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

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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

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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

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that arise from the Mexican drug "war." In January 2015, former Attorney General Murillo Karam 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. 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. Karam proclaimed that this story was "the historical truth" and that he was prepared to close the case.

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," because they suspected greater collusion between the Guerreros Unidos and federal officials. 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. 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).


11. Devereaux, supra note 2, at 2.


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

¹⁵. Devereaux, supra note 2, at 2; Científicos Consideran “Fantasiosa” la Versión de PGR Sobre el Caso Iguala, ECONOMIAHOY (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.


Center for Human Rights,\textsuperscript{19} made the following statement on behalf of the delegation:

\begin{quote}
[it]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 institutions . . . .
\end{quote}

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.\textsuperscript{21} Though, there have been reports in the media that assert that at least one of the students was also an active military officer.\textsuperscript{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 impunity\textsuperscript{23} in Mexico. For example, in June 2015, Jaime Rodriguez became the first gubernatorial candidate in Mexican history to win as an independent.\textsuperscript{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
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). 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. 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.

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


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).


throughout the Mexican drug war. In 2014, Mexico extradited sixty-six individuals to the United States, representing a 22 percent increase from the figures from the previous year. 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 countries—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. 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).


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, 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. 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


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. However, as will be further explained in Section IV(B)(ii), the legal elements of the definition differ slightly among instruments.

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.


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.\(^4^2\) Many Mexican drug lords began their careers by smuggling alcohol across the U.S. border during the Prohibition era.\(^4^3\) 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.\(^4^4\) 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.\(^4^5\)

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."\(^4^6\) 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.\(^4^7\) 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, Vincente Fox became the first-ever Mexican President from the PAN, ending the PRI's rule and with it the arrangements described above.\(^4^8\) It was in this changed landscape that


\(^4^4\) Grillo, supra note 42, at 63–64; O'Neil, supra note 42, at 66–67; Nill Sánchez, supra note 7, at 470.

\(^4^5\) Grillo, supra note 42, at 63–64; Nill Sánchez, supra note 7, at 470.


\(^4^8\) Nill Sánchez, supra note 7, at 470.
the drug "war" 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. 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. 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.

The 2006 election of President Felipe Calderón of the PAN only exacerbated the drug-related violence. 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. This attempt to eliminate the drug cartels with force only compelled drug cartels to retaliate with even greater force. 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, many hoped and even expected that Mexico would return to the "era of cozy deals with drug cartels." 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, AMERICA: 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.
fighting the cartels. 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. 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.

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. Although still moderately high, annual homicide levels have declined since 2012. 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. However, in 2015, this trend reversed, with the homicide levels increasing by more than 7 percent.

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. In 2014, Mexican soldiers killed twenty-two civilians allegedly belonging to an armed gang in Tlatlaya. Recent eyewitness evidence indicates that, after a brief exchange of fire, several of those killed were extra-judicially executed, even after surrendering. In May 2015, in a coordinated

59. Id.
60. Id.
62. Id. at 7.
63. Id. at vi–vii, 10.
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

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69. GRILLO, supra note 42, at 205–09, 281.
70. See VULLIAMY, supra note 50, at 20.
A similar chain of events occurred in the municipality of Joaquín Amaro in the state of Zacatecas. In December 2011, local police illegally detained ten men due to their suspected ties to organized crime. According to the two men who escaped, the detainees were blindfolded, beaten, and interrogated. Security camera footage shows that the police later handed eight of the detainees to armed, masked men at a gas station. The eight men are still missing. Two months before that, twenty men from Michoacán, traveling on vacation, were seized by gunmen and remained missing for weeks. 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. 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. The victims were believed to be rivals of the Arellano Felix drug cartel. 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.

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. The Mexican government estimates that 27,638 persons have disappeared in the
country since 2006 and remain missing. 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, breaking the record set the previous year for the number of disappearances in a given year by 584. Nearly half of the 27,638 people who have disappeared went missing during Peña Nieto’s term in office.

