based on Penitentiary System reports (huge files, reviewed by interdisciplinary groups that are often not present full time in the prisons, or in contact with the prisoner). Additionally, there are only three multi-person execution courts in the entire country (with two judges each, six total), which means that of the 7,449 individuals sentenced to prison (according to the official data from the DGSP, in June, 2013), each judge is responsible for 1,246 individuals. During his imprisonment, each person will require at least one request for a sentence reduction for good conduct, various requests (to leave the prison, for example), or transfers.

In this situation, which is not very different from the other countries, the real exercise of defence rights during enforcement is illusory. The judicial system's weakness in controlling the enforcement of sanctions, endemic prison overcrowding, and the lack of real contradictory and public practices, in addition to scarce social and academic information regarding 'prisoners' rights' means that, in this field, the applicability of this right is particularly weak.

5.2. The situation of indigenous peoples

Throughout Latin America, and in particular in those countries with a large population of indigenous peoples, in recent years there has been a growing concern with adapting the functioning of the judicial system to the conditions of indigenous peoples' cultures, in order to incorporate the political institutions that govern the social lives of such communities. In the case of the criminal process, this has meant an openness toward cultural diversity, which requires serious adaptations to their ordinary ways of functioning.

There is concern regarding language, which goes beyond the right to an interpreter. In countries such as Mexico or Guatemala, there is a diversity of indigenous languages and they are used extensively, which makes the issue even more complex. In spite of the increase in formal recognition of the rights of indigenous peoples, the chapter on Mexico highlights that in criminal proceedings 'it is clear that there are no effective mechanisms to ensure that indigenous people have a quality defense in accordance with their culture'.

In Guatemala the situation is similar. From a general perspective, criminal justice as a whole is not prepared to address the multicultural reality of the country. Although, through the ratification of ILO Convention and other international instruments, it may be argued that there are legal tools to address this task:

[i]n common practice, indigenous peoples do not enjoy the right to effective defence when they are tried for crimes that do not constitute such in their communities, and/or they are sentenced to punishments that have no cultural relevance to them. This is added to the fact that they are tried in a language that is not their own, even if they know it. Although there are not specialized institutions to provide free legal assistance to indigenous defendants, the IDDP has a unit (indigenous public defence offices) that uses these criteria and ensures its application, although prosecutors and judges do not consider them, and there is no national policy to train public officials on the issue.

In particular, one of the key problems is that the issue should not be narrowed to the existence of an interpreter. The use of one's language during the proceeding is

determinant. In Guatemala, it is possible to hold a trial in an indigenous language because there are growing numbers of officials capable of doing so, or such knowledge may be established as a requirement for certain positions.

In Brazil and Argentina, there are not as many indigenous peoples as in the other countries, but this does not mean that they do not face similar problems. In the state of Sao Paulo, where the field investigation was carried out, there were hardly any problems regarding trying members of indigenous communities, as such problems generally appear in the northern states. However, in the few cases located, it has been notorious that the accused was in a disadvantaged position, due to the lack of cultural sensitivity and near impossibility of understanding the proceedings. In Argentina, in spite of constitutional provisions regarding indigenous peoples' cultures, there are no express provisions regarding criminal justice except in the case of Chubut, which recognizes this diversity and directs its authorities to apply ILO Convention 169. This same province has, at least, a special area within the Public Defence Office to attend to cases that involve indigenous peoples. In other cases, officials have not received any type of training or guidance on the topic. In recent years, there have been non-state initiatives to organize and link up attorneys specialized in the defence of indigenous peoples' rights (Asociación de Abogados y Abogadas de Derechos Indígenas). Beyond these individual efforts, the situation is similar to that in other countries. Those accused who are members of indigenous communities are a particularly disadvantaged sector within criminal justice practices: the problems regarding a lack of information and understanding are exacerbated, as generally they are both members of indigenous communities and individuals with scarce economic resources (Colombia). Additionally, with respect to recognition of indigenous justice, although it has not been considered in this study, we are informed that it is poor, fragmented, and often adversely affected by other state practices.

6. Conclusions

In Chapter 10 we present the conclusions specific to each country and the general conclusions of the investigation as whole. With respect to the topic of this chapter, the following conclusions may be made:

- a) In the past two decades, there has been greater formal recognition of the set of rights related to criminal defence, tied to the process of reviewing former procedural legislation based on inquisitorial proceedings. Additionally, jurisprudence has improved in reaffirming and delineating these rights.

It may be said that in terms of formal recognition, the distance between international standards set in particular by the Inter-American System of Human Rights and national norms is not very large, and in any case, permits a broad exercise of the right to defence.

- b) In practice, this gap increases considerably. First, because the predominant focus of criminal justice systems on accused with low educational and economic resources makes understanding the system and knowledge of one's rights difficult. Second, because there is not, on the part of judicial system operators, a clear commitment to remedying this lack of information and understanding. By contrast, they think more in terms of formal compliance with obligations regarding communications, in order to avoid invalidating proceedings, than in the real effect of such communication.
- c) The quantitative and qualitative growth of public defence organizations is an appropriate measure to overcome this gap, but many of them are in situations of disadvantage with respect to institutional resources, technical support, and political and social support, compared to prosecutors and the police.
- d) The exercise of legal advocacy, both public and private, also prevent closing the gap between standards and practice, as it is not professionalized, not controlled, and is excessively tied to the old routines of the past which are now sometimes contrary to the law, but which continue as though legislation has not changed.
- e) All of these situations are worsened in the case of individuals or groups with special needs or characteristics, and in particular in the case of indigenous peoples.
- f) It may be concluded that this diagnostic *could be addressed with concrete positive actions*. It may be demonstrated that the reality of defence, although still unsatisfactory and in some areas critical, has been modified and expanded in recent years. This means that there are variables that may be worked upon in order to concretely reduce the distance that is perceptible today between what the Inter-American System considers an effective criminal defence and what actually occurs in many, too many, cases that go through the criminal justice system.

Alberto Binder
Ed Cape
Zaza Namoradze

CHAPTER 10. IMPROVING ACCESS TO EFFECTIVE CRIMINAL DEFENCE

1. Introduction

Latin America is in the midst of fundamental reforms to its criminal justice systems and processes, which mark the most significant procedural reforms for over two centuries. The reforms, although differing in detail across jurisdictions, are characterised by a shift from pre-Napoleonic Code inquisitorialism—which places emphasis on judicial investigation and formal, paper-based, trials—towards a more accusatorial approach—which places responsibility for crime investigation on the police and/or prosecutor, recognises the importance of the procedural rights of suspects and accused persons, and in which trials are conducted in public and based on the principle of orality. Whilst the pace of change has been quite rapid across the region, different countries, and different jurisdictions within countries, are at various stages of development in terms of adopting the necessary laws and procedures, and in the extent to which these changes have been incorporated into the routine practices and cultures of criminal justice institutions and personnel.

In this context, the aim of this study was to examine access to effective criminal defence in six Latin American countries by reference to regional normative standards, in particular those to be found in the American Convention on Human Rights (ACHR), as interpreted by the Commission on Human Rights and the Inter-American Court of Human Rights (ACtHR). However, in addition, we have also sought to interpret our findings by reference to the fair trial rights guaranteed by the European Convention on Human Rights (ECHR) as interpreted by the European Court of Human Rights (ECtHR). There were three particular reasons for this approach. First,

the ECHR and the ACHR have a lot in common in terms of the recognition that they give to fair trial rights generally, and to procedural rights in particular but, for a variety of reasons, the ECtHR has a more highly developed body of case-law concerning some of those rights. Second, most of the states that are signatories to the ECHR have an inquisitorial procedural tradition, which developed in a variety of ways in different jurisdictions, but given that signatory states also include those with an adversarial tradition, the ECtHR has had to develop a jurisprudence that has relevance across those different procedural traditions. Third, the procedural reforms in Latin America are mirrored, in some respects, by those that have taken place in countries that were formerly members of the ‘Soviet bloc’, and over a similar period of time. Broadly, those countries have also had to embrace accusatorial features of the criminal process; most have adopted new criminal procedure codes over the past two decades, which recognise that crime investigation is primarily conducted by the police and not judges or prosecutors, and which also recognise the significance of procedural rights of those suspected or accused of crime. Thus some of the issues that are currently challenging many Latin American jurisdictions have also had to be grappled with in Eastern Europe. A fourth reason may also be added, which is that similar studies have been conducted in many European countries, the methodologies of which were adapted for use in the Latin American context.¹

International and regional instruments recognise the key part played by defence lawyers in guaranteeing fair trial, both in terms of process and outcome.² According to the United Nations Basic Principles on the Role of Lawyers, those who are suspected or accused of crime are entitled to ‘call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings’.³ Furthermore, they are entitled to a lawyer with the necessary competence and experience in order that the lawyer may provide them with effective legal assistance.⁴ Similar recognition is given by the ACHR⁵ and the Commission,⁶

¹ See, in particular, Cape et al. 2010, and Cape & Namoradze 2012.

² See Chapter 1, sections 4.1 to 4.3.

³ *Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders*, Havana, 27 August-7 September 1990: report prepared by the Secretariat (United Nations publication, Sales No. E.91.IV.2), chap. 1, sect. B.3, annex, principle 1.

⁴ Principle 6.

⁵ Article 8(2).

