

MEXICO

I. INTRODUCTION

1. The Legal Framework

1.1. The Constitution

Mexico has a population of about 102 million people, including a considerable number of indigenous people, especially in southern Mexico.¹

Mexico is a representative federal democracy composed of 31 States and a Federal District where the Federal Government is located. Each of these entities has jurisdiction to enact laws which will have effect within their own territory and has its own Constitution and executive, legislative and judicial system.²

The Constitution of 1917 (*Constitucion Politica de los Estados Unidos Mexicanos*) guarantees a range of civil and political rights, among them the prohibition of punishment by mutilation and torture.³ It also provides for a right to petition and of recourse to courts by means of the remedy of *amparo*.⁴

The federal judiciary is composed of the Supreme Court of Justice, circuit courts and district courts.⁵ There is also a separate system of administrative and military courts.⁶ Article 103 of the Constitution provides that: "(t)he federal courts shall decide all controversies that arise out of law or acts of the authorities that violate individual guarantees, because of laws or acts of the federal authority restricting or encroaching on the sovereignty of the States; (and) because of laws or acts of State authorities that invade the sphere of federal authority." The federal courts have jurisdiction over all civil and criminal matters that arise from the enforcement and

¹ Core Document forming part of the Reports of State Parties: Mexico", UN Doc. HRI/CORE/1/Add 12/Rev. 1, 2 February 1995, paras. 1-16.

² Ibid., para.22.

³ See Chapter I of the 1917 Constitution, in particular Article 20 on rights in criminal proceedings and Article 22 on the prohibition of torture.

⁴ See Article 8 on the right to petition and Article 107 on the remedy of *amparo*. This remedy has been described as follows: "One of the most important type of cases the federal courts hear in Mexico are "amparo" suits (juicio de amparo). The "amparo" suit is an original Mexican institution with no exact equivalent in the common law tradition. The word "amparo" literally means favor, aid, protection, or shelter. Legally the word encompasses elements of several legal actions of the common law tradition: writ of habeas corpus, injunction, error, mandamus, and certiorari. There are five types of "amparo" suits: 1) "amparo" as a defense of individual rights such as life, liberty, and personal dignity; 2) "amparo" against laws (defending the individual against un-constitutional laws); 3) "amparo" in judicial matters (examine the legality of judicial decisions); 4) administrative "amparo" (providing jurisdiction against administrative enactments affecting the individual); 5) "amparo" in agrarian matters. The "amparo" suit may be either direct, initiated in the Supreme Court or collegiate circuit courts, or indirect, initiated in a district court and brought on appeal to the previously mentioned courts." (Footnotes omitted), see Introduction to *The Mexican Legal System*, 2d ed., 2000, by Francisco A. Avalos.

⁵ The first sentence of Article 94 of the Constitution reads: "The judicial power of the Federation is vested in a Supreme Court of Justice, in circuit courts, as a body in matters of *amparo* and as single judges in matters of appeal, and in district courts." See on the federal judiciary Articles 94 through 107 of the Constitution and the Organic Law of the Federal Judiciary.

⁶ See Article 13 of the Constitution and Article 57 of the Code of Military Justice for the jurisdiction of military courts.

application of federal laws or from treaties made with foreign powers.⁷ The Constitution contains no express provision entrenching the independence of the judiciary but provides guarantees against their removal from office.⁸

1.2. Incorporation and status of international law in domestic law

Mexico has become party to the following relevant international treaties:

- Geneva Conventions of 12 August 1949 (29 October 1952)
- International Convention on the Elimination of All Forms of Racial Discrimination (20 February 1975)
- International Covenant on Civil and Political Rights (23 March 1981)
- International Covenant on Economic, Social and Cultural Rights (23 March 1981)
- Convention on the Elimination of All Forms of Discrimination against Women (23 March 1981)
- American Convention on Human Rights (24 March 1981)
- Additional Protocol to the Geneva Convention related to the Protection of Victims of International Armed Conflicts (10 March 1983)
- Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (23 January 1986)
- Inter-American Convention to Prevent and Punish Torture, (22 June 1987)
- Convention Relating to the Status of Refugees (7 June 2000)
- Inter-American Convention on Forced Disappearance of Persons, ratified 2001
- Convention on the Non-applicability of Statutory Limitations to War Crimes and Crimes Against Humanity (15 March 2002)⁹

According to Article 133 of the Mexican Constitution, international treaties consistent with the Constitution become Mexican law upon signature by the President of the Republic, approval by the Senate and promulgation.¹⁰

Treaties must be adopted by the Executive, and are approved exclusively by the Senate of the Republic.¹¹ Thereafter, they are published in the official gazette of the Federation's Official Paper,¹² through which they become the supreme law of the entire union.¹³ Following publication, international treaties are self-executing and may be directly invoked or enforced through the courts and the administration.

⁷ Article 104 (I) of the Constitution. See Articles 105-107 of the Constitution for the powers of the Supreme Court which may review violations of individual rights in a trial in *amparo*.

⁸ See for appointment, term and removal of judges, Articles 96 to 101 of the Constitution.

⁹ This Convention only applies to the crimes committed after its entry into force. See "*Declaración interpretativa a la Convención sobre la Imprescriptibilidad de los Crímenes de Guerra y de los Crímenes de Lesa Humanidad, adoptada por la Asamblea General de las Naciones Unidas el 26 de noviembre de 1968*".

¹⁰ "This Constitution, the laws of the Congress of the [Mexican] Union arising from it and all the treaties consistent with it, signed by the President of the Republic and approved by the Senate, will be Supreme Law of all the Union.."

¹¹ Articles 133 and 89, section X and 76 of the Federal Constitution.

¹² See: Third title, Chapter II of the Legislative Power, Section II of the Initiative and Formation of Laws, Articles 72 and 89 of the Constitution; Article 1 of the Law on the Establishment Treaties, published in the Federation's Official Paper on Jan. 2nd of 1992 (hereinafter LCT).

¹³ Articles 3 and 4 of the Federal Civil Code.

While the Constitution does not set out the status of international treaties in domestic law, the Supreme Court held in a recent decision that treaties have no constitutional status but are superior to federal legislation.¹⁴ To be a legally binding precedent, this decision needs to be unanimously upheld five consecutive times.¹⁵ Nevertheless, the judgment is already persuasive for lower courts. Article 133 of the Constitution requires the judges of each state to apply the Constitution, laws and treaties even where these instruments conflict with provisions included in state constitutions and laws.

In spite of the self-executive nature of international treaties, Mexican judges have only seldom applied them and, where they have done so, in an inconsistent fashion. This has been attributed to a combination of factors, namely ignorance of international law, preference to apply domestic law and the fact that international law is often not invoked by parties to a legal dispute.¹⁶ Furthermore, Article 133 of the Constitution only refers to international treaties and not to international law more broadly. There is no Mexican jurisprudence clarifying the status and application of customary international law.

Mexico has adopted specific federal and state legislation at least partly implementing some of the treaties it has ratified. The Federal Law Against Torture, for example, was enacted in 1999 to implement the provisions contained in the Convention Against Torture. However, the act falls short of this objective in several aspects.¹⁷

2. Practice of Torture: Context, Occurrence, Responses

2.1. The Practice of Torture

In 1994, Mexico experienced the armed uprising of a guerilla organization, the Zapatista National Liberation Army (EZLN), in the southern state of Chiapas, largely as a result of discrimination suffered by the indigenous people at the hands of the state and federal authorities. The ensuing armed conflict was marked by serious human rights violations by the Mexican military, including disappearances and torture.¹⁸ Torture was systematic and endemic throughout the 1990s.¹⁹ In December

¹⁴ Amparo under revision 1475/98, National Union of Air Traffic Controllers, May 11th 1999, Ninth instance: Plenum source: Judicial Federal Weekly and Gazette no 10, November of 1999. Thesis: P. LXXVII/99, p. 46, Materia: isolated Constitucional Thesis (Pleno de la Suprema Corte de Justicia de la Nación. Novena Epoca, Volumen X, Página 46, Noviembre de 1999, Amparo de revisión 1457/98- Sindicato Nacional de Cotroladores de Tránsito Aéreo- 11 de mayo de 1999- Unanimidad de diez votos).

¹⁵ Articles 192 and 193 Amparo Law.

¹⁶ See ACAT/CMPDH submission to the Inter-American Commission of Human Rights, 2002.

¹⁷ See infra II and III.

¹⁸ See Amnesty International, Report 1995, Mexico, pp.210 et seq. and Amnesty International, Justice betrayed- torture in the judicial system, July 2001, AI Index: AMR 41/021/2001, pp.7 et seq.

