



## 人权理事会

## 第十七届会议

## 议程项目 3

增进和保护所有人权——公民权利、政治权利、  
经济、社会和文化权利，包括发展权

## 法官和律师独立性问题特别报告员的报告

增编

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## 内容提要

法官和律师独立性问题特别报告员应墨西哥政府的邀请于 2010 年 10 月 1 日至 15 日正式访问了该国。她有幸得到了总统的接见，并与联邦和州各级的政府、立法和司法部门、以及民间组织的代表和其他利害关系方举行了会议。她访问了联邦区以及恰帕斯、墨西哥城、新莱昂、圣路易斯波托西和尤卡坦等州，使她能够对该国各地区的司法情况作出评估。

特别报告员在报告中说，墨西哥面临的问题是暴力升级的问题，主要是那些与有组织犯罪有关的集团。尽管政府采取了措施，但犯罪的范围已经在全国扩大，并正在开始对墨西哥社会广大的阶层的日常生活带来影响。特别报告员强调说，这种情况说明更加有必要建立一个健全、独立和有效的司法机构。

特别报告员认为，司法系统长期存在结构和组织上的缺陷，特别是在联邦实体的层面上，这对司法当局的独立性和自治产生影响。

墨西哥在特别报告员任务范围在许多领域开展了深远的宪制改革。特别报告员指

\* 本报告的内容提要以所有正式语文分发。报告全文附载于内容提要，仅以提交的原文语文和英文分发。

出，2008年的刑事司法制度改革在这方面特别相关。特别报告员认为，这些改革能否成功地落实，取决于政治领导的水平，以及所有有关机构和利害相关方是否加紧努力。

报告详尽分析了联邦行政部门在对不尽人意的军事司法制度的改革方面所采取的主动行动。报告还提到了在人权、宪法保护权和关于少年司法制度的联邦立法提案方面开展的宪制改革。在讨论司法系统的主要挑战时，除了主要因有组织犯罪引起的暴力升级和公共安全状况日益恶化以外，报告还提到了违法不究的问题。在墨西哥，这个问题不仅与刑事调查中的结构缺陷有关，而且还与腐败有关，腐败已遍及各个层次，但在州和市各级尤为严重。然后，特别报告员详尽分析了所谓预防性拘留（arraigo）的宪法规定，认为这项法律制度在根本上有悖于无罪推定原则和人身自由权，因此应予以废除。

报告还述及法律职业和公共辩护人的工作方面的问题。特别报告员观察到对律师资格考核的要求不同意，并注意到没有一个独立的监督机构来维护法律职业的质量、操守、伦理和声誉。她还建议公共辩护人办公室在所有联邦实体中独立于行政部门，以维护控辩双方的平等。报告最后分析了诉诸于司法的问题，这是墨西哥政府必须为人民作更多事情的领域。报告还特别注意土著人民和妇女在进入司法制度方面的困难。

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### Report of the Special Rapporteur on the independence of judges and lawyers on her mission to Mexico

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## I. Introduction

1. At the invitation of the Government of the United Mexican States, the Special Rapporteur on the independence of judges and lawyers, Ms. Gabriela Carina Knaul de Albuquerque e Silva, visited the country on an official mission from 1 to 15 October 2010 in order to examine matters relating to the independence of the judicial branch, the judiciary and the country's lawyers. She visited the Federal District, Tuxtla Gutiérrez and San Cristóbal de las Casas in the State of Chiapas, Toluca in the State of México, Monterrey in the State of Nuevo León, San Luis Potosí in the State of San Luis Potosí and Mérida in the State of Yucatán.

2. The Special Rapporteur had the honour of being received by the President of Mexico and met with various federal and state authorities, persons in the judicial branch, public human rights bodies and representatives of civil society.

3. The Special Rapporteur wishes to thank the Government for its invitation to visit the country and for its close cooperation and expresses her gratitude to the Mexico Office of the Office of the United Nations High Commissioner for Human Rights (OHCHR) for its support.

## II. The justice system

### A. Federal level

4. Article 94 of the Constitution provides that the exercise of judicial authority shall be vested in the Supreme Court, the Electoral Tribunal, the circuit courts (both those presided over by a panel of judges and those in which a single judge presides), and the district courts.

#### 1. The Supreme Court

5. A total of 11 judges sit on the bench of the Supreme Court, which holds proceedings in plenary and in various chambers. Its sessions are usually open to the public.

6. The Supreme Court has played a vital role in recent years, particularly in terms of opening up its proceedings to the public and moving reforms of the country's justice system forward. The direct broadcasts of its plenary sessions, the publication of its decisions, the fact that the Court now holds public hearings on relevant issues and its decision to accept documentary submissions from major stakeholders without them necessarily having to be litigants are all praiseworthy signs of its modernization. Other signs of greater openness and modernity include the forthcoming publication of the transcripts of the Supreme Court's plenary sessions on its website and the decision to make recordings of plenary sessions held since June 2005 accessible over the Internet. In addition, in 2003 the Supreme Court held the National Consultation on the Comprehensive Reform of the Mexican Justice System in order to elicit proposals from the country's legal community and society at large about ways to improve the system for the administration of justice. The outputs of the Consultation were compiled in the *Libro Blanco de la Reforma Judicial* (white paper on judicial reform), which was published in 2006. This white paper sets forth a number of different actions, including 33 actions which it presents as essential items for inclusion on the agenda for judicial reform.<sup>1</sup> Action No. 27, which relates to the promotion of

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<sup>1</sup> *Libro Blanco de la Reforma Judicial*, p. 390.

cooperation among the organizations that administer justice, led to the establishment of the Mexican Association of Justice Officials (AMIJ). In addition, in 2007 the Supreme Court presented 14 proposed constitutional amendments under the State Reform Act.

7. Many of the recommended actions in the white paper (such as the reform of amparo proceedings, the reinforcement of the judicial branch at the state level and the reform of the criminal justice system), as well as a number of the 14 proposals made in 2007, deal with issues or circumstances that were examined by the Special Rapporteur during her visit. The Special Rapporteur is of the view that, in order to improve the justice system, consideration should be given to the proposals made in the white paper and those presented by the Supreme Court under the State Reform Act.

