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DRUGS, THUGS, AND MARIACHIS: IN SEARCH OF AN INSTITUTIONAL RESPONSE TO MÉXICO'S CRIMINAL CARTELS

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I. INTRODUCTION

México represents a dichotomy of images: first, as a land of sun, surf, and a place of destiny for vacationers, and second, as providing a haven for violent drug cartels operating with virtual impunity from the power of the state that appears unable to provide a fundamental duty—public safety. In the current environment of cartel violence, festive similes of mariachis called *narcocorridos* are muffling traditional Mexican poems by singing ballads praising drug cartel leaders. Defying the government prohibition

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against radio stations playing this type of music, *narcocorridos* are often commissioned by drug cartels as a popular source of entertainment in cities proximate to the United States-México border region.¹

Numerous examples exist in the United States of musicians extolling the use of cocaine, heroin or marijuana, as in the case of Willie Nelson's lyrics in "Roll Me Up and Smoke Me When I Die," which define his music and career.² Public discord regarding the social influence of *narcocorridos* is comparable to objections over rock music and "gangsta rap" that extols violence and drug use.³ Absent among many American artists is the financial influence of organized crime, compared to Mexican and American performers singing drug ballads at dirt-floored rodeo arenas and auditoriums on both sides of the border.⁴

1. Angela Santos, *Mexican 'Corrido' Music Becomes Anthem for Drug Traffickers, Film Shows*, FOX NEWS (LATINO, Jan. 10, 2017), <https://www.foxnews.com/entertainment/mexican-corrido-music-becomes-anthem-for-drug-traffickers-film-shows>; see also, Parker Asmann, *Mexico's Narcocorridos: A Case of Misunderstanding?*, INSIGHT CRIME (Apr. 24, 2019), (explaining the cultural and relationship to the war on drugs as part of the "Golden Triangle" region in western Mexico), <https://www.insightcrime.org/news/analysis/mexicos-narcocorridos-case-of-misunderstanding/>; Patrick Corcoran, *Mexican State Bans Narco-Music*, INSIGHT CRIME (May 20, 2011), (the lifestyle of narcocorridos extends to TV soap operas (narconovelas) that glorify drug traffickers), <https://www.insightcrime.org/news/analysis/mexican-state-bans-narco-music/>.

2. Willie Nelson, honored by Texas Commission on the Arts appointees in 2009 for contributing "to the vibrant cultural life of the Lone Star State" has previously been recognized through Tex. Legis. S. No. 687 July 4, 1975: *Willie Nelson Day in Texas* and by the Library of Congress, celebrating Willie Nelson's 60-year career and his selection as the 2015 recipient of the Library of Congress Gershwin Prize for Popular Song, Press Release, Willie Nelson Honored in Star-Studded Gershwin Prize Tribute Concert (Nov. 18, 2015), <https://www.loc.gov/today/pr/2015/15-202.html>. Nelson is expanding his brand to include marijuana products, under the name Willie's Reserve, marketed in Colorado and Washington legal-weed stores.

3. See e.g., Asmann, *supra* note 1 (discussing narcocorridos and the social influence in the context of the war on drugs), <https://insightcrime.org/news/analysis/mexicos-narcocorridos-case-of-misunderstanding/>; Gangsta Rap: Summary, HIP HOP MUSIC HISTORY, <https://www.hiphopmusichistory.com/gangsta-rap/> (last visited on May 3, 2022).

4. Olga R. Rodriguez, *US-born banda singers find success in Mexico*, US, ASSOCIATED PRESS (, July 2, 2014), <https://apnews.com/article/6fc1d03b2340481982605784808b2d68>. Rodriguez notes that U.S.-born singer Gerardo Ortiz profited from a ballad about a leader of the Sinaloa drug cartel, topping the music charts in Mexico while his music video singing "Quien Se Anima" (Who Will Dare), depicts a lifestyle of money, pleasures, banda music and women, has been viewed on YouTube more than 61 million times. *Id.*

Although warranting outrage, this form of popular culture distracts from public policy discussions regarding the United States-México efforts to combat crime cartels that have formed sprawling, illicit corporations.⁵ Since the 1970s, when President Richard Nixon instituted the war on drugs,⁶ ongoing collaboration has been tenuous between the United States and México. Beginning in 2008, the Bush Administration implemented a three-year, \$1.4 billion aid package to assist México with combating drug trafficking known as the Mérida Initiative.⁷ In the first year, the

5. COUNCIL ON FOREIGN RELATIONS, *Mexico's Long War: Drugs, Crime, and the Cartels* (Feb. 26, 2021), <https://www.cfr.org/backgrounder/mexicos-long-war-drugs-crime-and-cartels>.

6. See e.g., Peter Reuter, *Why Has US Drug Policy Changed So Little over 30 Years?*, 42 CRIME & JUST. 75 (2013) (describing the historical development and immobility of United States policy drug policy, emphasizing the status quo despite a decline in drug use).

7. Supplemental Appropriations Act, Pub. L. No. 110-252 § 1406(a) Mexico (2008). The Act provides for funding as follows:

(a) Assistance for Mexico- Of the funds appropriated under the headings 'International Narcotics Control and Law Enforcement', 'Foreign Military Financing Program', and 'Economic Support Fund' in this chapter, not more than \$352,000,000 of the funds appropriated in subchapter A and \$48,000,000 of the funds appropriated in subchapter B may be made available for assistance for Mexico, only to combat drug trafficking and related violence and organized crime, and for judicial reform, institution building, anti-corruption, and rule of law activities, of which not less than \$73,500,000 shall be used for judicial reform, institution building, anti-corruption, and rule of law activities: Provided, That none of the funds made available under this section shall be made available for budget support or as cash payments: Provided further, That not more than 45 days after enactment of this Act, and after consulting with relevant Mexican Government authorities, the Secretary of State shall report in writing to the Committees on Appropriations on the procedures in place to implement section 620J of the Foreign Assistance Act of 1961.

(b) Allocation of Funds- Fifteen percent of the funds made available in this chapter for assistance for Mexico under the headings 'International Narcotics Control and Law Enforcement' and 'Foreign Military Financing Program' may not be obligated until the Secretary of State reports in writing to the Committees on Appropriations that the Government of Mexico is—

(1) improving the transparency and accountability of federal police forces and working with state and municipal authorities to improve the transparency and accountability of state and municipal police forces through mechanisms including establishing police complaints commissions with authority and independence to receive complaints and carry out effective investigations;

(2) establishing a mechanism for regular consultations among relevant Mexican Government authorities, Mexican human rights organizations and other relevant Mexican civil society organizations, to make recommendations concerning implementation of the Merida Initiative in accordance with Mexican and international law;

(3) ensuring that civilian prosecutors and judicial authorities are investigating and prosecuting, in accordance with Mexican and international law, members of the federal police and military forces who have been credibly alleged to have committed violations of

administration designated \$116.5 million to assist México with the purchase of military equipment to conduct surveillance operations, combat drug trafficking related violence and organized crime, and assist Mexican law enforcement with counternarcotics programs.⁸ In 2009, Congress approved the Obama Administration's request for a total of \$300 million in Mérida funding,⁹ with additional funding from the U.S. Defense Department contributed for military and law enforcement personnel.¹⁰ The Trump Administration initially authorized an increase for the Mérida Initiative to \$139 million in 2017,¹¹ but reassessed the United States-México alliance, and reduced funding operations to \$87.7 million in

human rights, and the federal police and military forces are fully cooperating with the investigations; and

(4) enforcing the prohibition, in accordance with Mexican and international law, on the use of testimony obtained through torture or other ill-treatment.

(c) Exception- Notwithstanding subsection (b), of the funds appropriated by subchapter A for assistance for Mexico under the heading 'International Narcotics Control and Law Enforcement', \$3,000,000 shall be made available for technical and other assistance to enable the Government of Mexico to implement a unified national registry of federal, state, and municipal police officers.

(d) Report- The report required in subsection (b) shall include a description of actions taken with respect to each requirement and the cases or issues brought to the attention of the Secretary of State for which the response or action taken has been inadequate.

(e) Notification- Funds made available for Mexico by this chapter shall be subject to the regular notification procedures of the Committees on Appropriations and section 634A of the Foreign Assistance Act of 1961 (22 U.S.C. 2394-1).

(f) Spending Plan- Not later than 45 days after the date of the enactment of this Act, the Secretary of State shall submit to the Committees on Appropriations a detailed spending plan for funds appropriated or otherwise made available for Mexico by this chapter, which shall include a strategy, developed after consulting with relevant Mexican Government authorities, for combating drug trafficking and related violence and organized crime, judicial reform, institution building, anti-corruption, and rule of law activities, with concrete goals, actions to be taken, budget proposals, and anticipated results.

8. *Id.* Chapter 4(A). Included in expenditures is funding for judicial reform, institution building, anti-corruption, and rule of law activities, and human rights.

9. Omnibus Appropriations Act, Pub. L. No. 111-8 § 7045(e) (2009).

10. Center for International Policy, Latin America Working Group Education Fund, and Washington Office on Latin America, Just the Facts: A civilian's guide to U.S. defense and security assistance to Latin America and the Caribbean, "Grant U.S. Aid Listed By Country, All Programs, Entire Region, 2008-2013," (last visited May 9, 2022), available at <http://ciponline.org/facts/home.htm?msckid=719cc417cfc411ec9b7e14c17195cdea>.

"Just the Facts" is a civilian effort to oversee and understand the United States' military relationship with the Western Hemisphere.

11. Consolidated Appropriations Act of 2017, Pub. L. No. 115-31, 131 Stat. 135 (May 5, 2017).

support of México's federal security forces.¹² Despite support from the United States to assist México's government with security initiatives, México's National Institute of Statistics, Geography, and Information ("INEGI") reported 121,669 homicides (an average of over 20,000 people per year, more than fifty-five people per day, or just over two people every hour) during Felipe Calderón's administration from 2006–2012.¹³ Estimates also indicate over 29,000 murders occurred in 2017, an increase in deaths essentially associated with drug trafficking that reflects a failure of Enrique Peña Nieto's administration and the Institutional Revolutionary Party ("PRI") to control México's cartels prior to the end of Enrique Peña Nieto's administration in July 2018.¹⁴ President López Obrador's tenure is marked by continued violence from cartels and security forces engaging in human rights abuses, and a level of corruption¹⁵ that ranks among

12. U.S. DEP'T. OF STATE, FY 2018 CONGRESSIONAL BUDGET JUSTIFICATION – DEP'T OF STATE, FOREIGN OPERATIONS, AND RELATED PROGRAMS 317-85 (2018); *see also* Adam Isacson, *Trump's 2018 Foreign Aid Budget Would Deal a Devastating Blow to Latin America*, WOLA, May 24, 2017, <https://www.wola.org/analysis/trumps-2018-foreign-aid-budget-deal-devastating-blow-latin-america/>. Isacson notes that the State Department's International Narcotics Control and Law Enforcement program, would be cut back by approximately 40 percent, impacting security forces, the judiciary, human rights, and prevention of violence within Mexico. For an estimate of Merida Initiative funding from FY2008 to FY2017 see Clare M. Ribando & Kristin Finklea, CONG. RSCH. SERV., R 41349, U.S.-MEXICAN SECURITY COOPERATION: THE MERIDA INITIATIVE AND BEYOND 11 (2017).

13. KIMBERLY HEINLE, CORY MOLZAHN, & DAVID A. SHIRK, UNIVERSITY OF SAN DIEGO, DRUG VIOLENCE IN MEXICO: DATA AND ANALYSIS THROUGH 2014, Special Report. University of California, Trans-Border Institute, San Diego, i (2015) (noting a decline in homicides under both presidents Ernesto Zedillo (1994-2000) and Vicente Fox (2000-2006) in comparison to the Calderón Administration); *see also*, Randal C. Archibold & Damien Cave, *Numb to Carnage, Mexicans Find Diversions, and Life Goes On*, N.Y. TIMES (May 15, 2012), http://www.nytimes.com/2012/05/16/world/americas/mexicans-unflinching-in-face-of-drug-wars-carnage.html?_r=0.

14. Eli Meixler, *With over 29,000 Homicides, 2017 was Mexico's Most Violent Year on Record*, TIME, (Jan. 21, 2018), <http://time.com/5111972/mexico-murder-rate-record-2017/>; *see also*, Arturo Angel, *Mexico atraviesa el año más violento del que haya registro con casi 16 mil asesinatos en 2018*, ANIMAL POLITICO (July 21, 2018) <https://www.animalpolitico.com/2018/07/mexico-violento-asesinatos-2018/> (reporting a continued increase in violence during the last year of Peña Nieto's administration).

15. *See e.g.*, U.S. DEP'T. OF STATE, BUREAU OF DEMOCRACY, HUM. RTS., & LAB., 2020 Country Reports on Human Rights Practices (2021) (documenting forced disappearances by organized crime groups, sometimes with allegations of state collusion, and various forms of corruption), <https://www.state.gov/reports/2020-country-reports-on-human-rights-practices/>; JUNE S. BEITTEL, CONG. RSCH. SERV., R41576, MEXICO: ORGANIZED CRIME AND DRUG TRAFFICKING ORGANIZATIONS 5-7 (2020).

Argentina, Brazil, Bolivia, Cuba, Jamaica, Panama, Peru, and other Latin American countries.¹⁶

Notwithstanding the cooperative partnership that extends across decades, México is unwilling to modify domestic drug policies, straining its relationship with a United States that advocates an aggressive stance toward illicit drugs. In October 2008, President Calderón, who initiated an intensive counternarcotics campaign against drug cartels, proposed to decriminalize the possession of small amounts of drugs.¹⁷ Calderón signed legislation in April 2009 that decriminalized personal use of some illicit drugs.¹⁸ The promulgation of rules regulating illicit drugs occurred with little notice or opposition from within the governments of México or the United States.¹⁹ Individuals may now possess small amounts of marijuana, cocaine, heroin, lysergic acid diethylamide (“LSD”), ecstasy, and methamphetamine without penalty. The definition of “small amount” for marijuana intended for “personal use” is five grams—the equivalent of about four joints. A “small amount” of cocaine is a half-gram or the equivalent of about four lines. For other drugs, the limits are 50 milligrams of heroin, 40 milligrams for methamphetamine, and 0.015 milligrams for LSD.²⁰ Speaking for the Mexican Attorney General’s Office when the law took effect, a representative characterized the change as regulating rather

16. See e.g., Corruption Perceptions Index 2020, TRANSPARENCY INTERNATIONAL, <https://www.transparency.org/en/cpi/2020/index/mex#> (last visited Apr. 24, 2022). The 2020 report ranks Mexico 124 out of 180 countries. *Id.*

17. Elisabeth Malkin & Marc Lacy, *Mexican President Proposes Decriminalizing Some Drugs*, N.Y. TIMES (Oct. 2, 2008), <https://www.nytimes.com/2008/10/03/world/americas/03mexico.html> (stating the legislation is in response to an increase of drug addicts in Mexico doubling in the past six years to 307,000, and surveys indicating the number of Mexicans reported illicit drug use rising from 3.5 million to 4.5 million since 2002).

18. Título Séptimo. Delitos Contra La Salud Capítulo I. De La Producción, Tenencia, Tráfico, Proselitismo y Otros Actos en Materia de Narcóticos, arts. 193-99 (Aug. 24, 2009), JUSTIA MEXICO, <https://mexico.justia.com/federales/codigos/codigo-penal-federal/libro-segundo/titulo-septimo/capitulo-i/#articulo-193>.

19. Ioan Grillo, *Mexico’s New Drug Law May Set an Example*, TIME (Aug. 26, 2009) <http://content.time.com/time/world/article/0,8599,1918725,00.html> (a similar proposal was introduced in 2006 but was opposed by the Bush Administration causing then-President Vicente Fox to veto the bill).