¹⁹ A report commissioned by the Inter-American Human Rights Commission concluded in 1998 that: "torture continues to be practiced not only on an extra-judicial basis, but also as part of judicial investigations, for the purpose of intimidating prisoners, forcing them to incriminate themselves, and obtaining confessions" "Report on the Situation of Human Rights in Mexico", OEA/Ser.L/V/II.100, Doc. 7 rev. 1, September 24, 1998, para. 291. See also Report of the Special Rapporteur, Mr. Nigel S. Rodley, submitted pursuant to Commission on Human Rights resolution 1997/38, Addendum, Visit by the Special Rapporteur to Mexico, UN Doc. E/CN.4/1998/38/Add.2, 14 January 1998, paras.7 et seq. and Mexican League for the Defence of Human Rights and International Federation, "Observaciones de la LIMEDDH-FIDH al Tercer Informe Periódico del Gobierno Mexicano Respecto a la Convención Contra la Tortura y otros Tratos o Penas Cruelles Inhumanos o Degradantes de la Organización de las Naciones

2000, Vicente Fox, of the National Action Party, was elected President of Mexico, ending the 70-year rule of the Institutional Revolutionary Party. The new administration committed itself to fighting human rights violations,²⁰ but, in spite of some improvements in the protection of human rights, human rights violations remain widespread and incidents of torture continue to be reported.²¹

Public agents belonging to the security forces, usually from the state or federal judicial police and immigration police are the typical perpetrators of acts of torture. The use of torture by members of the army is also widespread during anti-drug operations.²² There are many different classes of victims. Suspects of ordinary crimes are often subjected to torture to extract confessions. In other instances, torture has been used as a method to fight insurgent groups to obtain information or for the intimidation of members of communities in which insurgent groups presumably operate. There have been many documented cases in which members of indigenous communities were forced under torture to sign blank sheets, which were later used in criminal proceedings as self-incriminating statements.²³

Prison centres are overpopulated, and health and sanitary conditions are poor. Prisoners suffering from HIV/AIDS and tuberculosis do not receive adequate care. Many prisons are staffed by under-trained and corrupt guards. Prisoners must procure food, medicine, and other necessities from guards, or bribe guards to allow the goods to be brought in from the outside. Prisoners are also subject to abuse from their fellow inmates who often exercise authority within the prison.²⁴

2.2. Domestic Responses

In June 1990, the Executive set up the National [Federal] Human Rights Commission (CNDH), the main administrative body responsible for proposing and ensuring compliance with national policy of respect for and protection of human rights. Subsequently, 32 human rights commissions corresponding to federal states and the Federal District were established.²⁵

The Federal Law Against Torture, adopted in 1991, obliges the State to establish permanent programmes for the training of personnel, to increase respect for human rights, and to improve professionalism of its police forces and those public servants

Unidas" (1997). See also the report published by the National Human Rights Commission in November 2001 on the human rights violations committed by Mexican security forces in the 1960s and 1970s, see www.cndh.org.mx.

²⁰ See Amnesty International, Mexico, Unfair trials: unsafe convictions, March 2003, AI Index: AMR 41/007/2003, p. 5. However, President Fox appointed as Attorney General of the Republic "a serving army general who was also a former chief military prosecutor with a record of failing to prosecute military officials accused of human rights abuses. In 2001, at least 13 other military officials were given senior posts in the Attorney General's Office.. Pre-election proposals to reform the administration of justice did not materialize and the increasing role of the military in the Attorney General's Office raised serious concerns about the willingness of the government to tackle impunity". Amnesty International, Annual Report 2002 (Mexico).

²¹ According to AI, Mexico, Unfair trials, supra, p. 1: "While some authorities indicate that the use of torture by federal bodies has declined as oversight has slightly improved, Amnesty International continues to receive persistent reports of torture every year. Furthermore, it is clear that torture at the state and municipal level remains endemic and not fully acknowledged let alone confronted.

²² Ibid., p.2.

²³ Information provided by ACAT and CMDPDH.

²⁴ See on prison conditions the reports by the National Human Rights Commission www.cndh.org.mx.

²⁵ See Core Document, supra, paras.54 et seq.

who participate in the custody and treatment of all persons under arrest, detention or prison. The government has, through the prosecution offices, launched publicity campaigns and training programs to combat torture.²⁶

The *Procuraduría General de la República* (Office of the Attorney General) undertook a model for determining the existence of torture. It developed a standard medical form for the use of official doctors to determine whether torture had been inflicted. While generally welcomed by NGOs, they made a series of recommendations to adjust the form to international standards. The Federal Government is currently waiting for new comments on the amended version.

Moreover, on 14 June 2002, the official gazette published a decree to amend Article 113 of the Mexican Constitution and which acknowledges the State's objective and direct legal responsibility to provide victims with reparation. This will not take effect until 1 January 2004. Also, the Senate recently approved a bill on the Federal Law of the Patrimonial Responsibility of the State (herein known as LFRPE), which is currently before the Deputies' Chamber.²⁷ The bill covers those damages caused by the regular administrative activity of the State, through public federal administration and through constitutionally autonomous organs.²⁸ This excludes the responsibility of the administrative authorities and autonomous organs of the Republic's states, for which the local congresses must expedite the corresponding laws. If approved, the LFRPE will come into force in January 2004.

2.3. International Responses

The United Nations Committee against Torture, in evaluating the third report presented to it by Mexico in 1997, recognised several improvements. However, it expressed concern that despite the measures taken by Mexico "during the four-year period covered by the report, torture continues to be systematically practised in Mexico, particularly by the federal and local judicial police, ... by members of the armed forces on the pretext of combating subversives."²⁹ According to the Committee this is the accumulation of a number of factors including: "the continuing impunity of torturers"³⁰ ... which is illustrated by the fact that "only two convictions based on the Federal Act to Prevent and Punish Torture and five for homicide resulting from torture were handed down between June 1990 and May 1996."³¹ In addition to this, "authorities responsible for the administration of justice continue to admit confessions and statements made under torture as evidence during trials"³²

²⁶ In December 2000, the President and U.N. High Commissioner for Human Rights (UNHCHR) Mary Robinson signed a cooperation agreement. The Office of the High Commissioner initiated a 5-month program that included a technical assessment of the National Human Rights Commission, training seminars on forensic investigations and the documentation of torture, and a conference on strengthening the capacity of indigenous NGO's. See US DOS, 2001 Country Reports on Human Rights Practices: Mexico, 4 March 2002.

²⁷ See http://www.senado.gob.mx/gaceta/129/version_valida_dict_respons_patrimonial_ap.html

²⁸ Article 1 LFRPE.

²⁹ Concluding observations of the Committee against Torture: Mexico, UN Doc. A/52/44, paras.153-170, 2 May 1997, para. 162.

³⁰ Ibid., para. 163

³¹ Ibid., para. 164

³² Ibid., para. 163

and there is a repeated "failure by the authority responsible for criminal investigation to investigate reports of torture promptly and impartially."³³

Likewise, the Special Rapporteur on Torture found that "Torture and similar ill-treatment are frequent occurrences in many parts of Mexico."³⁴

The Human Rights Committee has underlined, in considering the fourth report submitted by Mexico in 1999, as "a matter of the gravest concern that not all forms of torture are necessarily covered by law in all Mexican States, and that there is no independent body to investigate the substantial number of complaints regarding acts of torture and cruel, inhuman or degrading treatment."³⁵ The consequence of this is "that the persons responsible for those acts have not been brought to justice; and that the victims or their families have not received compensation."³⁶ In addition, the "Committee is concerned at the level of violence against women, including the many reported cases of abduction and murder which have not led to the arrest or trial of the perpetrators and the many allegations of rape or torture by the security forces of women in detention which the latter are fearful of reporting."³⁷

While there have been several cases before the Inter-American Commission on Human Rights,³⁸ it was only in early 2003 that the first case of torture was referred to the Inter-American Court of Human Rights.³⁹

II. PROHIBITION OF TORTURE UNDER DOMESTIC LAW

Articles 20 and 22 of the Mexican Constitution prohibit all forms of "incommunicado detention, intimidation or torture" or any "punishment involving mutilation and disgrace, branding, whipping, sticklashes, torment of any kind ... and any other unusual or excessive forms of punishment". Article 19 of the Constitution provides:

³³Ibid., para. 165

³⁴Report of the Special Rapporteur, Mr. Nigel S. Rodley, submitted pursuant to Commission on Human Rights resolution 1997/38, Addendum, Visit by the Special Rapporteur to Mexico, UN Doc. E/CN.4/1998/38/Add.2, 14 January 1998, para 78.

