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Confronting Mexico's Enforced Disappearance Monsters: How the ICC Can Contribute to the Process of Realizing Criminal Justice Reform in Mexico

Rodolfo D. Saenz

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Confronting Mexico's Enforced Disappearance Monsters: How the ICC Can Contribute to the Process of Realizing Criminal Justice Reform in Mexico

Rodolfo D. Saenz*

ABSTRACT

In 2015, the United Nations Committee on Enforced Disappearances released a report on Mexico, concluding that there is a generalized context of disappearances in the country, many of which would meet the legal definition of enforced disappearance. Despite the recurring pattern of mass disappearances throughout the country in the last decade, including the recent disappearance of forty-three students in Iguala, Mexico has not convicted a single person for an enforced disappearance committed after 2006. Equally appalling is the fact that 40 percent of missing person cases in the country never get opened. Mexico has begun a process of reforming its criminal justice system, but a lack of marked progress has largely prevented the country from adequately addressing this impunity.

This Article will argue in favor of pursuing an investigation at the International Criminal Court (ICC). It will demonstrate that, if the Office of the Prosecutor (OTP) were to open a preliminary examination in Mexico, the OTP would likely decide to initiate an investigation, even if enforced disappearance were the only crime considered. It will further argue that pursuing an investigation would likely contribute to Mexico's reform process through the OTP's use of positive complementarity, a strategy by which the OTP supplements ongoing domestic criminal proceedings in order to help ensure effective investigations and prosecutions. Not only could the OTP use the threat of opening an investigation to pressure Mexican authorities to enact reform but

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it could also adopt proactive measures to help accelerate that progress. This Article will propose three innovative measures that the OTP could use in Mexico as part of its positive complementarity strategy to bring Mexico closer to confronting its enforced disappearance monsters.

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I. INTRODUCTION

*At least when your loved one dies, you know where they are, what happened, you can eventually get used to it. We do not know what monster we are fighting.*¹

-Reyna Estrada, wife of disappeared husband

A. Iguala

September 26, 2014 is now a date that holds much meaning for the Mexican people. Just after sundown on that day, in the town of Iguala in Guerrero, the local police surrounded three buses full of university students from Ayotzinapa and opened fire.² During the

1. Tracy Wilkinson, *Mexico's Drug War Disappearances Leave Families in Anguish*, L.A. TIMES (Mar. 7, 2011), <http://articles.latimes.com/2011/mar/07/world/la-fig-mexico-disappeared-20110307/2> [<https://perma.cc/3GVC-WAPE>] (archived Oct. 6, 2016).

2. Ryan Devereaux, *Ghosts of Iguala*, THE INTERCEPT (May 4, 2015), <https://firstlook.org/theintercept/2015/05/04/how-43-students-disappeared-in-mexico-part-1/> [<https://perma.cc/V9DK-UQZU>] (archived Oct. 6, 2016); *Mexican Students*

chaos that ensued, two dozen people were wounded, six individuals were killed, and forty-four students were taken captive.³ The following morning the body of one of the students was found lying on a street with the skin from his face peeled off and his eyes gouged out.⁴

Despite the subsequent discovery of several mass graves in the area and several months of investigation, only one of the students' bodies has been positively identified.⁵ The whereabouts of the other forty-two students remain unknown. More than a hundred local officials and drug cartel members have been arrested and charged in relation to the incident, but no trial has neared completion.⁶ As will be discussed further in the next Section, the Iguala incident forms a part of a larger pattern of ongoing disappearances and enduring impunity in the country.

The events in Iguala triggered a serious debate in Mexico about how much the state is involved in mass disappearances—one that reflects the Mexican people's growing loss of confidence in the ability of its criminal justice system to investigate and to prosecute the crimes

Missing After Protest in Iguala, BBC NEWS (Sept. 29, 2014), <http://www.bbc.com/news/world-latin-america-29406630> [<https://perma.cc/TV4U-XRJJ>] (archived Oct. 6, 2016).

3. Óscar de Pablo, *Iguala: Crimen de Estado, Crimen de Clase*, EL MIRADOR POLÍTICO (Nov. 17, 2014), <http://www.gkillcity.com/articulos/el-mirador-politico/iguala-crimen-estado-crimen-clase> [<https://perma.cc/XA22-AXND>] (archived Oct. 6, 2016); Devereaux, *supra* note 2.

4. Rafael Romo, *Slain Mexican Student's Friends, Family Demand Justice*, CNN (Nov. 6, 2014), <http://edition.cnn.com/2014/11/06/world/americas/mexico-slain-student/> [<https://perma.cc/XR42-ZGXL>] (archived Oct. 6, 2016).

5. See Francisco Goldman, *Mexico's Missing Forty-Three: One Year, Many Lies, and a Theory That Might Make Sense*, NEW YORKER (Sept. 30, 2015), <http://www.newyorker.com/news/news-desk/mexicos-missing-forty-three-one-year-many-lies-and-a-theory-that-might-make-sense> [<https://perma.cc/8P3T-2SEW>] (archived Oct. 10, 2016) [hereinafter *Mexico's Missing Forty-Three*]; Francisco Goldman, *The Missing Forty-Three: The Government's Case Collapses*, NEW YORKER (June 8, 2015), <http://www.newyorker.com/news/news-desk/the-missing-forty-three-the-governments-case-collapses> [<https://perma.cc/RMW2-9A2A>] (archived Oct. 10, 2016) [hereinafter *The Missing Forty-Three*].

6. See Pedro Matías, *Ordena Juez Ampliar a Oaxaca Búsqueda de los 43 Normalistas*, PROCESO (May 18, 2015), <http://www.proceso.com.mx/?p=404678> [<https://perma.cc/AA4T-SF76>] (archived Oct. 6, 2016) (detailing an order by a judge in the Fourth District granting a "juicio de amparo," staying proceedings until a more complete investigation of the forty-three disappeared students is conducted); AMNESTY INT'L, ANNUAL REPORT: MEXICO (2015/2016), <https://www.amnesty.org/en/countries/americas/mexico/report-mexico/> [<https://perma.cc/YDX5-HKWV>] (archived Oct. 6, 2016) [hereinafter 2016 AI Report]; HUM. RTS. WATCH, WORLD REPORT 2016: MEXICO, <http://www.hrw.org/world-report/2015/country-chapters/mexico> [<https://perma.cc/B7SA-4B2T>] (archived Oct. 6, 2016) [hereinafter 2016 HRW Report]. For an informative report on the events and ensuing investigations concerning the events in Iguala see AMNESTY INT'L, "Treated with Indolence": the State's Response to Disappearances in Mexico (Jan. 14, 2016), <https://www.amnesty.org/en/documents/amr41/3150/2016/en/> [<https://perma.cc/Z5VE-3MHB>] (archived Oct. 6, 2016) [hereinafter *Treated with Indolence*].

that arise from the Mexican drug “war.”⁷ In January 2015, former Attorney General Murillo Karam⁸ publicly declared that, following the gunfire, members of the Iguala municipal police detained the students and turned them over to the drug cartel “Guerreros Unidos,” all under the orders of Iguala mayor José Luis Abarca.⁹ According to Karam, after this transfer, members of the drug cartel slaughtered and incinerated the students and tossed their remains into the San Juan River.¹⁰ Karam proclaimed that this story was “the historical truth” and that he was prepared to close the case.¹¹

Following these remarks, many individuals, including the President of the Mexican Commission for the Defense and Promotion of Human Rights (CMDPH), Luis Raúl González, contested the accuracy of the story, claiming that “Iguala is not a closed case,”¹² because they suspected greater collusion between the Guerreros Unidos and federal officials.¹³ Indeed, they had reason to harbor such beliefs: a 2014 investigative report, published by the Mexican magazine *Proceso*, alleges that Karam’s story was the product of unreliable interrogations of captured members of the drug cartel, deliberately calculated to confirm that story.¹⁴ In December 2014, a

7. Although referred to as a “war,” it is still debated whether the violence in Mexico would qualify as a non-international armed conflict under international humanitarian law. See, e.g., Andrea Nill Sánchez, Note, *Mexico’s Drug “War”: Drawing a Line Between Rhetoric and Reality*, 38 YALE J. INT’L L. 467, 470–91 (2013).

8. In March 2015, Karam was dismissed and replaced by Arely Gómez González. See *Mexico: Six Months of Frustration and Failure in Search For Missing Ayotzinapa Students*, AMNESTY, INT’L (Mar. 26, 2015), <https://www.amnesty.org/en/latest/news/2015/03/mexico-six-months-of-failure-in-search-for-missing-ayotzinapa-students/> [<https://perma.cc/M64H-KZMU>] (archived Oct. 6, 2016).

9. Patricia Dávila, “Los Normalistas Están Muertos; Fueron Calcinados”: Murillo Karam, PROCESO (Jan. 27, 2015), <http://www.proceso.com.mx/?p=394286> [<https://perma.cc/8VUT-TMSF>] (archived Oct. 6, 2016); Kyra Gurney, *Mexico Wraps Up Iguala Investigation Amid Widespread Doubts*, INSIGHTCRIME (Jan. 28, 2015), <http://www.insightcrime.org/news-analysis/mexico-wraps-up-iguala-investigation-amid-widespread-doubts> [<https://perma.cc/XT34-6KDB>] (archived Oct. 6, 2016).

10. Gurney, *supra* note 9; see also Andrew Russell, *19 Weeks ago, 43 Mexican Students Disappeared. What Happened?*, GLOBAL NEWS (Jan. 29, 2015), <http://globalnews.ca/news/1799545/19-weeks-ago-43-mexican-students-disappeared-what-happened/> [<https://perma.cc/BB29-DB7V>] (archived Oct. 9, 2016).

11. Devereaux, *supra* note 2, at 2.

12. Sonia Corona, *Mexico’s Top Human Rights Official Calls for Forced-Disappearance Laws*, EL PAÍS (Mar. 26, 2015), http://elpais.com/elpais/2015/03/26/inenglish/1427376260_734062.html [<https://perma.cc/7H9C-M8V2>] (archived Oct. 9, 2016).

13. See, e.g., Catalina Piccato, “It Was the State”: *Frustration with Corruption Grows in Mexico*, COLUM. POL. R. (Dec. 21, 2014), <http://cpreview.org/2014/12/it-was-the-state/> [<https://perma.cc/MW8A-4SPD>] (archived Oct. 9, 2016).

14. Anabel Hernández & Steve Fisher, *La Historia No Oficial: El Gobierno No lo Reconoce, Pero Según una Investigación de Proceso, Fuerzas Federales Sí Participaron en el Ataque Contra los Estudiantes de Ayotzinapa*, EL DIARIO (Dec. 14, 2014), <http://www.eldiariodecoahuila.com.mx/lomejordelaapro/2014/12/14/historia-oficial-475018.html> [<https://perma.cc/PLK3-DL83>] (archived Oct. 19, 2016); *Damning Report Claims Mexican Federal Police Participated in Disappearance of 43 Students*,

report authored by scientists from the Universidad Nacional Autónoma de México cast major doubt on the supposed early morning incineration of the students.¹⁵ Not trusting the Mexican government's investigative efforts, a delegation of the parents of the missing students enlisted the help of several independent experts, including the Argentine Forensic Anthropology Team (EAAF) and the Inter-American Commission on Human Rights-led (IACHR) Interdisciplinary Group of Experts.¹⁶ Both of these entities have also released reports questioning Karam's story and the government's investigative efforts.¹⁷

On May 18, 2015, the same delegation of parents gathered at Leiden University for a panel discussion about the disappearances in Iguala.¹⁸ Román Hernández, a lawyer from the Montaña Tlachinollan

HUFFINGTON POST (Dec. 14, 2014), http://www.huffingtonpost.com/2014/12/14/missing-students-mexico_n_6321866.html [<https://perma.cc/R5RF-YR5Q>] [archived Oct. 9, 2016]. For the full report, see Anabel Hernández & Steve Fisher, *La Historia No Oficial*, PROCESO (Dec. 2014), at 6, <http://www.proceso.com.mx/390560/iguala-la-historia-no-oficial> [<https://perma.cc/A2GT-TR9P>] (archived Oct. 19, 2016) [hereinafter *Proceso Report*].

15. Devereaux, *supra* note 2, at 2; *Científicos Consideran "Fantasiosa" la Versión de PGR Sobre el Caso Iguala*, ECONOMÍAHOY (Dec. 12, 2014), <http://www.economiahoy.mx/politica-eAm-mx/noticias/6321943/12/14/Cientificos-mexicanos-consideran-fantasiosa-la-version-de-la-PGR-sobre-el-caso-Iguala.html#Kku8Jw7RcEi9Tr2> [<https://perma.cc/SQA7-B76D>] (archived Oct. 9, 2016) (concluding that much more fuel would have been required to burn the bodies than contended by the Mexican government).

16. Devereaux, *supra* note 2, at pt. 2.

17. See, e.g., COMUNICADO DE PRENSA, EQUIPO ARGENTINO DE ANTROPOLOGIA Forense (EAAF), RESUMEN EJECUTIVO SOBRE INVESTIGACIONES EN EL BASURERO DE COCULA Y RIO SAN JUAN ¶ 3 (Feb. 9, 2016), http://centroprodh.org.mx/Resumen%20Ejecutivo%208-2-2016_revision.pdf [<https://perma.cc/X998-WYK2>] (archived Oct. 9, 2016) [hereinafter *EAAF Report*] (concluding that there were no signs of a mass incineration at the Cocula dump); INTERDISCIPLINARY GRP. OF INDEP. EXPERTS (GIEI), INFORME AYOTZINAPA: INVESTIGACIÓN Y PRIMERAS CONCLUSIONES DE LAS DESAPARICIONES Y HOMICIDIOS DE LOS NORMALISTAS DE AYOTZINAPA, at 307–31 (Sept. 6, 2015), <http://reddtdt.org.mx/wp-content/uploads/2015/09/Informe-ayotzi.pdf> [<https://perma.cc/4Y25-HVWF>] (archived Oct. 9, 2016) [hereinafter *GIEI REPORT*] (concluding that the students were not incinerated at the Cocula trash dump). For a full list of the reports of these entities, see *Analysis and Information on Mexico's Ayotzinapa Case: A List of Resources Regarding Mexico's Investigation of the 43 Disappeared Students*, WASH. OFFICE ON LATIN AM. (Aug. 10, 2016), <https://www.wola.org/analysis/analysis-and-information-on-mexicos-ayotzinapa-case/> [<https://perma.cc/W26M-6SK2>] (archived Oct. 9, 2016).

18. "The Students from Ayotzinapa: Security, Citizenship and the Search for Justice in Mexico," Klein Auditorium, Academy Building, Leiden University (May 18, 2015). For a video of the entire event, see PazEnMéxico Holanda – Países Bajos – Colectivos, *Ayotzinapa in Leiden University- Eurocaravana en Holanda*, YOUTUBE (May 18, 2015), <https://www.youtube.com/watch?v=r9kRtzTe9fA> (last visited Mar. 29, 2016) [<https://perma.cc/Y3GR-XN4L>] (archived Oct. 10, 2016) [hereinafter *Ayotzinapa in Leiden*].

Center for Human Rights,¹⁹ made the following statement on behalf of the delegation:

[t]he Mexican government is investigating [the students] as a result of probable connections with drug-trafficking . . . [it] practices the re-victimization of the victims, in this case by attributing to the victim the reasons for [his or her] victimization. This can deepen the distrust of those same victims in the judicial institutions²⁰

Indeed, the Mexican government has alleged that the Guerreros Unidos had motives to apprehend the students: the students were believed to be members of a rival cartel called Los Rojos.²¹ Though, there have been reports in the media that assert that at least one of the students was also an active military officer.²²

Irrespective of which version of the events is correct, these clashing narratives about the truth demonstrate why the Mexican people have a growing loss of confidence in their criminal justice system. Since Iguala, the Mexican population has begun to act more visibly on its frustration with government corruption and the impunity²³ in Mexico. For example, in June 2015, Jaime Rodríguez became the first gubernatorial candidate in Mexican history to win as an independent.²⁴ However, he was not the only independent to win in that midterm election: independent and smaller party candidates took key victories across the country, winning positions as local representatives and as members of the lower house of Mexico's

19. *Ayotzinapa Lleva Reclamos a Europa: Brigada Inicia Gira Por 12 Países*, CNN (Apr. 16, 2015), <http://mexico.cnn.com/nacional/2015/04/16/ayotzinapa-lleva-reclamos-a-europa-brigada-inicia-gira-por-12-paises> [<https://perma.cc/8DV5-LVYU>] (archived Oct. 9, 2016).

20. *Ayotzinapa in Leiden*, *supra* note 18, at 36:50–39:40.

21. Gurney, *supra* note 9.

22. *Compare La Sedena Confirma Que uno de los Desaparecidos de Ayotzinapa Era Militar*, CNN (June 19, 2015), <http://mexico.cnn.com/nacional/2015/06/19/la-sedena-confirma-que-uno-de-los-desaparecidos-de-ayotzinapa-era-militar> [<https://perma.cc/3ME6-WUGH>] (archived Oct. 9, 2016) (arguing that the assertion noted above has been confirmed), *with Padres Niegan Que uno de los 43 Alumnos de Ayotzinapa Fuera Militar*, CNN (June 22, 2015), <http://mexico.cnn.com/nacional/2015/06/22/padres-niegan-que-uno-de-los-43-alumnos-de-ayotzinapa-fuera-militar> [<https://perma.cc/B6W8-VZ5L>] (archived Oct. 9, 2016) (contesting the above assertion).

23. This Article uses “impunity” as it is used in legal vernacular. *Impunity*, BLACK’S LAW DICTIONARY (10th ed. 2014) (“[E]xemption or protection from penalty or punishment.”).

24. Dudley Althaus, *Independent Wins Mexican Governorship*, WALL ST. J. (June 8, 2015), <http://www.wsj.com/articles/mexicans-vote-in-tense-midterm-elections-1433692326> (subscription required) [<https://perma.cc/VTQ3-XVQZ>] (archived Oct. 9, 2016); Luis Pablo Beauregard, *‘El Bronco’, Primer Gobernador Independiente de México*, EL PAÍS (June 3, 2015), http://internacional.elpais.com/internacional/2015/06/08/actualidad/1433743475_944848.html [<https://perma.cc/46UB-X9EL>] (archived Oct. 9, 2016).

Congress.²⁵ These victories are staggering considering the historical political domination of Mexico's National Action Party (PAN) and the more recent emergence of two other major parties—the Institutional Revolutionary Party (PRI) and the Party of the Democratic Revolution (PRD).²⁶ These developments signal the beginning of a new intolerance towards corruption. The Mexican people are ready for change.

B. *Legal Reform as the Response to Iguala*

International institutions have also recognized the need for change, particularly with respect to Mexico's criminal justice system. In February 2015, the United Nations Committee on Enforced Disappearances (UNCED) released its concluding observations on Mexico, finding that there is a "generalized" context of disappearances in the country.²⁷ The UNCED noted that the grave case of the disappearance of the forty-three students illustrates the serious deficiencies in the state's ability not only to search for the victims of enforced disappearance but also to prevent, investigate, and impose sanctions.²⁸ The UNCED made the following recommendations, among others, to the State of Mexico:

- (i) adopt a general law regulating and facilitating the search for victims as well as the prevention, investigation, and prosecution of the act at both the federal and state levels;
- (ii) create and maintain a national register with comprehensive statistics regarding victims of enforced disappearance;
- (iii) reform the federal and state criminal codes so that they uniformly recognize the crime as autonomous from others and provide a definition in accordance with the International Convention on Enforced Disappearances; and

25. See Daniel Hernandez & Rafael Castillo, *Mexico Elections Update: 'El Bronco' Rides Wave of Discontent to Big Win in Nuevo Leon*, VICE NEWS (June 8, 2015), <https://news.vice.com/article/mexico-elections-update-el-bronco-rides-wave-of-discontent-to-big-win-in-nuevo-leon> [<https://perma.cc/LA72-3Y8V>] (archived Oct. 9, 2016) (detailing the results of the midterm election).

26. See Yann P. Kerevel, *Loyalty and Disloyalty in the Mexican Party System*, 56 LATIN AM. POL. & SOC'Y 93, 99–100 (2014); Althaus, *supra* note 24 (explaining the dominance of the three parties).

27. UNCED, OBSERVACIONES FINALES SOBRE EL INFORME PRESENTADO POR MÉXICO EN VIRTUD DEL ARTÍCULO 29, PÁRRAFO 1, DE LA CONVENCION ¶ 10 (Feb. 11, 2015), http://tbinternet.ohchr.org/Treaties/CED/Shared%20Documents/MEX/INT_CED_COB_MEX_19564_S.pdf [<https://perma.cc/R9G2-UXAF>] (archived Oct. 9, 2016) [hereinafter UNCED Report].

28. *Id.* ¶ 10.

- (iv) guarantee both (a) that all state entities or agents that could have been involved in a disappearance are investigated and (b) that those members of civil or military security forces that could have been involved be excluded from participating in such investigations, in order to ensure that Mexican officials conduct exhaustive and impartial investigations.²⁹

Implied in the UNCED's recommendations is the idea that legal reform may hold the key not just to combatting enforced disappearance but also to combatting the corruption that facilitates its perpetuation.

There are other strategies for addressing the disappearances in Mexico that could be borrowed from the larger debate about how to end the violence in the country. For example, many legal scholars argue that the ideal long-term solution to ending such violence is to eliminate U.S. drug demand by having the U.S. government adopt changes in U.S. policies concerning the criminalization of drugs.³⁰ However, even if all hard drugs were legalized in the United States, such a strategy would probably not address the corruption at the heart of the violence, as Mexican drug cartels would likely just expand their drug supply to other countries.

Others argue that the extradition of drug cartel leaders to the United States for drug-trafficking offenses could serve as an interim solution until Mexico becomes more capable of apprehending and prosecuting drug cartel members.³¹ Although extradition to the United States may indeed impede drug cartel leaders from directing criminal operations,³² in the past this strategy has also led to the splintering of cartels into smaller ones, thereby contributing to further violence.³³ What is more, the extradition strategy is not new: it has been utilized

29. *Id.* ¶¶ 16, 18, 20, 28. The Mexican government disputes the findings and recommendations in the Committee's report, arguing that it does not "adequately reflect the information presented or provide additional elements to reinforce the actions and commitments that have been undertaken to address the challenges mentioned." Kyra Gurney, *Why Is Mexico Rejecting UN Findings on Disappearances?*, INSIGHTCRIME (Feb. 18, 2015), <http://www.insightcrime.org/news-analysis/why-mexico-rejecting-un-findings-disappearances> [https://perma.cc/2A6P-EETX] (archived Oct. 9, 2016) (quoting the Mexican government press release).

30. See, e.g., STEVEN W. BENDER, *RUN FOR THE BORDER: VICE AND VIRTUE IN U.S.-MEXICO BORDER CROSSINGS* 164–71 (2012).

31. Joshua S. Spector, *Extraditing Mexican Nationals in the Fight Against International Narcotics Crimes*, 31 U. MICH. J.L. REFORM 1007, 1011 (1998) ("Mexico should extradite Mexican-national narco-traffickers high on the U.S.-extradition request list.")

32. Devin C. McNulty, *The Changing Face of Extraditions Between Mexico and the United States*, 31 CHAMPION MAGAZINE 32, 37 (2007).

33. See Walter Rodriguez, *Mexico's Catch-22: How the Necessary Extradition of Drug Cartel Leaders Undermines Long-Term Criminal Justice Reforms*, 38 B.C. INT'L & COMP. L. REV. 159, 186–87 (2015).

throughout the Mexican drug war.³⁴ In 2014, Mexico extradited sixty-six individuals to the United States, representing a 22 percent increase from the figures from the previous year.³⁵ Yet, the aforementioned surge in enforced disappearances continued during that period, suggesting that extradition alone is not enough.

As evidenced above, the current discourse on how to address the escalating drug cartel violence in Mexico has been heavily focused on transnational efforts by the United States and Mexico. Indeed, the Mexican drug war should continue to be imagined as a problem shared by the two countries³⁶—one that requires regional cooperation and the use of a variety of strategies in tandem. However, the literature has largely neglected the role of international criminal institutions in addressing Mexico's challenges, in particular the ongoing enforced disappearances and the vast impunity for such acts. Very few have analyzed whether the legal criteria for the crime would be met in the context of the drug war in Mexico or have proposed how those criminal institutions could help address the current failure to adequately prosecute the crime.³⁷ This Article seeks to fill those voids.

