

**Criminal Justice Reforms in the Americas  
A Conference Report**

Washington, D.C.  
November 17-20, 1998

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## ***INTRODUCTION***

In November 1998, the Due Process of Law Foundation convened a conference in Washington, D. C. on “Criminal Justice Reforms in the Americas.” The conference was organized in cooperation with the Inter-American Bar Association and was made possible by a grant from the United States Agency for International Development. The Conference was hosted by the Inter-American Development Bank and assistance was also provided by the World Bank. This report summarizes the papers presented at the conference and the conference proceedings.

### **I**

With this conference, the Due Process of Law Foundation formally inaugurated its program of activities. The idea envisaging the establishment of an institution dedicated to the improvement and modernization of national justice systems in the Americas dates back to the creation in 1992 of the United Nations Truth Commission for El Salvador. The Commission was composed of former President Belisario Betancur of Colombia, former Foreign Minister Reinaldo Figueredo of Venezuela and the undersigned, a former President of the Inter-American Court of Human Rights.

In El Salvador, we came face to face with a corrupt and abusive judicial system which, unless reformed, would make impossible the transition from a basically lawless and oppressive regime to a country where the rule of law and democratic institutions would have a chance gradually to take hold. Accordingly, among the recommendations contained in the Truth Commission Report, we dealt with the need to reform the justice system.

Over time, our experience in El Salvador led us to reflect upon the situation in other countries of our region and prompted the realization that, while El Salvador was in many respects unique, other countries in our region suffered to a lesser or greater extent from archaic, inefficient, oppressive, corrupt and largely undemocratic systems for the administration of justice, which needed to be reformed.

We concluded, therefore, that the improvement and reform of existing systems for the administration of justice needed to become a priority item on the agenda of all who believe in promoting human rights in the Americas. Left unattended, our inefficient, often corrupt and archaic justice systems will prevent genuine democracy from taking hold in our region. Over time, they will give rise to widespread popular dissatisfaction that risks bringing authoritarian leaders to power, starting us anew on the cycle of violence and repression many of us still remember all too well. These, in short, are the considerations that prompted the three former members of the United Nations Truth Commission for El Salvador and some of our friends and colleagues in 1996 to establish the Due Process of Law Foundation. And these basically are the considerations that serve as the guideposts for the future activities of the DPLF.

### **II**

Not surprisingly, given the high professional quality of the conference participants, the papers presented at the conference and the interchange of ideas they produced

contain a wealth of information about current administration of criminal justice reform efforts, their successes and failures. The conference demonstrated that important reforms are beginning to be implemented, that creative and committed scholars and practitioners are hard at work restructuring or promoting the restructuring of administration of criminal justice systems in their countries, and that at least in some of these countries promising reform proposals are being favorably received by national policy makers and judicial institutions.

At the same time, the conference also demonstrated that there is still a great deal of work to be done, particularly in ensuring that institutional innovations drawn from other legal systems, such as the Common Law's adversarial system, not be simply superimposed on existing institutions. Experience here shows that legal reforms must be adapted to the socio-political environment in which they are to be applied and that procedures and practices that work in one system will not necessarily work in another. These conclusions call for greater scrutiny of administration of justice reforms proposals in terms of their national and practical adaptability; they also call for training and research programs that employ empirical and comparative methods to test adaptability.

### III

The Due Process of Law Foundation is grateful to the conference participants for their willingness to share their experience and insights. It plans to draw on the conclusions that have emerged from the conference in formulating its own specific research and training programs. The DPLF expects to convene similar conferences in the future to continue the important dialogue started in November of 1998.

Thomas Buergenthal  
Washington D.C.  
June 1999

## **CONFERENCE REPORT**

By Douglass Cassel<sup>1</sup>

### **I. OVERVIEW**

A conference on Criminal Justice Reforms in the Americas was convened by the Due Process of Law Foundation and the Inter-American Bar Foundation, during November 17-20, 1998 in Washington, D.C. Funding was provided by the United States Agency for International Development (AID). The conference was graciously hosted by the Inter-American Development Bank (IADB).

The purpose of the conference was to bring together experts to review progress and problems in the reform of criminal justice systems in Latin America, with a view toward identifying directions for future exchanges, programming and research. The experts looked at both specific country experiences and broad regional issues.

The conference was inaugurated by United States Attorney General Janet Reno. On behalf of the Due Process of Law Foundation, welcoming remarks were made by Dr. Reinaldo Figueredo, Chairman of the Board of Directors, and by Professor Thomas Buergenthal, President of the Foundation. On behalf of the Inter-American Bar Foundation, welcoming remarks were made by its founder and first President, Mr. Charles Norberg.

During the conference Attorney General Jorge Madrazo of Mexico delivered two addresses, one on Mexico's efforts against international organized crime, particularly drug trafficking, and a second on prosecution and adjudication in Mexico's criminal justice system.

More than forty experts from Argentina, Bolivia, Chile, Costa Rica, El Salvador, Guatemala, Mexico, Peru, the United States and Venezuela participated, including officials of governments, the judiciary, prosecutors, public defenders, private practitioners and academic experts, as well as specialists from the World Bank and the Inter-American Development Bank. (A full list is included in this volume).

### **II. SUMMARY OF PROGRAM**

The working sessions were opened by Professor Buergenthal and by Dr. Fernando Carrillo Flores, former Minister of Justice of Colombia, and now the IADB's Senior Advisor for Public Sector Reform. Eight panels, each followed by plenary discussion, covered global and regional overviews, case studies of Venezuela and Chile, and topical studies on new roles for judges, prosecutors and defenders; rights of the defense; coordination of criminal investigations; and selection and training. In addition, Attorney General Madrazo gave a luncheon address on international organized crime.

