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**New Standards of Justice: Uncovering Motivations for Mexico's  
Recent Judicial Reforms amid a Security Crisis**

Kindra Mohr  
Comparative Law, Professor Frank Garcia  
Fall 2009

Mexico is in a state of siege. In recent years, organized crime and drug-related violence have escalated dramatically, taking innocent lives and leaving the country mired in bloodshed. The Mexican government, under the leadership of President Felipe Calderón, has responded in part by significantly extending the reach of its security operations, deploying thousands of federal police officers and military troops to combat the activities of drug cartels, and collaborating with the United States on an extensive regional security plan known as the Mérida Initiative.<sup>1</sup> In the midst of the security crisis, however, the government has somewhat paradoxically adopted judicial reforms that protect human rights and civil liberties rather than erode them, specifically the presumption of innocence standard in criminal proceedings and the implementation of oral trials.<sup>2</sup> Assuming that the new laws on the books will be applied in practice, these reforms represent an important commitment on the part of the government to uphold human rights and civil liberties. This is in stark contrast to the infamous judicial reforms in Colombia—the institutionalization of anonymous or “faceless” prosecutions in special courts—implemented after a surge in leftist and cartel brutality, and the murders of several prominent public and judicial officials in the 1980s.<sup>3</sup>

In many ways, there is a strong parallel between the security crises and drug-related violence in both countries, yet Mexico has rejected Colombia’s *justicia sin rostro*, or “faceless justice” approach, which the human rights community fiercely condemned. The combination of their similar experiences with the “war on drugs” and their relatively divergent policy responses provide fertile ground for a case study on what prompted Mexico to promote human rights and

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<sup>1</sup> JUNE S. BEITTEL, MEXICO’S DRUG RELATED VIOLENCE 2 (2009).

<sup>2</sup> PRESIDENCIA DE LA REPÚBLICA, FIRMA EL PRESIDENTE FELIPE CALDERÓN DECRETO DE REFORMA CONSTITUCIONAL EN MATERIA DE JUSTICIA PENAL Y SEGURIDAD PÚBLICA (2008), <http://www.presidencia.gob.mx/prensa/notas/?contenido=36426>.

<sup>3</sup> Robert Weiner, *War by Other Means: Colombia’s Faceless Courts*, 30 NACLA REPORT ON THE AMERICAS (1996), <http://www.questia.com/googleScholar.qst?docId=98485319>.

civil liberties through its adoption of the innocence standard and oral trials, despite the security threat on the ground. It is important to note at the onset of this discussion that not all reforms can be characterized as completely advancing or undermining the principles of human rights and civil liberties in either country; indeed some of Colombia's reforms were lauded for promoting human rights and civil liberties,<sup>4</sup> whereas there is concern that Mexico has not gone far enough to advance them.<sup>5</sup> Nonetheless, this paper narrowly focuses on the comparison between Colombia's faceless justice approach and Mexico's adoption of these particular reforms. In initiating the dialogue on this divergence, the paper will evaluate some hypotheses that could account for Mexico's reforms, and argue that a lack of reform alternatives and the failure of Colombia's approach were primary causes of Mexico's reform strategy.

In the first section, the paper will provide an overview of the security conditions and subsequent faceless justice reform approach in Colombia, highlighting some of the consequences of this approach. Second, the paper will describe the security context in Mexico and its recent judicial reforms involving the implementation of the innocence standard and oral trials, which stand in contrast to Colombia's reforms involving anonymous prosecutions. In the third section, it will assess three possible justifications for why Mexico turned away from Colombia's use of anonymous prosecutions and instead passed a constitutional amendment to ensure the innocence

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<sup>4</sup> For example, Colombia's reform efforts led to the adoption of a new Constitution in 1991, which contained provisions that limit the detention period before trial and prohibit torture and cruel, inhumane, or degrading punishment, among other praiseworthy provisions. However, these provisions were largely undercut by the institutionalization of anonymous prosecutions in special courts and the retention of the military's authority to hold secret trials against its personnel in cases of human rights abuses. See PETER DESHAZO & JUAN ENRIQUE VARGAS, JUDICIAL REFORM IN LATIN AMERICA: AN ASSESSMENT 7-8 (2006); Donald T. Fox & Anne Stetson, *The 1991 Constitutional Reform: Prospects for Democracy and the Rule of Law in Colombia*, 24 CASE W. RES. J. INT'L L. 139, 156-62 (1992); Luz Estella Nagle, *Colombia's Faceless Justice: A Necessary Evil, Blind Impartiality or Modern Inquisition?*, 61 U. PITT. L. REV. 881, 912-15 (2000).

<sup>5</sup> While human rights groups have praised Mexico for its reforms involving the protection of due process rights, such as the presumption of innocence and the transition to an accusatory, oral trial system for criminal proceedings, they have criticized the continued use of *arraigo*, detentions that allow for confinement without formal charges for up to 80 days for organized crime suspects. See HUMAN RIGHTS WATCH, COUNTRY SUMMARY: MEXICO 1-2 (2009); MIGUEL AGUSTÍN PRO JUÁREZ HUMAN RIGHTS CTR., HUMAN RIGHTS UNDER SIEGE: PUBLIC SECURITY AND CRIMINAL JUSTICE IN MEXICO 31-32 (2008).

standard and oral trials in criminal proceedings. The paper will posit that the absence of viable reform alternatives available to policymakers and the lessons learned from Colombia's experience served as an impetus for Mexico's reform strategy, and conclude with an invitation for further discussion on this topic.

