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Demonstrators held by government troops on the night of the 'Tlatelolco Massacre', October 2, 1968." (c) 1968 Archivo Proceso

Justice in Jeopardy: *Why Mexico's First Real Effort To Address Past Abuses Risks Becoming Its Latest Failure*

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MEXICO

JUSTICE IN JEOPARDY: *WHY MEXICO'S FIRST REAL EFFORT TO ADDRESS PAST ABUSES RISKS BECOMING ITS LATEST FAILURE*

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I. SUMMARY

When Mexican voters ended seven decades of one-party rule in July 2000, they opted for a candidate who promised to change the way their country was governed. That promise—repeated by the new president, Vicente Fox, on the campaign trail and once again in office—was to replace a prevailing climate of corruption and impunity with one of transparency, accountability, and respect for human rights.

No one expected real change to come overnight. The problems inherited by the new government were chronic, manifold, and deeply rooted in the very institutions designed to address them. The justice system, in particular, had for years failed to stop abusive state practices. In some instances it even encouraged them.

Perhaps the most glaring failure of the Mexican justice system was the way it had allowed egregious human rights violations to go unpunished. 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 had failed to do so.

The impact of this failure was profound. Hundreds of torture victims had struggled for years with crippling psychological wounds while their tormentors went free, unpunished and even rewarded by the state. Thousands of family members had suffered the anguish of not knowing the fate of "disappeared" loved ones while successive administrations refused to provide information that might have eased their plight. And Mexican society as a whole had assimilated the ultimate lesson in the limits of their country's rule of law: not even the most horrific crimes of government officials would be prosecuted.

In November 2001, President Fox announced the creation of a mechanism aimed at redressing this failure—a special prosecutor's office that would investigate and prosecute abuses committed against members of political and social groups during the previous regime. To facilitate the investigation—and end years of state secrecy surrounding what had taken place—the president ordered the release of millions of classified documents from the government agencies that had been involved in internal security operations.

It was Mexico's first official recognition of its obligation to investigate and prosecute these past abuses—and it was significant not only because it came from the president, but also because it appeared to be backed by the same institutions whose agents had either committed the abuses or failed to investigate them. The Interior Ministry (which controlled the internal security agencies) had helped to design the Special Prosecutor's Office and, in the following months, took charge of collecting and transferring once classified documents. The Attorney General's Office promised to provide the Special Prosecutor's Office with all the material and technical resources it needed to carry out its mission. The military (though not directly involved in the creation of the Special Prosecutor's Office) had recently begun endorsing accountability for human rights violations and, in 2002, would initiate its own prosecution of "dirty war" abuses.

A year and a half later, the Special Prosecutor's Office has produced few significant results, prompting an increasing number of observers to ask whether it is up to the difficult task it has been assigned.

To answer this question, Human Rights Watch conducted a research mission to Mexico in May 2003. We interviewed dozens of victims and relatives who have been working with the Special Prosecutor's Office—and in some cases have been struggling for years on their own—to advance investigations into their cases. We interviewed local human rights advocates who

expressed deep frustration with the slow progress of the work of the Special Prosecutor's Office, but appeared ready to collaborate with it to bring about results. Finally, we interviewed officials within the Special Prosecutor's Office who, for the most part, appeared to be committed to doing the best they could under what they described to be adverse circumstances.

In Human Rights Watch's estimation, the lack of progress in the investigations has not been from lack of trying. It cannot be explained merely by the difficulty of the cases, nor the shortcomings that exist within the office itself. The overriding problem is, rather, the failure of the Mexican government to provide the Special Prosecutor's Office with the support it needs to do its work. This lack of support has manifested itself in several ways:

Limited resources: Investigators and prosecutors within the Special Prosecutor's Office have been operating without the material and human resources they need, given the large number and the difficulty of the cases they are handling;

Limited access to government documents: Access to declassified documents has been seriously impaired by the way the government archives have been administered;

Limited military cooperation: The Mexican military has not been fully forthcoming with information requested by the Special Prosecutor's office, and it has interfered with the special prosecutor's work by pursuing its own investigation and prosecution of some of the same cases.

In addition to these deficiencies, which hinder its ability to investigate past abuses, the Special Prosecutor's Office faces major legal hurdles which could limit its ability to prosecute those responsible for them. Mexican courts may find that many—if not most—of the crimes can no longer be prosecuted due to statutory limitations. Already a judge has rejected the office's first and only request for arrest warrants on precisely those grounds. And President Fox himself confirmed this danger when he said, in November 2002, that the time allotted by statutory limitations had probably run for most of the cases under investigation. The president's observation—and the fact that some experienced Mexican jurists share this view—suggests a disturbing lack of concern within the government about the viability of the Special Prosecutor's Office. If it is true that the prosecutions are pre-ordained to fail, why was the office created in the first place?

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 state's "regular" institutions to duck their responsibility—leaving it to this new office to do what they should have been doing all along, and to take the blame when, and if, it fails to produce results.

The predicament of the Special Prosecutor's Office illustrates a more general problem with human rights in Mexico today. Over the past two and a half years, the government has taken important steps toward promoting accountability. But, upon closer scrutiny, these initiatives appear to be merely *half-steps*. They may be headed in the right direction, but they are insufficient to reach their stated goals. Two examples of these half-steps discussed in this report are the release of classified documents and the military's endorsement of human rights prosecutions, neither of which has lived up to its promise.

The Special Prosecutor's Office is, itself, the most troubling example of a half-step. Its creation represented an important breakthrough for accountability in Mexico. But unless the government takes aggressive measures to shore up the work of the special prosecutor, the whole

exercise could collapse and the promise of a new era of accountability and respect for human rights in Mexico will be left unfulfilled.

Recommendations

Human Rights Watch believes that the investigations being carried out by the Special Prosecutor's Office can still produce significant results. To make that happen, the government should do all it can to ensure that:

- Investigators and prosecutors within the Special Prosecutor's Office receive adequate resources and training;
- Declassified documents are readily available to the Special Prosecutor's Office, as well as to the general public;
- Military officials provide all requested information and cease to assert jurisdiction over cases under investigation by the Special Prosecutor's Office.

When it comes to prosecutions, Human Rights Watch is not convinced that statutes of limitations present an insurmountable problem. In interviews with Mexican lawyers and jurists, we found widely divergent views on whether and how prosecutors can prosecute the crimes under investigation. Where we did find consensus, however, was in the belief that prosecutors will need to navigate uncharted legal terrain and develop novel arguments that are acceptable to Mexican courts—and that it will be difficult for the lawyers in the Special Prosecutor's Office to do so without the assistance of more experienced and influential jurists. In other words, in the prosecutions as in the investigations, it will be difficult for the Special Prosecutor's Office to go it alone.

Instead, the Fox administration should take responsibility for addressing the statutory limitations issue. One way to do so would be for the president to convene a special task force or commission consisting of distinguished jurists and lawyers representing relevant private and state institutions that would work to ensure that:

- A broad consensus is generated regarding the nature of the legal hurdles facing the special prosecutor and the appropriate legal strategies that can be adopted to overcome them.

Whatever the ultimate outcome of the prosecutions, the government should also begin developing a strategy to ensure that:

- Information gathered by the Special Prosecutor's Office regarding past human rights abuses is widely disseminated to the Mexican public.

Finally, it is important that the government not forget that the obligation to investigate and prosecute past abuses—and hence to ensure the success of the Special Prosecutor's Office—lies with the state as a whole. Responsibility for the office's failure—if it should come to that—will ultimately lie with all the state institutions and actors that failed to do all they could to make it work.

II. 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 Alvarez, 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 of 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.¹

Others fared even worse. José Ignacio Olivares Torres, a guerrilla leader from Guadalajara, was captured by the 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 to identify him by his teeth and some scar tissue that had been left by an earlier surgery.²

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.³

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.⁴ 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.⁵

¹ Human Rights Watch interview with torture victim, Atoyac de Alvarez, 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.

² Human Rights Watch interview with Amabilia 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.

³ Testimony from eyewitnesses in Military Prosecutor’s Office (*Procuraduría General de Justicia Militar*, PGJM) document, “Averiguación Previa SC/034/2000/IV-E-BIS.”

