

**A.I.D. EVALUATION SUMMARY - PART I**

1. BEFORE FILLING OUT THIS FORM, READ THE ATTACHED INSTRUCTIONS.  
2. USE LETTER QUALITY TYPE, NOT "DOT MATRIX" TYPE.

**IDENTIFICATION DATA**

<b>A. Reporting A.I.D. Unit:</b> Mission or AID/W Office <u>El Salvador</u> (ES# _____)		<b>B. Was Evaluation Scheduled in Current FY Annual Evaluation Plan?</b> Yes <input type="checkbox"/> Slipped <input type="checkbox"/> Ad Hoc <input checked="" type="checkbox"/> Evaluation Plan Submission Date: FY ____ Q ____	<b>C. Evaluation Timing</b> Interim <input type="checkbox"/> Final <input checked="" type="checkbox"/> Ex Post <input type="checkbox"/> Other <input type="checkbox"/>
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**D. Activity or Activities Evaluated** (List the following information for project(s) or program(s) evaluated; if not applicable, list title and date of the evaluation report.)

Project No.	Project /Program Title	First PROAG or Equivalent (FY)	Most Recent PACD (Mo/Yr)	Planned LOP Cost (000)	Amount Obligated to Date (000)
519-0296	Judicial Reform Component I Revisory Commission of El Salvador Legislation (CORELESAL)	1984	9/30/92		

**ACTIONS**

E. Action Decisions Approved By Mission or AID/W Office Director	Name of Officer Responsible for Action	Date Action to be Completed
Action(s) Required  - Cease the funding to the Revisory Commission of Salvadoran Legislation (CORELESAL).  - Ministry of Justice will assume responsibility for legislative reform activities through a modification to Component I of the Judicial Reform Project.  - Project funds will be used to finance activities of the "Technical Support for Judicial Reform" (ATJ) under the Ministry of Justice.  - Grant Agreement amended to reflect above (PIL No. 63, AID Project No. 519-0296).	ARKlenicki, ODI	5/31/91
		6/1/91
		6/1/91
		5/29/91

(Attach extra sheet if necessary)

**APPROVALS**

**F. Date of Mission or AID/W Office Review of Evaluation:** \_\_\_\_\_ (Month) \_\_\_\_\_ (Day) \_\_\_\_\_ (Year) 1991

**G. Approvals of Evaluation Summary And Action Decisions:**

Name (Typed)	Project/Program Officer	Representative of Borrower/Grantee	Evaluation Officer	Mission or AID/W Office Director
	Ana Klenicki, ODI	Dr. Rene Hernandez Valiente Ministro de Justicia	Kateie Freeman, DPP	John A. Sanbrailo, Director
Signature	<i>Ana Klenicki</i>	<i>Dr. Rene Hernandez</i>	<i>Kateie Freeman</i>	<i>John A. Sanbrailo</i>
Date				

A B S T R A C T

H. Evaluation Abstract (Do not exceed the space provided)

CORELESAL was created in 1985 as part of the Judicial Reform Project to review the Salvadoran legislation, with emphasis on legislation affecting the criminal system, and to draft necessary revisions. The Commission was organized with diverse representation to guarantee a thorough airing of proposals by the groups most involved in the system, and to promote an apolitical approach to this reform process. Under the Commission was a technical group in charge of actually drafting the legislation. Some of the best legal minds in the country, who enjoy excellent national reputations, were hired as part of this technical body.

An evaluation of CORELESAL was carried out in 1987 as part of a general evaluation of the Judicial Reform Project. The evaluation was generally favorable. However, CORELESAL had completed very little work at that time, so the assessment was necessarily rather superficial. Since the time of the 1987 evaluation, concerns about the operation of the Commission and the impact of its work have been growing.

The present evaluation team identified five main problems: 1. The legal framework established by the Constitution does not permit major improvements without amending the Constitution itself, which CORELESAL has not seen as its mandate. 2. The structure of the judicial system, also as established by the Constitution, is politicized, and CORELESAL again has not perceived the Constitutional changes necessary to change the structure as falling within the ambit of its responsibility (or perhaps within the realm of possibility). 3. Debate within CORELESAL is not vigorous and critical, seems to inhibit the other members from openly discussing issues which are controversial and which the Supreme Court may not agree with. 4. CORELESAL has become isolated and is not open to outside suggestions. 5. The highly politicized atmosphere of the country would make it difficult for any group, under any form of organization, to achieve fundamental reforms in the justice system.

C O S T S

Evaluation Costs

1. Evaluation Team		Contract Number OR TDY Person Days	Contract Cost OR TDY Cost (U.S. \$)	Source of Funds
Name	Affiliation			
Marcelo Sancinetti	Checchi & Co.	30	10,868	519-0296
Ralph Smith	Checchi & Co.	20	9,660	519-0296
other costs (preparation, logical support, translations):			11,559	
TOTAL COSTS			32,087	

Mission/Office Professional Staff  
Person-Days (Estimate) 10 days

3. Borrower/Grantee Professional Staff Person-Days (Estimate) 10 days

## A.I.D. EVALUATION SUMMARY - PART II

### SUMMARY

J. Summary of Evaluation Findings, Conclusions and Recommendations (Try not to exceed the three (3) pages provided)

Address the following items:

- Purpose of evaluation and methodology used
- Purpose of activity(ies) evaluated
- Findings and conclusions (relate to questions)
- Principal recommendations
- Lessons learned

Mission or Office:

USAID/El Salvador

Date This Summary Prepared:

9/9/91

Title And Date Of Full Evaluation Report: October 9/90

Assessment of the Performance of the  
Revisory Commission of Salvadoran Legislation

The logframe goal of the Judicial Reform Legislation project is to build and sustain confidence in the Salvadoran Criminal Justice system.

The purpose is to improve administrative, technical and legal performance of El Salvador's criminal justice system.

#### Purpose of Evaluation

The Mission contracted Checchi and Co. to carry out a review of Revisory Commission of Salvadoran Legislation (CORELESAL) work in the criminal area and to assess its impact on the criminal justice system in El Salvador. The evaluation was limited to the criminal area since that has been the focus of our project, even though CORELESAL has carried out a significant amount of work in other fields. Checchi and Co. contracted two criminal law experts to carry out the evaluation, Judge Ralph Smith and Dr. Marcelo Sancinetti. Judge Smith, an American, is a former prosecutor and municipal court judge who is fluent in Spanish. Dr. Sancinetti, is an Argentinian law professor who also has a private law practice.

#### Methodology Used

The consultants reviewed all the legislation drafted by CORELESAL and legislation under consideration held meetings with all the members of the Commission and the technical group; interviewed representative members of the legal community and other important sectors of society (e.g. law schools, Ministry of Justice); held meetings with USEmbassy and AID in El Salvador; and, conducted an assessment of the production, productivity and priorities of the CORELESAL.

#### Purpose of Activity Evaluated

CORELESAL was created in 1985 as part of the Judicial Reform Project to review the Salvadoran legislation, with emphasis on legislation affecting the criminal justice system, and to draft necessary revisions. It was organized in two bodies. The Commission itself was the policy level body with representatives from the Executive Branch (the Executive Director), the Ministry of Justice, the Supreme Court, the Attorney General's Office, the Public Defender's Office, the Ministry of Defense, the bar associations, and the law schools. The Commission was organized with diverse representation to guarantee a thorough airing of proposals by the groups most involved in the system, and to promote an apolitical approach to this reform process. Under the Commission was a technical group in charge of actually drafting the legislation. Some of the best legal minds in the country, who enjoy excellent national reputations, were hired as part of this technical body.

An evaluation of CORELESAL was carried out in 1987 as part of a general evaluation of the Judicial Reform Project. The evaluation was generally favorable. However, CORELESAL had completed very little work at that time, so the assessment was necessarily rather superficial. Since the time of the evaluation, concerns about the operation of the Commission and the impact of its work have been growing. Of greatest concern was that the Supreme Court, since its membership changed in 1989, seemed to be exerting excessive influence over the work of CORELESAL and distorting the outcome of the work to support its own political purposes. CORELESAL also seemed to be reluctant to undertake difficult reform issues, even those which we considered important, such as the admissibility of co-defendants testimony. Additionally, CORELESAL seemed to be rejecting the work and recommendations of the technical body too often, and there were complaints that it had isolated itself from outside input and was not responding to requests for changes to draft legislation it circulated for comment. The bottom line concern was that, despite a rather high level of productivity on the part of CORELESAL and a recent increase in the amount of legislation which it had drafted being passed by the legislature, fundamental reforms to improve the judicial system seemed not to have been achieved.

#### Findings and Conclusions

The evaluation report concluded that CORELESAL's work had not had a fundamental impact on the criminal justice system in El Salvador. The evaluation team identified five main problems: 1. The legal framework established by the Constitution does not permit major improvements without amending the Constitution itself, which CORELESAL has not seen as its mandate. 2. The structure of the judicial system, also as established by the Constitution, is politicized, and CORELESAL again has not perceived the Constitutional changes necessary to change the structure as falling within the ambit of its responsibility (or perhaps within the realm of possibility). 3. Debate within CORELESAL is not vigorous and critical, and the presence of members of the Supreme Court on CORELESAL seems to inhibit the other members from openly discussing issues which are controversial and which the Supreme Court may not agree with. 4. CORELESAL has become isolated and is not open to outside suggestions. 5. The highly politicized atmosphere of the country would make it difficult for any group, under any form of organization, to achieve fundamental reforms in the justice system.

#### Principal Evaluation Recommendations

Eliminate the Supreme Court majority presence in CORELESAL.

Insure that all legislation projects be widely publicized before they are completed in order to guarantee wide support for the legislation.

Create a direct channel with the Executive branch in order to accelerate Assembly consideration of CORELESAL's draft legislation.

Incorporate foreign advisors in the work of CORELESAL.

Lessons Learned

When organizing a Commission such as the CORELESAL, it is necessary to take into account the functioning structure of different linkages, e.g., the legal profession, the judicial system and the legislative process. Because in El Salvador the Supreme Court controls the legal profession, it was found that their presence in the Commission had a chilling effect. A second important issue is the need to elicit support from the legal profession, from the beginning of the process, in any proposed new legislation. Thirdly, it is necessary to have a closer and direct line of communication with the Executive branch to expedite the National Assembly support of proposed legislation. Lastly, it is important to provide long term foreign technical assistance from the beginning of the process which is generally needed to build up skills, it fills gaps in substantive knowledge, and it is politically neutral.

In summary, the following are the lessons learned:

- \* Need to lessen Supreme Court presence in order to guarantee independent and non political work.
- \* Insure that wide participation is included when discussing future legislation.
- \* Need to work in closer terms with a representative of the Executive branch in order to attain speedier action by the National Assembly when considering proposed legislation.
- \* Provide long term foreign technical assistance which brings substantive knowledge but is politically neutral in order to maximize the results of the host country professionals.

H. ATTACHMENTS (List attachments submitted with this Evaluation Summary; always attach copy of full evaluation report, even if one was submitted earlier)

Assessment of the Performance of CORELESAL

L. COMMENTS BY MISSION, AID/W OFFICE AND BORROWER/GRANTEE

Based on the results of the evaluation, increasing difficulties in working with CORELESAL, and the Minister of Justice expression of interest in assuming a more participatory and active role in the new legislation process, the Mission decided to cease funding of CORELESAL and to create the necessary capability within the Ministry of Justice to continue with the legislative drafting. In order to maximize the lessons learned, it was also decided that the new outfit would work with long term foreign technical assistance that would be substantive and politically neutral.

XD-AID-289-A

Final

**ASSESSMENT OF PERFORMANCE  
OF CORELESAL**

Presented to:

O.D.I  
U.S.A.I.D./El Salvador

I.Q.C. PIO 519-0296-3-00041

Submitted by:

Checchi and Company Consulting, Inc.  
1730 Rhode Island Ave. NW, Suite 910  
Washington, DC 20036

October 1990

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## #1 Introduction

### I. Object of this report

This report is one of the four required by the Agency for International Development (U.S.A.I.D.) for the evaluation of the performance during the period 1985-1989 of the Revisory Commission for Salvadoran Legislation (CORELESAL), an agency created by an agreement between the governments of the United States and El Salvador "with the specific purpose of bringing legislative reforms in the field of criminal justice that were considered urgent in order to improve the judiciary in El Salvador" <sup>1</sup>. The objective of the creation of CORELESAL "has always been to build and sustain the confidence of the Salvadorans in their system through the development of an independent, responsible and responsive judiciary" <sup>2</sup>.

Two of the quoted reports should have been presented by a north american consultant and the two others by this writer (the Latin American consultant). In the last two, my responsibility was to report:

- a) whether and to what extent the reform projects of CORELESAL respond to the proposed objectives, "in particular in what concerns proceedings in criminal cases" <sup>3</sup>, with special reference to "due process, speedy trial and rules of evidence" <sup>4</sup>;
- b) about the state of the argument about the admissibility of the co-defendant's testimony as evidence in the criminal process in the Latin American countries <sup>5</sup>.

A separate report of this date, delivered on this date is an extensive critical study on point b).

This report is, therefore, concerned with a), that is, the analysis of the work performed by CORELESAL with respect to the stated objectives: to set new foundations for the development of a peaceful co-existence, democratic and just, based on the

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(\*) *Report prepared by the author at the request of AID (U.S.A.) through Checchi and Company Consulting Inc. (Washington), Buenos Aires, October 15, 1990.*

<sup>1</sup> *I quote this "objective directly from the text of the "Background: that precedes the written bases that are the reason for the Contract PIO 519-0296-3-00041, page 4.*

<sup>2</sup> *Ibid.*

<sup>3</sup> *"Bases" for the contract cited, "level of effort" page 7.*

<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.*

essential principles of the State of Law.

Both reports, however, are tightly related. In fact, from the information I have been able to attain on the origin and development of CORELESAL, the interest of the Department of State of the government of the United States was the result of the lack of elucidation and favorable resolution in the numerous cases of violation of fundamental human rights since 1980<sup>6</sup>, which had serious international repercussions. The government of El Salvador attributes this lack of disposition to deficiencies in the system in processing evidence. The failure of some of these cases and the unreliable resolution of others, especially the last one<sup>7</sup>, would be the result - as it is said - of the presumed negative repercussions that the evidence of the participation of some of the principal defendants, as well as the (also presumed) inadmissibility of the testimony of one defendant against another in the criminal justice system of El Salvador.

This report must, therefore, relate its contents to the relativity of real incidence of legislation to the unsatisfactory results.

The study of the Constitution of El Salvador, of the principal criminal legislation in force, and the projects created by CORELESAL itself, show, without a doubt, serious legislative deficiencies. But these same documents plus the results of the many interviews in El Salvador indicate, above all, problems in the structure of power, which show little indication of being overcome and which determine, to a much greater extent than legislative documents, the failure of the judicial system.

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<sup>6</sup> I refer, basically, to the cases known as: "Archbishop Romero"(24/3/1980), "Armenia Wall Murders" (1980-82, "Michael Kline"(13/10/1982), "Kidnapping Case" (1986), "Barrera Urquilla" 5/12/1986), "San Sebastian" (1988), Hector Miranda Marroquin and Lucio Parada (3/7/1989) and "Jesuit Killings" (6/11/1989) I take here the quotations from Report of the Situation in El Salvador, United States Department of State of 1/4/1990, pp. 12 and following where the summary about the circumstances of each case as well as the respective situation of the process can be consulted.

<sup>7</sup> I refer to the well known case of the "Murder of the Jesuits". In the morning of November 16, 1989 (1 a.m.) members of the Army of El Salvador (Atlacath Battalion, Military School) entered into the bedrooms of the University of Central America, where six Jesuit priests were asleep; the priests were killed, as well as two maids. The act is attributed - as immediate perpetrator - to the colonel in charge of the military school where the material perpetrators, among which there were some officers. I take these references from the same report cited in the former footnote, without having personal evidence of the circumstances of the case.

## **II. Starting Points**

The conclusions derived from the former point demand the clear statement that a study, as required, cannot be circumscribed by a strictly technical analysis of CORELESAL projects, because their evaluation cannot, in fact, disregard the political and functional context in which this Commission has to operate.

It is true that any legal text can be evaluated as "good" or "bad" according to certain parameters culturally accepted by the judicial conscience. And, in a sense, it is possible to address oneself to certain indicators of acceptability that may be considered as unrelated to the Salvadoran context. But this - instead of assuring an aseptic analysis of the material under study - could, in fact, cause a loss of sight of the starting point from which CORELESAL has to attempt to "legislate" and would be of little help in making a decision that - as I understand it - AID wishes to make as a consequence of the technical reports of the Argentine and American consultants. This analysis will attempt, then, an acceptable compromise between the perception of reality by the institutions of criminal justice, or the general political context, and the technical results of CORELESAL.

