

ENFORCEMENT UNDER A DEMOCRATIC RULE OF LAW.  
CRIMINAL INVESTIGATION AND PROSECUTION IN MEXICO  
AND HUMAN RIGHTS VIOLATIONS IN THE WAR AGAINST  
ORGANISED CRIME (2006-2011)

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## ABSTRACT

The purpose of this work is to examine the relationship between the weakness of criminal investigation and prosecution and human rights violations in the context of the strategy against organised crime in Mexico (2006-2011). It attempts to show how the strategy has conceived law enforcement, an essential aspect of the rule of law, predominantly as a matter of public security or police effectiveness, and not as a multidimensional responsibility in which the investigation, prosecution, administration of justice and rehabilitation components are equally relevant. The focus is set on the performance of the Office of the Prosecutor General (PGR), the institution of the executive branch responsible for investigating presumed crimes and acting as official prosecutor (the part that assumes the role of the accuser during criminal trials) in the federal jurisdiction. The fight against organised crime is not seen as the cause of human rights violations but rather as the context in which they occur. By observing the patterns of violations perpetrated by federal security agents (torture, cruel, inhuman or degrading treatment, arbitrary detention and illegal searches) and statistics of the PGR's activities in the 31 states and the Federal District (Mexico City), the study shows that most violations occur there where public prosecution has had the weakest performance. These findings are viewed through the concept of democratic rule of law since, when enforcement is consistent with it, rules aiming at guaranteeing human rights are observed.

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A José Antonio, a quien yo más quiero

## TABLE OF CONTENTS

LIST OF ACRONYMS.....	1
INDEX TO FIGURES AND TABLES.....	3
<b>INTRODUCTION.....</b>	<b>4</b>
<b>THE THEORETICAL FRAMEWORK. Enforcement under a Democratic Rule of Law: the Role of Formal Justice in Criminal Investigation and Prosecution.....</b>	<b>11</b>
The State and Rule of Law: the Centrality of Enforcement .....	12
Enforcement and its Conditions in Different Conceptualisations of Rule of Law .....	13
Enforcement within a Democratic Rule of Law .....	16
Separation of Powers and Separation of Enforcement Functions.....	18
Investigation and Prosecution: Formal Justice in Criminal Proceedings .....	20
<b>INTRODUCTION TO THE CASE STUDY .....</b>	<b>25</b>
<b>THE ACTOR. The PGR: Investigation and Prosecution in Mexico .....</b>	<b>28</b>
Institutional and Normative Aspects of Investigation and Prosecution .....	28
Prosecution and Investigation: the Actual Practice .....	32
The PGR and Antidrug Policies: Institutional Weakness vs. Corruptive Strength.....	36
<b>THE CONTEXT. The War against Organised Crime (2006-2010) .....</b>	<b>41</b>
From a Public Security to a National Security Problem.....	41
Launching the War against Organised Crime .....	45
The Military in Public Security .....	47
<b>THE OBSERVABLE FACTS. Human Rights Violations and their Circumstances.....</b>	<b>52</b>
The Unacceptable Consequence of the War on Drugs .....	52

Privileging Detention while Neglecting Investigation and Prosecution.....	59
Criminal Justice Reform .....	63
Summing up.....	66

**THE RELATIONSHIP. Incidence of Human Rights Violations**

**and Effectiveness of Prosecution by State .....68**

Measuring the Performance of the PGR and Examining Human Rights	
Violations by Security Agents .....	69
Observing the Tables .....	74
The Relationship Shown Graphically.....	75
Summary of Findings .....	79
Limitations and Strengths .....	81

**CONCLUSIONS .....84**

**BIBLIOGRAPHY.....88**

## LIST OF ACRONYMS

ACHR	American Convention on Human Rights
AFI	Federal Investigations Agency
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CISEN	National Security and Investigation Centre
CNDH	National Human Rights Commission
DEA	United States Drug Enforcement Agency
DFS	Federal Security Directorate
ICCPR	International Covenant on Civil and Political Rights
ICESI	Citizen Institute for Research on Insecurity
IFE	Federal Electoral Institute
INEGI	National Institute for Statistics and Geography
PF	Federal Police
PAN	National Action Party
PFM	Federal Ministerial Police
PGR	Federal Office of the Prosecutor General
PJF	Federal Judicial Police
PRD	Party of the Democratic Revolution
PRI	Institutional Revolutionary Party
SEDENA	Secretariat of National Defence

SEMAR	Secretariat of the Navy
SIEDO Crime	Specialised Office for the Investigation of Organised
SNSP	National Public Security System
UNHCHR	United Nations High Commissioner for Human Rights

## INDEX TO FIGURES AND TABLES

<b>Fig. 1.</b> Perpetrators of Human Rights Violations among Federal Security Agencies (2000-2010) .....	34
<b>Fig. 2.</b> Homicides Related to the War against Organised Crime According To Official Statistics (2006-2011).....	55
<b>Fig. 3.</b> Homicides Related to the War against Organised Crime According to Semanario Zeta (2006-2011) .....	56
<b>Fig. 4.</b> Complaints of Selected Human Rights Violations (2000-2011).....	57
<b>Fig. 5.</b> Complaints of Cruel, Inhuman or Degrading Treatment (2000-2011) .....	58
<b>Fig. 6.</b> Complaints of Torture (2000-2011) .....	59
<b>Fig. 7.</b> Perpetrators of Human Rights Violations among Federal Security Agencies (2000-2011) .....	60
<b>Fig. 8.</b> Complaints of Torture by Perpetrator (2000-2011).....	62
<b>Table 1.</b> Selected Human Rights Violations in National and International Legislation.....	72
<b>Table 2.</b> Average of Enforced Arrest Warrants by the PGR (as percentage of received during the year plus pending from the previous year) by Federal Entity (2000-2010) .....	74
<b>Table 3.</b> Complaints of Human Rights Violations Related to the Provision of Security by Federal Entity (Jan-Jun 2011) .....	75
<b>Fig. 9.</b> Enforced Arrest Warrants by State (2000-2010) and Complaints of Selected Human Rights Violations (2011).....	78
<b>Fig. 10.</b> Enforced Arrest Warrants by State (2000-2010) and Complaints of Human Rights Violations in the Security Sector According to the CNDH Rank (2011).....	81



## INTRODUCTION

In 2000 –in the midst of electoral democratisation– Mexico’s National Human Rights Commission (CNDH) reported 9 complaints of torture and 205 of cruel, inhuman or degrading treatment. By 2009 the first had risen to 33 and the latter to 1161.<sup>1</sup> This dramatic increase (366% and 566%, respectively), as has been noted by the CNDH<sup>2</sup>, Human Rights Watch<sup>3</sup>, Amnesty International<sup>4</sup> and the United Nations High Commissioner for Human Rights (UNHCHR)<sup>5</sup>, is visibly linked to the strategy against organised crime –primarily drug trafficking– launched by President Felipe Calderón (2006-2012) a few days after taking office.

From the beginning, the strategy involved the participation of the military in law enforcement tasks. It can hardly be surprising that since 2006 the majority of the perpetrators of these grave human rights violations (as is the case of others related to the provision of security, such as arbitrary detention and illegal searches)<sup>6</sup> are members of the armed forces. Nevertheless, affirming that human rights violations

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<sup>1</sup> CNDH, “Reporte de actividades 2009”, 2010.

<sup>2</sup> Declarations of José Luis Soberanes, president of the CNDH (1999-2009), in the website of the CNDH.

<sup>3</sup> Human Rights Watch, “World Report 2011: Mexico”.

<sup>4</sup> Amnesty International, “México: Nuevos informes de violaciones de derechos humanos a manos del ejército”, March 2009.

<sup>5</sup> Press Conference by UNHCHR, Navi Pillay, Mexico City, 8 July 2011.

<sup>6</sup> Complaints of arbitrary detention went from 227 to 1197 and those of illegal searches passed from 145 to 1,014 in the first three years of the strategy, according to the CNDH, *op.cit.*.

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can be explained by the war<sup>7</sup> against organised crime, or by the presence of the military in the streets obscures a more complex reality about law enforcement in democratic societies and about the security crisis in Mexico.

One way of addressing and explaining human rights violations committed by security agents of the Mexican state is identifying the different elements of the problem and their part in it. If the military are recognised as the perpetrators –not the cause–, and the war against organised crime is seen as the context in which violations occur –again, not the cause– it is then possible to focus on: (a) the conditions that allowed for violations to become more recurrent; and (b) the actors, and the actions or omissions by which they contributed to creating or reinforcing these conditions.

It is the contention of this work that impunity, and the ineffective prosecution of crimes at its origin, are among the conditions that can have more relevance in explaining the pattern of human rights violations related to the provision of security. For this reason, the focus is set on the Office of the Prosecutor General (PGR), which apart from being responsible for integrating preliminary inquiries and presenting criminal cases to the courts in the federal jurisdiction, was the leading actor in counternarcotics policies until 2006.

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<sup>7</sup> Lacking a more accurate term, and being the word chosen by the Mexican government, “war” will be used to refer to the studied phenomenon. It must be noted that it is not an armed conflict or a civil or international war as defined by international law.

While studies about human rights violations in the war against organised crime in Mexico have centred on the perpetrators<sup>8</sup> or the normative framework<sup>9</sup>, few have looked at the different components of law enforcement separately. Even fewer have reckoned the importance of the institution in charge of investigating and prosecuting federal crimes.<sup>10</sup>

In many ways, the performance of the PGR reveals ambiguous aspects about the conception of rule of law that prevailed during the years of authoritarianism.<sup>11</sup> Some of these have persisted in spite of a democratising trend, and are clearly manifest in the deficient or absent prosecution of crimes. The resulting impunity has costly implications in terms of human rights violations, indicating that law enforcement often falls short of abiding by a democratic rule of law.

In order to further develop the idea of a relationship between a deficient criminal prosecution and human rights violations at the hands of federal security agents in Mexico, the study has been divided into six parts. The first one presents a theoretical framework by which formal justice in criminal investigation and

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<sup>8</sup> See Human Rights Watch, “Uniform Impunity. Mexico’s Misuse of Military Justice to Prosecute Abuses in Counternarcotics and Public Security Operations”, 2009.

<sup>9</sup> See Miguel Agustín Pro Juárez Human Rights Center, “Human rights under siege: Public security and criminal justice in Mexico”, 2008.

<sup>10</sup> The studies by Miguel Carbonell, “Cuando la impunidad es la regla. Justicia penal y derechos humanos en México” in *Boletín Mexicano de Derecho Comparado*, vol. 39, num. 116, 2006, pp. 351 - 369; and Gerardo Laveaga and Álvaro Vizcaíno, *Los desafíos en la capacitación de los agentes del ministerio público ante la reforma constitucional en materia penal*, Mexico, Instituto de Investigaciones Jurídicas UNAM, 2006, are among the few in this sense, but they largely concentrate on the relationship between the Public Prosecutor and the judiciary.

<sup>11</sup> It can be said that Mexico was authoritarian from the time of its independence from Spain in 1810 until the mid 1990s. However, the transition to electoral democracy in 2000 is commonly considered as marking the end of authoritarianism. See Soledad Loaeza and Jean- François Prud’homme (coords.), “Introducción General” in *Los grandes problemas de México. Instituciones y Procesos Políticos*, Mexico, El Colegio de México, 2010.

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prosecution is located at the centre of law enforcement within a democratic rule of law. The purpose of this chapter is to show law enforcement as a constitutive function of the state and to define the conditions under which it is to be exercised when the state is democratic. Criminal investigation and prosecution, as sub functions of enforcement, are seen in detail since, while carrying them out, a democratic state must respect the rights of the suspects that aim at guaranteeing formal justice. These rights forbid the violations that this study seeks to explain: illegal searches, arbitrary detention, torture and cruel, inhuman or degrading treatment. Because they tend to occur precisely during criminal investigation and prosecution –the stages that precede the presentation of suspects before a judge– they affect the capacity of the judiciary to offer fair trials and, thus, substantive justice. This section shows how, theoretically, a democratic rule of law is not viable when criminal investigation and prosecution are not lawful, accountable and respectful of human rights; when suspects are illegally detained, tortured to confess or incriminated with illegally obtained evidence. Impunity –for both criminals and human rights violators– is shown as the bridge between a flawed criminal prosecution and the human rights violations under study.

The second section looks at criminal investigation and prosecution in practice, through the perspective of the main actor in the case study. It introduces the PGR, the institution in charge of investigating and prosecuting federal crimes in Mexico. It is identified as the actor with the most weight in reinforcing the conditions of impunity which, as argued, allow for the studied human rights violations to occur. The disparity between normative/institutional guidelines and the actual practice of

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the institution is stressed throughout. The objective of this section is to explain the reasons that can account for the weakness of the PGR and its inability to perform its functions effectively and consistently with a democratic rule of law.

The third section describes the context in which the human rights violations under study take place: the war against organised crime. It explains how organised crime, and particularly drug trafficking, went from being a public security threat to one that menaces the state and its essential capacities. The objective of the section is to show how the Mexican state saw compromised its ability to provide public security to its citizens and how it acted in response. At the corruption or ineffectiveness of its civil apparatus –the PGR at the federal level, and also local prosecutorial and public security institutions– the executive opted for placing the military at the frontline of the fight. Not being trained to perform law enforcement tasks, agents of the army became the main group of perpetrators of human rights violations in this sector.

The fourth section concentrates on the negative outcomes of the war against organised crime, specifically on four human rights violations: arbitrary detention, illegal searches, torture and cruel, inhuman or degrading treatment. The chapter describes their trends and circumstances. It also shows how the decision to launch a war against organised crime in which the military play the leading role resulted in a disproportionate focus on public security, more precisely, on detaining suspects. The other functions of law enforcement, among which are investigation and prosecution, were relegated. The PGR did not see its capabilities to investigate and integrate criminal cases strengthened, while the military and the federal police

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focused on the use of force in their attempt to provide public security. This imbalance, evident in the gaps between the number of arrest warrants and detained suspects, and between the latter and the suspects brought before a judge, resulted in more impunity. This became patent as human rights violations skyrocketed, revealing a weak rule of law; one that stands at considerable distance from democratic values.

The fifth section seeks to identify whether a relationship between the selected human rights violations and an ineffective criminal prosecution can be observed among the 32 federal entities (31 states and the Federal District, Mexico City). The core of the chapter is a graphic that places complaints of human rights violations on the horizontal axis and enforced arrest warrants on the vertical axis. The states are placed accordingly, showing how the incidence of illegal searches, arbitrary detention, torture and cruel, inhuman or degrading treatment is greater there where the PGR enforced less arrest warrants over the last decade. The analysis demonstrates how mid to long term impunity is in fact a condition that favours human rights violations by security agents, and how the war against organised crime is the context and not the cause of those violations.

Finally, a set of conclusions is presented in the sixth part. The findings of the study are considered in light of the theoretical framework outlined in the beginning, and some reflections about the analysis are extracted.

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## THE THEORETICAL FRAMEWORK

### **Enforcement under a Democratic Rule of Law: The Role of Formal Justice in Criminal Investigation and Prosecution**

This chapter presents law enforcement as a constitutive function of the state and defines the conditions under which it is to be exercised in a democratic rule of law. Various definitions of rule of law are included, to stress the centrality of enforcement and the rules that should frame it. Subsequently, the conditions that make rule of law democratic are outlined. Enforcement can then be viewed through the concept of democratic rule of law. This makes it possible to explain the enforcement of criminal law as being divided into sub functions, among which investigation and prosecution are the object of a more detailed account. It is shown that, while carrying them out, a democratic state must respect the rights that aim at guaranteeing formal justice, and thus at preventing the violations that this study seeks to explain. Because criminal investigation and prosecution precede the presentation of suspects before a court, they affect the capacity of judges to offer fair trials and, thus, substantive justice. The purpose of the section is showing that, theoretically, a democratic rule of law is not viable when criminal investigation and prosecution are not lawful, accountable and respectful of human rights.



## The State and Rule of Law: the Centrality of Enforcement

In a classical essay Max Weber claimed that the state could be sociologically defined, not in terms of its ends, but in terms of the means peculiar to it; namely the use of force.<sup>12</sup> As such, he defined the state as “a human community that (successfully) claims the monopoly of the legitimate use of physical force within a given territory.” This, he clarified, does not imply that force is the normal or unique means of the state, but the one specific to it.<sup>13</sup>

In this sense, it can be argued that the essence of the state is closely related to enforcement, or the capacity to force people to comply with its laws.<sup>14</sup> In a liberal democracy, or more precisely, a polyarchy<sup>15</sup>, enforcement is framed by a set of rules that aim at protecting citizens from each other, but also at protecting citizens from abuses on the part of the state. As put by Juan Linz and Alfred Stepan, when they identify the five interacting arenas that need to be in place in a consolidated democracy,<sup>16</sup> a legal guarantee for the citizens’ freedoms is a condition *sine qua non*

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<sup>12</sup> Max Weber, *Politics as a Vocation*, 1919, para. 3, in H.H. Gerth and C. Wright Mills (trans.), *From Max Weber: Essays in Sociology*, New York, Oxford University Press, 1946.

<sup>13</sup> *Ibid.*, p. 4.

<sup>14</sup> Francis Fukuyama, “The Imperative of State-Building” in *Journal of Democracy*, num. 2, vol. 15, 2004, p. 21.

<sup>15</sup> According to Robert Dahl (*Polyarchy: Participation and Opposition*, New Haven, Yale University Press, 1971), it is a regime with two dimensions: i) contestation (permissible opposition and public competition) and ii) participation (the right to participate in public contestation) (p.4). Additionally, he identifies seven conditions for the existence of such a regime: 1) a path of transformation in which competitive politics precede the expansion in participation or a swift transformation in which both come at the same time (p.34); 2) violence is no longer available to the opposition (p.51) and the economy allows for some degree of competition (pp. 57-60); 3) a favourable level of development (pp. 64-74); 4) preferably a low level of inequality (pp. 82-102); 5) non-extreme political cleavages (pp. 105-119); 6) political beliefs and culture (activism) (pp. 124-162); 7) an external environment that poses no oppressing influence (pp. 189-191).

<sup>16</sup> According to Juan Linz and Alfred Stepan (*Problems of democratic transition and consolidation: Southern Europe, South America, and post-communist Europe*, Baltimore-London, Johns Hopkins University Press, 1996), these are: (1) conditions for the development of a free and lively civil society; (2) relatively autonomous and valued political society; (3) rule of law to ensure legal guarantees for citizens’

of such a political regime. For these authors the term “rule of law” fits within this condition. It corresponds to the guarantee and protection of citizens’ rights, and requires that the government exercises “effectively its claim to the monopoly of the legitimate use of force in the territory”<sup>17</sup>.

