



Human rights under siege: Public security and criminal justice in Mexico

Miguel Agustín Pro Juárez Human Rights Center, Mexico City

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Introduction

The false dichotomy between public security and human rights¹

Governments in the Americas have historically used the discourse of public security to consolidate their own power rather than to address the true security needs of their populations. During the Cold War, appeals to security became a pretext for political repression, particularly in countries that fell under the domination of Latin America's brutal military regimes. The end of the Cold War and the fall of the region's military dictatorships appeared to usher in an era of democratization. However, following the events of September 11, 2001 and in a context of rising crime in much of Latin America, discourse on public security now centers once more on perceived security threats posed to the region by organized criminal groups, a language that governments have used to

¹ The introductory material in this and the following sections is based on Chapter 1 of Center Prodh's 2007 annual report, *Human Rights Under Siege: Structural Reforms and Institutionalized Repression Under the Calderón Administration (Hacia 2012, reformas estructurales y mano dura: el cerco en torno a los derechos humanos)*, available in Spanish at www.centroprodh.org.mx.

justify the adoption of measures that represent a clear reversal of the post-Cold War trend toward respect for fundamental human rights. In this climate, the Mexican government has turned to *mano dura* policies (an “iron fist” approach to public security), deploying highly visible security measures centered on a show of force while diverting attention from its lack of real response to the causes of crime and insecurity.

In analyzing this subject, it is important to recall that public security can be measured in at least two distinct ways: first, by levels of actual crime and violence and second, by the subjective perception of security or lack thereof among the population. The latter often has less to do with citizens’ actual contact with crime than with how crime is publicized in a country.

In Mexico, surveys of the perception of insecurity in recent years have reflected high levels of fear among the population. In 2005, for instance, the National Survey of Insecurity, conducted by the Citizens’ Institute for the Study of Insecurity (ICESI), revealed that 54% of Mexicans felt unsafe in their states of residence.² While part of the explanation for these results is that actual crime rates in Mexico were and continue to be high, the extent to which media coverage and other factors increase perceptions of insecurity is apparent when one considers that following the widely publicized fatal kidnapping of a high-profile businessman’s son in Mexico City in 2008, a national telephone survey found that 77% of the telephone-owning public now qualified the public security situation in Mexico as bad or very bad, a level described by the conductors of the survey as an increase of more than 25%.³ These levels of perceived insecurity

² Instituto Ciudadano de Estudios sobre la Inseguridad, *Tercera Encuesta Nacional sobre Inseguridad 2005 (ENSI-3): análisis de resultados* (Sept. 2005), 112, available at www.icesi.org.mx/estadisticas/estadisticas_encuestasNacionales.asp.

³ Bgc, Ulises Beltrán and Associates, *Ven útil torturar a secuestradores*, EXCELSIOR, Aug. 11, 2008, available at www.exonline.com.mx/diario/noticia/primeras/especiales_nacional/ven_util_torturar_a_secuestrad

create an environment in which the government can implement repressive measures by justifying such actions as necessary to maintain public order and security.

Indeed, given that public security is viewed as a topic of transcendental importance by the Mexican population, political actors from both the left and the right have traditionally sought to consolidate their popular support by promising to reduce crime through toughened security measures. Particularly since the mid-1990s, candidates for public office have used the popular perception of a public security crisis to make security the central component of their campaign platforms. Yet because the problem these authorities seek to address – the public perception of insecurity among voters, businesses, foreign investors, and others – is a subjective phenomenon, so too the politicians' response to this problem has been to seek an increased *perception* of safety among the target population in the immediate term, by deploying highly visible, militarized anti-crime operations or by increasing penalties for crimes.

These hard-line strategies have not produced actual decreases in criminal violence. Instead, killings related to organized crime in Mexico have more than doubled between 2005 and 2008 as the government has deployed tens of thousands of soldiers in militarized security operations in diverse states. This is not to mention the growing toll of civilian deaths at the hands of state agents who violate human rights while carrying out these anti-crime operations (see Chapter 1). Despite growing levels of violence and widespread human rights violations, however, over the past year the administration of President Felipe Calderón has continued to increase its reliance on *mano dura* policies,

ores/313709. The population's fear of crime has also spawned the growth of thousands of private security firms, the majority of which, according to media reports based on information from the Department of Public Security, are thought to operate outside of the normative framework established for such businesses. Alfredo Méndez, *Al margen de la ley, casi 8 mil empresas de seguridad privada*, LA JORNADA, Aug. 6, 2008, available at www.jornada.unam.mx/2008/08/06/index.php?section=politica&article=009n1pol.

expanding the role of military operations in Mexico's public security strategy and promoting harsh criminal justice reforms, including provisions that violate basic standards of due process.

The administration has sought to justify these actions by endorsing a false dichotomy between security and human rights, in which human rights are portrayed as an obstacle to fighting crime. In February 2008, for example, the head of Mexico's Special Office for the Investigation of Organized Crime (SIEDO) argued in support of reforms to allow for prolonged pre-charge detention and other violations of due process guarantees, stating that such measures were necessary to fight crime because "[w]e do not live in an ideal country fit for the application of ideal laws, we live in a country in conflict, in which organized criminals have immense power..."⁴ This dramatic narrative, repeated in various forms by many government officials, falsely suggests that Mexicans face a zero-sum equation in which they must choose between allowing powerful criminals to undermine their security and allowing state agents to undermine their human rights.

In contrast to this false tension between security and human rights, Center Prodh maintains that disregard for human rights brings less, not greater, public security. As we discuss in the pages that follow, *mano dura* approaches to crime-fighting have not brought about sustainable decreases in crime. They have, however, exposed civilians to increasing risks of death, injury, arbitrary detention, and other violations by state agents. These harsh security policies also lend themselves to abuse by authorities who use the criminal justice system as a tool of repression against individuals who protest government actions. Meanwhile, the Calderón administration's failure to address the security threats often posed by the police themselves, exemplified by the routine use of

⁴ Ignacio Izaga, *Es rosa, no draconiana, la reforma de justicia: PGR*, MILENIO, Feb. 18, 2008, available at www.milenio.com/monterrey/milenio/notaanterior.asp?id=923194. Author's translation.

excessive force and police brutality, perpetuates human rights violations and further undermines the ability of the police to gain citizens' trust.

In the chapters that follow, we examine three inter-related phenomena that pose great obstacles to the respect for human rights in the context of public security efforts in Mexico. These are: the deployment of the military to carry out policing tasks; the recent reform of the Constitution to legalize violations of due process rights of detainees in the criminal justice system; and the pervasive problem of the excessive use of force by Mexican law enforcement officers. In each case, we argue that it is by reversing these tendencies – not by ignoring the human rights of increasing numbers of its citizens – that the Mexican government can protect the lives, physical integrity, and well-being of its population.

Chapter 1

The militarization of public security under the Calderón administration

In December 2006, Felipe Calderón Hinojosa assumed the presidency in a context not only of rising criminal violence but also of generalized social discontent. The elections in which he was declared president-elect were widely questioned, and he took power amidst large-scale protests by sectors of society who opposed his election. In this context, Calderón's administration has shown time and again the importance that it places on consolidating its perceived legitimacy, including through close alliances with and public shows of support for the military, whose significant power in Mexican politics has grown in recent years.

Calderón began his administration by undertaking large-scale security operations led by the military and the federal police in various Mexican states including Sinaloa, Durango, Sonora, Michoacán, Baja California, and Guerrero. These operations deploy military and police forces in checkpoints located at the entrances to numerous cities and along highways and roads, where soldiers and police carry out physical searches of vehicles and individuals. Another element of the administration's anti-crime plan has been to send military and police to search private homes and arrest target individuals allegedly tied to drug cartels. To carry out these operations, the armed forces perform public security tasks that legally fall within the competence of the civilian police, or even of the public prosecutors. Members of the armed forces have also taken over control of some state and municipal police forces.⁵ These developments have occurred despite the fact

⁵ See José Ernesto Topete, *Militarizan Cd. Juárez; mando castrense asume control policíaco*, EL MEXICANO, May 19, 2008, available at www.oem.com.mx/elmexicano/notas/n703335.htm; Javier Valdez, Rubén Villalpando, and Mauricio Conde, *Militares asumen el control de dos corporaciones policíacas de Sinaloa*, LA JORNADA, May 20, 2008, available at www.jornada.unam.mx/2008/05/20/index.php?section=politica&article=016n2pol.

that Article 129 of Mexico's Constitution establishes, "In times of peace, no military authority may engage in functions other than those directly connected to military discipline."⁶

The first specific militarized operation launched by Calderón in the war against organized crime was *Operación Conjunta Michoacán* (Joint Operation Michoacán) in December 2006. In the context of this operation, the government deployed 4,260 soldiers, 246 military vehicles, and forty-six airplanes to Michoacán state, to curb the flow of drugs and destroy illegal drug plantations.⁷

Several weeks later, the federal government launched *Operación Conjunta Tijuana* (Joint Operation Tijuana), in which it deployed over 2,600 soldiers, 247 military vehicles, and thirty airplanes to Tijuana, Baja California, to disrupt drug trafficking routes and set up checkpoints in strategic areas.⁸ The operation was characterized by searches and the use of preventive detention.⁹

In January 2007, the government launched *Operativo Conjunto Guerrero* (Joint Operation Guerrero) to combat drug trafficking.¹⁰ Civil society groups have reported that this operation also included another purpose, less publicized than the first: to engage in

⁶ Author's translation.

⁷ Office of the President, *Anuncio sobre la Operación Conjunta Michoacán* (transcription of press conference), Dec. 11, 2006, available at www.presidencia.gob.mx/prensa/?contenido=28357.

⁸ National Security Cabinet, *Mensaje del Gabinete de Seguridad* (transcription of press conference), Jan. 2, 2007, available at www.presidencia.gob.mx/prensa/?contenido=28522.

⁹ See Juan Arturo Salinas, "Golpe propagandístico", la "militarización" de Tijuana, EL PROCESO, Jan. 6, 2007, available at www.proceso.com.mx/noticia.html?sec=0&nta=47260.

¹⁰ Office of the President, *El Presidente Calderón en la Ceremonia de Entrega del Sable de Mando de la Marina Armada de México* (speech), Jan. 19, 2007, available at www.presidencia.gob.mx/prensa/?contenido=28674.

counterinsurgency. The operation included 7,600 members of the army, navy, air force, and Federal Preventive Police (PFP).¹¹

Also in January 2007, the government initiated *Operación Conjunta Sierra Madre* (Joint Operation Sierra Madre), an operation against organized crime in the so-called Golden Triangle, comprised of the mountainous region of Durango, Sinaloa, and Chihuahua states.¹² By this time, over 9,000 soldiers were carrying out anti-crime operations in these three states alone.¹³ The government would later reinforce its militarized operations in the state of Chihuahua with *Operativo Conjunto Chihuahua* (Joint Operation Chihuahua, also called *Operación Conjunta Juárez*) in March 2008, which involved an initial deployment of over 2,000 soldiers to Chihuahua.¹⁴ The operation includes the establishment of forty-six checkpoints in Ciudad Juárez, and is characterized by military forces patrolling the streets.¹⁵ In June 2008, authorities announced that 1,400 more soldiers would be transferred to Chihuahua to strengthen this operation.¹⁶

Seeking to justify the deployment of tens of thousands of soldiers as an effective crime-fighting strategy, and responding to pressure for results from the United States (whose agenda has historically exerted influence over Mexico's anti-drug policies), the Mexican government has proclaimed that it has dealt a strong blow to drug trafficking networks in areas where militarized public security operations have occurred. To this end, the

¹¹ *Id.*

¹² Jesús Aranda, *Suman 9 mil 54, los efectivos militares en Chihuahua, Durango y Sinaloa*, LA JORNADA, Jan. 22, 2007, available at www.jornada.unam.mx/2007/01/22/index.php?section=politica&article=005n1pol.