For this purpose I have taken the following path: I have analyzed a great part of the CORELESAL work - its reform projects pending legislative approval or already approved - before meeting the Republic of El Salvador, and written - also before my trip to that country - an individual report of a CORELESAL project on a subject particularly indicative of the state of democratization of the criminal justice system of any country: its organization of trials by jury (if they have them). This report is attached hereto as "Addendum" in the same version as it was written in Argentina, as a way of assuring the requesting institution, and also myself, that this report is free of any prejudice that I may have acquired as a result of my trip to that country and the interviews that have taken place. That does not mean that I should not refer again here to the subject of the jury, in the general context of evaluation of the project (the real study of which could only be understood after the above mentioned visit). The evaluation of the projects require, however, all these explanations.

The evaluation is done in accordance with the following outline:

- A) Juridical-institutional framework that frames the work of CORELESAL;**
  - a) Degree of compatibility of the Constitution of the Republic of El Salvador with the essential principles of the "State of Law".**
    - 1) Deficiencies in the constitutional guarantees.**
    - 2) Deficiencies in the regulations of the Institutional structures (with special reference to the Judicial Power).**

- b) Structure and function of CORELESAL.
- B) Features of the criminal justice system
- C) Critical evaluation of the projects carried out by CORELESAL
  - a) General appraisal.
  - b) Regime of the "State of Exception".
  - c) Urgent reform on the death penalty and diverse trial aspects.
  - d) National Council on the Judiciary.
  - e) Reform to the jury system.
  - f) Constitutional control, habeas corpus and protection under the law.
  - g) Other projects
- D) Final opinion on the usefulness of CORELESAL.

**#2. Juridical-institutional framework into which the CORELESAL work fits.**

**I. Degree of compatibility of the Constitution of El Salvador with the essential principles of the State of Law.**

The need to start with this question arises because a good part of the limitations of the CORELESAL projects is determined - in my opinion - by the deficiencies of the constitutional system, which make difficult the success of a program like the one that created that commission, without also reforming the fundamental laws.

Of course we are not dealing here with a deep analysis of the Constitution, but we are only trying to show some examples of how far important values of a State of Law appear to be already infringed upon by the Constitution itself. For this, the indicative mention of some questions should be enough; they concern two major fields: individual guarantees and the structure of power (division of powers).

**A) Individual Guarantees**

Chapter I of the Constitution (arts.2/31) that regulates individual rights (arts. 2/28) and the state of exception (arts. 29/31) contain, in principle, the recognition of the principal rights admitted under constitutionality, but with important defects that become aggravated in case of suspension of constitutional guarantees.

**a) Without "state of exception"**

I warn against the first manifestation of this kind in art. 6 which guarantees freedom of expression, in this way:

"every person can freely express and disseminate his thoughts..."

This principle - that we all consider fundamental in all civilized nations - appears immediately conditioned thus:

"... as long as they do not subvert the public order..."

There are very few expressions that are so unfortunate for the history of public freedoms in the Latin American countries as the concept of "subversion". This is diffuse notion that literally interpreted ("sub-vert" = "turn around") should constitute the first constitutional right because the prohibition of "of turning something around" presupposes that the order of things, as they are, is the correct one, when this is precisely what is not recognized by somebody who wants a different order. Healthy laws should indicate, therefore, that concrete juridical values are forbidden by expression of thoughts, for example honor, the right to privacy, the truth in testimony by judicial officers, etc. "Subversion" as such cannot diminish the value of the judicial or social order.

It is true that freedom of expression has limits beyond what is specified in constitutional texts and that those limits have been universally recognized. What should alarm us, however, is the way it is formulated in the Constitution of El Salvador. As it was explained to me, that formulation attempted to improve the formula of earlier Salvadoran constitutions, which mentioned those who expressed ideas that were anarchist, that is, contrary to democracy. But there is not the least guarantee that the expression "subvert the public order" does not include every form of expression of an idea that can be critical of the power structure. On the other hand, what is symptomatic here is the appearance in the constitutional text of an expression so illiberal or so short of guarantees. The formulation is equivalent to saying:

"Men can express their ideas, except those that are subversive".

To summarize, with a restriction as that of art. 6, any totalitarian government could neutralize the criticism of their political opponents, based on the constitution, by deciding that any criticism "subverts" the established order.

A second question against human freedom and which is more closely related to the object of my contract is the power of institutions, generically referred to as "administrative" to hold any person in prison for 72 hours, "putting the prisoner in the hands of the competent judge". As I have been informed, this notion also covers detention as decided by military authority under the jurisdiction of which is the police in El Salvador. This means that a civilian citizen has few guarantees against the intervention of military authorities on his freedom of movement. On the other hand, there is not the slightest judicial control over which are the real conditions under which this detention can occur. Any action of indemnity for injury or legal claim for the arbitrariness of administrative detention that a civilian could claim against a military person under these conditions would be a dream. It shall soon be seen that in the majority of the cases that follow the criminal process, if the person involved is of low class, the normal procedure is that the defendant is beaten by the police until he

"confesses" extrajudicially. The Code of El Salvador does not validate this deposition unless two witnesses testify that they have seen the defendant making his deposition freely. This requirement is complied with by having employees of the police force itself so testify. And the judges accept the validity of this testimony, even though physicians may report that the accused has been received by them with clear symptoms of having been abused.

Then art. 14, which indicates that "only the judicial institution has the faculty to impose sentence", completes this guarantee in the following manner:

"However, the administrative authority can impose penalty through a resolution of sentence, after the corresponding judgment, to those breaking the law, rules or ordinances, with imprisonment for up to fifteen days or a fine, which can be exchanged for a similar period of imprisonment".

Also here, it seems, military authorities could make this kind of intervention against civilians, depending on how this question is regulated by secondary legislation. The project that CORELESAL prepared about this "administrative" faculty - later converted into law - is not clear in this sense, that is, it also permits this military intervention.

From the real/practical point of view, administrative detention commits, in El Salvador, the most serious of injuries to the State of Law. From the theoretical/formal point of view, the widest open door for the arbitrary restriction of personal freedom, even that decided by judicial authority, is determined, however, by art. 13, paragraph 3 of the Constitution:

"Art. 13...

"...

"For reasons of social defense individuals who, by their anti-social, immoral or harmful activities show a dangerous state and present imminent risks to the society or other individuals can be submitted to security measures for re-education or re-adaptation. These security measures must be strictly regulated by law and subject to the competence of the judicial bodies".

It is true that the text condition of "imminent risk" could put a limit to arbitrariness, if it were strictly interpreted and in accordance with a concrete definition of the "danger" element. Serious deficiencies in mental health can frequently imply concrete dangers to third parties. However, the text appears to refer to a categorization different from those states commonly known as "unimputability". The text rather appears to gather the postulates of what is called "author's criminal law", that is to say, a system of "social control" that does not center the imputation on the commission of an "act", but on the "personality" of an individual. This means that citizens must be careful to have a certain type of personality, so as not to affect judicial welfare as determined by law.

The influence of the so called "social defense", of French origins ("défense social", Marc Ancel) at the beginning of the text, is notorious. This school of thought is not relevant any more and has perhaps formed a cyst in Salvadoran law about the middle of this century. Or perhaps its origin in El Salvador may be the result of ancient "peligrosistas" (translator's note = those who speak of danger) of the Italian criminal positivism, a tendency that dominated Argentina during the years of the 30s and 40s.

In any case, the risk to individual guarantees represented by such a clause can be shown by Salvadoran law of 1953 known as the "Law of the Dangerous State", which is still formally in force. This law establishes the "conditions of danger" with tremendous insecurity (and true danger) for its citizens, including, for example the "habitual vagrants" (who are in turn defined as those who "do not practice any profession or trade even though they are fit for work" and lack the "legal means of subsistence"), the "habitual beggars", the "habitual drunks", the "quarrelsome individuals", those "suspected of attempts against others' property", etc. (art. 1, clause 1 and following ones). Among the "security measures" provided (art. 7) there are several forms of "internment for an indeterminate length of time". (!).

As far as I have been informed, these concealed penalties without a "punishable act" to justify them, have not been applied in practice for a long time, but the law is in force and by using it, any government could lock up any person with scarce possibilities of defense, since there could hardly be any legal action based on "unconstitutionality" before a text such as Article 13, paragraph 3 of the Constitution, as has been transcribed here. On the other hand, the Criminal Process Code in force (art.251, clause 3), provides for the negation of release from prison for reasons, among others, that the "prisoner has been declared to be in a dangerous state". (!) Of course, this presupposes an autonomous declaration established by another judge, but even so, it reinforces the aspect of "author's criminal law" which becomes a cyst in the constitutional and judicial system of El Salvador. CORELESAL did not attempt to substantially reform this negative condition, but transferred it to the rule of revocation of provisional freedom presumably already granted (art. 41 of the third project undertaken by the Commission - to reform art. 261 of the Criminal Process Code in force - sent on July 31, 1987).

**b) With "state of exception"**

Up to now some examples given on the risks to individual guarantees are provided by the Constitution for a "normal" situation.

Articles 29 through 31 regulate the "regime of exception" during which some constitutional guarantees can be suspended. It is not necessary to say that this so called "state of siege" does not mean that the State can operate outside the Law.

Well then, among the suspended guarantees (art. 29) is the one on "art. 6, clause 1", that is the "freedom to express and spread thoughts" and the proscription of the "previous censure, and now, of course even though the expressed thoughts may not be

**"subversive"** (in the sense of art. 6). This possible scope of the "state of exception" does not agree with the value of the restricted freedom nor can it answer any "exceptional need".

The scope of the "state of exception" is also worrisome against the guarantee of art. 24, that is the inviolability of private correspondence and telephone communications. With this, any person detained could eventually be deprived of any private communication with anyone in his trust by virtue of the state of exception. (!).

Of even greater significance are the restrictions of art. 29, clause 2, at least from the interpretation that comes from a first reading. The text reads:

**Art. 29...**

The guarantees contained in art. 12, clause 2 of this Constitution can also be suspended when it is so decided by the legislative power, with a favorable vote of one third of the elected deputies. This detention cannot exceed fifteen days.

"..."

The reference to art. 12, clause 2, is what would seem important, because of the paragraph that states:

**Art. 12...**

The detained person must be informed immediately and understandably of his rights and the reason for his detention, without the detainee being obligated to give testimony. The assistance of a defender in his dealings with the institutions auxiliary to the administration of justice and judicial proceedings, is guaranteed to the detainee in accordance with the provisions of the law.

"..."

Such a general formulation implies the legitimization of the guarantees considered essential to the State of Law, such as being immediately informed of the reasons for an individual's detention and the right of not being compelled to give testimony. (!) <sup>e</sup>

At any rate, even though the effects of the wide limits admitted by art. 29 of the Constitution are truly dangerous, there is no more grave defect than having civilians subjected to the jurisdiction of military tribunals in the case of the "regime of exception with respect to certain offenses. This is determined by art. 30:

**Art. 30.**

Once the suspension of constitutional guarantees has been declared, it shall be the competence of the special military tribunals the cognizance of offenses against the existence and organization of the State, against its internal or international person, or against public order, as well as offenses of international transcendence...(the underline is mine).

"..."

Certainly the circumstances of internal conflict that El Salvador is going through may have caused the legislators of 1983 to lose sight of the gravity of the decision made, which reiterates a tradition of the country's constitutions. Even though the process law approved after a CORELESAL project (about the "regime of exception") provides for the possibility of appeal the sentences of these tribunals in the civil courts - a solution already in force by the Code of Military Justice - has resulted, for some of the Salvadoran jurists interviewed - in the fact that a person named as suspect of the offenses referred to in art. 28 of the Constitution lacks every guarantee (!).

The CORELESAL project about the "state of exception" offered some "guarantee advances" over the chaotic picture visualized by art. 29 and art. 30 of the Constitution, but it was not passed by the legislature. Neither could it eradicate the most critical point of military competence, which is most definitely inclined to arbitrariness. In any case, some progress has been made which may yet to prove important. About the point that the Constitution uses the expression "special military tribunals", which CORELESAL interpreted as "special military" - not what would simply appear to say from the first reading of the text - that is: a very military tribunal - but rather it exploited the

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<sup>8</sup> *In the Declaration of Objectives of the project of the Criminal Process Law applicable to the Regime of Exception, the second draft bill of CORELESAL, the risk of this rule was noted and the following statement was issued: "Even though some of these rights, in a literal interpretation of the constitutional art. 29, could be suspended - like not being compelled to testify, or the appointment of a defense lawyer, not reason, nor justice nor ethics legitimize the presumed act of suspension. Furthermore, from the moment that the Treaties and Conventions on human rights mentioned entered into force, El Salvador acquired the international commitment of neither restricting them, nor suspending them. Therefore, in accordance with our judicial order, they cannot be repealed."*

expression "special" - at least this was its purpose - to take the "special military tribunal" from the orbit of the strictly military. In my judgment, it is very uncertain how this is going to be accomplished in practice. The power structure in El Salvador has not seemed to me to be inclined to put into force a more liberal stance than that allowed in the text. As we shall see later - anyway - the progress in the guarantees of the CORELESAL project on the State of Exception, was more appearance than reality (see *infra* #4, II, A).

Finally, a word about the second and third paragraphs of art. 30 of the Constitution, which reads:

**Art. 30...**

**"The trials that may be pending before the common authorities at the time of the suspension of the guarantees, shall continue under their jurisdiction."**

**Once the constitutional guarantees are re-established, the special military tribunals shall continue in charge of the cases pending before them".**

The international outcry in the cases of human rights violations in El Salvador and the text quoted, makes me think of an atrocious spring in the constitutional system in such cases.

In fact, art. 30 of the Constitution reads: "... as well as the crimes of international transcendence" (underline is mine). Therefore, it is not theoretically impossible that "states of exception" have been decreed with the exclusive purpose of assigning cases of this nature to the competence of military tribunals when the most important cases of this nature - I have been informed - are against high ranking military men; and that once the "state of exception" is finished (with the re-establishment of constitutional guarantees those tribunals will continue to be in charge (art. 30, paragraph 3, cit.). Of course the expression "... of international repercussions" can be interpreted - as CORELESAL itself answered me - in a less yague and open manner, in accordance with arts. 486 and those following of the Criminal Code of El Salvador, which correspond to the fifth part of the Code, named precisely " Offenses of international transcendence". With the interpretation of the constitutional sentence in accordance with arts. 486 and those following of the Criminal Code, a case like the one about the Jesuits, for example, could hardly be interpreted as one of "international transcendence", unless it were called "genocide" (art. 486, Code cit.). But the fact is that, if a crime, clearly genocide, were committed under the "state of exception" by military personnel, it would fall under the jurisdiction of the military tribunals (special) even after the situation of exception had been removed.(!).

**B) Institutional Structures  
Non Independent Judiciary**

The situation described above refers to constitutional guarantees.

But the constitutional regime is not any healthier with respect to the power structure. In particular, it does not favor "correction" - via jurisprudence - of the view presented by the text of the Constitution with respect to guarantees, so that the practical application of the law could counterbalance the relative insecurity of the rights of the individuals.

I would like to show here, only, the monolithic character of the organization of the judiciary.

Art. 186 establishes the way to appoint the Supreme Court justices.

Art. 186. On how a judicial career is established.

**"The magistrates of the Supreme Court of Justice shall be elected by the Legislative Assembly for a period of five years and in accordance with the law, they shall continue for equal periods, unless at the end of each period, the Legislative Assembly should decide to end it, or were dismissed by legal cause.**

"..."

In spite of the apparently firm expression "... and in accordance with the law, they shall continue for equal periods..." which makes one think that in reality they cannot be removed from office, the following paragraph clarifies the true situation: "... unless at the end of each period, the Legislative Assembly should decide to end it..."

In a few words, the political party that assumes the legislative power designates the Supreme Court, in which case it already has a favorable handicap - except in cases when the magistrates of the Supreme Court decide to become heroes - in the judicial arguments of the constitutional validity of the laws approved by the legislature.

This is not a consequence of small importance, considering that the system of "constitutional control" provided by the Constitution is not flexible - like the one of the United States or Argentina - but as rigid as can be.

Art. 183.

**The Supreme Court of Justice through the Court of Constitutional Affairs**

**shall be the only competent tribunal to declare the unconstitutionality of the laws, decrees and regulations, in their form and contents, in a general and compulsory manner, and can do so at the request of any citizen...** (underline is mine).

If, as it frequently occurs, the same party in power in the executive branch has the absolute majority in the legislature, there will be a unitarian power structure in all the phases of government including the maximum power in the judicial courts. Only the possibility of a "fracture" remains in this monolithic structure, since the Legislative Assembly is renewed every three years while the President and the Court justices stay in power for five years. It is obvious that this constitutes a small margin to permit an effective reciprocal control of the powers, considering that, as there will be few chances for action on unconstitutionality, there will also be few for "habeas corpus" and "protection under the law".

Fortunately this Constitution shows some progress in relation to earlier ones. The Salvadoran tradition always was that the Supreme Court appointed the lower judges, for a period equal to that of the Supreme Court itself. Therefore, they responded - in fact - in a hierarchical manner. The 1983 Constitution provides for the "magistrates of the Second Instance Courts and those of the First Instance Courts shall have stability in their positions" (art. 186). This could have allowed some independence - not immediate - but at least gradual - of the lower courts.

