



# ***Arraigo* made in Mexico: A violation to human rights**

**Report before the Committee Against Torture, on the  
occasion of the review of the 5<sup>th</sup> and 6<sup>th</sup> Periodic  
Reports of Mexico**

Comisión Mexicana de Defensa y Promoción de los  
Derechos Humanos, A.C.  
Organización Mundial Contra la Tortura

October, 2012

## Executive Summary

The figure of *arraigo* was introduced to the Mexican Constitution in 2008 as a federal preventive measure to detain people suspected of belonging to organized crime. Supposedly, *arraigo* is used as a means to investigate suspected criminals, but in practice, it is used as a kind of public scrutiny that allows more time for the authorities to determine whether the detained is guilty or innocent.

This measure is clearly a form of arbitrary detention contrary to the obligations of human rights that Mexico has acquired, and violates, among others, the right to personal liberty, legality, presumption of innocence, due process and the right to an effective remedy. Moreover, *arraigo* expands the possibilities of a person to be subject to torture or other cruel, inhuman or degrading treatment.

In the context of the "war against organized crime" launched by the Federal Government since 2006, insecurity and violence in Mexico have worsened. Violence in Mexico has increased appreciably over the last five years, one of its main causes being the militarization of public security. Of particular concern has been the increase in cases of torture that have been registered all across the country.

In this context, various government actions manifested in legislation and public policies are still recurrent around the country that deepen the structural conditions that make possible the practice of torture and the associated impunity. These actions include the involvement of the military in public security tasks, the establishment of a regime of exception with restrictions on basic guarantees of due process for persons accused of belonging to organized crime, and the constitutionalization of the figure of *arraigo* in the Mexican legal system.

To date, we ignore the real dimension of the use of this measure due to the opacity of the different authorities involved in the management of numbers and statistical controls of the use of *arraigo*. However, according to official data, the use of *arraigo* has shown a sustained annual increase of over 100% per year (in 2009 was 218.7% and the remaining years remained at a constant growth of 120%). According to information compiled by the Mexican Commission for the Defense and Promotion of Human Rights (CMDPDH), from June 2008 to date, an average of 1.82 people are put under *arraigo* every day at a Federal level and 1.12 on a local level.

The use of *arraigo* has proved to further expand the possibilities of a person to be tortured due to the limited legal controls and no judicial review of its application, as well as the discretion in its application.

In light of the above-mentioned, the undersubscribed, present before the Committee the impact that the figure of *arraigo* has had on the observance and respect of human rights in Mexico, as well as the increasing possibilities of a person to be submitted to torture. It also includes a series of recommendations we hope the Committee may take into consideration to issue its concluding observations regarding the reports submitted by Mexico.

## Introduction

In the context of the so-called “war against organized crime” launched by the Federal Government since 2006, violence and insecurity in Mexico have aggravated. Violence in Mexico has steadily increased over the last five years, one of the main causes being the militarization of public security. Of particular concern has been the increase in cases of torture that have been registered all across the country.

According to the Concluding Observations of the Human Rights Committee on Mexico, issued in 2010, there are different frequent governmental actions that have manifested in legislation and public policy that have deepened the structural conditions that allow the practice of torture and the associated impunity. Among such actions, the Committee refers to the involvement of the military in public security tasks, the establishment of a regime of exception with restrictions on basic guarantees of due process for persons accused of belonging to organized crime, and the constitutionalization of the figure of *arraigo* in the Mexican legal system (paragraphs 11-15).

The *arraigo* was incorporated to the Mexican Constitution as a federal preventive measure to detain people suspected of belonging to organized crime up to 80 days. The figure of *arraigo* was introduced into the Constitution after long years debating different proposals to reform the criminal justice system. These debates finally led to several Constitutional amendments to reform the justice system and improve public security in 2008. While the reform had meritorious improvements, such as the transition to an accusatory system of criminal justice, including the presumption of innocence as a fundamental principle, the reform also introduced certain abusive and non-democratic practices such as *arraigo*.

According to the explanatory introduction (“Exposición de motivos”) of the Constitutional reform, *arraigo* is essential to “the success of the investigation, the protection of persons or their legal rights, or when there is a substantiated risk that the offender may flee from justice”. *Arraigo* is currently used at a maximum of 40 days, and it can be extended up to 80 days under a new warrant.

Supposedly, *arraigo* is used as a means of investigating suspects, but in practice it allows the Prosecutor the opportunity of continuous monitoring over those suspected of committing a crime or that may have information related to said crime, and is intended to increase the time the authorities have to gather information against the individual under *arraigo*. The aim of *arraigo* is not to determine whether a person is guilty or not, but instead is used to deprive a person from liberty in order to obtain information that could be later used at the trial stage, information that is often obtained under torture.

In the end, this means that the investigation is not carried out to detain a person, but instead the person is arbitrarily detained to be investigated and in most cases to get a confession, contrary to the basic principles of justice under a democratic regime. Thus, the affected person is left without any

warranties and an opaque legal situation since they are neither accused nor under trial. What's more, the person is not even linked to any criminal proceeding but is simply deprived from liberty to be completely available for the investigative authorities, thus denying the presumption of innocence and the right of all persons to have a defending lawyer.