Following this logic, the capacity of a state to enforce its own laws is directly related to its ability to protect its citizens. At the same time, enforcement should adhere to a set of rules and conditions in order to be consistent with democracy. This gives us the two elements that are invariably included in the various definitions of rule of law: (1) the application of the laws of the state, and (2) the application in accordance with rules and conditions that guarantee the rights of persons. These elements imply that, in order to protect persons –and itself–, the state will not tolerate behaviours that break the laws (it will prosecute the suspect thief of my property) but it will enforce them in accordance with principles of justice and while respecting fundamental rights (it will bring the suspect offender before a court, presume his innocence and ensure that he has a fair trial, among others).

### **Enforcement and its Conditions in Different Conceptualisations of Rule of Law**

Pilar Domingo includes these elements in her two level definition, although she adds republican principles of separation of powers:

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freedoms and independent associational life; (4) a state bureaucracy that is usable by the new democratic government; and (5) an institutionalized economic society.

<sup>17</sup> *Ibid.*, p. 11.

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Rule of law can be taken to mean, on the one hand, limited government, normally in the form of the separation of powers, and on the other, the existence and real application of a body of rules and rights which regulate the relationship between the state and the individuals in a society, and between the individuals themselves. [...] [T]his basic normative set of rules and rights, normally embodied in a constitutional text, is minimally binding and overriding in the political and social order of a given community. At one level, rule of law means the mechanisms by which political power is checked and subordinated to pre-set rules of the game. At another level, it refers to the effective protection and advancement of rights entitlements, defined in the constitution.<sup>18</sup>

Likewise, Thomas Carothers speaks of their centrality while emphasising the aspects of “rule of law” that are more closely related to the functions of the judiciary and the institutions in charge of administering security and justice:

The rule of law can be defined as a system in which the laws are public knowledge, are clear in meaning, and apply equally to everyone. They enshrine and uphold the political and civil liberties that have gained status as universal human rights over the last half-century. In particular, anyone accused of a crime has the right to a fair, prompt hearing and is presumed innocent until proved guilty. The central institutions of the legal system, including courts, prosecutors, and police, are reasonably fair, competent, and efficient. Judges are impartial and independent, not subject to

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<sup>18</sup> Pilar Domingo, “Rule of Law, Citizenship and Access to Justice in Mexico” in *Mexican Studies / Estudios Mexicanos*, num. 1, vol. 15, 1999, p. 154.

political influence or manipulation. [...] [T]he government is embedded in a comprehensive legal framework, its officials accept that the law will be applied to their own conduct, and the government seeks to be law-abiding.<sup>19</sup>

Joseph Raz, even while he clarifies that the rule of law "is not to be confused with democracy, justice, equality (before the law or otherwise), human rights of any kind or respect for persons or for the dignity of man"<sup>20</sup>, also refers his definition to the enforcement of laws and its conditions:

1. All laws should be prospective, open and clear;
2. Laws should be relatively stable;
3. The making of particular laws [...] must be guided by open, stable, clear, and general rules;
4. The independence of the judiciary must be guaranteed;
5. The principles of natural justice must be observed (i.e., open and fair hearing and absence of bias);
6. The courts should have review powers [...] to ensure conformity to the rule of law;
7. The courts should be easily accessible; and
8. The discretion of crime preventing agencies should not be allowed to pervert the law.<sup>21</sup>

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<sup>19</sup> Thomas Carothers, "The Rule of Law Revival" in *Foreign Affairs*, no. 2, vol. 77, 1998, p. 96.

<sup>20</sup> Joseph Raz, "The Rule of Law and It's Virtue" in *The Law Quarterly Review*, vol. 93, 1977, p. 195.

<sup>21</sup> *Ibid.*, pp. 198-201.

This would fit what Guillermo O'Donnell calls a “minimal definition” of the concept. In it, “whatever law there is, it is fairly applied by the relevant state institutions” and includes the judiciary but is not exclusive to it.<sup>22</sup>

### **Enforcement within a Democratic Rule of Law**

For O'Donnell, the rule of law is “not just a congerie of legal rules, even if all have been properly enacted” but rather a legal system, where this “set of rules” has several characteristics in addition to being properly enforced.<sup>23</sup> He recognises the possibility of a much stronger link between democracy and rule of law. For him, the concept can be seen from the point of view of the theory of democracy and is more than “a generic characteristic of the legal system and of the performance of courts” and rather functions as “the legally-based rule of a democratic state”<sup>24</sup>. This is to say that the legal system can be in itself democratic. It is thus possible to speak of a “democratic rule of law” when:

- 1) It upholds the political freedoms and guarantees of polyarchy;
- 2) It upholds the civil rights of the whole population;
- 3) It establishes networks of responsibility and accountability, meaning that all agents, private and public, are subject to appropriate, legally established controls of the lawfulness of their acts.<sup>25</sup>

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<sup>22</sup> Guillermo O'Donnell, “Polyarchies and the (Un)rule of Law in Latin America: A Partial Conclusion” in Juan E. Mendez, Guillermo O'Donnell and Paulo Sergio Pinheiro (eds.), *The (Un)rule of Law and the Underprivileged in Latin America*, Notre Dame, University of Notre Dame Press, 1999, pp. 7-8.

<sup>23</sup> *Ibid.*, pp. 19 -20.

<sup>24</sup> *Ibid.*, p. 23.

<sup>25</sup> *Ibid.*, pp. 23-24.

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According to these conditions, how is enforcement to be conceived within a democratic rule of law? The first two imply that enforcement is to be consistent with the rights and freedoms endorsed by liberal democracy. These rights and freedoms are normally in a constitution (whether written or not), which may in turn refer to universal human rights. They represent legally defined limits to the action of the state and legally defined obligations that the state has towards citizens. In this sense, the state has the duty to enforce the laws since breaking them threatens the wellbeing of citizens; but its action is bound by laws and principles within the same legal framework. The third condition introduces a characteristic essential to the enforcement of laws in a democratic setting: accountability. It must be possible to verify whether an action or omission, by the state or by a citizen, conforms to the laws. If it is not the case, the pertinent institutions of the state have the duty to enforce them. Controls from within institutions and from other institutions, or from the citizens, must be in place to ensure that enforcement is executed in accordance with the rules and principles upheld by that same legal matrix.

Thus, the stately function of enforcement, understood within the concept of democratic rule of law, goes beyond the mere application of laws and requires that it be consistent with the principles and rules –both formal and substantial– enshrined by liberal democracy. The capacity of a state to enforce its own laws is directly related to its ability to protect its citizens, but a democratic rule of law implies that citizens will be protected both from other citizens and state agents whose actions transgress their rights: accountability applies to every actor.

## Separation of Powers and Separation of Enforcement Functions

In practice, the accountability of public actors is ensured through, inter alia, the separation of powers and functions among institutions that can verify the legality of each others' actions or omissions. Thus, most democracies typically establish a republican separation of the powers of the state among executive, legislative and judicial branches. Further separation of functions exists within those branches, and most responsibilities of the state involve the interaction of the three powers and of numerous institutions within them. Law enforcement is not an exception.

In particular, the enforcement of the laws that define the most serious offenses – those within criminal or penal law<sup>26</sup> illustrates the complexity of this aspect of the rule of law. It involves five functions: (1) the preventive or citizen security function, typically performed by the police; (2) the investigative function, which may be in hands of an investigations police; (3) the prosecution function, attributed to official prosecutors or state attorneys that represent the interests of the state and assume the role of the accuser during criminal trials; (4) the administration of justice function, in hands of judges; and (5) the social rehabilitation function, in charge of those institutions that administer the punishment and/or rehabilitation of offenders.<sup>27</sup>

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<sup>26</sup> Different kinds of laws can be enforced by democratic states: administrative, civil or criminal, although this division has been challenged. See John C. Coffee Jr., “Paradigms Lost: The Blurring of the Criminal and Civil Law Models--and what can be done about it” in *Yale Law Journal*, vol. 101, 1991-1992.

<sup>27</sup> Guillermo Zepeda Lecuona, “Criminal Investigation and Subversion of the Principles of the Justice System in Mexico” in Wayne A. Cornelius and David A. Shirk, (eds.) *Reforming the Administration of Justice in Mexico*, San Diego, University of California, 2007, pp. 136-137.

All are equally important and, are naturally interdependent. During the course of criminal proceedings, the institutions in charge of the different components of enforcement verify the legality of each other's actions or omissions. As Zepeda Lecuona points out in an example,

the judicial branch has the constitutional role of reviewing the conditions under which a citizen is detained, in order to ensure that the constitutional requirements that would justify depriving a person of liberty are met. This stage is vitally important for controlling, checking, and, if necessary, punishing any abuse of force or power by other actors in the system, whether it be the [...] police or the Public Prosecutor. Similarly, if the corrections system does not fulfil its mission of social rehabilitation, that precedent would result in high levels of recidivism, with serious repercussions for the public security system's preventive measures.<sup>28</sup>

Enforcement of criminal law, in conformity with a democratic rule of law, is possible to the extent that the institutions responsible for the different functions provide mutual and simultaneous controls to the activities of each other. Effectiveness and efficiency work in a similar way: since the performance of one institution is susceptible of affecting that of others vicious or virtuous circles are equally possible. Ideally, of course, the accountability factor of democracies should promote the latter rather than the former. It should promote patterns where

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<sup>28</sup> *Ibid.*, pp. 137-138.



institutions fulfil their duties and do it within reasonable periods at reasonable costs.

### **Investigation and Prosecution: Formal Justice in Criminal Proceedings**

Among the five functions of enforcement listed above, those concerned with the investigation and prosecution of crimes are central within a democratic rule of law, inasmuch as they precede the presentation of facts and suspects before a judge. When a crime is suspected of having been committed –and suspicion as opposed to assumption is essential– the role of investigation is to clarify what facts, and by whose authorship, probably account for a crime. Prosecution, in turn, refers to the function by which the findings of an investigation are integrated into a case and presented in a criminal trial. The prosecutor or official attorney is responsible for representing the interests of the state and acting as the legal party that accuses the suspect offender before a court.

A democratic rule of law requires these two functions of enforcement to be conducted while observing certain principles. Justice is the fundamental one, as it underlies the action of the institutions responsible for enforcing the laws. As Zepeda Lecuona notes “the other principles that govern the investigation and criminal proceeding[s] are subordinate to it”.<sup>29</sup>

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<sup>29</sup> *Loc.cit.*

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The principle of justice is sought through both formal and substantive means. John Rawls describes formal justice as “the impartial and consistent administration of laws and institutions, whatever their substantive principles”.<sup>30</sup> As such, procedure rules may appear as mere formalities; for example, those requiring the presence of a detainee’s lawyer if a confession is to be granted evidential weight. However, it is through these regulations that torture is prevented.

For Rawls formal justice is closely related with the principles of natural justice, which aim at preserving the integrity of the process.<sup>31</sup> In this sense, the system of rules “must make provisions for conducting orderly trials and hearings; it must contain rules of evidence that guarantee rational procedures of inquiry”. The author explains, while acknowledging variations among legal systems, that “the rule of law requires some form of due process: that is, a process reasonably designed to ascertain the truth, in ways consistent with the other ends of the legal system, as to whether a violation has taken place and under what circumstances.”<sup>32</sup>

Zepeda Lecuona considers that the concept of formal justice “allows us to avoid a significant number of unjust acts, but the formal aspect is insufficient because it should also address the content of the provision being applied”<sup>33</sup>. This last is the object of substantive justice, which focuses on the outcome of the application of the law, and normally falls within the competence of judges. Although formal justice, which is the one with which the investigative and prosecutorial components

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<sup>30</sup> John Rawls, *A Theory of Justice*, Cambridge, Harvard University Press, 1993, p. 76, cited in Guillermo Zepeda Lecuona, *op.cit.*, p.138.

<sup>31</sup> John Rawls, *A Theory of Justice*, Cambridge, Harvard University Press, *revised edition*, 1999, pp. 209-210.

<sup>32</sup> *Ibid.*, p. 210.

<sup>33</sup> Guillermo Zepeda Lecuona, *op.cit.*, p. 139.

of enforcement are mostly concerned, can open the way for substantive justice, the link is not always direct. As Rawls himself acknowledges, that would depend on the definition of substantive justice one holds:

The inevitable vagueness of laws in general and the wide scope allowed for their interpretation encourages an arbitrariness in reaching decisions which only an allegiance to justice can ally. Thus it is maintained that where we find formal justice, the rule of law and the honoring of legitimate expectations, we are likely to find substantive justice as well. The desire to follow rules impartially and consistently, to treat similar cases similarly, and to accept the consequences of the application of public norms is intimately connected with the desire, or at least the willingness, to recognize the rights and liberties of others [...]. [However,] it cannot be properly assessed until we know what are the most reasonable principles of substantive justice and under what conditions men come to affirm and to live by them.<sup>34</sup>

In this sense, respecting the rules of procedure in criminal proceedings is not always a guarantee of substantive justice, but it does provide citizens with the certainty that their civil rights will be respected: they will have equal access to the law, their trials will be as fair as possible and the evidence to incriminate them will have been fairly obtained. The risk of being detained without an arrest warrant, having one's property illegally searched, or being tortured or ill-treated diminish as formal justice is observed.

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<sup>34</sup> John Rawls, *op.cit.*, p. 52.

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Formal justice is the way through which a democratic rule of law is manifested in the early stages of criminal proceedings. Being linked to the integrity of the process of law enforcement, it is also related to its effectiveness. A criminal investigation where evidence is not obtained according to the rules will not be useful for a trial. If the false confession of a crime is obtained through torture, an innocent will receive punishment and the real criminal will remain free and out of the reach of justice. Thus, a faulty investigation or the faulty integration of a criminal case can encourage impunity. Systematic or long term ineffectiveness and non-compliance with the democratic rule of law in the investigation and prosecution stages can be especially negative both socially and institutionally. The result may be a vicious circle where citizens do not trust –or fear– the security and justice system and public servants within it feel no obligation to strictly follow rules of procedure or respect citizens’ rights. In this sense, impunity can pave the way for human rights violations, particularly those related to the provision of security.

The following chapters explore, through the study of human rights violations in the war against organised crime in Mexico, the consequences of criminal investigation and prosecution being ineffective and inconsistent with a democratic rule of law. The criterion that will serve to assess whether these functions are effectively performed is the extent to which the institution responsible for them is capable of investigating crimes and bringing suspects to justice. The criterion for evaluating whether they are consistent with a democratic rule of law is the extent to which they are performed while respecting the rights of persons.

As it will be shown, effectiveness and consistency with a democratic rule of law are interdependent. This is true whether the performance of institutions is positive or negative, as in the case of Mexico's Office of the Prosecutor General. This actor, who is responsible for the investigation and prosecution of crimes in the federal jurisdiction, will be looked at in detail in the following section, after a brief introduction to the case study.

## INTRODUCTION TO THE CASE STUDY

The following chapters seek to explain why four types of human rights violations (arbitrary detention, illegal searches, torture and cruel, inhuman or degrading treatment) have become recurrent in the war against organised crime that started in Mexico in 2006. For this reason, the case study identifies (1) the facts to be explained: the selected human rights violations; (2) the context in which they occur: the war against organised crime; (3) the conditions that allow or encourage their occurrence: impunity and the deficient criminal prosecution at its origin; (4) the actor that has most contributed to creating or reinforcing these conditions: the federal Office of the Prosecutor General; and (5) the relationship between these conditions and the facts to be explained: the link between a deficient criminal prosecution and the human rights violations mentioned above.

It is important to note that the military, who have been placed at the frontline of the war against organised crime, are recognised as being the perpetrators of most of these human rights violations. Nevertheless, the study seeks to go beyond an argument where the nature of the violator can explain, by itself, the incidence of abuses. With this in mind, the following chapters attempt to answer to these questions:

- (1) Why did the Mexican federal government launch a war against organised crime?
- (2) Why did it resort to the military and not to the civil security agents legally responsible for law enforcement?
- (3) Why did the PGR lose its formerly prominent role in counternarcotics strategies?
- (4) Why did relegating criminal investigation and prosecution have an impact in terms of impunity?
- (5) How has impunity resulted in human rights violations in the war against organised crime?

These questions will serve as a guide to the chapters to come. As their answers become clearer, the distance between the normative framework and the actual practice of the PGR will be stressed. Simultaneously, an account of the main problems that keep it from fulfilling its role will be given: corruption, work overload and other manifestations of institutional weakness inherited from an authoritarian past that, in many ways, persist until today.

The war against organised crime will be shown as the reaction of a government that, in the face of a serious threat to the essential capacities of the state, decided to assign the military apparatus to public security functions. It estimated that civil institutions –particularly the PGR– were not reliable. By disproportionately focusing on public security, at the neglect of other components of law enforcement, it accentuated the weakness of the institution responsible for criminal investigation

and prosecution. This detonated the spiral of impunity and human rights violations that can be observed in Mexico's war against organised crime.



## THE ACTOR

### The PGR. Investigation and Prosecution in Mexico

#### Institutional and Normative Aspects of Investigation and Prosecution

The PGR is the institution in charge of conducting investigations and acting as official attorney in criminal trials at the federal jurisdiction. Until 1900 these functions were performed by a Public Prosecutor (Ministerio Público) who was part of the structure of the judiciary. With its transfer to the executive branch, the objective was achieving the autonomy of the investigation and prosecution functions.<sup>35</sup>

The post-revolutionary Constitution of 1917, valid until today, established the separation of the stages of prosecution and judgment in its article 21. Hence, the only function of enforcement that falls within the responsibility of the judiciary is indictment; those of public security, investigation, prosecution and rehabilitation are performed by institutions within the executive power.<sup>36</sup>

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<sup>35</sup> Website of the PGR, “Historia de la PGR”.

<sup>36</sup> According to article 102 of the Mexican Constitution (*Constitución Política de los Estados Unidos Mexicanos*), valid 11 June 2011, the Prosecutor General, head of the PGR, is appointed by the president and is the only federal secretary who must be approved by the legislative power.

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By its mandate, the PGR is responsible for investigating and prosecuting federal crimes, amid public health crimes, arms trafficking and drug trafficking. Its functions are divided among twelve offices, out of which the following are relevant for this study: the Office for Regional Control, Criminal Proceedings and Injunctions (Subprocuraduría de Control Regional, Procedimientos Penales y Amparo) controls the work of public prosecution in the 32 state delegations. There is an Office for the Investigation of Federal Crimes (Subprocuraduría de Investigación Especializada en Delitos Federales), an Office for Human Rights, Attention to Victims and Community Services (Subprocuraduría de Derechos Humanos, Atención a Víctimas y Servicios a la Comunidad), a Federal Ministerial (investigations) Police (Policía Federal Ministerial) and a Specialised Office for the Investigation of Organised Crime (Subprocuraduría de Investigación Especializada en Delincuencia Organizada, SIEDO).<sup>37</sup>

Within the structure, the Public Prosecutor is the institution authorised to conduct the investigation of crimes and has “a monopoly in the area of criminal action”<sup>38</sup>. According to article 21 of the Mexican Constitution, the action of the investigations police is directed and supervised by the prosecutor, who additionally holds the exclusive authority to examine the evidence and decide autonomously whether

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<sup>37</sup> See Raúl Benítez Manaut, Abelardo Rodríguez Sumano and Armando Rodríguez Luna (eds.), *Atlas de la Seguridad y la Defensa 2009*, Mexico, CASEDE, 2010.