C. *The Purpose of this Article*

To address the Mexican government's pervading impunity for enforced disappearances and the population's distrust of the domestic criminal justice system, the Mexican government will need to enact legal reform. However, the necessary changes will take time to materialize. As suggested in the UNCED's report, Mexico has barely made progress with respect to its enforced disappearance epidemic. Until Mexico becomes capable of investigating and prosecuting the crime on its own, any international interventions should concentrate on aiding the reform process.

This Article makes the following original contributions to the discourse regarding enforced disappearances in Mexico and available

34. See Melanie Reid, *Mexico's Crisis: When There's a Will, There's a Way*, 37 OKLA. CITY U. L. REV. 397, 409 (2012) (describing extradition figures between 2006 and 2010).

35. BUREAU FOR INT'L NARCOTICS & LAW ENFORCEMENT AFFAIRS, U.S. DEP'T OF STATE, INTERNATIONAL NARCOTICS CONTROL STRATEGY REPORT, VOLUME I: DRUG AND CHEMICAL CONTROL 239 (Mar. 2015), <http://www.state.gov/documents/organization/239560.pdf> [<https://perma.cc/5U9N-RFKM>] (archived Oct. 9, 2016).

36. Alan D. Bersin, *El Tercer País: Reinventing the U.S. / Mexican Border*, 48 STAN. L. REV. 1413, 1418–19 (1996).

37. There are some very recent contributions. See, e.g., Justin A. Behraves, "Ya Me Canse": *How the Iguala Mass Kidnapping Demonstrates Mexico's Continued Failure to Adhere to its International Human Rights Obligations*, 21 L. & BUS. REV. AM. 291 (2015); C. M. Zandbergen, *Enforced Disappearances in Mexico's 'War on Drugs': Prosecuting Former President Calderón at the ICC?* (Sept. 2012) (unpublished thesis, University of Amsterdam) (<http://dare.uva.nl/cgi/arno/show.cgi?fid=468798> [<https://perma.cc/LVG6-GTXV>] (archived Oct. 9, 2016)).

alternatives for aiding the country in addressing the problem. It will argue in favor of involving the International Criminal Court (ICC), particularly the ICC Office of the Prosecutor (OTP), in the process of realizing criminal justice reform in the country. If the OTP opened a preliminary examination in Mexico, not only would it likely decide to initiate an investigation in accordance with Article 53 of the Rome Statute,³⁸ but the evaluative process leading up to that decision would also likely contribute to the enactment of domestic reform. The OTP could and should utilize positive complementarity, a strategy by which the OTP supplements ongoing domestic criminal proceedings in order to help ensure effective investigations and prosecutions.³⁹ Doing so would exert greater pressure on Mexican authorities to adopt relevant reforms and to accelerate Mexico's progress in addressing the impunity on its own.

D. *The Structure of this Article*

This Article is organized into four parts. In Part II, it will trace the emergence of the enforced disappearance problem in Mexico from its origins in the wake of the Mexican drug war to its more recent, generalized character. It will also highlight the lack of consensus concerning how many victims of enforced disappearance there are in Mexico. In Part III, it will outline Mexico's more recent efforts to reform its criminal justice system, discussing its continued failure to adequately prosecute the crime and explaining the underlying causes of that impunity. That Part will conclude by arguing that the combination of such impunity with the broader deficiencies in the Mexican criminal justice system creates a feedback loop, whereby the resulting lack of confidence in Mexican criminal institutions further exacerbates the impunity.

Part IV will seek to dispel the claim that the initiation of a preliminary examination concerning enforced disappearances in Mexico would not lead to an investigation. To this end, it will proceed through the different legal hurdles that the OTP would have to satisfy in order for an investigation to come to fruition, paying particular attention to contentious issues like the chapeau requirements for

38. Rome Statute of the ICC Article 53(1)(a)–(c), U.N. Doc. A/CONF.183/9 (July 17, 1998) [hereinafter Rome Statute] (“In deciding whether to initiate an investigation, the Prosecutor shall consider, [three factors: jurisdiction, admissibility, and the interests of justice].”).

39. See Carsten Stahn, *Complementarity: A Tale of Two Notions*, 19 CRIM. L.F. 87, 104 (2007) [hereinafter *A Tale of Two Notions*] (describing the “essential feature of ‘positive’ complementarity”); OTP, PROSECUTORIAL STRATEGY 2009–2012 5 (Feb. 1, 2010), <https://www.icc-cpi.int/NR/rdonlyres/66A8DCDC-3650-4514-AA62-D229D1128F65/281506/OTPProsecutorialStrategy20092013.pdf> [<https://perma.cc/QA5K-RSHR>] (archived Oct. 9, 2016) [hereinafter OTP Prosecutorial Strategy] (describing positive complementarity).

crimes against humanity and the complementarity assessment. Part V will draw on the example of the situation in Colombia to demonstrate that the mere threat of an ICC investigation during the preliminary examination phase could contribute greatly to Mexico's domestic reform process. It will then propose three innovative and proactive measures that the OTP could adopt as part of its positive complementarity strategy that would exert added pressure on Mexican authorities to enact crucial reforms.

II. THE RISE OF THE ENFORCED DISAPPEARANCE EPIDEMIC

Before explaining the impunity concerning enforced disappearances in Mexico, it is important to understand the origins and scope of the enforced disappearance epidemic plaguing the country. In order to do so, it is first critical to review what generally constitutes an enforced disappearance. Most international instruments define an enforced disappearance as some deprivation of liberty, done by state agents or persons acting with the authorization, support, or acquiescence of the state, followed by a refusal to acknowledge that deprivation of liberty or to give information on the whereabouts of the person, such that the person is left without recourse to legal remedies or procedural guarantees.⁴⁰ However, as will be further explained in Section IV(B)(ii), the legal elements of the definition differ slightly among instruments.⁴¹

This Part will begin by providing a brief background on the Mexican drug war and explain how the phenomenon of enforced disappearance emerged as a consequence of the escalating violence. Doing so will help illuminate the motives behind this commonly used practice, which will be relevant for the subsequent legal analysis of the crime in Part IV. This Part will then discuss the data, that is, what is known about the generalized context of disappearances in Mexico, and highlight the lack of consensus over the current estimates of the number of enforced disappearances in the country.

40. See International Convention for the Protection of All Persons from Enforced Disappearance, G.A. Res. 61/177, U.N. Doc. A/RES/61/177 (adopted Dec. 20, 2006); Inter-American Convention on Forced Disappearance of Persons Article 2, 33 I.L.M. 1429 (entered into force Mar. 28, 1996) [hereinafter Inter-American Convention]; Rome Statute, *supra* note 38, art. 7(2)(i).

41. Compare Rome Statute, *supra* note 38, art. 7(2)(i) (requiring "the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization . . . with the intention of removing them from the protection of the law for a prolonged period of time"), with G.A. Res. 61/177, *supra* note 40, pt. 1 art. 2 (including "or any other form of deprivation of liberty" and omitting requirements for a particular time period and a specific intent); and Inter-American Convention on Forced Disappearance of Persons art. II, Mar. 28, 1996, 33 I.L.M. 1429 (requiring "the act of depriving a person or persons of his or their freedom," and omitting requirements for a particular time period and a specific intent).

A. The Drug "War"

Drug cartels have operated in Mexico for nearly a century.⁴² Many Mexican drug lords began their careers by smuggling alcohol across the U.S. border during the Prohibition era.⁴³ However, it was not until the tail end of the century that these cartels really began to have influence. Following U.S. counter-narcotics operations in Colombia and the Caribbean during the 1980s and 1990s, Mexican drug cartels began to produce drug supplies domestically and to leverage their strategic position on the U.S. border for the purposes of smuggling.⁴⁴ As a result of these developments, Mexican drug cartels came to control both the transportation side and the supply side of drug trafficking in North America.⁴⁵

Despite the long-standing presence of drug cartels in Mexico, there had been relatively little drug-related violence in the country until the turn of the century. The PRI party's long-standing rule from 1929 to 2000 allowed for what some have called the "perfect dictatorship."⁴⁶ The PRI's domination allowed for the flourishing of a sustained "patron-client relationship" between Mexican government officials and the cartels, whereby the officials assigned trafficking routes and monopolies and protected cartel members from investigation and prosecution in exchange for a share of the profits.⁴⁷ Such arrangements permitted the cartels to operate quietly in the shadows while the government informally regulated the illegal enterprise.

Although this sanctioned corruption helped maintain the peace among drug cartels for many decades, it later became the country's Achilles heel. In 2000, Vicente Fox became the first-ever Mexican President from the PAN, ending the PRI's rule and with it the arrangements described above.⁴⁸ It was in this changed landscape that

42. See IOAN GRILLO, *EL NARCO: INSIDE MEXICO'S CRIMINAL INSURGENCY* 29–37 (2011) (describing various drug cartels in Mexico over the past 100 years); Shannon O'Neil, *The Real War in Mexico: How Democracy Can Defeat the Drug Cartels*, 88 FOREIGN AFF. 63, 66 (2009) (detailing the origins of the Mexican drug supply to the United States).

43. See Luis Astorga & David A. Shirk, *Drug Trafficking Organizations and Counter-Drug Strategies in the U.S.-Mexican Context* 14 (Ctr. for U.S.-Mex. Studies, Working Paper No. 10-01, 2010) (discussing the rise of Gulf DTO's founder).

44. GRILLO, *supra* note 42, at 63–64; O'Neil, *supra* note 42, at 66–67; Nill Sánchez, *supra* note 7, at 470.

45. GRILLO, *supra* note 42, at 63–64; Nill Sánchez, *supra* note 7, at 470.

46. M. Delal Baer, *Dispatch: Misreading Mexico*, 108 FOREIGN POL'Y 138, 140–41 (1997); Kerevel, *supra* note 26, at 99.

47. Tim Padgett, *Day of the Dead*, TIME (June 30, 2011), <http://www.time.com/time/printout/0,8816,2080608,00.html> [<https://perma.cc/L7PK-365U>] (archived Oct. 5, 2016); GRILLO, *supra* note 42, at 34–35; Nill Sánchez, *supra* note 7, at 470–71.

48. Nill Sánchez, *supra* note 7, at 470.

the drug “war”⁴⁹ began. In the absence of assigned trafficking routes, the cartels began to battle over turf, which compelled them to adopt more violent and aggressive approaches to securing the successful transit of their goods.⁵⁰ They acquired paramilitary hit squads and began employing unprecedented tactics, such as the use of heavy weaponry and widespread attacks on police and government officials.⁵¹ Additionally, rather than seeking arrangements with government officials to secure trafficking routes, the cartels began to use bribery and extortion to infiltrate various levels of government.⁵²

The 2006 election of President Felipe Calderón of the PAN only exacerbated the drug-related violence.⁵³ As a response to the escalating violence, his administration adopted a militarized approach, deploying forty-five thousand military troops to the areas that had been the major battlegrounds for drug-trafficking routes.⁵⁴ This attempt to eliminate the drug cartels with force only compelled drug cartels to retaliate with even greater force.⁵⁵ Consequently, what had started as a war among drug cartels vying for control of the trafficking routes expanded to a war that also involved fighting between members of the Mexican armed forces and drug cartels.

With the election of the current PRI President, Enrique Peña Nieto, in 2012,⁵⁶ many hoped and even expected that Mexico would return to the “era of cosy deals with drug cartels.”⁵⁷ However, it appears that Peña Nieto has largely continued Calderón’s strategy of

49. Recall that whether the “war” in Mexico would qualify as an armed conflict under international humanitarian law is still debated. *See, e.g., id.* at 470–91.

50. *See* ED VULLIAMY, *AMEXICA: WAR ALONG THE BORDERLINE* 17–20 (2010) (recounting anecdotes about drug trade violence in Mexico); Nill Sánchez, *supra* note 7, at 470–71; Padgett, *supra* note 47.

51. VULLIAMY, *supra* note 50, at 20; Nill Sánchez, *supra* note 7, at 470–71.

52. Nill Sánchez, *supra* note 7, at 471.

53. *Id.*

54. LISA HAUGAARD ET AL., *A CAUTIONARY TALE: PLAN COLOMBIA’S LESSONS FOR U.S. POLICY TOWARD MEXICO AND BEYOND* 1, 1 (2011), http://www.wola.org/sites/default/files/downloadable/Cautinary_Tale.pdf [<https://perma.cc/2BBT-RQVJ>] (archived Oct. 5, 2016).

55. *See* Steve Coll, *Whose Drug War?*, *NEW YORKER* (Nov. 9, 2011), <http://www.newyorker.com/news/daily-comment/whose-drug-war> [<https://perma.cc/5WUA-5TU2>] (archived Oct. 5, 2016) (stating that Mexico’s murder rate has increased since Calderón’s election).

56. Tim Padgett, *How Enrique Peña Nieto Won Himself and His Party the Mexican Presidency*, *TIME* (July 2, 2012), <http://world.time.com/2012/07/02/mexico-election-how-enrique-pena-nieto-won-himself-and-his-party-the-presidency/> [<https://perma.cc/X6TX-D2YD>] (archived Oct. 5, 2016).

57. Rory Carroll, *US Concerned Mexico’s New President May Go Easy on Drug Cartels*, *GUARDIAN* (July 2, 2012), <http://www.theguardian.com/world/2012/jul/02/usa-mexico-president-drugs-cartels> [<https://perma.cc/9BMY-3ZJA>] (archived Oct. 5, 2016); Raf Sanchez, *Mexican Election Raises Fears in Washington*, *TELEGRAPH* (June 29, 2012), <http://www.telegraph.co.uk/news/worldnews/centralamericaandthecaribbean/mexico/9365421/Mexican-election-raises-fears-in-Washington.html> [<https://perma.cc/XXR8-G646>] (archived Oct. 5, 2016).

fighting the cartels.⁵⁸ The Peña Nieto administration has achieved some victories: seven of the eleven drug cartel leaders captured or killed in the last six years were seized during Peña Nieto's first two years in office.⁵⁹ Although targeting the drug cartel leaders has indeed played a role in breaking up large cartels, it has also resulted in the emergence of more than eighty smaller drug cartels, all vying for territory and influence.⁶⁰

Recent gains with respect to the level of violence in Mexico have been modest. Since 2006, more than seventy-five thousand people have been murdered in drug-related violence in Mexico, with more than thirty-one thousand occurring during Peña Nieto's term in office.⁶¹ Although still moderately high, annual homicide levels have declined since 2012.⁶² For the second year in a row, the total number of homicides in Mexico declined by 15 percent in 2014, with only an estimated eight thousand deaths attributable to organized crime.⁶³ However, in 2015, this trend reversed, with the homicide levels increasing by more than 7 percent.⁶⁴

Despite these recent advancements with respect to the violence in Mexico, it is important to note that the savagery of such violence has remained largely unaffected. In May 2012, forty-nine bodies were found on the highway in the town of San Juan in Nuevo León, decapitated and with their hands and feet missing, next to a sign marking the territory of the "Las Zetas" cartel.⁶⁵ In 2014, Mexican soldiers killed twenty-two civilians allegedly belonging to an armed gang in Tlatlaya.⁶⁶ Recent eyewitness evidence indicates that, after a brief exchange of fire, several of those killed were extra-judicially executed, even after surrendering.⁶⁷ In May 2015, in a coordinated

58. See Bryan Llenas, *Drug Lords Falling Quickly in Mexico, as President Peña Nieto Follows Calderón's Old Playbook*, FOX NEWS LATINO (Mar. 5, 2015), <http://latino.foxnews.com/latino/news/2015/03/05/new-face-same-war-pena-nieto-following-calderon-playbook-in-mexico-war-on-drugs/> [https://perma.cc/F3J3-KD7X] (archived Oct. 5, 2016) (commenting that high number of drug-related arrests under Peña Nieto administration mirrored Calderón's strategy).

59. *Id.*

60. *Id.*

61. See KIMBERLY HEINLE ET AL., DRUG VIOLENCE IN MEXICO: DATA AND ANALYSIS THROUGH 2014 1, 9–10 (2015), <https://justiceinmexico.org/wp-content/uploads/2015/04/2015-Drug-Violence-in-Mexico-Report.pdf> [https://perma.cc/L3ZH-J4L8] (archived Oct. 5, 2016).

62. *Id.* at 7.

63. *Id.* at vi–vii, 10.

64. Roque Planas, *6 Things Going on in Mexico's Drug War that Matter More than El Chapo*, HUFFINGTON POST (Jan. 26, 2016), http://www.huffingtonpost.com/entry/mexico-drug-war_us_56a7995fe4b01a3ed123dbd9 [https://perma.cc/GNB6-T7TU] (archived Oct. 5, 2016).

65. *49 Mutilated Bodies Dumped on Mexican Highway*, CBS NEWS (May 13, 2012), <http://www.cbsnews.com/news/49-mutilated-bodies-dumped-on-mexican-highway/> [https://perma.cc/XF9Q-6SE5] (archived Oct. 5, 2016) [hereinafter *49 Mutilated Bodies*].

66. 2016 AI Report, *supra* note 6.

67. *Id.*

display of strength by one of the rising cartels, six soldiers inside an army helicopter were killed with a rocket-propelled grenade, and at least fifteen other soldiers and police were killed in several shootouts that took place throughout Jalisco that same day.⁶⁸

B. *The Emergence of Enforced Disappearances as a Byproduct*

The phenomenon of enforced disappearances emerged in the midst of this Mexican drug war. The militarized approach of the Mexican government, in combination with the increased autonomy of and competition among Mexican drug cartels, created a landscape marked by escalating violence between the Mexican military and drug cartels, and among the cartels themselves.⁶⁹ As described in the previous Section, while the drug cartels fought for control and survival, they increasingly employed unprecedented tactics, which prompted the Mexican government to respond more aggressively in turn.⁷⁰ As part of this back and forth, the disappearance of persons emerged as an additional instrument of war.

Many of the enforced disappearances in Mexico are used strategically to intimidate or to eliminate perceived enemies engaged in the drug war. The Iguala incident was not the first time people were abducted for those sorts of reasons, nor is it the first instance of mass disappearance in Mexico. The First San Fernando Massacre is a prime example.⁷¹ In August 2010 (four years before Iguala), local police unlawfully detained seventy-two migrants traveling by bus through Tamaulipas.⁷² After the police transferred the migrants to Las Zetas, the cartel executed the migrants, believing them to be members of a rival gang.⁷³ Mexican authorities subsequently discovered the bodies at a ranch, where they also found several mass graves containing the remains of approximately two hundred persons.⁷⁴

68. Jo Tuckman, *Mexico Declares All-Out War After Rising Drug Cartel Downs Military Helicopter*, GUARDIAN (May 4, 2015), <http://www.theguardian.com/world/2015/may/04/mexico-declares-war-rising-drug-cartel-downs-military-helicopter> [https://perma.cc/J8A3-SHNP] (archived Oct. 5, 2016).

69. GRILLO, *supra* note 42, at 205–09, 281.

70. See VULLIAMY, *supra* note 50, at 20.

71. The “Second San Fernando Massacre” occurred in 2011. *Mexico’s San Fernando Massacres: A Declassified History*, NAT’L SEC. ARCHIVE (Nov. 6, 2013), <http://nsarchive.gwu.edu/NSAEBB/NSAEBB445/> [https://perma.cc/BYQ9-C8BZ] (archived Oct. 5, 2016).

72. Michael Evans, *Mexico: Los Zetas Drug Cartel Linked San Fernando Police to Migrant Massacres*, NAT’L SEC. ARCHIVE (Dec. 22, 2014), <http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB499/> [https://perma.cc/V5H6-V3SZ] (archived Oct. 19, 2016).

73. Marcela Turati, *San Fernando-Ayotzinapa: Las Similitudes*, PROCESO (Dec. 2014), at 16–19, <http://www.slideshare.net/Monalisa1234567/la-noche-de-iguala-el-encubrimiento-proceso-1990> [https://perma.cc/UC2V-7B6T] (archived Oct. 19, 2016).

74. See *Mexican Police Arrest Suspect Tied to Migrant Massacre*, CNN (June 18, 2011), <http://edition.cnn.com/2011/WORLD/americas/06/17/mexico.massacre.arrest/>

A similar chain of events occurred in the municipality of Joaquín Amaro in the state of Zacatecas.⁷⁵ In December 2011, local police illegally detained ten men due to their suspected ties to organized crime.⁷⁶ According to the two men who escaped, the detainees were blindfolded, beaten, and interrogated.⁷⁷ Security camera footage shows that the police later handed eight of the detainees to armed, masked men at a gas station.⁷⁸ The eight men are still missing.⁷⁹ Two months before that, twenty men from Michoacán, traveling on vacation, were seized by gunmen and remained missing for weeks.⁸⁰ Their bodies were subsequently discovered in a mass grave, and their purported killers confessed that the victims had been mistakenly believed to be part of a rival gang.⁸¹ The discovery of several other mass graves throughout Mexico also evidences the pervasive use of disappearances as a means for eliminating enemies. In 2009, Mexican police arrested the infamous “Stew Maker,” who confessed to disposing of at least three hundred bodies over a decade by dissolving his victims in their graves with acid.⁸² The victims were believed to be rivals of the Arellano Felix drug cartel.⁸³ In February 2014, an investigation by Mexican authorities in Northern Coahuila led to the discovery of the burnt remains of at least five hundred persons who were suspected of being the family, friends, and acquaintances of rival gang members.⁸⁴

C. *The (Un)Known Facts about Enforced Disappearance in Mexico*

As a result of the absence of a national, comprehensive registry regarding disappearances in general, approximating the exact number of enforced disappearances in Mexico is difficult.⁸⁵ The Mexican government estimates that 27,638 persons have disappeared in the

index.html [<https://perma.cc/49PQ-8EWA>] (archived Oct. 5, 2016) (detailing another incident where local police unlawfully detained men and delivered them to Zacatecas).

75. *Mexico: Crisis of Enforced Disappearances*, HUM. RTS. WATCH (Feb. 20, 2013), <http://www.hrw.org/news/2013/02/20/mexico-crisis-enforced-disappearances> [<https://perma.cc/M9DR-69BR>] (archived Oct. 5, 2016).

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. Wilkinson, *supra* note 1.

81. *Id.*

82. *Police Arrest the “Stew Maker” Drug Thug who Dissolved 300 Bodies in Acid*, DAILYMAIL (Jan. 26, 2009), <http://www.dailymail.co.uk/news/article-1127328/Police-arrest-Stew-Maker-drug-thug-dissolved-300-bodies-acid.html> [<https://perma.cc/6KWH-CL2F>] (archived Oct. 5, 2016) [hereinafter *Stew Maker Article*].

83. *Id.*

84. *See Coahuila’s Clandestine Grave Body Count Rises to 500*, BORDERLAND BEAT (Feb. 8, 2014), <http://www.borderlandbeat.com/2014/02/coahuilas-clandestine-grave-body-count.html> [<https://perma.cc/R7AQ-DF56>] (archived Oct. 5, 2016) [hereinafter *BORDERLAND BEAT Article*] (describing the results of the investigation).

85. *See UNCED Report*, *supra* note 27, ¶ 18 (recommending that the state create a comprehensive registry of missing persons).

country since 2006 and remain missing.⁸⁶ There is reason to suspect that the number of annual disappearances has increased in recent years. In 2014 alone there were approximately 5,098 reported disappearances in Mexico,⁸⁷ breaking the record set the previous year for the number of disappearances in a given year by 584.⁸⁸ Nearly half of the 27,638 people who have disappeared went missing during Peña Nieto's term in office.⁸⁹

However, these estimates must be viewed with skepticism, as the Mexican government has not been providing consistent estimates. At the start of Peña Nieto's term in 2012, his administration reported that 26,121 people had disappeared since 2006.⁹⁰ In more recent years, other Mexican institutions have provided vastly different estimates. For example, in May 2014, the Minister of Interior, Miguel Ángel Osorio Chong, declared that only 8,000 people were still missing in Mexico.⁹¹ That same month, the National Human Rights Commission of Mexico (CNDH) estimated that 24,800 persons had disappeared since 2005.⁹² Even if one accepts the more recent 27,000 approximate figure, the Mexican government did not explain how it arrived at that number, who the victims were, where they came from, or, most importantly, how many victims were abducted by drug cartels, state authorities, or both.⁹³

86. 2016 AI Report, *supra* note 6, at 250; 2016 HRW Report, *supra* note 6.

