

Contemporary Disappearances in Mexico

A Conceptual Challenge for the International Framework on Enforced Disappearances

LENE GUERCKE*

7.1 Introduction

Since the adoption of a militarized approach to public security in Mexico in late 2006, commonly known as the ‘war on drugs’, violence has exploded and serious human rights violations, including enforced disappearances, have risen sharply. Mexico is currently the second country with most Urgent Actions before the Committee on Enforced Disappearances (CED/the Committee),¹ the treaty body created by the International Convention for the Protection of all Persons from Enforced Disappearance (ICPPED/the Convention),² and, in 2021, was the first country to be visited by the CED.³ In its report on the visit, as well as in

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¹ USAID, I(dh)reas, ONU-DH, El carácter vinculante de las Acciones Urgentes del Comité de la ONU contra la Desaparición Forzada en México (2023), p. 9, available at <https://www.idheas.org.mx/publicaciones-idheas/el-caracter-vinculante-de-las-acciones-urgentes-del-comite-de-la-onu-contra-la-desaparicion-forzada-en-mexico/>.

² International Convention for the Protection of All Persons from Enforced Disappearance, 1726 UNTS 3 (ICCPED), 23 December 2010. Urgent actions are a unique feature of the ICCPED. According to Art. 30 ICCPED, any person with a legitimate interest can present a request to urgently search for and find a person who has disappeared to the CED. The CED will then contact the State Party and request information about the person and their situation. See Office of the High Commissioner for Human Rights, Enforced Disappearances, Fact Sheet No. 6, Rev. 4, 2023, p. 56, available at www.ohchr.org/en/publications/fact-sheets/fact-sheet-no-6-rev-4-enforced-disappearances.

³ Committee on Enforced Disappearances (CED), Report of the Committee on Enforced Disappearances on Its Visit to Mexico: Findings, UN Doc. CED/C/MEX/VR/1, 18 May 2022. According to Art. 33 ICCPED, the Committee can request to visit a State

prior and subsequent concluding observations, the Committee expressed ‘deep’ concern over the widespread nature of disappearances throughout the country and the prevalence of ‘almost absolute impunity and revictimization’.⁴ Disappearances in Mexico today are complex to understand and conceptualize from a legal perspective due to the involvement of both State and non-State actors as perpetrators, which implies that not all of these crimes can be categorized as *enforced* disappearances under international human rights law (IHRL). The legal questions that the phenomenon of disappearances in Mexico today raises can become equally relevant for other contexts where State and non-State actors are involved in the disappearance of persons, for example, in the context of migration.⁵

This chapter first provides a brief overview of the complexity of present-day disappearances in Mexico. It then zooms in on the issue of non-State actors as perpetrators of disappearances and explains how the Mexican domestic legal framework addressed the issue of different perpetrators by creating two distinct crimes. Further, it presents and discusses two questions that the Mexican context raises for IHRL: the State’s failure to identify dead bodies as a form of enforced disappearance, on the one hand, and impunity as a form of acquiescence, on the other hand. The chapter’s final section presents the CED’s recently adopted ‘Statement on non-State actors in the context of the International Convention for the Protection of All Persons from Enforced Disappearances’ (Statement on Non-State Actors) and discusses how the definition of acquiescence provided by the CED could impact the categorization of disappearances in Mexico. It is argued that the CED’s definition of acquiescence could and should be applied in such a way as to consider a large number of disappearances in Mexico today as enforced disappearances, due to the State’s general awareness of risk of widespread disappearances and its failure to respond to clear patterns.

party after it has received ‘reliable information indicating that a State Party is seriously violating the provisions of this Convention’ and consulted the State party on the matter. Importantly, CED can only visit a State party if the latter agrees to the visit in accordance with Art. 33 ICCPED.

⁴ Ibid., para. 24; CED, Concluding observations on the report submitted by Mexico, UN Doc. CED/C/MEX/CO/1, March 2015, para. 10, 5; CED, Observaciones finales sobre la información complementaria presentada por México con arreglo al artículo 29, párrafo 4 de la Convención, UN Doc. CED/C/MEX/OAI/2, 29 September 2023, paras. 5, 11(b).

⁵ CED, General Comment No. 1 on Enforced Disappearances in the Context of Migration, UN Doc. CED/C/GC/1, 18 September 2023.

Based on the CED's Statement, the chapter proposes a presumption of acquiescence as the most appropriate approach in the Mexican context, as it places the burden of proof on the State in favour of the victims, thus potentially overcoming a seemingly arbitrary classification of victims into two categories. In that way, the State's contribution to the suffering of relatives could be more adequately reflected.

7.2 The Situation of Disappearances in Mexico

7.2.1 *Contextualizing Disappearances in Mexico*

Mexico's history of enforced disappearances dates back to the so-called dirty war⁶ period between the 1960s and mid-1980s. At the time, the then one-party State of the Institutional Revolutionary Party (PRI) pursued a strategy of repression against political opponents, including rural and urban guerrillas, that included enforced disappearances.⁷ Alongside this legacy of enforced disappearances, whose victims are still demanding truth and justice,⁸ since the onset of the 'war on drugs' in the country in late 2006 the number of disappeared persons has risen steeply. According to data provided by the National Search Commission (CNB for its Spanish initials) as of February 2024, over 114,000 persons had

⁶ The term 'dirty war', while commonly used to describe the period of organized and widespread State repression against political opponents, is not without controversy. See M. De Vecchi Gerli, '¡Vivxs Lxs Queremos! The Battles for Memory around the Disappeared in Mexico', PhD Thesis, University College London (2018), p. 15, available at <https://discovery.ucl.ac.uk/id/eprint/10064633/>.

⁷ For a historical analysis of State-sponsored violence and enforced disappearances in Mexico, see, for example, E. A. Montaña, C. V. Ovalle and J. S. Granada-Cardona, 'Recasting history to cast off shadows: State violence in Mexico, 1958–2018' in S. Mandolessi and K. Olalde Rico (eds.), *Disappearances in Mexico: From the 'Dirty War' to the 'War on Drugs'* (Routledge, 2022).

⁸ Several official attempts to deal with the legacy of the 'dirty war' by creating specialized institutions, including a special prosecutor's office, have failed. Most recently, in October 2021, a truth commission was created by presidential decree to investigate and clarify political violence and human rights violations committed between 1965–90. However, the commissioners have already denounced the lack of full access to archives of one of the key security institutions involved in human rights violations. See P. Ferri, 'La Comisión de la Verdad para la Guerra Sucia denuncia la falta de colaboración del Centro Nacional de Inteligencia' (2023) *El País México*, available at <https://elpais.com/mexico/2023-08-15/la-comision-de-la-verdad-para-la-guerra-sucia-denuncia-la-falta-de-colaboracion-del-centro-nacional-de-inteligencia.html>.

disappeared or gone missing since 1962.⁹ Among these, according to these data, 89,415 persons had been disappeared since 2006.¹⁰

The rise in disappearances, and violence more generally, cannot be attributed to a single cause. Nonetheless, experts agree that the militarization of public security as a means to fight drug-trafficking organizations played an important role in the sharp increase of human rights violations and violence more generally since late 2006. This relates, on the one hand, to the participation of the historically unaccountable Mexican armed forces in countering organized crime,¹¹ and, on the other hand, to the splintering of heretofore large criminal organizations into smaller warring groups following the initial strategy of removing the top leadership from large organizations.¹² To add complexity, the State and non-State actors involved do not always act independently but at times collaborate in the commission of crimes, including disappearances.¹³

⁹ Available at <https://versionpublicarnpdno.segob.gob.mx/Dashboard/ContextoGeneral>. It is important to note that in December 2023, President López Obrador presented an alternative version of the statistics of disappeared persons, based on a recount ordered by him earlier in the year, alleging that there were fewer disappeared persons. The recount itself and the presentation of alternative figures led to an outcry among relatives' associations and non-governmental organizations, who have since presented several cases of disappeared persons who no longer appear on the register. Nonetheless, and in view of the methodological criticisms raised, this chapter uses the data provided on the original website of the National Register of Disappeared and Missing Persons (RNPDO). See, for example, Movimiento por Nuestros Desaparecidos en México, 'Nuestra lucha no se borra; exigimos transparencia y diálogo sobre el registro de personas desaparecidas y toda política que nos impacte', 19 December 2024, available at <https://movndmx.org/nuestra-lucha-no-se-borra>; E. Tzuc, 'Tiene Censo de AMLO Otros Datos ... Equivocados Sobre Desaparecidos En México', *Animal Político*, 22 January 2024, available at <https://animalpolitico.com/sociedad/desaparecidos-censo-datos-equivocados>; A. Daen and M. Nochebuena, 'Omisiones, Dudas y Opacidad: El Censo de Desaparecidos Del Gobierno de AMLO', *Animal Político*, 15 December 2023, available at <https://animalpolitico.com/verificacion-de-hechos/te-explico/omisiones-falsedades-nuevo-censo-desaparecidos>.

