



MEXICO: THE NATIONAL GUARD

INTERNATIONAL HUMAN RIGHTS OBLIGATIONS

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INTRODUCTION

On 14 November 2018, Andrés Manuel López Obrador, the then president-elect of Mexico, presented his National Plan for Peace and Security and announced that during his term of office a National Guard would be created, made up of members of the Armed Forces and the Federal Police, to deal with public security issues in the country. Subsequently, on 20 November 2018, deputies belonging to the MORENA party's parliamentary group submitted a constitutional amendment to Congress to create a National Guard.

The General Committee of the Chamber of Deputies referred the initiative to the Committee on Constitutional Affairs, which, on 20 December 2018, approved a decision by which various provisions of the Constitution of the United Mexican States were amended, added and repealed regarding the National Guard.

This document analyses this decision in the light of international human rights law, which requires states to ensure that the use of the armed forces in public order duties is strictly exceptional; always under the control of civilian authorities; governed by an adequate legal and administrative framework on the appropriate use of force and firearms; and subject to adequate inspection, training and evaluation mechanisms.

EXCEPTIONAL USE OF THE ARMED FORCES IN PUBLIC ORDER OPERATIONS

The proposal aims to create a National Guard composed of, among others, members of the military drawn from both the Mexican Army and Navy, to carry out general public order functions that would normally be carried out by civilian police. This breaches international human rights law, which provides that the use of the armed forces for such work must be exceptional and subject to a number of restrictions.

The Inter-American Court of Human Rights has established that the state parties to the American Convention on Human Rights, of which Mexico is one,¹ may deploy the armed forces to deal with issues other than armed conflict, for example to deal with exceptional problems of criminality or of internal violence. But in these cases, the Court has indicated that states must always "restrict to the maximum extent the use of armed forces".²

In its recent judgment in the case of *Alvarado Espinoza et al v. Mexico*, the Court determined that the maintenance of internal public order and public security should be confined primarily to civilian police forces³ and that the exceptional involvement of the armed forces in these tasks should be:

- a) Extraordinary, such that any intervention is justified and exceptional, temporary and limited to what is strictly necessary in the circumstances;
- b) Subordinated and complementary to the work of civilian bodies and their work should not be extended to the duties proper to law enforcement agencies or the judicial or ministerial police;
- c) Regulated, through legal mechanisms and protocols on the use of force, according to the principles of exceptionality, proportionality and absolute necessity and in line with appropriate training; and
- d) Supervised by competent and independent civilian bodies with the necessary technical expertise.⁴

However, in the proposed constitutional reform, as it appears in the decision approved by the Constitutional Affairs Committee, no clear limits are imposed on the public order functions to be performed by the armed forces, as required under international law. The National Guard, as proposed, would act in an indeterminate number of cases, without the participation of members of the military within it being properly assessed or

¹ Mexico became a state party to the American Convention on Human Rights, through an instrument of accession deposited with the General Secretariat of the Organization of American States on 24 March 1981.

² Inter-American Court of Human Rights, *Case of Montero Aranguren et al. (Retén de Catia) v. Venezuela*, Preliminary Objection, Merits, Reparations, and Costs, Judgment of 5 July 2006, Series C No. 150, para. 78; *Case of Zambrano Vélez et al. v. Ecuador*, Merits, Reparations and Costs, Judgment of 4 July 2007, Series C No. 166, para. 51; *Case Cabrera García and Montiel Flores v. Mexico*, Preliminary Objection, Merits, Reparations, and Costs, Judgment of 26 November 2010, Series C No. 220, para. 88.

³ Inter-American Court of Human Rights, *Case of Alvarado Espinoza et al. v. Mexico*, Merits, Reparations and Costs, Judgment of 28 November 2018, Series C No. 370, para. 182.

⁴ Idem.

limitation in time or place, on a case-by-case basis and without their being properly regulated, subordinate to civilian authorities or supervised.

ORDERLY WITHDRAWAL OF THE ARMED FORCES FROM PUBLIC ORDER WORK

The proposed amendment to Article 21 of the Constitution indicates that the National Guard would come under the branch of the ministry responsible for security with regard to the planning, programming and execution of its functions, and to the branch responsible for national defence with regard to hierarchical structure, discipline, service regime, promotions, benefits, professionalization and training. However, the transitional arrangements in the reform proposal indicate that the Ministry of Defence would be in charge of the planning and implementation of National Guard operations for up to five years; these functions would then return to the Ministry for Security and Public Protection.