87. *Mexico and Impunity: A Case Study from the 2014 Human Rights and Democracy Report*, GOV.UK, <https://www.gov.uk/government/case-studies/mexico-and-impunity> (last visited Mar. 29, 2016) [<https://perma.cc/447P-XSWN>] (archived Oct. 4, 2016).

88. James Bargent, *2014 a Record Year for Disappearances in Mexico*, INSIGHT CRIME (Nov. 20, 2014), <http://www.insightcrime.org/news-briefs/2014-record-year-disappearances-mexico> [<https://perma.cc/9RX9-ZMUL>] (archived Oct. 4, 2016).

89. *See Treated with Indolence*, *supra* note 6, at 10 (reporting 3,425 disappearances in 2015 alone).

90. *Mexico: Drug war has led to 26,121 disappearances*, CBSNEWS (Feb. 26, 2013), <http://www.cbsnews.com/news/mexico-drug-war-has-led-to-26121-disappearances/> [<https://perma.cc/96Y3-PX4Q>] (archived Oct. 26, 2016).

91. *En México Hay 8 Mil Desaparecidos: Osorio Chong*, ARISTEGUI NOTICIAS (May 23, 2014), <http://aristeguinoticias.com/2305/mexico/en-mexico-hay-8-mil-desaparecidos-reporta-osorio-chong/> [<https://perma.cc/UEP8-H3C3>] (archived Oct. 5, 2016). A month later, Osorio Chong retracted his previous statement and claimed that there were 16,000 missing. Dulce Ramos, *Hay 16 Mil Desaparecidos en México, Asegura Segob*, ANIMAL POLITICO (June 17, 2014), <http://www.animalpolitico.com/2014/06/16-mil-desaparecidos-en-mexico-asegura-segob/#axzz3BRoUyMXm> [<https://perma.cc/76YS-NBWG>] (archived Oct. 5, 2016).

92. Victor Ballinas & Andrea Becerril, *De 2005 a la Fecha Hay 24 Mil 800 Personas Desaparecidos: CNDH*, LA JORNADA (May 21, 2014), <http://www.jornada.unam.mx/2014/05/21/politica/003n1pol> [<https://perma.cc/6QFF-CEDT>] (archived Oct. 5, 2016).

93. *Treated with Indolence*, *supra* note 6, at 11; *see also PBI Mexico: Disappearances in Mexico*, PEACE BRIGADES INT'L (Aug. 27, 2014), http://www.pbi-mexico.org/field-projects/pbi-mexico/news/news/?no_cache=1&tx_ttnews%5Btt_news%5D=4367&cHash=eda9933b0f83f7dc327e1d08759794ec [<https://perma.cc/F3ZA-JF7H>] (archived Oct. 5, 2016).

Human rights non-governmental organizations (NGOs) provide their own estimates as to the total number of disappeared. Some organizations argue that there is reason to believe that as many as 200,000 individuals remain missing, as the government's approximations do not take into account the overwhelming number of unreported disappearances.⁹⁴ Other organizations believe there have been at least 30,000 disappearances that would satisfy the legal requirements for the crime of enforced disappearance.⁹⁵

The fact that many disappearances go unreported is indeed another impediment to reaching accurate approximations about enforced disappearances. Less than 25 percent of enforced disappearances are reported.⁹⁶ In 2013, there were an estimated 4,007 enforced disappearances in Mexico.⁹⁷ But only 718 of those cases were reported to the police.⁹⁸ Likewise, many cases of enforced disappearance get misclassified as other offenses, such as abduction or abuse of authority; many times persons are simply considered "missing" or "lost."⁹⁹ Thus, it is difficult to estimate how many of the total crimes in Mexico would meet the criteria for enforced disappearance under international law.

Several human rights NGOs have made efforts to document cases of enforced disappearance. In a 2013 report, Human Rights Watch (HRW) identified several apparent perpetrators of enforced disappearances, including drug cartel members, the Mexican Army and Navy, the federal police, the state and municipal police, and gang members working in tandem with any of the above state entities.¹⁰⁰ Of the organization's 250 documented enforced disappearances between 2007 and 2013, more than 140 were committed either directly or

94. Michelle García & Ignacio Alvarado Álvarez, *Closer Look at Massacre in Mexico Reveals Glimpse of Corruption*, ALJAZEERA AM. (July 5, 2014), <http://america.aljazeera.com/articles/2014/7/5/closer-look-at-massacreinmexicorevealsglimpseofcorruption.html> [https://perma.cc/ZRG4-4JPZ] (archived Oct. 5, 2016).

95. Mauricio Torres, *El Gobierno "Desaparece a Los Desaparecidos", Acusan las ONG*, EXPANSION, (May 24, 2014), <http://mexico.cnn.com/nacional/2014/05/24/el-gobierno-desaparece-a-los-desaparecidos-acusan-las-ong> [https://perma.cc/2RM6-SY7P] (archived Oct. 5, 2016).

96. Human Rights Council, Rep. of the Working Group on Enforced or Involuntary Disappearances, ¶ 32, U.N. Doc. A/HRC/19/58/Add.2 (Dec. 20, 2011) [hereinafter UNWGEID Report].

97. *Mexico Kidnappings Top 105,000 in 2012, But Few Reported*, HUFFINGTON POST (Oct. 3, 2013), http://www.huffingtonpost.com/2013/10/03/mexico-kidnappings_n_4036902.html [https://perma.cc/SR8D-4HBF] (archived Oct. 5, 2016).

98. *Id.*

99. UNWGEID Report, *supra* note 96, ¶ 18.

100. HUM. RTS. WATCH, MEXICO'S DISAPPEARED: THE ENDURING COST OF A CRISIS IGNORED 3-4 (2013), http://www.hrw.org/sites/default/files/reports/mexico0213_ForUpload_0_0_0.pdf [https://perma.cc/MVH6-DQ46] (archived Oct. 7, 2016) [hereinafter MEXICO'S DISAPPEARED]; see also UNWGEID Report, *supra* note 96, ¶ 26.

indirectly by state agents.¹⁰¹ In June 2013, the CNDH declared that it was investigating 2,443 cases of disappearances in which it had found evidence of involvement by state authorities.¹⁰² These initiatives only begin to shed light on the number of enforced disappearances in Mexico.

III. THE ENDURING IMPUNITY AND ITS IMPACT ON TRUST

Despite what HRW has called “the most severe crisis of enforced disappearances in Latin America in decades,”¹⁰³ Mexico has only modestly begun addressing the pervasive impunity for those acts. As will be discussed further below, the country remains largely incapable of investigating and prosecuting the crime, searching for victims, and preventing future commissions of the crime. Although Mexico has begun the process of reforming its criminal justice system overall, the rate of progress remains slow, revealing a need for international involvement.

This Part will begin by discussing the reforms that Mexico has adopted within the last decade in order to improve its criminal justice system in general. Then it will highlight how impunity towards the crime of enforced disappearance has persisted despite these reform efforts. It will also seek to explain the underlying causes for those shortcomings, most importantly a recurring pattern of purposeful impediments the completion of investigative and prosecutorial proceedings. This Part will then examine the harmful impact that those deficiencies have had on the Mexican people’s willingness to trust their domestic criminal justice system, and explain how that distrust further contributes to impunity.

A. *Some Progress: Mexico’s Criminal Justice Reform Efforts*

Mexico’s criminal justice system largely followed the inquisitorial model until the beginning of the twenty-first century.¹⁰⁴ Under the old system, public prosecutors brought criminal charges and oversaw criminal investigations.¹⁰⁵ In making a decision, judges relied on written reports authored by prosecutors, and evidence pertaining to

101. MEXICO’S DISAPPEARED, *supra* note 100, at 3; *see also* UNWGEID Report, *supra* note 96, ¶ 17.

102. HUM. RTS. WATCH, WORLD REPORT 2014: MEXICO 1 (2014), https://www.hrw.org/sites/default/files/related_material/mexico_8.pdf (last visited Mar. 18, 2016) [<https://perma.cc/27PV-ETBF>] (archived Oct. 8, 2016).

103. MEXICO’S DISAPPEARED, *supra* note 100, at 2.

104. *See* David A. Shirk, *Criminal Justice Reform in Mexico: An Overview*, 3 MEX. L. REV. 189, 198–99 (2011); Gillian Reed Horton, *Cartels in the Courtroom: Criminal Justice Reform and its Role in the Mexican Drug War*, 3 MEX. L. REV. 229, 241 (2010) (noting that Mexico utilized a “strange hybrid system that was partially inquisitorial”).

105. Rodriguez, *supra* note 33, at 168.

the accused was sealed and kept from the public until the completion of the case.¹⁰⁶ This somewhat minor judicial role made it difficult to question the quality of criminal investigations.¹⁰⁷ Despite a constitutional guarantee enshrining the presumption of innocence, most Mexican courts did not adopt the presumption in practice, especially for the accused who were poor.¹⁰⁸

In 2004, President Vicente Fox proposed a series of constitutional and legislative changes to Mexico's criminal justice system, including a shift towards a more adversarial model.¹⁰⁹ Although these reform efforts failed to pass in the Mexican legislature,¹¹⁰ they sparked a national debate about reforming the Mexican criminal justice system and ultimately inspired several progressive Mexican states to adopt new adversarial procedures.¹¹¹ With added pressure from the U.S. Mérida Initiative, the Mexican Congress adopted federal judicial reforms in March 2008.¹¹²

The 2008 reforms included several key elements, all which were to be fully implemented by 2016.¹¹³ First, they introduced new adversarial procedures, including open trials with live public proceedings and the use of probable cause as the basis for the criminal indictment.¹¹⁴ Second, they provided for stronger constitutional protections for the presumption of innocence, guaranteed different judges for each stage of criminal proceedings, and embraced new requirements concerning adequate legal defense for the accused.¹¹⁵ Third, the reforms strengthened the formal investigative capacity of

106. *Id.*

107. *Id.*

108. Zachary J. Lee, Comment, *Wrestling with Mexican Criminal Procedure: How Law Schools in the United States and Mexico Can Team up to Rebuild Mexico's Criminal Trial*, 33 HOUS. J. INT'L L. 53, 62–63 (2010); Rodriguez *supra* note 33, at 168.

109. Shirk, *supra* note 104, at 202.

110. See Matthew C. Ingram, State-level Judicial Reform in Mexico: The Local Progress of Criminal Justice Reforms 3 n.1 (May 2010) (unpublished manuscript) (on file with author) (indicating that the 2008 federal reforms to the criminal justice system were initiated under President Vicente Fox in March of 2004).

111. CLARE RIBANDO SEELKE, CONG. RESEARCH SERV., R43001, SUPPORTING CRIMINAL JUSTICE SYSTEM REFORM IN MEXICO: THE U.S. ROLE 4 (2013).

112. *Id.* at 4; Shirk, *supra* note 104, at 202, 219. For more information on the substance of the Mérida Initiative, see Deborah M. Weissman, *Remaking Mexico: Law Reform as Foreign Policy*, 35 CARDOZO L. REV. 1471, 1486–94 (2014) (developing arguments regarding U.S. law reform projects as conditions of foreign aid through an examination of the Mérida Initiative).

113. MAJORITY STAFF OF S. COMM. ON FOREIGN RELATIONS, 112TH CONG., REP. ON JUDICIAL AND POLICE REFORMS IN MEXICO: ESSENTIAL BUILDING BLOCKS FOR A LAWFUL SOCIETY 9 (Comm. Print 2012); SEELKE, *supra* note 111, at 4. For a comprehensive summary of the substance of the reforms, see Shirk, *supra* note 104, at 198–219.

114. MATTHEW C. INGRAM, WILSON CTR., CRIMINAL PROCEDURE REFORM IN MEXICO: WHERE THINGS STAND NOW 2–4 (2013), http://www.wilsoncenter.org/sites/default/files/Ingram_CrimProReformMexico_Jan_2013.pdf [<https://perma.cc/HW2F-XTJZ>] (archived Oct. 8, 2016); Shirk, *supra* note 104, at 203, 209.

115. SEELKE, *supra* note 111, at 5–6; Shirk, *supra* note 104, at 203, 210–13.

police agencies to gather evidence and investigate criminal activity and to cooperate with other units.¹¹⁶ Finally, the reforms amended the Mexican Constitution to allow for the sequestering of suspects—particularly those suspected of organized crime—under *arraigo*, a practice whereby suspects may be held for up to forty days without criminal charges.¹¹⁷

Despite the progress that these reforms represent, they have yet to be fully implemented at the federal and state levels, thus Mexico continues to operate largely under its traditional system.¹¹⁸ As of June 2015, only four states had fully implemented the reforms and twenty-four states had partially transitioned to the new system.¹¹⁹ Likewise, only slightly over half of the country's municipalities had implemented the new criminal justice system.¹²⁰ One positive development occurred in February 2014, when the Mexican Chamber of Deputies approved a new National Criminal Procedure Code.¹²¹ This new code obligates all Mexican states to adopt the same procedures regarding investigations, arrests, indictments, hearings, and sentencing.¹²²

Mexico has also realized several notable improvements to its criminal justice system outside of the 2008 reforms. For example, a 2011 constitutional reform expanded Mexico's human rights obligations by taking into account those obligations contained in all international treaties signed by Mexico.¹²³ The Mexican Supreme Court subsequently held that all sentences of the Inter-American Court of Human Rights (IACtHR) are binding on all Mexican judicial

116. SEELKE, *supra* note 111, at 5; Shirk, *supra* note 104, at 203, 213–15.

117. SEELKE, *supra* note 111, at 6; Shirk, *supra* note 104, at 203, 217–18.

118. Rodriguez, *supra* note 33, at 167–68.

119. See OCTAVIO RODRÍGUEZ FERREIRA & DAVID A. SHIRK, CRIMINAL PROCEDURE REFORM IN MEXICO, 2008–2016, at 26 (2015), https://justiceinmexico.org/wp-content/uploads/2015/10/151008_FINALCOUNTDOWN_Full-Finalow-res.pdf [<https://perma.cc/9UKP-ZVUX>] (archived Oct. 8, 2016) (using a map to illustrate where the states stand with regard to implementation of the “New Criminal Justice System”).

120. *Id.* at 29.

121. cmlzahn, *Mexican Congress Approves New Unified Criminal Code*, JUST. IN MEX. PROJECT (Feb. 19, 2014), <https://justiceinmexico.org/congress-approves-new-unified-criminal-code-in-mexico/> [<https://perma.cc/6NG6-QBL5>] (archived Oct. 19, 2016).

122. Viridiana Rios, *Justice in Mexico: The Mexican Drug War's Most Important Change that Nobody Noticed*, KENNEDY SCH. REV. (Mar. 26, 2014), <http://harvardkennedyschoolreview.com/justice-in-mexico-the-mexican-drug-wars-most-important-change-that-nobody-noticed/> [<https://perma.cc/JCC2-Y4F4>] (archived Oct. 8, 2016); Rodriguez, *supra* note 33, at 170. Note, however, that the code did not restrict military jurisdiction in cases involving human rights violations committed by the military against other military personnel. See Inter-American Comm'n on Human Rights (Inter-Am. Comm'n H.R.), *Situation of Human Rights in Mexico* ¶ 79, OEA/Ser.L/V/II., Doc. 44/15 (Dec. 31, 2015), <http://www.oas.org/en/iachr/reports/pdfs/Mexico2016-en.pdf> [<https://perma.cc/9UEP-8QWA>] (archived Oct. 8, 2016) [hereinafter IACHR Report].

123. Carlos Cerda Dueñas, *Incorporating International Human Rights Standards in the Wake of the 2011 Reform of the Mexican Constitution: Progress and Limitations*, 10 SUR INT'L J. HUM. RTS. 37, 41 (2013).

bodies and branches of government and that all of Mexico's judges are obligated to take into account international treaties, even where the plaintiff does not have legal recourse under these treaties.¹²⁴ Another positive development is that several reforms to the Code of Military Justice came into force in June 2014.¹²⁵ These reforms exclude crimes committed by members of the Mexican armed forces against civilians from military justice jurisdiction.¹²⁶ Likewise, much to the satisfaction of several human rights NGOs, in February 2014 the Mexican Supreme Court limited the practice of *arraigo* to cases involving organized crime—a crime falling under federal jurisdiction.¹²⁷

All in all, Mexico is making strides in improving and modernizing its criminal justice system, but this process is taking time.

B. Mexico's Continued Impunity towards Enforced Disappearances and the Roots Thereof

Notwithstanding the above reform efforts, a failure to adequately prosecute enforced disappearances in the country has persisted. As will be discussed further below, Mexico has made even less progress in adopting specific reforms to address the roots of this impunity. As of December 2015, not one person had been convicted for an enforced disappearance committed after 2006.¹²⁸ Between 2006 and 2013, Mexican authorities opened 99 investigations for the crime of enforced disappearance at the federal level and 192 at the state level.¹²⁹ There have been six confirmed convictions at the federal level, but all for acts that occurred before 2006.¹³⁰ The most recent federal conviction was in 2010.¹³¹ The Mexican government did not report any convictions at the

124. *Luna v. Cossío*, Pleno de la Suprema Corte de Justicia [SJCJN], Record Number 912/2010, Agreement of the Full Court of the Supreme Court of Justice of the Nation, for the day July 14, 2011, ¶¶ 44–46 (July 14, 2011) (Mex.).

125. SEELKE, *supra* note 111, at 10.

126. MEXICAN MINISTRY OF FOREIGN AFFAIRS, MILITARY JURISDICTION REFORMS IN MEXICO, BOLETÍN INFORMATIVO NO. 54 (2014), https://embamex2.sre.gob.mx/eua/images/pdf/factsheets/013_Boletin_54_ingles.pdf [<https://perma.cc/V6RM-FD45>] (archived Oct. 19, 2016).

127. *Supreme Court Bans the Use of Arraigo at the State Level*, JUST. IN MEX. PROJECT (Feb. 26, 2014), <https://justiceinmexico.org/supreme-court-bans-the-use-of-arraigo-at-the-state-level/> [<https://perma.cc/54CM-SEEZ>] (archived Oct. 8, 2016).

128. *Mexico: 'Disappearances' Response Falls Short*, HUM. RTS. WATCH (Oct. 8, 2014), <http://www.hrw.org/news/2014/10/08/mexico-disappearances-response-falls-short> [<https://perma.cc/3MMU-3K5X>] (archived Oct. 8, 2016) [hereinafter '*Disappearances' Response Falls Short*]; see IACHR Report, *supra* note 122, ¶ 118 (identifying six cases of forced disappearances resulting in convictions: one each from 1977, 2002, 2003 and three from 2005).

129. *Disappearances' Response Falls Short*, *supra* note 128.

130. IACHR Report, *supra* note 122, ¶ 118; *Disappearances' Response Falls Short*, *supra* note 128.

131. IACHR Report, *supra* note 122, ¶ 118 n.153.

state level to the UNCED in February 2015, which strongly suggests that there had not been any.¹³²

Even more startling, the underlying cause of this impunity seems to be a general unwillingness among Mexican law enforcement and public prosecutors to investigate and prosecute the crime. Approximately 40 percent of all missing person cases have never been opened.¹³³ The investigations that are initiated have notoriously been plagued by a number of shortcomings, mainly occurring at the administrative level. A 2013 report by HRW identified several systemic patterns of investigative failures, including:

- (i) unexplained delays in the initial follow up on reported disappearances;
- (ii) intentionally misinforming victims' families that the law requires a person to have been missing for several days before a formal complaint may be filed;
- (iii) attributing blame to victims as a pretext for not opening investigations (e.g., presuming that victims are involved in criminal activities);
- (iv) routine failure to carry out basic investigative steps (e.g., visiting the scene of the crime, interviewing key suspects or witnesses, and obtaining the names of suspected police officers or soldiers implicated in the disappearance);
- (v) excessive reliance on families to carry out crucial investigative steps, which in turn puts the families at risk of threats and reprisals for their involvement;
- (vi) misplacement, suppression, or destruction of key evidence; and
- (vii) fabricating evidence (e.g., claiming to have conducted several interviews that never occurred).¹³⁴

132. See UNCED, UNHCR, *Consideration of Reports Submitted by States Parties Under Article 29, Paragraph 1, of the Convention: Reports of States Parties due in 2012: Mexico*, ¶ 164, U.N. DOC. CED/C/MEX/1 (Apr. 17, 2014), http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CED/C/MEX/1&Lang=en [<https://perma.cc/E4A7-RQFB>] (archived Oct. 5, 2016) (describing the six federal level convictions); see also AMNESTY INT'L, MEXICO: SUBMISSION TO THE UN COMMITTEE ON ENFORCED DISAPPEARANCES 4 (2015), <https://www.amnesty.org/download/Documents/AMR4100012015ENGLISH.pdf> [<https://perma.cc/XX3N-T3P2>] (archived Oct. 5, 2016) [hereinafter AI Submission] (noting limited state response to inquiries concerning enforcement as well as limited compliance with international human rights standards).

133. See AMNESTY INT'L, CONFRONTING A NIGHTMARE: DISAPPEARANCES IN MEXICO 10–11 (2013), <https://www.amnesty.org/en/documents/AMR41/025/2013/en/> (archived Oct. 5, 2016) [hereinafter CONFRONTING A NIGHTMARE].

134. See MEXICO'S DISAPPEARED, *supra* note 100, at 5–6, 34–67 (explaining authorities' investigative failures surrounding abductions). These investigative failures are well documented and are substantiated by several other human rights bodies and NGOs. See, e.g., IACHR Report, *supra* note 122, ¶¶ 121–27 (discussing failures in addressing victims' complaints and witnesses' testimony); UNCED Report, *supra* note

These patterns and the fact that so few cases of disappearance are investigated suggest that many police officers and public prosecutors are deliberately protecting perpetrators of the crime—that they want these crimes to remain uninvestigated.

However, corruption is not the only factor contributing to such impunity. Another factor is that the protocols for units investigating the crime need to be updated. The Deputy Federal Attorney General's Office Specialized in Organized Crime (SEIDO), which conducts federal investigations into enforced disappearances, only has a generalized protocol regarding such investigations.¹³⁵ Thus, the protocol does not incorporate procedures for evaluating chain of command and establishing “authorization, support, or acquiescence” by state agents—vital elements of the international crime.¹³⁶ What is more, the Specialized Search Unit for Disappeared People, a recently created unit within the Attorney General's Office, does not coordinate with SEIDO, resulting in a situation where the two entities conduct simultaneous and redundant investigations.¹³⁷

At the legislative level, there is also a lack of uniformity among federal and state definitions of the crime, which further inhibits adequate investigation. Many international institutions have implored Mexico to adopt a uniform definition that follows the definition in international instruments. For example, in 2009, the IACtHR held that Mexico's federal definition of the crime was insufficient to protect the guarantees enshrined in the Inter-American Convention on Forced Disappearances, as the federal law did not recognize the full gambit of potential perpetrators or the different forms of participation that state agents may have.¹³⁸ The court ordered Mexico to make the appropriate modifications.¹³⁹ The United Nations Working Group on Enforced or Involuntary Disappearances (UNWGEID) made a similar recommendation in 2012 and also called for the Mexican government

27, ¶ 27 (noting officials' failure to execute investigations efficiently, especially in their failure to act upon information they received in a timely manner); UNWGEID Report, *supra* note 96, ¶ 33–34 (articulating officials' omissions, delays, and lack of due diligence in their investigations); *Treated with Indolence*, *supra* note 6, at 16–19, 34–36, 46–47 (discussing faulty searches for victims and improper investigations relative to international standards); AI Submission, *supra* note 132, at 8–9, 13 (noting the Mexican federal attorney general's failure to execute prompt, effective, and impartial investigations).