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. In more recent years, other Mexican institutions have provided vastly different estimates. For example, in May 2014, the Minister of Interior, Miguel Angel Osorio Chong, declared that only 8,000 people were still missing in Mexico. That same month, the National Human Rights Commission of Mexico (CNDH) estimated that 24,800 persons had disappeared since 2005. 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.

86. 2016 AI Report, supra note 6, at 250; 2016 HRW Report, supra note 6.
89. See Treated with Indolence, supra note 6, at 10 (reporting 3,425 disappearances in 2015 alone).
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.\(^9\) Other organizations believe there have been at least 30,000 disappearances that would satisfy the legal requirements for the crime of enforced disappearance.\(^9\)

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.\(^9\) In 2013, there were an estimated 4,007 enforced disappearances in Mexico.\(^9\) But only 718 of those cases were reported to the police.\(^9\) 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.”\(^9\) 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.\(^10\) Of the organization’s 250 documented enforced disappearances between 2007 and 2013, more than 140 were committed either directly or


\(^{98}\) Id.

\(^{99}\) UNWGEID Report, supra note 96, ¶ 18.

indirectly by state agents. 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. 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,” 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. Under the old system, public prosecutors brought criminal charges and oversaw criminal investigations. 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.
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.\textsuperscript{106} This somewhat minor judicial role made it difficult to question the quality of criminal investigations.\textsuperscript{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.\textsuperscript{108}

In 2004, President Vincente Fox proposed a series of constitutional and legislative changes to Mexico's criminal justice system, including a shift towards a more adversarial model.\textsuperscript{109} Although these reform efforts failed to pass in the Mexican legislature,\textsuperscript{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.\textsuperscript{111} With added pressure from the U.S. Mérida Initiative, the Mexican Congress adopted federal judicial reforms in March 2008.\textsuperscript{112}

The 2008 reforms included several key elements, all which were to be fully implemented by 2016.\textsuperscript{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.\textsuperscript{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.\textsuperscript{115} Third, the reforms strengthened the formal investigative capacity of

\textsuperscript{106} Id.
\textsuperscript{107} Id.
\textsuperscript{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.
\textsuperscript{109} Shirk, supra note 104, at 202.
\textsuperscript{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 Vincente Fox in March of 2004).
\textsuperscript{111} Clare Ribando Seelke, Cong. Research Serv., R43001, Supporting Criminal Justice System Reform in Mexico: The U.S. Role 4 (2013).
\textsuperscript{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).
\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{118} As of June 2015, only four states had fully implemented the reforms and twenty-four states had partially transitioned to the new system.\textsuperscript{119} Likewise, only slightly over half of the country’s municipalities had implemented the new criminal justice system.\textsuperscript{120} One positive development occurred in February 2014, when the Mexican Chamber of Deputies approved a new National Criminal Procedure Code.\textsuperscript{121} This new code obligates all Mexican states to adopt the same procedures regarding investigations, arrests, indictments, hearings, and sentencing.\textsuperscript{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.\textsuperscript{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
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. Another positive development is that several reforms to the Code of Military Justice came into force in June 2014. These reforms exclude crimes committed by members of the Mexican armed forces against civilians from military justice jurisdiction. 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.

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. 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. There have been six confirmed convictions at the federal level, but all for acts that occurred before 2006. The most recent federal conviction was in 2010. The Mexican government did not report any convictions at the

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124. Luna v. Cossío, Pleno de la Suprema Corte de Justicia [SJCN], 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. SELKIE, *supra* note 111, at 10.


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


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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{138} The court ordered Mexico to make the appropriate modifications.\textsuperscript{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

\textsuperscript{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, \textit{supra} note 96, ¶ 33–34 (articulating officials’ omissions, delays, and lack of due diligence in their investigations); \textit{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, \textit{supra} note 132, at 8–9, 13 (noting the Mexican federal attorney general’s failure to execute prompt, effective, and impartial investigations).