⁴ Human Rights Watch interview with torture victim, Atoyac de Alvarez, Guerrero, May 24, 2003.

⁵ Human Rights Watch interview with torture victim, Atoyac de Alvarez, Guerrero, May 24, 2003.

The relatives of those victims “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 Alvarez, 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 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.”⁶

Another Atoyac resident described how her family had hounded the Attorney General’s Office about the case of her brother who had been detained by soldiers in 1974 and never seen again.⁷ After five years, the Attorney General’s Office 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.⁸ The family sought to refute this account by providing the Attorney General’s Office 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).⁹ 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.¹⁰

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 Alvarez. 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.¹¹

The Attorney General’s Office (*Procuraduría General de la República*, PGR) finally did open an investigation into the “disappearance” cases in Atoyac de Alvarez 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.

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.

⁶ Human Rights Watch interview with victim’s relative, Atoyac de Alvarez, Guerrero, May 24, 2003.

⁷ Human Rights Watch interview with Elezar Peralta, Atoyac de Alvarez, Guerrero, May 25, 2003.

⁸ Untitled document from Attorney General’s Office, March 23, 1979.

⁹ Letter to attorney general from Alejandrina Santiago, March 23, 1979.

¹⁰ CNDH document “EXP. CNDH/PDS/95/GRO/S00237.000, Case of Mr. Peralta Santiago Lucio.”

¹¹ Human Rights Watch interview with Tita Radilla Martínez, Atoyac de Alvarez, Guerrero, March 24, 2003.

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.¹² 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.¹³ 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."¹⁴ The Inter-American Court of Human Rights has held that this right imposes an obligation upon states to provide victims with effective judicial remedies.¹⁵

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 has held, "Every society has the inalienable 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."¹⁶

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.¹⁷

¹² International Covenant on Civil and Political Rights, 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.

¹³ 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.

¹⁴ 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 International Covenant on Civil and Political Rights (ICCPR) established the right of individuals to effective judicial recourse against human rights violations (article 2(3)).

¹⁵ 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.

¹⁶ "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 Inter-American Commission on Human Rights 1985-86, OEA/Ser. L/V./ II.68, Doc. 8, rev. 1, September 26, 1986, ch. V, p. 205.

¹⁷ 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

To the extent the state fails to inform relatives about the fate of the “disappeared,” it fails to fulfill its basic obligation to bring an end to the violation.¹⁸ 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.”¹⁹

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 disposal to inform the relatives of the fate of the victims and, if they have been killed, the location of their remains.²⁰

Finally it is important to stress that not any sort of investigation will suffice to fulfill this obligation. The Inter-American Commission on Human Rights has found that, “when the State permits investigations to be conducted by the entities with possible involvement, independence and impartiality are clearly compromised.”²¹ The result is “de facto impunity,” which “has a corrosive effect on the rule of law and violates the principles of the American Convention.”²²

III. 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”

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.”

¹⁸ 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.

¹⁹ 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.

²⁰ Inter-American Court, Velasquez Rodriguez Case, Judgment of July 29, 1988, para. 181.

²¹ IACHR, 1995 Annual Report, Report N° 10/95 (Case 10.580. Manuel Stalin Bolaños Quiñonez), Ecuador, para. 48.

²² 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.

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.²³ 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.²⁴ He also 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.²⁵ 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.

The executive order establishing the Special Prosecutor's Office 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.

Lack of Results

During its first year and a half in operation, the Special Prosecutor's Office has opened over 300 formal investigations and received many more complaints. It has collected testimony from hundreds of victims and family members and collected documentary evidence from the national archives.

²³ National Human Rights Commission (*Comisión Nacional de Derechos Humanos*, CNDH), "Informe Especial Sobre las Quejas en Materia de Desapariciones Forzadas Ocurridas en la Década de los 70 y Principios de los 80."

²⁴ "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 Special Prosecutor's Office is "Fiscalía Especial para movimientos sociales y políticos del pasado."

²⁵ 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."

Its investigations, however, have produced few concrete results. The special prosecutor has summoned several former officials, including former president Luis Echeverría Alvarez 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 also declined to answer the special prosecutor's questions, as did Miguel Nazar Haro and Luis de la Barrera Moreno, both former heads of the Federal Directorate of Security (*Dirección Federal de Seguridad*, DFS).

Aside from these interviews of high-profile figures, the Special Prosecutor's Office has conducted few interviews of former government officials or members of the institutions implicated in abuses. In the hundreds of "dirty war" cases, the office has only obtained testimony from two military witnesses.²⁶ In the 1968 and 1971 massacre cases, prosecutors have yet to obtain any testimony from members of the security forces that allegedly participated in the incidents. "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.²⁷

Officials in the Special Prosecutor's Office spoke candidly with Human Rights Watch about the limited results of their investigations.²⁸ They said that, in the vast majority of cases, they had done little more than systematize the information that had been provided to them by victims and relatives, along with the information collected by the CNDH. While the office has obtained some valuable documents from the national archive, it has pursued few investigative leads and collected virtually no testimony from third-party witnesses. The office has yet to carry out exhumations at the sites of suspected clandestine cemeteries.

In April 2003, the Special Prosecutor's Office sought arrest warrants for three men (the former directors of the DFS and the federal police) to face charges for the 1975 "disappearance" of Jesús Piedra Ibarra. What was to be the special prosecutor's first arrests instead proved an embarrassing setback when a judge rejected the petition on the ground that the time period allotted by the statute of limitations for the alleged crime had run. The special prosecutor has appealed this ruling.

The special prosecutor's "Support Group," meanwhile, has kept a very low profile. In May, 2003, the president named several new members to the group, but there has been no indication that it would take a more active role in advancing the special prosecutor's work. Similarly, the "interdisciplinary committee" in charge of developing a proposal to provide reparations to victims has not yet done so.

Human Rights Watch encountered a growing sense of frustration among victims and victims' relatives. All twenty-five victims and relatives we spoke to in Guerrero reported that they had seen no results from the special prosecutor's investigations.²⁹ Other family members in Mexico City reported limited advances on their cases, but complained that it only consisted of compiling information that they or the CNDH had already collected, and interviewing witnesses that they themselves had provided. Several also complained that the Special Prosecutor's Office had actually failed to interview witnesses whom they had suggested—a charge which officials

²⁶ Human Rights Watch interview with official in the Special Prosecutor's Office, Mexico City, May 27, 2003.

²⁷ Human Rights Watch interview with official in the Special Prosecutor's Office, Mexico City, May 28, 2003.

²⁸ Human Rights Watch interviews with officials in the Special Prosecutor's Office, May 24-8, 2003.

²⁹ Human Rights Watch interviews with victims and relatives in Atoyac de Alvarez, Guerrero, May 24-5, 2003.

within the Special Prosecutor's Office confirmed (explaining that it was not easy to track down the witnesses when the family members did not provide addresses).

If the Special Prosecutor's Office does not start producing results soon, one torture victim told Human Rights Watch, the victims and relatives will stop trusting it. One Atoyac resident told us that her family "had never rested" in their search for their missing brother, but that they, and the other families they knew, were already beginning to lose faith in the special prosecutor. Many other relatives of victims appear to have never had much faith in the investigation. 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.³⁰ A local human rights advocate, whose family was also subject to army abuses, told Human Rights Watch that the "hope for truth and justice" had dried up a long time ago.³¹

The opposite is true as well, however. If the special prosecutor starts producing concrete results, public perception could change rapidly, leading to much more active and widespread cooperation with the investigations. "As soon as he jails some of the people who committed those crimes," the local human rights advocate in Guerrero predicted, "many more people will step forward and be willing to participate"—and the testimonies of what took place will then inundate the Special Prosecutor's Office "like a downpour."

IV. OBSTACLES TO PROGRESS

Limited Resources

Shortly after the creation of the Special Prosecutor's Office, Mexico's attorney general, Rafael Macedo de la Concha, promised that the office would receive all the resources it needed to fulfill its mission.³² Yet numerous officials within the Special Prosecutor's Office told Human Rights Watch that the office had been seriously understaffed and underfunded during the first year and a half of operation.