20. Mark Stevenson, *Mexico Decriminalizes Small-Scale Drug Possession*, THE SAN DIEGO UNION-TRIBUNE, (Aug. 20, 2009), <https://www.sandiegouniontribune.com/sdut-lt-mexico-drug-decriminalization-082009-2009aug20-story.html>. For the prescribed limits for specific drugs a person may possess see art. 479 de la Ley General de Salud Federal (General Health Law Article 479 Federal of Mexico), https://leyes-mx.com/ley_general_de_salud/479.htm (last visited May 8, 2022).

than legalizing drugs to give the public greater legal certainty.²¹ Some criminal defense lawyers in México, however, view the change as merely codifying what has been an informal practice among public officials within the Mexican justice system.²² The desire of the government of President Calderón to decriminalize small amounts of illicit drugs is part of a strategy to shift law enforcement resources from minor consumers to big-time dealers and drug lords; this policy has had minimum consequences, but has frustrated U.S. officials who advocate an interdiction strategy to combat criminal cartels on both sides of the United States-México border.²³

An adjustment by President Enrique Peña Nieto with respect to combating Mexican drug cartels sought to reduce the level of violence, moving away from a military solution to minimizing cartel wars and transforming the problem from a national security response to a law enforcement response to drugs and other common crimes.²⁴ His desire to shift security policy ultimately gave way to a second verse of anticrime measures, relying on U.S. funding under the Mérida Initiative in light of the proliferation of México's drug cartels.²⁵ Electing to target high-profile members of criminal organizations, Peña Nieto's administration either killed or arrested more than 100 suspects during his tenure that include members of the Zetas, Sinaloa Cartel, Gulf Cartel, and other international drug traffickers.²⁶ A crucial problem for Peña Nieto, however, centered on the public's perception of corruption,²⁷ coupled with criminal charges filed against high-level officials from his political party during his term in

21. See Stevenson, *supra* note 20.

22. Telephone Interview with Carlos Francisco Ontiveros-Gonzalez, Ontiveros-Gonzalez Law Firm, Guadalajara, Jalisco, Mex. (Oct. 21, 2021).

23. Tracy Wilkinson & Richard Marosi, *In Mexico, No Jail Time for Small Amounts of Drugs*, L.A. TIMES (Aug. 23, 2009), <http://www.lacp.org/2009-Articles-Main/082309-Mexico-NoJail4Drugs-LATimes.htm>. Calderon originally wanted the bill to allow users caught with amounts within the limits to avoid jail time only if they agreed to rehabilitation, but the final draft only encourages treatment for addiction. *Id.*

24. Scott Stewart, *Understanding Pena Nieto's Approach to the Cartels*, STRATFOR (May 16, 2013), <https://worldview.stratfor.com/article/understanding-pena-nietos-approach-cartels>.

25. Scott Stewart, *Tracking Mexico's Cartels in 2019*, STRATFOR (Jan. 29, 2019), <https://worldview.stratfor.com/article/tracking-mexicos-cartels-2019>.

26. Beltran Leyva Org, *The Mexico Crime Bosses Peña Nieto's Government Toppled*, INSIGHT CRIME (Sept. 24, 2018), <https://insightcrime.org/news/analysis/mexico-crime-bosses-pena-nietos-government-toppled/>.

27. See *e.g.*, TRANSPARENCY INT'L, CORRUPTION PERCEPTIONS INDEX 2018 (2018).

office.²⁸ At the conclusion of his administration, Peña Nieto's commitment to lower the level of violence proved elusive, and he left office under suspicion of corruption associated with his wife's (Angélica Rivera) purchase of a \$7 million mansion from a government contractor.²⁹

After taking office in December 2018, President-elect Andrés Manuel López Obrador (López Obrador) announced a security plan dubbed a "hugs, not bullets" approach to gangs and drug trafficking focusing on public security, while deemphasizing direct confrontation against cartels with use of military forces.³⁰ Offering platitudes without substance, López Obrador appeared to concentrate on root causes of crime.³¹ During a January 2019 press conference, López Obrador announced an end to México's drug war, redirecting priorities away from capturing cartel bosses to a broad, ill-defined guarantee of public safety. In place of military personnel, he proposed establishing a national guard as part of a general anticrime strategy to combat violent crime.³² A change in strategy

28. See e.g., Press Release, U.S. Att'y Off., U.S. Dept. of Justice, Former Mexican Secretary of Public Security Arrested for Drug-Trafficking Conspiracy and Making False Statements, (Dec. 10, 2019), <https://www.justice.gov/usao-edny/pr/former-mexican-secretary-public-security-arrested-drug-trafficking-conspiracy-and>; Rafael Martínez, *Former Governor of Quintana Roo, Roberto Borge, Linked to the Process*, EL SOL DE MEXICO, November 13, 2019 (Borge accused of irregular performance of public office, and for allegedly having granted five concessions irregularly in Isla Mujeres), <https://www.elsoldemexico.com.mx/republica/justicia/vinculan-a-proceso-a-exgobernador-de-quintana-roo-roberto-borge-concesiones-isla-mujeres-4451151.html>; Press Release, U.S. Att'y Off., U.S. Dept. of Justice, Former Mexican Governor Extradited to the Southern District of Texas (Apr. 20, 2018), <https://www.justice.gov/usao-sdtx/pr/former-mexican-governor-extradited-southern-district-texas>.

29. See David Agren, *Mexico's Unpopular President to Leave behind Troubled Administration Mired in Scandal, Controversy*, USA TODAY (Sept. 12, 2018), <https://www.usatoday.com/story/news/world/2018/09/12/mexican-president-enrique-pena-nieto-defends-unpopular-administration/1265941002/>; Santiago Perez, *Mexico's First Lady to Sell Mansion Amid Conflict Allegations: President, First Lady on Defensive Over Ownership of Family Mansion*, WALL ST. J. (Nov. 19, 2014), <https://www.wsj.com/articles/mexicos-first-lady-to-sell-mansion-amid-allegations-of-conflict-of-interest-1416385541>.

30. Mary Beth Sheridan, *He Promised 'hugs, not bullets.' Now Mexico's AMLO is Facing an Outcry over Soaring Violence*, WASHINGTON POST, April 22, 2019, <https://www.washingtonpost.com/world/2019/04/22/he-promised-hugs-not-bullets-now-mexicos-amlo-is-facing-an-outcry-over-soaring-violence/>.

31. Eric Martin, *AMLO Lays Out Broad Plan for Addressing Violence in Mexico*, BLOOMBERG (Nov. 14, 2018), <https://www.bloomberg.com/news/articles/2018-11-15/amlo-lays-out-broad-plan-for-attacking-mexico-insecurity-crime>.

32. Casey Quackenbush, *There Is Officially No More War.' Mexico's President Declares an End to the Drug War Amid Skepticism*, TIME (Jan. 31, 2019),

did not immediately temper actions by criminal cartels that threatened López Obrador as he struggled to confront organized crime engaged in oil thefts from the state-owned oil company *Petróleos Mexicanos* (“Pemex”).³³ Moreover, a preliminary assessment of murders in México early on under the López Obrador Administration indicated an increase in violence within central México, where drug cartels fight for territorial control.³⁴

On January 25, 2019, President Trump complicated the United States-México security relationship when instituting policies to curtail the entry of undocumented aliens, eventually settling on the Migration Protection Protocols (“MPP,” also commonly referred to as Remain-in-México) asylum policy.³⁵ Afterwards, a letter of guidance sent within days to immigration officers in U.S. Citizenship and Immigration Services noted that:

under the MPP, the United States “understands that, according to the Mexican law of migration, the Government of México will afford such individuals all legal and procedural protection[s] provided for under applicable domestic and international law,” including the [Convention Relating to the Status of Refugees] and the [Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment]. Further, “[t]he

<http://time.com/5517391/mexico-president-ends-drug-war/>.

33. Parker Asmann, *AMLO Security Crackdown Met with Mexico Cartel Death Threats*, INSIGHT CRIME (Feb. 11, 2019), <https://www.insightcrime.org/news/brief/amlo-security-crackdown-mexico-cartel-death-threats/>.

34. *Id.*; see also, Mexico murder rate rises in first three months of 2019 (Apr. 22, 2019), <https://www.bbc.com/news/world-latin-america-48012923> (showing an increase of 9.6% in murders in Mexico reported by Mexico’s National System for Public Security, which López Obrador has disputed, leading to his further commitment to establishing a national guard).

35. See Memorandum from Kirstjen M. Nielsen, U.S. Sec’y of Homeland Security, on Policy Guidance for Implementation of the Migrant Protection Protocols (Jan. 25, 2019) (on file with author) (notifying the Government of Mexico about implementing these procedures under U.S. law). Section 1225 of the Immigration and Nationality Act (INA) provides specific procedures regarding the treatment of those not clearly entitled to admission, including those who apply for asylum. 8 U.S.C. § 1225. Section 1225(b)(2)(C) provides that “[I]n the case of an alien . . . who is arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States,” the Secretary of Homeland Security “may return the alien to that territory pending a [removal] proceeding under section 1229a” of the INA. 8 U.S.C. § 1225(b)(2)(C).

United States expects that the Government of México will comply with the commitments articulated in its statement of December 20, 2018.”³⁶

The chorus of México’s most popular music genres were muffled by voices of despair as sprawling collections of tent communities on México’s border were populated with migrants from Honduras, Nicaragua, El Salvador, and Guatemala, awaiting immigration hearings conducted in pavilions at the edges of the U.S border.³⁷ Trump’s response to the growing violence included threats to impose tariffs on Mexican exports unless México took action to mitigate the caravan of Central American migrants and drugs destined for the United States.³⁸ In the spirit of cooperation, Trump also pledged to take action to curtail the trafficking of weapons from the U.S. into México, relying on an existing interagency agreement since 2009 to stem the flow of guns to México and Central America.³⁹

While México’s government accommodated the Trump Administration’s MPP, López Obrador proceeded to ease an intensive

36. See Memorandum from U.S. Dept. of Homeland Sec. on U.S. Citizenship and Immigration Services (Jan. 28, 2019) (on file with author) (internal citations omitted).

37. See, e.g., Daniel Gonzalez, *The 2019 Migrant Surge is Unlike any We’ve Seen Before. This is Why: The reasons Behind the Wave of Central Americans Migrating to the U.S. are more Complicated than Blaming Immigration “Loopholes” or Human Smugglers*, USA TODAY (Sept. 23, 2019), <https://www.usatoday.com/in-depth/news/nation/2019/09/23/immigration-issues-migrants-mexico-central-america-caravans-smuggling/2026215001/>.

38. Louise Radnofsky, William Mauldin & David Luhnnow, *Trump Threatens Tariffs on Mexican Imports in Response to Migrant Surge; A Tariff of 5% is Set to Become Effective June 10, Potentially Rising to 25% on Oct. 1*, WALL. ST. J. (May 30, 2019), <https://www.wsj.com/articles/trump-threatens-5-tariff-on-mexican-imports-beginning-june-10-11559260679>. The threat of tariffs immediately disrupted stock trading in Tokyo and currency markets, as well as complicating ratification of the United States-Mexico-Canada Agreement that eventually replaced the North American Free Trade Agreement.

39. Gabriela Martinez, *The Flow of Guns from the U.S. to Mexico is Getting Lost in the Border Debate*, PBS NEWS HOUR (June 12, 2019), <https://www.pbs.org/newshour/politics/the-flow-of-guns-from-the-u-s-to-mexico-is-getting-lost-in-the-border-debate>. Since 2009, The ATF and Homeland Security Investigations (HSI), a unit of the Department of Homeland Security collaborate on weapons trafficking from Mexico and Central America. Memorandum of Understanding between ICE and ATF, June 18, 2009. It should be noted that a Memorandum of Understanding between agencies does not have the force of law. U.S. DEPT. OF THE INTERIOR, OFF. OF FIN. MGT., INTER-INTRA AGENCY AGREEMENT HANDBOOK, 7, ¶ 15 (Sept. 21, 2015).

counternarcotics campaign from previous administrations that relied on the military to pursue drug traffickers to reinforce national security.⁴⁰ Months later, however, López Obrador experienced a setback when, in October 2019, Mexican enforcement officials botched the arrest and eventual release of Ovidio Guzmán in Culiacán, Sinaloa (son of imprisoned Joaquin “el Chapo” Guzmán).⁴¹ Despite events requiring the withdrawal of security and military personnel amid an onslaught from cartel gunmen, López Obrador appeared tone-deaf by reiterating his plans for social programs to combat poverty as a means to deter drug trafficking, and plans for a new militarized national police force resulting in deployment of the National Guard in collaboration with the military regarding national security projects.⁴² In November 2019, after Mexican drug cartels caused the death of a number of U.S. citizens (three women and six children) residing in México,⁴³ Trump publicly announced plans to classify Mexican cartels as terrorists under the authority granted to the Secretary of State to designate an organization as a foreign terrorist organization (“FTO”).⁴⁴ Classification of criminal cartels as a FTO can result in freezing of assets, and any representatives and members of a designated FTO can be denied entry into and removed from the United States.⁴⁵ Trump, however, tempered plans designating Mexican cartels as FTOs after national security aides advised against deployment of troops,

40. Víctor Manuel Reyna Alvarado, *Contra narco, 50% de milicia; actuaron más de 133 mil activos entre 2015 y 2016*, EXCELSIOR (Sept. 17, 2016) <https://www.excelsior.com.mx/nacional/2016/09/17/1117381#imagen-2> (estimating the involvement of more than 130,000 military personnel in recent years for contra el narcotráfico prior to AMLO’s administration).

41. See Iniciativa Sinaloa, *El día que perdimos la ciudad*, YOUTUBE (Oct. 17, 2021) (documenting events that ultimately led to releasing Ovidio Guzman), <https://www.youtube.com/watch?v=gSzqiQqXRMA&t=150s>.

42. *AMLO’s National Guard Turns One*, JUSTICE IN MEXICO (July 9, 2020), <https://justiceinmexico.org/national-guard-turns-one/>.

43. Will Grant, *Mexico Ambush: How a US Mormon Family ended up Dead*, BBC NEWS (Nov. 8, 2019), <https://www.bbc.com/news/world-latin-america-50339377>.

44. Designation of Foreign Terrorist Organizations, 8 U.S.C. § 1189(a)(1) (2021). It should be noted that no Mexican cartels are designated as a foreign terrorist organization. The Secretary of State—in consultation with the U.S. Attorney General—designates terrorist organizations for immigration purposes and has the authority known as the Terrorist Exclusion List (“TEL”) pursuant to Section 411 of the USA Patriot Act of 2001. 8 U.S.C. § 1182. President Trump’s decision to classify Mexican cartels as terrorist was spurred by the deaths of three women and six children belonging to a Mormon family were killed in the northwestern Sonora state by drug cartels. Grant, *supra* note 43.

45. See 8 U.S.C. §§ 1182(9)(A)(i)(ii)(B)(i)(ii); 1227 (a)(1)(A).

including a unilateral use of force that would be tantamount to an invasion.⁴⁶ Subsequently, in the last year of Trump's presidency the partnership transformed into a more traditional law enforcement strategy to combat Mexican cartels after U.S. Attorney General William Barr pressured the Mexican government to militarize its narcotics enforcement, coupled with an acceleration of extradition proceedings of suspects wanted for crimes in the United States.⁴⁷ However, on October 16, 2020, a different resonance of tone reverberated across the border when Mexican General Salvador Cienfuegos Zepeda was arrested in Los Angeles, and was charged with four counts of drug trafficking and money laundering during his tenure as Defense Secretary in the administration of Enrique Peña Nieto (from 2012–2018).⁴⁸ Despite prosecutors' request for a permanent order of detention for Cienfuegos, citing his involvement with H-2 Cartel (a notorious Mexican drug cartel),⁴⁹ a month later Attorney General William Barr announced the dismissal of charges, transferring custody of Cienfuegos to the Mexican government on its promise to investigate him.⁵⁰ On January 15, 2021, México's Attorney General decided not to prosecute, characterizing the charges from the Department of Justice as a fabrication by the U.S. Drug Enforcement Administration ("DEA"), and exonerating the former defense minister.⁵¹

Presently, the Biden Administration is taking part in discussions with Mexican officials to overhaul security initiatives, preserving successes in

46. Ryan Pickrell, *Trump Wanted to Send US Troops into Mexico to Hunt Down Drug Cartels and Asked About it Repeatedly: Report*, BUS. INSIDER (Oct. 20, 2021), <https://www.yahoo.com/news/trump-wanted-send-us-troops-130445931.html>.