⁶ See Chapter 2, section 3.2.

and by the ECHR⁷ and ECtHR jurisprudence.⁸ For a right of access to a lawyer to be effective, a suspect or accused must be aware of the right, must have the ability to contact an appropriate lawyer who is willing and able to attend upon them promptly, must be able to communicate with them confidentially, must have a right to have the lawyer present at critical stages of the criminal process, and must be entitled to some kind of financial assistance if they are unable to afford to pay for a lawyer from their own resources. However, access to a competent and experienced lawyer cannot guarantee fair trial, and thereby secure justice, if the other requisites of fair trial, in terms of both process and outcome, are missing or are ineffective: the right to be presumed innocent unless and until the contrary is proven; the right to information about procedural rights, the reasons for arrest and detention, and about the offence of which they are suspected or accused; the right of an accused to participate in the process and to defend themselves effectively, including the time, powers and resources that enable them to do so; the right not to be deprived of their liberty unless this is authorised by law and based on legitimate considerations; the right to be dealt with without undue delay; and the right to appeal against decisions that adversely affect them.⁹

As in Europe, the fundamental normative frameworks in the jurisdictions in the study do, broadly, satisfy both international and regional standards, although in some jurisdictions they are not fully developed, and in some they are deficient in certain respects.¹⁰ However, even if satisfactory, an appropriate normative framework does not guarantee that access to defence rights is effective in practice. As was argued in Chapter 1,¹¹ whilst an appropriate constitutional and legislative structure is essential, it is not enough. For access to effective criminal defence to exist in practice, attention must be paid to two other factors: first, whether there are in place regulations, institutions and procedures that enable fair trial rights to be recognised and delivered; and second, whether there exist appropriate professional cultures amongst those responsible for facilitating and delivering criminal defence rights, including police officers, lawyers, prosecutors and judges. As in Europe whilst, with some important exceptions, the basic legal frameworks in the jurisdictions in the study are in line with international

⁷ Article 6(3)(c).

⁸ In particular, ECtHR, 27 November 2008, *Salduz v. Turkey*, no. 36391/02, and see Chapter 1, para. 4.3.2.

⁹ For international standards, see Chapter 1, section 4.1, and for regional standards, see Chapter 2 generally.

¹⁰ See generally, Chapter 9.

¹¹ See Chapter 1, section 2.

and regional norms, there are many ways in which the other two factors are inadequately realised, and so fail to ensure access to effective criminal defence. Some of these deficiencies require financial resources to remedy them. For example, not only public defender services, but also the police, prosecution and the courts are often grossly underfunded and, in some cases, structurally and institutionally inadequate. However, many of the deficiencies derive from regulatory, procedural and cultural factors that could be effectively tackled without significant additional financial resources. Indeed, some such reforms could not only result in savings resulting from greater efficiency and better targeted spending, leading to greater trust in criminal justice institutions, personnel and processes, but more directly by not unnecessarily incarcerating people.

In this chapter we will identify and examine some themes that are common across the jurisdictions in the study and which inhibit access to effective criminal defence (section 2). We then set out the conclusions and recommendations for each of the countries in the study (section 3).

2. Common themes

2.1. Avoidance of procedural rights

Whilst, in broad terms, the procedural rights of suspects and accused persons, such as the right to information about procedural rights, the right to information about the suspected offence, and the right of access to a lawyer, are incorporated into the constitutions and laws of the six countries, the study has demonstrated that to varying degrees (depending on the particular right, and the jurisdiction) they are not routinely given effect in practice. For example, when information about procedural rights, and about the reasons for arrest or detention, is provided it is often made available in formalistic and technical language (or provided in writing only after questioning) which is not tailored to the needs of the particular suspect or accused, and which is often not fully understood by them. The right of access to a lawyer is often inhibited by the fact that a lawyer is not available when and where they are needed, especially prior to and during police questioning, and where they are available the lawyer is often overworked and underpaid, with little or no attention paid to the quality of their work. The right to silence, whilst generally recognised in law, is of limited value because the police use pressure (sometimes in the form of threatened or actual violence) to persuade suspects to talk, and this is either explicitly or implicitly condoned by the judiciary. The right to adequate time and facilities to prepare a defence is limited by a lack of equality of

resources as between prosecutors and defence lawyers, by difficulties in defence lawyers gaining access to clients in custody, by late service of prosecution material and, in some jurisdictions, by mechanisms that prevent access by the defence to relevant documents and materials.

There are many similarities here with the findings of the research conducted in Europe. In Poland and Ukraine, for example, it was found that the police often denied suspects their procedural rights by dealing with them under the administrative, rather than the criminal, process; a loophole that was facilitated by imprecise laws, and effectively condoned by prosecutors and judges.¹² In France and Belgium, at the time that the research was conducted the law, in breach of clear ECtHR jurisprudence, did not require the police to inform suspects of the nature of the suspected offence following arrest, nor the right to remain silent, and in practice suspects were not given such information until after they had been interrogated.¹³ In Turkey, although the law required an arrested or detained person to be promptly informed of the grounds for arrest and the charges against them, this was ‘honoured more in the breach than the observance’.¹⁴

The causes of such rights avoidance are various in both regions, but major factors include a lack of clarity in the law concerning the precise terms of the procedural right, a lack of institutional capacity and resources, and professional cultures that do not accord appropriate respect to the procedural right in question—in other words, that do not treat them as *rights* of the suspect or accused.

Lack of clarity in the law leads to suspects and accused people not receiving relevant information at the appropriate time, and not understanding their rights even if they are informed of them. There is no provision in the law for a ‘letter of rights’ to be given to suspects or accused in Guatemala, and in Brazil the law states that a suspect need only be informed of their procedural rights after they have been interrogated. The failure to inform suspects of the reason for their arrest or detention is exacerbated by the fact that protocols are not available to instruct police officers as to what information they must give to an arrested or detained person and when they must give it. In Mexico, those who are arrested and charged do not immediately receive information regarding the reasons for detention and their rights, and there is no verification mechanism to show precisely when such information was provided and whether it

¹² Cape & Namoradze 2012, p. 446.

¹³ Cape et al., 2010, p. 555.

¹⁴ Cape et al., 2010, p. 556.

was provided in a manner that allows suspects to effectively exercise their rights. With regard to the right of access to a lawyer, in Brazil the law does not specify that the right applies whilst a suspect is held at a police station, and written information on rights is provided only after questioning. In Peru, there is no right of access to a lawyer during the first 24 hours of detention, and it appears that the police do not routinely inform detainees of their right to remain silent. In Argentina, there is no specific legal requirement ensuring prompt access to a lawyer. In Brazil, Guatemala and Mexico, the first contact with a lawyer normally occurs only a few minutes before the first hearing, which undermines the effectiveness of the guarantees for the right to remain silent and the privilege against self-incrimination.

The principle remedy for these forms of rights-avoidance is for the law to be revised so that the procedural rights are clearly regulated in sufficient detail so that legal obligations are clear. This needs to be accompanied by the introduction of protocols, which ensure that police officers are clearly instructed on what they must do in respect of suspects who they have arrested and detained. In themselves, such remedies are not resource intensive; they require the political will to enact appropriate legislation and regulations designed to fully comply with regional and international standards, and the institutional will on the part of the police, prosecutors and detention authorities to introduce effective protocols and procedures designed to give effect to them.

Some of the countries in the study have invested quite heavily in criminal justice institutions in the past decade or so, although it is clear that for most, if not all, of them such investment needs to continue or increase. If the police do not have sufficient resources, they will continue to adopt strategies and methods that prioritise securing confessions rather than obtaining independent evidence, and which encourage an excessive use of pretrial detention. If public defender institutions do not have the capacity and organisational infrastructure to provide effective access to legal assistance for all those suspects and accused who have a right of access to a lawyer, then inevitably access to legal assistance will either be a lottery for those entitled to it, or they will not deliver legal assistance to people at certain stages of the criminal process, such as at the police station or post-sentence. If the courts are underfunded, then judges will be motivated by the need to process cases as quickly as possible rather than by the desire to do justice in respect of individual defendants. Whilst such investment is likely to constitute a net cost to the state, it can deliver both short term savings, in respect of unnecessary pre- and post-trial detention, and longer term cost savings derived from greater willingness of people to engage in the criminal justice process

and, ultimately, from greater respect for the law and legal institutions and thus willingness to comply with the law.¹⁵

However, practices that avoid procedural rights result not only from inadequate laws and insufficient funding. They are often deeply embedded in police, prosecution and judicial cultures. Defence rights are frequently regarded as being inimical to the due administration of justice, and such attitudes—and the practices that follow from them—are often resistant to change even in the face of legal, structural and procedural reforms. As the research team in Argentina noted, one of the first lessons of the reform process is that the practices that ought to be displaced usually survive the change of legal structures, continuing under another name. They explained this by the fact that the bureaucratic learning of functional skills is based on repeating customary practices without further reflection on the content of those practices and what the rules require. Latin America is not exceptional in this respect; similar conclusions were drawn in the studies conducted in Europe.¹⁶ Changing professional cultures can be a lengthy and challenging process, but can be achieved provided that there is the desire to do so—examining and changing institutional pressures and incentives that encourage inappropriate attitudes and behaviours, encouraging reflective practice, and pursuing a programme of appropriate training.¹⁷

2.2. *Overuse of pre-trial detention*

Both regional and international normative standards require that pre-trial detention should be the exception, to be used only in cases where it is necessary in the interests of justice and/or public safety. All of the countries in the study formally recognise this standard in their laws, and yet in all of them, to a greater or lesser extent, accused people are unnecessarily held in custody pending trial, and in some jurisdictions a significant proportion of the prison population consists of people who have not been found guilty of an offence. The study found some jurisdictions where practice has

¹⁵ See Tyler 2006, Myhill & Quinton 2011, and Jackson et al. 2012.

¹⁶ Cape et al. 2010, p. 611; Cape and Namoradze, 2012, p. 447; and Blackstock et al. 2014, p. 443.