The chief problem has been a shortage of personnel. The office opened with fifteen prosecutors and after a year had grown to include thirty-five—which, according to officials within the Special Prosecutor's Office, was still not enough. When asked about the lack of progress on investigations, the special prosecutor himself explained that the work had been backed up due to the lack of prosecutors.³³ In Guerrero, for example, where the office has received over 300 complaints—and expects to receive many more—the office had had only eight prosecutors handling the cases. These same prosecutors were also responsible for numerous cases in other states, which they were forced to neglect for months. When they did turn to the other states, they had no choice but to neglect the Guerrero cases—and when they returned to Guerrero they had to put the other cases on hold once again.³⁴

The cases these prosecutors are handling can be particularly time-consuming, given their politically sensitive nature and the legal complexities that they entail (discussed further below). Collecting reliable evidence is unusually difficult given the long lapse of time since the crimes

³⁰ Human Rights Watch interview with AFI agent, Acapulco, Guerrero, May 24, 2003.

³¹ Human Rights Watch interview with Hilda Navarrete, Coyuca de Benitez, Guerrero, May 23, 2003.

³² Human Rights Watch interview with Attorney General Rafael Macedo de la Concha, Mexico City, December 4, 2001.

³³ Human Rights Watch interview with Special Prosecutor Ignacio Carrillo Prieto, Mexico City, May 23, 2003.

³⁴ Human Rights Watch interview with official in the Special Prosecutor's Office, Atoyac de Alvarez, Guerrero, May 24, 2003.

occurred, the mistrust and skepticism of many of the victims and relatives, and the unwillingness of former officials to provide information.

Other areas have also been affected by the shortage of personnel. For example, the Special Prosecutor's Office has set up a program to provide psychological attention to victims and their relatives. However, the program includes only two mental health professionals, making it impossible to provide services to any more than a small fraction of the people who could benefit from them.³⁵ Perhaps the most critical shortage in personnel is in the documentation center (discussed more fully in the next section), in which a team of five researchers has been given the daunting task of searching through millions of declassified government documents for evidence that will be crucial to the cases under investigation.

The staff shortage appears to be reflected as much in the quality as the quantity of the personnel. Human Rights Watch encountered officials within the Special Prosecutor's Office who seemed to be serious and motivated about their work. But several of these officials told Human Rights Watch that a significant number of their colleagues had little or no background in handling human rights cases.³⁶ One official reported working with prosecutors who had little idea of how to conduct an effective interview of victims' relatives and, as a result, neglected to ask for fundamental information.

We also received numerous complaints from NGOs and relatives of victims about the lack of professionalism of some members of the Special Prosecutor's Office. These complaints ranged from the failure to number the pages in the case files (a legal requirement that deters the removal of documents), to efforts, in one case, to deny one woman standing as a relative in the case of her common-law husband, who was forcibly disappeared in the 1970s.³⁷

Top officials within the office, including the special prosecutor himself, acknowledged to Human Rights Watch that staff training had been inadequate. Prosecutors had not received extensive training on how to handle human rights cases of this sort. And while some had participated in training sessions to "sensitize" them to the political context in which the crimes took place and the issues facing the families, these sessions had been "superficial."³⁸ The special prosecutor attributed the lack of adequate training to the office's lack of resources, though he indicated that he would be asking the Attorney General's Office to arrange new training sessions in the near future.

The Special Prosecutor's Office does not have any forensic equipment and until recently did not have its own forensic expert. Instead it had to rely on experts sent over by the Attorney General's Office.³⁹ Similarly, it has not been provided with its own team of investigators but rather has had to rely on police investigators provided by the Federal Investigations Agency (*Agencia Federal de Investigación*, AFI). In Guerrero, AFI agents have been called off other assignments and sent to interview relatives and potential witnesses in "disappearance" cases. According to one of these agents, they have not been compensated for the substantial transportation expenses or for the overtime they have put in to fulfill the additional assignment.⁴⁰

³⁵ Human Rights Watch interview with official in the Special Prosecutor's Office, Atoyac de Alvarez, Guerrero, May 24, 2003.

³⁶ Human Rights Watch interviews with officials in the Special Prosecutor's Office, Mexico City and Atoyac de Alvarez, Guerrero, May 2-8, 2003.

³⁷ Human Rights Watch interview with Graciela Mijares, Mexico City, May 26, 2003.

³⁸ Human Rights Watch interview with Special Prosecutor Ignacio Carrillo Prieto, Mexico City, May 23, 2003.

³⁹ Human Rights Watch interview with official in the Special Prosecutor's Office, Mexico City, May 26, 2003.

⁴⁰ Human Rights Watch interview with AFI agent, Acapulco, Guerrero, May 24, 2003.

Nor have they received any special training in how to handle these cases, which they have found to be exceedingly difficult given the distrust that the relatives and witnesses feel toward the federal police. 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.

In addition to the shortage of staff, the Special Prosecutor's Office has been plagued by a lack of material resources. One veteran prosecutor told Human Rights Watch that in his fifteen years working with the PGR, he had never seen such a lack of resources.⁴¹ Whereas normally each prosecutor would have his or her own computer and secretary, he had been sharing a computer with seven other prosecutors and a secretary with nine others. Officials in the Guerrero office told Human Rights Watch that the lack of resources had been a major obstacle for them in handling the large number of cases in the region. The Guerrero office's budget of \$5,000 (roughly US\$500) a month had proven inadequate to cover its operating costs. Several members of the Special Prosecutor's Office also reported that some of their colleagues had been forced to work for months without receiving salaries.

At the end of May 2003, the number of prosecutors assigned to the Special Prosecutor's Office was increased to fifty-seven. The special prosecutor assured Human Rights Watch that, along with the increase in staff, there had come an increased commitment of material resources. According to the office's top prosecutors, this long overdue increase would make it possible for them to accelerate the pace of their investigations. Yet sources within the office also told Human Rights Watch that the increase, while welcomed, was still short of what was needed to cover all their cases. It also remained to be seen whether the larger team of prosecutors would receive the resources and training they needed for the job.

Without having audited the special prosecutor office, Human Rights Watch is not in a position to determine whether the lack of resources has been caused entirely by an inadequate budget, or whether it is due in part to a poor management of funds within the office.⁴² What is clear is that the people carrying out the investigations feel they have not received the resources they have needed up till now.

Limited Access to Government Documents

A key component of the executive order creating the Special Prosecutor's Office was its instruction to "open" government archives that contained information related to past abuses.⁴³ Specifically, the president instructed the Interior Ministry to deposit in the National Archive (*Archivo General de la Nación*) all the documents generated by two extinct agencies that had directed internal surveillance and security operations—the Federal Security Directorate (*Dirección Federal de Seguridad*) and the General Directorate of Investigations (*Dirección General de Investigaciones*). The president also instructed the Interior Ministry to collect and deposit in the National Archive documents from other government agencies that might be relevant to the special prosecutor's investigation. In June 2002, these instructions were carried out and some eighty million documents were deposited in the National Archive.

The release of these documents promised to be—in and of itself—a major step toward accountability for abusive state practices. According to independent investigators who have

⁴¹ Human Rights Watch interview with official in the Special Prosecutor's Office, May 2003.

⁴² The annual budget of the Special Prosecutor's Office in 2002 was \$5 million (roughly US \$500,000) and was expected to be the same in 2003.

⁴³ Order of the President of the Republic, Mexico, November 27, 2001, chapter 3, "On the Opening of Institutional Archives."

examined the archives, the files contain a wealth of detailed information on human rights violations, as well as insights into the command structure and modus operandi of institutions that carried them out.⁴⁴ Their release meant that victims and relatives would now be able to conduct research on their own particular cases. Scholars and journalists would be able to study the inner workings of past governments. And, most critically, the Special Prosecutor's Office would be able to obtain evidence for its investigations. In the likely scenario that former government officials refused to cooperate with the special prosecutor, these documents might provide the only inside accounts of the state's involvement in past abuses.

