

Lost in Transition

Bold Ambitions, Limited Results for Human Rights Under Fox

The logo for Human Rights Watch, consisting of a black square with the words "HUMAN RIGHTS WATCH" in white, uppercase, sans-serif font, arranged in three lines.

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Printed in the United States of America

ISBN: 1-56432-337-4

Cover design by Rafael Jimenez

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We stand with victims and activists to prevent discrimination, to uphold political freedom, to protect people from inhumane conduct in wartime, and to bring offenders to justice.

We investigate and expose human rights violations and hold abusers accountable.

We challenge governments and those who hold power to end abusive practices and respect international human rights law.

We enlist the public and the international community to support the cause of human rights for all.

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Acknowledgements

This report was written by Tamara Taraciuk, Alan R. and Barbara D. Finberg Fellow at Human Rights Watch, and Daniel Wilkinson, deputy director of Human Rights Watch's Americas Division. It was edited by José Miguel Vivanco, executive director of the Americas Division, Wilder Tayler, Human Rights Watch's legal and policy director, Joseph Saunders, deputy program director, Ian Gorvin, consultant to the Program Office, María McFarland Sánchez-Moreno, Colombia researcher, Marianne Mollmann, advocacy director of the Women's Rights Division, Michael Bochenek, deputy director of the Children's Rights Division, and Adam Abelson, Princeton in Latin America Research fellow with the Americas Division. Americas Division associates Jennifer Nagle, Danielle Wainer, and Joanna Edwards contributed to research logistics and production. Americas Division interns Joanna Klonsky, Vanessa James, Christian Wlaschütz, Helena Cárdenas, Eloise Fluet, Casey Paschoaloti, Sarah Wright, Sarah Fick, Maria Sarabia, Sara Milstein, Carmen Laura Martinez Lopez, Joshu Harris, and Maira Magro provided valuable research support.

Human Rights Watch would like to thank the numerous organizations, government officials, and individuals that contributed to this report. We are especially grateful for the critical insights and advice we received from Edgar Cortez and Michel Maza from the Red Nacional de Organismos Civiles de Derechos Humanos "Todos los derechos para Todas y Todos," and Fabián Sánchez, Mario Solórzano, Sergio Mendez Silva and Maria Sirvent from the Comisión Mexicana de Defensa y Promoción de los Derechos Humanos. We also received valuable input from Denise Dresser and Miguel Sarre from ITAM University, Sergio Aguayo from El Colegio de México, Andrés Rozental from COMEXI, Emilio Alvarez Icaza from the Human Rights Commission of Mexico City, Lucy Tacher from PRODERECHO, Ernesto Villanueva from LIMAC, Ana Luisa Ligouri from the MacArthur Foundation, Laurie Freeman from the Washington Office on Latin America, Benjamin Naimark-Rowse and Martin Schoenteich from Open Society Justice Initiative, as well as from Paulina Vega, Pilar Noriega, Guillermo Zepeda, Bernardo Leon, Jan Perlin, Susana Camacho, Mario Bronfman, and Mariclaire Acosta. Human Rights Watch takes full responsibility for any errors or omissions in this report.

We are deeply grateful to the numerous victims and relatives of victims of human rights abuses who shared information regarding their cases for us.

Finally, Human Rights Watch would like to thank the Ford Foundation, the William and Flora Hewlett Foundation, the Robert Field Bullock Foundation, and Denise Dresser (member of the board of the General Service Foundation) for their generous funding of our work in Mexico.

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I. Summary and Recommendations

Mexico's 2000 presidential election was a decisive turning point in the country's transition to democracy. The victory of Vicente Fox, an opposition candidate, marked the end of seven decades of one-party rule. And the support he received from voters across the political spectrum made clear that Mexican society was ready for this change.

But elections alone do not make a democracy. How a country's leaders are selected is, of course, fundamental. But so is how they govern. And a principle requisite of democratic rule is that a nation's leaders be fully accountable to its citizens, as well as to its laws.

President Fox inherited a political system whose defining feature had been, precisely, its lack of accountability. In addition to rigging elections, the old regime had routinely violated the rights of its citizens, as well as its laws, and then covered up these violations by withholding basic information from Mexican society, while rejecting scrutiny from abroad. After the 2000 election ended one-party rule, the critical challenge that Mexico still faced in its transition to democracy was how to end this pattern of violation and cover-up.

Six years later, Mexico has made dramatic progress in addressing one part of that pattern, but very little in addressing the other. Under President Fox, the country has pursued a course of unprecedented openness and transparency—allowing international scrutiny of its rights practices and public access to information held by government agencies. What Mexico has yet to do, however, is effectively address the human rights problems that this openness and transparency have helped to expose. In particular, the country has yet to establish accountability for past atrocities, or to make serious progress in curbing the abuses that continue to be committed on a regular basis today. President Fox's efforts in these areas, while ambitious on paper, have largely failed to achieve their principal goals.

This report examines the current state of Mexico's transition to democracy from a human rights perspective. It does not address all the pressing human rights issues facing the country today. Rather, it focuses on those that are, in our view, most directly relevant to the challenge of promoting democratic accountability: openness to international rights monitors (Chapter 2); public access to government information (Chapter 3); accountability for past abuses (Chapter 4); and reforms of the justice system needed to end ongoing abuses (Chapter 5). In its concluding chapter, the report

discusses the most notorious human rights case of recent years—the murder and “disappearance” of hundreds of women in Ciudad Juárez—showing how that tragedy illustrates the main themes of this report (Chapter 6).

The report’s findings are based on extensive interviews with Mexican officials from all three major political parties and all three branches of the federal government, as well as from various state governments and autonomous institutions. The findings are also drawn from extensive interviews and consultation with representatives from local nongovernmental organizations, which have played an absolutely essential role in promoting democratic change in Mexico, as well as with lawyers, journalists, scholars, and leading members of Mexican civil society. Finally, the findings draw upon interviews with numerous victims and relatives of victims of human rights violations.

As Mexico prepares for its first presidential election since the end of one-party rule, the country’s transition to full democracy remains far from complete. President Fox’s human rights agenda has helped to advance this transition in certain key areas. Yet, Mexican democracy remains shackled by the laws and institutions it inherited from the old regime. The challenge of delivering the country from its authoritarian past will soon pass to a new president. To meet this challenge, the next administration will need to pursue an aggressive human rights agenda—building upon the strengths of Fox’s agenda, while avoiding its significant shortcomings.

Openness and Transparency

A central obstacle to democratic accountability in Mexico has been the culture of secrecy that has traditionally pervaded all areas of government. For years, Mexican citizens were denied access to the most basic information regarding the institutions and even the rules that governed their daily lives. In addition to infringing upon their right of access to official information, this lack of transparency severely undermined their ability to counter the abusive practices that state agents and institutions routinely committed against them.

The stifling impact of this culture of secrecy was compounded by the country’s refusal to allow international scrutiny of its human rights practices. The old regime actively discouraged and disregarded such scrutiny on the grounds that it constituted foreign meddling in the internal affairs of the state. Even under President Ernesto Zedillo, whose government showed greater willingness to engage with international rights monitors, Mexico never abandoned the position that respect for state sovereignty was more important than the protection of basic rights.

A New Foreign Policy

One of the first significant policy shifts that the Fox administration brought to Mexico was its rejection of a radical doctrine of non-interference that had defined the country's foreign policy for years. On his first full day in office, President Fox signed an agreement with the United Nations High Commissioner for Human Rights (UNHCHR) that committed Mexico to collaborating with the U.N. office to assess and improve Mexico's human rights practices. Several weeks later he announced the removal of onerous travel restrictions that had been used to limit foreign advocates' access to the country. And in the administration's first appearance before the U.N. Commission on Human Rights several months later, his foreign minister extended a permanent invitation to the U.N.'s human rights rapporteurs to evaluate conditions in Mexico and, in the same speech, announced the country's new approach to human rights: Mexico would treat them as universal and absolute values that surpassed national sovereignty in importance.

The foreign minister's words were backed by a variety of concrete actions that showed that Mexico was seriously committed to promoting human rights—both abroad and at home. The Fox administration had scrapped the defensive posture of the old foreign policy that aimed to shield Mexico from international scrutiny, and replaced it with a proactive policy that used the international rights regime as a catalyst for change within Mexico.

While international scrutiny is not, in itself, a prerequisite for democratic rule, accountability is. And international scrutiny often has proven instrumental in prompting states to take accountability more seriously. In the case of Mexico, international scrutiny has played a vital role in reinforcing efforts by local rights advocates to raise public awareness of the scope and nature of the country's human rights problems. As with all bad habits, the first step to addressing these problems is recognizing that something is wrong. And thanks in large part to the new foreign policy, the era of total denial in Mexico appears to have past.

The Transparency Law

Mexico's opening to scrutiny from abroad was soon followed by an even more radical opening to scrutiny from within. In 2002, the Mexican Congress passed a "transparency law" that dealt a potentially decisive blow to the longstanding culture of secrecy in government affairs. The new law established a "principle of maximum disclosure" that essentially reversed the state's traditional approach to the disclosure of official information. Where in the past disclosure was the exception, under the new law it would be the rule. The law also established a powerful mechanism—the Federal

Institute for Access to Official Information (IFAI)—to enforce this principle within the executive branch and mandated the creation of comparable mechanisms within the other branches.

The transparency law may prove to be the most important step Mexico has taken in its transition to democracy since the 2000 election. And the credit for making it happen is shared by many—from President Fox who signed the law, to the legislators from all three major parties who voted to pass it, and, perhaps most importantly, to a diverse array of civil society actors who conceived the law and convinced Mexico’s political leaders that it was necessary.

The potential impact of the law received a huge boost from the 2002 declassification of millions of secret documents from government archives. The release of the documents, ordered by President Fox, amounted to a retroactive application of the new principle of disclosure, giving journalists, investigators, and ordinary citizens access to government information, including extensive documentation of past human rights violations that had been denied to them for decades.

Ongoing Threats to Openness and Transparency

While the transparency law has transformed Mexico’s approach to managing information, there is still serious danger that the culture of secrecy will reassert itself in the future. The progress made in promoting transparency within the executive branch has not yet been matched in the other branches of government, nor in autonomous state institutions such as the National Human Rights Commission—and the transparency law does not even cover political parties, which employ large quantities of public funds to shape the country’s electoral and legislative processes. What’s more, within the executive, the IFAI remains vulnerable to political interference and has already encountered growing resistance on the part of several key agencies to turning over information. And in terms of the declassified archives, meaningful access remains severely limited by a variety of factors, including the overly broad application of criteria for protecting people’s privacy, which result in archivists withholding documents that should be made public. In sum, the historic advances that Mexico has made in the area of transparency still remain precarious today.

The opening to international scrutiny has not faced the same sort of institutional obstacles as the implementation of the transparency law. Yet the progress here may be even more precarious, given that it is neither enshrined in law nor the product of a formal political consensus. It is rather the foreign policy of one administration and

could easily be abandoned as quickly as it was launched on the first day of the next presidency.

Whether the openness and transparency continue and deepen will depend largely upon the next administration. To ensure that the transparency law realizes its full potential, the new president will need to insist that all government entities provide broad public access to information in their possession; promote legislation that would grant the IFAI constitutional autonomy and establish “transparency obligations” for political parties and other non-state actors that spend public funds; and support initiatives by other branches of the federal government, as well as by autonomous agencies, to create better implementing regulations to comply with the transparency law.

On the foreign policy front, the next administration will need to decide whether to embrace the new openness doctrine or return Mexico to the old “don’t ask, don’t tell” approach to international human rights. The new president should reject the notion that promoting national sovereignty is more important than protecting basic rights, continue actively collaborating with the UNHCHR and other international human rights monitors, and prioritize the implementation of measures in the National Human Rights Program, updating it as necessary to reflect evolving circumstances.

Accountability and Law Enforcement

A central area where Fox’s human rights agenda has come up short has been in its initiatives aimed at addressing another legacy of the old regime: the routine subordination of the rule of law to the perceived imperatives of public security.

The most egregious human rights crimes committed over the years in Mexico have typically targeted people that the state deemed to be security threats of one kind or another—from armed insurgents, to student activists, to common criminals. At their most extreme, these violations included the massacres of student protesters in 1968 and 1971, and the torture, execution, and forced disappearance of hundreds of civilians during the country’s “dirty war” in the 1970s and early 1980s. Compounding the horror of these atrocities was the fact that, for decades, Mexico failed to investigate and prosecute those responsible, thereby forcing Mexican society to assimilate the ultimate lesson in the limits of their country’s rule of law: government officials could get away with even the most brutal crimes.

Far more common than those acts of political violence, however, have been the routine abuses committed by law enforcement agents against criminal suspects throughout the

country. The most notorious of these has been the use of torture to obtain confessions from detainees. Another has been the systematic misuse of pretrial detention, resulting in innocent people being locked up with hardened criminals for months on end.

President Fox has launched two major initiatives to address this legacy of state lawlessness—one aimed at ending years of impunity for past abuses, the other at preventing future ones. Both initiatives were ambitious and essential. Yet both have so far failed to achieve their main goals.

The Special Prosecutor's Office

In November 2001, President Fox responded to repeated calls for a truth commission to investigate past abuses by creating something that was potentially even better: a special prosecutor's office that would investigate and prosecute these crimes—an initiative that would, in other words, seek both truth and justice.

Yet the results after four years have been deeply disappointing. The office has succeeded in obtaining the arrest and indictment of the former head of the secret police and three other security officials—something that would have been unthinkable in Mexico until very recently. But these successes have been eclipsed by major setbacks. The courts have roundly rejected the special prosecutor's efforts to indict former President Luis Echeverría and other former officials on charges of “genocide” for the massacres of student protestors. Although the special prosecutor did win an important Supreme Court ruling that authorized the prosecution of decades-old cases of forced disappearance, his office has managed to file charges in only fifteen of the more than 600 cases before it. And, as of this writing, the office has not obtained a single conviction.

Perhaps the most substantial accomplishment of the Special Prosecutor's Office so far, in addition to the indictments and the one favorable ruling from the Supreme Court, has been the production of an ambitious draft report on the history of the past abuses under investigation. Yet this draft report is, itself, the clearest evidence that the Special Prosecutor's Office has not lived up to its potential. The report has revealed the existence of extensive documentation in government archives that implicates former officials and military officers in the “dirty war” crimes. Yet even the report's main author concedes that it is a woefully incomplete document, containing only a small fraction of the information that could have been collected if a more thorough investigation were carried out. What the draft report shows, in other words, is that the Special Prosecutor's Office has made some progress in ending the official cover-up of these atrocities, but not nearly as much as it might have.

Justice Reform

One of the most ambitious initiatives of the Fox presidency has been a proposed overhaul of the justice system that would, among other things, address the root causes of its two most recurrent human rights problems—the use of torture and the misuse of pretrial detention.

In the case of torture, the main reason the practice continues is that prosecutors are able to use coerced statements to convict people at trial. It is easier, they find, to beat a confession out of someone than to conduct a professional investigation. The Fox proposal would curb this practice by removing the perverse incentive that promotes it. A modification of the Federal Constitution would establish that only confessions given directly before a judge could be used to convict someone of a crime. The coerced confession extracted in a backroom or basement corridor would no longer be admissible at trial.

In the case of pretrial detention, the problem is a legal regime that denies judges discretion to grant provisional liberty to suspects who are entitled to it—namely those who pose no danger to society, nor risk of evading justice. Under current law in most parts of Mexico, anyone charged with a “serious crime” is automatically jailed until trial. And, over the years, popular demand for anti-crime measures has prompted legislators at both the state and federal level to expand the list of these “serious” crimes to include a host of nonviolent and relatively minor crimes. As a result, today more than 40 percent of prisoners in Mexico have not been convicted of the crime for which they are being held, many of them locked up for months on end with convicted criminals.

The Fox proposal represents an important first step toward reducing this abusive practice at the federal level by allowing federal judges to grant provisional liberty in cases involving some “serious” crimes. The proposal also calls for a reform of the Mexican Constitution that would establish a presumption of innocence for individuals not convicted of a crime. This constitutional guarantee could be used to compel further changes in federal criminal law, as well as changes in the criminal law of the states, to reduce the excessive use of preventive detention at the local level.

Unfortunately, the proposed reforms have languished in Congress for more than two years, and their prospects for passage in the immediate future do not seem promising.

Reconciling Rights and Security

The failure of these two very different initiatives reflects Mexico's broader failure to integrate human rights and public security into a single coherent agenda. Perhaps the most eloquent testament to the enduring imbalance between these two priorities is the fact that, today, whereas tens of thousands of unconvicted Mexicans are locked up with hardened criminals because of their alleged involvement in nonviolent crimes, only four former officials are facing trial in civilian courts for the abduction, torture, murder, and forced disappearance of hundreds of people during the country's "dirty war."

The Special Prosecutor's Office was intended to help rectify this imbalance. Its failure to do so is, ultimately, the responsibility of the administration that created it. After launching the ambitious initiative, the Fox administration failed to ensure that the office possessed the credibility, technical expertise, and powers it needed to succeed. It also failed to ensure active collaboration from other institutions, including the federal investigative police who have been unable or unwilling to execute a majority of the arrest warrants in these cases, and, most importantly, the Mexican military, which has refused to cooperate in a serious fashion with the investigation and prosecution of these cases.

The work begun by the Special Prosecutor's Office can still be salvaged. But it will require the next president to take concrete steps to overcome the obstacles that have hindered progress until now. One such step is to compel the armed forces to collaborate actively with investigators and prosecutors working on these cases. A second step is to seek legislation granting the prosecutors of these cases the powers they need to obtain witness testimony. And finally, to reinforce and complement efforts to prosecute these cases, the president should promote the creation of a truth commission with the resources, expertise, and independence necessary to advance the investigation begun by the Special Prosecutor's Office.

Mexico's failure to pass justice reform proposals into law is more the fault of its Congress than that of its president. Yet here too the president could play a much more active role in confronting the broader political obstacle that impedes their passage: the widespread misperception that human rights and public security are conflicting priorities.

Opponents of Fox's anti-torture measure argue, for example, that it would weaken the hand of law enforcement, and thereby strengthen the hand of criminals. But they are wrong. Rather than undermining prosecutors, the measure would merely force them to do their job better. Unable to rely on coerced confessions, they would need to conduct more thorough investigations in order to obtain convictions. Current practice—notably the failure to end the use of coerced confessions—is a travesty for human rights and

public security: innocent people confess to crimes they didn't commit, while actual criminals go free.

Similarly, opponents of reforms aimed at curbing pretrial detention argue that the proposed measures, like the anti-torture reforms, would weaken law enforcement efforts. But, as with torture, the excessive use of pretrial detention constitutes a serious threat to public security. The cost of incarceration of tens of thousands of non-violent prisoners diverts public funds that would more wisely be invested in efforts to combat violent crime. It also contributes to the severe overcrowding of Mexican prisons, which in turn undermines the ability of penal authorities to control inmate populations—which then, in turn, results in a prison system where petty criminals (not to mention innocent suspects) must endure months living under the influence and even supervision of hardened criminals. The end result is a prison system that functions as a finishing school for delinquents.

Unfortunately, it seems unlikely that Congress will approve these much-needed measures so long as the basic misperception of their potential impact on public security prevails. For Mexico to make progress in this area, its political leaders—and in particular its president—will need to campaign actively to persuade the public that passage of the proposed measures is essential for promoting both human rights and public security.

The Lessons of Ciudad Juárez

Of all the human rights problems that rose to prominence during the Fox presidency, none has received more local and international media coverage than the state's response to hundreds of cases of murdered and “disappeared” women over the past decade in Ciudad Juárez, Chihuahua. This coverage has been crucial, both for drawing attention to the plight of the victims in Chihuahua and for raising much-needed awareness of the chronic problem of violence against women in Mexico. Yet, the tragedy of Ciudad Juárez also offers other important—though largely overlooked—lessons related to the main themes of this report.

One is the lesson that public security and human rights should be understood as complementary aims. In Chihuahua, innocent people were coerced into confessing to the killings of women, allowing the true criminals to remain at large. Another related lesson is that ending these abusive practices requires reforming the underlying deficiencies of the justice system that give rise to them. And a third fundamental lesson of Ciudad Juárez is that international scrutiny, combined with local advocacy, can play a crucial role in bringing about real progress in promoting human rights and accountability. Thanks in large part to this combination of international scrutiny and

local advocacy, the state of Chihuahua is now close to passing precisely the sort of justice reform measures that the Fox administration has been unable to get passed at the federal level. In short, the case of Ciudad Juárez shows that the kind of reforms that Mexico needs in order to make real progress on human rights are indeed possible.

Recommendations

Based upon the experience of the past five years, Human Rights Watch believes that there are four broad policies that the next administration should pursue in order to strengthen the protection of human rights and advance the transition to full democracy and rule of law in Mexico.

1) Openness

The next administration should pursue a foreign policy that encourages international scrutiny of human rights issues within Mexico. Specifically, it should:

- Recognize the universality of international human rights values and rejecting the notion that protecting national sovereignty is more important than protecting basic human rights;
- Continue active collaboration with the U.N. High Commissioner's Office and other international human rights monitors; and
- Continue implementation of measures proposed in the National Human Rights Program, while working with civil society to strengthen the program's contents.

2) Transparency

The next administration should promote increased government transparency. Specifically, it should:

- Instruct all entities within the executive branch to comply fully with the transparency law and maximize public accessibility to the information in their possession;
- Promote legislation that would grant the IFAI constitutional autonomy and establish transparency obligations for political parties and other non-state actors that spend public funds; and
- Support initiatives by other branches of the federal government, as well as the autonomous agencies and state governments, to create better transparency standards and implementing regulations.

3) Accountability

The next administration should promote accountability for past human rights atrocities. Specifically, it should:

- Order the armed forces to collaborate actively with investigators and prosecutors of human rights crimes involving current and former military personnel, and promote legislation that would prevent any cases involving human rights crimes from being tried in military courts;
- Promote legislation that would give prosecutors of human rights cases authority to offer reduced sentences to some individuals in exchange for effective collaboration in prosecuting these cases;
- Establish a truth commission with the resources and independence necessary to construct an authoritative account of past abuses and, most importantly, reinforce efforts to prosecute them.

4) Law Enforcement

The next administration should actively promote the passage of justice reforms aimed at curbing abuses that undermine public security. Specifically, it should promote reforms of the justice system that would:

- Require that confessions be made before a judge in order to have evidentiary value;
- Allow judges discretion to grant provisional liberty to suspects who pose no threat to society or risk of flight; and
- Incorporate the presumption of innocence in the Constitution.

II. Openness: A New Approach to Foreign Policy

On his first full day in office in December 2000, President Vicente Fox made what would prove to be one of the more significant gestures of his presidency: he signed a cooperation agreement with the U.N. High Commissioner for Human Rights (UNHCHR). Under the agreement, the Fox administration committed itself to collaborating with the UNHCHR's office to assess and improve Mexico's human rights practices. What makes that agreement seem so significant now is not so much the fruits of that collaboration—though these have indeed been valuable in themselves—but, rather, the fact that Fox signed such an agreement at all. For with that first act of his foreign policy, the new president revealed that Mexico was embarking upon an entirely new approach to international relations—and, with it, an entirely new way of handling human rights.

Mexico had embraced human rights causes in the past. It had signed and sometimes ratified international rights treaties. It had provided a safe haven to refugees fleeing murderous regimes in Central America, as well as to exiles from the Southern Cone whose politics had earned them *de facto* death sentences back home. And its leaders had regularly professed their commitment to respecting the rights of their own citizens.

But this public embrace of human rights had not translated into the respect of human rights at home. Even as it subscribed to the treaties, Mexico pursued policies that blatantly violated their basic tenets. Even as it sheltered other countries' dissidents, Mexico silenced, persecuted, and in some cases even slaughtered its own. Even as it professed its commitment to protecting rights, Mexico built its foreign policy around a radical interpretation of a principle that rendered this commitment largely meaningless—the principle that states and international actors should not interfere in the internal affairs of sovereign nations even in the face of serious human rights violations.

Under President Ernesto Zedillo, Mexican foreign policy began to change. Mexico accepted the jurisdiction of the Inter-American Court of Human Rights. It invited international monitors to visit and report on the country, and engaged in preliminary discussions with the UNHCHR's office regarding the cooperation agreement that Fox would eventually sign. And it showed increasing willingness to discuss human rights abroad. In a 1999 summit in Havana, for instance, President Zedillo advocated increased democracy in Cuba: "Today more than ever," he said, "sovereignty also needs democracy."

Yet, even under Zedillo, Mexico never abandoned the position that respect for state sovereignty was more important than the protection of basic rights. Zedillo's bold comment in Havana was quickly followed by a public assurance from his office that Mexico had not abandoned its commitment to noninterference in the internal affairs of Cuba. His government's talks with the UNHCHR's office were effectively shelved and only renewed by Fox's transition team. The Zedillo administration's invitation to international monitors was followed by its open rejection of those monitors' recommendations, expulsion of some foreign rights advocates, and imposition of onerous travel restrictions that limited the ability of foreigners to engage in human rights work within Mexico. So if Mexico under Zedillo had finally opened the door to international scrutiny, it was only a partial opening. The government still guarded that door jealously, always ready to slam it shut at the slightest perceived provocation.

Upon taking office, President Fox effectively threw the door wide open. His first foreign policy act—signing the agreement with the UNHCHR—was soon followed by another, similar one: he announced the lifting of the travel restrictions that had been used to limit foreign advocates' access to the country. And in his government's first appearance before the U.N. Commission on Human Rights several months later, his foreign minister, Jorge G. Castañeda, extended a permanent invitation to all the U.N.'s special rapporteurs to visit Mexico and evaluate the country's human rights practices.

If this invitation resembled the one offered by the previous administration, the international community had more reason now to believe that Mexico really meant it. Along with the invitation, the foreign minister declared before the U.N. Commission on Human Rights that Mexico regarded human rights as universal and absolute values that surpassed national sovereignty in importance. And these words were backed up with concrete actions. The administration created the new post of Under Secretary of State for Human Rights and named a prominent human rights advocate to fill it. It expressed concern about Cuba's human rights record at the 2001 session of the U.N. Commission on Human Rights and voted in favor of a resolution against Cuba the following year. It endorsed the principle of universal jurisdiction for human rights violations by authorizing the extradition of an Argentine to Spain to face charges for violations committed in Argentina over two decades earlier. And, after September 11, it became a forceful advocate for the promotion of human rights in the context of the "war on terrorism," voting in favor of resolutions that condemned U.S. actions in Guantanamo Bay, and pressing successfully for the creation of a human rights and terrorism post within the UNHCHR's office.

In short, what convinced the international community that Mexico was ready to engage on human rights issues was its foreign policy. In addition to the foreign affairs minister's

public invitation, there was also a simple calculus at work: a country that aggressively advocates human rights abroad effectively forfeits the sovereignty card as a shield to international scrutiny of its own practices. For governments unwilling to address their rights problems, this is an obvious liability. But members of the Fox administration approached it as an opportunity—promoting human rights abroad would make it harder for the country to ignore its rights problems at home.

Indeed, Mexico not only welcomed international scrutiny, in some cases it actively sought it. After Mexican nongovernmental organizations (NGOs) denounced the botched investigation into the death of rights activist Digna Ochoa, the Fox administration invited a specialist from the Inter-American Commission on Human Rights (IACHR) to evaluate the investigation. After the outcry over ongoing impunity for the murder of women in Ciudad Juárez, it actively encouraged international monitors to examine the problem. And when it came time to renew the collaborative relationship with the UNHCHR's office, it committed itself to something even more radical—the government would work with the U.N. representatives to develop a comprehensive evaluation of Mexico's human rights problems that would serve as the basis for a national human rights program aimed at addressing them.

By the time the UNHCHR signed this second agreement, the Fox administration had essentially inverted the doctrine that had guided Mexican foreign policy for decades. It had scrapped the old defensive posture that had aimed to shield Mexico from human rights norms and replaced it with a proactive foreign policy that used engagement with the international human rights system as a catalyst for change within Mexico.

Did the strategy work? Has the new foreign policy brought any improvement in human rights practices within Mexico? The answer, so far, is partly yes, but largely no. Mexico has signed and ratified important rights treaties. Yet the Congress has insisted on attaching reservations and interpretations that contradict and undermine the potential impact of some of these treaties (as in the case of the efforts, discussed in Chapter 4, to prosecute former officials for abuses committed during the country's "dirty war"). Mexico has also passed new legislation that explicitly reflects international norms in a variety of areas. Yet it has failed to create adequate implementing mechanisms for these new laws, or to modify laws that were already on the books. And it has failed to pass two of the most important bills of this sort—a reform of the Constitution that would clarify the hierarchy of international obligations in domestic law, and a reform (discussed in Chapter 5) that would address the grave deficiencies of the justice system. Mexico has developed a comprehensive National Human Rights Program based on the evaluation elaborated in coordination with the UNHCHR's office. Yet this program failed to

incorporate many key recommendations of that evaluation, while implementation of those it did include has only just begun.

Mexico's human rights NGOs, whose advocacy over the years largely paved the way for this change in foreign policy, have successfully seized upon the opening to draw increased international attention to the specific cases and general problems they work on. These local rights advocates have used the heightened international scrutiny to secure concrete results, including the release of wrongfully imprisoned individuals, in several important cases. Yet, despite these successes, they continue to encounter a deep and abiding resistance on the part of many authorities to changing the policies and practices that gave rise to the cases in the first place.

The considerable work that remains to overcome this resistance and change these practices does not fall within the ambit of foreign policy. It is now up to the other government ministries, as well as the other branches of government, to do their part to address the problems that have been more thoroughly exposed and analyzed these past few years. Yet openness to international scrutiny will continue to be important for exposing issues and complementing the efforts of local rights advocates to generate pressure for change.

The Old Closed-Door Policy

Human rights have long been an important component of Mexican foreign policy. But, until recently, the reason they figured there was not because they were a priority, but rather because they were seen as something that was “foreign,” a potential threat to the interests of the country—or, more precisely, a threat to the interests of the regime that governed it. Even during the Zedillo administration, when Mexican foreign policy began to change, Mexico was generally reluctant to promote human rights abroad, and was adamant in rejecting criticism from international actors regarding its own human rights problems at home.

The old regime relied on the principle of noninterference to justify this “don't ask don't tell” approach to international human rights. It insisted on a dogmatic reading of this principle, according to which foreign entities, be they states or international monitoring bodies, had no standing to involve themselves in the internal affairs of sovereign nations.

When, for example, Human Rights Watch published a report on state responsibility for rural violence in Mexico in 1997, the Mexican Foreign Affairs Ministry criticized the “curious timing” of the report, noting that former U.S. President Bill Clinton planned to

visit Mexico two weeks later. According to the Mexican government, when Human Rights Watch asked President Clinton to mention the need to end impunity for political violence in Mexico during his visit to Mexico, “[it seemed] to forget that Mexico is a sovereign country and therefore, that it does not receive instructions from any foreign government at all.”¹

The Zedillo administration also imposed restrictions on human rights activists’ ability to visit Mexico. As of May 1998, the government required visa applicants from human rights organizations to produce extensive documentation including a Spanish-language version of their organizations’ by-laws and letters attesting to their moral rectitude. A list of all locations to be visited had to be provided to the government at least thirty days in advance of the trip, a requirement that prevented human rights monitors from visiting Mexico during emergencies. The specificity of the requirements meant that human rights investigators would be prohibited from traveling to communities that they did not list on their visa applications, a serious impediment to investigators who needed to follow the leads encountered during research missions.

On several occasions in 1998, human rights defenders were prohibited from traveling to Mexico because Mexican consular officials, or their colleagues in Mexico City, appeared unwilling or unable to process visa requests. A lawyer from the Washington, D.C.-based Center for Justice and International Law (CEJIL), for example, was forced to cancel her participation in a human rights seminar she was to lead. Another was given a visa at the last minute that permitted her to do only a small portion of what she had planned—and requested—to do.

In addition to making it difficult to enter the country, Mexico also expelled foreign rights advocates from the country on several occasions. In June 1995, three priests from Argentina, Spain, and the United States were expelled for engaging in activities related to the defense of human rights in Chiapas. In April 1997, two members of the International Human Rights Federation who had been invited by NGOs in Mexico to investigate reports of human rights violations in the states of Guerrero, Oaxaca, and Chiapas, were expelled after they visited a prison in Acapulco and took the testimonies of torture victims.² In February 1998, a U.S. citizen who directed the Mexico Solidarity

¹ Foreign Affairs Ministry, press release 134, April 29, 1997. Translation by Human Rights Watch.

² IACHR, “Report on the Situation of Human Rights in Mexico,” OEA/Ser.L/V/II.100, Doc. 7 rev. 1, September 24, 1998, para. 663. See also IACHR, “Report N° 49/99 - Case 11.610, Loren Laroye Riebe Star, Jorge Barón Guttlein and Rodolfo Izal Elorz,” April 13, 1999, [online] <http://www.cidh.org/annualrep/98span/Fondo/Mexico%2011.610.htm> (retrieved February 2006).

Network was expelled. A group of NGOs reported over one hundred other cases of rights observers being expelled from Mexico in 1998.³

The formal justification for expelling foreigners was that Article 33 of the Mexican Constitution grants the executive the authority to make all foreigners “abandon the national territory, immediately and without prior trial” if the president considers that their presence is “inconvenient.” That same article also says that “foreigners may not, under any circumstances, interfere with political issues in the country.”

When questioned by the IACHR, the Mexican government justified some of these expulsions on grounds that the foreign rights advocates had “interfered in the internal affairs of the country.”⁴

A New Approach to Foreign Policy

Promoting Human Rights Abroad

Under President Fox, Mexico has presented to the United Nations and the Organization of American States (OAS) several initiatives related to human rights, including proposals related to the protection of migrants’ rights, the rights of indigenous peoples, the rights of handicapped people, and women’s right to land, property and inheritance. For example, Mexico has played a very important role in the recent adoption by a U.N. working group of a draft International Convention for the Protection of all Persons from Enforced Disappearances.⁵

In October 2002, Mexico successfully proposed the establishment of a mechanism to monitor compliance with the Inter-American Convention to Prevent, Sanction and Eradicate Violence Against Women (the “Belém do Pará Convention”).⁶ Mexico has also emphasized the importance of having a mechanism to promote compliance with the decisions of the Inter-American Court of Human Rights. Although the Court’s decisions are legally binding, there is currently no mechanism to ensure compliance with

³ Global Exchange et. al., “Foreigners of Conscience: The Mexican Government’s Campaign Against International Human Rights Observers in Chiapas,” April 1999, p. 4, [online]<http://www.globalexchange.org/countries/americas/mexico/observers/report/part1.pdf> (retrieved February 2006).

⁴ IACHR, “Report on the Situation of Human Rights in Mexico,” OEA/Ser.LV/II.100, Doc. 7 rev. 1, September 24, 1998, paras. 663-665.

⁵ International Convention for the Protection of all Persons from Enforced Disappearances, E/CN.4/2005/WG.22/WP.1/REV.4, September 23, 2005.

⁶ The mechanism was adopted in July 2004. See Ministry of Foreign Affairs, *La Política Exterior Mexicana en la Transición* (Mexico City: Fondo de Cultura Económica, 2005), p. 225.

its decisions. Until now, there has merely been a reference to the need to create such a mechanism in an OAS General Assembly resolution.⁷

Mexico has played a crucial leadership role in promoting international resolutions and standards concerning the protection of human rights when states adopt counterterrorism measures. For example, Mexico presented a draft resolution, which was unanimously adopted by the U.N. General Assembly in December 2002, on the protection of human rights and freedoms in the fight against terrorism.⁸ The Mexican Ambassador before the OAS presided over the working group that drafted the Inter-American Convention against Terrorism, which was adopted and signed by thirty of the thirty-four member states in June 2002.⁹

Mexico has promoted the creation of an international structure to monitor compliance with international standards on human rights and counterterrorism. Thanks to pressure from Mexico, the U.N. Counter Terrorism Committee's Executive Directorate now includes a "Human Rights, Humanitarian, Asylum Law Officer."¹⁰ Mexico has also led the initiative to get the U.N. Commission on Human Rights to appoint an independent expert on counterterrorism and human rights, an initiative that was approved by consensus in April 2004.¹¹ Based on the report of this independent expert, as well as the reports of other U.N. bodies, the U.N. Commission on Human Rights decided in April 2005 to appoint a special rapporteur on the promotion and protection of human rights and fundamental freedoms, who has a three-year mandate to oversee compliance with international norms on this topic.¹²

⁷ Letter from Ambassador García Moreno, Permanent Representative of Mexico before the O.A.S., to Human Rights Watch, March 15, 2006.

⁸ U.N. General Assembly, "Protection of Human Rights and Fundamental Freedoms while Countering Terrorism," A/RES/57/219, February 27, 2003.

⁹ O.A.S. General Assembly, "Inter-American Convention Against Terrorism," AG/RES. 1840 (XXXII-O/02), June 3, 2002. Article 15 of this Convention held that anti-terrorist initiatives must be undertaken in full compliance with international human rights law. To assist states "in complying with their international legal obligations," the IACHR prepared a report "[to] reaffirm and elaborate upon the manner in which international human rights requirements regulate state conduct in responding to terrorist threats." This report was adopted by the IACHR in October 2002. IACHR, "Report on Terrorism and Human Rights," OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr., October 22, 2002, para. 3.

¹⁰ Mexican Permanent Mission before the U.N., "Intervención de la delegación de México en la Reunión del Comité de la Lucha contra el Terrorismo establecido en virtud de la Resolución 1373 (2001) del Consejo de Seguridad," December 4, 2003 [online] http://www.un.int/mexico/2003/interv_120403.htm (retrieved March 2006). See the Organizational chart of the Counter-Terrorism Committee Executive Directorate, [online] <http://www.un.org/sc/ctc/documents/CTEDorgchart.pdf> (retrieved March 2006).

¹¹ For more information see Mexican Ministry of Foreign Affairs, *La Política Exterior Mexicana en la Transición*, (Mexico City: Fondo de Cultura Económica, 2005), pp. 139-140 and 213-231.

¹² U.N. Commission on Human Rights, Resolution 2005/80, April 21, 2005.

To complement the creation of international standards, Mexico has also promoted the consistent application of these standards to all governments that violate human rights. A paradigmatic example is how, starting with the Fox administration, the Mexican government decided to vote in favor of resolutions by the U.N. Commission on Human Rights that criticize the human rights situation in Cuba. After years of abstaining from voting, or voting against the Commission's resolutions on the human rights situation in Cuba, in 2002 Mexico began voting in favor of condemning the Cuban government's human rights abuses.¹³ The Mexican government has also voiced concerns at the OAS over the human rights situation in Cuba.¹⁴

At the same time, Mexico has criticized human rights violations by the U.S. government in Guantanamo Bay. In April 2005, Mexico was one of the eight countries that voted in favor of a draft resolution at the U.N. Commission on Human Rights that requested the U.S. government to authorize an impartial and independent fact-finding mission by U.N. representatives on the situation of detainees at the U.S. naval base in Guantanamo Bay. The resolution was rejected by twenty-two votes to eight, with twenty-three abstentions.¹⁵

Mexico became the first Latin American country to extradite someone for gross human rights violations under the principle of universal jurisdiction. In 2001, the Mexican Foreign Affairs Ministry approved the extradition of Ricardo Miguel Cavallo, an Argentine military official accused by Spanish courts of genocide, terrorism, and torture for acts committed during the military dictatorship in Argentina between 1976 and 1982. After an appeal, in 2003, the Mexican Supreme Court upheld the extradition order on charges of genocide and terrorism, though not on charges of torture.

Mexico has also used international mechanisms to defend the human rights of its citizens. In January 2003, it brought a case before the International Court of Justice

¹³ Mexico abstained from voting in the 2001 resolution on the situation of human rights in Cuba, but its representatives held that Mexico was concerned about the situation of human rights in Cuba, and that they abstained from voting because the proposed resolution was "biased and politicized." See "Palabras de la Embajadora Mariclaire Acosta, en relación con el proyecto de resolución de la situación de los derechos humanos en Cuba," April 18, 2001, http://www.sre.gob.mx/substg/dh/onu/57cdhinterv/interven_acosta57.htm (retrieved March 2006).

¹⁴ Nevertheless, the Mexican government has said that the OAS Permanent Council is not the appropriate forum to discuss Cuba's compliance with human rights standards since Cuba is not currently present in those discussions. See "Intervencion del Embajador Miguel Ruiz Cabañas, Representante Permanente de Mexico ante La OEA, sobre la Situacion de los Derechos Humanos en Cuba ante el Consejo Permanente," May 19, 2003, [online] <http://portal.sre.gob.mx/oea/popups/articleswindow.php?id=7> (retrieved March 2006).

¹⁵ U.N. Commission on Human Rights, "Report on the Sixty-first Session (14 March – 22 April 2005), Economic and Social Council, Official Records, 2005, Supplement No. 3," E/CN.4/2005/135, pp. 364-366.

against the U.S. government for violating the right to consular notification of Mexicans on death row in the United States. In March 2004, the court ruled against the United States, arguing that it had failed to inform fifty-four Mexicans arrested on capital charges of their right to talk to their consular officials, and ordered U.S. courts to provide an effective review of the convictions.¹⁶

Finally, Mexico has contributed economically to the Inter-American system of human rights. Aside from the budgetary contributions to the OAS, since 2001 the Fox administration has provided extra “voluntary funds” (US\$225,000 in 2005, for example) to the Inter-American Commission and Court.¹⁷

Openness to International Scrutiny

The Fox administration’s public repudiation of the dogmatic and self-serving use of the noninterference doctrine was backed by a wide range of concrete measures aimed at encouraging international scrutiny of the country’s rights practices.

One of the most significant of these was the signing of a cooperation agreement with the UNHCHR on the day after President Fox took office. Former president Zedillo had signed a memorandum of understanding with the UNHCHR at the end of 1999, but negotiations over the actual agreement were suspended until after the 2000 elections. Once Fox was elected president, his team moved forward with negotiations, which culminated with Fox’s signature of the agreement in December 2000.

As a consequence of this agreement, the UNHCHR established an office in Mexico City, with the purpose of assessing the structural deficiencies that impeded the full realization of human rights in Mexico, and determining what reforms were necessary to promote change. During the first phase of this project, the UNHCHR focused on capacity building of public officials and civil society members on the issue of how to combat torture.

The Fox administration signed a second agreement with the UNHCHR in April 2002, initiating a second phase of collaboration in which the U.N. office would work with a team of Mexican experts to produce a National Diagnosis of the Human Rights Situation in Mexico (*Diagnóstico sobre la Situación de los Derechos Humanos en México*). The

¹⁶ Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America), ICJ Rep. 128, 43 ILM 581 (2004).

¹⁷ Letter from Ambassador García Moreno, Permanent Representative of Mexico before the O.A.S., to Human Rights Watch, March 15, 2006.

diagnosis, which was concluded in 2003, provided a comprehensive assessment of the human rights situation in Mexico and a detailed series of recommendations that would serve as the basis for a national human rights program.

