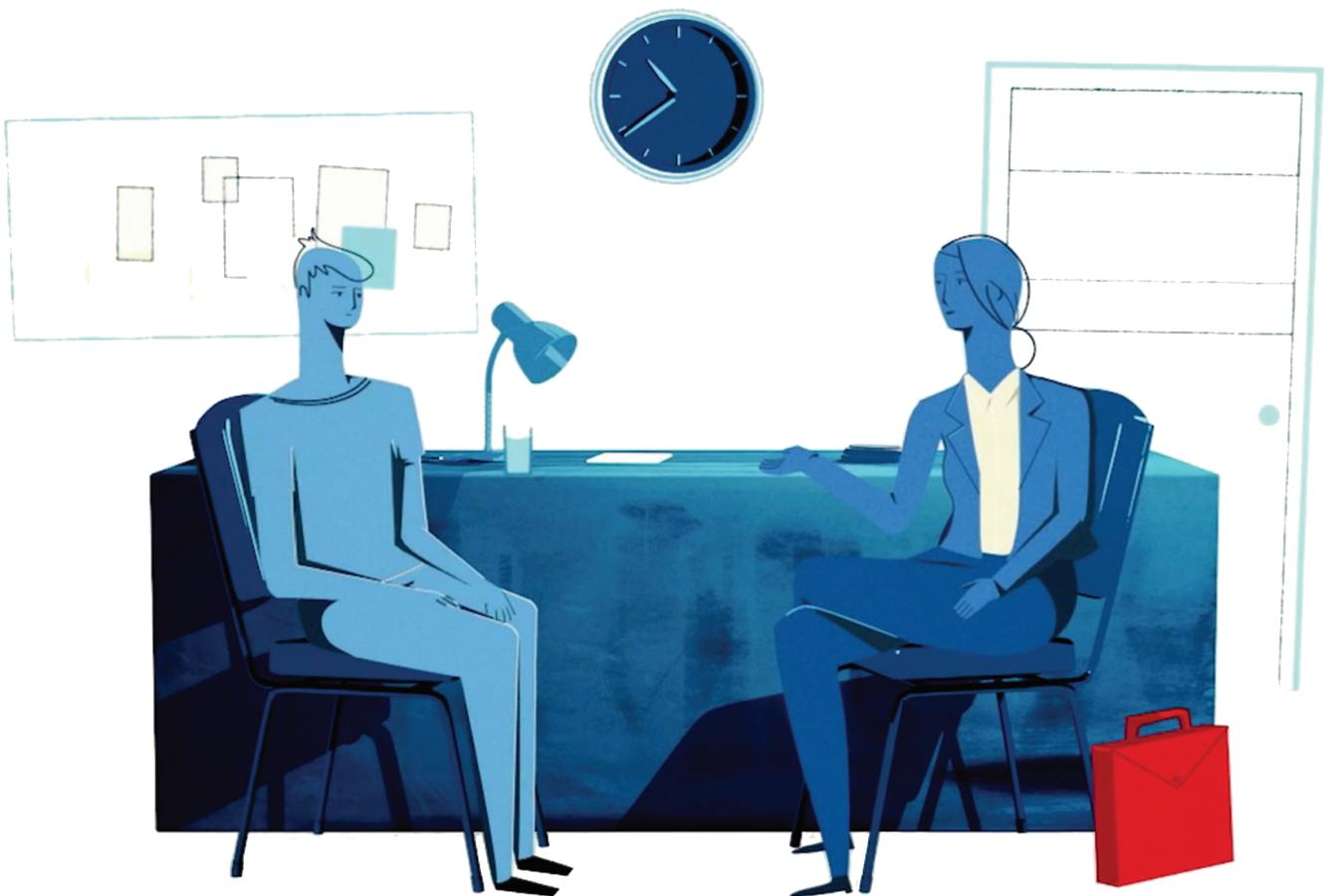


Access to a lawyer during the first hours of custody in Mexico

A Situation Analysis



association for
the prevention
of torture

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The Association for the Prevention of Torture (APT) is an independent non-governmental organisation based in Geneva, working globally to prevent torture and other ill-treatment.

The APT was founded in 1977 by the Swiss banker and lawyer Jean-Jacques Gautier. Since then, the APT has become a leading organisation in the prevention of torture. Its expertise and advice is sought by international organisations, governments, human rights institutions and other actors. The APT has played a key role in establishing international and regional standards and mechanisms to prevent torture, among them the Optional Protocol to the UN Convention against Torture (OPCAT) and National Preventive Mechanisms.

The APT's vision is a torture free world where the rights and dignity of all persons deprived of liberty are respected.

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Executive Summary

A recent study¹ commissioned by the Association for the Prevention of Torture (APT), *Does Torture Prevention Work?*, has shown that access to a lawyer in the first few hours of custody, along with other key safeguards, is one of the most effective measures in preventing torture and ill-treatment. Having access to a lawyer in the early hours of detention promotes a culture of transparency around deprivation of liberty, encouraging the authorities to respect the detainee's human dignity. Lawyers also play a fundamental role in ensuring that detainees are aware of their rights and can exercise them effectively.

In the last decade, Mexico underwent a series of reforms aimed at incorporating international standards and broadening the framework of guarantees to protect detainees during the early stages of custody. These reforms made it possible: to move from an inquisitorial criminal justice system to an adversarial and accusatory one; to establish a series of safeguards to prevent torture and ill-treatment, including the right to have a lawyer from the time of the arrest; and to review the regulatory and institutional framework of the Public Defender's Offices.

Despite these positive reforms, there is still a huge gap between the legal framework and reality. Several international and national bodies have confirmed that there are flaws and obstacles in the implementation of these key safeguards during the early stages of detention. According to data from the National Survey of Population Deprived of Liberty (ENPOL 2016),² only 19.8% of detainees had contact with a lawyer during the first hours of custody, and not always immediately. In only 28.8% of cases did the detainee make a statement with his/her lawyer present.

This analysis seeks to identify the obstacles and grey areas in the implementation of the right of access to a lawyer during the first hours of custody in Mexico, as well as ways forward that may contribute to reducing the gap between law and practice. The analysis focuses on the first hours of custody and, in particular, on detentions *in flagrante delicto*, in other words, from the time a person is detained by the police and the Public Prosecutor's Office until he/she is brought before a judge. It analyses, in particular, the implementation of the right of access to a lawyer in Mexico City and in the states of Nuevo León and Oaxaca. The methodology used for the analysis includes a desk review, questionnaires and interviews with key actors and institutions, as well as the sharing of experiences between experts from different sectors.

The conclusions of this analysis confirm that detainees are often subjected to different forms of ill-treatment during the initial stages of detention and arrest, and during their transfer to custodial settings prior to appearing before a judge.

They also confirm that access to a lawyer from the early stages of the detention is not guaranteed in practice, despite being stipulated in the national legislation. When this right is guaranteed,

1 Richard Carver and Lisa Handley, *Does Torture Prevention Work?*, Liverpool University Press, 2016.

2 National Institute of Statistics and Geography (INEGI), *National Survey of Population Deprived of Liberty, ENPOL 2016*, Mexico, pp. 23, 25, 26.

the detainee's access to a lawyer is usually only granted when they are handed over to the Public Prosecutor's Office, i.e. several hours after being arrested by the police. Even then, access to a lawyer in the Public Prosecutor's Office is not immediate and only takes place when the detainee gives a statement to the prosecutors – or shortly beforehand. Furthermore, in most cases, there are no suitable facilities to ensure that the communication between the detainee and the lawyer takes place in private and confidentially.

Mexican law provides that the detainee must be transferred to the Public Prosecutor's Office immediately after the police arrest. Therefore, access to a lawyer is generally considered necessary and feasible only while the detainee is being held by the Public Prosecutor's Office. However, in practice, the requirement for *immediacy* is not clearly defined, i.e. there is no definition of the maximum time limits for the transfer and this leads to a significant gap between the police custody and the transfer to the Public Prosecutor's Office without access to a lawyer.

By not setting clear time limits, the law leaves a margin of discretion for the actions of police officers and this, in practice, translates into delays in transferring detainees to the Public Prosecutor's Office. During this period, which can last up to 15 hours or in some cases even longer, detainees generally do not have the means to communicate with their families, third parties or a lawyer, and therefore face a high risk of torture and ill-treatment. There are also transfers to other locations before the person is handed over to the Public Prosecutor's Office, e.g. barracks or police stations, which result in additional delays in accessing a lawyer.

Another obstacle identified in practice relates to the capacity of the Public Defender's Offices, which tend to be the first point of access to detainees, especially those in the most vulnerable situations and with limited financial resources. However, they are often unable to provide appropriate assistance due to their excessive workload, limited financial and human resources, and late notification by the authorities.

Based on the findings of the analysis, the following ways forward have been identified to improve detainees' access to a lawyer from the early stages of custody:

Strengthen inter-institutional cooperation, mainly between law enforcement agencies, the Public Prosecutor's Office and Public Defender's Offices, as well as the judicial authorities and human rights commissions, through institutional agreements focused on ensuring early notification and access to a lawyer from the time of the arrest.

Reduce transfer times and delays by law enforcement institutions, as well as delays in physical access to a lawyer once at the Public Prosecutor's Office. Intermediate steps should therefore be eliminated, i.e. the police transferring the detainee to other places of detention prior to the Public Prosecutor's Office, such as police stations.

Define clear procedures for law enforcement agencies and the Public Prosecutor's Office in order to standardise their practices, as well as facilitate mechanisms that can assist the authorities to ensure compliance with the legal requirement of immediate transfer and access to a lawyer.

Strengthen the preventive role of lawyers by ensuring that they have the necessary resources to carry out their work effectively; introducing a shift system to ensure immediate intervention in the early stages of detention; developing clear procedures to prevent and handle cases of torture and ill-treatment, including in the absence of complaints from detainees or their families; and taking into account the specific needs of persons in situations of vulnerability.

Ensure effective communication of the right of access to a lawyer by police officers and public prosecutors, as well as the ways of exercising this right, considering the specific needs of persons in situations of vulnerability, such as indigenous people and persons with disabilities.

Strengthen independent oversight mechanisms, so they can effectively monitor the conduct of police officers and public prosecutors, and the right of access to a lawyer.

This analysis has been developed within a project that is part of APT's global work aiming to reduce the risks of torture and ill-treatment through the effective implementation of safeguards in the early stages of custody.

Acronyms

ANADEPE	National Association of State Public Defender's Offices
APT	Association for the Prevention of Torture
CNDH	National Human Rights Commission
CNPP	National Code of Criminal Procedure
CONEVAL	National Council for the Evaluation of Social Development Policy
CPEUM	Political Constitution of the United Mexican States
ENPOL	National Survey of Population Deprived of Liberty
IACHR	Inter-American Commission on Human Rights
LNEP	National Law on the Enforcement of Criminal Penalties
MNPT	National Mechanism for the Prevention of Torture
SCJN	National Supreme Court of Justice
SEGOB	Ministry of the Interior
SETEC	Technical Secretariat of the Coordinating Council for the Implementation of the Criminal Justice System
SIGEDEPU	Management Information System of the Public Defender's Office
SPT	United Nations Subcommittee on Prevention of Torture
UN	United Nations

Glossary

Custody: period from the time the person is detained until he/she is brought before a judge or released.

Detainee: a person who has been deprived of his/her liberty for allegedly having committed or participated in a criminal act.

Detention by the Public Prosecutor's Office: period during which the person is deprived of his/her liberty pending a decision by the Public Prosecutor's Office to open an investigation against him/her, following evidence indicating that he/she probably committed or participated in the criminal act for which he/she has been arrested.

First responder: role performed by the first authority to arrive or to have knowledge of the criminal act.

In flagrante delicto: a type of arrest in which a person is caught committing an apparently criminal act or is identified by the victim or aggrieved party and is immediately pursued and arrested.

Investigative police: police who act under the authority of the Public Prosecutor's Office to assist in the investigation of crimes.

Judicial police: police who transfer persons who have been prosecuted or sentenced to court.

Letter of rights: document that the police must carry with them, listing the rights that the person has during this period of custody and that they must read and explain to the person at the time of the arrest.

Police detention: period when the police deprive a person of liberty for allegedly having committed or participated in a criminal act and transfers the person to the investigating authority, the Public Prosecutor's Office.

Preventive police: police who carry out random patrols for surveillance purposes and to prevent crimes and assaults from being committed.

Safeguards: rules and procedures that reduce the risk of torture and other ill-treatment.

Standard police report: document in which the police must record information on the detainee, the victim and witnesses, as well as the facts leading to the arrest and other elements that provide evidence of their actions.

Statement: the right of the detainees to present to the Public Prosecutor's Office their version of the events for which they are being investigated.

Suspect: a person identified by the Public Prosecutor's Office as possibly having perpetrated or participated in a criminal act.