Mexico could use this period of five years, or a shorter one if possible, to ensure not only the transfer of certain functions from one ministry to another, but to transfer all the functions and personnel to the branch responsible for public order, with a view to demilitarizing public order strategies in an orderly manner and in line with a predetermined timetable.

PROTECTION OF DETAINEES AND DUE PROCESS GUARANTEES

The proposal seeks to amend Article 21 of the Constitution to allow the National Guard to participate in the investigation of crimes and, in general, to act as an ancillary body to the Public Prosecutor's Office. This proposal is in breach of international law, which states that the armed forces should not be involved in actions related to the prosecution of crimes and the administration of justice. As indicated above, the Inter-American Court of Human Rights has established that among the limitations on the functions of the armed forces in tasks of public security is that their participation must be subordinated and complementary to the work of civilian bodies and their work should not be extended to the duties proper to law enforcement agencies or the judicial or ministerial police.⁵

The proposed reform includes a provision that detainees should be held solely in the custody of the civilian authorities. However, it contains no provision limiting the cases where the military in the National Guard may carry out arrests or detentions, a function that should be strictly limited to only the most exceptional situations. The Inter-American Court of Human Rights has established in another case concerning Mexico a strong restriction on the use of armed forces in actions that impact on the right to personal liberty, stating that: "the possibility of granting the Armed Forces functions aimed at restricting the personal liberty of civilians should respond to strict criteria of exceptionality and due diligence in order to safeguard the treaty-based guarantees".⁶

LAWS ON USE OF THE FORCE AND ON THE REGISTRATION OF DETENTIONS

The reform proposal contains a provision for the creation of laws on the use of force and on the registration of detentions. It is not clear, however, if those laws would apply only to the National Guard or to all the country's security forces.

Amnesty International reiterates its recommendation that laws on the use of force and on the registration of detentions should be adopted that apply to all the security forces and to the actions of law enforcement officials.⁷ If these laws were consistent with human rights standards and properly implemented, they could

⁵ Idem.

⁶ Inter-American Court of Human Rights, *Case Cabrera García and Montiel Flores v. Mexico*, op. cit., para. 88, and Inter-American Court of Human Rights, *Case of Osorio Rivera and family members v. Peru*, Preliminary objections, merits, reparations and Costs, Judgment of 26 November 2013, Series C No. 274, para. 122.

⁷ Amnesty International, *False suspicions: Arbitrary arrests by police in Mexico* (Index: AMR 41/5340/2017).

make an important contribution to the prevention of human rights violations, such as arbitrary detentions, torture and enforced disappearances, and improve security and justice systems in Mexico.

MECHANISMS TO SUPERVISE AND EVALUATE THE NATIONAL GUARD

The proposal includes a series of mechanisms for parliamentary supervision of the performance of the National Guard. However, if a National Guard is created, and especially if it is composed even in part of military personnel, Congress should ensure that there is not only parliamentary oversight but that there are civilian mechanisms able to carry out technical supervision of the force. The mechanisms currently envisaged in the proposal are not sufficient to comply with international human rights law which states that there should be a system of accountability that includes external, independent and impartial oversight,⁸ carried out by competent, independent civilian bodies with the necessary technical expertise.⁹

MILITARY JURISDICTION

The proposal seeks to limit military jurisdiction over cases involving the National Guard. However, the proposal does so only by adding a paragraph to Article 13 of the Constitution, which limits military jurisdiction by establishing the sole jurisdiction of civilian courts for crimes committed in the exercise of the functions set out in paragraph 11 of Article 21 of this Constitution.

International human rights standards establish that military courts should be restricted to dealing only with violations of military discipline and should not have jurisdiction over crimes under international law or violations of human rights.¹⁰ Therefore, the wording should make it clear that the jurisdiction of military courts will not extend to dealing with any crime or human rights violation committed by members of the National Guard, whether committed against civilians or other members of the Armed Forces.

JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT

The proposed reforms originally included an amendment to Paragraph 8 of Article 21 of the Constitution regarding the jurisdiction of the International Criminal Court. However, the approved version contains no such amendment and does not include any mention of the International Criminal Court.

Amnesty International believes Mexico should remove from the Constitution the current text contained in the Paragraph 8 of Article 21, which states that the Federal Executive may, with the approval of the Senate in each case, recognize the jurisdiction of the International Criminal Court, and so seeks to unduly limit the jurisdiction of International Criminal Court, in violation of Mexico's obligations under the Rome Statute.

