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MEXICO

Indigenous women and military injustice

STOP
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Introduction

In the afternoon of 22 March 2002, in the community of Barranca Tecuani, municipality of Ayutla de los Libres, Guerrero State, 27-year-old Inés Fernández Ortega accompanied by four of her young children, was in her kitchen preparing water when eleven soldiers appeared nearby. Three of them reportedly came into her home and forcefully interrogated her about some meat that was drying outside on the patio, which the soldiers said had been stolen. While she understood the question, Inés, a *Tlapaneca (Me'phaa)* Indian speaks little Spanish and did not reply. Her children ran off to a relative's home. Inés Fernández was then reportedly raped. When Inés finally dared to approach her front door to close it, she saw that the meat meant for the family had been stolen. Later, she told her husband what had happened and together they reported the case to the local authorities in the hope that those responsible would be brought to justice.

An investigation was initially opened in the local Public Ministry office (*Ministerio Público*)¹ in Ayutla de los Libres, Guerrero. However, it was not long

before the military authorities claimed jurisdiction of the case. Despite evidence of some initial investigations, it was not until September, six months after the complaint of rape had first been made, that a letter was sent by the military prosecutor asking Inés Fernández to come forward to ratify her complaint. The letter was sent to the wrong address. In February 2003, the military prosecutor recommended closing the investigations. Among the reasons given, was the plaintiff's lack of interest in pursuing the case ("*no existe interés jurídico por parte de la agraviada*") as she had failed to turn up to ratify her complaint. A recommendation by the National Human Rights Commission (CNDH, *Comisión Nacional de Derechos Humanos*) in November 2003 highlighted this and other serious errors and omissions in the investigations, including the failure of the forensic services attached to the Public Ministry of the state of Guerrero to conserve vital forensic evidence. Crucially, however, the recommendation neglected to call for the investigations to be transferred to civilian jurisdiction. Although the case was not formally closed, more than two and half years later, it languishes in a military justice system that continues to demonstrate that it lacks the impartiality to properly investigate and bring to justice members of the army accused of human rights violations.

¹ The public ministry is part of the Public Prosecutor's Office at state and federal level. It is solely responsible for investigating offences in state, federal or military jurisdictions.

Unable to obtain justice in Mexico, and failed by other institutions – the civilian public prosecution services and civilian courts - this case, and that of Valentina Rosendo Cantú, another indigenous woman from Guerrero who was reportedly raped by soldiers a few days earlier on 16 February 2002, have been submitted to the Inter-American Commission on Human Rights (IACHR, *Comisión Interamericana de Derechos Humanos*).

This report focuses on the cases of six indigenous women who were reportedly raped by soldiers in the state of Guerrero. The report also examines the serious shortcomings in the investigations conducted by Mexican military prosecutors and the fundamental unsuitability of the military justice system to investigate human rights violations committed by members of the armed forces. It looks too at deficiencies in other institutions involved in these cases, including the offices of the public prosecutor, the courts, health care providers and the National Human Rights Commission. The report also examines some of the problems posed by the large military presence of the Mexican army in parts of Guerrero state and considers the numerous obstacles that deter indigenous women from making complaints of rape or other forms of sexual violence. Indigenous women experience both sexual and racial discrimination compounded by poverty. The report examines the multiple violations of human rights that indigenous women have experienced and the ways in which the Mexican State has fallen short of its obligations under the various international human rights treaties it has ratified to provide comprehensive guarantees to women and girls to protection from sexual violence and discrimination and provide remedies to victims whose rights are violated. AI also believes that the cases of rape documented in this report constitute torture and should be investigated as serious human rights violations.

Since 1994, several cases of rape of indigenous women by military personnel have come to national and international attention. They include the cases of Ana, Beatriz and Celia González Pérez, three sisters from the Tzeltal indigenous group, who were raped by soldiers in June 1994 at a roadblock near Altamirano in the state of Chiapas. This case,

presented to the Inter-American Commission on Human Rights in 1996, led to a ruling from the Commission in April 2001 which found the Mexican State had violated a range of fundamental human rights contained in the American Convention on Human Rights and the Inter-American Convention to Prevent and Punish Torture. It concluded that the rape the three women had suffered constituted torture, that there was no justification for the case to be investigated by military courts and recommended the state carry out a thorough, impartial and effective investigation in the civilian courts to determine responsibility and provide appropriate reparations.² The Mexican Government agreed to the case being reopened. However it remains under military jurisdiction with a measure of civilian prosecutor involvement. Plaintiffs in the case have said that there has been no progress in the investigations and justice and reparations remain as far off as ever.

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In Guerrero, apart from the case of Inés Fernández, five other complaints of rape have been made against the army since 1997. According to the testimony given to Amnesty International and her legal complaint, at about 2 o'clock in the afternoon of 16 February 2002, 17-year-old Valentina Rosendo Cantú, a member of the Tlapaneca (Me'phaa) indigenous group and mother of a three-month-old baby boy, was approached by eight soldiers from the Forty First Infantry Battalion (*41 Batallón de Infantería*) as she was washing clothes near her home in the village of Barranca Bejuco, Acatepec municipality. They were accompanied by a civilian whose hands were tied together. Two of the soldiers walked towards her and questioned her about the activities of some

² Inter-American Commission on Human Rights, Report No 53/01, Case 11.565, Ana, Beatriz and Celia González Pérez, Mexico, April 4, 2001

"hooded men" ("encapuchados").³ When she replied that she did not know any, one of the men pointed his gun at her and threatened to shoot. She was shown a photograph and asked about the individual's identity and was then read a list of 11 names. When she replied that she did not know the men, the soldier who had pointed his weapon at her hit her in the stomach with the butt of his rifle causing her to fall over and momentarily lose consciousness. One of the soldiers pulled her by the hair and questioned her further. The soldiers warned her that if she did not provide them with more information, they would kill everyone in the village. Then, watched by the others, two of the soldiers raped her.

On 21 April 1999, Victoriana Vázquez Sánchez, aged 50, and Francisca Santos Pablo, aged 33, from the community of Barrio Nuevo San José, Tlacoachistlahuaca municipality left their homes to go in search of their younger male relatives. Antonio Mendoza Olivero, Victoriana Vázquez's 10 year-old grandson, and Evaristo Albino Téllez, aged 27, Francisca Santos's brother-in-law, had not been seen since going to harvest their crops the day before. Victoriana Vázquez later said that when they reached the field they found a military camp and that soldiers spotted them trying to run away, caught up with them, took them to some abandoned houses and raped them. Both women related how the armed soldiers threw them to the ground, tied their hands behind their backs and ripped off their skirts. Three soldiers raped Victoriana Vázquez while others dragged Francisca Santos into a nearby ravine where she lost consciousness and was also raped. According to Victoriana Vázquez's son, relaying his mother's testimony in Spanish, the men were all in army uniform and:

*"[One of them] pulled down his trousers... He covered her face with her clothes... my mother was bleeding for a few days afterwards."*⁴

³ A reference to armed opposition groups – see Chapter 5 on military presence in the state of Guerrero.

⁴ *"Se bajó los pantalones... Él le tapó la cara con la misma ropa...estuvo sangrando mi mamá unos días"*.

Two years earlier, Delfina Flores Aguilar, 28, and Aurelia Méndez Ramírez, 31, members of the Tlapaneca indigenous group living in Zopilotepec, in the municipality of Atlixac de Alvarez reported that they were raped by soldiers on 3 December 1997. Aurelia Méndez, her husband Celerino Vázquez Solano and their children were collecting maize leaves on a plot of land in the parish of Tlacotzingo when at about 5 o'clock in the evening five soldiers arrived. Shots were fired frightening the couple and soldiers approached Celerino Vázquez and began to hit him with their rifles. They continued beating him and tied him up. One of the soldiers then hit Aurelia Méndez, threw her on the ground and reportedly raped her in front of her husband and children. She was then reportedly raped by another soldier. The two were taken to the plot of land that Delfina Flores and her husband Aureliano Vicente Cantú were working. According to her testimony, Delfina Flores Aguilar and Aureliano Vicente Cantú were working in a nearby field when they heard a gunshot and five soldiers carrying weapons arrived together with Aurelia Méndez and Celerino Vázquez who were tied up. The soldiers kicked and threatened Aureliano before tying him up. Three of the soldiers approached Delfina Flores. One of them grabbed hold of her and insulted her. She was grabbed by the hair and pushed. Delfina, who was carrying a four-month-old baby in her arms, fell to the ground. Her underwear was forcibly removed and she was raped by two soldiers. Delfina managed to avoid being raped a third time by grabbing hold of a stone but was instead hit by the soldier.

While, these cases may not constitute a widespread pattern, they are representative of the general climate of impunity that surrounds investigations handled by the military judicial system, since none of those responsible have been brought to justice. This lack of justice has a profound knock-on effect on indigenous communities, particularly women, in how they respond to the presence of the military. Amnesty International knows of three other cases which the women did not want to report suggesting that women are reluctant to come forward and report rape or pursue justice through the courts. Amnesty International is concerned

that other cases may not have come to light, since the consequences of reporting bear heavily on the women and their families.