³⁵ Concluding observations of the Human Rights Committee: Mexico, UN Doc. CCPR/C/79/Add.109, 27 July 1999, para 6.

³⁶ Ibid.

³⁷ Ibid., para. 16.

³⁸ See infra IV, 2.

³⁹ Case 12228 - Alfonso Martín del Campo Dodd against Mexico was referred to the Inter-American Court on 30 January 2003. See OAS Press Release, The Inter-American Commission on Human Rights concludes 117th regular session, CIDH-04-03, 10 March 2003: "Mr. Martín del Campo Dodd was arbitrarily detained on May 30, 1992, and subjected to torture and other cruel, inhuman, and degrading punishment by members of the judicial police of Mexico City for the purpose of making him confess to the murder of his sister and brother-in-law, committed the night before. Several judges ignored his allegations of torture and gave probative value to the alleged confession, and he has been in prison ever since. Considering that Mexico accepted the contentious jurisdiction of the Inter-American Court on December 16, 1998, the application refers to the facts that occurred from that date on, when Alfonso Martín del Campo Dodd was arbitrarily deprived of his liberty. The Court is asked to establish the responsibility of Mexico for denying Alfonso Martín del Campo Dodd the rights to personal liberty, due process, effective judicial protection, and humane treatment, on keeping him arbitrarily detained and rejecting his statement of innocence based on evidence that he had been forced to confess under torture, in violation of articles 7, 8, 25, 5, and 1(1) of the American Convention. In addition, the State is alleged to have given probative value to the victim's confession under torture in violation of Article 10 of the Inter-American Convention to Prevent and Punish Torture; and to have failed to duly investigate and punish the persons responsible for the acts of torture that were established by the authorities, constituting violations of articles 6 and 8 of the Inter-American Convention to Prevent and Punish Torture."

"Any ill-treatment during arrest or confinement; any molesting without legal justification; any exaction or contribution levied in prison are abuses which shall be punishable by law and repressed by the authorities."

The Constitution recognises the possibility to suspend the application of individual rights (*garantias individuales*) protected under Articles 1-29 when there is a "state of emergency" (declared by the President). This could theoretically include the constitutional protection from torture.⁴⁰ However, such measures have not been used since World War II and Article 27 of the Inter-American Convention on Human Rights establishes that the right to personal integrity (Article 5)⁴¹ cannot be suspended, and should not be suspended under any circumstances.⁴²

At the federal level, torture is prohibited by the Federal Act to Prevent and Punish Torture (*Ley Federal Para Prevenir y Sancionar la Tortura*), in force since 28 December 1991, which establishes that the offence of torture is committed when:

"An official commits the offence of torture when he uses his position to inflict severe pain or suffering, whether physical or mental, on a person in order to obtain from him or from a third person information or a confession, or to punish him for an act he has committed or is suspected of having committed, or to coerce him into doing or not doing something. Pain or suffering which arise only from, or are inherent in or incidental to, forms of punishment permitted by law, or arise from a legitimate act of authority shall not be deemed to constitute torture."⁴³

However, this definition of torture is not fully in line with the one used in Article 1 of the Convention against Torture.⁴⁴

Almost all states of the Republic have specific legislation dealing with acts of torture or have prohibited them in their Criminal Codes. However, no uniform definition of torture is used in the legislation of the states.⁴⁵ Furthermore, there are some states in which torture has not been criminalised. For example, in the State of Guerrero, the act of torture has only been prohibited in the Law of the State's Human Rights Commission and is not included in the State's Criminal Code.⁴⁶

⁴⁰ "Only the President of Mexico may, with the agreement of the Ministers of State, the Administrative Departments and the Office of the Attorney-General of the Republic and with the approval of Congress or, if Congress is not in session, that of the Standing Committee, suspend, either throughout the country or in a particular place, the guarantees enumerated in articles 1 to 29 of the Constitution, but he may do so only for a limited time and by means of general measures so that the suspension does not affect a particular individual". See Core Document, *supra*, para. 61.

⁴¹ It is not possible to make any reservation to this provision.

⁴² The same applies to the ICCPR and the Geneva Conventions.

⁴³ Article 3 of the Federal Act to Prevent and Punish Torture, 1991. Translation taken from AI, Universal Jurisdiction, The duty of states to enact and implement legislation, September 2001, AI INDEX: IOR 53/013/2001, Chapter 10.

⁴⁴ See Concluding observations of the Committee against Torture: Mexico, UN Doc. A/48/44, paras.208-229, 26 June 1993, para.215: "With reference to article 1 of the Convention, it was asked why the new Act to Prevent and Punish Torture did not use the exact wording of article 1 of the Convention in defining torture."

⁴⁵ See on this point CORONADO Franco, Fernando. *Recomendaciones emitidas por la ONU al Gobierno de México en materia de tortura*, en Crónica de la Comisión de Derechos Humanos de Querétaro, Revista cuatrimestral de abril a julio del 2001, número 26, año XI, pág. 23

⁴⁶ Torture has also not been made a specific offence in the state of Yucatán.

III. CRIMINAL ACCOUNTABILITY OF PERPETRATORS OF TORTURE

1. The substantive law: Criminal offences and punishment

Torture is a criminal offence both in Federal law and in most states, applying to officials of the Federal Republic and the concerned State respectively.

The Federal Criminal Code establishes⁴⁷ the criminal responsibility for acts of torture of those who: agree to commit or prepare acts of torture; commit acts of torture; jointly commit acts of torture; commit acts of torture by means of another person; deceptively make a person commit an act of torture; deceptively assist or help another person to commit acts of torture; assist the criminal after the act of torture is committed to fulfill a promise given before the offence; without previous agreement, jointly commit acts of torture, when it cannot be determined what were the consequences of the acts of each participant in the act.

Torture is punished by terms of imprisonment of 3 to 12 years, 200 to 500 fine units⁴⁸ and proscription from any public task, employment or commission for up to two times the term of imprisonment ordered.⁴⁹

Related offences that may cover cases of ill-treatment are abuse of authority and intimidation⁵⁰ as well as those related to inflicting bodily harm.⁵¹ Murder (*homicidio calificado*) requires intention and premeditation and carries a punishment of 30 to 60 years.⁵² Rape carries a punishment of 8 to 14 years imprisonment and rape in custody is an aggravating circumstance that carries the heavier punishment of up to 20 years imprisonment.⁵³

The Mexican Penal Code also has a section on international crimes, according to which genocide and war crimes are criminal offences subject to punishment.⁵⁴

⁴⁷ Article 13, Chapter III, Federal Criminal Code, 1931(amended in 2000), Chapter III. Article 12 of the Code provides that the attempt to commit torture constitutes a criminal offence.

⁴⁸ Article 4 of the Federal Act to Prevent and Punish Torture. These units are the equivalent of the perceived daily net income of the sentenced person at the moment of carrying out the crime and taking into account all his income. The minimum limit per day will be the equivalent of the current daily minimum wage in the place where the crime was committed. See Article 29 of the Federal Criminal Code.

⁴⁹ Article 4 of the Federal Act to Prevent and Punish Torture.

⁵⁰ See Article 215 (in particular 215 (2): "whenever... he/she, in the exercise of his/her functions or as a result of it, uses violence against a person without a legal cause or abuse or insult such a person and Article 219, both providing for short-to medium terms of imprisonment and fine as punishments.

⁵¹ See Articles 288 et seq.

⁵² See Articles 302 et seq. in particular 315 and 320 Federal Criminal Code. When charges accumulate "the penalty for the most serious offence shall be applied, and may be increased to up to one half more than the maximum length of sentence, provided that it does not exceed the maximum penalty..." Article 64 of the Federal Criminal Code and article 25 of the Criminal Code for the Federal District. Therefore, in cases involving torture followed by the death of the victim, the public authority is charged with homicide and the charges of torture dropped.

⁵² See Articles 302 et seq. in particular 315 and 320 Federal Criminal Code.

⁵³ See Articles 265- 265 bis Federal Criminal Code. The crime of rape is only prosecuted upon complaint by the victim.

⁵⁴ See Article 149 Federal Criminal Code.