## 2. Circuit and district courts

8. Circuit court judges and district court judges are appointed and assigned to a court for a period of six years by the Council of the Federal Judiciary. At the end of that time, they may be confirmed or promoted. The appointment and promotion of circuit court judges and district court judges is conducted by means of an internal or open competitive process.<sup>2</sup> The selection process is based on written examinations that involve the preparation of written decisions on given cases and an oral examination before a panel. In making its evaluation, the panel also takes into consideration courses taken by applicants in the Institute of the Federal Judiciary, length of service in the federal courts, their performance, academic degrees and any refresher or specialized courses that they may have taken.<sup>3</sup>

9. While the use of a competitive selection process and written examinations is welcome, the Special Rapporteur is concerned that the selection and promotion of women judges is hindered by the fact that, under existing regulations, candidates are assigned points (which are often a decisive factor in the final selection of candidates) for having taken refresher and specialized courses, and these courses are usually given in the evenings, when it is difficult for female judges who have children to attend. Another source of concern is the requirement that, when persons take on new responsibilities as circuit or district court judges, they must change assignments, as this limits the participation of female judges. Although this is not an instance of *de jure* discrimination in access to the profession, since the persons with the highest scores are selected, it is *de facto* discrimination, since, in practice, the assignment of points for attendance at evening classes penalizes women.

10. While the Special Rapporteur is aware that a gender equity programme has been established in the federal judiciary, its quasi-patriarchal framework and the prevalence of certain social conventions are an obstacle to the career advancement of women judges, especially to the most senior posts. The Special Rapporteur therefore believes that consideration should be given to the use of special temporary measures to ensure a gender balance in the judiciary and to make certain that women are able to become judges and to advance in their careers. The implementation of such measures should be coupled with efforts to raise awareness and promote an understanding of their significance on the part of all court officials.

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<sup>2</sup> Federal Judiciary Organization Act, art. 112.

<sup>3</sup> *Ibid.*, art. 114.

### 3. The Council of the Federal Judiciary

11. Administration, oversight and disciplinary action with respect to the federal judiciary, with the exception of the Supreme Court, are the responsibility of the Council of the Federal Judiciary (CJF), which is an independent body in both practical and administrative terms and is empowered to issue decisions.<sup>4</sup> CJF has seven members: the Chief Justice of the Supreme Court, who also presides over the Council; three circuit court and/or district court judges who are appointed by the Supreme Court in plenary; two members who are designated by the Senate; and one who is appointed by the President of Mexico. There is a conspicuous absence of women in this important body, especially in view of the fact that it is responsible for appointing, assigning, confirming and removing members of the judiciary in Mexico. The Special Rapporteur would like to draw attention to the need for balanced representation of men and women who are knowledgeable about gender issues.

12. A number of people expressed concern about the fact that the same person who presides over the Supreme Court also presides over the Council, since this could undermine the Council's independence from the Court. It would be advisable for the Chair of the Council to be held by someone other than the Chief Justice, who has important, full-time duties to discharge.

13. Another cause of concern is the fact that the Constitution states that the Council's decisions regarding any matter other than the appointment, assignment, confirmation or removal of judges, which can be reviewed by the Supreme Court, are final and cannot be contested, and there is therefore no judicial or other appeal against such decisions.<sup>5</sup>

14. The Special Rapporteur is of the view that there should be some provision for having any disciplinary or administrative decision that has an impact on the status of judges reviewed by an independent judicial body.<sup>6</sup> This recommendation also applies to the councils of the judiciary and electoral tribunals at the state level. All of the states and the Federal District should have a council of the judiciary,<sup>7</sup> and a national council should be established to coordinate the work of those state councils.

### 4. The Public Prosecution Service

15. The Public Prosecution Service is a key component of the justice system and is designed to ensure the proper investigation of crimes and prosecution of offenders. Article 102 A of the Constitution provides that the Federal Public Prosecution Service shall, *inter alia*, be responsible for the prosecution of all federal offences, for obtaining warrants for the arrest of suspects, for uncovering and submitting evidence against accused persons, for ensuring the prompt and speedy administration of justice, and for requesting that the court apply a given penalty.

16. The Attorney-General of the Republic, who is the head of the Federal Public Prosecution Service, is appointed by the President, and this appointment must then be ratified by the Senate. The fact that the country's prosecution services are not independent

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<sup>4</sup> Constitution, art. 100.

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

<sup>6</sup> See A/HRC/11/41, para. 61.

<sup>7</sup> At present, only six states do not have such a body: Baja California Sur, Campeche, Chihuahua, Colima, Oaxaca and Tamaulipas.

of the executive branch of government is a challenge to be overcome by Mexico's federal and state justice systems, inasmuch as this lack of autonomy can erode the credibility of the authority responsible for investigating crimes objectively and undermine confidence in its ability to do so.

17. The Special Rapporteur has been informed of a number of proposals for converting the Public Prosecution Service into an autonomous body and recommends that these proposals be accorded due consideration and be approved without delay, since the implementation of the new criminal justice system requires that the administration of justice be fully independent of the executive branch.

18. It is also necessary to ensure effective oversight of all prosecution services, increase their transparency, fully implement a system for the advancement of judges along a career path and improve the system for ensuring accountability. The process involved in converting the country's prosecution services into autonomous bodies should be coupled with their rationalization, monitoring and reorganization.

## **B. State level**

19. At the state level, the workings of the justice system are regulated primarily by the states' constitutions and their laws governing the organization of the bodies within that system. The make-up and names of these different agencies vary a great deal, but, generally speaking, the judicial branch is composed of a high court, courts of first instance, municipal courts and a council of the judiciary. In some states, electoral tribunals and administrative courts, as well as the public defender's office, also form part of the judicial branch.