To follow-up on the recommendations set out in the diagnosis, the U.N. office in Mexico has since carried out a series of projects to improve the human rights situation in Mexico, focusing mainly on the problem of use of torture, the need to strengthen civil society, and the protection of rights of members of indigenous communities.¹⁸

In addition to the collaboration with the UNHCHR, Mexico signed a cooperation agreement with UNESCO in 2002 to promote public policies related to human rights and a human rights culture in Mexico. Mexico also signed a cooperation agreement with the European Commission in 2004 to improve local knowledge of human rights and the mechanisms to protect them, and to harmonize national human rights policies and laws with international standards and obligations.¹⁹

The Fox administration has also engaged actively with the Inter-American system of human rights in a variety of ways. In addition to the open invitation that it extended to the O.A.S. Special Rapporteurs, Mexico also invited, in an unprecedented move, a specialist from the IACHR to evaluate the work of the Attorney General's Office (*Procuraduría General de la República*, PGR) on a high profile case involving the death of human rights activist Digna Ochoa.²⁰ Twenty-one months after Ochoa had been found dead in her office in October 2001, the PGR announced that it had concluded its investigation and had found no evidence that a crime had been committed. In response to vocal criticism by the Ochoa family and local rights advocates regarding the PGR's handling of the case, the Fox administration decided to invite someone from abroad to perform an objective evaluation of what had taken place done. The resulting report criticized the flaws and omissions in the PGR investigation.²¹

¹⁸ See information provided by the Mexico office of the UNHCHR, [online] <http://www.hchr.org.mx/oacnudhmexico.htm> (retrieved February 2006).

¹⁹ During the two-year project with UNESCO, the government, UNESCO and two Mexican universities conducted a series of seminars on human rights. As a consequence of the agreement with the European Commission, the government organized seminars and meetings to increase the dialogue between itself and civil society organizations. Mexican Ministry of Foreign Affairs, *La Política Exterior Mexicana en la Transición* (Mexico City: Fondo de Cultura Económica, 2005), p. 136.

²⁰ The government's invitation to an international expert was in response to a request by the Mexican NGO Centro Prodh.

²¹ See Human Rights Commission of Mexico City, "Informe especial sobre las irregularidades en la averiguación previa iniciada por la muerte de la Licenciada Digna Ochoa y Plácido," July 2004, p. 97.

The Fox administration has also actively addressed cases before the IACHR, seeking friendly settlements in several instances. For example, in the case of Alejandro Ortiz Ramírez, who was given a forty-year prison sentence after he was tortured to confess that he had committed murder, in December 2004 the Mexican government signed a friendly settlement and publicly recognized his innocence.²² Also, in March 2006, the Fox administration signed a friendly settlement with Paulina Ramírez, who, in 1999, at age 13, had been denied access to a legal abortion in her home-state of Baja California Norte. In the settlement, the Mexican government recognized that Ramírez's rights had been infringed, and agreed to push for reparations.²³

In addition to its engagement with international human rights bodies, the Fox administration has been far more receptive to scrutiny from NGOs than any previous Mexican administration. In December 2001, it eliminated the 1998 travel restrictions that the previous government had used to regulate foreign advocates' access to the country. As a result, international rights advocates could travel to and around Mexico more easily, and they were no longer expelled from the country because of their work.

In general, the Fox administration has demonstrated much greater willingness to receive criticism and discuss recommendations by international actors. This receptive attitude, combined with its active promotion of human rights abroad, has encouraged international monitors to take Mexico up on the general invitation to visit the country. The number of visits by international human rights monitors to Mexico has dramatically increased since Fox took office. Prior to 2000, only four monitors had conducted missions to Mexico. During the Fox presidency, the country received fourteen such missions from representatives of the United Nations and the OAS²⁴

²² Mexican Ministry of Foreign Affairs, *La Política Exterior Mexicana en la Transición* (Mexico City: Fondo de Cultura Económica, 2005), pp. 141-142.

²³ Hector Tobar, "Abortion Settlement Awarded in Mexico; The case involving a 13-year-old rape victim is a major victory, women's groups say," *Los Angeles Times*, March 8, 2006, p. A-1.

²⁴ The international observers that visited Mexico were the UNHCHR in December 2000, the president of the IACHR in July 2001, the Special Rapporteur on the Independence of Judges and Lawyers in May 2001, representatives of the U.N. Committee Against Torture in September 2001, the OAS Special Rapporteur on the Rights of Women in February 2002, the U.N. Special Rapporteur on Adequate Housing in March 2002, the Special Rapporteur on the Human Rights of Migrants in March 2002, UNHCHR in July 2002, the OAS. Special Rapporteur on Migrant Workers in July 2002, the Special Rapporteur on internal displacement in August 2002, the president of U.N. Human Rights Commission's working group on arbitrary detentions in November 2002, the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples in July 2003, the Special Rapporteur for Freedom of Expression in August 2003, and international experts of the U.N. Office on Drugs and Crime in October 2003. See Nacional Human Rights Program (Programa Nacional de Derechos Humanos, PNDH), p. 280.

Harmonization Efforts

Mexico's new foreign policy has generated new tools for promoting rights in Mexico. These include the country's new treaty obligations, as well as the extensive recommendations from international monitors regarding how to fulfill them. But for these obligations and recommendations to have an impact, they must be made part of the daily activities of the state institutions that have the authority to carry them out. The Fox administration has had only limited success in making that happen.

Ratification of International Human Rights Treaties

Before the Fox administration, the Mexican Congress had already ratified some important human rights treaties, such as the International Covenant on Civil and Political Rights, the American Convention on Human Rights, and the Convention on the Rights of the Child. The Fox administration has made a concerted effort to increase the number of international instruments that impose human rights obligations on the state. Since 2000, Mexico has ratified fourteen international treaties that protect human rights since.²⁵ These include the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, which had been signed in 1969 and was ratified in 2002; the Rome Statute of the International Criminal Court, signed in September 2000 but not ratified until 2005; and the Inter-American Convention on Forced Disappearance of Persons, signed in May 2001 and ratified in 2002.²⁶

Unfortunately, the Fox administration has itself undercut the value of these ratifications by allowing the Senate to attach interpretative declarations and reservations that limit the treaties' impact in Mexico. For example, when Mexico ratified the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity and the Inter-American Convention on the Forced Disappearance of Persons, it included "interpretative declarations" to the effect that the conventions would only apply to acts committed after the treaties entered into force (i.e., after 2002). In practice, as we describe in detail in Chapter 4, the declarations have increased the difficulty of using these instruments to promote accountability for past human rights

²⁵ Interior Ministry, "Informe de Ejecución del PNDH 2005," December 2005, p. 48.

²⁶ Other treaties ratified by Mexico were the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict that had been signed in September 2000; the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution, and child pornography that had been signed in September 2000; the Optional Protocol to the Convention Against Torture and Cruel Inhuman or Degrading Treatment or Punishment that had been signed in September 2003; the Optional Protocol to the International Covenant on Civil and Political Rights that had been signed in March 2002; and the Optional Protocol to the Convention on the Elimination of Discrimination against Women that had been signed in March 2002.

abuses in Mexico. Similarly, when Mexico signed the Inter-American Convention on the Forced Disappearance of Persons, it attached a reservation to the effect that members of the armed forces charged with forced disappearances would be tried in military courts for illicit acts they commit while on duty. This reservation contradicts the purpose of the treaty and violates international law, as international bodies have repeatedly held that military jurisdiction may never apply to cases involving human rights violations.²⁷

Reforming Domestic Law

The Fox administration has promoted a variety of legislative efforts aimed at bringing Mexico's domestic laws into harmony with its international obligations. In some cases, it has helped to ensure the adoption of new laws that refer explicitly to international human rights norms. For example, the 2003 Federal Law to Prevent and Eliminate Discrimination (*Ley Federal para Prevenir y Eliminar la Discriminación*) specifically establishes that the law must be interpreted in light of international norms and recommendations issued by international bodies.²⁸ Similarly, the Federal Law on Transparency and Access to Official Information (*Ley Federal de Transparencia y Acceso a la Información Pública Gubernamental*), which is discussed in detail in Chapter 3, created mechanisms to enforce the right of access to official information—an internationally recognized human right—within the executive, and mandated that other federal agencies had to adopt their own implementing regulations. In some cases, the new law has mirrored the administration's efforts to promote international human rights norms abroad. For instance, Mexico adopted the 2005 General Law on Disabled People (*Ley General de Personas con Discapacidad*) at the same time it was promoting a draft United Nations convention on this same issue.

Unfortunately, the potential impact of some these new laws has been limited by the failure to establish effective implementing mechanisms. For example, the National Council to Prevent Discrimination (*Consejo Nacional para Prevenir la Discriminación*) has limited power to implement the law to prevent discrimination since it may not issue recommendations or impose sanctions. Furthermore, its limited budget prevents it from having a real, nation-wide impact. Similarly, the Federal Institute on Access to Information (*Instituto Federal de Acceso a la Información Pública*) has promoted an impressive

²⁷ The U.N. Declaration on the Protection of all Persons from Enforced Disappearance adopted by General Assembly Resolution 47/133 of 18 December 1992 says in its Article 16 : "2. They [persons alleged to have committed any of the acts referred to in Article 4] shall be tried only by the competent ordinary courts in each State, and not by any other special tribunal, in particular military courts."

²⁸ According to Article 6, "The interpretation of the content of this law, as well as the acts by federal authorities, must be in accordance with applicable international instruments related to discrimination, with the recommendations and resolutions adopted by multilateral and regional organs, and other applicable legislation."

increase in transparency and access to information within the executive, but, as we describe in Chapter 3, it still faces tremendous challenges.

And if Mexico has managed to incorporate international norms into new legislation, it has largely failed to incorporate them into existing laws.²⁹ One of the most ambitious efforts to make Mexican law consistent with international standards has been the proposed overhaul of the justice system, discussed in Chapter 5. The proposal, which President Fox presented in March 2004, aims to develop a new, oral, adversarial justice system at the federal level. It contains specific measures designed to eradicate the existence of widespread human rights abuses in Mexico, such as the use of torture to obtain confessions and the excessive use of preventive detention. Though the Senate approved several pieces of the reform package in 2005, it left the most crucial ones pending. Even those that have been adopted by the Senate must be ratified by the House of Representatives and state legislatures before they can become binding.

Embedding International Norms in the Constitution

Another approach to incorporating international human rights norms into domestic law would be to make the country's treaty obligations directly applicable and enforceable within routine legal proceedings. And, indeed, the Mexican Supreme Court held in November 1999 that the provisions of treaties ratified by Mexico not only are directly applicable, but take precedence over federal and state statutory law (but not over provisions of the Constitution).³⁰ Yet this ruling did not rise to the level of binding jurisprudence (under the Mexican system, four more similar rulings are required for it to acquire that status) and the notion of direct applicability of treaty obligations remains a controversial and largely unused concept in Mexico.

In 2002, the Fox administration created the Sub-Commission on Harmonization (*Subcomisión de Armonización*) to foster discussion among government and civil society representatives on how to address this ambiguity and promote the incorporation into domestic law of the human rights norms enshrined in treaties ratified by Mexico.³¹ The solution the group came up with was a constitutional amendment that would essentially grant these norms the same status as constitutional law, making them directly

²⁹ An isolated example is the 2001 constitutional amendment that led to the inclusion in the Constitution of the prohibition all forms of discrimination, including on the basis of sex. Political Constitution of the United States of Mexico, Article 1, as amended August 14, 2001.

³⁰ Mexican Supreme Court, Pleno, Tesis LXXVII/99, Novena Época, Semanario Judicial de la Federación y su Gaceta, tomo X, p. 46.

³¹ Mexican Ministry of Foreign Affairs, *La Política Exterior Mexicana en la Transición* (Mexico City: Fondo de Cultura Económica, 2005), p. 144.

enforceable by allowing victims of violations to file injunctions (*juicios de amparo*) in federal courts. The proposal would also allow federal authorities to assert jurisdiction over cases related to human rights abuses that would otherwise be tried by state courts.³²

It was a bold proposal. Unfortunately, however, the administration itself chose to gut it just before sending it to Congress (and without consulting the civil society representatives who had been involved in the process of developing it), by including language that limited its scope to those human rights obligations that are already recognized in the Mexican Constitution.³³ And, even this dramatically weakened version of the proposal has gotten nowhere in Congress and been effectively shelved.

Congress did pass a more specific constitutional amendment, which accompanied this proposal, eliminating the death penalty in Mexico. Since the amendment's passage in June 2005, the military justice system and some state legislatures have also abolished the death penalty.³⁴

The National Human Rights Program

One concrete method for ensuring that these harmonization efforts would continue was the creation in December 2004 of the National Human Rights Program (*Programa Nacional de Derechos Humanos*, PNDH), which grew out of the diagnosis prepared by the UNHCHR. The purpose of the PNDH was to “establish the basis of a government

³² See “Iniciativa de Decreto que Reforma diversos Artículos de la Constitución Política de los Estados Mexicanos,” May 4, 2004, [online] http://www.sre.gob.mx/substg/dh/doctos_pdf/IniciativaDH.pdf (retrieved February 2006).

³³ According to local rights advocates, the proposal discussed within the Sub-Commission would have modified Article 1 of the Constitution to read “The Mexican state shall guarantee the protection of human rights provided for in international treaties ratified by it. In the protection of these rights, the interpretation most favorable for the individual shall prevail.” The new Article 103 should read “By laws or acts of authorities that violate individual rights or human rights included in international treaties ratified by the Mexican state.” Instead, Fox’s proposal, by contrast, modified Article 1 to read, “Human rights are recognized by this Constitution and their protection will take place in accordance to its terms,” and modified Article 103 to read “By laws or acts of authority that violate individual rights or human rights.”

Two other major differences, according to the NGOs, was that they had agreed the proposal would contain an explicit prohibition of torture and cruel, inhuman or degrading treatment, as well as a provision on the obligation to provide a hearing before the executive could expel foreigners. The Fox proposal does not contain either of these provisions.

See press release “Organismos de Derechos Humanos Exigen Garantías por parte del Ejecutivo Federal para Continuar el Proceso de Diálogo,” signed by all NGOs that participated in the negotiations, April 29, 2004.

³⁴ Interior Ministry, “Informe de Ejecución del PNDH 2005,” December 2005, p. 62.

public policy on human rights.”³⁵ As a result of the PNDH, each federal government agency created its own liaison office to implement the PNDH.³⁶

It is difficult to measure the impact of this initiative because implementing a government public policy on human rights will take much longer than one year. But it is possible to identify cases in which government agencies that had already begun to adopt measures to protect human rights continued to do so as part of the PNDH’s plan of action. A good example of such harmonization is offered by the activities carried forward by the Attorney General’s Office to combat torture, which began prior to the PNDH but were incorporated as part of the new government policy. In August 2003, this office adopted a medical and psychological evaluation system that implements the Istanbul Protocol.³⁷ After the creation of this mechanism at the federal level, the PGR signed agreements with various state attorney general offices to promote the implementation of this mechanism at the state level. As of November 2005, it had done so with four states.³⁸

Unfortunately, however, the implementation of this mechanism has had a limited impact to date with respect to corroborating torture allegations or sanctioning public officials responsible for torture. As we suggest in Chapter 5, one reason for this limited impact may be the fact that the protocol has been applied to cases in which the torture took place months or years earlier, and there was no longer physical evidence of the abuse. Also, as Mexican NGOs have pointed out, another problem appears to be the failure to ensure that the people applying the protocol are independent experts.³⁹

The Fox administration sought to increase the legitimacy of the proposed measures by inviting civil society participation in the design of the PNDH. As with the discussion on drafting a constitutional reform, the government promoted, through the Interior Ministry, the creation of spaces for dialogue with civil society organizations about the

³⁵ PNDH, p. 22.

³⁶ Those in charge of implementing the PNDH deliberately chose to place people from within government agencies in those liaison units, in order to permeate the entire government structure. Human Rights Watch interview with Darío Ramírez and Alexandra Haas, Interior Ministry, Mexico City, November 18, 2005.

³⁷ PGR, “Dictámen médico/psicológico especializado para casos de posible tortura y/o maltrato,” Agreement A/57/03, August 18, 2003.

³⁸ Human Rights Watch interview with Rafael González Morales, Mexico City, Mexico, November 18, 2005. González Morales is the head of the Department of Inter-institutional Participation, which is part of the PGR’s Vice Attorney General’s Office on Human Rights, Assistance to Victims and Community Services.

Various courses on the use of this evaluation mechanism were imparted to PGR and state officials. Interior Ministry, “Informe de Ejecución del PNDH 2005,” December 2005, p. 64.

³⁹ Red Nacional de Organismos Civiles de Derechos Humanos *Todos los Derechos para Todos*, “Informe de la Situación de los Derechos Humanos en México – 124º período de sesiones de la Comisión Interamericana de Derechos Humanos,” March 6, 2006.

most appropriate mechanisms to implement the diagnosis. These opportunities for dialogue, while limited, represented a marked improvement over the secrecy with which government policy had been crafted in the old regime.⁴⁰ Yet some key NGOs have lamented the fact that the government failed to respect the initial terms set for the consultations and that the officials who participated in the meetings did not have the power to make any decisions. Furthermore, the NGOs have expressed concern that very few civil society organizations from outside Mexico City were given an opportunity to participate in the process.⁴¹

Mechanisms to Ensure Continuity

The Fox administration has adopted some mechanisms aimed directly at ensuring effective implementation of the PNDH and of the other parallel initiatives that could bolster the incorporation of a human rights perspective in the Mexican government's work. However, these are very recent initiatives and results are just beginning to become apparent.

To ensure continuity of the measures proposed in the PNDH, the executive created a Follow-Up and Evaluation Committee (*Comité Coordinador de Seguimiento y Evaluación*) at the end of 2005. Composed of government and civil society representatives, as well as a representative of the United Nations, it has a specific mandate to create indicators to measure the impact of the PNDH and to propose reforms to improve it.⁴² The main problem with this initiative is that it is tied to the PNDH, which officially ends with the Fox administration. Therefore, it could be abandoned by the next administration.

In December 10, 2004, the Interior Ministry and the governments of all the states in Mexico signed a National Agreement on Human Rights (*Acuerdo Nacional de Derechos Humanos*). This agreement expresses their commitment to promoting and defending human rights, and is a first step towards bilateral agreements between the federal government and states to promote compliance with various PNDH recommendations at the state level.⁴³

⁴⁰ Another initiative to improve civil society organizations' involvement in government affairs was the 2004 passing of a federal law to promote activities of civil society organizations and their participation in the design of public policies. See Federal Law to Increase the Activities Performed by Civil Society Organizations (Ley Federal de Fomento a las Actividades Realizadas por Organizaciones de la Sociedad Civil), February 9, 2004.

⁴¹ See Red Nacional de Organismos Civiles de Derechos Humanos *Todos los Derechos para Todos*, "Documento Informativo para la Comisión Interamericana de Derechos Humanos: Comentarios sobre el Programa Nacional de Derechos Humanos elaborado por el Gobierno Mexicano," February 24, 2005.

⁴² Interior Ministry, "Informe de Ejecución del PNDH 2005," December 2005, p. 108.

⁴³ *Ibid.*, pp. 37-39.

There have also been other parallel initiatives that aim at increasing government adherence to human rights norms. One is the passage, in 2003, of the Law on Professional Career Service in the Federal Public Administration (*Ley del Servicio Profesional de Carrera en la Administración Pública Federal*). Based on this law, the Interior Ministry and the Ministry of Public Administration (*Secretaría de la Función Pública*) created a capacity-building program on human rights.⁴⁴ The executive also created a Manual to Introduce a Human Rights Perspective in Public Policy (*Manual para Introducir la Perspectiva de Derechos Humanos en las Políticas Públicas*), which is mandatory for all federal government agencies. And, as part of the government's National Program on Education 2001-2006, the executive created an Educational Program on Human Rights (*Programa de Educación en Derechos Humanos*) with the purpose of including human rights in various educational textbooks for primary and secondary schools.⁴⁵ Finally, in 2006, Mexican universities issued a Universities' Declaration in Favor of a Human Rights Culture with the purpose of including a human rights perspective in higher education.⁴⁶

Under President Fox's administration, the government has also set up some permanent structures—thematic commissions within the executive branch—that do not depend exclusively on the will of the president. For example, the government transformed the National Indigenous Institute (*Instituto Nacional Indigenista*, INI) into the National Commission for the Development of Indigenous Populations (*Comisión Nacional para el Desarrollo de los Pueblos Indígenas*, CDI). Unlike the INI, the new CDI was created with the purpose of influencing public policy. While it continues to work on certain INI projects aimed at assisting indigenous populations, the CDI also works with all federal government agencies to ensure that various public policies respect indigenous rights and cultural diversity.⁴⁷ Other institutions also seek to affect the way the federal government addresses specific issues across the board, such as non-discrimination and women's rights.⁴⁸

⁴⁴ The purpose of it is for all state officials to have greater knowledge on human rights and to address human rights as a transversal issue when adopting government policies. In November 2005, the first pilot course was given to twenty-one public officials working for the Interior Ministry. Interior Ministry, "Informe de Ejecución del PNDH 2005," December 2005, p. 45.

⁴⁵ *Ibid.*, pp. 49-51.

⁴⁶ See "Declaración universitaria a favor de una cultura de los derechos humanos," March 8, 2006, [online] http://www.derechoshumanos.gob.mx/index.php?option=com_docman&task=doc_download&gid=321&Itemid=74&mode=view (retrieved April 2006).

⁴⁷ See Comisión Nacional para el Desarrollo de los Pueblos Indígenas, "Acciones de Gobierno para el desarrollo integral de los pueblos indígenas – Informe 2003-2004," 2005, [online] http://cdi.gob.mx/informacion/informe_cdi_2003-2004_final.pdf (retrieved February 2006).

⁴⁸ They do so through agreements with other state and federal government offices, and by organizing courses and capacity-building. Examples of these institutions are the National Counsel on Handicapped People (*Consejo Nacional para Personas con Discapacidad*) created in June 2005; the National Institute of Women (*Instituto Nacional de las Mujeres*, INMUJERES); and the National Counsel to Prevent Discrimination (*Consejo*

Recommendations

Mexico's new approach to human rights in its foreign policy represents an important break from the past. Yet this approach is neither enshrined in law nor the product of a formal political consensus. It could be abandoned by the next administration as easily as it was launched by the present one. Should that happen, Mexico would greatly diminish the contribution that international scrutiny can make in exposing the country's human rights problems and generating pressure for much-needed reform.

The next administration should pursue a foreign policy that encourages international scrutiny of human rights issues in Mexico.

1) Continue the policy of openness to international scrutiny

The next administration's foreign policy should recognize the universality of human rights values and reject the notion that promoting national sovereignty is more important than protecting basic human rights.

Specifically, the next administration should repudiate the use of the principle of noninterference as an excuse to limit international scrutiny of human rights issues. It should encourage and facilitate visits and inquiries by international rights monitors, and provide these monitors with as complete information as possible regarding human rights practices.

2) Establish a permanent office of the UNHCHR in Mexico

The next administration should ensure that the UNHCHR continues to play a constructive role in promoting human rights in Mexico by signing a new agreement with the High Commissioner to establish a permanent office in Mexico.

The UNHCHR currently carries out several valuable projects in Mexico. Yet, given the lack of a permanent office, it has limited ability to engage in long term efforts to improve human rights practices in the country. A permanent UNHCHR presence would help to ensure the continuity of the efforts currently underway and make it more difficult for other administrations to abandon them or reverse the country's current openness to international scrutiny of human rights issues.

Nacional para Prevenir la Discriminación). Interior Ministry, "Informe de Ejecución del PNDH 2005," December 2005, pp. 81-104.

3) Prioritize the implementation of measures proposed in the National Human Rights Program (PNDH)

The next administration should instruct the agencies within the executive branch to implement the PNDH. The administration should also establish an interdisciplinary committee composed of representatives from government institutions, Mexican civil society, and international monitoring bodies, to perform a careful evaluation of the PNDH. The committee's mandate should be to update and strengthen the PNDH where necessary and create indicators to measure the state's progress in meeting its goals.

It is crucial that the Mexican government ensure the participation of a wide range of civil society representatives in this process to enhance the quality and legitimacy of the resulting human rights policies.

III. Transparency: Ending the Culture of Official Secrecy

If the 2000 election represented the decisive break with decades of one-party rule in Mexico, the next major step in the country's transition to democracy came two years later with the passage of the Law on Transparency and Access to Official Information. While the election of an opposition candidate confirmed that Mexico had finally changed the way it selected its leaders, the new "transparency law" showed that these leaders were ready to change the way the country was governed—at least in one key respect.

During the decades of one-party rule, a culture of secrecy had prevailed in virtually all areas of government. The problem was most acute during moments of national crisis, such as the 1985 earthquake or the 1994 economic meltdown, when government institutions systematically withheld the information that its citizens needed to respond and recover. But it also manifested itself in more mundane matters, as ordinary Mexicans were routinely denied access to the most basic information regarding the institutions and even the rules that governed their daily lives. Perhaps most importantly for the stunted quality of the country's democratic process, journalists were unable to obtain the information that was essential for reporting on government policies and programs.

For years this culture of secrecy was a principal obstacle to the promotion of human rights in Mexico. In addition to undermining the basic right of its citizens to freedom of information, the lack of transparency also undermined the ability of civil society actors and even well-intentioned government officials to confront an array of abusive practices by the state. Moreover, it prevented the victims of grave violations and their relatives from obtaining the information they needed to seek redress for the abuses they had suffered.

The 2002 transparency law dealt a major blow to this culture of secrecy. It established a "principle of publicity" that essentially reversed the state's traditional approach to the disclosure of information. Whereas in the past disclosure was the exception, under the new law it would be the rule. The law also established a powerful mechanism—the Federal Institute for Access to Official Information (IFAI)—to enforce this principle within the executive branch and mandated the creation of comparable mechanisms within the other branches. As a consequence, for the first time, Mexico opened the government to public scrutiny.

The transparency law was the single most unambiguous achievement in the area of human rights during the Fox presidency. The credit for making it happen is shared by many—from President Fox, who signed the law, to the legislators from all three major parties who voted to pass it, and, perhaps most importantly, to a diverse array of civil society actors who conceived the law and convinced Mexico’s political leaders that it was necessary.

The potential impact of the transparency law received a huge boost by the 2002 declassification of millions of secret documents from government archives, which President Fox had authorized the previous year when he established the Special Prosecutor’s Office to investigate past human rights abuses. The declassification amounted to a retroactive application of the new publicity principle, giving journalists, investigators, and ordinary citizens access to government information that had been denied to them for decades, and providing them with written evidence including extensive documentation of past human rights violations.

Both the transparency law and the document declassification had important ramifications for human rights monitoring in Mexico. They have allowed Mexican society to have access to written evidence on past human rights abuses that corroborated the claims of human rights victims and their families, as well as to information that was previously unknown.

But if the transparency law has transformed Mexico’s approach to managing information, there are good reasons to worry that the culture of secrecy will reassert itself in the future:

- The IFAI has not been granted autonomy from the executive branch and remains vulnerable to political interference;
- The IFAI has encountered reluctance on the part of several key government entities to full compliance with the transparency law—a problem that could worsen should the next administration choose not to prioritize transparency;
- The progress made in promoting transparency within the executive branch has not been matched in the other branches of government nor in the autonomous state institutions; and
- The transparency law does not apply to political parties, which receive substantial public funding and play a decisive role in determining who can run for office and what laws get passed by Congress.

Similarly, the value of the millions of documents declassified by President Fox has been severely undercut by a variety of obstacles faced by people conducting research in the National Archive. These include missing documents, the deficient management of the National Archive, the lack of adequate indexes, and the overly broad application of privacy protections.

In sum, the historic advances that Mexico has made in the area of transparency remain quite precarious even today. Whether these advances become permanent will depend largely upon the policies and priorities of the next president. It is crucial that the next administration commit itself to removing the obstacles that threaten the future success of the transparency law.

Background

Mexico took its first step toward ending its culture of secrecy when it reformed its Constitution in 1977 to provide that “the right of access to information shall be guaranteed by the State.”⁴⁹ However, this reform had little impact in practice. Attempts

⁴⁹ According to Article 6 of the Mexican Constitution, “The expression of ideas will not be subject to judicial or administrative inquiry, unless it attacks the morals, the rights of a third party, or if it leads to a crime, or affects public order; the right of access to information shall be guaranteed by the state.” In addition, Article 8 provided that government officials must respect individuals’ right to petition government agencies. According to Article 8, “Public officials and employees shall respect the exercise of the right of petition, provided it is made in writing and in a peaceful and respectful manner; but this right may only be exercised in political matters by citizens of the republic. Every petition shall be replied to in writing by the official to whom it is addressed, and said official is bound to inform the petitioner of the decision taken within a brief period.” In combination, these two articles establish the individual’s right to request and obtain information held by the government.

The Mexican Supreme Court has further developed the content of this right through interpretation in case law. In 1992 it held that the right of access to official information was a social guarantee related to freedom of expression (Mexican Supreme Court, Tesis 2a. I/92, *Semanario Judicial de la Federación*, August 1992, p. 44). In 1996 the Supreme Court decided that citizens had a right to receive truthful information from the government. Information provided by governmental authorities could not be manipulated or incomplete, nor based on specific group or individual interests (Mexican Supreme Court, Tesis P. LXXXIX/96, *Semanario Judicial de la Federación*, June 1996, p. 513). In 2000 the Supreme Court went even further, by holding that the right of access to official information is an individual guarantee, which may only be limited on certain occasions by national and social interests, and by rights of third parties (Mexican Supreme Court, Tesis P. XLV/2000, *Semanario Judicial de la Federación*, April 2000, p. 72).

to exercise the new constitutional right were generally unsuccessful.⁵⁰ And lack of transparency remained the norm in management of government affairs.⁵¹

The one area where real progress had been made in promoting transparency was in the management of national elections. After the debacle of the 1988 presidential contest, when the PRI government appeared to have stolen victory from the challenger, democracy advocates organized themselves to push for transparency in elections. Their advocacy led to the creation in 1990 of the Federal Electoral Institute (IFE), which began monitoring campaign spending and media coverage prior to the 1994 presidential election. Although the 1994 election was cleaner than the previous one, election observers still witnessed thousands of irregularities. The winner, Ernesto Zedillo, himself acknowledged that his own election had been flawed and, once in office, promoted a new electoral reform. Passed in 1996, the reform granted Mexico one of the world's most advanced balloting systems. In 1997 Mexicans elected a majority of opposition members to Congress, and in 2000 they finally ended one-party control of the presidency.⁵²

International Norms

The right to “seek, receive, and impart” information is recognized in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (ICCPR), and the American Convention on Human Rights.⁵³ In Human Rights Watch's

⁵⁰ In 1995, for example, a nongovernmental organization (NGO) requested information from President Ernesto Zedillo regarding his salary, income, and assets, as well as his allocation of the presidential budget. After waiting a year with no response, the NGO filed a lawsuit against the presidency to obtain the requested information. Even though the NGO won the case, the executive did not disclose all the information requested, and the income of the president remained a secret. See Sergio Aguayo and Paulina Grobet, “Las Violaciones al Derecho a la Información de los Mexicanos. La demanda de Amparo de Alianza Cívica contra la Presidencia de la República,” *Alianza Cívica*, 1996, pp. 5-10, 21.

⁵¹ Before a transparency law was passed, the right of access to official information was mentioned in legislation on the protection of the environment. In 1996 the General Law of Ecological Equilibrium and Environment Protection (*Ley General del Equilibrio Ecológico y la Protección al Ambiente*) was modified to include the right to environmental information in its Articles 159 to 159 bis 6. But the system that was supposed to implement access to environmental information was unsuccessful. In 1999, 64 percent of the requests had not been responded to and 21 percent were not responded to satisfactorily. Isabel Bustillos and Tomás Severino, “Diagnosis on Access to Environmental Information in Mexico. Initiative experience by ‘Acceso México’ [Mexico Access],” in IFAI, *Right of Access to Information in Mexico: a diagnosis by society* (Mexico City: IFAI, 2005), p. 28.

⁵² Julia Preston and Samuel Dillon, *Opening Mexico. The Making of a Democracy* (New York: Farrar, Strauss and Giroux, 2004), pp. 237, 261 and 483.

⁵³ Article 19 of the Universal Declaration of Human Rights; Article 19(2) of the ICCPR; and Article 13(1) of the American Convention on Human Rights.

view this right should be interpreted as generally entailing a right of access to official information as well as information that is generally available.⁵⁴

Although international human rights law does not explicitly provide a right of access to official information, there is growing international recognition that the right to seek, receive and impart information encompasses a positive obligation of states to provide access to official information in a timely and complete manner. Both regional and international organizations have held that the right of access to official information is a fundamental right of every individual.⁵⁵ In the Americas, the Inter-American Commission on Human Rights (IACHR) interpreted Article 13 of the American Convention (on the right to freedom of expression) to include the right of access to official information.⁵⁶ Moreover, it is internationally recognized that the right of access to official information is crucial to ensure democratic control of public entities and to promote accountability within the government.⁵⁷

⁵⁴ Human Rights Watch, "Chile: Progress Stalled-Setbacks in Freedom of Expression Reform," *A Human Rights Watch Short Report*, March 2001.

⁵⁵ Joint declaration by Ambeyi Ligabo, U.N. Special Rapporteur on Freedom of Opinion and Expression, Miklos Haraszti, OSCE Representative on Freedom of the Media, and Eduardo Bertoni, OAS Special Rapporteur for Freedom of Expression, December 6, 2004, [online] <http://www.cidh.org/Relatoria/showarticle.asp?artID=319&IID=1> (retrieved January 2006). See also Principle 4 of the Declaration of Principles on Freedom of Expression, approved by the IACHR at its 108th regular sessions in October 2000, [online] <http://www.cidh.org/Relatoria/showarticle.asp?artID=26&IID=1> (retrieved October 2005); and United Nations Economic and Social Council, Commission on Human Rights, "Civil and Political Rights, Including the Question of Freedom of Expression: The Right to Freedom of Opinion and Expression. Report of the Special Rapporteur, Ambeyi Ligabo, submitted in accordance with Commission resolution 2003/42," (New York: United Nations, 2003).

⁵⁶ IACHR, *Report on Terrorism and Human Rights*, OAS/Ser.L./V/II 116, Doc. 5 rev. 1 corr. 22, October 2002, para. 281.

Although a narrower interpretation of the right of access to information has prevailed in Europe, the European Court of Human Rights has interpreted that individuals had the right to obtain information held by the government if such information affected their private life, and therefore interfered with their right to privacy and family life. The European Court has also established that governments may not restrict a person from receiving information that others wish or may be willing to impart. European Court of Human Rights, "Leander v. Sweden," Case 10/1985/96/144, February 1985, paras. 48 and 74; European Court of Human Rights, "Gaskin v. United Kingdom," Case 2/1988/146/200, June 1989, para. 49; and European Court of Human Rights, "Guerra and others v. Italy," Case 116/1996/735/932, February 1998, paras. 53 and 60.

⁵⁷ In Europe it has been recognized since the early 1980s. See Toby Mendel, "Libertad de Información: Derecho Humano protegido internacionalmente," *Derecho Comparado de la Información*, January-June 2003, pp. 13-19, [online] <http://www.juridicas.unam.mx/publica/librev/rev/decoin/cont/1/cnt/cnt3.pdf> (retrieved November 2005).

The Inter-American Court of Human Rights held in 1985 that effective citizen participation and democratic control, as well as a true debate in a democratic society, cannot be based on incomplete information. Understanding freedom of expression as both the right to express oneself, and the right to obtain information, the Inter-American Court of Human Rights held that "freedom of expression is a cornerstone upon which the very existence of a democratic society rests. It is indispensable in the formation of public opinion. (...) It represents, in short, the means that enable the community, when exercising its options, to be sufficiently informed. Consequently, it can be said that a society that is not well informed is not a society that is truly free." Inter-American Court of Human Rights, "Compulsory Membership in an Association prescribed by Law for the

The right of access to information is governed by the “principle of maximum disclosure.”⁵⁸ In other words, the government is always presumed to be under an obligation to disclose information. This presumption can only be overridden under circumstances, clearly defined by law, in which the release of information could undermine the rights of others or the protection of national security, public order, or public health or morals.⁵⁹

Practice of Journalism (Articles 13 and 29 American Convention on Human Rights),” Advisory Opinion OC-5, November 13, 1985, para. 70.

The OAS General Assembly has held in 2003, 2004, and 2005 that access to official information is an indispensable requirement for a democracy to work properly, and that states have an obligation to ensure access to information. OAS General Assembly Resolution on Access to Official Information: Strengthening Democracy, AG/Res. 1932 (XXXIII-O/03), June 10, 2003, [online] http://www.oas.org/juridico/english/ga03/agres_1932.htm (retrieved October 2005); OAS General Assembly Resolution Access to Official Information: Strengthening Democracy, AG/Res. 2057 (XXXIV-O/04), June 8, 2004, [online] http://www.upd.oas.org/lab/Documents/general_assembly/2004/ag_res_2057_xxxix_O_04_eng.pdf (retrieved October 2005); and OAS General Assembly Resolution on Access to Official Information: Strengthening Democracy, AG/RES. 2121 (XXXV-O/05), May 26, 2005, [online] <http://www.oas.org/XXXVGA/docs/ENG/2121.doc> (retrieved October 2005).

The Chapultepec Declaration, signed by most heads of state in the hemisphere, and the Lima Principles, endorsed by the OAS and U.N. Special Rapporteurs on/for Freedom of Expression, also recognize this consensus. The Chapultepec Declaration determines in its second principle that every person has the right to seek and receive information, and in its third principle that “authorities must be compelled by law to make available in a timely and reasonable manner the information generated by the public sector.” It was adopted on March 11, 1994, by the Hemisphere Conference on Free Speech held in Mexico City. Experts and thirty-two government representatives, including former Mexican President Carlos Salinas de Gortari, endorsed it. See [online] http://www.declaraciondechapultepec.org/english/declaration_chapultepec.htm (retrieved October 2005). Principle 1 of the Lima Principles establishes access to information as an individual right and as a necessary component for a democratic society, and principle 2 establishes that states must make information available in a timely and complete manner. The Lima Principles were adopted in November 2000 by experts on freedom of expression and by the U.N. and OAS Special Rapporteurs on Freedom of Opinion and Expression. The Lima Principles, [online] <http://www.cidh.org/Relatoria/showarticle.asp?artID=158&IID=1> (retrieved October 2005).

⁵⁸ Principle 1 of The Public’s Right to Know – Principles on Freedom of Information Legislation holds that “[t]he principle that all information held by public bodies should be subject to disclosure and that this presumption may be overcome only in very limited circumstances.” The Principles on Freedom of Information Legislation were adopted in June 1999 by Article XIX, an NGO working on freedom of expression and access to information, in consultation with organizations in different countries, [online] <http://www.article19.org/pdfs/standards/righttoknow.pdf> (retrieved October 2005). It was later endorsed by the U.N. and Inter-American systems on human rights. See, for example, IACHR, *Report on Terrorism and Human Rights*, OAS/Ser.L./V/II 116, Doc. 5 rev. 1 corr. 22, October 2002, para. 284; IACHR Annual Report 1999, Vol. III, Report of the Office of the Special Rapporteur for Freedom of Expression, chapter II, OEA/Ser.L./V/II.111, Doc. 3 rev., Vol. III; and United Nations Commission on Human Rights Resolution 1999/36, U.N. Commission on Human Rights, 56th Sess., E/CN.4/2000/63 (January 18, 2000), para. 43.

⁵⁹ Article 19(3) of the ICCPR and Article 13(2) of the American Convention on Human Rights.

The Declaration of Principles on Freedom of Expression states that the right may only be limited exceptionally and such limitations must “be previously established by law in case of a real and imminent danger that threatens national security in democratic societies.” Principle 4 of the Declaration of Principles on Freedom of Expression, approved by the IACHR at its 108th regular sessions in October 2000, [online] <http://www.cidh.org/Relatoria/showarticle.asp?artID=26&IID=1> (retrieved October 2005).

The Transparency Law

Bringing about Reform

Mexico's transparency law was the product of a political consensus forged among a wide range of political actors, including President Fox, his PAN party, and members of the opposition parties in Congress, and brought about through an extensive campaign by members of Mexican civil society.⁶⁰

President Fox had mentioned access to information and transparency during his presidential campaign, and, early in 2001, his administration began drafting a law on access to official information.⁶¹ After a draft was leaked to the public, an array of civil society actors began to evaluate and critique the governmental initiative.⁶²

Then, in May 2001, some academics, activists, media owners and journalists created a group, later called the "Oaxaca Group," to discuss access to information.⁶³ This group produced the Oaxaca Declaration, which lists the necessary elements of legislation on access to information.⁶⁴ The group then drafted a legislative proposal and lobbied members from all opposition parties to introduce their proposal in Congress.⁶⁵

According to The Johannesburg Principles, restrictions must be "necessary in a democratic society to protect a legitimate national security interest." Principles 1(d) and 11 of The Johannesburg Principles on National Security, Freedom of Expression and Access to Information, [online] <http://www.article19.org/pdfs/standards/joburgprinciples.pdf> (retrieved October 2005). The Johannesburg Principles were adopted on October 1995 by experts in international law, national security, and human rights; and were later recognized by the U.N. Special Rapporteur on Freedom of Opinion and Expression and the OAS Special Rapporteur for Freedom of Expression. See Report of the Special Rapporteur Mr. Abid Hussain, pursuant to U.N. Commission on Human Rights resolution 1993/45, U. N. Commission on Human Rights, 52nd Sess., E/CN.4/1996/39 (March 22, 1996), para. 154; and IACHR Annual Report 2003, Vol. III, Report of the Special Rapporteur for Freedom of Expression, chapter IV, OEA/Ser.L/V/II.118 Doc. 70 rev. 2.

⁶⁰ Human Rights Watch telephone interview with Juan Francisco Escobedo, Mexico City, Mexico, December 19, 2005.

⁶¹ Sergio López-Ayllón, "La creación de la ley de acceso a la información en México: Una perspectiva desde el Ejecutivo federal," in Hugo A. Concha Cantú, et. al., *Transparentar al Estado: la experiencia mexicana de acceso a la información* (Mexico City: UNAM, 2005), pp. 7-10.

⁶² For example, in March 2001, the Universidad Iberoamericana organized a seminar for government officials, international experts, media representatives, academics, and civil society representatives to debate which standards had to be met by access to information legislation. See [online] <http://www.uia.mx/ibero/noticias/boletines/2001/CS0323.html> (retrieved October 2005).

⁶³ The Oaxaca Group was created when a group of specialists participated in a seminar on the right of access to information in Oaxaca. The name was given to them by *New York Times* correspondent Ginger Thompson, after she interviewed its members. Human Rights Watch telephone interview with Ernesto Villanueva, President of LIMAC and member of the Oaxaca Group, Mexico City, Mexico, October 24, 2005; and Human Rights Watch telephone interview with Miguel Treviño, Grupo Reforma and member of the Oaxaca Group, Mexico City, Mexico, December 7, 2005.

