Fordham International Law Journal

Volume 24, *Issue* 3 2000 *Article* 1

Presumed Guilty?: Criminal Justice and Human Rights in Mexico

Luke McGrath*

*

Presumed Guilty?: Criminal Justice and Human Rights in Mexico

Luke McGrath

Abstract

This Report is divided into five parts, which track the main issues that the mission examined. Part I examines the arbitrary arrest and detention practices that are widespread in Mexico. Part II explores the conditions and standards that lead to the taking of coerced confessions, as well as the ready use of such confessions at trial. In Part III, this Report turns to issues relating to legal representation in Mexico, especially the denial of access to counsel at critical points of the criminal process. The intimidation of defense attorneys, persons of confidence, and human rights advocates furnishes the subject of Part IV. Finally, Part V analyzes the role and performance of the Mexican judiciary, which represents a failed opportunity to redress many of the problems that the Report elsewhere recounts. Aside from detailing the mission's evidence, each section of the report discusses applicable international and domestic standards, and concludes with findings and recommendations.

SPECIAL REPORT

PRESUMED GUILTY?: CRIMINAL JUSTICE AND HUMAN RIGHTS IN MEXICO

*Report of the Joseph R. Crowley Program in International Human Rights/Centro de Derechos Humanos Miguel Agustín Pro Juárez ("PRODH"): Joint 2000 Mission in Mexico**

INTRODUCTION

On June 2, 1990, Manuel Manríquez San Agustín ("Manuel Manríquez"), a mariachi musician, was performing in a town square in Mexico City. Several men approached him, seeking the musical services of the mariachi band. Once the members of the band boarded the truck in which they traveled together, they were blindfolded and taken to the offices of the Public Ministry. The men who had approached them were agents of the Mexico City judicial police. At the Public Ministry, members of the judicial police detained Manuel Manríquez without an arrest war-

* The Joseph R. Crowley Program ("Program" or "Crowley Program") at Fordham University School of Law and The Miguel Agustín Pro Juárez Human Rights Center ("PRODH") wish to thank everyone who met with our delegation and who provided advice and assistance throughout the project. The members of the Crowley Program as well as the other U.S. based participants are especially indebted to our colleagues at the PRODH, and many others without whom we could not have undertaken this mission. In particular, we would like to thank Edgar Cortéz, Digna Ochoa, Mario Patron Sanchez, Michel Maza, and Laurie Freeman from the PRODH, attorneys Pilar Noriega, Bárbara Zamora, and Israel Ochoa, professors Miguel Sarre and Santiago Corcuera, and law student and legal representative Ana Lorena Delgadillo. Their invaluable assistance, their courageous dedication to justice, and their tireless efforts to promote the rule of law will remain a constant source of inspiration to all of us who participated in the mission. In addition, the Crowley Program and the PRODH would like to record our debt to the Lawyers Committee for Human Rights, and in particular to Denise Gilman, for invaluable support and advice before, during, and after the mission. The Crowley Program and the PRODH would also like to thank Alejandra Núñez, who, at the time, was a law student at the Autonomous Technical Institute of Mexico and Anilú Vázquez, a student at Fordham Law School, for their assistance with translation. Finally, the Co-Directors of the Crowley Program and the PRODH wish to single out the work of Peggy Healy, without whose extraordinary energy and dedication no mission would have been possible.

rant[1] and tortured him in order to force him to confess to a recent murder.[2] They beat him on several parts of his body, burned his testicles, and put gas and chili peppers up his nose.[3]

Seven days later, when Manuel Manríquez was brought before a judge, he revoked his confession, stating that he had been tortured and, as a result, signed a false confession. The coerced confession was the only piece of evidence linking him to the murder.[4] Nevertheless, Manuel Manríquez was convicted of homicide and sentenced to twenty-seven years in prison.[5] An appellate court affirmed that decision[6] and subsequent motions to overturn his conviction were rejected.[7]

After serving nine years, Manuel Manríquez was finally

---

1. *See* Inter-Am. C.H.R., *Report No. 2/99 Manuel Manríquez*, para. 40(a) (1999), *available at* http://www.cidh.org/annualrep/98eng/merits/Mexico%2011509.htm [hereinafter *IACHR Report on Manuel Manríquez*].

2. The confession states that a fight had ensued among several of Manuel Manríquez's friends and two brothers, when Manuel Manríquez arrived at the scene. One of the two brothers was already dead when he arrived and Manuel Manríquez killed the other one. The confession further states that Manuel Manríquez hired a driver with a pick-up truck to drive him and his accomplices to an area where they could dispose of the bodies, which they had placed in cardboard boxes. Manuel Manríquez then helped to load the bodies into the truck and to dump them in a remote area.

3. *See IACHR Report on Manuel Manríquez, supra* note 1, para. 3. The act of torture was confirmed after a doctor examined Manuel Manríquez in prison shortly after his detention. *See* Dirección General de Servicio de Salud de la Ciudad de México [Medical Certificate issued by the General Division of Health Services for Mexico City], June 8, 1990, *cited in id.* para. 49. The Mexican National Human Rights Commission ("CNDH") also found that Manuel Manríquez had been tortured. *See* Recommendation 35/94, CNDH GACETA, Mar. 17, 1994 (finding that "there is sufficient evidence to state that Manuel Manríquez, during the time he was detained, was subjected to torture by those who apprehended him"); *see also* Decision of the 12th District Court in Criminal Matters in Case 241/95, Nov. 21, 1996 (criminally convicting one of the agents of the judicial police who tortured Manuel Manríquez).

4. *See IACHR Report on Manuel Manríquez, supra* note 1, para. 66 (stating that "the [Inter-American] Commission considers that in effect the confession of Manuel Manríquez, obtained under torture, was the only part of the evidence that led the judges to determine that he was the direct perpetrator of the homicide of which he was accused").

5. Decision of the 36th Criminal Judge, June 9, 1990.

6. *See* Decision of the 11th Criminal Chamber of the Superior Court of Justice for Mexico City, Jan. 29, 1992 (relying on Manuel Manríquez's confession to find that the trial court had sufficient evidence for a conviction).

7. *See IACHR Report on Manuel Manríquez, supra* note 1, para. 4 (noting that motions to overturn his conviction were rejected by the First Collegial Court on Criminal Matters for Mexico City on October 15, 1992; the Ninth Chamber of the Superior Court of Justice for Mexico City on August 31, 1994; and the First District Court for Criminal Matters on January 27, 1995).

granted a judicial remedy known as recognition of innocence[8] and released, which was prompted by the Inter-American Commission on Human Rights' ("Inter-American Commission's") findings that agents of the judicial police tortured him.[9] One of the judges on the appellate panel that granted Manuel Manríquez's release was, coincidentally, the same judge who had denied him an earlier appeal. When asked about his change of heart, the judge responded that although he personally still believed Manuel Manríquez was guilty, he reversed his decision for two reasons: an international human rights body had intervened in the case and, after nine years in prison, the judge believed that Manuel Manríquez had served enough time for his crime.[10]

The Manuel Manríquez case demonstrates that the Mexican criminal justice system is riddled with serious failings, but is susceptible to reform. The failings include the arbitrary arrest and detention of individuals by the judicial police, the use of torture to obtain false confessions, and the evidentiary weight given to these confessions by judges, despite detainees' statements that they were obtained through coercion. The judge we interviewed, who was one of the judges on the panel that granted Manuel Manríquez's release, for example, was not convinced of his innocence or of the compelling evidence of the torture he suffered. The judge also failed to recognize the need not to base convictions on confessions obtained through torture. Yet the case also demonstrates that justice can be achieved in the Mexican criminal justice system. Although Manuel Manríquez served nine years in prison for a crime that he did not commit, he was eventually released through the recognition of innocence remedy, impelled by the Inter-American Commission's findings of torture. Indeed, at least according to some officials we interviewed, subsequent reforms to the criminal justice system have

8. This remedy may only be sought in very limited circumstances, when new incontrovertible evidence is found that invalidates the evidence which served as the basis for the conviction. *See* C.F.P.P. [Federal Code of Criminal Procedure], art. 49, 96 [hereinafter FCCP]; C.P.P.D.F. [Mexico City Code of Criminal Procedure], art. 49, 96 [hereinafter MCCCP]; C.P.D.F. [Federal Criminal Code], art. 560; C.P.D.F. [Mexico City Criminal Code], art. 614.

9. *IACHR Report on Manuel Manríquez*, *supra* note 1, para. 40 (finding that "it has been shown irrefutably that Manuel Manríquez was tortured by agents of the Mexican State").

10. *See* Interview with Name Withheld, Mexico City Supreme Court Judge, Superior Tribunal of Justice, in Mexico City, Mex. (May 25, 2000).

helped prevent this kind of a case from recurring.[11]

Abuse by police and prosecutorial agents can be remedied by a judicial system willing to act independently to ensure justice and to undertake reform. Nonetheless, too few necessary reforms have been implemented and too few judges apply existing reforms with sufficient independence. Nor do other officials, such as prosecutors, show adequate concern for the protection of fundamental freedoms. The Manuel Manríquez case, in sum, illustrates that Mexico has a long road to travel before its criminal justice system becomes rooted in human rights principles. Until effective reforms are undertaken and take hold in Mexico, international human rights law and intergovernmental human rights bodies will be crucial in safeguarding fundamental freedoms.

This Report contains the findings of a mission to Mexico examining the Mexican criminal justice system by the Joseph R. Crowley Program in International Human Rights at Fordham Law School ("Program" or "Crowley Program").[12] The mission was undertaken in partnership with the Centro de Derechos Humanos Miguel Agustín Pro Juárez[13] ("PRODH"), a leading

11. *See, e.g.*, Interview with Enrique Sánchez Sandoval, José Lepe Carrera, and Javier Raúl Anaya, Mexico City Supreme Court Judges, Superior Tribunal of Justice, in Mexico City, Mex. (June 1, 2000).

12. The Crowley Programs promotes teaching, scholarship, and advocacy in international human rights law. Principal elements of the Program include an annual fact-finding mission to an area of the world with significant human rights concerns; a student outreach project involving students in course work, research, and human rights internships, both domestically and abroad; and a speaker series, bringing many of the world's foremost experts in the field onto campus, stimulating dialogue and promoting scholarship. The Crowley Program approaches its work in these areas in light of the School's commitment to public service, its widely recognized strength in the field of international law, and its close proximity to the world's leading centers for human rights advocacy. For more information, visit the Crowley Program website at http://law.fordham.edu/crowley.htm.

13. PRODH was founded in 1988 by the religious order of the Jesuits in Mexico. PRODH is a non-governmental organization that seeks to promote a culture of respect for human rights and to defend persons or groups whose human rights have been violated. Based in Mexico City and with legal offices in the Mexican states of Chiapas, Guerrero, and Oaxaca, PRODH works with local, national, and international organizations to consolidate human rights protection in Mexico, particularly for those who suffer injustice, poverty, and marginalization. PRODH's seven basic areas of work are: research and analysis, legal defense, education and training, investigation and documentation of abuse, international advocacy, psychological attention to victims of torture, and defense of persons with HIV/AIDS. For more information, visit the PRODH website at http://www.sjsocial.org/PRODH.

non-governmental organization ("NGO") based in Mexico City that is known for its work in the defense of human rights in Mexico. The mission was comprised of: Tracy Higgins and Martin Flaherty, Fordham Law professors and Co-Directors of the Crowley Program; Peggy Healy, Crowley Program Special Projects Director; Luke McGrath, 1999/2000 Crowley Fellow; Robert Varenik, an expert in Latin American legal systems on the staff of the Lawyers Committee for Human Rights ("Lawyers Committee"); and Scott Greathead, a lawyer who has traveled widely in Latin America for the Lawyers Committee Human Rights Watch, and other organizations. The mission also consisted of six Fordham Law students who had spent the prior year studying human rights law and the Mexican criminal justice system: Susan Chung, Matt McGough, Molly Murphy, Elizabeth Quinlan, Irum Taqi, and Philip Yook. In addition, Lauris Wren, an attorney in New York, and Shauna Morden, a student at the School of International and Public Affairs at Columbia University, participated.

The delegation visited Mexico from May 28 to June 8, 2000, during which it conducted extensive interviews of government prosecutors and police officials, judges, defense lawyers, and human rights advocates.[14] The delegation carried out its work in courts, offices, and prison facilities in and around Mexico City, Oaxaca, Veracruz, and Guerrero. In each of these places, members of the mission team were able to observe judicial proceedings and to interview a number of individuals who have been charged and convicted of serious crimes.

Based on applicable human rights standards, as well as rights set out in Mexico's own domestic law, the mission identified five important areas relating to criminal practice and procedure: (1) arrest and detention, (2) the taking and evidentiary use of confessions, (3) legal defense and access to counsel, (4) the protection of defense lawyers and human rights advocates, and (5) the role of the judiciary. The investigation devoted particular attention to: inconsistencies between the law as written and the actual practices of police and prosecutors in the treatment of suspects; judicial independence; and reports of intimidation of defense attorneys and human rights advocates.

As this Report documents, substantial evidence points to a

14. During the week before the delegation's arrival, Peggy Healy conducted several preliminary interviews.

pervasive failure of the rule of law in Mexico in the investigation and prosecution of criminal cases, including: the arbitrary detention of suspects, the systematic use of torture and other coercive measures by police authorities to obtain confessions, the failure to provide or permit access to competent defense counsel, the routine use of coerced confessions to obtain convictions, and the virtual absence of any judicial authority willing to examine, let alone remedy, these abuses.

In many cases, the victims of these abuses have been charged with, and convicted of, serious crimes, including murder, based on virtually no evidence other than confessions that were coerced by torture or otherwise obtained illegally. Not surprisingly, many of the victims of these abuses are poor, and are unable to pay for competent legal counsel, or have been targeted by local authorities who are able to use the justice system, particularly in rural areas, to oppress their political or personal adversaries. But the victims of the breakdown in the rule of law also include wealthy or otherwise influential members of society, whose treatment reflects a criminal justice system more committed to "solving" crimes than doing justice.

Each of these problems is not only a serious source of concerns, but also implicates international human rights law. Several matters that the delegation explored are especially troubling. One is the demonstrable lack of judicial independence evident in the large number of the cases that we examined that involve serious police and prosecutorial abuses. Mexico's justice system differs markedly from the adversarial system of criminal justice the United States adopted from the British, and from the accusatorial system prevalent in much of Latin America and continental Europe. As Part V of this Report recounts, Mexico's justice system has historically evolved into a hybrid that some experts say embodies the worst elements of the inquisitorial and accusatorial systems, with the result that prosecutorial powers are virtually unchecked by an independent judiciary. Judges are almost an afterthought, and play a role one legal scholar told us was little more than "the parentheses" of a system dominated by the prosecution.[15] The result is a system where judges are rarely

15. *See* Interview with Renato Sales Heredia ("Renato Sales"), Chief Advisor, Mexico City Attorney General's Office, in Mexico City, Mex. (May 29, 2000); *infra* note 362 and accompanying text.

present for what passes as a trial in Mexico. It is not at all unusual for a judge to dismiss a well-founded claim of torture with the observation that, if a beating by police did not produce visible lesions, "the law is very clear that there is no torture."[16]

A further concern is equally fatal to a properly functioning justice system—the lack of access to effective defense counsel. The Mexican Constitution entitles every person "from the beginning of the [criminal] process" to "an adequate defense" by an attorney or other representative, or by "a public defender" if an accused cannot name a representative.[17] As Part III of this Report details, for the 80% of those charged with crimes in Mexico who are too poor to hire defense counsel, this is a right honored mainly in the breach.[18] Public defenders, where they are available, lack the resources, training, and often the interest to provide any service that could even remotely be described as an adequate defense. Even for those who can afford counsel, they are routinely and systematically denied meaningful access to their lawyers during the initial—and most crucial—phase of the criminal process, when the declaration of the accused is made before the Public Ministry.

These failures are exacerbated by the treatment of defense counsel who are perceived by some to be too effective in carrying out their duties to their clients. The most shocking example is the case of our colleague, Digna Ochoa, the Director of PRODH's legal division, and one of the most capable and respected defense attorneys in Mexico. As described below,[19] on the night of October 29, 1999, Ms. Ochoa was attacked in her Mexico City home, bound and blindfolded, and subjected to nine hours of terrifying interrogation on PRODH's activities.

Ms. Ochoa's attackers have never been identified or apprehended. This Report documents several other assaults on, and threats directed at, Ms. Ochoa, other PRODH staff members, and other defense lawyers and human rights advocates. The number and frequency of these unsolved attacks is too great to suggest that they represent anything other than a systematic effort to intimidate lawyers and others engaged in criminal de-

16. Interview with Gonzalo Jesús de Morales Avila, Judge, First District Court, in Oaxaca, Mex. (June 2, 2000).

17. MEX. CONST. art. 20 § 4.

18. *See infra* notes 232-33 and accompanying text.

19. *See infra* notes 313-16 and accompanying text.

fense work. The failure of Mexican law enforcement authorities to adequately respond to these incidents is inexcusable. No reform in the Mexican justice system will be adequate to restore the rule of law until the perpetrators of these attacks are themselves brought to justice.

Although this Report deals primarily with problems in the justice system, it also documents the dedicated and often heroic efforts of many Mexicans in and out of government to address and correct these problems, and the great strides that have been made in recent years in improving the system. We were particularly impressed with, and appreciate, the willingness of the many judges, prosecutors, police officials, and other government officials to discuss these issues.

Mexico boasts a number of outstanding institutions dedicated to safeguarding the rights of detainees and criminal defendants that have proven to be stalwart and invaluable advocates of the rule of law. This group includes many exceptional NGOs, attorneys, community activists, and academics, as well as certain government officials. Since our visit to Mexico, a new Federal administration has been installed under the leadership of President Vicente Fox, who has been an outspoken proponent of reforms in the Mexican justice system. Both the Crowley Program and the PRODH hope that this Report and the recommendations it contains will be useful in that effort.

This Report is divided into five parts, which track the main issues that the mission examined. Part I examines the arbitrary arrest and detention practices that are widespread in Mexico. Part II explores the conditions and standards that lead to the taking of coerced confessions, as well as the ready use of such confessions at trial. In Part III, this Report turns to issues relating to legal representation in Mexico, especially the denial of access to counsel at critical points of the criminal process. The intimidation of defense attorneys, persons of confidence, and human rights advocates furnishes the subject of Part IV. Finally, Part V analyzes the role and performance of the Mexican judiciary, which represents a failed opportunity to redress many of the problems that the Report elsewhere recounts. Aside from detailing the mission's evidence, each section of the report discusses applicable international and domestic standards, and concludes with findings and recommendations.

I. *ARREST AND DETENTION*

A. *Introduction*

Arbitrary detention is widespread in Mexico.[20] Indeed, the Inter-American Commission identified it as "one of the most serious problems that occur in Mexico."[21] Illegal detention itself is a violation of international human rights norms;[22] however, it is made more problematic by the fact that it often leads to other types of human rights abuses, including torture.[23] This section first describes international standards prohibiting arbitrary arrests and detention that are binding on Mexico. It then describes Mexican law governing the requirement of a judicial warrant for arrest and the exceptions to that requirement. Finally, the section describes and documents patterns and practices that violate international law and police, prosecutorial, and judicial procedures that contribute to those violations.

B. *Mexico's Human Rights Obligations*

1. International Human Rights Norms

Several international human rights instruments bear on the problem of arbitrary arrest and detention, including the American Convention on Human Rights ("American Convention") and the International Covenant on Civil and Political Rights

20. *See, e.g.*, HUMAN RIGHTS WATCH, SYSTEMIC INJUSTICE: TORTURE, DISAPPEARANCE, AND EXTRAJUDICIAL EXECUTION IN MEXICO 1 (1999) [hereinafter HUMAN RIGHTS WATCH, SYSTEMIC INJUSTICE].

21. Inter-Am. C.H.R., *Report on the Situation of Human Rights in Mexico*, OEA/Ser.L/V/II. 100 Doc. 7 Rev. 1, para. 219 (1998), *available at* http://www.iachr.org/annualrep/99eng/Chapter3a.htm [hereinafter *IACHR Report*]. Most common in Tabasco, Guerrero, Chiapas, Oaxaca, and Mexico City, arbitrary detention is most often attributed to the office of the state's Attorney General, the state police, and the army. *See* U.S. Dep't of State, *Country Reports on Human Rights Practices for 1999: Mexico*, at 840 (2000) [hereinafter *U.S. State Dep't Report*].

22. *See, e.g.*, American Convention on Human Rights, *opened for signature* Nov. 22, 1969, art. 7(3), O.A.S.T.S. No. 36 (1969), 9 I.L.M. 673 (entered into force July 18, 1978) [hereinafter American Convention] (stating that "[n]o one shall be subject to arbitrary arrest or imprisonment").

23. A 1996 report of the CNDH found that more than 30% of 505 cases studied involved arbitrary detention, which often led to physical mistreatment or prolonged detention. *See* Nat'l Human Rights Comm'n, *Procuración de Justicia y Derechos Humanos* 20, 40 (1996) [hereinafter *1996 CNDH Report*]. In its fourth periodic report to the Human Rights Committee, Mexico cites lower figures: 6.2% and 8.5% (138 of 1605 cases) for May 1996 and June 1996, respectively. *See* MEXICO STATE REPORT TO U.N. HUMAN RIGHTS COMM., CCPR/C/123/Add.1 (1997).

("ICCPR"),[24] both of which have been ratified by Mexico[25] and are binding in Mexican courts.[26] Article 7(1) of the American Convention guarantees the liberty and security of the individual.[27] Article 7(3) states that "[n]o one shall be subject to arbitrary arrest or imprisonment."[28] Article 7(4) and 7(5) provide that an individual, if detained, must be informed of the reasons for the detention, notified of the charge, and promptly brought before a judge or other official authorized to exercise judicial power over the detainee.[29] Article 7(6) guarantees recourse to a court for those detained so that the detention may be reviewed for lawfulness and the detainee released if the detention is determined to have been unlawful.[30] Finally, Article 22 guarantees an individual freedom of movement.[31] Similarly, Article 9 of the ICCPR prohibits arbitrary arrest and detention, guarantees an individual's right to be informed of the reasons for the arrest and of the charge, and guarantees an individual's right to brought promptly before a judge.[32] Article 9(5) also provides for compensation for unlawful arrest or detention.[33]

2. Domestic Law

Article 16 of the Mexican Constitution provides that, as a general rule, an arrest may only be executed pursuant to a warrant issued by a judge.[34] In order for the judge to issue an arrest

---

24. International Covenant on Civil & Political Rights, *opened for signature* Nov. 22, 1969, 999 U.N.T.S. 171, 6 I.L.M. 368 [hereinafter ICCPR].

25. Mexico ratified the American Convention on March 24, 1981, and the ICCPR on March 23, 1981. Mexico officially accepted the jurisdiction of the Inter-American Court of Human Rights in December 1998.

26. The Mexican Constitution gives ratified treaties the status of domestic law. *See* MEX. CONST. art. 133 (providing that "all treaties made, . . . shall be the Supreme Law throughout the Union"). "The judges of every state shall be bound to the said . . . treaties, notwithstanding any contradictory provisions that may appear in the constitution or laws of the States." *Id.*

27. *See* American Convention art. 7(1) (stating that "[e]very person has the right to personal liberty and security").