\textsuperscript{135} See AI Submission, \textit{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”).

\textsuperscript{136} \textit{Id.}

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


\textsuperscript{139} See \textit{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.\textsuperscript{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.\textsuperscript{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:\textsuperscript{142} twelve Mexican states have failed to incorporate the criminal offense into their criminal codes,\textsuperscript{143} sixteen states have laws with definitions for the crime that fall short of international standards,\textsuperscript{144} and only nineteen states classify enforced disappearance as an autonomous crime distinct from similar crimes, such as murder or kidnapping.\textsuperscript{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.\textsuperscript{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 disappearances\textsuperscript{147}—an important step towards

\textsuperscript{140}. UNWGEID Report, supra note 96, ¶¶ 13, 87.

\textsuperscript{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 Al 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).

\textsuperscript{142}. UNCED Report, supra note 27, ¶¶ 19–20.

\textsuperscript{143}. Al 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.").

\textsuperscript{144}. See Al 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. DEP'T 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.").

\textsuperscript{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.").

\textsuperscript{146}. Id. ¶¶ 116–17.

\textsuperscript{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.\textsuperscript{148} By June 2014, the unit had conducted searches for approximately 1,200 missing people and had located 380.\textsuperscript{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.\textsuperscript{150} As previously mentioned, in 2014, Mexico abolished military jurisdiction for human rights violations committed by military personnel against civilians,\textsuperscript{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,\textsuperscript{152} and only two of them were final.\textsuperscript{153}

\textsuperscript{148} Al Submission, supra note 132, at 10.
\textsuperscript{149} Id.
\textsuperscript{150} Suprédima Corte de Justicia de la Nación, expediente varios 912/2010, supra note 124, ¶¶ 44–46.
\textsuperscript{151} UNCED Report, supra note 27, ¶ 25; Al Submission, supra note 132, at 9.
\textsuperscript{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 female 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


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. Matlof, supra note 156.


159. Id.

160. Id.

161. VULLIAMY, supra note 50, at 178.

162. Matlof, supra note 156.

10 percent of all crimes in Mexico are reported.\textsuperscript{164} Of the reported crimes, roughly 65 percent led to the beginning of an investigation.\textsuperscript{165} In other words, approximately 7 percent of all crimes, reported and unreported, led to an investigation.\textsuperscript{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.\textsuperscript{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.\textsuperscript{168}

\textbf{Figure 1. The Life Cycle of Crimes in Mexico}\textsuperscript{169}

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

\begin{itemize}
\item 164. See \textsc{Instituto Nacional de Estadística y Geografía, Encuesta Nacional de Victimización y Percepción Sobre Seguridad Pública} (Oct. 2015) [hereinafter \textsc{Encuesta de Victimización y Percepción}] (noting that in 2014 10.7 percent of crimes in Mexico were reported).
\item 165. \textit{Id}.
\item 166. \textit{Id}.
\item 167. \textit{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).
\item 168. \textsc{Seelke, supra} note 111, at 2–3.
\item 169. \textit{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.
\end{itemize}
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

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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.").
174. U.S. Dep't of State, supra note 144, at 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.
detention of persons without judicial authorization in urgent cases involving serious offenses.\textsuperscript{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.

\textbf{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.\textsuperscript{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.”\textsuperscript{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 \textbf{Figure 2}).\textsuperscript{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.\textsuperscript{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,\textsuperscript{185} and 68 percent believed that such corruption was concentrated within their own department.\textsuperscript{186}

\begin{itemize}
\item \textsuperscript{180} Id. ¶ 18.
\item \textsuperscript{181} SEELKE, supra note 111, at 11.
\item \textsuperscript{183} Id. at 44.
\item \textsuperscript{186} Id.
\end{itemize}
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. More than 80 percent of crime victims believe that it is a “waste of time” to report a crime to authorities. Communities in some Mexican states where law enforcement and judicial institutions are particularly weak have begun to form armed “self-defense” groups. 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. Many relatives of victims of enforced disappearance suffer from threats or reprisals for becoming involved in investigations. Thus, it makes sense that so few disappearances are

