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## **1. Measures for a Better Implementation of the NAFTA Treaty. An Alternative to Re-negotiation**

**SUMMARY:** I. Introduction. II. "Legislative Arbitration". U.S. Laws in Accordance to the WTO. III. Judicial and Arbitration Processes Simultaneity. IV. Hierarchy of Laws. Treaties and Agreements. V. Reception or Incorporation of International Law into the National Right. VI. Juridical Nature of Protocols of Adhesion. VII. Constitutionality of the NAFTA and WTO Arbitration Procedures. VIII. Legal Reformatations. IX. Conclusion. X. Bibliography.

### **I. Introduction**

For many years, entrepreneurs, professors, farmers, legislators, and others interested in Mexico's economy and commercial relations, have repeatedly claimed a need to renegotiate the North America Free Trade Agreement (NAFTA) because they think Mexico has great disadvantages in front of its allies, specially the United States.

Thus far, many studies on the commercial and economic impact of the NAFTA on diverse sectors have been carried out with very different results, as well as for as against. Nevertheless, there are only a few works that indicate with precision the legal problems that have been detected in the 15 years of application of this treaty in Mexico, the United States and Canada. This is not permitting making the most out of NAFTA's terms.

I consider that before attempting a renegotiation, it is necessary to analyze this treaty and study all of its possibilities in order to be able to implement it in a way that's more favorable to Mexico. The NAFTA treaty has been ruling for 15 years, and there is still great ignorance about it.

At the government level, Mexico doesn't have a group of experts on the matter, the majority of the officials that intervened in the negotiation of the treaty and in the subsequent years of their implementation, work in the private sector today or they are dedicated to other activities, for which they continue hiring professional services of foreign offices for legal and economic counsel for the solution of controversies regarding the treaty's implementation. This result in Mexican officials not acquiring experience on the *know-how* of the NAFTA since they just adopt, apply and execute decisions taken abroad.

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This situation is an obstacle to the professional development and to the specialization of many Mexican officials that do not get to know in depth those problems nor their alternatives of solution, which limits the formation of true experts; that at the same time would form new generations of qualified professionals, which would eliminate or at least diminish the professional dependence of foreign consultants.

Another problem I have found is that the professional career service and their certifications of quality have not shown its utility on the formation of expert officials in the international commercial matter; therefore it is an open secret that the old vices in the contracting, continuance and ascent of personnel continue today. These failures perhaps have been rooted with the appearance of "transparency and legality", which can discourage the new generations and block the formation of experts.

On the other hand, many universities have not incorporated in their undergraduate programs subjects about international trade, in general, and further from it subjects relating the NAFTA. In some cases, when such subjects are available, they're not mandatory and are always kept as *optional*. Besides, very few schools offer any type of postgraduate studies on international trade matters.

There is also a lack of true experts on the NAFTA issues in the business sector since its source of human resources is the public sector and the universities, and as mentioned before, they have large structural deficiencies in the formation of professionals with a solid *know-how* and with commitment in the national interests.

My personal experience as an official, an attorney at law and a professor on foreign trade subjects has let me realize some legal problems that to me are the biggest obstacle to Mexico taking full advantage of the benefits in free trade agreements, and particularly of the NAFTA. Therefore it is possible to glimpse the measures or actions that Mexico can adopt unilaterally to eliminate or to reduce said disadvantages, and thus to obtain greater benefits from the treaties, without depending for it of the consent of the United States and Canada, as would happen in the case of a renegotiation of the NAFTA.

I consider that the sole proposal of renegotiating the treaty would place Mexico in disadvantage in front of the United States and Canada since their consent for that would not be *free*. So before coming to a long, complicated and expensive renegotiation table, there are different measures and actions for a better implementation of the NAFTA (from a Mexican perspective) that could be implemented without our commercial allies consent. I explain here some of the problems I have been able to identify and proposals of solution that would let Mexico obtain greater advantages of the NAFTA treaty without having to renegotiate it.

## II. “Legislative Arbitration”. U.S. Laws in Accordance to the WTO

There have been continuous arguments in the public, business and academic sectors that point out that the United States repeatedly breaks the commitments negotiated in commercial treaties, including the NAFTA and the WTO, using their national legislation as a shield.

Therefore, the Mexican government should make a bigger effort in educating expert professionals not only on the national *corpus juris* but also on the international laws of Canada and the United States to be able to alert when they're not in accordance to the dispositions of the World Trade Organization (WTO) and request the Trade Policy Review Body (TPRB) to conduct a regular review of such trade policies and ask them to carry out the proper legislative modifications for its duty compliance.

Many times, the American government has challenged Mexican laws via arbitration considering that they are not in accordance with the agreements that reach the WTO. For example: in 2004, before consulting the Mexican government, the United States requested the TPRB the integration of a Special Group to revise the Foreign Trade Law (*LCE, Ley de Comercio Exterior*) and the Federal Civil Procedures Code (*Código Federal de Procedimientos Civiles*), considering that they differed from the Antidumping and the SCM<sup>1</sup> Agreements.

This Special Group decided that the reforms *LCE* from 2003 were not compatible with the dispositions of the WTO, for which the Mexican government argued the resolution before the Dispute Settlement Body (DSB), they emitted its report in November 2005, confirming the Special Group's decision<sup>2</sup> and asking Mexico to adapt its legislation to the Antidumping and SCM Agreements, which Mexico had to do<sup>3</sup>.

Thus consultations extended for hours, in which American officials questioned their Mexican counterparts about the conformity of different dispositions of the *LCE* to the WTO. Since it is not my aim on this paper to emphasize on that matter I will just point out how paradoxical it is because if that same long list of questions was to be asked to the American officials they would find it hard to excuse their national legislation before the WTO dispositions. Therefore, it is to be considered that Mexico should plan a strategy to study and analyze the American trade policy and request their revision when needed.

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<sup>1</sup> Agreement on Subsidies and Countervailing Measures.

<http://www.worldtradelaw.net/uragreements/scmagreement.pdf>.

<sup>2</sup> Mexico- Definitive Anti-dumping measures on beef and rice. Complaint with Respect to Rice.

[http://www.wto.org/english/news\\_e/news05\\_e/news05\\_e.htm#295abr](http://www.wto.org/english/news_e/news05_e/news05_e.htm#295abr)

<sup>3</sup> *Decreto por el que se reforman, adicionan y derogan diversas disposiciones de la Ley de Comercio Exterior, DOF, December 21<sup>st</sup>, 2006.*

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The problem is, as said before, that the Mexican government does not count on a group of “Mexican” experts in American commercial legislation that can analyze in depth their conformity to the dispositions of the WTO and request the TPRB a full revision. This would help to reduce the disadvantage in the trade relations among both countries by the breach of the United States to the dispositions of the WTO, and would permit the education of experts in the American legislation that would impact in a better defense of the national interests and in the reduction of future controversies, or at least with greater possibility of defense and success.

### III. Judicial and Arbitration Processes Simultaneity

Final Mexican resolutions concerning American or Canadian merchandise can be challenged in three different ways: an internal or jurisdictional (*Recurso de Revocación, Juicio Contencioso Administrativo Federal* and *Juicio de Amparo*), and two external/arbitration: before a Binational Panel (Chapter XIX of the NAFTA treaty) and before the Appellate Body of the WTO (WTO Panel). This situation causes a great legal insecurity.

According to article 1904.1 of the NAFTA, “the Parties” (United States, Canada and Mexico) compromised to replace the internal judicial review of their final resolutions of dumping or of subsidies by the review of the Binational Panel. On the matter, the article 97 of the *LCE* establishes that any “interested Party” (importers, exporters or producers) can opt for challenging the final resolutions on international trade issues by a Binational Panel or by the internal way. Additionally, the Parties agreed that in case to prefer a Binational Panel, the final resolutions will not be able to be challenged before their national courts.

The time limit of 45 days to interpose the Mexican *recurso de revocación* begin to count after the 30 days predicted in the NAFTA for designation or certification of the administrative record and its filing with the panel.

Even when the Parties compromised to replace the judicial internal review of the final resolutions about dumping and subsidies for Binational Panel, in Mexico’s reality it is possible that the *interested parties* (exporters, importers and national producers) request its installation and that *other interested parties* (other national producers, importers and exporters) challenge the same resolution in an internal/judicial way.

In Mexico the installation of a Binational Panel as alternative way of solution of differences has been considered erroneously as an individual right or “not cumulative”, for which, when a Party (Parties) interested (national producer, importer or exporter) decide to go through Binational Panel, the rest of the interested parties aren’t forced to follow this same way of dispute settlement.

This situation contravenes the principles of speed and legal security that should govern in any arbitration process, therefore the resolutions emitted by a national Judge and by a Binational Panel, can turn out to be contradictory, what implies a great disadvantage for the Mexican researcher authority that has to defend its resolution before two ways (internal or judicial and external of Binational or arbitration Panel).

For example, in the case of American beef, some parties interested (importers and exporters) challenged the Secretary of Economy's resolution to impose compensatory quotes before a Binational Panel at the same time that other interested parties (importers and exporters) attacked that same resolution through the internal way. In this matter, the government of the United States would be able to challenge the measure at any moment during their force by activating two external ways and as many internal ways as producers, importers or exporters challenge the measure.

Before the case of bovine cattle, the Secretary of Economy rejected a resource of repeal when one of the parts interested (importer, exporter or producer) had requested the review of a final Resolution by the arbitration way of Binational Panel based on the article 97 fraction I of the *LCE*, without nonconformities had been presented on the matter. Nevertheless, in this case of bovine, inexplicably the authority changed the criteria in its own damage and that of the national producers, opening the possibility that a same final Resolution can be disputed by two ways, external or arbitration and internal or judicial.

This criterion of individual selection of way of challenge a final Resolution implies that when a request for dumping and subsidies investigation is presented by several producers, all of them can challenge the final resolution in a different way when they consider it violates their rights.

This complicates things in damage of the Mexican researcher authority and especially of the national producers considering that the American and Canadian governments can also challenge the resolutions of the Secretary of Economy by another arbitration way before the DSB of the WTO. The final resolution on imports of fructose from the United States was challenged in two arbitration ways at the same time: exporters requested a Binational Panel and the US government preferred a WTO Panel.

Even when in a Binational Panel the counterparts are the Mexican government and importers, exporters or national producers and in a WTO Panel it is two governments (Mexico and another Party of the WTO and the NAFTA treaty, United States or Canada), I think that this difference does not reduce nor eliminates the problems that come from holding two different arbitration processes and as many judicial processes as importers, exporters and national producers challenge the final resolution because of the following reasons:

- The same final resolution is challenged, which can cause, in some way, that the *littis* collides.

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- The Binational Panel's resolution can have a different sense than the one from a WTO Panel, and these can have a different sense than the one(s) from a judicial one.
- The final resolutions can be challenged before a WTO Panel for as long as they are in force, so even when a final resolution has been confirmed by the national court and by a Binational Panel, after many years, the US or Canadian government can still challenge the same resolution before a WTO Panel with the very same arguments used before.
- Both the Binational Panel and the national court review if the researcher authority (secretary of Economy) emitted its final resolution according to the national legislation: LCE and its regulation, and the treaties on such matter (Antidumping Agreement and SCM Agreement) while the WTO Panel only checks for accordance to the WTO dispositions (Antidumping Agreement and SCM Agreement). As for these agreements' dispositions, Mexico is obligated to legislate according to them, so the WTO Panel and the Binational Panel study practically the same case.

This situation means that the Binational Panel, the WTO Panel and the national courts can have different opinions respect to practically the same case and same analysis.