28. *Id.* art. 7(3).

29. *Id.* arts. 7(4), 7(5).

30. *Id.* art. 7(6).

31. *Id.* art. 22 (providing in part, that "[e]very person lawfully in the territory of a State Party has the right to move about in it").

32. ICCPR art. 9.

33. *Id.*

34. *See* MEX. CONST. art. 16 (stating that "[n]o one shall be inconvenienced in their person, family, home, papers or possessions, except by virtue of a written order of the competent authority, that justifies and motivates the legal cause of the procedure").

warrant, the prosecutor seeking a warrant must show that physical evidence of the crimes exists as well as evidence linking the suspect to the commission of the crime.[35] Article 16 further requires that, once the suspect has been arrested pursuant to a warrant, he must be brought before a judge "without delay."[36]

In theory, the judicial warrant requirement helps to prevent arbitrary arrest and detention by ensuring the participation of a decision-maker in the arrest determination who is more neutral than the police or prosecutor who are responsible for identifying and detaining criminals. Judicial participation not only guarantees that sufficient grounds exist for arrest but also helps to protect the security of the detainee while in the custody of the police by providing the opportunity of judicial oversight of custody. Nevertheless, despite the important function of the judicial warrant in safeguarding the human rights of detainees, recent constitutional and statutory reforms in Mexico have limited the force of the warrant requirement by expanding the scope of its exceptions.

In 1993, reforms to the Mexican Constitution significantly expanded the scope of the so-called urgent cases[37] exception to the warrant requirement. Article 16 now expressly allows the Public Ministry to order arrests in urgent cases and defines such cases as any situation involving a serious crime when there is a risk that the suspect may evade justice and the Public Ministry cannot go to the judicial authority for reasons relating to time, place, or circumstance.[38] Prior to 1993, this exception allowed warrantless arrests only in cases involving a serious crime, the risk that the suspect would evade authorities, and where there was no judicial authority available in the area.[39] By expressly authorizing warrantless arrest when the Public Ministry cannot obtain a warrant for reasons of time, place, or circumstance, the amendment to Article 16 expands both the circumstances under

35. *Id.* Specifically, Article 16 requires evidence that the accused is probably responsible for the crime. *Id.*

36. *Id.* Article 16 further provides that failure to present the accused immediately to judicial authority "will be punished by penal law." *Id.*

37. *Id.*

38. *Id.*

39. *See* Lawyers Committee for Human Rights, Elements of Criminal Procedure and Practice in Mexico 7 n.28 (1999) (unpublished manuscript, on file with the *Fordham International Law Journal*) [hereinafter Lawyers Comm. for Human Rights, Elements of Criminal Procedure].

which warrantless arrest is permitted and the discretion of the Public Ministry to determine whether those circumstances exist. Moreover, the Constitution does not define or limit the set of crimes classified as serious.[40] Rather, this set of crimes—and therefore the scope of the urgent cases exception—is determined by the codes of criminal procedure of each jurisdiction and has generally been expanding in recent years to encompass a broader range of offenses.[41]

Article 16 also provides that any person may detain an individual without a warrant if the individual is apprehended *en flagrante*.[42] This exception to the warrant requirement has existed in the Mexican Constitution since 1917 and is common in many Latin American countries.[43] In recent years, however, the exception has been expanded by statute well beyond its original limited scope, which permitted the apprehension of a suspect in the act of committing a crime.[44] For example, Article 193 of the Federal Code of Criminal Procedure ("FCCP") provides that an *en flagrante* arrest occurs: (1) When the suspect is apprehended in the act of committing a crime, (2) when the suspect is apprehended immediately after committing the crime and is physically followed away from the scene of the crime, or (3) in cases of serious crimes, during a forty-eight hour period after the crime was committed, when the victim, a witness, or a co-participant in the crime identifies the suspect or the suspect is found with the instruments or product of the crime in his possession or when there exist other indicia leading to a reasonable presumption that he had participated in the crime.[45] Article 267 of the Mexico City Code of Criminal Procedure ("MCCCP") provides a parallel definition for arrest *en flagrante* but extends the window

40. *See* MEX. CONST. art 16 (describing the set as crimes qualified as major).

41. *See* Decree Reforming and Adding Various Dispositions to the MCCCP and to the Organic Law for the Superior Court of Justice for Mexico City, art. 268, *cited in* Lawyers Comm. for Human Rights, Elements of Criminal Procedure, *supra* note 39, at 7 n.29 (changing the method for determining which crimes would be defined as serious and expanding that category).

42. MEX. CONST. art. 16. The person must then be turned over to the judicial police and then to the Public Ministry. *Id.* In practice, however, the person detaining the suspect is usually an agent of the judicial police or Public Ministry. *Id.*

43. *See* Lawyers Comm. for Human Rights, Elements of Criminal Procedure, *supra* note 39, at 8.

44. *Id.*

45. *See* FCCP art. 193.

for warrantless arrest to seventy-two hours.[46]

This recent expansion of the exceptions to the warrant requirement also has implications for the conditions of custody of the detainees. In cases involving a judicial warrant, the detainee must be presented immediately to the judge.[47] In cases falling within either the *en flagrante* or urgent cases exceptions to the warrant requirement, however, the detainee is turned over to the Public Ministry rather than to the judge.[48] The Public Ministry is then authorized to hold the detainee in its own installations for a period of forty-eight hours in most cases and up to ninety-six hours in certain cases before presenting the detainee to a judge.[49]

C. *Problems*

1. Breadth of Exceptions

The general requirement of a warrant, coupled with these very broad exceptions, provides a basis for Mexican officials interviewed by the delegation to claim that arbitrary detention is rare (or even nonexistent) in Mexico.[50] It is rare, they argue, because either a warrant is obtained or the case falls within one of the two exceptions to the requirement.[51] Although such arrests may technically be legal under Mexican law, the breadth of the exceptions undermines the protective value of the warrant requirement to such a degree that many of these legal arrests must be regarded as arbitrary and, therefore, in violation of international human rights norms. This is true for several reasons.

The first and most basic reason is that the breadth of the exceptions removes large numbers of cases from the protection

---

46. *See* MCCCP art 267.

47. MEX. CONST. art. 16.

48. *Id.*

49. *Id.* Specifically, the Constitution provides that "[n]o accused shall be retained by the Public Ministry for more than forty-eight hours . . . ; this period may be doubled in those cases that the laws prescribes as organized delinquency." *Id.*

50. *See, e.g.*, Interview with Francisco Javier Ruiz Jiménez, First Visitor, Mexico City Human Rights Commission, in Mexico City, Mex. (June 5, 2000) (stating that in "a significant number of cases [involving arbitrary arrest] we find that the detention was not arbitrary"). "We find that the suspect was detained *en flagrancia*." *Id.*

51. *See, e.g.*, Interview with Moisés Jiménez, federal prosecutor, in Guerrero, Mex. (June 5, 2000) (stating that "[a]rbitrary detention does not exist"). "Whether or not a detention is arbitrary depends on your point of view. There are only three types of detentions in the law: *en flagrancia*, urgent cases, or with a warrant." *Id.*

of the warrant requirement without ensuring that other indicia of guilt are present. For example, the *en flagrancia* exception, if confined to cases in which the defendant is interrupted in the commission of a crime or followed from the scene of the crime, is a reasonable accommodation of the demands of effective policing. The very circumstances that make it impossible to obtain a warrant, apprehending the defendant in the act, also serve to ensure the legitimacy of the arrest. The expansion of the *en flagrancia* exception to include arrest up to forty-eight hours after the commission of the crime undermines both the justification for foregoing the warrant, the immediacy of the crime, and the indicia of reliability, apprehending the defendant in the act. As Professor Miguel Sarre observed, "With the *en flagrancia* exception, it is enough if anyone fingers the individual as having committed the crime within 48 hours."[52]

The urgent cases exception goes even further, allowing warrantless arrest in any case in which the crime was sufficiently serious and obtaining a warrant would be sufficiently inconvenient for the Public Ministry. This exception is in no way connected to any indicia of reliability or procedural safeguards to ensure the proper exercise of police powers. Rather, the exception is simply a matter of expediency, reflecting a policy determination to sacrifice the rights of the detainee in the interest of expanded police discretion in cases involving crimes deemed serious.

2. Exercise of Discretion by Police and the Public Ministry

The exceptions to the warrant requirement also encourage practices that violate international law by allowing the Public Ministry to exercise substantial discretion. For example, the urgent cases exception will apply when it is impossible to seek a warrant from a judge for one of several reasons: time, place, or other circumstance.[53] The Public Ministry, or more commonly the judicial police, must make the determination of what constitutes impossibility in the first instance. The language of the constitutional exception provides very little guidance on this point. Similarly, the expanded *en flagrancia* exception requires other indicia leading to the probable responsibility of the suspect's par-

52. Interview with Miguel Sarre, Professor of Law, Autonomous Technical Institute of Mexico, in Mexico City, Mex. (May 29, 2000).

53. MEX. CONST. art. 16.

ticipation in the crime;[54] however, what constitutes other indicia or probable responsibility is left unspecified in the law and is again determined, in the first instance, by the judicial police or public ministry. As noted earlier, in order to obtain an arrest warrant, the prosecutor must produce evidence that the suspect is probably responsible for the crime.[55] In contrast, the codes of criminal procedure do not specify the level of suspicion necessary to detain an individual under either the urgent cases exception or the expanded *en flagrancia* exception. Thus, if the case falls within one of these exceptions, the individual may be initially detained on very little evidence.

3. Examples of Abuse of Discretion

The delegation encountered a number of cases vividly illustrating the potential for abuse created by the exceptions to the warrant requirement.[56] For example, in February 1995, police in Yanga, Veracruz, detained a group of seven individuals accused of cooperating with the National Zapatista Liberation Army ("EZLN").[57] Although the police had no warrant for their arrest, the authorities argued that they detained the defendants pursuant to the *en flagrancia* exception to the warrant requirement.[58] Specifically, they stated that law enforcement agents

54. *See* FCCP art. 193; *see also* MCCCP art. 267.

55. MEX. CONST. art. 16.

56. Although many of our interviews with detainees awaiting trial confirm the continuing prevalence of abusive practices, we emphasize several older cases in this report because the allegations of abuse have been investigated and confirmed by the national or state human rights commissions.

57. The National Zapatista Liberation Army ("EZLN") is mainly composed of Mayan Indians living in the Chiapas region of Mexico. *See* Raidza Torres Wick, *Revisiting the Emerging International Norm on Indigenous Rights: Autonomy as an Option*, 25 YALE J. INT'L. L. 291 n.21 (1991). The EZLN's main goal is to guarantee cultural rights for indigenous people. *See* Margarita González de Pazos, *Mexico Since the Mayan Uprising: Government and Zapatista Strategies*, 10 ST. THOMAS L. REV. 159, 160 (1997). In 1993, the Mexican Constitution was amended to include language that guarantees these rights. *Id.* Despite the progress in protecting indigenous rights, in practice, violations of their cultural rights occur routinely and there are still sporadic armed encounters between paramilitary groups and indigenous peoples. *See, e.g.*, Pilar Franco, *Rights—Mexico: Indigenous People in Hiding from Army Harassment*, Inter Press Service, June 7, 1999, 1999 WL 5949042. The defendants were eventually transferred to Mexico City where they were held in the custody of the police and the Public Ministry and, according to the findings of the CNDH, tortured and forced to sign inculpatory statements. *See* Recommendation 50/95, CNDH GACETA, Mar. 5, 1995, at 84 [hereinafter CNDH Recommendation 50/95].

58. CNDH Recommendation 50/95, *supra* note 57, at 91.

originally entered the house to execute a four-year old arrest warrant.[59] According to police, once they were inside the house, they found weapons and other evidence of EZLN activity.[60] The 1991 arrest warrant that served as a pretext for entering the house, however, had been issued in connection with a homicide that was entirely unrelated to this case.[61] As a result, the Mexican National Human Rights Commission ("CNDH") concluded that the authorities had illegally entered the home and had intentionally used the earlier unrelated investigation and warrant so as to avoid the need to obtain a proper arrest warrant in this case.[62]

More recently, in a case that has attracted international attention, two environmental activists, Rodolfo Montiel and Teodoro Cabrera, were illegally detained by soldiers who claimed that the defendants had been found with drugs and weapons in their possession.[63] The two men were held for several days before being turned over to the Public Ministry.[64] During this period, they were tortured, forced to sign confessions, and photographed with illegal weapons.[65] As in the Yanga case, the evidence had been fabricated as a justification for the illegal detention.[66] Notwithstanding the CNDH recommendation, Montiel and Cabrera were convicted in August 2000, based largely on this questionable evidence and the confessions they signed and later retracted, alleging torture.[67]

4. Few Judicial Safeguards

A further problem with the warrant exceptions is that, in addition to allowing the initial arrest to take place without judi-

---

59. *See id.*

60. *See id.*

61. *See id.*

62. *See id.*

63. *See* CNDH Recommendation 8/2000, CNDH GACETA, July 14, 2000, at 15, 20 [hereinafter CNDH Recommendation 8/2000].

64. *See* PRODH, *Silencing Environmentalist Activists in Guerrero, Mexico: The Case of Rodolfo Montiel and Teodoro Cabrera* (Apr. 2000), *available at* http://www.sjsocial.org/PRODH/boletin/spbul.htm [hereinafter PRODH, Silencing Environmental Activists]; *see also* CNDH Recommendation 8/2000, *supra* note 63 (finding that defendants were held in the custody of soldiers for at least two and a half days).

65. *See* Press Release, PRODH, Judge Convicts Mexican Environmentalists Teodoro Cabrera and Rodolfo Montiel (Aug. 29, 2000).

66. *See id.*

67. *See id.*

cial oversight, the criminal procedure codes do not provide for immediate judicial review of the circumstances of arrest and detention. Perhaps most problematically, the warrant exceptions specifically allow for a period of unsupervised detention before the detainee must be presented to a judge.[68] In cases in which an arrest is executed pursuant to a judicial warrant, the Constitution requires that the detainee be brought immediately before a judge and transferred to judicially supervised custody.[69] Inexplicably, in cases of warrantless arrest, when immediate judicial oversight of custody seems even more critical, the Constitution and codes of criminal procedure allow a period ranging from forty-eight to ninety-six hours before the detainee must be brought before a judge.[70] Because there may be no official record of the arrest, the detainee is extremely vulnerable to abuse during this period.[71] Indeed, the defendants in the Yanga and Montiel cases, allege that they were tortured prior to being turned over to the Public Ministry, allegations that were confirmed by the CNDH.[72]

In addition to the opportunities for abuse created by the exceptions to the warrant requirement, Mexican law provides few disincentives to the police or Public Ministry for the liberal use and abuse of the exceptions. For example, despite the vulnerability of detainees to coercion following a warrantless arrest, no per se rule exists for the exclusion of a confession made to the Public Ministry during a detention that is later determined to have been illegal.[73] In other words, even if the judge decides

---

68. MEX. CONST. art. 16.

69. *See id.*

70. *See id.*; FCCP art. 193; MCCCP art. 267. Specifically, the Mexican Constitution provides for detention of up to 96 hours before a defendant is brought before a judge, whereas the FCCP allows up to 72 hours and the MCCCP allows up to 48 hours.

71. Actually, this period may be much longer if the judicial police manipulate the time or date of the arrest. *See, e.g.*, Interview with Adalberto Jorge Pacheco Santiago, defendant, in Oaxaca, Mex. (May 30, 2000) (stating that he was detained by the judicial police for four months before he was brought to the Public Ministry's office, and that he was tortured extensively during this period); Interview with Israel Ochoa Lara ("Israel Ochoa"), defense attorney, in Oaxaca, Mex. (May 30, 2000) (explaining that one of his clients, Soloman Sebastían Hernández, was "arrested with an arrest warrant [and]. . . should have been immediately brought before a judge . . . but instead they brought him for interrogation"). "[T]his interrogation does not appear at all in his case file." *Id.*

72. *See* CNDH Recommendation 50/95, *supra* note 57; CNDH Recommendation 8/2000, *supra* note 63.

73. In contrast, when a detention exceeds established time limits, any confession

that the arrest of the individual did not fall within either exception to the warrant requirement and was therefore illegal, the judge will not necessarily exclude evidence gathered or a confession made during the period of illegal detention.[74] Rather, if the detainee seeks to retract the confession, he will have to prove that it was coerced.[75] Because there is no automatic exclusion of evidence obtained as a result of an illegal warrantless arrest, the Public Ministry and the judicial police have little incentive to curtail the practice.

Again, the Yanga case described above[76] provides an example. There, the trial court rejected the defense's argument that the search and *en flagrancia* detentions had been illegal. The court also indicated that, even assuming the illegality of the actions of the police, this illegality would not affect the decision on the guilt of the accused.[77] The court stated that, at most, the illegality of the search and detention would allow the defendants to present a cause of action against the authorities for the improper entry into their home.[78] The trial court thereby established that, even if the illegality of the arrest and detentions were proved, the validity of the evidence and documents obtained through those acts would not be affected. The appellate court partially reversed the trial court decision in this regard and found that the search of the house was illegal.[79] The court did not rule on the allegations that the detentions were illegal.[80]

Although the delegation is not prepared to draw a conclusion regarding the frequency of arbitrary arrest and detention, it

---

obtained is presumed to have been coerced and therefore invalid. *See* MCCCP art. 134; FCCP art. 134.

74. *See* Legal Weekly for the Federation, Collegial Circuit Courts, Fifth Epoch at app. 163, *cited in* Lawyers Comm. for Human Rights, Elements of Criminal Procedure, *supra* note 39, at 9 n.37 (Mexico Supreme Court holding that evidence establishing the arbitrary detention of a suspect does not require finding that suspect's confession was coerced). *But see* "Pérez García, Salvador," 84 S.J.F. 49 (7 época 1975) (detaining of a suspect by police officers before the charges are presented implies coercion of the person and, hence, the resulting confession is considered lacking in veracity).

75. *See infra* notes 149-69 and accompanying text (discussing defendant's burden of proving coercion).

76. *See supra* note 57 and accompanying text.

77. *See* Decision of the Sixth District Court on Criminal Matters for the Federal District, Aug. 20, 1996, at 169.

78. *See id.*

79. *See* Decision of the Third Unitary Federal Circuit Court for Mexico City, Mex., Jan. 3, 1997, at 63.

80. *See id.*

is clear that the Yanga and Montiel cases are not exceptional. The delegation heard numerous credible allegations of the use of fabricated or planted evidence, expired warrants, and false witness identifications as pretexts for warrantless arrests. Unfortunately, because these same techniques can be used to fabricate evidence that may serve as the basis for a judicial arrest warrant, the requirement of a judicial warrant would not entirely eliminate the problem of illegal arrest and detention. Nevertheless, by ensuring judicial participation and perhaps closer judicial supervision post-arrest, it would reduce the opportunities for police to act arbitrarily and then justify their actions after the fact.

D. *Recommendations*

- Narrow the exception to the warrant requirement for so-called urgent cases to restrict its application to the most serious categories of crimes and to emphasize the likelihood that the defendant will evade justice if a warrant is sought.
- Restrict the Public Ministry's use of the urgent cases exception by clearly defining the set of circumstances under which the Public Ministry may be deemed unable to acquire a warrant. These circumstances should be rare, and the burden should be on the Public Ministry to establish that the strict criteria are met.
- Narrow the *en flagrancia* exception to circumstances in which the suspect is apprehended in the act of committing the crime or followed from the scene of the crime.
- Eliminate the 48-hour period during which the suspect may be held by the Public Ministry following a warrantless arrest and, instead, require immediate presentation of the suspect before a judge.
- In any case of warrantless arrest, establish a presumption of illegality, requiring the Public Ministry to prove that the requirements of the exception were met and that the suspect was presented immediately to appropriate judicial authority.
- Amend codes of criminal procedure to require the exclusion of any evidence gathered in connection with an arrest later deemed illegal.

II. *TAKING AND EVIDENTIARY USE OF CONFESSIONS*

A. *Introduction*

As described in the foregoing section, problematic police practices, coupled with broad and vaguely defined exceptions to the warrant requirement, create opportunities for intimidation and abuse of detainees in Mexico. The delegation's wide-ranging interviews generated strong, though anecdotal, support for the conclusion that intimidation and abuse of detainees remain serious problems in the Mexican criminal justice system. The persistence of the problem of abuse and torture is confirmed by studies conducted by Mexican NGOs and governmental groups,[81] as well as international governmental and non-governmental human rights organizations.[82]

Based on such reports and upon our own interviews, we are convinced that mistreatment of detainees remains a serious problem in the Mexican criminal justice system; however, documenting the prevalence of such abusive practices was not a focus of our mission. Rather, beginning with the well-grounded assumption that torture remains a problem, the delegation explored various ways in which the system encourages, or fails adequately to discourage, such abuse. For example, Part I demonstrated how exceptions to the warrant requirement provide opportunities for abuse.[83] Additionally, Part III argues that, by denying meaningful access to counsel in the preliminary investigation stage, Mexican criminal procedure codes eliminate one

---

81. *See* Interview with Dr. José Luis Soberanes, President of the CNDH, in Mexico City, Mex. (June 5, 2000) (noting that "[t]en years ago, there were many more instances of torture but it still exists"). Dr. Soberanes responded to the delegation's request for statistics by acknowledging that "there have not been any major studies on this. Researching torture is a difficult task—we would have a research task of inductive approaches." *Id.*

82. *See IACHR Report*, *supra* note 21, para. 303 (noting that "even though Mexico has a broad legal framework for the prevention, eradication, and punishment of acts of torture, torture and the impunity of the perpetrators continue to pose a serious problem"); *U.S. State Dep't Report*, *supra* note 21, at 839 (stating that "the police regularly obtain information through torture, prosecutors use this evidence in courts, and the courts continue to admit as evidence confessions extracted under torture"); HUMAN RIGHTS WATCH, HUMAN RIGHTS IN MEXICO: A POLICY OF IMPUNITY 9 (1997) [hereinafter HUMAN RIGHTS WATCH, POLICY OF IMPUNITY] (noting that "[t]orture is endemic in Mexico"); U.N. GAOR, Final Observations of the Committee Against Torture: Mexico, A/52/44 paras. 153-70 (1997); U.N. ESCOR, 54th Sess., U.N. Doc. E/CN.4/1998/38/Add.2.

83. *See supra* Part I.

of the most effective and internationally recognized means of protecting the safety of detainees and ensuring due process.[84] Focusing on the procedures surrounding the taking of confessions and their use at trial, this section suggests that these procedures fail to adequately discourage practices of intimidation and coercion by privileging early statements taken before the Public Ministry and by placing an exceedingly high burden on the defendant to prove allegations of abuse.