The following are brief summaries of the presentations. More detailed summaries of the opening and closing panels, and of the addresses by Attorney General Madrazo, appear in part III. Full texts of presentations will be published in a separate volume.

The presentations were as follows:

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<sup>1</sup> Member of the Board and Secretary of The Due Process of Law Foundation and Director of The Center for International Human Rights, Northwestern University School of Law

## **1. Topic: Overview of Criminal Procedure Reform at the Global and Regional Levels:**

### Presenters:

Dr. Fernando Carrillo Flores, IADB (introduction)

Professor Mirjan Damaska of Yale Law School (global)

Dr. José Cafferata Nores, Member of Congress, Argentina (regional)

*Dr. Carrillo* explained that international banks recognize that the rule of law is the backbone of a market economy. He described the IADB's concerns with regard to the administration of justice, noting that 19 of the 26 Latin American states are in transition to oral, adversarial systems of criminal procedure.

*Professor Damaska* described the ideological and pragmatic reasons for the "great and accelerating transformations in criminal justice, not only in transitional but also in the most developed countries." He explained why, historically and currently, aspects of the adversarial system are increasingly adopted by countries with inquisitorial traditions. He stressed the need for careful study of adversarial reforms, because their effect on a particular inquisitorial system may vary greatly in practice. Stating that the rights of the defense must be balanced with crime control, he argued for protection of due process "prudently and in moderation."

*Dr. Cafferata* stated that the reform movement toward oral, adversarial systems of criminal justice in Latin America responds to democratic openings and ideas, and to more realistic crime policies. Explaining how the roles of participants in the criminal justice system are changing, he contended that inquisitorial resistance to reform results from the region's authoritarian colonial heritage and from efforts to retain arbitrary and unjust power. He rejected the supposed trade-off between public security and procedural protections for the accused; both security and liberty are possible. The causes of rising crime are not criminal procedure codes but, above all, social exclusion. The way to reduce crime is to build a more just society.

## **2. Topic: International Organized Crime:**

### Presenter:

Attorney General Jorge Madrazo of Mexico

*Attorney General Madrazo* warned that "increasingly violent, corrupting and dangerous" international organized crime, particularly drug trafficking, threatens democracy and the rule of law. He described Mexico's efforts to fight drug trafficking and official corruption and to work cooperatively with the United States. Opposing unilateral approaches, Dr. Madrazo advocated a Multilateral Evaluation Mechanism within the Organization of American States. He concluded that combating drug trafficking is feasible only within the framework of international cooperation.

## **3. Topic: Venezuela's Recent Adoption of a New Code of Criminal Procedure:**

### Presenters:

Dr. Gisela Parra, President of the Council of the Judiciary of Venezuela  
Dr. Fernando M. Fernández of the law firm of Baker & McKenzie and Director of the  
Venezuelan Section of Amnesty International  
Dr. Alberto Arteaga, attorney and Professor of Criminal Law at the Central University of  
Venezuela

*President Parra* outlined the process and content of the recent reform of Venezuela's Code of Criminal Procedure toward an oral, adversarial system. She explained that the formal initiation of the reform process began with an accord signed with the World Bank. While the new Code is scheduled to go into effect in 1999, three elements went into effect in March of 1998: reparations agreements, reduced penalties in return for admissions of facts, and lifting the confidentiality of pretrial investigations for the accused and defense counsel. To date there have been no published complaints against these reforms. Within a short time all functionaries of the system of justice will have been given orientations on the reforms.

*Dr. Fernández* focused on the failures of the previous system that led to the reforms. He identified nine crises, each leading in turn to transitions reflected in Venezuela's systematic, integral and comprehensive reforms. These crises involved, among others, a discredited State, the lack of a human rights culture, the failure and lack of public confidence in the judicial system, the politicized governance of the judiciary, and extremes of punishment (either impunity or excessive punishment). The reforms are serious and irreversible. While the bar association and prosecutors have opposed the new Code, civil society defends it.

*Dr. Arteaga* counseled against losing contact with reality; the promulgation of a law should not be confused with real change. There is a schizophrenia: the laws say one thing, reality another. What must be changed are mind sets, otherwise laws will be disregarded. He supports the new Code, albeit with some reservations. But in other countries, like Spain, reforms have been gradual. Venezuela is attempting to change everything at once.

#### **4. Topic: The Reform Experience in Chile:**

Presenter:

Dra. Julia María Loreto Ruz Donoso, Chile's Under-Secretary for Criminal Procedure Reform

*Dra. Ruz Donoso* explained Chile's gradual process of reform from an inquisitorial toward an oral, adversarial criminal justice system. When President Aylwin assumed office, Chile's judicial system lacked credibility and systematically violated human rights norms. President Aylwin began by increasing the material resources of the system, but after four years it became clear that higher salaries and more computers would not suffice without procedural reform. President Frei made efforts to gain public support for reform; the initial resistance of judges continues to diminish. There are various drafts of reforms; Chile plans to try the new system first in two regions, and after four years to extend it nationwide.