### **I. Colombia: Security Conditions and “Faceless Justice”**

The 1980s marked a particularly dark era for Colombians. Guerilla warfare consumed daily life for urban and rural populations who suffered from the ceaseless violence between armed leftist groups, cartels, and right-wing paramilitaries. The carnage intensified by the mid-1980s, as Pablo Escobar, the kingpin of the Medellín cartel, ordered a rash of killings of top public officials in order to fight extradition to the United States.<sup>6</sup> This was followed by the M-19 rebel group's attack on the Palace of Justice in 1985, leaving 11 justices dead.<sup>7</sup> The violence of the next few years culminated in the mass kidnappings and killings of judges, lawyers, human rights advocates, government officials, and two presidential candidates.<sup>8</sup> Meanwhile, the justice system lacked the institutional capacity and incentives to issue guilty verdicts, as judges quickly realized that convictions virtually guaranteed their own death sentences.<sup>9</sup> Thus, “perpetrators of most of the killings enjoyed total impunity...[and] the judiciary remained ineffective and shell-shocked.”<sup>10</sup> In order to strengthen the judiciary and respond to the violence, the government adopted a new constitution and code of criminal procedure in 1991, which institutionalized the faceless justice reform approach through the creation of special courts which secured the anonymity of judges, prosecutorial authorities, and witnesses.<sup>11</sup>

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<sup>6</sup> Nagle, *supra* note 4, at 896, 901-03.

<sup>7</sup> *Id.*, at 902.

<sup>8</sup> *Id.*, at 908.

<sup>9</sup> *Id.*, at 913.

<sup>10</sup> *Id.*, at 910.

<sup>11</sup> *Id.*, at 910, 913.

The special courts had jurisdiction over crimes involving drug and arms trafficking, extortion, oil pipeline sabotage, and acts of terrorism.<sup>12</sup> Prosecutors for these cases cavalierly issued warrants (if they were even requested), which gave law enforcement broad discretion over seizures, surveillance, and detentions, and the investigation proceeded in complete secrecy.<sup>13</sup> In court, there was no right to a public trial and the identity of the presiding judge was unknown to all parties but the prosecutor.<sup>14</sup> Courts were enclosed in bunkers, which contained one-way mirrors and voice distorters to protect court personnel.<sup>15</sup> Furthermore, the defense counsel had no access to witness statements, which were sealed by the witness's fingerprints rather than signature.<sup>16</sup> Neither the accused nor the defense counsel had a right to challenge witnesses, or examine or contest evidence; in fact, if the accused requested access to evidence, she would be required to testify.<sup>17</sup> At the appellate level, the judge also retained anonymity, and the courts only accepted written arguments.<sup>18</sup>

The primary objective of the faceless justice approach was to advance the functionality of the judicial system at the height of the security crisis by preventing impunity and minimizing the safety risks to judicial officials and witnesses.<sup>19</sup> However, this approach ultimately failed to fulfill its purpose. First, the system served as a platform for corruption: judges, law enforcement officers, and administrative staff involved in the process frequently solicited bribes in exchange for destroying evidence or dismissing charges.<sup>20</sup> In one case, the Cali cartel was funneling illicit

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<sup>12</sup> *Id.*, at 917.

<sup>13</sup> *Id.*, at 918, 920-21; Weiner, *supra* note 3.

<sup>14</sup> Nagle, *supra* note 4, at 910-11.

<sup>15</sup> Sandra Bibiana Flórez, *Justicia sin rostro en Colombia: amor y odio*, PROCESO, Feb. 12, 2007, <http://www.proceso.com.mx/prisma.html?sec=3&nta=48137>.

<sup>16</sup> Nagle, *supra* note 4, at 919.

<sup>17</sup> *Id.*, at 920; Weiner, *supra* note 3.

<sup>18</sup> Nagle, *supra* note 4, at 923.

<sup>19</sup> *See id.*, at 912-13.

<sup>20</sup> *Id.*, at 914-15; Nidia Marín, *Impide la corrupción crear "jueces sin rostro,"* EL SOL DE MÉXICO, Feb. 3, 2008, <http://www.oem.com.mx/laprensa/notas/n581463.htm>.

payments to a law enforcement officer associated with the special courts' investigative unit in order to buy immunity and plan attacks against anonymous judges.<sup>21</sup> Intelligence reports also revealed that 42 narco-trafficking groups formed an alliance to pay off various judicial and political officials to subvert the system.<sup>22</sup>

Second, judges, prosecutors, and witnesses as a whole were still highly vulnerable to assassinations and death threats.<sup>23</sup> Cartel members would often trace judges' identification codes back to their names and follow vehicles that entered through the bunker's access points.<sup>24</sup> In 1992, for example, Myriam Rocío Vélez, a faceless judge in a case involving the murder of a prominent newspaper manager, was gunned down with her escorts in front of her son.<sup>25</sup> Court personnel often sold the identities of protected witnesses, who were then murdered following their testimony.<sup>26</sup> Moreover, widespread terror continued to plague urban and rural areas of the country, despite the new procedures, due to inter-cartel rivalries and a revived guerrilla campaign against the state.<sup>27</sup> While murder rates for judicial personnel experienced a slight decline after the reformed procedures and special courts were in place, security analysts attribute the reduction to the government's willingness to ease sentencing for traffickers who turned themselves in to authorities rather than the government's faceless justice approach.<sup>28</sup>

Third, the attempt to strengthen judicial capacity and "securitize" criminal proceedings through this approach ultimately undermined the legitimacy of the judicial system. Ongoing corruption scandals and allegations of impunity further hampered the government's efforts to

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<sup>21</sup> Nagle, *supra* note 4, at 915.