Section I

About the analysis

1. Why an analysis on access to a lawyer during the first hours of custody?

- The first hours of custody: risks and safeguards

Anyone who is arrested and detained or who otherwise comes into contact with the police is in a situation of vulnerability. By its very nature, this form of interaction and the exercise of state police powers entail an inherent imbalance of power between the state authorities and the person being arrested and/or detained.

In these situations, the authorities have a positive duty to protect and respect the human rights of all detainees, while carrying out their lawful role of administering justice and conducting criminal investigations.

In Mexico, torture and ill-treatment continue to be widespread, particularly during the first hours of custody, prior to a person appearing before a judge. The results of the recent National Survey of Population Deprived of Liberty (ENPOL, 2016) revealed that, during detention, 75.6% of persons deprived of liberty suffered psychological violence, while 68.3% suffered physical assaults.³

A recent study⁴ commissioned by the APT to address the question *Does Torture Prevention Work?* revealed that implementing detention safeguards in practice has the strongest correlation with reducing torture. The study showed that the most effective measures to prevent torture include eliminating all forms of unofficial and incommunicado detention and implementing safeguards during the first hours and days after the arrest. Notification of family or third parties and prompt access to a lawyer or legal service providers have the greatest impact on reducing torture, closely followed by access to an independent medical examination. Other safeguards include information on rights and prompt access to judicial review.

³ ENPOL 2016, pp. 23,25,26.

⁴ Richard Carver and Lisa Handley, LUP, 2016.

- Access to a lawyer to prevent torture and ill-treatment

Access to a lawyer is widely recognised as a key element of fair, humane and efficient criminal justice systems based on the rule of law. This right is generally regarded as the basis for guaranteeing other rights in the criminal justice process, in particular the rights to defence and to a fair trial. Less often, however, the right to a lawyer is seen from the perspective of prevention.

Access to a lawyer from the early stages of detention is a fundamental safeguard in reducing the risk of torture and other forms of ill-treatment, since that is when the risk of intimidation and ill-treatment is higher. Having access to a lawyer in the first hours of detention promotes a culture of transparency around the deprivation of liberty, encouraging the authorities to respect the human dignity of the detainee, in accordance with human rights standards. Lawyers also play a fundamental role in ensuring that the detainee is aware of his/her rights, can exercise them effectively and understands the procedures (e.g. access to complaints mechanisms and medical and/or forensic examinations). Finally, the presence of a lawyer can significantly prevent unlawful and arbitrary detentions and can have a deterrent effect on the authorities, preventing them from using force or coercion to extract information or confessions.⁵

The research commissioned by the APT also shows that there is a significant gap between the safeguards enshrined in the legislation and their implementation in practice. In Mexico, although the right to prompt access to a lawyer is guaranteed by law, numerous international bodies and national institutions have revealed that there are still many flaws and obstacles to its implementation in practice. According to the 2016 ENPOL data, only 19.8% of detainees had contact with their lawyer, and not always immediately, and only in 28.8% of cases did the detainee make his/her statement with the lawyer present.

2. Key elements of the right of access to a lawyer

Access to a lawyer during the first hours of custody involves the right to communicate and consult a lawyer confidentially and to meet with him/her in private. These rights must be exercised immediately⁶ and also involve the detainee having a lawyer present while being interviewed by the authorities.

In practice, immediate access should be interpreted as access from the time the person is caught or arrested, or from the start of the custody and, in any event, before giving the first statement to the competent authority.

Communication between the lawyers and persons deprived of liberty should be private and confidential, and should not be subject to any censorship, interference, delay or other limitations. In addition, international standards state that the authorities must ensure there is adequate time and appropriate means and facilities for these consultations.

Direct and physical contact between the detainee and the lawyer must also be guaranteed. Both should also have access to information relating to the specific case.

It is important to ensure access to a lawyer not only before but also during any interview and/or

5 APT, *Series on Safeguards to Prevent Torture in Police Custody in Latin America*, Document No. 2: *Right of access to a lawyer*, June 2018, p. 2.

6 Organization of American States, Inter-American Commission on Human Rights, *Principles and Best Practices on the Protection of Persons Deprived of Liberty*, approved by Resolution 1/08, March 2008, Principle V.

statement to the relevant authorities, given the high risk of ill-treatment and coercion. Lawyers should be able to be physically present and to intervene during interviews/interrogations and/or statements, e.g. to seek clarification, query incorrect or unfair questions and to advise the detainee without undergoing intimidation, harassment or undue interference.⁷ A lawyer's presence during interviews/interrogations and/or statements can also function as a protective mechanism for the authorities, should they face unfounded allegations of ill-treatment.

It is essential to ensure that any restrictions on this right only apply in exceptional circumstances, are enshrined in law, are suitably justified and limited in scope and duration, according to well-regulated procedures.

Finally, detainees must be informed of their right of access to a lawyer so they may exercise this right effectively. In practice, this requires clear procedures on how detainees should be informed of this right.

3. Objectives and scope of the analysis

The aim of this document is to analyse how the right to a lawyer during the first hours of custody is implemented in practice in Mexico, identifying challenges and grey areas as well as ways forward that may contribute to reducing the gap between law and practice.

This analysis focuses on the first hours of custody, in other words, from the time a person is detained by the police until he/she is brought before a judge. Although there are different ways in which a person can be detained in Mexico, the analysis only deals with arrests *in flagrante delicto* for two main reasons. This type of arrest is more common in Mexico and involves other steps prior to the transfer of the detainee before the judge, which have been identified as potentially risky for the detainees.

Access to a lawyer during the period of custody is analysed in a cross-cutting manner during each stage and also in general. The analysis also addresses the specific obstacles in accessing this right by persons in situations of vulnerability, specifically indigenous people and persons with psychosocial and mental disabilities.

4. Methodology

This analysis on access to a lawyer in the first hours of custody in Mexico used a methodological approach based on three main strategies:

1. Desk review
2. Questionnaires and interviews with key actors
3. Sharing experiences between experts from different sectors

The first step was to gather information on detentions in Mexico, identify practices, the types of detention most frequently carried out and the potential risks of each of them, by reviewing relevant national and international reports.

The findings of this review supported the choice of *in flagrante delicto* arrests as the subject of this study and also identified three pilot states where the analysis should be focused: Mexico City, Nuevo León and Oaxaca. This choice was mainly based on criteria relating to their geographical

⁷ UN, General Assembly, *Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, A/71/298, 5 August 2016, para. 68-74.

location (north, centre and south, respectively) and to particular characteristics that were considered relevant for the analysis.

Nuevo León is one of the pioneer states regarding the implementation and institutional setting of the accusatorial and adversarial system. For example, the Public Defender's Office currently chairs the National Association of State Public Defender's Offices (ANADEPE).⁸ One of its municipalities – Escobedo – has a community police model that has implemented practices and technological tools that contributed to reducing police abuse during arrests.

Oaxaca is the state with the largest number of municipalities (570) in Mexico, which are governed by political parties and their own customs and practices. The state also has the country's highest number of indigenous people, 65.7%. 32.2% of them speaks an indigenous language.⁹ This allowed us to examine if there are different practices depending on the context and organisation, as well as in access to a lawyer by indigenous people.

Finally, Mexico City was selected for being the largest urban centre and city in the country, as well as for being the headquarters for the research team.

After this desk review, national and local legal framework for detentions *in flagrante delicto* were reviewed to identify the different stages and the role of the police, Public Prosecutor's Office and public or private defence at these times.

A questionnaire was then developed by the research team and sent by ANADEPE to the 32 state Public Defender's Offices in the country. A total of 31 responses were received from nine states: Chihuahua, Coahuila, Colima, Mexico State, Durango, Hidalgo, Nuevo León, San Luis Potosí and Zacatecas.

We conducted face-to-face and remote interviews with various actors using a specific interview and tailor-made format. Fifteen interviews were conducted over a two-month period with: two private lawyers from civil society organisations, four state preventive police, six members of state human rights commissions, one public prosecutor, one public defender and one expert in policing.

We were also present at the ANADEPE National Congress in Oaxaca, where we shared the importance of access to a lawyer as a safeguard in preventing torture and ill-treatment, as well as explaining the key role played by public defenders at this time.

An expert meeting was organised over two days in Mexico City in November. 25 participants discussed practices, challenges and possible ways forward to implement the right of access to a lawyer during the early stages of custody. Participants included: members of the National Mechanism for the Prevention of Torture; State Commissions of Mexico City and Nuevo León; Public Defender's Offices of Baja California, Mexico City, Oaxaca and Nuevo León; Public Prosecutor's Offices of the State of Mexico, Nuevo León and Oaxaca; the Mayor and Head of the Public Safety Secretariat of the Municipality of Escobedo, Nuevo León; a supervising judge of the State of Zacatecas; a private lawyer; and representatives of specialised civil society organisations.¹⁰

8 An association whose goals include developing common criteria aimed at efficiency and developing free legal services, as well as promoting inter-institutional coordination and cooperation between all Public Defender's Offices.

9 National Institute of Statistics and Geography (INEGI), Intercensal Survey 2015.

10 *Documenta, Instituto de Justicia Procesal Penal, Red Nacional de Profesionistas en Seguridad Pública Instituto para la Seguridad y la Democracia, México Evalúa, Foro Mexicano para la Seguridad Democrática.*

Section II

The first hours of custody in the national context: an overview

1. Legal and institutional framework

Over the last decade, Mexico has had a series of legislative reforms that have made it possible to incorporate international standards and broaden the framework of guarantees to protect persons deprived of their liberty during the early stages of custody.

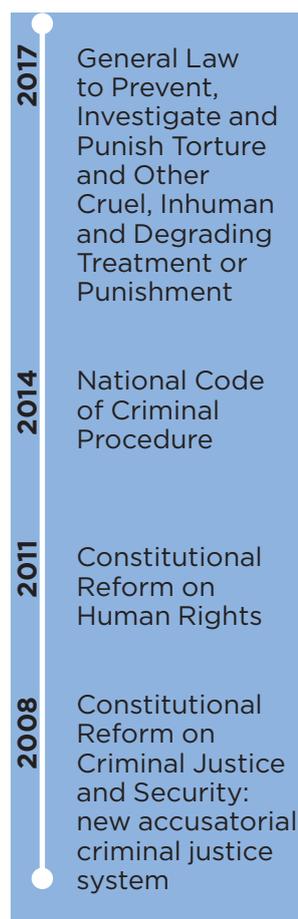
In 2008, with the Constitutional Reform on Criminal Justice and Security, the criminal justice system moved from an inquisitorial to an accusatorial and adversarial system. At the constitutional level, this reform introduced the right to a proper defence by a lawyer from the time of the person's detention,¹¹ removing the possibility of persons defending themselves or being defended by someone they trusted.

The 2008 reform also called for a review of the regulatory and institutional framework for all institutional actors within the criminal justice system. The reform forced the Public Defender's Offices of the Federation and the States¹² to introduce a set of standards in their laws and regulations to guarantee the right to a proper defence.¹³ The classification of the

¹¹ CPEUM, Article 20 (b) section VIII.

¹² Fix-Fierro Héctor, Suárez Ávila Alberto Abad, *Hacia una Defensa Pública de calidad. El nuevo diseño institucional de las defensorías públicas en las entidades federativas de la República Mexicana*, [Towards a high-quality public defence system. The new institutional framework among public defenders in the federal entities of the Republic of Mexico], Legal Research Institute at the National Autonomous University of Mexico, Mexican Journal of Constitutional Law, No. 21, January-June 2015, p.58.

¹³ SEGOB, *Guía para el diseño, instauración y fortalecimiento sustentable del servicio profesional de carrera en las defensorías públicas estatales de México. Los Estándares de la Defensa Pública en el Nuevo Sistema de Justicia Penal Mexicano* [Guide for the design, introduction and sustainable strengthening of the professional civil service career in the state public defender's offices in Mexico. Standards for the Public Defender's Offices in the Mexican New Criminal Justice



standards is based on the Public Defender's Offices' objectives, which involve not only the formal work of defence, but also ensuring respect for the rights and dignity of the persons concerned.¹⁴

The 2008 reform is reinforced and complemented by the 2011 Constitutional Reform on Human Rights, which incorporates human rights established in the international treaties to which Mexico is a party and obliges the authorities to apply and interpret the provisions that are most favourable to the person. In addition, this framework was significantly strengthened by the creation of a National Code of Criminal Procedure,¹⁵ which establishes a series of key safeguards to prevent torture and ill-treatment,¹⁶ including the right of the detainee to be able to access and communicate confidentially with a lawyer from the time of his/her arrest.¹⁷

Another important development in the protection of persons deprived of their liberty was the entry into force, in June 2017, of the General Law to Prevent, Investigate and Punish Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment. It includes among its obligations that: the Office of the Attorney General of the Republic implements a national programme to prevent and punish torture; the law enforcement agencies have an administrative record of the detention when the person is in their custody; and the Public Prosecutor's Office provides dignified conditions during the detainee's detention and prevents any authority from interviewing or questioning the detainees without them first having had contact with their lawyer.¹⁸

The fact that Mexico is a federal republic made up of 32 free and autonomous states, with their own government structures¹⁹ and laws, makes it difficult to implement these reforms. There are disparities not only between the federal and state level but also between the states, both in developing and shaping their laws and institutions and at the implementation level. This inevitably leads to different practices with respect to the right of access to a lawyer.