⁶⁴ These elements were: the recognition that the right of access to information was the right of every individual, that the right includes the possibility to gather information in the hands of the government, that government officials have the obligation to provide such information, that exceptions to this right must be minimal, that an

A special congressional working group, composed of members of Congress from the three major parties, representatives of the executive, and members of the Oaxaca Group, evaluated the proposals and arrived at a consensus on most of the issues that were being discussed. The result was the Federal Law on Transparency and Access to Official Information (*Ley Federal de Transparencia y Acceso a la Información Pública Gubernamental*), or “transparency law,” signed into law in June 2002.

The New Law

Normative Structure

The transparency law establishes that all information in the hands of the government is of a public nature. Accordingly, it requires public officials and agencies to apply the “principle of maximum disclosure” when it comes to managing official information: they must presume that the information is public, and only restrict it if it meets certain criteria.⁶⁶

The law establishes a list of transparency obligations, requiring every government entity to post on its Web site basic information about its structure, personnel, budget, and operating procedures. The law also creates mechanisms for the executive to respond to information requests, and orders other entities subject to the law to create their own mechanisms for this purpose as well.⁶⁷

The transparency law establishes limits on access to official information by defining what constitutes privileged and confidential information. According to the law, information may be considered “privileged” if its release could endanger national security; undermine international negotiations or relations; damage the financial, economic or monetary stability of the country; risk the life, health or safety of any person; or seriously damage the verification of law fulfillment, crime prevention or persecution, law enforcement, tax revenue, migration control, or the procedural

autonomous entity should decide if there is a dispute over whether certain information should be public or restricted, and that it must foresee modifications to all other laws that contradict this right. See [online] <http://www.amed.com.mx/oaxaca2.php> (retrieved October 2005).

⁶⁵ Human Rights Watch telephone interview with Issa Luna, vice president of LIMAC, London, United Kingdom, October 24, 2005.

⁶⁶ The “principle of maximum disclosure” (in international law) and “the principle of publicity” (in the English version of the transparency law) have the same meaning.

⁶⁷ Implementing mechanisms will be discussed in the next section.

strategies of judicial or administrative processes (as long as the resolutions have not been decreed). Access to “privileged” information may be limited for up to twelve years.⁶⁸

Information is “confidential” if the person who provided it to a government entity specifically indicated that it should remain so.⁶⁹ It is also “confidential” if it constitutes “personal data,” which the law defines to include:

all information concerning an individual, identified or identifiable, including their ethnic or racial origin, or related to their physical, moral or emotional characteristics, their personal and family life, residence, telephone number, patrimony, ideology, political opinions, religious or philosophical beliefs or convictions, physical or mental health, sexual preferences, or any other similar preferences that could have an impact on their intimacy.⁷⁰

Under the transparency law, “personal data” about an individual can only be disclosed if that individual authorizes the disclosure. The law also establishes the rights of individuals to obtain access to their own “personal data” and to require that government entities correct any incorrect data in their possession.⁷¹

The transparency law establishes one important exception for information on human rights cases. Specifically, it provides that “in case of severe violation of fundamental rights or crimes against humanity the information found in the investigations may not be deemed privileged.”⁷²

Mechanisms for Implementation

Given that the executive had been the center of secrecy for decades, the participants in the negotiations over the law agreed to focus on “opening” the executive first.⁷³ Thus,

⁶⁸ This period may be extended indefinitely by the IFAI within the executive branch, if compelled bodies prove that the causes that originated the period still exist.

⁶⁹ Article 18 of the transparency law.

⁷⁰ Article 3(II) of the transparency law.

⁷¹ See also Articles 20 to 26 of the transparency law.

⁷² Article 14 of the transparency law.

⁷³ Human Rights Watch telephone interview with Juan Francisco Escobedo, Mexico City, Mexico, December 19, 2005. Escobedo is one of the two members of the Oaxaca Group that participated in the negotiations in Congress to elaborate the final version of the law.

the transparency law addresses in detail the mechanisms by which citizens can obtain information held by the executive.⁷⁴

The transparency law created the Federal Institute for Access to Official Information (IFAI) to promote and regulate access to information within the executive branch, as well as liaison units within each executive agency to respond to specific information requests.

The law also created a system for soliciting access to information. Any person, including non-Mexicans, may request the desired information by visiting the IFAI Service Center, where he or she will be assisted on how to request information, by visiting the liaison unit in the agency where the desired information should be available, or by accessing the System for Information Requests (*Sistema de Solicitudes de Información*, SISI) on the Internet.⁷⁵ In the event that the information request is denied or if the person requesting it is dissatisfied with the answer, he or she may appeal that decision before the IFAI or the appropriate liaison unit (which will send the case to the IFAI). If the person wishes to appeal the IFAI's decision, he or she may then take the case before the courts.

The transparency law did not provide such detailed rules and mechanisms for the other major government entities—including the judiciary, Congress, the National Human Rights Commission (*Comisión Nacional de Derechos Humanos*, CNDH) and the Federal Electoral Institute (*Instituto Federal Electoral*, IFE)—but rather left it to each to develop its own.⁷⁶ As we show in detail below, the resulting regulations and mechanisms are of

⁷⁴ On June 11, 2003, President Fox issued implementing regulations that apply to federal executive entities and complement the transparency law. See “Reglamento de la Ley Federal de Transparencia y Acceso a la Información Pública Gubernamental,” [online] http://www.presidencia.gob.mx/transparencia/reglamento_LFTAIPG.pdf (retrieved December 2005).

⁷⁵ SISI gives individuals the possibility to request information and follow the processing of their request through the Internet. The Web site to access SISI is <http://www.informacionpublica.gob.mx/portal.html> (retrieved October 2005).

⁷⁶ Between April and June 2003 the Supreme Court, the Judicial Council (*Consejo de la Judicatura Federal*), the Senate, the House of Representatives, the CNDH and the IFE adopted their own implementing regulations. The Judiciary Council and the IFE later on adopted new, improved regulations. See Mexican Supreme Court, Agreement 9/2003, May 27, 2003; Judicial Council, Agreement 30/2003, June 12, 2003; Acuerdo Parlamentario para la Aplicación de la Ley Federal de Transparencia y Acceso a la Información Pública Gubernamental en la Cámara De Senadores, April 2003, [online] <http://www.senado.gob.mx/transparencia/content/marco/APLFT.pdf> (retrieved November 2005); Reglamento para la Transparencia y el Acceso a la Información Pública de la H. Cámara de Diputados, May 2003, [online] http://www.diputados.gob.mx/leyinfo/marco/reg_taipcd.DOC (retrieved November 2005); Reglamento de Transparencia y Acceso a la Información de la Comisión Nacional de Derechos Humanos, April 29, 2003, [online] <http://www.cndh.org.mx/normat/transp/transp.asp> (retrieved December 2005); and Reglamento del Instituto Federal Electoral en Materia de Transparencia y Acceso a la Información Pública, June 9, 2003. The

varied quality and have had different degrees of success in opening these government institutions.

One serious shortcoming of all implementing regulations is that they grant reviewing authority to essentially the same people who must provide information. In the judiciary, for example, the authority lies with a special commission appointed by the Judicial Council (a body made up of lawyers, judges, and Supreme Court justices), except for cases involving information in the possession of the Supreme Court, in which case it is a commission formed by the Court itself. In the Congress, it is commissions made up of legislators in each house. As for autonomous agencies, in the IFE, there is a commission made of electoral counselors, and in the CNDH, the reviews are conducted by the director of one of the commissions' investigative areas. Given that the members of the different review panels are members of the same entity that must provide information, it can be difficult for the petitioners to obtain an impartial hearing.

In theory, it is possible to appeal decisions to withhold information before the courts, since Mexican law makes it possible to seek an injunction (*amparo*) against any act by the federal government (except for acts by the Supreme Court).⁷⁷ But, this procedure is prohibitively long, expensive, and burdensome, and therefore not a viable option for most Mexicans. (A second appeal option exists in cases involving decisions by the IFE, which may be appealed before the Federal Electoral Tribunal (*Tribunal Electoral del Poder Judicial de la Federación*, TRIFE).)⁷⁸

IFE adopted new regulations on June 29, 2005, [online]
http://www.ife.org.mx/InternetCDA/TRANSP/despliega_canal_r.jsp?nombreCanal=Reglamentos&nombreCanalPadre=Marco%20Normativo (retrieved January 2006). Since those involved in promoting access to information within the judiciary harshly criticized the 2003 agreements adopted by the Supreme Court and the Judicial Council for not being open enough and promoting a narrow interpretation of the transparency law, new regulations were adopted for the entire judiciary in March 30, 2004 (Reglamento de la Suprema Corte de Justicia de la Nación y del Consejo de la Judicatura Federal para la Aplicación de la Ley Federal de Transparencia y Acceso a la Información Pública Gubernamental). See for example, José Antonio Caballero Juárez, "La regulación sobre el acceso a la información judicial en México. Algunos comentarios sobre el estado de la cuestión," in José Antonio Caballero Juárez et. al. (eds.), *El acceso a la información judicial en México: una visión comparada* (Mexico City: UNAM, 2005), pp. 191-192.

⁷⁷ Law that regulates the implementation of Articles 103 and 107 of the Mexican Constitution (*Ley de Amparo Reglamentaria de los Artículos 103 y 107 de la Constitución Política de los Estados Unidos Mexicanos*), [online] <http://www.cddhcu.gob.mx/leyinfo/doc/20.doc> (retrieved January 2006).

⁷⁸ These cases are described in detail in the IFE section of this chapter.

Results: Progress and Obstacles

The Executive

Positive Impact

Within the executive branch, the transparency law has had a dramatic impact on access to official information in a wide range of areas.

Compliance with the law's transparency obligations has improved steadily since it went into effect. According to evaluations conducted by the IFAI, compliance has increased from 32 percent in 2003, to 62 percent in 2004, and to over 90 percent in 2005.⁷⁹ During this time, agencies within the executive have received over one-hundred thousand information requests and responded to almost 90 percent of them.⁸⁰

The IFAI has played a crucial role in pressing for greater transparency within the executive. It has received an increasing number of complaints against federal agencies that denied access to information requests—from over 600 in 2003 to over 2,300 in 2005.⁸¹ In nearly three-quarters of these cases, the IFAI has found in favor of the individual or organization filing the complaint and instructed the government entity to provide the requested information.⁸²

The IFAI has successfully brought about the disclosure of a wide array of information previously inaccessible to the Mexican public. For example, it ordered the National Commission on Nuclear Security (*Comisión Nacional de Seguridad Nuclear y Salvaguardias*) to provide information on the enterprise that provided nuclear fuel used in a nuclear

⁷⁹ Information provided to Human Rights Watch by IFAI officials.

⁸⁰ There were 108,408 information requests to agencies within the executive, 101,955 of which were filed through the Internet. Of the total number of requests, 96,451 have been answered and 7,345 have been closed for lack of payment or because the person requesting information did not answer the IFAI's request for additional information. The institutions that received the highest numbers of requests for information were the Ministry of Finance and Public Credit (*Secretaría de Hacienda y Crédito Público*), the Mexican Social Security Institute (*Instituto Mexicano del Seguro Social*), the Ministry of Public Education (*Secretaría de Educación Pública*), and the Ministry of Environment and Natural Resources (*Secretaría de Medio Ambiente y Recursos Naturales*). All of them have answered at least 83 percent of the requests that were received. IFAI, "SISI statistics on November 24, 2005," [online] <http://www.ifai.org.mx/textos/stats.xls> (retrieved November 2005).

⁸¹ In 2003, there were 636 complaints, in 2004 there were 1,431, and in 2005 there were 2,353. *Ibid.* According to María Marván, President Commissioner of the IFAI, this increase is due to the fact that information requests are becoming more complicated, and system users realize that the decision in a majority of cases is to grant information that had been denied. Human Rights Watch interview with María Marván, President Commissioner of the IFAI, Mexico City, Mexico, November 17, 2005.

⁸² In 35 percent of the cases, the IFAI requested that the entity that denied information partially provide such information, and in 38 percent of the cases it reversed the agency's decision entirely and ordered it to provide all the information that had been requested. In the remaining 27 percent of the cases, the IFAI confirmed the agencies' decision to deny information. Information provided to Human Rights Watch by IFAI officials.

facility, as well as its country of origin. It required the National Commission on Social Security (*Comisión Nacional del Sistema de Ahorro para el Retiro*) to provide an individual information on his own social security accounts. It compelled the National Council on Science and Technology (*Consejo Nacional de Ciencias y Tecnología*) to inform how fellowships are assigned. And it obliged the Ministry of Foreign Affairs (*Secretaría de Relaciones Exteriores*, SRE) to inform someone who did not pass the selection process to be part of the Mexican foreign service the results she and others obtained on the exam.⁸³

As a result of the transparency law, Mexican society has obtained unprecedented access to information necessary to monitor government institutions and expose corruption. According to the staff of the liaison unit within the Ministry of Public Administration (*Secretaría de Función Pública*, SFP), for example, the obligation to publish vacancies and the number of employees and their salaries has made it easier to identify “*aviadores*”—government employees who do not actually work but got paid every month. The law has also made it easier to detect corruption in the granting of concessions and licenses by the public administration.⁸⁴

Information obtained through the IFAI has also been useful in unveiling corruption scandals related to the inappropriate use of public funds. For example, a Mexican human rights organization, FUNDAR, was able to document the misallocation of 200 million pesos (approximately U.S.\$19 million) in the federal budget earmarked to combat and prevent HIV/AIDS. The NGO submitted more than two hundred information requests to various federal agencies, including the Ministry of Finance and Public Credit and the Department of Health, to monitor how the extra funds were actually spent. The information they obtained revealed that the Department of Health had distributed the budget increase among hospitals that had budget crises and did not necessarily have experience in working with HIV/AIDS patients. Furthermore, they found that three out of seven of these hospitals had spent the entire extra allocation on “general services,” including security, cleaning products, and banking services.⁸⁵ Since the Ministry of Finance and Public Credit labels money as spent the moment it is transferred, they considered the money to have been spent on HIV/AIDS because the funds had been labeled as such. Given this scenario, the information obtained through information requests on how the money was actually spent helped publicize that the

⁸³ See Ernesto Villanueva et. al, *Importancia Social del Derecho a Saber—Preguntas y Respuestas en los Casos Relevantes del IFAI* (Mexico City: LIMAC, 2005).

⁸⁴ Human Rights Watch interview with staff of the liaison unit in the SFP, Mexico City, Mexico, January 18, 2006.

⁸⁵ Human Rights Watch telephone interview with Alicia Athié, FUNDAR, Mexico City, Mexico, December 19, 2005.

extra budget for HIV/AIDS was not getting to patients who desperately needed it, and it demonstrated the flaws in a system that allows such lack of accountability.

Another example of the misuse of public funds was the “Provida scandal.” In January 2003, thirty million pesos (almost U.S.\$3 million) of the budget for HIV/AIDS were allocated by the government to the National Pro-Life Committee (*Comité Nacional Provida*), a conservative NGO that would build ten Centers for Assistance to Women (*Centros de Ayuda para la Mujer*). With the purpose of monitoring how the money had been spent, six NGOs requested a copy of the agreement by which the Department of Health granted Provida the funds, and the periodic reports presented by Provida on how the money had been spent. A private company that audited the files concluded that the documentation showed that 90 percent of the funds were irregularly spent. For example, over 95 percent of the funds included in the category “Help for Women” in the budget was spent in hiring a company that organized parties, which had as directors the same people that were directors of Provida, and there were receipts that demonstrated that part of the money destined to combat HIV/AIDS was used to purchase Cartier pens, clothes for men and women, and women’s underwear.⁸⁶

Remaining Obstacles

A key to the effectiveness of the transparency law is the ability of the IFAI to operate independently of political pressure—especially if that pressure comes from the institutions in possession of information that should be public. The IFAI has been able to operate without undue interference thus far. Yet it remains vulnerable to being undermined or even sabotaged by future administrations.

One source of vulnerability is the method of selection of the commissioners who run the IFAI. Under the current structure, the president has sole authority to appoint IFAI commissioners. While the Senate may “object” to the president’s selections, it cannot actually block any appointment. Thus, a president who is not committed to transparency could appoint commissioners who would be unwilling or unable to apply the law effectively.⁸⁷

⁸⁶ Ibid. See also María Vallarta Vázquez and Ma. Concepción Martínez Medina, “Citizens Claim for Transparency and Accountability: Experience in Public Resources Deviation Monitoring,” in IFAI, *Right of Access to Information in Mexico: a diagnosis by society* (Mexico City: IFAI, 2005), pp. 35-46.

⁸⁷ The transparency law partially addresses this potential problem through the tenure of the commissioners. Of the five commissioners, two will be in office until September 2006 (and may be re-elected once for a seven-year term); two others will be in office until September 2009; and one will be in office until April 2011. Yet two consecutive administrations could still severely undermine the IFAI through poor selections of commissioners.

Another source of vulnerability is the budget. Currently, the IFAI proposes its budget to the president, who incorporates it into the executive's budget and sends it to Congress for approval. So far, the IFAI has received an annual budget of over 200 million pesos (U.S.\$20 million) every year since its creation.⁸⁸ However, an unsympathetic president (or Congress) could decrease this budget in the future and thereby undermine the IFAI's ability to carry out its work.

A final source of vulnerability is the fact that the IFAI has no authority to enforce its decisions or sanction officials who refuse to comply with them. While government entities have generally complied with its decisions so far, when they have not, the information petitioners have had to turn to the courts to force compliance.⁸⁹ In one case, for example, a former Mexican consul in the United States sought certified copies of documents from the Foreign Ministry and Attorney General's Office regarding the case of a Mexican fugitive in Texas. (The consul already had unofficial copies in his possession). After both entities denied him the certified copies, he appealed to the IFAI, which ruled in his favor. Yet still the entities refused to provide the copies. Consequently he took his case to court and won court orders for the entities to provide the copies.⁹⁰

When it comes to sanctioning officials who fail to comply with its instructions, the IFAI must rely on the SFP. Although IFAI officials report that the SFP has been supportive during the Fox administration, there remains a structural deficiency in the system that could undermine SFP's ability to sanction public officials for failing to comply with IFAI instructions in the future.⁹¹ Cases are decided by an "internal control organ" (*organo interno de control*) in each executive agency. Formally, these organs depend on the SFP, but under the transparency law, the head of the internal control organ is simultaneously a member of the agency's Information Committee, which is responsible for reviewing access to information decisions adopted by the liaison unit in each office. Consequently, in practice, the law is asking this person to potentially review his or her own decisions or those of his or her colleagues.

⁸⁸ Information provided to Human Rights Watch by IFAI officials.

⁸⁹ Ibid.

⁹⁰ Telephone interview with Humberto Hernández Hadad, Mexico City, Mexico, December 6, 2005. See for example, decision by Mexico City 16th district judge in administrative matters, file 760/2005, August 16, 2005, and decision by Mexico City 12th district judge in administrative matters, file 801/2005, November 11, 2005.

⁹¹ Human Rights Watch interview with María Marván, President Commissioner of the IFAI, Mexico City, Mexico, November 17, 2005.

While IFAI officials insist that these vulnerabilities have not been exploited so far, they also report encountering growing resistance among certain institutions to comply with information requests—including, in particular, the Attorney General's Office and the Ministry of Finance and Public Credit.⁹² Another institution that has been resistant to collaborate with the IFAI has been the Secretary of Defense (*Secretaría de Defensa Nacional*, SEDENA). For example, in May 2004 an individual asked SEDENA for information on how many cases of human rights violations by the military were pending before international bodies. In June 2004 SEDENA answered that there were no international proceedings against Mexican military officials. The answer consisted of one word: “none” (*ninguno*). The person who had requested information presented an appeal before the IFAI because she knew of at least four cases that were pending before the IACHR. The IFAI decided to reverse SEDENA's decision and ordered its Information Committee to grant access to the information requested.⁹³ Even though the IFAI's resolution held that some information on cases pending before the IACHR is available on the Internet and can therefore not be denied by SEDENA, in its response of October 2004, SEDENA only referred to two cases.

Another example of SEDENA's resistance to providing information has been documented by the Atalaya Program of ITAM University. In 2003, the Atalaya Program sought information on cases in which the CNDH had signed agreements with federal entities regarding their responsibility in human rights cases. After the CNDH denied access to its files, the Atalaya Program requested the information from twenty-four federal government agencies, including SEDENA. The Atalaya researchers obtained information from some of them, either directly or after an appeal before the IFAI, but not from SEDENA.⁹⁴ In December 2003, the Atalaya Program requested access to documentation on agreements between SEDENA and the CNDH, and SEDENA responded that the information should be requested from the CNDH. After an appeal, the IFAI decided SEDENA should provide a “public version” of the requested files.⁹⁵ Yet SEDENA still refused to provide access to the files. Instead, it only gave the Atalaya Program a document with basic information on five cases.

The Judiciary

The transparency law and its implementing regulations issued by the Supreme Court and the Judicial Council have increased transparency at the top levels of the judiciary. Both

⁹² Ibid.

⁹³ Ernesto Villanueva et. al, *Importancia Social del Derecho a Saber—Preguntas y Respuestas en los Casos Relevantes del IFAI* (Mexico City: LIMAC, 2005), pp. 113-124.

⁹⁴ Human Rights Watch telephone interview with Sandra Serrano, Mexico City, Mexico, March 1, 2006.

⁹⁵ IFAI decision on file 39/04 of May 4, 2004.

have complied with their transparency obligations by posting the required information on their Web sites and by responding to most requests they have received for specific information.⁹⁶ The Supreme Court has also promoted transparency by broadcasting its public hearings on television and the Internet.

Unfortunately, however, a culture of secrecy prevails, for the most part, in the work of Mexican judges.⁹⁷ Part of the problem is that many judges still believe that access to information and transparency belong to common law judicial systems and are incompatible with Mexico's legal system.⁹⁸ Another factor limiting access to judicial information is that decisions to deny information are never subject to outside review, but merely to review by the commissions formed by the Supreme Court and the Judicial Council.

One crucial area where access to information remains a problem within the judiciary involves obtaining copies of judicial rulings. While some decisions are now posted on the Internet, most are not.⁹⁹ In some cases, the decisions can be found in certain public libraries, yet tracking them down can be a difficult and time-consuming process. As a result, lawyers and even judges find it difficult to locate and learn from previous rulings that might be relevant to their case. Consequently, there is a greater risk that different courts—or even different judges within the same court—will adopt contradictory decisions without even being aware that they are doing it.

⁹⁶ By December 2004, the Supreme Court provided information in 28,386 requests for information, which is almost 100 percent of the requests. Mexican Supreme Court, "El Poder Judicial de la Federación, Salvaguarda del Orden Jurídico," Press Release number 701, December 15, 2004, [online] <http://www.scjn.gob.mx/inicial.asp> (retrieved December 2005). The Judicial Council complies with transparency obligations on its Web site—see <http://www.cjf.gob.mx/acceso%5Finformacion/> (retrieved December 2005). Between June 2003 and October 2004 it received 638 information requests, which included information on 1,514 issues. Of those, in 1,062 cases the information was provided, including certified copies of judicial decisions, copies of agreements adopted by the Judicial Council, names of people working in certain offices, and names of federal judges that were sanctioned during a period of time. "Informe General de Control y Seguimiento de Solicitudes Generadas por los 61 módulos de Acceso a la Información del Consejo de la Judicatura Federal," [online] http://www.cjf.gob.mx/acceso_informacion/presentacion/INFORMEGENERALDESOLICITUDES.pdf (retrieved December 2005).

⁹⁷ Ernesto Villanueva, "Derecho de acceso a la información en el poder judicial. Una aproximación al caso mexicano desde la perspectiva comparada," in José Antonio Caballero Juárez et. al. (eds.), *El acceso a la información judicial en México: una visión comparada* (Mexico City: UNAM, 2005), p. 181.

⁹⁸ *Ibid.*

⁹⁹ Supreme Court Justice José Ramón Cossío told Human Rights Watch that the judiciary is working to have all decisions available online, as well as a search engine. Human Rights Watch interview with José Ramón Cossío, Mexico City, Mexico, November 17, 2005.

The judiciary also continues to deny public access to information that is crucial for promoting greater accountability within the justice sector by arguing that it must be considered privileged or confidential information. For example, resumes and qualifications that lead to the appointment of judges are not available to the public. This is problematic because public disclosure of judges' qualifications and periodic evaluations could allow citizens to better monitor the quality of decision makers in the judicial system and may eventually increase their trust in the institution.

Other information that is unavailable is the number of cases before each court, their average duration, the number of accused who are actually imprisoned, and the percentage of decisions that end in a guilty verdict. This information is important for monitoring the courts' productivity, as well as to identify possible corruption cases.¹⁰⁰

Congress

Mexico's Congress has traditionally worked in a very obscure fashion, denying the public basic information about how members of Congress voted, what was being discussed, when meetings were taking place, and the reasons for adopted decisions. The transparency law has helped to expose the legislative process to greater public scrutiny, in large measure by salvaging previous initiatives that had proven to be largely ineffective in practice.

For example, both houses of Congress had adopted systems of electronic voting to help curb the problem of chronic absenteeism (the House of Representatives in 1998, and the Senate in 2001). Yet members of Congress continued to be absent during debates and no one had access to their voting records.¹⁰¹

Another past initiative was a 1999 law in which Congress imposed upon itself the obligation to televise its debates and provide the public with greater information about its activities.¹⁰² Yet the law did not come accompanied by any mechanism of enforcement and consequently, had little impact.¹⁰³

¹⁰⁰ Ernesto Villanueva, "Derecho de acceso a la información en el poder judicial. Una aproximación al caso mexicano desde la perspectiva comparada," in José Antonio Caballero Juárez et. al. (eds.), *El acceso a la información judicial en México: una visión comparada* (Mexico City: UNAM, 2005), pp. 183-185.

¹⁰¹ Human Rights Watch interview with Benito Nacif, CIDE, Mexico City, Mexico, November 16, 2005.

¹⁰² See Articles 130-135 of the Organic Law of the Mexican Congress (*Ley Orgánica del Congreso General de los Estados Unidos Mexicanos*), September 1999, [online] <http://www.cddhcu.gob.mx/leyinfo/doc/168.doc> (retrieved November 2005).

¹⁰³ Human Rights Watch interview with Benito Nacif, CIDE, Mexico City, Mexico, November 16, 2005.

The transparency law gave new life to both of these initiatives. Unlike the previous electronic voting initiatives, the law includes more detailed transparency obligations about what information must be provided to the public, including the obligation to inform on the voting records. And unlike the 1999 law, the new law and its implementing regulations create a mechanism for pressing the Congress to fulfill its transparency obligations and provide information: individuals and organizations can request information from a liaison unit (and appeal its decisions before a reviewing panel) in each house.

Both houses of Congress have received thousands of information requests and provided the requested information in a timely manner in the vast majority of cases.¹⁰⁴ Currently, both the Senate and the House of Representatives also comply with transparency obligations imposed by the transparency law by providing more information in their Web sites.¹⁰⁵ Nonetheless, a recent analysis by the Mexican organization CIDE (*Centro de Investigación en Docencia Económica*) on transparency in both houses shows that the Senate only complies with 45 percent of its transparency obligations and the House of Representatives complies with 66 percent.¹⁰⁶

One important area where Congress is not completely meeting its transparency obligations involves its failure to publicize parliamentary debates sufficiently in advance so as to allow civil society groups, journalists, and members of the general public to monitor its handling of pending legislation.¹⁰⁷ Consequently, it is more difficult to

¹⁰⁴ Between June 2003 and October 2005 the Senate received 4,792 information requests, 4,696 of which were sent via e-mail. Mexican Senate, "Informe de Gestión de Solicitudes de Información Recibidas 2003-2005," October 2005, [online] http://www.senado.gob.mx/transparencia/content/informes/informe_octubre_2005.pdf (retrieved November 2005). The Senate has responded to 96 percent of these requests. Between June 2004 and June 2005 the Senate denied information requested in six (out of 1,763) cases. During that year, there were six appeals, four of which were presented by individuals who did receive information but requested it to be presented to them in another format. Transparency and Access to Information Committee, "Annual Report 2004-2005," June 2005, [online] http://www.senado.gob.mx/transparencia/content/informes/informe_octubre_2005.pdf (retrieved November 2005). The House of Representatives has received, between June 2003 and June 2005, a total of 1,127 information requests. Only 0.53 percent of the cases were considered to request classified information. Liaison unit of the House of Representatives, "Transparency in the House of Representatives. The Liaison's Unit Annual Report 2005," June 2005, [online] <http://transparencia.diputados.gob.mx/media/informe2004-2005.pdf> (retrieved November 2005).

¹⁰⁴ For the Senate, see [online] <http://www.senado.gob.mx/transparencia/content/informacion/index.htm> and for the House of Representatives, see [online] <http://transparencia.diputados.gob.mx/index.php?node=0> (retrieved November 2005).

¹⁰⁵ *Ibid.*

¹⁰⁶ Benito Nacif Hernández et. al., "Informe de Transparencia del Poder Legislativo en México," Monitor Legislativo de CIDE, March 2006, p. 3.

¹⁰⁷ Human Rights Watch telephone interview with David Dávila, FUNDAR, Mexico City, Mexico, November 9, 2005.

generate meaningful public discussion of this legislation at the critical moments when Congress is debating it.

Another area where transparency remains lacking—one not covered by the law’s transparency obligations—involves the fact that members of Congress need not disclose any income they receive from other professional activities. Consequently, it can be difficult or impossible to detect potential conflict of interest that legislators might have when debating and voting upon legislation affecting parties with whom they have financial relationships.

Perhaps the most glaring shortcoming of the transparency law’s implementation in Congress is the failure to apply it to a central component of legislative activity in Mexico—the parliamentary groups. These groups, composed of the congressional representatives from each political party, receive substantial funds from Congress, based on the proportion of representatives they have in each house. In 2005, for example, the total budget for these parliamentary groups in Congress was 755.5 million pesos (over U.S.\$70 million).¹⁰⁸ When journalists from *Reforma* newspaper requested information on how the parliamentary groups had spent this money, Congress refused it on the grounds that it was the political parties (which are not subject to the transparency law) that spent the money.¹⁰⁹

The significance of this shortcoming is compounded by a larger structural problem with the national legislature that undermines its accountability to the Mexican public. Currently, members of Congress are barred from immediate re-election.¹¹⁰ As a result, their future careers in public office depend not so much on how they perform in the eyes of the voters who elected them, but rather on whether their party will select them to run for other offices. The result is a perverse dynamic in which legislators are more accountable to their parties than to the people they represent.

This arrangement undermines the purpose of the transparency law in two ways. First, legislators have little incentive to provide information to the public regarding their

¹⁰⁸ Andrea Merlo and Claudia Salazar, “Mantienen opaco gasto de bancadas,” *Reforma*, August 8, 2005.

¹⁰⁹ Human Rights Watch telephone interview with Miguel Treviño, Grupo Reforma, Mexico City, Mexico, December 7, 2005.

¹¹⁰ In November 2004, two Senate Commissions held that Congress should approve legislative modifications that allow for the re-election of members of Congress. They argued there was no impediment in Mexican law or history to do so, and that it would ensure a more professional Congress and greater accountability. Senate Commissions on Constitutional Issues and Legislative Studies, “Dictamen sobre la Iniciativa con Proyecto de Reformas a los Artículos 59 y 116 de la Constitución Política de los Estados Unidos Mexicanos, en materia de reelección legislativa,” November 30, 2004.

legislative activity, since they have no need of convincing voters that they should be maintained in their posts. Secondly, it increases the power and relevance of the parliamentary groups, which are not subject to the transparency obligations established by the new law.

Electoral Federal Institute (IFE)

The Electoral Federal Institute (IFE) has played a decisive role in Mexico's transition to democracy by ensuring free and fair elections. The transparency of the institution is critically important to ensure electoral processes continue to produce legitimate, democratic governments in the future.

The transparency law and its implementing regulations have served to reinforce steps that the IFE had already been taking since 1998 to ensure transparency. For example, the IFE had already established a series of norms that provide for the disclosure of reports presented to the IFE by political parties, as well as information on political parties' finances.¹¹¹ The transparency law strengthened these norms by introducing a number of new features: uniformity, minimum standards, and the obligation to respond to individual requests for specific information.¹¹²

Today, the IFE complies with its transparency obligations by posting critical information on its Web site, including its budget, the contracts it has signed, and the amount of public funds received by political parties.¹¹³ Thanks to the transparency obligations, the IFE is now providing information related to the electoral process in 2006 that had never been made public before. This includes information on the campaign expenses of the candidates and the number of television spots each has bought.¹¹⁴ The IFE has responded to over a thousand requests for information, mostly related to political parties and the office within the IFE that is in charge of monitoring their expenditures.¹¹⁵

One of the IFE's most important contributions has been to obtain information from political parties, which are, as noted above, not directly covered by the transparency law. In 2003, for example, a journalist requested that the IFE provide information on the

¹¹¹ IFE, "Diagnóstico en materia de transparencia y acceso a la información pública," July 9, 2004, pp. 16-19.

¹¹² Human Rights Watch interview with Electoral Counsel Andrés Albo, IFE, Mexico City, Mexico, January 18, 2006.

¹¹³ See [online] http://www.ife.org.mx/InternetCDA/TRANSP/index_a.jsp (retrieved February 2006).

¹¹⁴ Human Rights Watch interview with Electoral Counsel Andrés Albo, IFE, Mexico City, Mexico, January 18, 2006.

¹¹⁵ Information provided to Human Rights Watch by Rodolfo Vergara, head of the IFE liaison unit, Mexico City, Mexico, January 19, 2006.

income earned by political parties' leaders. When the IFE denied the request on the grounds that it did not have that information in its files, the journalist appealed to the Federal Electoral Tribunal (*Tribunal Electoral del Poder Judicial de la Federación*, TRIFE), which has jurisdiction to review any decision adopted by the IFE. The TRIFE ruled in the journalist's favor, finding that his right to obtain information through the IFE related to the electoral process extended to information regarding the use of public funds by political parties and national political groups.¹¹⁶ In a second case presented by the same journalist, the TRIFE extended this right to information to include the salaries earned by leaders of political parties that had lost their party registration.¹¹⁷ According to the journalist who presented both cases, pressure on political parties made them publicize this information on their Web sites even before the TRIFE published its decisions.¹¹⁸

In an effort to fulfill its obligations under the transparency law, the IFE produced a self-evaluation in July 2004 in which it found that the institute's existing legal framework did not sufficiently ensure access to information held by political parties. The IFE recognized that recent initiatives, such as the IFE's obligation to disseminate reports sent to it by political parties and the recent TRIFE decisions, have promoted greater transparency of political parties. Nevertheless, the report recognized, these advances would not be consolidated if they were not incorporated into a new legal structure.¹¹⁹

As a consequence of this self-assessment, as well as the TRIFE rulings in the cases brought by the journalist, in 2005, the IFE issued new implementing regulations for the transparency law. These regulations created a mechanism by which the IFE may request information from political parties.¹²⁰

However, the effectiveness of this mechanism remains limited by the fact that the IFE has no power to sanction political parties when they refuse to comply with information requests. The only measure available in these cases is to publicize the parties' lack of compliance. The threat of bad publicity could be a powerful way of exerting pressure (as

¹¹⁶ Human Rights Watch telephone interview with Arturo Zárate, *El Universal*, Mexico City, Mexico, December 20, 2005. The court decided that if the IFE had obtained information on the salaries of political parties' leaders when it audited the parties, it should have that information in its files (even if the verification was done in the political parties' offices, which was the IFE's argument). If it does not, it should request that information from the political parties, and it should provide it to the person requesting it. Federal Electoral Tribunal, file SUP-JDC-041/2004, June 25, 2004, [online] <http://www.trife.org.mx/index.asp> (retrieved January 2006).

¹¹⁷ Federal Electoral Tribunal, file SUP-JDC-216/2004, September 10, 2004, [online] <http://www.trife.org.mx/index.asp> (retrieved January 2006).

¹¹⁸ Human Rights Watch telephone interview with Arturo Zárate, *El Universal*, Mexico City, Mexico, December 20, 2005.

¹¹⁹ IFE, "Diagnóstico en materia de transparencia y acceso a la información pública," July 9, 2004, p. 127.

¹²⁰ Article 28(1) of the IFE's implementing regulations.

in the example above). However, there is still no way of ensuring genuine and full compliance with requests.

National Human Rights Commission (CNDH)

The CNDH, the autonomous agency charged with “protecting, observing, promoting, studying, and divulging” human rights in Mexico, possesses a wealth of important and valuable information on the rights practices of state institutions. Public access to this information is crucial for several reasons. First, it permits Mexican civil society to know about human rights abuses and to monitor their elected officials’ efforts to address them. Second, it helps policy analysts, commentators, and ordinary voters to evaluate public policies from a human rights standpoint. Finally, public access to the CNDH’s information allows Mexican society to monitor the work of the CNDH itself.

Prior to the transparency law, the CNDH was already one of the federal entities that disclosed the most information to the public. And the amount of information it discloses on the Internet has increased dramatically since the federal law came into effect.¹²¹

Yet, even today, there are still limits to obtaining information. As with other state entities, the CNDH has applied confidentiality norms in a blanket fashion that limits access to basic information. For example, in one case, while the IFAI explicitly said that all information related to salaries earned by public officials had to be made public, the CNDH considered that information regarding how much bonus salary was earned by officials working within the CNDH at the National Human Rights Center (*Centro Nacional de Derechos Humanos*) was confidential.¹²² A second example refers to an information request by an NGO that asked the CNDH for copies of the resumes of members of the CNDH advisory committee.¹²³ Instead of providing a public version of the resumes with the information that the CNDH considered “personal data” omitted, it denied access to the entire document.¹²⁴

¹²¹ Human Rights Watch telephone interview with Miguel Pulido, FUNDAR, Mexico City, Mexico, December 7, 2005.

¹²² Ibid. See also Oficio No. C1/ST/137/05 by the CNDH, and see for example IFAI decision on File No. 1726/05, November 23, 2005, [online] http://www.ifai.org.mx/resoluciones/recursos_rev/2005nov23/1726.pdf (retrieved December 2005).

¹²³ The advisory committee is a body composed of members of civil society. It has, among other duties, the obligation to oversee the budget and internal regulations of the CNDH.

¹²⁴ Human Rights Watch telephone interview with Berenice Ortega, Academia Mexicana de Derechos Humanos, Mexico City, Mexico, December 20, 2005.

Furthermore, public access to information regarding the work of the CNDH is limited in significant ways. The CNDH considers all cases that it has under review to be strictly confidential.¹²⁵ While it makes sense to limit public access to sensitive information regarding ongoing investigations, the CNDH applies this confidentiality rule in such an absolute fashion that even the individuals who filed specific complaints are denied access to their own files. For example, in 2005 the CNDH argued that “information in files under study by the CNDH is privileged information” and denied a person access to his own file (related to the violation of his right to health, right to information, and reproductive rights as a consequence of forced sterilization).¹²⁶

Obtaining information on concluded cases can also be difficult.¹²⁷ The CNDH’s implementing regulations of the transparency law allow its staff to reserve information on concluded cases for twelve years.¹²⁸ Complete information is only available on recommendations, but on average, between 2003 and 2005, these constitute less than 1 percent of the all concluded cases.¹²⁹ Many more cases are resolved through settlements between the CNDH and the state agency in which the agency accepts its responsibility.

¹²⁵ According to Article 9 of the CNDH implementing regulations on transparency: “According to Article 4 of the Law on the CNDH, and in accordance with its Article 14(I), information or documentation in files pending before the CNDH is considered privileged information.”

According to Article 4 of the Law on the CNDH: “The CNDH staff shall handle confidentially information and documentation related to the issues it may evaluate.”

According to Article 48 of the Law on the CNDH: “The CNDH is not forced to provide any evidence it used to any government agency or official to which it issued a recommendation, nor to any individual. If these evidences were requested, [the CNDH] will have discretion to decide whether to provide them.”

According to Article 78 of the internal rules of the CNDH: “Investigations carried forward by the CNDH staff, the procedural steps carried forward after each complaint, and the documentation received from the authorities and the individuals will be handled with the most absolute privilege, in the parameters set forth by Article 4 of the Law. In any case, authorities will abide by [the transparency law and the CNDH’s implementing regulations]. The aforementioned provisions do not apply to considerations the CNDH takes into account when issuing recommendations, declarations, or preparing annual or special reports. When someone requests copies of, or access to, information held in a file pending before the CNDH related to his or her own case, [he or she may receive the information only if] the case was concluded and the content of the file may not be considered privileged or confidential information.”

¹²⁶ Letter by the CNDH’s Information Committee to an individual requesting information, August 4, 2005 (additional identifying information withheld).

¹²⁷ Programa Atalaya of ITAM and La Ronda Ciudadana, “Análisis de la CNDH en 2004,” February 2006, p. 45.

According to Article 125 of the CNDH rules of procedures, the CNDH may conclude cases due to different reasons.

¹²⁸ Article 10 of the CNDH implementing regulations on transparency.

¹²⁹ When the CNDH evaluates the evidence presented in a complaint and concludes that there was a human rights violation, it issues a recommendation. Each recommendation will include a description of the facts of the case and the evidence analyzed by the CNDH, an analysis of the human rights violations, and specific recommendations to government agencies to act. Recommendations issued by the CNDH are then made public; and the CNDH has a follow-up mechanism by which it evaluates compliance by government agencies. See Articles 128 to 139 of the CNDH rules of procedure.

When, in 2003, the Atalaya Program of ITAM University requested access to the files of some concluded cases, the CNDH denied it, arguing that the Law on the CNDH and its implementing regulations of the transparency law allowed it to consider such information privileged.¹³⁰ The Atalaya Program then presented an injunction, challenging the applicable regulations. A few weeks before the Supreme Court was going to decide the appeal, and two years after the initial request, the CNDH allowed them to see the files that were mentioned in the injunction. In February 2006, the Supreme Court decided the case was moot, and did not address whether the challenged laws were constitutional.¹³¹

Although the CNDH does provide some aggregate data in its annual report about the cases it handles, this information tends to be broad and vague. Consequently, it is impossible to know which human rights issues are brought to it and evaluated by it, which government officials and agencies are accused of violating human rights, which cases it decides to close and why, what happens to closed cases, and how government authorities react to most complaints and decisions by the CNDH.

State Level Institutions

The transparency law only applies to federal agencies.¹³² Consequently, each of Mexico's thirty-one states and Mexico City (*Distrito Federal*) must pass its own transparency law that applies to state agencies. In November 2005, twenty-seven states and Mexico City, as well as some municipalities, had transparency laws.¹³³

According to the CNDH annual reports, in 2003 it concluded 3,342 cases and only 22 were recommendations (0.65 percent); in 2004 it concluded 3,800 cases and only 39 were recommendations (1.02 percent); and in 2005 it concluded 4,717 cases and only 28 were recommendations (0.59 percent). Information available online at <http://www.cndh.org.mx/lacndh/informes/informes.htm> (retrieved April 2006).