This measure clearly constitutes a form of arbitrary detention contrary to the human rights obligations that Mexico has acquired and violates, among others, the right to personal freedom, legality, the presumption of innocence, due process and the right to an effective recourse. Moreover, *arraigo* widens the possibilities of a person to be subjected to torture or other cruel, inhumane, or degrading treatment.

Since the consideration of the 4<sup>th</sup> periodic review of Mexico before this Committee in 2006, even before the Constitutional reform to the justice system, the Committee analyzed the use of the figure of *arraigo*, issuing to the State the following recommendation:

**In the light of the federal Supreme Court's decision, the State party should ensure that *arraigo penal* is eliminated both from legislation and in actual practice, at the federal and state levels (paragraph 15).**

However, far from advancing towards its elimination, the State – as shown in the 5<sup>th</sup> and 6<sup>th</sup> periodic reviews presented before this Committee – has sought to justify its use under arguments that do not meet the objective of the recommendation. The actions outlined by the State, far from indicating actions for the elimination of *arraigo*, seek to further justify its use. This was also shown by the position of the State towards the recommendations issued by the Human Rights Council during the Universal Periodic Review on 2009, when Mexico rejected three recommendations issued in regards to the use of *arraigo*, arguing it was necessary for the advancement of the investigations due to the complexity of organized crime. Also, in the follow-up report to the recommendations issued by the Subcommittee on Prevention of Torture (SPT), of which the State developed a Plan of Action for its implementation, Mexico again argued for the need to use *arraigo* and justified its use, despite the celerity of the recommendation.

### ***Arraigo* in the Mexican legal framework: A History of its (un)constitutionalization**

The figure of *arraigo* in Mexico was incorporated into the criminal system for the first time in 1983, after reforming the Federal Code of Criminal Proceedings, which introduced it as a preventive measure to guarantee the availability of the offenders during the preliminary investigation and during the criminal process.

With this reform, *arraigo* was applied under the request of Prosecutors when the nature of the offense or the sanction does not require a pre-trial detention and there is a well-founded basis for believing the defendant could evade justice. This form of preventive detention is allowed for up to 30 days and is permitted renewal by a Judge at the request of the Prosecutor. However, the Code did not

specified the place where the arrest should be carried out, allowing it to be carried out in special facilities, hotels, or private homes. This practice is clearly unconstitutional.

In 1984, *arraigo* was extended within the criminal system into the Code of Criminal Proceedings for the Federal District and Federal Territories as a mechanism for Judges to retain persons that may testify about a crime.

During 2006 and 2007, before the approval of the reform to the justice system, several projects were presented to Congress that finally converged in a Bill approved at the Joint Committees in the House of Representatives on December 10, 2007. In the Bill approved by the whole Congress only three days after its approval by the Commissions, a reform to Article 16 of the Constitution was included that consecrated the figure of *arraigo* at a Constitutional level.

The approval of the Constitutional reform to the criminal justice system has allowed the regular application of *arraigo* not only when there is a substantiated risk that the suspect may evade justice, but also for all cases where there is suspicion of organized crime, where authorities have argued that it is necessary for the success of the investigation.

Since 2008, *arraigo*, search warrants and pre-trial detention have become the most frequent criminal investigation “techniques” in Mexico. Their regular use sets a mystification of the systems of criminal justice and public security on which justice has become a tool at the disposal of the security system. Thus, the Mexican State has set up a regime of exception where the application of a pre-conviction punishment reduces the juridical guarantees and places people in a legal limbo where they are neither accused nor under trial. In most cases, a person is arrested based on the testimony of an “anonymous witness” which too often is obtained through torture.

But the reform went beyond constitutionalizing the figure of *arraigo* as a tool to fighting organized crime. Through a transitional article, the Bill allowed the application of *arraigo* for all serious offenses until 2016, empowering local authorities to use *arraigo* to pursue crimes ranging from murder, kidnapping, burglary, or even theft of vehicles. This provision has no justification that accounts for its need and contravenes the very purpose of the Constitutional reform, thus reviling the exceptionality of the measure.

### **An ambiguous definition of organized crime: an open door to the subjective application of *arraigo***

An element of great concern is the ambiguity of the definition of organized crime, which has allowed the subjective application of *arraigo*. Article 2 of the Federal Law on Organized Crime establishes that:

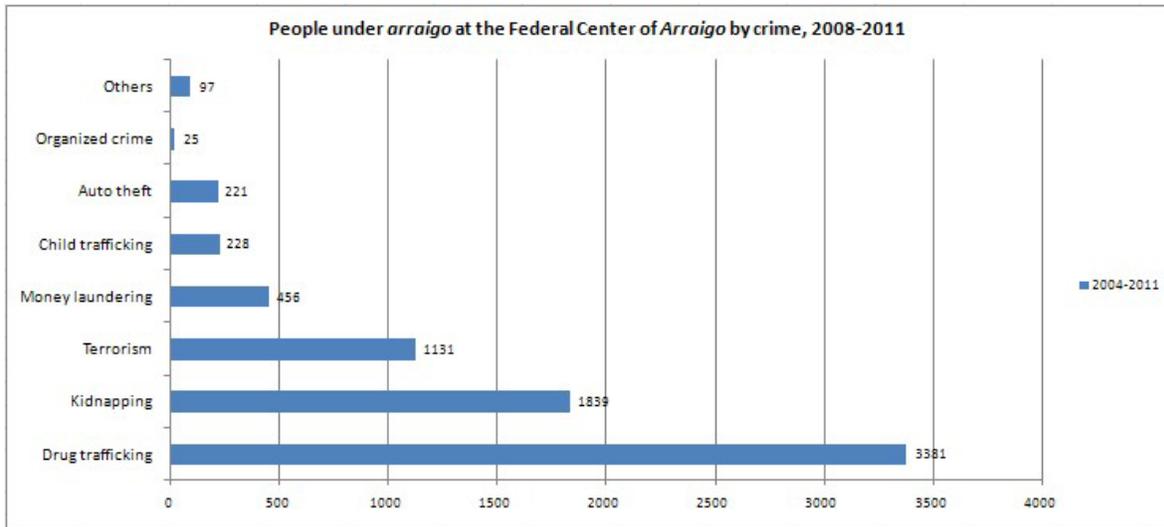
**Article 2.-** When three or more people agree to organize or organize themselves to commit, in a permanent or reiterated way a conduct that by itself or linked to others, have as a result to commit one or more of the following crimes, will be sanctioned by that mere fact as members of organized crime.

Such definition is obviously ambiguous, designed precisely so that no one may be saved from an imputation of organized crime. This wording indicates that only the association to commit a crime as a crime, without specifying what standards of proof would give substance to an indictment for this offense. In addition, according to the wording “shall be sanctioned...as members of organized crime”, the Law indicates not a behavior, but a special treatment. In that sense, simply pointing someone of belonging to organized crime, often through protected witnesses or victims of torture, is enough so that authorities may order an *arraigo*. This is done by negating to prove any particular criminal conduct rather than his proving any alleged membership to organized crime. This low standard of the definition of organized crime has proven not to be in accordance with the United Nations Convention against Transnational Organized Crime (Palermo Convention).

The emblematic case of Mr. Jaime Gonzalez Carlos Coronel, a doctor of the city of Agua Prieta, in the state of Sonora, who was put under *arraigo* for three subsequent periods by the Attorney General's Office exemplifies this. Once the first 40 days for which he was under *arraigo* expired, under the alleged crime of organs and migrants trafficking, the Attorney requested an extension for other 40 days, the maximum period the prosecution has to condemn or release the person under *arraigo*. However, in a total violation of the Law and even the Constitution, when the period of 80 days expired, the Attorney General requested a further *arraigo* order, but this time for money laundering. With that, the file was sent before the Tenth District Court of Chihuahua, by which Mr. Gonzalez Coronel was transferred to the maximum security prison in the Altiplano, in the State of Mexico.

On the other side, the low level of evidence required to put a person under *arraigo* has allowed the authorities to overuse that figure, thus violating the principle of legality. According to the Federal Law on Organized Crime, as already noted, for the *arraigo* to be ordered by a Judge, the prosecution must have “reasonably sufficient evidence to prove that someone is a member of organized crime”. This means that it is only necessary for the authorities to hold the existence of a possibility or likelihood that a person intended to be put under *arraigo* belongs to “organized crime”.

Nonetheless, the difficulties to prove the typical elements of organized crime have generated that *arraigo* is used to prosecute serious crimes under the mere suspicion that they may be committed under an organized scheme, but without any final proof. It is thus significant that, although the Constitution allows the use of *arraigo* only for organized crime offenses, this particular crime is only featured on 0.05% of all *arraigo* orders, while persons accused of committing other kind of crimes such as drug crimes (46%), kidnapping (23%) and terrorism (16%) were more commonly classified under *arraigo*.