The credibility of the investigative process can only be guaranteed if the investigations are transparent and impartial and it is ultimately to the benefit of the army to allow civilian jurisdiction of cases involving military officials accused of human rights violations to determine their innocence or otherwise.

Under a range of international treaties ratified by the Mexican Government including the American Convention on Human Rights (ACHR), and the International Covenant on Civil and Political Rights (ICCPR) as well as regional and international standards that deal expressly with violence against women such as the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (“Convention of Belém do Pará”), the state has a duty to address violence against women. It is only by tackling the root causes of such violence and taking specific and effective measures to end impunity and deal with discrimination against women that levels of violence against women in Mexico, by state agents as well as private individuals, will begin to decrease.

The United Nations (UN), the Inter-American Court of Human Rights⁵ and Inter-American Commission on Human Rights (IACHR) have criticised the persistent failure of military tribunals to bring to justice members of the military involved in human rights violations and, in their reports on Mexico, UN Special Rapporteurs have frequently expressed serious concerns about levels of impunity within the military justice system. All have recommended that complaints of human rights violations committed by the armed forces be investigated in the civilian courts.

⁵ See for example, rulings of Inter-American Court in cases of Durand and Ugarte, sentence 16 August 2000, and Cantoral Benavides, sentence 18 August 2000, reference to military tribunals by UN Special Rapporteur on Torture, E/CN.4/1995/34, 12 January 1995.

This report is partly based on information gathered by Amnesty International delegates during visits to Mexico in June 2003 and June 2004. Delegates met with survivors, witnesses, local non-governmental organizations, lawyers and the State Human Rights Commission, CODDEHUM, (*Comisión de Defensa de los Derechos Humanos del Estado de Guerrero*). Several requests for meetings with military commanders in the state of Guerrero and with the Military Attorney General to discuss some of the issues connected with the cases were unsuccessful. This report forms part of Amnesty International’s worldwide campaign to Stop Violence against Women, that was launched in March 2004.

2. Discrimination against indigenous women

*“indigenous women are the most marginalized of the marginalized”.*⁶

In the conclusion to his December 2003 report on Mexico, the UN Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people expressed particular concern about the situation of indigenous women and children⁷. Among the most marginalized sectors of society, indigenous women face discrimination on numerous levels, culturally, economically and socially. According to the Special Rapporteur’s report, indigenous women are twice as likely to die during childbirth as non-indigenous women. Access to education remains extremely low with significant levels of illiteracy. In its 2002 observations on Mexico’s fifth periodic report submitted to the UN Committee on the Elimination of Discrimination against Women (CEDAW), the committee stated that poverty was:

“a serious obstacle to enjoyment of rights by women, who make up the majority of the most vulnerable sectors, especially in rural and indigenous areas”

⁶ “*la mujer indígena es la marginada de los marginados*” “*Contra el silencio y el olvido*” Centro de Derechos Humanos de la Montaña “Tlachinollan”, 10th anniversary report, June 2003 – May 2004.

⁷ E/CN.4/2004/80/Add.2, 1 December 2003

and called on the Mexican Government to prioritise women in its poverty eradication strategy particularly in rural and indigenous areas so that women

*“fully enjoy their rights on an equal footing in the areas of education, employment and health ...”*⁸

In its 1998 observations on the third and fourth periodic reports submitted to the CEDAW by the Mexican State, the committee noted,

“that the policies to promote equality within the family are insufficient, since stereotyped roles are perpetuated in the family by deeply rooted traditions of men’s superiority”.⁹

In indigenous communities as in Mexico generally, women are for the most part subject to traditional social norms, subordinate to their husband with limited influence over decisions affecting their lives. Domestic violence, including sexual abuse, within the home and family is believed to be common in indigenous communities as elsewhere. However, confronted by cultural attitudes that disregard, deny or even condone violence against women and a criminal justice system that seldom delivers justice, women in general, but particularly women from indigenous groups, rarely denounce such cases. Overcoming internalised guilt or shame to denounce the case, even to the community, takes enormous courage. If she speaks out, a woman may face stigmatization or outright rejection by the family or community. After they denounced that they had been raped, the three Tzeltal sisters and their mother were reportedly rejected by their community and forced to flee. The IACHR ruling highlights the fact that:

the “pain and humiliation suffered by the women was aggravated by their condition as members of an indigenous group. First of all, because of their lack of knowledge of the language of their aggressors and of the other authorities; and also because they were repudiated by their own

⁸ CEDAW/C/SR.569 and 570 - 6 August 2002, concluding observations or comments A/57/38, Part III, paras. 420-453.

⁹ CEDAW/C/1998/I/L.1/Add.7, 3 February 1998

*community as a result of the violations ..”[para 95]*¹⁰

As the General Recommendation No 25 of the Committee monitoring the Convention on the Elimination of Racial Discrimination (CERD) notes:

“The Committee notes that racial discrimination does not always affect women and men equally or in the same way. There are circumstances in which racial discrimination only or primarily affects women, or affects women in a different way, or to a different degree than men. Such racial discrimination will often escape detection if there is no explicit recognition or acknowledgement of the different life experiences of women and men, in areas of both public and private life.

Certain forms of racial discrimination may be directed towards women specifically because of their gender, such as sexual violence committed against women members of particular racial or ethnic groups in detention or during armed conflict; the coerced sterilization of indigenous women”

The six women raped by the military whose cases are documented in this report and who have dared to confront the very real cultural, economic and social barriers that exist to seek redress from the state have had to contend with a system that offers poor medical care, substandard forensic examinations and a judicial system that appears reluctant or incapable of providing even minimum guarantees of a successful outcome. In a region in which most live in conditions of extreme poverty with little or no access to basic resources, some have lacked the funds needed to proceed with the case. For example, one of the reasons given by Delfina Flores, Aurelia Méndez and their husbands for not pursuing the complaint of rape they had lodged with the National Human Rights Commission was that they could not pay for the transport to take them from their remote community in the mountainous region of Guerrero to the town of Chilapa. Another important barrier is the fact that many indigenous people, but

¹⁰ *“el dolor y la humillación que sufrieron las mujeres se agrava por su condición indígena. En primer lugar, por el desconocimiento del idioma de sus agresores y de las demás autoridades intervinientes; y además, por el repudio de su propia comunidad como consecuencia de los hechos aquí establecidos”*.

particularly women, speak little or no Spanish, the official language of all government institutions. In practice this has meant that their access to legal and health services is seriously limited as they are unable to communicate in the language spoken by the officials and translation is often not provided. The lack of interpreters also means that officials remain generally ignorant of and uninterested in indigenous customs and culture.

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Article 8.1 of Convention 169 concerning Indigenous and Tribal Peoples notes that,

“In applying national laws and regulations to the peoples concerned, due regard shall be had to their customs or customary laws”.

With regard to government action, the convention also notes in article 2(2)(a) that it has the responsibility for developing measures that include:

“ensuring that members of these peoples benefit on an equal footing from the rights and opportunities which national laws and regulations grant to other members of the population...”.

The action of the Mexican Government in relation to the cases included in this report is clearly at odds with these obligations.

The principal obstacle in these cases, however, has been the transfer of the cases to military jurisdiction which continues to demonstrate an alarming lack of accountability towards those who denounce serious human rights violations

committed by military officials. This failure to investigate, hold accountable and bring to justice members of the armed forces suspected of being responsible for serious human rights violations is almost absolute and has been extensively documented by Amnesty International and other national and international non-governmental organizations.

The Mexican Government has made addressing violence against women a priority and through the National Institute for Women, (INMUJERES, *Instituto Nacional de Mujeres*) has made progress in the formulation of public policies for preventing and eradicating all forms of violence against women. Translating these policies into effective action remains a key challenge. The role of military justice in these cases is at odds with the government's stated commitment to combat violence against women.

3. Rape and military jurisdiction

Rape and other forms of sexual abuse exact a devastating physical, emotional and psychological toll on those who have lived through the experience. The draft Elements of Crimes for the Statute of the International Criminal Court gives the following definition of rape:

1. The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.
2. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent”.

Although not a situation of armed conflict, the definition of rape used in the Rome statute is the most advanced yet. As signatory to the Rome Statute, the Mexican Government should seek to ensure that this definition is incorporated into federal and state laws.

None of the women whose cases are described in this report have remained unscathed. Some have left their community. One of the women had to undergo medical treatment for a sexually transmitted infection acquired through being raped. In some cases, the partner has been unable to accept what has happened and the stigma attached to rape has intensified frictions within the family. The army presence in the region acts as a constant reminder of the trauma the women have experienced. In the case of Inés Fernández, the army returned to her village in January 2003 and attempted to pressurize her husband into withdrawing the rape allegation. The lack of justice only serves to exacerbate the psychological trauma suffered by the women, at the same time deterring other women who might also have been raped from coming forward to denounce their case. Since 2001, Amnesty International has learned of at least three other cases of reported rape by the army where the women were too afraid to make complaints for fear of reprisal and because there was no belief that the judicial system would deliver justice.

