

# Aportes **DPLF**

Number 21

Year 9

January 2017

MAGAZINE OF THE DUE PROCESS OF LAW FOUNDATION

**20**  
Anniversary  
1997-2017

**Impunity  
and grave  
human rights  
violations in**

**Mexico**

## From the editor

**Over the past decade, the human rights situation in Mexico has deteriorated markedly. The war on drug trafficking has played a critical role in increasing violence perpetrated by criminal groups, but also crimes committed by government forces. Although the Mexican government acknowledges this situation and has taken measures to address it, reality shows us that human rights violations—and, significantly, the lack of an appropriate response from institutions of the Mexican justice system—continue to be the rule rather than the exception.**

On the night of September 26, 2014, 43 students of the Raúl Isidro Burgos Rural Teachers' College in Ayotzinapa, Guerrero, disappeared. Although this was neither the first nor the last case of disappeared persons in Mexico, the number who went missing, the fact that they were students, the involvement of multiple levels of government forces, and the persistence of their relatives made this case a turning point that unleashed national and international public indignation.

Under the precautionary measures that were processed before the Inter-American Commission on Human Rights (IACHR) in this case, the **Interdisciplinary Group of Independent Experts (GIEI)** was created through an agreement between the IACHR, the Mexican State, and representatives of the victims. The GIEI was tasked with conducting a technical verification of the actions taken by the Mexican State after the students' disappearance, with respect to locating them and exhausting the lines of investigation, as well as providing services and reparations to the victims.

The GIEI was an unprecedented experience of State-IACHR cooperation and case monitoring in real time. Composed of five international experts, the GIEI showed us that it is possible to investigate this kind of atrocity while treating the victims with

respect and consideration. Its findings on the case—set forth in two reports—were essential, but the most important legacy may have been its **in-depth look at the Mexican criminal justice system** and the GIEI's recommendations for improving it.

A perfect complement to the GIEI's work was the report **Undeniable Atrocities: Confronting Crimes Against Humanity in Mexico**, published last year by the Open Society Justice Initiative (OSJI) and five Mexican civil society organizations. This report presents a rigorous analysis of the crimes committed in Mexico during the past decade and establishes reasonable grounds to consider that **crimes against humanity** have been committed by both State and non-State actors, who must be properly investigated and prosecuted.

This report also offers several recommendations aimed at different actors, highlighting the proposed creation of an **international mechanism for the investigation** of heinous crimes and major corruption cases in Mexico.

The **assessment is clear**: the Mexican judicial system has the enormous responsibility of providing an appropriate response to the legacy of serious human rights violations committed during the past decade. If current conditions make this difficult, we must think outside the box and not rule out international support, as happened in the case of the students from Ayotzinapa.

In order to contribute to this reflection, but also to help the rest of the hemisphere better understand the circumstances in Mexico, we are dedicating this edition of **AportesDPLF** to the current situation of human rights in Mexico.

The **first section** of this edition examines the serious human rights violations taking place in Mexico. On this subject, the former Attorney General of Guatemala, **Claudia Paz y Paz**, explains to us how the Ayotzinapa case exposed the main shortcomings of the Mexican criminal investigation system. Based on her experience as a member of the GIEI, she proposes a number of recommendations for improving the system. Along these same lines, **Ariel Dulitzky**, a member of the United Nations Working Group on Enforced or Involuntary Disappearances, sets forth 20 points for the creation of a public agenda for the prevention and eradication of forced disappearance in Mexico.



The former UN Special Rapporteur on Torture, **Juan Méndez**, shares his main conclusions from the mission he conducted to Mexico in his capacity as rapporteur. This section is concluded by **Eric Witte** of OSJI, who offers an in-depth analysis of why certain crimes currently being committed in Mexico could be considered crimes against humanity.

The reform of the Mexican criminal justice system is addressed in the **second section** of this edition. **Miguel Sarre** calls attention to the false dichotomy between defendants' rights and the right of victims to truth and justice, while **Iván de la Garza** addresses ongoing challenges in the implementation of the new adversarial criminal justice system, in effect throughout Mexico since June 2016. Finally, **Carlos Ríos** examines the role of precautionary measures in the new adversarial system and explains how the culturally rooted values of the inquisitorial system could hinder the proper implementation of pretrial detention.

The **third section** includes some reflections on fundamental institutional reforms that are being carried out in Mexico. **Úrsula Indacochea** of DPLF discusses the intense involvement of political bodies in the selection of senior justice system authorities in Mexico, noting the lack of effective checks and balances. **Óscar Arredondo** describes the new National Anti-Corruption System, the challenges that have arisen since the constitutional reform of 2015, and the steps that remain to be taken for its proper implementation. **Aroa de la Fuente** addresses the issue of energy reform in Mexico and describes the current situation, three years after its enactment.

The vulnerable situation of certain sectors of the population in Mexico is examined in the **fourth section** of the journal. **Leopoldo Maldonado** of ARTICLE 19 presents the reality faced by Mexican journalists and shows that the war on drug trafficking has affected the exercise of freedom of expression in different ways. **Ana Lorena Delgadillo** of the Foundation for Justice and Rule of Law addresses the situation experienced by the relatives of disappeared migrants and explains how these families' organizations have promoted the creation of a transnational mechanism that would allow them to access justice.

To conclude this edition, the **fifth section**, entitled **From the states**, provides a window on the situation in the interior of the country. Sister **Consuelo Morales** and **Ana Claudia Martínez** describe the current conditions in Nuevo León, highlighting the role of public opinion in the proper implementation of the new criminal procedure system in that state. In Chihuahua, **Lucha Castro** tells us how, in view of the security crisis unleashed by the war on drug trafficking, civil society and the state government have formed a partnership to combat impunity and corruption. From Coahuila, **Michael Chamberlin** explains how the joint efforts of relatives of disappeared persons created an impact that led to the creation of a Working Group composed of civil society, the United Nations, and state authorities, which has promoted state reforms on the issue of forced disappearance. **César Pérez** details how the practice of torture continues to go unpunished in the state of Jalisco, despite state reforms to criminalize such conduct. Finally, **David Lovatón** shows that the state of Yucatán—although it does not face the same serious human rights situation as the rest of the country—also has significant issues, many of which are related to protection of the human rights of Mayan indigenous communities.

Katya Salazar  
Executive Director

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# Serious violations of human rights

# Ayot



# Recommendations for improving the Mexican criminal investigation system in light of the Ayotzinapa case

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**Claudia Paz y Paz**

*Former Attorney General of Guatemala and member of the GIEI*

**T**his article presents some of the principal findings of the investigation conducted by the Interdisciplinary Group of Independent Experts (GIEI) on behalf of the Inter-American Commission on Human Rights (IACHR) in the case of the 43 students who disappeared in Iguala, state of Guerrero, better known as the Ayotzinapa case. It is public knowledge that the main shortcomings that the GIEI identified in its investigation of this case are a constant in criminal investigations in Mexico. Its findings and recommendations therefore should serve as a roadmap for improving the system for the pursuit and administration of justice nationwide.

## Background

The Interdisciplinary Group of Independent Experts was appointed by the IACHR pursuant to Precautionary Measure 409/14, issued in connection with the forced disappearance of 43 students of the Isidro Burgos Rural Teachers' College on September 26,

2014, in Iguala, Guerrero, Mexico. In November 2014, the IACHR, the Mexican State, and representatives of the victims signed a technical assistance agreement that established the GIEI's mandate to assist in the investigation conducted by the Office of the Attorney General of the Republic (PGR), provide support in the search for the disappeared youths, examine the Comprehensive Victim Services Plan, and make general recommendations on the issue of forced disappearance in Mexico.

The GIEI was composed of five experts: Carlos Martín Beristain, Alejandro Valencia Villa, Ángela María Buitrago, Francisco Cox, and Claudia Paz y Paz. Each of us worked for two six-month terms. We presented two

reports, one in September 2015 and the other in April 2016. The second report included a chapter detailing our findings on the workings of the criminal investigation system and victim services in Mexico, and on the various shortcomings that made it difficult to fully establish the facts of what occurred on September 26 and 27 and identify all of the perpetrators. These problems are common in the investigation of human rights violations in Mexico.

We outline below some of the shortcomings that most deeply undermine the possibilities for progressing in the investigation to determine the ultimate fate of the 43 disappeared students, as well as the identity and roles of all of the perpetrators.

**The difficulty of accessing relevant information and the potential loss of evidence increases with the fragmentation of the investigations. The investigation of the case of Ayotzinapa was split up into countless preliminary investigations...**

**It is foreseeable that, if the perpetrators of obstruction, torture, or negligence leading to the loss of evidence are not punished, the investigations will continue to be conducted with all of the aforementioned weaknesses**

### **Confession as a principal form of evidence and an incentive for torture**

The theory of the case presented by the PGR contains weaknesses and contradictions. According to its version, the 43 students were reportedly taken to the Cocula dump, where they were murdered and their remains incinerated and then thrown into a nearby stream. This account relies exclusively on the statements of five alleged members of Guerreros Unidos, an organized crime cartel operating in the state of Guerrero, who incriminated themselves and their associates. According to the official medical reports, these five individuals showed strong indications of having been tortured between the time of their detention and the time at which they gave their statements to the PGR, while they were in the custody of the Office of the Deputy Attorney General for Special Investigation into Organized Crime (SEIDO).

The PGR's version contradicts the conclusions of a fire expert, Dr. José Torero<sup>1</sup>, and of the Argentine Forensic Anthropology Team (EAAF)<sup>2</sup>: they maintain that there is no physical evidence to support the assertion that the events took place as described by the alleged perpetrators. On the contrary, the remains found in the Cocula trash dump indicate that there had not been a fire, of the magnitude required to burn 43 bodies, at that location in the night and early morning hours of September 26–27, 2014.

These findings exposed extremely serious flaws. Not only was there no progress toward establishing the facts,

but also the investigation of the truth was hindered by an official version that is contradicted by scientific evidence and is based on the confessions of individuals who showed serious signs of having been tortured.

The use of a confession as a sole means of proof is not a problem exclusive to this investigation into the forced disappearance of the 43 students. As numerous reports have documented, it is a recurring problem in the investigation of organized crime in Mexico, encouraged in part by national case law. Several court judgments have held that in cases of organized crime, the confession of the defendant constitutes complete circumstantial evidence; in other words, it is intermediate evidence that acquires full evidentiary value when coupled with other evidence, however minimal. The other evidence normally consists of confessions from codefendants, in cases where two or more people are under investigation; in order for there to be sufficient evidence, it is enough for them to acknowledge their participation in the conduct and point to the participation of their alleged co-perpetrators.

In the GIEI's second report, we underscored how relying on the confessions of defendants not only leads to erroneous lines of investigation but also encourages the practice of torture.

### **Lack of independence on the part of experts**

A solid investigation of a case as complex as this one, or any case of serious human rights violations, requires the use of scientific evidence. It is therefore

crucial that experts be independent and not subordinate to any of the parties. The GIEI found that the experts oriented the conclusions of some of their reports toward supporting the official version, rather than offering an independent analysis based solely on the evidence. At the same time, the forensic reports failed to properly assess the serious indications of torture that were documented.

Because of this, it is critical that the forensic services be separate from the Office of the Attorney General of the Republic and be able to function as an autonomous institution. The framework for the enactment of the new *Ministerio Público*<sup>3</sup> Law will be the ideal scenario for discussing what mechanisms can be put in place to ensure this institution's autonomy.

### **Excessive formalism in criminal investigations and the lack of contextual analysis: Not seeing the forest for the trees**

The inadequacy of the investigation is obscured by formalism. The written recording of irrelevant details and the repetition of information in documents pertaining to the requests, the reports, the receipts, and the ratifications produce enormous case files in which the substantive information is buried. The difficulty of accessing relevant information and the potential loss of evidence increases with the fragmentation of the investigations. The investigation of the case of Ayotzinapa was split up into countless preliminary investigations.<sup>4</sup> The arrests were carried out for crimes discovered at the time of their commission, which led to isolated investigations, and it was the *Ministerio Público* that determined in which case file to record the evidence. Given that murder is not one of the crimes included in the Federal Organized Crime Law, the six executions that took place on



the night of the events remained under state jurisdiction, with the illogical result that the investigation of the criminal acts was conducted in isolation from the investigation of the criminal network in which the perpetrators were involved.

Formalism also conceals the decontextualization of the investigations. In the Ayotzinapa case, one theory to be investigated is the transportation of heroin on buses as a possible motive for the attack. The way in which Guerreros Unidos operates, its co-optation of public servants, and the routes along which the drugs and money circulated were all completely disregarded in the investigation. This omission hindered an understanding of the real import and magnitude of the case. The events were described as the actions of crazed members of Guerreros Unidos and a few corrupt police officers, without acknowledging the relationship of organized crime to all the levels of authority present that night—members of the military, state, federal, and ministerial police officers, and municipal police officers from three different towns—which the GIEI recommended investigating.

The GIEI documented and informed the PGR of these shortcomings and other more serious ones, including the fact that the former director of the Criminal Investigation Agency, Tomás Zerón, had taken one of the detainees to the scene of the crime on the San Juan River, without his defense attorney and without any record of these proceedings being made in the case file. Nevertheless, the PGR has made no progress on the investigations into the obstruction of justice or Zerón's responsibility in the cases of torture, in spite of the fact that he recently resigned. This situation affects the progress of the

investigation into the forced disappearance of the 43 students, as well as other investigations of serious human rights violations, since there is no clear message within the PGR that this conduct will not be tolerated.

### The future of the criminal investigations system in Mexico

The transition to the accusatory model, which entered into force throughout the country on June 18, 2016, is an opportunity to overcome these weaknesses, especially by cutting red tape in criminal investigations. However, in cases involving organized crime, the Mexican Constitution still allows for *arraigo* (a restraining order prohibiting a suspect or defendant from leaving the jurisdiction of the court) to be imposed for up to 80 days against persons under investigation. This measure creates a scenario that hinders judicial oversight over detention, since individuals are detained for investigation rather than investigated for possible detention, which facilitates the practice of torture when detainees remain in the custody of the PGR. This means that the new system enters into operation but leaves the door open for the old practices to continue.

Similarly, the amendments to Article 102 of the Constitution provide for the transformation of the PGR into an Office of the Prosecutor General of the Republic, an entity that is expected to be autonomous from the other branches of the State. Nevertheless, transitional Article 19 of the constitutional reform also provides that all of the resources of the current PGR, including human resources, will be automatically transferred to the new institution. Given the

lack of internal mechanisms to investigate the obstruction of justice, in both the Ayotzinapa case and other cases of serious human rights violations, or with respect to the practice of torture, this transfer will mean that those public servants responsible for such serious crimes will continue to be in charge of the investigations. It is foreseeable that, if the perpetrators of obstruction, torture, or negligence leading to the loss of evidence are not punished, the investigations will continue to be conducted with all of the aforementioned weaknesses, even with the creation of the new institution.

### Conclusion

For all of these reasons, it is imperative that the mothers and fathers of the 43 students be informed of the outcome of the investigations into the obstruction of justice and the injuries consistent with torture that several of the detainees presented. This is essential to allow the investigation into the forced disappearance of the 43 students to move forward. It is the only way to guarantee that these acts are not repeated in future investigations and that the justice system can fulfill its responsibility to punish the perpetrators and prevent new human rights violations.■

### NOTES

- <sup>1</sup> Fire expert, professor of civil engineering, and head of the School of Civil Engineering at the University of Queensland, Australia.
- <sup>2</sup> The EAAF is a nongovernmental, nonprofit scientific organization that applies forensic sciences—mainly forensic anthropology and archaeology—to the investigation of human rights violations in Argentina and worldwide. See the EAAF website at <http://eaaftypepad.com/>.
- <sup>3</sup> In Mexico, an institution within the Attorney General's Office, that represents the society's interest in the investigation of cases and the prosecution of crimes.
- <sup>4</sup> The preliminary investigation (*averiguación previa*) is the initial investigative stage in Mexican criminal procedure, carried out by the *Ministerio Público*. It consists of performing all necessary procedures to prove that all of the elements of the crime have been met, for purposes of deciding whether to proceed with the criminal action.

**The use of a confession as a sole means of proof is not a problem exclusive to this investigation into the forced disappearance of the 43 students**

# Recommendations from the second report of the GIEI in the Ayotzinapa case

Pursuant to Precautionary Measure 409/14 and at the request of its beneficiaries, the Inter-American Commission on Human Rights (IACHR) and the Mexican government signed an agreement creating the Interdisciplinary Group of Independent Experts (GIEI). The GIEI's objective was to provide international technical assistance in the investigation of the disappearance of 43 students of the Isidro Burgos Rural Teachers' College in Ayotzinapa, Guerrero, as they traveled through the area of Iguala. The agreement set forth four lines of action: devising plans to search for disappeared persons who may be alive; technical analysis of the avenues of investigation; technical analysis of assistance to victims and their relatives; and recommendations for public policies on forced disappearance.

The GIEI was made up of Carlos Martín Beristain, Ángela Buitrago, Francisco Cox Vial, Claudia Paz y Paz, and Alejandro Valencia Villa.

In its second and final report, the GIEI issued 22 recommendations to the Mexican State. The Miguel Agustín Pro Juárez Human Rights Center (Center Prodh), which represents the victims in this case, grouped those recommendations into four categories: legal reforms, institutional design changes, changes in practice, and other public policy measures. We are grateful to the Center Prodh for allowing us to share this document, as it shows the progress made and the ongoing challenges to improving criminal investigation procedures and the justice system in Mexico.

## LEGAL REFORMS

### 1 General Law to Prevent, Investigate, and Punish Forced Disappearance

The GIEI requested the urgent enactment, with prior consultation of victims, of a law on forced disappearance that would *at a minimum*:

- i. Establish a National Registry of Disappeared Persons designed to facilitate searches and investigations, containing preexisting information and integrated into the National Victim Assistance System
- ii. Set up a National Commission on the Search for Disappeared Persons that includes organizations and victims, proposes public policies, and assists in the implementation of the National Exhumation Plan.
- iii. Clearly establish, by law, an immediate search process that authorities can undertake on their own initiative. This process should devise search hypotheses; ensure coordination between federal and state authorities and the application of the Minnesota Protocol; use specialized teams; facilitate the participation of outside experts and victims' relatives, and allow for access to any public entity.
- iv. Secure the cooperation of telecommunications carriers in providing information.
- v. Include benefits for effective cooperation
- vi. Regulate certificates of absence
- vii. Establish the criminal responsibility of the superiors of State agents involved in cases of forced disappearance.

**Status of Related Processes** In December 2015, the executive branch introduced a bill in the Senate. The Movement for Our Disappeared in Mexico provided inputs to both the executive and legislative branches. Nothing has passed as of this writing. Civil society organizations and associations of relatives of disappeared persons drafted a proposal containing eight

minimum points to be included in the law, consistent with the GIEI's proposal.

### 2 General Law to Prevent and Punish Torture

The GIEI made multiple recommendations to eradicate the use of torture and cruel treatment. Many of them can be addressed in the discussion currently underway on the General Law to Prevent, Investigate, and Punish Torture. These recommendations include:

- i. Guarantee the exclusion of unlawful evidence obtained under torture. In no case should a confession by itself be considered to constitute full proof; it must be checked against other types of evidence.
- ii. Provide medical guarantees during detention. Any person suspected of having been tortured must immediately undergo a medical and psychological exam for verification. The exam should be conducted by independent experts according to the highest standards.
- iii. Update forms used by the Office of the Attorney General of the Republic (Procuraduría General de la República, PGR) and state prosecutors' offices for medical opinions on detainees.

**Status of Related Processes** In April 2016, the Senate passed the draft General Law to Prevent, Investigate, and Punish Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, and sent it to the House of Representatives.

However, after three months of inactivity, in December 2016 the Justice and Human Rights Committees of the House of Representatives introduced several regressive amendments to the draft. Those amendments would obscure and hinder torture complaints and investigations. The coalition of organizations and academic institutions that have made contributions throughout the process, as well as the Office of the United Nations High Commissioner for Human Rights in Mexico, have called upon the House to remove those amendments.

## INSTITUTIONAL DESIGN CHANGES

### 3 Institutional redesign of the prosecutors' offices

The GIEI documented multiple dysfunctional aspects attributable to the design of the prosecutors' offices. Many of these flaws may be addressed in the discussions on the transition to the Office of the Prosecutor General of the Republic (Fiscalía General de la República, FGR).

There should be a specialized human rights unit with sufficient human, technical, and financial resources. This unit should streamline the work of the agencies that currently deal with these issues.

This Assistant Prosecutor's Office for Human Rights should include context analysis units that study patterns arising from the analysis of regional dynamics, communications networks, financial aspects, areas of influence, and internal structures of criminal groups as well as government authorities, from a macro-criminality perspective. The staff should have the necessary conditions to investigate masterminds as well as direct perpetrators, including the chain of command and potential responsibility of superiors.

**Status of Related Processes** The Constitution was amended in October 2014 to create the Office of the Prosecutor General, but the content and design of this office is not currently being discussed. Although the House of Representatives passed a bill and forwarded it to the Senate, the measure has not been taken up again.

**The draft bill does not include the creation of an Assistant Prosecutor's Office for Human Rights.** This implies a step backward from the agency role that is currently filled, at least on paper, by the Office of the Deputy Attorney General for Human Rights, Crime Prevention, and Community Service.

### 4 Specialized human rights courts

Given the complexity and social significance of crimes involving human rights violations, the GIEI suggested the creation of courts with exclusive jurisdiction over those crimes, both in the federal judiciary and at the state level.

**Status of Related Processes** There is no public discussion in Mexico on this issue, nor has any bill been drafted, although there is one for broadcasting, economic competition, and telecommunications.

### 5 Autonomous expert witness services

The GIEI proposed the creation of an autonomous expert and forensic body with state and federal jurisdiction, which would entail an institutional redesign.

That body would be financially and administratively autonomous and would not report to any investigative or judicial institution. Its staff members would have technical, scientific, and professional capacities and would be appointed on the basis of career professional service and supervised by academic authorities. The body's work would be guided by protocols that meet the highest standards.

**Status of Related Processes** There is a constitutional reform bill in the Senate that calls for expert witness services to be removed from the purview of the prosecutors' offices.

The issue was addressed in the discussion of secondary laws, but Mexican legal tradition may first require a constitutional amendment. The issue will be raised in the debate on the Organic Law of the Office of the Public Prosecutor.