47. Josede Córdoba & Sadie Gurman, *World #1 – Mexican President Reverses Policy on Fighting Drug Cartels to Aid U.S.*, STUDENT DAILY NEWS (Feb. 11, 2020), <https://www.studentnewsdaily.com/daily-news-article/world-1-mexican-president-reverses-policy-on-fighting-drug-cartels-to-aid-u-s/>.

48. Cienfuegos was secretly indicted by a grand jury in 2019, the highest-ranking Mexican official ever charged with drug trafficking. *See* Indictment at 1-4, United States v. Zepeda, No. 19-366 (E.D.N.Y. Aug. 14, 2019).

49. Detention Memorandum at 1, United States v. Zepeda, No. 19-366 (E.D.N.Y. Oct. 16, 2020).

50. Press Release, William P. Barr, Attorney General of the United States, and Alejandro Gertz Manero, Fiscalía General of Mexico, U.S. Dep't of Just. (Nov. 17, 2020), <https://www.justice.gov/opa/pr/joint-statement-attorney-general-united-states-william-p-barr-and-fiscal-general-mexico>.

51. Taylor Barnes, Natalie Gallón & Florencia Trucco, *Mexican President Defends Decision not to Press Charges against Ex-Minister who was Arrested on Drug Charges in US*, CNN (Jan. 15, 2021), <https://www.cnn.com/2021/01/15/americas/mexican-president-defends-dismissal-of-probe/index.html>.

regard to the rule of law, human rights, and other crime-fighting strategies, while López Obrador continues to seek less confrontational methods for combating criminal cartels. In a joint statement at the Biden Administration's first United States-México High-Level Security Dialogue, the "Bicentennial Framework" was announced, which offers a new approach to address security cooperation, including solutions to migration surges at the United States-México border, the environment, agriculture, technology, energy, and trade.⁵² México's Senate presented a challenge to law enforcement and other priorities as it prepared to take a major step toward transforming the drug war—approving legislation to legalize marijuana countrywide.⁵³ The legislative action, in response to México's Supreme Court of Justice ("SCJN") ruling in 2018 that the prohibition on possessing and growing cannabis was unconstitutional, caused the Senate to amend existing law, but a consensus has not been reached in the Congress on regulating recreational cannabis.⁵⁴ Undeterred, the SCJN declared unconstitutional México's health law prohibiting use of marijuana absent legislation to allow Mexican citizens to request permits to consume marijuana from the Federal Commission for the Protection Against Sanitary Risks ("Cofepris"), an agency of the Ministry of Health.⁵⁵ SCJN's declaration, however, does not allow for commercial importation, trade or supply of marijuana that will require legislation to regulate the cannabis industry.⁵⁶ Further exasperating the harmony between the two governments, López Obrador is wanting to temper military cooperation with the United States in fighting drug trafficking,

52. Editorial, *U.S. and Mexico Agree to Bicentennial Framework*, VOICE OF AMERICA, Nov. 8, 2021, <https://editorials.voa.gov/a/u-s-and-mexico-agree-to-bicentennial-framework/6304393.html>.

53. Oscar Lopez, *Mexico Set to Legalize Marijuana, Becoming World's Largest Market*, N.Y. TIMES, March 10, 2021, <https://www.nytimes.com/2021/03/10/world/americas/mexico-cannabis-bill.html>.

54. *Is it Already Legal? The SCJN Declares Unconstitutional the Articles that Prohibit the use of Cannabis in Mexico*, GREEN ENTREPRENEUR (June 28, 2021), <https://www.greenentrepreneur.com/article/375948>.

55. Gustavo Pineda Negrete, *Ya sera legal? SCJN declara inconstitucional la prohibicion del uso ludico de la cannabis [Will it already be Legal? SCJN Declares Unconstitutional the Prohibition of the Recreational use of Cannabis]*, CC NEWS (June 28, 2021), <https://news.culturacolectiva.com/mexico/scjn-declara-inconstitucional-el-uso-ludico-de-la-marihuana/>.

56. Suprema Corte [Supreme Court] (@SCJN), TWITTER (June 28, 2021, 5:05 PM), <https://twitter.com/SCJN/status/1409633987459354630/photo/1>.

pivoting toward promoting economic development.⁵⁷ His effort to transform Mexican policy occurs as cartel-related violence is virtually unchallenged, and signing legislation that makes it illegal for government agencies to share intelligence and information about drug cartels with American agents working in México.⁵⁸

II. DESPUÉS DE QUE LOS MARIACHIS QUEJEN EN SILENCIO:⁵⁹ AN UNCERTAINTY OF POLICY TO COMBAT MEXICAN CARTELS

While in the early stages of López Obrador's tenure, México continued deploying military troops and federal police officers in some circumstances, asserting success the following year despite challenges to Mexican governance among criminal cartels.⁶⁰ In July 2021, López Obrador proclaimed that “[t]here is governability in the country. In public security matters we’ve also made progress, even with the complexity of the problem we inherited.”⁶¹ His “transmite un mensaje en la canción,” reminiscent of his campaign for president,⁶² may have been in response to General Glen D. VanHerck, the commander of the U.S. Air Force Northern Command, previously depicting the current situation in México as ungovernable, and asserting that “counternarcotics, migration and human trafficking [are] all symptoms of transnational criminal organizations who are operating oftentimes in ungoverned areas—about 30 percent to 35 percent of México.”⁶³ VanHerck's comments were

57. *Mexico Asks US to End Anti-drug Military Cooperation*, AGENCE FRANCE PRESSE (June 9, 2021), <https://www.barrons.com/news/mexico-asks-us-to-end-anti-drug-military-cooperation-01623264914>.

58. Salvador Rivera, *Biden and AMLO Must Mend Fences or Drug Cartels will run Rampant, Security Expert Says*, BORDER REP. (Jan. 18, 2021), <https://www.borderreport.com/hot-topics/border-crime/biden-and-amlo-must-mend-fences-or-drug-cartels-will-run-rampant-security-expert-says/>.

59. Translation: After the Mariachis Fall Silent

60. See e.g., *AMLO Declares Improved Security and that No New Cartels Have Formed Since He Joined Office in 2018*, BORDERLAND BEAT (July, 4, 2021), <http://www.borderlandbeat.com/2021/07/amlo-declares-improved-security-and.html>.

61. *Id.*

62. El Universal, AMLO canta con mariachi “Mexico lindo y querido” [AMLO Sings with Mariachi “Mexico lindo y querido”], YouTube (Oct. 12, 2018), <https://www.youtube.com/watch?v=wWqC6tG7nog>.

63. USNORTHCOM-USSOUTHCOM Joint Press Briefing, Craig Faller, Navy Admiral, U.S. Southern Command & Glen VanHerck, Air Force General, U.S. Northern Command (Mar. 16, 2021), <https://www.defense.gov/News/Transcripts/Transcript/Article/2539561/usnorthcom-ussouthcom-joint-press-briefing/>.

dismissed by Alejandro Hope, former senior officer of México's Center for Investigation and National Security ("CISEN"), as baseless and unmoored of reality, while expressing hope the Biden Administration would remain "open to trying new strategies in the fight against Mexican criminal gangs."⁶⁴ The Biden Administration is pursuing a broad policy against corruption, focusing on the U.S. government's approach to working "with international partners to counteract strategic corruption by foreign leaders, [and] foreign state-owned or affiliated enterprises," among other entities.⁶⁵ Although the policy leaves much to the imagination, López Obrador has not abandoned his proposal to bring an end to an intensive counternarcotics campaign, easing the reliance on the military to pursue drug traffickers to reinforce national security.⁶⁶ Offering the Mexican public and U.S. officials platitudes without substance as if he were performing "La Fiesta del Mariachi" with Luis Miguel,⁶⁷ López Obrador is adamant about de-emphasizing the fight against criminal cartels,⁶⁸ despite new threats among some criminal cartels engaged in oil thefts from Pemex.⁶⁹ Moreover, the violence across México has not abated during the first-half of López Obrador's term, requiring the use of armed forces for public security tasks and his new security force, the National Guard, while relying on a network of government social programs to

64. B. Debusmann, *US Assessment of Slipping Mexican Control over Territory has "No Connection to Reality"*, LA POLITICA ONLINE (Mar. 22, 2021), <https://www.lapoliticaonline.com/nota/132869-us-assessment-of-slipping-mexican-control-over-territory-has-no-connection-to-reality/>.

65. Memorandum on Establishing the Fight Against Corruption as a Core United States National Security Interest, 2021 DAILY COMP. PRES. DOC. 467 (June 3, 2021).

66. Víctor Manuel Reyna Alvarado, *Contra narco, 50% de milicia; actuaron más de 133 mil activos entre 2015 y 2016*, EXCELSIOR (Sept. 17, 2016), <https://www.excelsior.com.mx/nacional/2016/09/17/1117381#imagen-2> (estimating the involvement of more than 130,000 military personnel in recent years for contra el narcotráfico prior to AMLO's administration).

67. Warner Music Mexico, *Luis Miguel — La Fiesta Del Mariachi (Video Oficial [Official Video])*, YOUTUBE (Dec. 18, 2017), https://www.youtube.com/watch?v=12_eYjSP5G8.

68. Eric Martin, *AMLO Lays Out Broad Plan for Addressing Violence in Mexico*, BLOOMBERG (Nov. 14, 2018), <https://www.bloomberg.com/news/articles/2018-11-15/amlo-lays-out-broad-plan-for-attacking-mexico-insecurity-crime>.

69. Parker Asmann, *AMLO Security Crackdown Met with Mexico Cartel Death Threats*, INSIGHT CRIME (Feb. 11, 2019), <https://www.insightcrime.org/news/brief/amlo-security-crackdown-mexico-cartel-death-threats/>.

address “root causes of violence, namely poverty and lack of opportunity.”⁷⁰

Contributing to a medley of actions, as if engaged in traditional Mexican dance steps⁷¹ along the U.S. border, is Texas Governor Greg Abbott, who strains the credulity of policymakers by asserting his authority to “secure the border.”⁷² Abbott signed an executive order declaring “that the surge of individuals unlawfully crossing the Texas-México border poses an ongoing and imminent threat of disaster for certain counties and agencies in the State.”⁷³ Specifically, he noted the potential for the spread of COVID-19 associated with the Biden Administration’s failure to enforce a “Title 42 order,” by admitting migrants into the United States and the State of Texas who could carry the disease across the border, and by prohibiting anyone other than law enforcement to provide ground transportation to migrants detained by Custom and Border Patrol.⁷⁴ The same order instructs Texas Department of Public Safety (“DPS”) troopers:

to stop any vehicle upon reasonable suspicion of a violation of [his order], and to reroute such a vehicle back to its point of origin or a port of entry, . . . [or] impound a vehicle that is being used to transport migrants in violation of [the order], or that refuses to be rerouted.⁷⁵

The U.S. Department of Justice secured a temporary restraining order against Abbott’s executive order to enjoin state officials from prohibiting

70. *AMLO Declares Improved Security and That No New Cartels Have Formed Since He Joined Office in 2018*, *supra* note 58.

71. *See, e.g.*, Mariachi Alas, *La Charreada*, YOUTUBE (June 1, 2016), <https://www.youtube.com/watch?v=jQy2MvTr8Ek>.

72. It should be noted that Abbott’s predecessor, Rick Perry, also used the governor’s office to authorize Operation Strong Safety to send 1,000 National Guard troops to secure the Texas-U.S. southern border in the summer of 2014, falsely claiming credit for a subsequent decline in illegal immigration. *See, e.g.*, Bradley Saacks, *Rick Perry Says 74 Percent Drop in Border Apprehensions Shows Texas Surge Worked*, POLITIFACT (July 25, 2015), <https://www.politifact.com/factchecks/2015/jul/26/rick-perry/rick-perry-says-74-percent-drop-border-apprehensio/>. For a more comprehensive review of Texas and border security see DURANT FRANTZEN & MARSHALL B. LLOYD, *TEXAS’S CRIMINAL JUSTICE SYSTEM*, 263-78 (Carolina Acad. Press, 2018).

73. Exec. Order No. GA-37 (July 28, 2021).

74. *Id.*

75. *Id.* ¶ 2.

the transportation of migrants until a resolution of the case on the merits, which cites the Supremacy Clause of the United States Constitution and the related doctrine of intergovernmental immunity, establishing a substantial likelihood of success on the merits that the order stands as an obstacle to federal immigration enforcement.⁷⁶

Governor Abbott, adamant in his effort to secure the border, and as if he were issuing the *Primer Grito de Independencia en Tejas*,⁷⁷ announced a “10-Point Plan to Combat Border Crisis,” attracting other governors’ commitment to “securing the border and keeping Americans safe.”⁷⁸ Abbott was undeterred in securing the border despite the Federal Emergency Management Agency’s (“FEMA”) denial of Texas’s Federal Emergency Declaration, vowing to appeal the request for supplemental federal assistance to respond to the thousands of illegal crossings along the border.⁷⁹ Sending a derisively worded letter specifying the millions of dollars in costs for the state and local jurisdictions, he requested additional federal assistance from programs outlining justification that were similar to his executive order.⁸⁰ The sincerity of financial despair may be met with silence considering months prior to sending the letter Abbott signed legislation authorizing \$100 million in funding the Operation Lone Star Grant Program (“OLS”) to improve interagency border security operations and “encourage local governments to apply for these funds to enhance . . . ongoing collaborative efforts to deter illegal immigration and prevent the smuggling of people, drugs, weapons, and other contraband into [the] state.”⁸¹ Some of the funds have been used to purchase shipping containers

76. Motion for Preliminary Injunction, *United States, v. Texas*, No. EP-21-CV-173-KC (W.D. Tex. Aug. 26, 2021), ECF No. 3.

77. See e.g., Excelsior TV, *López Obrador da su primer Grito de Independencia en el Zócalo*, YOUTUBE (Sept. 15, 2019), <https://www.youtube.com/watch?v=BEekExTD3u8&t=0s>.

78. Press Release, Greg Abbott, Governor, Office of the Texas Governor, State Governors Outline 10-Point Plan to Combat Border Crisis (Oct. 6, 2021), <https://gov.texas.gov/news/post/governor-abbott-state-governors-outline-10-point-plan-to-combat-border-crisis>.

79. Press Release, Greg Abbott, Governor, Office of the Texas Governor, Governor Abbott Announces Intention to Appeal FEMA Denial of Federal Emergency Declaration in Response to Border Crisis (Sept. 29, 2021), <https://gov.texas.gov/news/post/governor-abbott-announces-intention-to-appeal-fema-denial-of-federal-emergency-declaration-in-response-to-border-crisis>.

80. Letter from Gov. Greg Abbott, Gov. Tex., to Joseph R. Biden, Jr. (Sept. 20, 2021) (on file with author).

81. Press Release, Greg Abbott, Governor, Office of the Texas Governor, Governor Abbott Announces Operation Lone Star Grant Program to Enhance Border Security

placed on the riverbanks in the border town of Eagle Pass, Texas, as well as armored vehicles interspersed with the containers, and to fund the deployment of Texas National Guard personnel and state troopers and vehicles as a second line of defense to stop migrants from illegally crossing the river.⁸² Hundreds of state troopers and National Guard positioned in the area are meant to display a “show of force” that—at best—physically intimidates migrants away from crossing in high-traffic areas.⁸³ Despite having no authority to arrest migrants for violating federal immigration laws, Texas officials have charged some aliens with trespassing on private property as part of Abbott’s “Operation Steel Curtain” that is limited to a confined area of the 1,250-mile long Texas–México border.⁸⁴ In response, members of the U.S. Congress, led by Congressman Joaquin Castro, have requested the Justice Department to open an investigation into OLS alleging that the state’s border policy violates the Supremacy Clause of the U.S. Constitution. Programs funded by OLS, according to Castro, establish a separate state immigration policy allowing for arrest, prosecution, and jailing of migrants by state and local officials on the bases of criminal trespass, separation of families, and denial of basic constitutional rights while confined for weeks in a state prison or county jail.⁸⁵ Some politicians, as in the case of Senator Ted Cruz, dismayed with border security and other current events, are advocating for a modern Texas secessionist movement despite the absence

Operations (Sept. 20, 2021), <https://gov.texas.gov/news/post/governor-abbott-announces-operation-lone-star-grant-program-to-enhance-border-security-operations> (allocating \$1.8 billion for border security); *see also* An Act Relating to Making Supplemental Appropriations Relating to Border Security and Giving Direction Regarding Those Appropriations, H.B. 9, 87th Leg., 2d Sess. (Tex. 2021).