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187. ENCUESTA NACIONAL DE CALIDAD E IMPACTO GUBERNAMENTAL, supra note 182, at 44.
188. ENCUESTA DE VICTIMIZACIÓN Y PERCEPCIÓN, supra note 164, at 10.
190. IACHR Report, supra note 122, ¶¶ 47–52; SREIJE, supra note 111, at 4.
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, 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. 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. Consequently, there are three ways to

193. See Rome Statute, supra note 38, art. 7(1) (defining “crime against humanity”).
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 *propio 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 *propio motu* on the basis of information concerning crimes within the jurisdiction of the court sent in by individuals or groups, states, or nongovernmental organizations.200 The OTP has already received numerous pleas to initiate a preliminary examination following the

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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).


events in Iguala, 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. 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.

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 complaint was filed in 2011 requesting an investigation into crimes committed by President Calderón and the drug lord Joaquin "El Chapo" Guzman. Others may argue that the relevant elements of the crime of enforced disappearance would not be satisfied. Carola Zandbergen is one of the


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


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.\textsuperscript{206} This Part will respond to these claims.

\textbf{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{210} For personal jurisdiction, the acts in question must have been committed by a national of a State Party.\textsuperscript{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).\textsuperscript{212} Thus, the first two bases for jurisdiction would be satisfied.

\textbf{B. Material Jurisdiction}

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

\begin{footnotesize}
\begin{enumerate}
\item Zandbergen, supra note 37, at 30–33, 35–40.
\item Rome Statute, supra note 38, arts. 11–13; OTP Report, supra note 200, ¶ 4.
\item See Mexico Ratifies the Rome Statute, supra note 195 (establishing the date on which Mexico ratified the Rome Statute).
\item 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).
\item Rome Statute, supra note 38, art. 12(2); OTP Report, supra note 200, ¶ 4.
\item Id.
\item 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).
\item Rome Statute, supra note 38, arts. 11–13; OTP Report, supra note 200, ¶ 4.
\end{enumerate}
\end{footnotesize}
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.\footnote{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.”\footnote{215} This test is the lowest evidentiary standard provided by the statute,\footnote{216} and the information available to the Prosecutor need not be “comprehensive” or “conclusive,” as required in the investigation phase.\footnote{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.\footnote{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).\footnote{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.\footnote{220} According to the ICC Elements of the Crimes, a

\begin{footnotesize}
\footnote{214. Rome Statute, \textit{supra} note 38, arts. 5, 7(1), 13.}
\footnote{215. \textit{Id.} art. 53(1)(a).}
\footnote{216. Situation in the Republic of Côte D’Ivoire, \textit{supra} note 199, ¶ 24.}
\footnote{217. \textit{Id.}}
\footnote{218. Rome Statute, \textit{supra} note 38, at arts. 7(1), 7(2)(a).}
\footnote{219. \textit{Id.} at art. 7(2)(a).}
\footnote{220. Prosecutor v. Tadić, Case No. IT-94-1-T, Opinion and Judgment, ¶ 649 (ICTY May 7, 1997).}
\end{footnotesize}
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

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.
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. 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. The analysis is not exclusively quantitative or geographical, but rather based on the facts of the case. The attack may be the “cumulative effect of a series of inhumane acts or singular effect of an inhumane act of extraordinary magnitude.” 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. The OTP similarly opined, for the purposes of the preliminary examination, that the murder or disappearance of 156 victims would be considered widespread.

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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”).
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).
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. 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." The term policy is interpreted broadly as encompassing a planned, directed, or organized crime that evidences a regular pattern. The crucial factor is that the actual aim of the policy be to attack a civilian population. 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. 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. 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. 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 disappearances.