Rape is not included in the Code of Military Justice (*Código de Justicia Militar*). However, this has not been an obstacle for the military who have used article 57 of the Code of Military Justice to invoke the use of the Federal Penal Code in the cases of reported rape involving military personnel. Article 57, paragraph II, clause a/ specifies that acts of military discipline are those:

“that were committed by military while on active service or for reasons of active service”¹¹.

Article 37 of the Regulations for the Internal Service of the Army Corps (*Reglamento para el Servicio Interior de los Cuerpos de Tropa*) establishes that acts of service are:

“those that soldiers carry out, alone or collectively in line with orders they receive or in carrying out functions that are their responsibility according to

¹¹ *“que fueren cometidos por militares en los momentos de estar en servicio o con motivo de actos del mismo”.*

rank and in agreement with the laws, regulations and dispositions of the Army.”¹²

As interpreted by the military and confirmed by the courts, this has meant that any crimes committed by military personnel are *de facto* crimes of military discipline. Article 58 of the Code of Military Justice allows the military to invoke the use of the Federal Penal Code or the local Penal Code where the incident took place¹³. Over the years, this broad interpretation by the military authorities of article 57 has been repeatedly upheld by the civilian judicial authorities, allowing military courts, which are hierarchically under the control of the Ministry of Defence, not the judiciary, to investigate and try human rights violations carried out by the military. However, the acquiescence of the civilian judiciary to this wide definition of military jurisdiction is in apparent contradiction with the Mexican Constitution.

Article 13 of the Mexican Constitution prohibits special jurisdictions and sets limits to the scope of military jurisdiction:

*“No one can be tried according to private laws or by special courts. No one or corporate body can have privileges..... Military jurisdiction shall be recognized for the trial of crimes against and violation of military discipline, but the military tribunals shall in no case extend jurisdiction over persons who do not belong to the army. Whenever a civilian is involved (**complicado**) in a military crime or violation, the respective civil authority shall deal with the case”¹⁴.*

¹² *“se llaman actos de servicio los que ejecutan los militares aislados o colectivamente en cumplimiento de órdenes que reciban o en el desempeño de las funciones que les competen según su categoría y de acuerdo con las leyes, reglamentos y disposiciones del Ejército”.*

¹³ *“Cuando en virtud de lo mandado en el artículo anterior, los tribunales militares conozcan de delitos del orden común, aplicarán el Código Penal que estuviere vigente en el lugar de los hechos al cometerse el delito; y si éste fuere de orden federal, el Código Penal que rija en el distrito y territorios federales.*

¹⁴ *“Nadie puede ser juzgado por leyes privativas ni por tribunales especiales. Ninguna persona o corporación puede tener fuero..... Subsiste el fuero de guerra por delitos y faltas contra la disciplina militar; pero los tribunales militares, en ningún caso y por ningún motivo, podrán extender su jurisdicción sobre personas que no*

Legislators specifically did not use the word accused or implicated when referring to the relation of the civilian to the offence. Despite this, the courts have interpreted *complicado* as implying just this, so that only those cases in which civilians are *accused* of crimes cannot be tried in military jurisdiction. In spite of the intention of legislators to limit the scope of military jurisdiction to violations in military discipline and to those cases where only military personnel are involved, secondary legislation such as the Code of Military Justice, and interpretive rulings by the civilian courts have undermined this principle. The Mexican Government has made some important steps to incorporate international standards into national legislation. In this case, it is vital that the interpretation of legislation is in accordance with the recommendations of international human rights mechanisms rather than in direct contradiction.

In the case of Valentina Rosendo Cantú, on 11 February 2003, lawyers submitted an appeal (*recurso de amparo*) to the judge of Fifth "B" Appeal Court in Criminal Cases (*Juzgado Quinto "B" de Distrito de Amparo en Materia Penal*) in the Federal District against the military's decision to accept jurisdiction of the case. They argued *inter alia* that: military jurisdiction violated the basic principles of independence and impartiality, that presenting the case to military jurisdiction was imposing a special authority on Valentina who was both a civilian and the victim of the crime [in violation of article 13 of the Constitution], and that the military's justification of its competence to investigate and hear the case on the grounds that the crimes denounced by Valentina had been committed by soldiers "*on active service or for reasons of active service*" violated the Constitution and implied that the torture and sexual abuse suffered by Valentina constituted acts of service.

Rejecting the appeal on 9 May 2003, the court ruled that article 13 of the Constitution had not been violated, that even though the constitutional precept provided that in certain cases the civilian

pertenezcan al Ejército. Cuando en un delito o falta del orden militar estuviere complicado un paisano, conocerá del caso la autoridad civil que corresponda."

authorities should hear crimes of a military order in which a civilian was *complicado*, this was only when the civilian was involved in the commissioning of crime (committing the crime – "*comisión del delito*"), not the victim of a crime. Supporting this argument the judge cited the Supreme Court ruling from 1995 which states,

*"If it appears proven that the accused was a military official, and that he was on active service on the day he caused the death of a person, which also appears in his statement, the crimes for which he is being tried are against military discipline, in accordance with article 57, paragraph II, clause a/ of the Code of Military Justice ... And therefore it is for the military authorities to hear the case."*¹⁵

The 1995 ruling by the Supreme Court gives greater legal weight to the Code of Military Justice than to the Constitution in order to justify military jurisdiction in cases where a serving military official is accused of any offence in the civilian penal code, whatever the severity or whatever the context. This precedent has been used repeatedly by the civilian authorities to surrender jurisdiction to the military of cases in which military officials have been accused of human rights violations, and where this has been challenged by the victim's legal counsel, the courts have confirmed this unwarranted principle.

The 1995 ruling by the Supreme Court is in contradiction to Mexico's Constitution and the recommendations of international human mechanisms. It dates from a period of authoritarian rule when the judicial and legislative branches continued to be largely subordinate to the interests of the executive and when there were widespread human rights violations by the military. It is now time for the executive, the Supreme

¹⁵ *"Si aparece probado que el procesado tenía carácter militar, y se encontraba en servicio el día en que causó la muerte de una persona, lo que también aparece en su declaración, los delitos por los que se le procese son contra la disciplina militar, de acuerdo con lo dispuesto en el artículo 57, fracción II, inciso a/ del Código de Justicia Militar Y por lo mismo corresponde conocer del proceso que se le sigue al inculcado a las autoridades militares"* (Sexta época, Instancia: Pleno, Fuente: Apéndice de 1995, volumen: Tomo II, Parte SCJN; Tesis:220, página 125)

Court and the legislature to take urgent steps to restrict military jurisdiction to specifically defined offences in military discipline and not to protect those accused of human rights violations from evading effective criminal prosecution and punishment.

4. International legal framework – responsibility of the Mexican state under international law

International human rights courts and international criminal tribunals have established that the pain and suffering caused by rape are consistent with the definition of torture. In many circumstances under international law, rape has been acknowledged as a form of torture owing to the severe mental and physical pain and suffering that it is inflicted on the victim. The Inter-American Commission on Human Rights found that the rape of a woman for her presumed participation in an armed opposition group by a member of the security forces constituted torture noting:

“Rape causes physical and mental suffering in the victim. In addition to the violence suffered at the time it is committed, the victims are commonly hurt or, in some cases, are even made pregnant. The fact of being made the subject of abuse of this nature also causes a psychological trauma that results, on the one hand, from having been humiliated and victimized, and on the other, from suffering the condemnation of the members of their community if they report what has been done to them”¹⁶.

The European Court of Human Rights ruled in the case of *Aydin v. Turkey* that,

“Rape of a detainee by an official of the State must be considered to be an especially grave and abhorrent form of ill-treatment given the ease with

¹⁶ *La violación produce un sufrimiento físico y mental en la víctima. Además de la violencia sufrida al momento que se perpetró, las víctimas habitualmente resultan lesionadas o, en algunos casos, aun quedan embarazadas. El hecho de ser objeto de un abuso de esta naturaleza les ocasiona asimismo un trauma psicológico que resulta, por un lado, del hecho de ser humilladas y victimizadas y por el otro, de sufrir la condena de los miembros de su comunidad, si denuncian los vejámenes de los que fueron objeto”.* Inter-American Commission on Human Rights, Report no. 5/96, case 10.970, Peru, March 1, 1996.

which the offender can exploit the vulnerability and weakened resistance of his victim. Furthermore, rape leaves deep psychological scars on the victim which do not respond to the passage of time as quickly as other forms of physical and mental violence”¹⁷.

Under international law not every case of rape engages the responsibility of the state. It is accountable under international human rights law for rape by its agents and is also accountable for rape by private individuals if it fails to act with due diligence to prevent, punish or redress it.

The Mexican Government has repeatedly stated that it is committed to using the United Nations *Manual on Effective Investigation and Documentation of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* known as the “Istanbul Protocol” as a means of investigating allegations of torture. As well as the technical gathering of evidence, a fundamental principle of the protocol is the impartiality and independence of the investigating authorities. Investigations conducted under military jurisdiction clearly do not meet these standards.