<sup>38</sup> Guillermo Zepeda Lecuona, *op.cit.*, p. 134.

criminal action should be pursued.<sup>39</sup> Simultaneously, it acts as the accuser in criminal trials.

Having these relative advantages compared to defence attorneys, the Public Prosecutor is referred to as the “privileged party” in criminal proceedings.<sup>40</sup> For Zepeda Lecuona, “[t]he few analyses conducted of the prosecutorial institution –at either a national level or comparatively- emphasize the broad powers of this office and the legal and investigative importance of its conduct”<sup>41</sup>. It is pertinent to say that, along with the “broad powers”, come a set of legally established ruling principles and the obligation to respect rights while exercising its duties.

These principles and rules, serving as a normative guide, are contained in article 20 of the Constitution. Clarifying the facts, protecting the innocent and avoiding impunity are stated among the objectives of criminal proceedings. The text also establishes general guidelines for rules of evidence. In its fifth fraction it ascertains the presumption of innocence, assigning the burden of proof to the accuser, whether the Public Prosecutor or a private party, depending on the case. Solitary confinement, intimidation and torture are expressly forbidden, and the evidentiary weight of confession obtained through this last is established as invalid. Likewise, it is stated that any evidence obtained through the violation of fundamental rights

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<sup>39</sup> See article 21, *Constitución Política de los Estados Unidos Mexicanos*, valid 11 June 2011, and Guillermo Zepeda Lecuona, *op.cit.*, p. 140.

<sup>40</sup> *Ibid.*, pp. 133-134.

<sup>41</sup> *Ibid.*, p. 134.

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should be void. The rights to legal assistance and to be brought promptly before a judge upon detention are stressed, along with others aiming at the fairness of trials.<sup>42</sup>

These guidelines are reinforced by Mexico's international human rights obligations on the matter. The state signed the International Covenant on Civil and Political Rights (ICCPR) in March 1981, and its First Optional Protocol in March 2002, with no reservations or declarations. Its ratification of the Second Optional Protocol was delivered in September 2007. It is also a party to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) since January 1986, and it declared its recognition of "the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation".<sup>43</sup> It ratified its Optional Protocol in April 2005. Within the inter-American system of human rights, it is a party to the American Convention on Human Rights (ACHR) and the Inter-American Convention to Prevent and Punish Torture.

All of these instruments contain precepts by which Mexican institutions are legally bound to respect the rights of those subject to criminal investigation and prosecution. In particular, article 9 of the ICCPR prohibits arbitrary detention and establishes the right to be brought promptly before a judge; article 14 establishes the right to a fair trial, to be presumed innocent until proved guilty and to legal assistance. Article 7 forbids torture and cruel, inhuman or degrading treatment or

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<sup>42</sup> Article 20, *Constitución Política de los Estados Unidos Mexicanos*, valid 11 June 2011.

<sup>43</sup> Declaration of Mexico to the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.

punishment, a precept that is reinforced and detailed in the CAT and the Inter-American instrument on the topic.<sup>44</sup>

### **Prosecution and Investigation: the Actual Practice**

Needles to say, these national and international laws are often not observed by agents of the PGR. From the creation of the CNDH in 1990 until 2003, 70% of the 953 documented cases of torture were attributed to its agents (mainly the investigations police). In 83% of the cases, the purpose of torturing was to obtain a confession to incriminate the detainee.<sup>45</sup> This trend changed after 2006, when the war against organised crime was launched and the military became the most significant group of perpetrators of torture. Although a more detailed account of this change will be given in a subsequent section, it is important to stress that until 2007, the PGR was consistently identified by the CNDH as committing the largest number of human rights violations in Mexico.<sup>46</sup>

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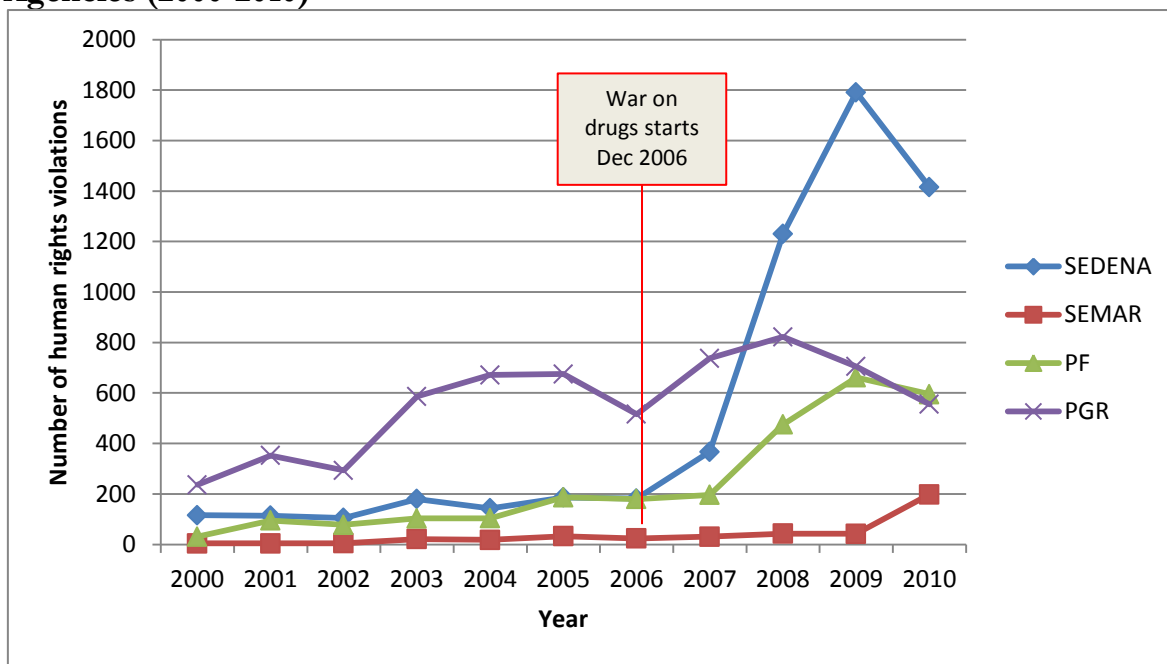
<sup>44</sup> See ICCPR, CAT and the Inter-American Convention to Prevent and Punish Torture.

<sup>45</sup> Ricardo Hernández Forcada and María Elena Lugo Garfías, *Algunas notas sobre la tortura en México*, Mexico, CNDH, 2004, pp. 13, 135-136.

<sup>46</sup> CNDH, “Reporte de actividades 1999-2009”, 2010.

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**Fig. 1. Perpetrators of Human Rights Violations among Federal Security Agencies (2000-2010)**



Key: SEDENA: Secretariat of National Defence; SEMAR: Secretariat of the Navy; PF: Federal Police; PGR: Office of the Prosecutor General

Source: CNDH annual reports 2000-2010 and CNDH, “Sistema Nacional de Alerta”.

The tendency to disregard citizens’ rights comes along a pattern of ineffectiveness. During the last ten years (2000-2010) the PGR’s annual average of enforced arrest warrants (as percentage of the number of warrants received during the year plus the number of warrants pending from the previous year) was of only 16.98%. In that same period, the average number of pending arrest warrants at the end of the year was of 27,930. By the end of 2010, in the midst of a war against organised crime, there were 21,870 unenforced arrest warrants for federal crimes.<sup>47</sup>

Another important indicator of the limited capacity of the PGR to investigate and prosecute federal crimes is the fact that, out of the small number of suspects that

<sup>47</sup> INEGI, “Sector Seguridad y Justicia” in *Anuario de Estadísticas Nacionales 2010*, Mexico, 2011.

are brought to trial, more than 80% are apprehended *in flagrante delicto* (2009).<sup>48</sup> For federal Magistrate Ricardo Paredes, the cases that are solved because the suspect was caught during the commission of the offense do not represent an effort in terms of investigation or integration of the preliminary inquiry; thus when an investigation is needed, prosecutors simply do not deal with cases.<sup>49</sup> From the point of view of the criminal, not being caught during the commission of the offense substantially increases the possibility of not being caught at all. The implications of this, in terms of impunity, are socially very costly: the latest available studies (2008) show that 78% of the victims of a crime choose not to report it to the authorities.<sup>50</sup>

Work overload has been identified as one of the main problems behind the low effectiveness of the PGR. More than 50% of its employees are in the administration sector. In contrast, public prosecution represents roughly 14% of the staff. Just in 2008, every agent of the Public Prosecutor was assigned an average of 900 cases.<sup>51</sup> For Zepeda Lecuona, “[c]ase overload has saturated the Public Prosecutor’s offices”, who are thus unable to provide an acceptable service. Quite unexplainably, the personnel of the PGR has diminished or stagnated since the war on drugs started. In 2006 the PGR had 21,755 public servants, out of which only 2,854 were agents of the Public Prosecutor. By July 2010 the total number of employees was of 20,606 and the number of agents of the Public Prosecutor had slightly increased to

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<sup>48</sup> Marien Rivera, “Reforma penal: La guerra útil”, Mexico, CIDAC, 2009, p.2. The newspaper *La Jornada* speaks of a percentage of 89% for 2007 in “Sobrecarga de trabajo, freno a la impartición de justicia”, 6 August 2008.

<sup>49</sup> *La Jornada*, “Corrupción endémica”, 7 August 2008.

<sup>50</sup> ICESI, “Victimización, Incidencia y Cifra Negra en México. Análisis de la ENSI-6”.

<sup>51</sup> *La Jornada*, “Corrupción endémica”, *art.cit.*

2,922. The most affected sector was the investigations police, whose personnel diminished by 54% (from 7,992 to 3,741) between 2007 and 2011.<sup>52</sup>

Corruption is another of the great endemic burdens of the PGR. For Luis Astorga, the existence of a network of complicity between members of the investigations police and criminals makes it possible to speak of mafias within the institution.<sup>53</sup> Its participation in combating drug trafficking has probably been the factor with the most weight in feeding corruption's deep roots.

Since the government of Lázaro Cárdenas (1934-1940), the PGR began to participate in combating the production and traffic of marihuana and opium poppy.<sup>54</sup> Although between 1947 and 1985 this function was primarily performed by the Federal Security Directorate (DFS), the PGR was well permeated by this pathology of authoritarian Mexico. Explaining the degree to which civil institutions were corrupted, particularly those dedicated to the investigation and prosecution of crime, is central to understanding the actual security crisis and the present government's decision to place the military at the frontline of the war on drugs.

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<sup>52</sup> *La Jornada*, "Redujo la PGR su plantilla laboral", 23 July 2011.

<sup>53</sup> Luis Astorga, "El tráfico de drogas. La seguridad y la opción militar" in Alberto Aziz Nassif and Alfonso Sánchez Alonso (coords.), *El Estado Mexicano: herencias, y cambios. Globalización, poderes y seguridad*, Mexico, CIESAS, 2005, p. 407.

<sup>54</sup> Website of the PGR, "Historia de la PGR.



## The PGR and Antidrug Policies: Institutional Weakness vs. Corruptive Strength

Several authors have argued that under the rule of the Institutional Revolutionary Party (PRI), which governed Mexico from 1929 to 2000<sup>55</sup> corruption developed into a “distribution of spoils” mechanism that allowed the authoritarian government to exercise control over both criminality and its own agents. For Stephen D. Morris “[c]orruption [was] a crucial mechanism in Mexico’s unique governing style. By allocating spoils, corruption help[ed] undermine the potential of organizations to threaten the system”.<sup>56</sup> Along with corruption, the centralisation of power within the hegemonic party, as Mónica Serrano and Marco Palacios argue, allowed the Mexican state to control the levels of violence in the illicit drug business during at least forty years (1947-1985).<sup>57</sup>

During that time, the DFS, the intelligence agency of the PRI regime, led the counternarcotics policy.<sup>58</sup> Corruption and complicity with drug traffickers, as noted by Luis Astorga and David Shirk, “ensured that organized criminal activity was extensively protected and well regulated”.<sup>59</sup> In 1985, when Enrique Camarena, an undercover agent of the United States Drug Enforcement Agency (DEA) was

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<sup>55</sup> Created in 1946, the Partido Revolucionario Institucional (PRI) is the successor of the Partido de la Revolución Mexicana (1938-1946), which in turn succeeded the Partido Nacional Revolucionario (1929-1938). See Rogelio Hernández, “La historia moderna del PRI: entre la autonomía y el sometimiento” in *Foro Internacional*, vol. 40, num. 2, 2000, pp. 278-306.

<sup>56</sup> See Stephen D. Morris, *Corruption and Politics in Contemporary Mexico*, Tuscaloosa, University of Alabama, 1991, p.41.

<sup>57</sup> Marco Palacios and Mónica Serrano, ‘Colombia y México: las violencias del narcotráfico’, in Arturo Alvarado and Mónica Serrano (coords.), *Seguridad nacional y seguridad interior- Los Grandes Problemas de México*, Mexico, Colmex, 2010, p.106.

<sup>58</sup> *Ibid.*, p.116.

<sup>59</sup> Luis Astorga, and David A. Shirk, ‘Drug Trafficking Organizations and Counter-Drug Strategies in the U.S.-Mexican Context’, *Evolving Democracy*, San Diego, Center for U.S.-Mexican Studies, January 2010, p.9.

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murdered in Jalisco (central Mexico), the complicity of the DFS with drug trafficking organisations was blatantly exposed.<sup>60</sup> As a sign of good will and commitment to the cooperation policy with the United States, the DFS was dismantled<sup>61</sup>, and the responsibility of combating drug trafficking was entirely transferred to the PGR.<sup>62</sup>

This decision translated into a much more intense exposure to corruption for the PGR, where a specialised office to investigate and prosecute drug trafficking was created, the Commission for Public Health Offenses (Comisión para la Atención contra los Delitos de la Salud).<sup>63</sup> Soon, the corruptive power of the illicit drug business –and the institutional weakness of the PGR– became patent. During the administration of President Carlos Salinas (1988-1994), due to continuous corruption scandals, the institution was headed by five different persons.<sup>64</sup> At the same time, in an effort to reorganise the antidrug effort, a “tradition” to inaugurate, purge and restructure specialised offices within the institution began.

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<sup>60</sup> Formal cooperation agreements against the production and trafficking of narcotics exist between Mexico and the United States since the 1940s. See Froylán Enciso, “Los fracasos del chantaje. Régimen de prohibición de drogas y narcotráfico”, in Arturo Alvarado and Mónica Serrano (coords.), *op.cit.*, p. 7. Cooperation increased in 1975, after the presence of Mexican heroin in the U.S. market was noticed to have significantly increased. See María Celia Toro, *Mexico's 'War' on Drugs. Causes and Consequences*, London, Lynne Rienner, 1995, pp. 15-17.

<sup>61</sup> See Sergio Aguayo, *La Charola, una historia de los servicios de inteligencia en México*, Mexico, Grijalbo, 2001.

<sup>62</sup> The civil intelligence agency that replaced the DFS in 1985, the National Security and Investigation Centre, CISEN, has been kept away from the counternarcotics policy as a means to preventing its corruption. See Leonardo Curzio, ‘The evolution of intelligence services in Mexico’, in John Bailey and Jorge Chabat (comps.), *Transnational Crime and Public Security, Challenges to Mexico and the United States*, San Diego, University of California, 2002.

<sup>63</sup> Sigrid Arzt, *Democracia, Seguridad y Militares en México*, Open Access Dissertations, Miami, University of Miami, 2011, p. 70.

<sup>64</sup> These are Enrique Álvarez del Castillo, Ignacio Morales Lechuga, Jorge Carpizo, Diego Valadés and Humberto Benítez Treviño. See Sigrid Arzt, *op.cit.*, pp. 66-67.

09/09/2011-15:07:20 <HU981-7-FY\_10a1\_1001365\_B430B4EE2D80F9A162B6EE770542BEEB3EA5C530>

In 1992 the National Centre for the Control of Drugs (Centro Nacional de Planeación y Control de Drogas, CENDRO) was established.<sup>65</sup> A year later, in 1993, in response to the assassination of Cardinal Juan Jesús Posadas Ocampo by suspect members of criminal organisations, the National Institute for the Combat of Drugs (Instituto Nacional de Combate a las Drogas, INCD) was created, in an effort to increase coordination among the agencies involved in the fight against drug trafficking. By 1997, after its director, General Gutiérrez Rebollo was found to be on the payroll of the Juárez cartel, the INCD was replaced by the Specialised Prosecution Office for Public Health Offenses (Fiscalía Especializada para la Atención a Delitos Contra la Salud, FEADS).<sup>66</sup> In 2003, the latter was dismantled after the discovery of a complicity network with criminal organisations and the Specialised Office for the Investigation of Organised Crime (Subprocuraduría de Investigación Especializada en Delincuencia Organizada, SIEDO) was set up. The suspicion of corruption within it motivated the launching of internal “Operation Clean-up” (Operación Limpieza) in 2008, which exposed high rank officials of the SIEDO as having sold information to the Beltrán Leyva cartel.<sup>67</sup> The purge was considered successful and the office survives to the present day. Higher standards of recruitment and surveillance mechanisms have since been reinforced, but corruption remains an imminent threat given the tremendous amount of resources

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<sup>65</sup> Leonardo Curzio, *op.cit.*, p. 172.

<sup>66</sup> Benjamin Nelson Reames, “A Profile of Police Forces in Mexico” in Wayne A. Cornelius and David A. Shirk (eds.), *op.cit.*, pp. 124-125.

<sup>67</sup> *La Jornada* “Investigan a extitular de la SIEDO por la venta de información a los Beltrán Leyva”, 29 October 2008.

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at the hands of traffickers. Peter Smith estimates that criminal organisations annually spend more than twice the total budget of the PGR in bribes.<sup>68</sup>

A similar pattern has been followed by investigations police forces. President Vicente Fox (2000-2006), the first to come from a party different to the PRI in 71 years, dismantled the corrupt Federal Judicial Police (PJF) in November 2001. He created the Federal Investigations Agency (AFI), in an attempt to professionalise the force.<sup>69</sup> In May 2009, during the administration of Felipe Calderón (2006-2012), the corporation's functions were taken over by the Federal Ministerial Police (Policía Federal Ministerial, PFM).<sup>70</sup> The aim has consistently been that of creating a professional, uncorrupted investigations police.