Unfortunately, however, access to the released documents has been seriously curtailed by a variety of factors. To obtain material, researchers must submit written requests to the archive staff, listing topics of interest, and then wait (as long as ten days) for relevant documents to be retrieved. The determination of which documents are relevant is made by the archive staff and, in particular, the director of the particular collection, who is ultimately responsible for which documents are shown to researchers.⁴⁵ In the case of independent researchers (including victims and relatives), the archive staff is authorized to deny access to documents that might infringe upon the "privacy" of other people. Such "privacy" restrictions are commonplace in government archives. In the United States, for example, public access to government documents is limited by the 1974 Privacy Act, which restricts public access to government documents with information about other people's personal lives, but does not limit access to information about people's professional or public activities.⁴⁶ Unfortunately, in Mexico, there is no clear definition of what constitutes protected "private" material. Various researchers (including victims' relatives) report being denied access to documents on "privacy" grounds, only to learn later that the documents in question contained no information on other people's personal lives.⁴⁷ One researcher recalled the director of the DFS collection, Vicente Capello, refusing to show her some documents on the grounds that they revealed the identities of government informants. When she challenged him to show the legal basis for this refusal, he responded only that it was his own decision.⁴⁸ The former director of the National Archive acknowledged Capello's authority to make such decisions, according to one press account, saying that he had "absolute discretion" to determine which documents a researcher could see.⁴⁹

This privacy restriction does not apply to the investigators from the Special Prosecutor's Office. However, they too must rely on the archive staff—and particularly the director of each collection—to determine which documents are "relevant" to the topics they are investigating.

Giving one person full discretion over what documents researchers see is problematic for several reasons. One is the risk that this person could abuse his or her authority to deny access to documents that should be public. This risk is particularly pronounced under the current arrangement for the one of the most important collections—the archives of the DFS—given that

⁴⁴ Human Rights Watch telephone interviews with Sergio Aguayo, Mexico City, June 2003, and Kate Doyle, Mexico City, June 2003. Aguayo is a Mexican scholar. Doyle directs the Mexico Project of the National Security Archive.

⁴⁵ Human Rights Watch telephone interview with archive director, Vicente Capello, Mexico City, June 25, 2003.

⁴⁶ Human Rights Watch telephone interview with Kate Doyle, Mexico City, June 2003.

⁴⁷ Human Rights Watch interview with Amabilia Olivares, Mexico City, May 27, 2003. Human Rights Watch interview with official of the Special Prosecutor's Office, May 2003. Human Rights Watch telephone interview with Kate Doyle, Mexico City, June 2003. See also Jacinto R. Munguía, "La amenaza del silencio, otra vez," *Proceso*, February 2, 2003, pp. 28-30.

⁴⁸ Human Rights Watch telephone interview with Kate Doyle, Mexico City, June 2003.

⁴⁹ Darío Fritz, "El AGN cierra puertas," *Revista Milenio*, October 7, 2002, p. 39.

the official in charge, Vicente Capello, was himself a DFS employee for decades.⁵⁰ Capello's background has prompted suspicions among victims, relatives, and journalists that he may be preventing the release of important documents that incriminate his former colleagues. Whether or not these suspicions are well-founded, there clearly is a strong potential for conflicts of interest arising here.

Another problem with this arrangement is more structural in nature. Under the current arrangement, any release of documents with information about powerful and potentially dangerous individuals ultimately depends on the person in charge of the archives. That fact makes him—and to a lesser extent his staff—vulnerable to pressure from people who might wish to prevent the release of incriminating material. One credible source told Human Rights Watch that individuals working in the archives had, in fact, already been subject to acts of intimidation.

The greatest obstacle to access is far more mundane, however. The archives are not indexed or catalogued. Unlike other government archives in Mexico and elsewhere, researchers are not provided with any information about what documents they should expect to find inside. (The United States national archives in Maryland, for example, has a room full of research aids to guide researchers in their hunt for documents.) As a result, investigators have no way of knowing where to look for information relevant to their research—or of knowing whether the archive staff is providing all the information that it should. As one experienced investigator put it, releasing the files without providing an index is “almost like not making them accessible at all.”⁵¹

To compensate for the lack of indexes and catalogues, the documentation center of the Special Prosecutor's Office has been developing its own—slowly mapping the archives' content based on what documents the archive staff bring them. This is an enormously arduous and time-consuming task. While the archive contains millions of documents (according to the director of the documentation center, they would climb three kilometers if stacked on end), the documentation center has only five researchers. The center's director told Human Rights Watch that she would need twice as many researchers to a “thorough and irrefutable job.”⁵² This assessment was echoed by the Mexican scholar, Sergio Aguayo, who has published two books based on research he did in the archives before they were opened to the public. Aguayo had more researchers for each of his books than the Special Prosecutor's Office has had for its hundreds of cases, and he told Human Rights Watch that the special prosecutor's documentation center “definitely does not have enough people to do the job that it has to do.”⁵³

A year after these documents were “released,” it is clear that more must be done to make them genuinely accessible. Specifically, the government should make sure the archives are equipped with the basic research aids that any archive needs to function: an index and catalogue of its contents. This work should not be left to the special prosecutor, who already has more than enough to do investigating hundreds of cases, but rather the government ministries that generated the documents in the first place.

The government should also redesign the procedure by which researchers gain access to documents. It should stop granting full discretion over who sees what to a single individual. It should develop a more precise and sensible definition of the type of “privacy” that is to be protected (and seek passage of legislation establishing this definition as a legal standard). It should develop a review procedure by which researchers can appeal decisions to deny access to documents. Finally, it should work to avoid real or perceived conflicts of interest including cases

⁵⁰ Human Rights Watch telephone interview with Vicente Capello, Mexico City, June 25, 2003.

⁵¹ Human Rights Watch telephone interview with Kate Doyle, Mexico City, June 2003.

⁵² Human Rights Watch interview with María de los Angeles Magdalena, Mexico City, May 28, 2003.

⁵³ Human Rights Watch telephone interview with Sergio Aguayo, Mexico City, June 2003

in which individuals making decisions about access to documents have had direct ties to the institutions or persons that may be under investigation.

Limited Cooperation by the Military

Another recent development that appeared to parallel and potentially reinforce the mission of the Special Prosecutor's Office has been the Mexican military's public embrace of human rights prosecutions. On multiple occasions the military's top brass has expressed its commitment to making sure army abuses do not go unpunished.⁵⁴ In September 2002, the military attorney general's office (*Procuraduría General de Justicia Militar*, PGJM) appeared to make good on this commitment by indicting three officers for their alleged involvement in the deaths of 143 people who "disappeared" while in army custody during the 1970s.⁵⁵ This indictment was the first formal recognition by the military of its role in abuses from that era—and, in that regard, it represented an important break from years of official silence and denial.

The military's new attitude should have been a great boon for the Special Prosecutor's Office. Given the fact that military officers were directly involved in many—if not most—of the crimes under investigation, the Mexican military is in a position to make a major contribution to the special prosecutor's investigations. Current and former officers could provide testimony, and the institution itself could provide documentary evidence that would help investigators determine who was responsible for the violations and what happened to the victims. Short of that, these documents could expedite the special prosecutor's investigation by identifying potential witnesses and other leads. Moreover, military documentation could be needed at trial to determine that particular witnesses or suspects actually served in the military (since, in Mexican courts, eyewitness identifications are insufficient to establish someone's military status).

Unfortunately, however, the military's professed commitment to accountability has not translated into full and active support for the Special Prosecutor's Office. The executive order establishing the Special Prosecutor's Office instructed the Minister of Defense to have the PGJM provide prosecutors with information needed for their investigations.⁵⁶ Yet several officials in the Special Prosecutor's Office told Human Rights Watch that the military had failed to provide all the information requested of it. When asked for information that would aid the investigations, PGJM officials have routinely claimed that they were unable to find what was asked for. 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 PGJM responded that "no information was found relating to the incidents that you mention."⁵⁷ When asked for the names of the officers who served in 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

⁵⁴ "Defender los derechos humanos, prioridad para la Sedena: Macedo," *La Jornada*, January, 2000. Jesus Aranda, "Sedena se abre a la participación civil en pesquisas de abuso militar," *La Jornada*, June 11, 2001. Human Rights Watch interview with Military Attorney General, Brig. Gen. Jaime Antonio López Portillo Robles Gil, Col. Rubén Palacios Vargas, Lt. Col. Aníbal Trujillo Sánchez, Maj. Carlos Sergio Ruvalcaba, Maj. Jesús Rosario Aragón Valenzuela, Maj. Andrés Cortes Ríos, Mexico City, June 13, 2001.