The Mexican authority should go back to the criteria of *accumulation* or *attraction*, without making a law amendment that could be challenged before the WTO. That way, once an arbitration process has started all interested parties have to submit their conflict before the same process.

#### IV. Hierarchy of Laws. Treaties and Agreements

Fifteen years after the ratification of the NAFTA, more than 80% of the commercial trade of Mexico is carried out with the United States, which is why there have been so many studies about this treaty. Nevertheless, there are a very few papers that analyze all the aspects of the NAFTA and the legal complications of its implementation, as from an American or Mexican point of view.

Mexico and many other countries assume their international commitments through a "treaty", but according to the United States legal system, they have two ways of compromising: a treaty and an agreement. The difference among the treaties subscribed by Mexico and the treaties or agreements subscribed by the United States is substantial.

Most of the time, the United States adopts international responsibilities through "Congressional Executive Agreements" (CEA) and not through treaties. I think that CEAs do not

comply with the fundamental dispositions of the Vienna Convention, such as *pacta sunt servanda* or the supremacy of the treaty in front of national laws.<sup>4</sup>

After the Second World War more than 90% of the American international commitments have been adopted via a CEA, which means they have almost completely substituted treaties. ....

The difference between treaties subscribed by Mexico and the American CEA affects Mexico in a negative way because:

- CEA's implementation is indirect, which means they need incorporation to national law of the CEA dispositions (implementation act). On the other hand, a treaty signed by Mexico has direct application, and according to article 133 of the Mexican Constitution, it's adopted as a national law.
- Based on the *Grandfather Clause* a CEA has lower hierarchy compared to a federal law, so in case of conflict among them, the federal law prevails. Mexico does not have such criteria, so international commitments (treaties) prevail in front of national law.
- On internal level, what obligate the United States are the implementation acts and not the international instruments themselves. Mexico is very attached to the *pacta sunt servanda* principle (Vienna Convention, article 26), therefore the direct source of commitment is the treaty.
- A treaty can deprive the effects or application of a federal law or a decree that were emitted later, which contravenes the principle of *lex posterior derogat priori*, so a federal law or a decree that collides with a treaty might be abrogated or derogated *ipso facto*.

As to the hierarchical level of a treaty and a federal law according to the Mexican legal system, the Supreme Court has decided in two different ways: the first one alludes that a treaty does not have higher hierarchy in front of a federal law nor *vice versa*, therefore both have the same rank after the Constitution, leaving the judge the faculty of deciding in every case. In 1999 the Supreme Court decided upon offering treaties a higher rank than federal laws, which has been confirmed by two thesis of 2007.

There is a great asymmetry between the Mexican and the American commitment level, right from the way both countries incorporate and implement their international responsibilities. Mexico should consider the way their allies adopt these responsibilities and review their own ways. I reckon

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<sup>4</sup> There are three types of CEA: 1) the Congress authorizes the President to carry out agreements with other nations on some particular subject; 2) the Congress can legislate in matter of foreign affairs, nevertheless, the President has to verify its execution before the law starts to rule; and 3) the President negotiates an international agreement and subsequently seeks the approval of the Congress by means of an implementation act. As opposed to the other two types of CEA, this does not imply a delegation of faculties of the Congress to the President, therefore his purpose is to replace the treaties creation process by one of creation of laws. Yoo, John C., "Laws ace Treaties? : The Constitutionality of Congressional Executive Agreements", Michigan Law Review, USES, Vol. 99:757, february 2001, pp. 759 and 766.

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that the Supreme Court should return to the previous criterion that considers that treaties don't have a higher level than federal laws, or that they have equal rank.

Another choice would be conditioning the hierarchy of a treaty to the principle of "international reciprocity", like the French Constitution does in its 55<sup>th</sup> article, establishing a higher hierarchy to treaties only when the other party (parties) do the same.

### V. Reception or Incorporation of International Law into the National Right

There is a great ignorance in Mexico about the right of treaties, particularly on the theme of incorporation to the national law.

According to "dualistic" theories international and national law have different sources and regulate different relations. International (public) law regulates relations among States (main subjects of international law), while national law governs relations among individuals or between these and the State. Consequently, international laws are irrelevant to national law, so in order for these to be valid they require of an action of the State (a law). This means an indirect form of incorporation; such is the case of the United States.

In a dualistic system a treaty is part of a legal system separated of the internal law (therefore system is called "dual"). A treaty is not part of the internal law, at least not directly, for which there should be an act of transformation, by means of an action of the State that incorporates the norm of the treaty to its internal law.

According to Kelsen, "monistic" theories hold the essential unit of all legal systems, so every norm owe their validity and force to superior norms, until the fundamental law that can be national or international, depending on ethical or political factors. These theories recognize the validity of the treaties without itself requiring a subsequent action of the State. Therefore, they adopt a direct incorporation; such is the case of Mexico.

Monistic theories are divided into "internal monism" that place internal law above international, and "international monism" that do the contrary.

International law doesn't take part in the dispute, so each State decides whether to take a monistic or a dualistic position. Besides of the method of incorporation, the State has to follow the Vienna Convention principle of *pacta sunt servanda* on its international commitments. Like said before, Mexico adopts a direct method of incorporation.

## VI. Juridical Nature of Protocols of Adhesion

Another problem recently presented is related to the validity, incorporation and application of protocols of adhesion of a treaty in domestic law when they are subscribed years after the main treaty and that represent benefits to Mexico, but that at the moment of its application may affect individuals. Such is the case of the Protocol of Adhesion of the People's Republic of China to the WTO, adopted in the Ministerial Conference of Doha on November 11<sup>th</sup> 2001, and that establishes the terms and conditions of China's adhesion to the WTO starting December 11<sup>th</sup>, 2001.

Among other commitments, China accepted a transition safeguard mechanism for specific products that will last until November 2013 that contains transitory measures of safeguard and against the deviation of commerce. According to this, Mexico can argue a safeguard measure against certain Chinese products when their import is such that cause or threats to cause disorganization in the market of like-products.

On this particular case two problems are presented, among others, the determination from a Mexican law basis: a) if the protocol of 2001 is part of the treaty of 1994; b) the incorporation of the protocol to domestic law and the conditions to make it obligatory; and c) the mechanism of implementation in Mexico.

According to international law all connected instruments are part of the treaty, nevertheless, the problem reduces to Mexico, where there is a question not covered by statute law since national law do not regulate the juridical nature, validity nor implementation of the protocols, especially when they are signed many years after the treaty, like the protocol of adhesion of China to the WTO.

Considering the dynamics of trade relations of Mexico with the rest of the world, it appears to be urgent that the Congress legislates about such protocols in the Law about Celebration of Treaties, where their legal nature should and their requirements for obligation should be established.

## VII. Constitutionality of the NAFTA and WTO Arbitration Procedures

According to the "principle of regulatory hierarchy", all treaties subscribed by Mexico should be in agreement to the Constitution. Consequently, the NAFTA and WTO arbitration procedures should comply with the fraction II of the article 104 of the Constitution:

*Article 104. It corresponds to the courts of the confederacy to know and resolve:*

...

*III. - Of those (disputes) in which the Confederacy is a part. (parenthesis and underlined added)*

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On this matter, the article 8 of the Law about Celebration of Treaties establishes the possibility that a treaty or an interinstitutional Agreement contains international mechanisms for the solution of legal controversies (arbitration procedures) in which the confederacy is a part, which blatantly contravenes the fraction III of the article 104 constitutional.

*Article 8. Any treaty or interinstitutional agreement that contains international mechanisms for the settlement of disputes, in which the confederacy is a part... (underlined added).*

Giving justice is a sovereign function of the State that is carried out by means of the judicial process. The State allows in some cases and with respect to certain matters, that this sovereign function passes to individuals through the arbitration process; nevertheless, it is evident that this is not possible in the conflicts in which the confederacy is a party, in which case the Constitution is explicit commanding that these controversies should be resolved by federal courts.

The “Calvo Clause” inserted in the article 27, fraction I related to the article 104, fraction III of the Constitution, obligates foreign investors to come to national courts in case of dispute with the Mexican government, which is confirmed by the constitutional mandate to submit to national courts all disputes in which the confederacy is a party.

## **VII. Legal Reforms**

Before the year 2000, a project of amendments to the Regulation of the *LCE* was formulated, which, among other, has the purpose to clarify concepts and procedures to bring greater legal certainty, nevertheless, almost a decade after it hasn't been completed. This is a proposal to reform the article 67:

*Importers of identical or similar merchandise to one that has to pay a provisional or definite compensatory quote must pay it if they prove that the country of origin is different than the country that exports the merchandise under disloyal conditions of commerce.*

Some may consider that the article 67 allows elution of payment of a compensatory quote through the figure of “triangulation”, which is why importers of merchandise under payment of a compensatory quote have challenged its collection arguing that the country of origin of the merchandise (United States) is different than the country of origin of the compensatory quote (China).

## IX. Conclusion

I reckon that it is not convenient to renegotiate the NAFTA treaty not only because of the reasons I exposed, but also because what it would cost since it is a situation out of the Mexican government control. Therefore, my proposal basically consists on carrying out actions for a better implementation of the treaty with the benefits, terms and conditions that were already negotiated.

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## 2. Front Desk Justice: Inside and Outside Criminal Procedure in Mexico City

**SUMMARY:** I. Initiating Criminal Procedure. The Barandilla or Front Desk. II. Pretrial Investigation. III. Procedure Without a Detainee. IV. Procedure with a Detainee. V. Conclusions. VI. Bibliography.

“What’s your name?” —the clerk (*oficial secretario*) at the Public Prosecutor’s Office asked him.

“Osvaldo”.

“Osvaldo what?”

“Ramos”.

“Ramos what?”<sup>1</sup>

“I don’t know”.

“What do you mean you don’t know?”

“I don’t know”.

Exasperated, the clerk sitting next to me said, “Just write ‘Ramos Ramos.’”

“How old are you?”

“I don’t know”.

“Are you trying to be difficult?”

Osvaldo begins to cry. Between sobs, one can only make out part of what he is saying, “It wasn’t me. Please let me go. I promise I’ll be good. I promise”.

“Okay” —the clerk says—, “be quiet now. If you’re good, we’ll let you go. But tell us, how old are you?”

“I don’t know” —repeats Osvaldo.

“How can you not know how old you are?”

“I don’t know. I’ve lived on the street since I was a kid and I don’t know when I was born” — Osvaldo begins to cry again.

The police officer standing behind him smacks him on the head. “Open your mouth”, he says. Osvaldo opens his mouth wide, showing his rotten teeth. The police officer standing on the other

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<sup>1</sup> In Mexico, full legal names include both maternal and paternal last names.

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side laughs. The clerk joins in the laughter. Osvaldo laughs too. The public defender does not see any of this. She is talking to one of the other clerks sitting at the next desk and has not spoken to her client since Osvaldo was brought in from the detention center.

“Just write ‘19’”, the clerk tells me. That makes Osvaldo an adult and subject to prosecution.

“Where do you live?”

“Nowhere”, he replies.

“What do you mean ‘nowhere’? Do you want to leave? Because, you know, if you want, we can send you back downstairs to the detention center with the police officers. Do you want that?” —the clerk asks—, “or do you want to go?”

The public defender finally comes over to see what is happening with her client. “Be good”, she tells him. Osvaldo nods.

“So?” the clerk asks him, “where do you live? Where do you sleep?”

“There at *Revolucion* Avenue. We sleep inside the drainage pipes, but yesterday it was raining and so it was full of water. That’s why I got into the car. I swear I didn’t do anything. Can I go? I promise I’ll be good. I swear”. Osvaldo begins to cry again. “There’s a priest who sometimes takes care of us. I have his phone number in my wallet. Maybe I can call him and he can help”. Osvaldo tells the secretary, “It’s in my wallet. Just let me call him”.