<sup>22</sup> Flórez, *supra* note 11.

<sup>23</sup> Marín, *supra* note 16.

<sup>24</sup> See Flórez, *supra* note 11.

<sup>25</sup> *Id.*

<sup>26</sup> Nagle, *supra* note 4, at 952.

<sup>27</sup> *Id.*, at 914.

<sup>28</sup> *Id.*

cultivate a reputation of judicial integrity and impartiality.<sup>29</sup> Faceless reforms also came at the price of human rights and civil liberties. For example, the government sacrificed the fundamental tenets of due process for a system based on anonymity: the accused, subject to a secret trial, had no right to confront his/her accuser, and was forced to present a defense against undisclosed evidence and testimony under a presumption of guilt.<sup>30</sup> Little proof was necessary to confirm criminal allegations, and judges escaped official scrutiny and accountability due to their ability to render anonymous decisions.<sup>31</sup> Because the system made it possible for witnesses to present capricious claims against an enemy, it provided a conduit for revenge and blood feuds.<sup>32</sup> Furthermore, the Organization of American States denounced the faceless justice approach, emphasizing its violation of the American Convention on Human Rights and basic principles of the rule of law.<sup>33</sup>

By the end of the 1990s, despite its flaws, the Colombian Congress approved legislation that would extend the operation of the faceless justice system, albeit in a modified form.<sup>34</sup> Shortly thereafter, protests ensued and human rights groups and the international community began to apply more pressure on the Colombian government.<sup>35</sup> Amid a great deal of controversy, on April 6, 2000 the Constitutional Court declared that the anonymous procedures and special courts violated due process and struck down the legislation, marking the end of the faceless justice system.<sup>36</sup> Over the past decade, the Colombian government has continued to

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<sup>29</sup> Flórez, *supra* note 11.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> Nagle, *supra* note 4, at 950.

<sup>33</sup> INTER-AM. COMM'N ON HUMAN RIGHTS, ORG. OF AM. STATES, THIRD REPORT ON THE HUMAN RIGHTS SITUATION IN COLOMBIA (1999), <http://www.cidh.oas.org/countryrep/Colom99en/chapter-5.htm>.

<sup>34</sup> U.K. HOME OFFICE, IMMIGRATION AND NATIONALITY DIRECTORATE COUNTRY ASSESSMENT – COLOMBIA (2002), <http://www.unhcr.org/refworld/docid/3c2b4e097.html>.

<sup>35</sup> Larry Rohter, *Secretive Colombian Courts Survive Protests over Rights*, N.Y. TIMES, June 20, 1999, <http://www.nytimes.com/1999/06/20/world/secretive-colombian-courts-survive-protests-over-rights.html>.

<sup>36</sup> U.K. HOME OFFICE, *supra* note 30.



struggle with the implementation of an overarching reform plan that would enhance domestic security while developing democratic institutions and strengthening the rule of law.<sup>37</sup>

## II. Mexico: Security Conditions and a New Reform Approach

The current security crisis in Mexico in many regards resembles the Colombian experience described above. Since the early 2000s, violence and narcoterrorism activities have grown steadily in response to the government's aggressive security strategies and inter-cartel competition for market dominance.<sup>38</sup> Over the past two years, drug-related violence escalated to a "level of intensity and ferocity that has exceeded previous periods of [the crisis]."<sup>39</sup> While exact statistics are difficult to obtain, data indicate a drastic rise in murders of public officials and private citizens since 2006.<sup>40</sup> The Mexican government estimates that there were 5,600 drug-related killings in 2008—a 110 percent increase over 2007 figures.<sup>41</sup> In the early months of 2009, the murder rate rose 146 percent from the equivalent period in 2008; if this rate continues, Mexico will surpass rates in Colombia at "the peak of the mayhem unleashed by Pablo Escobar in the 1980s."<sup>42</sup>

As in Colombia, Mexican judges, prosecutors, and other public officials have been targets of cartel violence.<sup>43</sup> Judges and other judicial personnel overseeing narcotrafficking and organized crime cases receive death threats and are kidnapped or worse if they are not complicit with the demands of drug traffickers. In 2008, for example, armed assailants murdered Ernesto

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<sup>37</sup> See JUNE S. BEITTEL & CLARE RIBANDO SEELKE, COLOMBIA: ISSUES FOR CONGRESS 19, 24 (2009).

<sup>38</sup> BEITTEL, *supra* note 1, at 10-11; Francisco González, *Mexico's Drug Wars Get Brutal*, 108 CURRENT HISTORY 72 (2009).

<sup>39</sup> BEITTEL, *supra* note 1, at summary.

<sup>40</sup> *Id.*, at 10.