¹⁷ For example, in the *Inside Police Custody* study joint training of police officers with defence lawyers was found to improve mutual understanding of each others' roles, and role-play exercises led to reflection on established practices. See Blackstock et al. 2014 (2).

improved,¹⁸ but overall the picture was of significant over-use of pre-trial detention.¹⁹ Statistics compiled by the International Centre for Prison Studies (ICPS), confirming our own findings, show that the proportion of the prison populations in the countries in the study who are in pre-trial detention range from 33.4 per cent in Colombia to 54.2 per cent in Peru. It is notable that in the Buenos Aires and Cordoba provinces of Argentina, we found the proportion of the prison population who are in pre-trial detention to be 60 per cent and 50.8 percent respectively, whereas in Chubut province the figure was significantly lower, at 29 per cent. Looked at another way, the ICPS statistics show that whereas in the majority of countries in the world the pre-trial/remand population is below 40 per 100,000 of the national population, in is significantly higher in the six Latin America countries in the study, ranging from 53 per 100,000 in Guatemala to 120 per 100,000 in Peru. In all six countries, the rate has grown, in some cases significantly, since the turn of the century.²⁰

There is a range of reasons why Latin American countries make such significant use of pre-trial detention, and our study was not designed to examine in depth the reasons for this phenomenon. However, some of the reasons are closely linked to the factors that we argue are central to the concept of access to effective criminal defence. In most of the countries, the law provides that pre-trial detention is mandatory in the case of certain categories of alleged crime, something that is contrary to both international standards, and the ACHR and IACtHR case law. In some of the countries, certain procedural factors also contribute to the over-use of pre-trial detention. In Brazil, persons accused of crime are not required to be produced before a judge for the purposes of a pre-trial detention hearing. In Mexico, informal preventive detention and pre-trial detention in respect of suspected organized crime constitute arbitrary detention since they are imposed in respect of people against whom formal investigations have not even been initiated. In Peru and Brazil judges continue to rely mainly on the seriousness of the alleged offence as the basis for pre-trial detention. In Argen-

¹⁸ For example, in Baja California, Mexico, and in Colombia.

¹⁹ See Chapter 9, section 4.3.3. The statistics compiled by the International Centre for Prison Studies show the following proportions of the prison population who are in pre-trial detention: Argentina 50.3%; Brazil 38%; Colombia 33.4%; Guatemala 50.3%; Mexico 42.6%; and Peru 54.2% (ICPS, *World Pre-trial/Remand Imprisonment List*, available via <http://www.prisonstudies.org/news> (last accessed 6 November 2014)).

²⁰ ICPS, *World Pre-trial/Remand Imprisonment List*, available via <http://www.prisonstudies.org/news> (last accessed 6 November 2014). For a major, global, study of the use of pre-trial detention, see OSJI 2014.

tina, prosecutors have the power to order pre-trial detention without effective judicial supervision, and the law defines certain offences in respect of which pre-trial release is not permitted, which appears to encourage the abuse of plea-bargaining. Accused persons often have difficulty in accessing documents and materials relevant to pre-trial detention decisions, and frequently have inadequate time and facilities to prepare for court hearings. Clearly, legislative reform is necessary to bring national laws and procedures in line with regional and international requirements.

However, this is another area where professional cultures inhibit the fair application of the law. Our study found that, whatever the legal criteria for determining pre-trial detention decisions, judges often make decisions based on standard factors, such as the seriousness of the alleged crime, rather than taking an individualised approach which takes into account the particular features of the case, such as the circumstances of the accused and the strength of the evidence. This is also something that is found in jurisdictions in other regions, including a number of European countries.²¹ Judicial training is required to reinforce the requirement to make pre-trial decisions based on legitimate legal considerations, which should be strengthened by a requirement for judges to make reasoned decisions, together with the right of the accused to appeal the decision or have it reviewed by a higher judicial authority. However, the need for a change in professional attitudes is not confined to judges. It has been found in other studies that prosecutors have a significant impact on pre-trial detention decisions—in most cases where they object to pre-trial release, the judge orders pre-trial detention.²² Thus, whilst changing judicial attitudes is important, action is also necessary to change the approach of prosecutors, and investigators, so that they only object to pre-trial release where this is necessary for a legally valid reason. This also indicates the need to examine institutional incentives and training.

2.3. Inadequate time, facilities and information for consideration of the evidence and preparation of the defence

If suspects and accused persons are to engage in the criminal process, and to be able to defend themselves effectively (either in person or through a lawyer), then they must have sufficient time and facilities to enable them to do so. Effective participation also

²¹ See Cape et al. 2010, p. 603, and Cape & Namoradze, 2012, p. 448.

²² See, for example, Hucklesby 1997, which was a study conducted in England and Wales. See also Cape & Namoradze, 2012, p. 449, regarding Georgia and Ukraine.

means that they must be given, or have access to, sufficient information—about the reasons for arrest and detention, about objections to pre-trial release, and about the alleged offence—to enable them to understand why they have been detained and prosecuted, and to be able to prepare for pre-trial detention hearings and to prepare their defence. It follows that if a suspect or accused is represented by a lawyer, the lawyer must not only have access to that information in sufficient time to enable them to perform their functions, but must also have timely access to their clients, and the facilities to speak to them in private. All such requirements are embodied in regional and international normative instruments, and are essential components of the fundamental principle of the equality of arms. Yet in our study we find that one or more of these components, and often a combination of them, is frequently missing or deficient.

As noted earlier whilst, in the countries in the study, there is generally sufficient legal recognition of the obligation on the police and prosecution to provide information regarding the reasons for arrest and detention, and regarding the accusation or charges, and to provide access to case materials, there is a series of impediments that often mean that such information, and such access, is not provided, either at all or in sufficient time for it to be useful. Information concerning procedural rights, and about the arrest or detention, is often not provided in a timely way, and is provided in a formalistic, technical, language that many suspects and accused are incapable of understanding. In most countries in the study there is no document that could be regarded as constituting a ‘letter of rights’. Information about, and materials relevant to, the alleged offence(s), which are essential for preparation of the defence, are often not provided (in full, or at all), and a range of excuses are given for not making relevant document and materials available to the defence. Where such information is made available, it is often only provided either at, or shortly before, a court hearing, which is exacerbated in some jurisdictions by the fact that public defenders are only appointed at the last minute. In cases where the suspect or accused is in custody or pre-trial detention, visits by lawyers are often impeded, and facilities for private consultations are inadequate or unavailable.

Whilst the accusatorial form is increasingly being adopted across the jurisdictions in the study, its effectiveness in delivering fair trial, and thus justice, is undermined by the persistence of practices, which would be of less concern, at least in theory, in a context in which inquisitorial protections remained. As it is, the overall picture is one not of criminal justice *systems*, in which the various institutions and personnel operate harmoniously with the common goal of ensuring that justice is done, but of a series of

institutions and personnel each with their own objectives, imperatives and practices which sometimes conflict and which often prevent effective access to criminal defence. For the most part, the solution does not lie with more legislation, although in some cases there is a need for laws and regulations to more clearly define rights and procedures, and also remedies for non-compliance. Rather, what is needed is for the various institutions to review their allocation of resources, and their procedures, and to make changes that ensure that legal requirements are complied with.

For example, public defender organisations should consider how to ensure that a competent public defender is allocated to a case in sufficient time to enable them to take proper instructions from the client, to discover relevant information, and to adequately prepare for court hearings. The police and public prosecutors need to review the form and timing of information provided about procedural rights, arrest and detention, and the suspected crime, to ensure that suspects and accused persons, and their lawyers, receive the information in an understandable form, in sufficient detail and in sufficient time in order to ‘safeguard the fairness of the proceedings and allow for an effective exercise of the rights of the defence’.²³ The police and detention authorities must ensure that the suspects and the accused have access to their lawyers at times when this is necessary, and that there are facilities which enable them to communicate in private. Methods of verification should be introduced so that compliance with the disclosure and access requirements can be assured, and mechanisms for challenging non-compliance should be created.²⁴ Finally, judges should consider, in any particular case, whether fair trial is possible in circumstances where such obligations have not been complied with. Practices that do not comply with the law, and which interfere with fair trial, will persist if those responsible for such practices suffer no adverse consequences from a breach of their obligations.

2.4. Lack of access to competent, independent, legal advice and representation

Latin America and Europe have chosen different paths in delivering legal assistance to those who are suspected or accused of crime. The countries in the study, in common

²³ This is the formula adopted by the EU in the Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings. See, for example, Recital 28 and Article 6(1).

²⁴ See, for example, the EU Directive on the right to information, Article 8(1) and (2).

with most countries in the region, have adopted a public defender model, although most of them also make some use of lawyers in private practice. Some of the jurisdictions, such as Sao Paulo, Brazil, and Colombia, have witnessed a significant growth in spending on public defenders but in most, if not all, jurisdictions public defender institutions suffer from a serious lack of resources, resulting in heavy workloads and in many cases poor quality, and a lack of equity with the prosecution and other state criminal justice institutions. Furthermore, public defender institutions are structurally organized under the executive branches of government, usually within the ministry of justice or the attorney general's office, which raises questions of institutional autonomy of criminal defence services.

In Europe, by contrast, most countries have adopted a *judicare* model whereby lawyers in private practice are paid by the state to undertake legal aid cases. In some countries, institutional responsibility for legal aid services has been given to legal aid institutions (such as legal aid boards), that have the responsibility of administering legal aid and funding legal aid cases, which are independent of the government. However, most European countries have not been particularly successful in ensuring effective access to legal assistance by suspects and accused, leading to the conclusion that legal aid is 'the Achilles heel in many law systems in the EU'.²⁵ Thus, despite the difference in approach to the organisation of state-funded criminal defence services, jurisdictions in both regions experience similar problems in honouring the regionally and internationally recognised right to a lawyer. The result is that suspects and accused persons are often unable to exercise their right to legal representation that is provided at a time, and to a standard of quality that safeguards the fairness of the proceedings. Developing appropriate solutions to the problems identified is inhibited, in both regions, by a lack of basic data on essential aspects of legal aid and criminal defence, such as the level of demand for legal aid disaggregated by the different needs of various population groups, what demand has been met in practice by reference to the different stages of criminal proceedings, and the level of quality of the services delivered, etc.