“Where is your wallet?” the secretary asks.

“The officers took it. They left it on that desk”, he says, pointing to one of the clerks’ desks. The clerk in charge of Osvaldo’s case walks to the desk and asks if the wallet is there. “It’s brown”, Osvaldo shouts from behind.

“Did you see the wallet?” the clerk asks the police officers.

“It was on the desk”, one of them responds. “Do you know where it is?” he asks the other clerk. The wallet is never found and Osvaldo is still crying at intervals.

“Okay. Be quiet”, the clerk tells him.

“Can I please have some water?” —the detainee asks—. “It’s just that

I’m very thirsty” —the clerk gets up and asks the clerk at the adjacent desk if the food for the detainees has arrived. He then asks to have some food brought over. When the packets arrive, he gives two of them to Osvaldo, who quickly opens one and examines its contents. Osvaldo takes a box of juice out, takes a drink, and then hugs his two packages of food beaming with joy. It is a comic gesture. The two police officers and the public defender laugh. Osvaldo laughs with them.

Osvaldo was detained early that morning. The two police officers who brought him to the agency had found him sleeping in a parked car, after the owner of the car alerted them to his presence. Osvaldo said that he earned money cleaning car windows, working at various stoplights. He makes enough money from this to eat and buy “stone”, a drug made from battery

fluid and cocaine residue. Searching for a place to sleep the night before, he broke into a car and fell asleep inside. That is how he was found. He claimed that he had not taken anything from the car but, according to the police, the owner said a pair of sunglasses and two CD's were missing. Osvaldo was detained and taken to the public prosecutor's office where he was charged with aggravated theft, a crime punishable by two-and-a-half to eight years of prison and with no possibility of bail.

The clerk dictated Osvaldo's initial declaration and gave it to Osvaldo to sign. "I don't know how to" Osvaldo told him. The public defender took the document and read it to him. As she read it, Osvaldo looked around the room—he looked at the clerks and the police officers still standing near him, and at me, sitting opposite the desk. When the public defender finished reading the document, she took Osvaldo's thumb and pressed it onto an inkpad and then onto the margin of each page of his confession. She repeated the movement for each page while we all watched. "Can I go now boss?" Osvaldo asked the clerk when he finished. "I've been good. Let me go now". "You'll leave later"—the clerk responded.

That morning, Osvaldo Ramos Ramos was sent to the Mexico City Eastern Detention Center as a pretrial detainee. He is one of the 200,000 detainees in Mexico's prisons and one of the successful detentions brought about by Mexico City's police and its public prosecutor's office.

In Mexico today, reported crimes hover around 1.5 million or 1,490 per 100,000 inhabitants,<sup>2</sup> placing Mexico among countries with relatively high crime rates. Although statistics on reported crimes put Mexico just slightly above the world average and close to Spain (1,770/100,000) and Russia (1,779/100,000), "black number" studies", *i.e.*, studies of *unreported* crimes, place Mexico among the countries with the world's highest crime rates.<sup>3</sup>

According to the ICESI<sup>4</sup> 2002 survey, 66% of the crime victims surveyed stated they had not reported the crime to any authority. In Mexico City, 76% of respondents stated they had not reported the crime.<sup>5</sup> The number of unreported crimes brings the total for 2001 to over 4 million crimes (or 4,412/100,000 inhabitants); 44% of which were violent crimes.<sup>6</sup>

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<sup>2</sup> See INEGI reported crime database. Available at <http://www.inegi.gob.mx/est/contenidos/espanol/tematicos/mediano/ent.asp?t=mvio37&c=5599>.

<sup>3</sup> European Institute for crime prevention, cited in GUILLERMO ZEPEDA LECUONA, *CRIMEN SIN CASTIGO* (CIDAC, 2004). An even earlier study carried out by FUNSALUD- WORLD BANK in 1995 estimated that only 15% of crimes were reported.

<sup>4</sup> Instituto Ciudadano de Estudios sobre la Inseguridad. The ICESI was created by the Consejo Coordinador Empresarial [Entrepreneurial Coordination Council], the Confederación Patronal de la República Mexicana [Mexican Employers Association], the Este País Foundation, the Instituto Tecnológico de Estudios Superiores de Monterrey [Technological and Higher Studies Institute of Monterrey], and the National Autonomous University of Mexico (Universidad Nacional Autónoma de México). Its purpose is to study and generate independent statistics on criminality in Mexico. To this end, the ICESI has conducted national surveys annually since 2001. The surveys are available at <http://www.icesi.org.mx/index.cfm?catID=944>.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

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The ICESI survey showed that, in 2001, the public prosecutor's office (*ministerio público*) initiated investigations for only 74 out of every 100 crimes reported to it.<sup>7</sup> In addition, in 6 out of every 10 cases for which the public prosecutor's office initiated an investigation, crime victims reported that "nothing happened". Those cases were probably closed, most likely due to lack of evidence. Other studies report an even higher number of "nothing happened" cases. For instance, Guillermo Zepeda states that in 2000, only 11.4% of reported crimes nationwide resulted in the initiation of an investigation.<sup>8</sup> Furthermore, of the investigations opened that year, only 6.4% reached the courts.<sup>9</sup>

In Mexico City, crime rates are especially high. Mexico City has the country's highest concentration of population (10% of the Mexican population —8.5 million people in Mexico City, plus 7.5 million in suburban areas in the State of Mexico) and one of the country's highest crime rates. The city's crime rate is surpassed only by the State of Mexico, which borders the city and is considered part of the metropolitan area, and the State of Baja California, site of the city of Tijuana. The daily average crime rate in 2003, according to the Mexico City Public Security Ministry (SSPDF), stood at 473.5.<sup>10</sup> When the number of unreported crimes is added to those given by the SSPDF, it paints a grim picture.

The failure of the criminal justice system to prosecute and punish criminals has had an unfortunate effect on the enforcement of criminal procedure laws, affecting both defendants and victims alike. The failure to reduce crime has resulted in the enactment of harsher sanctions and criminal laws. Recent judicial reforms to amend the constitution and give more power to police and prosecutors are an example of this. However, as this paper argues, the poor institutional design combined with the existence of corruption, lack of resources, defective coordination among agencies and poor training of officials better explain the system's failures and often result in the arrest and sanctioning of petty criminals or defendants without economic resources. Still, Mexican policy makers insist that a better way to combat crime is to focus on statutory reform. Few, and rarely successful, attempts have been made to modify the legal institutions or culture surrounding the criminal justice system.<sup>11</sup> In most instances, reforms are a great disappointment and rarely achieve anything other than creating conditions for further police abuse and procedural violations.

This paper examines the initial phase of criminal procedure in Mexico and the problems that

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<sup>7</sup> Id.

<sup>8</sup> GUILLERMO ZEPEDA LECUONA, *CRIMEN SIN CASTIGO* (CIDAC, 2004).

<sup>9</sup> Id.

<sup>10</sup> See <http://www.ssp.df.gob.mx/htmls/ssp-sec-informe-2004-2.html>.

<sup>11</sup> On March 18, 2003, for example, the Mexico City Public Security Ministry (SSPDF) told the press that, in an effort to crack down on crime, they would have 18,000 detainees by the end of that year. This goal was achieved on December 23rd, and the 18,000th arrestee appeared on the front page of several newspapers bearing that number. A sign, "We kept our promise," was conspicuously displayed with the arrestee. Yet, the SSPDF reported that police efficiency in 2003 was 14%. See <http://www.ssp.df.gob.mx/htmls/ssp-sec-informe-2004-2.html>.

arise when put into practice. Focusing on the public prosecutor's office, it analyzes and evaluates the structure and functioning of the initial phases of criminal procedure in Mexico City from an ethnographical perspective. This paper explores possible explanations for the constant failures of Mexico City's criminal justice system in two fundamental areas: criminal prosecution and adherence to procedural laws. I focus primarily on the first two phases of the procedure: *barandilla*<sup>12</sup> and pretrial investigation, which occur at the public prosecutor's offices.

The operation of Mexico's criminal justice system begins at the public prosecutor's office when the police, having witnessed a crime, detain a person and bring him or her to the agency, or when a victim comes forward and reports a crime to a public prosecutor. The public prosecutor's office is thus the door through which crime victims and alleged criminals enter the Mexican criminal justice system, and the public prosecutors and the police set the criminal justice machinery in motion. What happens or fails to happen there determines not only the nature of procedure but also the functioning of the system as a whole.

These agencies are not only the place where Mexico's criminal justice system begins its interaction with crime victims and alleged criminals, but are also the first place where the system breaks down. The agencies are where initial procedural violations to defendants' rights occur, where victims are denied their right to report a crime, and where over 75% of criminal reports get stranded. The agencies are also where many victims are denied access to the justice system and where many defendants are wrongfully detained and charged. Because of this, this study focuses primarily on the criminal procedure that occurs within the agencies.

## **I. Initiating Criminal Procedure. The *Barandilla* or Front Desk**

Formally, Mexican criminal procedure is initiated when one of two events occur: (a) an alleged victim or witness comes to the public prosecutor's office to report a crime, or (b) the police bring a suspect caught in the act of committing a crime to the agency. Mexican scholars disagree as to when exactly the criminal procedure begins. Former Supreme Court Justice Victoria Adato held that criminal procedure begins when the public prosecutor initiates an investigation and carries out (with the aid of the police) the actions needed to obtain sufficient evidence to press charges.<sup>13</sup>

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<sup>12</sup> "Barandilla" is the term used in Mexico to refer to the front desk at the public prosecutor's office. It is literally a desk that stands at the entrance of the agencies. Every person who enters the agency must first talk to the person sitting at the barandilla.

<sup>13</sup> VICTORIA ADATO GREEN, *DERECHOS DE LOS DETENIDOS Y SUJETOS A PROCESO 2* (UNAM-III, 2000).

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Mexican criminal justice scholar Guillermo Zepeda states that the phase of pretrial investigation begins when the public prosecutor learns that a crime may have occurred and thus begins an investigation.<sup>14</sup> Zepeda does not make a distinction between the prosecutor's learning of a crime and the initiation of an investigation, but describes these two events as simultaneous. Most Mexican legal scholars agree that criminal procedure begins when the public prosecutor learns that a crime may have occurred and opens an investigation.

The formal determination of when criminal procedure begins affects the proper enforcement of criminal law and shapes detainees' rights and victims' access to the criminal justice system. Therefore, determining when criminal procedure begins is important for several reasons. First, it establishes the moment at which due process rights for both victims and defendants become enforceable.<sup>15</sup> Second, if criminal procedure begins when the public prosecutor initiates an investigation, important antecedent steps may be neglected.

The participant observations carried out for this study at public prosecutor's offices indicate that, although the procedure does not formally begin until public prosecutors open an investigation (during the pretrial investigation phase) and a case file, there is an antecedent step that is traditionally excluded from the study of Mexican criminal procedure. This phase begins when a victim comes to a public prosecutor's office to report a crime and is either granted or denied access to the system. It occurs at the agency's front desk, known in Mexico as the *barandilla* and ends there with the public prosecutor's decision to open an investigation or not.