### **Appointment and term of office**

20. In general, the chief justice of the high court is elected by the full panel of judges of that court. In most cases, judges are appointed by the state council of the judiciary on the recommendation of the head of the executive branch at the state level, with the approval of the legislature or of its standing intersessional committee. Under this system, which is used throughout the country, the governor is the person who actually appoints judges, although this appointment is then ratified by the state congress. This link with the executive branch is so strong that, in practice, the latter also determines who will be appointed chief justice, which can seriously undermine the independence and autonomy of the bodies charged with administering justice at the local level. During her visit, the Special Rapporteur was witness, on at least two occasions, to the existence of an unusually close relationship between a chief justice and the governor of the state in question.

21. With regard to the appointment of high court justices, the Special Rapporteur believes that the necessary steps, including structural and legislative changes, should be taken to ensure the complete independence of the state judiciary from the executive branch.

22. The judges of courts of first instance are usually appointed by means of a competitive application process. There are some states, however, where judges can also be appointed directly.

23. The Special Rapporteur emphasizes the need to establish and apply objective criteria for the selection and promotion of judges<sup>8</sup> in order to place the focus on candidates' abilities and integrity and on merit. The existing practice at both the federal and state levels,

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<sup>8</sup> See A/HRC/11/41, paras. 30 and 97.

whereby judges are selected on the basis of competitive examinations, may therefore be a suitable procedure, especially if these competitive screening processes take the form, at least in part, of written, anonymous and objectively scored examinations.

24. A system for the entire judiciary in which the appointment, promotion and removal of judges are based on objective criteria should be established. Open competitive selection mechanisms should be used throughout the country so that the best possible professional can be selected for each position on the basis of objective, transparent criteria that incorporate a gender perspective.

25. The term of office for judges of various ranks differs from one state to another. In most cases, judges are appointed for an initial period after which they may be confirmed in their posts. Sometimes this confirmation process involves an in-service proficiency examination.

26. The Special Rapporteur is concerned that the requirement that an appointment be confirmed or ratified upon the completion of an initial term of office could undercut the independence of judges, as the need for confirmation could subject them to undue pressure in the performance of their functions and make it difficult for them to be impartial. It would be another matter to have a probationary period after which the incumbent's appointment could be confirmed. Otherwise, short terms of office could weaken the judicial system.<sup>9</sup>

27. The Special Rapporteur recommends that judges be given security of tenure once they have been appointed on the basis of a competitive selection process. If a probationary period is to be established, it should be short and no extensions should be permitted; once this period is over, a permanent appointment should be granted, although this does not mean that judges may not be required to attend refresher courses or pass in-service proficiency examinations.

## **C. General observations**

### **1. Concentration of judicial activity**

28. There are a number of areas in which the administration of justice at both the federal and state levels does not fall within the purview of the judicial branch. At the federal level, examples would include tax law, administrative law, labour law, military law and agrarian law. There have been a number of initiatives for making these areas autonomous and independent of the executive branch and transferring them to the judicial branch. The incorporation of the Electoral Tribunal into the federal judicial branch in 1996 is one example of a step in this direction.

29. The Special Rapporteur believes that all aspects of the administration of justice should be encompassed within the judicial branch. Consideration should therefore be given to proposals for attaining the necessary unification of judicial activity within the independent organ responsible for the administration of justice in Mexico.

### **2. Budget**

30. A sufficient budget is required in order to have an effective judiciary and system for the administration of justice. There are a number of proposed bills under which no less than 2 per cent of federal and state budgets would be allocated to the respective judicial branches. The Special Rapporteur is of the view that the passage of these bills would strengthen the

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<sup>9</sup> Ibid., para. 54.



judiciary's financial and budgetary autonomy and, hence, its independence and would enhance the administration of justice. The Special Rapporteur recommends that the judiciary give these proposals serious consideration, make an effort to rationalize the expenditures of the judicial branch, increase the transparency of its administrative procedures and heighten its effectiveness and efficiency.

### **III. Recent reforms and developments affecting the judicial system**

31. During her visit, the Special Rapporteur was informed about various long-term constitutional changes geared towards increasing constitutional recognition and protection of human rights and overhauling key institutions with the justice system.

#### **A. Constitutional reform of the criminal justice system**

32. The chief aim of the constitutional reform of the criminal justice system approved in 2008<sup>10</sup> is to convert the country's semi-inquisitorial system into an oral, adversarial system of criminal justice. The reform's positive aspects include its incorporation of the principle of the presumption of innocence and the provision that any statement that is not made in the presence of a judge is invalid. The reform will contribute to greater transparency, more effective public information services and better access to the criminal justice system. Difficulties have been encountered in its implementation, however, and the advancement of the reform process does not appear to be underpinned by a determined, constant and steady foundation of political will. The escalation of violence and growing lack of public safety have been cited as reasons for delaying or weakening the implementation of this reform. In some cases, such as in Chihuahua, counter-reforms have been brought to the fore that reduce the new system's effectiveness in guaranteeing fundamental rights.

33. The Special Rapporteur believes that the successful implementation of the reform of the criminal justice system will hinge on political leadership and on the redoubled efforts of all the relevant institutions and stakeholders, as well as on the necessary economic investments and other specific actions. The broad-based political consensus that paved the way for the reform's passage is now in urgent need of the support, in word and deed, of the authorities at the highest level in order to backstop, advocate and accelerate the reform's implementation.

34. Efforts must be made to encourage all court officials and legal professionals to embrace the new criminal justice system and to dispel doubts and misconceptions about the new system's nature and effectiveness. Law school curricula should be reoriented towards the study and analysis of the new criminal justice system.<sup>11</sup> In the opinion of the Special Rapporteur, efforts to introduce a system of indicators for gauging progress in implementing the reform should also be stepped up. The Government has reported that the Technical Secretariat of the Coordinating Council for the Implementation of the Criminal Justice System (SETEC)<sup>12</sup> is designing a system of indicators for use in monitoring and

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<sup>10</sup> Published in the *Diario Oficial de la Federación* of 18 June 2008.

<sup>11</sup> The chamber for oral proceedings at the Monterrey School of Law provides an example of good practices in this area.