There is a particular problem at the investigative stage, when the police detain the suspect. Whilst regional and international standards require that a suspect arrested and detained by the police is immediately entitled to access to a lawyer, this is generally not the case in the countries in the study. In some, such as Mexico, Argentina and Colombia, whilst it is provided for by law, in practice most suspects do not have access to a lawyer when arrested. In other countries, such as Brazil and Peru, suspects do not

²⁵ Cape et al. 2010, p. 41, and Cape & Namoradze 2012, p. 452.

have a legal right of access to a lawyer at this stage at all (Brazil), or not during the first 24 hours of detention (Peru). In the latter group of countries, legislative reform is necessary in order to introduce such a right. In the former group, action is necessary, first to ensure that the police inform suspects of their right and facilitate access, and second to ensure that public defenders have the resources and organisational capacity to guarantee that lawyers are available to attend to clients detained by the police at short notice. In the EU, under legislation that is due to come into force in 2016, states will have a responsibility to ensure that suspects and accused persons, including those detained by the police, have access to a lawyer. This legislation will require Member States to both ensure that the police facilitate access, and that mechanisms (such as duty lawyer schemes) are established to ensure that it is delivered.²⁶

The requirement, to be found in the International Covenant on Civil and Political Rights (art. 3), and the United Nations Basic Principles on the Role of Lawyers, that the suspects and the accused are entitled to the assistance of a lawyer of their own choosing, is directed at ensuring that lawyers are independent of the state and state institutions, and that those who use their services have confidence in their independence. This is problematic in jurisdictions where legal assistance for indigent suspects and accused persons is provided by a public defender service (which, of course, is a state institution). However, the problem is not unique to systems which employ a public defence service to provide legal aid. In a number of European countries where legally aided services are provided by lawyers in private practice, there is concern that the way in which legal aid lawyers are appointed can create a relationship of dependency on those who appoint them, and that contractual mechanisms can compromise independence.²⁷ In a number of countries in the present study, concern was expressed about the potential for political interference with public defender services, and dealing with this requires both legislative action to ensure institutional independence, and clear professional rules that ensure that the primary professional duty of public defenders is to represent the interests of their clients.²⁸

²⁶ Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty.

²⁷ See Cape, et al., 2010, p. 592, and Cape and Namoradze, 2012, p. 451.

²⁸ For an example of the England and Wales Public Defender Service Code of Conduct, see <http://publicdefenderservice.org.uk/solicitors/about-us/> (last accessed 6 November 2014).

2.5. *Quality and professional cultures*

Whilst adequate financial resources are essential to ensure that public defenders have the capacity to make the right of access to a lawyer a real, practical right, sufficient resources are not enough to ensure a good quality service. As noted earlier, other criminal justice institutions and personnel have a responsibility to ensure that defence lawyers are able to have access to their clients and perform their functions without hindrance, and in such a way that accords respect to the key role that they perform in ensuring that other procedural rights of the suspects and the accused are respected. Public defender institutions and bar associations also have an important role to play in ensuring that defence lawyers have the knowledge, skills and expertise to provide a competent service. In some countries in the study, such as Mexico, the role of the former is problematic given that the membership of a bar association is not compulsory and, in any event, bar associations are often more concerned with protecting their members than driving up quality. Thus in the Latin American context, it is public defender institutions that are likely to have to play the major role in quality assurance. Managerial mechanisms are needed that are designed to improve the quality of public defenders (and private lawyers who undertake publicly-funded cases) and sustain those standards over time.

Quality cannot be assured in the absence of a clear concept of what the defence lawyer's role is. This is particularly important in a context where the underlying principles of criminal legal procedures are undergoing significant change, and where the defence lawyer's role is not necessarily understood, or respected, by other criminal justice personnel. In Brazil and Guatemala, it is common for the first meeting between a lawyer and their client to take place outside of the courtroom a few minutes before the first hearing. In Peru, public defenders face problems with the collection of evidence due to lack of funds, and if the defendant's family cannot cover the costs of a specialist then it will not be paid for by the public defender office. As a result, the process relies heavily on testimony, whilst other technical forms of evidence are almost always absent in public defence cases. In Mexico there are no obligatory standards for the legal profession, with the result that there is a lack of quality control and inadequate accountability mechanisms. Similarly, in Argentina and Peru, there is lack of clear requirements regarding the scope of services that public defenders should provide, and the standards which they should meet, and there are no quality assurance mechanisms or effective case assignment and workload management systems. In Colombia, the legal aid system is characterized by low pay and an excessive workload for public

defenders, and the possibility for public defenders to conduct private cases has created a perverse incentive in that they can redirect some of their cases from the public defender system to their private offices.

Similar challenges in terms of the quality of criminal defence services were faced by countries in Eastern Europe where, in the post-Soviet era, criminal procedures underwent fundamental changes similar to those in Latin America. One response to this was the drafting of a Model Code of Conduct and Model Practice Standards by the Legal Aid Reformers' Network.²⁹ Articulating the role of the defence lawyer in this way, especially if done in consultation with public defenders and other key stakeholders, can be an excellent way of prompting debate and reflection on the role of the defence lawyer in the reformed procedural context. It can also contribute to a perception of the legitimacy of the role, which can be particularly important for defence lawyers carrying out their functions in an environment which is often difficult, and sometimes hostile.

However, in order to ensure access to effective criminal defence it is not enough to concentrate on the culture and standards of defence lawyers. The actions and professional cultures of other criminal justice personnel are fundamental in ensuring that the procedural rights of suspects and accused persons are respected. This study has demonstrated that even where the law does reflect international norms regarding procedural rights, whether they are respected in practice often depends upon the approach taken by police officers, prosecutors and judges. In turn, their actions and attitudes are often informed not only by procedural traditions and cultures, but also by institutional incentives and personal ambitions. There is no simple solution to this, but attention needs to be paid not only to recruitment and training, but also to resources and organisational imperatives. Ultimately, the judiciary must take responsibility for ensuring that the police and prosecutors are held accountable, and that their decisions are transparent, justified, and motivated by respect for the law.

²⁹ Legal Aid Reformers' Network, *Model Code of Conduct for Legal Aid Lawyers in Criminal Cases and Model Practice Standard for Criminal Defence*, 2014, available via <http://www.legalaidreform.org/criminal-legal-aid-resources/item/752-the-model-code-of-conduct-for-legal-aid-lawyers-in-criminal-cases> (last accessed 6 November 2014). For an example from England and Wales, see Ede & Shepherd 2000, and from the USA, see the National Legal Aid & Defenders Association, *Performance Guidelines for Criminal Defense Representatives*, available at http://www.nlada.org/DMS/Documents/998933823.822/document_info (last accessed 6 November 2014).

3. Conclusions and recommendations for individual countries³⁰

3.1. *Argentina*

3.1.1. Major Issues

Each of the provinces under 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 this 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 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.

³⁰ Marion Isobel provided extensive input in the development of the conclusions and recommendations.

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. The 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.³¹ 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 causes 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 up to 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 place obstacles to effective defence, although the extent to

³¹ Soria 2012, p. 43.

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.³² 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 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 law 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.³³

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 process.³⁴ From the answers of the official 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.³⁵

³² This is a crisis characterized by more and more attorneys, with less work, with greater difficulty for young attorneys to begin practices, a growing need for technical advice, and, finally, more people in need of defence (Binder 2005, p. 63).

³³ *Ibid.*, p. 65.

³⁴ This way of teaching privileges the memorization of legislative texts, above developing analytic abilities. Böhmer 2005, p. 35.

³⁵ Course of oral, adversarial litigation had an impact on students that attended them, but when they are optional, the impact diminishes. Even today, in Cordoba and Buenos Aires they have a limited reach. Bar associations and public defence offices have not addressed this situation as a problem that needs to be resolved. There are exceptions to this reality, given that some universities have incorporated oral litigation as part of required curriculum: within the jurisdictions under study, the National University of Patagonia in Trelew. In the rest of the country, this occurs in the national universities of La Pampa, Comahue, La Rioja, the University del Mar, and the University

Nearly all of the officials 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 also 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 a 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

del Centro Educativo Latinoamericano. Additionally, there are many universities that have begun offering such classes as electives.

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.

3.1.2. 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 communication between attorneys and clients 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 for-

- malized, 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.

3.2. *Brazil*

3.2.1. Major Issues

The 1998 Federal Constitution, which re-established 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.³⁶ 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

³⁶ 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.

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. Thus, in the police phase, the law provides for a ‘note of guilt’³⁷ 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.³⁸ 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 contain 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

³⁷ 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.

³⁸ 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.

to investigation and procedure files in all but exceptional cases.³⁹ The Federal Supreme Court (STF) has supported this development,⁴⁰ through Binding Precedent 14, which states that defence attorneys have the right to access police investigation files.

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.⁴¹ 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.⁴² In this case, the express normative provision⁴³ 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

³⁹ Exceptional cases are those in which the judge may order the secrecy of the criminal procedure file.

⁴⁰ The STF edited Binding Precedent 14, which assured defence attorneys had access to the decisions of the police investigation.

⁴¹ While not prohibited, there is no legal disposition to make it obligatory, meaning it is essentially inexistent.

⁴² 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.

⁴³ Legal and constitutional.

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, as those awaiting trial make up 35 percent of the prison population.⁴⁴ 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.⁴⁵ The lack of legal assistance and the mixed legal/administrative nature of the execution phase have serious consequences for prisoners' access to defence.

⁴⁴ 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.

⁴⁵ 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.

Some perceptions noted in the research indicated a strong punitive discourse,⁴⁶ 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.⁴⁷

Finally, nearly all people were detained *in flagrante*,⁴⁸ which demonstrates the ineffectiveness of criminal investigations.

