

Enforced Disappearance in Mexico: Between Progress and Remaining Challenges

By Gabriella Citroni

FICHL Policy Brief Series No. 39 (2015)

1. Introduction

Like many countries in Latin America, Mexico experienced the systematic use of enforced disappearance between 1960 until the early 1980s, during the so-called 'Dirty War'. Successive years have been characterised by the struggle of family associations of disappeared persons to establish the fate and the whereabouts of their loved ones, preserve their memory, and obtain justice and reparation. Since the mid-2000s, there has been a new wave of enforced disappearances: currently, Mexico has the highest number of registered cases in Latin America.¹

On 26 September 2014, tragedy struck once more, with the enforced disappearance of 43 students from the teachers' school in Ayotzinapa, Guerrero. Subsequent allegations of collusion between organised crime, the local mayor of the town of Iguala, and local police reignited national and international attention on enforced disappearance.² In March 2015, a fact-finding mission was concluded by the Interdisciplinary Group of Independent Experts, designated by the Inter-American Commission on Human Rights ('IACHR'), following an agreement between the IACHR, the Mexican State, and representatives of the disappeared students.³

This policy brief focuses on the progress made, and analyses the remaining challenges in the fight against enforced disappearance in Mexico. In order to explore future prospects it also takes into consideration the recommendations of international human rights mechanisms.

¹ See the annual reports of the United Nations Working Group on Enforced or Involuntary Disappearances ('WGEID'); for 2014, see UN doc. A/HRC/27/49 of 4 August 2014.

² Human Rights Watch, 'Mexico: Delays, Cover-Up Mar Atrocities Response', 7 November 2014, available at <http://www.hrw.org/news/2014/11/07/mexico-delays-cover-mar-atrocities-response>, last accessed on 29 April 2015.

³ IACHR, 'Interdisciplinary Group of Experts to Launch at IACHR Headquarters its Work on the Case of the Students of Ayotzinapa, Mexico', Press Release 008/15, 30 January 2015.

2. Enforced Disappearance in International Law and the Obligations Assumed by Mexico

Enforced disappearance constitutes a multiple and continuous violation of several human rights⁴ as well as a crime under international law that, under certain conditions, can amount to a crime against humanity. Mexico ratified the Inter-American Convention on Forced Disappearance of Persons on 9 April 2002, and the International Convention for the Protection of All Persons from Enforced Disappearance on 18 March 2008. At the time of writing, Mexico has not recognised the competence of the UN Committee on Enforced Disappearances ('CED') to receive and examine individual and inter-State communications.⁵ On 28 October 2005, Mexico ratified the ICC Statute of the International Criminal Court ('ICC'). Article 7(2)(i) of the Statute lists the enforced disappearance of persons as a crime against humanity when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of such attack.⁶

By ratifying these three treaties, Mexico is bound by international obligations concerning the prevention and suppression of enforced disappearance and the punishment of those responsible. Nonetheless, in several instances, Mexico has not fully complied with these obligations.

⁴ On the continuous nature of enforced disappearance, see Art. 17(1) of the Declaration on the Protection of All Persons from Enforced Disappearance; Art. III of the Inter-American Convention on Forced Disappearance of Persons; and Art. 8(1)(b) of the International Convention for the Protection of All Persons from Enforced Disappearance. See WGEID, *General Comment on Enforced Disappearance as a Continuous Crime*, 2010, at <http://www.ohchr.org/Documents/Issues/Disappearances/GC-EDCC.pdf>, last accessed on 29 April 2015.

⁵ Pursuant to Arts. 31 and 32 of the International Convention.

⁶ On 12 September 2014, civil society associations submitted a public communication to the Prosecutor of the ICC, see FIDH, CMD-PDH and CCDH, 'México: Informe sobre presunta comisión de crímenes de lesa humanidad en Baja California entre 2006 y 2012'.

With regard to the ICC Statute, Mexico has not yet adopted the necessary legislative measures to guarantee the full implementation of the treaty. To date, neither the Mexican Federal Criminal Code nor the criminal codes of the 32 states (including Mexico City) define crimes against humanity, including enforced disappearance as a crime against humanity. The lack of a specific crime hinders effective prosecution at the national level and the rigorous application of the principle of complementarity *vis-à-vis* the ICC.