¹⁰ The total number of disappeared and missing persons for that period is 97,672. See <https://versionpublicarnpdno.segob.gob.mx/Dashboard/Sociodemografico>.

¹¹ See *Case of Alvarado Espinoza and Others v. Mexico*, Inter-American Court of Human Rights Series C No. 370, 2018, paras. 59ff.

¹² See M. Serrano, 'Mexico: A humanitarian crisis in the making' in W. G. Pansters, B. T. Smith and P. Watt (eds.), *Beyond the Drug War in Mexico: Human Rights, the Public Sphere and Justice* (Routledge, 2017).

¹³ See, for example, CED, Report on Visit to Mexico: Findings, para. 13; Inter-American Commission on Human Rights (IACHR), Situation of Human Rights in Mexico, OEA/Ser.L/V/II.Doc. 44/15, 2015, paras. 34–52.

Indeed, given the pervasiveness of corruption, it is often difficult to draw clear lines between these actors, especially organized criminal groups and State actors.¹⁴ Existing information about victims and perpetrators of disappearances compiled by civil society organizations, relatives, journalists and academia, while based on a rather limited number of cases in comparison to the overall number of disappearances, show that the modes of disappearances, the victims and the perpetrators differ depending on the time period and the geographic location. Consequently, it is not possible to provide a single, general account of disappearances across Mexico or of who the victims and perpetrators are.¹⁵

7.2.2 Victims

Victims of disappearances in Mexico today are a heterogenous group and, contrary to assertions by authorities¹⁶ and persisting criminalizing attitudes against victims and relatives by society at large, there is no evidence to suggest that most victims had ties to organized crime.¹⁷ Social leaders or activists continue to be among the victims of disappearances today,¹⁸ yet most current disappearances cannot be tied to any form of political or social activism. Moreover, and contrary to the traditional image of security forces as perpetrators, both police officers and members of the military have also been disappeared.¹⁹ Although the

¹⁴ See, for example, Fidh and I(dh) eas (2021) 'Mexico: Criminal Structure within the Public Prosecutor's Office of the State of Nayarit and Crimes Against Humanity', No. 769a, available at www.opensocietyfoundations.org/sites/default/files/corruption-that-kills-en-20180502.pdf.

¹⁵ On this complexity, see also P. Calveiro, 'Disappearance and governmentality in Mexico' in S. Mandolessi and K. Olalde Rico (eds.), *Disappearances in Mexico: From the 'Dirty War' to the 'War on Drugs'* (Routledge, 2022), pp. 85–92. For a proposal of a typology of the different fates of victims of disappearances in Mexico today, see A. A. Pozos Barcelata, *El Cuerpo Ausente como Sujeto Político: El Proceso de Construcción de la Desaparición de Personas en México como un Problema de Acción Política (1969–2018)* (Université du Québec, 2018), p. 149ff.

¹⁶ CED, Report on Visit to Mexico: Findings, para. 39.

¹⁷ See, for example, Observatorio sobre Desaparición e Impunidad (ODIM), *Informe Sobre Desapariciones en el Estado de Nuevo León Con Información de Cadhac* (Facultad Latinoamericana de Ciencias Sociales, 2017), pp. 29–30.

¹⁸ See C. Robledo Silvestre, 'Desaparecer por defender el territorio', A dónde van los desaparecidos, 18 March 2021, available at <https://adondevanlosdesaparecidos.org/2021/03/18/desaparecer-por-defender-el-territorio/>.

¹⁹ In the north-eastern State of Nuevo León, for example, the first disappearance cases registered by the NGO CADHAC, were of police officers. See ODIM, *Informe sobre Desapariciones*, p. 25; '¿Les ha quedado grande el cargo? lanza madre de militar

majority of reported disappearance victims are male,²⁰ disappearances of women and girls have risen significantly in recent years, which can be the result of human trafficking, increased violence in general, as well as gender-based violence, such as femicides.²¹ Finally, certain groups are especially vulnerable to becoming victims of disappearances, while at the same time being the least visible. This includes migrants, who risk falling victim to human trafficking or being kidnapped at the hands of organized crime, either acting alone or in collusion with immigration (or other) authorities,²² as well as victims belonging to indigenous groups who experience high levels of exclusion, racism and marginalization and are often overlooked.²³ Communities living in territories of certain economic or extractive interests can suffer high levels of violence, including forced displacement and disappearances.²⁴

desaparecido a Peña y Cienfuegos', Proceso, 8 May 2018, available at <https://www.proceso.com.mx/nacional/2018/5/8/les-ha-quedado-grande-el-cargo-lanza-madre-de-militar-desaparecido-pena-cienfuegos-204640.html>.

²⁰ See <https://versionpublicarnpdno.segob.gob.mx/Dashboard/ContextoGeneral>.

²¹ Committee on the Elimination of Discrimination against Women, Concluding observations on the Ninth Periodic Report of Mexico, UN Doc. CEDAW/C/MEX/CO/9, 25 July 2018, paras. 23–4; see also K. Ansolabehere et al., *Nombrarlas para encontrarlas. Contexto, dinámicas y respuestas en torno a la desaparición de mujeres en el centro de México* (ODIM, FLACSO, 2021); A. Ayala Martínez, 'Buscando mujeres desaparecidas en vida: Entre trata de personas y violencia de género', A dónde van los desaparecidos, 5 March 2021, available at <https://adondevanlosdesaparecidos.org/2021/03/04/buscando-mujeres-desaparecidas-en-vida-entre-trata-de-personas-y-violencia-de-genero/>.

²² CED, Report on Visit to Mexico: Findings, paras. 18–20; *Informe presentado al Comité contra la Desaparición Forzada en vista del dialogo de seguimiento con respecto a México, en ocasión de la 15ª sesión* (Fundación para la Justicia y el Estado Democrático de Derecho and TRIAL International, 2018), available at <https://trialinternational.org/wp-content/uploads/2018/11/Full-report-to-the-Committee-on-Enforced-Disappearances-Spanish.pdf>.

²³ See, for example, R. Aída Hernández Castillo, 'Las múltiples ausencias de los indígenas desaparecidos en México', A dónde van los desaparecidos, 25 April 2019, available at <https://adondevanlosdesaparecidos.org/2019/04/25/las-multiples-ausencias-de-los-indigenas-desaparecidos-en-mexico/>; X. Antillón Najlis, *Yo sólo quería que amaneciera impactos psicosociales del caso Ayotzinapa* (Fundar, Centro de Análisis e Investigación, 2018).

²⁴ C. Jiménez-Damary, Visit to Mexico – Report of the Special Rapporteur on the human rights of internally displaced persons, UN Doc. A/HRC/53/35/Add.2, 27 June 2023; CED, Report on Visit to Mexico: Findings, para. 21; Silvestre, 'Desaparecer por defender el territorio'.