- *In flagrante delicto* arrests: stages and role of the authorities

In Mexico, a person may be arrested if there are reasons to assume that he/she has allegedly committed an administrative offence or a crime. Each state sets out the different administrative offences in their laws and regulations. The same applies to crimes, which are set out in the Federal Criminal Code and local Criminal Codes, and the way they are processed is set out in the National Code of Criminal Procedure (CNPP).

A person can be arrested for allegedly committing or participating in a crime, the focus of this study,

System], Technical Secretariat of the Coordinating Council for the Implementation of the Criminal Justice System (SETEC) 2015, pp.79, 80, 82.

14 As part of the standards for protecting the person's dignity, the defenders should be evaluated on the treatment and personal attention they give to the person and their family, as well as the efforts that the defenders make to ensure that the other authorities (judicial, administrative or private) treat them with respect. In the *standards of adequate defence*, the defender must conduct all defence activities according to the timeframes required by law, from the start of the process until the end of the defence.

15 The CNPP was enacted in 2014 and gradually repealed all the codes of criminal procedure (federal and state) until becoming the sole applicable law in 2016.

16 UN, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, Mission to Mexico, A/HRC/28/68/Add.3, 28 December 2014, para. 18.

17 CNPP, Articles 17 and 152.

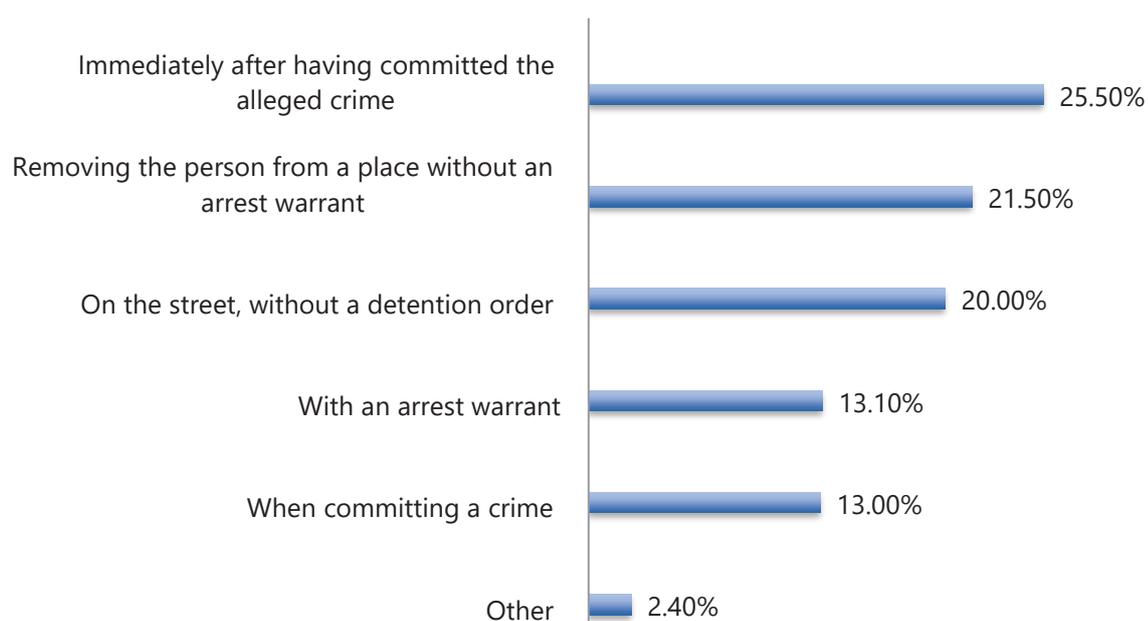
18 General Law to Prevent, Investigate and Punish Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, June 2017, Articles 63 and 64.

19 The federal power is spread across the executive branch, represented by the President, the legislative branch represented by the Chamber of Deputies and Senate and the judicial branch. The structure is the same at state level.

in the following situations: enforcing an arrest warrant,²⁰ an urgent case,²¹ *arraigo*²² and *in flagrante delicto*. In Mexico, arrests *in flagrante delicto* occur more frequently than those that take place on another legal basis²³ (table 1).

In this type of detention, the person is discovered committing an apparently criminal act and is immediately caught and detained. Alternatively, if the person is not caught committing the act but is identified as a perpetrator by the victim, an aggrieved party, or a co-perpetrator, the police will begin an immediate search based on this information.

Table 1. Condition under which detention is carried out in Mexico



Source: ENPOL 2016

20 A document issued by a judge at the request of the Public Prosecutor's Office ordering the arrest of a person based on a previous alleged offence, evidence of having committed that offence and the possibility that the person has committed the offence or been involved. CPEUM, art. 16, para. 3 and 4.

21 Where the Public Prosecutor's Office orders a person's arrest because the time, place or circumstance make it impossible to apply to the judge for an arrest warrant and because it is a serious crime and there is a demonstrable risk that the person could evade justice. See CPEUM, Article 16 (6).

22 An order issued by a judge at the request of the Public Prosecutor's Office, to detain a person in cases of organised crime to investigate the person, ensure the person or property are protected, or where there is a demonstrable risk that the person may evade justice. See CPEUM, art. 16 (8).

23 Amnesty International, *False Suspicions. Arbitrary detentions by police in Mexico*, 2017, p.14.

This type of arrest can be carried out by:

1. any person, who will have to hand the detainee over to the nearest authority; and/or
2. the police, which, being the first authority aware of the fact, will act and perform the duties of a first responder. These duties, in addition to carrying out the arrest, consist of assisting anyone who requires it, protecting the scene, gathering evidence and, if there are victims or witnesses, interviewing them about what happened in order to notify the Public Prosecutor's Office.

The police cannot interview the detainee about the incident; they may only ask for general information (name, age, etc.). However, they have the powers to interview witnesses and victims about the event.²⁴

During these early stages of custody, it is important to differentiate between two types of police who can detain and take on the role of first responder in a *in flagrante delicto* situation: preventive police and investigative police.

The preventive police have the role of prevention and surveillance by conducting random patrolling with the aim of preventing crimes and attacks from being committed, while the investigative police investigate crimes acting under the authority of the Public Prosecutor's Office. The investigative police can also carry out the arrest.

The role of the preventive police ends when the person who has been arrested is transferred to the Public Prosecutor's Office, while the investigative police continue their work. They can assist the Public Prosecutor's Office in carrying out investigations and follow its orders. Any act carried out without its authorisation should not be deemed lawful. The investigative police units are part of the organisational structure of prosecuting authorities (Public Prosecutor's Office), the law enforcement agencies, or both.²⁵

Once the person is arrested, the police must inform him/her of the reason for his/her arrest and of the rights listed below, that are set out in a letter of rights that the police must carry with them and read to the detainee:²⁶

1. To remain silent.
2. To make a statement and, if so, to be assisted by his/her lawyer before the competent authority.
3. To be assisted by a lawyer. If the detainee does not want to or is unable to do so, a public defender will be assigned to him/her.
4. To inform a family member or other person of the facts surrounding the detention and the current place of custody.
5. To be presumed innocent from this moment until proven guilty.
6. To be assisted by a translator or interpreter, to be provided by the State.
7. If the detainee is a foreign national, he/she is entitled to have the consulate notified about the detention.
8. To appear before the Public Prosecutor's Office or before a supervising judge immediately after being detained.

Once arrested, the person must be transferred to the Public Prosecutor's Office, which is the

24 CNPP, art. 132 (X).

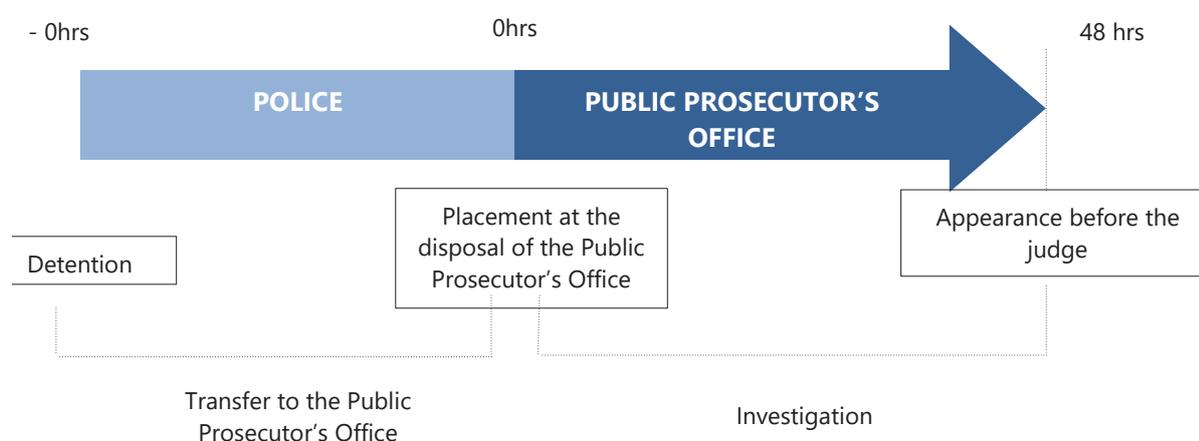
25 General Law of the National Public Security System, art. 75-77; CNPP, art. 132.

26 Letter of rights available in *Protocolo Nacional de Actuación. Primer Respondiente, Comisión Nacional de Seguridad* [National Protocol. First responder, National Security Commission], Version 1, p. 67: <http://www.secretaria-doejecutivo.gob.mx/docs/pdfs/normateca/protocolos/ProtocoloPrimerRespondienteV1.pdf>

investigating authority that determines whether there is evidence of committing or being involved in the crime.²⁷ During this period, the person is deprived of his/her liberty in detention centres, also known as cells (*separos* and *galeras*), and has the right to make a statement after he/she has been interviewed by a lawyer, who must also be present during the statement.

If the Public Prosecutor's Office decides that there is evidence stating that the person is likely to be responsible or involved, they will request that the person be transferred to the judicial authority, where a hearing will take place to commence proceedings.²⁸

Table 2. Process of *in flagrante delicto* arrests



2. Gap between the law and reality

Although Mexico has tried to address this problem through a series of reforms, the safeguards in place are particularly weak in detecting and preventing torture during those early stages. International organisations have warned that during these first hours of custody in Mexico there is a high risk of ill-treatment and torture, especially during the police detention and until the detainee is handed over to the judicial authority.²⁹ There are no appropriate checks on the legality of the detention nor on the time frame for bringing the person before the Public Prosecutor's Office; there is no immediate access to a proper defence and statements are given without a lawyer being present.³⁰ There are shortcomings, weaknesses and obstacles in the implementation, causing a huge gap between the legislative and judicial framework and the reality.

When it first visited the country in 2010, the UN Subcommittee on Prevention of Torture (SPT) stated that, during these first hours, persons deprived of liberty face a high risk of being tortured.³¹ The SPT recommended to the State to implement a series of safeguards as formal preventive

27 CPEUM, art. 16.

28 Ibid.

29 IACHR, Human rights situation in Mexico (op. cit.) para. 11, 297; UN, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, Mission to Mexico, A/HRC/28/68/Add.3, para. 25.

30 UN, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, Mission to Mexico, A/HRC/28/68/Add.3, para. 42, 43, 77.

31 UN, Report on the visit to Mexico by the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or

control.³² On its last visit in 2016, the situation had not changed. Persons deprived of their liberty who had been interviewed stated that they had suffered torture and ill-treatment, particularly at the time of deprivation of liberty, during the transfer and when admitted to the various detention centres, or during interrogations, pointing out that police officers (municipal, state, federal and ministerial) were the main persons responsible.³³

Another problem that was identified is the arbitrary use of *in flagrante delicto* arrests. Sometimes, the legal framework is not properly applied³⁴ and this type of arrest is used to investigate another crime (*delitos puente o chaleco*), creating a false *in flagrante delicto* of a minor criminal offence and allowing the police to arrest a person to investigate another more serious crime. In some cases, for example, arrests begin with an administrative misdemeanour.³⁵

The 2016 National Survey of the Population Deprived of Liberty (ENPOL) also describes this situation,³⁶ revealing that 75.6% of the persons deprived of liberty who were interviewed stated that they suffered psychological violence during the arrest,³⁷ while 68.3% were physically assaulted³⁸ by the authority or person who carried out the arrest.³⁹

Even when it is established that the person has the right to be brought before the Public Prosecutor's Office immediately and without delay, there have been unjustified delays in the transfer, ranging from two to more than 48 hours (*table 3*).

International organisations have warned that during these first hours of custody in Mexico there is a high risk of ill-treatment and torture, especially during the police detention and until the detainee is handed over to the judicial authority

Degrading Treatment or Punishment, Doc. CAT/OP/MEX/1, 31 May 2010, para. 144.