The failure to take effective action and ensure that those responsible for the rape of indigenous women are brought to justice means that the state breaches the obligations it has entered into through the ratification of international and regional standards such as the International Covenant on Civil and Political Rights (ICCPR), the United Nations Convention against Torture and Cruel, Inhuman and Degrading Treatment or Punishment, the American Convention on Human Rights (ACHR), and the Inter-American Convention for the Prevention and Punishment of Torture. It also contravenes international standards that expressly deal with violence against women, namely the

¹⁷ *“la violación de una persona detenida por un agente del Estado debe considerarse como una forma especialmente grave y aberrante de tratamiento cruel, dada la facilidad con la cual el agresor puede explotar la vulnerabilidad y el debilitamiento de la resistencia de su víctima. Además, la violación deja profundas huellas psicológicas en la víctima que no pasan con el tiempo como otras formas de violencia física y mental.”* Case of *Aydin v. Turkey* (57/1996/67/866), European Court of Human Rights, 25 September 1997.

Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (“Convention of Belém do Pará”) and the Convention on the Elimination of All Forms of Discrimination against Women including the Optional Protocol as well as in the case of Valentina Rosendo Cantú, the UN Convention on the Rights of the Child.¹⁸

International human rights law provides wide-ranging guarantees of the rights of women and girls to protection from sexual violence and abuse. International law requires states to address persistent violations of human rights and take measures to prevent their occurrence. With respect to violations of physical integrity, states have a duty to prosecute abuse, whether the perpetrator is an agent of the state or a private citizen. Article 2 of the ICCPR requires governments to provide an effective remedy for abuses and to ensure the rights to life and security of the person of all individuals in their jurisdiction, without distinction of any kind including sex. When states routinely fail to respond to evidence of sexual violence and abuse of women and girls, they send the message that such attacks can be committed with impunity. In so doing, states fail to take the minimum steps necessary to protect the right of women and girls to physical integrity.

Mexico ratified the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in 1981 and ratified its Optional Protocol in 2002. The Optional Protocol gives women who have been denied justice in their own country the possibility of seeking redress at an international level. Once all internal appeals have been exhausted, this mechanism permits victims or their legal representatives to submit a complaint

¹⁸ ICCPR ratified by Mexico on 23/3/81, ACHR ratified by Mexico on 3/4/82, Convention against Torture ratified on 23/1/86, Inter-American Convention to Prevent and Punish Torture, ratified on 22/6/87, CEDAW, ratified on 23/3/81 and Optional Protocol on 15/3/02, Convention on the Rights of the Child, ratified on 21/9/90, Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (“Convention of Belém do Pará”) on 12/11/98 and ILO Convention 169 on Indigenous and Tribal Peoples ratified on 5/9/90.

directly to the UN Committee that monitors implementation of the Convention which can conduct its own investigations and decide on the case under consideration.

The Mexican Government has not taken steps to implement international recommendations in regard to ending military investigation of human rights violations committed by the armed forces. Furthermore, in the 2001 ratification of the Inter-American Convention on Forced Disappearance of Persons, the reservation put forward by the Government of Mexico to Article IX¹⁹ once again reinforced the role of military jurisdiction to investigate human rights violations. Article IX of the Convention sets a key standard for the region in explicitly excluding serious human rights violations such as forced disappearance from military jurisdiction. The Mexican Government’s decision to opt out of this clause goes against the objective of the Convention and raises grave concerns about the government’s determination to end impunity for human rights violations committed by the military.

In December 2003 the Office of the High Commissioner for Human Rights in Mexico published its Diagnostic on the Human Rights Situation in Mexico as the basis for the development of the National Human Rights Programme. President Fox ordered his government to implement the recommendations included in the groundbreaking report. Proposals

¹⁹ Article IX notes “Persons alleged to be responsible for the acts constituting the offence of forced disappearance 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. The acts constituting forced disappearance shall not be deemed to have been committed in the course of military duties. Privileges, immunities or special dispensations shall not be admitted in such trials, without prejudice to the provisions set forth in the Vienna Convention on Diplomatic Relations.” The Mexican Government’s reservation argues that military courts are administrative courts and not special jurisdictions and therefore do not fall within this category. However, this is an evasion of responsibility set out in the Vienna Convention article 19(c) of which does not admit the formulation of reservations that are “incompatible with the object and purpose of the treaty”.

in section 2.1.7.4 (page 36) refer explicitly to military jurisdiction and recommend the authorities:

“to elevate to a constitutional guarantee the right of access to civilian criminal justice and not military, in the case of civilians who are victims of offences committed by military personnel”

and:

“to restrict the scope of the concept of offences against military discipline and derogate article 57, paragraph II of the Code of Military Justice, to establish in its place the offences which can be brought before the military courts.”²⁰

In September 2004 Amnesty International addressed a memorandum to the Federal Congress²¹ concerning recent reform proposals by the executive to strengthen human rights protection in the Constitution and criminal justice system. The memorandum highlighted the absence of any proposals by the executive addressing these issues and called on legislators to end military jurisdiction for human rights violations.

5. Military presence and operations in Guerrero

“In peace times, no military authority may exercise functions beyond that which have direct connection with military authority” Article 129 of the Mexican Constitution²²

“We do not agree with the soldiers being here, because we women are very scared when we see them, because we do not speak Spanish and we cannot defend ourselves if they say something to us because we do not understand them. When we see

²⁰ *“Elevar a la categoría de garantía constitucional el acceso a la jurisdicción penal no militar, por parte de los particulares que sean víctimas o ofendidos por actos de personal militar; Restringuir el alcance del concepto de actos en contra de la disciplina militar y derogar el artículo 57, fracción II, del Código de Justicia Militar para en su lugar, establecer, de manera taxativa, los tipos penales que pueden ser materia de los juicios castrenses”*

²¹ Mexico: Memorandum to Mexican Federal Congress on Reforms to the Constitution and Criminal Justice System, AMR 41/032/2004, September 2004

²² *“En tiempo de paz, ninguna autoridad militar puede ejercer más funciones que las que tengan exacta conexión con la disciplina militar”*

the soldiers, we run away in fear because the soldiers have weapons. Everyone is scared, particularly the women.”²³ (El Sur de Acapulco newspaper, 7 March 2002)

During the “dirty war” (*guerra sucia*) of the 1970s and early 1980s, members of armed opposition groups as well as others deemed by the authorities to be political opponents such as political activists and social leaders were the target of widespread and systematic human rights violations including arbitrary detention, torture, “disappearance” and extrajudicial execution. In this period, over 400 people “disappeared”, most of them in the state of Guerrero in the context of counterinsurgency operations jointly undertaken by the army and police against the armed opposition group, the *Partido de los Pobres* (Party of the Poor).

The role of the Mexican army in policing activities once again increased in Guerrero during the 1990s, particularly in anti-narcotic operations and with the emergence of the *Ejército Popular Revolucionario* (EPR, Popular Revolutionary Army) and the *Ejército Revolucionario del Pueblo Insurgente* (ERPI, Insurgent People's Revolutionary Army), the army also became increasingly involved in counterinsurgency operations. Widespread human rights violations including arbitrary arrest and torture and less frequently, extrajudicial executions and “disappearances” were reported. Levels of human rights violations by the military peaked in Guerrero in the mid to late 1990s. In El Charco in 1998, 11 peasants were killed as a consequence of military counter-insurgency operations. The case was handed to military tribunals for investigation which justified the military action and exonerated those responsible. Other prominent cases of abuse by the army include that of Rodolfo Montiel and Teodoro Cabrera, two environmentalists who were arbitrarily arrested and tortured by soldiers

²³ *“No estamos de acuerdo en que estén los soldados, porque las mujeres de aquí nos espantamos cuando los vemos, porque no hablamos español, y no podemos defendernos si nos dicen algo porque no entendemos. Cuando vemos a los soldados nos vamos corriendo, con miedo, porque los soldados tienen armas. Toda la gente tiene miedo, y más las mujeres”* (A woman from the community of Barranca Bejuco describes her fear of the military shortly after Valentina Rosendo Cantú was raped by two soldiers in February 2002).

following their arrest in May 1999. National and international attention on their cases eventually resulted in their release by President Fox in 2001 but none of the soldiers were ever brought to justice nor were the two men compensated for the human rights violations they suffered. Over this period, the CNDH, the official institution and only oversight mechanism presently available to receive complaints of human rights violations committed by state officials, made repeated recommendations on cases of torture and arbitrary arrest which the military authorities failed to implement.

Today, military operations primarily focus on search and destroy operations of drug crops in remote mountainous areas. However, these operations are also linked to gathering intelligence on indigenous communities and identifying what the military perceive to be subversive elements. Members of inadequately trained and under-resourced mobile units often resort to taking food and other basic necessities from indigenous communities, themselves already living a precarious existence. While reports of serious human rights violations have declined from levels reported in previous decades, the military continues to play an active role in policing operations and reports of harassment of community members and stop and search activities are commonplace. Arbitrary abuses committed by state, municipal and federal authorities against indigenous communities have a long history. Conflicts within communities are common which the state authorities frequently exploit for political ends. The response of the state authorities often favours one side over another resulting in abuses and impunity. Communities, suspicious of the authorities, rarely register complaints fearing retaliatory action is likely and that there will be no judicial redress.