## CHANGES IN PRACTICE

### 6 Registration of detainees as a safeguard against torture and forced disappearance

Because the GIEI documented the fact that a chain of custody of persons is a safeguard against forced disappearance, while its absence is conducive to torture, it recommended the creation of a National Registry of Detainees. The documentation of all deprivations of liberty in registries and/or case files is a preventive measure against the disappearance of persons.

**Status of Related Processes** In its judgment in the case of *Cabrera García and Montiel Flores*, the Inter-American Court of Human Rights ordered Mexico to strengthen its record-keeping on detainees.

The procedural rules require the registration of a person's detention but do not allow for the identification of the specific public servant responsible for the detainee at any given time. Detentions are only recorded at the federal level and in a few states.

For the security agencies, transparency and information take priority over the guarantee of individual rights. The current registry documents the delivery of the detainee to the custody of the *Ministerio Público* but does not create a record at the time of arrest, when the detainee faces the greatest risk of torture.

### 7 Application of the Minnesota Protocol in exhumations and investigations of possible extrajudicial executions

The GIEI noted the importance of implementing the standards of the Minnesota Protocol, at least when conducting exhumations and investigating possible arbitrary executions.

Extrajudicial executions are one outcome of forced disappearances. It is therefore essential to adopt the Protocol as a guide for their investigation and for inquiries that are opened when

victims' remains are discovered. The protection of the scene, the proper safeguarding and documentation of the evidence—especially in the processing of grave sites—and the training of personnel who conduct exhumations and autopsies all must be guaranteed.

**Status of Related Processes** There are currently no legal instruments or practices that require full implementation of the standards of the Minnesota Protocol in criminal investigations into possible extrajudicial executions or investigations opened when human remains are found.

## OTHER PUBLIC POLICY MEASURES

### 8 State policy on the right to truth

The GIEI insists that Mexico has failed to properly acknowledge the extent of the crisis. Therefore, it proposes the adoption of a State policy to guarantee the right to truth, starting with official recognition of the situation and of the magnitude of the disappearances, helping to pinpoint specific time periods (such as the Dirty War), patterns, etc. It also recommends the promotion of historical memory projects with the participation of victims' families.

**Status of Related Processes** A number of bills have been proposed for the preservation of memory with regard to human rights violations, but it cannot be said that there is a State policy on the right to truth.

### 9 Program for the gradual withdrawal of the armed forces from public security functions

Having verified the Army's knowledge of the macro-criminality in Iguala, and affirming the lack of accountability and civilian oversight over the armed forces, the GIEI cites the importance of a program for the gradual withdrawal of the armed forces from security functions. This would include:

- i. Professionalizing the police force to be a civilian and democratic body with specialized career employees.
- ii. Regulating the use of force in accordance with international standards.
- iii. Establishing mechanisms for civilian oversight and monitoring of the functions of civilian and military forces.

**Status of Related Processes** No proposal has been submitted for public debate in this regard, either by the government or by the political parties. To the contrary, there are currently a number of legislative initiatives designed to "legalize" the (unconstitutional) participation of the armed forces in public security tasks under the guise of "domestic security." Given that such legislation would be a step backward for the full enjoyment of human rights, civil society organizations have called for any legislative proposal to provide for the gradual withdrawal of the armed forces from public security tasks.

### 10 Enhanced international cooperation

Based on its experience and the multiple obstacles it faced, the GIEI recommended that Mexico assume a cooperative attitude toward international assistance.

With respect to the universal system of human rights, the GIEI urges Mexico to recognize the jurisdiction of the United Nations Committee on Enforced Disappearances to receive and examine individual communications.

Regarding the Inter-American system, Mexico should resolutely support the IACHR and the Inter-American Court in view of their financial crisis, preventing any retaliation for the positions the IACHR and the GIEI have taken.

It is crucial to support the Special Follow-Up Mechanism to the GIEI's recommendations in the Ayotzinapa case, strengthening cooperation and steering clear of a nationalist approach.

**Status of Related Processes** According to the GIEI's reports and findings, the State has been reluctant to cooperate with international bodies and at times has openly rejected them. Mexico has yet to fully recognize the jurisdiction of the Committee on Enforced Disappearances.

With regard to the Inter-American system, Mexico launched a vigorous offensive against the IACHR following the second report of the GIEI.

In September 2016, the IACHR announced the creation of a Special Follow-up Mechanism in the Ayotzinapa case. In early 2017, the mechanism conducted a technical visit to Mexico. The families and their representatives hope that the Special Follow-up Mechanism will enjoy the necessary conditions for its work and not face a campaign of defamation and obstruction as the GIEI did.

# Essential elements of a public agenda for the prevention and eradication of **disappearances** in Mexico

**Ariel Dulitzky** *Member of the United Nations Working Group on Enforced or Involuntary Disappearances*

**F**or nearly 10 years, international human rights organizations have urged Mexico to address the extremely serious situation of disappearances. The United Nations (UN) Working Group on Enforced or Involuntary Disappearances visited the country in 2011 and later published its mission report<sup>1</sup> as well as its follow-up report.<sup>2</sup> These were followed by the concluding observations of the UN Committee on Enforced Disappearances,<sup>3</sup> the report of the Inter-American Commission on Human Rights (IACHR) on its on-site visit,<sup>4</sup> and the reports and recommendations of the Interdisciplinary Group of Independent Experts (GIEI) of the IACHR.<sup>5</sup> The Inter-American Court of Human Rights had previously handed down important judgments, such as *Radilla Pacheco*,<sup>6</sup> on disappearances in the context of the Dirty War, and *Cotton Field*,<sup>7</sup> on disappearances perpetrated by private parties in the context of the violence against women in Ciudad Juárez. Organizations like Human Rights Watch,<sup>8</sup> Amnesty International,<sup>9</sup> and the Open Society Justice Initiative<sup>10</sup> have also documented the situation of forced disappearances. As a result, we are not in need of additional diagnostic assessments: all the reports agree that there is a widespread practice of disappearances in several parts of the country, many of which can be classified as forced disappearances.

In the paragraphs below, we put forward 20 essential elements for a



comprehensive, coherent, effective, and efficient public policy that can serve to prevent and eradicate forced disappearance in Mexico.

**1** As a first step, the authorities, including the most senior officials, need to acknowledge the seriousness, complexity, and scale of the problem. Although some authorities have voiced tentative recognition of the reality of forced disappearance, such statements have not been consistent, uniform, and homogeneous among all Mexican State authorities, nor have they been issued at the highest level. There has also been a failure to acknowledge the magnitude of the

problem, as the Working Group recommended. There is no national diagnostic assessment of the problem of forced disappearance of persons that would allow for the development of comprehensive and effective measures for its prevention, eradication, investigation, punishment, and reparation. The information from different State institutions in relation to cases of forced disappearance is gathered unsystematically, and frequently in a contradictory manner. The dispersal of this information does little to help evidence the real scale of the phenomenon. While it is true that a considerable number of kidnappings and crimes similar to forced disappearance are committed by

organized crime groups, not every disappeared person has been kidnapped by an organized crime group acting independently; on the contrary, the participation of the State in forced disappearances is also a reality in the country. In addition, due to the prevailing impunity, many cases that could be classified as crimes of forced disappearance are reported and investigated under a different category or are not even considered to be crimes. Often, in popular parlance, cases of forced disappearance are euphemistically called *levantones*, meaning the abduction of the friends/family of a rival with the express purpose of torturing and murdering them, not for ransom. Many times forced disappearances are considered to be simple kidnappings or abuse of authority, or the individuals are simply considered to be lost, missing, or not found (particularly when they are members of groups such as women, children, or migrants), without a proper investigation to rule out the possibility of forced disappearance.

**2** A change in the political and cultural attitude of the security forces and justice system officials is needed in order to guarantee the rights to the truth, justice, reparation, memory, and guarantees of nonrepetition, and to make possible the prevention and eradication of forced disappearances. In particular, the military paradigm of citizen security must be changed, the withdrawal of military forces from public safety operations must be considered, and criminal law must be applied as a way to prevent forced disappearances. In addition, a new legal culture is needed to ensure the success of the accusatory system and break the systematic pattern of impunity in cases involving disappearances. The prevailing legal and judicial culture gives rise to fear and frustration that discourages victims from reporting or pressing for the investigation of forced disappearances. Defects prevalent in the administration and pur-

## Both the law and judicial practice should advance in establishing the criminal responsibility of hierarchical superiors

suit of justice need to be eliminated, including the prioritizing of excessive legal formalism over the search for truth; the predominance of investigations based exclusively on confessions, many obtained under torture, or on evidence provided by relatives; the frequent attempts by authorities, especially Prosecutors' Offices, to discredit disappeared persons by asserting that they were involved in criminal groups, without any evidence or investigation of this claim; and the authorities' refusal to receive reports of disappearances or their insistence on recording them as petty crimes.

**3** The public policy must take shape through the indispensable, unavoidable, and urgent enactment of a general law on forced disappearances. In recent years, different bills have been introduced before Congress, but none has passed. The most recent, sponsored by President Enrique Peña Nieto in December 2015, was criticized by organizations and experts for failing to adhere to the relevant international standards.

**4** Harmonization and coordination is needed among the different levels of government, recognizing the country's federal structure. Federal public policy should establish the co-responsibility and accountability of all levels, with leadership and coordination under the responsibility of the federal government. In particular, the federal State must have the power to act in the event that local authorities are unable or unwilling to do so. The case of the 43 students from Ayotzinapa is a prime example of the

incapacity and unwillingness to investigate at the local level. Nevertheless, this does not mean that switching to federal jurisdiction in and of itself guarantees the success of an investigation; the Ayotzinapa case is a sad testimony to that fact.

**5** Given the characteristics of the phenomenon and the current constitutional framework, the public policy must acknowledge forced disappearance in its different forms, as well as other types of disappearances that do not qualify as forced disappearance under international human rights law, such as those committed exclusively by private parties without the tolerance or cooperation of State agents. The public policy should recognize the particularities, autonomy, seriousness, and complexity of the crime and phenomenon of forced disappearance, properly defining it in the law. It cannot allow the responsibility of the State to be diluted when the disappearance is committed directly or indirectly by a public servant.

**6** The public policy must make it a priority to immediately break the systematic pattern of impunity that currently prevails. The investigation, prosecution, and punishment of cases of disappearance should also be made a political priority. The investigation must be opened and pursued at the initiative of government authorities, and with due diligence; it should not be necessary for victims' relatives to push for this. The investigation should be conducted by independent and impartial bodies, recog-

nizing the systemic way in which forced disappearances occur, rather than treating them as isolated incidents. Both the law and judicial practice should advance in establishing the criminal responsibility of hierarchical superiors and in developing the capacity to investigate, prosecute, and punish both direct perpetrators and masterminds, with benefits for effective cooperation. The public policy must ensure that the investigations are conducted by persons who have the capacity to investigate and analyze patterns of conduct and *modus operandi*, regional dynamics, communications networks, financial aspects, and areas of influence and operation—both of the criminal groups and of the authorities. Once again, the multiplicity of grave sites found during the investigation of the 43 students from Ayotzinapa demonstrates that disappearances do not occur in isolation; rather, they are the result of systematic plans involving the use of forced disappearance in a context of chronic impunity.

**7** The search for a disappeared person must be launched immediately, on the State's own initiative, ensuring cooperation between the federal government and the states. In particular, the search must be conducted from a humanitarian perspective rather than as a strictly judicial matter—that is, not through judges, prosecutors, and Special Prosecutors' Offices within the framework of investigations and eventually preliminary investigations and trials, where the main objective is to determine the criminal responsibility of the perpetrators before determining the fate or whereabouts of the disappeared person. The search for the disappeared person (the humanitarian aspect) must be conducted parallel to and in coordination with the investigation of the criminal offense (the judicial aspect). But neither should be subordinate to the other, or to its outcomes. A National Commission on the Search for Disappeared Persons should be created for this purpose.

**The information from different State institutions in relation to cases of forced disappearance is gathered unsystematically, and frequently in a contradictory manner**

**8** The public policy should establish a national search plan and a national map of gravesites. It should ensure capacity for the exhumation and identification of human remains. These should be turned over to relatives with dignity and support, and with a certificate of absence by reason of disappearance.

**9** An essential principle that should guide every action and measure is respect for the dignity of all victims of forced disappearance, that is, of the disappeared persons and their relatives, and all those who suffered harm as a consequence of the disappearance.

**10** Relatives and relatives' associations must receive the necessary backing to undertake their efforts. In particular, families' participation in the investigations must be ensured, but without placing the burden of the investigation on them. They must be informed of the investigation's progress and should be afforded adequate protection from any type of retaliation or risk to their safety.

**11** The public policy should serve particularly vulnerable sectors. It should be adopted and implemented with a gender perspective. It should also take account of the transnational aspects of the disappearance of migrants. It must be guided by the best interests of the child, given the high number of disappeared children and adolescents, as well as their status as victims when their family members disappear. The policy should be culturally sensitive in cases involving the forced disappearance of indigenous persons, and it

must pay attention to the needs of victims of forced disappearance living in poverty.

**12** The particular situation of human rights defenders and journalists should be addressed—not only as victims of forced disappearances but also in view of the threats, harassment, and attacks to which they are subjected because of their work on matters involving forced disappearances.

**13** As a way to prevent disappearances, arrest records should be kept more rigorously. The possibility of a National Registry of Detainees should be considered, and efforts to combat the practice of arbitrary detention should be strengthened. *Arraigo*—a restraining order prohibiting a subject or defendant from leaving the jurisdiction of the court while a criminal investigation is in process—should be eliminated both from the law and from practice at all levels of government, and the broad concept of offenses detected *in flagrante delicto* should be limited as a way to prevent forced disappearances.

**14** To ensure implementation of the public policy, steps should be taken to ensure the necessary budget, firm political support, professionally trained and highly qualified personnel, autonomous forensic and expert witness services, and the most advanced technical resources, with mechanisms for citizen participation as well as independent and impartial monitoring and evaluation processes.

**15** The policy must cover disappearances from all different time periods, including those perpetrated during the Dirty War.

**16** It must acknowledge the binding force of the recommendations and measures of reparation adopted by the international human rights bodies of the UN and the Organization of American States, guarantee compliance with those recommendations and measures, and follow up on them in good faith.

**17** The competence of the UN Committee on Enforced Disappearances to receive and examine individual and interstate communications must be accepted.

**18** A specific registry of forced disappearances should be created. Currently, there is a National Data Registry on Disappeared or Missing Persons, but it does not make specific reference to potential forced disappearances. Such a registry should also contain detailed, disaggregated information that provides a basis for analysis of patterns, actors, and perpetrators. Unfortunately, Mexico knows more about how many gallons of petroleum it exports every day than it does about how many people have disappeared in the country. This puts the priorities of the Mexican State into perspective. The lack of reliable data dilutes the responsibility of the State and of particular security forces, and it prevents the development of comprehensive policies of investigation, prevention, and punishment.

**19** In order to guarantee appropriate reparations, the functioning of the Executive Commission for Victim Assistance and the Victims' Law should be reviewed. Unfortunately, the Victims' Law and the Executive Commission have not thus far provided an adequate response to victims of forced disappearance. Indeed, the number of victims registered with the Executive

**Mexico knows more about how many gallons of petroleum it exports every day than it does about how many people have disappeared in the country. This puts the priorities of the Mexican State into perspective**

Commission is minimal in relation to the number of disappearances that the registry of disappearances itself contains. The vast majority of victims of disappearance have still not received appropriate reparation or comprehensive medical, legal, and psychological services.

**20** Guaranteeing access to records, in particular those of law enforcement and the armed forces, is essential. All names of persons responsible for disappearances documented by the National Human Rights Commission (CNDH) in its recommendation on the Dirty War should be published immediately. The final report of the Office of the Special Prosecutor for Social and Political Movements of the Past (FEMOSPP) should be officially published, without any changes, and the documents compiled should be made accessible.

When this comprehensive public policy is discussed, let us recall the words of Julio Cortázar from 1981: "At this time of study and reflection, meant to create more effective instruments in defense of the rights and freedoms that have been trampled [...], the invisible presence of thousands upon thousands of disappeared persons precedes, surpasses, and continues all of the intellectual work we may do [...]. Here, [...] where they are not, where they are evoked as a reason for doing the work, here we must feel that they are present and near, sitting among us, looking at us, talking to us." ■

## NOTES

<sup>1</sup> UN Human Rights Council, *Report of the Working Group on Enforced or Involuntary*

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<sup>2</sup> UN Human Rights Council, *Report of the Working Group on Enforced or Involuntary Disappearances, Addendum: Follow-up Report to the Recommendations Made by the Working Group: Missions to Mexico and Timor-Leste*, September 11, 2015, A/HRC/30/38/Add.4.

<sup>3</sup> UN Committee on Enforced Disappearances, *Concluding Observations on the Report Submitted by Mexico under Article 29, Paragraph 1, of the Convention*, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/043/63/PDF/G1504363.pdf?OpenElement>

<sup>4</sup> IACHR, *The Human Rights Situation in Mexico*, OEA/Ser.L/V/II.Doc. 44/15, December 31, 2015.

<sup>5</sup> Interdisciplinary Group of Independent Experts, *Ayotzinapa Report: Research and Initial Conclusions of the Disappearances and Homicides of the Normalistas from Ayotzinapa* (September 6, 2015), [http://media.wix.com/ugd/3a9f6f\\_e1df5a84680a4a8a969bd45453da1e31.pdf](http://media.wix.com/ugd/3a9f6f_e1df5a84680a4a8a969bd45453da1e31.pdf), and *Ayotzinapa Report II: Forward Steps and New Conclusions on the Investigation, Search and Care for Victims* (April 24, 2016), [http://media.wix.com/ugd/3a9f6f\\_cba336a52f1a4298b3fa1e6fa16526b2.pdf](http://media.wix.com/ugd/3a9f6f_cba336a52f1a4298b3fa1e6fa16526b2.pdf).

<sup>6</sup> I/A Court H.R., *Case of Radilla Pacheco v. Mexico*, Preliminary Objections, Merits, Reparations, and Costs, Judgment of November 23, 2009, Series C, No. 209.

<sup>7</sup> I/A Court H.R., *Case of González et al. ("Cotton Field") v. Mexico*, Preliminary Objection, Merits, Reparations, and Costs, Judgment of November 16, 2009, Series C, No. 205.

<sup>8</sup> Human Rights Watch, *Mexico's Disappeared: The Enduring Cost of a Crisis Ignored* (New York: HRW, 2013), <https://www.hrw.org/report/2013/02/20/mexicos-disappeared/enduring-cost-crisis-ignored>.

<sup>9</sup> Amnesty International, "Treated with Indolence": *The State's Response to Disappearances in Mexico* (London: AI, 2016), <https://www.amnesty.org/en/documents/amr41/3150/2016/en/>.

<sup>10</sup> Open Society Justice Initiative, *Undeniable Atrocities: Confronting Crimes against Humanity in Mexico* (New York: Open Society Foundations, 2016), <https://www.opensocietyfoundations.org/sites/default/files/undeniable-atrocities-2nd-edition-20160808.pdf>.



# Torture in Mexico

## Observations of the former UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment

**Juan Méndez** *Former United Nations Special Rapporteur on Torture (2010–2016)*

In my capacity as the United Nations Special Rapporteur on Torture from 2010 to 2016, I had occasion to visit Mexico in April–May 2014. This was the most intense of the 12 missions I conducted during my time as rapporteur, as well as the most successful in terms of obtaining information to make a precise diagnostic assessment of the situation and formulate appropriate recommendations for overcoming structural problems. However, it was also the most controversial of my missions. The report was made public in March 2015, and its presentation to the UN Human Rights Council in Geneva led to a number of personal attacks against me by various officials. There were also some local commentators who were more interested in condemning the bearer of bad news than in discussing the content of the report.

Unfortunately, the noise surrounding my report has prevented the rational discussion of my recommendations, which at the time were considered useful and positive by some Mexican government spokespersons. It is also important to underscore the fact that civil society and the independent press in Mexico gave me ample opportunity to defend my integrity and explain my conclusions. Because of this, I believe that on balance my visit and my report were positive, although the opportu-

nity for a more constructive debate may have been lost.

At the end of my visit, when I presented my preliminary briefing to the authorities, officials from the Foreign Ministry tried to convince me to change the wording of my report, which characterized torture in Mexico as “widespread”. As should be evident, an independent expert from the United Nations cannot allow anyone to instruct him on what he can or cannot say. When Mexico invited me to visit the country, it did so in order for me to give my most honest and dispassionate assessment of the reality of torture—not for me to tell them what is most convenient to internal relations among the different sectors of the State. Additionally, as I managed to explain exhaustively, my conclusion was based on countless interviews with detainees and survivors who were later released, all of whom confirmed that in the first few days after arrest they were subjected to beatings, suffocation, electrical shocks, and various forms of psychological torture. These interrogation methods were repeated, whether the arresting authorities were municipal, state, or federal police, state prosecutors’ offices, investigators from the Office of the Attorney General of the Republic (PGR), or members of the armed forces. And in every case, this routine of torture was associated with

a pattern of near-absolute impunity, as documented by both official and non-governmental human rights protection bodies. In the heat of the controversy, I suggested that, even if my opinion regarding the widespread nature of the torture was not shared, we could nonetheless accept that we had a divergence that need not keep us from discussing ways to tackle the problem. Regrettably, the dialogue with the authorities did not go beyond this disagreement.

As I have done with other countries visited during my term, I asked Mexico in late 2015 to invite me to conduct a follow-up visit to examine the status of compliance with my recommendations; I hoped that we might try again to engage in constructive dialogue. In early 2016, the Permanent Mission of Mexico to the United Nations Office in Geneva informed me that such a visit could not be made that year. Because my term ended on October 31, 2016, the decision necessarily meant that I would not be the one to carry out the follow-up visit.

Nonetheless, I have been to Mexico twice on academic visits since the release of my report, and I have taken the opportunity to speak with authorities in the legislative and judicial branches and with human rights officials at the *Ministerio Público*. Because of this, I have remained abreast of regulatory

developments such as the new General Criminal Enforcement Law and the draft General Law against Torture, which passed in the Senate but has inexplicably stalled in the lower chamber. I have also closely followed developments in the most notorious cases of forced disappearance, torture, and extrajudicial execution, like that of the students from the teacher training college in Ayotzinapa.

As is the practice for the Special Procedures of the United Nations, my team and I have continued to investigate the situation in Mexico since 2014 and have submitted a follow-up report to the government for its consideration, albeit without the benefit of a second visit. At the time of writing this article, that report is still confidential, as the Mexican government has been given time to reply before my successor submits it to the Human Rights Council. It will be made public in February 2017, as part of the annual report of the Rapporteurship on Torture to the

Council, and may be discussed at the March 2017 session.