STRENGTHENING CIVILIAN POLICE FORCES

The transitional arrangements state that a series of studies will be undertaken of the police and a programme of restructuring and strengthening implemented in order to enable the police to resume the exercise of their public order functions.

Amnesty International believes that Mexico needs to strengthen the police and that in order for this to be successful, it must be carried out in a transparent manner, with the participation of civil society, and guarantees must be given that it will have a sufficient budget. Mexico needs professional and reliable police forces to carry out public order duties and so contribute to the realization of human rights in the country.

⁸ Inter-American Court of Human Rights, *Case of Women Victims of Sexual Torture in Atenco v. Mexico*, Preliminary Objection, Merits, Reparations, and Costs, Judgment of 28 November 2018, Series C No. 371, paras 166, 355 and 356.

⁹ Inter-American Court of Human Rights, *Case of Alvarado Espinoza et al. v. Mexico*, op. cit., para. 182.

¹⁰ Inter-American Court of Human Rights, *Case of Radilla Pacheco v. Mexico*, Preliminary Objection, Merits, Reparations, and Costs, Judgment of 23 November 2009, Series C No. 209, paras 273 to 275.

However, this should not be conditional upon the establishment of a National Guard and must be carried out as soon as possible, regardless of whether Congress decides to create a National Guard or not.

RECOMMENDATIONS

Amnesty International, therefore, makes the following recommendations to the Congress of the United Mexican States:

- Withdraw the proposal to create a National Guard made up totally or partially of military personnel.
- If the decision is made to create such a National Guard, Amnesty International urges Congress to take all necessary measures to ensure that the initiative is in accordance with the provisions of international human rights law, including:
 - Clearly distinguishing and separating the distinct functions of civilian and military personnel in the National Guard and permitting the involvement of military personnel only in exceptional circumstances, evaluated on a case-by-case basis and subject to the restrictions imposed by international law.
 - Ensure that the actions of military members of the National Guard are under the control of civilian public security authorities or civic bodies.
 - Do not allow military members of the National Guard to participate in the investigation of crimes or to act as an ancillary body to the Public Prosecutor's Office.
 - Allow military members of the National Guard to carry out arrests only in clearly exceptional circumstances and in accordance with the framework of human rights law.
 - Ensure that military personnel in the National Guard act exclusively within the operational framework of a civilian police force trained to deal with crime and not on the basis of combatting an enemy force.
 - Explicitly state in the text of the Constitution that, on the expiry of the maximum term established for the given purpose, which should be as short as possible, the Armed Forces will not be able to perform public order duties.
 - Once this period has elapsed, in order to continue being part of the National Guard, all military personnel must be discharged from the Armed Forces and registered as a civilian in the National Guard, with the corresponding approved rank, or be reintegrated into the Armed Forces.
 - Establish accountability mechanisms for the National Guard through competent, independent civilian bodies with the necessary technical expertise.
 - Establish the exclusive jurisdiction of ordinary civilian courts over human rights violations and crimes in which members of the National Guard are suspected of bearing criminal responsibility.
- Establish in law provision for a unified register of detentions in the country that meets international human rights standards, in accordance with the rulings of the Inter-American Court of Human Rights; ensure that this covers both state and federal authorities, that records are logged in real time and that the register is easily accessible, and put in place clear supervisory and accountability mechanisms on maintaining of the register.
- Adopt a law on the use of force and firearms that is in line with international human rights standards, in particular the United Nations Basic Principles on the Use of Force and Firearms by the Law Enforcement Officials.
- Repeal the Paragraph 8 of Article 21 of the Constitution which seeks to unduly limit the jurisdiction of the International Criminal Court.

Strengthen civilian police forces, through a national, transparent procedure and with the participation of experts and civil society organizations, to facilitate an orderly withdrawal of the Armed Forces from public order duties and ensure that the necessary budgetary resources are allocated for this purpose.

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In November 2018, the then president-elect, Andrés Manuel López Obrador, presented his National Plan for Peace and Security. This provided for the creation of a National Guard, composed of members of the Armed Forces and the Federal Police, to deal with public security issues in the country. Later that same month, the Mexican Congress began discussing a proposal for constitutional reform to create the National Guard.

This document analyses this decision in the light of international human rights law, which requires states to ensure that the use of the armed forces in public order duties is strictly exceptional; always under the control of civilian authorities; governed by an adequate legal and administrative framework on the appropriate use of force and firearms; and subject to adequate inspection, training and evaluation mechanisms.