<sup>12</sup> Presidential decree of 13 October 2008.

evaluating the implementation of the reform and hopes to have baseline indicators for all the states by late 2011.

35. Of the country's 32 federative entities, only Baja California, Chihuahua, Durango, México, Morelos, Nuevo León, Oaxaca and Zacatecas have brought their justice systems into line with the reform. Progress at the federal level since 2008 has not been noteworthy either, as the legislature has not yet passed the corresponding amendments to the Federal Code of Criminal Procedure,<sup>13</sup> organizational laws and other ordinances relating to the new criminal justice system or the relevant legislation on the application of criminal penalties and other matters.

36. Under the applicable provisions, the Government of Mexico and the governments of its individual states are free to decide when and how to implement the constitutional reform so long as they do so within the eight-year implementation period, which will come to an end in 2016. Nonetheless, the period of time provided for completion of the reform should be used by the Government of Mexico and by the federative entities to phase in the new system gradually, rather than to defer the actions and changes required for its implementation.

37. As part of this process, passage is recommended, for example, of the Judgements Enforcement Act, which was approved by the Chamber of Deputies in April 2009 and is now before the Senate.

## **B. Reform of the military justice system**

38. In accordance with article 13 of the Constitution, offences and contraventions of military discipline fall within the purview of the military justice system, but military courts "may not, under any circumstances or for any reason, extend their jurisdiction to include persons who do not belong to the Army". In addition, "when a civilian is implicated in an offence or contravention of military law, the case shall be heard by the corresponding civil authority". This provision is clearly stated and is in line with international standards relating to the jurisdiction of military courts, which, by definition, is of an exceptional nature.

39. The wording of article 57 of the Code of Military Justice and, in particular, of section II (a) is a cause of concern, however, inasmuch as offences against military discipline are defined as including ordinary and federal offences when they are "committed by military personnel when on duty or as a result of acts related thereto". As a consequence of this open-ended wording and the even broader way in which it has been interpreted, military personnel alleged to have violated the human rights of civilians have been tried in military courts. This is a source of serious concern at a time when military personnel are serving as public security forces.

40. Following the issuance by the Inter-American Court of Human Rights of its judgement of November 2009 in the case of *Radilla-Pacheco v. Mexico*, in which it determined that Mexico should adopt, within a reasonable period of time, the appropriate legislative reforms in order to make article 57 of the Code of Military Justice compatible with international standards in this field,<sup>14</sup> the federal executive branch stated that it would

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<sup>13</sup> The Government has reported that the proposed federal code of criminal procedure was approved by the Coordinating Council on 9 December 2010.

<sup>14</sup> Inter-American Court of Human Rights, *Radilla-Pacheco v. Mexico*, judgement of 23 November 2009, operative para. 10.

submit a bill to limit the scope of military courts' jurisdiction. During the Special Rapporteur's visit, two new judgements were issued by the Inter-American Court of Human Rights in which it again called upon the State to reform the military justice system.<sup>15</sup>

41. On 18 October 2010, the federal executive submitted a bill that would exclude only three offences from the jurisdiction of the military courts: enforced disappearance, torture and rape. Although this would certainly be a step in the right direction, a list of specific offences that are not subject to military jurisdiction is not satisfactory, given the exceptional nature of these courts' jurisdiction. Furthermore, this bill would not exclude other equally serious crimes and human rights violations, such as extrajudicial executions, from military courts' jurisdiction.

42. In December 2010, the Inter-American Court of Human Rights again found against Mexico in a judgement in which the Court reiterated that the military courts were not competent to investigate, judge or punish alleged perpetrators of human rights violations and that such violations fell within the purview of the ordinary justice system. In its judgement, the Court added that its finding applied not only to cases of torture, enforced disappearance and rape, but to all human rights violations.<sup>16</sup> The Special Rapporteur believes that the military justice system in Mexico should not have jurisdiction over human rights violations or over cases involving civilian victims.<sup>17</sup>

43. An additional concern about this bill is that it would not resolve another shortcoming of the current system of military justice, which is that victims or their family members do not have access to an effective remedy (including amparo) to contest cases tried by the military courts. The Special Rapporteur considers that, in addition to reforming the Code of Military Justice, amendments should be adopted that would provide access to an effective judicial remedy to persons affected by judgements issued by military courts.

### C. Constitutional reform in the area of human rights

44. Under the proposed reform, which would amend 11 articles of the Constitution, the human rights standards set forth in international treaties would be expressly recognized in article 1.<sup>18</sup> If passed, this reform would contribute to the effective protection of human rights, to the implementation of recommendations and judgements issued by international human rights organizations and to the development of the Supreme Court's jurisprudence in the area of human rights. Mexico has the opportunity to foster changes in the way that the judicial branch functions so that its inner workings reflect the international commitments assumed by the State.

45. The Special Rapporteur recommends that the constitutional reform relating to human rights be passed as soon as possible and that mechanisms be established for putting

<sup>15</sup> Inter-American Court of Human Rights, *Fernández Ortega and others v. Mexico*, judgement of 30 August 2010, and *Rosendo Cantú and others v. Mexico*, judgement of 31 August 2010.

<sup>16</sup> Inter-American Court of Human Rights, *Cabrera García and Montiel Flores v. Mexico*, judgement of 26 November 2010, para. 198.

<sup>17</sup> See the concluding observations of the Human Rights Committee on the fifth periodic report of Mexico (CCPR/C/MEX/CO/5), paras. 11 and 18.

<sup>18</sup> The Supreme Court has already ruled on the ranking of treaties within the national legal system. See Amparo Review No. 1475/98.

into effect the judgements of the Inter-American Court of Human Rights and the decisions and recommendations of other international and regional human rights bodies.

#### **D. Reform of the juvenile justice system**

46. In 2006 an amendment to article 18 of the Constitution entered into force under which a special justice system for juveniles was established. Although this amendment does provide for an adversarial system and places emphasis on rehabilitation, the secondary federal legislation<sup>19</sup> appears to set aside the principles of public disclosure and of adversarial, oral proceedings. Consideration is being given to an approach whereby, under a transitional article, Congress would make the necessary changes to bring the juvenile justice system into line with the new adversarial criminal justice system provided for in the 2008 constitutional reform once it has been implemented at the federal level.