Unfortunately, none of what has taken place over the 30 months since my official visit allows me to change my assessment that torture in Mexico is widespread. The most recent data confirm that physical and psychological coercion is the normal interrogation method in Mexican criminal investigations—especially in the case of organized crime suspects—and that all of the agencies involved in domestic security use it regularly. There are also no signs of progress toward breaking the prevailing impunity that surrounds repressive actions. In the two and a half years since my official visit, Mexicans have seen harrowing images of torture methods and have heard remarks from senior officials condemning those practices, but they have not seen concrete actions to investigate, prosecute, and punish the perpetrators. They have also seen that the authorities prefer to grudgingly cooperate with international moni-

tors like the Interdisciplinary Group of Independent Experts that investigated the events at Ayotzinapa, rather than take their conclusions and recommendations seriously.

Mexico has the appropriate institutional, human, and material resources to combat the threat of organized crime while respecting the rule of law and the dignity of all human beings. What is lacking, however, is a hefty dose of political will to confront sectors within the State that prefer the status quo of impunity for crimes of the State. Those same sectors choose to use torture, forced disappearance, and extrajudicial execution as tools to fight organized crime. This only widens the distance between the repressive forces and the society they are supposed to serve, deepens the public's mistrust of government institutions, and hinders the urgent task of tackling corruption and the infiltration of criminality into sectors of the State. ■

## Mexico before the Human Rights Council

### Follow-up report of the United Nations special rapporteur on torture and other cruel, inhuman, or degrading treatment or punishment

**O**n March 2, 2017, the new United Nations Special Rapporteur on torture and other cruel, inhuman, or degrading treatment or punishment, Nils Melzer, presented to the UN Human Rights Council the follow-up report on the recommendations made to the Mexican State after the visit of the previous special rapporteur, Juan Méndez, to Mexico from April 21 to May 2, 2014.

In this new report, the special rapporteur calls upon the Mexican State to enact the General Law to Prevent, Investigate, and Punish Torture and Other Cruel, Inhuman, or

Degrading Treatment or Punishment. In addition, he suggests that the concept of *arraigo* (a restraining order prohibiting a subject or defendant from leaving the jurisdiction of the court while a criminal investigation is in process) should be eliminated from Mexican law. The follow-up report states that two years after the former rapporteur's visit to Mexico, torture and abuse continue to be widespread. It concludes by urging the Mexican State to comply with the recommendations made in the mission report.

## Civil society forum with finalists for the position of Executive Secretary of the Inter-American Commission on Human Rights



From left to right: Katya Salazar (DPLF) and Francisco Quintana (CEJIL), event moderators; Elizabeth Abi-Mershed, Michael Reed, Paulo Abrão, and Renzo Pomi (screen), finalists to the post of Executive Secretary of the IACHR.

In recent years, civil society has been advocating greater transparency within the bodies of the Inter-American Human Rights System. This has included efforts to achieve broader participation in the processes for selection of their members. Given the current financial situation of the Inter-American system, and particularly that of the Inter-American Commission on Human Rights (IACHR), the election of the Commission's new Executive Secretary last year represented a crucial moment for its future.

With this in mind, on July 25, 2016, the day before the election, the Open Society Justice Initiative (OSJI), DPLF, and CEJIL held the first **Civil Society Forum with Finalists for the Position of IACHR Executive Secretary**. The event's main objective was to create a space that would enable civil society to have direct contact with the finalists selected for this position and to learn more about their backgrounds, their positions on the challenges facing the IACHR, and how they would perform in the position.

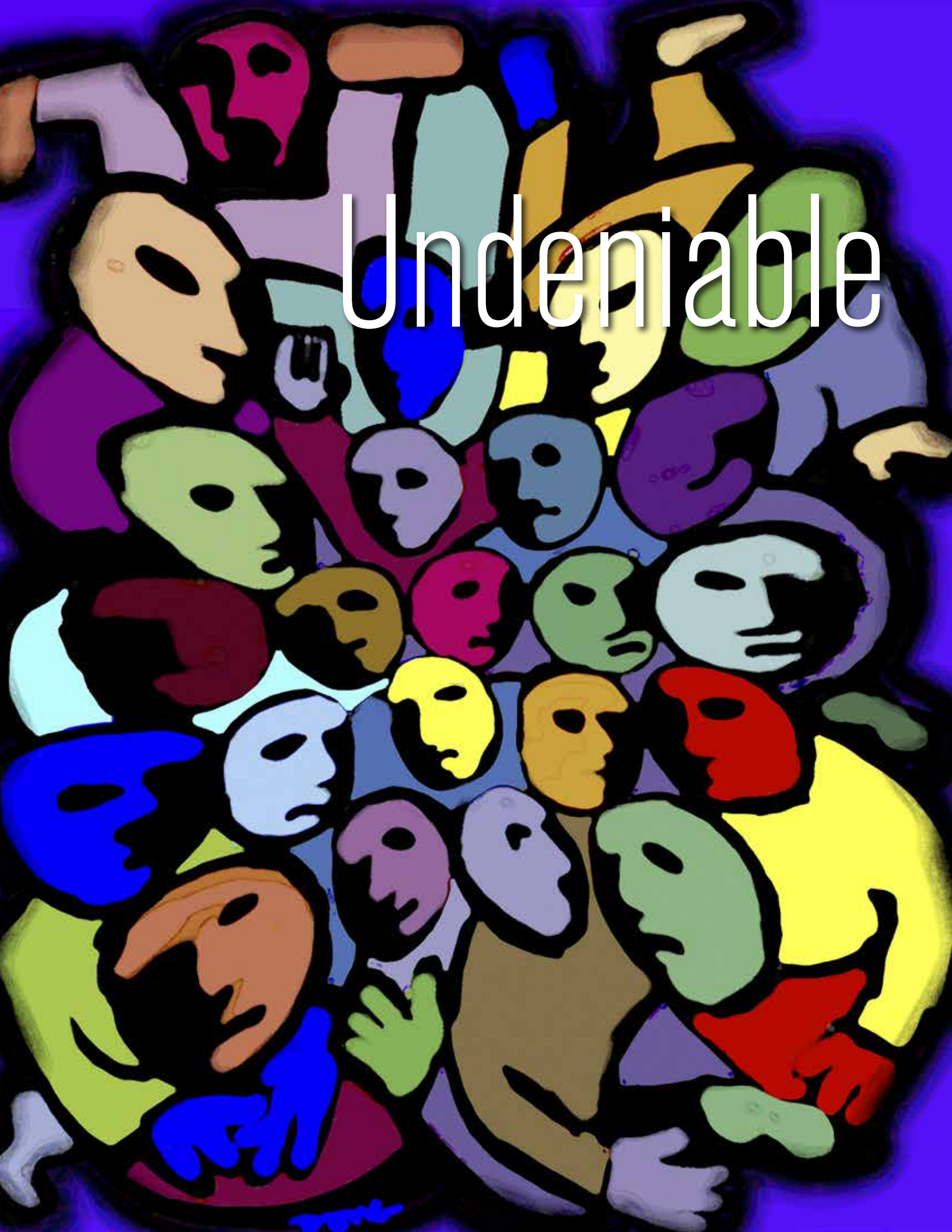
Four of the five finalists participated in the forum, which was moderated by Katya Salazar, Executive Director of DPLF, and Francisco Quintana, Program Director at CEJIL. The conversation was held in three stages: first, each candidate made a brief presentation; next, the candidates responded to a number of predeter-

mined questions, for which they had time to prepare; and finally, they were given the opportunity to respond to questions that members of civil society from around the region had submitted in advance via the Internet.

The selection of the IACHR Executive Secretary is a matter of public interest for the population of the Americas. Accordingly, this forum, which was broadcast live, was vitally important because it fostered greater transparency in the selection process and promoted civil society participation and involvement. It allowed for closer interaction with the finalists in order to learn about their approaches, strategies, and proposals with respect to the operation, funding, and future of the Commission. DPLF hopes that this event has laid the foundation for a more active participation and inclusion of civil society in processes for the selection of members of the Inter-American human rights bodies.

On July 26, 2016, at IACHR headquarters, the plenary interviewed the five finalists for the position. As a result of this process, **Paulo Abrão**, a Brazilian national, was selected as the new Executive Secretary of the IACHR. He will occupy this post for a four-year term, with the potential for renewal for an additional term.

# Undeniable



# atrocities:

## Confronting crimes against humanity in Mexico

**Eric Witte** *Senior Project Manager for National Trials of Grave Crimes at the Open Society Justice Initiative*

According to Mexico's government, Ayotzinapa, Tlatlaya, San Fernando, and other cases of disappearance, murder, and torture in the country over the past decade have been isolated incidents. Criminal organizations have been overwhelmingly responsible for the crimes, the government insists, and in the few cases where State actors have been responsible, they have been prosecuted and punished. In an extraordinary joint statement by the Attorney General's Office, the Interior Ministry, the Army, and the Navy, the government restated these positions in June 2016, responding to the launch of the report *Undeniable Atrocities: Confronting Crimes Against Humanity in Mexico*.<sup>1</sup>

*Undeniable Atrocities* presents the findings of over three years of research by the Open Society Justice Initiative together with five Mexican partner organizations: the Mexican Commission for the Defense and Promotion of Human Rights, the Fray Juan de Larios Diocesan Center for Human Rights, I(dh)eas Human Rights Strategic Litigation, Foundation for Justice and Rule of Law, and Citizens in Support of Human Rights (CADHAC). Together, we sought answers to big questions about crime and impunity in Mexico. These increased sharply following the decision of former President Felipe Calderón, shortly

after he took office in December 2006, to deploy the military on a large scale to fight drugs and organized crime.

Just what were the dimensions of murder, disappearance, and torture in Mexico over the following decade, and who committed these crimes? In response, how much criminal accountability has there been? Have the crimes been isolated incidents, as the government claims, or are there patterns of criminality, so that they qualify as international crimes? And finally—because it quickly became evident to researchers that there has been almost no criminal accountability—what are the causes of impunity?

We concluded that there is a reasonable basis to believe that both Mexican federal forces and non-State actors have committed murder, enforced disappearance, and torture as crimes against humanity. And the main obstacles to justice are political, erected by State institutions implicated in the perpetration of the crimes. To escape its crisis of atrocity and impunity, Mexico needs temporary international involvement in its criminal justice system while domestic reforms are enacted that enhance the autonomy and credibility of its justice institutions. The nature of the crimes means that the International Criminal Court (ICC) could possibly assert jurisdiction, but for the

sake of the victims and for development of the rule of law, it would be better for Mexico to make domestic justice work.

### Scale of crime and accountability

According to government statistics, there were over 150,000 intentional murders in Mexico from the beginning of 2007 through 2015. With the discovery of hundreds of clandestine graves across the country over the past decade, containing remains not reflected in the official statistic, that number is surely low. There has been very little justice for all of this killing. Of all homicide investigations opened between 2009 and 2015, prosecutors issued indictments in only about 16 percent of cases.

Disappearances in Mexico have received extensive media attention, yet the frequently cited government statistic of around 26,000 disappeared is unreliable. It represents a partial accounting of persons missing for criminal and noncriminal reasons, according to arbitrary and nontransparent criteria. The reality is that nobody knows how many people have disappeared in Mexico, but there is reason to believe that the actual figure is significantly higher. A number of well-documented cases of enforced disappearance, which by

definition directly or indirectly involve State perpetrators, are not included in the government's database.

There is good reason to believe that enforced disappearances are extensive. Hundreds of cases have been well documented by the National Human Rights Commission (CNDH) and civil society organizations. But when these are pursued at all, prosecutors frequently issue charges that obscure State involvement, categorizing them as “kidnappings” or other lesser offenses. *Undeniable Atrocities* looks in detail at government kidnapping statistics and estimates that from 2007 through 2014, there were an astonishing 580,000 kidnappings in Mexico. If even a small proportion of these involved State agents, the number of enforced disappearances would far exceed the nearly 500 complaints of enforced disappearance at the hands of federal authorities received by the CNDH from 2007 through 2015.

Much clearer is that there has been almost no criminal accountability. During the past decade at federal level, there have been only 14 convictions for enforced disappearance. Despite many documented cases involving Army and Navy perpetrators, only one soldier has ever been convicted of the crime.

The same pattern extends to torture. Over the past decade there have been over 9,400 complaints of torture and ill-treatment to the CNDH, a figure that is widely considered low. Mexicans are well aware that torture is an everyday practice of police and prosecutors. Yet from the beginning of 2007 through 2015, there were only six convictions for torture at federal level, all of low-ranking perpetrators.

## Crimes against humanity

Crimes against humanity are pattern crimes, and understanding these patterns opens the legal path to criminal accountability—not just for low-level perpetrators, but for those who issued

**We identified a State policy of indiscriminate and extrajudicial use of public force against any civilian perceived as being connected with organized crime**

orders to commit atrocities, or who knew or should have known about atrocities by their subordinates and failed to prevent or punish them. Unlike simple crimes, crimes against humanity are not subject to a statute of limitations.

*Undeniable Atrocities* concludes that there is a reasonable basis to believe that federal government actors and the Zetas cartel committed murder, enforced disappearance, and torture as crimes against humanity, as defined in the Rome Statute of the ICC. Mexico is party to the Statute. The atrocities are widespread and systematic and are perpetrated against civilian populations in accordance with State or organizational policy. The “reasonable basis” standard we used is the one the ICC prosecutor must meet in order to open an investigation.

We identified a State policy of indiscriminate and extrajudicial use of public force against any civilian perceived as being connected with organized crime. The decision to use force in this way is what has criminalized the implementation of an otherwise legitimate State objective: to combat organized crime. Victims of federal actors include members of criminal organizations, but also a great many “false positives”—individuals falsely accused of involvement in organized crime. Other victims, dubbed “collateral damage,” are innocent bystanders gunned down through the reckless use of force. Evidence for the existence of such a policy includes statements from senior government officials and retired

military officials, testimony of military officials in court cases, and such documentary evidence as the Army's written order to kill, issued to troops before the 2014 Tlatlaya massacre. It also includes two major indications of policy by omission: the near total failure to investigate and prosecute federal forces for these crimes, and the failure to pass a law regulating the use of force.

At least in the years of their greatest strength, the Zetas maintained a strong hierarchy and appeared to perpetrate atrocities as part of a clear organizational policy, namely, to terrorize civilian populations in specific territories in order to extract payments from other criminals active there. Some of these crimes, including the notorious San Fernando massacres of migrants, involved the collusion of State actors. We looked at the Zetas as a case study of non-State actors. It is possible that other criminal organizations in Mexico have also committed crimes against humanity.

## Obstacles to justice

There are clear technical and resource barriers to criminal accountability for atrocities in Mexico, but we concluded that these are secondary to political obstruction.

During the Calderón and Enrique Peña Nieto governments, political obstruction has taken several forms. First, the government has denied and minimized the existence of the crisis. Officials at the highest level, as well as lower-level functionaries, frequently

make unfounded assertions that the victims are themselves criminals. Government officials have attacked civil society representatives and international officials who speak out about the generalized nature of these crimes.

The government has encouraged and allowed the use of torture in criminal investigations. It even relied extensively on torture in the Ayotzinapa investigation—the most closely observed criminal case in Mexico’s history. Torture allows the government to obscure State responsibility for atrocities, and prosecutors and police who can make anyone confess to anything have little incentive to learn professional investigative techniques.

Successive governments have fiercely resisted accountability for atrocities perpetrated by the military. In numerous cases, civilian prosecutors have manipulated evidence to cover up these crimes, as was obvious in the Tlatlaya case involving extrajudicial killing by the Army.

This manipulation is possible because prosecutors lack sufficient autonomy, and forensic and witness protection functions fall within the tainted Attorney General’s Office, where scientific findings and witness accounts are easily tampered with.

Mexican leaders have consciously decided to militarize the police forces. This creates heavily armed, poorly trained units adept at committing atrocities and unskilled at investigating crime.

When pressed on atrocity crimes, the government has announced a series of initiatives with great fanfare—then rendered them meaningless through politicization, a lack of political support, and a withdrawal of funding. The Unit Specialized in the Search for the Disappeared, the National Plan for the Search of Non-Located Persons, *Províctima*, and the Victims’ Law all fit this pattern.

Finally, the federal government has failed to clarify ambiguities in federal-state criminal jurisdiction, or responsibilities within the federal bureaucracy. There is a clear pattern of federal and state prosecutors exploiting jurisdictional ambiguity in order to abandon inconvenient cases. Families of the disappeared routinely get the run-around.

### Breaking the cycle

The Mexican people know that their justice system doesn’t work, which is why they report less than 10 percent of all crime to authorities. With its long history of broken promises, the government cannot repair that lack of trust with more vows to reform. To build public confidence, it must take bold actions. The central recommendation of *Undeniable Atrocities* is to create an investigative commission, based in Mexico, that would include international investigators and prosecutors. The mechanism would have a mandate to investigate atrocity crimes and grand corruption, and to introduce cases in Mexican courts.

Why would Mexico’s government agree to such a step? In its statement responding to the report, the government clearly rejected international involvement. But political calculations can change. The approaching 2018 elections present one possibility for a new course.

There are also more sobering routes to change. Two years ago, following the Ayotzinapa killings and disappearances, hundreds of thousands of Mexicans took to the streets. To defuse the situation, the Peña Nieto administration agreed to invite the Inter-American Commission on Human Rights to send independent experts to audit its investigation. If the failings identified by the Interdisciplinary Group of Independent Experts (GIEI) in their reports are ignored, more atrocities and more protests are inevitable, and the possibility

of an ICC investigation will grow. That prospect just might cause the government to accept the idea of international involvement closer to home. ■

### NOTES

<sup>1</sup> Open Society Justice Initiative, *Undeniable Atrocities: Confronting Crimes Against Humanity in Mexico* (New York: Open Society Foundations, 2016). For the government’s response, see “Posición del Gobierno Mexicano respecto al informe de la Organización Open Society Justice Initiative: Comunicado conjunto de la Secretaría de Gobernación, la Secretaría de la Defensa Nacional, la Secretaría de Marina y la Procuraduría General de la República” June 7, 2016, <http://www.gob.mx/segob/prensa/posicion-del-gobierno-mexicano-respecto-al-informe-de-la-organizacion-open-society-justice-initiative>.

## The fight against **impunity** in Latin America. Diverse experiences from an international law perspective: The role of CICIG, MACCIH, and the GIEI



From left to right: Iván Velásquez, CICIG Commissioner; Carlos Beristain, member of the GIEI; Katya Salazar, DPLF; Eduardo Stein, former Vice President of Guatemala

**O**n Monday, June 13, 2016, an event called “**The Fight against impunity in Latin America. Diverse experiences from an international law perspective: The role of CICIG, MACCIH, and the GIEI**” was held in Santo Domingo, Dominican Republic, during the General Assembly of the Organization of American States (OAS). The gathering, which was co-organized with WOLA (Washington Office on Latin America), and OSJI (Open Society Justice Initiative), sought to reflect on different aspects of these ad hoc mechanisms, which seek to cooperate with the States in their fight against impunity. These mechanisms offer a range of capacities, from cooperation and technical assistance to investigation and complaint before the courts, including the formulation of recommendations and the proposal of structural and regulatory reforms.

The mechanisms discussed at this event were the **International Commission against Impunity in Guatemala (CICIG)**, created to establish the existence of unlawful bodies and clandestine security apparatuses and their connection to State agents, and to assist in the investigation of crimes committed by such groups; **the Interdisciplinary Group of Independent Experts of Ayotzinapa (GIEI)**, established pursuant to the precautionary measure granted by the Inter-American Commission on Human Rights, which sought to assist in the investigation of the forced disappearance of 43 students of the Isidro Burgos Rural Teachers’ College in Ayotzinapa, Mexico; and the **Mission to Support the Fight**

**against Corruption and Impunity in Honduras (MACCIH)**, created to support and work with Honduran State institutions to prevent, investigate, and punish corrupt acts.

Participants in the event included Iván Velásquez, a current CICIG Commissioner; Carlos Martín Beristain, a former member of the GIEI-Ayotzinapa; Francisco Guerrero, OAS secretary for strengthening democracy and MACCIH coordinator; Eduardo Stein, former vice president of Guatemala and a key actor during the negotiations that led to the creation of the CICIG; and Mariclaire Acosta, a Mexican human rights defense lawyer and former under-secretary of human rights and democracy at Mexico’s Ministry of Foreign Affairs.

Iván Velásquez and Carlos Beristain addressed the main achievements of the CICIG and the GIEI, as well as the current and past obstacles faced by these mechanisms. Eduardo Stein and Francisco Guerrero addressed the political processes that gave rise to the CICIG and the MACCIH, the political challenges to their creation, the scope of their mandates, and their jurisdictions and powers. Mariclaire Acosta linked the preceding presentations to the current reality in Mexico and discussed the possibility of mobilizing international support to establish a similar institution in that country. All the speakers discussed how these institutions build their legitimacy, their relationship to civil society, the State’s incentives for their creation, and their relationship to the structural problems in the countries where they work.



MAGAZINE OF THE DUE PROCESS OF LAW FOUNDATION

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# Reform of the criminal justice system

# Defendants' rights versus victims' rights:

# A false dichotomy

**Miguel Sarre** *Tenured Professor at Instituto Tecnológico Autónomo de México (ITAM, Mexico Autonomous Institute of Technology) and member of the United Nations Subcommittee against Torture from 2007 to 2014*

Some prominent groups have expressed their opinion in the Mexican media that human rights and due process in criminal cases contribute to crime.<sup>1</sup> The broad social acceptance of this position includes officials at the most senior levels of federal and local government, and therefore it is appropriate to note its consequences, not only with respect to the weakening of the rule of law but also with respect to citizen security.

It might seem that the violence in Mexico is due to an accident of geography, one that places us in close proximity to the avid drug users of the United States. But the security crisis in Mexico, more than mere happenstance, is a political calamity, characterized by the steep number of crimes committed by State agents for the sake of the prosecution and punishment of common crimes. That is serious in itself, but even more alarming is the fact that this *iatrogenic crime*,<sup>2</sup> created from within, drives new cycles of criminality.

Without the analysis of criminal iatrogenesis, it is difficult to understand the spiral of violence in Mexico. Each cycle begins when a common criminal is pursued by members of the security institutions and the *Ministerio Público*, giving rise to human rights violations, and continues when the tenacious pursuers in turn become the new common criminals, generally even more skillful.