7.2.3 Perpetrators

Perpetrators are also heterogeneous and include State actors belonging to different security forces and a variety of non-State actors.²⁵ Among the latter, the most prominent are organized criminal groups. In some instances, disappearances are known to have been used in a strategic manner by such groups to ensure territorial control and intimidate local populations.²⁶ Conversely, some disappearances may also be perpetrated by individuals who are not part of either State security forces or organized criminal groups, for example, in the context of gender-based violence.²⁷ In yet other cases, victims of 'regular' kidnappings are not liberated after the family has paid the ransom, thus converting the kidnapping into a disappearance.²⁸ Disappearances committed by non-State actors in the Mexican context thus appear to be motivated by different factors, ranging from criminal purposes such as human trafficking and forced recruitment into criminal organizations,²⁹ to terrorizing the population as a means of securing territorial control, as well as to 'simply' getting rid of dead bodies. This diversity of victims, perpetrators and motives, compounded by the general lack of effective investigations that could provide more clarity about the perpetrators and motives, complicates the understanding of disappearances in Mexico today.

7.2.4 Forensic Negligence

A final important aspect of the crisis of disappearances in present-day Mexico is the country's forensic crisis and the incapacity of forensic authorities to identify dead bodies and remains, as shown by the

²⁵ See CED, Report on Visit to Mexico: Findings, para. 13; IACHR, Situation of Human Rights in Mexico, paras. 34–52.

²⁶ This has particularly been documented in relation to the criminal group Los Zetas. See, for example, Human Rights Clinic, 'Control . . . over the Entire State of Coahuila' *An Analysis of Testimonies in Trials against Zeta Members in San Antonio, Austin, and Del Rio, Texas* (The University of Texas School of Law, 2017).

²⁷ See Ansolabehere and others, *Nombrarlas para encontrarlas*.

²⁸ J. A. Román, 'Familia veracruzana pagó rescate por un hijo y perdió a dos de sus miembros', *La Jornada*, 2 November 2015, available at <https://www.jornada.com.mx/2015/11/02/politica/005n2pol>.

²⁹ See, for example, A. Guillén and D. Petersen, 'El regreso del infierno: los desaparecidos que están vivos', *A dónde van los desaparecidos*, 4 February 2019, available at <https://adondevanlosdesaparecidos.org/2019/02/04/los-desaparecidos-que-estan-vivos/>.

existence of at least 52,000 unidentified bodies in the country.³⁰ Added to the failure to identify, there are numerous examples of mishandling of dead bodies by authorities, who, overwhelmed with the number of bodies they were receiving, buried them in official mass graves or disposed of them in other ways. In many instances, burials did not follow specific protocols and were conducted negligently without adequate documentation, resulting in the confusion of bodies and their exact location in cemeteries.³¹ Such malpractice was discovered on a number of occasions during exhumation processes, for example, when exhumed bodies did not correspond to existing registers or when the number of bodies in exhumed graves was much higher than that officially documented.³² Additionally, due to inadequate records and lacking databases, even identified bodies have been buried in official mass graves without notification of the families.³³ One particularly concerning example of mishandling is the cremation of 1,430 unidentified bodies without prior taking of DNA samples in the State of Jalisco between 2006 and 2015.³⁴ In several states, due to a lack of capacity in forensic institutions, the latter are sub-contracting private funeral homes to deal with bodies found in clandestine mass graves. These private companies are tasked with conducting the necropsies, which can lead to a loss of crucial data needed to identify the person.³⁵

³⁰ Animal Político, 'El gobierno reconoce "crisis forense": Hay 52 mil cuerpos sin identificar', *Animal Político*, 17 March 2022, available at www.animalpolitico.com/sociedad/censo-base-encinas-cuerpos-identificar-mexico; E. Tzuc and M. Turati, 'Un País Rebasado Por Sus Muertos', Quinto Elemento Lab, 22 September 2020, available at www.quintoelab.org/crisis-forense/un-pais-rebasado-por-sus-muertos/.

³¹ See, for example, F. Rodríguez, 'Desaparecer Dos Veces: La Burocracia Que Pierde Cuerpos', Quinto Elemento Lab, 28 September 2020, available at <https://quintoelab.org/crisisforense/desaparecer-dos-veces-la-burocracia-que-pierde-cuerpos/>.

³² Tzuc and Turati, 'Un País Rebasado'.

³³ E. Tzuc, 'Cruce de datos: La clave para localizar a miles de personas desaparecidas', A dónde van los desaparecidos, 23 January 2023, available at <https://adondevanlosdesaparecidos.org/2023/01/23/cruce-de-datos-la-clave-para-localizar-a-miles-de-personas-desaparecidas/>.

³⁴ Centro de Justicia para la Paz y el Desarrollo (CEPAD), 'Incineraciones de Cuerpos No Identificados. Crímenes Sin Justicia', 30 Enero 2019, available at <https://cepad.org.mx/2019/01/incineraciones-cuerpos-no-identificados-crimeres-sin-justicia/>; D. F. Mígués, 'Desaparecer Hasta Volverse Cenizas', Quinto Elemento Lab, 9 April 2019, available at <https://quintoelab.org/project/volversecenizas>.

³⁵ M. Vizcarra, 'Crisis Forense: Cuando Las Funerarias Suplieron al Semefo', Quinto Elemento Lab, 6 October 2020, available at <https://quintoelab.org/crisisforense/crisisforense-cuando-las-funerarias-suplieron-al-semefo/>.

The forensic crisis led to the establishment in late 2019 of an Extraordinary Forensic Mechanism (EFM), in order to accelerate and support the identification of remains. However, due to a lack of funds, uncertainties about the members' contracts, insufficient political support and institutional collaboration, as well as internal disagreements, by early 2023 almost all members of the EFM had resigned and it is now to be replaced by another mechanism.³⁶ Notably, even with the establishment of extraordinary mechanisms, the identification of such a large amount of remains is likely to take decades, especially considering that violence and disappearances continue.³⁷ Moreover, in addition to the tens of thousands of known unidentified bodies, there are also thousands of clandestine mass graves spread across the Mexican territory, suggesting an even greater burden of identification of as yet unknown scale.³⁸ The mishandling of remains by authorities can be another effective cause for a person's disappearance in Mexico, which is very different from the 'original' terrorizing aim usually associated with the crime of enforced disappearance.³⁹ In these cases, even though non-State actors may have been responsible for killing the victim, their *disappearance* is the result of negligence by State actors, even though, as I discuss in Section 7.3, it is unlikely to be considered an enforced disappearance under international law.

The foregoing overview illustrates the complexity of disappearances in Mexico today. On the one hand, the heterogeneity of perpetrators, victims and manners in which persons are disappeared means that there are multiple explanations for the occurrence of disappearances. Furthermore, the lack of effective investigations into these cases implies that there is often very little information from which to draw on for the

³⁶ E. Cortez Morales, 'El Mecanismo Extraordinario de Identificación Forense: Un Proyecto Trunco', Instituto Mexicano de Derechos Humanos y Democracia (IMDHD), 9 March 2023, available at www.imdhd.org/comunicacion/blog/el-mecanismo-extraordinario-de-identificacion-forense-un-proyecto-trunco..

³⁷ Tzuc and Turati, 'Un País Rebasado'.

³⁸ Most recently, the estimated number of clandestine mass graves is above 5,600. See E. Tzuc, 'México Rebasa Las 5 Mil 600 Fosas Clandestinas', Quinto Elemento Lab, 9 October 2023, available at <https://quintoelab.org/project/mexico-rebasa-cinco-mil-fozas-clandestinas>.

³⁹ Javier Yankelevich makes a useful conceptual distinction between the state of *being disappeared* and being the victim of the crime of disappearance, which may or may not be the cause of this state. J. Yankelevich, 'El Concepto de Persona Desaparecida' in J. Yankelevich (ed.), *Manual de Capacitación para la Búsqueda de Personas. La Voz de la Academia*. (Comisión Nacional de Búsqueda, 2020), vol. I, p. 24. The effect, however, can be equally terrorizing. I thank María de Vecchi for raising this point.

purpose of analysis. Simultaneously, the forensic crisis further adds to the complexity of disappearances in Mexico today, because it shows that many persons who are disappeared may not be victims of a disappearance in a legal sense. In that sense, contemporary disappearances are difficult to comprehend and explain because they differ significantly from the traditional understanding of enforced disappearances as crimes committed by authoritarian – or otherwise repressive – States against political opponents.⁴⁰ Moreover, and perhaps relatedly, it also complicates their categorization from a legal perspective, which I discuss in Section 7.3.