B. *Mexico's Human Rights Obligations*

1. International Standards

Several international human rights treaties binding on Mexico require that courts exclude from consideration at trial any confession obtained through coercion. Both the American Convention and the ICCPR establish that criminal defendants may not be compelled to confess guilt and that a confession shall be valid only if it is made without coercion of any kind.[85] The United Nations High Commissioner for Human Rights has interpreted the relevant provisions of the ICCPR as requiring a prohibition on the admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment.[86] The Inter-American Convention to Prevent and Punish Torture is even more explicit. It provides that "[n]o statement that is verified as having been obtained through torture shall be admissible as evidence in a legal proceeding."[87] Finally, with respect to Mexico, the United Nations Human Rights Committee ("Human Rights Committee")[88] has recently urged

84. *See infra* Part III.

85. *See* American Convention art. 8(3) (stating that "[a] confession of guilt by the accused shall be valid only if it is made without coercion of any kind"); ICCPR art. 14(3)(g) (providing that "[i]n the determination of any criminal charge against him, everyone shall be entitled not to be compelled to testify against himself, or to confess guilt").

86. *Replaces General Comment 7 Concerning Prohibition of Torture and Cruel Treatment or Punishment, General Comment 20*, U.N. HCHR, 44th Sess., para. 12 (1992) (stating that "the law must prohibit the use of admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment").

87. Inter-Am. Convention to Prevent and Punish Torture, art. 10, O.A.S.T.S., No. 67 (1987) [hereinafter Inter-Am. Convention to Prevent Torture].

88. The Human Rights Committee is charged with enforcing the rights enumerated in the ICCPR. *See generally* DOMINIC MCGOLDRICK, THE HUMAN RIGHTS COMMITTEE: ITS ROLE IN THE DEVELOPMENT OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (1991).

Mexico to take steps to ensure that confessions obtained by force cannot be used as evidence in trial proceedings.[89]

2. Domestic Law

On its face, Mexican law forbids the use of coerced confessions as evidence in criminal proceedings. For example, Article 20 of the Mexican Constitution explicitly prohibits torture and provides that a declaration must be voluntary.[90] The Federal Law for the Prevention and Sanction of Torture ("Federal Law to Prevent Torture") is more explicit, criminalizing acts of torture and providing that "no confession or information obtained through torture may be used as evidence."[91] Similarly, most states have passed statutes criminalizing acts of torture.[92]

Although these prohibitions on torture and the use of coerced confessions are important, their interpretation and application in the context of criminal procedure ultimately determine their efficacy. Hence, as a prophylactic measure, Article 20 of the Constitution provides that a confession must be made before the Public Ministry or a judge and in the presence of counsel or person of confidence[93] in order to have evidentiary value.[94] More to the point, confessions rendered to the judicial police are inadmissible, whether or not they are voluntary.[95] Enacted in response to the problem of mistreatment of detainees by judicial police, this limitation of the use of declarations to those rendered before the Public Ministry or a judge has been credited by Mexican officials with a significant reduction in the

89. *Concluding Observations of the Human Rights Committee: Mexico*, U.N. H. R. Comm., ccpr/c/79/Add.109, para 7, 66th Sess., para. 7 (1999) [hereinafter *Concluding Observations of the Human Rights Committee: Mexico*].

90. MEX. CONST. art. 20. (providing that "the defendant shall not be obliged to declare" and that "intimidation or torture are forbidden and will be punished under the criminal law").

91. *La Ley Federal para Prevenir y Sancionar la Tortura* [Federal Law to Prevent and Sanction Torture], *reprinted in* EL DIARIO OFICIAL DE LA FEDERACÍON EL 27 DE DICIEMBRE DE 1991 (1991) [hereinafter Federal Law to Prevent Torture]. The criminal procedure codes of the states and the Federal District also provide that a confession must be voluntary in order to have evidentiary value. *See, e.g.*, FCCP art. 287; MCCCP art. 249.

92. Torture, however, is not a crime in the state of Yucatan.

93. *See infra* note 252 and accompanying text.

94. MEX. CONST. art. 20. For a discussion of the role of counsel at the declaration stage, see *infra* notes 187-218 and accompanying text.

95. The MCCCP and the FCCP further codify this constitutional prohibition on the use of confessions taken by the judicial police. *See* FCCP art. 287; MCCCP art. 249.

level of torture.[96]

Finally, amendments to the codes of criminal procedure have reduced the evidentiary centrality of confessions in the trial and conviction of a defendant. For example, the FCCP provides that "a confession alone cannot serve as the basis for charges brought by the Public Ministry against a defendant."[97] These codes also provide that a confession cannot be accepted if other evidence undermines its truthfulness.[98] As many judges and prosecutors explained to the delegation, following these changes, the confession is no longer considered the "queen of evidence."[99]

C. *Problems*

1. Taking of Confessions by the Public Ministry

Although the reforms described above may have reduced the level of abuse of detainees by the judicial police, they have not fully addressed the problem of coerced confessions for several reasons. First, although domestic law defines statements taken by judicial police as inadmissible at trial, it does not prohibit police interrogation of detainees. Hence, police are free to question detainees during the period before they are presented to the judge to render a formal declaration.

In cases of warrantless arrest, this period may legally last up to forty-eight hours in most cases and up to ninety-six hours in certain cases.[100] As a practical matter, it often lasts much longer. According to Renato Sales, Chief Advisor for the Mexico City Attorney General's Office, "the forty-eight hour rule is inter-

96. *See, e.g.*, Interview with Dr. Luis de la Barreda Solorzano, President, Mexico City Human Rights Commission, in Mexico City, Mex. (May 31, 2000) (asserting that "[t]en years ago, torture occurred in practically every case"). "After the new law against torture was passed, it took all validity away from confessions taken by police. Because of this, the rate of torture has diminished spectacularly." *Id.*

97. FCCP art. 287; *see also* MCCCP art. 59.

98. *See, e.g.*, MCCCP art. 249.

99. *See, e.g.*, Interview with Maclovio Murillo Chávez, Federal Court Judge, in Guerrero, Mex. (June 5, 2000) (stating that "in our penal system, we no longer give full validity to confessions"). "Confessions become only an indicia, not dispositive. Now the 'queen of evidence' is circumstantial." *Id.*

100. MEX. CONST. art. 16. Renato Sales notes that the availability of this 48-hour period actually creates an incentive for the police to proceed under one of the exceptions to the warrant requirement even when obtaining a warrant might be possible. *See* Interview with Renato Sales, Chief Advisor, Mexico City Attorney General's Office, in Mexico City, Mex. (May 29, 2000).

preted by the Public Ministry to begin running at the time the Public Ministry gets the defendant rather than the time the judicial police pick him up."[101] Thus, the defendant may remain in the unsupervised custody of the judicial police for a significant period of time, often unrecorded, before the 48-hour period of custody by the Public Ministry begins.

Because this extended period of custody by the judicial police is often unsupervised by either the Public Ministry or by counsel,[102] it presents a significant opportunity for abuse of detainees. Indeed, the Inter-American Commission found that "most cases of torture and of cruel, inhuman, and degrading treatment occur in the context of the criminal justice system, mainly during the early stages of investigation of criminal offenses."[103] Numerous interviews by the delegation with detainees and defense lawyers confirmed this finding. For example, Alvaro Sebastian Ramirez, an indigenous Zapotec from San Agustin, Loxichas, reported that he was kidnapped by the judicial police, detained for eleven days, tortured, and forced to sign over one hundred blank sheets of paper.[104] Recounting his experience, he told the delegation that:

> They put my hands over my head, gave electric shocks to my genitals, and put chili pepper in my nose. They beat me with rifle butts and on the back, on the legs, on my head, they just kept beating me . . . . Every three days they would give me some filthy water. I had a hood on for eleven days, except when they gave me water to drink and when I had to sign. They told me that they had already raped my daughter, and that they would kill me last. They wanted me to confess that I

101. Interview with Renato Sales, Chief Advisor, Mexico City Attorney General's Office, in Mexico City, Mex. (May 29, 2000).

102. Although Article 20 (IX) of the Mexican Constitution provides that a criminal suspect has a right to adequate representation from the beginning of the criminal proceedings, this provision has been interpreted as guaranteeing the defendant the right to access to counsel only upon rendering his formal declaration before the Public Ministry. As a result, detainees are not routinely provided access to an attorney during the period in which they are detained and questioned by the Judicial Police. *See infra* notes 187-218 (discussing access to counsel).

103. *IACHR Report*, *supra* note 21, para. 305.

104. Interview with Alvaro Sebastián Ramírez, defendant, Etla Prison, in Oaxaca, Mex. (June 1, 2000). Mr. Sebastián Ramírez told the delegation that he expected that the police would use the signed sheets to manufacture accusations against others. *Id.*

was a major in the EPR [Popular Revolutionary Army].[105]

Mr. Sebastián Ramírez's case was not unique or even unusual; the delegation interviewed a number of other individuals who reported abuse at the hands of the judicial police and heard reports of still other cases from defense attorneys. When questioned about such cases of abuse, Dr. Luis de la Barreda Solarzano, President of the Human Rights Commission of Mexico City, remarked to the delegation that "judicial police act practically without any control. The Constitution says that they are within the control of the Public Ministry but in reality they are not under [its] authority—they are out of control."[106]

Although statements made by detainees during this period of custody by the judicial police are not admissible, the abusive practices persist because they can have an important impact on confessions that are admissible. This happens in at least two ways. First, the Public Ministry may be directly implicated in the coercion by participating in or overseeing the abuse and intimidation of detainees. For example, Joel Martínez González, a defendant accused of guarding arms for the EZLN in Cacalomacan, reported that the police beat him and forced him to confess that he was a member of the EZLN.[107] He and the other defendants were then taken to the Public Ministry with bags over their heads and were forced to declare formally what they had been made to confess to police.[108] Mr. Martínez González informed the delegation that Public Ministry and police agents "made up my declaration. They added things to my preparatory declaration. They made me sign, grabbing my wrist and making me sign."[109]

Obviously, if the Public Ministry participates in the coercion, a requirement that a confession be made before the Public Ministry serves as no protection against the use of coerced confessions. Yet, even when agents of the Public Ministry do not

105. *Id.* When interviewed by the delegation, Mr. Sebastián Ramírez was being held in preventive detention at Etla Prison in Oaxaca. *Id.*

106. *See* Interview with Dr. Luis de la Barreda Solarzano, President, Mexico City Human Rights Commission, in Mexico City, Mex. (May 31, 2000).

107. *See* Interview with Joel Martínez González and Gonzalo Sánchez Navarete, defendants, in Mexico City, Mex. (June 3, 2000).

108. *Id.* (recounting that "I was forced to make my declaration"). "They threatened me. They grabbed my wrist to make me sign. I didn't want to—I was hit in the head and forced to sign." *Id.*

109. *Id.*

directly engage in coercive or intimidating practices during the declaration, the detainee's statement is necessarily affected by the lingering threat of police custody. The significance of this threat was apparent in the delegation's interviews with detainees and has been confirmed by the work of other NGOs. The Lawyers Committee notes that "[s]ince the Public Ministry will often return the suspect into police custody if he makes an 'unsatisfactory' declaration, it is logical that the suspect will seek to make a declaration that placates the Public Ministry."[110] According to Human Rights Watch, "even if a detainee is not tortured at the time of making a statement, torture by police prior to delivery to prosecutors can be just as effective in ensuring that a confession turns out as police desire."[111]

Defense lawyers in Mexico who were interviewed by the delegation shared this view. For example, Pilar Noriega, an active human rights lawyer in Mexico City, remarked that she had "several cases where the person, in spite of giving testimony, was threatened with torture if he was not giving everything that the police wanted."[112] Indeed, many defense lawyers have such little confidence in the voluntariness of the declaration made before the Public Ministry under the threat of police custody that they decline to be present in order to avoid ratifying a coerced statement.[113]

2. Taking of Confessions before a Judge

In addition to declarations made before the Public Ministry, Mexican law provides that declarations made before a judge and in the presence of counsel or a person of confidence are admissible at trial.[114] Defense lawyers and human rights groups in Mexico tend to regard such statements as more reliable than those made before the Public Ministry, but for reasons that have little to do with the fact of judicial oversight of the hearing itself. Rather, a detainee's declaration before a judge usually coincides with his transfer from the custody of the judicial police to a regu-

110. Lawyers Comm. for Human Rights, Elements of Criminal Procedure, *supra* note 39, at 19.

111. HUMAN RIGHTS WATCH, SYSTEMIC INJUSTICE, *supra* note 20, at 40.

112. Interview with Pilar Noriega García ("Pilar Noriega") and Digna Ochoa Y Plácido ("Digna Ochoa"), defense attorneys, in Mexico City, Mex. (May 29, 2000).

113. *See id.*

114. MEX. CONST. art. 20.

lar detention center. By eliminating the threat that the detainee will be returned to the control of the judicial police, this transfer of custody alleviates somewhat the climate of intimidation.[115]

Despite a reduction of the risk of intimidation when a detainee makes his declaration before a judge, the participation of a judge does not entirely resolve the problem. This is true for several reasons. First, even though the detainee may no longer be in the custody of the judicial police, he may legitimately fear that the police may act against his family or friends if he fails to cooperate before the judge. For example, on June 25, 1996, Enrique and Adrián Aranda Ochoa were arrested without a warrant in connection with a robbery and were subsequently charged with a kidnapping that had taken place in 1995.[116] Upon their arrest, the brothers were taken to the police station and later to two different Public Ministry installations in Mexico City.[117] At each place, they were severely tortured by preventive and judicial police.[118] As a result of the torture, they signed two separate confessions, one at each of the Public Ministry installations.[119] The Aranda brothers assert that the judicial police who coerced them into signing the Public Ministry declarations later threatened them and their families with further abuse if they did not ratify their declarations before the judge.[120] Indeed, immediately before giving their first judicial declarations, the detainees spoke by telephone with their parents who told them that a judicial police vehicle was parked near their home.[121] Based on the threats and their concern for their family, the defendants ratified their Public Ministry confessions before the judge.[122]

Second, by the time he is brought before a judge, the detainee may have made an earlier declaration before the Public

115. For this reason, many human rights groups, including the IACHR, have recommended restricting declarations to judicially-supervised hearings, eliminating Public Ministry declarations altogether. *See IACHR Report*, *supra* note 21, para. 318.

116. *See* Interview with Enrique and Adrián Aranda Ochoa, defendants, North Prison, in Mexico City, Mex. (June 2, 2000).

117. *See id.*

118. *See id.* (Adrián Aranda Ochoa explained that "the torture included blows and kicks to parts of my body . . . . They put a plastic bag over my face and struck me in the stomach and asphyxiated me").

119. *See id.*

120. *See id.* (Enrique Aranda Ochoa stated that "what was important to me was the threats to our families, parents, and sisters, to our women companions, and to us").

121. *See id.*

122. *See id.*

Ministry that was tainted by intimidation or abuse. Although the subsequent judicial declaration may, in theory, be made under less threatening circumstances for the reasons already mentioned, if the detainee retracts an earlier confession and insists that he was coerced, the judge is very likely to discredit the retraction pursuant to the principle of procedural immediacy.

As understood throughout Latin America, and by the Inter-American Commission, the principle of procedural immediacy places greatest weight on a statement made to the judge, emphasizing the importance of the judge's ability to assess the evidence directly.[123] In Mexico, however, this principle is understood quite differently—it creates a presumption that the first or "most immediate" statement of the defendant after arrest should be given the greatest credibility.[124] Yet, as noted above, the detainee often makes this first statement at a point at which he is very vulnerable—in the control of the Public Ministry and under threat of custody by the judicial police. Thus, Mexico's interpretation of the principle of procedural immediacy converts what is intended to function as a procedural protection for the accused into the opposite—an incentive for the abuse of the rights of accused.

Although Mexican authorities have argued that the link between procedural immediacy and coerced confessions was addressed by the 1993 revisions to the Constitution prohibiting the use of confessions rendered before the Judicial Police,[125] courts continue to invoke the principle to privilege the declaration before the Public Ministry, which, as described above, may also be tainted by intimidation or abuse.[126] For example, according to Mr. Alfonso Martín del Campo Dodd, agents of the judicial police at the Mexico City Attorney General's office tortured him

123. The Inter-American Commission explains the purpose underlying procedural immediacy as "avoid[ing] as much as possible any distancing of the judge from the elements of the proceeding and *especially from the accused.*" *IACHR Report, supra* note 21, para. 313 (emphasis added).

124. *See* Alicia Ely Yamín & Pilar Noriega García, *The Absence of Rule of Law in Mexico: Diagnosis and Implications for a Mexican Transition to Democracy,* 21 LOY. L.A. INT'L & COMP. L.J. 467, 499 (July 1999); Interview with Guillermo Eduardo González Medina, Assistant Secretary to the Attorney General, in Mexico City, Mex. (June 1, 2000) ("The first declaration has greater force in our system."). "The second declaration can revoke the first, but [the defendant] has to prove torture." *Id.*

125. MEX. CONST. art. 20.

126. *See supra* notes 100-13 and accompanying text.

by placing a plastic bag over his head and beating him.[127] As a result of the torture, he signed a written statement confessing that he killed his brother-in-law and his sister and then staged his own kidnapping.[128] When the defendant made his declaration before the judge, he stated that he had been tortured and had signed a false confession under coercion.[129] He was nevertheless convicted. Crediting the first statement, the court placed the burden on the defendant to prove that the confession was false and had been obtained through torture.[130] The appellate court granted full validity to the confession and sustained the conviction.[131]

The defendants in the Yanga case were also tortured during the preliminary investigation stage while in the custody of the policy and Public Ministry,[132] and eventually signed confessions before the Public Ministry.[133] In their first declarations before the judge, in fact, before the judge's secretary, and in subsequent declarations, the defendants withdrew their Public Ministry confessions, claiming that they had signed them as a result of torture.[134] No investigation was undertaken at any point during the proceedings in response to the defendant's allegations of torture. The trial court considered the initial confessions valid and stated that the withdrawal of the confessions was simply an effort to avoid criminal responsibility.[135]

A third problem, which reinforces the doctrine of procedural immediacy, is the marked skepticism with which allegations of torture are met. In interviews with prosecutors and judges,

---

127. *See* Interview with Martín Alfonso del Campo Dodd, defendant, Pachuca Prison, in Hidalgo, Mex. (June 3, 2000).

128. *See id.*

129. *See id.*

130. *See* Decision of the Eighth Chamber of the Superior Court of Justice for Mexico City, Mex. Aug. 17, 1993, at 65.

131. *See id.*

132. *See* Interview with Alvaro Castillo, defendant, in Mexico City, Mex. (June 3, 2000) (reporting that the police "hit me on the back of my neck, my stomach, they burnt my arms and legs with cigarettes"). "They brought mineral water and forced it up my nose while covering my mouth . . . . They dumped water on me . . . . They then brought electric cables which they used to shock me in the legs and back." *Id.*

133. *See id.* (recounting that "[w]e had pages and pages they made us sign, and those were what the Public Ministry used").

134. *See id.*

135. *See* Decision of the Sixth District Court for Criminal Matters in Mexico City, Mex. (Aug. 20, 1996).

the delegation encountered a widespread belief that defendants routinely fabricate allegations of torture and coercion, often at the suggestion of their lawyers. According to federal judge Murillo Chávez, "[u]nfortunately, torture is a form of defense people utilize. They always allege that people have been tortured."[136] Federal Judge Gonzalo Jesús de Morales Avila stated simply, "[t]hey always say they were hit."[137] Linking this general skepticism to the policy underlying procedural immediacy, Raúl Aguilar Maraboto, President of the Superior Tribunal of Justice in Xalapa, explained, "we pay attention to the first statement because it is fresher. The defense lawyers tell them to say they were hit."[138]

An obvious tension exists between these claims that torture is routinely invoked as a means of avoiding criminal responsibility and the claims of many of the same judges that cases of torture are rare. In fact, it seems that allegations of torture are relatively common; however, they are not often credited by judges and, even less frequently, investigated by prosecutors. The failure to take seriously allegations of torture is itself a violation of Mexico's obligations under international law.[139] In addition, this judicial skepticism regarding claims of torture undermines the effectiveness of the judiciary in excluding evidence tainted by coercion.

A fourth obstacle to the effectiveness of judicial oversight as a means of ensuring the voluntariness of confessions is the absentee judge. Notwithstanding the guarantee of Article 20 of the

---

136. Interview with Murillo Chávez, Federal Judge, in Guerrero, Mex. (June 5, 2000)

137. Interview with Gonzalo Jesús de Morales Avila, Judge, First District Court, in Oaxaca, Mex. (June 2, 2000).

138. Interview with Raúl Aguilar Maraboto, President of the Superior Tribunal of Justice in Xalapa, in Mexico City, Mex. (June 2, 2000). This attitude not only undermines the role of a judge in ensuring the integrity of the criminal process but also serves as a justification for the restrictions on access to counsel. For example, a prosecutor in Veracruz testified that as a practice, his office does not permit access to counsel because, "if we did permit it, they would counsel them and the declaration would be worked up." Interview with Ernest Fernando, prosecutor, in Veracruz, Mex. (June 1, 2000). This perception of lawyers as tainting the judicial process not only undermines the role of the lawyers in protecting the rights of the detainee/defendant but also contributes to hostility toward and intimidation of the lawyers themselves.

139. *See* Convention Against Torture & Other Cruel, Inhuman or Degrading Treatment of Punishment, arts. 2, 4, G.A. Res. 39146, 39 U.N. GAOR, Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984) [hereinafter Convention Against Torture].

Mexican Constitution,[140] it is a common practice for the judge's secretary rather than the judge himself to hear the declaration of the defendant.[141] Indeed, Mr. Solomón Sebastían Hernández, an indigenous Zapotec who had been held in preventive detention in Oaxaca for almost three years at the time of the interview, told the delegation that he had never seen the judge presiding in his case despite the fact that he was at the final stages of the judicial process.[142] Following Mr. Sebastían Hernández's hearing, members of the delegation located the presiding state court judge, Mr. Roberto Diego López Hernández, in an office adjacent to the hearing room. The judge explained that it is standard practice to rely on the written record rather than to hear the testimony directly. He commented, "I wonder when you say to be present there . . . do you mean that I should be there to intervene in the process? I'm not there to intervene in the process, nothing is going to change by my presence."[143]

This case is not unique. Criminal defense lawyers and human rights advocates reported to the delegation that judges' secretaries often oversee the cases while judges appear only on rare occasions.[144] According to Bárbara Zamora, "[i]n a normal proceeding, a person should declare verbally in front of the judge. If [the declaration] is written, it is supposed to be ratified verbally in front of the judge."[145] Pilar Noriega adds that "[t]he problem is that lawyers have become accustomed to this and have accepted it. When we lawyers demand the presence of a judge, it's perceived to be an aggressive attitude, even though we're just demanding our clients' rights."[146]

---

140. MEX. CONST. art. 20. (guaranteeing that a criminal defendant "will be tried in public audience by a judge").

141. This practice was widely confirmed by defense lawyers and acknowledged by judges themselves. *See, e.g.*, Interview with Bárbara Zamora, attorney, in Mexico City, Mex. (May 30, 2000); Interview with Amado Chinas Fuentes, federal court judge, in Oaxaca, Mex. (June 2, 2000) (stating that "[o]ur system is eminently written, but our law makes it possible for the judge to be there").

142. *See* Interview with Solomón Sebastían Hernández, defendant, in Oaxaca, Mex. (May 30, 2000).