¹³ *Id.*

¹⁴ Department of Defense, *Efectivos militares refuerzan las acciones en contra de la delincuencia organizada en el estado de Chihuahua* (press release), March 27, 2008, available at www.presidencia.gob.mx/prensa/?contenido=34517.

¹⁵ *Id.*

¹⁶ *Reforzarán 1,400 militares el Operativo Chihuahua*, MILENIO, July 1, 2008.

Calderón administration has published data regarding the amount of drugs seized and the number of arrests carried out during these operations as proof of the effectiveness of this strategy. However, these data are a deceptive means of judging the success of the operations. For instance, an obvious problem with using the number of arrests as an indicator of success in reducing drug trafficking is that only a percentage of the individuals arrested in public security operations have been convicted of involvement in organized crime.¹⁷

Day by day, as the government continues to publicize amply its militarized security operations, levels of criminal violence continue to rise. Indeed, the number of killings associated with organized drug crime jumped from over 1,500 in 2005 to over 2,500 per year in 2006 and 2007.¹⁸ Mexican authorities argued that they had weakened the drug cartels and that levels of violence would decline in 2008.¹⁹ However, in 2008 the Attorney General's office confirmed that the number of killings had reached 1,378 by mid-May, an increase of 47% compared to the same period in 2007.²⁰ Based on this official count, the rate of killings at that time had more than doubled since 2005, rising from an average of roughly four per day in 2005 to nearly ten per day by May 2008.²¹ As

¹⁷ Indeed, to publicize the arrest of specific individuals in the mass media as proof of success in the fight against crime contradicts the spirit of the presumption of innocence.

¹⁸ See Maureen Meyer, *At a Crossroads: Drug Trafficking, Violence and the Mexican State*, Washington Office on Latin America, with contributions from Coletta Youngers and Dave Bewley-Taylor (Nov. 2007), 1, available at www.wola.org; Luciano Franco, *2005, el año de la violencia en México: CNDH; hubo 1,500 ejecuciones*, LA CRÓNICA DE HOY, Jan. 26, 2006, available at www.cronica.com.mx/nota.php?id_nota=222888; *PGR: los cárteles son cada vez más débiles, pero provocan más muertes*, LA JORNADA, Dec. 11, 2007, available at www.jornada.unam.mx/2007/12/11/index.php?section=politica&article=016n2pol.

¹⁹ *PGR: los cárteles son cada vez más débiles, pero provocan más muertes*, LA JORNADA, Dec. 11, 2007, available at www.jornada.unam.mx/2007/12/11/index.php?section=politica&article=016n2pol.

²⁰ E. Eduardo Castillo, *Mexican homicides jump 47 pct.; 1,378 die in '08*, USA TODAY, May 23, 2008, available at www.usatoday.com/news/topstories/2008-05-23-2282436097_x.htm.

²¹ For his part, Felipe Calderón has sought to justify the violent character of the country's war against organized crime as a sign of his government's commitment to public security, stating in numerous speeches, "If you see dust flying, don't worry, it's because we're cleaning the house." Sergio Javier Jiménez, *Calderón exalta lucha anticrimen*, EL UNIVERSAL, Feb. 15, 2008, available

of September, following further sharp increases in violence over the summer, media reports place the total number of killings so far in 2008 at more than 3,000, with an average of nearly seventeen killings per day during July and August 2008, including the deaths of ten children.²²

These data call into question the effectiveness of the militarized “frontal combat” approach to drug trafficking. Indeed, the mere design of the frontal combat system demonstrates that it does not respond to root causes of crime. As one example, the strategy of waiting for drug traffickers to pass through military checkpoints is a reactive approach at best.²³ Intelligence-gathering, on the other hand, has been under-used in the overall crime-fighting strategy.²⁴ Much less does the government’s current approach address underlying institutional flaws that create an environment in which organized crime can thrive and remain unpunished. The urgent need to address the deficiencies in numerous police forces (including abysmal salaries, lack of effective training in how to build a case based on investigation and evidence, and even illiteracy²⁵); the need to strengthen drastically the criminal justice system and increase victims’ access to justice;

at www.eluniversal.com.mx/nacion/157584.html. Author’s translation. See also Office of the President, *Conferencia Magistral del Presidente Calderón en la Universidad de Harvard* (translation of speech), Feb. 11, 2008, available at www.presidencia.gob.mx/prensa/?contenido=33742.

²² *Suman mil muertos en 2 meses*, EL UNIVERSAL, Sept. 3, 2008, available at www.eluniversal.com.mx/nacion/162101.html.

²³ In one survey commissioned by a local newspaper in June 2008 in Ciudad Juárez, a city that has been a focal point of activity for Joint Operation Chihuahua, more than 2 out of 3 surveyed residents felt that the military operation was producing “few results,” “very few results,” or “no results” in terms of reducing crime. *Reprueban 2 de cada 3 juarenses Operación Conjunta Chihuahua*, EL DIARIO DE CIUDAD JUÁREZ, June 29, 2008, available at www.diario.com.mx/nota.php?notaid=2d571b6029795cad34242547c7f6151d. Author’s translation.

²⁴ See, e.g., Daniel Blancas, *Sin inteligencia ni análisis táctico, los operativos contra la inseguridad*, LA CRÓNICA DE HOY, July 17, 2008, available at www.cronica.com.mx/nota.php?id_notas=373330.

²⁵ In the city of Matamoros in Tamaulipas, as one example, 15% of the police force is illiterate. Julia Antonieta Le Duc, *Analfabetos, al menos 15% de los 600 policías de Matamoros*, LA JORNADA, Feb. 28, 2008, available at www.jornada.unam.mx/2008/02/28/index.php?section=estados&article=031n3est.

and the well-known, pervasive levels of corrupt law enforcement practices that favor evasion of the law by public servants and private individuals alike are all factors that must be addressed to achieve sustainable reductions in crime levels. Yet with the possible exception of the recognition of the extent of police corruption, these issues have increasingly been crowded out of the discourse on public security.

Finally, looking beyond factors directly related to the police and justice systems, we underscore the government's failure to prioritize the solution of crucial social problems such as extreme disparities in the distribution of economic resources and a lack of access to quality work and educational opportunities. In a country in which recent standardized test results show that over 79% of primary and secondary school students lack competence in subjects such as literacy and mathematics,²⁶ the need to prioritize socioeconomic deficiencies would appear urgent from the perspectives of human rights, development, and security alike. As a non-governmental organization dedicated to the defense of human rights, we have therefore voiced deep concern over governmental discourse that reduces security concerns to the fight against organized crime.

The human cost of militarizing public security: grave violations to fundamental rights

Far from guaranteeing a solution to the problem of criminal violence in Mexico, the participation of the armed forces in tasks that fall within the legal competence of civilian authorities creates a new problem: a greater incidence of human rights violations accompanied by high levels of impunity. As the military deploys its forces from the

²⁶ In the recent application of the *Enlace* standardized educational test to nearly 10 million primary and secondary school students throughout Mexico, 79.1% of the tested population scored in the categories of "deficient" or "basic/minimal" for literacy, mathematics, or sciences. Karina Avilés, *Sin formación "mínima" para leer o sumar, 79.1% de alumnos de primaria y secundaria*, LA JORNADA, Aug. 20, 2008, available at www.jornada.unam.mx/2008/08/20/index.php?section=sociedad&article=055n1soc. Author's translation. These figures do not capture the many children who do not have access to public schooling at all.

perspective of doing battle against an enemy army,²⁷ respect for human rights and accountability do not enter into the equation.

A recent investigation by Center Prodh surveys the nature of the growing human rights violations by the military, which include shootings, torture, illegal searches, and aggression against vulnerable populations such as indigenous communities and migrants. Center Prodh reviewed media articles from January 2007 through June 10, 2008, drawing mostly from national newspapers to compile data on the sample of military abuses reported in these sources. During the period under study, these media registered at least fifty cases or generalized situations of human rights violations by the military. These abuses included fifteen cases in which soldiers reportedly opened fire against civilians without justification (according to the sources surveyed, at least eleven people died in the first half of 2008 due to military human rights violations, an increase compared to 2007). Among just these fifty reported cases, there are fourteen cases in which soldiers committed abuses in military checkpoints, usually by shooting civilians driving through the checkpoint. In the case of Chihuahua state, the increase in military abuses is particularly evident over the last year. Between April and June 2008 alone, that is, after the implementation of Joint Operation Chihuahua, that state witnessed at least six high-profile cases of military abuses reported in the national media. It is important to note, however, that due to its methodology our survey captures only a fraction of actual military human rights violations, and is meant to be representative

²⁷ The military mentality of fighting an enemy force is exemplified by a statement by army General Jorge Suárez Loera, commander in *Operativo Conjunto Chihuahua*. Speaking in a meeting with businesspeople and government officials in April 2008, General Suárez summarized the results of a recent shoot-out, in which he reported that fourteen individuals had been killed, by concluding simply, “[now] there are fourteen fewer criminals.” *La CNDH debería hacer recomendaciones a los cárteles, dice general en Chihuahua*, LA JORNADA, Apr. 8, 2008, available at www.jornada.unam.mx/2008/04/08/index.php?section=politica&article=010n1pol. Author’s translation.

rather than to offer total statistics on the number of violations or victims during this time.²⁸

The cases surveyed in our study include, among others:

- The case of **four civilians arbitrarily shot by soldiers on the evening of March 26, 2008** in the state of Sinaloa. Members of Center Prodh, in conjunction with the Sinaloan Civic Front (*Frente Cívico Sinaloaense*), carried out a mission to document this case. The events took place in the community of Santiago de Caballeros, where soldiers opened fire without justification on a passing vehicle, killing four passengers (Edgar Geovany Araujo Alarcón, Héctor Zenón Medina López, Manuel Medina Araujo, and Irineo Medina Díaz) and wounding two others. The victims were not armed, nor is there any evidence that they were participating in any illegal activities.
- The case of **five family members arbitrarily shot and killed at a military checkpoint in La Joya, Sinaloa, on June 1, 2007**. The events occurred when soldiers opened fire on eight members of the Esparza Galaviz family, who were passing by a military checkpoint and failed to stop in time when soldiers unexpectedly signaled for their vehicle to halt. Five of the family members, all women and children, died in this attack, while the other three (including two more children) sustained injuries.²⁹
- The case of **generalized human rights violations in Carácuaro, Nocupétaro, and Huetamo, in the state of Michoacán, during the first week of May 2007**. Following an ambush in which five soldiers were killed, the army initiated a search for the perpetrators that quickly turned into an excuse for generalized

²⁸ Full results of the survey are available in Center Prodh, *Military Abuses in Mexico* (prodh briefing), July 14, 2008, available at www.centroprodh.org.mx/english.