135. See AI Submission, *supra* note 132, at 8 (asserting that SEIDO investigations do not implement “a specialized protocol developed in line with international experience in the investigation of enforced disappearances”).

136. *Id.*

137. *Cf. id.* (arguing that the combination of SEIDO and Specialized Search Unit efforts is “insufficient to ensure a rigorous investigation”).

138. *Radilla-Pacheco v. Mexico*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 209, ¶¶ 316–24 (Nov. 23, 2009).

139. See *id.* ¶¶ 343–44 (holding that “the State shall adopt all the measures necessary to make that legal classification compatible with the international standards”).

to bring its state definitions in line with the international instruments.¹⁴⁰

Despite these recommendations, most of the problems outlined by the IACtHR and UNWGEID remain unaddressed. The federal law still does not contain a definition of the crime in accordance with international law, resulting in the exclusion of a whole subset of potential cases of enforced disappearance from being prosecuted.¹⁴¹ The UNCED noted in February 2015 that some of the Mexican states had still not codified enforced disappearance as a crime at all and that those that had codified the crime did so with varying sentences for enforced disappearance or did not follow the definition of the International Convention for the Protection of All Persons from Enforced Disappearances:¹⁴² twelve Mexican states have failed to incorporate the criminal offense into their criminal codes,¹⁴³ sixteen states have laws with definitions for the crime that fall short of international standards,¹⁴⁴ and only nineteen states classify enforced disappearance as an autonomous crime distinct from similar crimes, such as murder or kidnapping.¹⁴⁵ In December 2015, President Peña Nieto submitted a draft general law concerning enforced disappearances, but, at the time of writing, no such bill has been passed in Mexico's legislatures.¹⁴⁶

That is not to say that Mexico has not made strides in addressing the above shortcomings. Last year, at the legislative level, the Mexican legislature passed *La Ley del Registro Nacional de Datos de Personas Extraviadas o Desaprecidas*—a law setting up a national registry for statistics about enforced disappearance¹⁴⁷—an important step towards

140. UNWGEID Report, *supra* note 96, ¶¶ 13, 87.

141. See IACHR Report, *supra* note 122, ¶¶ 112–14 (noting the faults in the definition that ultimately limit responsibility for the crimes and prevent a guaranteed punishment); see also AI Submission, *supra* note 132, at 5 (asserting that Mexican federal law fails to comply with the international definition of enforced disappearance and fails to recognize all the ways in which public officials could be involved in enforced disappearances).

142. UNCED Report, *supra* note 27, ¶¶ 19–20.

143. AI Submission, *supra* note 132, at 5–6; see also IACHR Report, *supra* note 122, ¶ 115, n.148 (“[T]he Mexican government identified only 13 states whose local criminal codes define the crime of forced disappearance.”).

144. See AI Submission, *supra* note 132, at 5–6 (“Many of the remaining 20 states operate laws that fall well short of the standard established in the International Convention and the Inter-American Convention on Forced Disappearance of Persons.”); see also U.S. DEPT OF STATE, MEXICO: COUNTRY REPORT ON HUMAN RIGHTS PRACTICES FOR 2014, 3 (2014), <http://www.state.gov/documents/organization/236914.pdf> [<https://perma.cc/5DFY-ETEP>] (archived Oct. 5, 2016) (“The federal criminal code and the legislation of the 16 federal entities that classify forced disappearance as a crime do not use the same definition, and penalties vary according to the jurisdiction.”).

145. See IACHR Report, *supra* note 122, ¶ 115 (“As far as the 31 states and the Federal District are concerned, the State has reported that 19 have provided for forced disappearance as an independent crime in their criminal codes.”).

146. *Id.* ¶¶ 116–17.

147. UNCED Report, *supra* note 27, ¶ 17.

better cataloging the disappearances occurring in the country. At the administrative level, in June 2013, the Mexican government created the Specialized Search Unit for Disappeared People (SSUDP), which, in principle, was supposed to support and coordinate investigations and searches with state-level prosecutor offices and other agencies.¹⁴⁸ By June 2014, the unit had conducted searches for approximately 1,200 missing people and had located 380.¹⁴⁹

At the judicial level, the Mexican Supreme Court has held that all Mexican judicial bodies are bound by the decisions of the IACtHR, including those concerning enforced disappearance.¹⁵⁰ As previously mentioned, in 2014, Mexico abolished military jurisdiction for human rights violations committed by military personnel against civilians,¹⁵¹ including enforced disappearance, thereby eliminating one avenue through which military perpetrators could avoid prosecution.

In light of the above, it would seem that Mexico has tried to make progress with respect to the impunity for enforced disappearances, but the general patterns identified in the HRW report strongly suggest that many Mexican authorities are actually impeding progress and avoiding investigation in order to shield the perpetrators.

C. *The Overall Climate of Impunity and the Broader Deficiencies in the Mexican Criminal Justice System*

The impunity concerning enforced disappearances is part of a larger, overall climate of impunity in Mexico. Enforced disappearance is not the only potential crime against humanity that has gone largely unpunished in Mexico. Between 2005 and 2013 there were only four convictions for torture,¹⁵² and only two of them were final.¹⁵³

148. AI Submission, *supra* note 132, at 10.

149. *Id.*

150. Suprema Corte de Justicia de la Nación, expediente varios 912/2010, *supra* note 124, ¶¶ 44–46.

151. UNCED Report, *supra* note 27, ¶ 25; AI Submission, *supra* note 132, at 9.

152. INT'L FED'N FOR HUM. RTS., MEXICO: INFORME SOBRE PRESUNTA COMISIÓN DE CRÍMENES DE LESA HUMANIDAD EN BAJA CALIFORNIA ENTRE 2006 Y 2012 22 (2014), https://www.fidh.org/IMG/pdf/rapport_mexique-ld2-1-2.pdf [<https://perma.cc/Y5C3-6K5D>] (archived Oct. 5, 2016).

153. *Id.*; see also U.N. HRC, 28th Sess., *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Juan E. Méndez ¶ 32, U.N. DOC. A/HRC/28/68/Add.3 (Dec. 29, 2014) [hereinafter HRC REPORT] (“The Government reported only five convictions for torture between 2005 and 2013, of which two are final and impose prison terms of 3 and 37 years respectively.”); *México Falsea Ante la ONU Sentencias Por Tortura (Mexico Misrepresents to the U.N. Sentences for Torture)*, VANGUARDIA (July 7, 2014), <http://www.vanguardia.com.mx/mexicofalseaantelaonusentenciasportortura-2107000.html> [<https://perma.cc/DTW7-RN6K>] (archived Oct. 5, 2016). However, the Mexican government has reported that between 2006 and 2015 there have been fifteen federal convictions of torture. See IACHR Report, *supra* note 122, ¶ 212 & n.293 (comparing the reporting and conviction rates for cases concerning torture).

Similarly, there have been almost no convictions of public officials for such acts.¹⁵⁴ A failure to adequately prosecute torture has persisted despite the more than 11,254 complaints of torture and ill-treatment received during that period.¹⁵⁵

What is more, the practice of “femicide,” that is, the murder of women because they are women, has reached near-epidemic levels in Mexico.¹⁵⁶ Six women fall victim to this crime every day in the country.¹⁵⁷ A recent report by the National Citizen Femicide Observatory concluded that, of the 3,892 femicides identified between 2012 and 2013, only 24 percent were investigated by authorities¹⁵⁸ and only 1.6 percent resulted in conviction.¹⁵⁹ Almost half of the victims died from cruel acts and/or the excessive use of physical force.¹⁶⁰ The fact that the perpetrators “kill women because they are women, and because they can,” is what sets femicide apart from regular murder;¹⁶¹ “[h]ate is what marks these crimes.”¹⁶²

Furthermore, Mexico’s criminal justice system tends to be marked by blanket impunity for crimes in general. A recent study by El Centro for Estudios Sobre Impunidad y Justicia ranked Mexico as the second highest country on its impunity scale.¹⁶³ A 2015 report found that only

154. See AMNESTY INT’L ANNUAL REPORT: MEXICO (2014/2015), <https://www.amnesty.org/en/countries/americas/mexico/report-mexico/> [<https://perma.cc/Z3A5-F4XV>] (archived Oct. 5, 2016) (“Investigations into the crimes were not made public and no one had been prosecuted at the end of the year.”).

155. HRC REPORT, *supra* note 153, ¶ 32.; see also AMNESTY INT’L, PAPER PROMISES, DAILY IMPUNITY: MEXICO’S TORTURE EPIDEMIC CONTINUES 6–8 (2015), https://www.amnesty.ch/de/laender/amerikas/mexiko/dok/2015/starker-anstieg-von-folterklagen-offenbart-wachsende-menschenrechtskrise/151013_paper-promises-daily-impunity_english.pdf [<https://perma.cc/BTG6-QDRY>] (archived Oct. 5, 2016) (noting the Mexico’s federal attorney general’s failure to accurately report the number of torture complaints filed).

156. See VULLIAMY, *supra* note 50, at 185 (using “feminicidio, femicide, the mass slaughter of women . . . to describe the iniquity of a singular and savage phenomenon”); see also Judith Matloff, *Six Women Murdered Each Day as Femicide in Mexico Nears a Pandemic*, ALJAZEERA AM. (Jan. 4, 2015), <http://america.aljazeera.com/multimedia/2015/1/mexico-s-pandemicfemicides.html> [<https://perma.cc/62GJ-ULK9>] (archived Oct. 5, 2016) (“Femicides are a pandemic in Mexico.”).

157. Matloff, *supra* note 156.

158. OBSERVATORIO CIUDADANO NACIONAL DEL FEMINICIDIO, ESTUDIO DE LA IMPLEMENTACIÓN DEL TIPO PENAL DE FEMINICIDIO EN MÉXICO: CAUSAS Y CONSECUENCIAS 2012 Y 2013 199 (2014), <http://catolicasmexico.org/ns/wp-content/uploads/2014/11/Estudio-de-Feminicidio-en-M%C3%A9xico-2012-2013.pdf> [<https://perma.cc/A9HA-CTFQ>] (archived Oct. 5, 2016) [hereinafter ESTUDIO DEL FEMINICIDIO].

159. *Id.*

160. *Id.*

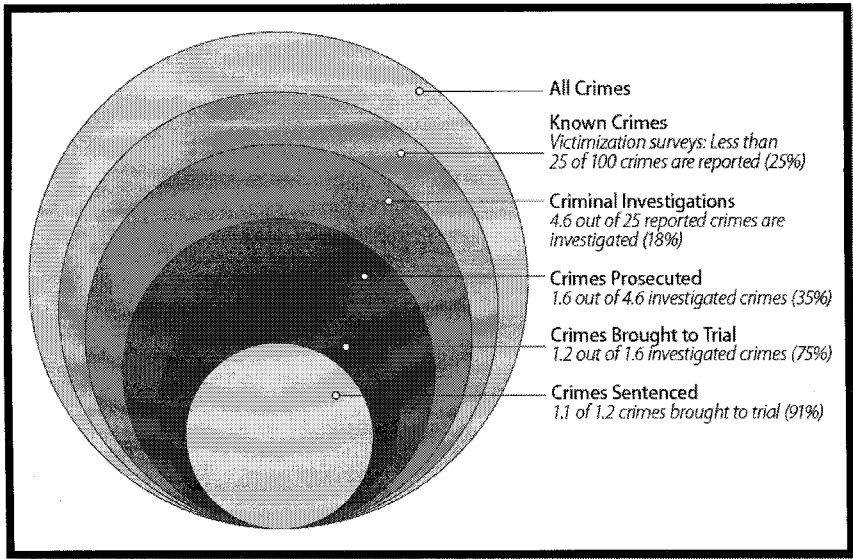
161. VULLIAMY, *supra* note 50, at 178.

162. Matloff, *supra* note 156.

163. CENTRO DE ESTUDIOS SOBRE IMPUNIDAD Y JUSTICIA, ÍNDICE GLOBAL DE IMPUNIDAD 2015 44 (Apr. 2015), <http://www.udlap.mx/cesij/resultadosigi2015.aspx> [<https://perma.cc/4AYZ-MFKS>] (archived Oct. 26, 2016) [hereinafter ÍNDICE GLOBAL DE IMPUNIDAD 2015].

10 percent of all crimes in Mexico are reported.¹⁶⁴ Of the reported crimes, roughly 65 percent led to the beginning of an investigation.¹⁶⁵ In other words, approximately 7 percent of all crimes, reported and unreported, led to an investigation.¹⁶⁶ Of the crimes that were investigated, more than 50 percent resulted in nothing or no resolution, and roughly 8 percent reached a disposition before a judge.¹⁶⁷ These figures suggest that the vast majority of crimes are left unaddressed (see Figure 1). Despite the fact that 90 percent of cases are prosecuted at the state level, fewer than 13 percent of cases are resolved at the state level.¹⁶⁸

Figure 1. The Life Cycle of Crimes in Mexico¹⁶⁹



Despite the reforms described in Section III(A), Mexico's criminal justice system has continued to be marked by an overall climate of impunity for the reasons discussed in Section III(C). First and foremost, there is a demonstrated proclivity for corruption among law

164. See INSTITUTO NACIONAL DE ESTADÍSTICA Y GEOGRAFÍA, ENCUESTA NACIONAL DE VICTIMIZACIÓN Y PERCEPCIÓN SOBRE SEGURIDAD PÚBLICA (Oct. 2015) [hereinafter ENCUESTA DE VICTIMIZACIÓN Y PERCEPCIÓN] (noting that in 2014 10.7 percent of crimes in Mexico were reported).

165. *Id.*

166. *Id.*

167. See *id.* at 11 (noting that 53.8 percent of alleged crimes resulted in nothing or no resolution, while 7.3 percent of alleged crimes reached a disposition before a judge).

168. SEELKE, *supra* note 111, at 2–3.

169. *Id.* at 3. This graphic is presented to give an idea of how few crimes reach the sentencing stage in Mexico. It depicts data from before the 2008 reform, though roughly the same proportion of cases reach sentencing now.

enforcement and public prosecutors. The use of bribery and torture by state and federal investigative police is well documented.¹⁷⁰ Thus, many of the crimes of concern are committed by state authorities themselves or by entities that the state wishes to protect. Likewise, there is pervasive complicity between prosecutors and public defenders, further suggesting that many public officials are not interested in pursuing justice.¹⁷¹

Second, even in the absence of such corruption, Mexico would not have sufficient infrastructure or resources to adequately prosecute all crimes. Due to case backlogs and inefficiencies, nearly half of Mexico's current prison population consists of prisoners waiting for a final verdict.¹⁷² As a result, many of the accused remain in prison for months or years without a sentence and are detained even when charged with relatively minor offenses.¹⁷³ As of June 2014, Mexican prisons were operating 27 percent above capacity.¹⁷⁴ Relatedly, Mexico generally suffers from inadequate resources and staffing.¹⁷⁵ For example, Mexico currently has a proportion of four judges for every one hundred inhabitants, far below the average global proportion of seventeen judges for every one hundred inhabitants.¹⁷⁶ As a result of the overwhelming caseloads, judges often delegate matters to courtroom clerks, and, consequently, many inmates never get to appear before the judge that sentences them.¹⁷⁷

Finally, at the legal level, Mexico suffers from a lack of uniformity in many of its substantive criminal laws. As with the crime of enforced disappearance, states have been reluctant to include the crime of femicide in their criminal codes. Only ten states have included it in their criminal codes, despite a federal law obligating implementation.¹⁷⁸ Likewise, the federal definition of torture and the majority of state definitions of torture do not meet the standards of international instruments.¹⁷⁹ For example, the newly enacted National Code of Criminal Procedure continues to authorize the

170. See, e.g., Elena Azaola & Marcelo Bergman, *The Mexican Prison System*, in *REFORMING THE ADMINISTRATION OF JUSTICE IN MEXICO* 91, 91–116 (Cornelius Wasda & David A. Shirk eds., 2007).

171. See generally 2016 HRW Report, *supra* note 6 (discussing the government's limited progress in investigating and prosecuting crime).

172. ÍNDICE GLOBAL DE IMPUNIDAD 2015, *supra* note 163, at 64; see also Shirk, *supra* note 104, at 196 ("Because of lengthy delays in criminal proceedings, many defendants languish in jail for months or years without a sentence.").

173. Shirk, *supra* note 104, at 196, 210.

174. U.S. DEP'T OF STATE, *supra* note 144, at 6.

175. 2016 HRW Report, *supra* note 6.

176. ÍNDICE GLOBAL DE IMPUNIDAD 2015, *supra* note 163, at 64.

177. Shirk, *supra* note 104, at 196.

178. ESTUDIO DEL FEMINICIDIO, *supra* note 158, at 201.

179. HRC Report, *supra* note 153, ¶¶ 14–15.

detention of persons without judicial authorization in urgent cases involving serious offenses.¹⁸⁰

Thus, Mexico is not only plagued by a failure to prosecute enforced disappearances, it is also plagued by an overall climate of impunity. And the investigative and prosecutorial efforts concerning other international crimes suffer from shortcomings similar to the efforts concerning enforced disappearances.

D. *The Resulting Lack of Confidence in the Domestic Criminal Justice System*

Mexico's pervasive impunity and the largely unaddressed weaknesses in its criminal justice system have resulted in a growing distrust of criminal justice institutions. In late 2012, 74 percent of the Mexican public indicated that they have little to no faith in the domestic criminal justice system.¹⁸¹ A 2014 study by the Instituto Nacional de Estadística y Geografía (INEGI) found that more than 88 percent of the population believes that corrupt practices occur "very frequently" or "frequently."¹⁸² Nearly 90 percent of the Mexican population believes its police officers are frequently engaged in corruption, roughly 85 percent believes that its political parties are engaged in such practices, and approximately 65 percent believes that its judges are as well (see **Figure 2**).¹⁸³ Roughly 85 percent of Mexicans do not trust current President Peña Nieto, and over 60 percent believe that corruption has increased during his term of office.¹⁸⁴ Such perceptions of corruption are even shared by law enforcement officials themselves. One poll of the municipal police in the city of Guadalajara found that about half of the 5,400 officers surveyed accept the existence of high levels of corruption in the police force for which they work,¹⁸⁵ and 68 percent believed that such corruption was concentrated within their own department.¹⁸⁶

180. *Id.* ¶ 18.

181. SEELKE, *supra* note 111, at 11.

182. INEGI, BOLETÍN DE PRENSA NÚM. 264/14, RESULTADOS DE LA SEGUNDA ENCUESTA NACIONAL DE CALIDAD E IMPACTO GUBERNAMENTAL 2013 43 (June 16, 2014), http://www.inegi.org.mx/est/contenidos/proyectos/encuestas/hogares/especiales/encig/2013/?_file=/est/contenidos/proyectos/encuestas/hogares/especiales/encig/2013/doc/encig2014_06.pdf [<https://perma.cc/D82Q-2BPX>] (archived Oct. 19, 2016) [hereinafter ENCUESTA NACIONAL DE CALIDAD E IMPACTO GUBERNAMENTAL].

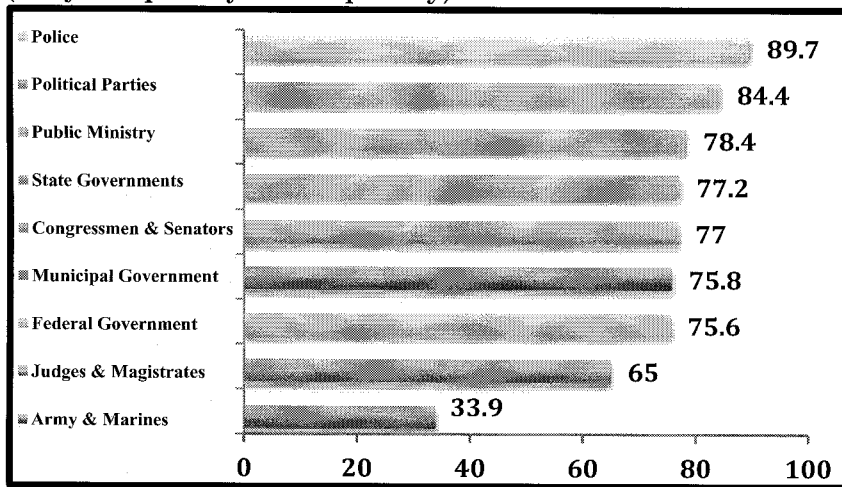
183. *Id.* at 44.

184. *60% of Mexicans Say Corruption Has Increased with Peña Nieto*, TELESUR, (Feb. 21, 2015), <http://www.telesurtv.net/english/news/60-of-Mexicans-Say-Corruption-has-Increased-with-Pena-Nieto---20150221-0005.html> [<https://perma.cc/4BJN-QKDH>] (archived Oct. 8, 2016).

185. MARCOS PABLO MOLOEZNİK ET AL., JUSTICIABARÓMETRO: ENCUESTA A OPERADORES DEL SISTEMA DE JUSTICIA PENAL 15 (2009), <http://catcher.sandiego.edu/items/peacestudies/justiciabarometro.pdf> [<https://perma.cc/7CRY-9DJR>] (archived Oct. 19, 2016).

186. *Id.*

Figure 2. Perceptions of the Frequency of Corruption in Different Sectors¹⁸⁷
(Very Frequently or Frequently)



The above distrust in Mexican institutions has coincided with the public's disengagement from the Mexican criminal justice system. Only 10 percent of crimes in Mexico are reported.¹⁸⁸ More than 80 percent of crime victims believe that it is a “waste of time” to report a crime to authorities.¹⁸⁹ Communities in some Mexican states where law enforcement and judicial institutions are particularly weak have begun to form armed “self-defense” groups.¹⁹⁰ The fact that the delegation of the survivors and parents of the forty-three missing students called upon independent, non-state entities to assist in the investigatory efforts in Iguala confirms that the Mexican public does not trust state institutions to conduct proper investigations, particularly those who are victims of crimes.¹⁹¹ Many relatives of victims of enforced disappearance suffer from threats or reprisals for becoming involved in investigations.¹⁹² Thus, it makes sense that so few disappearances are

187. ENCUESTA NACIONAL DE CALIDAD E IMPACTO GUBERNAMENTAL, *supra* note 182, at 44.

188. ENCUESTA DE VICTIMIZACIÓN Y PERCEPCIÓN, *supra* note 164, at 10.

189. JO TUCKMAN, MEXICO: DEMOCRACY INTERRUPTED 108 (2012).

190. IACHR Report, *supra* note 122, ¶¶ 47–52; SEELKE, *supra* note 111, at 4.

191. See Press Release, IACHR, Interdisciplinary Group of Experts to Launch at IACHR Headquarters its Work on the Case of the Students of Ayotzinapa, Mexico (Jan. 30, 2015) (https://www.oas.org/en/iachr/media_center/PReleases/2015/008.asp [<https://perma.cc/6DQZ-L28H>] (archived Oct. 8, 2016)) (detailing the entities comprising the interdisciplinary group); *The Missing Forty-Three*, *supra* note 5 (reporting on the crisis in Iguala); *The Missing Joy of Mother's Day*, PEACE BRIGADES INT'L (May 8, 2015), <http://www.peacebrigades.org/en/content/missing-joy-mothers-day> [<https://perma.cc/9NHC-HUEK>] (archived Oct. 19, 2016).

192. UNWGEID Report, *supra* note 96, ¶ 33.

reported, as many are discouraged from pursuing investigations due to interference or the belief that nothing will come of it.

These developments evidence a vicious cycle. As impunity becomes more rampant, the Mexican public loses confidence in its domestic criminal justice system and becomes less willing to participate in that system. Such disengagement further contributes to impunity, as less crime is reported and investigated. In order to break this cycle, Mexico will need to enact the reforms necessary to counteract this epidemic and incentivize state authorities to pursue justice. Added pressure from international institutions can only aid the legal reform process. As will be discussed in the remainder of this Article, pursuing an investigation at the ICC for the crimes of enforced disappearance is one way to exert such pressure.