3.2.2. 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.

⁴⁶ In general, those interviewed were active in the police and prosecutor's office.

⁴⁷ Especially with respect to the prosecutor's office.

⁴⁸ 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.

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.

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.

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.

3.3. Colombia

3.3.1. 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 leading 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 qual-

ity 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 for 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 by 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 for 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.

3.3.2. 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 attend to 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 S NDP investigators, experts, and assistants must be increased, as they currently represent less than three per cent of those of the investigation unit of the prosecutor. The physical resources of the S NDP 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.⁴⁹ 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 S NDP, 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 S NDP needs an increase in its work and investment budgets, deeper analyses should be undertaken to determine how insufficient the budget is. Meanwhile, the S NDP 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.⁵⁰

Second, the S NDP could harness resources other than those it receives through budgetary appropriations by regulating some of its activities. In

⁴⁹ Although it is necessary to strengthen investigations in the S NDP, 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.

⁵⁰ 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 S NDP has not been able to identify who truly needs their services free of cost.

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 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.

3.4. Guatemala

3.4.1. 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 this right 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.

3.4.2. 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.

3.5. Mexico

3.5.1. 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-incrimination, 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 con-

trol 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.

3.5.2. 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.

3.6. *Peru*

3.6.1. 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 of 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 normative 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 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 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 the organizations, 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 that are not sufficiently trained to carry out the defence of their clients, which reduces their clients' possibilities of securing justice.

3.6.2. 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 is 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, 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.

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ANNEXES

ANNEX I. 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.

**ANNEX 2. ANNEX TO THE DIRECTIVE 2012/13/EU
OF THE EUROPEAN PARLIAMENT
AND OF THE COUNCIL OF 22 MAY 2012**

Indicative model Letter of Rights

The sole purpose of this model is to assist national authorities in drawing up their Letter of Rights at the national level. Member States are not bound to use this model. When preparing their Letter of Rights, Member States may amend this model in order to align it with their national rules and add further useful information. The Member State's Letter of Rights must be given upon arrest or detention. This however does not prevent Member States from providing suspects or accused persons with written information in other situations during criminal proceedings.

A. ASSISTANCE OF A LAWYER/ENTITLEMENT TO LEGAL AID

You have the right to speak confidentially to a lawyer. A lawyer is independent from the police. Ask the police if you need help to get in contact with a lawyer, the police shall help you. In certain cases the assistance may be free of charge. Ask the police for more information.

B. INFORMATION ABOUT THE ACCUSATION

You have the right to know why you have been arrested or detained and what you are suspected or accused of having done.

C. INTERPRETATION AND TRANSLATION

If you do not speak or understand the language spoken by the police or other competent authorities, you have the right to be assisted by an interpreter, free of charge. The interpreter may help you to talk to your lawyer and must keep the content of that communication confidential. You have the right to translation of at least the relevant passages of essential documents, including any order by a judge allowing your arrest or keeping you in custody, any charge or indictment and any judgment. You may in some circumstances be provided with an oral translation or summary.

D. RIGHT TO REMAIN SILENT

While questioned by the police or other competent authorities, you do not have to answer questions about the alleged offence. Your lawyer can help you to decide on that.

E. ACCESS TO DOCUMENTS

When you are arrested and detained, you (or your lawyer) have the right to access essential documents you need to challenge the arrest or detention. If your case goes to court, you (or your lawyer) have the right to access the material evidence for or against you.

F. INFORMING SOMEONE ELSE ABOUT YOUR ARREST OR DETENTION/INFORMING YOUR CONSULATE OR EMBASSY

When you are arrested or detained, you should tell the police if you want someone to be informed of your detention, for example a family member or your employer. In certain cases the right to inform another person of your detention may be temporarily restricted. In such cases the police will inform you of this.

If you are a foreigner, tell the police if you want your consular authority or embassy to be informed of your detention. Please also tell the police if you want to contact an official of your consular authority or embassy.

G. URGENT MEDICAL ASSISTANCE

When you are arrested or detained, you have the right to urgent medical assistance. Please let the police know if you are in need of such assistance.

H. PERIOD OF DEPRIVATION OF LIBERTY

After your arrest you may be deprived of liberty or detained for a maximum period of ... [fill in applicable number of hours/days]. At the end of that period you must either be released or be heard by a judge who will decide on your further detention. Ask your lawyer or the judge for information about the possibility to challenge your arrest, to review the detention or to ask for provisional release.

ANNEX 3. DESK REVIEW PRO-FORMA

This pro-forma sets out the information to be obtained in the Desk Review phase of the research.

Sources of data will include:

- laws (constitution, statutes, codes and case-law, as relevant);
- professional rules;
- statistics (both official and statistics collected by non-government bodies);
- existing research.

In each case, the source of the data should be specified. Where the question concerns whether there is a right, regulation, exception, etc., specify the source with as much precision as possible: e.g., the Police and Criminal Evidence Act 1984, s 58; the Criminal Procedure Code, art. 3(1); Constitutional Court, Decision No. 82/94, 1 December 1994; the Law Society's Code of Conduct 2007, rule 1.01. Referencing should follow the style used in *Effective Criminal Defence in Europe*.

Although the order in which the information is collected does not matter, it is important that the report of the desk review sets out the data in the same order as in this pro-forma, referring to the question number as appropriate. Where it helps, for example, to provide important contextual information, or to indicate recent or prospective changes, the information requested should be accompanied by a narrative account. Also, where appropriate, the in-country researcher should include proposals and recommendations, e.g., regarding the need for routine data collection as to legal aid expenditure, etc.

If data requested in this pro-forma is not available, this fact should be noted—the fact that data is not routinely collected, or is not made publicly available, is an important research finding in itself. For example, if no statistics are routinely collected (or are collected but are not made available) on the proportion of defendants who are represented at court, this should be noted.

Some questions specifically ask whether a rule or practice differs depending upon whether a suspect or defendant is able to pay privately and/or is in receipt of legal aid. In gathering the data, consider whether there are, or are likely to be, any differences in principle or in practice depending upon whether the suspect/defendant: is able to pay for legal services at a full commercial rate; or pays privately, but at lower than the commercial rate; or is in receipt of, or is entitled to, legal aid (or other forms of state assistance, such as legal provision by a public defender service).

You should try to limit the number of words to 15,000, although this is a guideline rather than a strict limit. If appropriate, you can cross-reference to the critical account rather than duplicate information.

Country/jurisdiction:

Data collected by:

Dates of data collection: Between and

1. General statistical and other information

(Generally, statistics should be for the most recent year available, although an indication should be given if there are significant changes from year to year. If there is relevant data on ethnicity relating to any of the following categories of data, this should also be included).

1. Legal aid and state/national expenditure
 - a) Absolute and per capita state/national expenditure on criminal legal aid
 - (i) at investigative stage
 - (ii) at later stages

- b) Any other state/national expenditure on criminal legal aid (for example, any quantifiable other data about complementary services such as institutional pro bono/ex officio services)
 - c) Proportion of the population who are eligible for legal aid
 - d) Proportion of suspects/defendants who have legal advice and/or representation
 - (i) at investigative stage
 - (ii) at later stages
 - e) Proportion of suspects/defendants in receipt of legal aid –
 - (i) at investigative stage
 - (ii) at later stages
 - f) Proportion of suspects/defendants who make a financial contribution or against whom a contribution order is made on conviction, and figures on amounts of contributions/orders.
 - g) Average remuneration per case (i.e. amounts paid to lawyers) or in a public defender case, the average cost per case.
 - h) Legal aid expenditure by type of work (e.g. profit costs, travelling/waiting, experts, etc.).
 - i) Number of cases and expenditure on interpretation/translation.
2. Criminal justice system
- a) Number of arrests
 - b) Proportion of those arrested who are then proceeded against
 - c) Proportion of those proceeded against who are kept in custody pending trial, including any data on average length of time spent in custody awaiting trial, or who are subject to conditional release pending trial.
 - d) Proportion of those proceeded against who are convicted/found guilty.
 - e) Proportion of those who are convicted/found guilty who are given a custodial sentence.
 - f) Proportions of those in (b), (c), (d) and (e) who are legally represented.
 - g) Where there is a guilty plea or expedited hearing procedure, in what proportion of cases is there a guilty plea or expedited hearing.
3. The legal profession
- a) Number of lawyers belonging to bar associations.
 - b) (If it is possible to practice without belonging to a bar association) Proportion of lawyers belonging/not belonging to bar associations.

- c) Number and proportion of practising lawyers who engage in criminal defence work.
- d) Number and proportion of lawyers who receive legal aid for (i) work, and (ii) criminal defence work.
- e) Number and proportion of lawyers working for public defender services.
- f) Number of complaints about lawyers, and outcomes of any complaints/disciplinary procedures.

2. Right to information concerning the accusation

1. Is there a legal obligation requiring
 - i) a suspect (i.e. person being questioned by police or prosecutor in circumstances where there are grounds to suspect that they have committed an offence), and/or
 - ii) a defendant (ie person against whom criminal proceedings have commenced), to be informed of the nature and cause of the accusation against him/her?

If so

- a) What is the source of that obligation?
 - b) When does the duty arise?
 - c) Is the right absolute or conditional?
 - d) What is the extent of the information that has to be supplied?
 - e) In what form does the information have to be supplied (eg. verbal, writing, summary or in full)?
 - f) Is there a continuing obligation to provide information as the investigation/case develops?
 - g) Is there any existing evidence as to whether and how this obligation is complied with?
 - h) Are there any sanctions or remedies if the obligation is not complied with?
2. Is there a legal obligation requiring
 - i) a suspect (i.e. person being questioned by police or prosecutor in circumstances where there are grounds to suspect that they have committed an offence), and/or

ii) a defendant (i.e. person against whom criminal proceedings have commenced), to be informed in detail of the accusation against him/her (i.e. information about the investigation and evidence obtained), including material that is not put/to be put before the court?

