

WHERE DOES MEXICO STAND IN ITS FIGHT AGAINST IMPUNITY?

New Autonomous National Prosecutor's Office
Has Yet to Realize its Potential

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REPORT



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INTRODUCTION

The failure of Mexico's former federal Attorney General's Office (*Procuraduría General de la República*, PGR) to successfully prosecute corruption cases, grave human rights violations, and other high-impact crimes played a lead role in generating the widespread violence and insecurity that plagues Mexico today. In the face of generalized impunity, Mexican and international human rights groups, anti-corruption experts, and criminal justice reformers have led a historic push in recent years to reduce political meddling in sensitive criminal investigations.

In February 2014, Mexico's Congress passed a constitutional reform mandating the transformation of the PGR into an independent, autonomous National Prosecutor's Office (*Fiscalía General de la República*, FGR), separate from the executive branch.¹ After years of delay in passing the constitutional and legislative reforms needed to formally create the FGR, Alejandro Gertz Manero took office as Mexico's first autonomous national prosecutor in January 2019.²

While the creation of the FGR sparked hope for a new era in Mexico—in which politicians and security forces are held responsible for their misdeeds and citizens have trust in the criminal justice system—the new institution has yet to realize its potential. National Prosecutor Gertz has failed to fulfill several essential aspects of his mandate, including by illegally appointing special prosecutors, closing off spaces for citizen participation, and announcing reform efforts that are inherently incompatible with the spirit of the FGR and Mexico's broader adversarial criminal justice system.

In this report, we discuss the importance of this transition and analyze the FGR's performance in the first year and a half of Gertz's nine-year term. We also examine how the FGR has operated during COVID-19, as Gertz's response to the pandemic has been criticized for not implementing proper safeguards for employees and for using the pandemic as a pretext for stalling the FGR's work.³

WHY IS THE NEW STRUCTURE AND FUNCTION OF THE FGR IMPORTANT?

In the years following the 2014 constitutional reform, civil society organizations worked in close collaboration with Mexican policy makers to design the FGR's "implementing law", which entered into force in December 2018.⁴ The law, which defines the internal structure and governing rules of the FGR, serves to guarantee the new institution's independence from political pressure and to set forth more effective methods for investigating federal crimes.

The law calls for the creation of important accountability mechanisms and civil society oversight measures, and aims to break with the bad investigative habits that characterized the former PGR. Some of the requirements stipulated include:

THE PRESENTATION OF A CRIMINAL PROSECUTION PLAN

This document is the most important transparency and accountability mechanism established in the implementing law. This instrument lays out which types of cases the FGR will prioritize in the investigation, prosecution, and litigation stages, as well as the FGR's short, medium, and long-term goals. The plan should allow observers to analyze whether or not the FGR's investigative priorities are based on objective data and criminal analysis, and to measure the FGR's efficiency in reaching its own goals.

THE CREATION OF A CITIZEN COUNCIL FOR THE FGR

This citizen-led body is responsible for issuing opinions and recommendations about the FGR's performance. While these opinions are not binding, the national prosecutor is required to respond to them. In addition, the national prosecutor is supposed to consult the Citizen Council for advice and recommendations regarding the content of the Criminal Prosecution Plan. In this way, the Citizen Council is the body meant to represent civil society and act as a counterweight against the national prosecutor by demanding accountability for his or her actions. In spite of its importance, over 18 months have passed since the FGR officially began operations, but the Senate has yet to name the five members who will make up this citizen-led body.

SPECIALIZED PROSECUTOR'S OFFICES

While the Mexican Constitution mandates that the FGR include two special prosecutors' offices for corruption and electoral crimes, the implementing law adds two more special prosecutors' offices—one for investigating human rights violations and one for managing internal affairs investigations. According to the law, the heads of each of these four offices should be named by the national prosecutor, and the Senate must carry out an evaluation to accept or reject the nominations. The law establishes that the nomination process for each special prosecutor should be open, transparent, based on merit, and allow for civil society participation.

A NEW INVESTIGATIVE FRAMEWORK

The implementing law sets forth a new model for investigating criminal phenomena in which individual crimes are no longer investigated as isolated incidents. Under the new model, FGR officials should analyze crimes in the context of criminal patterns and trends—a more effective way of tackling organized crime.