## **5. Topic: “The Judge, the Prosecutor and the Defense Attorney: New Roles and Old Habits?”**

### Presenters:

Dr. Alvaro Ferrandino, Director of the Public Defender’s Office of Costa Rica

Dr. Jaime Giraldo, former Minister of Justice of Colombia

Professor Juan Enrique Vargas of Diego Portales University of Chile

*Dr. Ferrandino* explained that Costa Rica has had a mixed system since 1975, and that he has assisted in training programs in Guatemala and El Salvador. In those countries, the strongest proponents of reform toward oral, adversarial systems of criminal justice are defense lawyers and public defenders. At first some defense lawyers opposed reforms because they would expedite criminal cases, depriving the defense of the tactical use of delay. Now, however, defense lawyers understand that the new systems gives them greater opportunities to defend their clients.

*Dr. Giraldo* termed justice in Colombia today equal or worse than before the reform of the criminal justice system in 1991. In an accusatory system, which Colombia has had since 1979, tremendous resources are needed to ensure an adequate defense; injustice results if defense resources are not equal to those of the prosecution. Colombia spends 1.6% of its gross domestic product on justice, more than any country in Latin America except Costa Rica. The *fiscalía* has some 20,000 personnel, of whom 884 are public defenders. Despite enormous efforts, these defenders are unable to attend to even ten percent of indigent accused during the pretrial investigation (*sumario*). There are also appointed defense counsel; every lawyer in Colombia is obligated to accept such service. However, in Dr. Giraldo’s opinion, without the inquisitorial system, in which judges of instruction gather evidence, both inculpatory and exculpatory, poor people in Colombia no longer have a defense. Other problems include delays and a high rate of impunity.

*Professor Vargas* opined that problems of design and implementation cannot be separated; the great majority of problems of implementation are problems in design. Design must not be utopian or ivory tower, but must take realistic account of case loads and budgets. A serious reform must ask, What are the minimum changes that can be made and financed? Such reform is long term; we will perhaps see its fruits after 15 or 20 years. Even the minimum of a trial before a judge, with prosecutor and defense lawyer, is not attainable system-wide.

## **6. Topic: Whether the Rights of Criminal Defendants Receive Better Protection Following Procedural Reforms:**

### Presenters:

Juvenile Court Judge Miguel Trejo Escobar of El Salvador

Professor Mauricio Duce of Diego Portales University in Chile

Appellate Judge Yolanda Pérez Ruiz of Guatemala

*Judge Trejo* summarized El Salvador’s reforms, including an oral, adversarial ju-

venile justice code in effect for three years, and a new Code of Criminal Procedure in effect for seven months. The previous system violated human rights: cases averaged three years in duration, 70% of those in jail were pretrial detainees, accused rarely had contact with defense counsel, and most accused confessed to police but later denied their confessions before judges. Now El Salvador has moved to a largely oral system of public trials, similar to those of Guatemala and Costa Rica, in an effort to meet international treaty standards. However, the country is experiencing a wave of violent crime and public insecurity, and society reacts by demanding more police and jails, and more severe penalties. The new Code has been accused of being incapable of repressing crime and even of contributing to crime.

*Professor Duce* explained that Chile's reform, not yet implemented, remains in parliamentary discussion. Chile does not yet even have a Public Ministry or prosecutors; judges are responsible for everything, although many functions are exercised by their assistants. Pretrial proceedings are still mostly secret. The situation of the rights of the accused is disastrous; the ideology of the system is hostile to them. Sixty percent of detainees are pretrial. The proposed reform, incorporating articles 7 and 8 of the American Convention on Human Rights and Article 14 of the International Covenant on Civil and Political Rights, is a substantial advance for the rights of the accused. However, the Chilean transition has not yet made possible the reform of the police (*los carabineros*). Still, determinism must be rejected; instead, programs must be designed to overcome obstacles.

*Judge Pérez*, speaking of prisoners' rights, called for coming down to earth. Reforms tend to focus on criminal procedure without addressing the independence of judges, the criminal code or the penitentiary code. We have put new wine in old bottles; some judges simply do not apply the reforms. The worst is in the jails, where the procedure begins and ends. In Guatemala 74% of prisoners in 1995 were pretrial; the percentage actually rose after adoption of the new Code of Criminal Procedure in 1994, because judges feared losing their paychecks. The public defenders do not even know their clients. Seventy percent of the prisoners are illiterate. So what rights of prisoners? What protection?

## **7. Topic: "The Criminal Investigation: Practical Problems in Coordination of Judicial, Prosecutorial and Police Functions during Criminal Investigations:**

### Presenter:

Attorney General Jorge Madrazo of Mexico

*Dr. Madrazo* explained the historical evolution of Mexico's criminal justice system from inquisitorial to accusatorial. Since the Constitution of 1917, the Public Ministry has been tasked to investigate and prosecute, and the judiciary to adjudicate. He also explained recent constitutional amendments, one of which has contributed to impunity by requiring the Public Ministry to present evidence of all elements of the crime in order to justify preventive detention or to open a trial, but without extending the period of only 48 hours previously allowed for these purposes. The government has proposed amendments to remedy

this problem, and approval is expected soon.

## **8. Topic: Selection and Training of Judges, Prosecutors and Public Defenders:**

### Presenters:

Appellate Judge Yolanda Pérez Ruiz of Guatemala

Dr. José Albino Tinetti, Director, Judicial Training School of El Salvador

Dr. Alvaro Ferrandino, Director, Public Defender's Office of Costa Rica

*Judge Pérez* observed that law schools do not train graduates to be good judges, prosecutors and defenders; good judges must be good humanists. Training through international cooperation is often done in foreign accents in inappropriate locations; some participants view such programs as vacations. Before adoption of Guatemala's new Code of Criminal Procedure there was no training, only general information about its purposes; even today we do not understand the why, how and what for of its new institutions. In Quetzaltenango before the reform 51% of the prisoners were pretrial; now the figure is 74%, demonstrating a lack of understanding of the presumption of innocence. The Judicial School does not solve the problem; it focuses on keeping statistics on the number of attendees and asking for funds.