This part of procedure, often ignored in Mexican criminal procedure studies, is fundamental in understanding many of the problems in criminal procedure, especially that of

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<sup>14</sup> GUILLERMO ZEPEDA LECUONA, *supra* note 8 at 108

<sup>15</sup> There is, for example, controversy regarding when certain rights of defendants begin to be enforceable. Article 20 (IX) of the Constitution states that defendants have a right to a defense from the beginning of the procedure and that *the judge* is responsible for assigning one if the defendant cannot afford one. Article 294 of the Criminal Procedure Code for Mexico City repeats this provision but adds the defendants' right to hire (*or request*) defense from the moment of arrest. However, in 1975 when the Court stated that the law must be interpreted to mean that defendants have a right to request or hire counsel if they wish, and specifically express this desire, it does not imply the authorities' obligation to appoint counsel upon arrest. See: DEFENSA, GARANTÍA DE. MOMENTO EN QUE OPERA, Primera Sala de la Suprema Corte de Justicia de la Nación [S.C.J.N.] [SUPREME COURT], *Semanario Judicial de la Federación y su Gaceta*, Séptima Época, 187-192 Segunda Parte, September 1984, p. 25 (Mex.).

The lack of a defense attorney present during police interrogation and investigation was therefore an oversight of the defendant for not requesting to have one present and not of the corresponding authority (See DEFENSA, GARANTÍA DE. MOMENTO EN QUE OPERA, Primera Sala de la Suprema Corte de Justicia de la Nación [S.C.J.N.] [SUPREME COURT], *Semanario Judicial de la Federación y su Gaceta*, Séptima Época, 72 Segunda Parte, March 1975, p. 27 (Mex)).

In another decision made that year, the court stated that the failure to notify defendants of their rights could not be imputed to either the police or the public prosecutors because it was, according to the Constitution, the obligation of *the judge* and not of the executing authorities (See DEFENSA, GARANTÍA DE. NO COMPETE AL MINISTERIO PÚBLICO, Primera Sala [S.C.J.N.] [SUPREME COURT], *Semanario Judicial de la Federación y su Gaceta*, Séptima Época, 70 Segunda Parte, October 1974, p. 17 (Mex.) and DEFENSA, GARANTÍA DE. Averiguación Previa, Primera Sala [S.C.J.N.] [SUPREME COURT], *Semanario Judicial de la Federación y su Gaceta*, Séptima Época, 44 Segunda Parte, July 1972, p. 23 (Mex.).

unreported crimes. An examination of the *barandilla*'s attributes and operations can increase researchers', practitioners' and policymakers' understanding of problems related to reporting and not reporting crimes and shed light on the reasons behind the negative views Mexicans have of their criminal justice system.

A chest-high desk dominates the entrance to the public prosecutor's office; this is the *barandilla*. A public prosecutor —called “the agent of *barandilla*” (*agente de barandilla*)— staffs the desk every day from 9:00 a.m. to 7:00 p.m. His job is to attend the people who come to the office and direct them to the appropriate place or person to assist them with their requests. “Good day”, says a woman in her sixties upon entering the office. “I'm here because someone stole my license plate”.

“Yes, Ma'am” —the agent answers—. “Go down this hall and turn left at the first door. That will take you to the civil judge. Someone there will help you”.

“Good morning, I'm here because someone stole my bag on the subway”.

“Tell me, sir, where exactly was your bag stolen?” When the man gives the location, the agent responds, “I see... Well, I'm sorry, but this agency does not correspond to the place where you say the crime took place. You need to go to the agency that covers that territory... No, I don't know which one that would be, but if you go down the hall and down the stairs to where the judicial police are, they can tell you where you need to go”.

Each one of the public prosecutor's offices in Mexico City has its own assigned territory. All the crimes occurring in an office's territory fall under the jurisdiction of that office. An executive order issued by the district attorney's office mandates that a victim can report a crime at any public prosecutor's office.<sup>16</sup> This order instructs the public prosecutors in charge to initiate the procedure for that case and then send it to the public prosecutor's office in the district where the crime occurred. However, at two of my field sites (which I have coded MH3 and MH5), victims were told that, to report

a crime, they had to go to the office in the district where the crime was committed. Victims who tried to report a crime that occurred in a different office's territory were directed to the “correct” agency by the agent of *barandilla*.

Another woman comes to the office to report that her husband hit her. She has a bruise on her face that extends from her mouth to her eye. She is crying as she tells the public prosecutor why she is there. “Yes, ma'am. Can you tell me where these events took place?” She gives him the address. “I see”, he says after corroborating that the events took place within MH5 territory. “Do

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<sup>16</sup> Reglamento de la Ley Orgánica de la Procuraduría General de Justicia del Distrito Federal [R.L.O.P.G.J.D.F.] [Regulation of the Organic Law of the Public Prosecutor's Office of Mexico City], art. 14 [D.O.], Apr. 30, 1996 (Mex.).

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you have your ID with you? We need it to file a report. It's really not up to me. I can send you on to the agent's desk, but he's just going to ask for the same thing. It's really better if you get your ID". "But I left my ID at home and I'm afraid to go back. You see, my husband is still there", she tells the agent. "Well, don't you have a brother or a friend who could do that for you?"

Finally, the friend accompanying her offers to get the ID. The agent of *barandilla* shows his approval and tells them it will be easy once they come back with the ID. "And please bring a photocopy of it when you come back so you don't have to run out again". I watch as they walk away.

There is no law or regulation requiring an ID to report a crime, yet everyone who came to MH5 trying to make a report was asked for one. During the participant observations for this study, I often witnessed people being turned away because they did not have an ID, a photocopy of their ID, or some other document. At first, I thought this happened because the agent of *barandilla* expected a gratuity to begin an investigation, but I never saw him taking or asking for money. I later discovered that there was an explicit policy to dissuade individuals from reporting a crime; it was an effort to lower crime rates. "We need to lower the crime rates!" the head of the office told all of us at the *barandilla* one day. "The boss said 15%, and last time we only reduced 9%. I don't want you initiating procedures for everything that comes along, *Licenciado*"<sup>17</sup> —he said to the agent of *barandilla*.

"Open 'special acts,' if you need to". That was exactly what happened with many of the people I saw coming to the office to report a crime. "What am I supposed to do?" he said to me apologetically after he scolded the agent of *barandilla* for initiating too many procedures. Each case initiated counted against MH5's efforts to make its crime statistics appear lower.

The Mexican constitution and the local criminal procedure code indicate the public prosecutor's powers and duties<sup>18</sup>, which are, basically, to investigate and prosecute crimes according to specific procedures. Crime prevention is not a direct function of the public prosecutor<sup>19</sup>, but rather a function of the crime prevention police, which are administratively a

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<sup>17</sup> "Licenciado" refers to someone licensed to practice law.

<sup>18</sup> See Constitución Política de los Estados Unidos Mexicanos [Const.], as amended on July 7<sup>th</sup> 2008, art. 21 and 102 [D.O.] 5 de febrero de 1917 (Mex.) and Código de Procedimientos Penales del Distrito Federal [C.P.P.D.F.] [Mexico City's Criminal Procedures Code] art. 3 [D.O.], Aug. 29, 1931. Also see Ley Orgánica de la Procuraduría General de Justicia del Distrito Federal [L.O.P.G.J.D.F.] [Organic Law of the Public Prosecutor's Office of Mexico City] [D.O.], Apr. 30, 1996 (Mex.) and its bylaw, the Reglamento de la Ley Orgánica de la Procuraduría General de Justicia del Distrito Federal.

<sup>19</sup> The secondary law, which regulates the Office of the General Attorney and its powers state that one of the functions of the Public Prosecutor's Office (*Ministerio Público*) is that of crime prevention. According to this law, the public prosecutor should assume this role by educating the public, investigating criminal behavior, and sharing information with other institutions. See L.O.P.G.J.D.F. [D.O.] Apr. 30, 1996 (Mex.).

separate entity from the public prosecutor's offices and officers.<sup>20</sup> Currently, public prosecutor's offices and agents do not have the means to reduce crime except through deterrence caused by the effective prosecution of criminals. MH5 made crime reporting a long and complicated process for victims and third parties. Victims frequently left the agency frustrated because they were denied the opportunity to report a crime.

Every day, a large number of individuals come to the public prosecutor's offices with different problems and concerns. Some of these are legal problems while others are not. "I'm here because I lost some very important documents from my office and I want a 'proof of facts,'<sup>21</sup>" one woman tells the agent of *barandilla*.

Another person comes in and says, "I'm here because I want to get a divorce".

Yet another asks, "Can you tell me how I can get a driver's license?"

Still another says, "I want to report a crime. My mother died two years ago and now my brother-in-law doesn't want to leave her house".

"Well, you need to go to a civil court for that, ma'am", the agent of *barandilla* patiently explains. "You see, that's not a crime. This is a public prosecutor's office, and we do not deal with those types of issues".

People come to the agency with a sense of urgency to deal with all types of legal matters: family problems, divorces, labor problems, and so on. People come to ask for "no criminal record" certificates or to seek legal guidance on almost any subject. Some of the people who come to MH5 cannot read or write; others have no idea where to go and choose the public prosecutor's office as the first available place to approach Mexico's legal system. Various regulations state that the agent of *barandilla* is supposed to be a legal expert who can give information on every matter pertaining to legal affairs.<sup>22</sup> At MH5, he would direct people to the agency or office that best suited their needs by telling them which one it was and how to get there. This included civil, labor, family and other courts and offices. He gave legal advice and suggested legal strategies for people to follow. Sometimes, the advice he gave was correct; at others, it was apparent that his advice was wrong, and I watched as he sent people across town with a problem that would probably go unresolved for days, weeks, or even longer. Overburdened by the number of people who came to the agency and his lack of knowledge of legal subjects and institutions, MH5's agent of *barandilla* often acted as

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<sup>20</sup> The prosecutor's police (*policía judicial*) forms part of the Public Prosecutor's Office while other police forces like the crime prevention police, are managed by a different entity.

<sup>21</sup> A document which consists of official recognition of any occurrence, including the lost or theft of an object. This recognition has value as it may be used as evidence in legal proceedings

<sup>22</sup> See the Reglamento de la Ley Orgánica de la Procuraduría General de Justicia del Distrito Federal, *supra* note 18 and, Decision A/013/03 of the Mexico City Public Prosecutor, in which the Quality and Compassion Program is Established for Attending Citizens at Decentralized, Central and Processing Offices of the Public Prosecutor (*Acuerdo A/013/03 del C. procurador general de justicia del Distrito Federal, por el cual se establece el programa de calidad y calidez en la atención a la ciudadanía en las agencias del Ministerio Público desconcentradas, centrales y de procesos*).

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deficient legal counsel.<sup>23</sup>

Local laws require that the person staffing the *barandilla* be one of the office's personnel and an appointed public prosecutor. The law prohibits trainees and students from working at the *barandilla*.<sup>24</sup> Beyond that, there are no requirements or training needed to staff the *barandilla*.

Bylaws relating to the public prosecutor's office define the agent of *barandilla*'s role as that of facilitating crime reporting. However, the MH5 agent's action often went beyond this. As noted above, when a person came to MH5's *barandilla*, the agent would ask why he or she had come to that office. If the agent of *barandilla* decided to initiate an investigation, he would give the alleged victim a form to fill out. The District Attorney's Office has mandated the use of a form (a standard form for reporting crimes) in 2003 as part of the administration's efforts to simplify and standardize crime reporting<sup>25</sup> by dividing crime reporting into three categories. Each category of crime had its own form. There was one for reporting the theft of cell phones and pagers (Special Preliminary Investigation-*Averiguación Previa Especial*); another for reporting any other crime (Direct Preliminary Investigation-*Averiguación Previa Directa*) and a set of special forms (Special Acts) to report events that do not constitute a crime, but still required legal validation, such as lost documents and public nuisance.