²⁹ See, e.g., *Matan a familias en retén*, REFORMA, June 3, 2007.

repression against the population. More than 1,000 soldiers maintained the area under a virtual siege for three days, while the mayors of Carácuaro and Nocupétaro reported “countless” cases of torture and warrantless searches of homes.³⁰

- The case of **four minor girls sexually abused by soldiers in Nocupétaro, Michoacán on May 2, 2007**. After interrogating the girls about drug cartel activity in the area, beating them, and threatening to kill them, soldiers took the victims to a military base and sexually assaulted them.³¹ The National Human Rights Commission, which documented the case, later verified that two of the girls had been raped.³²
- The case of **13-year-old Marlene Caballero, shot and wounded while passing through a military checkpoint in Tecpan de Galeana, Guerrero, in June 2007**, when the driver of the vehicle in which she was riding failed to stop.³³ Representatives of the Department of Defense later sought to minimize the occurrence, pointing out that the child’s gunshot wound “was not life-threatening.”³⁴
- The **arbitrary killing of 16-year-old Iván Calderón in front of a military camp in Morelia, Michoacán, on May 12, 2008**. The victim was attempting to help a

³⁰ Francisco Gómez and Marco Antonio Duarte, *El Ejército asume el control de Carácuaro*, EL UNIVERSAL, May 5, 2007, available at www.el-universal.com.mx/estados/64593.html. Author’s translation.

³¹ Ángeles Cruz, *Ante la CNDH, mujeres violadas en Michoacán relatan agresión*, LA JORNADA, May 17, 2007, available at www.jornada.unam.mx/2007/05/17/index.php?section=politica&article=016n2pol.

³² *Soldados sí violaron a 2 menores en Carácuaro*, LA CRÓNICA DE HOY, June 15, 2007, available at www.cronica.com.mx/nota.php?id_notas=306833.

³³ See, e.g., Jesús Guerrero, *Hieren a niña en retén militar*, REFORMA, June 30, 2007.

³⁴ Gustavo Castillo García, *Justifica Sedena balazo a una niña de 13 años*, LA JORNADA, July 1, 2007, available at www.jornada.unam.mx/2007/07/01/index.php?section=politica&article=021n1pol. Author’s translation.

friend whose truck had broken down in front of the camp when a soldier opened fire, killing the victim and severely wounding his companion.³⁵

As another indicator of the growing abuses committed by the military, the number of complaints against Mexico's Department of Defense (Sedena) received by Mexico's National Human Rights Commission (CNDH) more than doubled during the first year of the Calderón administration, going from 182 in 2006 to 367 in 2007 (that is, roughly one per day in 2007). Available statistics suggest that the number for 2008 will greatly exceed the total for 2007, as by May 2008 the CNDH had received a total of 634 complaints against the Department of Defense since the start of the Calderón administration, placing the rate of complaints in 2008 at roughly double that of 2007.³⁶ In July 2008, the Commission issued eight recommendations regarding military abuses committed against civilians during 2007 and 2008, including grave human rights violations such as arbitrary deprivation of life, torture, arbitrary detention, and excessive use of force and firearms.³⁷

Beyond individual human rights abuses such as those highlighted in this chapter, Center Prodh considers that the militarized security operations deployed by the federal government represent a *de facto* state of exception that restricts human rights in general. Article 29 of the Mexican Constitution provides for the generalized suspension of individual freedoms in "cases of invasion, grave disturbances of public order, or any other such situation that provokes grave danger or conflict in society."³⁸ However, this article contemplates a discrete national emergency rather than the long-term fight

³⁵ Rafael Rivera, *Soldado mata a menor frente a campo militar*, EL UNIVERSAL, May 13, 2008, available at www.el-universal.com.mx/nacion/159445.html.

³⁶ Calderón took office in December 2006. See Silvia Garduño/Agencia Reforma, *Llueven quejas a Sedena*, EL MAÑANA, May 19, 2008, available at www.elmanana.com.mx/notas.asp?id=58000.

³⁷ National Human Rights Commission, Recommendations 29/2008 through 36/2008, available at www.cndh.org.mx.

³⁸ Author's translation.

against crime. Further, given that declaring a state of exception under this article affects fundamental rights, Article 29 stipulates that certain requirements must be met for this measure to be legal, including that the declaration of the state of exception must be submitted to the national Congress. In the case of Mexico, no such state of exception has been declared through these legal channels. To be clear, such a declaration, even if made, could not authorize certain grave violations, such as arbitrary killings or torture.

With respect to the suspension of human rights obligations in the inter-American system, contemplated in Article 27 of the American Convention on Human Rights, the Inter-American Court of Human Rights (whose binding jurisdiction has been recognized by Mexico) has emphasized that the suspension of such rights is a strictly exceptional measure to be invoked only in true cases of emergency, “to the extent and for the period of time strictly required by the exigencies of the situation,’ *and not as a means to fight common crime.*”³⁹ Even in cases of war or public emergency, certain rights may never be suspended under Article 27, such as the rights to life and humane treatment. The Inter-American Court has also stated that:

...in certain states of emergency or in situations of disturbance of law and order, States use the Armed Forces to control the situation. In that respect, the Court deems absolutely necessary to emphasize the extreme care which States must observe when they decide to use their Armed Forces as a mean for controlling social protests, domestic disturbances, internal violence, public emergencies and common crime. As stated by the Court, “States must restrict to the maximum extent the use of armed forces to control domestic disturbances, since they are trained to fight against enemies and not to protect and control civilians, a task that is typical of police forces.” The strict fulfillment of the duty to prevent and protect the endangered rights must be assumed by the domestic

³⁹ *Zambrano Vélez et al. v. Ecuador*, Inter-Am. Ct. H.R. (Ser. C) No. 166 (2007)(Judgment), para. 52. Emphasis added.

authorities in observance of a clear demarcation between military and police duties.⁴⁰

Notwithstanding these international legal norms, in Mexico, we have observed with concern the growing role of the military in carrying out policing tasks,⁴¹ as well as the normalization of other public security measures that violate basic human rights and reveal a mentality of war rather than one of public security. This mentality is perhaps unsurprising given that the federal Department of Public Security began 2008 by declaring that it would go “all-out” in its war against crime, stepping up its “direct fight” and “frontal combat” against criminal targets.⁴²

As long as the Mexican government approaches crime as a war that can be won through territorial street battles and deployment of military force, the government will continue to confuse the practical and legal distinctions between *national* security (which includes armed resistance of an invading army) and *public* security (which is focused on reducing levels of domestic crime). This confusion leaves *human* security by the wayside, as it ensures that little attention will be paid to human rights concerns, including the government’s responsibility to present real solutions from civilian institutions for the security and socioeconomic problems that confront Mexico today.

⁴⁰ *Id.* at para. 51.

⁴¹ We note that on August 29, 2008, the Mexican government released its long-overdue National Human Rights Program (similar to the National Programs prepared by every government department to outline planned objectives for each presidential term). This document covers the period from 2008-2012 and mentions as a line of action “promoting the progressive withdrawal” of the armed forces from policing tasks. *Programa Nacional de Derechos Humanos 2008-2012*, DIARIO OFICIAL DE LA FEDERACIÓN, Aug. 29, 2008, *Estrategia 2.4*, available at www.dof.gob.mx. Author’s translation. While this provision relates to a longstanding demand of Mexican human rights organizations, it does not provide guidance on how withdrawal of the military might be accomplished or by when, if at all.

⁴² Alfredo Méndez, *Se actuará contra ‘blancos específicos’ en el combate al crimen organizado*, LA JORNADA, Jan. 9, 2008, available at www.jornada.unam.mx/2008/01/09/index.php?section=politica&article=008n1pol. Author’s translation.

Alarming, the only concrete proposal by state actors to permit the withdrawal of soldiers from daily anti-crime activities is a proposal developed by a group of army generals that would substitute the military's role in security tasks by creating a national police force subject to military-style discipline, in which the penalty for involvement with organized crime or other acts of rebellion or treason would be death.⁴³ One of the authors of this proposal explained in a media interview that the proposal would create "a paramilitary-type structure, in which civilians would eventually assume control, once the changes in the police forces were in an advanced stage."⁴⁴ The proposal would create a new jurisdiction, police jurisdiction, to judge police accused of crimes;⁴⁵ presumably this would resemble military jurisdiction, discussed in the following section. The plan also proposes the creation of an *Estado Mayor* (a staff directed by military personnel) within every department of the government to strengthen security.⁴⁶

This proposal, although ostensibly designed to allow for the withdrawal of soldiers from direct policing tasks, would instead impose a military structure on the civilian police forces for an undetermined period of time, as well as increasing the power of the military within each governmental department. The proposed police jurisdiction, if similar to military jurisdiction, would likely serve to perpetuate impunity for human rights abuses committed by police. Finally, the reinstatement of the death penalty would constitute a grave setback for human rights. Indeed, since the death penalty has been abolished in Mexico, to reinstate it would directly violate numerous human rights instruments to which

⁴³ Jorge Alejandro Medellín, *Proponen muerte para narcopolicías*, EL UNIVERSAL, Aug. 25, 2008, available at www.eluniversal.com.mx/primer/31525.html; Jorge Alejandro Medellín, *Ejército quiere policía con disciplina militar*, EL UNIVERSAL, Aug. 25, 2008, available at www.eluniversal.com.mx/nacion/161901.html.

⁴⁴ Jorge Alejandro Medellín, *La pena de muerte no frenará plan: militares*, EL UNIVERSAL, Aug. 26, 2008, available at www.eluniversal.com.mx/nacion/161908.html.

⁴⁵ Jorge Alejandro Medellín, *Ejército quiere policía con disciplina militar*, EL UNIVERSAL, Aug. 25, 2008, available at www.eluniversal.com.mx/nacion/161901.html.

⁴⁶ Jorge Alejandro Medellín, *Proponen muerte para narcopolicías*, EL UNIVERSAL, Aug. 25, 2008, available at www.eluniversal.com.mx/primer/31525.html.

Mexico is a party, such as the American Convention on Human Rights, the Protocol to the American Convention on Human Rights to Abolish the Death Penalty, and the Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty.

Center Prodh, while calling for the withdrawal of the military from policing tasks, reiterates that the goal of such withdrawal should be to reinforce the control of civilian institutions over public security tasks. In no case should any withdrawal plan involve subjecting civilian bodies to greater military control, much less the application of the death penalty or other measures contrary to fundamental human rights.

The illegal extension of military jurisdiction over cases of human rights violations

A key factor perpetuating the military human rights abuses discussed above is the extremely high level of impunity for such abuses, due in part to the unconstitutional extension of military jurisdiction to investigate and prosecute cases of human rights violations committed against civilians by members of the armed forces. This use of military, as opposed to civil, jurisdiction serves to restrict the investigation and punishment of military human rights crimes, leaving such cases in military courts to be tried by judges who lack independence and impartiality.

Article 13 of the Mexican Constitution establishes that “military jurisdiction subsists for crimes and offenses against military discipline...”⁴⁷ However, “military discipline” is defined by the army, in Article 57 of its Code of Military Justice, in an expansive manner that includes even crimes committed by military personnel that violate civilians’ basic human rights. This Code of Military Justice was promulgated by Presidential decree in 1933, having never been approved by Congress, and has gone virtually unamended for

⁴⁷ Author’s translation.