47. The Special Rapporteur does not understand this *modus operandi*, which would seem to be neglecting an opportunity to make the federal juvenile justice system an example to be emulated rather than a transitional model based on the existing, outmoded system. By definition, the juvenile justice system must be a specialized one that is not linked to the justice system for adults. The Special Rapporteur therefore recommends that the juvenile justice system adopt an oral and adversarial procedural model that includes all the protective mechanisms provided for in the Convention on the Rights of the Child and is in full compliance with international standards in the area of juvenile justice.

48. Sufficient funding must also be provided for the implementation of the constitutional reform relating to the juvenile justice system at all levels, particularly in terms of the necessary infrastructure and specialized training for the system's staff.

#### **E. Reform of amparo proceedings**

49. Amparo proceedings, which are an institution of Mexican origin, appear to have become an inaccessible, slow, complicated and costly remedy that is out of the public's reach. A reform is currently under discussion which, in the view of the Special Rapporteur, ought to afford broader access to amparo proceedings, provide for the recognition of legitimate interests, permit the institution of collective amparo proceedings, give general effect to amparo decisions under certain circumstances, and strengthen the role of this legal institution in protecting human rights.

50. The Special Rapporteur considers that Congress should pass the constitutional amendment concerning amparo proceedings without delay and that a new law on the remedy of amparo should be promulgated that is fully aligned with international human rights standards and that duly reflects the proposals presented by the federal judiciary.

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<sup>19</sup> On 9 December 2010, the Joint Senate Committee on Justice, Internal Affairs and Legislative Studies submitted a bill that would, inter alia, promulgate the Federal Juvenile Justice Act.

## IV. Challenges for the justice system

### A. Escalating violence and a growing lack of public security as a result of organized crime

51. During her visit, the Special Rapporteur saw first-hand that Mexico is in crisis owing to the exponential increase in violent incidents, most of which are linked to organized crime. This situation has a direct impact on the work of judges, public prosecutors, public defenders and lawyers. In many cases, judges, court officials and legal professionals are unable to act freely or fully independently because they are faced with threats, intimidation, harassment and other forms of undue pressure.<sup>20</sup> In addition, criminals and particularly organized crime are stepping up their efforts to infiltrate and interfere with judicial institutions through the use of corruption and threats. The Special Rapporteur believes that it will only be possible to strengthen democracy and the rule of law and to combat violence effectively if the justice system as a whole is sound, independent and properly shielded from threats, pressure and outside interference.

52. The Special Rapporteur sees the safety of judges, prosecutors and lawyers as a key issue. The State is responsible for ensuring their safety and to take into account the specific risks to which they are exposed in the course of, for example, particularly sensitive cases, such as those dealing with corruption, organized crime or human rights violations.<sup>21</sup>

53. In view of the above, the Special Rapporteur therefore recommends that a comprehensive preventive system be adopted for the protection of all justice officials at the federal and state levels.

### B. Impunity

54. The Special Rapporteur believes that widespread impunity, which has come to be seen as commonplace, is one of the major challenges to be faced by Mexico. Its causes appear to include a flawed system of crime investigation and repeated jurisdictional disputes between federal and state authorities which hinder the State's efforts to mount an effective response.

55. In addition, a number of sources, including senior officials, have informed the Special Rapporteur about widespread corruption in the police force, particularly at the municipal and state levels, which criminal groups appear to have infiltrated to a greater extent. The current structure of the country's police apparatus is not conducive to its control and oversight either, since 92 per cent of the country's approximately 420,000 police officers work in the state and municipal forces. At the municipal level alone, there are some 22,000 different police forces. The Federal Government is seeking to overhaul this

<sup>20</sup> During the Special Rapporteur's stay in the country, an attack at a federal court building in Monterrey, Nuevo León, left one security officer wounded.

<sup>21</sup> See A/HRC/11/41, para. 79. See also principle No. 11 of the Basic Principles on the Independence of the Judiciary, guideline No. 5 of the Guidelines on the Role of Prosecutors and principle No. 17 of the Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Cuba from 27 August to 7 September 1990.

apparatus by establishing a single leadership structure in each state as a means of increasing the professional stature of the police force and strengthening oversight and accountability.

56. Corruption is found at all levels of the justice system. Although the Government has introduced “confidence checks” and reviews of the finances of police officers, public prosecutors and the staff of other judicial bodies in an effort to address this problem, these measures do not appear to have been enough to eradicate corruption.

57. The Special Rapporteur notes that the extent of government involvement in the effort to combat impunity is a reflection of the extent of a State’s commitment to the full enjoyment of human rights.<sup>22</sup>

58. Steps should be taken, as a matter of urgency, to strengthen the technical and investigative capacity of the country’s police forces and public prosecution services and to provide specialized and professional training to their staff. The structure of the police force should also be overhauled with a view to improving oversight and the professional stature of its members. The system for apportioning responsibility for investigating crimes and prosecuting offenders between federal and state agencies needs to be clarified.

59. Internal oversight mechanisms also should be reinforced to ensure accountability of all components of the criminal justice system (police force, public prosecution services, the judiciary, offices of public defenders and judicial officials).

### C. Preventive custody

60. Preventive custody (*arraigo*) is a precautionary measure that is used to make sure that a suspect remains available during the criminal investigation stage. An article providing for preventive custody was incorporated into the Constitution in 2008, after the Supreme Court had ruled that such detention was unconstitutional in 2006.<sup>23</sup>

61. The decision to provide for the use of preventive custody in the Constitution presumably has something to do with the Government’s need for such an instrument given the exceptional degree of violence in the country caused by the presence of organized crime. The most commonly cited rationale for preventive custody, however, is that it can be used in cases of *flagrante delicto* when the person in question has apparently been involved in the commission of some other offence associated with organized crime but there is not yet sufficient evidence to prove it.