**Two wounded hearts  
placed on a scale: one  
asks for justice, the other  
for revenge; and the most  
wounded heart only rests  
by weeping**

*Blas Galindo, Mexican composer  
(1910-1993)*

How did we get to this point? Police officers, members of the military, and other State agents realize that the methods used to combat crime<sup>3</sup>—which include house searches, *levantones*,<sup>4</sup> and torture—can be applied for their own benefit, to commit common crimes such as robbery, kidnapping for ransom, and drug trafficking. Groups of agents then decide to become involved in these activities from within these institutions, from outside, or serving as a conduit between them.

This process can be established by connecting the dots backwards: it is no coincidence that the members of the most powerful criminal organizations were deserters from the Mexican Army.<sup>5</sup> Many of the most prominent crime figures have worked in the government's security institutions.<sup>6</sup>

Kidnappers and other similar criminals need one foot inside the State, which not only provides them with privileged information but also grants them impunity through the fabrication of guilty parties. This involves police officers and prosecutors who induce or coerce victims to identify innocent people, among other abuses. The outcomes, broadly disseminated in the media, allow these State accomplices to justify remaining in their positions.

In one paradigmatic case, the Mexican Supreme Court (SCJN) is set to adjudicate the *amparo* petition (petition for a constitutional remedy) of an individual convicted of the offense of kidnapping. The petitioner cites two illegal actions by the Mexico City Prosecutor's Office to induce the victim to identify him in photographs and, upon his arrest, through a one-way mirror, without the participation of his defense lawyer.<sup>7</sup> The argument of the defense is that the flawed identification procedure and unlawful detention had a corrupting effect on the entire case and on the sentencing.<sup>8</sup> Judges cannot condemn arbitrariness while at the same time tolerating that the accuser benefits from it.

The attacks on due process and human rights have reached independent civil society organizations, criminal defense attorneys, the judiciaries, and national and international human rights defense bodies, including the United

Nations special rapporteur on torture, Juan Méndez (who served from 2010 to 2016). The attacks have been so severe that the chief justice of the SCJN, Luis María Aguilar, was forced to speak out vehemently in defense of the court's function of guaranteeing individual rights and freedoms.<sup>9</sup>

When the administration of President Enrique Peña Nieto curries favor with those who pit the rights of defendants against the rights of crime victims, it misinforms and fails to educate the public, as would be the case if one were to reward a school that teaches that the rights of the child cannot be met without diminishing the protection of the elderly, or vice versa.

Contrary to that false dichotomy, the rights of victims to truth and justice are predicated on respect for every defendant's right to due process:

It is worth clarifying that the rights of the accused are not "just" human rights guarantees; they are part and parcel of the epistemological mechanism for fact finding in criminal proceedings. Respecting the rules to establish the truth requires full consistency with rights of the accused; these must be seen as an essential component of accurate and truthful fact finding on which punishment is premised. If only one of these rights is violated, in only one aspect, in only one instance, the whole process loses credibility and is likely to fail in its objective of properly establishing the truth and of imposing just punishment. There is no truth outside the process; there is no truth that can be reached without full respect of the rights of the accused.<sup>10</sup>

## The security crisis in Mexico, more than mere happenstance, is a political calamity, characterized by the steep number of crimes committed by State agents

For the victims, managing to separate justice from revenge, to the point of understanding that it is impossible to obtain peace and security without due process, is an intellectual, emotional, and moral challenge. For those in government, on the other hand, such an approach is not merely optional; it is a constitutional requirement and a political exigency in view of widespread impunity.<sup>11</sup>

The (indirect) contribution of judges to collective security does not consist of making up for the deficits of the prosecution, but rather of raising the threshold of the lawfulness of its actions; only in this way can police investigation capacities be strengthened, the spiral of iatrogenic violence halted, and the necessary public trust in the justice system created. Without all of these, there can be no real security.

It does not matter how much money is spent on anti-crime campaigns in Mexico, or how many courthouses and prisons are built. Until society and its rulers demonstrate a firm belief in the importance of due process, the greatest risk to our future security will continue to be posed by State agents who man costly helicopters, handle sophisticated official weaponry, and carry out ordinary unlawful detentions. ■

### NOTES

<sup>1</sup> Héctor Aguilar Camín, journalist with Hoy por Hoy, "Delitos y proceso penal en el Ejército" [Crimes and criminal procedure in the Army], interview on W Radio, October 9, 2008. Audio

available in Spanish at <http://www.wradio.com.mx/llevar.aspx?id=686806>.

<sup>2</sup> The "iatrogenic" concept comes from medicine, in reference to diseases acquired as a result of hospitalization or surgery.

<sup>3</sup> Recall the cynical expression "I steal for the crown," attributed to José Luis Manzano, interior minister under then-president Carlos Menem of Argentina. See H. Verbitsky, *Robo para la corona* (Buenos Aires: Planeta, 2011). Similarly, many police officers justify their actions by claiming that they torture "for the government."

<sup>4</sup> *Levantar* (literally to lift, similar to the French *enlever*) is used colloquially in Mexico to identify both kidnappings carried out by common criminals and the extrajudicial detention of a person by State agents.

<sup>5</sup> This is the case of the Zetas cartel, formed as an outgrowth of the Airborne Special Forces Group (GAFF). See "Analizan las relaciones entre el crimen organizado y la política en América Latina" (Instituto de Investigaciones Sociales, Universidad Nacional Autónoma de México, April 8, 2014), [http://www.iis.unam.mx/indexcontent.php?\\_module=681](http://www.iis.unam.mx/indexcontent.php?_module=681)

<sup>6</sup> The penetration of police institutions and prosecutors' offices by organized crime is favored by the frequent turnover of the heads of government institutions, their lack of effective oversight over the lower chain of command, and their ignorance of the actual mechanisms of operation of the institutions they preside over, which are frequently controlled by commanders and other mid-level agents.

<sup>7</sup> In view of the growing judicial rejection of evidence obtained through torture, the prosecutors' offices and police agencies increasingly resort to more subtle methods to obtain results.

<sup>8</sup> Supreme Court of Mexico, First Division, ADR 3055/2016.

<sup>9</sup> Milenio.com. (June 15, 2016). "Detenciones sin tortura" pide presidente de la Corte. Retrieved from: [http://www.milenio.com/politica/Detenciones\\_sin\\_tortura-Suprema\\_Corte\\_de\\_Justicia\\_de\\_la\\_Nacion-seguridad\\_juridica\\_0\\_756524362.html](http://www.milenio.com/politica/Detenciones_sin_tortura-Suprema_Corte_de_Justicia_de_la_Nacion-seguridad_juridica_0_756524362.html)

<sup>10</sup> S. Zappalà, "The Rights of Victims v. the Rights of the Accused," *Journal of International Criminal Justice* 8, no. 1 (2010): 145.

<sup>11</sup> See official figures on impunity in Mexico and its causes at [bit.ly/2aPUV7t](http://bit.ly/2aPUV7t).

## Visit by high court justices from Peru and Colombia to Monterrey, Nuevo León



From left to right: Leonor Arteaga, DPLF Senior Program Officer; Justice Carlos Arenas Bátiz, President of the Superior Court of Nuevo Leon; César San Martín Castro, Justice of the Supreme Court of Peru; Justice Alfredo Beltrán Sierra, former President of the Constitutional Court of Colombia

On August 15–16, 2016, the Due Process of Law Foundation (DPLF) and Citizens in Support of Human Rights (Ciudadanos en Apoyo a los Derechos Humanos, CADHAC) organized a visit by Justices **César San Martín Castro** of Peru and **Alfredo Beltrán Sierra** of Colombia to the city of Nuevo León, in the Mexican state of Monterrey. The purpose was to contribute from a comparative law perspective to the ongoing discussions on the roles of victims and defendants in criminal cases and the effective investigation of complex crimes.

Justice San Martín Castro presided over the court that convicted former Peruvian president Alberto Fujimori; he is now chief justice of the Transitory Criminal Chamber of the Supreme Court of Peru. Justice Beltrán Sierra served as chief justice of the Constitutional Court of Colombia.

During their visit, the justices participated in a conference entitled **“The Importance of Due Process in the Context of Violence;”** together with **Carlos Arenas Bátiz, chief judge of the Superior Court of Nuevo León.** This activity was held at the Superior Court and attracted legal practitioners, members of civil society organizations, students, and members of the media. The speakers underscored how important it is that judges apply the law without interference from the political branches of government, and that they be able to explain their decisions to the public as a means

of building public trust and improving the credibility of the judiciary. Speakers also encouraged judges to apply international and comparative law standards when adjudicating cases involving complex crimes.

There was also a discussion group with local judges, a collective dialogue with civil society, and a meeting with academics, journalists, and opinion leaders. These forums provided space for an informed debate on the role of judges in a democratic society and the challenges of implementing an accusatory criminal justice system, as Mexico is currently doing.

Justices San Martín Castro and Beltrán Sierra agreed on the need to respect due process as a measure to guarantee access to justice, and they called upon the authorities to refrain from attempting to justify serious human rights violations like torture as a necessary means of combating organized crime.

This event was particularly timely in light of the current experience in **Nuevo León** with the implementation of the new accusatory criminal justice system. This process has raised concerns insofar as it is seen as potentially allowing for the mass release of criminal defendants. The message was straightforward: no system of criminal procedure is perfect or solves every problem, but when there are clear rules that respect human rights, victims and defendants alike receive better justice services.

# Notes on implementation of the accusatory criminal justice system in Mexico and challenges to its consolidation

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## Background on the reform

**T**he reform of the criminal justice system in Mexico did not begin as an attempt to achieve national transformation. Rather, it started with efforts by two of the states: first, a “semi-reform” in Nuevo León in 2004,<sup>1</sup> and later, a much broader reform in Chihuahua in 2006.

In 2004, President Vicente Fox Quesada introduced an initiative to implement the accusatory criminal justice system at the national level, but this was postponed.<sup>2</sup> It was not until the constitutional reform of June 18, 2008, under the administration of President Felipe Calderón Hinojosa, that the accusatory criminal justice system became mandatory for all of the country’s jurisdictions. The transitional articles of this reform established a *vacatio legis* of eight years so that the federal government, the states, and the military justice system could make the necessary institutional adjustments to ensure that the accusatory system would be operational throughout the country by June 2016.

One element that played a significant role during this implementation period was the worsening of crime rates throughout the country. Most notably, the murder rate increased by more than 48 percent between 2008 and 2015. During the period from 2010 to 2012, the country had an average of 26,312 homicides per year.<sup>3</sup>

It is also essential to underscore the presence of organized crime throughout almost the entire country. Criminal organizations are no longer engaged solely in drug trafficking, but have expanded into other crimes such as kidnapping, extortion, and human trafficking.<sup>4</sup>

In this context of widespread criminality, promotion of a legal system that defends due process, limits pretrial detention, and guarantees the presumption of innocence is quite complicated.

From the standpoint of public policy—and even though it sounds trite to say so—the implementation process has been highly complex. This has undoubtedly been a reality for all countries that have embarked on such a transforma-

tion. However, given its size, geographic composition, and federal system of legal and territorial organization, Mexico is a special case.

Accordingly, it should be understood that there has not been one single implementation process in Mexico, but rather 33 processes: one for each of the 32 federal entities, plus a process at the federal level. Each state has its own practitioners in the system, that is, its office of the prosecutor or attorney general, its courts, its public defenders’ office, and its police forces. Furthermore, police matters require that a distinction be made between the investigative police and the police responsible for public safety, which may report both to the state government and to the local municipalities.

In addition, each state has had to consider its own particularities in making decisions about the implementation process, taking into account its population size, number of municipalities, and criminal typology.

## Challenges to consolidation

A great many challenges remain to be addressed. Nevertheless, we would argue that certain issues are particularly urgent because of their system-wide impact and because they are common throughout the country. Four such issues are discussed below.

- **Reorganization of the offices of prosecutors and attorneys general and improved coordination with police**

During the initial years of implementation, efforts were concentrated mainly on the oral aspect of hearings, with an emphasis on the oral proceedings of the criminal trial. This inertia meant that the impact and importance of the investigation phase was overlooked, and this omission in turn led to neglect of one of the key criminal justice reform issues: the transformation of the *Ministerio Público*.

In this author's opinion, the principal task for the *Ministerio Público* is to adopt a working model that enables it to be more efficient and more effective in the types of solutions it offers for the diverse matters it handles. Therefore, as part of its procedures, the ministry must classify matters with the objective of resolving them according to the array of possibilities offered by the National Code of Criminal Procedure: the conditional suspension of proceedings, restitution agreements, expedited proceedings, and temporary stays of proceedings, among others.

Although it seems to have been understood that not every matter will be disposed of through oral proceedings, one of the main complaints against the traditional justice system appears to persist: many cases received by the *Ministerio Público* remain stalled there without any response. If this trend is not reversed, the *Ministerio Público* will end up being a giant bottleneck that fosters

impunity and, consequently, skepticism about the reform process.

It should also be a priority for the offices of prosecutors or attorneys general to strengthen their coordination plans with the police. We think that this will be possible only to the extent that the prosecutors understand their role in leading the investigation and the police develop the necessary proficiency to take charge of investigative actions in keeping with the standards of investigation demanded by the accusatory system.

- **Strengthening of the public defender service**

The criminal justice reform seeks to guarantee the right to an adequate defense, requiring the State to provide a high-quality public defender service staffed by defense attorneys who are career professionals and who are remunerated at the same rate as the prosecutors.

However, the institutional design of the public defenders' offices does not appear to meet those standards. While some states make an effort to meet the constitutional guidelines on the issue, for others it does not seem to be a priority.

Nevertheless, in terms of the quality of service and the establishment of a career service for public defenders, we believe that certain changes are imperative in order to strengthen the public defenders' offices and comply with the reform. These include: 1) providing the public defenders' offices with technical and operational autonomy, as well as with legal personality and their own assets; 2) guaranteeing the adequate working conditions required for public defenders to perform well; 3) establishing a professional career service that makes it possible to have public defenders who provide high-quality service to their clients; 4) guaranteeing that public defenders and prosecutors enjoy similar rates of

pay, 5) preventing work overload, and 6) managing expert witness support for the establishment of evidence.<sup>5</sup>

- **Harmonization of constitutional justice and the accusatory criminal justice system**

It is crucial to rethink the concept of *amparo* (petition for a constitutional remedy) in the criminal justice process. Under the traditional system, the *amparo* played a decisive role in the defense of the fundamental rights of the accused, becoming their principal guarantee. However, the accusatory system in and of itself provides a significant number of controls, both preventive and reactive, that serve to limit the abuse of State power. Preserving the current design and practices of *amparo* could end up hampering the criminal justice process and, in the worst-case scenario, could contribute to impunity.

In addition, the case law created within the traditional justice system should be reviewed in order to determine which cases may still be applicable in the accusatory system. This is particularly important if we consider that there are legal concepts that have similar names in both systems, but different content and objectives.

- **Evaluation and information systems**

Finally, it is a priority to have an information and evaluation system that allows for a clear and objective view of the performance of the criminal justice reform.

Although interesting efforts have been made to establish such information systems—for instance, through the National Institute of Statistics and Geography, the Executive Secretariat of the National Public Safety System, and the now-defunct Technical Secretariat of the Coordinating Council for the

Implementation of the Criminal Justice System—at the present time there is no standardized and reliable way to assess whether expectations of the criminal justice reform process are being met.

## Conclusion

In our opinion, the current status of the criminal justice reform process in Mexico oscillates between two poles: on one hand, the hope for justice, and on the other hand, the fear that things will appear to change, only to remain the same.

Unquestionably, certain aspects of the reform are already evident, albeit in some states more than others. Generally speaking, civil society organizations, universities, and, in quite a few cases, professionals working within the justice system have demonstrated their enthusiasm for the reform, hoping that it will meet the initial high expectations.

Nevertheless, it should also be recognized that there are problems, some very serious, that must be tackled in the short term. If the decision makers disregard their obligation to address these issues, there is a risk that criminal justice reform could end up like so many other promises of transformation: changing everything just to stay the same. ■

## NOTES

- <sup>1</sup> On the 2004 reform in Nuevo León, see M. Ayala, J. Carrasco, A. Saucedo, and A. Varas, *La reforma al sistema de justicia penal en Nuevo León: Sus principales tendencias (2004–2007)* (Mexico: Renace and Facultad Libre de Derecho de Monterrey, 2009). In addition, on implementation over time of reform in this state, see Observatorio Ciudadano de la Justicia, “Nuevo León y sus ‘sistemas’ de justicia,” December 4, 2015, <http://ocj.org.mx/2015/12/04/nuevo-leon-y-sus-sistemas-de-justicia/>.
- <sup>2</sup> The basic content of the reform initiative is available on the website of former president Vicente Fox, [fox.presidencia.gob.mx/actividades/?contenido=7839](http://www.presidencia.gob.mx/actividades/?contenido=7839).
- <sup>3</sup> Murders rose from a total of 14,006 in 2008 to

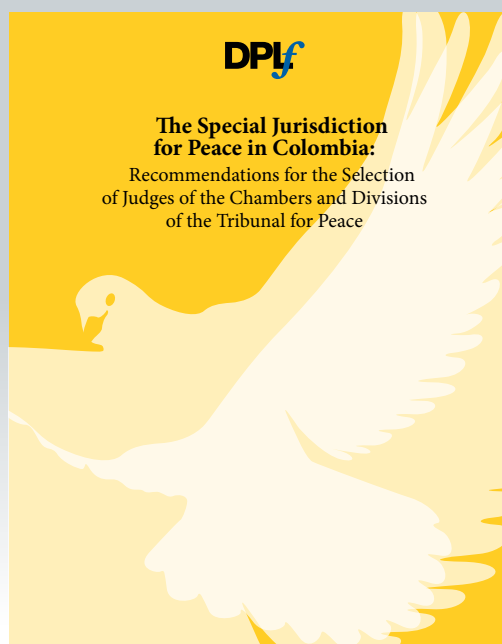
20,762 in 2015. In 2010, there were 25,757 confirmed murders, in 2011 there were 27,213, and in 2012 there were 25,967. See “Mortalidad: Conjunto de datos: Defunciones por homicidios” on the website of the Instituto Nacional de Estadística y Geografía (National Institute of Statistics and Geography), [www.inegi.org.mx/sistemas/olap/proyectos/bd/continuas/mortalidad/defuncioneshom.aspx?s=est](http://www.inegi.org.mx/sistemas/olap/proyectos/bd/continuas/mortalidad/defuncioneshom.aspx?s=est).

<sup>4</sup> On the evolution of organized crime in Mexico, see <http://narcodata.animalpolitico.com>.

<sup>5</sup> J. de la Torre Rodríguez, A. Barrera Sánchez, and G. Reyes Salas, *Guía para el diseño, instauración y fortalecimiento sustentable del servicio profesional de carrera en las defensorías públicas estatales en México: Los estándares de la defensa pública en el nuevo sistema de justicia penal mexicano* (Mexico: Secretaría Técnica del Consejo de Coordinación para la Implementación del Sistema de Justicia Penal, Secretaría de Gobernación, 2014); H. Fix-Fierro and A. Suárez Ávila, “Hacia una defensa pública de calidad: El nuevo diseño institucional de las defensorías públicas en las entidades federativas de la República mexicana,” *Cuestiones Constitucionales: Revista Mexicana de Derecho Constitucional* (Universidad Nacional Autónoma de México, Instituto de Investigaciones Jurídicas), no. 32 (January–June 2015): 157–200; V. Baz et al., *Hallazgos 2015: Evaluación de la implementación y operación a ocho años de la reforma constitucional en materia de justicia penal* (Mexico: Centro de Investigación para el Desarrollo, 2016).

# The Special Jurisdiction for Peace in Colombia

Recommendations for the selection of judges for the chambers and divisions of the Tribunal for Peace



The Special Jurisdiction for Peace (SJP) is a completely new experience in Latin America. The victims' right to justice and the need to establish the facts of what happened—and, if appropriate, to punish the perpetrators—are the driving forces behind this transitional justice mechanism. Created by agreement between the Colombian government and the FARC-EP guerrilla group, the SJP has jurisdiction over crimes committed in the context of and because of the armed conflict, in particular grave human rights violations and serious breaches of international humanitarian law.

The pivotal role of the SJP in restoring confidence in the rule of law and consolidating peace means that its members must be persons ideally suited to perform the tasks entrusted to it. Drawing on international standards for the selection of high court judges, best practices observed in the region, and the experience of other transnational justice mechanisms around the world, this document makes recommendations for the design of a transparent procedure for the selection of peace judges that will yield those results.

# Penalties, pretrial detention, and precautionary measures in criminal procedure:

## The urgency of a new constitutional reform in Mexico

**Carlos Ríos** *Criminal justice and human rights expert*

**O**n June 18, 2016, Mexico's new accusatory criminal procedure system finally entered into force nationwide. Following publication of the 1934 criminal code, which was based on the inquisitorial model, it took 82 years for the national legal system to acknowledge the need to return to the original ideas of the 1917 constitutional convention, which introduced the principles of the accusatory model of criminal procedure in Mexico.

According to its political rationale, the accusatory process allows for the preservation of the rights of the different parties while incorporating important elements needed for effective criminal prosecution, and it provides counterweights to ensure respect for the principle of the presumption of innocence and other due process guarantees. Nearly a century passed since these principles were first discussed in 1917 before they were put into practice.

The idea of a criminal procedure based on a mixed-inquisitorial court system was examined, harshly criticized, and finally ruled out by the 1917 constitutional convention. In fact, an extensive procedural revolution was announced in the message that Mexican revolutionary leader Venustiano Carranza delivered to the convention when it was established on December 1, 1916. Nevertheless,



the vicissitudes of post-revolutionary Mexico kept the Constitution from achieving regulatory effectiveness on that point, and the institutions of accusatory criminal procedure were never addressed by the regular legislature. As a result, the system continued with the same procedure inherited from the colonial era. In 1934, when the Federal Code of Criminal Procedure was published, the inconsistency with the superior governing principles of the Constitution of 1917 was legitimized in the law. In essence, the law repealed the sections

of the Constitution governing criminal procedure.

Eighty-two years later, we run the risk of having history repeat itself. This time, the higher regulatory principles provided in international human rights law for the application of precautionary measures, including pretrial detention, are weakened by procedural views that are still culturally rooted in the inquisitorial culture.

Both the Inter-American system and the United Nations' universal system for the protection of human rights have



established a regulatory doctrine that characterizes precautionary measures and pretrial detention as instruments to be used on an exceptional basis—that is, only when there are objective reasons to suggest that the defendant is connected to the criminal act, and there is a risk of flight, a risk that evidence may be tampered with, or a well-founded risk of harm to the victims.