143. Interview with Roberto Diego López Hernández, state court judge, in Oaxaca, Mex. (May 30, 2000).

144. *See, e.g.*, Interview with J. Antonio Aguilar Valdez, First Visitor, Mexico City Human Rights Commission, in Mexico City, Mex. (June 5, 2000).

145. Interview with Bárbara Zamora, attorney, in Mexico City, Mex. (May 30, 2000).

146. Interview with Digna Ochoa and Pilar Noriega, defense attorneys, in Mexico City, Mex. (May 29, 2000).

In short, despite efforts to eliminate statements taken by the judicial police and otherwise curtail the role of confessions in the criminal justice system, the use of confessions or witness statements taken under coercive conditions continues to be a serious problem. As Digna Ochoa, a prominent defense attorney, stated, "The problem is that once a person is tortured and signs a confession, the judge gives full value to the declaration, and when the person withdraws it in front of a judge, the judge does not credit it."[147] Judge Murillo Chávez explained the reasoning in this way:

> In these cases, the presumption is that the authorities are acting in accordance with the law. When they don't, this must be demonstrated. When the defendant retracts the confession, he needs to show the cause of the retraction—[that is,] show evidence that he was tortured. This is because so many people systematically allege being tortured in order to avoid being tried. So a person has the right to retract the confession and show the reason.[148]

In short, a declaration made by the detainee while under the control of the Public Ministry and judicial police and without meaningful access to counsel enjoys a presumption of validity. The burden of proof is then on the detainee to show why the statement should be disregarded. Unfortunately, as the next subsection demonstrates, this burden is nearly an impossible one for the defendant to prove.

3. Defendant's Burden to Prove Torture

As noted above, under Mexican law, a confession that is given under the threat of torture may not be relied upon in a criminal proceeding.[149] As a practical matter, however, having such a confession excluded is extremely difficult. The difficulty stems from both the definition of torture applied by judges and the method of proof.

The Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment, which Mexico

---

147. Interview with Digna Ochoa, attorney, PRODH, in Mexico City, Mex. (May 29, 2000).

148. Interview with Maclovio Murillo Chávez, federal court judge, in Guererro, Mex. (June 5, 2000).

149. *See supra* notes 91-104 and accompanying text (discussing exclusion of coerced confession under Mexican law).

has ratified, defines torture to include "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed."[150] Article 3 of the Federal Law to Prevent Torture defines torture as the infliction of "grave physical or psychological pain or suffering on a person for the purpose of obtaining . . . information or a confession or of punishing the person for an act that he or she may have committed or is suspected of having committed."[151] Thus, both international and domestic laws prohibit both physical and psychological torture, whether for the purpose of obtaining information or for punishment.

The efficacy of this statutory prohibition on torture depends, to a large extent, on judicial practice in that it is judges who determine whether sufficient evidence of torture exists. Unfortunately, many Mexican officials interviewed by the delegation described a much narrower standard for what constitutes torture than that prescribed in international law or the federal statute. According to many prosecutors and judges, torture is limited to physical abuse that leaves lesions; physical abuse that does not result in lasting lesions is considered mistreatment, a lesser crime. As Bertharuth Areola Ruiz, the assistant attorney general for proceedings in Oaxaca explained, "[a]buse of authority includes beatings that don't arrive at the point of lesions. Up to the point of lesions, this is a different crime, but not torture."[152] Judge Gonzalo Jesús de Morales Avila acknowledged that "[o]ften, when they torture, they do not leave lesions," but added that "if the medical certification declares that there are no signs of torture, the law is very clear that there is no torture."[153]

This definition of torture is problematic for several reasons. First, the presence of visible lesions has no necessary relationship to the severity of physical abuse. Rather, the definition simply

150. Convention Against Torture art. 1(1).

151. Federal Law to Prevent Torture.

152. *See* Interview with Bertharuth Areola Ruiz, Assistant Attorney General for Proceedings, in Oaxaca, Mex. (June 2, 2000).

153. *See* Interview with Gonzalo Jesús de Morales Avila, Judge, First District Court, in Oaxaca, Mex. (June 2, 2000); *see also* Lawyers Comm. for Human Rights, Elements of Criminal Procedure, *supra* note 39, at 24.

places a premium on torture techniques the effects of which are either invisible or disappear quickly. Second, it creates an incentive for prolonged detention by the judicial police or Public Ministry to allow any visible lesions to heal and disappear. Third, it means that psychological torture is virtually impossible to prove. Many judges acknowledged that psychological torture might occur; however, they noted that, as it cannot be corroborated with physical evidence, they generally do not credit such allegations.[154] One federal judge went so far as to say that "only God would know" whether or not psychological torture had occurred.[155]

Another way in which the definition of torture applied by judges apparently departs from the definition under international and domestic law concerns the purpose of the abuse. Although both international and domestic laws define torture expressly to encompass severe mistreatment intended as punishment,[156] many judges and prosecutors expressed the view that torture is limited to abuse intended to elicit information from victims.[157] This narrow definition, coupled with the per se exclusion of statements taken by the judicial police,[158] leads many judges to the conclusion that, notwithstanding the claims of detainees, torture rarely occurs: why would police inflict physical abuse to extract testimony when that testimony is inadmissible?

Both the burden and method of proving torture further compound the problem of this narrow definition. Although the Mexican procedural codes do not specify the burden of proof when a defendant alleges torture, judges have placed the burden on the defendant to prove that torture occurred rather than on the prosecutor to establish the voluntariness of the contested declaration. As one judge explained, "In these cases, the pre-

154. *See* Interview with Gonzalo Jesús de Morales Avila, Judge, First District Court, in Oaxaca, Mex. (June 2, 2000) (noting that "it is practically impossible to prove psychological torture").

155. Interview with Maclovio Murillo Chávez, federal court judge, in Guererro, Mex. (June 5, 2000).

156. *See* Convention Against Torture art. 1(1); Federal Law to Prevent Torture art. 3.

157. *See, e.g.*, Interview with Maclovio Murillo Chávez, federal court judge, in Guererro, Mex. (June 5, 2000) (noting that "the accused needs to show a causal link between the wounds and the outcome, because in some cases, people self-inflict wounds").

158. *See supra* notes 94-96 (discussing domestic law prohibiting use of confessions rendered to judicial police).

sumption is that the authorities are acting in accordance with the law. When they don't, this must be demonstrated."[159] Mexican officials regard the 1993 reforms as having addressed the problem of the burden of proof by requiring the public prosecutor to show that the statement was taken before the Public Ministry and in the presence of defense counsel or a person of confidence. But, for the reasons explained above and in Part III, such safeguards do not adequately ensure the voluntariness of the statement. In practice, the defendant's signature on a confession and the ratification of the confession by a defense attorney or person of confidence sets up a strong presumption in favor of its validity. Under the principle of procedural immediacy the defendant's earliest statement is granted even more weight.[160] The defendant must overcome the weight of these presumptions in order to have a confession excluded.

The method by which a defendant must prove torture further adds to the difficulty. When asked about proof of torture, many judges emphasized that the defendant cannot rely solely on his or her testimony. As Judge Amado Chiñas Fuentes explained, "[t]here is a principle that no one can prove something with words alone. You must have evidence to corroborate what occurred. It is never the case that someone could prove torture by the statement itself."[161] Yet, the defendant may have little or no access to corroborating evidence, particularly evidence from official sources. For example, Article 7 of the Federal Law to Prevent Torture provides that "any detainee or accused person shall, immediately upon request, be examined by a forensic medical expert, and if none is available, or if the detainee requests it in addition, by a doctor of his or her choice."[162] The court, however, may discount a report submitted by a defendant from a private doctor, regarding it as biased, and require instead a medical certificate from an official doctor substantiating the torture allegations.[163] Yet, such an official report, if it exists, may not be

159. *See* Interview with Maclovio Murillo Chávez, federal court judge, in Guerrero, Mex. (June 5, 2000).

160. *See supra* notes 123-34 (discussing the principle of procedural immediacy).

161. Interview with Amado Chiñas Fuentes, federal court judge, in Oaxaca, Mex. (June 2, 2000).

162. *See* Federal Law to Prevent Torture art. 7.

163. *See* Interview with Gonzalo Jesús de Morales Avila, Judge, First District Court, in Oaxaca, Mex. (June 2, 2000).

available to the defendant. Article 56 of the Organic Law for the Public Ministry's office in the Federal District established the power of the Public Ministry to provide copies of such reports but not the obligation to do so.[164] Apparently, the Public Ministry has interpreted this as a discretionary power, placing the defense at the mercy of the prosecution, even regarding proof of allegations of torture by the Public Ministry itself or the judicial police under its supervision.[165]

Limiting medical evidence to the report of an official doctor is also problematic due to the lack of independence of such doctors. An obvious conflict of interest arises between the doctor's role as a civil servant with a professional relationship to the Public Ministry and his or her duty to evaluate and report objectively on the condition of the detainee. Although doctors do sometimes note signs of torture in their evaluations,[166] the delegation heard many accounts of doctors not only ignoring physical abuse but also acting affirmatively to cover up the torture. For example, Alvaro Sebastian Ramirez, a defendant detained in Etla Prison, reported to the delegation that "[t]he doctor showed up not to treat me but to cover up evidence of torture before [I was sent] to the Public Ministry. Another doctor looked at me later, but didn't even touch me. I told her I had been tortured, but she just signed off on the papers."[167]

Poor funding and training of forensic doctors only compounds the problem with medical evidence. Often detainees lack access to any physician in a timely manner. Delay in medical examinations can mean not only the denial of needed medi-

---

164. *See* Reglamento de la Ley Orgánica de la Procuraduría General de Justicia del Distrito Federal [Regulations of the Organic Law on the Office of the Attorney General for Mexico City], art. 56, *cited in* Lawyers Comm. for Human Rights, Elements of Criminal Procedure, *supra* note 39, at 24 n.112.

165. *See* Interview with Mauricio Barrera, defense attorney, in Mexico City, Mex. (May 30, 2000) (noting that "[w]e have a right to ask for a copy of documents during the investigation, but the Public Ministry rarely gives them because it is too much work"); Interview with Enrique Aranda Ochoa, North Prison, in Mexico City, Mex. (June 2, 2000) (stating that "[t]he psychological report also says that we had symptoms of post-traumatic stress stemming from torture. But to this date, although they let us read these reports, they would not let us have copies . . . .").

166. *See, e.g.*, Interview with Mauricio Barrera, defense attorney, in Mexico City, Mex. (May 30, 2000).

167. Interview with Alvaro Sebastian Ramirez, defendant, Etla Prison, in Oaxaca, Mex. (June 1, 2000).

cal treatment but also the loss of critical physical evidence of torture.

Even assuming that the defendant can establish that physical abuse occurred, he must further prove that the torture was meant to compel the confession. In other words, he must establish the state of mind of the torturer. The fact of physical abuse coupled with an inculpatory declaration and a retraction by the defendant is not enough to support a conclusion of torture. Rather, it is generally accepted among judges, prosecutors, and even government human rights officials that law enforcement officers may physically harm defendants, but that the motivation is punishment, not obtaining a confession. Yet, it would be exceedingly rare for a defendant to be able to offer any direct evidence of the perpetrator's intent short of the defendant's own testimony, which is typically viewed quite skeptically.

Given the narrow definition of torture applied by the courts and the heavy burden of proof imposed on defendants, it is not surprising that evidence is rarely excluded on this basis. The practical result of this failure to exclude tainted confessions is to undermine any incentive to eliminate such abusive practices by the police and the Public Ministry. In short, the statutory prohibition on torture in the Federal Law to Prevent Torture cannot succeed in eliminating the practice without substantial changes in criminal procedure in cases where allegations of torture are raised. This link between the substantive law on torture and criminal procedure led the Human Rights Committee to express its concern "that the possibility exists of placing on the accused person the burden of proof that the confession has been obtained by coercion."[168] The Human Rights Committee specifically recommended that Mexico "amend the provisions of the law as necessary to ensure that the burden of proof that a confession used in evidence has been made by the accused person of his own free will shall lie with the State."[169]

D. *Recommendations*

- Establish a system of inspection and monitoring of all places of detention under control of the judicial police

168. *See Concluding Observations of Human Rights Committee: Mexico, supra* note 89, para. 7.

169. *Id.*

and Public Ministry, including the videotaping of interrogations.

- Once a detainee is presented to the Public Ministry, he should not be returned to the custody of the Judicial Police.
- Statements made by detainees prior to presentation before a judge, including statements made before the Public Ministry, should have no probative value, whether or not they are made in the presence of defense counsel or a person of confidence.
- Judges should preside in person over any hearing concerning the testimony of the accused, particularly when allegations of torture have been raised.
- When a detainee has made a credible allegation of torture, the Public Ministry should immediately open an investigation. This investigation should, in turn, be coordinated with the criminal proceedings against the accused to ensure that any evidence of mistreatment of the detainee will be available to the court and to the detainee for use in his defense.
- The prosecutor and judge should not necessarily treat the absence of physical evidence that would be consistent with allegations of torture as proof that such allegations are false.
- Access to independent forensic experts should be expanded, as should the funding and training of such experts.
- The burden of proving the validity and voluntariness of a confession should be placed on the State, the party seeking to rely on the evidence at trial.

III. *LEGAL DEFENSE*

A. *Introduction*

The requirement of "effective legal assistance"[170] is nowhere more important than in systems, such as Mexico's, that fail to accord the full measure of criminal justice rights in the ways doc-

170. *Basic Principles on the Role of Lawyers*, art. 6, 21, 8th Cong., at 118, U.N. Doc. A/CONF. 144/28/Rev. 1 (1990) [hereinafter *Basic Principles on Lawyers*].

umented in Parts II and III.[171] This part considers the ways in which the Mexican criminal justice system fails to meet this need.

This section begins with a survey of Mexico's international and domestic legal obligations to ensure that persons have adequate legal representation. It then considers the extent to which current practice fails to meet these obligations in several critical areas. First, this section documents the systematic denial of meaningful access to legal counsel, especially during the critical early stages of criminal investigations. Next, it considers Mexico's failure to provide adequate legal representation to persons who cannot afford it. Finally, this section concludes with an examination of Mexico's guarantee that persons may choose to be represented by non-lawyer "persons of confidence," an option that in theory seeks to augment legal representation but in practice is used as a way of defeating it.

B. *Mexico's Human Rights Obligations*

1. International Obligations

Several international instruments to which Mexico is a party establish the right to counsel. The American Convention provides that every person accused of a criminal offense is entitled, at a minimum, to adequate counsel and to private communication with the lawyer.[172] The Inter-American Court of Human Rights ("Inter-American Court"),[173] in an advisory opinion, further stated that the American Convention could be violated "if it can be proved that the lack of legal counsel affected the right to

171. *See* Martin Flaherty, *Human Rights Violations Against Defense Lawyers: The Case of Northern Ireland*, 7 HARV. HUM. RTS. J. 87, 88, 97 (1994).

172. American Convention art. 8(2). The American Convention provides that the accused is entitled to:

> [A]dequate time and means for the preparation of his defense; the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with counsel; the inalienable right to be assisted by counsel provided by the state, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law; the right of the defense to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts . . . .

Id.

173. Mexico officially accepted the jurisdiction of the Inter-American Court of Human Rights in December 1998.

a fair hearing."[174] The Inter-American Commission, moreover, has made clear that the right to counsel attaches upon arrest rather than the filing of formal criminal charges. As the Commission recently declared, Mexico should "guarantee the right of those *arrested* to communicate *immediately* with an attorney of their choice."[175]

The ICCPR likewise guarantees a broadly defined right to effective counsel. In particular, Article 14 provides that in the determination of any criminal charge against a person, the accused shall be entitled to adequate defense and to communicate with counsel of his or her own choosing.[176] Like the American Convention, the ICCPR provides the accused with the right to examine witnesses against him or her, as well as to obtain witnesses on his or her behalf under the same conditions as witnesses against the accused.[177]

The Human Rights Committee has amplified several aspects of the right to effective representation. In interpreting Article 14 of the ICCPR in the various individual petitions brought before it, the Human Rights Committee stated that the right of a defendant to have adequate time and facilities for the preparation of his or her defense is "an important element of the guarantee of a fair trial" and a "corollary of the principle of equality of arms" between the prosecution and the defense.[178] The Human Rights Committee also noted that once counsel is as-

---

174. Advisory Opinion OC-11/90, Inter-Am. C.H.R., ser. A, No. 11, 27 (1990), *reprinted in* PROTECTING HUMAN RIGHTS IN THE AMERICAS 108-09 (Thomas Buergenthal & Dinah Shelton eds., 4th ed. 1995).

175. *IACHR Report*, *supra* note 21, para. 721 (emphasis added).

176. *See* ICCPR art. 14(3). The ICCPR provides that the accused shall be entitled to:

> adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing; . . . [t]o be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it; [t]o examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him . . . .

Id.

177. *Id.* art. 14(3)(e).

178. Little v. Jamaica, Hum. Rts. Comm. Decisions, 43rd Sess., para. 8.3, U.N. Doc. CCPR/C/43/D/283/1988 (1991), *available at* http://www1.umn.edu/humanrts/undocs/html/dec283.htm.

signed to the accused, measures must be taken to ensure that the lawyer provides effective representation in the interests of justice.[179] Moreover, the Human Rights Committee further stated that when the complainant was unable to obtain the testimony of a witness on his or her behalf under the same conditions as testimony of witnesses against the complainant, the ICCPR provision was violated.[180]

The right to effective legal counsel receives further protection and definition from the United Nations Basic Principles on the Role of Lawyers ("Basic Principles on Lawyers").[181] Approved by the General Assembly in 1990, the Basic Principles on Lawyers constitute the international community's authoritative statement on matters relating to legal representation. As such, they form an important part of the growing body of customary international law protecting fundamental human rights. According to the Basic Principles on Lawyers, "[a]ll persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings."[182] They also state that governments "shall ensure that all persons [be] immediately informed by the competent authority of their right to be assisted by a lawyer of their own choice upon arrest or detention."[183] The Basic Principles on Lawyers further provide the accused with the right to have a "lawyer of experience and competence commensurate with the nature of the offence assigned to them in order to provide effective legal assistance, without payment by them if they lack sufficient means to pay for such services."[184] As for the timing of access to counsel, they state that governments shall ensure that "all persons arrested or detained, with or without criminal charge, shall have *prompt* access to a lawyer, and in any case not later than forty-eight hours from the time of arrest or detention."[185] Moreover, the Basic Principles on Lawyers provide the accused with "adequate opportunities, time and facilities to be

179. *See* Steadman v. Jamaica, Hum. Rts. Comm. Views, 59th Sess., para. 10.3, U.N. Doc. CCPR/C/59/D/528/1993 (1997), *available at* http://www1.umn.edu/humanrts/undocs/html/VWS528.htm.

180. *See* Little, para. 8.4.

181. *Basic Principles on Lawyers*, *supra* note 170.

182. *Id.* art. 1.

183. *Id.* art. 5.

184. *Id.* art. 6.

185. *Id.* art. 7 (emphasis added).

visited by and to communicate and consult with a lawyer, without delay . . . and in full confidentiality."[186]

2. Domestic Obligations

In 1993, reforms of the Mexican Constitution for the first time established a criminal suspect's right to a defense counsel, including a public defender, during the prior investigation phase of the criminal process.[187] This prior investigation stage runs from the Public Ministry's initiation of an investigation through the stage in which the Public Ministry brings formal charges against the suspect before a judge. Article 20, § IX of the Constitution now provides that the suspect "will *from the beginning of the process* . . . have the right to an adequate defense, through self-representation, the representation of an attorney or of a person of his confidence. If he does not wish to name a representative or cannot do so . . . the judge will assign him a public defender."[188]

Numerous officials, scholars, and lawyers with whom we met interpret the process as the moment of detention. On this reading, the Constitution clearly grants the accused with the right to counsel from the time the defendant is detained.[189] Others, however, interpret Article 20 as giving the defendant the right to counsel only upon making a formal declaration before the Public Ministry.[190]

---

186. *Id.* art. 8.

187. *See* Lawyers Comm. for Human Rights, Elements of Criminal Procedure, *supra* note 39, at 12.

188. MEX. CONST. art. 20 (IX) (emphasis added).

189. *See, e.g.*, Interview with Dr. Luis de la Barreda Solorzano, President, Mexico City Human Rights Commission, in Mexico City, Mex. (May 31, 2000) (stating that "[t]he Constitution and the law are very clear that from the moment of detention the detainee has the right to consult"); Interview with Margarita Herrera Ortiz, President, Veracruz Human Rights Commission, in Veracruz, Mex. (May 31, 2000) (stating that "t]he very moment a person is arrested, he has the right to ask for an attorney. If we deny a person that right, we are violating the law."); Interview with Miguel Sarre, Professor of Law, Autonomous Technical Institute of Mexico, in Mexico City, Mex. (May 29, 2000) (asserting that "[f]ormally speaking, access to counsel starts at the moment of detention").

190. *See, e.g.*, Interview with Gonzalo Jesús de Morales Avila, Judge, First District Court, in Oaxaca, Mex. (June 2, 2000) (stating that "the defendant does have the right to a defender, but not until he makes a declaration"); Interview with José Dávalos, Director General, Training Institute of the Federal Attorney General's Office, in Mexico City, Mex. (May 31, 2000) (stating that there is only one interpretation of the Constitution, which is the right to counsel at the moment of declaration); Interview with Augus-

To the extent that contested provisions of domestic law should be interpreted in a manner with international standards, it would appear that the plain meaning of Article 20 should prevail and that the right to counsel should arise upon arrest.[191] But whatever the proper interpretation, actual practice renders the debate moot. As the next section will document, detainees throughout Mexico are routinely denied access to counsel during the initial investigation, even though they remain in detention and subject to interrogation by the Judicial Police. Instead, access to counsel is ordinarily granted only when the accused makes his or her first formal declaration before the Public Ministry.

Specific criminal law provisions facilitate current practice. A number of observers told our delegation that this phenomenon reflects a more general pattern in which particular criminal law provisions undermine constitutional reforms intended to better secure fundamental rights.[192] In this instance, both state and federal codes of criminal procedure acknowledge the principle that the accused has the right to counsel during the initial investigation, but adopt the narrow definition of this right as attaching only upon the detainee's declaration before the Public Ministry. The FCCP, for example, provides that the accused shall be advised of his or her right to counsel immediately upon detention, as well as of his or her right to be assigned a public defender if he or she does not chose an attorney.[193] The FCCP further states, however, that the accused has the right to legal representation "to declare."[194] Other FCCP provisions, moreover, state only that counsel be present during formal evidentiary proceedings during the prior investigation stage rather than

---

tín González, Judicial Police Attorney, in Mexico City, Mex. (June 7, 2000) (stating that "[w]hen the Public Ministry takes a declaration, the accused has the right to access to counsel").

191. *Basic Principles on Lawyers, supra* note 170, art. 5. *Cf.* Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) (holding that ambiguous United States laws should be interpreted in the manner that is most consistent with international law).

192. *See, e.g.*, Interview with Santiago Corcuera, Professor of Law, in Mexico City, Mex. (May 29, 2000) (asserting that "[t]he question is whether the legal framework not only allows, but promotes illegal detention . . . [the] change in procedural law regarding *en flagrancia* . . . is an element which is facilitating arbitrary detention").