The crime of torture is not explicitly prohibited by the Code of Military Justice,⁵⁵ which exclusively governs the conduct of military personnel.⁵⁶

The Federal Public Servants' Responsibility Law sets up the administrative procedures and sanctions to be taken against federal public officials, which are independent from any criminal responsibility.⁵⁷ Article 53 of that law defines the type of administrative sanctions available, namely private or public admonishment; private or public warning or reprimand; suspension; dismissal; sanctions of an economic nature; and temporary bar to employment, to hold a position or commission in the public service.

2. The Procedural Law

2.1. Immunities

There are no specific immunity or amnesty laws for acts of torture.⁵⁸

2.2. Statutes of Limitation

According to the Federal Criminal Code and the Code of Military Justice, the statute of limitations for crimes is the period equal to the middle term between minimum and maximum punishment prescribed for the criminal offence in question.⁵⁹ The Federal Act to prevent and punish torture establishes a sentence of imprisonment ranging from 3 to 12 years. The statute of limitations for the crime of torture is therefore seven and a half years.

2.3. Criminal Investigations

Torture survivors, relatives, trustworthy persons, their legal representatives or any other person who is familiar with the facts of the case can lodge an oral or written complaint with the Federal or State Public Prosecution. The complaint must include a

⁵⁵ The Code of Military Justice, 1933, provides an expansive notion of offences that includes "offences under common or federal law . . . when committed by military personnel on active service or in connection with active service." See Article 57 Code of Military Justice.

⁵⁶ Mexican authorities argue that the Federal Law against torture is applied as ancillary legislation to the Military Code. At the time of writing, there have been no cases of military personnel sentenced for acts of torture.

⁵⁷ Article 54 establishes the criteria to be considered when imposing administrative sanctions: I. The gravity of the act and the need to suppress practices which infringe, in any way, upon the legal provisions of the RPS or any other provisions which originate from the RPS; II. Socio-economic circumstances of the public servant; III. Hierarchical level, prior history and conditions of the offender; IV. External conditions and methods of implementation; V. Number of years in the job; VI. Recidivism; and VII. Amount of the benefit or economic damage derived from the failure to fulfill his or her duties.

⁵⁸ There is an amnesty law relating to violence committed in Chiapas during January 1994, which theoretically includes torture. The Amnesty Law (Chiapas) came into force in January 1994. It "declared an amnesty for all those persons against whom penal action had been taken, or could be taken, before federal tribunals, for those crimes committed due to the violent situation, or related to it; occurring in various municipalities of the State of Chiapas from January 1, 1994 until the 20th day of the same month and year at 15:00 hours." Article 1 Amnesty Law (Chiapas) published in the *Diario Oficial de la Federación* Jan. 22, 1994. The law further benefits persons imprisoned, as it also cancels any sanctions. Article 3 Amnesty Law (Chiapas). Moreover, it is established that people benefiting from the law may not be "interrogated, investigated, called, detained, apprehended, processed or bothered in any way for the acts which are included in this amnesty in the future. Article 4 Amnesty Law (Chiapas).

⁵⁹ In 2002, the Senate of the Union ratified the Convention on the Non-applicability of Statutory Limitations to War Crimes and Crimes Against Humanity. Arguably, statutory limitations law should therefore not be applicable to systemic practices of torture (war crime or crimes against humanity) in Mexico.

description of the circumstances of the case, names of the alleged perpetrators or any information relevant for their identification. The identification of the perpetrators is not mandatory to initiate an investigation.

In addition, a claimant (or his or her legal representative) can file a complaint with special agencies of the public prosecution, when the lawyer or any other public servant working on the investigation has committed an error or breached the complainant's individual rights. In the Federal District, complaints may be submitted to the Internal Bureau of Control in charge of Office Control of the Public Prosecution (*Contraloría Interna de la Procuraduría General de Justicia*) or to the Office of the Public Servants' Prosecutor *Fiscalía para Servidores Públicos* any agent of the Public Prosecution.⁶⁰

According to Article 21 of the Constitution, "investigation and prosecution of crimes is the duty of the Public Ministry." Consequently, the Federal and State Public Prosecutions are the agencies responsible for the investigation of a complaint and prosecution of an alleged torturer. The jurisdiction of the former includes complaints against federal public servants (federal civil police) whilst the latter encompasses cases against state public servants (local police, etc.). While the military is in principle subject to the same procedure where military personnel have committed crimes against civilians, in practice such cases are transferred to military jurisdiction, investigations being carried out by military prosecutors.⁶¹

The opening of an investigation is obligatory. The required level of substantiation in opening an investigation is low and requires very basic information regarding the crime and the accused. However, lack of sufficient evidence to establish the crime or the responsibility of the accused is the typical reason used by the public prosecution to refrain from remitting an investigation to the judiciary for indictment. This decision can be reviewed any time provided where the victim produces new evidence or through a presentation of *amparo* application before a district court.⁶²

The public prosecution is responsible for collecting evidence.⁶³ The Federal Code of Criminal Procedure⁶⁴ affords both the defence and the prosecution the right to present as evidence a medical report drawn up by public or independent doctors.⁶⁵ A

⁶⁰ Art. 9(XVIII) of the Code of Criminal Procedures of the Federal District. Article 58 of the Federal District's Public Prosecution Constituting Law gives the Internal Bureau power to sanction members of the Prosecution as per the Federal Public Servant's Responsibilities Law. This same law establishes special human rights divisions in each prosecution office. These divisions were created in 1996 and have jurisdiction to receive complaints related to the violation of individual rights by public servants.

⁶¹ AI, Mexico, Unfair trials, *supra*, p.20.

⁶² The application must be filed within 15 days of notification of the decision. See on this AI, Mexico, Unfair trials, *supra*, p.14: "Article 21 of the Constitution does allow for the decision to be legally challenged. Though this provision has never been codified in law, the Supreme Court has ruled that the *amparo* appeal is the appropriate procedure. However, before the complainant can lodge an appeal he must exhaust all internal procedures of the Public Ministry to review the decision, then failing this he may finally request the judiciary review via a *recurso de amparo*. However, the "*amparo*" procedures are extremely complicated and slow, and have been widely criticised for failing to provide adequate and timely redress to violation of fundamental guarantees."

⁶³ Articles 2 (II) and article 141(II)(Y)(V) of the Federal Code of Criminal Procedures (published in the Official Gazette on 30 August 1934 ("amended several times")).

⁶⁴ Article 222 Federal Code of Criminal Procedures.

⁶⁵ See also Articles 162 to 188 of the Code of Criminal Procedures for the Federal District Enacted on 29/08/1931 ("amended several times"). Article 164 of this Code actually allows each party to have two medical reports drawn up.

detainee has the right of access to a public or independent doctor.⁶⁶ The only requirement for a private doctor to be appointed by the complainant is possession of "an official degree on the science or art related to the point in question, if the profession or art is legally regulated; otherwise, knowledgeable experts will be appointed..."⁶⁷

When the prosecution believes it has enough evidence to criminally prosecute one or more persons, it will remit its investigation to the judiciary. Otherwise, the case will be put on hold until the investigation confirms the offence and the offenders are identified. If no new evidence is found, the case is archived. In the former case, the judge will determine whether the investigation was carried out according to the law, whether the offence has been established and the offenders identified. The judge assigned to the case will then issue an arrest warrant for the alleged perpetrators, if they have not already been arrested by the prosecution. The accused may be suspended from his post pending the investigation of the allegations (before or after the preliminary hearing).⁶⁸

At a preliminary hearing (*declaración preparatoria*), the judge determines whether there is sufficient evidence to require the accused to be placed on trial and if that is the case, a formal indictment order (*auto de formal prisión*) is issued.

When the prosecutor takes penal action (after formal charges are laid) against an accused, the penal procedure will begin before the judiciary. There, the victim has the right to receive counsel from the prosecutor attached to the court hearing the case. Given that the prosecutor undertakes the penal action, the victim may name representatives and trusted persons to act with the prosecutor. This is known as the right to *coadyuvancia* (co-prosecution). There is no right of private prosecution.

The final paragraph of Article 20 (X) of the Constitution provides that: "In all criminal proceedings, the victim of an offence or aggrieved party shall be entitled to legal assistance; to reparation of damage, where appropriate; to assistance by the Public Prosecutor's Office; to emergency medical care whenever required; and to any other benefit stipulated by law." Consequently, the Public Prosecution is to represent the interests of torture survivors (as well as any other victim of a crime) pursuing a complaint before the public prosecution during the investigation. In that sense, legal representation is free.⁶⁹ At the same time, the victim may name chosen trustworthy persons who may act on his/her behalf, without prejudicing the prosecutor's obligation to counsel and support the victim. There is no public fund available for an accused or a complainant to choose a lawyer of their own election during investigation proceedings.⁷⁰ Victims, their families and witnesses have a right to

⁶⁶ Article 7 of the Federal Act to prevent and punish torture.