<sup>41</sup> Latin Am. Newsletters, *Mexico-U.S.: The Drugs War—Dissecting the threat perceived in Washington*, LATIN AM. SEC. & STRATEGIC REV., January 2009, at 4.

<sup>42</sup> Latin Am. Newsletters, *Cartels add political dimension to 'drugs war'*, LATIN AM. SEC. & STRATEGIC REV., Feb. 2009, at 6.

<sup>43</sup> Jeremy Schwartz, *Judges Latest Target in Mexico Drug War*, COX NEWS SERV., February 2, 2008, [http://www.coxwashington.com/hp/content/reporters/stories/2008/02/02/MEXICO\\_JUDGES02\\_COX.html](http://www.coxwashington.com/hp/content/reporters/stories/2008/02/02/MEXICO_JUDGES02_COX.html).

Palacios Lopez, a judge overseeing a high profile trafficking case.<sup>44</sup> More recently, attacks in northern Mexico left a federal prosecutor dead, along with 16 other individuals.<sup>45</sup> In addition, last year authorities uncovered a plot to attack the public prosecutor's office along the border.<sup>46</sup>

In response, the Mexican government has adopted a *mano dura* security strategy similar to Colombia's, deploying over 45,000 soldiers and 5,000 police units and launching full-scale military operations across the country.<sup>47</sup> The government has also entered into an agreement with the United States under the Mérida Initiative, which provides \$1.6 billion over the course of three years to combat drug trafficking and organized crime.<sup>48</sup> Simultaneously, Mexico has initiated a series of rule-of-law reforms to strengthen judicial institutions and improve the formal administration of justice, particularly in criminal proceedings. However, unlike Colombia, Mexico has discarded the option of anonymous prosecutions and instead has elected a number of reforms that demonstrate a greater respect for human rights and civil liberties.<sup>49</sup> Among these reforms are the adoption of the presumption of innocence standard for criminal defendants and the transition to oral trials.<sup>50</sup>

In June 2008, President Calderón signed into effect a constitutional amendment to fundamentally transform the criminal justice system by establishing explicit constitutional rights

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<sup>44</sup> *Judge murdered in Northern Mexico*, NOTIEMAIL, Jan. 22, 2008, <http://news.notiemail.com/noticia.asp?nt=11930591&cty=200>; Manuel Roig-Franzia, *Arrests, Slaying Underscore Mexico's Drug Crisis*, WASH. POST, Jan. 23, 2008, <http://www.washingtonpost.com/wp-dyn/content/article/2008/01/22/AR2008012203439.html>.

<sup>45</sup> *Prosecutor, 16 other dead in Mexico border attacks*, INDIAN EXPRESS, July 30, 2009, <http://www.indianexpress.com/news/prosecutor-16-other-dead-in-mexico-border-a/495993/>.

<sup>46</sup> *Marching as to War; Mexico*, ECONOMIST, Feb. 2, 2008, [http://www.economist.com/world/americas/displaystory.cfm?story\\_id=E1\\_TDGDRGSG](http://www.economist.com/world/americas/displaystory.cfm?story_id=E1_TDGDRGSG).

<sup>47</sup> VANDA FELBAB-BROWN, *THE VIOLENT DRUG MARKET IN MEXICO AND LESSONS FROM COLOMBIA* 19 (2009).

<sup>48</sup> FELBAB-BROWN, *supra* note 42, at 20; Kindra Mohr, *The Mérida Initiative: An Early Assessment of U.S.-Mexico Security*, 9 PATERSON REV. 71, 75 (2008).

<sup>49</sup> See HUMAN RIGHTS WATCH, *supra* note 3.

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

under Article 20 for two new elements: the presumption of innocence and oral trials.<sup>51</sup> The amendment swept through both the Congress, with 462 votes in favor out of 468, and the Senate, with a vote of 71-to-25, and subsequently passed with the support of a majority of the state legislatures.<sup>52</sup> While the Mexican Supreme Court noted in an isolated case that the presumption of innocence was implied in the Constitution, the standard was not binding until the 2008 amendment.<sup>53</sup> In the past, law enforcement agencies “had the monopoly over investigative and prosecutorial actions...[and] in practice all detainees were regarded as guilty until proven innocent.”<sup>54</sup>

One practical consequence of the innocence standard involves the role of public prosecutors. Traditionally, the Mexican criminal justice system has provided prosecutors with a great deal of latitude when investigating crimes, even granting them the *de facto* authority to make a preliminary, “pseudo-judicial” determination on a suspect’s guilt.<sup>55</sup> In effect, prosecutors were functioning as judges by issuing statements that were analogous to binding legal decisions.<sup>56</sup> Coupled with a process of closed, written arguments instead of oral trials, this

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<sup>51</sup> CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS, art. 20 (as amended), <http://www.diputados.gob.mx/LeyesBiblio/pdf/1.pdf>; Manuel Roig-Franzia, *Mexico Revises its Justice System*, WASH. POST, June 18, 2008, [http://www.washingtonpost.com/wp-dyn/content/article/2008/06/17/AR2008061702334\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2008/06/17/AR2008061702334_pf.html); MIGUEL AGUSTÍN PRO JUÁREZ HUMAN RIGHTS CTR., *supra* note 3. It is worth noting that the original 1917 Constitution contained a guarantee of a “public trial” by a judge or jury of literate citizens, which, for all intents and purposes, was never applied in practice. See CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS, art. 20, § 6, <http://www.solon.org/Constitutions/Mexico/Spanish/constitution-mex.html>.