32 UN, SPT Report on the visit to Mexico 2010, para. 284-286.

33 UN, Report on the visit to Mexico by the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Doc. CAT/OP/MEX/R.2, 15 December 2017, para. 20, 21.

34 Amnesty International, *False Suspicions. Arbitrary detentions by police in Mexico*, 2017, p.14.

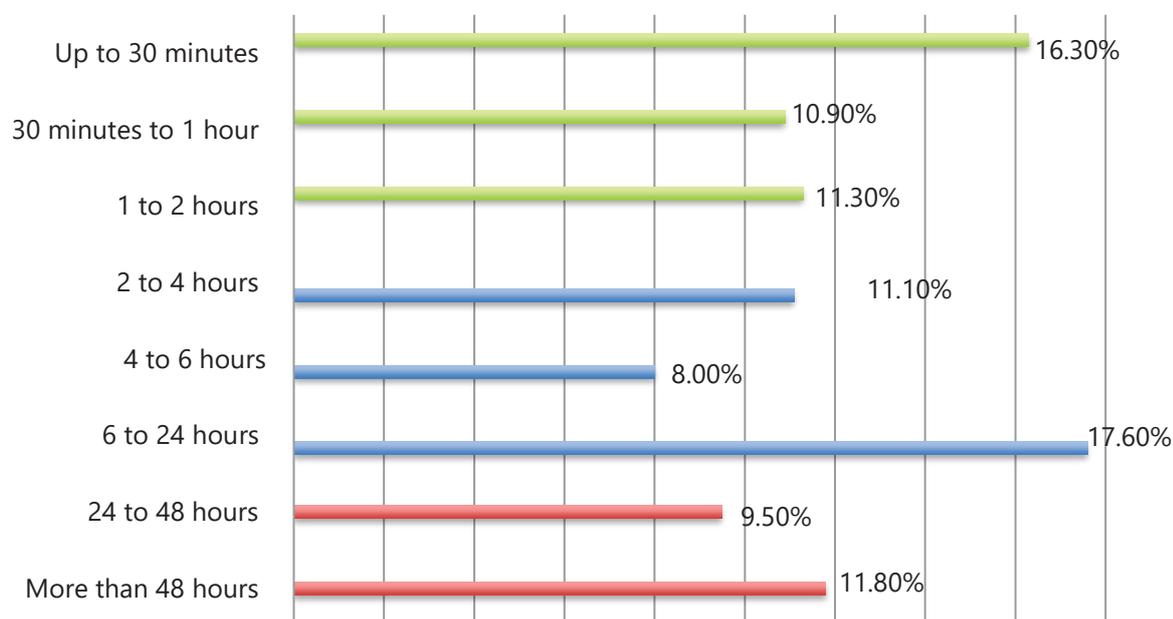
35 *Ibid*, p. 16.

36 ENPOL 2016, p. 23, 25, 26.

37 58% were placed in solitary confinement or isolation, 52% were threatened with trumped-up charges, 36.6% were pressured to report someone and 28.2% were threatened with harm to their family.

38 59% were kicked or punched, 19.4% suffered electric shocks, 6.5% burns and 4.5% sexual violence.

39 In 33.6% of cases, the arrest was carried out by the investigative police while 32.6% were by the municipal preventive police and only 15% of cases were by a federal authority.

Table 3. Time between arrest and when the person is brought before the Public Prosecutor's Office

Source: ENPOL 2016

On this particular right, the Mexican State was found by the Inter-American Court of Human Rights (IACHR) in the case of *Cabrera García and Montiel Flores* to have exceeded the detention period and not to have brought the persons filing the complaint immediately before the judge to determine the legality of their detention. The Court established that transfer without delay is a mechanism to avoid illegal or arbitrary detention and takes on even greater significance when aiming to minimise any risk of violating the person's rights.⁴⁰

While at the Public Prosecutor's Office, the persons who were interviewed also stated that they were victims of psychological and/or physical violence by or with the consent of the persons who took them into custody. 49% of the population deprived of their liberty stated that they were incommunicado or isolated, 40.8% were threatened with trumped-up charges and 20.2% were threatened with harm to their family. 39.4% were kicked and punched and 23.5% were hit with an object.

Various reports from the National Mechanism for the Prevention of Torture (MNPT) also warn that in the detention centres there is no separation between persons arrested for administrative infringements or those handed over by the Public Prosecutor's Office, prosecuted and sentenced. There are also no public telephones where they can make a call, spaces where they can receive visits from the lawyer or their family, or facilities for persons with disabilities.⁴¹

At the same time, only 19.8% of those arrested and brought before the Public Prosecutor's Office

40 IACHR, 26 October 2010, *Case of Cabrera García and Montiel Flores v. Mexico*, Series C, No. 220, para. 102.

41 The MNPT reports and recommendations are available at:

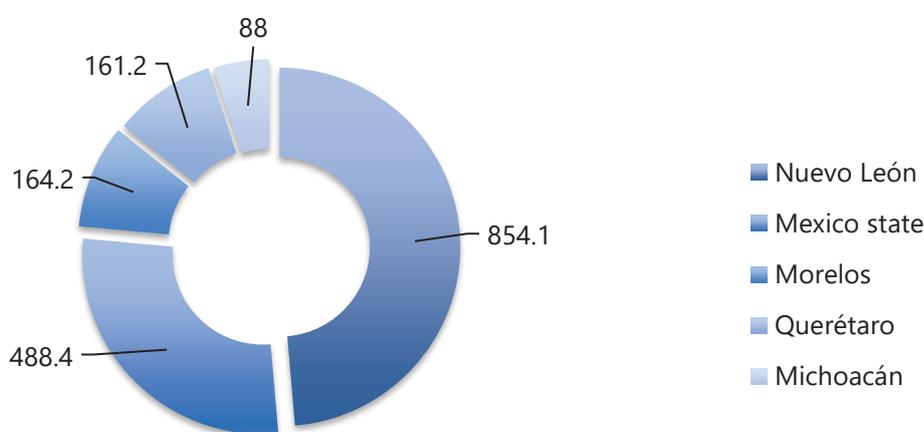
http://www.cndh.org.mx/Mecanismo_Nacional_de_Preencion_de_la_Tortura.

See also National Human Rights Commission, General recommendation No. 28. On illegal incarceration in the Republic of Mexico's municipal and district prisons, 13 September 2016, para. 8.

were able to contact their lawyer, and not always immediately. The lawyer was only present in 28.8% of cases where the detainees gave their statement.⁴²

In Mexico, access to a lawyer can be via private lawyers who offer a paid service, or public lawyers provided by the State through its Public Defender’s Offices. However, only 22.6% of the population is able to choose and pay for their own lawyer, while 77.3% of the remaining population waits for the State to assign a defender, owing to their vulnerable status (extreme or moderate poverty, social deprivation, etc.).⁴³ The fact that the Public Defender’s Office is the first route of access to justice for the most vulnerable sectors of the population⁴⁴ gives rise to a number of critical factors, including an excessive workload for the public defenders.⁴⁵

Table 4. Number of cases per public defender per year (2017)



Source: Prepared by the authors with data from *México Evalúa, Findings 2017. Follow-up and Assessment of the Criminal Justice System in Mexico.*

Mexico is also a multicultural country with around 53 indigenous people⁴⁶ who, from the time of their arrest and throughout the process, also have the right to an interpreter with knowledge of their language and culture. This continues to be a widespread complaint, since studies reveal that only 16% of indigenous people deprived of their liberty have had access to a translator or interpreter at some point during the process.⁴⁷

Other persons who are mostly invisible and in a more vulnerable situation in terms of detention are those who have a psychosocial or mental disability. They face one of the greatest obstacles as it is declared that they cannot be charged. In other words, their legal capacity is not recognised,

42 ENPOL 2016, p. 29.

43 CONEVAL, *Poverty in Mexico 2016*.

44 Aguiar-Aguilar, Azul A, *The Public Defender’s Office in Jalisco*, Western Institute of Technology and Higher Education, 2016, p.121.

45 México Evalúa, *Hallazgos 2017. Seguimiento y Evaluación del Sistema de Justicia Penal en México* [Findings 2017. Follow-up and Evaluation of the Criminal Justice System in Mexico], Mexico 2018, p. 93.

46 INEGI 2010.

47 Ana Aguilar García, Gregorio González Nava, Philippa Ross, *Effective Criminal Defence in Latin America, Mexico chapter*, 2015 p.36.

and they are denied the right to a lawyer of their own choosing. This is one of the most significant barriers to effective justice.⁴⁸

48 Diana Sheinbaum, Sara Vera, Hacia un sistema de justicia penal incluyente. Proceso penal y discapacidad psicosocial [Towards an inclusive criminal justice system. Criminal procedure and psychosocial disability] Documenta, 2016, p. 93.

Section III

Police detention

1. National legal framework

At the national level, the Constitution (CPEUM) is the legal framework regulating detention and the National Code of Criminal Procedure (CNPP) is the framework that regulates the procedure and responsibilities of the authorities involved. Both provisions set out the rights to which the person is entitled at the time of the arrest, as well as the safeguards during this period. The local Constitutions regulate detentions in accordance with the provisions of the CPEUM.

Likewise, the General Law to Prevent, Investigate and Punish Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment only establishes obligations for law enforcement agents at this time, specifically with respect to detention registers and the police officers' use of force.

The *National Protocol - First Responder* aims to standardise the actions of the police (federal, state and municipal). It establishes standard and mandatory criteria for all police institutions when performing arrests, as well as a series of steps to be taken prior to handing the person over to the Public Prosecutor's Office (table 5).

According to the National Protocol, the police must take the following steps before handing the person over to the Public Prosecutor's Office:

1. Inform the person of the reasons for the arrest.
2. Conduct a search of the detainee and seize any objects related to the event.
3. Read the letter of rights to the detainee.
4. Inform the Public Prosecutor's Office about the detention, the seized items and, if necessary, the need to secure the place where the operation took place. The Public Prosecutor's Office will

The fact that the police transfer time depends on the circumstances and contexts of the detention means that in practice the scope of what is immediate or without delay is subject, on the one hand, to the discretion of the detaining authorities and, on the other, to practices in each state, even with standard criteria

specify where the detainee is to be transferred, where the seized items are to be stored and, if necessary, the actions taken by the Public Prosecutor's Office to protect the site. If the site needs to be secured, the police will identify if there is anyone who needs protection and help, request support through the Public Prosecutor's Office (medical attention, firefighters, civil protection, etc.), document the site and, if there is evidence, collect it, safeguard it, cordon off the area and inform the Public Prosecutor's Office to send back-up (investigative police and experts).

5. Fill in the detention register,⁴⁹ which should contain:
 - I. Name of the detainee.
 - II. Physical description of the detainee.
 - III. Reason, general circumstances, place and time of the detention.
 - IV. Name(s) of person(s) involved in the detention.
 - V. Place where the detainee will be transferred.
 - VI. Photograph of the detainee.
 - VII. Photograph of the place of detention.
6. Fill in the standard police report.⁵⁰
7. Hand the person over to the Public Prosecutor's Office. This takes place when the police physically hand the detainee over with the standard police report, the letter of rights and, if applicable, any items that have been seized with the forms for the chain of custody and seizure.

Both the CPEUM and the CNPP set out that, once a person is arrested, he/she must be transferred to the Public Prosecutor's Office *immediately* and *without delay*. However, none of these provisions establishes what is meant by *immediately* and *without delay* or what period constitutes clear and real immediacy.

While none of these provisions is clear on these expressions, there is a legal interpretation that states that:

[...] the expressions "without delay" or "immediately" cannot be understood as concrete and specific measures or units of time in length or duration, but rather as a reference for action for the person making an arrest and implies the prior and necessary fulfilment of all the conditions to hand the person over to ensure compliance with the law.

Therefore, the time taken to carry this out is relative and must be understood as the time needed to execute it according to the specific circumstances of the case and a criterion of reasonableness that must consider time, methods and means of communication, distance, conditions of the place, period and form of detention, as well as safety aspects both for the detainee and the authority.