*Dr. Tinetti* stated that unlike Guatemala, where the new Code of Criminal Procedure was drafted in secret, El Salvador adopted a participatory strategy, utilizing large numbers of lawyers working in groups. Even so, there remains much controversy. In 1990 El Salvador had no training school but AID contracted with an entity to provide training. However, because of a dispute between AID and the Supreme Court, judges did not participate. Training was provided to prosecutors, defenders, attorneys and law professors by Latin American and Spanish experts, including on the doctrine of *finalismo* in criminal law. Manuals were drafted in various areas of relevant law by Salvadoran professors working with foreign experts. AID has now left but the training continues.

*Dr. Ferrandino* believes in training, especially on-site training by means of accompanying the official being trained. In terms of international cooperation, there is now a new era: As AID is in retreat in the region, the international banks are stepping in with loans.

For more than 30 years Costa Rica has had a judicial school, where the judiciary trains judges, prosecutors, defenders and police. Since 1968 the Constitution has required that the judicial system receive not less than six percent of the national budget. AID provided assistance early; although it has now left Costa Rica, it left an institution installed.

## **9. Topic: Concluding Observations:**

### Presenters:

Ms. Norma Parker of the United States AID

Ms. Fay Armstrong, Administration of Justice Officer in the U.S. Department of State

Professor Thomas Buergenthal

Dr. Reinaldo Figueredo

*Ms. Parker* viewed the conference as one of the best she has attended in recent

years. It will be very useful for the donor community, represented at the conference by the U.S. Departments of State and Justice, AID and the IADB. Training should be practical, realistic and sustainable, based on the reality of each country.

*Ms. Armstrong* hoped the conference would lead to a broad plan of action and that the conferees would assist in designing it. Possibilities might include establishment of networks or of a center on criminal justice reform within the framework of the Summit of the Americas.

*Professor Buergenthal* was most impressed with the realism in diagnostics and prescriptions. Justice reform must take into account the cultural, political and economic context of each country and sub-region. There must be a regional commitment but not a regional blueprint; there could be regional or sub-regional centers with differing functions.

Reform requires continued financial support from AID and international banks. Political support could come through international human rights mechanisms, national legislatures, and non-governmental organizations focusing on administration of justice. Failure to act urgently risks turning back the clock on democracy. Personal and societal security must be made, in the eyes of the public, compatible with due process of law.

In closing, *Dr. Figueredo* repeated a theme sounded by Dr. Carrillo at the outset — that the “rule of law is the backbone of a market economy.” A multi-disciplinary approach to reform is essential. The new openings are irreversible but often traumatic.

### **III. SUMMARY OF SELECTED PRESENTATIONS**

This section includes more detailed summaries of the opening and closing panels, as well as of the addresses by Attorney General Jorge Madrazo of Mexico.

#### **1. Opening Panel: Overview of Criminal Procedure Reform at the Global and Regional Levels:**

##### Presenters:

Dr. Fernando Carrillo Flores, IADB (introduction)

Professor Mirjan Damaska of Yale Law School (global)

Dr. José Cafferata Nores, Member of Congress, Argentina (regional)

*Dr. Carrillo* noted that inadequate funding undermines the capacities of all state institutions in Latin America, including the judiciary. The international banks have recognized the need to provide financial assistance, beginning with the judicial system, and later with the administration of criminal justice. They understand that the rule of law is the backbone of a market economy.

Great challenges face the administration of criminal justice in Latin America: there is a need for efficiency and fairness in the functioning of prosecutors, courts, councils on the judiciary and public defenders, and in such procedures as *amparo*. Other themes of concern to the IADB include access to criminal justice in the face of economic inequalities, crime prevention, rights of victims, juvenile offenders, prison conditions and preventive detention.

Of 26 states in Latin America, 19 are in transition to an oral, adversarial system of criminal justice.

Crime is also becoming more transnational, which may suggest the need for reflection concerning existing international instruments.

*Professor Damaska* termed this is an age of great and accelerating transformations in criminal justice, not only in transitional but also in the most developed countries. In part the pressures for change are pragmatic. Criminal justice systems confront heavier caseloads. Their “retail” designs must now meet “wholesale” needs. With limited budgets, there is movement toward rationing justice.

In part the pressures are ideological. The United States stresses due process of law and Europe stresses the need for fair procedures to ensure human rights. These emphases sometimes have teeth, as in the case of the European Court of Human Rights.

There is an obvious tension between the pragmatic and ideological pressures for reform. Pragmatists want quicker ways to handle more cases, while idealists want more safeguards that could slow down justice. Technological advances can ameliorate this tension.

There are also tensions between civil and common law, and between adversarial and inquisitorial systems. But globally the flow of ideas is decisively one-sided, with Anglo-American concepts increasingly influencing the European civil law tradition. This is in part because Anglo-American procedure is flexible; almost any right can be waived. The U.S. has responded to rising crime by not insisting on expensive, full-fledged trials where defendants agree not to contest charges. Instead prosecutors are allowed to plea bargain. The result is a two-tiered system: full trials in a minuscule number of cases, while most cases are resolved consensually. In contrast, until recently, Europe remained inflexible and did not allow plea bargains.