¹³⁰ Letter signed by Graciela Sandoval Vargas of the technical secretariat of the CNDH's information committee with reference to file 2003/3-T, July 28, 2003.

¹³¹ The appeal does not generate any effect on other requests for information; i.e., the next time an individual or organization requests this type of information from the CNDH, they will have to present their cases to the courts and wait for their resolution.

¹³² It would have been possible to create a "general" law (that would automatically make state governments subject to the law), but those negotiating the creation of the law decided instead to pass a "federal" one, thinking it would lead to a series of state laws that would follow the pattern established by the federal government. Human Rights Watch telephone interview with Juan Francisco Escobedo, Mexico City, Mexico, December 19, 2005.

¹³³ These twenty-seven states are Aguascalientes, Baja California, Baja California Sur, Campeche, Chihuahua, Coahuila, Colima, Durango, Guanajuato, Guerrero, Jalisco, México state, Michoacán, Morelos, Nayarit, Nuevo León, Puebla, Querétaro, Quintana Roo, San Luis Potosí, Sinaloa, Sonora, Tamaulipas, Tlaxcala, Veracruz, Yucatán and Zacatecas. At the local level, there are transparency laws in municipalities in Coahuila, Colima, Durango, México state, Jalisco, Nuevo León, Guanajuato, and Sinaloa. See list of municipal laws published by IFAI, [online] <http://www.ifai.org.mx/test/eym/municipal.htm> (retrieved December 2005).

But the positive impact of having all these laws has been undermined by a variety of factors. Most of the local laws and implementing mechanisms do not promote the same high level of transparency established by the federal law. In some of the states, access to official information is discretionary and supervising institutions are ineffective.¹³⁴

In many of the states, the transparency laws do not apply to all government entities. Some exempt the judicial branch entirely, for example, or fail to establish effective implementing mechanisms within the judiciary. As a consequence, most state judiciaries in Mexico remain opaque, and it is difficult to access information in their possession.¹³⁵ Since most cases are judged in local jurisdictions, the lack of access to judicial information at the state level is extremely harmful for openness and transparency in Mexico.

Another common problem is the cost of copies, which in most states is prohibitively high. While the IFAI has held that each copy should not cost more than half a peso, less than 10 percent of the states have the same limit. In extreme cases, such as Michoacán, each copy costs more than sixteen pesos.¹³⁶ In states where information is not given electronically, the high cost of copies will clearly limit access to information of those who cannot afford those prices.

One reason for the weakness of the state laws is the lack of an organized constituency that can promote the passage and effective implementation of transparency legislation. As previously explained, the active participation of civil society groups was decisive in the creation of the federal law. But active civil advocacy is missing in many states.¹³⁷

The IFAI has helped states confront some of these obstacles by preparing a comparative analysis of state laws and by establishing an office to foster collaborative activities with local governments.¹³⁸ Its most recent initiative is Information System Mexico (*Sistema de*

¹³⁴ A comprehensive comparative analysis of laws passed prior to October 2005 concluded that the best laws were those in Campeche, Distrito Federal, Morelos, Sinaloa and Baja California. Those that did worse in the evaluation were Tlaxcala, Aguascalientes, Puebla, Nuevo León, and Veracruz. Ernesto Villanueva et. al, *Derecho de Acceso a la Información Pública en México – Indicadores Legales* (Mexico City: LIMAC, 2005), pp. 4 and 35.

¹³⁵ José Antonio Caballero Juárez, “La regulación sobre el acceso a la información judicial en México. Algunos comentarios sobre el estado de la cuestión,” in José Antonio Caballero Juárez et. al. (eds.), *El acceso a la información judicial en México: una visión comparada* (Mexico City: UNAM, 2005), p. 202.

¹³⁶ Ernesto Villanueva, “El precio del derecho a saber,” *Proceso*, February 4, 2006.

¹³⁷ David Sobel et. al., “The Federal Institute for Access to Public Information in Mexico and a Culture of Transparency,” Project for Global Communication Studies at the Annenberg School for Communication at the University of Pennsylvania, February 2006, p. 31.

¹³⁸ See [online] <http://www.ifai.org.mx/test/eym/edos.htm> (retrieved December 2005).

Información México, INFOMEX), which is funded by the World Bank. INFOMEX is open to every state entity that decides to participate in it, and its purpose is to create a system to obtain information from state governmental entities through the Internet. As of February 2005, thirteen states and Mexico City had signed agreements with IFAI to participate in it.¹³⁹

The Opening of Secret Government Archives¹⁴⁰

The Release of Documents

In November 2001, President Fox decided to “open” government archives that contained information related to past human rights abuses. Specifically, the president instructed the Interior Ministry to deposit in the National Archive all the documents generated by two defunct agencies that had directed internal surveillance and security operations—the Federal Security Directorate (*Dirección Federal de Seguridad*, DFS) and the General Directorate of Political and Social Investigations (*Dirección General de Investigaciones Políticas y Sociales*, IPS). The president also instructed the Interior Ministry to collect and deposit in the National Archive documents from other government agencies, including the Secretary of Defense (*Secretaría de Defensa Nacional*, SEDENA), that contained information related to Mexico’s “dirty war.”¹⁴¹ In June 2002 these instructions were carried out and some eighty million documents were deposited in the National Archive.

These files contain detailed information on human rights violations committed during Mexico’s “dirty war” as well as insights into the command structure and *modus operandi* of the institutions that carried them out. The availability of this information removed the cloak of secrecy around the security apparatus and provided Mexican society insight into the inner workings of the old regime. Journalists were able to investigate and obtain documentation on what had happened during those years. Victims of human rights violations and their families were able to review the files that government agencies kept on them. It was finally possible to document a part of Mexican history that had been, until then, mostly based on testimonies.

¹³⁹ The states are Colima, Nuevo León, Durango, Coahuila, Guanajuato, Estado de México, Michoacán, Morelos, Nayarit, Puebla, Querétaro, San Luis Potosi and Sinaloa. David Sobel et. al., “The Federal Institute for Access to Public Information in Mexico and a Culture of Transparency,” Project for Global Communication Studies at the Annenberg School for Communication at the University of Pennsylvania, February 2006, p. 31.

¹⁴⁰ Portions of this section were originally published in Human Rights Watch, “Justice in Jeopardy: Why Mexico’s First Real Effort to Address Past Abuses Risks Becoming its Latest Failure,” *A Human Rights Watch Report*, vol. 15, no. 4 (B), July 2003.

¹⁴¹ Order of the President of the Republic, Mexico, November 27, 2001 (Chapter 3: “On the Opening of Institutional Archives”).

Most of this information is held in the first two galleries of the National Archive. The first gallery contains documents of the DFS, and the second gallery contains documents of the IPS. (The second gallery includes documents from various offices that were subordinated to the Interior Ministry, including the DFS and SEDENA.)

Limits on Accessibility

Management of the Archive

To obtain material, inquirers have to submit specific written requests to the archive staff listing topics of interest, and then wait for relevant documents to be retrieved. The determination of which documents are relevant is made by the archive staff—usually the director of the particular collection, who is ultimately responsible for which documents are shown to researchers.

The arrangement is particularly problematic in the case of the DFS collection, where the official in charge seems to have complete discretion with respect to what information is provided to inquirers. These decisions are not subject to any type of review. In 2003, a researcher had asked for photographs taken at student demonstrations in 1968 and the director of the collection refused to give her the notes that were stapled to each picture. When she challenged him to show the legal basis for this refusal, he responded only that it was his own decision. He then tore the photographs from the pages stapled to them, and only gave her the pictures.¹⁴² The then director of the National Archive acknowledged his authority to make such decisions, claiming, according to one press account, that he had “absolute discretion” to determine which documents a researcher could see.¹⁴³

Giving one person full discretion over what documents researchers see is problematic for several reasons. One is that this person could become vulnerable to pressure from people who might wish to prevent the release of incriminating material. Another is that this person might be tempted to abuse his or her authority to deny access to documents that should be public. Currently, this risk is particularly pronounced in the case of the DFS archives, given that the director of the collection was himself a DFS employee for decades.

¹⁴² Human Rights Watch telephone interview with Kate Doyle, Mexico City, Mexico, June 2003. Kate Doyle, “‘Forgetting is not Justice’ Mexico Bares Its Secret Past,” *World Policy Journal*, summer 2003, p. 71.

¹⁴³ Darío Fritz, “El AGN cierra puertas,” *Revista Milenio*, October 7, 2002, p. 39.

Overly Broad Application of Privacy Protections

The released documents in the National Archive contain a great deal of information that contains “personal data” and therefore cannot be released to the public. Unfortunately, there are no clear guidelines in place to help the archive staff determine what information must remain confidential, and how to handle documents containing confidential information. As a result, researchers are routinely denied access to documents that either contain no personal data, or which could easily be released in a public version, from which the private information is excised.

For example, one researcher was initially denied access to a file on the grounds that it contained someone’s personal data and therefore could only be released with the authorization of that person’s family.¹⁴⁴ After the researcher obtained the necessary authorization, she was able to access the file and found that, while it did indeed contain some documents with personal data, it also contained documents that should have been accessible. For example, one was a DFS document describing a confrontation between members of an insurgent organization and government agents in which five civilians had been killed and two detained.¹⁴⁵ The only information in the document that could constitute personal data was the names of those killed and detained; the archive staff could easily have prepared a public version of the document by excising those names.¹⁴⁶

However, care also needs to be taken in the provision of a public version of a document that contains private information. According to researchers interviewed by Human Rights Watch, when the National Archive did provide a public version of files, there was so much information eliminated from the text that it became useless for their research.¹⁴⁷

Lack of Indexes

Another major obstacle to accessing documents in the National Archive is that more than 50 percent of the collections in the archives is not indexed or catalogued. As one experienced researcher put it, releasing the files without providing an index is “almost like not making them accessible at all.”¹⁴⁸

¹⁴⁴ The researcher could not obtain an authorization of the person whose personal data was being withheld because this person had died.

¹⁴⁵ The document is D.F.S.-14-II-74.

¹⁴⁶ Human Rights Watch telephone interview with Adela Cedillo, Mexico City, Mexico, February 2, 2006.

¹⁴⁷ Human Rights Watch interview with Susana Zavala Orozco, Mexico City, Mexico, November 17, 2005, and Human Rights Watch telephone interview with Adela Cedillo, Mexico City, Mexico, December 19, 2005.

¹⁴⁸ Human Rights Watch telephone interview with Kate Doyle, Mexico City, Mexico, June 2003.

When investigators are researching human rights issues in the two relevant galleries of the National Archive, they have no way of knowing where to look for information relevant to their research—or of knowing, for that matter, whether the archive staff is providing all the information that it should. The first gallery has a catalogue, but it is not entirely available to the public, and most of the information in the second gallery is not even indexed.¹⁴⁹ Consequently, not even the archive staff knows what information can be found in at least 60 percent of the boxes in their charge.¹⁵⁰

The impossibility of knowing what information is available and how to find it has discouraged many inquirers from using the National Archive for their research. One journalist told Human Rights Watch, for example, that he had spent two weeks in the National Archive scouring through 1,500 to 2,000 files, of which only 5 percent were useful for his research. The journalist was certain that if he had been provided an adequate index, he would have found the relevant documents in far less time.¹⁵¹

Missing Documents

Another worrying aspect of the declassified material is the gaps that appear to exist in the documentation that has been turned over to the National Archive. For example, one journalist found a series of documents in the National Archive that refers to a ceremony that took place at Military Base Number One on October 2, 1979. The ceremony was organized by the military “in the memory of those that died in compliance of their duty on October 2, 1968, in the Tlatelolco Plaza,” and there was an order to invite members of the “Olimpia Battalion” to the ceremony. There is no other reference in any other

¹⁴⁹ The first gallery is extremely organized: the staff has cards that state what information is available in each box and where to find it. But there is no list of how many cards there are or which cards cover which topics. The information is completely catalogued but the catalogue is not entirely available to the public. So investigators must request information on a topic to the staff in that gallery, and they will receive those cards the staff considers relevant for the research they are conducting. Given the management problems mentioned earlier, particularly the full discretion granted to archive staff on what information should be provided, the existence of a catalogue that may not be entirely seen by researchers is useless to limit arbitrariness in the provision of information. Under this scheme, only the archive staff is aware of the “whole picture.” The second gallery contains more than 3,000 boxes and only 600 of them are indexed. (Human Rights Watch interview with Dulce María Liahut Baldomar, director of Central Historical Archive at the National Archive, Mexico City, Mexico, January 20, 2006.) The boxes sent to the National Archive by SEDENA are amongst the 600 indexed ones, but the index is rough and simple and does not contain detailed information of what is the content of each box. Therefore, when researchers want to look for information in this gallery, they have to look at all boxes, one by one, and see whether there is information that could be valuable for their research.

¹⁵⁰ David Sobel et. al., “The Federal Institute for Access to Public Information in Mexico and a Culture of Transparency,” Project for Global Communication Studies at the Annenberg School for Communication at the University of Pennsylvania, February 2006, p. 36.

¹⁵¹ Human Rights Watch interview with Jorge Carrasco, *Revista Proceso*, Mexico City, Mexico, November 18, 2005.

document to the existence of the Olimpia Battalion.¹⁵² There is only one document from SEDENA that recognizes that there were nineteen military officials injured, but there is no reference to military officials who died during that incident.

Another example of a glaring gap in the archival material involves the DFS reports on the National Committee for the Defense of Disappeared, Persecuted, and Exiled Prisoners (*Comité Nacional Pro Defensa de Presos Desaparecidos, Perseguidos y Exiliados*), which later became known as the Eureka Committee. Although the “dirty war,” repression, and government monitoring of civil organizations continued, and the DFS files in the first gallery have information up to 1985, the DFS reports on this Committee mysteriously end at the beginning of 1979.¹⁵³

The Power of the Special Prosecutor’s Office to Reserve Information¹⁵⁴

The Special Prosecutor’s Office has the authority to separate information that it is using for its investigations and prohibit researchers from having access to it. There are currently three hundred files that may not be seen by the general public.¹⁵⁵

By setting aside information on investigations that have already been concluded, the Special Prosecutor’s Office has made it harder for investigators to access information that must be public. For example, a researcher recently tried to obtain information from boxes in the National Archive on two “disappearance” cases (Ignacio Salas Obregón and Jesús Piedra Ibarra) in which the special prosecutor had already concluded the investigations and had presented the cases before a judge. Yet the information remains reserved by the Special Prosecutor’s Office, and therefore entirely inaccessible to the public.¹⁵⁶

Applying the Transparency Law to the Archives

Since the National Archive is a federal agency, it is subject to the IFAI’s supervision on transparency matters. According to the IFAI, since January 2005 the Archive complies fully with its transparency obligations.¹⁵⁷ Yet several experienced researchers told

¹⁵² Jacinto R. Murguía, “La ceremonia del 2 de octubre de 1969: Los inexistentes muertos del Batallón Olimpia,” *La Revista*, September 27, 2004, pp. 14-19.

¹⁵³ Human Rights Watch telephone interview with Adela Cedillo, Mexico City, Mexico, February 2, 2006.

¹⁵⁴ The Special Prosecutor’s Office was created by President Fox to prosecute human rights abuses committed during Mexico’s “dirty war” and is described in detail in Chapter 4 of this report.

¹⁵⁵ Human Rights Watch interview with Dulce María Liahut Baldomar, Mexico City, Mexico, January 20, 2006.

¹⁵⁶ Human Rights Watch telephone interview with Adela Cedillo, Mexico City, Mexico, February 2, 2006.

¹⁵⁷ See [online] <http://www.ifai.org.mx/evaluacion/anexo.xls> (retrieved December 2005).

Human Rights Watch that the federal law has not, in fact, contributed nearly as much as it could to increasing access to information in the National Archive.¹⁵⁸

Guidelines on archiving issued by the IFAI and the National Archive have not led to the creation of a useful index of the documentation held in the National Archive. And the IFAI's interpretations of the transparency law have not been applied by the National Archive staff. For instance, the transparency law provides that information that is relevant for the investigation of gross human rights abuses or crimes against humanity may not be classified as privileged information. The IFAI has interpreted this to mean that, in these cases, not even the preliminary stages of a criminal investigation (*averiguación previa*) may be considered privileged information.¹⁵⁹ Yet, as previously mentioned, archive staff maintains information on human rights cases unavailable to the public, even after the Special Prosecutor's Office has concluded its investigations.

Not only does the Archive staff classify some information as privileged per request of the Special Prosecutor's Office, but it also denies access to other information related to these issues. When a researcher argued that she should have access to files in the Archive in order to research "disappearance" cases during Mexico's "dirty war" because information on past human rights abuses may not be considered privileged, the Archive's director told her that only "competent authorities" could carry forward such investigations.¹⁶⁰ Although the director offered to consult with the IFAI as to whether this was the proper interpretation of the transparency law, the researcher told Human Rights Watch that she never heard back from the Archive staff on this matter.¹⁶¹ And, although the Archive's director told Human Rights Watch that she and her staff did not

¹⁵⁸ Human Rights Watch interview with Ángeles Magdaleno, Mexico City, Mexico, November 16, 2005; Human Rights Watch interview with Susana Zavala Orozco, Mexico City, Mexico, November 17, 2005; and Human Rights Watch telephone interview with Jacinto Munguía, LIMAC, Mexico City, Mexico, December 7, 2005.

¹⁵⁹ The IFAI's decision was made in connection with an information request by the NGO LIMAC (Libertad de Información – México A.C.) that asked the Attorney General's Office (*Procuraduría General de la República*, PGR) for a copy of the investigation by the Special Prosecutor's Office related to the possible commission of genocide during Mexico's "dirty war." The Special Prosecutor's Office answered that since they had already presented the case before a judge, they no longer had a copy of the requested file. In September 2004, the NGO appealed before the IFAI. In its decision, the IFAI reversed the PGR's decision to deny information, arguing that they were investigating the probable commission of genocide, which was a crime against humanity. The IFAI ordered the PGR to provide a public version of the investigation that would not publicize personal data, in order to protect the privacy of the victims and the accused. Ernesto Villanueva et. al, *Importancia Social del Derecho a Saber – Preguntas y Respuestas en los Casos Relevantes del IFAI* (Mexico City: LIMAC, 2005), pp. 77-93. The information was finally given to the NGO by the PGR, making previously unknown information public.

¹⁶⁰ Letter from Dulce María Liahut Baldomar, director of Central Historical Archive at the National Archive, to Adela Cedillo, April 18, 2005.

¹⁶¹ Human Rights Watch telephone interview with Adela Cedillo, Mexico City, Mexico, December 19, 2005.

know when to classify what constituted a crime against humanity, they had not requested guidelines from the IFAI on how to address this issue.¹⁶²

Transparency and Human Rights

The transparency law and the opening of secret government archives have allowed many people in Mexico to exercise a fundamental human right: the right of access to official information. By exercising this right, individuals have been able to expose abusive practices from the past. By providing elements to promote accountability, the right has served as a vehicle to strengthen democracy in Mexico.

According to those who have tried to document human rights abuses committed during the “dirty war” in Mexico, there has been a major change in the last years. Prior to the transparency law and the opening of the archives, Mexican society had testimonies that narrated what had happened during the “dirty war.” Now, it is possible to obtain evidence that corroborates those testimonies. For example, in February 2002, *El Universal*, a daily newspaper in Mexico, published for the first time photographs that proved that student protestors had been massacred by security forces on October 2, 1968. These twelve pictures with images of mutilated corpses and crushed skulls constituted, according to prominent Mexicans interviewed by *El Universal*, evidence of the government’s campaign against dissidents, and of its cover-up of these activities.¹⁶³

In addition to corroborating existing testimony, the access to government documents has shed new light on these past abuses. It has, for example, made it possible to see how the government financed the “dirty war” activities through documents in which successive presidents authorized “unforeseen” expenses of the DFS and General Directorate of Social and Political Investigations (*Dirección General de Investigaciones Políticas y Sociales*) to be used in “confidential” commissions.¹⁶⁴ The declassified documents have also shed light on the relationship between the news media and the Mexican government during the “dirty war.” A researcher has found, for example, documents that show that media owners expressed their preferences to the government about which president should replace Díaz Ordaz in 1969. Other documents show how the government used the provision of paper to newspapers to control their publications.

¹⁶² Human Rights Watch interview with Dulce María Liahut Baldomar, Mexico City, Mexico, January 20, 2006.

¹⁶³ Kate Doyle, “‘Forgetting is not Justice’ Mexico Bares Its Secret Past,” *World Policy Journal*, summer 2003, pp. 66-67.

¹⁶⁴ Jacinto R. Munguía, *Historia Confidencial: Las nóminas secretas de gobernación* (Mexico City: LIMAC, 2004), pp. 21-24.

The IFAI has proven to be a good ally at times for researchers seeking information on human rights issues. For example, information provided by the Attorney General's Office (*Procuraduría General de la República*, PGR) after the Mexican NGO LIMAC requested information through the IFAI made public previously unknown information on the 1971 student massacre.¹⁶⁵ For the first time, people read about the existence of "Operation Old" (*Operación Viejo*), in which 250 police and secret service agents participated. Their role was to create a barrier around the place where the events took place, in order to facilitate the massacre carried out by a paramilitary group named *Los Halcones*. This and other documentation used by the Special Prosecutor's Office provided evidence that in June 10, 1971, *Los Halcones* worked closely with the Mexican security forces. After they obtained this information, the NGO published it in their Web site and in news articles.¹⁶⁶ This publicity led to the dissemination of information that is of public interest, and to the possibility of evaluating the work of the Special Prosecutor's Office in respect of how justice for the victims of the massacre was pursued.

The IFAI has made several important decisions requiring entities within the executive branch to provide information to the public. But some institutions, such as SEDENA, have not been very responsive. For example, in 2004, a journalist requested information from SEDENA related to the "dirty war": the list of military prisoners between 1973 and 1976; the list of civilians who were held at Military Base Number One between 1972 and 1976; and the names of the director, deputy director and chief guard of the prison between 1970 and 1982. SEDENA provided the name of the director, but held that there was neither a deputy director nor a chief guard at that time. It also answered that there were never civilians in that prison, and that it could not inform about military prisoners since that information was privileged and confidential in order to protect their private lives.

After the journalist appealed, the IFAI conducted an investigation and discovered that the Special Prosecutor's Office has initiated various investigations concerning civilians who were supposedly held in clandestine prisons at Military Base Number One, and that the CNDH had found that four civilians were mentioned in the prisoners list of Military Base Number One. It therefore decided to reverse SEDENA's denial of information regarding the existence of civilians in that military prison, and held that if there is no information available, it must follow the legal procedure established by the transparency law to report that there is none. Regarding information on military personnel held in the

¹⁶⁵ Ernesto Villanueva et. al, *Importancia Social del Derecho a Saber—Preguntas y Respuestas en los Casos Relevantes del IFAI* (Mexico City: LIMAC, 2005), pp. 77-93.

¹⁶⁶ Jacinto R. Munguía, "Las claves del genocidio," *La Revista*, February 14, 2005, pp. 52-56.

prison, the IFAI held that it may not be considered privileged information since it does not risk the life, security or health of any individual.¹⁶⁷

After the IFAI resolution, SEDENA informed the journalist that it would provide the list of military prisoners at Military Base Number One, but that it did not have any files with information on civilian prisoners held there.¹⁶⁸ Nevertheless, the journalist was able to then find a document in the DFS files at the National Archive, signed by Luis de la Barreda Moreno, head of the DFS at that time, that lists forty-one civilians that were detained by the military, and specifically says that one of them was going to be sent to Military Base Number One.¹⁶⁹

In some cases, it is still impossible to obtain information held by certain security agencies without their collaboration. The Center for National Information and Security (*Centro de Información y Seguridad Nacional*, CISEN) denied access to tens of thousands of files prepared by the political police of the PRI, arguing before the IFAI that they were “privileged files.” Even if an individual were allowed to see information held by CISEN, this person would not be able to find it. According to a study prepared at the beginning of the Fox administration, CISEN is not an institution but rather a series of interconnected espionage systems. It compiles information on intelligence operations, telephone interventions, credit card accounts, correspondence, and personal activities; but information is located in different places and only people within CISEN have the codes necessary to find all of it. According to the late Adolfo Aguilar Zinser, who served as President Fox’s national security adviser, “the spider web can only be unraveled by those who know its secrets, and Fox's government did not dare to take control of CISEN.” As a consequence, he concluded that “CISEN continues to serve the individuals and groups of the old regime.”¹⁷⁰

In sum, Mexicans today have unprecedented access to government documents that shed light on abusive state practices. Yet locating relevant information can often be unnecessarily difficult. And key government institutions continue to make it harder—and in some cases impossible—to obtain crucial documentation.

¹⁶⁷ IFAI Resolution related to file 901/04, November 4, 2004.

¹⁶⁸ Letter sent by Gral. Div. Dem. Humberto Alfonso Guillermo Aguilar, president of the Information Committee of SEDENA, to Juan Velez Álvarez, February 15, 2005.

¹⁶⁹ Human Rights Watch interview with Juan Velez Álvarez, Mexico City, Mexico, January 19, 2006. Velez Álvarez referred to document D.F.S.-6-IX-72.

¹⁷⁰ Antonio Jáquez, “Inteligencia sin control,” *Proceso*, number 1464, November 21, 2004.

Recommendations

Mexico has made unprecedented progress over the past several years in promoting transparency and access to information. Yet the advances in this area remain quite precarious even today. To ensure that they continue and deepen, the next administration should strive to remove the obstacles that continue to undermine the transparency law.

1) Instruct executive agencies to comply fully with the Transparency Law

The president should make it emphatically clear to all the institutions of the executive branch that they must comply fully with their transparency obligations and collaborate fully with individuals seeking information in their possession.

The administration should also instruct all agencies within the executive to adopt measures that ensure appropriate archiving. It should support the IFAI's efforts to promote improved archiving practices by allocating special funds for the creation of archiving offices within each agency, and providing adequate training to staff who will work in these offices.

The next administration should pay special attention to improving access to documents held in the National Archive. Specifically, it should remove the burdensome procedures established for inquirers to request information. It should immediately provide funds for an independent group composed of historians and archivists to create an index of all available information in the archives, starting with the first and second galleries, which contain valuable information of past human rights abuses. Finally, it should order the Attorney General's Office to require prosecutors, when extracting documents from the archives for prolonged periods of time, to replace them with copies, and return the originals as soon as possible to the public domain.

2) Work with Congress to improve the legal framework for transparency and access to information

To avoid political interference by the executive in the IFAI's work, the next administration should work with Congress to reform the Constitution in order to grant the IFAI constitutional autonomy.

As an autonomous constitutional agency, the IFAI would have the ability to sanction government officials that do not comply with its decisions. It would also be able to review all decisions on access to information adopted by all federal institutions (and not only those within the executive branch). It would submit its own proposed budget to

Congress, rather than relying on the executive branch to do so. And its commissioners could be appointed by Congress, rather than by the president.

If the IFAI were to become an autonomous constitutional agency, all government agencies subject to the law would automatically have standing to appeal its decisions regarding their management of information. One potential complication that could easily arise is that government agencies would abuse the appeals process to discourage legitimate requests for information. Therefore, when establishing the IFAI as a constitutionally autonomous agency, it will also be necessary to adopt measures to limit unfounded and frivolous appeals of its decisions by other government entities.

To increase accountability of the use of all public funds, the next administration should promote a reform of the transparency law that would extend the scope of its application to include political parties and all other entities that spend public funds. Such an amendment is critical for enhancing accountability for activities that are public in nature—from the participation of political parties in elections to the provision of public services by private actors.

3) Promote increased transparency in other federal and state entities

The next administration should encourage and actively support initiatives to create better transparency standards and implementing regulations within other branches of the federal government, as well as the autonomous agencies and state governments.

To promote the uniform application of transparency norms and the right of access to information in all government and autonomous agencies, the next administration should work with Congress to incorporate the “principle of maximum disclosure” in the Constitution, as well as specific standards drawn from the federal transparency law.

IV. Accountability: Ongoing Impunity for Past Atrocities¹⁷¹

Among the most dramatic examples of the lack of accountability of Mexico's old regime were the atrocities committed against student activists, armed insurgents, and other actors deemed to be threats to national security. At their most extreme, these violations included the massacres of student protesters in 1968 and 1971, and the torture, execution, and forced disappearance of hundreds of civilians during the country's "dirty war" in the 1970s and early 1980s. Under international law, Mexico was obligated to investigate and prosecute these crimes. Yet, for three decades it failed to do so.

The impact of this failure was profound. Hundreds of torture victims struggled for years with crippling psychological wounds while their tormentors went free, unpunished and even rewarded by the state. Thousands of family members suffered the anguish of not knowing the fate of "disappeared" loved ones while successive administrations refused to provide information that might have eased their pain. And, while the violence did not have a direct impact on the vast majority of Mexicans, it did force Mexican society as a whole to assimilate the ultimate lesson in the limits of their country's rule of law: the regime that governed them was willing to commit—and able to get away with—even the most brutal of crimes.

For decades, the regime's victims, their relatives, and diverse members of civil society called for an end to this historic failure. Vicente Fox, during his 2000 presidential campaign, responded to this call by promising to establish a truth commission that would end the cover-up of these crimes. Then, after a year in office, he announced that, instead of creating an independent commission, he had instructed his attorney general to establish a special prosecutor's office to address the cases.

The initiative was the result of a compromise between members of the administration who had endorsed the idea of a truth commission and others who had opposed it. Yet, in theory at least, the initiative held the possibility of accomplishing even more than what the advocates of a commission had hoped for. Not only would the office investigate and document the past crimes, it would also prosecute those responsible for them. It would, in other words, pursue both truth and justice.

Four years later, the results of this important initiative have been deeply disappointing. The Special Prosecutor's Office has succeeded in obtaining the arrest and indictment of

¹⁷¹ Portions of this chapter were originally published in Human Rights Watch, "Justice in Jeopardy: Why Mexico's First Real Effort to Address Past Abuses Risks Becoming its Latest Failure," *A Human Rights Watch Report*, vol. 15, no. 4 (B), July 2003.

the former head of the secret police and three other security officials—something that would have been unthinkable in Mexico until very recently. It has also won an important ruling from the Supreme Court that prevents these and other officials from using statutes of limitations to shield themselves from prosecution in cases involving “disappeared” victims whose whereabouts remain unknown.

But these successes have been eclipsed by major setbacks. The office has opened criminal investigations in over six hundred forced disappearance cases, but filed charges in only fifteen of them. It has obtained arrest warrants for twelve former officials, but only six have actually been arrested, and only four of these are facing trial in civilian courts. The special prosecutor’s most ambitious move—his effort to obtain indictments of former president Luis Echeverría—was rejected by the courts. And, as of this writing, the office has not obtained a single conviction.

Perhaps the most substantial accomplishment of the Special Prosecutor’s Office, in addition to the indictments and the favorable Supreme Court ruling, has been the production of an ambitious draft report on the history of the crimes under investigation. (The final version had not been released as this Human Rights Watch report went to press.) The draft report systematizes new evidence culled from the secret archives that Fox released in 2002, integrating it with new and old witness testimony, to construct the most complete account to date of the role of the state—and in particular the military—in numerous human rights atrocities.

Yet this draft report is, itself, the clearest evidence that the Special Prosecutor’s Office has not yet lived up to its potential. Even its main author has conceded that the report contains only a small fraction of the information that could have been collected if a more serious investigation had been carried out. At the same time, however, it reveals the existence of extensive evidence in government archives implicating former officials and military officers—a level of documentation that has never been found in countries like Argentina and Chile, where prosecutors have managed to prosecute many similar crimes. Given the type of evidence that is now available, Mexico should be able to make similar progress in promoting accountability for past human rights abuses.

The Special Prosecutor’s Office was meant to provide the Mexican state with a means of fulfilling its obligation to address past abuses. But it runs the risk of doing the opposite. The creation of a “special” entity may have merely made it easier for the “regular” institutions of the justice sector to continue to duck their responsibility—leaving it to the new office to do what they should have been doing all along, and to take the blame for its failure to produce more substantial results.

Yet the failure of the Special Prosecutor's Office to achieve more substantial results is, ultimately, the responsibility of the Fox administration itself. After launching the ambitious initiative, the administration failed to ensure that the office possessed the resources, credibility, and powers it needed to succeed. It also failed to ensure the active collaboration from other institutions, such as the Federal Investigation Agency (*Agencia Federal de Investigación*, AFI), which has been unable or unwilling to execute a majority of the arrests warrants obtained by the special prosecutor.

The institution that has shown the least willingness to collaborate with the Special Prosecutor's Office is the one that could potentially contribute the most: the Mexican military. While the Defense Ministry has declassified important documents from the "dirty war" era, it has done virtually nothing to help investigators understand or locate evidence within the released files, or obtain information that appears to be absent from those files. Moreover, military prosecutors have insisted on pressing charges in military courts against military officers for the crimes that the special prosecutor is investigating, potentially sabotaging efforts to prosecute the crimes in civilian courts, where human rights cases belong.

Shortly before this report went to press, the Fox administration announced, inexplicably, that it intended to close the Special Prosecutor's Office within a matter of weeks. To do so would mean, essentially, consigning to failure the country's first serious effort to promote accountability for these atrocities. But, whether or not the office does close, Mexico's obligation to complete the work it began—to end the years of impunity for these crimes—will remain as pressing as ever. And just as President Fox inherited full responsibility for this ongoing impunity from his predecessors, so the next president will inherit it from Fox.

Human Rights Watch believes that the work begun by the Special Prosecutor's Office can still be salvaged, but only if aggressive steps are taken to overcome the obstacles, detailed in this chapter, that have hindered the investigation and prosecution of these crimes until now. These steps should include ordering the military to cooperate fully with civilian prosecutors, promoting legislation that would expand the tools available to those prosecutors, and, finally, establishing a truth commission that would reinforce efforts to prosecute these crimes.

Background

History of Abuses

On October 2, 1968, in the Tlatelolco section of Mexico City, government troops opened fire on a student demonstration, killing or wounding hundreds of protestors and establishing what would be a *modus operandi* for handling threats to the political establishment in the coming years: repressive violence followed by official denial and silence.

There would be no serious investigation of the “Tlatelolco Massacre”—nor of the “Corpus Christi Massacre” that followed three years later, in which student demonstrators were attacked by thugs enlisted, trained and armed by the government.

In the coming decade, the Mexican government would carry out repeated and systematic human rights abuses against political opponents and dissidents in what came to be known as the country’s “dirty war.” Its targets included armed groups and their sympathizers, real or alleged, as well as student activists and other people who participated in protests, but never armed activity. Its methods included torture, extrajudicial execution, and forced disappearance, and often entailed an extreme degree of brutality and wanton disregard for human life.

One resident of Atoyac de Álvarez, Guerrero, for example, described to Human Rights Watch how he had been detained by the army in 1974 and held for two weeks, blindfolded and subject to daily torture, which included cigarette burns and electrical shocks to his testicles. His captors demanded that he confess to having participated in the killing of several soldiers—a crime he insists he had not committed. He resisted their pressure, even as some his fellow prisoners were beaten to death, but finally capitulated when told that his family would be killed if he did not sign the confession.¹⁷²

Others fared even worse. José Ignacio Olivares Torres, a guerrilla leader from Guadalajara, was captured by the Federal Security Directorate (*Dirección Federal de Seguridad*, DFS) in January 1974. Three days later his body appeared on a street in his home city, with signs of torture that included the holes where scorching hot nails had been driven into his kneecaps. His face was so disfigured that his family was only able

¹⁷² Human Rights Watch interview with torture victim, Atoyac de Álvarez, Guerrero, May 24, 2003. Many of the people interviewed, including victims, victims’ relatives and officials within the Special Prosecutor’s Office, preferred to speak on the condition that their identities would not be revealed.

to identify him by his teeth and some scar tissue that had been left by an earlier surgery.¹⁷³

Hundreds of people were detained by security forces and never seen again. During 1974, an air force plane made regular night flights out of a military base in Guerrero to dump bodies out over the Pacific Ocean. According to former air force personnel who participated in the flights, the prisoners were shot in the head just before being boarded on the plane, though some were still alive when tossed out the cargo door.¹⁷⁴

The violence left profound scars on the victims and their relatives. One torture victim told Human Rights Watch that, because of severe blows he had received to his head while in detention, he had been unable to return to work and had been supported the last three decades by his children.¹⁷⁵ Another recalled suffering from anxiety attacks and being unable to complete his university studies because he found it impossible in the wake of his torture to concentrate on his studies.¹⁷⁶

The relatives of the “disappeared” suffered a particularly cruel fate—waiting in vain for years for the news that might allow them to bury their dead and begin a process of mourning. The cruelty was compounded by the Mexican government’s refusal to provide them with information about what had happened to their family members—or to prosecute those responsible.

Human Rights Watch spoke with dozens of people in Atoyac de Álvarez, Guerrero, who recalled months and years of desperation and despair as they visited government offices, military bases, and prisons searching for lost loved ones. Wherever they went, they were rebuffed, and in some cases even threatened with reprisals if they persisted in their search.

One Atoyac resident described how, in the mid-1970s, after months of searching for a son who had been detained by soldiers, she managed to get a meeting with the commander of a local military base. The officer told her to go home and wait for her son. “So I went home and waited,” she recalled. “But I couldn’t take it. I almost went

¹⁷³ Human Rights Watch interview with Amalia Olivares, Mexico City, May 26, 2003. Photograph of Olivares’ legs showing holes produced by nails appeared in Darío Fritz, “La ejecución de Sebas,” *Milenio*, October 7, 2002, p. 38.

¹⁷⁴ Testimony from eyewitnesses in Military Prosecutor’s Office (*Procuraduría General de Justicia Militar*, PGJM) document, “Averiguación Previa SC/034/2000/IV-E-BIS.”

¹⁷⁵ Human Rights Watch interview with torture victim, Atoyac de Álvarez, Guerrero, May 24, 2003.

¹⁷⁶ Human Rights Watch interview with torture victim, Atoyac de Álvarez, Guerrero, May 24, 2003.

crazy. I wanted to cry. I wanted to scream. I wanted to run. I couldn't eat. I couldn't sleep. So I prayed to God to give me the peace of mind to wait. And I waited day and night. And I have never stopped waiting."¹⁷⁷

Another Atoyac resident described how her family had hounded the Attorney General's Office (*Procuraduría General de la República*, PGR) about the case of her brother who had been detained by soldiers in 1974 and never seen again.¹⁷⁸ After five years, the PGR responded with a document that alleged that the brother had been living a "troubled life," borrowing money from prostitutes and provoking fights with their pimps. The note claimed that he had been detained by "various individuals," who had demanded he return money taken from a brothel.¹⁷⁹ The family sought to refute this account by providing the PGR with a series of letters from local authorities and former employees that attested to the brother's good conduct as well as his relatively well-off economic condition (to disprove the allegations he had borrowed money from prostitutes).¹⁸⁰ But they never received any clarification from the government until, in 2001, a report of the National Human Rights Commission confirmed that the brother had indeed been the victim of a forced disappearance carried out by soldiers.¹⁸¹

Another resident described how, in 1998, she and a group of other relatives of "disappeared" people brought their cases to the federal prosecutor's office in Atoyac de Álvarez. When the attending prosecutor heard the nature of their cases, he told them he could not receive it and left the office. A few minutes later a car full of soldiers showed up in front of the office and appeared to stand guard at the front door. The relatives waited for several hours and were finally able to get another prosecutor to take the case when a television news reporter showed up and began filming their interaction. But the case languished in the office for months.¹⁸²

After years of campaigning by victims' relatives and national human rights groups, the PGR (finally) did open an investigation into the "disappearance" cases in Atoyac de Álvarez in 1999. But in 2000, the PGR decided it did not have jurisdiction over the cases and turned them over to the military justice system—which had, itself, consistently failed to investigate and prosecute abuses committed by military personnel.

¹⁷⁷ Human Rights Watch interview with victim's relative, Atoyac de Álvarez, Guerrero, May 24, 2003.

¹⁷⁸ Human Rights Watch interview with Eleazar Peralta, Atoyac de Álvarez, Guerrero, May 25, 2003.

¹⁷⁹ Untitled document from Attorney General's Office, March 23, 1979.

¹⁸⁰ Letter from Alejandrina Santiago to attorney general, March 23, 1979.

¹⁸¹ National Human Rights Commission (*Comisión Nacional de Derechos Humanos*, CNDH) document "EXP. CNDH/PDS/95/GRO/S00237.000, Case of Mr. Peralta Santiago Lucio."

¹⁸² Human Rights Watch interview with Tita Radilla Martínez, Atoyac de Álvarez, Guerrero, March 24, 2003.

By November 2001, thirty-three years after the Tlatelolco massacre, there had still been no serious effort to prosecute these or other human rights violations committed during that era.

Mexico's Obligations under International Law

Mexico is party to several international treaties that prohibit human rights violations, including torture, arbitrary detention, extrajudicial execution, and forced disappearance.¹⁸³ The Mexican government's obligation under these treaties is not only to prevent violations, but also to investigate and prosecute any violations that do occur.

This second set of duties is, in part, a corollary to the first, reflecting the view that effective prevention requires investigation and punishment.¹⁸⁴ It also derives from the right to a legal remedy that these treaties extend to victims of human rights violations. The American Convention on Human Rights, for example, states that every individual has "the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights."¹⁸⁵ The Inter-American Court of Human Rights has held that this right imposes an obligation upon states to provide victims with effective judicial remedies.¹⁸⁶

In addition to the obligation to investigate and prosecute, states have an obligation to inform the public about the violations that took place. This obligation also derives partly from the states' duty to prevent future violations. As the Inter-American Commission on Human Rights (IACHR) has held, "Every society has the inalienable

¹⁸³ International Covenant on Civil and Political Rights (ICCPR), ratified by Mexico on March 23, 1981; American Convention on Human Rights, ratified by Mexico on March 24, 1981; Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, ratified by Mexico on January 23, 1986; Inter-American Convention to Prevent and Punish Torture, ratified by Mexico on June 22, 1987; Inter-American Convention on Forced Disappearance of Persons, ratified by Mexico on April 9, 2002.

¹⁸⁴ The Inter-American Court of Human Rights, for example, has held that "the State has the obligation to use all the legal means at its disposal to combat [impunity], since impunity fosters chronic recidivism of human rights violations, and total defenselessness of victims and their relatives." Inter-American Court, Paniagua Morales *et al.*, Judgment of March 8, 1998, para. 173.

¹⁸⁵ Article 25 of the American Convention on Human Rights. Similarly, the Inter-American Convention to Prevent and Punish Torture requires states to "take effective measures to prevent and punish torture" and "other cruel, inhuman, or degrading treatment or punishment within their jurisdiction" (Article 6). It also requires states parties to guarantee that "any person making an accusation of having been subjected to torture within their jurisdiction shall have the right to an impartial examination of his case," and that "their respective authorities will proceed properly and immediately to conduct an investigation into the case and to initiate, whenever appropriate, the corresponding criminal process" (Article 8). Also, the ICCPR established the right of individuals to effective judicial recourse against human rights violations (Article 2(3)).