Whether the strategy of dismantling offices, police forces and institutional functions is wise can be legitimately questioned. In many ways, Mexico resembles a “Leviathan that amputates its own arm in the hope of seeing it grow again” as put by Froylán Enciso.<sup>71</sup> It would seem that institutions are thought of as capable of functioning instantly and independently of the conditions and structural factors that can affect their development. Metaphorically speaking, by continuously dismantling the whole machine, it is difficult to identify the component that keeps failing. For Jorge Carrillo Olea, founder of the first Commission for Public Health Offenses at the PGR and first director of the civil intelligence agency that replaced the DFS

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<sup>68</sup> Mónica Serrano and María Celia Toro, “From Drug Trafficking to Transnational Organized Crime in Latin America”, in Mats Berdal and Mónica Serrano (eds.), *Transnational Organized Crime and International Security: Business as Usual?*, London, Lynne Rienner, 2002, p.172.

<sup>69</sup> Benjamin Nelson Reames, *op.cit.*, p. 119.

<sup>70</sup> Raúl Benítez Manaut, *et.al.* (eds.), *op.cit.*, pp. 258-259.

<sup>71</sup> Froylán Enciso, *op.cit.*, p. 82.

(CISEN, National Security and Investigation Centre), “the PGR has undergone fourteen years of systematic destruction”, nullifying its capacity to gain institutional strength.<sup>72</sup>

The trajectory of the PGR, its incapacity to resist corruption and its overall ineffectiveness in investigating and prosecuting federal crimes, in particular drug trafficking, were among the decisive elements that drove President Felipe Calderón to assign the military to lead the war against organised crime upon taking office in 2006. The next section will explore the motivations, limitations and consequences of this strategy.

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<sup>72</sup> *Reforma*, “El ex gobernador de Morelos advierte sobre la importancia de tomar las riendas políticas y judiciales en los estados”, 20 April 2011.

## THE CONTEXT

### The War against Organised Crime (2006-2010)

#### From a Public Security to a National Security Problem

An opinion poll conducted in 2006 showed that 82% of Mexicans believed that insecurity was the most serious problem faced by the country.<sup>73</sup> Crimes such as abduction and extortion –probably the most socially disruptive expression of the power of criminals– were affecting the lives of families and communities in areas with strong presence of the drug cartels.<sup>74</sup> Scenes of beheaded and mutilated bodies, manifestations of intra and inter cartel conflicts, were resulting in entire towns living in fear.<sup>75</sup> Criminal organisations had acquired the capacity to infiltrate and, in some cases, control municipalities (such as Mier, in the state of Tamaulipas)<sup>76</sup>, states (Tamaulipas)<sup>77</sup>, and even federal institutions like the SIEDO, as described above. Similarly, many municipal and state police agencies had been either “privatised” or

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<sup>73</sup> Speech by Alejandro Poiré, Technical Secretary of the National Security Council in *El Universal* “Falso que la sociedad rechace lucha anticrimen”, 18 July 2011.

<sup>74</sup> See Prem Mahdevan, “A war without ‘principals’: narco-violence in Mexico”, Zurich, Research Institute for European and American Studies, Centre for Security Studies, May 2011.

<sup>75</sup> See Nelson Arteaga Botello, “Decapitaciones y mutilaciones en el México contemporáneo” in *Espacio Abierto*, vol. 18, num. 3, 2009, pp. 463-486.

<sup>76</sup> *Milenio*, “Ciudad Mier, pueblo fantasma”, 11 November 2010.

<sup>77</sup> *BBC Mundo*, “Tamaulipas, ¿en camino de convertirse en un estado fallido?” , 13 April 2011.

corrupted (such as Cherán, Michoacán<sup>78</sup>). Criminal groups had extended their activities to a point where they could “sell” protection, rule over the mayors of towns and collect “taxes”. Eduardo Medina Mora, Prosecutor General between 2006 and 2009, in an interview published in “El País” (Spain) in 2008 recognised that criminal organisations were disputing control over the State’s basic competences.<sup>79</sup> Organised crime had passed from being a public security to a national security threat.<sup>80</sup>

In many ways, as put by Joaquín Villalobos, Mexico had “a bomb under the rug”.<sup>81</sup> Along more than seven decades of authoritarian government under the PRI, public servants and criminal organisations had come to establish a symbiotic arrangement, in place at least since the 1970s, when the illegal production of marihuana and heroin started flourishing, driven by a rapidly growing U.S. market.<sup>82</sup> It can be presumed that a set of implicit or explicit agreements, to a large extent centralised by the party, existed among authorities and criminals.<sup>83</sup>

<sup>78</sup> *Excelsior*, “Disuelven la Policía de Cherán para formar nuevo cuerpo policiaco”, 9 May 2011.

<sup>79</sup> cited in Rubén Aguilar and Jorge Castañeda, *El Narco. La Guerra Fallida*, Mexico, Punto de Lectura, 2009, pp. 33-34.

<sup>80</sup> Public security and national security refer to different arenas. While the former emphasises the protection of persons and properties, the latter is concerned with the protection of the state, its institutions and essential functions. Nevertheless, they stand close together and share various traits in the current security crisis in Mexico. See John Bailey, “Public Security and Democratic Governability: Theorizing about Crime, Violence, Corruption, State and Regime”, Chicago, Working Papers of the Seminar for the Midwest Political Science Association, 14-17 April 2004, p.2.

<sup>81</sup> Joaquín Villalobos, “De los Zetas al Cártel de la Habana” in *Foreign Affairs Latinoamérica*, vol. 11, num. 2, 2011, p. 17.

<sup>82</sup> María Celia Toro, *op. cit.*, p.16.

<sup>83</sup> The existence of arrangements, centralised thanks to the vertical control of the PRI, has been presumed by authors such as Marco Palacios and Mónica Serrano, *op.cit.*, p.116 and Luis Astorga and David A. Shirk, *op.cit.*, p. 6.

These complicity networks seemed to have held the entente in place, limiting the violent effects of organised crime activities for the population, who knew or cared little about drug trafficking towards the US. Nevertheless, by the decade of 2000 organised crime had grown in complexity and importance since the 1970s. Several factors can account for its mutation from a public security to a national security issue.

- a. Drug trafficking became the main activity of organised crime, as the business flourished and encouraged common criminals to form organisations.<sup>84</sup> Already in 1975 Mexican traffickers produced and supplied 80% of the heroin consumed by U.S. market.<sup>85</sup>
  
- b. In the 1980s the trafficking routes of cocaine changed from the Caribbean, via the Florida peninsula, to the continent, via the border between Mexico and the U.S.<sup>86</sup> When cocaine started becoming popular in the latter, in the early 1980s, most of it was introduced to the country through the coasts of Florida. The effective recovery of control over the area by the DEA resulted in the alteration of the route.<sup>87</sup> This produced both quantitative and qualitative changes in the dynamics of trafficking in Mexico. Serrano and Toro estimate that by 1988 the total drug economy represented between 1.25 and 4 percent of Mexico's GDP, and between 6 and 20 percent of its export

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<sup>84</sup> Mónica Serrano and María Celia Toro, *op.cit.*, p.155.

<sup>85</sup> According to the U.S. President's Commission on Organized Crime, cited in María Celia Toro, *op. cit.*, p.16.

<sup>86</sup> Marco Palacios and Mónica Serrano, *op. cit.*, p.114.

<sup>87</sup> The amount of cocaine seized by the Mexican authorities went from 29 kilos in 1980 to 39,337 kilos in 1989, according to Maria Celia Toro, *op. cit.*, p.33.



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income.<sup>88</sup> In this manner, criminal organisations acquired unprecedented financial capacities, and their structures were consolidated.

- c. A decrease in the prices of narcotics (originating in an increase in the offer) forced criminals to reorganise the production and transportation of their products, reconsider their arrangements with state officials and expand into other criminal activities. Organised crime extended its “business” into kidnapping, extortion, human trafficking, piracy and theft, to name a few.<sup>89</sup>
- d. Restrictions to the sale of assault weapons in the U.S. were lifted in 2004, increasing their availability to criminals. The porous border between the two countries posed little or no difficulty to arms smuggling.<sup>90</sup>
- e. The country underwent a period of decentralisation that started during the 1980s and deepened throughout the 1990s, becoming patent at the same time as democratisation opened its way through. These processes largely contributed to the destabilization of corruption networks and diluted the control formerly exercised by the ruling party.<sup>91</sup> Enriched cartels with increasingly corruptive capacities, and who could easily obtain sophisticated weaponry, had acquired enough power to subjugate political authorities at all

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<sup>88</sup> Mónica Serrano and María Celia Toro, *op. cit.*, p.161.

<sup>89</sup> *Loc.cit.*

<sup>90</sup> A ten year Federal Assault Weapons Ban, forbidding the sale of assault weapons to the public was passed by the U.S. Congress on September 13, 1994 and signed into law by President William Clinton. It only applied to weapons manufactured after the date of the enactment. It expired on September 13, 2004; there have been numerous attempts to renew it, but it has not been proposed for voting. See Brady Center to Prevent Gun Violence, “The Impact of the 1994 Federal Assault Weapon Act”, 2004.

<sup>91</sup> Luis Astorga and David A. Shirk, *op.cit.*, p. 7.

levels. Nothing can express the situation more clearly than the popular phrase “organised crime against disorganised government”.<sup>92</sup>

### **Launching the War against Organised Crime**

In this context, the war against organised crime was launched by President Felipe Calderón (2006-2012) on the first weeks of his administration<sup>93</sup>. He had taken office after tightly contested elections<sup>94</sup>, on the aftermath of which the candidate of the leftist Party of the Democratic Revolution (PRD) started a movement to question the validity of the elections and the legitimacy of his government. To authors like Rubén Aguilar and Jorge Castañeda the strategy was a means to gaining legitimacy by putting insecurity at the centre of the political stage. Mainly, they argued that there was no significant increase in the domestic consumption of drugs (most were destined to the U.S.), that corruption was nothing new and that violence had not significantly increased in the preceding years.<sup>95</sup>

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<sup>92</sup> “Crimen organizado contra gobierno desorganizado”

<sup>93</sup> The joint operation in the state of Michoacán (Operativo Conjunto Michoacán) on December 11 December 2006 –10 days after Calderón took office– marks the beginning of what would become known as “the war against drug-trafficking” or “the war against organised crime”. The counternarcotics operation involved the deployment of more than 6,500 agents of the federal police, the investigations police, the navy, the army and the civil intelligence agencies. See: *La Crónica de Hoy*, “Anuncia gabinete de seguridad operativo conjunto Michoacán” 12 December 2006.

<sup>94</sup> Felipe Calderón, candidate of the National Action Party (PAN), was declared winner by obtaining 233,831 more votes than Andrés Manuel López Obrador, candidate of the Party of the Democratic Revolution (PRD). The difference amounts to 0.58%, as reported in IFE, “Reporte Oficial de las Elecciones Federales, 2006”, 2006.

<sup>95</sup> Rubén Aguilar and Jorge Castañeda, *op.cit.* p.13.

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Nonetheless, the power of criminal organisations had qualitatively changed. As summarised by Jorge Chabat, Calderón inherited a security situation in which (a) drug trafficking organisations controlled several territorial areas of the country; (b) a war among cartels had increased the levels of violence in an unprecedented manner; (c) the border with the U.S. was increasingly violent and problematic; (d) the flow of narcotics towards the U.S. had not been affected by the policies of previous governments; and (f) domestic consumption of drugs was increasing.<sup>96</sup> Additionally, and most importantly, the state had seen its capacity to provide security to the population dramatically undermined, and the civil institutions in charge of the antidrug policy, notably the PGR, were deeply corrupted.

The strategy arrived to the scene of public security policy causing controversy both nationally and internationally<sup>97</sup>: it was recognised that organised crime –particularly drug trafficking– had come to a critical point, but there was no consensus about the means to be employed, in particular, about the extent to which the military should participate in public security activities. It was feared –with good reason– that this would increase human rights violations.<sup>98</sup>

The army had been taking part in counternarcotics operations since 1946, when the prohibitionist policy took force in the neighbouring United States.<sup>99</sup> However, the role of the military had been restricted to localising and destroying illegal crops of

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<sup>96</sup> Jorge Chabat, ‘Las respuesta del gobierno de Felipe Calderón al desafío de narcotráfico: entre lo malo y lo peor’, in Arturo Alvarado and Mónica Serrano (coords.), *op.cit.*, p. 29.

<sup>97</sup> For a negative opinion see *Stratfor*, “Mexico: Illusory Victories in Michoacan” 20 December 2006. For a positive opinion see *Noticieros Televisa*, “Inicia etapa urbana del 'Operativo Conjunto Michoacán””, 23 December 2006.

<sup>98</sup> Jorge Chabat, “En busca de la vida ciudadana” in *Letras Libres*, February 2007.

<sup>99</sup> See María Celia Toro, *op.cit.*

marihuana and opium poppy, and their interaction with the population had been very limited. This time, the strategy comprised a constant, frontal attack against drug trafficking, using all the resources at the disposal of the federal government throughout the Mexican territory.<sup>100</sup> The federal police, and particularly the army and the navy, were to have an unprecedented participation, displacing the PGR from its leading role in the fight.

### **The Military in Public Security**

Since 2006, there has been much debate about the legality of the participation of the military in public security tasks. A thesis of the Supreme Court of Justice has interpreted article 129 of the Mexican Constitution in the sense that the army and the navy are constitutionally entitled to participate in public security activities, but only in support of civil authorities and in extraordinary circumstances.<sup>101</sup> Nevertheless, this has been perceived as insufficient by the President, a faction of the Legislature, the Secretaries of Defence and the Navy and a part of public opinion.

Since 2009, the President and some parliamentary groups have proposed modifications to the current National Security Law, awakening much controversy and public pressure, both for and against. For some, there is an urgent need of a new law that provides a more detailed framework on the attributions of the military

<sup>100</sup>Rubén Aguilar and Jorge Castañeda, *op.cit.*, p. 11.

<sup>101</sup> Pleno de la Suprema Corte de Justicia de la Nación, *Semanario Judicial de la Federación y su Gaceta*, 9 (III), March 1996.

in public security and their relationship with civil authorities.<sup>102</sup> For others, “legalising” the presence of the military in the streets might broaden the criteria to establish the temporary suspension of guarantees and risks of increasing an already dramatic number of human rights violations at the hands of marines and soldiers.<sup>103</sup> Several civil society groups and organisations have been putting pressure against any changes to the law that might create a potential threat in this sense, such as the one led by poet Javier Sicilia.<sup>104</sup>

It is interesting to note that since 2008 the military have been consistently asking for a law that frames their participation in the fight. As stated in a document of national NGO CIDAC, many among the military are convinced that they are acting within a legal vacuum, where everything and nothing is permitted at the same time, where they have become a vulnerable institution that is subject to judgment and incrimination.<sup>105</sup>

The recent constitutional changes by which military agents who are suspect of committing human rights violations are to be tried in civil and not in military courts were interpreted in this sense by some high rank officers.<sup>106</sup> This legal reform,

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<sup>102</sup> Another important point of the discussion centres on the current faculty of the President, legally Commander in Chief of the Armed Forces, to decide autonomously on deploying the armed forces for internal security reasons. In some legislative proposals, this prerogative of the executive is given broader powers, while in others the approval of Congress is put forward. See *La Jornada*, “Ley de Seguridad Nacional: divisiones e improcedencia”, 27 April 2011.

<sup>103</sup> Murphy Woodhouse, “Mexico’s House of Deputies Likely to Approve Police State Law”, Americas Program of the Center for International Policy, 25 April 2011.

<sup>104</sup> *La Jornada*, “Abren vía Movimiento de Paz y diputados a ley seguridad”, 17 August 2011.

<sup>105</sup> CIDAC, “Ley de Seguridad Nacional: la disyuntiva”, 27 April 2011.

<sup>106</sup> *Proceso*, “Fallo de la Corte favorece al narco, argumenta la Sedena” 13 July 2011.

motivated by a sentence of the Inter-American Court of Human Rights<sup>107</sup> has been received positively by both national and international human rights NGOs (notably Human Rights Watch and the National Network for Human Rights Civil Organisations in Mexico).<sup>108</sup> Nonetheless, it may be pertinent to ask if, given the effectiveness and efficiency rates of civil prosecutorial and investigative institutions, this will significantly translate into more accountability and less impunity.

For Sigrid Arzt, both the complexity of the organised crime phenomenon and the corruption of police and prosecution agencies drove the government of Calderón into assigning the military to the frontline of the war. However, she argues that introducing the military into an area that was exclusively the competence of civil police corporations has altered the civil-military pact established by the post revolutionary regime.<sup>109</sup> This pact, it must be remembered, is what kept Mexico away from the pattern of military political influence and/or dictatorship that Latin America underwent during the twentieth century.

Beyond that, it must be acknowledged that while the military have seen their prominence and budget increase during the war on drugs<sup>110</sup> patrolling the streets and assuming the functions of municipal police forces has not been easy nor rewarding for them. Being trained for national defence –and not for public security– they are used to dealing with enemies and not with suspects. They have found it

<sup>107</sup> *Radilla-Pacheco v. Mexico*, IACHR, Judgment of 23 November 2009.

<sup>108</sup> *El Universal* “HRW celebra coraje moral de ministros”, 13 July 2011.

<sup>109</sup> Sigrid Arzt, *op.cit.*, p. 6.

<sup>110</sup> The annual budget of the SEDENA went from 26.31 thousand million pesos in 2006 to 63.93 thousand million pesos approved for 2011 according to *La Jornada*, “Se dispara el gasto militar con Calderón”, 5 November 2010.

incredibly challenging to apply protocols to regulate the use of force while at the same time being effective when engaging in armed confrontation against groups with sophisticated military weaponry.<sup>111</sup> From being one of the most respected institutions in the country, they have passed to occupy the leading position in human rights violations.<sup>112</sup> Their reputation has been severely damaged: in their opinion, they are losing what had arduously been recovered since the student massacre of 1968 and the dirty war of the early 1970s, when similarly, civil governments commanded them to do “their dirty work”<sup>113</sup>

With this, the intention is not to justify the abuses that in fact, personnel of the army and the navy have committed while performing public security activities. It is just worth noting that the military might not want all the responsibilities that have been entrusted upon them. The fact that they show concern about their reputation wearing down indicates two things: (1) they are aware that they are not legally nor technically capable of exercising public security functions beyond emergency situations; (2) to be pointed at as human rights violators is not taken comfortably. It does have an impact when the National Human Rights Commission or international

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<sup>111</sup> Weaponry as sophisticated as anti-tank rockets (RPGs, rocket-propelled grenades) have been confiscated from the Zetas, an extremely violent criminal organisation initially created by former military elite special operations agents. See *La Jornada*, “Asesta el ejército un considerable golpe a los Zetas; les decomisa arsenal en Coahuila”, 4 June 2011.