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).
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.\textsuperscript{265} Indeed, any entity that has the capacity to bring down a military helicopter,\textsuperscript{266} dump forty-nine decapitated bodies on a public highway,\textsuperscript{267} or dissolve three hundred bodies in acid,\textsuperscript{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.\textsuperscript{269}

As previously mentioned, drug cartels are fundamentally driven by profit and the desire to control trafficking routes.\textsuperscript{270} Their billion-dollar enterprises take years to build.\textsuperscript{271} For these reasons, many drug cartels have acquired or assembled paramilitary units for the purpose of intimidating and eliminating perceived enemies, including civilians.\textsuperscript{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."\textsuperscript{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.\textsuperscript{274} Although Judge Kaul regards the existence


\textsuperscript{266} Tuckman, supra note 68.

\textsuperscript{267} 49 Mutilated Bodies, supra note 65.

\textsuperscript{268} Stew Maker Article, supra note 82.

\textsuperscript{269} UNCED Report, supra note 27, ¶ 10.

\textsuperscript{270} Nill Sánchez, supra note 7, at 503.

\textsuperscript{271} See Malcolm Beith, The Last Narco: Hunting El Chapo, the World's Most Wanted Drug Lord 56–196 (2010); Keefe, supra note 265.


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

of such state-like criminal organizations as unlikely,\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{278}

\textsuperscript{275} Situation in the Republic of Kenya, \textit{supra} note 209, ¶ 52, at 28 (Kaul, J., dissenting).
\textsuperscript{276} Rome Statute, \textit{supra} note 38, art. 7(2)(i).
\textsuperscript{277} See, e.g., OTP \textit{Report}, \textit{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).
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. 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. HRW identified a similar pattern of state authorities first detaining and then transferring victims to members of drug cartels. For example, the facts of the 2010 San Fernando Massacre evidence a similar pattern. Even if the "historical truth" is false, 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. Thus, the IACtHR considers whether the victim was arbitrarily detained and whether such detention complied with procedures enshrined in local law.


279. Rome Statute, supra note 38, art. 7(2)(i).
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.\textsuperscript{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.\textsuperscript{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."\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.

\begin{footnotes}
\item[286] Heliodoro Portugal v. Panama, supra note 278, ¶ 113.
\item[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).
\item[288] Rome Statute, supra note 38, art. 7(2)(i).
\item[289] See The Missing Forty-Three, supra note 5, at 2; Turati, supra note 73, at 16–18.
\item[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).
\item[291] See The Missing Forty-Three, supra note 5 at 2.
\end{footnotes}
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

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

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


of disappeared persons. 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. At the time of writing, only one of the forty-three students' remains has been positively identified. It took six weeks before Mexican authorities could publicly comment conclusively on the fate and whereabouts of the students. The mayor of Iguala fled shortly after the disappearances. 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. 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, 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.
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. The IACtHR’s focus on state human rights obligations
once again drives the court’s analysis, making it more concerned
with state omissions with respect to investigative and prosecutorial
diligence. The fact that the whereabouts of the victims are still
unknown is a factor that weighs heavily in favor of satisfying the
element. 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. 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. 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. Even if they did not, in fact, burn the bodies at the Cocula
dump, 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.

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.
According to the Decisions of the Inter-American Court of Human Rights, 10 INT’L CRIM.
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).
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. The admissibility analysis is comprised of an assessment of (1) gravity and (2) complementarity. 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. The rationale behind this requirement is one of judicial economy: the court’s resources should not be expended on “minor” crimes. 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. 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. Recall that the UNCED has concluded that there is a “generalized” context of enforced disappearances in Mexico. 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. 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).
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].”\textsuperscript{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.\textsuperscript{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?”\textsuperscript{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.\textsuperscript{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.\textsuperscript{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

\begin{thebibliography}{99}
\bibitem{322} Ayotzinapa in Leiden, supra note 18, at 2:32:00–2:34:00.
\bibitem{323} OTP Policy Paper, supra note 319, ¶ 63.
\bibitem{324} Ayotzinapa in Leiden, supra note 18, at 2:28:30–2:30:10.
\bibitem{325} OTP Policy Paper, supra note 319, ¶ 64.
\bibitem{326} Id. ¶ 65.
\end{thebibliography}
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 violence 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. The first question in assessing complementarity is an empirical one: are there or have there been any relevant national investigations or prosecutions? Domestic inactivity is sufficient to make a case admissible, and, in such a scenario, the other questions of unwillingness or inability would not arise. 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, 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 2006 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. More precisely, ongoing proceedings remain admissible if the state is or was “unwilling or unable genuinely to carry out the investigation or prosecution.” 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. Unwillingness may be