⁵⁵ The officers are Brig. Gen. Mario Arturo Acosta Chaparro, Gen. Francisco Quirós Hermosillo, and (Ret.) Maj. Francisco Barquin.

⁵⁶ Order of the President of the Republic, Mexico, November 27, 2001, chapter 1, article 3.

⁵⁷ Letter from the PGJM to the special prosecutor, March 2003 ("no se encontró información relacionada con los hechos que se citan").

passed since 1974, it is not feasible to provide the documentation in the archives as it has been requested.”⁵⁸

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 in and the dates he served there—yet, still, the PGJM claimed it could find no information on the officer.⁵⁹

The PGJM’s repeated claims that it could not locate information seems highly dubious given the fact that, according to people who have done extensive research in the National Archives, the military keeps exceptionally detailed and well-organized files. While it certainly may be true that locating the requested information is a time-consuming task, that is precisely the task that the president assigned the military in the executive order that established the Special Prosecutor’s Office.

Unfortunately, instead of devoting more time and energy to supporting the special prosecutor’s investigations, the PGJM has chosen to pursue its own prosecution of some of the “dirty war” crimes. In September 2002, the PGJM indicted three military officers for their role in some of the “disappearance” cases under investigation by the special prosecutor. In February 2003, the PGJM installed an office in Atoyac de Alvarez, Guerrero—a short distance from the office already established by the special prosecutors office—and began calling on victims’ relatives to provide testimony about alleged “disappearances” committed by the army.

While the indictment represented an important—if long overdue—recognition by the military of its role in past abuses, this achievement was undercut by the fact that these cases 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.⁶⁰ 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

⁵⁸ 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 transcurido desde 1974, no es factible proporcionar la documentación que obra en los archivos en los terminus requeridos*”).

⁵⁹ Letter from the PGJM to the special prosecutor, March 2003.

⁶⁰ 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.

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.”⁶¹

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,"⁶² 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."⁶³ (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.⁶⁴)

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."⁶⁵ Accordingly, when both military and civilians are suspected of committing a particular crime, the case goes to civilian courts.⁶⁶ 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.⁶⁷

The PGJM may be genuinely committed to prosecuting these crimes. 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

⁶¹ 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 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].

⁶² Article 13, Constitution of the Republic of Mexico.

⁶³ Code of Military Justice, art. 57 (Mex.).

⁶⁴ Article IX 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."

⁶⁵ Article 13, Constitution of the Republic of Mexico.

⁶⁶ 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." Suprema Corte de Justicia de la Nación, Quinta Época, Pleno, Semanario Judicial de la Federación, Tomo XL, p. 1393.

⁶⁷ 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..."

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.⁶⁸ A third is the fact that the indicted military officers were already in jail facing drug charges. A fourth factor, mentioned above, is the fact that the PGJM was violating the Mexican constitution by asserting jurisdiction over the case.

Whether or not the PGJM is serious about prosecuting these cases, its assertion of jurisdiction presents serious obstacles to the Special Prosecutor's Office. Chief among these is the possibility 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 the United States, 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 fear. 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.⁶⁹ Another woman who refused to testify explained that she could not believe the military had any intention of conducting a serious investigation. “They ignored us back then,” she said, “why would it be different now?”⁷⁰ Other relatives in Atoyac de Alvarez, who themselves had not yet been called upon for testimony, expressed similar distrust of the PGJM's investigation. One woman said she would not collaborate with a military investigation since “[t]hey are the ones who took my husband away.”⁷¹ 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.⁷² Another woman asked rhetorically, “How am I going to go to the PGJM when I'm denouncing an army general?”⁷³

As Human Rights Watch documented in its 2001 report, *Military Injustice: Mexico's Failure to Punish Army Abuses*, this sort of fear and distrust of military authorities is widespread in Guerrero. Civilians often do not differentiate military justice officials from other officers. Indeed, when civilians received invitations to give statements before military prosecutors, they perceived what might have been a good-faith effort on the part of the PGJM as a form of harassment. Even if the PGJM were fully committed to combating human rights abuses by the army, it would be difficult to convince civilians that military prosecutors were able to act independently of the interests of the army.

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

⁶⁸ “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.

⁶⁹ Human Rights Watch interview with victims' relatives, Atoyac de Alvarez, Guerrero, May 24-25, 2003.

⁷⁰ Human Rights Watch interview with victim's relative, Atoyac de Alvarez, Guerrero, May 24, 2003.

⁷¹ Human Rights Watch interview with victim's relative, Atoyac de Alvarez, Guerrero, May 24, 2003.

⁷² Human Rights Watch interview with victim, Atoyac de Alvarez, Guerrero, May 24, 2003.

⁷³ Human Rights Watch interview with victim's relative, Atoyac de Alvarez, Guerrero, May 24, 2003.

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.”⁷⁴

Even if the military prosecution does not end in acquittal, the anxiety caused by the PGJM’s presence in Atoyac de Alvarez may have already impaired the work of the Special Prosecutor’s Office there, exacerbating 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.⁷⁵ According to another official, the fact that the PGJM set up its Atoyac office 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 office of the special prosecutor one day to solicit testimony from family members who arrived there.⁷⁶

The PGJM did disband its Atoyac office in February 2003 after human rights groups complained about it to the Interior Ministry. Then, in June, the PGJM announced that it might strip the accused officers of their military rank and then cede jurisdiction over their cases to civilian authorities. Both these actions represented a welcome retreat from the PGJM’s interference in the special prosecutor’s work. However, much more is needed for the military to make good on its professed commitment to accountability. Above all, it needs to take its obligation to support the special prosecutor more seriously by doing whatever is necessary to secure the information requested by the special prosecutor.

Statutes of Limitations

In addition to the problems plaguing its investigations, the Special Prosecutor’s Office is facing a serious problem that could affect its prosecutions. Mexican courts may rule that many if not most of the cases must be dismissed because the time period during which prosecution is allowed has already elapsed. The president himself indicated as much when he said, in November 2002, that it might be impossible to prosecute most of the cases.⁷⁷ This prediction found some support in April 2003, when a judge blocked the first effort by the Special Prosecutor’s Office to obtain arrest warrants, arguing that the statute of limitations on the alleged crime had run.

Mexican jurists are divided over whether or not statutes of limitations present an insurmountable obstacle for the prosecution of these cases.⁷⁸ There is general agreement, however, that successful prosecutions will require navigating uncharted legal terrain and developing novel legal strategies that are acceptable to Mexican courts.

A brief review of the legal issues involved reveals that this could be a challenging task. Most of the cases under investigation took place in the late 1960s and early 1970s. In cases where the victims were clearly killed, the prescription appears to be unambiguous: the statute of

⁷⁴ Letter from PGJM to victim’s relative, Atoyac de Alvarez, Guerrero, February 2003.

⁷⁵ Human Rights Watch interview with official in the Special Prosecutor’s Office, Mexico City, May 29, 2003.

⁷⁶ Human Rights Watch interview with official in the Special Prosecutor’s Office, Atoyac de Alvarez, Guerrero, May 24, 2003.

⁷⁷ “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”).

⁷⁸ Human Rights Watch interviewed ten lawyers and jurists about the legal issues facing the Special Prosecutor’s Office, Mexico City, May – June, 2003.

limitations allows prosecution up to thirty years after the killing took place and that time period has elapsed. (Under Mexican law, a prosecutor must open an investigation, not press charges, before the time period allotted by the statute of limitations expires. So homicide cases that occurred before 1972 would, in principle, no longer be subject to prosecution by the special prosecutor who only began his investigations in 2002.) What could be more difficult are cases of forced disappearance, where it is unclear what exactly happened to the victim—and *when*—and therefore at what point the statute of limitations began to run.