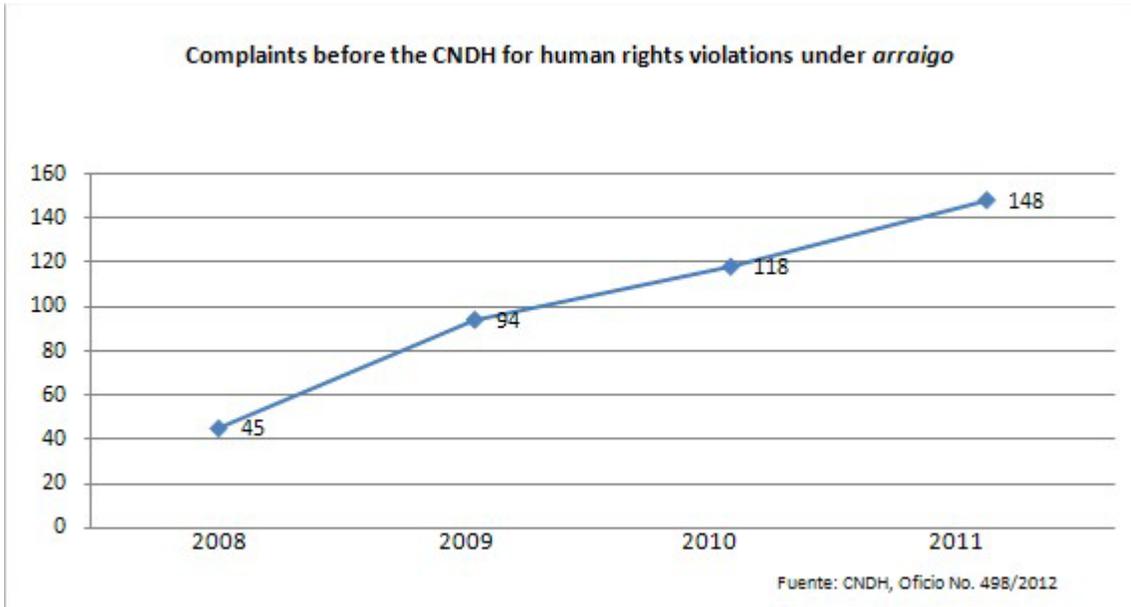
According to the information obtained through a request for access to public information submitted by the CMDPDH (SJA/DGAJ/09406/2011) the Attorney General's Office (PGR) reported that between June 2008 and October 2011 the overall number of people under *arraigo* was 6.562 with an annual average of 1.640 affected persons and a rate of annual increase of over 100% per year (in 2009 the increase was of 218.7% and the following years remained at a constant growth of 120%). According to data compiled by the CMDPDH, from June 2008 to date, an average of 1.82 people were put under *arraigo* at a Federal level every day and 1.12 locally.

### Human rights violations under *arraigo*

The use of *arraigo* has proved to increase the possibilities of someone being tortured due to the limited legal control of the figure itself, the lack of judicial revision to its implementation, and the lack of discretion in its application. On the final report of the United Nations Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (SPT) after their visit to Mexico it shows that, based on the medical exams of people under *arraigo*, 50% of the cases showed signs of recent violence (paragraph 225).

According to the National Human Rights Commission (CNDH), between 2008 and 2011, 405 complaints were presented for violations of human rights under *arraigo*. Moreover, this institution showed an increase in the number of complaints related to the use of *arraigo* from 45 in 2008 to 148 complaints in 2011. From the total number of complaints submitted, 38% were due to an arbitrary detention and 41% regarding cruel, inhuman or degrading treatments caused before, during, and after their detention. Of the total number of cases, 26% referred both violations.

Amongst the cases of torture and other cruel treatments, victims refer to beatings, injuries and fractures, as well as electric shocks to the genitals and other parts of the body. There were also cases of people submitted to long periods of isolation, which hindered their legal defense.



Those who submitted complaints for human rights violations under *arraigo* identified the Attorney General's Office as responsible for said violations in 70% of the cases. In 40% of the cases the Ministry of Public Security was identified as responsible, and the Mexican Ministry of Defense (SEDENA) in 34% of the cases.

Despite the high number of complaints, CNDH issued only four recommendations related to the use of *arraigo* so far, which means that only 0.98% of all complaints have resulted in a recommendation. It is worth noting that none of these recommendations question the use of *arraigo* or its impact in human rights. Moreover, on their annual reports of the National Mechanism for the Prevention of Torture, it has never been stated the cases of torture of those under *arraigo*.

Mexican law does not establish the places where *arraigo* should be applied. This has motivated authorities to improvise detention centers in houses, hotels and other facilities for detention. This has also allowed for people to be detained under *arraigo* in military facilities, as fully documented by CMDPDH. After a specific request by CMDPDH requesting the reason for the use of military locations to put people under *arraigo*, SEDENA responded that regardless that the use of *arraigo* is not their direct responsibility, the decision taken by the Attorney General's Office of detaining people in their facilities was due to the "evaluation of circumstances, lack of facilities and resources for the immediate application of *arraigo*". Nonetheless, they admitted that military facilities were not suitable locations for *arraigo* detentions.

A good example of this situation can be found in the case of 25 police officers from the city of Tijuana, state of Baja California. On March 2009 these members of the local police were detained and brutally tortured until their captors obtained self incriminating confessions, as it is stated in CNDH's recommendation 87/2011. After being tortured for several days, a federal judge authorized their detention under *arraigo* in the same military barracks where they were detained and tortured. Their detention in the military facilities resulted in an increase of said tortures and ill-treatment.