*Since a specific time-based rule cannot be established, it is sufficient that the period is clearly not excessive such that it may be considered that an illegal detention has been committed, as there must be an objective fact that evidences this.*⁵¹

49 General Law of the National Public Security System, Article 113.

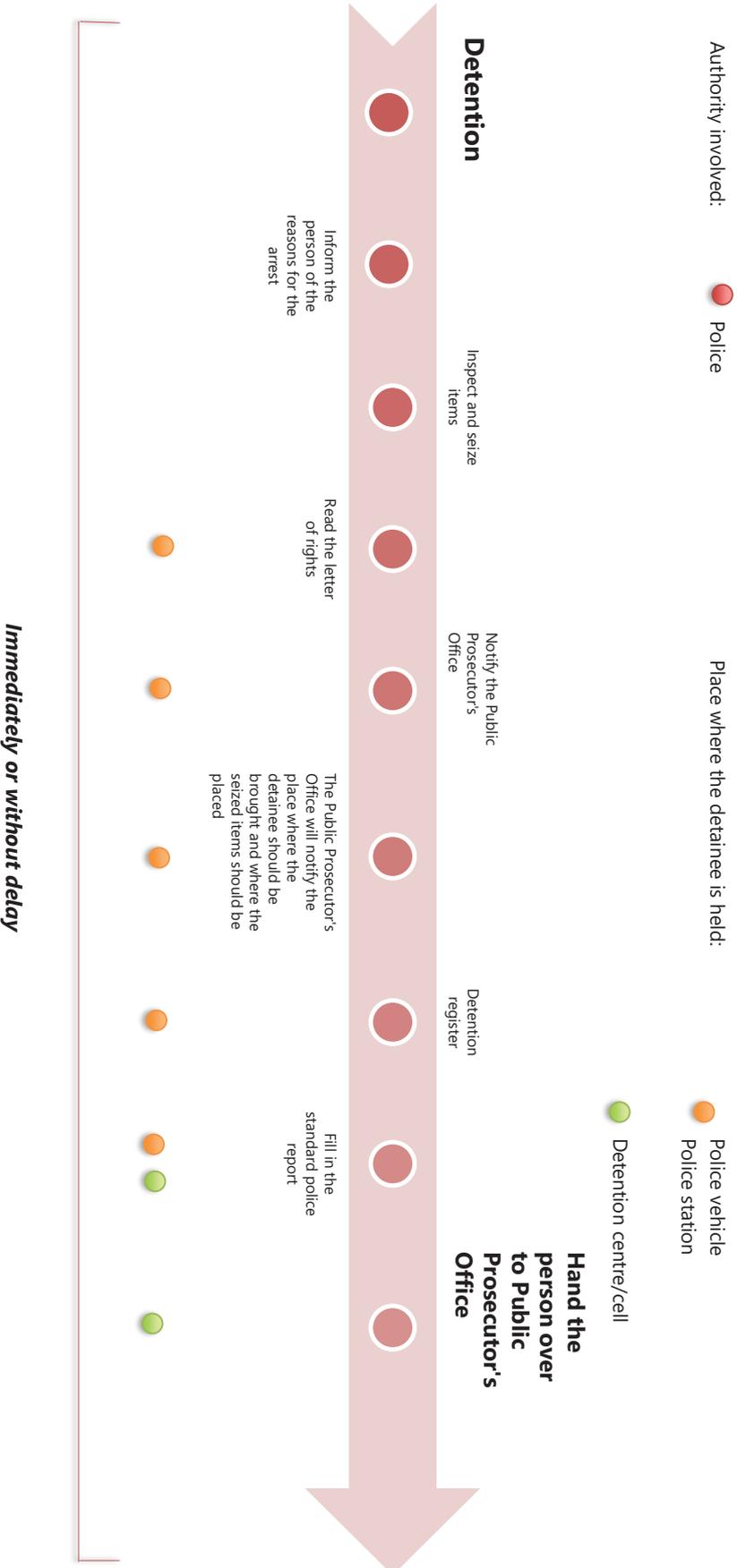
50 The new standard police report was published in November 2017, in accordance with Agreement 02/XLIII/17 of the National Public Security Council (CNSP) and aimed to reduce the time and likelihood of errors in filling it in. It is available here: http://secretariadoejecutivo.gob.mx/docs/pdfs/IPH_delitos_27022018.pdf

51 SCJN, Thesis II. 2 (10). *Puesta a disposición. Alcances de las expresiones "sin demora" o "de manera inmediata" y "autoridad competente", relatividad de su valoración de acuerdo a las circunstancias justificantes del caso* [Handing the person over. Scope of the expressions "without delay" or "immediately" and "competent authority" with respect to the circumstances supporting the case], Judicial Weekly Gazette of the Federation, Book 36, November 2016, Volume IV, p. 2505.

This is relevant because, as established in the National Protocol, the police must take a series of steps prior to this transfer. These steps cannot be omitted as they form part of the standard police report, which is an essential requirement to hand the detainee over to the Public Prosecutor's Office. It is also important to note that there is no mention of where the detainee will be while these steps are being taken; whether in the police vehicle or in a detention centre, nor how their safety and security will be guaranteed during this period.

If an immediate or prompt transfer is subject to the time it takes the police to perform each of these acts, the natural flow to reach the Public Prosecutor's Office would be as follows in a timeline:

Table 5. Actions performed from the time of the arrest until the person is handed over to the Public Prosecutor's Office.



Source: Drafted by the author based on CNPP, National Protocol for First Responder and interviews with police officers.

The fact that the transfer time depends on the circumstances and contexts surrounding the detention means that, in practice, the scope of *immediately* or *without delay* is subject, even with standard criteria, to the discretion of the authorities detaining the person and to the practices in each of the states. Similarly, if the places where the persons will be in custody are not determined when these acts are carried out, there will be uncertainty as to their location and their safety and security during this period.

The detainee's right to contact his/her lawyer or even a family member or third person at this time, to inform them of their detention and place of custody, could help to reduce the risk of incommunicado detention or unjustified delays during the transfer. Both the CPEUM and CNPP include these rights and establish that the detainee will have the right to choose a lawyer and consult him/her in private from the time of the arrest (*table 6*).

According to the Protocol, these rights must be notified when the police read the letter of rights. However, upon reviewing the letter, it is clear that these and other rights that correspond to this period of custody are only listed without explaining how and when they can be exercised.⁵²

For example, if, at that moment, the person asks to contact his/her lawyer, or third party, it is not clear which authority will be able to facilitate this contact or how and when it will be able to do so. It is also not known whether the police will be able to set up the call, whether they will be able to provide a telephone number for a lawyer, or whether they are able to call the Public Defender's Office directly. Similarly, if the person is able to communicate with his/her lawyer, or family member or third party, it does not specify under what conditions this communication will be guaranteed, nor does it specify their access in case they could visit the place of detention.

None of these provisions mentions how these rights will be communicated to indigenous people if they do not speak Spanish – the language in which the letter of rights is written – or how to communicate with persons with a mental or psychosocial disability.

To summarise, the police only have a limited role with respect to these rights. They are only required to read the rights and to prove this with a signature from the detainee and, if this person refuses or cannot do so, the signature of a witness. There is no mechanism to verify if the detainee has actually or properly understood the rights, or to check whether any means of communication have been provided, in cases where this takes place.

While the legal framework contains provisions guaranteeing the detainee's rights during this period, the fact that it is not clear and accurate means that its provisions are subject to interpretation and therefore also to practices that may occur in different contexts and can present a risk at this time. These risks are mainly related to incommunicado detention, unjustified delays during transfers and uncertainty about the detainee's location, security and integrity.

52 Letter of rights available at: <http://www.secretariadoejecutivo.gob.mx/docs/pdfs/normateca/protocolos/ProtocoloPrimerRespondienteV1.pdf>

Table 6. National and local legal framework for detentions

Legislation	Text
<p>Political Constitution of the United Mexican States</p>	<p>Article 16 (...) Any person may arrest the offender while he/she is committing a crime or immediately after having done so and hand him/her over without delay (...) to the Public Prosecutor’s Office.</p> <p>Article 20, section B. Rights of the accused:</p> <p>(...)II. The right to make a statement or to remain silent. From the time of their arrest, they shall be informed about the charges against them and their right to remain silent, which cannot be used against them. All forms of intimidation, torture and lack of communication are forbidden and shall be punished by the criminal law. Any confession made without the assistance of a lawyer shall have no weight as evidence.</p> <p>(...)VIII. They shall have the right to a proper defence by a lawyer, whom they are free to choose, including from the time of their arrest. If they do not wish to or cannot appoint a lawyer when asked to do so, the judge shall appoint a public defender.</p>
<p>Political Constitution of the Free and Sovereign State of Oaxaca</p>	<p>Article 14. Any person may arrest the offender while he/she is committing a crime or immediately after having done so and hand him/her over without delay to the nearest authority, which shall hand him/her over equally promptly to the Public Prosecutor’s Office.</p> <p>Article 8, section B. Rights of the accused [...]</p> <p>VIII. They shall have the right to a proper defence by a lawyer, whom they are free to choose from the time of their arrest. If they do not wish to or cannot appoint a lawyer when asked to do so, the judge shall appoint a public defender.</p>
<p>Political Constitution of the City of Mexico</p>	<p>Article 6 [...] H. Access to justice. Everyone has the right (...) to free and quality legal defence and assistance in all legal proceedings, in accordance with the law.</p> <p>Article 59, section I. (...) indigenous people shall have the right to a public defender who is indigenous or has an intercultural perspective. (...) shall at all times have the right to be assisted by interpreters.</p>
<p>Political Constitution of the Free and Sovereign State of Nuevo León</p>	<p>Article 15, paragraph 5. Any person may arrest the suspect while he/she is committing an offence or immediately after he/she has committed an offence, bringing him/her without delay (...) before the Public Prosecutor’s Office.</p> <p>Article 19. Rights of the person being charged, section B [...]</p> <p>VIII. They shall have the right to proper defence by a lawyer, whom they are free to choose from the time of their arrest. If they do not wish to or cannot appoint a lawyer when asked to do so, the judge shall appoint a public defender.</p>

Legislation	Text
<p>National Code of Criminal Procedure</p>	<p>Article 147. The law enforcement agencies shall be obliged to detain anyone who commits a crime <i>in flagrante delicto</i>, shall make a record of the detention and, (...) shall immediately bring him/her before the Public Prosecutor's Office.</p> <p>Article 132. The police will have the following obligations (...)</p> <p>III. To make arrests in cases authorised by the Constitution, informing the detainees of their rights; (...)</p> <p>VI. To inform the Public Prosecutor's Office of the detention by any means and without delay and to record the arrests in the register immediately (...)</p> <p>XVI. Issue the police report</p> <p>Article 152. Authorities carrying out an arrest for a <i>in flagrante delicto</i> crime or an emergency detention should ensure that the person has full and clear knowledge of the rights listed below at any stage during the custody:</p> <p>[...] II. The right to consult their lawyer in private</p>
<p>General Law to Prevent, Investigate and Punish Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment</p>	<p>Article 61.- The authorities of the three levels of government shall, within the scope of their competence, implement a standardised system of systematic review of the rules, procedures and protocols on detention [...] and the legitimate use of force to prevent torture and other cruel, inhuman or degrading treatment or punishment.</p> <p>Article 63.- The law enforcement officers who perform the arrests must report them in the Administrative Registry of Detentions using a standard police report.</p> <p>Article 64.- The National Information Centre shall receive the information on the arrests made by the police officers and shall also record the following information:</p> <p>I. Name of the police officer making the Administrative Report;</p> <p>II. place where the Administrative Report is made;</p> <p>III. time when the Administrative Report is made; and</p> <p>IV. the journey made by the police officers from the place where the Administrative Report is made until the detainee is placed in the custody of another authority.</p>

Legislation	Text
<p>National Protocol for First Responder</p>	<p>The authority with law enforcement duties that witnesses a criminal act in flagrante delicto shall carry out the following steps:</p> <p>(...) b. Arrest. Upon arrest, the First Responder shall proceed as follows:</p> <ul style="list-style-type: none"> b.1 Search the person b.2 State the reason for the arrest b.3 Read the letter of rights, leaving the corresponding record in the standard police report b.4 Seize the detainee’s property b.5 Notify the Public Prosecutor’s Office of the detention (...) d. Fill in the standard police report <p>The detainee is handed over to the Public Prosecutor’s Office when the police physically hand him/her over with the police report, the record of having read the letter of rights and any seized items with the forms on the chain of custody and seizure.</p>

2. Challenges identified in practice⁵³

The main challenges identified in practice were the number of hours spent transferring the detainees to the Public Prosecutor’s Office and their incommunicado detention. The transfer times range from 15 minutes to 3, 8 and up to 11 hours and, in most cases, these delays were declared to be unreasonable.

During this period, the detainees do not have the means of contacting family, third parties or their lawyer. On the one hand, this is because the police declare that they do not have the necessary resources. For example, they do not have a mobile phone they can use for this, meaning they would need to provide their own phone, and this would compromise their safety. On the other hand, when detained, the person is handcuffed or his/her personal possessions are withheld, including his/her mobile phone, making it physically impossible to make a phone call.

Although the law provides that the person must be transferred to the Public Prosecutor’s Office, in practice transfers are also made to other places prior to the person being handed over to that authority. In some states, for example, the detainee is transferred to a police barracks or station, or to Early Intervention Centres. In none of these cases does the detainee have contact with or access to a lawyer and obstacles have been identified in their access to family members.

Detainees are also transferred to places such as hotels, parking lots, rented spaces or vacant lots, known as *white prisons*, where the person is held for hours or even days in order to extract information, mainly in the case of very serious crimes. There are also cases where the person does not reach the Public Prosecutor’s Office as he/she is released during the transfer.