Forced Disappearance

The crime that most adequately describes what took place in the majority of cases investigated by the Special Prosecutor's Office is "forced disappearance."⁷⁹ Under international law, prescription should not be a problem when prosecuting these cases. On the contrary, the Inter-American Convention on Forced Disappearance of Persons stipulates that criminal prosecution of this crime "shall not be subject to statutes of limitations."⁸⁰

However, Mexico only established the crime of forced disappearance in its federal criminal code in 2001. And when it ratified the Inter-American Convention in 2002, it included an interpretative declaration stating that "it shall be understood that the provisions of said Convention shall apply to acts constituting the forced disappearance of persons ordered, executed, or committed after the entry into force of this Convention." This interpretative declaration refers to Article 14 of the Mexican constitution, which holds that "no law will be applied retroactively to the detriment of any person."⁸¹ Under Mexican law, therefore, it is impossible to charge someone with a specific offense of forced disappearance that was carried out before 2001.

One way to avoid the retroactivity problem may be to treat forced disappearance as a continuing crime. Under the Inter-American Convention, "forced disappearance...shall be deemed continuous or permanent as long as the fate or whereabouts of the victim has not been determined."⁸² Similarly, the United Nations Declaration on the Protection of all Persons from Enforced Disappearances states that "[a]cts constituting enforced disappearance shall be considered a continuing offence as long as the perpetrators continue to conceal the fate and the whereabouts of persons who have disappeared and these facts remain unclarified."⁸³

In other words, the prosecution could argue that a crime of forced disappearance from the 1970s is still underway today, in violation of the law established in Mexico in 2001.

This argument might be undermined, however, by the definition of forced disappearance in Mexican law, which attributes the crime to the public servant who keeps the victim hidden

⁷⁹ The Inter-American Convention on Forced Disappearance of Persons defines "forced disappearance" as "the act of depriving a person or persons of his or their freedom, in whatever way, perpetrated by agents of the state or by persons or groups of persons acting with the authorization, support, or acquiescence of the state, followed by an absence of information or a refusal to acknowledge that deprivation of freedom or to give information on the whereabouts of that person, thereby impeding his or her recourse to the applicable legal remedies and procedural guarantees." Article II, Inter-American Convention on Forced Disappearance of Persons.

⁸⁰ Article VII, Inter-American Convention on Forced Disappearance of Persons.

⁸¹ Article 14, Constitution of the Republic of Mexico ("... *a ninguna ley se dará efecto retroactivo en perjuicio de persona alguna*").

⁸² Article III, Inter-American Convention on Forced Disappearance of Persons.

⁸³ Declaration on the Protection of all Persons from Enforced Disappearance, General Assembly resolution 47/133, December 18, 1992.

“under whatever form of detention.”⁸⁴ Unlike the international definitions—under which the crime continues as long as information about the victim is withheld—the Mexican definition appears to limit the crime to the time during which the victim is actually detained. Consequently, under Mexican law, the prosecution would probably have to establish that the “disappeared” person continued to be held in detention after the crime was put on the books in Mexico.

The international definition should, in principle, override the domestic one, since the Mexican Supreme Court has held that international treaty obligations override domestic law. However, given the fact that the judicial branch is not accustomed to applying international legal norms that differ from domestic ones, persuading courts of the merits of this position may require a significant effort on the part of the Special Prosecutor’s Office.

Illegal Abduction

Given the retroactivity problem, the Special Prosecutor’s Office has chosen not to bring charges of forced disappearance now, but instead to apply the crime of illegal abduction (*privación ilegal de la libertad*), which did exist in the Mexican penal code in the 1970s when most of the “disappearances” took place.

The time period established by the statute of limitations for the type of abductions under investigation is only twenty-two years and six months. However, the Special Prosecutor’s Office is arguing that this crime is a continuous or permanent one (the two terms appear to be used interchangeably in the Mexican penal code⁸⁵), and that there is a legal presumption that the crime is ongoing as long as there is no evidence that the victim has been liberated or turned over to judicial authorities.

The special prosecutor has supported his claim that illegal abduction is a permanent crime with two court rulings regarding what makes a crime be classified as “permanent.”⁸⁶ But neither court ruling addressed the specific problem here—namely, whether there is a presumption that the crime is continuing so long as the corpse does not appear. And some jurists have flatly rejected the argument that there exists a legal presumption that the persons continue to be alive and in detention. On the contrary, they believe the prosecutors would have the burden of proving that the detention is ongoing, which would most likely be impossible.

In the one case that the Special Prosecutor’s Office has brought before a federal judge—seeking an arrest warrant—the judge simply ignored the special prosecutor’s argument about the crime being ongoing and held that the statute of limitations had already run. The special prosecutor has appealed this ruling.

⁸⁴ “Comete el delito de desaparición forzada de personas, el servidor público que, independientemente de que haya participado en la detención legal o ilegal de una o varias personas, propicie o mantenga dolosamente su ocultamiento bajo cualquier forma de detención.” Código Penal Federal, Libro Segundo, Capítulo III BIS, Desaparición Forzada de Personas, Artículo 215-A.

⁸⁵ The Mexican penal code defines crimes as: “Permanent or continuous, when the consummation is prolonged in time” (“*Permanente o continuo, cuando la consumación se prolonga en el tiempo*”). The clock on the statute of limitations for a permanent crime begins ticking “from the termination of the consummation” (“*[d]esde la cesación de la consumación en el delito permanente*”). Código Penal Federal, Libro Primero, Título Primero, Responsabilidad Penal, Capítulo I, Artículo 7.

⁸⁶ Suprema Corte de Justicia de la Nación, Sexta Epoca, Primera Sala, Semanario Judicial de la Federación, Segunda Parte, LIX, p. 14, and Sexta Epoca, Primera Sala, Semanario Judicial de la Federación, Segunda Parte, III, p. 72.

Homicide

Several jurists told Human Rights Watch that, rather than trying to build a case on the presumption that “disappeared” individuals remained alive, it would be more feasible to make a case that the victims had in fact been killed. Prescription would no longer be a problem for the “disappearance” cases that took place less than thirty years prior to when the special prosecutor began investigating them (since the statute of limitations for this type of homicide committed in the 1970s is thirty years).

It should not be difficult to establish a presumption that the victims of forced disappearances in the 1970s were in fact killed. To strengthen this argument, moreover, prosecutors might need to shift the focus of their investigations. One experienced criminal lawyer told Human Rights Watch that it would be necessary to collect evidence pointing to the death of the victim. Exhumations of clandestine cemeteries could become a top priority (making it all the more critical for the Special Prosecutor’s Office to acquire the forensic equipment and expertise it currently lacks). Since the remains of many victims would, presumably, never be found, it might be necessary to develop lines of investigation aimed at supporting, through circumstantial evidence, a presumption that the victims had in fact been killed.

The question for the Special Prosecutor’s Office, then, is whether it is more feasible to establish a presumption of death or a presumption of ongoing detention—and what would be the evidentiary requirements at trial for each.

Torture or Ill Treatment

Another possible approach would entail considering forced disappearance as a form of “torture” that is continuous. This is an argument that Spanish Judge Baltasar Garzón used in the case against Chilean ex-dictator, Augusto Pinochet, and has been endorsed by the United Nations Human Rights Committee, the Inter-American Court of Human Rights, and various international tribunals.

A forced disappearance may produce two classes of victims of torture or ill treatment: the person disappeared⁸⁷ and that person’s relatives.⁸⁸ In cases of the former, prosecutors would run into the same difficulty as with illegal abduction—having to establish a presumption that the victim is still alive. In cases of the latter, prosecutors would have little difficulty establishing that

⁸⁷ The Inter-American Court of Human Rights, in *Velásquez Rodríguez*, held that “the mere subjugation of an individual to prolonged isolation and deprivation of communication is in itself cruel and inhuman treatment.” Inter-American Court, *Velásquez Rodríguez* case, Judgment of July 29, 1988, Series C N° 4, para.187. See also *El-Megreisi v Libya*, cited in Report of the Human Rights Committee, Vol. II, GAOR, 49th Session, Supplement 40 (1994), Annex IX T, para. 2.1-2.5 (detainee, “by being subjected to prolonged incommunicado detention in an unknown location, is the victim of torture and cruel and inhuman treatment”); *Mojica v. Dominican Republic*, Human Rights Committee, Jurisprudence, Communication No. 449/1991, para 5.7 (“the disappearance of persons is inseparably linked to treatment that amounts to a violation of Article 7”).