Regrettably, the best opportunity that existed to favor that gradual independence has already been lost: the clue was in the structure of the National Council on the Judiciary, an organization provided by the Constitution to propose candidates to the Supreme Court, who could be appointed to the Second Instance and Second Instance Courts (art. 187). I say this has been lost because the law that was finally approved by this Council practically gives the Supreme Court, inside the Council itself, the majority necessary for making the lists of candidates to be elected by the Court itself. The CORELESAL project was - also here - more rational and pluralistic than the one finally approved by the Assembly, which, as it will be shown later, followed, at the critical point, the steps of the project that the Supreme Court itself had prepared.

All this is meant to show that the Supreme Courts could act - in reality - in a manner totally subordinate to the power from which they really depend - the political power - and how, in turn, with its constitutional competence being so wide (art.182) practically no case of any transcendence could avoid the influence of its decisions. At the same time, the fate of the lower judges is tied to the power of the Court in the Council, while the justices of the peace follow - simply and clearly - according to the Constitution - into this situation, that is, being directly appointed by the Court.

None of this could be an easy road - with CORELESAL or without it - to achieve an "independent, responsible and responsive judiciary" as is the objective of the program sponsored by AID and for which I have written this report.

It is natural that this risk consists not only of the arbitrary repression of innocent citizens, but also of the lack of just punishment for the perpetrators of grave crimes, if

they are people who have influence in the institutions of power.

Therefore, the true reason for the facts that shook up the international opinion does not lie on the defects of the Criminal Process Code of El Salvador. It rests - in my opinion - on the authoritarian and closed center of the levels of power.

## **II. Structure and function of CORELESAL**

The former development is not independent - in my opinion - of the internal structure of the Commission, or of the real possibilities of its accurate performance.

There was certainly an attempt to give the Commission an external appearance of political and ideological pluralism. Of the ten members, two are magistrates of the Supreme Court, two are appointed representatives: one by the Attorney General and the other by the Public Defender, two more are appointed by the Ministry of Justice and Defense respectively, two other are representatives of the lawyers associations, one of the Law faculties, and the last one represents the President of the Republic, and acts as executive secretary.

From the meetings held with the various officials, rectors and deans of universities, centers of jurists, lawyers, etc. I was able to form the opinion that CORELESAL was born as a commission originally linked rather with the executive power, which meant, at this time in history (1984-1985) a partial rejection of the Legislative Assembly and of the Judiciary, which at that time did not coincide with the political origin of the government. There may have been also a certain hostility towards the Commission, because of its ties to the interests of the United States. Presumably the Commission may have later arrived at a compromise solution, as the result of which the political features of the different sectors may have unified more closely with each other.

This picture cannot be taken as a conclusive opinion and neither can it be taken as infallible for any of the final conclusions of this report. In order to arrive at certain conclusions, it would be necessary to work very closely with CORELESAL for a period of time, not to analyze only a group of projects with the help of little more than a dozen interviews during a stay of two weeks in the country and within the reduced framework of 30 days, during which time I was also required to prepare a report on the validity of co-defendants' testimony within the judicial tradition of Latin America.

At any rate, the two following points may be considered as highly probable:

- a) that CORELESAL is today an organization closely dependent upon political power;
- b) that over that dependence the great influence of magistrates of the Supreme Court in the heart of the Commission has a

significant role.

The first conclusion practically constituted a common theme in several interviews, but it was also explicitly expressed by an official linked to the government, making this opinion, in this sense, rather undoubtful.

The second conclusion is supported by formal and material reasons. In the first place, just as it was analyzed in the former chapter, the Supreme Court is an institution that, without being independent from political power, has also great power over all the lower judicial structures. This should make things rather uncomfortable for any other member of the Commission - such as representatives of the lawyers' associations, or the universities - to sustain positions frontally opposed to those of the members of the Court. On the other hand, the Supreme Court also acts as a disciplinary supervisor of the Salvadoran lawyers. There is no a lawyers association acting as a tribunal for ethical questions, so that the Supreme Court may punish a lawyer by suspending the exercise of his profession (for example - for criticizing the Supreme Court which - as many believed - has actually happened, with punishment of up to 5 years of suspension). It is superfluous to bring up the oppressive factor of this kind of jurisdiction.

In the only meeting that the consultants had with CORELESAL in plenary session, it was possible to notice the dominance of the points of view of the magistrates of the Court (especially one). The members who could be, *ex ante*, expected beforehand to be more ideologically independent, remained practically silent (one of those who did speak is an ex-magistrate of the Supreme Court). Finally there was no attitude of self-criticism. This is strange in a collegiate body with so many jurists where differences of value concepts would necessarily arise. The external appearance was that of a body united in a block against the visit of external consultants.

This impression, however, can be taken as not being very significant, because it is the kind of situation that would normally be produced in a meeting of this kind. On the other hand, in the meeting of the Argentine consultant only with the majority of the members of the Commission (at least the magistrate of the Court that I have mentioned earlier was not in attendance, but some technical jurists that integrate and run the working team were) in order to verbally explain a summary of the impressions that had taken me there, there was a noticeable tendency to critical discussion and a small dose of self-criticism that had not been apparent in the first meeting.

Now I shall relate what happened in that first meeting when I questioned the Commission on whether the "Law of the State of Exception" ( the second CORELESAL project, reformed by the Assembly) had been criticized by public opinion. I insisted on this question - in spite of a first negative answer - because in earlier interviews with personnel not related to CORELESAL I had received an opposite answer. There, one of the Court magistrates took the floor and answered concisely that if the law had been criticized, that criticism came from individuals inclined to commit "those offenses" (those of art. 29 of the Constitution). This answer made useless any continuation of the discussion. Now it is not necessary to find out whether there should be any criticism to

the law, or if the judge there did not refer to the law that finally passed, but to the CORELESAL project (clearly less totalitarian than the Constitution and the definitive law). What is important is that, in a context where a theoretical critic may be called a possible delinquent, without anybody being surprised, it cannot be possible to discuss legislative bills.

Finally, with this in mind, I would like to bring up the basic argument of constitutional character for any country that admits - even though it may be formally - the principle of the division of power. And this is the point to be made about the personal participation of the magistrates of the Supreme Court at the heart of CORELESAL.

The Salvadoran Constitution attributes to the Supreme Court constitutional initiatives for affairs of its interest. This is, by itself - in my judgment - not quite plausible; but in any case, all the projects prepared by CORELESAL do not fall into that classification. This is only a relatively small part of them. Even in those cases in which the Court may take the initiative legitimately, it would not be compulsive for it to be part of CORELESAL, but rather, on these subjects only, there should be an alternative project by the Supreme Court, independent of that of CORELESAL.

The present structure already casts doubts on the constitutional legitimacy of CORELESAL itself, because a justice of the Supreme Court cannot be open to a personal judgement on what a law should or should not be like, or on its compatibility with the Constitution outside the framework of a concrete legal case. To give an example: how could a magistrate who has said in a quasi-public action that whoever argues the validity or scope of a law is a probable delinquent be judge in a case of unconstitutionality or in a case where the scope of this or that law, applicable to the case is being argued? Any other example could put in evidence that nobody can be judge and legislator (or quasi-legislator) at the same time.

I frankly believe that any lawyer could reject a judge who is part of CORELESAL and who had to participate in a case in which the applicable law had originated in the heart of the Commission because it would be - by definition - a case of pre-judgment. But what is reasonable is not to multiply the valid rejections, but to remove the defects of legitimacy existing in the Commission, that is, to make CORELESAL (a quasi-legislative body) independent - at least formally - of the tribunal that will have to apply those laws that result from its projects.

At the same time, it would be necessary to provide for more participation of the law schools and the lawyers' associations. These intermediate organizations, even though they have always taken a political position, they traditionally have a more independent opinion - although it is not sure that this would be the case in El Salvador.

### **#3. Features of the System of Criminal Justice**

The system of criminal justice in any country is basically formed by four large

fields: basic criminal legislation, the criminal process, the system of administration of justice (institutions of application of the law), and criminal enforcement (its penitentiary model).

- 1) The Salvadoran system of "criminal law enforcement" (penitentiary) does not need to be considered here. Furthermore, I have not made any study of the subject, with the exception of reading a most interesting report, prepared by CORELESAL: "Diagnostic Study of the Penitentiary System of El Salvador", from which it can be ascertained that this is a situation in need of reform.
- 2) With respect to the Criminal Code, it is certain - in my opinion - that the law is crisscrossed with authoritarian solutions. This is more obvious in the special configuration of the statistics on delinquency than in the "general" part of the Code, which has relatively modern rules, even though they are not exempt of defects and contradictions<sup>9</sup>. There are some forms of criminalization of behavior that should not be part of a republic. I emphasize here, only as examples, the following criminal acts: to promote or manage subsidiaries of foreign associations that advocate "anarchic doctrines" (art. 377); to disseminate or advertise "anarchic doctrines or those contrary to democracy" (art.378); to possess "subversive material", publications, photographs or films for the dissemination of doctrines that may be "anarchic or contrary to democracy" (art. 379); to cooperate in "subversive propaganda" (art. 380); to show "disrespect to foreign anthems or emblems" (art.391); to show "disrespect to the Motherland, her Symbols

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<sup>9</sup> *The "general part" of the Code, which is the least objectionable, has solutions which are at the same time incongruent and contrary to principles that are today well spread and firmly accepted, such as the rejection of the excusable effect of any "error of law", regardless of how invincible the author may be (art. 3, Penal Code), a solution that does not agree with the requirement of personal culpability for the application and degree of the penalty, which is correctly established in art. 2 ("principle of responsibility". Another group of provisions which are impossible to explain rationally are arts. 50,52 and 72 of the same Code. On one hand, art. 52 sets the rule ~~correct~~, according to the theory of participation - that each (person participant in a punishable act) will answer in the measure of his own culpability". On the other hand, art. 50 states that "subjective circumstances such as the quality, or the personal relationships and other elements of subjective character, not an integral part of the legal definition of a crime, will affect only those upon whom they converge. Until now one rule is coherent with the other one. But art. 72 sends everything crashing to the ground precisely because it states that "the punishment of the accomplice... shall in no case exceed two thirds of the punishment decreed for the perpetrator". Therefore, the causes of lesser culpability that benefit the perpetrator (art. 52) and the subjective conditions that could eventually diminish his culpability (art. 50), would also benefit, by reflection - according to art. 52 - the accomplice, and with that, arts. 50 and 52 lose all sense of rationality. This last error, contrary to the former one, does not imply a more aggressive or authoritarian solution of the criminal system, against the "accomplice": the lesser culpability of the perpetrator would benefit him indirectly, but, however this may be beneficial to accomplices, it cannot be accepted: this is an indulgence that lacks all justification.*

or the Heroes of the National Independence" (art. 395) (I) <sup>10</sup>. Furthermore, those suspect of having committed these offenses cannot be released from jail (?) (art. 251 of the Process Code, that CORELESAL proposed to maintain in its third bill, not yet approved).

But, while these legislative precepts are very dangerous for the individual guarantees, in reality they seem to have had little effect, or even no effect at all. The CORELESAL report about the situation in the penitentiaries speaks of a prison population in which, besides being formed by 91% of indicted prisoners, 92.9% of the total is distributed among those convicted or sentenced for homicide, theft, robbery, violence and rape. That is the classic picture of the Latin American society in which abuses of power, in general, all illegitimate deprivation of freedom, coercion, extortion, kidnapping, swindle of the public administration or of private citizens, other forms of fraud and hundreds of other offenses serve as ornaments in the Code books and go practically unpunished.

Former provisions of the law already criticized as "authoritarian" also remain more in the writing than in the system of application of criminal justice. With this, the former criticism seem to make no sense. But the "criminal types" that are contained in the codes of any society also have a symbolic value that show what are the values of importance to a community, independent of the criminal justice system itself and because they are operative in practice. A code that allows itself to threaten punishment for possessing writings of "anarchic propaganda" or for "disrespect towards the heroes of the national independence" can only exist - however inapplicable those provisions may be in practice - in a society in which other mechanisms of control (licit or illicit) are also totalitarian.

However, the fundamental values in all these aspects come more into play in the legislation of the criminal process and in the transparency of the judicial bodies, than in the criminal codes. This is also the case in El Salvador.

The Process Code in El Salvador is an old conception - even though it was approved in 1973 - of a predominantly inquisitive character, with process rules that are applied only in some cases - and not for others, with a system of rules of evidence that come from ancient texts - that is, appropriate to the system of "legal proof" - basically similar to those of the Argentine Federal Code - but which has received, nevertheless, the influence of more modern ideas which are in contradiction to that system, as shown by the fact that art. 488 has the feel, as a general principle, of an opposite system: that of "healthy criticism".

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<sup>10</sup> Neither "motherland", nor "symbol, nor "hero", nor "independence", or "national" are written with capital letters in the Spanish language. But the tendency exists (grammatically incorrect) of writing words that imply "authority" with "big letters" (the use of big letters depending on the degree of authoritarianism). In my opinion, this is the intent of art. 395 of the Penal Code of El Salvador.

**Art. 488. Evaluation.**

**The proofs of delinquency shall be evaluated in accordance with the rules of healthy criticism, using a rational system of deductions which must be in agreement with the other proofs of the process, with the faculty to make stand, in each case, the facts that must be established by means of their examination and evaluation, whatever their number or origin".**

With rules like this, it is strange that the lack of elucidation in serious criminal cases - generally murders - has been attributed to deficiencies of the code in the rules of admissibility of the proof, because this general principle comes from modern regimes, in which all elements validly incorporated into the legal process can be evaluated by the judge - whether it is a trial by judge or a trial by jury.

It is quite certain that this same code, within the framework of creative jurisprudence, with intellectual habits of freedom, could have been applied in reasonably correct terms to the resolution of those cases. If this did not happen in El Salvador, then - because certainly there is no "judicial law" there which can be imposed by the authority of reasonable and creative decisions - and also because the real independence of the trial judges is scarce and practically nil, even more so in the case that concerned the organization that requested this report.

The real drama of the process law is not in the rules of proof, but in the rudimentary system with which the trials are carried out and that ends punishing the weak social groups - which already suffer much in this country - and extends a safe cloak of impunity over the strong social groups.

The reality of the criminal justice regime is that it operates as follows:

The system foresees the possibility that the so called "auxiliary bodies" (it must be remembered that the police here are dependent upon the Army, and directly on the Ministry of Defense) can detain the accused for 72 hours and then put him under the disposition of the competent judge only at the end of this time; during this lapse, the accused is frequently beaten until he produces an "extrajudicial confession", valid - according to the Code - under the condition that, naturally, the accused has not been the object of "physical force or intimidation" (art. 496, clause 3). To be sure of this requirement, the code is satisfied when two witnesses testify that this confession has been given freely. Such witnesses are, according to documentation, always officials of the same police force. And when the accused is received by a physician, the physician frequently declares that the accused shows symptoms of having been beaten, but this is not sufficient for the judge not to give credence to the "extrajudicial confession", as long as there are the two witnesses as required by the Code.

It is evident that the process law starts there from the presumption hominis that torture is frequent, to the point that "in the case of political offenses... the extrajudicial

confession shall have no value as proof" (art. 496, clause 1). The correct legal solution was then, to always presume the lack of freedom in this testimony and consider inadmissible the confession before "auxiliary bodies" for any offense, even those called "common crimes".

In turn, the first instance judge - eventually the "justice of the peace" (art. 148) - can decide the detention of the offender, "to be questioned", also for another 72 hours. At the end of this period the judge makes the decision to dictate a warrant of provisional detention or release him. If the latter occurs, reality shows that the case dies, paralyzed, on some shelf. This must exert great pressure on the judge to write precisely a warrant of detention that can be dictated on the only basis that - in the judgment of the judge - there are "sufficient elements for trial" (art. 247) - frequently only the extrajudicial confession.

Against this decision, there are little possibilities of release ("excarceration"). In the first place - the release is inadmissible if the crime - eventually with its aggravating circumstances - provides for a prison sentence exceeding a maximum of three years. Practically all crimes of some relevance exceed the three year sentence, which is the cause for a jail population. (it must be remembered that simple theft provides for a sentence scale of 1 to 5 years in prison (art. 237, Penal Code)! And then there are the innumerable aggravating circumstances, for example: "should the crime be committed with agility, craftiness or a costume..." or "by two or more persons..." (etc.) - that can increase the punishment to 8 years (art. 238, Penal Code) !.

This is what explains why the prison population in El Salvador, charged with common crimes, is made up of 91% of people indicted, that is, people who enjoy the judicial state of "innocent" according to the Constitution, and who will continue in that situation for about two or three years, but frequently a lot longer. A variety of recourses (appeals and others) collaborate negatively to make the process slow and tangled.

At the same time, during the stage of "trial", the defense by a lawyer, member of the Bar, is not "compulsory", so that poor people - that is, the major part of those who are really affected by the penal system - do not have a defense lawyer during the whole process in which the principal process guarantees are in play (coercive measures against freedom, etc.).

With this picture, it is also surprising that the jailed population in El Salvador increased, as of June 26, 1988 - counting the three penitentiaries, twelve penal centers and three hospital pavilions - to only 4.799 prisoners. I say "only" not because this is a small figure with relation to the total population of the country (about 5 million inhabitants) and considering the proportion in other Latin American countries, but because, with such a criminal system as the one in force (of fact and jure) in El Salvador, there should be a tremendously high proportion of private citizens deprived of their freedom.