¹⁸⁶ Inter-American Court, Velásquez Rodríguez Case, Judgment of July 29, 1988, paras. 166, 174, 176. See also Inter-American Court, Loayza Tamayo Case, Judgment of November 27, 1998, para. 169.

right to know the truth about past events, as well as the motives and circumstances in which aberrant crimes came to be committed, in order to prevent repetition of such acts in the future.”¹⁸⁷

The state has a special obligation in cases of forced disappearance to provide information to the victims’ relatives. The U.N. Human Rights Committee has held that the extreme anguish inflicted upon relatives of the “disappeared” makes them direct victims of the violation as well.¹⁸⁸ To the extent the state fails to inform relatives about the fate of the “disappeared,” it fails to fulfill its basic obligations.¹⁸⁹ In addition, the Inter-American Court has held that states’ obligation to provide reparation to victims of abuses translates into an obligation to provide family members with information about what has happened to people who have “disappeared.”¹⁹⁰

Given this duty to inform, the duty to investigate violations must be understood as distinct from the duty to prosecute them. According to the Inter-American Court:

The duty to investigate . . . continues as long as there is uncertainty about the fate of the person who has disappeared. Even in the hypothetical case that those individually responsible for crimes of this type cannot be legally punished under certain circumstances, the State is obligated to use the means at its

¹⁸⁷ “Areas in which steps need to be taken towards full observance of the human rights set forth in the American Declaration of the Rights and Duties of Man and the American Convention on Human Rights,” Annual Report of the IACHR 1985-86, OEA/Ser. L/V./ II.68, Doc. 8, rev. 1, September 26, 1986, ch. V, p. 205.

¹⁸⁸ The U.N. Human Rights Committee articulated this principle in the case *Quinteros v. Uruguay*, concluding that the mother of a “disappeared” person was entitled to compensation as a victim for the suffering caused by the failure of the state to provide her with information. Case No. 107/1981. “The Committee understands the anguish and stress caused to the mother by the disappearance of her daughter and by the continuing uncertainty concerning her fate and whereabouts. The author has the right to know what has happened to her daughter. In these respects, she too is a victim of the violations of the Covenant suffered by her daughter in particular, of article 7.”

¹⁸⁹ See Diane Orentlicher, “Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime” in *Yale Law Journal* No. 100, 1990; Naomi Roht-Arriaza (comment), “State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law”, *California Law Review* No. 78, 1990; and José Zalaquett, “Confronting Human Rights Violations Committed by Former Governments: Principles Applicable and Political Constraints” in *State Crimes: Punishment or Pardon*, Aspen Institute Justice and Society Program, New York, 1989.

¹⁹⁰ The Court has held that parents have a right to obtain reparation for suffering inflicted upon them by the forced disappearance of a child. This obligation is not satisfied with the offer to pay monetary damages. It must also include ending the state of uncertainty and ignorance regarding the fate and whereabouts of the “disappeared” persons. Inter-American Court, *Aloeboetoe Case, Reparations* (Article 63.1 American Convention on Human Rights), Judgment of September 10, 1993, para. 76.

disposal to inform the relatives of the fate of the victims and, if they have been killed, the location of their remains.¹⁹¹

Finally it is important to stress that not just any sort of investigation will suffice to fulfill this obligation. The IACHR has found that, “when the State permits investigations to be conducted by the entities with possible involvement, independence and impartiality are clearly compromised.”¹⁹² The result is “de facto impunity,” which “has a corrosive effect on the rule of law and violates the principles of the American Convention.”¹⁹³

The Special Prosecutor’s Office

Creation and Mandate

On November 27, 2001, after decades of secrecy and denial, the Mexican state officially recognized the acts of political violence perpetrated by its security forces during the “dirty war” of the 1970s and early 1980s. In a public ceremony in Mexico City, the National Human Rights Commission (*Comisión Nacional de Derechos Humanos, CNDH*) released a three thousand page report on state abuses committed during that era.¹⁹⁴ The report was based largely on information from secret government archives on more than five hundred people who had been reported missing. It confirmed that at least 275 of those missing had been arrested, tortured, and killed by state security forces.

After the CNDH presented its report, President Fox announced the creation of a special prosecutor’s office to investigate and prosecute past abuses committed against dissidents and opposition groups by state security forces.¹⁹⁵ He also instructed the attorney general to establish a “Support Committee,” made up of “citizens of public standing and experience in the judicial branch or in the promotion of human rights,” that would provide the special prosecutor with assistance in the investigations, and instructed the interior minister to establish an “interdisciplinary committee” to develop a proposal for providing reparations to the victims of abuses.

¹⁹¹ Inter-American Court, Velasquez Rodriguez Case, Judgment of July 29, 1988, para. 181.

¹⁹² IACHR, 1995 Annual Report, Report N° 10/95 (Case 10.580. Manuel Stalin Bolaños Quiñonez), Ecuador, para. 48.

¹⁹³ IACHR, 2000 Annual Report, Report N° 53/01 (Case 11.565. Ana, Beatriz y Celia González Pérez), Mexico, para. 81, citing IACHR, 1995 Annual Report, Report N° 10/95 (Case 10.580. Manuel Stalin Bolaños Quiñonez), Ecuador, para. 48.

¹⁹⁴ CNDH, “Informe Especial Sobre las Quejas en Materia de Desapariciones Forzadas Ocurridas en la Década de los 70 y Principios de los 80.”

¹⁹⁵ “Acuerdo por el que se disponen diversas medidas para la procuración de justicia por delitos cometidos contra personas vinculadas con movimientos sociales y políticos del pasado.” Order of the President of the Republic, Mexico, November 27, 2001. The official name of the office is Special Prosecutor’s Office for social and political movements of the past (*Fiscalía Especial para movimientos sociales y políticos del pasado*).

The executive order establishing the Special Prosecutor's Office specifically instructed the Defense Ministry to turn over to the prosecutor's office any information relevant to the cases to be investigated. And it instructed the Interior Ministry to release secret government archives with information on these abuses, so that it would be readily available to the special prosecutor, as well as to the public at large.

Within a few weeks, the attorney general named a legal scholar, Ignacio Carrillo Prieto, to serve as the special prosecutor, and by mid-January 2002, the office was up and running. Its staff of fifteen prosecutors was divided into three sections. The first would address the forced disappearance cases already investigated by the CNDH, as well as other similar cases from the "dirty war." The second section was charged with examining the 1968 and 1971 massacres of student protestors.¹⁹⁶ The third section would explore other abuses not covered by the first two (with no fixed time limit).

In addition to these sections, the Special Prosecutor's Office set up a documentation center whose task was to collect relevant information from the secret government documents that were set to be released, as well as from other government archives. The office also set up a two-person team to develop a program to provide psychological care to the victims and relatives of past abuses.

Results after Four Years

The Special Prosecutor's Office has broken some important new ground in its efforts to end official impunity in Mexico. But its few successes have been eclipsed by major setbacks in a variety of areas.¹⁹⁷

¹⁹⁶ In January 2002, the Mexican Supreme Court ruled that Attorney General's Office erred when it chose not to investigate the 1968 Tlatelolco massacre because the period allotted by the statute of limitations had run. The court ruled that even though the alleged crimes took place more than thirty years earlier, the issue of statutory limitation should be addressed only after an investigation was carried out. "Resolución dictada en el amparo en revisión 968/99 de la Suprema Corte de Justicia de la Nación relacionada con los hechos de 1968."

¹⁹⁷ Mexican non-governmental organizations have also provided detailed critiques of the work of the Special Prosecutor's Office on several occasions. (See for instance, "Los delitos del pasado, el acceso a la justicia y la verdad: una cuenta pendiente del Estado mexicano," a report presented to the Inter-American Commission on Human Rights by the Fundación Diego Lucero, Centro de Derechos Humanos Miguel Agustín Pro Juárez, Comité de Madres de Presos Políticos y Desaparecidos de Chihuahua, Comisión Mexicana de Defensa y Promoción de los Derechos Humanos, y la Asociación de Familiares de Detenidos, Desaparecidos y Víctimas de Violaciones a los Derechos Humanos, March 2005.)

The Massacre Cases

The special prosecutor's most notorious setbacks have come in the two most emblematic crimes of the old regime—the massacres of student protestors in 1968 and 1971. Today, one of the cases is effectively dead; the other just barely alive.

The Special Prosecutor's Office began work on the two massacre cases after the Supreme Court ordered the PGR to investigate them in 2002. It focused first on the 1971 massacre and, in July 2004, charged eleven people, including former president Luis Echeverría, with “genocide” for the killings that had taken place then. A federal judge rejected the charges, arguing that the statute of limitations had run for the alleged crime. The Special Prosecutor's Office filed an appeal, which eventually reached the Supreme Court. In June 2005, the Court ruled that that the statute of limitations had indeed run for everyone except Echeverría, and the former interior minister Mario Moya y Palencia. The Court reasoned that the clock on the statute of limitations had been suspended during the years Echeverría and Moya y Palencia had enjoyed immunity from prosecution due to their government posts. Consequently, the thirty-year period allowed for prosecution had not yet terminated. The Supreme Court sent the case back to the trial court to determine whether the charges were sufficiently substantiated to proceed to trial. A month later, the trial judge ruled that they were not and closed the case, a ruling that is not subject to appeal.

In the 1968 case, the Special Prosecutor's Office charged eight former officials, including Luis Echeverría, with “genocide” in September 2005. The office also charged Echeverría and two other ex-officials with responsibility for a forced disappearance case. Once again, a judge rejected the genocide charge for everyone, except Echeverría, on the grounds that the period allowed for prosecution by the statute of limitations had run. The judge also rejected the charges in the case of Echeverría, but on the grounds that there was not sufficient evidence that the alleged crime constituted “genocide.” The Special Prosecutor's Office has appealed the ruling in the 1968 case. This time, however, the Supreme Court has declined to review the appeal, and it is currently under review by a lower court.

The only charge from the 1968 massacre that can proceed, according to the trial judge, is the case of the single forced disappearance. Yet here the judge found that the Special Prosecutor's Office had failed to establish probable cause of criminal responsibility. In other words, this one case could still go forward, but only if the prosecutors are able to present more compelling evidence to substantiate their charge.

The Forced Disappearance Cases

The Special Prosecutor's Office has made some progress in a number of other forced disappearance cases. It has filed charges of "abduction" (*privación ilegal de la libertad*) in fifteen of these cases and obtained indictments in nine of them.¹⁹⁸ It has obtained arrest warrants for twelve former officials, but only six have actually been arrested. Since Mexico does not permit trials *in absentia*, prosecutions can only proceed against those former officials who are under arrest.

One of those six is Miguel Nazar Haro, the former director of the DFS. The case involves the forced disappearances of Jesús Piedra Ibarra and Ignacio Salas Obregón, both members of the guerrilla group "*Liga Comunista 23 de Septiembre*."¹⁹⁹ Nazar Haro was arrested in February 2004, but released from jail and placed under house arrest the following November, as a result of a 2004 law that allows people over seventy years old to avoid jail time while in preventive detention.²⁰⁰ The case is currently stalled due to the defense's efforts to summon a witness who cannot be found. (There is no legal time limit for this evidence to be incorporated into this case, and the first stage of the trial may not conclude until the testimony is given before the judge.)

A second person facing trial is Juventino Romero Cisneros, a former Nuevo Leon state judicial police official, who is charged with the "abduction" of Jesús Piedra Ibarra.²⁰¹ Romero Cisneros has presented two injunctions, which are now being reviewed by an appeals court after having been rejected by the trial court.

A third person facing "abduction" charges in case of Jesús Piedra Ibarra is Carlos G. Solana Macías, former judicial police director in Nuevo León state.²⁰² The Special Prosecutor's Office concluded its investigation into this case in 2004, but Solana Macías was not detained until December 2005. Solana Macías has presented an injunction, which remains pending.

¹⁹⁸ All cases are at the first stage of the procedure before the judge (*instrucción*). After this stage ends, the defense counsel and prosecutor must argue their conclusions before the judge.

¹⁹⁹ The case 62/2003 is pending before the Juzgado Cuarto de Distrito de Nuevo León and relates to the illegal detention of Jesús Piedra Ibarra. The case 11/2004 relates to the illegal detention of Ignacio Arturo Salas Obregón and was added to this case.

²⁰⁰ Article 55 of the Federal Criminal Code of Mexico.

²⁰¹ The case 62/2003 is pending before the Juzgado Cuarto de Distrito de Nuevo León and relates to the illegal detention of Jesús Piedra Ibarra.

²⁰² The case 104/2004 is pending before the Juzgado Cuarto de Distrito de Nuevo León and relates to the illegal detention of Jesús Piedra Ibarra.

The fourth person facing trial is Wilfredo Castro Contreras, former commander of the judicial police in Guerrero state, charged with “abduction” in the disappearance case of Bernardo Reyes Félix, an alleged member of a guerrilla group in Guerrero state.²⁰³ Like Nazar Haro, Castro Contreras has benefited from the 2004 law and is under house arrest. The case is currently stalled due to the defense lawyers’ efforts to summon an expert witness.

In two other cases, the prosecutions have been derailed by questionable actions by the judges. One involves “abduction” charges against Alejandro Straffon Arteaga, former state attorney in Hidalgo, for the “disappearance” of six members of the guerrilla group “*Brigada Campesina Los Lacandones*.” After Straffon was arrested, a judge refused to indict him, setting him free instead. The Special Prosecutor’s Office appealed the ruling and won an order from an appeals court to re-arrest Straffon. But Straffon has since eluded capture.

In another case, the special prosecutor filed “abduction” charges against General Francisco Quirós Hermosillo in August 2005 for the 1974 abduction of Rosendo Radilla in Guerrero. The judge issued an arrest warrant, but then turned the case over to the military justice system, arguing Quirós Hermosillo was a military official and was accused of an act that he committed while on duty. The decision, which has since been upheld by an appeals court, sets a disturbing precedent for the hundreds of forced disappearance cases involving military personnel that have yet to be prosecuted. (The problem of military jurisdiction over these cases is discussed in detail below.)

The Historical Report

In addition to the indictments in the “forced disappearance” cases, the other area where the Special Prosecutor’s Office has made some significant progress is in producing an ambitious draft report on the history of the crimes under investigation.

The significance of the report is twofold. First, the report contains new evidence that has been culled from the secret archives that Fox “opened” in 2002—including documentation from the military’s archives which had been completely inaccessible in the past. For years, the only evidence available regarding these abuses had been the testimony of victims and their relatives, which had been painstakingly gathered by local rights groups. In its detailed report in 2001, the CNDH supplemented such testimony with official documentation on many of the crimes drawn from the secret archives from

²⁰³ The case 77/2004 is pending before the Juzgado Segundo de Distrito en el Estado de Guerrero, and relates to the illegal detention of Bernardo Reyes Félix.

the defunct Federal Security Directorate (*Dirección Federal de Seguridad*). These documents clearly showed that the victims, before being “disappeared,” had been detained and held by security forces.

The report from the Special Prosecutor’s Office has expanded upon the documentation from the DFS archives and added documents from the military itself. These documents provide detailed information of some of the military operations that took place in Guerrero at the time of the “disappearances”; clear evidence that the military routinely detained civilians; the names of people or identification of military units involved in the operations, including the detentions; and clear evidence that the defense secretary and (at least in a few cases) the president knew about the detentions.

The military documents generally do not provide the names of the detainees, nor any direct indication that they were subject to torture, murder, or forced disappearance. Nor do they provide direct evidence that the top military and civilian officials knew that detainees were suffering such a fate. However, combined with the DFS documents and the testimony, they provide the fullest picture to date of the state’s repressive machinery at work.

This, then, is the second reason the new draft report is significant: it has begun the crucial work of integrating and cross-referencing information from the military documents with the information already available in the CNDH report, and witness and victim testimony gathered by civil society groups.

What Remains to Be Done

The draft report, while representing a significant advance, is also the clearest evidence that the Special Prosecutor’s Office has not lived up to its potential. Its principal author, José Sotelo, acknowledges that the report contains only a small fraction of the information that could have been collected if a more serious investigation had been carried out. According to Sotelo, there are significant portions of the declassified military archives that his understaffed and unpaid team did not have time to examine, and there are substantial gaps in those portions of the files that they did review. “What appears in the report is only 15 percent of the information that’s in the archives,” Sotelo told Human Rights Watch. “It’s just the tip of the iceberg.”²⁰⁴

²⁰⁴ Human Rights Watch telephone interview with José Sotelo, director of the historical documentation team of the Special Prosecutor’s Office, Mexico City, March 9, 2006.

In addition to the archival research that remains to be done, Sotelo told Human Rights Watch that his team has been unable to complete other important tasks. One is to document the abuses committed by the armed groups that the state was combating. Another is to create a database detailing all the evidence available on each individual case of forced disappearance—a crucial step for demonstrating the solid evidentiary basis of the report’s findings.

Despite its obvious shortcomings, however, the draft report does contain important evidence implicating former officials in the abuses under investigation. In fact, with the exception of Guatemala, Paraguay, and most recently Argentina, no other country in the region has seen secret documentation of this sort made public. And yet, even without the benefit of such compelling evidence, prosecutors elsewhere have been able to make significant progress in prosecuting similar cases. In Argentina, for example, over 330 former military and police personnel are now facing human rights-related charges and about 180 are detained in prisons or military installations, or are under house arrest. In Chile, over ninety former military and police officers have been convicted, and hundreds of other cases are currently being prosecuted.

Clearly, with the sort of evidence they have at their disposal, Mexican prosecutors should be able to accomplish much more in these cases than they have to date. If hopes for prosecuting those responsible for the 1968 and 1971 massacre cases have dimmed considerably, there is no good reason at this point for Mexico not to prosecute many of the hundreds of cases of forced disappearances (including the one case linked to the 1968 massacre).

Aside from prosecutions, the single most important unfulfilled task in the eyes of the victims’ families is to determine the ultimate fate of the “disappeared.” To date, the Special Prosecutor’s Office has determined the whereabouts of only six out of the more than six hundred people who “disappeared” during the “dirty war.” (It found that four of these were sent to psychiatric institutions, and two were killed while in detention.²⁰⁵)

In this respect, it is important to keep in mind that Mexico’s obligation under international law is not only to prosecute the abuses but also to inform the public—and especially the victims—about what exactly took place. When Human Rights Watch asked the relatives of the “disappeared” in Guerrero what they hoped to obtain from the Special Prosecutor’s Office, the vast majority answered simply: the truth about what took place and the location of their loved ones.

²⁰⁵ Human Rights Watch interview with Mario Ramirez Salas, Mexico City, January 18, 2006.

A final task that remains pending is providing reparations to the victims of past abuses and their relatives. While the “interdisciplinary committee” established by the Interior Ministry has reportedly developed a proposal for a reparations program, it has not yet been implemented.

Obstacles to Accountability

The Fox administration presented the Special Prosecutor’s Office as an initiative that would combine the functions of a truth commission with those of a criminal prosecutor. The office would both investigate and prosecute past human rights atrocities. It would seek, in other words, to provide both truth and justice where before there had been only official denials and impunity. Yet the office has confronted daunting obstacles that have seriously hindered its progress in both areas.

Obstacles to Truth

Unwilling Witnesses

One basic obstacle to resolving past human rights cases has been the unwillingness of former government officials and military officers to testify regarding what they know. With few exceptions, former members of the security apparatus that carried out these abuses have been unwilling to provide information.

The special prosecutor has summoned several former officials, including former president Luis Echeverría Álvarez and former Mexico City regent Alfonso Martínez Domínguez, to testify about their alleged involvement in the 1968 Tlatelolco massacre. The interrogations produced little new information, however. Echeverría chose not to respond to the special prosecutor’s questions (exercising his constitutional right against self-incrimination), and Martínez Domínguez denied all responsibility. Former general Luis Gutiérrez Oropeza, head of the Presidential Security, also declined to answer the special prosecutor’s questions, as did Miguel Nazar Haro and Luis de la Barreda Moreno, both former heads of the Federal Directorate of Security.

In the forced disappearance cases, the Special Prosecutor’s Office has sought testimony from only five retired military officers and ten former civilian officials.²⁰⁶ Only one has provided useful testimony, though he later retracted it. The rest have either denied any

²⁰⁶ When asked why more have not been sought out for interviews, the prosecutor in charge of the forced disappearance cases explained that, under Mexican law, prosecutors need to have compelling reason to seek such interviews—and if they summon potential witnesses without having it, they can be charged with prosecutorial harassment. Human Rights Watch interview with Juan Carlos Sánchez Ponton, Mexico City, January 18, 2006.

knowledge of the events, or exercised their constitutional right to remain silent rather than provide potentially self-incriminating testimony. “The biggest obstacle we’ve encountered,” one top prosecutor told Human Rights Watch, “is the big silence” that has been kept by those who knew what happened.²⁰⁷

Such silence is hardly surprising. Whether it’s a matter of *esprit-de-corps*, or simply the fear of self-incrimination, former officials rarely reveal much in circumstances like these. Moreover, they have nothing to gain by testifying. Mexico does not allow for plea bargaining, except in cases of organized crime. Consequently, the Special Prosecutor’s Office has no way to encourage witnesses to testify.

While the Special Prosecutor’s Office has been able to gather substantial testimony from eyewitnesses and surviving victims, even many of them are reluctant to collaborate with investigators. In Guerrero, where a majority of the “disappearance” cases took place, the distrust is particularly pronounced.²⁰⁸ A police investigator told us that the vast majority of relatives he sought out to provide declarations did not want to talk to him about their cases. Only two out of thirty people this agent tracked down were willing to answer his questions, and many were made visibly nervous by his presence. He said that his colleagues had reported similar experiences.²⁰⁹

The unwillingness of former military and security personnel to testify has made it virtually impossible to determine the ultimate fate of the “disappeared.” According to various researchers who have worked in the government archives, including the head researcher, no documentary evidence has been found in the government archives with that information—and it seems unlikely that any will be found. A more promising method for determining the fate of the “disappeared” would be to conduct exhumations at the site of clandestine graves where many have presumably been buried. The problem here, however, is locating the burial sites. According to the world-renowned Argentine Team of Forensic Anthropologists (*Equipo Argentino de Antropología Forense*, EAAF), which conducted a preliminary mission to Mexico in September 2003 at the behest of the Special Prosecutor’s Office, it would be very difficult to find the remains of victims without having “direct witnesses” who could point out precisely where investigators should dig.²¹⁰

²⁰⁷ Human Rights Watch interview with official in the Special Prosecutor’s Office, Mexico City, May 28, 2003.

²⁰⁸ Human Rights Watch interviews with relatives of “forced disappearance” victims, Guerrero, May 2003.

²⁰⁹ Human Rights Watch interview with the Federal Investigative Agency (*Agencia Federal de Investigación*, AFI) agent, Acapulco, Guerrero, May 24, 2003.

²¹⁰ Human Rights Watch telephone interview with Patricia Bernardi, EAAF, Buenos Aires, Argentina, March 14, 2006.

Incomplete archives

Given the unwillingness of current and former state actors to testify about past abuses, the Special Prosecutor's Office has had to turn to another source of evidence: the documents they left behind in their institutional archives. Indeed, according to the Special Prosecutor's Office, these documents have provided more than 90 percent of the new evidence the office has obtained during its four years in operation.²¹¹ Unfortunately, however, the Special Prosecutor's Office's ability to exploit this source has also been severely limited by several of the factors we described in Chapter 3.

One important limiting factor has been the government's failure to ensure that key archives turned over by the Interior Ministry (including the DFS archive) were adequately equipped with the basic research aids that any archive needs to function: a complete index and catalogue of its contents. More than 50 percent of the collections in the archives are not indexed or catalogued, and the catalogues that do exist are rough and incomplete. As a result, investigators from the Special Prosecutor's Office had little guidance when they began searching the archives for information on the abuse cases.²¹²

To compensate for the lack of indexes and catalogues, the documentation center of the Special Prosecutor's Office was forced to develop its own—slowly mapping the archives' content based on the documents brought to them by the archive staff. This has proven to be an enormously arduous and time-consuming task, given that the archive contains millions of documents—and today it remains far from complete. For example, as we described in Chapter 3, in one of the two key galleries of the archives containing government documents covering the “dirty war” years, six hundred out of three thousand boxes in the second gallery are indexed. The boxes sent to the National Archive by SEDENA are amongst the six hundred indexed ones, but the index is rough and simple and does not contain detailed information about the content of each box. Therefore, when researchers want to look for information in this gallery, they have to look at all boxes, one by one, and see if there is information that could be valuable for their research because there is no way of knowing, beforehand, what is in each box.

As we discuss below, the documentation team never had adequate personnel to complete their archival research. “There's a sea of information in the archives,” the

The EAAF reached this conclusion after evaluating the case files of the Special Prosecutor's Office and visiting four locations in Sinaloa and Guerrero.

²¹¹ Human Rights Watch interview with officials in the Special Prosecutor's Office, January 18, 2006.

²¹² The first gallery of the National Archive contains documents of the DFS, and the second gallery contains documents of the IPS. The second gallery includes documents from various offices that depended from the Interior Ministry, including DFS and SEDENA.

current director of the team said. “With time and resources one could accomplish a lot. But the time ran out on us.”²¹³

Once the archives were mapped out and the researchers were able to comb through a substantial portion of the files, it became clear that there was another and even more serious problem with their contents: the apparent lack of documents relevant to a number of the most important questions.

The files appear to lack any information about the ultimate fate of the hundreds of people who were “disappeared” during the “dirty war.” While there is evidence of arbitrary detention in many cases—sufficient to establish the forced disappearance of the victims—what’s missing is information about what happened to them after they were detained, how they were killed, and what was done with their bodies.

Also lacking are documents directly or indirectly identifying who did the killing, who authorized it, who knew about it, and who could have stopped it. This is not to say that there isn’t sufficient and even compelling evidence to convict some of those who were responsible. But building a case for conviction based on circumstantial evidence is far more difficult than building one based on direct evidence of participation in—or knowledge of—the crimes.

The absence of such documentation may well result from the fact that the criminals had the foresight to avoid leaving any paper trail. But, as we saw in Chapter 3, there are also glaring examples of documentation that does not exist, but logically should. For example, although the National Archive contains a series of documents referring to a 1969 ceremony to honor members of the “Olimpia Battalion” who “died in compliance of their duty on October 2, 1968, in the Tlatelolco Plaza,” there are no other documents describing the role the battalion played during the massacre that took place then and there. Moreover, there is no other reference in any other document to the existence of the Olimpia Battalion.²¹⁴ There is only one document from SEDENA that recognizes that there were nineteen military officials injured, but there is no reference to military officials that died during that day.

Yet another example of missing documentation involves the archives of the PGR. Although these archives were not released along with the others in 2002, investigators

²¹³ Human Rights Watch telephone interview with José Sotelo, Mexico City, March 9, 2006.

²¹⁴ Jacinto R. Murguía, “La ceremonia del 2 de octubre de 1969: Los inexistentes muertos del Batallón Olimpia,” *La Revista*, September 27, 2004, pp. 14-19.

from the Special Prosecutor's Office did have access to them. And, while they were able to find the case files for investigations that the PGR had opened against civilians detained during the 1968 and 1971 massacres, they found that all the case files for the investigations of the crimes committed against civilians had been removed.²¹⁵ (Investigators from the Special Prosecutor's Office did find more recent case files for investigations into the removal of those earlier case files, but these did not yield any clues about the original events.)

In sum, the archives have been an invaluable source of information. But to navigate them effectively, and to fill in the major gaps in its contents, the Special Prosecutor's Office would have benefited enormously from the active collaboration on the part of the institutions that generated those documents—the institutions whose members participated in the crimes under investigation. Such collaboration was not forthcoming.

Obstruction by the Military

If there is one state institution that could fill in the holes in the investigations, it is the Mexican military. Military personnel participated in many—if not most—of the crimes, and the institution itself is directly implicated in their abusive practices. The Mexican military has a clear obligation to advance efforts to resolve these crimes and ensure that those responsible are brought to justice. This obligation is established in Mexican and international law. It was explicitly included in the executive order that created the Special Prosecutor's Office.²¹⁶ And it has even been publicly recognized by the top brass of the military on various occasions.

Yet the military's record on fulfilling this obligation has been one of abject failure. While it is true that SEDENA turned over hundreds of boxes of files to the National Archive, as we noted above, there are mysterious gaps in the documents that appear in the archives. Moreover, it is extremely difficult for an outsider to navigate through what is there. While SEDENA did provide a general catalogue of the files in the archives, it did not provide a detailed index of the contents of those files. And, according to the chief investigator of the Special Prosecutor's Office, much of what was there was written in code and largely incomprehensible to the unschooled reader.²¹⁷ SEDENA has not

²¹⁵ Human Rights Watch interview with Juan Manuel Ruiz Jimenez, January 18, 2006.

²¹⁶ President Fox instructed the Minister of Defense to have the PGJM provide prosecutors with information needed for their investigations. Order of the President of the Republic, Mexico, November 27, 2001, Chapter 1, Article 3.

²¹⁷ Human Rights Watch interview with José Sotelo, director of the historical documentation team of the Special Prosecutor's Office, Mexico City, March 9, 2006.

provided the investigators from the Special Prosecutor's Office with any guidance that would make it easier to locate relevant information.

When investigators from the Special Prosecutor's Office have requested information directly from the military, they have been routinely told that the information did not exist. When, for example, the Special Prosecutor's Office requested information about the military personnel who were assigned to a military checkpoint in a specific town in Guerrero, the Military Prosecutor's Office (*Procuraduría de Justicia Militar*, PGJM) responded that "no information was found relating to the incidents that you mention."²¹⁸ When asked for the names of the officers who served at the Atoyac military base in 1974, the PGJM responded that the Special Prosecutor's Office would have to provide the officers' names itself, explaining that "given the constant promotions and demotions of personnel in the Battalion and the time that has passed since 1974, it is not feasible to provide the documentation in the archives as it has been requested."²¹⁹

Even when the Special Prosecutor's Office has provided the names of specific officers, the PGJM has claimed that it could not find files on those individuals. In one case, the Special Prosecutor's Office provided not only the name and rank of an officer, but also the military base he had served at and the dates he served there—yet still, the PGJM claimed it could find no information on the officer.²²⁰

The military has also consistently refused to provide information regarding civilians who "disappeared" after being held in military installations. When asked by the Special Prosecutor's Office for any information regarding individuals who were last reported seen alive in military detention, the PGJM has insisted that it could find no information. Typical was the response it gave to the Special Prosecutor's Office's inquiry regarding Alberto Arroyo Dionisio. According to both eyewitnesses and a DFS document cited in the CNDH's 2001 report, Arroyo was held for two months by the military in Guerrero and then sent to Military Base Number One. Yet the PGJM reported to the Special

²¹⁸ Letter from the PGJM to the special prosecutor, March 2003 ("*no se encontró información relacionada con los hechos que se citan*").

²¹⁹ Letter from the PGJM to the special prosecutor, February 2003 ("*Es necesario que precise los nombres de los Generales y Jefes a que se refiere, en virtud de que por las constantes altas y bajas de personal en un Batallón y por el tiempo transcurrido desde 1974, no es factible proporcionar la documentación que obra en los archivos en los términos requeridos*").

²²⁰ Letter from the PGJM to the special prosecutor, March 2003.

Prosecutor's Office that "[after] a meticulous search in the corresponding archives, no records were found indicating that the person entered any military prison."²²¹

Not only has the military proven unwilling or unable to provide critical information about the "dirty war" crimes, it has publicly denied or downplayed the military's role in past abuses. When asked, for example, about the "Brigada Blanca," the counterinsurgency group responsible for many of the "dirty war" crimes, Defense Secretary Clemente Vega insisted that it was "something that doesn't concern the military." He also claimed that the Brigada Blanca had not used Military Base Number One as a base of operations.²²²

This denial by the institution's top officer reflects the position taken by the institution in response to queries by the Special Prosecutor's Office and independent investigators. When investigators within the Special Prosecutor's Office conducted an inspection of Military Base Number One, the military officers accompanying them insisted that they knew nothing about the detention of civilians.²²³ And, as was documented in Chapter 3, when one journalist who has written extensively on the "dirty war" used the transparency law to request a list of civilians held at Military Base Number One, SEDENA replied that "since the creation of military prisons there have been no 'civilians' held or detained in them, but only military personnel who breach military discipline."²²⁴

What makes these denials especially remarkable is the fact that they brazenly contradict what is already public information. In its 2001 report, the CNDH announced that it had been able to verify "the existence of installations run by members of the aforementioned 'Special Brigade or White Brigade' inside Military Base Number One."²²⁵ The CNDH report also cited at least eleven documents from the 1970s, most from the Federal Security Directorate, that revealed that civilians had indeed been held at Military Base

²²¹ Letter from the PGJM to the Special Prosecutor's Office, August 6, 2003. ("*Después de una búsqueda minuciosa en los archivos correspondientes, no se encontraron antecedentes de que la persona haya ingresado a alguna prisión militar.*")

²²² Jorge Alejandro Medellín y Juan Cervantes, "La Brigada Blanca no atañe a la SDN: Vega," *El Universal*, February 25, 2004.

²²³ Human Rights Watch interview with officials in the Special Prosecutor's Office, Mexico City, January 18, 2006.

²²⁴ Federal Institute for Access to Official Information, file 901/04, November 4, 2004, p. 2 ("*...desde la creación de las prisiones militares no se ha recluido o detenido en ellas a 'personas civiles', sino únicamente a personal militar que infringe la disciplina militar.*")

²²⁵ CNDH, "Informe Especial Sobre las Quejas en Materia de Desapariciones Forzadas Ocurridas en la Década de los 70 y Principios de los 80" (*la existencia de instalaciones a cargo de los miembros de la mencionada 'Brigada Especial o Brigada Blanca' dentro del Campo Militar Número Uno.*)

Number One. Similarly, a widely publicized book by Julio Scherer and Carlos Monsiváis cites a DFS report from the day of the Tlatelolco massacre that lists the names of over three hundred civilians held at Military Base Number One.²²⁶ This documentation, moreover, was corroborated by numerous firsthand accounts from civilians who reported having been held at the military base.

The repeated claims by SEDENA that it cannot locate information relevant to the “dirty war” cases seem highly dubious given the fact that, according to people who have done extensive research in the National Archive, the military keeps exceptionally detailed and well-organized files. It certainly may be true that locating the requested information is a time-consuming task. However, that is precisely the task that the president assigned the military in the executive order that established the Special Prosecutor’s Office.

There is one important exception to the military’s stonewalling the investigation of these crimes. In 2002, the Military Prosecutor’s Office turned over the files of the cases they were bringing against Acosta Chaparro and Quiros Hermosilla. The files contained the only available accounts by former military personnel of army participation in “dirty war” crimes—detailed, graphic, and compelling testimony regarding the extrajudicial execution of civilians at an air force base in Guerrero state, and the disposal of their bodies in the ocean.²²⁷

Yet this example of information sharing is an exception that proves the rule in several respects. First, it shows that military personnel *do* have compelling eyewitness testimony to provide, and are willing to provide it under certain circumstances. In this case, the first witness to provide information did so while being interviewed by prosecutors investigating drug charges against the former military officers. He was a participant in a witness protection program established for witnesses in cases involving organized crime—and he stood to benefit himself with a sentence reduction in exchange for his collaboration, an arrangement that is currently only available in cases involving organized crime. The other three former military officers who corroborated his claims did so

²²⁶ The DFS report states: “Con relación a los acontecimientos suscitados en la Plaza de las Tres Culturas, de la Unidad Santiago Tlatelolco, en esta ciudad, hoy por la tarde fueron detenidos 1,043 (un mil cuarenta y tres) personas, las cuales se encuentran como sigue: 363 (trescientos sesenta y tres) en el Campo Militar No. 1.” Julio Scherer García and Carlos Monsiváis, *Los Patriotas. De Tlatelolco a la guerra sucia*, (México: Nuevo Siglo Aguilar, 2004), pp. 15-16. Document confirmed by researcher within the Special Prosecutor’s Office. (And corroborated by another document in the National Archive, a report by then Attorney General Julio Sánchez Vargas, which included testimony by General Crisóforo Mazón Pineda, who commanded the military operation in the plaza where the massacre took place, in which he affirmed that 1,500 people had been detained and transferred to the *Campo Militar Número Uno*. National Archive, Interior Ministry documents in the second gallery, volume 1866.)

²²⁷ Testimony from eyewitnesses in PGJM document, “Averiguación Previa SC/034/2000/IV-E-BIS.”

when summoned by military prosecutors—in other words, when the military itself compelled them to do so.

The fact that the military turned over the case files is hardly evidence of active collaboration with the Special Prosecutor’s Office. The military was required by law to do so, since the files contained evidence regarding crimes that the civilian prosecutors were investigating. And, while the military appears to have flouted this obligation in other cases, in this particular case, it would have been difficult to deny that the testimony existed—at least not without doctoring the case files themselves, which could have easily been detected. Moreover, the military officers implicated by the testimony were already being prosecuted in military courts for illegal drug trafficking, and clearly out of favor with the institution. And finally, as we discuss below, there may have been little reason to fear that the Special Prosecutor’s Office would succeed in prosecuting them, as civilian courts were likely to turn the cases over to the military justice system.

In fact, even as the military turned over the case files, its prosecutors proceeded to pursue their own criminal investigation of the “disappearance” cases. In doing so, they further undermined the Special Prosecutor’s Office’s ability to gather information on the cases, heightening the climate of fear and distrust that continues to haunt the communities that bore the brunt of the “dirty war” decades ago.

As part of its own investigation, the PGJM installed an office in Atoyac de Álvarez, Guerrero—at a short distance from the office already established by the Special Prosecutor’s Office—and began calling on victims’ relatives to provide testimony about alleged “disappearances” committed by the army. Many civilians in the area who received these summons interpreted them as a form of harassment.²²⁸ The PGJM is itself apparently aware of the effect its investigations have had on victims’ relatives in Guerrero. One woman who disregarded an invitation to collaborate with the PGJM received a letter in which a PGJM official wrote that the military “understands the anxiety that the invitation to appear before a military authority may have caused you, which was probably the reason you may have decided not to make an appearance before us, given that it is precisely military personnel to whom you attribute the “disappearance” of your son.”²²⁹

Although the PGJM eventually closed its office in Atoyac de Álvarez, its presence may have had a lasting impact on the work of the Special Prosecutor’s Office there, feeding

²²⁸ Human Rights Watch interviews with victims’ relatives, Atoyac de Álvarez, Guerrero, May 24-25, 2003.

²²⁹ Letter from PGJM to victim’s relative, Atoyac de Álvarez, Guerrero, February 2003.

the climate of distrust toward the government that exists within the community. According to one official in the Special Prosecutor's Office, the families cited by the PGJM believed that the Special Prosecutor's Office had given their names to their military counterparts, thereby violating their rules of confidentiality.²³⁰ According to another official, the presence of the PGJM near that of the special prosecutor may have created the impression that the civilian authorities were working in tandem with the military ones, thereby compromising their credibility with victims' relatives. This perception, the official complained, was only exacerbated when several PGJM officials installed themselves in the Special Prosecutor's Office one day to solicit testimony from family members who arrived there.²³¹

Instead of conducting its own criminal investigation, the military should have been actively supporting the work of the Special Prosecutor's Office. The director of the special prosecutor's documentation team, José Sotelo, estimated that, if SEDENA had collaborated actively with investigators, they would have been able to completely resolve 85 or 90 percent of the cases.²³² Instead, because the military has stonewalled, the process of solving most of these cases has only just begun.

Obstacles to Justice

Inability to detain suspects

A major obstacle to prosecuting these cases has been the state's failure to execute the majority of the arrest warrants that the special prosecutor has obtained from judges. Since Mexican law prohibits trying people *in absentia*, the prosecutions cannot proceed so long as the accused remain at large.

There are currently thirteen arrest warrants against seven former officials that have not been carried out. According to the director of the AFI, the agency that is responsible for executing these warrants, the poor outcomes result from the fact that the people at large have extensive ties with people within the political system and law enforcement institutions who make it possible for them to elude capture. For example, Luis de la Barreda Moreno, a former director of the DFS, has been able to elude capture for over

²³⁰ Human Rights Watch interview with official in the Special Prosecutor's Office, Mexico City, May 29, 2003.

²³¹ Human Rights Watch interview with official in the Special Prosecutor's Office, Atoyac de Álvarez, Guerrero, May 24, 2003.

²³² Human Rights Watch interview with José Sotelo, director of the historical documentation team of the Special Prosecutor's Office, Mexico City, March 9, 2006.

two years because he is “part of the Mexican political system and has the support of the political class.”²³³

In the case of Isidro Galeana, a former judicial police commander in Guerrero state who was charged by the Special Prosecutor’s Office in 2003 with the “disappearance” of Jacobo Nájera Hernandez, Human Rights Watch received eyewitness reports from other law enforcement agents that he was protected by members of the local police, who were serving as his bodyguards when they should have been arresting him. Galeana was able to remain at large for almost two months until his death, by natural causes, in January 2004.

While it may indeed be more difficult to carry out arrest warrants of former officials who still have strong ties with local and national law enforcement agencies, it should not be impossible. Mexican law enforcement agencies have repeatedly proven their effectiveness in recent years by arresting some of the country’s most powerful and violent drug traffickers.

Legal Hurdles

Another major challenge for the Special Prosecutor’s Office has been how to develop legal strategies that could overcome two basic legal hurdles—how to prosecute old crimes that might be subject to statutes of limitation, and how to apply Mexican criminal law to egregious human rights violations that were not adequately contemplated in the penal code at the time they were committed. The strategies the special prosecutor has pursued have shown very mixed results.

The “Genocide” Cases

The special prosecutor’s legal strategy in the two most emblematic cases—the massacres of student protestors in 1968 and 1971—has clearly not worked. In both cases, he argued that the crime committed had been “genocide,” and that genocide was not subject to a statute of limitations. The courts have not accepted either argument.

In the first case the special prosecutor pursued—the 1971 massacre—the Supreme Court upheld a lower court’s ruling that genocide is in fact subject to a thirty-year statute of limitations. But the court did accept an argument presented by the special prosecutor that two of the accused, Luis Echeverría Álvarez and Mario Augusto José Moya y Palencia, could still be prosecuted since the clock on the statute of limitations had been

²³³ Human Rights Watch interview with Genaro García Luna, Director of AFI, Mexico City, November 14, 2005.

suspended during the years their official posts had imbued them with immunity from prosecution. The Supreme Court sent the case against these two back to the trial court to determine whether the charges were sufficiently substantiated to proceed to trial.²³⁴ A month later, the trial judge ruled that the alleged crime did not constitute “genocide,” but instead was a case of “simple homicide”—a crime for which the statute of limitations had expired, even for Echeverría and Moya y Palencia. The 1968 case, meanwhile, has suffered a similar fate. The trial court found that the period established by the statute of limitations has passed. And while the special prosecutor appealed the ruling, there is no reason to think this appeal will fare better than the other.