7.3 Disappearances in Mexico from a Legal Perspective

The complexity of disappearances in Mexico today not only creates challenges for understanding and addressing the issue in practice. It also highlights questions from a legal perspective, which stem from the interrelated issues of involvement of non-State actors in the commission of disappearances, who may or may not have ties to State actors, and the issue of severe State omissions and malpractice. In this section, I briefly outline the legal consequences of non-State actor involvement in the commission of (enforced) disappearances from an IHRL perspective and discuss how the domestic Mexican legal framework addressed this matter. I then engage with two questions that the Mexican context raises from the IHRL perspective, concerning the mishandling of remains and the notion of acquiescence.

7.3.1 *Non-State Actors as Perpetrators of Disappearances*

According to the definition in IHRL, enforced disappearances can only be committed by State agents or non-State actors who are in some manner connected to the State. This is illustrated by the definition of enforced disappearances contained in article 2 ICPPED:

‘Enforced disappearance’ is considered to be the arrest, detention, abduction or any other form of deprivation of liberty *by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State*, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law. (emphasis added)

⁴⁰ M. R. Berman and R. S. Clark, ‘State terrorism: Disappearances’ (1982) 13 *Rutgers Law Journal* 531.

The UN Declaration on the Protection of All Persons from Enforced Disappearance (DPPED) and the Inter-American Convention on Forced Disappearance of Persons (IACFDP), instruments that predate the ICPPED, contain similar definitions.⁴¹ Within International Criminal Law (ICL) the definition of enforced disappearance varies slightly: first, it requires an intention to remove the victim from the protection of the law for a ‘prolonged period of time’. Second, it refers to the commission of an act ‘by, or with the authorization, support or acquiescence of, a State or a political organization’ (emphasis added),⁴² which has led to the interpretation that, under ICL, certain types of non-State actors can commit enforced disappearances as crimes against humanity even without involvement of State actors.⁴³ While this is important to keep in mind, the main focus of this chapter lies on IHRL because the ICL definition only applies in the context of a systematic or widespread attack, as defined in the Rome Statute.⁴⁴ Although arguments have been made that violence in Mexico has reached this threshold in certain areas and during certain periods of time,⁴⁵ it is beyond the scope of this chapter to engage with this question.

⁴¹ The UN Declaration uses the phrase ‘by officials of different branches or levels of Government, or by organized groups or private individuals acting on behalf of, or with the support, direct or indirect, consent or acquiescence of the Government’, Preamble, Declaration on the Protection of All Persons from Enforced Disappearance, UN Doc. A/RES/47/133, 18 December 1992. The IACFDP wording is almost identical to the ICPPED and refers to acts ‘perpetrated by agents of the State or by persons or groups of persons acting with the authorization, support, or acquiescence of the state’, Art. II, Inter-American Convention on Forced Disappearance of Persons, 33 ILM 1529, 9 June 1994.

⁴² Art. 7(2)(i), Rome Statute of the International Criminal Court, 2187 UNTS 90, 17 July 1998.

⁴³ CED, Statement on non-State actors in the context of the International Convention for the Protection of All Persons from Enforced Disappearances, UN Doc. CED/C/10, 2 May 2023, para. 17; O. de Frouville, ‘Criminalizing or trivializing enforced disappearances? The issue of “non-State actors” in O. de Frouville and P. Sturma (eds.), *La pénalisation des droits de l’homme* (Pedone, 2021), pp. 147–96; A. R. Wolffenbuttel, ‘Enforced Disappearances: Applicable to Political Organizations?’ (2021) 61 *Virginia Journal of International Law Online* 159.

⁴⁴ Rome Statute, Art. 7(1).

⁴⁵ ‘Criminal Structure within the Public Prosecutor’s Office’; Fidh and Comisión Mexicana de Defensa y Promoción de los Derechos Humanos (CMDPDH), Art. 15 Communication under the Rome Statute to the International Criminal Court Regarding the Alleged Commission of Crimes against Humanity in Chihuahua, México between 2008 and 2010 (2018), available at www.fidh.org/IMG/pdf/mexique715anglais-1_final.pdf; Fidh, Centro Diocesano para los Derechos Humanos Fray Juan de Larios and Familias Unidas en Búsqueda y Localización de Personas Desaparecidas, Mexico Coahuila: Ongoing Crimes against Humanity (2017), available at <https://www.fidh.org/>

In addition to the attribution criteria of authorization, support or acquiescence listed in the definition of enforced disappearance, the ICPPED contains a separate article dealing explicitly with disappearances that do not reach this threshold. After much discussion during the drafting process, the inclusion of article 3 ICPPED was a compromise to address the reality that in certain contexts non-State actors were perpetrating disappearances, without diluting the responsibility of the State by calling such crimes ‘enforced disappearances’.⁴⁶ Article 3 establishes obligations of States to ‘take appropriate measures to investigate’ and ‘bring to justice’ the perpetrators of disappearances committed by non-State actors acting ‘without the authorisation, support, or acquiescence of the State’. Beyond this, disappearances falling within article 3 are not explicitly mentioned in the Convention. In this way, article 3 clearly indicates that there is a difference between enforced disappearances and disappearances committed by non-State actors falling within article 3 ICPPED. This understanding has been reiterated by the CED in its observations on reports by State Parties⁴⁷ and in its recently adopted Statement on Non-State Actors, which I discuss below.⁴⁸

[IMG/pdf/angmexico_coahuila_ongoing_crimes_against_humanity_fidh-final_a_revisar-1.pdf](#); OSJI, *Undeniable Atrocities: Confronting Crimes against Humanity in Mexico*. (Open Society Foundations, 2016); Fidh, CMDPDH and Citizens’ Commission of Human Rights of the Northeast (CCDH), Mexico: Report on the Alleged Commission of Crimes against Humanity in Baja California between 2006 and 2012 (2014) 642a, available at www.fidh.org/IMG/pdf/mexique642ang2014web.pdf.

⁴⁶ Commission on Human Rights, Report of the Intersessional Open-Ended Working Group to Elaborate a Draft Legally Binding Normative Instrument for the Protection of All Persons from Enforced Disappearance, UN Doc. E/CN.4/2004/59, 23 February 2004, paras. 29–41; Commission on Human Rights, Report of the Intersessional Open-Ended Working Group to Elaborate a Draft Legally Binding Normative Instrument for the Protection of All Persons from Enforced Disappearance, UN Doc. E/CN.4/2005/66, 10 March 2005, paras. 29–35; Commission on Human Rights, Report of the Intersessional Open-Ended Working Group to Elaborate a Draft Legally Binding Normative Instrument for the Protection of All Persons from Enforced Disappearance, UN Doc. E/CN.4/2006/57, 2 February 2006, paras. 12–14. See also de Frouville, *Criminalizing or Trivializing Enforced Disappearances?*.

⁴⁷ See for example CED, Concluding Observations on the Report Submitted by Colombia under Art. 29 (1) of the Convention, UN Doc. CED/C/COL/CO/1, 27 October 2016, para. 15; CED, Concluding Observations on the Report Submitted by Iraq under Art. 29 (1) of the Convention, UN Doc. CED/C/IRQ/CO/1, 13 October 2015, para. 12.

⁴⁸ CED, Statement on non-State actors, para. 16.