“MIXED UNITS” TO INVESTIGATE COMPLEX CRIMES

The national prosecutor is allowed to pull personnel from various units within the FGR and state-level prosecutors' offices to investigate and litigate complex cases. This helps to prevent the same crime from being investigated at both the federal and state level, which can lead to case file fragmentation.

THE POWER TO ASSERT JURISDICTION OVER STATE-LEVEL INVESTIGATIONS

The implementing law expands the power of the FGR to assert jurisdiction over certain state-level investigations when it is clear that the investigation is compromised or is not being carried out in an objective, effective manner.

WHO IS MEXICO'S FIRST NATIONAL PROSECUTOR?

The appointment of the FGR's first head served as an important opportunity to guarantee the independence and strong leadership of the new institution. However, the selection of Alejandro Gertz Manero as Mexico's first national prosecutor raises serious questions about the FGR's independence, as Gertz has close ties to President Andres Manuel López Obrador and served as his security advisor during his presidential campaign.

The Mexican Senate, which is controlled by a coalition led by President López Obrador's political party, the National Regeneration Movement (MORENA), selected Alejandro Gertz in a rushed, opaque manner, without allowing space for adequate deliberations or civil society input. Gertz's proximity to the president threatens the impartiality of the FGR, setting a poor precedent for the young institution's future as an autonomous check on political power.

Since Gertz took office in January 2019, he has breached several essential aspects of the implementing law, including by:

ILLEGALLY APPOINTING SPECIALIZED PROSECUTORS

The implementing law stipulates that the national prosecutor is responsible for appointing the heads of each of the four specialized prosecutors' offices within the FGR in processes that are transparent, allow for civil society participation, guarantee autonomy, and closely evaluate the merits of each candidate. When making a nomination, the national prosecutor must inform the Senate of the selected candidate, and the Senate has 10 days to challenge the designation if it sees fit.

National Prosecutor Gertz selected María de la Luz Mijangos as the first anti-corruption prosecutor in a process that did not include an open call for candidates nor a public evaluation of her qualifications for the

post. Another concern is President López Obrador's relationship with the anti-corruption prosecutor: during López Obrador's presidential campaign, he named Mijangos as one of his favorites for the position, which calls into question her independence from the executive. Despite these irregularities, after Gertz informed the Senate of his selection, the Senate failed to carry out an assessment of her candidacy during the designated 10-day period, neglecting their important oversight role.

When Gertz selected Sara Irene Herrerías as the special prosecutor for human rights, and Adriana Campos López as the internal affairs prosecutor, he did not even inform the Senate of his selected candidates, as is required by law. Prior to her selection as the human rights prosecutor, Herrerías had already been working in the former PGR as the deputy prosecutor in charge of the PGR's former human rights unit. Hence, her selection appears to have been a mere administrative move, rather than a careful choice based on merit and qualifications.

Civil society organizations challenged the selection of both Mijangos and Herrerías in court due to these deficiencies.⁵ During the judicial proceedings, National Prosecutor Gertz asserted that he is not obligated to follow the guidelines outlined in the implementing law. He maintained that he has every right to make nominations directly, contradicting the stipulations outlined in the law.⁶

CLOSING OFF SPACES FOR CITIZEN PARTICIPATION

Since taking office, Gertz has operated in an opaque, distant manner, failing to meet with victims and civil society organizations, in spite of multiple requests.⁷ He has made few exceptions for certain high-profile cases that have garnered international media attention, agreeing to meet with family members of the nine individuals of dual U.S.-Mexican citizenship who were

killed in Sonora in November 2019,⁸ as well as the families of the 43 Ayotzinapa students who were forcefully disappeared by Mexican security forces in September 2014.⁹

While the implementing law stipulates that Gertz should have developed the Criminal Prosecution Plan in a public and transparent process that allowed for civil society participation, he failed to do so. Civil society organizations requested meetings with Gertz to discuss their ideas for the plan, but the requests went unanswered.¹⁰ On January 20, 2020, Gertz presented a version of the final Criminal Prosecution Plan to the Mexican Senate for approval, without ever holding a public consultation or making public the methodology he used to develop the plan.