<sup>52</sup> *Id.*; Katerina Ossenova, *Mexico Senate passes judicial reform bill*, JURIST, Mar. 6, 2008, <http://jurist.law.pitt.edu/paperchase/2008/03/mexico-senate-passes-judicial-reform.php>.

<sup>53</sup> Carlos Rios Espinoza, *Redesigning Mexico’s Criminal Procedure: The State’s Turning Point*, 15 SW. J. L. & TRADE AM. 53, 75-76 (2008).

<sup>54</sup> Carlos Macías, *Mexico Revamps Its Judicial System*, AMERICAS SOC’Y, June 19, 2008, <http://as.americas-society.org/article.php?id=1112>; Beatriz Magaloni, *Enforcing the Autocratic Political Order and the Role of Courts*, in *RULE BY LAW: THE POLITICS IN AUTHORITARIAN REGIMES* 180, 190-91 (Tom Ginsburg & Tamir Moustafa eds., 2008).

<sup>55</sup> Interview by Cheryl Corley with John Mill Ackerman Rose, Professor, Institute for Legal Research at the National Autonomous University of Mexico (June 19, 2008), <http://www.npr.org/templates/story/story.php?storyId=91684101>.

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

practice encouraged abuse of power and bred corruption within the judicial system.<sup>57</sup> The 2008 reforms restructured prosecutors' offices based on the presumption of innocence standard; they are now only able to gather evidence and present the case to court, and the judge is responsible for giving fair weight to each side. Discretionary abuse is subject to appeal. The new standard has created a "real separation...between those who decide the guiltiness and those who investigate and accuse the suspect."<sup>58</sup>

The constitutional amendment also revolutionizes the process in which courts conduct criminal trials. The accused will no longer be subject to closed hearings based on written arguments, which, fostered immunity and undermined civil liberties and human rights principles.<sup>59</sup> Rather, the amendment calls for the implementation of public, oral trials "in an effort to ensure transparency and the opportunity to fair legal representation."<sup>60</sup> The new trial procedures involve extensive training for judges, lawyers, and judicial personnel, in addition to the construction of new court facilities to comply with the new trial requirements.<sup>61</sup> Due to the similarity to U.S. criminal trials, training programs and educational exchanges are already under way between U.S. and Mexican institutions.<sup>62</sup> In fact, Southwestern University Law School has received multi-year financing through the Mérida Initiative for its training-exchange program with the Law Department of the Instituto Tecnológico de Estudios Superiores de Monterrey.<sup>63</sup>

In contrast to Colombian reforms in the 1990s, the use of anonymity in the investigatory and adjudicatory stages of the criminal process is notably absent from the reforms in Mexico.

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<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> Macias, *supra* note 50.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *USAID/Mexico's Role in the Merida Initiative: Hearing Before the Subcomm.on State, Foreign Operations, and Related Programs of the H. Comm. on Appropriations*, 111th Cong. (2009) (statement of Rodger D. Garner, USAID Mission Dir. to Mex.), <http://www.usaid.gov/press/speeches/2009/ty090310.html>.

<sup>63</sup> *Id.*

Indeed, human rights advocates and many legal professionals have drawn attention to Mexico's distance from Colombia's approach, and hailed the constitutional amendment as a significant advancement for human rights and civil liberties.<sup>64</sup> Nonetheless, major changes will not occur overnight, given that the government has until 2016 to fully implement the reforms.<sup>65</sup> Thus, it will take time before policymakers and analysts can evaluate progress in terms of the reforms' impact on crime, human rights and civil liberties, and the overall advancement of the rule of law. However, it is clear that, despite facing similar threats to domestic security (a time in which a state may be more inclined to disregard human rights and civil liberties), Mexico's adoption of these two elements into its criminal justice system fall far on the other end of the human rights and civil liberties "spectrum" as compared to Colombia's faceless justice approach. What still remains unclear is why the Mexican government pursued these reforms. The next section of the paper will explore some potential explanations for this phenomenon.

### **III. Possible Justifications for Mexico's Reform Strategy**

Although it passed with overwhelming support at both the state and federal levels, Mexico's historic 2008 constitutional amendment was not without immense debate. Negotiations repeatedly stalled, and political jockeying over the reforms consumed the terms of President Calderón's two predecessors, as policymakers faced the challenge of balancing security measures with protecting the rights of the general population.<sup>66</sup> Despite significant media coverage of the amendment's passage, there appears to be little evidence to explain the government's motivations for adopting these two particular reforms as opposed to Colombia's approach. In reality, it is most likely that a multitude of factors contributed to the eventual

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<sup>64</sup> MIGUEL AGUSTÍN PRO JUÁREZ HUMAN RIGHTS CTR., *supra* note 3; TRANS-BORDER INSTITUTE, JUSTICE IN MEXICO 10 (2008).

<sup>65</sup> Roig-Franzia, *supra* note 47.

<sup>66</sup> *Id.*

acceptance of a transformed criminal justice system. However, in hopes of narrowing the universe of possibilities to what may have been some of the core factors in the reform process, this paper will assess three hypotheses.

