

EXECUTIVE SUMMARY

Few exercises of the State's power demand as much care to avoid error and abuse as arrest and detention of its inhabitants. Mexico's government, which has witnessed a significant problem of violent crime, must daily attempt to balance its right and duty to enforce the law and protect its inhabitants with the equally important requirement that it respect the rights of those it chooses to deprive of liberty. This is a challenge, but not necessarily a dilemma. Properly calibrated in a well-run system, the values of law enforcement and respect for rights are more complementary than many in Mexico—and elsewhere—have appreciated.

Mexico's search for this balance has historically been unsuccessful despite its early attempts to outlaw torture and other forceful means of extracting confessions from suspects. Coercion became, and remains, closer to the rule rather than the exception, with confessions still the featured weapon in the prosecutorial arsenal. Indeed, it is the purpose of this report to demonstrate the ways in which the criminal justice process encourages, tolerates or simply fails to prevent the forcible extraction of information from suspects and witnesses.

The Mexican government has taken issue with assertions by human rights organizations that torture remains a serious problem in Mexico. In recent years, key Mexican officials have contended that torture has been drastically reduced and is now a second- or third-tier problem among human rights issues. On one level, this is beside the point, since torture is simply the most egregious method by which law enforcement officials oblige detainees to make statements, violating a host of fundamental rights in the process. However, the perception among key policy makers that Mexico has conquered a longstanding problem of such gravity is likely, if it sticks, to retard efforts to implement much-needed reforms. President Fox's acknowledgment that torture is a problem which demands urgent attention, is a welcome, very recent development.

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In the preparation of this report, the authors have examined available evidence and carefully evaluated official claims that torture has been successfully addressed. We join in the findings of both the United Nations and the Organization of American States—and echo the conviction of Mexico’s new President—that torture continues to be a problem in need of serious attention and that the large majority of incidents take place in connection with criminal proceedings. The evidence to the contrary is both limited and seriously flawed as an indicator of national trends. The National Human Rights Commission (*Comisión Nacional de Derechos Humanos*, CNDH) lacks data on abuses in the 31 Mexican states and the Federal District, and there is currently no adequate system for coordinating the methods and findings of all the local, state-based commissions. The system of human rights commissions needs prompt reform if it is to serve even as a reliable source of data. While scattered, information from state commissions as well as the CNDH suggests that the incidence of torture is still alarmingly high, even if lower than in prior years. For those who torture, the risk of prosecution and conviction remains only a theoretical disincentive to abuse. As illustrated by several cases digested in appendices, the rules and practices that govern criminal procedure remain an invitation to abuse, a circumstance largely confirmed by interviews with more than 200 individuals, including defense counsel, prosecutors and judges. Until significant reforms take place there is little assurance of meaningful progress.

The phenomenon of institutionalized abuse—defined here as unwarranted and unlawful coercive pressure—within the criminal justice system seems clearly linked to certain specific rules and practices which are the primary focus of this report. More general factors also play a role, making it difficult to curb abuse. These include the written inquisitorial nature of the Mexican criminal process, the imbalance of power created by the expansive role of the prosecutor, and a lack of effective investigative techniques. The specific factors include the following:

The Pattern and Practice of Arbitrary Detentions

Arbitrary detentions are prevalent in spite of the constitutional requirements for judicial arrest orders and immediate presentation of suspects before a judge. Wide-reaching exceptions that allow for warrantless detentions in broadly-defined “urgent cases” or in cases where a suspect is apprehended “*en flagrante*” (in the act) give prosecutors and

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police undue discretionary authority to order and execute arrests without a judicial order. This discretion may be misused to apprehend persons against whom there may be little cause to arrest or charge. And in the time between the arrest and the presentation before a judge, abuses, including torture, may be employed to elicit a confession that is then used as the basis for a prosecution. Mexican law does not discourage this practice, and confessions obtained during arbitrary detention are not likely to be invalidated at trial. Recent constitutional reforms that dilute the evidentiary requirements for judicial warrants are not likely to significantly reduce resort to warrantless arrests.

Rules and Practices Regarding the Registration of Detainees

While Mexican law reflects international standards that require accurate recording of relevant circumstances surrounding the detention and interrogation of persons, the law is frequently ignored. Authorities commonly falsify key information relating to the time and circumstances of detention. Unacknowledged custody, during which a detainee is particularly vulnerable to abuse, can extend for weeks. There is no established hierarchy of responsibility regarding detainees between and within prosecutorial and police systems. Significant progress in resolving these problems has been made in Mexico City but in the rest of the country it appears that little attention has been paid.

Restrictions on the Suspect's Access to a Defense Attorney

International standards provide that suspects must have immediate access to counsel upon detention unless they expressly and unequivocally waive that right. While the Mexican Constitution does guarantee a suspect's right to counsel during a criminal investigation, confusing criminal code provisions have been interpreted as guaranteeing the defendant the right to access counsel only upon his formal declaration before the prosecutor. In practice, suspects have no right to counsel during the period of detention for interrogation by the police, which can extend for hours or even days. While Mexican law precludes the inclusion in evidence of confessions made without presence of counsel, abuse and mistreatment inflicted prior to a confession may coerce defendants into confessing even when finally in the presence of their attorneys. Administrative rules and practices, such as lack of access to facilities in detention that would permit confidential interviews, restrict necessary interaction between defendants and their counsel.