⁸⁸ In *Quinteros v Uruguay*, the U.N. Human Rights Committee found that the mother of a “disappeared” woman, who suffered “anguish and stress...by the disappearance of her daughter and by the continuing uncertainty concerning her fate and whereabouts,” is “a victim of the violations of the Covenant on Civil and Political Rights, in particular of Article 7 [torture and cruel and inhuman treatment], suffered by her daughter” (107/1981, para.14). The European Court of Human Rights has also held that the extreme pain and suffering inflicted on the mother of the “disappeared” person violated Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. *Kurt v. Turkey*, Eur. Ct. Hum. Rts, Case No.15/1997/799/1002, May 25, 1998, para.134.

the relatives of the “disappeared” have been subject to extreme anguish—and continue to be today.

To prosecute anyone for the ongoing suffering inflicted upon the relatives of the “disappeared,” however, the prosecution may need to overcome the provision of article 14 of the Mexican constitution that prohibits the imposition “by simple analogy or even by overwhelming reason, any punishment that is not decreed by a law specifically applicable to the crime in question.”⁸⁹ It will be necessary then for the prosecution to identify a crime or crimes in the Mexican penal code that are specifically applicable to cases of forced disappearance.

Crimes against Humanity

Given that the torture, executions, and forced disappearances appear to have been carried out in a widespread and systematic way by state agents, they almost certainly rise to the level of “crimes against humanity,” as defined in international law.

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. 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 to which no statute of limitation contained in the laws of any state can apply.⁹⁰

In addition, prosecutors might refer 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.”⁹¹ 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.”⁹²

When ratifying the convention, however, Mexico included an “interpretative declaration” to the effect that it would “consider statutory limitations non-applicable only to crimes . . .

⁸⁹ Article 14, Constitution of the Republic of Mexico (“...por simple analogía y aún por mayoría de razón, pena alguna que no esté decretada por una ley exactamente aplicable al delito de que se trata”).

⁹⁰ 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.

⁹¹ Article 1, 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).

⁹² Article 4, 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.”

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.

But prosecutors could point out that this declaration does not affect Mexico’s obligations under the convention.⁹³ 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.” And, more significantly, it is wrong because the prohibition is also a non-derogable norm of international customary law.

For Mexican courts to accept this argument, the special prosecutor may also have to persuade them that an exceptional decision not to apply statutory limitations in these cases does not violate the prohibition on retroactive criminal laws in the constitution.⁹⁴ This is because the bar on statutory limitations for crimes against humanity already existed in customary international law when the acts being prosecuted took place. In any event, the prosecution’s efforts could be greatly facilitated if the Mexican legislature chose to recognize the State’s obligation under the convention by withdrawing the interpretative declaration.

Tolling of Statutory Limitations

Several Mexican jurists told Human Rights Watch that, under Mexican law, the statute of limitations may be suspended in cases where public prosecutors were prevented by government officials from pursuing cases. If, for example, prosecutors had been prevented from pursuing cases during the administration of Luis Echeverría (1970-76), then it might be argued that the clock on the statute of limitations only started running in 1976.

This argument would probably require evidence that, under previous administrations, prosecutors were prevented from pursuing cases. And even if the factual case could be made, the jurists acknowledge that the legal argument would entail a novel application of existing Mexican law.

Prosecutors could bolster the argument, however, by referring to international human rights standards. The United Nations Declaration on the Protection of all Persons from Enforced Disappearances, for instance, states that when the legal remedies guaranteed by the ICCPR “are no longer effective, the statute of limitations relating to acts of enforced disappearance shall be suspended until these remedies are re-established.”⁹⁵ The Human Rights Committee has held that human rights violations “should be prosecutable for as long as necessary, with applicability as far

⁹³ 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.”

⁹⁴ 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.

⁹⁵ Article 17, United Nations Declaration on the Protection of all Persons from Enforced Disappearances.

back in time as necessary to bring their perpetrators to justice.”⁹⁶ Similarly the Inter-American Court has ruled that “provisions on prescription...are inadmissible” when they “are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance,” since they “violate non-derogable rights recognized by international human rights law.”⁹⁷

Developing a Viable Legal Strategy

Prosecuting the “dirty war” crimes may not be an easy job, but it should not be an impossible one either. The challenge for the Special Prosecutor’s Office is to find the most viable legal strategy—and then to make it work.

Finding a viable strategy will entail breaking new ground in legal terrain where the issues are complex. The Special Prosecutor’s Office has—to its credit—shown a willingness to be creative in developing its legal arguments. Yet these arguments have yet to be tested seriously, and they are likely to encounter resistance from courts that are wary of innovative ideas, especially those involving international human rights norms.

When it comes to making its legal strategy actually work, the Special Prosecutor’s Office will not only have to be creative, it will also have to be persuasive. It will have to convince judges that its novel legal arguments are consistent with Mexican law. It will also need to impress upon judges the weight of Mexico’s international obligations to prosecute human rights violations.

One sure way to strengthen the prosecution’s arguments is to have them be scrutinized, refined, and publicly endorsed by the country’s most experienced and knowledgeable jurists. Ideally, when the cases go to trial, it should be clear that these legal arguments reflect not only the views of the special prosecutor, but also the views of the Fox administration and the broader legal community.

The task of devising a viable legal strategy for these cases is simply too complex to leave entirely to the Special Prosecutor’s Office. What is needed instead is a collective effort by the government’s top legal experts and the country’s most experienced and influential jurists.

To that end, the president should 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 should consist of distinguished jurists, as well as lawyers representing relevant private and state institutions, including the Foreign and Interior Ministries, the PGR, the PGJM, the CNDH and, of course, the Special Prosecutor’s Office. The aim of this group should 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.

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 state. But, by allowing the special prosecutor to falter or fail alone, the government risks perpetuating the underlying problem that created the need for a special initiative in the first place: the failure of these institutions to assume their responsibility for promoting accountability in human rights cases. It risks, in other words, reaffirming the worst practices of a justice system that allowed the most serious human rights violations to go unpunished for decades.

⁹⁶ Concluding Observations of the Human Rights Committee: Argentina, November 3, 2000, United Nations document CCPR/CO/70/ARG, para. 9.

⁹⁷ Inter-American Court, Barrios Altos Case, Judgment of March 14, 2001, para. 41.

In addition to pooling legal expertise, therefore, this commission would give the diverse institutions of the Mexican state an opportunity to take responsibility for—and thereby begin to resolve—a problem that is, ultimately, not the special prosecutor’s, but rather their own. By joining forces to strengthen the Special Prosecutor’s Office, these state institutions can strengthen the justice system as a whole.

Lack of Back-up Measures

Despite the lack of concrete results in the investigations, and the skepticism that President Fox and others have expressed about the viability of prosecutions, the government appears not to have explored any new measures aimed at reinforcing the work of the special prosecutor.

Human Rights Watch believes that the investigations currently underway can achieve significant results, provided that the Special Prosecutor’s Office receives adequate resources, access to government documents, and cooperation from the military. Still, it may be necessary to consider additional measures that would strengthen the special prosecutor’s ability to obtain information.

One such additional measure would be to create incentives for suspects to testify before the special prosecutor. 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. In Mexico, this faculty has already been granted to prosecutors pursuing cases against organized crime—though with mixed results.⁹⁸ A law granting it to prosecutors in human rights cases could be modeled on the one for organized crime, addressing whatever shortcomings have limited its effectiveness to date. It would have to be designed with great care to prevent abuses—by either suspects or prosecutors. It would not be applicable to people who bore major responsibility for human rights violations, but rather to minor offenders who played a small role in crimes conceived by others.

In addition to strengthening the special prosecutor’s ability to obtain information, the government should also seek to make sure that this information is put to good use—above and beyond serving as evidence for the prosecution of individual criminals.