IV. THE THREAT IS REAL: THE HIGH LIKELIHOOD OF THE OTP OPENING AN ICC INVESTIGATION

A trial before the ICC concerning enforced disappearances in Mexico would certainly address some of the impunity plaguing the country. However, even if there were no trial, the mere threat of an ICC investigation would in itself exert pressure on domestic authorities to enact appropriate reform and to think twice about shielding perpetrators. Furthermore, if a formal investigation were initiated, it would help clarify the truth concerning many of the most serious cases of enforced disappearance in the country. Despite the multitude of other crimes that could form the subject of an ICC investigation, including murder, torture, severe deprivation of physical liberty, and persecution against an identifiable group,¹⁹³ this Part will argue that, even with just the crime of enforced disappearance in Mexico, the procedural requirements for initiating an investigation would be met.

Before an ICC investigation can begin, the OTP must conduct a preliminary examination in order to determine whether to open an investigation.¹⁹⁴ Mexico ratified the Rome Statute in 2005, becoming subject to the ICC's jurisdiction on January 1, 2006, when the treaty entered into force for Mexico.¹⁹⁵ Consequently, there are three ways to

193. See Rome Statute, *supra* note 38, art. 7(1) (defining "crime against humanity").

194. Rome Statute, *supra* note 38, arts. 13–15, 53(1); ICC, *Preliminary Examinations*, <https://www.icc-cpi.int/pages/preliminary-examinations.aspx> (last visited Feb. 3, 2017) [<https://perma.cc/YV7P-W5HN>] (archived Oct. 8, 2016).

195. See ROBERT CRYER ET AL., AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 166–68 (3d. ed. 2014); Press Release, ICC, Mexico Ratifies the Rome Statute, ICC Press Release ICC-CPI-20051031-113 (Oct. 31, 2005) (http://www.icc-cpi.int/en_menus/asp/press%20releases/press%20releases%202005/Pages/mexico%20ratifies%20the%20rome%20statute.aspx [<https://perma.cc/7XBR-75J5>] (archived Oct. 8, 2016)) [hereinafter Mexico Ratifies the Rome Statute]; Rome Statute, *supra* note 38, arts. 12–15.

initiate a preliminary examination concerning enforced disappearances in Mexico: the Mexican government refers the situation to the ICC Prosecutor (the Prosecutor), the United Nations Security Council (UNSC) refers the situation to the Prosecutor, or the Prosecutor initiates an investigation *proprio motu*.¹⁹⁶

The first scenario is unlikely. As state involvement is inherently part of the enforced disappearance definition, it is unlikely that the Mexican government would be willing to risk any exposure of government participation in international crimes. Likewise, as mentioned above, the Mexican government has historically resisted the involvement of the ICC. The second scenario is also unlikely. There is currently nothing to suggest that the UNSC would refer a situation in Mexico in the near future. As previously mentioned, in February 2015 the UNCED released a report on Mexico, but with little effect. And recent pleas for UNSC referrals have largely focused on atrocities occurring in other parts of the world.¹⁹⁷

Thus, if a preliminary examination concerning enforced disappearances in Mexico were to begin, most likely the Prosecutor would have to initiate it.¹⁹⁸ Subject to the Pre-Trial Chamber's approval,¹⁹⁹ the Prosecutor may initiate preliminary examination *proprio motu* on the basis of information concerning crimes within the jurisdiction of the court sent in by individuals or groups, states, or non-governmental organizations.²⁰⁰ The OTP has already received numerous pleas to initiate a preliminary examination following the

196. See Rome Statute, *supra* note 38, arts. 13–15 (discussing the processes by which the ICC will begin a preliminary investigation). For a comprehensive review of how a preliminary examination could be opened in other scenarios, see CRYER ET AL., *supra* note 195, at 166–68.

197. See, e.g., Michelle Nichols, *France Presses U.N. for Islamic State to Face Court*, REUTERS (Mar. 27, 2015), <http://www.reuters.com/article/2015/03/27/mideast-crisis-islamic-state-un-idUSL2NOWT1QY20150327> [https://perma.cc/BE58-YX6D] (archived Oct. 8, 2016) (describing France's efforts to urge the UNSC to refer the Islamic State militant group to the ICC); Press Release, UNSC, Referral of Syria to International Criminal Court Fails as Negative Votes Prevent Security Council from Adopting Draft Resolution, U.N. Press Release SC/11407 (May 22, 2014), <http://www.un.org/press/en/2014/sc11407.doc.htm> [https://perma.cc/8VFC-59DT] (archived Oct. 8, 2016) (describing the UNSC's unwillingness to refer the situation in Syria to the ICC).

198. See Rome Statute, *supra* note 38, art. 15(3) (detailing the process through which the Prosecutor requests authorization for an investigation); see also Prosecutor v. Katanga & Chui, ICC-01/04-01/07 OA 8, AC Judgment, ¶¶ 73–79 (Sept. 25, 2009) [hereinafter *Prosecutor v. Katanga & Chui*] (discussing the analysis by which the ICC determines when it has jurisdiction over a case based on the insufficiency of domestic prosecutorial efforts).

199. Situation in the Republic of Côte D'Ivoire, ICC-02/11, PTC Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire, ¶¶ 16–18 (Oct. 3, 2011) [hereinafter *Situation in the Republic of Côte D'Ivoire*]; Rome Statute, *supra* note 38, art. 15(3), 15(4).

200. OTP, ICC, *Report on Preliminary Examination Activities 2015* ¶ 12 (Nov. 12, 2015), <https://www.icc-cpi.int/iccdocs/otp/OTP-PE-rep-2015-Eng.pdf>. [https://perma.cc/GJG8-3PU2] (archived Oct. 8, 2016) [hereinafter *OTP Report*]; Rome Statute, *supra* note 38, art. 15(1).

events in Iguala,²⁰¹ but, at the time of writing, the OTP has not yet responded.

Assuming the OTP opened a preliminary examination in this way, the OTP could then consider the requirements for initiating an investigation. In order to open an investigation, the OTP must be satisfied that there is a reasonable basis to proceed with an investigation.²⁰² That determination is based on an examination of the factors set out under Article 53(1)(a)–(c) of the Rome Statute:

- (A) temporal jurisdiction and either territorial or personal jurisdiction;
- (B) material jurisdiction;
- (C) admissibility (gravity and complementarity); and
- (D) the interests of justice.²⁰³

This Part will analyze each of these factors in turn, and ultimately conclude that, if the OTP were to initiate a preliminary examination, it would indeed decide to initiate an investigation.

Some may oppose the pursuit of an investigation in Mexico, arguing that the procedural hurdles for opening an investigation, particularly the complementarity analysis, would not be satisfied, and that the case would thus waste valuable court resources. In fact, the Mexican government did just that after a complaint²⁰⁴ was filed in 2011 requesting an investigation into crimes committed by President Calderón and the drug lord Joaquin “El Chapo” Guzman.²⁰⁵ Others may argue that the relevant elements of the crime of enforced disappearance would not be satisfied. Carola Zandbergen is one of the

201. See, e.g., European Parliament Resolution on the Abduction of 43 Students in Guerrero/Mexico (2014/2905(RSP)) ¶ 9 (2014) (calling on the OTP to open an investigation of the enforced disappearances in Mexico); INTE.FED’N OF HUMAN RIGHTS ET AL., COMUNICACIÓN DE ACUERDO CON EL ARTÍCULO 15 DEL ESTATUTO DE ROMA DE LA CORTE PENAL INTERNACIONAL SOBRE LA PRESUNTA COMISIÓN DE CRÍMENES DE LESA HUMANIDAD, EN MÉXICO ENTRE 2006 Y 2012 1–23 (Sept. 2014), https://www.fidh.org/IMG/pdf/informe_mexico_cpi.pdf [<https://perma.cc/95ZJ-PYB9>] (archived Oct. 8, 2016) (calling on the ICC Prosecutor to open a preliminary examination into alleged Crimes Against Humanity in Mexico); Statement of the Mexican Commission for the Defense and Promotion of Human Rights to the 13th session of the Assembly of States Parties (Dec. 10, 2014) (<http://cmdpdh.org/wp-content/uploads/2014/12/IntENG.pdf> [<https://perma.cc/APF8-QC2Q>] (archived Nov. 22, 2016) [hereinafter CMDPH Letter] (urging the president of the Bureau of the Assembly States Parties to urge the prosecutor to initiate a Preliminary Examination).

202. Rome Statute, *supra* note 38, art. 15(3); see also ICC, Rules of Procedure and Evidence, U.N. Doc. PCNICC/2000/1/Add.1, at 17 (2000).

203. Rome Statute, *supra* note 38, art. 53(1)(a)–(c); *OTP Report*, *supra* note 200, ¶ 3.

204. *Mexico Activists Seek ICC Investigation of Drugs War*, BBC (Nov. 25, 2011), <http://www.bbc.com/news/world-latin-america-15899687> [<https://perma.cc/YZ7T-XV6Q>] (archived Oct. 8, 2016).

205. *Id.*

few who has analyzed these requirements. She argues that a number of the chapeau requirements for crimes against humanity would likely not be satisfied in the context of the Mexican drug war.²⁰⁶ This Part will respond to these claims.

A. Temporal, Territorial, and Personal Jurisdiction

In order to open an ICC investigation, the OTP must conclude that there is (i) temporal jurisdiction and (ii) either territorial or personal jurisdiction.²⁰⁷ This Section analyzes this requirement and concludes that it would indeed be met.

The Rome Statute entered into force for Mexico when it became a State Party, on January 1, 2006.²⁰⁸ Thus, the ICC would have temporal jurisdiction over Rome Statute crimes committed in the territory of Mexico or by its nationals from January 1, 2006 onwards.²⁰⁹ If the OTP were to examine the enforced disappearances as occurring in the context of the Mexican drug war, nearly all of such crimes would fall within the desired period, as the war began around 2006.

For there to be territorial jurisdiction, the acts in question must have been committed on the territory of a State Party.²¹⁰ For personal jurisdiction, the acts in question must have been committed by a national of a State Party.²¹¹ In light of the information discussed in earlier Sections, both bases for jurisdiction would be satisfied in this case, as the enforced disappearances occurred within Mexico and were likely committed by Mexican nationals (e.g., state authorities or Mexican drug cartel members).²¹² Thus, the first two bases for jurisdiction would be satisfied.

B. Material Jurisdiction

In order to initiate an ICC investigation, the requirement of material jurisdiction must also be satisfied.²¹³ For there to be material

206. Zandbergen, *supra* note 37, at 30–33, 35–40.

207. Rome Statute, *supra* note 38, arts. 11–13; *OTP Report*, *supra* note 200, ¶ 4.

208. See Mexico Ratifies the Rome Statute, *supra* note 195 (establishing the date on which Mexico ratified the Rome Statute).

209. Rome Statute, *supra* note 38, art. 11(2); *OTP Report*, *supra* note 200, ¶ 112 (reaching a similar conclusion as to the jurisdiction in Afghanistan); see also Situation in the Republic of Kenya, ICC-01/09, PTC Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ¶¶ 173–74 (Mar. 31, 2010) [hereinafter Situation in the Republic of Kenya] (reaching a similar conclusion).

210. Rome Statute, *supra* note 38, art. 12(2); *OTP Report*, *supra* note 200, ¶ 4.

211. *Id.*

212. See Situation in the Republic of Kenya, *supra* note 209, ¶¶ 175–80 (similarly finding jurisdiction *ratione loci* as there was sufficient information to believe that the acts in question occurred on Kenyan territory).

213. Rome Statute, *supra* note 38, arts. 11–13; *OTP Report*, *supra* note 200, ¶ 4.

jurisdiction, the Prosecutor must be satisfied that a crime within the jurisdiction of the court has been or is being committed. Enforced disappearance is a crime against humanity under the Rome Statute, and thus it is a crime within the jurisdiction of the court.²¹⁴ However, for material jurisdiction, the information available must also provide the Prosecutor with “a reasonable basis to believe that a crime within the jurisdiction of the court has been or is being committed.”²¹⁵ This test is the lowest evidentiary standard provided by the statute,²¹⁶ and the information available to the Prosecutor need not be “comprehensive” or “conclusive,” as required in the investigation phase.²¹⁷

This Section will examine the likelihood of the OTP finding a reasonable basis to believe that the crime of enforced disappearance has been committed in Mexico. In order to qualify as an enforced disappearance under the Rome Statute, the act in question must first satisfy the chapeau requirements for crimes against humanity under Article 7(1) and then meet the definition of enforced disappearance under Article 7(2)(i). This Section will ultimately conclude that both sets of requirements would be satisfied.

1. The Chapeau Requirements for Crimes against Humanity

In order to qualify as a crime against humanity under the Rome Statute, the act in question must be committed as part of an “attack” that is

- (1) directed against a civilian population,
- (2) widespread or systematic, and
- (3) committed pursuant to or in furtherance of a state or organizational policy.²¹⁸

Article 7(2)(a) defines an attack as “any course of conduct involving the multiple commission of acts” referred to in Article 7(1).²¹⁹ Thus, a single act of intentional killing could constitute a crime against humanity, if that act fits within the context of a widespread or systematic attack.²²⁰ According to the ICC Elements of the Crimes, a

214. Rome Statute, *supra* note 38, arts. 5, 7(1), 13.

215. *Id.* art. 53(1)(a).

216. Situation in the Republic of Côte D'Ivoire, *supra* note 199, ¶ 24.

217. *Id.*

218. Rome Statute, *supra* note 38, at arts. 7(1), 7(2)(a).

219. *Id.* at art. 7(2)(a).

220. Prosecutor v. Tadić, Case No. IT-94-1-T, Opinion and Judgment, ¶ 649 (ICTY May 7, 1997).

military attack is not necessary.²²¹ The instances of mass disappearance, like Iguala and the 2010 San Fernando Massacre, all occurred during the Mexican drug war, which involved countless acts of crimes listed under Article 7(1), including murder, severe deprivation of liberty, torture, and enforced disappearance.²²² Such a context would very likely constitute the kind of attack referenced in the statute, even if just the instances of enforced disappearance were considered.

a. An Attack Directed against the Civilian Population

The first element requires that the attack be directed against the civilian population. The term civilian population encompasses “groups distinguishable by nationality, ethnicity, or other distinguishable features.”²²³ It refers to persons who are civilians, rather than members of the armed forces and other legitimate combatants.²²⁴ In particular, where there is no established armed conflict under international humanitarian law,²²⁵ the term includes “all persons except those who have the duty to maintain public order and have the legitimate means to exercise force.”²²⁶ The entire civilian population need not be targeted, though the targeted group of persons must have been the primary object of the attack; a group of incidental victims would be insufficient.²²⁷

This element would be satisfied. Many of the victims of the mass disappearances identified earlier all share distinguishable features. In the case of Iguala, the victims were all students of the Ayotzinapa school.²²⁸ In the 2010 San Fernando Massacre, the victims were all foreign migrants.²²⁹ The victims of femicide who remained missing for prolonged periods of time were all female.²³⁰

221. Preparatory Comm’n for the ICC, Elements of Crimes, art. 7(1), U.N. Doc. PCNICC/2000/1/Add.2 (2000).

222. Rome Statute, *supra* note 38, at arts. 7(1)(a), (e), (f), & (i).

223. *See, e.g.*, Prosecutor v. Ruto et al., Case No. ICC-01/9-01/11, PTC Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ¶ 164 (Jan. 23, 2012) [hereinafter Prosecutor v. Ruto et al.] (indicating that the civilian population can include a group defined by its (perceived) political affiliation); *see also* G. METTRAUX, INTERNATIONAL CRIMES & THE AD HOC TRIBUNALS 166 (2005) (“The ‘population’ must form a somewhat self-contained group of individuals, either geographically or as a result of other common features.”).

224. Situation in the Republic of Kenya, *supra* note 209, ¶ 82.

225. Recall that whether the “war” in Mexico would qualify as an armed conflict under international humanitarian law is still debated. *See, e.g.*, Nill Sánchez, *supra* note 7, at 470–91.

226. Prosecutor v. Kayieshma & Ruzindana, Case No. ICTR-95-1, TC Judgment, ¶ 127 (May 21, 1999) (emphasis in original).

227. Situation in the Republic of Côte D’Ivoire, *supra* note 199, ¶ 33.

228. *The Missing Forty-Three*, *supra* note 5.

229. Turati, *supra* note 73, at 15.

230. Matloff, *supra* note 156.

Zandbergen argues that most crimes during the Mexican drug war have targeted members of drug cartels, and thus civilians are not the main targets.²³¹ However, this argument assumes that members of drug cartels are not civilians. Even in cases where the intended targets are presumed members of rival gangs, in the absence of an armed conflict, such victims would still form part of an identifiable group, namely a cartel. Furthermore, an attack against drug cartel members would qualify as an attack against the civilian population, as most drug cartel members would likely not have a duty to maintain public order or the legitimate means to exercise force. In contrast, crimes directed against members of the Mexican law enforcement or national armed services would not form part of an attack on civilian population, as such individuals would have had that duty and legitimate means to use force.

All in all, the OTP would likely conclude that many of the enforced disappearances committed in the context of the drug war were directed against the civilian population.

b. A Widespread or Systematic Attack

The second element requires that the attack also be either widespread or systematic. *Widespread* refers both to the number of resultant victims and the large-scale nature of the attack.²³² The analysis is not exclusively quantitative or geographical, but rather based on the facts of the case.²³³ The attack may be the “cumulative effect of a series of inhumane acts or singular effect of an inhumane act of extraordinary magnitude.”²³⁴ The ICC has not set an express minimum number of victims. In *Prosecutor v. Ruto*, the Pre-Trial Chamber found that an attack was widespread given that it covered four locations in two districts and involved the death of more than 230 people.²³⁵ The OTP similarly opined, for the purposes of the preliminary examination, that the murder or disappearance of 156

231. Zandbergen, *supra* note 37, at 33–34.

232. See, e.g., Situation in the Republic of Kenya, *supra* note 209, ¶ 95 (“As such, the element refers to both the large-scale nature of the attack and the number of resultant victims.”); see also *Prosecutor v. Bemba Gombo*, Case No. ICC-01/05-01/08, PTC Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ¶ 83 (June 15, 2009) (indicating that in order to be widespread the attack must be “carried out over a large geographical area or . . . in a small geographical area directed against a large number of civilians”).

233. Situation in the Republic of Kenya, *supra* note 209, at ¶ 95.

234. *Id.*

235. See *Prosecutor v. Ruto et al.*, *supra* note 223, ¶¶ 175–78 (“Viewed as a whole, the evidence shows that the attack was massive, frequent, carried out collectively with considerable seriousness and directed against a large number of civilian victims.”).

persons and the rape of or sexual violence towards 109 women were sufficient to establish a widespread attack.²³⁶

Even just looking at the instances of mass disappearance in Mexico, it is likely that this element could be satisfied. The UNCED has concluded that there was “a context of generalized disappearances in a large part of the territory of the state, many of which could qualify as enforced disappearance.”²³⁷ The events in Iguala involved the disappearance of forty-three students in the state of Guerrero.²³⁸ The 2010 San Fernando Massacre involved the disappearance of seventy-two migrants in the state of Tamaulipas.²³⁹ The nearly three hundred disappearances perpetrated at the hands of the “Stew Maker” likely occurred in Baja California.²⁴⁰ Those instances are in addition to the 250 documented enforced disappearances identified by HRW that are occurring all over Mexico.²⁴¹ The discovery of countless mass graves all over Mexico further suggests that Iguala and the 2010 San Fernando Massacres are not the first instances of their kind.²⁴² Both the cumulative number of victims and the geographic range support a finding of the widespread character.

In the alternative, the systematic character could also likely be demonstrated. The term *systematic* is qualitative in nature.²⁴³ It refers to the “organized nature of the acts of violence and the improbability of their random occurrence.”²⁴⁴ It can “often be expressed through patterns of crimes, in the sense of non-accidental repetition of similar criminal conduct on a regular basis.”²⁴⁵ Contrary to the findings of Zandbergen,²⁴⁶ there does seem to be evidence of that pattern of criminality. The Stew Maker’s process of dissolving three hundred victims underground certainly indicates a “non-accidental repetition” of the same crime on a regular basis.²⁴⁷ Similarly, the discovery of at least seventeen other mass graves in the area surrounding Iguala during the search for the forty-three students strongly supports the

236. See *OTP Report*, *supra* note 200, ¶¶ 171–73 (discussing the events that took place on September 28, 2009 at Conakry stadium for the purposes of the preliminary examination in Guinea).

237. UNCED Report, *supra* note 27, ¶ 10.

238. *The Missing Forty-Three*, *supra* note 5.

239. See Turati, *supra* note 73, at 16–17.

240. Stew Maker Article, *supra* note 82 (“‘Stew maker’ . . . confessed to disposing of at least 300 bodies over a decade by dumping them in graves and pouring acid on them to let them dissolve underground.”).

241. MEXICO’S DISAPPEARED, *supra* note 100, at 1.

242. See, e.g., BORDERLAND BEAT Article, *supra* note 84 (describing the discovery of more than 500 persons in mass graves in the northern part of the state of Coahuila alone).

243. GERHARD WERLE & FLORIAN JESSBERGER, PRINCIPLES OF INTERNATIONAL CRIMINAL LAW 340 (3d ed. 2014).

244. Situation in the Republic of Côte D’Ivoire, *supra* note 199, ¶ 54.

245. *Id.*

246. Zandbergen, *supra* note 37, at 30–32.

247. See Stew Maker Article, *supra* note 82.

inference that many enforced disappearances end with the execution and burial of the victims.²⁴⁸ Such techniques for making someone disappear cannot be committed accidentally. On the contrary, they require a coordinated effort in order to avoid their discovery.

Based on this evidence, the OTP would likely conclude that there was a widespread and systematic attack in Mexico.

c. An Attack Committed Pursuant to or in Furtherance of a State or Organizational Policy

The final element requires that the attack also be conducted pursuant to or in furtherance of a “State or organizational policy.”²⁴⁹ The term *policy* is interpreted broadly as encompassing a planned, directed, or organized crime²⁵⁰ that evidences a regular pattern.²⁵¹ The crucial factor is that the actual aim of the policy be to attack a civilian population.²⁵² The previously mentioned context of the Mexican drug war supports the existence of such a policy, as countless enforced disappearances, not to mention murders, torture, and persecution, are being committed as part of a preconceived strategy to eliminate perceived enemies, many of whom form a part of the civilian population.

The body responsible for such a policy must be either a state or an organization.²⁵³ The term state includes regional and local government entities; a policy need not have been harbored by the “highest level of the State machinery,” to qualify as a state policy.²⁵⁴ As previously discussed, the precise level of state involvement in enforced disappearances in Mexico remains unclear. However, the events in Iguala and the 2010 San Fernando Massacre both evidence a pattern of at least some involvement by state officials in the perpetration of such acts.²⁵⁵ HRW identified a similar pattern in its 2013 Report, wherein it concluded that state agents were directly or indirectly involved in more than half of the organization’s documented enforced

248. See *Another 17 Mass Graves Found in Iguala, Mexico*, TELESUR (Dec. 20, 2014), <http://www.telesurtv.net/english/news/Another-17-Mass-Graves-Found-in-Iguala-Mexico-20141220-0026.html> [<https://perma.cc/4HGG-E5P4>] (archived Oct. 19, 2016) (“Blanco added that on December 18, UPOEG, together with the family members of the 43 missing Ayotzinapa teachers college students and the Federal Prosecutor’s Search Unit found the graves in the Barranca del Tigre area of Iguala district.”).

249. Rome Statute, *supra* note 38, at art. 7(2)(a).

250. See *Prosecutor v. Ruto et al.*, *supra* note 223, ¶ 210 (“[A]n attack which is ‘planned, directed or organised’, as opposed to ‘spontaneous or [consisting of] isolated acts,’ satisfies the policy requirement.”).

251. Situation in the Republic of Côte D’Ivoire, *supra* note 199, ¶ 43.

252. See *Prosecutor v. Ruto et al.*, *supra* note 223, ¶ 210–11, 213 (“[T]he organisational policy must be directed to commit ‘such attack.’”).

253. Rome Statute, *supra* note 38, at art. 7(2)(a).

254. Situation in the Republic of Côte D’Ivoire, *supra* note 199, ¶ 45.

255. Devereaux, *supra* note 2, pt. 2; Turati, *supra* note 73, at 16–17.

disappearances.²⁵⁶ This well-documented pattern supports the inference that officials at various levels of the Mexican government do harbor policies to at least facilitate enforced disappearances against the civilian population.