⁶⁷ Article 223 Federal Code of Criminal Procedures. See also Article 171 of the Federal District's Code of Criminal Procedures.

⁶⁸ Article 54 (VI) Federal Public Prosecution Constituting Law.

⁶⁹ Article 141 of the Federal Code of Criminal Procedures also establishes the right to be informed, when requested, of the development of the proceedings. See also Article 4 (VI) of Accord A003, 6 July 1999, issued by the Federal District's Attorney General which establishes the organization and procedures of the public prosecution.

⁷⁰ "...(a)ttorneys are not always available during the questioning of defendants; in some instances a defense attorney may attempt to represent several clients simultaneously by entering different rooms to certify formally that he was present, although he did not actually attend the full proceedings... Provision of translators to non-Spanish speaking defendants, including indigenous ones, is provided for but poorly implemented, resulting in prisoners being convicted without fully understanding the documents they have been required to sign". US DOS, 2001 Country Reports on Human Rights Practices: Mexico, 4 March 2002.

protection during criminal proceedings.⁷¹ Furthermore, any person has the right to request the adoption of precautionary measures from the Federal and State Commissions of Human Rights and from the Inter-American Commission of Human Rights (ICHR).⁷²

2.4. National Human Rights Commissions

A victim of torture can also lodge a complaint with the National or State Human Rights Commissions (depending on whether the accused is a federal or State agent). In federal cases, there is no time limit for lodging complaints.⁷³ In contrast to the public prosecution, the commissions are autonomous institutions that do not depend on the executive. The commissions can determine that a violation of human rights took place and issue non-binding recommendations to the public prosecution or any other public institution whose public servants were allegedly involved in the violation, to initiate an investigation and/or set up a prosecutorial unit to investigate the case.⁷⁴ They do not have the authority to criminally prosecute individuals. A complainant or his or her representative may lodge an appeal before the National Human Rights Commission against any final decision of a Human Right Commission as well as against the final reports submitted by the local authorities in fulfilling the recommendations issued by these bodies.⁷⁵

2.5. Trial stage

The competent courts for trying police officers charged with torture are criminal courts (trial, appeal and district divisions) and the Supreme Court.

Military courts have jurisdiction over crimes committed by military personnel in the exercise of their duty. This does not include crimes committed against civilians as Article 13 of the Constitution establishes as a general rule that military personnel should be subject to ordinary criminal courts when a civilian is involved.⁷⁶ However, in practice such cases are still tried by military courts.⁷⁷

Although there are some variations between the different state codes, the penal procedure is similar in all states of the Republic, as they are all based on the principles of the Constitution. Proceedings are inquisitorial. The standard of proof during the investigation and the criminal proceedings themselves is beyond

⁷¹ Art. 2 (V) of the Federal Code of Criminal Procedures authorises the public prosecution to adopt "the necessary provisions and measures to provide security and help to the victims".

⁷² The ICHR may ask the national government to take the necessary measures to ensure the security and physical integrity of the alleged victim.

⁷³ See National Human Rights Commission Organization Act, in force since 30 June 1992.

⁷⁴ Art. 102 (B), Mexican Constitution.

⁷⁵ Article 61 of the National Human Rights Commission Organization Law.

⁷⁶ Article 13 of the Mexican Constitution defines military jurisdiction as covering only "crimes and misdemeanours against military discipline but the military courts may not in any case or for any reason extend in jurisdiction over persons who do not belong to the army. When a civilian is involved in a crime or misdemeanour of military order, the case will be heard by the corresponding civilian authority". Article 57 of the Code of Military Justice, however, provides an expansive notion of such offenses that includes "offenses under common or federal law . . . when committed by military personnel on active service or in connection with active service."

⁷⁷ AI, Mexico, Unfair trials, supra, pp. 19, 20.

reasonable doubt.⁷⁸ At trial, a torture survivor has the right to be present and has the status of a complainant and is a co-prosecutor to the proceedings.⁷⁹ He or she can appoint any person (including family members and members of NGOs) as assistants.⁸⁰ Judges have broad sentencing powers.⁸¹ The President has the power to grant, according to law, pardons to those convicted of crimes within the jurisdiction of the federal courts, and to those convicted of common crimes in the Federal District and Territories.⁸² A person convicted of a crime may be released on parole after the expiration of 3/5 of the sentence, unless the acts were committed against minors. Before release, the perpetrator must compensate or pledge to compensate the victim for damages, exercise good conduct during the time served and prove to be socially rehabilitated and not likely to re-offend.⁸³

3. The Practice

Torture survivors rarely make allegations against their torturers because of fear of reprisals based on threats they receive when they are tortured. Also, there is a general lack of trust in the authorities as the perpetrators usually belong to the same public agency (public prosecution) in charge of the investigation of the complaint. Furthermore, some torture survivors are unaware of their rights while in detention.

Investigations are neither impartial nor thorough. The Public Ministry frequently categorises torture as the less serious crime of bodily harm and subsequent investigations are often confined to internal disciplinary procedures. The prosecutors and the judicial police are not seen to be vigorous in their investigation of torture complaints. Investigations are often closed or archived for lack of sufficient evidence. Victims have a right to challenge the decision to close the investigation (not if it is archived) but in any case, the available procedures are time-consuming and have therefore not provided an effective remedy to secure the timely reopening of investigations. Moreover, victims of torture are often not given prompt and confidential access to medical examinations and the quality of medical records in torture cases is poor, as medical professionals dealing with such cases do not have the required expertise.⁸⁴

Investigations by the military prosecutors attached to the Military Public Ministry against military personnel in torture cases have been criticised for contravening the law, which states that the Public Ministry should be competent to investigate such cases, for lack transparency and for the small number of cases resulting in prosecutions. Victims are often intimidated and, when victims do not actively pursue their cases, they are generally archived or dropped. The system of *coadyuvancia* (co-

⁷⁸ See Articles 246 to 248 Federal District's Criminal Procedures Code and Article 135 of the Federal District's Criminal Procedures Code, according to which the following are admissible as evidence in a criminal trial: Confession; Private and public documents; Expert reports; Reconstruction of the events, carried out by authorities; Witness testimony; Presumptions.

⁷⁹ Article 141 of the Federal Code of Criminal Procedures.

⁸⁰ Article 20 (B) of the Constitution of the United States of Mexico and Art. 9 (X) Federal District's Code of Criminal Procedures.

⁸¹ See for the criteria to be applied in determining sentences, Article 52 of the Federal Criminal Code.

⁸² See Article 89 XIV of the Constitution.

⁸³ Articles 84, 85, 76 and 90 of the Federal Criminal Code.

⁸⁴ See AI, Mexico, Unfair trials, *supra*, pp.13 and 14.

prosecution) in such cases has also not been active, leaving victims of torture with little influence over proceedings.⁸⁵

The National and States Human Rights Commissions have, according to observers, not developed a consistent policy and practice of vigorously investigating torture complaints. Thus, victims often refrain from complaining to the commissions in the first place because of their ineffectiveness and of doubts about the genuine independence of the commissions. Investigations are often not carried out thoroughly and, where the commissions have made recommendations to prosecute torture, albeit often for lesser charges than torture, the overwhelming majority of these recommendations have been ignored by the authorities concerned.⁸⁶

The Mexican judiciary has gained independence during the last few years but is still widely viewed as deferential to the Public Ministry and prone to corruption.⁸⁷ It has failed to take a pro-active role in demanding the investigation and prosecution of torture cases. Confessions elicited through torture are not admissible in court.⁸⁸ Nonetheless, Mexican jurisprudence has interpreted the principle of "procedural immediacy"⁸⁹ as follows: "In conformity with the principle of procedural immediacy [*inmediación procesal*] and unless the retraction of the confession is legal, the first statements by the accused which are made without sufficient time for preparation or for exculpatory reflection should prevail over later statements."⁹⁰ "When a detainee goes before a judge and retracts a statement made to a prosecutor, claiming coercion, judges can cite this principle to avoid determining whether or not the detainee was coerced and without questioning the police and prosecutors who may be acting in bad faith."⁹¹ Thus, it is difficult to challenge the evidentiary value of a confession made during the investigation proceedings even when the allegations of torture are raised at such early stages of the preliminary hearing. In the case of a defendant who makes an allegation of torture in the course of a trial, a separate investigation and trial proceeding (trial within a trial) is to be opened. Only a final judgment establishing that the confession was elicited through torture will influence the outcome of the main trial. In practice, judges place the burden of proof on the defendant. Against this background, defendants will commonly not be able to prove that confessions have been made under torture and given that Mexican judges are reluctant to accept evidence indicating torture, judges generally do not establish the

⁸⁵ See *ibid.*, p.20 and HRW, "Military Injustice: Mexico's Failure to Punish Army Abuses", December 2001.

