



Advocacy for Human Rights in the Americas

REPORT



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MISSION UNACCOMPLISHED

Mexico's New Criminal Justice System Is Still a Work in Progress

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INTRODUCTION

After eight years of reform, Mexico has a new criminal justice system—at least on paper. When the Mexican Congress passed a series of constitutional reforms to Mexico's justice system in 2008, it was lauded as an important step towards making the criminal justice system more effective, efficient, and transparent and as one of Mexico's most powerful and ambitious tools to counter impunity and corruption. Given the magnitude of the reforms, the federal and state governments were given eight years to make the full transformation from a primarily inquisitorial, written-based system to an adversarial, oral-based system in which the prosecution and defense present competing evidence and arguments in open court. As of June 18, 2016, the transition to the new criminal justice system (*Nuevo Sistema de Justicia Penal*) is officially over. But a fully reformed system is far from being a reality in the country.

The reformed system had to be implemented in Mexico's 31 states and Mexico City for the investigation and prosecution of crimes at both the federal and state levels. Although authorities asserted that by the June 18 implementation deadline, the new system was operating to some extent in all of the country for state-level crimes, they reluctantly acknowledged that only four states met all the criteria to consider the system fully operational (Coahuila, Nuevo León, Yucatán, and Chihuahua).¹

Regarding crimes under federal jurisdiction, Mexican authorities said in an interview with WOLA that the new system is operating in 28 states; however, in

states with high levels of violence and the presence of organized crime, such as Guerrero, Tamaulipas, Jalisco, and Baja California, the new system just began to operate in June 2016.² Federal crimes are under the authority of the Attorney General's Office (*Procuraduría General de la República*, PGR) and include crimes related to drug trafficking and organized crime.

Apart from a disorganized and slow implementation process, the full transition to the new system will be delayed until prosecutors and judges conclude thousands of cases opened under the inquisitorial or "old" system, which has faced backlogs for decades. In the old system, federal prosecutors usually take over seven months before presenting charges against a suspect and on average each prosecutor handles forty cases.³ Additionally, on June 15, 2016—just three days before the transition to the new system officially ended—the Mexican Congress finally approved a key set of amendments (*miscelánea penal*) that defined the operational and procedural aspects of the adversarial system, including relevant due process exceptions in organized crime cases.⁴ Implementing these amendments will also delay the complete transition to the adversarial system.

Given these complications, an evaluation by the Mexican think tank CIDAC estimated that the full implementation of the new system could take 11 more years, meaning that it could be until 2027 that people prosecuted in Mexico fully benefit from the new safeguards of the reformed system.⁵

CHANGES UNDER THE NEW SYSTEM

The new system incorporates significant changes to improve investigations and criminal trials in Mexico. An essential change was to include the presumption of innocence and human rights as core principles in criminal investigations. All police now work under the public prosecutor's office for the investigation of crimes: police can now receive reports of crimes and act as “first responders” to the scene. Additionally, agents are now responsible for preserving crime scenes and taking basic investigative actions before prosecutors take control of the scene (before only investigative police had these responsibilities).

Other changes under the new system include creating a separate judge (*juez de control*) that ensures human rights are respected throughout an investigation. Additionally, an independent judge to oversee that sentences are enforced (*juez de ejecución*) was created. There is an improved justice system for adolescents, alternative measures to pretrial detention, and alternative case resolution methods, such as mediation and plea bargaining. Victims and defense lawyers also have a more active participation in the process.

Moreover, the new criminal justice system in Mexico is fundamentally oral meaning that prosecutors, defense lawyers, and judges will shift from a written-based system to an oral-based, adversarial system with cross examinations. These changes require a different set of skills for case management and arguing and hearing cases in court.