Zandbergen concludes that President Calderón's initiation of the War on Drugs in 2006 does not amount to the requisite state policy, as its purpose was meant to reduce drug-related violence, and thus there was no state policy within the meaning of the Rome Statute in that context.²⁵⁷ However, it is worth reiterating that the policy need not be made explicit or be decided upon at the highest levels.²⁵⁸ In line with the jurisprudence of the Pre-Trial Chamber, the aforementioned pattern of state collusion evidences a common policy among at least some Mexican officials.²⁵⁹

Regardless, the existence of an organizational policy would likely be found. The precise meaning and scope of *organization* remains debated. The Pre-Trial Chamber has interpreted the term fairly broadly to include non-state actors, emphasizing the group's potential, in terms of physical capacity and personnel, to perform acts that violate human rights.²⁶⁰ For example, in *Prosecutor v. Ruto*, the following was sufficient to establish the existence of an organization: (i) the existence of a leader, three commanders, and four divisional commanders, (ii) access to a considerable amount of capital, guns, and manpower, and (iii) the creation of an entity that had the primary purpose of attacking supporters of political opponents.²⁶¹

However, in a dissenting opinion, Judge Hans-Peter Kaul advocated for a more limited interpretation of organization, excluding most non-state actors.²⁶² According to Judge Kaul, in order to qualify as an organization, such an entity must act like a state.²⁶³ Accordingly, the entity must have the following characteristics: (i) a collectivity of persons, (ii) established and acting for a common purpose, (iii) operating over a prolonged period of time, (iv) a hierarchical structure, "including, as a minimum, some kind of policy level," (v) a capacity to impose that policy on its members and sanction appropriately, and (vi) a capacity and means to attack a civilian population on a large scale.²⁶⁴

Many of the major drug cartels committing enforced disappearance in Mexico could satisfy the conditions for an

256. MEXICO'S DISAPPEARED, *supra* note 100, at 1, 29–33.

257. Zandbergen, *supra* note 37, at 32–33.

258. Situation in the Republic of Kenya, *supra* note 209, ¶¶ 87, 89.

259. Situation in the Republic of Côte D'Ivoire, *supra* note 199, at ¶ 43 (clarifying the criteria for a state policy).

260. Situation in the Republic of Kenya, *supra* note 209, ¶ 90.

261. *Prosecutor v. Ruto et al.*, *supra* note 223, ¶¶ 194–97, at 74–76.

262. Situation in the Republic of Kenya, *supra* note 209, ¶¶ 51–53, at 27–29 (Kaul, J., dissenting).

263. *Id.* ¶ 51, at 27.

264. *Id.* ¶ 51, at 27–28.

organization under either formulation. Most Mexican drug cartels have the basic structure of command and the weapons, financial resources, and manpower necessary to carry out large-scale attacks.²⁶⁵ Indeed, any entity that has the capacity to bring down a military helicopter,²⁶⁶ dump forty-nine decapitated bodies on a public highway,²⁶⁷ or dissolve three hundred bodies in acid,²⁶⁸ could not have done so without this sort of a capacity or organized command structure. The “generalized” scope of the enforced disappearances is a testament to that.²⁶⁹

As previously mentioned, drug cartels are fundamentally driven by profit and the desire to control trafficking routes.²⁷⁰ Their billion-dollar enterprises take years to build.²⁷¹ For these reasons, many drug cartels have acquired or assembled paramilitary units for the purpose of intimidating and eliminating perceived enemies, including civilians.²⁷² With such forces, drug cartels not only have the capacity to attack the civilian population, but also the capacity to sanction any dissident members of the cartel who do not acquiesce to the cartel’s plans.

The rationale behind Judge Kaul’s dissent is that the juxtaposition between *state* and *organization* in Article 7(2)(a) implies that organizations “should partake of some characteristics of a State.”²⁷³ However, in many smaller cities in Mexico, most notably Michoacán, many drug cartels do operate like a state: they establish parallel governments and fulfill many government functions, like ensuring public safety.²⁷⁴ Although Judge Kaul regards the existence

265. See Callin Kerr, *Mexico’s Drug War: Is It Really a War?*, 54 S. TEX. L. REV. 193, 200–06 (2012); Carina Bergal, Note, *The Mexican Drug War: The Case for a Non-International Armed Conflict Classification*, 34 FORDHAM INT’L L. J. 1042, 1086 (2011); Craig A. Bloom, *Square Pegs and Round Holes: Mexico, Drugs, and International Law*, 34 HOUS. J. INT’L L. 345, 385–93 (2012); Patrick Radden Keefe, *Cocaine Incorporated*, N.Y. TIMES (June 15, 2012), http://www.nytimes.com/2012/06/17/magazine/how-a-mexican-drug-cartel-makes-its-billions.html?pagewanted=all&_r=0 [https://perma.cc/G6RR-SXB5] (archived Oct. 8, 2016).

266. Tuckman, *supra* note 68.

267. *49 Mutilated Bodies*, *supra* note 65.

268. Stew Maker Article, *supra* note 82.

269. UNCED Report, *supra* note 27, ¶ 10.

270. Nill Sánchez, *supra* note 7, at 503.

271. See MALCOLM BEITH, *THE LAST NARCO: HUNTING EL CHAPO, THE WORLD’S MOST WANTED DRUG LORD* 56–196 (2010); Keefe, *supra* note 265.

272. See, e.g., Noah Rayman, *Mexico’s Feared Narcos: A Brief History of the Zetas Drug Cartel*, TIME (July 16, 2013), <http://world.time.com/2013/07/16/mexicos-feared-narcos-a-brief-history-of-the-zetas-drug-cartel/> [https://perma.cc/49BS-9K27] (archived Oct. 8, 2016).

273. Situation in the Republic of Kenya, *supra* note 209, ¶ 51, at 27 (Kaul, J., dissenting).

274. Jerjes Aguirre & Hugo Amador Herrera, *Institutional Weaknesses and Organized Crime in Mexico: The Case of Michoacán*, 16 TRENDS ORG. CRIM. 221, 224–34 (2013).

of such state-like criminal organizations as unlikely,²⁷⁵ such groups are very much a reality in many parts of Mexico.

Thus, it is likely that the Prosecutor would find the existence of an attack pursued in furtherance of a state policy, or, at the minimum, the existence of an attack pursued in furtherance of an organizational policy. Consequently, all of the chapeau elements for crimes against humanity would be met.

2. The Definition of *Enforced Disappearance*

In order to find a reasonable basis to believe that enforced disappearances have or are being committed, the acts in question must not only form part of the kind of attack discussed above, but also meet the definition for enforced disappearance under the Rome Statute. Under Article 7(2)(i), an enforced disappearance involves

- (1) an arrest, detention, or abduction of persons;
- (2) [carried out] by, or with the authorization, support, or acquiescence of a State or political organization;
- (3) followed by the refusal to acknowledge that deprivation of liberty or to give information on the fate or whereabouts of those persons;
- (4) with the intention of removing them from the protection of the law for a prolonged period of time.²⁷⁶

The ICC has not yet heard a case involving an alleged enforced disappearance. Likewise, the OTP has dealt very little with the crime in its preliminary examination reports, and, when it has, it has not engaged in a full analysis of the elements of the crime.²⁷⁷ As a result, this subsection will look to the jurisprudence of the IACtHR for guidance where appropriate, as it is a court that has heard at least thirteen cases involving enforced disappearance in Latin America.²⁷⁸

275. Situation in the Republic of Kenya, *supra* note 209, ¶ 52, at 28 (Kaul, J., dissenting).

276. Rome Statute, *supra* note 38, art. 7(2)(i).

277. See, e.g., *OTP Report*, *supra* note 200, ¶¶ 171–74 (finding a reasonable basis to believe the crime of enforced disappearance was committed with respect to the situation in Guinea).

278. See *Rodríguez Vera et al. (Desaparecidos del Palacio de Justicia) v. Colombia*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 287 (Nov. 14, 2014); *Radilla-Pacheco v. Mexico*, Preliminary Objections, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 209 (Nov. 23, 2009) [hereinafter *Radilla-Pacheco v. Mexico*]; *González et al. (“Cotton Field”) v. Mexico*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 205 (Nov. 16, 2009); *Ticona Estrada et al. v. Bolivia*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 191 (Nov. 27, 2008); *Heliodoro Portugal v. Panama*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 186 (Aug. 12, 2008) [hereinafter *Heliodoro Portugal v. Panama*]; *Goiburú et. al. v. Paraguay*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 153 (Sept. 22, 2006); *Bladeón-García v. Perú*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 148 (Apr. 6, 2006); *Case of the Mapiripán Massacre v.*

This subsection will utilize the example of Iguala to demonstrate that many of the disappearances in Mexico would meet the definition of enforced disappearance under the Rome Statute.

a. The Deprivation of Liberty Element

To qualify as enforced disappearance under the statute, there must have first been an arrest, detention, or abduction.²⁷⁹ According to Attorney General Murillo Karam's "historical truth," the forty-three students were first detained by Iguala municipal police before being handed over to the Guerreros Unidos, who crammed the students into the back of two trucks, piled one on top of the other.²⁸⁰ HRW identified a similar pattern of state authorities first detaining and then transferring victims to members of drug cartels.²⁸¹ For example, the facts of the 2010 San Fernando Massacre evidence a similar pattern.²⁸² Even if the "historical truth" is false, as many claim,²⁸³ the students were nevertheless ultimately abducted within the meaning of the statute.

The corresponding element in the Inter-American Convention on Forced Disappearances (IACFDP) is slightly broader. It requires any "deprivation of freedom" against the will of the person.²⁸⁴ Thus, the IACtHR considers whether the victim was arbitrarily detained and whether such detention complied with procedures enshrined in local law.²⁸⁵ In *Heliodoro Portugal v. Panama*, taking victims against their will to an unknown destination without explaining the reasons for

Colombia, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 122 (Sept. 15, 2005); Case of the 19 Merchants, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 93 (June 12, 2002) [hereinafter Case of the 19 Merchants]; *Bámaca-Velásquez v. Guatemala*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 70 (Nov. 25, 2000) [hereinafter *Bámaca-Velásquez v. Guatemala*]; *Cantoral-Benavides v. Perú*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 69 (Aug. 18, 2000); *Caballero-Delgado & Santana v. Colombia*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 22 (Dec. 8, 1995); *Velásquez Rodríguez v. Honduras*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4 (July 29, 1988).

279. Rome Statute, *supra* note 38, art. 7(2)(i).

280. Devereaux, *supra* note 2, pt. 2, at 7–8; Francisco Goldman, *Crisis in Mexico: The Protests for the Missing Forty-Three*, NEW YORKER (Nov. 12, 2014), <http://www.newyorker.com/news/news-desk/crisis-mexico-protests-missing-forty-three> [<https://perma.cc/TD5G-54SW>] (archived Oct. 8, 2016) [hereinafter *Crisis in Mexico*].

281. See MEXICO'S DISAPPEARED, *supra* note 100, at 1, 29–33.

282. See Turati, *supra* note 73, at 16–18 (explaining that the victims of the 2010 massacre in San Fernando, Tamaulipas, were also detained by police, who later placed them in the custody of a drug cartel).

283. See, e.g., EAAF Report, *supra* note 17, ¶ 3 (finding that the forensic evidence does not support the theory that the incinerated remains discovered belong to the forty-three missing students); GIEI REPORT, *supra* note 17, at 307–31 (claiming that the fate of the missing forty-three students is still unclear); Piccato, *supra* note 13 (concluding that the Mexican government, not a drug cartel, was responsible for the missing students' disappearances).

284. Inter-American Convention, *supra* note 40, art. 2.

285. See, e.g., *Bámaca-Velásquez v. Guatemala*, *supra* note 278, ¶ 143.

their captivity was sufficient to satisfy the element.²⁸⁶ In Iguala, the forty-three students were piled one on top of the other in the back of a truck, which strongly indicates that the Guerreros Unidos detained the students against their will and in violation of local law.²⁸⁷ Thus, the detention and subsequent abduction of the students would satisfy both the Rome Statute and the IACFDP.

b. The Requisite State Authorization, Support, or Acquiescence

Perhaps the most controversial element of enforced disappearance is the requirement that the detention or abduction be carried out “by[] or with the authorization, support, or acquiescence of a State or a political organization.”²⁸⁸ This Article does not mean to ascribe blame to the Mexican government, federal or local, for all the disappearances plaguing Mexico, but will merely observe that there have been disappearances perpetrated with the support of state authorities, and that such instances would meet the definition of state authorization, support, or acquiescence.

In the cases of Iguala and the 2010 San Fernando Massacre, local Mexican authorities carried out the initial detention and subsequently transferred the victims to drug cartels.²⁸⁹ HRW has documented at least 149 cases of enforced disappearance occurring in Mexico with similar patterns of state involvement, at least in the initial detention of victims.²⁹⁰ In those circumstances, there would be sufficient evidence that state authorities carried out at least the initial detention, and in doing so they supported the ultimate abduction of the victims by conducting that detention. In cases like Iguala, where the Mayor of Iguala, José Luis Abarca, allegedly ordered the municipal police to detain the students *como sea* (by whatever means), arguments could be made that state authorities not only supported the detention but also authorized and acquiesced to it.²⁹¹ The current lack of information available makes it difficult to conclude that state authorities conducted the entire Iguala abduction, though the wording of the statute makes clear that state authorities need only conduct a detention or support the abduction.

286. *Heliodoro Portugal v. Panama*, *supra* note 278, ¶ 113.

287. See NIELS UILDRIKS & NELIA TELLO PEÓN, MEXICO'S UNRULE OF LAW: IMPLEMENTING HUMAN RIGHTS IN POLICE AND JUDICIAL REFORM UNDER DEMOCRATIZATION 75–77 (2010) (explaining that Mexican law requires that detention be formally registered and that the detainees immediately be handed over to the public prosecutor's office).

288. Rome Statute, *supra* note 38, art. 7(2)(i).

289. See *The Missing Forty-Three*, *supra* note 5, at 2; Turati, *supra* note 73, at 16–18.

290. MEXICO'S DISAPPEARED, *supra* note 100, at 1, 17–33 (finding ninety-five cases of enforced disappearance involving local police; sixty involving security forces; thirteen involving the federal police; and twenty involving the Navy).

291. See *The Missing Forty-Three*, *supra* note 5 at 2.

The corresponding element in the Inter-American Convention largely mirrors that of the Rome Statute, although it specifically recognizes that non-state actors, “acting with the authorization, support, or acquiescence of the state,” may perpetrate the deprivation of liberty in question.²⁹² As a human rights court, the IACtHR emphasizes omissions by state authorities with respect to preventing such deprivations. In *Case of the 19 Merchants v. Colombia*, the court found it sufficient that the paramilitary group controlled the region, that members of the Colombian military endorsed a plan to murder the victims, and that law enforcement officials “let them [gain] advantage and failed to control and monitor them,” despite knowing that the paramilitary group was committing criminal acts, massacres, and collective murders.²⁹³

The court’s analysis seems to be centered on the state’s failure to act despite an awareness of a non-state entity’s history of prior human rights abuses and the state’s endorsement of a plan to repeat those abuses. In the case of Iguala, the local police would have been aware of the cartel’s proclivity for egregious human rights violations in the area, such as murder and torture,²⁹⁴ and, in handing over the students to such gangs, would have had reason to expect that the students would have at least been detained by an entity lacking a legal basis to do so and in violation of a human right.²⁹⁵

Despite the likelihood of finding the requisite state acquiescence or support in many disappearance cases in Mexico, drug cartels would not qualify as political organizations within the meaning of the statute. Some legal scholars have advocated that the phrase is meant to include entities that are obligated to provide information on the whereabouts of missing persons.²⁹⁶ Under this line of argument, it is the state’s participation in the crime that justifies enforced disappearance being a crime against humanity and that distinguishes the crime from other crimes like kidnapping and abduction.²⁹⁷ As Irena Giorgou convincingly argues, non-state actors are generally not expected to ensure the legally mandated procedural protections accompanying deprivations of liberty or to inform the public about the whereabouts

292. Inter-American Convention, *supra* note 40, art. 2.

293. *Case of the 19 Merchants*, *supra* note 278, ¶¶ 84–86, 118–22, 135.

294. See *Iguala and Guerreros Unidos*, GUERRERO VIOLENCE PROJECT (Oct. 12, 2014), <https://guerreroviolenceproject.wordpress.com/2014/10/12/iguala-and-guerreros-unidos/> [<https://perma.cc/V8MG-V5WG>] (archived Oct. 8, 2016).

295. See Organization of American States, American Convention on Human Rights art. 7, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123 (entered into force July 18, 1978) (concerning the right to personal liberty).

296. See, e.g., WERLE & JESSBERGER, *supra* note 243, at 382; Irena Giorgou, *State Involvement in the Perpetration of Enforced Disappearance and the Rome Statute*, 11 J. INT’L CRIM. JUST. 1001, 1012 (2013).

297. WERLE & JESSBERGER, *supra* note 243, at 333; Giorgou, *supra* note 296, at 1012–13.

of disappeared persons.²⁹⁸ Indeed, the drafters would not have included the term *political organization* if they meant to refer to all private entities. The inclusion of the term *political* as a qualifier was meant to encompass a narrower spectrum of entities than the organization referred to in the chapeau requirements. Thus, acts committed by drug cartel members must have been committed with some involvement by the state in order to qualify as enforced disappearances; acts committed solely by drug cartel members would not meet the requirements of the statute.

c. The Refusal to Provide Information on the Fate and Whereabouts of the Victim

In order to constitute enforced disappearance under the Rome Statute, the abduction or detention of the person must have been followed by a refusal to provide information concerning the fate and whereabouts of the victim.²⁹⁹ At the time of writing, only one of the forty-three students' remains has been positively identified.³⁰⁰ It took six weeks before Mexican authorities could publicly comment conclusively on the fate and whereabouts of the students.³⁰¹ The mayor of Iguala fled shortly after the disappearances.³⁰² These facts support the conclusion that much information about the whereabouts of the students was withheld in the weeks following the disappearance of the students. Indeed, a report by *Proceso* accuses federal authorities of having hidden information regarding the whereabouts of the students in the aftermath of Iguala.³⁰³ These facts, if true, would definitely satisfy the element.

Other disappearance cases in Mexico where the victims remain missing or were missing for several weeks would also likely satisfy this element. More than twenty-seven thousand persons remain missing in Mexico and 40 percent of those cases have never been investigated,³⁰⁴ which evidences a regular failure on the part of the perpetrators to provide information about where the victims are and whether they are alive. Such cases would definitely satisfy the element.

The corresponding element in the Inter-American Convention is, once again, broader than the element in the Rome Statute. It requires

298. Giorgou, *supra* note 296, at 1012.

299. Rome Statute, *supra* note 38, art. 7(2)(i).

300. See *The Missing Forty-Three*, *supra* note 5.

301. See *Crisis in Mexico*, *supra* note 280, at 1–2.

302. *Id.* at 2.

303. *Proceso Report*, *supra* note 14.

304. 2016 AI Report, *supra* note 6 (“Unfolding human rights crises at the national level included Mexico, which was plagued by thousands of complaints of torture and other ill-treatment and reports of extrajudicial executions; the whereabouts of at least 27,000 people remained unknown at the end of the year.”); see also CONFRONTING A NIGHTMARE, *supra* note 133, at 10–11.

either (1) the absence of information or (2) the refusal to acknowledge the deprivation of liberty or to give information about the whereabouts of the victim.³⁰⁵ The IACtHR's focus on state human rights obligations once again drives the court's analysis,³⁰⁶ making it more concerned with state omissions with respect to investigative and prosecutorial diligence.³⁰⁷ The fact that the whereabouts of the victims are still unknown is a factor that weighs heavily in favor of satisfying the element.³⁰⁸ Consequently, the disappearances in Iguala, as well as many others, would satisfy the IACtHR formulation.

d. The Specific Intent Requirement

Lastly, in order to constitute an enforced disappearance under the Rome Statute, the perpetrator must have had the specific intention of removing the victim from the protection of the law for a prolonged period.³⁰⁹ The inclusion of the term *prolonged period* does not require the victim's actual removal for such a period, just an intention to do so.³¹⁰ According to apprehended members of Guerreros Unidos, the cartel went to great lengths to conceal the remains of the students from discovery. They confessed to burning the bodies, breaking bones into fragments, placing them in plastic bags, and tossing those bags in a river.³¹¹ Even if they did not, in fact, burn the bodies at the Cocula dump,³¹² some sort of practice was adopted to ensure the bodies would not be discovered. The use of a sophisticated procedure, much like the Stew Maker's dissolution of bodies in acid, strongly suggests an intention to conceal the fate and whereabouts of the victims permanently, not only to escape punishment, but also to hide such details from the victims' families and friends as well as the broader public. The mass graves discovered throughout the country further evidence a pervasive intent to permanently conceal victims from the protection of the law.³¹³

As it is likely that all the chapeau requirements and elements of the definition of enforced disappearance would be met, it is also likely that the OTP would find the requisite material jurisdiction.

305. Inter-American Convention, *supra* note 40, art. 2.

306. Juan Luis Modollel González, *The Crime of Forced Disappearance of Persons According to the Decisions of the Inter-American Court of Human Rights*, 10 INT'L CRIM. L. REV. 475, 485–86 (2010).

307. *See, e.g.*, Radilla-Pacheco v. Mexico, *supra* note 278, ¶¶ 17, 201, 230–34.

308. *See id.*

309. Rome Statute, *supra* note 38, art. 7(2)(i).

310. Modollel González, *supra* note 306, at 485.

311. *Crisis in Mexico*, *supra* note 280.

312. Recall that the EAAF and the GIEI concluded just that. *See* EAAF Report, *supra* note 17, ¶ 3; GIEI REPORT, *supra* note 17, at 307–31.

313. *See, e.g.*, BORDERLAND BEAT Article, *supra* note 84.

C. The Admissibility Requirement

In order for there to be a reasonable basis to believe that enforced disappearances have or are being committed, the Prosecutor must also consider whether the case(s) would be admissible under Article 53(1)(c) of the Rome Statute.³¹⁴ The admissibility analysis is comprised of an assessment of (1) gravity and (2) complementarity.³¹⁵ This Section will analyze each in turn, and ultimately conclude that both assessments would support a finding of admissibility.

1. The Gravity Requirement

In order to satisfy the admissibility requirement, the conduct in question must exceed a certain level of gravity.³¹⁶ The rationale behind this requirement is one of judicial economy: the court's resources should not be expended on "minor" crimes.³¹⁷ According to the Prosecutor, the gravity assessment entails a consideration of (a) the scale of the crimes, (b) the nature of the crimes, (c) the manner in which they are committed, and (d) their impact.³¹⁸ This subsection will briefly discuss each of these in turn, and ultimately conclude that they would very easily be satisfied.

According to the OTP's recent policy paper on preliminary examinations, the scale may be assessed in light of the number of direct and indirect victims, the bodily and psychological harm caused to the victims and their families, or their geographical or temporal spread.³¹⁹ Recall that the UNCED has concluded that there is a "generalized" context of enforced disappearances in Mexico.³²⁰ The more than twenty-seven thousand people who have disappeared since 2006 and who remain missing and the discovery of mass graves all over the country speak to the vast number of victims and the geographic and temporal spread of such acts.³²¹ The large number of family members who have suffered as a result of this phenomenon only adds to the

314. Rome Statute, *supra* note 38, art. 53(1)(a); *OTP Report, supra* note 200, ¶ 3.

315. See Rome Statute, *supra* note 38, art. 17(1)(a)–(d); *OTP Report, supra* note 200, ¶ 5.

316. Rome Statute, *supra* note 38, art. 17(1)(d).

317. WERLE & JESSBERGER, *supra* note 243, at 103–04.

318. *OTP Report, supra* note 200, ¶ 7. The Pre-Trial Chamber has outlined a slightly different analysis, which considers whether the behavior in question: (a) was systematic or large scale, (b) led to "social alarm," and (c) involved the most senior leaders suspected for being responsible for the crimes within the jurisdiction of the court. PROSECUTOR V. DYILO, ICC-01/04-01/07, DECISION ON THE PROSECUTOR'S APPLICATION FOR WARRANTS OF ARREST, ARTICLE 58, ¶¶ 43–64 (Feb. 10, 2006), https://www.icc-cpi.int/CourtRecords/CR2007_00196.PDF [<https://perma.cc/XQ8Q-QLEA>] (archived Oct. 8, 2016).