⁸⁶ AI, Mexico, Unfair trials, *supra*, pp.22 and 23. The National Human Rights Commission made 73 recommendations regarding torture to the Public Prosecutor from 1990 to 2001, which resulted in 57 charges being brought, and eight convictions where a sentence was imposed.

⁸⁷ According to the 2002 report of the Special Rapporteur on Independence of Judges and Lawyers, between 50 to 70% of the Mexican Tribunals suffer from corruption. Although some Mexican scholars criticized this report because according to them it lacked methodology to determine percentages, the existence of serious corruption in the judiciary was not denied. See Report of the Special Rapporteur on Independence of Judges and Lawyers, UN Doc. E/CN.4/2002/72/Add.1, Jan. 24th, 2002.

⁸⁸ See Article 8 of the Act to prevent and punish torture, "Ninguna confesion o informacion que haya sido obtenida mediante tortura podra invocarse como prueba."

⁸⁹ In other Latin American countries, the principle is understood to establish that whatever statements are given before or during trial should be made in the presence of the person (i.e. the judge) who will make the decision as to whether the defendant is innocent or guilty.

⁹⁰ Thesis number 82, Federal law seminar, appendix on defined jurisprudence 1917-1971, Part II, First Chamber, p. 175.

⁹¹ Human Rights Watch, "Systemic Injustice: Torture, "Disappearance," and Extrajudicial Execution in Mexico", 1999.

fact of torture or call for investigations to be instituted against the alleged perpetrators.⁹²

Only few of those responsible for torture have been brought to trial and only a very small number have been sentenced, often on lesser charges than torture, the result being almost complete impunity.⁹³ According to the Human Rights Office of the Attorney General of the Republic, 57 public officials were charged with torture between 1990 and 2001, eight of which were sentenced.⁹⁴

IV. CLAIMING REPARATION FOR TORTURE

1. Available Remedies

1.1. Constitution

Article 20(B) of the Constitution stipulates a right to reparation for any criminal offence:⁹⁵ "When justified, the Public Prosecution must request reparations for damages and the judge cannot reject such demand if the person who has been requested to pay the reparations has been found guilty." The law will set up expedient procedures to execute the reparation sentences.⁹⁶

The Constitution provides for the remedy of *amparo* which allows the right-holder to challenge decision and the competent court to provide reparation for a violation of fundamental rights.⁹⁷

1.2. Administrative Law

Reparation may be claimed for government misconduct under Article 10 of the Federal Act to prevent and punish torture: "A person who commits any of the offences covered by this Act shall be liable for the legal, medical, funeral, rehabilitation and any other expenses incurred by the victim or his relatives as a result of the offence. He shall also be required to make good the damage and to provide compensation for the loss or injury suffered by the victim or his economic dependants, in the following cases: I. Loss of life; II. Impairment of health; III. Loss of freedom; IV. Loss of income; V. Incapacity for work; VI. Loss of or damage to

⁹² AI, Mexico, Unfair trials, *supra*, pp.17,18.

⁹³ "Torture persists in Mexico and exists with almost complete impunity. The champions in this regard are members of the PGR (Office of the Public Prosecutor of the Republic) according to a statistical study issued by the CNDH (National Human Rights Commission) between 1990 and 2000 and an indication of this is that of the 660 agents accused of torture, only 8 were sentenced (Raymundo Gil Rendon, Mexican Bar Association- Barra Mexicana de Abogados, La Jornada, October 2002, quoted *ibid.*, p.14.

⁹⁴ *Ibid.*, p. 1.6.

⁹⁵ The new Article 20 came into force on 21 September 2000.

⁹⁶ See also Article 20 (X) of the Constitution according to which "the victim of an offence or aggrieved party shall be entitled to legal assistance; to reparation of damage, where appropriate..."

⁹⁷ See Article 107 of the Constitution for trials in *amparo*. See also Core Document, *supra*, para.59: "If an individual alleges that his human rights have been violated, he must appeal to the appropriate authority for the appropriate remedies: in criminal cases, the appropriate remedies are reconsideration, complaint for refusal of leave to appeal and amparo; and in civil cases, reconsideration, appeal, special appeal, complaint, judicial liability and amparo. The complainant may also appeal to CNDH (the National Human Rights Commission), which will provide him with advice on the legal measures available to him and on how to use them or, if all legal remedies have been exhausted, it will investigate the case and make a recommendation.

property; VII. Defamation of character. In determining the corresponding amounts, the judge shall take into account of the extent of the damage. Under article 32, section VI, of the Penal Code for the Federal District in respect of ordinary law and for the Republic as a whole in respect of federal law, the State shall bear subsidiary liability for making good the damage.”

The scope of the responsibility of the State is determined according to the principles laid down in the Civil Code.⁹⁸ Administrative proceedings are conducted according to the Public Servant’s Federal Law of Responsibilities. According to Article 33 of the Federal Law of Responsibility of Public Servants, compensation shall depend on an administrative hearing and on the recommendation of the National Human Rights Commission.⁹⁹ These proceedings are carried out before the responsible administrative authorities. Financial compensation may be awarded as a result of the acceptance of a recommendation by the corresponding authorities for compensation from the National Human Rights Commission.¹⁰⁰ Article 34 of the same law states that payment must be made within 2 years of the recommendation. In those cases where the claim is rejected, legal proceedings before civil courts have to be brought within one year from the time of the administrative decision.¹⁰¹

1.3. Civil Law

Reparation for acts of torture can be claimed under tort law as laid down in Federal and State Civil Codes for unlawful culpable acts resulting in damages.¹⁰² The State is jointly, together with the perpetrator, and vicariously liable for intentional misconduct of its public servants, and subsidiary liable for offences which do not require intent in which case the State is only liable if the public servant cannot pay or does not have sufficient funds to pay the damages.¹⁰³ Article 1928 of the Civil Code establishes that the State may reclaim damages paid for torts committed by its public officials.¹⁰⁴

Under the Federal Civil Code, pecuniary and non-pecuniary damages may be awarded.¹⁰⁵ Reparation may include both moral and material damages.¹⁰⁶ Mexican

⁹⁸ Articles 1927 and 1928 of the Federal Civil Code.

⁹⁹ When the administrative disciplinary procedure has determined the responsibility of the public servant and that an administrative fault has caused damage to individuals, victims may have recourse to entities such as the *Secretaría de Contraloría y Desarrollo Administrativo*, so that they acknowledge the responsibility to compensate damages or to order the proper payment without the individuals having need to go to trial. If the State denies payment of compensation or if the amount is unsatisfactory to the claimant, they may have recourse to administrative or judicial services.

¹⁰⁰ Federal Public Servant’s Responsibilities Law, art. 77(bis). Art. 44 of the National Human Rights Commission Organization Law establishes that a recommendation shall include terms of compensation when damages have been proved.

¹⁰¹ Article 78 (1) Federal Public Servant’s Responsibilities Law, 1 January 1983.

¹⁰² See e.g. Chapter V of the Federal Civil Code (as amended in December 1982), Article 1910.

¹⁰³ Article 1927 Federal Civil Code. Article 1016 also applies to Article 1927.

¹⁰⁴ Artículo 1928: “El que paga los daños y perjuicios causados por sus sirvientes, empleados, funcionarios y operarios, puede repetir de ellos lo que hubiere pagado.”

¹⁰⁵ Article 1915 Federal Civil Code, Chapter V.

¹⁰⁶ The amount of moral damages awarded is independent of any other amount awarded for material damages. See Article 1916 Federal Civil Code.