If so:

- a) What is the source of that obligation?
 - b) When does the duty arise?
 - c) Is the right absolute or conditional?
 - d) What is the extent of the information that has to be supplied?
 - e) In what form does the information have to be supplied (e.g. verbal, writing, summary or in full)?
 - f) Are there any time limits for the provision of information?
 - g) Is there a continuing obligation to provide information as the investigation/case develops?
 - h) Is there any existing evidence as to whether and how this obligation is complied with?
3. Are there any sanctions or remedies if the obligation is not complied with?
- (3) Is there a legal obligation to provide the information referred to in (1) and (4) to the suspect or defendant in a language which s/he understands?

If so

- a) What is the source of that obligation?
 - b) Is there any existing evidence as to whether and how this obligation is complied with?
 - c) Are there any sanctions or remedies if the obligation is not complied with?
4. Is there any difference between poor or legally aided suspects and defendants and those who are well able to pay privately
- a) in law?
 - b) in practice?
5. Is there any obligation to give a suspect or defendant a 'letter of rights' informing them of their rights?

If so

- a) What is the source of that obligation?
- b) Who has to provide the 'letter of rights'? Where available, attach a

- 'letter of rights' from your jurisdiction?
- c) At what stage does the letter of rights have to be provided?
 - d) Is there an obligation to provide the 'letter of rights' in a language that the suspect/defendant understands?
 - e) Is there an obligation to verify whether the suspect/defendant understood the rights included in the 'letter of rights'?
 - f) Is there any existing evidence as to whether and how this obligation is complied with?
 - g) Are there any sanctions or remedies if the obligation is not complied with?

3. The right to defence

1. Does the suspect/defendant have the right to defend themselves
 - i) at the investigative stage?
 - ii) at the trial stage?
 - iii) is there any difference between the first instance and appeal or cassation stage?

If the suspect/defendant does have the right to defend themselves:

- a) What is the source of that right?
 - b) When does the right arise?
 - c) How is the suspect/defendant to be informed of the right?
 - d) Does the right differ depending on the financial resources of the suspect/defendant and/or whether they are legally aided?
 - e) Is there any existing evidence as to whether and how this right is exercised?
2. Does a suspect/defendant have the right to the assistance of a lawyer?
If so
 - a) What is the source of that right?
 - b) When does the right arise? (e.g., on arrest, only on being brought before a court, etc.)
 - c) How is the suspect/defendant to be informed of the right?
 - d) How is a request for a lawyer recorded?
 - e) Does the right differ depending on the financial resources of the suspect/defendant and/or whether they are legally aided?

- f) Are there circumstances where legal assistance is mandatory?
 - g) Are there any circumstances where legal assistance is not permitted (e.g., during interrogation, at an appearance before a prosecutor, at a hearing before an examining magistrate)?
 - h) Is there provision for a right or obligation to a lawyer to be waived by the suspect/defendant?
3. Does a suspect/defendant have a right to choose his/her lawyer?
- If so
- a) What is the source of that right?
 - b) Is the right absolute?
 - c) Does the right differ depending on the financial resources of the suspect/defendant?
 - d) If choice is restricted, does the suspect/defendant have a right to ask for a replacement (e.g., if they do not trust an appointed lawyer)?
 - e) Is there any existing evidence as to the exercise of this right?
4. What are the arrangements for contacting and/or appointing a lawyer?
- a) Are these arrangements contained in law, procedural rules, protocols, etc.?
 - b) Do they differ depending on the financial resources of the suspect/defendant and/or whether they are legally aided?
 - c) How do the arrangements differ if the suspect/defendant is in custody?
 - d) Is there any existing evidence as to how these arrangements work in practice? (e.g. the proportion of requests that result in legal assistance being received, delay in contacting lawyers, facilities for legal consultations and whether they are in private, etc.).
 - e) Where a suspect/defendant requests a lawyer, are there any restrictions on what the police/prosecutor/court may do before legal assistance is procured?
5. What provision is there, if any, for indigent suspects/defendants to be provided with legal advice and/or representation free or at reduced cost:
- (i) at the investigative stage?
 - (ii) at the trial stage?
 - (iii) is there any difference between the first instance and appeal or cassation stage?

If there is such provision:

- a) What is the legal framework for it?
 - b) How are suspects/defendants informed of the provision?
 - c) Are there any legal or professional obligations on lawyers to provide legal advice and/or representation?
6. Who makes the decision regarding entitlement to free or subsidised legal advice and/or representation:
- (i) at the investigative stage?
 - (ii) at the trial stage?
 - (iii) is there any difference between the first instance and appeal or cassation stage?
- a) How is this regulated? (e.g. by law, procedural rules, professional conduct rules, etc.)
 - b) Is there any existing evidence about how the decision-making and appointment process works?
7. Is there a means test for free or subsidised legal advice and/or representation?
If so
- a) What is the legal framework for the means test?
 - b) How is the means test defined?
 - c) Does the means test differ depending on the stage of the proceedings?
 - d) How do eligibility levels relate to possible comparators, e.g. minimum wage?
 - e) Who applies the means test?
 - f) What information has to be supplied by the applicant?
 - g) Are there provisions for the suspect/defendant to make a contribution, and/or for recovery of costs from them (e.g. on conviction)?
 - h) Is there existing evidence about the means test, how it is applied, how long it takes for a decision to be made, what impact it has (if any) on the proceedings (e.g. are proceedings adjourned whilst a decision is made, what length of delays are typical, etc.)?
8. Is there a merits test for free or subsidised legal advice and/or representation?
If so
- a) What is the legal framework for the merits test?
 - b) How is the merits test defined?
 - c) Does the merits test differ depending on the stage of the proceedings?

- d) Who applies the merits test?
 - e) What information has to be supplied by the applicant?
 - f) Is there existing evidence about the merits test, how it is applied, how long it takes for a decision to be made, and what impact it has (if any) on the proceedings (e.g. are proceedings adjourned whilst a decision is made, what length of delays are typical, etc.)?
9. Are there any special restrictions on the availability of legal aid, legal advice or representation, choice of lawyer, etc. in terrorist cases?
- If so
- a) What is the source of the restrictions?
 - b) How are terrorist cases defined?
 - c) Is there existing evidence of the application of the restrictions?
10. What types of work does legal aid cover, and does this differ depending on the stage of proceedings?
- a) Are there restrictions on the amount of work that can be done/will be paid for?
 - b) Does legal aid cover:
 - tracing and/or interviewing witnesses?
 - carrying out other investigations?
 - instructing experts?
11. Are there any consequences for the accused, or the police/prosecutor, for the admission or use of evidence or for the final decision (sentence), if a suspect/defendant
- a) Does not have legal advice/representation?
 - b) Is not informed about their right to a lawyer or about their right to legal aid?
 - c) Who wants a lawyer is denied access to a lawyer or when access to a lawyer is delayed (certain procedural actions (e.g. interview) are carried out in the absence of a lawyer)?
 - d) Is denied the right to have a lawyer of his/her own choice, or to have his/her lawyer replaced?
12. What are the arrangements for the remuneration of lawyers in legal aid cases?
- a) What is the legal framework for remuneration?

- b) Does it differ depending upon the type of case, stage of proceedings, etc.?
- c) How do levels of remuneration compare with remuneration for privately funded cases?
- d) Is there any existing evidence on how the system of remuneration works in practice?

4. Facilitating effective defence

1. What rights and/or powers do the suspect/defendant and/or their lawyer have to:
 - i) Seek evidence?
 - ii) Investigate facts?
 - iii) Interview prospective witnesses (or require the police/prosecutor to do so)?
 - iv) Obtain expert evidence?In relation to any such right or power:
 - a) What is the source of that right?
 - b) Is it absolute or conditional?
 - c) Does the exercise of any such right depend on the financial resources of the suspect/defendant or on whether they are in receipt of legal aid?
 - d) Does the exercise of any such right differ for a suspect/defendant who is in custody?
 - e) Are there any professional limitations on a lawyer carrying out any of these activities?
 - f) Is there existing evidence as to whether and how such rights are exercised?
 - g) Are there any sanctions or remedies if a right/power is denied?
2. What right does the suspect/defendant (personally or by their lawyer) have to apply for bail (i.e., release from custody, whether or not involving a financial obligation):
 - i) during the period following initial (provisional) arrest?
 - ii) pending the outcome of the investigation?
 - iii) pending final determination of the case?

In relation to any right to apply for bail:

- a) What is the source of the right?
 - b) Who makes the decision regarding bail?
 - c) Is release on bail dependent on payment of money?
 - d) What conditions, if any, can be imposed when a person is released on bail?
 - e) Does the exercise of the right depend upon the financial resources of the suspect/defendant?
 - f) Is there any existing evidence as to the practical implementation of any right to apply for bail?
3. What period of notification to the defence is required before any appearance before a prosecutor, judge or court and what provision is there for any hearing to be delayed/adjourned in order to give the accused and/or their lawyer time to prepare?
- a) What is the source of any period of notification?
 - b) Is there any existing evidence as to how this works in practice?
 - c) Is there any sanction or remedy if the period of notification is not complied with?
4. With regard to evidence put before a trial court, and witnesses giving oral evidence at court:
- i) Who decides what evidence is to be produced, and which witnesses are to be called to give oral evidence?
 - ii) If these decisions are not made by the accused or their lawyer, does the accused or their lawyer have a right to demand that evidence be produced and/or that witnesses be called to give oral evidence?
 - iii) What right does the accused or their lawyer have to examine or cross-examine witnesses?
 - iv) Is there any provision for evidence obtained illegally or unfairly to be excluded at trial? For example, how is evidence obtained by torture or ill treatment treated, and how is evidence obtained in the absence of a lawyer treated?