<sup>112</sup> IJ UNAM, “Primera Encuesta Nacional sobre Cultura de la Constitución en México”, 2003; CNDH, “Reporte de actividades 2009” and Human Rights Watch, “Uniform Impunity...”, *art.cit.*

<sup>113</sup> See Jorge Alejandro Medellín “Responsabilizan a Estado y Ejército de la ‘guerra sucia’” in *El Universal*, 28 February 2006, and the website of the Centre for Retired Military Analysis and Opinion (Centro de Análisis y Opinión de Militares Retirados).

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human rights NGOs deliver recommendations and exercise “the power of shaming”<sup>114</sup>.

In general, while the work of the military in the fight has been recognised – particularly in those states and cities where the federation has had to send them to take over the functions of corrupt or inexistent police forces—<sup>115</sup> there seems to be consensus about the fact that they cannot and should not replace civil public security indefinitely. A recurrent topic in President Calderón’s speech is the need to strengthen public security and judicial institutions.<sup>116</sup> However, it is not clear if detailed plans and terms have been provided for the full reestablishment of civil authorities back in their legally instituted attributions.

In this sense, it is legitimate to ask when the critical phase will be over, and whether an effort is being made to prevent and punish human rights violations at the hands of those who implement the strategy: the federal police, the PGR and particularly the army and the navy. An overview of the results and costs of the war against organised crime in terms of human rights shows how there seems to be no systematic attempt to guarantee the protection of citizens, and how the public security function of enforcement has been advanced taking distance from a democratic rule of law and, very relevantly, separately from other functions, in particular those of investigation and prosecution.

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<sup>114</sup> The role that shaming can play in terms of “socialising” human rights norms has been studied in Thomas Risse and Kathryn Sikkink, “Ch.1.The socialization of international human rights norms into domestic practices: introduction” in Thomas Risse *et.al.*, *The Power of Human Rights: International Norms and Domestic Change*, Cambridge, Cambridge University Press, 2008.

<sup>115</sup> *Plano Informativo*, “Reconocen gobernadores labor del Ejército”, 28 June 2011.

<sup>116</sup> *Milenio*, “Discurso integro de Felipe Calderón ante el Congreso de E.U.”, 20 May 2010; and *Organización Editorial Mexicana*, “Fortalecer las instituciones de seguridad pública, plantea Calderón”, 12 January 2011.



## THE OBSERVABLE FACTS

### Human Rights Violations and Their Circumstances

#### The Unacceptable Consequence of the War on Drugs

After five years of joint operations, constant presence of the military and the federal police throughout the country (approximately 106,000 troops monthly<sup>117</sup>), several local police corporations whose functions have been taken over by the military, and numerous incidents of armed confrontation with suspect traffickers the results have been mixed. Approximately 131,000 suspects have been detained, out of which only 7.3% have been brought to trial.<sup>118</sup> More than 102,000 weapons, 8,000 tons of marihuana and over 98,000 kg of cocaine have been confiscated.<sup>119</sup>

A parallel measure, using the federal government's statistics, shows that since 2006 36,115 people have died in connection with the war on drugs.<sup>120</sup> Nevertheless, the accuracy of these numbers has been recently challenged. According to an investigation conducted by the Bajacalifornian journal "Semanao Zeta", official

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<sup>117</sup> *Reforma*, "Arroja guerra magros resultados" 26 June 2011.

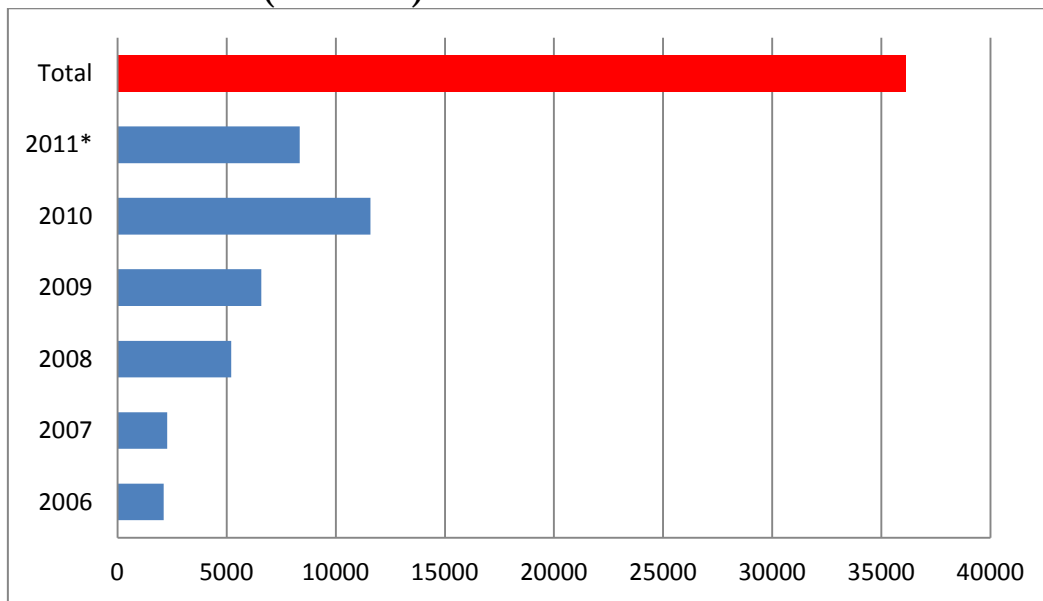
<sup>118</sup> Hearing of Prosecutor General Marisela Morales before the Congress on 29 June 2011.

<sup>119</sup> Presidencia de la República, "Cuarto informe de ejecución del Plan Nacional de Desarrollo", March 2011; and *El Universal*, "Poiré presume decomiso de 102 mil 600 armas," 5 April 2011.

<sup>120</sup> until 5 August 2011, according to the National Public Security System (SNSP) and *Reforma*, "Ejecutómetro", August 2011.

statistics include only those killed by fire weapons or sharp instruments, but leave out those burned to death, beheaded, drowned, asphyxiated or whose cause of death is unknown. If these last were included, the count would go up to at least 50,490.<sup>121</sup> Even by the official statistics the number of deaths is astonishing. Estimates about the number of civilian and military casualties of the war in Afghanistan (2001-2011) talk about approximately 38,283 deceased.<sup>122</sup> This can give an idea of the level of violence of this non-declared war.

**Fig. 2. Homicides Related to the War against Organised Crime According to Official Statistics (2006-2011)**



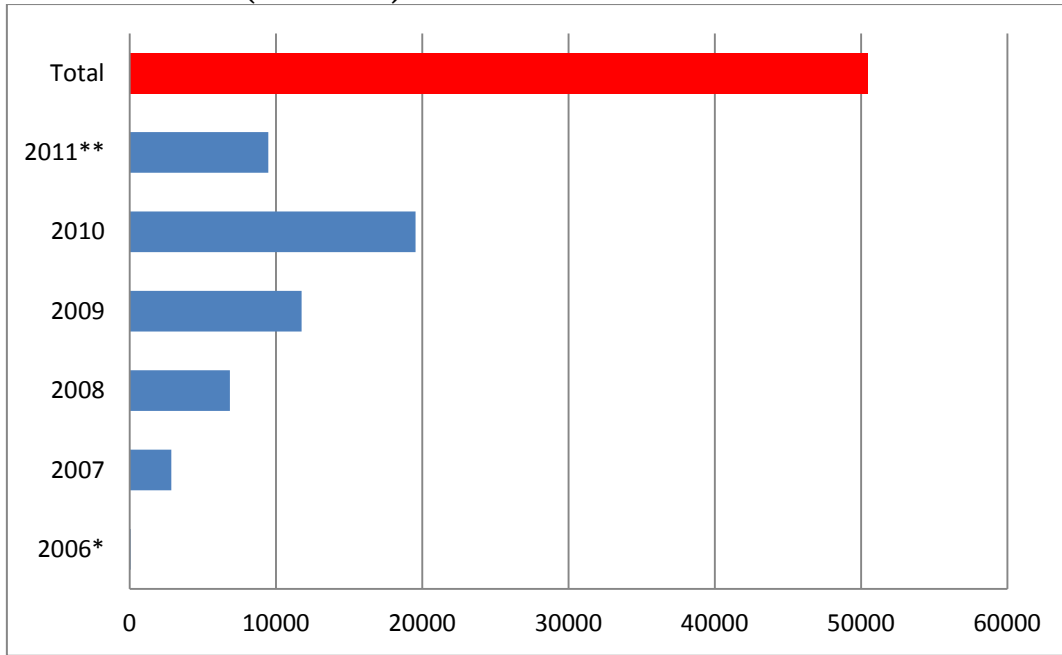
\* until the 5<sup>th</sup> of August 2011

Source: SNSP and *Reforma*, “Ejecutómetro”, August 2011.

<sup>121</sup> *Semanario Zeta*, “50 mil ejecuciones”, num. 1946, 4 July 2011.

<sup>122</sup> United States Department of Defense, “Casualties”, February 2011; and databases of the Upsala Department of Peace and Conflict Research.

**Fig. 3. Homicides Related to the War against Organised Crime According to Semanario Zeta (2006-2011)**



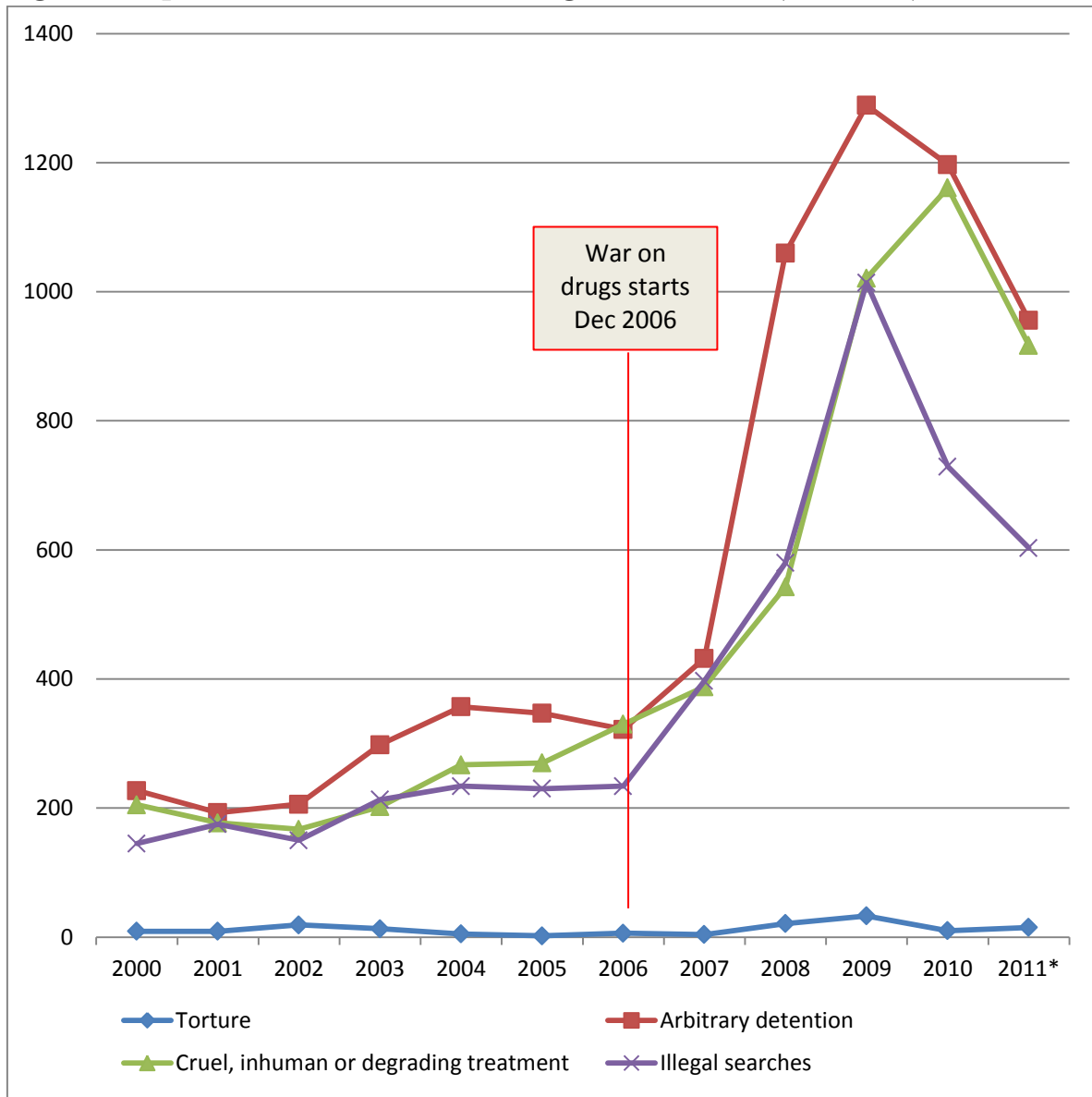
\*It includes December only, the month when the war on drugs was launched.

\*\*until the end of May 2011

Source: *Semanario Zeta*, “50 mil ejecuciones”, num. 1946, 4 July 2011.

Human rights violations associated to the implementation of the strategy against organised crime (by federal government agencies) also showed a dramatic increase.

**Fig. 4. Complaints of Selected Human Rights Violations (2000-2011)**

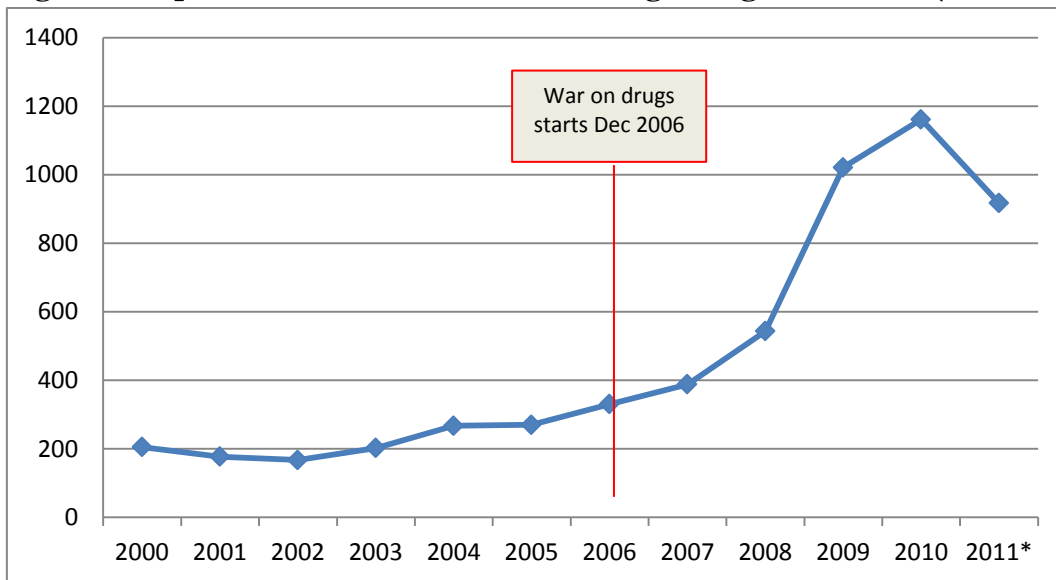


\*until the end of June 2011

Source: CNDH annual reports 2000-2010; CNDH, "Sistema Nacional de Alerta"; and CNDH, Infomex 57210/10, doc. 116/2011, 11 February 2011.

Complaints of cruel, inhuman or degrading treatment went from 270 in 2005 to 1,161 in 2010.<sup>123</sup> Those of arbitrary detention rose from 347 in 2005 to 1,197 in 2010;<sup>124</sup> illegal searches passed from 230 to 729 in the same period.<sup>125</sup> It is interesting to note how these three last violations follow a very close pattern, showing that the perpetration of one type can open the door to others. Someone who is arbitrarily detained is more likely of being ill-treated than someone whose arrest fulfilled legal formalities.

**Fig. 5. Complaints of Cruel, Inhuman or Degrading Treatment (2000-2011)**



\*until the end of June 2011

Source: CNDH, “Sistema Nacional de Alerta”; and CNDH, Infomex 57210/10 - doc. 116/2011, 11 February 2011.

In what refers to torture, the previous graph does not show as clearly the importance of the increase after 2006. Being such an atrocious human rights violation, it should be studied within its own scale: one single complaint of torture is

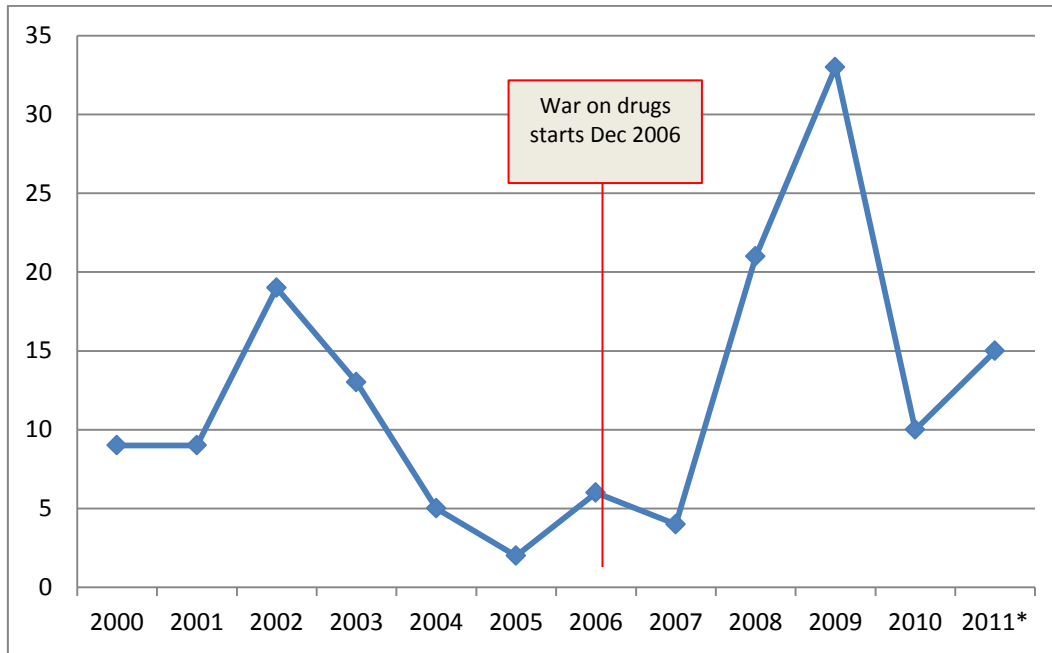
<sup>123</sup> CNDH, Infomex 57210/10, doc. 116/2011, 11 February 2011.