75 years. Even leaving aside the irregular process by which it was promulgated, the provisions of Article 57 of this code contradict the plain meaning and intent of Article 13 of the Mexican Constitution, since they make military jurisdiction applicable to all crimes committed by members of the armed forces “while on duty or due to acts associated with this duty.”⁴⁸ The use of military jurisdiction for human rights abuses against civilians also contradicts Article 20 of Mexico’s Constitution, which establishes a series of rights for victims of crimes. These include, among others, the right to remain informed of and participate in the investigation of the reported crimes, a right that is not respected in practice in trials governed by military jurisdiction. However, the consolidation of the army as an unquestionable power in Mexico has meant that neither legislators nor judges have dared to place limits on this expansive use of military jurisdiction.

Numerous international human rights bodies have explained that Mexico’s use of military jurisdiction in human rights cases is not permissible under international law and prevents accountability for human rights violations. Then-UN Special Rapporteur on Torture Sir Nigel Rodley reported in 1998 after a visit to Mexico, “Military personnel appear to be immune from civilian justice and generally protected by military justice,”⁴⁹ and specified, “Cases of serious crimes committed by military personnel against civilians [should] be subject to civilian justice.”⁵⁰

Similar calls have been issued to the Mexican government by the UN Committee Against Torture, the Special Rapporteur on Violence against Women, the Special Rapporteur on the Rights of Indigenous Peoples, the Special Rapporteur on Extrajudicial Executions,

⁴⁸ Author’s translation.

⁴⁹ *Report of the Special Rapporteur, Mr. Nigel Rodley*, E/CN.4/1998/38/Add.2, Jan. 14, 1998, para. 86.

⁵⁰ *Id.* at para. 88j.

the Special Rapporteur on the Independence of Judges and Lawyers, and the Working Group on Arbitrary Detention.⁵¹

It is worth noting the constant jurisprudence of the Inter-American Court of Human Rights on this subject. That tribunal has established that military courts:

...should have a restrictive and exceptional scope, bearing in mind that they should only judge members of the armed forces when they commit crimes or misdemeanors that, owing to their nature, affect rights and duties inherent to the military system. In this regard, when the military justice system assumes jurisdiction over a matter that should be heard by the ordinary justice system, the right to have a case tried by the appropriate judge is affected. This guarantee of due process should be examined taking into account the object and purpose of the American Convention, which is the effective protection of the individual. For these reasons, and due to the nature of the crime and the rights and freedoms damaged, the military criminal jurisdiction is not the competent jurisdiction to

⁵¹ Committee Against Torture, *Concluding Observations*, CAT/C/MEX/CO/4, Feb. 6, 2007, para. 14 (“The State party should ensure that cases involving violations of human rights... committed by military personnel against civilians, are always heard in civil courts, even when the violations are service-related”); Committee Against Torture, *Report on Mexico Produced by the Committee Under Article 20 of the Convention*, CAT/C/75, May 25, 2003, para. 220g (“The application of military law should be restricted only to offences of official misconduct and the necessary legal arrangements should be made to empower the civil courts to try offences against human rights”); *Report of the Special Rapporteur on violence against women, its causes and consequences, Yakin Ertürk*, E/CN.4/2006/61/Add.4, Jan. 13, 2006, para. 69a(vi) (“Ensure... that all cases of violence against civilians committed by military personnel are investigated by civilian authorities, prosecuted by civilian authorities and adjudicated by independent and impartial civilian courts”); *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen*, E/CN.4/2004/80/Add.2, Dec. 23, 2003, para. 90 (“Any offence by a member of the military committed against a civilian should without exception be heard in the civil courts”); *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Ms. Asma Jahangir*, E/CN.4/2000/3/Add.3, Nov. 25, 1999, para. 107f (“Initiate reforms aimed at ensuring that all persons accused of human rights violations, regardless of their profession, are tried in ordinary courts”); *Report of the Special Rapporteur on the independence of judges and lawyers, Dato'Param Cumaraswamy*, E/CN.4/2002/72/Add.1, Jan. 24, 2002, para. 192d (“With regard to the military and military courts: Crimes alleged to be committed by the military against civilians should be investigated by civilian authorities...”) Working Group on Arbitrary Detention, *Report of the Working Group on Arbitrary Detention on its Visit to Mexico*, E/CN.4/2003/8/Add.3, Dec. 17, 2002, para. 72f (“as the forced disappearances committed by the military in the past constitute serious human rights violations, they should be dealt with by the ordinary civil courts”).

investigate and, if applicable, prosecute and punish the perpetrators of human rights violations.⁵²

Two fundamental requirements of the rule of law in any democratic state are civilian control of government institutions and the equal application of the law to all members of society, including members of the military. Thus as rising abuses call attention to the need for accountability for crimes committed by Mexico's armed forces, the scope of military jurisdiction has become a crucial test of the government's willingness to bring its laws and practices into line with its human rights obligations and its Constitution.⁵³

Earlier this year, Center Prodh filed two *amparos* (legal actions designed to protect an individual against unjust governmental conduct) challenging the constitutionality of Mexico's Code of Military Justice insofar as it extends military jurisdiction over cases of human rights violations committed against civilians. These legal actions come in the context of the military's arbitrary shooting of six individuals in the community of Santiago de Caballeros, Sinaloa, in March 2008, resulting in the deaths of four of the victims. After documenting this case, Center Prodh took on the legal representation of some of the victims' family members to challenge the transfer of the investigation and judicial process in this case to military jurisdiction. We argue in our constitutional challenge that the expansive scope of military jurisdiction established in Article 57 of the Code of Military Justice violates Articles 1, 13, 14, 16, 17, 20, 49 and 133 of the Constitution. We

⁵² *Zambrano Vélez et al. v. Ecuador*, Inter-Am. Ct. H.R. (Ser. C) No. 166 (2007)(Judgment), para. 66.

⁵³ We note that Mexico's recently published National Human Rights Program includes as a line of action the "promotion of reforms" of military jurisdiction in light of international standards. *Programa Nacional de Derechos Humanos 2008-2012*, DIARIO OFICIAL DE LA FEDERACIÓN, Aug. 29, 2008, *Estrategia 2.3*, available at www.dof.gob.mx. Author's translation. However, the vague wording of this provision gives little indication of what, if any, reforms might take place. For instance, the Program does not state that military jurisdiction will be withdrawn from cases of human rights violations, although this is the central requirement to bring Mexican practice in this area into line with the government's international human rights obligations.

are currently awaiting the results of these amparos, which are before a District Court in the state of Sinaloa.

The Merida Initiative: reinforcing a dysfunctional public security paradigm

In a recent development that unfortunately reinforces the role of Mexico's military in policing tasks, on June 30, 2008, US President George Bush signed into law an aid package known as the Merida Initiative (also initially called Plan Mexico), which will channel US \$400 million worth of foreign aid from the United States to Mexico in its first year. This aid will come in the form of direct military assistance, vehicles, police equipment, and other efforts aimed at strengthening Mexico's fight against organized crime, with \$73.5 million of this total (18%) earmarked for the vague category of "judicial reform, institution building, anti-corruption, and rule of law activities."⁵⁴ This aid package is contained in the United States' Supplemental Appropriations Act, 2008. The US government also contemplates at least two more years of such funding, bringing the total amount of anticipated funding to more than US \$1 billion.

Civil society organizations in Mexico are deeply concerned that the Merida Initiative reinforces the dysfunctional public security paradigm discussed above, one that is based on a militarized war against drug traffickers. During the initial phases of discussion of the Merida Initiative, Center Prodh and other human rights organizations expressed these concerns in both national and international fora, as well as in meetings with government actors from the United States. As the initiative progressed through the US Senate and House of Representatives, in May 2008 Center Prodh and Amnesty International Mexico sent a joint letter to the US Congress, signed by thirty-three Mexican NGOs, academics, and other prominent individuals, calling, at a minimum, for

⁵⁴ Supplemental Appropriations Act, Pub. L. No. 110-252 § 1406(a) (2008).

the inclusion of human rights conditions in the final version of any eventual aid package to Mexico.

Following pressure both from sectors of the US Congress and Mexican civil society, the final US legislation specifies that 15% of the funds contemplated for Mexico under the categories “International Narcotics Control and Law Enforcement” and “Foreign Military Financing Program” in the Supplemental Appropriations Act cannot be disbursed until the US State Department reports that the Mexican government is:

- Improving the transparency and accountability of its police forces
- Ensuring that civilian (as opposed to military) prosecutors and judicial authorities are investigating and trying members of federal police and military forces credibly alleged to have committed human rights violations, in accordance with Mexican and international law
- Enforcing the prohibition on using testimony obtained through torture as evidence in court, in accordance with Mexican and international law
- Establishing a mechanism for regular consultation between the Mexican government and civil society to monitor implementation of the Merida Initiative⁵⁵

It is important to note that these human rights conditions, particularly regarding torture and civilian jurisdiction over military human rights abuses, echo obligations already voluntarily assumed by the Mexican government in its Constitution and by its ratification of numerous international human rights treaties. In this sense, the conditions represent a renewed opportunity for the Mexican government to demonstrate a serious commitment to fulfilling these obligations.

⁵⁵ See *id.* at § 1406(b).

Despite the inclusion of human rights conditions as a side feature to this massive aid package, however, it is alarming that the Merida Initiative comes largely in the form of military aid, a design that, rather than encouraging a much-needed reversal of direction in current security policies, fails to question the continued territorial war against suspected criminals by the armed forces. During the period of implementation of the Merida Initiative, Center Prodh will continue to collaborate with other civil society organizations and experts to monitor closely human rights violations committed by military and police forces, as well as the influence that the Merida Initiative has on respect for human rights in public security operations in Mexico.

Chapter 2

Overdue advances, troubling setbacks: the Constitutional reforms of 2008 and further threats to human rights in the criminal justice system

As part of the federal government's war against crime, in March 2007 Felipe Calderón proposed a series of Constitutional reforms in criminal justice that, among other provisions, included setbacks in the protection of fundamental human rights for individuals suspected of many crimes. Before analyzing this proposal and the eventual Constitutional reforms of 2008 to which it gave rise, it is useful to consider the historical context of these reforms.

The idea of fighting crime through harsh criminal justice reforms is not novel: since the 1990s Mexico has witnessed diverse legal reforms aimed at strengthening the fight against crime and insecurity by toughening the penalties for crimes and restricting the due process rights of detainees or defendants. However, such reforms have not had their hoped-for impact on levels of crime and have instead maintained or exacerbated crippling levels of inefficiency in the criminal justice system. One example of the effects of such a strategy is seen in Mexico City, where a 2003 reform to the Penal Code of the Federal District instituted prison time as the punishment for minor theft (formerly punishable by a fine). Meanwhile, over the past decade the population of Mexico City's penitentiaries has more than doubled to surpass 37,000,⁵⁶ with a notable portion of this number attributable to extending prison time to individuals convicted of theft following the 2003 reforms.⁵⁷ As of October 2007, two of the city's correctional facilities (*Reclusorio Preventivo Varonil Oriente* and *Reclusorio Preventivo Varonil Norte*) contained between

⁵⁶ Subsecretary of Penitentiary Systems, *Estadísticas: Movimiento Diario de Población*, available at www.reclusorios.df.gob.mx/estadisticas/index.html (last visited Sept. 6, 2008).

⁵⁷ Human Rights Commission of the Federal District, *Diagnóstico de derechos humanos del Distrito Federal* (2008), para. 2253, available at www.cd hdf.org.mx.