Courts, however, have rarely awarded moral damages in civil litigation. Under the federal and states' Civil Codes, compensation for material damages consists of:

- Medical expenses
- Lost wages
- Material deterioration suffered by the victim's property; and
- The privation of legal gain which should have been obtained by the victim.¹⁰⁷

The criteria used to establish the amount of pecuniary damages caused by torture in civil proceedings is the one laid down by the Federal Employment Law.¹⁰⁸ This law contains a special formulation which limits the amount of recovery under the Federal Civil Code to relatively small amounts.¹⁰⁹

A civil suit may be brought by the victim, or in case of death, by the victim's family before a civil court.¹¹⁰ The statute of limitations for civil lawsuits arising from acts of torture is two years from the time of the event.¹¹¹ Plaintiffs have to pay a court fee. No legal aid is available for civil cases. The plaintiff has to prove the tort and damages on the balance of probabilities. By law, the decision in the civil suit is independent of the outcome of a related criminal case but in practice courts have made such linkages. Judges have wide discretion in awarding compensation.¹¹² The losing party will have to cover all costs unless there are specific circumstances justifying an exception to the rule.¹¹³ Judgments against individual defendants can be enforced through a court order but orders of execution cannot be issued against public institutions.¹¹⁴

1.4. Criminal Law

Damages can be obtained through criminal proceedings by filing a complementary civil lawsuit.¹¹⁵ The Public Prosecutor is by law obliged to request the repair of damage caused which has to be decided upon by the concerned judge.¹¹⁶ The victim

¹⁰⁷ Vargas, Jose A., *Mexican Law: A Treatise for Legal Practitioners and International Investors*, Vol.2, 209-38 at 215, West Group, 1998.

¹⁰⁸ Article 1915 Federal Civil Code. Article 1916 Federal Civil Code: "The victim's heir cannot receive reparations unless the action was undertaken while the plaintiff was alive. The judge will determine the amount of reparations, taking into account the rights infringed, the level of responsibility, the economic situation of the perpetrator and victim and the circumstances of the case. When the moral [non-pecuniary] damage affected the victim in his or her dignity, honour, reputation or respect, the judge will order, if requested by the victim and payable by the perpetrator, the publication in the media, of an excerpt of the verdict which adequately reflects its nature and scope. If the damages arise from an act which became public through the media, the judge will order that the extract of the verdict will be given the same relevance had it been an original diffusion."

¹⁰⁹ Articles 513 and 514 (permanent illness and disability), Articles 476 to 503 (definitions, causes and consequences of employment related accidents) Federal Civil Code.

¹¹⁰ In the case they are seeking moral damages, charges must be brought by the victim himself or by his descendants if he had begun the process while alive, according to Article 1916 of the Federal Civil Code.

¹¹¹ Article 1934 Federal Civil Code.

¹¹² See e.g. Amparo civil directo 476/54. *Illíades viuda de Ize Elena* (October 25, 1954). Tercera Sala, Semanario Judicial de la Federación. Época 5ª, Tomo CXX, p. 1821.

¹¹³ See Chapter II of the Code of Civil Procedure.

¹¹⁴ See Article 4 of the Federal Civil Code.

¹¹⁵ See Chapter V, Articles 29 et seq. Federal Criminal Code, in particular Article 34.

¹¹⁶ Article 31 bis Federal Criminal Code and Article 34 *ibid.*: "The redress for the injury that shall be made by the offender is of the nature of a public penalty and shall be called for ex officio by the Public Prosecutor. The aggrieved party or his rightful claimants may provide to the Public Prosecutor or judge, as the case may be, the facts and

must, through the Public Defender's office, prove a) that torture was committed, b) who was responsible for committing the act and c) the existence of damages stemming from torture. As with criminal prosecutions, the victim has 7 years and 6 months from the time the acts of torture took place to initiate an action.¹¹⁷ The right to reparation is only extinguished in the case that the defendant's innocence is proved, not if an official pardon (*indulto*) is granted.¹¹⁸ Furthermore, the right to parole and other benefits depend on having paid compensation.¹¹⁹

Since changes brought about by a reform of the Criminal Code in 1994, reparation, which is part of the monetary sanction imposed on the offender, includes compensation of the material and moral damage caused, including the payment of medical treatment needed by the victim for the rehabilitation of his/her health as a consequence of the crime as well as restitution of consequential losses and damages.¹²⁰ In case of death of the victim, close relatives are entitled to such compensation.¹²¹ Satisfaction and guarantees of non-repetition are not contemplated in the Criminal Code.

The judge shall take the damages required to repair the consequences of the crime and the evidence obtained during the trial into account when determining the nature and amount of damages.¹²² The State is jointly liable in case of torture as the law provides its joint liability for intentional crimes committed by its public officials in the exercise of their duty and is liable in a subsidiary way when those crimes were committed with negligence or imprudence.¹²³ The Federal Code is often used as a guideline to elaborate the local state criminal codes. The forms of reparation and criminal procedures, however, vary in each 31 of the states and the Federal Districts.

Public defenders, the offended person, or his/her legitimate representatives may petition the judge for the precautionary seizure of the accused's goods, with which the reparations and damages may be effectuated. This seizure will be lifted when the accused, or someone acting on his behalf, provides sufficient evidence to the jurisdictional authority to assure the satisfaction of these damages and prejudices caused.¹²⁴ Article 37 of the Federal Criminal Code provides the following for the enforcement of judgments: "The redress of injury shall be ordered in the same way as the fine. Once the decision for redress is made enforceable, the court which has handed it down shall immediately transmit a certified copy of the decision to the competent taxation authority which, within three days of receiving the copy, shall institute the garnishment process, notifying the person in whose favour it has been awarded, or his legal representative."

evidence available to them to demonstrate the need for, and amount of, that redress, in accordance with the provisions of the Code of Criminal Procedure."

¹¹⁷ Article 105 Federal Criminal Code. See also Articles 91 and 115 Federal Criminal Code.

¹¹⁸ Articles 92 and 98, Federal Criminal Code

¹¹⁹ Articles 76, 84, 85 and 90 Federal Criminal Code.

¹²⁰ Articles 29 and 30 Federal Criminal Code. In addition, the latter article provides that the repair of the damage shall include the psychological therapeutic treatment required by the victim.

¹²¹ Article 30 bis.

¹²² Article 31 Federal Criminal Code. 35 of the Federal Criminal Code establishes that the State will receive the payment if the reparation is not collected by the beneficiaries.

¹²³ Article 32 VI Federal Criminal Code.

¹²⁴ Article 149 Federal Criminal Code.

In 2002 the Federal District's Criminal Code was adopted. It establishes the "solidary" liability of the Federal District for acts committed by its public servants, regardless of whether they are intentional or not. It also sets up a compensation fund for victims of torture. Similar funds exist in the Tlaxcala, Nuevo León and Mexico State.

2. Practice

No cases are known in which torture survivors or relatives of torture victims have obtained reparation through administrative proceedings or before Mexican courts. The main obstacle, besides access to justice, is inadequate legislation¹²⁵ and the difficulty of securing sufficient evidence to prove torture-related compensation claims. This applies in particular to prompt access to medical examinations which would allow detainees to obtain medical certificates following an examination by an appointed medical officer that confirm the occurrence of torture. This has been difficult given the current practice.¹²⁶ Given the low rate of convictions for torture, victims are not likely to receive reparations through criminal proceedings¹²⁷ or other available mechanisms.

The Mexican State has accepted its responsibility to provide reparation to victims of torture (in most cases through the payment of a sum of money) in relation to a few cases litigated before the Inter-American Human Rights Commission. In the case of Valentín Carrillo Saldaña, concluded by friendly settlement, the family of the victim received reparation following the torture and killing of the victim by security forces, namely 102,661 Mexican Pesos as compensation for the material damage, which includes indemnization and funeral expenses (in conformity with the provisions of domestic law), guarantees of medical assistance and health services, award of scholarships to the victim's minor children until they reach the age of majority, and the issuance of a joint public statement by the State and the petitioners by way of compensation for the moral damage caused.¹²⁸ In the Martinez San Augustin case, also known as "the mariachi case", the government released the petitioner and paid him compensation following the report by the Inter-American Commission.¹²⁹ In a further case, where three people had been tortured and one of them extrajudicially executed, for the first time, the Mexican Ombudsman report established that Mr. Reyes Penagos was the victim of torture. The local government paid some compensation in form of "humanitarian assistance" but without recognising the existence of torture. The case is presently pending before the Inter-American Commission in a friendly settlement procedure.

¹²⁵ See Report by the Special Rapporteur, *supra*, para.68: "The CNDH (National Human Rights Commission) said that the legislation on compensation was highly deficient and that they were working on draft legislation for submission to the legislature that would improve the current system and establish a compensation fund for the victims of human rights violations. Members of the Human Rights Commission of the Chamber of Deputies said that legislative measures had to be introduced to establish compensation or reparation for victims and that the State should accept subsidiary liability and allocate resources for such compensation."

¹²⁶ See *supra* III, 3.