319. OFFICE OF THE PROSECUTOR, INTERNATIONAL CRIMINAL COURT, POLICY PAPER ON PRELIMINARY EXAMINATIONS, ¶ 62 (Nov. 2013), https://www.icc-cpi.int/iccdocs/otp/OTP-Policy_Paper_Preliminary_Examinations_2013-ENG.pdf [<https://perma.cc/R2U6-VY5L>] (archived Oct. 6, 2016) [hereinafter OTP Policy Paper].

320. UNCED Report, *supra* note 27, ¶ 10.

321. 2016 AI Report, *supra* note 6, at 249.

scale. One of the survivors of the Iguala delegation that visited Leiden University made the following concluding remark concerning the psychological effect on victims' relatives: "[l]osing a family member to natural causes feels truly terrible. Just imagine what it feels like when you know that it was your own state [that was responsible]."³²² Thus, a situation in Mexico concerning enforced disappearances would have the requisite scale.

The nature of the crimes would likewise support the finding of gravity. According to the OTP, the nature of the crimes refers to the specific elements of the offense.³²³ As previously discussed, the definition of enforced disappearance has a number of unique elements, including the participation of state authorities, the intent to remove the person from the protection of the law for an indefinite period, and the purposeful refusal to provide information concerning the fate or whereabouts of the victim. As one of the members of the Iguala delegation remarked, "[o]ur classmates are not kidnapped . . . What are [the perpetrators] asking for?"³²⁴ What distinguishes enforced disappearance from kidnapping or abduction, and what gives the crime its international character, is the state's participation in the act and interference with the truth. These aspects of the crime make it especially heinous.

The manner of commission of these crimes likewise supports a finding of gravity. The OTP has indicated that the analysis of this factor should consider, among other things, (a) the means employed to execute the crime, (b) the intent of the perpetrator, (c) the extent to which the crimes were systematic, (d) or the presence of particular cruelty.³²⁵ Recall the creative and sophisticated means that many perpetrators like the Stew Maker and the Guerreros Unidos employ in order to avoid responsibility for the crime. The perpetrators intend for their victims to remain missing indefinitely and use sophisticated measures to ensure that they do. The pervasive intent to make victims disappear entirely and the apparent, blatant disrespect for the victims' bodies are a further testament to the gravity of the crime.

Finally, the impact of such crimes provides further support for a finding of gravity. The OTP has indicated that such an impact may be assessed in light of the social, economic, and environmental damage inflicted on the affected communities, among other things.³²⁶ The Introduction and Part III discussed the resulting public distrust of the Mexican criminal justice system and how that distrust further increases impunity. Those discussions also referenced the horror associated with not knowing which state authorities are serving the

322. *Ayotzinapa in Leiden*, *supra* note 18, at 2:32:00–2:34:00.

323. OTP Policy Paper, *supra* note 319, ¶ 63.

324. *Ayotzinapa in Leiden*, *supra* note 18, at 2:28:30–2:30:10.

325. OTP Policy Paper, *supra* note 319, ¶ 64.

326. *Id.* ¶ 65.

country and which are serving the drug lords. These developments have had a deleterious effect on the country socially, causing patterns of forced displacement to avoid the drug violence³²⁷ as well as a general frustration with and disengagement from the criminal justice system. Thus, the gravity requirement would very likely be met.

2. The Complementarity Analysis

As part of the admissibility analysis, the Prosecutor also considers complementarity concerns.³²⁸ The first question in assessing complementarity is an empirical one: are there or have there been any relevant national investigations or prosecutions?³²⁹ Domestic inactivity is sufficient to make a case admissible, and, in such a scenario, the other questions of unwillingness or inability would not arise.³³⁰ Indeed, such a scenario likely exists, at least for the majority of enforced disappearance crimes in Mexico. Because several Mexican states do not criminalize enforced disappearance or employ definitions that are compatible with international standards,³³¹ a large portion of enforced disappearance cases either cannot be prosecuted or would not be prosecuted properly. The fact that around 40 percent of disappearance cases have never been opened and that no one has been convicted for an enforced disappearance committed after 2006³³² further suggest that a large portion of enforced disappearance crimes would be admissible before the court.

It is also likely that many of the enforced disappearance cases that are under investigation or that are being prosecuted would also be deemed admissible. Where there are or have been national investigations or prosecutions, the analysis focuses on whether those national proceedings encompass the same person for the same conduct as those to be investigated by the court.³³³ More precisely, ongoing proceedings remain admissible if the state is or was “unwilling or unable genuinely to carry out the investigation or prosecution.”³³⁴ For a situation in Mexico, the analysis would deal more with unwillingness, as inability relates more to whether the domestic judicial system has substantially collapsed.³³⁵ Unwillingness may be

327. Sebastián Albuja, *Criminal Violence and Displacement in Mexico*, 45 FORCED MIGRATION R. 28, 28 (2014).

328. Rome Statute, *supra* note 38, arts. 17(1)(a)-(c), 53(1)(b); OTP Policy Paper, *supra* note 319, ¶¶ 42, 46.

329. OTP Policy Paper, *supra* note 319, ¶ 47.

330. Prosecutor v. Katanga & Chui, *supra* note 198, ¶ 78.

331. UNCED Report, *supra* note 27, ¶ 19–20.

332. CONFRONTING A NIGHTMARE, *supra* note 133, at 10–11; 2016 HRW Report, *supra* note 6; *Disappearances’ Response Falls Short*, *supra* note 128.

333. Rome Statute, *supra* note 38, art. 17(1)(a)–(c); OTP Policy Paper, *supra* note 319, ¶¶ 47, 49.

334. Rome Statute, *supra* note 38, arts. 17(1), 20(3).

335. *Id.* art. 17(3).

found, *inter alia*, where there has been an unjustified delay in the judicial proceedings or if the proceedings are or were being undertaken for the purpose of shielding the person concerned from criminal responsibility for Rome Statute crimes.³³⁶

With respect to unjustified delay, the Prosecutor looks to indicators, such as the pace of investigative steps and whether there is evidence of a lack of intent to bring the concerned persons to justice.³³⁷ With respect to the intent to shield a person from criminal responsibility, there are several relevant indicators, including (a) insufficient steps in the investigation or prosecution, (b) ignoring evidence or giving it insufficient weight, (c) intimidation of victims, and (d) flawed or manipulated evidence.³³⁸

Contrary to what the Mexican Foreign Ministry would have the OTP believe,³³⁹ there is ample evidence available for the Prosecutor to conclude that there has been both an unjustifiable delay and an intent to shield perpetrators of the crime. Recall the investigative failures observed by the UNCED, UNWGEID, and multiple other human rights NGOs:

- (i) unexplained delays in the initial following up on reported disappearances;
- (ii) intentionally misinforming victim families that the law requires a person to have been missing for several days before a formal complaint may be filed;
- (iii) attributing blame to victims as a pretext for not opening investigations;
- (iv) routine failure to carry out basic investigative steps;
- (v) excessive reliance on families to carry out crucial investigative steps;
- (vi) misplacement, suppression, or destruction of key evidence; and
- (vii) fabricating evidence.³⁴⁰

Not only do these shortcomings largely track the criteria identified in the previous paragraph, but they also evidence a broader resistance by Mexican law enforcement officials and prosecutors to follow through with the investigation and prosecution of the crime. As a result of these shortcomings, many families of victims are forced to drive such investigations on their own initiatives, and, when they do, those

336. *Id.* art. 17(2); OTP Policy Paper, *supra* note 319, ¶ 50.

337. OTP Policy Paper, *supra* note 319, ¶ 52.

338. *Id.* ¶ 51.

339. See Press Release, Mexico Ministry of Foreign Relations, Comunicado 372 (Nov. 10, 2011) ¶¶ 5–6.

340. See, e.g., MEXICO'S DISAPPEARED, *supra* note 100, at 34–67; UNWGEID Report, *supra* note 96, ¶¶ 33–34.

families often face threats of reprisal for trying to advance the case.³⁴¹ Whether it be for reasons of protecting the perpetrators or because of lack of sufficient resources, or both, the reality on the ground is that many of the ongoing proceedings suffer from avoidable delay or purposeful evasion of investigation.

After considering both gravity and complementarity, it is likely that the OTP would conclude that the particular case(s) would be admissible.

D. *The Interests of Justice*

Finally, in order to initiate an investigation at the ICC, the OTP must consider the interests of justice under Article 53(1)(c).³⁴² The interest of justice assessment is a countervailing consideration that may give reason not to proceed with an investigation.³⁴³ There is a strong presumption that investigations and prosecutions will be in the interest of justice; a decision not to proceed on 53(1)(c) grounds would be exceptional.³⁴⁴ Thus, unless there is express resistance from the victims or relevant intergovernmental organizations or NGOs, the investigation will proceed.³⁴⁵ Such a resistance does not exist at this time in Mexico. To the contrary, the victims and relevant human rights entities are desperately seeking the involvement of the court.³⁴⁶ Although the Mexican government may resist international involvement and advocate for more internal solutions, such considerations do not form part of the analysis, and, even if they did, they would not be enough to overcome the presumption.

Having examined all of the above factors, the OTP would indeed find a reasonable basis to proceed with an investigation in Mexico, even if such an investigation involved only enforced disappearances.

V. HOW POSITIVE COMPLEMENTARITY COULD AID THE MEXICAN REFORM PROCESS DURING A PRELIMINARY EXAMINATION

Initiating an investigation before the ICC would exert pressure on Mexican authorities to make further progress with respect to its domestic reforms and, ultimately, to unearth some of the truth about what happened to the many victims of enforced disappearance. Yet, even before that investigation comes to fruition, the OTP has a

341. See MEXICO'S DISAPPEARED, *supra* note 100, at 34–67.

342. Rome Statute, *supra* note 38, art. 53(1)(c); OTP Policy Paper, *supra* note 319, ¶ 67.

343. OTP Policy Paper, *supra* note 319, ¶ 67.

344. *Id.* ¶ 71.

345. *Id.* ¶¶ 67–68.

346. See, e.g., CMDPH Letter, *supra* note 201; *Ayotzinapa in Leiden*, *supra* note 18, at 2:26:00–2:27:00.

powerful tool for fomenting and accelerating the Mexican domestic reform process, namely its strategy of positive complementarity.

The meaning and scope of positive complementarity are still evolving and remain debated among international criminal law scholars.³⁴⁷ Under the traditional complementarity principle, domestic investigations and prosecutions should have priority over those of the ICC.³⁴⁸ Fulfillment of this principle helps avoid simultaneous proceedings in various courts concerning the same criminal acts.³⁴⁹ The Rome Statute has several provisions that aim to protect this arrangement. For example, under the statute, State Parties have several positive obligations to ensure that they are able to conduct investigations and proceedings independently.³⁵⁰ Likewise, the statute also has provisions that allow for the ICC or the Prosecutor to supervise the fulfillment of those obligations.³⁵¹

The notion of positive complementarity emerged as a means to further ensure that domestic courts can meet their obligations.³⁵² The OTP considers it an “approach” to the complementarity principle that involves the encouragement of genuine national proceedings through the OTP’s cooperation with, and outreach to national authorities.³⁵³ This more collaborative notion of complementarity can be inferred from the Rome Statute, which envisages “international cooperation” as a means of enhancing the effective prosecution of international crimes and regards the fight against impunity as a shared burden.³⁵⁴ Historically, the OTP has envisioned the preliminary examination as the “first opportunity” for the OTP to implement positive complementarity;³⁵⁵ however, its most recent formulation seems to embrace a broader view, expanding the concept to include ICC support

347. See, e.g., Carsten Stahn, *Taking Complementarity Seriously: On the Sense and Sensibility of ‘Classical’, ‘Positive’ and ‘Negative’ Complementarity*, in *THE INTERNATIONAL CRIMINAL COURT AND COMPLEMENTARITY: FROM THEORY TO PRACTICE* 233, 233–36 (Carsten Stahn & Mohamed M. El Zeidy eds., 2011) [hereinafter *Taking Complementarity Seriously*]; see generally William W. Burke-White, *Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice*, 49 *HARV. INT’L L.J.* 53, 53–108 (2008).

348. See Rome Statute, *supra* note 38, pmb. to art. 1; CRYER ET AL., *supra* note 195, at 536–67.

349. CRYER ET AL., *supra* note 195, at 536–67.

350. See, e.g., Rome Statute, *supra* note 38, art. 88 (“States Parties shall ensure that there are procedures available under their national law for all the forms of cooperation which are specified under [Part 9].”).

351. See, e.g., Rome Statute, *supra* note 38, art. 18, ¶¶ 2–3 (“At the request of [a] State, the Prosecutor shall defer to the State’s investigation . . . [but such a deferral] shall be open to review by the Prosecutor . . .”).

352. See CRYER ET AL., *supra* note 195, at 536–67; *Taking Complementarity Seriously*, *supra* note 347, at 233–35.

353. See OTP Prosecutorial Strategy, *supra* note 39, at 5.

354. See Rome Statute, *supra* note 38, pmb. For a comprehensive treatment of this argument, see *A Tale of Two Notions*, *supra* note 39, at 87–113.

355. OTP Prosecutorial Strategy, *supra* note 39, at 10.

of global efforts to combat impunity for ICC crimes, irrespective of ICC proceedings.³⁵⁶

This Part will argue that another reason for pursuing an ICC investigation concerning enforced disappearances in Mexico is that the OTP could use its positive complementarity strategy during the preliminary examination to exert greater pressure on domestic authorities to adopt appropriate criminal justice reforms. Such pressure would likely accelerate the progress already being made and bring Mexico closer to addressing its climate of impunity on its own.

This Part will be divided in two Sections. First, it will argue that the mere threat of investigation has already contributed to domestic reform in other countries, and thus that threat would likely aid the reform process in Mexico. Drawing on the example of the situation in Colombia, it will demonstrate that, over the course of the preliminary examination, the OTP's evaluative process led to several advances with respect to criminal law legislation, judicial willingness to prosecute international crimes, and investigative and prosecutorial capacity. Second, this Part will propose several specific measures that the OTP could adopt to exert additional pressure on Mexican authorities. In particular, it will suggest that the OTP could help expand existing networks of cooperation, endorse or substantiate the investigative efforts of human rights organizations and judicial bodies, and encourage other international entities to be more proactive.

A. A Look at the Situation in Colombia: The Threat of an Investigation Has Already Contributed to Domestic Reform Efforts

The OTP's work in Colombia has been heralded by many as the most successful example of positive complementarity in practice.³⁵⁷ Indeed, as this Section will demonstrate, it has contributed to developments in three main areas: (i) improvements to existing legislation, (ii) progressive shifts in the attitudes of judicial entities, and (iii) shifts in investigative and prosecutorial priorities. These developments highlight the impact that the threat of opening an investigation in Mexico would likely have on the country's process of realizing criminal justice reform.

356. See International Criminal Court & Office of the Prosecutor, *Strategic Plan: 2016-2018*, ¶¶ 95-97 (July 6, 2015), https://www.icc-cpi.int/iccdocs/otp/070715-OTP_Strategic_Plan_2016-2018.pdf [<https://perma.cc/MJQ7-PTT8>] (archived Oct. 5, 2016) [hereinafter *2015 Strategic Plan*] (suggesting the implementation of global information sharing centers and crime databases as well as capacity building).

357. See, e.g., Lionel Nichols, *The Strategy of Positive Complementarity, in THE INTERNATIONAL CRIMINAL COURT & THE END OF IMPUNITY IN KENYA* 29, 40 (2015); Kirsten Ainley, *The Responsibility to Protect and the International Criminal Court: Counteracting the Crisis*, 91 INT'L AFF. 37, 48 (2015). For another example of success, see Burke-White, *supra* note 347, at 71-73 (explaining that in 2005, the threat of prosecution in Sudan provided a very visible influence over the willingness of domestic authorities to prosecute international crimes themselves).

Before beginning, it is important to acknowledge the difficulty in demonstrating a direct causal link between the OTP's positive complementarity strategy and the developments identified below. The OTP has visited and corresponded with Colombian authorities on many occasions³⁵⁸ and has released a number of formal reports detailing Colombia's progress and the OTP's contributions to that progress.³⁵⁹ Such interactions definitely played a role in reinforcing the threat of an investigation and incentivizing domestic authorities to act. A notable recent development was the agreement between the Government of Colombia and the Fuerzas Armadas Revolucionarias de Colombia—Ejército del Pueblo (FARC-EP) to create a “Special Jurisdiction for Peace,” which would allow the Chambers of Justice and a Tribunal for Peace to prosecute and sanction those responsible for several grave crimes committed during armed conflict.³⁶⁰

However, positive complementarity was not the only force at work in these developments. On the contrary, positive complementarity formed part of a network of international efforts to engage with and influence Colombian authorities. Other international organizations and judicial bodies, most notably the IACtHR and human rights NGOs like Amnesty International (AI) and HRW, were involved and contributed to the momentum for change.³⁶¹ The important point is that progress was made as a result of a collective pressure to which the ICC contributed. Thus, at a minimum, the OTP's efforts indirectly led to the changes discussed below.

The OTP's ongoing threat of opening an investigation played a role in three positive developments in Colombia. First, the OTP's involvement contributed to a number of improvements to existing Colombian legislation. For example, throughout the preliminary examination, the OTP indicated that it would be monitoring the

358. See, e.g., Press Release, Office of the Prosecutor, ICC Prosecutor Visits Colombia, ICC-OTP-20080821-PR347 (Aug. 21, 2008) (<https://www.icc-cpi.int/Pages/item.aspx?name=icc%20prosecutor%20visits%20colombia> [<https://perma.cc/C97Z-6CP2>] (archived Oct. 5, 2016)).

359. See, e.g., *OTP Report*, *supra* note 200, ¶¶ 136–67.

360. See *id.* ¶¶ 141, 148–49.

361. See, e.g., Case of the Pueblo Bello Massacre v. Colombia, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C), No. 140, ¶¶ 177–93, 211–12 (Jan. 31, 2006), http://www.corteidh.or.cr/docs/casos/articulos/seriec_140_ing.pdf [<https://perma.cc/R9F7-ZJB7>] (archived Oct. 5, 2016) (urging Colombian authorities to refine its investigative and prosecutorial standards for extrajudicial executions and to reduce the scope of its military criminal jurisdiction).

implementation of the Justice and Peace Law³⁶² (JPL).³⁶³ This law was negotiated in 2005 as part of Colombia's transitional justice process, offering demobilized paramilitaries reduced prison sentences in exchange for a full confession of their crimes and their cooperation in other investigations.³⁶⁴ Following its passage, the law received much scrutiny due to excessive delays in JPL proceedings.³⁶⁵ The year 2012 was marked by several legislative changes meant to improve the JPL framework. For example, the Colombian legislature passed Law 1592,³⁶⁶ which introduced several procedural changes aimed at making the JPL process more efficient, such as anticipated judgments for those paramilitaries with more lead responsibility.³⁶⁷ Another legislative development bearing the mark of the OTP's involvement is the Legal Framework for Peace³⁶⁸ (LFP). This law includes a strategy of prioritization and selection of cases against non-paramilitaries, focusing on those most responsible for the commission of several crimes under ICC jurisdiction and allowing for the conditioned dropping of non-selected cases.³⁶⁹ Although the law as it stands may indeed create

362. Ley 975 de 2005, julio 25, 2005, 45.980 DIARIO OFICIAL [D.O.] (Colom.). For a thorough review of the substance of this law, see KAI AMBOS, *THE COLOMBIAN PEACE PROCESS AND THE PRINCIPLE OF COMPLEMENTARITY OF THE INTERNATIONAL CRIMINAL COURT* (2010); see also ICC's *Principle of Complementarity*, in 2 *THE INTERNATIONAL CRIMINAL COURT & COMPLEMENTARITY: FROM THEORY TO PRACTICE* 1071, 1071–96 (Carsten Stahn & Mohamed M. El Zeidy eds., 2011).

363. See, e.g., ALEJANDRO CHEHTMAN, *THE IMPACT OF THE ICC IN COLOMBIA: POSITIVE COMPLEMENTARITY ON TRIAL* 21 (Oct. 2011), <http://www.domac.is/media/domac-skjol/Domac-17-AC.pdf> [<https://perma.cc/54FE-828L>] (archived Oct. 5, 2016) (describing a letter from the OTP indicating that it would monitor whether the JPL complied with the requirements of “truth, justice, and reparations”); SHAW DRAKE, *THE COURT'S ROLE IN PROMOTING ACCOUNTABILITY IN COLOMBIA'S TRANSITIONAL JUSTICE FRAMEWORK* 4 (June 19, 2014), <http://www.amicc.org/docs/Colombia%20and%20the%20ICC.pdf> [<https://perma.cc/B6CR-GMCV>] (archived Oct. 5, 2016) (discussing two letters sent in July and August of 2013 warning the judicial branch of Colombia that certain provisions of the LFP, if left unchanged may result in the initiation of an investigation).

364. *Feature Series: Colombia's Justice and Peace Process*, ICTJ (May 8, 2012), <https://www.ictj.org/news/feature-series-colombia%E2%80%99s-justice-and-peace-process> [<https://perma.cc/XXB4-N4B8>] (archived Oct. 5, 2016).

365. See *id.* (noting that more than 2,000 demobilized paramilitaries were still awaiting trial and only seven cases had ever reached a verdict as of March 2012).

366. Ley 1592 de 2012, diciembre 25, 2005, 48.633 DIARIO OFICIAL [D.O.] (Colom.).

367. Inter-Am. Comm'n on Human Rights, *Truth, Justice, and Reparation: Fourth Report on Human Rights Situation in Colombia*, OEA/Er.L/V/II, Doc. 49/13 ¶¶ 310, 361 (Dec. 31, 2013) [hereinafter *Truth, Justice, and Reparation Report*], <http://www.oas.org/en/iachr/reports/pdfs/Colombia-Truth-Justice-Reparation.pdf> [<https://perma.cc/2MC6-6XAP>] (archived Oct. 5, 2016).

368. Acto Legislativo No. 1 de 2012, julio 31, 2012, “Por medio del cual se establecen instrumentos jurídicos de justicia transicional en el marco del artículo 22 de la Constitución Política y se dictan otras disposiciones” (Cong. de la República de Colom.).

369. Int'l Criminal Court & The Office of the Prosecutor, *Situation in Colombia: Interim Report* ¶¶ 204–05, 221 (Nov. 2012), <http://www.icc-cpi.int/NR/rdonlyres/3D3055BD-16E2-4C83-BA85-35BCFD2A7922/285102/OTPCOLOMBIAPublicInterim>

concerns about the investigation of low- to mid-level offenders,³⁷⁰ the passage of the law nonetheless constitutes a major legislative step towards the country being able to prosecute international crimes on its own and to properly prioritize cases in line with OTP goals.³⁷¹

Second, the OTP's involvement has also triggered a shift in attitudes among Colombian courts towards greater recognition of international crimes and international criminal law standards. Colombia has not yet adopted a law implementing the Rome Statute and has only sparingly included crimes that would qualify as crimes against humanity in its criminal code³⁷²—which does not include a definition of crimes against humanity.³⁷³ However, within the last decade, many Colombian courts have begun to interpret and apply international criminal law, even in the absence of relevant domestic law codifying it. For example, in 2010, the Colombian Supreme Court recognized responsibility for genocide, despite the fact that the conduct in question occurred prior to the implementation of domestic laws criminalizing the act.³⁷⁴ Since roughly the time that the OTP began its preliminary examination, domestic courts have also begun to apply international criminal law concerning other crimes against humanity.³⁷⁵ Similarly, in 2010, the Supreme Court embraced modes of liability from international criminal law,³⁷⁶ and some domestic courts have followed suit, embracing the concept of “co-perpetration-by-means.”³⁷⁷

Finally, the OTP's involvement has played a role in the adjustment of investigative and prosecutorial priorities so as to facilitate the investigation of international crimes. For example, the organizational structure of the JPL Unit of the Attorney General's Office in Colombia has been redesigned to facilitate greater consideration of evidence fulfilling the chapeau requirements for

ReportNovember2012.pdf [https://perma.cc/29M2-YZ4R] (archived Oct. 5, 2016).