The District Attorney's order mandated the use of these forms to obtain information from victims, as well as an initial, firsthand account of the events reported.<sup>26</sup> These forms were to be available at all agencies for the public, so that crime victims could come to an agency, fill out a form, and then give it to the agent of *barandilla* to initiate a procedure when deemed appropriate.<sup>27</sup> However, this was not the way MH5 operated. Instead of giving the form to people who came to the agency, the agent of *barandilla* would first ask the person to give an account of the events. Based on that oral account, the agent of *barandilla* would decide whether to process the person's claim. If the agent decided to go even further and initiate a criminal procedure, he would give the person the standard form. After the victim filled out the form, the agent would read it to check for mistakes and style.

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<sup>23</sup> A worker from the Center of Attention to Victims of Domestic Crime (CAVI for its initials in Spanish: *Centro de Atención a la Violencia Intrafamiliar*) often assisted the MH5 Agent of *Barandilla* with the people who came to the agency. The CAVI is an organization within the Mexico City District Attorney's Office that is aimed at giving psychological, as well as medical assistance, to victims of domestic violence. The CAVI is also geared at giving legal advice to victims of this type of violence. For this purpose, a CAVI representative is placed at the front desk of every agency.

<sup>24</sup> Agents of *Barandilla* are considered public prosecutors for purposes of the law and must meet the same requirements to become agents.

<sup>25</sup> Decision A/003/03 of the Mexico City Public Prosecutor in which the Use of the Standard Format is Authorized to Initiate Special Reports, Special Preliminary Investigations and Direct Preliminary Investigations without a Detainee and Guidelines for its Use are Established for Agents of the Public Prosecutor's Office.

<sup>26</sup> Id.

<sup>27</sup> Id.

If he were not satisfied with the way it was written because he felt it was either unclear or inaccurate, he would make the alleged victim fill out a new form. Often, the agent would end up dictating what he thought was an appropriate, legal account of the events. When the victim did not know how to read and write, the agent would fill out the form himself and have the victim put an “X” at the bottom of the page. In the end, what was written on the form was the agent’s account of the events and not the victim’s version, thus transforming the purpose of the form into a new step in criminal procedure.

Although the *barandilla* is a key component in criminal procedure, MH5 gave it virtually no attention. MH5’s head of the agency was almost never at the *barandilla*. On a few occasions, when the reception area became extremely crowded, the prosecutor (the person in charge of all the public prosecutor’s Offices in the Miguel Hidalgo Delegation),<sup>28</sup> whose office was on the same floor in that same building, would come to the *barandilla* and ask why so many people were waiting in line. On these occasions, he would reprimand the clerks and the agent for not attending the people in the reception area. At such moments, service at the *barandilla* quickened, but then slowly slipped back to its habitual slow and bureaucratic pace once the prosecutor left.<sup>29</sup>

True, the failures of MH5 cannot necessarily be extended to other agencies. However, the question stands, how does the *barandilla*, the first door to the criminal justice system, work in other agencies? The Mexican criminal justice system’s failure to increase the number of reported crimes cannot be solely attributed to the *barandilla* but, if other offices work the same way as the MH5 does, the performance of the *barandilla* can explain some of the fears people have in terms of reporting crimes. The way people are first treated does affect the way they view the criminal justice system, and this in turn affects the trust they have in the system.

## II. Pretrial Investigation

As previously noted, most Mexican doctrinal texts on criminal procedure law consider the pretrial investigation phase the starting point of criminal procedure. In this phase, the public prosecutor

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<sup>28</sup> “Delegations” are political divisions equivalent to “Boroughs” for instance in the City of New York. Each *delegación* has a popularly elected head or *delegado* that may or may not belong to the same party as the Mexico City Mayor.

<sup>29</sup> At MH3 there was no one at the *barandilla*. This agency’s lighter workload made this possible, and people simply came to the agency and talked to the public prosecutors or clerks in charge. MH3’s agents had a system in which the clerks took turns at attending cases. With this system, every victim or person who came to the agency was able to talk to an agent or clerk, perhaps providing clients with a higher standard of treatment and counsel upon their arrival at the agency. However, it was not uncommon at MH3 for victims to be turned away for not having an ID or for victims to be sent to another agency.

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supposedly conducts an extensive preliminary investigation<sup>30</sup> to determine (a) whether there is sufficient evidence to warrant formal charges against detainees or (b) in situations in which the existence of a crime has already been established, whether there is sufficient evidence to press charges against any suspects. Ideally, during this preliminary investigation, the public prosecutor interrogates suspect(s), victim(s) and any available witnesses, including the police officers involved as either witnesses or first responders.<sup>31</sup> The public prosecutor also supposedly visits the crime scene to look for evidence or other information that may help locate suspects.<sup>32</sup> Based on these interrogations and other evidence, the public prosecutor, the clerks or both the agent and the clerks decide whether to open an investigation and whether to press formal charges against any suspect or detainee.<sup>33</sup>

The procedure begins when one of two events occurs: (1) an alleged victim or witness comes to a public prosecutor's office to report a crime, or (2) the police bring a detainee who was arrested caught in the act of committing a crime. Procedure differs in these two cases. This section describes analyses and evaluates these two types of procedure separately. Both explanations begin with initiating criminal procedure at the public prosecutor's office and examine the work of public prosecutors, clerks, the police, and experts in gathering evidence to validate the existence of *corpus delicti*<sup>34</sup> and to identify possible suspects.

### III. Procedure without a Detainee

After an alleged victim is 'processed' by the agent of *barandilla* and the standard form is filled out, the alleged victim is taken before one of the clerks. At the public prosecutor's offices studied, victim and witness questioning was typically conducted and initial declarations were typically taken by one of the clerks, and sometimes by a public prosecutor. At the two public prosecutor's offices studied, the agents' work areas were next to each other, separated by partitions with upper glass panels. This made conversations relatively private while allowing others to see what was taking place. Each agency has three teams of public prosecutors and three or

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<sup>30</sup> This procedure is described in articles 262 to 443 of the Mexico City Code of Criminal Procedure. See Código de Procedimientos Penales del Distrito Federal [D.O.] Aug. 29, 1931

<sup>31</sup> *Id.* at art. 94-124.

<sup>32</sup> *Id.*

<sup>33</sup> VICTORIA ADATO GREEN, *supra* note 13

<sup>34</sup> " "*Corpus Delicti*" is the body and substance of the crime and with respect to specific crimes it means the actual commission by some of the particular crime charged, which may be established by *prima facie* evidence from which the commission of the crime may be logically inferred". See McGraw-Hill's Spanish and English Legal Dictionary, Dahl's Abridged Law Dictionary, 2004.

four clerks working 24-hour shifts, followed by 48 hours off-duty time.<sup>35</sup> At MH5, the clerks would initiate procedures and case files, and the agent in charge would supervise their work. The clerks took turns taking crime reports from incoming claimants so that work would be evenly distributed. When an arrestee was brought to the agency, the next clerk in line would take the case.

Once in the presence of a clerk, the victim or witness would again give an oral account of the facts.<sup>36</sup> As required by law, at MH5, this account was usually entered into the agency's computer system. The clerk opened a file and assigned it a case number, which contained information that identified the particular public prosecutor's office, the date and the order of the cases opened at that agency that day.<sup>37</sup> If the workload that day was light, the clerk immediately entered the victim's or witness's account of events. If the clerks were very busy (e.g., because there was an arrestee who had to be indicted or released before the constitutional period expired), the clerks would listen to victim's or witness's account, open a case file and schedule an appointment for the person to come back. The person would then leave the agency with a copy of his or her crime report and a case number to follow the progress of his or her claim. Later in the day, the clerks would use the information on the standard form to complete the information in the system and submit an order for the proceedings needed to complete the investigation, such as those involving the judicial police and experts.

At the end of each 24-hour shift, incomplete cases (in the form of a case file) are left for the next shift to complete a file or obtain an indictment or arrest warrant. At the end of each shift, the public prosecutors and clerks send case files with no known suspect to the agency's "desks" (*mesas*), where other clerks carry out the necessary procedures to formally close the investigation. Most cases without a known suspect were filed as unsolved and eventually permanently closed due to lack of evidence.

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<sup>35</sup> Although prohibited by the regulations, some clerks had informal assistants, mostly law students, who helped file cases and initiate procedures for minor crimes. These assistants were paid by the clerks or agents themselves. One assistant at MH3 said she was paid \$30 pesos (approx \$3 USD) for each case filed as unsolved and \$150 (\$15 USD) for every successfully concluded case. Having assistants gave the clerks and agents time to deal with cases they considered more important, such as theft, burglary, assault, homicide or cases where an arrestee or a victim of a more serious crime was present.

<sup>36</sup> See article 8 of the bylaw. See Reglamento de la Ley Orgánica de la Procuraduría General de Justicia del Distrito Federal, *supra* note 18 at art. 8

<sup>37</sup> This in accordance with the attorney's regulation: Decision Number A/010/2001 of the Mexico City Public Prosecutor in which the Acronyms and Numbers Identifying the Preliminary Investigations Opened at Decentralized Public Prosecutor's Offices Subordinate to the Assistant Public Prosecutor's Office for Preliminary Investigations and form part of the District Public Security and Administration of Justice Coordinating Offices and are Established (*Acuerdo no. A/010/20001 del procurador general de justicia del Distrito Federal, por el que se establecen las siglas y números con los que se identificarán las averiguaciones previas que se inicien en las agencias del Ministerio Público dependientes de la Subprocuraduría de Averiguaciones Previas Desconcentradas, que forman parte de las coordinaciones territoriales de seguridad pública y procuración de justicia*).

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### 1. Investigation

Among the most important parts of criminal procedure are gathering evidence and investigating allegations of illegal conduct. The Mexico City Criminal Code stipulates that, even in cases without a suspect, public prosecutors must conduct a pretrial investigation using every procedure available that might aid in finding evidence and identifying suspects.<sup>38</sup> These procedures include inspecting the crime scene, interrogating possible witnesses and suspects, gathering documentary evidence and any other activities permitted by the Code of Criminal Procedure.<sup>39</sup>

At MH5 and MH3, these proceedings were carried out in form, but not in substance. After a file was opened for a victim's report, the clerks in charge sent a written request to the judicial police to investigate the facts reported by the victim.<sup>40</sup> Even though public prosecutors are supposed to visit crime scenes along with the judicial police and experts, in most cases, MH5's public prosecutors agents did not visit crime scenes, but requested that the police, experts or both visit the crime scene.<sup>41</sup> Police and expert visits rarely yielded any information useful to the case.

During the participant observations carried out at MH5, I was twice sent to conduct the onsite inspection so that the clerk could include the report in the case file. Once, it dealt with a car crash. I was asked to report the state of the vehicles involved and to corroborate the victim's statement. The other time was a burglary of a food stand in a nearby subway station. An assistant and I were sent to interview witnesses and conduct the onsite inspection, along with a judicial police officer. After a 30-minute visit, we left the site without any information that might have aided the investigation. Predictably, these inspections did not provide sufficient evidence to continue the investigations and so the cases were closed as unsolved. Investigations at MH3 and MH5 rarely yielded any evidence or information to aid in identifying suspects, presumably because no real investigation took place at any level. The work of the public prosecutors and clerks primarily consisted of assembling case files, a task done at their desks. Every decision made by a public prosecutor or clerk and every procedure ordered or conducted must be included in the file, a

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<sup>38</sup> See Código de Procedimientos Penales del Distrito Federal [D.O.] Aug. 29, 1931 at article 4 and 265. See also Reglamento de la Ley Orgánica de la Procuraduría General de Justicia del Distrito Federal, *supra* note 18 at art. 16.