*A. Hypothesis I: Public Demand*

First, it is possible that elected officials were responding to public demands for more judicial transparency and constitutional safeguards to prevent state encroachment on human rights and civil liberties. Prior to the amendment's adoption, a Gallup poll revealed that only 37 percent of survey respondents in 2007 had confidence in the judiciary, suggesting that the public would likely favor judicial reforms.<sup>67</sup> This is unsurprising, given widespread discontent with the state's historical abuse of authority and use of the judiciary as an instrument to suppress political dissidence and empower the ruling class.<sup>68</sup> For many, the judicial system "not only offer[ed] what it can't deliver, it [became]...one of the causes of the poverty and injustice that characterize Mexico."<sup>69</sup> The deep public mistrust of the judiciary stems in part from its failure to hold public officials accountable for state-sponsored human rights abuses, and also from its generation of a culture of corruption and impunity by allowing criminals to return to the streets.<sup>70</sup> Thus, it seems plausible that the majority of Mexicans would perceive the innocence standard and implementation of oral trials as a "crucial step in the transition to an open system where the

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<sup>67</sup> Julie Ray, *Mexico's Citizens Ready for Improved Judicial System*. GALLUP, Feb. 20, 2008, <http://www.gallup.com/poll/104455/mexicos-citizens-ready-improved-justice-system.aspx>. Survey results were based on random interviews with approximately 1,000 adults, aged 15 and older.

<sup>68</sup> See Magaloni, *supra* note 50.

<sup>69</sup> Nancy J. Blake & Kathleen Blake Bohne, *The Judicial System in Mexico* (pt. 1), OPEN DEMOCRACY, Aug. 7, 2009, <http://www.opendemocracy.net/article/the-judicial-system-in-mexico>.

<sup>70</sup> See TRANSPARENCY INT'L, GLOBAL CORRUPTION REPORT 2007 226-27 (2007).

power of the state is balanced by the rights of the accused, who would be transformed from a subject under the law, to a citizen protected by it.”<sup>71</sup>

However, these statistics and the negative reputation of the judiciary among the population do not comport with some of the public’s attitude toward these two reforms. At a time when many Mexicans, particularly along the U.S. border, fear for their lives on a daily basis, there has been anxiety that these reforms will simply make it easier for criminals to evade conviction and continue ravaging communities.<sup>72</sup> In other words, in the midst of a security crisis, Mexicans want security. One striking illustration of this sentiment was a rally involving the citizens and mayor of Salina Cruz, who protested the reforms, believing they would lead to the release of a suspect who was likely involved in the murder of a 10-year old girl.<sup>73</sup> As captured in one protestor’s remarks, “Oral trials only protect the criminals”;<sup>74</sup> in Salina Cruz, the saying goes, “What use is the concept of innocent until proven guilty if there is no way of ever proving anyone’s guilt?”<sup>75</sup> Based on this view, it would seem possible that some Mexicans would have even supported Colombia’s faceless justice approach.<sup>76</sup>

This perception in Salina Cruz was shared in Oaxaca as well, where the police had to suspend training courses on the new reforms due to protests after the local court released an alleged car thief in an oral trial.<sup>77</sup> The view in some communities is that the release of someone who is presumed guilty “ignites more rage and indignation than the incarceration of innocent

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<sup>71</sup> Nancy J. Blake & Kathleen Blake Bohne, *The Judicial System in Mexico* (pt. 2), OPEN DEMOCRACY, Aug. 7, 2009, <http://www.opendemocracy.net/article/the-judicial-system-in-mexico-challenges-and-prospects-for-reform-part-ii>.

<sup>72</sup> Nancy J. Blake & Kathleen Blake Bohne, *The Judicial System in Mexico* (pt. 3), OPEN DEMOCRACY, Aug. 7, 2009, <http://www.opendemocracy.net/article/the-judicial-system-in-mexico-challenges-and-prospects-for-reform-part-iii>.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *See id.*

<sup>77</sup> *Id.*

people.”<sup>78</sup> Although this belief is not universal, it seems doubtful that a popular outcry for these reforms triggered government action. Thus, while public demand at some level may have been a modest factor in the establishment of the innocence standard and implementation of oral trials, it was unlikely to be the primary impetus for the reforms.

### *B. Hypothesis II: U.S. Pressure*

A second possible explanation for the enacted reforms is U.S. pressure on Mexico, through the Mérida Initiative, to strengthen democratic institutions and the rule of law, and to cement its commitment to human rights and civil liberties. This is to say that the conditionality and funding provisions discussed throughout the Initiative’s planning stages, prior to the legislative passage of the constitutional amendment in March and June 2008, may have sufficiently compelled federal and state legislators in Mexico to move forward with the reform strategy. A U.S.-Mexico bilateral security strategy was one of the top issues on the agenda of President Calderón’s first visit to the White House in November 2006.<sup>79</sup> During subsequent negotiations in Mérida in March 2007, U.S. officials expressed their mounting concerns over Mexico’s lack of due process and the accusations of gross human rights abuses by the military.<sup>80</sup> While officials did not specifically “advise” Mexican policymakers to adopt reforms such as the innocence standard and oral trials, it was evident that Washington was very interested in seeing Mexico improve its record on human rights and civil liberties, and it was willing to use the funding as leverage to generate pro-human rights and civil liberties reforms.<sup>81</sup> Recognizing that the United States would ““want some concessions in exchange for the aid,”” the Mexican

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<sup>78</sup> *Id.*

<sup>79</sup> EMBAJADA DE LOS ESTADOS UNIDOS EN MÉXICO, MEETINGS BETWEEN MEXICAN AND U.S. PRESIDENTS (2009), <http://www.usembassy-mexico.gov/bbf/bfPresidentialVisits.pdf>.