This leads to the possibility that the system of selection of cases is in fact chaotic

and arbitrary, treating the "confession" as the effective proof of the process, but it also leads to the thought that the system of social control also has mechanisms that are not formal as well as illicit <sup>11</sup>.

Therefore, the legislation that required urgent and imperative modification and that CORELESAL had to undertake from the beginning, was the Criminal Process Law, but not because of defects in the rules of proof - which although true, are not decisive - but because of the extreme margin in which state arbitrariness is tolerated.

If this is taken together with the fact that the bodies that apply the criminal laws - the judges - respond in fact to a tradition of "hierarchical subordination", it is easy to conclude that in El Salvador, after the Constitution, there is nothing in more need of reform - in order to enter into a State of Law - than its Criminal Process Code.

In my judgement, had CORELESAL wanted to fulfill a role of historical transcendence for the political life of El Salvador, it should have started by modifying the rules of the criminal process. A good code of criminal process and a good system of criminal justice can be correctly drawn in a couple of years. Instead, the Commission elaborated on other kinds of projects, and even when dealing with the project of urgent reforms to bring the criminal code, the codes of criminal process and military justice to an adequate level with the 1983 Constitution (its third project, not yet reconsidered by the Legislative Assembly after the presidential veto), it did not introduce any substantial modifications in this respect.

In all, the Commission is currently preparing a new Criminal Process Code that will modernize the system. I was not able to get access to any written document that would allow me to express an opinion about the perspectives of this work <sup>12</sup>. But its jurists appear to be inclined to improve the system.

#### **#4. Critical Evaluation of the CORELESAL Projects**

##### **I. General Evaluation.**

The road traveled until now indicates already a good part of the conclusions about the possible efficiency of the work of CORELESAL to strengthen a democratic State.

There are institutional limits of a juridical-formal character, on one side, and of a political character on the other, which determine a very unfavorable handicap for the

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<sup>11</sup> *As I have been informed during the interviews, the police make "agreements" with the victims or with the perpetrators, "solving" the case, and there are cases in which this solution (informal and illicit) may involve even the "justice of the peace" himself.*

<sup>12</sup> *Yes, I have met with some of the staff jurists of the Commission, where I was informed of the general features of the possible reform bill. But when I requested a copy of the internal instrument named "Bases", which would be the center of future reforms, I was told that it only had "internal" approval and could not be shown.*

Commission from its starting point and this - as I understand it - is independent of the good will its members may have had.

Frequently one can sense the mixture of contradictory ideological lines in their bills and on the basis of their objectives, sometimes with thoughts of guarantees, others with frankly authoritarian reminiscences. The constitutional framework is of little help in this case.

Different from the management groups, the genuine technical teams of the Commission seem to tend towards guarantees. The studies are, in general, well written and the preliminary studies perceive and make clear the fundamental problems of the subject under study. Its jurists have, besides - as far as I can gather - a capacity for self-criticism greater than that insinuated in the studies made by the management of the Commission, who seem to be really dedicated to their work.

I do not mean to say with this that the projects do not have technical deficiencies or that compromise solutions do not make them incoherent sometimes. What I do mean to say is that, potentially, more can be expected from the technical organization than from - in my opinion - the institutional structure and political function.

On the other hand, the projects are not publicly discussed during their preparation - time when debate is most needed: when the main value decisions are about to be made - but only when the project is finished and about to start its peregrination towards the Legislative Assembly.

During its preparation, it is difficult even to know the direction of the projected reform. For example, several of the "Bases" for the reform of the legal process have already been written, to which access is denied because it is not yet a "definitive" document<sup>13</sup>.

There is also the fear (well founded, of course, as we have seen) of making too explicit the defects of the system in force or of expressing one's own opinion. If a jurist in the Commission is explaining, for example, that the intention (of the "Bases Procesales") is to assure strongly the guarantees of the "natural judge" and after his explanation he is asked if it is possible to manipulate the competent judge under the present system, he may answer by simply repeating: "We want to strengthen the guarantees of the natural judge", as if it were uncomfortable for him to answer, for example: "yes, today there are no existing guarantees about the untouchability of the

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<sup>13</sup> See footnote (12). It seems clear to me that one way to make the CORELESAL work more lively and more transparent would be to open their ideas to a public debate, before granting them "internal approval". To do the opposite means that, when the bill can be presented and discussed publicly, it is already too late to achieve structural changes.

competent judge<sup>14</sup>.

Finally, once the project is finished, there is not a pre-established channel to move quickly and effectively the CORELESAL projects into the legislature. The program should have foreseen in its inception - I think - which way the Salvadoran government would support - via a Ministry - each project finalized by the Commission. It is hard to understand that a bill may be waiting for months or years to be taken up by the Legislative Assembly, without a move by the Executive to push it through. In my opinion, the program itself should foresee this "treatment channel" for the projects as part of the agreement itself<sup>15</sup>.

Next I shall make a critical evaluation of the principal projects that CORELESAL has created. Naturally, I cannot produce a report with the particulars of each project, but I can only analyze them from the point of view of their technical competence to strengthen a democratic system with guarantees. I shall simply leave aside, therefore, the projects that do not involve the institutions or the system of criminal justice<sup>16</sup>.

Even so, all public opinion will not be able to stay beyond the margin of suspicion, because of the lack of knowledge, direct and profound, of the reality of El Salvador. What appears to be the most aseptic and authorized opinion - because it is expressed by somebody removed from the regular place of social conflict - may also be the reason for the deficiency and provisionality of such opinion which may not be sufficiently connected to the reality. In what follows, I shall attempt to show the measure in which this may make my own opinions relative, in relation to each project to be

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<sup>14</sup> *This must certainly make difficult the work of jurists in El Salvador - inside or outside CORELESAL. Naturally, the higher or lower disposition to express one's opinion also depends on personal characteristics. I have also seen very critical attitudes within the Commission staff, as well as outside, but basically, there is a real problem in this context.*

<sup>15</sup> *With this I do not mean to say that the delay in the treatment of the projects has been "harmful". Frankly, any project that after a presidential veto has not been returned to be discussed by the legislature (the third prepared by CORELESAL), is quite deficient and it would be better to suggest its withdrawal by the Commission itself. The Commission appears to realize - furthermore - that this is not a good project and should attempt to neutralize it with a more global one that would leave it without effect (about this project, see infra # 4, II, B). What I also want to say in the text is that -assuming that a project is "good" (one must start from the basis that the program is efficient at that), it should be thinking beforehand of a system that would favor the treatment of the respective project at the opportune time. In any case, this would be difficult to achieve since there seems to be no efficient current of communication in El Salvador -with the exception of CORELESAL - between the Executive and the Legislative Assembly. There have been cases - I have been informed - when the President has ended up vetoing bills sent by himself.*

<sup>16</sup> *I explicitly leave aside the projects that deal with the definition of the small farmer (first project), the law on names (fourth project), the law on adoption (ninth project) and the recent project on the Family Code, which had just been presented to public opinion on the day I ended my visit to the country. This project can, however, be relevant to the institutional life of El Salvador, and it seems to have - from what I heard from the orators on the day of its public presentation (October 9, 1990) - very progressive institutions. (At any rate, I have not studied the text, not even minimally, which did not exist before my trip.)*

considered.

## II. Evaluation of the projects

### A) Criminal Process Bill Applicable During the Regime of Exception

The first project to be considered - "second" of those produced by CORELESAL - deals with what is known as the "State of Exception", was finished by the Commission on February 23, 1987 and passed as law - with substantial modifications - on November 16, 1989, coincidentally the same days as the murder of the Jesuits and in the middle of consternation due to a military offensive by the FMLN.

The bill appears to be an effort to obtain more efficiency on the guarantees in relation to the framework provided by the Constitution - already described - that establishes military courts to deal in the first instance with the cases that during the period of exception enter into the jurisdiction of special military courts. The Commission attempts to insert those courts - which are not martial courts - into the body of the administration of ordinary justice. The project also meant some progress with respect to the so called Decree 50, that provided the regulations for the "State of Exception" of arts. 29 and 30 of the Constitution, until the project prepared by CORELESAL went into effect as the law.

In this sense, the efforts to re-define the notion of "special military tribunal" in order to - as was already explained - diminish the degree of arbitrariness, must be considered. Even though, all forms of military jurisdiction over civilians - however temperate - has to be repugnant to the judicial sensitivity, the fact is that CORELESAL could hardly totally avoid such jurisdiction, because it was imposed by the Constitution and furthermore, it responds to a long tradition of constitutions (very numerous, on the other hand!) that ruled El Salvador since the last century <sup>17</sup>. Thus the reason why my report has started with a description of the principal defects of the fundamental law of the Republic, for which CORELESAL is not responsible.

Another example of those efforts was the intent to strengthen the constitutional guarantees even while the regime of exception was in force, in a sense, almost clearly contrary to the constitutional text and its bases for part of the Commission as we have mentioned earlier:

**Even though some of those rights (those of the accused) in literal interpretation of art. 29 of the Constitution, could be suspended - such as the one about not being forced to testify, or that of appointing a defense counsel - not**

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<sup>17</sup> *Very healthy and contrary to this tradition was, nevertheless, the Constitution of 1841. Its art. 78 used to read: "In no case or circumstances will the Salvadorans be judged in military courts or tribunals, nor subject to the punishment prescribed by the military ordinances, with the exception of the navy or the military in active duty". (I quote according to the "Bases" document for this bill by CORELESAL itself, t. I, p. 48).*

reason, nor justice, nor ethics legitimize the case in which they can be suspended. Furthermore, from the moment of entry into force of the Treaties and Conventions on Human Rights, mentioned earlier, El Salvador acquired the international commitment of not infringing upon them or suspending them, therefore, in accordance with our judicial order, they cannot be annulled" (see note 8).

This is why two important precepts were included in the Commission report; they are:

**"Art. 13.**

When no defense attorney has been appointed, for whatever reason, the Auxiliary Body will communicate this information to any of the First Instance Judges on Military Affairs, or to the Criminal judge so that he proceeds immediately to make the required appointment."

**"Art. 14.**

The accused shall have the right to have his defense attorney present at the time of his deposition and in any official act in which his presence is required."

However, in the law finally approved by the Legislative Assembly on the basis of this bill, the chapter referring to the "rights of the accused" was modified with the exclusion of art. 13 of the bill. The text of art. 14 was maintained (as art. 13) but the following precept was added (as art. 14) that destroyed the relative meaning of guarantee that the bill was trying to pass above the Constitution.

It reads:

**"Art. 14.**

If the suspension of the constitutional guarantees included those contemplated in arts. 12 and 13 of the Constitution. The accused shall have the rights established in this Chapter after the administrative detention that cannot exceed 15 days. (I transcribe the text as it appeared in the "Diario Oficial"; the period in the article, however, must be read as a "comma".)

With this we have already consecrated the suspension of the right to legal defense during the administrative formalities previous to the trial - which are, as we have seen, of decisive later influence - and also of the supreme guarantee of not being compelled to testify against oneself. Said suspension remains in place as long as the administrative

detention, which can be as long as fifteen days.

It is true that the main injurious manifestations against the guarantees of not being forced to testify against oneself could find limitations in art. 15, paragraph 2 of the approved law, according to which "discriminatory treatment, torture or other means that are cruel, inhuman or degrading are forbidden".

Yes, however, to the practice of legally admitting declarations of accused individuals given under torture in the administrative headquarters - this is not formally approved by the law, but it happens in fact - art. 36 of the law is added, which allows conviction based on the extrajudicial confession as the only proof, and that proof is obtained during the time (15 days) that the accused finds himself at the mercy of the administrative authorities. A system appears in all its blackness, a system that offers guarantees only in appearance, a system that leaves nothing of the right to a fair trial, a system that by means of vicious formulations which have no other value than theoretical lying, leads, inevitably to the victimization and conviction of the accused outside the framework of due process.

If this were not the case, pay attention to the text of art. 36:

**Art. 36.**

**"When the only proof against the accused is the extrajudicial confession in the form regulated here, the judge may reduce the sentence by a quarter of the minimum sentence indicated by the law for such offense".**

The rules to which precept "...in the form regulated here..." refers are the same ones of the Process Code - which refer to art. 35 of the law - with which it can be very clearly established what kind of real guarantees the system can offer to the individual accused of offenses during the regime of exception.

And I note here that the regulation of art. 36 was planned by CORELESAL itself, which would give credit to the idea that its efforts of guarantee in this matter have been more verbal ornaments than reality. The Commission is well aware of the habit of torture in the application of the present Criminal Code, which it did not attempt to reform on this point (see immediately below point B). By giving validity to an extrajudicial confession in an administrative instance which it knows can be extended to 15 days, it has set all the possibilities for the greatest arbitrariness and injury to fundamental rights, even though this may not arise from the letter of the law, but from the overall application of the system. Only by negating all validity to any type of declaration before "auxiliary bodies", forbidding even the performance of interrogations by such bodies, much more could have been obtained for individual guarantees than by any declaration of rights.

Next to this, another symptomatic reform by the Assembly with respect to art. 3

of the bill, becomes highly irrelevant. It required that individuals under the age of 16 would be subject to the Minors Code. The law also changed this prescription, establishing a lower limit: 14 years of age, thus subjecting then, all adolescents from 15 on to the process regime of the "State of Exception".

In what is really decisive, I understand that those Salvadoran jurists were right when, although being acid in their opinions against those who commit acts to which the State of Exception can be applied, bowed before the truth that any one who is subject to this regime will be deprived of all constitutional guarantees. The fact that this is more attributable to the Constitution than to CORELESAL does not change this truth in any way. And in any case, the Commission did not do - as we can see - all that was left to be done.

**B) Immediate Reforms to the Criminal Process Law, the Criminal Code and the Code of Military Justice**

The third project of CORELESAL is the one identified as "Immediate reforms to the Criminal Process law, the Criminal Code and the Code of Military Justice", of July 31, 1987. The bill was approved by the Assembly but was vetoed by the President and up to now it has not been re-considered.

This is a project that, concerning the Process Code, touched on important aspects that could turn it into an instrument of progress for the function of the system of criminal justice, had it been conceived in a more reasonable way. Regretfully, the work of CORELESAL was here - in my judgment - mistaken in some basic value aspects and ended up wasting the best opportunity to humanize the criminal process in El Salvador in the necessary measure <sup>18</sup>.

In the heart of the Commission the idea is shared that this is a deficient project and then it is explained that it was prepared at the beginning of the work, with serious limitations of bibliographical material and means in general. This conviction reaches such a point that the Commission hopes that the complete elaboration of the Criminal Process Law, currently under study, will replace the project that we are now considering, so that the Assembly can consider the bill of the new Process Code before the other one can be considered again.

Not everything was regressive in this project, however. In fact, the reform proposed for arts. 46 and 62, which assures a greater protection to the guarantee of trial defense,

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<sup>18</sup> *Naturally, it is possible that a really progressive project - one that would conceive the criminal process in a humanitarian way, with guarantees and agility - would have in El Salvador the greatest possibilities of failure in the Assembly. But anyway, the CORELESAL program would have to be - in my opinion - as ambitious as possible, without starting his proposals from the simple recognition of limitations impossible to overcome.*

was particularly relevant, with the possibility of the appointment of a defense attorney when the accused is before the "auxiliary bodies" and demanding the need for the defense in the trial phase.

In other aspects, however, the project did not make the decision required by the gravity of the situation of the lack of protection in which the accused finds himself in this country - especially if he has scarce economic resources. I refer now, basically, to two points: the extrajudicial confession and the rules for the release from prison.

The Commission has expressed concern about the fact that the confession before the "auxiliary bodies" is commonly obtained - in El Salvador - by violent and criminal means <sup>19</sup>). Yet, it has not tried to remove its judicial effect. The Commission here surrenders a basic guarantee in the civilized nations so that the system does not lose the small dose of efficacy it may have, on the basis that confession would be the key to the majority of the convictions. This is shown with all clarity - and quite explicitly - in this paragraph of the background of the project:

**"It is evident that in our country, the problem of extrajudicial confession is above all, cultural. We would propose removing all value to a confession given to the auxiliary bodies were it not for the lack of a truly scientific police force dedicated to the investigation of offenses with the most modern techniques. This is the reason why we believe it must be maintained as an institution.**

No anger is saved here by reasoning this way. At this time, because the system has no other way of investigating, validity should be given to a confession that - with a probability bordering on certainty - will be obtained by torture. It is obvious that the only solution compatible with a State of Law in a country where it is assumed that the defendant is tortured regularly to make him confess, is to deny the validity of a confession given before auxiliary bodies.