<sup>124</sup> CNDH, “Reporte de actividades 2005”, 2006 and CNDH, “Reporte de actividades 2009”, 2010.

<sup>125</sup> *Ibid.*

in itself excessive. From only two complaints received by the Commission in 2005, the number rose to 33 in 2009. In 2010, as for other violations, there was an important decrease (to 10 cases); however during the first 7 months of 2011 there have already been 15 complaints.<sup>126</sup>

**Fig. 6. Complaints of Torture (2000-2011)**



\*until the end of June 2011

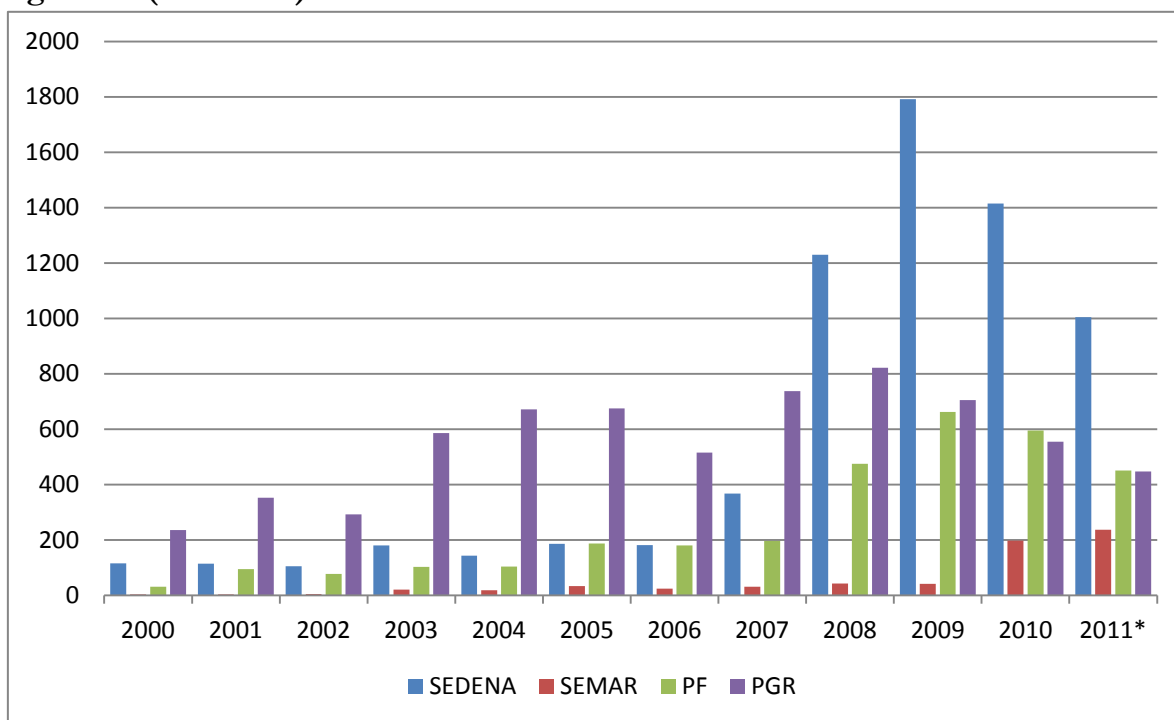
Source: CNDH, “Sistema Nacional de Alerta”; and CNDH, Infomex 57210/10 - doc. 116/2011, 11 February 2011.

In these four types of violations (illegal searches, arbitrary detention, cruel, inhuman or degrading treatment and torture) the army has been identified as having the worst records since the war on drugs started. Concern about this has been

<sup>126</sup> CNDH, “Sistema Nacional de Alerta”; and CNDH, Infomex 57210/10 - doc. 116/2011, 11 February 2011.

expressed by the CNDH<sup>127</sup>, Human Rights Watch<sup>128</sup>, Amnesty International<sup>129</sup> and the UNHCHR<sup>130</sup>.

**Fig. 7. Perpetrators of Human Rights Violations among Federal Security Agencies (2000-2011)**



\*until the end of July 2011

Key: SEDENA: Secretariat of National Defence; SEMAR: Secretariat of the Navy; PF: Federal Police; PGR: Office of the Prosecutor General

Source: CNDH annual reports 2000-2010 and CNDH, “Sistema Nacional de Alerta”.

The immediate, direct causes of members of this group being the most frequent perpetrators can be identified as: (1) the military are performing public security functions for which they are neither legally nor technically qualified; (2) until the 12<sup>th</sup> of July 2011, the military who committed human rights violations were tried in

<sup>127</sup> Declarations of José Luis Soberanes, president of the CNDH (1999-2009), in the website of the CNDH.

<sup>128</sup> Human Rights Watch, “World Report 2011...”, *art.cit.*

<sup>129</sup> Amnesty International, *art.cit.*

<sup>130</sup> Press Conference by UNHCHR, Navi Pillay, *art.cit.*

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military and not in civil courts, exacerbating the perception of impunity;<sup>131</sup> (3) in many cases the military are not acting “in support of civil authorities” as the Supreme Court of Justice ruled that it should be. Otherwise, cases of illegal searches and arbitrary detention would not be as frequent since, the investigations police or local police forces would know they should carry warrants and observe certain formalities if they are to gather evidence and bring any suspects before a court. The detention and subsequent release of Jorge Hank Rhon, former mayor of Tijuana is a highly publicised example of such a situation: no civil authority was present.<sup>132</sup>

### **Privileging Detention while Neglecting Investigation and Prosecution**

While it is undeniable that since the war on drugs started the military are responsible for most human rights violations, particularly for most cases of torture, a closer look at the pattern by perpetrator shows a significant change over time. As has been mentioned in a previous section, the PGR (the investigations police) had been the authority most accused of cases of torture (70% of them) between 1990 and 2003. Until then, it had been found to torture to obtain incriminating confessions in 83% of cases.<sup>133</sup> After 2006 the military became the ones that most committed this violation, and complaints against the PGR decreased, particularly after 2008.

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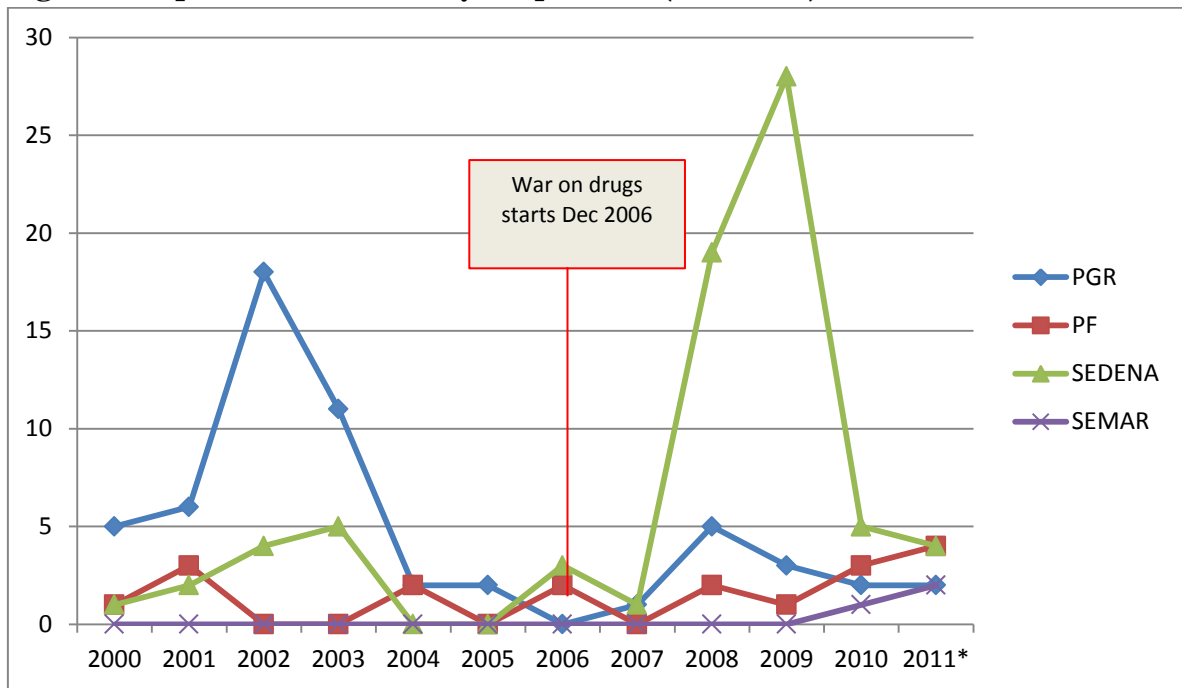
<sup>131</sup> *El Universal*, “HRW celebra coraje moral de ministros”, 13 July 2011.

<sup>132</sup> The detention by the military of former mayor of Tijuana, Jorge Hank Rhon, is one among many cases in which not observing the rules of evidence resulted in the release of the detainee, in spite of the presence of drugs and illegal weapons in the property. The detention was done in absence of an agent of the Public Prosecutor. See *El Universal*, “Detienen a Jorge Hank en Tijuana”, 4 June 2011; and *El Universal*, “Dictan libertad a Hank por falta de elementos”, 14 June 2011.

<sup>133</sup> Ricardo Hernández Forcada and María Elena Lugo Garfías, *op.cit.*, pp. 13, 135- 136.



**Fig. 8. Complaints of Torture by Perpetrator (2000-2011)**



\*until the end of June 2011

Key: SEDENA: Secretariat of National Defence; SEMAR: Secretariat of the Navy; PF: Federal Police; PGR: Office of the Prosecutor General

Source: CNDH annual reports 2000-2010 and CNDH, “Sistema Nacional de Alerta”.

It could appear as evident that having the military do public security tasks –a function for which they are not trained– would result in more torture at the hands of this group. The available information for recent years does not specify whether they torture detainees with the purpose of obtaining confessions or for reasons of “military intelligence”.<sup>134</sup> Nevertheless, given that the confession obtained by a soldier does not have evidentiary weight, the second reason appears more plausible.

<sup>134</sup> The recommendations of the CNDH include accounts of the facts that constitute human rights violations and often state the purpose of torture as identified by the victim. However, recommendations represent roughly 3.1% of all complaints of this violation, according to the institution’s annual reports. It is thus difficult to generalise by such a small sample. A public information request of complaints records was submitted, but an answer is still being awaited.

As for what explains the first “peak” in the graph for the PGR, the period 2000-2005 matches the administration of a military, General Rafael Macedo de la Concha, at the head of the institution.<sup>135</sup> It also comprises the first years of the AFI substituting the corrupt PJF.<sup>136</sup> For Sigrid Arzt, during this time the PGR experienced a period of militarization that extended to the way it was professionalised.<sup>137</sup> The sharp increase in 2002-2003 could obey to the military training received by the then newly created AFI, certainly not the most adequate instruction for an investigations police, and which most likely lacked a much needed emphasis on formal justice procedures and the rights of suspects.

The decrease in cases of torture by PGR agents, particularly after 2008 is far more puzzling. A number of hypotheses will be put forward. First, during that year the – so far– successful “Operation Clean-up” took place (as mentioned in a previous section). With it, 25 high-rank agents who were discovered to be on the payroll of the Beltrán Leyva cartel (and probably of others<sup>138</sup>) were purged. The operation may have sent the message that institutional controls were working and that breaking the rules would not be tolerated. This could have had an effect in reducing the incidence of torture.

A second (more audacious) hypothesis to explain the decrease would be linking it to the presence of the military in public security tasks. It is difficult to prove but, there

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<sup>135</sup> See Figure 1 above, which includes all complaints of human rights violations, and shows an upward trend precisely in the period 2000-2005.

<sup>136</sup> The AFI's functions were taken over by the PFM in 2008, as mentioned earlier.

<sup>137</sup> Sigrid Arzt, “The militarization of the PGR”, in Wayne A. Cornelius and David A. Shirk (eds.), *op.cit.*, p. 161.

<sup>138</sup> *El Universal*, “Compró el narco a jefes de la SIEDO”, 27 October 2008.

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exists a possibility that the military are doing the investigations that are normally the responsibility of the PGR.<sup>139</sup> This could also mean that the former are incurring in torture as “part” of their new role. It is a mere supposition, and would sadly suggest that the deficient investigations that the PGR would normally be conducting have increased their “torture quota” at the hands of the military.

A third hypothesis, now focusing only on the data, centres on the tremendous decrease ( from 7,992 to 3,741) in the number of investigations police agents between 2007 and 2011.<sup>140</sup> If this group was the one most accused of committing torture and its personnel decreased by 54%, it seems logical that there would be, at least, an equal decrease in cases of torture. It may appear as a quite simplistic observation, but it reveals a lot about the nature of this war against organised crime.

The fact that the federal investigations police shrank in such a proportion during the implementation of an intensive law enforcement strategy is at least scandalous. Alongside, it must be recalled that only 7.3% out of the approximately 131,000 suspects that have been detained for offenses related to organised crime have been processed (either charged or acquitted).<sup>141</sup> This clearly indicates that criminal investigation and prosecution are not being given the importance they would deserve if enforcement were conceived within a democratic rule of law.

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<sup>139</sup> Recommendations 41/2011; 31/2011 and 75/2010 are among the ones pointing in this direction, but they do not allow, by themselves, the identification of a pattern.

<sup>140</sup> *La Jornada*, “Redujo la PGR su plantilla laboral”, 23 July 2011.

<sup>141</sup> Hearing of Prosecutor General Marisela Morale before the Congress on 29 June 2011.

## Criminal Justice Reform

An incredibly ambitious reform to the criminal justice system –at least formally– was started during the administration of Calderón, in June 2008. According to it, in an eight year term, the prosecutorial system should change from the inquisitorial to the adversarial model employed in common law countries.<sup>142</sup> The declared objective has been that of making a more efficient system, in which the oral examination of witnesses and evidence, as opposed to the current written one, helps make the administration of justice faster and better. However, the challenges in terms of training, monitoring and transforming an institutional/judicial culture –along with its vices– have proved to be great. Agents of the Public Prosecutor seem to be the most resilient to escape the inertias of the current system.<sup>143</sup>

So far, the progress of the reform is minimal. In the states where its implementation has started, there appears to be much confusion about the adversarial process, which has resulted in the deficient handling of cases. Only in the state of Chihuahua, one of the most affected by drug-related violence and where human rights violations in the security sector are higher, 40 out of the first 65 processed suspects were released due to faulty preliminary inquiries.<sup>144</sup>

Among them was the publicised *Rubí* case. During the investigation, Sergio Barraza confessed the murder of 16 year old Rubí Frayre Escobedo to state police agents and gave directions of the place where, as they confirmed, the corpse had been

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<sup>142</sup> See the differences between the models in William Van Caenegem, “Advantages and disadvantages of the adversarial system in criminal proceedings” in *Review of the Criminal and Civil Justice System in Western Australia*, vol. 1, 1999, pp. 69-102.

<sup>143</sup> Gerardo Laveaga and Álvaro Vizcaíno, *op.cit.*, pp. 28-31.

<sup>144</sup> *Norte*, “Rehacer el Nuevo Sistema Penal: ¿avance o retroceso”, 21 August 2011.

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placed. At the trial, in spite of him insinuating a confession, the judges did not instruct further questioning or investigation and declared him innocent, at the indignation of public opinion and particularly of the victim's mother, Marisela Escobedo. The reason was that some procedure rules were still designed for the inquisitorial model: the confession needed to be given before the Public Prosecutor in presence of a lawyer and be previously integrated to the file. Agents of the Public Prosecutor had not obtained it themselves, and thus did not include it in the case.<sup>145</sup> Barraza, presumably linked to criminal organisations, was released, while Marisela Escobedo took the case to a higher instance. This time, Barraza was found guilty and an arrest warrant was issued. Before he could be apprehended, he allegedly killed Marisela Escobedo at the doors of the government palace of Chihuahua, where she had been protesting against the deficient justice system for two weeks.<sup>146</sup> The story horrified public opinion and motivated the governor of Chihuahua to ask for the first judges' dismissal and criminal prosecution. They claimed that they could not declare him guilty while at the same time observing the rules of evidence. Few noticed the role of the agents of the Public Prosecutor in the matter, even less saw a half-way through criminal justice reform.

While this case did not belong to the federal, but to a state jurisdiction, similar situations take place at the former due to the unclear, partial implementation of one model on top of a faulty previous one. It is true that training would solve large part of the problem, nevertheless this has proved to be a challenge for agents of the

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<sup>145</sup> *CNN México*, "El abogado de los jueces del caso Rubí argumenta en su defensa", 21 January 2011.

<sup>146</sup> *El Universal*, "Matan a activista Marisela Escobedo", 16 December 2010.

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Public Prosecutor who are overloaded with work. As it has been mentioned, each one must take care of over 900 cases yearly. A public servant said in this respect “Either they work or they get training. They cannot do both things at the same time”.<sup>147</sup>

At the federal level, the way in which the law is currently attempted to be enforced can be simplified as one where the federal police and the military “hunt” for individuals whom they do not often have the decency of calling suspects.<sup>148</sup> Then, when the investigations police and agents of the Public Prosecutor cannot integrate the preliminary inquiry and have no evidence to file charges, they resort to the infamous figure of *arraigo*. This is equivalent to an “informal” extended temporary custody granted by judges, by which agents of the Public Prosecutor can detain suspects for up to 80 days while they gather enough evidence to incriminate them.<sup>149</sup> The figure was included in the 2008 reform of article 16 of the Mexican Constitution, specifically for cases of organised crime.<sup>150</sup> The contradiction with article 19, by which no one can be detained for longer than 72 hours without being formally indicted is evident.<sup>151</sup> Jurists and human rights organisations have

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<sup>147</sup> Gerardo Laveaga and Álvaro Vizcaíno, *op.cit.*, p. 5.

<sup>148</sup> See press releases from the army where the words “suspect” or “presumed” are absent and the detainee is assumed as criminal before being brought before a judge: SEDENA, “El Ejército Mexicano detiene en Cancún, Q. Roo., a Ricardo Benítez Servín (a) ‘El Mudo’”, 15 August 2011; and SEDENA, “Resultados de la operación ‘Lince Norte’ del 16 de julio al 4 de agosto de 2011”, 4 August 2011. In the latter, not only are those detained automatically called criminals, but those killed during armed confrontation are said to have been “shot down” (*abatidos*). The language of war is not disguised.