<sup>39</sup> See Código de Procedimientos Penales del Distrito Federal [D.O.] Aug. 29, 1931 at article 94 and 135-244. Article 135 of the Code of Criminal Procedure catalogs the evidence accepted in criminal courts. The subsequent chapters of the code give specific details for each type of evidence.

<sup>40</sup> As stated above, the public prosecutor is assisted by a police officer in the investigation of a possible crime. Each agency has a judicial police unit assigned to it. The police, like the prosecutors themselves, work on a 24-hour shift and 48-hour time off basis. At MH5 approximately 10 police officers were assigned to the agency to aid prosecutors in their investigations. See Constitución Política de los Estados Unidos Mexicanos [D.O.] Feb. 5, 1917 at article 21

<sup>41</sup> See Reglamento de la Ley Orgánica de la Procuraduría General de Justicia del Distrito Federal, *supra* note 18 at art. 16.

time-consuming activity. Furthermore, this information must be supported by the corresponding statutes in the Code of Criminal Procedure and its bylaws<sup>42</sup>. In addition to this, each page in the file must be numbered, signed and stamped to prevent any pages from being lost or omitted.<sup>43</sup> Stamping and signing represents an additional burden for public prosecutors and clerks. Since each agent and clerk handles a large number of cases, there is little time to actually investigate crimes. At MH5, I often helped the clerks number and stamp pages.

Part of the work done by public prosecutors and clerks during the pretrial investigation supposes police and expert participation. In theory, both police and experts act jointly with public prosecutors. Criminal procedure is based on this assumption and on the principle that investigative work by police and experts is crucial to finding evidence and identifying suspects. In theory, staff members from all three sectors —public prosecutors (or clerks), the police, and experts— work together to solve cases. However, at MH3 and MH5, neither police nor experts provided any useful input to the investigation.

MH5's public prosecutors and clerks seemed to sense the futility of police reports and the impossibility of identifying suspects. On one occasion, an MH5 clerk was opening an investigation for a stolen cell phone. The victim claimed he had not seen the assailants. Minutes after the victim left with his case file number, the clerk added a note to the case file stating that, at 23:00 hours, he had received a report from the police stating there was no evidence of or witnesses to the events reported by the victim. The clerk made this entry before requesting that the judicial police visit the crime scene. "They use a model form and fill it out each time. They don't even visit the crime scene", another clerk told me later. During my observations at both agencies, I read many police reports and none contained any information that could be used to identify possible suspects.

The final component of pretrial investigations is the evidence gathered by the experts.<sup>44</sup> As in the case of the police reports, the forensic reports examined at MH5 and MH3 served no purpose other than to justify filing a case as unsolved. The shortage of experts and their lack of training and resources made it almost impossible for their work to be of any value. The extremely bureaucratic procedures that had to be followed for each test also minimized the chances of conducting a "real" investigation. Unlike the MH5's police, the agency's experts seemed to visit crime scenes and perform the tests requested by public prosecutors. However, their work rarely yielded any information useful to the case either and thus, most cases ended up as unsolved.

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<sup>42</sup> *Id.*

<sup>43</sup> See Código de Procedimientos Penales del Distrito Federal [D.O.] Aug. 29, 1931 at art. 14.

<sup>44</sup> See Reglamento de la Ley Orgánica de la Procuraduría General de Justicia del Distrito Federal, *supra* note 18 at art. 77, Section V.

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### 2. *Unsolved Cases*

On June 25, 2004, three men came to MH3 to report a burglary at a construction site next to the *Periférico* freeway. The men stated that a threeton bulldozer had been stolen from the site, along with several computers and other tools, the night before. In the morning, the first workers to arrive found the bulldozer missing, the door to the office building open and the security guard with his arms tied, lying on a cot in his station. This security guard was one of the three men who had come to the agency; the other two were the site's administrator and engineer.

During this first interview, the three men sat before one of the clerks. The head of the agency was also present. Once the men made their declarations, the head of the agency asked the security guard what had happened and where he had been hit. "Here, on my head", the man replied.

"Where?" the agent asked, searching the man's head, parting the hairs at the spot where the security guard had pointed. "Here?" the agent inquired.

"I don't see anything. Are you sure you were hit?" —he asked again, still searching for the wound.

"Are you sure?" he asked again, showing his disbelief in the guard's story.

"Really! I'm not lying", the guard insisted.

"Well, I'm going to ask you to speak with the police officers", the agent said, leading the three men to chairs in the waiting area.

After the men had been interviewed by the clerk, two judicial police officers questioned the security guard in a room at the back of the agency. This room, normally used as an office, was now a storage area with several file cabinets and stacks of files on the floor. There was also a desk against one of the walls and a chair. Usually, files from past cases are sent to the *bunker* (the general archives), but since the main office had run out of storage space, the files had to be stored at each agency. The head of the agency gave me permission to observe the questioning.

During the questioning, the two police officers asked the security guard to sit in the chair while they (and I) stood. They repeatedly asked the guard if he knew who was responsible for the theft. The security guard seemed to have a low socio-economic background. He spoke very basic Spanish and was dressed in a dirty ripped shirt and his hair was disheveled from the recent search for a head wound. He told the police officers that he had been hit on the head from behind and fell to the ground. His hands had been tied behind him with duct tape and he had been pushed onto the small cot where he usually spent the night after making his rounds. He further stated that he had not seen his assailants; they had pointed a gun at him and had warned him that if he moved, he would be killed. He also said he had heard the sound of machinery outside, but did not dare move for fear of being shot and because, as he said, he was tied up. The officers asked him again if he had

been involved. “What type of gun did they use?” they then asked.

“I don’t know”, the guard answered.

“What do you mean, you don’t know? Was it a big gun? What color was it?”

The guard stood by his account of the events, “No, I swear I had nothing to do with it. Really”, he insisted.

The officers told him he was going to get into trouble if he was lying. After approximately thirty minutes, they finally told him he could leave. The guard quietly stood up and left the room. When he left, the officers told me that they did not think he had had anything to do with the crime. “He’s too stupid”, one of the officers told me.

From later conversations with clerks, the police, and the agent, I learned that the burglary had required substantial planning, since a bulldozer could not simply be driven off the site and onto the freeway, but would have to be put on a truck. The police and the clerk said that, at the time of the burglary, many police cars were patrolling the zone and that it was unlikely that a vehicle that size would have gone unnoticed by the officers. The clerk later told me that the police patrolling the area were probably involved, but it was difficult to find the person responsible since they would never find any witnesses. “This will probably end up in the ‘dead files’”, he told me.

As stated earlier, Guillermo Zepeda pointed out that only 18.2% of the cases initiated in 2000 went to court.<sup>45</sup> More often than not, cases initiated without a detainee are stored as “temporarily unsolved” or “NEAPS”, the initials in Spanish for *No Ejercicio de la Acción Penal* [No Criminal Action Taken].<sup>46</sup> Former Public Security Secretary, Alejandro Gertz Manero, has said that only 10% of the crimes reported in 2004 resulted in an indictment.<sup>47</sup> Of the total number of indictments, approximately half were cases where defendants had been caught in the act.<sup>48</sup>

In principle, the public prosecutor bases his decision to press charges on three types of information: (a) the initial declaration; (b) the subsequent questioning of witnesses and possible suspects, police officers, and victims; and (c) the evidence gathered by the judicial police and experts.<sup>49</sup> Theoretically, if sufficient evidence is gathered and a suspect is identified, the agent

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<sup>45</sup> GUILLERMO ZEPEDA LECUONA, *supra* note 8.

<sup>46</sup> As noted above, unsolved cases are filed as temporarily or definitely unsolved. Temporary unsolved cases are those that have been temporarily closed because there is not enough to continue with the investigation. Temporarily unsolved cases eventually become definitely unsolved ones if enough time passes without finding any new evidence. The time needed to permanently close a file is determined by the highest sanction in the Criminal Code that applies to the particular crime. If this period expires, a case is filed as definitely unsolved and is permanently closed. A case is also filed as unsolved when the crime is not serious and the victim pardons the offender, or when, after the pretrial investigation, the public prosecutor determines that no crime was committed. Reglamento de la Ley Orgánica de la Procuraduría General de Justicia del Distrito Federal, *supra* note 18 at art. 63

<sup>47</sup> From Alejandro Gertz Manero, Seguridad y Justicia, Address at the Círculo de Estudios México (August 19, 2004).

<sup>48</sup> *Id.*

<sup>49</sup> See Código de Procedimientos Penales del Distrito Federal [D.O.] Aug. 29, 1931 at arts. 16 and 11.

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requests an arrest warrant from the corresponding judge.<sup>50</sup> If, on the other hand, the pretrial investigation did not yield enough information to identify a suspect, the public prosecutor stores the case as temporarily unsolved. Eventually, most of these cases are permanently closed.<sup>51</sup>

To avoid cases being closed as unsolved without proper investigation, the District Attorney's Office has issued orders that require each case file to be supervised (in the sense of reviewed). When it is determined that a case file is unsolved, it is sent to the head of the agency who reviews the file and ratifies the decision to file the case as such.<sup>52</sup> Once the head of the agency approves and signs the case file, it is sent to the Assistant Public Prosecutor's Coordinating Office (*Coordinación de Agentes del Ministerio Público Auxiliares del Procurador*), a unit within the District Attorney's Office that again reviews and ratifies the decision to store a case file as unsolved.<sup>53</sup> This ratification, however, is based solely on the written contents in the file and whether all the formal requirements for a case file have been met, at least "on paper".

However, in reality, no real investigation has taken place. On several occasions, I saw case files the Coordinating Office sent back to MH5 because they were not stamped or numbered properly. On other occasions, I saw case files sent back for not specifying the right articles of the applicable codes or regulations. Once the Coordinating Office is satisfied with these formalities, the case is filed as temporarily unsolved.<sup>54</sup>

Most unsolved cases eventually become permanently unsolved, and the investigations are permanently closed. Guillermo Zepeda found that in 1999, 3.2% of investigations nationwide were closed because the criminal charges were not approved for filing, 24.0% were closed voluntarily, 27.0% were closed because the time limit for prosecution had expired, and only 9.7% were closed because the investigation was successfully concluded.<sup>55</sup>

Of those closed due to time limits, over half were definitively closed.<sup>56</sup> Many cases thus go unsolved and unpunished, the typical outcome if there are no known suspects when the case is opened. For cases in which a suspect is known or a person has been detained, cases are usually "successfully concluded".

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<sup>50</sup> *Id.*

<sup>51</sup> See Reglamento de la Ley Orgánica de la Procuraduría General de Justicia del Distrito Federal, *supra* note 18 at art. 15.

<sup>52</sup> *Id.* at art. 17.

<sup>53</sup> This office is governed by the Reglamento de la Ley Orgánica de la Procuraduría General de Justicia del Distrito Federal, *supra* note 18 at chapter XIII.

<sup>54</sup> *Id.* at art. 25.

<sup>55</sup> GUILLERMO ZEPEDA LECUONA, *supra* note 8 at 189.

<sup>56</sup> *Id.*

#### IV. Procedure with a Detainee

On July 27, 2004, a man was arrested for stealing a screwdriver from a supermarket. As he was leaving, the concealed screwdriver set off the store's alarm and two police officers arrested him and brought him to the agency (MH5). When they arrived, the detainee was put in a chair in front of me. The man started crying and said, "Miss, can you please help me? Please help me". He then turned to someone else standing nearby, "Please, can you help me? Will you please help?" When no one answered, he continued to cry. "Please let me go. I'll be good. I promise. I have a daughter. She's three months old. Please, let me go". One of the clerks walked over and told him to be quiet.