²³⁴ When appealing, the Special Prosecutor’s Office presented four arguments. The first three were rejected by the Supreme Court, and the fourth was considered valid. The four arguments (in italics) and the Supreme Court’s conclusions are as follows:

a) *According to international law, no statute of limitations should apply to the crime of genocide.*

The Supreme Court held that Article 14 of the Mexican Constitution establishes the principle of non-retroactivity of criminal law, which applies also to international treaties. Mexico ratified the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity and included an interpretative declaration according to which the Convention only applies after it was ratified (2002). Even if this declaration were considered a reservation, which may never contradict the object and purpose of the treaty, the Supreme Court concluded that this only matters at the international level since not applying the reservation internally would, in this case, mean not applying the Mexican Constitution, which is unacceptable.

b) *According to Mexican procedural law, the term of the statute of limitations applicable to the crime of genocide was interrupted in this case by investigative procedures that took place between 1971 and 2004.*

The Supreme Court considered that, according to Mexican criminal procedure law, not every investigation that takes place counts as an act that may interrupt the term of the statute of limitations. Only those acts performed by the Prosecutor’s office or Judge that aim at solving the crime or determining who was responsible for committing the crime may interrupt the term of the statute of limitations. The Supreme Court concluded that the investigative acts mentioned in the appeal did not validly interrupt the term of the statute of limitations.

c) *The judicial officials in the city government, which should have investigated and prosecuted the case, were unable to do so properly. The case was against a former Mexican president, and the situation in the country (basically, city government officials did not have enough independence and autonomy from the federal government) made such investigation and prosecution practically impossible.*

The Supreme Court argued that the judicial system in Mexico was based on the Mexican Constitution (basically, Articles 21 and 102) and, as such, it could not violate any of the constitutionally prescribed guarantees of due process. According to the Court, former President Echeverría directly controlled the federal and city Prosecutors’ offices because it was constitutionally prescribed. The Court held that there were no convincing arguments by the Special Prosecutor’s Office to sustain that the observance of the entire constitutional order was interrupted during Echeverría’s presidency.

d) *The term of the statute of limitations should not begin during the period that Luis Echeverría Álvarez and Mario Augusto José Moya y Palencia held office since during that time they could not be prosecuted for the acts of 1971.*

The Court considered that until December 1, 1976, when Echeverría and Moya y Palencia left office, the federal Prosecutor’s office was unable to initiate a criminal prosecution against them for the acts of 1971. The Court concluded that the term of the statute of limitations had not expired in these two cases only (it did for the rest of the accused).

Appeal file number 1/2004-PS that derived from the Supreme Court’s power to attract (8/2004-PSf), June 15, 2005.

Under international law norms, the obstacle to prosecution of these cases should not have been the statute of limitations since, under international law, genocide is not subject to one. The problem, from the standpoint of international human rights law, is that the crime in question did not constitute “genocide.”

According to the Genocide Convention, an essential element of the crime is that the perpetrators act with the “intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such.” This definition was intentionally constructed to exclude cases where the target is a political group, such as the groups of student activists targeted in the 1968 and 1971 massacres. Nevertheless, the special prosecutor attempted to argue that the victims of the massacre constitute a “national group” because they were a group of Mexican “nationals.”²³⁵ In terms of international law, this argument is farfetched. And while the special prosecutor has argued that under Mexican law it is plausible, the definition used in the Mexican penal code is essentially the same as that which is used in

²³⁵ The special prosecutor has argued that Mexican courts have made this argument in the decision to extradite Ricardo Cavallo, an Argentine military official accused of human rights violations in Argentina in the late 1970s. On August 25, 2000, a Spanish court (*Juzgado de Instrucción # 5 de la Audiencia Nacional de Madrid*) requested Cavallo’s preventive detention in order to extradite him to Spain. The extradition request was for Cavallo’s responsibility for genocide, torture, and terrorism that took place in Argentina during the “dirty war” period (1976-1983). But, while the Supreme Court authorized the extradition, it did not address the substantive issue of whether genocide could be committed against a political group.

The Mexican judge that received and evaluated the extradition request did not directly address the issue of whether a political group may be a victim of genocide. The judge argued that he was only required to evaluate whether the Spanish extradition request was done in accordance to the bilateral extradition treaty between Mexico and Spain (*Tratado de Extradición y Asistencia Mutua en Materia Penal entre los Estados Unidos Mexicanos y el Reino de España*.) In fact, he considered that he was legally unable to evaluate the merits of the crimes for which Cavallo was being extradited (i.e., whether the elements that constitute the crime had been proven, and whether or not the accused was responsible). In order to establish that the alleged facts constituted *prima facie* genocide, the judge simply transcribed the arguments presented by the Spanish judge in the extradition request. In a brief paragraph, the Mexican judge concludes that the Spanish government has fulfilled the requirements of the bilateral extradition treaty since it has “included a detailed analysis of the illegal facts, including when and where they happened, and its legal analysis.” (Decision on extradition 5/2000 by Judge Guadalupe Luna Altamirano, 6th district judge of Mexico City in federal criminal cases, January 11, 2001.) After Cavallo presented an appeal, the Mexican Supreme Court confirmed the extradition. Cavallo argued that the Convention on the Prevention and Punishment of the Crime of Genocide violated the Mexican Constitution because it allows the extradition of political crimes. According to Cavallo, genocide may be considered a political crime, and as such, may not be subject to extradition. In its decision, the Supreme Court does not address whether genocide may be committed against a political group, but rather evaluates if the crime of genocide may be of political nature. The Supreme Court held that Mexico had adopted an objective theory to determine which crimes ought to be considered political; i.e., it takes into account what is being protected, and not the intention of the author of the crime. A crime is considered political if it is committed against the state, and therefore the crime of genocide does not have a political nature. The Supreme Court established that the crime of genocide was created to protect certain human groups considered stable, which constitute the area in which the individual members of the group develop themselves, in such a way that it is comparable to a state. (Mexican Supreme Court, decision in appeal 140/2002, June 10, 2003, [online] [http://www.scjn.gob.mx/Asuntos/2003/CAVALLOENGROSE\(X\)2.pdf](http://www.scjn.gob.mx/Asuntos/2003/CAVALLOENGROSE(X)2.pdf) (retrieved April 2006).)

the international law.²³⁶ Numerous Mexican criminal lawyers have told Human Rights Watch that they were unconvinced by the special prosecutor's interpretation. And, more to the point, the courts hearing the case have also rejected it, rendering this a moot point.

Did the special prosecutor have any better options for prosecuting these crimes? One possibility would have been to file charges for "aggravated homicide" rather than "genocide." There is no question that the killings fit the definition of this crime. However, there is some ambiguity with regard to the calculation of the statute of limitations. According to one interpretation of the law applicable at the time of the crimes, the statute of limitations would most likely be thirty years, making it impossible to prosecute most of the accused, but allowing for prosecution of Echeverría and Moya y Palencia (using the tolling argument already endorsed by the Supreme Court). However, the federal criminal code in effect at the time of the crimes, combined with a series of non-binding Supreme Court rulings from the era, permit another interpretation of the statute of limitations that would foreclose the possibility of prosecuting even those two cases. Fearing that courts would resolve this ambiguity in favor of the defendants, the Special Prosecutor's Office chose not to pursue this line of prosecution.

Another option would have been to argue that the killings constituted "crimes against humanity." The concept of "crimes against humanity" in international law refers to serious acts of violence, including murder, torture, and forced disappearance, carried out in a widespread or systematic fashion against an identifiable group of persons.²³⁷ Crimes against humanity have been proscribed in several treaties ratified by Mexico and have existed in customary international law for over half a century—since well before Mexico's "dirty war." They are, moreover, deemed to be part of *jus cogens*—the highest standing in international legal norms—thereby constituting a non-derogable rule of international law.²³⁸

²³⁶ According to Article 149 BIS of the Mexican Criminal Code, "The crime of genocide will be committed by the person that, with the purpose of destroying (in whole or in part) one or more national groups or of an ethnic, racial or religious character, commits, through any means, crimes against the life of members of these groups, or if [this person] imposes massive sterilization with the purpose of impeding the reproduction of the group."

²³⁷ According to Article 6 of the Rome Statute of the International Criminal Court, "For the purpose of this Statute, "genocide" means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group."

²³⁸ See Cherif Bassiouni, "Crimes Against Humanity," in Roy Gutman and David Rieff, eds., *Crimes of War* (New York: W.W. Norton & Company, 1999), p. 107.

In addition, prosecutors might have referred specifically to Mexico's obligation under the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity to argue that their prosecutions could not be barred by statutory limitations. Article 1 of the Convention states that statutory limitations shall not apply to crimes against humanity, "irrespective of the date of their commission."²³⁹ Moreover, the Convention obligates Mexico to "undertake to adopt, in accordance with their respective constitutional processes, any legislative or other measures necessary to ensure that statutory or other limitations shall not apply to the prosecution and punishment of the crimes . . . and that, where they exist, such limitations shall be abolished."²⁴⁰

When ratifying the Convention, however, Mexico included an "interpretative declaration" to the effect that it would "consider statutory limitations non-applicable only to crimes . . . committed after the entry into effect of the Convention with respect to Mexico"—i.e., after Mexico ratified the Convention in 2002. According to the declaration, Mexico's obligation not to apply statutory limitations would not apply to the cases under investigation by the Special Prosecutor's Office. Yet prosecutors could have pointed out that this declaration does not affect Mexico's obligations under the Convention.²⁴¹ Instead, it represents an interpretation of those obligations that is simply wrong. It is wrong because it directly contradicts the language of Article 1 that prohibits the application of statutory limitations "irrespective of the date of their commission."

But if the "crimes against humanity" option makes good sense from an international law perspective, it would have represented a major new development for Mexican criminal law. For Mexican courts to accept an argument of this sort, the special prosecutor would still have had to persuade them that an exceptional decision not to apply statutory

²³⁹ Article 1 of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity. The convention refers to war crimes and crimes against humanity, whether committed in time of war or in time of peace, as they were defined in the Charter of the International Military Tribunal, in Nuremberg, and reaffirmed by the United Nations General Assembly (in Resolution 95 (I) of 11 December 1946).

²⁴⁰ Article 4 of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity. The convention's preamble explains the rationale for this provision, stating that "the application to war crimes and crimes against humanity of the rules of municipal law relating to the period of limitation for ordinary crimes is a matter of serious concern to world public opinion, since it prevents the prosecution and punishment of persons responsible for those crimes," and that "it is necessary and timely to affirm in international law, through this Convention, the principle that there is no period of limitation for war crimes and crimes against humanity, and to secure its universal application."

²⁴¹ The United Nations Treaty Handbook (sec. 3.6.1) explains the difference between a reservation and an interpretative declaration: "A State may make a declaration about its understanding of a matter contained in or the interpretation of a particular provision in a treaty. Interpretative declarations of this kind, unlike reservations, do not purport to exclude or modify the legal effects of a treaty. The purpose of an interpretative declaration is to clarify the meaning of certain provisions or of the entire treaty."

limitations in these cases did not violate the prohibition on retroactive criminal laws, as established in the Constitution—since the bar on statutory limitations for crimes against humanity already existed in customary international law when the acts being prosecuted took place.²⁴² Making this case to judges who are generally unversed in international law would have been a difficult task. And it is likely that the judges would make their determination based on the misguided interpretive declaration.

In this sense, a potentially powerful legal strategy for prosecuting these cases was undercut by the Mexican government’s willingness, when ratifying the relevant international treaties, to compromise its commitment to the fundamental international norm that crimes of this nature are not subject to statutes of limitations.

The Forced Disappearance Cases

Unlike with the genocide cases, the Supreme Court has given a green light to prosecuting cases of forced disappearance that occurred decades ago. In fact, it has issued two separate rulings authorizing the prosecution of two different types of “disappearance” crimes despite the passage of time.

The first ruling came in November 2003, after the special prosecutor sought his first arrest warrant in a forced disappearance case, charging Nazar Haro and other officials with the “abduction” of Jesús Piedra Ibarra. A trial court judge refused to grant the warrant on the grounds that the statute of limitations had run out. But the special prosecutor appealed and won a ruling from the Supreme Court that held that the time allotted by the statute of limitations for abduction cases did not begin to run out so long as the victim remained missing.

The second ruling came in July 2004, when the Supreme Court ruled on a constitutional challenge presented by the government of Mexico City to the “interpretive declaration” that Mexico had added when subscribing to the Inter-American Convention on the Forced Disappearance of Persons. The Court held that the crime of forced disappearance is of a permanent and continuous nature—i.e., it does not end and continues to take place as long as the fate of the victim of forced disappearance remains unknown. As a consequence, the Supreme Court concluded that the statute of

²⁴² The prosecution of crimes under international customary law is entirely compatible with international law and the treaties Mexico has ratified even if such crimes did not appear in the national statutes at the time they were committed. Art 15(2) of the ICCPR (that in its first paragraph contains the prohibition of retroactive criminal laws) states: “Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.” Mexico did not enter any reservation to this provision of the ICCPR.

limitations only begins to run out when the victim of forced disappearance appears (dead or alive) or when this person's fate becomes known.²⁴³

The Special Prosecutor's Office was therefore clear to prosecute the old forced disappearance cases either as "abductions" or as forced disappearances. The special prosecutor chose the former option, reasoning that judges would reject charges of forced disappearance on the grounds that the crime was not on the books at the time the victims were abducted (and the crime of abduction was).²⁴⁴ This concern appears to have been misplaced, however, since the Supreme Court's 2004 ruling on the issue of the statute of limitations, which created binding case-law, made clear that the crime of forced disappearance continues to be committed on a daily basis, so long as families do not know what happened to their loved ones. Even though the criminal code that was in effect in the 1970s did not include the crime of forced disappearance, the current code does include it, and it applies to the cases in which victims remain "disappeared" today.

The decision to press charges of "abduction" could create other serious problems for the prosecution. As the Mexican NGO *Comisión Mexicana de Defensa y Promoción de los Derechos Humanos* has pointed out in a petition pending now before the IACHR, the penal code appears to indicate that the crime can only be committed by non-state actors (*particulares*), or by state actors who are not acting in their official capacity.²⁴⁵ Yet in the majority of the "disappearance" cases, it appears that the perpetrators were indeed acting under color of law, carrying out a government policy, with authorization and support of the state.

Developing Viable Legal Strategies

When the Special Prosecutor's Office was created in 2001, it was already clear that it would face enormous legal hurdles. The most obvious of these was the problem of statutes of limitations. President Fox himself recognized this early on in the process when he said, in November 2002, that it might be impossible to prosecute most of the cases because of the passage of time.²⁴⁶

²⁴³ Mexican Supreme Court, Tesis: P./J. 48/2004, Novena Época, Pleno, Semanario Judicial de la Federación y su Gaceta XX, July 2004, p.968.

²⁴⁴ Human Rights Watch interview with Special Prosecutor's Office staff, Mexico City, January 17, 2006.

²⁴⁵ Petition by *Comisión Mexicana de Defensa y Promoción de los Derechos Humanos* to the Inter-American Commission of Human Rights (Caso 12.511, Rosendo Radilla Pacheco, Mexico), January 5, 2006.

²⁴⁶ "Ve Fox difícil castigar a represores," *Reforma*, November, 11, 2002 ("*Es muy probable que una buena parte de los responsables no vayan a la cárcel, porque se han acabado los términos legales para el enjuiciamiento de esos crímenes*").

Human Rights Watch explored these legal hurdles in detail in our 2003 report, *Justice in Jeopardy*, and concluded that, under the circumstances, the task of developing a viable legal strategy was far too ambitious and complex to leave entirely to the Special Prosecutor's Office.²⁴⁷ Forging viable legal strategies would entail breaking new ground within a criminal justice system that was poorly equipped to deal with crimes of this nature. And it wouldn't be enough merely to choose the legal arguments that were legally sound. Prosecutors would also need to convince judges that their novel legal arguments were consistent with Mexican law. They would need to impress upon judges the weight of Mexico's international obligations to prosecute human rights violations. In short, prosecuting these cases would require pushing Mexican criminal law in new directions. It would require overcoming the very legal doctrine and habits that had, for decades, served to perpetuate the culture of impunity.

What was needed, we argued in the 2003 report, was a collective effort by the government's top legal experts and the country's most experienced and influential jurists. The best way to strengthen the prosecution's arguments would be to have them be scrutinized, refined, and publicly endorsed by the country's most experienced and knowledgeable jurists. Ideally, when the cases went to trial, it would be clear that these legal arguments reflected not only the views of the prosecutor, but also the views of the Fox administration and the broader legal community.

To that end, we recommended that the president convene a task force or commission to examine the issue of statutory limitations and any other legal obstacles that could limit the prosecution of past abuses. This group would consist of distinguished jurists, as well as lawyers representing relevant private and state institutions, including the Foreign Affairs and Interior Ministries, the PGR, the PGJM, the CNDH and, of course, the Special Prosecutor's Office. Its aim would be to generate greater clarity and consensus about the nature of the legal obstacles, and to assess—in light of both national and international law—the advantages and disadvantages of the various prosecution strategies that the Special Prosecutor's Office might adopt to overcome them.

The Fox administration did not give this issue the attention it deserves nor attempt the kind of coordinated approach outlined above. Instead it chose to leave the monumental challenge of overcoming the legacy of impunity at the heart of the Mexican legal system on the shoulders of a single prosecutor and his staff. It is impossible to know whether a presidential task force of this sort would have necessarily ensured greater success in prosecuting these cases within Mexican courts. But it almost certainly could have led to

²⁴⁷ Human Rights Watch interviewed ten lawyers and jurists about the legal issues facing the Special Prosecutor's Office, Mexico City, May – June, 2003.

greater clarity about the legal issues at stake, and helped to expose the deficiencies of the Mexican legal system that have contributed to the ongoing impunity associated with these crimes.

Military Justice

A third major obstacle to prosecution has been the Mexican military. In addition to stonewalling and interfering with investigations (as described above), the military has pursued its own prosecution of some of the “dirty war” crimes, interfering with and potentially sabotaging the work of the civilian prosecutors.

In September 2002, the PGJM indicted three military officers for their role in some of the “disappearance” cases under investigation by the special prosecutor. This indictment appeared to represent an important—if long overdue—recognition by the military of its role in past abuses. Yet in fact it was at best a grave mistake: cases like these do not belong in military courts.

International human rights bodies have repeatedly argued that military tribunals should not be relied upon to prosecute human rights abuses, and called on states to transfer jurisdiction over human rights cases from military to civilian authorities.²⁴⁸ In the case of Mexico, the U.N. Special Rapporteur on Torture found that Mexican military personnel who committed abuses were “generally protected by military justice” and concluded that “[c]ases of serious crimes committed by military personnel against civilians, in particular torture and other cruel, inhuman or degrading treatment or punishment, should, regardless of whether they took place in the course of service, be subject to civilian justice.”²⁴⁹

²⁴⁸ The U.N. Human Rights Committee (HRC), which monitors states' compliance with the ICCPR, has repeatedly called on states parties to subject military personnel alleged to have committed human rights violations to civilian jurisdiction. For example, in 1997 it urged the Colombian government to take “all necessary steps . . . to ensure that members of the armed forces and the police accused of human rights abuses are tried by independent civilian courts,” specifically recommending “that the jurisdiction of the military courts with respect to human rights violations be transferred to civilian courts.” Concluding observations of the Human Rights Committee: Colombia, U.N. Doc. CCPR/C/79/Add. 76, May 3, 1997, para. 34. The Committee has made similar recommendations to the governments of Chile and Peru, on the grounds that the “wide jurisdiction of the military courts to deal with all the cases involving prosecution of military personnel . . . contribute[s] to the impunity which such personnel enjoy against punishment for serious human rights violations.” Concluding observations of the Human Rights Committee: Chile, U.N. Doc. CCPR/C/79/Add. 104, March 30, 1999, para. 9. See also U.N. Doc. CCPR/C/79/Add. 67, July 25, 1996, para. 23. Similarly, the Inter-American Court has held that “[i]n a democratic State governed by the rule of law, the scope of authority of criminal military courts must apply on a limited and exceptional basis,” and that “[m]ilitary officers must be prosecuted for the commission of only those offenses and infractions that, because of their nature, have an adverse effect on the assets of the military.” Inter-American Court, Durand and Ugarte Case, Judgment of August 16, 2000, para. 117.

²⁴⁹ United Nations, *Question of the human rights of all persons subjected to any form of detention or prison and, in particular, torture and other cruel, inhuman, or degrading treatment or punishment*. Report of Special

Despite this international consensus, Mexican military justice officials have continued to assert jurisdiction over army abuse cases. They note that the Mexican Constitution establishes military jurisdiction for “offenses against military discipline,”²⁵⁰ and rely on the fact that the Code of Military Justice provides an expansive notion of such offenses that includes “offenses under common or federal law...when committed by military personnel on active service or in connection with active service.”²⁵¹ (When ratifying the Inter-American Convention on Forced Disappearance of Persons, Mexico submitted a reservation to the treaty’s prohibition on asserting military jurisdiction over cases of forced disappearance.²⁵²)

In this particular case, however, the assertion of military jurisdiction also violates the Mexican Constitution, which holds that “military tribunals shall in no case and for no reason exercise jurisdiction over persons who do not belong to the army,” and that “[w]henever a civilian is implicated in a military crime or violation, the respective civilian authority shall deal with the case.”²⁵³ Accordingly, when both military and civilians are suspected of committing a particular crime, the case goes to civilian courts.²⁵⁴ In the “dirty war” cases it is prosecuting, the PGJM has recognized the participation of civilians in the commission of the crimes, yet it has persisted with the prosecutions.²⁵⁵

Rapporteur Nigel Rodley, submitted pursuant to Resolution 1997/38 of the Commission on Human Rights, E/CN.4/1998/38/Add.2, January 14, 1998, paras. 86, 88[j].

²⁵⁰ Article 13 of the Constitution of the Republic of Mexico.

²⁵¹ Article 57 of the Code of Military Justice of Mexico.

²⁵² Article 9 of the Inter-American Convention on Forced Disappearance of Persons stipulates that “acts constituting forced disappearance shall not be deemed to have been committed in the course of military duties.” The convention also provides that “Persons alleged to be responsible for the acts constituting the offense of forced disappearance of persons may be tried only in the competent jurisdictions of ordinary law in each state, to the exclusion of all other special jurisdictions, particularly military jurisdictions.” Mexico submitted a reservation to the latter provision, stating that “Military jurisdiction does not constitute a special jurisdiction in the sense of the Convention,” and therefore the military justice system could continue to assert jurisdiction “when a member of the armed forces commits an illicit act while on duty.”

²⁵³ Article 13 of the Constitution of the Republic of Mexico.

²⁵⁴ The Mexican Supreme Court has ruled out the possibility that the same case can be tried simultaneously under military and civilian jurisdictions: “...neither the historical background of Article 13 of the Constitution, nor the social conditions prevailing when the article was created, nor the ideas expounded by the legislators at its drafting, nor the literal meaning of the words in its text can sanction the interpretation that when in a military crime a civilian is implicated, the military authorities will judge the members of the army and the civilian authorities will judge the civilian person; and therefore, the civilian authorities are the ones who shall exercise jurisdiction in a military process where there are civilians involved.” Mexican Supreme Court, Pleno, Quinta Época, Semanario Judicial de la Federación, Tomo XL, p. 1393.

²⁵⁵ In a document submitted to the Special Prosecutor’s Office, the PGJM wrote that it had detected “the participation in the criminal activities analyzed in the present document of other persons who did not have military status but did have the status of government agents...”

But several factors raise questions about the seriousness of this commitment. One is the timing: after three decades of inaction, the PGJM chose to prosecute these crimes only after the Special Prosecutor's Office began investigating them. Another is the indictment itself: it originally charged the defendants with the deaths of 143 people, but it turned out that as many as seven of the named victims are in fact alive today.²⁵⁶ A third is the fact that the indicted generals were already in jail facing drug charges. A fourth factor, mentioned above, is the fact that by asserting jurisdiction over the case, the PGJM was violating the Mexican Constitution.

Whether or not the PGJM is serious about prosecuting these cases, its assertion of jurisdiction presents serious obstacles to the Special Prosecutor's Office. In addition to the impact, described above, that the military investigations have on the Special Prosecutor's Office in Guerrero, there is a serious risk that, should military trials end in acquittals, the prosecution of these officers by the Special Prosecutor's Office would be precluded under the principle of *non bis in idem*—the principle, known as “double jeopardy” in Anglo-American jurisdictions, according to which a person cannot be tried twice for the same crime.

The likelihood of such an outcome is increased by the fact that very few of the relatives and surviving victims in Guerrero have been willing to testify before the PGJM, thus denying it of evidence that may be necessary to obtain convictions. The main reason for their refusal appears to have been the fear described above. Several Atoyac residents told Human Rights Watch that they disregarded the request for testimony from the PGJM because they were scared of the army, and the one person Human Rights Watch spoke with who had provided testimony confirmed that most victims' relatives she knew were too scared to do so.²⁵⁷ Another woman who refused to testify explained that she could not believe that the military had any intention of conducting a serious investigation. “They ignored us back then,” she said, “why would it be different now?”²⁵⁸ One man who reported having been tortured by soldiers—who also forcibly “disappeared” his son—said he would never go to the PGJM since it was the military that had harmed him.²⁵⁹ Another woman asked rhetorically, “How am I going to go to the PGJM when I'm denouncing an army general?”²⁶⁰

²⁵⁶ “Acusan a generales de matar 143 civiles,” *Reforma*, October 29, 2002. Human Rights Watch spoke to one of the individuals listed, who had been temporarily detained by the military, in 1974, but was eventually set free. Human Rights Watch interview with Antonio Hernández, Mexico City, January 8, 2003.

²⁵⁷ Human Rights Watch interview with victims' relatives, Atoyac de Álvarez, Guerrero, May 24-25, 2003.

²⁵⁸ Human Rights Watch interview with victim's relative, Atoyac de Álvarez, Guerrero, May 24, 2003.

²⁵⁹ Human Rights Watch interview with victim's relative, Atoyac de Álvarez, Guerrero, May 24, 2003.

²⁶⁰ Human Rights Watch interview with victim's relative, Atoyac de Álvarez, Guerrero, May 24, 2003.

Unfortunately, it is not merely the military prosecutors and judges who insist that these cases be tried within the military justice system. Their position is shared by some civilian judges as well, as was made clear last year in one of the most prominent forced disappearance cases from Guerrero state.

In August 2005, the special prosecutor filed charges against Gen. Francisco Quirós Hermosillo, accusing him of being responsible for the “disappearance” of Rosendo Radilla. The judge issued an arrest warrant, but then turned the case over to the military justice system, arguing Quirós Hermosillo should be tried in a military court since he was being prosecuted for an act that he had allegedly committed while on duty. Despite two appeals by the Special Prosecutor’s Office, the case was sent to military courts.²⁶¹ The military judge that received the case actually sought to return it to civilian jurisdiction, arguing that he did not have jurisdiction to evaluate the former general for these acts.²⁶² But a federal civilian court ruled once again that the case did in fact belong within the military justice system.²⁶³

Given that military officers are implicated in many, if not most, of the forced disappearance cases, the precedent that has been set here is likely to have profoundly negative ramifications for Mexico’s efforts to establish accountability for past abuses. The country will be once again leaving the task of justice in the hands of the institution that carried out the crimes in the first place. It will, in other words, be perpetuating the old system in which those involved in public security are not bound by the rule of law.

Shortcomings of the Special Prosecutor’s Office

The Special Prosecutor’s Office was seriously understaffed and under-funded during the first year and a half of its operation. The chief problem at the outset was shortage of personnel. The office operated with thirty-five prosecutors during its first years—not enough, according to officials within the Special Prosecutor’s Office, to cover the heavy load of difficult cases. In addition to the shortage of staff, the Special Prosecutor’s

²⁶¹ When the Special Prosecutor’s Office appealed the decision on August 15, 2005, the same judge decided the case had already been sent to military jurisdiction. On August 19, 2005, the Special Prosecutor’s Office appealed before a higher court (*Primer Tribunal Unitario de Circuito*), which denied the appeal on the same grounds.

²⁶² The judge concluded that it did not have jurisdiction to evaluate the case because the acts did not constitute a crime committed as a consequence of his military duties, and argued that, according to Article 13 of the Code of Military Justice, military jurisdiction was restrictive.

²⁶³ The federal court based its decision on the 2005 ruling of the Supreme Court (Mexican Supreme Court, Primera Sala, Tesis 148/2005, October 26, 2005).\

Office had been plagued by a lack of material resources. One veteran prosecutor told Human Rights Watch at the time that in his fifteen years working with the PGR, he had never seen such a lack of resources.²⁶⁴

During the second year of operation, the number of prosecutors assigned to the Special Prosecutor's Office was increased to fifty-seven, and in the following months the special prosecutor and his staff reported an increase in resources. In January 2006, the directors of each prosecutorial team told Human Rights Watch that they had adequate staff and resources to carry out their work.

Yet the lack of resources remained acute in one area: the documentation team. During the first year and a half of operation, the research team consisted of only five members. The director of the team at the time told Human Rights Watch that, with this number, it was virtually impossible to do a "thorough and irrefutable job."²⁶⁵

The staff of the documentation center has since grown. In January 2006, it included twenty-five people. Yet the director of the area, José Sotelo, reported that their salaries were too small to attract experienced researchers. Moreover, it was difficult to retain people because of the failure of the PGR to pay them on a regular basis. Due to administrative mismanagement, the researchers were forced to go many months without being paid for their work. Many were hired over the course of 2004. They were not paid until April 2005 for their work in 2004, and not paid for the work completed during the first half of 2005 until September of that year. At this writing, they still had not been paid for the work done since July 2005.

In addition to working without pay, the researchers were forced to work without basic resources. According to Sotelo, they also had no operating budget and frequently had to pay their operating expenses (including costly travel) out of their own pockets. "The conditions weren't there for doing this work," Sotelo told Human Rights Watch. "The obstacles made it almost impossible."²⁶⁶

The documentation team's efforts might have benefited from the active participation of the Special Prosecutor's Support Committee. Indeed, when President Fox announced the creation of the office in 2001, it appeared that this committee would serve at least

²⁶⁴ Human Rights Watch interview with official in the Special Prosecutor's Office, May 2003.

²⁶⁵ Human Rights Watch interview with María de los Angeles Magdalena, Mexico City, May 28, 2003.

²⁶⁶ Human Rights Watch telephone interview with José Sotelo, Mexico City, director of the historical documentation team of the Special Prosecutor's Office, March 9, 2006.

part of the function of a truth commission—by involving prominent citizens in the efforts to investigate and document the past abuses. Yet the special prosecutor chose not to engage the committee in this way. And, as a result, it has played only a secondary role in the process to date.

Recommendations

Months before creating the Special Prosecutor's Office, the Fox administration insisted that it would not pursue any initiative to address past abuses that might undermine the existing institutions of the justice sector. But, by allowing the special prosecutor to falter, the government has merely helped to perpetuate the underlying problem that created the need for a special initiative in the first place: the failure of those institutions to assume their responsibility for promoting accountability in human rights cases. If the work begun by the Special Prosecutor's Office is never completed, the initiative will ultimately serve to reaffirm the worst practices of a justice system that allowed the most serious human rights violations to go unpunished for decades.

Such an outcome is still, by no means, inevitable. The work of the Special Prosecutor's Office can be salvaged. But it will require taking aggressive measures to overcome the obstacles to accountability identified in this chapter.

1) End military obstruction

The one state institution that has the most to contribute to the investigation and prosecution of these crimes is the Defense Ministry. But, instead, it has chosen not to collaborate in a meaningful fashion, thereby defying the presidential order that established the Special Prosecutor's Office and violating its obligation to Mexican society to uphold the rule of law.

This open defiance of the civilian government represents one of the starkest examples of Mexico's ongoing failure to establish democratic accountability. Ending it, therefore, is crucial not only to promote accountability for past atrocities, but also to advance the country's transition to democracy.

Toward that end, the civilian government must order the minister of defense to take steps to ensure that the PGJM provides full support to the prosecutors handling cases of past atrocities. Specifically, the defense minister should order the PGJM to do all it can to locate documents and information requested by prosecutors investigating human rights cases. The PGJM should also cede jurisdiction over cases involving egregious human rights abuses to civilian prosecutors.

2) Expand Tools Available to Prosecutors

The Special Prosecutor's Office has had almost no success in obtaining useful information from current and former security forces. It is not surprising that these officials refuse to collaborate: they have little to gain and potentially much to lose by doing so. And, so long as prosecutors are unable to offer meaningful incentives for collaboration, it is unlikely they will ever break this wall of silence.

A second critical step to ensuring successful prosecutions of these cases is to grant prosecutors the power to provide incentives to potential witnesses. This could take the form of a new law that would allow prosecutors to offer reductions in jail sentences to individuals who provide information about the human rights crimes under investigation. Such authority is available to and regularly employed by prosecutors in the United States (in the form of "plea bargaining") and recently has proved effective in Peru, where it was granted to the special prosecutor charged with investigating abuses committed under the regime of Alberto Fujimori.

Another measure that could increase prosecutors' investigative powers is to grant them the possibility of offering monetary rewards to individuals who provide information that helps to determine the fate of the people "disappeared" during the "dirty war." Rewards should also be made available to individuals who provide information that leads to the capture of suspects for whom arrest warrants are outstanding. To complement these incentives for witnesses and suspects to testify, prosecutors must be able to offer a "witness protection" program to ensure the safety of individuals that decide to collaborate with the investigations.²⁶⁷

The law would have to be designed with great care to prevent abuses—by either suspects or prosecutors. It would not be applicable to people who bear major responsibility for human rights violations, but rather to minor offenders who played a small role in crimes conceived by others. The law would also need to clearly establish the obligation of every person and government agency that holds valuable documentation to share with prosecutors documents that could serve as evidence in trial.

²⁶⁷ Articles 35-39 (Chapter 7) of the Federal Law against Organized Crime.

In Mexico, these faculties have already been granted to prosecutors pursuing cases against organized crime, albeit with mixed results.

3) Create a Truth Commission

A final crucial step for reinforcing efforts to prosecute these cases is to establish a truth commission that has the resources, expertise, and independence necessary to advance the investigation that the Special Prosecutor's Office has begun.

There are several reasons for why creating an independent truth commission makes good sense today. The first is the difficulty of the research. Given the enormous amount of information in the National Archive, and the difficulty of sifting through it, the job requires a team of top-notch researchers, with the necessary resources, experience, and expertise.

A second reason for a truth commission is that much of the most valuable documentation includes material that is likely to be restricted to ordinary researchers on the grounds that it contains "personal data." Indeed much of this information should be restricted, such as the reports on declarations made under torture, which involve allegations, true and false, about neighbors and friends. According the director of the special prosecutor's documentation team, the material is explosive and needs to be handled with utmost care. A truth commission would provide the institutional and legal framework in which expert researchers could gain unlimited access to this material without violating the privacy rights of individuals.

A third reason has to do with credibility. Several journalists who worked extensively on these issues have told Human Rights Watch that they believe that there are former military and other officials who might be willing to turn over information in their possession (such as files from personal archives), but only if they believed the recipients would first, respect their confidentiality; and second, put the information to good use. In other words, they would be willing to assume the risks of helping Mexico clarify these crimes if they could lessen that risk and believed the risk was not undertaken in vain. In short, they would be more likely to turn over information to an investigative body if they believed that the investigation were going to lead somewhere.

A truth commission will only be worthwhile, however, if it is done right. It must be an independent, non-partisan body, made up of knowledgeable and prestigious members. It must also be allocated the resources necessary to conduct thorough and fair investigations. It must be required to operate with full transparency. And it must be granted the legal authority to obtain documents and cooperation from other government institutions. Anything short of this will produce a commission that lacks the credibility needed to carry out its tasks effectively.

Most importantly, the truth commission should not be conceived of as a substitute for prosecutions. Its aim should be to complement and strengthen the work of the prosecutors handling these cases. Specifically, when it obtains incriminating evidence, it should transfer it directly to the pertinent judicial authorities.

If President Fox or his successor offers Mexico a truth commission as a consolation prize—and gives it the same half-hearted support that the Special Prosecutor’s Office has received—then Mexico will merely end up with two failures instead of one.

V. Law Enforcement: Ongoing Abuses that Undermine Public Security

If Mexico no longer engages in political violence as a matter of state policy, it does still tolerate, encourage, and—in some cases—even mandate human rights abuses in the name of public security. The most notorious of these abuses is the use of torture by law enforcement agents to obtain confessions from criminal suspects. Another is the systematic misuse of preventive detention that results in innocent people being locked up with hardened criminals for months on end.

One of the most important initiatives of the Fox presidency has been a proposed overhaul of the justice system that would—among other things—address the root causes of these two problems. While the reform package also contains several flawed provisions, the specific measures aimed at curbing the use of torture and excessive use of preventive detention are urgently needed.

Unfortunately, these proposed reforms have languished in Congress for over two years, and their prospects for passage in the near future do not seem promising. That could change, however, but only if some of the country's political leaders prove willing to publicly counter what is the single most salient obstacle to progress in this area: the common misperception that public security and human rights are conflicting priorities.

Public insecurity is a top concern of the Mexican public, as well it should be. Mexicans have a fundamental right to protection from crime—as well as a right to justice when they are victims of crime. Yet there is a broad consensus in Mexico today that the state has largely failed to provide either. This consensus has fueled widespread discontent within Mexican society, which manifested itself most dramatically during the Fox presidency in one of the largest public demonstrations in recent Mexican history—the 2004 Citizen's March Against Delinquency and Impunity.

Politicians and public security officials routinely respond to this legitimate demand by promising to “get tough” on crime. They pass laws imposing harsher sentences. They boast of the number of “criminals” thrown in jail every year. They increase the number of crimes for which preventive detention is mandatory. And they disregard calls for the eradication of abusive practices like the use of torture and the misuse of preventive detention.

While it is one thing to be tough, it is quite another to be effective. The human rights components of Fox's justice reform proposal have encountered resistance because they appear to hinder the political imperative to get tough on crime. Yet, in fact, the measures aimed at curbing abuses are needed not only to promote human rights, but also to make the country's criminal justice system more effective in promoting public security.

Take torture, for example. The main reason many Mexican law enforcement agents continue to practice torture is that it allows them to obtain confessions that can be used to convict people at trial. It is easier, they find, to beat a confession out of someone than to conduct a serious investigation. The victims are often unable or unwilling (due to fear) to prove the abuse took place. And judges routinely accept the coerced confessions as proof of guilt, even when the victims retract them later at trial. The result is a travesty for human rights and public security: innocent people confess to crimes they didn't commit, while those who did indeed commit the crimes go free.

The Fox proposal would curb this practice by removing the perverse incentive that promotes it. A modification of Article 20 of the Constitution would establish that only confessions given directly before a judge could be used to convict someone of a crime. The coerced confession extracted in a backroom or basement corridor would no longer be admissible at trial.

Opponents of the measure argue that it would weaken the hand of law enforcement—and thereby strengthen the hand of criminals. But they are wrong. Rather than undermining prosecutors, the measure would merely force them to do their job better. Unable to rely on coerced confessions, they would need to conduct more thorough investigations in order to obtain convictions.

The systematic misuse of preventive detention presents a similar challenge. Under current law in most parts of Mexico, anyone charged with a "serious crime" is automatically jailed until trial. A judge has no discretion to grant provisional liberty to these suspects—not even to those who seem unlikely to elude justice and pose no apparent danger to society. Over the years, popular demand for anti-crime measures has prompted legislators at both the state and federal level to expand the list of these "serious" crimes to ever more absurd proportions. So, for example, in the state of Jalisco today, a robbery carried out by more than one person at night is a "serious" crime—which means two men charged with robbing a chocolate bar after sunset will automatically face months in prison while awaiting trial.

The result: more than 40 percent of prisoners in Mexico have not been convicted of the crime for which they are being held; many of these prison inmates have been charged with only nonviolent or relatively minor crimes; many will eventually be acquitted; and many pose no clear threat to society. Under international law, they are entitled to provisional liberty. But in Mexico, they are locked up for months on end, often with convicted criminals.

The Fox proposal has taken an important first step toward reducing this abusive practice at the federal level by allowing federal judges to grant provisional liberty in cases involving some “serious” crimes. The proposal also calls for a reform of the Mexican Constitution that would establish a “presumption of innocence” for individuals not convicted of a crime. This constitutional guarantee could be used to compel further changes in federal criminal law, as well as changes in the criminal law of the states to reduce the excessive use of preventive detention at the local level.

As with the anti-torture reform proposals, opponents argue that the measures aimed to curb preventive detention would weaken law enforcement. But once again, they are wrong. As with torture, the excessive use of preventive detention constitutes a serious threat to public security. The cost of incarceration of tens of thousands of nonviolent prisoners diverts public funds that would more wisely be invested in efforts to combat violent crime. It also contributes to the severe overcrowding of Mexican prisons, which undermines the ability of penal authorities to control inmate populations. This, in turn, results in a prison system where petty criminals—not to mention innocent suspects—must endure months living under the influence and even supervision of hardened criminals. The end result is a prison system that functions as something of a finishing school for delinquents.

The measures proposed to address the problems of torture and excessive use of preventive detention are part of a much broader reform package aimed at establishing an adversarial system of justice in Mexico. Not all the measures included in this package are positive from a human rights perspective. In fact, some are quite dangerous, such as a proposed reform of the Constitution that would effectively suspend basic due process guarantees in cases involving “organized crime.” Even the measure that could help reduce the excessive use of preventive detention contains serious shortcomings, as it does not end the automatic application of preventive detention for many “serious” crimes, nor for “minor” crimes when the accused cannot guarantee the payment of reparations to the victim.

Yet, however flawed the reform package may be, the measures to address the root causes of torture and the misuse of preventive detention represent a crucial break from the past. Both are imperative for promoting human rights and public security in Mexico. What the country now needs is for someone to show the political leadership necessary to persuade the public of the proposed reforms' importance—and thereby transform them into a political imperative.

Torture

Mexico's Open Secret²⁶⁸

Among the human rights scandals that erupted during the Fox presidency, three of the most prominent were the prosecution of environmentalist peasants in Guerrero, the crackdown on protestors in Guadalajara, and ongoing impunity for the Ciudad Juárez murders. On the face of it, the three have little in common. But in fact, despite their obvious differences, all three share one important feature with countless other human rights cases that preceded them: the use of torture.

The Environmentalist Peasants of Guerrero

One of the earliest abuse cases to receive national and international attention during the Fox presidency involved Rodolfo Montiel and Teodoro Cabrera, two peasant leaders involved in environmental activism who were detained in 1999 by soldiers in the mountains of Guerrero. The two were held illegally by the military for two days and, when finally presented before civilian authorities, confessed to having been caught with the illegal drugs and weapons that the soldiers claimed to have found on them. Later they recanted these confessions before a judge, claiming they had been subjected to torture.