Finally, a major challenge for law enforcement is that their actions are subject to the orders of senior commanders, who assess their performance based on the number of people that the police officers hand over to the Public Prosecutor’s Office. This creates pressure and leads police officers to focus

⁵³ Information obtained from August to November 2018 via a desk review, interviews and expert meeting.

more on completing the process than on ensuring that the detainees understand their rights.

Table 7. Challenges identified by state

<p>Mexico City</p>	<ul style="list-style-type: none"> • 15 minutes to 3 or 8 hours from arrest to being handed over to the Public Prosecutor's Office. • When arrested, the person is immobilised using handcuffs, making it impossible to make a call. • Even if they are close to the Public Prosecutor's Office, the detainees are taken for a <i>walk</i> and are handed over to offices far away from the places of detention. • The standard police report is completed in the police vehicle during the transfer or upon arriving at the Public Prosecutor's Office. This takes 3 to 5 hours on average. • There are inconsistencies between what is stated in the standard police report and what the detainee says, mainly with respect to the place and time of detention. • There are delays in handing the person over to the Public Prosecutor's Office for various reasons: the Public Prosecutor's Office declares it does not have the competence and the person has to be transferred to a Specialised Office, or there is no doctor to conduct the review and certification so the person has to be transferred to another office or to an institution that can carry out the certification.
<p>Oaxaca</p>	<ul style="list-style-type: none"> • 4 to 8 and up to 11 hours from the time of arrest to being handed over to the Public Prosecutor's Office. • The police only allow a call to be made at the time of arrest if the person has his/her own phone. Otherwise, they only facilitate this if the detainee is accompanied by a child or needs some medication for an illness. • If the persons are able to communicate with their family or a lawyer, they can only state where they are being transferred to. The persons cannot say where they are being detained since there have been cases where lawyers and/or relatives have taken the detainee away, offered money and/or assaulted police officers. • The detainee is transferred to a police barracks prior to being handed over to the Public Prosecutor's Office. At the police barracks, there are public telephones where the detainee can communicate with family members and/or a lawyer. This call must be authorised by the head of the police barracks. The police barracks do not have the authority to contact the Public Defender's Office. • Fingerprints and photographs are taken, and medical examinations are conducted at the barracks and the standard police report is filled in with help from lawyers at the barracks. This takes between 2 and 4 hours. During this period, the person is in the cells. • No lawyers or family members are allowed in the barracks. Access, when allowed, is only granted a few moments before the transfer to the Public Prosecutor's Office and, in some cases, only when accompanied by a visitor from the human rights commission.

<p>Oaxaca</p>	<ul style="list-style-type: none"> • The detainee is only transferred directly to the Public Prosecutor’s Office if the police are told that there are blockades, or the police realise that the patrol is being followed so the detainee can be taken from them. In these cases, the Public Prosecutor’s Office provides rooms to fill in the standard police report, medical certificate, etc. <p><i>Indigenous people</i></p> <ul style="list-style-type: none"> • If the arrests were made in remote communities or municipalities, the transfer to the police barracks can take 4 to 8 hours. • The police who conduct the arrest request assistance from the people who are present to help them communicate with the indigenous person. • The letter of rights is read in Spanish. • Access to an interpreter or translator is provided at the police barracks or before the judge.
<p>Nuevo León</p>	<ul style="list-style-type: none"> • Transfer times range from 15 minutes to 3 hours. • At the time of arrest, all the detainee’s belongings are taken away and they are therefore unable to call their lawyer or family until they reach the Public Prosecutor’s Office. • Before being transferred to the Public Prosecutor’s Office, the person is transferred to an <i>Early Intervention Centre</i> where it is decided whether or not a crime has been committed or if there is any alternative to the criminal process. If there has been a crime, the person is transferred to the Public Prosecutor’s Office where he/she is allowed to call his/her lawyer. • When they arrive at the Public Prosecutor’s Office, the police fill in the standard police report. Filling in the form creates a delay in the detainee being handed over to the authorities. Meanwhile, the person is in the police vehicle.

Community police: the experience of the Municipality of Escobedo Monterrey, Nuevo Leon

The municipality of Escobedo is one of two municipalities in Mexico⁵⁴ where the community police model has been put into practice.

According to this model, the police conduct specific tasks, first by identifying areas at risk or conflict zones, and then trying to prevent these from occurring by approaching the persons who live in that zone.

Each police officer wears a camera on their uniform lapel, and it remains switched on throughout their shift. The recording can be watched on the police force's district cameras. These cameras cannot be tampered with and at the end of the shift the entire recording is downloaded and stored.

If they arrest someone during their shift, the person is taken to the police station where numbered stages set out the steps the police must follow (1. reading rights, 2. medical certification, etc.) before taking the detainee to the cell. There are surveillance cameras in the cells and throughout the police building.

Everything that happens on the shift and during the arrests is recorded. If someone claims to have been mistreated by the police, the district cameras can play back the shift to check what the person and the police have said. This legitimises and vindicates the work of the police, but also protects the safety and integrity of the detainees.

With this model, there is also coordination with the State Human Rights Commission when conducting an annual review of complaints about police action. From 2015 to the date of this analysis, Escobedo was the municipality with the lowest number of complaints (40 complaints) in the Monterrey Metropolitan area of Nuevo León.

3. Role of private lawyers and public defenders

At the time of this analysis,⁵⁵ each State had already adapted its Law on the Public Defender's Office to the new model. However, only the Law of the Nuevo León Public Defender's Office⁵⁶ references its role at the time of the arrest. The laws of the Mexico City⁵⁷ and Oaxaca⁵⁸ Public Defender's Offices do not reference this moment. Only the state of Nuevo León has regulated its intervention during this stage, while the Offices in Mexico City and Oaxaca have no such regulations in force.

The law and regulations of the State of Nuevo León mention that the Public Defender's Office must ensure that the police protect the detainees and explain their rights to them. However, it does not

54 Morelia in Michoacán is another state where this model has been implemented. The experience has been widely documented by national and international bodies. For more information: New York Times, *Para alejar la violencia, una ciudad mexicana transformó su policía* [Tackling violence, a Mexican city transformed their police force], September 2018: <https://www.nytimes.com/es/2018/09/01/violencia-en-mexico-michoacan-policia/>

55 December 2018.

56 Congress of the State of Nuevo León, Seventy-fifth Legislative Session, last reform 14 November 2016.

57 Federal District Legislative Assembly, VI Legislative Session, Law of the Federal District Public Defender's Office, February 2014.

58 Congress of the Free and Sovereign State of Oaxaca, Decree 2092, 12 November 2016.

specify at what point during the detention, nor where and under what conditions, the lawyer has access to the detainee (*table 8*).

Public and private lawyers agree that, in practice, contact between the detainee and their lawyer is only guaranteed when the person comes before the Public Prosecutor's Office and not always immediately. However, the Constitution and the laws and/or regulations provide that the person can have this contact from the time of his/her arrest.

There is also a view shared by most actors, including private lawyers and public defenders themselves, that access to a lawyer is neither feasible nor necessary during these early stages, until the person is handed over to the Public Prosecutor's Office and actions are focused mainly on the criminal defence.

On the other hand, experts note that, although there is no communication or physical access to the detainee during this period of custody, the involvement of a lawyer or even of a family member or third party at this time would provide immediate information on the person's condition, the circumstances of the detention, as well as certainty regarding the time and location where it took place, thus preventing incommunicado detention and helping to monitor the transfer.

This would also complement the police's communication of the information in the letter of rights. It would avoid the claim that the rights communicated to the detainee were a one-sided version by the police authority. It would also allow information to be collected that complemented or supported checks on the standard police report, to provide a genuine balance between the police version and what happened during the arrest.

Table 8. State legal framework on the Public Defender's Offices

Legislation	Text
Law on the Nuevo León Public Defender's Office	Article 4. The Institution shall provide its professional services in criminal matters to which every individual is entitled in accordance with Articles 17 and 20 of the Political Constitution of the United Mexican States and 19 of the Political Constitution of the Free and Sovereign State of Nuevo León, consisting of a comprehensive, uninterrupted, timely, technical, proper and efficient defence.
Regulations of the Law on the Nuevo León Public Defender's Office⁵⁹	<p>Article 3. (...) in criminal matters, the service must be provided from the time of arrest or at the request of the accused.</p> <p>Article 25. The Defence Department for criminal investigations will have the following responsibilities (...)</p> <p style="padding-left: 40px;">I. To provide legal assistance to detainees without delay (...) in accordance with Article 20 of the Constitution</p> <p style="padding-left: 40px;">IV. Provide, from the time of the arrest and during the investigation, all the elements and evidence needed for their defence.</p> <p>Article 94. [...] the Defender has the following duties:</p> <p style="padding-left: 40px;">III. To ensure that the police and the Public Prosecutor's Office treat the accused with courtesy and respect in all circumstances (...), especially safeguarding the right to their physical and psychological health.</p> <p>Article 95. To comply with information standards, the defender shall have the following obligations; (...)</p> <p style="padding-left: 40px;">VI. To explain to the accused the roles of (...) the police (...) as well as the rights of the accused vis-à-vis these bodies.</p>

59 Official Journal, Constitutional Government of the Free and Sovereign State of Nuevo León, Monterrey, Nuevo León, 16 September 2015.

Section IV

Detention by the Public Prosecutor's Office and transfer to the judicial authority

1. National legal framework

As with detentions by the police authority, the legal framework that governs this custody stage at national level is the Constitution (CPEUM), the National Code of Criminal Procedure (CNPP) and the General Law to Prevent, Investigate and Punish Torture. The legal framework mainly sets out the obligations of the Public Prosecutor's Office with respect to acts aimed at investigating and its responsibility towards the detainee. However, unlike police custody, the regulatory framework that governs detention by the Public Prosecutor's Office also mentions the role of the private lawyer and the Public Defender's Office at this time. In addition to these provisions, the National Law on the Enforcement of Criminal Penalties (LNEP) governs the transfer of the accused to detention centres and courts.

Unlike police custody, this period of custody is a specific period of 48 hours in which the authority must perform various actions aimed at determining whether it is likely that the person committed or participated in the act for which he/she was arrested. These actions include:

- Recording the time when the person was handed over to the Public Prosecutor's Office and updating the information on the detainee previously entered by the police in this/her arrest record.⁶⁰
- Conducting a preliminary check on the conditions under which the detention was carried out (*verification of in flagrante delicto*).
- Ordering a medical examination of the detainee by a doctor working for the Public Prosecutor's Office or a health institution.
- Informing the detainee of the charges against him/her, as well as of his/her rights during this stage, including the right to communicate with his/her lawyer, to make a statement or to remain silent.

60 According to the General Law of the National Public Security System (Article 114), prosecution authorities must update the information as soon as the detainee is handed over to them and collect the following: address, date of birth, marital status, level of education and occupation or profession, unique population registry code, ethnic group, description of the detainee's physical state, fingerprints, anthropometric information and other means that allow the individual to be identified.

- Providing the means for the detainee to contact his/her lawyer.
- Requesting a public defender if the person is unable or refuses to appoint a private lawyer.
- Conducting and ordering investigations that support the determination to institute criminal proceedings. The Public Prosecutor's Office will be assisted in this by its experts and the investigative police.
- If it is decided that criminal action will be brought, the defendant must be transferred to a correctional facility where he/she will wait for a hearing to be scheduled before the judge. Otherwise, the person must be released immediately.

Table 9. Actions taken by the Public Prosecutor's Office from the time the detainee is handed over to them until they are brought before the judge.



Source: Drafted by the author based on CNPP (Articles 113, 131, 147, 149 and 152) and interviews.

As soon as the police hand over the detainee and the standard police report to the Public Prosecutor's Office, the CNPP sets out that the Public Prosecutor's Office must verify the *in flagrante delicto* act, in other words, examine if the detention was due to a *in flagrante delicto* act and if the police acted in accordance with the provisions of the Constitution and the CNPP (communicating rights and the reasonableness of transfer times). If the detention does not meet these requirements, the person should be released immediately and, if appropriate, request that disciplinary or criminal sanctions be imposed on the police officers involved. If this verification confirms the detention was legal, the detainee will remain with the Public Prosecutor's Office, which will continue with the investigation.

According to the CPEUM and the CNPP, up to this point in the custody, the detainee will have the opportunity to communicate with family, a third party and, specifically, with his/her lawyer. The Public Prosecutor's Office will be responsible for facilitating this communication (*table 9*). However, the regulatory framework does not specify when such communication should be facilitated within those 48 hours.

Despite the lack of clarity in the law, it is possible to say that the communication with the lawyer may take place from the moment the detainee is handed over to the Public Prosecutor's Office until before his/her statement is taken, as the Constitution and the CNPP stress that the detainee must meet their lawyer in advance and confidentially.

This is clear if the person, or his/her family, is able to contact a private lawyer. However, the process may vary if the detainee is unwilling or unable to appoint a private lawyer. In such instances, the detainee will have to wait for the same Public Prosecutor's Office to request that a public defender be appointed, according to the procedures established in each of the offices (protocols, coordination agreements with the Public Defender's Office, notification systems, etc.).