It is true that the "extrajudicial confession" in itself - in the abstract - should not be put aside as one of the clues in the criminal procedure. For example, the declaration of a neighbor of the accused who testifies having heard a conversation in which the accused related to his wife that he has committed a homicide should be considered relevant. And in a "cultural" system - to use the words of CORELESAL - in which the police, as a rule, would not exercise pressure, it would have some relevance together with the declaration of an official who states that he has heard the same thing from the accused. But if the real system starts with the recognition that the police tortured the accused during the hours of the so called "administrative detention" - which the Constitution unreasonably permits to extend up to 72 hours - then there is no other

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<sup>19</sup> *In the background of this project, the Commission itself declares: "With respect to the extrajudicial confession, it is a notorious fact that in this country, in the majority of the cases, it is obtained by the auxiliary bodies by violence or intimidation..." (t. II, p. 389; cf. also page 402 [the underline is mine]).*

solution - for a State that pretends to be included among the civilized nations and respects the individual rights - than deny all effects to declarations given before "auxiliary bodies".

The other matter where the Commission did not touch the most critical point is the one related to the "release from prison". Even though here one can see some small timely progress, the main restrictions are basically maintained. The most significant of which should be named now and that is the maintenance of the absolute proscription of release from jail for offenses that require a sentence of more than three years in prison. The offenses that are not part of this group have such little significance that whatever has been achieved to favor liberty in these cases has no relevance. On the other hand, even in that group there are offenses in which the accused is not allowed release from prison. Those are criminal cases as listed in art. 251 and which I have mentioned earlier as indicative of the authoritarian vision of the Criminal Law (propaganda of anarchic ideas, or ideas contrary to democracy, contempt of the mother nation or the national independence heroes, etc.).

The serious reforms (Criminal Code and Military Justice) also included in this project are not - in general - of the same importance as the procedure reform could have had, had the necessary solution been undertaken. But some in particular are also harmful.

Especially in the matter of the death penalty, the Commission makes here a protracted effort to relate the criminal law to the 1983 Constitution - that forbids the death penalty for crimes not of a military nature in time of international war - that was clearly regressive.

Already by the Constitution, the death penalty was substituted by the highest penalty in existence in the Criminal Code (30 years imprisonment). Here CORELESAL invokes the "principle of proportionality" to increase that maximum with respect to the crimes that before carried the death penalty. Conclusion? It proposes that these crimes carry a minimum of 30 years in prison (the maximum in force today, according to the Constitution) and increases its maximum to 35 years, that is, it proposes to increase the maximum by 5 years (!). With this, another seed has been planted to maintain the draconian aspect of the criminal framework of the Salvadoran Code, a text that, in this respect, requires a complete and profound revision.

For this reason, it is to be desired - in my opinion - that this project not be reconsidered by the Assembly, keeping it in the lethargic state in which it entered after the presidential veto.

### **C) National Council on the Judiciary**

The fifth project presented by CORELESAL to the parliament was the one that regulates the function of the National Council on the Judiciary, on June 27, 1988,

approved on October 4, 1989.

AID's officials already know exactly the institutional importance that this project has had and the vicissitudes that it went through before the approval of the definitive law.

It is necessary here to emphasize what is already known, and that is, that while CORELESAL made efforts to conceive the Council's structure in a relatively pluralistic fashion -although always with a relative majority of members of the Supreme Court - the Court produced another project that assured its absolute control of the institution.

The proposed configuration of both projects was as follows:

<b>CORELESAL</b>	<b>SUPREME COURT</b>
total: 9 members	total: 9 members
3 magistrates of the S.C.	5 magistrates of the S.C.
1 Second Instance judge	3 members from the lawyers' assoc.
1 First Instance judge	1 member from the law faculties
1 member from the office of the Attorney General	
1 member from the office of the Public Defender	
1 member from the lawyers' assoc.	
1 member from the law faculties	

The configuration of the Supreme Court project speaks for itself by its intended legislative orientation. But the resistance of those who integrate the Salvadoran courts when losing their old prerogative of monolithic appointments of the judicial power goes down deep, even beyond what the project itself can show.

This is demonstrated by the so called "explanatory vote" of the dissident members who, already in 1984 presented a fraction of the Supreme Court against other project supported by the majority of that court - which was not, in any way pluralistic - but wanted to reduce the dissidents even further by means of a scarce number of openings in the instances of power by appointment.

That project assigned 3 of the 7 openings to the Court magistrates, so that with the judges of the first and second instances favoring the Court they had - in that version - total control. This was not much, however, for those who held the minority opinion (the source we consulted - the CORELESAL records themselves - do not register the names of the dissident magistrates). The so called "explanatory vote" intended to set the basis for the reason why the National Council of the Judiciary had to be - in reality - a "collaborator" of the Court, which could only suggest candidates but without limiting the Court's faculties of appointment. Hence the proposal of an article that imposed that "the appointment... shall be made by the Supreme Court of Justice preferably among the candidates proposed by the National Council of the Judiciary" (cf. CORELESAL, National Council of the Judiciary, page 287) (underline is mine). It was obvious that this

distorted the constitutional reform of 1983.

Neither that project - nor the opinion of the dissidents - nor the later Court project, became the definitive law. But the final result was - in fact - substantially the same: on the bases of the configuration proposed by the Court (see supra), the Assembly, in the definitive law that was passed, increased the number of members to 10, giving the new post to the law faculties and not only continued to allow the Court to have 50% of the direct votes, but also allows the president of the Council (a justice of the Court) to cast the decisive vote (!).

The Commission - as one could see - had tried to achieve a better situation, or at least formally better, more pluralistic - although, without a doubt, the opinion of the Court members who are part of CORELESAL must have had an opposing influence in the heart itself of the Commission. Furthermore, CORELESAL had required a wide opinion from the different interested sectors, with great emphasis, also, on the background of comparative law that illustrated the diverse possible solutions.

Frankly, there is no way for me to know - because of my legal education, accustomed to the Argentine system, also of defective function <sup>20</sup> - which should be the most suitable system to guarantee the true independence of the judicial system in El Salvador, the independence of the criterium of its judges, the honesty of the judicial function, etc. But I can affirm that the final result of the law that is being organized by the Council provided by the law of 1983, seems ex ante absolutely unsuitable to achieve the pluralism and independence we are after. The consulted opinions agreed almost unanimously that the law in force will assure almost absolute control of the Court over the Council, and through that, over all the judiciary system, as in the olden days. The immediate result is an intense political control over justice. In the real political-institutional conditions of El Salvador, this cannot be good.

If in this sense there has been some improvement in the institutional structure, it could be because the 1983 Constitution established that the judges cannot be removed, at least the judges of the first and second instance (not so the justices of the peace). But the creation of the Council, as such, is left as a decorative figure.

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<sup>20</sup> *In Argentina, the national judges are appointed by the President of the Republic in agreement with the Senate; the provincial judges are designated in accordance with the rules of each province, which are similar most of the time (appointment by the governor of the province, in agreement with the legislature). Once they are appointed, the judges cannot be removed, but this does not prevent the recurring attitude of attachment to power, directly proportional to the judicial office, meaning that the Supreme Court is generally the least independent, which naturally, has not helped in any way the real enforcement of the democratic system.*

#### D) Reforms to the Jury System

The sixth bill prepared by the Commission (November 9, 1988) passed by the legislature by the middle of this year, affect the reforms of some aspects of the plenary proceedings and basically, the jury system.

I have already explained that on this subject I include a separate document as an "addendum", which remains written exactly as I conceived it before I visited the country - in the belief that the project had not yet been passed as law.

Theoretically, I still consider the global conception of my analysis as correctly. However, I find it difficult to reaffirm the specific criticisms with certainty, especially in the context of the Salvadoran reality.

The tension here is produced between the "citizens participation in the criminal justice system" and "the concrete possibilities of that participation".

In several meetings I have been persistently told about the injustices of the jury in innumerable decisions ("injustices" that must be understood as "acquittals"). The problem of illiteracy (60%) was also explained to me with great care, which in any case, would turn "elitist" the strip of the population that could participate in the system of "citizens' justice".

I continue to think, however, that those arguments are not decisive. It is true that the jury offers great uncertainty, but there is not the smallest guarantee that the judge, or any member of the state in general, offers any certainty of better justice. I believe that El Salvador is a clear example of this, considering the impunity that has been maintained, basically, in the serious injuries to fundamental rights <sup>21</sup>.

At the same time, the improvised and insufficient polls of the opinions of the "man in the street", that I performed on this subject, inform me that people easily distrust the judge more than the jury. And in the way that the so called Judicial Body in the Constitution of 1983 is structured (the other ones were worse), the attitude of the "man in the street" seems to be well founded. There were also the important jurists who answered that the state judge, in effect, makes decisions as arbitrary as the jury - or even

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<sup>21</sup> *During my stay in the country I heard the news, through a television newscast - that a jury had found a military man guilty of having killed some peasants because they belonged to the PDC party (Communist Democratic Party). The accused had been convicted - in absentia - because he was out of the country. I have not been able to corroborate this information by other means. In any case, it seems certain that it would have been more difficult for a state judge to arrive at the same conclusion.*

worse <sup>22</sup>.

On the other hand, the Constitution of El Salvador, repeating a long tradition in the country, sits a tribunal of jurors as one of the judicial bodies and does so as a guarantee to the defendant. Against the argument that the Constitution speaks of the jury for "those offenses determined by law" - there is the counter argument that this does not mean that the Assembly is free to remove any offense from the cognizance of the jury "just because", as if the guarantees were complied with for just one case. This was told to me, however, by one of the members of the Commission. The regulations should comply with some reasonable general rules. Finally, the traditions of republic certainly speak: in favor of trial by jury, not against it.

If conceiving a jury is a difficult task in El Salvador today, it should be mandatory to search for ways to inform the society of the institutional transcendence of the jury and promote in this way the greater justice of the system (for example, giving elementary lessons in criminal justice, the sense of criminal justice, moral foundations of the punishment, proper behavior of the members of the jury, etc.) In any case, the jury constitutes a republican instrument and in a country where the structure of power is monolithic, anything is advisable, except its gradual disappearance <sup>23</sup>.

Therefore, I believe that the thoughts that I expressed in my report are valid and I enclose them as an "addendum".

Perhaps the only thing left to add here is that the Legislative Assembly - as I was verbally informed - did not favorably pass the reform that concerned the change of a jury trial from the "small" cities to the "important" ones as proposed by CORELESAL - with the Legislature then agreeing with one of the observations that I express in that report.

#### **E) Constitutional control, Habeas corpus and Protection**

The seventh project carried out by CORELESAL is the one that refers to the procedure of constitutional control, habeas corpus and legal protection. It was concluded on June 27, 1989 and as far as I know, it has not yet been passed by the Assembly.

With reference to constitutional control, I personally support an always diffuse type of control (any judge), limited to the particular case (the anglo-saxon model) instead of a system with rigid controls and general effects (German, Spanish models, etc.) The

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<sup>22</sup> *I note here that, when being interviewed by me on the subject of the jury, one government official insisted over and over on injustices that could result from this system. However, when I asked a state judge the question of whether he offered better guarantees, he went pale and gave an abstract answer in the sense that a public functionary has to apply the law and is responsible for its application - an answer that could not possibly ease anybody's mind.*

<sup>23</sup> *In my country (Argentina) the constitutional mandate of trial by jury (Constitution of 1853) has never been complied with, and this has to do, quite possibly, with certain social insensitivity towards the complicated problems of criminal justice.*

former model permits a more fluid relationship between variations in public opinion and the exercise of the judicial function in accordance with the cultural pattern of the moment. But this is now irrelevant. We have already seen that the 1983 Constitution followed the second course. And the legislation projected by CORELESAL appropriates the Salvadoran antecedents and formulates a coherent structure of abstract and centralized constitutional control, with slight concessions to a diffuse type of control (it is anticipated that a particular judge of a certain case may declare the incompatibility of the law against the Constitution, for a concrete case). There are no questions of significance to be considered here because the ways and means in which this control will function in reality are more conditioned by the structures of power than by the chosen legislative model. A Judicial Power which has little independence from the political power will hardly exercise constitutional control, whatever the legislative model selected.

With reference to habeas corpus, as an institution closely tied to the historical birth of the protection of individual freedoms, the selected model is already - in my judgment - clearly open to criticism.

In the Anglo-American tradition that nurtures those libertarian habits in all the places where the remedy of habeas corpus exists, this is characterized by the exhibition of the detained person in a public courtroom, before the protective judges (habeas corpus derives from the ancient dictum Libero homine exhibendo). This has the purpose, then, of taking the prisoner from the environment of his custody, in order to guarantee his protection against any oppression contrary to law. The judges, in turn, receive an impression, directly from the case.

In Argentina, the old processal corruption had come to suppress the personal appearance of the beneficiary, substituting the personal appearance with a report. This was energetically corrected with the restoration of democracy, by law 23.098 passed by Congress in 1984. In El Salvador instead, the practice similar to that abandoned by Argentina, seems to have been traditional for a very long time. This is also the system that CORELESAL opts for in its project. During my visit to that country, it was explained to me that frequently civilians have more confidence in an official (who may be a lawyer) appointed to see the living conditions of the accused, than in a state judge. The system presumes that the official who issues this report will act impartially and in defense of the rights that have been abused, if that were the case.

However, the adoption of the true habeas corpus, centered in the hearing and public debate to which the beneficiary must necessarily attend, would be one of the best means to guarantee protection against torture, which is a problem of such extent in El Salvador, and against any other form of arbitrary detention. With reference to habeas corpus - in my judgment - there is a serious deficiency in the chosen starting point, regardless of how much it corresponds to Salvadoran customs which is - in many respects - precisely what need to be modified.

In the face of this, I consider the treatment of that part of the project that refers to the action of legal protection, to be secondary.

## **F) Other Projects**

I am interested in referring finally to three projects of lesser institutional importance, to offer a critical analysis of some purely technical aspects that will show the reasonableness of the suggestion I make in this report in the sense that there should be already, in this stage of the preparation of the projects, more critical debate about the normative solutions that are intended to plan or be incorporated to the laws in force. This, even though the accuracy of this council is independent of whether or not it exactly agrees with the juridical analyses that follow.

In any case, the extremely technical character of the observations will require more time than the earlier questions which, just because they are institutional and basic, are certainly more important, but possible of being presented in briefer form.

### **a) Reforms in the Matter of Appeals for Reversal or Annulment**

The sixth project written by the Commission (November 11, 1988, approved on October 6, 1989) referred to the substantiation of the appeal for reversal with the as in of giving greater right of defense to the "parties", and to prevent the judge from revoking an interlocutory decree dictated by himself, without contradiction from the other party; also to prevent that a justice of the peace could revoke a ruling dictated by himself, without consulting the judge of first instance.

This new complication of the numerous recourses of the Process Code, the function of which I have hardly been able to comprehend, cannot seem reasonable to me. Down deep, it appears that the thinking is only that of making the arrest warrant stronger (preventive imprisonment) since a justice of the peace can dictate it, but not revoke it. It is possible that some cases of revocation of arrest warrants that have affected the public opinion in El Salvador may have influenced this reform. But an effect like that cannot be prevented with a remedy like the one attempted. Henceforth, I attempt to offer some reasons of a technical character - disregarding this as the possible point of origin of the project - and without pretending in any way to end the discussion, considering that, in my opinion, the whole system of recourses of the criminal process in El Salvador should be critically reversed, or better yet, the Code should be replaced by one that responds to a modern system of codes.

The reforms could be summarized as follows:

- 1) A decision was made to limit the power of the lower judges with a mechanism that establishes that the parties may dispute the dictated revocations (modification of art. 515).
- 2) Art. 514 was modified making it compulsory for the judge, to grant a hearing to the other "parties" for the substantiation of the recourse of revocation presented on behalf of one of them.

- 3) It is established that the revocations dictated by a justice of the peace - with respect to interlocutory sentences - shall have no effect until confirmed by a judge of the first instance.

With respect to the first aspect, it is necessary to note that if what was attempted was to strengthen the rights of the parties who face determined important decisions dictated by judges of the first instance (or of the peace) it would have been convenient to arrive at a different solution. The power to repeal of the judge that dictated the resolution cannot be limited, but rather the possibility of an agreement to a revision directly by a higher tribunal should be expanded (appeal, not repeal).

The problem that arises is that a possible erroneous limitation between the recourse of the appeal and that of the revocation, which must answer to different needs, and that, therefore, must also maintain different structures of substantiation. The Process Code of El Salvador adopts a system of "numerus clausus" for the determination of matters that may be appealable (cf. art. 520). If I have not performed an analysis of all the resolutions that allow access to the appeals courts via the appeal, it is evident that - by the needs described by the Commission itself - that certain resolutions of importance have been left out of this possibility, generating an unjust situation of lack of defense.

However, as I understand it, the solution to this problem may come from two different routes:

- i) either these questions must expressly be included in the closed list of appealable resolutions; or
- ii) a general criterion is established to determine when a resolution is appealable, leaving aside the system of "numerus clausus".

This last one is the system followed by the Code of Federal Procedures in Argentina, where the recourse of appeal is only granted against definitive sentences and against the interlocutory decrees that make a decision about an article or cause irreparable burden, that is, those that, if executed would modify the juridical relations of the persons involved or the situation of things in such a way that it would be almost impossible to restore them to their former state.

What appears to be inconvenient is to modify the regime of the recourse of reversal to provide more possibilities to the parties in question that, in reality, should be possible to revise via the appeal procedure.