© Eric Chavelas - Indigenous women sit on the ground in front of military official

In a recent visit to the state of Guerrero, Amnesty International delegates learned of a range of abuses against indigenous communities by the military, as well as the various police forces, judicial, state and municipal. These included serious human rights violations committed over recent years, such as rape, arbitrary arrest and ill-treatment as well as intimidation and threats, and other arbitrary acts of destruction of property and crops, robbery, cutting off water supplies to the community, and illegally entering homes. The army presence frequently disrupts the daily activities of the indigenous communities as the women, fearful of the soldiers, are often forced to remain indoors, and children are kept home from school. Roadblocks are set up and men in particular are arbitrarily stopped and questioned about their activities, accused of growing drugs or supporting armed groups. According to a report in *El Sur*, indigenous communities in the municipality of Ahuacuotzingo complained in February 2004 about the actions of soldiers and members of the judicial police, the recently renamed, Agency of Federal Investigations (AFI, *agencia federal de investigaciones*) who had arrived in their villages on anti-narcotics operations a few days earlier and who were harassing the community, taking photographs of women as they bathed in the river, stopping children on their way to school and questioning them about drugs and weapons and threatening to break down the doors of peoples' homes.

Increasingly, some communities are beginning to speak out about arbitrary abuses and harassment they have suffered and in a small number of cases have managed to persuade local battalions to decamp. With the support of local human rights organizations such as the *Centro de Derechos Humanos de la Montaña Tlachinollan* based in Tlapa de

Comonfort with its dedicated legal defence team and outreach work among indigenous communities, individuals and communities are beginning to lodge legal complaints regarding army and police abuses²⁴. Even so, while military courts continue to claim jurisdiction of any complaints made against members of the army, soldiers will continue to commit abuses secure in the knowledge that they remain immune from criminal prosecution.

The heavy military presence in certain regions of Mexico such as the states of Chiapas and Guerrero and the involvement of the military in policing operations has been repeatedly criticised by the UN and IACHR. The UN Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples recently recommended that:

“the army should be withdrawn from the immediate area of indigenous communities”,

when the communities requested and that their presence and activities in indigenous areas be:

*“strictly compatible with their constitutional duties”.*²⁵

In 2003, the UN Working Group on Arbitrary Detention called for a clear separation between military and policing tasks in the area of law and

order²⁶, echoing recommendations made by other UN and IACHR²⁷ bodies about the need to demilitarize society and avoid the deployment of the armed forces in law and order operations. In recent years, the Mexican armed forces have increased human rights training courses for officials. While these are important, they do not deal with the underlying issue of accountability.

6. Military investigations and the denial of justice

*“the Inter-American Commission has maintained that ‘when the State permits investigations to be conducted by the entities with possible involvement, independence and impartiality are clearly compromised’, as a result of which it is ‘impossible to conduct the investigation, obtain the information, and provide the remedy that is allegedly available’, and what occurs is de facto impunity, which ‘has a corrosive effect on the rule of law and violates the principles of the American Convention.’ In particular, the IACHR has determined that, as a result of its nature and structure, military courts do not meet the requirements of independence and impartiality imposed under Article 8(1) of the American Convention” [para 81]*²⁸

The Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (“Convention of Belém do Pará”). explicitly codifies the State’s obligation to act with due diligence in order to prevent, investigate and punish violence against women and to adopt all appropriate legal and administrative measures without delay. States parties are committed to:

²⁴ The prominent political role of the military in public affairs in the state of Guerrero is reflected in a recent statement by the military commander of the Ninth Military Region, General Felipe Bonilla Espinobarros who in setting up road blocks to restrict access to opponents of a proposed dam, made public accusations against human rights organizations stating that in supporting those opposed to the dam the organizations were seeking financial gain.

²⁵ *“Cuando así lo demanden las comunidades indígenas, el ejército deberá ser replogado de las inmediaciones de las comunidades indígenas y su presencia y actividades en zonas indígenas deberán ser estrictamente compatibles con sus deberes constitucionales”.* Report of the Special UN Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, E/CN.4/2004/80/Add.2, 1 December 2003.

²⁶ Report of the Working Group on Arbitrary Detention on its visit to Mexico (27 October-10 November 2002), E/CN.4/2003/8/Add.3, 17 December 2002.

²⁷ See for example, Report on the Situation of Human Rights in Mexico OEA/Ser.L/V/II.100 Doc. 7 rev. 1, September 24, 1998.

²⁸ IACHR, Report No 53/01, Case 11.565, Ana, Beatríz and Celia González Pérez, Mexico, April 4, 2001, para 81 which itself quotes the Inter-American Court ruling on the case of Case of Durand and Ugarte, Ruling of August 16, 2000.

*“take all appropriate measures, including legislative measures, to amend or repeal existing laws and regulations or to modify legal or customary practices which sustain the persistence and tolerance of violence against women; establish fair and effective legal procedures for women who have been subjected to violence which include, among others, protective measures, a timely hearing and effective access to such procedures; establish the necessary legal and administrative mechanisms to ensure that women subjected to violence have effective access to restitution, reparations or other just and effective remedies”.*²⁹

In the cases of reported rape, rather than taking steps to carry out full and impartial investigations, the military investigators have instead frequently set out to disprove the allegations, placing the burden of proof on the victim, and flouting international standards ratified by the Mexican Government that guarantee equal protection before the law without discrimination. Investigation mechanisms including lodging a complaint, the ratification process, initial investigations, visit to the site, identity parades, protection of witnesses, medical examinations have all been seriously deficient and have been conducted in a manner that at times has been both threatening and disrespectful. There has been virtually no oversight of the proceedings and certainly no accountability. This section of the report considers some of the serious flaws that have been reported in the investigations.

Lack of impartiality

*“The Ministry of Defence rejects accusations against military personnel for the alleged violation of a woman in Guerrerothe Mexican Army and Air Force ... did not carry out any operation in the area of the community of Barranca de Bejuco on or around the date in question...”*³⁰

²⁹ Article 7(e) 7(f), 7(g).

³⁰ Press statement 025 issued by the Ministry of Defence on 7 March 2002. *“La Secretaría de la Defensa Nacional rechaza las acusaciones en contra de personal militar, por presenta violación a una mujer en el estado de Guerrero... los efectivos del Ejército y Fuerza Aérea Mexicanos ... no efectuaron en dicha*

On the day in March 2002 that 17-year-old Valentina Rosendo Cantú formally denounced that she had been raped by two soldiers, a statement from the Ministry of Defence appeared in the daily newspaper *“El Sur de Acapulco”* denying that any army operation had taken place in the area on the day in question and suggesting that the complaint was an attempt by local criminal interests to discredit the army. Without apparently having undertaken any investigations into the allegation, the army had already reached its conclusions. Yet just two months later, it was this same institution that took over the investigations.

The recent decision by a military judge to drop the case against General Arturo Acosta Chaparro for the murder of 22 people in Guerrero during the “dirty war” in the 1970s on the grounds that the evidence was no longer relevant (*“desvanecimiento de datos”*), demonstrates the pervasive impunity in the military justice system for members of the armed forces accused of serious human rights violations. Acosta Chaparro was originally charged with 143 murders, but the formal accusation reduced the number to 22. The military judge reportedly chose to ignore eye witness statements alleging that the military had headed operations in which a number of individuals were taken to the airforce base *Pie de la Cuesta*, killed and subsequently thrown from planes into the sea in favour of statements by former senior military officers, including generals, who reportedly stated they could not remember (*“No me acuerdo”*). This case demonstrates the lack of impartiality of the military courts, the judge showing a lack of impartial assessment of the evidence in favour of hierarchy.

The military judicial system, being part of the executive structure, cannot guarantee impartiality, independence and accountability necessary for a judicial system as established in the ICCPR and ACHR. Historically powerful, the Mexican Armed Forces are in theory subordinate to the executive, but exercise a large degree of institutional and political power. Military judges are serving officers with the rank of brigadier general and are appointed by the Minister of Defence as are

fecha o próximas, alguna operación en las cercanías de la comunidad Barranca de Bejuco”

military prosecutors.³¹ As a result, protecting the interests and image of the military institution comes before ensuring that civilian victims of human rights violations committed by members of the armed forces receive justice. In addition, an independent plaintiff may not start criminal proceedings against a member of the armed forces, as only the Ministry of Defence has the authority to prosecute members of the armed forces before a military court.

Appeal petitions (*amparo*) against military jurisdiction in cases in which the military are accused of human rights violations on the grounds that it is unconstitutional and fails to guarantee an independent and impartial investigation have to Amnesty International's knowledge never been won. In the case of Valentina Rosendo, her legal counsel made repeated unsuccessful appeals to civilian courts. There is no effective oversight mechanism to hold the institution to account if it does not conduct a proper investigation and while the CNDH has issued recommendations on a number of cases, it has no authority to compel the military to comply.