370. *Id.* ¶ 205.

371. International Criminal Court & Office of the Prosecutor, *Strategic Plan June 2012–2015*, ¶¶ 19, 22 (Oct. 11, 2013), <https://www.icc-cpi.int/iccdocs/otp/OTP-Strategic-Plan-2013.pdf> [https://perma.cc/SA8R-5RQY] (archived Oct. 5, 2016) (detailing the OTP's prioritization of investigations of the most responsible persons for crimes under the jurisdiction of the court).

372. U.S. LIBRARY OF CONG., CRIMES AGAINST HUMANITY STATUTES AND CRIMINAL CODE PROVISIONS IN SELECTED JURISDICTIONS, <http://www.loc.gov/law/help/crimes-against-humanity/index.php> (last visited Mar. 29, 2016) [https://perma.cc/6BWW-TEMY] (archived Oct. 5, 2016) (noting that the Colombia Criminal Code only accounts for genocide, forced disappearances, kidnapping, arbitrary detention, torture, forced displacement, and crimes of terrorism).

373. CHEHTMAN, *supra* note 363, at 48.

374. Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala. Penal. marzo 11, 2012 (No. 33301, pp. 33–35) (Colom.).

375. See CHEHTMAN, *supra* note 363, at 43–44.

376. Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala. Penal. febrero 23, 2010 (No. 32805, pp. 77–78) (Colom.).

377. See CHEHTMAN, *supra* note 363, at 44.

crimes against humanity.³⁷⁸ Accordingly, prosecutors within the Unit are no longer divided by case, but rather by geographic location, which has already enabled the Unit to more readily identify systematic patterns of criminality.³⁷⁹ Similarly, the National Unit of Analysis of the Attorney General's Office adopted a four-phase method to help link specific cases to more general patterns of criminality.³⁸⁰ As a result of this initiative, the National Unit was able to reassign 133 cases involving crimes that formed part of a larger criminal enterprise,³⁸¹ thereby consolidating various open investigations.

Collectively these developments demonstrate that the OTP's positive complementarity strategy has contributed to strides at the legislative, judicial, and administrative levels, the same three areas that Mexico is currently attempting to reform. The example of Colombia highlights just how influential the mere threat of an ICC investigation can be in accelerating the domestic reform process. At a minimum, positive complementarity provides an additional avenue through which to apply pressure to domestic authorities to enhance their national criminal justice systems. The above gains provide an additional reason to pursue an investigation at the ICC.

B. Positive Complementarity in Mexico: Three Innovative Measures that the OTP Could Adopt During a Preliminary Examination

The example of Colombia illustrates the impact that even just the threat of an investigation may have on the domestic reform process. However, in the case of Mexico, and in general, the OTP need not limit its positive complementarity efforts to the mere threat of an investigation. Indeed, the OTP has recently acknowledged the importance of strengthening international networks during the preliminary examination phase.³⁸² If such coordinated investigative and prosecutorial efforts are to be realized, the OTP must be at the forefront of them. The international community will look to the OTP to take action.

Bearing the importance of such leadership in mind, this Section proposes three proactive measures that the OTP could take as part of a positive complementarity strategy during a preliminary examination

378. *Id.* at 39–40.

379. *See id.*

380. Truth, Justice, and Reparation Report, *supra* note 367, ¶ 381, 165 n.643.

381. *Id.* ¶ 381.

382. *See 2015 Strategic Plan*, *supra* note 356, ¶¶ 72–73 (“The Office will continue to facilitate cooperation in relation to its preliminary examinations, investigations and trials in two ways: (1) by ensuring that there is strategic and operational advice and cooperation support available to integrated teams . . . and (2) by consolidating and further expanding the Office’s network of general and operational focal points and judicial actors, and streamlining and standardizing processes and interactions with partners.”).

in Mexico and explains how the measures could impact the domestic criminal justice reform process. The three measures are as follows: (1) expand networks of cooperation beyond the ICC and domestic authorities, (2) endorse and substantiate the investigative efforts of human rights organizations and judicial bodies, and (3) inspire other international bodies and organizations to apply further pressure on domestic authorities to enact appropriate reforms. The more pressure the OTP exerts on Mexican authorities to reform the criminal justice system, the greater the likelihood that Mexico will adopt timely reforms.

Before discussing these three measures, it is important to explain how they would be consistent with the Rome Statute. Following that discussion, this Section will then discuss how the three measures would exert greater pressure on Mexican authorities to enact reform.

1. How the Measures Adhere to the Rome Statute

The proposed measures all share a common theme: the ICC engaging with entities aside from the domestic entities directly involved in the preliminary examination. Although the OTP has not yet adopted such measures in practice, the broader goals of the ICC and several provisions in the Rome Statute would not preclude the OTP from taking such initiatives. For one, the Preamble of the Rome Statute makes clear that the effective prosecution of international crimes “must be ensured by taking measures at the national level and by enhancing international cooperation.”³⁸³ Thus, the Preamble envisages the fight against impunity as being a shared burden—one that is not limited to the ICC or domestic courts alone.

Moreover, a number of provisions in the Rome Statute bestow upon the Prosecutor broad discretion in how to go about ensuring the effectiveness and genuineness of domestic investigations and prosecutions in states under preliminary examination. For example, Article 54(3)(d) allows the Prosecutor to “enter into such arrangements or agreements . . . as may be necessary to facilitate the cooperation of a State.”³⁸⁴ Similarly, Article 93(10) recognizes that the court may assist a State Party conducting an investigation or trial through cooperation, if so requested by the State Party.³⁸⁵ It provides a non-exhaustive list of the forms of cooperation.³⁸⁶ It may be inferred from such broad language that the OTP is free to pursue different approaches to help states under preliminary examination overcome shortcomings in their domestic criminal proceedings, including engagement with other international bodies and entities.

383. Rome Statute, *supra* note 38, pmb1.

384. *Id.* art. 54, ¶ 3(d).

385. *Id.* art. 93, ¶ 10.

386. *Id.*

Indeed, the Rome Statute seems to encourage the OTP to embrace measures not expressly mentioned in the statute, so long as they serve the goals of the ICC. For example, Article 93(10)(l) allows for “any other type of assistance . . . with a view to facilitating the investigation and prosecution of crimes within the jurisdiction of the Court.”³⁸⁷ Similarly, Articles 53(1)(b) and 53(2)(b) give the Prosecutor discretion to continue evaluating admissibility under Article 17(1) up through the investigation phase of proceedings.³⁸⁸ These two sub-articles presuppose that certain states will initially be unable or unwilling to prosecute during the preliminary examination phase. Thus, they not only validate the Prosecutor’s ongoing evaluation of domestic proceedings, but they also imply that, during that evaluative process, the Prosecutor may adopt measures that would contribute to a new willingness or capacity to prosecute.³⁸⁹

2. How the Measures Could Exert Additional Pressure

The first measure that the OTP could take during the preliminary examination is to expand networks of cooperation beyond merely the ICC and domestic authorities. One of the major problems in Mexico is the lack of consensus regarding the actual number of disappearances in the country and which disappearances would qualify as enforced disappearances. As the OTP gathers public information regarding potential instances of enforced disappearance in the country, it could also facilitate a dialogue between national human rights NGOs, such as the CMDPH, and international organizations, such as AI and HRW, that have been documenting cases of enforced disappearance. It could also invite domestic agencies charged with making such estimates to share their numbers and engage in more collective efforts to track the enforced disappearance phenomenon.

Through such dialogues, the OTP could help produce more accurate estimates as to the number of enforced disappearances in the country, both for the public and for the purposes of the preliminary examination. The OTP has already suggested various tools for information sharing with third parties to help address impunity in general³⁹⁰ and it need only apply such ideas in practice during preliminary examinations. The mere existence of such collaboration alone would put Mexican legislators in a difficult position: they would need to either adopt appropriate reform to improve Mexico’s ability to

387. *Id.* ¶ 10(l).

388. *Id.* arts. 17, ¶ 1, 53 ¶ 1(b), 53, ¶ 2(b).

389. See Burke-White, *supra* note 347, at 81.

390. See 2015 *Strategic Plan*, *supra* note 356, ¶¶ 95–96 (proposing the following measures: building a global database in which practitioners can share their experiences, developing a common crime database, creating a platform for the exchange of confidential information related to the investigation of international crimes, and encouraging third parties to help develop domestic prosecutorial capacity).

contribute to such efforts or oppose that reform and risk being perceived as having motives to shield the perpetrators. Likewise, such efforts would be consistent with the broader goals of ensuring effective domestic proceedings, as they would contribute both directly and indirectly to a comprehensive mapping of the totality of the enforced disappearances in the country, revealing the true extent of systematic patterns across the country.

The second measure that the OTP could adopt is to expressly endorse or corroborate findings reached in the reports of human rights bodies or organizations, thereby adding weight and legitimacy to them. Recall the UNCED's recent report regarding enforced disappearances in Mexico and the Mexican government's rejection of several of the report's recommendations, including numerous proposed responses to the persistence of domestic investigative shortcomings.³⁹¹ As the OTP is examining the effectiveness of domestic investigative efforts for the purposes of the admissibility analysis, it could expressly state that it supports the findings and recommendations contained in the UNCED report. Moreover, it could substantiate those findings by drawing on other human rights reports, like the 2013 HRW report. By legitimizing the findings reached in both reports, the OTP would likely increase the pressure on Mexican authorities to respond accordingly, again making it more difficult for Mexican lawmakers to resist reform. If the OTP were to open an investigation in Mexico, the OTP could then actually supplement the findings produced in such reports with its own findings, adding further weight to existing reports. These sorts of efforts to bolster the work of other international entities would not only increase pressure on Mexican authorities, but they would also be in line with the goals of the statute, as they would be contributing to the development of a new willingness and capacity to prosecute international crimes domestically.

The third and final measure that the OTP could adopt is to inspire other international organizations and bodies to exert pressure on the Mexican government. More precisely, by becoming more proactively involved in a particular aspect of Mexico's reform process, the OTP may encourage other international entities to also become more proactive in the reform process or to reinforce the ICC's efforts. Recall the change of attitudes by Colombian courts towards the interpretation and application of international criminal law. The OTP was not acting alone in attempting to trigger those developments. During the same period, the IACtHR had also advocated for national supreme courts to develop doctrines that would allow courts to apply international norms

391. *Government Ministries Questioned the United Nations Report that Is Damning Over Government Practices*, TELESUR (Feb. 14, 2015), <http://www.telesurtv.net/english/news/Mexico-Govt-Rejects-UN-Report-on-Enforced-Disappearances-20150214-0016.html> [<https://perma.cc/TUJ3-LSPH>] (archived Oct. 5, 2016).

and standards.³⁹² It is difficult to know whether the OTP or the IACtHR was the first to exert such pressure, but the point is that the OTP's more pronounced involvement on an issue could generate "spillover effects," inspiring other international or regional entities to engage in such issues, to reinforce the efforts of the ICC, or to expose other issues. By increasing or intensifying the "pressure points" in this way, the OTP would also be contributing to a new domestic willingness and capacity to effectively prosecute.

It is necessary to address one important counter argument to the OTP taking a more proactive approach towards domestic reform in Mexico, namely concerns about state sovereignty. Like many Latin American countries, Mexico values non-interference in its domestic affairs.³⁹³ As mentioned in the previous Section, Mexican authorities have opposed the intervention of the ICC in the past.³⁹⁴ Thus, it is very likely that the Mexican government would perceive the presence of the ICC and its efforts to mobilize international cooperation as interference into a matter of domestic concern.

This subsection does not mean to endorse the unrestrained expansion of the notion of positive complementarity; rather, it has proposed various measures that remain rooted in one of the express purposes of the ICC, namely to ensure the effective investigation and prosecution of international crimes through international cooperation.³⁹⁵ As previously shown, various provisions in the Rome Statute encourage the Prosecutor to take great liberties in aiding states under preliminary examination to overcome shortcomings in their domestic criminal proceedings. Positive complementarity is meant to be a tool for enhancing a state's criminal justice efforts, when such enhancement is merited.

As demonstrated in Parts II and III, Mexico suffers from several appalling shortcomings in its investigation and prosecution of enforced disappearances. Those shortcomings have resulted in a pervasive pattern of state officials intentionally impeding the completion of such proceedings—a pattern that domestic reform efforts have been unable to correct or address. Such a perverse and blanket denial of justice embodies the kind of impunity that justifies international involvement and cooperation. The Rome Statute recognizes that there are limits to

392. See, e.g., *Almonacid-Arellano et al. v. Chile*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 154, ¶ 129 (Sept. 26, 2006) (calling for the applicability of crimes against humanity notwithstanding domestic legislation which allowed for amnesty from prosecution for such crimes); *Marino Lopez et al. (Operation Genesis)*, Case No. 12.573, Inter-Am. Comm'n H.R., Report No. 64/11, OEA/Ser.L/V/II.127, doc. 4 rev. 1 ¶ 240 (2011) (applying the principle of distinction from international humanitarian law).

393. See Martha L. Cottman & Otwin Marenin, *International Cooperation in the War on Drugs: Mexico and the United States*, 9 POLICING & SOC'Y 209, 218 (1999).

394. Comunicado 372, *supra* note 339, ¶¶ 3, 5–6.

395. See Rome Statute, *supra* note 38, pmb1.

the principle of state sovereignty, but the case of Mexico illustrates a scenario in which the international community should be more engaged in a state's efforts to address impunity.

VI. CONCLUSION

In the coming years, Mexico will have to confront a number of enforced disappearance monsters, both literal and metaphorical. This Article touched on several of these monsters in Parts II and III: the perpetrators and accomplices of these egregious acts, the indeterminate scope of this "generalized" behavior, the relatively slow progress in enacting crucial reforms to the Mexican criminal justice system, the investigative shortcomings of state authorities, the pervasive resolve to shield perpetrators, and the increasing deterioration of public faith in domestic criminal justice institutions. Mexico is a long way from being able to effectively confront these various monsters on its own, but international institutions can play a vital role in accelerating Mexico's domestic reform process.

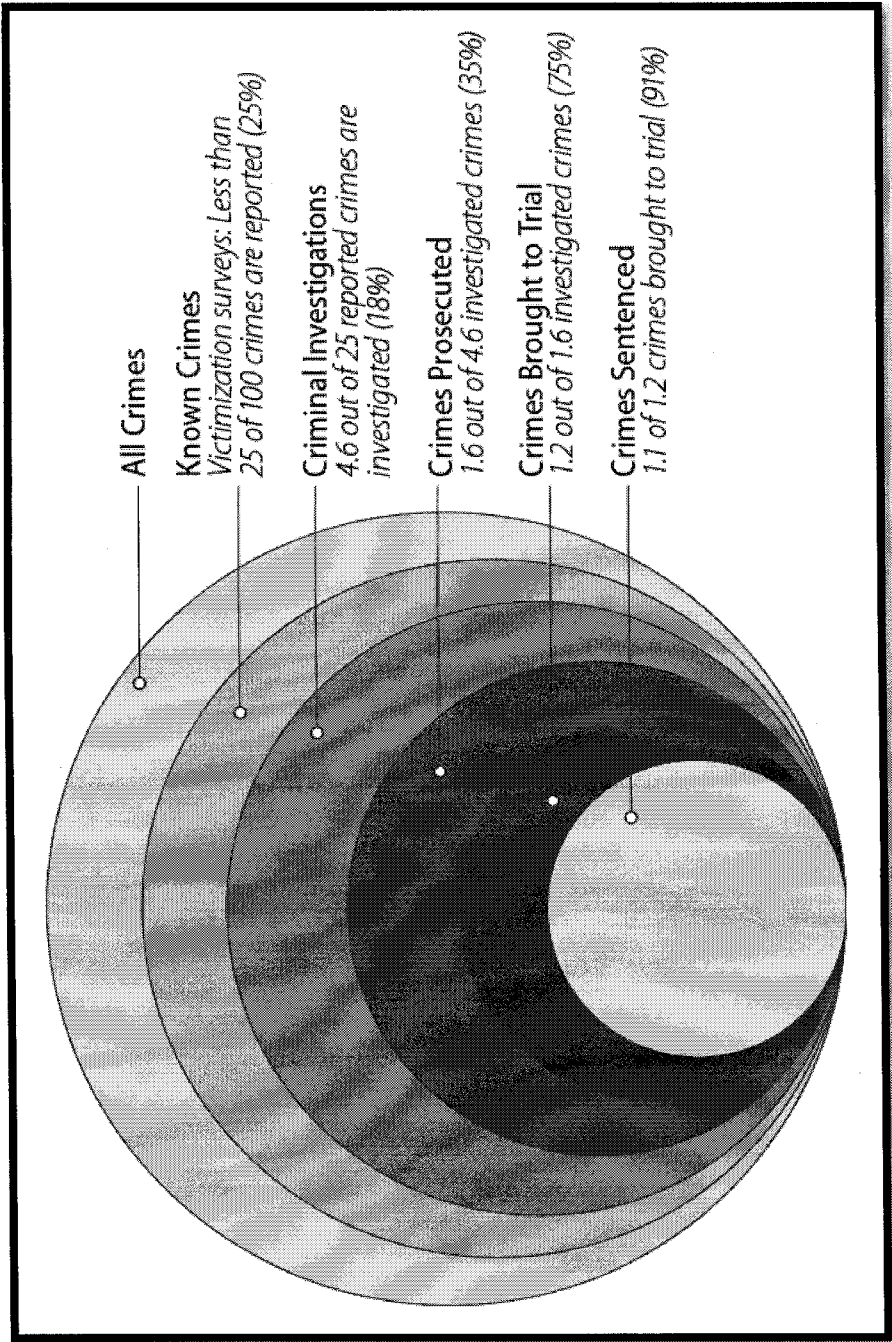
This Article has proposed one avenue through which the international community could help Mexico realize such reform, namely the pursuit of an ICC investigation. Part IV explained the feasibility of the OTP opening an investigation in Mexico, if a preliminary examination were initiated. It is important to note that the likelihood of opening such an investigation would increase substantially if the OTP considered other international crimes apart from just enforced disappearances. Thus, contrary to what some may argue, the threat of opening an investigation is very real. Part V identified an additional, and important, justification for pursuing an investigation at the ICC: the likely impact that the OTP's positive complementarity strategy would have on Mexico's criminal justice reform process. Opening an ICC investigation would in itself greatly reinforce the threat of having a case brought before the ICC, however the OTP should not stop there. The three measures proposed in this Article, if adopted, would only exert additional pressure on Mexican authorities and further accelerate the reform process in Mexico.

This Article is meant to initiate a broader dialogue about how the ICC should continue to evolve in order to respond to several new challenges in international criminal justice, particularly the rise of non-state actors. The phenomenon of enforced disappearances and the monsters associated with it will likely continue to be a challenge in the coming decades. It is only a matter of time before the ICC will be forced to confront the problem more directly. This Article has suggested that the ICC should play a leading role in broader international efforts to influence the domestic criminal justice reform process where merited. The OTP's positive complementarity strategy could and should be used in tandem with the efforts of other international and regional bodies seeking to contribute to a country's progress in effectively prosecuting

international crimes. It will certainly take time to reconceptualize the role of the ICC into a more proactive variant—indeed, there are limits to the notion of positive complementarity and practical impediments to achieving such a transformation. But, as the preliminary examination in Colombia demonstrates, even the slightest contributions to domestic reform may ultimately trigger waves of progress.

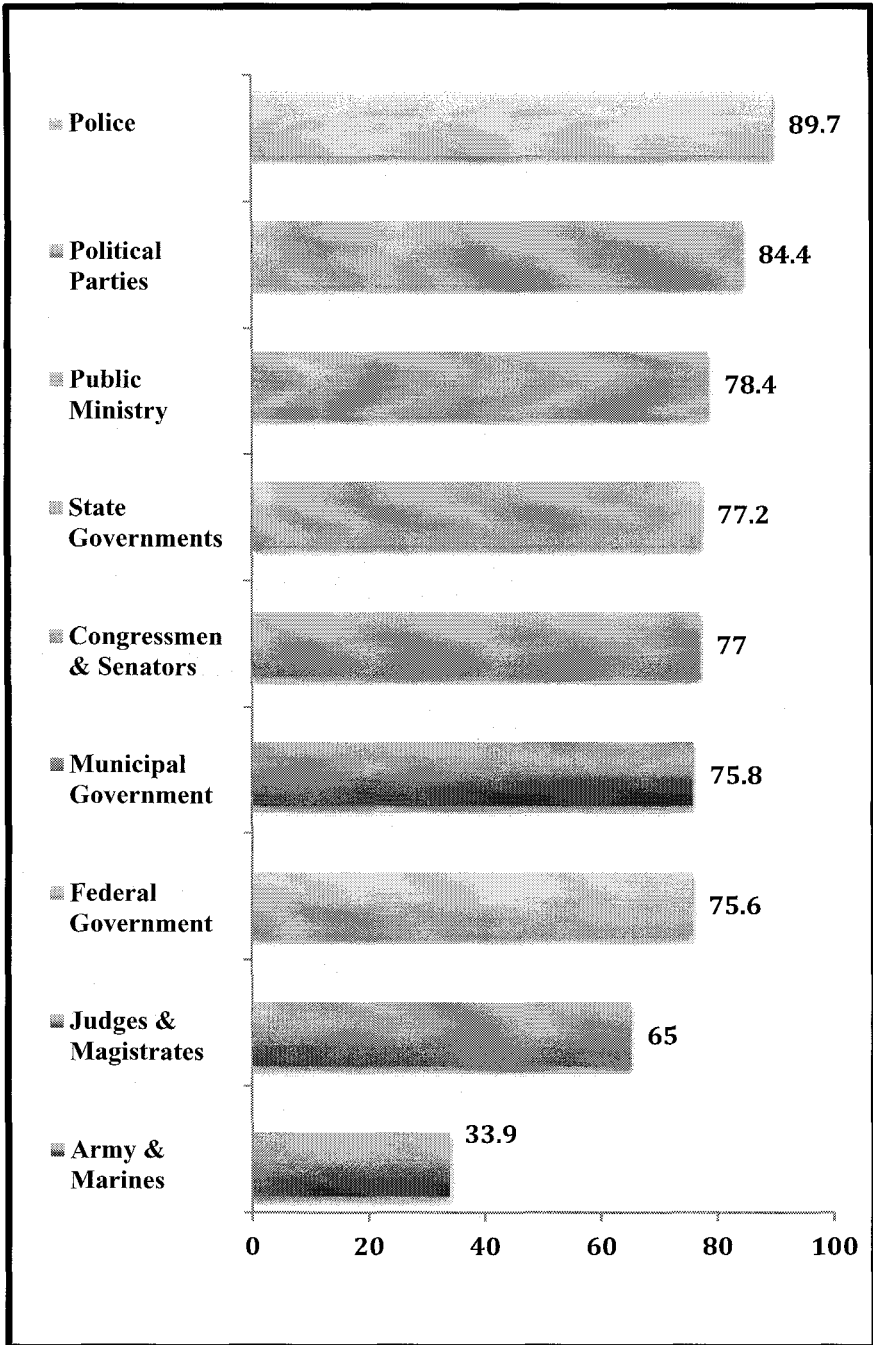
Mas vale algo que nada (Something is worth more than nothing).

Figure 1. The Life Cycle of Crimes in Mexico



Source: CLAIRE RIBANDO SEELKE, CONG. RESEARCH SERV., R43001, SUPPORTING CRIMINAL JUSTICE REFORM IN MEXICO: THE U.S. ROLE 3 (2013).
Note: This graphic is presented to give an idea of how few crimes reach the sentencing stage in Mexico. It depicts data from before the 2008 reform, though roughly the same proportion of cases reach sentencing now.

Figure 2. Perceptions of the Frequency of Corruption in Different Sectors (Very Frequently or Frequently)



Source: INEGI, Boletín de Prensa Núm. 264/14, Resultados de la Segunda Encuesta Nacional de Calidad e Impacto Gubernamental (ENCIG) 2013 44 (June 16, 2014).