In relation to these issues:

- a) What is the legal source of the procedures and rights (if there are such rights)?
- b) Does exercise of any rights depend upon the financial resources of the accused?

- c) Is there any existing evidence as to how the processes work in practice?
5. Is there a guilty plea and/or expedited hearing procedure (in which the court does not hear and/or review the evidence)?
- a) What is the legal source of such procedures?
 - b) How does any guilty plea procedure and/or expedited hearing procedure operate?
 - c) What are the formal (legal) incentives for a defendant of entering into a guilty plea/expedited hearing procedure: e.g. sentence discount, bail, etc.?
 - d) Is there any existing evidence as to how this process works in practice: incentives (formal and informal), plea bargaining, etc.
6. Does a suspect/defendant have a right to a private consultation with their lawyer
- i) at the investigative stage, and
 - ii) at the trial stage?
- a) What is the source of any such right?
 - b) Are there any sanctions or remedies if the right is breached?
- If there is a right to a consultation in private
- a) Are there any limitations on the right?
 - b) What is the legal source of the limitations?
 - c) Who decides whether a consultation is not to be held in private?
 - d) Does it make any difference if the suspect/defendant is in custody?
 - e) Is there any existing evidence as to the extent to which the power to limit private consultations is used?
 - f) Are there any sanctions or remedies if the right is breached?
7. Does a lawyer acting for a suspect/defendant have a right to communicate in private with third parties (e.g., witnesses, experts, etc.)?
- a) What is the source of any such right?
 - b) Are there any limitations on exercising the right?
 - c) Who decides whether any such right is to be interfered with?
 - d) Is there any existing evidence as to the extent to which any such right is interfered with?
 - e) Are there any sanctions or remedies if the right is breached?
8. Are lawyers subject to any other form of interference with their ability to act in the best interests of their clients?

If yes

- a) What interference is permissible, and in what circumstances?
- b) What is the legal source of any form of interference?
- c) Does it make any difference if the client is in custody?
- d) Does it make any difference if the lawyer is funded by legal aid or is a public defender?
- e) Is there any existing evidence as to the use of such power?
- f) Are there any sanctions or remedies if there is such an interference?

9. Is there a bar association?

If yes

- a) Is the bar association independent of government and government institutions?
- b) What is the legal entity of the association?
- c) Do practicing lawyers have to belong to the bar association?
- d) Are there any restrictions on membership of the bar association by qualified lawyers?
- e) Does the bar association have exclusive responsibility for discipline of the legal profession? How does the disciplinary process work?
- f) Does the bar association have a specialist section for criminal defence lawyers and/or is there a specialist organisation for criminal defence lawyers?
- g) What are the functions of such specialist section/organisation?

10. How are the obligations of lawyers to their clients

- i) Described, and
- ii) Regulated?

- a) Are there any differences in respect of criminal defence lawyers?
- b) Is there a complaints mechanism for clients dissatisfied with the service provided by their lawyer?
- c) Is there any existing evidence as to how the regulation and complaints mechanisms work, especially in relation to criminal defence lawyers?
- d) Are the results of complaints and/or disciplinary proceedings published?

11. In relation to criminal defence work

- i) Is the provision of legal services limited to qualified lawyers?

ii) Are there any minimum quality of service requirements placed on lawyers doing criminal defence work?

If yes to (ii)

- a) Who are the requirements imposed by?
- b) What are the requirements?
- c) How are they regulated and enforced?
- d) Is there any existing evidence as to how the quality of service requirements operate in practice?

5. The right to interpretation and translation

1. Does a suspect or defendant have a right to free assistance of an interpreter if s/he cannot understand or speak the language of their lawyer, the investigator or the court?

If yes

- a) What is the source of any such right?
- b) How is the need for an interpreter determined?
- c) Who has responsibility for determining it?
- d) Who pays for it?
- e) Is there any existing evidence as to how it works?
- f) Is there any remedy or sanction if the right is breached?

2. Does a suspect or defendant have a right to free translation of documents, evidence, etc. if s/he cannot understand the language in which they are written?

- a) If yes
- b) What is the source of any such right?
- c) How is the need for translation determined?
- d) Who has responsibility for determining it?
- e) Who pays for it?
- f) Is there any existing evidence as to how it works?
- g) Is there any remedy or sanction if the right is breached?

3. Is there any regulation of the competence and independence of interpreters and translators?

- a) What is the source of any such regulation?

- b) How does it work?
- c) Is there any remedy or sanction available to the suspect/defendant if an interpreter or translator is not competent or independent?

6. Additional guarantees for vulnerable groups

1. Are there any special provisions concerning
 - i) the right to legal assistance,
 - ii) bail, or
 - iii) court proceedings for juvenile suspects and defendants?

If yes

- a) What is the source of any such special provisions?
- b) How is 'juvenile' defined?
- c) What are the special provisions?
- d) Is there any existing evidence as to the use and application of the special provisions?
- e) Is there any remedy or sanction if the special provisions are not provided?

2. Are there any special provisions concerning:
 - i) the right to legal assistance,
 - ii) bail, or
 - iii) court proceedings for mentally vulnerable suspects and defendants, or for any other specific group of vulnerable people such as indigenous groups?

If yes

- a) What is the source of any such special provision?
- b) How is 'mentally vulnerable' defined?
- c) What are the special provisions?
- d) Is there any existing evidence as to the use and application of the special provisions?
- e) Is there any remedy or sanction if the special provisions are not provided?

7. **Guarantees for trials in absentia**

1. Can the accused be tried in his/her absence?

If yes

- a) What protection or guarantees exist?
- b) What is the source of any such protection or guarantee?
- c) Is there any existing evidence as to the number and proportion of trials conducted in the absence of the accused, and as to how such trial work?
- d) Is there any remedy or sanction if any such protection or guarantee is breached?

ANNEX 4. CRITICAL ACCOUNT PRO-FORMA

Purpose of the critical account

The purpose of the critical account of the criminal justice system in each jurisdiction included in the research study is to provide a critical, dynamic account of the system and processes using existing sources of information in order to provide a context against which data collected during the research study may be understood. Together with the Desk Review, it will provide a basis for determining what further research is required for the purposes of the country report, and much of the information gathered for both the critical account and the desk review will be used when writing the country report. Where relevant you may cross-reference information in the Desk Review rather than repeat information.

The overarching goal of the project is to contribute to effective implementation of indigent defendants' rights to real and effective defence, as part of a process of the advancing observance of, and respect for, the rule of law and human rights. Effective criminal defence has three dimensions: the contextual dimension, the procedural dimension, and the outcomes dimension. The critical account will be the principal source of information on the contextual and outcomes dimensions, but may also provide some information on the procedural dimension in so far as this data is available.

The guideline length for the critical account is 8,000 words; although you may feel it necessary to exceed this, and it should broadly follow the structure set out below. Since criminal justice systems in most jurisdictions are, to a greater or lesser extent, changing rapidly the account should be dynamic in the sense of conveying the primary characteristics of those changes and the 'direction of travel'. Where available,

reference should be made to existing data, statistics, and other existing research evidence. Guidance on referencing is provided below.

Style Guide

A detailed style guide with instructions on how to correctly reference documents will be provided by the Project Management Team before you commence work.

1. Introduction

A brief introduction to the criminal justice system and processes, describing its typical characteristics, the significant areas of change in the past 10 years, the application of international or regional jurisprudence such as that from the Inter-American system, major recent or current issues (e.g. terrorism, prison overcrowding, immigrants and crime, etc.).

2. Crime in its social and political context

- a) Brief geo-political information, e.g., population, concentrations of populations, ethnicities.
- b) Crime levels, whether they increasing/declining/static, how crime is measured, incarceration rates (both for sentenced and non-sentenced prisoners), ethnic profiles of suspect/defendant and imprisoned populations.
- c) The public and political perceptions of crime—whether crime is a major consideration for the public and in the media, the place of crime in political debate, fear of crime, statistics on and perceptions of whether crime is largely committed by e.g., poor people, ‘outsiders’ (e.g. ethnic minorities), organised gangs, etc.
- d) Attitudes to dealing with suspects and defendants, and whether these are changing, eg., can attitudes be described as liberal, are they becoming more or less punitive, are punitive measure popular, perceptions of human rights norms as they relate to crime and those accused of crime.
- e) Political and public perceptions of criminal justice professionals and institutions—lawyers, police, prosecutors, judges and the courts.
- f) Political and public perceptions of and attitudes to state expenditure on

the criminal justice system, and to expenditure on legal aid/assistance to suspects/defendants.

- g) Political and public perceptions of justice and access to justice, especially in the case of poor suspects/defendants.
- h) Perceptions and awareness of rights within the criminal justice system.
- i) The prevalence and perceptions of torture in the criminal justice system.

3. The structure and processes of the criminal justice system

- a) The basic tradition and characteristics of the criminal justice system e.g. inquisitorial/adversarial.
- b) Relevant stages of the criminal process and the relevant nomenclature (e.g., in England and Wales there are essentially three stages: (1) Pre-charge or investigative stage when the subject of the enquiry is known as the suspect; (2) From charge to trial, when the person is known as the defendant or accused; (3) Post-conviction, when the person is known as the convicted person or criminal, or appellant if they are appealing against conviction and/or sentence).
- c) Classification of offences.
- d) The structure and functions of the criminal courts, first instance and appellate.
- e) How criminal proceedings are initiated and processed, including the basic stages (e.g. arrest, charge, plea), and whether guilty pleas or expedited proceedings are possible (and the extent of use of such procedures).
- f) Whether there are mechanisms for dealing with criminal conduct by administrative means (and the extent of use of such mechanisms).
- g) The relationship between the investigative stage and the trial stage—the principle of immediacy in theory and practice, the use of pre-trial statements of the accused and witnesses as evidence at trial, mechanisms for excluding illegally or unfairly obtained evidence.
- h) Who decides what material is to go before the trial court, and which witnesses are to be called to give oral evidence.