7.4 Disappearances in Mexico from the Perspective of IHRL

Returning to the Mexican context, where both State and non-State actors commit disappearances, from an IHRL perspective not all of these disappearances can thus be considered as *enforced* disappearances. For example, an organized criminal group that abducts a group of construction workers, holds them at a secret location, executes them and buries their remains in a clandestine mass grave, thereby effectively disappearing them, is not committing an *enforced* disappearance because it is acting on its own account without any apparent connection to the State. If, however, the same group committed a massacre and buried the victims in a clandestine mass grave while a police convoy stood guard nearby – for example, because the officers had received a bribe – the State is acquiescing to the act,⁴⁹ and the case becomes one of *enforced* disappearance. In a third scenario, where the criminal group that commits the massacre is known to have close connections to the local police force and can therefore act undisturbed and without fear of being held to account, the indirect involvement of the State is less visible, and it is not clear whether acquiescence could be established. This example illustrates that the dividing line between different legal types of disappearances in the Mexican context is very thin.

The legal distinction is of relevance, however, because it implies that there exist two types of disappearances in Mexico today, and, consequently, two types of victims. To illustrate the difference, article 24 ICPED, which provides a broad definition of victims and establishes their comprehensive rights to truth, reparation and participation, only applies to victims of *enforced* disappearances, excluding victims of disappearances falling within article 3 ICPED.⁵⁰ The exclusion of victims of disappearances falling within article 3 ICPED from the scope of article 24 implies that their relatives are also not considered victims under the Convention. Due to the detrimental impact of the agony of not knowing the fate or whereabouts of a loved one on the relatives of disappeared persons, regardless of the identity of the perpetrator, this exclusion has

⁴⁹ See, for example, *Hajrizi Dzemajl et al. v. Yugoslavia*, Committee Against Torture, CAT/C/29/D/161/2000, 2002, para. 9(2).

⁵⁰ This was confirmed by the CED in its recently adopted Statement on Non-State Actors. However, the CED does not explicitly exclude the applicability of Art. 24 ICPED and emphasizes that: ‘In order to comply fully with such obligations, States must ensure full respect for the rights of victims, including children’. See CED, Statement on non-State actors, para. 20.

been criticized.⁵¹ Conversely, excluding victims of disappearances falling within article 3 may be justified from a legal perspective based on the lack of direct or indirect State participation in such disappearances. In a context like Mexico, however, where the State's actions and omissions are seen as perpetuating all types of disappearances and the State's failure to conduct effective investigations makes it impossible to clearly distinguish between them, a differentiation between types of victims seems somewhat arbitrary.

7.5 The Mexican Law on Enforced Disappearance

Domestically, in 2017, the Mexican government responded to pressure by relatives and civil society and adopted legislation to address the issue of disappearances in the country. The General Law on Enforced Disappearance, Disappearance Committed by Private Individuals, and the National Search System (General Law) deals with the problem of State and non-State perpetrators of disappearances by establishing two crimes, as indicated by its title: enforced disappearances and disappearances committed by private individuals. Notably, the definitions of the two crimes differ significantly in that the definition of enforced disappearance is almost equal to that contained in the ICPPED,⁵² whereas the crime 'disappearance committed by private individuals' is defined as 'committed by anyone who deprives a person of their liberty with the aim of hiding the victim or the victim's fate or whereabouts.'⁵³ The

⁵¹ See A. Srovin Coralli, *Non-State Actors and Enforced Disappearances: Defining a Path Forward*, (Geneva Academy, 2021), pp. 10–11, available at www.geneva-academy.ch/research/publications/detail/608-non-state-actors-and-enforced-disappearances-defining-a-path-forward; R. Huhle, 'Non-State actors of enforced disappearance and the UN Convention for the Protection of All Persons from Enforced Disappearance' (2013) 26 *Humanitäres Völkerrecht Informationsschriften* 21, 25. So far, no studies have been conducted that compare whether there are any differences in the suffering of victims depending on the perpetrator. See M. Bourguignon, A. Dermitzel and M. Katz, 'Grief among relatives of disappeared persons in the context of state violence: An impossible process?' (2021) 31 *Torture Journal* 14, 29.

⁵² 'A public servant or private person acting with the authorisation, support or acquiescence of a public servant commits the crime of enforced disappearance of persons if they by any means deprive a person of their liberty, followed by the abstention or refusal to acknowledge this deprivation of liberty, or to provide information about the person or the person's fate, destiny, or whereabouts.' Author's translation. Art. 27 Ley General en Materia de Desaparición Forzada de Personas, Desaparición Cometida por Particulares y del Sistema Nacional de Búsqueda de Personas, 17 November 2017.

⁵³ Art. 34 LEDDCPI, author's translation.

difference between the two definitions has been criticized by the CED on the basis that article 3 ICPPED refers to ‘acts defined in article 2’, which, accordingly, would imply that both crimes should be defined in the same manner.⁵⁴ From a traditional criminal law perspective, however, this definition may be justified.⁵⁵

Whereas the ICPPED only explicitly mentions State obligations to investigate and bring perpetrators to justice in relation to disappearances committed by non-State actors falling within article 3, the General Law clearly establishes obligations to search for *all* disappeared and missing persons⁵⁶ and conduct criminal investigations *ex officio* into all cases where a disappearance may be related to the commission of a crime, regardless of the perpetrator.⁵⁷ The General Law thus overcame the ICPPED’s silence on additional State obligations regarding disappearances falling within article 3 by establishing equal general obligations in relation to enforced disappearances and disappearances committed by private individuals.⁵⁸ Importantly, the sections dealing with prevention (articles 158–73) establish preventive obligations without differentiating between the crimes of enforced disappearance and disappearance committed by private individuals, thereby going significantly beyond the ICPPED.

Regarding reparations, the General Law distinguishes between disappeared persons as direct victims and their relatives as indirect victims,⁵⁹ which differs from the definition of victims contained in article 24 ICPPED.⁶⁰ At the same time, relatives of both types of disappearances

⁵⁴ CED, Follow-up Observations on the Additional Information Submitted by Mexico under Art. 29, Paragraph 4, of the Convention, UN Doc. CED/C/MEX/CO/R.1/Add.1, 13 November 2018, paras. 10–11.

⁵⁵ See A. M. Mayo Flota, ‘The Crime of Disappearance of Persons by Private Individuals in the New Mexican Legislation: An International Law Perspective’, Master Thesis, Institute of International and Development Studies (2018), pp. 40–4.

⁵⁶ Art. 89, LEDDCPI.

⁵⁷ Art. 13, *ibid.*

⁵⁸ Art. 13–23, *ibid.* On how the General Law incorporates international standards on enforced disappearance in relation to investigation, see S. L. Morelos Zaragoza, ‘The Mexican Law on the Forced Disappearance of Persons, Disappearances Committed by Individuals and the National Missing Persons System: How many steps forward?’ (2019) *XII Mexican Law Review* 125, 141–3.

⁵⁹ Art. 137 LEDDCPI refers to the ‘direct victims’ of the crimes of enforced disappearance or disappearance committed by private individuals, whereas article 138 of the General Law refers to the ‘relatives of victims’ of the two crimes.

⁶⁰ According to article 24 (1) ICPPED, victims of enforced disappearance are ‘the disappeared person and any individual who has suffered harm as the direct result of an

are considered as victims,⁶¹ which is an important step beyond article 24 ICPED, that, as discussed previously, only encompasses victims of *enforced* disappearance. Nonetheless, there remains a difference between victims when it comes to reparations also in the General Law: while all victims have the right to receive comprehensive reparation,⁶² article 152 establishes that the Federation and federal entities have an obligation to ensure comprehensive reparation to victims of enforced disappearances. The obligation to compensate the harm caused to victims of disappearances committed by private individuals is only subsidiary in nature,⁶³ which reflects current international standards in relation to reparation obligations of States for acts committed by non-State actors.⁶⁴

Mexican domestic law can thus be seen as going beyond the ICPED in certain aspects. Nonetheless, some grey areas in the international framework are also reflected in the domestic realm given that the General Law adopted the definition of enforced disappearance from the ICPED. Consequently, questions about the definition of terms such as support, authorization and acquiescence, which I discuss below, are of equal relevance, as there continues to be a small difference between victims of enforced disappearances and victims of disappearances committed by private individuals with regard to reparations also under the national framework. Moreover, clarifying the threshold for support, authorization and acquiescence at the international level could also provide useful guidance for domestic prosecutions.