82. Sandra Sanchez, ‘Operation Steel Curtain’: Shipping Containers set up Along South Texas Border to Stop Illegal Crossings, KXAN (Nov. 19, 2021), <https://www.kxan.com/border-report/operation-steel-curtain-shipping-containers-set-up-along-south-texas-border-to-stop-illegal-crossings/>.

83. *Show of Force by Texas Military and DPS at Eagle Pass*, HONEST AUSTIN TEAM (Nov. 18, 2021), <https://www.honestaustin.com/2021/11/18/operation-steel-curtain/>.

84. *See e.g.*, Jolie McCullough, *Hundreds of Migrants Accused of Trespassing Languish in Texas Prisons: A County Judge’s New Approach Might Prolong Their Detention*, TEXAS TRIBUNE (Dec. 10, 2021) https://www.texastribune.org/2021/12/10/texas-border-security-migrant-prisons/?mc_cid=4959d8878d&mc_eid=feb4941e0e (referring to the OLS, describing the delayed hearings for migrants consisting of wrongful arrests and detentions for weeks without charges filed or assigned a lawyer).

85. Letter from Joaquin Castro to Alejandro Mayorkas, Sec. Dept. Homeland Sec., and Merrick B. Garland, U.S. Att’y Gen. (Oct. 29, 2021) (on file with author).

of a legal basis to secede from the United States.⁸⁶ Presently, while Texas politicians quarrel over the legalities of the state's powers, no action has been taken to intercede against OLS as Governor Abbott mesmerizes the public of Texas along the Rio Grande with announcements on border security tantamount to spirited fiestas and la serenatas that are the envy of policymakers on both sides of the border.⁸⁷

III. IN SEARCH OF INSTITUTIONAL ALTERNATIVES IN RESPONSE TO MÉXICO'S CRIMINAL CARTELS—OLÉ!

Obviously, there is no immediate solution that can address public security within México in light of the onslaught of cartels that combat each other and Mexican security forces. There is a necessity to form a coherent strategy that López Obrador's administration finds acceptable and is compatible with traditional law enforcement programs. Key to innovative plans is pragmatic alternatives as part of an institutional response that Mexican officials can support.⁸⁸ While the Mérida Initiative is no longer the cornerstone of United States-México collaboration, México's policymakers might consider a multidimensional strategy that includes existing policy as essential to combat cartels. More specifically, President López Obrador's bold strategy may include a paradigm shift to address the

86. Alexandra Hutzler, *Ted Cruz Wants Texas to Secede if U.S. Comes to a 'Point Where It's Hopeless'*, NEWSWEEK (Nov. 9, 2021), <https://www.msn.com/en-us/news/politics/ted-cruz-wants-texas-to-secede-if-us-comes-to-a-point-where-its-hopeless/ar-AAQsxwg?pfr=1>. Senator Cruz, a constitutional scholar, omitted facts that Texas cannot legally secede from the Union since Congress approved Joint Resolution for Annexing Texas to the United States. J. Res. 8, 28th Cong., 5 Stat. 797, 798 (2d Sess. 1845). Annexation led to the Mexican-American War that was resolved by negotiations. Treaty of Guadalupe Hidalgo, U.S.-Mex., Feb. 2, 1848, 9 Stat. 922, T.S. No. 207; Texas Constitution of 1845, art. XIII, § 3 makes clear that “[a]ll laws or parts of laws now in force in the republic of Texas, which are not repugnant to the constitution of the United States, the joint resolutions for annexing Texas to the United States, or to the provisions of this constitution, shall continue and remain in force as the laws of this State.” Tex. Const. art. XIII, § 3; *see also*, *Texas v. White*, 74 U.S. 700 (7 Wall.) 726 (1869) (Texas remained a State, with “no place for reconsideration or revocation, except through revolution or through consent of the States, . . . and all the acts of her legislature intended to give effect to that ordinance, were absolutely null, . . . [thus Texas] did not cease to be a State, nor her citizens to be citizens of the Union.”). *Id.*

87. *See* David Peña, *The Most Beautiful Music In Mexico - La Musica Mas Bella De Mexico - Vol 1*, YOUTUBE (July 15, 2019), <https://www.youtube.com/watch?v=KXZR7MAXDo>.

88. Mary Speck, *Great Expectations and Grim Realities in AMLO's Mexico*, PRISM, Vol. 8, No. 1 (2019).

influence of drug cartels, but must combat the violence among criminal networks, and restore respect for public institutions. Descriptions of México's criminal cartels, contributory factors leading to the growth and/or influence of organized crime, drug-related violence, and security threats are well documented in academic literature and government reports.⁸⁹ Scholarly explanations of the "war on drugs" include a concise United States-México cooperation encompassing more than four decades of initiatives.⁹⁰ Researchers employ a variety of empirical, economic, and public policy analyses of Mexican cartels to emphasize an urgent need for cooperative efforts, especially between México and the United States.⁹¹ Absent in the discussions is an institutional response beyond elusive suggestions to strengthen law enforcement strategy that is the underpinning of anticrime policies within México to combat cartels.⁹² The following discussion suggests alternatives designed to combat the corrosive effects of criminal cartels involved in the asymmetrical use of violence, corruption practices, and innovative means to transport illicit drugs into the United States. While these alternatives may not generate a consensus among all existing stakeholders, the suggestions offer solutions that have been part of resolving conflicts under similar circumstances threatening the ability of officials to govern within a nation-state's borders.

Mantener la Calma y Cantar Junto con los Demás

Currently, a means of "soft diplomacy" taking place is focused on preventing at-risk youth in violence-affected cities led by the United States Agency for International Development ("USAID"). According to USAID,

89. See e.g., Sukanya Basu & Sarah Pearlman, *Violence and Migration: Evidence from Mexico's Drug War*, 7 J. DEV. & MIGRATION 1, 5-6, 13-22 (2017).

90. James Cooper, *The United States, Mexico, and the War on Drugs in the Trump Administration*, 25 WILLAMETTE J. INT'L L. & DISPUTE RES., 234, 241 (2018).

91. See e.g., SIBEL MCGEE, MICHAEL JOEL, & ROBERT EDSON, APPLIED SYS. THINKING INST. OF ANALYTIC SERVS., INC., MEXICO'S CARTEL PROBLEM: A SYSTEMS THINKING PERSPECTIVE, 2-4 (2011).

92. See e.g., VANDA FELBAB-BROWN, BROOKINGS INST., MEXICO'S OUT-OF-CONTROL CRIMINAL MARKET, FOREIGN POLICY, (2019). Felbab-Brown mentions that while "there is no silver bullet to reduce violence in Mexico," violence in Mexico can decline if either a single cartel wins territorial control of drug trafficking, or the state augments its capacity to combat organized crime and win public support. *Id.* at 19. Her analysis fails to provide specificity other than Mexico's current government needs a comprehensive enforcement strategy, coupled with anti-crime socio-economic policies that have no direction on how to enhance state authority with respect to public safety.

prevention efforts are necessary to target crime among youths “to address community-level conflict and violence, and slowly rebuild social capital among community members and confidence in government institutions.”⁹³ The United States is funding several youth programs aimed at preventing violence: two to reduce violence (totaling \$21.1 million), one that focuses on reintegration of juvenile offenders (\$1.3 million), and one that provides therapy for probation offenders (\$847,000).⁹⁴ Other initiatives include bolstering institutional reforms regarding the rule of law, improving the criminal justice system, assisting crime victims, and protecting human rights.⁹⁵ Under the direction of Administrator Samantha Power, USAID programs are combined with projects on economic, environmental, and migration challenges representing a shared interest between the United States and México that impact security issues within México.⁹⁶ These programs align with López Obrador’s global plan to focus on root causes of crime, while de-emphasizing the fight against criminal cartels. Hence, the perspective of the López Obrador Administration is best characterized by México’s foreign minister Marcelo Ebrard, who publicly stated, “The Mérida Initiative is dead. It doesn’t work, okay?”⁹⁷

Whereas diplomacy may be the preferred pathway toward normalcy, law enforcement remains a viable part of controlling criminal cartels. The United States-México Bicentennial Framework on Security, Public Health, and Safe Communities is the latest security framework representing shared priorities, values, and responsibilities. Primary goals include protecting the safety of people on both sides of the border, preventing trafficking across borders (of weapons, drugs, and humans), and pursuing transnational criminal networks.⁹⁸ More importantly, López

93. U.S. AGENCY FOR INT’L DEV., *MEXICO: CRIME AND VIOLENCE PREVENTION* (2021).

94. *Id.*

95. U.S. AGENCY FOR INT’L DEV., *MEXICO: RULE OF LAW* (2021).

96. Press Release, Spokesperson Rebecca Chalif, Administrator Samantha Power’s Meeting With Mexican Ambassador to the United States Esteban Montezuma, (Oct. 4, 2021) (on file with author).

97. Ryan C. Berg, *The Bicentennial Framework for Security Cooperation: New Approach or Shuffling the Pillars of Merida?* CTR. FOR STRATEGIC & INT’L. STUD. (Oct. 29, 2021), <https://www.csis.org/analysis/bicentennial-framework-security-cooperation-new-approach-or-shuffling-pillars-m%C3%A9rida> [hereinafter *The Bicentennial Framework for Security Cooperation*].

98. *US and Mexico Agree on Bicentennial Framework*, EDITORIALS (Nov. 10, 2021) <https://editorials.voa.gov/a/us-and-mexico-agree-on-bicentennial-framework/6307955.html>. Other shared interests include migration, the environment, agriculture, technology, energy, trade and innovation.

Obrador's campaign pledge of "hugs, not bullets" cannot materialize absent interdiction programs if México expects to attract investors to fulfill his development plan to accomplish substantial economic growth by the end of his term in office.⁹⁹ The National Development Plan for 2019–2024 ("PND") outlines ambitious objectives regarding economics, regional projects, social policies, and eradication of public corruption, expecting to attract public and private investment.¹⁰⁰ While the PND has specificity on its objectives, there is a lack of insight on attracting foreign direct investment ("FDI") that stems from an ongoing failed response to criminal extortion, violence, and México's criminal cartels. México is no longer listed as one of the more desirable FDI destinations¹⁰¹ and multinational companies began shuttering operations prior to López Obrador's administration; some even contribute to security problems that may disrupt México's economic plans which depend on foreign investments.¹⁰²

What seems to have derailed the United States-México partnership is the arrest of General Cienfuegos, causing the Mexican Senate and Congress to pass a law that approved a proposal insisted on by President López Obrador to restrict U.S. agents in México and remove their diplomatic immunity.¹⁰³ The expected trial that may cause some Mexican officials to vocalize a less than joyous *grito* asking "*¿Qué tal?*" is that of

99. *Plan Nacional de Desarrollo 2019-2024*, DIARIO OFICIAL DE LA FEDERACIÓN (July 12, 2019), https://www.dof.gob.mx/nota_detalle.php?codigo=5565599&fecha=12/07/2019.

100. Mexico's 2019-2024 National Development Plan, 12 NAT'L L. REV. NO. 142, May 22, 2022, <https://www.natlawreview.com/article/mexico-s-2019-2024-national-development-plan>.

101. PAUL A. LAUDICINA & ERIK R. PETERSON, KEARNEY, The 2021 FDI Confidence Index, (2021). The Kearney FDI Confidence Index is an annual survey of global business executives that ranks the markets likely to attract the most investment in the next three years. Among countries in the Western Hemisphere, only Canada, United States and Brazil are listed among the twenty-five most attractive countries to FDI in the world.

102. See e.g., *How increased cartel violence and extortion operations are threatening the security of global companies – Mexico Analysis*, MAX, <https://www.max-security.com/security-blog/increased-cartel-violence-and-extortion-threatening-the-security-of-global-companies-mexico-analysis/> (last visited March 11, 2022, 6:04 PM); and Berg, *supra* note 94.

103. Coordinación de Comunicación Social, *Aprueba Senado reforma a Ley de Seguridad Nacional*, SENADO DE LA REPÚBLICA (Dec. 9, 2020), <http://comunicacion.senado.gob.mx/index.php/informacion/boletines/49943-aprueba-senado-reforma-a-ley-de-seguridad-nacional.html>; see also, Parker Asmann, *What Do Security Law Reforms Mean for US-Mexico Organized Crime Fight?*, INSIGHT CRIME (Dec. 18, 2020), <https://insightcrime.org/news/analysis/us-mexico-security-law-reform/>.

Genaro García Luna, a former secretary of public security awaiting trial for cocaine trafficking.¹⁰⁴ García Luna, whose arrest in Dallas, Texas in 2019 reportedly agitated México's political establishment, is also under indictment in México for illegal enrichment, and officials are likely to submit an extradition request following the conclusion of the former minister's trial in the United States.¹⁰⁵ His charges stem from taking millions of dollars in bribes from "el Chapo" Guzman's Sinaloa Cartel while in charge of México's Federal Police Force; these crimes are prosecutable within the extraterritorial jurisdiction of the United States.¹⁰⁶ However, all is not lost as César Duarte, the former governor of Chihuahua arrested in July 2020 in Miami, Florida for charges of conspiracy and embezzlement of government funds, is extraditable to México and detained "pending both a review of México's extradition request by the Secretary of State and Duarte's potential surrender to México."¹⁰⁷ Moreover, Mexican national Jose Gonzalez-Valencia was extradited from Brazil to the United States on November 10, 2021, on charges of conspiring to distribute cocaine into the United States dating back to an October 26, 2016, indictment and a December 2017 extradition request.¹⁰⁸ His arrest is part of the DEA's "Operation Stir the Pot," one of several investigations implemented to prosecute international drug traffickers.¹⁰⁹ Cooperative efforts of extradition requests is indicative of a traditional "Jarabe Tapatio,"¹¹⁰ in coordination of enforcement efforts relying on

104. *See* Superseding Indictment, United States v. Genaro Garcia Luna, No. 19-576 (E.D.N.Y. July 30, 2020).

105. Lizbeth Diaz, *Mexico Issues Warrant for Ex-security Chief Accused of Aiding Cartel*, REUTERS (Nov. 29, 2020), <https://www.reuters.com/article/us-mexico-crime-idUSKBN2890QU>.

106. *See* Superseding Indictment at 3-7, United States v. Genaro Garcia Luna, No. 19-576 (E.D.N.Y. July 30, 2020).

107. In the Matter of the Extradition of Cesar Horacio Duarte Jaquez, Order, Certification of Extraditability, and Order of Commitment, No. 20-mc-22829-UNA, 1 (S.D. Fla. Nov. 8, 2021).

108. *See* Indictment, United States v. Jose Gonzalez-Valencia, No. 16-cr-00192, (D.D.C. Oct. 26, 2016).

109. Press Release, U.S. Dep't. Justice, Off. Pub. Aff., Mexican National Extradited from Brazil to Face International Cocaine Trafficking Charge (Nov. 12, 2021) (on file with author).