When it established the office, the Fox administration presented the initiative as an alternative to a truth commission, reasoning that a special prosecutor could “accomplish more than a Truth Commission, since it would not only aim to clarify what took place but rather determine responsibility and, where possible, apply legal sanctions to those who are responsible.”⁹⁹ The emphasis on prosecution here was not presented as an alternative to the documentation work associated with a truth commission—but rather as a crucial addition to it.

Currently, however, there is no clear strategy for the Special Prosecutor’s Office to fulfill this truth-telling role. The documentation center of the Special Prosecutor’s Office has been developing plans to establish a “library,” where the general public will be able to consult documents that the office has collected in the course of its investigations. But it is not yet clear where this library will be located and how it will be sustained once the office is no longer

⁹⁸ Federal Law against Organized Crime, ch. 7, art. 35-9.

⁹⁹ Order of the President of the Republic, Mexico, November 27, 2001 (“...ir más allá de lo que podría lograrse con una Comisión de la Verdad, ya que no solamente se busca esclarecer los hechos sino deslindar responsabilidades y, en su caso, sancionar conforme a derecho a los responsables”).

running.¹⁰⁰ And, while this initiative could be an important source of information for victims, relatives, and independent researchers, it is unlikely to benefit the many people who would have difficulty accessing the library.

More will clearly be needed to ensure that the information gathered by the Special Prosecutor's Office is disseminated to victims, victims' relatives, and the general public. This might require taking steps to make sure the office—or possibly its Support Committee—has the necessary resources, personnel, and training to elaborate a authoritative report on the abuses under investigation. It may also mean reconsidering the decision not to create a truth commission.¹⁰¹

In this respect, it is important to keep in mind that Mexico's obligation under international law is not only *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.

V. RECOMMENDATIONS

The president should instruct the attorney general to take steps to strengthen the ability of the Special Prosecutor's Office to handle its large and difficult caseload. Specifically, the attorney general should:

- Assign more prosecutors, investigators, and administrative personnel to the office;
- Designate a special team of forensic experts and provide forensic equipment to the office;
- Designate a special team of police investigators that works exclusively with the office and under the orders of the special prosecutor;
- Provide more extensive training to the office's prosecutors and investigators, as well as to the police investigators assign to work with them;
- Conduct a thorough audit and assessment of the resource allocation within the office.

The president should instruct the interior minister to take steps to promote greater access to the government archives that contain information about past abuses. Specifically, the Interior Ministry should:

- Provide the Special Prosecutor's Office and independent researchers with indexes and catalogues of the contents of the relevant archives;
- Develop a more precise and limited definition of what constitutes “private” information off limits to independent investigators;
- Redesign the procedure for obtaining archived files so that the responsibility for the release of information does not rest with a single person (or small number of people).

¹⁰⁰ Human Rights Watch interview with María de los Angeles Magdalena, Mexico City, May 28, 2003.

¹⁰¹ Another reason the Fox administration gave for not doing so was that, under Mexican law, the president does not have the authority to establish “extra-institutional forums” that would “classify conduct as violating human rights or as criminal.” However, a truth commission could provide information about the history of political violence and the fate of the victims without seeking to determine criminal responsibility.

The president should instruct the minister of defense to take steps to ensure that the PGJM provides full support to the Special Prosecutor's Office. Specifically, the defense minister should:

- Order the PGJM to do all it can to locate documents and information requested by the special prosecutor;
- Order the PGJM to cede jurisdiction over the cases under investigation by the special prosecutor.

The president should take steps to help the special prosecutor address the legal hurdles it faces in prosecuting the cases under investigation. Specifically, he should:

- Convene a task force or commission consisting of distinguished jurists, as well as representatives of key institutions of the state, that would work to generate greater clarity and consensus about the nature of the legal hurdles and to assess the advantages and disadvantages of strategies that the special prosecutor's office might adopt to overcome them.

The government should consider taking additional measures to reinforce work of the Special Prosecutor's Office. Specifically, it should:

- Consider legislative measures that would strengthen the investigative powers of the special prosecutor—by, for instance, allowing prosecutors to reduce the sentences of minor offenders who provide information that substantially advances the investigation and prosecution of human rights crimes.
- Develop a program to systematize and disseminate the findings of the investigations to victims, victims' relatives, and the Mexican public generally—including the publication of a comprehensive report on the history of “dirty war” abuses, prepared by the Special Prosecutor's Office, its “Support Committee,” or an independent “truth commission.”

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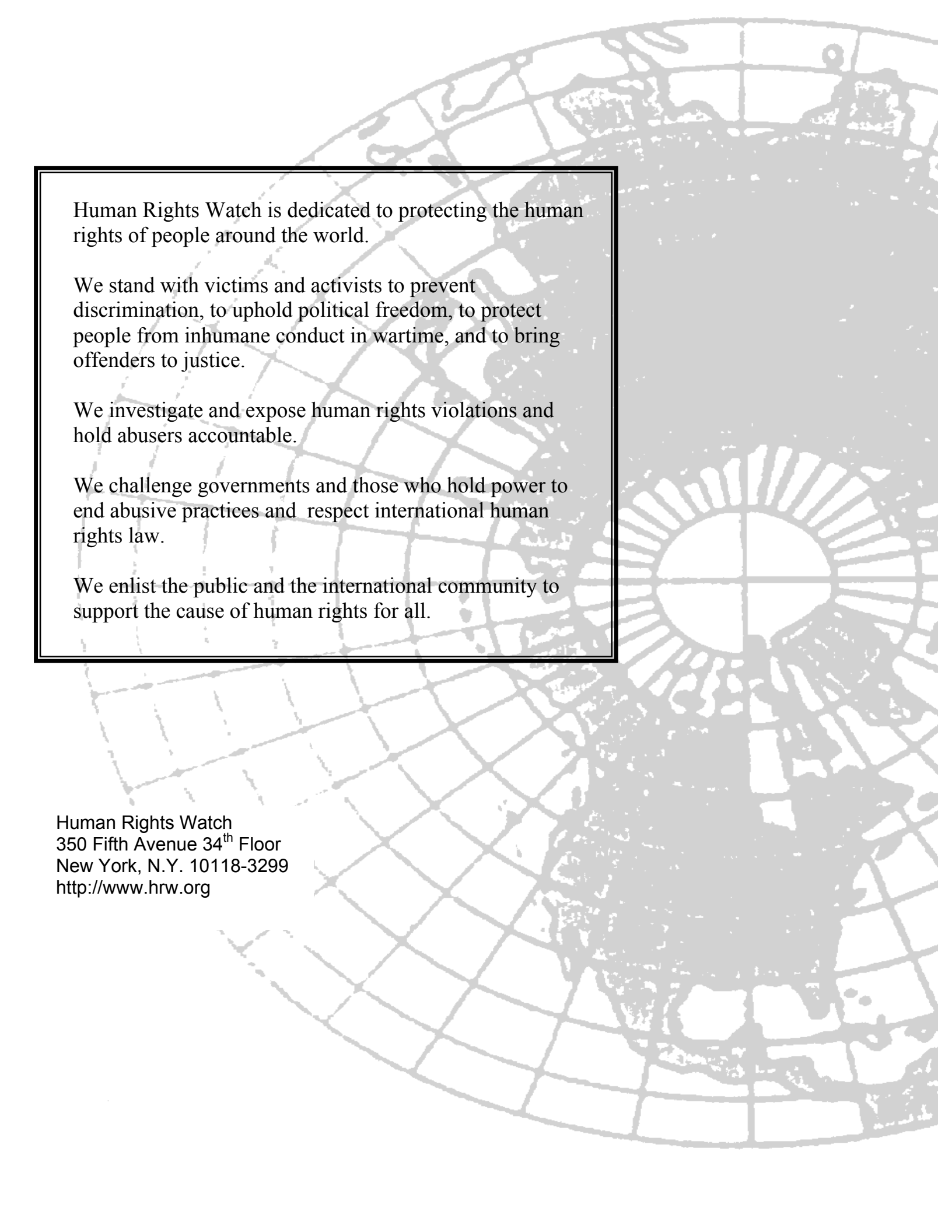
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