7.6 Legal Questions Arising from the Mexican Context

Due to the general lack of effective investigation and search for the disappeared, regardless of the perpetrator, as well as prevailing impunity, *all* disappearance cases in Mexico, today and in the past, are connected by State omission. It is therefore unquestionable that, from the perspective of IHRL, the Mexican State bears some level of responsibility for all disappearances, at a minimum for its failure to investigate these acts, search for the victims and hold those responsible to account. The precise

enforced disappearance'. Consequently, there is no distinction between direct and indirect victims.

⁶¹ Art. 138, LEDDCPI.

⁶² Art. 150, *ibid*.

⁶³ Art. 152, *ibid*.

⁶⁴ Dinah Shelton, *Remedies in International Human Rights Law* (Oxford University Press, 2015), p. 75.

nature of this responsibility varies, however, because the State has different obligations depending on the type of disappearance and the international responsibility arising from a failure to investigate is less than that arising from direct or indirect State involvement. Nonetheless, given that impunity and corruption are key factors that perpetuate the commission of disappearances at the hands of both State and non-State actors in Mexico, and considering the active role of the State in the creation of the current crisis of disappearances through militarization, on the one hand, and forensic negligence, on the other, the question arises whether the Mexican State could be responsible in a more direct manner.

7.6.1 *Forensic Negligence as Enforced Disappearance*

One question that arises concerns the implications of the State's negligence when it comes to the appropriate identification and handling of bodies, which, while technically part of the obligation to investigate and search,⁶⁵ is also a *direct* cause of the disappearance of tens of thousands of persons in Mexico, as outlined above. Could the State's utter negligence with regard to the handling of dead bodies constitute *enforced* disappearances because they are the direct result of actions and omissions by State agents? The answer to this question is most likely negative, given that the international definition of enforced disappearance contains three elements: deprivation of liberty, involvement of State agents and negation of information about the fate or whereabouts of the victim.⁶⁶ In cases of mishandling of dead bodies, the second and third elements are clearly present. However, if the reason that the body came into the hands of authorities was a homicide committed by a non-State actor, then the first element of an enforced disappearance, the deprivation of liberty at the hands of a State agent or a person acting with the authorization, support or acquiescence of the State, is lacking.⁶⁷ This is because a deprivation of liberty generally includes different forms of restrictions to a person's ability to move freely,⁶⁸ which implies that a person must be alive to exercise her right to liberty. Consequently, the mishandling, lack of

⁶⁵ See CED, Guiding Principles for the Search for Disappeared Persons, UN Doc. CED/C/7, 8 May 2019.

⁶⁶ T. Scovazzi and G. Citroni, *The Struggle against Enforced Disappearance and the 2007 United Nations Convention* (Nijhoff, 2007), pp. 271–2.

⁶⁷ I thank Grażyna Baranowska for bringing my attention to this issue.

⁶⁸ See Human Rights Committee, General Comment No. 35: Article 9 (Liberty and Security of Person), UN Doc. CCPR/C/GC/35, 16 December 2014, paras. 3–5.

identification and possible misplacement of a dead body would not constitute a deprivation of liberty and, as argued by Yankelevich, while the victims of such State negligence are in fact disappeared, they are not victims of the crime of disappearance.⁶⁹ In Mexican domestic law, the General Law criminalizes acts relating to hiding or destroying human remains as separate crimes.⁷⁰

From a theoretical perspective, it is thus clear that the mishandling of human remains cannot constitute an enforced disappearance. Notwithstanding, the scale of the forensic crisis in Mexico today poses questions for the international framework on enforced disappearances. This is because thousands of persons would not be disappeared in Mexico today if it were not for the mishandling of their remains by the responsible authorities, yet, in the absence of a deprivation of liberty or evidence thereof, they cannot – strictly speaking – be considered victims of disappearances under IHRL. If this line of reasoning were to be followed, it would not even be possible to hold the Mexican State responsible for a failure to investigate under article 3 ICPED because this article refers to ‘acts defined in article 2’ and therefore also requires a deprivation of liberty followed by a refusal to disclose the victim’s fate or whereabouts.⁷¹ If non-State actors kill a victim and hide the body, this act could fall within article 3. However, if the body is simply left in the street, the underlying crime is a murder and not a disappearance.⁷²

While this approach makes sense in isolated cases, in situations where a State not only fails to identify victims but also actively obfuscates their fate or whereabouts by mishandling remains, it is counterintuitive to exclude them from the framework of enforced disappearances. This is because the very origin of the international legal framework dealing with both the missing and the disappeared is the detrimental impact on relatives of the uncertainty of not knowing what happened to their loved ones and where they are and, in the Mexican case, this uncertainty stems from the *State’s* omissions.⁷³ Considering this, the international

⁶⁹ Yankelevich, *Manual de Capacitación para la Búsqueda*.

⁷⁰ Article 37, LEDDCPI.

⁷¹ Note, however, that beyond the ICPED framework, the State could still be held responsible for failing to investigate the death and identify the person, as well as for the damage caused to families as a result (often considered to amount to a violation of the relatives’ right to physical integrity) under other IHRL instruments.

⁷² Yankelevich, *Manual de Capacitación para la Búsqueda*, p. 22.

⁷³ For a discussion of how the origins of the international legal framework on enforced disappearances, see B. Finucane, ‘Enforced disappearance as a crime under international

framework on enforced disappearances should be able to reflect the State's role in the effective disappearance of thousands of persons and leaving thousands of relatives in a limbo of uncertainty.⁷⁴ Further research is needed to explore the type of responsibility the State might incur under the framework on enforced disappearances in such cases, for example, whether the continuous obligation to search would apply even though the victim is, legally, not a victim of a disappearance.

7.6.2 *Impunity as Acquiescence*

A second legal question regarding disappearances committed by non-State actors in the Mexican context concerns the meaning of acquiescence and the point at which a disappearance that ostensibly would fall under article 3 ICPPED could become an *enforced* disappearance in line with article 2 ICPPED on the basis of the State's omissions. This is because near-absolute impunity and systemic corruption are widely considered to be crucial perpetuating factors of the country's crisis of disappearances.⁷⁵ In view of this, arguments have been made that the State's persistent failure to investigate, and impunity more generally, would not 'only' imply a violation of the State's obligation to investigate but should also be viewed as a form of acquiescence when it reaches a certain threshold, such as systematicity.⁷⁶ The reasoning behind such arguments is that the systematic failure to search for the victims and to

law: A neglected origin in the laws of war' (2010) 35 *The Yale Journal of International Law* 171.

⁷⁴ For an example of such negligence, see the case of Cosme Humberto Alarcón Balderas in the north-eastern State of Coahuila. After years of searching for him, Cosme's mother was able to identify him on pictures from a homicide file, yet the State prosecutor's office had lost his body. To this day, and despite four exhumations, his remains have not been found. Given that the body was identified on pictures, the case is treated as a homicide and not a disappearance. See F. Rodríguez, '¿Cómo se despiden una madre de un hijo cuyo cuerpo perdió el Estado?', A dónde van los desaparecidos, 23 October 2023, available at <https://adondevanlosdesaparecidos.org/2023/10/23/como-se-despide-una-madre-de-un-hijo-cuyo-cuerpo-perdio-el-estado/>.

⁷⁵ See, for example, International Federation for Human Rights (Fidh) and I(dh)cas, *Litigio Estratégico en Derechos Humanos* (2020) Situation of Impunity in Mexico, 750a, available at www.idheas.org.mx/wp-content/uploads/2020/05/Mexique750ang-1.pdf; OSJI, *Corruption That Kills*.