In the first place, because when the general character is established (now not only for those resolutions forgotten by the recourse of appeal) some counter productive effects are created in the substantiation of the recourses that, by their own nature (they do not produce an injury that cannot be later corrected) is convenient to treat within a system of traditional repeal (without hearing of the parties and without dispute before a superior court). To try to obtain a repeal in these questions with the new system shall be, more

often than not, a waste of time.

In the second place, this does not seem to be the best remedy for the resolution of problems generated in the group of resolutions in dissent (especially the resolution of provisional detention that seems to be the problem that preoccupies the Commission the most).

The adequate thing to do would be to agree to the direct control of the superior court, or at least, to allow the injured party the free choice of access to the superior court (appeal).

It is nonsense to give more importance and attention to the revocation of the resolution than to the resolution itself. In fact, in the statement of objectives of the reform that we analyze, it is indicated that the warrant for provisional detention is an interlocutory sentence of great significance and transcendence in the process. Nevertheless, the emphasis is only on the need to revise the revocations and not in establishing an adequate system of revision of the resolution itself, to make it, eventually, revocable.

Let us give some thought to the case of provisional detention. In principle and in the generality of the cases, it seems difficult that the judge himself may change his mind about a resolution of such transcendence, since it can be assumed that before its importance and transcendence (the freedom of the defendant) he has done an exhaustive analysis, before arriving at his decision - which could be in error, but which can hardly be expected to be changed by him. Substantiation of the revocation, after hearing of the parties, shall be, practically always, a waste of time within a processal system which is already slow and injurious to the real "party": the accused.

This is also the way to resolve the problem in more modern projects. The Model Criminal Process Code for Iberoamerica, for example, eliminates the recourse of appeal during the stage of the trial in order to gain speed (of course with a general trial system totally different, especially with the investigation in the hands of the Public Ministry, under the control of the trial judge). However, it leaves standing the possibility of appeal - in favor of the defendant- precisely in consideration to coercive measures.

The same mistake (to worry more about the revocation rather than the resolution itself) is made with the amendment to art. 515, which establishes that in case the revocation is dictated by a justice of the peace, he will abstain from enforcing it until it is reviewed and confirmed by a judge of the first instance.

In fact, if the honesty of the justices of the peace cannot be trusted to take care of questions of this kind, what must be decided is not that the revocations must be confirmed by a judge, but rather that the dictate of the resolution itself must always be "revised", or better yet, resolved by judges considered to be honest.

In my opinion, this reform brings to mind that it is more important to assure the stability of the "detention warrants" than to reaffirm the "freedom of the citizen".

**b) Arrest Taxes or Administrative Fines**

The bill for an arrest tax or administrative fine is a project of June of the year 1989 (eighth project of the Commission), that has already been passed as law.

In general, the law regulates accurately the provisions of art. 14 of the Constitution. I must recognize that this law - and its declaration of objectives - has an aspect more respectful of individual guarantees and essential principles of a State of Law than those of the Criminal Code and Process Code in force and their application as related in the CORELESAL report on the penitentiary situation. In a certain way, this creates a certain perplexity, because, precisely due to the scarce gravity and limited stigmatization that characterize these punishments, the man of law can be more flexible in this matter, compared to the rigor of the guarantees that are required in the case of Nuclear Criminal Law. On the other hand, the important real brake in the administrative arbitrariness - if this is the fear - can hardly be provided by this procedure before the administration itself. The Argentine experience indicates that all administrative instances are systematically against the individual and has a chaotic degree of organization and institutional seriousness. The real brake can only be provided by later judicial control.

In any case, the gravity of the possibility of "administrative arrest" continues to be represented by the fact that, under this name, the police are also included, subordinate in turn to the armed forces. A risk offered by the constitutional and institutional system we have described.

On the specific side, I notice that it is not a good idea to do without the production of proofs, as art. 13 says, in case the presumed defendant "would not present opposition or confess the infraction". In the first case, the solution does appear to be correct, but in the second, the impression is that the confession would already bar any opposition to the proof on the part of the accused. There may be cases, however, when the presumed defendant may confess, and in spite of that, may want to produce proof of innocence (partial or total) or, for whatever reason may want to bring proof to the trial, and there is no reason why he should be denied what is not denied to a defendant who has not confessed to the offense. On the other hand, the qualification of "having confessed" or "not having confessed" may be arguable. In any case, then, the disregard of the proof would depend on the consent (or "lack of opposition") of the accused.

One aspect in which my observations may seem authoritarian about the CORELESAL bill that was later passed as law is that I do not agree with the double judgment as determined by art. 3, clause 2, when "opposition... also constitutes an offense or fault". This rule appears to be logically derived from the principle non bis in idem (pages 3 and 5 of the Declaration of objectives). In my judgment, however, it is a mistake. Infringement of the order must be punished independently, without prejudice of the penal action.

Should the opposite occur, there is great risk of creating grave conflicts. In the

first place, because of the theoretical difficulties of establishing precise rules about the notion of "fact itself", and in particular of the aspect of that identity commonly known as eadem causa petendi. The difficulties of delimitation of ideal concurrence (same action) aggravate precisely that problem. If the principle of proscription of the double jeopardy were on the balance here, unjust solutions could arise.

Theoretical example: A police edict punishes with imprisonment of up to 10 days the shooting of fire arms at night, even though this may not entail danger. While this rule is in force, "A" fires a gun at night against "X" with the intention of killing him (attempted homicide). Policeman "B", who hears the shot, catches the offender and arrests him. He confesses to having fired a shot at night against a street light, without hitting it and agrees to the disregard of proof in accordance with art. 13. The proceedings run quickly and the administrative authority imposes a sentence to "A" of 8 days of imprisonment. The sentence stands.

A few days later, "X" files a criminal case against "A" for attempted homicide and shows proof that "A"'s shot went through his hat. Why should he not have a criminal case against "A"?

Against the effect of this example, it should not be argued that "that" would already be "another case". The act is really only one. That the first "case" did not consider the deceitful representation of homicide does not demonstrate anything.

The correct solution must be to start from the point that the administrative criminal proceeding, having taken place in a non judicial site, has no reason to cover the guarantees of the criminal process with the cloak of the prohibition against double jeopardy.

What would have been reasonable instead, would have been a solution such as this:

### Art.3.

"... (second paragraph). In the case in which the administrative violation also constitutes a crime of infringement of the criminal law, neither the beginning of the proceedings or its definitive resolution will affect the exercise of the criminal action, which shall be treated independently. However, in the case where an administrative sentence has previously been dictated, the arrest or fine imposed shall be counted by the criminal judge as part of the sentence to be applied by him. If the criminal process has been concluded before any possible administrative procedure and the sentence would require imprisonment, this sentence will be considered as sufficiently involving the lesser infringement and shall quash any punishing action derived from the administrative law.

The last paragraph can be explained because, in that case, the criminal punishment would fulfill already - by itself - all the possible goals of both penal actions (administrative and judicial).

It is wrong to believe that the question that I refer to here is an anodyne. On the contrary, it could be of extraordinary interest if it referred to acts committed by Army officials-inclusively within the context of grave violations of human rights- that were considered by the military tribunal as lack of discipline within the service and that punishing administrative decision would stand (for lack of appeal).

Another interesting point that I am unable to deduce from only one reading of the law, is the one that refers to whether the administrative sentence is provisionally executory even though there may be a judicial recourse against it. If the penalty is pecuniary (fine) there are no serious risks (solve e repete). But if it means arrest, since the law starts from the basis that this cannot be carried out until the end of the administrative process, do not think that there would be any grave damage to the administration from the fact that the execution of the arrest could not be put into effect until the end of the revision performed by jurisdictional institutions (that is, the Organo Judicial). Should this be an attempt against the efficiency of the "power of the police", then some thought could be given to a provisional bail for a degree of prevention in the administrative headquarters, but always being able to prevent that any day of arrest depends on the sole decision of an administrative institution.

**c) Criminal reforms related to minor children and the family**

CORELESAL also prepared a draft bill related to certain reforms that involve the Criminal Code, the Criminal Process Code and the Minors Code concerned with the protection of juridical assets of the family and minor children (tenth project of the Commission). This bill is dated June 27, 1989 and was quickly approved on February 14, 1990.

The bill starts with a statement of objectives with these words:

**"The need to give better protection to the juridical assets of the family and minor children is the objective of an urgent reform of the criminal dispositions..."**

That beginning is already suggestive. The CORELESAL report on the penitentiary situation itself speaks that, of those detained in prison - 91% of whom are indicted (accused without sentence), 90% of the total are there for offenses such as theft, robbery, violence with injury, rape and homicide so that it is somewhat doubtful that anything could be urgent in the question of criminal protection of the family and minor children because most of these figures existed basically under the reformed law and - it so appears - they had no effect. There is no reason to believe that they should have any effect now.

I guess that it would have been preferable to leave these reforms for the context of the integral reforms of the codes (Criminal and Criminal Process Codes). In the meantime, the postponement of this isolated project would not have resulted in anything

grave.

At any rate, I want to show here, with an example taken from art. 1 of the bill (now the law), the incoherence that partial reforms can originate, precisely because they show such little reflection in relation to the context.

Art.1 of the law I refer to says:

**"Art. 1. Substitute art. 178 (of the Criminal Code for the following one:**

**Special Abandonment**

**"Art. 178. If a woman abandons her child within seventy-two hours after birth, she shall be punished with imprisonment for one to four years.**

**"If, as a consequence of this abandonment, the newborn child should die, the sentence shall be of three to six years of imprisonment. Should the child suffer injuries, she shall be punished with a sentence of two to five years in prison, depending on the severity of those injuries" (underline of sentences is mine.)**

Art. 178 of the Criminal Code that was replaced by the reform, said:

**Art. 178 Especially Attenuated Abandonment (replaced by art. 178 of the law approved after a CORELESAL proposal). If a woman should abandon her child in order to protect her reputation, within seventy-two hours of birth, she will be punished with a sentence of six months to two years in prison.**

**If, as a consequence of this abandonment, the child should die, the sentence shall be from three to five years in prison, and should injuries occur to the child, she shall be punished with nine months to three years in prison, depending on the gravity of the injuries. (The underline of the sentences is mine.)**

The Declaration of Objectives based the replacement of this text for the former one, on the following reasoning:

**"In the description in art. 178 of abandonment with special attenuating circumstances, the conduct of the active subject, who is a woman, the purpose of the abandonment is to protect her reputation. This element is indispensable for the offense to be committed and the imposition of the respective punishment.**

**"The change proposed by the bill consists of the omission of this motive, stating that in a conflict of rights, the ones that must prevail are, in all cases, those of the abandoned minor child over those of the mother presumably dishonored. Furthermore, the gravity of this illicit conduct deserves a more serious punishment in virtue of the potential harm caused to the victim and the**

**social repercussions accompanying the consummation of these facts.**

**"On the other hand, the investigation of the empirical reality that surrounds these offenses show that, at this time, the mothers who abandon their newborn children do not do it, in almost the totality of the cases, "to defend their honor", since our society has currently a higher degree of tolerance of the unwed mother phenomenon. As a rule, these mothers abandon their children for economic reasons, or to escape the mountain of responsibilities such as attention, personal care, etc. that they cannot or do not want to undertake."**

I want to disregard the consideration to the political-social concerns expressed here, although I do not agree with the idea that it is worse to abandon a child because of "poverty, than "to hide one's dishonor". What is really grave, from the ethical point of view, is to abandon a child to hide one's dishonor, even though historically that action may have enjoyed the privilege of having attenuating circumstances.

What I am interested in is the analysis of the technical reasonableness of the reform, which can be understood only if the earlier text of art. 178, as transcribed, as well as the text of art. 177 are taken into consideration. Art. 177, still in force, reads:

**Art. 177. Abandonment of a Person. If an individual responsible for the care or custody of a minor under the age of 12, or of a person incapable of taking care of himself, abandons him or puts his life in danger, placing him in a position of being forsaken, shall be punished with imprisonment from six months to three years.**

**Should death occur as a consequence of this abandonment, the punishment shall be from six to ten years of imprisonment; should there be injuries, the punishment shall be from one to six years, depending on the gravity of the injuries." (The underline of the sentences is mine.)**

As one can see from the simple reading, what was called "Especially attenuated abandonment" in the old art. 178, was a privileged abandonment, that is a special offense, that contained all the elements stated in art. 177 and added others, attenuating the conduct described. As we saw, the law that was passed from the CORELESAL draft "attempted" to aggravate the conduct of the mother who abandons in the circumstances of that criminal type and calls it "special abandonment".

Now, if what was attempted was to aggravate in relation to the former art. 178, it would have been better to simply annul the precept of "especially attenuated abandonment" and allow it to enter into force in the generic form of art. 177.

And now, what has happened?

The result of this incongruity is that if a mother - according to this new law -

abandons her child during the first seventy-two hours of his life, she is punished with 1 to 4 years in prison, but if she abandons him starting on the 73rd. hour of his life, the generic punishment of art. 177, that is from six months to 3 years applies. That means that the so called "special abandonment" is now an aggravated abandonment in relation to the generic one of art. 177, as long as it happens during the first three days of life of the child, but anyone with knowledge of the law could abstain from the abandonment for a little longer than that limit, so that, by abandoning an older child, a woman would receive an attenuated sentence (in relation to abandonment within the first three days). Nobody could explain that this consequence could be considered reasonable.

And all does not end there, however. Because if the qualifying circumstances of the second paragraph of art. 177 or of the new art. 178 occur, the "special abandonment" is not more grave, but less grave (?).

I explain. If, as a consequence of abandonment according to art. 177, death occurs, the punishment is 6 to 10 years, if injuries occur, from 1 to 6 years. But if the same occurs according to art. 178, in case of death the punishment is from 3 to 6 years, and from 2 to 5 in case of injuries. Therefore, a rare criminal case occurs. While the perpetrator (mother) "abandons a child that is not yet 72 hours old", her conduct is more grave than that of any other person abandoning anybody else, or more grave than her own conduct if she abandons the child after the third day, but if the qualifying consequences of this abandonment occur, that abandonment stops being "more grave" and becomes "less grave" (?).

With this, there is no room for praising this rule. Now it is of no interest to consider if the other precepts of this reform suffer from analogous defects or not. What is of interest to highlight here is not only that this reform was not urgent, but also that, as any partial reform, it lacks coherence with the context of the reformed code.

#### **#5. Final Opinion about the Usefulness of CORELESAL**

The developments described up to now could lead to the thought that - in the opinion of this consultant - the AID program in El Salvador with respect to the revision of the Salvadoran legislation is not really useful.

That is not, however, my sincere opinion.

If I have started by describing the framework into which the work of CORELESAL fits, it is precisely because it sets the limits of the efficacy of the projects of the Commission, or at least, it negatively conditions its work. But in one way or another, CORELESAL has produced work and several projects, some of which mean progress in relation to the previous situation and in relation to what could have been expected from the constitutional precepts. In any case, the Commission continues to work and may possibly produce a draft bill for the Criminal Process Code that may, in some

measure, improve the present situation, which is so harmful to the fundamental values to the State of Law. Although I have the feeling that neither in this case will the Commission - to speak the colloquial language - know how to "take the bull by the horns".

If, on the other hand, I have emphasized as unfavorable the great power that the structures of power in general, and the Supreme Court in particular, have over the Commission, and if I, furthermore, have also emphasized how inappropriate it seems - in accordance with the division of powers - that magistrates of the Supreme Court participate directly in the Commission, I cannot but recognize that the political situation in El Salvador may not be able to stand anything better. And in any case, the Commission lends a service technically superior -it seems to me -to the legislation of the Republic than the legislature itself could provide, regardless of which is the party in power.

The precarious political system should speak, therefore, in favor of maintaining the program, but also of the need to reinforce it, because it is also evident that the CORELESAL projects - by themselves - are superior, albeit scarcely, from the point of view of libertarian advocates, to the general level of the political context. And the objective was - as I interpret it - to produce a true Copernican turn in the authoritarian orientation of the old legislative traditions of El Salvador. In this sense, the results indicate - in my judgment - a deficit, not properly technical but of values, that is necessary to cover.

The relative question of how could this strengthening be achieved, after five years of evolution of the project, is not easy for a foreigner to answer, a foreigner who has only shared a couple of weeks with his Salvadoran colleagues. And to find such answer was not part either of the obligations of my contract.

A possibility was verbally suggested, however, by the AID officials in El Salvador, during an exchange of opinions. The idea was to co-integrate the Commission with jurists not part of the Salvadoran context itself, for example with one North American, one European and one Latin American, or any other possible combination of people who could participate in the heart of the Commission without being personally influenced by the political context. Whether this is a viable remedy or not - I cannot give absolute assurances.

In any case, it seems to me that it would produce favorable results if it achieved two structural modifications:

- a) that the concrete ideas which are the bases for the projects be publicly known before the projects are finalized, (for this the idea of the co-integration of the Commission could be useful).
- b) the creation of a channel from the Executive Branch to

allow the facilitation of the treatment of the projects  
by the legislature.

Up to what point these modifications can be achieved and up to what point they would serve the purpose of a greater achievement of the objectives of the program, are questions difficult to answer, especially in the context of El Salvador.