Lodging a complaint of rape and the ratification process

*"States shall ensure that complaints and reports of torture shall be promptly and effectively investigated. Even in the absence of an express complaint, an investigation should be undertaken if there are other indications that torture or ill treatment may have occurred. The investigators, who shall be independent of the suspected perpetrators and the agency they serve, shall be competent and impartial ..."*³²

³¹ Articles 27 and 42 of the Code of Military Justice.

³² "Los Estados velarán por que se investiguen con prontitud y efectividad las quejas o denuncias de torturas o malos tratos. Incluso cuando no exista denuncia expresa, deberá iniciarse una investigación si existen otros indicios de que puede haberse cometido un acto de tortura o malos tratos. Los investigadores, que serán independientes de los presuntos autores y del organismo al que éstos pertenezcan, serán competentes e imparciales ..." . Appendix 1, Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol).

Substantiating rape cases in court is a complex and sensitive procedure. However, this should spur authorities to establish effective and independent mechanisms capable of securing justice for the plaintiffs. Making a complaint should be a simple unbureaucratic process. The six women in this report complied with the appropriate civilian authorities only to see their demand for redress not only denied but subverted by the military judicial system, which, in seeking to place the burden of proof on the plaintiffs, exerted intolerable pressure on them. In Mexico, for a complaint to progress, the plaintiff has to come forward to ratify their initial statement. In cases involving members of the military, this ratification takes place before the military prosecutor who is based in the barracks. This can put the plaintiff at greater risk as they may be identified by the suspects or their colleagues or they may be intimidated or threatened. The ratification process should not be used as an excuse to delay or obstruct the process of investigation. In the case of Inés Fernández, however, it took a full six months before the military prosecutor sent out a communication summoning her to ratify her statement and, as noted in the CNDH recommendation, the communication of 18th September 2002 calling Inés Fernández to ratify her complaint was sent to the village of Barrio de San Felipe instead of Barranca Tecuani. In addition, Inés Fernández' failure to attend an identity parade was because she was never appropriately informed that this procedure was due to take place. This non-attendance was used by the military prosecutor as evidence of the plaintiff's lack of interest in pursuing the case, providing one of his arguments for recommending archiving the case. In the event the Military Attorney General (PGJM, *Procurador General de Justicia Militar*) returned the case calling for further investigations to be carried out.

The failure to attend a summons was also used by the military investigators in the cases of Beatriz, Ana and Celia González Pérez, the three sisters who were raped by soldiers in Chiapas on 4 June 1994, as one of the reasons for closing their case. Shortly after they were raped, the three sisters underwent a meticulous forensic examination by a local civilian doctor. In its ruling on the case in

April 2001, the IACHR stated that the medical report revealed a detailed professional examination of the three victims that met the parameters laid down by the UN Human Rights Commission. Nevertheless, the military prosecutor chose to completely ignore the results of the previous medical examination and ordered the sisters to present themselves for another examination

This decision demonstrated a profound lack of regard for the women as such examinations by their very nature are extremely intrusive and likely to cause women to relive their trauma. Such examinations should be conducted by impartial medical professionals with proper training and in a dedicated location with due consideration being given to the physical and psychological wellbeing of the individual. When the three sisters failed to appear to submit themselves to a new examination, this time under military supervision, the military prosecutor closed the case in September 1995 because of:

“the lack of legal interest on the part of the victims and their representative”

and because:

“the criminal evidence is not in any way credible, nor is the probable liability of the military officers.”³³

The Mexican Government accepted without question the military’s decision in this case, as the ruling notes,

“The Mexican State maintains that it has not been possible to fully verify the petitioners’ allegations, because of a lack of cooperation on the part of the victims. It alleges that the investigation was archived because the González Pérez sisters refused to appear before the Military Prosecutor’s Office to present their testimony and to submit themselves to a new gynaecological examination. As a result, it argues that no human rights violations can be attributed to the Mexican State

³³ *“la falta de interés jurídico por parte de las ofendidas y su representante” ... “no se acreditan elementos de tipo penal alguno ni la probable responsabilidad de elementos militares”.*

and asks the Inter-American Commission to reject the complaint”³⁴.

Only the Public Ministry whether civilian or military is empowered to investigate a complaint. The victim and their representatives are dependent in the civilian system on the Public Ministry allowing them an active role in accompanying the investigations, known as *coadyuvancia*. In the military case, while technically also a right of the defendant, this system is virtually inoperative. The plaintiff and their legal advisors have very limited access to the investigations and have to go to the military barracks to access files. Unsurprisingly, individuals, particularly from indigenous communities are very reluctant to go to military barracks and in any case a request for access may be denied for bureaucratic reasons. This means that the rights of the victim to justice are seriously curtailed, preventing them from being able to scrutinize the work of the military prosecutor.

While individual victims or their relatives are often denied access to case documents, they are nevertheless expected to comply with orders issued by the military prosecutor to present themselves before the investigator based at the military barracks. Valentina Rosendo Cantú refused to accede to a summons to appear before the military prosecutor in March 2002, on the grounds that as a civilian, military jurisdiction did not apply to her. Her lawyers argued that the incidents were not ones that,

“constitute a mere fault or infraction of military discipline but were serious crimes as typified in the penal code of the state of Guerrero”³⁵

³⁴ *“El estado mexicano expresa que no se han podido constatar de manera plena los alegatos de los peticionarios, debido a la falta de cooperación de las víctimas. Alega que la investigación fue archivada porque las hermanas González Pérez se negaron a comparecer ante la Procuraduría General de la Justicia Militar para presentar su testimonio, y para someterse a un nuevo examen médico ginecológico. En consecuencia, sostiene que no hubo violación alguna de derechos humanos imputable al Estado mexicano y solicita que la Comisión Interamericana desestime la denuncia”.*

and as such required a serious, objective and impartial investigation. The lawyers' appeal failed but the military prosecutor went further stating that his office could call anyone to testify, whether civilian or military, who might be able to supply information that could be used to investigate the crime and that the individual was obliged to come forward as many times as required to do so. This illustrates how in cases such as these, the victim is made to feel the subject of the investigation.

Initial investigations, visit to the site, identity parades

*"Since they beat Valentina, none of the women go out and work in the fields has been abandoned"*³⁶

The Istanbul Protocol sets out the basic procedures for the effective investigation of torture and cruel, inhuman or degrading treatment, including guidelines for gathering oral testimony from the victim and other witnesses, and collection of physical evidence. Among the suggested procedures for conducting an investigation, the protocol stresses that those carrying out the investigations should protect victims and their families from further violence or intimidation, avoid re-traumatizing the victim, demonstrate sensitivity towards the individual including an awareness of social, cultural and gender differences and conduct the investigation in a safe and neutral environment. None of these procedures were followed by the military who in some of the cases reported to Amnesty International, arrived *en masse* in the community and asked the women to identify their attackers from among a large group of soldiers. No steps were taken to protect the women or other witnesses and there was no legal adviser present at the time. On 15 March 2002, the military prosecutor investigating the complaint of rape made by Valentina Rosendo went to

³⁵ "no son actos que constituyan una mera falta o infracción a la disciplina militar sino mas bien representan figuras delictivas graves del orden comun tipificadas en el Código Penal del Estado de Guerrero".

³⁶ "Desde que golpearon a Valentina todas las mujeres no salimos y el trabajo en el campo está abandonado" Women in the community describing how the attack on Valentina Rosendo had affected them .

Barranca Bejuco accompanied by some 30 soldiers to stage a line up. Valentina did not identify the suspects, a fact that was subsequently used to discredit the claim of rape. Instead of guaranteeing the protection of the victim, the reverse is true in that the victim is exposed to potential rejection by the community who see them as a threat to the broader community. Furthermore, the failure to identify a suspect in such circumstances is then used as evidence to discredit the allegation of rape.

On 30 December 1997, Delfina Flores Aguilar and Aurelia Méndez Ramírez were summoned by an official of the Public Ministry in Chilapa to attend an identity parade. The parade did not take place until the following day and was attended by the military prosecutor. In a complaint to the CNDH in January 1998, a local non-governmental organization (NGO), the Regional Centre for the Defence of Human Rights, José María Morelos y Pavón (*Centro Regional de Derechos Humanos José María Morelos y Pavón*) said the military official had tried,

*"to intimidate and confuse the facts of this case, stating that the rape did not take place and that the medical certificate was not valid"*³⁷

The NGO also complained that although the Public Ministry official had said that eight soldiers would attend the identity parade, there were 32 soldiers present, that no measures had been taken to protect the safety of the two women who were made to confront the soldiers face-to-face, that the parade had not been carried out in the appropriate place and that the women had had no legal defence. In an interview with *La Jornada* newspaper in January 2002, Delfina Flores Aguilar, described how she had felt at the time. She said,

"That day, lots of soldiers arrived, they stood in two lines. They said that about seven of them would come, but there were lots of them. I went first, then Aurelia. She entered and cried. I felt as if I was drunk. I felt dizzy and upset ... I recognized three of the soldiers. One of them was laughing at me and I said, 'it was this one and

³⁷ "tratando de intimidar o confundir sobre los hechos de este caso, señalando que no se dio tal violación y que el certificado medico no tiene validez".

this one'. One of them had a thick beard but after they shaved it off."³⁸

Victoriana Vázquez Sánchez and Francisca Santos Pablo, from Barrio Nuevo San José, Tlacoachistlahuaca municipality in the state of Guerrero, both indigenous Mixteco speakers who speak no Spanish, gave official testimonies about what they had suffered to the Public Ministry through an interpreter on 8 May 1999. They had delayed coming forward due to the intense trauma they suffered and the fear of reprisals. On 26 May 1999 the Public Ministry turned the case over to the military judicial system. The women left the area shortly after lodging their official complaint of rape and the authorities were able to argue that they could not investigate the case further. Amnesty International received reports that there had been pressure on the community and inducements to leave the area.

