



MEMORANDUM

From: José Miguel Vivanco, Executive Director, Americas Division, Human Rights Watch

To: Senator Patrick Leahy, Chairman of the State and Foreign Operations Subcommittee, U.S. Senate

RE: State Department Report on Mexico and the Merida Initiative Human Rights Requirements

Date: September 10, 2009

By law, 15% of the Merida funds are withheld until the State Department reports that Mexico has met *all* four human rights conditions included in the aid package. Since **the State Department report does not show that Mexico is meeting the condition that requires that “civilian authorities are investigating and prosecuting army abuses, in accordance with Mexican and international law,”** it should not be considered a sufficient justification for the release of the withheld Merida funds.

1. Efforts with Limited Impact

The report describes several **efforts by the Calderon administration** to comply with the requirement on accountability for army abuses: (a) The Ministry of Defense and the Ministry of the Navy created their own Human Rights Directorates, (b) military officials held meetings with members of international and regional human rights bodies and representatives of NGOs, and (c) the Ministry of Defense has formally agreed to investigate most of the abuses documented by the National Human Rights Commission (Comision Nacional de los Derechos Humanos, CNDH).

These **efforts, however, do not contribute to promoting accountability** for army abuses: (a) the Human Rights Directorates have served principally as a vehicle to communicate with the CNDH and other government offices; (b) the meetings with human rights organizations generally do not lead to a constructive dialogue on substantive issues; and (c) the Ministry of Defense has agreed to investigate the cases documented by the CNDH only through the military justice system, which has in the past led to impunity for abuses by the military.

2. Recognized Flaws in the Military Justice System

The report **recognizes serious structural flaws in the military justice system**, which are inconsistent with the argument that this justice system can effectively try and prosecute army abuses:

- ***The report states that*** “In general, however, the information received from the Mexican government regarding these cases, and the opaqueness of the military court system,

makes it difficult to analyze the nature and type of complaints filed, the status of cases against members of the military alleged to have violated human rights, or the results of the military prosecution.”

- *The report recognizes that the scope of civilian review of military decisions is very limited by stating that* “victims and their relatives have no legal recourse to request prosecution or appeal the outcome of a military court.”

3. Missing Information

The report **does not include critical information** that is necessary to determine whether Mexico is in fact meeting the requirements:

- *The report states that military courts have convicted 12 soldiers, but it fails to mention additional available information that suggests these convictions may not amount to accountability for human rights abuses.*

The Mexican government has not provided basic information on the facts of the cases nor when they occurred. But the very limited available information shows that:

- a. **4 soldiers were charged with committing crimes that do not constitute human rights abuses:**
 - In 2 cases the crime was “infractions of the common duties that all soldiers need to abide by” (“infracciones de los deberes comunes a todos los que están obligados a servir al Ejército”)
 - In 2 cases the crime was “involuntary manslaughter” (“homicidio culposo”), which could simply be a car accident.
- b. **6** members of the military were sentenced to prison terms of more than 10 years.
- c. The information creates the impression that the convictions involve recent cases by stating that they were issued “during the current administration.” However, **only one conviction stems from an investigation that started during the Calderon administration (in 2007). In eight of the 12 convictions, the cases have file numbers dating from the late 1990s, so presumably the crimes were then as well** (one case file is from 1996, six are from 1997, and one is from 1998).
- d. **One conviction has been appealed, so it could be reversed.**
- e. There is no available information on whether other members of the military have been acquitted in the same case. This information is relevant to determine to what extent the convictions amount to justice in a specific case. (For example, if 10 soldiers attack a civilian but only one is convicted, this person could be just a scapegoat and it is thus not a good example of the military justice system providing victims with access to justice).
- f. **This information contradicts information that the Mexican government provided previously.** In June, the Mexican government officials stated that it had “9 registered convictions against 14 members of the military.” To date, the government has been unwilling or unable to provide additional information on these cases.

- *The report gives more weight to the military’s practice of asserting jurisdiction to investigate and try army abuses, than to the Mexican Constitution and its interpretation by the Supreme Court and Mexican constitutional law experts.*

The report does not mention:

- a. The **exact language of the Constitution**, which in article 13 allows for military jurisdiction only for “crimes and faults against military discipline.” The Mexican military has broadened the scope of cases it asserts a right to investigate based on a very expansive definition of such offenses included in the Code of Military Justice, which states in its article 57 that the “crimes and faults against military discipline” include “faults under common or federal law... when committed by military personnel in active service or in connection with acts of service.”
 - b. A **2005 Supreme Court ruling** that is binding on all judicial authorities, including military ones, which limited the scope of military jurisdiction by defining “service” as “performing the inherent activities of the position that [he or she] is carrying out.”ⁱ The court did not explicitly state that all military abuses against civilians should be sent to civilian prosecutors and courts, but serious abuses such as rape and torture clearly cannot be considered “inherent activities” of the military.
 - c. The fact that **Mexican constitutional law experts** consider that the Constitution clearly provides that civilian prosecutors should investigate cases when a civilian commits, or is a victim of, a crime.ⁱⁱ Article 13 of the Constitution states that “under no cause and for no circumstance may military courts extend their jurisdiction over persons which are not members of the Armed Forces” and that “when a crime or a fault involves a civilian, the case shall be brought before the competent civil authority.”
- *The report does not mention that Mexico is violating its international obligations by prosecuting and trying army abuses in a military justice system that lacks basic safeguards to ensure independence and impartiality.*

The report does not mention that:

- a. Mexico is **bound by several international treaties**, including the International Convention on Civil and Political Rights and the American Convention on Human Rights, which require that individuals be tried by “**independent and impartial tribunals.**”ⁱⁱⁱ Mexico also has the obligation to **provide victims of abuse with effective remedies, including justice.**^{iv}
- b. The **problems with the Mexican military justice** system include the following: the secretary of defense wields both executive and judicial power over the armed forces, military judges have little job security and may reasonably fear that they will be removed if they adopt decisions that the secretary dislikes, civilian review of military court decisions is very limited, and there is virtually no public scrutiny of military investigations and trials.
- c. **International human rights bodies have consistently rejected the use of military prosecutors and courts in cases involving crimes against civilians**, by stating that the jurisdiction of military courts should be limited to offenses that are strictly military in nature. Specifically, over the last decade **several international bodies have issued reports documenting the lack of independence and impartiality in Mexico’s military**

justice system, and the resulting impunity for human rights abuses investigated by military courts. Therefore, they have consistently called on Mexico to transfer human rights cases to civilian courts. These reports include, for example, a 1998 report by the UN special rapporteur on torture, a 2002 report by the U.N. special rapporteur on the independence of judges and lawyers, a 2003 report by the office of the UN High Commissioner for Human Rights, a 2006 report by the Inter American Commission on Human Rights, and a 2007 report by the United Nations Committee Against Torture.

- *The report relies on the fact that the military justice system is supposed to be modified to reflect recent constitutional amendments, but it fails to explain the content of these modifications or when they will occur.*

The report does not mention that the constitutional reform to the Mexican justice system, passed in June 2008, **gave the Mexican government 8 years to implement it**. There is no publicly available information on how the Mexican government is planning to modify the military justice system or when it will happen. xzz

ⁱ Mexican Supreme Court, Jurisprudence, “Contradiction of Thesis” (Contradicción de Tesis) 105/2005-PS, September 28, 2005. The original language in Spanish is: “realización de las funciones propias e inherentes al cargo que desempeña.”

ⁱⁱ Mexican jurists have offered several arguments in support of the view that, in light of an analysis of Article 13 of the Mexican Constitution as a whole, civilian courts have jurisdiction to address these cases:

a. That the mere fact that the victim is a civilian is enough to prohibit the use of military courts to investigate these cases.

b. That military courts may not exercise jurisdiction over civilian victims, since the Constitution was modified to recognize victims’ rights in its Article 20(C), and those rights cannot be adequately met in the military system. These rights include the right to be informed of the progress of the proceedings, to collaborate with prosecutors investigating the case (coadyuvancia), to receive urgent medical and psychological attention, and the possibility of appealing certain decisions adopted by prosecutors.

c. That the “nature of the offense” determines which justice system has jurisdiction to investigate a case, and whenever a case involves a common crime against a civilian (and not strictly a breach of military discipline), civilian courts have jurisdiction to address it.

d. That, since the Code of Military Justice did not go through the appropriate process for approval of legislation, the entire code should be unconstitutional. The Code of Military Justice was issued by General Abelardo L. Rodríguez, acting president in 1933, using extraordinary powers asserted by the executive at that time, and it was never approved by the Mexican Congress. According to this view, since the code was not adopted by Congress, it should not be deemed a legally binding interpretation of Article 13 of the Constitution.

For additional information, see Human Rights Watch, “Uniform Impunity,” chapter II.

ⁱⁱⁱ ICCPR, art. 14(1): “Everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.” ACHR, art. 8(1): “[E]very person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law.”

^{iv} International Covenant on Civil and Political Rights, art. 2(3)(a). American Convention on Human Rights, art. 25.