What is certain is that the achievement of a more democratic State in that country is an ideal too distant. And that the forces that CORELESAL can lend in that direction are, at this time, limited.

Buenos Aires, October 22, 1990

Marcelo A. Sancinetti

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ANNEX 1

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## Reforms to the System of Trial by Jury

Among the projected reforms to the institution of the system of trial by jury, it is possible to discern those of a technical character among the rules that affect the political sense of the jury as a democratic organization for the administration of justice. Naturally, this division is of relative precision, since any problem of juridical regulation has many facets.

### #1. Political aspects

It is of interest to concern ourselves with the reforms of the first type.

The legislation in force already offers - in my judgment - some angles for serious criticism which seem to be emphasized in the bills under study.

If the question is to express an opinion totally removed from the circumstances of fact that characterize the political life of El Salvador, that is, if one can be circumscribed by the juridical texts and the reform drafts available for the study required by AID, the only impression is that the institution of the jury is seen - by the jurists of the Republic of El Salvador - with great distrust, as a symbol of an indulgent institution that does not discriminate and removes criminality from certain behavior and that, on the positive side, sees the professional judges, members of the bar, that is, the permanent members of the administration of justice as officials who are faithful to the law and to the ideal of the value of justice.

This is, in my opinion, the leading idea in this part of the reforms under study. As a manifestation of this situation, notice two critical aspects:

- a) the exclusion from the cognizance of the jury of the procedures in the case of serious offenses - exclusion that already exists in the Codes in force, but which is to be increased, as projected.
- b) the territorial translation of the procedures located in cities of "small importance".

**a) Exclusion depending on the kind of offense**

With reference to item a), it is a normal and universal practice in the institution of trial by jury that the offenses of lesser gravity be excluded from the cognizance of the jury. This is also a fact according to art. 317, clauses 1 and 2 of the Process Code in force in El Salvador and it is also maintained in the draft bill in art. 317, clause 1, by means of an indirect formulation: "those prosecuted in summary proceedings".

The opposite case, however, is not usual nor recommended. The institution of trial by jury may be arguable in many aspects, like any other manner of conflict resolution. But if it is restricted to "certain cases" and this restriction is based - even explicitly - on having to prevent an unjust decision for serious offenses, the starting point is a political presumption that is subject to serious criticism, that is, that the general system of trial by jury - that in principle appeared to be demanded by art. 189 of the political Constitution - is an unjust and deficient system, that must be, however, maintained but only for offenses that are - let us say it that way - of intermediate gravity. Of course, the projected exclusion (offenses connected to the traffic of drugs, illegal possession of drugs, several forms of rape, as well as several offenses against property) are not necessarily more grave than those that would remain under the cognizance of the jury (for example homicide). It is also true that the mention of drug traffic among those offenses excluded could be due to the greater fear that private individuals could have - justifiably next to the potential perpetrators - and eventually charged with this crime - and not to the greater gravity of the offense. And that, finally, not to allow the jurors the cognizance of sexual crimes could be founded - as the bill proposes - on the right to privacy of the victim. But these arguments are - in my opinion - for the sake of appearance.

In the first place, there is no explanation of the reason why the crime of qualified theft, robbery or swindle would be removed from the cognizance of the jury. The reason, as explained in the draft bill (due to the notorious increase of these crimes in recent times requiring quick and effective justice that has not been achieved by jury trials [p. 12, of the paper on "comparative reports"]), is not convincing. Even though this is not explicitly explained, the fear seems to be impunity in these cases. But, should there be a reason to believe that the jury produces unjust acquittals, then there is no explanation why this fear should not cause concern - and much more - in the case of homicide or any other crime. The frequency of the excessive commission of certain criminal acts must not be the cause on the other hand - of the variations in the procedural guarantees - if the jury is removed as one of them. This political tendency to reduce the guarantees according to statistics - or any other numbers - or even according to the low number of elucidations, etc. is never a sure way to administer better justice, but rather for the strengthening of power in some direction and a reduction of individual guarantees.

In the second place, if there were really few guarantees to citizen safety for those called to serve in the jury of certain cases, let us suppose, for example, the drug traffic, and that this fear would produce unfair acquittals. It would seem that the professional judges should be subject to the same fears, with the same results. If, against this supposition, it were considered easier to maintain the safety and protection of a few

professional judges - in any case, numerically determined - than of the population as a whole and that this would justify the change in the judicial process, would this not lead, anyway, to a very partial kind of justice and that the judge that made this resolution would be inclined - as it happens in those countries where there is little independence in the Judicial Power - as in Latin America in general and Argentina in particular - to act in accordance with the inclinations of the power that has given him protection?

In the third place, the solution of sexual crimes never permits the protection of the privacy of the victim, which is rather incompatible with it. In this case, the victim finds herself in the middle of a conflict: exercise of the legal process vs. protection of her privacy. She is the only one who can opt between repression and secrecy. This is particularly the case if the press is allowed - as it happens in most countries - to make commerce of all the details of a judicial case. On the other hand, sexual crimes, more than any other cases, put into play the values, feelings, as well as the deepest prejudices of man. If the function of criminal conflict resolution in these cases is circumscribed by the professional judge, there is the risk that the prejudices prevailing in the social class of the judge - which is a small group, within the wider context of a quite peculiar community of jurists in each society, may dominate the proceedings. The system of jurors permits - in my opinion - a judgment more in accord with the values of the majority in a community and a more public criticism of the decisions, precisely because of these facts.

Finally, all the former reflections bring into play the tension - always present - among institutions: justice by professionals (or at least permanent judges) vs. justice by the community, tension that is found at the bottom of all discussion about the value of juries. The writer of this report does not have, on any account, a blind faith in the value of juries, but neither does he have it in the professional judges, whom he knows better because of the politics of his own country. The resolution of grave social conflicts - as those generated by criminal deeds - cannot be successfully achieved one way or the other. The criminal act is in itself a conflict without a solution.

In any case, it is sure that a system of administration of justice cannot be assumed ab initio as unfair, and reserve it -because it is unfair- for a group of crimes that would necessarily be considered less important whatever the punishment threatened. This would have to have - if this bill is accurate - the effect of increasing the type of offenses that would not have the benefit of a jury. This conclusion appears to be undefensible. It is fictitious to believe that the number of simple homicides or swindles, for example, would diminish drastically as soon as the potential perpetrators realized that these offenses do not get to be tried by juries, but by stable judges.

#### b) Territorial translation

The attribution of territorial competence to the greater "importance, location or population density" of the respective city does not seem fortunate either. This criterion attempts to remove from the cognizance of the jurors where the crimes has been taken

place, those cases involving crimes that require a minimum punishment of 8 or more years in prison (see pp. 17 and following of the respective report).

The starting point is the assumption that those cities offer "better guarantees of security, seriousness and honesty" (idem) and requires that the jury be formed only by persons "residents of those cities". This would achieve - according to the bill - "a greater degree of impartiality because the decisions would not be influenced by sentimentality or fear, which are pressures from which jurors from smaller communities cannot be removed and which induce them to pronounce verdicts which are unfair" (op. cit).

I would dare say that within all the reforms under analysis, this proposal is the one that attempts against the political sense of the jury in the most obvious way.

Culturally, the jury also responds to the pretense that only the leading citizens would be the ones to appreciate the criminal act that creates the conflict. Now, if part of the serious crimes are removed from then jurisdiction of the jury - just because - to put them under the jurisdiction of technical judges - and other crimes are assigned to a jury but in a place different from the one of the conflict, the system would distort the institution to such extent, that it would become totally contrary to the traditions of the State of Law.

I am not familiar with the particularities of the political life of El Salvador, and in any case, it would not be my place to judge them. It is possible, however, to speculate on the social reactions that a system such as this would originate, in the abstract, or at least on the reactions that it should originate.

The urban centers with scarce population - that, those of "little importance" - would witness how the "important" centers would assume the resolution of their conflicts. These small centers would feel that a good part of their social control-however small - would be expropriated and this would become another reason to maintain its relatively scarce importance. On the other hand, the "important cities" would resolve their own conflicts, as well as others', frequently with political-criminal criteria opposite to those where the act has taken place.

Of course, it is hardly necessary to clarify that the apparent distinction between the question of "fact" and "law" cannot serve as a brake to arbitrariness of that kind, under the presumed argument that the law that would impose a juridical consequence, the substantive law, is uniform for the whole Republic. There is no doubt that the so called "questions of fact" suffer today from the evaluation of different values with respect to the "question of the facts themselves". The qualifications of the means used in the case of homicide, for example, such as "insidious", or "suitable to produce great damage or common danger", or the "perfidious" way of killing are not mere facts, comprehensible facts, independent of their meaning within a certain social context. It is not at all certain that the appreciation of these circumstances as concurrent or not with the crime, do not give the same results in small rural villages as in the big cities. That these errors could be corrected by appeal or revocation - on the basis of a poor application of the law -

could constitute an apparent argument. The first sentence - if it is a conviction - already causes injury to a citizen that no judicial revocation can repair.

The territorial location of criminal conflicts is the response to a cultural value that is too high to be affected by the idea that everything is resolved better in the big cities. If I were allowed to give example in the Argentine context - to avoid all the susceptibilities of the nationals of a country that I do not know - it is practically a true fact that the city of Buenos Aires is the scene of the most unjust and tortuous sentences in the whole country of which it is the capital. The judges of the big cities - especially if they are professional judges - are the ones that most frequently owe their power to a situation of privilege, and have therefore, a narrow margin of independence. The justices of the Supreme Courts are usually the most clear examples of this, and I find it difficult to believe that the situation in El Salvador is very different from the rest of Latin America.

On the other hand, the exercise of one's own justice must develop - in principle - a greater sense of responsibility in one's social life. To make some communities believe that they are not capable of solving the conflicts that originate in them, would not agree with a project about democratic consolidation.

All that is necessary is to summarize with one conclusion: nothing except an irritating kind of justice (as well as being unfair) can derive from the projected translation of competence according to the importance of the respective cities.

## # 2. Aspects of a technical nature

What has been stated above, makes the evaluation of the properly technical aspects of the projected reforms notoriously less significant.

It seems to me that the design projected for the new functions of the jury tribunals distorts the institution to such a point that a professional judge from the place where the criminal act took place would always be preferable, regardless of the case, than the game this would become under such unlike conditions.

Nevertheless, regardless of how obscure the formula: "The jury is established for the trial of common offenses, as determined by the law" (art. 189 of the Constitution) may be, doing away with the jury system would seem incompatible with the Constitution, which seems to demand that common offenses be tried by juries. The Legislative Assembly could not reduce to "zero" this "determination of the law". The declaration of objectives of the project itself, starts from that basis, by closing the report with the following paragraph:

**"The institution of the jury, which is the result of a constitutional precept, is part of a centenarian juridical tradition in our law. The efforts that we can make to renew it and modernize it, is the best contribution that we could make to our system of administration of justice" (Declaration of objectives, p. 35).**

**Beyond that, it should not be recommended. What should be recommended is the cultural development of the population, making our citizens feel the importance of the responsible exercise of the administration of justice.**

**Should the institution of the jury be maintained - and I start with the assumption that this is a standing point - the projected reforms do not seem to me to be free of objections from the technical point of view. At least, they should generate great difficulties in their interpretation, no matter how clear the legal text may be.**

**In order to give some examples - only examples - of the problems expressed above, to make the competence of the tribunal depend upon too many conditions connected with characteristics of the criminal act, demands an anticipated assumption of factual data that are not certain, nor evident at the time of initiating the trial. If, for example, the offenses of "qualified theft, robbery or swindle" are removed from the cognizance of the jury (art. 317, clause 2, draft bill), how is the question of whether a theft is simple or qualified going to be resolved? or that of fraudulent administration? By necessity, by the quick assumption of certain facts which may yet need to be elucidated.**

**The attribution of competence must depend upon very clear signals, a priori uncontestable. This also speaks in favor of not making the distinction between cases "for the jury" and cases for "the professional judge", or between cases for the "small cities" and cases for the "big cities".**

**Another outstanding concern of the project is that of the qualification of the conditions to be part of a jury. The most important points seem to me to be: nationality, a certain degree of basic education, good "public and private" conduct and known employment.**

**The second of those conditions could hardly be defended, in the assumption that "the ninth grade of education or its equivalent" (art. 318, clause 4, draft bill) is easily accessible to all the inhabitants of El Salvador. Even so, there would always be many unfair exclusions. The degree of schooling or university studies rarely help much for the proper evaluation of the case, it is doubtful that a nuclear physicist is in a better condition than an uneducated peasant to decide if it was "X who wanted to take Y's tractor during that particular night". The capacity for sensorial perception, emotional equilibrium and in any case, simple, natural intelligence, may be, in this respect, more decisive than the degree of basic education. Naturally, nobody could recommend as reasonable, however, the answering of a battery of psychological tests before becoming part of a jury.**

And here there is also the influence of the political sense of the jury. The population must exercise the administration of justice, not only "bear it". And this means not to require any special qualities. But, if the requirement for a certain basic education should have some validity - the current requirement in El Salvador is to be able "to read and write" (art. 318, 3, Process Code) and that seems to be a reasonable minimum - even so, it would not be easy to accept the rest of the requirements.

The requirement to be "a Salvadoran national", for example, even though it is not totally unjustifiable, it is not quite equitable for all the peaceful inhabitants of the nation who pay taxes, contribute to the social order and participate positively in the communal life. Even less, if the political Constitution recognizes a Central American people with a certain cultural unity. A resident of the country, with a known address, integrated in the community should be capable of judging in the same way he can be judged. Even though being in a jury constitutes the exercise of a political, it is obvious that it is not in the same sense as electing administrative or legislative officials. All in all, it is possible that this may not have any practical relevance because, as a rule, being or not being on a jury is not considered as something decisive for the individual realization of one's social life. It is rather the opposite. The common citizen prefers, quite possibly, never to act as a juror. In any case, this point should not suffer from criticism and it is mentioned here only as illustration.

The requirements of good conduct - especially "good private" conduct, and the one about "known occupation" seem clearly unfair. These qualifications allow strategies for marginalization and stigmatization, that a State of Law cannot include among its mechanisms for social control. This, without considering at this point the large field of interference of irrational prejudices that these clauses offer. In that sense, it is possible that the Constitution of El Salvador itself justifies distinctions of this kind; but this Constitution is not precisely a good example - in my opinion - of respect of privacy - an essential principle that it does command to protect and teach.

A plausible concern for the bill refers to the eventual intervention of substitute jurors, due to the absence of the proper one. The problem arises when the substitute juror has not attended the hearings and may hamper his ability to judge. The bill proposes that the substitute attends the hearing from the beginning. This solution is, in principle, correct. But it is also possible to imagine that a substitute may not be needed. The requirement that several substitutes should attend the hearings in case something happens is to take things too far. It would seem preferable to continue in session without the juror who must be absent. This clause could solve the problem of the few cases in which this situation could be present, and would avoid the added expense of always having - sometimes without a final usefulness - a substitute juror with all responsibilities of the process that weigh on the jurors who must decide the case.

### **# 3 Conclusions**

Other aspects of the reform would create, at this point, many analytical developments. Some are just too small to be understood with only the reading of the texts in force and the reform proposals, without seeing how the process functions in real life and over a certain period of time. I refer here, especially, to what the declaration of objectives puts together under the title of "explanation of concepts", "complementation of ideas" and "modifications of criteria" (p. 29 and following pp.)

The development of the former points, however, is sufficient to show an unfavorable opinion of the reform that is projected.

The work performed, according to its own objectives, is well done: there is good writing, clarity of concepts and a tendency to considerable coherence in the values from which they start. And this is a tendency that I do not think is very good. It is dominated by extreme distrust of the system of the jury and the private conviction that the judge belongs to a state institution and is, therefore, trustworthy. It is sure that this is not true. Although it favors the government at all times, as if the objective is the government control in decisions about justice. A risk that the men of law consider the most threatening.

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**ASSESSMENT OF THE PERFORMANCE  
OF THE NATIONAL COMMISSION  
FOR LEGAL REFORM (CORELESAL)  
IN EL SALVADOR**

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**I.Q.C. # 14**

**Presented to:**

**LAC/DI, Washington**

**Submitted by:**

**Checchi and Company Consulting, Inc.  
1730 Rhode Island Avenue  
Washington, D.C. 20036**

**October 1990**

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**REPORT N° 3**

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**WASHINGTON AND EL SALVADOR'S VIEWS  
ON  
CORELESAL PRIORITIES**

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**Written by Judge Ralph G. Smith**

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**October 1990**

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## THE PRIORITIES OF CORELESAL

### I. INTRODUCTION

The government of El Salvador and the United States, through the Agency for International Development (AID) initiated, in 1984, the Judicial Reform Project. The purpose of the Project, which was formally activated in 1985, was to foster development of an independent, responsible and responsive judiciary through fundamental reforms to be accomplished through the parallel efforts of the several components of the Project.