110. A "Jarabe Tapatio" is a Mexican folk dance, often called the national dance of Mexico, and better known internationally as the Mexican hat dance. *See* Traveling in a Confused World, *Jarabe Tapato - Traditional Mexican Dance*, YOUTUBE (Dec. 8, 2016), <https://www.youtube.com/watch?v=0CRSfjT0sYY&t=0s>.

previous agreements between the current administrations.¹¹¹ Hence, diplomats on both sides of the border are trying to voice cooperation in response to cartels “todos en la reunión corearon su apoyo por la iniciativa” (everyone at the meeting chorused their support for the initiative). Interdiction continues to be a mainstay of Mexican security using military and law enforcement personnel to seize illicit drugs subsequent to the United States-México negotiations associated with the Bicentennial Framework.¹¹² While negotiations continue, however, Mexican criminal groups’ influence transcends beyond the border region, threatening the security needs in other Latin American countries by penetrating state institutions and contributing to corrupting the essence of governance.¹¹³ What happens in México does not necessarily stay in Mexican jurisdiction as drug-related violence has a spillover effect, with the potential to create narco-states in strategic locations as transient points in the routing of illicit drugs to the United States.¹¹⁴

111. See Extradition Treaty Between the United States of America and the United Mexican States, U.S.-Mex., May 4, 1978, 31 U.S.T. 5059, as amended by the Protocol to the Extradition Treaty Between the United States of America and the United Mexican States of May 4, 1978, U.S.-Mex., Nov. 13, 1997, S. TREATY, DOC. NO. 105-46 (1998).

112. See e.g., Parker Asmann, *What Does Massive Fentanyl Seizure Say About US-Mexico Security Relations?*, INSIGHT CRIME (Nov. 9, 2021), <https://insightcrime.org/news/massive-seizure-fentanyl-us-mexico-security/> (Remarking that [t]he Mexican Army and the National Guard continue to raid clandestine labs as in the case of a synthetic drug lab in the capital of northwest Sinaloa state and seized 118 kilograms of fentanyl, considered the largest in history, “el cual tendría un precio estimado en el mercado nacional de \$970’432,000.00 (NOVECIENTOS SETENTA MILLONES CUATROCIENTOS TREINTA Y DOS MIL PESOS 00/100 M.N.), con lo que se evita que este tipo de sustancias adictivas lleguen a la juventud mexicana y afecte su desarrollo integral.”); Press Release, Ejército Mexicano, Guardia Nacional y F.G.R. detienen a Armando N Colombia (a) El Inge, líder del Cártel del Pacífico en Sinaloa, Gobierno de Mexico (Nov. 4, 2021), <https://www.gob.mx/sedena/prensa/ejercito-mexicano-guardia-nacional-y-f-g-r-detienen-a-armando-n-a-el-inge-lider-del-cartel-del-pacifico-en-sinaloa>.

113. See e.g., Ryan C. Berg & Margarita R. Seminario, *Ecuador’s security crisis warrants US assistance*, THE HILL (Nov. 29, 2021), <https://www.msn.com/en-us/news/world/ecuador-s-security-crisis-warrants-us-assistance/ar-AARh8UK?ocid=msedgntp>.

114. See e.g., Gabrielle Debinski, *A vote for change in Honduras. Will they get it?*, SIGNAL (Dec. 1, 2021), <https://mail.google.com/mail/u/0/#inbox/FMfcgzGllCnkwlzGPZdCChwLwvVTSgSM>; Jon Lee Anderson, *Is the President of Honduras a Narco-Trafficker?*, THE NEW YORKER (Nov. 8, 2021), https://www.newyorker.com/magazine/2021/11/15/is-the-president-of-honduras-a-narcotrafficker?utm_source=Eurasia+Group+Signal&utm_campaign=ac6fd2265cEMAIL_CAMPAIGN_2021_12_01_12_05&utm_medium=email&utm_term=0_e605619869-ac6fd2265c-170138305. Both articles address Honduran President Juan Orlando

Truth and Reconciliation Commission

An institutional response that is not being considered is a truth and reconciliation commission that allows policymakers to provide transparency as a compromise, in part, for those who are or have been complicit in the acts of México's modern-day bandoleros. Truth and reconciliation commissions are designed to provide transparency in circumstances involving human rights violations, internal armed conflict, and other crimes that are linked to state action. The case of South Africa represents an established pattern of forced disappearances, extrajudicial executions, and other human rights violations committed by state officials and others. In a report from the Truth and Reconciliation Commission of South Africa (Commission or "TRC"), the Amnesty Committee summarized findings of substantive human rights violations between 1960 and 1990; these implicated institutions like the government, businesses, and labor organizations for being complicit in the occurrence of human rights violations.¹¹⁵ Witnesses appeared before the Commission to provide statements of human rights violations, and perpetrators (that testified with the knowledge they would receive amnesty from both civil and criminal prosecution) confessed truthfully and completely.¹¹⁶ The end result was the achievement of a sense of national unity as part of political negotiations that eventually granted amnesty in respect of acts, omissions, and offenses in order to advance reconciliation and reconstruction in accord with the legal basis for the Commission's investigation.¹¹⁷ Achieving national unity, however, may be at the expense of individual

Hernández's connection with Mexico's Sinaloa drug cartel. His brother Former Congressman Juan Antonio "Tony" Hernández was found guilty in October 2019 of smuggling tons of cocaine into the US and is serving a life sentence. Press Release, U.S. Att'y's Off. S.D.N.Y., U.S. Dept. of Justice, Former Honduran Congressman Tony Hernández Sentenced To Life In Prison And Ordered To Forfeit \$138.5 Million For Distributing 185 Tons Of Cocaine And Related Firearms And False Statements Offenses (Mar. 30, 2021), <https://www.justice.gov/usao-sdny/pr/former-honduran-congressman-tony-hernandez-sentenced-life-prison-and-ordered-forfeit>.

115. See, e.g., TRUTH AND RECONCILIATION COMMISSION, TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA REPORT, Vol. 6, § 2, Ch. 4-5 (2003).

116. See generally Emily H. McCarthy, *South Africa's Amnesty Process: A Viable Route Toward Truth and Reconciliation*, 3 MICH. J. RACE & L. 183 (1997) (discussing the legal aspects of establishing amnesty, application, and eligibility for amnesty).

117. See, e.g., ALEX BORAINÉ, A COUNTRY UNMASKED: INSIDE SOUTH AFRICA'S TRUTH AND RECONCILIATION COMMISSION (2000) (describing work of the Commission).

justice that is denied judicial review out of deference to matters of foreign affairs to accomplish a final resolution.¹¹⁸

In Latin America, truth and reconciliation commissions have contributed to the process of transitioning from a dictatorial means of governance to a democratic one after a period of widescale human rights violations.¹¹⁹ For example, Guatemala experienced years of civil war that led to human rights abuses; these years were the focus of the United Nations-sponsored Commission for Historical Clarification (Comisión para el Esclarecimiento Histórico, or “CEH”)¹²⁰ and the Inter-Diocese Project for the Recovery of Historical Memory (Proyecto Interdiocesano de Recuperación de la Memoria Histórica, or “REMHI”), which was sponsored by the Roman Catholic Archdiocese of Guatemala.¹²¹ The outcome was more about exhumation of and information about the missing, as well as compensation of the families of victims, with impunity for state actors.¹²² El Salvador’s Truth Commission (Comisión de la Verdad Para El Salvador, “CVES”) was mandated after years of violence associated with its civil war between the government of El Salvador and the Frente Farabundo Martí para la Liberación Nacional (“FMLN”). A brokered agreement by the United Nations with the FMLN and the El

118. See e.g., *In re S. Afr. Apartheid Litig.* (Apartheid Litig. I), 346 F. Supp. 2d 538, 543 (S.D.N.Y. 2004), *aff’d in part, vacated in part* sub nom. (dismissing plaintiffs’ claims under the Alien Tort Claims Act (ATCA), 28 U.S.C.S. § 1350, and Torture Victim Protection Act of 1991 (TVPA), 28 U.S.C. § 1350, *Khulumani v. Barclay Nat’l Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007) (plurality opinion) (“[T]he panel join[ed] to affirm the district court’s dismissal of . . . TVPA claims,” but vacated the district court’s dismissal of the plaintiffs’ ATCA claims), *aff’d* sub nom. for lack of quorum, *Am. Isuzu Motors, Inc. v. Ntsebeza*, 553 U.S. 1028 (2008) (“[S]ince a majority of the qualified Justices are of the opinion that the case cannot be heard and determined at the next Term of the Court, the judgment is affirmed under 28 U.S.C. § 2109, which provides that under these circumstances the Court shall enter its order affirming the judgment of the court from which the case was brought for review with the same effect as upon affirmance by an equally divided Court.”); see also, *Punishing Apartheid’s Crimes: If it Happened it wasn’t me*, *ECONOMIST*, at 41 (Aug. 4, 2007) (noting the attempt to litigate claims after the conclusion of the TRC proceedings involving abuses by public officials).

119. Amy Ross, *Truth and consequences in Guatemala*, 60 *GEOJOURNAL* 73, 73-74 (2004).

120. *Commission for Historical Clarification*, UNITED NATIONS, (1999).

121. Guatemala: The Commission for the Recovery of National Memories; treatment of those who may Have spoken with this commission or other similar commissions regarding war -time abuses (1996-1999), *summarized in* THOMAS QUIGLEY, *GUATEMALA NEVER AGAIN: RECOVERY OF HISTORICAL MEMORY PROJECT, THE OFFICIAL REPORT OF THE HUMAN RIGHTS OFFICE, ARCHDIOCESE OF GUATEMALA* (2020).

122. Ross, *supra* note 115, at 74-77.

Salvadoran government led to the investigation of the nature and effect of the violence between 1980 and 1991, attributing most of the violence to state actors.¹²³ The CVES report indicated human rights violations, as well as external influences which acted to arm the parties during the twelve years of civil conflict (in which more than 75,000 Salvadorans were killed).¹²⁴ Afterwards, the legislature of El Salvador enacted the General Amnesty Law for the Consolidation of Peace (Decree No. 486) of March 20, 1993, applicable to crimes related to the conflict.¹²⁵ According to the Inter-American Commission on Human Rights (“IACHR”), the law is a violation of international law because it forecloses further investigation in unpunished crimes committed by agents of the state between 1980 and 1992, including those examined in the CEH report; according to the IACHR, the law also ignores the “right to know the truth” and the right to compensation for victims and their relatives.¹²⁶ Peru’s Truth and Reconciliation Commission (the Comisión de la Verdad y Reconciliación del Perú, or “CVR”), established in 2001, investigated and reported on human rights abuses committed in Peru by state forces and Communist Party Shining Path (Sendero Luminoso) insurgents between 1980 and 2000.¹²⁷ The CVR recorded that, of the total number of people who died during the conflict period (between 61,007 and 77,552 victims), 54% of deaths were attributed to the Shining Path.¹²⁸ Amnesty International’s assessment of the CVR report concludes the Commission’s recommendations were worthy goals to pursue in light of the extensive internal armed conflict spanning more than a decade.¹²⁹ The wide-ranging

123. U.N. Security Council, Annex, From Madness to Hope: The 12-Year War in El Salvador: Report of the Commission on the Truth for El Salvador, U.N. Doc. S/25500 (Apr. 1, 1993), <https://archive.org/details/S25500EN/page/n9/mode/2up>.

124. *Id.*

125. General Amnesty Law for the Consolidation of Peace, Legislative Decree 486, March 20, 1993, available at <https://www.refworld.org/docid/3e50fd334.html>.

126. Lucio Parada Cea et al. v., El Salvador, Case 10,480, Inter-Am. Comm’n H.R., Report No. 1/99, OEA/Ser.L/V/II.102, doc. 6 rev. ¶ 148-58 (1999).

127. AMNESTY INT’L, AMNESTY INT’L REP., PERU: THE TRUTH AND RECONCILIATION COMMISSION – A FIRST STEP TOWARDS A COUNTRY WITHOUT INJUSTICE (2004).

128. *Id.* at 6.

129. *Id.* at 30-38; *see also* AMNESTY INT’L, AMNESTY INT’L REP., PERU: LETTER TO THE PRESIDENT IN SUPPORT OF THE WORK OF THE TRUTH AND RECONCILIATION COMMISSION (2003) [hereinafter PERU: LETTER TO THE PRESIDENT] (expressing support for the Commission in furthering a transition to democracy). *But see Peru Truth Commission: Recommendations for Reconciliation Not Being Implemented*, ANDEAN AIR MAIL & PERUVIAN TIMES (Nov. 29, 2021), <https://www.peruviantimes.com/27/peru-truth->

reparations in the CVR report are a means to make “a clear break between the past in which abuses and violations were committed with total impunity and a future with respect for human rights.”¹³⁰

Colombia represents a different challenge for truth and reconciliation. Since the 1960s, the government and the rebel group known as the Revolutionary Armed Forces of Columbia (“FARC”) have been negotiating an end to the ongoing violence there.¹³¹ One of the goals of the negotiation is to account for the millions of victims that have been displaced within Columbia, assassinated, disappeared as a result of force, and suffered other human rights violations.¹³² At issue are things such as land redistribution, integration of FARC into the political arena, and the prospect of ending the powerful cocaine cartels that have been contentious issues for the government and rebel forces.¹³³ Subsequent to the initial peace agreement, Colombian officials enacted the Victims and Land Restitution Law (Law 1448),¹³⁴ which established a reparations program,

commission-recommendations-for-reconciliation-not-being-implemented/20062/.

130. PERU: LETTER TO THE PRESIDENT, *supra* note 124, at 3. It should be noted that former President Alberto Fujimori was convicted for crimes against humanity and sentenced to twenty-five years in prison, and subsequently pardoned despite protests; *See Barrios Altos and La Cantuta v. Peru, Monitoring Compliance with Judgment, Order of the Court*, ¶ 173, 179 (Inter-Am. Ct. H.R. May 30, 2018) (questioning the use of pardons) (decision available only in Spanish); THE AMERICAN SOC’Y OF INTERNATIONAL LAW, *Inter-American Court of Human Rights—presidential pardon—anti-impunity—conventionality control*, 113:3 AMERICAN J. OF INT’L L., 568 (2019) (Peru’s Supreme Court later held Fujimori’s pardon lacked legal effect. He is serving a sentence with a scheduled release in February 2032. Supreme Court decision reported in International Decisions 568, 113 AJIL 3, n.2 (2019)).

131. Chris Kraul, *The Battles began in 1964: Here’s a look at Colombia’s War with the FARC Rebels*, L.A. TIMES, Aug. 30, 2016, <https://www.latimes.com/world/mexico-americas/la-fg-colombia-farc-explainer-snap-story.html>. The author provides an overview of FARC and negotiations to seek a peaceful end to Colombia’s internal conflict.

132. *See e.g., Colombia: Events of 2019*, World Report 2020, HUMAN RIGHTS WATCH, 143-55, May 2020, available at <https://www.hrw.org/world-report/2020/country-chapters/colombia>. https://www.hrw.org/sites/default/files/world_report_download/hrw_world_report_2020_0.pdf.

133. Nicola Bilotta, *The FARC, Land Reform, and the Future of Colombia’s Security*, GLOBAL RISK INSIGHTS (Oct. 1, 2017), <https://globalriskinsights.com/2017/10/land-farc-future-colombia/>; Michael Hart, *Colombia on the Verge of Historic FARC Peace Deal*, GEOPOLITICAL MONITOR (Mar. 20, 2016), <https://www.geopoliticalmonitor.com/colombia-on-the-verge-of-historic-farc-peace-deal/>.