One of the victims declared:

“...I sat on the floor and had my hands tied behind my back while another person asked for my name, then I was laid down on my back with my hands fastened behind me. Then another voice said with a menacing tone “WE’RE GOING TO TALK YOU AND ME, I’LL ASK AND YOU’LL ANSWER, YOU’LL SAY HOW, WE WILL LEAD YOU, START NOW” when he said “START NOW” I thought “WHAT?”. I didn’t know what to say. Immediately after I heard the same voice saying “YOU’RE OUT OF TIME”; I felt someone tying my feet with tape, I wasn’t feeling well. Suddenly, while I was held hogtied and blind folded, someone started suffocating me with a plastic bag several times and kept asking me who Bolaños was and why was he giving orders to me. The more I answered, the more they got angry, there were three men: one sitting on my feet, another one sitting on my stomach and the last one was the voice of the person who was suffocating me with the plastic bag; I think I lost consciousness during the first interrogation; I remember that when I recovered I felt someone giving me a chest massage and when he saw me recovering consciousness he said “HE’S BACK”; the same man with the threatening voice kept suffocating me; I didn’t know what to do, I panicked when I was resuscitated the first time, it meant my life was worthless, I could only wonder “what have I done...?”

Recommendation 87/2011 by the CNDH highlights the illegality to retain persons in military installations. Therefore, they recommended to the Ministry of Defense to ensure that those detained by soldiers not to be taken to military facilities, but to be immediately presented before the appropriate authority in accordance to the law. Also, in their recommendation 52/2012 which concerns a case of torture and rape on behalf of soldiers in the state of Baja California, the CNDH reiterated the call for the military authorities to ensure that all persons detained by the army are brought immediately before the authority concerned and not to use military facilities as detention, interrogation, detention, rape and torture.

### **International consensus: Human rights mechanisms recommend the elimination of *arraigo***

Human rights violations arising from the use of *arraigo* have led to various international human rights mechanisms to openly manifest the need to eliminate this figure from the Mexican law and practice. In the report of the visit of the Working Group on Arbitrary Detention to Mexico in 2002, they concluded that, after visiting “*arraigo* houses”, *arraigo* represented a form of arbitrary detention because of the inadequacy of the judicial warranties. They also stated that while the places where these detentions are not secret, they are “discrete”, pointing out that the exact locations were more or less taboo that even the authorities didn’t know precisely where they were located (paragraph 50). The Working Group was the first to condemn the use of *arraigo* in Mexico, even before its constitutionalization in 2008.

Furthermore, this Committee Against Torture expressed concern in 2007 about the figure of *arraigo*, noting that this could become a form of preventive detention with the use of safe houses guarded by the judicial police and prosecutors, which suspects can be detained for 30 days and up to 90 days in some states, while carrying out the investigation to gather evidence. Therefore, the Committee recommended the State to ensure that *arraigo* be eliminated both in law and in practice, at the federal and local level (paragraph 15).

Subsequently, the United Nations Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading, after its visit to Mexico in 2009, found that the use of *arraigo* left the detainees in a vulnerable situation without a defined legal status to exercise their right to defense. They also noted that the lack of supervision on the practice of *arraigo* widens the range of incidence in cases of torture, which showed that nearly 50% of people interviewed during their visit to the Federal Center of *Arraigo* in Mexico City showed signs of torture and abuse. Therefore, the Subcommittee recommended the adoption of legislative and administrative measures to prevent torture or other degrading treatment under *arraigo* (paragraph 238).

Months later, in March 2010, during the consideration of the fifth periodic report of Mexico, the Human Rights Committee of the United Nations expressed grave concern about the legality of the use of the *arraigo* in the fight against organized crime in which a person may be detained without charge for up to 80 days without legal safeguards prescribed by Article 14 of the Covenant. The Committee emphasized that persons subject to this form of detention are in danger of being subjected to ill-treatment and recommended the Mexican State to take all necessary measures to eliminate *arraigo* at all levels of government (paragraph 15).

The UN Special Rapporteur on the Independence of Judges and Lawyers said at the end of her official mission to Mexico in October 2010, that carrying out an arrest to investigate – when the appropriate should be investigated quickly and effectively to arrest someone – shows a malfunction of the system of administration of justice and a violation of the presumption of innocence. In this sense, considered *arraigo* to be a violation of human rights which must be eliminated (paragraphs 92-94).

More recently, the Working Group on Enforced or Involuntary Disappearances noted in its report on their visit to Mexico in March 2011 that several people faced transient or short-term disappearances, who were later presented to the authorities and placed under *arraigo*. In this regard, the Working Group also recommended the abolition of *arraigo* of law and practice, both at the federal and local level (paragraph 88).

Also, during the Universal Periodic Review in 2009, some States questioned the practice of *arraigo* in Mexico. New Zealand, Ireland and Switzerland recommended evaluating the use of *arraigo* and eliminate it "as soon as possible", as it can be considered as an arbitrary detention. However, the State refused to accept these recommendations because they indicated the figure of *arraigo* meets the standards set out in the International Covenant on Civil and Political Rights and the Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

However, despite the consensus of the various international human rights mechanisms against the use of *arraigo* in Mexico, to date, the State far from moving towards its elimination, continues to use it more and more often and tries to justify and legitimize its use despite empirical evidence demonstrating its ineffectiveness.

### **Magnitude of *arraigo*: Opacity and lack of statistical control**

As mentioned above, although the Constitutional reform of 2008 provided for the exclusive use of *arraigo* to combat crimes related to organized crime, by virtue of the transitional eleventh article of the decree on which the reform was published, it allowed the application of the measure for all serious offenses in the Criminal Codes until 2016.