The same is true if the detainee wishes to appoint a new lawyer or his/her lawyer resigns or steps aside. In these cases, if there is no new lawyer, the detainee will be assigned a public defender.

Once this communication is guaranteed, it is also important to consider the time it will take for the lawyer to travel to the office, as well as the actual, physical access to the detainee once the lawyer visits the Public Prosecutor's Office.

The General Law to Prevent, Investigate and Punish Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provides that, until the lawyer has access to the detainee, the Public Prosecutor's Office must ensure that no other authority questions, interviews or has access to him/her.

In the case of indigenous people and persons with disabilities, the CPEUM and the CNPP provide that access to the persons' private lawyer or public defender shall be guaranteed as set out above. However, if the detainees do not speak or understand Spanish, they are guaranteed the right to translation and interpretation when they are brought before the judge. The same is true for persons with disabilities, where it is established that the judge will guarantee to provide an interpreter or the technology that allows them to obtain the required information in a form that they can understand (*table 10*).

However, the time until the detainee has access to translators, interpreters or technology is excessive, considering the time taken for the transfer by the police authority and detention by the Public Prosecutor's Office – 48 hours – and the hearing before the judge – 72 hours.

If the Public Prosecutor's Office decides to bring criminal proceedings, the detainee will be transferred by the judicial police to a correctional centre where there will be a record that they have been admitted and a medical examination will be carried out, as set out in the LNEP. The person must not wait more than 72 hours in this detention centre, a period set both by the CPEUM and

the CNPP, to schedule the detention review hearing in which the judge will determine the legality of the detention.⁶¹

As soon as this hearing is scheduled, the police must then transfer the detainee from the correctional centre to the court, if the courtrooms are not located in the same correctional centre.

Table 10. National legal framework governing detention by the Public Prosecutor's Office

Legislation	Text
Political Constitution of the United Mexican States	<p>Public Prosecutor's Office</p> <p>Article 16 (...) no suspect may be detained by the Public Prosecutor's Office for more than 48 hours, during which time his/her release must be ordered, or he/she must be handed over to the judicial authority.</p> <p>Judicial authority</p> <p>Article 19. No detention by a judicial authority may exceed a period of 72 hours from the date on which the accused is handed over to them.</p> <p>Access to a lawyer</p> <p>Article 20, section B. The accused (...)</p> <p>VIII. Shall have the right to a lawyer, whom they are free to choose, including from the time of their arrest. If they do not wish to or cannot appoint a lawyer when asked to do so, the judge shall appoint a public defender. They will also have the right to have their defender appear at all proceedings.</p>
National Code of Criminal Procedure	<p>Detention by the Public Prosecutor's Office</p> <p>Article 129. The Public Prosecutor's Office (...) may, consistent with his/her rights and in the presence of the lawyer, request that the accused appear and order him/her to make a statement if they consider that it is important to clarify if a criminal act took place and if the person participated or was involved.</p> <p>Article 149. Verification of <i>in flagrante delicto</i> (...) The Public Prosecutor's Office shall examine the conditions under which the detention was carried out immediately after the person is handed over to them. If the detention did not take place in accordance with the provisions of the Constitution and this Code, they shall order the person's immediate release.</p> <p>In addition, during the detention period, the Public Prosecutor's Office (...) shall carry out such investigative acts as it deems necessary to institute criminal proceedings.</p> <p>Access to a lawyer</p> <p>Article 113. The accused shall have the following rights (...) II. To communicate with a family member and his/her lawyer when arrested, and the Public Prosecutor's Office must provide all the facilities to enable this.</p>

61 CPEUM, Article 19 and CNPP, Articles 309-310.

Legislation	Text
<p>National Code of Criminal Procedure</p>	<p>Article 122. If the accused cannot or refuses to appoint a private lawyer, the Public Prosecutor’s Office shall request the competent authority to appoint a public defender.</p> <p>Article 118. During the course of the proceedings, the accused may appoint a new lawyer; however, until the new lawyer accepts the position, the (...) Public Prosecutor’s Office shall appoint a public defender for the accused so as not to leave him/her without a defence.</p> <ul style="list-style-type: none"> • Times and conditions under which access to a lawyer will be granted <p>Article 113. [...] IV. To be assisted by their defence lawyer when making their statement, as well as in any other proceedings and to have a private meeting with them in advance;</p> <p>Article 117. The lawyer’s obligations [...] II. To appear and provide legal assistance to the accused when he/she submits the statement, as well as during any other proceedings.</p> <p>Article 125. A person who is accused and detained for any reason shall have the right, before making a statement, to a prompt and private meeting with his/her lawyer, if requested, and at a location appointed for this purpose.</p> <ul style="list-style-type: none"> • Resignation or withdrawal by the lawyer <p>Article 120. If the lawyer resigns or withdraws from the defence, the Public Prosecutor’s Office (...) shall inform the accused that he/she has the right to appoint another lawyer. However, if he/she does not appoint or does not wish to or cannot appoint a new lawyer, a public defender shall be appointed.</p> <p>Indigenous people and persons with disabilities</p> <p>Article 45. If the accused does not speak or understand Spanish, the judge shall guarantee him/her access to translators and interpreters to communicate with his/her lawyer. They may appoint a trusted translator or interpreter.</p> <p>If the person has a disability, he/she has the right to be provided with an interpreter or technology that allows him/her to access the requested information in a form that can be understood or, failing this, someone who knows how to communicate with him/her.</p> <p>Transfer to the judicial authority</p> <p>Art. 131. Obligations of the Public Prosecutor’s Office (...) XVII. To hand the detainees to the judicial authorities within the time frameArt. 308. Review of the legality of the detention.</p> <p>Immediately after the accused is arrested for an <i>in flagrante delicto</i> act or as an emergency detention and is handed over to the supervising judge, an appointment shall be made for the initial hearing at which the detention shall be reviewed.</p>

Legislation	Text
General Law to Prevent, Investigate and Punish Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	<p>Article 65. Prosecution institutions must update the information on the Administrative Register as soon as they receive the detainee in their custody, and reliably register the chain of custody, time and name of the person responsible for the detainee from the time of receipt until the person is released or under judicial review.</p> <p>If the detainee is in the custody of the Public Prosecutor's Office, it must be ensured that no authority will interrogate, interview or have access to the detainee until he/she has been interviewed by his/her lawyer. This interview should be conducted in complete privacy.</p>
National Law on the Enforcement of Criminal Penalties	<p>Article 22. The Judicial Police (...) shall have the following duties:</p> <ol style="list-style-type: none"> I. To transfer the persons who have been accused and sentenced to the courts where their hearings will be held. II. To provide security and safe custody in the courts for the person deprived of their liberty. <p>Article 75. Any person deprived of liberty and detained in a centre shall undergo a psychological and physical examination when admitted.</p>

2. Challenges identified in practice

The main challenge identified in practice is the delay in the Public Prosecutor's Office notifying the Public Defender's Office about a detainee being brought before them. Even though the detainee is already in the office, the Public Defender's Office receives notification between one hour and 36 hours after the detainee is handed over. In some cases, the Public Defender's Office is notified once the review hearing has been requested.

Another challenge lies in the lawyer's actual and physical access to the detainee. This primarily occurs with private lawyers who, in some cases, have to prove they have been appointed upon arriving at the Public Prosecutor's Office, meaning it may take them approximately two hours before they can actually access the detainee.

In the case of public defenders, physical access to the detainee takes place once they reach the Public Prosecutor's Office. This is because public defenders assist detainees in more than 90% of cases, meaning the offices already recognise them. However, one of the greatest challenges they face is having too much work, which has an impact on the time and attention they can give to the detainees.

Private lawyers and public defenders agree that, although physical access to the person is usually guaranteed – despite the delays – one of the greatest challenges is in conducting their first interview with the detainee in a private and confidential setting, as there are no spaces provided for this. Interviews take place in the cells in the presence of a police guard or in the offices where the official is located.

Although there is no time limit for this first interview and advice from the lawyer to take place prior to the detainee making his/her statement, in practice lawyers are subject to the same 48-hour period as the Public Prosecutor's Office, which may vary depending on how long it takes to be notified and to obtain physical access to the detainee.

Another challenge identified that has a direct impact on the detainee’s right to make a statement is the discretionary power of the Public Prosecutor’s Office with respect to the private lawyers’ and public defenders’ access to the records on the investigation. The lawyers’ lack of access or limited access to these records mean that, when the lawyer interviews the detainee, he/she recommends to the detainee not to make a statement.

Lawyers and public defenders describe cases where, during the first interview with the detainee, the latter states that he/she has already *made a statement* to the police – even though the police do not have the authority for this. In these instances, at the time of the police arrest, these detainees were not informed of their right to remain silent and, when *making a statement*, they were not immediately taken to the Public Prosecutor’s Office to do so in the presence of and having previously consulted their lawyer, as enshrined in the law. The police and Public Prosecutor’s Office do not record this but use it at their discretion in their investigations, mainly in the case of very serious crimes.

The lawyers have, in turn, noted that there is still pressure on the detainees to make a statement, without them being present. To this end, there are acts of intimidation aimed at:

- requesting information on persons involved in the act, mainly in the case of very serious crimes;
- not making a statement about ill-treatment or torture during the detention or detention by the Public Prosecutor’s Office; and/or
- promises that they will benefit if they plead guilty or collaborate with the investigation.

Another challenge is that not all the Public Prosecutor’s Offices have cells or detention centres, especially in municipalities that are far away from the state capital, so the detainees have to be transferred, causing delays in handing them over.

Table 11. Challenges identified by state

Mexico City	<ul style="list-style-type: none"> • The time it takes the police to fill in the standard police report generally leads to additional delays in handing the person over to the Public Prosecutor’s Office. • Public Prosecutor’s Offices point to a lack of information and contradictions in the standard police report, mainly regarding the place and time of the arrest. • At weekends and during holidays and long weekends, the number of cases where access to a lawyer is not immediately available increases, as the guards on duty cannot handle all cases. • Incommunicado detention of the detainee persists while they are in detention centres or cells. • Most of the assaults on detainees take place when they are admitted to the detention centres after the medical assessment and/or in the tunnels that connect the cells to the courtrooms.
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<p>Oaxaca</p>	<ul style="list-style-type: none"> • Public Prosecutor's Offices consider a delay that exceeds 8 to 10 hours to be unreasonable. • The delays occur mainly because the arrest took place in a municipality that does not have a Public Prosecutor's Office; the person was detained because of an administrative fault and when no agreement was reached, the police transferred the detainee to the Public Prosecutor's Office a few hours later; or the person is arrested under a system of practices and customs and, when no solution is reached, he/she is transferred to the Public Prosecutor's Office. • The length of time it takes for the public defender to arrive depends on when the detainee is brought before the authority. If it is in the morning, the defender will come immediately, but if the detainee is brought before the authority at night or at dawn, the defender will be brought before him/her early the following day. If the detainee arrives with his/her own lawyer, the proceedings will commence immediately. • Access is provided to the records of the investigation before the hearing or until the lawyers, having been refused by the Public Prosecutor's Office, file an appeal with the judicial authority, which may take around 24 hours to take effect and to have access to the records. • Private lawyers state that there is incommunicado detention.
<p>Nuevo León</p>	<ul style="list-style-type: none"> • Even when the police arrive at the Public Prosecutor's Office quickly, there are delays in handing the person over as they have to fill in the police report at the office, which takes approximately two hours. • Some municipal police officers have errors or omissions in their police report, meaning that the Public Prosecutor's Office does not understand the report when they review it and it has to be redone. • The Public Defender's Office is contacted through the Early Intervention Centres once they decide that the detainee will be sent to the Public Prosecutor's Office, since the reason why the person was detained constitutes a crime and there was no alternative to the proceedings.

3. Role of private lawyers and public defenders

Unlike police custody, where only the Law on the Nuevo León Public Defender's Office mentions its role at this time, the laws of each state describe the role of the Public Defender's Office from this moment. Through their Regulations, some laws, such as the Nuevo León Law, also include information standards, the role of the Public Defender's Office prior to and during the detainee's statement, and actions to be taken in the event of ill-treatment or torture.

Although Mexico City and Oaxaca do not have regulations in force, it is interesting to note, for example, that one of the obligations of the Mexico City Public Defender's Office is to set up specialist units to assist persons with disabilities and indigenous people. In the latter case, it emphasises that the Public Defender's Office will have persons trained in indigenous languages to provide support to indigenous people. It also mentions that both the Public Prosecutor's Office and the courts must provide appropriate spaces.

Oaxaca, for example, states that if the public defender delays or fails to appear at proceedings requested by the Public Prosecutor's Office, he/she will be liable under administrative law (*table 12*).

- Notification of public defenders by Public Prosecutor's Office

The interviews and responses to questionnaires sent to the Public Defender's Offices show that there is a range of notification systems. For example, some are notified by the Public Prosecutor's Office by e-mail, via WhatsApp, or by telephone, according to a shift system provided by the same Defender's Office each month.