10,000 and 11,000 individuals each, more than twice their installed capacity,⁵⁸ generating an environment that lends itself to violence rather than any type of social readaptation. Mexico City's Human Rights Commissioner, Emilio Álvarez Icaza, has summed up the effects of the 2003 reforms for individuals convicted of minor theft in terms that make clear their counterproductive effects on public security: "These people are being sent to a university of crime."⁵⁹

Indeed, the lack of deterrent power in Mexico's criminal justice system does not stem from lack of severe penalties, but more plausibly from extremely high rates of impunity for crimes. According to empirical research on this topic, of all crimes committed in Mexico, only one out of four is reported to authorities.⁶⁰ Only in slightly more than 1% of crimes is there ever a conviction, which translates to a level of impunity of roughly 98%.⁶¹ As a concrete example, in Ciudad Juárez, Chihuahua state, out of 839 homicides committed between January 1 and August 18, 2008, in only 18 cases (2%) have authorities initiated criminal proceedings before a judge.⁶² These levels of impunity reflect, among other problems, a lack of trust in authorities and a lack of belief in the criminal justice system by victims (leading to lack of reporting of crimes) and the failures of the system to investigate reported crimes and build solid, evidence-based cases against perpetrators. The authorities' lack of investigation and prosecution of crimes

⁵⁸ *Id.* at Graph 25.1, para. 2251.

⁵⁹ Nacha Cattán, *Making his Voice Heard* (interview with Emilio Álvarez Icaza), THE NEWS, July 28, 2008, 4-5.

⁶⁰ Guillermo Zepeda Lecuona, *Crímen sin castigo. Procuración de justicia penal y Ministerio Público en México*, Centro de Investigación para el Desarrollo and Fondo de Cultura Económica (2004). Other organizations have placed the rate of reported crimes even lower, at 20%. See National Human Rights Commission, *Recomendación General número 12. Sobre el uso ilegítimo de la fuerza y de las armas de fuego por los funcionarios o servidores encargados de hacer cumplir la ley*, Jan. 26, 2006, available at www.cndh.org.mx.

⁶¹ Guillermo Zepeda Lecuona, *Crímen sin castigo. Procuración de justicia penal y Ministerio Público en México*, Centro de Investigación para el Desarrollo and Fondo de Cultura Económica (2004).

⁶² Pedro Sánchez B., *Ausencia de investigación en crímenes exhibe falta de justicia*, EL DIARIO DE CIUDAD JUÁREZ, Aug. 20, 2008, available at www.diario.com.mx/nota.php?notaid=0cb9b5ff84e4a66400aed971799522b3.

such as homicide also perpetuates stereotypes about the victims, such as that all male homicide victims are criminals killed by other criminals, whose deaths need no clarification and whose killers need not be brought to justice for these crimes.⁶³

At the same time, for those individuals who are arrested as suspects in a criminal case in Mexico, human rights violations are widespread and systematic. Among subjects of great concern in this regard are the systematic violation of the rights to personal liberty and due process. These widespread human rights violations on one hand, coupled with the extremely high rates of impunity for crimes mentioned above, highlight the need for reforms to the law enforcement and judicial systems. The comprehensive reform of the criminal justice system has in fact been one of the longstanding demands of the Mexican human rights movement, as historically the authorities most frequently implicated in human rights violations have been those who work within this system.

While a general consensus has existed for years about the urgent need to reform the legal framework and institutional practices of the criminal justice system, however, this consensus has not extended to the detailed or controversial questions implicit in any such reform. Thus it is possible to find supporters of reform among political actors ranging from those who defend a reform centered on defendants' rights, incorporating international standards of due process, to those who support a reform to give more tools to the government in its war against organized crime.

Center Prodh's experience defending human rights cases has led us, along with numerous other human rights organizations, to advocate for a transition to a criminal justice system characterized by an accusatory, adversarial, and oral (as opposed to inquisitory) character. In an *accusatory* system, the accusing party in a criminal process

⁶³ See *id.*

bears the burden of proof, always preserving the distinction between the roles of the prosecutor, defense, and judge. In an *adversarial* system, the parties in a criminal process exchange arguments in conditions of equality before the court. Finally, in an *oral* system, the parties present their evidence, which will potentially form the basis for criminal convictions, orally before the judge, in accordance with the principles of immediacy, confrontation, public character, and transparency. These prerequisites are indispensable to ensure a fair trial for the accused and an accurate outcome for all parties involved in a judicial process.

The implementation of an accusatory system as outlined above is a necessary, not a sufficient, condition to guarantee the human rights of individuals accused of involvement in a crime. Beyond this requirement, any reform to the justice system should be based on the recognition of the procedural human rights standards indispensable in a democracy, otherwise known as fundamental due process rights. These include the presumption of innocence, the right to equality of all persons before the law, and the right of detained individuals to be brought promptly before a judge. It is worth recalling that the Mexican government has ratified international conventions that require it to guarantee these rights, such as the American Convention on Human Rights and the International Covenant on Civil and Political Rights.

The process of Constitutional reform, 2007-2008

Unfortunately, Felipe Calderón's 2007 proposals for criminal justice reform made it clear that respect for human rights was far from the driving force behind his proposal to modify the Constitution. Working in a political context characterized by a search for legitimacy and by the implementation of *mano dura* public security policies, on March 9, 2007, the Calderón administration proposed a controversial reform package designed explicitly to

provide law enforcement officers with greater tools in the fight against organized crime.

The proposed package of reforms included, among other measures:

- Establishing a regime of exception in matters involving organized crime, with fewer due process rights for individuals in this category.
- Providing law enforcement authorities with the power to conduct searches without a warrant in cases related to organized crime.
- Giving Constitutional status to *arraigo*, a highly criticized form of pre-charge detention (discussed below).

Debates over these and other proposed reforms continued over the following months. Throughout the process, human rights organizations called for a wide public discussion of the reform proposals and for a Constitutional reform that would harmonize the Mexican criminal justice system with the requirements of due process. In this vein, and considering that several provisions in Calderón's proposed reform package would violate basic due process rights, Center Prodh, Lawyers for Justice and Human Rights, and the network of organizations "All Human Rights for All" testified at a thematic hearing on this subject before the Inter-American Commission on Human Rights on October 12, 2007.

Several months later, at the end of 2007, the relevant commissions of Mexico's House of Representatives elaborated a draft Constitutional reform that incorporated elements of diverse proposals, including that of the Calderón administration. On December 12, 2007, the House approved the bill with 366 votes in favor, fifty-three against, and eight abstentions. The bill modified Calderón's proposed reform package, although as discussed below, it retained several of that proposal's most troubling features.

The bill was sent to the Senate, where it was debated and approved within days (although with some modifications), with eighty votes in favor, twenty-seven against, and four abstentions. The changes introduced by the Senate were limited to two aspects: 1) changing a provision that would have expanded prosecutors' ability to use information that has traditionally been confidential, including banking, fiscal, financial, investment, electoral, and fiduciary information; and 2) amending the bill's proposed constitutionalization of warrantless searches. Once the House, Senate, and a majority of state congresses had given final approval to the revised reforms (from which the text relating to warrantless searches was eventually eliminated), they were promulgated on June 18, 2008.⁶⁴

Advances

The reforms as approved contain several aspects that, if implemented in good faith, will represent important advances for human rights within Mexico's criminal justice system. Among the most noteworthy are:

- *The adoption of an accusatory, oral criminal justice system.* Following years of advocacy by civil society, academics, and experts in this field, Article 20 of the Constitution now explicitly establishes a criminal justice system based on oral trials for criminal defendants, to be implemented gradually over the next seven years. In establishing an accusatory and oral system for criminal trials, Mexico at last joins the established trend in such judicial reform throughout Latin America.⁶⁵

⁶⁴ *DECRETO por el que se reforman y adicionan diversas disposiciones de la Constitución Política de los Estados Unidos Mexicanos*, DIARIO OFICIAL DE LA FEDERACIÓN, June 18, 2008, available at www.dof.gob.mx.

⁶⁵ For an analysis of the practical experiences and results of such reforms in other countries, see the research project on this topic undertaken by the Justice Studies Center of the Americas, *Follow-Up on Criminal Procedure Reform*, at www.cejamerica.org (documents in Spanish).

- *The recognition of the right to an effective public defender.* Article 17 of the Constitution establishes that the federal and state governments shall ensure the existence of public defense services of high quality and that public defenders shall be paid at least as much as public prosecutors. In a country in which the majority of defendants depend upon public defenders, who often work in disadvantaged conditions compared to the prosecution, this reform is significant.
- *The explicit recognition of several due process rights.* Article 20 of the Constitution now includes several rights that were not explicitly recognized before. These include the presumption of innocence, the right to an effective defense, the right to remain silent, and that evidence obtained through the violation of fundamental rights, such as through torture, shall be inadmissible.

Setbacks

Notwithstanding these advances, other aspects of the reform represent grave setbacks in the respect for human rights. For instance:

1) *The reforms give Constitutional status to arraigo, a much-criticized form of pre-charge detention.* The reformed Constitution explicitly permits *arraigo*, a type of detention already common in Mexico in which prosecutors, with judicial authorization, may detain individuals for months prior to charging them with any crime. In other words, police and prosecutors, rather than being required by law to justify prolonged detention by gathering sufficient evidence to warrant charging someone with a criminal offense, can first place the person under *arraigo* and then seek evidence that would justify that very detention. This logic of ‘detain first and investigate later’ has naturally encouraged the use of torture during the period of *arraigo* to produce leads regarding the possible participation of the

detainee or others in crimes; in this regard, it is worth recalling that torture is a systematic practice in the Mexican criminal justice system that remains in impunity despite the existence of laws prohibiting it.⁶⁶

In cases of suspected organized crime, Article 16 of Mexico's Constitution now provides that prosecutors may place individuals under *arraigo* for up to eighty days.⁶⁷ This prolonged period of detention without charge goes against the right to liberty contained in instruments such as the American Convention on Human Rights and the International Covenant on Civil and Political Rights, which require authorities to inform detainees promptly of the charges they are facing and then to present the detainees before a judge within a reasonable period of time. As Human Rights Watch has pointed out, the eighty-day period of pre-charge detention now authorized in the Mexican Constitution is "the longest of its kind in any Western democracy. In other countries, the limit for any form of pre-charge detention... is generally less than seven days."⁶⁸ The use of *arraigo*, as it has been carried out in Mexico in recent years, has also been characterized as a human rights violation and a form of arbitrary detention by human rights bodies of the United Nations.⁶⁹

⁶⁶ See, e.g., Committee Against Torture, *Report on Mexico Produced by the Committee Under Article 20 of the Convention*, CAT/C/75, May 25, 2003, paras. 137-38 ("[T]orture continues to be practised frequently in Mexico... the widespread absence of penalties, whether administrative or criminal, for those responsible [is a contributing factor]").

⁶⁷ The initial limit established in Article 16 is forty days, after which the period of *arraigo* may be extended up to a maximum of eighty days in total.

⁶⁸ Letter from José Miguel Vivanco, Executive Director, Americas Division, Human Rights Watch, to President Felipe Calderón, March 6, 2008, available at hrw.org/english/docs/2008/03/06/mexico18221_txt.htm.

⁶⁹ See, e.g., Committee Against Torture, *Concluding Observations*, CAT/C/MEX/CO/4, Feb. 6, 2007, para. 15; Working Group on Arbitrary Detention, *Report of the Working Group on Arbitrary Detention on its Visit to Mexico*, E/CN.4/2003/8/Add.3, Dec. 17, 2002, paras. 45-50.