3. The Judgment of the Inter-American Court of Human Rights in the Case of *Radilla Pacheco*

On 26 November 2009, the Inter-American Court of Human Rights ('IACtHR') rendered its judgment in *Radilla Pacheco v. Mexico* concerning the enforced disappearance of Mr. Rosendo Radilla Pacheco, carried out by members of the military from 25 August 1974 during the Dirty War. Taking into account the continuous character of the crime, the IACtHR dismissed the *ratione temporis* preliminary objection filed by the State, and asserted its jurisdiction over the case even though Mexico became a party to the American Convention on Human Rights ('ACHR') on 24 March 1981, and accepted the jurisdiction of the IACtHR on 16 December 1998.

The IACtHR found Mexico responsible for violating Radilla Pacheco's rights to personal liberty, humane treatment, juridical personality and life in contravention with the obligation to respect and ensure such rights and Articles I and XI of the Inter-American Convention on Forced Disappearance of Persons ('IACFDP'). The Court also found Mexico responsible for violating, to the detriment of Mr. Radilla Pacheco and his relatives, the rights to humane treatment, fair trial and judicial protection as established by Articles 1.1. and 2 of the ACHR and Articles I(a)-(b) and (d), IX and XIX of the IACFDP. Finally, the IACtHR established that Mexico had breached the duty to adopt domestic legal provisions pursuant to Article 2 of the ACHR, in relation to Articles I and III of the IACFDP with respect to the crime of enforced disappearance.

In addition to the payment of compensation to Mr. Pacheco's relatives, the IACtHR ordered Mexico, *inter alia*, to carry out diligent and effective investigations within a reasonable period of time and to identify, prosecute and punish those responsible; to continue with the active search and immediate location of Pacheco or his remains; to adopt within a reasonable time the necessary legal reform to make Article 57 of the Military Justice Code compatible with international standards; amend Article 215-A of the Federal Criminal Code; carry out seminars or courses on a permanent basis on the case-law of the Inter-American Human Rights System concerning the jurisdictional limits

of military criminal justice, as well as training on proper investigation and prosecution of acts which constitute forced disappearance; to hold a public function to acknowledge responsibility for the facts of the case and in memory of Pacheco; and provide psychological support to the relatives of the victim.

The IACtHR thoroughly analysed the phenomenon of enforced disappearance during the Dirty War in Mexico and required the adoption of necessary measures not only to provide restitution in the specific case, but also to effectively address the hundreds of other enforced disappearances carried out in the same context as well as to prevent future cases.

Several remedies ordered by the Court remain unimplemented. However, the State did hold a public ceremony to acknowledge its responsibility (on 17 November 2011 in the city of Atoyac, although the victim's relatives were absent); it also paid the required compensation; and carried out courses on human rights concerning the limitation of military jurisdiction and the prosecution of enforced disappearance. Additionally, in July 2014, Mexico withdrew its reservation to Article IX of the IACFDP, in which it recognised the jurisdiction of military courts in cases of enforced disappearance.

4. The Visits of the United Nations Working Group on Enforced or Involuntary Disappearances

The United Nations Working Group on Enforced or Involuntary Disappearances ('WGEID') visited Mexico for the first time in 1982⁷ and again in March 2011.⁸ At the conclusion of the second visit, the WGEID published a report where it analysed the progress made in relation to the disappearances carried out both during the Dirty War and in more recent times, and formulated detailed recommendations so that Mexico complies with its international obligations regarding the rights to truth, justice and reparation for the victims of enforced disappearance and their relatives.

Among others, the WGEID recommended that the offence of enforced disappearance be included in the criminal codes of all states, as well as the adoption of a general law on enforced disappearance at the federal level; establishing a specific procedure for finding disappeared persons with assistance of the relatives of victims; compiling a national register of persons who have been victims of enforced disappearance; eliminating preventive custody (*arraigo*) from legislation and practice;⁹ strengthening the

⁷ WGEID, *Report on the visit to Mexico*, UN doc. E/CN.4/1492/Add.1, 22 February 1982.

⁸ WGEID, *Report on the visit to Mexico*, UN doc. A/HRC/19/58/Add.2, 20 December 2011.