In the U.S. the ideological pressures for due process, while strong in the 1960s, are not as powerful as in some parts of the world. Warren Court constitutionalism responded to neglect of the poor and minorities. Cynics might also suggest that it reflected in part the entry of the middle class into the criminal justice system because of drug offenses. Lately there has been some retreat from due process in the U.S. This reflects the unusual position of the U.S. in two respects. First, while Eastern Europe can make cosmetic reforms of laws without really changing practice, that is harder to do in the U.S. because of its aggressive legal profession. Second, the gap between public opinion and public governance is somewhat closer in the U.S. than in most other countries. Experts cannot simply agree among themselves on criminal procedure. And the public sees many defense safeguards as technicalities.

The one-sided transfer is not new; the history of European civil law is characterized by periodic transplants of Anglo-American law: in France in 1791 (unsuccessfully), again in the late 19th century, then as a reaction to the Nazis after World War II, and most recently in Eastern Europe with the fall of communism. One reason the adversarial trend has been dominant is the link between modes of procedure and the nature of the state. The inquisitorial system is linked with a strong, intrusive state. The adversarial approach is linked with liberal democracy. For similar reasons the American invention of judicial review of statutes is spreading.

Another factor is American cultural influence through television and movies. The American mode of trial is dramatic, unlike that of the civil law.

Another factor is that Europeans have only recently had to confront pragmatic pressures. Previously most cases were resolved in the investigation; trials were basically brief reviews. Now, with increased safeguards for the defense during the trial and preliminary phases, defendants have bargaining chips that they can use in negotiations with prosecutors and courts. Mechanisms similar to plea bargaining now exist in Germany, Italy, France and most of Eastern Europe; a two-tier system is beginning to emerge. But Europe still refuses to accept plea bargaining in really serious cases.

Before borrowing from another system, one should reflect on the ramifications of a given change. Some reforms change little; others change everything. To trace the real impacts, one needs expert practitioners who know how the judges and lawyers work in practice. One must also ask what are the objectives.

One innocuous change is to have direct and cross-examination done by the attorneys, in lieu of examination of witnesses by the judge. That one change alters little else. However, if you go further and make the judge passive, so that the defense lawyer has to interview witnesses, in many European countries that would be seen as tampering with the evidence. You would also have to take the dossier away from the judge; otherwise he will intervene too much.

That latter step — removing the dossier from the judge — is an example of a radical change. It should not be done unless the legal profession is prepared; otherwise they will revolt, as in Italy. Another radical change is to introduce guilty pleas. Once only contested cases go to trial, everything changes, because now the paradigmatic case is a difficult one.

Ultimately the rights of the defense must be balanced with crime control. Due process should be pursued prudently and in moderation.

*Dr. Caffferata* observed that criminal justice reform is much more than a matter of codes, but involves culture and values. Reforms are associated with political concepts. New conditions in the Americas — democratization, advances in civil and political rights, and peace processes — have led to a reform movement in criminal justice. These reforms seek to protect rights and to limit arbitrary and repressive state action, while respecting the public interest in law enforcement and punishment of crime. They do so within a framework of institutional transparency, in which prosecution and adjudication functions are clearly delimited, the rights of both accused and victims are guaranteed, and the case is heard in a public, oral trial.

Many governments in Latin America, with international support, now seek to adopt modern conceptions of the administration of justice in democratic republics. These include a system of oral, public and adversarial criminal procedure, in which the preliminary investigation (secret and written) is no longer definitive, judges must be impartial adjudicators dedicated to safeguarding rights, and there is full equality between prosecution and defense. The reforms seek to improve the rights of the accused, by protecting his liberty and defense during the proceeding, and by rendering inadmissible confessions and other evidence obtained through torture or by other illegal means.

These reforms have been influenced by democratic ideas, by trends in crime policy, and by the resistance of the inquisitorial culture.

Democratic ideas reject the false totalitarian claim that, “If you want liberty you can have it, but you will pay a price in security; more liberty will mean insecurity and an increase in crime and public disorder.” The old authoritarian contention continued, “If

you want security, you also have to pay a price, and that price is paid in liberty.” The democratic reform movement breaks with this false dichotomy. Both liberty and security can be enjoyed. The rights of both accused and victims must be protected.

The reform movement also views criminal procedure as part of a broader crime policy. It recognizes realistically that not all crimes can be prosecuted. Hence it rejects the principle of legality, which insists on prosecution of all crimes, in favor of the principle of opportunity, which demands rational criteria to select cases, instead of the *de facto* selection of socially excluded citizens for prosecution.

The reform movement also recognizes that trials cannot realistically establish the whole truth. Instead the goal must be more limited: to prove guilt, not to prove innocence. Thus the accused is presumed innocent, the burden of proof is on the prosecution, and the truth about guilt emerges not from the internal reflection of the judge, but from the procedural confrontation between accuser and accused. A consensual truth may also be accepted, based on an agreed resolution for reparations to the victim in lieu of punishment.

Inquisitorial resistance by some in the legal profession masquerades as ideological, when it really involves the distribution of power. Often it takes the form of delaying reforms on the pretext of lack of funds, or on the ground that a crime wave makes reform inopportune. What it really seeks is to preserve the power to persecute, to adjudge and to punish. It reflects the colonial heritage of an inquisitorial culture, which assigns the central procedural role to the investigating judge, and which presumes the accused guilty. Such a presumption is characteristic of a totalitarian state, which cannot tolerate even the appearance of disobedience, and so punishes even the appearance of crime by preventive detention of the accused. Understandably judges resist reforms that remove their power to punish based on their will, rather than on the basis of a determination of guilt at trial.