The CNDH would eventually determine that the soldiers had planted at least some of the evidence that the two men later confessed to possessing.²⁶⁹ By planting it, the soldiers gave themselves grounds to detain the men, and then by failing to hand them over promptly to the civilian authorities, they had the opportunity to torture or intimidate them into making false confessions. After the military refused to cooperate with investigators, the CNDH also concluded—based on a legal presumption—that the two men had in fact been tortured.²⁷⁰

²⁶⁸ Parts of this section were originally published in Human Rights Watch/Americas, "Mexico – Military Injustice: Mexico's Failure to Punish Army Abuses," *A Human Rights Watch Report*, vol. 13, no. 4(B), December 2001.

²⁶⁹ CNDH, Recommendation 08/2000, July 14, 2000.

²⁷⁰ *Ibid.*

Despite the CNDH's findings, however, a judge convicted the two men, basing his decision at least in part on their retracted confession, as well as on the planted evidence.²⁷¹ It was only after a sustained national and international campaign brought attention to the case that this miscarriage of justice was rectified and the two men were released.

Crackdown in Guadalajara

On May 28, 2004, in Guadalajara, after some participants in an anti-globalization demonstration clashed with security forces, Jalisco state police rounded up over a hundred people, some as they sat in public parks or strolled down the street, and some even as they were being treated in a Red Cross clinic. The majority of the detainees were then held illegally, incommunicado, for over two days. During this time, more than seventy people were arbitrarily detained. Fifty-five of them were subject to cruel and inhumane treatment, including nineteen who were tortured with the aim of coercing them into signing self-incriminating statements and providing information.²⁷²

The experience of twenty-six-year-old university student Norberto Ulloa Martínez was typical. "I was taken alone to a room by four policemen," Ulloa told Human Rights Watch. "They punched and kicked me in the head, the back, the legs, and knees and threatened to kill me if I didn't sign the confession they had written. One of them carried a pistol. He said, 'if you don't sign, I will kill you.' I signed the declaration."²⁷³

Impunity in Ciudad Juárez

A third prominent case involved law enforcement authorities' handling of cases involving the murder and "disappearance" of women in Ciudad Juárez, Chihuahua. Responding to mounting local, national, and international pressure to address the hundreds of cases of murdered and missing women, local authorities relied on coerced confessions to generate scapegoats. In 2003, the CNDH reported having found eighty-nine instances in which the suspects in these crimes had "spontaneously confessed"

²⁷¹ Magistrate in the First Unitary Tribunal of the 21st Circuit, Decision in case 406/2000, October 26, 2000.

²⁷² CNDH, "Informe Especial de la Comisión Nacional de los Derechos Humanos Relativo a los Hechos de Violencia Suscitados en la Ciudad de Guadalajara, Jalisco, el 28 de Mayo del 2004, con Motivo de la Celebración de la III Cumbre de América Latina, el Caribe y la Unión Europea," [online] <http://www.cndh.org.mx/lacndh/informes/espec/jalisco/index.htm> (retrieved December 2005), 2004, part VI.

²⁷³ Human Rights Watch telephone interview with Norberto Ulloa Martínez, June 21, 2006.

before the public prosecutor, only to recant the confession before a judge, claiming that they had been subjected to torture.²⁷⁴

One case involved two bus drivers who were detained in 2001 and confessed to raping and murdering eight young women and dumping their bodies in a cotton field—only to recant as soon as they were brought before a judge. A medical examination administered after they had spent a day in police custody found they had suffered first degree burns on their genitals—injuries that had not been observed in another medical examination shortly after their detention. This medical evidence, along with the fact that entire lines in the men’s separate police declarations were identical, led the CNDH to conclude that they had in fact been tortured.²⁷⁵ Despite this finding—and despite the fact that a forensic expert reported having been pressured to plant evidence against the two men, and the fact that DNA tests of the presumed victims did not match the corpses the men had allegedly dumped; and the fact that one of their defense attorneys was gunned down by police in the street; and the fact that one of two defendants later died under suspicious circumstances in detention—in October 2004 the surviving defendant, Victor Javier García Uribe, was sentenced to fifty years in prison for the murders. In July 2005, after an appeal, Mr. García Uribe was freed due to lack of evidence.²⁷⁶

Another suspect who suffered similar abuse is David Meza. In May 2003, after hearing that his teenage cousin had “disappeared” in Ciudad Juárez, twenty-six year-old David Meza traveled from his home in Chiapas to help his family search for her. He soon became involved in local efforts to press for progress on the missing women cases, organizing acts of civil disobedience and publicly ridiculing the state attorney general. In July, police announced that they had found his cousin’s body and summoned Meza to police headquarters. Meza then confessed to the murder—but only, he claims, after two days of torture. He told Human Rights Watch that he was subject to electrical shocks, as well as cuts on his scrotum, chest, and arms, and deprived of sleep for two days. Even though he recanted his confession before the judge, and even there was no other evidence linking Mr. Meza to his cousin’s murder, he has been in preventive detention for over two and a half years.²⁷⁷ The Chihuahua State Human Rights Commission has certified that Mr. Meza was abused while in custody of the state judicial police and issued

²⁷⁴ CNDH, “Informe Especial de la Comisión Nacional de los Derechos Humanos sobre los Casos de Homicidios y Desapariciones de Mujeres en el Municipio de Juárez, [online] Chihuahua,” <http://www.cndh.org.mx/lacndh/informes/espec/juarez2003/index.htm> (retrieved December 2005), 2003, part VI.

²⁷⁵ *Ibid.*

²⁷⁶ Chihuahua Supreme Tribunal, Decision in case 474/04, , July 15, 2005.

²⁷⁷ Human Rights Watch interview with David Meza Argueta, Chihuahua City, Mexico, November 15, 2005.

a recommendation in April 2005 requesting the state prosecutor's office to initiate legal action against the responsible officers.²⁷⁸

Only the Tip of the Iceberg

While those three cases received unusual attention within Mexico and abroad, they were hardly isolated incidents. In Chihuahua, for example, the abusive treatment of detainees extends far beyond suspects in the cases of killings of women. In its 2003 report on Ciudad Juárez, the CNDH observed that the use of physical or psychological violence to obtain confessions appeared to be a regular practice within the state prosecutor's office.²⁷⁹ And indeed, Chihuahua's current attorney general, Patricia González, told Human Rights Watch that during her twenty-four years as a criminal judge, she had encountered cases of torture "all the time."²⁸⁰

A disturbing example from Chihuahua involves the case of "Juan José Pérez," who was arrested in 2003 by five police officers when he was in his cell-phone store in Ciudad Juárez.²⁸¹ Pérez told Human Rights Watch he was illegally detained for two days and physically and psychologically abused to confess to having committed a kidnapping. According to the state prosecutor's office, Pérez remained in preventive detention until April 2005, when a judge declared he was innocent. In another 2003 case from Chihuahua, police forcibly removed "Andrés Martínez" from his house one night in a town near Chihuahua City. They brought him to a government office where they tortured him for three hours, insisting he confess to a kidnapping.²⁸² According to the state prosecutor's office, which has initiated proceedings against the police officers suspected of carrying out the abuse, they beat him severely, gave him electrical shocks in his genitals, inserted a broom stick in his anus, and placed a plastic bag on his head until he passed out.

Similarly, in Jalisco, the use of torture has not been limited to the case of the anti-globalization protestors. In July 2003, for example, Eduardo Guadalupe Jaime Díaz was detained in Zapopan, Jalisco, and taken to the state prosecutor's office. According to

²⁷⁸ Chihuahua State Human Rights Commission, Recommendation 12/2005, April 25, 2005.

²⁷⁹ CNDH, "Informe Especial de la Comisión Nacional de los Derechos Humanos sobre los Casos de Homicidios y Desapariciones de Mujeres en el Municipio de Juárez, [online] Chihuahua," <http://www.cndh.org.mx/lacndh/informes/espec/juarez2003/index.htm> (retrieved December 2005), 2003, part VI.

²⁸⁰ Human Rights Watch interview with Patricia González, Chihuahua State Prosecutor, Chihuahua City, Mexico, November 15, 2005.

²⁸¹ Human Rights Watch interview with "Juan José Pérez" (not his real name), Chihuahua City, Mexico, November 15, 2005.

²⁸² Human Rights Watch interview with "Andrés Martínez" (not his real name), Chihuahua City, Mexico, November 15, 2005.

the State Human Rights Commission, Díaz was tortured by seven police officers who beat him, partially suffocated him with a plastic bag, and applied electrical shocks to various parts of his body, seeking to induce him to confess he had robbed a beauty parlor.²⁸³

In Guerrero, as well, there have been torture cases that have escaped outside attention. In February 2000, for example, Álvaro García Ávila, Juan García Ávila, and Alfredo García Torres were arrested by soldiers in their homes in the community of Las Palancas and taken to a military base. Álvaro García Ávila and García Torres told Human Rights Watch they were badly beaten and tortured at the military base. García Torres said that soldiers beat him, threatened to kill him, and placed bags over his head to suffocate him. The soldiers accused him of having killed several police officers in 1999.²⁸⁴ They also accused him of being a guerrilla and demanded he tell them the whereabouts of the guerrilla commander. García Ávila also reported being beaten and asked about the commander. That night, they were transferred into the custody of the public prosecutor in Zihuatanejo. They were beaten again and forced to sign confessions.²⁸⁵

Chihuahua, Jalisco, and Guerrero are by no means the only states where torture is a chronic problem. State human rights commissions have documented cases that show widespread use of torture throughout Mexico. For example, in June 2001, Moisés Alberto Arceo Pérez, accused of robbing a vehicle, was tortured by judicial police officers and prosecutors in Yucatán.²⁸⁶ In April 2003, Juan Carlos Martínez Berrios, alleged to have kidnapped his cousin, was tortured by prosecutors in the State of Mexico; Martínez Berrios died a few days later as a result of the torture.²⁸⁷ In December 2003, Esteban Gregorio Morales Martínez and Martín Vásquez Pérez were tortured by judicial police in Oaxaca seeking to establish they had committed a robbery.²⁸⁸ In March 2004, Omar Ibarra Ávalos, accused of robbing car radios, was tortured by judicial police

²⁸³ Jalisco State Human Rights Commission, Recommendation 10/2004, December 22, 2004.

²⁸⁴ On March 5, 1999, judicial police arrived in the community of Rancho Nuevo where, the day before, a memorial service had been held for Alvaro García's brother, Otoniel García Torres, who had been shot to death two weeks earlier. According to community members, Otoniel García had attempted to prevent illegal foresting by an official in the *ejido* of Río Frío. The official responded by seeking the help of a local political boss, who in turn hired the police to carry out the killing. According to community witnesses, the police arrived shooting and the locals responded, killing four police and three *madrinas* (paramilitaries) who had accompanied them. [Undated letter by Luis Torres, signed by Estafania Torres, Marria Cruz Yañez, Salud Torres Montiel, Guadalupe Torres, Epifanio Peralta, Conseción Segura. Also, Human Rights Watch interviews with Álvaro García Avila and Alfredo García Torres, Acapulco, Guerrero, Mexico, March 31, 2001.]

²⁸⁵ Human Rights Watch interviews with Alvaro García Avila and Alfredo García Torres, Acapulco, Guerrero, March 31, 2001.

²⁸⁶ Yucatán State Human Rights Commission, Resolution on file C.D.H.Y. 132/III/2001, April 1st, 2002.

²⁸⁷ State of Mexico Human Rights Commission, Recommendation 21/2004, March 12, 2004.

²⁸⁸ Oaxaca State Human Rights Commission, Recommendation 48/2004, November 19, 2004.

officers in Nayarit.²⁸⁹ In December 2004, Raúl Silva Espinosa was tortured by judicial police officers in Querétaro seeking to establish he had participated in a robbery.²⁹⁰

State commissions continue to receive regular reports of torture. For example, in 2005, the Oaxaca State Human Rights Commission received seven complaints in which torture is alleged. Human Rights Watch obtained documentation on one of these complaints, which refers to the case of thirty-five-year-old Feliciano Julián Gómez Ortiz. Gómez Ortiz, accused of having stolen a cargo of Nestlé products, was tortured in July 2005. Four police officers arrived at his car repair shop in Tlaxiaco, Oaxaca, searching for someone else. When they could not find that other person, they took him instead. After he was tortured for three hours by two police officers, one of them pulled out a picture from a drawer and told the other one: “this is not the asshole we are looking for.”²⁹¹

According to a 2003 CNDH study, there were some 588 cases of torture (many involving more than one victim) documented by state and national human rights ombudsmen between 1990 and 2003.²⁹² A 2005 CNDH general recommendation on the practice of torture reiterated that the problem of torture in the justice system persists.²⁹³

There are good reasons to believe, moreover, that the documented cases represent only a small fraction of the total number. One is the fact that torture is notoriously difficult to document. There are usually no witnesses to the crime, and it often leaves no physical scars on the victim. Consequently, the only evidence of torture is likely to be the word of the victim, which is often insufficient to prove that the crime took place.

And even this evidence may often never emerge, since a principal effect of the torture—and often its main objective—is to intimidate the victim into silence. For example, “Andrés Martínez” told Human Rights Watch that he is now “scared of everything.” A year after he pressed charges against the police officers that had tortured him, a man

²⁸⁹ Commission for the Defense of Human Rights of the State of Nayarit, Recommendation 28/2004, October 19, 2004.

²⁹⁰ Queretaro State Human Rights Commission, Recommendation (157)/05/2005, May 9, 2005.

²⁹¹ Human Rights Watch interview with Feliciano Julián Gómez Ortiz, his wife Esperanza, and his two sons, as well as with his lawyers from the Center for Human Rights and Advice for Indigenous Populations (*Centro de Derechos Humanos y Asesoría para Pueblos Indígenas*, CEDHAPI), Tlaxiaco, Oaxaca, Mexico, November 21, 2005.

²⁹² Ricardo Hernández Forcada y María Elena Lugo Garfias, “Algunas notas sobre la tortura en México,” (Mexico, CNDH: 2004), p. 139.

²⁹³ CNDH, “Recomendación General 10: Sobre la Práctica de la Tortura,” November 17, 2005.

came to visit him and “suggested” he withdraw his case. He did not do that, but he did modify his declaration to remove the statement saying that he had recognized the torturers. Another man who had been tortured at the same time later told Martínez that his fear of reprisals had deterred him from doing anything that would draw attention to his torture, including even going to the hospital to get medical assistance.²⁹⁴

A second consideration that may explain why torture is still such a widespread phenomenon in Mexico is that it is very rarely sanctioned. Although there are a series of norms that were adopted to initiate cases against public servants that commit acts of torture, the CNDH has recently held that there is a very high rate of impunity for torture practices in Mexico.²⁹⁵

Those states that try to prosecute these cases face considerable obstacles. In Oaxaca, for example, a special office has been set up within the state prosecutor’s office to handle torture allegations. Yet officials from the state human rights commission told Human Rights Watch that this office routinely relabeled these as “abuse of authority” cases (which carry lighter sanctions).²⁹⁶ In Chihuahua, the current state attorney general set out to investigate torture allegations when she took office in 2004. But officials from the office in charge of these investigations told Human Rights Watch that progress had been limited by a variety of factors—including the fact that they received information on torture cases a long time after the alleged abuse took place, as well as the fact that police officers were reluctant to collaborate with the investigation or arrest their colleagues.²⁹⁷

The Incentive to Torture

Yet the reason torture continues in Mexico is not so much because people can get away with it. It is, rather, because torture fulfills a significant function within the Mexican criminal justice system: it generates confessions. According to the CNDH study, in over 90 percent of the cases documented by the federal and state ombudsmen, torture had been used to force a confession from the victim.²⁹⁸

²⁹⁴ Human Rights Watch interview with “Andrés Martínez” (not his real name), Chihuahua City, Mexico, November 15, 2005.

²⁹⁵ CNDH, “Recomendación General 10: Sobre la Práctica de la Tortura,” November 17, 2005.

²⁹⁶ Human Rights Watch interview with Hugo López Hernández, visitador general, and Marcos Figueroa Calvo, executive secretary, Oaxaca State Human Rights Commission, Oaxaca, Oaxaca, Mexico, November 22, 2005.

²⁹⁷ Email correspondence with a member of the office in charge of investigating torture allegations (*Contraloría de Asuntos Internos*) in the State Attorney General’s Office, February 10, 2006.

²⁹⁸ Ricardo Hernández Forcada y María Elena Lugo Garfías, “Algunas notas sobre la tortura en México,” (Mexico, CNDH: 2004), p. 139.

Forced confessions can serve multiple purposes. One is to provide evidence—both the self-incriminating statement itself and any leads a victim might provide to other witnesses and physical evidence—that the victim is guilty of a crime. But if torture is typically intended to force the truth out of a criminal, it's just as likely to force a lie out of someone who is innocent. It can, consequently, serve an even more sinister purpose—providing law enforcement agents cover for their own criminal activities. When, for instance, agents illegally detain people without an arrest warrant, they can force the detainees to say they had been caught committing a crime—i.e., *in flagrante delicto*—thereby justifying the detention. In this way, torture facilitates the practice of arbitrary detention—which is, itself, a chronic human rights problem in Mexico.²⁹⁹

Law enforcement agents know that even if a torture victim retracts a confession later at trial, the judge is likely to give greater weight to the confession than to the retraction, in accordance with Mexico's peculiar version of the "principle of procedural immediacy." In other countries, this principle is understood to mean that the evidence presented directly before the judge is likely to be more reliable and, consequently, deserves greater weight as evidence in a trial. But Mexico has turned the concept on its head, with judges giving greater weight to statements made most "immediately" after the crime—i.e., before the suspect appears in front of the judge. According to the Mexican Supreme Court, first declarations have more evidentiary value since they are made without any external influence and without the possibility to reflect on what happened.³⁰⁰

In a series of rulings in 1995, the Supreme Court held that a confession can only serve to prove guilt when it is corroborated by other evidence.³⁰¹ But these rulings have not changed the practice on the ground. Judges still regularly apply the Mexican version of the principle of procedural immediacy. As a result, instead of serving as a procedural

²⁹⁹ Arbitrary detention is related to the lack of powers of law enforcement agents to investigate crimes. Since law enforcement agents have no investigative powers, they can only combat crime by detaining individuals in the street if they are caught committing a crime. As we discuss in the section on excessive use of preventive detention, police officers usually have to fill a quota of detained individuals. The incentive to detain people is even greater if law enforcement agents can use coercion to obtain a confession that will later be used as evidence in trial because they can virtually detain anyone and then use a coerced confession against them.

This situation is exacerbated by the fact that arbitrary detention is not a typified crime in Mexican criminal codes, it is generally possible to detain someone *in flagranti* if a third person indicates that the accused was seen committing a crime, and it is not possible to present an injunction against an arbitrary detention if the accused is then formally charged with a crime (because the appeal becomes moot).

³⁰⁰ Mexican Supreme Court, Primera Sala, Tesis 106, Sexta Época, Apéndice de 1995, tomo II, Parte SCJN, p. 60. See also Segundo Tribunal Colegiado del Sexto Circuito, Tesis: VI.2o. J/61, Novena Época, Semanario Judicial de la Federación y su Gaceta, Tomo: IV, August 1996, p. 576.

³⁰¹ Mexican Supreme Court, Primera Sala, Tesis 108, Sexta Época, Apéndice de 1995, tomo II, Parte SCJN, p. 61.

guarantee for the accused, in practice, the principle of procedural immediacy in Mexico does precisely the opposite—facilitating, if not encouraging, abuse.

Most of the torture cases mentioned above fit this pattern. Álvaro García Ávila and Juan García Ávila, for example, were convicted on weapons charges based on coerced confession in which they admitted to possessing illegal firearms, which were corroborated by the testimony of three of the soldiers who had detained them. The judge in their case disregarded their subsequent declarations in which the two denied the charges to which they had confessed, claiming that the previous statements had been made under coercion. Their innocence was corroborated by all the civilian witnesses called to testify, as well as by a fourth soldier. Nevertheless, the judge hearing the case, applying the principle of procedural immediacy, chose to rely on the recanted confessions.³⁰²

Similarly, Victor García Uribe was found guilty in 2004 of several of the Ciudad Juárez murders by a judge who based the verdict almost exclusively on Uribe's confession, even though it was contradicted by other evidence.³⁰³

To overcome the immediacy principle, these torture victims must prove that their confessions were coerced. According to the Mexican Supreme Court, this recantation by the accused is not, by itself, sufficient to eliminate evidentiary value of the confession. Instead the accused must present evidence in favor of the claim that the confession was coerced.³⁰⁴

But, as we noted earlier, proving coercion and even torture can be difficult, if not impossible, given the likely absence of witnesses and physical evidence. And even when there is physical evidence of torture, the defendant may have a difficult time convincing a court to disregard an allegedly coerced confession. This difficulty was clear, for example, in the case *Martin Del Campo Dodd*.³⁰⁵ After being detained by Mexico City

³⁰² Magistrate of the Second Unitary Tribunal of the 21st Circuit, Decision in criminal case 79/2000, January 31, 2001. In the same trial, García Torres was convicted on drug charges, based on the testimony of the soldiers who said they captured him while he was carrying three kilos of poppy seed down the road from the house. Although he had never confessed to this, the judge dismissed his testimony denying his guilt and the corroborating testimony of eyewitnesses, on the grounds that they "lack[ed] juridical relevance in the face of the direct and categorical accusations made by the captors."

³⁰³ Chihuahua Supreme Tribunal, Case 474/04, July 14, 2005, p. 47.

³⁰⁴ Mexican Supreme Court, Primera Sala, Tesis 104, Sexta Época, Apéndice de 1995, tomo II, Parte SCJN, p. 59.

³⁰⁵ Inter-American Court on Human Rights, "Case Martin del Campo Dodd v. Mexico – Preliminary Objections," September 3, 2004.

police in 1992, Del Campo confessed to murdering his sister and brother-in-law, only to recant at trial, arguing that the confession had been extracted under torture. A medical examination at the time of his detention documented the injuries that he claimed the police had inflicted. And later, the prosecutor's office determined that the police had indeed arbitrarily detained and beaten Del Campo. Yet the trial and appellate courts ruled that Del Campo had failed to disprove the claim he had made in his confession that his wounds had been self-inflicted. In other words, the allegedly coerced confession helped provide the grounds for refuting the claim that it had been coerced.

What is even more remarkable is the fact that, even when torture is proven, the victim can still be convicted with evidence obtained through the coerced confession. Mexican courts have held that, so long as the confession has been corroborated by other information, the fact that a confession has been obtained through physical violence should not be the basis for acquitting the suspect.³⁰⁶ While the coerced confession may itself be thrown out, the leads it generates can still serve as evidence at trial. Indeed, some Mexican courts have even found—in clear violation of international law—that a coerced confession can itself be admissible at trial if it is corroborated by other evidence.³⁰⁷

In sum, Mexico's criminal justice system currently encourages torture by allowing law enforcement agents to use coerced confessions to achieve their ends—whether those ends are obtaining criminal convictions or covering up illegal activity. As long as it fulfills this function, the practice of torture in Mexico is unlikely to go away.

Mexico's Obligations Under International Law

International human rights law categorically prohibits torture, as well as cruel, inhuman, or degrading treatment. This prohibition is established by Article 7 of the International Covenant on Civil and Political Rights (ICCPR) and Article 5 of the American Convention on Human Rights. Mexico has also assumed the responsibility to prevent and punish torture by ratifying the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in 1986 and the Inter-American Convention to Prevent and Punish Torture in 1987. In April 2005, Mexico ratified the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

³⁰⁶ Tercer Tribunal Colegiado de Circuito, Tesis 474, Octava Época, Apéndice de 1995, Tomo II, Parte TCC, p. 281.

³⁰⁷ Segundo Tribunal Colegiado del Sexto Circuito, Semanario Judicial de la Federación XIV, July 1994, p. 512.

Why Past Efforts to Curb Torture Have Failed

Mexico has not ignored its torture problem altogether. Over the past fifteen years, all three branches of government have taken steps to curb the practice. Yet their actions have, for the most part, consisted of ad-hoc measures in response to torture-related scandals, which they treated as embarrassing aberrations rather than as symptoms of an ongoing structural problem. And all of them have failed for the same reason: they stopped short of addressing the root cause of the problem.

Legislative Action

In the early 1990s, Congress passed anti-torture legislation that was promising in theory, but inadequate in practice. The 1991 Federal Law for the Prevention and Punishment of Torture made it a federal crime to practice torture and established that no confession or information obtained through the use of torture could be cited as evidence at trial.³⁰⁸ But according to its Article 1, the law only applies in trials in Mexico City and elsewhere, only in federal courts. Furthermore, these protections have been severely undermined in many cases by the difficulties that victims face when it comes to proving their torture. And, as previously mentioned, even when torture is proven, some federal courts have disregarded the law and found that a coerced confession can itself be admissible at trial if it is corroborated by other evidence.³⁰⁹

The 1991 law also requires that the person making a confession have a lawyer present. But, as the U.N. Special Rapporteur on Torture has reported, this provision has little impact in practice, given that most criminal defendants in Mexico rely on public defenders who are “poorly qualified, extremely badly paid, and overworked,” and therefore find it “virtually impossible” to ensure “an adequate defense.”³¹⁰ Moreover, the law allows criminal suspects to make confessions in the presence of “a person of confidence” instead of a lawyer. In many cases, criminal suspects had never met, let alone consulted with, this “person of confidence” until the moment they signed their confessions. Furthermore, the “person of confidence” was often an employee of the prosecutor’s office.

Two years later, Mexico passed a constitutional amendment that struck closer to the heart of the problem. It established that only confessions made before a judge or

³⁰⁸ Law to Prevent and Sanction Torture (*Ley Federal para Prevenir y Sancionar la Tortura*), December 27, 1991.

³⁰⁹ Segundo Tribunal Colegiado del Sexto Circuito, *Semanario Judicial de la Federación XIV*, July 1994, p. 512.

³¹⁰ United Nations Commission on Human Rights, “Report of the Special Rapporteur, Mr. Nigel S. Rodley, submitted pursuant to Commission on Human Rights resolution 1997/38,” E/CN.4/1998/38/Add.2, January 14, 1998, para. 38.

prosecutor could be cited as evidence. The aim was to prevent the police from beating confessions out of people when they were alone behind closed doors. Yet the presence of a prosecutor is not enough to prevent coerced confessions. After all, the judicial police work for the prosecutors and they share the same incentives to force suspects to confess. A suspect could always be beaten up behind closed doors before being presented to the prosecutor and if the prosecutor found the suspect to be “uncooperative,” he could return the suspect to the police for another beating.

Judicial Rulings

In recent years, the Supreme Court and lower courts have issued rulings providing guarantees that should, in theory, curb the use of torture. But their impact has also been limited in practice.

As previously mentioned, since 1995, the Supreme Court has held that the confession is admissible at trial only if it is corroborated by other evidence.³¹¹ Lower courts have explicitly held that the first declarations of the accused do not always have more value than subsequent ones, since “immediacy” is not the only element that should be taken into account when evaluating the truth of a confession.³¹²

Yet, as we have seen, this jurisprudence has not been respected in practice. One problem is that there is no clear interpretation of what counts as “corroborating evidence.” Consequently, it is possible for prosecutors to corroborate the coerced confession using weak evidence that is independently obtained, or strong evidence that derives from the confession itself. In fact, prosecutors in Mexico City offer witness statements as the only evidence in 90 percent of the cases. In most of those cases, the witnesses are either the arresting officers or the officers who sent the suspect to the prosecutor’s office.³¹³

In January 2005, the Supreme Court held that the right to adequate counsel becomes effective from the moment in which the accused is presented to the prosecutor.

³¹¹ Mexican Supreme Court, Primera Sala, Tesis 108, Sexta Época, Apéndice de 1995, tomo II, Parte SCJN, p. 61. Other judicial decisions held that a confession given before the judicial police and the prosecutors and not before a judge will only have evidentiary value if it is corroborated by other evidence. Tribunal Colegiado del Vigésimo Circuito, Tesis 478, Octava Época, Apéndice de 1995, tomo II, parte TCC, p. 284.

³¹² Segundo Tribunal Colegiado del Sexto Circuito, Tesis VI.2o.J/184, Octava Época, Semanario Judicial de la Federación IX, March 1992, p. 91; and Tribunal Colegiado en Materia Penal del Séptimo Circuito, Tesis VII.P.J/48, Octava Época, Gaceta del Semanario Judicial de la Federación 86, February 1995, p. 43.

³¹³ National Center for State Courts, “Practice Matters: Mexico City’s Criminal Courts. An Evaluation and Suggestions for Change,” (unpublished) p. 137.

Accordingly, the first declaration given before the prosecutor will be inadmissible if the accused did not have the chance to consult privately with a lawyer prior to the declaration.³¹⁴

This decision is most welcome since a recent evaluation by the Center for Investigations and Education in Economics (*Centro de Investigación y Docencia Económicas*, CIDE) found that only 30 percent of those that made declarations before a prosecutor, and only 73 percent of those that made declarations before a judge, had access to a lawyer when they gave their statements.³¹⁵ However, this decision does not constitute binding jurisprudence in Mexico, and therefore it is unlikely to result in any immediate change in the way the justice system works.

Even if, eventually, the Supreme Court does create binding jurisprudence on this issue, ensuring adequate counsel at the point when the suspect is before the prosecutor will not solve the problem. After all, 60 percent of those accused of crimes are detained by the police and remain under their custody for some time before being presented to a prosecutor.³¹⁶

Government Programs

In 2000, the Fox administration committed itself to “25 steps to combat torture,” consisting mainly of measures to increase the training and supervision of police and detectives, as well as to improve investigations into torture allegations.

As part of this program, the PGR issued internal guidelines for compliance with the Istanbul Protocol, which sets standards for documenting torture and its consequences.³¹⁷ The internal guidelines include criteria to be used by specialists performing medical and psychological evaluations of people who allege they were victims of torture.

³¹⁴ Mexican Supreme Court, Primera Sala, Tesis 1a.CLXXI/2004, *Semanario Judicial de la Federación y su Gaceta* XXI, January 2005, p. 412. Another recent decision by a lower court also provides the guarantee of adequate counsel and the prohibition of torture by defining a confession as “an admission of facts that constitute a crime for which the person is being accused, given by a person of more than eighteen years old, mentally capable of doing so, which is given before a person with legal faculties to receive it, with assistance of his or her defender, and without any use of violence.” Cuarto Tribunal Colegiado del Décimo Circuito, Tesis XV.4o.J/1, *Novena Época, Semanario Judicial de la Federación y su Gaceta*, tomo XXI, January 2005, p. 1527.

³¹⁵ Marcelo Bergman et. al., “Delincuencia, Marginalidad y Desempeño Institucional,” *División de Estudios Jurídicos*, CIDE, 2003, p. 48.

³¹⁶ *Ibid.*, p. 51.

³¹⁷ The Istanbul Protocol became a United Nations document in 1999 and it is also called “Manual on Effective Investigation and Documentation of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.”

These guidelines apply automatically to the federal government, and the Attorney General's Office has signed agreements with some state-level counterparts for its implementation in the states. Although this is a good example of internalizing an international norm, most torture cases occur at the state level—as the Mexican government itself recognizes—and the greatest challenge for the federal government today is making the guidelines mandatory for all state prosecutor offices and ensuring that they all receive courses on how to use them.³¹⁸ Until that happens, these measures will have limited impact at the state level.

Moreover, the adoption of the guidelines cannot, by itself, guarantee that cases of torture will be adequately investigated and addressed. It is also necessary to ensure the guidelines are implemented effectively. Their implementation in Mexico has been undermined by several factors, according to Mexico NGOs, among them the fact that authorities conducting the evaluations have not always been independent experts, and crucial evidence has sometimes been neglected.³¹⁹ More fundamentally, the guidelines themselves provide no guarantee that perpetrators of torture will be prosecuted, the single most effective way of curbing abuse.

In September 2003, President Fox signed the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The Protocol, which was ratified in April 2005, establishes a system of regular visits to be undertaken by independent international and national bodies to places where people are deprived of their liberty to document abusive practices and offers recommendations for improving the guarantees against torture and mistreatment.

Fox's Reform Package

The Key to Progress

While these initiatives may have prevented some abuses, what Mexico has needed to overcome its torture problem is a reform that would make it far more difficult to use coerced confessions at trial—not in theory, but in practice. In March 2004, President Fox sent to Congress a justice reform proposal that included measures designed to do precisely that.

³¹⁸ "Mexico's report before the Committee against Torture," Ministry of Foreign Affairs, 2005, p. 9.

³¹⁹ Red Nacional de Organismos Civiles de Derechos Humanos *Todos los Derechos para Todos*, "Informe de la Situación de los Derechos Humanos en México – 124^o período de sesiones de la Comisión Interamericana de Derechos Humanos," March 6, 2006.

One measure is an amendment of Article 20 of the Constitution, which requires that a criminal defendant have access to defense counsel from the moment he or she is brought before the prosecutor, and that it be an “adequate” and “certified” lawyer. This requirement aims to end the practice of incompetent or even non-certified “defenders,” also known as “persons of confidence,” from signing off on confessions without ever providing serious legal counsel to the defendant. The Senate approved this constitutional reform in 2005, which is an important step. But, it still has to be approved by the House of Representatives and local congresses before it can become enforceable.³²⁰

While this reform should be helpful, alone it is not enough to solve the problem. Judicial police would still routinely have custody of suspects before presenting them to a prosecutor and could torture them before they receive adequate counsel.

The critical change proposed by the Fox administration is to deny evidentiary value to all confessions that are not made directly before a judge. The proposed modification of Article 20 of the Constitution would render inadmissible any confession “given before any authority other than a judge or before a judge but without the presence of a defense lawyer.” The reform package also proposes to modify Article 459 of the federal criminal procedure code to incorporate these provisions at the federal level.

Under this proposal, prosecutors will no longer be able to use confessions they obtained on their own (or through the judicial police) and, consequently, will be much less likely to conspire with the police to coerce self-incriminating testimony. This provision, together with another that requires judges to be present at all judicial hearings, would put to rest Mexico’s peculiar version of the “immediacy principle.” Torture victims would no longer have to prove that their original pretrial confession was coerced. It simply would not be admissible at trial.

Both prosecutors and investigative police agree that this is a necessary solution. The attorney general of the state of Chihuahua, for example, told Human Rights Watch that denying evidentiary value to confessions obtained by prosecutors prior to trial is “absolutely crucial for ending torture.”³²¹

³²⁰ See the proposed reform to the Federal Code of Criminal Procedure [online] http://www.presidencia.gob.mx/docs/reformalegal_ssp.pdf, and the proposed reform to the Constitution [online] http://www.presidencia.gob.mx/docs/reformas_ssp.pdf (retrieved April 2006).

³²¹ Human Rights Watch interview with Patricia González, Chihuahua State Attorney, Chihuahua City, Mexico, November 15, 2005.

Another important reform that remains pending would deny legal effect to all illegal practices by law enforcement agents, thereby quashing any evidence obtained illegally.³²² This provision is crucial to prevent courts from considering other evidence that is obtained as a consequence of coerced confessions, since today there are no clear rules regarding the use of this type of evidence at trial.

Impact at the State Level

Since the federal code of criminal procedure does not apply to states, any reforms to it will have no impact at the state level. However, the proposed constitutional reform to Article 20, requiring that confessions be made only before judges, does apply to states.

The constitutional reform proposal will, in the first place, strengthen a series of reforms that have been taking place at the state level. This is crucial since 95 percent of crimes are judged by state level judicial systems.³²³ Justice reform proposals are currently under discussion in Oaxaca, Jalisco, Zacatecas, and Chihuahua, and they all address the problem of ascribing evidentiary value to confessions obtained by prosecutors.

The Oaxaca, Jalisco and Zacatecas reform proposals require that any declaration by the accused be given in presence of a defense attorney and before a judge.³²⁴ The Chihuahua reform package, on the other hand, still says that declarations rendered before a prosecutor could have evidentiary value, but the proposal provides for other mechanisms to ensure that the person accused of a crime is not tortured to obtain a confession.³²⁵ A Nuevo León reform proposal that was adopted in part in December 2004 establishes a new oral and adversarial system for some crimes, but it still allows confessions to be rendered before a prosecutor. Statements made by the accused to prosecutors are valid as long as they were made in the presence of defense counsel and are later read (or reproduced with documentation) in front of a judge.

³²² Article 470 of the proposed federal criminal procedure code.

³²³ Ministry of Public Security, "Antecedentes del Sistema Nacional de Seguridad Pública," [online] http://www.ssp.gob.mx/application?pageid=sensp_sub_2&rootId=28&pbname=sensp_acerca&docName=Antecedentes&docId=37 (retrieved December 2005).

³²⁴ The Oaxaca reform is the clearest one, and establishes both conditions expressly in its proposed Article 138. The Jalisco and Zacatecas proposals specifically establish the declaration by the accused must be given in presence of the defense attorney, and after the accused was assisted by the attorney. They both also propose that the judge must read the accused his or her rights prior to the declaration, which implicitly means that the judge must be present. In the Jalisco proposal it is Articles 162 to 167, and in the Zacatecas one it is Articles 164 to 172.

³²⁵ A ministerial declaration will be valid evidence only if it was given in presence of a defense attorney, if it was videotaped, if the prosecutor proves that the accused was not forced to declare, and if the accused was not illegally detained at that time. Article 361 of the proposed reform.

While they would represent a step forward, not all proposed state-level reforms go far enough, making it all the more pressing that Mexico adopt the Fox administration's proposed reform to Article 20 of the Mexican Constitution, requiring all states to propose and adopt reforms capable of genuinely eradicating the use of forced confessions. Some reforms assume that the contradiction of evidence presented by the prosecutor and the defense counsel before the judge—by itself—will be enough to disqualify a coerced confession. Yet without other safeguards, this has not been the case.

Adoption of the proposed constitutional reform is also important to prevent constitutional challenges to the new state norms. If local prosecutors feel that state-level reforms are limiting their ability to solve cases, they could request the federal attorney general to challenge the constitutionality of the new norms. Absent a constitutional requirement that state laws substantively mirror federal laws aimed at curbing coerced confessions, local prosecutors could argue that new state procedural laws contradict Article 21 of the Constitution, which gives prosecutors the authority to conduct criminal investigations.

If state prosecutors comply with new state laws and do not challenge them, reforms at the state level could improve the justice administration in Mexico enormously. But, in light of a potential constitutional challenge, it is crucial to complement state reforms with the adoption of Fox's proposed amendment to Article 20.

A Dangerous Flaw

While part of the reform proposal would represent a major step forward, the progress it offers could be severely undercut by a huge exception it has carved out for cases involving “organized crime.” Fox's proposal adds language to the Constitution that allows a distinct legal regime to apply to these cases, so that they are not bound by the basic due process guarantees established by the Constitution. It is an astounding measure, especially considering that Mexican law defines “organized crime” broadly to include not only drug cartels, but also any group of three or more people who conspire to commit multiple crimes.³²⁶ It may well be true that law enforcement agents may need special tools to bring powerful mafias to justice, but this does not justify creating a wholly separate set of rules under the Constitution.

³²⁶ Article 2 of the Federal Law Against Organized Crime (*Ley Federal contra la Delincuencia Organizada*).

Other Useful Measures

In addition to changing the text of the Constitution and the law, other measures must be adopted. It is essential that any constitutional reform be accompanied by proper training that will teach current standards to prosecutors and judicial police, as well as how to conduct better investigations, and the consequences of not doing so. For judges to become more effective guarantors of basic rights, they must have access to training and sufficient resources to assume their new role, enforce reforms, and adequately manage their case load.

Above all, it will be essential to adopt at least some measures that will ensure more direct involvement of the judges in the criminal process. A recent study shows that 90 percent of those imprisoned in two states and Mexico City report that they never spoke with the judge that was deciding the case against them.³²⁷ The judge's presence during declarations must be, then, the first step towards their greater involvement in the judicial process in general.

Misguided Opposition to an Urgent Reform

The main obstacle to passing these much-needed reforms has been politicians' concerns that they run counter to the public demand for greater public security. Opponents of the measures argue that denying prosecutors the authority to use confessions will prevent them from doing their job.

But this argument is largely misleading. Under the proposed reform, prosecutors will still be able to interrogate suspects to build leads that can help them solve cases. What they will not be able to do is use these declarations as evidence at trial. This limitation is undoubtedly a significant one. But it must be understood as a serious antidote to a very serious and widespread problem.

Moreover, the antidote is needed not merely to curb abuses, but also to improve the quality of investigations carried out by prosecutors. As the Under Secretary of Criminal Public Policy of Public Security in the Fox administration put it "so long as confessions have evidentiary value, investigative police officers will be tempted to obtain confessions instead of search for hard evidence."³²⁸ For some, this temptation is all the more powerful when it is possible to force confessions out of people. "Why take the time and

³²⁷ Marcelo Bergman et. al., "Delincuencia, Marginalidad y Desempeño Institucional," División de Estudios Jurídicos, CIDE, 2003, p. 52.

³²⁸ Human Rights Watch interview with Rafael Ríos, Mexico City, Mexico, November 17, 2005.

effort to establish the actual truth,” these prosecutors figure, “if I can close the case by coercing a suspect into ‘confessing?’”

But when coercion becomes a convenient shortcut, the cost for criminal suspects is profound, as torture often causes enduring psychological as well as physical damage. And as the case of Ciudad Juárez has demonstrated, the torture victims are not the only ones affected by this abuse. If criminal suspects are wrongly convicted on the basis of coerced testimony, the victims of their alleged crimes (and the victims’ relatives) will be denied their right to justice as well.

Defenders of the proposed exception for “organized crime” argue, in similar terms, that it is necessary because of the difficulties and dangers associated with investigating drug cartels and kidnapping rings. It is certainly reasonable for the reforms to include well-designed and targeted exceptions for certain cases that are particularly difficult to investigate. Other countries, such as Italy, Colombia and the United States, have adopted such exceptions. However, none of these countries have resorted to measures as extreme as the blanket exception under the Mexican reform proposal, which would deny basic constitutional guarantees to anyone suspected of participating in organized crime, broadly and nebulously defined. Mexico’s proposed blanket exception would remove incentives for thorough investigation, increasing the likelihood that the innocent would be convicted and that some of the most hardened criminals would be left free, ultimately making prosecutors less effective at combating organized crime.

Excessive Use of Preventive Detention

More than 40 percent of prisoners in Mexico—over eighty thousand individuals—have not been convicted of the crime for which they have been imprisoned. Instead they serve prison time for months on end, both before and during trial. The reason for this is that the justice system currently does not grant judges the power to decide, in cases where “serious crimes” are alleged, whether a suspect should remain in jail or be provisionally released pending trial. The problem is aggravated by the penchant of elected officials to increase the number of “serious crimes” (*delitos graves*) in response to public demands for improved public security.

This excessive use of preventive detention violates the fundamental rights of thousands of Mexicans. And, combined with the penal system’s failure to keep separate facilities for convicted prisoners and those who have not been convicted, it contributes to the overcrowding of prisons, with dire consequences for public security in Mexico.