A major purpose of this provision is to make immeasurable the number of possible cases of *arraigo*, which is increased by the opacity by the various authorities involved in handling numbers and statistical controls. To date the actual dimensions of the use of this measure are ignored, since coupled with this, the authorities – both federal and local – have no record of people who have gone under *arraigo*, its causes and the further outcome.

During the first years of the implementation of the *arraigo*, the PGR recognized that between June 18, 2008 and April 9, 2010 647 requests for *arraigo* were issued across the country. In contrast, the Federal Judiciary Council (CJF) reported that between June 18, 2008 and May 14, 2010, Federal Judges had issued 1051 orders for *arraigo*. The discrepancy in official numbers can only be understood if there had been granted 808 *arraigo* orders in a period less than a month, from 9 April to 14 May 2010.

For its part, on its third annual report (2009), the President of the Supreme Court of Justice (SCJN), Guillermo Ortiz Mayagoitia, said the Judiciary granted "over 90%" of all applications for interim measures, of which 3.457 were requests for searches, 556 *arraigo*, 26 communication interventions and one authorization to request information from telephone companies. It is contradictory that the number of granted *arraigos* is even lower than indicated by the PGR.

Moreover, under the gloss of the Federal Government report of 2010, the Attorney General's Office revealed before the Senate that only from January to August of the year 2009, *arraigo* was applied 1.166 times. However, a year later, by a request for access to information, the same agency reported that between January 2008 and June 2011 had applied the *arraigo* to 7.775 people in the Federal Center of *Arraigo*.

The government's opacity has prevented to reveal the real magnitude of the use of *arraigo* and thus let analyze the effectiveness of the measure. The PGR has reported many times that between 90% and 95% of people under *arraigo* have been consigned, which is widely presumed as an indicator of the success of the measure; however, it is always omitted that only 3.2% of that total receives a conviction.

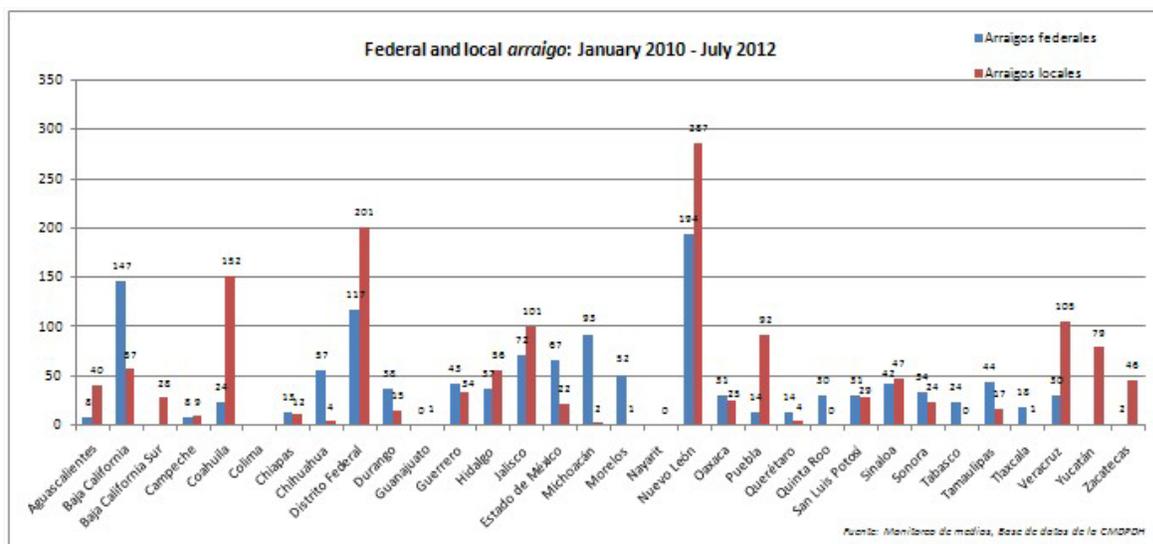
The lack of records by the authorities prevents to know the extent of the use of *arraigo* and justify its application despite the low rate of effectiveness that has been evidenced. It is worthwhile drawing the attention to the fact that none of the reports of President Calderon have released figures on how many *arraigos*, for what crimes and what destiny had all people under *arraigo* during his

administration. It seems that despite the constitutionalization of the measure, it had to be run as a secret.

**Arraigo at the local level: Extensive and excessive use**

The eleventh transitional article of the decree on the constitutional reform of 2008 not only authorizes the Federal Public Ministry in the use of *arraigo* for felonies, but also allows local attorney’s offices to apply it within their jurisdictions until 2016. This will be the year when federal authorities will assume sole responsibility on offenses related to organized crime. As showed by the annex to this report, the range of serious crimes by which the local authorities have the power to put someone under *arraigo* is very broad and has led to the extensive and excessive use of the measure.

Of the total number of *arraigos* registered by CMDPDH based on press information, 54% have been applied by local authorities for common law crimes. In the last two years, the states that registered the highest number of local *arraigos* were: Nuevo León, Federal District, Coahuila, Veracruz, and Jalisco.