⁹ On the recent six to five vote of the Supreme Court on the constitutionality of 'arraigo' for grave crimes, see Bulletin 080/2015, 15

detention register to ensure that it is regularly updated and harmonised with other databases in order to monitor the physical location of detainees; adopting a new *Amparo* Act;¹⁰ continuing investigations on the disappearances committed during the Dirty War; providing support to the relatives and their associations so that they can play their role in the cases of enforced disappearance; establishing a national search programme for disappeared persons with an immediate action protocol; and guaranteeing the right to reparation for the victims.

Progress has been made on several counts. Since 2011, the crime of enforced disappearance as an autonomous offence has been codified in 11 more Mexican states; a new *amparo* Act was approved in April 2013; a General Victims' Law was adopted in January 2013; a specialised unit for the search of disappeared persons was set up in June 2013 within the Attorney General's Office ('PGR'); a Forensic Commission for the identification of human remains was established pursuant to an agreement of August 2013 between the PGR, the Argentine Forensic Anthropology Team, and associations of Mexican civil society and organisations of relatives of disappeared migrants from Honduras, El Salvador and Guatemala; and a forensic database of migrants from the state of Chiapas has been put into place.

In 2015 the WGEID will issue a follow-up report to formally assess the progresses made and the remaining challenges.

5. Recommendations of the United Nations Committees

Enforced disappearance in Mexico has also been the subject of recommendations by several United Nations committees, but to date there has been no significant progress in their implementation.¹¹

In its concluding observations from 2012 on Mexico, the Committee against Torture expressed concern over the increasing number of enforced disappearances apparently committed by public authorities or by criminal or private groups acting with the direct or indirect support of government officials in several states. It also expressed concern about the large number of murders and disappearances of human rights defenders, journalists, migrants in transit in

April 2015, <http://cdhdfbeta.cdhdf.org.mx/2015/04/cdhdf-lamenta-decision-de-la-scjn-respecto-de-la-constitucionalidad-del-arraigado/>.

¹⁰ The writ of *amparo* is a constitutional remedy for the protection of individual fundamental rights, commonly found within Latin American countries.

¹¹ The report on the visit to Mexico of the Special Rapporteur on extrajudicial, summary or arbitrary executions also mentions the phenomenon of enforced disappearances, particularly of migrants and women; see UN doc. A/HRC/26/36/Add.1, 28 April 2014, paras. 15, 35, 42, 46, 57 and 74.

Mexico, as well as gender-based disappearances. It urged Mexico to act upon the recommendations of the WGEID, particularly those regarding the adoption of a general law on enforced disappearance, the definition of the crime, and effective investigations.¹²

The Committee on the Elimination of Discrimination against Women noted the increasing number of forced disappearances of women and girls in several states including Chihuahua, Nuevo León and Veracruz, and the slow or in-existent implementation of the protocols of search. It recommended Mexico to develop a consistent official register of enforced disappearances in order to be able to assess the magnitude of the phenomenon and adopt appropriate policies; review local penal codes in order to define enforced disappearance as a crime; simplify the existing procedures to activate the search of disappeared women and girls; and standardise police protocols of search.¹³

Likewise, the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families emphasised the alarming number of disappearances of undocumented migrant workers coming from the southern border. They were perpetrated primarily by national and international organised criminal groups, in some cases with the participation of public authorities or with the complicity or acquiescence of federal, state and municipal authorities. The Committee noted that, despite the various actions of the authorities, impunity prevails. It has, therefore, recommended that Mexico investigate and punish those responsible for these crimes without delay and provide adequate compensation.¹⁴

The Human Rights Committee recommended that Mexico reopen its Special Office of Prosecutor for Past Social and Political Movements of PGR to ensure that all cases of serious human rights violations, including those committed during the Dirty War, continue to be investigated, that those responsible are brought to justice and punished, and that the victims or their relatives receive fair

¹² Committee against Torture, *Concluding Observations on Mexico*, UN doc. CAT/C/MEX/CO/5-6, 23 November 2012, paras. 12–14 and 21.

¹³ Committee on the Elimination of Discrimination against Women, *Concluding Observations of the Committee on the Elimination of Discrimination against Women*, UN doc. CEDAW/C/MEX/CO/7-8, 27 July 2012, paras. 18 and 19(b).