4. Criminal justice professionals and institutions

- a) The role of the police, prosecutors and judges, the structures and institutions within which they operate, and their relationships with each other.

- b) The role of criminal defence lawyers and the structures within which they operate (e.g. public defenders, private practice, the extent of specialisation, etc.).
- c) Perceptions of criminal defence work within the legal profession.
- d) The relationship between criminal defence lawyers and other criminal justice professions and institutions.
- e) Whether the role and culture of criminal defence lawyers, police, prosecutors and judges have developed to reflect reforms in criminal procedure.

5. The organisation of legal aid

A description of the legal aid system and other mechanisms for providing legal services to poor and relatively poor suspects and defendants, including:

- a) whether there is an institution that has overall responsibility for legal aid, and a description of its status and functions;
- b) how legally-aided legal services are funded and delivered, e.g. through the private bar, through a public defender service, etc.
- c) what are the organisational arrangements for delivering legal aid services, e.g., how the public defender service is organised; any issues of independence, level of sophistication of the organization; supervision or lack of supervision inside the offices; whether there are specialized sections for juveniles or certain types of crimes; quality issues and standards for the provision of legal aid; workload issues; professional responsibility issues etc.
- d) financial arrangements relating to legal aid, e.g., whether lawyers are paid on a per case basis, whether they are paid for time spent or a fixed fee, etc.

6. Rights and freedoms

Whether, and/or how, the following are given effect, in theory and in practice:

- a) the presumption of innocence
- b) the 'right to silence'
- c) the burden of proof
- d) the right to a reasoned judgement
- e) the right to appeal
- f) equality of arms

- g) The right to be released from custody pending trial (attitudes to and perceptions of the use of pretrial detention. Proportions of people who are kept in pretrial detention and an analysis of how pretrial detention is used).

7. Preliminary Conclusions

The major issues and challenges for the criminal justice system over the next few years, including the major issues arising from the desk review and major prospective changes to the criminal justice system and/or processes.

8. Selected bibliography

The major books, research reports and other sources on the criminal justice system and processes (both those in the language of the relevant jurisdiction and in English).

ANNEX 5. COUNTRY REPORT PRO-FORMA

Purpose of the country reports

The country reports serve two primary purposes. First, they will form discrete chapters of the book that will be published out of the research. Second, they provide the major source of information (in addition to the desk review and critical account) with respect to the six countries in the study on which the research team will base the analysis, conclusions and recommendations.

The need to be analytical and critical

Before writing the country report you will have feedback from the country reviewer and the research team. It is important that the country reports are both analytical and critical. There are normally significant differences between what the law states and what actually happens in practice, and as far as possible a person reading your report should be left with an understanding of what those differences are and how important they are. Look at the chapter on England and Wales (in *Effective Criminal Defence in Europe*, 2010), or Bulgaria) (in *Effective Criminal Defence in Eastern Europe*, 2012) as examples of what we mean by ‘analytical and critical’.

We recognise that in all jurisdictions there is a lack of data and empirical research on the criminal justice system and processes. Lack of data is, in itself, an important finding. Lack of empirical research should not prevent you from using the best available evidence in order to analyse and draw conclusions about, the aspects of the criminal justice system and processes in which this research project is interested.

Researchers are encouraged to refer to regional or international judgments against their country where relevant.

Word limit

The maximum total number of words is 15,000 (excluding footnotes and the bibliography). It is important that you comply with this, as there are limits on the total size of the book of which the country reports will form a part.

Style Guide

A detailed style guide including instructions on how to correctly reference documents will be provided by the Project Management Team before you commence work. Please make sure that you follow the Style Guide. In addition, please note the following:

- a) Your report must follow the structure of the country report guidelines set out below.
- b) You must use no more than three levels of headings, following the numbering system below. In order to ensure that all country reports are consistently structured, all headings that are numbered in the structure below (e.g. 2, 2.3, 2.3.1 – but not a), b)) must be used in the same way and in the same order, using the same words for the heading. Level 2 or 3 headings that are not specified below (e.g. 1.1, 2.1.1) are within your discretion. You should not use numbered headings beyond Level 3 (e.g., you should not have a heading numbered 2.1.1.1 or 2.1.1.2).
- c) In order to make the reports readable for a non-lawyer readership, the precise reference to code and legislative provisions should be put in a footnote rather than in the text. For example, in the text you may write ‘The Criminal Code provides that...’, with the relevant provision or paragraph number being placed in a footnote.
- d) All monetary values should be expressed in US Dollars, with the local currency equivalent being put in a footnote.
- e) Where interviews, or other forms of fieldwork, have been conducted for the purpose of writing the country report, this should briefly be explained, either in the introduction section or in a footnote when the research is first referred to. If the research includes interviews, a brief indication should be given of the status of the interviewees (e.g. five judges, three prosecutors

and six lawyers who undertake criminal defence work) together with the period over which the interviews were conducted (e.g., Interviews were conducted between 1 May 2009 and 15 June 2009 in three cities including London.).

Structure of the country report

As noted above, the country report must follow this structure. The numbers in brackets against each section is a guideline word limit for each section, but note that this is only a very rough guide.

1. Introduction (1,800)

This section should set the scene for understanding the report and its findings. Researchers can decide what information to include (e.g., specificities of criminal justice systems; country information; poverty levels, discrimination and other major social and political issues if relevant, etc.). There should be some reference to size of population and other basic demographic information so that a reader unfamiliar with the country has some understanding of it. It should also include any major changes, and the ‘direction of travel’.

2. Legal aid (900)

This section should explain legal aid provision for criminal cases in your country, including:

- spending on criminal legal aid, broken down by reference to the various stages of the criminal process if this information is available
- organisational responsibility for administering legal aid, for example, whether there is a legal services commission or similar
- methods of delivering legal aid services (e.g. private lawyers, public defenders, duty lawyer schemes, etc.)
- eligibility for legal aid, by reference to the different stages of the criminal process
- methods of application for and/or appointment of lawyers funded by the state, and

- remuneration, if possible comparing legal aid remuneration rates with those applicable to privately funded work.

3. Legal rights and their implementation (9,300)

3.1. The right to information

This section should include a description of how the law regulates the following rights, and a critical account of how they work in practice

- information on procedural rights (the ‘letter of rights’)
- information on the nature and cause of the accusation
- detailed information (right of access to, or copies of the file) concerning the relevant evidence/material available to the police/prosecutor/examining magistrate

3.2. The right to defend oneself

This section should include a description of how the law regulates the right of defence, and a critical account of how it works in practice, differentiating between (a) the right of a suspect/defendant to defend themselves, and (b) the right to legal advice and/or representation

The section should cover:

- the point at which the right arises
- whether there is a choice of lawyer
- whether there is provision for a lawyer to be provided free of charge or at reduced cost if the suspect/defendant cannot afford a lawyer and any eligibility conditions (cross-referring to section 2. as appropriate)
- arrangements for accessing legal advice and representation
- whether there is right to consult, and communicate in private, with the lawyer
- how the right to an independent and competent lawyer who is professionally required to act in the best interests of their client is given effect
- any special provisions for vulnerable (by reason of age and mental disorder) suspects/defendants
- whether there are any differences in law and/or in practice between suspects/defendants who pay privately, and those who rely on legal aid.

3.3. Procedural rights

This section should include a description of how the law regulates the following rights, and a critical account of how they work in practice.

3.3.1. The right to release from custody pending trial

3.3.2. The right of a defendant to be tried in their presence

3.3.3. The right to be presumed innocent

3.3.4. The right to silence

3.3.5. The right to reasoned decisions

3.3.6. The right to appeal

Analysis of each of the procedural rights listed above should include:

- legal recognition (of the right in general terms)
- procedural protection (procedural mechanisms designed to ensure that the right can be effectively realised)
- evidence about how the right is implemented in practice
- analysis/evidence of how it works for poor defendants
- analysis/evidence of how it works for ethnic minorities, where relevant (i.e. when (a) laws and procedures discriminate against minorities on their face, or operate to have a disproportionate impact; and (b) there is evidence of discrimination against minorities in granting access to certain rights as established in prior research).

3.4. Rights relating to effective defence

This section should include a description of how the law regulates the following rights, and a critical account of how they work in practice.

3.4.1. The right to investigate the case

Including rights to:

- equality of arms (including the right to be present at investigative acts such as identification line-ups or search)
- seek evidence
- investigate facts
- interview prospective witnesses
- obtain expert evidence

3.4.2. The right to adequate time and facilities for preparation of defence

3.4.3. The right to equality of arms in examining witnesses

This refers to the right to secure the attendance of witnesses, and to examine or to have examined witnesses, favourable to the defendant on the same conditions as those against them.

3.4.4. The right to free interpretation of documents and translation

During interrogation, hearings, communication with counsel for suspects/defendants who cannot understand or speak the language.

4. The professional culture of defence lawyers/public defenders (1,800)

This section should include a critical account of

- lawyers' role in criminal proceedings and their duty to the client as reflected in ethical rules and standards, and as perceived by lawyers and other actors
- the existence (or otherwise) of unified professional body(ies) and their role/perceptions of their role
- the extent to which the legal profession(s) and/or bar associations take responsibility for legal aid, and
- quality and quality assurance mechanisms.

5. Political commitment to effective criminal defence (600)

This section should include a critical analysis of government policies in the areas of criminal defence and legal aid, and in related fields, for example, crime and criminal justice policies, minorities, poverty—if they affect the realisation of effective criminal defence rights.

6. Conclusions (900)

Identifying and summarising (a) any positive features, and (b) any negative features and/or major concerns regarding access to effective criminal defence, and recommendations for improving access to effective criminal defence.

7. Bibliography

Listing all publications referred to in the Country Report.