Component I of the Judicial Reform Project is the Revisory Commission for Salvadoran Legislation (CORELESAL). The Commission consists of ten members, appointed by the President, and includes representatives of the Supreme Court (2), and of the Ministry of Defense, the Ministry of Justice, the Public Ministry, law faculties and attorney associations. CORELESAL was charged with the duty of preparing a series of analytical studies of the judicial system and of drafting legislation to be presented to the Legislative Assembly. Particular emphasis was to be placed upon the area of criminal justice.

CORELESAL got off to a slow start. Prior to September of 1989 it had drafted eleven laws, only one of which had been adopted by the Assembly, and that one, the Definition of Small Farmer Law, became obsolete 34 days after its enactment.

In late 1989 and in 1990 activity increased, both in the studies and draft legislation prepared by CORELESAL, and in the passage of some measures by the Assembly. By July, 1990, thirteen laws had been drafted and submitted to the Legislative Assembly, and nine had been adopted. One, a bundle of amendments to the Criminal and Criminal Procedure Codes and to the Code of Military Justice, was approved by the Assembly but rejected by the President.

Funding of CORELESAL'S activities by AID is being scaled back in a three-step process, and will, under the present agreement, terminate in September, 1992.

### II. SCOPE OF THIS REPORT

At the time of this writing AID is endeavoring to assess the effectiveness of CORELESAL in meeting its mandated objectives and furthering the purposes of the Judicial Reform Project. The author hereof was engaged to assist in the assessment effort by conducting interviews with:

1. Washington representatives of the ODI/AID, and other relevant U.S. foreign policy makers, and

2. Representatives of US/AID El Salvador and officers of the U.S. Embassy in San Salvador,

and to thereafter prepare a brief report outlining Washington's views on the reforms which CORELESAL should be undertaking, and what its priorities should be, in order that U.S. interests be satisfied. These interviews have been completed and results reported in the following sections.

Attached hereto is a list of the persons interviewed.

### III. WASHINGTON INTERVIEWS

It was immediately apparent that the focus of Washington's interest and concern is the case of the Jesuit murders and the perceived lack of any real progress in bringing the perpetrators of such a heinous crime to justice.

The interviews revealed, in general, a sense of overwhelming frustration and impatience with the criminal law system of El Salvador and little confidence in the attempts made to reform it through the Judicial Reform Project, and particularly CORELESAL.

There was, among those interviewed, virtually unanimous agreement in characterizing the criminal law system of El Salvador as chaotic, corrupt, politicized, inefficient, slow, antiquated, and generally, in a phrase heard more than once, "rotten to the core." An air of deep pessimism as to the possibility of any real solution within the foreseeable future was plainly evident.

#### A. SPECIFIC CONCERNS OF THOSE INTERVIEWED (WASHINGTON)

The following were the specific concerns expressed by one or more, and in some cases all, of those interviewed:

##### 1. Codefendant Testimony.

The acute concern of those interviewed was the finding of some solution to the problem of bringing to justice the perpetrators of such high-profile atrocities as the Jesuit murders. This and similar cases in which the Salvadoran armed forces have been involved have been slowed in their progress or stopped altogether by what are regarded as grave deficiencies in the Criminal Code and Criminal Procedure Code of El Salvador, and particularly in the provision prohibiting the use of codefendants or coconspirators as witnesses for the prosecution.

All of those interviewed felt that a revision of the law to permit codefendant testimony was imperative. It was pointed out that many Latin American jurisdictions permit this testimony to one degree or another. One of the interviewees had spent a day in the Library of Congress doing personal research on the subject, and had come to the conclusion that no real reason existed in the tradition of the civil law to prohibit a modification of the law to allow the consideration of such testimony.

There have been, apparently, several inquiries into this question, but no in-depth studies were brought to the attention of the writer. The memoranda which treated of the subject did not consider the basic differences between common law procedures for the reception of evidence and the practice in countries in which the procedures are based, for the most part, upon the Code Napoleon.

Those interviewed expressed considerable consternation over the fact that codefendant testimony is available in cases of kidnapping, extortion and drug-trafficking, but not in other cases just as, or more serious, such as homicide. The failure of CORELESAL to recommend and draft appropriate legislation, which might be a simple as "running a line through a few words" was viewed as an indication of the ineffectiveness of the Commission.

## 2. Interlocutory Appeals

The use of interlocutory appeals was also a source of frustration for the persons interviewed. Several expressed the desire for a modification of the rules of procedure so as to save the various possible grounds for appeal until termination of the case, and thereby have them all heard at once, as is generally the case in the United States. No studies of this problem and its possible solution were brought to the attention of the writer.

## 3. Politicization of the Supreme Court of El Salvador

Considerable concern was expressed over the increasing tendency of the Corte Suprema de Justicia to become a politically motivated body. The close ties of the present Chief Justice of the court with the head of the ARENA party has generated a fairly complete lack of confidence in the ability of the Corte Suprema to fulfill its function in a non-political and corruption-

free manner. Since much of CORELESAL'S work goes through the hands of the Corte Suprema before it is considered by the Assembly, and because of the presence of two supreme court justices as members of CORELESAL, the politicization of the court is perceived to be a real threat to independence of action by CORELESAL.

#### 4. Pre-Judgment Incarceration of Criminal Defendants

The frequently long period of incarceration of a defendant during the pendency of a criminal case is of concern to some of those interviewed. The pre-judgment incarceration sometimes exceeds the maximum sentence for the crime with which the accused is charged, and the record-keeping and retrieval systems in the jails and prisons are so inefficient and inaccurate that a prisoner may sometimes be completely lost in the system unless he has a lawyer who can take the legal steps to allow him to gain his freedom.

#### 5. Necessity of Complete Revision of the System

The interviewees expressed, in various forms, the belief that the entire legal and judicial system in El Salvador needs drastic revision from the ground up. "The whole system is a mess."... "Rotten to the core."... "CORELESAL is operating around the edges and not getting to the heart of the matter."... "Impunidad of the military is a fact of life."

How such a drastic revision could be accomplished was not addressed, except to question whether or not there might be some alternative to the present efforts being made through CORELESAL. Little optimism was expressed as to the possibility of any short-term improvement of the situation.

#### 6. Corruption of the Judiciary

The entire judiciary was characterized as generally corrupt and/or subject to outside pressure sufficient to prevent unbiased and honest decisions. Lack of public confidence in the judicial system is seen as one of the reasons for much violence in the region. If fair and rapid redress of wrongs cannot be obtained through the court system, the people react by protecting themselves by whatever means are available. The result is vendettas likened to the "Hatfield-McCoy" situation. The politicization of the Supreme Court was viewed as part of the corruption problem since it has effective control over judicial appointments.

#### 7. General Ineffectiveness of CORELESAL

The opinion was expressed by at least one of the persons interviewed that CORELESAL has not produced any really valuable legislation at all. The specific objections to any particular piece of legislation were not voiced. On the other hand, another stated that the Commission had produced legislation which would have helped control terrorism, but it was not signed by President Cristiani after being passed by the Assembly.

#### 8. Lack of Effective Communication

Two of the interviewees felt that Washington was not being regularly and completely informed as to what was transpiring in El Salvador with regard to the CORELESAL component of the Judicial Reform Project. It was felt that reports of the pending or drafted legislation were cursory and did not contain enough detail to allow a real evaluation or examination of what was occurring, and that background material as to the necessity of the legislation and how priorities were arrived at was lacking. The material produced to illustrate this did, however, appear to be fairly well-detailed summaries.

#### IV. SAN SALVADOR INTERVIEWS

The interviews conducted in San Salvador revealed almost all of the concerns expressed by those spoken with in Washington. Those concerns, however, were stated in more detail, and frequently expressed with reference to particular key players involved.

The Embassy and AID have their own separate objectives, which are not necessarily divergent, but which may result in different responses to developing problems. Overly simplified, it may be said that the Embassy is concerned with immediate, sometimes short-term actions to deal with specific problems, while AID is concerned more with long-range plans and the overall effectiveness of the programs it sponsors.

At the present time the Embassy's overriding interest is to press for an early resolution of the Jesuit case resulting in the conviction and punishment of those responsible. While it is certainly just as concerned about this case and other similar cases, AID takes a broader, longer range view of the whole situation and endeavors to find solutions which will result in a complete revision of the judicial system so as to make the reoccurrence of such tragedies unlikely.

## A. SPECIFIC CONCERNS OF THOSE INTERVIEWED (EL SALVADOR)

As stated above, most of the same concerns expressed by Washington were expressed by those interviewed in San Salvador, and will not be reiterated here except where difference of emphasis may exist, or where amplification is necessary.

### 1. Codefendant Testimony

This problem is viewed by personnel on the scene as being somewhat more complicated than it may appear to those interviewed in Washington. The statement of a coimputado, or accomplice may, it appears, be taken into account by the judge who conducts the preliminary investigation for some purposes, but not for others. The present law does not permit the use of a codefendant as a formal sworn witness, whose testimony would be given a great deal more weight than that accorded to an unsworn declaration. The unsworn declaration may, however, give rise to an indicio or to a presuncion. These terms are translated as "presumption", but do not seem to have the same weight accorded to a presumption in the common law system. These observations are not intended to represent a completely accurate statement of the law, but only as an indication that the question involves something more than may appear at first glance. A detailed report on the status of codefendant testimony in Latin America is being drafted by an expert on the subject.

CORELESAL has itself made a study of the question of admissibility of codefendant testimony in other Latin American jurisdictions, but some doubt has been expressed as to the complete accuracy of the study.

It is conceded by those interviewed that nothing CORELESAL or the Assembly could do at this point would be likely to be of help in bringing the Jesuit murderers to justice, since new legislation would not be retroactive where substantive matters are involved.

One observation regarding codefendant testimony was that the prohibition is not totally "off the wall", since there are some recognized good reasons for excluding such testimony, even if the more progressive view of some other countries is to make it admissible.

### 2. Politicization of the Supreme Court

This problem is viewed by El Salvador interviewees as a very serious one. The Supreme Court has been characterized as "an incredibly political

organization", and fears are expressed that it will seriously undermine the usefulness of CORELESAL. The Supreme Court has managed to procure changes in the CORELESAL draft for the National Council for the Judiciary law, so as to leave complete control over the appointment of judges just where it has heretofore been -- in the hands of the Supreme Court. With the Supreme Court controlling not only the appointment of judges, but the support personnel of the courts, and with the Supreme Court having extremely close ties with the ARENA party, little hope exists for fair and corruption free courts.

### 3. Necessity of Complete Revision of the System

All agree that the whole criminal law and procedural system must be revised from top to bottom before any real progress can be made toward the establishment of a judicial system in which the people may have confidence. A substantial number of changes were drafted by CORELESAL and passed by the Assembly, but then rejected by the President for reasons not entirely clear. The legislation was sent back for further study and revision. CORELESAL has now embarked upon a project to study and draft a completely new, modern criminal code. This project is in its infancy, and while hope exists that a major reform is in the offing, there does not appear to be a great deal of confidence that this will actually occur.

### 4. General Effectiveness of CORELESAL

The question of the effectiveness of CORELESAL is the subject of a separate report. The comments made here reflect only the general impression created by CORELESAL as given by those interviewed.

CORELESAL is seen by most of those spoken with as a very good idea which has not fully lived up to expectations, nor reached its attainable potential. It is generally regarded as a responsible body with credentials (at least up to the present time) of non-partisanship, which, however, needs a more dynamic leadership than that provided by the present Executive Secretary.

Some of those interviewed comment that CORELESAL is overpaid; that in the first year or so the members and the staff came to work late, left early and produced little; and that the members are now a congenial group who are used to each other and rarely express opposing viewpoints or discuss matters in depth.

Those persons dealing directly with CORELESAL have difficulty in determining exactly what it is doing at any given time, because of the lack of regular informative reports. Generally, the only information comes in the form of annual action plans and quarterly reports. The latter are useless as a means of keeping current with the work of CORELESAL because they are, for the most part, uninformative accounting documents. Personal attendance of AID personnel at meetings of the commission appears to arouse resentment on the part of some or all of the members.

It is said that CORELESAL solicits very little input from persons or entities interested in, or who would be affected by, the proposed legislation it produces, at least until after final drafts have been prepared. Meetings held after final draft production are of little value because by then there is no real chance of effecting changes.

A further criticism of CORELESAL concerns its failure to aggressively push for passage of the draft bills it produces. The commission has been characterized as aloof and uninterested in the fate or future of its efforts once they have been produced.

Despite the foregoing criticisms, no one interviewed seemed to regard CORELESAL as a corrupt or biased group. It is recognized that their job is a difficult one in view of the political polarization of the country. The criticism seems principally to center upon a perceived ineptness, and not upon any ethical or moral deficiencies.

#### V. CONCLUSIONS

From the information and opinions elicited as above set forth, it may be concluded that, in general, Washington believes that CORELESAL should be assigning top priority to the study of specific deficiencies in the criminal law of El Salvador, which deficiencies have been made painfully apparent by the Jesuit case and others of similar high-profile. The question of codefendant testimony is, of course, of very deep concern.

The feeling seems to be that some very visible revisions need to be made to, among other things, dramatize the fact that the United States and the government of El Salvador do not condone senseless political murders by members of any group, including the military, and that strong steps are being taken to prevent any similar future incidents.

At the same time, Washington feels that a sweeping revision of the whole criminal code and judicial system is necessary, and that CORELESAL should focus its efforts on such a revision, leaving for later consideration other matters which Washington views as less pressing, such as the legislation dealing with minors, adoption and family matters.

The viewpoint of the Embassy parallels that of Washington.

AID/EL SALVADOR recognizes the seriousness of the immediate concerns expressed by Washington, but views them more as parts of the larger, longer range efforts to transform the whole judicial climate of the country.

#### VI. RECOMMENDATIONS

The purpose of this report is to inform rather than to suggest solutions for the problems enunciated by the persons interviewed. A report dealing in detail with the work of CORELESAL is in process of preparation. The apparent problems are not merely matters of procedures and priorities existing in vacuo; they are bound up with the political turmoil and subject to influences best assessed by those on the scene and intimately acquainted with the key players involved. Certain observations may be made, however, which may result in some alleviation of the more apparent problems.

One of the major problems noted is the lack of an adequate information flow between CORELESAL and ODI/AID. It is realized that this is a rather delicate problem, since the independence of CORELESAL must be made generally apparent in order for it to be effective as a Salvadoran institution, and not merely another agency of the United States. On the other hand, the United States is obviously not interested in supplying substantial amounts of financing to an organization which may pay little attention to the needs of the country as perceived by the United States. At present, virtually nothing is known about what CORELESAL is actually doing on a day-to-day basis, or what direction its efforts are taking, until it produces the final draft of proposed legislation.

A second problem is the lack of aggressive leadership of CORELESAL.

A third problem is the failure of CORELESAL to seek input and advice from interested parties prior to final draft presentations.

A fourth problem is the failure of CORELESAL to push for passage of draft legislation once it is produced.

Recommendations for alleviation of these problems are as follows:

1. CORELESAL should be required to keep complete, informative and accurate minutes of each of its meetings, including accounts of questions discussed and decisions made, and to furnish copies of these minutes to ODI/AID on a weekly basis.
2. The present Executive Secretary is said to be likely to depart CORELESAL in the near future. If this should occur, ODI/AID should make every effort to procure appointment of an aggressive, dynamic and yet non-political (or acceptably political) leader to take his place. Spadework for this eventuality should commence immediately. The appointment of one of the present supreme court members of the Commission would be a very serious blow to its independence.
3. CORELESAL should be strongly urged, or required, if this is possible, to hold open meetings, advertised in advance, for discussion of proposed legislation prior to commencement of the drafting thereof.
4. CORELESAL should be urged to aggressively push for passage of its legislation by seeking publicity, appearing at Assembly hearings, procuring influential legislators or organizations to sponsor legislation and in general to show a continuing and active interest in their draft bills until they are finally adopted by the Assembly.
5. Interchange of ideas between the Embassy and ODI/AID should be continued and perhaps expanded through the present liaison committee.

It is realized that the above recommendations may appear to be somewhat benign and that they do not address the question of how to achieve the immediate specific changes deemed vital by Washington. These acute problems are, however, being considered by the agencies involved as largely political problems. Recommendations as to political or diplomatic efforts to secure the results desired are matters obviously beyond the scope of this report.

**ANNEX 1**

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**PERSONS INTERVIEWED**

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**PERSONS INTERVIEWED**

**WASHINGTON**

**James Michel, Assistant Administrator, AID/LAC**  
**Michael Kozak, Prin. Deputy Asst. Secretary of State,**  
**Inter-American Affairs**  
**William Walker, Ambassador to El Salvador**  
**Peter Romero, Director, State Department**  
**William Schoux, Director, LAC/DI**  
**Faye Armstrong, State Department**

**By telephone: Lorraine Simard, AID Desk Officer, El Salvador**

**EL SALVADOR**

**William Dieterich, Embassy, Deputy Chief of Mission**  
**Henry H. Bassford, Director, AID/El Salvador**  
**John Lovaas, Deputy Director, AID/El Salvador**  
**Gail Lecce, Director, ODI/AID**  
**Philip Chicola, Embassy Staff**  
**Stuart Jones, Embassy Staff**  
**Carlos Mejia, Embassy Staff**

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