¹⁴ Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, *Concluding Observations of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families*, UN doc. CMW/C/MEX/CO/2, 8 April 2011, paras. 29–30. For a detailed analysis of the issue of enforced disappearance of migrants in transit in Mexico, see Inter-American Commission on Human Rights, Human rights of migrants and other persons in the context of human mobility in Mexico, doc. OEA/Ser.L/V.II Doc.48/13, 30 December 2013, paras. 156–208, 337–339, 383, 389, and conclusions 6–10 and 24–27.

and adequate reparation. The Committee also recommended bringing criminal legislation on enforced disappearance in line with international standards.¹⁵

In February 2015, the CED issued its concluding observations on Mexico,¹⁶ following its first review of the country. The CED declared that currently the practice of enforced disappearance in Mexico is generalised. The CED's main recommendations focus upon the (i) urgent and participatory enactment of a General Law on Enforced Disappearance; (ii) the creation of an exhaustive national register of disappeared persons, including evidence or leads indicating direct or indirect involvement of public officials; (iii) the creation of a Specialised Prosecution Unit to investigate enforced disappearances, which should work in close co-operation with the Specialised Search Unit for Disappeared People; and (iv) the uniform registration of all persons deprived of liberty, including those placed in migrant holding centres and military detention facilities.

Such recommendations represent a roadmap for Mexico to follow in order to enhance its legislative, administrative and judicial tools to prevent and eradicate this crime. Unfortunately, the government of Mexico issued a public statement in which it indicated that "the recommendations of the CED do not duly mirror the information presented by Mexico during the session nor do they provide additional elements that may strengthen the actions already undertaken to solve the existing challenges".¹⁷

Moreover, the CED availed itself, for the first time since its inception, of its competence under Article 33 of the International Convention for the Protection of All Persons from Enforced Disappearance, informing Mexico that it requested to undertake a visit to the country in November 2014, since it received reliable information indicating that Mexico is seriously violating the provisions of the Convention. The CED requested Mexico to give its consent to the visit before the end of February 2014. At the time of writing, Mexico has not yet replied, thus showing

a worrying lack of co-operation with the Committee,¹⁸ which expressed its expectation that Mexico would consent for the visit to be carried out within a reasonable period of time.¹⁹

6. Conclusions

To date, Mexico has shown an ambivalent attitude towards the phenomenon of enforced disappearance. On the one hand, there have been encouraging developments but, on the other, many of the recommendations made by various international human rights mechanisms are still to be implemented.²⁰

Among these, the fight against impunity concerning both disappearances that occurred during the Dirty War and more recently must be highlighted. The examples of, among others, Argentina, Guatemala and Peru demonstrate that, despite the many obstacles and years of waiting and struggling, this is a goal that can be achieved. However, in order to build a different future, it is essential to face the past, establish the truth about what happened, guarantee reparation, investigate the facts, and punish those responsible in accordance with the extreme gravity of the crime.

Gabriella Citroni is Professor of international human rights law at the University of Milano-Bicocca (Milan, Italy). She is a legal adviser for the Latin American Federation of Associations of Relatives of Disappeared People (FEDEFAM), and for the Swiss non-governmental organisation TRIAL (Track Impunity Always).

ISBN: 978-82-8348-008-5

PURL: <https://www.legal-tools.org/doc/2fafef/>

¹⁵ Human Rights Committee, *Concluding Observations on Mexico*, UN doc. CCPR/C/MEX/CO/5, 26 March 2010, para. 12.

¹⁶ Advanced unedited version, only available in Spanish at http://tbinternet.ohchr.org/Treaties/CED/Shared%20Documents/MEX/INT_CED_COB_MEX_19564_S.pdf (unofficial translation).

¹⁷ Joint press release by Ministry of Interior (SEGOB) and Ministry of Foreign Affairs (SRE), 13 February 2015, at <http://saladeprensa.sre.gob.mx/index.php/es/comunicados/5589-060>.

¹⁸ CED, *Annual Report*, UN doc. A/69/56 of 2 June 2014, para. 72; see also <http://amnistia.org.mx/nuevo/2015/02/17/>, 17 February 2015.

¹⁹ CED Concluding Observations on Mexico (unedited version), *supra* note 16, para. 9.

²⁰ See *supra* notes 12–14, 17.