<sup>80</sup> Laurence Iliff, *U.S. conditions threaten Mexico anti-drug package*, THE DALLAS MORNING NEWS, May 29, 2008, <http://globalexchange.org/countries/americas/mexico/5685.html>.

<sup>81</sup> *See id.*



embassy began conducting informal polls of members of the U.S. Congress during the first half of 2007 about the potential requisites involved in enacting the proposal.<sup>82</sup>

The U.S. government manifested its position in two areas of the Initiative. One area was through the proposal's conditionality provisions, which required (a) benchmarks for promoting judicial reform, institution building, and the rule of law, among other goals, (b) the creation of military and police vetting procedures, and (c) the U.S. Secretary of State's certification that the Mexican government is undertaking reforms to increase transparency, investigating allegations of corruption and human rights abuses, and holding military and police forces accountable for their actions.<sup>83</sup> The second area that reflected the U.S. position was through funding provisions which dedicated Mérida assistance specifically to rule-of-law and judicial reform activities.<sup>84</sup> Congress set a minimal floor on the funding allocation for these activities, and the Bush administration proposed a fifth of total spending in the FY2008 supplemental request for reforms and institution-building measures.<sup>85</sup>

However, like the hypothesis on public demand, U.S. pressure for judicial reform through the Mérida Initiative was not likely the main catalyst for Mexico's constitutional amendment. Admittedly, the Initiative's specific funding allocation for judicial reforms was not inconsequential, as Mexican policymakers were more apt to pass the "subsidized" reforms; indeed Mérida funds are currently paying for the training and infrastructure needed to implement the innocence standard and oral trial system.<sup>86</sup> Furthermore, given the U.S. position toward human rights and civil liberties in Mexico, it is more than conceivable that support for the

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<sup>82</sup> *Bush's support is delayed*, PROCESO, Sept. 1, 2007, <http://www.cipcol.org/?p=470> (quoting a Mexican official who agreed to the interview).

<sup>83</sup> COLLEEN W. COOK ET AL., *MÉRIDA INITIATIVE: PROPOSED U.S. ANTICRIME AND COUNTERDRUG ASSISTANCE FOR MEXICO AND CENTRAL AMERICA* 6 (2008); RAY WALSER, *MEXICO, DRUG CARTELS, AND THE MÉRIDA INITIATIVE: A FIGHT WE CANNOT AFFORD TO LOSE* 3 (2008).

<sup>84</sup> BEITTEL *supra* note 1, at 16.

<sup>85</sup> COOK ET AL., *supra* note 77, at 2, 4.

<sup>86</sup> *USAID/Mexico's Role in the Merida Initiative*, *supra* note 57.

Initiative would have waned if the Mexican government attempted to implement Colombia's faceless justice approach.<sup>87</sup>

Nonetheless, evidence suggests that U.S. pressure may have only played a partial role in garnering support for these reforms. For instance, Mexican officials pushed back when the U.S. Congress initially proposed more stringent conditionality provisions, and threatened to withdraw from negotiations.<sup>88</sup> Claiming that the United States was violating Mexico's sovereignty, one member of the Party of the Democratic Revolution summarized the government's position, saying, "We are the first ones to defend the idea that Mexico needs these reforms, along with advances in human rights...[b]ut the United States cannot make unilateral demands."<sup>89</sup> Mexican politicians were unambiguous: they would not be beholden to U.S. bureaucrats, and they would enact reforms by their own initiative.<sup>90</sup> Moreover, while states do seek international legitimacy,<sup>91</sup> it is often not the driving force behind domestic legislation. This is particularly true for constitutional amendments like those in Mexico, which required broad support from multiple levels of government, most of which are generally removed from international currents and high echelon negotiations with the United States.<sup>92</sup> Hence, while it may have been a factor to some degree, there is reason to question that U.S. pressure specifically spurred support among Mexican policymakers for human rights and civil liberties reforms and triggered the adoption of the innocence standard and oral trial system.

### *C. Hypothesis III: Lack of Alternatives and Colombia's Failure*

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<sup>87</sup> See COOK ET AL., *supra* note 77, at 2, 4.

<sup>88</sup> Iloff, *supra* note 75.

<sup>89</sup> *Id.*

<sup>90</sup> See *id.*

<sup>91</sup> THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* prelude (1990).

<sup>92</sup> Jens Erik Gould & Adriana Lopez Caraveo, *Mexico Senate Approves Calderon's Anti-Crime Measure (Update 2)*, BLOOMBERG, March 6, 2008, <http://www.bloomberg.com/apps/news?pid=20601086&sid=atg88GkIckwo>.