It is evident that local *arraigo* is being used regularly. On June 10, 2011, during a national meeting on the implementation of law attended by all the local attorneys, the Attorney General announced a reform proposal signed by all 32 local attorneys and herself, in order to introduce to the Constitution the use of *arraigo* at the local level and extend its use to all serious crimes, both at the federal and local levels. The proposal was to be submitted for consideration to the National Security Council on June 30 of that same year, but to date there has been no more information on the issue.

Nonetheless, it seems that the consensus announced by the Attorney General is being reversed. Some local Legislatures have begun to discuss plans to expel *arraigo* from their local codes. On July 28, 2012 the Congress of Chiapas removed *arraigo* from its local legislation on the grounds that it poses a "sui generis" status suffered by detainees under this kind of arrest by which the rights of the detainee are

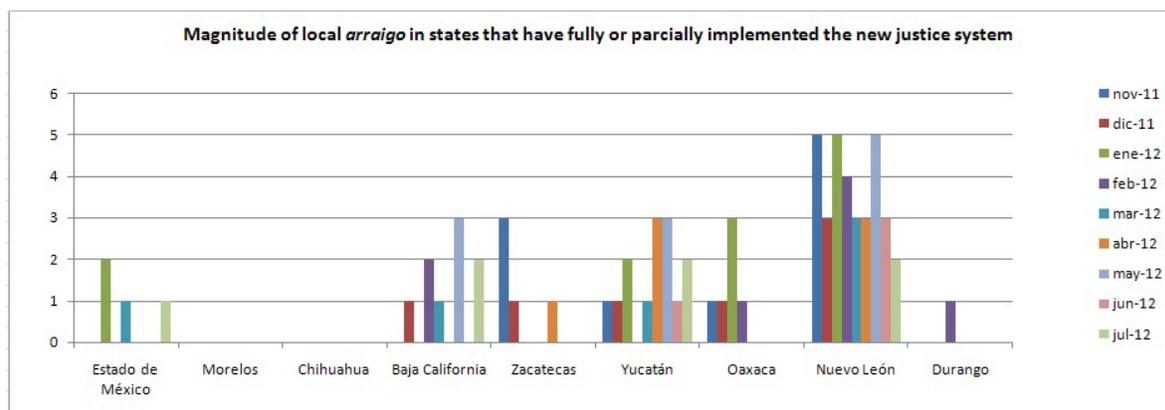
significantly restricted". In addition, the local Constituent included in Article 4 of the Constitution of the state of Chiapas an explicit prohibition to detain a person under *arraigo*, noting that:

"In the state of Chiapas, for offenses of common law, *arraigo* is prohibited within the processes inherent in the preliminary searching"

Similarly, the state of Oaxaca has eliminated the use of *arraigo* from its Criminal Code, which is expected to be implemented by 2013. However, the figure remained as the form of "home detention" (where the location of *arraigo* will be the house of the person submitted to this legal figure) which may have similar effects as *arraigo* as it can be applied as an investigative technique before a person is subject to criminal prosecution.

The Human Rights Commission of the Federal District (CDHDF) issued a recommendation on April 29, 2011 which urged the local Attorney to promote the elimination of local *arraigo* before Congress. The CDHDF also proposed the issuance of internal agreements to eliminate this practice within 30 days. However, the recommendation has not been implemented by local authorities.

On the other side, it is important to note that several states that have begun to implement the new justice system are still making use of *arraigo*, contrary to what is stated in the eleventh transitory of the decree of the reform on the criminal justice system. This article allows for local authorities to use the figure of *arraigo* just until the adversarial system is in place. This provision allows states to apply *arraigo* "while the accusatory system is effectively in place". However, according to CMDPDH investigations, in states that have fully or partially implemented the new justice system, the use of the *arraigo* remains. For example, in the states of Oaxaca and Yucatan, *arraigo* continues to be applied, despite the implementation of the new penal system, as illustrated by the graph below:

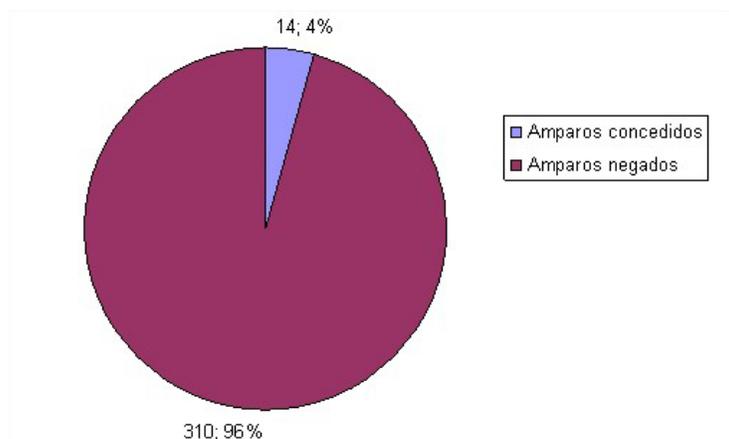


### **Arraigo and its lack of judicial guarantees**

Despite the progress in certain states towards eliminating *arraigo* from their local legislation, it is concerning that after the adoption of the Constitutional reforms of 2008, the Supreme Court has not discussed the implications of the figure of *arraigo* and, furthermore, that judgments of Federal Courts in the matter still maintain a low profile in the argument and public debate of this measure. Thus, the right to an effective remedy against the abuses committed under *arraigo* is hampered at first because the guarantee of due process and the protection of personal safety and integrity, guaranteed by

Article 16 of the Constitution, which should be the matter of an *amparo* (Mexican figure of habeas corpus), empowers the authority to practice the violation of human rights.