¹²⁷ Inter-Am. Comm. HR. *Informe sobre la situación de los Derechos Humanos en México*. OEA/Ser.L/V/II.100, Doc. 7 rev. 1, Septiembre 24, 1998, Original: Spanish

¹²⁸ See Report No 107/00, Case 11.808, Valentín Carrillo SALDAÑA, Mexico, December, 4, 2000 <http://www.cidh.oas.org/annualrep/2000eng/ChapterIII/Friendly/Mexico11.808.htm>.

¹²⁹ See REPORT N° 9/97, On Admissibility, CASE 11.509, MEXICO, March 12, 1997, <http://www.cidh.org/annualrep/96eng/mexico11509.htm>.

V. GOVERNMENT REPARATION MEASURES

The new government acknowledges that torture has been practiced in Mexico. However, the message delivered by the government is that this is a problem, which has been largely overcome. Moreover, the federal government's disapproval of torture practices has not trickled down to the lower echelon of public servants, who continue to be actively or indirectly engaged in the practice of torture and ill-treatment.

Mexican legislation, aside from the publication of a part of a verdict, does not provide measures of satisfaction for torture survivors such as public apologies. Any act of this nature takes place in an *ad hoc* basis and depends on the good will of the public servant in charge of the corresponding institution. There are no governmental reparation schemes or other mechanisms in place through which torture survivors can obtain reparation.¹³⁰ Neither are there any government schemes providing health services for torture survivors but several rehabilitation centres offer treatment for victims of torture.¹³¹

VI. LEGAL REMEDIES IN CASES OF TORTURE COMMITTED IN THIRD COUNTRIES

1. Prosecution of acts of torture committed in third countries

1.1. The Law

1.1.1. Criminal Law

Article 4 of the Federal Criminal Code provides for passive and active personality. Crimes committed on foreign territory by a Mexican against Mexicans or against others, or by a foreigner against Mexicans shall be punished in the Republic according to the Federal laws, if they fulfil the following criteria: the accused shall be in the Republic; the prisoner shall not have been tried in the country in which he committed the crime, and the crime he is accused of shall be characterized as a crime both in the country it was carried out as well as in the Republic.

Likewise, Article 6 of the Federal Criminal Code might provide for the exercise of universal jurisdiction:¹³²

"[w]hen an act is committed which is not an offence under this Code but is an offence under a special law or under an international treaty to which

¹³⁰ The establishment of a Truth Commission was contemplated with regard to Mexico's persecution of political activists during the 1970s and the killing of students in 1968. The current President Fox and then electoral candidate promised to establish such a commission in his campaign but did not do so once elected. However, a special prosecutor was appointed and the former President Echeverria was being investigated for the 1968 massacre (he was Secretary of State at that time).

¹³¹ Such as Asociación contra la tortura (ACAT).

¹³² All translations in this section are taken from AI, "Universal Jurisdiction: The duty of states to enact and implement legislation", September 1, 2001. AI also quotes from an unpublished paper according to which the exercise of universal jurisdiction might be limited by principles regulating the jurisdiction of criminal courts, i.e. the requirement of a personal connection with the offender/offended or the territorial connection with the offence. See *ibid.*

Mexico is a party, the respective law or treaty shall apply, taking into account the provisions of Book I of this Code and, if applicable, the subsequent provisions of Book II.¹³³

“When a single issue appears regulated by diverse dispositions, the specific shall prevail over the general”

The Attorney General (*Procurador General de la República*) could initiate an investigation and prosecution in these cases

Diplomatic and consulate personnel are accorded immunity in line with the provisions of the Vienna Convention on Consular Relations, 1963 and the Vienna Convention on Diplomatic Relations, 1961, to which Mexico is a party.

1.1.2. Extradition law

Extradition in Mexico can proceed on the basis of bilateral treaties and when no treaty has been signed, on the basis of Mexico’s International Extradition Law, 1975.

Torture or acts amounting to torture are extraditable crimes, so long as torture is a crime under the law of the requesting State. The grounds on which extradition may be refused are: the requested person was absolved, pardoned, subject to an amnesty law or completed the sentence related to the crime which originated the request; no charges were laid by a legitimate party, when the offence under the Mexican criminal demands such requirement; a statute of limitation under Mexican or the requesting country’s criminal law precludes further prosecution; or the offence was committed within the jurisdiction of the [Mexican] Republic’s tribunals.¹³⁴

In addition, extradition will not be granted when the person had the status of slave in the country where the crime was committed, will be subject to political persecution in the requesting country¹³⁵ or when the offence for which extradition is requested comes within the jurisdiction of the military tribunals.¹³⁶ Mexican nationals cannot be extradited but for exceptional cases resolved by the Executive.¹³⁷ Moreover, according to the jurisprudence of the Mexican Supreme Court, Mexicans cannot be extradited if they face the death penalty.¹³⁸ Article 16, section IV of the Internal Rules of the Ministry for Foreign Affairs assigns to the Directorate-General of Legal Affairs of the Ministry for Foreign Affairs responsibility for taking action in extradition proceedings in accordance with the provisions of the International Extradition Law and of any agreements concluded between Mexico and other States. The second paragraph of Article 33 of the International Extradition Law (to be consistent) provides that a decision granting extradition can be challenged only through an action for *amparo*.

¹³³ Book I contains general provisions, concerning matters such as principles of criminal responsibility and punishments. Book II includes Article 149 (Violations of obligations to humanity).

¹³⁴ Article 7 International Extradition Act, 1975.

¹³⁵ Article 8 International Extradition Act.

¹³⁶ Article 9 International Extradition Act.

¹³⁷ Article 14 International Extradition Act. Most of these cases are related to alleged drug traffickers extradited to the US.

¹³⁸ See on this Article 10 International Extradition Act.

1.2. The Practice

There are no cases involving the exercise of the passive personality principle or universal jurisdiction. Nevertheless, in 2000, NGOs applied to the US authorities for the arrest of Major Anderson Kohatsu, a member of the Peruvian military who had been involved in the torture of a Peruvian national. An order of arrest was issued against Kohatsu, who was briefly detained and released by a decision of the US State Department. As Kohatsu's flight made a stopover in Mexico, CMDPDH, a Mexican NGO, submitted a petition to the Federal Prosecutor's Office for the arrest of Kohatsu. Subsequently, the Office of the Prosecution (*Ministerio Público*) interrogated Kohatsu but he was then allowed to leave the country without further action being taken.¹³⁹

The only known extradition proceedings of an alleged torturer is the case of former Argentine army officer Ricardo Miguel Cavallo, initially arrested in Mexico in August 2000 on charges relating to false documents. On 1 September 2000, Spanish Judge Baltazar Garzón issued an international arrest warrant, based on charges relating to torture, disappearances and kidnappings committed during the military dictatorship in Argentina from 1976 to 1983. Mexico's Ministry of Foreign Affairs agreed to extradite him on 2 February 2001, after Judge Guadalupe Luna Altamirano held on 12 January 2001 in a judicial opinion requested by the Ministry, that the extradition could proceed only on the charges of genocide and terrorism. Cavallo challenged the Ministry's extradition order through a judicial writ (*amparo*). Federal District Judge Juan García Orozco concurred with Judge Luna and denied the extradition order on the grounds that a statute of limitation barred the crime of torture. The judge, however, held that the extradition could proceed on the other two grounds.¹⁴⁰ The Ministry of Foreign Affairs of Mexico appealed this decision.¹⁴¹ The appeal is pending at the Supreme Court.

2. Claiming Reparation for acts of torture committed in third countries

Mexican civil courts can exercise jurisdiction based on residence or cause of action.¹⁴² As a general rule, the Court will apply the law of the place where the tort occurred. In principle torture survivors could also claim compensation for torture committed abroad in criminal proceedings initiated in Mexico on one of the recognised grounds outlined above.

There is no law on state immunity in Mexico and no precedents in relation to relevant cases.

There are no known cases in which survivors of acts of torture committed outside the territory of Mexico have sought or obtained redress in the country.

¹³⁹ Information provided by REDRESS' contacts.

¹⁴⁰ See Aranda, Jesús and Gómez, Carolina, "Caso Cavallo: ordena a la SRE que emita nuevo acuerdo sobre la extradición del ex represor", *La Jornada*, March 27th, 2002 and AI, Universal Jurisdiction, supra.

¹⁴¹ Mexico's Ministry of Foreign Affairs, Press Release No. 061/02 Tlatelolco, D.F., April 12th, 2002.

¹⁴² Article 12 Federal Civil Code.