Moreover, according to law, Gertz should have sent the text of the plan to the Citizen Council for comments before presenting it before the Senate, yet he failed to wait for the Citizen Council to be established to move forward with the process. Finally, Gertz failed to make the text of the Criminal Prosecution Plan available to the public: the text of the plan was leaked to the media by members of the Senate.¹¹ These are serious irregularities, given that the Criminal Prosecution Plan will be valid for eight years, until Gertz leaves office.

Despite these deficiencies, the Senate Justice Commission scheduled a motion to approve the final Criminal Prosecution Plan in February of this year. This, despite the fact that Gertz sent the plan to the Senate without first making it public or sending it to the Citizen Council for comments and recommendations (as mentioned above, the Citizen Council has not even been formed yet).¹² The final Criminal Prosecution Plan can not be approved until the Citizen Council takes shape.

To date, federal prosecutors continue to operate based on a “Provisional Criminal Prosecution Plan”, which the FGR passed internally in 2019 and subsequently published online this year as a means to guide the new institution’s work during the transitional period.

Finally, Gertz has violated the spirit of citizen participation by directly and opaquely appointing the special prosecutors. According to the implementing law, any citizen should be able to express their support or objection to specific candidates, present relevant information about their backgrounds and merits, and attend interviews with the candidates to ask questions. Further, the law mandates that the national prosecutor must justify his reasons for ignoring any citizen’s objection to a candidate.

BOX 1

WHAT ARE THE MAJOR CONCERNS REGARDING GERTZ'S CRIMINAL PROSECUTION PLAN?

Apart from failing to take into account citizen input, our organizations understand that the final Criminal Prosecution Plan that has not yet been approved has many deficiencies and violates the implementing law in several other ways, including:

- **The document's proposals are not supported by objective data or information:** The implementing law requires the Criminal Prosecution Plan to be based on criminal analysis, assessments of the current climate in Mexico, public perceptions of violence, reports about the situation of crime victims, and "other documents that serve as a strong source of information related to criminal phenomena." Since the plan does not cite evidence-based support, it is impossible for the Senate or civil society to analyze whether the proposals it outlines will be effective in meeting the FGR's objectives.
- **The plan insists on investigating crimes based solely on the type of crime, despite the fact that the implementing law sets forth a new investigative model based on broader criminal phenomena:** This rigid way of investigating crime by crime, without analyzing how separate crimes may be related to one another, was one of the leading factors that contributed to the former PGR's inefficiency. In this way, the plan ignores one of the main mechanisms the implementing law sets forth for tackling organized crime.
- **In the section about "factors that affect institutional performance," the plan excludes several important elements:** This includes issues surrounding corruption within the institution as well as factors that limit the ability of victims to participate in the investigation of their case. Victims' groups and civil society organizations have frequently pointed to these flaws in the institution. The Interdisciplinary Group of Independent Experts, which assisted in the former PGR's investigation into the Ayotzinapa case and is again involved in the investigation, also pointed to these problems in their reports about the case.¹³
- **In the section about the FGR's strengths, opportunities, weaknesses, and threats, the plan lists the implementing law as a weakness:** The plan frames the implementing law as "incompatible with the FGR's fiscal and investigative functions." This, despite the fact that the implementing law (and not the personal wishes of the national prosecutor) is in fact the document that legally mandates the FGR's fiscal and investigative functions. This section of the plan also classifies as a threat any effort at the legislative level to challenge legal reforms set forth by the national prosecutor. This serves as another example of how Gertz lacks respect for institutional counterweights to his power, as it disregards the important role of the legislative branch in developing and analyzing reform proposals and holding public hearings to discuss these issues.
- **Some of the crimes that have the deepest and most detrimental effects on Mexican society are not included in the FGR's priorities:** This includes femicide.

HOW HAS THE FGR PERFORMED IN ITS FIRST YEAR?

Fully transforming the FGR into an effective, rights-respecting institution is a massive undertaking. In the FGR's first few years of operation, it has a critical opportunity to set a precedent for the future. To do so, the FGR must have a sufficient operating budget, take steps to root out officials with a history of altering evidence, torturing suspects, or otherwise tampering with investigations, and put an end to the bribery and corruption that has traditionally dictated which cases receive attention and which cases flounder in limbo.