193. *See* FCCP art. 128(III)(b).

194. *See id.* art. 128(III)(a).

from the moment of arrest.[195] In similar fashion, the MCCCP provides that a suspect will be able to designate a legal representative during the prior investigation stage,[196] yet states that the right to actual assistance arises "when he declares" before the Public Ministry.[197] Further language suggests that a legal representative be present during the prior investigation only during formal evidentiary proceedings.[198] In these ways, both state and federal codes effectively support the current practice denying detainees access to counsel during interrogation by the police during the prior investigation stage.[199]

C. *Access to Counsel in Practice*

Both defense lawyers and government officials made clear to our delegation that the standard practice in Mexico is to deny access to counsel until a detainee first makes his or her declaration before the Public Ministry, and even then, to deny communication between the two at least until after the declaration is made. Among other things, this practice violates international standards guaranteeing prompt access, the ability to prepare a defense, and in numerous instances, to select a lawyer of one's own choosing. These violations occur, moreover, during the very period in which the authorities pressure the accused to give statements that, under the doctrine of procedural immediacy, are given the most weight at trial.[200] Access to lawyers is denied, in short, where it is needed most.

The Crowley Mission failed to encounter a single case in which a detainee had access to counsel prior to the first declaration or even which, once there, the lawyer could speak with the detainee until after the declaration was made. Typical is the case of Roberto Nagera, a Mexico City street vendor charged with assault. According to his legal representative, Mr. Nagera was not

---

195. *See id.*

196. *See, e.g.*, MCCCP art. 134 (providing that suspects will be able to name a lawyer or person of confidence to represent them "beginning in the prior investigation stage"). The MCCCP also states that a public defender must be assigned if the suspect fails to name a defense representative. Moreover, it provides for the right of the accused to communicate with whomever she or he wishes from the place of detention in the Public Ministry. *Id.*

197. *Id.*

198. *Id.* art. 269.

199. *See id.* arts. 269, 431.

200. *See supra* note 124 and accompanying text.

permitted to see a lawyer or person of confidence until his first formal declaration took place before the prosecutor's secretary.[201] Nor, moreover, was Mr. Nagera at any point permitted to speak with his person of confidence even though she was present during the declaration.[202] Mr. Nagera's counsel further told our delegation that, although she wanted to advise her client during the proceedings, she remained silent out of fear that the prosecutor's secretary would indicate in the file that she was conducting his declaration and replace her with a public defender who would provide no meaningful legal assistance.[203] Similarly, Manuel Galicia, charged with robbery and possession of a weapon, was denied access to counsel until the formal declaration commenced.[204] Even then, Mr. Galicia could not communicate with his attorney during the proceedings. Instead, the lawyer was merely permitted to be present in the room, and only could talk to him after his declaration was made.[205]

In several instances the denial of access was even more troubling. In the case of Alfonso Del Campo Dodd,[206] the accused had no access to legal representation until the declaration,[207] even though the accused was charged and later convicted of a double murder. According to the defendant, moreover, the police had earlier conducted a lengthy interrogation before he had any benefit of legal advice. In Oaxaca, Andrés Enrique Hernández was likewise prohibited from seeing a lawyer before he made his declaration. Once again, the lawyer, a public defender, was present during the proceeding, but was not permitted to talk with Mr. Hernández.[208] In this case, however, Mr.

---

201. Interview with Ana Lorena Delgadillo Pérez ("Ana Lorena Delgadillo"), law student and person of confidence, in Mexico City, Mex. (May 30, 2000); *see also* Interview with Alvaro Castillo, defendant, in Mexico City, Mex. (June 3, 2000) (stating that "[w]e didn't even see the [public defender] until we went to declare and the secretary said this is your lawyer").

202. Interview with Ana Lorena Delgadillo, law student and person of confidence, in Mexico City, Mex. (May 30, 2000).

203. *Id.*

204. Interview with Mauricio Barrera, law student, in Mexico City, Mex. (May 30, 2000).

205. *Id.*

206. Criminal File No. 57/92, Mexico City.

207. Interview with Alfonso Del Campo Dodd, defendant, Pachuca Prison, in Hidalgo, Mex. (June 3, 2000).

208. Interview with Andrés Enrique Hernández, defendant, Etla Prison, in Oaxaca, Mex. (June 1, 2000); *see also* Interview with Octaviano Hernández Pacheco, defendant,

Hernández did not even know his name, even though the attorney signed the court papers at the proceeding.[209]

In a number of cases, lawyers show up late or not at all. For example, Adalberto Jorge Pacheco Santiago,[210] a defendant in the Loxicha case, stated that his public defender did not arrive until twenty minutes into his declaration.[211] In the Cacalomacan case,[212] Gonzalo Sanchez Navarrete made his declaration without the presence of an attorney.[213] In fact, Mr. Navarrete stated that he declared "about four times without a lawyer."[214] Similarly, in the case involving Eduardo Torres and thirty-four indigenous rights members from the organization Centro de Apoyo al Movimiento Popular Oaxaqueño ("CAMPO") in Oaxaca, the declarations were also taken without the presence of a lawyer.[215] Nevertheless, in many of the cases, the court secretary still wrote "that the public defender [was] there," even though "the public defender [was] not there."[216]

Lawyers throughout Mexico indicated that these cases reflected the norm. As one attorney summarized the situation: "[i]n a practical sense, for the judge to believe [that] the constitutional guarantee of counsel has been satisfied, the defender must only be there and sign the papers. The judge doesn't look to whether any real counsel was offered, just whether the defender was there."[217] As noted, many judges and secretaries apparently do not even care whether the lawyer is physically present so long as he or she signs the relevant papers. As a result, some lawyers indicated that they generally prefer not to take part

---

Etla Prison, in Oaxaca, Mex. (June 1, 2000) (stating that the "public defender never identified himself as such").

209. *Id.*

210. Criminal File No. 57/98, Oaxaca, Mex. The attorney in the case also testified that he did not have any contact with the defendant before the declaration before the Public Ministry.

211. Interview with Adalberto Jorge Pacheco Santiago, defendant, in Oaxaca, Mex. (May 30, 2000).

212. Criminal File No. 30/95, Mexico City, Mex.

213. Interview with Gonzalo Sanchez Navarrete, defendant, in Mexico City, Mex. (June 3, 2000).

214. *Id.*

215. Interview with Eduardo Torres, Gladis Ramírres, Cesar Morales, Members, Indigenous Rights Group, in Oaxaca, Mex. (June 1, 2000).

216. Interview with J. Antonio Aguilar Valdez, First Visitor, Mexico City Human Rights Commission, in Mexico City, Mex. (June 5, 2000).

217. Interview with Israel Ochoa, defense attorney, in Oaxaca, Mex. (June 2, 2000).

in declaration proceedings because the attorneys do not assist the defendants, but only serve to legitimize the current judicial process that undermines the rights of the accused.[218]

Current practice in Mexico stands in stark contrast to express international guarantees. In particular, the wholesale denial of legal representation until a detainee's formal declaration is clearly inconsistent with the Inter-American Commission's conclusion that the American Convention requires immediate access to counsel,[219] as well as with the right of prompt access to a defense lawyer set out in the Basic Principles on Lawyers.[220] Because the accused may be held in detention for forty-eight to ninety-six hours, the formal declaration may not take place until after many hours or even days.[221] A detainee, therefore, has no access to counsel during this entire period, even though she or he is usually within the custody of the Judicial Police and subject to repeated interrogation.[222]

Likewise violating international standards is the peculiar practice of preventing attorneys from speaking with clients even though they are physically present. It is difficult to see how this practice can be squared with the American Convention's provision that the accused have the right "to communicate freely and privately with counsel . . . in order to prepare a defense."[223] Nor would this systematic practice pass muster any more easily under the Basic Principles on Lawyers, which guarantee that the accused shall have adequate time and opportunity "to be visited by and to communicate and consult with a lawyer."[224] That these violations occur during the declaration before the Public Ministry, proceedings that are especially important in the Mexican criminal justice system, make them even more egregious.

---

218. Interview with Pilar Noriega, defense attorney, in Mexico City, Mex. (May 29, 2000) (stating that "[g]enerally, I prefer not to be present when declarations are taken, because they just put down what they want to put down whether or not I am there").

219. *See IACHR Report*, *supra* note 21, para. 721.

220. *See Basic Principles on Lawyers*, *supra* note 170, art. 7.

221. *See* Lawyers Comm. for Human Rights, Elements of Criminal Procedure, *supra* note 39, at 14. This practice violates the Basic Principles on Lawyers, which calls on governments to ensure all detainees with access to counsel, "and in any case not later than forty-eight hours from the time of arrest or detention." *See Basic Principles on Lawyers*, *supra* note 170, art. 7.

222. *See* Lawyers Comm. for Human Rights, Elements of Criminal Procedure, *supra* note 39, at 14.

223. American Convention art. 8(2).

224. *Basic Principles on Lawyers*, *supra* note 170, art. 8.

International instruments do not merely provide detained persons with a right to counsel, but with a right to counsel of choice.[225] While this right does not appear to be denied as consistently as the rights of prompt access and communication, the delegation nonetheless encountered a troubling pattern in which the right to choose legal counsel was honored in the breach. For example, Octaviano Hernández Pacheco, after his arrest, had requested his own private lawyer. He recounted the scene at the courthouse as the following: "[t]he public defender said, 'I will be your lawyer.' I said, 'I have a lawyer, Israel Ochoa. Please give me an opportunity to call him.' But the proceeding just continued with this public defender just sitting there."[226] Even though the lawyer should have presented witnesses on behalf of the defendant, the public defender did not speak one word to Mr. Pacheco.[227] Instead, the lawyer just signed the declaration.[228] Similarly, in a case involving students attending the National Autonomous University of Mexico City, the arrested students requested to have a private lawyer.[229] They were informed, however, that a public defender was already assigned to their case.[230] Even though the students felt that the public defender's representation was not adequate, they were not allowed to have counsel of their choice.

D. *Adequacy of Legal Defense*

1. Public Defenders

Even without the types of state interference just described, the vast majority of the Mexican population would nonetheless face the problem of poor or inadequate legal representation.[231] Approximately 80% of those individuals who find themselves facing the criminal justice system cannot afford private counsel and

225. *See* American Convention art. 8(2); ICCPR art. 14(3); *Basic Principles on Lawyers*, *supra* note 170, art. 1.

226. Interview with Octaviano Hernández Pacheco, defendant, Etla Prison, in Oaxaca, Mex. (June 1, 2000).

227. *Id.*

228. *Id.*

229. Interview with Digna Ochoa, attorney, PRODH, in Mexico City, Mex. (May 29, 2000).

230. *Id.*

231. *See generally* Lawyers Comm. for Human Rights, Elements of Criminal Procedure, *supra* note 39, at 16 (describing the public defender system in Mexico).

consequently rely on public defenders.[232] The work of public defenders throughout Mexico suffers from numerous factors, including heavy caseload, lack of training, and low salaries. In addition, public defenders do not enjoy sufficient autonomy from prosecutors, especially at the state level. As Professor Santiago Corcuera Canezut states, the net result is a system in which "our jails are full of poor people, full of those who have no access to counsel. The public defense system does not work in Mexico because of lack of resources. That is probably one of the most horrendous crimes that the State can commit."[233]

The problems that plague the public defender system are evident throughout the criminal justice process. According to Antonio Aguilar Valdéz for example, in Mexico City thirty-three public defenders are expected to handle the prior investigation stage even though there are seventy-four different Public Ministry agencies.[234] As a result, public defenders often find that they have to attend several agencies at once, and thus cannot be present at many of their clients' declaration proceedings.[235] Understaffing, moreover, remains a problem during the second stage, once the case is before a judge. At this point, Mexico City provides fifty-four public defenders to cover the cases that appear before 132 court secretaries.[236] On average, each public defender handles 100 to 150 cases,[237] and is assigned to three hearings a day—any one of which may last from eight to twelve hours.[238] The situation appears even more bleak once it is kept in mind that public defenders must not only attend hearings,

232. *See* Interview with Jesús Zamora Pierce, President, Mexican Academy of Criminal Sciences, in Mexico City, Mex. (June 7, 2000); *see also* Lawyers Comm. for Human Rights, Elements of Criminal Procedure, *supra* note 39, at 15.

233. Interview with Santiago Corcuera Canezut, Professor of Law, in Mexico City, Mex. (May 29, 2000); *see also* Videotape: Joseph R. Crowley Program in Int'l Human Rights (Fordham Law School 2000) (on file with the Crowley Program).

234. Interview with J. Antonio Aguilar Valdez, First Visitor, Mexico City Human Rights Commission, in Mexico City, Mex. (June 5, 2000).

235. *Id.*; *see also* Lawyers Comm. for Human Rights, Elements of Criminal Procedure, *supra* note 39, at 16.

236. *Id.* For a more specific example, in the Penal Court of Peace, which deals with minor offenses, 36 public defenders handle cases for the 80 secretaries. *Id.*

237. Interview with Juan Luis González, President, Mexico City Judicial Council, in Mexico City, Mex. (June 6, 2000).

238. *See* Interview with J. Antonio Aguilar Valdez, First Visitor, Mexico City Human Rights Commission, in Mexico City, Mex. (June 5, 2000).

but also are responsible for conducting investigations, drafting documents, and making court appearances.

On top of all this, the salaries of public defenders are significantly lower than that of prosecutors.[239] In consequence, the Mexican criminal justice system does not approach even the most rudimentary type of equality that should exist between defense and prosecution. As Antonio Valdéz stated, "this process is terrible. [Public defenders] are incapable of attending even minimally in these cases. Thus, in practice, the defense is practically nonexistent."[240]

Particularly at the state level, public defenders further lack sufficient independence in both formal and practical terms. In Mexico City, for example, the Office of the Public Defender forms part of the executive branch of government and falls under the jurisdiction of the General Department of Legal Services of the Office of the Government Subsecretary for Legal Affairs.[241] Even more troubling, in Oaxaca, the public defenders are not only part of the executive branch of the government as well, but also fall under the authority of the prosecutor's office.[242] On both the federal and state level, moreover, public defenders share physical facilities with members of the Public Ministry. Federal defenders assigned to the prior investigation phase of the criminal proceeding work in the Public Ministry installations.[243] In similar fashion, the law of the Mexico City Office of the Public Defender states that the Public Ministry must provide the public defenders with the required physical

239. *See id.*; Interview with Jesús Zamora Pierce, President, Mexican Academy of Criminal Sciences, in Mexico City, Mex. (June 7, 2000). The salaries of the federal defenders, however, are similar to those of federal prosecutors. *See* Interview with César Esquinca Muñoz, Director General, Federal Public Defenders Institute, in Mexico City, Mex. (June 6, 2000); *see also* Lawyers Comm. for Human Rights, Elements of Criminal Procedure, *supra* note 39, at 16.

240. *See* Interview with J. Antonio Aguilar Valdez, First Visitor, Mexico City Human Rights Commission, in Mexico City, Mex. (June 5, 2000).

241. *See* Lawyers Comm. for Human Rights, Elements of Criminal Procedure, *supra* note 39, at 17. Recent improvements have been made, however, for defenders at the Federal level. Currently, the Federal defenders form part of the judicial branch of government and are employed by the Federal Institute of Public Defenders, which is viewed as an auxiliary body to the organ of the judicial branch, the Judicial Council. *See id.* at 16.

242. Interview with Roberto Diego López Hernández, state court judge, 6th State Penal Court, in Oaxaca, Mex. (May 30, 2000).

243. *See* Lawyers Comm. for Human Rights, Elements of Criminal Procedure, *supra* note 39, at 17 (citing Federal Public Defenders Law, Article 25).

space.[244] In the absence of their own facilities, defenders must depend on the Public Ministry for necessary equipments and materials, such as chairs, typing machines, and computers.[245] Not only do public defenders and the Public Ministry prosecutors, therefore, work in close proximity, the Public Ministry exercises a considerable degree of control over the public defenders' working conditions.

The potential for prosecutorial control becomes especially pronounced in smaller jurisdictions. As one defense lawyer explained, the even greater proximity often means that public defenders fail to represent their clients effectively because of an "identity of interests" between the defender and prosecutor.[246] Public defenders necessarily form close relationships with prosecutors with whom they must deal frequently, and therefore "don't want to make it harder for themselves the next time" they have to work with the prosecutors.[247] In such an environment, the quality of defense representation necessarily diminishes in the face of the prosecutors' hostility to zealous defense advocacy.[248]

In these ways, current practice in Mexico again violates the international standards. The American Convention, the ICCPR, and the Basic Principles on Lawyers all provide the accused with the right to adequate counsel.[249] The Basic Principles on Lawyers further provide the defendant with the right to have a "lawyer of experience and competence commensurate with the nature of the offense."[250] Moreover, the Human Rights Committee interpreted the ICCPR provisions as embodying the "principle of

244. *See id.* (citing Mexico City Public Defenders Law, Article 25).

245. *See* Interview with J. Antonio Aguilar Valdez, First Visitor, Mexico City Human Rights Commission, in Mexico City, Mex. (June 5, 2000).

246. Interview with Digna Ochoa, Attorney, PRODH, in Mexico City, Mex. (June 3, 2000). Moreover, in some cases, the assigned public defenders were not independent attorneys qualified to represent the defendants. For example, in the Ricardo Hernández López Case, the public defender testified that he worked for Prior Investigations of the Federal Attorney General's Office, and that he attended the defendant's declaration proceedings because he was requested to do so by the Public Ministry. Ricardo Hernández López et. al Case, Criminal File No. 16/95, Veracruz.

247. Interview with Digna Ochoa, Attorney, PRODH, in Mexico City, Mex. (June 3, 2000).

248. *See* Lawyers Comm. for Human Rights, Elements of Criminal Procedure, *supra* note 39, at 16.

249. *See supra* Part III. A.

250. *Basic Principles on Lawyers, supra* note 170, art. 6

equality of arms" between the defense and the prosecution.[251] In the Mexican criminal justice system, however, the defense is neither equal nor separate. In this situation, the rights of the accused are further eroded.

2. Persons of Confidence

The Mexican Constitution also provides the accused with the right to have the assistance of a "person of confidence."[252] In addition, the Federal Law to Prevent Torture states that the accused may be represented by an attorney or a person of confidence when making a formal declaration before the Public Ministry.[253] The right to select a person of confidence augments an individual's options for legal representation. It can, theoretically, even make up for the deficiencies of the public defender system by allowing a person to choose a representative whom he or she trusts, and who, though lacking formal legal training, may nonetheless operate as an effective advocate.

In practice, however, the person of confidence can make matters worse. In some cases, for example, the person of confidence assigned to the defendant was in fact unknown to the defendant.[254] In a number of other cases that our delegation encountered, the person of confidence actually worked for the Public Ministry.[255] As Digna Ochoa, a leading defense lawyer states, "in many cases, the person of confidence may be from the Public Ministry, trusted by the Public Ministry, in the confidence of the Public Ministry."[256] She cited one instance, among others, in which a cleaning person for the Public Ministry was assigned

---

251. Little v. Jamaica, Hum. Rts. Comm. Decisions, 43rd Sess., para. 8.3, U.N. Doc. CCPR/C/43/D/283/1988, *available at* http://www1.umn.edu/humanrts/undocs/html/dec283.htm.

252. MEX. CONST. art. 20(IX).

253. *See* Federal Law to Prevent Torture art. 9. Under these provisions, however, it is not apparent whether the representation requirement applies during the prior investigation stage or only during the period following the formal declaration before a judge. *Id.*

254. *See, e.g.*, Fernando Domínguez Paredes et. al Case, Criminal File No. 30/95, Mexico City. In this case, the defendants testified that they neither knew nor had any contact with the persons of confidence before or during their declarations. *Id.*

255. *See also* Lawyers Comm. for Human Rights, Elements of Criminal Procedure, *supra* note 39, at 18.

256. Interview with Digna Ochoa, Attorney, PRODH, in Mexico City, Mex. (May 29, 2000).

as the person of confidence for the defendant.[257] In another case, an individual who had signed as the person of confidence was allegedly one of the people who had tortured the defendant.[258] The precise extent of this problem is unclear, though the ability of one defense lawyer to recount several specific incidents is troubling. At least as far as that attorney is concerned, the practice is sufficiently widespread to justify the conclusion that "[persons of confidence] do not have any function. The only thing they do is to legitimize something that is illegal."[259]

In certain instances, interference comes not from the prosecutor but from the public defender. According to one person who herself has acted as a legal representative, public defenders often discourage individuals from appointing a person of confidence because they prefer not to work with one.[260] Nor, in practice, does the defendant have the option to replace an inadequate public defender with the person of confidence. One reason is that persons of confidence are regularly denied the power to sign documents during court proceedings.[261] Another is that they are further denied the right to ask direct questions during court proceedings, but must instead do so through the public defender.[262]

E. *Conclusions and Recommendations*

The Mexican criminal justice system routinely denies access to counsel until the accused make a formal declaration before the Public Ministry. Even during this important proceeding, the accused is not permitted to communicate with his or her legal representative. Legal representatives, moreover, often appear late or fail to attend at all. These practices effectively deny the

257. *Id.*

258. *Id.*; *see also* Fernando Domínguez Paredes Case. The persons of confidence in this case were affiliated with the Public Ministry. One representative was working as a legal secretary to the Public Ministry when the defendants gave their declarations; the other person of confidence was promoted to the position of legal secretary for the Public Ministry of Ixtlahuaca. *Id.*

259. *See* Interview with Digna Ochoa, Attorney, PRODH, in Mexico City, Mex. (June 3, 2000).

260. Interview with Ana Lorena Delgadillo, law student and person of confidence, in Mexico City, Mex. (May 30, 2000) (stating that "[i]t's hard to work with a public defender because they don't want [the person of confidence] to be their boss").

261. *Id.* This is in practice, but not necessarily the law. *Id.*

262. *Id.*

accused legal advice during the period of initial investigation during which they need it most. Even without these problems, the quality of legal defense in Mexico is generally poor, especially to those who cannot afford private attorneys. Moreover, the right to representation by a "person of confidence," a device meant to address the lack of public defenders, is often perverted to assign the accused with individuals who are agents of the prosecution.

The delegation recommends that:

- Mexico's laws should provide defendants with access to counsel at the moment of detention, not upon making a declaration. The Constitution should also be made clear on the issue of access to counsel, and should conform to the international human rights standards. In addition, the criminal procedure codes should be revised to provide the accused with the right to an attorney from the beginning of the criminal process.
- Efforts should be made to educate law enforcement personnel, prosecutors, judges, and defense attorneys of the constitutional provisions that allow the defendants to have immediate access to attorneys. As Dr. César Esquincia noted, the 1993 modification of the Constitution, which in his view provides the defendants with early access to counsel, has not "been easy to advance because of decades of custom."[263] Thus, education and training of those involved in the criminal justice system would be crucial in promoting measures of reform.
- State-level public defenders should have additional resources through the establishment of a public defender institute, modeled after the Federal Defender Institute of Mexico. The institute, which would be in charge of the public defender system at the state level, would work towards increasing the salaries of the public defenders, as well as to furnish them with the resources and the support necessary to provide adequate representation for the defendants. Such an institute would attempt to alleviate the current "inequality of arms" that exists between the defense and the prosecution.