The reforms imply new roles for the participants. The need for independence of judges leads to creation of Councils on the Judiciary to depoliticize their selection. The need for impartiality suggests that judges should adjudicate and guarantee rights, and not actively investigate, which could compromise their impartiality.

The reforms have improved the institutional situation of the prosecution; today the public ministries of most countries in the region enjoy constitutional status and, in various forms, independence from the executive. The procedural role of the prosecution has also been strengthened, from case selection to investigation to proving the charges at trial. And its new role aligns it more closely with the victim. The prosecution is now the agency responsible for efficient crime prosecution. At the same time, it must respect the rights of the accused.

The reforms have given the victim both a greater role in the proceedings (in various forms) and interdisciplinary assistance outside the proceedings.

The reforms also recognize new rights for the accused, including a presumption of pretrial liberty rather than of preventive detention, time limits on preventive detention and prohibitions of *incommunicado* detention. His declarations are now seen as a means of defense rather than of prosecution. Criminal punishment may now be imposed only on the basis of sufficient proof, reasonably and objectively analyzed. And it is recognized that the goal of punishing crime does not justify violating personal dignity and other basic rights.

Several states have also adopted new laws on juvenile delinquency, following the norms of the Convention on the Rights of the Child.

Looking to the future of the reform movement, one positive sign is the increasing incorporation by states in the region of international human rights treaties, and of reports and decisions of international human rights organs, into domestic legislation and judicial rulings. On the other hand, negative signs include rising violent crime and the general sense of public insecurity, as well as organized crime and public corruption, which generate calls for inquisitorial responses. While these issues are not easy to resolve, reform must not surrender in the face of them. Basic rights must be preserved. And in the great majority of cases, the rational utilization of the legitimate investigative powers of the state will suffice to do justice.

Time will tell whether increasingly influential press coverage of trials and crimes will be positive or negative for reform. In principle the press must enjoy the broadest possible freedom, including to report on criminal matters. This need not harm reform — so long as the judiciary acts independently of the opinions and pressures of the media.

Finally, the claim often heard, that rising crime is due to the greater rights of the accused in modern criminal procedures, is a smokescreen. Criminal procedures operate on the effects, not the causes of crime. The causes are not in the laws, but, above all, in social exclusion. The way to reduce crime is to build a more just society.

## **2. Addresses by Attorney General Jorge Madrazo of Mexico:**

### **(A) International Organized Crime:**

*Attorney General Madrazo* warned that “increasingly violent, corrupting and dangerous” international organized crime, particularly drug trafficking, threatens democracy and the rule of law. Mexico’s lengthy border with the world’s largest drug market in the United States has made the country a “transit territory” for traffickers.

The Government of Mexico works to combat drugs for reasons of public health, national security and international cooperation. Under the coordination of the Attorney General, various agencies are involved, including the military until new generations of federal judicial police can be readied. The finance ministry participates in investigating and controlling drug money laundering. Health and education agencies are engaged in prevention and rehabilitation. The cost is high in budgetary terms and in lives lost.

Corruption has been “intensively attacked” within the Attorney General’s office. A Center of Trust Control, established last year, administers rigorous medical, toxicological, psychological, financial, polygraph and other examinations of civil servants working in the fight against drugs, as well as of all persons joining the Attorney General’s office. During the two years of Dr. Madrazo’s administration, criminal action has been taken against 223 judicial police and 76 federal prosecutors, and 346 such officials have been dismissed.

Mexico’s statistics are very good with regard to drug eradications, seizures and arrests, including of certain prominent drug traffickers, some of whom face not only criminal charges but also extradition to the U.S., with which Mexico has extensive cooperation in matters of mutual legal assistance and drug control strategy. This cooperation includes a High Level Contact Group which meets regularly.

Mexico supports the creation of a Multilateral Evaluation Mechanism within the Organization of American States, in lieu of the unilateral, politicized and unproductive U.S. decertification process. The administrations of both Presidents Zedillo and Clinton

have the political will to work together against drug trafficking and other organized crime, particularly transnational crime. Mexico also works with Guatemala, Belize, Colombia and other Iberoamerican countries against international drug trafficking.

Modern criminal procedures must be made more efficient and fair. Proposed reforms are under discussion in Mexico and expected to be approved soon. Mexico is open to exchange ideas on improving criminal justice in the Americas. Combating drug trafficking is feasible only within the framework of international cooperation.

## **(B) Coordination of Judicial, Prosecutorial and Police Functions During Criminal Investigations**

*Attorney General Madrazo* explained that Mexico continues in the long process of perfecting its administration of justice. Prosecution and adjudication must be closely coordinated. Following an historical evolution, Mexico's criminal justice system today tasks the Public Ministry, through local and federal prosecutors, to investigate crimes, present formal charges before tribunals and participate as a party in the criminal process. Criminal judges issue arrest warrants or orders of liberty, commit the accused to trial or to prison, and evaluate evidence to determine criminal responsibility and to impose the corresponding punishment.

The functions of prosecution and adjudication were not always so clearly delimited and separated in Mexico. The system of justice was originally inquisitorial, but a series of necessary constitutional and legal reforms separated the two functions and assigned them to different branches of government.

From the origins of public ministries centuries ago in France and England, Dr. Madrazo traced the historical development of the institution in Mexico. Under the Constitution of 1917, the Public Ministry was separated from the judge of instruction, and put exclusively in charge of investigation and prosecution of crimes. At the same time, judges were given exclusive power to impose criminal punishments (except for infractions of police regulations, usually punished by fines), and the Judicial Police were placed under the direct control of the Public Ministry. Since 1917, then, the criminal justice system has been constitutionally defined as an accusatory system.