Indigenous communities and the population at large know that if they lodge a complaint against the military, there is always the possibility of reprisal. On 16 January 2003, 22 members of the 48th Infantry Battalion of the Mexican army reportedly entered Barranca Tecuani village. Four armed soldiers went to the home of Fortunato Prisciliano and Inés Fernández and allegedly demanded repeatedly for over half an hour that Fortunato Prisciliano withdraw the allegation of rape. He refused to accept their demands. Two days later, soldiers again approached Fortunato Prisciliano but he insisted that he would not withdraw the charge. The soldiers then set up camp in the municipality for ten days, reportedly intimidating and harassing local people.

³⁸ *Ese día llegaron allá muchos soldados, se pararon en dos filas. Dijeron que iban a venir unos siete, pero eran muchos. Yo entré primero, después Aurelia. Ella entró y lloró. Me sentía como si estuviera borracha, estaba mareada y me dio pena ... a los tres soldados los reconocí. Uno de ellos se estaba riendo de mí y dije 'fueron éste y éste'. Uno estaba bien barbón, pero después lo rasuraron"* (La Jornada, 28 January 2002).

© AI - Valentina Rosendo Cantú

Medical examinations

In cases of rape, the medical examination is a very complex process. The Istanbul Protocol notes that in an ideal situation:

*"there should be adequate physical and technical facilities under which survivors of sexual violations may be examined appropriately, and a team that includes professionals such as experienced psychiatrists, psychologists, gynaecologists and nurses who are trained in the treatment of survivors of sexual violation. An additional purpose of the consultation after sexual assault is to offer support, advice, and, if appropriate, reassurance"*³⁹.

There are few medical facilities in the mountainous area of Guerrero. Staff have little training or expertise in dealing with cases of sexual violence and may well be afraid to issue medical reports which might contradict the military version of events. On 18 February 2002, Valentina Rosendo sought help from the medical centre in Caxitepec for the injuries she had suffered at the hands of the soldiers. She was given a few pills for the pain but although there was reportedly blood in her urine, the doctor refused to issue her with a medical certificate or prescription reportedly on the grounds that he was afraid of the military. At the

³⁹ Istanbul Protocol, para. 218

hospital in Ayutla de los Libres where Inés Fernández went for a medical examination on 23 March, there were no female doctors available to examine her and she had to wait until the following day for a female doctor at a private clinic to perform the examination. On 5th April, lawyers representing Inés Fernández expressed concern at the failure of the hospital to make known the results of laboratory tests on the samples taken, particularly in light of the fact that the hospital director had informed them that the hospital did not in fact have the necessary equipment to perform the analyses.

The clinical examinations fell far short of the standard laid down in the Istanbul Protocol. This Protocol makes clear that finding physical evidence of rape can be very difficult because of the almost inevitable time lapse and therefore dependence solely on the physical evidence undermines the success of an eventual prosecution. Reports of the medical examinations on the six women seen by Amnesty International are inadequate and are confined to looking for physical signs of sexual assault. Medical experts state that it is rare to find any physical evidence on female genitalia more than one week after the assault and that there is “identifiable damage” of female genitalia in less than 50% of cases immediately after rape. It is therefore vital to establish broader details as possible elements of proof.

The process of examination and interviewing is culturally complex and doctors have no training to make an adequate assessment of the situation and its broader context in order to gain information that would help to substantiate the case. Failures committed by doctors because of pressures or lack of technical resources are often inverted during the investigation and presented as proof that no crime was committed. The pressure doctors are under and the lack of technical resources serves later to prove against rather than prove the case. A very rare exception to this was the examination of the three indigenous women raped in Chiapas in 1994 where by coincidence a thorough independent examination by a local doctor did validate the evidence, though even in this case the military

authorities chose to ignore the evidence and demanded the three undergo another examination.

In the case of Valentina Rosendo, according to a letter of 6 June 2003 from the Human Rights Office of the Ministry of Foreign Affairs (*Dirección General de Derechos Humanos de la Secretaría de Relaciones Exteriores*) sent to Amnesty International, the military prosecutor took declarations from medical staff at the hospital in Ayutla on 7 March and 11 March 2002. The letter states that Valentina Rosendo did not inform either the doctor who saw her at the hospital on 26 February or the social worker who saw her the following day about the beating or rape. Instead, the doctor apparently alleged that Valentina Rosendo had said that her injury had been sustained as a result of a piece of wood falling on her abdomen. Denials by women who have been raped are common where profound trauma and in this case, socio-cultural pressures, are present. On 30 April 2002, says the letter, Major Fernando Fuentes Ayala, who was asked to examine the results of the urine test carried out on 27 February 2002 concluded that the test was normal and that it was impossible to determine whether Valentina Rosendo had been raped or not as the urine test had been done 11 days after the alleged event took place. The military examination is inadequate because it only seeks physical evidence which, given the time lapse, is lacking. This combined with the reluctance of the women to be examined by military doctors virtually closes off any possibility of the investigations advancing.

Amnesty International in documenting torture over the years has repeatedly noted the failure of medical professionals to adequately document torture particularly when under pressure from the authority allegedly responsible. In many cases, medical examinations have been used to discredit the allegations.

Oversight mechanisms

There are no effective oversight mechanisms to hold the military to account when it fails to investigate properly. While the CNDH can investigate the work of the military prosecutor and

make recommendations, it has no authority to compel the military to comply. Its recommendations generally fail to refer to international standards or press for the implementation of recommendations by international human rights mechanisms. For example, in the case of Inés Fernández, it failed to state that the military justice system was not an appropriately impartial agency to investigate cases of human rights violations committed by the military against civilians. The CNDH does not sufficiently follow up its recommendations or assess in full compliance with its recommendations. If an investigation does not result in a recommendation to the authorities, then all information relating to the case remains confidential. In addition, the CNDH has reported being denied access to information when conducting investigations. Its recommendation on the Inés Fernández case makes clear that it asked the military prosecutor on five separate occasions for a copy of the file of the preliminary investigation which the prosecutor turned down on the grounds that it was not complete. This, said the CNDH made it difficult for it to adequately investigate the case.

While the CNDH investigation into the case of Inés Fernández illuminated some of the deficiencies in the military investigations, it did not help ensure adequate redress. While its mandate is limited, the Guerrero State Human Rights Commission, (CODDEHUM) has sought to obtain the basic elements of the cases before being obliged to hand them over to the CNDH.

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Delfina Flores Aguilar and Aurelia Méndez Ramírez were reportedly raped by several soldiers in December 1997 and their husbands, Aureliano Vicente Cantú and Celerino Vásquez Solano were arbitrarily detained. Following an investigation, the CNDH concluded that three soldiers were responsible for the injuries sustained by Celerino Vásquez Solano at the time of arrest and that the military doctor who had recorded that there was no sign of injuries or evidence of physical violence was responsible for abetting the soldiers. However, it made no further comment on the rape of the two women beyond a reference to the military prosecutor's denial that a sexual assault took place. Despite involving serious human rights violations, the CNDH proposed an amicable settlement (*"amigable composición"*) to include an internal administrative investigation by the army into the actions of the soldiers in injuring Celerino Vásquez and the military doctor's cover up. A communication to Delfina Flores dated 19 November 1998, informed her that the army had accepted the proposal *"in all its terms"* (*"en todos sus terminos"*) and that it considered the complaint resolved though it would await the results from the administrative proceedings the army had agreed to undertake. No information on any further investigations, administrative or otherwise, undertaken by the army into the complaints of rape made by the two women has been forthcoming. Amnesty International is not aware of any further action taken by CNDH to monitor compliance of the agreement.

7. Failures of other institutions:

This report focuses on the role of the Mexican military justice system in preventing justice in cases of rape by members of the Mexican army of indigenous women in Guerrero. However, it is important to note the serious shortcomings of other institutions involved in these cases.