62. In these cases, as a general rule, rather than prosecuting a person for a *flagrante delicto* offence, prosecutors prefer to have them held in preventive custody even though they do not have enough evidence to charge them with another more serious crime. This is also because prosecutors usually prefer to have such people available for questioning rather than having them brought before a judge.

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<sup>22</sup> Interim report of the Special Rapporteur to the General Assembly (A/65/274), para. 79.

<sup>23</sup> Article 16 of the Constitution states that: “When dealing with organized crime, the judicial authority, at the request of the prosecutor, may order that a person be held in preventive custody in a facility and for a period of time as provided for by law, up to a maximum of 40 days, if such detention is necessary for the success of the investigation or for the protection of persons or property, or if there is a well-founded risk that the suspect will abscond from justice. This time period may be extended if the Public Prosecution Service demonstrates that the original grounds for preventive custody are still valid. The total period of preventive custody may not, however, exceed 80 days.”

63. These considerations simply confirm the arbitrary nature of preventive custody and its incompatibility with the principle of the presumption of innocence and the right to personal liberty. Cases of preventive custody were found to be a form of arbitrary detention by the Working Group on Arbitrary Detention of the Human Rights Council following its visit to Mexico. Moreover, it was found to be inherently at variance with the oral, adversarial model adopted by Mexico for use in its system of criminal procedure.

64. Under the provision governing preventive custody, persons may be detained for the purpose of an investigation, whereas the appropriate and correct course of action would be to swiftly undertake an effective investigation and then proceed to make an arrest. The use of preventive custody is the outgrowth of a poorly functioning system for investigation and the administration of justice. It creates incentives that run counter to the enhancement of judicial authorities' investigative capacity and may be conducive to other human rights violations. The Special Rapporteur therefore considers that the legal institution of preventive custody should be expunged from Mexico's criminal justice system.

## **V. The legal profession and the Office of the Public Defender**

### **A. The legal profession**

65. The Special Rapporteur found that the standards that individuals are required to meet in order to become members of the legal profession are not uniform and that there is no independent oversight mechanism for upholding the quality, integrity, ethics and good repute of the profession. The great majority of the lawyers with whom the Special Rapporteur met referred to a lack of confidence in the profession and a tendency to disparage it and felt that there was an urgent need for its revitalization and regulation.

66. Apart from differences in legal training, the quality of the services rendered by legal professionals also has to do with other factors, such as the presence of procedures for establishing responsibility and accountability, and with the application of strict ethical standards in the profession. No such structural apparatus for practitioners of the legal profession appears to be in place. There is therefore an urgent need to regulate the legal profession in order to ensure that qualified, professional representation is provided. One of the measures that could improve the situation would be to make membership in the bar association and bar certification a requirement. Another would be to require persons who have completed law school and who wish to practice law to complete an internship and take a comprehensive examination in order to obtain their law degree and qualify to exercise the profession.

67. Another important factor is that the great majority of lawyers, including those employed in the judicial branch, do not seem to routinely invoke international human rights law. This state of affairs clearly reflects a form of cultural resistance which can be altered only through the provision of a sound legal education with an international human rights focus.

68. The Special Rapporteur considers that international human rights law should be an obligatory part of the curricula of all law schools.

69. International human rights law should be covered in the courses that students must take in order to become judges or lawyers. Training in this area should not be confined to the early stages of a person's career, but should instead be provided on an ongoing basis throughout justice officials' professional lives.

70. A coordinated, sustainable civic and legal education policy should also be designed and implemented across-the-board, not only for law students, but for the population at large.

## **B. The Office of the Public Defender**

71. In order to ensure that justice is administered properly, public defence attorneys must perform their duties in a professional and effective manner. The alignment of public defenders' salaries with those of public prosecutors as part of the 2008 constitutional reform is clearly a step forward, as is constitutional recognition of accused persons' right to a qualified, professional defence.<sup>24</sup>

72. The Federal Office of the Public Defender is part of the judicial branch. At the state level, however, the situation varies; in some states, the public defender's office is attached to the judicial branch, as in Chiapas, whereas, in others, it is part of the executive branch, as in Yucatán, San Luis Potosí, México and Nuevo León. The autonomy and independent action of the public defender's office may be hampered in states where both the public defender's office and the public prosecution service are attached to the executive branch. There are marked differences between the situation at the state and federal levels in terms of the quality, effectiveness and accessibility of public defence services.

73. The Special Rapporteur considers that, in order to uphold the principle of equality of arms, offices of the public defender should be made independent of the executive branch. She also recommends that these offices' infrastructure should be improved by, for example, allocating sufficient human and financial resources and setting up autonomous investigative and expert services units within these offices.

## **VI. Access to justice**

74. Mexicans, and especially vulnerable groups and people living in marginal areas, generally see the justice system and judicial officials as being remote from their daily lives and not readily accessible.

75. The actual physical distance between the places where people live and the courts in some regions, a lack of infrastructure and of suitable facilities for persons with disabilities, and discriminatory treatment of certain groups are some of the factors that interfere with people's access to justice. In the most remote areas of the country, infrastructure is inadequate, and victims, parties to a trial, other litigants, lawyers and public defenders have to travel long distances to reach the courts. The Special Rapporteur has also observed that, mainly at the local level, the courts have difficulty in ensuring access to persons with disabilities.

76. Mexico should build the capacity of its institutions and procedures for guaranteeing the right of disadvantaged persons and members of vulnerable groups to obtain justice. As part of this effort, it should also promote access to the justice system for persons living in remote areas of the country.

### **A. Women**

77. Although advances have been made in providing women with access to justice, including the promulgation of laws aimed at giving women access to a life free of violence, women continue to face obstacles in this respect. As a result of the unsafe situation existing in the country, the number of women victims has increased. Gender-based violence has also

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<sup>24</sup> Article 20, section B VIII, of the Constitution.



been on the rise, while the percentage of such cases which are solved remains very low. The Special Rapporteur has received information about cases of gender-based violence in which staff of the public prosecution service have pressured victims to drop their charges and resolve the situation through conciliation proceedings or mediation.