Even though the Supreme Court's jurisprudence determines that an *arraigo* implies the violation of the right to personal liberty of the person concerned, in many cases the judges denied the *amparo* arguing that *arraigo* does not violate the guarantee of personal liberty or constitute an act of deprivation of liberty, but is simply an "act of nuisance". According to a report by the Federal Judiciary, obtained by request for access to information, it appears that between January 5, 2009 and October 13, 2011 only 14 indirect *amparos* promoted by people who were detained under *arraigo* were granted, while in the same period 310 *amparos* were denied, clearly demonstrating the absence of an effective judicial remedy against the *arraigo*. In the resolutions of *amparo* on the issue, the Judge refuses the denial of protection on behalf of the social interest, even if the responsibility of the person under *arraigo* has not been determined.



On the other side, according to different lawyers, filing an *amparo* against *arraigo* orders at a federal level only hastens the Prosecutor to consign the investigation before a Judge so he can quickly issue the detention order before the merits of the *amparo* are analyzed, therefore leaving without any matter the process against *arraigo*. Consequently, the previous acts are valid without even taking into account if the *arraigo* order met the required legal standards, therefore legitimizing the measure. It has been rare when a Judge has analyzed the merits of an *amparo* against an *arraigo*, which means that Judges have not studied if the detention derived from an *arraigo* order implies a human rights violation or not.

This has a significant impact on the presumption of innocence since, even when there has been no cause to demonstrate if a person under *arraigo* is guilty in accordance with the principles of an adversarial justice system, a penalty has already been imposed. It is as if the person, innocent or not, has been convicted as a criminal the minute the file is opened. In the end, this means the person has never been innocent.

In practice, by using *arraigo*, the principle of presumption of innocence has been reverted, a principle that was stipulated by the Constitutional reform of 2008. Hence, with the figure of *arraigo*, deprivation of liberty exceeds if a person is guilty or not, altering the necessary balance between a detention and the alleged illegal act. Today, a person serving as a witness in a particular case may be put under *arraigo* by various arguments, mainly preventing eventual "private revenge" or avoiding an excuse to participate in the proceeding. The witness is forced and the presumption of innocence is again irrelevant.

This is also aggravated by the lack of clear procedural rules that allow the proper functioning of the justice system and guarantee the principle of legality. With this, the risk of breaking the rules of a democratic system increases and takes the criminal justice system in Mexico far from the international standards and principles of an adversarial criminal system.

## Recommendations

Human rights in Mexico have deteriorated greatly since the "war against organized crime" imposed a security policy based on the use of force and militarization. While the practice of *arraigo* has been widely condemned by various human rights mechanisms, both national and international, multiple authorities at a federal and local level have been reluctant to eliminate this figure from legal regulations.

In this sense, we trust the Committee reiterates its concern over this measure which is contradictory to human rights, since *arraigo* clearly constitutes an arbitrary detention and facilitates the use of torture. In light of this, we would like to present a series of recommendations that we hope the Committee may take into consideration in issuing their Concluding Observations to the reports presented by Mexico, and ask to also take into account the previous recommendations issued by different United Nations mechanisms previously described:

1. To immediately eliminate the figure of *arraigo* from law and practice, both at the federal and local level.
2. To reform the primary and secondary legislation, both at the federal and local level, in order to guarantee that the figure of *arraigo* is eliminated, and make sure that the implementation of the new criminal justice system at the local level respects the definite exclusion of *arraigo* at the local level.
3. Until the figure of *arraigo* is eliminated, the State should take the necessary measures to effectively forbid torture and other cruel treatment before, during and after *arraigo*, including:
  - a) Prohibiting the detention of persons under *arraigo* in military facilities, barracks, police facilities or any other place that does not meet the proper conditions of a detention site;
  - b) Guaranteeing that the testimony of people under *arraigo* have no probative value during the criminal proceeding;
  - c) Assuring that all people under *arraigo* have the right to be represented by counsel of their choice;
  - d) Ensuring that people under *arraigo* have access to their defense counsel during all interrogation;
  - e) Allowing people under *arraigo* to file complaints before the competent authorities when they believe they have been subjected to torture or other cruel treatment.
  - f) Ensuring that the Judiciary, both Federal and local, observes the irrestrictive respect of the rights relative to the due legal process and applies its functions of jurisdictional review to avoid violations of the right to defense and the integrity of those persons.