263. Interview with César Esquinca Muñoz, Director General, Federal Public Defender's Institute, in Mexico City, Mex. (June 6, 2000).

- A further suggestion for reform, as indicated by several academics and lawyers in Mexico, is to place the defendants at the disposition of the judge as early as possible.[264] Some have stated that because of the poor quality of public defense, having immediate access to counsel merely "adds to the bureaucracy without providing any additional protection to the defendants."[265] For example, since the presence of an attorney during the declaration only serves to legitimize the judicial process that undermines the rights of the defendant, the accused should instead have prompt access to the judge.[266] In this manner, the defendant would not be placed in the hands of the Judicial Police and the Public Ministry without any form of accountability, but before a judge.

IV. *PROTECTION OF HUMAN RIGHTS DEFENDERS*

A. *Introduction*

As the previous section suggests, the defense of fundamental rights in Mexico by default often falls to independent defense lawyers and other human rights advocates. Too many of these lawyers, however, have been the target of harassment and intimidation from official and unofficial sources. The intimidation of Mexican human rights defenders has been underlined as a cause of concern by several international bodies, including the Inter-American Commission, the United Nations Rapporteur on Executions,[267] and the United Nations Sub-Commission on the Promotion and Protection of Human Rights. In the overwhelming majority of these cases, the Mexican government has failed to adequately investigate and prosecute those responsible for the persecution of human rights defenders.

---

264. Interview with Mariclaire Acosta Urquidi, Director, Mexican Human Rights Commission, in Mexico City, Mex. (June 1, 2000).

265. *Id.*

266. Interview with Miguel Sarre, Professor of Law, Autonomous Technical Institute of Mexico, in Mexico City, Mex. (May 29, 2000).

267. U.N. Comm'n on Human Rights, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, U.N. ESCOR, 56th Sess., U.N. Doc. E/CN.4/2000/3/Add.3. para. 103 (2000) [hereinafter *Special Rapporteur Report*].

B. *Mexico's Obligations to Protect Human Rights Defenders*

1. International Obligations

International law affords lawyers and other human rights defenders in Mexico both general and specific safeguards. Comprehensive treaties, such as the ICCPR and the American Convention, guarantee basic rights that are central to the work the human rights advocates pursue, including freedom of expression, freedom of assembly, and freedom of association. More specific instruments, such as the Basic Principles on Lawyers and the recently approved Declaration on the Right and Responsibility of Human Rights Defenders ("Defenders Declaration")[268] provide more extensive safeguards.

As the Lawyers Committee for Human Rights has observed, neither legal defense nor human rights advocacy could proceed without the ability to think and speak freely, to join with others, or to peaceably assemble.[269] Mexico is bound to observe these rights under the general human rights treaties that it has ratified. In particular, the American Convention guarantees freedom of expression (Article 13),[270] the right to assembly (Article

---

268. Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, G.A. Res. 144, 53d Sess., U.N. Doc. A/RES/53/144 (1999) [hereinafter Defenders Declaration], *available at* http://www.un.org/documents/ga/res/53/a53r144.pdf.

269. *See* LAWYERS COMM. FOR HUMAN RIGHTS, A DISABLING ENVIRONMENT: GOVERNMENTAL RESTRICTIONS ON FREEDOM OF HUMAN RIGHTS NGOS IN MEXICO 6 (1999) [hereinafter, A DISABLING ENVIRONMENT].

270. American Convention art. 13. Article 13 provides:

1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.
2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure:
   a. respect for the rights or reputations of others; or
   b. the protection of national security, public order, or public health or morals.
3. The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.
4. Notwithstanding the provisions of paragraph 2 above, public entertain-

15),[271] and freedom of association (Article 16).[272] Likewise, the ICCPR protects substantially the same rights in Articles 19 (expression),[273] Article 21 (the assembly),[274] and Article 22 (associa-

---

ments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence.

5. Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law.

Id.

271. American Convention art. 15. Article 15 states:

The right of peaceful assembly, without arms, is recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and necessary in a democratic society in the interest of national security, public safety or public order, or to protect public health or morals or the rights or freedom of others.

Id.

272. American Convention art. 16. Article 16 states:

1. Everyone has the right to associate freely for ideological, religious, political, economic, labor, social, cultural, sports, or other purposes.
2. The exercise of this right shall be subject only to such restrictions established by law as may be necessary in a democratic society, in the interest of national security, public safety or public order, or to protect public health or morals or the rights and freedoms of others.
3. The provisions of this article do not bar the imposition of legal restrictions, including even deprivation of the exercise of the right of association, on members of the armed forces and the police.

Id.

273. ICCPR art. 19. Article 19 states:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
   a. For respect of the rights or reputations of others;
   b. For the protection of national security or of public order (*ordre public*), or of public health or morals.

Id.

274. ICCPR art. 21. Article 21 states:

The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.

tion).[275] As with many human rights instruments, these treaties permit restrictions on these fundamental freedoms only when necessary to ensure certain specified purposes, such as "national security," and then only "by law."[276] Nor did any official with whom the delegation met suggest that such provisions legitimated intimidation of defense lawyers or human rights advocates. To the contrary, the American Convention and the ICCPR each make clear that governments not only must refrain from infringing on basic rights, but that they must take affirmative steps to secure them, including providing remedies where violations occur.[277] In these ways, these treaties and conventions "add to the legal foundation that requires respect for the rights of associations, including human rights NGOs."[278]

In addition, the Basic Principles on Lawyers,[279] further specify protections that address the unique role defense attorneys have in safeguarding fundamental rights. Basic Principle Number 16, for example, states that "[g]overnments shall ensure that

---

Id.

275. ICCPR art. 22. Article 22 states:

1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.
2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.

Id.

276. *See, e.g.*, American Convention art. 13(2). *Cf.* LAWYERS COMM. FOR HUMAN RIGHTS/CROWLEY PROGRAM IN INT'L HUMAN RIGHTS, OBSTACLES TO REFORM: EXCEPTIONAL COURTS, POLICE IMPUNITY AND PROSECUTION OF HUMAN RIGHTS DEFENDERS IN TURKEY 108-10 (1999) [hereinafter LCHR/CROWLEY TURKEY REPORT].

277. American Convention art. 1 (stating that "[t]he States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition"); art 10 (providing that "[e]very person has the right to be compensated in accordance with the law in the event he has been sentenced by a final judgment through a miscarriage of justice"); ICCPR art. 2 (stating that "[e]ach State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy").

278. A DISABLING ENVIRONMENT, *supra* note 269, at 3.

279. *See infra* notes 181-86, 220-24, 249-50 and accompanying text.

lawyers are able to perform all their professional functions without intimidation, hindrance, harassment or improper interference; and shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics."[280] Basic Principle Number 17 provides that "[w]here the security of lawyers is threatened as a result of discharging their functions, they shall be adequately safeguarded by the authorities."[281]

Human rights defenders enjoy additional protection from the Defenders Declaration. Approved by the General Assembly in 1998, the Defenders Declaration extends and clarifies more general freedoms as they apply to human rights advocates. As with the Basic Principles on Lawyers, the Defenders Declaration does not constitute a binding treaty, but does serve both as an authoritative interpretation of how other human rights instruments pertain to human rights defense and as evidence of developing customary international law.[282] Mexico, moreover, "expressed its full agreement when the United Nations Commission on Human Rights finally adopted the [Defenders] Declaration in April 1998."[283] For all of these reasons, the Declaration is a significant "aid in interpreting the Mexican State's existing obligations under international human rights law."[284]

Article 1 of the Defenders Declaration provides that "[e]veryone has the right, individually and in association with others, to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels."[285] Further, the Declaration "identifies and protects those activities that are most important to the work of human rights defenders worldwide."[286] Among these include such basic freedoms as the right to assembly,[287] to "know, seek, obtain, receive . . . [and] publish information about human rights,[288] to participate in government and public affairs,[289] to

280. *Basic Principles on Lawyers*, *supra* note 170, art. 16.
281. *Id.* art. 17.
282. A DISABLING ENVIRONMENT, *supra* note 269, at 4.
283. *Id.*
284. *Id.*
285. Defenders Declaration art. 1.
286. A DISABLING ENVIRONMENT, *supra* note 269, at 5.
287. Defenders Declaration art. 5.
288. *Id.* art. 6.

file complaints of rights violations and receive an effective remedy,[290] and to 'solicit, receive and utilize resources' related to the protection and promotion of human rights."[291] Recently, the United Nations Commission on Human Rights announced that it planned to name a special rapporteur to monitor the treatment of human rights defenders around the world.[292] This decision confirms the world community's determination that all governments respect the principles that the Defenders Declaration sets forth.

2. Domestic Obligations

Domestic law in Mexico also affords further, though more limited, protection of human rights defenders. In particular, the Mexican Constitution, while not specifically addressing freedoms for human rights advocates, nonetheless sets forth fundamental guarantees that are central both to their work and the work of their organizations.

Together, Articles 6 and 7 of the Constitution safeguard freedom of expression. Article 6 provides that the "expression of ideas shall not be subject to any judicial or administrative investigation, unless it offends good morals, infringes the rights of others, incites to crime, or disturbs the public order."[293] Similarly, Article 7 more specifically protects written advocacy, stating "[f]reedom of writing and publishing writings is inviolable. No law or authority may establish censorship, require bonds from authors or printers, or restrict the freedom of printing" subject only to limitations "by the respect due to private life, morals, and public peace."[294]

Freedom of assembly and association, rights that are especially critical for human rights organizations, receive constitutional protection in Article 9. This provision states that the

289. *Id.* art. 8.

290. *Id.* art. 9.

291. *Id.* art. 13.

292. *See* Press Release HR/CN/982, United Nations Comm'n on Human Rights, Commission on Human Rights Concludes Fifty-Sixth Session (Apr. 28, 2000), *available at* http://www.unhchr.ch/huricane/huricane.nsf/view01/5CDA1D740E03F01E802568D2002B168D?opendocument; Press Release, Human Rights Watch, UN to Monitor Harassment of Rights Workers (Apr. 27, 2000), *available at* http://www.hrw.org/press/2000/04/un0427.htm.

293. MEX. CONST. art. 6.

294. *Id.* art. 7.

"right to assemble of associate peacefully for any lawful purpose cannot be restricted."[295] The Article does, however, set out two limitations. The rights mentioned do not extend to "deliberative armed assemblies."[296] In addition, "only citizens of the Republic may" exercise the rights of assembly and association, and then only "to take part in the political affairs of the country."[297]

Despite these protections, the Mexican government has employed, or sought to employ, various legal mechanisms to restrict human rights advocacy. Certain laws or proposed legislation at both the federal and state levels provides for strict government scrutiny of human rights NGOs in particular. Specific devices include, among others: oppressive, mandatory registration requirements, extensive oversight by government bodies, or the conditioning of government benefits on submission to such registration and oversight.[298]

Of special concern is the Mexican government's power to place "serious limitations on the ability of Mexican human rights NGOs to interact with human rights organizations from other parts of the world."[299] This power stems in significant part from Article 33 of the Constitution, which in part states that "[f]oreigners may not in any way participate in the political affairs of the country."[300] The same Article further provides that "the Federal Executive shall have the exclusive power to compel any foreigner whose remaining he may deem inexpedient to abandon the national territory immediately and without the necessity of previous legal action."[301] Expulsions under Article 33 are immediate and do not require a judicial proceeding or hear-

---

295. *Id.* art. 9.

296. *Id.*

297. *Id.* Article 9 states in full:

> The right to assemble or associate peaceably for any lawful purpose cannot be restricted; but only citizens of the Republic may do so to take part in the political affairs of the country. No armed deliberative meeting is authorized. No meeting or assembly shall be deemed unlawful which has for its object the petitioning of any authority or the presentation of a protest against any act; nor may it be dissolved, unless insults be proffered against said authority or violence is resorted to, or threats are used to intimidate or compel such authority to render a favorable decision.

Id. *See* A DISABLING ENVIRONMENT, *supra* note 269, at 3.

298. *Id.* at 9-24.

299. *Id.* at 24.

300. MEX. CONST. art. 33.

301. *Id.*

ing of any sort.[302] The vague wording and often arbitrary application of Article 33, moreover, afford foreign human rights activists no basis for determining at what point their activities become inexpedient. Article 33 expulsions, further, frequently ignore due process rights guaranteed all individuals[303]—including foreigners[304]—under the Mexican Constitution.[305]

One further way in which Mexico law works to restrict human rights advocacy stems from the creation of a new visa category for human rights observers from abroad. To receive such a visa, known as an FM-3, applicants must meet several strict requirements: the application must be filed thirty days prior to arriving in Mexico; the applicant's NGO must be at least five years old or have consultative status with ECOSOC; and the application must include a schedule of planned activities while in Mexico, a letter from a Mexican NGO that invited the applicant, and a summary of the applicant's own previous human rights experience. Even when granted, FM-3 visas are available for no longer than ten days, and for groups no larger than ten people.

In practice, the Mexican Government has used these requirements both to refuse visa applications to legitimate human rights observers and to harass human rights advocates rightfully in the country under FM-3 visas. In this regard, the Human Rights Committee stated that:

> [t]he Committee is concerned at the obstacles to the free

---

302. *See* A DISABLING ENVIRONMENT, *supra* note 269, at 32 (citing "Velasco Tovar Luis" (5a época Oct. 3, 1951)). The Lawyers Committee nonetheless cites one Mexican case holding that:

> the discretionary authority to expel foreigners under Article 33 is conditioned by other provisions in the Constitution. For example, the courts have held that certain basic due process provisions of the Constitution apply even when State officials decide to expel foreigners under Article 33. . . The Mexican courts specifically held that State agents may not act arbitrarily in deciding to expel foreigners pursuant to Article 33 and must justify and provide the rationale for their deportation decisions in order to comply with the Mexican Constitution. State agents also may not mistreat foreigners held in detention before deportation.

Id.

303. MEX. CONST. art. 16 (outlining due process rights).

304. *See id.* art. 1 (extending constitutional rights to "every person in the United Mexican States").

305. *See* GLOBAL EXCHANGE, FOREIGNERS OF CONSCIENCE: THE MEXICAN GOVERNMENT'S CAMPAIGN AGAINST INTERNATIONAL HUMAN RIGHTS OBSERVERS IN CHIAPAS (1999), *available at* http://www.globalexchange.org/campaigns/mexico/observers/report (examining Mexican law regarding expulsion of foreign human rights activists).

> movement of foreigners, especially the members of non-governmental organizations investigating human rights violations on Mexican territory, and in particular the fact that residence permits have been cancelled and visas refused for the same reasons. The State party should lift the restrictions on the access and activities of persons entering Mexico to investigate human rights violations.[306]

These restrictions, moreover, have been employed exclusively against foreign nationals involved in human rights work. As the Lawyers Committee recently noted, "foreign businessmen do not face the same threat even when they travel to Mexico to lobby the legislatures or governmental officials for favorable trade legislation"[307] or other policy reforms that arguably constitute involvement in the political affairs of the country.

In December 2000, President Fox's office issued a press release announcing that foreigners wishing to visit Mexico as human rights observers would no longer be required to obtain special FM-3 visas, but the President did not issue instructions to consulates and embassies regarding how to comply with this announcement.[308] Reports that the National Migration Institute (Instituto Nacional de Migración, or the "INM") has issued a circular with new instructions facilitating the entry of foreign human rights observers has not been confirmed.

C. *Intimidation of Lawyers and Other Human Rights Advocates*

A disturbing number of lawyers and activists who met with the Crowley delegation reported incidents of harassment that they attributed to government actors. Even in those cases where the perpetrators remain unidentified, the government's failure to identify those responsible raises questions of official toleration, or even complicity, in the intimidation of human rights defenders.[309] The nature of these problems in part makes assess-

---

306. *See Concluding Observations of the Human Rights Committee: Mexico, supra* note 89.

307. A DISABLING ENVIRONMENT, *supra* note 269, at 31.

308. *See* Press Release, Office of the President, Mexico Lifts Restrictions on Foreign Citizens (Dec. 23, 2000).

309. Special Rapporteur Report, *supra* note 267, para. 103. The Special Rapporteur Report states that:

> The continuing threats against the lives of human rights defenders suggest that the Government has not, despite its declared commitment to do so, taken adequate steps to provide these persons with protection and eliminate threats

ing their precise scope difficult. In general, however, our mission confirmed the conclusions of such groups as Amnesty International that "Mexican human rights defenders face repeated acts of intimidation and harassment on account of their activities to promote and protect human rights."[310] In the words of Rosairo Huerta Lara, a professor of law who has received death threats while working for human rights in Veracruz, in Mexico "working for human rights is hard and dangerous."[311]

Just how hard and dangerous is illustrated by the experience of the PRODH. In recent years the lawyers and staff of the PRODH have been subject to a series of threats and physical attacks in recent years, all of which remain unsolved and inadequately investigated by the government.

The most appalling of these incidents have been the kidnapping and attempted murder of Digna Ochoa, the Director of the PRODH legal division. A leading defense attorney, Ms. Ochoa has received international recognition of her human rights advocacy from the American Bar Association Section of Ligitation and the Council on Cultural and Scientific Cooperation in El Salvador.[312] On the night of October 28, 1999, Ms. Ochoa was attacked in her Mexico City home and, while tied up and blindfolded, subjected to a nine-hour interrogation on PRODH's activities.[313] Her interrogators demanded informa-

---

to their security. The Special Rapporteur commends the work done by NGOs, often under difficult circumstances. She notes, however, that many of these organizations work in situations of violence and in a polarized political atmosphere, in which they sometimes find it difficult to maintain an image of neutrality and thereby risk losing their effectiveness in building confidence amongst estranged communities.

Id.

310. AMNESTY INT'L, MEXICO: THE SHADOW OF IMPUNITY 11 (1999). The report further observed that "[a]lthough seldom the victims of extra-judicial executions, 'disappearances' or torture, Amnesty International has received numerous reports of human rights defenders receiving death threats, coming under armed attack and being arbitrarily detained." *Id.*

311. Interview with Rosario Huerta Lara, Professor of law, Veracruz University, in Veracruz, Mex. (May 31, 2000).

312. Chris Zombory, *Heaping on the Honors: ABA Awards Recognize Contributions to Justice System*, A.B.A. J., Nov. 2000, at 100 (listing Litigation Section International Human Rights Award); Sobre Esta Piedra, Las Adelitas, *available at* http://sobreestapiedra.com/libros/correa_sagavia/007_las_adelitas.htm (describing award of CONCICES Roque Dalton Medal).

313. Interview with Digna Ochoa, Attorney, PRODH, in Mexico City, Mex. (June 6, 2000).

tion on each PRODH staff member and other PRODH contacts, all while transcribing her answers onto a laptop computer.[314] After cutting her phone line, her attackers left her prone and bound next to an open gas tank. Ms. Ochoa's kidnappers left behind two notebooks, one inscribed "ha, ha," and a briefcase that had been stolen from her on August 9, when she was previously abducted.[315] Also on October 29, the same day that Ms. Ochoa was interrogated by intruders in her home, the PRODH offices were broken into and ransacked.[316]

The official response to Ms. Ochoa's assault remains inadequate, despite an order from the Inter-American Court directing the Mexican government "to adopt, without delay, all measures necessary" to safeguard PRODH lawyers.[317] This type of protective order, granted in "cases of extreme gravity and urgency, and when necessary to avoid irreparable damages to persons,"[318] came as a result of an application brought in the wake of Ms. Ochoa's attack and was the first time Mexico had been brought before the Inter-American Court.[319] The steps taken by the Mexican government to comply with the Inter-American Court, however, have not reassured the PRODH or its staff. Ms. Ochoa told the Crowley delegation that she is "not satisfied with the protective measures implemented" on her behalf by the Mexican government.[320] Though Ms. Ochoa has been assigned two police agents from the Mexico City Attorney General's Office, the officers "lack sufficient resources, equipment and training to effec-

314. *Id.*; *see also* Press Release, PRODH, Urgent Action: Attempt on Life of Human Rights Lawyer, Digna Ochoa Y Plácido, Spanish version *available at* http://www.sjsocial.org/prodh (Oct. 29, 2000) [hereinafter Urgent Action].

315. Interview with Digna Ochoa, Attorney, PRODH, in Mexico City, Mex. (June 6, 2000); *see also* Urgent Action, *supra* note 314.

316. Interview with Digna Ochoa, Attorney, PRODH, in Mexico City, Mex. (June 6, 2000); *see also* Urgent Action, *supra* note 314; Lawyers Comm. for Human Rights, *Update—Mexico: Digna Ochoa Y Plácido, Miguel Agustin Pro Juarez Center For Human Rights* (Nov. 1999), *available at* http://www.lchr.org/l2l/ochoa1199.htm (visited Feb. 14, 2001).

317. *IACHR Report, supra* note 21; *see also* Lawyers Comm. for Human Rights, Media Alert: Mexican Authorities Ordered to Ensure Safety of Human Rights Lawyers, *available at* http://www.lchr.org/media/digna11992.htm (Nov. 23, 1999) [hereinafter Safety of Human Rights Lawyers].

318. American Convention art. 63; *see also* Safety of Human Rights Lawyers, *supra* note 317.

319. *See id.*

320. Interview with Digna Ochoa, Attorney, PRODH, in Mexico City, Mex. (June 6, 2000).

tively guarantee her safety."[321] On several occasions, the police agents' car has not functioned, and they have not been given enough money to purchase fuel.[322] Additionally, neither the agents nor their car are equipped with a radio or cellular telephone, "making it impossible for Ms. Ochoa to locate them, or for them to call for police backup in the event of a threat or attack."[323]

Ms. Ochoa's kidnapping was merely the latest in a series of threats and attacks directed against her and other lawyers at the PRODH. The attacks began on August 9, 1999. Ms. Ochoa told the Crowley delegation that on that day, a man approached her on the street asking for directions, then pushed her into a car with two other men. During the four hours she was detained, the men punched her in the stomach and stole her briefcase, purse, address book, voting card, business cards, and other identification.[324] As she put it, while she "would like to think it was just a common assault, the perpetrators kept saying, 'Is it her? Is it her?'"[325]

Ms. Ochoa has good reason to believe that the attacks on her were not simple street crimes in light of repeated threats that appear to target her and her colleagues for the work that they do. This type of intimidation dates back at least to August 1996, when the PRODH offices received an anonymous threat directed against Ms. Ochoa and her colleague, Pilar Noriega.[326]

---

321. PRODH, *Protect the Protectors of Human Rights in Mexico*, FOCUS: HUM. RTS. IN MEX. (PRODH), Spring 2000, at 11.

322. *Id.*

323. *Id.* The government has also begun a 24 hour government surveillance of the PRODH's office by stationing a judicial police car in front of the building around the clock. Members of the PRODH have suggested that these measures have as much to do with monitoring the PRODH's activities as with protecting its workers. Interview with Digna Ochoa, Attorney, PRODH, in Mexico City, Mex. (June 6, 2000). Digna Ochoa stated, "The police are here. Sometimes I don't know who I should be seeking protection from." *Id.* The police did nothing to dispel this impression when the Crowley delegation, on one of its many visits to the PRODH, took a photograph in the general direction of the police car on duty and the plainclothes officer in the vehicle became belligerent and demanded that the camera be turned off.