Then, a judicial police officer came over and stood next to him. When the detainee started asking me for help again, the officer told the detainee, "Be quiet, or you'll suffer for it". The officers who brought the man to MH5 put the screwdriver on the clerk's desk. The price tag was still on it. It was worth \$175 pesos (approximately \$17 USD).

"At least let me make a phone call", the man pleaded. "I know I'm allowed to make a call", he insisted, raising his voice and crying even louder. The officer then made the detainee stand up and took him down to the detention center. Later that day, he was sent under pretrial detention to a Mexico City prison.

That same day, another person—a boy between 16 and 18—was arrested. Like the man described above, the boy had been arrested by security guards for shoplifting. The boy had stolen some perfume and deodorant from a local Wal-Mart. He, too, was sent to prison under pretrial detention without bail. The cost of the items stolen came to \$240 pesos (approximately \$24 USD).

The participant observations conducted showed that, in most cases with detainees, these individuals were arrested without a warrant and for misdemeanors. Approximately half of Mexico's detainees caught in the act are arrested without warrants.<sup>57</sup> Although human rights activists and NGOs have widely criticized the frequent use of detentions without warrants by the Mexican police,<sup>58</sup> Mexico's legal system and criminal law interpretations still validate and facilitate police arrests without warrants. The broad definition of "special circumstances" in article 16 of the Mexican Constitution is one example of such validation.<sup>59</sup> This article, amended in 1993 and again in 1999, allows arrests without warrants in "urgent cases". The reforms to article 16 elaborate on "urgent cases" to include arrests made when police determine that the suspect

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<sup>57</sup> Alejandro Gertz Manero, *supra* note 47.

<sup>58</sup> See also INTER-AMERICAN COMMISSION OF HUMAN RIGHTS, REPORT ON THE SITUATION OF HUMAN RIGHTS IN MÉXICO (1998).

<sup>59</sup> Constitución Política de los Estados Unidos Mexicanos [D.O.] Feb. 5, 1917 at art. 16.

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might escape the authorities, fundamentally leaving the decision to the officer's discretion.<sup>60</sup>

Another example of this is the concept of "*en flagrancia*" —caught in the act— as used in Mexican law today. Previously, it referred to cases in which police witnessed a crime in progress (i.e., in the act). This concept was later expanded to include an arrest if:

- The arrestee was identified by a victim or witness as the person responsible for committing a crime,
- The arrestee was found in possession of the item subject of the crime, or
- Fingerprints or other evidence made it possible to infer that the arrestee participated in a crime.

The constraints on these bases for an arrest *en flagrancia* are: (a) the law considers it a serious crime, (b) less than 72 hours have passed since the crime occurred, and (c) the criminal investigation was initiated prior to the arrest.<sup>61</sup>

These reforms, intended to facilitate arrests and help police fight crime, have adversely affected criminal prosecution and police practices. Without the resources or the motivation to investigate crimes, Mexico's police focus on apprehending subjects caught in the act. A survey from the Centro de Investigación y Docencia Económicas (CIDE)<sup>62</sup> conducted in Mexico City and its suburbs found that most detainees are petty criminals and not those who commit the serious crimes that most concern Mexican society.<sup>63</sup> This is especially true regarding thefts and robberies of small amounts of money. Many of the defendants I saw at MH5 were arrested under these circumstances. The CIDE survey also found that many detainees are arrested *en flagrancia* (in the act of committing a crime): over half of the surveyed detainees (57.0%) said they had been arrested within the first three hours of committing the crime.<sup>64</sup> An additional 25.0% of the respondents said they were arrested within 30 days of committing a crime, 7.4% within 30 to 180 days, 4.0% between six months and one year after, and a further 6.6%, a year or more after committing a crime.

Before asking a judge to issue an arrest warrant, a public prosecutor must first establish there is reasonable cause against a person. The case file is then sent to a criminal court along with a

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<sup>60</sup> Report of the Joseph R. Crowley Program in International Human Rights & Centro de Derechos Humanos Miguel Agustín Pro Juárez, *Presumed Guilty?: Criminal Justice and Human Rights in Mexico*, 24 FORDHAM INT'L L. J. 801, 809 (2001) [hereinafter the Joseph Crowley Report].

<sup>61</sup> See Código de Procedimientos Penales del Distrito Federal [D.O.] Aug. 29, 1931 at art. 267.

<sup>62</sup> The CIDE is a publicly funded institution located in Mexico City.

<sup>63</sup> The CIDE prison survey shows that most detainees in Mexico City are not only arrested without a warrant but are also arrested for misdemeanors. The survey was conducted in Mexico in May 2002. It was given to 1,605 inmates from 18 different prisons in the states of Mexico and Morelos and in Mexico City. See MARCELO BERGMAN coord., *DELINCUENCIA, MARGINALIDAD Y DESEMPEÑO INSTITUCIONAL. PRIMERA ENCUESTA DE LA POBLACIÓN EN RECLUSORIOS (CIDE, 2002)*.

<sup>64</sup> Id.

request for a warrant.<sup>65</sup> Guillermo Zepeda has reported that, nationwide, 85% of the requests for arrest warrants are granted.<sup>66</sup> However, over half of the warrants granted do not result in arrests. Based on data from the National Institute of Statistics (INEGI), 33% of the arrest warrants granted nationwide resulted in arrests.<sup>67</sup> In Mexico City, 47.6% of the arrest warrants resulted in arrests.<sup>68</sup>

Since only 11% of the cases opened at a public prosecutor's office obtain an arrest warrant, and since only 33% of the arrest warrants result in actual arrests, Mexico's criminals enjoy a great deal of impunity.<sup>69</sup>

Once an arrestee is in custody with or without an arrest warrant, the public prosecutor's office has 48 hours to bring criminal charges against the arrestee in a court or release him.<sup>70</sup> This period can be extended to 72 hours if the suspect is accused of a serious crime.<sup>71</sup> Thus, from the time of arrest, prosecutors have 48 hours (and in certain cases, 72 hours) to gather enough evidence to press charges. Since public prosecutors and clerks work for 24-hour shifts (followed by 48 hours off-duty), many cases are passed on to the next shift, which must finish the process to obtain an indictment. Detainees remain in the agency's detention center until bail is granted. If bail is refused, they are sent to a pretrial detention center. Many arrestees are sent to prison as pretrial detainees, without the possibility of obtaining bail.

The Mexican Constitution and local code of criminal procedure grant several rights to the accused during the pretrial investigation:

- The right to request provisional release under bail (which is granted unless one of the exceptions stated in article 20 of the Constitution applies);<sup>72</sup>
- The right to be informed of the accusations against him or her;<sup>73</sup>
- The right to not have his or her personal belongings or person taken or searched without a warrant issued by a judge;<sup>74</sup>

<sup>65</sup> See Código de Procedimientos Penales del Distrito Federal [D.O.] Aug. 29, 1931 at art. 2 and 4.

<sup>66</sup> GUILLERMO ZEPEDA LECUONA, *supra* note 8 at 210.

<sup>67</sup> *Id.* at 205 and 206-208. According to Zepeda in 2000, there were 253,539 effective arrest warrants in 30 states, not counting Mexico City or the State of Nayarit, which apparently do not give out this information. Of these, 127,666 were pending from the previous year and 125,873 had been issued that year.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 177. This number reflects the estimated percentage of cases nationwide.

<sup>70</sup> In cases where an arrest has been made *en flagrancia*, the case file is also sent to a criminal court for the detention to be validated. Código de Procedimientos Penales del Distrito Federal [D.O.] Aug. 29, 1931 at art. 268 bis. See also VICTORIA ADATO GREEN, *supra* note 13. Also see Constitución Política de los Estados Unidos Mexicanos [D.O.] Feb.

5, 1917 at articles 16, 20 and 21.

<sup>71</sup> Código de Procedimientos Penales del Distrito Federal [D.O.] Aug. 29, 1931 at art. 268.

<sup>72</sup> Constitución Política de los Estados Unidos Mexicanos [D.O.] Feb. 5, 1917 at art. 20; Código de Procedimientos Penales del Distrito Federal [D.O.] Aug. 29, 1931 at art. 556-574. See also Código Federal de Procedimientos Penales [C.F.P.P.] [Criminal Procedures Code] art. 399 to 417 [D.O.] Aug. 30, 1934.

<sup>73</sup> Código de Procedimientos Penales del Distrito Federal [D.O.] Aug. 29, 1931 at art.269.

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- The right to counsel;<sup>75</sup>
- The right to remain silent and not give an initial declaration;<sup>76</sup>
- The prohibition of torture and of being held *incommunicado*, the lack of legal standing of any statement or declaration given to anyone except the public prosecutor or judge, and the lack of legal standing of any statement or declaration given without the assistance of a defender.<sup>77</sup>

At the agency studied as part of this research, many of these rights were observed in form, but not in substance. Many defendants did not know how to read or write and because of defendants' low socio-economic background and educational level they were unaware that their rights were being violated. The only recourse for many defendants was the often deficient service of public defenders. The code of criminal procedure specifies that the public prosecutor has the obligation to inform defendants of their rights, including their right to not make an initial statement.<sup>78</sup> However, CIDE data suggests that many defendants are not informed that the statement they are asked to give the public prosecutor is not compulsory. The CIDE survey found that 77% of the defendants interviewed responded "No" to the question, "Did anyone inform you at the Public Prosecutor's Office that you had the right not to declare?"<sup>79</sup> At MH5, I saw several defendants being informed of this right; however, both the public defender and the public prosecutor or clerk recommended that they give a statement. Both public prosecutors and public defenders told defendants that invoking their right to not give a declaration would count against them in the future. In these cases, defendants usually gave a statement, often to their detriment.

At MH5, this statement was taken by the clerks. The clerk would first ask the defendant for an oral account of the events and would then include this statement in the file using the SSAP.<sup>80</sup> Statements rendered at the Public Prosecutor's Office under these circumstances practically guaranteed convictions. At MH5, I often saw defendants give incriminating statements, unaware of what they were doing. On several occasions, I observed the clerks as they wrote down the defendant's oral account. In the statements that the clerks entered into the SSAP, they would

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<sup>74</sup> Constitución Política de los Estados Unidos Mexicanos [D.O.] Feb. 5, 1917 at art. 16.

<sup>75</sup> *Id.* at art. 20 and Código de Procedimientos Penales del Distrito Federal [D.O.] Aug. 29, 1931 at article 269.

<sup>76</sup> Constitución Política de los Estados Unidos Mexicanos [D.O.] Feb. 5, 1917 at art.20, II; Código de Procedimientos Penales del Distrito Federal [D.O.] Aug. 29, 1931 at articles 269, 289, 290 and 291; Código Federal de Procedimientos Penales [D.O.] Aug. 30, 1934, at article 128.

<sup>77</sup> Código de Procedimientos Penales del Distrito Federal [D.O.] Aug. 29, 1931 at article 289.

<sup>78</sup> *Id.* at art. 269 III.

<sup>79</sup> See MARCELO BERGMAN *supra* note 63

<sup>80</sup> The computer software system used today by agents and *oficiales secretarios* (*sistema simplificado de averiguaciones previas or SSAP*) to create files (*expedientes*). The SSAP was instated by the District Attorney's office to simplify procedures and avoid corruption. The information in each case is recorded permanently in the main system. Once a file is created in the system, the case is recorded and may be accessed from any computer within the system that uses the software. Each agent and *oficial secretario* have a number and code that allows them to access the system. Any changes or proceedings added to these files are recorded in the system with the agent's and *oficial secretario*'s number.

include the incriminating information, but leave out information that might aid the detainees' defense.