78. Judicial institutions' efforts to incorporate a gender perspective into their work have not yet resulted in effective gender mainstreaming across the entire range of judicial activity, as gender stereotypes continue to exist.

79. The Special Rapporteur urges judicial authorities and other officials involved in the administration of justice to take all necessary steps to ensure that women have full access to justice and, in particular, to make certain that cases of violence against women are effectively investigated and their perpetrators punished, as well as to mainstream a gender perspective in all areas of activity of the judicial system.

## **B. Indigenous peoples**

80. The Special Rapporteur is aware of the legislative progress that has been made in improving indigenous peoples' access to justice. The extent to which indigenous peoples' and communities' right to apply their own legal systems is recognized varies a great deal, however. The tendency in most local legislatures is to restrict the material jurisdiction of indigenous judicial authorities. In some cases, community authorities responsible for the administration of traditional justice are required to have formal legal training or to be formally appointed, and the traditional system is subordinate to the ordinary justice system. Difficulties in ensuring the availability of bilingual court interpreters also persist.

81. Educational media campaigns in indigenous languages designed to inform people about the procedures for obtaining access to the justice system need to be stepped up. In addition, information about the ways in which justice is administered by indigenous peoples and about the need to respect their legal systems should be disseminated among, inter alia, judicial officials.

## **VII. Conclusions**

**82. In general, the federal judiciary is independent and impartial. The Supreme Court has played a key role in recent years, especially in opening its door to the public and in promoting the reform of the country's justice system.**

**83. The independence, autonomy and impartiality of judicial bodies at the state level are being called into question, however, because of the fact that the federal executive takes part in the appointment of judges at that level. The linkage existing between superior court judges and the executive branch at the state level can seriously undermine the independence and autonomy of judicial bodies at the local level.**

**84. At both the federal and state levels, with the exception of the Supreme Court, the independence of the judiciary is threatened by a lack of transparency and the impunity that this engenders, by inefficiency and corruption, and by undue influence and interference on the part of the public and private sectors.**

**85. At the federal and state levels, there are areas of judicial activity that do not fall within the purview of the judicial branch, such as tax, administrative, labour, military and agrarian law.**

**86. The requirement that a judicial appointment be confirmed after an initial period has been completed, which seems to be in effect at the federal level and in**

virtually all the states, could undermine the independence of the judiciary, since the need to have their appointments ratified could expose judges to undue pressure and deprive them of the necessary impartiality.

87. The fact that the Public Prosecution Service is part of the executive branch could erode the credibility of the Service, which is supposed to take an objective approach to the investigation of crimes and the prosecution of accused persons, and could undermine people's confidence in its ability to do so.

88. Successful implementation of the reform of the criminal justice system will hinge on political leadership and on the redoubled efforts of all the relevant institutions and stakeholders, as well as on economic investments and other actions which should be undertaken at once.

89. The proposal for the reform of the military justice system, as it currently stands, does not appear to be satisfactory. The Special Rapporteur shares and reiterates the conclusions of a number of global and regional human rights organizations that have maintained that Mexico's military courts should not have jurisdiction over cases involving human rights violations or cases in which the victims are civilians.

90. The human rights reform passed by Congress plays an extremely important part in ensuring the effective protection of the human rights of all persons by, in particular, contributing to the implementation of recommendations and decisions made by international and regional human rights organizations.

91. The shortage of financial and human resources and the absence of suitable specialized and general training for members of the police force and of the Public Prosecution Service are some of the greatest challenges for the country's justice system.

92. Preventive custody (*arraigo*) is an arbitrary measure that is incompatible with the principle of the presumption of innocence and the right to personal liberty. It is also inherently at variance with the oral, adversarial model with which Mexico has replaced its former semi-inquisitorial system.

93. Access to justice is an area in which Mexico must do more for the sake of many of its citizens, especially women, the indigenous population, immigrants and people living in poverty and in remote rural areas.

## **VIII. Recommendations**

94. Based on the above conclusions, the Special Rapporteur would like to make the following recommendations to the Government of the United Mexican States:

(a) Steps should be taken towards the functional, organizational and structural unification of all judicial activity in Mexico within the judicial branch;

(b) An autonomous, appropriate and sufficient budget should be established for the effective, independent and autonomous operation of the judiciary and for the administration of justice;

(c) The bills and proposals submitted to a number of legislatures under which no less than 2 per cent of federal and state budgets would be allocated to the respective judicial branches should be considered and approved. The judiciary should also do more to rationalize expenditure, make its administrative activities more transparent, and operate more effectively and efficiently;

(d) Consideration should be given to the use of special temporary measures to attain a gender balance in the judiciary, along with proper training and awareness-raising activities so that all members of the judiciary will understand the aim and rationale of these special measures, and to ensure that women join the judiciary and are promoted within it;

(e) The proposals for the improvement of the justice system made by the Supreme Court in its white paper and within the framework of State reforms should be examined and taken into account;

(f) *Appointment of judges and their terms in office.* The necessary steps, including structural and legislative changes, should be taken to ensure that the members of the judiciary at the state level are fully independent of the corresponding executive branch;

(g) A system for the entire judiciary in which the appointment, promotion and removal of judges are based on objective criteria should be fully established. Competitive selection mechanisms should be used throughout the country so that the best possible professionals can be selected on the basis of objective, transparent criteria that incorporate a gender perspective;

(h) Judges should be given security of tenure once they have been appointed on the basis of a competitive selection process and their appointments should be made permanent. If a probationary period is to be established, it should be short and no extensions should be permitted. Once this period is over and the candidates' performance has been judged to be satisfactory, they should be given permanent appointments, although this does not mean that judges may not be required to attend refresher courses or pass in-service proficiency examinations;

(i) *Council of the Judiciary.* The Council of the Judiciary should be presided over by someone other than the Chief Justice of the Supreme Court, who has important, full-time duties to discharge. There should also be a balanced representation of men and women who are knowledgeable about gender issues;