<sup>149</sup> Juventino Castro y Castro, “El arraigo penal”, *Trilogía*, 25 June 2009.

<sup>150</sup> *Loc.cit.*

<sup>151</sup> Article 16, *Constitución Política de los Estados Unidos Mexicanos*, valid 11 June 2011.

repeatedly expressed the illegality and right-violating nature of *arraigo*.<sup>152</sup> Amnesty International has qualified it as a form of arbitrary detention and called for its derogation.<sup>153</sup>

### Summing up

This is a war against organised crime where the military act as police officers, detain and probably investigate. In the meantime, the investigations police and federal agents of the Public Prosecutor see their responsibilities and personnel stagnate, quantitatively and qualitatively. The strategy can hardly be considered to aim at law enforcement when those detained are not brought before a judge, whether because of lack of investigation or due to faulty or inexistent criminal cases. The importance of these components of enforcement goes beyond the mere fact of having to release suspects or extend their detention owing to insufficient evidence. An already solid cycle of impunity is being encouraged, undermining justice and contributing to the further weakening of institutions that are central to a democratic rule of law.

As it was shown in a previous section, the PGR has been undergoing –at least during the last 24 years– a process of degradation where corruption, inefficiency, lack of training and work overload have made it incapable of playing the role it should have in law enforcement. By 2006 the situation of public/national security had become critical, and the executive power did not trust the PGR (along with

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<sup>152</sup> CENCOS-CADHAC, “El arraigo es violatorio de los derechos humanos”, 4 May 2011; and *El Universal*, “El arraigo es inconstitucional, afirman expertos en derecho”, 6 February 2010.

<sup>153</sup> Amnesty International, *art. cit.*, p. 8.

several local police forces and prosecutorial institutions) to be at the frontline of a war against criminal organisations. Thus, the military were sent to take over public security, and the already existing void of investigation and prosecution grew larger. Alongside came a dramatic increase in the number of human rights violations committed in the context of law enforcement.

The relationship between this void and human rights abuses is not accidental. As investigation and prosecution become more deficient, less consistent with a democratic rule of law, impunity and inobservance of formal and substantial justice open the way for rights violations. The following section will explore this relationship in depth, attempting to show how the medium-long term neglect of investigation and prosecution can have human rights violations as an outcome.



## THE RELATIONSHIP

### Incidence of Human Rights Violations and Effectiveness of Prosecution by State

To say that there are human rights violations in Mexico's war on drugs because the military are performing public security functions is as correct an explanation as it is insufficient. The military may be the most significant group of perpetrators, but their action is being exercised in a context of long term impunity and weak rule of law. The capacity of the state to enforce consistently its own laws while respecting the rights of citizens has not been uniformly exercised. This was true at least a decade before the strategy against organised crime was launched.<sup>154</sup> The aspect in which it has been most clearly manifest is in the deficient or absent prosecution of crimes.

One way of showing the relation between this and the incidence of human rights violations in the security sector is to look at the performance of the PGR in the 31 states and the Federal District (Mexico City) during the last decade, and examine it in light of violations complaints. Analysing by state makes it possible to assess whether better prosecution rates are observable there where violations are lower, and vice versa.

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<sup>154</sup> The NGO CIDAC and *México Evalúa* conducted a study that showed that between 1996 and 2000 impunity in the country averaged 96%. See "Indicadores para entender y monitorear la Seguridad Pública en México", 2009, p. 5.

## **Measuring the Performance of the PGR and Examining Human Rights Violations by Security Agents**

The performance of the PGR can be measured according to its enforcement of arrest warrants. These are issued by judges once the Public Prosecutor presents a preliminary inquiry that shows enough evidence as to merit the detention of a person. Their purpose is bringing suspects before a judge, which is why their execution is crucial for the administration of justice. Each unenforced warrant represents another brick in the wall of impunity. Hence, measuring enforced arrest warrants, as a percentage of the total number of arrest warrants per year (which is the sum of the warrants received during that year and those pending from the previous year) provide a good indicator of the work of the PGR by state.

In what refers to human rights violations, complaints for illegal searches, arbitrary detention, torture and cruel, inhuman or degrading treatment, provide a sample of abuses committed by agents of the army, the navy, the federal police and the PGR. All are illegal acts and are forbidden by national and international laws, as is summarized in the following table:

**Table 1. Selected Human Rights Violations in National and International Legislation**

	Illegal searches	Arbitrary detention	Torture	Cruel, inhuman or degrading treatment
National Legislation	- art. 14 and 16 of the Constitution	- art. 14 and 16 of the Constitution	-art. 20 and 22 of the Constitution. -Federal Law for the Prevention and Punishment of Torture	-art. 22 of the Constitution. -The Federal Law for the Prevention and Punishment of Torture does not typify this violation.
International Legislation	-art. 17.1 of the ICCPR <sup>155</sup> -art. 11.2 of the ACHR	-art. 9.2 of the ICCPR -art. 7.3 of the ACHR	-art. 7 of the ICCPR -CAT -art. 5.2 of the ACHR	-art. 7 of the ICCPR -CAT -art. 5.2 of the ACHR

Source: CAT, ICCPR, ACHR, *Ley Federal para Prevenir y Sancionar la Tortura* and *Constitución Política de los Estados Unidos Mexicanos*.

The CNDH has been documenting these abuses for the past twenty years, nevertheless information as detailed (by type of violation, perpetrator and state) is limited, hence a snapshot of the present composition of violations (January to June 2011) will be the object of analysis.

<sup>155</sup> See General Comment No.16 to Art. 17 of the ICCPR: *The right to respect of privacy, family, home and correspondence, and protection of honour and reputation*, 8 April 1988.

## Notes

- It is acknowledged that rigorously speaking, it is not statistically valid to measure a six month count of violations against a ten year tendency of prosecution performance. It is also recognised that the amount of data is too small as to produce valid correlations. Nevertheless, the study makes it possible to show the effect of prior, mid to long term ineffectiveness of prosecution in present human rights violations.
- The following tables present the data that is subsequently put into dispersion graphs. The “Security and Justice” chapter of the National Institute for Statistics and Geography (INEGI) offers a consistent source of prosecution statistics from 2000 to 2010, presented in the first one. The second contains information from the National Alert System of the CNDH, set into operation in January 2011.
- The states that have had joint operatives, coordinated by the federal government (the modus of the strategy against organised crime) are marked in a different colour.<sup>156</sup> The purpose of this is distinguishing whether the war against organised crime can be taken as an explanatory variable or as the context in which human rights violations occur. This will allow to show the weight of the performance of the PGR, comparing among states “with and without” war on drugs.

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<sup>156</sup> Until May 16, 2011 joint operatives had taken place (or were currently taking place) in 13 states, according to the Website of the Presidency of the Republic.

**Table 2. Average of Enforced Arrest Warrants by the PGR (as percentage of received during the year plus pending from the previous year) by Federal Entity (2000-2010)**

Federal entity (state)	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	Average 2000-2010
AGUASCALIENTES	12.00	26.80	46.15	47.13	44.14	25.00	33.75	35.71	32.05	41.41	53.98	<b>36.19</b>
BAJA CALIFORNIA	2.26	4.43	6.65	3.27	8.66	10.51	14.42	15.61	17.38	17.80	16.15	<b>10.65</b>
BAJA CALIFORNIA SUR	13.79	15.71	36.61	35.12	21.20	17.36	18.92	12.29	20.68	27.48	21.74	<b>21.90</b>
CAMPECHE	12.62	18.45	22.30	22.22	20.21	15.85	13.97	16.79	17.01	26.12	24.76	<b>19.12</b>
CHIAPAS	6.27	7.38	7.37	6.90	11.61	10.85	7.89	7.25	10.01	11.10	18.41	<b>9.55</b>
CHIHUAHUA	6.97	4.17	8.51	6.54	6.51	8.56	9.97	7.05	13.84	12.07	10.33	<b>8.59</b>
COAHUILA	4.39	9.92	12.26	13.62	12.83	14.73	13.70	12.21	12.02	12.53	11.51	<b>11.79</b>
COLIMA	21.83	19.54	23.90	28.02	27.73	22.64	15.10	25.36	24.81	22.08	22.57	<b>23.05</b>
DISTRITO FEDERAL	8.57	11.09	13.19	15.42	22.03	20.51	19.39	18.67	23.36	21.41	24.97	<b>18.06</b>
DURANGO	6.97	11.13	11.93	15.76	9.10	11.07	12.96	14.35	10.98	15.09	16.93	<b>12.39</b>
ESTADO DE MEXICO	9.05	13.92	19.97	22.39	20.86	22.04	22.73	18.35	25.09	24.42	24.79	<b>20.33</b>
GUANAJUATO	9.93	16.35	15.05	26.51	15.03	16.46	18.94	16.34	19.86	19.64	31.26	<b>18.67</b>
GUERRERO	2.51	7.45	22.35	16.96	11.64	14.10	11.27	11.07	13.87	12.70	10.26	<b>12.20</b>
HIDALGO	9.58	9.25	14.21	17.90	32.89	32.16	27.11	28.93	24.92	25.91	29.44	<b>22.94</b>
JALISCO	1.85	4.66	4.59	7.62	11.18	11.50	12.80	10.76	17.75	21.13	24.43	<b>11.66</b>
MICHOACAN	5.06	5.48	10.01	11.92	11.50	14.43	12.56	13.44	10.27	11.48	11.61	<b>10.71</b>
MORELOS	7.85	28.60	22.35	32.78	15.73	16.35	17.45	17.21	16.64	30.70	21.51	<b>20.65</b>
NAYARIT	2.29	3.45	7.03	16.59	12.70	12.88	16.06	16.83	21.31	32.35	22.03	<b>14.86</b>
NUEVO LEON	0.08	9.14	6.84	8.99	12.20	14.36	11.46	17.37	20.43	28.52	19.68	<b>13.55</b>
OAXACA	2.73	6.96	8.72	13.97	10.83	13.34	8.94	7.80	9.04	15.03	14.42	<b>10.16</b>
PUEBLA	14.62	13.17	18.18	27.62	15.72	19.42	20.00	16.64	21.33	24.42	22.69	<b>19.44</b>
QUERETARO	19.23	10.76	23.39	33.47	23.24	18.40	20.75	23.04	18.18	18.37	22.07	<b>20.99</b>
QUINTANA ROO	8.94	14.91	23.67	25.59	16.78	9.40	18.44	18.59	17.18	20.90	19.64	<b>17.64</b>
SAN LUIS POTOSI	2.85	4.00	8.37	10.93	8.60	12.45	11.81	10.83	13.26	18.40	16.64	<b>10.74</b>
SINALOA	6.50	7.84	12.80	12.06	14.40	18.50	22.99	22.76	21.90	24.63	19.02	<b>16.67</b>
SONORA	2.16	15.36	13.74	15.35	16.68	20.75	20.87	17.53	30.84	32.80	31.27	<b>19.76</b>
TABASCO	5.37	11.06	14.67	14.14	13.64	12.38	11.58	16.55	19.59	35.02	32.70	<b>16.97</b>
TAMAULIPAS	2.13	5.19	4.94	3.01	3.12	2.99	3.99	3.21	5.68	6.51	5.68	<b>4.22</b>
TLAXCALA	25.47	18.55	24.83	37.67	25.44	42.48	33.11	37.95	40.21	40.00	36.00	<b>32.88</b>
VERACRUZ	9.22	8.66	11.97	16.71	20.29	19.66	25.07	19.53	21.11	19.04	15.53	<b>16.98</b>
YUCATAN	10.26	28.63	31.82	26.67	23.76	21.21	19.86	35.82	30.91	40.16	28.93	<b>27.09</b>
ZACATECAS	5.32	8.96	9.54	15.85	12.63	9.41	12.42	15.26	19.17	10.32	22.17	<b>12.82</b>

Note: States shaded in yellow have had (or currently have) joint enforcement operatives.

Source: INEGI, "Sector Seguridad y Justicia" in *Anuario de Estadísticas Nacionales 2010*, Mexico, 2011.

**Table 3. Complaints of Human Rights Violations Related to the Provision Security by Federal Entity (Jan-Jun 2011)**

CNDH rank	state	total complaints security sector	%	torture					cruel, inhuman or degrading treatment					arbitrary detention					illegal searches					totals, selected violations
				T	PGR	PF	SEDENA	SEMAR	T	PGR	PF	SEDENA	SEMAR	T	PGR	PF	SEDENA	SEMAR	T	PGR	PF	SEDENA	SEMAR	
29	AGUASCALIENTES	18	0.8						9	1	1	3	0	11	1	1	3	0	2	0	0	1	1	22
4	BAJA CALIFORNIA	144	6.6	2		1			60	5	3	47	1	77	3	2	55	0	50	2	7	40	0	189
24	BAJA CALIFORNIA SUR	26	1.2						14	1	0	12	1	16	0	0	15	1	12	0	0	12	0	42
27	CAMPECHE	20	0.9						14	2	1	5	4	11	2	1	2	4	10	1	1	5	1	35
12	CHIAPAS	77	3.5						19	2	2	8	0	26	3	3	10	0	14	1	0	9	1	59
8	CHIHUAHUA	110	5.0						50	4	28	18	0	43	4	21	15	0	24	1	6	16	1	117
9	COAHUILA	89	4.1	1			1		35	1	3	23	6	59	3	2	28	24	25	2	0	9	14	120
20	COLIMA	45	2.1						21	2	1	2	16	32	2	0	2	23	14	0	0	2	12	67
2	DISTRITO FEDERAL	152	6.9						40	14	18	3	2	42	13	18	3	2	14	4	5	1	1	96
7	DURANGO	111	5.1						54	7	9	32	0	44	7	7	27	0	45	7	7	30	0	143
16	ESTADO DE MEXICO	70	3.2	1	1				35	11	12	9	1	30	8	14	7	1	19	4	6	9	0	85
26	GUANAJUATO	25	1.1						5	0	5	0	0	4	1	1	0	0	6	0	2	4	0	15
6	GUERRERO	114	5.2						61	3	11	40	4	52	2	12	34	4	50	3	6	36	2	163
25	HIDALGO	25	1.1						12	5	1	1	0	15	6	2	1	0	6	3	0	0	0	33
17	JALISCO	64	2.9						31	5	6	12	2	36	4	7	13	6	17	1	0	8	5	84
3	MICHOACAN	147	6.7						74	3	22	48	1	62	2	16	42	1	54	0	12	40	2	190
14	MORELOS	73	3.3	1	1				39	3	11	22	1	38	2	14	17	0	28	2	3	20	1	106
22	NAVARRIT	39	1.8						19	1	0	17	1	21	2	1	12	3	8	0	1	7	0	48
31	NO LOCATION	12	0.5						6					5					1					12
11	NUEVO LEON	80	3.6	3	1		1	1	56	2	10	28	10	50	3	8	22	9	11	0	1	7	2	120
5	OAXACA	124	5.7	3			1	1	44	7	6	15	9	47	6	4	17	9	35	1	1	20	4	129
28	PUEBLA	19	0.9	2		1			5	0	2	1	0	3	0	2	0	0	5	1	2	2	0	15
33	QUERETARO	6	0.3						3	0	3		0	6	1	1	0	0	1	0	1	0	0	10
21	QUINTANA ROO	39	1.8						12	0	0	4	8	20	0	0	9	7	18	0	0	7	9	50
15	SAN LUIS POTOSI	72	3.3	1	1				38	2	17	18	1	46	2	15	23	2	20	0	9	10	1	105
18	SINALOA	51	2.3						23	1	1	19	2	20	2	1	10	6	27	1	0	23	3	70
10	SONORA	82	3.7						19	3	3	11	2	19	5	2	8	1	16	1	0	14	0	54
19	TABASCO	49	2.2	1			1		31	3	0	14	1	32	4	0	13	2	18	3	0	9	0	82
1	TAMAULIPAS	181	8.3						35	4	9	12	10	31	1	7	7	15	27	0	6	10	11	93
32	TLAXCALA	7	0.3						6	2	3	1	0	6	1	3	1	0	0	0	0	0	0	12
13	VERACRUZ	74	3.4						19	1	3	11	4	31	5	2	13	6	11	1	0	8	2	61
23	YUCATAN	29	1.3						20	3	9	4	1	13	2	7	3	1	11	2	4	2	1	44
30	ZACATECAS	15	0.7						8	0	2	5	0	8	0	2	5	0	4	0	1	3	0	20

Key: PGR: Office of the Prosecutor General; PF: Federal Police; SEDENA: Secretariat of National Defence; SEMAR: Secretariat of the Navy; T: total  
 Source: CNDH, "Sistema Nacional de Alerta".

- Column 3, total complaints in the security sector, represents numbers of files. Each file may report one or more violations. Hence, the totals for the four selected violations (last column) may be higher.
- States shaded in yellow have had (or currently have) joint enforcement operatives.
- Numbers in red indicate the worst perpetrator by type of violation.

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## Observing the Tables

The tables, by themselves, do not express much. However, three things are worthy of attention. First, in theory, the PGR should have standard rules of operation and perform its duties according to the same criteria. However, as the enforcement of arrest warrants shows, the work of this federal institution has not been consistent among states. This study focuses on the consequences of that inconsistency; explaining the reasons behind it escapes its scope. However, in light of the account provided in previous sections, the mere existence of variations reveals an aspect of the PGR's institutional weakness.

Second, the only three federal entities where the PGR has committed more violations than the army are Mexico City (Distrito Federal), the State of Mexico (Estado de México) and Hidalgo. It is interesting because these neighbouring federal entities concentrate 23% of Mexico's population and have a high level of urbanisation.<sup>157</sup> Neither has had joint operatives as part of the strategy against organised crime, and violations match the previous pattern, where the PGR had the worst records. Since drug-related violence and the war on drugs have only marginally affected these federal entities, it is possible that human rights violations here are less connected to the war on drugs.

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<sup>157</sup> According to INEGI, "Censo de Población y Vivienda 2010", the total population in 2010 was 112,336,538. The State of Mexico counts 15,175,862; Mexico City: 8,851,080 and Hidalgo : 2,665,018.