How the Legal System Limits Judges' Discretion

The Mexican legal system does not grant judges the power to decide whether a person accused of a “serious crime” will face trial in preventive detention or in provisional liberty. Article 20 of the Mexican Constitution holds that a judge may grant provisional liberty unless the law expressly prohibits it in light of the gravity of the offense. But instead of establishing criteria for determining whether the circumstances in a specific case justify sending the accused to preventive detention, Mexican laws—both at the federal level and in most states—establish an extensive list of “serious crimes” for which preventive detention is mandatory.³²⁹ In other words, if a person is charged with any of those “serious crimes,” judges do not have discretion to evaluate that case. They must send the accused to preventive detention and deny any request for provisional liberty.

In response to popular demands for stronger anti-crime measures, the list of “serious crimes” has increased—both at the state and federal levels—during the last years. The list of “serious crimes” includes crimes that are not necessarily dangerous. In Jalisco, for example, if a robbery is committed with two aggravating factors it becomes a serious crime. For instance, if two people shoplift at night it becomes a serious crime because it is a robbery with two aggravating factors (it involves two people and occurs at night). In Zacatecas, certain electoral crimes are considered serious crimes. So, if a public official uses public funds to support a political party or candidate, independently of the sanction that this person could face for misuse of public funds, he or she will also be sent to preventive detention for being accused of a (serious) electoral crime. In Yucatán, the illicit sale of alcoholic beverages is a serious crime. Therefore, if a person illicitly sells or distributes alcoholic beverages, he or she will face trial in preventive detention.

At the state level, almost all criminal procedure codes have a list of “serious crimes.” In those places where there is no list of “serious crimes,” such as Veracruz and Mexico City, a crime is considered “serious” if the mathematical average between the maximum and minimum sentences for that crime is more than a certain number of years. In Mexico City, for example, a crime is “serious” if the average is more than five years. The problem in these cases is also that judges do not have discretion to grant provisional liberty in cases of “serious crimes.” If someone is accused of a crime that is considered “serious” due to the arithmetic formula, judges must send the accused to preventive detention. In these states, as a consequence of civil society’s calls for justice, politicians have increased the sentences of most crimes. Thus, the end result is the same as it is at the federal level or as it is in those states where there is a list of “serious crimes”: Many non-dangerous crimes become “serious” and preventive detention becomes mandatory.

³²⁹ At the federal level, Article 194 of the Federal Criminal Procedure Code lists which crimes are considered “serious.”

Currently, the Mexican Constitution does not include in its text the presumption of innocence. Some Supreme Court constitutional interpretations have stated that the presumption of innocence is implicitly contained in the Constitution.³³⁰ However, these interpretations do not yet constitute binding jurisprudence.

Impact on Prison Conditions

The current legal framework leads to an excessive use of preventive detention—a problem that has only been exacerbated as federal and state legislators have expanded the number of crimes deemed “serious.” The number of Mexican prisoners who have not been convicted of the crime for which they are being held has doubled over the past decade.³³¹ Currently there are over eighty thousand prisoners in preventive detention, almost 43 percent of the total prison population.³³²

The large number of suspects in preventive custody is a major factor contributing to overcrowding in Mexico’s prisons. The fact that Mexico routinely fails to separate convicted and not convicted prisoners only exacerbates the problem.³³³ The average occupancy rate of Mexican prisons currently stands at 135 percent of actual capacity.³³⁴ In extreme cases, such as one prison in the state of Sonora, occupancy rates are in excess of 500 percent of capacity.³³⁵

The problem of prison overcrowding has only worsened during the Fox presidency. Between December 2000 and November 2005, the prison population increased by 54,488 prisoners (a 35.2 percent increase).³³⁶

³³⁰ See for example Mexican Supreme Court, Tesis P. XXXV/2002, Novena Época, Semanario Judicial de la Federación y Su Gaceta XVI, August 2002, p. 14.

³³¹ Between 1994 and 2004, the number of unconvicted prisoners in Mexico has almost doubled: it increased from 42,167 to 81,947. Guillermo Zepeda, “Myths of Pretrial Detention in Mexico,” Open Society Justice Initiative, 2004, p. 8.

³³² Guillermo Zepeda, “Myths of Pretrial Detention in Mexico,” Open Society Justice Initiative, 2004, p. 6. The percentage of prisoners in preventive detention at the state level is of 44.5 percent, and at the federal level it is of 31.2 percent. Open Society Justice Initiative, “The Economic Costs of Pretrial Detention in Mexico: A Cost-Benefit Analysis,” (forthcoming 2006), p. 22.

³³³ CNDH, “Informe Especial de la Comisión Nacional de los Derechos Humanos sobre la Situación de los Derechos Humanos en los Centros de Reclusión de la República mexicana, dependientes de Gobiernos Locales y Municipales,” [online] <http://www.cndh.org.mx/lacndh/informes/espec/creclus/index.htm> (retrieved December 2005), 2004, part IV.b.4 and part V.B.

³³⁴ Elena Azaola et. al., “El Sistema Penitenciario Mexicano,” Project on Reforming the Administration of Justice in Mexico, Center for U.S Mexican Studies, 2003, p. 6.

³³⁵ Open Society Justice Initiative, “The Economic Costs of Pretrial Detention in Mexico: A Cost-Benefit Analysis,” (forthcoming 2006), p. 60.

³³⁶ CNDH, “Recomendación General 11: Sobre el Otorgamiento de Beneficios de Libertad Anticipada a los Internos en los Centros de Reclusión de la Republica Mexicana,” part I.A.

Overcrowding leads to increasingly bad conditions for those detained in Mexican prisons. Fifty-three percent of prisoners in three local jurisdictions (Mexico City, Mexico state and Morelos) reported that they do not receive enough food, and 29 percent do not have enough water to drink. Most prisoners rely on their families for medicine, clothes, shoes, and basic resources necessary for their hygiene (for example, soap, toilet paper, and toothpaste). Prisoners rarely receive an education or have the chance to work while in prison.³³⁷ Overcrowding, with similar consequences, has also been documented in the majority of state prisons.³³⁸

An example of the misuse and tragic consequences of the current system of preventive detention involves the case of Felipe García Mejía, who was arrested in January 2004 in Mexico City. He was charged with allegedly stealing a woman's bag on the street, while in the company of his brother and a friend. The prosecutors considered it a "serious crime" and he was therefore sent to preventive detention. García Mejía's case also tragically exemplifies how sending people to preventive detention may lead to other violations of rights. Although he was only fifteen years old, he was sent to jail with adult prisoners. While in preventive detention, he was harshly beaten by another inmate.³³⁹ Due to his injuries, he died a few days after his arrest.³⁴⁰

Mexico's Obligations Under International Law

Under these circumstances, detention of unconvicted prisoners violates international human rights law concerning the presumption of innocence, one of the most established and widely accepted principles of the right to a fair trial, and the treatment of prisoners.

Article 8(2) of the American Convention on Human Rights expressly establishes that every person accused of a criminal offense has the right to be presumed innocent. Article 24 of the ICCPR also provides that "everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law." And Article 9(3) of the ICCPR, for its part, establishes that persons charged with a crime

³³⁷ CNDH, "Informe Especial de la Comisión Nacional de los Derechos Humanos sobre la Situación de los Derechos Humanos en los Centros de Reclusión de la República mexicana, dependientes de Gobiernos Locales y Municipales," [online] <http://www.cndh.org.mx/lacndh/informes/espec/creclus/index.htm> (retrieved December 2005), 2004, part V.B.

³³⁸ *Ibid.* See also U.N. Commission on Human Rights, "Report of the Working Group on Arbitrary Detention on its visit to Mexico," E/CN.4/2003/8/Add.3, December 17, 2002, p. 3.

³³⁹ In addition to the international human rights standards mentioned in the next section, when the person detained is under 18 years old, there is also a violation of article 37 (c) of the Convention of the Rights of the Child and Article 10 (2) (b) of the International Covenant on Civil and Political Rights.

³⁴⁰ Human Rights Commission of Mexico City, Recommendation 5/2004, June 24, 2004.

should not, as a general rule, be kept in detention.³⁴¹ According to the United Nations Human Rights Committee, preventive detention may only be used if it is lawful, reasonable, and necessary. It is only appropriate if it is necessary “to prevent flight, interference with evidence or the recurrence of crime” or “where the person concerned constitutes a clear and serious threat to society which cannot be contained in any other manner.”³⁴²

Furthermore, the previously-described living conditions violate international human rights standards that provide that persons deprived of liberty must be treated with dignity.³⁴³ The failure to separate convicted prisoners from those who are in preventive detention undermines the presumption of innocence and violates international standards that provide that convicted and unconvicted persons should be held separately and receive separate treatment.³⁴⁴ Finally, Mexico’s criminal system fails to pursue the social reintegration of those convicted for having committed a crime, which, according to international law, should be the goal of any criminal system.³⁴⁵

³⁴¹ Article 9(3) of the ICCPR; see also General Comment No. 8 of the Human Rights Committee on the ICCPR, Art. 9 (Sixth Sess. 1982), Report of the Human Rights Committee, adopted Apr. 12, 1984 by the Human Rights Committee, 40 U.N. GAOR Supp. (No. 40) U.N. Doc. A/40/40 (stating “[p]re-trial detention should be an exception and as short as possible”).

³⁴² Hugo van Alphen v. the Netherlands (No. 305/1988) (July 23, 1990), Official Records of the General Assembly, Forty-fifth Session, Supplement No.40 (A/45/40), vol. II., annex IX, sect. M., para. 5.8. Similarly, the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders established that:

(b) Pre-trial detention may be ordered only if there are reasonable grounds to believe that the persons concerned have been involved in the commission of the alleged offenses and there is a danger of their absconding or committing further serious offences, or a danger that the courts of justice will be seriously interfered with if they are left free;

(c) In considering whether pre-trial detention should be ordered, account should be taken of the circumstances of the individual case, in particular the nature and seriousness of the alleged offence, the strength of the evidence, the penalty likely to be incurred, and the conduct and personal and social circumstances of the person concerned, including his or her community ties;

Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August-7 September 1990: report prepared by the Secretariat (New York: United Nations, 1991), E.91, IV, chap.I, sect.C (para.2).

³⁴³ See Article 10(1) of the ICCPR; Article 5(2) of the American Convention on Human Rights; and Rules 15 to 26 of the Standard Minimum Rules for the Treatment of Prisoners, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolution 663 C (XXIV) of July 31, 1957 and 2076 (LXII) of May 13, 1977.

³⁴⁴ Article 10 (2) (a) of the ICCPR; Article 5 (4) of the American Convention on Human Rights; and Rules 8 (b) and 84 to 93 of the Standard Minimum Rules for the Treatment of Prisoners.

³⁴⁵ Article 10(3) of the ICCPR; Article 5(6) of the American Convention on Human Rights; and Rules 58 to 61 and 71 to 81 of the Standard Minimum Rules for the Treatment of Prisoners.

Fox's Reform Package

The justice reform package that President Fox presented in March 2004 offers an important step toward curbing the excessive use of preventive detention in Mexico through amendments to the federal Constitution and the federal code of criminal procedure.

One of the proposed amendments to the Constitution would establish a constitutional guarantee of the presumption of innocence. Another would add language indicating that judges may grant provisional liberty to individuals accused of “serious” crimes.³⁴⁶ An amendment to the Federal Code of Criminal Procedure would include more specific language allowing judges to determine whether or not to grant provisional liberty in cases involving certain (but not all) “serious crimes,” provided that the accused does not have a prior conviction for a serious crime, has complied with procedural obligations in prior trials, and is not subject to an extradition process related to the accusation.³⁴⁷

Unfortunately, the Fox proposal suffers from serious shortcomings. One is that it maintains automatic preventive detention for many of the “serious crimes” in the federal criminal code. Another is that it fails to eliminate existing provisions that deny provisional liberty to individuals accused of “non-serious” crimes who are unable to guarantee their ability to pay damages should they be convicted.³⁴⁸

³⁴⁶ Under the proposal, Article 20 of the federal Constitution would read: “In all criminal cases, the accused, the victim or the offended party will have the following rights.

A. The accused [will have the right to]:

(I) The presumption of innocence until declared guilty of a crime by competent courts. [The accused] shall face trial in liberty, except if, in accordance to the law:

(a) It is considered a serious crime, **unless the judge decides otherwise,**

(b) It is a non-serious crime, sanctioned with prison sentence, if the accused cannot guarantee his or her ability to pay reparations, and

(c) The judge has reversed possibility that the accused face trial in provisional liberty (in both serious and non-serious crimes).

³⁴⁷ Under the proposal, Article 252 of the Federal Code of Criminal Procedure would read: “(...) The judge may grant provisional liberty to the accused, in light of the circumstances of the investigated crime in the case of crimes in [some sections of the article that lists serious crimes] as long as the accused has not been previously convicted of a serious crime, has always previously complied with procedural obligations, and is not subject to an extradition process related to the crime for which he or she is being accused. In these cases, the crime will not be considered serious for the purposes of granting provisional liberty.”

³⁴⁸ Under the proposal, Article 237 of the Federal Code of Criminal Procedure would read: “Every person accused of having committed a crime will face trial in liberty, unless the accusation is related to crimes considered serious by this Code and the judge has not authorized the liberty, or if the accusation is related to non-serious crimes but the accused has not provided guarantees for reparations, or in both types of crimes, if the accused was previously granted provisional liberty and a judge reversed such decision. ”

See proposed Article 20(A) of the Constitution, and proposed Articles 237-252 and 336-341 of the Federal Code of Criminal Procedure.

Yet both these shortcomings could potentially be counteracted by establishing a constitutional guarantee of the presumption of innocence. This guarantee could provide the basis for compelling future legislative and judicial actions to grant judges greater discretion in determining when and whether to grant provisional liberty.

The constitutional guarantee of the presumption of innocence could also have an important impact at the state level—especially in states where efforts are already underway to reform local criminal law to address the problem of excessive use of preventive detention.

Proposed state reforms to the codes of criminal procedure in Chihuahua, Jalisco, Oaxaca, and Zacatecas have specifically addressed the problem of excessive use of preventive detention. The proposed reforms in Chihuahua, Jalisco, and Oaxaca would go even further than the federal proposal by completely eliminating the list of “serious crimes” from the local codes of criminal procedure. The reforms would grant the judge discretion to adopt the most appropriate precautionary measures in all cases. Moreover, they would limit preventive detention to a maximum of twelve months.³⁴⁹ A reform proposal in Zacatecas, by contrast, keeps the current system of relying on a list of “serious crimes,” but it does grant judges discretion to decide on preventive detention with respect to crimes that are not listed as “serious crimes.”³⁵⁰

These states’ reforms are the exception, however, which is all the more reason why an amendment to the federal Constitution to guarantee the presumption of innocence is so crucial: it could compel other states to pursue similar reform efforts.

Misguided Opposition to an Urgent Reform

As with the proposed anti-torture reforms, opponents argue that efforts to curb the misuse of preventive detention would weaken law enforcement. A typical view was expressed by one senator, who told Human Rights Watch that a constitutional guarantee of the presumption of innocence was unnecessary and that the reform of preventive detention would only “mean setting criminals free.”³⁵¹

³⁴⁹ In the Jalisco proposal it is Articles 189 to 206; in the Chihuahua proposal it is Articles 177 to 194; and in the Oaxaca proposal it is Articles 169 to 174. According the director of legislative studies in the Nuevo León State Attorney’s office, they are beginning to draft a reform proposal with the same provisions. Email correspondence between Human Rights Watch and Nina Ruiz Lozano, March 13, 2006.

³⁵⁰ Article 191 of the Zacatecas proposal.

³⁵¹ Human Rights Watch interview with Senator Orlando Paredes, Mexico City, Mexico, November 16, 2005.

The comment, which presumes the guilt of jailed suspects, is itself an eloquent—if inadvertent—testament to the need to reinforce the principle of the presumption of innocence in Mexico. It also shows a troubling lack of awareness of the negative consequences of the excessive use of preventive detention, which itself constitutes a serious threat to public security.

Ineffective Use of Resources

The incarceration of tens of thousands of nonviolent prisoners diverts public funds that would more wisely be applied to other strategies to promote public security. The average cost of having one person in prison in Mexico is 130 pesos per day (U.S.\$ 12.5).³⁵² If there are eighty-two thousand prisoners in preventive detention in Mexico, and the numbers are increasing, the cost per day of keeping these people in prison is over U.S.\$1 million. And, this is only the direct cost of incarceration, which does not take into account other costs, such as that which results from the prisoner's inability to work, earn an income, and pay taxes, as well as the social and psychological costs incurred by the prisoners' dependants.

Corruption and Violence within Prisons

The excessive use of preventive detention also contributes to the severe overcrowding of Mexican prisons, which in turn undermines the ability of penal authorities to control inmate populations. This lack of control fosters the development of corruption networks within prisons, which are sometimes operated by prison guards and sometimes by powerful mafias within the prisons. As a result, for example, inmates in some prisons have to pay an "internal tax" once or twice a day. Prisoners must pay to receive visits, to be able to get food from their family members, to be transferred to bigger or less violent cells, or to avoid performing their cleaning duties.³⁵³

The system then becomes so chaotic that, according to a prison director in Aguascalientes, those working within it must increase the number of convicted prisoners that get an early release. Since there is a limit to the number of people a prison can house, and there are practically no limitations on who goes into the prisons, the system generates a perverse incentive: if overpopulation is complicating governance within the prison, the penal authorities in charge of determining who gets early release has an incentive to increase the number of prisoners to which they grant that type of release. When granting release, they consider whether the convicted person has served 60

³⁵² Open Society Justice Initiative, "The Economic Costs of Pretrial Detention in Mexico: A Cost-Benefit Analysis," (forthcoming 2006), p. 53.

³⁵³ *Ibid.*, p. 63.

percent of the sentence, whether he or she has been sentenced more than once for that same crime, and whether he or she behaved well in prison. The criteria used to grant early release do not include whether that person will be a danger to society after he or she is released. As a consequence, three out of ten “high risk” convicted prisoners get early release.³⁵⁴

Furthermore, since convicted and unconvicted individuals participate together in some activities within prisons (such as sports, education, and family visits), people who have been charged with less serious crimes often interact with inmates convicted of violent crimes. In many cases, the most hardened criminals recruit prisoners that are in jail for minor crimes to perform major crimes when they leave prison. A well-known example of this was the 2005 kidnapping of soccer coach Rubén Omar Romano. His kidnapping was orchestrated by a dangerous criminal held in the Santa Martha Acatitla prison, and carried out by other individuals who had been in the prison with him prior to their release.³⁵⁵ Those carrying out the kidnap had been imprisoned for minor crimes.³⁵⁶

More Prisoners Does Not Equal More Security

Critics of the proposed reform argue that preventive detention is necessary to ensure that “criminals” are sent to jail. But this argument is based on the erroneous assumption that increased imprisonment of suspects results in increased security. This is not the case in Mexico.

Too often, arrest quotas and other arbitrary factors—not an assessment of the risk a particular individual poses—drive decisions to imprison suspects. For example, in 2003, the Secretary of Public Security of Mexico City (*Secretaría de Seguridad Pública del DF*) said it intended to increase the number of arrests in order to be able to present twenty-five thousand people—evidently an arbitrary number—before a prosecutor every year. Between 2002 and 2005, the number of prisoners in Mexico City doubled.³⁵⁷ Prosecutors told the Mexican NGO CIDE that they were required to send cases to trial, and that “the more cases you send, the better; it does not matter if they are properly substantiated or not.”³⁵⁸

³⁵⁴ Human Rights Watch telephone interview with Juan Pablo Ruiz de la Rosa, Aguascalientes, México, March 10, 2006. Ruiz de la Rosa is the director of the El Llano prison in Aguascalientes.

³⁵⁵ Silvia Otero, “Trasladan a autor de secuestro de Romano a La Palma,” *El Universal*, September 22, 2005.

³⁵⁶ Silvia Otero, “Reclutan a plagiarios en penal,” *El Universal*, September 23, 2005.

³⁵⁷ Open Society Justice Initiative, “The Economic Costs of Pretrial Detention in Mexico: A Cost-Benefit Analysis,” (forthcoming 2006), p. 35.

³⁵⁸ Documentary “El Tunel” by Roberto Hernández, CIDE, 2005.

Judicial police officers sometimes face even more troubling incentives: some receive an economic bonus if they detain people and send them before a prosecutor. For example, in the municipality of Tlanepantla in the State of Mexico, police officers received 1,500 pesos (almost U.S.\$150) for every person they arrested. The system, which was publicized, lasted only a few days due to complaints by civil society groups.³⁵⁹ Nevertheless, this practice has apparently not disappeared. In a 2005 documentary, a judicial police officer confirmed that officers do receive a bonus if they arrest someone and present this person before a prosecutor.³⁶⁰

The increasing number of prisoners is, therefore, not a good measurement of the system's effectiveness at combating insecurity. Given the failure of prosecutors to conduct reliable investigations, there is little certainty as to whether the jailed suspects are, in fact, responsible for the crimes for which they are charged.

Another argument against limiting the use of preventive detention is that it will be harder for prosecutors to solve crimes, and for judges to convict, because every person charged with a crime will "remain free." This argument is also fundamentally flawed. To allow judges to presume that every individual is innocent and grant them the ability to determine in each case whether that person should be held in preventive detention simply gives them the possibility to decide if the defendant will face trial in jail or in provisional liberty. It does not force judges to leave everyone free during trial. And even in cases where they do grant provisional liberty, judges will be able to use other measures to ensure that the person will be present during trial and eventually sent to jail if he or she is found guilty and the crime merits imprisonment.

Recommendations

If Mexico is to make any meaningful progress in curbing the abuses that continue to be committed in the name of fighting crime, it will need to recognize that these abuses themselves represent a threat to public security. The justice reform measures discussed in this chapter represent a crucial step in the direction of integrating human rights and public security into a single coherent agenda.

³⁵⁹ Open Society Justice Initiative, "The Economic Costs of Pretrial Detention in Mexico: A Cost-Benefit Analysis," (forthcoming 2006), p. 71.

³⁶⁰ Documentary "El Túnel" by Roberto Hernández, CIDE, 2005.

1) Curb the use of coerced confessions as evidence in trial

The next administration should promote a constitutional amendment that would allow confessions to be admissible as evidence at trial only if they are made before a judge and with the presence of a defense attorney. This reform would eliminate the main incentive that judicial police and prosecutors currently have to engage in torture—the fact that confessions rendered before prosecutors can be used as evidence in trial.

2) Curb the excessive use of preventive detention

The next administration should promote an amendment to the Constitution, giving judges full discretion to grant provisional liberty or preventive detention in all cases of “serious” and “non-serious” crimes. Preventive detention should be a measure of last resort, adopted only in cases where the judge believes the suspect will otherwise not be present during trial, where granting provisional liberty would interfere with the normal development of the judicial process, where there is substantial evidence that the accused would pose a serious threat to society which cannot be contained in any other manner. In all cases, the judge should also have the power to adopt other precautionary measures that do not interfere with the liberty of the accused.

To ensure that the judges’ discretion is exercised properly, the decision to grant provisional liberty or to impose preventive detention must be reasoned and adopted after open and oral hearings in which the prosecutor and the defense attorney had the possibility to explain their points of view.

The next administration should also promote an amendment to the Constitution to establish a guarantee of the presumption of innocence. Such an amendment could play a vital role in compelling further reforms at the federal and state level to allow judges more discretion over the use of preventive detention.

VI. A Paradigmatic Case: Ciudad Juárez

The human rights story that has drawn the most local and international press coverage during the Fox administration has been the case of Ciudad Juárez, where, for over a decade, local law enforcement authorities failed to resolve hundreds of murders and “disappearances” of women. The extensive coverage of the killings has been crucial both for drawing attention to the plight of the victims and their families and for raising much-needed awareness of the broader problem of violence against women in Mexico.

Yet the tragedy of Ciudad Juárez also offers other important lessons that have received less attention—lessons that reflect the main themes of this report. Chief among these is how abusive police practices undermine both human rights and public security, as well as how systemic reforms are needed to improve Mexico’s ability to promote both rights and security. But in addition to showing what’s wrong with the system and what changes are needed to fix it, Ciudad Juárez also offers an important example of how Mexico can actually make real progress in bringing these changes about.

Scapegoats: How Abuses Undermine Public Security

Over the past thirteen years, more than four hundred women have been murdered or “disappeared” in Ciudad Juárez, Chihuahua. In a majority of the cases, authorities have not been able to determine who was responsible for the crimes against the women.³⁶¹ At least thirty-four of the victims remain unaccounted for today.³⁶²

For years, local law enforcement authorities did little to address the problem. Only when families of the victims began to mobilize, and the killings and “disappearances” began to draw extensive media attention, did state authorities begin to act.³⁶³ But instead of conducting serious investigations, the state prosecutor’s office resorted to the abusive

³⁶¹ The Chihuahua state attorney’s office informed Human Rights Watch that, between 1993 and 2005, there were 377 homicides of women, eighty percent of which were related to family or gender violence. Information on cases until November 9, 2005 provided to Human Rights Watch by the Chihuahua State Prosecutor’s office. Human Rights Watch interview with Patricia González, Chihuahua State Prosecutor, and with Cony Velarde, Deputy Prosecutor for the North Zone of Chihuahua State, Ciudad Juárez, Mexico, November 14, 2005.

³⁶² Attorney General’s Office (*Procuraduría General de la República, PGR*), “Informe Final de la Fiscalía Especial para el Atención de Delitos Relacionados con los Homicidios de Mujeres en el Municipio de Juárez, Chihuahua,” January 2006, p. 32.

³⁶³ Human Rights Watch telephone interview with Luz Castro (Centro de Derechos Humanos de las Mujeres y Justicia para Nuestras Hijas), April 26, 2006.

tactics that regularly substitute for good police work in Chihuahua: they sought to convict scapegoats on the basis of coerced confessions.

Chapter 5 of this report detailed two cases in which local authorities used torture to obtain confessions and thereby “solve” the crimes against women. One of them involved two bus drivers, Víctor García Uribe and Gustavo González Meza, who were tortured in 2001 until they confessed to having killed eight women. Gonzalez Meza died in prison under mysterious circumstances, and García Uribe was declared not guilty by a judge in 2005. The second case involved David Meza, who was tortured in 2003 and coerced into confessing he had killed his cousin. His case remains pending, but there is no evidence against him, other than the coerced confession.

These were not isolated incidents. Chapter 5 detailed two other cases of torture by law enforcement agents in Chihuahua, and cited Chihuahua’s current attorney general, Patricia González, who told Human Rights Watch that during her twenty-four years as a criminal judge, she had encountered cases of torture “all the time.”³⁶⁴ Moreover, a 2004 report by the CNDH found eighty-nine instances in which the suspects in these crimes had “spontaneously confessed” before the public prosecutor, only to recant the confession before a judge, claiming that they had been subjected to torture. In the same report, the CNDH observed that the use of physical or psychological violence to obtain confessions appeared to be a regular practice within the state prosecutor’s office.³⁶⁵

The reliance on coerced confessions did not solve the crimes nor address the family members’ claims for justice. Instead, they most likely contributed to the problem, given that, as the confessed killers were presumably innocent, those guilty of the crimes remained at large. Indeed, in 2004, the year after David Meza was jailed, the yearly homicide rate for women in Ciudad Juárez actually increased.³⁶⁶

Using Foreign Policy to Promote Local Change

After the Fox administration opened Mexico to international scrutiny, numerous international observers visited Ciudad Juárez to examine the situation there first-hand, meeting with victims’ relatives and local rights advocates to hear their concerns and

³⁶⁴ Human Rights Watch interview with Patricia Gonzalez, Chihuahua State Prosecutor, Chihuahua City, Mexico, November 15, 2005.

³⁶⁵ CNDH, “Informe Especial de la Comisión Nacional de los Derechos Humanos sobre los Casos de Homicidios y Desapariciones de Mujeres en el Municipio de Juárez, Chihuahua,” 2003, part VI, [online] <http://www.cndh.org.mx/lacndh/informes/espec/juarez2003/index.htm> (retrieved December 2005).

³⁶⁶ National Commission to Prevent and Eradicate Violence Against Women in Ciudad Juárez, “Segundo Informe de Gestión mayo 2004 – abril 2005,” pp. 52-53.

complaints. These observers included the Special Rapporteur of the U.N. Commission on Human Rights on the Independence of Judges and Lawyers (2001), the United Nations Committee Against Torture (2001), the Special Rapporteur on the Rights of Women of the Inter-American Commission on Human Rights (2002), two experts from the Committee Against the Elimination of Discrimination Against Women (2003), and the United Nations Office on Drugs and Crime (2003). Several international NGOs, including the Washington Office on Latin America, Amnesty International, and the Latin American Working Group, also conducted onsite research and extensive advocacy work that served to reinforce local advocacy efforts aimed at ending the impunity for these crimes.

This international presence played a crucial role in generating pressure on Mexican authorities to act. According to Mariclaire Acosta, former Under Secretary for Human Rights and Democracy in the Ministry of Foreign Affairs, after the intense scrutiny by the international community, it became “impossible for the president and the members of his cabinet charged with law enforcement and public security to continue to look the other way.”³⁶⁷ For the Foreign Affairs Ministry, it was a casebook example of using international scrutiny to encourage government action on human rights within Mexico.

Local rights advocates also told Human Rights Watch that the international attention had been decisive in forcing government action. According to Luz Castro, who works with the Center for the Human Rights of Women (*Centro de Derechos Humanos de las Mujeres*) and with a group of victims’ families called Justice for our Daughters (*Justicia para Nuestras Hijas*), “After all the visits and reports by international organizations, the state had to recognize the problem.”³⁶⁸ Similarly, Marisela Ortiz, who works with the

³⁶⁷ The first steps taken by the federal government were the 2001 creation of a national institute to design public policies to promote gender equality, and giving the mandate to two congressional commissions to evaluate the situation in Ciudad Juárez. Mariclaire Acosta Urquidi, “The Women of Ciudad Juárez,” Center for Latin American Studies of Berkley University, Policy Paper No. 3, May 2005, pp.9-10.

³⁶⁸ Human Rights Watch telephone interview with Luz Castro (Centro de Derechos Humanos de las Mujeres and Justicia para Nuestras Hijas), April 26, 2006.

According to Article 199 of the proposed reform, “In sexual crimes, in crimes committed against minors, and in crimes related to intra-family violence, the judge will not propose an agreement between the parties nor decide that there will be a hearing for that purpose unless the victim or his or her legal representatives requests it.” Social workers, lawyers, and NGO representatives told Human Rights Watch that public prosecutors often tell victims of domestic and sexual violence to reconcile with the aggressor, in particular if he is a family member. Undue emphasis on reconciliation and mediation is problematic for a number of reasons. Victims of domestic and sexual violence are unlikely to file a report unless the aggressor is a repeat abuser or the rape or violence was committed by a stranger. Further, an emphasis on reconciliation contributes to the pervasive notion that “low levels” of violence or sexual abuse in marriage are unavoidable and therefore not criminal. Insistence that the female victim negotiate with the aggressor can also lead to further abuse, and assumes that the victim and the perpetrator of the crime are equally empowered to negotiate their relationship. In fact, while voluntary mediation certainly should be offered by the state, undue emphasis on mediation can perpetuate an existing power imbalance, especially if not accompanied by policy measures that offer real alternatives to staying in an

NGO May Our Daughters Return Home (*Nuestras Hijas de Regreso a Casa*), another group of victims' relatives told Human Rights Watch: "The opening was absolutely necessary. Our cries for help wouldn't have gotten a response if it weren't for the international monitors. The opening was what made it necessary for the federal and state government to do something."³⁶⁹

The Fox administration responded to the growing concern in 2003 by creating the National Commission to Prevent and Eradicate Violence Against Women in Ciudad Juárez (*Comisión para Prevenir y Erradicar la Violencia contra las Mujeres en Ciudad Juárez*).³⁷⁰ The Commission then engaged in a variety of activities, including helping to bring the Argentine Forensic Anthropology Team (*Equipo Argentino de Antropología Forense*, EAAF) to Chihuahua to identify the bodies of dead women. In 2004, after a request by the Commission and Mexican NGOs, the EAAF prepared a report that evaluated the flaws in past investigations that had tried to identify bodies of dead women, and concluded that prior identification of bodies was unreliable.³⁷¹ Since then, the EAAF has worked under the auspices of the state prosecutor's office in Ciudad Juárez to obtain samples from bodies and family members in order to match their DNA results. By January 2006, the EAAF had obtained DNA samples from sixty bodies and 125 family members, and had succeeded in identifying thirteen bodies.

In addition to establishing the Commission, the Fox administration appointed a federal Special Prosecutor for the Homicides of Women in Ciudad Juárez (*Fiscal Especial para la Atención de Delitos Relacionados con los Homicidios de Mujeres en el Municipio de Juárez, Chihuahua*) in 2004. The role of this prosecutor has been limited by the fact that most of the cases at issue fall under the jurisdiction of local courts and prosecutors. Only twenty-four of the 377 homicides can be tried in federal courts, and those cases are currently being investigated by a division of the federal Attorney General's Office (*Procuraduría General de la República*, PGR) charged with investigating organized crime

abusive relationship. Such measures might include the availability of long-term shelters, and economic support for single parents. Human Rights Watch, "The Second Assault: Obstructing Access to Legal Abortion after Rape in Mexico," *A Human Rights Watch Report*, Volume 18, No. 1(B), March 2006, pp. 25-27.

³⁶⁹ Human Rights Watch telephone interview with Marisela Ortiz (*Nuestras Hijas de Regreso a Casa*), April 26, 2006.

³⁷⁰ The Commission's program to eradicate violence against women in Ciudad Juárez, which lists forty areas of action involving different federal and state agencies, aims at ensuring justice, prevention, and the promotion of women's human rights. The Commission's work has been, among others, to generate links between different actors, create a database on the cases of homicides and disappearances, elaborate diagnosis of the structural causes of homicides and disappearances of women, and promote assistance to victims and their families. National Commission to Prevent and Eradicate Violence Against Women in Ciudad Juárez, "Segundo Informe de Gestión mayo 2004 – abril 2005," pp. 232-6.

³⁷¹ Human Rights Watch interview with members of the EAAF, Ciudad Juárez, México, November 14, 2005.

*(Subprocuraduría de Investigación Especializada en Delincuencia Organizada, SIEDO).*³⁷²

Nonetheless, according to state officials, the Special Prosecutor's Office has been helpful in identifying irregularities in past investigations by state authorities.³⁷³ For example, in its final report, the special prosecutor found that 177 public officials (i.e., over 35 percent of those that participated in investigations) had participated in acts that might warrant administrative or criminal sanctions. According to the PGR, none of these public officials continue to work for the state attorney's office.³⁷⁴

The Special Prosecutor's Office has also actively participated in a joint effort of the federal and state governments to provide economic reparations to the families of the victims in these cases. The federal government has contributed 25 million pesos and the state government 5 million (totaling almost U.S.\$3 million) to a fund that has provided economic compensation to the families of sixty-three of the victims.³⁷⁵ (Some family members and local rights advocates have expressed grave reservations about the reparations program, fearing that it will serve as a substitute for prosecutions.³⁷⁶)

In addition to spurring action by the federal government, the international attention has helped to spur action at the level where, given the nature of the problems, it was most needed: the state government. After taking office in October 2004, Chihuahua's new attorney general, Patricia González, made the cases a top priority of the prosecutor's office and set about changing how the state approached these and other cases, increasing the emphasis on investigative techniques and strengthening the work of internal offices that sanction officers that commit abuses.³⁷⁷

³⁷² PGR, "Informe Final de la Fiscalía Especial para el Atención de Delitos Relacionados con los Homicidios de Mujeres en el Municipio de Juárez, Chihuahua," January 2006, p. 58.

³⁷³ Human Rights Watch interview with Patricia González, Chihuahua State Prosecutor, and with Cony Velarde, Deputy Prosecutor for the North Zone of Chihuahua State, Ciudad Juárez, Mexico, November 14, 2005.

³⁷⁴ PGR, "Informe Final de la Fiscalía Especial para el Atención de Delitos Relacionados con los Homicidios de Mujeres en el Municipio de Juárez, Chihuahua," January 2006, p. 67 and 100.

³⁷⁵ Each family received 136,656 pesos (U.S. \$13,000 dollars). *Ibid.*, p. 90.

³⁷⁶ Critics of the reparations program argue that the authorities have used the funds to discourage demands for further investigations and prosecutions, by requiring the recipients of reparations to sign a waiver agreeing not to seek independent confirmation of their daughters' identities with the EAAF. A second criticism is that the PGR designed the program without any meaningful consultation with the affected parties. Finally, the compensation has not been accompanied by a governmental recognition that the state had failed in its obligation to investigate and prevent the murders.

³⁷⁷ New officials increased the resources and personnel of the Prosecutor's office, moved their offices so that they are now closer to the centers for the attention of victims, they created a new system for forensic science, and they reactivated old investigations. They identified as a major flaw in past investigations that judicial police was unable to investigate and coordinate its activities with other agencies, and therefore decided to increase coordination between prosecutors, police, and experts. Human Rights Watch interview with Patricia González, Chihuahua State Prosecutor, and with Cony Velarde, Deputy Prosecutor for the North Zone of Chihuahua State, Ciudad Juárez, Mexico, November 14, 2005.

By the end of 2004, the new approach appeared to be generating positive results. The state prosecutors had obtained the arrest of fifty-two people accused of having committed these types of crimes against women, including eleven for crimes committed between 1993 and 2002. State prosecutors completed investigations in 80 percent of the cases from 2005 involving homicides of women, and all these cases are pending before a judge that must decide whether they go to trial.³⁷⁸ Significantly, there were four complaints of torture by law enforcement agents during this time, and they led to three arrests of state agents. This stands in contrast to the previous six years, during which there had been eighteen torture complaints, but not a single arrest warrant issued.³⁷⁹

Yet, as we showed in Chapter 5, the problem of torture being employed as a substitute for effective investigations is difficult to eradicate so long as prosecutors are able to use coerced confessions to convict suspects. The state attorney general told Human Rights Watch that she had reached the same conclusion and, consequently, believed that the most effective way to curb the practice of torture was to reform the state's justice system.³⁸⁰ Similarly, the president of the Chihuahua State Human Rights Commission told Human Rights Watch that a reform of the justice system was needed to remove the incentives that promote the use of torture and abuses to obtain confessions.³⁸¹

The views of these two officials were by no means isolated. In fact, a consensus had emerged in the state that the justice system was in need of an overhaul. In May 2005, the state judicial, legislative, and executive branches signed an agreement to reform the system.³⁸² And in January 2006, the top officials of all three branches presented a reform proposal that would, among other things, tackle the problem of torture and coerced confessions. Specifically, the proposal would establish that a confession made before a prosecutor (in the absence of a judge) could only have evidentiary value if it met certain specific conditions: the statement is videotaped and made in the presence of a defense attorney, and the accused has not been subject to illegal detention.

This proposed anti-torture measure does not go as far as the one proposed at the federal level by the Fox administration—and specifically Fox's proposed amendment to the

³⁷⁸ Information provided to Human Rights Watch by the Chihuahua State Prosecutor's Office.

³⁷⁹ Human Rights Watch interview with Patricia González, Chihuahua State Prosecutor, and with Cony Velarde, Deputy Prosecutor for the North Zone of Chihuahua State, Ciudad Juárez, Mexico, November 14, 2005.

³⁸⁰ Human Rights Watch interview with Patricia González, Chihuahua State Prosecutor, Chihuahua City, Mexico, November 15, 2005.

³⁸¹ Human Rights Watch interview with Leopoldo González Baeza, Chihuahua City, Mexico, November 15, 2005.

³⁸² Chihuahua Congress, Agreement N° 71/05 II P.O., May 31, 2005.

Constitution establishing that only confessions made before a judge would have evidentiary value at trial. Yet there is a good reason why not: if the state reform did include such a restriction, it would most likely face a constitutional challenge on the grounds that it undermined the authority that the federal Constitution grants prosecutors to conduct criminal investigations. Even if the proposed measures fall short of the ideal, they still could be very useful in curbing the practice of torture in Chihuahua.

The proposed reform in Chihuahua also addresses the issue of the excessive use of preventive detention. And on this issue, it goes further than the Fox proposal, by striking entirely from the criminal procedure code the list of “serious crimes” for which preventive detention is mandatory. Consequently, state judges would have the discretion to adopt the precautionary measures that are most appropriate for each case. The proposal also limits the length of preventive detention to a maximum of twelve months.³⁸³

As this report went to press, the Chihuahua legislature had yet to vote on these measures. Yet the fact that these much needed reforms are even on the table is due, in large measure, to the intense national and international exposure that the state has received in recent years—which, in turn, is due largely to Mexico’s new openness to international scrutiny.

The state attorney general told Human Rights Watch that, without the opening, the discussion currently underway in the state would never have taken place. The international scrutiny “was absolutely necessary to bring change,” she said. “It forced a recognition that something had to be done.”³⁸⁴

The Lessons of Ciudad Juárez

The case of Ciudad Juárez offers several key lessons regarding human rights in Mexico today. The most evident, and most widely reported, is that violence against women is a major problem in Mexico, one requiring urgent attention by state and federal authorities. Human Rights Watch focused extensively on one aspect of this problem in our report, “The Second Assault: Obstructing Access to Legal Abortion after Rape in Mexico,” issued in March 2006.

³⁸³ This issue is addressed in Articles 177 to 194 of the proposed reform.

³⁸⁴ Human Rights Watch interview with Patricia González, Chihuahua State Prosecutor, Chihuahua City, Mexico, November 15, 2005.

The other lessons of Ciudad Juárez, which have received less attention, are the ones related to the main themes of this report. The first is that human rights and public security must be understood as complementary aims. In Chihuahua, local authorities responded to a public security crisis by engaging in abusive behavior, using coerced confessions to jail scapegoats rather than conducting serious criminal investigations that might actually solve the crimes. Instead of resolving the problem, in other words, they merely prolonged it, jailing presumably innocent people while the true criminals remained at large.

A second, related lesson is that, in order to improve both its human rights and public security practices, Mexico needs to reform the underlying deficiencies of the justice system—both at the state and federal levels—that give rise to abusive practices. Chihuahua is on the verge of becoming one of the first states to undertake such a reform because experienced officials within the justice system have come to see why it is necessary.

A third lesson regards the value of international scrutiny for promoting real progress on human rights at the local level. The repeated visits by international monitors to Ciudad Juárez proved crucial, not only in reinforcing efforts by local advocates to draw attention to the plight of the victims and their families, but also in helping to generate a broad consensus that the justice system was in need of reform.

And herein lies a final critical lesson: the issues at stake here are not partisan ones. Mexico's human rights problems are by no means the province of any one political party—nor, for that matter, are their solutions. In Chihuahua, the abusive police practices occurred during years when both PRI and PAN governors were in office. And the state's current justice reform proposal—which largely mirrors the one promoted at the federal level by a PAN administration—has been spearheaded by a PRI governor and his attorney general, who was, herself, ratified in her post by all the major parties in the state legislature.

It is not clear at this point whether the reform proposal—and, specifically, the measures to curb torture and the excessive use of preventive detention—will pass in Chihuahua. And even in the event that they do pass, for Mexico as a whole to make real progress in curbing these abuses, similar reforms will be needed throughout the country, not only in other states, but also at the federal level.