(j) In view of the fact that the decisions of the Council of the Judiciary are final and cannot be contested, and that there is therefore no judicial or other appeal against such decisions (unless they refer to the appointment, assignment, confirmation or removal of federal judges, which can be reviewed by the Supreme Court, or to the removal of judges at the state level), the Special Rapporteur recommends that provision be made for another independent judicial body to review disciplinary and administrative decisions, whether taken at the federal or state level, which have an impact on the status of judges;

(k) A national council should be established within the judiciary to coordinate the work of the councils of the judiciary;

(l) *Public Prosecution Service.* Consideration should be given to the proposals that have been put forward for making the Public Prosecution Service genuinely autonomous from the executive branch;

(m) In order to ensure effective oversight of public prosecution services, their transparency must be enhanced and the system for ensuring their accountability must be improved through, inter alia, the work of internal oversight bodies. The process involved in converting the country's public prosecution services into autonomous bodies should be coupled with their rationalization and reorganization;

(n) *Constitutional reform of the criminal justice system.* The broad-based political consensus that paved the way for the passage of this reform is now in urgent

need of the support, in word and deed, of the authorities at the highest level in order to backstop, advocate and accelerate the reform's implementation;

(o) Efforts should be made to radically alter the attitude of court officials and legal professionals towards the new criminal justice system, to encourage them to embrace it, and to dispel doubts and misconceptions about the new system's nature and effectiveness. Law school curricula should be reoriented towards the new criminal justice system. A system of indicators for gauging progress in implementing the reform should be introduced without delay;

(p) The period of time provided for completion of the reform should be used by the Government of Mexico and by the federative entities to phase in the new system gradually, rather than to defer the actions and changes required for its implementation;

(q) In order to provide effective access to justice, mechanisms should be established to ensure prompt and full execution of judicial decisions and compliance with them. The bill on the enforcement of judgements which was approved by the Chamber of Deputies in April 2009 and is currently under consideration by the Senate should be passed as soon as possible;

(r) *The military justice system.* In addition to reforming the Code of Military Justice, persons affected by judgements issued by military courts should have an effective judicial remedy for contesting or challenging them;

(s) *Constitutional reform in the area of human rights.* This reform should enter into force as soon as possible. In addition, consideration should be given to the establishment of mechanisms for facilitating the implementation in Mexico of judgements of the Inter-American Court of Human Rights and the decisions and recommendations of other international and regional human rights bodies;

(t) *The juvenile justice system.* The juvenile justice system should immediately adopt an oral, adversarial procedural model that includes all the protective mechanisms provided for in the Convention on the Rights of the Child and is in full compliance with international standards in the area of juvenile justice;

(u) Implementation of the constitutional reform relating to the juvenile justice system at all levels requires, as a matter of urgency, that sufficient funding be provided for the necessary infrastructure and specialized training for the system's staff;

(v) *Reform of amparo proceedings.* Mexico should facilitate access to amparo proceedings, which are an institution of Mexican origin. It should provide for the recognition of legitimate interests, permit collective amparo proceedings, give general effect to amparo decisions under certain circumstances and strengthen the protection afforded by this legal institution for human rights that are recognized in international instruments;

(w) The constitutional reform bill relating to amparo that was passed by Congress and is awaiting ratification by the state legislatures should be approved without delay, and a new law on the remedy of amparo should be promulgated that is fully aligned with international human right standards and that duly reflects the proposals presented by the federal judiciary;

(x) *Challenges for the justice system.* A comprehensive preventive system should be adopted for the protection, as a matter of urgency, of all justice officials, judges, prosecutors, lawyers and public defenders at the federal and state levels;

(y) Steps should be taken on an urgent basis to strengthen the technical and investigative capacity of the country's police forces and public prosecution services and to provide specialized and professional training to their staff. The structure of the police force should also be overhauled with a view to improving oversight and the professional stature of its members;

(z) The system for apportioning responsibility and jurisdiction over the investigation of crimes and the prosecution of offenders between federal and state agencies should be clarified;

(aa) The Special Rapporteur considers that internal oversight mechanisms should be refined in order to ensure the accountability of all components of the criminal justice system (police force, public prosecution services, the judiciary, offices of public defenders and judicial officials);

(bb) The institution of preventive custody (*arraigo*) should be expunged from Mexico's criminal justice system;

(cc) *The legal profession and public defenders.* The regulation of members of the legal profession is urgently needed in order to ensure that qualified, professional representation is provided. One of the measures that could improve the situation would be to make membership in the bar association and bar certification a requirement. Another would be to require persons who have completed law school and who wish to practice law to complete an internship and take a comprehensive examination in order to obtain their law degree;

(dd) International human rights law should be an obligatory part of the curricula of all law schools;

(ee) International human rights law should be covered in the courses that students must take in order to become judges or lawyers. Training in this area should not be confined to the early stages of a person's career, but should instead be provided on an ongoing basis throughout justice officials' professional lives;

(ff) A coordinated, sustainable civic and legal education policy should also be designed and implemented across-the-board for law students and for the population at large;

(gg) In order to uphold the principle of equality of arms within the criminal justice system, offices of the public defender should be independent of the executive branch. Such offices' infrastructure should also be improved by, for example, allocating sufficient human and financial resources and setting up autonomous investigative and expert services units within these offices;

(hh) *Access to justice.* Mexico should build the capacity of its institutions and procedures for guaranteeing the right of disadvantaged persons and members of vulnerable groups to obtain justice. It should promote access to justice in remote areas of the country;

(ii) Judicial authorities and other officials involved in the administration of justice should take all necessary steps to ensure that women have full access to justice and, in particular, to make certain that cases of violence against women are effectively investigated and their perpetrators punished, as well as to mainstream a gender perspective in all areas of activity of the judicial system;

(jj) Educational media campaigns in indigenous languages designed to inform people about the procedures for obtaining access to justice should be stepped up;

**(kk) Information about the ways in which justice is administered by indigenous peoples and about the need to respect their justice systems should be disseminated among judicial officials and the public at large.**

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