Given that neither public demand nor the pressure stemming from Mérida negotiations was the primary driving force behind these reforms, it is necessary to consider yet another hypothesis to justify the underlying motivations for Mexico's particular reform strategy. A third possible explanation is that policymakers were faced with a dearth of reform alternatives, and they recognized the fatal flaws associated with Colombia's approach. While it may seem overly simplistic, for the reasons discussed below, this is arguably one of the more plausible explanations for the government's design of a criminal justice system that would bolster human rights and civil liberties by including the innocence standard and oral trials.

Under such severe security conditions, Mexican officials faced the difficult challenge of rapidly enhancing domestic security while ensuring that their policies did not undermine the fundamental principles of democratic rule.<sup>93</sup> Thus, their options were limited to some degree. They could not afford to be "weak" on crime, but neither could they turn Mexico into a police state. They needed to strike a balance between pursuing an aggressive militarized strategy with reforms that would protect human rights and civil liberties.<sup>94</sup> As President Calderón began to expand military operations, a growing attitude emerged that there was a "dire need for judicial changes amid the security crisis,"<sup>95</sup> and the proposal for the innocence standard and oral trial system appeared to be one of the few politically acceptable options. Daniel Lund, the president of a major Mexican polling firm, expressed this dilemma saying, "The problem is so serious no one knows a decent alternative at this point."<sup>96</sup>

Mexico's options were further restricted by the fact that Colombia's faceless justice approach did not present Mexican policymakers with a viable alternative. This approach fell into

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<sup>93</sup> MAUREEN MEYER ET AL., AT A CROSSROADS: DRUG TRAFFICKING, VIOLENCE AND THE MEXICAN STATE, 10-11 (2007).

<sup>94</sup> *See id.*

<sup>95</sup> Gould & Caraveo, *supra* note 87.

<sup>96</sup> *Id.*

disrepute in the early 2000s, and many analysts and legal professionals in both Colombia and Mexico have suggested that the faceless justice reforms were a complete failure.<sup>97</sup> For one former prosecutor in Colombia, by creating other avenues for impunity and judicial discretion, *justicia sin rostro* directly contradicted some of the goals it was supposed to achieve.<sup>98</sup> Many Mexican legislators and legal professionals have agreed. Law professor Carlos Daza Gómez of the Universidad Nacional Autónoma de México argued that Colombia's approach did not function because it simply did not eradicate corruption or violence against the judiciary.<sup>99</sup> To Professor Gómez and others, the introduction of the innocence standard and oral trials represented a more thoughtful and sophisticated solution that would concomitantly protect human rights and civil liberties and counterbalance the government's military strategies.<sup>100</sup> Although one governor proposed the implementation of Colombia's approach for organized crime cases in Mexico, the majority of Mexican legislators flatly rejected the idea, insisting that it would "undermine society's confidence in the judicial process"<sup>101</sup> and that building trust in the judiciary would require reforms like the innocence standard and the oral trial system.

Given this assessment, it seems feasible that the lessons learned from Colombia's experience and a limited selection of politically acceptable options were significant factors in the design and adoption of Mexico's judicial reforms. Although this may only partially explain why the proposal for the innocence standard and oral trial system took hold as opposed to other human rights and civil liberties reforms, it does reveal that Mexican policymakers viewed it as one of the only practical (and politically expedient) options for strengthening the administration of justice and the rule of law in the midst of the security crisis.

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<sup>97</sup> See Flórez, *supra* note 11; Marín, *supra* note 16.

<sup>98</sup> Flórez, *supra* note 11.

<sup>99</sup> Marín, *supra* note 16.

<sup>100</sup> See *id.*

<sup>101</sup> TRANS-BORDER INSTITUTE, *supra* note 59.

## **Conclusions**

The preceding analysis sought to uncover possible justifications for Mexico's recent judicial reform strategy, specifically by examining reform efforts in Colombia and Mexico. It began with an overview of the security conditions in both Colombia and Mexico, highlighting the unfortunate parallels of the drug war that has cost each country thousands of innocent lives. Within this context, the paper canvassed a contrast in the judicial reform approach between the two countries. On the one hand, Colombia pursued a strategy based on the concept of faceless justice, which undercut judicial legitimacy and fundamental principles of human rights and civil liberties, and ultimately failed. On the other hand, Mexico adopted a constitutional amendment that embodies its commitment to human rights and civil liberties by guaranteeing the presumption of innocence standard and the right to an oral trial in criminal cases. Despite the international attention that Mexico's reforms received, it remained relatively unclear what factor(s) induced the passage of this amendment.

This paper evaluated three hypotheses, and argued that neither public demand nor pressure by the United States was a significant factor in prompting the enactment of the innocence standard and oral trial system. This is not to contend that these variables had no part in incentivizing Mexican policymakers; rather, they were likely secondary motivations. The paper analyzed a third hypothesis, and based on the evidence presented above, posited that the absence of reform alternatives and the failings of Colombia's faceless justice approach were central to the implementation of these pro-human rights and civil liberties reforms.

This being said, the hypotheses above by no means compose an exhaustive list, and much remains open for discussion. This paper established an initial framework for further dialogue on why Mexico pursued this road to reform amid its security crisis by suggesting that it was

principally motivated by a lack of options and the fatal flaws embedded within the faceless justice approach. Although only the future will reveal whether Mexico's reforms take hold in practice, they nonetheless illustrate a significant move by the government to respect and uphold human rights and civil liberties. Hopefully this analysis will stir a debate and lead to a better understanding of the motivations behind these historic and positive reforms.