SERIOUS DELAYS IN IMPLEMENTING THE REFORMS

There is no question that Mexico needed to reform its criminal justice system: the most recent national victimization surveys from 2015 show that over 92 percent of crimes in the country were not investigated or reported to authorities, primarily because victims do not trust authorities or they think that reporting crimes in Mexico is a waste of time.⁶ The majority of the population has little trust in prosecutors and judges and over 50 percent perceive them as corrupt. Less than half of the crimes that are actually investigated show any progress or are resolved.

The work of Mexican prosecutors in criminal investigations is questionable: according to a 2012 survey conducted in federal prisons, over 43 percent of the detainees testified before the prosecution without a defense lawyer and 55 percent of the detainees that had pleaded guilty, did so after being subject to some form of harassment, such as torture,

pressure, or threats.⁷ The results of investigations have also been poor: between 1999 and 2012, only 14.3 percent of federal prosecutions ended in a conviction; at the state level, between 2000 and 2012, this percentage decreased to 7.2 percent.⁸

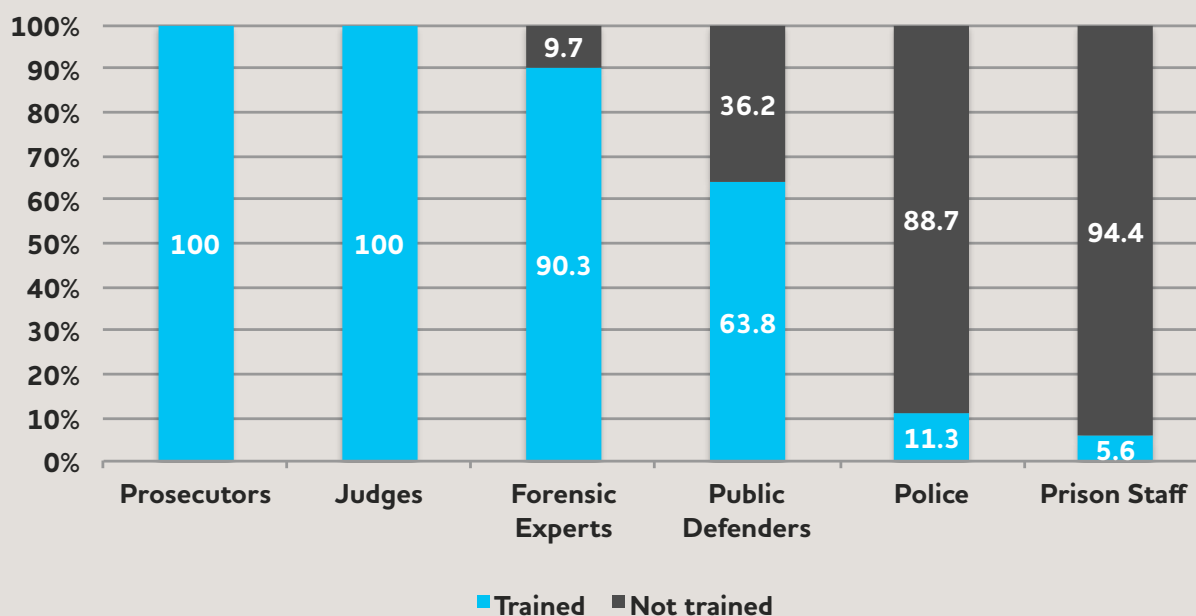
During the first years of the reform under former president Felipe Calderon and at the onset of the Peña Nieto administration, authorities did not prioritize the implementation of the new system. Although in 2008 the Mexican government created a Technical Secretariat (*Secretaría Técnica del Consejo de Coordinación para la Implementación del Sistema de Justicia Penal*, SETEC) to coordinate the implementation of the new system throughout the country, the SETEC did not have a budget during its first year and did not begin to function until 2009, one year after the reforms were approved.⁹ The real rush to transition to the new system came as the deadline steadily approached. For instance, it

wasn't until March 2014 (six years after the reforms were approved) that Mexico's Congress issued the National Code of Criminal Procedures setting forth a common set of procedures for all of the states and the federal government for the investigation and prosecution of crimes under the new system.¹⁰

President Peña Nieto has stated that Mexico spent MXN\$ 21 billion (approximately US\$ 1.1 billion) for the implementation of the new system.¹¹ In practice, the allocation of these resources has been disorganized and the training unequal, which has diminished the functionality and effectiveness of

the new system in the short term.¹² For instance, while Mexico provided over MXN\$ 484 million (approximately US\$ 25 million) in training for actors under the new system, by September 2015 only prosecutors and judges had been fully trained. Meanwhile, 9.7 percent of forensic experts, 36.2 percent of public defenders, 88.7 percent of police officers, and 94.4 percent of penitentiary staff had received no training.¹³ Lastly, as WOLA has highlighted previously, authorities do not have adequate mechanisms to evaluate the results and effectiveness of the training.¹⁴

PERSONNEL TRAINED VS. NOT TRAINED ON MEXICO'S NEW JUSTICE SYSTEM [AS OF SEPTEMBER 2015]



Source: <http://bit.ly/1T4fSzY>

OLD HABITS DIE HARD

TRANSFORMING HOW AUTHORITIES UNDERSTAND THE RULE OF LAW

With authentic political will, proper planning, and transparency, Mexico could overcome the existing technical gaps to make the system fully operational. But this will not be enough to improve criminal investigations and make due process a reality in all criminal cases. The major challenge is ending the entrenched practices of the operators of the

system, including the prosecutors, judges, and lawyers.

Thus far, operators' performance under the new system shows alarming signs of repeating the old practices that obstructed professional investigations for decades.¹⁵

- **Bureaucracy in hearings.** When prosecutors appear before judges under the new system to present and defend a case, they often just read the content of the investigative files or statements prepared in advance, instead of presenting and defending cases in an articulated and convincing way. This causes hearings to last longer than they should and reproduces a bad practice of the old system where excessive information hinders the process and makes it difficult to understand the content of a criminal investigation.¹⁶
- **High rates of suspects “caught in the act.”** The majority of federal cases under the new system involve suspects who are “caught in the act” of committing a crime (*“flagrancia”* or *“cuasi-flagrancia”*).¹⁷ This means the suspects detention is not the result of an investigation and prosecutors do not practice the skills to investigate crimes under the new system. Under the old system, authorities often abused the use of *“flagrancia”* or *“cuasi-flagrancia”* to detain individuals and avoid a professional investigation of cases. According to a 2012 study conducted in federal prisons, about half of convicted inmates surveyed were detained in *“flagrancia.”*¹⁸
- **The new system will not end torture automatically.** According to UN Special Rapporteur for Torture Juan Mendez, torture in Mexico is used mainly from the moment a person is detained until he/she is brought before a judge with the purpose of punishing the person and as a way to extract confessions or incriminating information.¹⁹ Under the new system there are relevant safeguards against torture, for example: supervision over the legality of detentions during the different stages of an investigation (*control de detención*); the implementation of an official registry of detainees; and the fact that prosecutors can no longer charge a suspect of a crime based on his/her confession. The General Law on Torture to be approved in the Mexican Congress in the coming months should further develop mechanisms to prohibit the use of evidence obtained through torture. However, experience shows that even with safeguards, the use of torture in criminal proceedings persists. The case of Israel Arzate is illustrative of this situation.²⁰ In February 2010, Arzate was arbitrarily detained by Mexican soldiers in Ciudad Juarez, Chihuahua and taken to a military base where he was beaten, given electric shocks, and asphyxiated repeatedly until he gave a false confession that was used in a criminal investigation against him under the new system. When Arzate told the judge that he had been tortured into giving the confession, the judge refused to view the visible marks on his body, failed to open an investigation into possible wrongdoing by the soldiers, and instead ordered that his trial proceed. After three years in prison, Arzate was finally released through a decision handed down by the Supreme Court in November 2013.

- **The unclear role of armed forces in criminal investigations.** The new system establishes the role of a “first responder,” defined as “the authority with public security roles in the place where a crime has been committed.”²¹ The broad definition has put to debate whether the Army and Navy, which carry out public security tasks as part of the country’s national security strategy, can act as “first responders” and therefore, receive crime reports, preserve crime scenes and the chain of custody of evidence, carry out investigative actions until prosecutors arrive at the scene, and even detain suspects caught in the act of committing a crime (“*flagrancia*”). This possibility is particularly worrisome for cases of crimes and human rights violations that involve members of the armed forces and may risk the independence and success of investigations. For instance, in the June 2014 massacre of 22 civilians by soldiers in Tlatlaya, State of Mexico—a case in which at least 12 of the victims were extrajudicially executed—the National Human Rights Commission (*Comisión Nacional de los Derechos Humanos*, CNDH) determined that the Army altered the crime scene to make it appear as if all of the victims died in a gun battle.²² In the March 2010 case of the unlawful killing of two university students in Monterrey, Nuevo Leon, the CNDH found that the soldiers tampered with the crime scene to incriminate the students.²³

EXCEPTIONS TO DUE PROCESS FOR ORGANIZED CRIME CASES

Mexico’s criminal justice reforms are undoubtedly important but they also included due process exceptions for crimes related to organized criminal activities that severely limit or negate the safeguards of the new system. Given the high number of crimes in Mexico that are linked to or prosecuted as organized crime cases, these exceptions represent concerning limitations to due process guarantees for many detainees.

These exceptions are also relevant in terms of accountability and justice for grave human rights violations in Mexico, as human rights cases are often investigated as ones involving organized crime. For instance, the 2010 and 2011 massacres of 265 migrants in San Fernando, Mexico and the enforced disappearance of the 43 students from Ayotzinapa were initially investigated by the PGR’s Special Prosecutor’s Office for Organized Crime (*Subprocuraduría Especializada en Investigación de Delincuencia Organizada*, SEIDO).²⁴

The exception rules are based on a broad definition of organized crime: “a de facto organization of three or more persons that perpetrate crimes on a permanent or repeated basis.” This broad definition

can potentially widen the range of cases that fall under the exceptions and restrict defendants’ rights. Some of these due process exceptions for organized crime include: 1) a prolonged form of pretrial detention, called “*arraigo*,” in which the prosecutor can request the detention of a person with suspected links to organized crime for up to 80 days without any formal accusation or indictment; 2) mandatory pretrial detention; 3) the interception of private communications; and 4) restricted communication and visitation rights.

The due process exceptions for organized crime are a key part of the current problems with Mexico’s “old” criminal justice system. In his report on Mexico, UN Special Rapporteur on Torture Juan Mendez concluded that the use of torture in the country is exacerbated by the exceptions for organized crime and that *arraigo* violates human rights, exposes the detainee to torture, and it is ineffective (only 3.2 percent of individuals subject to *arraigo* since 2008 have been convicted of any crime).²⁵

The Group of Experts that assisted the Mexican government in the investigation of the 43 disappeared Ayotzinapa students carried out an

in-depth analysis of the medical reports of 17 key suspects and found strong evidence to suggest that the suspects were tortured.²⁶ The Group of Experts noted that the majority of the medical reports conducted when the suspects were first detained did not register significant injuries while the medical reports conducted hours after suspects were in SEIDO custody recorded several injuries. In the case of the suspect Agustín García Reyes, the first medical report after his detention recorded one injury; a medical report from seven hours after his detention recorded 30 injuries that were not present previously. Subsequent medical reports include additional injuries, leading the Group of Experts to conclude that García Reyes received sequential injuries while he was in custody that correspond to torture or mistreatment.

In regards to pretrial detention, as of January 2016, over 41.4 percent of inmates in Mexican prisons were awaiting a judgment.²⁷ This despite the fact that prison overcrowding is a significant problem,

with an average of 18 percent overpopulation in all prisons.

SEIDO agents have received training and the office has opened cases under the new system.²⁸ However, judging by the amendments that the Mexican Congress approved on June 16 to the Federal Law on Organized Crime, the due process guarantees of the new system, as well as the right to privacy, will continue to be severely limited for cases involving organized crime.²⁹ These recent amendments to the organized crime law could extend the due process exceptions to all persons that intentionally participate in the illicit activities of criminal organizations.

Given how seldom the rule of law has prevailed in the country, the continued use of these tools and exceptions could have grave consequences and hinder the use of professional, scientific techniques in criminal investigations.

U.S. ASSISTANCE FOR JUSTICE REFORM IN MEXICO

The United States has supported judicial reform efforts in Mexico for more than a decade, and this assistance has increased with the Mérida Initiative.³⁰ The U.S. Agency for International Development (USAID) is currently implementing an US\$81 million rule of law program to support Mexican states and the federal government in the reforms, including through technical assistance. The program also supports civil society organizations in their activities to monitor and support the reforms. Furthermore, the Department of Justice (DOJ) provides technical assistance and trainings for federal justice sector personnel.

As Mexico works to consolidate the implementation of the new system in Mexico, the U.S. government should continue to provide robust support for

judicial reform efforts in Mexico through the State, Foreign Operations, and Related Programs Appropriations legislation. This support should ensure that USAID and the DOJ are coordinating their efforts and measuring the impact of U.S.-supported training, including whether training has increased the effectiveness of justice sector officials and their capacity to apply the skills required under the new system. Additionally, training should be provided to all actors within Mexico's justice sector: judges, prosecutors, investigators (police), forensic experts, private lawyers, and public defenders. USAID and the DOJ should also continue to support the civil society organizations that are monitoring the government's implementation of the system and providing independent and critical assessments on the progress and shortcomings.

LOOKING FORWARD

On June 18, authorities in Mexico celebrated with great fanfare the last day of the legal deadline for the implementation of the new system and called it a “mission accomplished.” On June 20, federal authorities published an agreement for the “consolidation” of the adversarial system to which state governments can choose whether or not to adhere.³¹ This opt-in clause may make it more difficult to track the implementation and consolidation of the reforms at the state level.

While the new criminal justice system is technically in place in Mexico, its full implementation must be seen as a long-term objective for the Mexican government. Moreover, there is a latent risk that the old entrenched practices that fostered impunity and corruption will prevail. Below are recommendations the Mexican government should consider as it moves forward with the full implementation of the reformed justice system at the state and federal levels.

- Establish a transparent and organized mechanism to report on a regular basis the remaining gaps for the full operation of the system and the results obtained thus far. In doing so, the government must provide quality and substantial information. It should also acknowledge that, while training is important, training alone will not make the system operational. Special emphasis must be given to the skills and capacity of operators to act under the new system and the development of clear indicators to measure the impact of the training they receive.
- Authorities must abandon the approach of “quantity over quality” in the criminal justice system. Successful case outcomes should no longer be measured by the number of arrests made but by the legality of the procedures undertaken during an investigation and the resolution of cases in a way that complies with the new system, including the efficient use of alternative dispute resolution and alternatives to incarceration.
- Ensure accountability for grave human rights violations under the new system. Congress should pass the General Laws on Torture and Disappearances and ensure that the new laws are in line with the new criminal justice system. Notably, the General Law on Torture should strengthen mechanisms to exclude evidence obtained through torture and also allow for investigations into torture accusations to take place without impeding a case’s original criminal investigation. Additionally, federal and local prosecutors must have trained staff to carry out investigations into grave human rights violations under the new system. Lastly, the Mexican Congress must revisit the exceptions to due process for organized crime, as well as the participation of armed forces in public security tasks, including their potential participation in criminal investigations under the new system.

NOTES

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ABOUT WOLA

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