The rationale for this system is that the entire criminal case must be built on two core values that follow from the principle of the presumption of innocence:<sup>1</sup> first, that the rights of individuals to their liberty can only be abridged when there is evidence to overcome the presumption of innocence to which every defendant is entitled; and second, that the construction of a system of pretrial detention and precautionary measures should be compatible with the rules of treatment that must be applied to a criminal defendant when he or she is subject to proceedings intended to demonstrate his or her responsibility for a crime. This demands that precautionary measures—especially pretrial detention—should never be thought of as advance punishment, but may only be applied based on the need for precaution.

The 2008 constitutional reform pertaining to criminal matters reintroduced the overarching principles of the accusatory criminal court system: procedural immediacy, contradiction, continuity, concentration, and openness. But it left significant issues pending with respect to the regulation of precautionary measures, including pretrial detention. This reform was informed by contrasting views on how the process and its objective should be understood. Accordingly, in spite of its notable rights-based orientation, its final wording retained elements that are inconsistent with a democratic criminal procedure.

A number of instruments designed to combat organized crime were preserved, particularly *arraigo*<sup>2</sup>

and the introduction of written records at oral hearings. In addition, it became possible for courts to impose pretrial detention on their own motion for certain types of crimes considered to have special impact.

These inquisitorial court rules create structural dissonance in Mexican criminal procedure that prevents it from developing naturally. When precautionary measures are confused with penalties—as they will be unless their reasonableness is examined at the time of their application—the legitimacy of the criminal process as a whole is affected. Practitioners in the system and the public in general have the expectation that pretrial detention will be applied when the crime for which the person is being prosecuted is considered “serious.” The procedure itself should not be turned into a form of punishment.

A report published by the Due Process of Law Foundation in 2016, entitled *Pena sin delito: Percepciones acerca de la finalidad de la prisión preventiva en México* (Punishment without crime: Ideas on the purpose of pretrial detention in Mexico), conducted a legal analysis of the Mexican criminal procedure system, both at the constitutional level and with respect to the secondary laws applicable throughout the Republic, as well as in four states (Chihuahua, Morelos, state of Mexico, and Oaxaca). The study concluded that there are significant discrepancies between the superior model that provides for a rights-based court system under international human rights law, on one hand, and the Mexican Constitution, on the other. These discrepancies include the existence of a list of offenses for which pretrial release cannot be granted and that require the judge to impose pretrial detention.

The study also explored empirically whether practitioners in the system, including trainers certified by the Technical Secretariat of the Coordinating Council for the Implementation of the Criminal Justice System, have a strong

commitment to the principles of human rights in relation to the application of precautionary measures and pretrial detention in criminal cases. The study suggests that there is a firmly rooted culture that views pretrial detention as a form of social control to prevent crime. That culture can, when put into practice, undercut the general principles of the accusatory model and the democratic values that inform it, thereby jeopardizing the viability of the recently introduced criminal procedure.

If a catalog of crimes not subject to pretrial release is maintained, constitutionally and legally, we can expect that the longstanding orientation of the Mexican criminal process, with its inquisitorial features, will continue to prevail among generations of law students. The reform of Mexico’s criminal justice system demands not only a solid institutional and regulatory framework but also a cultural transformation. This is why the constitutional reform of 2008 needs to be fine-tuned to eliminate once again the concept of pretrial detention on the court’s own motion and other mechanisms such as *arraigo* that clearly violate fundamental rights. Otherwise, we run the risk of repeating the events of 1934.■

## NOTES

<sup>1</sup> Principle contained in Article 8.2 of the American Convention on Human Rights and Article 14.2 of the International Covenant on Civil and Political Rights.

<sup>2</sup> *Arraigo* is a legal concept in the Mexican criminal justice system that allows the *Ministerio Público* to keep a criminal defendant subject to its jurisdiction in order to prevent his or her potential flight while preliminary investigations are conducted by the public prosecutor. It is a concept that is considered to violate human rights because it contravenes the principle of the presumption of innocence.

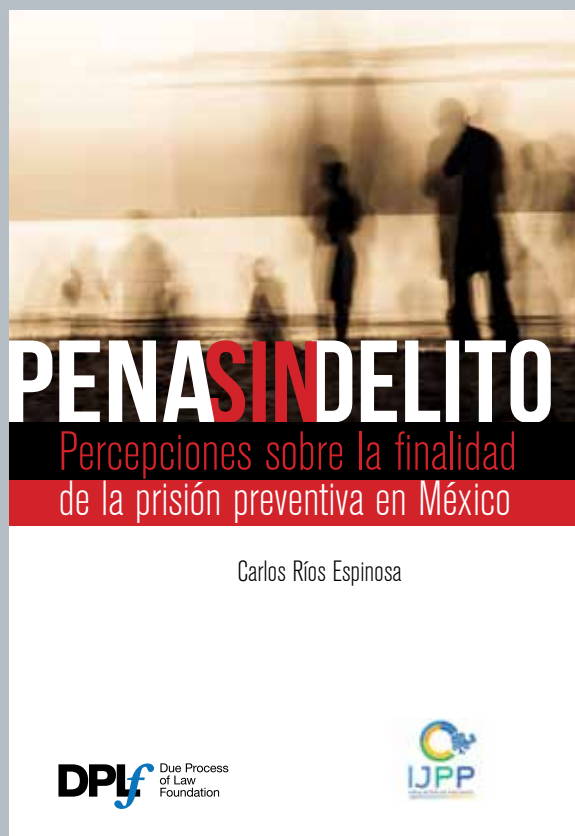
<sup>3</sup> Available in Spanish at <http://dplf.org/es/resources/pena-sin-delito-percepciones-acerca-de-la-finalidad-de-la-prision-preventiva-en-mexico>.

<sup>4</sup> Decentralized administrative body of the Department of the Interior, created to support and assist federal and local authorities in actions as needed during the implementation of the criminal justice system reforms in Mexico.

## Punishment without Crime: Ideas on the Purpose of Pretrial Detention in Mexico



From left to right: Javier Carrasco, IJPP; Iván de la Garza, professor at the Facultad Libre de Derecho de Monterrey; Carlos Ríos, criminal justice specialist and author of the report; Ursula Indacochea, DPLF; Layda Negrete, México Evalúa and Ana Dulce Aguilar, IJPP.



In Mexico City, the Due Process of Law Foundation (DPLF) and the Institute of Procedural Criminal Justice (Instituto de Justicia Procesal Pena, (IJPP) presented a report entitled ***Punishment without Crime: Ideas on the Purpose of Pretrial Detention in Mexico***. The report was prepared by **Carlos Ríos Espinosa**, a criminal justice and human rights researcher, with the support of the IJPP. Other contributors included **Ursula Indacochea**, coordinator of DPLF's Judicial Independence program; **Javier Carrasco**, executive director of IJPP; **Iván de la Garza**, professor of law at the Facultad Libre de Derecho de Monterrey; **Miguel Sarre**, professor of law at the Instituto Tecnológico Autónomo de México; and **Layda Negrete**, coordinator of the Quality of Justice Project at México Evalúa.

The report, placing special emphasis on pretrial detention, examines the use of precautionary measures in the new accusatory justice system with respect to four main issues: i) the compatibility of the Mexican legal framework with international human rights law, ii) the way in which practitioners in the new system perceive the independence of the judge when he or she applies precautionary measures, iii) the perception held by prosecutors and public defenders with regard to the objectives pursued by those measures, and iv) the way in which the media report facts related to police detentions and the use of precautionary measures.

One of the most notable conclusions of the report is that the success of the new accusatory system of criminal procedure, especially its system of precautionary measures, could be at risk because of the distorted perception that judges and lawyers have of their own role in the system and of the objectives these measures pursue. This erroneous perception, sometimes encouraged by the print media, could end up destabilizing the rights-based nature of the criminal justice system, leading to its failure.

MAGAZINE OF THE DUE PROCESS OF LAW FOUNDATION

**20**

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# Institutional Reforms

# The power of the president to appoint senior justice authorities in Mexico

**Úrsula Indacochea** Senior Program Officer Judicial Independence, DPLF

**T**here are no ideal formulas in comparative law to establish mechanisms for the selection of senior justice system authorities that shield them from all undue influence. Nevertheless, the power to select these authorities, and the way in which it is exercised, is perhaps one of the most revealing indicators of a particular State's engineering of checks and balances and of how it views the role of citizens in building democracy.

Some countries in the region, such as El Salvador and Guatemala, have entrusted their judicial councils or ad hoc selection committees with the responsibility of screening candidates, leaving the final decision in the hands of a political body like parliament. Others, such as Peru, select their senior prosecutors and justices through a public competition. Still another model is election by popular vote in Bolivia, where the political body—the Plurinational Assembly—is responsible for screening applicants. Colombia is a special case because of the strong tradition of its high courts, which select their own members. Only a few countries, including Argentina and Mexico, continue to select their high court authorities through procedures that involve political bodies exclusively, following the US model.

Given this variety of mechanisms, international law has established

certain minimum guidelines designed to streamline the selection process and create the conditions to ensure that the candidates chosen are the most suitable to hold those positions. They need to be able to discharge their duties independently and free from undue influence or pressure, both external and from within their own institutions. Regardless of the mechanism adopted, these minimum guidelines require (i) procedural transparency, (ii) maximum openness of all stages and elements, (iii) the most objective criteria possible for identifying the merits of the candidates, and (iv) the regulation of mechanisms for the participation of civil society, which guarantee effective citizen oversight.

In the case of political mechanisms, these guidelines function by strictly curtailing the discretion of the political authority, because they render the decision-making process public and subject it to intense citizen oversight regarding the suitability of the candidates chosen.

In Mexico, however, the mechanisms for the selection of senior justice authorities retain a strong authoritarian slant. This is reflected in the predominant role given to the President of the Republic to nominate or propose candidates; the imperviousness of presidential nomination decisions; the absence of any duty to publicly justify

these decisions, or any mechanisms for citizen participation at that stage; and the lack of effective remedies to judicially challenge appointments that fail to comply with the rules of the game (with respect to procedures as well as the assessment of merit). Hence, nothing can be done to dispute the appointment of an unqualified candidate, or one that has clear conflicts of interest.

The procedure for selecting justices for the Supreme Court of Mexico (Suprema Corte de Justicia de la Nación, SCJN) is a case in point. Under Article 96 of the Mexican Constitution, this is a two-stage procedure: the president must submit a short list of three candidates to the Senate for consideration in order to fill each vacancy. The Senate, after a public hearing, must select one of the candidates within 30 days. If it fails to do so, or rejects the short list twice, the president decides.

The constitutional provision does not include—nor does any lower-ranking law include—a requirement for transparency or openness in the president's decision. Nor does it establish mechanisms for citizen participation that would allow for objections to candidates that do not fit the profile (the description of required credentials and characteristics), or for the airing of valuable information about their background. The president is not required to state the reasons

for his or her nominations. On the contrary, Article 95 of the Constitution weakens the regulatory requirements of the profile by specifying that the appointment should go “preferentially” rather than “necessarily” to persons who fit the profile.

This provision could, in practice, result in only one—or none—of the shortlisted individuals being a suitable candidate for the SCJN (the so-called “shortlist of one” or “blank shortlist”). This would force the Senate to choose an unsuitable person for the position or to reject all of the names on the shortlist. In such situations, the Senate’s ability to screen and select Supreme Court justices becomes merely formal and devoid of content.

Compared to the opacity of the presidential nomination, the process in the Senate enjoys greater transparency, given the public nature of the legislature’s work. Even so, there are no clear rules that regulate this phase. In each selection process, the Senate Justice Committee—which must issue a decision to the Senate’s Plenary—approves the rules to which it will be subject, which may or may not allow for citizen participation.

Another more recent example is the procedure for selecting the attorney general. The Office of the Attorney General of the Republic (Procuraduría General de la República, PGR) is the country’s highest criminal investigating and prosecuting authority and is part of the Federal Executive Branch. According to the applicable text of Article 96 (IX) of the Mexican Constitution, the attorney general must be appointed by the president and confirmed by the Senate. In spite of the importance of

this appointment, there are no rules that impose transparency and openness on the presidential decision, much less a duty to assess essential components of the profile, such as the absence of conflicts of interest that could jeopardize the candidate’s autonomy, or a commitment to human rights.

The president’s recent appointment of Raúl Cervantes, in October 2016, as the new head of the PGR, followed by Senate confirmation in a public session that lasted barely 45 minutes, made clear the absence of checks and balances from this mechanism. Civil society was left out of the process completely. Greater public scrutiny would have shed light on the new attorney general’s partisan political ties, which were incompatible with the ideal profile of the country’s most senior justice official.

The same shortcomings are apparent even in the regulation contained in the new text of Article 102-A of the Constitution, which will serve to select the new head of the Office of the Prosecutor General of the Republic (Fiscalía General de la República, FGR), a body with constitutional autonomy pursuant to the reforms of February 2014. This provision once again stipulates a political appointment mechanism, one in which the Senate proposes a list of 10 candidates to the president within 20 days of a vacancy; the pres-

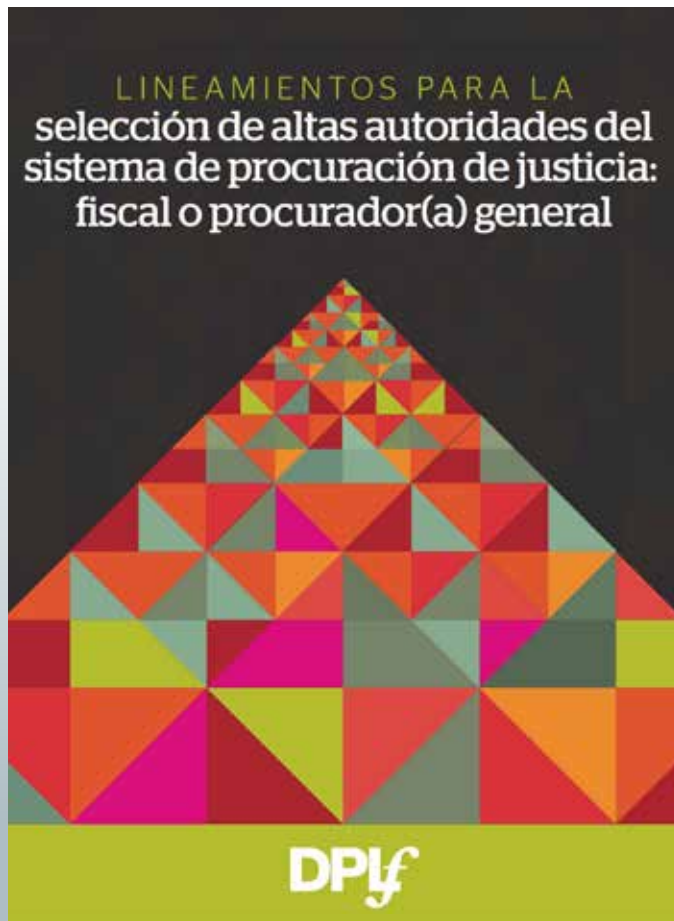
ident compiles a short list of three names; and, after a public hearing, the Senate chooses one of them to serve as the new prosecutor general. However, it fails to mention transparency and openness, citizen participation, or merit as the guiding criterion for the decision.

This three-stage mechanism continues to grant final appointment authority to the president in the event that the Senate fails to make an appointment within the established time periods, which are, moreover, clearly insufficient to allow the legislature to properly investigate and evaluate the candidates’ backgrounds. If the intent of the constitutional reform was to create an autonomous Office of the Prosecutor General, the procedure for appointing its head should include the necessary guarantees to preserve such autonomy.

Ineffective checks and balances, the dominance of the executive branch, the imperviousness and opacity of nominations, the absence of civil society participation mechanisms, and the impossibility of challenging irregular appointments in court are hallmarks of the selection processes for senior justice system officials in Mexico—a country that needs, now more than ever, trustworthy institutions and independent senior officials capable of leading these institutions strategically in the fight against impunity. ■

**In Mexico the mechanisms for the selection of senior justice authorities retain a strong authoritarian slant. This is reflected in the predominant role given to the President of the Republic**

## Guidelines for the selection of senior justice authorities: Attorney general or prosecutor general



The Due Process of Law Foundation has published a report entitled **Guidelines for the Selection of Senior Justice Authorities: Attorney General** or Prosecutor General. It describes optimal procedures for the selection of individuals to fill those senior positions and suggests elements to be included in the ideal profile of an Attorney General or Prosecutor General as an appropriate way to identify the merits of the candidates.

Transparent, public, participatory, and merit-based selection has a direct impact on the suitability of the candidate selected, and, therefore, on the independence and autonomy of the entire institution. The presence or absence of those features influences the effectiveness and initiative with which crimes are prosecuted and can have repercussions on the decision to either bring a criminal action or shelve the investigation in specific cases. Proper selection of candidates is therefore a crucial element in the fight against impunity.

The report is based on comparative experience in the selection of attorneys general and prosecutors general in the region, as well as on rules and standards developed within the framework of the United Nations, the Inter-American Human Rights System, and the Council of Europe. It also provides some examples in which the violation of those standards has led to appointments being successfully challenged in court.

**ELEMENTOS PARA UN PERFIL DE FISCAL O PROCURADOR GENERAL**

El perfil para evaluar la idoneidad de las altas autoridades de procuración de justicia, de acuerdo a estándares internacionales y buenas prácticas, debería incluir los siguientes elementos

- RECONOCIDA HONORABILIDAD**  
Conducta ética irreprochable y alta calidad moral, que no pueda ser objeto de condenas, señalamientos, denuncias u objeciones éticas, y que sea reconocida públicamente.
- CONOCIMIENTO LEGAL SOBRESALIENTE**  
Alto nivel de conocimiento del Derecho Penal y de diversos aspectos de la investigación criminal y materias afines.
- INDEPENDENCIA E IMPARCIALIDAD**  
Ausencia de vínculos, actuales o pasados, que generen la apariencia de falta de independencia y puedan afectar la confianza en la institución que representa.
- EXPERIENCIA Y CONOCIMIENTO DEL SISTEMA DE JUSTICIA PENAL**  
Reconocida trayectoria profesional que revele un conocimiento práctico del sistema y que, además, haya sido coherente y respetuosa de los derechos humanos.
- COMPROMISO CON LOS DERECHOS HUMANOS, LA DEMOCRACIA Y EL ESTADO DE DERECHO**  
Trayectoria de vida que comprenda muestras concretas de defensa de estos valores.
- TRANSPARENCIA EN LA ACTUACIÓN FUNCIONAL**  
Conocida disposición a hacer públicas sus decisiones y a dar cuenta a la ciudadanía de los actos funcionales en los que interviene.
- CAPACIDAD DE INTERLOCUCIÓN CON OTROS ACTORES Y USUARIOS DEL SISTEMA**  
Capacidad para relacionarse con altos funcionarios gubernamentales, expertos, organizaciones de la sociedad civil y público en general; así como sensibilidad y capacidad de interlocución con las víctimas.
- CONOCIMIENTO DE LOS PRINCIPALES DESAFÍOS INSTITUCIONALES DEL SISTEMA DE PROCURACIÓN DE JUSTICIA**  
Conocimiento crítico de los principales problemas del manejo y administración de recursos humanos y financieros.

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## The Prosecutor's Office that Mexico Needs: Reflections from the Latin American Experience for the Design of the New Office of the Prosecutor General



From left to right: Grace Fernández Morán, victim; Ursula Indacochea, Senior Program Officer for Judicial Independence, DPLF; Ana Lorena Delgado, Executive Director FJEDD; Layda Negrete, independent researcher; Edgar Cortez, IMDDH; Ximena Suárez, associate for Mexico, WOLA.

#Fiscalía  
QueSirva

An international seminar, “**The Prosecutor’s Office that Mexico Needs: Reflections from the Latin American Experience for the Design of the New Office of the Prosecutor General of the Republic**,” was held in Mexico City on November 28–29, 2016. The event was co-organized with the Foundation for Justice and Rule of Law (Fundación para la Justicia y el Estado Democrático de Derecho, FJEDD) of Mexico, and the Washington Office on Latin America (WOLA). Mexico will soon transition from the current Office of the Attorney General of the Republic (Procuraduría General de la República, PGR) to the new Office of the Prosecutor General of the Republic (Fiscalía General de la República, FGR). The objective of the seminar was to debate the model currently in use in Mexico and the principal aspects to be addressed by a new law that will regulate the transition and the design of the new office, drawing on models and experiences in other countries of the region.

The event was designed to be a closed workshop for members of civil society organizations and activists from the **#FiscalíaQueSirva** (“For a Prosecutor’s Office that Works”) movement. Participants included international experts such as **Marco Fandiño** and **Leonel González** of the Justice Studies Center of the Americas (Centro de Estudios de Justicia de las Américas, CEJA), a project of the Organization of American States (OAS); **Gonzalo Rúa** of the Institute for Comparative Studies in the Criminal and Social Sciences (Instituto de Estudios Comparados en Ciencias Penales y Sociales, INECIP) in Argentina; **Jan-Michael Simon**, of the Max Planck Institute for Foreign and International Criminal Law in Germany;

**Claudia Paz y Paz**, former Attorney General of Guatemala; **Víctor Cubas**, Attorney General of Peru; **Julio Contardo**, Regional Prosecutor for Bío Bío of the Office of the Public Prosecutor of Chile; and **Gina Cabarcas**, Deputy Director of public policy in the Office of the Prosecutor General of Colombia. Mexican experts introduced each topic from the local perspective.

Issues discussed by the panelists included the institutional challenges of transitioning to an accusatory criminal justice system; the strategic design of a criminal prosecution policy and its indicator-based evaluation; institutional guarantees for the constitutional autonomy of the Office of the Prosecutor General; the profile and process for selection of the prosecutor general; the service components of prosecutorial training and its minimum standards; accountability mechanisms; the management of investigations and the autonomy of expert witness services; the redefinition of the relationship with victims; the investigation of complex crimes and the creation of specialized prosecutors’ offices; and measures for transitioning to the new model.

This dialogue between the participants and the international guests made it possible to take advantage of the recommendations and lessons learned from international experience, and to draw conclusions and identify minimum points that should be included in the secondary laws of the new FGR. It also allowed Mexican civil society to prepare for active and informed participation in the public debate on the enactment of the secondary laws, as well as on the amendment of various articles of the Constitution pertaining to the process for selecting the prosecutor general and to the automatic transition of the chief and staff of the old PGR to the new FGR model.