They may also be notified by a direct request to the public defender assigned to the Public Prosecutor's Office, by the Public Defender's Office Management Information System (SIGEDEPU) or by electronic notification systems developed by the Public Defender's Office itself.

Private lawyers will be notified by the detainee's relatives once the detainee has communicated with them via a call facilitated by the Public Prosecutor's Office, which does not always take place immediately.

The states that have a coordination agreement between the Public Prosecutor's Office and the Public Defender's Office are focused on making notification and access to detainees more efficient. States that do not have such an agreement agree that this would be a mechanism that could facilitate communication and access. However, they point out that such an agreement would be subject to administrative changes both at the Public Defender's Office and the Public Prosecutor's Office.

Although most Public Defender's Offices rely on coordination agreements for immediate notification that a detainee has been handed over, none of them, for example, have gender-differentiated protocols or protocols for persons with disabilities and/or indigenous people.

- Physical access to the detainees by the public defenders

The majority of public defenders state that, unlike private lawyers, there are no obstacles in their access to the detainees. However, both identify obstacles in access to the records of the investigation. Where access is available, they identify different times when the Public Prosecutor's Office will facilitate it:

- Once the public defender is notified and assigned via e-mail or the computer system of the Public Defender's Offices.
- When the public and private lawyers arrive at the office of the Public Prosecutor's Office.
- Prior to the interview and taking the detainee's statement.
- Hours before the review hearing is set up, particularly in the case of private lawyers.

Once they have access to the detainee and, where appropriate, to the records of the investigation, public and private lawyers recommend that the detainee makes a statement in the following cases:

- There are reasons to declare the detention was arbitrary or illegal.
- The lawyer had timely access to the records of the investigation and could interview the detainee prior to the time the detainee makes his/her statement. Access to the records and interviewing the detainee enabled the lawyer to assess whether there is information that would be of benefit and could help to secure the detainee's release.
- There was ill-treatment or torture during these early stages of custody.

If, during the initial interview, the person claims to have suffered ill-treatment or torture, the public defenders will inform the Public Prosecutor's Office, file a complaint with the State Human Rights Commission and provide medical assistance. This will then be heard by the judge at a review hearing. Most public defenders have protocols for dealing with these cases.

In cases where a statement is made, the only evidence of the presence of a lawyer is a written record with the name, signature and copy of their professional licence. There is no other mechanism to verify their actual presence and attendance at this time.

Table 12. State legal framework on the Public Defender’s Office

Legislation	Text
<p>Law on the Nuevo León Public Defender’s Office</p>	<p>Article 4. The Institute shall render its professional services in criminal matters to every individual who is entitled under Articles 17 and 20 of the Political Constitution of the United Mexican States and 19 of the Political Constitution of the Free and Sovereign State of Nuevo León, consisting of a comprehensive, uninterrupted, timely, technical, proper and efficient defence.</p>
<p>Regulations of the Law on the Nuevo León Public Defender’s Office</p>	<p>Article 67. Defenders assigned to criminal cases shall (...)</p> <p>V. Provide the necessary advice to the detainees prior to their statement to the authority, ascertaining the details and circumstances of the crime being attributed to them, making them aware that they have been assigned to the case and ensuring that their constitutional guarantees and human rights will be respected by the investigative body or judge.</p> <p>VI. If the accused wishes to make a statement (...) inform them of the legal implications and respective consequences. If, however, the accused persists in their wish to make a statement, the defender will first make them record this in writing, obtaining their signature and fingerprints for the record and all legal purposes.</p> <p>VII. Warn if the detainee was tortured, beaten, detained incommunicado or his/her rights were violated, requesting to the Public Prosecutor’s Office or judge to request the corresponding medical examination. If it is positive, ensure that this circumstance is duly noted and lodge the corresponding complaint.</p> <p>VIII. Ensure that the statement or interview made to the detainee before the Public Prosecutor’s Office (...) establishes the facts as they were reported, signing the respective minutes where appropriate.</p> <p>IX. Assist the accused from the time their preparatory statement is taken or an interview is conducted, respectively, until it is concluded and intervening where necessary.</p> <p>Article 95. To comply with the information standards, the defender shall have the following obligations;</p> <p>I. To inform the accused of the content and conduct of the investigation by the Public Prosecutor’s Office and of their own investigation.</p>

Legislation	Text
<p>Federal District Public Defender's Office Act⁶²</p>	<p>Article 19. The public defenders' obligations shall be: (...) VIII. To assist persons (...) during the investigation, intermediate and trial stages.</p> <p>Article 26. Specialist units shall be set up to deal with:</p> <p>I. Persons with disabilities</p> <p>(...) Indigenous people</p> <p>Article 27. The Public Defender's Office shall have defence counsel with the language skills to assist indigenous people (...) It shall enter into collaboration agreements with public and private institutions to be supported by interpreters and translators.</p> <p>Article 33. The investigative agencies of the Public Prosecutor's Office (...) and the courts of the Superior Court of Justice of the Federal District should have public defenders who provide legal assistance to those who request it (...) they must provide the Public Defender's Office with suitable physical spaces at their premises and grant them the necessary facilities to perform their duties.</p>
<p>Law of the Public Defender's Office of Oaxaca⁶³</p>	<p>Article 35. Administrative Responsibility.</p> <p>The public servants of the Public Defender's Office shall be liable under administrative law, if:</p> <p>I. There is a delay, for a justified reason, in processing matters entrusted to them; [...].</p> <p>VII. They fail to appear, without justification, at the designated hearings and proceedings, as well as at those deemed to be urgent, determined by the director, as requested by the Public Prosecutor's Office or the judicial authority.</p>

62 Legislative Assembly of the Federal District, VI Legislature, last reform, December 2014.

63 Congress of the Free and Sovereign State of Oaxaca, Decree 2092, 12 November 2016.

Computerised notification system

Baja California Public Defender's Office

The Computerised Notification System includes the Public Prosecutor's Office and the Office of the Attorney General. Once the detainee is handed over to the Public Prosecutor's Office, this will be recorded in the system, the name of the public defender will appear immediately and will be notified. If the Public Prosecutor's Office does not record this information, the system will not allow the officer to carry out the rest of the formalities as the investigation files are in digital format.

Once notified, the public defender will go to the detention centre and interview the person on how he/she was treated during the detention, obtain general information about the fact and communicate his/her rights. During these first moments, public defenders only focus on the person's state, safety and security rather than a criminal defence strategy.

Although the investigation files are in digital format, the Public Defender's Office has a separate file where, for example, it records whether the person was ill-treated or tortured. To do this, the public defender asks the detainee for permission to take photographs of him/her in order to build up trust and, in turn, create a separate record to what is in the investigation file.

The Baja California Public Defender's Office constantly holds seminars and/or conversations with all the actors involved in this period of custody to set up practical coordination agreements, to protect the detainee and share strategies on support and defence, among others.

Section V

Addressing the main challenges of accessing a lawyer during the first hours of custody: ways forward

This analysis identified the main challenges in implementing the right of access to a lawyer in the early stages of custody in Mexico, especially during police detention and when being held by the Public Prosecutor's Office. The roles and responsibilities of the main actors and institutions involved were also analysed. Based on the above findings, some ways forward have been proposed to improve detainees' access to a lawyer in the early stages of custody.

Strengthen inter-institutional cooperation

Access to a lawyer as a safeguard to prevent torture and ill-treatment is a shared responsibility. Lawyers, both public and private, play a crucial role in early access to legal assistance. However, this right can only be implemented effectively if everyone involved performs his/her respective role and responsibilities appropriately. It is therefore essential to strengthen inter-institutional cooperation, mainly between law enforcement agencies, the Public Prosecutor's Office and the Public Defender's Office, as well as the judicial authority and human rights commissions, through institutional agreements that focus on ensuring notification and prompt access to a lawyer from the time of the arrest.

It is also suggested to establish collaboration agreements with law societies, bar associations and pro bono lawyers to facilitate access to detainees from the early stages of custody.

Reducing transfer times and delays

The right to access a lawyer should be exercised immediately upon arrest. It is essential to reduce transfer times by law enforcement agencies, as well as delays at the Public Prosecutor's Office. There must be clear deadlines that remove the law's discretion with respect to the criterion of immediacy and allow the detainee to be transferred by the police to the Public Prosecutor's Office without delay. There should also be clear deadlines that ensure physical access to a lawyer as soon as the detainee is handed over to the Public Prosecutor's Office. Finally, intermediate steps should be eliminated to guarantee that the detainee is handed over to the Public Prosecutor's Office immediately and thus reduce the risk of torture and ill-treatment, for example transferring the detainee to other places

of detention, such as police stations, before the Public Prosecutor's Office. If transfers to these types of places continue, it is essential to ensure key safeguards are in place from that moment, including access to a lawyer.

Set clear procedures for law enforcement agencies and the Public Prosecutor's Office

It is recommended to draft procedures to standardise practices for law enforcement officers and the Public Prosecutor's Office and ensure compliance with the legal requirement for immediacy in handing the person over and having access to a lawyer. These procedures should set out the steps to be followed and the deadlines for each, as well as the mechanisms to assist the authorities in complying with them. For example, it should be clear how and within what timeframe police officers must notify the Public Prosecutor's Office of the arrest, as well as the family, third party or a lawyer.

Strengthen the preventive role of lawyers

Public and private lawyers play a fundamental role in preventing torture and other ill-treatment. Since Public Defender's Offices are usually the first route of access to detainees, especially those who are most vulnerable and have limited financial resources, it is important to ensure that they have the necessary means to carry out their work effectively. It is also recommended to have shift systems that ensure that lawyers can be involved immediately in the early stages of the detention. Moreover, it is important that the Public Defender's Offices have clear procedures to prevent and deal with cases of torture and ill-treatment, including in the absence of complaints from the detainees or their families. Finally, it is critical that the Public Defender's Offices develop procedures that consider the specific needs of persons in situations of vulnerability.

Ensuring effective communication of the right of access to a lawyer

To be able to exercise the right of access to a lawyer, the detainees must be notified of this right by the police officers and the Public Prosecutor's Office. In addition to the police reading the letter of rights, detainees must be informed of how they can exercise these rights. These letters could also be placed in police vehicles so they can be seen by the detainee, together with telephone numbers of the Public Defender's Office and private lawyers. It has also been suggested that the letter of rights be made available in an easy-to-read format for persons with disabilities and also translated into several languages.

Strengthen independent oversight mechanisms

The conduct of police officers and the Public Prosecutor's Office should be monitored regularly by external and independent bodies, to identify risks and ensure that detainees are protected from abuse and have effective access to key safeguards. At the same time, it is important that there is also control over the effective enjoyment of the right to a lawyer. The National Mechanism for the Prevention of Torture is in a unique position, having unrestricted access to any place of detention, persons and information, without prior notice. Furthermore, a key role is also played by other institutions, including state human rights commissions and civil society organisations, which are authorised to visit places of detention by virtue of their mandate or by specific agreement.

Annex

Main international and regional human rights standards on access to a lawyer

International Standards

- United Nations, [International Covenant on Civil and Political Rights](#), Article 14 (3) b.
- United Nations, [International Convention for the Protection of All Persons from Enforced Disappearance](#), Article 17 (2) d.
- United Nations, [Convention on the Rights of the Child](#), Article 37 (d).
- United Nations, [International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families](#), Articles 16-18.
- United Nations, [Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment](#), Principle 11.
- United Nations, [Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems](#), Principle 3.
- United Nations, [Basic Principles on the Role of Lawyers](#), Paragraphs 1-8.
- United Nations, [Standard Minimum Rules for the Treatment of Prisoners \(Nelson Mandela Rules\)](#), Rule 61.
- United Nations, [Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment](#), Paragraphs 68-74.
- Human Rights Council, [Resolution on safeguards to prevent torture during police custody and pre-trial detention](#), 2016, A/HRC/RES/31/31, Paragraph 12 (d).
- Human Rights Committee, [General Comment No. 32](#), Paragraph 34.

Regional standards

- Organization of American States, Inter-American Commission on Human Rights, [Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas](#), approved through Resolution 1/08, March 2008, Principle V.
- [Robben Island Guidelines for the Prohibition and Prevention of Torture in Africa](#), Guideline 20 (c).
- [Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa \(Luanda Guidelines\)](#).
- European Union, [Directive 2016/1919 of the European Parliament and of the Council](#) of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings.

Access to a lawyer from the early stages of detention is a fundamental safeguard in reducing the risk of torture and other forms of ill-treatment, since that is when the risk of intimidation and ill-treatment is higher. Despite the positive reforms that Mexico has undergone in the last decade to incorporate international standards and broaden the framework of guarantees to protect detainees during the early stages of custody, there is still a huge gap between the legal framework and reality.

This document seeks to identify the obstacles and grey areas in the implementation of the right of access to a lawyer during the first hours of custody in Mexico, as well as ways forward that may contribute to reducing the gap between law and practice. This study was made possible thanks to the collaboration and contributions from various actors and institutions from different sectors.

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