The Quality of Legal Services

The quality of the representation provided by defense attorneys is generally poor throughout the criminal process. The vast majority of criminal defendants are represented by public defenders alone and the representation they provide is inadequate. For example, most fail to intervene in any way during a confession, and fail to object when coerced confessions are used in evidence. Factors contributing to this inadequacy of representation include low salaries, minimal training, excessive case loads and a lack of adequate independence and autonomy from prosecutors. Legislation permitting defendants to designate a “person of confidence” as an alternative to a public defender is unclear and, in any event, not vigorously applied. Persons so designated are sometimes unknown to the defendant or are employees of the prosecution.

Authorities Qualified to Receive a Confession

Mexican law provides that in order to have evidentiary value, a confession must be made before a prosecutor or judge, in the presence of counsel. While these rules preclude the police from obtaining confessions for use as evidence, they have not been interpreted as precluding police interrogation of suspects. Accordingly, while in police custody, defendants are frequently encouraged, sometimes under coercion, to confess or to identify other suspects. When police pass the defendant on to prosecutors to provide a statement, the prosecutors seldom inquire into the treatment of the defendant while in police custody or ensure that confessions or other statements made were voluntary. To the contrary, prosecutors expect defendants' statements to mirror declarations made during police interrogation and often return the suspect into police custody if they are not satisfied with the defendant's statement. Intergovernmental bodies that have analyzed the close relationship between Mexico's police and prosecutors have recommended that evidentiary value be given only to confessions rendered before a judge. This is particularly advisable given the perverse use in Mexico of the principle of “procedural immediacy.” Unlike in most comparable jurisdictions, where the principle creates a presumption that evidence (such as a confession) presented before a judge should have the greatest weight, in Mexico it creates a presumption that the first statement—usually taken when the defendant is most likely to be subjected to abuse—should be entitled to greater credibility and weight than subsequent statements, including those before the judge.

The Evidentiary Value of Confessions

Mexican law provides that a confession alone cannot serve as the basis for charges brought by the prosecution, and that a confession will not be valid if other evidence shows it is not truthful. Nonetheless, confessions obtained through coercion continue to be used in evidence and judges often require defendants alleging mistreatment to meet an unreasonably high standard of proof. Even where that high standard is met, tainted evidence is seldom excluded from evidence. To the contrary, confessions obtained in questionable circumstances are frequently utilized as central pieces of evidence in decisions convicting defendants, even though international human rights law and basic principles of criminal law require that the courts exclude from consideration entirely any confession or other evidence obtained through coercion. Courts violate the presumption of innocence guaranteed by international law by placing the burden on the defendant not only to show that the original confession was coerced but also to prove that it is false and that the defendant's declaration of innocence and version of the events are truthful.

The Inadequate Medical Examinations of Detainees

Detainees in criminal proceedings are examined by forensic doctors as a matter of course. But these examinations are usually perfunctory and are seldom directed to detect and document torture to the satisfaction of a judge. Forensic doctors themselves are often poorly trained and equipped, and are compromised by their relationship to the Public Ministry. Possibilities for independent medical examinations are either too limited or too late in the prosecution to be useful to defendants' cases.

The Role of Judges

Judges generally fail to control abuses against suspects and to ensure the proper administration of justice. Judges seldom act affirmatively to ensure that the confessions rendered before them are truly voluntary and do little to investigate allegations of coercion. A lack of judicial independence compromises the ability of the criminal justice system to protect against abuses. While recent reforms have created more independent and objective mechanisms for appointing judges, many obstacles to independence remain: senior judges are political appointees, less senior judges are holdovers from the old regime, the presidency main-

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tains *de facto* power to dismiss judges, and most judges do not have tenure. Lack of independence leaves judges vulnerable to pressure from the executive branch, including prosecutors, to convict based on tainted confessions. While prosecutors may threaten criminal prosecution against judges who fail to convict, judges are seldom sanctioned for compromising the due process rights of defendants. Judicial councils, which are responsible for judicial discipline, are generally unwilling to address the failure of judges to ensure defendants' rights.

Judges routinely conduct criminal proceedings in a manner that fails to provide adequate guarantees for the efficacy of the system, the accuracy of the verdict, or the protection of the defendant's rights. Mexican law fails to unequivocally require judges to attend the hearings and other proceedings which take place in the cases under their jurisdiction even though it is internationally recognized that physical presence is crucial for analyzing evidence properly and protecting the rights of the defendant. Excessive workloads render it virtually impossible for judges to attend all hearings in criminal cases before them.

In spite of a general rule in both Mexican and international law requiring public hearings in criminal proceedings, the combination of gaps in Mexican law and inadequate physical infrastructure renders public hearings very rare.

The Absence of Judicial Remedies

International human rights law provides for the right of recourse to a court for protection against acts that violate rights. While Mexican law provides for retrials in cases of error or inadequate defense, a coerced confession does not justify a retrial. In any event, appeal courts are loath to overturn a criminal proceeding based on common prosecutorial or police practices, even where those practices violate the defendant's rights.

The *amparo*—a legal remedy for State actions that violate fundamental constitutional rights—has in practice failed to provide an effective remedy in cases of abuse occurring during the criminal process. In theory, another remedy known as “recognition of innocence” may be used to overturn a conviction when incontrovertible evidence proves innocence, but it is almost never applied in practice.

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Military Involvement in Law Enforcement

The Mexican armed forces participate in criminal law enforcement activity in spite of provisions to the contrary the Mexican Constitution and the recommendations of international human rights bodies. The civilian police and prosecutorial forces have also become increasingly militarized as many members of the military have been incorporated into their ranks, particularly in the new Federal Preventive Police. Human rights abuses that arise when soldiers trained for combat are placed in policing functions are seldom investigated and usually go unpunished, as cases involving soldiers are handled by a military court system that protects its own.