134. Victims and Land Restitution Law (Ley de Víctimas y Restitución de Tierras, Law 1448), available at <https://en.unesco.org/creativity/sites/creativity/files/law1448v18jun20.pdf>.

truth-seeking mechanisms, and land restitution procedures for victims of the armed conflict, including new institutions to implement these programs, namely the Victims' Unit, the Land Restitution Unit, and the National Center for Historical Memory.¹³⁵ According to the National Center for Historical Memory, the violence contributed to: (1) 220,000 people killed; (2) nearly 6 million people displaced; (3) over 60,600 cases of forced disappearances, sexual crimes and gender-based violence; and (4) the forced recruitment of almost 6,500 children and youth.¹³⁶ The 2016 peace agreement endeavored to end the longest civil conflict in the Western Hemisphere. It included a Comprehensive System of Truth, Justice, Reparation and Non-Recurrence, which was surprisingly rejected by the public (50.2 percent of Colombians against the peace deal and 49.8 percent voting in favor), thus requiring further deliberation between the government and FARC.¹³⁷ After the rejection of the referendum, Colombia's Congress approved a peace accord to disarm FARC,¹³⁸ but left

135. See AMNESTY INT'L, AMNESTY INT'L REP., COLOMBIA: THE VICTIMS AND LAND RESTITUTION LAW (2012). Examples of programs are noted in *supra* note 133: art. 21 recognizes the need for collective reparations; art. 31 notes administrative and judicial procedures for reparation and land restitution. Colombia also instituted truth-seeking mechanisms, Victims' Unit, the Land Restitution Unit, and the National Center for Historical Memory. See Lisa Haugaard and Virginia M. Bouvier, *Colombia's Disappeared: Assessing the Search for Truth*, United States Institute of Peace, June 10, 2016, <https://www.usip.org/blog/2016/06/colombias-disappeared-assessing-search-truth>; Vanessa Buschschluter, *Colombia's Victims of Conflict 'a priority' for the State*, BBC NEWS, (April 9, 2014), <https://www.bbc.com/news/world-latin-america-26934313> (description of the Victims' Unit, the Land Restitution Unit progress to compensate victims, three years after passage of the Victims and Land Restitution Law 1448, *supra* note 133; Frances Thomson, *Land Restitution in Colombia: Why so few Applications?*, FMR 56, Latin America and the Caribbean, 35, Oct. 2017, <https://www.fmreview.org/sites/fmr/files/FMRdownloads/en/latinamerica-caribbean/thomson.pdf> (an assessment of Colombia's Victims and Land Restitution Law (Law 1448 of 2011; and National Center for Historical Memory, Report, <http://www.centrodememoriahistorica.gov.co/micrositios/informeGeneral/>).

136. Centro Nacional de Memoria Histórica, *Estadísticas del Conflicto Armado en Colombia*, <http://www.centrodememoriahistorica.gov.co/micrositios/informeGeneral/estadisticas.html>. (Showing estimates of victims by categories throughout Colombia from 1985 through 2012).

137. Julia Symmes Cobb & Nicholas Casey, *Colombia Peace Deal Is Defeated, Leaving a Nation in Shock*, N.Y. TIMES (Oct. 2, 2016), <https://www.nytimes.com/2016/10/03/world/colombia-peace-deal-defeat.html>.

138. Marco Sassòlo, *How Does Law Protect in War?, Final Agreement to end the Armed Conflict and Build a Stable and Lasting Peace*, (Nov. 24, 2016), <https://casebook.icrc.org/case-study/colombia-peace-agreement>.

a void allowing other criminal organizations to begin cultivating cocaine fields, and some rebels elected to work with criminal organizations.¹³⁹ Presently, the peace agreement is an ongoing transition as violence continues among some communities, “in particular in areas historically characterized by limited [s]tate presence, illicit economies and high levels of poverty.”¹⁴⁰ Moreover, former FARC members have been indicted for subsequent kidnapping, hostage-taking, and crimes against humanity and war crimes,¹⁴¹ while members of the public security forces have been indicted for extrajudicial killings.¹⁴² In a report submitted to the U.N. Security Council, work performed by Carlos Ruiz Massieu, the Secretary-General’s Special Representative and Head of the United Nations Verification Mission in Colombia, explained efforts to resolve some of the longstanding issues.¹⁴³ This was a concern for members of the Security Council, which noted the high number of persons displaced by the actions of illegal armed groups, the challenges facing the illicit-crop-substitution program, and an increased cocaine production that has unavoidably led to rising levels of violence and corruption.¹⁴⁴ Although the transition has encountered problems, the fact that FARC has demobilized its troops is a remarkable development for Colombia and external stakeholders as rebels are reincorporated into civilian life, which includes being elected as members of Colombia’s legislature.¹⁴⁵

139. U.N. Human Rights Council, *Annual Report of the United Nations High Commissioner for Human Rights on the situation of human rights in Colombia*, ¶ 6, 11, U.N. Doc. A/HRC/37/3/Add.3 (Mar. 21, 2018).

140. U.N. Secretary-General, *United Nations Verification Mission in Colombia*, ¶ 15, U.N. Doc. S/2021/603 (June 25, 2021).

141. *Id.* ¶¶ 7-10.

142. *Id.* ¶¶ 67-69 (noting former President of Colombia, Juan Manuel Santos, appeared voluntarily before the Truth Commission accounting for extrajudicial killings during his term as Minister of Defence (2006–2009), asking victims for forgiveness).

143. S.C. Res. 745, U.N. Doc. S/RES/745 (Aug. 30, 2017), available at https://colombia.unmissions.org/sites/default/files/s_2017_745_english.pdf. The resolution documents the work performed by the Secretary-General’s Special Representative to consolidate the peace process to end the conflict.

144. Press Release, Security Council, *Nearly Five Years into Colombia’s Historic Peace Agreement, Unprecedented Strides in Justice Marked alongside Lingering Violence, Experts Tell Security Council*, U.N. Press Release SC/14579 (July 13, 2021).

145. Gabriella Levy, Juan Tellez & Mateo Villamizar-Chaparro, *Five Years after Colombia’s peace deal, the FARC is no longer on U.S. terrorist group lists: But Colombia’s peace is far from secure, our research shows*, WASH. POST (Dec. 2, 2021), <https://www.washingtonpost.com/politics/2021/12/02/five-years-after-colombias-peace-deal-farc-is-no-longer-us-terror-group-lists/>. See also, Press Release, Antony J. Blinken,

These and other examples may serve as models if the present Mexican government is interested in working toward an end to the violence that is entering its third decade under López Obrador's leadership. Recall the Party of National Action's ("PAN") President-elect Vicente Fox's announcement after winning his election; Fox called for establishing a truth commission assigned to investigate dozens of unresolved cases of human rights violations throughout México during the seventy-one year reign of the PRI.¹⁴⁶ Neither PAN nor PRI made progress toward implementing a truth and reconciliation commission, but the idea may be of interest to those who want to address serious human rights violations with respect to: (1) extrajudicial killings, (2) disappearances, (3) torture, (4) police corruption and alleged involvement in narcotics-related abuses, (5) poor prison conditions, (6) arbitrary arrest and detention, (7) trafficking in person, and (8) (and foremost) criminal cartels. Cooperation among México's cartels is the primary challenge for a truth commission that may require immunity, permit cartel members to retain their earnings, and incentivize Mexican officials to finally legalize marijuana, thereby allowing criminal organizations to retain some aspects of their illicit businesses. Most recently, López Obrador has signed an executive decree creating a truth commission to investigate the kidnapping of forty-three students in an apparent massacre which remains an unsolved crime. The disappearances occurred in September 2014 and were linked to police investigations of passengers on buses in Iguala, which occurred during the Peña Nieto Administration.¹⁴⁷ Instituting a truth commission to investigate

Sec'y of State, U.S. Dept. of State, *Revocation of the Terrorist Designations of the Revolutionary Armed Forces of Colombia (FARC) and Additional Terrorist Designations* (Nov. 30, 2021) (on file with U.S. Dept. of State) (noting that Secretary of State Antony J. Blinken said "the FARC formally dissolved and disarmed. . . [and] no longer exists as a unified organization that engages in terrorism or terrorist activity or has the capability or intent to do so." The revocation of FARC as a terrorist organization does not negate potential charges under United States law for narco-trafficking and terrorist activity against those who subsequently abandoned the 2016 Peace Accord in August 2019. FARC was removed from the terrorist group list under former President Barack Obama, and afterwards President Donald Trump returned it to the Foreign Terrorist Organization list in recognition of its terrorist activity).

146. Vicente Fox, President of Mexico, Address after Winning Presidential Election, *Mexico Considers Truth Commission*, Human and Constitutional Rights (July 20, 2001), <http://www.hrcr.org/hottopics/mexico.html> (last updated July 18, 2003).

147. DECRETO, por el que se instruye establecer condiciones materiales, jurídicas y humanas efectivas, para fortalecer los derechos humanos de los familiares de las víctimas del caso Ayotzinapa a la verdad y al acceso a justicia (Apr. 12, 2018), https://www.dof.gob.mx/nota_detalle.php?codigo=5545622&fecha=04/12/2018.

and hold public hearings over crimes committed by public officials and criminal cartels, however, is not in the foreseeable future as López Obrador searches for other solutions to the escalating problem of criminal violence amid criticism of his administration.¹⁴⁸

Inter-American Court of Criminal Justice

An alternative to the quagmire that criminal cartels present to Mexican officials is establishing an independent, regional tribunal with the power to preside over a range of transnational crimes. Establishing a regional court in the hemisphere is not a new concept: the idea of creating a tribunal dates back to the early 1900s,¹⁴⁹ and more recently a sub-regional tribunal has been created, the Court of Justice of the Andean Community.¹⁵⁰ Presently, there are no discussions underway within the Organization of American States (“OAS”) or other sub-regional organizations proposing a permanent regional tribunal to combat transnational crimes in the Western Hemisphere. OAS members, however, may want to consider a dialogue to explore the possibility of empowering a court with broad jurisdiction over transnational crimes. Forming an Inter-American Court of Criminal Justice (“Inter-ACrtCJ”) is a viable response to combat drug trafficking in

148. Vanda Felbab-Brown, *Mexico's New President Needs a Better Solution to Criminal Violence: Without Smarter Policing, Amnesty and Legalization Won't Make Mexico Safe*, FOREIGN AFFAIRS (Sept. 27, 2018), <https://www.foreignaffairs.com/articles/mexico/2018-09-27/mexicos-new-president-needs-better-solution-criminal-violence> (noting that López Obrador has considered “granting conditional amnesty to some accused criminals, and his administration will consider legalizing marijuana and licensing illegal poppy cultivation for the production of medical opiates,” but is critical of these options and focuses on targeting the “middle operational layer of criminal groups” and tactical and strategic intelligence among Mexico’s law enforcement officials. The article provides no plans of implementation other than interdiction and strengthening intelligence, coupled with anti-corruption programs aimed at local police officials).

149. See e.g., Convention for the Establishment of a Central American Court of Justice (1907), art. II, (Sept. 26, 2010), <https://english.dipublico.org/182/convention-for-the-establishment-of-a-central-american-court-of-justice-1907/> (stating that the tribunal is authorized to adjudicate disputes involving “violation[s] of treaties or conventions, and other cases of an international character.”). The Central American Court of Justice was reconfigured under the Central American Integration System (Sistema de Integración Centroamericana or “SICA”). See Convention on the Statute of the Central American Court of Justice, art. 22, Dec. 10, 1992, 1821 U.N.T.S. 291.

150. Andean Group: Treaty Creating the Court of Justice of the Cartagena Agreement, May 28, 1979, 18 I.L.M. 1203. See also Agreement Establishing the Caribbean Court of Justice, arts. 3, 12, 14, 25(4), Feb. 14, 2001, 2255 U.N.T.S. 319.

all its forms, and other transnational crimes.¹⁵¹ Existing commitments require stakeholders to criminalize specific behaviors that are recognized as both transnational and domestic crimes.¹⁵² Furthermore, criticism that beleaguers some tribunals may not be as formidable to overcome given that enforcement strategies against transnational crimes are a fundamental part of OAS policy regarding hemisphere security.¹⁵³ If OAS members consider establishing an Inter-ACrtCJ, the following sections outline the more pertinent aspects to be addressed by a committee or OAS Working Groups.¹⁵⁴

Jurisdictional and Substantive Issues

Jurisdiction of an Inter-ACrtCJ should be limited to the most serious transnational crimes defined as “offences whose inception, prevention, and/or direct or indirect effects involve more than one country,”¹⁵⁵ taking special consideration of an offender’s involvement in an organized criminal group.¹⁵⁶ The following, with one exception, are broad definitions/categories of crimes acknowledged as obligatory for OAS

151. See, e.g., Fernando A. Iglesias, Comments, *A Regional Criminal Court against Transnational Organized Crime*, FEDERALIST DEBATE 18, 19 (, Mar. 2014). As Vice President of Global Democracy, an independent organization that promotes democratic institutions, Iglesias outlines the branches of a proposed regional court, advocating ratification of a treaty to establish a regional court empowered to combat criminal organizations involved in human trafficking and drug trafficking.

152. Cf. Erin Creegan, *Permanent Hybrid Court for Terrorism*, 26 AM. U. INT’L L. REV. 237, 265-66 (2011).

153. *Id.* at 262-65 (discussing obstacles confronting other tribunals that impede establishing a tribunal that may be intrudes on a nation-state’s sovereignty).

154. Cf. *id.* The discussion reflects some of the arguments and suggestions presented by Creegan.

155. Cf. Ninth U.N. Congress on the Prevention of Crime and the Treatment of Offenders, U.N. Doc. A/CONF.169/5, ¶¶ 33-35, 41, 45, 47, 49, 67 (Mar. 30, 1995) (outlining the various threats from transnational organized crimes that undermine public administration at all levels). See United Nations Convention Against Transnational Organized Crime art. 2(b), Nov. 15, 2000, T.I.A.S. 13127, 2225 U.N.T.S. 209 [hereinafter UNCTOC] (defining serious crime as “conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty”).

156. Special consideration can be evidence of the offender’s influence, control, or domain of a TOC group. See UNCTOC, *supra* note 146, art. 2(a). The article defines organized criminal group as “a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit.”

Members¹⁵⁷ to take domestic enforcement action against serious transnational crimes if a nexus exists involving more than one country:

Illicit Drug Trafficking:¹⁵⁸

(g) (i) The production, manufacture, extraction, preparation, offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation or exportation of any narcotic drug or any psychotropic substance contrary to the provisions of the 1961 Convention, the 1961 Convention as amended or the 1971 Convention;

(ii) The cultivation of opium poppy, coca bush or cannabis plant for the purpose of the production of narcotic drugs contrary to the provisions of the 1961 Convention and the 1961 Convention as amended;

(iii) The possession or purchase of any narcotic drug or psychotropic substance for the purpose of any of the activities enumerated in (i) above;

(iv) The manufacture, transport or distribution of equipment, materials or of substances listed in [tables attached to the source], knowing that they are to be used in or for the illicit cultivation, production or manufacture of narcotic drugs or psychotropic substances;

(v) The organization, management or financing of any of the offences enumerated in (i), (ii), (iii) or (iv) above.¹⁵⁹

157. Reference to international, regional agreements and others in this section form the consensus regarding legal commitments. *Cf.* Org. of Am. States G.A. Res. 2621, Hemispheric Plan of Action on Drugs 2011-2015 (June 7, 2011) [hereinafter Hemispheric Plan of Action on Drugs 2011-2015].

158. "Illicit [drug trafficking]" means cultivation or trafficking in drugs contrary to the provisions, including terms and substances, under control. United Nations Single Convention on Narcotic Drugs of 1961 art. 1(l), Mar. 30, 1961, 520 U.N.T.S. 151 (amended by the 1972 Protocol) [hereinafter Single Convention on Narcotic Drugs of 1961].

159. United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances art. 3(1)(a), Dec. 20, 1988, 1582 U.N.T.S. 95 (entered into force Nov. 11, 1990) [hereinafter U.N. Convention Against Illicit Traffic in Narcotic Drugs] (extending Inter-Am. Ct. H.R. jurisdiction over crimes committed with intent, knowledge, or purpose required as an element of an offense pertaining to illicit drug trafficking, criminalizing production, manufacture, extraction, preparation, offering, offering for sale, distribution, sale, delivery manufacturing, possession, and distribution, for the purpose of the production of narcotic drugs).