## The selection process for Supreme Court justices in Mexico: Recommendations for selecting the best candidates based on international and comparative law



In December 2015, DPLF published a report assessing the process for the selection of two new justices of the Supreme Court of Mexico (SCJN). The report supplements Luis Pásara's prior evaluation of the regulation of this procedure.

The selection of members of the high courts is a significant event in a country's political and institutional life, as it concerns the maximum judicial authority that must adjudicate society's most salient controversies. Therefore, the existence of processes that make it possible to select the most qualified individuals to sit on the highest courts is a specific measure with major impact on the independence of the judiciary as a whole. The selection of the most suitable people for these positions helps strengthen democracy and the rule of law and guarantee the effective separation of powers.

The report presents various recommendations on ways to bring the current procedure for selection and appointment of Supreme Court justices in Mexico into line with current international standards and best practices for the selection of high court judges in international law and comparative experience.

### PRINCIPIOS MÍNIMOS QUE DEBEN REGIR LOS PROCESOS DE SELECCIÓN

La entidad a cargo de preselección debe ser autónoma.

Se debe tener un perfil previo, claramente detallado para el cargo.

Todas las etapas del proceso deben ser claras y públicas.

LINEAMIENTOS PARA UNA SELECCIÓN DE INTEGRANTES DE ALTAS CORTES DE CARÁCTER TRANSPARENTE Y BASADA EN LOS MÉRITOS

La preselección debe ser motivada.

Las capacidades de los candidatos deben evaluarse en audiencias públicas.

Se debe procurar que la composición de la corte sea diversa.

Se deben recibir e investigar las objeciones contra candidatos.

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# Reflections on Mexico's national anti-corruption system

**Óscar Arredondo** *Researcher at FUNDAR, Centro de Análisis e Investigación (FUNDAR Center for Analysis and Research), Mexico City*

**T**ransparency International's Corruption Perceptions Index ranks Mexico 103rd out of 175 countries,<sup>1</sup> and of the 34 nations that make up the Organization for Economic Cooperation and Development (OECD), our country is considered the most corrupt. In recent years, these poor rankings have been borne out by scandals. The weakness of Mexico's institutions and legal framework has allowed corruption to permeate all structures and systems within the government to the point where corruption has become normalized. The phenomenon has become immensely complex, and its effects have an impact on all sectors of society.

The indications of corruption involve senior government officials, reaching as high as President Enrique Peña Nieto. On July 18, 2016, during the enactment of secondary laws regulating the National Anti-Corruption System (SNA), the president publicly apologized for his own apparent conflict of interest in view of the November 2014 revelation that a government contractor had granted a line of credit to his wife on preferential terms for the purchase of a property known as the "White House."

Corruption aggravates all of the country's problems and is an enormous obstacle to its development. It also undermines citizens' opportunities and the exercise of their constitutional rights. The democracy, justice, security, health,

education, and other indispensable elements that we need for a decent life cannot be guaranteed by a corrupt government. The State's inability to address or resolve the country's biggest problems is due in large measure to the fact that corruption is deeply rooted at all levels of government. Impunity is the fuel that feeds and exacerbates this phenomenon. The greater the impunity, the greater the corruption.

Rather than taking the comprehensive and multidisciplinary approach required to address corruption, the constitutional reform of May 2015 and the secondary laws emanating from it have focused thus far on the management, oversight, and monitoring of public spending, as well as on the strengthening of punitive and accountability mechanisms and authorities, principally in the administrative realm. This approach is useful as an initial step toward curtailing corruption in Mexico. Nevertheless, Congress must move to enact laws that combat other aspects of corruption, such as the abuse of power

in police agencies, the ties between politicians and organized crime, corruption in the electoral system, corruption in the criminal justice system, and all aspects of extortionate corruption, or as it is often called, low-level corruption.

During the 2012 electoral race, Peña Nieto, then the presidential candidate of the Institutional Revolutionary Party (Partido Revolucionario Institucional, PRI), spoke at a campaign event at the Ibero-American University in Mexico City. He expressed pride in the social repression that he had ordered in 2006, as governor of the state of Mexico, in the municipality of San Salvador Atenco, where state police violently confronted citizens who were protesting the expropriation of their land for the construction of an airport. Two people died in that confrontation, and 26 women reported being raped by state and municipal police. This speech garnered the collective repudiation of the university community, and later a video was leaked showing that the candidate ordered the investigation of

**The State's inability to address or resolve the country's biggest problems is due in large measure to the fact that corruption is deeply rooted at all levels of government**

the students who angrily ran him out of their university after this event.

In response, 132 students made a video in which they identified themselves as students of Ibero-American University. Most of the country's public and private school students joined the protest, and the election campaign ended in massive demonstrations of contempt throughout the country. Peña Nieto's inauguration on December 1, 2012, was held amid a climate of protest. The following day, the main political forces signed the "Pact for Mexico," an agreement that included a legislative agenda designed to maintain governability and accomplish the changes proposed during the campaign through an alliance of the country's three major political parties: the PRI, the Democratic Revolution Party (Partido de la Revolución Democrática, PRD), and the National Action Party (Partido Acción Nacional, PAN). One of the most important commitments of the Pact for Mexico was to promote reforms to the legal framework related to transparency, accountability, and the fight against corruption.

These anti-corruption reforms began to take shape in 2012, at the beginning of President Peña Nieto's administration. Now, four years later, we can say that the constitutional reform and the laws arising from it are the result of persistent pressure from a society that recognizes the urgency of taking forceful measures against corruption.

At the beginning of 2013, the PRI proposed a constitutional reform bill seeking to create an autonomous body, independent of the executive branch, to be called the National Anti-Corruption Commission.<sup>2</sup> The bill was passed by the Senate but was strongly criticized by organizations focused on transparency, accountability, and anti-corruption because of its clear technical and legal shortcomings. Later, given various dif-

**Nevertheless, neither the legal advances nor the resources for their implementation are as yet sufficient to break from the structures of corruption that are so firmly entrenched in the government**

ferences among the parties and in light of the high-profile state elections, the Pact for Mexico broke down, ending the prospects for creation of a National Anti-Corruption Commission.

The representatives in the lower chamber of Congress, rather than taking up the idea of a Commission again, considered different opinions and suggestions from civil society and academia and reflected on the importance of resolving the law's key limitations, particularly with respect to the proper oversight of public resources and the reliable administration of justice. Various initiatives were presented with the aim of creating a "system" rather than a single isolated authority.

While political forces were discussing creation of an anti-corruption system, two events took place that sent shock waves through Mexican society. The first happened on the night of September 26, 2014, when 43 students were forcibly disappeared by members of the police forces of the municipality of Iguala and the state of Guerrero; witnesses also attested to the participation of the Federal Police and the Army. The second incident was the White House scandal, which broke on November 9, 2014.

These events were decisive in turning public opinion in favor of anti-corruption constitutional reform. The House of Representatives decided to introduce a bill to the Plenary that incorporated not only the different suggestions made by political groups

represented in the legislature, but also various proposals and observations put forward by civil society organizations. The bill was passed by Congress at the end of February, and the constitutional reform took effect in May 2015.

The creation of a National Anti-Corruption System in the Mexican Constitution entailed construction of a new legal framework for the monitoring and oversight of public spending, the administration of justice in cases related to serious irregularities, and the establishment of civil and criminal liability. Legislative action took account of clear and compelling proposals from organized civil society and from an enormous number of citizens who backed the proposal to Congress through a Citizen Initiative for a General Law of Administrative Liabilities, more commonly known as "3 of 3 Law" (*Ley 3 de 3*). More than 630,000 signatures were gathered for this initiative, which was drafted and promoted by a group of organizations and academic institutions, with support from the business sector. The hundreds of thousands of signatories exerted the political pressure needed to demand an open parliamentary process in the pending establishment of the legal structure.

The constitutional reform creating the SNA was carried out through the enactment of laws, a process that took place through a plural and participatory congressional mechanism. Experts from civil society not only took on the enormous task of drafting and pro-

moting the content of “3 of 3 Law” but also joined working groups to create or amend eight other laws. From April to June 2016, various researchers and academics took part in discussion roundtables, debates, and forums. We issued opinions, and defended and incorporated the proposals arising from this plural and participatory exercise.

Nevertheless, neither the legal advances nor the resources for their implementation are as yet sufficient to break from the structures of corruption that are so firmly entrenched in the government. Those Mexicans who are the most prepared and committed to struggle toward this end must be recruited. It is essential to focus on mechanisms for the public selection and appointment of the people who will manage the SNA. Individual merit must be prioritized over political quotas and relationships. Professional capacity, honesty, and commitment must be the forces driving the paradigm shift that we hope for.

In short, the SNA was created as a coordinating body for the authorities involved: the judiciary, the agency

that guarantees transparency, the supreme audit institution, the executive branch office in charge of internal oversight, the Office of the Special Anti-Corruption Prosecutor, and a citizen participation committee that will need to be created in the coming months. The laws enacted were the General Law of Administrative Liabilities, the Oversight and Accountability Law, the Law of the National Anti-Corruption System, and the Organic Law of the Federal Court of Administrative Justice. In addition, amendments were made to the General Government Accounting Law, the Tax Coordination Law, the Organic Law of the Attorney General’s Office, the Federal Code of Criminal Procedure, and the Organic Law of the Federal Public Administration.

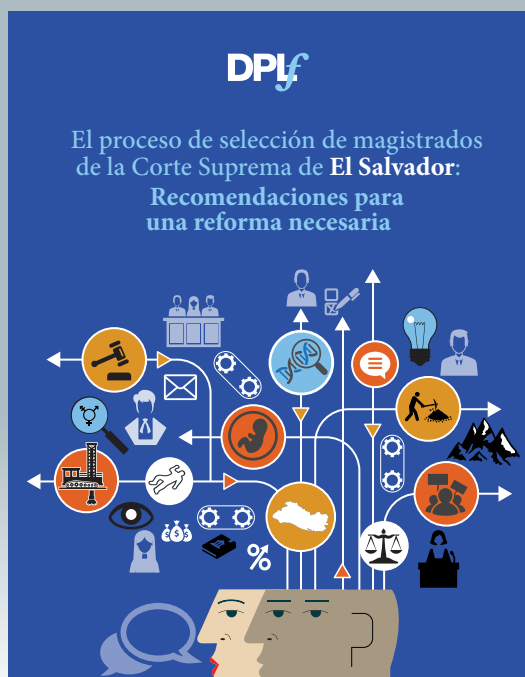
Much work remains to be done within the SNA. There is a legislative agenda that includes a number of other laws that need to be strengthened. Steps must be taken to create effective checks and controls that discourage corruption through the participation of society and institutions. Significant progress has

been made and should be celebrated, but continuous monitoring is needed to ensure that the implementation of the system allows it to function. Above all, it should be borne in mind that the constitutional reform and the secondary laws failed to include human rights on the anti-corruption agenda. That omission should be addressed through the advocacy work of human rights organizations, where there is still much to be done.

In the meantime, we can affirm that the system of impunity and corruption in Mexico, which is so harmful to the country’s society and institutions, is threatened by the conscious and dedicated participation of its citizens. ■

## NOTES

- <sup>1</sup> Transparency International, 2014 Corruption Perceptions Index, <http://www.transparency.org/cpi2014/results>.
- <sup>2</sup> On December 12, 2012, the Senate passed the constitutional reform bills that would create the National Anti-Corruption Commission, but they failed to pass in the House of Representatives.



## The process for the selection of Supreme Court justices in El Salvador

**B**uilding on previous reports on this subject, in 2016 the Due Process of Law Foundation published **The Process for the Selection of Supreme Court Justices in El Salvador: Recommendations for Necessary Reform** (in Spanish). With this contribution, DPLF seeks to promote greater reflection on urgently needed changes to the mechanism for the selection of Supreme Court justices in El Salvador, with the objective of bringing it into line with international standards on transparency, openness, and citizen participation.

# Energy reform in Mexico: Human rights setbacks

**Aroa de la Fuente** *Researcher at FUNDAR, Centro de Análisis e Investigación (FUNDAR Center for Analysis and Research), Mexico City, and coordinator of the Latin American Network on Extractive Industries (RLIE)*

**I**t has been three years since the constitutional reform on energy was enacted in Mexico in December 2013, supplemented by the amendment of its secondary laws in 2014. Alarmed by the implications of this reform, numerous social actors have raised their voices to condemn it, pointing to the likely repercussions for human rights.

Among other actions, and in view of the Mexican State's narrow-minded refusal to acknowledge this infringement, various organizations took part in a March 2015 hearing before the Inter-American Commission on Human Rights entitled "Energy Reform and Economic, Social, and Cultural Rights in Mexico."<sup>1</sup> The holding of this hearing signaled an acknowledgement that the legislative changes do indeed have consequences for human rights, and it allowed those speaking out on this issue to be heard.

As discussed in the publication *El sector de hidrocarburos en la Reforma Energética: Retrocesos y perspectivas* (The Oil and Gas Sector in Energy Reform: Setbacks and Perspectives),<sup>2</sup> one of the main issues identified was that at the same time the petroleum industry was privatized, it was declared to be "of public utility." This gives it priority over

any other activity undertaken in the territories and allows the State to force landowners, such as indigenous and peasant farming communities, to rent or sell their land to corporations—even for such harmful projects as fracking. This not only contravenes the State's human rights obligations but also entails legislating in favor of private interests while attempting to disguise it as a matter of public interest.

The government has already taken a number of steps to implement the reform. In August 2014, it granted oil and gas exploration and extraction concessions to *Petróleos Mexicanos* (Pemex) in different states of the country. These regions are inhabited by indigenous and peasant farming populations; however, there was no prior consultation, nor were the appropriate social impact assessments conducted, even though these measures are requirements under both international law and the recently enacted Oil and Gas Law.

We also have no knowledge of these procedures being carried out in the initial competitive bidding processes whereby contracts were awarded to private companies in 30 areas around the country. In fact, in the case of the

projects in shallow waters of the Gulf of Mexico, the Ministry of Energy stated that it was not necessary to perform social impact studies because the projects were located in the ocean.<sup>3</sup> This position, of course, is indefensible and ignores the adverse effects that coastal populations have been experiencing for years as a result of this activity.

These realities demonstrate that the authorities responsible for the energy sector lack commitment to the rights of the communities that are affected by the reform. They also confirm that the intent of the reform is to promote the activity of the oil and gas companies rather than the public interest or social welfare. Our actions, as members of civil society, are crucial to exposing and limiting these practices. ■

## NOTES

<sup>1</sup> "Reforma energética y derechos económicos, sociales y culturales en México," available in Spanish at [https://www.youtube.com/watch?v=t7e\\_b29L-c6o](https://www.youtube.com/watch?v=t7e_b29L-c6o).

<sup>2</sup> A. de la Fuente, J. C. Guerrero, E. del Pozo, and O. Arredondo, *El sector de hidrocarburos en la Reforma Energética: Retrocesos y perspectivas* (Mexico City: Fundar, 2016), <http://fundar.org.mx/el-sector-hidrocarburos-en-la-reforma-energetica-retrocesos-y-perspectivas/>

<sup>3</sup> Reply of the Ministry to request for information no. 0001800050015, filed by *CartoCrítica* in 2015.

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# Highly vulnerable groups

# Forms of violence against the press in Mexico:

## Payoffs, bullets, and criminalization

**Leopoldo Maldonado** *Protection and Defense Officer at ARTICLE 19, Mexico and Central America Office*

**D**uring the past decade, violence against the press in Mexico has continued in an upward spiral seemingly without end. In the framework of the so-called “war against drug trafficking,” which has caused hundreds of thousands of deaths and at least 26,000 disappearances, violence against the press appears to be viewed more as collateral damage than as a specific issue warranting profound analysis.

Such analysis is urgently needed. However, focusing on a single type of violence, that is, *political/physical violence*, with a one-dimensional cause that is the war on drugs, would deprive us of a deeper and all-encompassing reflection. In this article we set forth some additional lines of analysis that also take account of *economic violence and symbolic violence* resulting from the power struggles within interrelated fields, struggles that are conducive to most serious violations of human rights and the rights of journalists. Accordingly, we will provide a brief overview of the empirical situations in the different fields—political, economic, and symbolic—that give rise to these different types of violence.

### **Payoffs: economic violence**

There are many sources of economic violence against the press, but it is helpful



to focus on two: the discretionary allocation of government advertising and the instability of employment for journalists. The former can be considered an external cause, while the latter is endogenous to the media.

Government advertising in Mexico has been an efficient mechanism of subtle censorship. There has historically been a perverse relationship between media companies and governments that confers benefits on both. Government influence, previously exercised through a State monopoly on the sale of news-

print, is today manifested in the opaque and arbitrary provision of money as a reward or punishment for a given editorial line. The federal government spent 1.4 billion pesos (US\$700 million) on government advertising during the 2012–14 period.<sup>1</sup> In spite of a constitutional mandate ordering legislation on the issue since February 2014,<sup>2</sup> any attempt at regulation has been immediately halted by the media companies themselves.<sup>3</sup>

Nevertheless, the millions spent by public entities on government ad-

vertising do not result in improved working conditions for journalists. The case of Gregorio Jiménez, murdered in February 2014 in the state of Veracruz, revealed one of the greatest tragedies of Mexican journalism: the fact that many practice the profession in poverty, without the most basic employment benefits or employer support and protection. The slain journalist was paid 25 pesos per article—a little more than one US dollar. After his death, *Liberal del Sur*, one of the newspapers for which he had been working, denied having any employment relationship with Gregorio.

### **Bullets: Political or physical violence**

We cannot deny that physical violence and political violence are intimately connected, as the country's power structures—formal and informal, legal and illegal—require certain conditions of silencing to carry out their political and economic plans. Physical violence goes beyond the pathological behaviors of individuals or groups: it involves a struggle that plays out in specific places and bodies, through which the different powers-that-be attempt to subjugate, intimidate, and annihilate in order to reinforce their power and secure their control.

For the year 2015, ARTICLE 19 documented 397 assaults on journalists. During the first quarter of 2016, there were 218 reported assaults. By the end of October 2016, 10 murders had been documented, which is equal to one death every 26 days. From 2003 to the present, 23 journalists have reportedly disappeared. Contrary to the official narrative, the data show that over the last seven years nearly a majority of the attacks (49.7 percent) have been committed by State agents. This chilling fact confirms one of the most compelling observations of the Inter-American Commission on Human Rights (IACHR), which categorizes our

country as “one of the most dangerous countries in the world for journalists, excluding countries that are at war.”<sup>5</sup>

Of course, this violence is supported by official structures that guarantee that it will be met with impunity. This is reflected in a failed institutional response. In 2006, the Office of the Special Prosecutor for Crimes against Journalists was established at the federal level, and in 2010 it became the Office of the Special Prosecutor for Crimes against Freedom of Expression (FEADLE). According to the FEADLE's internal data, 798 preliminary investigations were opened between July 2010 and August 2016, resulting in 101 cases being brought before a judge<sup>6</sup> (12.65 percent), with just two convictions (0.25 percent). The inability of the State to eradicate impunity is clear—there was no conviction in 98 percent of cases overall—but the impunity in cases of crimes committed against journalists is even worse: as high as 99.75 percent.<sup>7</sup>

These figures reveal the total ineffectiveness of the FEADLE, which replicates and worsens the shortcomings of the justice administration apparatus. This is true despite the constitutional and legal framework that, since 2013, has allowed the federal investigative authority to take over the investigation of cases from local jurisdictions. In our experience, the FEADLE in practice takes a discretionary approach to exercising its authority to take over investigations, based on politics and pragmatism. In making this calculation, it most likely considers the potential effects on local actors of an eventual revelation of com-

licity or direct involvement by public servants as perpetrators in attacks on journalists. This can be inferred from the stubbornly high percentage of attacks on the press that are committed by agents of the State.

In addition, the federal Protection Mechanism for Human Rights Defenders and Journalists was created in 2012, following the Colombian model. Once again, an initiative promoted by civil society organizations in partnership with certain government actors resulted in a legal framework whose implementation was mismanaged and left enormous gaps. The mechanism is marred by shortcomings in the procedures designed to ensure rapid responses and effective measures for persons who request protection. More broadly, it is based on a reactive approach that lacks inter-institutional coordination between the national ombudsman and the FEADLE—which means that violence against the press persists.

In short, in spite of a robust legal framework, the government's responses remain fragmented and lack a comprehensive perspective that would encompass everything from prevention to the pursuit of justice, truth, and reparation. This absence of government coordination—whether intentional or not—is an additional factor in the victimization of journalists, and it intensifies the prevailing mistrust between citizens and the government. Ultimately, the current state of affairs serves the interests of various actors, both legal and illegal. Above all, it

**For the year 2015, ARTICLE 19 documented 397 assaults on journalists. During the first quarter of 2016, there were 218 reported assaults**

**The facile justification of the most atrocious crimes against journalists allows the State to take no action, with impunity as the end result**

serves to silence the press as it attempts to expose government corruption and the collusive relationships between criminal networks and public servants.

**Criminalization: Symbolic violence**

According to the French sociologist Pierre Bourdieu, in a symbolic conflict the objective is to impose the legitimate vision of the social world, that is, to arrogate the power to construct the world. Of course, in this struggle over construction of the meaning of reality, resources are not distributed equitably, and thus hegemony (consensus) is constructed around certain social practices.

The media play a leading role in the construction of meaning, which is disguised as common sense. In this way, they become a normalizing power. While the media's construction of representation across society is beyond the scope of this article, it is important to underscore the role they play in the representation of violence and its causes.

As part of a complex political and economic arrangement between the large media organizations and different levels of government, the violence perpetrated by criminal groups is explained as social pathology, while the violence of the State is uncritically celebrated and glorified.

In general, police news tends to reflect a simplistic perspective in

which defendants and victims alike are criminalized and reviled. Reflecting deep classist, racist, and sexist bias, the individuals being judged (victims and defendants) are cast as the creators of their own fate: wrong friends, wrong time, wrong place.

This narrative is widely applied to crimes against journalists, which may be publicly attributed to organized crime, bad journalistic practices, or even romantic relationships with criminals (in the case of female journalists). The facile justification of the most atrocious crimes against journalists allows the State to take no action, with impunity as the end result. In this way, the spiral of violence becomes unstoppable, and the idea that "the press eats its own" becomes real.

**Conclusion**

The dilemma facing the press in Mexico can be summed up using the criminal slang "payoffs or bullets" (plata o plomo). To this we can add the aspect of criminalization as a justification and explanation for the attacks. In this context, journalists in Mexico are caught in the crossfire between various forces: apathetic media entrepreneurs, ultraviolent criminal groups, and State security forces, all against a backdrop of stigmatizing news production and impunity.