324. Interview with Digna Ochoa, Attorney, PRODH, in Mexico City, Mex. (June 6, 2000); *see also* Urgent Action, *supra* note 314.

325. *Id.*

326. Lawyers Comm. for Hum, Rts., Pilar Noriega and Digna Ochoa, Mexico, *available at* http://www.lchr.org/121/ochoa1.htm (Aug. 1996) [hereinafter Noriega and Ochoa]; *see* interview with Digna Ochoa, Attorney, PRODH, in Mexico City, Mex. (June 6, 2000).

Significantly, an especially alarming string of threats occurred after the August 1999 attacks. Written death threats, including one of Ms. Ochoa's business card defaced with a black cross, were received at the PRODH by mail on September 3, 1999.[327] On September 8, 1999, four envelopes containing death threats were discovered inside PRODH's offices; one of the threats was addressed specifically to the PRODH legal staff.[328] On September 14, PRODH's receptionist found two envelopes with death threats inside her desk drawer.[329] On October 5, Ms. Ochoa found her stolen voting card at the front door of her home in Mexico City.[330] The address on the card was from a previous residence; by placing the card at her current address, her attackers were making her aware that they knew where she lived and that her whereabouts was being tracked.[331] On October 13, a bomb threat was found inside the PRODH Legal Defense Department office.[332] These threats culminated with the October 1999 attack on Ms. Ochoa in her home.

Threats continue, notwithstanding the Inter-American Court order directing Mexico to protect PRODH attorneys. On January 31, 2000, for example, anonymous death threats were discovered in a desk drawer of the PRODH legal division.

Interviews with numerous defense lawyers and other human rights activists suggest that the experience at the PRODH is not exceptional. Particularly striking were the accounts of Jose Luis Izuna Espinoza and Juan Rivero, two prominent defense attorneys who represent elite white collar defendants. Among other things, these attorneys told our delegation that they are convinced that government authorities staged a robbery of their personal effects to mask the theft of legal documents pertaining to an *amparo* action that they had filed. They further asserted that

---

327. Press Release, PRODH, Threats and Attacks Against the Miguel Agustin Pro Juarez Human Rights Center (2000) [hereinafter Threats and Attacks]; *see* Noriega and Ochoa, *supra* note 326; interview with Digna Ochoa Y Plácido, Attorney, PRODH, in Mexico City, Mex. (June 6, 2000).

328. Threats and Attacks, *supra* note 327; *see* Noriega and Ochoa, *supra* note 326; interview with Digna Ochoa Y Plácido, Attorney, PRODH, in Mexico City, Mex. (June 6, 2000).

329. *Id.*

330. *Id.*

331. Threats and Attacks, *supra* note 327; *see also* Noriega and Ochoa, *supra* note 326; interview with Digna Ochoa Y Plácido, Attorney, PRODH, in Mexico City, Mex. (June 6, 2000).

332. *Id.*

it is not uncommon for defense attorneys to be threatened with tax audits, malicious prosecution, or worse for overly zealous legal representation. To address these issues, Mr. Izunza in particular has felt compelled to help establish a human rights committee in the Mexico City Bar Association.[333]

Lawyers and activists in other areas of Mexico also report incidents of intimidation and harassment. In Oaxaca, for example, defense attorney Israel Ochoa has reported harassment in which officials have used legal mechanisms to impede his work. Mr. Ochoa represents indigenous communities and clients in southern Mexico, including many defendants from the politically tense Loxicha region. In June 1999, an arrest warrant for Mr. Ochoa was issued pursuant to criminal charges filed in February 1997 under Article 232 of the FCCP, which prohibits sponsoring or assisting two parties with conflicting interests in the same activity.[334] This charge ostensibly arose because one of Mr. Ochoa's Loxicha clients had allegedly implicated another client in a confession to the authorities.[335] Upon learning of the inculpatory statement at hearing on February 11, 1997, Mr. Ochoa immediately withdrew his representation of one of the defendants.[336] Despite this action, the Federal Office of the Attorney General decided to initiate the criminal proceeding that same day.[337] Domestic and international human rights organizations, including the Lawyers Committee, called for the charges to be dropped, characterizing the charges as "at best an inappropriate over-reaction given the circumstances of the case, and at worst, a misuse of prosecutorial power for political purposes."[338] The charges against Mr. Ochoa were dropped in September 1999, after a judge declared the arrest warrant and criminal investigation invalid and the Attorney General allowed the appeal period

333. Interview with José Luis Izunza Espinoza, Coordinator, Mexican Criminal Bar Commission, in Mexico City, Mex. (May 31, 2000).

334. Lawyers Comm. for Human Rights, *Mexico—Israel Ochoa Lara*, *available at* http://www.lchr.org/121/israel0799.htm (July 1999) [hereinafter *Ochoa*].

335. In rural Mexico, it is fairly common practice for a single attorney to represent more than one defendant in a criminal case. *Id.*

336. A DISABLING ENVIRONMENT, *supra* note 269, at 39. Mr. Ochoa has also challenged the declarations made by these and other Loxicha defendants as having been coerced by the judicial police and members of the public ministry. Ochoa, *supra* note 334.

337. A DISABLING ENVIRONMENT, *supra* note 269, at 39

338. *Ochoa*, *supra* note 334.

to expire.[339] Evelio Bautista Torres, a professor of criminal law and former judge in Oaxaca, characterized Mr. Ochoa as a "good defender" for his success in "discovering many violations of the criminal procedure" in his cases,[340] but added that the "government doesn't look on Israel favorably, [and consequently puts] up obstacles for him to work through to do his job."[341]

Other activists in Oaxaca report unofficial and more dire intimidation. Nora Martínez, an administrator at the Comité Regional de Derechos Humanos [Regional Human Rights Committee] Bartolomé Carrasco ("BARCA") in Oaxaca, told the Crowley delegation that there had been threats and attempts on the life of Romualdo Wilfrido Mayren Peláez, the former director of BARCA, which were not subsequently investigated by the government.[342] Other human rights activists recounted incidents in which the police followed human rights defenders in an attempt to intimidate them.[343] In similar fashion, Evincio Nicholas Martínez, the President of the Oaxaca state Human Rights Commission, told us that the Commission has "suffered" and "has been threatened because of our work. I have denounced, for example, those who threaten my deputies who work on these cases."[344] Mr. Martínez stated that though he had informed the public ministry so that they could investigate, and also announced the threats through the press, the public ministry had failed to identify the perpetrators.[345]

Intimidation of human rights defenders extends not only to lawyers but to community organizers and activists as well. Among the most troubling cases involves Rodolfo Montiel Flo-

339. *Id.*

340. Interview with Evelio Bautista Torres, criminal law professor, Autonomous University "Benito Juárez" of Oaxaca, in Oaxaca, Mex. (June 2, 2000).

341. *Id.*

342. Interview with human rights activists, in Oaxaca, Mex. (May 31, 2000) (including Mario Hernández, law student, BARCA; Nora Martínez, administrator, BARCA; Martínez, professor of criminal law, Autonomous University "Benito Juárez" of Oaxaca; Marino Mendoza García, law student, BARCA; Alicia Mesa, Technical Secretary, Centro de Derechos Humanos Los Príncipes; Joan Mulharek, Maryknoll Sisters; Anastácio Luis Ortega, Centro de Derechos Indígenas Flor y Canto; Sofia Robles Hernández, Servicios del Pueblo Mixe; Abdón Rubio Cabrera, Centro de Derechos Humanos Los Príncipes; and Veronica Vasquez de la Rusa, law student, BARCA).

343. *Id.*

344. Interview with Evincio Nicolás Martínez, President, Oaxaca Human Rights Commission, in Oaxaca, Mex. (May 31, 2000).

345. *Id.*

res, the noted environmental activist from Guerrero state. Mr. Montiel was recently convicted and sentenced to prison on drug and weapons charges, despite credible evidence that the charges against him were false and politically motivated, and that the evidence against him had been fabricated and his statements coerced by torture.[346] Mr. Montiel was first allegedly harassed by the government in 1998, while peacefully protesting logging operations in Guerrero. After his group blocked roads to halt timber trucks' passage through his community, Mr. Montiel was detained and questioned by the Mexican Army, who warned that his family would face reprisals if he reported the incident.[347] On May 2, 1999, Mr. Montiel was detained, and under torture, forced to sign a statement confessing to drug and weapons crimes. During his trial, Mr. Montiel detailed the circumstances surrounding his illegal detention, described the torture by which his statement was coerced, and denied the drug and weapons charges against him. Despite a conclusion by the National Human Rights Commission that prosecution's evidence was fabricated and the charges unfounded, Mr. Montiel was convicted on August 28, 2000, and sentenced to six years and eight months in prison.

Mr. Montiel has been named a prisoner of conscience by Amnesty International, and in April 2000 was awarded the prestigious Goldman Environmental Award, which was accepted by his wife in ceremonies in Washington, D.C., and San Francisco. He continues to be represented by the PRODH. When Ms. Ochoa was kidnapped and interrogated in Mexico City on October 28, 1999, her captors interrogated her about Guerrero, prompting her belief that the attack may have been related to her work in the Montiel case.[348]

D. *Conclusions and Recommendations*

Independent defense lawyers and human rights advocates in Mexico have too often been the subjects of intimidation for the work that they do. The forms of harassment that have been

346. PRODH, Silencing Environmental Activists, *supra* note 64

347. Amnesty Int'l, Prisoners of Conscience: Environmentalists Rodolfo Montiel and Teodoro Cabrera, *available at* http://www.web.amnesty.org/ai.nsf/index/AMR410132000 (Apr. 4, 2000).

348. *See* Lawyers Comm. for Human Rights Memorandum from Anu Menon, to Rob Varenik (Apr. 25, 2000) (on file with the *Fordham International Law Journal*).

reported cover a broad spectrum, including verbal threats, torture, kidnapping, selective prosecution, and attempted murder. These and other forms of intimidation have occurred throughout the country and have been directed against attorneys, those associated with human rights NGOs, and community activists. In many instances government officials have employed legal mechanisms at their command to retaliate against human rights advocates. More generally, the government at all levels has too frequently failed to investigate and prosecute those who have perpetrated intimidation. In this regard, we agree with the UN Special Rapporteur on Executions, who concluded:

> [t]he continuing threats against the lives of human rights defenders suggest that the Government has not, despite its declared commitment to do so, taken adequate steps to provide there persons with protection and eliminate threats to their security. The Special Rapporteur commends the work done by NGOs, often under difficult circumstances.[349]

Accordingly, the delegation recommends that:

- The Mexican government at all levels should make good on its previous commitments and fulfill its international obligations by thoroughly and expeditiously investigating and prosecuting all instances of criminal wrongdoing directed at defense lawyers and other human rights advocates.
- The Mexican government should take further affirmative steps to protect lawyers and human rights advocates who have been the subjects of threats and intimidation.
- In particular, those who kidnapped and assaulted Digna Ochoa need to be identified and brought to justice. Further, Ms. Ochoa and her PRODH colleagues who have been threatened should receive adequate protection from officers with sufficient training, equipment, and funding to comply with the mandate of the Inter-American Court.
- More generally, the Mexican government should publicly recognize the importance of the work of non-governmental human rights organizations, as well as counteract campaigns that characterize the work of human rights advocates as defenders of criminals.

---

349. Special Rapporteur Report, *supra* note 267, para. 103.

- No prosecutions should be brought against any lawyers or other human rights advocates for pursuing their legitimate work.
- The convictions of the environmental activists Rodolfo Montiel and Teodoro Cabrera should be vacated. Those responsible for torturing and obtaining confessions from Montiel and Cabrera should be identified and brought to justice.
- The Mexican government should clearly regulate the requirements and procedures for foreigners who wish to visit Mexico as human rights observers. Relying on circulars issued by the INM is insufficient, because they can easily be replaced by new circulars.

V. *THE ROLE OF THE JUDICIARY*

A. *Introduction*

In many legal systems a vigilant, independent judiciary serves as a vital safeguard for preventing human rights abuses that would otherwise occur, and for redressing them when they do take place. This is not the case in Mexico. Instead, judges in Mexico at most enjoy the potential to be little more than a marginal check in a system that revolves around prosecutors. Even then, this potential frequently goes unrealized.

This section examines the challenges facing the Mexican judiciary and thus the people who depend upon it. It begins with a brief consideration of relevant international and domestic standards. Next, this section turns to the many structural features of the Mexican criminal justice system that all but guarantee that judges will be marginal while at the same time assuring that prosecutors remain central. Finally, this part of the report analyzes the ways in which current procedures addressing judicial selection, tenure, and oversight fail to accord judges sufficient independence notwithstanding recent reforms.

B. *Mexico's Relevant Obligations*

1. International Obligations

The Universal Declaration of Human Rights enshrines an

international commitment to "the rule of law."[350] Both the Declaration and subsequent international instruments spell out the meaning of the phrase by guaranteeing an array of specific rights[351] as well as mandating various procedures and institutions.[352] The American Convention, for example, states that "every person has a right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature."[353] In similar fashion, the ICCPR provides that in the case of a criminal charge a suspect is entitled to "a fair and public hearing by a competent, independent and impartial tribunal established by law."[354] Beyond such requirements, nations are free to implement the rule of law in any number of ways, as is reflected in the diversity of legal systems throughout the world.[355]

Certain international standards, however, do bear more directly upon the role of the judiciary. In particular, the U.N. Basic Principles on the Independence of the Judiciary (the "Basic Principles on the Judiciary")[356] set forth guidelines to safeguard the integrity and autonomy of courts throughout the world. Like the Basic Principles on Lawyers, the Basic Principles on the Judiciary do not constitute a treaty. Nonetheless, they have received the approval of the General Assembly and reflect a considered global consensus that provides evidence of customary international law.

Among other things, the Basic Principles on the Judiciary state that "[t]he independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the laws

350. Universal Declaration of Human Rights, pmbl., G.A. Res. 217A, U.N. GOAR, 3d Sess., pt. 1, at 71, U.N. Doc. A/810 (1948).

351. *See, e.g.*, ICCPR art. 9 (defining right to liberty).

352. *Id.* art. 14 (stating that "everyone shall be entitled to a fair and public hearing by a competent, independent, and impartial tribunal established by law").

353. American Convention art. 8(1).

354. ICCPR art. 14.

355. *See* Reed Brody, *Introduction: The Independence of Lawyers and Judges, A Compilation of International Standards*, CENTRE FOR THE INDEPENDENCE OF LAWYERS AND JUDGES BULLETIN, Apr.-Oct. 1990, at 3-13.

356. Basic Principles on the Independence of the Judiciary, G.A. Res. 40/32, 7th Cong., at 59, U.N. Doc. A/CONF, 121/22/Rev. 1 (1985).

of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary."[357] They further provide that the judiciary shall decide matters "without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect from any quarter or for any reason."[358] In addition, the Principles declare that the method for selecting judges should be free of "improper motives"[359] and that judges should be suspended or removed only for actions that make them unable to discharge their duties.[360]

2. Domestic Obligations

Among other things, Mexico has a further obligation to ensure the independence of its judiciary under domestic law. Article 17 of the Mexican Constitution guarantees that everyone has the right to the administration of justice by competent, independent, and impartial courts, which should issue resolutions promptly, completely, and impartially. This article also provides that federal and local laws should establish the means necessary to guarantee the independence of the courts.[361]

C. *The Place of the Judiciary Within the Mexican Judicial System*

Renato Sales, Chief Advisor for the Mexico City Attorney General's Office, captured a common view in telling our delegation that "judges in Mexico are the parentheses" of a criminal justice system dominated by the prosecution.[362] Much of the judiciary's marginal role derives from the structure of Mexico's criminal justice system itself and from the failure of judges to assert what powers they do have. The result is an often egregious imbalance in the courtroom favoring the government, a disparity that guarantees a systemic violation of the rights of criminal defendants.

---

357. *Id.* art. 1.

358. *Id.* art. 2.

359. *Id.* art. 10.

360. *Id.* art. 18. The Defenders Declaration also addresses the role and nature of the judiciary. In particular, Article 9(2) provides that everyone has a right to a public review of his or her complaint by a independent, impartial, and competent judicial or other legal authority. *See* Defenders Declaration, *supra* note 268, art. 9(2).

361. MEX. CONST. art. 17.

362. Interview with Renato Sales, Chief Advisor, Mexico City Attorney General's Office, in Mexico City, Mex. (May 29, 2000).

Many of the structural features that diminish the judiciary can be traced back to Mexico's uneasy mixing of two types of legal systems: one accusatorial, the other inquisitorial.[363] In the inquisitorial model, a single authority effectively holds the power to investigate, accuse, and adjudicate. In an accusatorial system, by contrast, one element of government investigates while another adjudicates, at which point the opposing sides share an equal opportunity to intervene. Historically, Mexico has attempted to move from the inquisitorial approach to an accusatorial framework. According to a number of experts, however, what has instead come about is the worst of both worlds. On one hand, the prosecution, in effect, enjoys as much or more power than it did under a simple inquisitorial framework. Indeed, certain reforms have resulted in the augmentation of prosecutorial powers to the point where they currently go virtually unchecked.[364] On the other hand, however, the executive's power is checked by little more than the facade of the independent adjudicatory authority contemplated by a true accusatorial system. According to one expert, the inquisitorial model, which is marked by its lack of an adversarial element, still dominates in Mexican law, and the Public Ministry possesses powers beyond those expected in an accusatorial system.[365] As Sales put it, "[o]ur system is not an accusatorial system. It's not an inquisitorial system. It's a mixed system. A mixed system is inquisitorial because the real power is in the hands of the executive."[366] This imbalance, he further explained, is at the root of the problems

363. *See* Lawyers Comm. for Human Rights, Elements of Criminal Procedure, *supra* note 39, at 4-5 nn.14 & 15.

364. Interview with Renato Sales, Chief Advisor, Mexico City Attorney General's Office, in Mexico City, Mex. (May 29, 2000); *see also* Lawyers Comm. for Human Rights, Elements of Criminal Procedure, *supra* note 39, at 5-6.

365. J. Antonio Aguilar Valdéz, First Visitor, Mexico City Human Rights Commission, described how Mexico's 1917 legislation aimed for an accusatory penal process over which the judge would preside, with the two parties sharing equal opportunity to intervene. Aguilar Valdéz, however, further explained that the Constitution does not provide for this kind of system, and the initial investigation is under the control of the Public Ministry, who "presides over everything and does whatever he wants." Interview with J. Antonio Aguilar Valdéz, First Visitor, Mexico City Human Rights Commission, in Mexico City, Mex. (June 5, 2000).

366. Interview with Dr. Samuel I. Del Villar Kretchmar, Attorney General of Mexico City and Renato Sales, Chief Advisor, Mexico City Attorney General's Office, in Mexico City, Mex. (June 6, 2000).

with Mexico's criminal justice system.[367]

This mixed system encourages the police and prosecution to set the terms in a given case while leaving judges with little opportunity to intervene in any meaningful way. In the words of one law student, acting as a person of confidence during the process, "defendants find the first judge [to be] the police," some of whom allegedly fabricate proof in order to detain someone.[368] When the Public Ministry then receives notice of an accusation, a prosecutor immediately begins to investigate and look for proof, with no one supervising his or her work. As a result, a prosecutor often completes preparing a case before it is presented to the judge.[369] One magistrate in Mexico City suggested that the Public Ministry should carry out the initial investigation under the oversight of the judges, which would aid in the efficiency of the process, and would increase confidence in the system. In addition, this magistrate stated that "[o]ne of the problems in Mexican criminal law is that people don't find credible the magistrates because the investigation is under the Public Ministry's power [which] the Public Ministry is totally free to bring without limitation."[370]

One factor further enhancing the Public Ministry's advantage is the Mexican system's heavy reliance on the written record as opposed to hearings or other adversarial processes. Though a common feature of civil law systems,[371] the emphasis in the context of the Mexican framework means that judges are forced to rely on a record compiled almost exclusively by the executive. To cite one example, judges ordinarily base their decision to issue an arrest warrant on what is contained in the written record, which the prosecutor alone has prepared.[372] As if this were not enough, in urgent and *en flagrancia* cases, prosecutors can en-

367. Interview with Renato Sales, Chief Advisor, Mexico City Attorney General's Office, in Mexico City, Mex. (May 29, 2000).

368. Interview with Ana Lorena Delgadillo, law student and person of confidence, in Mexico City, Mex. (May 30, 2000).

369. Interview with J. Antonio Aguilar Valdéz, First Visitor, Mexico City Human Rights Commission, in Mexico City, Mex. (June 5, 2000). Aguilar Valdéz notes that the prosecutor often prepares the suspect's declaration, as well.

370. Interview with Miguel Angel Aguilar López, Magistrate, 2d Unitary Tribunal of the Federal District, in Mexico City, Mex. (June 6, 2000).

371. LCHR/CROWLEY TURKEY REPORT, *supra* note 276, at 27-47 (1999).

372. Interview with Roberto Diego López Hernández, state court judge, 6th State Penal Court, in Oaxaca, Mex. (May 30, 2000).

tirely bypass the legal requirement of obtaining a judge's approval for arrest, which effectively puts the Attorney General in the role of, or perhaps even superior to, a judge.[373] If a suspect is arbitrarily detained, moreover, no "effective post-arrest mechanism of judicial control" exists.[374] The only way a detainee may challenge the detention is if he brings a separate action against the police or Public Ministry. Otherwise, a judge will not review the detention.[375]

Nowhere are constraints on the judiciary more significant than with regard to potentially unreliable evidence. As discussed in Part II,[376] not only does the law discourage judges from questioning confessions, it actually promotes reliance on such proof. Judges regularly use the principle of procedural immediacy to accept statements of the suspect into evidence and as a result, judges can reject a defendant's retraction of the statement, even when there is evidence of coercion or torture.[377] In the unlikely event that a judge does consider whether a confession was coerced, the defendant still carries the burden of proving coercion, which is nearly impossible. Since the relevant information rests not with the defendant but with the agents who allegedly engaged in the torture, it will almost necessarily remain inacces-

373. Interview with Renato Sales, Chief Advisor, Mexico City Attorney General's Office, in Mexico City, Mex. (May 29, 2000).

374. *See* Lawyers Comm. for Human Rights, Elements of Criminal Procedure, *supra* note 39, at 9.

375. *See id.*

376. *See supra* Part II.

377. According to a defendant in the Yanga case, "[e]ven after the [National] Commission [of Human Rights] found that there had been torture, the judge kept to the first Public Ministry declaration." Interview with Alvaro Castillo, defendant, in Mexico City, Mex. (June 3, 2000). Defense lawyer Digna Ochoa, explained, "[t]he problem is that once a person is torture[d] and signs a confession, the judge gives full value to the declaration." Interview with Pilar Noriega and Digna Ochoa, defense attorneys, in Mexico City, Mex. (May 29, 2000). The First Visitor of the Mexico City Human Rights Commission stated that:

> Because the detainees are in the custody of the judicial police, they make the initial decision without being able to talk to a lawyer, and are sometimes mistreated by the judicial police. Because they are afraid of further mistreatment, they will give involuntary confessions and this problem is further exacerbated by the principle of procedural immediacy, which seems to continue to be applied by judges.