⁷⁶ See B. A. Frey, 'Conceptualising disappearances in international law' in K. Ansolabehere, L. A. Payne and B. A. Frey (eds.), *Disappearance in the Post-Transition Era in Latin America* (Oxford University Press, 2021).

identify and punish the perpetrators could be understood as endorsement and de facto authorization of such crimes.⁷⁷

The main objection to these arguments is that a strict reading of the ICPED would warrant maintaining a separation between articles 2 and 3 and that a failure to investigate disappearances committed by non-State actors (falling within article 3) would be a violation of article 3, rather than retroactively converting it into acquiescence.⁷⁸ Moreover, existing case law on acquiescence generally requires a certain level of awareness of risk to a specific victim and a possibility to *prevent* an act from occurring. Regarding disappearances, this means that the State would have to be aware of a risk in relation to the initial deprivation of liberty.⁷⁹ A less explored question is whether corrupt ties between criminal groups and State actors could be the basis for establishing acquiescence, or even support, to acts of such groups, even in cases where the State was not directly aware of a specific risk.⁸⁰ Having previously engaged with the issue of acquiescence in the Mexican context,⁸¹ Section 7.7 focuses specifically on the CED's recently adopted Statement on Non-State Actors and explores the extent to which it elucidates this question.

7.7 The CED Statement on Non-State Actors and the Mexican Context

7.7.1 *The CED Statement on Non-State Actors*

In March 2023, the CED adopted the Statement on Non-State Actors with the aim of 'clarifying the scope of applicability of the Convention with regard to acts committed by non-State actors, the obligations of States parties in that regard, as well as implications for the functions entrusted to the Committee'.⁸² The Statement is a key document because it outlines the Committee's position on several issues that were previously unclear, especially regarding disappearances falling within article 3 ICPED. Regarding the latter, the Statement indicates that no Convention obligations

⁷⁷ Ibid.

⁷⁸ L. Guercke, 'State acquiescence to disappearances in the "context of Mexico's War on Drugs"' in S. Mandolessi and K. Olalde Rico (eds.), *Disappearances in Mexico: From the 'Dirty War' to the 'War on Drugs'* (Routledge, 2022), pp. 127–49.

⁷⁹ Ibid., pp. 136–40.

⁸⁰ Ibid., p. 141.

⁸¹ Ibid.

⁸² CED, Statement on non-State actors.

beyond those explicitly established in article 3 ICPPED, that is, to take appropriate measures to investigate and bring those responsible to justice, apply to article 3 disappearances.⁸³ At the same time, and in line with its Guiding Principles for the Search for Disappeared Persons,⁸⁴ the Committee made clear that States do have an obligation to search for all disappeared persons.⁸⁵ The Statement further clarifies that the Committee ‘may register’ cases falling within article 3 as Urgent Actions under article 30, receive communications relating to alleged violations of article 3 under articles 31 and 32 ICPPED and it may request a visit to a State party upon receiving reliable information of serious violations of obligations under article 3.⁸⁶ Finally, the Statement confirms that, following article 5 ICPPED, disappearances committed by non-State actors acting without the authorization, support or acquiescence of the State can be considered ‘enforced disappearances’ as crimes against humanity in situations where there is a nexus with a ‘widespread or systematic attack against a civilian population’.⁸⁷

One of the Statement’s most ground-breaking contributions, also beyond the crime of enforced disappearance, is the definition of the terms ‘support, authorisation and acquiescence’ because it is the first time that a treaty body has provided such definitions. Whereas ‘support’ and ‘authorisation’ have received virtually no attention in cases concerning disappearances committed by non-State actors, existing jurisprudence encompassing an analysis of acquiescence is often confusing or even contradictory. In that sense, the adoption of a definition can be viewed as a welcome development. The extent to which the definition will be accepted and taken up in case law by bodies other than the CED remains to be seen, however, as the Statement is a soft law instrument whose legal authority is unclear.

7.7.2 *The CED’s Definition of Acquiescence*

In light of the questions outlined above (Section 7.6.2), in particular the argument that impunity could constitute acquiescence, the CED’s

⁸³ Ibid., para. 20(4).

⁸⁴ CED, Guiding Principles.

⁸⁵ CED, Statement on non-State actors, para. 20. Moreover, read together with the CED’s recently adopted General Comment on Enforced Disappearances in the Context of Migration, the obligation to conduct ex officio investigations into a disappearance encompasses enforced disappearances and those falling within Art. 3. See CED, General Comment No. 1, para. 37.

⁸⁶ CED, Statement on non-State actors, paras. 24–6.

⁸⁷ Ibid., para. 17.

definition of acquiescence is of particular relevance for the Mexican context. The notion of ‘acquiescence’ is notoriously difficult to establish because it concerns silence from which consent can be inferred.⁸⁸ Perhaps due to this difficulty, jurisprudence on acquiescence by UN treaty bodies, as well as the Inter-American Court of Human Rights (IACtHR) and the European Court of Human Rights (ECtHR), is often vague, sometimes contradictory and generally does not include an in-depth analysis or explanation of the notion itself.⁸⁹

In the Statement, the Committee defines ‘acquiescence’ as follows:

5. ‘Acquiescence’ means that the State knew, had reasons to know or ought to have known of the commission or of the real and imminent risk of commission of enforced disappearance by persons or groups of persons, but that one of the following applies:

- (a) The State has either accepted, tolerated or given consent to this situation, even implicitly;
- (b) The State has deliberately and in full knowledge, by action or omission, failed to take measures to prevent the crime and to investigate and punish the perpetrators;
- (c) The State has acted in connivance with the perpetrators or with total disregard for the situation of the potential victims, facilitating the actions of the non-State actors who commit the act;
- (d) The State has created the conditions that allowed their commission.

6. In particular, there is acquiescence within the meaning of article 2 when there is a known pattern of disappearance of persons and the State has failed to take the measures necessary to prevent further cases of disappearance and to investigate the perpetrators and bring them to justice.

This definition reflects existing jurisprudence in that it upholds the criteria of foreseeability, and imminence, which are commonly used in cases involving human rights violations committed by non-State actors and/or acquiescence. At the same time, it also goes beyond approaches in case law because it explicitly encompasses both the State’s role in the creation of conditions that allowed the commission of such crimes and impunity for disappearances falling within article 3 ICPPED. Thus, a

⁸⁸ On the notion of acquiescence, see N. S. Marques Antunes, ‘Acquiescence’, *Max Planck Encyclopedias of International Law [MPIL]* (Oxford Public International Law, 2006).

⁸⁹ See, for example, M. Milanovic, ‘State Acquiescence or Connivance in the Wrongful Conduct of Third Parties in the Jurisprudence of the European Court of Human Rights’ (2019), available at <http://dx.doi.org/10.2139/ssrn.3454007>; Guercke, ‘State Acquiescence to Disappearances’, pp. 135–40.

State's failure to prevent a disappearance that was foreseeable and imminent can be considered as acquiescence if the State created the conditions for it to occur, or if it failed to investigate and bring the perpetrators to justice in contexts where there are clear patterns of disappearances falling within article 3 ICPED. Furthermore, and distinct from case law on acquiescence by other human rights bodies, the definition is silent on the State's ability to prevent the disappearance. This is particularly relevant because there can be State acquiescence without physical presence or involvement of State actors. The question that remains for the CED, and other bodies applying this definition, is how, in a specific case, it will establish foreseeability and the existence of a real and imminent risk: Does the State's knowledge have to relate to the particular victim, or can it be more general contextual knowledge relating to a particular group of persons or a whole population?⁹⁰ At what point is the risk of a disappearance to occur 'real and imminent'?

7.7.3 *The Statement on Non-State Actors and the Mexican Context*

Returning to the situation in Mexico, these questions are of crucial importance. All four elements listed in paragraph 5 as conditions for acquiescence could apply in relation to the Mexican State:

- (a) if State forces let certain criminal groups operate freely, one could argue that they are giving implicit consent to their actions;
- (b) the State continuously fails to investigate disappearances that are reported, and it also fails to take effective measures against the groups committing these disappearances, which could be seen as a failure to prevent⁹¹;
- (c) several high profiles cases, such as the disappearance of the 43 students from Ayotzinapa in 2014⁹² or the 2011 massacre in Allende

⁹⁰ With regard to torture, some authors have argued that general knowledge of such acts being committed and failure to take measures against them would be sufficient to establish acquiescence. R. McCorquodale and R. La Forgia, 'Taking off the blindfolds: Torture by non-State Actors' (2001) 1 *Human Rights Law Review* 189, 206.