An understanding of the violence in Mexico after ten years of war on crime

thus requires us to take a multifactorial perspective while still keeping in mind that there are common elements in the widespread violence. The attacks against the press have specific historical dynamics that lead to particular political, sociocultural, and economic relationships, which in turn give rise to the violence inherent in each area of dispute. Perhaps by better explaining the types of violence we can create the social will to eradicate them. ■

**NOTES**

- <sup>1</sup> R. Cabrera, "Sin precedente, gasto de publicidad oficial de Peña Nieto," *Aristegui Noticias*, August 26, 2015, <http://aristeguinoticias.com/2608/mexico/sin-precedente-gasto-de-publicidad-oficial-de-pena-nieto/>.
- <sup>2</sup> The political and electoral reform of February 2014 established a deadline for the federal Congress to enact a secondary law establishing the parameters of Article 134(8) of the Mexican Constitution. That deadline expired on April 30, 2014.
- <sup>3</sup> Fundar, Centro de Análisis e Investigación, "Baja California se opone a la regulación en publicidad oficial, promueve opacidad en gasto público," June 22, 2015, <http://fundar.org.mx/baja-california-se-opone-a-regulacion-de-publicidad-oficial-promueve-opacidad-en-gasto-publico/>.
- <sup>4</sup> See the following three reports from ARTICLE 19: Segundo Informe Trimestral 2016: Un periodista asesinado cada 22 días (August 4, 2016), <http://articulo19.org/en-mexico-se-asesina-a-un-periodista-cada-26-dias/>; M.I.E.D.O: Informe 2015 sobre violencia contra la prensa (March 18, 2016), <http://articulo19.org/m-i-e-d-o-informe-2015-sobre-violencia-contra-la-prensa/>; La desaparición y desaparición forzada de quienes ejercen la libertad de expresión en México (February 2016), <http://articulo19.org/mexico-el-pais-con-mas-periodistas-desaparecidos-23-caso-en-doce-anos/>.
- <sup>5</sup> IACHR, The Human Rights Situation in Mexico. OEA/Ser.L/V/II. Doc. 44/15, December 31, 2015.
- <sup>6</sup> This consists of sending the preliminary investigation to the criminal court judge for purposes of initiating the indictment process, as well as the admission and examination of evidence.
- <sup>7</sup> See statistical information from FEADLE, August 2016, at <http://www.gob.mx/pgr/acciones-y-programas/fiscalia-especial-para-la-atencion-de-delitos-cometidos-contra-la-libertad-de-expresion-18894>.



## DPLF files *Amicus Curiae* briefs in cases pending before Mexican courts on the right to free, prior, and informed consultation



Fuente: losangelespress.org

In late 2015 and during 2016, together with other human rights organizations and academic institutions, the Due Process of Law Foundation (DPLF) filed several *amicus curiae* briefs with Mexican courts in cases concerning the right to free, prior, and informed consultation of indigenous peoples.<sup>1</sup>

In October 2015, an *amicus curiae* brief was filed with the Supreme Court of Mexico **on behalf of Mayan communities affected by the release of genetically modified (GMO) soy in their territories**. The brief sought to contribute to the Supreme Court's decision on a number of *amparo* actions—petitions for a constitutional remedy—challenging a permit granted to the transnational corporation Monsanto. The permit allows the company to plant GMO soy without first engaging in free and informed consultation with the Mayan communities directly affected.

In June 2016, another *amicus curiae* brief was filed with the Seventh District Court of the State of Oaxaca in a **case related to the implementation of the Eólica del Sur wind energy project** and its impact on the Zapoteca indigenous people of Juchitán de Zaragoza. That case alleged a lack of proper consultation prior to the authorization of the wind project, which directly affects this indigenous community.

A third *amicus curiae* brief was filed in November 2016 with the First Court of the Twenty-First Circuit of the State of Guerrero, in the **adjudication of a writ of *amparo* filed by the Me'phaa community of San Miguel del Progreso**. The *amparo* challenges the issuance of Notice of Abandoned Mining Claim 02/2015 by the Mexican Ministry of the Economy, allowing private individuals to obtain licensing concessions for natural resources exploration and exploitation in ancestral territories of the indigenous community of San Miguel del Progreso.

The briefs were filed in these three cases to identify the international human rights law and comparative constitutional law standards on the applicable right to free, prior, and informed consultation and consent, as well as standards on the recognition of territorial rights of indigenous peoples applicable to the granting of concessions for natural resources exploration and exploitation projects.

The briefs have had favorable outcomes. In particular, in the first of the cases mentioned above, the Supreme Court suspended the planting of GMO soy in Mayan communities in the states of Yucatán and Campeche until free, prior, and informed consultation is conducted with those communities.

<sup>1</sup> To access these documents see: <http://dplf.org/es/actividades>

# Progress and challenges in access to justice for migrant populations

**Ana Lorena Delgadillo** *Director of Fundación para la Justicia y el Estado Democrático de Derecho (FJEDD, Foundation for Justice and Rule of Law)*

**T**he Central America–Mexico–United States migration route is known as one of the world’s most dangerous. It is not known exactly how many migrants have disappeared along the way, but there are hundreds of relatives who have been searching for their loved ones for years. As a result, relatives of disappeared migrants have organized committees to press, from their countries of origin, for the search for their family members. These committees have pioneered the systematic documentation of cases and are the most important and closest support structure for families in Central America. They have taught the rest of civil society how to establish transnational mechanisms to address this phenomenon.

## **Insufficiency of national measures as a means to address regional problems**

When a Central American family is faced with the disappearance of a migrant in Mexico, they are told to report the case to the diplomatic institutions of their home country, which refer the case to Mexico through diplomatic channels. The matter is then referred to the consul of the migrant’s country in Mexico. In the experience of the Foundation for Justice and Rule of Law, these cases are handled exclusively through diplomatic channels, often without involving the criminal authorities that have jurisdiction to investigate in Mexico. This leaves these cases in a state of uncertainty and impunity. The process fails to provide an effective response for families who, located in another country and facing substantial financial constraints, cannot easily file a complaint in Mexico.

The countries involved have not organized effectively to meet the needs of the families. Some, like Guatemala, have opened investigations in their local Prosecutor’s Office, which is a step in the right direction. However, when they request that proceedings be conducted in Mexico, they must deal with diplomatic and criminal cooperation agreements that are slow and bureaucratic, with no guarantee that the information will reach the country that should be conducting the necessary proceedings. Given this situation, civil society has been promoting actions that can provide a transnational response to a phenomenon that by nature goes beyond any one country’s borders.

## **Transnational measures undertaken**

### **Forensic data bank**

The forensic data banks started by the Argentine Forensic Anthropology Team (EAAF) promoted flexible and participatory ways of resolving a transnational problem through

the exchange of forensic data. The first hurdle was to ensure that the countries of origin had information on their citizens who had disappeared, died, or been murdered in transit so they could later share information with morgues (in the transit or destination country) that held unidentified remains. The governmental and nongovernmental design of the data banks allows for greater transparency and inclusion, since the family groups are involved in their administration and monitoring and serve as the best oversight mechanism. At this time, there are data banks in Honduras, El Salvador, and the Mexican states of Chiapas and Oaxaca, as well as a detailed documentation effort in Guatemala. The local organization plan allows for a degree of order and control over the data that will facilitate its availability when broader national or regional information sharing is needed.

### **The Forensic Commission to identify remains from three massacres involving migrant populations in Mexico**

As part of an effort to facilitate mass exchanges of forensic information between various countries, the Forensic Commission was created in 2013 within the Office of the Attorney General of the Republic (PGR) of Mexico. Its task was to identify remains located from the massacres of 72 migrants in Mexico<sup>1</sup> in 2010, 193 sets of remains found in mass graves in 2011, and 49 torsos located in 2012. Experts from EAAF and the PGR work jointly on this Commission. The agreement signed with 11 regional organizations has led to progress on a diverse coordination effort among governmental and nongovernmental organizations (NGOs). The challenges are daunting, given an institutional culture in which processes do not always flow smoothly. But there are also lessons learned and best practices that make it possible to move forward with a more regional focus and with the trust of the families.

### The transnational mechanism for access to justice

Because most of the crimes are committed in Mexico and the families or victims who can report them are in other countries, civil society organizations suggested that Mexico's PGR should adopt a mechanism that uses those countries' embassies as valid legal forums for reporting crimes that occur in Mexico and for carrying out monitoring, support, and reparation actions. Toward this end, the Mexican Foreign Search and Investigation Support Mechanism was established in December 2014.<sup>2</sup> Civil society also proposed the need for a department to centralize reports of crimes committed against the migrant population so the issue can be studied to identify patterns that go beyond individual cases. Although it is a first step, the Foreign Support Mechanism must be able to function regularly, with qualified staff in the countries of origin and destination to assist victims who wish to file a complaint, rather than depending on Mexico-based staff to go to the embassies to receive reports.

### Involvement of the Inter-American Human Rights System and United Nations mechanisms

The Office of the Rapporteur on the Rights of Migrants of the Inter-American Commission on Human Rights (IACHR),<sup>3</sup> as well as mechanisms of the United Nations, have highlighted the need for countries to effectively document cases of disappeared migrants and to work together to identify remains and ensure access to justice. The hearings held before the IACHR helped provide civil society and victims with another forum for dialogue, as well as for reporting violations and reaching consensus.

### Pending issues for effective access to justice

The work of the family groups is always at the forefront, and their participation in any justice mechanism is essential. Existing efforts that involve victims, NGOs, and governments should be strengthened, extended, and replicated, as in the case of the Forensic Commission.

A transnational mechanism is only possible if efforts in the responsible countries are consistent. There can be no international exchange of forensic data if the countries whose migrants have disappeared do not have organized, updated, and accessible local information, or if the countries in possession of human remains—like Guatemala, Mexico, or the United States—lack a database on those remains that can be shared.

In view of the challenges presented by a hardening of immigration policy in the United States, Mexico and Central America must reconsider their strategies for the protection of migrants, especially in the face of a potential increase in the deportation of undocumented migrants. While it is important to address this issue, we should insist

that it not be the only focus of protection, especially given the reality that migrants attempting to reach the United States continue to be subjected to disappearance, kidnapping, sexual violence, murder, and extrajudicial execution in Mexico. There are still no comprehensive protection and prevention plans in Mexico for this population; nor have the countries of Central America joined forces to demand that Mexico implement better measures for the prevention and investigation of crimes.

Effective measures are needed to protect migrants in transit, and the transnational mechanism must be strengthened. Mexican embassies are not prepared to receive complaints of crimes committed in Mexico, and they lack both the staff and the protocols to ensure access to justice, searches, punishment, and the reparation of harm.

Countries should review their agreements for cooperation in criminal matters, since the existing agreements—at least those between Mexico and Guatemala, El Salvador, and Honduras—result in slow, bureaucratic proceedings, with little involvement by families and organizations.

The Inter-American and universal human rights systems were forceful in making their recommendations to Mexico. Nevertheless, we still do not have precautionary measures that include several countries with different obligations, nor has it been possible to hold hearings with various countries to address issues of protection and access to justice. Reports by the rapporteurs of the Inter-American System and the United Nations, when they discuss migration, disappearance, or extrajudicial execution, continue to have a national rather than a regional focus.

International shifts in migration policy force us to see the defense of individual rights through a different lens. Hopefully, the challenges we face will be resolved with creativity and responsibility, based on the defense of persons rather than of institutions or countries. ■

### NOTES

<sup>1</sup> The declaration is at [http://www.dof.gob.mx/nota\\_detalle.php?codigo=5312887&fecha=04/09/2013](http://www.dof.gob.mx/nota_detalle.php?codigo=5312887&fecha=04/09/2013).

<sup>2</sup> The declaration is at [http://www.dof.gob.mx/nota\\_detalle.php?codigo=5420681&fecha=18/12/2015](http://www.dof.gob.mx/nota_detalle.php?codigo=5420681&fecha=18/12/2015).

<sup>3</sup> IACHR, Human Rights of Migrants and Other Persons in the Context of Human Mobility in Mexico, OEA/Ser. L/V/II, Doc. 48/13, December 30, 2013, recommendations 27 and 36–39. Although this report is about Mexico, it makes recommendations to the countries of the region that we consider important.

<sup>4</sup> See, for example, United Nations Human Rights Council, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Christof Heyns, Addendum: Mission to Mexico, A/HRC/26/36/Add.1, April 28, 2014, paras. 110 and 113; and United Nations Committee on Enforced Disappearances, Concluding Observations on the Report Submitted by Mexico under Article 29, Paragraph 1, of the Convention, CED/C/MEX/CO/1, March 5, 2015, para. 24.

## DPLF and Misereor coordinate meeting with organizations from Central America, Mexico, and the Dominican Republic on **business and human rights**



Workshop participants during one of the sessions

From November 7 to 10, 2016, a workshop was held in Mexico City on **the obligations of corporations in the context of large-scale energy, infrastructure, and natural resources extraction projects in Latin America**. The workshop was open to members of organizations from Guatemala, El Salvador, Honduras, the Dominican Republic, and Mexico who had participated for the preceding six months in an online course offered by Misereor (the German Catholic Bishops' Organization for Development) with the support of DPLF.

Unlike prior versions of the course and the workshop, priority this time was given to having course participants share their experiences, successful cases, obstacles, and lessons learned from

their strategies to defend territory against human rights violations committed by transnational corporations. Specific legal defense cases and community-strengthening strategies in each of the five countries were presented during the workshop. Participants discussed those strategies and the results obtained, noting differences and similarities between the various experiences. Most importantly, the workshop created a forum for dialogue about the potential impact of an appropriate strategy for denouncing violations committed by transnational corporations. It also helped identify future steps that the participants can take individually in their own countries and as a network in partnership with organizations from other countries.

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# From the states

Nuevo León Chihuahua Coahuila Jalisco Yucatán

# Nuevo León Public opinion rules, but does not [should not] govern<sup>1</sup>

**Sister Consuelo Morales** *Founder of Ciudadanos en Apoyo a los Derechos Humanos (CADHAC, Citizens in Support of Human Rights)*

**Ana Claudia Martínez** *Former Executive Director of CADHAC*

**M**exico's New Criminal Justice System (Nuevo Sistema de Justicia Penal, NSJP) has been subject to debate from the enactment of the reforms in 2008 to its current operation throughout the country. The debate has addressed nearly all aspects of the reform, including the rights of victims, the work of supervisory judges, the recording of detentions, and the most basic human rights of criminal defendants.

This article considers the last of these issues, specifically in the state of Nuevo León. For some months now the highest-ranking authorities in the state have encouraged public opinion to challenge the legitimacy of the rights of criminal defendants, citing supposed shortcomings in the NSJP that result in their release from custody.<sup>2</sup> In our opinion, this is a faulty approach to the problem of impunity. When impunity is attributed to human rights, it makes respect for human rights look like an obstacle to justice when in fact it should be viewed as the only way forward.

This article aims to shed light on the situation in Nuevo León and to show how the statements of local authorities continue to mislead public opinion. We first provide brief background on the reforms enacted by the NSJP and also explain what we mean by public opinion. We then address the debate that has taken place in Nuevo León since the beginning of 2016 in relation to the NSJP and the human rights of

criminal defendants. Finally, we provide our reflection on the matter.

## The NSJP and the concept of public opinion

In 2008, the Mexican legislature, known as the Congress of the Union, passed several amendments to the Federal Constitution aimed at reforming the criminal justice system. The purpose of the changes was to respond to society's demand for a fair criminal justice system that provides legal tools to defendants, to the *Ministerio Público*, and to victims to enable them to assert their respective arguments, so that judicial processes can be conducted in a neutral arena.<sup>3</sup> There was—and still is—a feeling that our system was deficient and failed to guarantee the rights of either defendants or victims.

The changes required, among other things, that there be an organic separation between the judge, the accuser, and the defender (accusatorial system); that the main proceedings of the case be conducted verbally (orality); that the judge be the one to receive the evidence and hear the arguments that provide the basis for his or her opinion (immediacy); that arguments and evidence be presented by the parties under equal conditions and assessed by an impartial judge (contradiction); that proceedings, in general,<sup>4</sup> be open to the public, which lends greater transparency to criminal proceedings (openness); that criminal case processing times be

reduced (concentration); and that the procedural stages follow one another as promptly as possible (continuity).<sup>5</sup>

Although there are other provisions as well, all of them seek substantive and procedural changes to the rules of the game with a view to ensuring unconditional respect for the human rights of the individuals involved in the judicial process.

Touching briefly on the concept of public opinion: According to the Royal Spanish Academy, an opinion is the judgment or assessment of something or someone. According to Kimball Young,<sup>6</sup> an opinion goes beyond a mere notion or impression but is less solid than positive knowledge based on adequate evidence. What, then, do we mean by public opinion?

There are many definitions, but in general we can say that public opinion is produced when individual processes of opinion formation, expressed publicly, give rise to collective processes of public reflection, which in turn may end up defining the popular will.<sup>7</sup> In some cases this may later be expressed through the work of the legislative body.<sup>8</sup>

## The debate in Nuevo León

In February 2016 two articles were published that set off a media debate on the actions of the Superior Court of Justice of Nuevo León. The Court's decisions were attacked, and the Court attempted to justify them. The articles discussed acquittals handed down by judges with

respect to persons being prosecuted for serious crimes such as murder, kidnapping, and rape. The headlines of the articles were “Builder’s 4 Killers Acquitted” and “They Kidnap, They Rape, They Are Convicted and Acquitted,” both published in *El Norte*, the state’s most widely circulated newspaper.<sup>9</sup> The acquittals were based on due process violations concerning, among other issues, prolonged unwarranted detentions, the admission of evidence obtained during preliminary detention, and the taking of statements from defendants without the presence of their defense attorneys.

There were many reactions to these articles, but they varied little. Some organizations<sup>10</sup> and civil servants from the executive and legislative branches spoke out against the decisions, asserting that it should not have been possible for a judge to release *criminals* from custody, whether or not this was called for by law.<sup>11</sup> They thought it was worse still that the chief justice of the Superior Court appeared publicly to explain the legal basis for the decisions,<sup>12</sup> as this was seen to signal a lack of commitment to the matter.<sup>13</sup> The chief justice was urged to make a decision: he was either on the side of the victims or on the side of criminals.<sup>14</sup> Critics also declared that the appropriate reforms would be made to the NSJP so that “these kinds of cases will not happen,”<sup>15</sup> and that human rights were technicalities that could not take priority over the idea of justice or the rights of the victims. There were also statements from alleged sources within the judiciary who maintained that with the criteria of legality being applied, the prisons of Nuevo León would end up “empty.”<sup>16</sup>

In response to these criticisms, the Superior Court of Justice published a study examining 624 court judgments, orders, and decisions. The report explained the trends in releases from custody and the reasons for ordering them, with the objective of identifying “the

**This is a faulty approach to the problem of impunity. When impunity is attributed to human rights, it makes respect for human rights look like an obstacle to justice**

legal criteria applied most frequently.”<sup>17</sup> Based on this document, the municipal authorities of the metropolitan area of Monterrey and the executive branch of the state of Nuevo León indicated that they would hold meetings in order to reach “agreements” on the application of the NSJP.<sup>18</sup> Nevertheless, in spite of the meetings, the stream of public commentary—most of it negative—continued.<sup>19</sup>

### Final reflection

There is no doubt that Mexico has a serious impunity problem. Nevertheless, we believe that prevailing public opinion about the rights of criminal defendants, considering their rights to be obstacles to justice, and about the NSJP, considering it to favor only criminals, is erroneous. It is even more so if these two factors are held to be triggers for impunity.

This opinion arises from a desperate citizenry that wants to know why crime rates in Mexico have not gone down, and why the likelihood that reporting a crime will result in an effective conviction is nearly zero. The situation appears even worse if we look at the number of victims who actually obtain redress for the harm. Nevertheless, these circumstances do not justify the public’s opinion on the matter, much less the statements by authorities that encourage these views.

It would appear that one of the most important objectives that motivated the NSJP reform, unconditional respect for the human rights of persons involved in judicial cases, has been forgotten. We say this because the releases from

custody that have been called into question were based on violations of the defendants’ human rights, which means that the human rights of those persons are in fact being protected. In other words, if a person is deprived of liberty without sufficient evidence, he or she will be released; or if the evidence used to prove the defendant’s guilt was illegally obtained, it will be thrown out, resulting in release. And this is exactly what is happening in Nuevo León.

Human rights are not technicalities. Human rights are the concrete manifestation of individual dignity, and this is what makes all of us equal. It is therefore impossible to maintain that the human rights of victims rank higher than the human rights of criminal defendants. To do so would mean falling prey to the same ideologies that led humanity to justify slavery at a particular time in history, despite the passage of time and the evolution of the human thought process.

Contrary to what state and municipal executive branch authorities, as well as some legislators, have been asserting, the Superior Court has met one of the objectives behind the reform of the criminal justice system, and in so doing has protected the most basic human rights of individuals subject to criminal prosecution.

Although public opinion points in another direction, it should not be allowed to determine the actions of the authorities of any branch of government. There is a constitutional mandate to promote human rights, which these

**Human rights are not technicalities. Human rights are the concrete manifestation of individual dignity...**

authorities have not fulfilled; rather, they have fueled a campaign to discredit persons who have been deprived of their liberty, the judges who have made decisions seeking to protect human rights, and the individuals they have called “human rights fanatics.”