For its part, Mexico's Supreme Court declared in 2006 that:

[*Arraigo*], although it serves the dual purpose of facilitating a criminal investigation and avoiding the flight of the defendant to prevent the fulfillment of any eventual arrest warrant, violates the right to personal liberty established in Articles 16, 18, 19, 20, and 21 of the Constitution.⁷⁰

Notwithstanding this declaration, *arraigo* has now been made constitutional through the simple insertion of this practice into the Constitution.

2) *The reforms establish a set of crimes for which preventive detention is mandatory.*

The reforms incorporate into Article 19 of the Constitution a list of crimes that always require pre-trial detention. This system violates the principle by which preventive detention should be exceptional and reviewable, responding to the circumstances of each individual case. In this regard, the Inter-American Commission on Human Rights has established, "preventive detention as a norm of general application in criminal cases... violates the right to personal freedom and the presumption of innocence."⁷¹ The establishment of mandatory preventive detention is also particularly severe given that the already excessive use of such detention is a chief cause of overcrowding in Mexican detention facilities, accounting for 43% of detainees as of 2007.⁷²

3) *The reforms incorporate into the Constitution a special regime of exceptional measures for individuals accused of involvement in organized crime, which restricts due process rights and applies starting from the phase of investigation.* This special regime of exception allows for intrusive and human rights-violating measures that undermine basic due process guarantees to the detriment of those investigated, charged, or sentenced within its framework. For instance, the Constitution explicitly contemplates

⁷⁰ Opinion XXII/2006, Plenary Court, S.J.F. y su *Gaceta*, XXIII, Feb. 2006, 1171.

⁷¹ Inter-Am. Comm.H.R., *Report on the situation of human rights in Mexico* (1998), para. 233.

⁷² Department of Public Security, *Primer Informe de Labores* (Sept. 2007), 78, available at www.ssp.gob.mx.

the use of *arraigo* for individuals suspected of involvement in organized crime (Article 16) and reduces safeguards regarding the admissibility of evidence in the trials of such individuals (Article 20). This regime of exception sets the stage for widespread violations of the principle of equality in the protection of human rights established in Article 2 of the International Covenant on Civil and Political Rights and Article 1 of the American Convention on Human Rights, which state that governments must guarantee the human rights enumerated in these instruments without any type of discrimination.

This approach is all the more grave when one considers that the broad and ambiguous definition of “organized crime” in Mexican legislation⁷³ has allowed state governments to accuse members of social movements of being organized criminals as a means of justifying the arbitrary detention of social activists. With the creation of the regime of exception for organized crime through the recent Constitutional reforms, civil society groups thus fear that this new regime of restricted due process rights will be applied as a tool of repression against individuals who protest government policies.

Even leaving aside this last concern, the creation of this special regime of exception to investigate and prosecute those accused of involvement in organized crime is a particularly disturbing development. By establishing two separate justice systems in the Mexican Constitution – one for organized crime and another for common crimes – the reforms in effect translate into one criminal justice system for those seen as citizens and another for those seen as enemies of the State. They divide Mexican society into those

⁷³ Mexico’s Federal Law Against Organized Crime defines organized crime as “When three or more individuals agree to organize themselves, or do organize themselves, to commit in a permanent or repeated manner acts that by themselves or joined to other acts have the purpose or result of committing one or more of [a list of specific crimes].” *LEY Federal Contra la Delincuencia Organizada*, DIARIO OFICIAL DE LA FEDERACIÓN, Nov. 7, 1996, Art. 2, available at www.dof.gob.mx.

who possess human rights, on one hand, and those who are seen as enemies first and human beings second.

Threats of further setbacks in the criminal justice system

Beginning in the summer of 2008 following the high-profile kidnapping and killing of Fernando Martí, son of a prominent Mexican businessman, governmental discourse has once more centered on proposed legal reforms to strengthen the government's fight against crime. The discussion currently features proposals for toughening penalties for violent crimes, as well as the announcement of initiatives to create a unified federal police force⁷⁴ (replacing the current structure, which includes several different forces under distinct federal departments) and to introduce further modifications to the criminal justice system in the short term.

Responding to the public outcry caused by the Martí case, Felipe Calderón, following the pattern of seeking to influence the public perception of security with visible, hard-line measures, has proposed reforming the penal code to punish aggravated kidnapping with life imprisonment, an initiative that is now under consideration by the Mexican Congress.⁷⁵ Another initiative recently presented to Congress by Mexico's Green Party (*Partido Verde Ecologista de México*) would reinstate the death penalty for such crimes,⁷⁶ in direct violation of Mexico's human rights obligations.

The foregoing hard-line proposals come within a context of similar reactions to past high-profile kidnappings in Mexico, in which the principal response to such crimes has been

⁷⁴ Gustavo Castillo García, *Pactará Los Pinos con gobernadores la creación de una sola policía federal*, LA JORNADA, Aug. 21, 2008, available at www.jornada.unam.mx/2008/08/21/index.php?section=politica&article=009n1pol.

⁷⁵ *Da entrada el Congreso a la primera de una serie de reformas en materia de seguridad*, EL PROCESO, Aug. 14, 2008, available at www.proceso.com.mx/noticia.html?sec=1&nta=61367.

⁷⁶ V. Ballinas and A. Becerril, *Propone el PVEM pena capital para plagarios*, LA JORNADA, Aug. 21, 2008, available at www.jornada.unam.mx/2008/08/21/index.php?section=politica&article=009n2pol.

to lengthen the prison sentence mandated for offenders. According to a study conducted by one of Mexico's leading newspapers, each of the increases in the penalty for kidnapping in past decades (first to a maximum of thirty years; then to forty years; later to sixty years, with the possibility of over 100 years due to accumulated crimes), coincided precisely with a case of kidnapping that generated media attention and public outcries over insecurity and thus prompted a hard-line response from the government.⁷⁷ Despite this escalating series of penalties, kidnappings have become more frequent in Mexico in recent years (under the latest and harshest set of penalties), with the Secretary of Public Security, Genaro García Luna, reporting 472 kidnappings in 2005 and 785 in 2007, in addition to a large number of unreported kidnappings.⁷⁸ Non-governmental estimates place the actual number of kidnappings considerably higher, with several research institutes and consulting firms concurring that annual kidnappings in Mexico number at least in the thousands.⁷⁹

In short, the high level of media and television coverage given to kidnappings (currently including, for instance, anonymous television commercials that feature a supposed kidnapper describing how he kidnaps and brutally abuses his victims) provoke equally high levels of fear among the Mexican public. In this environment, citizens are increasingly willing to sacrifice their human rights for the appearance of gains in public security, even if past hard-line measures implemented by the government have not translated into lower rates of crime in reality.

⁷⁷ *Aumento de la sanción, única respuesta ante los secuestros*, LA JORNADA, Aug. 13, 2008, available at www.jornada.unam.mx/2008/08/13/index.php?section=politica&article=006n1pol.

⁷⁸ Ricardo Ravelo, *Firman acuerdo nacional por la justicia*, EL PROCESO, Aug. 22, 2008, available at www.proceso.com.mx/noticia.html?sec=0&nta=61589.

⁷⁹ See IKV Pax Christi, *El Secuestro es un Negocio Explosivo* (2008), 20-21, available at www.ikvpaxchristi.nl/tempspaans.htm.

On August 21, 2008, the federal government announced the adoption of a 75-point National Pact for Security, Justice, and Respect for Law, signed during a meeting of Mexico's National Security Council by representatives of the three branches of the federal government, the governors of Mexico's thirty-two states, and non-governmental actors such as business groups and citizens' anti-crime groups.⁸⁰ Non-governmental human rights organizations, who were not invited to take part in the meeting that resulted in the Pact, note that human rights are not a central feature of the plan.⁸¹ Among many other points, the Pact includes commitments by the various branches of government to construct two new federal penitentiaries with special sections for kidnapers; to create anti-kidnapping task forces; to increase efforts to purge police forces of corruption; to fight addictions; and, in line with the recent Constitutional reforms, to modify the Federal Code of Criminal Procedure and the Federal Law Against Organized Crime.⁸² The Pact also specifies that the Mexican media will refrain from defending crime, and will instead give coverage to cases in which authorities successfully arrest individuals who had been denounced by citizens.⁸³ This follows a pattern of public discourse in which Felipe Calderón has accused the media of failing to play its required role in the fight against crime and even of being complicit with organized

⁸⁰ Ricardo Ravelo, *Firman acuerdo nacional por la justicia*, EL PROCESO, Aug. 22, 2008, available at www.proceso.com.mx/noticia.html?sec=0&nta=61589.

⁸¹ See, e.g., Emir Olivares Alonso, *Preocupa la ausencia de derechos en pacto sobre seguridad: ONG*, LA JORNADA, Aug. 23, 2008, available at www.jornada.unam.mx/ultimas/2008/08/23/preocupante-ausencia-de-derechos-en-pacto-sobre-seguridad.

⁸² See *Acuerdo Nacional por la Seguridad, la Justicia y la Legalidad*, DIARIO OFICIAL DE LA FEDERACIÓN, Aug. 25, 2008, available at www.dof.gob.mx. In response to a massive public march organized by the anti-crime campaign *Iluminemos México* (Light Up Mexico) at the end of August 2008, plans are now underway to create a Citizens' Institute by October 2008 to monitor implementation of the National Pact, as well as to offer recommendations to strengthen the government's actions in the fight against crime. See Claudia Guerrero, *Construyen símil de IFAI en seguridad*, REFORMA, Sept. 1, 2008.

⁸³ See *Acuerdo Nacional*, *supra* note 82.

crime by failing to give sufficient positive coverage to government operations against criminals.⁸⁴

Center Prodh is concerned that in the current climate of proposals for hard-line, visible solutions to public security problems, some of the legislative initiatives mentioned in this section could lead to further regressive reforms to the criminal justice framework. In particular, any proposals aimed at restricting further due process rights or even reinstating the death penalty would be both misguided from a perspective of reducing crime and in flagrant violation of Mexico's human rights obligations. As the Mexican Congress evaluates the various reform initiatives currently before it, as well as those being prepared by the executive branch in accordance with the National Pact, Center Prodh reiterates that it is by reversing the ineffective, *mano dura* criminal justice trends of the recent past and instead strengthening institutions under a framework of respect for human rights that Mexico will best protect the lives and well-being of its citizens.

⁸⁴ See Claudia Herrera Beltrán, *El "¡ya basta!" exige "a todos" no ser cómplices de la ilegalidad: Calderón*, LA JORNADA, May 13, 2008, available at www.jornada.unam.mx/2008/05/13/index.php?section=politica&article=003n1pol.

Chapter 3

Excessive use of force by Mexican police

One final topic that dramatically highlights the need to professionalize Mexico's security forces and adjust Mexican law to international standards – both to protect the population's human rights and to reduce obstacles to public security – is the routine use of excessive force by Mexican law enforcement bodies. The disproportionate use of force by these bodies ranges from threats to physical abuse to torture, and has included numerous arbitrary killings.

In Mexico, neither federal nor state legislation clearly regulates the use of force by law enforcement officers.⁸⁵ This omission has allowed a systematic pattern of excessive use of force to go unchecked and has served as an obstacle in subsequent efforts to investigate or punish those responsible for this violation.

In recent years, the excessive use of force has characterized the behavior of Mexican police throughout the country. Aside from routine physical abuse of individual detainees in criminal cases, police have engaged in diverse large-scale acts of abuse and repression when called upon to maintain public order. To give just a few well-known examples of this phenomenon, on May 28, 2004 in Guadalajara, Jalisco, during the Third Summit of Latin America, the Caribbean, and the European Union, members of the city and state police forces took part in an operation to repress anti-globalization protesters. The operation resulted in nineteen cases of torture, seventy-three cases of

⁸⁵ One exception to this trend is the Federal District (Mexico City), whose Legislative Assembly passed a law to regulate the use of force in early 2008. See *Decreto por el que se expide la Ley que Regula el Uso de la Fuerza de los Cuerpos de Seguridad Pública del Distrito Federal*, GACETA OFICIAL DEL DISTRITO FEDERAL, No. 319, Apr. 22, 2008, 3, available at www.consejeria.df.gob.mx/gaceta/index.php.

illegal detention, and fifty-five cases of cruel, inhuman, or degrading treatment.⁸⁶ On April 20, 2006 in Lázaro Cárdenas, Michoacán, the state and federal police acted to break up a group of striking workers, leaving two individuals dead, twenty-one others injured by firearms, and thirty-three more injured from other types of attacks.⁸⁷ The National Human Rights Commission subsequently confirmed that the police had made excessive use of firearms in the operation.⁸⁸

As an example from a different context, in June 2008 police in the Federal District (Mexico City) deployed a massive operation to raid a disco, the News Divine, to check whether alcohol was being served to minors. The operation was characterized by large-scale physical and sexual abuse, threats, and other violations by police against the disco's customers. Most notoriously, the police simultaneously forced the customers to exit the disco while blocking or restricting their passage through the door, causing the deaths of twelve individuals (nine youths and three police) who were crushed and asphyxiated in the mass of people trapped in the disco.⁸⁹

Finally, turning to examples from a longer-term context of repression, police brutality in response to social activism in the state of Oaxaca has been particularly grave. On July 16, 2007, municipal and state police forces blocked the path of protesters on their way to an alternative celebration of the traditional festival of Guelaguetza in Oaxaca City, Oaxaca, using tear gas and other violent means of repression. International human

⁸⁶ National Human Rights Commission, *Informe Especial de la Comisión Nacional de los Derechos Humanos relativo a los hechos de violencia suscitados en la Ciudad de Guadalajara, Jalisco, el 28 de mayo del 2004, con motivo de la celebración de la III Cumbre de América Latina, el Caribe y la Unión Europea* (2004), VII. Conclusiones y Propuestas, available at www.cndh.org.mx.

⁸⁷ See National Human Rights Commission, Recommendation 37/2006 (Oct. 11, 2006), § IV.E, available at www.cndh.org.mx.

⁸⁸ *Id.*

⁸⁹ Human Rights Commission of the Federal District, Recommendation 11/2008, available at www.cd hdf.org.mx/index.php?id=reco1108.

rights observers investigating these events later reported that the operation of July 16th was characterized by “reports of beatings, torture, and mistreatment, and a disproportionate use of force...”⁹⁰ The State Human Rights Commission highlighted that in the case of Emeterio Merino Cruz, who was beaten and tortured into a state of coma while in police custody during these events despite not having resisted arrest, “it is clear that his state of health is the result of an obviously excessive use of force at the time of his detention and custody by the police, who victimized him through cruel, inhuman, and degrading treatment...”⁹¹ In Emeterio’s case, photographs of the events demonstrate the brutal violence to which he was subjected. He would remain in a coma for over thirty days, and one year later he reported in an interview that he had still not regained motion in his right hand or foot and suffered from constant headaches.⁹²

Another example of the excessive use of force in Oaxaca was the killing of José Alberto López Bernal on October 29, 2006, when members of the Federal Preventive Police (PFP) shot him at close range with a tear gas canister, although such weapons are not meant to be fired directly at an individual at short distances.⁹³

Through Center Prodh’s fieldwork in Oaxaca, we have confirmed that in various cases, there is irrefutable evidence of the excessive use of force by diverse police bodies. However, the federal government consistently denies that the Federal Preventive Police have committed human rights violations while carrying out their operations. The state

⁹⁰ Diakonie and International Commission of Jurists, *Informe de la Visita de la Comisión Internacional de Juristas y la Obra Diacónica Alemana a Oaxaca, México (agosto 2007)*, Nov. 2007, 13. Author’s translation.

⁹¹ Oaxaca State Human Rights Commission, *Informe Preliminar* (July 19, 2007), 7, available at <http://www.cedhoax.org/notas/informepre.pdf>. Author’s translation.

⁹² Octavio Vélez Ascencio, *Víctima de la brutalidad policiaca en Oaxaca reclama indemnización*, LA JORNADA, July 16, 2008, available at www.jornada.unam.mx/2008/07/16/index.php?section=estados&article=040n1est.

⁹³ National Human Rights Commission, Recommendation 15/2007, (May 23, 2007), § IV.L, available at www.cndh.org.mx.

government has likewise denied allegations of excessive use of force by its agents in these same events.

Excessive force and sexual torture: the case of San Salvador Atenco

Another paradigmatic case exemplifying the use of excessive force and police brutality, which Center Prodh has documented and taken on as a case of integral defense, is that of the human rights violations committed during the police operation carried out by state and federal police in San Salvador Atenco (state of Mexico) in May 2006. In this case, disproportionate and irrational use of force and firearms transformed into the torture, including sexual torture, of dozens of detained individuals.

On May 3 and 4, 2006, a small group of local flower vendors clashed with police forces in the town of Texcoco, near to San Salvador Atenco, in the state of Mexico. While the flower vendors and local social movement People's Front in the Defense of Land (FPDT) state that municipal authorities had agreed on May 2nd to let the flower vendors set up their stalls in the town square, on May 3rd the local authorities, backed by the state government, nonetheless ordered police to prevent the flower growers from setting up their stalls. This led to several confrontations between authorities and local citizens on May 3, 2006. In response, on the night of May 3rd-4th, 2,500 members of state and federal police forces surrounded the town of San Salvador Atenco and deployed a repressive operation of massive scale against those within its boundaries.

Throughout the operation, police officers indiscriminately assaulted and detained both protesters and by-standers not involved in the conflict. Among other examples of excessive use of force during the operation, the police killed 14-year-old Javier Santiago and 20-year-old Alexis Benhumea (the first was shot and the second died of head

trauma after a police officer fired a tear gas canister directly at him).⁹⁴ The police also arbitrarily detained more than 200 other people, severely beating the detainees. One 22-year-old student narrated the events of her detention in the following terms:

On May 4, around 8:30 AM, we were hidden in a house, seven men, two women and a 14-year-old boy. About fifteen *granaderos* (anti-riot police) showed up at the house and started insulting us. They started beating the boy when he was trying to change his shirt since it was soaked in tear gas, a few of them beat him until he was all bloody. They ordered us to kneel in front of a wall with our hands behind our heads and our shirts covering our faces, they started beating our heads with clubs and then arrested us.⁹⁵

The victims arbitrarily detained during the operation included forty-seven women, many of whom were systematically tortured by Mexican police through rape, other forms of sexual violence, and beatings while blindfolded and forced to lie one on top of the other during their journey by bus to a detention facility. Some victims were raped by more than one policeman in a row, while other police groped and insulted the victims during the rapes; one narrates that the police told her they would find and abuse her family members; and many of the victims reported that the police threatened them with death while sexually abusing them.⁹⁶ Although the trip to the detention facility would have taken two hours under normal conditions, the Atenco detainees' journey took at least four hours, leading to the presumption that the police took an indirect route to prolong the time during which they could rape and torture the individuals held inside the buses.

⁹⁴ See National Human Rights Commission, Synthesis of Recommendation 38/2006 (Oct. 16, 2006), § 8, available at www.cndh.org.mx.

⁹⁵ Center Prodh, World Organisation Against Torture (OMCT), and the Latin American and Caribbean Committee for the Defense of Women's Rights (CLADEM), *State Violence Against Detained Women in Mexico: the San Salvador Atenco Case*, alternative report presented to the CEDAW Committee, Aug. 2006, 7, available at www.omct.org/pdf/VAW/2006/CEDAW_36th/CEDAW_alt_report_Mexico_en.pdf.

⁹⁶ In May 2008, Center Prodh released a video documentary featuring nine of the female victims of Atenco, who narrate the events of May 2006 and discuss the continuing impunity against which they are struggling in this case. The documentary, entitled *Urgent Call for Justice: the Voice of the Women of Atenco*, is available online at <http://mx.youtube.com//DenunciaDH>.

An ongoing, severe aspect of the brutal abuses committed in Atenco is the impunity that characterizes this case, coupled with government officials' justification of the excessive use of force. Beginning in the days following the violations, state government officials made a series of public statements seeking to discredit the victims' reports of torture. In June 2006, Mexico state governor Enrique Peña Nieto portrayed the female detainees' reports of rape as probable fabrications and alleged that women belonging to "radical groups" were trained to say that police had raped them.⁹⁷ Regarding the police operation as a whole, two years later Governor Peña Nieto declared that he was proud of the way his state's police forces had acted to suppress the protesters in May 2006 and that if faced once more with the need to re-establish public order, he would act in the same way again.⁹⁸

In the months following the violations committed in Atenco, Center Prodh and fourteen of the women tortured by Mexican police presented numerous pieces of evidence to Mexico's federal Special Prosecutor for Crimes related to Violence against Women and Human Trafficking (Fevimtra), requesting that the Special Prosecutor assume federal jurisdiction over the investigation of the case. However, to date the Special Prosecutor's office, now headed by former state human rights commissioner Guadalupe Morfín, has not charged any of the alleged perpetrators. This lack of action is all the more troubling given that the use of sexual violence by police when arresting women is a widespread problem. For instance, female victims of the violent police operation at the 2004 Third Summit of Latin America, the Caribbean, and the European Union (mentioned above) also reported sexual abuse.⁹⁹ As another example, in January 2003, police in Mexico

⁹⁷ *Desestima Peña abusos en Atenco*, REFORMA, June 16, 2006.

⁹⁸ Silvia Chávez González, *Peña Nieto, orgulloso del caso Atenco*, LA JORNADA, May 15, 2008, available at www.jornada.unam.mx/2008/05/15/index.php?section=politica&article=018n2pol.

⁹⁹ Center Prodh, World Organisation Against Torture (OMCT), and the Latin American and Caribbean Committee for the Defense of Women's Rights (CLADEM), *State Violence Against*

City detained 18-year-old Nadia Ernestina Zepeda Molina, whom they falsely accused of selling drugs. In addition to beating Nadia and two other youths detained with her, police raped her while transporting her to the local public security offices.¹⁰⁰

At this writing, state authorities have not charged any police who participated in the San Salvador Atenco operation with either torture or rape, and have instead brought minor charges, such as abuse of authority, in just a handful of cases. To date, the only criminal punishment has been the conviction of a single officer for the non-serious offense of “libidinous acts,” meaning that he can avoid any jail time simply by paying a fine of approximately US\$800. Considering that thousands of police participated in the operation, using excessive force and committing acts of brutality and torture against scores of civilians, it is clear that state authorities have failed to carry out an effective investigation or to act against the vast majority of the perpetrators. Much less have authorities sought to prosecute those who planned and oversaw the operation and who, according to testimonies of police officers later interviewed by Center Prodh, had ordered the police forces to detain “everything that moved” and to beat the victims whenever there were no media cameras in view.¹⁰¹ Impunity for all of these actors persists despite strong condemnation from international bodies such as the United Nations Committee Against Torture (CAT) and Committee on the Elimination of All

Detained Women in Mexico: the San Salvador Atenco Case, alternative report presented to the CEDAW Committee, Aug. 2006, 14, available at www.omct.org/pdf/VAW/2006/CEDAW_36th/CEDAW_alt_report_Mexico_en.pdf.

¹⁰⁰ *Id.*

¹⁰¹ Center Prodh and the Institute for Security and Democracy (Insyde), *De Atenco a la Reforma Policial Democrática: Una mirada propositiva en clave de reforma policial democrática y derechos humanos (From Atenco to Democratic Police Reform: A constructive evaluation in the spirit of democratic police reform and human rights)* (2006), 48-50. Author’s translation.

Forms of Discrimination against Women (CEDAW),¹⁰² as well as from foreign governments and the wider international community.¹⁰³

Given the denial of justice at the national level, on April 29, 2008, eleven of the victims of torture in Atenco filed a petition in this case before the Inter-American Commission on Human Rights, together with Center Prodh and the Center for Justice and International Law (CEJIL). The petition denounces the Mexican government for having violated the victims' right to be free from torture, their right to liberty, and their right to access to justice, among others. It also denounces the excessive use of force in this case and the Mexican government's lack of legislation governing such use of force as violations of Articles 5 and 2 of the American Convention on Human Rights, respectively.

Finally, we note that in one potentially useful development in the case, Mexico's Supreme Court has decided to exercise its investigatory powers to examine the violations that occurred in May 2006 in San Salvador Atenco, with a view to setting forth standards for the use of force by Mexican security forces. We discuss the Supreme Court's involvement in more detail in the following section.

¹⁰² These are the committees to whom Center Prodh, the World Organisation Against Torture (OMCT), and the Latin American and Caribbean Committee for the Defense of Women's Rights (CLADEM) had submitted a shadow report on the Atenco case in 2006. Center Prodh, World Organisation Against Torture (OMCT), and the Latin American and Caribbean Committee for the Defense of Women's Rights (CLADEM), *State Violence Against Detained Women in Mexico: the San Salvador Atenco Case*, alternative report presented to the CEDAW Committee, Aug. 2006, available at www.omct.org/pdf/VAW/2006/CEDAW_36th/CEDAW_alt_report_Mexico_en.pdf.

¹⁰³ Activists and citizens across the globe have come together to demand justice for the women of Atenco. In May 2008, roughly 5,000 individuals in more than forty-five countries signed letters directed to Mexico's attorney general calling for federal authorities to prosecute the perpetrators of the torture committed in San Salvador Atenco. That same month, ninety-six members of the United States Congress signed an open letter calling upon Mexico's attorney general to ensure that federal authorities take jurisdiction of this case and deliver justice to the victims.

The need for a legal framework that regulates the use of force

Starting with the Atenco case, we have dedicated significant time to exploring the problem of excessive use of force by Mexican police. While researching this subject, we have found statistics and cases that lead to the inescapable conclusion that the excessive use of force is a constant feature of interactions between police and civilians.

The statistical information generated by the National Human Rights Commission (CNDH), based on the individual complaints received by that body, shows that from June 1990 through December 2005, the Commission received a total of 3,928 complaints related to the illegitimate use of force and firearms, of which 2,081 involved illegal searches and incursions into homes; 617 involved violations of the right to physical integrity; 466 involved violations of the right to life; 304 involved acts of intimidation; 291 involved threats; seventy-six specified arbitrary use of force; fifty-seven involved attacks against property; twenty-five involved violations to the integrity of minors (those under age eighteen); six were classified as summary or extrajudicial executions; and five involved violations of the right to freedom of assembly or association.¹⁰⁴

The CNDH states:

...[U]pon concluding the processing of the respective complaints for the period between June 1990 and December 31, 2005, [this Commission] issued forty-two recommendations, in which it found violations to the right to life; the arbitrary use of force; attacks on private property; illegal searches of private homes; intimidation; and violations of the rights to assembly and association.... Further, this National Commission has published three special reports: the Agua Fría case of August 30, 2002; the Loxicha Region case of January 31, 2003; and a report on the violent events of Guadalajara, Jalisco, on May 28, 2004, during the Third Summit of Latin America, the

¹⁰⁴ National Human Rights Commission, *Recomendación General número 12. Sobre el uso ilegítimo de la fuerza y de las armas de fuego por los funcionarios o servidores encargados de hacer cumplir la ley*, Jan. 26, 2006, available at www.cndh.org.mx.

Caribbean, and the European Union, in which [the CNDH] confirms that various officials and law enforcement officers incurred in the illegitimate use of force and firearms to the detriment of individuals.¹⁰⁵

The same document reports that “the human rights commissions of thirty-one states and of the Federal District, during various periods between 1993 and September 2005, ranging from one to twelve years, have received 26,563 complaints and issued 2,124 recommendations” in this area.¹⁰⁶

With respect to the use of force by law enforcement officers, the Inter-American Court has indicated:

...States must adopt all necessary measures to create a legal framework that deters any possible threat to the right to life... Especially, States must see that their security forces, which are entitled to use legitimate force, respect the right to life of the individuals under their jurisdiction.

The use of force by law enforcement officials must be defined by exceptionality and must be planned and proportionally limited by the authorities. As such, the Tribunal has considered that force or coercive means can only be used once all other methods of control have been exhausted and have failed.¹⁰⁷

Further, the Inter-American Court has specified several of the criteria that determine whether the use of force by law enforcement officers is legitimate, such as: 1) the exceptionality, necessity, proportionality, and humanity of the conduct; 2) *the existence of a legal framework that regulates the use of force*; 3) the planning of the use of force, including training of members of the military and state security forces in the norms of

¹⁰⁵ *Id.* Author’s translation.

¹⁰⁶ *Id.* Author’s translation.

¹⁰⁷ *Zambrano Vélez et al. v. Ecuador*, Inter-Am. Ct. H.R. (Ser. C) No. 166 (2007)(Judgment), paras. 81 and 83.

human rights protection and the limits applicable in all circumstances to the use of weapons; and 4) adequate control and monitoring of the legitimacy of the use of force.¹⁰⁸

For its part, the Office of the UN High Commissioner for Human Rights in Mexico has recommended that Mexican police forces should adopt as part of their regulations the international standards established to govern the use of force, which consist of the UN Code of Conduct for Law Enforcement Officials and the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.¹⁰⁹

As mentioned above, the Mexican Supreme Court, recognizing that grave human rights violations had occurred in the case of San Salvador Atenco, has initiated its own investigation into the facts of this case. The naming of a special Investigatory Commission for this purpose by the Supreme Court represents an opportunity for the Court to set standards to regulate the use of force throughout the country. According to the goals established in the Agreement of the Supreme Court of February 6, 2007, establishing the Investigatory Commission, one of the Commission's objectives is "that this Supreme Court establish criteria governing the limits on the use of force by public officials..."¹¹⁰

Bearing in mind this mandate, Center Prodh, the Institute for Security and Democracy (Insyde), and Dr. Gustavo Fondevila of the Center for Research and Teaching in Economics (CIDE) submitted to the Supreme Court an amicus curiae brief containing criteria for the use of force based on internationally recognized human rights standards. The goal of our amicus brief is to provide technical assistance to the Court and to

¹⁰⁸ *Id.* at paras. 82-90.

¹⁰⁹ Office of the High Commissioner for Human Rights (Mexico), *Diagnóstico sobre la Situación de los Derechos Humanos en México* (2003), 45, available at www.hchr.org.mx/diagdh.htm.

¹¹⁰ Extract from the resolution on Inquiry No. 03/2006, Supreme Court of Justice, Feb. 6 2007, 68-69. Author's translation.

encourage it to recommend that the Mexican State regulate the use of force according to the specific requirements of international standards.

In particular, in this brief we underscore the need for the use of force to be governed by the principles of necessity, rationality, legality, proportionality, preservation of life whenever possible, use of firearms as a last resort when other levels of force are insufficient, training of law enforcement officers in the use of force, and punishment of officers who use excessive force to the detriment of the population. Drawing on international standards such as the Code of Conduct for Law Enforcement Officials and the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, we offer guidelines with reference to specific levels and types of force, such as projectile weapons and chemical weapons. Drawing on comparative legal frameworks, we also set forth several existing models or scales for determining what type of force is appropriate to respond to various situations (e.g. passive resistance to orders, active resistance, violent confrontation endangering lives, etc.) to provide technical assistance to the Court in setting forth practical regulations for the use of force for Mexico's police. These proposals are currently under study by the Supreme Court, as we await a final decision in this case.

Conclusion

Faced with rising levels of violent crime, the Calderón administration has employed a reactive strategy centered on highly visible shows of force, often in the form of militarized security operations that promise to engage drug traffickers in frontal combat, but that have not reduced overall levels of criminal violence. The government has also enacted and proposed penal reforms to weaken due process rights and toughen already severe penalties for crimes. The widespread human rights violations that result from these strategies are justified through a public discourse based on a false dichotomy between public security and human rights, and are generally left in impunity by authorities who often lack independence from the security forces they are charged with investigating. The use of military jurisdiction in cases of human rights violations committed by the armed forces is a structural factor contributing to this pattern of endemic impunity.

On the other hand, the government has taken little to no effective action to address the dysfunctional manner in which its police forces frequently interact with Mexico's citizens, especially the generalized use of disproportionate force that characterizes the response of Mexican police to criminal detainees and participants in social protest alike.

The excessive use of force is just one of several institutional and societal problems that the current administration has failed to address in its ongoing war on crime. By reducing the complicated nature of Mexico's public security challenges to a simplistic battle between good and evil – between state agents and organized criminals – authorities have left by the wayside other aspects of public security that warrant equal or greater attention than physical confrontations with violent crime. Among these, we underscore the lack of political will to address the stark social and economic inequality that

characterizes Mexico today, a social context that is impossible to separate from the high levels of crime that plague the country.

Bearing in mind these considerations, as well as the cases and statistics contained in this report, Center Prodh calls upon the government to:

- Withdraw the armed forces from participation in public security tasks that fall within the competence of the civilian police forces;
- Ensure that cases of human rights violations committed by members of the armed forces are investigated and prosecuted by civilian authorities;
- Reform the criminal justice system to include internationally recognized due process rights without discrimination, eliminating *arraigo*, mandatory preventive detention, and the regime of exception for organized crime from the Constitution and transitioning to a fully accusatory system based on the presumption of innocence;
- Legislate to regulate the use of force by law enforcement bodies and effectively train these bodies in the use of force, taking into account international standards in this area;
- Deliver justice to the victims of the human rights violations described in this report by prosecuting the material and intellectual authors of these violations, providing reparations for harm caused, and adopting measures to prevent such violations from re-occurring in the future.

Center Prodh believes that crime cannot be defeated with crime. As long as Mexican authorities seek to combat organized criminal groups with strategies that violate human rights, they too are disobeying legal obligations designed to protect human life and physical security, to the detriment of countless victims. It is against this background that

Center Prodh underscores the urgent necessity for the Mexican government to reverse the troubling tendencies described in this report and to recognize that public security and human rights are not mutually exclusive, but rather are two mutually reinforcing, necessary components of a democratic state.