In Mexico, statements rendered to the public prosecutor present an enormous problem for defendants. This is largely due to the weight given to confessions and the interpretation the court gives to the principle of proximity.<sup>81</sup> In Mexico, judges consider a confession the most valuable type of evidence.<sup>82</sup> The Mexican Supreme Court has stated that a confession should be considered "absolute evidence" of a person's responsibility as long as it is not implausible and can be corroborated by other evidence.<sup>83</sup>

The Court has also declared that, once a confession has been made, the defendant's subsequent denial of statements in the confession does not negate the value of the confession, and the defendant bears the burden of proving that the confession is false.<sup>84</sup>

Given the Court's interpretation of the principle of proximity, based on the theory of procedural proximity, a confession given during the pretrial investigation stage has greater value than any subsequent declarations and invalidates any subsequent declarations to the contrary.<sup>85</sup> As noted in the Joseph Crowley Report, the principle of proximity was originally "intended to function as a procedural protection for the accused".<sup>86</sup> Accordingly, this principle placed the greatest weight "on a statement made to the judge, emphasizing the importance of the judge's ability to assess the evidence directly".<sup>87</sup> The theory, as interpreted by most Latin American countries and the Inter-American Commission on Human Rights, assumed that acts which occur in the presence of a judge are more valuable because the judge will guarantee the veracity of the statement, as well as insure that the defendant was not coerced. However, the Mexican Supreme Court has given this principle the opposite meaning.<sup>88</sup> It has interpreted "proximity" to refer to the confession given

<sup>81</sup> Código de Procedimientos Penales del Distrito Federal [D.O.] Aug. 29, 1931 at articles 136 and 137.

<sup>82</sup> According to Yamin and Noriega, "In Mexico, the confession has historically been treated by judges as one of the most valuable types of evidence [...] Notwithstanding significant evidence indicating that involuntary confessions are unreliable, judges in Mexico view confessions to have the most probative value". Alicia Aly Yamin & Ma. Pilar Noriega, *The Absence of the Rule of Law in Mexico: Diagnosis and Implications for a Mexican Transition to Democracy*, 21 LOY. L. A. INT'L & COMP. L. J. 467, 499 (1999).

<sup>83</sup> CONFESIÓN, VALOR DE LA, Primera Sala, S.C.J.N. [SUPREME COURT], *Semanario Judicial de la Federación y su Gaceta*, Sexta Época, Segunda Parte, XLIV, February 1961, p. 49. (Mex.).

<sup>84</sup> RETRACTACIÓN, VALOR PROBATORIO DE LA PRIMERA CONFESIÓN. Primera Sala, S.C.J.N. [SUPREME COURT], *Semanario Judicial de la Federación y su Gaceta*, Sexta Época, Segunda Parte, XC, December 1962, p. 27 (Mex); and CONFESIÓN ANTE EL MINISTERIO PÚBLICO, RETRACTACIÓN, Primera Sala, S.C.J.N. [SUPREME COURT], *Semanario Judicial de la Federación y su Gaceta*, Sexta Época, Segunda Parte, XXXIX, September 1960, p. 41 (Mex.). In a later case, the Court stated that if a defendant claimed to have been forced to make a first confession before the *Ministerio Público* through torture or coercion, it was his/her duty to prove that torture had in fact taken place. See RETRACTACIÓN, CONFESIÓN ANTE EL MINISTERIO PÚBLICO, Primera Sala, S.C.J.N. [SUPREME COURT], *Semanario Judicial de la Federación y su Gaceta*, Sexta Época, Segunda Parte, XVI, Octubre 1958, p. 232 (Mex.).

<sup>85</sup> JESÚS ZAMORA PIERCE, GARANTÍAS Y PROCESO PENAL 185 (2001).

<sup>86</sup> The Joseph R. Crowley Report, *supra* note 60.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

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in the time closest to the perpetration of the alleged acts, as opposed to the one rendered in the presence of a judge.<sup>89</sup> Yamin and García have pointed out that, in Mexico, “Given the theory of the procedural proximity of the evidence, the initial declarations of the accused receive priority since the corresponding legal value had been given to them because they were issued within proximity to the acts”.<sup>90</sup> If a defendant makes a confession during initial questioning, the court will give it greater weight.

When an initial declaration was given at MH5, the police officers who brought the defendant in would be present, along with the detainee’s defender or “person of his or her confidence”.<sup>91</sup> When arrests were made *en flagrancia*, the police officers who made the arrest were called in as eye witnesses, further implicating the defendants.

As a final note, it is important to mention that when a case file is closed as unsolved, either because no suspects were identified or because the warrant did not result in an arrest, the public prosecutor’s Office that opened the case stores the case file until it is declared permanently closed.<sup>92</sup> In these cases, the file never leaves the agency. When an arrestee is in custody or a defendant has been granted bail, once the pretrial investigation phase is completed the case file is sent to a different public prosecutor, known as the trial prosecutor, who pursues the case in the courts from the instruction phase to the sentencing phase.

Mexican prosecutors obtain convictions in almost every case when there is an indictment; the circumstances involve the existence of a confession, hardly any investigation of the fact, and no plea-bargaining whatsoever.<sup>93</sup>

The National Institute of Statistics (INEGI) reports that 87% of the rulings made by Mexico’s local criminal courts in 2003 ended up in convictions.<sup>94</sup>

In Mexico City, 93.4% of the rulings made by the city’s local criminal courts ended up in convictions.

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<sup>89</sup> DECLARACIÓN PRIMERA DEL REO, VALOR DE LA. Primera Sala, S.C.J.N. [SUPREME COURT], Semanario Judicial de la Federación y su Gaceta, Sexta Época, Segunda Parte, XLIII, p. 37 (Mex.) and RETRACTACIÓN Y APLICACIÓN DEL PRINCIPIO DE INMEDIATEZ, Primera Sala, S.C.J.N. [SUPREME COURT], Semanario Judicial de la Federación y su Gaceta, Sexta Época, Segunda Parte, LVII, p. 58 (Mex.).

<sup>90</sup> Alicia Ely Yamin & Ma. Pilar Noriega, *supra* note 82.

<sup>91</sup> Article 20 of the Mexican Constitution establishes that a defender or “person of his or her confidence” be present at the time of the initial declaration. However this right is only fulfilled in form and in most cases, defendants do not have any defense present at this time.

<sup>92</sup> This is due to the term barring of the penalty. Reglamento de la Ley Orgánica de la Procuraduría General de Justicia del Distrito Federal, *supra* note 18 at art. 25.

<sup>93</sup> See OPEN SOCIETY JUSTICE INITIATIVE, MYTHS AND PRETRIAL DETENTION IN MEXICO 14 (2005)

<sup>94</sup> See the National Institute of Statistics (INEGI) at <http://www.inegi.gob.mx/estadisticas>.

## V. Conclusions

In Mexican criminal procedure, the pretrial investigation phase is the bottleneck in the system. During this phase, many cases become inactive files (*archivo muerto* —permanently unsolved—). Mexico's public prosecutors —along with clerks, the judicial police and experts— are responsible for investigating crimes and bringing those responsible to court. Mexican criminal procedure is structured on the basis that criminal investigation and gathering evidence are key in finding suspects and prosecuting them. However, at the public prosecutor's offices I observed very little or no investigation takes place. Most procedures which were initiated without a detainee end up unsolved. In many cases, crime victims simply decide not to report the crime, fearing the long and bureaucratic procedures or anticipating the system's ineffectiveness. In cases where an arrest warrant is issued, relatively few arrests result, and many cases that involve a detainee result from an arrest without a warrant. In those cases where an arrestee is brought before a public prosecutor, prosecution and later convictions are the norm. Public prosecutor's offices are an extremely important part of the Mexican justice system. For many people, the agencies are not only the entrance to the criminal justice system, but also a first approach to the legal system. People arrive at the agencies with all types of issues. Some of these issues are legal, others are not. Some are criminal law issues and others are not. From divorces, inheritance problems, lost driver's licenses, to reporting crimes, people arrive at public prosecutor's offices because it is the only legal institution they seem to know about and choose it as their first approach the legal system.

As previously noted, the ICESI survey indicated that only 24% of the crimes that occurred in Mexico City in 2002 were reported.<sup>95</sup> This paper provides several possible explanations for crime victims' reluctance to report a crime.<sup>96</sup> The participant observations conducted for this study at the two Miguel Hidalgo public prosecutor's offices demonstrate that the fears expressed by victims about the agencies and their reluctance to attend have sound bases. Initiating a criminal procedure is a drawn-out and time-consuming experience that usually yields no positive result. Moreover, once a procedure has been opened, victims are often not informed about the status of their procedure —and they need to pay gratuities to receive information, a copy of their file or a copy of their report.

Today, public prosecutors and police officers unilaterally decide if and when to initiate a criminal procedure, and if and when to prosecute. Except for the internal formal case file review process, the work of public prosecutors goes unchecked, and they are not held accountable for their

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<sup>95</sup> See ICESI survey on Victimization. Available at <http://www.icesi.org.mx/index.cfm?cat ID=944>.

<sup>96</sup> *Id.* In the ICESI survey, many respondents (39%) stated they had not reported a crime because they felt reporting it would be a waste of time, others (20%) expressed a lack of trust in the authorities, a further 17% showed concern over the long and complicated procedures.

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decisions. Part of this lack of accountability results from the fact that case files are hidden from public view and can only be accessed by the parties directly involved in the case. Today, Mexico's criminal investigations and criminal procedures are conducted virtually in secret. Because these files are the sole source of information on each proceeding, and because the public has no access to these files, much of what happens in Mexico's criminal procedure is inaccessible to independent scrutiny.

Aware of the ineffectiveness of police and prosecutorial organizations and activities, Mexico's authorities continue to endorse legal reforms that increase both sanctions and the discretion of the police and prosecutors. As a result of these reforms, there has been an increase in the number of arrests of petty criminals, a dramatic rise in the prison population, a reduction of procedural guarantees and the extensive use of arrests without warrants.<sup>97</sup> Reforms have failed to address the main problem in criminal prosecution: the lack of investigation, without which criminal procedure is simply an empty process damaging both victims and defendants.

Many of the shortcomings of Mexico's criminal procedure result from the lack of preparation and resources available to conduct investigations, without which the pretrial investigation phase becomes a vacuous process. Experts and prosecutors need better resources and the necessary equipment and personnel to conduct investigations. It is essential for public prosecutors and clerks to leave their desks and become real investigators. Today, agents, experts and even public defenders in Mexico City work in precarious conditions. They receive extremely low salaries<sup>98</sup> and have an overwhelming workload.

Institutions gain dignity and respect from many sources. One of these sources is found in the physical space in which they operate. Social and legal institutions are immersed in symbols that lead us to understand the world in certain ways and give authority and power to institutions. Laws and procedures do not exist exclusively on paper. The manner in which they come to life give them a defining character and meaning. Today's public prosecutor's offices send a mixed message. Mexican citizens see the agencies' decaying facilities, torn furniture and rusty chairs as reflections of the institutional decay that characterizes and pervades the agencies' operations and moral code. With torn and rusty furniture and no tools, it is doubtful that Mexican citizens, public prosecutors and clerks will grasp the importance of their function.

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<sup>97</sup> See <http://www.spf.df.gob.mx/htmls/ssp-sec-informe-2004-2.html>. According to the Public Security Ministry, when the reforms to the criminal code augmenting sanctions and further expanding the circumstances that deny bail were enacted in 2003, prison population increased 20% by 2004.

<sup>98</sup> The monthly salary of a local public prosecutor ranges between 8,000 and 12,000 Mexican pesos (approximately 800 to 1,200 USD per month) depending on their seniority.

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