BUDGET CONCERNS

While this is the time to ensure that the FGR has the resources it needs to build a strong foundation, in 2019 the FGR's budget was smaller than any budget the PGR had received since 2008.¹⁴ While the FGR was allocated a 14.5 percent budget increase in 2020, adding up to MXN\$13,244, this is still the lowest budget since 2011.

An analysis of the 2020 budget conducted by the Mexican think tank México Evalúa found that most funds have gone toward maintaining the structures under which the PGR operated, while little has gone toward making any substantial improvements to the institution's structure or investigative practices.

For example, only 0.11 percent of the budget has been allocated to the transition body responsible for mapping out what the FGR will need to do to complete the transition from the PGR and fully comply with the implementing law.¹⁵ Additionally, the bodies responsible for resolving certain low-level crimes through the alternative justice system—which is critical to reducing the hefty case backlogs plaguing the federal justice system—suffered a budget decrease of 3.4 percent from 2019.

CONTINUED CORRUPTION AND HUMAN RIGHTS COMPLAINTS

The corrupt practices that characterized the PGR continue to debilitate due process for detainees and access to justice for victims. For example, victims continue to report having to pay a bribe in exchange for FGR personnel opening an inquiry into the crime they suffered.¹⁶ Similarly, some defense lawyers say they have had to pay bribes of up to USD\$200 to be granted access to documents about their client's case—documents that should be free according to Mexican law.¹⁷

In other cases, FGR personnel have been accused of selling sensitive information about victims and whistleblowers to criminal groups, severely threatening the integrity of criminal investigations as well as the safety of those who denounce crimes. Extortion also appears prevalent: there have been reports of FGR personnel promising families that they will release their detained loved one in exchange for a bribe, even when the detainee had already been cleared for release.

In addition, torture and other human rights violations remain prevalent in criminal investigations. Between January 2019 and April 2020, Mexico's National Human Rights Commission (*Comisión Nacional de los Derechos Humanos*, CNDH) received 586 complaints of human rights violations committed by FGR personnel. The complaints range from reports of cruel, inhuman, and degrading treatment, to refusing to provide urgent health or psychological services to detainees.¹⁸

PROGRESS IN EMBLEMATIC CASES

The FGR has made important progress in clarifying certain high-profile cases of corruption and grave human rights violations that took place during the previous administration of Enrique Peña Nieto. This includes pressing several charges against Emilio Lozoya, former head of the state-owned oil company PEMEX, who has been accused of accepting bribes from the Brazilian construction conglomerate Odebrecht between 2012 and 2014. The charges are related to bribes Lozoya allegedly received from the steel company Altos Hornos de México (AHMSA) in exchange for PEMEX's purchase of an inoperative fertilizer plant in 2014.¹⁹

In an interview with the *Associated Press*, Gertz affirmed that the previous government worked to cover up the Odebrecht corruption scandal in Mexico and that Lozoya's case is a symbol of the corruption schemes of the previous government.²⁰ On June 29, 2020, Lozoya accepted his extradition from Spain to face the charges in Mexico.²¹ However, upon his return to Mexico on July 17, Lozoya was not detained but rather taken to a private hospital due to health concerns. Reports indicate he is engaged in conversations around a plea bargain with Mexican authorities; however the details of the plea bargain are not public.²² He is expected to be charged with money laundering, bribery, and criminal association.²³

Gertz has also supported the work of the FGR's Investigative Unit for the Ayotzinapa Case.²⁴ The unit has made important progress in investigating the case of the 43 Ayotzinapa students who were forcefully disappeared by Mexican security forces in September 2014 in Iguala, Guerrero. In March, a federal judge issued arrest warrants against five government officials and a former marine for torture, forced disappearance, and obstruction of justice in the case.²⁵

To date, the FGR has been able to detain three of the six accused. The Mexican government has requested that Interpol assist in locating one of the accused, Tomás Zerón, who headed the PGR's Criminal Investigations Agency at the time of the students' disappearance. In late June 2020, the FGR obtained additional arrest warrants against 46 government officials from different municipalities in Guerrero for their involvement in the case.²⁶