Constitutional reforms in 1993 modified the concept of "corpus of the crime," and substituted the concept of "elements of the crime." Prosecutors must now show the probable responsibility of the accused for each element of the crime, before a judge can order an arrest or open a trial.

However, these reforms led to a degree of impunity, because the Public Ministry was still given no more than the 48 hours previously allowed (except 96 hours in cases of organized crime), to gather the expanded evidence now required to bring the suspect before a judge. In other countries following the "*finalista*" school of criminal procedure, the periods are much longer: six months in Germany, nine months in Perú (12 months in extraordinary cases, and even longer in cases of terrorism, espionage or drug trafficking); and up to 15 days in Colombia.

In other words, Mexico's current legislation does not give the prosecutor enough time to gather the evidence required to keep a suspect in preventive detention. This gives a clear idea of the enormous problem in prosecuting crimes in recent years in Mexico.

Therefore, in December 1997, the federal executive proposed constitutional reforms, which were approved in November 1998 by the federal congress and are now un-

der review by local legislative bodies, as required by the Constitution.

Beginning in 1994 there was also a process of constitutional reforms affecting, among other things, the selection and structure of the federal and local judiciaries. The Supreme Court was reduced to eleven justices, and a Federal Judicial Council and Electoral Tribunal were created. Responsibility for advising the government was shifted from the Attorney General to a new legal advisor's office within the Ministry of the Presidency. Judges were also authorized to hear petitions (*amparo*) challenging prosecutorial decisions to desist or not to prosecute. These reforms strengthened checks and balances and the protections available to victims of crime.

Attorney General Madrazo also detailed other duties of the Public Ministry (such as appearing in all cases in which the government has a legal interest) and specified more precisely its duties in criminal cases.

On the eve of the new millennium, both the Public Ministry and the judiciary face the challenges of attacking impunity and crime, reestablishing public order and creating the conditions that will allow Mexicans to develop in harmony.

### **3. Concluding Panel:**

#### Presenters:

Ms. Norma Parker of the United States AID

Ms. Fay Armstrong, Administration of Justice Officer in the U.S. Department of State

Professor Thomas Buergenthal

Dr. Reinaldo Figueredo

*Ms. Parker* viewed the conference as one of the best she has attended in recent years. Its ideas and themes will be very useful for the donor community, represented at the conference by the U.S. Departments of State and Justice, AID and the IADB. She noted that training should be practical, realistic and sustainable, based on the reality of each country.

*Ms. Armstrong* agreed with Professor Mejía's identification of six areas in which international cooperation can support reform: design of content and methodology for training; institutionalization of training; basic training of trainers; assistance in implementation; diagnostic assessments before and after reforms; and publications. Ms. Armstrong hoped that the conference would lead to a broad plan of action and that the conferees would assist in designing it. Possibilities might include establishment of networks or of a center on criminal justice reform, within the framework of the Summit of the Americas.<sup>2</sup>

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<sup>2</sup> *Editor's note:* The Final Declaration of the Second Summit of the Americas, April 19, 1998, calls for establishing a "hemispheric center for studies" on administration of justice. The accompanying Plan of Action commits leaders to "[e]xpedit the establishment of a justice studies center of the Americas, which will facilitate training of justice sector personnel, the exchange of information and other forms of technical cooperation in the Hemisphere, in response to particular requirements of each country. To this end, they request the Ministers of Justice or other competent authorities to analyze and define the most suitable actions for the organization and establishment of such a center."

*Professor Buergenthal* evaluated the conference as very good and was most impressed with the candor and realism in the diagnostics, as well as the realism about what can and should be done.

For justice reform, the cultural, political and economic context of each country and sub-region must be taken into account. Regional cooperation has its place but must recognize its limits and specific functions; there must be a regional commitment but not a regional blueprint. There are some common trends, so that there could be regional or sub-regional centers with differing functions.

Reform requires funding. Professor Buergenthal hopes that AID will continue to fund justice reform, and welcomes the new commitments by international banks in this field.

Reform also requires political support. One source not yet fully exploited in our region is the use of international mechanisms for protection of human rights. European countries have amended their laws in response to judgments of the European Court of Human Rights, through the involvement of national parliamentarians. The Inter-American human rights system can do more to promote reforms, especially in such areas as due process of law and freedom of the press.

A second source of political support could be international human rights NGO's that focus on administration of justice. For many ordinary people, their contact with authority is through the justice system. Failure to act urgently to reform justice risks public impatience and might even lead to turning back the clock on democracy. We need to figure out a way to make personal and societal security, in the eyes of the public, compatible with due process of law. If we succeed in that, we can succeed with reforms.

Reform should also reexamine specialized courts, which may lend themselves to specialized mentalities, inefficiency and even repression. Civil justice also needs reform along with criminal justice.

Professor Buergenthal thanked the representatives of U.S. AID, the Departments of State and Justice and the IADB for their support in arranging the conference.

*Dr. Figueredo* closed the conference by repeating a theme sounded by Dr. Carrillo at the outset — that the “rule of law is the backbone of a market economy.” Dr. Figueredo believes that a multi-disciplinary approach to reform is essential, recognizing that the new openings, while irreversible, are often traumatic.

# Annex I Conference Program

## CONFERENCE ON CRIMINAL JUSTICE REFORMS IN THE AMERICAS

November 17 - 20, 1998 Washington, D.C.