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.
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. 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.
338. *Id.* ¶ 51.
families often face threats of reprisal for trying to advance the case.\textsuperscript{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.

\textbf{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).\textsuperscript{342} The interest of justice assessment is a countervailing consideration that may give reason not to proceed with an investigation.\textsuperscript{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.\textsuperscript{344} Thus, unless there is express resistance from the victims or relevant intergovernmental organizations or NGOs, the investigation will proceed.\textsuperscript{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.\textsuperscript{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.

\textbf{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

\textsuperscript{341} See \textit{Mexico's Disappeared}, supra note 100, at 34–67.
\textsuperscript{342} Rome Statute, \textit{supra} note 38, art. 53(1)(c); OTP Policy Paper, \textit{supra} note 319, ¶ 67.
\textsuperscript{343} OTP Policy Paper, \textit{supra} note 319, ¶ 67.
\textsuperscript{344} Id. ¶ 71.
\textsuperscript{345} Id. ¶¶ 67–68.
\textsuperscript{346} See, e.g., CMDPH Letter, \textit{supra} note 201; Ayotzinapa in Leiden, \textit{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.\textsuperscript{347} Under the traditional complementarity principle, domestic investigations and prosecutions should have priority over those of the ICC.\textsuperscript{348} Fulfillment of this principle helps avoid simultaneous proceedings in various courts concerning the same criminal acts.\textsuperscript{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.\textsuperscript{350} Likewise, the statute also has provisions that allow for the ICC or the Prosecutor to supervise the fulfillment of those obligations.\textsuperscript{351}

The notion of positive complementarity emerged as a means to further ensure that domestic courts can meet their obligations.\textsuperscript{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\textsuperscript{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.\textsuperscript{354} Historically, the OTP has envisioned the preliminary examination as the “first opportunity” for the OTP to implement positive complementarity;\textsuperscript{355} however, its most recent formulation seems to embrace a broader view, expanding the concept to include ICC support.
of global efforts to combat impunity for ICC crimes, irrespective of ICC proceedings.\footnote{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 into 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.\footnote{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.

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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 Affairs 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 occasions and has released a number of formal reports detailing Colombia's progress and the OTP's contributions to that progress. 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.

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. 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


360. See id. ¶¶ 141, 148–49.

implementation of the Justice and Peace Law (JPL). 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. Following its passage, the law received much scrutiny due to excessive delays in JPL proceedings. The year 2012 was marked by several legislative changes meant to improve the JPL framework. For example, the Colombian legislature passed Law 1592, which introduced several procedural changes aimed at making the JPL process more efficient, such as anticipated judgments for those paramilitaries with more lead responsibility. Another legislative development bearing the mark of the OTP’s involvement is the Legal Framework for Peace (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. Although the law as it stands may indeed create


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).


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.).

concerns about the investigation of low- to mid-level offenders, 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.

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 code—which does not include a definition of crimes against humanity. 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. 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. Similarly, in 2010, the Supreme Court embraced modes of liability from international criminal law, and some domestic courts have followed suit, embracing the concept of “co-perpetration-by-means.”

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
crimes against humanity. 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. 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. 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, 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. 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.
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.

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 general 390 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(1).
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. 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.
and standards. 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. As mentioned in the previous Section, Mexican authorities have opposed the intervention of the ICC in the past. 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. 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

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395. See Rome Statute, supra note 38, pmbl.
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


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).