Interview with J. Antonio Aguilar Valdéz, First Visitor, Mexico City Human Rights Commission, in Mexico City, Mex. (June 5, 2000).

sible without the help of the court.[378] Furthermore, if a coerced confession is not the only evidence offered, there is a good chance that the judge will not only allow it into evidence, but will also use it in his or her decision. Appellate courts often will not overturn decisions of lower courts when evidence of coercion exists, because the judges indicate that there is other evidence in the record that corroborates the confession.[379] Ironically, most appellate courts will not overturn a proceeding based on "accepted practice in the administration of justice,"[380] precisely because so many abuses are inherent within the system.

Perhaps more troubling, even where judges do have authority, they frequently fail to exercise it. In particular, many judges ignore violations of both procedural and constitutional guarantees. For example, judges must validate all arrests, but they "often fail to question suspect or patently false police versions of how detainees came into custody."[381] In some cases, upper level courts have even ruled that despite a lower court's erroneous validation of the arrest, a defendant can still be tried simply because a judge certified the indictment.[382] In similar fashion, courts often fail to intervene even when the suspect's defender clearly did not adequately represent the suspect.[383] Some defenders even indicated that judges actively hinder their attempts to provide representation. According to one, "if you're an aggressive public defender, the judge complains. The judges don't want to be disturbed. So the public defender does minimum work, so the cases keep moving."[384] At least one prosecutor confirmed this general picture in stating that the judiciary contributes to a situation in which defense lawyers are like zeros and prosecutors are like 600-pound gorillas.[385]

Other common practices further undermine judicial over-

---

378. *See* Lawyers Comm. for Human Rights, Elements of Criminal Procedure, *supra* note 39, at 22.

379. *See id.*

380. *See id.* at 31.

381. HUMAN RIGHTS WATCH, SYSTEMIC INJUSTICE, *supra* note 20, at 37. This occurs particularly in cases of torture or disappearances. *Id.*

382. *Id.* at 37-38.

383. *See* Lawyers Comm. for Human Rights, Elements of Criminal Procedure, *supra* note 39, at 25.

384. Interview with Ana Lorena Delgadillo, law student and person of confidence, in Mexico City, Mex. (May 30, 2000).

385. Interview with Renato Sales, Chief Advisor, Mexico City Attorney General's Office, in Mexico City, Mex. (May 29, 2000).

sight. The Crowley delegation was particularly surprised to discover how rarely judges attend proceedings at all, but instead rely on secretaries to go in their place. As a professor of criminal law put it, "judges are locked in their offices," and most "have their secretaries or even lower employees, taking depositions and declarations."[386] According to one defense attorney, Digna Ochoa, "the process is all written, and the secretary of the judge is present, but really the judge is not present. Many of the judges don't know the lawyers, much less the person they're going to be sentencing."[387] J. Antonio Aguilar Valdéz, of the Human Rights Commission for the Mexico City, stated that "[t]he secretaries really oversee the cases. The judges only appear on rare or important cases."[388] Two prisoners, Enrique and Adrián Aranda Ochoa, confirmed this impression, explaining that in one and a half years, they saw the judge "one or two times only. Instead, we saw the secretary all the time."[389] Another prisoner, Alfonso del Campo Dodd, indicated that the judge did not even sentence him, the secretary did.[390]

Notably, judges are also rarely present when testimony is being given. A prosecutor in Veracruz explained that the declaration a defendant makes before the Public Ministry has probative value, "often there is not any judicial presence," and usually the only figures present are the prosecutor, the typist, and the declarant.[391] Moreover, without the oversight of a judge, the stenographer, who creates the record, may inaccurately record the proceedings. Digna Ochoa indicated that "[w]e have to make sure that the typist doesn't write down something our clients aren't saying, that there is no intimidation going on, we have to be taking care of the witnesses at the same time as trying to pay

386. Interview with Evelio Bautista Torres, criminal law professor, Autonomous University "Benito Juárez" of Oaxaca, in Oaxaca, Mex. (June 2, 2000).

387. Interview with Pilar Noriega and Digna Ochoa, defense attorneys, in Mexico City, Mex. (May 29, 2000).

388. Interview with J. Antonio Aguilar Valdéz, First Visitor, Mexico City Human Rights Commission, in Mexico City, Mex. (June 5, 2000).

389. Interview with Enrique and Adrián Aranda Ochoa, defendants, North Prison, in Mexico City, Mex. (June 2, 2000).

390. *See* Interview with Alfonso del Campo Dodd, defendant, Pachuca Prison, in Hidalgo, Mex. (June 3, 2000).

391. Interview with Rafael Hernández Virues, Asst. Attorney General, Veracruz State Attorney General's Office, in Veracruz, Mex. (June 1, 2000).

attention to what the typist is writing down."[392] Instead of recording the precise words of the declarant, the typist often will take down the words in "judicial language"[393]—that is, legal jargon that may reflect the stenographer's impressions and prejudices rather than what the speaker actually said.

Several factors contribute to judicial absenteeism. Procedural codes do not clearly mandate that a judge be physically present at given proceedings. Excessive caseloads make it impossible for most judges to attend all hearings in any case.[394] In addition, the heavy reliance on the written record that is characteristic of civil law systems adds inefficiency to the process, exacerbating the heavy caseload problem.[395] Reliance on the record, moreover, furnishes judges with a further excuse not to be present because what matters is the record itself, rather than the manner in which it is compiled. In consequence, even those judges who would take an active role in proceedings still direct a secretary to preside over certain proceedings. A federal court judge in Oaxaca, for example, believed that judges were free "to request testimony, to interrogate, to take depositions, to make conclusions."[396] This judge expressly stated, however, that "[I]f it is a common charge, and all the evidence is in the case file, including the defendant's own admission, then it may be justifiable that the judge not be present at a proceeding."[397]

Beyond this, the written record further works to undermine judicial oversight even when judges do attend proceedings. This follows because some judges apparently believe that they should not intervene precisely because they should depend solely on the record itself. In the words of the President of the Judicial Council for Mexico City, "[t]he judge may believe that the per-

---

392. Interview with Pilar Noriega and Digna Ochoa, defense attorneys, in Mexico City, Mex. (May 29, 2000).

393. *Id.*

394. *See* Lawyers Comm. for Human Rights, Elements of Criminal Procedure, *supra* note 39, at 29 (describing the lack of clarity in the criminal procedure codes). A spokesman from the Mexico City Human Rights Commission called these hearings "long" and "laborious." Interview with J. Antonio Aguilar Valdez, First Visitor, Mexico City Human Rights Commission, in Mexico City, Mex. (June 5, 2000).

395. *See* Pilar Domingo, *Rule of Law, Citizenship and Access to Justice in Mexico*, Mexican Studies, The Regents of the University of California (1999), *available at* 1999 WL 19605295.

396. Interview with Amado Chiñas Fuentes, Judge, 4th District Court, in Oaxaca, Mex. (June 2, 2000).

397. *Id.*

son is innocent but he must rely on documentation."[398] A state judge in Oaxaca amplified the point, stating: "[o]ur judicial process is eminently written, in the written form. Therefore, what we base our sentence on is what is included in the written record . . . . It's not our custom to be in the oral form of justice . . . . The idea of [a] hearing is that it is basically a formality . . . ."[399]

This judge further opined that doing no more than merely asking for a reconstruction of the events of the case would intrude upon the defense attorney's job and destroy the judge's impartiality.[400] In light of such attitudes, even a judge's physical attendance does not by itself ensure meaningful judicial oversight.

The comparative weakness of the judiciary in the criminal justice system reflects the position of the courts in Mexico more generally. Of the three government branches, the judiciary is clearly the weakest.[401] As an initial matter, judicial review is severely constrained even after recent reforms. Under these changes, eight ministers of the Supreme Court may declare laws unconstitutional and take them off of the books entirely.[402] Triggering this mechanism, however, is another matter. To do so requires a request from either one-third of Congress, one-third of a state congress, or the Attorney General must request the review within thirty days of the passage of the law. With these severe restrictions, laws will rarely be challenged because thirty days is hardly enough time to formulate a persuasive argument. The Attorney General, as part of the executive branch, is unlikely to mount a challenge, nor is one-third of a legislative body ordinarily likely to do so.[403] Jurisdictional limitations, moreover, further limit the potential of judicial review. This applies in particular to Mexico's many specialized administrative

398. Interview with Dr. Juan Luis González, President, Judicial Council of the Federal District, in Mexico City, Mex. (June 6, 2000).

399. Interview with Roberto Diego López Hernández, state court judge, 6th State Penal Court, in Oaxaca, Mex. (May 30, 2000).

400. *Id.*

401. Michael C. Taylor, *Why No Rule of Law in Mexico? Explaining the Weakness of Mexico's Judicial Branch*, 27 N.M.L. REV. 141, 142 (1997).

402. Yamín & García, *supra* note 124, at 502 (1999). This stands in contrast to the *amparo* mechanism, through which people are merely exempt from unconstitutional laws.

403. *Id.* at 502.

tribunals, which to a significant extent function beyond the scope of judicial oversight.[404] For these and other reasons, the judicial branch in Mexico remains subordinate to the legislature and the executive both substantively and symbolically. This continuing subordination cannot help but confirm the attitude evident among criminal court judges that they should serve as mere rubber stamps to the actions of the other branches.

D. *Judicial Independence*

Beyond marginalization, one further structural reason for the ineffectiveness of the Mexican judiciary is lack of independence. Despite recent constitutional reforms under the Zedillo administration, many commentators both outside and inside the Mexican criminal justice system suggest that the government still falls short of its obligations to ensure judicial autonomy. Under the Zedillo reforms, the Supreme Court's eleven ministers are now elected by a two-thirds vote, rather than by a simple majority, of the Senate from a list of candidates proposed by the executive.[405] The ministers also have fixed, non-renewable terms of fifteen years, which may foster greater independence from the executive because a minister could survive two presidential terms.[406] The reforms, moreover, created the Federal Judicial Council, to which seven members are appointed by the judiciary, the executive, and Congress. The President of the Supreme Court heads the Council, which was formed to relieve the Supreme Court of some of its administrative duties, including the appointment of judges to lower courts, controlling disciplinary actions against judges, and resolving complaints against them.[407]

---

404. *See* Domingo, *supra* note 395. On the federal level, the judiciary is comprised of the Supreme Court of Justice, collegial or unitary circuit courts, district courts, and the Council of the Federal Judiciary. Members of the Supreme Court are called ministers, magistrates sit on the circuit court, and judges sit in the district court. *See* West-Group Mexican Law Library, *Introduction: Selected Aspects of the Mexican Legal System* 14, *available at* 1997 WL 685237. State courts are modeled after the structure of the federal courts. The Superior Court of Justice is the high appellate court, and there are civil courts and criminal courts, justices of the peace, and several specialized courts. The specialized courts include administrative courts, family courts, real property leasing courts, and commercial courts. *See id.* at 16.

405. *See* Domingo, *supra* note 395.

406. *See* Héctor Fix-Fierro, *Judicial Reform and the Supreme Court of Mexico: The Trajectory of Three Years*, 6 U.S.-MEX. L.J. 1, 6 (1998).

407. *See* Domingo, *supra* note 395. The Council was formed in 1994 at the federal level, and some states in Mexico have introduced such councils by amending their local

The implementation and scope of the reforms, however, may be more apparent than real. When Zedillo took office and introduced the reforms in 1994, he promptly replaced all of the members of the Supreme Court with his own candidates, an act that was reminiscent of past executive control over the judicial branch.[408] Moreover, if the Senate rejects a President's candidate to the Supreme Court two times successively, the President may still appoint a minister to the Court.[409] As stated by the Inter-American Commission, "the system under which the President nominates candidates for confirmation by the Senate does not appear to be conducive to the proper functioning of an open, competitive system with due checks and balances on the selection process."[410]

Similar concerns apply to the selection of judges on lower courts. Although the judicial councils in Mexico City and other federal jurisdictions oversee the appointment of trial-level and some appellate judges through a more competitive process, the magistrates at the highest level courts in these jurisdictions are still appointed through a process that is heavily influenced by the executive branch. The President of the judicial council in Mexico City stated:

> [i]t's hard to separate judicial power from political process. The naming of the judges [is] done by the local executive. Then it has to be approved by the local assembly so it's a political process. If the executive names a person who isn't in the same party, the assembly won't approve the nomination. The naming of judge is political. Judicial resolutions have political consequences. Our independence can only be won every day with our work and being transparent and far away from politics. As an institution, it shouldn't be political. At least in the naming of judges, there's no independence because it's a political process.[411]

Moreover, "many lower level judges named previously through a process which was political in nature, remain in their positions

---

statutes. *See* Jorge A. Vargas, *The Rebirth of the Supreme Court of Mexico: An Appraisal of President Zedillo's Judicial Reform of 1995*, 11 AM. U.J. INT'L & POL'Y 195, 334 (1996).

408. *See* Taylor, *supra* note 401, at 158.

409. *See* Yamín & García, *supra* note 124, at 502.

410. *IACHR Report*, *supra* note 21, para. 41.

411. Interview with Dr. Juan Luis González, President, Judicial Council of the Federal District, in Mexico City, Mex. (June 6, 2000).

. . . [and] often have strong ties to the executive branch."[412]

Several organizations also remain skeptical of the Council's ability to handle complaints. When, for example, the PRODH filed an administrative complaint against a judge who did not respond after 35 days to an *amparo* suit filed by four indigenous people who had been arbitrarily detained, the Council rejected the complaint months later, "alluding to [the judge's] excessive workload."[413] According to the Lawyers Committee, "the judicial councils [at the Mexico City and federal levels] often state that they have no competence to review the actions of judges in relation to situations of possible abuses of the rights of defendants."[414] Furthermore, the councils themselves suffer from a lack of independence, because they maintain close ties to the judiciary that they are charged with disciplining and supervising.[415]

The Inter-American Commission has also noted that judicial independence further suffers from lack of adequate tenure. Currently, only the fifteen-year terms for Supreme Court provide meaningful tenure. By contrast, circuit court magistrates and district court judges have only six-year terms, after which they may be ratified, promoted, or removed.[416] In the view of the Inter-American Commission:

> [t]he fact that circuit magistrates and district judges are subject to transfer until appointed to a new position undermines the principle of genuine removability, which is an essential requirement for an independent judicial branch. Moreover, the fact that lower court judges are not unremovable at all, together with the absence of anything that could be called a genuine legal career, gives cause for real concern.[417]

As a result, those judges who hope to be appointed to another position may be inclined to serve governmental interests.[418]

By definition, lack of independence exposes the judiciary to

412. *See* Lawyers Comm. for Human Rights, Elements of Criminal Procedure, *supra* note 39, at 26.

413. PRODH, Briefing Materials for Members of Congress and State Department 4 (2000).

414. *See* Lawyers Comm. for Human Rights, Elements of Criminal Procedure, *supra* note 39, at 27.

415. *See id.* at 28.

416. *See id.* at 26.

417. *IACHR Report*, *supra* note 21, para. 394.

418. *Id.* para. 395.

pressure from the Public Ministry to obtain convictions rather than acquittals, even if the decisions are based on unreliable confessions or other weak evidence.[419] A number of actors in the criminal justice system told the Crowley delegation of their impression that judges, and the court generally, are allied with the prosecution, and the problem of improper influence is generally perceived to be worse at the state level than at the federal level.[420] As one defense lawyer in Mexico City put it, "it seems very important to me that the judge . . . sees himself as an ally with, the Public Ministry . . . [s]o that the problem of the lawyers is not only to confront the Public Ministry but also the personnel of the judge, the court."[421] From a more technical angle, a prosecutor in the Mexico City Attorney General's office stated that the power to grant provisional liberty to a defendant under Article 21 of the Mexican Constitution is seen as a power of the Attorney General rather than as a right of the defendant, and "in practice, the judge usually grants or denies provisional liberty based on the attorney general's recommendation, and thus treats it as being at the discretion of the prosecutor."[422] In Mexico City, judges "who are absolutely under the hand of the Public Ministry's office" are called "judges of consignment," as if they were on consignment for the executive.[423]

Experts with whom we met told us that an even more pointed source of pressure is the threat of prosecution. Only the Public Ministry may conduct criminal investigations, including proceedings against judges, and some judges indicated that employees of the Public Ministry threaten criminal proceedings for

419. *See* Lawyers Comm. for Human Rights, Elements of Criminal Procedure, *supra* note 39, at 26-27.

420. *See IACHR Report, supra* note 21, para. 393; *see also U.S. State Dep't Report, supra* note 21, at 834-35. One defense attorney indicated that although judges' salaries have recently been raised, the judges on the state level are still underpaid compared to those at the federal level "so their independence is worse." Interview with Pilar Noriega, defense attorney, in Mexico City, Mex. (May 30, 2000).

421. Interview with Pilar Noriega and Digna Ochoa, defense attorneys, in Mexico City, Mex. (May 29, 2000).

422. Interview with Renato Sales, Chief Advisor, Mexico City Attorney General's Office, in Mexico City, Mex. (May 29, 2000).

423. Interview with Dr. Luis de la Barreda Solorzano, President, Mexico City Human Rights Commission, in Mexico City, Mex. (May 31, 2000); *see also* Interview with Mariclaire Acosta, Mexican Commission for the Defense and Promotion of Human Rights, in Mexico City, Mex. (June 1, 2000) (stating that the prosecutor generally "becomes" the judge, and there is "no real independence between the executive and the judge").

a failure to convict. With no external control of the Public Ministry's authority, agents can effectively control the judiciary through these threats of prosecution.[424] According to the President of the Mexico City Human Rights Commission, "[w]e're living in a situation which I have never seen in all my years in the law, where judges and magistrates are being investigated because they have not done what the Public Ministry's office wanted them to . . . . A week ago this office submitted recommendation[s] to end investigations against three judges."[425] A public defender in Veracruz echoed the point, remarking that "judges either obey or agree with the prosecution, maybe because they fear them."[426] This attorney also explained that public defenders try to use the law to argue against prosecutors, but they often need the judge to support them, which is very uncommon, because "[j]udges who weigh the prosecutor's evidence critically, standing up to the Public Ministry, can get into trouble."[427]

Perhaps the most grave form of pressure arises not from the executive's own threats against judges but its failure to protect them from external danger. This problem has been sufficiently pressing to draw the attention of the United Nations Special Rapporteur on the Independence of Judges and Lawyers, who expressed concern to the Mexican government on at least two occasions when judges who did not imprison suspects were both removed from office and received death threats.[428] One of these judges was later murdered, and the Special Rapporteur indicated that his death "put at grave risk the independence and

---

424. *See* Lawyers Comm. for Human Rights, Elements of Criminal Procedure, *supra* note 39, at 27.

425. Interview with Dr. Luis de La Barreda Solorzano, President, Mexico City Human Rights Commission, in Mexico City, Mex. (May 31, 2000); *see also* Interview with J. Antonio Aguilar Valdez, First Visitor, Mexico City Human Rights Commission, in Mexico City, Mex. (June 5, 2000) (stating that the Public Ministry can initiate an investigation against judges who do not do what they wish).

426. Interview with Roberto Camacho Hernández, public defender, in Veracruz, Mex. (June 1, 2000).

427. *Id.*

428. *See Report of the Special Rapporteur on the Independence of Judges and Lawyers, Mr. Param Cumaraswamy*, U.N. ESC, Comm. on HR, 54th Sess., U.N. Doc. E/CN.4/1998/39 (Feb. 12, 1998), *available at* http://www.hri.ca/fortherecord1998/documentation/commission/e-cn4-1998-39.htm; *see also Report of the Special Rapporteur*, 52nd Sess., E/CN.4/1996/37 (Mar. 1, 1996), *available at* http://www.unhcr.ch/refworld/un/chr/chr96/thematic/37-law.htm.

impartiality of the judiciary in Mexico."[429]

Against these odds, some judges have ultimately issued positive rulings on the basis of human rights considerations. Many of these decisions, however, underscore the importance of outside pressure. To cite one example, in Israel Ochoa's case, who was arrested for supposedly representing two clients with opposing interests, the judge deciding the *amparo* action ultimately annulled the arrest warrant, holding that the prosecution had not sufficiently established the elements of the crime. This occurred only after the case received significant reaction from national and international human rights organizations, the Oaxacan bar association, and other groups. As Human Rights Watch stated, "[w]hile positive, these cases also highlighted a disturbing weakness in Mexico's justice system: years of injustice could be ignored by judges, and the ability to obtain justice depended not on ingrained respect for human rights within the justice system but on a victim's ability to marshal public support for his or her case."[430]

E. *Conclusions and Recommendations*

As parentheses in the criminal justice system, the judiciary in Mexico too often fails to serve as a meaningful guarantor of basic rights. To a significant extent, this situation results from important structural features of Mexico's mixed accusatorial and inquisitorial system. In particular, responsibility for the initial, and usually most important, phase of investigation lies with the Public Ministry, which compiles the written record that frames the rest of the criminal process. In consequence, many judges not only fail to question, but also rely upon questionable evidence, such as coerced confessions. Even where judges do have authority, moreover, they frequently fail to exercise it. Especially troubling in this regard is judicial absenteeism, itself a result of overly heavy caseloads, unclear procedural codes, and the system's heavy reliance on the written record. In addition to these problems, judicial independence presents another concern. In general, the executive and legislative branches wield considera-

429. *Report of the Special Rapporteur*, 52nd Sess., E/CN.4/1996/37 (Mar. 1, 1996), *available at* http://www.unhcr.ch/refworld/un/chr/chr96/thematic/37-law.htm.

430. HUMAN RIGHTS WATCH, WORLD REPORT 2000: MEXICO HUMAN RIGHTS DEVELOPMENTS 137, 140 (1999).

ble power in judicial selection, oversight, and—given lack of sufficient tenure—reappointment. Executive threat of prosecution, along with failure to protect judges from outside threats, constitute still further factors undermining vigorous judicial enforcement of fundamental rights.

The delegation recommends that:

- Mexico should revise its constitution to move from an inquisitorial system to an accusatorial system, by taking away some of the powers of the Public Ministry and giving them to the judge.
- Judges should actively engage in the criminal justice process, and all criminal procedure codes should be carefully drafted to clarify when judges must be present at criminal proceedings. No testimony should be taken without the presence of the judge, and no sentence should be given by anyone but the judge.
- The Mexican government should consider modifying the criminal justice system in ways that will decrease the emphasis on a written record, which would increase the efficiency and transparency of proceedings.
- All hearings should be open to the public, except for cases exempted by international instruments.
- The Mexican government should take greater steps to ensure the independence of the judiciary, as mandated under domestic and international law, by decreasing executive influence over the selection processes for judges. The government should also seek to guarantee the independence of the Judicial Council from the Supreme Court.
- The selection process of judges should continue to be evaluated, and programs on both the state and federal levels should be instituted to ensure that the high quality, independent lawyers are entering the judiciary. In addition, judges' salaries should be evaluated and raised accordingly.