In addition, on July 7, the special prosecutor for the case, Omar Gómez Trejo, announced the identification of the remains of one of the students, Christian Alfonso Rodríguez Telumbre. The remains were found near the location where the students disappeared and were identified by forensic scientists at the University of Innsbruck in Austria.²⁷

While this progress is welcome, the FGR must go beyond only prosecuting high-profile cases. According to the FGR's annual report, in 2019 the number of cases brought before a judge increased by 17 percent as compared to 2018, and the agency secured convictions in 6,561 cases, 37 percent more than in 2018.²⁸ However, without public information on the details of the cases, it is impossible to measure the significance of this increase.

WHAT'S NEXT FOR GERTZ AND THE FGR?

First, Gertz should put forth a framework for allowing civil society participation in the final Criminal Prosecution Plan, particularly given the absence of the Citizen Council.

Additionally, given the socioeconomic impact that COVID-19 has had on Mexico, the FGR should approve a “Complementary Plan” that lays out a framework for investigating any allegations of corruption in the government’s pandemic response, including any mismanagement of public funds or corruption in public purchases of health supplies. The document should also set forth a plan for investigating cases of violence against women, which have increased in the context of the pandemic. The FGR should also make public the criteria and guidelines it will use to respond to complaints during the pandemic.

While Mexican courts halted their work due to the pandemic except for “urgent issues,” since June 8 they have begun allowing online activities to proceed, including hearings and sessions.²⁹ In the coming weeks and months, it will be important to monitor whether the FGR is able to bring more cases before a judge while working under the guidelines the institution set forth for operating during the pandemic.³⁰

WHAT CAN THE U.S. DO TO SUPPORT THE FGR?

Since the onset of the Merida Initiative, a multi-year aid package starting in 2008, the U.S. government has allocated over USD\$3.1 billion in assistance to strengthen security and the rule of law in Mexico, including some USD\$400 million to support judicial reforms. The Department of Justice (DOJ) and the State Department's Bureau of International Narcotics and Law Enforcement Affairs (INL) can continue to support these efforts, including by providing specialized training and technical assistance to justice officials at the federal and state level. The U.S. Agency for International Development (USAID) can also continue its work to strengthen state-level criminal justice systems.³¹

As Mexico continues its transformation to the FGR, and similar transitions occur at the state-level, both governments should consider whether U.S. assistance can be beneficial in this process.

WHAT IS THE ROLE OF INTERNATIONAL HUMAN RIGHTS BODIES IN MONITORING THE TRANSITION?

The Inter-American Commission on Human Rights (IACHR) has been monitoring the transformation of the FGR since March 2017, after it granted human rights organizations a thematic hearing to address threats to the new institution's autonomy.³² The IACHR's interest in strengthening the FGR lies in its direct role in protecting human rights in Mexico. The Commission made this clear in its 2016 report on the human rights situation in Mexico, noting that the lack of independence enjoyed by law enforcement bodies was a "structural cause of impunity."³³

The IACHR should continue to monitor this process and request information from the Mexican government regarding the results that the FGR achieves in the investigation and prosecution of grave human rights violations. The IACHR should document the results of this monitoring in the recommendations section of its annual report, and should continue to hold public hearings on this topic.

The UN Special Rapporteur on the independence of judges and lawyers also addressed the role of prosecutors' offices in the fight against impunity and corruption in his annual report to the UN Human Rights Committee during its 44th session, highlighting the need to reduce executive power over these institutions. The Special Rapporteur should collect information on how the FGR is operating in Mexico and issue a statement regarding the FGR's repeated breaches of Mexican law as well as international standards.³⁴

NOTES

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ABOUT WOLA

The Washington Office on Latin America (WOLA) is a leading research and advocacy organization advancing human rights in the Americas. We envision a future where public policies protect human rights and recognize human dignity, and where justice overcomes violence.

ABOUT DPLF

The Due Process of Law Foundation (DPLF) is a regional organization comprised of professionals with a variety of nationalities, that promotes the Rule of Law in Latin America through the use of analysis and recommendations, cooperation with private and public organizations and institutions, exchanges of experiences, and advocacy efforts.

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