⁹¹ I have developed this argument elsewhere. See L. Guercke, 'State responsibility for a failure to prevent violations of the right to life by organised criminal groups: Disappearances in Mexico' (2021) 21 *Human Rights Law Review* 329, 353–6.

⁹² IACHR, Follow-up on the Ayotzinapa Case by the IACHR Special Follow-Up Mechanism (Organization of American States, 2018), Situation Report OEA/Ser.L/V/II. Doc, p. 82.

and Piedras Negras,⁹³ have shown connivance between State and criminal actors, and there are examples of criminal organizations in charge of security forces, for example, in the State of Nayarit;⁹⁴ moreover, the negligent behaviour of authorities in the forensic context could be described as the State acting 'with total disregard for the situation of the potential victims';

- (d) finally, combining the persistence of impunity, as well as the role of State policies in causing the upward spiral of disappearances, it could be argued that the Mexican State 'has created the conditions that allowed their commission'.

Nonetheless, it still needs to be established that the State could have foreseen a disappearance and that the latter was imminent for there to be acquiescence.

Considering that the situation of disappearances in the country has been highlighted by Mexican civil society and regional and international human rights mechanisms for decades, and the Mexican State itself recognizes that there is a crisis of disappearances, there is clearly general knowledge of a real risk for persons to disappear. Notwithstanding, given the variations in the dynamics of disappearances across time and space, the level of risk for a disappearance to occur and its imminence also vary. Therefore, a blanket assumption of knowledge for all cases would be controversial. However, given that disappearances are 'widespread in much of [Mexico's] territory', as observed by CED itself since 2015,⁹⁵ it could be argued that there does exist a 'real and imminent risk of the commission' of a disappearance in those regions where disappearances are considered to be widespread. This interpretation would imply that in areas where disappearances are widespread, all disappearances could be considered as enforced disappearances based on acquiescence.

Furthermore, paragraph 6 of the Statement refers to State failure to respond to known patterns of disappearances falling within article 3 ICPED. While this paragraph does not mention the criteria of foreseeability and imminence of risk, it must be presumed that the existence of a pattern implies the necessary foreseeability and imminence of risk, as it is unlikely that the CED intended to provide two different definitions of

⁹³ See, for example, S. Aguayo and J. Dayán, *El Yugo Zeta: Norte de Coahuila, 2010–2011* (Colegio de México, 2017).

⁹⁴ Fidh and I(dh)reas, 'Mexico: Criminal Structure within the Public Prosecutor's Office'.

⁹⁵ CED, Concluding Observations on Mexico, CED/C/MEX/CO/1, para. 10.

acquiescence. Paragraph 6 implies that the Committee agrees with the above-mentioned arguments (Section 7.6.2) in favour of considering State inaction, for example, as manifested in persistent impunity, as a form of acquiescence in certain circumstances. Returning to the example of an organized criminal group who abducts and executes a group of construction workers and buries the victims' remains in a clandestine mass grave, as per the definition of acquiescence provided by the CED, the crime could now also be categorized as an *enforced* disappearance in the following scenario: even if no State agents were present at the scene, State agents could be considered as acquiescing to the act if said organized criminal group was known to regularly abduct, execute and bury specific groups of persons, such as construction workers, constituting a pattern, and was able to engage in these activities undisturbed.

7.7.3.1 A Presumption of Acquiescence?

A final important aspect of the Statement on Non-State Actors concerns what could be termed a 'presumption' of acquiescence. Consistent with recent case law concerning disappearances in Mexico by CED itself and the Human Rights Committee (HRC),⁹⁶ which concerned allegations of direct State participation, paragraph 7 of the Statement places the burden of proof on the State to show that there was no acquiescence:

7. In such cases, the State has the burden of proving that there was no acquiescence on its part, and it must demonstrate that it has taken concrete measures and action to prevent, investigate and punish the crime, and that such measures have been effective in practice.

While the definition of acquiescence provided in the Statement does not allow for a blanket categorization of all contemporary disappearances in Mexico as *enforced* disappearances on the basis of acquiescence, a *presumption* of acquiescence can be useful in a context of generalized State inaction. This is because if a case is brought alleging acquiescence, the State will have to show that it has taken measures to address disappearances in areas where there are patterns of disappearances, disappearances are widespread or where there are clear links between State officials and non-State actors. If the State fails to show that it has not acquiesced, victims will be considered as victims of enforced disappearance. In that

⁹⁶ See *Hidalgo Rea and Rivera Hidalgo v. Mexico*, Human Rights Committee, UN Doc. CCPR/C/131/D/3259/2018, 2021; *Berrospe Medina and Mendoza Berrospe v. Mexico*, Committee on Enforced Disappearances, UN Doc. CED/C/24/D/4/2021, 2023.

sense, a presumption of acquiescence may be the most appropriate approach to the Mexican context because it could avoid a differentiation between the victims of different types of disappearances in the international realm. This would reflect the Mexican State's overall responsibility based on its negligence towards all disappeared persons in the country and their relatives.

7.8 Conclusion

The issue of disappearances in Mexico highlights some of the legal questions surrounding disappearances committed by non-State actors and contexts of utter State failure to protect human rights and end impunity. Given that not all disappearances can be considered *enforced* disappearances in line with the ICPPED, the involvement of non-State actors can imply the coexistence of two types of disappearances and, subsequently, two types of victims. Yet, the Mexican context shows the potential issue with such a distinction due to the overall failure of the State to prevent disappearances, including those committed by non-State actors, as well as to investigate, search for the disappeared and ensure that perpetrators are brought to justice. Considering the detrimental impact on relatives of the uncertainty over the fate and whereabouts of their loved one, which gave rise to the international framework on the missing and disappeared in the first place, legal distinctions between categories of victims can seem arbitrary in such a context. Moreover, questions arise whether the State could not bear a higher level of responsibility for all disappearances due to its role in creating and perpetuating the country's disappearance crisis.

This chapter has shown that it is unlikely that the gross mishandling of dead bodies, one of the effective causes of disappearances in Mexico, could be considered as a type of enforced disappearance. Nonetheless, further research is needed to explore in what ways the State might be considered as more directly responsible for these crimes, given their impact on victims' relatives. Regarding the question of State inaction and impunity as a form of acquiescence, the CED's Statement on Non-State Actors for the first time provides a concrete definition of the term 'acquiescence', which is of great relevance to the Mexican context. The Committee's definition of acquiescence is broad and could apply to a very large number of disappearances in the country. This is because, according to the Statement, acquiescence can result from inaction in instances where there is a known pattern of disappearances, as well as

when a State has created the conditions for the commission of disappearances and there exists a foreseeable risk that they will occur. Given that disappearances in Mexico have been considered as ‘widespread’ in many parts of the country for years, an argument could be made that there is always foreseeable and imminent risk in areas where disappearances are widespread. Additionally, where there are clear patterns of disappearances, the Statement can be read to presume the necessary foreseeability and imminence of risk, converting the State’s inaction into acquiescence. Finally, the Statement provides for a presumption of acquiescence, which could be particularly important in the Mexican context to avoid seemingly arbitrary distinctions between victims.

These questions matter not just for Mexico but also for other situations in which State and non-State actors may be involved in the commission of disappearances and dead bodies are grossly mishandled, for example, in the context of migration. It will now be up to the CED to apply its own definition of the terms support, authorization and acquiescence and, regarding the latter, decide how it will determine the existence of knowledge or foreseeability and imminence of risk. If States are not to evade responsibility on the basis of legal nuance, a broad interpretation of these criteria based on knowledge of the risk itself and imminence based on an analysis of the context, rather than a specific victim, would be the most appropriate manner to approach this question.