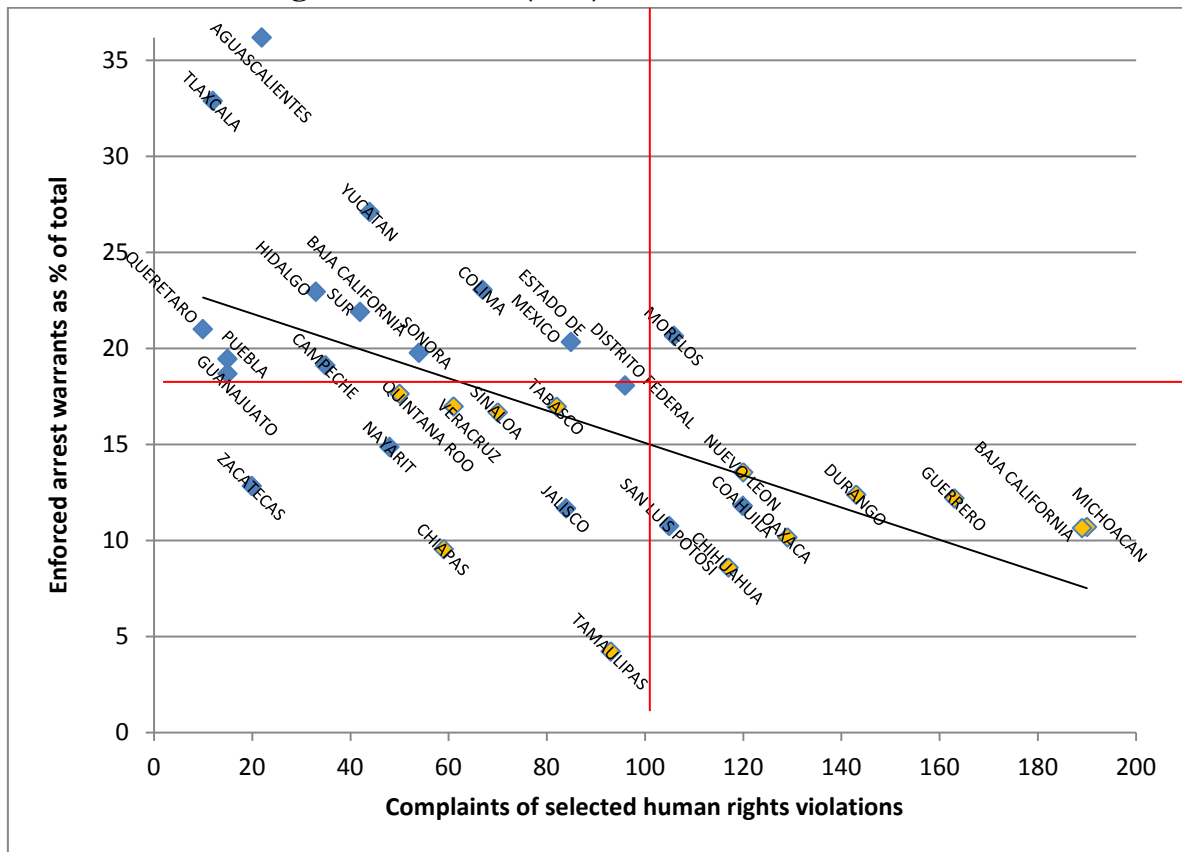
Third, is the fact that the states where there have been joint operatives (those where the strategy against organised crime has been applied) are not necessarily the ones with the worst record of human rights violations. One would not expect Jalisco (Guadalajara, its capital city, is the second most populated in the country) to have more human rights violations than Sinaloa, epicentre of the infamous Sinaloa cartel and where the presence of federal forces is strong. San Luis Potosí also figures among the ones with bad violations records, but in which the federation has not had a systematic presence in law enforcement activities. Nevertheless, in both Jalisco and San Luis Potosí the PGR has had a worse performance than in Sinaloa, as will be shown.

### **The Relationship Shown Graphically**

With this, the observation to be stressed is that human rights violations cannot be solely explained by the context in which they occur: the strategy against organised crime. When the information in the charts is put into dispersion graphs, placing the states according to the relation between human rights violations and enforced arrest warrants by the PGR, it is possible to see that the tendency to have human rights violations increases as the percentage of enforced arrest warrants diminishes. The following graph shows the 32 federal entities.



**Fig. 9. Enforced Arrest Warrants by State (2000-2010) and Complaints of Selected Human Rights Violations (2011)**



Note: A yellow point indicates that there are or have been joint operatives in that state.

When the snapshot of violations is seen against the average of enforced arrest warrants of the last ten years (2000-2010), it is possible to see that in the 13 states where there are (or have been) joint operatives the PGR has enforced less than 17.6% of warrants. This indicates that in every state where the federation has applied the strategy against organised crime –where it has had to intervene due to a critical security situation– arrest warrants have had lower execution rates. None of the states in the upper left quadrant, where the PGR has better performed, have been judged as needing the systematic presence of federal forces

The graph also shows that not all the states with the worse human rights records, those in the lower right quadrant, have had joint operatives. San Luis Potosí and

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Coahuila have more than 100 complaints of the selected violations and neither has had this kind of intervention. However, in both the PGR has enforced less than 12% of arrest warrants. Thus, the lower right quadrant contains the states with more human rights violations. The PGR has executed less than 14% of warrants in all of them, but the federal government has not sent forces to the whole group.

Morelos, an exception –since it counts more than 100 violations, but where the enforcement rate is above 20%– will be explained short afterwards. For now, it is important to stress that in 9 out of the 10 states with more than 100 violations the PGR has had a poor performance (Michoacán, Baja California, Guerrero, Durango, Oaxaca, Nuevo León, Coahuila, Chihuahua and San Luis Potosí).

In the states where the rate of enforcement is over 17.6% (Distrito Federal, Estado de México, Colima, Yucatán, Aguascalientes, Tlaxcala, Sonora, Baja California Sur, Hidalgo, Campeche, Querétaro, Puebla, Guanajuato, and Morelos) 13 out of 14 have less than 100 complaints of the selected human rights violations. Out of these 13, only the State of Mexico and Mexico City count more than 67 complaints. Thus, the upper left quadrant gathers those states with less human rights violations and where the performance of the PGR has been better.

The lower left quadrant, where violations are below 100 but the enforcement of arrest warrants is below 17.6% allows for some interesting observations. In 6 out of 9 cases there have been joint operatives. This also supports the idea that not necessarily all the states with joint operatives have had more human rights

violations. However, it may also appear to indicate that the PGR having a worse performance is not always connected with more human rights violations. All the same, it is worth noting that in 5 out of the 9 cases of this quadrant the PGR has enforced more than 15% of arrest warrants (Nayarit, Quintana Roo, Veracruz, Sinaloa and Tabasco). Interestingly, in all of these 5 cases the PGR has had a better enforcement rate than in all the states of the lower right quadrant, where the enforcement of warrants is below 14%.

Morelos is an interesting case, since the enforcement rate is over 20% but violations exceed 100. While this state has not had joint operatives in the scale of those of Chihuahua, Tamaulipas or Michoacán, the presence of military and federal police agents increased after 2009, specifically after the killing of the leader of the Beltrán Leyva cartel during an operation of the navy.<sup>158</sup> Human rights violations increased as this happened, suggesting an exception to the findings of this study.

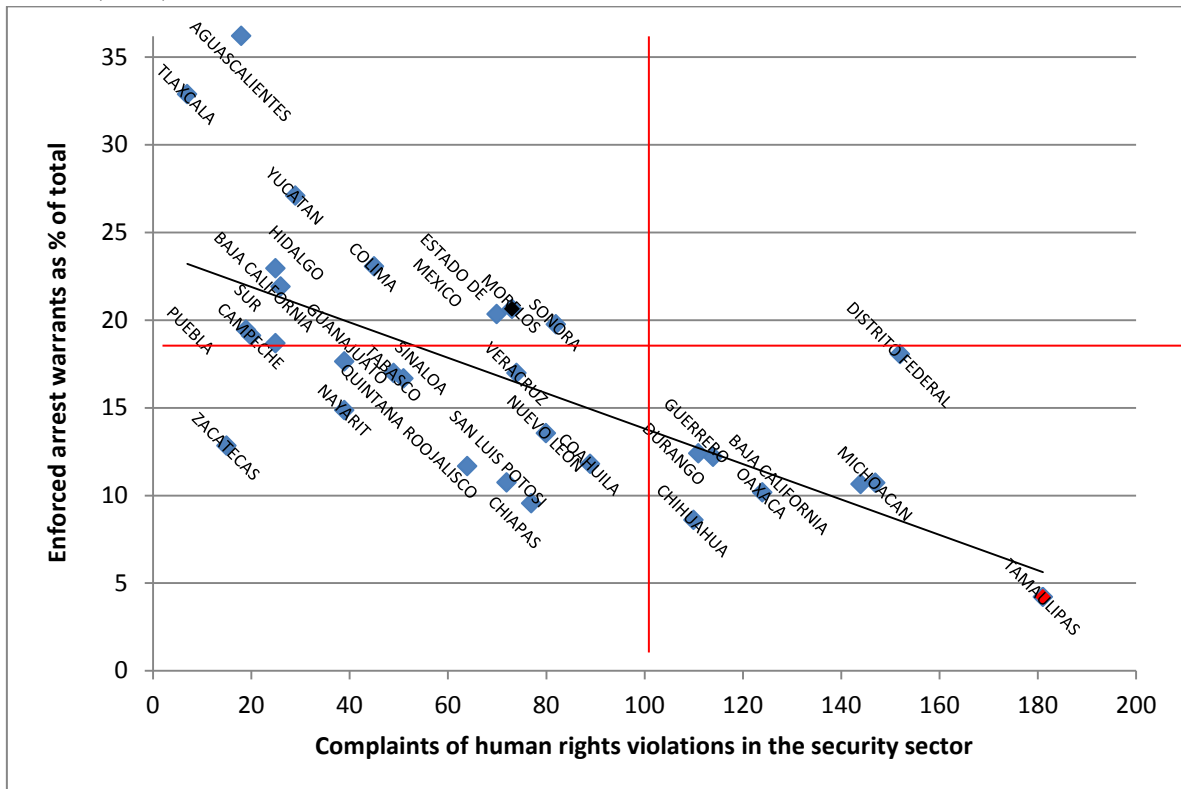
Nevertheless, when considering the CNDH's ranking, which measures complaint files of all violations (Table 3, first column), Morelos appears at the upper left quadrant. The apparent exception of Tamaulipas may also be explained in this manner: in the graph above it appears as having the worst enforcement average (4.2%), but the number of violations is below 100. When the total number of complaints files in the security sector is graphed, Tamaulipas is at the lower right corner: it ranks as having the worst record in the country. The graph is included merely as a parenthesis, since it shows that there where the PGR has had the lowest

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<sup>158</sup> *Organización Editorial Mexicana*, "Muere Arturo Beltrán Leyva al enfrentarse con la Marina en Cuernavaca", 17 December 2009.

performance is also where more complaints files of human rights violations in the security sector have been registered.

**Fig. 10. Enforced Arrest Warrants by State (2000-2010) and Complaints of Human Rights Violations in the Security Sector According to the CNDH Rank (2011)**



### Summary of Findings

While the configuration of the analysis does not make it possible to speak, in a strict sense, of a correlation between enforced arrest warrants and the selected human rights violations, it does allow us to speak of a sufficiently clear relation. Several findings can be mentioned in this respect:

- a) The states where federal agents committed most human rights violations were also those where the enforcement of arrest warrants had been the poorest during the previous ten years (lower right quadrant). This could indicate that public security agents feel less compelled to respect human rights there where the prosecution of crimes is less effective.
  
- b) The states where federal agents committed less human rights violations were also those where the enforcement of arrest warrants had been more effective during the previous decade (upper left quadrant). This indicates that those whose role is providing public security are less prone to violating human rights there where prosecution functions better.
  
- c) The 13 states where there have been joint operatives have lower averages of enforced arrest warrants. This could indicate that a less effective prosecution might have been among the causes of the severe deterioration of public security that motivated the mobilisation of the federal government.
  
- d) Not all the 13 states where there have been joint operatives have the higher records of human rights violations complaints. Seven of them are past the 100 complaints mark and the remaining six are before it. This indicates that those states where human rights violations are more frequent are not necessarily those where the federation has sent forces.
  
- e) Only Morelos shows more than 100 complaints of human rights violations and a significantly better performance of public prosecution than states with

a similar number of complaints. This is an exception to the general findings of the study, and could indicate the relevance of other factors favouring human rights violations. It also shows that in 96% of the cases, crime prosecution was better there where violations were lower, according to the position among quadrants.

- f) States where the PGR has had a better performance in what concerns enforcement of arrest warrants tend to have less complaints of the selected human rights violations, regardless of the quadrant where they are represented in the graph.
- g) The exceptions of Tamaulipas and Morelos (the first having the worst enforcement record and less of the selected human rights violations, the second having a better enforcement record and more human rights violations) show how the choice of studied violations affects the position in relation to enforcement. When taking into consideration the CNDH's ranking, Morelos passes to the upper left and Tamaulipas to the lower right quadrant.

### **Limitations and Strengths**

It may be legitimately asked why the study chose to focus on torture, cruel, inhuman or degrading treatment, arbitrary detention and illegal searches, and not on the ranking proposed by the CNDH. The reason is that counting by file and not by

violation minimises those incidents in which multiple violations are committed. The trade-off, however, is that by choosing only four types of violations, the study leaves out others, such as unlawful exercise of public authority, enforced disappearance or abuse of force which, incidentally, are more often in Tamaulipas than in other states.<sup>159</sup> The choice of the cited violations also obeys to the fact that they are among the few consistently registered under the same name by the CNDH since 2000. While this did not pose a problem for the analysis by state, it was relevant in order to maintain consistency with previous chapters.

Another visibly missing aspect, that would add consistency to the argument, would be the analysis of human rights violations in conjunction with that of enforced arrest warrants, both before and during the war on drugs. This would have allowed to show whether a variation in the effectiveness of prosecution produced a change in the pattern of human rights violations in the security sector. However, as has been mentioned earlier, the available information did not allow for it.

The most evident limitation is probably the fact that, since none of the states where there have been joint operatives has a better enforcement rate and less human rights violations (upper left quadrant) it is difficult to know if what has more effect in the low level of abuses is the performance of the PGR or the absence of joint operatives. This is true, at least for those states with more effective crime prosecution.

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<sup>159</sup> See CNDH, “Sistema Nacional de Alerta”.

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Nonetheless, the study suggests a plausible explanation for human rights violations in the context of the war on drugs that goes beyond what is commonly supposed. The federal government, through its joint operatives, is not always present there where human rights violations in the security sector are higher. Approximately half of the states where the federal government has sent forces are among those with less violations.

In the same sense, out of the 22 states with less human rights violations (left side) 14 have seen a better performance of crime prosecution while only 8 have seen a more deficient one. In contrast, among the 10 states with more human rights violations (right side), nine have a lower effectiveness of crime prosecution.

These observations, of course, are not capable of explaining every aspect of the pattern of human rights violations. Many other elements can have an influence on whether the relationship between citizens and state agents in charge of security in Mexico is abusive or protective. However, the findings of the analysis do indicate that human rights violations related to the provision of security can be the outcome of a deficient criminal prosecution. A more profound reflection about this association, as seen in the case of Mexico and its war against organised crime, will be given in the concluding section.



## CONCLUSIONS

The dramatic increase of human rights violations related to the provision of security that has been observed since the strategy against organised crime was launched in Mexico in 2006 reveals an incomplete democratic rule of law. The state has proved to be unable to guarantee the respect of citizens' fundamental rights while assuming the enforcement of laws. Perhaps more precisely, while deficiently enforcing its own laws, the state has decreased its ability to protect citizens from each other and from its own agents.

The incredibly low rate of enforcement of federal arrest warrants translates into impunity: if less than 17% of them has been, in average, executed over the last decade, close to 83% of suspects of federal crimes have not been brought to justice. The effects in terms of the credibility of the public security and administration of justice systems are felt, not just by a society who chooses to report only 22% of crimes to the authorities,<sup>160</sup> but also among the state's own security agents who feel no obligation to perform their duties in a lawful manner.

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<sup>160</sup> ICESI, "Victimización, Incidencia y Cifra Negra...", *art.cit.*, p. 73.

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A soldier who has been commanded, at the incompetence of civil authorities, to perform the work of a policeman, has no reason to fear prosecution for violating the human rights of the persons he detains when he is aware that not even criminals are brought before the courts. This can be especially true when the rights we are talking about are related to formal justice. The military are fighting a war against drug trafficking, not providing citizen security. Hence, with the aim of delivering results –and sheltered by the notion of combating threats to national security– any methods are thought to be valid, any civilian casualties or abuses justified.

It is true that before the war on drugs started civil authorities were not that respectful of procedural rights either. The PGR was the leading perpetrator of torture until 2003. The simultaneous presence of human rights violations in the early stages of criminal procedures and the ineffective prosecution (the low enforcement of arrest warrants is the ultimate manifestation of that) were a reality in Mexico before the military were sent to the streets. However, the nature of military training, the functions for which their existence is conceived, makes it more difficult to have them abide by what they consider to be formalities. In a way, it should not be surprising that, if the civil authority who is supposed to be instituted and trained for the investigation and prosecution of crimes disregards persons' rights, the military, who is not meant to perform that function, disrespects them.

That the military are the most significant group of perpetrators is beyond doubt. That they are performing public security activities outside the subsidiary role they should legally have, is also a fact. However, their presence in the streets is not the

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cause of human rights violations. They are the perpetrators, not the cause behind torture. In the same sense, it is not the strategy against organised crime what can account for human rights violations. The war on drugs is the context, not the cause.

The structural explanation of human rights violations is related to the mid – long term impunity; the absence of accountability not just for military, but for civil authorities; the inability of the national human rights institution (the CNDH) to go beyond conciliating, non binding recommendations that repeatedly violate the victims’ rights to recourse.<sup>161</sup> The insufficient strength of this last would merit an entirely different study, but it is important to mention that, in many ways, the Commission has kept the politically “discrete” role it exercised during the years of authoritarianism. In this sense, it has not acted as an effective means against impunity: human rights violations go systematically unpunished.

The PGR’s role in the war against organised crime has been undermined not only in terms of policy, but also in what refers to the pressure that public opinion could exert. Both the investigations police and federal agents of the Public Prosecutor have seen their institutional capacity decline, quantitatively and qualitatively, at the indifference of society and authorities.

The strategy of the federal government cannot claim to be enforcing the law: those against whom criminal charges exist are not being detained, and those detained are not being brought before a judge. As if it was not enough, those detained are seeing

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<sup>161</sup> See Human Rights Watch, “Mexico’s National Human Rights Commission. A critical assessment”, vol. 20, num. 1(B), 2008.

their human rights systematically disrespected. The consequences of this go beyond the lack of suitable evidence that allow for the integration of criminal cases and subsequent presentation of suspects before a judge. Impunity is being encouraged in its two facets: both criminals and abusive authorities go unpunished. The way in which these facets mutually reinforce each other is not accidental, and certainly not trivial. It is extremely costly in terms of human rights, and reveals a rule of law that stands far from the democratic ideal.

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