Investigations by the Public Ministry

National and international human rights organizations have identified numerous flaws in the procedures and practice of the Public Ministry, identifying it as one of the chief sources of ongoing

human rights violations, particularly in regard to complaints of torture.⁴⁰

Valentina Rosendo Cantú lodged a formal complaint of rape before the Public Ministry office in Ayutla de los Libres, Guerrero, on 8 March 2002. However the Public Ministry refused to investigate on the grounds that the offence had been committed in the jurisdiction of the Public Ministry Office in Tlapa de Comonfort. It took until 5 April for this jurisdictional issue to be resolved in favour of the Unit for Sexual Offences and Offences against the Family (*Ministerio Público del Fuero Común especializado en delitos sexuales y atención a las víctimas de violencia intrafamiliar*) in Tlapa de Comonfort and a further 10 days before this office finally began to investigate the case further. Early evidence is crucial in all rape cases. The delays in this case indicate an apparent reluctance to take on any cases involving the military and carry out even the most basic investigations that might provide evidence for subsequent prosecutions. On 16 May, after receiving a letter dated 8 April from the Subprocurator of Criminal Procedures (*Subprocurador de procedimientos penales*) recommending the case be handed to the military judicial system, the Public Ministry official in Tlapa declared himself without jurisdiction. The public prosecutor should also represent the interests of the victim, but in this case as in others, the Public Ministry failed to challenge military jurisdiction, curtailing the womens' rights to justice and redress.

Shortcomings in basic investigation procedures including the systematic collection and preservation of forensic evidence has been identified in other cases of violence against women in Mexico, in particular in the abduction and murder of women in Ciudad Juárez and Chihuahua.⁴¹ The initial forensic examination in cases of rape forms a crucial part of the investigation. Given the nature of the crime, absolute care should be taken to avoid causing

⁴⁰ See for example "Unfair trials: unsafe convictions: AI Index: AMR 41/007/2003 for further information.

⁴¹ For further information see, *Intolerable killings: 10 years of abductions and murder of women in Ciudad Juárez and Chihuahua* AI Index: AMR 41/026/2004.

women further physical or psychological trauma. The recommendation issued by the CNDH in November 2003 on the case of Inés Fernández criticised the Forensic Services of the Office of the Public Ministry in Guerrero state for its scientific handling of the case. According to the CNDH recommendation, the forensic services identified the presence of spermatozoids in the samples that the military prosecutor's office had sent over, but when the military prosecutor requested the samples be returned for further tests, the laboratory said that they had been used up ("*se consumio durante su estudio*") during the test. The forensic expert designated by the CNDH noted that the tests that had been carried out would not normally result in the samples being used up in this way and criticised the Forensic Services for failing to conserve them for future use in determining the identity of the likely perpetrator, and for failing to follow proper procedure in documenting the samples and results. The military prosecutor was also criticised. According to the CNDH, he should have predicted that the tests might reveal traces of semen and should have asked the Forensic Services to conserve or return the samples for further tests.

Courts

As described earlier, civilian courts have consistently ruled in favour of maintaining military jurisdiction for human rights violations by interpreting "acts of service" as any action committed by the military while on duty. These rulings ignore recommendations made by international human rights bodies which emphasize that all cases of reported human rights violations should be investigated and tried by independent and impartial authorities, that is to say, not the same authorities or institutions that have been accused of involvement in the crime.

As the case of Valentina Rosendo Cantú illustrates, appeals in civilian courts to uphold the principles of independence and impartiality which underpin justice systems and the rule of law have so far been unsuccessful. Instead, rulings have been based on jurisprudence such as the Supreme Court decision from 1995. It is of serious concern that such decisions, dating from a period of widespread

human rights violations and authoritarian rule, continue to serve as precedents guiding the administration of justice in Mexico. The present Fox administration has committed itself to introducing transparency, accountability and the rule of law. However, these principles have yet to be applied in relation to human rights violations committed by the military.

8. Conclusion

The six cases of rape allegedly committed by military officials that are documented in this report amount to torture and should be investigated as serious human rights violations. Amnesty International believes that as women from indigenous groups, they faced multiple discrimination at the hands of a range of institutions, particularly the neglectful and dismissive treatment by both the military and civilian judicial systems, denying them reparations and redress. The investigations conducted by the military prosecutors have been woefully inept and riddled with serious errors and omissions. These investigations clearly demonstrate the inability, ineffectiveness and lack of political will of the Mexican military justice system to deliver independent and impartial investigations and trials for victims of human rights violations. Amnesty International concludes that the current scope of the military justice system to investigate cases of human rights violations involving members of the Mexican armed forces undermines constitutional limitations on military jurisdiction and directly contradicts international human rights recommendations to the Mexican Government.

Amnesty International concurs with the conclusions of a number of international human rights mechanisms that military operations in such states as Guerrero exceed the reasonable exercise of military mandate in regard of security. Amnesty International believes that the cases in this report demonstrate the damage caused to local communities of the military presence carrying out law and order functions.

The Mexican state is going through a period of modernization. The present administration has

committed itself to introduce accountability, transparency, respect for human rights and the end to impunity. Now is the time to modernize the armed forces and their relationship to society, in particular to restrict military justice and ensure human rights violations are investigated and tried with all appropriate guarantees of independence and impartiality in the civilian justice system.

RECOMMENDATIONS

The interpretation by Mexican courts of the Constitution in favour of military jurisdiction when military officials are implicated in internationally recognised human rights violations undermines the rule of law, fosters impunity and exacerbates the denial of justice for victims. International human rights bodies such as the UN thematic mechanisms and IACHR have repeatedly called on the Mexican authorities to restrict military jurisdiction and ensure a strict separation of military responsibilities and tasks from police law enforcement functions. Amnesty International calls on the Mexican Government and other relevant institutions to adopt and effectively implement the following recommendations.

Impartial investigation of human rights violations

- Reform article 13 of the Constitution and articles 37 and 57, paragraph II, clause a/ of the Code of Military Justice to ensure that they conform unambiguously with international recommendations that allegations of human rights violations committed by military personnel whether on active service or not are investigated and tried in civilian courts.
- Transfer from the jurisdiction of the military justice system all cases of human rights violation, including the rape cases documented in this report, to the appropriate civilian authorities to ensure justice and reparations for the victims.
- Incorporate into domestic legislation international human rights standards and the recommendations of international human rights mechanisms.
- Remove the reservation to Article IX of the Inter-American Convention on Forced Disappearance of Persons in order to ensure civilian jurisdiction over serious human rights violations such as forced

disappearance, committed by military personnel.

- Ensure in legislation the separation of the military from police law and order functions.
- Civilian authorities should conduct prompt, full and impartial investigations into reports of sexual violence, in particular rape, in which members of the security forces are implicated. Ensure that all members of the security forces implicated by judicial or disciplinary investigations in such cases are suspended until such time as their responsibility or innocence has been determined.
- Ensure that military authorities refrain from making statements on the substance of the allegations until investigations by civilian authorities have been concluded and that any official who impunes the reputation of the victim is disciplined.
- Exercise due diligence in the investigation of reports of sexual violence against women, including punishment of those responsible, reparations to the victims and crime prevention.
- Take steps to ensure that complaints of sexual violence are properly recorded and that evidence is gathered and preserved. Ensure that the survivors of sexual violence have timely access to medical and forensic experts.
- Legislation should ensure the forensic services, which presently come under the control of the Public Prosecutor's Office, are an autonomous agency with clear operational independence. Regulation should ensure its work is carried out on the basis of protocols developed from international standards for the collection, storage and assessment of forensic

evidence. It should be staffed and resourced to meet these requirements.

- Establish effective guarantees to enable victims to report the perpetrators, including effective protection for complainants, survivors and witnesses.
- Introduce provisions to guarantee the rights of complainants and survivors, including the right to have legal assistance and/or the support of an individual of their choice throughout any proceedings in which the victim's attendance is required; prohibit humiliating or discriminatory questioning; prohibit police or legal procedures in which the victim is forced to confront or have visual contact with her aggressor or aggressors; prevent any form of secondary victimization.
- Take steps to ensure that officials responsible for prosecuting crimes, dispensing justice and monitoring the performance of public officials are aware of, and correctly apply, national and international standards concerning the trial of offences of a sexual nature.

Develop comprehensive public policy to combat violence against women

- Adopt legislation to effectively implement the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women ("Convention of Belém do Pará").
- Advance public policies to eliminate all forms of discrimination against women and ensure that there is a coordinated and adequately-funded institutional response to prevent, punish and eradicate sexual and gender-based violence. Such a response must ensure that survivors have access to the services and resources they need, as well as rehabilitation, and include the adoption of special measures to

protect women and girls from particularly vulnerable communities.

- Give impetus to programmes on behalf of and in concert with indigenous women and girls, with a view to promoting their civil, political, economic, social and cultural rights; to putting an end to their situation of disadvantage for reasons of gender or ethnicity.
- Ensure access to reliable and appropriate social services that can provide victims of sexual violence with psychological help and social support for their rehabilitation and reintegration.
- Provide effective training programs for personnel within the public health system on caring for victims of sexual violence.
- Implement education programs aimed at public and community leaders on the importance of not stigmatizing victims of sexual and gender-based violence and take action to empower women and girls to enable them to seek help and adequate support.
- Ensure that non-governmental organizations working on sexual violence are involved in the drawing up of programs, services, policy and management tools and the monitoring and evaluation of government action to address the needs of the survivors of sexual violence.