### CONFERENCE PROGRAM

#### November 17, 1998

- 6:30 p.m. Reception at the Hilton Embassy Row Hotel, Consulate Ballroom, 2015 Massachusetts Avenue, NW, Washington, D.C.
- 7:30 p.m. Working Dinner, Consulate Ballroom, Hilton Embassy Row Hotel
- Remarks by:
- The Honorable Janet Reno, Attorney General of the United States;
- Professor Thomas Buergenthal, President, The Due Process of Law Foundation;
- Dr. Diego Betancur: Message from former President Belisario Betancur of Colombia;
- Dr. Charles Norberg, President of the Inter-American Bar Foundation;
- Dr. Reinaldo Figueredo, Chairman of the Board, The Due Process of Law Foundation

#### November 18, 1998

Inter-American Development Bank,  
1300 New York Avenue, NW  
Washington, D.C.  
Northwest Break Out Room (E9B) 9th Floor

- 9:00 a.m. Opening of the Conference
- Professor Thomas Buergenthal, President, Due Process of Law Foundation (USA)
- Dr. Fernando Carrillo, Senior Advisor, Public Sector Reform, Inter-American Development Bank (USA)
- 9:30 a.m. Criminal Procedure Reform Movements: An Overview
- Moderator: Professor Thomas Buergenthal
- Global Trends  
Professor Mirjan Damaska, Sterling Professor of Law,  
Yale University Law School (USA)
- Regional Trends Dr. José Cafferata, Member of Parliament (Argentina)
- 10:45 a.m. Break

- 11:00 a.m. Discussion
- 12:30 p.m. Working Lunch  
Moderator: Dr. Reinaldo Figueredo  
Remarks by Lic. Jorge Madrazo, Attorney General of Mexico
- 2:30 p.m. A Recent Example: Venezuela's New Code of Criminal Procedure  
Moderator: Professor Douglass Cassel, Member of the Board and Secretary, The Due Process of Law Foundation  
Address by Dr. Gisela Parra, President of the Council of the Judiciary, Venezuela
- The Venezuelan Reform: Achievements and Problems  
Commentators:  
Dr. Fernando Fernández, Baker & McKenzie, and Director, Venezuelan Section, Amnesty International (Venezuela)  
Dr. Alberto Arteaga Sánchez, Arteaga Sánchez & Associates, and Professor of Criminal Law, Central University of Venezuela
- 3:30 p.m. Discussion
- 4:15 p.m. Break
- 4:30 p.m. Criminal Procedure Reform in Chile  
Chair: Dr. Fernando Carrillo  
Dr. Loreto Ruz Donoso, Under-Secretary for Criminal Procedure Reform, Ministry of Justice (Chile)
- 4:50 p.m. Discussion
- 5:45 p.m. End of Session

November 19, 1998

Inter-American Development Bank, Room E9B

New Institutions and Systems:  
Coping with Problems at the National Level

- 9:15 a.m. The Judge, the Prosecutor and the Defense Attorney: New Roles and Old Habits?  
  
Moderator: Dra. Beatriz Mejía, Professor of Methodology, School of Law, Pontifical Catholic University of Peru  
  
Dr. Alvaro Ferrandino, Director, Public Defender's Office (Costa Rica)  
  
Dr. Jaime Giraldo, Former Minister of Justice (Colombia)  
  
Dr. Juan Enrique Vargas, Professor and Researcher, School of Law, Diego Portales University (Chile)
- 10:15 a.m. Discussion
- 11:30 a.m. The Rights of the Criminal Defendant: Better Protection?  
Moderator: Christina Biebesheimer, Attorney, Inter-American Development Bank

Professor Mauricio Duce, Professor and Researcher, School of Law, Diego Portales University (Chile)  
Dr. Miguel Trejo Escobar, Juvenile Judge (El Salvador)  
Lic. Yolanda Pérez, Judge (Guatemala)

12:15 p.m. Discussion

1:00 p.m. Working Lunch

2:30 p.m. The Criminal Investigation: Practical Problems in the Coordination of Judicial, Prosecutorial and Police Functions

Moderator: Judge Peter Messitte, United States District Court for the District of Maryland

Address by Lic. Jorge Madrazo, Attorney General of Mexico

3:30 p.m. Break

3:45 p.m. Discussion

5:00 p.m. End of Session

November 20, 1998

Inter-American Development Bank, Room E9B

9:00 a.m. The Selection and Training of Judges, Prosecutors and Public Defenders

Moderator: Dr. Linn Hammergren, Justice Reform Specialist, The World Bank

What Changes in Selection and Training Practices are Needed to Implement Criminal Justice Reform?

The Role of National Law Faculties and Judicial Training Centers

Regional Cooperation: Its Modalities and Institutional Framework

12:00 p.m. Concluding Observations

Fay Armstrong, Esq., Administration of Justice Officer, Office of Policy Planning, Coordination and Press, U.S. Department of State

Norma Parker, Deputy Assistant Administrator, Bureau for Latin America and Caribbean, U.S. Agency for International Development

Dr. Reinaldo Figueredo, Chairman of the Board of The Due Process of Law Foundation

Professor Thomas Buerghenthal, President of The Due Process of Law Foundation

12:30 p.m. Conclusion of Conference

**Annex II**  
**CONFERENCE PARTICIPANTS**

**CONFERENCE ON CRIMINAL JUSTICE REFORMS IN THE AMERICAS**  
November 17 - 20, 1998 Washington, D.C.

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