So long as these authorities do not publicly change their stance and openly defend the human rights of all of the state’s inhabitants, the general public will continue to resist the proper implementation of the NSJP. Worse yet, the NSJP will encounter resistance from legal practitioners working in the new system, particularly the staff of the State Office of the Public Prosecutor and other civil servants responsible for enforcing the public safety laws. They appear not to understand that the human rights violations they commit will not continue to be an open secret, as they have until now, but will become the central argument of the state’s criminal litigants whenever these atrocities occur. ■

**NOTES**

- <sup>1</sup> See J. Habermas, *Historia y crítica de la opinión pública: La transformación estructural de la vida pública* (Barcelona: Gustavo Gili, 1990), p. 263. The English edition of this work is *The Structural Transformation of the Public Sphere* (Cambridge, UK: Polity Press, 1989). Both editions are translations of the original work published in German in 1962 as *Strukturwandel der Öffentlichkeit*.
- <sup>2</sup> See, e.g., C. Jiménez, “Por un tecnicismo sueltan a asesino de la hija de Nelson Vargas,” *La Razón*, April 19, 2016, p. 19; V. Fuentes and A. Baranda, “Liberan a criminales debido a tecnicismos,” *Reforma*, April 20, 2016; E. Ochoa, “Nuevo sistema de justicia penal protege a otra delincuente,” *El Horizonte*, April 19, 2016.
- <sup>3</sup> See the statement of reasons for the amendments to the Federal Constitution on this matter. Ministry of Parliamentary Services, *Reforma constitucional en materia de justicia penal y seguridad pública* (Mexico City, 2008), <http://www.diputados.gob.mx/sedia/biblio/archivo/SAD-07-08.pdf>.
- <sup>4</sup> There are exceptions.
- <sup>5</sup> S. García, *La reforma penal constitucional* (Mexico: Porrúa, 2010), pp. 109–26.
- <sup>6</sup> K. Young, *La opinión pública y la propaganda* (Mexico: Paidós, 1986), pp. 10–11.
- <sup>7</sup> See J. J. Rousseau, *Discurso sobre las ciencias y las artes* (Buenos Aires: Aguilar, 1980), p. 46.
- <sup>8</sup> In addition, reasoning and prior instruction on the issue or matter about which the opinion is formed is also a recurring element in the definition of public opinion. That is, not just any expression of ideas can become public opinion, as prior informed reflection is necessary. On this point, see Habermas, *Historia y crítica de la opinión pública*.
- <sup>9</sup> L. A. Rivera, “Absuelven a 4 homicidas de constructor,” *El Norte*, February 3, 2016; L. A. Rivera, “Plagian, violan, los sentencian y los absuelven,” *El Norte*, February 10, 2016.

- <sup>10</sup> See, e.g., D. Flores, Y. Chio, and P. Martínez, “Hay injusticia para víctimas,” *El Norte*, February 7, 2016.
- <sup>11</sup> See, e.g., “Cuestiona Gobernador a Juez: ‘Es increíble, no tiene corazón,’” *El Norte*, February 7, 2016.
- <sup>12</sup> G. Talavera, “Atribuyen liberaciones a malas prácticas,” *El Norte*, February 8, 2016.
- <sup>13</sup> R. Cantú, “Declaran ‘non grato’ a presidente de TSJ,” *El Norte*, February 10, 2016.
- <sup>14</sup> I. Hernández and J. Tapia, “Alcaldes exigen a jueces frenar liberación de delincuentes,” *El Horizonte*, March 11, 2016, 11. Even some mayors in the metropolitan area of Monterrey, Nuevo León, levied insults at the chief justice of the Superior Court. See, e.g., C. Rojas, “Estalla Mauricio Fernández contra el Poder Judicial en NL,” *7Info*, February 25, 2016, p. 25, <http://www.info7.mx/seccion/estalla-mauricio-fernandez-contra-el-poder-judicial-en-nl/1565298/>.
- <sup>15</sup> See, e.g., M. García, “Analizarán ley para impedir liberaciones,” *El Norte*, February 10, 2016.
- <sup>16</sup> L. Rivera and G. Talavera, “Penales se van a vaciar,” *El Norte*, February 8, 2016.
- <sup>17</sup> Judiciary of the State of Nuevo León, *Análisis de sentencias y detenciones en el sistema de justicia penal del estado de Nuevo León: Identificación de los criterios de mayor incidencia* (Monterrey, 2016), [https://www.pjenl.gob.mx/pdf/Analisis-de-sentencias-y-detenciones-en-el-sistema\\_de-justicia-penal-del-estado-de-Nuevo-Leon.pdf](https://www.pjenl.gob.mx/pdf/Analisis-de-sentencias-y-detenciones-en-el-sistema_de-justicia-penal-del-estado-de-Nuevo-Leon.pdf).
- <sup>18</sup> See, e.g., P. Martínez, A. Dávila, and M. Córdova, “Ahora buscan con TSJ evitar liberaciones,” *El Norte*, April 2, 2016; P. Martínez and D. Reyes, “Revisarán con Ediles protocolos de captura,” *El Norte*, April 6, 2016.
- <sup>19</sup> See, e.g., F. Ares, “Colocará San Pedro cámaras a policías,” *El Norte*, April 11, 2016; D. Reyes and P. Martínez, “Alertan por posible liberación de 2 mil reos de Nuevo León,” *SDP Noticias*, August 3, 2016.
- <sup>20</sup> According to the 2015 National Survey on Victimization and Perception of Public Safety, the “hidden figure,” that is, the proportion of crimes that are unreported or that do not lead to a preliminary investigation, was 93.7 percent at the national level during 2015, while in 2014 it was 92.8 percent, which means that all of these crimes have gone unpunished. See Instituto Nacional de Estadística y Geografía, Encuesta Nacional de Victimización y Percepción sobre Seguridad Pública (ENVIPE) 2016, Boletín de prensa 399/16, September 27, 2016, [http://www.inegi.org.mx/saladeprensa/boletines/2016/especiales/especiales2016\\_09\\_04.pdf](http://www.inegi.org.mx/saladeprensa/boletines/2016/especiales/especiales2016_09_04.pdf)



# The Chihuahua Citizens' Alliance

**Lucha Castro** *Human rights defender and founder of the Centro de Derechos Humanos de las Mujeres (CEDEHM, Women's Human Rights Center)*

**M**y country is falling apart. In the state of Chihuahua, a weak link in global capitalism, we survive in a society made vulnerable, assaulted by the social, economic, human safety, and environmental crises caused by neoliberalism and free trade. The maquiladora assembly plant model of industrialization has reduced women to the status of a disposable workforce.

Chihuahua is the land that brought attention to femicide and where, despite that visibility, more than two thousand women have been murdered since 1993. It is the number one state in the country for reported rapes, suicides, and teen pregnancies, and fourth in domestic violence. Chihuahua is the most dangerous place to defend human rights: the state's five main cities are among the worst 15 cities to be a woman in Mexico, and 30 percent of the precautionary measures issued by the Inter-American Commission on Human Rights pertain to the state of Chihuahua.

In my state, women in rural communities are forced to live amid armed men, including soldiers, police officers, and hit men. Prisoners of terror, they see their sons kidnapped and forced to join criminal organizations, and their daughters carried off as spoils of war. The Tarahumara indigenous people are massacred for refusing to turn their lands over to the narcos, or drugrunners. In my state, children play at being assassins.

**Chihuahua is an emblematic case that can pave the way and serve as an example of how to recover the dignity of a people by breaking the pact of impunity**

The war against drug trafficking has become a war against the civilian population. We have attained the highest murder rate in the world, with 149 homicides per 100,000 inhabitants in 2010. The toll—10,000 orphans, 230,000 displaced persons, and some 100,000 jobs lost—has meant only suffering for women, who have lost their husbands, fathers, and sons in a war that was not directed against them. Many households have lost the family's main breadwinner.

Former governor César Duarte left behind a failed, criminal, and bankrupt state, with previously unimaginable levels of corruption, a debt of 55 billion pesos, and expenditures of 2.7 billion pesos to control the communications media, compromising future revenue until 2044. We are in a financial emergency. Among many other things, there is a shortage of medicines in public hospitals, and police vehicles are left without gasoline. In view of this unprecedented crisis, we human rights defenders have vowed to cure the historical wounds of our abused

and humiliated people. Accordingly, we decided to form the Chihuahua Citizens' Alliance (Alianza Ciudadana por Chihuahua), an ethical alternative to assist the new administration of Javier Corral and rupture the pact of impunity and political corruption that is eating away at the state.

This is an unprecedented commitment to institutions, the rule of law, and justice. Chihuahua is an emblematic case that can pave the way and serve as an example of how to recover the dignity of a people by breaking the pact of impunity. I made the decision to be part of this history and to join the team that is investigating the corruption. I hold onto the hope that, in the words of Eduardo Galeano, "many small people, in small places, doing small things can change the world." I make that commitment, and with the vision of respect for human rights, I raise my hand to say "here I am," with my personal history as a pledge. Let us move forward together to end the corruption that is destroying my country. ■

# Model for the participation of relatives of disappeared persons in actions of the government of Coahuila, Mexico

**Michael Chamberlin** *Assistant Director of the Diocesano para los Derechos Humanos Fray Juan de Larios (Fray Juan de Larios Diocesan Center for Human Rights), Saltillo, Coahuila*

The state of Coahuila, in northern Mexico, borders on Texas in the United States. It is one of the states that has been plagued by criminal violence and serious human rights abuses within the larger context of the war on drugs over the past ten years. One of the costs of this cycle of violence that has affected the entire country has been the disappearance of persons. According to data from the Coahuila State Attorney General's Office, there have been 1,790 investigations and some 1,830 victims. However, the actual numbers are higher if we consider that 93 percent of kidnappings—including those where the victims have disappeared—go unreported.

Throughout 2009, families from Coahuila and other parts of the country began to come to the Fray Juan de Larios Diocesan Center for Human Rights to seek support in locating their disappeared relatives. With assistance from the Fray Juan Center, United Forces for Our Disappeared in Coahuila (*Fuerzas Unidas por Nuestros Desaparecidos en Coahuila, FUUNDEC*) was established on December 19 of that year. Consisting of 120 families at present, it works to pressure the authorities to search for the disappeared and investigate these cases.

Various efforts to engage in dialogue with the authorities at both levels of government, state and federal, were undertaken, but with no substantive

**The Autonomous Working Group (GAT) [is] responsible for coming up with proposals for compliance with the recommendations of the United Nations Working Group on Enforced or Involuntary Disappearances**

outcomes in the first few years. It was not until 2013 that FUUNDEC signed an agreement with the recently elected governor, Rubén Moreira, to establish an Autonomous Working Group (GAT) responsible for coming up with proposals for compliance with the recommendations of the United Nations Working Group on Enforced or Involuntary Disappearances. These compliance measures, if agreed to, would be binding on the government. The working group is composed of three representatives, one from civil society, one from the Office of the High Commissioner for Human Rights in Mexico, and one appointed by the governor—in this case the director of the School of Law of the University of Coahuila.

This model of dialogue between victims and the government has, in three years, resulted in a decree creating the Comprehensive Services Program for Relatives of Disappeared Persons (*PROFADE*); amendments to the state Constitution to prohibit the disappearance of persons, and to the Criminal

Code to create the offense of disappearance consistent with the international Convention for the Protection of All Persons from Enforced Disappearance; the Law on the Declaration of Absence by Disappearance, which recognizes the rights of disappeared persons and their relatives; amendment of the Law of the Office of the Attorney General to specialize the Office of the Deputy Attorney General for Investigation and create the Search Unit; and, recently, the creation of the Law on the Location, Recovery, and Forensic Identification of Persons.

There is undoubtedly much more to be done. From the point of view of the families, the greatest accomplishment would be to have their disappeared relatives returned to them and to obtain truth and justice. Nevertheless, the achievements thus far are unparalleled in Mexico in terms of quantity and quality, and we believe that the model can be useful in other places because it combines legitimacy, credibility, and technical and legal knowledge with political will. ■

# Torture in Jalisco: Perpetual impunity

**César Pérez** Executive Director of the Centro de Justicia para la Paz y el Desarrollo (CEPAD, Justice Center for Peace and Development)

Without a doubt, Jalisco is about mariachis, horsemanship, and tequila—symbols that identify Mexico to the world. The state is also known for its majority Catholic and conservative population, for its leading role in the Cristero War (1926–29),<sup>1</sup> and for being an electoral bastion of the right-wing National Action Party (PAN) since the party's founding in 1939. Despite this historical conservatism, the country's most important urban guerrilla group during the so-called Dirty War (1965–84),<sup>2</sup> the September 23 Communist League, was founded on March 15, 1973, in the city of Guadalajara, the capital of Jalisco.

Throughout the turbulent history of Jalisco, one common thread continues to this day: the corruption and impunity of state agents. Cases of torture and forced disappearance intensified during the first decade and a half of the twenty-first century, albeit for other reasons, no longer as a method for combating an insurgency.

From its entry into force in 1993 until its repeal in April 2015, the State Law to Prevent and Punish Torture was never enforced. During this period, there was not a single case or record of that law being enforced against investigating prosecutors or police of the Office of the Public Prosecutor of Jalisco (FGJ)—formerly the Jalisco State Attorney General's Office (PGJ)—or any other police forces or personnel assigned to the state penitentiary system. It was

**The fact that state agents act with impunity requires us to engage in creative impact litigation in order to guarantee and protect the physical and emotional well-being of victims**

not even applied at the investigative stage, let alone in the prosecution or conviction of any defendant before a court of law. After new anti-torture legislation took effect in May 2015, there were 1,182 recorded complaints alleging serious human rights violations between 2000 and May 2016.<sup>3</sup>

It was leaked to some media outlets that in 2015 two municipal police officers had been punished for torturing a young man, resulting in his death. In spite of the state prohibition against inflicting torture on detainees, arising from both international obligations and the 2011 constitutional reform on human rights, the responsibility of the state by action, omission, and acquiescence, which allowed this scourge to remain unpunished in Jalisco, was clear. This included inaction by the government human rights body, which did little or nothing to prevent, investigate, punish, and redress the harm to the surviving victims and their families.

As nongovernmental human rights organizations, we face a major challenge in working to change the status quo. Meanwhile, the fact that state agents are able to act with impunity requires us

to engage in creative impact litigation in order to guarantee and protect the physical and emotional well-being of victims and their relatives as long as conditions do not exist for filing criminal complaints against the direct perpetrators and masterminds. ■

## NOTES

<sup>1</sup> The Cristero War, led by the government of Plutarco Elías Calles and the Catholic hierarchy, was one of the most terrible civil wars in twentieth-century Mexico. Perhaps the most complete account of this bloody episode is the book authored by J. Meyer, *La Cristiada: La guerra de los cristeros* (Mexico: FCE/CLIO, 2007).

<sup>2</sup> "In the 1960s, '70s, and '80s in Guadalajara, the torture to which both innocent civilians and armed militants were subjected by local and federal police and by the Mexican Army, and the places where it was carried out, were an open secret. The accounts of survivors leave no doubt that torture was tolerated and ordered by the highest-ranking authorities of Jalisco and of the country, as verified by the poorly engineered Special Prosecutor for Social and Political Movements of the Past (FEM-OSPP) in its historical report." Centro de Justicia para la Paz y el Desarrollo, *Análisis de la Tortura en Jalisco 2000–2009* (2010), p. 9.

<sup>3</sup> The figures were published in CEPAD's *Análisis de la Tortura en Jalisco 2000–2009* (ibid.) and in the local newspaper *El Informador*, <http://www.informador.com.mx/jalisco/2016/664045/6/justifican-tendencia-de-cifras-de-tortura-por-mayor-difusion.htm>

# Yucatán is more than Cancún

**David Lovatón Palacios** *Professor at the Universidad Católica del Perú and Consultant to DPLF*

**T**he Yucatán Peninsula in Mexico is world-renowned for its idyllic beaches and resorts, including Cancún and the Mayan Riviera, where millions of Europeans, North Americans, Mexicans, Brazilians, and Asians go to relax surrounded by white sand, blue sea, cenotes (natural wells), and stunning archeological sites. It is undoubtedly one of the parts of the world that most resembles paradise. This is why, at the thirteenth meeting of the Conference of the Parties (COP 13) to the Convention on Biological Diversity, held in Cancún in December 2016, President Enrique Peña Nieto announced the creation of the Mexican Caribbean Biosphere Reserve on the coast of eastern Yucatán, which will become the largest protected natural area in the country.

But the Yucatán Peninsula is not just Cancún. It is a vast region comprising three Mexican states, Campeche, Yucatán, and Quintana Roo, with a rich biodiversity and singular geography. It has one of the largest freshwater reserves in Mexico and is the ancestral home of peninsular Mayan indigenous peoples, including the Ch'ol, Tzeltal, Tzotzil, and others. It was also the site of the Caste War of Yucatán, which has yet to be properly included in the official history of Mexico.

For a long time, the economy of the peninsula was based on the growing of sisal, a type of agave that supplied a flourishing rope manufacturing industry, and on exploitation of the cheap labor of the indigenous population. Today, the regional economy centers on tourism and hospitality, as well as soy,

corn, and African palm monoculture. There have also been recent attempts to build renewable energy parks (wind and solar).

By contrast, the region's indigenous and peasant farming communities practice an ancestral and environmentally friendly type of agriculture characterized by the Mayan milpa (maize field) and the production of organic honey, which is highly sought after in international markets. Indigenous peoples as well as diverse sectors of civil society, academia, and the regional press are therefore legitimately concerned about water pollution, deforestation, and the death of honeybees. They point out that the Mexican State is failing to respect the right to free, prior, and informed consultation, undertaken in good faith and in a culturally appropriate manner, to which the indigenous communities are entitled. The government has also disregarded the right to prior consultation in the case of genetically modified soy.

Indigenous and peasant farming communities do not oppose agricultural development or the establishment of renewable energy parks. They are not enemies of development. What they do oppose is severe environmental degradation and the pollution of natural resources like water, and they object to not being heard and having their fundamental rights violated.

During the 159th regular session of the Inter-American Commission on Human Rights (IACHR) held in Panama City in December 2016, a group of indigenous and peasant farming communities and civil society organizations condemned the grave violations of the human rights of indigenous peo-

ples and the serious environmental and water pollution caused by monocrops—whether genetically modified or not—as well as the renewable energy parks in the Yucatán Peninsula. They asked Mexican authorities at both the federal and state levels to take prevention and reparation measures to ensure that these violations do not become irreparable.

It was very significant that the IACHR provided this international opportunity to bring attention to the serious human rights problems in the Yucatán Peninsula. Unfortunately, given the human rights tragedy and the crisis of insecurity and organized crime that other Mexican states are facing, there is an erroneous perception that human rights problems are nonexistent in the peninsula. Those problems do exist, although they are of a different kind than forced disappearances, extrajudicial executions, and torture.

As a follow-up to that hearing, the IACHR should cooperate with the Mexican State, urging it to listen to indigenous and peasant farming communities and to incorporate the alternative development model proposed by indigenous peoples, in the exercise of their right to self-determination, into its public policies for development of the Yucatán Peninsula. This model could be based on successful industries such as beekeeping or on renewable energy parks, but with prior consultation and consent of local communities and with a more equitable distribution of the benefits. In short, it should be a socially and environmentally sustainable development model. ■

## Public hearing before the IACHR on the human rights situation of the indigenous peoples of the **Yucatán Peninsula**



Foto: Antonio Cordoba/CIDH

**O**n December 5, 2016, during the 159th session of the Inter-American Commission on Human Rights in Panama City, a public hearing was held on **the human rights situation of indigenous peoples in Yucatán, Mexico**. At this hearing, **Mayan indigenous** and **peasant farming communities**, along with **civil society organizations**, condemned before the international community the human rights violations being perpetrated in the three states that make up the Yucatán Peninsula: Campeche, Quintana Roo, and Yucatán. They particularly noted the implementation of public policies that encourage an economic **model based on soy, corn, and African palm monoculture**—in some cases using **genetically modified crops**—and the intensive use of **toxic chemicals**.

The Mayan and peasant farming communities in the region allege the violation of various rights as a result of these activities, including the rights of access to water, to a healthy environment, to their ancestral lands, to free, prior, and informed consultation, and to self-determination in their social and economic development. Similarly, the communities and organizations requested before the IACHR that Mexican state and federal authorities take the necessary measures to prevent and redress the violation of their rights. This hearing was extremely important for this issue, as it provided an international forum in which to address the serious human rights problems of the Yucatán Peninsula, which have been overshadowed by the human rights crisis and insecurity plaguing other regions of the country.



# From Latin America to Mexico

## Shared experiences in investigating serious human rights violations and supporting victims

**M**indful of the human rights crisis facing Mexico, and in an effort to help find solutions, the Due Process of Law Foundation set out to examine the experiences of various Latin American countries with regard to the impacts of mass human rights violations. Toward this end, DPLF helped organize meetings with members of civil society and independent experts who could share reflections on lessons learned, successes, and ongoing challenges.

The first activity was held in 2015, when DPLF invited representatives from Mexican organizations to learn firsthand about the truth, memory, and justice processes stemming from the legacy of internal armed conflicts and dictatorships in El Salvador, Guatemala, and Peru. Later, during the **International Seminar on the Fight against Impunity for Serious Human Rights Violations, Transitional Justice, and Victims' Rights**, held in August 2016, DPLF and the Mexican Commission for the Defense and Promotion of Human Rights (CMDPDH) organized a closed meeting with members of civil society and experts from across the region. This activity was used to gather experiences from different countries that could be useful in the Mexican context, where the commission of serious crimes is a current topic of discussion. It also served to facilitate network building. Participants discussed the role of victims and human rights movements in truth commissions and in the search for disappeared persons; models and experiences of supporting victims; challenges arising in the investigation and punishment of serious human rights violations; and transitional justice and pacification processes in Latin America in general.

Two months later, in October 2016, DPLF and the Foundation for Justice and Rule of Law (FJEDD) held a second meeting, **Experiences in Supporting Victims of Serious Human Rights Violations: Mexico and Latin America**, this time with the participation of victims and civil society from various Mexican states, Central American countries, and Peru. This activity facilitated the learning and sharing of information and experiences on the political fight against impunity, impact litigation, building partnerships, caring for caretakers (or concern for the mental health of those who work



with victims), as well as psychosocial and victim support work, described by the participants themselves.

In the course of these consultations, consensus emerged around several main ideas. First, civil society must foster collective power, seeking complementarity in areas where there are common interests, assuming progress and accomplishments as an initial point for the discussion of discrepancies. Second, victims should be recognized as legitimate parties whose needs are at the core of any proceeding. It is necessary to foster victims' autonomy and promote their transformation into protagonists of their own change. Accordingly, support should not be conditioned upon the needs of a court case, as the victim's welfare must be paramount. Third, it is necessary to deepen discussions on how to work and build partnerships with the State and its institutions. Fourth, it is important to include mixed work plans with international experts, national experts, and civil society, always thinking about multidisciplinary and comprehensive strategies. Finally, it is necessary to broaden the discussions to other circles and forums. The relevance of sharing experiences from different situations, and cultivating closer ties between organizations from Mexico City and the Mexican states, is a crucial element to consider.

MAGAZINE OF THE DUE PROCESS OF LAW FOUNDATION



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**Due Process of Law Foundation** (DPLF) is a regional organization comprised of a multi-national group of professionals. Its mandate is to promote the rule of law and human rights in Latin America through analysis and recommendations, cooperation with public and private organizations and institutions, the sharing of experiences, and advocacy.

This publication was made possible thanks to the generous support of:

