
**BURYING THE RIGHT TO JUSTICE IN
BACKYARD BATTLEFIELDS:**

**MILITARIZATION IN MEXICO CONFLICTS
WITH THE AMERICAN CONVENTION
ON HUMAN RIGHTS**

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I. INTRODUCTION

The Mexican federal government relied on its military to instill public order in Mexico throughout the twentieth century.¹ The armed

1. See CENTRO DE DERECHOS HUMANOS DE LA MONTAÑA TLACHINOLLAN [TLACHINOLLAN MOUNTAIN CENTER FOR HUMAN RIGHTS], *La militarización en la montaña: Abusos crecientes y ausencia de controles civiles* [The Militarization of

forces increasingly supplanted police forces during the Mexican Dirty War in the 1970s to 1980s to suppress indigenous and peasant social movements, particularly in southern Mexico.² In the 1990s, the military was used to quell the uprisings of the Zapatista National Liberation Army (*Ejército Zapatista de Liberación Nacional*) (EZLN) and the Popular Revolutionary Army (*Ejército Popular Revolucionario*).³ In the decades since, Mexican presidents have relied on the military to fulfill traditional police roles, continue to suppress uprisings, combat the drug trade, and weaken organized crime.⁴ During President Felipe Calderón's administration, the government initiated the "war on drugs,"⁵ and increased its use of the

the Mountain: Growing Abuses and Lack of Civilian Control], in LUCHAR PARA CONSTRUIR EL AMANECER DE LA JUSTICIA 56, 57–60 (Atziri Ávila & Román Hernández eds., 2011) [hereinafter TLACHINOLLAN] (describing the use of the Mexican armed forces in public security throughout the twentieth century in repressing political opposition and social movements).

2. See *id.* (noting that the Mexican Dirty War resulted in the forced disappearances of over one thousand Mexican citizens as well as torture and extrajudicial killings); SUSANA NISTAL & IÑIGO PRIETO, PEACE BRIGADES INTERNATIONAL, HUMAN RIGHTS DEFENDERS IN THE STATE OF GUERRERO 33 (2007), available at http://www.protectionline.org/IMG/pdf/Defenderes_Guerrero_PBI_Mexico_ENG.pdf (noting that initially the Mexican federal government used the military to suppress movements such as the Zapatista Army of National Liberation in Chiapas; however, after the guerrilla groups were largely quashed in the 1980s "the army was incorporated into civil police bodies"); see also Graham H. Turbiville, *Mexico's Multimission Force for Internal Security*, 80 MIL. REV. 41, 44 (2000) (describing the incorporation of thousands of military officers and equipment into the federal police force in the late 1990s).

3. See TLACHINOLLAN, *supra* note 1, at 58 (noting that in the 1990s the passing of the "General Law" [*Ley General*] — which increased coordination between the military and the national police — coincided with active and retired military agents assuming roles in public security and justice administration).

4. *Id.*; see also Ken Ellingwood, *Mexico Military Faces Political Risks Over Drug War*, L.A. TIMES (Mar. 23, 2010), <http://articles.latimes.com/2010/mar/23/world/la-fg-mexico-army23-2010mar23> (referring to the Mexican military as the "tip of the spear" in the "war on drug cartels" and noting that since 2006, 50,000 military personnel have been performing tasks such as manning roadblocks, patrolling cities, and performing searches in houses).

5. See COLLEEN W. COOK, CONG. RESEARCH SERV., RL34215, MEXICO'S DRUG CARTELS (2007) (discussing violence among warring drug cartels and the Mexican Armed Forces that characterizes the "war on drugs" and noting that drug cartels have gained power since the demise of the Colombian drug cartels in the 1990s). Mexico is now the leading supplier country of illicit substances to the United States. *Id.*; see also, e.g., José Eleazar Ávila, *¡40,000 muertos! ¿Cuántos más?... [40,000 Dead! How Many More?]*, MILENIO (June 14, 2011), <http://impreso.milenio.com/node/8975565> (estimating the death toll to be 40,000

armed forces to fulfill civilian police roles.⁶

The increase in military presence in civilian law enforcement forces correlates to an increase in crimes committed by the military against civilians.⁷ The majority of these crimes have gone unpunished because crimes committed by the military against civilians are subject to military jurisdiction under the Military Justice Code, as opposed to the civilian law enforcement and judicial regime.⁸ The consequence is unbridled impunity for soldiers who commit crimes against civilians.⁹ Military adjudication of crimes against civilians creates institutional hesitancy of tribunal members

people); *Progress in Mexico Drug War is Blood-Drenched*, MSNBC.COM (Mar. 10, 2009), http://www.msnbc.msn.com/id/29620369/ns/world_news-americas/t/progress-mexico-drug-war-blood-drenched/#.T1eEmfGPVZo (describing the increase in deaths associated with the “war on drugs,” and noting that deaths doubled from 2008 to 2009).

6. See Christina M. Fetterhoff, *Military Justice Reform in Mexico Amid Increased Violence*, CENTER FOR HUMAN RIGHTS & HUMANITARIAN LAW (Oct. 19, 2011), <http://hrbrief.org/2011/10/military-justice-reform-in-mexico-amid-increased-violence/> (noting the Calderón Administration deployed over 40,000 troops and the number of alleged human rights abuses committed by the military increased).

7. See HUMAN RIGHTS WATCH, *NEITHER RIGHTS NOR SECURITY: KILLINGS, TORTURE, AND DISAPPEARANCES IN MEXICO’S “WAR ON DRUGS”* 5 (2011) [hereinafter *NEITHER RIGHTS NOR SECURITY*] (concluding that the current policy has led to an increase in human rights violations, including allegations of torture, extrajudicial killings, and enforced disappearances); see also *Mexico’s Supreme Court Ends Military Jurisdiction for Soldiers Committing Human Rights Violations*, INT’L DRUG POL’Y CONSORTIUM, <http://www.idpc.net/fr/node/1775> (last visited Oct. 10, 2011) [hereinafter *IDPC*] (explaining that during the Calderón Administration, Mexican citizens filed almost 5,000 complaints against the military for human rights violations, including more than 1,000 in 2010 alone).

8. See Código de Justicia Militar [CMJ] [Military Justice Code] art. 57(II)(A), *Diario Oficial de la Federación* [DO], 31 de Agosto de 1933 (Mex.) (requiring crimes committed by soldiers in times of service to be investigated and adjudicated under military jurisdiction); see also HUMAN RIGHTS WATCH, *UNIFORM IMPUNITY: MEXICO’S MISUSE OF MILITARY JUSTICE TO PROSECUTE ABUSES IN COUNTERNARCOTICS AND PUBLIC SECURITY OPERATIONS*

13 (2009) [hereinafter *UNIFORM IMPUNITY*] (explaining that the Mexican military has expanded the scope of its jurisdiction to include human rights violations committed by soldiers against civilians).

9. See *NEITHER RIGHTS NOR SECURITY*, *supra* note 7, at 10 (noting that the military prosecutor’s office has opened over 3,000 cases of human rights violations perpetrated by the military against civilians and revealing that soldiers were convicted in less than one half of one percent of these cases).

to enforce the law.¹⁰

Over the past decade, the Inter-American Human Rights system issued recommendations and decisions in several cases that involved military officers committing crimes against civilians.¹¹ The Inter-American Court of Human Rights (“IACtHR”) heard four cases since 2008 in which members of the Mexican military were held to have committed grave human rights violations.¹² The IACtHR has consistently held that military investigation and adjudication of crimes committed by the military against civilians violates the right to judicial guarantees under the American Convention on Human Rights.¹³ Specifically, this type of adjudication and investigation violates Article 8, regarding judicial guarantees, and Article 25, regarding judicial protection.¹⁴ In July 2011, Mexico’s Supreme Court issued a resolution (“Radilla Resolution”) recognizing that the Military Justice Code was incompatible with Mexico’s Constitution and the American Convention.¹⁵ Applying this rule, the Supreme Court held that military tribunals should not decide cases in which the rights of civilians are at stake.¹⁶

10. See UNIFORM IMPUNITY, *supra* note 8, at 2–4 (examining the institutional problem of soldiers policing themselves).

11. See *Gonzalez Perez v. Mexico*, Case 11.565, Inter-Am. Comm’n H.R., Report No. 53/01, OEA/Ser.L/V/II.111, doc. 20 rev. ¶ 2 (2001) (recounting that Mexican Armed Forces personnel arbitrarily detained, tortured, and raped three victims); *Velásquez Rodríguez v. Honduras*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 119 (July 29, 1988) (relaying that Honduran soldiers kidnapped, tortured, and disappeared victims).

12. See, e.g., *Cabrera Garcia v. Mexico*, Preliminary Objections, Merits, Reparations and Legal Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 220, ¶¶ 187–89, 194–207 (Nov. 26, 2010) (holding that that Mexico violated American Convention Articles 8, 25, and 1(1) when military courts intervened in the preliminary investigation into alleged torture and arbitrary detention of victims and subjected the perpetrators to military jurisdiction).

13. E.g., *id.* ¶¶ 194–207 (establishing that military jurisdiction is not the competent jurisdiction to investigate, prosecute, or punish those who commit violations of human rights).

14. *Id.*

15. See Resolución Dictada por el Tribunal Pleno en el Expediente Varios 912/2010 [Resolution of the Plenary Supreme Court on Case 912/2010], *Diario Oficial de la Federación* [DO], 4 Octubre 2011 ¶¶ 43–44 (Mex.) [hereinafter *Radilla Resolution*] (ruling that Military Justice Code Article 57, which confers military jurisdiction over cases involving civilians, is incompatible with the Constitution of Mexico).

16. See *id.* (ruling that alleged violations of human rights of civilians do not fall

The Supreme Court also held that it had original jurisdiction to hear cases involving military jurisdiction.¹⁷ In May 2012, the court announced that it had received twenty-eight cases involving military jurisdiction from lower courts, and ordered all lower courts to postpone final rulings in pending cases involving the transfer of human rights violations from civilian to military jurisdiction until it had resolved the constitutional issue in the cases before it.¹⁸ Under Mexico's civil law system, the Radilla case does not itself set a precedent for the unconstitutionality of military jurisdiction over civilians, but it has opened the door to creating binding precedent by allowing the court to hear a series of cases on the same constitutional issue.¹⁹

This Comment evaluates whether the Radilla Resolution complies with American Convention Articles 8 and 25 and investigates whether the militarization of law enforcement in Mexico is an obstacle to full compliance. Part II(A) introduces the concept of police militarization, a process that is increasingly occurring throughout Mexico.²⁰ It describes the recent Radilla Resolution of the Mexican Supreme Court and the jurisprudence in the Inter-American system regarding the right to justice under Articles 1, 2, 8, and 25 of the American Convention.²¹

under military jurisdiction under any circumstances); *see also Mexico's Supreme Court Decides to End Military Jurisdiction for Soldiers Who Commit Human Rights Violations*, WASHINGTON OFF. ON LATIN AM. (July 13, 2011), http://www.wola.org/commentary/mexico_s_supreme_court_decides_to_end_military_jurisdiction_for_soldiers_who_commit_human_rights_violations [hereinafter WOLA] (describing the decision as a historic ruling); IDPC, *supra* note 7 (discussing that the Supreme Court issued the historic ruling after reviewing the 2009 Inter-American Court decision of Radilla Pacheco).

17. *See* Radilla Resolution, *supra* note 15, ¶¶ 45, 55.

18. Acuerdo General Número 6/2012 [General Agreement Number 6/2012], Quinto [Part Five], Diario Oficial de la Federación [DO], 17 de Mayo de 2012 (Mex.).

19. *See* Jorge Carrasco Araizaga, *Corte Evita Jurisprudencia en Fuero Militar [Court Avoids Jurisprudence on Military Jurisdiction]*, EL PROCESO (Sept. 3, 2012), <http://www.proceso.com.mx/?p=318813> (noting that in its most recent case, the Supreme Court failed to rule on the constitutionality of the Military Justice Code, missing an opportunity to progress in setting a binding precedent).

20. *See* discussion *infra* Part II.A (explaining that militarization is a process that has consequences for both law enforcement and the justice system).

21. *See* discussion *infra* Part II.B (discussing recent cases regarding military jurisdiction in the Inter-American System).

The Radilla Resolution, although it is a vital step toward compliance with American Convention Articles 8 and 25, does not end military jurisdiction over investigation and adjudication of violations committed by military personnel because it is not binding, but it does create a window to do so.²² Part III(B) argues that the use of military to fulfill both law enforcement and adjudication roles is an obstacle to full compliance.²³

Part IV recommends that Mexico's Congress enact legislation that ends military jurisdiction for crimes against civilians.²⁴ Mexico must limit its use of the military in civilian law enforcement through legislation.²⁵ In addition, the United States can use foreign policy to pressure the Mexican government to reform its policy of militarization.²⁶

II. BACKGROUND

A. CHARACTERISTICS AND CONSEQUENCES OF POLICE MILITARIZATION IN MEXICO

The line between the armed forces and civilian public security is blurred,²⁷ as many state and municipal police forces are considered militarized.²⁸ In countries where this takes place, military tribunals

22. See discussion *infra* Part III.A (explaining the lack of legal force of the Radilla Resolution and Mexico's duty to ensure the right to justice through effective legislation).

23. See discussion *infra* Part III.B (discussing deficiencies in investigations and the thousands of cases pending under military jurisdiction without progress).

24. See discussion *infra* Part IV.A (arguing that Military Justice Code Article 57 must be amended and that legislation must protect civilians who are victims of military abuse and wish to prosecute).

25. *Id.*

26. *Id.*

27. See GEORGE WITHERS ET AL., WASHINGTON OFFICE ON LATIN AM., PREACH WHAT YOU PRACTICE: THE SEPARATION OF MILITARY AND POLICE ROLES IN THE AMERICAS 8–14 (2010) (discussing generally that in Latin America many countries do not have a clear delineation between the military and the police, and that the Mexican military in particular is deeply engaged in law enforcement).

28. See *Mexico Replaces Police with Soldiers in Border Area* (National Public Radio broadcast June 24, 2011) (conveying that the federal executive replaced entire police departments in 22 municipalities with military units); see also U.N. OFFICE ON DRUGS AND CRIME [UNODC], HANDBOOK ON POLICE ACCOUNTABILITY, OVERSIGHT, AND INTEGRITY, at 1 n.2, U.N. Sales No. E.11.IV.5 (2011) [hereinafter UNODC]. Militarization is the process by which police forces

frequently replace civilian control over the judiciary.²⁹ This process occurs regardless of whether a state of war exists.³⁰ A militarized police force lacks civilian accountability,³¹ characterized by monitoring of law enforcement by ministries, the judiciary, the legislature, and members of civil society.³² In Mexico, members of the military are not accountable to the state or local police, but instead have exclusive operations that supersede those of public officials.³³

Mexican military personnel differ significantly from civilian police forces in equipment, capabilities, and training.³⁴ For example, military personnel are not trained in the collection and preservation of evidence.³⁵ Soldiers frequently manipulate crime scenes, obtain

become “military in style, culture and operations and sometimes in fact, when the police have been part of the military,” UNODC, *supra*, at 1 n.2.

29. See generally WITHERS ET AL., *supra* note 27, at 8–14 (noting that soldiers throughout many countries in Latin America are subject to a military justice system and mentioning Colombia’s public security as one of the most militarized); see also COLOM. COAL. AGAINST TORTURE, ALTERNATE REPORT TO THE 4TH PERIODIC REPORT OF THE COLOMBIAN STATE TO THE COMMITTEE AGAINST TORTURE 7 (2009), available at http://www.coljuristas.org/documentos/libros_e_informes/informe_alterno_4_tortura_re_en.pdf (reporting on the use of the Colombian military justice system to investigate and adjudicate cases of torture).

30. Lisa Brooten, *Media, Militarization, and Human Rights: Comparing Media Reform in the Philippines and Burma*, 4 COMMUNICATION, CULTURE, & CRITIQUE 229, 230 (2011) (noting that militarization is also a process that authorizes violence as a means of maintaining public order).

31. See UNODC, *supra* note 28, at 9 (advocating that a critical step to establish civilian oversight over the police is to demilitarize it and make sure that officers report to civilian— not military—authorities); COMMONWEALTH HUMAN RIGHTS INITIATIVE [CHRI], POLICE ACCOUNTABILITY: TOO IMPORTANT TO NEGLECT, TOO URGENT TO DELAY 19 (Maja Daruwala & Claire Doube eds., 2005) [hereinafter CHRI, POLICE ACCOUNTABILITY] (stating that civilians have control over police forces if those forces are directly accountable to the people they protect).

32. See UNODC, *supra* note 28, at 9 (advocating for a transparent way to hold police accountable so that civilian perception of the force improves).

33. See Marcos Moloeznik, *The Militarization of Public Security and the Role of the Military in Mexico*, in POLICE AND PUBLIC SECURITY IN MEXICO 65, 73 (Robert A. Donnelly & David A. Shirk eds., 2009) (explaining that the political autonomy of the armed forces is largely due to the two defense cabinet ministries being headed by military authorities as opposed to a political authority).

34. See WITHERS ET AL., *supra* note 27, at 3, 17 (describing the general differences in military and civilian police training in Latin America and specifically in Mexico with regard to a lack of human rights training).

35. See Press Conference, Special Rapporteur, Inter-Am. Comm’n H.R.,

testimony through torture, and fail to document injuries through appropriate medical examinations.³⁶

Moreover, Mexico's police militarization is increasing.³⁷ In 2006, the government installed thousands of military personnel and authorized them to perform domestic security duties.³⁸ An estimated 50,000 soldiers currently engage in counter-narcotics operations throughout Mexico.³⁹ Military personnel operate highway checkpoints and patrol city streets and rural areas.⁴⁰ Military officers occupy traditionally civilian law enforcement offices in twenty-one out of Mexico's thirty-one states.⁴¹ A likely reason for the Calderón

Conclusion of the 143 Period of Sessions (Nov. 4, 2011) (commenting on the lack of citizen security, and training and preparation for maintaining public order); *see also Mexico: Deliver Justice for Killings, Disappearances in Monterrey*, HUMAN RIGHTS WATCH (Feb. 3, 2011), <http://www.hrw.org/news/2011/02/03/mexico-deliver-justice-killings-disappearances-monterrey> (describing the failure of the armed forces to conduct thorough investigations, and comparing military personnel, who are trained to use lethal force to prevail in conflict, with civilian police, who are traditionally trained to use the minimum force necessary to enforce laws of the immediate community).

36. *See* NEITHER RIGHTS NOR SECURITY, *supra* note 7, at 8-19, 161 (noting that crime scenes are frequently tampered with to give the appearance that cartel members, rather than soldiers, are responsible).

37. *See* Maria de la Luz González, *Crece 68% la Fuerza Militar en Seguridad [Military Security Force Grows 68%]*, EL UNIVERSAL (Sept. 17, 2011), <http://www.eluniversal.com.mx/nacion/189027.html> (relaying that the number of soldiers in public security roles in Mexico has increased sixty-eight percent since 2006; soldiers are in charge of public safety units in fourteen of Mexico's thirty-one state police departments and are chiefs of local police in six municipalities); *see also* Luis A. Pérez & Mariana Martínez, *The Militarization of Tijuana*, LA PRENSA SAN DIEGO (Feb. 29, 2008), <http://laprensa-sandiego.org/archieve/2008/february29-08/militarization.htm> (noting that the military budget is increasing at the rate of 16 percent per year and military checkpoints and convoys are seen frequently).

38. *See The Mexican Military Grows 68 Percent for Security Tasks*, DIÁLOGO (Sept. 26, 2011), http://www.dialogo-americas.com/en_GB/articles/rmisa/features/regional_news/2011/09/26/feature-ex-2553 (noting that Felipe Calderón deployed 21,000 soldiers throughout Mexico).

39. *See* WOLA, *supra* note 16 (discussing the importance of the Radilla Resolution in relation to increasing reports of human rights violations by soldiers).

40. *See* Joe Cummings, *Drugs, Rebellion, and Mexico's Militarization*, MEXCONNECT (Jan. 1, 2006), <http://www.mexconnect.com/articles/1306-drugs-rebellion-and-mexico-s-militarization> (noting that the troop size and military budget increased significantly since the 1990s).

41. *See* Marcelo Galan, *Avanza Cambio de civiles por militares [Progress in Exchange of Police for Military]*, EL UNIVERSAL (Feb. 28, 2011), <http://www.eluniversal.com.mx/estados/79716.html> (explaining that senior armed

administration's decision to increase soldiers in the public security sphere is public distrust of, and unpreparedness of, civilian police forces.⁴² However, while members of the administration claim that the presence of the military in these territories is temporary, there is no timeline or plan for their withdrawal or for transition to a reliable police force.⁴³

1. Consequences of Militarized Law Enforcement and Adjudication in Mexico

In Mexico, military tribunals exert jurisdiction over cases involving crimes of torture, rape, and arbitrary detention committed by military personnel against civilians.⁴⁴ The application of military jurisdiction in these cases creates an inherent conflict of interest.⁴⁵ The Mexican military justice system is not a neutral party when presiding over cases involving crimes committed against civilians by military personnel, leading to rampant impunity.⁴⁶

An unaccountable police force increases the opportunity for

services officers conduct most surveillance in areas where cartels are present).

42. See Moloeznik, *supra* note 33, at 70 (conveying that a majority of Mexicans perceive the military positively and distrust the state and federal police forces; that forty-five percent believe that the military's primary purpose should be crime fighting and drug trafficking; and that historically Mexico uses the military during national crises).

43. See Pérez & Martínez, *supra* note 37 (noting that the increasing military budget also demonstrates a lack of will to withdraw troops).

44. See UNIFORM IMPUNITY, *supra* note 8, at 37-62 (analyzing cases of grave abuses committed by soldiers brought by dozens of alleged victims).

45. See *id.* at 10 (conveying structural deficiencies of the military justice system and noting that there is practically no publicly available information regarding military tribunals); see also KRISTIN BRICKER, CTR. FOR INT'L GOVERNANCE, MILITARY JUSTICE AND IMPUNITY IN MEXICO'S DRUG WAR 4 (2011), available at <http://www.cigionline.org/publications/2011/9/military-justice-and-impunity-mexicos-drug-war> (noting that since 2006, few soldiers have been punished for human rights violations). See generally Rosendo Cantú v. Mexico, Preliminary Objections, Merits, Reparations and Legal Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 216 (Aug. 31, 2010) (discussing the forwarding of Rosendo Cantú's case to military jurisdiction and consequent impunity of perpetrators).

46. See UNIFORM IMPUNITY, *supra* note 8, at 10 (explaining that the Secretary of Defense has control over both the executive and judicial aspects of the military and that military personnel lack the incentive to make critical judgments for fear of not being promoted).

human rights violations.⁴⁷ The implementation of an unaccountable, and inappropriately trained, militarized law enforcement and judiciary generally leads to high rates of impunity,⁴⁸ discrimination, reduced access to justice,⁴⁹ a failure to afford due process, and the use of brutality, torture, and extrajudicial executions.⁵⁰ In Mexico, the increase in deployment of military personnel over the past five years correlates with increases in alleged human rights violations.⁵¹ Absent a policy governing the use of force, members of the armed forces frequently perform warrantless searches of individuals, automobiles, and houses.⁵² Since 2006, Mexico's National Human Rights Commission (CNDH) has received more than 4,800 complaints against the military for human rights violations, increasing from 182 complaints in 2006 to 1,415 in 2010.⁵³ Through its investigations, the CNDH has issued over forty reports documenting human rights violations committed by the military.⁵⁴

47. See CHRI, POLICE ACCOUNTABILITY, *supra* note 31, at 19 (advocating that the police are responsible for ensuring that citizens are able to enjoy fundamental rights); cf. WITHERS ET AL., *supra* note 27, at 12 (describing the use of the armed forces of Honduras to evict and capture the poor in land disputes, which has resulted in an increase in alleged human rights violations).

48. Press Release, U.N. Office of the High Commissioner of Human Rights, United Nations Working Group on Enforced or Involuntary Disappearances Concludes Visit to Mexico (Mar. 31, 2011), *available at* <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10907&LangID=E> [hereinafter WGEID Press Release].

49. See CHRI, POLICE PRACTICES: OBSTRUCTION TO POOR PEOPLE'S ACCESS TO JUSTICE 11-13 (2003) [hereinafter CHRI, POLICE PRACTICES] (describing the common practice of the militarized police force in India of denying the registration of complaints of impoverished people).

50. See CHRI, POLICE ACCOUNTABILITY, *supra* note 31, at 3-8 (describing abuses by militarized police forces in the British Commonwealth); see also Broton, *supra* note 30, at 230 (explaining that globally, civilians are increasingly victims of military abuse); ADAM ISACSON, NACLA REPORT ON THE AMERICAS (2004) (noting that using the military to fulfill civilian roles poses serious risks to human rights).

51. See NEITHER RIGHTS NOR SECURITY, *supra* note 7, at 4-5 (arguing that the increase in human rights abuses is a direct result of the current Mexican security policy).

52. See WGEID Press Release, *supra* note 48 (noting that available information shows that only the Ministry of the Navy and the Police of Mexico City have policies regarding the use of force).

53. WOLA, *supra* note 16.

54. See WGEID Press Release, *supra* note 48 (noting that these reports are often the only records available to demonstrate patterns of human rights violations as military investigative and adjudicative bodies do not release equivalent reports).

2. *Overview of Mexican Law Regarding the Use of Military and the Supreme Court Radilla Resolution*

Mexico's Constitution prohibits the use of military authority in many civilian matters.⁵⁵ Article 13 prohibits the use of military tribunals in the adjudication of persons who do not belong to the army.⁵⁶ Article 129 provides that soldiers must only execute operations that are directly connected to military missions.⁵⁷ In addition, Article 1 provides that all international human rights treaties and norms are binding.⁵⁸

Despite these constitutional requirements, the federal executive continues to use the armed forces to maintain public order in Mexico, and prosecutors routinely send cases involving civilians and soldiers to military tribunals for adjudication.⁵⁹ Between 1917 and 1988, the Supreme Court periodically issued nonbinding rulings allowing military jurisdiction in cases where civilians were victims of military abuses.⁶⁰ Moreover, Article 57 of the Military Justice Code, a federal law, requires that crimes committed by military personnel in active service or related to military operations be subject to military jurisdiction.⁶¹ In practice, this provision ensures that allegations of human rights violations committed by military personnel are almost always subject to military jurisdiction.⁶² Despite the fact that the Constitution of Mexico vests domestic security in the municipal and state governments, the armed forces are authorized by the president

55. Constitución Política de los Estados Unidos Mexicanos [C.P.] [Political Constitution of the United Mexican States], *as amended*, art. 13, Diario Oficial de la Federación [DO], 5 de Febrero de 1917, *translated in* Constitution of Mexico, ORG. OF AM. STATES, http://www.oas.org/juridico/mla/en/mex/en_mex-int-text-const.pdf (last visited Nov. 16, 2011).

56. *Id.* art. 13.

57. *Id.* art. 129.

58. *Id.* art. 1.

59. *See* UNIFORM IMPUNITY, *supra* note 8, at 5, 9 (noting that the Attorney General routinely acquiesces to assertions of jurisdiction by military officials).

60. *See id.* at 5, 15 (explaining that the military has consistently asserted jurisdiction in cases involving allegations of grave abuses of civilians' rights).

61. Código de Justicia Militar [CMJ] [Military Justice Code] art. 57(II)(A), Diario Oficial de la Federación [DO], 31 de Agosto de 1933 (Mex.).

62. *See* UNIFORM IMPUNITY, *supra* note 8, at 5, 13 (explaining that in practice, the Attorney General of Mexico has automatically sent all cases involving crimes committed by the military to the Military Justice Attorney General).

to maintain order over rural areas.⁶³

A decision by the Mexican Supreme Court may impact the use of military jurisdiction, but to create jurisprudence on a legal or constitutional issue, the Supreme Court must issue five uninterrupted and consistent decisions on the issue.⁶⁴ The Radilla Resolution announces that members of the military accused of any human rights violation must be tried in civilian courts.⁶⁵ The ruling came after consideration of a 2009 decision by the Inter-American Court of Human Rights regarding the forced disappearance of human rights defender Rosendo Radilla in 1974 by Mexican soldiers.⁶⁶

The Radilla Resolution holds that: (1) Article 1 of Mexico's Constitution requires all judges in Mexico to adhere to international human rights treaties, adopting an interpretation most favorable to human rights,⁶⁷ (2) decisions of the IACtHR in which Mexico is a party are binding and others are informative or guiding,⁶⁸ (3) the Supreme Court has original jurisdiction disputes between military and civilian courts,⁶⁹ (4) Military Justice Code Article 57 is

63. See Raúl Benítez, *The Urgent Need for Reform in Security Policy*, in 1 WOODROW WILSON CENTER REPORTS ON THE AMERICAS, MEXICO IN TRANSITION 42 (Andrew D. Selee ed., 2001) (conveying that this is due to an institutional structure in which legal initiatives are presented by the president and largely unchecked by legislative mechanisms).

64. See Radilla Resolution, *supra* note 15, ¶¶ 43–44 (holding that adjudication of cases involving civilians in military tribunals violates the Constitution and international law). *But see* JORGE A. VARGAS, MEXICAN LAW FOR THE AMERICAN LAWYER 18–21 (2009) (explaining that Mexico belongs to the civil legal tradition and thus does not abide by the principle of stare decisis and explaining that under the Federal Amparo Act, jurisprudence is created after five consecutive and uninterrupted decisions approved by an identically-constituted court). *See also* FRANCISCO A. AVALOS, INTRODUCTION TO THE MEXICAN LEGAL SYSTEM 13 (2d. ed. 2000) (describing that binding Supreme Court jurisprudence is established only after five consecutive and consistent rulings on a legal issue, and the high value of codified law within Mexico's civil law system).

65. See Radilla Resolution, *supra* note 15, ¶¶ 43–44 (stating that military jurisdiction cannot operate under any situation involving the vulnerability of human rights of civilians).

66. See *id.* ¶ 37 (recognizing that the IACtHR ordered the state of Mexico to adopt certain measures).

67. See *id.* ¶ 27 (establishing a system of interpretation and application as required by IACtHR decisions).

68. See *id.* ¶ 31 (developing an analytical framework for lower courts to follow).

69. See *id.* ¶¶ 45, 55 (ordering all federal courts and tribunals to inform the

incompatible with Article 13 of the Constitution and Articles 2 and 8(1) of the American Convention,⁷⁰ and (4) once an investigation is filed it cannot be removed to military jurisdiction.⁷¹ This aspect of the Radilla Resolution only applies to future cases; thus, pending cases in military jurisdiction require an injunction to be filed in civilian court in order to have their cases removed.⁷² The Mexican Congress has yet to pass a legislative reform that complies with the Supreme Court's ruling.⁷³

B. THE INTER-AMERICAN SYSTEM AND ITS JURISPRUDENCE
REGARDING THE RIGHT TO JUSTICE IN RELATION TO
MILITARIZATION

The standards of the Inter-American system are enshrined in two multilateral treaties: the American Declaration on the Rights and Duties of Man of 1948 and the American Convention on Human Rights of 1969.⁷⁴ The American Convention on Human Rights

Supreme Court when a related situation arises so that it may assert original jurisdiction in the matter).

70. See *id.* ¶¶ 43-44 (explaining that article 57 is incompatible with article 1 of the Mexican Constitution and articles 2 and 8(1) of the American Convention because to establish that crimes committed by the military are subject to military jurisdiction does not guarantee to civilians or their families the opportunity to come before a judge in an ordinary jurisdiction); see also Código de Justicia Militar [CMJ] [Military Justice Code] art. 57(II)(A), Diario Oficial de la Federación [DO], 31 de Agosto de 1933 (Mex.) (defining crimes within military jurisdiction as those committed by soldiers in times of service or with a military motive).

71. See Radilla Resolution, *supra* note 15, ¶ 50.

72. See *id.* ¶ 45 (noting that the ruling should be applied in all future cases); see also BRICKER, *supra* note 45, at 7 (arguing that the resolution is a temporary solution and that Mexico can only be in compliance once the Military Justice Code is modified).

73. See BRICKER, *supra* note 45, at 8-9 (discussing proposals to modify the Military Justice Code); see also Gloria Leticia Díaz, "Usted Disculpe", *Dice Gobierno a Indígena Violada por Militares Hace Nueve Años* [Government says "We Apologize to You" to an Indigenous Woman Raped Nine Years Ago], PROCESO.COM.MX (Dec. 15, 2011), <http://www.proceso.com.mx/?p=291519> (reporting that on December 9, 2011, the president contacted legislators requesting reform of Article 57 to conform to the IACtHR decisions).

74. See HENRY J. STEINER ET AL., INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW POLITICS AND MORALS 1020, 1025 (3d ed. 2007) (discussing the two intergovernmental bodies that supervise state compliance with the American Convention: the Inter-American Commission on Human Rights (IACHR) and the Inter-American Court of Human Rights (IACtHR)).

“American Convention”) vests the application and interpretation of the American Convention on Human Rights and other treaties concerning human rights with the IACtHR.⁷⁵ Mexico has ratified the American Convention and recognized as binding the adjudicatory jurisdiction of the IACtHR on matters relating to the interpretation or application of the American Convention on Human Rights.⁷⁶ The Right to Justice, under Articles 1(1), 2, 8, and 25, of the American Convention, has been developed extensively in the jurisprudence of the IACtHR over the past decade.⁷⁷

1. Articles 8 and 25 of the American Convention

American Convention Article 8 encompasses due process rights under the American Convention.⁷⁸ These include guarantees to adjudication within a reasonable time by a competent and neutral court.⁷⁹ Article 25 guarantees the right to judicial protection.⁸⁰

75. Organization of American States, American Convention on Human Rights arts. 52–65, Nov. 22, 1969, 1969 O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 [hereinafter American Convention]; see also INTER-AM. COURT OF HUMAN RIGHTS, <http://www.corteidh.or.cr/historia.cfm?&CFID=230260&CFTOKEN=89785735> (last visited Mar. 21, 2012) (stating that the American Convention is a multilateral treaty that was signed in 1969 and entered into force in July of 1978).

76. See Constitución Política de los Estados Unidos Mexicanos [C.P.] [Political Constitution of the United Mexican States], as amended, art. 1, Diario Oficial de la Federación [DO], 5 de Febrero de 1917 (guaranteeing that all people of Mexico enjoy the human rights recognized in the Mexican Constitution and treaties to which Mexico is a party); see also American Convention, *supra* note 75, arts. 44–50 (describing the procedure and competence of the IACHR to hear matters concerning violations of the American Convention).

77. See Richard J. Wilson & Jan Perlin, *The Inter-American Human Rights System: Activities from Late 2000 Through October 2002*, 18 AM. U. INT'L L. REV. 651, 653–700 (providing an overview of recent cases before the IACtHR in which Articles 1, 2, 8 and 25 were applied); see also STEINER ET AL., *supra* note 74, at 433 (noting that the IACHR opposes the use of military courts in matters where there are civilian parties even in the context of maintaining national security).

78. See generally *Rosendo Cantú v. Mexico*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 216, ¶¶ 72–75, 161 (Aug. 31 2010) (holding that Mexico violated Articles 8 and 25 when the case of soldiers torturing and gang raping Rosendo Cantú was transferred to military jurisdiction).

79. American Convention, *supra* note 75, art. 8 (establishing that such court must be previously established by law).

80. See *id.* art. 25 (“[e]veryone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal . . . even though such violation may have been committed by persons acting in the course of their official

The IACtHR and the IACHR have repeatedly affirmed that military tribunals and investigations are unacceptable under Articles 8 and 25.⁸¹ Such tribunals are regarded as a violation of the “Principle of the Competent Court.”⁸² The IACtHR examines “the nature of the crime and the juridical right damaged” to determine whether a court is competent.⁸³ A military tribunal is only competent when presiding over crimes that are military in nature and in which military rights are infringed.⁸⁴ Impartiality and independence are also essential factors in determining whether due process rights are protected.⁸⁵

The IACtHR also decides whether the investigations into alleged crimes are in accordance with the “principle of effectiveness.”⁸⁶

duties.”).

81. *See, e.g.*, *Gonzalez Perez v. Mexico*, Case 11.565, Inter-Am. Comm’n H.R., Report No. 53/01, OEA/Ser.L/V/II.111, doc. 20 rev. ¶ 4 (2001) (concluding that the Mexican state violated articles 8 and 25 when the Attorney General transferred the preliminary investigation of an alleged rape and torture by soldiers to the PGJR); *Bolaños Quiñones v. Ecuador*, Case 10.580, Inter-Am. Comm’n H.R., Report No. 10/95, OEA/Ser.L/V/II.91, doc. 7, ¶¶ 42-48 (1996) (finding that Ecuador violated Articles 8 and 25 when the investigation was carried out by Naval Intelligence agents when marines detained and forcibly disappeared Bolaños Quiñonez).

82. *See, e.g.*, *Radilla-Pacheco v. Mexico*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 209, ¶ 266 (Nov. 23, 2009) (discussing the principle of the competent court as linked to due process under articles 8 and 25); *Cabrera Garcia v. Mexico*, Preliminary Objections, Merits, Reparations and Legal Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 220, ¶¶ 194-201 (Nov. 26, 2010) (declaring that Mexico violated article 8 because a deficient investigation inevitably results in an incompetent tribunal).

83. *See, e.g.*, *Rosendo Cantú v. Mexico*, Preliminary Objections, Merits, Reparations and Legal Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 216, ¶ 161 (Aug. 31, 2010) (conveying that the nature of the crime was gang rape and did not relate to the military mission); *Radilla-Pacheco*, Inter-Am. Ct. H.R. (ser. C) No. 209, ¶ 277 (describing that the nature of the crime was arbitrary detention and did not impact military rights).

84. *See Radilla-Pacheco*, Inter-Am. Ct. H.R. (ser. C) No. 209, ¶ 273 (noting that if human rights such as the right to life are infringed, then ordinary courts are the only competent courts to investigate and prosecute).

85. *See Bolaños Quiñones*, Inter-Am. Comm’n H.R., Report No. 10/95 (noting that impartiality and independence are compromised when judicial proceedings are conducted by bodies involved in the crimes).

86. *Radilla-Pacheco*, Inter-Am. Ct. H.R. (ser. C) No. 209, ¶ 201 (observing that state response, an aspect of the principle of effectiveness, must entail a serious and impartial investigation).

Investigations, similar to trials, must be impartial to be considered effective.⁸⁷ In addition, there must be an adequate state response that includes a diligent investigation, conducted ex officio and within a reasonable period of time.⁸⁸ An ex officio investigation requires immediate action by government officials without petitioning from victims or their families.⁸⁹ The state is required to provide necessary technological and pedagogical resources to initiate the ex officio investigation.⁹⁰ A reasonable period of time for the government to initiate an investigation is determined by the complexity of the crime.⁹¹

87. See *Lacayo v. Nicaragua*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 30, ¶ 80 (Jan. 29, 1997) (affirming that a military criminal law, which did not require military witnesses to appear to testify, prevented any impartial investigation that could lead to the prosecution of offenders); see also *Cabrera Garcia v. Mexico*, Preliminary Objections, Merits, Reparations and Legal Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 220, ¶¶ 198-202 (Nov. 26, 2010) (noting that military investigations into crimes committed by the military against civilians are per se ineffective).

88. See, e.g., *Radilla-Pacheco v. Mexico*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 209, ¶¶ 201, 245 (Nov. 23, 2009) (concluding that a preliminary inquiry that remained open more than seven years after the Special Prosecutors' Office began investigation, and seventeen years after the cabinet authority was made aware of the disappearance, was unreasonable); *Bulacio v. Argentina*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 100, ¶ 114 (Sept. 18, 2003) (holding that articles 8 and 25 were violated when a court case regarding injuries to, detention, and death of Bulacio was still not resolved after ten years); *Lacayo*, Inter-Am. Ct. H.R. (ser. C) No. 30, ¶ 80 (affirming that two years accrued after submission of petition for judicial review is unreasonable).

89. See *Cabrera Garcia v. Mexico*, Preliminary Objections, Merits, Reparations and Legal Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 220, ¶ 193 (Nov. 26, 2010) (holding that the state failed to conduct an ex officio investigation when the government initiated the investigation three months after learning of the torture and only upon the express requests of petitioners).

90. See *Radilla-Pacheco*, Inter-Am. Ct. H.R. (ser. C) No. 209, ¶ 222 (discussing what is necessary to constitute due diligence in an investigation of a forced disappearance).

91. See *id.* ¶ 244 (explaining that the complexity of the case, procedural steps taken by the victim and actions taken by judicial authorities must be taken into account to determine timeliness); under the requirements in article 8(1) of the American Convention); see also *Maia Fernandes v. Brazil*, Case 12.051, Inter-Am. Comm'n H.R., Report No. 54/01, OEA/Ser.L/V/II.111, doc. 20 rev. (2000) (holding that an eight-year delay alone in obtaining the first conviction constituted a denial of rights under articles 8 and 25).

2. Articles 1 and 2 of the American Convention

Article 1(1) of the American Convention imposes a “duty to ensure” on States, which requires them to take affirmative measures to guarantee rights in the treaty.⁹² Article 2 requires States to adopt legislation or other provisions to ensure compliance with the other articles of the American Convention.⁹³

In *Radilla-Pacheco v. Mexico*, involving the arbitrary arrest and subsequent forced disappearance of the petitioner,⁹⁴ the IACtHR held that the state violated its obligation under American Convention Article 1(1) to offer effective judicial recourse to alleged victims of human rights abuses under Article 25, pursuant to due process of law under Article 8.⁹⁵ The IACtHR determined that the state failed to perform a diligent investigation within a reasonable period of time.⁹⁶ Thus both the IACtHR and the IACHR have interpreted Articles 8 and 25 to place a duty on the state through Articles 1 and 2 to diligently and effectively investigate and adjudicate crimes and to adopt legislation or other provisions that ensure these processes.⁹⁷

92. See American Convention, *supra* note 75, art. 1(1) (“The States Parties to this Convention undertake to respect the rights and freedoms recognized herein *and to ensure* to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms. . . .”) (emphasis added).

93. See American Convention, *supra* note 75, art. 2 (“States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.”); see also *González v. Mexico*, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 205, ¶ 287 (Nov. 16, 2009) (affirming that the duty to investigate arises from the obligation to ensure fulfillment of other rights enshrined in the American Convention).

94. See *Radilla-Pacheco v. Mexico*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 209, ¶¶ 122, 173-314 (Nov. 23, 2009) (concluding that the motive for Radilla Pacheco’s abduction was his composition of a popular Mexican folk song whose verses illustrate peasant social battles that occurred in Atoyac de Álvarez).

95. *Id.* ¶¶ 190-91 (noting that a delay in determining the basic facts of an investigation can in itself be a violation of due process guarantees under the American Convention).

96. *Id.* ¶ 245.

97. See *id.* ¶ 247 (describing the positive duty of states to adopt or adjust legal provisions, including constitutional text, to ensure compliance with the American Convention); see also *Maia Fernandes v. Brazil*, Case 12.051, Inter-Am. Comm’n H.R., Report No. 54/01, OEA/Ser.L/V/II.111, doc. 20 rev., ¶¶ 85-87 (2000) (noting that the IACHR holds the view that a state has failed its obligations under the

III. ANALYSIS

While the Radilla Resolution brings Mexico closer to compliance with the Right to Justice under the American Convention, it is deficient because it is undermined by Military Justice Code Article 57's existence and application.⁹⁸ Moreover, the ruling fails to address aspects of militarization other than the justice system.⁹⁹ If lower civilian courts and military courts follow the Radilla Resolution, Mexico will be in compliance with the principle of the competent court under IACtHR jurisprudence.¹⁰⁰ However, it is unlikely that most lower courts and military courts will follow a nonbinding decision.¹⁰¹ Without legal force, Military Justice Code Article 57 preempts the Radilla Resolution.¹⁰² That provision will allow military tribunals and investigations to continue to be applied in cases involving the commission of crimes by military personnel against civilians.¹⁰³ Even under the Radilla Resolution, military authorities can conduct investigations prior to the filing of a complaint in civilian court.¹⁰⁴

American Convention when its structures and processes proscribed by law fail to ensure the "full and fair exercise of human rights").

98. See Código de Justicia Militar [CMJ] [Military Justice Code] art. 57(II), Diario Oficial de la Federación [DO], 31 de Agosto de 1933 (Mex.) (permitting military tribunals to oversee cases in which crimes are committed by active soldiers or during a military operation); see also *Radilla-Pacheco*, Inter-Am. Ct. H.R. (ser. C) No. 209, ¶ 342 (holding that Article 57 is incompatible with the American Convention); BRICKER, *supra* note 45, at 8 (referring to the Radilla Resolution as a "stopgap" measure until article 57 is reformed).

99. See generally Radilla Resolution, *supra* note 15 (addressing the competence of civilian courts for adjudication and investigation only after a formal complaint is filed in a federal court).

100. See American Convention, *supra* note 75, art. 2 (permitting Mexico to adopt "such legislative or other measures as may be necessary to give effect to" articles 8 and 25) (emphasis added); AVALOS, *supra* note 64, at 13-14 (noting the nonbinding nature of a solitary Supreme Court administrative ruling).

101. See American Convention, *supra* note 75, art. 2 (requiring an effective legal provision that ensures the fulfillment of other rights of the American Convention). But see Juzgado Sexto de Distrito del Centro Auxiliar de la Segunda Región, Dec. 2, 2011, Amparo 818/2011, ¶ 60-67 (holding that article 57 is unconstitutional and contrary to the American Convention).

102. See AVALOS, *supra* note 64, at 13-14 (conveying the emphasis placed on code over court decisions).

103. *Id.*

104. See Radilla Resolution, *supra* note 15, ¶ 50 (holding that once complaints are filed they cannot be transferred to military jurisdiction).

Moreover, the policy of replacing civilian police forces with military personnel impedes the conduct of an effective investigation as required under the American Convention because of the latter's lack of training and proper equipment.¹⁰⁵ Finally, the Radilla Resolution does not apply retroactively.¹⁰⁶ Cases of human rights abuse committed by the military that remain under military jurisdiction are likely violations of the principle of "sufficient state response" because cases must be addressed within a reasonable time and *ex officio*.¹⁰⁷

A. THE RADILLA RESOLUTION ENCOURAGES COURTS TO APPLY CIVILIAN JURISDICTION TO CASES, BUT FAILS TO ENSURE PROTECTION OF THE RIGHT TO JUSTICE

If followed, Mexico would be closer to compliance with the principle of the competent court because lower courts would be prohibited from transferring cases to military prosecutors.¹⁰⁸ However, American Convention Article 2 requires Mexico to adopt legislation or other provisions that are effective in ensuring the rights enshrined in the American Convention.¹⁰⁹ The Radilla Resolution is not binding on lower courts or military courts to the extent that it holds Military Justice Code Article 57 unconstitutional.¹¹⁰ Because Mexico has failed to adopt effective provisions that ensure the right to justice, Mexico remains in violation of the American Convention.¹¹¹

105. See NEITHER RIGHTS NOR SECURITY, *supra* note 7, at 16 (discussing the greatest obstacles to effective investigations and prosecutions, including the propensity of security forces to contaminate and manipulate crime scenes).

106. See Radilla Resolution, *supra* note 15, ¶ 45 (affirming that the resolution applies to future cases).

107. See BRICKER, *supra* note 45, at 8 (noting the failure of the Radilla Resolution to apply to cases currently under military investigation).

108. See Radilla Resolution, *supra* note 15, ¶ 50 (holding that complaints cannot be transferred to military jurisdiction).

109. See Radilla-Pacheco v. Mexico, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 209, ¶ 288 (Nov. 23, 2009) (remarking that the requirement of effectiveness is referred to as the "principle of *efet útil*").

110. See AVALOS, *supra* note 64, at 13-14. *But see* Jorge Carrasco Araizaga *supra* note 19 (noting that the decision permitted the court to receive almost thirty cases related to military jurisdiction by asserting original jurisdiction).

111. See American Convention, *supra* note 75, art. 2 (requiring effective legislation necessary to ensure the rights and freedoms enumerated in the

1. *The Radilla Resolution Upholds the “Principle of the Competent Court”*

The Radilla Resolution brings Mexico closer to compliance with the American Convention because it holds that Article 57 of the Military Justice Code is incompatible with Article 13 of Mexico’s Constitution and the American Convention.¹¹² It also holds that under no circumstances can military jurisdiction operate in situations implicating one’s civil human rights.¹¹³ These holdings are in accordance with the competent court principle of IACtHR jurisprudence.¹¹⁴ The Radilla Resolution took into account the Inter-American Court decision of *Radilla-Pacheco*, which held that military jurisdiction over crimes involving civilians is incompatible with the articles of the American Convention pertaining to the Right to Justice.¹¹⁵ The “principle of the competent court” is a key element of due process under Articles 8 and 25.¹¹⁶ To determine whether a court is competent, “the nature of the crime and the juridical right damaged” must be taken into account.¹¹⁷ A military tribunal is only a

American Convention).

112. See Radilla Resolution, *supra* note 15, ¶ 43 (holding that Military Justice Code Article 57 is unconstitutional and incompatible with the American Convention).

113. See *id.* ¶¶ 43-44 (establishing that civilian authorities must have unique jurisdiction over cases filed in federal courts).

114. See *id.* ¶ 43 (explaining that establishing violations of human rights as offenses against the military discipline does not allow victims or their families to come before a civilian judge or court).

115. See *Radilla-Pacheco v. Mexico*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 209, ¶ 272 (Nov. 23, 2009) (noting that the IACtHR has consistently held that in democratic states in times of peace, the competence of military criminal jurisdiction is limited to protecting military rights related to military operations).

116. See *id.* ¶ 266 (noting that the IACHR stated that the military justice system in Mexico does not satisfy the principle of the competent court).

117. See, e.g., *Cabrera Garcia v. Mexico*, Preliminary Objections, Merits, Reparations and Legal Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 220, ¶ 187 (Nov. 26, 2010) (considering the IACHR’s conclusions that torture is not related to the military discipline or its mission and that the investigation into torture allegations should have been conducted by the regular courts); *Rosendo Cantú v. Mexico*, Preliminary Objections, Merits, Reparations and Legal Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 216, ¶ 161 (Aug. 31, 2010) (relaying that gang rape did not damage military juridical interests); *Radilla-Pacheco*, Inter-Am. Ct. H.R. (ser. C) No. 209, ¶ 277 (reasoning that an arbitrary detention and forced disappearance violated rights under articles 8 and 25 and were not military in

competent court when the nature of the crime is a military one and military rights are infringed.¹¹⁸ Ordinary courts have jurisdiction over soldiers who commit human rights abuses against civilians because those crimes do not impact military rights and are not furthering a military mission.¹¹⁹

The Supreme Court's ruling complies with the holdings of the Inter-American Court because it requires that all cases in which human rights are violated by military personnel shall be tried in civilian courts.¹²⁰ In addition to these crimes being outside of the military realm, military personnel are not impartial or independent actors.¹²¹ A military tribunal arbitrating a human rights violation committed by a soldier cannot be impartial because it is "sitting in judgment of itself."¹²² Furthermore, the military lacks independence because it answers to the Secretary of Defense and would not want to issue an unfavorable ruling.¹²³

There is evidence that the Radilla Resolution has had an impact as military courts have subsequently decided to transfer cases to the

nature).

118. *Radilla-Pacheco*, Inter-Am. Ct. H.R. (ser. C) No. 209, ¶ 313 (holding that the principle of the competent court was violated by extending military jurisdiction to crimes outside of military activities).

119. *See id.* ¶¶ 274, 277 (noting that military jurisdiction cannot be applied to situations involving the forced disappearances and other violations of human rights of civilians because that is not "a legitimate and acceptable means for compliance with military missions.").

120. *See Radilla Resolution*, *supra* note 15, ¶¶ 43-44 (holding that Military Justice Code Article 57 is incompatible with Article 13 because it requires military courts to adjudicate cases involving soldiers violating the human rights of civilians).

121. *See UNIFORM IMPUNITY*, *supra* note 8, at 10 (arguing that the structure of the armed forces and the military justice system does not allow the armed forces to act impartially or independently); *see also Mexico: Nine Years Later, Cases of Indigenous Women Raped and Tortured by Soldiers are Transferred out of Military Jurisdiction*, ROBERT F. KENNEDY CTR. FOR JUST. & HUM. RTS. (Aug. 17, 2011), <http://rfkcenter.org/mexico-nine-years-later-cases-of-indigenous-women-raped-and-tortured-by-soldiers-are-transferred-out-of-military-jurisdiction> [hereinafter ROBERT F. KENNEDY CTR.] ("The military is not an impartial actor.") (statement of Robert F. Kennedy Center President Kerry Kennedy).

122. UNIFORM IMPUNITY, *supra* note 8, at 10.

123. *See id.* (noting that military judges, for job security reasons, will not issue an unfavorable ruling against the military because the Secretary of Defense has both executive and judicial power over military judges).

federal Attorney General.¹²⁴ Nine years after the alleged crimes were committed, the Military Justice Attorney General (“PGJM”) moved two petitioners’ cases to a civilian court.¹²⁵ The timing of the removal is further evidence that the Radilla Resolution is persuasive in the military sphere to apply international due process requirements.¹²⁶ As further evidence of its impact, the Supreme Court cites to the Radilla Resolution in its administrative order staying cases involving military jurisdiction in lower courts.¹²⁷

2. *Mexico Remains in Violation of Articles 8 and 25 Because the Radilla Resolution Is Trumped by Conflicting Legislation*

The Radilla Resolution does not require that Mexico modify its laws because it is the first ruling on the constitutionality of Military Justice Code Article 57.¹²⁸ Nevertheless, the court has announced that by way of this ruling it is asserting original jurisdiction over more than twenty cases involving alleged military abuse, which presents an opportunity to amend or invalidate the code.¹²⁹ American Convention Articles 2, 8, and 25 require Mexico to adopt effective legislation or provisions that compel a competent court to adjudicate cases.¹³⁰ In order to comply, the state must adopt legislation that conforms to the principle of the competent court.¹³¹ This legislation

124. See ROBERT F. KENNEDY CTR., *supra* note 121 (reporting that in August 2011 the PGJM relinquished jurisdiction in two cases involving women raped by soldiers in 2002).

125. See *id.* (advocating that the two cases that were transferred illustrate the need for increased civilian control over Mexico’s military).

126. See *id.* (asserting that the PGJM’s notification of removal acknowledged that the military lacked jurisdiction to hear the two cases involving human rights abuses committed by the military).

127. Acuerdo General Número 6/2012 [General Agreement Number 6/2012], Quinto [Part Five], Diario Oficial de la Federación [DO], 17 de Mayo de 2012 (Mex.).

128. See AVALOS, *supra* note 64, at 13 (noting that binding jurisprudence is created through five consecutive decisions on a legal matter).

129. Acuerdo General Número 6/2012 [General Agreement Number 6/2012], Quinto [Part Five], Diario Oficial de la Federación [DO], 17 de Mayo de 2012 (Mex.).

130. See American Convention, *supra* note 75, art. 2 (requiring legislation or other measures that give effect to rights in the American Convention).

131. See *Radilla-Pacheco v. Mexico*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 209, ¶ 342 (Nov. 23, 2009) (requiring the State to enact legislative modifications to make article 57 compatible with the American Convention).

must give effect to the principle that civilian courts are the only courts that can preside over cases in which neither the nature of the crime nor the right damaged are of a military character.¹³²

The Radilla Resolution holds that Article 57 of the Military Justice Code is incompatible with the Mexican Constitution and international law, but this does not render the Military Justice Code invalid because it is not binding jurisprudence.¹³³ Under Mexico's civil law system, the federal code supersedes Supreme Court decisions.¹³⁴

Without binding jurisprudence invalidating Military Justice Code Article 57, American Convention Article 2 requires modification of the Military Justice Code because Article 57 does not uphold the principle of the competent court either in form or in practice.¹³⁵ In general, the PGJM does not comply with the Radilla Resolution and continues to apply Military Justice Code Article 57.¹³⁶ The latter remains incompatible with international law because it conflicts with the principle of the competent court.¹³⁷ The provision allows all cases

132. *See id.* ¶ 288 (noting that there is an obligation for the State to adjust or adopt domestic legislation in order to guarantee the rights enshrined in the American Convention and inferring that such legislation must be effective).

133. *See* AVALOS, *supra* note 64, at 13-14 (suggesting that without five consecutive decisions the ruling is little more than persuasive).

134. *Id.*

135. *See* American Convention, *supra* note 75, at art. 2 (requiring parties to the Convention to adopt legislation giving effect to rights protected by the Convention); *see also* Garrido v. Argentina, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 39, ¶ 68 (Aug. 27, 1998) (recognizing the "universally valid" principle of customary international law that parties to international agreements must alter domestic law to ensure compliance with treaty obligations); Jorge Carrasco Araizaga, *Militares sin fuero: decision tardía e insuficiente* [*Soldiers without Jurisdiction: Decision too Late and too Little*], PROCESO.COM.MX (July 16, 2011), <http://www.proceso.com.mx/?p=276090> (arguing that the decision does not subject the military court to civilian jurisdiction and that an attorney litigating for the armed forces will deny civilian court competence over the cases).

136. *See* BRICKER, *supra* note 45, at 8 (describing the Radilla Resolution as a "stop-gap" until the legislature enacts laws repealing article 57, while noting that such legislation has not yet been passed); *see also* AVALOS, *supra* note 64, at 12-13 (describing Mexico's civil law tradition, which places a higher value on codes than court decisions).

137. *See* Código de Justicia Militar [CMJ] [Military Justice Code] art. 57(II)(A), Diario Oficial de la Federación [DO], 31 de Agosto de 1933 (Mex.) (upholding the use of military jurisdiction in crimes committed by active soldiers or during a

of violations by military personnel against civilians to be subject to military tribunals regardless of the nature of the crime and the rights damaged.¹³⁸ Thus despite the Radilla Resolution, by failing to modify or override this law, Mexico continues to be in violation of Article 2, and thereby Articles 8 and 25.¹³⁹

B. THE RADILLA RESOLUTION, EVEN IF IT WERE BINDING, DOES NOT TRANSFER PENDING CASES UNDER MILITARY JURISDICTION TO CIVILIAN COURTS OR REQUIRE ADEQUATE INVESTIGATIONS

The Radilla Resolution does not apply retroactively, so competent authorities are not investigating thousands of cases of human rights abuse committed by the military that are still pending.¹⁴⁰ The failure to effectively investigate these cases within a reasonable time constitutes an insufficient state response.¹⁴¹ A sufficient state response requires an ex officio, diligent, and impartial investigation within a reasonable period of time.¹⁴² Furthermore, the policy of militarizing police forces is an obstacle to achieving a sufficient state response because soldiers rarely perform effective investigations.¹⁴³

military operation).

138. See Abel Barrera Hernández, *Restricción del Fuero Militar: Triunfo de Víctimas y Sociedad Civil* [Military Jurisdiction Limitation: Victory for Victims and Civil Society], CONTRALÍNEA (Aug. 7, 2011), <http://contralinea.info/archivo-revista/index.php/2011/08/07/restriccion-del-fuero-militar-triunfo-de-victimas-y-sociedad-civil> (arguing that military jurisdiction is incompatible with the American Convention and arguing for increased civilian control over public security).

139. See *Radilla-Pacheco v. Mexico*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 209, ¶¶ 288-89 (Nov. 23, 2009) (concluding that as long as Mexico continues to extend military jurisdiction to crimes that are not characteristic of the military realm or in connection to the military discipline, it is violating Articles 2, 8 and 25 of the American Convention).

140. See *Radilla-Pacheco*, Inter-Am. Ct. H.R. (ser. C) No. 209, ¶ 201 (noting that sufficient state response is a decisive aspect of fulfillment of articles 8 and 25).

141. *Id.*

142. *Cabrera Garcia v. Mexico*, Preliminary Objections, Merits, Reparations and Legal Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 220, ¶ 215 (Nov. 26, 2010) (ordering investigation of the facts within a reasonable period of time); *Radilla-Pacheco*, Inter-Am. Ct. H.R. (ser. C) No. 209, (holding that the failure to carry out an immediate investigation in the case of a forced disappearance and a total of seventeen years without a reasonable delay in investigation constituted an unreasonable period of time).

143. See NEITHER RIGHTS NOR SECURITY, *supra* note 7, at 16 (describing evidentiary problems common to investigations by security forces, including

1. Militarization of Law Enforcement Leads to Insufficient State Response as Complaints Are Not Addressed Within a Reasonable Period of Time and Ex Officio

To date, there remains a long backlog of cases pending in military tribunals, accumulating since at least 2006.¹⁴⁴ Mexico is violating Articles 8 and 25 by failing to adequately respond, evidenced by the elapsed time taken to address these cases.¹⁴⁵ The Inter-American Court has established that the State has the obligation to protect the right to a fair trial, which requires diligent and effective investigation within a reasonable period of time.¹⁴⁶ Failure to act within such a time frame constitutes a lack of a state response, which is a decisive element in assessing if there has been compliance with Articles 8 and 25 of the American Convention.¹⁴⁷ The IACtHR analyzes the state response by determining whether the facts under investigation and the corresponding criminal responsibilities are made effective within a reasonable time.¹⁴⁸ This is determined on a case-by-case basis that

evidence tampering and contamination and the acquiring of confessions through violence and coercion).

144. *See id.* at 10-11 (reporting that the PGJM refuses to open many cases, and that of the over 3,500 cases opened since 2007 many remain pending with little progress toward any result, in part because of delay tactics used by prosecutors who either believe that they have no chance of prevailing in the military system or who are openly colluding with the military).

145. *See* *Lacayo v. Nicaragua*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 30, ¶¶ 74-89 (Jan. 29, 1997) (recognizing that article 8's procedural due process guarantees include the right to a hearing within a "reasonable time," and that Article 25 guarantees "prompt recourse for protection" of victims of human rights violations where the victim seeks such recourse).

146. *See* *Bulacio v. Argentina*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 100, ¶ 114-15, 119 (Sept. 18, 2003) (recognizing Mexico's admitted violations of article 8's fair trial guarantee and Article 25's right to judicial protection — which encompasses Article 8's due process protections — where delays in the investigation of injuries, detention, and death of Bulacio led to a failure to prosecute over twelve years after violations occurred).

147. *See* *Radilla-Pacheco v. Mexico*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 209, ¶ 191 (Nov. 23, 2009) (analyzing the due diligence of the investigation).

148. *See id.* (holding that the state violated the Right to Justice where it received a formal communication of the facts and did not immediately start a comprehensive investigation); *see also, e.g., Lacayo*, Inter-Am. Ct. H.R. (ser. C) No. 30, ¶ 80 (holding that the government violated article 8 where the death of the victim involved extensive investigation making it complex, victim's father did not obstruct process by following established procedure, application for judicial review took two years to process, and more than five years elapsed from court order to the

takes into account factors such as complexity of the crime and behavior of judicial authorities.¹⁴⁹

During Calderón's administration, over 5,000 complaints against military personnel were filed.¹⁵⁰ Although it is unclear whether the military tribunals and other governmental bodies involved will give effect to the Radilla Resolution, most cases involving military crimes against civilians prior to this decision were either dismissed or sent to military jurisdiction.¹⁵¹ Between December 2006 and June 2010, federal and local public prosecutors sent 1,661 cases in which soldiers committed crimes against civilians to military courts.¹⁵² Cases are rarely transferred from military to civilian jurisdiction, and when they are, parties seeking transfer must overcome many procedural and bureaucratic obstacles.¹⁵³

Due to the severe lack of transparency of the military justice system, it is uncertain what the nature of the majority of these cases is in order to determine their complexity.¹⁵⁴ However, alleged cases

initiate proceeding).

149. See *Lacayo*, Inter-Am. Ct. H.R. (ser. C) No. 30, ¶ 77 (adopting the three factor analysis used by the European Court of Human Rights in interpreting "reasonable time" under the European Convention for the Protection of Human Rights and Fundamental Freedoms, which includes considering the "judicial activity of the interested party" in addition to complexity and judicial behavior); *Maia Fernandes v. Brazil*, Case 12.051, Inter-Am. Comm'n H.R., Report No. 54/01, OEA/Ser.L/V/II.111, doc. 20 rev., ¶ 39-40, 44 (2000) (noting that "reasonable time" is determined on a case-by-case basis and finding that Brazil violated articles 8 and 25 where seventeen years passed without a final decision being issued in an attempted murder investigation, including an eight year period between the crime's commission and the commencement of investigations).

150. See BRICKER, *supra* note 45, at 3-45 (noting that complaints of government-perpetrated human rights violations filed with the CNDH increased twenty-six percent since 2006, and that between 2006 and 2011, 5,055 alleged violations had been filed against military officials).

151. *Id.* (describing how prosecutors feel compelled by the CMJ to turn cases involving active military personnel over to military jurisdiction, and that where such cases do reach civilian courts, judges often dismiss them or send them to military courts).

152. *Id.*

153. See ROBERT F. KENNEDY CTR., *supra* note 121 (describing the recent decision of PGJM prosecutors to transfer the cases of two women to civilian courts, made as a result of international pressure, and nearly 10 years after the women began to seek transfer).

154. See AMNESTY INT'L, MEXICO: NEW REPORTS OF HUMAN RIGHTS VIOLATIONS BY THE MILITARY 8 (2011) (describing the inability to gather data on human rights abuses committed by the military and the failure by civilian and

of human rights abuses are usually complex in nature involving copious evidence and investigation.¹⁵⁵ Furthermore, interested parties have filed complaints and procedures under existing Mexican law and often inquire into the status of their cases.¹⁵⁶ The behavior of the military, as well as civilian judicial authorities, has led to widespread impunity.¹⁵⁷ These factors, taken into consideration with evidence that the infringements under considerations are not minor infractions, but human rights abuses, show that the state is not responding within a reasonable time.¹⁵⁸ Mexico is violating Articles 8 and 25 by failing to uphold this due process requirement.¹⁵⁹

Cases are not being transferred to civilian jurisdiction *ex officio* as demonstrated by the only two cases that have been transferred, which were removed only after making demands to the PGJM and the Attorney General.¹⁶⁰ The Radilla Resolution requires that

military courts to publish relevant information).

155. *See, e.g.,* Radilla-Pacheco v. Mexico, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 209, ¶ 245 (Nov. 23, 2009) (affirming that a case of a forced disappearance of over 35 years is considered complex); Lacayo v. Nicaragua, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 30, ¶ 78 (Jan. 29, 1997) (finding that where the investigation involved large amounts of evidence and extensive investigation the case was complex).

156. *But see* AMNESTY INT'L, *supra* note 154, at 8 (noting that the number of complaints received by local human rights nongovernmental organizations is far greater than that received by legal bodies as many individuals do not lodge complaints because they fear for their lives).

157. *See* BRICKER, *supra* note 45, at 4 (observing that, as of 2011, military courts under Calderón punished only one soldier for committing a violation against a civilian).

158. *See* Lacayo, Inter-Am. Ct. H.R. (ser. C) No. 30, ¶ 81 (applying a "global analysis of the proceeding" in finding a five year lapse between the time a court ordered a proceeding and judicial action being taken was not reasonable).

159. *Id.*

160. *See* Hanako Taniguchi, *Indígenas Buscan Enjuiciar a Militares por Violación en una Corte Civil [Indigenous Seek to Prosecute Military for Rape in Civil Court]*, CNN MÉXICO (July 28, 2011), <http://mexico.cnn.com/nacional/2011/07/28/indigenas-buscan-enjuiciar-a-militares-por-violacion-en-una-corte-civil> (noting that the victims presented a formal request to the Attorney General and PGJM); *see also* BRICKER, *supra* note 45, at 10 (noting that cases are transferred only after an injunction has been filed); Kenneth Roth, *Letter to Secretary of State Hillary Clinton*, HUMAN RIGHTS WATCH (July 13, 2009), http://www.hrw.org/news/2009/07/13/letter-secretary-state-hillary-clinton#_ftn7 (describing in an open letter by Human Rights Watch Executive Director the process by which the decisions of military tribunals can be challenged, noting that

investigation is conducted by civilian authorities once a complaint is filed in federal court, but many cases do not make it from the police station to federal court.¹⁶¹ Prosecutors often choose not to prosecute or to send the case to a military tribunal.¹⁶² With the increasing number of soldiers taking over law enforcement positions, the likelihood of prosecutors investigating cases involving the military is further reduced.¹⁶³

2. The Policy of Militarization to Combat Crimes Undermines Mexico's Ability to Conduct Effective Investigations of Crimes in Compliance with Articles 1, 2, 8, and 25

The Radilla Resolution fails to prevent the policy of substituting police forces for military personnel who are not trained to conduct adequate investigations. Because of this deficiency, Mexico remains in violation of Articles 8 and 25, in connection with Articles 1 and 2 of the American Convention.¹⁶⁴ According to IACtHR jurisprudence, the state has an obligation to conduct thorough and effective investigations.¹⁶⁵ Investigations, similarly to trials, must be

there is no direct appeal from a military tribunal and that victims' only recourse is to file for an injunction—*amparo*—asking for civil courts to take action, or for military tribunals to reconsider decisions to close investigations based upon deprivation of due process rights).

161. See, e.g., AMNESTY INT'L, *supra* note 154, at 11 (describing the case of Brenda Calderas whose complaint regarding the disappearance of her husband, and the torture of and detention of others by military authorities was repeatedly dismissed by the Attorney General, even though Calderas had personal knowledge of the circumstances surround the detention).

162. See *id.*; see also BRICKER, *supra* note 45, at 5 (detailing the Attorney General's policy of automatically transferring cases involving active duty military personnel to military jurisdiction).

163. See BRICKER, *supra* note 45, at 4 (suggesting that the Mexican government could have foreseen a rise in human rights violations as a consequence of militarization, since the military is not "trained to interact with civilians within . . . a minimal framework of human rights").

164. Radilla Resolution, *supra* note 15; see also NEITHER RIGHTS NOR SECURITY, *supra* note 7, at 6 (reporting that in 24 cases of extrajudicial killings which Human Rights Watch obtained evidence of, soldiers in a majority of the cases tampered with crime scenes to make the victims appear to be aggressors, or to shift suspicion of responsibility to organized crime elements).

165. Radilla-Pacheco v. Mexico, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 209, ¶ 192 (Nov. 23, 2009) (declaring that an effective investigation shall in its totality aim to achieve truth with the ultimate purpose of punishment for those responsible).

impartial,¹⁶⁶ and the use of the military to investigate a human rights violation committed by the military presents a clear conflict of interest.¹⁶⁷

Investigations by militarized police forces into crimes that are committed by the military often lead to a failure by the state to ensure effective investigations.¹⁶⁸ In an effective investigation into a human rights violation, investigators must preserve evidence, identify possible witnesses, obtain statements, and diligently attempt to determine key facts regarding the crime.¹⁶⁹ Investigators must thoroughly examine the scene of the crime and have the technology to do so.¹⁷⁰

The Mexican armed forces are not trained to conduct adequate investigations.¹⁷¹ They are trained to use search and destroy techniques rather than the art of evidence preservation, and indeed often fabricate evidence.¹⁷² In addition, the federal government allocates insufficient financial resources, which enhances the risk of corruption and abuse of power.¹⁷³ Due to fundamental differences in

166. See *Rosendo Cantú v. Mexico*, Preliminary Objections, Merits, Reparations and Legal Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 216 (Aug. 31, 2010) (affirming that in cases involving human rights violations of civilians, military tribunals do not satisfy the requirement of independence and impartiality).

167. See *Mexico: Deliver Justice for Killings, Disappearances in Monterrey*, *supra* note 35, at 10 (citing a 2009 report by Human Rights Watch and anecdotal evidence from four cases of disappearance or extrajudicial killing to conclude that “Mexico’s military justice system lacks the independence and impartiality necessary to provide victims with an effective remedy through meaningful investigation and prosecution” of human rights violators).

168. See *id.* (recognizing that the consolidated judicial and executive authority of the defense secretary severely limits civilian oversight and public scrutiny of the military justice system).

169. See *Radilla-Pacheco*, Inter-Am. Ct. H.R. (ser. C) No. 209, ¶¶ 178-90 (analyzing the failure of military investigators to ascertain basic facts such as the location, time, and cause of the crime).

170. *Id.*

171. See *WITHERS ET AL.*, *supra* note 27, at 25 (asserting that military personnel receive little of the training in conducting criminal investigations or collecting evidence that police officers undergo).

172. See *id.* (pointing out that the military’s training and available resources “designed to kill the enemy” rather than address criminal activities); see also *NEITHER RIGHTS NOR SECURITY*, *supra* note 7, at 6 (mentioning that crime scenes are frequently altered to shift responsibility for crimes).

173. See *WITHERS ET AL.*, *supra* note 27, at 26 (observing that low salaries often encourage military personnel to engage in illicit activities to supplement their

mission and techniques between the military and civilian law enforcement, a militarized police force leads to inadequate investigations that are rarely conducted ex officio and within a reasonable period of time.¹⁷⁴ Mexico remains in violation of the American Convention because of its application of militarized police to investigate and adjudicate crimes committed by soldiers against civilians.¹⁷⁵

IV. RECOMMENDATIONS

A. MEXICO'S CONGRESS SHOULD ENACT LEGISLATION THAT ENDS MILITARY JURISDICTION FOR CRIMES AGAINST CIVILIANS AND TRANSFERS PENDING INVESTIGATIONS AND CASES TO CIVILIAN COURTS

Mexico must adopt legislation that ensures that human rights violations committed by the military will be investigated and adjudicated in civilian courts.¹⁷⁶ To do so, Mexico must modify Article 57 of the Military Justice Code to be in compliance with Articles 8 and 25 of the American Convention.¹⁷⁷ This modification

income); *see also Mexico: Deliver Justice for Killings, Disappearances in Monterrey*, *supra* note 35 (reporting mishandling of investigations by military personnel and explaining that in a fact-finding mission in Nuevo Leon, Human Rights Watch found major deficiencies in military investigations, including a failure to interview witnesses, visit locations of the crime, and ascertain basic information regarding the facts of the crime).

174. *See* NEITHER RIGHTS NOR SECURITY, *supra* note 7, at 16 (discussing how deficiencies in investigations by security sources leave prosecutors with little evidence to build a case on, forcing prosecutors either to abandon cases altogether, or to initiate new investigations to find credible evidence).

175. American Convention, *supra* note 75, arts. 1, 2, 8, 25; *see also* AMNESTY INT'L, *supra* note 154, at 8 (indicating that, besides violating international law, the military's self-policing of human rights violations against civilians obstructs the ability of families to ascertain the location of detainees and prevent further abuses against victims who have already suffered human rights violations).

176. *See* discussion *supra* Parts II.B, III.A (discussing the duty to ensure that the competent court principle is applied in cases against civilians). *See generally* BRICKER, *supra* note 45 (describing legislation proposed by Senator René Arce, and supported by the IACtHR, that modifies Article 57 to prohibit military jurisdiction in cases involving the violation of human rights or in which civilians are amongst the victims).

177. *See supra* notes 127-36 and accompanying text (describing how article 57 conflicts with the principle of the competent court and preempts the Radilla Resolution).

would prevent Article 57 from applying to crimes committed by active soldiers against civilians.¹⁷⁸

In addition, legislation should mandate that cases pending in military jurisdiction be transferred *ex officio* and immediately.¹⁷⁹ This will not only be a step toward compliance with the American Convention, but it will reduce the level of impunity, increase transparency in judicial processes, and allow for appellate review.¹⁸⁰

B. THE MEXICAN FEDERAL GOVERNMENT SHOULD LIMIT ITS USE OF MILITARY IN CIVILIAN LAW ENFORCEMENT

Mexico should refrain from supplanting law enforcement with military personnel.¹⁸¹ This leads to politicization of the military and consequently a lack of political will to strengthen civilian law enforcement in order to combat crime.¹⁸² The use of military personnel to investigate and adjudicate crimes committed by soldiers leads to high rates of impunity.¹⁸³ If military personnel are used to fight organized crime, it must supplement police operations.¹⁸⁴ In

178. See *supra* notes 128-39 and accompanying text (discussing the conflict between the principle of the competent court and Military Justice Code Article 57).

179. See discussion *supra* Part III.B (describing the duty to conduct investigations diligently, impartially, and *ex officio*, and the failures of military investigators to meet this duty).

180. See *supra* note 165 (discussing the lack of transparency and civilian oversight in military tribunals); NEITHER RIGHTS NOR SECURITY, *supra* note 7 (affirming that military courts do not deter soldier misconduct, as evidenced by the fact that human rights groups in Mexico report that incidents of human rights abuses by the military are increasing).

181. See Janine Zúñiga, *Mexico Seeks Solutions to Drug War: Calderón willing to consider legalization*, San Diego Union Tribune (Aug. 14, 2010), <http://www.signonsandiego.com/news/2010/aug/14/mexico-seeks-solutions-to-drug-war> (mentioning that soldiers are deficient at policing smaller crimes in communities where the military has supplanted civilian security personnel).

182. See WITHERS ET AL., *supra* note 27, at 14 (noting that the weakening of the civilian system leads to an increased and self-perpetuating reliance upon the military to perform internal police functions).

183. See NEITHER RIGHTS NOR SECURITY, *supra* note 7, at 9 (observing that in five Mexican states, where 1,615 investigations into violations were handled by the military since 2007, not a single soldier has been convicted, and that less than one percent of investigations opened by PGJM between 2007 and June, 2011 resulted in convictions).

184. See *Radilla-Pacheco v. Mexico, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 209, ¶ 272* (Nov. 23, 2009) (mandating that military jurisdiction be reduced or even revoked

addition, the military should be assigned specific timelines for their operations to ensure empowerment of police forces to face organized crime.¹⁸⁵ Careful delineation between military and police tasks will reduce the risk of military supplanting police forces as well.¹⁸⁶

Should the federal government choose to supplement civilian police with military forces, legislation should mandate increased training in the area of human rights and investigations.¹⁸⁷ Training in the areas of gathering and maintenance of evidence must be provided to ensure that investigations are effective and there is access to justice.¹⁸⁸ Key aspects of training should include the preservation of crime scenes, interviewing witnesses, and due process guarantees under international law.¹⁸⁹

C. THE UNITED STATES SHOULD SUPPORT CIVILIAN POLICE FORCES THROUGH FUNDING, TRAINING, AND SOCIAL PROGRAMS

The United States continues to send military financial assistance as part of its strategy in the “war on drugs.”¹⁹⁰ Rather than

in times of peace).

185. See WITHERS ET AL., *supra* note 27, at 26 (contending that “as long as governments continue to make up for police forces’ deficiencies with military power, law enforcement agencies will never develop to their proper capacities”); see also Pérez & Martínez, *supra* note 37 (discussing a lack of political will to withdraw troops as the government becomes more reliant on their resources).

186. See WITHERS ET AL., *supra* note 27, at 14 (discussing areas of overlap in the roles served by Mexico’s military and traditional civilian-controlled police functions, including control of public protests, civic and social assistance, and protection of domestic private assets).

187. See *Mexico: Deliver Justice for Killings, Disappearances in Monterrey*, *supra* note 35 (describing the lack of due diligence by military in investigations including the failure to interview witnesses, visit crime scenes, and follow basic procedure).

188. See WITHERS ET AL., *supra* note 27, at 25 (describing military operations and the use of search and destroy techniques, which demonstrate inadequate preservation of evidence, and describing a lack of appropriate training and resources).

189. See NEITHER RIGHTS NOR SECURITY, *supra* note 7, at 16 (discussing inadequacies in soldier investigations, including crime scene tampering and the use of coerced confessions).

190. See Doris Gómora, *Aumenta 400% del Pentágono [400% Increase from the Pentagon]*, EL UNIVERSAL (Aug. 11, 2011), <http://www.eluniversal.com.mx/primer/37477.html> (observing that between the years 2007 and 2011, the United States increased its military spending in Mexico by four hundred percent from fifteen million to seventy-one million dollars per year).

emphasizing funding of the Mexican military, the United States should increase monetary and training assistance to police forces.¹⁹¹ Such support will help enable them to tackle issues like drug trafficking and organized crime, while safeguarding human rights.¹⁹² Increased U.S. law enforcement training of local police forces, rather than military-to-military and military-to-police training will limit the use of military tactics to fight crime.¹⁹³

The United States should condition military financing on the implementation of socioeconomic programs, such as basic schooling and vocational training programs, thereby shrinking the employment pool for organized crime.¹⁹⁴ Breaking up criminal networks will reduce the pressure on the federal government to use military to

191. See WITHERS ET AL., *supra* note 27, at 28 (calling upon the United States to provide aid for police training focusing on “comprehensive institutional strengthening of law enforcement,” as opposed to limiting training to counter-narcotics efforts, and recommending implementation investigative training programs for civilian police such as the Justice Department’s existing International Criminal Investigative Training Assistance Program (ICITAP)); *see also* *Narcoterrorism and the Long Reach of U.S. Law Enforcement: Hearing Before the Subcomm. Comm. on Terrorism, Nonproliferation and Trade of the H. Comm. on Foreign Affairs*, 112th Cong. 38 (2011) [hereinafter *Narcoterrorism Hearing*] (statement of Vanda Felbab-Brown, Fellow, The Brookings Institute) (describing systemic weaknesses in civilian police forces, and predicting that “comprehensive police reform will require a sustained commitment [by the United States] over a generation at least.”).

192. *See Narcoterrorism Hearing, supra* note 191, at 28 (noting that police forces in Mexico are extremely weak, but arguing that there is more complex institutional weakness driving organized crime that needs a multifaceted response, including socioeconomic development).

193. *See* Jeanna Cullinan, *North Mexico Police Desert Training Course*, IN SIGHT: ORGANIZED CRIME IN THE AMERICAS (Sept. 6, 2011), <http://insightcrime.org/insight-latest-news/item/1513-North-mexico-police-desert-training-course> (reporting on a desertion incident at a military training facility in the state of Chihuahua where 350 police officers from the state of Tamaulipas were receiving training in military tactics and where they may have been deprived of food in addition to being subject to grueling hours); *see also* WITHERS ET AL., *supra* note 27, at 27 (recommending that the United States should refrain completely from training police in military tactics).

194. *See Narcoterrorism Hearing, supra* note 191 at 39 (arguing that fortifying socioeconomic institutions can counter drug cartel power over marginalized civilian groups); *see also* Christopher Sherman, *U.S. to Train Police in Mexico*, SALT LAKE TRIB. (Aug. 17, 2011), <http://www.sltrib.com/sltrib/world/52406860-68/mexico-training-state-brownfield.html.csp> (reporting that this type of training has begun to take place as part of foreign assistance).

supplant police forces.¹⁹⁵ Socioeconomic funding can raise the level of education and standards of living, which may lead to a reduction in organized crime.¹⁹⁶ Several scholars have argued that the way to combat organized crime is much like combatting fraud and money laundering operations in the United States.¹⁹⁷ These tactics may prove more effective than blunt force.¹⁹⁸ Because militarization is occurring rapidly, immediate steps should be taken to ensure that training of police forces and the military in basic aspects of investigation is a prerequisite to certain U.S. foreign assistance programs in Mexico.¹⁹⁹ Although Mexico faces complex public violence problems, largely due to organized crime, civilian police forces should take a leading role in investigating domestic crimes, and ordinary courts should then prosecute alleged perpetrators.²⁰⁰

V. CONCLUSION

The Radilla Resolution is in accordance with the Right to Justice under the American Convention and has laid the foundation for the

195. See NEITHER RIGHTS NOR SECURITY, *supra* note 7, at 16 (suggesting that the current reliance on the military is a result of President Calderón declaring “war” on organized crime without initiating law enforcement reforms which would have made civilian-controlled police more effective in combating such crime).

196. See *id.* at 32 (arguing that, for many Mexican citizens, basic livelihood depends on the informal economy, and institutional weaknesses makes marginalized groups susceptible to involvement in organized crime).

197. See *The International Exploitation of Drug Wars and What We Can Do About It, Hearing Before the Subcomm. on Oversight and Investigations of the H. Comm. Foreign Affairs*, 112th Cong. 45 (2011) (statement of Andrew Selee, Director, Mexico Institute, Woodrow Wilson Center) (arguing that the mapping of financial transaction networks will help track key targets).

198. *Id.* (discussing sharing intelligence resources to reduce violence).

199. See CLARE RIBANDO SEELKE, CONG. RESEARCH SERV., RL 32724, MEXICO: ISSUES FOR CONGRESS 11 (2011) (explaining that fifteen percent of Foreign Military Financing (FMF) and International Narcotics Control and Law Enforcement (INCLE) funds can be withheld until the Secretary of State reports that Mexico is meeting human rights standards—incentive for Mexico to change its policies); see also *supra* notes 38-40 and accompanying text (describing rapid increases in military budget and deployment).

200. See WGEID Press Release, *supra* note 48 (expressing concern about the reliance on military personnel and courts in the area of public security while acknowledging that Mexico has taken steps to initiate reform of the civilian security apparatuses, such as establishing the office of Executive Secretary of Public Security and the National Security System which is intended to increase cooperation among federal and local police).

Supreme Court to rule the Military Justice Code Article 57 unconstitutional. The IACtHR has made it clear that military courts do not satisfy the principle of the competent court.²⁰¹ In order to ensure that civilian rather than military courts are used, the Mexican Supreme Court or the legislature must invalidate article 57. Moreover, cases pending under military authority should be transferred immediately and *ex officio* to civilian jurisdiction to ensure their effective investigations.

The policy of militarization of police forces can be limited in order to ensure that police are conducting investigations in which evidence is pursued, key witnesses are interviewed, and crime scenes are thoroughly investigated. These basic aspects of training should be emphasized in U.S. foreign policy. Addressing these elements will bring Mexico closer to compliance with Articles 1, 2, 8, and 25 of the American Convention.

201. *See, e.g.,* Radilla-Pacheco v. Mexico, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 209, ¶ 272 (Nov. 23, 2009) (noting the IACtHR's repeated affirmation that military criminal jurisdiction has an extremely limited scope in times of peace and applies only when military rights are threatened).