Operation of Submersible Vessel or Semi-submersible Vessel Without Nationality:

OFFENSE.—Whoever knowingly operates, or attempts or conspires to operate, by any means, or embarks in any submersible vessel or semi-submersible vessel that is without nationality and that is navigating or has navigated into, through, or from waters beyond the outer limit of the territorial sea of a single country or a lateral limit of that country’s territorial sea with an adjacent country, with the intent to evade detection¹⁶⁰

Illicit Manufacturing of Weapons:

“Illicit manufacturing”: the manufacture or assembly of firearms, ammunition, explosives, and other related materials:
 from components or parts illicitly trafficked; or
 without a license from a competent governmental authority of the State Party where the manufacture or assembly takes place; or
 without marking the firearms that require marking at the time

160. Operation of Submersible Vessel or Semi-submersible Vessel without Nationality Act, 18 U.S.C. § 2285(a) (2017). Operation of a submersible vessel is the exception to obligatory domestic enforcement action against serious transnational crimes. Moreover, the Inter-American Drug Abuse Control Commission approved model legislation to encourage Members to enact legislation to counter the threat posed by submersible vessels and semi-submersible vessels without nationality and consider applying extraterritorial jurisdiction that includes an attempt or conspiracy to commit such an offenses. See Org. of Am. States, Inter-Am. Drug Abuse Control Comm’n, *Model Legislation on Self-Propelled Submersible and Semi-Submersible Vessels*, OEA/Ser.L/XIV.2.49, CICAD/doc.1891/11 corr. 2 (June 30, 2011) (advocating promulgation of domestic laws regarding submersible, semi-submersible vessels that is reflective of 18 U.S.C. § 2285 (2017)). Colombia enacted a statute prohibiting the construction, possession, or crewing a semisubmersible, punishable with penalties ranging from six to twelve years in prison, in response to maritime security threats as part of other preventive measures to combat terrorism, drug trafficking, piracy, and other threats. Ley No. 1311, July 9, 2009, Por medio de la cual se Adicionan los Artículos 377A y 377B a la Ley 599 de 2000 (Código Penal), se crea el Tipo Penal de uso, Construcción, Comercialización, Tenencia y Transporte de Semisumergibles o Sumergibles (Colom.), <https://docs.colombia.justia.com/nacionales/leyes/ley-1311-de-2009.pdf>. The statute is a response to an increase in maritime drug smuggling through Colombian ports. See Julieta Pelcastre, *Colombian Authorities Shake up the Drug Trade: More than a Metric Ton of Cocaine was Confiscated at one of the Country’s Main Exit Points*, DIALOGO DIGITAL MIL. MAG. (June 19, 2017), <https://dialogo-americas.com/articles/colombian-authorities-shake-up-the-drug-trade/#.Yi0-hnrMJPY>.

of manufacturing.¹⁶¹

Illicit Trafficking of Weapons:

“Illicit trafficking”: the import, export, acquisition, sale, delivery, movement, or transfer of firearms, ammunition, explosives, and other related materials from or across the territory of one State Party to that of another State Party, if any one of the States Parties concerned does not authorize it.¹⁶²

Human Trafficking:

“Trafficking in persons” shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.¹⁶³

Human Smuggling:

The “procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person

161. Inter-American Convention Against Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives and Other Related Materials, Belize-Mex., art. 1(1), opened for signature Nov. 14, 1997, 2029 U.N.T.S. 55 (entered into force July 1, 1998) [hereinafter CIFTA] (controlling trade in firearms, ammunition, explosives and related materials, requiring criminalization of illicit manufacturing and trafficking, and encouraging cooperation between state parties).

162. *Id.* at art. 1(2). CIFTA defines firearms as (a) “any barreled weapon which will or is designed to or may be readily converted to expel a bullet or projectile by the action of an explosive, except antique firearms manufactured before the 20th Century or their replicas; or (b) any other weapon or destructive device such as any explosive, incendiary or gas bomb, grenade, rocket, rocket launcher, missile, missile system, or mine.” *Id.* at art. 1(3).

163. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime art. 3(a), Dec. 12-15, 2000, 2237 U.N.T.S. 319 (entered into force Dec. 25, 2003) [hereinafter Trafficking Protocol].

into a State Party of which the person is not a national or a permanent resident,”¹⁶⁴ involving “the facilitation, transportation, attempted transportation or illegal entry of a person(s) across an international border, in violation of one or more countries laws, either clandestinely or through deception, such as the use of fraudulent documents.”¹⁶⁵

Money Laundering:

(b) (i) The conversion or transfer of property, knowing that such property is derived from any [drug trafficking] offense or offenses . . . or from an act of participation in such offense or offenses, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such an offense or offenses to evade the legal consequences of his actions;

(ii) The concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property, knowing that such property is derived from an offense or offenses or from an act of participation in such an offense or offenses¹⁶⁶

Terrorism:

(d) Any action, in addition to actions already specified by the existing conventions on aspects of terrorism, the Geneva Conventions and Security Council resolution 1566 (2004), that is intended to cause death or serious bodily harm to civilians or non-combatants, when the purpose of such an act, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act.¹⁶⁷

164. Protocol against the Smuggling of Migrants by Land, Sea, and Air, Supplementing the United Nations Convention against Transnational Organized Crime, art. 3, Dec. 12-15, 2000, 2241 U.N.T.S. 507 (entered into force Jan. 28, 2004).

165. THE HUM. SMUGGLING & TRAFFICKING CTR., FACT SHEET: DISTINCTIONS BETWEEN HUMAN SMUGGLING AND HUMAN TRAFFICKING (2006).

166. U.N. Convention Against Illicit Traffic in Narcotic Drugs, *supra* note 150, at art. 3.

167. U.N. HIGH-LEVEL PANEL ON THREATS, CHALLENGES AND CHANGE, A MORE SECURE WORLD: OUR SHARED RESPONSIBILITY: REPORT OF THE HIGH-LEVEL PANEL ON THREATS, CHALLENGES AND CHANGE, at 52, U.N. Sales No. E.05.I.5 (2004); *see also* Inter-American

These categories, some lacking specificity that is necessary in domestic penal codes, serve as a starting point for discussions to establish jurisdiction of an Inter-ACrtCJ. Limiting jurisdiction to serious transnational crimes with an emphasis on organized criminal enterprises should alleviate fears that peripheral offenders will be the target of a dragnet by an Inter-ACrtCJ investigative body. Concerns regarding empowering prosecutors “so [that they] cometh as a thief in the night”¹⁶⁸ arresting common criminals, with States acting as a centurion protecting their nationals, have not materialized into a substantial problem for other tribunals with jurisdiction over international crimes.

Enforcement, Power, and Capacity of an Inter-ACrtCJ

Effectiveness of an Inter-ACrtCJ is dependent on the willingness of OAS members to recognize the legitimacy of the court’s powers, made evident by financial support including additional funding beyond the normal program-budget.¹⁶⁹ Cooperation, however, extends beyond acknowledgment of the powers of the Inter-ACrtCJ or budget concerns. The independence of a prosecutor, a part of transparency in government activities essential to respect for the rule of law,¹⁷⁰ requires the ability to

Convention Against Terrorism, art. 2, June 3, 2002, S. Treaty Doc. 107-18 (stating that parties agree to adopt the necessary measures and to strengthen cooperation among them, in accordance with the terms of this Convention accept pre-existing international agreements to define acts of terrorism).

168. See *1 Thessalonians* 5:2-4 (King James) (“For yourselves know perfectly that the day of the Lord so cometh as a thief in the night. For when they shall say, Peace and safety; then sudden destruction cometh upon them, as travail upon a woman with child; and they shall not escape. But ye, brethren, are not in darkness, that that day should overtake you as a thief.”); see also *Matthew* 24:42-44 (King James) (“Watch therefore: for ye know not what hour your Lord doth come. But know this, that if the goodman of the house had known in what watch the thief would come, he would have watched, and would not have suffered his house to be broken up. Therefore be ye also ready: for in such an hour as ye think not the Son of man cometh.”).

169. Org. of Am. States, Charter of the Organization of American states arts. 54(e), 55. The General Assembly approves the program-budget of the Organization and determines the quotas of the Member States to contribute to the maintenance of the Organization, taking into account the ability to pay of the respective countries and their determination to contribute in an equitable manner. Decisions on budgetary matters require the approval of two thirds of the Member States. The OAS has a regular fund, which supports the General Secretariat, and a special fund (voluntary country contributions), for specific programs and initiatives.

170. Org. of Am. States, Inter-American Democratic Charter art. 4, Sept. 11, 2001.

investigate and/or submit charges *proprio motu* to an Inter-ACrtCJ. Prosecutors could honor requests of individual States, or the General Assembly, in a similar manner to how investigations are initiated within the jurisdiction of the International Criminal Court (“ICC”), absent deferral of investigations or prosecution of offenders.¹⁷¹ Otherwise, prosecutors may be reluctant to pursue investigations if members try “gaming” the inter-American system in a myriad of circumstances that would be detrimental to the enforcement of the OAS’s democratic norms.¹⁷²

Advocates for an Inter-ACrtCJ should expect the court to encounter problems of capacity, absent a centralized law enforcement authority that can compel States to collaborate with investigations. For obvious reasons, issues of sovereignty prevent the formation of a separate enforcement agency that would be acceptable to OAS Members. Consequently, domestic enforcement officials must be willing to assist with investigations, arrests, and prosecution of offenders. Scholars note the United States’ record of taking a lead role to coordinate regional enforcement plans to combat threats from criminal organizations that have the potential to destabilize the Western Hemisphere.¹⁷³ Furthermore, the United States is the largest contributor to the OAS,¹⁷⁴ which includes support for coordinated action plans against transnational organized crime. Funding an Inter-ACrtCJ as part of budget priorities to apprehend and prosecute offenders could be used to persuade Congressional leaders that have sought to broaden the United States’ extraterritorial jurisdiction to support a regional tribunal.¹⁷⁵ External agencies such as the International

171. INTERNATIONAL CRIMINAL COURT, ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT pt. 2, arts. 12-16, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

172. Dexter S. Boniface, *The OAS versus ALBA: The Clash over Democracy and the Rule of Law in the Americas*, 4 (American Pol. Sci. Ass’n, 2012 Annual Meeting Paper, 2012) (referring to former President Hugo Chávez and President Daniel Ortega dismissive actions toward the IACHR’s efforts to protect democratic freedoms against authoritarian regimes).

173. See generally Bruce Zagaris, *Developments in the Institutional Architecture and Framework of International Criminal and Enforcement Cooperation in the Western Hemisphere*, 37 U. MIAMI INTER-AM. L. REV. 421 (2006).

174. See, e.g., Peter J. Meyer, CONG. RSCH. SERV., R42639, ORGANIZATION OF AMERICAN STATES: BACKGROUND AND ISSUES FOR CONGRESS 5-7 (2013).

175. Kristin M. Finklea, CONG. RSCH. SERV., R40525, ORGANIZED CRIME IN THE UNITED STATES: TRENDS AND ISSUES FOR CONGRESS 8-13 (2010). *But cf.* Julian Pecquet, *Panel Votes to Cut Funding to Organization of American States*, THE HILL: GLOB. AFFS. (July 24,

Criminal Police Organization (“INTERPOL”) can function in a subsidiary role to provide intelligence and surveillance operations to assist with enforcement actions.¹⁷⁶ INTERPOL-led operations target illicit drugs, weapons and other crimes across the Americas.¹⁷⁷ Therefore, an independent Inter-ACrtCJ that complements national criminal justice systems should not raise concerns given the aforementioned definitions of serious transnational crimes, need for enforcement, capacity of a tribunal dependent on OAS budgetary priorities and external contributions, and limits its mission to combat transnational organized crime in the region.

*The Long-Arm of an Inter-ACrtCJ: Jurisprudence and
Due Process of Law*

While a transnational criminal tribunal is a novel concept, proponents may want to consider empowering an Inter-ACrtCJ with an established norm of law: universal jurisdiction. Bestowing universal criminal jurisdiction on a tribunal is a focal point of concern dating back to the early years of the United Nations,¹⁷⁸ as well as a topic of polarization among states.¹⁷⁹ Commonly associated with international crimes,¹⁸⁰ some

2013), <http://thehill.com/blogs/global-affairs/americas/313157-panel-votes-to-cut-funding-to-organization-of-american-states>.

176. Background information on INTERPOL is accessible at *Overview*, INTERPOL, <http://www.interpol.int/About-INTERPOL/Overview> (last visited Oct. 1, 2017). INTERPOL currently has 190 member countries (“members”), and receives statutory contributions and voluntary contributions donations. Estimates of operating revenue is reported under *Finances*, INTERPOL, <https://www.interpol.int/About-INTERPOL/Funding> (last visited Oct. 1, 2017).

177. See, e.g., *Drugs worth Nearly One Billion Dollars Seized in INTERPOL-led Operation across Central America and the Caribbean*, INTERPOL (July 2, 2013), <http://www.interpol.int/News-and-media/News-media-releases/2013/PR079>; see also *INTERPOL-led Operation Targets Methamphetamine Production and Trafficking across Americas*, INTERPOL (Feb. 5, 2013), <http://www.interpol.int/en/News-and-media/News-media-releases/2013/PR008>.

178. G.A. Res. 260 B (III), Study by the International Law Commission of the Question of an International Criminal Jurisdiction (Dec. 9, 1948) (considering the possibility of charging persons with genocide and other certain crimes under international law, requested the International Law Commission to study the feasibility of creating a judicial organ with jurisdiction conferred by international conventions, as well as the possibility of establishing a Criminal Chamber of the International Court of Justice).

179. See generally Bernhard Graefrath, *Universal Criminal Jurisdiction and an International Criminal Court*, 1 EUR. J. INT’L L. 67 (1990).

180. See, e.g., RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 402 cmts. c-g, 404, cmts. a-b, 423 (AM. L. INST. 1987) (the crimes of genocide,

consider the empowerment of national courts with universal jurisdiction a necessity due to practical limitations of international tribunals to prosecute crimes involving mass atrocities.¹⁸¹ Although some states disfavor granting recognition of universal jurisdiction to tribunals,¹⁸² a distinction should be apparent with an Inter-ACrCJ exercising universal jurisdiction over transnational crimes. First, the crimes and categories previously identified are the basis for criminal prosecutions among most states in the region. The affirmation of the Hemispheric Plan of Action on Drugs 2011–2015 obligates states to adopt domestic legislation criminalizing offenses listed in the 1988 Convention.¹⁸³ Secondly, the cost previously alluded to in association with prosecuting offenders is a powerful incentive for states challenged by transnational organized crime to grant the Inter-ACrCJ universal jurisdiction.¹⁸⁴ Discussions at the OAS General Assembly's Forty-Third Regular Session on the regulation and/or legalization of illicit drugs indicate that some states are overwhelmed by transnational crimes, resulting in prioritizing domestic concerns above enforcement against transnational criminal organizations. States in the region besieged because of transnational organized crime should be eager to accept an Inter-ACrCJ exercising universal jurisdiction and demonstrate a willingness to combat transnational crimes.¹⁸⁵

crimes against humanity, war crimes, and the crime of aggression without territorial, personal, or national-interest link to the crime in question when committed).

181. Maximo Langer, *The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes*, 105 AM. J. INT'L L. 1, 4-5 (2011) (Claims of jurisdiction exercised by national courts under customary international law to assert universal jurisdiction for genocide, crimes against humanity, and war crimes are not addressed).

182. Article 12(2) of the Rome Statute enables the International Criminal Court (ICC) to exercise jurisdiction over nationals of non-consenting, non-States Parties, but the United States asserts that only States can invoke universal jurisdiction. See OFFICE OF THE PROSECUTOR, INT'L CRIM. COURT, SECOND REPORT OF THE PROSECUTOR OF THE INTERNATIONAL CRIMINAL COURT TO THE U.N. SECURITY COUNCIL PURSUANT TO UNSCR 1593 3 (2005); see also David Scheffer, *Staying the Course with the International Criminal Court*, 47 CORNELL INT'L L.J. 47, 65 (2002) (arguing that universal jurisdiction is exercised by States, not by a permanent tribunal).

183. Hemispheric Plan of Action on Drugs 2011-2015, *supra* note 148, at 15. The other major treaties and protocols previously mentioned are listed in the Action Plan, and have been ratified by most of the OAS Members.

184. Langer, *supra* note 172, at 6-7. The author's assessment of universal jurisdiction for international crimes is applicable to transnational crimes.

185. M. Cherif Bassiouni, *The Time Has Come for an International Criminal Court*, 1 IND. INT'L & COMP. L. REV. 1, 17-18 (1991) (indicating the acceptance among Latin American nations of a regional court to prosecute international trafficking in drugs and

Legal scholars note that U.S. Congressional officials have shown interest in the past in establishing a treaty-based tribunal with jurisdiction over drug trafficking and other transnational crimes.¹⁸⁶ Officials dedicating their legislative agenda to combatting transnational crimes should support universal jurisdiction for an Inter-ACrtCJ to avoid complexities associated with transnational crimes that raise questions of legitimizing extraterritorial jurisdiction of the United States. Numerous legislative responses have authorized extraterritorial jurisdiction in reaction to illicit drugs transported from South America to the United States on the high seas to combat criminal cartels throughout the Western Hemisphere representing a seven million square-mile area about twice the size of the continental United States.¹⁸⁷ Similar legislative action has occurred with respect to human trafficking¹⁸⁸ that has withstood judicial scrutiny regarding prescriptive jurisdiction and due process under international and domestic laws.¹⁸⁹ The courts have ruled that criminal cartels engaged in human smuggling by land or sea originating beyond U.S. borders can be prosecuted notwithstanding circumstances in which offenders have no physical or financial nexus with the United States. Crimes of weapons trafficking, money laundering, and terrorism are also subject to extraterritorial jurisdiction under U.S. laws,¹⁹⁰ and federal courts routinely infer “congressional intent to provide for extraterritorial jurisdiction over foreign offenses that cause domestic harm,” consistent with general principles of international law.¹⁹¹ Other attempts to close loopholes to avoid safe harbors for offenders are a tailored response to the inherent global nature of drug trafficking.¹⁹² Legislative initiatives will

terrorism).

186. *Id.* at 14-17.

187. The White House, WHITE HOUSE: OFF. NAT’L DRUG CONTROL POL’Y, *Transit Zone Operations*, <https://obamawhitehouse.archives.gov/ondcp/transit-zone-operations> (last visited Oct. 1, 2017). The Transit Zone includes the Caribbean Sea, the Gulf of Mexico, and the eastern Pacific Ocean. *Id.*

188. *See e.g.*, 18 U.S.C. § 1596(a)(2) (2012).

189. *See United States v. Baston*, 818 F.3d 651, 669–70 (11th Cir. 2016).

190. *See, e.g.*, CHARLES DOYLE, CONG. RSCH. SERV., RL33658, FEDERAL EXTRATERRITORIAL CRIMINAL JURISDICTION: LEGISLATION IN THE 109TH CONGRESS 10-12 (2007).

191. *See, e.g.*, *United States v. MacAllister*, 160 F.3d 1304, 1308 n.8 (11th Cir. 1998).

192. *See, e.g.*, The Drug Trafficking Safe Harbor Elimination Act, H.R. 313, 112th Cong. (2011). The Safe Harbor Elimination Act proposed to amend Section 846 of the CSA “to clarify that persons who enter into a conspiracy within the United States . . . to traffic illegal controlled substances outside the United States, or engage in conduct within

undoubtedly face challenges to apply the extraterritorial jurisdiction of the United States with respect to rule of law issues,¹⁹³ or from the ongoing dynamics of criminal enterprises. The power of an Inter-ACrtCJ with universal jurisdiction avoids having parts of the Americas become a safe haven for traffickers whose crimes take place within as well as outside the region. Circumstances involving transient actors engaged in serious transnational crimes can avoid having to navigate domestic jurisdictional pitfalls by transferring cases to the Inter-ACrtCJ.¹⁹⁴

Subjecting nationals to Inter-ACrtCJ jurisdiction, however, raises questions of fundamental rights of due process of law.¹⁹⁵ For example, article 3 of the 1988 Convention establishes subject matter jurisdiction over international drug trafficking and related offenses.¹⁹⁶ A treaty-based tribunal will require OAS members to adopt domestic legislation recognizing the Inter-ACrtCJ's jurisdiction over these offenses occurring in their respective territory.¹⁹⁷ In compliance with fundamental rights of due process, a review in national courts is necessary to ensure that prosecution of crimes before the Inter-ACrtCJ establishes a nexus with

the United States to aid or abet drug trafficking outside the United States, may be criminally prosecuted in the United States.” *Id.* The legislation was referred to the Senate Committee on the Judiciary, S. 1672, 112th Congress (2011), which took no action.

193. See, e.g., John O’Neil Sheehy, Note, *False Perceptions on Limitation: Why Imposing A Nexus Requirement Under the Maritime Drug Law Enforcement Act Would Not Significantly Discourage Efforts To Prosecute Maritime Drug Trafficking*, 43 CONN. L. REV. 1677, 1694-1700 (2011) (illustrating the practical considerations of satisfying the statutory jurisdiction requirements and extradition agreements in relation to the MDLEA).

194. See, e.g., *United States v. Lopez-Vanegas*, 493 F.3d 1305, 1313 (11th Cir. 2007). Drug conspiracy convictions were vacated, holding that “the object of the conspiracy was to possess controlled substances outside the United States with the intent to distribute outside the United States, there is no violation of § 841(a)(1) or § 846.” Failed prosecutions led to proposal of the Safe Harbor Elimination Act to amend existing law, but it may not satisfy fundamental constitutional requirements to establish a nexus to apply extraterritorial jurisdiction.

195. See, e.g., Patricia M. Wald, *International Criminal Courts: A Stormy Adolescence*, 46 VA. J. INT’L L. 319, 345 (2006) (explaining the development of international criminal courts and her experience as a judge on one of three courts, the Yugoslav Tribunal in the Hague, she acknowledges that while some fundamental due process guarantees are not included in the procedures of the ICC such as “rights of jury trial, protection against double jeopardy, and the rejection of hearsay evidence” these same rights are not “granted to defendants in the rules for U.S. military tribunals authorized for non-citizen perpetrators of war crimes since 9/11.”).

196. U.N. Convention Against Illicit Traffic in Narcotic Drugs, *supra* note 149, art. 3(5)(a)-(e).

197. *Id.* at art. 3(1).

serious international organized criminal activities. Some OAS members may object to an absence of a right to a jury trial that presently is not part of international criminal adjudication.¹⁹⁸ Appeals could be limited, a practice already established for some domestic actions, to avoid litigious efforts that delay prosecution without violating due process rights of defendants that is consistent with national security and public safety.¹⁹⁹ In addition, empowering the Inter-ACrtCJ with universal jurisdiction includes the authority to compel states to cooperate, including the arrest and surrender of offenders.²⁰⁰ States choosing not to recognize the Inter-ACrtCJ jurisdiction, however, would be prohibited from undermining enforcement efforts by creating bilateral agreements to avoid having their nationals surrendered by other states to the court.²⁰¹

198. See, e.g., William A. Schabas, *United States Hostility to the International Criminal Court: It's All About the Security Council*, 15 EUR. J. INT'L L. 701, 712 (2004) (noting that not among the "feeble" arguments cited as part of official policy, the absence of a jury trial is of concern among legal commentators); Chenyu Wang, Note, *Rearguing Jury Unanimity: An Alternative*, 16 LEWIS & CLARK L. REV. 389, 402 (2012) (arguing for unanimity jury verdicts, the author notes that most foreign jurisdictions do not conduct jury trials, and where utilized a less than unanimous verdict is the norm); and Amy Powell, Note, *Three Angry Men: Juries in International Criminal Adjudication*, 79 N.Y.U. L. REV. 2341, 2379 (2004) (extolling the virtues of jury trials, suggests that inclusion of a jury ought to be considered "where the State of the accused and/or the State where the crime was committed have a tradition of juries.").

199. See, e.g., *Defenders of Wildlife v. Chertoff*, 527 F. Supp. 2d 119 (D.D.C. 2007), cert. denied, 554 U.S. 918 (2008) (waiver by Michael Chertoff, Secretary of Homeland Security, of numerous federal environmental laws, to construct fences and roads along the U.S.- Mexico Border within a conservation area, under the REAL ID Act of 2005. 8 U.S.C. § 1103. Section 102 of the REAL ID Act gives district courts of the United States exclusive jurisdiction to hear all causes or claims arising from any action undertaken, or any decision made, by the Secretary of Homeland Security pursuant to waiver of environmental laws limiting appellate review only upon petition for a writ of certiorari to the Supreme Court of the United States. 8 U.S.C. § 1103(c)(2)(A)(C). It should be noted that in 2020, DHS granted waivers to expedite construction of barriers and roads along the border consistent with Determination Pursuant to the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as Amended 85 Fed. Reg. 9,794 (Feb. 20, 2020) to comply with Exec. Order No. 13,767, 82 Fed. Reg. 8,793 (Jan. 25, 2017) as part of border security and immigration enforcement improvements. See also International Cooperation and Judicial Assistance, pt. 9, vol. 2187, I-38544, arts. 88-92 (Rome Stat. of Int'l. Crim. Ct. (November 10, 1998, July 12, 1999)).

200. International Cooperation and Judicial Assistance, p. 9, vol. 2187, I-38544, arts. 86, 89 (Rome Stat. of Int'l. Crim. Ct., (November 10, 1998, July 12, 1999)).

201. See generally David A. Tallman, Note, *Catch 98(2): Article 98 Agreements and the Dilemma of Treaty Conflict*, 92 GEO. L.J. 1033, 1041 (2004) (stating that on August 3, 2002, President Bush signed the American Servicemembers' Protection Act of 2002 (ASPA), prompting the United States to create a blanket exempt from the ICC jurisdiction

Finally, the issue of where to confine defendants during pretrial and post-trial stages of litigation presents security problems for countries throughout the hemisphere. A possible solution is use of existing facilities at Guantánamo Bay Naval Base (“Gitmo”) despite controversies surrounding the facilities at Gitmo that have focused on fundamental rights of detainees,²⁰² leading policymakers to advocate ending its detention operations.²⁰³ Conditions under which detainees were held have improved and are not likely to be the subject of future domestic litigation with only forty prisoners remaining and the Biden Administration’s pledge to close the prison.²⁰⁴ More importantly, leasing Gitmo facilities to the OAS would not lead to further litigation among states with respect to judicial and enforcement personnel, as well as detainees under the jurisdiction of the Inter-ACrtCJ.²⁰⁵ The remoteness, fortification of detention units, and the

by entering into Article 98 agreements in conformity with the Rome Statute. The ASPA authorizes the withdrawal of military aid to countries that have not entered into an Article 98 agreement, some of these countries are Latin American nations whose military assistance is critical to combating drug trafficking).

202. *Hamdi v. Rumsfeld*, 542 U.S. 507, 525 (2004) (stating that while no bar exists to holding citizens as an enemy combatant, “the writ of habeas corpus remains available to every individual detained within the United States”); *Hamdan v. Rumsfeld*, 548 U.S. 557, 591 (2006) (claiming “[e]xigency alone, of course, of war will not alone justify the establishment and use of penal tribunals not contemplated by the Federal Constitution’s Article I, § 8 and Article III, § 1 of the Constitution unless some other part of that document the Constitution authorizes a response to the felt need.” Such authority derives only from powers granted jointly to the President and Congress in time of war as enumerated in the Constitution).

203. See e.g., Sen. Dianne Feinstein, *It’s Time to Close Guantanamo*, LAWFARE INST. (Jan. 11, 2022), https://www.lawfareblog.com/its-time-close-guantanamo?utm_campaign=Governance%20Studies&utm_medium=email&utm_content=200673447&utm_source=hs_email. Senator Feinstein cites delays in trials, uncertainty in meaningful sentences, and President Obama’s Executive Order to close the detention facilities. *But cf.* Exec. Order No. 13,567, 76 C.F.R. 13275 (2011), authorizing continued detention of each detainee subject to continued review of a detainee’s confinement at Gitmo under a continued law of war detention policy consistent with the interests of the United States, including national security interests.

204. Anthony Lake and Thomas Wilner, *Closing Guantánamo is Long Overdue*, THE HILL, April 25, 2021, <https://thehill.com/opinion/national-security/549584-closing-guantanamo-is-long-overdue/?msclkid=d0f3447fcfdc11ecb0a535d387139cc9>.

205. Org. of Am. States Charter, arts. 133-35, February 27, 1967, 21 U.S.T. 607 (expressing the legal capacity, privileges, and immunities of the OAS, representatives, and juridical status of the Specialized Organizations and their personnel while in the territory of each Member); Privileges and Immunities of International Organizations, 22 U.S.C. § 288a (2012); see also William M. Berenson, *Immunity for International Organizations? Squaring the Concept of Immunity with The Fundamental Right to a Fair Trial: The Case*

absence of external jurisdiction over inmate-nationals makes Gitmo or similar facilities a viable means to incapacitate detainees that have committed offenses across a range of transnational crimes.

IV. CONCLUSION

The description of United States-México contemporary relations is a search for solutions to control criminal cartels representing a pestilence for the Mexican government that is experiencing internal problems of corruption. Alternatives discussed above either as a stand-alone or medley of options involving continuing interdiction, public hearings before a commission that lead to publication of reports, shaming public officials, and removal of cartel members for selective prosecution before an independent criminal tribunal are possible, but must be a practical solution to cyclical events. The globalization of México's criminal cartels threaten the rule of law within México and in other vulnerable Latin American countries that have become distribution points for drugs destined for the United States, West Africa, and Europe.²⁰⁶ Problems associated with criminal cartels in México are not provincial; Mexican-based cartels have extensive networks that cannot be addressed in a metaverse state of existence as policymakers are moving in rhythm to la México mariachis.²⁰⁷ If policymakers on both sides of the border fail to compromise and implement an agreement, cartels will continue in operation, expanding business opportunities beyond the myopic perception of the border region. Presently, México is drifting toward a country in disunion governed by customary rules determining the rights and duties regulating independent countries as a nation-state, intimidated in part by thugs with drugs, finances, weapons, and political power to rule strategic areas and control the border region.²⁰⁸ Without doubt, López Obrador has a partnership with

of the OAS, 3 THE WORLD BANK LEGAL REV.: INT'L FIN. INST. AND GLOB. LEGAL GOVERNANCE 133-45 (Hassane Cisse, Daniel D. Bradlow, and Benedict Kingsbury eds., 2012).

206. Jose Miguel Cruz & Brian Fonseca, *How Transnational Crime Is Mutating in the Age of COVID-19 in Latin America*, AMERICAS Q. (Jan. 26, 2021), <https://americasquarterly.org/article/the-other-mutating-virus-the-pandemic-and-organized-crime/>.

207. See e.g., Daniella65, *Lucero Rancheras*, YOUTUBE, (July 23, 2013), <https://www.youtube.com/watch?v=8HnStO9U6iQ&t=110s>.

208. *Arrests After 10 Bodies Found in Car in Mexico*, BBC NEWS (Jan. 6, 2022), <https://www.msn.com/en-us/news/world/arrests-after-10-bodies-found-in-car-in-mexico/ar-AASvZhc?ocid=msedgntp>. The bodies were discovered in a vehicle parked

the United States that will allow him to take center stage and orchestrate a downbeat that is heard across México and the entire hemisphere to combat, jail, or negotiate with criminal organizations. If not López Obrador, México has others with talent who may be willing to make hard choices that will impact the core of Mexican institutions currently functioning as an opaque blocking the transparency of corruption among elected officials, as well as military and police personnel. Otherwise, the Mexican public will witness strolling mariachis performing for the entertainment of thugs, cartels, and policymakers with no end to the search for solutions to drug trafficking and other transnational crimes that plague the Mexican government, as well as communities beyond a shared border region. At some point, the public may lose their mind over the borderline as officials unsuccessfully manage criminal cartels while responsible policymakers are nowhere to be found as the music plays on.²⁰⁹

outside the local state governor's office, a common tactic used by criminal cartels to frighten the public. *Id.*

209. Madonna, *Borderline*, YOUTUBE, (Oct. 26, 2009), https://www.youtube.com/watch?v=rSaC-YbSDpo&t=23s_